dict. They refused to do so; and accordingly permanent interdict was granted. But that is not the position in which the question presents itself to us now. The question is one of interim interdict, and I desiderate any authority on which, in the state of this process, interim interdict should be refused pending the inquiry whether the new process spoken of has or has not been the means of stopping the pollution of the stream. I think we should continue the interim interdict unless, when the report is made to us, we should see cause to alter our views.

Lord Benholme—I am very clearly of opinion that we ought not to recal the *interim* interdict, but I am a little at a loss to know how in consistency with that course we can take the step which your Lordship suggests, of allowing the respondents to submit their operations to a scientific person or persons, because if the interim interdict is to take effect, one view of it may be that they cannot give that person an opportunity of saying whether what they do is prejudicial or not. It depends on whether they are in fact polluting the stream now, whether they are to be prevented altogether from shewing this scientific person that they are innocent, or getting his opinion upon the innocence of their conduct. I do not see my way to that. But I may have misunderstood your Lordship's proposal.

Lord Justice-Clerk—Interm interdict can at any time be taken off. The proposal is to continue the interim interdict before answer on the reclaiming note.

Lord Neaves—I think the course proposed by your Lordship is the right one. I think the parties on both sides have pleaded their case too high. They attempt to show that nobody can be harmed by the granting of this interdict. Now if a man breaks an interdict he is not only liable in reparation, but he can be severely punished. He can be sent to prison for an unlimited period. Such an interdict therefore is not to be granted merely because it can do the person no harm. Every subject is under inderdict to a certain extent. If he does wrong, he is liable in reparation; but I think there must be a foundation for such a course of procedure, not only because it is against a wrong, but because a wrong is apprehended. On the other hand, the attempt on the other side to disconnect themselves altogether with the former proceedings appears to me just as unfounded. The true nature of the case is that this mill is under suspicion. It did carry on a trade which was interdicted, and still it carries on the same manufacture, though in a different way. The respondents in this case are most willing to make an experiment; and they have confidence that if that experiment is carefully carried out there will not be a breach even of interim interdict; but they do not wish that this interim interdict should be granted in such a way that, behind their backs, or by the negligence of their workmen, they shall be found liable. I think they are repentant, and ought to be encouraged. If the parties are going to mend their ways and cease to do evil and learn to do well, I think they ought to be received with open arms. I trust that they are doing so. I can imagine that many people from very general impressions and custom are doing injurious things, and never think that they are doing any harm. They make a mistake, and all the time the pollution is going on. If they now, by the declarator which has been pronounced, are doing their best, and hope to succeed in not having any more pollution, I think we are not to discourage them, but rather to encourage them. I can see no harm in this, and it would be a great blessing indeed, if it can be found that this manufacture, a most important one for the country, and one which it is most desirable not to suppress, can be carried on. I would be sorry to see the making of paper discontinued in this country; but at the same time it is most desirable that it should be carried on without doing injury to the parties interested in the streams. The reason why a difference may be made between this party and the others is that they declare not only that they are willing to turn over a new leaf, but that they have done so, while the others do not say that they wish to do so, or ask an apportunity of doing so. I think the course proposed is a reasonable one. The report ought to do made at once. It is one of great interest to the community, and the sooner it is done the better.

The Court unanimously, before further answer on the reclaiming note, remitted to a professional man to inquire and report, and meanwhile continued the interim interdict.

Counsel for the Duke of Buccleuch and others—Watson and Johnstone. Agents—Gibson & Strathearn, W.S.

Counsel for Brown & Company—The Solicitor-General and Asher. Agents—J. & R. Macandrew, W.S.

Wednesday, October 29.

SECOND DIVISION.

[Lord Mackenzie, Ordinary

HAMILTON *v.* DIXON.

Mandate—Unilateral Obligation—Breach of Contract—Reparation—Iron Warrant—Master and Servant—Summons—Relevancy.

A raised an action against B, an iron-master, to compel him to fulfil a written obligation bearing to be signed by C, a salesman, as follows—"I hold at the credit of A, and will deliver to his order on demand, 750 tons of pig-iron, (Signed) for B, C." There were also conclusions for damages. The pursuer averred that this obligation to deliver had not been fulfilled, and that C was the defender's manager, and had an authority and was in the practice of granting such obligations. Action *dismissed* as irrelevant, in respect that C's authority could not extend to an obligation of this kind *ex facie* gratuitous, unless there were (1) special assent by B, and (2) specific explanation as to how the obligation was entered into.

This was an action at the instance of James Borland Hamilton, iron merchant, Glasgow, against the firm carrying on business at Calder and Govan under the name of "William Dixon," and the pursuer concluded for delivery of 750 tons of pig-iron, together with £500 in name of damages, caused by failure to deliver the same in May 1866; or otherwise for £2500. From 1849 to 1866 Mr Dixon's business was carried on

by trustees for his creditors, and since 1866 the testamentary trustees under Mr Dixon's trust-disposition and settlement have conducted it in the interests of the beneficiaries. During the subsistence of the trusts neither Mr Dixon nor his son took any active part in the business. The managing clerk of "William Dixon," who conducted the sales of Calder and Govan pig-iron, was a Mr John Campbell, who entered the service of the firm in 1826, and who from 1839 to 1866 was exclusively entrusted with the commercial department of the pig-iron business.

The pursuer averred (Cond. 11)—"During the whole of the said period the said John Campbell signed the firm of 'William Dixon' in the manner aftermentioned, with the authority, or at all events the sanction and assent, of the said William Dixon, the said William Smith Dixon, the said William Johnston, and the said Walter Mackenzie, and the said testamentary trustees, and the documents so signed by him were honoured by the firm without any question whether they were onerous or gratuitous. It was universally believed by all persons engaged in the trade, and was the fact, that the said John Campbell had authority to sign the said firm as he did. (Cond. 12) Accordingly, down to 1866, the said John Campbell continued, with the full knowledge and sanction of the said William Dixon, during his life, and thereafter of his said trustees and of William Smith Dixon, to do every act and exercise every power connected with the commercial department of the said business as fully as could have been done by themselves. In particular, the said John Campbell did everything which required to be done in connection with the disposal and delivery of the Govan and Calder pig-iron made at the said works, and he alone granted all documents required by the usage of the trade in connection therewith, including the writing of letters, the making out of invoices, the indorsing and granting of delivery orders, and makers' obligations for delivery of pig-iron, and the raising of money by pledging iron warrants, all which were uniformly signed by him on behalf of the firm of 'William Dixon.' His mode of signature was '*for* William Dixon, John Campbell,' and this was the only signature known, at all events since the year 1841, to purchasers of or dealers in iron in Glasgow. The pursuer believes and avers the trade never once saw the signature of William Dixon, William Smith Dixon, William Johnston, Walter Mackenzie, or any of the said testamentary trustees, to any document or letter relating to business transactions in pig-iron. When persons called at the counting-house in Glasgow with reference to pig-iron contracts the said John Campbell was generally the only person whom they saw, or if either the said William Dixon or his trustees, or his son, the said William Smith Dixon, were found there, they invariably referred to the said John Campbell as the person alone authorised to transact business in such iron. The defenders truly withdrew from the superintendence and control of the commercial department of the business, and delegated the same exclusively to the said John Campbell, with all the powers and authorities which they themselves possessed."

