out of which the ministers were entitled to augmentations. Now, in this case there is nothing but this, that before the rights of the ministers had been legally ascertained, the town, as administrators of the hospital fund, did in point of fact gratuitously give additions to the stipends for a certain time, which were afterwards withdrawn, but these were not given out of the hospital funds except to a small extent; they were given partly out of the funds of minor incorporations within the burgh of Dundee, partly out of other sources. Surely these gratuitously paid sums of money could not be said to be attached to the benefice, nor to be funds upon which the ministers had a legal claim. They were no parts of the fruits of the benefice which accrue annually in the shape of money, and on this plain ground I am for adhering to the interlocutor of the Lord Ordinary.

The other Judges concurred.

The interlocutor of the Lord Ordinary was accordingly adhered to.

Agent for Pursuer—James Allan, S.S.C.

Agents for Defenders—Maclachlan, Ivory, & Rodger, W.S.

Friday, June 29.

EDIN. AND GLAS. RAILWAY CO. *v.* HALL (*ante*, vol. i., p. 113).

Poor — Assessment — Deductions — Property and Income tax. Held (alt. Lord Kinloch), that property tax, paid under the Property and Income Tax Acts, is not one of the taxes for which deduction is to be made under section 37 of the Poor Law Amendment Act.

This was a suspension of a poinding executed by the inspector of poor for the city parish of Glasgow against the Edinburgh & Glasgow Railway Company for alleged arrears of poor-rates from 15th May 1857 till 14th May 1859. The point on which the case was now before the Court referred to the question whether the property tax payable under the Act 5 and 6 Vict., c. 35, and relative statutes, is to be included amongst the rates, taxes, and public charges, the amount of which is to be deducted in estimating the annual value of lands and heritages in respect of which poor-rates are payable, under section 37 of the Act 8 and 9 Vict., c. 83. The Lord Ordinary (Kinloch) held that it was, and explained the grounds of his opinion in the following.

Note.—The question at present raised is whether property tax is included in the rates, taxes, and public charges referred to in the 37th section of the Poor Law Amendment Act, which declares "That in estimating the annual value of lands and heritages, the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year, under deduction of the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same."

The deductions here referred to are deductions to be made after ascertaining "the rent at which, one year with another, the lands and heritages might, in their actual state, be reasonably expected to let from year to year." This rent is first to be ascertained, and afterwards the deductions are to be made. There is here no question about "tenant's charges,"—the burdens which a tenant would estimate in fixing the rent, and would offer. The rent is to be first ascertained, and there then are to be deducted the sums which the proprietor would have to pay to maintain the lands in their existing state, "and all rates, taxes, and public charges payable in respect of the same." What appears to be the object of ascertainment is the amount of net receipts which the proprietor will draw from the subjects; which is the sum on which it is intended he should be rated to the poor.

It appears to the Lord Ordinary that the property tax is one of these charges. It is, by the express terms of the Act imposing it, payable "in respect of the property," and is reasonably deducted by the the proprietor before he comes to an estimate of his net receipts from the subjects. It seems to the Lord Ordinary to fall directly under the principle of the enactment.

It has been said that property tax is not levied on property, but on the profits of property, and is rightly to be called a personal tax. This is scarcely consistent with the terms of the Property Tax Act, which draws (sec. 1) a marked distinction between the charges on "property" and "profits." Besides, every yearly tax payable in respect of property is truly a burden on the rents, which are just the profits of land; and, in this respect, the tax in question does not seem different from other yearly taxes. It may be said of all these with equal propriety, that they are personal taxes imposed in respect of property. For instance, poor's rates themselves may be accurately so described; yet the Court have found that these must be deducted in a question like the present.—Glasgow Gas Company *v.* Adamson, 23d March 1863, 1 Macq. 727. All the taxes are alike contributions to the necessities of the State, imposed on proprietors in respect of property. The Lord Ordinary considers that all such are to be deducted, under the 37th clause of the Poor Law Act; and he does not perceive any essential difference between the property tax and the others. W. P.

The respondent reclaimed.

PATTON and W. M. THOMSON appeared for the Reclaimer, and

SOLICITOR-GENERAL and MACKENZIE for the Company.

At advising—

The LORD JUSTICE-CLERK—The question which we are called upon to decide is one of very general application, and regards the construction of certain words in the 37th section of the Poor Law Amendment Act—a clause which directs in what manner the annual value of lands and heritages is to be estimated for the purpose of rating. The direction of that clause is that the annual value is to be taken to be "the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year, under deduction of the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates, taxes, and public charges, payable in respect of the same." Now, that is a mode of estimating annual value which is very equitable in itself, and has been found in practice to be very just in its operation. It is precisely in accordance with what is very familiar to men of business in another department, estimating the annual value of an estate with a view to fix its price in the case of a sale. When you are considering what is the true value of an estate that is brought into the market for sale, you either take the actual rent, or what may be supposed to be the rent, that it would bring if

