mean to say it is not proved that into the complainers' bank account the proceeds of the loan went. They went there to fill up a vacuum which Low himself had made. I suppose part of the defalcation of £5000 was relative to this account. The deficit would first have been so much more if this sum had not been paid to account. But the point is — and as a matter of my own observation I express the opinion—that if there is no liability upon the contract under which the loan was made, the liability upon the principal does not lie, because the benefit of the money has been received.

With reference to the case of *Paul*, I have already in the course of the argument expressed the opinion which I have upon it. There the party was acting within the authority. Whether that was right or wrong I am not concerned to inquire. It was the Court who held that he was acting within his authority in contracting a debt of £7000, and that therefore Paul as principal was liable to the creditor in that debt. For the reasons which I have stated, I am of opinion that the judgment ought to be reversed and that the suspension ought to be sustained.

Lord Gifford — I am of the same opinion. This is a charge by the respondents on a bill for £150 drawn *ex facie* by the respondents and accepted *p. pro.* by Low for the complainers. The question is between the drawers and acceptors themselves, and in the respondents' examination we find that it was simply a loan. Now, this raises the question whether Low had power to borrow as an agent. If he had not, then the respondents had no right to lend.

Now, on the whole matter, I think that in the position which Low held, the lender had no right to assume that Low had that power, and that Low could not bind his principals. It would be a startling thing if a general agent could bind without express powers given him, and the question would be, what is to be the limit? The question is one of mandate, and really comes to this. Has a general agent of a mercantile firm conducting the business of the firm power to bind his principal for borrowed money? I do not think so. It is quite a different question from that of a partner. The Lord Ordinary says—"It is settled that a partner of a mercantile firm may borrow money on the credit of the firm." The principle is "that the sudden exigencies of commerce render it absolutely necessary that such a power should exist in the members of a trading partnership (Lindley 216, 1st ed.). But a partner is the agent for the firm, and when an agent is entrusted with the performance of the duties of a partner, the Lord Ordinary is inclined to think that the necessity is the same, and therefore that the powers are implied "— but there are no authorities cited, and in the absence of them I cannot agree with the Lord Ordinary. As to the second ground of judgment, this would be intelligible if it could be shown that the complainers were *lucrati* in the sense of keeping money to which they had no right; but it only means that Low in applying the sum to the complainers' account in the bank was reducing a debt due to them, and therefore this is certainly not money got from the respondents and applied for the complainers' behoof in the sense of the Lord Ordinary's note. I think then that both grounds fail.

Lord Ormidale — I must own that at first I thought this was a very hard case for the respondent Mr Stewart, because he had advanced £150 as he believed to meet the complainers' exigencies in Glasgow, and I thought that he had done so under circumstances which entitled him to some consideration at our hands, but on examining his evidence my sympathy with him has been displaced. The transaction about which the present action is raised took place on 26th December, and I find that the voucher which was given in return was antedated 15th November preceding—a very suspicious circumstance in itself. This however was not the first transaction between Mr Stewart and Low, for according to his own statement he had a transaction of the same nature on the 4th December, when he advanced Low £200 in return for a cheque *p. pro.* of complainers. The next was on the 8th December for £300, and the next on the 13th December for £150, when he was given in return a cheque drawn in favour of Sinclair, Moorhead, & Company, and endorsed *p. pro.* of the firm. Now, surely these are peculiar transactions to have with a house with a large business; and further, we find from his evidence that he found on inquiry that the house was of high standing, but still he went on making loans in this way to Low. Then comes the particular transaction in question. The respondent says he did not know the object of antedating the bill. There was some object, and not a very good one, and in any case he should have paused till he had asked for the meaning of what ought to have struck him as suspicious; it would have been an easy matter to have telegraphed to Glasgow for satisfactory information. Here there are circumstances which at the very outset deprive the respondents of my sympathy, and I rather think go to the very root of the claim, to a large extent against the complainers; it is impossible to believe that they could have thought he had a constructive authority to borrow.

I need not go into the other views expressed by your Lordships, and generally I concur.

The Court recalled the Lord Ordinary's interlocutor and suspended the charge complained of.

Counsel for Complainers—Guthrie Smith—Shaw. Agents — Rhind, Lindsay, & Wallace, W.S.

