familiar description, and may well be submitted to a jury.

LORD ADAM—This is an action of damages, and the Legislature says that such cases arising in this Court are to go to a jury unless special cause be shown for this not being done, or the parties agree otherwise. From the fact that such cases arising in the Sheriff Court may be appealed to this Court for jury trial, we must take it that the view of the Legislature still is that actions of damages of the requisite amount should be tried by a jury. That amount is fixed at £40, and therefore the fact that this is a claim for only £50 is not *per se* sufficient ground for not sending it to a jury.

LORD M'LAREN—The last case in which we considered the question of dispensing with jury trial was an action of damages for assault. We were then all of opinion that in cases of *quasi*-delict the pursuer, or for that matter the defender if he wished it, was entitled to jury trial. In actions for breach of contract like the present we have a freer hand. There may be cases of breach of contract (especially those arising out of maritime contracts, where the amount of damage, if any, is often a matter of calculation, there being no dispute as to the facts) where we should send the case for proof to the Sheriff, or a judge, without the assistance of a jury, these not being properly and in substance actions of damages. This is a claim of damages for breach of the whole contract, and the damages to be awarded, if any, are just what a jury may think proper. I am therefore for sending it to a jury.

LORD KINNEAR—I am of the same opinion. This is an action of damages, and the pursuer is entitled to jury trial unless special cause is shown to the contrary. The slenderness of the amount claimed is not enough, because the Legislature has fixed the amount which determines whether a case may be brought here for jury trial or must be tried by the Sheriff in his own Court. The amount claimed here is above the limit laid down, although not much above it, and the circumstances are eminently suited for a jury.

The Court approved the issue proposed.

Counsel for Pursuer and Appellant—Orr—Ralston. Agents—George Inglis & Orr, S.S.C.

Counsel for Defender and Respondent—Dewar. Agents—White & Nicholson, S.S.C.

Saturday, July 15.

FIRST DIVISION.

[Sheriff of Caithness.

CORMACK *v.* KEITH & MURRAY.

Trust—Law-Agent Appointed by Truster—Power of Trustees to Change the Agency—Interdict.

Held that a law-agent to a trust appointed by the truster holds office at the will of the trustees, and is not entitled to interdict other law-agents chosen by them from acting.

Case of *Fulton* v. *M'Allister*, February 15, 1831, 9 Sh. 442, *distinguished.*

The late George Sinclair Waters died on 15th March 1893 leaving a trust-disposition and settlement, by which he appointed two gentlemen to be his trustees and executors, and which contained the following clauses—"And in addition to the usual powers of gratuitous trustees known in the law of Scotland, I specially authorise and empower my trustees to employ factors or law-agents for the management of my estate, who may be of their own number, and to allow such factor a reasonable remuneration, and the law-agent the usual professional fees for their respective services: And I appoint my law-agent to these presents to be law-agent to my trustees, and desire that he should instruct my trustees in the proper and efficient carrying out of this my settlement and trust-disposition and settlement. . . . In witness whereof these presents, written on this and the five preceding pages by David Cormack, solicitor, Wick, my law-agent, are subscribed by me at Tister aforesaid, the sixth day of April eighteen hundred and ninety-two."

Founding upon these clauses, the said David Cormack brought an action in the Sheriff Court at Wick against Messrs Keith & Murray, solicitors there, who, as he alleged, had been acting as law-agents for Mr Waters' trustees, praying the Court "to interdict, prohibit, and restrain the defenders from acting as law-agent or law-agents to the trustees of the said George Sinclair Waters, and from acting as law-agent or law-agents of the said trustees to instruct them in the proper and efficient carrying out of the said settlement and trust-disposition and settlement of the said George Sinclair Waters, so long as the pursuer is alive, and is able and willing to act."

The Sheriff-Substitute (MACKENZIE) granted interim interdict, but upon a record being made up, dismissed the action as incompetent and irrelevant and recalled the interdict.

The pursuer appealed to the Sheriff (THOMS), who upon 17th June 1893 recalled the interlocutor, continued the interim interdict, and sisted the process pending the result of an action of interdict brought by the same pursuer against the trustees.

