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.

Counsel for the Defenders and Respondents—Morrison, K.C.—Lippe. Agents—Dalgleish, Dobbie, & Co., S.S.C.

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

superior, by infeftment or otherwise, be liable for any other or different casualty than would have been payable by the heir if he had taken the estate by succession to the testator without the same having been conveyed to trustees. . . ."

The Most Noble John Douglas Sutherland Campbell, Duke of Argyll, *first party*, and Mrs Emily Eliza Hardcastle or Graham, Skipness Castle, Argyllshire, widow, and others, the trustees acting under the trust-disposition and settlement of the deceased Robert Chellas Graham of Skipness, *second parties*, presented a Special Case for the opinion of the Court to determine whether under Mr Graham's trust-disposition and settlement a casualty of composition or of relief duty only was payable by the second parties as vassals of the lands of Skipness to the first party as superior.

Mr Graham died on 22nd November 1908, infeft in the lands and estate of Skipness, having paid on 2nd May 1891 to his superior the late Duke of Argyll, the first party's predecessor, the sum of £1600 in full of the composition due for the lands and estate in respect of the death of Walter Campbell of Skipness, the last-entered vassal. By his trust-disposition and settlement, dated 23rd October 1879, he made, *inter alia*, the following provisions with regard to the estate of Skipness:—"*In the second place*, I direct my trustees . . . to allow to my said wife, subject to the provision after mentioned, the liferent use and enjoyment of the mansion-house of Skipness and garden and grounds, and also of the home farm of Skipness, all as presently occupied by me . . .; but providing that if I shall leave a son who shall be entitled to take the estate of Skipness under the provisions hereinafter contained, then the liferent of the said mansion-house, home farm, . . . and others hereinbefore conferred on my said wife shall cease and determine on his attaining the age of twenty-five years, and . . . the said mansion-house and home farm so liferented by her be made over to such son so taking the said estate. . . . *In the fifth place*, In the event of my decease leaving issue . . . I direct my trustees . . . (*second*) to hold and retain the whole residue and remainder of my means and estate until my eldest child, if a male, shall attain the age of twenty-one, or if a female shall attain that age or be married whichever of these events shall first happen, and until the said period I direct my trustees to hold and apply the free income or annual proceeds of the said residue and remainder, after answering the previous purposes of this trust, for behoof of my child or children in equal proportions among them, if more than one; . . . (*third*) 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 failing him before attaining the said age for behoof of the next eldest son on his attaining said age, and so on for my sons in the order of seniority, the estate of Skipness as vested in me, . . . but subject to the liferent of the said mansion-house and home farm, . . . hereinbefore conferred upon my said wife for the period until my son for whom the said estate shall be so held shall attain the age of twenty-five years complete, when I direct that the said estate, . . . so directed to be held for his behoof, shall (freed from the liferent of any part thereof by his said mother) be disponed and made over to him . . .: Declaring that my son for whom the said estate of Skipness shall be so held shall be entitled to have the whole income thereof (subject to his mother's said liferent interest) applied for his behoof from the time of the same falling to be held for his behoof till he attain majority, that is, the age of twenty-one years complete, and after attaining that age he shall be entitled to receive the same, and that he . . . shall . . . have power at any time after attaining the said age of twenty-one years to dispose of the said estate . . . by deed or other writing to take effect at decease: But so long as the said estate, . . . or any part thereof, shall continue in the hands or under the control of my trustees not conveyed or unpaid, the same shall be held as not having vested in such sons (except to the effect of giving efficacy to any of the directions, conditions, and provisions herein contained), and to be alimentary provisions for such sons respectively, so that the same shall not be assignable by such sons, nor liable to be affected by their debts and deeds, or by the diligence of their creditors."

By a codicil dated 19th March 1903 the testator provided, *inter alia*, as follows—"I direct my trustees . . . to hold and retain after implementing any prior purposes of trust, the whole residue of my means and estate, heritable and moveable, real and personal, including specially my whole estate of Skipness and the mansion-house and home farm thereon, and all furniture and plenishing, . . . and to allow to my said wife during all the days and years of her life after my death the free use and enjoyment and the annual income and produce of the said residue for her liferent use allenarly, and the division of the said residue among my children, and the conveyance of my said estate of Skipness and others to my son who shall ultimately be entitled to take the same in terms of my said trust-disposition and settlement, shall accordingly be postponed until the death of my said wife."

