the Sheriff, if he was of opinion that important questions of law were involved, has not stated the same in his interlocutor, and if by this is meant that he must set forth in a separable part of his interlocutor an articulate statement of the questions of law on which he thinks that the unsuccessful party should have an opportunity of having his judgment reviewed, he has certainly not done so. We were referred to the case of *The Duke of Argyll* v. *Muir* (1910 S.C. 96), where the Lord President made certain remarks on the draughtsmanship of section 8, and in these observations I express my respectful concurrence, but as I agree further with him that the underlying idea of the section is perfectly clear, I do not think it ought to be construed too literally. The Sheriff has here made a finding in law in his interlocutor, and he has discussed in the note which he appended the various authorities on which he bases his finding. He has also within seven days of the interlocutor granted leave to the pursuer to appeal, and it must therefore be inferred that he considered that an important question of law was involved in his decision. That being so, I think both the conditions which are necessary to a competent appeal to the Court of Session have been satisfied, and that we are bound to entertain the appeal. It would be obviously impracticable for the Sheriff in every summary case to consider, possibly without previous argument, whether the decision which he was pronouncing involved important questions of law, and to state these articulately so as to pave the way for a further appeal, when at that stage of the cause no suggestion may have been made by either party as to further procedure. I cannot think that that was intended, having in view the provision that the interlocutor granting leave to appeal may be signed within seven days of the interlocutor on the merits. The jurisdiction of the Court of Session in such summary causes, if this view be sound, would be similar to the jurisdiction which the House of Lords exercises with regard to judgments pronounced by either Division on appeals coming from the Sheriff Court. On questions of fact the judgment of the Court of Session cannot be reviewed by the House of Lords, but the findings in law proceeding on these facts are open to review. I am therefore for repelling the objection to competency and appointing the cause to be put out for hearing.

The LORD JUSTICE-CLERK and LORD CULLEN concurred.

LORD ARDWALL was absent, and LORD DUNDAS was sitting in the Extra Division.

The Court sustained the competency of the appeal and ordered the cause to be put to the roll.

Counsel for Pursuer—Paton. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defenders—T. G. Robe tson. Agents—Laing & Motherwell, W.S.

Thursday, July 13.

FIRST DIVISION.

[Lord Dewar, Ordinary.

GLEN'S TRUSTEES *v.* GLEN AND OTHERS.

MILLER (GLEN'S *CURATOR BONIS*) *v.* GLEN'S TRUSTEES.

Process — Multiplepoinding — Trust — Competency — Double Distress.

A father died survived by a widow and a daughter. Thereafter his widow, who had been his executrix, died. The *curator bonis* of the daughter raised an action of count and reckoning and payment against the widow's trustees and executors, in which he averred that the widow had immixed her husband's estate with hers, and that it formed the bulk of the estate of which she died possessed. This action was signeted after, but called before, an action of multiplepoinding whereby the widow's trustees and executors, as real raisers, threw into Court the whole estate under their administration as such, and called as defenders the daughter and her *curator bonis* and the whole individual beneficiaries under the widow's settlement. They maintained that this procedure was justified on the ground that they were threatened with legal proceedings by the beneficiaries under the widow's will if they admitted the claim of the *curator bonis*. The Lord Ordinary (Dewar) repelled the defender's plea to the competency of the multiplepoinding, and sisted the action of count, reckoning, and payment *in hoc statu*.

The Court *sustained* the defender's plea to the competency of the multiplepoinding, and *recalled* the sist of the action of count, reckoning, and payment.

David Rintoul and another, the trustees acting under the trust-disposition and settlement of Mrs Jane M'Laren or Glen, dated 17th August 1907, *pursuers and real raisers*, raised an action of multiplepoinding against Marion Glen, daughter of the said Mrs Glen, and Guy B. Miller, *curator bonis* to the said Marion Glen and others. The summons was signeted on 12th October 1910. Answers were lodged for Guy B. Miller, *curator bonis* to Miss Marion Glen, who pleaded that the action was incompetent and should be dismissed.

