the defender for pasturage after the date of the charter cannot be viewed as connected with the charter, which neither conveys the privilege nor provides for the exaction of the rent.

It does indeed appear anomalous, as well as unfortunate, that the parties who have the most regular title, and the only title of perpetual endurance, to the building lots, should be found to have the weakest defence against the conclusion for removal from their possession of the privilege of pasturage. But so it is. The title on which they rest is in its terms exclusive of the privilege which they seek to defend, while the leaseholders enjoy it under the express words of their leases.

Accordingly, the result of my opinion is that, except in regard to the feuars represented by M'Callum, the Lord Ordinary's interlocutor should be altered; that both classes of tenants—those holding long leases and those standing on entries in the rentals—should be assoilzied; but that the pursuer is entitled to decree in terms of the conclusions of the action, as restricted, against John M'Callum and those whom he is held to represent.

The Lord President was not in office when the case was argued.

In adjusting the interlocutor, a question arose as to whether the defenders were entitled to claim the privilege of grass for horses; but they put in a minute giving it up, and the following interlocutor was pronounced:—

"*Edinburgh, 20th March* 1867.—The Lords having advised the reclaiming note for John M'Callum and others, No. 385 of process, with the minute for the pursuer, No. 387 of process, and minutes for John M'Callum and others, defenders, Nos. 388 and 389 of process, and heard counsel for the parties, Recal the interlocutor of the Lord Ordinary submitted to review: Find that the conclusions for removing the defenders from the lands and others libelled have been departed from by the pursuer: Find that none of the defenders make any claim to horse grazing on the lands libelled or any part thereof, either permanently or for a term of years, and therefore Find and Declare in terms of the declaratory conclusions of the summons so far as horse grazing is concerned: Find that the following defenders, who hold or are interested in feu-rights of certain portions of the lands libelled, have not established any right, either permanent or for a term of years, to graze their cows upon the lands libelled, or any part thereof—viz., the defenders John M'Callum, Malcolm M'Kinnon, the Rev. Duncan M'Farlane (so far as regards the lot of ground described in statement five of the revised defences, No. 176 of process), Archibald M'Neill, Donald M'Donald, Duncan M'Call, Lachlan M'Callum, Hugh M'Millan, (whose revised defences are included in No. 176 of process), and Margaret M'Lean or Wilson, John Wilson, Alex. M'Lean, Hector Campbell, and John M'Lean, whose revised defences are No. 331 of process, and therefore to that extent and effect Find and Declare, so far as these particular defenders are concerned, in terms of the declaratory conclusions of the libel, and to the extent and effect to which decree of declarator has been pronounced as aforesaid, prohibit, interdict, and discharge the defenders as concluded for in the libel; and as regards the whole other defenders, Find that they have established the right claimed by them to a cow's grass on the Muir Lawn referred to in the record forming part of the lands libelled, subject to the effect of the orders or regulations of 22d and 30th November 1792, founded on by the pursuer, so far as regards those of the defenders whose rights were obtained subsequent to these dates, and assoilzie the said whole other defenders from the conclusions of the libel except as regards the horse grazing herein otherwise above disposed of, and decern: Find the defenders who are assoilzied as aforesaid entitled to expenses, and remit the account thereof, when lodged, to the Auditor of Court to tax the same and report, and *quoad ultra* Find no expenses due to either party, and decern.

"JOHN INGLIS, *I.P.D.*"

Agent for Pursuer—James Dalgleish, W.S.

Agents for Defenders—David Curror, S.S.C., and J. Y. Pullar, S.S.C.

BROATCH *v.* JENKINS (*ante*, p. 121).

Fraudulent Misrepresentation—New Trial. New trial granted, on the ground that a verdict was not supported by evidence.

This case was tried on the 18th and 19th December last, before Lord Barcaple and a jury, under the following issue, viz.:—

"Whether the defender, David Jenkins, by fraudulent misrepresentation as to the number and extent of the accounts, and amount of the balance, claimed by him from the defender, James Rankine, induced the pursuer to become a party to the minute of reference No. 29 of process as cautioner for the said James Rankine?"

The jury, by a majority of 9 to 3, found for the pursuer.

BURNET, for the defender, moved for a rule, which was granted.

MACDONALD, for the pursuer, showed cause.

PATTISON replied.

The Court (Lord Deas dissenting) made the rule absolute, on condition of the defender paying the expenses of the first trial. The majority were of opinion that, assuming every word of the pursuer's testimony, it did not establish what he had undertaken to prove. There was therefore no evidence to support the verdict.

Agent for Pursuer—Robert Johnston.

Agent for Defender—James Somerville, S.S.C.

Friday, March 15.

FIRST DIVISION.

COLVIN *v.* DIXON.

Reparation—Breach of Contract—Unilateral Obligation—Iron Warrant—Master and Servant—Usage—Relevancy. An action of damages for non-implement of an obligation to deliver iron granted by the manager of an ironmaster for his employer, dismissed as irrelevant, in respect—(1) the record did not exclude the possibility of the obligation being gratuitous; (2) it did not contain any averment that the manager had any authority to bind his employer in a gratuitous obligation, which he could not do without special authority or usage, which in this case was not averred with sufficient specification; (3) it did not aver any contract betwixt the pursuer and defenders of which the obligation was executorial; and (4) it did not aver delivery of the obligation by the defenders to the pursuer, and did not specify the character in which the pursuer sued upon it.

