in justification, and this line of inquiry I as presiding Judge disallowed.

Lord Shand—In argument the defender distinctly disavowed any intention of attempting to prove *veritas*, but it appears that at the trial it was proposed to read the evidence which was taken on commission in order to prove the statement in answer 3 for the defender, that the pursuer's sons on being challenged for throwing stones at the police, stated that they had mistaken them for their father. Your Lordship disallowed this evidence, which if it had been admissible would have gone in mitigation of damages. The question between the parties therefore comes to be this, whether this evidence should have been allowed in a question with the pursuer the Rev. John Browne himself. The information contained in the article complained of came to the defender from a correspondent in Ireland. But the action is not directed against the correspondent who supplied the news, but against the proprietor and publisher of the newspaper, and he has accepted any responsibility which may attach to the publication of the article in question. He at the same time admits he knew nothing of the facts of the case, but received all the information he has on the matter in the ordinary course of business. In such circumstances there is no room for letting in evidence as to the state of mind of the writer in order in any way to limit the responsibility of the owner of the paper. In considering as to the admissibility of this evidence, it is as well to have before us the terms of the issue for the pursuer the Rev. John Browne—[*His Lordship here read the issue quoted above*]. Now, upon this issue the point for the jury to consider was, whether Browne, in order to attain the position of a political martyr, had placed his sons outside his house with directions to throw stones at him. It is not now denied by the defenders that this allegation is false, and therefore it is calumnious. But it has been urged that the evidence which has been rejected should have been admitted in mitigation of damages, and that because the pursuer's sons are alleged to have said that in throwing stones at the police they mistook them for their father. But why should an allegation of that kind in any way mitigate damages? Even if the boys had, upon being challenged by the police, told such a story, it could have had no effect in a question like the present, and accordingly the evidence which his Lordship disallowed fell to be rejected.

It could only have been admitted in mitigation of damages provided the writer of the article or the publisher had known that the boys as a matter of fact had told this story. But the defender frankly admits he knew nothing whatever of the facts of the case, and accordingly this evidence was most properly disallowed.

A different question would have been raised if this had been an action directed against the writer of the article, but even then, in order to have got the benefit of this evidence, he would have required to have taken an issue of *veritas*.

In ordinary cases of actions of damages for slander I still hold that the jury ought to have before them every fact which can in any way affect their judgment. This does not, however, apply to the evidence sought to be admitted here, and I therefore come to the same conclusion in the whole matter as as has been arrived at by Lord Mure.

Lord Adam—I concur in disallowing the evidence which the defender desires to have admitted. My opinion on the question is just this. We have here as defender not the writer of the article complained of, but only the proprietor and publisher of the newspaper in which the article was inserted. If the defender had been the writer of the article complained of, and if he had put in issue the state of his mind when he wrote it, and had appeared for examination and cross-examination, and if in these circumstances such evidence as was here disallowed had been tendered in order to show that he had not been actuated by malicious motives, I should have had great difficulty in refusing to admit it. The evidence in question would in such circumstances have been relevant; but if he had kept out of the box, and had proposed to prove this isolated fact, I rather think I should not have admitted the evidence. That question is, however, not before us, and I do not discuss it further. As the matter stands I have no doubt that it would be quite competent for the publisher of this newspaper to prove the state of his own mind when he admitted that article to the paper and published it. But I do not think it is competent for him to prove the state of mind of an anonymous correspondent who sent him the article, and that by proving a fact which may or may not have affected his mind at all. Upon that ground therefore I think this evidence was rightly rejected.

Lord President—I think this matter is well settled by authority. The points which have been determined have been very clearly stated by Lord Adam, in whose opinion I entirely concur.

The Court disallowed the bill of exceptions.

Counsel for the Pursuers—M'Kechnie—Stevenson. Agent—W. B. Wilson, W.S.

Counsel for the Defenders—J. Comrie Thomson—Shaw. Agents—Millar, Robson, & Innes, S.S.C.

Friday, February 1.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

MAXWELL'S TRUSTEES *v.* GORE AND OTHERS (GILL'S TRUSTEES).

Process — Multiplepoinding — Claim — Riding Claim.

In an action of multiplepoinding a person who is creditor of a creditor of the holder of the fund cannot claim to be ranked directly on the fund *in medio*, nor can a person who is creditor of a creditor of another claimant claim to be ranked as a rider upon the claim of that claimant.

In his trust-disposition and settlement Maxwell directed his trustees in certain events which happened, to realise the residue of his estate, and to pay one-half thereof to

Gill. By indenture made between Gill and certain persons named as trustees therein it was declared that the trustees should hold Gill's prospective share in the residue of Maxwell's estate for behoof of Gill, his wife, and his daughter, and, *inter alia*, they were directed to pay to Gill three-fourths of the income which might arise therefrom.

