it, he put himself in a position that subjects him in payment for it. Now we must remember, as a peculiarity in this case, that up to the 14th June the seller had taken up a wrong position, and I think that that exempts the purchaser from the necessity of putting himself in the same position that he would have required to do had the seller been in the right. I quite agree with the decision of the Court in the case of *Padgett*, but that case discloses a very different state of facts from this one. In that case the sellers at once and peremptorily took up their proper position, which here the seller did not till late in the day. Now that is certainly a state of matters in which you cannot be very particular, about the time at which the purchaser takes his final stand. On 16th May Mr Chapman does not say that it is too late to arrange matters. The next three or four weeks are occupied with correspondence, and finally Mr Couston makes a proposal to return the lots objected to. Now, suppose that no summons had been brought up to that time, suppose the offer had been made before the copy of the summons was sent to Mr Couston's agents, it is very difficult indeed to see that anything had occurred which prevented the purchaser from taking up his proper position at the time when he did. He had at an early period made an objection of a general kind, and when he had had time and opportunity to make the investigations which the nature of the article rendered necessary, he reduced his objections to a specific form, and made his offer to return. The very number of bottles opened, and upon which your Lordship so strongly animadverts, proves to my mind the difficult nature of the investigation required before the purchaser could come to a satisfactory conclusion in his own mind. It was essential to ascertain the true nature and quality of the wine. There was no reason why this examination should not be made. There is no allegation of improper conduct on the part of the purchaser. It is not averred that the sellers were at any time refused access to the wine; and the result of the examination of both sides was that, not only was the wine disconform to sample, but that it was totally unsaleable. The Lord Ordinary's interlocutor proceeds upon the idea that eight months have now elapsed since the sale, and that the wine has not even yet been placed in neutral custody. But if the buyer offers to return the wine, and that offer is not accepted, I am not sure that it is incumbent upon him to remove it to neutral custody. There is no allegation of anything being wrong either on one side or the other. It is said, however, that the offer was not made until the summons was actually served. I am not sure of that. The offer was made *simul et simel* with the acknowledgment of receipt of the service copy of the summons, and I do not think we can hold that the offer was too late on this account. That Mr Chapman is the pursuer in this case does not alter the question at all. He is unfortunate in having his name brought forward in the matter; and I think he has been very badly treated by his constituents; but on full consideration of the case, I cannot see that its circumstances come up to that of *Padgett* v. *M'Nair*, or that there is any obligation upon the defenders in consequence of their own actings to pay for that which they never bought.

LORDS ARDMILLAN and KINLOCH concurred with the LORD PRESIDENT.

The Court adhered substantially, but altered certain of the Lord Ordinary's findings.

Agents for Pursuer—Millar, Allardice & Robson, W.S.

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

Friday, March 10.

THE BANK OF SCOTLAND *v.* MRS MARGARET M'NEILLIE OR COMRIE AND OTHERS.

Process — Competency — Multiplepoinding — Double Distress—Trust—Discretionary Power. Where a truster had directed his trustees to pay over to his widow a certain sum, to be by her divided among her relations "as she shall think fit"; and she had received the money and deposited it in her own name in bank—*Held*, that no double distress was created by her brothers and sisters raising actions against her, seeking to compel her to divide the sum, and then arresting in the hands of the bank on the dependence of their actions; and that a multiplepoinding raised by them in the hands of the bank, by virtue of the supposed competition then created, was incompetent.

Observed, that any attempt of whatever kind to compel the widow to divide the sum must be absolutely inept.

By one of the clauses of his trust-disposition and settlement, the late Robert Comrie directed his trustees, at the first term of Whitsunday or Martinmas after his death, to pay to his widow Margaret M'Neillie or Comrie "the sum of £600 sterling, to be by her at any time divided among her relations as she shall think fit."

Mr Comrie died on 23d January 1868, and his trustees, in implement of the above direction, paid over to Mrs Comrie the sum of £600, which she upon 1 June 1869 paid into the Bank of Scotland at Kirkcudbright, on deposit-receipt in her own name. Since then it had lain there, she declining to divide it at once in terms of her discretionary power.

Accordingly her brothers and sisters, upon the footing that they were the only next of kin referred to by the testator, and that Mrs Comrie was bound to make the division among them at once, first of all raised separate judicial proceedings against her to compel her to proceed to a division, and then, having each of them arrested the sum on deposit-receipt in the hands of the bank, on the dependence of their actions, proceeded to bring this action of multiplepoinding in name of the bank as pursuers and nominal raisers, against Mrs Comrie and themselves as defenders.

The conclusion of the summons was, that it should be found and declared "that the defender and common debtor, the said Mrs Margaret M'Neillie or Comrie, was constituted by trust-disposition and settlement, executed by her said deceased husband on or about the 27th day of February 1864, and recorded in the Steward-Clerk's Books of the Stewartry of Kirkcudbright, the day of 1868 years, depositary or trustee for the disposal of £600 sterling, thereby declared and provided to be made payable to her by the trustees therein named and designed, at the date, in the manner and for the purpose therein specified, viz.:—That the same should be divided by her amongst her said rela-

tions, called as defenders hereto as aforesaid, in the way and in the manner prescribed by the said trust-disposition and settlement; or otherwise as may be considered just and expedient by our said Lords, and that said sum of £600 sterling having been advanced and paid to her by her said husband's trustees, and she having deposited the same in the said pursuer's branch bank established at Kirkcudbright, the pursuers are only liable in once and single payment thereof, with bank interest due thereon from the date of said deposit until payment, or until consignation in this process, and that to the person or persons who may have best right thereto; for determining which, the said several persons, creditors, or pretended creditors foresaid, and the said Mrs Margaret M'Neillie or Comrie, common debtor for her interest, and all others pretending right to said sum of £600 sterling, ought to produce their respective rights, claims, and titles, or other interests in said sum, and dispute their preferences thereto."