This is an action at the instance of William Colvin, iron merchant in Glasgow, against the

firm of William Dixon, ironmasters there. The pursuer concludes for £3500 of damages for breach of contract. The action is based on the following averments :—

"7. On 16th May 1866, the pursuer purchased from Campbell Brothers, iron brokers, Glasgow, 1000 tons Calder or Govan pig iron, f.o.b., in Glasgow, at 53s. 6d. per ton. The terms were cash on the day of sale against makers' orders to deliver. In implement of this contract the pursuer on the same day paid Campbell Brothers £2675, being the price of said iron, and he received from them in exchange, and in the ordinary course of business, a certificate or obligation granted by the defenders, and their firm of William Dixon, in the following terms :—'Glasgow, May 16, 1866.—I hold to the credit of William Colvin, Esq., one thousand tons pig iron, mixed numbers, Calder or Govan brands, in my option, and will deliver the same on demand.—For WILLIAM DIXON, JOHN CAMPBELL.'

"8. By this certificate or obligation the defenders and their firm of William Dixon, acknowledged that they held and became bound to keep, for behoof of and at the order of the pursuer, 1000 tons of pig iron, mixed numbers, Calder or Govan brands. The acknowledgment or obligation is signed for the defenders and their said firm by John Campbell, who was the manager employed by the defenders to conduct in Glasgow the pig iron department of their business, and he was authorised by the defenders to grant such certificates or obligations. The said John Campbell had for a period of about thirty years, in the ordinary course of business, and as acting for the defenders, been in the habit of granting such certificates or obligations, which were always duly implemented by the defenders. Full value was given by the pursuer for the certificate or obligation above set forth, and in virtue thereof the defenders became bound to deliver to the pursuer 1000 tons of iron as therein mentioned.

"9. The defenders, prior to the date of the said certificate and obligation, did not themselves take any active part in the management of the commercial business of their said company. The said John Campbell was exclusively entrusted with the commercial department of the pig iron business. He was in use to grant obligations to the trade for delivery of pig iron of the nature above-mentioned in name of the company firm, and signed by him on behalf of the company. He had the authority of the defenders to grant such obligations, and he was the only person known to the trade as selling Dixon's pig iron. The obligations of the said nature granted by the said company or firm were invariably signed by Mr Campbell for the firm, and the trade, as the defenders well knew, took and recognised them as the obligations of the defenders. They were always regularly fulfilled.

"10. In accordance with usual practice, the pursuer, on receiving the said certificate or obligation, endorsed it in the following terms :—'Please place to credit of my stock-account. *P. pro* WILLIAM COLVIN, J. S. STEVENSON,' and transmitted it to the defenders, and to their firm of William Dixon, with a letter in the following terms :—'William Dixon, Esq.—Glasgow, 16th May 1866.—Dear Sir,—Please receive to credit of my stock-account your engagements for 1000 tons, mixed numbers, Calder or Govan pig iron.—I am, dear Sir, yours truly, *P. p.* WILLIAM COLVIN, JAMES S. STEVENSON. D. 567. 600 tons No. 1, 400 tons No. 3.' The defenders received the said obligation with this letter, and retained the same.

"11. The defenders recognised and homologated the said certificate or obligation, and acknowledged their obligation to implement. Not only did the defenders retain possession of the certificate or obligation transmitted to them by the pursuer, as above-mentioned, in order that the pursuer might draw for or grant delivery-orders for the iron as he required it, but the defenders implemented certain of the delivery-orders drawn by the pursuer against the said 1000 tons contained in the said certificate. . . . . .

"12. The pursuer granted certain further orders addressed to the defenders for further deliveries to account of the 1000 tons held by them for the pursuer, but these orders have not been implemented; and on 18th May 1866 the defender Walter Mackenzie addressed to the pursuer a letter in the following terms :—'1 Dixon Street, Glasgow, 18th May 1866.—With reference to the document which has been sent here by you with a request that the iron mentioned therein shall be delivered, I am now to notify that the validity of that document as an obligation on Mr Dixon's estate is not allowed, and that I am not authorised to provide or deliver iron from Mr Dixon's works unless upon payment to me of an agreed-on price.—I am, Sir, your most obedient servant, WALTER MACKENZIE. William Colvin, Esq., 54 St Vincent Street.'" . . . . . .

The defenders pleaded that the action was irrelevant. They also averred :—"2. The counting-house department of the defenders' business is conducted in offices situated in Dixon Street, Glasgow. John Campbell, up till 18th May 1866, had charge of the books of the said business, and was the managing counting-house clerk and salesman. On said 18th May he was dismissed by the defenders from their service.