At the date of Gill's death the whole capital of his share in Maxwell's estate, and a portion of the income which had become due, was in the hands of Maxwell's trustees, who raised an action of multiplepoinding and exoneration to determine who had right thereto.

The trustees under the indenture appeared, and claimed the whole fund, and certain persons who alleged themselves to be creditors of Gill claimed to be ranked and preferred to the amount of their alleged claims either directly on the fund *in medio*, or as riders on the claim of the trustees under the indenture, averring that the indenture had been granted without any consideration, and was invalid in competition with B's creditors; and further, that the fund *in medio* consisted of income due to B to an amount more than sufficient to pay the debts due to them.

The Court repelled the claims of the alleged creditors of Gill, either as direct or riding claims, in respect that they were neither creditors of Maxwell's trustees nor of the trustees under the indenture.

By his trust-disposition and settlement Sir William Alexander Maxwell conveyed to the trustees therein named his whole estate, heritable and moveable, for certain purposes. He directed them, *inter alia*, to pay the whole free income of the residue of the estate to Hugh Bates Maxwell, his brother, and on his death, to William Maxwell, son of Hugh Bates Maxwell, should he survive his father, and on the death of the survivor to convey and make-over the whole residue of the estate to the heirs of the body of Hugh Bates Maxwell and William Maxwell in the order specified in the deed, and lastly, but only in the event of William Maxwell and Hugh Bates Maxwell, and the children of their bodies having died without leaving issue, Sir William Alexander Maxwell directed and appointed his trustees and executors to make payment of the free residue and remainder of his said whole estate and effects, heritable and moveable, real and personal, wherever situated when realised, to his stepsons, the said Walter Henry Gill and Dundas Reinhardt Gill equally between them and their respective heirs.

The testator died on 4th April 1865. Hugh Bates Maxwell died without issue, other than the said William Maxwell, on 9th February 1870, and William Maxwell died without issue on 4th December 1885.

By indenture executed the 16th April 1877 between Walter Henry Gill on the one part, and Frederick Augustus Gore and others (thereinafter called trustees) of the other part, proceeding on the narrative that the said Walter Henry Gill was desirous irrevocably to settle the moiety of the residue of Sir William A. Maxwell's estate, bequeathed to him in the manner therein mentioned, it was declared that "the trustees were to invest the said moiety in their own names, and pay one-fourth part of the dividends and income arising therefrom to the said Catherine Adeline Maxwell Lambert (afterwards Mahon), the only child of the said Walter Henry Gill, during her life, for her sole and separate use, and the remaining three-fourths to the said Walter Henry Gill and his assigns during his life, and after his death, survived by his wife Elizabeth Saunder Gill as therein provided. Upon the death of the survivor of the said Walter Henry Gill and Mrs Elizabeth Saunder Gill, the said trustees were directed to pay the dividends, income, and interest of the whole principal trust premises to the said Catherine Adeline Maxwell Lambart (now Mahon) as therein provided."

Mrs Elizabeth Saunder Gill predeceased her husband Walter Henry Gill, who married for his second wife Mrs Alice Gill. He died on 22nd October 1887.

The present action of multiplepoinding and exoneration was brought by the trustees under the trust-disposition and settlement of Sir William Alexander Maxwell, to determine who had right to the moiety of the residue of Sir William Alexander Maxwell's estate falling to Walter Henry Gill. Among other parties called as defenders were the trustees under the indenture of 16th April 1877—Mrs Catherine Adeline Maxwell Mahon, the only child of Walter Henry Gill and Mrs Alice Gill, his widow and executrix.

In their condescendence the pursuers, after setting forth the facts above narrated, averred—That they had been advised that doubts existed as to the sufficiency of the indenture of 16th April 1877 to convey the estate therein mentioned, and also as to the right of the defender, the said Catherine Adeline Maxwell Gill, formerly Lambart, now Mahon, to nominate new trustees without the consent and concurrence of the persons to whom she charged her interest in the funds under the said indenture by way of mortgage or assignment. In order to determine who had right to the half of the free residue and remainder of the whole estate and effects, heritable and moveable, real and personal, of the said Sir William Alexander Maxwell falling to the said Walter Henry Gill, and in order to the exoneration and discharge of the pursuers the present action had become necessary. Dundas Reinhardt Gill and Walter Henry Gill and the trustees under the indenture of 16th April 1877 had desired payments to account of their respective shares of the residue. The pursuers accordingly made certain payments to Dundas Reinhardt Gill, and on or about the same dates they set aside the like sums, and paid the same into bank for behoof of Walter Henry Gill and his trustees, as they, the trustees of the indenture of 16th April 1877, were not in a position to grant a discharge to the pursuers for such payments. These sums were as follows—

On 25th July 1887 . .	£5028	6	6
On 16th August 1887 . .	447	10	3
And on 21st September 1887	4000	0	0

The pursuers had all along been and were willing and ready to hand over the same to the persons entitled thereto on receiving a proper discharge. They had since realised sums amounting to over £26,000, but there were large portions of the estate still remaining to be realised.

