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

engine caught a smoke-board which depended from the bridge; (8) that the bridge is lower at the north end than at the south end; (9) that the truck on which the engine was loaded was loaded too high at Alva Station; (10) that by the funnel coming in contact with the smoke-board the pursuer's plant was seriously damaged; (11) that the pursuer has suffered damage to the extent of £100 sterling; (12) that the special contract under which the goods were conveyed contains, *inter alia*, a clause freeing the defenders from liability for damage to the goods except upon proof that such damage arose from wilful misconduct on the part of the defenders' servants: *Finds in fact and in law* that there is no proof of wilful misconduct on the part of the defenders' servants: *Finds in law* that the defenders are not liable in reparation to the pursuer: Therefore repels the pursuer's pleas-in-law: Sustains the second and third pleas-in-law stated for defenders, and assoilzies the defenders."

Note.—[*After narrating the facts*]—"There can, I think, be no doubt that there was fault and negligence on the part of the defenders' servants; in fact I think I might say that there was gross negligence. To allow very highly loaded waggons to leave Alva Station without passing them under the gauge appears to me to amount to neglect of duty of a very serious kind, especially when one remembers that these waggons were to be attached to a passenger train. Of course, with that aspect of the matter, *i.e.*, the safety of a passenger train, I have nothing to do in this case, which is only concerned with the defenders' duty to the pursuer's property in their care; but one would imagine that the fact of the waggons going as part of a passenger train would have made the defenders' servants at Alva very particular. The pursuer and his son state in their evidence that the pursuer asked a railway porter at Alva if they were not going to gauge the trucks. They are not able to identify the porter, and both porters employed at Alva deny that they were so interrogated. I am inclined to believe the pursuer and his son, principally because of their saying that the porter said it was too much trouble, as the gauge was at the other side of the railway from where the waggons were and there was no engine to shunt them. This was the case. The pursuer or his son could hardly have invented this statement. It is curious that none of the railway employees—porters, stationmasters, or guards—should have had any doubts about the loads safely passing the bridges on their journey, when clearly it was only a question of an inch or two. At Alva I think the railway employees were lulled into a feeling of false security by the fact that the things had come to Alva from Dunblane in safety, passing under several bridges on the way. But of course it is the lowest bridge that is the important one. This load might perhaps have travelled all over Scotland for all I know and never come to harm had it not been shunted at Grahamston. Be the explanation of the carelessness what it may, I think it was clearly the duty of the railway servants to have passed the trucks under the gauge. They were manifestly very highly loaded; above all, they did stick at Grahamston Bridge and cause an accident. Had the defenders been carrying the goods under their common law liability or under a contract where they were responsible for the fault or negligence of their servants there could be no doubt of their responsibility. The contract here, however, was a special contract such as is permitted and contemplated by the seventh section of the Railway and Canal Traffic Act 1854 (17 and 18 Vict. cap. 31). It is signed by the pursuer, and it contains a clause setting forth that the pursuer agrees to relieve the defenders from all liability for damage to the merchandise conveyed 'except upon proof that such . . . damage . . . arose from wilful misconduct on the part of the company's servants.' It also places in the forefront a statement that the defenders have 'two or alternative rates for the carriage of the . . . merchandise, at either of which rates the said merchandise may be carried at the sender's option; one, the ordinary rate, when the company take the ordinary liability of a common carrier; the other, a special or reduced rate, when the sender agrees to relieve the company . . . except upon proof,' &c., as above. No question of this contract not being 'just and reasonable' is raised or could well be raised in this case. The stipulations, although far from being just and reasonable in themselves, are made so by the alternative of common law liability being offered (*Manchester, &c. Railway* v. *Brown*, 1883, L.R., 8 App. Cas. 703; *Great Western Railway Railway* v. *M'Carthy*, 1887, L.R. 12 App. Cas. 218) and the ordinary rate as distinguished from the special rate is not so high as to be prohibitive. (See opinions of L.P. Inglis in *Finlay* v. *North British Railway*, July 8, 1870, 3 Macph. 959, 970; and Lord Watson in *Manchester, &c. Railway* (*sup. cit.*) at p. 716.) The ordinary rate is 25 per cent. higher than the special rate. That does not appear on the face of the contract, but is spoken to in evidence. The pursuer pleads (1st plea-in-law) that he was not aware and was not informed by the defenders that there were two alternative rates for the conveyance of his plant, and that therefore he is not bound by the contract he signed. This is a plea which I think cannot be listened to. In *Great Western Railway Company* v. *M'Carthy* (*sup. cit.*) Lord Watson said (at p. 234)—"I am willing to assume that these persons never read, or if they did read paid no attention to the terms of the consignment notes. . . . But it is impossible to say, even on that assumption, that they had not due notice that the appellants (a railway company) were ready and willing to carry their cattle without limitation of liability for a higher rate than that which they were paying. Whether they did or did not take the trouble to inform themselves, they must be taken to have known