"3. The writing, dated 16th May 1866, founded on by the pursuer, was not granted in pursuance or in consequence of any contract of sale, or other contract or transaction between the pursuer and defenders, or between the defenders and any other party, but was gratuitously and fraudulently signed and given by the foresaid John Campbell to his sons, who composed the firm of Campbell Brothers, and was fraudulently received by them. The defenders were not then possessed of any iron belonging to Campbell Brothers or the pursuer, nor were they under any contract or obligation to transfer or deliver iron to Campbell Brothers or the pursuer. The writing in question was not granted by John Campbell in the course of his duty or employment as the defenders' servant, or in the course of any transaction made by him on their account, or in the course of their business. The defenders believe and aver that it was a fraudulent device between the said John Campbell and Campbell Brothers (whose partners were his sons), with a view to enable the latter to raise money by entering into a contract to sell or get advances on iron which they did not possess, and to which they had no right. The said John Campbell had no authority gratuitously to give away the defenders' iron, or gratuitously to grant an obligation, binding the defenders to deliver iron to a party who had no contract or transaction with them for the delivery of iron, and to whom they were under no obligation to deliver iron."

In regard to the alleged partial implement of the contract founded on, the defenders stated that this was done by Campbell without authority.

The pursuer proposed the following issue :—

"Whether, by the document No. 11 of process, dated 16th May 1866, the defenders, through

John Campbell, their manager or salesman, undertook to deliver to the pursuer on demand 1000 tons pig iron, mixed numbers, Calder or Govan brand; and, whether, in breach of said obligation, the defenders failed to deliver to the pursuer, or his order, 798¼ tons of iron, or thereby, being the balance of the said 1000 tons, to the loss, injury, and damage of the pursuer?

"Damages laid at £3500 sterling."

The Lord Ordinary (Barcaple) reported the case with the following

"*Note.*—The defenders maintain that the pursuer has not set forth a relevant case to entitle him to an issue. The ground of this contention is, that the facts averred by the pursuer do not infer liability by the defenders to implement the obligation for breach of which damages are claimed.

"They object to the relevancy of the pursuer's case, that it is not alleged that there was a contract of sale of iron by them, of which contract the document in question is executorial, or that there was any other onerous consideration for which the document was granted; and they contend that, in the absence of such contract or consideration, the document not being signed by the defenders or their firm, but by Campbell, their servant, it cannot bind them.

"The pursuer expressly avers that Campbell had the authority of the defenders to grant such obligations, and that he had been in the habit of doing so, in the ordinary course of business, for about thirty years. There are also averments, perhaps still more important to the present question, that institorial powers of a very general and ample kind were vested in Campbell as managing a part of the defenders' business. But, in the absence of any further averment, it must be held that the pursuer does not undertake to establish the existence of any onerous contract or consideration out of which the obligation signed by Campbell arose. That document does not purport to constitute or carry out a sale, and it makes no reference to any contract or consideration in respect of which it was granted. For anything that appears on its face, it may have been a perfectly gratuitous undertaking. As the pursuer does not make any opposite averment, he seems to rest his case upon the document itself as binding the defenders, notwithstanding its being signed gratuitously—that is, fraudulently—by Campbell, as their servant; and the argument proceeded on that footing.

"None of the pursuer's statements amount to an averment of usage of trade in regard to such documents. It is stated that Campbell had authority from the defenders to grant them—that he had long done so in the ordinary course of business—and that they had been always duly implemented by the defenders. These averments have all relation to the conduct of the defenders' business, not to any general usage of trade in regard to such documents. But it is sufficiently set forth that Campbell had full powers to act for the defenders in selling their pig iron, and especially to grant documents of the kind founded on. The Lord Ordinary understands the averments to mean that Campbell had authority to grant such obligations for iron sold by him, not that he was authorised to grant gratuitous obligations for delivery of the defenders' iron.

"The Lord Ordinary is of opinion that the pursuer's case, as thus put by himself, is not relevant. The institorial power vested in Campbell, though ample and including authority to grant such obligations in the exercise of that power, was necessarily limited by the nature of his employment. That was, according to the pursuer's statement (Cond. 9), the exclusive management of the 'commercial department' of the defenders' pig iron business, he being 'the only person known in the trade as selling Dixon's pig iron.' Whoever dealt with him in that capacity was bound to know that he could only transact for the sale of his employers' iron, and bind them to deliver iron which had been sold; and that whatever obligations for the delivery of iron he had been in use to grant, and the defenders to implement, were of that description.

"The peculiarity of the case is, that the pursuer did not deal directly with either Campbell or the defenders, while he is the direct creditor in the obligation. If he had been merely the assignee of Campbell Brothers, as the original obligees in a similar document, he would have been exposed to the defences competent against his cedents as parties to Campbell's fraud. That ground of defence does not exist in the present case. But, in the shape which the transaction was made to take, the Lord Ordinary thinks that it was incumbent upon the pursuer, as the party to whom the obligation bore to be undertaken, to satisfy himself that it was within the powers which he was entitled to rely upon as being vested in Campbell. He saw upon the face of the document that it was not signed by the defenders, but only by their servant, and that it did not refer to any onerous cause for which it was granted; and he knew that, as far as he, the obligee, was concerned, no such cause of granting existed. The Lord Ordinary thinks that in these circumstances he was not entitled to assume that it was granted in respect of an onerous contract with Campbell Brothers, from whom he had purchased the iron.