Frederick Augustus Gore and others, the trustees under the indenture of 16th April 1877, lodged a claim to the whole fund *in medio*, and there being no other claimant, on 22nd May 1888 the Lord Ordinary (M'Laren) pronounced the following interlocutor:—"In respect no other claim has been lodged, and no objection stated, for aught yet seen, and on the motion of the claimants Frederick Augustus Gore and others (Walter Henry Gill's trustees) ranks and prefers them on the fund *in medio* in terms of their claim; authorises and ordains the pursuers and real raisers to endorse and deliver up to the said claimants, or their agents Messrs J. & A. Peddie & Ivory, W.S., the two deposit-receipts of the Clydesdale Bank, Limited, in name of 'Messrs Ronald & Ritchie, S.S.C., for Sir William Alexander Maxwell's trustees, for behoof of W. H. Gill, Esq., or his trustees,' for £5028, 6s. 6d., and £447, 10s. 3d., dated respectively 25th July and 16th August 1887, and a third deposit-receipt of the said bank in name of 'Charles Ritchie, Esq., S.S.C., for Sir W. A. Maxwell's trustees, for behoof of Captain Walter Henry Gill, or his trustee,' for £4000, dated 21st September 1887, and decerns."

Thereafter two other claimants appeared, viz., Mr David Patrick and Messrs Hill, Thomson, & Company, and claimed to be ranked and preferred as riders upon the interest the said Frederick Augustus Gore and others, as trustees foresaid, have been found to have in the fund *in medio* to the extent of the sum due to them, or otherwise to be ranked and preferred on the fund *in medio* to the extent foresaid preferably to the said claimants.

Mr Patrick's claim was for £30, with interest thereon from 30th November 1877, on which date he averred he had cashed a cheque for Walter Henry Gill, which had been subsequently dishonoured.

Messrs Hill, Thomson, & Company's claim amounted to £22, 4s. 8d., for goods supplied and cash advanced to Walter Henry Gill, for the greater part of which debt they held a bill by Walter Henry Gill in their favour dated 18th May 1886, of which, however, they had not been able to get payment.

Both claimants averred that Walter Henry Gill granted the indenture of 16th April 1877 without any consideration, and the same was invalid in competition with his creditors. The claimants were therefore entitled, to the extent of the said debt, to be ranked and preferred to the funds and estate thereby bearing to be conveyed *primo loco*, and in preference to the trustees of said settlement who have been ranked and preferred for aught yet seen to the whole fund *in medio*. By the same indenture Walter Henry Gill retained right to the income arising from the capital sums transferred thereby, and the said income was liable in payment of his debts, and, *inter alios*, the debt due to the claimants. The fund *in medio* consisted of income due to Walter Henry Gill to an amount more than sufficient to pay the debts due to the claimants.

In answer to these averments the claimants Frederick Augustus Gore and others, the trustees under the indenture, denied that the indenture had been granted without any consideration, and explained that it was an onerous postnuptial provision by Walter Henry Gill for his first wife Mrs Elizabeth Saunder Gill and his daughter. With regard to the income of Walter Henry Gill's share of the residue of Sir W. A. Maxwell's estate accruing between 4th December 1885 and 22nd October 1887, they were bound to account for three-fourths thereof to Mrs Alice Gill, the widow and executrix of Walter Henry Gill. They submitted that they should be authorised to uplift £9000 of the £9447, 10s. 3d. deposited by the pursuers and real raisers in the bank, and that the balance should be retained to meet the riding claims, and that before they were disposed of intimation should be made to Mrs Alice Gill, as executrix aforesaid, and to the Norwich Union Insurance Company, who also claimed to be a creditor of Walter Henry Gill.

The executrix did not lodge a claim.

