to enter the carriage, and by careless driving upsets the carriage and his friend is injured, the master is not liable, because the servant was not acting within the scope of his duty in driving his, the coachman's, friend in the carriage. Again, if a servant, say a publican's assistant, who has instructions to turn everyone out of the house at the hour of closing, asks a personal friend to remain after that hour as his guest, and hearing the police coming tries to induce the friend to leave and failing to do so uses violence and causes personal injury, it it seems to me that it would be the height of impudence for the injured guest to bring an action of damages against the employer. In no proper sense could it be said that the assistant, in allowing the guest to remain or in ejecting him from the house for the purpose of screening himself, was acting within the scope of his duty.

"In all the cases in which an employer has been held liable for the violence of his servant, the servant has been acting, although in an unduly violent manner, in the interests of his employers. I was referred in particular to the case of *Carter*, 49 American Rep. 780, and to a case of *M'Graw*, 28 S.L.R. 256. In neither of these cases does it appear either that the trespasser was expressly invited to come on the car or engine by the servant, although the servant may have become aware of his presence, or that in forcing him off the servant had any other purpose than to obey his master's orders. In *M'Graw's* case I may say that the question of relevancy was never determined at all. The Lord Ordinary allowed a proof before answer, and it was the pursuer, not the defender, who reclaimed, the pursuer wishing a trial by jury. It is plain from the opinions of the Lord Ordinary and those of the Judges of the Inner House that they entertained great doubts of the relevancy of the action."

Counsel for the Pursuer—Orr. Agents—George Inglis & Orr, S.S.C.

Counsel for the Defenders — Salvesen. Agents—Simpson & Marwick, W.S.

Wednesday, March 13.

SECOND DIVISION.

[Sheriff of Lanarkshire.

GORDON *v.* GORDON, &c.

Process — Trustee — Executor-Dative — Exoneration—Discharge—Multiplepoinding—Competency.

An executor-dative brought an action of multiplepoinding in the Sheriff Court for the distribution of the estate in his hands. He called as defenders certain parties who claimed to be creditors of the deceased, and the deceased's next-of-kin so far as known to him. He averred that in his belief there were other next-of-kin of the deceased, but that he had been unable to trace their names and addresses; and further, that the claims of the creditors were disputed by certain of the next-of-kin, who claimed to be preferred on the fund *in medio* without deduction of the claims of creditors and without reference to possible claims by other next-of-kin.

Held that the action was incompetent in respect that there was no double distress.

M'Rae v. *Gray*, January 10, 1895, 32 S.L.R. 172, *followed.*

Peter Gordon, baker, Lenzie, executor-dative of the deceased Peter Gordon, Condorrat, Dumbartonshire, raised an action in the Sheriff Court at Glasgow against Mrs Annie Stirling or Gordon and others, in which he prayed the Court "to find that the pursuer is, as executor aforesaid, holder of sundry funds of the total value of £78, 4s. 9d., being the whole moveable property of the said deceased Peter Gordon, weaver, which is claimed by the defenders in various conflicting proportions, that he is only liable in once and single payment thereof, and is entitled on payment or consignation to be exonered thereof and to obtain payment of his expenses, and that decree should issue in favour of the party or parties who shall be found to have best right to the fund *in medio*."

The pursuer averred—"(Cond. 1) The said Peter Gordon, weaver, died at Condorrat aforesaid, on 25th September 1893, and the pursuer thereupon entered upon the management of his moveable estate as executor-dative *qua* next-of-kin, conform to testament-testamentar in his favour, granted by the Sheriff of Stirling, Dumbarton, and Clackmannan, of date 15th November 1893. (Cond. 2) The defenders Charles Stewart, Mrs Kate Gilfillan or Watson or Miller, and Alexander Bulloch, claim to be creditors of the deceased, and the remaining defenders and the said Charles Stewart are the next-of-kin of the said Peter Gordon, weaver, so far as known to the pursuer. The pursuer believes that there are other next-of-kin of the deceased, but, notwithstanding diligent inquiry and correspondence with America and Australia, he has not been able to trace their names and addresses. (Cond 3) The claims of the creditors above named are disputed by certain of the next-of-kin, who claim to be preferred to the fund *in medio* without deduction of said claims of creditors, and without reference to possible claims by other next-of-kin whose names and addresses are at present unknown. In these circumstances the present action of multiplepoinding has been rendered necessary."

The defender Mrs Kate Gilfillan or Watson or Miller lodged defences in which she averred that shortly after the deceased's death she made a claim setting forth specifically the indebtedness of the deceased to her, which claim she was now proceeding to constitute in Dumbartonshire.