"The Lord Ordinary thinks that the general proposition maintained by the defenders is well founded—viz., that they cannot be bound by a gratuitous and fraudulent obligation to deliver iron, granted by their servant, any more than they would be bound by his having actually delivered their iron to a third party, without any consideration. In the one case they seem to be entitled to refuse performance, just as in the other they would be entitled to recover the stolen property, into whosesoever hands it might have passed. The Lord Ordinary thinks that this is a correct view of the law generally applicable to such a case; and it does not appear to him that there is anything to prevent its application in the nature of the document in question, or in the position of Campbell as it is set forth by the pursuer, or, lastly, in the circumstance that the pursuer is himself the direct obligee.

"Reference was made to the cases of Grant *v.* Norway, 10 C. B. 665, 20th February 1851; Hubbersty *v.* Ward, 8 Exch. Cases, 330, 26th January 1853; and Coleman *v.* Riches, 16 C. B. 104, 2d May 1855. "E. F. M."

CLARK and GIFFORD, for the pursuer, argued:—1. This action is laid upon the defenders' obligation, which they are bound to implement. There was, in reality, no contract betwixt the pursuer and defenders, but it is explained in Cond. 7 how the obligation came to be onerously held by the pursuer. Under the old practice, the order would have been endorsed by Campbell Brothers, but since the decision in Bovill *v.* Dixon, 3 Macq. 1, negativing the negotiability of these documents, the practice has been, to get them direct from the maker. Campbell was the person who invariably

granted these documents for the defenders. The Lord Ordinary has erred in assuming the defenders' statement without any admission of it by the pursuer. It is stated by the defenders that Campbell got no price for the iron, but that is no part of the pursuer's statement. It was not necessary that the pursuer should allege a contract betwixt him and the defenders when he had their direct obligation granted *in re mercatoria*. This is a liquid document. No doubt it is not transferable like a bill of exchange, but in a question betwixt the receiver and the granter, there is no distinction betwixt the two. There may be a different presumption of value, but that makes no difference, for the granter is bound to implement it, though gratuitous. It is for the defenders to allege and prove some relevant ground on which they are not bound to implement the obligation. 2. Even although Campbell Brothers got this iron gratuitously, the pursuer has a relevant case. The obligation was granted directly to the pursuer in the usual course of the defenders' trade. The pursuer paid money to Campbell Brothers, and was told that Dixon had the iron which was sold. The pursuer then went to Campbell and found that that was so. If he had gone to any one else he would have been referred to Campbell, who managed the whole business. If Campbell told a falsehood, is that not to bind the defenders who put him there? The cases cited by the Lord Ordinary do not apply. They were cases of shipmasters, who possess only a limited power as agents. But Campbell had the whole charge of the business. He may commit a breach of duty, but with that third parties have no concern. If the iron had been delivered, it could not have been followed and reclaimed by the defenders. A factor with power to sell, but none to pledge, may pledge his principal's property. If he does so for his own benefit, that is a fraud, but yet the owner cannot reclaim it from the pledgee. 1 Bell's Com., 483.

YOUNG and THOMSON, for the defenders, replied —There is here no contract betwixt the pursuer and defenders, or any averment that Campbell had any authority to deliver iron, or grant orders for its delivery, which had not been the subject of a previous contract of sale. It is just because the document founded on has not the privileges of a bill that the pursuer was bound to go a step further than the mere possession of the document. If it is signed by a servant, he must aver authority. A master is not liable for acts of his servant beyond the scope of his employment. Smith's Merc. Law, 7th edition, p. 125. If Campbell delivered iron, or granted an order to a person with whom his employers had no contract, he acted beyond his powers, and the iron, if delivered, could be reclaimed. The action is therefore irrelevant.

The following other authorities were cited:— Kingsford *v.* Merry, 1 H. and N. 503; Ersk., 3, 3, 39; Galloway *v.* Grant, 19 D. 865; Orr and Barber *v.* Union Bank, 1 Macq. 513.