The Lord Ordinary (M'Laren) on 19th June 1888 pronounced the following interlocutor:—"Finds that the claimants Hill, Thomson, & Company and David Patrick are entitled to be ranked and preferred on the fund *in medio* as riding claimants on the claim of the claimants Frederick Augustus Gore and others (Walter Henry Gill's trustees) in terms of their claims, and ranks and prefers them accordingly, and decerns: Finds them entitled to expenses; allows accounts thereof to be given in, and remits to the Auditor of Court to tax the same and report: Further, ranks and prefers the said claimants Frederick Augustus Gore and others to the balance of the said fund *in medio*, and decerns: and authorises the pursuers and real raisers to pay to the said claimants the amounts to which they have now been ranked and preferred, and the expenses now found due, when taxed, and decerns."

The claimants, the trustees under the indenture, reclaimed, and argued—If the indenture were assumed to be inept the claims of Patrick and Hill, Thomson, & Company were directly against Maxwell's trustees. But they could not have sued these trustees unless they had first arrested the funds in their hands, for Maxwell's trustees were not entitled to settle the validity of claims against Gill or his representative. The only person who could sue a deceased person's debtors was the representative of the deceased who had the duty of distributing his estate, and there was no ground for drawing a distinction between lodging a claim in a multiplepoinding and suing directly—*Hinton* v. *Connell's Trustees*, July 6, 1883, 10 R. 1110; Lord Shand's opinion in *Rae* v. *Meek*, July 20, 1888, 15 R. 1050. If the indenture were assumed to be valid, then Patrick and Hill, Thomson, & Company claimed as riders on the claim of the reclaimers, but they were in no better position in this case, for they had no direct claim against the reclaimers, but only against Gill's executrix, and a person lodging a riding claim was in no more favourable position than a person lodging a substantive claim. Creditors with unconstituted claims could never compete with an intimated assignation—*Royal Bank* v. *Stevenson*, December 4, 1849, 12 D. 250.

Argued for the claimants Patrick and Hill, Thomson, & Company—The claims of these claimants were not unconstituted. One held a bill for his debt, the other a cheque which had been dishonoured. The *Royal Bank* case was therefore not in point. The indenture was invalid to exclude creditors. No one could so

convey his own property as to preserve to himself the beneficial use of it, but exclude his creditors —*Learmonth* v. *Miller*, November 21, 1871, 10 Macph. 107, and 2 R. (H. of L.) 62. The claimants should therefore be ranked *primo loco* on the fund *in medio*, or otherwise as riders on the claim of the trustee under the indenture. If the executrix had appeared in the process they could no doubt have claimed to be ranked as riders on her claim. Why should they not be ranked on the claim of the trustees under the indenture, who would have to account to the executrix for the income due to Walter Henry Gill at the time of his death?

At advising—

Lord President—The raisers of this multiplepoinding are the testamentary trustees of the late Sir William Maxwell of Calderwood Castle, under a deed of settlement dated 3rd November 1862, and certain codicils. They sold the estate for various purposes, but according to the events which have happened they are now holding, or at least recently did hold, the entire residue of the estate for the benefit of two gentlemen of the name of Gill—Walter Henry Gill, and Dundas Reinhardt Gill, who were the stepsons of the testator, and who, failing other purposes of the trust, are entitled to divide the residue of the estate between them. There is no question about the right of Mr Dundas Reinhardt Gill to get his one-half of the share of that residue, and the fund *in medio* consists of the half which is destined by the settlement of Walter Henry Gills The condescendence of the fund *in medio* set. out these different facts, and also a certain deed of indenture dated the 16th of April 1877, by which apparently Mr Walter Gill settled his share of Sir William Maxwell's estate by creating a trust in the person of Mr Frederick Augustus Gore and others, who are the reclaimers. The raisers say in the 15th article of the condescendence of the fund *in medio* that doubts exist as to the sufficiency of the said indenture of April 1877 to convey the estate therein mentioned, and also as to the right of the defender Mrs Catherine Mahon to nominate new trustees under that deed, and in consequence of these doubts they bring this multiplepoinding calling the trustees under the indenture, and also the executrix of Mr Walter Gill, and some other parties, but the two other parties who are of the most importance as defenders of this action are the executrix of Mr Walter Gill and the trustees under the indenture of 1877. They further set out that they have made payments to Mr Dundas Reinhardt Gill out of his share of the residue of the estate, but as Mr Walter Gill and the trustees under the indenture of 1877 were not in a condition to grant a discharge, they paid corresponding sums into bank on their account, amounting in all to £9465. And then they go on to state that they have made further recoveries of the estate amounting to very large sums. In short, the succession is a very lucrative one, and there are ample funds apparently to meet every claim that can be brought against it.

