of the debtor. In ascertaining whether a creditor is so barred, the evidence is favourably construed for the general body of creditors, so as to secure equal distribution, and to prevent partial preferences. On a fair and reasonable construction of the proof in this case, the Lord Ordinary is of opinion that the pursuer must be held to have recognised and acceded to the trust, and to be barred by personal exception from acquiring a preference by the arrestment libelled on over the whole other creditors."

Marianski reclaimed.

Pattison for him.

Scott and Reid in answer.

At advising—

Lord President—I am satisfied that the Lord Ordinary has not only reached a sound conclusion, but has put it on true grounds. Mr Marianski was a creditor of M'Lay for £499. The debt was constituted by bill, and he further held an assignation of a policy of insurance on M'Lay's life. To a certain extent, then, he was a secured creditor. He seems to have been pretty intimate with the state of M'Lay's affairs, and to have known that he had no other property but his household furniture. If Marianski had thought that he was imperfectly secured, the obvious course would have been to poind his debtor's furniture. But he knew that if he had proceeded to poind, other creditors would have got themselves conjoined. So he waits till the trustee has sold the furniture, and then arrests the proceeds in his hands. He has not been successful in securing a preference, for in the meantime his conduct has been such as to bar him from resorting to separate measures. The trust-deed was intimated to him. He attended the sale, and stated to the trustee that he intended to accede to the trust. This circumstance makes the case a far stronger one than that of *Croll.* He sees other creditors at the sale, and acts throughout as if he had acceded to the trust, and it is not till the proceeds of the sale are in the trustee's hands that he uses arrestments. I have great doubt whether, in any view, arrestment in the hands of the trustee was a competent proceeding. I do not think that the trustee was the debtor of the bankrupt. But it is not necessary to decide this.

Lord Deas—I am of the same opinion. The last objection would, I think, be sufficient in itself. The furniture was the whole estate of the bankrupt, while the amount of his debts was many times its value. There could not possibly be any reversion for which the trustee could be called to account to the bankrupt. Yet this arrestment is laid on as if the trustee had been debtor to the bankrupt. But I agree with your Lordship that the personal bar is sufficient to determine the case.

The other Judges concurred.

The Court adhered.

Agents for Pursuer—Keegan & Welsh, S.S.C.

Agent for Defender—John Walls, S.S.C.

Friday, March 10.

CHAPMAN *v.* COUSTON, THOMSON & CO.

Sale—Rejection—Disconform to Sample—Retention by Buyer—Auction. Circumstances in which it was *held* (*diss.* Lord Deas) that purchasers had failed in the duty incumbent upon them by law to return the goods delivered if they objected to them as disconform to sample, or otherwise differing from the thing bought; and that therefore they were liable in the contract price.

Opinion by Lord Deas, that the article purchased being of a very peculiar nature, and the seller having taken up a wrong position from the beginning, the buyers were liberated from immediate observance of the above mentioned legal obligation, and had made their rejection and offer of return in time.

Held by the whole Court that in a sale by auction the disposal of each lot forms a distinct and completed transaction or contract of sale; and that actual corporeal return of goods objected to was not in all cases necessary, nor even (altering Lord Gifford's interlocutor) was the placing of them in neutral custody; but that the nature and quality of the goods in each case determined the duty of the buyer in dealing with them, if he intended to reject them.

This was an action at the instance of Thomas Chapman, auctioneer in Edinburgh, against Messrs Couston, Thomson & Co., wine merchants, Leith, concluding for the sum of £699 as the price of several lots of wine bought by them at an auction sale held by the pursuer upon 19th March 1870. The pursuer had been instructed to sell a large quantity of the wines belonging to Messrs Aitken, Campbell & Turnbull, under a *del credere* commission. And of these wines the defenders purchased eleven lots. Being large purchasers, for their own convenience, and that of the sellers, they did not take delivery until about a fortnight after the sale. Delivery was given from the cellars of Messrs Aitken, Campbell & Turnbull. By the conditions of the sale, which were printed and prefixed to the catalogue of wines to be sold, and which were well known to the defenders before the sale took place, it was specially stipulated that purchasers were to pay the prices of the wines bought by them "before or on delivery." The pursuer however allowed the defenders as old customers to obtain delivery of the wines which they had purchased without previous payment, on the understanding that they would immediately thereafter pay to him the price thereof. The defenders did not make payment as the pursuer expected, but it was not till 6th May that they gave notice to the pursuer that some of the clarets were faulty and disconform to sample and to the descriptions in the sale catalogue, and they claimed deductions from the price accordingly. Much correspondence between the parties ensued, the following excerpts from which will disclose the position taken up by the pursuer and defenders respectively:—

"*Leith, April* 7, 1870.

