Friday, July 18.

SECOND DIVISION.

[Lord Trayner, Ordinary.

MEIKLE *v.* WOOD (TAIT'S FACTOR).

Process — Multiplepoinding — Double Distress—Competency.

A person had disappeared in South America in 1838, and had not since been heard of. Between the years 1846 and 1847 certain successions had opened in which the absent person was interested, and a factor *loco absentis* had been appointed in 1865. In 1872 certain persons, including the next-of-kin of the missing person, sold their rights and interests in his estate, and granted a disposition thereof to the purchaser, who, in order to bring the factory to an end, and to have the estate conveyed to whomsoever had right thereto, raised an action of multiplepoinding in name of the factor, calling as defenders the granters of the disposition.

Held that the action was competent to try the question whether the missing person was dead or not.

This was an action of multiplepoinding and exoneration by William Wood, C.A., factor *loco absentis* to Andrew Burnet Tait, nominal raiser, against James Meikle, actuary, Edinburgh, real raiser, and David Scott, C.A., trustee on the sequestrated estate of W. Johnstone and Andrew Burnet Hunter.

The action was raised in the following circumstances—Andrew Burnet Tait was born upon 5th October 1838. In 1853 he sailed as an apprentice seaman on a voyage to South America. On 10th December 1853 he was admitted to the hospital at Callao, and on 13th January following he was discharged cured. Nothing had been heard of him since. Between 1846 and 1847 certain successions opened, in which Andrew Burnet Tait and his brother William were jointly interested. The latter obtained payment of his shares, and on his petition the pursuer was appointed factor *loco absentis* to Andrew Burnet Tait upon 18th March 1862, and had since held the office. William Hunter Tait died on 28th May 1870, and by will conveyed to his wife Mrs Elizabeth Smith Reid or Tait all his means, and appointed her his executrix. Upon 17th October 1870 Mrs Tait was married to William Johnstone, who, the pursuer alleged, had acquired right *jure mariti* to all the property and effects which belonged to Mrs Tait, including the funds to which she had succeeded or acquired right through the will of William Hunter Tait, her former husband, in her favour. Johnstone was sequestrated upon 4th May 1871, and the defender David Scott, C.A., was appointed trustee on his estates. Upon 30th October 1872 David Scott, as trustee, with the necessary consents, including that of the defender Andrew Burnet Hunter, cousin-german and next-of-kin of Andrew Burnet Tait, offered to public sale under articles of roup dated October 1872 the rights, interests, and claims of right in the estate, funds, property, or effects of Andrew Burnet Tait, or in the funds, property, or effects held by William Wood, C.A., as factor *loco absentis*. These subjects were purchased by the defender and real raiser Mr Meikle. A disposition and assignation of the subjects was granted in Mr Meikle's favour, and was intimated to the factor *loco absentis*. In August 1865 the late William Hunter Tait had presented a petition to the Court of Session to have the estate of his brother Andrew Burnet Tait conveyed over to him. The factor lodged answers, and upon 10th February 1866 the petition was refused, on the ground that in the circumstances there was no presumption of the death of Andrew Burnet Tait. The case is reported in 4 Macph. 443, and *ante*, vol. i, p. 154.

The estate under the control and management of the pursuer, as factor foresaid, being the fund *in medio* in this action, consisted of Andrew Burnet Tait's share of the above-mentioned successions.

The real raiser now averred—"If Andrew Burnet Tait died unmarried and intestate at any date between 1854 and 1870, his brother the said William Hunter Tait was entitled to succeed to his whole estate, either *ab intestato* or under the destinations contained in the said trust-dispositions and settlements. . . . As there can now be no doubt that Andrew Burnet Tait is long since dead, it is desirable that the factory should be brought to an end. These proceedings are necessary that all parties interested may be convened, and that the pursuer may obtain judicial authority to convey the estate to the party or parties having right thereto."

He pleaded—"(2) In the circumstances disclosed in the condescendence, an action of multiplepoinding is competent, and is the most convenient form of process for determining the rights of parties in the estate."

The nominal raiser pleaded—"(1) The action is incompetent, or, *separatim*, unnecessary, in respect—(1st) That the nominal raiser is a judicial factor; and (2d) That there is no double distress. (4) There being no proof or presumption that Andrew Burnet Tait was dead, either at 28th May 1870, or, *separatim*, that he is now dead, the real raiser has no title or interest to raise the present action."

The Lord Ordinary pronounced this judgment—"Sustains the second branch of the first plea-in-law and the fourth plea-in-law for the nominal raiser: Dismisses the action, and decerns: Finds the real raiser liable in expenses, &c.

