"It was also contended alternatively on the part of Mrs M'Lean, that no more could be deducted from the fund out of which her legitim was exigible than the value of the house, so far as it had been completed and actually existed at the time of Mr Robertson's death, which was admitted to be £635, or at the utmost no more than £934, being the amount for which Mr Robertson was under actual contracts with tradesmen at the time of his death. And in support of this contention, the Lord Ordinary was referred to Erskine, 2, 2, 14, and the case of Johnston *v.* Dobie and Others, 25th February 1783, Mor. 5443.

"Now, while it is quite true that Mr Erskine states in the passage referred to that 'One's collecting of timber, stones, slates, or other materials for raising any fabric or edifice, is not sufficient to make them heritable *destinatione*, till they be united to the surface of the ground by actual building,' it appears to have been decided in the case of Johnston *v.* Dobie, cited by Mrs M'Lean herself, that the actual union or fixing of materials in a building is not indispensable, and that acts short of that unequivocally indicative of the *animus* of the proprietor are sufficient to make a subject in itself moveable heritable *destinatione*. The argument of both the contending parties in that case, as clearly appears from the report, which is very instructive on such questions as the present, proceeded upon the assumption of this principle being indisputable, and so accordingly, while 'some of the Judges seemed to be of opinion that even the simple collecting of materials for building might often sufficiently denote the *animus destinandi* of the proprietor, so as to render them heritable, others appeared to admit no other rule but the then actual state of the subjects; but the opinion of the majority was, that in cases like the present, where the will of the proprietor so strongly marked is actually carrying into execution by overt acts, such *animus* should have full effect.' And accordingly the Court found that the articles of unfixed work destined for the house fell to the heir, and not to the executors.

"The principle of this judgment, the Lord Ordinary thinks, supports the interlocutor he has pronounced. Mere intention, not expressed and declared in clear and unequivocal terms, or manifested by unmistakeable acts and conduct, may not be enough, but in the present case the *animus destinandi* of the late Mr Robertson has not only been unequivocally manifested, but to a large extent actually carried into effect. Not only so, but as the Lord Ordinary views the proof—taking, of course, as part of it, the mutual admissions of the parties—Mr Robertson had entered into engagements, on the assumption that the house in question would be completed, of such a nature and in such a way as precluded him from retracting or receding from them. It is impossible, indeed, on any reasonable view of the evidence, to suppose that Mr Robertson would have stopped short of the full completion of the house. His whole acts and conduct bearing on the matter plainly and decidedly indicate a fixed resolution to the contrary—a resolution which he had to a large extent carried into effect.

"These are the grounds upon which the Lord Ordinary has arrived at the conclusion embodied in his interlocutor, and that conclusion he thinks is in accordance with established principles, as illustrated by the authorities already referred to, as well as many others, of which he considers it sufficient to mention Bell's Principles, S. 1490; and Elliot *v.* Minto, 1 W. and S. 678.

"That in the most favourable view that could be adopted for Mrs M'Lean, the sum of £934, being the amount of the actual contracts binding on Mr Robertson at the time of his death, in reference to specific portions of work in connection with the house in question, falls to be deducted from the fund otherwise available for legitim, was scarcely disputed, and is supported by precedents directly in point—Robson *v.* Denny, 2d February 1861, 23 D. 429; and Cooper *v.* Jarman, 4th December 1866, Weekly Notes, vol. i. p. 378.

"It is presumed from what fell from the parties at the debate, that, on the footing of the Lord Ordinary's interlocutor, they will have no difficulty in agreeing as to the full and final disposal of the litigation. "R. M."

Agents for Trustees—Maitland & Lyon, W.S.

Agents for Mrs M'Lean—Hamilton & Kinnear, W.S.

Friday, March 8.

John Millar, Esq., advocate, this day presented her Majesty's commission in his favour as Solicitor-General of Scotland; and the usual oaths having been administered to him, he was invited by the Court to take a seat within the bar.

SECOND DIVISION.

RICHMOND *v.* LITTLE.

Teinds—Commonty—Decree of Valuation. Circumstances in which held that it was not proved that the teinds of a portion of divided commonties were included in a decree of sub-valuation.

This is a question in the locality of Orwell between Mr Richmond, one of the heritors, the minister of Orwell, and the common agent in the locality. The question is, whether the portion now belonging to Mr Richmond of the divided commonties of Cuthill Muir and Berry Muir are to be held as having been included in a sub-valuation obtained in 1630. The subjects described in Mr Richmond's title are "the lands of Collinstain or Collinston, and Stenton, with houses, biggings, yards, parts, pendicles, and pertinents of the same whatsoever, lying within the barony of Cuthill-Gourdie and sheriffdom of Perth." The commonties were divided and allocated in 1774. The Lord Ordinary (Barcaple) held that Mr Richmond had failed to show that the valuation included the teinds of his portion of the commonties. There being no mention of the commonties in the titles and no information in regard to them at all prior to the division in 1774, it was only presumptively that it could be held that they existed as commonties in 1630, and that the right of commonty then attached to Collinston and Stenton. But assuming that that was to be presumed, the Lord Ordinary was of opinion that on a sound construction of the decree of valuation it could not be held to include the teinds in question.

The pursuer (objector) reclaimed.

COOK and DUNCAN for him.

CLARK and ASHER for defender.

At advising,

Lord COWAN—I concur in the views taken of this case by the Lord Ordinary.

It is a principle well established that an heritor asserting that the teinds of his lands have been valued has imposed on him the burden of making out the fact on grounds satisfactory to the Court. This principle is specially applicable to a question

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