"Dear Sirs—For lot 19 you have sent us down wine differently sealed. One portion is sealed 1864, the other has no year upon it. The wines are quite different; so you must have made some mistake. You will have to get back the latter portion, and replace it with the wine sealed 1864 as per samples.—Yours truly,—Couston, Thomson & Co."

On April 18th the defenders received a communication from a customer in Reading, to whom they had sent samples of lots 24 and 51, to the effect that the wine was unsound, they accordingly communicated this fact to Mr Chapman on May 6th, and on the same day Mr Chapman wrote to

Aitken, Campbell & Turnbull as follows—"I am extremely sorry to learn from Mr Couston to-day, that he has had some samples of the clarets he bought at your sale returned to him as unsound. He got a gentleman to look at the wines yesterday in his cellar, and finds that there are in the bins many bottles apparently unsound. He opened some which are so. He is very much put about as to this, and I fear you will require to examine into this matter, and get it settled. You will have need for caution and prudence in treating on this difficulty. Mr Couston point-blank refuses to pay me. I have lodged £1500 in bank to-day on your account." On the following day Mr Chapman wrote to the defenders:—

"*May* 7, 1870.

"Dear Sirs—Referring to my conversation yesterday with your Mr Couston, I have to say that I am sorry if any of the wine bought at Aitken, Campbell & Turnbull's sale is faulty, and shall be quite willing to take back *all your purchases* at that sale. I can only do this, or receive payment of the purchase-money as per account, and shall be glad to know your decision by Tuesday next.—I am, &c.—T. C. To this the defenders answered:—

"*Leith, May* 14, 1870.

"Dear Sir—In reply to your letter of 7th inst., and with reference to the conversation the writer had with you in connection therewith, we have to say that we have fully considered the matter, and do not see our way to withdraw our claim for compensation. We shall be glad to hear from you, with any proposal you may deem it advisable to make.—Yours truly,—COUSTON, THOMSON & Co." On the same day, but before receiving this letter, Mr Chapman, having no reply to his letter of the 7th, passed a cash order upon the defenders through the British Linen Company's Bank for the amount they were due him. This order was dishonoured, with the answer returned—"Not according to sample." On 16th May Mr Chapman accordingly wrote—"As you have dishonoured the cash order I passed on you on the plea of 'Not according to sample,' I beg to say that I will give you till to-morrow evening to return the wine, otherwise I must at once take steps to enforce payment without any further notice." On the same day the defenders wrote—"Of course we shall not honour the cash order you say you have passed upon us. We ask you to furnish us with the wine purchased conform to sample exhibited at the sale, and conform to the description in the catalogue. That you have not done, and failing your doing so we claim upon those wines that are not conform to samples and descriptions the difference in price betwixt the price at which we purchased at the sale and the price we would have to pay to replace such wines by purchase in the open market. We are quite willing to do anything that is reasonable to settle the matter, but are neither to be frightened or coerced." To this Mr Chapman replied —"If you pay me for the wine purchased, or, if not satisfied, accept my offer to take it back, there will be no fear of your being either 'frightened or coerced.' You got away the wine on the faith of your reputation, and in honour you are bound to pay. If I have failed in anything you can have recourse on me, but to withohold payment and refuse to return the wine is not, I can tell you, either acting fair to me nor improving your position. I am quite good enough surely to meet any claim for damages you may have." Mr Couston answered:—

"*Liverpool*, 18*th May* 1870.

"Dear Sir—Your letter of the 16th has reached me here. I do not see my way to put myself in a *worse* position than I at present occupy, and must adhere to the contents of my last letter."