The defenders appealed to the First Division of the Court of Session, and argued—(1) It was irrelevant to ask interdict against

a brother solicitor taking any legal business that was offered to him even if the trustees had no right to employ him, but (2) the truster if he had lived could have changed his law-agent, so could his trustees—*Foster* v. *Elsley*, 1891, L.R.,19 Ch. Div. 518, and cases of *Shaw* v. *Lawless*, 1838, 5 Cl. & Fin. 129 (Lord Chancellor Cottenham, p. 153), and *Finden* v. *Stephens*, 1836, 2 Phillips, 142, there referred to. The trustees had the power of employing factors and law-agents, who might be of their own number, which was inconsistent with the idea that the pursuer held the right to the law-agency for life. To give effect to his contention would be to make him virtually sole trustee with absolute control of the management of the trust-estate.

Argued for respondent—(1) The Sheriff had taken the right course pending the result of the other action. (2) He had been given the law-agency as a legacy. He was a *delectus persona* specially chosen by the truster, and could not be removed by the trustees—M'Laren on Wills, ii. 243, and *Fulton* v. *M'Allister*, February 15, 1831, 9 Sh. 442, there cited. That was the only Scotch case. The English cases, turned upon the terms of the appointments which were more general than here.

At advising—

LORD PRESIDENT—I am of opinion that this petition must be dismissed. The application is for interdict against certain gentlemen acting as professional law-agents on the employment of the trustees named in the petition. That is, *prima facie*, a very startling proposition, and it is necessary to see upon what grounds it is rested. The complainer points to a clause in the trust disposition of the deceased, and he says that he has a permanent appointment as law-agent, with the result—for such is his argument—that he is entitled to get an interdict against anybody employed by the trustees presuming to act, whether they are hired or otherwise, as law-agent in any matter which requires agency. But when we look to the trust-disposition I find nothing to support that at all. It is necessary to attend to the juxtaposition in which the clause the complainer founds upon is placed. The sentence taken as a whole is this—"And in addition to the usual powers of gratuitous trustees known in the law of Scotland, I especially authorise and empower my trustees to employ factors or law-agents for the management of my estate, who may be of their own number, and to allow such factor a reasonable remuneration, and the law-agent the usual professional fees for their respective services." Now, I do not know why the apologetic reference to the usual powers of gratuitous trustees was introduced except so far as it enabled the gratuitous trustees to act as factor and law-agent, but the general power is that of appointing a factor and law-agent with the usual fees for their services. Then the testator goes on—"And I appoint my law-agent to these presents to be law-agent to my trustees, and desire that he should instruct my trustees in the proper and efficient carrying out of this my settlement and trust-disposition and settlement." Well, I think that that fairly read means no more than this—I appoint this gentleman to be my law-agent at the start of the trust; and he shall as his first step give the requisite information to my trustees for beginning their duties. But does that disable them from exercising the power of appointing another law-agent? I think not. It seems to me that the observations of Lord Cottenham are quite applicable to this case. This gentlemen appoints Mr Cormack to be the law-agent for his trustees in the same sense as he might have appointed him to be law-agent for himself—that is to say, a merely revocable appointment which he could revoke next day or the day after. He put his trustees in the same position, and the result is, that while Mr Cormack may proffer his services at the first, and be paid for the services he performs, the trustees are quite entitled to appoint somebody else and dispense with his services. That is what they have done, and it seems to me, therefore, that the petition is founded on a total misconception. It would be a most unfortunate and preposterous state of matters if this individual, who has merely a pecuniary interest in the trust, should be entitled to perpetual interdict against trustees, who want to have nothing to do with him, going on to appoint another agent and getting the trust business done. I am glad we are not forced to any such conclusion by the terms of the deed, and I am for recalling the judgment and dismissing the petition.

LORD ADAM concurred.

LORD M'LAREN—I do not doubt that it is in the power of any individual or company to appoint a law-agent or secretary who is to perform their business for a definite time at a salary. But even in such a case the law-agent or secretary would only be in the same position as any other salaried servant. He would be liable to be dismissed at any time, and might claim damages in respect of the uncompleted part of his contract of service. But in this case there is not even the semblance of an obligation undertaken by the testator to employ this gentleman for any definite period of time. After giving the trustees the fullest powers in regard to the trust, he proceeds to make an appointment of his then agent to be law-agent to the trust in the form of an instruction to the trustees, and that, doubtless, as your Lordship has pointed out, would entitle the respondent (the complainer in the Inferior Court) to call together the trustees, read the will, and set the trust agoing. But then it seems to me that being appointed, the agent must hold his appointment as law-agent on the same footing as any other law-agent, and that it can be discontinued at any time by the testator himself exercising his right of revocation, or by his executors, who have all the powers in relation to this contract which their con-

stituent himself had. In my apprehension there is a double objection to the interdict which the Sheriff has granted—first, that there was no continuing appointment which the petitioner could put forward as giving him a title in a question with the trustees; and secondly, that even if he had a continuing employment, that gave him no right to the remedy of specific performance, but would only give rise to a claim of damages for breach. I agree with your Lordship that the claim is quite preposterous.

