as agents. It was incompetent, then, to sue them in this action.—*Robertson* v. *Fleming, vide supra; Taylor* v. *M'Dougall & Sons*, July 15, 1885, 12 R. 1304; *Alleyne* v. *Darcy*, June 16, 1854, 4 Irish Chanc. 199; *Barnes* v. *Addy*, February 12, 1874, 9 Ch. App. 251. In this case it was held that an agent could not be made a constructive trustee merely because he acted as agent of the trust, unless he assisted the trustees in something illegal. (2) Even supposing a breach of professional employment could competently be inquired into in this action, there was no relevant averment of such on record with reference to the particular investment, and none of recklessness or negligence.

The trustees argued—(1) The action, as framed, was incompetent. It was not based on an alternative but on a cumulative liability or fault. If negligence was relevantly averred in both cases, it was negligence of a different kind and degree, that of a trustee in the one case and of a law-agent in the other. The Court could not, then, expiscate the rights of parties or apportion the amount in which it was sought to make them liable—*Taylor v. M'Dougall & Sons, supra; Barr* v. *Neilson*, March 20, 1868, 6 Macph. 651. (2) There was no relevant case stated against them. The only substantive allegation of fault was quite insufficient.

A similar argument was stated for Hamilton Andrew Hotson.

At advising—

LORD JUSTICE-CLERK—In regard to the question decided by the Lord Ordinary, whether where a trustee acting under a marriage-settlement intends to invest part of the money in his hands, and employs an agent to make the investment, and the investment turns out faulty, the agent can be made responsible in the same action as the trustee by one of the beneficiaries who has suffered—I am of opinion that no case has yet decided that such proceedings are not competent. I think the principle of the case of *Robertson* v. *Fleming* does not arise here. I should therefore be disposed to negative the Lord Ordinary's ground of judgment, and to send the case to proof before further answer. But we have had an argument on relevancy, and I am far from saying that the record exhibits with lucidity or precision the precise grounds on which the pursuer proceeds. The statements in his record, however, although general, I do not think fall short of relevancy, because if the averments in articles 6 and 7 of the condescendence are proved I am far from saying the pursuer has not a good case against the trustee and against his law-agent. Where the record fails is that it lacks precision as regards the mutual duties and mutual errors of the two separate defenders. But I am not disposed to shut out the pursuer from a proof which I think ought to be short, and will probably disperse a good many of the perplexities that seem to surround the case at present. I therefore propose to recal the Lord Ordinary's interlocutor and to send the case to proof.

LORD YOUNG—That is also my view. I quite agree that there is no authority, and for my own part I see no good reason for refusing to allow two such sets of defenders to be called as defenders in the same action. I had, I own, considerable difficulty, just as your Lordship has had, about the relevancy of the record. I do not much like the record, and probably the explanation is that the pursuer has got a stumbling case. I agree, however, that there are averments within which, in spite of their generality, it would be unsafe to say that the pursuer could not possibly establish a case of liability, and therefore we cannot dismiss them on the ground of irrelevancy. I concur in the observation that the grounds of difficulty will almost certainly disappear on a short inquiry. The proof cannot be a long one. It will clear up much that is perplexing now, and in the result we shall be able substantially to acquit or condemn the defenders.

LORD RUTHERFURD CLARK—I agree. I hope the proof will be short. I must say I have had grave doubts as to the relevancy of this case, but at the same time I do not see how it can be disposed of satisfactorily in any other way than by sending it to proof so as to have the whole facts before us for our acquittal or condemnation of the defenders.

LORD CRAIGHILL was absent.

The Court recalled the Lord Ordinary's interlocutor, and before further answer ordered proof.

Counsel for Pursuers—Comrie Thomson—Rhind. Agent—William Officer, S.S.C.

Counsel for Trustees—G. W. Burnet. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Messrs Hotson & Howie, and Robert Howie—Law. Agent—Robert D. Ker, W.S.