The defenders, in answer to these statements, admitted that John Campbell was in the employment of William Dixon as cashier and salesman of pig-iron in Dixon Street, with authority to sell pig-iron, and that he had granted obligations for the delivery of iron sold, which were honoured by his employers.

The pursuers set forth (Conds. 13, 14, and 15) the usage of the iron trade as to the purchase and transfer of iron as follows:—"On a sale being completed the ironmaster either at once transfers the iron in his books to the credit of the purchaser, or at least does so when the price is paid. If the purchaser wishes to have immediate delivery he passes an order of delivery on the ironmaster in favour of a third person, in the form of an order or request to deliver to such third person, or his order, the quantity specified in the order, and, in accordance with the usage of trade during said period, the ironmasters have uniformly given effect to such delivery orders. When immediate delivery is not required by the purchaser, but he wishes to have a voucher which he may use with his banker or otherwise, he obtains from the ironmaster documents, called in the trade makers' obligations or pig-iron scrip, expressed in the following or similar terms, viz.:—"(*Place and date*) I hold at the credit of . . . . and will deliver to his order on demand, free on board, at . . . (*quantity*) tons (*quality and brand*) pig-iron." The obligations in this form bear the signature of the ironmaster, and both delivery orders and obligations are and have for many years been known to and recognised by the trade as importing that the price of the iron has been paid or settled for to the satisfaction of the granter. For many years past, according to the universal usage and custom of the trade, such obligations, indorsed by the purchaser or grantee, have, in the knowledge of the defenders and the others persons who from time to time constituted the firm of 'William Dixon,' been dealt with as giving to the holder right to the iron therein mentioned. On such indorsed obligation or such indorsed delivery order being intimated to the ironmaster, the iron has, in the knowledge of the defenders and others foresaid, been in use to be delivered; and if immediate delivery is not required by the person lodging the document, as is most frequently the case, the iron has been in use to be transferred to his credit in the ironmasters' books. Prior to the year 1850, and for a period of several years, the said firm of 'William Dixon' was in use to grant makers' obligations undertaking to deliver iron to the person holding the document. These documents were invariably signed '*for* William Dixon, John Campbell.' After that date, and it is believed in consequence of a litigation which arose as to the effect of obligations in favour of the bearer, the said firm discontinued to issue such documents. Towards the end of 1865, however, the iron market throughout Great Britain became unusually active, and the defenders' said firm of 'William Dixon,' as a part of their ordinary business transactions, issued makers' obligations for iron in the terms specified in the preceding article; and throughout that year the said firm thus issued makers' obligations for many thousands of tons of iron, and the trade had large and important transactions on the faith of such obligations granted by the defenders' firm for the delivery of the iron. During this period the defenders' firm were in use to grant acknowledgments or obligations for delivery of pig-iron in favour of third parties, to whom the original holder of the firm's obligation had transferred his right thereto by indorsation or delivery order. The defenders, as ironmasters, knew that, according to the usage of

trade and the invariable practice followed in the conduct of their own business, the delivery orders and the obligations for delivery granted by the said John Campbell for their behoof as aforesaid, imported to all persons dealing with them that the price of such iron had, previous to the issue of the documents, been paid or settled for to the satisfaction of the granters. Accordingly, the documents so signed were taken and recognised by the trade as proving that the price of the said iron had been already paid or settled for, and the said documents were afterwards uniformly given effect to by the defenders, and the obligations therein expressed fulfilled by them down to the date of the failure of 'Campbell Brothers' after mentioned."

All these statements the defenders denied.

In the year 1858 a business was established in Glasgow by David Campbell, iron-broker there, and John Campbell junior, merchant in London, both sons of John Campbell. This new concern was a branch of a house previously established in London by the same persons. The firm was "Campbell Brothers," and their business consisted in the buying and selling of iron. This firm failed in May 1866, and were sequestrated. The pursuer averred that — (Cond. 17) Campbell Brothers had an unlimited credit with "William Dixon" for the purchase of pig-iron, and were in the habit of receiving from the firm of "William Dixon," through John Campbell, obligations or scrip notes in the form of that given to the pursuer for iron which had not been paid for by them, for the purpose of obtaining loans thereon, it being understood between the firms of "William Dixon" and "Campbell Brothers" that all such obligations or scrip notes should be binding on the firm of "William Dixon," and should be carried into the general account between the firms. The practice of granting these obligations or scrip notes was in fact resorted to by the firm of "William Dixon" as a mode of supplying Campbell Brothers with funds, and maintaining their credit without themselves advancing money, and was adopted with the knowledge and sanction of the defenders."

All this the defenders denied, and they explained that subsequent to the sequestration, and after a litigation which resulted in their favour, they "agreed to bear a portion of the loss which the parties had sustained through the fraud of John Campbell and Campbell Brothers, but, at the same time, it was expressly stipulated that the pursuer should not be entitled to the benefit of this agreement except upon the condition therein mentioned, with which condition he has hitherto failed to comply, the defenders throughout having declined to acknowledge any liability under the pretended obligations referred to."