I am sorry to find that it appears to have been thought that an observation of mine in a passage in my Law on Wills had given some countenance to this claim. From the passage as read I do not gather that I had expressed any opinion on the question. I only professed to summarise the import of the case which is there referred to in a note—the case of *Fulton* v. *M'Allister*—and apparently I had not called attention to the specialty of that case, which was that one of the trustees was constituted factor, and was therefore a trustee with larger powers than the others. On that ground the decision may be explained as meaning that the trustees were not entitled to take to themselves the larger powers that had been specially given to one of their number. But the case is evidently one of so special a character that it would be of no value as a precedent in any other case. I agree that the interlocutor of the Sheriff should be recalled and the petition dismissed.

LORD KINNEAR concurred.

The Court recalled the Sheriff's interlocutor and dismissed the petition.

Counsel for the Pursuer and Respondent —Jameson—Watt. Agent—S. F. Sutherland, S.S.C.

Counsel for the Defenders and Appellants —Ure—M'Lennan. Agents — Macpherson & Mackay, W.S.

Tuesday, July 18.

SECOND DIVISION.

[Sheriff of the Lothians.

HAMILTON & ANOTHER *v.* THE HERMAND OIL COMPANY, LIMITED.

Reparation—Dangerous Machinery—Fencing — Child Killed by Straying Past Insufficient Fence.

Before a house occupied by a miner there was a piece of vacant ground about 30 yards broad. On the other side of this ground, and opposite the house, stood the pumping machinery of the mine. It was surrounded by a strong fence three feet high, in which there was a lifting gate. The miner's daughter, accompanied by her brother of four years of age, went, according to custom, to draw water from the trough which was connected with the pumping machinery. The trough being dry, she called to the engineman. He came, lifted off the gate, looked down the pump-shaft, and went to the engine to put on more power, leaving the gateway open. The girl led the child to the house and telling him to go within, she turned aside to find water elsewhere. The child strayed back to the pump shaft, entered the gateway and was instantly killed by the pumping machinery. The miner having sued the mine-owners for damages, the defenders pleaded — (1) that the danger was seen and apparent, (2) contributory negligence of the pursuers or their daughter, (3) that the child was a trespasser.

Held that the pursuers were entitled to damages. The Lord Justice-Clerk and Lord Young were of opinion, (1) that apart from the removal of the gate there was no apparent danger, (2) that there was no contributory negligence in assuming that the protection was complete, and (3) that the child who was in immediate danger whenever it crossed the limit defined by the line of the gate was not a trespasser.

Lord Trayner doubting these grounds, was of opinion that in the special circumstances of the case it was the duty of the defenders to have such a fence that even strayers should not be exposed to the risk of injury, and that failure in this duty made them liable.

This was an action by John Hamilton, miner, West Calder, and his wife, against the Hermand Oil Company, Limited, West Calder, for damages for the death of their son William, aged four, who was killed by an accident at a pit of the defenders on 19th March 1892. The sum claim was £100.

It appeared that on that day the pursuers had gone out for the afternoon, leaving the house and younger children in charge of their daughter Mary, a girl sixteen years old. While her parents were away, Mary Hamilton, accompanied by her brother William, went to draw water from a trough connected with a pump from the mine, which was worked by the engine at the pit-head a short distance off. The Hamiltons lived in a cottage about thirty yards away from the pump and its machinery, and it was their custom, as that of other families living near the pit, to draw water for secondary purposes from this trough. No permission had been given to the cottagers to do this but they had never been forbidden, and it was within the knowledge of the company's officials that it was done. In front of the pursuer's cottage, and between it and the pumping machinery was an open space upon which the children used to play. The pump at the pit-head was a massive piece of machinery, including an arrangement of cranks one of which, called the bell crank, oscillated, one end being attached to the pump, and the other moving about 2½ or 3 feet vertically above the ground. It was fenced off from the surrounding vacant ground by a strong fence in height 3 feet 3 inches. In