Counsel for Hamilton Andrew Hotson—Lorimer. Agents—Ronald & Ritchie, S.S.C.

Wednesday, June 30.

FIRST DIVISION.

[Lord Trayner, Ordinary.

HIGHLAND RAILWAY COMPANY *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Railway—Running Powers—Occupier of Line—Liability for Assessment—Tenancy.

It was agreed between two railway companies that a short junction line should be formed in order to allow the trains of one of them, the N. Co., to run into a station belonging to the other, the H. Co. By the private Act carrying out this agreement the H. Co. were to lay down the line, and the N. Co. were to run over and use it, and to pay a percentage upon the outlay so incurred, and pay certain rent for the station, and proportions of servants' wages—the additional line being the exclusive property of the H. Co., and liable to be used by them, if they chose, as part of their undertaking. *Held* that the right of the N. Co. was one of running powers only, and that they were not liable as occupiers of the line to relieve the H. Co. of assessment or rates laid upon the occupiers thereof.

In the year 1865 it was arranged between the Strathspey Railway Company and the Highland Railway Company that a junction should be formed between their lines of railway at a point about three miles north of Boat of Garten Station. The object of the arrangement was to allow the Strathspey Railway Company to run their trains into and out of Boat of Garten Station, and in order to do so it was necessary either that the trains should run over the single line of the Highland Railway from the point of junction to Boat of Garten, or to lay down a second line of rails. As the former alternative would have been attended with great danger, the Highland Railway Company agreed to lay down the requisite second line of rails at their own expense, and it was agreed that the Strathspey Company should pay them a yearly sum for the use of the line and of the Boat of Garten Station.

The agreement between the said companies was embodied in the 30th section of the Strathspey Railway Extension Act 1865, which, on the narrative that there was at present a single line, and that it was to be doubled, and to be used by the Strathspey (afterwards Great North of Scotland Railway) Company for the purposes of their traffic upon the terms and conditions thereinafter expressed, provided:—"The Highland Company shall, upon notice requiring them so to do being given to them in writing by the company, proceed forthwith to construct all the necessary works for laying down, and shall lay down, an additional line of railway upon so much of the Highland Railway as will be situate between the point of junction with that railway hereby authorised and the Boat of Garten Station, and they shall construct all such works and afford all such accommodation at and in connection with the said station as may be requisite or necessary for the use of this said additional line of railway for the purposes of the traffic of the company (including in such term, for the purposes of this enactment, any company for the time working the Strathspey Railway) and the interchange of traffic with the Highland Company at that station; such doubling of the said railway and other works shall be completed by the Highland Railway Company within the time specified in the notice to be given to them by the company as aforesaid, and so that the same may be ready for use on the opening of the railway hereby authorised; and if not completed at such time the Highland Company shall thenceforth, until such completion, pay to the Company a daily penalty of £20. The company on the first of January in every year, or within fourteen days thereafter, shall pay to the Highland Company £7 per centum per annum upon the outlay incurred by that company up to that date in constructing the necessary works for and in laying down such additional rails, including the cost of the land required for such additional rails, and of all alterations of the Highland Railway, or of any of the works connected therewith necessary for or consequent upon the laying down the said additional line of rails, such percentage to be computed from the date or dates of the actual expenditure by the Highland Company of the cost of constructing the said line and works. The company shall pay to the Highland Company, in respect of the use of that company's Boat of Garten Station, and the works and conveniences connected therewith, such rent and such proportion of the salaries of the officers and servants required to work the traffic of that station, and of the cost of maintaining the station buildings, as failing agreement shall be settled by arbitration in manner hereinafter provided. The said additional line of rails and other works shall be the exclusive property of the Highland Company, and may be used by them for the general purposes of their undertaking: Provided always that it shall be lawful for the company, but subject always to the bye-laws and regulations of the Highland Company, to run over and to use, with their engines, carriages, and servants, and for the purposes of their traffic of all kinds, the said additional line of rails, and the conveniences connected therewith, at the said Boat of Garten Station, upon payment of the sums of money hereinbefore expressed, and the company shall be entitled to charge and receive tolls for and in respect of all traffic passing over the said additional line of rails coming from or destined for the railway of the company. The said additional line of rails and other works shall be made and maintained by the Highland Company to the reasonable satisfaction of the chief engineer for the time being of the company. The company shall, if they require such accommodation, erect in connection with the said additional line of rails their own engine-shed, turn-table, water-tank, and other works necessary for the accommodation and working of their locomotives and carriages, and the Highland Company shall afford to the company all due and proper facilities for so doing not inconsistent with the convenient and economical working of their own traffic. All needful facilities shall be offered by, and all such duties shall be performed and services rendered by, the Highland Company at the Boat of Garten Station as may be necessary for the accommodation, interchange, and transmission of the traffic coming from or destined for the undertaking of the company. . . . If and when the Highland Company shall double its line of railway between the said Boat of Garten Station and Grantown, such an alteration shall be made in the terms of payment on which so much of the said railway as is situate between the point of junction therewith of the railway hereby authorised and the Boat of Garten Station shall be used by the company as shall be agreed between the companies, or as failing agreement shall be determined by arbitration in the manner hereinafter provided. The company shall not, except with the consent in writing of the Highland Company, take up any passengers, parcels, animals, goods, minerals, or other matters or things at the Boat of Garten Station, or at the junction of the railway hereby authorised with the Highland Railway, or at any intermediate point or place on that railway, and deliver the same at any other station on that railway, nor in any way whatsoever interfere with the local traffic of the Highland Company." . . .