The raisers pleaded—"The defenders and other beneficiaries, if any, exclusively interested in said legacy of £600 sterling, with interest due thereon as aforesaid, the fund *in medio*, and in the division and distribution thereof, are entitled *de plano*, to have the same divided and distributed amongst themselves as libelled, or at all events, to have it adequately secured and rendered safe in the meantime, by consignation in bank in their names or otherwise, and kept ready for final division and distribution when the proper time arrives for that purpose."

Mrs Comrie appeared and claimed the whole fund *in medio*, and to hold the same in terms of her late husband's trust-deed. She pleaded—"(1) The sum of money forming the fund *in medio* having been left directly to the claimant for the purpose specified in the trust-deed, she ought to be ranked and preferred *primo loco* thereto, in terms of her claim, with expenses. (2) The claimant cannot be compelled by legal proceedings to exercise the faculty committed to her by her deceased husband, in regard to the said fund. (3) In no view are the claimant's brothers and sisters-german entitled to have the fund divided equally among them, they being not her only relations.

The Lord Ordinary (ORMIDALE) pronounced the following interlocutors in the case:—

"19*th May* 1870—The Lord Ordinary having heard parties' procurators, repels the objections to the multiplepoinding; finds the real raisers entitled to their expenses, including the expenses of this discussion; remits the accounts thereof when lodged to the auditor to tax and report; finds the nominal raisers liable only in once and single payment; holds the summons as a condescendence of the fund *in medio*, and appoints the claimants to lodge their condescendences and claims within ten days.

"19*th November* 1870.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, sustains the claim for Mrs Margaret M'Neillie or Comrie, No. 20 of process, and accordingly ranks and prefers her to the fund *in medio;* repels the competing claims, and decerns; finds the claimant Mrs Comrie entitled to expenses as against the other claimants; allows her to lodge an account thereof, and remits the same when lodged to the auditor to tax and report."

Against this latter interlocutor the real raisers reclaimed.

PATTISON, for them, referred to *Williamson* v. *Gardiner*, 17 Nov. 1865, 4 Macph. 66, and *Scott* v. *Scott*, 2 Macq. 281.

MACLEAN for Mrs Comrie, the common debtor.

At advising—

LORD PRESIDENT—This is the most extraordinary proceeding, or rather one of a series of the most extraordinary proceedings, which ever came before this Court. I am not going to construe farther than is necessary the clause in the trust-settlement of the late Mr Comrie, which has given rise to this process. To do so would be to involve ourselves in questions of some difficulty, and which are quite beside the disposal of this case. I can conceive that hereafter, and as soon as Mrs Comrie exercises the discretionary power of division committed to her, those questions may arise, but at present it does not seem to me that there is any room for entertaining them. Mr Comrie directs his trustees to pay over to his widow "the sum of £600 sterling, to be by her at any time divided among her relations, as she shall think fit." Now it is quite clear that it is left entirely to the discretion of Mrs Comrie, at what time and in what manner this division shall be made, and the fund disposed of. The words are "to be divided as she shall think fit." She has not, it appears, yet thought "fit" to make a division, and, so far as I can see, no Court can compel her to do so. I therefore think that any attempt to compel Mrs Comrie to proceed with a division must be absolutely inept, never mind in what form it is made. While, as regards this particular form of a multiplepoinding, it is most manifestly and absurdly incompetent. The way in which it has been attempted to raise double distress is for the brothers and sisters of Mrs Comrie, who are claiming to have the fund divided among them, to raise action against her, and then arrest upon the dependence of these actions; and then, in virtue of these arrestments, they say they have created double distress. But there is no more room for a competition for this fund in the hands of the bank, between these relatives and Mrs Comrie, than between them and the trustees under Mr Comrie's settlement. Without going farther, I may simply state that I am of opinion that the objections to the multiplepoinding ought to have been sustained *in initio litis*. But the interlocutor of the Lord Ordinary of May 19th repels the objection, and appoints the claimants to lodge their condescendences and claims. I am therefore of opinion that that interlocutor should be recalled—and of course all subsequent ones fall with it—and that we should simply sustain the objection, and dismiss the action as incompetent.

The other Judges concurred.

The Court accordingly recalled the interlocutor of the Lord Ordinary, and dismissed the action.

Agent for the Real Raiser and Reclaimers—William Mackersy, W.S.

Agent for the Common Debtor and Respondent—Hugh Milroy, S.S.C.

Saturday, March 11.

SECOND DIVISION.

KETCHEN *v.* KETCHEN.

Aliment—Parent and Child—Divorce. Circumstances in which *held* that £25 per annum was a sufficient sum to be paid by a captain in the army for the support of a daughter, four years