that the joint act of a tenant for life and of a tenant in tail in creating a burden over the estate is to be held the incurring or the creation of an encumbrance by the tenant in tail, notwithstanding that he could not create an encumbrance without the consent of the tenant for life. And then that illustrates very strongly the view that I have now been taking; for the radical right remaining and being vested in tenant in tail, he was of course in the position of heir in possession. He had the fee—the other was only an encumbrance. Here the fiar is the heir in possession. The right of the substitute heir is a *jus crediti*, not a real right in the estate; but I think consequently—apart altogether from the views which Lord Gifford has stated clearly and strongly—he cannot be said to incur or create an encumbrance of this kind. As regards the allowance claimed in regard to the annuity which fell on the late Lord Glasgow's death, I can see no ground for that. The present Earl was not deprived of anything by the late Earl's death in regard to the annuity, for he received all for which he stipulated; the annuity only ceased at its stipulated term. His succession to the estate was coincident with the cessation of the annuity; but they were not cause and effect. The annuity would have ceased although the present Earl would never have succeeded; as, for instance, if the late Earl had had children. In like manner, the annuity might have continued though he had succeeded, as in the case of the late Earl having committed irritancy and forfeited the estate during his life. The decision in *Harrison's* case is unquestionably a very weighty one, and I should have found it difficult, whatever I might have thought of its merits—and undoubtedly the question is one which admits of doubt—I should have had great hesitation in going against a decision of the House of Lords in regard to the construction of an imperial statute if the interests in question had been similar; but looking to the ground on which that case was determined, and especially to Lord Selborne's judgment, I cannot help seeing that the tenant in tail had the radical right and interest in him at a time when this annuity transaction was entered into; for Lord Selborne rather seems to think that it was a payment out of his own estate which was stipulated for by mere anticipation; I say, looking at that, I cannot apply the grounds of judgment in *Harrison's* case to the relations in which the parties here stand. Your Lordships adhere to the Lord Ordinary's interlocutor.

Mr Hamilton asked for expenses. Mr Rutherfurd opposed this motion, and submitted that since the date of the Lord Ordinary's interlocutor the balance of success between the parties had been equal.

The Court found the respondent entitled to expenses, but modified them to two-thirds, *i.e.*, they take off from the Inner House expenses one-third the amount.

Counsel for Inland Revenue—Lord Advocate and Rutherfurd. Agent—Angus Fletcher.

Counsel for Earl of Glasgow—Dean of Faculty (Clark), Q.C., and Hamilton. Agents—Hope, Mackay, & Mann, W.S.

Friday, January 15.

SECOND DIVISION.

SPECIAL CASE—THOMAS GLADSTONE AND OTHERS (MACKIE'S TRUSTEES) AND OTHERS.

Annuity—Income-Tax—Deduction.

A testator left to his widow an annuity "free from all burthens, taxes, and deductions whatsoever,"—*Held* the trustees under his trust-disposition and settlement were not entitled to deduct income-tax from the amount of the annuity.

Trustee—Partnership—Auctor in rem suam.

One of the trustees under a testamentary deed was a partner in a commercial business with the testator. The testator directed his trustees to conduct the concern until his youngest son attained the age of twenty-five. It having been found by the trustees that it would be for the advantage of the trust-estate to increase the interest in the business enjoyed by the partner, who was also one of their number, they applied to the Court for its opinion and judgment upon their powers in the matter. *Held* that the trustees could not increase the share of their co-trustee *qua* partner; no one could be *auctor in rem suam*, but that the wording of the trust-deed entitled them to appoint him factor with a reasonable allowance for his trouble.

This was a Special Case raising important and interesting questions under the succession to the estate of the late Ivie Mackie of Auchencairn, Kirkcudbrightshire, who died on 23d February 1873, survived by his wife Mrs Agnes Gladstone or Mackie and three sons, James Todd Mackie, John Gladstone Mackie, and Stuart Mackie. His eldest son James died on 5th August 1873, leaving a will, the executors under which were the fifth parties to the case. The other parties were the widow Mrs Mackie, of the fourth part, David Fulton, of the third part, and the two younger and surviving sons, of the second part. The trustees under Mr Ivie Mackie's trust-disposition and settlement were the parties of the first part.