By the Great North of Scotland Railway Amalgamation Act 1866 the Strathspey Company was amalgamated with the Great North of Scotland Railway Company, and all its rights and liabilities were taken over by the amalgamated company. The Highland Company constructed the additional line of rails soon after the passing of the Strathspey Extension Act, and the Great North of Scotland Railway Company after its amal-

gamation in 1866 had the use of the said line of rails, and ran its trains into Boat of Garten Station.

The sum ultimately settled to be due to the Highland Co. as percentage on cost under the agreement was £1519 at January 1868, and £854 annually thereafter, while the rent for Boat of Garten Station was fixed at £85, and a certain proportion of the salaries of the officials was also to be paid.

The Great North Company began to use the new line in 1866, and from that date to the date of this action the Highland Company paid both the owners' and occupiers' share of the rates, taxes, and road assessment due in respect of the line.

The present action was raised by the Highland Railway Company for declarator that the defenders were occupiers of the line of railway made by the pursuers under section 30 of the Act of 1865, and were liable for the rates and taxes payable for the line in respect of occupancy, and in any event for declarator that the defenders were bound to free the pursuers of all rates and taxes in respect of occupancy, and in particular of those paid by them since the line was laid down, and to recover the sum of £971, 10s. 8d. from the Great North Company as the amount of occupiers' rates which the pursuers had paid, and which they maintained that the defenders as occupiers of the piece of line made by the pursuers in terms of the statute already referred to ought to have paid.

The pursuers averred that the defenders had had the exclusive use of the said line of rails from 1866, and that they themselves had no intention of using the said line, as there was no connection between that line of rails and their own except the station sidings at Boat of Garten.

The defenders averred that the line in question was part of the pursuers' undertaking, who were entitled under the Act as above quoted to use it for their ordinary traffic. They also alleged that they had all along paid the rent fixed for the use of the station at Boat of Garten, and the percentage on the outlay on the additional line fixed by the statute.

The defenders also denied their liability to pay occupiers' rates, on the ground that they were not so entered in the valuation roll, and that an attempt to get them so entered was refused by the assessor, and his decision was not appealed from by the pursuers.

The pursuers pleaded, *inter alia*, "(1) The defenders being the occupiers of the said line of railway, are liable for the proportion of the rates therefor payable by occupiers."

