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 nterlocutor:—

"*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

twenty-one years of age, it shall be in the power of my said trustees to give or allow him the free use of the interest of one-half of the whole accumulated sum hereby bequeathed to him till he shall attain the age of twenty-five years complete; and it shall also be in the power of three-fourths in number of my said trustees to give the said James Scott Black the free use and disposal of one-third part of the portion of the legacy not appointed to be invested in the purchase of a landed estate, after he shall have attained twenty-one years of age; and between that time and the period at which he shall attain twenty-five years of age; but the said James Scott Black or his brother William Connel Black shall have no title to vote as trustees in either of the two last-mentioned cases.'

"It will be observed from the terms of this provision that the truster, the petitioner's father, directed that two-third parts of the sum of £40,000 and accumulations should be laid out on land to be purchased and entailed by the trustees under his deed of settlement, between the time when the petitioner should attain twenty-one and thirty years of age. The petitioner attained twenty-one years of age on 1st July 1861, and is consequently now above the age of thirty, but to the present time the trustees have not made any purchase of lands. The present application relates to the trust funds which they hold under the truster's direction for that purpose, and which have now reached about £80,000, partly in consequence of a rise in the value of certain stocks in which the funds have been invested, and partly because a share of the legacy left to the late Simpson Black, the petitioner's younger brother, has been added, in consequence of his death, to the petitioner's share.

"The petitioner applies to the Court for authority to disentail the trust funds just mentioned, under the provisions of the Rutherfurd Act (11 and 12 Vict. cap. 36), and specially section 3d, on the ooting that under the provisions of that statute (1) he is heir of entail in possession of an entailed estate, held by virtue of a deed of entail dated prior to 1st August 1848; and (2) that he is the only heir in existence, and unmarried. It is necessary to his success in the application that he should establish the affirmative of both of these propositions. If the entail under which the estate or funds are held is to be taken as of a date subsequent to 1st August 1848, because by the direction of the truster it was not to be executed till after 1st July 1861, when the petitioner attained to twenty-one years of age, the estate, as regards the right of an heir to disentail it, must be regulated by the 1st section of the Act, which requires, in the case of an heir of entail in possession born before the date of the entail, that he should have the consent of the heir next in succession, of the age of twenty-five years complete, and born after the date of the tailzie, so that in that case the petition must be refused. Again, if there be heirs of entail other than the petitioner in existence, the consent of the three nearest heirs must be obtained; and should it be held that such heirs exist, this application, which is made without their consent, must be refused.

"The petitioner's elder brother William Connel Black, and his sister Lady Alison, are beneficiaries under the trust, as explained in the petition; and the respondents, as trustees under the deed of settlement, represent their interests, as well as those of their children. They resist the application on the two separate grounds (1), that the entailed estate or funds are held under an entail dated after 1st August 1848, and cannot therefore be disentailed by the petitioner alone, and at a date so soon after the date of the entail; and (2) that even assuming the estate or funds to be held under an entail dated prior to 1st August 1848, the petitioner is not, as he contends, the only heir of entail in existence, and so cannot execute an effectual deed of entail.

"The Lord Ordinary is of opinion that the argument of the respondents on both these points is unsound.

"The first of them depends on the view to be taken of the effect of sections 27 and 28 of the Rutherfurd Act. The respondents maintain that, according to the sound construction of section 28, the date of any entail to be in terms of trust directions must be fixed by a reference to the time at which the entail could have been first executed, and not sooner; thus, even in the case of a trust-deed which has come into operation as to itsg ene ral purposes by the death of the truster long prior to 1st August 1848, if the direction to purchase and entail lands has been suspended in its effect by one or more liferents, or by a condition being imposed which, for its fulfilment, required the lapse of a series of years, according to the respondents' contention the date of the entail in such cases must be taken as at the death of the liferenters, or the date at which the condition was purified, because then at the earliest the entail could have been executed, and not as at the death of the truster, when his general trust came into operation.

"The petitioner, on the other hand, contends that the simple rule of the statute is, that the date at which the trust-deed, placing the property under trust to be ultimately entailed, came into operation, *i.e.*, in the present case the death of the truster, shall, for the purposes of the Act, be held to be the date of any entail made in execution of the trust; and the Lord Ordinary is of opinion that this view is sound.