Now, in these circumstances the only party who appeared as a claimant in the multiplepoinding was Mr Frederick Augustus Gore, and the other trustees under the indenture of 1877, and there being no other claimant the Lord Ordinary pronounced an interlocutor on the 22nd of May 1888, and "in respect that no other claim has been lodged, and no objection stated, for aught yet seen," he ranked and preferred Frederick Augustus Gore and the other trustees of Mr Walter Gill on the fund *in medio* in terms of their claim, and authorised the pursuers to endorse and deliver up to them the receipts for the sums which had been lodged in bank to account of Mr Walter Gill's share of the estate. After that there appeared in the process two other claimants, viz., Mr Patrick, and Messrs Hill, Thomson, & Company. Now, these persons are creditors or alleged creditors of the deceased Walter Gill, and they claim alternatively to be ranked and preferred as a rider upon the interest of Frederick Augustus Gore and the other trustees under the indenture of 1877, or otherwise to be ranked and preferred on the fund *in medio* to the extent foresaid preferably to the said claimants—that is, preferably to Gore and others, the trustees under the indenture. Now, upon the appearance of these claimants the Lord Ordinary of consent recals the decree of 22nd May last. That appears to me to be rather a mistake in the course of this proceeding. In so far as regards the direct claims against the fund *in medio* as made by these parties preferably to Gore and others, there were ample funds I think to meet these claims without recalling the authority which had been granted by the previous interlocutor to deliver up the receipts for the £9400 that was in bank. There is one bond alone for £19,000 which has been realised since that date, and therefore in so far as funds to meet the direct claim of these now appearing claimants are concerned there was no need to recal that part of it. And in so far as regards the riding claim which they state alternatively, it is quite a mistake to have recalled the ranking of Gore and others as trustees, because unless they were ranked on the fund *in medio* there could be no riding claim, and there could be nothing taken through their sides by a riding claimant. And therefore it appears to me that the interlocutor of the 22nd of May 1888 ought to have stood.

But that brings us to a consideration of what these claimants represent in the way of interests in this multiplepoinding. If they claim directly against the fund *in medio*—that is to say, against the fund in the hands of Maxwell's trustees—the question naturally arises, What have they got to do with the estate or funds of the late Sir William Maxwell? and the only answer that they can make to that is to say that Maxwell's trustees are debtors to their debtor. Now, that is by no means clear even if it were relevant. Maxwell's trustees are debtors to somebody on behalf of Mr Walter Gill, but the question comes to be whether the trustees under the indenture of 1877 are not preferable to everybody. They are in the position, as they represent, of taking a right under an assignation which has been intimated to the holders of the fund, and certainly a creditor of Walter Gill with an unconstituted claim could never compete with an intimated assignation. That is altogether out of the question. If, indeed, they had brought an action against Walter Gill or his executrix, and upon the dependence of that action had attached the fund *in medio* by arrestment, I could quite understand their coming into competition with an inti-

mated assignation. But they have done nothing of the kind, and having done nothing in any way to attach the fund *in medio* their direct claim against that fund cannot possibly be entertained. And accordingly the Lord Ordinary has not entertained that claim. But what he has done is this—He has sustained their riding claim, and upon this footing apparently that they are entitled to claim as against Gore and others, trustees under the indenture of 1877.

Now, it appears to me that the very same objection arises there as in the pursuer's case, as in the case of the claim directly against the fund *in medio*, because neither of these personal creditors of the late Walter Gill had any direct right against Gore and others, trustees under the indenture. The indenture is not granted for their benefit. It is granted for other purposes altogether. If, indeed, they could show that the indenture is bad, which they have not attempted to do, or if they could show that in any way whatever Mr Gill is really a party interested directly in that fund which they claim, they would be in a different position, although even then they could not possibly have a direct right against the fund in the hands of the trustees under the indenture, because the parties who are benefitted by that indenture have a direct claim against that fund, whereas the trustees under the indenture are in relation to these riding claimants nothing but debtors of their debtor. Therefore whether as regards the fund *in medio* or the fund belonging to the trustees under the indenture of 1877, there is no direct claim whatever in the person of these creditors. It must be kept in view that Mr Walter Gill had no connection with Scotland apparently at all, except his interest in Sir William Maxwell's estate under his settlement. He was a gentleman living in England, and the debts apparently incurred to those riding claimants were debts incurred in England. Now, the only course which a party can follow in these circumstances with the view to do diligence so as to attach a fund belonging to his debtors is to raise action against his debtors in the first place, or, Mr Gill being dead, to raise action against his executrix, and that is just the course which they have not adopted. That is the only competent course by means of which they could have access either to the fund *in medio* or to the fund to be obtained in this process of multiplepoinding by the trustees under the indenture of 1877. The Lord Ordinary in the interlocutor under review has found that these claimants are entitled to be ranked and preferred as riding claimants on the claim of the claimants Frederick Augustus Gore and others in terms of their claims. Now, it is a very curious interlocutor that, pronounced in the circumstances, because he has already recalled the ranking and preference in favour of Gore and others, and how the riding claims can be admitted upon a claim that is not yet ranked I do not very well see. But apart from that difficulty in point of form, I am decidedly of opinion that the Lord Ordinary is wrong in ranking these riding claims at all as riding claims for the reasons that I have already assigned, that they have not in any way attached the fund upon which they seek to set up these riding claims.

