are called public and parochial burdens, and we cannot take a better sample of it than the poor-rate itself. The poor-rate is charged as a percentage upon the annual value of the heritable subject as fixed under this 37th section. But that subject may in point of fact not be yielding a shilling to its owner from accidental causes, and yet the owner will be liable to pay the poor-rate to the full amount on the rateable value of the subject. On the other hand, in the case of the income tax the rateable value of the subject is nothing for the purpose of subjecting the owner in ultimate liability, unless he not only receives annual value from it, but keeps that annual value in his own pocket. There cannot be a greater contrast than that presents between these two different kinds of taxes; and so I just come back to what, I think, was very clearly and well stated as part of the judgment of this Court by Lord Neaves in the case of Hard *v.* Anstruther, in dealing with this very matter of the income tax. He says in that case, where it was proposed to charge the income tax on a person who was the owner of the estate for the time, but was not in point of fact receiving the rents, or receiving any value out of the estate:—"It seems to me to be sufficient to say that the pursuer has no income out of these lands effeiring to that period. Income tax is truly a personal tax on personal income. It is of no consequence how it is to be levied as to machinery. The thing is to ascertain how and by whom it is due. It cannot be due without income." (1 Macp. 22) Now every word of that is perfectly true as regards the income tax, and it is just the very reverse of true as regards the poor-rate, or any of those other taxes known as public and parochial burdens, and which are described as payable in respect of lands and heritages. It appears to me, therefore, that the Lord Ordinary has gone wrong here, and that the income tax cannot be allowed as one of the deductions which is to be made under the 37th section of the Poor-Law Act, under the name of "rates, taxes, and public burdens, payable in respect of lands and heritages."

Lord COWAN—The question is whether the income tax is one of the deductions to be made in respect of rates, taxes, and public charges, payable in respect of lands and heritages. On that subject there is a judgment by Lord Neaves which was not taken to the Inner House, but which is to be found in Mr Smith's work on the Poor-Law, p. 118. It was given in the case of Greville *v.* Thomson, 10th July 1857. I find also that a question occurred under the Income Tax Acts which existed prior to 1816, in reference to the free rents of an entailed estate, with regard to provisions for children and an annuity to a widow, and the case of Elliot *v.* Elliot, 17th July 1813, F.C., fixed that the income tax was not to be deducted. But there was also the Lochbuy case (Maclaine *v.* Maclaine, 29th November 1845, 8 D. 150), in which I was counsel, which had reference to the construction to be put on Lord Aberdeen's Act, with regard to provisions of the same description, and I find that the views of the Judges in that case were just those which your Lordship has expressed. Now I think the same principles ought to lead us to the conclusion here that the income tax is not to be deducted as a tax payable in respect of lands and heritages. I am satisfied that the judgment pronounced by Lord Neaves in the case to which I have referred is a correct judgment, and I think we ought now to give it the authority of this Division of the Court.

Lord BENHOLME and Lord NEAVES concurred.

The following interlocutor was accordingly pronounced:—"Recal the interlocutor of the Lord Ordinary: Find that the income tax as charged on income derived from lands and heritages under the Statute 5 and 6 Vict. c. 35, and subsequent Acts, is not one of the rates, taxes, and public charges payable in respect of lands and heritages which, under the 37th section of the Poor Law Amendment Act, fall to be deducted in estimating the annual value of such lands and heritages: And remit to the Lord Ordinary," &c.

Agents for the Suspenders—Hill, Reid, & Drummond, W.S.

Agent for the Respondent—William Burness, S.S.C.

EDMOND *v.* BLAIKIE AND ANDERSON.

Trust—Intromission after Recal of Trust—Liability of Trustees. Held that notwithstanding a clause of indemnity in a trust-deed, trustees acting under it who had been superseded and called upon to count and reckon and denude were liable in exact diligence for subsequent intromissions with the estate.

