duced one or two receipts, signed by the widow herself, in which this division is directly adopted. Lastly, on this head the intervention of Mr Graham in 1864, and the statement of Mr Towers Clark at that time, seem to me to put the question of the widow's assent entirely at rest. Owing to an impression, how produced we do not see, which seems to have prevailed with her, the widow, then at the age of ninety-three, appointed Mr Graham to uplift her money instead of her son. He inquired into the matter, and was perfectly satisfied with the arrangement subsisting, but thenceforward he drew precisely the same sums from Mr Towers Clark on account of the annuity as those which had been in use to be paid. If I add to this the explicit statement of Mr Towers Clark that the arrangement of 1850 was the subject of anxious consideration by the widow, I come with no hesitation to the conclusion that every one of these sums was paid by the directions, and retained with the consent and approval, of the widow herself.

If, therefore, we are to treat this case as one concluded on the facts, and as no proposal for further proof has been made on either side, I am of opinion that the widow agreed that her jointure should share in the division, and that although she could not have been compelled by action to act on this agreement, she did so, and was entitled to do so. The omission of reference to the jointure in the written instrument I have already explained, but it seems to me of no moment, seeing that the widow's own authority was quite a sufficient discharge, term by term, of the sums retained.

That is the judgment of the Court. We are of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The Lords therefore adhered.

Counsel for Pursuer and Reclaimer—Lord Advocate (Balfour)—Trayner—Pearson. Agents—H. B. & F. J. Dewar, W.S.

Counsel for Defender and Respondent—J. P. B. Robertson—Douglas. Agents—J. & J. H. Balfour, W.S.

Wednesday, November 30.

SECOND DIVISION.

[Lord Lee, Ordinary.

DUDGEON *v.* ELLIOT.

Property—Co-Feuar—Mutual Gable — Liability for Share of Cost.

A proprietor of part of a tenement, founding on the terms of a feu-charter which contained a stipulation that the builder of the tenement should be entitled to recover from the feuars of the adjoining ground half the cost of erection of the mutual gable—*held* entitled to claim from an adjoining feuar a share of the cost of erecting that portion of the gable which was mutual to their respective properties, although a claim had been intimated against him by the builders of the tenement for the same debt.

Observed that the proper mode for determining such a double claim is a process of multiplepoinding.

Messrs J. & W. Elliot, builders, Edinburgh, disponed to Mrs Dudgeon the southmost shop and dwelling-house on the street and sunk flats of a tenement situated at the corner of Bellevue Place and Claremont Terrace, Edinburgh. This tenement, of which Mrs Dudgeon's property formed part, was built upon ground contained in a feu-charter in favour of John Elliot and William Elliot, and the survivor of them, as trustees for their firm of J. & W. Elliot, and of their or the survivor's heirs and assignees whomsoever, granted by the trustees of Donaldson's Hospital, whereby it was stipulated "that the east and south gables of the foresaid tenement were to be built so as to suit as mutual gables for said tenement and the tenement to be erected on the adjoining ground to the east and south thereof, and that the said gables should be built, one-half on the ground disponed, and the other half on the adjoining ground," of which the said trustees for Donaldson's Hospital were originally proprietors. The feu-charter also stipulated that "the said John Elliot and William Elliot, as trustees foresaid, or their foresaids, who build the said mutual gables and division wall, shall be entitled to recover from the adjoining feuars half the cost of erection of the said mutual gables or division walls, as the same shall be ascertained by a surveyor mutually chosen by the feuars concerned."

The defender Mr John Elliot junior began to build on the adjoining piece of ground, which he had acquired from the trustees of Donaldson's Hospital, taking advantage of the said mutual gable in the erection of his tenement. The pursuer Mrs Dudgeon claimed, in terms of the feu-charter, her share of the cost of erection of the said mutual gable. The defender refused payment, and maintained that the right to recover from the adjoining feuars half of the cost was limited by the feu-charter to the builders of said gables, and that the whole of the said tenement, including said gables, was erected by Messrs J. & W. Elliot. This firm was dissolved in 1879, and the business carried on by Mr John Elliot, on whose sequestrated estates a trustee was appointed in March 1880.

The defender averred that the trustee on Mr John Elliot's estate had claimed from him the cost of erection of the said gables, and that he had arranged with him the price to be paid when the present claim by the pursuer was raised.

The Lord Ordinary remitted to Mr Watherston, valuator, to examine the mutual gable and division walls in dispute, and report his opinion on the value thereof, and thereafter decerned against the defender for the sum of £35, 4s., being the sum which the reporter held to be the value of the proportion of the gable and division walls effeiring to the defender.

The defender reclaimed, and argued—That a demand for the whole cost exigible from him in respect of his share of the said gable had been made by the trustee on Mr John Elliot's sequestrated estate. In view of this fact it was unjust to hold him responsible to Mrs Dudgeon on the same account. He asked the Court to pronounce an interlocutor which would relieve him of the responsibility of double payment in respect of this portion.