Upon May 26th, in reply to a letter from Messrs Couston, Thomson & Co.'s agents, Mr Chapman writes—"I told Mr Couston that I did not know of what he complained, as he had never yet stated a complaint; and if he wouid say of what he complained, I would show it to my employers. I have offered, and again offer, to take all Mr Couston's purchases back if he is not satisfied; but till he does this, or pays for his purchases, I decline to receive any communications through an agent." Upon 31st May Messrs Couston & Thomson's agent wrote—"Dear Sir—Messrs Couston, Thomson & Co. have now gone over the wines which they purchased from you at your sale on the 19th of March last, and they find the following is defective, or not according to sample from which they bought, viz.—(1) Lot 19—46 dozen out of 60 dozen; and (2) the whole of lots No. 24 and 56. They are agreeable to retain the rest of the goods purchased at the sale, and pay for them, and also to pay for the above lots, provided you supply them with the goods which they bought according to the sample and description. Failing your being able to do this, they think that they are entitled to the difference between the price at which they purchased them and the price at which they can be bought in the market, and which they estimate as follows," &c. On the following day Mr Chapman replied—"Messrs Couston, Thomson & Co.'s proposition cannot be entertained. I refer you to my former offers as to the mode of settlement."

As nothing appeared likely to come of this correspondence, Mr Chapman took out the summons in the present action, and his agents sent it to Couston, Thomson & Co.'s agent for him to accept service. He replied—"I have received yours of yesterday, with the signeted summons and copy therein referred to. I have now seen my clients, and, without prejudice to the questions between them and Mr Chapman, I have to state that they are agreeable to pay for the whole of their purchases, with the exception of lots 24 and 51, which they are willing to return without any claim for deterioration or value."

The pursuer pleaded, *inter alia*—"The defenders not having objected *tempestive* to the quality of any of the wines purchased by them, are barred from objecting to the same now." And the defenders pleaded—"The said wines being of different kinds and qualities, and sold in different lots to all comers in the course of competition, the sale of each lot is a separate transaction, and the defenders were entitled to reject the lots not conform to contract, and retain the other lots. The defenders having rejected the said lots 19, 24, and 51, and timeously offered to return the same, are not liable for the price at which they were sold."

The Lord Ordinary (GIFFORD) ordered a proof, the result of which went to establish that the wines comprising lots 24 and 51 were unsound and quite unmarketable, though when they had become so did not appear. And that lot 19 consisted of substantially the same wine, though bottled at different times, and from different hogsheads, and differently sealed.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 29th November* 1870.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, proof adduced, and whole process, Finds (1) that the defenders purchased from the pursuer, at a public sale on 19th March 1870, the various lots of wine and liqueurs mentioned in article 1st of the pursuer's condescendence, and that at the various prices therein specified: Finds (2) that shortly after the said sale, and about the end of March or beginning of April, the defenders received delivery of the whole lots so purchased by them: Finds (3) that some time thereafter, and in April and May 1870, the defenders objected to lots Nos. 19, 24, and 51, as being disconform to sample: Finds (4) that the defenders did not expressly offer to return these lots, but the pursuer intimated that he would not receive them unless the whole lots purchased by the defenders were returned: Finds (5) that the defenders have not returned, and have not placed in neutral custody, any of the disputed lots, or any part thereof, but have retained, and still retain, in their own possession, custody, and control, the whole lots purchased by them: Finds, in point of law, that the defenders are barred from now withholding payment of the price on the ground that the wines, or any of them, are of defective quality: Therefore decerns and ordains the defenders to make payment to the pursuer of the sum of £699, 16s. 5d. sterling, with interest thereon, at five per cent., from 14th May 1870 and until payment: Finds the pursuer entitled to expenses, but subject to modification, and remits the account thereof, when lodged, to the auditor of Court to tax and to report."

Against this interlocutor the defenders reclaimed.

WATSON and CAMPBELL SMITH for them.

SOLICITOR-GENERAL (A. R. CLARK) and ASHER for the pursuer and respondent.

Authorities referred to—*Pendreich & Company* v. *Jardine*, January 28, 1869, 6 Law Rep. 272; *Padgett* v. *M'Nair*, November 24, 1852, 15 D. 76; *M'Bey* v. *Gardiner*, June 22, 1858, 20 D. 1151; *Ranson* v. *Mitchell*, June 3, 1845, 7 D. 813; *Robson* v. *Thomson*, February 4, 1864, 2 Macph. 593; *Jaffè Brothers* v. *Ritchie*, December 21, 1860, 23 D. 242.

