heir-at-law, including expenses for which the said reclaimer was found liable to said heir-at-law, fall to be paid to the reclaimer out of the fund *in medio:* Find the reclaimer entitled to expenses since the date of the Lord Ordinary's interlocutor reclaimed against, and of consent rank and prefer the said Henry Cowan to the sum of £143, being his share of the fund *in medio*, and the amount of the expenses to which he has been found entitled under the first and second findings of this interlocutor, as the same have been adjusted by the counsel for the parties: Further, of consent rank and prefer the claimants Mrs Margaret Cowan or Hodge, Mrs Catherine Cowan or Waddell, and David Scott Cowans, each to the extent of one-third of the balance of the fund *in medio*."

Counsel for the Reclaimer—Sir C. Pearson. Agents—Reid & Guild, W.S.

Counsel for the Respondents—Graham Murray—Salvesen. Agent—J. Smith Clark, S.S.C.

Wednesday, October 17.

FIRST DIVISION.

[Lord Lee, Ordinary.

HENDERSON *v.* HENDERSON.

Process—Reclaiming-Note—Competency—Boxing in Vacation after Expiry of Reclaiming Days—Personal Diligence (Scotland) Act 1838 (1 *and* 2 *Vict. cap.* 114), *sec.* 20.

By the 20th section of the Personal Diligence (Scotland) Act ten days are allowed for reclaiming against interlocutors of a Lord Ordinary loosing arrestments. An interlocutor loosing arrestments was pronounced on the last Wednesday of the summer session. The reclaiming days consequently expired on a Saturday in vacation, on which day the office was closed. The reclaiming-note was lodged on the following Tuesday, the first day after expiry of the reclaiming days on which the office was open. *Held* that the reclaiming-note was lodged in time.

This was an action of count, reckoning, and payment brought by Andrew Henderson against Mrs Isabella Burd or Henderson. In virtue of a warrant of arrestment contained in the summons the pursuer arrested the funds of the defender in the hands of the Union Bank of Scotland (Limited). The defender presented a petition to the Lord Ordinary craving to have the arrestments loosed, and the Lord Ordinary (Lee) on 18th July 1888 pronounced this interlocutor:—"The Lord Ordinary having heard counsel on the foregoing petition, on consignation of the sum of One hundred and twenty pounds in the National Bank of Scotland (Limited), Recals the arrestments above referred to, and decerns."

The Personal Diligence (Scotland) Act 1838 (1 and 2 Vict. cap. 114), sec. 20, provides that such judgment shall be subject to the review of the Inner House by a reclaiming-note duly lodged within ten days from the date thereof.

The pursuer reclaimed, but the reclaiming-note, which in terms of the statute was due on Saturday 28th July, was not lodged till Tuesday 31st July. It appeared that in vacation the office was only open on Tuesdays, Wednesdays, and Thursdays.

The respondent objected to the competency of the reclaiming-note, and argued that it could not be received, not having been duly lodged within the time allowed by the Personal Diligence Act. Though the office was shut there was no difficulty in lodging the note at the Clerk's house, or posting it to him at the Register House—*Lockhart* v. *Cumming*, May 27, 1851, 13 D. 996; *Ross* v. *Herde*, March 9, 1882, 9 R. 710.

The reclaimer argued—(1) The reclaiming days falling in vacation the note was in time if lodged before the first box-day—Bankruptcy Act 1856 (19 and 20 Vict. cap. 79), sec. 171; *Joel* v. *Gill*, January 11, 1860, 22 D. 357; Court of Session Act 1868 (31 and 32 Vict. cap. 100), secs. 94 and 107. (2) The office not being open in vacation except on Tuesdays, Wednesdays, and Thursdays, the reclaiming-note was in time as lodged on the first possible day after the expiry of the ten days. There was no obligation to lodge at the Clerk's house, or necessity that the Clerk's house should be open, or even should be in Edinburgh—*Craig* v. *Jex Blake*, March 16, 1871, 9 Macph. 715; *Russell* v. *Russell*, November 12, 1874, 2 R. 82; *Bain* v. *Adam*, February 7, 1884, 21 S.L.R. 389. The defender had suffered no prejudice by the delay.

At advising—

Lord President—In this case the Lord Ordinary pronounced an interlocutor on 18th July last, and according to the Personal Diligence Act the reclaiming-note had to be lodged within ten days, namely, on or before 28th July, which was a Saturday. Now, the obligation that the reclaiming-note should be lodged on that day was one incapable of fulfilment, because the office was not open, and there was no one to receive it. Where a limit of time is imposed by a statute there is always an implied condition that it is possible to perform the Act required. Now, it appears to me to have been impossible to perform the act in question, therefore if we were to hold that in consequence of the impossibility of performing it there was an implied obligation to lodge the reclaiming-note earlier, we should, I think, be construing the statute in a way not meant. I am consequently of opinion that we should sustain the competency of the reclaiming-note. In so deciding I do not interfere with the authority of the case of *Lockhart* v. *Cumming*, and I should be sorry to do so, as we have not only the authority of that case by itself, but its authority was expressly reserved in the case of *Joel* v. *Gill*, where a distinction was drawn between the circumstances upon which the decisions in the two cases were grounded.

Lord Mure—I am of the same opinion. Where a party lodges a reclaiming-note on the first possible opportunity beyond the ten days I think it is still a good reclaiming-note. If we were to hold otherwise we should be shortening the time permitted by the statute.

Lord Shand and Lord Adam concurred.

