of the Corporation of Glasgow? And the third was whether it happened through the sole fault of Messrs Lyons? These three alternative views were fully before the jury, and the jury affirmed the first view and negatived the two others. I agree with your Lordships that the jury was not entitled to find that the accident happened through the joint fault of the Corporation of Glasgow and of Messrs Lyons, and that accordingly the verdict which embodies that view must be set aside.

The Court set aside the verdict and refused the motion for absolvitor.

Counsel for Pursuer—G. Watt, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders first called—A. O. M. Mackenzie, K.C.—Macquisten. Agents—Campbell & Smith, S.S.C.

Counsel for the Defenders second called—Constable, K.C.—Duffes. Agents—Warden & Grant, S.S.C.

Friday, January 14.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

FREE CHURCH OF SCOTLAND AND OTHERS *v.* MACKNIGHT'S TRUSTEES.

(See *ante* October 22, 1915, p. 35.)

Trust—Charitable Bequest—Revenue—Administration of Trust—Recovery of Estate—Income Tax—Personal Liability of Trustees, Law Agents, and Factors.

In an action of count, reckoning, and payment by the beneficiaries under a trust for religious purposes, they averred that certain payments of income tax had not been recovered owing to the negligence of the trustees and their law agents. The tax had been paid on demand for a number of years, when it was brought to the knowledge of the trustees and their law agents that as a result of a decision of the House of Lords in an English case they had all along been entitled to recover it. The trustees thereupon recovered the tax for the previous three years, the limit of recourse allowed by the Income Tax Acts. The beneficiaries sued for the amount of the income tax for the years preceding these three.

Held in the circumstances that neither the trustees nor their law agents were personally liable for failure to recover the income tax.

The Free Church of Scotland and others, *pursuers*, brought an action of count, reckoning, and payment against Hugh Martin and others (A. G. Macknight's trustees), *defenders*.

The case is reported *supra*, p. 35. That report gives the facts. The question remaining for decision was the second objection taken to the trustees' accounts, viz., that they had failed to recover recoverable income tax, on which question the Court had allowed amendment.

The defenders Hugh Martin and Robert Martin (two of the trustees) lodged a minute of amendment deleting their answers to the second objection stated by the pursuers and substituting therefor the following answers:—"Admitted that certain payments of income tax were deducted from or made in respect of rents received by the defenders, and that such payments were not recovered for the period prior to 5th April 1909, and that thereafter certain sums were recovered. *Quoad ultra* denied. Explained that the trust income was ingathered and payments made, not by the defenders personally, but by various house factors employed by the trustees or by the law agents in the trust acting as factors for the trustees. Said law agents were, for the period prior to October 1906, Messrs Hugh Martin & Mackay, S.S.C., and thereafter Messrs Hugh Martin & Wright, S.S.C. These house factors were —[*here followed the names of the house factors*]. Explained that by the Income Tax Act 1842 (5 and 6 Vict. cap. 35), section 61, Schedule A, No. 6, allowances in respect of the Property and Income Tax under Schedule A of that Act are made by the Inland Revenue Commissioners, *inter alia*, on the rents and profits of lands, tenements, hereditaments or heritages vested in trustees for charitable purposes, so far as the same are applied to charitable purposes, and it is further provided by said section that 'the said last-mentioned allowances to be granted on proof before the Commissioners for Special Purposes of the due application of the said rents and profits to charitable purposes only, and in so far as the same shall be applied to charitable purposes only,' and also that 'the said last-mentioned allowances to be claimed and proved by any steward, agent, or factor acting for such school, hospital, or almshouse, or other trust for charitable purposes, or by any trustee of the same, by affidavit to be taken before any Commissioner for executing this Act in the district where such person shall reside, stating the amount of the duties chargeable, and the application thereof, and to be carried into effect by the Commissioners for Special Purposes, and according to the powers vested in such Commissioners, without vacating, altering, or impeaching the assessments on or in respect of such properties, which assessments shall be in force and levied notwithstanding such allowances.' In terms of the Income Tax Act 1860 (23 and 24 Vict. cap. 14), section 10, claims for repayment of income tax must be made within the three years next after the year of assessment. For the reasons stated on record no part of the income arising from the trust subjects was applied towards the establishment and maintenance of the mission carried on by the defenders or for any other charitable purpose until 5th April 1905, and the trustees were not entitled to the statutory allowances for periods prior to that date. The attention of these defenders was not directed to the

fact that income tax was to any extent recoverable during said years, and they gave no instructions to their factors or law agents to take steps for recovery thereof. The trustees' accounts were regularly audited by Messrs A. & J. Robertson, C.A., Edinburgh, but these auditors made no observation as to the recovery of income tax. Assuming that there was any failure to recover income tax on the part of these defenders, they submit that that was a pure omission for which they are not responsible. They have taken no steps to recover the sums thus lost from their law agents or factors, as they do not think that they are responsible therefor, but they are willing and hereby offer to allow the pursuers to take in their names any legal proceedings which they may deem advisable against said law agents and factors on receiving an undertaking to indemnify them against the expenses of such proceedings." [*Here followed a statement of the income and income tax payable thereon for the various periods*].

