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-

ing any power to the Court to effect transfers or complete titles to ships. Farther, it seems to be contemplated that the order should be granted at once, and for the purpose of carrying out the order of sale, section 63 enacts that every order of sale shall contain a declaration vesting the right to transfer the ship or share so to be sold in a nominee of the Court, who shall thereupon be entitled to transfer as if he were registered owner. Section 64 limits the time within which an application for sale may be made. All that is quite clear, but the proceeding is very summary and rapid, and it may naturally occur that, in the course of this summary procedure, there are persons who have an interest and a title to interfere. The case is an anomalous one altogether, and accordingly it appears to me that section 65 is intended entirely for the purpose of providing for that case. When you read the section, every term in it corresponds with that idea. The very term "interested person," suggests there may be any kind of interest entitling one to interfere betwixt the nominee and the unqualified person. It would be most unsafe to define what kind of interest is necessary. Indeed, I abstain from illustrating the matter. I think it means any person who can establish a *prima facie* interest of any kind. But, farther, what kind of prohibition is to be issued under section 65? Not what we are asked to grant in this petition, but it is to be for a time to be named —that is, until proper inquiry can be made. Besides, what is the subject, the dealing with which is to be prohibited? It is "such ship or share," to which words it is impossible, on any principle of construction, to find an antecedent except in the preceding sections. On these grounds I am clear that this petition is incompetent.

The other Judges concurred, and the petition was therefore refused as incompetent, with expenses.

Agent for Petitioner—John Henry, S.S.C.

Agents for Respondents — Wilson, Burn, & Gloag, W.S.

Saturday, March 9.

SECOND DIVISION.

MACLEAN AND HOPE *v.* FLEMING (*ante*, p. 270).

Process—Evidence (Scotland) Act, 1866—*Commission—Witnesses Abroad—Jury Trial—Act of Sederunt*, 1841. Held (repeating the judgment of the Court of Feb. 23, 1867) that commission to examine witnesses beyond the jurisdiction of the Court in terms of the Evidence (Scotland) Act 1866, must be preceded by affidavit and adjusted interrogatories, it being the intention of the Act to assimilate its practice to that applicable to jury trial, and the latter being fixed by the Act of Sederunt of 1841.

In this case, on 23d February last, the Court recalled an interlocutor of the Lord Ordinary (Kinloch), who granted a commission to the Vice-Consul at Constantinople to examine the witnesses in the cause that were to be obtained there. The case was set down for trial before the Lord Ordinary under the Evidence Act of 1866. The Court on that occasion held that, under the Evidence Act it was only competent to take on commission the *whole* evidence in the cause, and that, either upon cause shown to the Court, or of consent of parties; and that, if commission should be granted to examine any witness who is resident beyond the jurisdiction of the Court, that could only be done with reference to the existing practice. The pursuers then made a motion to the Lord Ordinary that they were entitled to get a commission for the purpose of examining certain witnesses named, without either making affidavit according to the practice applicable to jury trial, or preparing interrogatories for the examination of the witnesses. The defender having objected to the motion, the Lord Ordinary reported the case.

CLARK and WATSON, for the defender, argued —The object of the Evidence Act in dispensing with proof by commission is as far as possible to assimilate its practice to that applicable to jury trial. That practice is fixed by the 17th section of the Act of Sederunt of 1841, which provides that such examination as is here craved by the pursuers shall proceed upon affidavit and interrogatories; and, it being so fixed, it is not within the discretion of the Court to dispense with these formalities.

YOUNG and MACKENZIE, in answer—The Act says nothing as to the practice of jury trial. In the 10th section of the Sheriff Court Act there is a provision in terms the same as the third exception in the second clause of the Evidence Act, and affidavit and interrogatories are unknown in the practice of the Sheriff Court. Further, the system of examination by affidavit and interrogatories is highly inconvenient, and is not to be enforced by implication when it is not *per expressum* enjoined.

At advising,

LORD JUSTICE-CLERK—Since the discussion yesterday, we are in a condition to say that, in the view of the majority of the Court at the time of the former decision in the case, their judgment was influenced by the assumed application of the Act of Sederunt of 1841. But, as the view taken by the Court rested upon grounds not necessarily involving an adoption of the Act of Sederunt as the basis of judgment, as the Court is now differently constituted, and as the case is anxiously pressed as involving an important rule in procedure under a new statute, I have thought it right to form and express the judgment to which I have come independently of authority.

The application is made with reference to a case set down for trial upon a day fixed before the Lord Ordinary. In the ordinary course of proceedings the party who makes the application would have to bring all his witnesses before the Judge, who on that day was to try the cause as a jury would under other circumstances have done. I do not attach any consequence to the question as to whether such a case could have been tried otherwise than by a jury prior to the passing of the Act. The rule as to trial where formerly no other than a jury was competent and as to trial in reference to a matter where a different method of trial might have been competent, must, I think, be precisely the same. The analogy is between proceedings set down to be tried on a day certain and by adduction of parole evidence before a Lord Ordinary, and the case where issues had been adjusted, and a trial was impending before a jury. The first section of the Act declares it incompetent to grant commissions except as hereinafter directed, and the second section contains the direction and the portion of the direction applicable to this case "to grant such commission," &c. A separate provision at the close of the section applies to proofs to lie *in retentis*. The reference to existing practice in the material part of the clause is certainly not applicable to proofs taken to lie *in retentis*. It