of wood upon his estate, might require to use this river a great deal more than other members of the public. It was not because of any private right he had, but because this is a public navigable river, which he as a member of the public required or might require to resort to frequently, that he had rights which he was entitled to have preserved. He says he will be satisfied if those rights are not interfered with. But the bridge is now up, and his trustees allege that those rights are interfered with, and I think this is proved. The proof shews there is a present material obstruction; but whether that is so or not, if there is a bridge which may at any future time come to be a block in the way of navigation, its existence is inconsistent with the pursuers' present right, for that right is to prevent any obstruction which now impedes, or which may impede, the navigation of the river. I therefore think that the letter founded on does not in the least preclude the present action. I think the right of navigation was reserved to the fullest extent; and if it be shown to have been injured, either by an obstruction which now causes injury, or which causes apprehension of injury, the pursuers are not barred by anything in that letter from maintaining their right to have that obstruction removed.

The Court adhered.

Counsel for Pursuers—Lord Advocate (Watson)—Kinnear—Mackintosh. Agents—Tawse & Bonar, W.S.

Counsel for Defenders—Balfour—H. J. Moncrieff—Jameson. Agent—John Carment, S.S.C.

Saturday, January 27.

SECOND DIVISION.

[Lord Young, Ordinary.

GLOVER AND OTHERS (SCOTT'S TRUSTEES) *v.* SCOTT AND OTHERS.

Succession—Trust—Vesting.

A truster directed his trustees to pay an annuity to his wife, and to collect the residue of his estate and lodge the same in bank until the fund so collected should be sufficient to pay off the debts heritably secured upon his property. On the death of his wife, "and as soon thereafter as the whole heritable debts" should be paid off, the trustees were to sell the heritable property and divide the whole estate among the truster's children. It was further specially provided and declared that the estate should not be divided during the lifetime of the wife, nor until the whole heritable debts were paid off, "without prejudice to my said trustees selling my said heritable subjects, under burden of the heritable debts affecting the same, at any time after the death of my said spouse without waiting until they shall be in possession of funds to enable them to clear off said debts as aforesaid, provided they shall think such a course expedient."—*Held* that the shares of the children vested on the death of the widow.

This was an action of multiplepoinding and exoneration raised by the trustees acting under the trust-disposition and settlement of James Scott senior, builder, Maryhill, dated 24th June 1852 and recorded 26th February 1857. The settlement conveyed to trustees the whole heritable and moveable estate, for payment of debts, for payment to his widow of an annuity of £30. to to be reduced to £20 on the death or marriage of her daughter Janet. The 3rd and 4th purposes of the trust were as follows:—"*Thirdly*, My said trustees and their foresaids, after payment of my whole debts and all expenses incurred by them in the execution of this trust, and after providing for the payment of the said yearly provision to my said spouse, and whole other sums before and after specially mentioned, shall collect the residue of my said estate; and in the event of my having prior to my decease paid off and liquidated the heritable debts presently affecting or which may affect my heritable subjects or any other heritable property I may yet acquire, they shall, in the event of my said spouse being alive, invest the residue of my said means and estate in good heritable or personal security, taking the rights and titles in their names as trustees foresaid, and hold the same until the time when a division of my estate is appointed to be made; But in the event" (which event occurred) "of my dying before the heritable debts presently affecting my heritable subjects, or any additional sums I may still borrow on the security of the same, or any other heritable property I may yet acquire, shall be fully paid off and extinguished, then my said trustees and their foresaids are hereby directed to collect the said residue and remainder of my means and estate, and lodge the same in some responsible banking company in their names, as trustees foresaid, until the funds so collected shall amount to such a sum or sums of money as may enable them from time to time to liquidate and discharge such heritable debts, or whichever parts or portions thereof may be remaining over unpaid and unextinguished." "*Fourthly*, My said trustees and their foresaids, upon the decease of my said spouse in the event of her surviving me, and so soon thereafter as the whole heritable debts now affecting or which may yet affect the heritable subjects presently belonging to me, or which I may yet acquire, shall be paid off and discharged in the event of the same not having been discharged during my lifetime, are hereby directed to sell and convert my whole estate, heritable and moveable, real and personal, generally and particularly before described and conveyed, into money, and after paying or providing for all expenses, to divide the same into five parts or shares and pay over the said shares to the following parties, my children, namely—to James Scott junior, wright, Maryhill, one share; Robert Scott, mason, Maryhill, one share; Catherine Scott or Haddow, widow of George Haddow, flesher, Glasgow, one share; Elizabeth Scott or Cameron, spouse of John Cameron, mason, and residing at Maryhill, one share; and Janet Scott, presently residing in family with me at Maryhill, one share: And in the event of any of my said children above mentioned deceasing before or after me, and before the division shall take place of my said means and estate, leaving lawful issue of their bodies respectively alive at that time, then the child or children of any such deceaser or de-