The Special Case stated, *inter alia*—"4. The truster died on 22nd November 1908, survived by his widow the said Mrs Emily Eliza Hardcastle or Graham and by five children, namely — (1) the said Robert Francis Graham; (2) Mrs Dorothy Susan Mary Graham or Johnston, wife of the said Bertram Vaughan Johnston; (3) Frances Gertrude Graham; (4) Ethel Winifred Graham; and (5) Angus Graham. The elder son, Robert Francis Graham, was born on 16th June 1876, and the younger son, Angus Graham, on 3rd April 1902.

Mrs Graham and the said children all still survive. . . .

"6. The trustees have made up title to the said lands and estate of Skipness and others conform to notarial instrument in their favour recorded . . . on 22nd October 1909, and are accordingly impliedly entered with the superior in virtue of the Conveyancing (Scotland) Act 1874; and since the truster's death they have in terms of said trust-disposition and settlement and codicils retained the whole residue, including said lands and estate, for behoof of truster's widow in liferent and the other purposes of the trust.

"7. The Duke of Argyll as superior of the said lands and estate of Skipness has claimed payment from the trustees as vassals therein of a composition of a year's rent or value thereof for the year 1909-1910 after making the usual deductions. The trustees deny liability therefor, and in order to have the question determined the parties have agreed to present this Special Case, to which the Duke of Argyll is the party of the first part, and the trustees are the parties of the second part. The parties are agreed that the nett amount of said composition, if due, is £1317, 14s. 6d."

The *question of law* was — "Are the second parties liable to make payment to the first party of said sum of £1317, 14s. 6d., a composition of one year's rent or value of the lands and estate of Skipness and others for the year 1909-10, or is relief duty only payable?"

Argued for the first parties—The Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887 (50 and 51 Vict. cap. 69), did not apply, because it was not clear under the trust-disposition and settlement and codicil who was to take the ultimate beneficial interest. The effect of the codicil was to postpone distribution and therefore vesting. The trustees therefore were infeft, and by section 4 of the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94) were impliedly entered, and could not, therefore, tender the heir for entry so as to avoid payment of a composition — *Rankin's Trustees* v. *Lamont*, February 27, 1880, 7 R. (H.L.) 10, 17 S.L.R. 416; *Stuart* v. *Jackson*, November 15, 1889, 17 R. 85, *per* L. P. Inglis at p. 96, 27 S.L.R. 178; *Magistrates of Edinburgh* v. *Irvine's Trustees*, July 1, 1902, 4 F. 937, *per* L. P. Balfour at p. 941, 39 S.L.R. 737; *Moir's Trustees* v. *Duke of Argyll*, December 16, 1903, 6 F. 218, 41 S.L.R. 174; *Nolan* v. *Hartley's Trustees*, December 12, 1866, 5 Macph. 153, 3 S.L.R. 108.

Argued for the second parties—The trustees held the fee for the heir, and therefore only relief duty was due. The trustees had no direction to convey to anyone but the heir. The mere fact that the trustees held for the heir under an obligation ultimately to convey the estate to him, was no ground for exacting composition duty if the trustees could hold for nobody but him. The trustees' infeftment could not change the investiture, and the trust was a mere burden on the fee—*Lord Home* v. *Lyell*, December 9, 1887, 15 R. 193, 25 S.L.R. 141; *Stuart* v. *Jackson* (*cit. sup.*); *Duke of Athole* v. *Stewart*, March 20, 1890, 17 R. 724, 27 S.L.R. 590; *Duke of Athole* v. *Menzies*, March 20, 1890, 17 R. 733, 27 S.L.R. 575. These cases showed that even apart from the Act of 1887 if the trust was one for continuance of the existing investiture relief duty only was due, but in any event under the Act of 1887 it was clear that relief duty only was due. In the present case no one could take except the eldest son and heir, and all that the deed did was to postpone his right.

At advising—

LORD PRESIDENT—In this Special Case the question is whether the second parties, who are the trustees of the late Mr Robert Graham of Skipness, are bound to pay a composition of a full year's rent or merely a relief duty for the estate of Skipness to the first party, the Duke of Argyll, who is the superior.

The late Mr Robert Graham was a duly entered vassal with the Duke, and he died in 1908, leaving a trust-disposition and settlement by which he appointed the second parties trustees. The purposes of the trust, so far as material, were these—The trustees were directed to retain the whole residue of his estate, which included the heritable estate of Skipness, 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 failing him before attaining the said age for behoof of the next eldest son on his attaining said age, and so on for my sons in the order of seniority, the estate of Skipness." A certain liferent of the mansion-house was given to the truster's wife until the attainment of the age of twenty-five by the son succeeding, but nothing else was given to her which directly affected the heritable estate. There were certain clauses with which I need not trouble your Lordships, dealing with the possibility of the first son dying between the ages of twenty-one and twenty-five, and there was a declaration as to non-vesting in sons, and it is a declaration upon which argument might be possible; but I shall not enter upon that matter, because in the view that I take of the case it is not necessary to make up one's mind upon it.