the terms of their own contract; and, if so, they must be taken to have known that the appellants at the time when they contracted did offer to carry the cattle at carrier's risk.' This judgment applies exactly here, and so the pursuer's first plea-in-law must be repelled. The question then remains, has the pursuer proved that the damage to his goods arose from wilful misconduct on the part of the defenders' servants? I think this question must be answered in the negative. I do not think that the pursuer has proved that the defenders' servants have been guilty of wilful misconduct. 'Where a railway company agrees to carry at a reduced rate (the contract being *bona fide* and not colourable) upon condition of being relieved of the ordinary liability for negligence and to be responsible only for the consequences of the wilful misconduct of their servants, it will be for the plaintiff, in an action for injury to the goods carried, to prove more than culpable negligence. There must be evidence of actual wilful misconduct causing the injury'—*Glenister* v. *Great Western Railway*, 1873, 22 W.R. 72. The rubric above quoted seems to be a correct statement of the law. As confirming this, reference may be made to the opinion of Lord Alverstone, C.J., in *Forder* v. *Great Western Railway*, (1905) 2 K.B. 532, 535, approving of the definition of wilful misconduct given by Mr Justice Johnson in Ireland in the case of *Graham* v. *Belfast and Northern Counties Railway Company*, (1901) 2 I.R. 13. Mr Justice Johnson says 'wilful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure, or omission, regardless of consequences.'

"These being the rules of law, can it be said that the pursuer has proved that the defenders' servants have been guilty of wilful misconduct? The proof does not bear it out. I was at first impressed by the evidence given by the pursuer and his son about the pursuer's request to have the waggons gauged, and I was inclined to think that the railway porters' failure to gauge them when so requested might amount to wilful misconduct. But it seems to me, apart from the slight doubt which I have as to whether this occurred or not, that the evidence of the station-master, Mr Blackwood, is conclusive against the pursuer's contention. Mr Blackwood was the responsible official; it was not to the porters that the pursuer had to look, it was to the station-master. The station-master in his evidence says that he examined the vehicles and came to the conclusion that they did not require to be gauged. I cannot say that I am altogether satisfied with the evidence given for the defenders, but I cannot on the whole see my way to hold that there was any wilful misconduct on the part of any of their servants.

"The defenders must therefore be assoilzied.

"I have thought it right to make a finding of the amount of damage I think due, in case, should there be an appeal, a different view of the law might be taken as to the responsibility of the defenders. It seems to me that £100 would compensate the pursuer."

The pursuer appealed to the First Division.

On 6th December 1911 the Court appointed the case to be heard before a Court of Five Judges, and it was so heard on 22nd December.