At advising,

Lord CURRIEHILL—I have had great anxiety in dealing with this case. It involves questions of vast importance in commercial law, which fairly arise under the statements of parties in this record, and I think they will require the very serious consideration of the Court. The action, as stated in the summons, is an action for payment of £3500, stated as being the amount of loss and damage sustained by the pursuer by and through the defenders' breach of contract and wrongful failure fully to implement and perform the defenders' contract and obligation for the delivery of iron contained in the defenders' certificate, order, or obligation, dated 16th May 1866. That is an action of damages against the defenders, who exist as a company, although they appear here under the name of an individual, for breach of contract. Now, what we have to do is to examine this record, in order to ascertain what the contract so founded upon consists of. I have endeavoured to analyse the record with the view of determining that question, and I shall state to your Lordships shortly what the result of that analysis has been. The first six articles of the condescendence consist of a statement of who the defenders are, and how they come to appear here in the name of an individual, though they really consist of a number of partners. That has nothing to do with the merits of the action. The first statement upon the merits of the claim is in the seventh article, and it is— [Reads]. There is there set forth a contract of sale, but it is not alleged that the defenders were parties to that contract in any form. They were not one of the contracting parties. It was a contract of sale of iron between the pursuer of the action and Campbell Brothers. Therefore that is not the contract which is libelled upon, and which the defenders are said to have broken, because they are not parties to it. But the article proceeds:—"In implement of this contract," &c.—[Reads]. Now, it is not alleged that the defenders and the pursuer were parties to this contract. The pursuer calls it a contract, but it is not alleged that any contract took place between the pursuer and defenders. He says the parties were not the defenders, but third parties, so that whatever the effect of the document may be, we have not the pursuer and the defenders brought together as contracting parties. But the contract is said to be contained in this obligation, which is the one libelled upon, and referred to in the conclusion of the action, and the breach of which is made the foundation of the claim for damages. That requires us to consider the nature and legal character of this document; and, in the first place, I am very clear as to what it is not. It may be a document *in re mercatoria*, and might not require, in that aspect of it, to be authenticated; but it is not one of the documents recognised in the merchant law. It is not a bill of exchange, or a promissory note, or bill of lading, or even an IOU. All these, except bills of lading, are documents that must relate to cash; and any document of this kind relating to the *ipsa corpora* of moveables or goods is not one of these privileged documents. That was a matter early decided after the law of Scotland came to any degree of maturity. In the years 1713 and 1715, the legal character of such documents had to be very seriously considered by the Court, and it was decided, and the decision has never been doubted since, that such documents do not possess the character or the privileges of bills of exchange. I allude to the two cases of Leslie, 16th December 1713, and Douglas, 18th Feb. 1715, the reports of which are to be found in the Dictionary, p. 1397. Therefore, in any question as to the effect of such documents, they are to be dealt with according to the ordinary principles of law relating to the writings of parties, and how far writings of parties form contracts between the parties cannot be decided by reference to those principles of mercantile law which are applicable to privileged documents. The next remark I make upon this statement in the record is that the pursuer does not state that this document was delivered

to him by the defenders. Had he said nothing about the mode in which he got it, or the party from whom he got it, there might have been a presumption, from his having it in his own hands, that he got it from the granters; but he himself states on the record that the parties from whom he received it were not the defenders, but Campbell Brothers, with whom he had been entering into a different contract of sale of iron to which I have already referred. Therefore, there is no statement that it was delivered by the defenders to him or to any party. There is another defect in the statements on record—that they don't allege that Campbell Brothers, from whom he received it, were authorised by the defenders to deliver it to him. There is no statement to that effect. Upon this record we are left in total ignorance of how Campbell Brothers got hold of this document. But it was only from Campbell Brothers, third parties altogether, that the delivery which the pursuer alleges was made to him. Then the document on the face of it bears to be signed not by the defenders, but for them by a person named John Campbell. In this article at least there is no statement of any authority having been given by the defenders to John Campbell to sign that document. Therefore, so far as the 7th article of the condescendence is concerned, I see nothing to bring the pursuer and the defenders together in the character of parties contracting with each other. But then we come to the next article, and it begins by reciting the terms of the document. Then it goes on—"The acknowledgment or obligation is signed for the defenders and their said firm by John Campbell, who was the manager employed by the defenders to conduct in Glasgow the pig iron department of their business, and he was authorised by the defenders to grant such certificates or obligations." Now this allegation brings us to what is the important question in the present action. A document is founded on, to which the defenders are said to be parties, which document is not signed by themselves, but is signed by a third party for them. Now the vast importance of that question is this—A very large proportion of the business of this country is conducted by traders of all descriptions, authorising factors, agents, servants, and managers, to conduct their business and to sign documents for them; in short, it is managed by procuration, and the signatures of such managers are binding upon their constituents, when granted within the exercise of the functions which are entrusted to them, but they are not binding upon their constituents when they are not granted within their functions, and when they are not granted under express authority. And it comes to be a very difficult question, when the authority is disputed, to settle the boundaries within which the signature of such persons is binding upon their constituents, and when such third party is guilty of fraud. The result often is, that one of two parties, both perfectly innocent, is to suffer by the fraud of a third party; and the question is, which of these two innocent parties is to be the victim? Now this 8th article brings out a very important question of that kind. What is the range of the procuration which is said to have been given by the defenders to John Campbell? He was the manager "employed by the defenders to conduct in Glasgow the pig iron department of their business," and merely being employed by them to conduct the pig iron department of their business in Glasgow does not, in my opinion, necessarily imply that he was authorised to grant documents of this description to persons who had no contract with him in that capacity, or with his constituents, because the pursuer himself is the party in whose name this document is granted, and he well knew whether or not he had any such contract with the defenders. He does not allege that he ever had, and therefore this is a document granted in the name of a party who had had no transaction with Campbell's constituents. Therefore, the mere circumstance of Campbell being the manager of the pig iron department of the defenders could not necessarily be made the ground of a belief on the part of the pursuer that Campbell, under that management, was entitled to grant such acknowledgments to parties who had no contract with the defenders, who had bought no iron from them, and who had no intercourse whatever with them upon the matter. But then it proceeds to say that Campbell was authorised by the pursuer to grant "such certificates and obligations." Now, if this allegation meant this—that there had been a usage on the part of Campbell to grant certificates of this kind to persons who had no transactions with his employers, and that they had uniformly implemented such documents when they were presented to them, I don't say whether that would be relevant or not. But that is not said here. I think there is a vagueness—said to have been a studied vagueness; but I don't care whether it is studied or not, there is a vagueness, and I don't believe it was meant to represent transactions of that kind. In all cases where a party is attempted to be made liable for documents granted by his manager or procurator out of the natural course of the business, on the ground that there has been a usage on the part of the manager to grant such documents, and that the party has homologated that by implementing them, the record must be most specific upon that subject. I think it must be specific, in the first place, that the Court may be quite clear as to what kind of case they are dealing with; and I think it is also indispensable in order that the principal may be able to meet the party at a trial, and to know what the instances were on which the usage is founded. Suppose this case went to trial, how could the defenders meet the pursuer as to the instances upon which he intended to found his plea of such usage? It is quite clear that very distinct specification is essential to a record where liability is attempted to be created upon such grounds. I see that this matter engaged the attention of the Second Division of the Court, in the case of Swinburne, 13th June 1856, 18 D. 1025. That case differed in its history altogether from this; but one of the questions which arose was exactly that with which I am now dealing—namely, how far agents, when they were out of the strict range of their agency, and had put their names on bills on behalf of their constituents, bound their constituents by such documents. Allegations were made that though the documents were not granted within the bounds of the agency, yet it had been the usage for the agents to grant such documents, which were recognised by their constituents. But the Court held that the allegations were not sufficiently specific, and that it would be necessary not only to make the allegations more specific, but also to give instances of cases in which the constituents had recognised such documents, and as that was not done the action was dismissed. Now, I think that the present case should be dealt with exactly in the same manner. I don't say that the pursuer may not state a case which may infer liability; but I think he has failed to