By a codicil the truster eventually so far altered his trust-disposition and settlement that he directed his trustees, notwithstanding the provisions of his settlement, to allow his wife the liferent of the estate of Skipness, and accordingly the conveyance to the eldest son, or failing the eldest son to the second son, and so on, was postponed until the death of the wife.

Now I shall assume that under the law as it stood before the Conveyancing Amendment Act of 1887 composition would

have been due by the second parties. I do not say that that is necessarily so, but upon the assumption that there was no vesting in the eldest son it would certainly have been a possible result under the law before 1887 that a composition would have been due. But the Act of 1887 was undoubtedly passed as a remedial Act to get over what was considered a hardship upon vassals which had been brought upon them by the operation of the Act of 1874, in so far as the Act of 1874 prevented vassals employing the device which was common before that Act of putting forward the heir to take up the mid-superiority. I need not remind your Lordships of the whole series of cases—*Ferrier's Trustees* v. *Bayley*, 1877, 4 R. 738, 14 S.L.R. 480, and *Rankin's Trustees* v. *Lamont*, 1880, 7 R. (H.L.) 10, 17 S.L.R. 416, by which it was settled that that device was no longer available. The first section of the amending Act is this—"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 superior, by infeftment or otherwise, be liable for any other or different casualty than would have been payable by the heir if he had taken the estate by succession to the testator without the same having been conveyed to trustees."

Now I think the proper meaning to be given to the expression "by virtue of which the heir of the testator has the ultimate beneficial interest in such estate," is this—and the true test is the test applied long ago in the *Magistrates of Musselburgh* v. *Brown*, February 21, 1804, F.C., M. 15,038—viz., could the trustees introduce a stranger heir, or could they not? If there is an intermediate period during which subordinate rights such as liferents or the rights of creditors are introduced, that does not matter, provided the person who is ultimately to take is the heir of the old destination, and that the trustees could not use their conveyance for the purpose of introducing a stranger. Tried by that test I think this is a case where the trustees so hold that the heir of the testator has the ultimate beneficial interest in the estate, for the eldest son must take, or if he is not alive the next, and so on, and whoever takes eventually will be the heir of the old destination.

Accordingly I am of opinion that we should answer the question by saying that relief duty only is payable.

LORD KINNEAR—I am of the same opinion. I think that but for the Act of 1887 questions might have been raised as to the effect of this trust deed upon the right of trustees for heirs to enter. There might have been a question as to whether the trust title was adverse to the title of the heir, or whether it was not a trust for the mere continuance of the old investiture subject to certain interests which would not affect the investiture. But then I think all these questions are superseded by the Act of 1887. They might in certain cases have been questions of difficulty, and in others they might have been clear enough, but I do not think we need to consider that now, or the exact form in which they would have been raised in the present case, because I agree entirely with your Lordship as to the construction of the Act of 1887. I think that that statute necessarily contemplated that there should be no immediate investiture of the heir. There is an immediate interposition of a trust for certain purposes which, although they may interfere with the immediate entry of the heir, do not interfere with his ultimate beneficial interest. And then I agree that the only test must be the test applied in the case of the *Magistrates of Musselburgh* v. *Brown*, Feb. 21, 1804, F.C., M. 15,038, and we must inquire whether the trust enables the trustees to introduce a stranger or whether it does not, and I am clearly of opinion with your Lordship that it allows them to introduce nobody except the heir.

LORD MACKENZIE—The question here is whether by virtue of the trust disposition and settlement and relative codicils executed by the late Robert Chellas Graham, who died in 1908, his heir has the ultimate beneficial interest in his estate of Skipness. If he has, then the Act of 1887 (50 & 51 Vict. c. 69) sec. 1, provides that the trustees shall not be liable for any other or different casualty than would have been payable by the heir if he had taken the estate by succession to the testator without the same having been conveyed to trustees. That is to say, in that event the second parties are not now bound to pay a composition to the first party.

Under the settlement and codicils the testator's widow is to have the liferent of the estate of Skipness, She is alive. The eldest son of the marriage had attained majority before the trust came into operation, and is now more than 25 years of age. In this state of the facts the direction to the trustees is to convey Skipness to him on his mother's death. There is a declaration that so long as the estate remains in the hands of the trustees the same shall be held as not having vested, although after attaining the age of 21, the eldest son has right to dispose of the estate by *mortis causa* deed. It was argued that there was no vesting in the eldest son. Assuming but not deciding that there was not, the estate has vested in no one else. The trustees are at present holding the estate for the purpose of conveying to him on the expiry of the liferent, and in the event of his decease there is no direction to the trustees to convey to anyone who would not then be the heir of the truster. It is therefore in any

event the truster's heir who has by virtue of the settlement the ultimate beneficial interest in the estate. By the infeftment of the trustees and their implied confirmation there is no enfranchisement of a new destination. It is a trust infeftment which operates merely as a burden on the title.