The case was therefore sent to the roll.

Counsel for the Pursuer (Reclaimer)—Rhind. Agent—William Officer, S.S.C.

Counsel for the Defender (Respondent)—Salvesen. Agent—D. Howard Smith, Solicitor.

Tuesday, October 23.

SECOND DIVISION.

JAMIESON AND ANOTHER *v.* ROBERTSON AND ANOTHER

Process—Multiplepoinding—Competency.

A creditor of a deceased person raised an action against his executrix, for payment of an alleged debt exceeding in amount the apparent estate, which was otherwise sufficient to pay all claims of creditors in full. Another creditor thereupon brought an action of multiplepoinding with the assent of the executrix, and in her name, against the creditors as defenders. *Held* that the action of multiplepoinding was competent.

Peter Duffus, crofter, Clashendrum, Kincardineshire, died on 27th June 1886, intestate and without leaving lawful issue.

Mrs Elizabeth Duffus or Jamieson was confirmed executrix-dative, and sold off and realised the whole of the said deceased Peter Duffus' estate so far as recoverable.

There remained in the hands of the executrix for distribution among the creditors (after paying the preferable debts) the sum of £94, 7s. 0½d., which, apart from the claim about to be narrated, was sufficient to meet the claims against the estate.

Ann Robertson, a servant of the deceased, had a disputed claim against the estate for £104, 17s., and brought an action for that amount against the executrix upon 15th April 1887, to which answers were duly lodged.

Upon 26th April 1887 James Dallas, one of the creditors on the estate, raised an action of multiplepoinding as real raiser in the name and with the concurrence of the said Elizabeth Duffus or Jamieson, as pursuer and nominal raiser, against the said Ann Robertson and the unpaid creditors on the estate, the above sum of £94, 7s. 0½d. being the fund *in medio*. To this action Ann Robertson objected, on the ground (1) that the action was incompetent, there being no double distress, and (2) that the action was unnecessary, the prior action of constitution at her instance being still in dependence and being a simpler and less complicated mode of action for dealing with her claim than a multiplepoinding.

The Sheriff-Substitute (Dove Wilson) repelled the defences and ordered claims. He added this note:—

"*Note.*—It is unfortunate that the rules as to the competency of bringing an action of multiplepoinding are so unsettled and difficult to understand. I deduce from the cases, however, that while the existence of a claim for a disputed debt, said to be due from a trust-fund, will not authorise the action where the trustee is competent and willing to defend an ordinary action for a claim, it will do so where he is unable or unwilling to defend it. Such is the position of the person who is here in the position of trustee. She says that the defender Ann Robertson is making a claim against the estate which she believes to be bad, but which she is unwilling and unable from want of funds to take the responsibility of rebutting. Whatever inconvenience the course of raising a multiplepoinding may occasion, I cannot find authority for saying that it is incompetent. On the contrary, she seems entitled to use this process for obtaining her discharge.

The cases I have found it necessary to consult are:—(1) *Crockat* v. *Panmure*, 1853, 15 D. 737; (2) *Mitchell* v. *Strachan*, 1869, 8 M. 154; (3) *Park* v. *Watson*, 1874, 2 R. 118; (4) *Kyd* v. *Waterston*, 1880, 7 R. 884; (5) *Robb's Trustees* v. *Robb*, 1880, 7 R. 1049; (6) *Pollard* v. *Galloway*, 1881, 9 R. 21; and (7) *Dill, Wilson, & Co.* v. *Ricardo's Trustees*, 1885, 12 R. 404.

"It is not surprising if I have been able to obtain from these cases only imperfect guidance. They extend over a period of more than thirty years, and they show that during all that time the law has been in a state of doubt and conflict. In the first of them the Lord Ordinary was overruled, and an Inner House Judge dissented. In the second an Inner House Judge doubted and withheld his concurrence. In the third the Court recalled the judgment of two Sheriffs. In the fourth the Lord Ordinary was overruled. In the fifth case the same Lord Ordinary intimated that he followed the preceding decision 'with the greatest possible regret.' In the sixth the two Sheriffs concerned differed in opinion, and the case was decided in the Court of Session, by two Judges voting one way and another the opposite way. In the seventh case there was no difference of opinion on the bench, but one of the Judges took the opportunity of saying that he thought a previous case had been wrongly decided. The cases I have quoted were not selected by me for the purpose of showing how much difference of opinion it was possible to put within a small compass. They are the cases which I had looked out as raising the questions most resembling the question here raised."

Against the interlocutor the defender Ann Robertson appealed to the Sheriff (Guthrie Smith), who pronounced the following interlocutors:—

"28*th September* 1887.—Having heard parties' procurators on the foregoing appeal, sists the process until the issue of the relative action raised in the name of Ann Robertson."

"3*rd March* 1888.—Having heard parties' procurators on the pursuer's motion to recal the sist and have the appeal proceeded with, in respect the relative action at the instance of the defender Ann Robertson against the pursuer has now been finally decided, makes avizandum."

"14*th March* 1888.—The Sheriff recals the sist; recals the interlocutor of 5th August; dismisses the action; finds the real raiser liable in expenses to the defender Ann Robertson; allows an account to be given in, and remits the same for taxation, and decerns."

The pursuer and the real raiser thereupon appealed to the Court of Session.

Argued for the appellants—The process of multiplepoinding was competent. It was in the circumstances the proper process, being certainly the cheapest and best form of action, and perhaps the only one. It was the proper action for executors to bring who wished exoneration