Guy Burns Miller, writer in Glasgow, *curator bonis* to Miss Marion M'Laren Glen, *pursuer*, raised an action of count, reckoning, and payment against David Rintoul and another, the trustees and executors of Mrs Janet M'Laren or Glen, acting under her trust-disposition and settlement dated 17th August 1907, *defenders*. The summons was signeted on 24th October 1910.

The circumstances in which the actions were raised sufficiently appear from the

opinion of the Lord Ordinary (Dewar). Compare also opinion of Lord Johnston.

On 5th April 1911 the Lord Ordinary in the action of multiplepoinding pronounced this interlocutor—"Repels the defences for the compearing defender Guy B. Miller, *curator bonis* to Marion Glen, and sustains the competency of this action."

Opinion.—"The pursuers and real raisers in this action are trustees acting under the trust-disposition and settlement, dated 17th August 1907, of the late Mrs Jane Glen.

"The compearing defender is Mr Guy Burns Miller, *curator bonis* to Miss Marion Glen, daughter of the said Mrs Glen, and the other defenders are beneficiaries under Mrs Glen's will.

"The pursuers and real raisers set forth on record that they have taken possession of Mrs Glen's estate, which amounts to £5134 or thereby, and that questions have arisen as to its distribution; that the compearing defender as *curator bonis* claims the whole fund on the ground that it belonged to Mrs Glen's late husband James Glen (to whom Mrs Glen had confirmed as executrix, and of whose estate she had liferent under his will); while the other defenders claim that the fund now in the real raisers' hands, or at least the greater part of it, was Mrs Glen's own absolute property, and falls to be administered and disposed of under and in terms of her trust-disposition and settlement. The pursuers further aver that if the compearing defender's contention is sound certain legacies left by Mrs Glen cannot be paid, and they plead that the action is necessary to obtain exoneration and to ascertain who is entitled to the fund *in medio*.

"The compearing defender admits that both he and the other defenders claim the fund, but he maintains that no question arises between him and them as beneficiaries under Mrs Glen's will, as he only claims the late James Glen's estate. He avers that the said James Glen died possessed of £6500 or thereby, and that under his holograph will, dated 15th February 1892, his estate was bequeathed to Mrs Glen in liferent and to his daughter the said Miss Marion Glen in fee; that Mrs Glen did not disclose to the defender that such a will existed, but possessed and enjoyed the said estate as her own absolute property and without completing a proper title thereto; and he, as *curator bonis* foresaid, has raised an action of accounting against the pursuers and real raisers as representing Mrs Glen, concluding for payment of the sums found due under said accounting. The said action was signeted on 24th October 1910, and was called in Court before the action of multiplepoinding, although the summons in the latter was signeted on 12th October 1910. In these circumstances he pleads that this action of multiplepoinding is incompetent and ought to be dismissed, or at all events sisted, until his rights are ascertained under the action of accounting.

"I have read all the authorities to which both parties referred me, but I do not think that on a question of competency one case is of much assistance in deciding another, because so much depends upon the general circumstances of each case. But this I think is clear—when trustees are entitled to exoneration and cannot obtain it on account of conflicting claims to the fund in their hands, an action of multiplepoinding at their instance has always been held competent. Now the defender does not dispute that the real raisers are entitled to exoneration, and but for the conflicting claims they would obtain it. All he says is that he makes no claim under Mrs Glen's will or from her estate, and that he has no dispute with the beneficiaries. That is true, but both he and they have lodged claims on separate and hostile grounds to the funds which the trustees hold. The two estates are mixed through no fault of the trustees; they do not know which claim should be preferred. There is, therefore, double distress which prevents exoneration, and I see no reason why the real raisers should undertake the responsibility of deciding the questions which have arisen for themselves or incur the risk of having them determined under the action of accounting which the defender has raised.

"I accordingly repel the defender's plea-in-law, sustain the competency of this action, and sist the action of accounting *in hoc statu*."

On 5th April 1911 the Lord Ordinary in the action of accounting pronounced this interlocutor—". . . Sists process *in hoc statu*."