Counsel for Respondents—Keir—J. A. Reid. Agents—Finlay & Wilson, S.S.C.

Friday, June 4.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MILLER AND OTHERS *v.* M'LAREN AND OTHERS.

Friendly Society—Jurisdiction of Courts of Law where all Courts Excluded by Statute—Trades Union Act 1871 (34 *and* 35 *Vict. cap.* 31), *sec.* 4 *—Interdict.*

Section 4 of the Trades Union Act 1871 is in these terms—"Nothing in this Act shall enable any court to entertain any legal pro-

ceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely, . . . any agreement for the application of the funds of a trade union."

Held that the provisions of the above section did not prohibit an action of interdict brought by a trade union to prevent a branch of the society from uplifting and applying certain funds in violation of its rules.

Observations per Lords Ormidale and Young on *M'Kernan's* case, Feb. 6, 1874, 1 R. 453.

This was an action of interdict raised at the instance of Thomas Miller and others, the trustees and other office-bearers of the Amalgamated Society of Railway Servants for Scotland, which was a trade union registered under the Trades Union Act 1871, and the defenders John M'Laren and others were the trustees and office-bearers of the Motherwell branch of the society, and were entrusted with funds collected in that branch, to be applied by them according to the rules of the society.

The object of the interdict was to interdict the latter "from uplifting from the Bank of Scotland all or any sums of money deposited in the Bank of Scotland at Motherwell in name of the trustees of said branch, and in particular two sums of £70 and £12 respectively deposited in said bank. Further, to interdict them from paying any portion of said funds, or any part of the general funds belonging to, or in the custody, or under the control of the said branch or the office-bearers thereof, to any person or persons except in implement of the benefits provided to members of said branch by the rules of said society."

The grounds on which the pursuers based their prayer for interdict were as follows:—"(Cond. 7) By rule 19 it is provided that 'The branch treasurer shall, along with the three-weekly statement referred to in rule 18, remit to the general treasurer one-half of collections to union fund. The other half, or the balance thereof remaining, shall be lodged in bank in name of the branch trustees, so as to be available for any immediate local demand that may arise.' At the commencement of this action the said branch treasurer should have remitted under that rule a certain portion of the funds then in his hands, and since then he has received other sums which ought also to have been remitted, but which he has failed to do. (Cond. 10) The said radical defenders have formed a scheme for destroying the said Motherwell branch, and they intend to take possession of said funds and divide them amongst the members of the branch, or amongst each other, and not in accordance with said rules. (Cond. 11) In pursuance of said scheme, a meeting of the said branch was convened by H. T. Kennedy, secretary to the Motherwell branch of the society, to take steps to drop its connection with the said Amalgamated Society of Railway Servants for Scotland. Said meeting was held on 25th September 1879 in the Royal Hotel Hall, Motherwell, and a resolution was then come to in the following terms, or other terms of similar import:—'That this branch drop all connection with the Amalgamated Society of Railway Servants for Scotland, and that George Foord, clerk, 31 Caledonian Blocks, Motherwell, and James Muirhead, engine-driver there, be appointed to uplift the money from the bank, and retain it in their hands until the secretary should prepare a scheme of division of the amount among the members, and to be thereafter divided.'" The defenders, while admitting that the meeting was convened on the date stated, averred that it was called merely to advise the branch to drop connection with the Amalgamated Society and to uplift the funds for the purpose of being formed anew under the Friendly Society Acts; and they pleaded that (1) the action was excluded by the Trades Union Act of 1871, supplemented by the Trades Union Act of 1876, and that the pursuers had no *locus standi in judicio*. (2) The pursuers had no proper authority to bring the action, as all the standing committee were not given in the instance and did not concur.

The Sheriff-Substitute (BIRNIE) allowed the defenders a proof in support of their plea that the action was incompetent and excluded by statute. The Sheriff (CLARK) however recalled this judgment, adding the following note:—

"*Note.*— . . . The main, indeed the only, question to be considered is the plea that the action is excluded by the Trade Union Act of 1871, as supplemented by the Trade Union Act of 1876; and as to this I must admit that I have had very great difficulty, and have only arrived at the result to which effect is given in the interlocutor after repeated and anxious consideration. . . . .