The pursuers further averred (Cond. 24)—"In the beginning of May 1866 Campbell Brothers applied to the pursuer, through David Campbell, for an advance or loan on 750 tons of pig-iron, mixed numbers, belonging to them in the hands of "William Dixon," and offered as security the makers' scrip, or obligation for that amount, in favour of the pursuer. The amount of the loan asked for was £1875, being at the rate of 50s. per ton, while the market value of such iron at that date was 56s. per ton. The actual cost of making a ton of iron at that time was about 50s. or 51s. per ton. (Cond. 25) The said David Campbell, in requesting the said loan on behalf of his said firm, distinctly stated to the pursuer that the sum was required for two days only, and that if it should not then be taken up by his firm he had arranged for its being taken up by the makers, the said 'William Dixon,' themselves. In reliance upon these statements, and in the knowledge of the connection and course of dealing between 'William Dixon' and Campbell Brothers above explained, the pursuer agreed to grant the said loan; and accordingly, on 11th May 1866, he handed to the said David Campbell, for behoof of his said firm, the sum of £1875, and received in exchange therefor the scrip note or obligation of 'William Dixon' in favour of his own firm for 750 tons of pig-iron. The said scrip note or obligation is in the following terms, viz.:—'Glasgow, 11th May 1866. I hold at the credit of Messrs J. B. Hamilton and Crawford, and will deliver to their order on demand, seven hundred and fifty tons pig-iron, mixed numbers, Calder or Govan brand, in my option. *For* William Dixon, John Campbell.' (Cond. 26) In granting the said loan the pursuer acted in *bona fide*, and in reliance and in the belief that, in conformity with the invariable usage and understanding of the trade, such scrip or makers' obligations as that which he obtained were only issued for and as representing iron, the value of which had already been paid to the makers, or for which they had otherwise obtained an onerous consideration. In fact, the said obligation or scrip note was one of those which had been issued by the firm of 'William Dixon' for the purpose of enabling Campbell Brothers to obtain an advance of money on it, and it has been taken into account in the settlement of accounts between the two firms."

The defenders "denied that there ever was any business connection of any kind between the firm of William Dixon and Campbell Brothers, except as sellers and purchasers of iron. Denied that the document founded on was issued by the firm of "William Dixon" for the purpose of enabling Campbell Brothers to obtain an advance of money on it, or for any other purpose."

The pursuers further averred (Cond. 27) "Campbell Brothers stopped payment on 18th May 1866, and on 28th May of that year their estates were sequestrated. (Cond. 28) After the stoppage of Campbell Brothers it was ascertained that they had obtained advances from a large number of iron merchants in Glasgow, as well as from one or more of the banks, on the security of delivery orders and makers' obligations for Calder and Govan iron; and it was alleged by the defenders that the said obligations did not appear in their books, and that no money had been granted therefor. They also gave intimation that until the facts could be fully ascertained and their legal position known, they would decline fulfilment of any of the delivery orders tendered to them, and even of the makers' obligations granted by 'John Campbell, for William Dixon.'

The defenders "admitted that none of the obligations referred to were entered in the defenders' books, none such having been undertaken by the defenders, and that the defenders declined to acknowledge the same."

The pursuer maintained, that in consequence of the loan not having been repaid by Campbell Brothers, he was entitled to delivery of the 750 tons of pig-iron, and to sell the same, and apply the proceeds thereof in extinction of the amount of the loan. The defenders refused either to deliver

the iron or to pay the amount demanded, and explained that they had no transaction with the pursuer or his firm of Hamilton and Crawford, and that the pretended obligation founded on was not granted by them or issued in implement of any sale of pig-iron, or of any transaction between the pursuer's firm and themselves, but that it was signed by John Campbell, and delivered by him to Campbell Brothers fraudulently, and without value to the defenders, and without their authority.

The pursuer pleaded "(1) The defenders, the firm of 'William Dixon,' and the defenders the sole partners of that firm, are bound to implement the obligation above libelled and undertaken by the firm as aforesaid. (2) The said John Campbell having granted the said obligation within the scope of his employment, the defenders are bound to implement the same. (3) The said John Campbell having granted the obligations libelled on behalf of the defenders, and with their authority, the defenders are bound to implement the same. (4) The defenders having acknowledged and fulfilled numerous similar obligations granted on their behalf by the said John Campbell, and having thus led the trade, and in particular the pursuer, to believe that the said John Campbell had authority to grant such obligations, the defenders are not entitled to repudiate the same. (5) The defenders having withdrawn from the superintendence and control of the commercial department of the business, and delegated the same to the said John Campbell, are not entitled to repudiate obligations such as that libelled, granted by him while occupying that position. (6) The defenders having, in breach of their obligation, refused to deliver the iron in question, the pursuer is entitled to any loss and damage which he may sustain if the iron when delivered shall be below the price requisite to satisfy and pay his said loan. (7) Failing the defenders making delivery of the said iron, the pursuer is entitled to have decree for the whole loss and damage thereby occasioned to him, with interest and expenses as libelled."

The defenders pleaded "(1) The pursuer's averments are not relevant or sufficient in law to support the conclusions of the action. (2) The defenders not being in fact under any contract with or obligation to deliver iron to the pursuer or his firm, the action is unfounded. (3) The document libelled as importing a contract or obligation, implement of which is sought, or otherwise for breach of which damages are demanded, having been granted by John Campbell without authority, and gratuitously and fraudulently, does not bind the defenders, and affords no action to the pursuer against them. (4) The pursuer has no good cause of action against the defenders, and they are entitled to absolvitor. (5) The defenders are only answerable *qua* trustees, and not personally, for any liability which may attach to them in the premises."

The Lord Ordinary pronounced the following interlocutor and note:—

"*Edinburgh, 14th June* 1873.—The Lord Ordinary having heard the counsel for the parties and considered the closed record, before answer allows the parties a proof of their respective averments, and to the pursuer a conjunct probation: Grants diligence to both parties to cite witnesses; and appoints the proof to be led before the Lord Ordinary on a day to be afterwards fixed.

"*Note.*—The defenders plead that the averments of the pursuer are not relevant or sufficient in law to support the conclusions of the summons; and they maintain that there is no real difference between the averments of the pursuer in the present record and those which were found irrelevant in the case of *Colvin* v. *William Dixon*, 5 Macph. 603. The Lord Ordinary has not been able to take that view of the pursuer's averments, and he considers that these averments are materially different from those made by Mr Colvin in his action against the defenders. The defect in Colvin's case was that he did not aver that there was any onerous contract or consideration on the part of the firm of 'William Dixon,' in respect of which the obligation or pig-iron scrip held by him was granted, and which he was entitled to enforce; and that there was no sufficiently specific averments that the manager of that firm, by whom the obligation bore to be subscribed for the firm, granted it within the scope of his authority, express or implied, so that it was obligatory upon the firm.