The *curator bonis* of Marion Glen reclaimed in both actions, and argued—The multiplepoinding was incompetent. There were no competing claims and no double distress. By competing claims were meant claims in the same place, or—as phrased by Lord Adam in *Mackenzie's Trustees* v. *Sutherland*, January 10, 1895, 22 R. 233, at p. 235, 32 S.L.R. 172—in the same class. The case was not covered by Lord Kinnear's dictum, or equitable exception, regarding the necessity of double distress at p. 237 of that case. Reference was also made to *Crokat* v. *Lord Panmure*, June 8, 1853, 15 D. 737, and *Blair's Trustees* v. *Blair*, December 12, 1863, 2 Macph. 284.

Argued for the respondents—Double distress was a question of circumstances. The main consideration was how to best serve the convenience and interest of all parties. The case was covered by Lord Kinnear's dictum in *Mackenzie's Trustees* (*supra*). Reference was also made to *Jamieson* v. *Robertson*, October 23, 1888, 16 R. 15, 26 S.L.R. 12; *Fraser's Executrix* v. *Wallace's Trustees*, February 15, 1893, 20 R. 374, 30 S.L.R. 421; *Commercial Bank of Scotland, Limited* v. *Muir*, December 1, 1897, 25 R. 219, 35 S.L.R. 174; *MacGillivray's Trustees* v. *Dallas*, June 6, 1905, 7 F. 733, 42 S.L.R. 791.

At advising—

LORD JOHNSTON—James Glen died in 1892 survived by his widow and a daughter Marion Glen. His widow died in 1909, and his daughter is represented by Guy Burns

Miller, her *curator bonis*. Mrs Glen left a settlement dated 1907 appointing trustees, who have made up a title to her estate. Miss Glen's curator avers that her father, by holograph will, left his estate to his widow in liferent and to his daughter, the ward, in fee, his widow being appointed his executrix; that Mrs Glen confirmed to a portion of his estate, and was already in possession of the rest without the necessity of making up a title through him, and has immixed the whole with her own estate; that her husband's estate forms the bulk, if not the whole, of what Mrs Glen died possessed; and that she has never accounted therefor. Accordingly he has raised an action of count, reckoning, and payment against the trustees and executors of Mrs Glen, calling them to account for the estate of the late James Glen intromitted with by their author, so that the amount of the said estate due to the pursuer as *curator bonis* to Marion Glen, the only child of the deceased James Glen and Mrs Glen, might be ascertained and paid over to him accordingly, and he concludes for payment in cash, under deduction of the value of any securities which should be ascertained to have belonged to Mr Glen, and which might be handed over *in forma specifica*. This summons was not indeed signeted before the action of multiplepoinding now to be mentioned had been signeted and served, but it was, nevertheless, called in Court before the multiplepoinding, and is thus the prior action. The multiplepoinding was called shortly after it, and records in both actions have been made up. By the action of multiplepoinding the trustees, as real raisers, threw into Court the whole estate under their administration as Mrs Glen's trustees and executors, and they called as defenders Marion Glen and her curator, and the whole individual beneficiaries under Mrs Glen's settlement, and themselves as her trustees. The present question is whether this action of multiplepoinding is competent.

Irrespective of the precedence of the action of count, reckoning, and payment, I conceive that this action of multiplepoinding is not competent as an action of distribution, and is premature as an action of exoneration.