They added, *inter alia*, the following plea-in-law — "(1) Any failure to recover income tax being a mere omission for which these defenders are not legally responsible, the objection with reference thereto should be repelled."

The defender William Sutherland Mackay (the remaining trustee) lodged a minute of amendment deleting his answer to the second objection stated by the pursuers, and adopted the answer and pleas-in-law for the other defenders, and stated in addition—"This defender further explains that while he was aware that by statutory provision income tax on trust funds applied for charitable purposes was recoverable, he was not aware, and it did not occur to him, that the expenditure of the income of this trust in promotion of a mission at Bathgate or elsewhere was, or might be held to be, expenditure as for charitable purposes within the meaning of the Income Tax Act 1842. Explained further, that this defender was in partnership with the defender Hugh Martin till 30th September 1906, when the partnership was dissolved. For a month after the said dissolution of partnership the said Hugh Martin was sole law agent in the trust, and thereafter up to the present time the said firm of Hugh Martin & Wright have been the law agents in the trust."

The pursuers lodged a minute of amendment, adding at the end of their second objection to the defenders' accounts the following:—"With reference to the statements in answer the pursuers have no knowledge as to the particular persons by whom the trust income was ingathered. The pursuers believe and aver that the defender Hugh Martin, either by himself or as representing his firm for the time, has acted as factor and law agent for the trustees during the whole period of the trust. The provisions of the Income Tax Acts are referred to. The pursuers do not admit that the trust income accruing prior to 5th April 1905 was not applied for charitable purposes within the meaning of said Acts, or that the trustees were not entitled to the statutory allowances for periods prior to that date. The pursuers on the contrary maintain that the trustees were entitled and bound to recover the said allowances for the whole period down to 1909. Believed to be true that the trustees have taken no steps to recover the sums lost to the trust estate from any parties who may be responsible to them therefor. *Quoad ultra* not known and not admitted. The pursuers submit that in the circumstances above set forth the defenders are themselves liable to account to the pursuers for the sums in question, as sums which should have been assets of the estate had the trustees exercised due diligence as above mentioned, and that it would be inequitable that the pursuers should be required to take action against other parties who may be responsible to the trustees. The pursuers further maintain that in any event the defender Hugh Martin is in the circumstances liable to account to them for the sums in question."

They further added the following plea-in-law — "(2) The defenders' answers to the pursuers' second objection being irrelevant the said objection of the pursuers should be sustained."

Argued for the pursuers — This process was habile to try the question of liability of the trustees as trustees and also as law agents such of them as had acted as law agents, for they were called as trustees and as individuals, and there was no necessity to take from them as trustees an assignation of their rights against themselves as law agents — *Muir* v. *Collet*, 1862, 24 D. 1119; *M'Naught* v. *Milligan*, 1885, 13 R. 366, 23 S.L.R. 236. The trustees were personally liable for the amount of the income tax they had failed to recover. They could have recovered the income tax — Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 61; *Commissioners of Income Tax* v. *Pemsel*, [1891] A.C. 531. Failure to recover income tax was failure to ingather an asset and rendered the trustees personally liable. In any event this applied for the period subsequent to 5th April 1905. They were also liable for the prior period, for although the income was not being actually expended on a religious purpose, it was accumulated, and the accumulated income together with current revenue was thereafter applied to a religious purpose, and when the income was applied the tax should have been recovered. Indeed it was within the meaning of the Income Tax Act 1842 that the tax on income earmarked for but not actually expended on a religious purpose should be recovered. Further, the law agents of the trust were personally liable as a law agent *spondet peritiam*, and failure to recover income tax owing to ignorance of a decision binding in the United Kingdom was negligence on his part and entailed personal liability—*Frame* v. *Campbell*, 1836, 14 S. 914, 1839, M'L. & R. 595, *per* Cottenham, L.C., at p. 614; *Simpson* v. *Kidstons, Watson, Turnbull, & Company*, 1913, 1 S.L.T. 74; *in re Sharpe, Rickett* v. *Rickett*, [1906] 1 Ch. 793.

