I therefore think that the determination of the Commissioners is wrong.

LORD KINNEAR—I am of the same opinion. I think it is settled by previous decisions, (1st) that the right to exemption does not depend upon the charitable origin of the institution, but upon its actual condition and character when it is alleged that liability to taxation has arisen; and (2nd) that a hospital which is entirely or mainly self-supporting is not within the class entitled to exemption. Upon the question of fact which arises under this second branch, I agree with Lord Adam and Lord M'Laren that the hospital in question is self-supporting, and therefore not entitled to the exemption.

The LORD PRESIDENT concurred.

The Court reversed the determination of the Commissioners, and sustained the assessment.

Counsel for the Lunatic Asylum—Ure—Salvesen. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Surveyor of Taxes—A. J. Young. Agent—The Solicitor of Inland Revenue.

Wednesday, June 26.

FIRST DIVISION.

[Court of Exchequer.

REVELL (SURVEYOR OF TAXES) *v.* SCOTT.

Revenue — Income - Tax — Occupation of Shootings—Farm and Right of Shooting Occupied by One Tenant under Separate Leases — Property and Income-Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *No.* 7, *Schedule B, sec.* 63.

Held that a person who was tenant of a farm under one lease, and lessee of the landlord's shooting rights over the farm under another lease, was liable to be assessed under Schedule B of the Income-Tax Acts on the aggregate amount of the shooting and agricultural rents payable under the two leases.

At a meeting of the General Commissioners of Income-Tax for the county of Sutherland held at Dornoch on 20th November 1894, Mr Tom Scott, farmer, Rhifail, appealed against an assessment of £1042, 17s. 6d. made on him under Schedule B of the Income-Tax Acts for the year ended 5th April 1895, in respect of the occupation of Rhifail sheep-farm and shootings.

The Commissioners were of opinion that the assessment under Schedule B ought not to include the appellant's shooting rental, and that appellant was only liable to be assessed under said schedule on his rent as grazing tenant, and they reduced the assessment to £672, 17s. 6d. accordingly.

The present case was stated for the opinion of the Court at the request of the Surveyor of Taxes.

The case contained the following statements:—"Mr Scott is tenant under the Duke of Sutherland of Rhifail sheep-farm, in virtue of a fourteen years' lease as from Whitsunday 1889, and he is also the lessee under another lease, applicable to the same period, of the landlord's shooting rights over said farm, and also of his angling rights over one beat of the river Naver. According to such leases he pays yearly the following separate rents, viz., £670 in respect of the occupancy and grazing of the farm, £370 for the shootings, including a furnished lodge-keeper's house and offices, and £100 for the angling, together with a further sum of £2, 17s. 6d. yearly of fire insurance, payable on the farm and other buildings rented by him. Mr Scott is in the actual occupation of Rhifail farm and resides upon the same all the year round. No assessment under Schedule B has been made in previous years upon Mr Scott in respect of the shootings and angling until the year 1893-94, when the Schedule B assessment, so far as it included the shooting rental, was discharged after a hearing before the Commissioners.

"The appellant contended (and his contention was admitted by the Surveyor) that if the shooting of Rhifail during his occupancy of the grazing right had been let by the proprietor to another person, the shooting tenant would not have been liable to income-tax under Schedule B in respect of the shooting rent; and that no distinction can be drawn between his position and that of a shooting tenant who pays a separate rent for the shootings. . . . This is the first occasion in the county of Sutherland, since the passing of the Income-Tax Act 1862, that the occupancy of shootings over and above the primary and beneficial occupation of the land as a sheep grazing farm (apart from deer forests) has been made the subject of assessment in respect of income-tax under Schedule B. . . .

"It was contended on behalf of the Crown that the Schedule B assessment of £1042, 17s. 6d., being the annual value of the farm and shootings thereon in the occupancy of the appellant (less the sum of £70 allocated to the shooting lodges), was rightly made according to No. vii., Schedule B, section 63 of the Income-Tax Act of 1845 (5 and 6 Vict. cap. 35)." . . .

Argued for the Surveyor of Taxes—The appellant was undoubtedly an occupier of land by his possession under his shooting lease just as much as in virtue of his agricultural lease. The case of *Middleton* v. *Lord Advocate*, March 16, 1876, 3 R. 599 was directly in point. There, as here, the tenant had the exclusive use or occupation of the land, and the rent paid by him was its agreed-on actual value, in that case as a deer forest, in this for farming and shooting combined. Rule vii., Schedule B, section 63, of the Act of 1842 provided for the duty under Schedule B being charged in addition to the duty under Schedule A, according to the general provision in rule 1, Schedule A,

section 60, on the full amount of the annual value of the lands. That rule extended to all lands "for whatever purpose occupied or enjoyed," and the annual value was in this case the full rent paid, on which accordingly the appellant must be assessed—*Menzies* v. *Solicitor of Inland Revenue*, January 18, 1878, 5 R. 531—15 S.L.R. 285; *Stewart* v. *Bulloch*, January 14, 1881, 8 R. 381, where the shooting rent was reckoned in calculating the amount of a composition — *Paterson* v. *Johnston*, November 12, 1879, 7 R. 12, at pp. 24-7.

