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.

Counsel for Complainer — Lang. Agent—Thomas Lawson, S.S.C.

Counsel for Respondent—A. J. Young. Agent—D. Howard Smith, Solicitor.

Saturday, January 27.

SECOND DIVISION.

[Bill Chamber.

ALEXANDER *v.* STUART.

Proof—Bill of Exchange—Onerosity—Fraud.

Averments which *held* sufficient to entitle the suspender of a charge under a bill to a proof *pro ut de jure.*

This was a suspension by John Alexander, Arnhill, by Huntly, complaining that he had been charged at the instance of John Stuart, Mill of Crannabo, Marnoch, to pay £35 under an alleged bill, dated 20th June 1876, by the complainer and William Roger, residing in Huntly, payable four months after date, but under deduction of £18, 6s. 6d. paid to account on 20th Oct. 1876. Alexander averred that Roger was a mutual friend of himself and the charger. He had fallen into embarrassed circumstances, and in the month of June last, at the suggestion and solicitation of the charger, the complainer was induced to accept of the bill charged on, along with Roger, on the understanding and agreement that it was to be drawn by the charger and indorsed and cashed by him at the Aberdeen Town and County Bank, at its branch in Banff, and that the charger was to hand the contents of the bill to Roger for his own use, under deduction of a sum of £5 to be paid out of it to account of a debt due by Roger to the charger. This was done because the Bank would not discount the bill in the names of the charger and Roger alone. It was part of the said agreement that, although the charger was the drawer and indorser of the bill, he should have no right of relief against the complainer as one of the acceptors, except to the extent of one-half of any sum which Roger might be unable to pay. Upon this agreement alone the complainer accepted the bill charged on, and delivered it to the charger for the purpose of being discounted. He received no value for the bill. The charger discounted the bill, but failed to implement the agreement under which it was accepted by the complainer and Roger. The respondent fraudulently, and in breach of that agreement, applied the whole of the money to his own uses and for his own purposes, and fraudulently failed to give to the acceptor Roger any part of the sum. The bill became due on the 23d October 1876. On the 20th of that month Mr James Forbes, solicitor of the charger, wrote to the complainer a letter, in which he demanded immediate payment of £16, 13s. 6d., alleged to be due by the complainer and Roger to the charger on the bill in question. In that letter the charger's solicitor stated that the £16, 13s. 6d. was the amount of a bill for £14, 5s., with interest payable on the same since 20th May 1873, which was accepted by Roger to the charger, and in respect of which the charger's solicitor stated that the bill for £35, being the one charged on, was granted. On receipt of this letter the respondent's solicitor wrote to the charger's agent stating the agreement under which the complainer was a party to the bill as above set forth. To this letter the complainer's agent received no reply. Until receipt of the letter of 20th October the complainer did not know of the existence of the bill for £14, 5s. The complainer would not have accepted the bill charged on had he known that it was to be applied to the payment of a former bill.

The respondent, on the other hand, averred that on 23d January 1873 he drew a bill upon Roger for £14, 5s., payable four months after date. This bill was duly accepted by Roger, and was for value had and received by Roger from the respondent. After the said bill had become due, or about that time, the respondent learned that Roger had been putting away or had put away his effects in favour of his mother and brother, and that he was not able to pay the said bill, and in point of fact he did not pay it. The respondent frequently pressed Roger for payment of the said bill, and ultimately threatened him with personal diligence, and the result was that at a market held at Keith on 14th June 1876 Roger offered the respondent, on condition that he should not do diligence against him in the meantime, a bill at four months by the complainer in favour of an unnamed acceptor. The bill had £35 in the corner, and was signed by the complainer. The respondent, it was proposed by Roger, was to retain the bill for £14, 5s. This offer was considered by the respondent, and the result was that he agreed to take the £35 bill, with the complainer as acceptor, only on the conditions (1) that Roger should also be an acceptor; (2) that he should retain the £14, 5s. bill until the £35 bill was paid; (3) that he should discount the £35 bill and have the use of the money in the meantime; and (4) that on the £14, 5s. bill with interest being paid, he should hand over the £25 bill. In point of fact, the £35 bill was a collateral security for the £14, 5s. bill, and was granted by the complainer and received by the respondent only on that footing. The complainer was present, and agreed to all those conditions. The £35 bill was granted for that sum by Roger and the complainer, who was really Roger's cautioner, to induce the respondent to postpone diligence against Roger, and in consequence of its being granted he did postpone such diligence. The £35 bill was protested against the complainer for the sum in the bill for £35, under deduction, as the protest bears, of "£18, 6s. 6d. sterling," being the difference between the said bills for £14, 5s., with interest thereon, and the £35 bill. That difference has been paid by the respondent to the bankers who discounted the £35 bill, but neither Roger nor the complainer has made any payment to account of either of the bills. The charge sought to be suspended was given for payment of the said sum of £35, less the said sum of £18, 6s. 6d.

The Lord Ordinary refused the note, and the suspender reclaimed.

Argued for him—The suspender is entitled to a proof *pro ut de jure* of his averments. A relevant case of fraud is alleged. In *Anderson* v. *Lorimer*, 21st November 1857, 20 D. 74, a proof was allowed of the averment that a bill had been signed blank on the understanding that it was to