"In the present case the averments of the pursuer are not only much more specific and extensive than those in the case of *Colvin*, but they are materially different. He avers that none of the partners of William Dixon from 1849 to 1866 ever took any part in the management of the commercial business of the firm; and that the same was exclusively entrusted to their managing clerk, John Campbell, who was the general and sole representative of the firm in their pig-iron business, and who signed for the firm, with the authority or sanction and assent of the partners. The pursuer further avers (Cond. 12) that, accordingly, John Campbell, down to the year 1866, continued, with the full knowledge and sanction of William Dixon, and thereafter of his trustees, to do every act and exercise every power connected with the commercial department of the business as fully as could have been done by themselves; and, in particular, that he did everything in connection with the disposal and delivery of the pig-iron made at the works; and, alone, granted all documents required by the usage of trade in connection therewith, including makers' obligation or scrip, and the raising of money by pledging iron warrants, all which were uniformly signed by him on behalf of the firm of "William Dixon."' It is also averred that the defenders delegated the superintendence and control of the commercial department of the business to Campbell, with all the powers and authorities which they themselves possessed. It is also averred (Cond. 13), that obligations and delivery orders for iron have for many years been known to and recognised by the trade as importing that the price of the iron has been paid or settled to the satisfaction of the granter; that 'for many years past, according to the universal usage and custom of the trade, such obligations, indorsed by the purchaser or grantee, have, in the knowledge of the defenders, and the other persons who from time to time constituted the firm of "William Dixon," been dealt with as giving to the holder right to the iron therein mentioned;' and (Cond. 15) that the defenders knew that, according to the usage of trade and the invariable practice followed in the conduct of their own business, the delivery orders and obligations granted by Campbell for their behoof imported to all persons dealing with them that the price of such iron had, previous to the issue of the documents, been paid or settled to the satisfaction of the granters. The pursuer further

avers (Cond. 17), that the firm of Campbell Brothers, through whom he acquired the obligation libelled on, was intimately connected with the firm of William Dixon, with whom they had an unlimited credit for the purchase of pig-iron, and from whom, through John Campbell, they were in the habit of receiving obligations or scrip notes similar to that founded on by the pursuer, 'for iron which had not been paid for by them, for the purpose of enabling them to obtain loans thereon, it being understood between the firms of William Dixon and Campbell Brothers that all such obligations or scrip notes should be binding on the firm of "William Dixon," and should be carried into the general account between that firm and Campbell Brothers. The practice of granting these obligations or scrip notes was, in fact, resorted to by the firm of "William Dixon," as a mode of supplying Campbell Brothers with funds, and maintaining their credit without themselves advancing money, and was adopted with the knowledge and sanction of the defenders.'

"The pursuer also states (Cond. 23) that he had many transactions with Campbell Brothers, and that he was cognisant that they were supported by the firm of 'William Dixon,' and were in the habit of holding and issuing obligations or scrip notes of William Dixon, which that firm had always honoured. He avers (Conds. 24 and 25) that in the knowledge of the connection and course of dealing between William Dixon and Campbell Brothers, above explained, he, on the application of Campbell Brothers, lent them £1875 on 750 tons of pig-iron in the hands of William Dixon, and belonging, as alleged, to Campbell Brothers, and that he received from them in security the obligation or scrip note libelled on: And in the 26th article of his Condescendence the pursuer makes the following averment: 'In granting the said loan, the pursuer acted in *bona fide* and in reliance and in the belief that, in conformity with the invariable usage and understanding of the trade, such scrip or makers' obligations as that which he obtained were only issued for and as representing iron the value of which had already been paid to the makers, or for which they had otherwise obtained an onerous consideration—in fact, the said obligation or scrip note was one of those which had been issued by the firm of "William Dixon" for the purpose of enabling Campbell Brothers to obtain an advance of money on it, and it has been taken into account in the settlement of accounts between the two firms.'

"These averments are so different from those made in *Colvin* v. *William Dixon* that the Lord Ordinary is unable to give effect to the argument of the defenders that there is no difference between that case and the present, and to their plea on the authority of that case that the pursuer's averments are irrelevant. According to the view which he takes of these averments, as at present advised, the action cannot be thrown out as irrelevant. He does not think it expedient to give any opinion at this stage of the cause upon the relevancy of each of the various grounds of action therein set forth and above referred to, and he considers that the proper course is to allow a proof before answer, which will reserve the full effect of the defenders' plea of irrelevancy until the case comes to be advised on the proof. When the facts are ascertained, the question as to their relevancy to support the conclusions of the summons will then more properly arise for disposal than it does at present."

The defenders reclaimed.

Argued for them—The averments here are made certainly more distinct that in *Colvin* v. *Dixon*, but they are not sufficient. [Quotes Lord Deas' opinion in *Colvin* v. *Dixon*.] Suppose the manager of a shop who has full authority to control and carry on the whole business were to give as a present to his son a valuable gem, it would require a most distinct averment of knowledge and consent on the part of the principal to such a transaction in order to make him liable. There would be no difference in the case of an obligation to deliver the gem. Such a case is *prima facie* theft. The answer, and the only answer, is, "you authorised it," but of this there must be a distinct personal averment.

The pursuer (respondent) argued—We have made our averments much more specific than they were in *Colvin* v. *Dixon*. [Lord Neaves—Are you suing *ex contractu?*—Yes. What contract? or have you succeeded to another's contract, if so *assignatus utitur jure auctoris?*] We were led to believe that there was something really existing between the parties, and in the Condescendence the course of dealing is set forth. If these acts belong to a class of acts which are authorised, they are binding in a question between an external person and the mandant; (*Barwick* v. *English Joint Stock Bank* and opinion of Willes, J. there, p. 265.) As to the authority of a partner, consult Bell's Com. and *Union Bank* case. In a question of the amount of authority given to a clerk, a proof before answer was allowed; (*Galloway* v. *Grant.*)

Authorities—*Colvin* v. *Dixon*, 5 Macph. 603; *Barwick* v. *English Joint Stock Bank*, 2 Exch. L. R. 259, May 18, 1867; *Union Bank* v. *Maclin & Sons*, 10 Scot. Law Rep. 301, March 7, 1873; *Galloway* v. *Grant*, 19 D. 865 and 20 D. 320; *Orr & Barber* v. *Union Bank*, 1 Macq. 513; Bell's Com. i. 483, ii. 611; Smith (Merc. Law) 125, 7th ed.; Ersk. 3, 3, 39; *Kingsford* v. *Merry*, 1 H. and N. 503.