Lord Mure—I agree with your Lordship in thinking that the Lord Ordinary's interlocutor must be recalled, because I do not think the case is in shape for giving effect to a riding claim of the description of Mr Patrick's, or of Hill Thomson, & Company's. They, as I understand, allege themselves to be creditors of the late Walter Gill, and they claim upon a part of the fund *in medio*, which is said to have belonged to Mr Gill, and which is now payable to his representatives whoever they may be. And they claim here as riders upon the claim of Mr Gore, who claims the fund *in medio* upon the grounds set forth under an indenture by which he takes a particular portion of that fund. Mr Gore, as I understand the matter, is not a debtor of the claimants. Their debtor is Mr Gill's executrix, who has been called in the action, but does not appear. Now, if she had been called, and had put in a claim to be preferred to that fund as against Gore, and had been preferred, I could then have quite well seen that Mr Patrick and Hill, Thomson, & Company might have claimed as a rider on Mr Gill's executrix upon the share of the fund *in medio* that is said by them to belong to Mr Gill. But she has not claimed, and therefore Gore and others, as trustees under the indenture, have the right to get hold of the money belonging to Mr Gill, to be paid to whoever was his creditor in other matters.

I agree with your Lordship that the riding claim in these circumstances upon what is coming into Gore's hands is not a competent proceeding in point of form, and cannot be entertained. The only hesitation I have had in this case about the matter was in consequence of certain statements on the record in answer to the claiming party. A proposal was made on the part of Mr Gore, which it strikes me was in the circumstances a very fair proposal, and by which the matter might possibly have been extricated in this process had that proposal been adopted, for Mr Gore frankly admits that of the £9400 that was claimed a considerable proportion is the sum which he probably will have to hand over to Mrs Gill, the executrix of Walter Gill. But then they say that it represented income which in point of fact belonged to Mr Gill. But they go on to say—"The claimants submit that they should be authorised to uplift £9000 from the said deposits—that is, from the £9400—and that the balance should be retained to meet the riding claims, and that before they are disposed of intimation should be made to Mrs Alice Gill as executrix foresaid and to the Norwich Union Insurance Company." Now, that stands as a proposal made by Gore, and I think in the circumstances it was a very fair proposal. I called attention to it during the discussion, and I never heard any explanation as to why that proposal had not been adopted, because if Mrs Gill had got notice, and had come forward and claimed, this riding claim would have been in shape, but at present it appears to me to be altogether out of shape. It is very likely that there was some good reason for the course adopted, but as matters now stand I agree that this is an incompetent mode of working out the matter, and that these riding claims should be refused.

Lord Shand—I have come to the same conclusion as your Lordships. It appears that the trust which was created by Mr Gill was by virtue of a

deed executed, I think, in April 1877, and the deed was intimated to the trustees, the holders of the fund, on the 3rd of May 1877. At that time neither Mr Patrick's debt nor Hill, Thomson, & Company's debt was in existence. They became creditors for the first time in November 1877, after the fund in question in the hands of Maxwell's trustees had been assigned to Mr Gill's trustees for the purposes of the deed of 1877.

In that state of matters the question that arises is, in the first place, Is there a good riding claim here on the claim of Gill's trustees to the fund *in medio?* Undoubtedly Gill's trustees *prima facie* are the persons entitled to draw the money from Maxwell's trustees. They have an assignation intimated, and they are prepared to give a discharge for any money they get. As I understand, the first view of this case presented for the claimants Hill, Thomson, & Company and Mr Patrick is this, that they are entitled to come in as riders on the claim of Gill's trustees. I agree with your Lordship in thinking that that cannot be allowed in the state in which matters are. Mr Patrick and Hill, Thomson, & Company claim to be creditors of Mr Gill, but he is dead; there is no decree of constitution here, there has been no proceeding adopted by way of action against Gill's executrix to constitute the claim and to obtain a warrant of arrestment, and no arrestment has been used either in the hands of Gill's trustees or in the hands of the raisers Maxwell's trustees. I doubt very much whether an arrestment would have attached anything in Maxwell's trustees' hands, but assuming it to be so, there is no *nexus* of that kind here, and therefore I think Gill's trustees are in a position to say, these claimants who propose to have a riding claim on our claim have no title whatever to take up that position. There is neither constitution nor arrestment nor *nexus* of any kind attaching this fund. It is a personal claim, bearing to be a claim against Mr Gill, who had a claim against his own trustees, who again had a claim against the raiser. In these circumstances it appears to me that in the absence of any *nexus* there is no room for the riding claim on Gill's trustees so as to attach money in the hands of the raisers.