do so in the present record, and therefore, in my opinion, this case should be disposed of by the action being dismissed. That, as I understand it, will not prevent the pursuer from bringing another action with more specific statements if he thinks that the facts of the case warrant him in doing so.

Lord DEAS—There are some questions which have been suggested in the course of the argument in this case which, if it were necessary to decide them, might be attended with very considerable difficulty. I don't think it is necessary in this case to give any opinion as to the validity or invalidity of the document which is here founded upon, supposing that it be an obligation by the defenders Dixon & Co. Nor is it necessary to give any opinion as to whether this document could be carried by indorsation from one party to another. The document is certainly not a bill, nor a promissory-note, nor a bill of lading, nor even an I O U. I had occasion, in a case before the case of Bovill and Dixon, to state the doubts and difficulties which I had in regard to such documents, and these were confirmed to a certain extent by the judgment of the House of Lords in the case of Bovill and Dixon. But I don't think it necessary to enter into any question of that kind, because, assuming all that in favour of the pursuer, there still, to my mind, remains a fatal objection against the relevancy of this action. John Campbell is said to have been the manager of the defender's iron business; he was their salesman. The allegation is, and the averment may mean something broader, that he was the manager. But I don't find it averred in this record that, either as such manager, or in any other capacity, he had any express authority to bind the defenders, Dixon & Co., in any gratuitous obligations; and I don't find any averment on this record that he was in use to bind the defenders, Dixon & Co., in gratuitous obligations, which they acted upon and implemented. The only approach to that is the averment in repeated articles which Lord Curriehill has noticed as to Campbell being in use to grant such obligations. I cannot construe the words "such obligations," to mean that he had been in use to grant gratuitous obligations for the defenders, Dixon & Co., which they honoured and implemented. If that had been the meaning of it, he should have said it. It is not said distinctly, and I don't think it was meant to be said by the pursuer; and I can construe "such obligations" in no other way than obligations of this kind—this sort of document, but not as meaning this sort of document, to the effect of binding the defenders gratuitously, if it is not averred that he had any express authority of that kind, or any implied authority of that kind. The next thing to attend to is that there is no averment in this record of any onerous transactions of any kind between the pursuer and the defenders, Dixon & Co.; and, moreover, there is no averment of any onerous transaction of any kind between the defenders, Dixon & Co., and Campbell Brothers. That seems to me to be fatal in itself. The want of averment that he had power or authority, general or special, to grant obligations, and the want of an averment that this was onerous either as between the defenders and the pursuer, or as between the pursuer and Campbell Brothers, is to my mind entirely fatal to the action. It is impossible to hold that when a man is appointing a salesman, or even a general manager of a particular department of business, without express authority, he gives him the power to give to any of his friends obligatory writings, binding his constituent, on which he may go and raise money, and for which the constituent gets no consideration whatever. To hold that he is entitled to give any of his friends a bill of his employers, or an I O U of his employers, or a document which can be thrown into the market and money raised upon it—to give that gratuitously for the accommodation of his private friends, would be an extravagant view for which I know neither principle nor authority. But that is what the case comes to. No doubt there are further averments, put somewhat more generally, that the pursuer upon the same day indorsed the document and sent it to the defenders, desiring them to place it to his credit in their stock account, and that they did so. And that is followed by averments that the pursuer got delivery of various quantities of iron from the defenders, and that they have homologated the obligation. That matter about delivery and homologation is averred particularly in Art. 11 of the record. In the answer to that article it is fully explained by the defenders that all this was nothing else than the doing of John Campbell, and to that explanation there is no answer made, and no denial whatever. And accordingly it is not upon that that the pursuer now proposes to take an issue. The issue which is proposed is entirely upon the footing that the whole question between the parties is the authority of John Campbell to grant that document, and does not proceed on the footing of homologation and actings. As I read the explanation it is not attempted to be disputed. That being so, what takes place about these deliveries? That only, to my mind, makes the case stronger against the relevancy; because if it is not averred that John Campbell had authority to grant this document gratuitously, he could not have authority to deliver the defenders' iron; and if he delivered the defenders' iron gratuitously to anybody whatever, that would be nothing else in the eye of the law than theft of the iron. Observations were made to the effect that there was a theft regarding the document. That may be a different matter; but certainly the act of taking the defenders' iron without their authority was theft beyond all question, and that just illustrates the extravagance of the supposition that he could grant the document. If he could grant the document, he could deliver the iron; but if it be theft to deliver the iron without authority, he had not power to grant the document without authority. I don't think it necessary to say any more about this case. If I am not right in these views there are various important questions about the effect of the document which might arise; but these observations are quite sufficient to show that the pursuer cannot succeed in this action. I agree that we should only dismiss the action; but I am very clearly of opinion that there is nothing relevant here.