She pleaded, *inter alia*—"(2) There being no double distress, nor competition between disputed debts, nor amongst a class claiming as next-of-kin, the action is incompetent, and cannot be resorted to for the purpose of constituting disputed debts, or of distribution amongst next-of-kin."

On 29th October 1894 the Sheriff-Substitute (SPENS) dismissed the action, and found the defender Mrs Miller entitled to expenses from the real raiser.

"*Note.*—The real raiser is the executor of a certain Peter Gordon. He says the whole estate amounts to some £78, and he says there are certain claims by alleged creditors which are disputed by the next-of-kin. Accordingly, he calls these alleged creditors and the next-of-kin in this action, apparently wishing to leave it to the Court to distribute the fund in such proportions as it may think fit. The next-of-kin are entitled to nothing until the debts are paid. The executor is, in my opinion, bound to hold the fund until the debts are settled. The executor is not entitled to fling the whole fund into Court and say some of the next-of-kin dispute some of the creditors' claims, and therefore I leave it to the Court to settle. I am not aware of authority for this course, and therefore I think that the multiplepoinding is, at all events, premature, and I accordingly dismiss it."

On appeal the Sheriff (BERRY) adhered and found the appellant liable to the defender in expenses.

"*Note.*—There is not here either a conflict of claim or a possible conflict. If the debt in respect of which the action has been or is about to be brought by the alleged creditor is a just debt, it undoubtedly takes precedence of any claim on the part of a beneficiary or next-of-kin. The proper contradictor of one claiming as a creditor of the estate is the executor, and it is he that is bound to meet the person so claiming when his claim is made. I agree with the Sheriff-Substitute that this multiplepoinding should be dismissed."

The pursuer appealed, and argued—The action was competent, because (1) some of the beneficiaries had refused to recognise the claims of the creditors, and refused to allow the pursuer as executor to pay the creditors—*Blair's Trustees* v. *Blair*, December 12, 1863, 2 R. 284; and (2) some of the beneficiaries could not be traced, and the executor was thus unable with safety to distribute the estate. The case of *M'Rae* v. *Gray and Others*, January 10, 1895, 32 S.L.R. 172, was different from the present, for in the first place the beneficiaries in the case of *M'Rae* had not refused to give the trustees an extrajudicial discharge; and in the second place, the Parochial Board, who were the creditors, had raised an action against the trustees long before the trustees brought their action of multiplepoinding.

Argued for the defender—The case of *M'Rae* ruled the present. In the case of *Blair's Trustees* a personal claim was set up by one of the trustees, which he would neither abandon or sue for in a petitory action. The trustees had therefore in that case no option but to raise the multiplepoinding. Here there was no double distress, and the action was incompetent—*Maxwell* v. *Waddell*, May 30, 1894, 21 R. 827; *Croket* v. *Lord Panmure*, June 8, 1853, 15 D. 737.

At advising—

LORD JUSTICE-CLERK—The case of *Blair* certainly staggers one a little at first sight, and makes it difficult for a moment to conceive how the judgment of the two Sheriffs can be supported. But Mr Watt has brought forward a later case, in which the Court held that it was not competent to bring a multiplepoinding in circumstances similar to the present. In *Blair*, as Mr Watt pointed out, one of the trustees set up a personal claim against the estate, which he would neither abandon or bring forward by a petitory action for judicial determination. It was therefore a very special case.

This not being a case in which there is double distress, and the case of *M'Rae* being in point, I am of opinion that our decision in this case should be the same.

LORD YOUNG—My opinion is that the judgment of the Sheriffs is right, and that the case of *M'Rae* is an authority in point, not merely for affirming the judgment appealed against, but affirming it with expenses.

LORD RUTHERFURD CLARK—If this was a case of double distress in the proper sense of the word, the pursuer would have been entitled to raise this multiplepoinding, and we would be bound to go on with it, because in a case of double distress such an action is the appropriate remedy. But I do not think that this is a case of double distress, for there are not here claims upon the same fund. The only claims are made by creditors and beneficiaries. These are not competing claims, for the latter are only entitled to the balance of the estate remaining over after the creditors are paid.

The only justification for the action is that it is brought as an action of exoneration. But I do not think that an executor can bring such an action just as he has entered on his office, and in order to relieve himself of the duties which he has undertaken. We cannot, in my opinion, allow it to proceed, and in dismissing it we follow the opinions expressed by the Judges in the case of *M'Rae*.

LORD TRAYNER—I agree with the opinion last delivered.