it were let, you deduct any expense that may be necessary to keep it up in its then actual state, and you deduct the public burdens; and when you have done these things, you get the annual value, and you take so many years' purchase of that annual value, according to the nature of the subject, and that represents the true price. This is just exactly the same thing. Now, in the case which I have been supposing, what is meant by deducting the public burdens? It means deducting all public burdens that affect the subject, either directly or indirectly, and including parochial burdens, which are sometimes specially expressed, but are generally impliedly included under the term public burdens, even when they are not separately expressed. You deduct, in short, not the land-tax merely, which may be said to be the more appropriate burden of a landed estate, but also the poor-rates, the prison assessment, and all those other local rates and taxes, of which we know so much in the everyday business of life. But was it ever heard of, that in any such estimate as that, the income tax payable by the proprietor of the estate was deducted? That is quite a new and startling proposition. And accordingly, in the only case which can be represented as an authority on this point that was quoted to us—I mean the case of Wilson *v.* Home—it was held that an obligation to pay public burdens during the continuance of the old income tax did not include an obligation to pay income tax as the proprietor. That is almost a direct authority upon the question before us. But I think a little further consideration of what the true nature of the income tax is will make it very clear that it is impossible to hold the income tax to fall under any such general description as either "public burdens" or "public and parochial burdens," or "rates, taxes, and public charges," which is the expression used in this clause of the Poor Law Act. The income tax, as it is popularly, and, I think, very accurately called, is really a tax upon the free income of every subject of her Majesty above a certain amount, at the rate of a certain percentage upon that free income. That is the nature of the tax. The original Act imposing the tax — the 5 and 6 Vict., c. 35 — is called in its title, "An Act for granting to her Majesty duties on profits arising from property, professions, trades, and offices"—in short, from whatever source any man derives profits, or, in other words, income, a tax shall be paid upon the free income which he enjoys. Now it is said that a portion of this income tax—viz., that which is charged at the rate of 7d. in the pound upon the rents of land derived to the owner of the land, is a charge, or rate, or tax payable in respect of the land, within the meaning of the 37th section of the Poor Law Act; but it does not appear to me that can be said with any propriety. I see the Lord Ordinary has fallen into a mistake entirely as to the meaning of certain words in schedule A of the Income Tax Act, and supposes that the argument of the party desiring to deduct the income tax here receives support from the use of these words. The assessment is imposed in this way, "For all lands, tenements, and hereditaments or heritages in Great Britain there shall be charged yearly in respect of the property thereof, for every 20s. of the annual value thereof, the sum of 7d." Now, says his Lordship, this is a charge made in respect of the property, and it is just that very same thing that the 37th section says — that all charges payable in respect of the same, that is, in respect of the property, shall be deducted. But, unfortunately, that is an entire fallacy, because what the 37th section of the Poor Law Act says is that all charges payable in respect of the lands and heritages shall be deducted. The phrase in the Income Tax Act is that "there shall be charged yearly 7d. in the pound, in respect of the property of all lands, tenements, and hereditaments," which means in respect of the interest of the owner in that subject as contrasted with the interest of the occupant; for immediately afterwards, in schedule B, there occurs the corresponding expression, "For all lands, tenements, and heritages in Scotland there shall be charged yearly in respect of the occupation thereof, for every 20s. of the annual value thereof, the sum of 2½d." And therefore I don't think that the railway company here can obtain any advantage from the use of that phrase in the Income Tax Act. But the tax being charged upon income from whatever source arising, it, no doubt, became necessary, as matter of machinery, to fix what was the way in which it was to be charged upon different kinds of income arising from different sources, and also in what way it was to be levied and recovered; and accordingly the great bulk of these Acts of Parliament regarding the income tax is occupied with a detail of such machinery. But such machinery, I think, has very little to do with the present question. The present question is what is truly the nature of this tax, and upon what is it levied? Now, if we consider what its operation is, especially with reference to the rents of land—the thing that we are here dealing with —I think that we shall see very plainly that it cannot be said to be a public charge of any kind, payable in respect of lands and heritages. A landed proprietor is not directly charged with the tax upon his rents. On the contrary, the payment even of the landlord's income tax is made, in the first instance, by his tenant. The 7d. in the pound, where the estate is let to a tenant, is paid by the tenant who is in the occupation; and that 7d. in the pound is deducted by the tenant from the rent which he pays to the landlord. But, then, although the landlord receives his rents in this way minus the tax, and so indirectly is made to pay 7d. in the pound upon his rents, it by no means follows that he pays in the end a tax of that amount, because it depends entirely on what the amount of his own free income is whether he pays 7d. in the pound upon his rents, or whether he will pay anything in the pound on his rents at all in the result; for if he is burdened up to the fullest amount of the value of his estate with debt—whether heritable or personal debt, it does not matter—or, in other words, if the rents which he receives from his tenants he is obliged to pay away in the shape of interest to his creditors, he will deduct from the interest that he pays to his creditors the amount of the income tax, and in the end the creditors of the landlord, and not the landlord himself, will bear the burden of that income tax. Now, that being so, it would be a very strange thing to say that a tax which in such circumstances is shifted to the liability of a person who has no sort of connection with the land in question at all, or whose connection with the land is only that he is a creditor secured over the land, should yet be called a tax payable or a public charge payable in respect of the lands and heritages. I think that would be a misconstruction of the fair meaning of these words. But this will be made still more clear if we attend for a moment to the contrast which there thus arises between the incidence and operation of the income tax, and those of the ordinary taxes which

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