Saturday, February 10.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

LEWIS' TRUSTEES *v.* PIRIE AND OTHERS.

Trust—Agent and Client—Trustee Acting as Law Agent—Appointment—Remuneration.

Where a trust deed empowered trustees to appoint one of their own number to act as law agent of the trust, *held*, in the circumstances, that one of the trustees having done proper professional work for the trust on the instructions of the others or with their knowledge and approval, was entitled to remuneration.

Observed that the correct and proper procedure was, however, for the trustees formally to make the appointment and minute it.

On 25th November 1910 George Macritchie Crichton and others, the trustees then acting under the will of William Lewis, Aberdeen, *pursuers*, brought an action in the Sheriff Court at Aberdeen against Alexander Pirie, Alexander Morrison Williamson, and William Young, who had formerly acted as trustees under the will, *defenders*, for an accounting of their intromissions with the trust estate and payment of such balance as might be found due by them. The pursuers objected to the account lodged inasmuch as it charged against the estate an account for professional services by Messrs Paull & Williamsons, advocates in Aberdeen, of which firm the defender Williamson was a partner.

The defenders, *inter alia*, pleaded—"(3) The items in the account of intromissions to which objection is taken being proper items, subject to the amount thereof being adjusted by the Auditor, the said items should be remitted to the Auditor, and the defenders having been all along willing to settle on the basis of the Auditor's taxation, the defenders should be assoilzied with expenses."

The *facts* are given in the interlocutor and note of the Sheriff-Substitute (LOUTTIT LAING) dated 26th May 1911, which were as follows:—"*Finds in fact* (1) that the pursuers are trustees and executors acting under the last will and testament of the late William Lewis, who resided at No. 348 Great Western Road, Aberdeen, and the defenders are the trustees and executors who formerly acted thereunder—the defenders A. M. Williamson and Alexander Pirie being trustees nominated in said will and testament, the defender William Young having been subsequently assumed; (2) that the said will and testament contained the following clause—'And I confer all usual powers and privileges on my trustees and executors, including power to appoint a factor and law agent from among their own number or otherwise at the expense of the executry estate'; (3) that on 18th October 1909 the defenders the said A. M. Williamson and Alexander Pirie as trustees foresaid held a meeting in the office of Messrs Paull & Williamsons, advocates, Aberdeen, of which the said A. M. Williamson is a partner, at which they accepted office as trustees; (4) that after the said Alexander Pirie at said meeting had suggested that the said A. M. Williamson would require to advertise for any claims against the deceased's estate and to look after anything that had to be done by a lawyer, the trustees resolved that 'Mr Williamson's firm should record the will and insert the ordinary advertisement for claims'; (5) that the minutes Nos. 12 to 22 inclusive of process show the nature of the business transacted at the meetings of the defenders as trustees foresaid, and the instructions upon which the said firm of Messrs Paull & Williamsons acted: *Finds in law* (1) that in respect of the clause quoted in the second finding in fact *supra*, the defenders as trustees foresaid were entitled to employ the said firm of Messrs Paull & Williamsons as law agents in the trust, and to remunerate them for their work; (2) that the said firm of Messrs Paull & Williamsons was validly employed by the defenders as trustees foresaid as law agents in the said trust; and (3) that the defenders are entitled in the account of their intromissions with said trust estate to charge against said estate the accounts incurred by them to the said firm of Messrs Paull & Williamsons, said accounts, however, being subject to taxation by the Auditor of Court: With these findings remits said accounts to the Auditor of Court to tax and report; meantime continues the case for further procedure, and grants leave to appeal."

Note.—"The main question between the parties is whether the defenders are entitled in the accounts of their intromissions with the estate of the late Mr William Lewis to debit against it the sum of £79, 16s., subject to taxation, that being the amount of the account incurred by them to Messrs Paull & Williamsons, advocates, in connection with the winding up of the estate. The pursuers object to the inclusion of these accounts in the defenders' account of intromissions, on the ground that neither Mr Williamson, who was a trustee under the settlement, nor his firm were validly appointed law agents to the trustees, and therefore the work done for behoof of the trust by Mr Williamson or his firm cannot be charged for. It is quite settled in law that a trustee is not either directly or indirectly entitled to make a profit out of the trust estate under his administration, that "he cannot by his own appointment or that of his co-trustees secure remunerative employment in the management of the trust," and that "the same rule is applicable to the employment of a firm of which the trustee is a partner," unless under the trust-deed power is conferred upon the trustees to appoint one of their number to be their law agent (see opinions in *Goodsir* v. *Carruthers*, June 19, 1858, 20 D. 1141). In the present case the