"It was argued for the respondents, with reference to the words of section 28, 'the date at which the Act of Parliament, deed, or writing, placing such money or other property under trust, or directing such land to be entailed, first came into operation,' that the words 'first came into operation must be construed to refer to the date of the deed coming into operation as a direct operative instruction to entail, admitting of being at once fulfilled; and that in the case where the fulfilment of the direction was necessarily suspended by existing liferents, or by such a condition as in the present case—viz., that the institute of entail should have attained a certain age before the entail should be executed, the deed would only come into operation in the sense of the statute when it was possible to execute the entail by the liferents having ceased, or the condition having been purified. The Lord Ordinary is, however, of opinion that there is no good reason for so construing the language of the statute. Taking the 27th and 28th sections together, it is obvious that the latter of these sections was intended to introduce a fixed and important general rule, regulating for the purposes of the Act the date of entails made or to be made under trust directions. The language used is distinct and unambiguous, and fixes the date at which the Act of Parliament or trust-deed contain-

ing the direction to entail *first came into operation* as the date of the entail to be afterwards made. If it had been intended by the Legislature to refer not to the date when the Act of Parliament or trust-deed first came into operation generally, as a statute or trust-deed, but to the date at which the direction to entail first came into operation in this sense, that it became possible for the trustees, in compliance with the directions given to them, to execute the entail, this might have been easily provided. The argument of the respondents seems to require that words shall be added to the section beyond those which it contains for the purpose of giving to it the meaning for which they contend, and which is different from the plain and ordinary meaning of the words used. It is true that the effect of the 28th section, as construed by the petitioner, is to do some violence to the directions of the trust-deed or Act of Parliament; for, although the execution of the entail may thereby be postponed for a considerable time, the Act of Parliament declares that, for the purposes of the Act, the date of the entail shall be taken as if no such postponement had been ordered. It is not, however, remarkable that directions to entail contained in a trust-deed or Act of Parliament should be so dealt with, or that a direction to postpone making an entail, with the effect of thereby making the entail more enduring, should not be effectual; for it was the avowed purpose and effect of the statute to limit the effect and duration of entails; for, according to the preamble of the statute, the existing law of entail had been found to be 'attended with serious evils, both to heirs of entail and to the community at large.'

"The view which the Lord Ordinary takes of the 27th and 28th sections of the statute received effect in the case of *Dickson* v. *Dickson*, 8th June 1855, 17 D. 814. In that case a person having an interest as an heir of entail in trust money directed to be invested in land to be entailed, taking advantage of section 29 of the statute, granted a provision under the Aberdeen Act in favour of his wife, who survived him. The truster who left the fund to be entailed died in 1837, but by much the greater part of the fund to be ultimately laid out in the purchase of lands to be entailed was given in liferent to the truster's sister, who survived till 16th January 1850. The granter of the bond of provision died on 2d May 1850, before the direction to purchase and entail lands was or could be carried into effect. The Court held the provision to be effectual. In doing so, it became necessary to settle the question whether the entail was to be held as dated prior to 1st August 1848 or not? for in the former case only, according to the opening words of the 29th section of the statute, a provision under the Aberdeen Act could competently be granted; and it was held, with reference to section 28 of the statute, that the date when the trust-deed came into operation, viz., 1837—not the date when the direction to entail first admitted of being carried into effect, viz., 1850—was the date of the entail. The Lord Ordinary is therefore of opinion that, on a sound construction of the statute, and on the authority of the case just noticed, the entailed estate or funds in the present case must, with reference to the clauses authorising disentail under the statute, be regarded as held under an entail dated in 1844, when the trust-deed of the late Mr Black came into operation.

"It was further maintained for the respondents that, in any view, the petitioner is not the sole heir of entail in existence. This contention was founded on the following clause in the trust-deed: 'Declaring also that in the event of my said son James Scott Black dying without leaving lawful issue, the said estate, if the same shall have been purchased, shall, immediately after his death, be sold, and the price thereof and whole accumulations, either of rents or interests, accruing subsequent to the death of my said son, be divided among my surviving sons and daughters in the proportions following, viz., Each of my sons shall receive a double share or portion of the said price, and each of my daughters shall receive the one-half of the portion or share falling to a son; and declaring also, that if any of my children shall have died leaving lawful issue, such issue shall succeed equally among themselves to the share that would have fallen to their deceased parent had he or she been in life; and for the purpose, in the event foresaid, of enabling the said lands to be sold, I appoint and order the person who may at the time be the heir of the investiture, to make up titles thereto in a proper and legal manner in fee-simple; and on the said lands being sold, to dispone and convey the same to the purchaser, his heirs and successors, heritably and irredeemably: Declaring also that the share or portion of the said price and accumulations thereof falling to or devolving on any of my daughters shall be held by my said trustees for behoof of such daughter in liferent, for her liferent use allenarly, and the child or children of her body lawfully begotten in fee, and shall be invested by my said trustees accordingly, and in precise conformity to the directions, conditions, provisions, and stipulations hereinbefore written in reference to the legacy of £20,000, specially bequeathed to my daughter, the said Jane Rodger Black.'