"Associations of masters or of workmen, commonly called trades unions, were for long denied the advantages of this process—*i.e.* registration giving the benefits of incorporation—apparently on the ground that they had often been abused for the purpose of restraining trade, and that if they were to obtain the benefits of registration these abuses would be greatly intensified. At length by the Act of 1871 the Legislature thought fit to concede the benefits of registration to trades unions, and also to relieve them from certain disabilities and penal consequences under which they had hitherto lain. It did not, however, place trades unions on an equal footing with other associations. It still left them under certain disabilities. Its provisions are of a very remarkable kind, insomuch that in the case of *M'Kernan* v. *The United Operative Masons Association*, Feb. 6, 1874, 1 R. 453, they called forth the remark of Lord Benholme, 'that the statute presents some things which on ordinary principles of legislation seem to be inconsistent.' It conceded certain rights, but it did not concede the full power of enforcing such rights by the ordinary operation of the courts. It is a sound principle of jurisprudence that where a right exists, there always co-exists an adequate and effectual means by legal process of enforcing and vindicating such right. It is plain, therefore, that if the Legislature had been silent on this subject, the mere fact that a registered trade union was declared entitled to become a party to an agreement or trust, would have entitled it to enforce such agreement or trust in the ordinary way—that is to say, by direct petitory action. Here, however, the Legislature has interfered, and by sec. 4 it has provided that in certain cases therein set forth this principle of ordinary jurisprudence shall not apply. Now, in interpreting a provision of this kind, while it is not for a moment to be supposed that the Legislature had not full power to alter the common law to any extent it might deem proper, no further departure from the rules of ordinary jurisprudence is to be assumed than

the words of the Act plainly require. That is to say, a registered trade union must be held to have all the privileges of enforcing its rights which the common law gives, except where these are expressly taken away. Mere implication or analogy cannot be admitted in a case of this kind. Now, what are the prohibitory words of the statute? They are contained in section 4. . . . . .

"Now, the first question to be considered is, whether the ground of the present action can be described as one of the agreements struck at by the terms of this section? I entertain very great doubts of this. Indeed, I do not think that it could be so described except by a very remote analogy, and a plain straining of the statutory language. The ground of the action is simply the undertaking which all members of the society came under to obey its rules. It is not an agreement to provide benefits to members, as was the case in *M'Kernan's* action; it is not an agreement to furnish contributions to a workman to discharge a fine, or to pay a subscription, or as to how goods shall be sold, or workmen shall be employed; it is not an agreement between one trade union and another. If, therefore, the present action were a direct petitory one to pay over the funds in the defenders' hands to the trade union, I have great doubt if it could be thrown out of Court on the ground that it proceeded on an agreement struck at by the provisions of section 4. But it is unnecessary in dealing with the present case to consider this further. The present action can in no sense be described as a legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any agreement whatever. It is simply an action for interdict. The defenders are in possession of funds belonging to the trade union which can only be applied as provided for by its rules. The defenders are seeking to apply these funds in direct violation of the rules. The pursuers ask, not that the defenders be decerned to apply such funds in accordance with the rules, or be subjected in damages for acting otherwise, but simply for interdict—that is, to preserve the *status quo*. What the effect of that interdict may be in its remote consequences cannot as yet be known. It is possible the defenders may find it for their interest to obey the rules which they themselves adopted. It is possible they may be induced to end the matter by arbitration. It is possible further legal proceedings may be raised, and if this takes place it will be time enough to determine whether such proceedings are or are not barred by the statute. In the meantime all that is desired is to preserve the *status quo*, and I am altogether unable to see how this can be said to be a legal proceeding with the object of directly enforcing or recovering damages for breach of an agreement, and therefore I am unable to see how it can be said to be prohibited by the provisions of section 4.