At advising—

LORD PRESIDENT—In this case Mr Chapman, auctioneer in Edinburgh, sues the defenders Messrs Couston, Thomson, & Co., wine merchants in Leith, for the price of certain wines exposed for sale at his auction-rooms on 19th March 1870, and bought by the defenders. The total amount sued for is £699, 16s. 5d., with interest since 14th May last. Out of the wine exposed at the sale there were eleven different lots purchased by the defenders. For these purchases they have refused to pay, and the defence which they state to this action is, that certain lots purchased were inferior in quality, and disconform to sample according to which they were bought, and farther, in part at least, were so bad as to be quite unmarketable. They specify in particular three different lots—namely, lots 19, 24, and 51 of the sale catalogue. They say that they timeously rejected those lots, and offered to return them to the pursuer; but that he, having at first agreed to their proposal, afterwards turned round and refused to have them back, and accordingly the defenders consigned in bank the sum of £315, being the price of the unobjectionable lots, but declined to pay for those objected to. This is a perfectly relevant defence as stated, for I perfectly agree with the Lord Ordinary that the sale of each lot is a completed transaction. This defence, I say, is averred perfectly relevantly, provided it is well founded in point of fact. But, on the other hand, the pursuer pleads that, assuming the wines to be objectionable, and disconform to the samples by which they were sold, the defenders are not now entitled to maintain that defence, because they neither objected to the wine nor returned it *tempestivè;* because, in fact, they made no proper objection, and still retain it in their own possession. The law upon which the pursuer relies here is perfectly well settled. If the buyer finds the goods when delivered not conform to the sample, or otherwise different from the thing purchased, and desires to be quit of them accordingly, he must at once rescind the contract. He is not entitled to hold by the contract for any purposes of his own, and yet refuse to pay the price. He must, on the contrary, rescind the contract, return the goods, and if he chooses claim damages for non-implement of the contract. Now, what is the state of the facts here. It appears that the defenders' purchases, being of large quantities of wine, were, for the convenience of all parties, not delivered to them until some time after the sale, and that the delivery was made, not from the premises of the pursuer, but from those of his employers. The sale took place on the 19th March last, delivery was completed on the 7th of April following, and from the 7th April to the 6th May no objection was taken. On the 6th May, however, Mr Couston called upon the pursuer, and it is important to observe the position taken up by the former at this interview, as stated by Mr Chapman in his evidence, and corroborated by Mr Turnbull, one of Mr Chapman's employers, and in nowise contradicted by the defenders. Mr Chapman says—"About 6th May he (Mr Couston) came to me and said that he had sent some samples of one of these purchases to a customer in England, and that he had received a complaint to the effect that it had arrived in an unsound or a doubtful condition. He said he would require to be protected in this case, as the wine seemed not to be what it was represented. I had heard no other complaint from him with respect to the wine. When he made this complaint to me, he did not mention any particular lot. He seemed to make it as a sort of general complaint. Until I got his agent's letter of 31st May 1870, I had no further complaint, except perhaps in casual conversations as to the wine, and I said I could do nothing unless he put his complaints in shape before me, which was done by that letter of 31st May." Now, as I said before, no attempt is made to contradict this, and it receives confirmation from the letter written by the pursuer Mr Chapman to his employers, Messrs Aitken, Campbell, & Turnbull, of the same date, May 6th. In short, up to May 31st the objection was never stated but as an objection generally to the whole wine. Now, Mr Chapman at once took up the position that the defenders had purchased for ready money, and had got delivery contrary to the usual rule in mere reliance upon their good faith and business integrity. Accordingly, when they declined payment, Mr Chapman naturally felt himself very much aggrieved. But notwithstanding, he says, and says at once, that he is ready to take back all the wine purchased by them. He writes on the 7th May, the day after his conversation with Mr Couston, "I am sorry if any of the wine bought at Aitken, Campbell, & Turn-