Lord ARDMILLAN—I am very clearly of the same opinion. I take everything that is alleged by the pursuer as correct in dealing with this matter of relevancy; but I can take nothing beyond what his averments are to support his case. Now, the document is unilateral; it does not bear to be for value; it does not in terms relate to any contract or transaction; it was not delivered to the pursuer by the defenders, or even by John Campbell; it reaches the pursuer through other hands, and it is not even by the pursuer alleged to have been delivered to Campbell Brothers. The pursuer does not set forth any contract whatever between the defenders and himself, and his statements exclude

the idea of such a contract, and he does not allege any contract between the defenders and Campbell Brothers. He does not even allege that there was a transaction of sale between the defenders and Campbell Brothers, so that he leaves this unilateral obligation to stand upon the averments that he received it from another party, he having no contract with the defenders, and the defenders no contact with the party from whom he says he received it. Now, I think that before we proceed to consider the question of the authority of Campbell to grant this document, there are very serious defects in the pursuer's case in regard to the matter of averment of contract, because I cannot see that the pursuer has averred enough here to make even his meaning plain as to how he came into possession of this document. But that is not all. The document bears to be signed by John Campbell, and the pursuer alleges a certain amount of authority. But looking to the nature of his averments, he must either allege that this document was signed with reference to a contract, and, as he has alleged no contract — that averment he cannot make—he must allege that this document, being granted without reference to a contract, was granted by a person who had power to grant it. Certainly, that would be a very striking averment, but he has not made it. He has not alleged that he had power to grant it gratuitously. I agree entirely with Lord Curriehill that the words "such certificates and obligations" cannot be held as meaning such a certificate or obligation as this where he does not allege a contract. I think it can only mean certificates or obligations in these terms, and where they might have been granted in the ordinary course of business. It would be a most extraordinary averment that he was in the habit of granting certificates or obligations of a gratuitous character, because if he was not entitled to make a present of his employers' iron gratuitously to his friends, he was as little entitled to come under an obligation to do so. If the giving of the iron would have been theft—and I agree with Lord Deas as to that—if he had applied to his own purposes his masters' iron it would have been theft, and if so, then to come under an obligation to commit a theft can be no more lawful than the commission of the theft; and so, if this be a gratuitous document, obliging him to deliver iron, it cannot be one whit more favourable than the actual delivery of the iron gratuitously would have been; and therefore I think the pursuer here, both upon the matter of contract and upon the matter of authority, has fallen short of what the law requires in laying the foundation of a case such as is now presented. At the same time, it may be that he may have a case at the back of all this; and if so, he may raise another action, and I think it is quite right that we should not assoilzie the defenders, but that we should dismiss this action, in respect that the averments on record are not explicit enough and definite enough to support the case as laid.

Lord President—This is an action for breach of contract, and the contract libelled and alleged to be broken is contained in the document dated 16th May 1866. Now, that so-called contract is an unilateral obligation, containing no expression of any consideration in respect of which it was granted; and when the pursuer proposes to recover damages in respect of the breach of that contract, the first question that I put to myself is this—What is his legal character as giving him the title to sue upon that contract? And the only answer which he gives to me on this record is that he is the obligee. But he will not tell me what kind of an obligation it is that has given him this right; he will not tell me what character of obligee is his character and title to sue—whether he is a vendee, or a pledgee, or a depositor—for these, I think, are almost, if not altogether, the only characters in which a person can sue upon an obligation to deliver moveables. Now, that is a very startling thing at first sight; but I think it becomes still more serious as regards the position of the pursuer when you see what he discloses as well as when you see what he declines to disclose. He has declined to tell me whether he is a vendee, or a pledgee, or a depositor, or what he is under this unilateral obligation; but he tells me this, that he did not get it from the obligant. Now it is very clear law that an unilateral obligation requires to be delivered in order to be binding. Was this unilateral obligation ever delivered to anybody? That is not said. Perhaps if nothing had been said about it on the record there might have been a presumption more or less valuable to the pursuer, that his possession of it, as he is the obligee in the document, was evidence of its being delivered to him. But then that presumption, whatever the worth of it might be, is entirely removed by his alleging on the record that it was given to him by Campbell Brothers; and he has not said what was the connection between Campbell Brothers and Dixon, or in what way they got it from Dixon. He has done nothing to negative the supposition that they may have found it, or stolen it, or got it as a gift. In that state of the record, I confess, the conclusion to which I am forced is this, that if this document had been signed by William Dixon the action would have been irrelevant; and abstracting the question how far there is a good averment of authority of John Campbell to bind Dixon, the whole averments upon which the action depends are to be found in the seventh article of the condescendence. But then, looking to the strange character of the document, and to the manner in which the pursuer thinks fit to introduce it to notice in this seventh article of the condescendence, the question about Campbell's authority becomes only too serious, because when he goes on to say, in the subsequent articles of his condescendence, that Campbell had authority to grant such documents, that he was the salesman of Dixon's iron, and that he was in the constant habit of granting such documents, the meaning of that plainly is, that he, as salesman, was in the habit of granting obligations for the delivery of the iron sold, and nothing else; whereas, such an authority to grant obligations for delivery of the iron sold would never justify the granting of such an obligation, except where there was a sale to the party to whom the delivery was to be made; and therefore the averment of authority as regards Campbell, I think, becomes, from its relation to the averments in the seventh article of the condescendence, absolutely useless. 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 be 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 to them, and that they 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 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. They gave me this; where they got it, or how they got it, or how Dixon came to grant it, I decline to give any explanation of. That is the position in which the pursuer stands, and it appears to me that that is not a good ground of action. I therefore concur with your Lordships in holding that this action must be dismissed; but for reasons which I have suggested I can quite understand that an action may yet be laid upon this same obligation, and may be so averred as to be perfectly relevant and sufficient.