"The Sheriff-Substitute has allowed a proof before answer of whether the purposes of the present association are in restraint of trade. In the view I take, and for the reasons I am about to give, this appears to me altogether unnecessary. The pursuers' society is registered both under the Act of 1871 and that of 1876. Now, the Act of 1871 appears to have been intended solely for trades unions; and it so defines a trade union that it is only such associations of masters and workmen as contain the element of restraint of trade that fall under its definition. It would therefore seem that an association without this element could not have been registered under the Act of 1871 at all. If they were a mere benefit society they were free to register under the Friendly Societies Acts, or they might have taken their chance as an ordinary unincorporated association. By electing to register themselves as a trade union under the Act of 1871 they seem necessarily to have held themselves out as a combination one of whose purposes was in restraint of trade. But the Amending Act of 1876 eliminated this element from the definition, and declared that societies of workmen and masters might register under the Act of 1871 whether they contained the element of restraint of trade or not. Now, the pursuers' association is registered under this last Act also, and whether, therefore, its purposes are or are not in restraint of trade, it has made itself a trade union under the Act of 1871, so that while entitled to all the privileges of that Act, it has also subjected itself to all its inconveniences, whatever these may be. The pursuers can no longer therefore divest themselves of the character so impressed upon their association, and claim the rights of an association existing only by common law, even if such would better their position. From this, therefore, it seems to follow that it is quite unnecessary to inquire whether the purposes of the present association are or are not in restraint of trade. In either case it by registration has made itself the creature of the statute and subject to all the provisions contained therein."

Argued for the pursuers—(1) A society like this ceases to be a common law body as soon as it takes the benefits of the Trades Union Act of 1871, and the 4th section of that Act bars it from coming into Court with an action of this kind.—*M'Kernan* v. *United Operative Masons Association of Scotland*, Feb. 6, 1874, 1 R. 453; *Shanks* v. *United Operative Masons Association of Scotland*, March 11, 1874, 1 R. 823. (2) The requisite standing committee of ten persons are not in Court.

At advising—

Lord Ormidale—This case is one of some complexity, but after examining the record and giving special attention to the arguments it appears to me that it may be easily decided.

The action is one of interdict alone, and contains no declaratory nor petitory conclusions; its object is simply to preserve the *status quo* and to prevent funds being diverted from their proper uses.

It is raised at the instance of the trustees and standing committee of the Amalgamated Society of Railway Servants for Scotland, and they are all here in Court except the tenth, who was never appointed. The conclusions are as I have stated them.

The grounds on which the complainers base their prayer for interdict are these—That the defenders having formed a scheme to drop all connection with the Amalgamated Society, to destroy the Motherwell branch, and to uplift its funds with a view to its being formed under the Friendly Societies Act, had held a meeting on the 25th September 1879 for the purpose of arranging these matters, and that in pursuance of this scheme, and at the beginning of the action, they had failed to remit to the branch treasurer certain funds which under rule 19 ought to have been so remitted.

The respondents, on the other hand, while ad-

mitting that the meeting was convened on the date stated, and while denying the complainers' right to interfere in what was done at the meeting, aver that it was agreed merely to advise the branch to drop connection with the Amalgamated Society, and to uplift the funds for the above purpose, and that such a meeting could at best not bind absent members.

This, I take it, is a sufficient admission on the respondents' part to entitle the complainers to interdict to some extent—whether to the full extent is another matter. Such, then, is the nature of the action and the interdict applied for. The Sheriff-Substitute after the record had been made up allowed a proof in support of the plea of the defenders that the action was incompetent and excluded by statute. I do not understand what he meant by that, for he does not say that it was to prove certain facts of incompetency, and indeed it does not appear to me to be a very competent proceeding, although at the same time in a somewhat similar action in England a proof was allowed and taken. The Sheriff-Principal, however, who recalled the interlocutor, came, I think, to a substantially right result. His interlocutor is somewhat detailed, and in his note he gives full expression to the grounds of his interlocutor. It too is perhaps unnecessarily long, and I think it would have been enough to find that the present action being one of interdict did not fall within the category of legal proceedings instituted with the object of "directly enforcing or recovering damages for the breach of any of the agreements enumerated under sec. 4 of the Act 34 and 35 Vict. cap. 31," and was not therefore an action which the Court had no power to entertain. His findings, however, are sound, and further, he says that what justifies his interlocutor is the fact that the present action can in no sense be described as a legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any agreement whatever. It is simply an action for interdict. The defenders are in possession of funds belonging to the trade union which can only be applied as provided for by its rules. The defenders are seeking to apply these funds in direct violation of the rules. The pursuers ask, not that the defenders be decerned to apply such funds in accordance with the rules or be subjected in damages for acting otherwise, but simply for interdict, *i.e.*, to preserve the *status quo.*