Argued for the defenders Hugh and

Robert Martin—Prior to 5th April 1905 the income was not applied to a religious purpose but was accumulated. The Income Tax Act 1842 allowed recovery of the tax only when the income was *de facto* applied, and "applied" in its ordinary meaning meant "expended." The Income Tax Act was strictly construed, and the privilege of recovery could not be extended to cases beyond those actually covered by the words, *e.g.*, to income earmarked for but not applied to religious purposes, or accumulations of income—*Maughan* v. *The Free Church of Scotland*, 1893, 20 R. 759, 30 S.L.R. 666; *Rex* v. *Special Commissioners of Income Tax*, [1911] 2 K.B. 434. There was no averment that the income was actually applied, and the pursuers' averments were therefore irrelevant. Further, Robert Martin acted solely as a trustee and could not be held liable for a mere omission. It was absurd to hold gratuitous trustees personally liable for a loss due to ignorance of an English decision on an abstruse branch of the law. A trustee could leave such matters as this to competent law agents, and there his responsibility ended when he was prepared as he was here to assign his rights of action against the law agent to the pursuers. Further, there was no relevant averment of negligence against the law agent. Even if the pursuers' averments were otherwise relevant, the only averment of fault against the law agents was that they failed to be aware of a decision of the House of Lords in an English case when there was a Scotch decision to the contrary—*Baird's Trustees* v. *Lord Advocate*, 1888, 15 R. 682, 25 S.L.R. 533. That was not an averment of a sufficient degree of negligence to render them personally liable. *Frame* v. *Campbell* (*cit.*), and *Simpson* v. *Kidstons, Watson, Turnbull, & Company* (*cit.*) were not in point, for the law agent in those cases was employed to do a particular item of business. *In re Sharpe* (*cit.*) was not in point, for there liability was based on a positive act of an agent not an omission.

Argued for the defender William Sutherland M'Kay — As trustee this defender adopted the argument for the other defenders and referred to the Trusts (Scotland) Act 1861 (24 and 25 Vict. cap. 84), sec. 1, and *Buchanan* v. *Eaton*, 1911 S.C. (H.L.) 40, 48 S.L.R. 481. Further, there was no averment of want of professional skill in a sufficient degree to render him liable as law agent. The decision in *Baird's Trustees* v. *Lord Advocate* (*cit.*) was still authoritative as to the meaning of "charitable" in Scots law in all cases except with regard to income tax — *Blair* v. *Duncan*, 1901, 4 F. (H.L.) 1, *per* Halsbury, L.C., 39 S.L.R. 212; *Macintyre* v. *Grimond's Trustees*, 1904, 6 F. 285, *per* Lord Moncrieff at p. 292, 41 S.L.R. 225, 1905, 7 F. (H.L.) 90, 42 S.L.R. 466.

At advising—

LORD PRESIDENT — We are now, as I understand, to dispose of the last topic in controversy between the trustees of the Free Church and the testamentary trustees of the late Mr Macknight. The complaint that is made against the defenders is that they negligently failed to recover from the Inland Revenue certain sums of income tax upon money paid by them in terms of the trust-deed for the support and maintenance of a religious mission at Bathgate; and the period during which they are said to have failed extends from the year 1900 to 1909. During that period the trust was for some years in abeyance, but that does not affect the question which we are now called upon to decide.

Now I consider first the case set out on the record against the testamentary trustees. They are sought to be made liable because of their omission to claim repayment of the income tax in respect that the moneys confided to their charge were applied to charitable purposes. It was not really applied to charitable purposes, it was applied to religious purposes; but then it is said that by a decision of the House of Lords (*Commissioners of Income Tax* v. *Pemsel*, [1891] A.C. 531), which must be held now to be the law of the land, and which reverses the decision of this Court (*Baird's Trustees*, 15 R. 682, 25 S.L.R. 533), "charitable purposes" means "religious purposes" in the sense of the 61st section of the Statute of 1842. I assume, accordingly, that if the claim for repayment had been made it would have been acceded to by the Inland Revenue authorities. But the question is, in the first place, whether or no the testamentary trustees were guilty of negligence in not claiming the repayment.

Now I think it is a sufficient defence for the testamentary trustees as testamentary trustees to say that they employed respectable law agents and factors to manage the business of the trust, and that it was really no affair of theirs to see that the factors so employed recovered such sums as we have here in question. But I do not desire in this case to rest my judgment upon any mere technicality, for, unquestionably, we have before us the gentlemen who were appointed factors and law agents for this trust during one part, at all events, of the period with which we are dealing. And, accordingly, if in my opinion there was responsibility on the shoulders of these factors and law agents, I should be prepared to give effect to that view in this action without making it necessary to raise any further proceedings against them. But I think there was no responsibility on the part of the law agents and factors for negligence in failing to recover this income tax.