At advising—

Lord Justice-Clerk—I think that the Lord

Ordinary's interlocutor ought to be adhered to. I do not see what other conclusion he could have come to, for the title of the pursuer is not denied, and the liability of the defender is not denied.

LORD YOUNG—I am of the same opinion, but I should just like to add a single remark. If a party is distressed by a double claim brought on plausible grounds he is entitled to bring a multiplepoinding. Distress need not be in the form of diligence. The law never requires that distress should proceed the length of diligence. But there was nothing of the sort done here. The defender stood off until Mrs Dudgeon makes her demand, and now suggests that someone else is making the same claim. But this is not double distress.

LORD CRAIGHILL—It does not appear that any course is open to us other than to give decree in terms of the Lord Ordinary's interlocutor. The Court cannot bring a multiplepoinding. If there is double distress there can be a multiplepoinding, that two claimants may be brought face to face. But what the defender has not done the Court cannot do.

The Lords adhered.

Counsel for Pursuer — Darling. Agents—Purvis & Wakelin, S.S.C.
Counsel for Defender—Trayner—J. A. Reid. Agent—A. Rodan Hogg, Solicitor.

Thursday, December 1.

SECOND DIVISION.

[Sheriff of Lanarkshire.

GRANT *v.* GLASGOW DAIRY COMPANY.

Reparation—Road—Negligence—Carriage.

A boy four years old was crossing a thoroughfare in charge of a girl about nine years old, who was close beside him. Just after he came out from behind a lorry which was standing at the side of the street, and which prevented him from seeing up the street, he was knocked down and had his thigh broken by a milk van which was coming down the street on its own side. The evidence was contradictory as to whether the van was being driven at an excessive pace or not; the driver was not sitting on his own seat, but low down beside the shaft of the van. The accident happened in broad daylight. *Held* that the accident having occurred in daylight, there was a presumption of fault against the driver, and that on the evidence he had not overcome that presumption, and damages assessed at £50.

This was an action raised in the Sheriff Court of Lanarkshire by Adam Grant, boilermaker, as administrator-in-law for his pupil son, to recover £100 as damages for an injury inflicted on the pupil through his being run over in Garscube Road, Glasgow, on 2d November 1880, by a van belonging to the defenders. The proof led showed that at two o'clock on the afternoon of that day the pursuer's son, who was then between three and four years of age, and who had been sent in charge of his sister, a girl ten years of age, to a shop in Garscube Road, was in the act of crossing the street, which is of considerable width, on his return home. About two doors above the shop to which the children had been sent a lorry laden with bottles had been newly drawn up, which obscured to some extent from the child the view of the street in the direction from which the defender's van was at the time approaching. Just after the child had come out from behind this lorry he was struck by the horse in the defender's milk cart, which was being driven down the street on its proper side, and had passed within a few feet of the lorry. The boy was thus knocked down and a wheel passed over him, causing a comminuted fracture of the right thigh, from which he suffered great pain, was for some time in a hospital, and was lame for a considerable period, but from which no constitutional injury appeared at the time of this action to have been sustained. The little girl, according to her own evidence, was at that time close to the boy, and ran back when she saw that the accident was inevitable, and it was admitted by one of the boys in the defenders' cart at the time that he saw the children, and saw the girl run back, but that it was then too late to avoid the accident. The child appeared to have been coming pretty quickly out from behind the lorry when the accident happened. The evidence was contradictory as to the speed at which the van was being driven at the time when the accident occurred. Two persons who were with the lorry, on the one hand, deponed that the van was being driven furiously and recklessly by a boy who had been sent along with the driver for the purpose of assisting him in the delivery of the milk. This evidence was corroborated by that of the mother of the boy, who had seen the accident from her window at the other side of the street. On the other hand, the driver of the van (a lad of seventeen) deponed that he was himself driving at the time at an ordinary trot, and this evidence was corroborated both by the boy who was with him and by several bystanders who had observed the van immediately before the accident, and had witnessed the accident. It was proved that the driver was not at the time sitting in his own high seat, which ran across the cart above the barrels of milk, but was sitting low down at the corner of the cart with his feet outside. It was also proved that immediately before the accident the driver and the boy were laughing and talking together, though this was denied by the driver. The evidence for the defence was to the effect that the driver had no time to draw up after the child came in sight from behind the lorry.

The Sheriff-Substitute (GUTHRIE) found that it was not proved that the defenders' driver was driving recklessly, or that the accident occurred through his fault, and assoilzied the defenders.

The Sheriff (CLARK) on appeal adhered. He added this note to his interlocutor:—(After examining the evidence and holding the preponderance to be with the defenders)—"In addition to this it seems very clear that a certain amount of contributory negligence attaches to the pursuer's case. His son—a boy between three and four years of age—seems not to have been properly looked after, and it is very obvious on the proof that he rushed out of the shop and put himself in such a position that it might have been difficult, if the defenders' driver had exercised the utmost amount of circumspection, to have prevented