At advising—

Lord Justice-Clerk—In this case of *Hamilton* v. *Dixon*, the action is founded upon a document bearing to have been granted by William Dixon, and the terms of which are as follows;—"*Glasgow*, 11*th May* 1866.—I hold at the credit of Messrs J. B. Hamilton and Crawford, and will deliver to their order, on demand, seven hundred and fifty tons pig-iron, mixed numbers, Calder or Govan brand, in my option. *For* William Dixon, John Campbell." The pursuer sues on that document, upon the ground that it is an obligation on the defenders to deliver that amount of pig-iron, stating that it has not been delivered, and concluding, consequently, for fulfilment of the obligation. It is pleaded, on the part of the defenders, that there is no relevant statement from which to infer an obligation upon Dixon. It appears from the statements on record that at the date of this obligation "William Dixon & Co.," ironmasters, Glasgow, or those who represented that Company, were really the trustees of William Dixon, who had obtained a reconveyance of the whole of Dixon's property, a very large iron-manufactory, on the 10th of May, just a day before the transaction in question was entered into. Up to that time, and during a long period, the management or the control of the business was in the hands of a trustee for Dixon, appointed by his creditors a good many years before. From the year 1859 forward, the person who took control of the business, for behoof of the credi-

tors, was a gentleman named Mackenzie. On the 10th of May, the debt having been all cleared off, the testamentary trustees obtained a reconveyance, and were vested in the property and business. During all that time John Campbell acted as the manager of the commercial concerns of the Company. In article 12 of the Condescendence his functions are very distinctly stated; and, in point of fact, I think your Lordships may assume that in everything connected with the disposal of the iron John Campbell had as ample power as any agent in that position could have. Still he was but an agent. He was not a partner, although he was in the habit of signing documents for the firm, and in managing the affairs of the Company there can be no doubt that the Company would have been bound, so long as his transactions were within the Company's business. Now it is pleaded, on the part of the defender, that this document indicates a gratuitous transaction, and reference has been made to the previous case of *Colvin* v. *Dixon*, (5 M'Pherson, p. 603) in the First Division, where the document was substantially the same as that which is founded on here. In that case it was found that the agent had acted beyond what are the functions of an agent, unless where there is specific authority. As there was no allegation of specific authority on that record, the Court found the statement on record irrelevant, without, however, indicating that the document might not be the foundation of an action had the statements on record been sufficient. That was quite sufficient for the disposal of that case; but some general and important views were indicated by the Court in regard to the effect of the document and the nature of the document itself. I particularly refer to the views thrown out by the Lord President at the conclusion of the advising, which appear to me to go very deep into the elements necessary for the decision of the present question. This record has been framed for the purpose of obviating the objections which were taken to the record in that other case. The case of *Colvin* was, in some respects, a more favourable case than the present, if the statement of authority had been more explicit, but the record here goes into considerable detail for the purpose of showing that John Campbell (whether the obligation was or was not a gratuitous one) had sufficient authority to grant it, or at least sufficient authority to represent William Dixon in a question with third parties. The question which your Lordships have to consider is, whether the plea of the defenders, that there is no relavant case, is well founded. If we are to hold this document as representing an independent and original contract, I then should certainly have thought, on the face of it, that it was gratuitous. If it has no reference to any onerous contract, that must be its nature. And if it were properly a gratuitous obligation—that is to say, if Campbell undertook to hold at the credit of the pursuers 750 tons of pig-iron belonging to his employers, without consideration —I doubt whether it is possible to entertain the action under any circumstances, unless there were, in the first place, specific allegations that there had been special consent given by those entitled to give it to the particular transaction; and, in the second place, a clear explanation of how such an extraordinary obligation came to be granted at all. In the present case the trustees were vested in the property; and it seems to me that if the above is to be held as the nature of the transaction, it was manifestly as much beyond the power of the trustees as it was beyond the power of an agent. But I doubt whether that document does represent a separate and independent contract; on the contrary, I think it is perfectly evident that it does not. Taken by itself, it is hardly a mercantile document at all. It does not intelligently represent a transaction known in the commercial world. John Campbell says that he holds at the credit of Messrs Hamilton these 750 tons of pig-iron. On what footing he held it, on what consideration, whether as seller or custodier, or as in pledge, is not even said. There is no price mentioned, there is no price discharged, either directly or by implication, and accordingly it is not a mercantile contract if you are to consider it on its own words. But, even with the explanation in the record, it is manifest what the real nature of the document is. It is simply an acknowledgement by the maker, the manufacturer of the pig-iron, that the party named in the document is now in right of an antecedent contract, and, read in that way, the document itself is perfectly distinct from ordinary documents in the course of business. In the case of *Dixon* v. *Bovill*, decided in the House of Lords in the year 1856, the Lord Chancellor gave expression to an opinion which seems to have been acted on ever since, that ironmakers' scrip—that is to say, a document of this nature, granted to A B—had not the effect of carrying the right to a third party by endorsation; and accordingly, in order to obviate that, the practice has been not merely to endorse the original scrip, but to take from the ironmakers an acknowledgment in terms something like the present, in the name of the transferee or endorser who has a right to the original contract. That seems to me, on the very face of it, what this document implies, and it necessarily depends on the nature of the antecedent transaction whether or not it is to have legal effect. This is made quite clear when we come to the statement in this record, and nothing can be more distinct than the allegation which is made in the record, that the document represents an onerous transaction. The statements are contained in Condescendences 13, 14, and 15, and begin thus:—"For many years past the usage of the iron trade in Scotland with reference to the purchase and transfer of iron in the hands of ironmasters, or sold by them, has been and is of the following nature:—On a sale being completed, the ironmaster either at once transfers the iron in his books to the credit of the purchaser, or at least does so when the price is paid," and so on. All that follows, follows upon the same footing. It goes on to explain the course followed, which is exactly in the terms which the law has now decided; that is to say, these makers' obligations are only transferred when the maker himself acknowledges the right of the transferee; and it proceeds to give an instance and example of one of these documents, which runs thus:—"(*Place and date*).—I hold at the credit of . . . . , and will deliver to his order on demand, free on board at . . . . , (*quantity*) tons (*quality and brand*) pig-iron." Then it says, this document being transferred to an assignee, the maker is in the habit of granting a document, and acknowledging the right of the transferee; and so completely does such a document infer onerosity that in the 15th article of the Condescendence the pursuers aver that "the defenders, as ironmasters, knew that, according to the usage of trade, and the invariable practice followed in the conduct of their own business, the delivery-orders, and the