The statute is expressed, as I think, in very clear and distinct terms, and if read —and I assume it was read or it ought to have been read—by the law agents and factors would never for a moment have suggested to them that they were entitled to claim repayment of income tax for money paid on a religious mission in Bathgate. And it is certain that if they had turned to the Scottish decisions on the subject they would have found that they were free from responsibility. *Baird's* case stands in the books. And it is significant here that although these accounts were audited yearly by a well-known firm of accountants in Edinburgh and by the Auditor of the Court, no

attention was ever called to the fact that there had been a failure to obtain repayment. I draw my own inferences, but this is not a case in which we are entitled to draw inferences, for it appears to me that it is exclusively a question of fact—Did they know or ought they to have known that they were entitled to claim repayment?

Now in order to decide that question in favour of the pursuers I should have desiderated on this record a clear and distinct averment to the effect that it was well known in the profession during the period over which these payments were made that "charity" meant not, as ordinary men in Scotland would believe, "charitable" merely, but "religious purposes," and that according to the common practice and common knowledge amongst professional men the claim was regularly made on the Inland Revenue authorities for repayment of income tax upon allowances paid out, as this was, for a religious purpose. There is no such averment on this record, and the law agents and factors frankly say—one of them—that his attention was never directed to the question, and the other, who appears to have bestowed anxious care upon the trust, that while he was quite aware of the statute and quite aware of the Scottish law on the subject he had no knowledge whatever of the English decision.

I cannot hold that he was guilty of any negligence because of that ignorance in the absence of any averment to the effect that it was common knowledge in the profession at the time.

This case seems to me to stand in marked contrast to the case of *Frame*, (1836) 14 S. 914, and the case of *Simpson*, 1913, 1 S.L.T. 74, which were cited to us. In the former a law agent made a flagrant error in libelling the wrong section of a statute, and the agent in the latter case was guilty, if the averments of the pursuer were true, of gross negligence in not knowing the provisions of the Public Authorities Protection Act. But in this case, aided by the ordinary light of reason, he could not by any possibility have known that there was the right to recover these payments.

Accordingly I hold, in the absence of any averment such as I have suggested, that there was no ground for holding the factors and law agents responsible. I am therefore for adhering, although not exactly on the same ground, to the judgment of the Lord Ordinary.

LORD MACKENZIE—I reach the same conclusion as your Lordship on the ground that there is no relevant case set out by the pursuers here upon the record of bad faith, whether the action be considered as directed against the trustees or the law agents and factors of the trust.

LORD SKERRINGTON—I concur.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the Pursuers—Constable, K.C.—Burnet. Agents—Simpson & Marwick, W.S.

Counsel for Hugh Martin and Robert Martin—Chree, K.C.—Mitchell. Agents—Hugh Martin & Wright, S.S.C.

Counsel for William Sutherland M'Kay—Wilson, K.C.—Young. Agents—Sutherland M'Kay & Pattison, W.S.

Saturday, January 15.

FIRST DIVISION.

[Sheriff Court at Perth.

MURRAY *v.* WYLLIE.

Reparation—Slander—Privilege—Malice—Relevancy—Sufficiency of Averment of Malice.

The defender in an action of damages for slander, a parish minister, wrote a letter to the pursuer, who was then a candidate for the office of elder in the parish church, stating that a serious charge had been made against him by a third party; that if the pursuer persisted in his candidature he would have to tell the kirk-session and have proofs; that he could not ordain an elder, in view of his own ordination vows, against whom there was such a charge; that he thought the pursuer should carefully consider the matter and say that he did not see his way to accept office; that that would be the quietest way, and no one would ever hear of the matter, while otherwise the whole thing must be made public. The pursuer stated his case alternatively, averring that he had not been given any opportunity by the defender to deal with the charge made, and denying that any charge had been made. *Held* (1) that the occasion was privileged and that there should have been a relevant averment of malice, and (2) that as the defender was acting in a public capacity in discharge of a public duty, "want of probable cause" would have required to go into any issue.

Process—Relevancy—Alternative Grounds of Action—One Relevant, the Other Irrelevant.

In an action for damages for slander the pursuer's case was stated alternatively, and one of the alternatives, which were mutually exclusive, was irrelevant. *Held* that the action was irrelevant.

William Murray, butcher, Bankfoot, *pursuer*, brought an action in the Sheriff Court at Perth against the Reverend A. M. Wyllie, The Manse, Auchtergaven, Bankfoot, *defender*, for £500 damages for slander.

The pursuer averred—"(Cond. 2) During the autumn of 1914 the defender intimated from the pulpit that four new elders were required to complete the Session of Auchtergaven Church and nomination papers were sent to every member of the congregation in order that they might nominate four elders. When these papers were returned it was found that the pursuer was one of the four highest. (Cond. 3) There-