Mr Mackie disponed his heritable and real estates to trustees for certain trust purposes, and out of this disposition and settlement there arose certain questions which formed the subject of the case presented to the Court. The first question submitted arose under the truster's provision for his widow, to whom he directed his trustees to pay "an annuity, free from all burthens, taxes, and deductions whatsoever, of £2500, during all the days of her life." Mrs Mackie, founding upon this clause of the deed, maintained that she was entitled to receive payment of her annuity of £2500 free of income-tax; while the trustees contended that they were bound to deduct income-tax before payment.

The second question arose on a direction to the trustees contained in the sixth purpose of the trust-deed, which was as follows:—"I direct my trustees, as soon as can conveniently be done, to invest in any of the securities abovementioned (that is to say heritable security, Government stock, or railway or other debentures) the sum of £35,000, the interests or dividends on which shall be paid to the said James Tod Mackie, my son,

yearly or half-yearly during all the days of his life, for alimentary purposes only, and to the express exclusion of his debts and deeds, and the diligence of his creditors, and such interests or dividends shall not be assignable." The principal sum at his death he directed should be divided in certain proportions among the issue of his said son. The trustees on 23d February 1873 proceeded to realise the trust-estate, but at James' death had only been able to effect investments of the £35,000 to the extent of £14,720; and no dividends on these investments became due during James' life, nor was any dividend paid him on any part of the £35,000. His executors now demanded payment of five per cent. per annum interest on the whole sum, so far as not invested, from the date of his father's to his own death; and a proportional part of the dividends accruing on the invested portions corresponding to the periods during which James survived the dates of the respective investments. The trustees, on this point, contended that, as no time was specified by the truster for making and completing the investment, and they had not unduly delayed making them, the executors were only entitled to the proportion of dividends on the invested portions; or, if to interest on the uninvested portion, then only to the interest actually derived from it, which was, on the average, £4, 3s. 6d. per cent. per annum.

The third question had regard to the management of the business of the firm of Findlater & Mackie, Manchester, of which the truster had been a partner. The trustees had paid all bequests, &c., under his settlement, and now held the residue for the two youngest sons already mentioned, and part of this residue was made up of the capital of the truster in the firm (£15,252, 5s., which bore interest at the rate of 5 per cent. per annum), and 57-64th shares in the net profits, which for 1873 amounted to between £8000 and £9000. At the truster's death there were three other partners, one of whom was Mr Fulton, the third party in the case, and also a party as one of the trustees. The truster's share was then 39-64ths, Fulton's 7-64ths, and those of the other two partners respectively 18 64ths; but the two last dying soon after the truster, their shares fell, in terms of the co-partnery, into his, and were since held by his trustees as part of the residue. Fulton was the manager and had the sole conduct of the affairs of the firm—the trustees, who, under the trust, were partners in place of the residuary legatees until each should arrive at 25 years of age, not being able to take part therein; and both these and the residuary legatees concurred in thinking it in the interests of the firm and of the residuary estate that Fulton, who was entitled to retire at any time, and on whom the success of the firm depended, should receive such additional allowances as should amount to 24-64th shares of the net profits, on which consideration he was willing to continue in the firm and to devote his whole time to its affairs. Looking to the terms of the deed of copartnery, which made each partner's share in lieu of all allowances, the trustees doubted whether they had the power to do this, although Fulton and the residuary legatees thought they had under articles 33 and 34 of the contract of copartnery, which were as follows:—"33. That at any time thereafter it shall be lawful for the parties hereto by an entry in the books of the partnership, signed by all the parties, to vary, alter, or add to any of the provisions in these presents; and such alterations or additions shall be binding on, and conclusive against, all the parties, as if same were originally part of, and incorporated with, these presents 34. That it shall be also lawful for the said Ivie Mackie to bequeath by will his share in the partnership to any person he shall think fit; and the person to whom such share shall be bequeathed shall stand in the place and stead of the said Ivie Mackie during the remaining continuance of the partnership; and all and every deed and deeds (if any) which shall be necessary for making such legatee (who is the person hereinbefore referred to as his 'testamentary nominee') a partner under the provisions of these presents, shall be executed by the said Alexander Findlater, David Fulton, and Edmund Aked Gladstone, and all other proper parties; and in case the said Ivie Mackie shall not exercise and make use of this power, then his share of and in the said partnership shall descend to his executors or administrators, who shall stand in the same position as the said Ivie Mackie now holds in said partnership." John Gladstone Mackie was now twenty, and Stuart was eighteen years of age. The questions as laid before the Court were:——(1) Whether the widow was entitled to receive her annuity free of income tax? (2) Whether the executors of James Tod Mackie were entitled to interest on the uninvested portion of the £35,000 from the period from his father's to his own death? (3) Whether, having respect to the terms of the copartnership and the trust settlement of Ivie Mackie, his trustees had power to pay out of the profits of the firm, until the youngest of the residuary legatees should arrive at twenty-five years of age, such allowances to Fulton as, taken with his 7-64th shares, should not exceed 24-64th shares of the whole net profits—he devoting himself solely to the business of the firm in the meantime? (4) Whether the trustees had power under the trust-deed to appoint Fulton to be their factor for the management of their interest in the business, and to allow him such remuneration as they should deem reasonable? And (5) Whether, in terms of the contract of copartnery the trustees had power to alter the provisions of the contract to the effect of increasing Fulton's share until the youngest residuary legatee should reach the age of 25 years?