"The provision now quoted is certainly a very peculiar one. The trust-deed in express terms directs that a deed of strict entail on a series of heirs shall be executed, and yet contains a provision that should the petitioner die without leaving issue, and so the heirs called should fail, the estate shall be sold, and the price divided among the petitioner's brothers and sister, and their families; and the truster directs that the person 'who may at the time be the heir of the investiture' shall make up titles thereto, and, on the lands being sold, convey them to the purchaser. The question is, Does this clause call into existence any heirs of entail other than the petitioner? The respondents do not maintain that the petitioner's surviving brother and sister are such heirs of entail, for, according to the truster's direction, the property, when the tailied destination fails, is to be sold, and the price of it divided among certain beneficiaries. They, however, maintain that they are entitled, in any deed of entail to be executed by them, to insert their own names in their character of trustees as heirs of entail, to take the property, failing heirs of the petitioner's body, for the purpose of selling it and dividing the proceeds.

"The Lord Ordinary is of opinion that the insertion of any clause in the deed of entail which should have the effect, after the exhaustion of a series of heirs, of taking the property back to the respondents with this view, would be inconsistent with the character of a deed of entail, and ineffectual. But however this may be, he is further of opinion that the respondents are not entitled to insert their own

names, as trustees, as heirs of entail under the deed; and that consequently the petitioner is not only the heir of entail in possession in the sense of the Rutherfurd Act, but, being the sole heir of entail in existence and unmarried, holding the estate under an entail dated prior to 1st August 1848, he is entitled to succeed in the present application.

"On the grounds above stated, the Lord Ordinary is of opinion that the petitioner is entitled to succeed in his application, on the assumption that the facts stated in the petition are correct, and the procedure under the statutes regular; and with the view of ascertaining whether this be so, the Lord Ordinary has made the usual remit to a professional man to inquire, and report."

"*Edinburgh, 16th June* 1873.—The Lord Ordinary having resumed consideration of the petition and proceedings, with the report by Mr Ralph Dundas, W.S., No. 13 of process, Finds that the procedure has been regular and proper, and in conformity with the provisions of the Acts of Parliament and relative Acts of Sederunt; and with reference to the Note to the foregoing interlocutor of 26th May last, Finds that the trust-disposition and settlement of the said deceased James Black, merchant in Glasgow, under which the respondents, his testamentary trustees, hold the fund which forms the subject of the present application in trust, for the purpose of being applied in the purchase of land to be entailed upon the petitioner, and the series of heirs mentioned in said trust-disposition and settlement of the said James Black, having first come into operation on the death of the said James Black, which took place on 12th September 1844, that date, viz., 12th September 1844, must, for the purpose of the Act 11 and 12 Victoria, chapter 36, be held to be the date of any deed of entail which the trustees might execute in favour of the petitioner and the said series of heirs: Finds that the petitioner is the only heir of entail at present in existence under the destination above mentioned; and that, in respect he has attained the age of 25 years complete, and is now unmarried, he is entitled, in virtue of the 3d and 27th sections of the said Act, to receive payment from the said trustees of the said deceased James Black of the sum of £79,851, 7s. 9d., or such other sum as shall be ascertained to be the amount of the said fund, after deduction of the sums which shall be expended or required by the said trustees out of the residue of the trust-estate in order to purchase or provide for the annuities granted by the said trust-disposition and settlement, and still to be provided for: Interpones authority: Grants warrant to and authorizes and ordains the said trustees to pay, transfer, convey, and make over the various funds and property composing the said sum of £79,851, 7s. 9d., under deduction as aforesaid, and all securities held by them for the same, with the interest and dividends due thereon, to the petitioner, on his granting to them a valid acknowledgment and receipt therefor; and decerns *ad interim*: And, on the motion of the respondents, Mr Black's Trustees, grants them leave to reclaim against this interlocutor,"

The respondents reclaimed.

