of the kind raised by this record—viz., whether the valuation ascribed to certain lands *nominatim*, includes the teinds of a portion of the existing property known under that name, to which the right is not shown by the titles to have belonged in exclusive property to the heritor. The portion of land, the teinds of which are in question came into the exclusive possession and ownership of the heritor only at the division of the commonty in September 1774. Prior to that date this portion of the lands did not form a part of the estate of Colliston and Stenton; except in so far as it may be held to have been embraced within the titles as a portion of the undivided common to which the proprietor had right. To establish the allegation that the teinds of this part of his present estate in this situation are valued, the heritor requires to make out two propositions—1st, That, in 1630 when the valuation was led before the sub-commissioners, there was attached to the lands of Colliston and Stenton a right of property in the undivided commonty; and 2d, that the valuation in question did, in fact, apply to and include this share of the undivided common. On both of those points it appears to me that the case of the heritor rests on no satisfactory ground, but is based on mere inference, on which it would be unsafe for the Court to proceed.

On the first question, it is contended that the description of the lands has continued the same in the titles from a date within a few years of the valuation of 1633 until now. It is "All and whole"—[Reads]—This description contains no right to the commonty either specially or in the general terms *cum communitatibus* usual in early title-deeds, though "parts and pertinents" are given. These words may, by possession of commonty, apply to a right of property or to a right of servitude. It cannot therefore be certainly predicated that at the date of the valuation any right of property in the undivided commonty appertained to the proprietor of the lands of Colliston and Stenton. There may be a presumption to that effect, but it is not certain that it was a property and not a servitude right. Passing, however, from that objection, the graver objection is, that the valuation affords no evidence that this right of commonty was included in the valuation. The words are, "the lands of Stenton and Colliston pays of teind 29 bushels victual, two-part meal and third-part bear." No reference is here made to rights of commonty, or to parts and pertinents. Observe the different terms in which other lands in the decreet are specifically valued as regards teinds. Where valuation sets forward a sum of money paid as rent or value and worth of "stock and teind," there might be room for holding that rent or value to have included rights in commonty attached to the lands then valued. The present is not a case of that kind at all. There is merely a valuation of the teinds paid for the lands. That must have been the value or worth of the rental both paid by the then owner of the teinds to the titular. On the whole, I think this reclaiming note should be refused.

Lords Benholme and Neaves concurred.

The interlocutor of the Lord Ordinary was accordingly adhered to.

Agents for Pursuer—Jardine, Stodart, & Fraser, W.S.

Agents for Defender—Leburn, Henderson, & Wilson, S.S.C.

LEIGHTON'S TRUSTEES *v.* LEIGHTON AND OTHERS.

Trust—Powers of Trustees—Actual Payment—Resolution to Pay—Vesting. Circumstances in which held that trustees having formally resolved to bring an action of multiplepoinding for winding up the trust, the share of a beneficiary dying before the action was raised, had vested.

Alexander Leighton, tenant in Drumcairn, by his trust-disposition directed his trustees to hold his estate for behoof of his three sons equally, either paying them the income of their shares, or buying annuities for them, or making money advances to them on any fit occasion. The shares were not to vest until payment. The advances were to bear interest until repayment or readjustment, the trustees having the power to enforce repayment when they thought proper. The testator died in 1857. At that date two of the sons, Robert and Stewart Leighton, had had advances made to them by the testator himself, which were to be reckoned against them in accounting to them for their shares of the trust-estate. The trustees, during their management of the trust, made advances to the sons at various times. They gave over the crop and stocking of certain farms to Stewart, taking his bond for the amount, and in 1860 they advanced him a sum of about £3000, to enable him, jointly with his brother George, to buy a property called Westerton. Altogether Stewart's advances amounted to more than a third of the trust-funds. Stewart Leighton died in February 1865. This multiplepoinding was raised in October following. The question was, whether Stewart's share of the trust-estate had vested in him before his death, so as to be carried by his disposition and settlement to Mrs Soutar, who claimed in the action as his disponee?

The Lord Ordinary (Barcaple) held, on a view of the whole circumstances of the case, looking to the state of accounts, and to the minutes of the meetings of the trustees, that vesting had taken place. In 1861 the trustees had contemplated bringing the trust to an end, and had taken legal advice as to their power to do so, while in November 1864 they "resolved to institute an action of multiplepoinding, in order to obtain a free and indisputable discharge of their trusteeship." The Lord Ordinary held this to be a distinct resolution by the trustees, never departed from, to wind up the trust immediately, on the footing of making over their shares to the sons absolutely. He therefore sustained Mrs Soutar's claim.

Robert, one of the surviving sons of the testator, reclaimed.

YOUNG and BROUN for him.

GIFFORD and SPITTAL for Mrs Soutar.