On the other question, whether there is any direct claim, I concur in what your Lordship has said. What the Lord Ordinary has done is to sustain the riding claim. If there had been an arrestment there might have been a direct claim, but looking to the circumstances in which parties here are, there having been no proceeding against the executrix and no arrestment of any kind, I do not see that there is a case for a direct claim against Maxwell's trustees interpelling them from paying to the holders of the assignation so much of the fund as would meet the claims of Patrick and Hill, Thomson, & Company. So that in either view of the case I agree with your Lordship in thinking that these claims must be disallowed.

Lord Adam—The parties we have here are Maxwell's trustees, who are raisers of the multiplepoinding, and are or were the holders of the fund *in medio*. Then we have Captain Gill's trustees under a certain indenture, who are claimants, and we have also here creditors of Mr Gill, or at least they allege themselves to be creditors of Mr Gill, Mr Patrick and Hill, Thomson, & Company. These are the parties. Now, Mr Patrick and Hill, Thomson, & Company claim alternatively. They claim either as a riding claim upon Gill's trustees' claim, or, if that be not successful, they claim directly against the fund *in medio* as against Maxwell's trustees. That is the position of matters.

Now, it is to be observed that these two creditors—Mr Patrick and Hill, Thomson, & Company—do not allege that they are creditors of Maxwell's trustees. If that be so, it appears to me perfectly clear that they could not have sued Maxwell's trustees directly for the sums alleged to be due to them by Mr Gill, because that would be, as your Lordship has pointed out, simply a creditor suing his debtor's debtor, and that we have decided very recently, upon well-known principles, is quite incompetent. So far as the claim is made directly against Maxwell's trustees, I hold that any claim directed by these two creditors against Maxwell's trustees is quite out of the question. But in my opinion the position is exactly the same as regards Gill's trustees. They do not allege that they are creditors of Gill's trustees, and they do not allege that they have any claim under Gill's trust. What they claim, as I said before, is that they have a claim against the late Mr Gill. That again is simply a claim by a creditor against his debtor's debtor or alleged debtor. It is neither more nor less than that, and I hold that such a claim as that is quite out of the question. It humbly appears to me that that being so, this claim of these trustees must on either branch of it be repelled, and I think that the whole case lies there, and that it is a clear and a simple case. It is quite clear to my mind that the claim of these parties is upon Gill's representative, and against nobody else directly, and if they desire to get payment of their money that is their course to follow.

The Court pronounced the following interlocutor:—

> "Recal the interlocutor reclaimed against: Repel the claims of the claimants Hill, Thomson, & Company and David Patrick, and rank and prefer the claimants the said Frederick Augustus Gore and others as trustees foresaid in terms of their claim, and decern: Grant warrant to, authorise, and ordain the pursuers and real raisers to endorse and deliver up to the said Frederick Augustus Gore and others, as trustees foresaid, or their agents Messrs J. & A. Peddie & Ivory, the following deposit-receipts of the Clydesdale Bank, Limited, dated 24th October 1888, viz.—(1) deposit-receipt for the sum of £5153, 16s. 4d. in name of Ronald & Ritchie, S.S.C.; (2) deposit-receipt for £458, 3s. 9d. in name of the said Ronald & Ritchie; (3) deposit-receipt for £4086, 11s. 5d. in name of Charles Ritchie, S.S.C.; and (4) deposit-receipt for £502, 7s. 5d. in name of the said Ronald & Ritchie, and that upon a certified copy of this interlocutor; and remit the cause to the Lord Ordinary to proceed further therewith as shall be just and in terms of law," &c.

Counsel for the Claimants (Reclaimers)—D.-F. Mackintosh—Lorimer. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for the Claimant David Patrick—C. S. Dickson. Agents—Ronald & Ritchie, W.S.

Counsel for the Claimants Hill, Thomson, & Company—C. S. Dickson. Agents—Davidson & Syme, W.S.

Saturday, February 2.

SECOND DIVISION.

SCHOOL BOARD OF ECKFORD *v.* THE RATEPAYERS.

School Board — Retiring Allowance — Teacher's House.