Argued for appellant—The defenders' failure to comply with the rule as to "dimensions of loads" amounted to wilful misconduct—*Hoare* v. *Great Western Railway Company* (1877), 37 L.T. (N.S.) 186; *Dobson* v. *United Collieries, Limited*, December 16, 1905, 8 F. 241, 43 S.L.R. 260. Misconduct might consist in (*a*) intentional wrong-doing, or (*b*) refusal to take proper care, or (*c*) reckless conduct without regard to the consequences—*Graham* v. *Belfast and Northern Counties Railway*, [1901] 2 I.R. 13; *Forder* v. *Great Western Railway Company*, [1905] 2 K.B. 532; *Gordon* v. *Great Western Railway Company* (1881), 8 Q.B.D. 44; *Webb* v. *Great Western Railway Company* (1877), 26 W.R. 111; *Haynes* v. *Great Western Railway Company* (1879), 41 L.T. (N.S.) 436. What had been done here amounted to wilful misconduct, for the evidence showed that no proper consideration had been given to the matter by the company's servants. Even if they had thought, after looking at the load, that it would pass under the gauge, that only made it all the more necessary to comply with the rule, for the smaller the margin the greater was the misconduct. The evidence showed that this class of goods was always near the maximum, and that being so there was all the more reason why the goods in question should have been passed under the gauge. Where, as here, the matter was doubtful, there was no room for discretion, for the rule was absolute. In such circumstances omission to comply with it clearly amounted to wilful misconduct. The second branch of the rule (viz., that relating to engines) was also applicable, for the engine in question fell within its scope. [LORD SKERRINGTON—If this branch of the rule was never put to any of the witnesses, how can we convict them of misconduct?] *Esto* that the rule was not put to the station-master, he must be held to have known it. The rule was *prima facie* applicable, and the *onus* of showing that it was not, or that it was never observed, lay on the company.

Argued for respondents—Where, as here, the company's servants had considered the matter, they were not liable, for error of judgment did not amount to wilful misconduct—*Graham* (*cit. sup.*) at p. 19; *Lewis* v. *Great Western Railway Company* (1877) L.R., 3 Q.B.D. 195; *Manchester, Sheffield,*

and Lincolnshire Railway Company v. *Brown* (1883), 8 A.C. 703; *Foster* v. *Great Western Railway Company*, [1904] 2 K.B. 306. *Esto* that where the matter was doubtful the rule should have been complied with, it was not so here, for the station-master was never in any doubt; he was confident after measuring it with his eye that it would pass under the gauge. The second branch of the rule was inapplicable, for it did not apply to engines of this class. Even if it were applicable, the pursuer was barred from founding on it, as it was never put to the station-master or even referred to in the proof. In any event it did not affect outsiders, as it was only a domestic rule affecting the relations between the company and its own servants. Breach of such rules did not infer wilful misconduct in questions with third parties.

At advising—

LORD SKERRINGTON—[*Read by the Lord President*]—Upon the facts, as these were established at the proof, the only question raised by this appeal is whether the station agent at Alva was guilty of wilful misconduct when he failed to use the gauge for the purpose of testing whether the loaded waggons containing the pursuer's engine and switchback plant were of such dimensions that they would certainly pass safely under all the overhead bridges of the defenders' railway on their journey from Alva to Grahamston. The Sheriff-Substitute has assoilzied the defenders apparently upon the ground expressed in his fourth finding in fact, viz.—"That the station-master at Alva saw the trucks, considered whether it was necessary that they should be gauged, and decided that it was not necessary." I agree in thinking that this finding is justified by the evidence, but the question remains whether the conduct of the station-master in failing to gauge the load did or did not in the circumstances amount to misconduct. If this question is answered in the affirmative, there is no difficulty in arriving at the conclusion that the station-master acted deliberately and intentionally, or, in other words, wilfully.