At advising,

Lord COWAN said there was no doubt that the provisions of the trust-deed were somewhat peculiar, and unusual powers were conferred upon the trustees, who might, in the event of any of the sons misconducting themselves, limit their right in the estate. But, in the circumstances in which the case had arisen, he thought the Lord Ordinary was right, and that the shares had been vested at all events some time before the death of Stewart. It was contended that the advances were to be repaid, and that, therefore, they had not vested. Now, it was quite possible that, at an earlier period, these sums might have been re-demanded; but the question here was, What was the state of

matters when Stewart died? It was plain, from the minutes of the trustees, that for some time they were preparing to close the trust. In April 1864 they were ready to pay over finally if they had the power. After getting advice that they had power, they resolved to raise an action of multiplepoinding for their own exoneration, and at the same time recommended the sons to adjust the trust accounts so that there might be as little delay as possible. It was probably owing to this recommendation that the delay in the actual raising of the action took place, but that delay was not to affect the rights of the parties. The action was necessary for exonerating the trustees; and although the powers of trustees in management of a trust may be, as here, very large, it does not follow that the rights of the beneficiaries are to be prejudiced by delay, on the part of agents or others, in carrying out the resolutions of the trustees. No doubt, the clause of vesting was very strong, but after the resolution of the trustees in November 1864, it could not be held that Stewart's share had not vested in him. His Lordship could not give effect to the contention of the reclaimer, that even after the action was raised, it would still be competent for the trustee to interfere, and refuse payment to any of the sons.

Lord Benholme and Lord Neaves concurred. The Lord Justice-Clerk not having been present at the hearing of the case, did not take part in the advising.

Agent for Leighton—T. Sprot, W.S.

Agents for Soutar—Mackenzie, Innes, & Logan, W.S.

Saturday, March 9.

FIRST DIVISION.

ROY *v.* HAMILTONS AND CO.

Ship—Merchant Shipping Act, sec. 65—*Petition to Interdict Transfer—Competency.* An application by a personal creditor of a firm of shipowners to have them interdicted from transferring their ships, presented under section 65 of the Merchant Shipping Act, refused as incompetent.

The petitioner, who is an African agent, resident in Glasgow, says he has a claim against Messrs Hamiltons & Company, merchants in Glasgow, to the amount of £6260, 15s. 2d. This claim Messrs Hamiltons & Co. dispute to the extent to which it is stated, and a proof has been allowed to the parties.

Meanwhile, the petitioner asked the Court to interdict, prohibit, and discharge the respondents from selling, transferring, or mortgaging four ships, of which they are the registered owners, or any of them, or any share or shares thereof, and from otherwise dealing with the said ships or any of them, until they shall have found caution for the sums sued for.

The application was founded on the Merchant Shipping Act of 1854, sec. 65, which gives the Court of Session power, "upon the summary application of any interested person, made either by petition or otherwise, and either *ex parte* or upon service of notice upon any other person, as the Court may direct, to issue an order prohibiting for a time to be named in such order, any dealing with such ship or share."

The petitioner averred that the respondents were *vergentes ad inopiam*, that they had recently sustained heavy losses, and that they were in course of transferring their assets and business; and that it was their intention to transfer and dispose of the said ships before they arrive in this country or become subject to the diligence of arrestment at the petitioner's instance, whereby his security would be lost.

The respondents lodged answers denying the averments in the petition, and pleading that the application was incompetent, the section of the statute founded on being inapplicable to the circumstances.

YOUNG, CLARK, and H. SMITH for the petitioner.

A. MONCRIEFF and GLOAG for the respondents.

At advising,

The LORD PRESIDENT—I cannot say I have any doubt of the incompetency of this application. The clause founded on gives a power to the Court on the summary application of any interested person to issue an order prohibiting for a time to be named any dealing with certain ships or shares of ships. It is on this clause the petition is founded. It is material to consider who the petitioner is, and under what circumstances he asks this remedy. He is a personal creditor of the respondents and nothing more. The petition applies to four ships which, he states, are at present beyond the jurisdiction of the Court, but he cannot state precisely where they are. He further states that it is the respondents' intention to transfer these ships before their arrival in this country, whereby his security for payment of his debt will be lost, by which security he means any power which he may have to attach the ships by arrestment. That is his whole case, and, of course, on the same statement he would, according to his construction of the Act, be entitled to attach any number of ships belonging to any persons or companies who he may choose to allege are his debtors. It appears to me that this is an attempt to make use of this section of the Act for a purpose which was never contemplated, in the interest of a party not within the scope of its provisions, and in a manner and form totally unauthorised. Section 65 forms part of a subdivision of Part II. of the Merchant Shipping Act regarding the "registry of British ships," and the subdivision is styled, "transfers and transmissions." The sections 55 to 61 regulate the mode of transmitting and transferring British ships and shares either as betwixt buyers and sellers or in case of bankruptcy, succession, or marriage. But section 62 deals with a particular subject not dealt with in previous sections—the case, namely, of a ship or a share coming to belong by the death of any owner, or the marriage of any female owner, to any person who is not qualified in terms of section 18 to be the owner of a British ship. Without some such provision as section 62 contains, the person so succeeding would not be entitled to take up the legal estate in the ship or share. The remedy provided is bringing the ship to sale, and it is very necessary to attend to sections 62, 63, and 64, in order that we may quite understand the meaning of all the terms used in section 65. Section 62 provides that in such cases as I have mentioned it shall be lawful to the Court to order a sale to be made of the property so transmitted, and to direct the proceeds to be paid to the person entitled under such transmission, or otherwise as the Court may direct, and generally to act in the premises as the justice of the case requires. Now this is a very large and wide discretion, and it is important to observe that in so far as regards the transmission of ships, this is the first section giv-