

by verbal intimation from Mr Nimmo to the defender in a conversation which took place on 4th April 1885, or by his letter of 25th April 1885. Now, let us take the last of these first. It is clear that this letter does not amount to resiling. It expresses no such intention, and therefore I do not look upon it as interrupting the right of the defender to validate his right by possession of the subjects. But it is said that sufficient intimation of withdrawal was given to the defender by his conversation with Mr Nimmo. I do not think that there is sufficient evidence to establish that. In the first place, it is not said that Mr Nimmo had instructions from his employer to make any intimation of withdrawal; and secondly, his evidence is quite different from his letter. I think it would be most unjust to the defender to hold that the pursuer resiled from his bargain. In my opinion the pursuer has not established the contention that the defender held his farm under tacit relocation.

LORD LEE—I agree, but I wish to say, as I understand is also my Lord Young's view, that I think that at the time the landlord is said to have resiled from his bargain, it was too late for him to do so. It was said that mere abstention from giving formal notice was not enough to make *rei interventus* so as to validate the lease, but we cannot take mere abstention by itself. After the tenant had refrained from giving notice, and as the last day of giving notice had expired, the tenant must be held to have been in possession, not under the old lease, but on new terms. There was more than abstention, as he went on to possess the ground in the belief that he had made arrangements for a new lease which was to begin at Whitsunday.

The Court pronounced the following interlocutor:—

“ . . . Find (1) that the defender possessed the lands and others libelled from Whitsunday 1883 till Whitsunday 1885 under a lease between him and George Sutherland of Forse, the proprietor of the subjects, and that the said lease terminated at Whitsunday 1885; (2) that he has since possessed the said subjects, not by tacit relocation under the said lease, but under an arrangement entered into between him and Mr Sutherland, set forth in the letter of 1st December 1886, addressed by Mr Sutherland to his agent Mr Nimmo, and delivered by Mr Sutherland to the defender's wife on behalf of the defender: Therefore dismiss the action, reserving the pursuer's claim for rent and the defender's claim for meliorations, and all answers to said claims: Find the defenders entitled to expenses,” &c.

Counsel for the Pursuer (Appellant)—Guthrie—MacWatt. Agent—Alfred Sutherland, W. S.

Counsel for the Defender (Respondent)—Strachan—M'Lennan. Agent—Thomas Liddle, S. S. C.

Wednesday, October 17.

FIRST DIVISION.

[Lord Trayner, Ordinary.

COWAN'S TRUSTEES v. COWAN.

(*Ante*, vol. xxiv. p. 469.)

Process—Multiplepoining—Claims—Expenses.

In a multiplepoining raised by trustees to determine the right to a certain portion of a trustor's estate the question in the competition was argued between the heir-at-law of the trustor and one of four next-of-kin. As a result the latter secured a judgment that the fund was in great part moveable, but was found liable in certain expenses to the heir-at-law in respect of failure in certain contentions. The respective rights of the heir-at-law and the next-of-kin having been thus determined, the three other next-of-kin lodged claims. *Held* that they could only be allowed to participate in the fund on condition of bearing equally with the next-of-kin who had litigated the question all the expenses incurred by him, including those in which he had been found liable to the heir-at-law, as the contentions in which he had failed were not of a reckless character.

Daniel Cowan, merchant, Broughty Ferry, died childless on 19th December 1881. In order to settle the rights of the heir-at-law and the next-of-kin to certain heritable property left by the deceased his trustees raised an action of multiplepoining and exoneration. The question as to the right to the fund *in medio* was argued between James Cowan, the heir-at-law, and Henry Cowan, one of four next-of-kin. As a result of this competition Henry Cowan secured for the next-of-kin a large portion of the fund *in medio*, but was found liable in certain expenses to the claimant James Cowan.

After the respective rights of the heir-at-law and the next-of-kin had been determined claims were lodged by the other three next-of-kin, Mrs Margaret Cowan or Hodge, Mrs Catherine Cowan or Waddell, and David Scott Cowans.

The Lord Ordinary (TRAYNER) on 27th January 1888 pronounced the following interlocutor:—
“ Having heard counsel for the claimants, Ranks and prefers the claimant James Cowan to the sum of £45, 17s. 1d., with interest corresponding thereto since the date of consignment, being his share of the fund *in medio* in terms of the interlocutor pronounced by the First Division on the 19th March 1887: Finds the claimant Henry Cowan entitled to payment out of the fund *in medio* of the sum of £46, 12s., being three-fourths of the expenses in which he was found liable by the interlocutor of 20th May 1887, and three-fourths of the estimated expense incurred by him under the reclaiming-note: Further, ranks and prefers the claimants Henry Cowan, Mrs Margaret Cowan or Hodge, Mrs Catherine Cowan or Waddell, and David Scott Cowans, each to the extent of one-fourth of the balance of the fund *in medio*: Grants warrant to, authorises, and ordains the Union Bank of Scotland, Limited, Edinburgh, to make payment to the claimants of the sums to which they have been severally found entitled out of the sum consigned in their hands, conform

to deposit-receipt, and the Accountant of Court to exhibit and deliver up the said receipt for the purpose of said payments, and decerns."