I. On the first question, as to income tax, the following authorities were cited—5 and 6 Vict. c. 35, §§ 102, 103; 16 and 17 Vict. c. 34, § 42; 35 and 36 Vict. c. 20, § 8; 36 and 37 Vict. c. 18, § 6; *Blair* v. *Allen*, Nov. 17, 1858, 21 D. 15; *Turner* v. *Mullineux*, Jan. 16, 1861, 1 Johnson & Hemming, 334; *Festing* v. *Taylor and Duchess of Somerset*, Jan. 14, 1862, 3 Best & Smith, 217, 235.

II. On the second question, as to the interest on the £35,000, it was argued for Mr James Mackie's trustees that the clause was imperative. It could not be supposed that the truster intended that his son should be left without any alimentary provision while the trustees were looking for a suitable investment. Moreover, the money was to be in full of James Tod Mackie's legal provisions.

III., IV., V. On the question of the powers of the trustees arising under queries 3, 4, and 5, it was urged by the other parties to the Special Case that a valuable part of the trust-estate was in danger, and that the trustees were bound to exercise their power to the utmost. That unless this or some similar course

were taken, this valuable portion of the trust-estate would be lost or much diminished in value. It was expedient, advantageous, and yet quite reasonable, to adopt one of the modes suggested; and it was the truster's intention that the business should be preserved for his residuary legatees as part of the residue of his means. Any one of the courses was more reasonable than a sale; moreover, there was power given in the trust-deed to appoint a factor, the words being as follows:—"And to appoint the said William Halliday Lidderdale to be their factor and agent for the management of my estates and affairs in Scotland, and to give a reasonable allowance to him for his trouble, and on his death or resignation to appoint one of their own number, or any other person, to the same office, and on the same terms. As also, to appoint one of their own number, or any other person, to be factor for the management of my estates and affairs in England, and to give a reasonable allowance to him for his trouble." Under the mode suggested, the trust-estate would have, besides the interest of capital invested, a larger share than the truster had originally himself.

At advising—

Lord Justice-Clerk—My Lords, this is a case in which several questions of considerable difficulty arise, and they have received very deliberate attention from the Court. The first point which arises is under question 1 of the Special Case, which runs thus—[*reads*]. This, I think, must be answered in the affirmative, that is to say, the income tax itself, as well as the whole sum of money left, forms part of the legacy. On the 2nd question, which is as follows—[*reads*]—I think there is no ground for the demand for more interest than the trustees actually realized from the invested funds, and that therefore the representatives of Thomas Ivie Mackie are entitled to the interest as calculated at the average rate during the period of non-investment. The third question arises in very peculiar circumstances, and is rested on very peculiar grounds. [*His Lordship here stated the circumstances.*] The power sought is really an alteration of the contract of co-partnery, and it is said to be expedient in the interests of all parties; but the question comes to be really whether the trustees have power to enter into any such arrangement. If the question was whether the trustees were partners in this concern, and whether as partners they had the power to make this alteration, then I think a good deal might be said for their powers in the matter, but there is this peculiarity here, that David Fulton is not only managing partner, but he is also a trustee, and hence the point at issue comes to be whether indeed a body of trustees can give over to one of their own number a large portion of the trust estate. That element is to my mind conclusive, and we must answer the question in the negative.