By trust-deed, executed on 25th March 1847, Mr Dingwall of Rannieston conveyed his estate to the defenders, Mr John Blaikie and Mr now Sir Alexander Anderson, advocates in Aberdeen, in trust for the purposes of management and payment of creditors. The most ample powers were conferred upon the trustees. They were allowed to appoint a factor, who might be one of their own number; and it was further declared that in "the execution of the trust they should not be liable for omission nor for exact diligenge, nor for the solvency of tenants or for any factors to be appointed by them, nor *singuli in solidum*, but each only for his own actual intromission. Both of the defenders accepted the trust; and without any formal or written appointment Messrs Blaikie & Smith, advocates in Aberdeen, of which firm the defender John Blaikie was the leading partner, acted as factors in the trust, and continued to do so till 1849, when the duties were assumed by the firm of John and Anthony Blaikie, of which firm the defender Blaikie was the leading partner. On the 22d October 1855 Mr Dingwall executed another trust-deed in favour of the pursuer, conveying to him his whole estate, and empowering him to call upon the defenders to account and to denude. This new trust was forewith intimated to the defenders, and in 1857 the present action, founding upon it and concluding for an accounting and denuding, was raised against them. In consequence of certain claims set up and questions raised by the defenders, considerable litigation ensued; but these were finally decided in favour of the defenders by a judgment of the Second Division in November 1860, the defenders at the same time being ordered to denude. Some months before this judgment was pronounced, the firm of J. & A. Blaikie became bankrupt and was sequestrated. Intimation of the present process was accordingly made to the trustee on the sequestrated estate of the defender John Blaikie, but no appearance was made for him. A representation was then made by the other defender, Sir Alexander Anderson, that the balance of trust-funds standing at the debit of the trustees, and apparently due by them, amounting to £145, had been in the hands of Messrs Blaikie as factors for the trust at the date of their sequestration, and

that he could not be made responsible for the loss that might thereby be sustained. Additions were in consequence allowed to be made to the record—for the pursuer, to the effect that Sir Alexander had been guilty of gross negligence in allowing the funds to remain in the hands of Messrs Blaikie when he knew they were in embarrassed circumstances; and for the defender to the effect that he believed them to be solvent, and quite able to meet their engagements. A proof having been led, the import of which was that Sir Alexander Anderson, from having granted accommodation bills in favour of the Messrs Blaikie, must have been aware of their embarrassments, and that he failed to exercise any superintendence over their actings as factors for the trust allowing them to mix up the trust-funds with their own, and calling for no examination of their accounts. The Lord Ordinary (Ormidale) decided in favour of the pursuers, finding Sir Alexander Anderson, as well as the other defenders, liable in payment to the pursuer as Mr Dingwall's trustee for the amount of the trust-funds in the hands of the Messrs Blaikie at the date of their sequestration. His Lordship observes in his note :—

"1. There having been no regular written appointment of factors in this case was in itself an irregularity; but the Lord Ordinary has not been much influenced by that circumstance, seeing that both parties have proceeded throughout the litigation and maintained their pleas on the footing that Messrs Blaikie and Smith, and afterwards Messrs J. & A. Blaikie, were in point of fact the factors for the trust, and of their having acted as such. He cannot, however, hold that the mere appointment of a factor or factors, however formal and regular, is of itself a sufficient answer or defence to a claim of liability against trustees, even where protected by an immunity clause, in the words of the Lord Justice-Clerk in Lyons *v.* Charles, 13th May 1830, 8 Sh. 741—'The appointment of a factor cannot excuse trustees from responsibility.' And so accordingly, in Hume *v.* Menzies, 10th July 1845, 7 D. 1010; and Robertson *v.* Mackenzie and Others, 14th June 1854, 26 Jurist, p. 498, issues were, notwithstanding a clause of immunity equally strong as that in the present case, sent to a jury to try the facts relating to the liability of trustees for funds lost through the insolvency of their factor