The defenders' counsel argued that the station-master had committed a mere error of judgment in coming to the conclusion that the waggons would pass through the gauge. He founded specially upon the fact that the height of the load exceeded by very little the height of the gauge; that the same load (though in Caledonian Railway waggons) had come in safety to Alva Station; and lastly, that at Grahamston, where the accident occurred, the whole seven waggons containing the pursuer's goods passed twice under the bridge in safety, and that it was only on the third occasion when the waggons were being shunted under the extreme north side of the bridge, that one of them came in contact with an overhead smoke board. I see nothing in the evidence to suggest that the station-master's estimate of the height of the waggons was made carelessly, but this very fact emphasises the importance of the rule which he was admittedly bound to obey, and which required that "all loads must be gauged when there is any reason to doubt that they are not within the dimensions." The meaning and object of this rule are clear, viz., that whenever a load is such as to suggest a reasonable doubt whether it is of the specified dimensions, the question must be placed beyond doubt by applying the gauge, and must not be decided according to the skilled though fallible judgment of the official responsible for the safety of the train. In the present case the height of the load was so slightly in excess of the height of the gauge that, according to the evidence of Mr Roderick, the defenders' assistant-engineer, "no one with the naked eye could be expected to detect it." To quote the language of other witnesses for the defenders who saw the waggons before the accident, the load struck them as being "just about the maximum." If that was not a case where the official responsible for the safety of the load had "some reason to doubt" that his eye might possibly be mistaken, I do not know in what circumstances the rule would be applicable. The rule cannot mean that the responsible official is not to send forward a load which he has reason to believe may imperil the train. It would be idle to make a rule to the effect that a railway servant must not knowingly and intentionally expose life and property to what he himself regards as a possible peril. Accordingly it was the duty of the station-agent at Alva to apply the gauge and not to trust to his eye. The station-master at Grahamston was asked, "Do you ever allow a load like this to go out of your yard without being gauged?" To which he replied, "It is impossible, it cannot. We can tell pretty well by the eye, but I would not rely on it." The station-master at Alva chose to interpret the rule as meaning that he was entitled to dispense with the gauge and to rely on his eye alone in every case where he personally entertained no doubt that the load was within the maximum dimension. In so perverting the plain meaning of the rule, and in deliberately choosing to trust to his eye (which might be and actually was mistaken) rather than to use the gauge, I am of opinion that the station-master wilfully failed to do his duty, and wilfully exposed the pursuer's goods to injury during the transit. For this wilful misconduct the defenders must pay damages, the amount of which has been assessed by the Sheriff, without objection, at £100.

LORD KINNEAR—I agree.

LORD JOHNSTON—[*Read by Lord Mackenzie*]—I do not think that there is any doubt about the facts here. The Sheriff says "that the station-master at Alva saw the trucks, considered whether it was necessary that they should be gauged, and decided that it was not necessary." Substantially this is what happened, though I think that the words "considered" and "decided" are rather high pitched. I

think that the station-master's consideration was perfunctory and hardly deserves the name. Mr Blackwood the station-master was influenced by the fact that trucks with the same load had come safely from Dunblane, and his eye not calling in question that similar trucks similarly packed with the same load would make the journey to Grahamston equally safely, he did not think himself called on to gauge the truck in question. Seeing that at best there was a very narrow margin, and that an irregularly-shaped article such as the engine of a showman carried on a lorry, the lorry being mounted on a truck, was a much more difficult subject of which to judge the height by the eye than an ordinary sheeted waggon, I agree with the learned Sheriff "that there was fault and negligence on the part of the defenders' servants—in fact, I might say that there was gross negligence." But something more is necessary to make wilful misconduct. Were it proved that the defenders' servants had been called on to gauge the waggon, or been remonstrated with for not doing so, the case would have been different. But though there is some proof to this effect, it is insufficient.