ceasers shall receive equally among them, if more than one, share and share alike, the share or proportion that would have fallen to their parent if in life: Declaring that if any of my said children shall die before or after me without having been married, or without leaving lawful issue alive at the time of said division, the share or shares which would have belonged to such deceaser or deceasers shall fall and belong to the survivor or survivors of my said children before mentioned." The settlement then conferred the following discretionary power on trustees:—"But it is hereby expressly provided and declared that no part of the said residue of my means and estate shall be divided during the lifetime of my said spouse, nor until the whole heritable debts affecting my heritable subjects and estate are paid off and extinguished; without prejudice to my said trustees selling my said heritable subjects, under the burden of the heritable debts affecting the same, at any time after the death of my said spouse, without waiting until they shall be in possession of funds from my said general estate, to enable them to clear off said debts as aforesaid, provided they shall think such a course expedient, and for the interest of my estate: And to enable my said trustees, or their foresaids to carry the purposes of this settlement into execution, I do hereby specially empower and authorise them and their foresaids to sell and dispose of my whole heritable and moveable property and estate for such price or prices as can be obtained therefor." The usual power to name a factor was given to the trustees, and it was declared that James Scott, jr. was to be relieved of two heritable bonds for £350, which remained as burdens on the heritable estate.

The truster died on 8th October 1854, leaving almost no moveable estate. He was survived by his wife, who died in November 1867, and by his five children named as residuary legatees, all of whom also survived their mother. For some time the trustees continued to accumulate the rents of the estate, amounting to about £78, with a view to pay off the debt, but on 28th April 1875, in the exercise of the discretion given them by the settlement, they resolved to sell the heritable estate. The subjects were accordingly purchased at a sale by public roup by James Scott jr. The truster's children other than James Scott, jr. had all predeceased the date of the resolution by the trustees to sell. In these circumstances, the succession being assumed to be moveable in respect of the direction to sell, James Scott claimed that as the sole survivor of the residuary legatees he was entitled to four-fifths of the residue (which consisted of the price of the heritable estate and of certain accumulations of rent), the remaining one-fifth falling to Jessie Cameron, daughter of Elizabeth Scott or Cameron, the only child of the truster who left issue. On the other hand, various representatives of the predeceasing children contended that the shares of residue had vested at the death of the truster's widow in 1867, and that vesting had not been postponed to the date of the trustees' resolution to sell. This action of multiplepoinding was accordingly raised by the trustees; and the Lord Ordinary found, *inter alia*, that vesting had taken place at the death of the truster's widow in 1867.

James Scott jr. reclaimed.

Authorities—*Thorburn* v. *Thorburn*, 16th February 1836, 14 Sh. 485; *Wilkie* v. *Wilkie*, 27th January 1837, 15 Sh. 430; *Leighton* v. *Leighton*, 8 March 1867, 5 Macph. 561; *Howat's Trs.* v. *Howat*, 17th December 1869, 8 Macph. 337; *Paterson's Tr.* v. *Paterson*, 29th January 1870, 8 Macph. 449; *Cowan* v. *Sloane*, 20th May 1876, 13 Scot. Law Rep. 448; *Ferrier* v. *Ferrier*, 18th May 1872, 10 Macph. 711.

At advising—

Lord Justice-Clerk—The question here is whether the residue vested at the widow's death or whether the vesting was postponed till the sale of the heritable estate. I agree with the Lord Ordinary in the former view. The testator was in doubt with regard to the value of the heritable estate which he had purchased. At the same time he was anxious that his widow should be provided for, and he says that the heritable estate is not to be sold until the debts have been discharged—[*reads 3d and 4th purposes*]. Had the deed stopped there it might have been difficult to hold that vesting took place before the debt was cleared off. But he goes on to provide—[*reads discretionary power*]. Now, whether or not the trustees were bound to sell is an entirely different question from that of vesting. The sale might have been made under burden of the debt. I think the division under the 4th purpose of the settlement means a division which became possible at the widow's death. There is no decided case in which an absolute discretion vested in trustees has been made the basis of vesting.

Lord Gifford—I am of opinion that vesting here took place at the death of the truster's widow. No doubt a truster may suspend vesting until the period of division. But here the delay was for the purpose of discharging heritable debt. The truster did not intend that the children nominated as residuary legatees, and dying while the estate was in course of liquidation, should lose their right. There was a power to sell given, and, in my opinion, the children might have demanded a conveyance; or they might have purchased the debt and so forced a sale and division on the trustees.

Lord Ormidale—The interlocutor reclaimed against contains a variety of findings, but the only one complained of is that to the effect that the residue of the trust-estate in question vested at the decease of the truster's widow Mrs Scott in November 1867.

The reclaimers contended that vesting did not take place till April 1875, when the trustees resolved to sell and divide the estate.

The question thus raised, and which the Court has now to decide, is, I think, one of nicety, and not unattended with difficulty, owing to the peculiar terms in which the truster has expressed himself.