"2. In the present instance it does not appear that there was any sufficient call or occasion for the trust-funds being left in the hands or under the control of the factors. The trust in favour of the defenders had practically come to an end by the constitution of the new trust in favour of the pursuer, and, so far as the Lord Ordinary can discover, although the defenders or their factors continued thereafter to collect and receive the rents or assets of the trust-estate, they neither made nor were required to make any disbursements of importance. It is difficult, therefore, to understand why the trust-funds should have been left in the hands of the factors. Not only, however, were the trust-funds so left, but no check or no control appears to have been exercised by the trustees in regard to them. There is no evidence, indeed, that the defender Sir Alexander Anderson ever inquired about them, and certain it is that he did not see to their being deposited in bank to the credit of the trustees, or secured in any other way whatever. In short, neither in reference to the trust-funds in the hands of the Messrs Blaikie, nor in regard to anything else connected with the trust-estate, does it appear that Sir Alexander Anderson ever made any inquiry, or did anything at all. What is called the sederunt book is little better than an absolute blank. The Lord Ordinary, therefore, doubts very much whether the clause of immunity in this case, intended, as it expressly bears, to be a protection to the trustees in the execution of the trust, has any application. But be that as it may, he cannot, having regard to all circumstances, hold that it affords a good defence to the trustees. On the contrary, he is of opinion that the defender Sir Alexander Anderson, as well as the other defender Blaikie, has been guilty of such *culpa lata*, or gross negligence, as to render him liable for the trust-funds in question.

. . . . . .

"For the reasons which have now been adverted to, the Lord Ordinary has been unable to resist the conclusion that in law the defender Sir Alexander Anderson, as well as Mr John Blaikie, is liable for the trust-funds which were in the hands, or under the control, of Messrs Blaikie at the time of their failure. He may add, however, that he has come to this conclusion with reluctance, if not with difficulty, in regard to Sir Alexander Anderson, as it does not appear that he is chargeable with any positive act or acts of personal delinquency in the matter."

The defender Anderson reclaimed.

MACKENZIE (with him SOLICITOR-GENERAL) supported the reclaiming note.

PATTON, A. R. CLARK, and BALFOUR, for the respondent were not called upon.

At advising—

The Lord JUSTICE-CLERK—I think this is as clear a case as I ever saw. The loss complained of occurred between 1857 and 1860. I mean that it arose in consequence of what took place within that period—the bankruptcy of the Blaikies—who were allowed to draw the rents of this estate and keep a considerable quantity of the same in their hands unsecured, which has been lost by their bankruptcy. Now, during that period what was the position of the defenders? Were they acting or entitled to act as trustees under the deed of 1847? Certainly not. That deed had been superseded by the new deed executed in 1855, and the position which they held was just that of defenders to this action, called upon to account for their intromissions and desired to denude. After the action was raised it appears to me that they should have given up management, but if they drew the rents they were bound not to have retained a shilling of them, but, on the contrary, to have paid them into Court. They would not have drawn these as trustees, and they had no more protection from the clause of immunity in the deed of 1847 than if they had never been trustees at all. What was it they said when they came into Court? They said—We are willing to denude upon your settling accounts with us. At 31st December 1856 the trust-estate is owing us £145; but in consequence of the receipt of rents the balance was made to turn, so that on 20th August 1857 the defenders were, on their own showing, indebted to the estate in £58. Now, that £50 should have been at once paid into Court. Whatever has become of it—whether it has been lost or not I don't inquire nor care—the defenders are bound to pay it, and every farthing additional they received. Nor do I care what the relation was which subsisted between Blaikie and Anderson. It is said that he was factor to the trust. I see no evidence of any such appointment. He may have drawn the rents from the tenants, and have been allowed so to do by his co-trustee. If that were the case, it was intromission by Ander-

son just as much as by Blaikie. This case does not depend for its solution on any question of negligence on the part of the trustees. The conduct to be inquired into is that of defenders to a suit. But if it had been necessary to inquire whether Anderson had been negligent in allowing the funds to remain in Blaikie's hands, I think there is overwhelming evidence to prove that he was. [His Lordship here adverted to the evidence, and then continued]—But it is not necessary for the determination of the case to make out gross negligence on Anderson's part. It is not proposed to make these defenders liable for improper management of a trust, and it is only to such things that the clause of immunity in the deed of 1847 applies. The case is that of persons who had been deprived of the office of trustees retaining trust-funds for their own indemnity and benefit.