At advising—

The Lord President—The petitioner, Captain James Scott Black is interested in a large sum of money, amounting, it is said, now to about £80,000, which is directed to be invested in land, and the land to be entailed under the provisions of a deed made by his father upon the 10th of September 1844. He founds upon the 3d, 27th and 28th sections of the Entail Amendment Act, taken in connection with each other; and he contends that, being under the provisions of this deed the only heir of entail in existence and unmarried at the date of the deed of entail, or the time at which the lands are to be held as purchased and entailed, being of a date prior to the 1st of August 1848, he is, in virtue of these three clauses, taken in combination, entitled to acquire this money as his own absolute property.

The question is attended with some difficulty, and particularly I have experienced difficulty in construing the 28th section of the statute; but, after full consideration these difficulties have disappeared, and I am now very clearly of opinion that the petitioner is entitled to prevail.

In expressing the grounds of that opinion, I think it necessary to consider the effect of the Entail Amendment Act generally, because a good deal of the argument addressed to us,—indeed the most forcible part of the argument—was to the effect that any other construction of the 28th section than that which was contended for by the petitioner might really have the effect of defeating one great object of the statute. That object I conceive to be to prevent persons making entails for the future from affecting with fetters persons not born or in existence at the date of the entail. In order to carry out that object it is provided that in the case of what may be called new entails, that is to say, entails made after the 1st of August 1848, any heir born after the date of the entail, being in possession of the entailed estate, and twenty-one years of age, is absolutely entitled to acquire the estate in fee-simple. In like manner, and carrying out the same principle, in the case of an entail made after the 1st of August 1848, an heir of entail who is born before the date of the deed may, with consent of his own apparent heir born after the date of the deed,—provided that apparent heir be twenty-five years of age,—also acquire the estate in fee-simple, the principle of that enactment being that there is in the person of these two heirs a combination of the two things required in the first case I have stated. There is the heir born before the date of the deed, who is the heir in possession, and furnishes that requisite of the title to disentail; and combined with him there is the heir-apparent, the next heir entitled to succeed, who, being born subsequently to the date of the deed, would, when he succeeded to the estate, be himself entitled to disentail absolutely. That is just carrying out the same principle and the same object in a different set of circumstances. Then, analogously to these provisions, there are two provisions regarding entails made prior to the date of 1st August 1848. That date is taken to be as it were the date of the entail with reference to the persons then unborn; and any person being an heir of entail in possession under one of these old entails, being born subsequently to the 1st of August 1848, and being of full age, is entitled unconditionally to acquire the land in fee-simple. And so an heir of entail born before the 1st of August 1848, in the case of an old entail, combined with his heir-apparent born subsequently to 1st August 1848, affords that combination of qualifications in the case of an old entail