The fourth question, I have no doubt, should be answered in the affirmative, and the fifth is involved in the third, and should be answered in the negative.

Lord Neaves—I concur, and upon the two first questions say nothing. The third question really comes to be whether the trustees, consisting *inter alios* of David Fulton, can make the said David Fulton a gift for a consideration of the difference between 7-64ths and 24-64ths of the profits. This would imply that David Fulton is a party to the transaction, and as he is a trustee, he would, I think, be *auctor in rem suam*, and that, accordingly, his claim and his position would be incompatible. On the other questions I concur.

Lord Ormidale—I am of the same opinion. As to the first question, the English authorities quoted to us make the point clear, for they draw a distinction between the case where an annuity is a gift by will, and the case of a contract. On the second question I have no observations to offer—I think the result we have arrived at is reasonable. On the fourth I have no difficulty, because by the trust deed the trustees are authorised to appoint one of their number to be factor [*quotes clause*], and I might suggest that the interlocutor should upon this point embody the words of the trust-deed.

Upon the third and fifth questions I concur, and I think that, in the existing circumstances, it is *ultra vires* of the trustees to make an additional payment as suggested to one of their number—no trustee is entitled to make a profit by his position.

Lord Gifford—I have come to the same conclusion. The first question must be answered in the affirmative. Looking at the construction of the settlement, the words are that the bequest is to be "free of all deduction." I think the 103d clause of the Income-tax Act does not apply to the case of a will, which is not a covenant in the sense of the Act. That clause runs as follows:—[*reads it.*] The object of this enactment was to prevent landlords shifting the weight of their taxation on to others. On the second question, as to the accruing interest from the testator's death until that of his son, I think the reasonable construction is, that the party for whom the investment is ultimately found is entitled to the average produce of the fund during the time the investment is being sought for.

As to the proposed arrangement with the factor under questions 3 and 5, I concur with your Lordships.

We cannot alter the contract in the mode suggested. I think there is not the power in the existing circumstances to do so. Fulton is not entitled to make profit by his present position, or to be *auctor in rem suam*. On the fourth question I have felt that there is some delicacy. The point is, whether one of the trustees may be appointed factor to manage the business—[*reads question*].

I dont think that the judgment of this Court can be evaded by appointing Fulton as factor with a salary equal to the difference between 7-64ths and 24-64ths, but I think he is entitled to a reasonable remuneration.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the Special Case, are of opinion and find:—

"(1) That the parties of the first part are entitled and bound to pay to Mrs Mackie, the party of the fourth part, her annuity of £2500 free of income-tax.

"(2) That the executors of James Tod Mackie, the parties of the fifth part, are entitled to such amount of interest upon the sum of £35,000, in so far as uninvested prior to the death of the said James Tod Mackie, as the parties of the first part have on the average realised from the existing invest

ments of the trust-funds during that period, and that from the death of the testator.

"(3) That the parties of the first part are not entitled in the circumstances set forth in the case to make the proposed arrangement with Mr Fulton.

"(4) That the trustees have the power under the trust-deed to appoint Mr Fulton to be their factor for the management of their interest in the business of Findlater & Mackie, and to allow him a reasonable allowance for his trouble.

"(5) That this question is answered in the negative; and allow the expenses incurred by all the parties to this case, including the *curator ad litem*, to be paid out of the trust-estate, and remit to the Auditor to tax the same, and to report and decern."

Counsel for the Trustees—Dean of Faculty (Clark), Q.C., and Gloag. Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for the other Parties—Solicitor-General (Watson) and Blair. Agents—Hunter, Blair, & Cowan, W.S.

R, Clerk.

Friday, January 15.

SECOND DIVISION.

[Lord Shand, Ordinary.

LOGAN (SPROAT'S JUDICIAL FACTOR) *v.* ALEXANDER SPROAT AND MRS M'LELLAN.

Trust—Liability of Trustee—Bill—Fraudulent concealment of Fact—Neglect of Duty.