Argued for appellant—(1) Only one rent was contemplated by Schedule B, and that was for the "occupation" of the land in the statutory sense, which did not embrace shooting purposes. It was merely a fiction of law to hold that the right of a game tenant was "occupation." (2) All the rules contemplated only the assessment of profits, but the tenant of a shooting could not be said to make a profit out of his shooting rights. This constituted the differences between assessment under the Property and Income Tax Acts and that under the Poor Law Act, where a game tenant had been held to be in the occupation of land and so assessable. The terms and objects of the Acts were different —*Stirling Crawfurd* v. *Stewart*, June 6, 1861, 23 D. 965. The headings of the Income Tax Acts showed that they were intended to exact duties on "profits," and thus an agricultural tenant was exempted if he did not make profits—14 Vict. c. 12, sec. 3; 16 and 17 Vict. c. 34, sec. 46; 43 and 44 Vict. c. 20, sec. 52; 53 and 54 Vict. c. 8, sec. 23. Schedule B of the 1853 Act (16 and 17 Vict.) was subordinate to Schedule A, and unless the ownership was assessable the occupancy could not be. But shooting rents were not assessed *qua* ownership, under Schedule A but under Schedule D; therefore they were not assessed under Schedule B *qua* occupancy. Under the 1842 Act this contention would be equally valued.

At advising—

LORD PRESIDENT—This is an important case and requires consideration, but the facts lead me to the conclusion that the decision of the Commissioners is wrong.

That Mr Scott is in occupation of these lands in virtue of his agricultural lease is admitted. That by his possession under his shooting lease he is also in the sense of law in occupation of the lands can hardly be regarded as disputable in view of the decisions. I may refer to the case of *Middleton* (cited in the case), where the previous decisions are noted, and to Lord Mure's opinion in *Paterson* v. *Johnston*, 7 R. 17, where they are carefully examined.

If Mr Scott, then, be in occupation of the lands under both leases, he comes under Schedule B, and the next question is, what, to use the phraseology of the statute, shall the annual value of the lands be understood to be? The 63rd section says that the duties under Schedule B shall be charged, according to the general rule in No. 1. Schedule A, on the full amount of the annual value. This leads us to the 60th section, which gives the rule referred to, and there we find that the annual value of lands is understood to be the rent by the year at which the same are let at rack-rent, if the amount of such rents shall have been fixed by agreement. This rule is to apply to all lands and heritages capable of actual occupation, of whatever nature and for whatever purposes occupied or enjoyed.

If Mr Scott is occupant of the lands under both his leases, then the rent he pays under both is rent for the occupation of these lands, and the fact that one of his rights of occupancy is for one purpose, and the other for another, is nothing against the assessment, and shows merely that the annual value of these lands arises from their being suitable for two modes of occupation which are diverse but compatible. The aggregate of the two rents fixed by agreement is, in the sense of the statute, the rent at which these lands are let. The fact that there are two leases and two rents, and not one rent stipulated in one lease, seems to me to make no more than a superficial difference.

My opinion is that the decision of the Commissioners should be reversed.

LORD ADAM—I concur. I cannot doubt that if the shootings and the grazings had been included in one lease instead of two, the joint rent would necessarily have been the annual value of the lands in a question with Mr Scott, and I confess that I cannot see that it makes any difference that the parties should have fallen on the device, as I may call it,—I do not use the word in any bad sense,—of endeavouring to avoid part of the assessment by dividing the occupation into two leases. I agree with your Lordship that that makes no difference. I think that under the authority of the case of *Middleton* and the other case quoted, Mr Scott is in the occupation of the lands for the purposes of shooting just as much as he is in the occupation of the lands for the purpose of grazing; and therefore I think the conclusion is clear that the Commissioners' judgment is wrong and must be reversed. I may notice—I do not know how far it may have influenced the judgment of the Commissioners—that there is said to have been an admission made by the Surveyor "that, if the shooting of Rhifail during the appellant's occupancy of the grazing right had been let by the proprietor to another person, that other person would not have been liable to income-tax under Schedule B." I make no observation upon whether that was right or wrong, but I wish to point out that that is not an admission of fact, but an admission of law, which the Commissioners were, of course, not entitled to take from the Surveyor. On the whole matter I concur with your Lordship.