which entitles them to disentail and acquire the lands in fee-simple just analogously to the provision for the heir of entail and his heir-apparent in the case of the new entail. Now to carry out these regulations still further, and to secure still more effectually the great object of the statute, viz., to prevent entailers from affecting with fetters persons not born, there are some other provisions of the statute which are worthy of attention. I mean particularly the 47th, 48th, and 49th sections, which are directed to an evasion of the leading provisions of the statute—to prevent evasion either by the creation of trusts, or by the creation of successive liferents, or by the creation of leasehold rights in succession. All these modes of evading the statute have been anticipated and provided against. And it is just part of the same system which we really find developed in this statute as a very harmonious whole, that is to be found in the 27th and 28th sections, with which we are more immediately concerned. The object of the 27th section is to place money intended to be invested in land to be entailed exactly in the same position with reference to the first three sections of the statute as if it were land actually purchased and entailed. The heir in any of the categories contained in the first three sections is entitled to anticipate or forestall the investment of the money in land and the making of the entail, by stepping in before anything is done, and saying,—'if this were done I should be entitled to have the land in fee-simple, and so to prevent all unnecessary trouble, I will take it now in the form of money.' Then the 28th section provides that for the purposes of this Act, the date at which the Act of Parliament, deed, or writing, placing such money or other property under trust, or directing such land to be entailed, first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and also shall be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail. Now the contention of the petitioner is that in the present case the date of the deed of entail, or the date at which the land should have been entailed in terms of the trust, must be taken to be the death of the truster, at which time the deed or writing placing such money under trust came into operation; and it is upon the solution of that question that the petitioner's whole case depends. The provisions of the trust-deed are by no means immaterial in considering this question, and, indeed, one of the chief difficulties created in the application of this 28th section to the present case arises from the peculiar terms of the trust-deed. The truster directs £40,000 to be set aside for the purpose of buying land to be entailed upon his son Captain Scott Black, and a certain series of heirs; and it is quite obvious from the general provisions of the deed,—I need not go over them for the purpose of establishing that, because I don't think there can be any difference of opinion on the subject,—that the right of Captain Scott Black to this money, or to the land which is to be purchased by means of this money, did not vest in him until he attained the age of twenty-five years complete. The trustees were to be entitled to buy land at any time after he attained the age of twenty-one and between that date and the time when he attained the age of thirty, but no interest either in the money or in the land could vest in him until he attained the age of twenty-five; and it was contended that until he attained the age of twenty-five this deed could not properly be said to come into operation, because if he did not survive that date no land might be bought at all, or if it had been bought, it would have to be sold again, because the amount whether in money or in land, failing him without issue before he attained the age of twenty-five, was to be divided among his brothers and sisters. Now that is a very plausible argument, but I think it goes no further in its true effect than this, that until Captain Scott Black attains the age of twenty-five he cannot possibly proceed to acquire this money in fee simple, or the land which is purchased by means of it. But to all other effects the clause of the statute must be construed without reference to the trust. It applies equally to all trust-deeds, and to all cases of money invested in trust. or placed under trust, as it is expressed here, and to all land directed to be entailed. It is not limited in its operation apparently to any particular class of cases, but is intended to apply to all cases where money is placed under trust for the purpose of buying land to be entailed, or where land is placed under trust for the purpose of being entailed. Taking it, therefore, as applicable to all such cases, the question comes to be when this trust-deed came into operation within the meaning of this clause; and I am of opinion that this trust-deed came into operation for the purposes of this Act—that is to say, with a view to the disentailing clauses of this Act—at the date at which the deed placing the money under trust came into operation as a deed for placing money under trust, for the ultimate purpose of buying land to be entailed, and that is of course, the death of the testator; because the deed is a *mortis causa* deed, and did not come into operation during his lifetime, but came into operation the moment the breath was out of his body. The words in the section which probably create the greatest difficulty are those which say that that date shall be held to be the date at which the lands should have been entailed in terms of the trust-deed; and it does seem a little startling at first sight that when, according to the directions of the truster, it is not possible that lands should have been entailed in terms of the trust for a long period after the trust-deed came into operation as a trust-deed, yet still that the date of the trust-deed is to be held to be the date at which the lands ought to have been entailed. It seems as if, in a case like this, it was a provision of the statute that the direct contrary of what the truster provided shall be carried into effect. But that is really not so, because it is a mere artificial date that is here created, and created for a special purpose—for the purpose of securing the full and effectual operation of the disentailing clauses of the statute. And it was a provision of a very necessary kind, because if this clause were to be read otherwise, a man might succeed by means of trust direction in keeping up the money or the land for so long a period before it was actually entailed that there should be parties in the enjoyment of the money or the land substantially under all the restrictions and fetters of an entail, although the entail has not been executed down to a very late period, it may be for two or three generations. The consequence of that in regard to such a trust-deed would be to defeat the leading object of the statute, and to enable him to bind a succession of persons not born at the date of his trust-deed. Now that, I think, is a conclusive argument against the construction of the 28th

section contended for by the respondents; and upon that ground I am for adhering to the Lord Ordinary's interlocutor.

Lord Cowan—I entirely concur in the opinion which your Lordship has delivered. I shall only add, that the conclusion at which your Lordship has arrived with reference to the meaning of the 28th section, and the proper construction to be applied to the intermediate clause in that section, is confirmed, according to my reading of the section, by this, that there are two clauses fixing the date of the entail. I read the 28th section thus—"That for the purposes of this Act, the date at which the Act of Parliament, deed, or writing, placing such money or other property under trust, or directing such land to be entailed;—" then I eave out the intermediate words, which really create the only difficulty in the clause, and I connect the words that I have read with what follows —"shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever the actual date of such entail." So that at whatever date an entail made under this trust shall be executed, the express declaration of the statute, as I read it, is, that the date when the deed comes into operation by the death of the truster shall be held to be the date of every entail that could possibly be executed under the terms of that trust; and that, I apprehend, bears upon the effect and meaning of the 27th section in regard to the application made by the present petitioner.