A died leaving a trust-disposition and settlement by which he named certain trustees, who were, after realizing his estate and paying legacies, to divide the residue into three parts, one of which went to B his brother. Some time prior to his death B, being in difficulties, applied to his brother A for aid, which was rendered in the following way—B granted to a banker C, (his own agent, and also his brother's) a trust-deed for behoof of his creditors conveying all the crop and stock of his farm. Thereafter A purchased the crop and stock from C, giving C his bill for the amount, and this bill having been discounted by C the money was applied in paying off B's debts. A thereafter died without having been put in possession of the crop and stock, and of the trustees named by him the only accepting ones were C, B, and B's son. In making up the inventory C did not enter the amount of the bill as an asset of the trust-estate, but some years afterwards he resigned his office of trustee and also the agency. Then C died, and his executrix claimed payment of the amount of the bill against the trust-estate; B having been removed from his office of trustee, the Court appointed a judicial factor. C's executrix claimed payment of the amount of the bill against the trust-estate and obtained decree in absence, which the judicial factor suspended, after which further action ceased for some time. At length, however, the factor raised this action of declarator against B and C's executrix to have it found that—(1) the bill was granted for behoof of B, and that B was bound to relieve A's trust-estate to the amount thereof; and (2) that in event of the factor not obtaining relief against B, C's executrix was barred from maintaining a claim against the trust-estate, or otherwise was bound to relieve the trust-estate of any loss in connection with the bill. *Held* (*diss.* Lord Gifford) that the facts as disclosed on record did not sustain the allegations of fraudulent concealment of fact and loss caused by neglect brought against C.

This case came up by a reclaiming note by the widow of William Hannay M'Lellan of Marks, Kirkcudbrightshire, against an interlocutor pronounced by the Lord Ordinary (SHAND) in an action at the instance of C. B. Logan, W.S., judicial factor of the late Thomas Sproat, Geelong, Victoria, Australia, against Alexander Sproat of Brighouse, Borgue, Kirkcudbright, and the reclaimer. The pursuer was appointed judicial factor on the trust-estate of Thomas Sproat on 28th January 1873, after his brother (the defender Alexander Sproat) had been removed from the trusteeship. Mr Logan on entering on his office found that Mrs M'Lellan, the other defender, had made, and as executrix of her husband was insisting in, a claim against the estate for payment of a bill for £1582, 12s. 8d., granted on 19th April 1858 by Thomas Sproat in favour of W. H. M'Lellan, in respect of an advance made by him to Thomas Sproat of £1510, 12s. 6d. Mrs M'Lellan had obtained decree in absence for the amount of interest since 1859 on 19th May 1863. On the 7th October 1863 a note of suspension of this decree was passed, but no further judicial proceedings had been taken by either party. Mr Logan in May 1874 brought the present action, to have it found that Mrs M'Lellan was barred by the actings of her husband as trustee on the trust-estate from insisting on her claim against the estate.

The summons concluded for declarator—(1) that a bill for £1582, 12s. 8d., dated Kirkcudbright, 19th April 1858, drawn by W. H. M'Lellan upon and accepted by the deceased Thomas Sproat, was granted for behoof of Alexander Sproat, and that Alexander Sproat was bound to relieve the pursuer and the trust-estate of Thomas Sproat of any claim competent to the defender Mrs M'Lellan, as her husband's executrix, in respect of the bill; and (2) that in the event of the pursuer not obtaining relief from Alexander Sproat, Mrs M'Lellan was barred from maintaining a claim against the trust-estate, or otherwise was bound to relieve the trust-estate of any loss sustained through the bill. Alexander Sproat did not enter appearance to defend.

The pursuer set forth in his condescendence that in the early part of the year 1858 Alexander Sproat, tenant of Brighouse, Borgue, in the stewartry of Kirkcudbright, became embarrassed in his circumstances, and applied for assistance to his brother Thomas Sproat, sometime of Geelong, in the colony of Victoria, who had shortly before returned to this country. After some negotiations, in which the late Mr W. H. M'Lellan took part, Thomas Sproat ultimately agreed, upon certain conditions stipulated for his security and acceded to by Mr W. H. M'Lellan, as representing Alexander Sproat, to afford the latter pecuniary assistance, with the view of meeting the pressure which was then put upon him by his creditors; and,