The idea of the raisers of the multiplepoinding is that the threat of legal proceedings against them at the instance of Mrs Glen's legatees, if they recognise the claim of the *curator bonis*, is enough to justify them throwing the estate into Court in order to allow rival claimants to fight out the matter at issue between them, and so to obtain their own exoneration. But the curator's claim is not a claim to a share of the estate. It is a claim against the estate, and a claim of debt to be made good against the trustees as representing Mrs Glen, and not against her legatees, who have no title to represent her or her estate. Nor is it a claim in competition with the legatees, who have no claim against the estate, but only to their respective interests in the estate under the trustees. It may have been quite within the legatees' right to interpel Mrs Glen's trustees from recognising the curator's claim, except under judicial authority, but the trustees are bound to know, that if they pay under judicial authority, any threat by the legatees of judicial proceedings against them for so doing is a mere *brutum fulmen*. Their course was clear, viz., to inform the legatees that they had no intention of recognising the claim except under judicial authority, as on the face of the papers it was impossible that they should do so and then to have defended any action the curator might raise. If they were apprehensive that the curator's claim was good, and that he might sweep away the whole funds that had fallen into their hands, and leave them without sufficient to pay expenses, it was always open to them to give the legatees the opportunity of supplying funds or defending the claim in their name. But I must say that on the statement of the case it is pretty clearly apparent that they need have no apprehensions as to incurring the expense of a defence, for the apparent circumstances are such as to entitle them to have a judgment of the Court to clear up the question whether they are bound to account, and if so for how much.

Now let me turn to the record to see the grounds put forward by the trustees, as real raisers, for this action, for they appear to me conclusive against them when examined.

They say in cond. 3 that the trustees took possession of Mrs Glen's estate and made up a title to all funds of which they found her possessed. That is common ground. Then they say—"Questions have arisen in regard to the distribution of this estate by the pursuers and real raisers, and actions have been threatened against them as after mentioned by competing claimants to the estate." Both these statements are inaccurate. No question has arisen with regard to the distribution of Mrs Glen's estate. There is a claim of debt against Mrs Glen's estate, which must be determined before it can be ascertained what is Mrs Glen's estate, and this must be done before it can be distributed under her will. And when it is ascertained what is Mrs Glen's estate, there are apparently no competing claimants. The legatees are perfectly at one as to their rights, though they may all have to abate. Next, after setting forth the curator's action of count, reckoning, and payment, not entirely accurately, and the legatees' objection to his claim being acceded to, the trustees state that the legatees "repudiate the contention of the said Guy B. Miller. Conflicting claims and conflicting interests thus exist in regard to said estate. Moreover, the legacies left by Mrs Glen cannot be paid or paid in full if the defenders' contentions are sound." The latter may or may not be true, but the fact creates no conflict of claims or conflicting interests in Mrs Glen's estate. You must first ascer-

tain what the estate is before there can be any call to determine conflicting claims to it or to interests in it.

Then, finally, the trustees wind up thus —"The pursuers and real raisers are unable to decide as to the merits of the competing claimants, whose claims are mutually exclusive, and they have been threatened with actions at the instance of the rival claimants." This is the focussing of their ground for taking the proceedings. But it is an inaccuracy to speak of the claim of a creditor and the claim of a legatee as competing claims, or as mutually exclusive. They can never enter into competition. And they are not mutually exclusive at all, even though there may be enough to pay the debts and nothing left to divide among the legatees.

And this is made absolutely clear when it is considered that the question alleged to be at issue here cannot be entertained in the competition which is assumed to be the object of the action, but must be determined in adjusting the fund *in medio*. If the action of count and reckoning is looked at, it will be at once seen what is the nature of the question which has to be determined with the curator. Mrs Glen did confirm to some of her husband's estate. There is other estate standing in her name, but alleged to have been his. Some is in the specific form in which it was when Mr Glen died. Some is not. If the curator is right he may vindicate some specific securities and establish his right to a payment in cash after allowing for the value of such specific securities. The questions *hinc inde* are such as fall to be determined in an ordinary action, and most conveniently in an action of count, reckoning, and payment. How could they be determined in the multiplepoinding? Certainly in adjusting the fund *in medio* between the trustees and the curator, though most inconveniently. For the first question would then be an indirect one, viz., how much is to be deducted in order to ascertain what is left as Mrs Glen's proper estate, and therefore as the fund *in medio?* It could not be determined between the curator and the legatees in the competition, because the legatees have no claims to specific items of the estate found in Mrs Glen's hands, but only to legacies out of that which may be found to have been Mrs Glen's own estate. The two assumed competing claimants cannot, therefore, in the action of multiplepoinding come to grips, just because they have no competing interests. The trustees and the *curator bonis* must fight out the question between them, the decision of which will determine how much remains of Mrs Glen's estate, for it is only for distribution of Mrs Glen's estate that the action is raised. When the fund *in medio* is thus determined, Mrs Glen's legatees may come in and claim in the competition, if they have, as admittedly they have not, any questions of ranking or otherwise between them, and in this competition the curator has no place. It is, I think, therefore manifest that the proper action in which to dispose of the curator's claim is the ordinary action of count, reckoning, and payment, and that the multiplepoinding as an action for distribution is incompetent. I accept entirely the classic statement of Lord Kinloch in *Russel* v. *Johnston*, 21 D. 886. Though the earlier views as to the indispensability of double diligence may have been modified, it is still, however, his Lordship said, "necessary to the validity of the action that there should be a true claim to one fund or property on separate and hostile grounds, not a mere ostensible case got up in order to try a question of debt or obligation between two individuals, the proper mode of trying which is a direct action, and I think that it applies to the case before us.