Lord Deas—In order to entitle the petitioner to do what he proposes to do, he must, in the first place, be an heir in possession of an entailed estate; in the second place, he must be the only heir in existence, and unmarried; and, in the third place, the entail must be dated prior to the 1st of August 1848. Now there is no room for any doubt at all that he is the heir in possession, and there is no room for any doubt that he is the only heir in existence, and unmarried. The only question which has been raised substantially has been whether this entail is to be held to be dated prior to the 1st of August 1848; and that depends upon the construction put upon the 28th section of the Rutherfurd Act. Now, I confess I have no doubt as to the meaning of that section—"Be it enacted that, for the purposes of the Act, the date at which the Act of Parliament, deed, or writing, placing such money or other property under trust, or directing such land to be entailed, first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever its actual date may be."
The date at which the Act of Parliament came into operation, or at which the deed came into operation, or the writing came into operation, or the deed directing the land to be entailed first came into operation, shall be held to be the date of the entail to be made upon it, whatever that date may be. I cannot see the possibility of reading these words in any other way than this, that in the case of a *mortis causa* deed they refer to the date of the death of the maker of the deed. That is unquestionably the date when the deed or writing came into operation. It is satisfactory to see, as your Lordship has pointed out, that that is not only the literal and only possible grammatical meaning of the section, but it is plainly and obviously the meaning of the statute; because otherwise it would be in the power of those who called themselves heirs of entail to lay the fetters upon any number of persons they thought proper, and so to defeat the great purpose of the statute. I confess I should have no doubt about it if I were considering it for the first time, but I had occasion to consider it in the case of *Dickson*, where I formed that opinion. Lord Curriehill was clearly of the same opinion on that point, and I certainly understood then, and have thought ever since, that the Lord President was substantially of the same opinion. I see that the report of his Lordship's opinion is certainly not so distinct upon that matter as he gave it, but I don't think that is a very accurate report of his Lordship's opinion, and I am confirmed in that by looking at the report of the same date in the Jurist, because I see they are not the same at all. It rather appears to me that the reporters have been under a certain degree of confusion with reference to the two questions which occurred in that case—the one being the question about the date, and the other the question which gave us much more difficulty—whether the party there was an heir in possession. And it appears to me that the reporters have thought the Lord President to be speaking sometimes on the one question when he was truly alluding to the other. I am confirmed in that by this, that in both reports Lord Curriehill says distinctly—"I am of the same opinion upon both points with your Lordship"—*i.e.*, with the Lord President. Now, if the Lord President had not concurred with Lord Curriehill and myself on that point, Lord Curriehill could not possibly have been of the same opinion with his Lordship. We had full consultation about it, and my impression has ever since been that we were all substantially agreed about that, although there may have been a little difference in expression. In the report his Lordship is made to say—"The trust came into operation upon the death of the truster. The trustees had then power over the trust-estate. That is one date, and perhaps a wrong one." That about its being perhaps a wrong one is not in the other report at all. I suspect it should have been "a right one" in place of "a wrong one;" but certainly, though there is a little confusion between the two points, I always understood that we had the sanction of Lord Colonsay for that opinion, and I don't see how we could have come to the result we came to in any other way.

Lord Benholme—I am of the same opinion as that of all your Lordships who have spoken. It is a short question in one respect, but I think it is not very difficult to interpret those important words that for the purposes of the Act the date of the entail shall be held to be that at which the trust-deed, or other deed which contains the exercise of the power on the part of the entailer, shall come into operation. The object of this clause, and of this part of the Act, is to limit the power of the entailer as to making restrictions on heirs of entail. Now the powers of the entailer are certainly, I think, to be judged of as at the time when these powers are fully executed and exhausted; and that must be held to be the time when, by the granter's death, the deed comes into operation. Its fulfilment may be future, but the time when the deed under which the entail is ultimately to be executed comes into operation, appears to me to be the date

of the granter's death. The date of the commencement of the privileges of the heir of entail may be looked at from one point of view, but the power of the testator is to be looked at from a totally different point of view, and I think the Act of Parliament distinctly states that in regard to that matter, the last moment at which he could exercise these powers is to be held to be the date at which the entail comes into operation.

LORD NEAVES—I concur in the opinion delivered by your Lordship, and adopt the grounds of it. Whatever may be said of the case of *Dickson*, I am satisfied with the thorough sifting which this Act of Parliament, as bearing on this matter, has now received.