I do not think that authorities relating to the interpretation of the words "serious and wilful misconduct" occurring in the Workmen's Compensation Acts are altogether applicable to the present case. But all the authorities bearing directly on the present question are agreed that "wilful misconduct" is something "beyond any negligence, even gross or culpable negligence" (*per* Johnston, J., in *Graham's* case, [1901] Ir. Rep., 2 K.B. 13). "Wilful misconduct means misconduct to which the will is a party, something opposed to accident or negligence; the *mis*conduct, not the conduct must be wilful" (*per* Bramwell, L.J., in *Lewis's* case, L.R., 3 Q.B.D. 206). In wilful misconduct, then, the will must be party to the misconduct. Negligence, even gross and culpable negligence, excludes the idea of will. Negligence done on purpose is a contradiction in terms. The moment that an act of omission or commission which involves the neglect of a known duty is done intentionally, or with the will in disregard of that duty, it ceases to be negative negligence and becomes positive misconduct, and that wilful; and in such wilful misconduct there is, I think, involved a recklessness of consequences. The circumstances of the present case come short of this. The company's rule says all loads must be gauged when there is any reason to doubt that they are not within the dimensions. This involves judgment, and, as it seems to me, not judgment of this Court, wise after the fact, but of the man on the spot and at the time. It is not an absolute rule but a guide which leaves play to discretionary judgment. The station-master at Alva committed an error of judgment which led him to neglect a precaution, and one which was indicated to him by the rule of the defenders as a proper precaution. But, as I have said, that rule was not imperative. It left something to observation, impression, and discretion. I cannot, therefore, regard the station-master's action, or rather omission, as amounting to misconduct, and that wilful, or as more, at most, than an error in judgment carelessly arrived at, and equiparate to negligence. It is impossible to conclude that there was anything approaching to recklessness of consequences.

I have treated the case as one to which the first rule referred to, viz., that as to "Dimensions of Loads,' applied. That rule is not, as I have said, absolute, but discretionary. But it was attempted to bring it under a second and peremptory rule, viz., "Thrashing machines, agricultural and traction engines, and all engines and machines of a like kind, must be passed under the gauge." The pursuer's engine is certainly an engine, but this rule does not cover all engines, but only engines of a like kind. And *prima facie* the pursuer's engine from its general description and purpose was not of like kind, and there is no evidence whatever in the case to countervail this impression. I do not think, therefore, that I am called on to consider whether the neglect of a positive direction or rule would amount to wilful misconduct, though I think that it would be impossible intentionally to neglect such a positive rule without the neglect importing a recklessness of consequences.

On the whole matter, I am for refusing the appeal and affirming the Sheriff's interlocutor.

LORD MACKENZIE—The pursuer delivered to the defenders, for conveyance on their railway from Alva Station to Grahamston, what are described in the consignment note as trucks and roundabouts and in the proof as a steam switchback railway. The consignment was placed on seven loaded trucks, which were attached to a passenger train. In the course of the journey the train passed under several railway bridges, but when it was being shunted into a siding at Grahamston Station the funnel of an engine on a lorry or boiler carriage, which formed part of the load, came into contact with a smoke board hanging from the roof of a bridge. The question is whether the defenders are liable in damages for the accident. The North British Railway have two alternative rates for the carriage of such goods. One is the ordinary rate, when the company takes the ordinary liability of a common carrier. The other is a special or reduced rate, when the sender agrees to relieve the company from all liability for loss, damage, mis-delivery, delay, or detention, except upon proof that such loss, damage, mis-delivery, delay or detention arose from wilful misconduct on the part of the company's servants. The question in the case is whether the defenders' servants were guilty of wilful misconduct. The Sheriff-Substitute had no doubt that there was fault and negligence on their part. He characterises it as gross negligence to despatch from Alva station