LORD M'LAREN—I concur with your Lordship, and upon the same grounds. I think this case is ruled by the case of *Middleton* v. *Lord Advocate*, and that no legal distinction can be taken between

a right to occupy land for all purposes where the object which the tenant has in view is deer shooting, and where it is shooting of a different description. I apprehend that an occupation of land for the combined purposes of agricultural or pastoral pursuits and shooting constitutes the whole occupation of the subject, and is properly assessed at the full rent under Schedule B.

LORD KINNEAR—I am of the same opinion for the same reasons

The Court reversed the determination of the Commissioners.

Counsel for the Surveyor of Taxes—A. J. Young. Agent—The Solicitor of Inland Revenue.

Counsel for the Appellant—A. Jameson—Macphail. Agents—Macpherson & Mackay, S.S.C.

Wednesday, June 26.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

CARRUTHERS *v.* CARRUTHERS' TRUSTEES.

Trustee—Personal Liability—Neglect to Audit Factor's Accounts in Accordance with Truster's Directions—Culpa lata.

A testator conveyed his whole estate to five trustees, who resided in different parts of Scotland, directing them to pay the liferent of the residue to his daughter and the fee to her children. Power was given to the trustees to appoint a factor, and they were directed within one month after the 31st day of December in each year to call for an account of the factor's intromissions, and to audit the same. The testator died in 1879 leaving, as the bulk of his estate, a *pro indiviso* share of a heritable property, consisting partly of minerals and partly of agricultural ground. One of the trustees, who had been the testator's law-agent, acted as factor to the trust. The rents and royalties were not drawn directly by the factor, but by the agents of the other co-proprietors, who paid the factor the shares due to the trust. The factor's accounts were audited and found correct in 1881, 1882, 1888, and in June 1890. No further account was rendered by the factor, who became bankrupt and absconded, in the end of 1891, when it was found that he had appropriated about £380 of trust money which had come into his hands since June 1890.

In an action by the liferentrix to have the remaining trustees ordained to replace the sum misappropriated by the factor, on the ground that it had been lost through their neglect in failing to audit his accounts annually, the Court (*aff.* judgment of Lord Kincairney) *assoilzied* the defenders, *holding* (1) that, although the trustees had failed in their duty in not auditing the factor's accounts regularly, their negligence did not amount to *culpa lata*, involving personal responsibility; and (2) that the loss to the trust-estate was not, as matter of fact, the result of their failure in duty—*diss.* Lord Rutherfurd Clark, who held (1) that the negligence of the trustees amounted to *culpa lata;* and (2) that the *onus* lay upon them of proving that the loss to the trust had not resulted from that negligence, and that they had failed to discharge it.

David Carruthers, manufacturer in Bervie, died on 7th April 1879 leaving a trust-disposition and settlement, whereby he conveyed his whole estate to five trustees, of whom three—James Glegg, William Jarvis, and Hector Forbes resided in Bervie, one, the truster's brother William Carruthers, in Glasgow, and the fifth, Hall Grigor, the truster's agent, in Inverkeithing. The trustees were directed to pay the liferent of the residue of the estate to the truster's daughter, and the fee to her children. The deed contained the following clause:—"With full power to my said trustees to appoint factors, either of their own number or other fit persons, for uplifting the rents and interest of my said estate, and to hold him liable to them for all omissions, errors, or neglect of management, and for his own personal intromissions with my said estate; and I do hereby direct my said trustees under this settlement annually, within one month after the 31st day of December in each year during their administration, to cause their factor to make up an account of the intromissions had by him by virtue hereof in the course of the year ending on that date, and to lay the same, with the whole vouchers thereof, before them, to be by them examined, audited, and (if found to be correct) approved of; and in the event of my said trustees being dissatisfied with the management of my said estate by the said factor whom they may appoint, I hereby authorise them to appoint a new factor in his place, either of their own number or other fit person as aforesaid, who shall be responsible to them as above mentioned."

All the trustees nominated accepted office. No special appointment of Mr Grigor as agent or factor for the trustees was made, but he acted in that capacity.

The truster's debts exceeded his personal estate, and a *pro indiviso* share of the lands of Cobbinshaw, consisting partly of minerals and partly of a farm, formed the bulk of the trust-estate. It was heavily burdened, and the greater part of the rents were exhausted in payment of interest on bonds, taxes, and expenses. The rents and royalties were not drawn directly by Mr Grigor, but the shares of them effeiring to the trust were from time to time paid to him by the agents of the other co-proprietors.