"*Opinion.*—I think this action incompetent, in respect there is no double distress. The real raiser does not aver in his condescendence that any claim to the fund in question adverse to that which he himself puts forward has been made or intimated, or even exists. The only persons called as defenders are the real raiser and the persons from whom he derived the title on which his claim is founded. Plainly there can be

no adverse interest among them, for the real raiser Mr Meikle has been vested in all right to the funds in question which the others had or pretended to have. It was said that the action was competent because while Mr Meikle on the one hand claims the fund, the nominal raiser on the other hand claims to retain it. But that, in my view, is fallacious. The nominal raiser has the fund in his own hands, and he is making no claim with reference to it whatever. It might just as well be said that a debtor claims on a fund in his hands when, in answer to his creditor's demand for payment, he pleads in defence a claim for compensation or a *contra* account. The reason why the nominal raiser refuses to pay over the fund to the real raiser is because the latter has no right to the fund, not because others are claiming it also.

"The action and the real raiser's claim are based upon the hypothesis that Andrew Burnet Tait is dead. The real raiser does not aver that he is dead, but says 'there can now be no doubt' that such is the case. I cannot adopt that view. Tait has not been heard of since January 1854, at which time he was little more than fifteen years of age. If alive now he would be rather over fifty-one. I know of no authority for holding at common law that a man is to be presumed dead at such an age even although he has not been heard of for thirty-six years, and has been sought after and advertised for as has been done here. But even if that were held it would not avail the real raiser. He can have no claim to the funds in question unless it be held that Tait died prior to 1870,—that is, at the age of thirty-one, and after he had been unheard of for a period of sixteen or seventeen years. I think I am right in saying that there is no case warranting the presumption of death in such circumstances. I am therefore prepared to sustain the nominal raiser's fourth plea."

At advising—

LORD JUSTICE-CLERK—When I first heard the debate in this case I was of opinion that this was a very extraordinary multiplepoinding, to which there were no parties except the real raiser and the nominal raiser, and was inclined to adhere to the Lord Ordinary's interlocutor, but after consultation I have come to be of opinion that a process of this kind is not an infrequent way to be used in getting an estate like this into Court so that any person who considers he has a right to it may put in his claim. It is obvious that it is a very convenient process for that purpose, and if there is precedent for it, as I understand there is, I am inclined to hold that the action should be sustained as competent.

LORD YOUNG—I think so too, and I think there is no objection on technical grounds. The question which is at issue in this case is, whether the man who has disappeared is dead or not? That question must be tried in some way, and this form of process has this advantage, that an order will be pronounced by the Judge for claims to be sent in to this estate, and that order for claims will be advertised through the country. I asked Mr Jameson in the course of the debate whether if this advertisement produced one or two persons who thought they had claims upon this estate, he could persist in his objection to the form of process, and he said no. It is quite possible that this advertisement may produce the man who is supposed by one party here to be dead, and he would of course be preferred to the whole fund. If any question as to the identity of the person coming forward and claiming as Andrew Tait arose between the nominal raiser and him, that question could be tried in this process, or any question as to the date of the man's death between the claimants who had appeared. I agree that the interlocutor of the Lord Ordinary should be recalled, and the case remitted back to him on the footing that this is a competent process for trying the questions raised.

LORD RUTHERFURD CLARK—I have had some difficulty with this case, but I have come to be of opinion that it may proceed as an administrative suit.

LORD LEE—I agree with the opinion expressed by Lord Young, but as the result of our judgment is to recal the Lord Ordinary's interlocutor I think it right to express the grounds of my opinion.

The pursuer alleges that as factor *loco absentis* he has a title which enables him to claim the sum of money in dispute in this case as belonging to Andrew Burnet Tait; but on the other hand it is said that the next-of-kin are entitled to succeed to Andrew Tait's estates because he is dead. The nominal raiser puts forward two pleas—the first is that the action is incompetent in respect (1) that the nominal raiser is a judicial factor, and (2) that there is no double distress. The other plea is that "there being no proof or presumption that Andrew Burnet Tait was dead either at 28th May 1870, or *separatim*, that he is now dead, the real raiser has no title or interest to raise the present action." What the Lord Ordinary has done is in the first place to sustain the plea that the action is incompetent, and then to sustain that 4th plea that there is no proof that this man is dead, there having been no proof led in that matter. I think that there must be some mistake here, because it is impossible it seems to me to dismiss an action as incompetent and at the same time to dispose of the merits of the case.