The defenders pleaded, *inter alia*—"(2) That the action was irrelevant. (3) The defenders not being occupiers in the sense of the Acts imposing the assessments sued for, and *separatim*, not being entered in the valuation roll as such occupiers, are entitled to absolvitor;" and (4) "The defenders having fulfilled all the obligations incumbent on them under sec. 30 of the Strathspey Railway Extension Act 1865, are entitled to absolvitor."

The Lord Ordinary (TRAYNER) pronounced this interlocutor:—"Sustains the second and fourth pleas-in-law for the defenders, and also the first part of the third plea-in-law: Assoilzies the defenders from the conclusions of the summons, and decerns: Finds the pursuer liable in expenses, &c.

"*Note.*—The pursuers seek to have it declared that the defenders are occupiers of a line of railway which connects their several undertakings, and that in respect of such occupancy the defenders are liable for certain rates and taxes. The defenders maintain in defence that they are not 'occupiers' of the railway in the sense of the Acts imposing the assessments sued for; that their right in the railway is not occupancy but use; and that the amount which they are bound to pay in return for such use is fixed by statute, and excludes liability for the claim now made by the pursuers. The solution of the question at issue depends upon a construction of the 30th section of the Strathspey Extension Act 1865, whereby it is provided that the pursuers should make the line of railway in question, that the defenders should be entitled 'to run over and use' it, and that the defenders should be bound to pay the pursuers in each year '£7 per centum per annum upon the outlay incurred by that company up to that date' in the construction of the said line of railway. The defenders maintain that their rights of use thus conferred upon them is in effect a right of running powers, while the pursuers say that the defenders' right may more correctly be represented as that of tenantry. I am of opinion that the defenders are right. There are two provisions in the statute which seem to me inconsistent with the idea of the defenders being the tenants or occupiers of the line—(1) The line (declared to be the exclusive property of the pursuers) is one which 'may be used by them' (the pursuers) 'for the general purposes of their undertaking.' The defenders have not the exclusive use or occupancy of the line (which is a general feature of tenantry); they are at best but joint-tenants or occupiers of the line along with the pursuers, who may use it for the general purposes of their own undertaking. That they have not in point of fact so used the line of railway in question (as they allege) is not of any moment. They may commence and continue to use it as and when they please. (2) The use to which the defenders may put the line of railway is not unrestricted, nor is it such use, in its manner or extent, in their own character, as might be expected if they were tenants and occupiers. They are only entitled to use the line 'subject always to the bye-laws and regulations' of the pursuers' occupancy. These two provisions seem to me to exclude the idea of the defenders being the tenants of the line in any ordinary sense. I think the right of the defenders is plainly enough expressed in the words of the statute as a right to 'run over and to use' the line in question, subject to the restriction I have already pointed out. Beyond that the defenders have no right.

"I regard the statute as equally clear upon the question of the defenders' obligations; not only does it fix that the defenders are to pay £7 per cent. upon the pursuers' outlay, but it adds that the defenders are to have the right 'to run over and use' the line of railway 'upon payment of the sums of money hereinbefore expressed.' I can read this only as entitling the defenders to the right conferred, on payment of the amount fixed by statute, exclusive of all other charge or liability—otherwise the defenders would be liable in return for the right conferred upon them not only in the sum expressed in the statute, but in something beyond and in addition to which the

statute stipulates. Although not necessary to the decision of the case, I may say that, in my opinion, the plea of incompetency urged by the defenders is not well founded. *Hogg* [June 22, 1880], 7 R. 986."

The pursuers reclaimed, and argued—The question was, whether the true position of the defenders was not that of occupants? There was something more here than mere running powers. This was shown (1) by the objects for which the line was made as shown by the clause in the Act; and (2) the fact that the defenders had had exclusive use of the line so made. The position of the defenders was that of occupant, and they should be taxed as such—*Simpson* v. *Dennison*, 10 Hare's Chan. Rep. 51.

Counsel for the defenders were not called upon.