settlement creating the trust contained the clause narrated in the second finding in fact, which empowered the trustees to appoint one of their number as law agent in the trust, and it is admitted that had the minutes of the trust borne that the trustees appointed Mr Williamson or his firm as law agent or law agents in the trust, no possible objection could be taken to that firm's account being charged against the trust estate. Standing such a clause in the trust-deed, the objection formulated by the pursuers is that the account cannot be so charged, because no formal appointment of Mr Williamson or his firm was made or minuted in the trust minutes. This objection appears to me to be wholly groundless. The evidence of Mr Williamson and Mr Pirie proves that at the second meeting of the trustees Mr Williamson was asked to perform any work that had to be done by a lawyer, and their evidence and the minute of 18th October 1909 shows that Mr Williamson's firm was instructed to record the will and insert the ordinary advertisement for claims. The other minutes show also that at meetings of the trustees instructions were given to Mr Williamson in connection with trust matters which could only be competently performed by a lawyer. In what capacity was Mr Williamson acting when he carried out these instructions? I think that it is clear that when these instructions were given they were given on the footing that Mr Williamson's firm were the legal advisers of the trust and that as such they would be entitled to charge for carrying them out. It is true that there is no formal statement in any minute to the effect that the trustees appoint Mr Williamson or his firm as law agents in the trust, but such an entry, while not unusual, is not, I think, essential for the valid appointment of a trustee as law agent to the trust in which he is trustee provided that the trust-deed contains a clause similar to that in Mr Lewis' settlement. The relationship of agent and client is daily constituted without any contract either verbal or written, the mere acceptance of employment creating that relation, and if this relationship in the case of agents and the outside public may be so constituted, I see no reason why it should not also be so constituted between trustees and one of their number when the trust-deed under which they act empowers them to so employ one of their number. Accordingly in my view the relationship of agent and client was competently constituted between the defenders as trustees and the firm of Messrs Paull & Williamsons by the trustees' instructions given verbally and minuted in the minutes of the trust meetings. The general law on this subject will be found in *Goodsir* v. *Carruthers*, *supra*, and in *Lauder* v. *Millar*, July 15, 1859, 21 D. 1353. I refer also to the case of *Brown's Trustees* v. *Horne*, December 13, 1904, 12 S.L.T. 614, where, so far as the report shows, there was no formal written appointment of the firm of which one of the trustees was a partner, but merely a letter authorising them to perform certain work in connection with the trust. . . ."

The pursuers appealed to the First Division of the Court of Session.

Argued for the appellants — The will authorised the trustees to appoint one of their own number law agent of the trust, but unless Mr Williamson's appointment had been formally made, he, being a trustee, must be presumed to have acted gratuitously. It was true that he had been employed originally to do work for the trust, but the employment was to do certain specified work, and neither he nor his firm had ever been validly appointed law agents of the trust. If there were a local rule in Aberdeen that no formal appointment was necessary, it was a wrong rule which should be corrected and brought into conformity with the general law. The following cases were referred to — *Lord Gray and Others* (*Petitioners*), June 21, 1856, 19 D. 1; *Goodsir* v. *Carruthers*, June 19, 1858, 20 D. 1141; *Lauder* v. *Millars*, July 15, 1859, 21 D. 1353, *per* Lord Justice-Clerk, at p. 1356.

Argued for the respondents — The will authorised the trustees to appoint one of their own number to act as law agent of the trust. The facts showed that Mr Williamson or his firm had done the work in the capacity of a law agent, and no written contract was necessary to validate the appointment of a law agent — *Bell* v. *Ogilvie*, December 18, 1863, 2 Macph. 336. The minutes showed that an appointment, though not a formal one, had been made. Moreover, the trustees knew that Mr Williamson's firm were acting as law agents, and they had approved of an account which included charges for work so done by them. A formal appointment had been made originally, at least to do certain specified work, and this appointment had later developed into a general appointment.

At advising—

LORD DUNDAS—[*Read by Lord President*] —The pursuers of this action are the trustees and executors, assumed and acting, under the last will and testament of the late Mr William Lewis, who died on 11th October 1909. The three defenders are the trustees and executors, original and assumed, who formerly acted under the said deed. Two of them, Mr Williamson and Mr Pirie, were nominated by it, along with a Mr Hislop, who declined to act, and the third, Mr Young, was assumed into the trust, apparently at the request of the testator's widow, in November 1909. The defenders resigned office in October 1910. The action is in form a demand upon the defenders to account for their whole intromissions with the trust estate, and for payment of the balance due, but the real question is raised by the pursuers' objection to the estate being debited with the amount of certain charges alleged to have been incurred by the trustees for professional services rendered by Messrs Paull & Williamsons, advocates, Aberdeen (of which firm the defender Mr Williamson is a partner) in connection with the winding up of the trust estate. The pursuers say that neither Mr Williamson nor his firm were validly

appointed to the law agency of the trust. The testator's settlement contained an express power to his trustees and executors "to appoint a factor and law agent from among their own number or otherwise at the expense of the executry estate." It was thus within the trustees' power to appoint Mr Williamson or his firm to the agency, and the question comes to be one of fact, whether or not such appointment was validly made.