Lord COWAN—Under the trust-deed of 1847 there does not appear to have been any formal appointment of factor—although that deed empowered the trustees to make such, and, if they pleased from their own number. The management of the estate seems, however, to have been devolved upon Blaikie. It then appears that the truster having become dissatisfied, resolved that it would be expedient to execute a new deed. This was in 1855, and although he had not reserved power to himself under the former deed to do so, there is no doubt whatever that he was quite entitled to recal the former trust and create a new one. Now it does not exactly appear that the deed of 1855 was intimated to the Blaikies and Anderson, but in 1857 this action was brought calling them to account for their management. That was a judicial intimation of the most pointed kind. At the time the action was brought it appears from their own statement that the defenders were owing £50 to the estate. The action called upon them to denude. They were entitled, they said, to be discharged before denuding, And so they were, but after the action was brought they were not entitled to intromit with the trust-funds. Their trust was recalled. They might have been entitled to retain any funds in their hands in liquidation of their claims against the estate; but where was their title to go on with the management of the trust and intromit with the rents? Perhaps it might have been that from 1855 to 1857, as there was a balance due to them, they were entitled to intromit with the rents; but whenever the balance turned they should have paid it into Court. The sum now claimed is a growing balance between 1857 and Blaikie's bankruptcy. The defenders, it appears to me, are to be dealt with as persons who jointly concurred in intromissions with an estate without a title. The very able argument addressed to us by Mr Mackenzie has not satisfied me that there is not evidence of gross negligence on the part of Anderson, had it been necessary for the determination of the case to consider that. He knew of Blaikie's embarrassments, and yet left all the management of the estate to him. He can't so rid himself from responsibility. But I agree with your Lordship that this is not necessary for the disposal of the case.

Lord BENHOLME—This case appears to me to be distinguished from every other case of the kind by the feature that whatever immunities these trustees may have had under the deed by which they were appointed, their position with regard to these was completely altered when the trust in favour of Edmond was created. From that time they were not entitled to plead immunities. Thereafter they drew the rents of the estate, not for the benefit nor on the mandate of their constituent, but for their own benefit and security. Now, when the mandate was recalled, exact diligence was required; and if a person intromits with funds, or allows a factor to do so in such circumstances, he is bound in exact diligence. He transacts at his peril. A right of retention exercised in such circumstances as we have disclosed in this case is to be used in the strictest and most careful way.

Lord NEAVES—I should be quite prepared to affirm the interlocutor under review *simpliciter*. I think the conclusions deduced by the Lord Ordinary from the proof are quite sound. I think, however, the proof might have been dispensed with altogether, because the case admits of being decided on a very simple view of it. The defenders no longer held the position of trustees after the judicial demand made upon them in this action. It cannot be pretended that they could thereafter have exercised any of the large discretionary powers conferred upon them by the deed under which they had formerly acted. All that had come to an end. There are cases where an absolute conveyance may be said to result in a trust where the purposes for which a conveyance was made are fulfilled. This is a case of another kind. The trust had been put an end to by the truster, and the defenders kept it up for their own protection and security. They could not pretend to any power to act as trustees, but they say they were entitled to retain the estate for their own indemnity. In this position of matters they came to be holders of the estate *in rem suam*. Now, it never was heard of that a creditor in possession could refuse to debit himself with the proceeds of the estate because his factor failed. The defenders had a balance in their hands, and they were bound to see to its careful preservation.

The Court therefore adhered with additional expenses.

Agents for Pursuer—Hill, Reid, & Drummond, W.S.

Agents for Defender—Hope & Mackay, W.S.

OUTER HOUSE.

(Before Lord Jerviswoode).

A. *v.* B.

Practice—Proof—Conjugal Rights Act. A defender and her alleged paramour having failed to appear at a diet of proof in a divorce case for identification, warrant granted to apprehend them.

In the interlocutor allowing a proof to the pursuer in this case, the Lord Ordinary, "on the motion of the pursuer ordains the defender, and C. D. referred to in the libel and relative condescendence, to appear personally at the said diet of proof for the purpose of identification, and grants warrant for citing them accordingly." At the diet of proof,

"FRASER, for the pursuer, put in executions ot citation against the defender and against the said C. D. to appear at this diet of proof for the pur pose of identification, and these parties having been called, and having failed to appear, counsel moved the Lord Ordinary for a warrant to apprehend them and detain them in safe custody till produced at an adjourned diet of proof before the Lord Ordinary at twelve o'clock to-morrow. The Lord Ordinary, having considered the said motion, and, in respect said parties have failed to appear, grants warant to messengers-at-arms to apprehend the persons of the said B. and C. D., and to