obligations for delivery granted by the said John Campbell for their behoof as aforesaid, imported to all persons dealing with them that the price of such iron had, previous to the issue of the documents, been paid or settled for to the satisfaction of the granters." Therefore if that had been the nature of this action, if there had been an antecedent sale, and this document had been granted by John Campbell to the assignee of the original contract, it would have been only in accordance with the ordinary practice, and only in accordance with the legal position of the parties; but, unfortunately, it is perfectly clear in this case that that was a false representation. It is stated in the 26th article of the Condescendence—"In fact, the said obligation or scrip-note was one of those which had been issued by the firm of William Dixon for the purpose of enabling Campbell Brothers to obtain an advance of money on it, and it has been taken into account in the settlement of accounts between the two firms." Therefore the usage which is said to uphold a sale would not support this document, which was not granted on a sale, but, on the contrary, was a scrip-note pretending an antecedent sale which never took place, and that for the purpose of enabling Campbell Brothers to obtain advances of money. That such a transaction was within the authority of John Campbell is out of the question, and the statement of usage made in support of it is plainly and utterly inconsistent with fact. But then it is said, and this is the only strong point of the case, that the document implies an onerous contract; and although in point of fact there was none, yet the party taking it was entitled to assume that Dixon was liable. In the first place, there is a question that might occur to one, though I don't give any opinion upon it as to the terms of this contract, from the omission of some very important words, which are quoted in the style in article 13. These documents invariably bear the words "free on board," which implies that the price has been satisfied, and that the vendor is not entitled to retain the iron. Whether the document itself places the assignee in the more favourable position of the cedent, might be a question; at all events, it put the party who took the document on his inquiry as to the nature of the antecedent sale. But, however that may be, the statement in articles 24 and 25 of the condescendence is perfectly conclusive that the pursuer was in the full knowledge of the real nature of the transaction. Article 24 states—"In the beginning of May 1866 Campbell Brothers applied to the pursuer, through David Campbell, for an advance or loan on 750 tons of pig-iron, mixed numbers, belonging to them in the hands of William Dixon;" and offered, "as security, the makers' scrip or obligation for that amount, in favour of the pursuer." There, no doubt, it is said that Campbell Brothers, who were sons of John Campbell, do not ask for an advance of money upon iron which they said belonged to them; but then the 25th article goes on to say—"The said David Campbell, in requesting the said loan on behalf of his said firm, distinctly stated to the pursuer that the sum was required for two days only, and that, if it should not then be taken up by his firm, he had arranged for its being taken up by the makers, the said William Dixon, themselves." The meaning of that simply is, not only was there no antecedent contract whatever between Campbell Brothers and Dixon, but that, in point of fact, though the document bore that 750 tons of pig-iron had been delivered, it was neither more nor less than a cautionary obligation undertaken by William Dixon that they should pay £1875 in the event of Campbell Brothers not doing it; for I cannot attach any other meaning to the words that he had arranged for its being taken up. That does not mean that the iron should be delivered, but that the money which was advanced should be paid by "William Dixon,"—and that this was utterly beyond the power and authority of John Campbell I have no doubt. It was nothing more nor less than a gross fraud on the trustees. I think there can be no doubt about it. There is a statement on the record that by the course of dealing Campbell Brothers had been in the habit of getting such accommodation from John Campbell, and that this course of dealing was known to the trustees. I think that makes the case a great deal worse, for it proved beyond all question that the pursuer, who was aware of that course of dealing, must have been thoroughly cognisant of the real nature of the transaction into which he was entering. Each of these instances must have been a fraud upon the beneficiaries, which the trustees could not overlook, and which certainly would have required specific authority to the individual acting before it could be possible to make a relevant case out of such facts. The statements founded on in the record have only resulted in showing still more clearly than in the case of *Colvin* that this style of document has been abused by a transaction which no agent was entitled to enter into, and which, in my opinion, was a fraud. On the whole matter, I have no hesitation in holding that this record is wholly irrelevant.

Lord Cowan—The summons concludes for decree against the defenders to deliver 750 tons pig-iron, in terms of the delivery-order granted by the Company of "William Dixon" and signed for William Dixon, John Campbell, and farther, concludes for damages caused the pursuer by the defender's failure to deliver said iron in May 1866, with interest. The summons is dated 14th December 1872.

The defence to this action is that no relevant statement is made to support the conclusions; that the defenders are under no obligation to deliver pig-iron to the pursuer; and that the document libelled on was granted by John Campbell without authority, and gratuitously and fraudulently.

The nature of the transaction averred in the record, under which the pursuer obtained the obligation on which he founds, requires, in the first place, to be carefully observed. After explaining the position of John Campbell as the manager of the commercial department of the firm of "William Dixon," and the formation of the company of "Campbell Brothers" by two sons of John Campbell, and the stoppage of that firm in 1864, and their ultimate sequestration in 1866, the pursuer explains in his condescendence the manner in which he obtained the obligation on which his claim is rested. It is alleged in articles 24, 25, and 26 that in May 1866 Campbell Brothers applied for an advance or loan of £1875 on 750 tons of pig-iron, and offered as security the obligation of the defenders "William Dixon" for that amount that this application for a loan was made on the distinct statement that the sum was required for two days only, and that if not then repaid it would be so by the defenders, and the obligation taken

up by them; and that the pursuer having agreed to grant the said loan, he advanced the required sum and received in exchange the obligation in question; and it is farther alleged that the said obligation was one of those which had been issued by the firm of "William Dixon" for the purpose of enabling Campbell Brothers to obtain advances of money. The transaction, thus alleged, appears to me nothing else than an allegation of a loan of money made by the pursuer to Campbell Brothers, for the repayment of which the obligation in question was undertaken to be given as security. No transaction whatever as for the purchase or sale of pig-iron is alleged to have taken place between the pursuer and the firm of "William Dixon." Nay, no specific transaction, as for the purchase of iron, is alleged to have occurred between Campbell Brothers and the firm of William Dixon, the obligation to deliver which could be made the subject of transfer to the pursuer by assignation. The document sets forth what the truth of the transaction, as explained by the pursuer himself, shows to be fictitious—viz., that William Dixon held pig-iron belonging to the pursuer himself; and farther, there is no allegation, and the pursuer's own statement forbids the inference, that in return for the obligation libelled the firm of "William Dixon" received any consideration whatever. The transaction stands out clearly and undisguisedly simply as a loan of money by the pursuer to Campbell Brothers, in security of which the latter were to obtain and hand to the pursuer an obligation in the terms libelled, bearing to be executed for the firm of William Dixon by John Campbell, the father of the two brothers Campbell. And thus, without any transactions as to pig-iron with either of the parties to the loan, and without any money payment or other consideration, the firm of William Dixon is alleged by the signature of John Campbell to the document in question to have become bound to deliver 750 tons of pig-iron.