There is not, I think, much room for doubt as to the law applicable to the case. It is well settled that, apart from special power conferred by the trust deed and duly acted on, a trustee who is a law agent and does legal work on behalf of the trust is not entitled to be remunerated for it, but only to receive the amount of his outlays, this rule being only an example of the broad principle that no man with a fiduciary duty can place himself in a position where his own interest may conflict with his duty. And in the absence of any power in the trust deed, a solicitor trustee cannot claim remuneration for professional services, even though the trustees have in fact appointed him their law agent, any such payment being *ultra vires*. On the other hand, it is, of course, quite lawful and usual for a testator to permit (as the testator here has permitted) the appointment and remuneration of one of his trustees as law agent, and it has been held that express power to appoint one of the members of the trust to be law agent implies, as matter of intention, that he may be remunerated at the expense of the trust. I have no doubt—and I desire to say it clearly, looking to some passages in the evidence in this case—that the correct and proper course where trustees are empowered, and resolve to exercise the power, to appoint one of their number as their law agent, is to record the appointment in the minutes of the trust. It does not require the example of the present proceedings to demonstrate that any other course is likely to lead to subsequent misunderstanding and disputes, and perhaps litigation. It is true, as the Sheriff-Substitute observes, that the relationship of agent and client is often constituted by the mere fact of employment, so as to involve the agent's right to remuneration for his services. That is because the fact of the performance of such services raises, in the ordinary case, an extremely strong presumption that they were rendered upon the usual terms on which professional practice is conducted. But the case of a law agent who is a trustee does not raise the same presumption, and a solicitor in that position who proposes to do legal work for the trust must walk warily if he is to be sure of his remuneration. Where the trust deed contains no power to appoint him, as a member of the trust, to be law agent, he cannot, as already stated, recover any remuneration. Where there is such power, and the trustees resolve to appoint him to the agency, his appointment ought to be minuted, but though that correct and business-like step be neglected, I think he may yet recover his remuneration if it is proved in fact that he did proper professional work for the trust on the instructions of the trustees, or with their knowledge and approval.

The present case is, to my mind, a narrow one on the facts, but I think the Sheriff-Substitute's conclusion is sufficiently supported by the evidence, and ought to be affirmed. Mr Williamson clearly believed that he (or his firm) was acting throughout as the authorised law agent of the trust, and he says that he would not have done the work on any other footing. His omission definitely to record in the minutes the fact that he or his firm held that position seems to have arisen from his views as to the proper practice in such circumstances, which appear to me to be loose and not such as can be judicially approved of. But if he had minuted the appointment I do not doubt that his co-trustees would willingly have signed the minute. Mr Pirie depones that at the meeting on 18th October 1909 he "suggested to Mr Williamson that he would require to advertise for any claims against the deceased's estate and also to look after anything that had to be done by a lawyer. I saw the advertisement in the newspapers." Strangely enough, the advertisement is not produced, so that we do not know its exact terms. Again, Mr Pirie says—"It is the case that at the second meeting" (*i.e.*, 18th October) "I asked Mr Williamson to attend to everything that required a law agent." Later he adds—"I just fall back on what I said before—that I asked him to advertise and to look after the necessary things and keep the trust right. That was after Mr Williamson had seen Mrs Lewis. (Q) Did you instruct Mr Williamson to act as law agent at the first meeting—(A) No; I understood he was law agent. I thought so when he wrote and told me that the will was in his hands. (Q) Who appointed him?—(A) There was no more appointing that I know of than what I have said." Mr Young, the other trustee, depones—"I understood when I went into the trust that Mr Williamson occupied the position of law agent to the trustees. I never thought much about it at all, although I knew he was writing and doing the work and giving his advice." One must also keep in view the minutes of the trust down to and including that of the meeting on 19th August 1910, at which the three trustees signed the deed containing their own resignations and the assumption of new trustees, and authorised "the agents" to take credit in their account of intromissions for the amount of their business accounts and commission subject to taxation. The whole thing is regrettably loose, but I think it is sufficiently proved that Mr Williamson's firm were authorised by Mr Pirie—the only trustee besides Mr Williamson as at 18th October 1909—to record the will and advertise for claims, and look after all such matters as had to be done by lawyers, and that the firm did perform professional services thereafter for the trust, with the

knowledge and approval of Mr Pirie and of the assumed trustee Mr Young. Accordingly I consider that the defenders—whose position might apparently have been so easily made clear beyond dispute—are entitled to succeed, and that we should of new find in terms of the interlocutor appealed against. The case will have to go back to the Sheriff Court for taxation of the accounts and disposal of expenses other than those of the appeal.

