could not have become incompetent merely because the Court on an examination of the averments found that the case against the husband was irrelevant. That is perfectly clear, and involves nothing contrary to the decision in the case of *Barr* v. *Neilsons*. But when we come to examine the case before us it appears that, after averring as against both wife and husband various joint slanders, the pursuer goes on in condescendence 8 to aver as against the husband a separate slander uttered on a different occasion—a slander by the husband alone, and, so far as the statements show, without any complicity on the part of his wife. The case therefore presented is one of various wrongs committed jointly by two parties, followed by an entirely separate wrong committed only by one of them, and on that case is rested a conclusion for a lump sum of damages against both parties or either of them. Now, I am afraid that this is just the kind of case to which the rule of the case of *Barr* v. *Neilsons* applies, and I think is enough for the decision of the question before us. I agree that the action as laid is incompetent, and that the judgment of the Lord Ordinary should be adhered to.

LORD KINCAIRNEY—The case of *Barr* v. *Neilsons* has sometimes seemed to me to present some difficulty, but it is too late to discuss it now. It must be accepted as a conclusive authority, and the question we have to decide is whether it applies in the case before us. If an action for a lump sum is brought against A and B for a wrong done by A and a separate wrong done by B, then the case of *Barr* applies and the action is incompetent. This is the case we have here. There is an averment of a slander by the wife and an averment of a separate slander on a subsequent occasion by the husband, in which the wife was not participant. The case thus falls under the case of *Barr*, and I therefore concur in your Lordship's opinion.

LORD YOUNG was absent.

The Court adhered.

Counsel for Reclaimers—Forbes. Agent—D. Howard Smith, Solicitor.

Counsel for Respondents — Dunbar. Agents—Donaldson & Nisbet, S.S.C.

Saturday, March 4.

FIRST DIVISION.

ARGO *v.* PAULINE AND OTHERS.

Process—Mandatary—Multiplepoinding.

In an action of multiplepoinding raised in the Sheriff Court by the holder of a fund, claims were lodged by certain claimants resident in Australia. These claims having been repelled by the Sheriff, the claimants appealed to the Court of Session. *Held* that they were not bound to sist a mandatary.

By a codicil dated 1st October 1889 the late Miss Elmslie, of Philadelphia, U.S.A., who died on 20th March 1900, made the following provision—"In regard to the residue of my estate I add the name of Gavin E. Argo, of Scotland, who I wish to divide what falls to him with my relatives of like degree in Scotland living at the time of my death."

At the time of the testatrix's death there were twenty-nine relatives of the same degree to her as Mr Argo who were living and domiciled in Scotland. Besides these relatives there were two other relatives, viz., Annie Elmslie and Isabella Elmslie, of the same degree of relationship to her as the others, both of whom had been resident in Australia for many years. One of them, however—Annie Elmslie—happened to be residing in Scotland at the date of the testatrix's death, and the other, Isabella Elmslie, resided there from 18th April 1900 to 27th December 1901.

The right of the twenty-nine relatives who were domiciled and living in Scotland to participate in the bequest was not disputed, but a question arose as to the right of Annie and Isabella Elmslie to share in the bequest.

An action of multiplepoinding was accordingly raised in the Sheriff Court at Aberdeen at the instance of Mr Argo, in which all the said relatives (including Annie and Isabella Elmslie) were called as defenders in order to determine their rights to the fund.

On 13th December 1904 the Sheriff-Substitute (HENDERSON BEGG) found that the claimant Annie Elmslie was entitled to participate in the fund, on the ground that she was *de facto* resident in Scotland at the date of the testatrix's death, but that the claim of Isabella Elmslie fell to be repelled.

On appeal, the Sheriff (CRAWFORD) recalled the Sheriff-Substitute's interlocutor and repelled the claims of both Annie and Isabella Elmslie.

Annie and Isabella Elmslie, who were resident in Melbourne, Australia, appealed to the Court of Session.

On the case appearing in the Single Bills counsel for the respondents moved the Court to ordain the appellants to sist a mandatary.

Argued for the respondents—The claimants were resident in Australia. Their claims had been repelled, so that this appeal was similar in its nature to a petitory action. The circumstances in the case of *Gordon's Trustees* v. *Forbes*, February 27, 1904, 6 F. 455, 41 S.L.R. 346, were different from the present and were exceptional. In the event of the appellants being unsuccessful the respondents would have the right to ask for expenses, and they were therefore now entitled to have the appellants ordained to sist a mandatary. The requirement of a mandatary applied to all proceedings, not to actions merely, *e.g.*, a claimant in a sequestration had been ordained to sist a mandatary—Mackay's Manual, p. 236. [The LORD PRESIDENT referred to the case of *North British Railway Company* v. *White*, November 4, 1881, 9 R. 97, 19 S.L.R. 59, as to the necessity for sisting a mandatary in a multiplepoinding.]