bull's sale is faulty, and shall be quite willing to take back all your purchases at that sale. I can only do this or receive payment of the purchase money as per account," &c. I do not know that he could possibly have taken up a more reasonable position, considering that there was no particular wine objected to. Mr Chapman wrote again on the 14th. He still takes the proper course for him under the circumstances, and gave the defenders a farther opportunity of returning the wine. Now, what do the defenders say in reply to these letters of Mr Chapman's. Their letter of the 16th May is the first proper reply we have to Mr Chapman's letter of the 7th. They say—(*His Lordship reads letter of* 16*th May quoted above*). Now here, on the other hand, is a distinct position taken up by the defenders in opposition to that of Mr Chapman. The defenders object, but do not particularise their objection; Mr Chapman offers to take back their purchases, failing which he insists upon payment of the price. The defenders still insist in their objections, but claim a drawback for the inferior value. They retain the wine, and make not the slightest proposal to return it or any part of it. The next letter is one from Mr Chapman adhering to the position he had adopted, and the reply to it by Mr Couston, on May 18th, was simply a refusal to put himself "in a worse position" than he then occupied—the true meaning of which was, "I have the wine, and you have not got the price, and I intend to maintain that state of matters." Now, that is a position which it is quite settled in mercantile law that the buyer cannot adopt. But the correspondence continues farther. On May 31st there comes a letter from Messrs Couston & Thomson's agents disclosing the particular objections. Down to this point no specific objections had ever been made. But even then there was not one word of returning the wine objected to. The defenders still keep it in their own hands. This position is maintained by them till the action is actually raised. It is only when the signeted summons is sent to the defenders' agent, in order that he may accept service, that for the first time an offer is made on the part of the defenders to return the wine objected to. Had this offer been made at first, and if it had been followed up by the return of the wine, they would have put themselves in a very different position. But not even then was it followed up, and to this moment they retain all the wines in their hands.

In this state of circumstances, the question comes to be, whether the defenders have not put themselves out of Court by the position they have taken up. When goods purchased and delivered are objected to by the buyer, there is a particular duty incumbent on him if he intends to insist in his objection, which he is bound to discharge, and that duty is, at once to return the goods. Of course the return is a thing which may be done in various ways. It is not always necessary that the *ipsum corpus* of the goods should always be returned to the premises of the seller. That course may not be expedient for the interests of either party, and may be neither possible nor convenient; in such a case any buyer who knows what he is about immediately proceeds to place the articles in neutral custody for behoof of the seller, and communicates at once with him. If, from necessity, instead of doing this, he himself keeps them to the order and on account of the seller, it must be under the most strict and careful observance of the condition that they are not to be touched by himself in the meantime. Now, how is it here. Why we have Mr Couston tampering with the wine continually during the whole of the time it lies in his cellars up to the date of the trial, drawing bottle after bottle to the extent of several dozen. That is a kind of conduct on the part of a buyer which is quite inconsistent with the requirements of the law in the position which Mr Couston takes up. Instead of actually returning the goods, if that in the circumstances be an unsuitable course, he must at least secure that they are kept as entirely untouched as if they had been in neutral custody. The defenders have therefore entirely failed in the duty which was by law incumbent on them if they were going to reject the wine. I therefore arrive at precisely the same result as the Lord Ordinary, though I am not quite sure that his findings will not need to be slightly altered, as he seems to have assumed that it was absolutely necessary to place the wine in neutral custody, which I do not consider to be precisely the case.

Lord Deas—[His Lordship having gone over the facts of the case as already narrated, proceeded]—Upon the 14th June, in the letter of the defenders' agent, in reply to that which asked them to accept service of this summons, there is undoubtedly an offer to return the lots which substantially are the only ones now objected to, namely 24 and 51. There is indeed a proposal about lot 19, but that we need not notice, as the buyers do not now refuse to keep this lot. I agree with your Lordship in the chair that each lot is a separate purchase; and also in your Lordship's statement of the general law applicable to the case, namely, that a buyer is not entitled to keep the subject, and at the same time insist for a deduction from the price. If, on the other hand, however, the purchaser offers in sufficient time to return the articles, then undoubtedly he is not liable in the price. The whole question then here is, whether the defenders' offer of 14th June was in time? Up to that date both parties took a wrong view of their case. The view taken by the seller was that the purchaser must either take the whole or return the whole. He refused to acknowledge that each lot was a separate purchase, and that the buyer was entitled to keep those which were unobjectionable. On the other hand, the buyer took an equally erroneous view of his position, namely, that he was entitled to reject and yet retain the wine in security of compensation. Up then to this point of time, viz., the 14th June, both parties were equally wrong, and the question is whether the purchaser changed his mind, and came round to the right view, and made his offer to return in time? We must deal with the question as if there were no other purchases than the ones objected to. Now there is no doubt that a considerable time elapsed between the sale and the offer to return, but in a question of this kind it is always necessary to look to the nature of the articles sold, and with regard to wine there is this great peculiarity, that it is an article which, when bought in large quantities and in bottle, it is very difficult to examine thoroughly, or immediately—a certain length of time is required. If, then, the purchaser, when he examines the wine, finds that he has reason to suspect something wrong, and intimates the same to the seller, that does not mean that he is to be held bound to pay for it if he does not return it at once. The seller must make out that though he did object to

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-