LORD PRESIDENT—I agree, and I emphasise for the information of the profession that the only proper procedure is to make the appointment and to minute it. But as actual matter of law I cannot say that it is absolutely necessary that there should be a minute of appointment, because it is clear that the appointment may competently be proved in other ways.

Here I am quite satisfied that the law agents were in fact and knowingly appointed to be agents to the trust by the two other trustees, and I think that to give effect to the contention of the pursuers would be to do no more than to take advantage of what was a slip in the trust management.

LORD JOHNSTON—[*Read by Lord Mackenzie*]—I concur in the judgment proposed. At the same time I feel strongly that the procedure in this trust has been most unsatisfactory. I conceive that where a trustee who is a law agent, even when he has been the law agent of the testator, contemplates acting as law agent in the trust, and under a special clause in the trust deed to charge for his services, he ought not merely to obtain a definite and minuted appointment from his co-trustees, but also to explain to his co-trustees, who are probably laymen and ignorant of the law of trusts and of agency, the position in which he is placed by the law and by the terms of the trust deed. In the present case I cannot avoid the conclusion that his co-trustees knew Mr Williamson to have been the testator's law agent, and assumed that he became in succession law agent in his trust because of that fact, and of the further fact that he was in possession of the settlement, and so called the trustees nominated together to consider whether they would accept.

But I agree that the actings in this trust have been such that though Mr Williamson and his firm slid, so to speak, into the position of agents in this trust, they have been allowed to do the work in such circumstances that it would be going too far now to deny them their remuneration.

LORD KINNEAR and LORD MACKENZIE not having been present at the hearing, gave no opinions.

The Court dismissed the appeal, affirmed the interlocutor of the Sheriff-Substitute, and repeated the findings in fact and in law therein.

Counsel for the Pursuers and Appellants—Blackburn, K.C.—W. T. Watson. Agents—Cameron & Orr, S.S.C.

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Saturday, February 10.

FIRST DIVISION.

DUKE OF ARGYLL *v.* GRAHAM'S TRUSTEES.

Superior and Vassal—Trust—Entry—Casualty—Composition—Relief—Infeftment in Trust—Conveyancing (Scotland) Acts (1874 *and* 1879) *Amendment Act* 1887 (50 *and* 51 *Vict. cap.* 69), *sec.* 1.

A vassal, entered with the superior, died in 1908, leaving a trust-disposition and settlement and codicils by which he conveyed his lands to trustees to retain until his eldest child, if a male, should attain the age of twenty-one, or if a female should attain that age or be married, and "upon the arrival of the said period, if I shall then have a son or sons surviving, I direct my trustees to hold and retain for behoof of my eldest son, and failing him before attaining the age of twenty-one years complete for behoof of my next eldest son on his attaining the said age . . ., and so on for my sons in the order of seniority, the estate of S." The conveyance of the estate was postponed till the death of the vassal's wife, to whom he gave a liferent. There was a declaration in the deed that so long as the estate remained in the hands of the trustees it should be held not to have vested, although after attaining the age of twenty-one the eldest son was given the right to dispose of it by *mortis causa* deed. The vassal was survived by his widow and by his eldest son, who had attained majority before the trust came into operation.

In a claim by the superior of the lands against the trustees for payment of a composition, *held* that as in the sense of the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887 the ultimate beneficial interest was in the heir of the testator and the trustees could not introduce a stranger, relief duty only was payable.

The Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887 (50 and 51 Vict. cap. 69), sec. 1, enacts—"Where by a trust-disposition and settlement, or other *mortis causa* writing, any heritable estate is conveyed to trustees for behoof of, or with directions to convey the same to, the heir of the testator, whether forthwith or after the expiration of any period of time not exceeding twenty-five years, or by virtue of which the heir of the testator has the ultimate beneficial interest in such estate, the trustees under such trust-disposition and settlement or other *mortis causa* writing shall not, upon their entering, or by reason of their having prior to the date of this Act entered, with the