I am accordingly of opinion that a composition is not due.

LORD JOHNSTON was absent.

The Court found in answer to the question of law in the case that relief duty only was payable by the second to the first party.

Counsel for the First Party—Macphail, K.C.—Hon. W. Watson. Agents—Lindsay, Howe, & Co., W.S.

Counsel for the Second Parties—Chree. Agents—Webster, Will, & Co., W.S.

Thursday, February 22.

FIRST DIVISION.

(BEFORE FIVE JUDGES.)

[Sheriff Court at Falkirk.

BASTABLE *v.* NORTH BRITISH RAILWAY COMPANY.

Railway — Carriage of Goods — Owner's Risk Note—Wilful Misconduct

The owner of switchback plant consigned it to a railway company for conveyance from Alva to Grahamston. The contract under which the goods were carried provided that the company were not to be liable for loss unless it arose from wilful misconduct on the part of their servants. The regulations of the company with respect to the dimensions of loads provided that "these must not exceed those given in the Railway Clearing House classification book for the line or lines over which they have to pass, and must be gauged when there is any reason to doubt that they are not within the dimensions." In the course of the journey the goods were injured through coming in contact with a smoke-board suspended from a bridge through which they had to pass while being shunted into a siding. The evidence showed that there was good reason to doubt whether the goods would pass through the gauge. The stationmaster at Alva, instead of gauging the goods before despatching them, judged the matter with his eye, and came to the conclusion that the load would pass through the gauge.

In an action at the instance of the owner of the goods, *held* that the omission to pass them under the gauge amounted to wilful misconduct.

On 4th July 1910 William Bastable, switchback proprietor, Falkirk, *pursuer*, brought an action against the North British Railway Company, *defenders*, for payment of £325 in respect of damage done to a steam switchback railway belonging to him owing to its having come in contact with a smoke-board suspended from a bridge on the defenders' railway. The contract under which the goods were carried was a special (owner's risk) one, under which the pursuer, in respect of a reduced rate, agreed to relieve the defenders "from all liability for loss, damage, misdelivery, delay, or detention, except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the company's servants."

With regard to the conveyance of merchandise, the rules and regulations of the company contained the following provisions:— . . . "*Dimensions of Loads.*—These must not exceed those given in the Railway Clearing House Classification Book for the line or lines over which they have to pass, and all loads must be gauged when there is any reason to doubt that they are not within the dimensions. . . . *Threshing Machines, Agricultural and Traction Engines*, and all *Engines* and *Machines* of a like kind must be passed under the gauge." . . .

The pursuer pleaded, *inter alia*—"(4) Said damage having been caused through the wilful misconduct of defenders' servants, pursuer is entitled to decree as craved."

The defenders, *inter alia*, pleaded—"(2) The goods having been carried by the defenders under the special contract produced, the defenders are not liable to the pursuer except upon proof that the damage arose from wilful misconduct on the part of the defenders' servants. (3) The damage not having arisen from wilful misconduct on the part of the defenders' servants, the defenders ought to be assoilzied."

On 27th December 1910 the Sheriff-Substitute (MOFFATT), after a proof, pronounced the following interlocutor:— "*Finds in fact* (1) that on 1st June 1910 the pursuer, who is owner of a steam switchback railway with which he visits shows, fairs, and similar functions all over the country, by special contract signed by himself contracted with the defenders to convey this switchback plant from Alva Station to Falkirk (Grahamston) Station, both on the defenders' line; (2) that the said plant was loaded upon defenders' trucks, which trucks were attached to a passenger train which left Alva in the afternoon of the said 1st of June; (3) that the trucks were not put through the gauge at Alva Station; (4) that the stationmaster at Alva saw the trucks, considered whether it was necessary that they should begauged, and decided that it was not necessary; (5) that the train arrived safely at Grahamston Station, having passed without mishap through a bridge named the Hope Street Bridge, a little to the west of the station, and the trucks were thereafter detached and shunted into a siding; (6) that in order to reach the siding the trucks had again to pass twice under Hope Street Bridge; (7) that on passing for the last time under Hope Street Bridge, on the northmost line, the funnel of the pursuer's