That is the essence of the case. As to the question whether under strict construction of the words in the section this Court could not entertain an action in reference to agreements where damages are concluded for, but must throw it out, I am glad to say we are not called on to give any decision, because the present action is not in any sense one to enforce damages directly. Whatever may have been our view—and during the discussion observations have been made by us to the effect that we thought such actions are not necessarily excluded, but only that no aid was to be taken from the statute to make them possible if in themselves they were already incompetent at common law—I should have been loth to pay anything but deference to the decision arrived at in *M'Kernan's* case, for while I cannot say that it is conclusive to my mind that such actions must be thrown out by the Court, the Judges were unanimous on this point, and without going further into the merits of the case I can only say that as long as I find an interlocutor of this Court uninterrupted I shall be ruled by it till it is set aside. But, however, I repeat, the judgment in *M'Kernan's* case is not applicable, as we are simply dealing with an action of interdict to preserve the *status quo.* *M'Kernan's* case was a direct petitory action for £50.

Now, the only other material question is the objection to instance—that while it was necessary that the standing committee of the Amalgamated Society should number ten, nine only were pursuers. It appears to me that looking to the facts that the instance comprises a chairman, a vice-chairman, a general secretary, a general treasurer, and nine out of the standing committee, the objection cannot stand, especially when the action is merely one to keep the *status quo* and prevent uplifting of the funds. The only other remaining question is as to the prayer of the interdict. It was said by the defenders that the prayer was too wide, that it was vague, general, and comprehensive, to a degree hardly to be sustained, because the consequences might be serious, and though the Sheriff-Principal's judgment is good on other grounds, I think we may narrow this part of it, and with such a restriction I should hope sanguinely that the whole matter in dispute may be arranged.

Lord Gifford—Substantially I concur with your Lordship, and in a few words will state the grounds on which I have arrived at my decision.

This is not an action to enforce any agreement under the 4th section of the Act 34 and 35 Vict. cap. 31, and it may be described as an action raised by certain members of a society to prevent the abuse of funds vested in them as trustees. The defenders are trustees of the Motherwell branch of the Amalgamated Society. It is said that as such they possess certain funds which they propose to uplift and apply to purposes not authorised by the society. Surely this is a good ground of action, and should be granted just as against a private trustee who acted in the same way. This is the simple view I take, and surely none of the statutes create any incompetency to interfere. It would be startling if it were so, and would come to this, that trustees of any trades union who had funds might misappropriate them without being called to account.

This is a total misconception of the intention of the statute, and I have no difficulty in agreeing that it is not a case struck at by the statute.

Lord Young—I am of the same opinion, and I agree that the terms of the interlocutor ought to be limited as proposed by your Lordships, and indeed the Sheriff-Principal has granted the interdict as craved in no wider terms, for in the note to his interlocutor he says—"It is possible the defenders may find it for their interest to obey the rules which they themselves adopted. It is possible they may be induced to end the matter by arbitration. It is possible further legal proceedings may be raised, and if this takes place it will be time enough to determine whether such proceedings are or are not barred by the statute. In the meantime all that is desired is to preserve the *status quo.*" This latter your Lordships will do for them, and for myself I should like to say—what is really in accordance with the observations of your Lordships—that I think the parties would show great wisdom, now that the split appears inevitable, if they were amicably to settle the

whole matter before the funds are completely exhausted in litigation.

One other observation I have to make, which is, that we are not here concerned with *M'Kernan's* case, which may have been, for all that we have here, well or ill decided. Here the question is not one about directly enforcing any agreement, or awarding damages for breach of it, but simply one of interdict. But as the case is before us, I must say I could only concur, as at present advised, with the observations of some of the Judges on the footing that at common law and irrespective of statute an action in the Court was not maintainable. There may or may not have been good grounds for action in that case, but if it was a good action on good grounds at common law, there was no occasion to go to the statute as enabling the Court to entertain the action, and I cannot read these observations without its crossing my mind that the learned Judges had not seen that all statutes are framed with tacit reference to the rules of common law.