waggons with high loads without passing them under the gauge. He was, however, unable to take the view that there was wilful misconduct. One of the cases cited in his note is that of *Forder* v. *The Great Western Railway*, 1905, 2 K.B. 532, in which Lord Alverstone, C.J., adopts the definition of wilful misconduct given by Johnston, J., in the case of *Graham* v. *Belfast & Northern Counties Railway Company*, 1901, 2 I.R. 13. The Chief-Justice, however, makes a not unimportant addition to the definition, because he says that a man is guilty of wilful misconduct if he acts with reckless carelessness, not caring what the results of his carelessness may be. The law laid down by Bramwell, Brett, & Cotton, LL.J., in *Lewis* v. *The Great Western Railway* is to the same effect. The facts here appear to me to make the present case one of wilful misconduct within the meaning of this definition. The failure to pass the trucks under the gauge was not an omission due to mere forgetfulness. The station-master at Alva did apply his mind to the point and deliberately refrained from gauging the load. Nor is it possible to regard his failure as a mere error in judgment. It appears to me to amount to more than this. I think that the fact spoken to by the goods porter, viz., that the gauge was not at the side they were loading on, but as he explains "on the other side a good bit away," has something to do with the matter. The Sheriff-Substitute says he was inclined to believe the pursuer and his son when they state that one of the porters was asked if he was not going to put the trucks through the gauge, and got a reply in the following terms:—"No, it is a lot of bother to get to our gauge; it is on the goods siding and causes trouble, and there is no engine here to shunt them." The pursuer founds on the rules and regulations of the North British Railway. One of the latter reads thus:—"Threshing machines, agricultural and traction engines, and all engines and machines of a like kind, must be passed under the gauge." I do not think this regulation applies to a case like the present, as it plainly refers to engines of a different type altogether. The other regulation is to the following effect:—"*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." I think it is not possible for anyone who looked at the loads in question, as the station-master admits he did, to consider that there was no reason for doubt. It is proved that the height of the gauge is 12 feet 11 inches from the rails in the centre. The average height of a carriage is 12 feet. It must have been apparent that there was reason to doubt whether the funnel in question, which proved to be more than 11 inches above the average height of a carriage, would pass safely under all the bridges. The foreman yardsman at Grahamston says the pursuer's load struck him as being near the maximum height. The goods guard at Grahamston said that if he had been loading two of the wagons in question, which were a little higher than the others, he would have passed them under the gauge, and admits that all the waggons must have been very near the maximum. Now the station-master at Alva was an experienced man, who had been there for eleven years, and was well acquainted with the gauge. He knew there was a rule which bound him to gauge a load when there was any doubt about it. That he did not so gauge the loads on this occasion appears to me to amount to such reckless carelessness that it comes within the definition of wilful misconduct as contained in the cases above referred to.

I am accordingly unable to agree with the conclusion of the Sheriff-Substitute, and am of opinion that the pursuer is entitled to recover damages from the Railway Company. I understand there is no dispute about the amount assessed by the Sheriff-Substitute, £100.

LORD PRESIDENT — I agree with the majority of your Lordships. I think that what I humbly conceive to be the fallacy of the opposite view is brought about by not sufficiently considering what is the true meaning of the word "negligence." Now, that there can be negligence which infers no legal liability at all is evident. But, on the other hand, I think that when the word negligence is used in actions of damages it is only another word for fault, because it has been laid down again and again that unless there is a duty no amount of negligence will infer liability. Negligence, if liability is to flow from it, must consist in the neglect of a duty, and the existence of a duty must first be established; there is no easier way of bringing that home than by remembering the terms of the issue under which in our practice every case of this class is tried, viz., whether so-and-so incurred injury through the fault of the defender?

Now supposing that in this case there had been no special contract there would have been an action based upon the fault of the defenders, and I do not suppose that my learned brother who differs from the rest of the Court would doubt that action would have lain upon these facts had there been no such special contract.

I think, therefore, that for practical purposes when we are dealing with liability we may substitute the word "fault" for the word "negligence." That is what we find when we refer to the Roman system. I suppose that the proper translation of the word *culpa* is "fault," but it is very often translated as "negligence," and here it is that there comes in what in my view is the fallacy which is expressed in the opinions of the learned Judges which Lord Johnston has quoted, that wilful negligence must be something beyond negligence and opposed to negligence. I do not look upon it in that way. Wilful misconduct is negligence; it is fault; and therefore to treat

negligence as one thing and wilful misconduct as something entirely different is, I think, to look at the matter in the wrong light.