Held (1) that the amount of the retiring allowance of a teacher appointed before 1872, provided only it be not less than two-thirds of his salary, is entirely in the discretion of the school board; and (2) that a school board may competently allow a retiring teacher to continue to occupy rent free the teacher's house as part of such allowance—Lord Lee *dub.* whether a teacher's house, so long as it is kept up, should not be occupied by the person actually discharging the duties of teacher.

The School Board of the parish of Eckford, in the county of Roxburgh, in December 1886 arranged with Mr Henry Richardson Lawrie, the teacher of the Eckford School, that he should retire upon an allowance of £60 per annum, with the use of the teacher's house and garden rent-free for the rest of his life.

Mr Lawrie was then nearly seventy-eight years of age, had taught in the parish for fifty-eight years, and had occupied the house and garden attached to Eckford School for fifty-five years.

Mr Lawrie's emoluments consisted of a salary of £50, the school fees, which amounted to about £32 or £33 per annum, and four-fifths of the annual Parliamentary grant, amounting to between £33 and £39. His whole emoluments as teacher of Eckford Public School accordingly amounted to about £120 per annum, exclusive of the house and garden.

Certain of the ratepayers objected to the arrangement made by the School Board, holding that they were not entitled to give the retiring teacher the use of the house and garden, or more than the amount of his salary—£50 per annum in money.

A Special Case was presented to the Court by the School Board of the first part, and by the said ratepayers of the second part, to have the legality of the School Board's action determined.

The following questions were submitted—"1st, Whether the first parties in granting Mr Lawrie a retiring allowance were (*a*) restricted to a sum not exceeding the gross amount of his salary? or whether (*b*) their power in fixing the amount was entirely discretionary? 2nd, Whether the first parties (*a*) were entitled to grant to Mr Lawrie, in addition to the retiring allowance in money, the free use of the schoolmaster's house and garden during his life? or whether (*b*) they were bound to make them over to the person actually discharging the duties of schoolmaster? 3rd, Whether, assuming that the first parties are wrong in giving Mr Lawrie the continued use of the schoolmaster's house and garden, they have power, in addition to his retiring allowance of £60 (*a*) to provide him with another house and garden of the same annual value? or (*b*) to pay him a further yearly sum equal in amount to such annual value? or (*c*) to let the schoolmaster's house and garden to him?"

The Parochial and Burgh Schools (Scotland) Act 1861 (24 and 25 Vict. c. 107), provides, *inter alia*—Sec. 18. "Nothing in this Act shall be held to interfere with any arrangement which may have been concluded between the heritors and schoolmaster of any parish for the retirement of such schoolmaster, except as regards the house and garden, and premises attached thereto, which shall in every case be made over at the term of Whitsunday next after the passing of this Act to the person actually discharging the duties of schoolmaster, and where the use of such premises may have formed part of a retiring allowance, the heritors shall make reasonable compensation to the ex-schoolmaster." . . . Sec. 19. . . . "Provided that where such resignation shall not be occasioned by any fault on the part of the schoolmaster, the heritors shall grant a retiring allowance, the amount whereof shall not be less than two-third parts of the amount of the salary pertaining to said office at the date of such resignation thereof, and shall not exceed the gross amount of such salary.". . . Sec. 20. "In all cases in which the minister and heritors are by this Act empowered to provide a retiring allowance for a schoolmaster who shall resign or shall be removed from his office, it shall be lawful for them, if they see fit, to provide for such schoolmaster in addition to such allowance, and in like manner, a further yearly sum equal in amount to the annual value of any dwelling-house and garden to which he may be entitled as such schoolmaster, as the same shall be valued by the assessor of the county."

The Education (Scotland) Act 1872 (35 and 36 Vict. c. 62), provides by section 60 that "Any teacher of a public school appointed previously to the passing of this Act may be removed from his office in manner following. . . . (2) If the school board of any parish or burgh shall consider that any such teacher is incompetent, unfit, or inefficient, they may require a special report regarding the school, . . . and in receiving such report the school board may, if they see cause, remove such teacher from office, . . . provided also that in the case of teachers of parish schools appointed previously to the passing of this Act who may be so removed, the school boards shall have the same powers of granting retiring allowances, and the teachers shall have the same rights to retiring allowances, as were vested in heritors and ministers and in parish schoolmasters respectively by sections 19 and 20 of the Parochial and Burgh Schoolmasters (Scotland) Act 1861, in the case of parish schoolmasters permitted or required to resign, or dismissed or removed from office as therein provided." Section 61 provides that "A school board may permit any teacher of a public school to resign his office upon the condition of receiving a retiring allowance, and the said board may award or pay to such teacher out of the school fund such retiring allowance as they shall think fit, provided always