It is represented, however, that the competency of the action may be supported on the ground that otherwise the trustees cannot get exoneration. The suggestion is, I think, delusive. Because they have been interpelled from recognising the curator's claim without judicial authority, it does not follow that if they pay after that authority has been obtained they will not receive all necessary exoneration. At any rate it is time enough to consider that question when the action of count and reckoning is disposed of. It would have been different had the case been such as *Jamieson* v. *Robertson*, 16 R. 15, where there was not one creditor merely but several creditors, between whom there was necessarily competition, for there was not enough even to pay the one who had sought to constitute her debt. But the competition there was between several claimants against the state, and not between a claimant against the estate and claimants on the estate. It might also have been different if the curator was lying by, as the alleged creditor was in the case of *Blair* v. *Blair's Trustees*, 2 Macph. 284.

The chief authority on which the trustees founded is that of *Mackenzie's Trustees* v. *Sutherland*, 22 R. 233, where, though the decision itself is not in their favour, it is said that the general trend of the opinions of the Court is so. I cannot so read them. In my opinion the question of exoneration, there being only one creditor in the field, and that creditor not lying by, but having come forward with an appropriate action to constitute his claim, is just as premature in this case as it was in *Mackenzie's Trustees*. And therefore I think this action of multiplepoinding not only incompetent as an action for distribution, but premature as an action for exoneration, and I come to the conclusion that it ought to be dismissed with the less regret that it is above all things as inconvenient a proceeding, and one as likely to be productive of expense in the determination of the real question raised, as could well be conceived.

LORD SKERRINGTON—The question in this case is as to the competency of an action of multiplepoinding and exoneration instituted by the testamentary trustees and executors of the late Mrs Glen, who died on 16th October 1909, for the distribution of the estate under their adminis-

tration. Its value according to the inventory was £5134. A claim has been made against the pursuers at the instance of the *curator bonis* of Miss Marion Glen, the only child of Mrs Glen and of her husband James Glen, who died in 1892. James Glen left a holograph will by which he appointed his wife to be his executor and liferenter of his property, and by which, according to the contention of the *curator bonis*, he impliedly bequeathed the fee of his estate to his daughter. His estate amounted to about £6500. The *curator bonis* claims that part of the estate included in Mrs Glen's inventory can be identified as having belonged to Mr Glen at his death and belongs in property to his ward. For the balance of Mr Glen's estate which cannot now be identified he claims that he is a creditor of Mrs Glen's trustees and executors and entitled to an ordinary ranking along with her other creditors if there are any. The first branch of the claim if well founded would be preferable to the claims both of creditors and of legatees of Mrs Glen, while the second branch would be preferable to the claims of her legatees. In each case Mrs Glen's trustees and executors are the persons vested with the proper title to resist the claim of the *curator bonis*, though they are, of course, responsible to Mrs Glen's creditors (if any) and to her legatees for their actings and administration. It was suggested in argument that Mrs Glen's trustees and executors might have a counter claim against the ward as representing the late Mr Glen in respect of *jus relictæ*, her right to which Mrs Glen never expressly renounced. Such a claim does not seem a very hopeful one in the circumstances, but in any case it would simply form a defence *pro tanto* against the claim at the instance of the *curator bonis*, and it would not affect the question whether the present action of multiplepoinding and exoneration is competent. That action was raised on 12th October 1909, and on 24th October 1909 the *curator bonis* brought a direct action against Mrs Glen's trustees for the purpose of constituting the two claims already described. The Lord Ordinary has sustained the competency of the multiplepoinding and has sisted process in the direct action.