After careful consideration of all the averments in the record, I cannot discover anything sufficient set forth to support this action against the defenders on the ground of their manager, John Campbell, having had power and authority to grant such an obligation in the circumstances set forth. The authority vested in John Campbell in the affairs of William Dixon is set forth in article 12 of the record. It is averred that he was authorised to exercise every power connected with the commercial department of the business; in particular, in connection with the disposal and delivery of the pig-iron made at the works; that he had power to grant all documents required by usage of trade in connection therewith, including makers' obligations for delivery of pig-iron, "and the raising of money by pledging iron warrants," *i.e.*, for the Company itself; and in article 14 that the firm, through their manager, issued makers' obligations for iron as part of their ordinary transactions; and further, that such acknowledgments or obligations for delivery of pig-iron were granted in favour of third parties, to whom the original holder of the firm's obligations had transferred his right. These are the allegations in reference to the powers and authority of John Campbell to grant the obligation in question, so as to bind the firm of William Dixon. But having regard to the position thus occupied by their manager, it was an abuse of his power, and outwith his authority, to grant an obligation to deliver iron simply in security of a loan of money obtained by Campbell Brothers from the pursuer. And I cannot hold that the subsequent averments in this record, implying that John Campbell had acted in a similar manner with reference to other parties after the sequestration of Campbell Brothers, can at all affect the relevancy of the present action, or the sufficiency of the document founded on to infer obligation against the firm of William Dixon. The repetition of unauthorised acts of the same kind will not support the legality of such acts. Nor can any usage of trade be admitted to probation, to the effect of supporting transactions which are in themselves vitious and illegal. No power or authority in John Campbell to bind the firm of William Dixon to secure loans of money to Campbell Brothers, or any other parties, is even alleged in this record. And yet that is the true character of the transaction in support of which the pursuer founds upon the obligation libelled. The granting of writings to serve as cautionary obligations is altogether beyond the power of a commercial manager occupying the position here assigned to John Campbell; for even a partner could not do so to bind the firm in any question with a third party taking such a cautionary obligation, without the express sanction of the firm.

On the grounds now stated, and those which your Lordship has so fully explained, and in which I concur generally, I am of opinion that the interlocutor of the Lord Ordinary should be recalled, and this action dismissed; and in so dealing with it, it appears to me that we will act substantially on the principles recognised in the similar case of *Colvin*, referred to by the Lord Ordinary.

Lord Benholme—In this case, after very anxious consideration, I have come to the conclusion that it cannot be well distinguished from the case of *Colvin*. I confess that my thoughts were set in the right groove by the observations of the Lord President in that case, in which he contrasts the case before him with another case, or another set of cases, which might have been laid before the Court. His Lordship says, at page 613 of the fifth volume of M'Pherson:—"Now there may be circumstances in which such a document as this might form a good ground of action. There are many circumstances in which such a document, standing by itself, and being the sole obligation as between the ironmaster and the party suing upon it, might afford a perfectly good ground of action. In the first place, an obligation of delivery of this kind given by the ironmaster to a person purchasing iron from him, might be transferred by assignation to a third party, and the assignee might raise action on that obligation of delivery against the ironmaster. He no doubt would be liable to be met by all exceptions pleadable against the party from whom he acquired it; but still, so far as the relevancy of his action is concerned, I should not expect him to say much more than that this was an obligation for delivery of pig-iron which had been received by Messrs Campbell Brothers, or whoever the party might be, in the ordinary course of trade, from Dixon, and that it had been sold and assigned by them, and that he sued as assignee of Campbell Brothers. Or even this case might easily be supposed—that Campbell Brothers, having bought from Dixon a certain quantity of iron, immediately entered into a contract of sub-sale with Colvin, and sold the same iron to him, and to

prevent circuity, asked Dixon, as the original seller, to grant an obligation of delivery direct to the sub-vendee. An action raised upon such a document as this in these circumstances would also be very easily stated, and very easily sustained as regards relevancy. But the essential difference between all these cases and the present is this, that in these cases the pursuer of the action would set himself out distinctly in his character of assignee or sub-vendee—a character which, existing in him, necessarily implies the existence of two contracts of sale, one from Dixon to the party from whom the pursuer acquired, and the other from that party to the pursuer. But in the present case there is nothing of that sort. There is a complete blank in point of averment between the pursuer and Dixon, and the only way in which that blank is sought to be filled up is by saying "there was a contract between me and Campbell Brothers; but as to the relation between Campbell Brothers and Dixon I know nothing." The distinction here brought out by the Lord President is of great importance. Here we find that the document in question does not indicate a sub-sale. It is directly granted to this person, and that puts him under the necessity of showing that with him there was an onerous transaction. Now the only onerous transaction which can be pretended is not value given to Dixon, but to Campbell Brothers—sons of Campbell who granted this document. The course of argument which this necessitates was not admitted in the case of *Colvin;* therefore I cannot see that the Lord Ordinary has pointed out any such important distinction between this case and the former one, in point of averment, as to enable me to come to a different conclusion.

Lord Neaves—I have arrived at the same conclusions as your Lordships. The general aspect of such cases has been very carefully considered. As to the case of *Colvin*, I concur thoroughly in the views expressed by the Lord President. They are exhaustive, clear, and, I think, conclusive. Therefore, it rather appears that the only point we have to consider is, whether averments now inserted in this record for the purpose of remedying what was objectionable or defective in the former case, are such as ought to alter the result. I do not think they will; I think that this case is perhaps more defective than *Colvin's*. It is a singular case, and it leads one to look at the principle of law applicable to this matter with considerable closeness. The Romans had what is called the "Literarum Obligatio," which constituted an obligation by the mere interchange or delivery of a writing containing certain statements; but, as I understand, the law of Scotland has no such thing as a proper "Literarum Obligatio." Erskine so puts it. He says, "By the usage of Scotland all written obligations, and particularly bonds for sums of money, are founded on a prior contract; and so have a cause antecedent to, and distinct from, the obligations themselves, and are therefore effectual." In some respects that gives an advantage to the party founding on it; but in other respects it requires to be supported by some antecedent contract or transaction, and the document is invalid unless it represents such a prior contract. It is the record in one sense, in another sense it is the constitution, because it is contemporaneous evidence of the contract entered into between the parties reduced to writing. Now what kind of contract was entered into between the parties here? Nothing of the kind is stated, nor does the contract explain it. I do not know what the contract is, or is said to be; and when we come to look at it from some other point of view, we see how anomalous and heterogeneous it is in every way. Supposing Dixon's firm had actually delivered iron to the pursuer, what would have been the contract under which he received it? Would he have become proprietor of the iron? How? The Dixons were proprietors before, and if they gave it to him, he came to have a certain right, not that of property, for that would have been contrary to his intentions and to his rights. He would have become a sort of pledgee, not by the pledge of Dixon, but by the pledge of another party who never had possession himself, so that it was by the pledge of another party in the hands of Mr Hamilton. That is a very anomalous proceeding. It is not the execution of a sale between Hamilton and Dixon, and it has not the appearance of a sale. The sale was not direct from one party to another. It was the transference of a sale, by which the delivery of the iron, if it took place, was to divest the firm of W. Dixon of their property in the iron, and to invest Hamilton with some right in the iron; but where was the property to be? The property of the iron would have been in these intermediate people, the Campbell Brothers, and in this way it was a pledge by Dixon, who divested himself of ownership by putting it into the hands of Hamilton as pledgee. That is a very anomalous proceeding and it requires to be looked at with great suspicion.