Against this interlocutor Henry Cowan reclaimed, and argued—The other next-of-kin should bear equally with him the expense of the litigation carried on for their benefit. That was the only condition upon which they should be allowed to participate in the fund won by him for their benefit. That condition should also apply to the expenses in which he had been found liable to James Cowan, as his failure there was an incident of the litigation above referred to, and his contentions had not been of a reckless character.

The respondents, the other next-of-kin, argued—That they should only have to share in the expenses incurred by the claimer where he had been successful. The authority of *Morgan v. Morris* (cit. sub.) went no further than this. They were not under any obligation to contribute to the expense incurred by the claimer in maintaining untenable propositions.

Authorities—*Morgan v. Morris*, March 11, 1856, 18 D. 797-818; *Binnie's Trustees v. Henry's Trustees*, July 3, 1883, 10 R. 1075; *Jaffe v. Caruthers*, March 3, 1860, 22 D. 936.

At advising—

LORD PRESIDENT—The question argued in the multiplepounding was between an heir and one of four next-of-kin. The fund *in medio* consisted of heritage, but the Lord Ordinary, by interlocutor pronounced on 9th November 1886, decided that the property was to be regarded as moveable for the purposes of the competition. Under a reclaiming-note, to this Division that interlocutor was modified, and the heir was found entitled to a certain portion of the fund *in medio*. Then, when the division between the heir and the executors had been thus determined, three executors came forward and made an application, and desired to be allowed to participate in the fund which had been won by one executor. The question then came to be, on what terms they should be permitted to participate.

Now, the principle on which a question of this kind is to be solved, when all parties do not choose to come forward, but leave the question to be determined by the efforts of one of their number, is this—When they come in to the case they must bear their share of the expenses which the one who has litigated has incurred. That is a very obvious principle of equity, and in ordinary cases I think the way in which it is to be applied can be easily determined. In the present case the Lord Ordinary has found Henry Cowan, who came forward and fought the case for the next-of-kin, entitled to three-fourths of the expenses he has incurred out of the fund *in medio*. I do not see that that is consistent with the principle I have referred to. That principle requires one of two courses to be adopted. Either the incoming parties must pay over three-fourths of the expenses out of their own pockets, or the entire amount of the expenses must be deducted from the fund *in medio*. Either one or other of these courses is just and consistent with the principle referred to. The Lord Ordinary does not decide consistently with this principle when he finds that three-fourths of the expenses should be deducted from the fund *in medio*. He deducts

the three-fourths which the parties coming in should contribute, but not the fourth, which is to be contributed by the claimant Henry Cowan. The principle is a very obvious one, and its application is, I think, not difficult. The only point of specialty in the present case is, that to a certain extent the successful litigant was unsuccessful. A reclaiming-note was presented against an interlocutor of the Lord Ordinary of date 9th November 1886, and under it he lost part of the fund *in medio*, and to that extent must be considered to have claimed too much. Now, it is said that he should bear the part of the expense incurred in supporting that claim. To that proposition I am not inclined to consent. No doubt it is possible to conceive a case of nimious and oppressive litigation where the litigant could not expect to be reimbursed for the expense he had incurred. The true view, I think, in estimating the expenses to be paid by parties coming in is, that when they ask to share in the fruits of a litigation they must bear the expense of any little mishap which may have occurred in the course of such litigation.

LORD MURE—I am of the same opinion. I think that when one person succeeds in creating a fund for the benefit of the executors they must bear their fair share of the expenses which he has incurred in creating that fund.

LORD SHAND—There can be, I think, no doubt but that if Henry Cowan had not appeared in the multiplepounding the whole fund would have been swept away to the benefit of the heir. The executors are taking benefit of this action of Henry Cowan's, and that being so, I agree with your Lordship that the legitimate expenses incurred in arriving at a settlement of the question which had to be decided must be paid equally by all the next-of-kin. The Lord Ordinary, I believe, thought that he was allocating the fund in that way, and his interlocutor, so far as it deducts three-fourths of the expenses, should be modified, as there should have been a deduction of the whole expenses. The first thing to be done is to deduct the expenses; the second, to divide the fund.

The only specialty in the case is the one referred to by your Lordship, namely, that Henry Cowan was wrong in part of his case. If his contentions had been reckless, then I should have held that he had no claim to be recouped for the expenses in putting them forward; but the argument he submitted was a fair one, and must be looked on as an incident of his pleading the case as he did, and those who take the benefit of his appearance must bear their fair share of the expenses he incurred.

LORD ADAM concurred.

The Court pronounced the following interlocutor:—

"The Lords having considered the reclaiming-note for Henry Cowan against Lord Trayner's interlocutor of date 27th January 1888, and heard counsel for the parties, Recall the said interlocutor reclaimed against in so far as it deals with the fund *in medio* falling to the next-of-kin: Find that the whole expenses incurred by the said claimer in the competition with James Cowan, the

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—Bowing 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 1838 pronounced this interlocutor:—"The Lord Ordinary having heard counsel on the foregoing petition, on consignment 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.