I regard this as quite a competent form of process for the purpose. In my experience a multiplepoinding was not an unusual method of raising the question whether a person who would undoubtedly have right to an estate if he was alive was really dead or not. Before the Presumption of Life Statute of 1882 was passed the most common way of raising the question was by means of a multiplepoinding, as was done in the case of *Barstowe*, and other cases of that class. No doubt in that case it was known that there were some claimants to the fund,

but it was not known who all the claimants might be, and so the officer of court who held the fund raised a multiplepoinding so that an order for claims might be made, and that the advertisement of that order might cause any others, persons who had claims, to come forward for their interest.

In that case it was the officer of Court who brought the case into Court, and here it is the next-of-kin; but surely the next-of-kin is entitled to do something to make useful this fund which has been lying by so long; and what could he do more than make the officer of Court bring a multiplepoinding so that an order for claims might be made and the conflicting interests of parties determined.

I think that upon principle, and upon the ground that this form has been the practice of the Court, this action ought to be sustained as competent.

The Court recalled the Lord Ordinary's interlocutor and remitted to him to proceed.

Counsel for the Real Raiser—Sir C. Pearson—C. N. Johnston. Agents—Waddell & M'Intosh, W.S.

Counsel for the Nominal Raiser—Jameson—M'Phail. Agents—Melville & Lindesay, W.S.

Friday, July 18.

SECOND DIVISION.

[Lord Trayner, Ordinary.

WATT *v.* ROGERS AND OTHERS (WATT'S TRUSTEES).

Process—Title to Sue—Accounting—Action by Beneficiary of Trust against Alleged Debtor to the Trust.

A beneficiary of a trust sued one of the trustees for count and reckoning and payment to the trustees of a sum alleged to be due to the trust-estate. She alleged that this sum was in the defender's hands at the truster's death, and that the other trustees refused to require any account of the defender's intromissions therewith. The defender alleged that the sum was received by her in gift from the truster and was presented to her as her own absolute property.

Held (diss. Lord Rutherfurd Clark) that in the circumstances the pursuer had a title to sue, and was not limited to the remedy of calling upon the trustees to raise an action against the defender, and if they declined, of obtaining the use of their names as pursuers by finding caution to free them from expenses.

The late William Roger senior, Dundee, died in December 1884, aged 87, leaving a daughter Janet Roger, who was insane and confined in an asylum near Dundee. There was a son William Roger, who predeceased his father, leaving a widow and seven children. The eldest daughter was married to David Watt, produce merchant, Dundee. The others lived in family with their mother.

William Roger senior left a trust-disposition and settlement dated 10th December 1875 by which he appointed certain trustees and directed them to pay the whole yearly income of his estate after his death equally between his children William and Janet Roger, and in the event of the brother predeceasing her, which event happened, they were directed to pay or expend for behoof of his children the share which would have fallen to their father if alive, and on the death of Janet Roger they were directed to hold, pay, and apply the whole estate to and for behoof of the children of William Roger junior. By a codicil dated 14th February 1881 the truster provided that if William Roger's wife should survive him, which event happened, she should receive during her lifetime what her husband would have received if he had been alive. By another codicil dated 17th February 1883 the truster recalled the appointment of the original trustees and appointed Mrs Roger, the widow of the late William Roger junior, Daniel M'Ewan Roger, her son, and James Gray, joiner, Dundee, to be the new trustees. Upon the death of William Roger senior these trustees took possession of and entered upon the administration of the estate.

Upon 18th May Mrs Watt, with the consent and concurrence of her husband, raised an action against Mrs Roger as an individual and the above-named trustees to have them ordained to produce an account of their intromissions with William Roger senior's estate, and also to ordain Mrs Roger to pay to these trustees the sum of £1500 due by her to the estate.

The pursuer averred that the codicils were obtained from William Roger "while weak and facile by fraud and circumvention and undue influence exercised by the defender Mrs Roger to benefit herself." She averred also—"Deceased had a sum of between £800 and £900 deposited in the Dundee Savings Bank (Investment Department), and it is believed and averred that the defender Mrs Roger shortly after her husband's death in July 1881 uplifted the same and applied it to her own uses and purposes, and that without any authority from the deceased William Roger senior or anyone on his behalf. . . . The defenders, the trustees of the late William Roger, however, have never called the defender Mrs Roger to account for her intromissions, and refuse to do it although repeatedly called on by pursuer to do so. As already explained, the trustees are the defender Mrs Roger herself, her son Daniel M'Ewan Roger, who lives in family with her, and their friend the said James Gray, who is largely indebted to her, and they were nominated by the foresaid codicil, impetrated fraudulently from the deceased by Mrs Roger simply for the purpose of evading an action of count and reckoning for her intromissions which she knew the trustees would at her instigation refuse to raise. The trustees