The Court pronounced this interlocutor:—

"Dismiss the appeal and affirm the interlocutors appealed against, and decern: Find the defender Mrs Miller entitled to expenses in this Court, and remit the same and the expenses found due in the Inferior Court to the Auditor," &c.

Counsel for the Pursuer — Salvesen — Agents—Simpson & Marwick, W.S.

Counsel for the Defender—Crabb Watt. Agents—Douglas & Miller, W.S.

Thursday, March 14.

FIRST DIVISION.

[Lord Low, Ordinary.

MAIN *v.* LANARKSHIRE AND DUMBARTONSHIRE RAILWAY COMPANY.

Railway—Lands Taken under Compulsory Powers — Compensation — Deposit—Petition to Uplift Consigned Money—Reduction of Award—Default on Part of Railway Company—Lands Clauses Consolidation (Scotland) Act 1845 (8 *Vict. cap.* 19), *secs.* 84 *and* 86.

Section 84 of the Lands Clauses Consolidation Act enacts that promoters of an undertaking acquiring lands under compulsory powers may enter upon such lands before an award has been made fixing the amount of compensation to be paid by them for such lands, if they deposit by way of security such sum as may be fixed by a valuator to be the value of such lands, and, if required, grant a bond for a sum equal to the sum so to be deposited for payment of all such purchase money or compensation as may be determined to be payable by them. Section 86 enacts that, if the conditions of the bond shall not be fully performed, it shall be lawful for the Court of Session to order the deposit to be applied in such manner as it shall think fit for the benefit of the parties for whose security the same shall so have been deposited.

A railway company, desiring to enter upon lands taken under compulsory powers before the amount of compensation payable therefor had been determined, deposited a sum fixed by a valuator in terms of section 84 of the Lands Clauses Act, and granted a bond for a like amount to the proprietor. An award was subsequently issued fixing the amount of compensation to be paid for the lands, but the railway company brought an action for reduction of this award. While this action was proceeding the proprietor presented a petition for authority to uplift the money deposited so far as found due by the arbiter.

The Court (*rev.* judgment of Lord Low) *dismissed* the petition on the ground that the railway company could not be in default until the action of reduction should be finally disposed of.

Fortune v. *Edinburgh and Bathgate Railway Company*, February 7, 1849, 11 D. 531, *distinguished.*

The Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 19), sec. 84, enacts—"Provided also that if the promoters of the undertaking shall be desirous of entering upon and using any such lands before an agreement shall have been come to or an award made or verdict given for the purchase money or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking to deposit in the bank by way of security, as hereinafter mentioned, either the amount of purchase money or compensation claimed by any party interested in or entitled to sell and convey such land, and who shall not consent to such entry, or such a sum as shall by a valuator . . . be determined to be the value of such lands, . . . and also, if required so to do, to give to such party a bond . . . for a sum equal to the sum so to be deposited for payment to such party . . . of all such purchase money or compensation as may . . . be determined to be payable by the promoters of the undertaking in respect of the lands so entered upon, . . . and upon such deposit by way of security being made, . . . and such bond being delivered or tendered to such non-consenting party, . . . it shall be lawful for the promoters of the undertaking to enter upon and use such lands." . . .

Section 86 enacts—"The money so deposited shall remain in the bank by way of security to the parties whose lands shall so have been entered upon for the performance of the bond to be given by the promoters of the undertaking, . . . and upon the conditions of such bond being fully performed, it shall be lawful for the Court of Session, upon application by petition, to order the money so deposited . . . to be repaid to the promoters of the undertaking, or if such conditions shall not be fully performed, it shall be lawful for the said Court to order the same to be applied in such manner as it shall think fit for the benefit of the parties for whose security the same shall so have been deposited."

The Lanarkshire and Dumbartonshire Railway Company, incorporated by Act of Parliament 1891, being desirous of entering upon ground occupied under lease by Thomas Main, market gardener, Milton, near Bowling, on 8th March 1893 deposited in bank the sum of £3668, 10s., being the sum fixed by a valuator in terms of the Lands Clauses Consolidation (Scotland) Act 1845. They also granted Main a bond for the like amount.

Upon 11th April 1894 the oversman (the arbiters having differed) found that the railway company were liable to the said Thomas Main in the following amounts of compensation in respect of his whole claims —(1) The sum of £2280 as the value of two acres taken (including the value of the stock therein); (2) £650 in respect of injurious affection of the remainder of the subjects held in lease; and (3) a sum alternatively of £1100, or £960, or £550, or £480, according to the nature of the accommodation works to be provided by the railway company.

Upon 15th May 1894 the railway company raised an action before Lord Low against Main for the reduction of the above award, upon the ground that the