The pursuers and real raisers of the multiplepoinding do not allege that the *curator bonis* refused or delayed unreasonably to constitute his claims and thus compelled them to take the initiative. If that had been the state of the facts Mrs Glen's trustees would, in my opinion, have been entitled to bring the *curator bonis* into Court in an action of multiplepoinding and exoneration, and the latter could not have maintained successfully that the action was incompetent or unnecessary, nor could he have complained that the fund in the hands of the trustees was thereby made liable for the expenses of bringing the action into Court and obtaining exoneration. The decision in *Blair's Trustees* v. *Blair*, 1863, 2 Macph. 284, proceeded, I think, on the ground that the creditor, who was also one of the trustees, did not desire to raise a direct action against the trustees. As a general proposition, however, I do not think that a person who has a preferable claim which he is ready and willing to constitute against his proper contradictor is bound to submit to have his claim decided in an action of multiplepoinding and exoneration merely because certain persons whose interest it is that the claim shall be successfully resisted refuse to give to the contradictor an extrajudicial discharge. For example, suppose in the present case that the whole fund had been claimed by the *curator bonis* as his ward's property, why should he (if successful in his claim) have to bear the expense of bringing the action into Court, and of the trustees' exoneration, merely because creditors and legatees of Mrs Glen threatened to cause trouble and expense to her trustees? A person who vindicates a right of property has no concern with the fact that his opponent happens to hold a representative or a fiduciary position, and may in such capacity incur trouble and personal liability. Or again, seeing that there is no competing claim by a creditor of Mrs Glen, why should the claim of the *curator bonis*, as a creditor, suffer prejudice because Mrs Glen's legatees refuse to give an extrajudicial discharge to her trustees? A creditor of a person deceased has no concern with the administration of the trusts of the will of his deceased debtor or with the claims of the heirs *ab intestato*. The whole situation is different where the conflicting claims are at the instance of persons who all stand on substantially the same plane. A person claiming as a creditor of a party deceased cannot pretend that he has no concern with the fact that there are other alleged creditors who dispute the validity of his claim—*Jamieson* v. *Robertson*, 1888, 16 R. 15. So, too, a beneficiary under a will or under intestacy cannot pretend that he has no concern with similar claims which conflict with his own. In both these cases accordingly a claimant must submit to the fund *in medio* being charged with the expenses incurred by the real raiser in consequence of conflicting but possibly unfounded claims made by third parties, though I do not doubt that in a case of misconduct the Court would have power to make a claimant personally liable for the whole expenses caused by an unfounded claim which directly led to a competent though really unnecessary action of multiplepoinding and exoneration.

I have referred at some length to the liability of the fund *in medio* for the raiser's expenses, because I think that it affords a *prima facie* test of the competency of an action of multiplepoinding and exoneration in a case like the present. Of course there are many cases where the fund *in medio* happens to be large enough both to pay the raiser's expenses and also to satisfy in full the claim of the party who objects to the competency of the action together with his expenses of process if he is successful. In such cases there

would be no substantial injustice in holding the action to be competent, and there are considerations of convenience in favour of this course. On the authorities, however, I do not see my way to hold that the competency of an action of multiplepoinding and exoneration depends on the accident whether a particular claimant can recover payment in full out of the fund *in medio* if his claim is well founded. Equally I do not see my way to adopt the suggestion which was made in a recent case in the Second Division to the effect that an objection to the competency of an action might be obviated if the real raiser agreed that in the event of his claim proving unfounded he would not ask for the expenses of bringing the action into Court, and would further agree to be liable for the expenses of the nominal raiser—*M'Dowell & Neilson's Trustee* v. *Hagart & Company*, 1905, 8 F. 235. If an action of multiplepoinding and exoneration is a competent one, then (apart from misconduct) the raiser is according to practice entitled to his expenses out of the fund *in medio*—*Hepburn's Trustees* v. *Rex*, 1894, 21 R. 1024.