At advising—

Lord President—The proposition upon which the case of the pursuers depends is that the defenders are and have since 1866 been the occupiers of the line of railway laid down by the pursuers in terms of and pursuant to the provisions of sec. 30 of the Strathspey Extension Act 1865.

Now, this question depends entirely upon the construction of the 30th section of this Act, which in the first place provides for the use by the defenders of a piece of railway which was to be constructed by the pursuers, and also for the use by the defenders of the station premises at Boat of Garten. It is accordingly stipulated at the beginning of the section that the pursuers were, upon application made to them by the defenders, to lay down an additional line of railway upon so much of their line as would be situated between the authorised line and the Boat of Garten Station, and to erect all such works as were necessary for the use of the said additional line. The provision for payment for all this is thus expressed—"The company (*i.e.*, the defenders) . . . shall pay to the Highland Company £7 per centum per annum upon the outlay incurred by that company up to that date in constructing the necessary works for and in laying down such additional rails." . . Now, this is clearly a stipulation for the payment of a permanent annuity for the use of this additional piece of railway which is to be laid down by the Highland Company.

But the clause goes on to provide—"The company shall pay to the Highland Company, in respect of the use of that company's Boat of Garten station, and the works and conveniences connected therewith, such rent and such proportion of the salaries of the officers and servants required to work the traffic of that station, and of the cost of maintaining the station buildings, as failing agreement shall be settled by arbitration in manner hereinafter provided. The said additional line of rails and other works shall be the exclusive property of the Highland Company, and may be used by them for the general purposes of their undertaking, provided always that it shall be lawful for the company, but subject always to the bye-laws and regulations of the Highland Company, to run over and to use with their engines, carriages, and servants, and for the purposes of their traffic of all kinds, the said additional line of rails and the conveniences connected therewith at the said Boat of Garten station upon payment of the sums of money hereinbefore expressed, and the company shall be entitled to charge and receive tolls for and in respect of all traffic passing over the said additional line of rails."

Then follow certain provisions relative to the accommodation to be provided by the Highland Company at the Boat of Garten station, after which the clause proceeds as follows—"If and when the Highland Company shall double its line of railway between the said Boat of Garten station and Grantown, such an alteration shall be made in the terms of payment on which so much of the said railway as is situate between the point of junction therewith of the railway hereby authorised and the Boat of Garten station shall be used by the company, as shall be agreed between the companies, or as failing agreement shall be determined by arbitration in the manner hereinafter provided."

Now, taken together, the clauses just come to this, that in respect of this piece of line laid by the Highland Company the defenders are to have running powers over it, but subject to the regulations of the Highland Company, while as regards the station at Boat of Garten, the right of the defenders to it is a right of occupancy in respect of which rent is to be paid. That being the view I take of the case, I think the Lord Ordinary is right, and that the section can bear no other construction than the one he has put on it. There is in the one case a right of occupancy, and in the other a right of running powers with the extra right to charge tolls on the portion of the line on which they (the defenders) have these running powers.

On these grounds I think the judgment of the Lord Ordinary is right.

Lords Mure, Shand, and Adam concurred.

The Court adhered.

Counsel for Pursuers—Strachan—Low. Agent—J. K. Lindsay, S.S.C.

Counsel for Defenders—Comrie Thomson—Ferguson. Agents—Gordon, Pringle, & Dallas, W.S.

Thursday, July 1.

FIRST DIVISION.

THE GLASGOW GENERAL EDUCATIONAL ENDOWMENTS BOARD *v.* THE MINISTER AND MANAGERS OF ST COLUMBA GAELIC CHURCH AND OTHERS.

Trust—Endowment—Educational Endowments (Scotland) Act 1882—*Scheme for Educational Endowments—Powers of Governing Body Constituted by Scheme.*

A scheme framed by the Commissioners under the Educational Endowment Act 1882 for the management of sundry educational endowments in Glasgow provided that the governing body "shall apply" a certain part of income in paying the fees at elementary schools of "children whose parents or guardians, not being in receipt of parochial