The Dixons could not be divested of the real right of property except in so far as they invested some other party; it being remembered that property by the law of Scotland is only transferred by tradition, and of course by tradition inferring the transference of the "*dominium.*" It is very important to observe that the transaction upon the face of the document did not relate to any definite or specific quantity of iron, and for this obvious reason, that, upon the face of the document, Dixon, and Campbell who represented Dixon, left the choice of the brand in his option. There was nothing specific. There was merely a general promise as it were, or rather declaration, that he held at the credit of that party a quantity of iron, not specific, of which a certain number of tons might be delivered of one brand, or of the other brand, in the option of the party who was to hold. That is a very anomalous position. There is nothing said about the price or consideration of any kind. It is not said that the price is paid, and even the usual style is not observed as to its being "free on board;" and in that way we have a document which does not do, what I take it Erskine's law implies, viz., set forth an antecedent contract in such a way as to be enforceable and regular. It is an attempt to do in shorthand two anomalous and incompatible things. It is not pretended that there was a contract of sale between Campbell Brothers and Dixon, and it does not appear what the prices settled were; and it just comes to this, that the transaction was either a manifest fraud against his own employers, or it was a falsehood and act of deceit practised by John Campbell upon the pursuer, who was led to believe in some way or other that there was a transaction in iron when there was not; and that Dixon & Company were going to give away their iron, upon the act of their

manager, for a debt to another man. Into these circumstances Mr Hamilton made no inquiry. Now, I cannot imagine that any allegations which he makes are relevant to support the view that a manager of that description, without a mandate to do it, should give away the property of that Company without any consideration whatever. If Mr Hamilton could prove that Campbell Brothers had a just claim to that iron, it might be that the transference of it might be effected in that anomalous way; he might have been in the position of enforcing Campbell Brothers' contract against Dixon; but then there is no such contract between the parties but the document in question that I can see; and I consider it to be not binding upon them and not enforceable, and none of the allegations which are made are so expressed as to yet aver this peculiarity.

The Court pronounced the following interlocutor:—

"Recall the said interlocutor: Find that the pursuer's statements are irrelevant to support the conclusions of the summons; therefore dismiss the action: Find the defenders entitled to expenses, and remit to the auditor to tax the same, and to report."

Counsel for Pursuer and Respondent—Solicitor-General (Clark), Q.C., Watson, and Balfour. Agents—Webster & Will, S.S.C.

Counsel for Defenders and Reclaimers—Lord Advocate (Young), Q.C. and Asher. Agents—Melville & Lindesay, W.S.

R. Clerk.

Tuesday, November 4.

FIRST DIVISION.

[Lord Shand, Ordinary.

WILLIAM AULD (BLACK'S TRUSTEE) *v.* BLACK.

(Heard before Seven Judges.)

Rutherford Act, 1848, §§ 3, 27, *and* 28—*Trust.*

A truster, by deed dated 1844, left certain sums of money to trustees to be invested in land and entailed, the investment to be made between the institute's twenty-first and thirtieth years, and the entail to be executed after he attained twenty-five. The institute, after he was twenty-five, applied for authority to disentail the trust-funds, on the ground that he, being the only heir of entail in existence and unmarried at the date of the deed of entail, or the time at which the lands were to be held as purchased and entailed, being of a date prior to August 1, 1848, was entitled to acquire the same in fee-simple, in terms of the Rutherford Act. *Held* that the petitioner was entitled to pervail.

Captain James Scott Black presented a petition on March 11, 1873, for authority to disentail certain trust-funds, and acquire the same in fee-simple. Answers to this petition were lodged by Mr William Auld and others, trustees under the trust-disposition of the late Mr James Black, the petitioner's father.

The Lord Ordinary pronounced the following nt erlocutor:—

"*Edinburgh, 26th May* 1873.—The Lord Ordinary having heard counsel for the petitioner and the trustees of the late James Black, and considered the petition, and answers and productions, with reference to the views expressed in the subjoined note, Remits to Mr Ralph Dundas, W.S., to inquire whether the procedure has been regular and proper, and in conformity with the provisions of the Acts of Parliament and relative Acts of Sederunt; and also to inquire into the facts set forth in the petition; and to report.

"*Note.*—This application, like a similar one at the instance of the Honourable Robert Preston Bruce of Prestonfield, raises a question of importance, both on account of the general principle and of the large pecuniary amount involved in the particular case.

"The petitioner, Mr Scott Black, captain in the 11th Regiment of Hussars, is the second son of the late James Black, merchant in Glasgow, who died on 12th September 1844, when the petitioner was three years of age. Mr Black left a trust-disposition and deed of settlement, dated 7th July 1842, by which, *inter alia*, (by the fifth purpose) he left and bequeathed to the petitioner the sum of £40,000, with interest from the time of his death, under deduction of certain sums which might be laid out for his education and board. The deed then proceeds in the following terms in reference to the sum and interest so bequeathed:—"And I do hereby strictly provide and enjoin that of the said accumulated sum two-third parts or shares shall be laid out and invested by my said trustees in the purchase of a landed estate in Great Britain or Ireland, in such a situation or locality as may meet the approbation of my said son and of my said trustees; and the said estate shall be firmly entailed on him, and the heirs-male of his body lawfully begotten, according to their seniority, and the heirs-male of their bodies, lawfully begotten, according to their seniority; whom failing, on the heirs-female of the body of the said James Scott Black, lawfully begotten, in their order, and according to their seniority; and on the heirs whomsoever of their bodies lawfully begotten, the eldest heir-female, and the descendants of her body lawfully begotten, always excluding heirs-portioners and succeeding without division. And the deed of entail shall contain all the usual and necessary clauses, and such prohibitory, irritant, and resolutive clauses as my said trustees shall conceive, or shall be advised to be necessary, and which shall be deemed effectual for preserving the said estate to the heirs before specified, and for preventing the succession from being altered, and the said lands, or any part thereof, from being sold, burdened, dilapidated, or evicted in any manner of way whatever in all time coming, excepting as aftermentioned; and I hereby provide that the said investment shall be made between the time my said son shall attain twenty-one years of age and thirty years of age; and after he shall attain twenty-five years of age he shall have the free use and disposal of the remaining third part of said accumulated sum, and the same shall be paid over to him accordingly; but the rents or profits derived from the estate so purchased, or the interest of the two-third parts or shares of the foresaid sum appropriated for the said purchase arising thereon before the estate is bought shall be purely alimentary, and not attachable in any way: Declaring also that after my said son shall attain