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

when there were conflicting claims against the estate—Bankton, iii. 8, 88; Ersk. Inst. iii. 9, 43. There were competing claims here, and that was sufficient to justify the action; it was not necessary that there should be double distress—*M'Dougal's Trustees*, July 9, 1830, 8 Sh. 1036. The only case apparently in favour of the view that the process was incompetent was *Robb's Trustees* v. *Robb*, July 3, 1880, 7 R. 1049, but there the trustees objected to the action of multiplepoinding being brought; here it had been brought in the name and with the concurrence of the executrix. The claim here made was larger than the whole free residue, and in any case would render the estate insolvent, which was a sufficient reason for bringing a multiplepoinding to settle the claims of all the creditors.

Argued for the respondent—The action of multiplepoinding was incompetent, and in any view it was inexpedient. There were not disputed claims here. The only matter in dispute was the amount of Ann Robertson's claim, which had been properly determined in a separate action of constitution at her instance. The multiplepoinding had been brought not by the executrix, but by one of the creditors as real raiser. A creditor was not entitled to make the whole estate the fund *in medio* of a multiplepoinding because one claim was larger than the executrix and the creditors were prepared to admit. The case of *Robb's Trustees*, and especially Lord Gifford's opinion, supported this contention. It was unadvisable that this small estate should be lessened by the expenses of a multiplepoinding.

At advising—

Lord Young—The question here is regarding the competency of an action of multiplepoinding, brought in name of Elizabeth Duffus or Jamieson, executrix-dative on the estate of the late Peter Duffus, a crofter, she being designed as the pursuer and nominal raiser, and the real raiser being a creditor on the estate of the name of Dallas. There are some six or nine creditors called as defenders, one of them being Ann Robertson. The executrix, we were told, assents to the action being brought in her name by one of the creditors on the estate on which she is the executrix, and all the creditors assent to this form of action with the exception of Ann Robertson, who says it is incompetent. The nature of her claim has been explained to us. She was a servant of the deceased, and her claim amounted to £104. By reason of that claim the estate, the whole amount of which was only £94, was unable to pay the creditors in full, and this action of multiplepoinding was raised. Now what is the objection to this form of action? I cannot conceive any, and I must look at it as if the action had been raised by the executrix herself. Now, Mr Sym, with that candour which we always expect from him, and which he always displays, admitted that an executrix who finds claims made in excess of the estate may raise a multiplepoinding for exoneration. But what difference does it make whether it was originally brought by her, or approbated by her when brought by one of the creditors? I can see no reason for drawing a distinction.

It appears that Ann Robertson had got the length of raising a summons against the executrix in another action to have the amount of her claim against the deceased's estate determined. Well, I think the proper course for the executrix was to bring a multiplepoinding, or when a multiplepoinding was brought in her name by a creditor, to bring the matter under the notice of the Court—it was the same Sheriff—and have the action brought under the multiplepoinding, but what happened was this. The learned Sheriff, I suppose at the instance of Ann Robertson, sisted the action of multiplepoinding until the amount of her claim had been settled in the other action. I cannot comprehend the course followed by the Sheriff. It was the reverse of the right course, which was to have held Ann Robertson's summons in the other action as a claim in the action of multiplepoinding. After sisting the multiplepoinding until the other action had been otherwise decided, the Sheriff then considered the competency of the multiplepoinding, and held that it was incompetent. I think he was wrong. I am of opinion it was competent, and that the appeal must be sustained, and the appellant found entitled to expenses.

Lord Rutherfurd Clark concurred.

Lord Lee—I concur. I think that this is not a case of a creditor taking the administration of the estate out of the hands of the executrix against her will by means of a multiplepoinding.

Counsel for the Appellants—Low—Kennedy. Agent—D. Lister Shand, W.S.

Counsel for the Respondent Ann Robertson—Sym. Agent—W. B. Rainnie, S.S.C.

Tuesday, October 23.

SECOND DIVISION.

[Lord Trayner, Ordinary.

FORD & SONS *v.* STEPHENSON.

Trust for Creditors—Principal and Agent—Right in Security.

A trader conveyed his whole estates, including his business, to a trustee for behoof of his creditors. In terms of the trust, the trader continued to conduct the business as manager for the trustee, and ordered the necessary supplies, which were paid for by the trustee. A merchant who in knowledge of the trust arrangement had supplied goods, raised an action against the trustee, as principal of the trader, for the price thereof. *Held* (*rev.* Lord Trayner) that the trustee was liable for payment of these goods because they had been ordered by his manager.

This was an action by William Ford & Sons, merchants, Leith, against Richard Stephenson, ironmonger, Duns, for payment of an account for goods supplied to the late Matthew Wilson, formerly grocer in Duns, for which the defender was said to be liable.

On 26th June 1866 the said Matthew Wilson, on the narrative that his affairs had become embarrassed, and that the defender had made advances to him, and was willing to undertake the