Action dismissed, with expenses.

Agent for Pursuer—James Webster, S.S.C.

Agents for Defenders — Melville & Lindesay, W.S.

Friday March 15.

SECOND DIVISION.

HENDERSON *v.* PAULS.

Arbitration — Remuneration of Arbiter — Implied Contract—Moral Obligation. (1) *Held* that in the absence of stipulation an arbiter has no claim to remuneration; but (2) circumstances in which *held* that the parties to a submission had impliedly bound themselves to remunerate the arbiter equally; (3) *Dictum* of Lord Medwyn, in *Fraser*, 16 S. 1057, repudiated, and *held* that one of two parties implementing a *moral* obligation has no title to enforce relief from the other party *at law.*

This case, which depends betwixt the same parties as that of Pauls *v.* Henderson *(ante*, p. 179 and 246), came up to-day upon a question as to payment of the arbiter's fee, amounting to £31, 10s. That had been paid by the pursuer, and he now sought to recover the one-half from the defenders.

The pursuer made the following averment:—"In addition the said David Henderson has paid to the referee the very reasonable fee of £31, 10s., for relief and repayment of which the said Andrew Walter Paul, and Thomson Paul, are liable to him. This he did after proposing to the said Thomson Paul, for himself, and as acting for his brother, to meet and adjust the amount, but having received no reply, he intimated on 3d June 1864 that he considered the said sum of £31, 10s. a fair and reasonable fee for the referee, and would pay it to him in the course of the following day, and claim repayment thereof from the defenders; but there was no reply given to the intimation, nor objection to his doing so stated by the defenders. The amount of the sums due the pursuer as at date of the summons, amounts, including the amount of the arbiter's fee, as per state produced herewith, to £118, 10s. 7¼d., and the defenders are liable in further interest on £115, 3s. 3d. of that sum, being principal, from the date hereof till payment. The pursuer has often desired and required the defenders to make payment of the sums found due by the decreet-arbitral, and of the fee paid to the arbiter, but they have refused, or at least delayed, so to do. Denied that any such notice as stated in the defenders' answer to this article was made to the pursuer or his agents."

To which the following answer was made by the defenders:—"Denied that the defenders are due the sums here stated or any of them. With regard to the alleged fee of £31, 10s. said to be paid to the referee, the statements here made are denied, and it is explained, that notice was made to the pursuer's by the defenders' agent, that the alleged decreet-arbitral was objected to, and was to be brought under reduction. *Quoad ultra* denied."

The Lord Ordinary (Ormidale) found the defenders liable, and added the following note to his interlocutor:—

"The Lord Ordinary refers to his note subjoined to the interlocutor in the reduction case as fully explaining the grounds on which he proceeded in assoilzieing the pursuer from that action.

"The only matter involved in the present action which was not also involved in the reduction case, and disposed of by the interlocutor therein, is the fee of thirty guineas paid by the pursuer to Mr Maitland, the arbiter, and one-half of which, as having been so paid, is now sought to be recovered from the defenders. The defenders nowhere say that the fee was extravagant or unreasonable, and the proceedings in the submission amply instruct that it was not so. It is apparent, indeed, that the defenders have not stated, and did not intend to state, any objection or defence to the claim in question, or indeed to any of the sums concluded for, except in so far as they might be established in their action of reduction. In other words, it is plain, the Lord Ordinary thinks, that the defenders relied solely on the reduction, and neither stated nor intended to state any defence apart from or independent of the reduction. Accordingly, after setting out the particulars of their defences, they, in the 11th or final article of their statement, say—'In these circumstances, the defenders have been advised to raise, and are in the course of raising, an action of reduction of the pretended decreet-arbitral, on the several grounds above indicated;' and the defenders' pleas in law are stated on the same footing. They contain no indication