One thing, however, is clear, and neither was nor could have been well disputed, viz., that vesting cannot be held to have taken place before the death of the truster's widow at soonest. There was an object in that, inasmuch as till the widow's death the residue could not be relieved of her annuity and other burdens, and the amount of it could not therefore be earlier ascertained. Besides, and this is enough of itself, the truster has so willed it, as was conceded by all parties at the debate, and as the Lord Ordinary has found.

But whether it must be held that the truster intended, and has so expressed himself as to require it to be held, that vesting should not take place till not only the decease of the widow, but till the actual division of the residue of his estate amongst the parties entitled to it, is another and quite a different question. He, no doubt, uses language in the fourth purpose of his settlement which is calculated to denote that he meant that vesting should not take place till the division of the residue of his estate was actually made, or, at anyrate, as was contended for by the reclaimers, till the trustees in their discretion resolved to sell his heritable property with a view to paying off the debts upon it and dividing the residue. But whether this was truly the object and intention of the testator must, I think, depend upon the whole scope and purposes of his settlement, and not upon isolated expressions to be found in the fourth purpose of it. In this view, I consider it important to observe that the truster in the third purpose of his settlement, which may as regards the point now in question be looked upon as introductory to the fourth purpose, evidently contemplated that his trustees should *ante omnia* pay off all his debts, and then hold the remainder for payment of his widow's and other provisions. But that he intended that his debts of every description should be discharged without any delay that could be avoided is, I think, quite manifest.

I am disposed to think that the difficulty as to the death of the widow being held to be the date of vesting, arising from expressions used by the truster in the fourth purpose of his settlement, is removed. And in accordance with the same view, the clause in the settlement that the fact of the trustees delaying till sufficient funds should arise from the accruing income of the trust-estate for paying off the heritable debts is to be without prejudice to their selling the property "under the burden of the heritable debts affecting the same after the death of my said spouse, without waiting until they shall be in possession of funds from my said general estate to enable them to clear off said debts as aforesaid, provided they shall think such a course expedient for the interest of my said estate"—may be considered as intended to facilitate rather than postpone the division and vesting of the residue of the truster's estate.

In these circumstances, and as there is no reason that I can see for holding that the truster could have intended to postpone vesting after the decease of his widow, and just as little reason for supposing that he intended to leave the period of vesting to the arbitrary discretion of his trustees, I am of opinion with the Lord Ordinary that vesting must be held to have taken place at the decease of the widow. Nor do I think that this conclusion is repugnant to any of the decided cases which were cited at the debate on the part of the reclaimers. The nearest in point of any of these cases is that of *Howat's Trustees* (17th December 1869, 8 Macph. 337); but by the settlement there in question it was provided that on the event of the children, who were the residuary legatees, predeceasing the testator, "or dying before receiving payment of their share," without leaving lawful children, the share of such child should accrue to the survivors; and it was upon this very peculiarly expressed provision that the question of vesting in that case turned. It appears to me, therefore, that the case of *Howat's Trustees* must be considered so special as not to rule the present or any other case not the same as regards the terms of the settlement on which it depends. On the other hand, the case of *Ferrier* v. *Ferrier* (18th May 1872, 10 Macph. 711), cited at the debate for the respondent, appears to me to go far to support the argument of the respondents in the present case.

The result is, that in my opinion the Lord Ordinary's interlocutor reclaimed against ought to be adhered to.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for James Scott junior against Lord Young's interlocutor of 18th October 1876, Refuse said note, and adhere to the interlocutor complained of, with additional expenses, to be paid out of the fund *in medio*, and remit to the Auditor to tax the same and to report; and remit the cause to the Lord Ordinary, with power to decern for the expenses now found due, and decern."

Counsel for James Scott junior — Kinnear — Lorimer. Agents—Davidson & Syme, W.S.

Counsel for Mrs Mary Montgomerie or Scott — M'Laren—Millie. Agents—J. & A. Hastie, S.S.C.

Saturday, January 27.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

M'KEAN *v.* LORIMER & MOYES.

Process—Decree by Default—Reponing.

Circumstances in which an application to be reponed against decree by default was *refused.*

The complainer M'Kean brought a suspension of a charge for £9, 11s. 10½d, given under a protested bill by the respondents. When the case came before the Lord Ordinary in the Bill Chamber he proposed "that he should be allowed to decide it as on a passed note, and upon the footing that his judgment should be final." The respondents were willing to assent to this course, but the complainer declined. The note was accordingly passed and a record made up in the usual way. The complainer did not lodge his print in time, and thereby caused some delay; and when the record had been closed and the case enrolled in the Motion Roll on December 19th, in order that it might be sent to the Debate Roll, the Lord Ordinary suggested, and parties agreed, that the case, being one requiring despatch, should be disposed of on the following Friday. When that time came there was no appearance for the complainer, and after the case had been repeatedly called without any appearance by counsel or agent on behalf of the complainer, the Lord Ordinary repelled the reasons of suspension and found the charge orderly proceeded. Against this interlocutor the complainer asked to be reponed, offering to pay such expenses as had been caused by the delay.

The Court refused the application.