There was in the Roman law a distinction between various degrees of fault—*lata, levis,* and *levissima.* I think that it has been authoritatively held that these distinctions do not exist in our law, not at any rate for the purpose of making a distinction in the liability of a defender where an action is based upon fault—that is to say, upon a dereliction of duty. It does not matter whether that fault is what, in the Roman system, would have been called *lata, levis,* or *levissima.* But that distinction of the Roman law can be introduced by contract, and I think that is precisely the effect of the class of special contract we are dealing with in this case. Where a special contract says, as this one does, that the Railway Company is only to be liable for wilful misconduct, it does make a gradation. The question then comes to be, not whether you have negligence on the one hand, or something different from negligence on the other, but what degree of negligence is proved against the Railway Company. Upon that matter I agree with, and need not repeat, what has been said by my brethren.

I think here there was that degree of negligence which comes under the description of wilful misconduct. Looking at it in that light, I avoid the sort of puzzle which I cannot help thinking leads to the judgment to the opposite effect, which may be thus expressed—"How am I to say that this is wilful misconduct when as a matter of fact the man was negligent in what he did? Negligence is one thing and wilful misconduct is another, and therefore, to my mind, if I say he is negligent I must say he is not guilty of wilful misconduct." That does not seem to me a proper way to look at it. I think he is guilty of negligence, and the question is whether he is guilty of gross negligence, which comes to be wilful misconduct. I think he was, and therefore I agree with your Lordships.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute dated 27th December 1910: Repeat the first twelve findings in fact in said interlocutor with the exception of Nos. 3 and 4, in lieu whereof find in fact (3) that the rules and regulations of the defenders' company provide as follows—'*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'; (4) that there was reason to doubt whether said load was within said dimensions; (4a) that there was in these circumstances a duty on the defenders' station-master at Alva to pass the load under the gauge, which duty he wilfully neglected: Find in fact and in law that there is proof of wilful misconduct on the part of the defenders' station-master at Alva: Find in law that the defenders are liable in reparation to the pursuer: Therefore decern against the defenders for payment to the pursuer of the sum of one hundred pounds sterling in name of damages: Find the defenders liable to pursuer in expenses, and remit," &c.

Counsel for Pursuer (Appellant)—Constable, K.C.—J. B. Young. Agent—D. C. Oliver, Solicitor.

Counsel for Defenders (Respondents)—Cooper, K.C.—E. O. Inglis. Agent—James Watson, S.S.C.

Friday, February 23.

FIRST DIVISION.

DUNNETT AND OTHERS (MITCHELL'S TRUSTEES).

Succession — Testamentary Writings — Writ — Holograph Writing on Paper Wrapped Round I O Us—Identification of Documents Referred to in Writing—Legatum liberationis.

On a lady's death there were found in her repositories four I O Us granted by her stepdaughter and stepdaughter's husband for loans of money by the deceased to them, which had not been repaid. The I O Us were lying pinned together, along with a letter, which had been sent in connection with one of them, serving as a wrapper, and on the back of the letter the words, "I don't want this paid up. J. Mitchell" (deceased's signature), were written in ink and holograph of the deceased.

Held that the holograph writing was a valid testamentary bequest of the loans vouched by the I O Us, which were sufficiently identified with the word "this" by the circumstances in which they were found.

On 11th July 1912 a Special Case was presented to the Court by the Rev. William Dunnett and others, the trustees of the late Mrs Jessie Finnie or Mitchell (*first parties*), and Mrs Marion Mitchell or Pride, wife of William Pride, engineer, Lincoln, and William Pride for his own interest (*second parties*).

The Special Case stated—"1. Mrs Jessie Finnie or Mitchell, widow of Mr William Mitchell, tobacco manufacturer, Kilmarnock, who resided at Ann Bank, Kilmarnock, died there on 6th January 1911. No children were born of the marriage. Her husband, the said William Mitchell, had been previously married, and he left one daughter, Mrs Marion Mitchell or Pride, one of the parties of the second part.

"2. On four occasions between the years 1895 and 1898 the said Mrs Mitchell advanced sums on loan to her stepdaughter, the said