Counsel for the appellants was not called on.

The Court refused the motion and sent the case to the roll.

Counsel for the Appellants—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents — A. R. Brown. Agents—Ronald & Ritchie, S.S.C.

Wednesday, March 8.

SECOND DIVISION.

[Sheriff Court of Dumfries and Galloway at Kirkcudbright.

ROWAN & BORLAND *v.* M'LAUCHLAN.

Process — Cessio — Debtors (Scotland) Act 1880 (43 *and* 44 *Vict. c.* 34), *secs.* 8 *and* 9—*Bankruptcy and Cessio (Scotland) Act* 1881 (44 *and* 45 *Vict. c.* 22), *sec.* 9—*Petition for Cessio—Withdrawal of Petitioning Creditors Prior to Date of Debtor's Examination — No Other Creditors Made Parties to Petition—Failure of Debtor to Appear—Decree of Sheriff Granting Cessio under sec.* 9 *of Act of* 1881.

In a petition for cessio at the instance of certain creditors of a debtor, the petitioners withdrew their petition prior to the day fixed by the Sheriff for the debtor's public examination, and on that day their agent informed the Sheriff of the fact. An agent representing certain other creditors of the debtor was present in Court, but no step was taken to sist any of them as petitioners, or to make them in any way parties to the process. The debtor failed to appear, and the Sheriff, so far as the record of the proceedings showed, *ex proprio motu* pronounced decree of cessio, and appointed a trustee under section 9 of the Act of 1881, on the ground that the debtor's failure to appear had been wilful.

Held, in an appeal in which the debtor was the appellant and the trustee and certain unpaid creditors were the respondents, that the interlocutor of the Sheriff was incompetent and fell to be recalled in respect that at the time when it was pronounced there was no instance to support the process.

Section 9 of the Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. c. 22) provides — "If the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful, he may in the debtor's absence pronounce decree of *cessio bonorum*."

Messrs Rowan & Borland, drapers, Newton-Stewart, on 20th January 1905 presented a petition for cessio in the Sheriff Court of Dumfries and Galloway at Kirkcudbright against James M'Lauchlan, dairyman, craving the Court to appoint a trustee to take the management and disposal of his estate for behoof of his creditors, and to ordain him, if so required, to execute a disposition *omnium bonorum* in favour of such trustee for their behoof. Messrs Rowan & Borland were creditors of M'Lauchlan for the sum of £15, 0s. 6d. with 16s. 1d. of expenses conform to extract decree of the Sheriff of Dumfries and Galloway dated 6th January 1905. In the condescendence annexed to the petition the petitioners set forth the names of two persons as being the only other creditors of the debtor so far as known to the petitioners.

On 20th January the Sheriff-Substitute (NAPIER) made the usual first order in a petition for cessio in terms of section 9, sub-section 1, of the Debtors (Scotland) Act 1880, requiring, *inter alia*, the defender and his creditors to appear in the Sheriff Court-House, Kirkcudbright, on 3rd February for public examination.

On 3rd February the Sheriff-Substitute pronounced the following interlocutor:—"Present William Nicholson jr., solicitor for creditors. The respondent failed to appear after having been duly cited. The Sheriff-Substitute holds his failure to appear wilful: Ordains the defender to grant a disposition *omnium bonorum* to Mr J. E. Milligan, solicitor, Dalbeattie, who is hereby appointed trustee for behoof of the defender's creditors: Dispenses with caution, and appoints all funds belonging to the defender's estate to be lodged in the Union Bank at Dalbeattie: Further, appoints the defender to appear for public examination within the Court-House here on the 10th inst. at 10 o'clock forenoon."

The debtor appealed to the Court of Session, and before the case came on for hearing lodged a minute in the following terms:—"Macmillan, for the respondent and appellant James M'Lauchlan, stated to the Court that . . . on the morning of the said 3rd February 1905 the appellant's agent Mr W. M. Kelly, solicitor, Newton-Stewart, on behalf of the appellant, made payment to Mr J. R. Saunders, solicitor, Castle Douglas, the agent for Rowan & Borland, the petitioning creditors, of the full amount of their debt and expenses, and received a receipt in settlement thereof. Mr Kelly had also on the appellant's behalf settled or arranged with all the other creditors of the appellant known to him, including Richard Ker and Mitchell Davidson, the only two persons mentioned as creditors of the appellant besides the petitioners in the petition for cessio. Mr Saunders thereupon promised to withdraw the petition, and in reliance on this settlement the appellant's agent informed the appellant that he need not attend the Court, and accordingly neither he nor his agent, who thereupon left to fulfil a business engagement in another part of the country, attended at the calling of the case. Mr Saunders duly intimated to the Sheriff-Clerk that the matter had been settled, and on the case being called in Court stated to the Sheriff-Substitute that his client's claims had been satisfied and that he withdrew the petition.