LORD ARDMILLAN—I have nothing to add to what your Lordship has said, for I am entirely of the same opinion. I do not rely necessarily on the case of *Dickson*, because the grounds of judgment are to my mind clear, even if that decision had not been pronounced in Dickson's case; but from the explanation given by Lord Deas, who took a part in that decision, Dickson's case seems to be so far an authority for our present judgment.

LORD JERVISWOODE concurred.

Counsel for Reclaimers—Watson and M'Laren. Agents—Ronald, Ritchie & Ellis, W.S.

Counsel for Respondent (Petitioner)—Solicitor-General (Clark), and Marshall. Agents—Tods, Murray & Jamieson, W.S.

Wednesday, Nov. 5.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

CAMPBELL *v.* ORD & MADDISON.

Reparation—Culpa—*Contributory Negligence—Jury Trial—Bill of Exceptions—Motion for New Trial.*

An action for damages was raised by the father of a child, four years old, for injuries caused by a machine standing unprotected in a public thoroughfare, against the owners of the machine. At the trial the defenders asked the presiding Judge to direct the jury—(1) that the child was capable of contributing by negligence to the accident; (2) that the pursuer was not entitled to recover if the fault of the boy's brother, then with him, materially contributed to the accident. The Judge refused to give these directions, and a bill of exceptions was tendered, which, together with a motion for a new trial on the ground that the verdict was contrary to evidence, came before the Court,—*held* that the Judge was right (1) in leaving the first point to the jury as a question of fact, not of law; and (2) in refusing, on the evidence, to give the second direction.

This case arose out of an action of damages at the instance of John Campbell, as administrator-in-law for his son Robert, against Ord & Maddison, agricultural implement makers at Darlington. The cause was tried on 22d July 1873, before the Lord Justice-Clerk and a jury. The circumstances as set forth on record were as follows:—The pursuer is a baker in Hawick, and his dwelling-house and shop are in one tenement in No. 10 High Street, Hawick, about twenty yards from the Tower Knowe, upon which a weekly corn market is held every Thursday. The market is held on an open street or place, with shops and dwelling-houses on three of its sides, and men, women, and children passing to and fro. The defenders have for a considerable time past attended this market, selling agricultural implements and other machines. These for the last three years they have exposed on market days on the Tower Knowe or public street, in front of the Tower Hotel, for show and sale. Some of the machines are dangerous when set in motion, but nevertheless they were in use to be exposed on the public street without being properly fenced or watched, with their gear in full working order, and so that they could be set in motion by any one. When they were formerly exhibited there was generally in attendance upon them a man, who was, however, engaged only to take them to and from the market, and who did not watch them. On these occasions young lads, and particularly children who happened to be about the street, began to work the machines and set them in motion for amusement. This was frequently the case, and the present Provost of Hawick and others noticed the danger to children, and spoke to Messrs Ord & Maddison's traveller and the other man about it, warning them of the risk, and cautioning them against exposing the machines without their being more carefully watched, and the handles being removed and wheels locked or tied up. On Thursday the 27th of February 1873 the implements and machines were exposed as usual, and amongst them was an oil-cake crusher—a machine of a peculiarly dangerous construction. About 3 P.M. the pursuer's sons, Neil, aged seven, and Robert, aged four years, and other children, were on the street amusing themselves, and they began to look at and touch the oil-cake crusher, which was in full gear and working order. While the younger one was examining and touching the wheels on the outside of the machine—wheels which were not fenced in any way—his right hand was caught and severely crushed in the pinion or cog wheels, some one on the other side having set the machine in motion by pushing the handle. The fore and middle fingers were broken in several places, and the former lacerated to such an extent that amputation was necessary. The injuries sustained have disfigured and partially disabled the hand for life. The boy will never be able to employ his hand in any heavy work. The whole injury to him was, the pursuer alleged, caused by the fault of Ord & Maddison, or others for whom they were responsible. They were guilty of gross negligence in having taken no precaution whatever in regard to the machines.

The pursuer pleaded—"The pursuer's pupil son having sustained loss, injury, and damage from the fault or gross negligence of the defenders, they are liable in damages and *solatium* as concluded for, with expenses."

The defenders pleaded—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons, and the defenders should be assoilzied. (2) The injury alleged not having been caused by the defenders they should be assoilzied, with expenses."