Now, I concede that with reference to most, if not all, of the cases to which section 4 applies, the Court would not entertain action—*e.g.*, any agreement to furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union—which is only an euphemistic way of paying money to persons on strike in obedience to a trades union. This Court at common law could not enforce such an agreement. Again, any agreement to discharge any fine imposed upon any person by sentence of a court of justice—here again we have a case where common law, quite irrespective of statute, would not entertain action. The cases are not numerous at most, but the statute says, having regard to the nature of the agreement, if your view of the common law does not let you enforce it, there is no authority hereby given to entertain action. Therefore I could only assent to the decision in *M'Kernan's* case on the assumption that at common law, and irrespective — *i.e.*, without the assistance — of statute, action was not competent; and indeed this was the view on which the Lord Ordinary founded, and this and some other considerations have afforded good grounds for the Court refusing to entertain action unless the Act of Parliament required it. These are all the remarks, probably superfluous, which I think it necessary to make in expressing my concurrence with your Lordships.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor:—

"Find that it sufficiently appears from the admissions of the respondents themselves that they propose illegally interfering with and appropriating the funds in question: Therefore sustain the appeal, recal the judgment of the Sheriff complained against, and interdict the respondent from uplifting any part of the said funds till the rights of the parties are ascertained: Find neither party entitled to expenses either in this Court or the Inferior Court, and decern."

Counsel for Appellants — Scott. Agent — Alexander Morison, S.S.C.

Counsel for Respondents—Brand—Solicitor-General (Balfour). Agent—Adam Shiell, S.S.C.

Friday, June 4.

FIRST DIVISION.

[Exchequer Cause—Lord Curriehill.

SPECIAL CASE—LORD ADVOCATE *v.* CONSTABLE'S TRUSTEES.

Revenue—Succession-Duty Act 1853 (16 *and* 17 *Vict. c.* 51), *sec.* 2 *and sec.* 12—*Succession—Predecessor—Successor.*

C. became entitled under a settlement made by a lady, who died in 1848, to the fee of a certain sum upon the death of her parents, who were constituted liferenters under the same settlement; during the lifetime of the testatrix the sum was invested in a bond and disposition in security in which C.'s father was debtor. After the death of the testatrix, C. in 1852 discharged her right to the said bond and disposition in security in consideration of another bond granted by her father and mother in her favour; her parents died in 1863 and 1868 respectively. Succession-duty was claimed on the sum due to C. *Held* that this was a succession under the Succession-Duty Act of 1853, that C. was the "successor" and the testatrix the "predecessor" in the meaning of the Act, and claim therefore (*rev.* Lord Curriehill) *sustained.*

Opinion (*per* Lord Shand) that duty was exigible under the 12th section of the Act if it could be held that the 2d section did not apply.

By disposition and settlement dated 22d October 1838, and subsequent codicil, two sisters, Miss Barbara and Miss Christian Constable, conveyed their whole joint estate to the survivor of them in liferent, and after her death to Mr James Nicoll and his spouse (their sister) and the survivor of them in liferent, and to their children *nominatim* in fee. By the codicil it was provided that Mr and Mrs Nicoll should assume the name of "Constable." Mr and Mrs Nicoll had two sons and a daughter Miss Christian Constable Nicoll Constable, in connection with whose succession this case arose.

Miss Barbara Constable died on 3d October 1846, her sister then succeeding to the liferent of their joint estate. In 1846 Mr Nicoll borrowed £10,000 out of that joint estate from Miss Christian Constable on bond and disposition in security, £5000 to be repaid to her in liferent, for her liferent use allenarly, and £5000 to her and her heirs and assignees whomsoever, whom failing or at her death to the said three children of Mr Nicoll, equally amongst them, their heirs and assignees in fee, but under the real and preferable burden always of the liferent of their father and mother, and the survivor of them. By dispositions and assignations dated in 1847 and 1848 Miss Christian Constable acquired right, to the extent of £5000, to a bond and disposition in security, and instrument of sasine following thereon, by which Mr Nicoll had in 1846 became debtor to Euphemia Whitson for £5500. Miss Christian Constable died on 15th September 1848, and her right to the extent of £5000 in the