The present case is not a favourable one for sustaining the competency of an action of multiplepoinding and exoneration, seeing that the beneficiaries under Mrs Glen's will are all apparently of full age and *sui juris*. Although they have threatened Mrs Glen's trustees with legal proceedings if the claim of the *curator bonis* is admitted, it is obvious that the trustees are not bound judicially to resist the claim unless the beneficiaries provide a sufficient indemnity against the costs which the trustees may incur or for which they may be found liable.

But the consideration that the question could, with due regard to the interests of Mrs Glen's trustees, be determined in a direct action is not conclusive against the competency of the multiplepoinding, because the same might equally be true in a case where such an action was undoubtedly competent, *e.g.*, where there were conflicting claims either at the instance of two or more creditors or at the instance of two or more beneficiaries. In such cases an indemnity might keep the trustees perfectly safe, but according to well-established practice they are not bound to resort to this device, but may bring an action of multipleponding and exoneration. Conversely my opinion to the effect that the present action is incompetent would not have been different if the beneficiaries under Mrs Glen's will had been minors or persons not yet in existence. In such a case an action of multiplepoinding and exoneration might have been the only satisfactory way of protecting Mrs Glen's trustees against trouble and expense in the future, but none the less I should have held that the *curator bonis* had no concern with any such considerations.

There are to be found in the cases, and particularly in *Mackenzie's Trustees* v. *Sutherland*, 1895, 22 R. 233, dicta which appear to state the right of a trustee to exoneration in very absolute terms, and which would support the competency of the present action, but in my opinion these dicta are wider and more general than is justified by the authorities and the practice of our Courts. This whole department of our law seems to me to be unnecessarily technical and cumbrous, and I see no good reason why, without resorting to an action of multiplepoinding and exoneration, trustees should not be authorised in every case of difficulty to apply to the Court for directions—the expenses of such applications being left entirely to the discretion of the Court. In the present state of the law, however, it is only in a very limited class of cases that trustees can invoke the help of the Court, and the present case in my opinion is not one of them.

The result is that the defender's plea of incompetency should be sustained, and the action of multiplepoinding and exoneration ought to be dismissed.

LORD PRESIDENT—I confess I have had considerable difficulty in this case, and if I thought that the decision necessarily laid down rules upon the general question I should have had to ask for more time for consideration, because in particular I do not think it is possible to apply to the question of the competency of the multiplepoinding the cast-iron rule that all the claims should be on what I may call one plane, and that is really the chief objection which, in the opinion of my brother Lord Johnston, is directed against the present action. But I do not feel that in the circumstances I can dissent from the judgment which is proposed, because whatever one's views upon the general question may be, it would always eventuate in each case being a question of circumstances, and I think here there is undoubtedly in Court, even in one sense at an earlier stage than the multiplepoinding, a petitory action in which the question may be perfectly well tried. In Lord Skerrington's opinion he has said much with which I agree, but on the whole general question of multiplepoindings I desire to reserve my opinion.

LORD KINNEAR and LORD MACKENZIE were sitting in the Extra Division.

In the action of count, reckoning, and payment the Court pronounced this interlocutor—

> "... Recal said interlocutor [of 5th April 1911] and remit the cause to the Lord Ordinary to proceed as accords. ..."

In the action of multiplepoinding and exoneration the Court pronounced this interlocutor—

> "... Recal said interlocutor [of 5th April 1911] and sustain the said defender's plea to the competency: Dismiss the action, and decern. ..."

Counsel for the Reclaimer (Guy Burns Miller)—Horne, K.C.—Hamilton. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Respondents (Mrs Glen's Trustees)—Crabb Watt, K.C.—Christie. Agents—Simpson & Marwick, W.S.