

Wednesday, May 30.

FIRST DIVISION.

[Lord Low, Ordinary.

MACNAB v. WADDELL AND OTHERS.

Process—Multiplepointing—Competency—  
Double Distress.

In an action of multiplepointing brought to determine alleged competing claims to a trust-estate the real raiser averred that he was entitled to one-half of the trust-estate, and that the same half was also claimed by another party.

Held that the action was incompetent in respect that it dealt with the whole trust-estate as the fund *in medio*, and that there was no averment of competing claims as to one-half thereof.

Peter Waddell raised an action of multiplepointing in name of Mrs Catherine Macnab, widow of Peter Macnab, and sole surviving trustee under the antenuptial contract of marriage entered into between her and the said Peter Macnab, against himself, the said Peter Waddell, Mrs Catherine Macnab, as an individual, John Macnab, and certain other parties who were next-of-kin of the deceased Peter Maenab.

The real raiser Peter Waddell averred that by the said contract of marriage the deceased Peter Macnab had conveyed certain estate to the trustees therein named, that the trustees were directed, failing issue of the marriage, and in event (which happened) of Peter Macnab being the predeceaser of the spouses, to make over that estate in two equal shares, one to Peter Macnab's widow for her absolute use, and the other to any person whom Peter Macnab might appoint by any writing under his hand, and failing such appointment to his next-of-kin; that Peter Macnab had left a holograph testamentary settlement, whereby, in exercise of the power of appointment given him by the marriage contract, he had left half of the said trust property contributed by him to the real raiser; that he (the real raiser) claimed that half in virtue of the provisions of the marriage contract and the holograph will, but that Mrs Catherine Maenab would not pay it over to him, as it was also claimed by virtue of an *inter vivos* assignation from Peter Macnab.

The nominal raiser Mrs Macnab pleaded that the action was incompetent in respect that *ex facie* of the summons there was no double distress.

On 8th March 1894 the Lord Ordinary (Low) having heard counsel on the closed record on the competency of the action, repelled the defences and sustained the competency.

The nominal raiser reclaimed.

At advising—

LORD PRESIDENT — Lord Adam has pointed out what seems to me to be an unanswerable objection to the competency

of this multiplepointing, and this appears on the face of the Lord Ordinary's opinion. The only double distress alleged to exist consists of competing claims, not to the fund *in medio*, but to one-half of the fund *in medio*. As regards the other half there is no dispute whatever. The real raiser seems to have assumed that if he could show the existence of a competition for any part of the estate this was enough to support the competency of a multiplepointing, throwing the whole estate into Court as the fund *in medio*. This view cannot be supported, and its adoption would be highly inconvenient. If we were to sustain this multiplepointing, the necessary and probably the intended result is that the administration of the whole marriage-contract estate is taken out of the hands of the marriage-contract trustee. For this there is no valid reason. It is the duty of the trustee to divide the estate. A dispute such as we have here, as to who is entitled to this particular share of the estate, might be settled by an action of multiplepointing for the distribution of the one-half which is the subject of dispute. The present action is in my opinion incompetent.

LORD ADAM — Peter Macnab and the defender and nominal raiser Mrs Catherine Macnab entered into an antenuptial marriage-contract, by which Mr Macnab conveyed his whole estate to trustees, of whom the nominal raiser is the sole survivor. In the event (which has happened) of the husband being the predeceaser of the spouses, and of there being no issue of the marriage, one-half of the estate was to go to the widow for her absolute use. There is no question as to that portion of the estate. The other half of the estate was destined to any person whom Peter Macnab might appoint, whom failing to his next-of-kin. As regards this half of the estate there is double distress. A claim to it is lodged by Peter Waddell, who is the heir under a will left by Macnab, and it is also claimed by John Macnab, a brother of Peter Macnab. If the fund *in medio* had been limited to the latter half of the estate, I should have agreed with the Lord Ordinary in thinking that there was double distress, but the fund is not limited to that half of the estate, but comprises the whole estate. It is, however, the duty of the marriage-contract trustee to administer the estate, and having done so, to pay over the estate to the person in right of it.

It appears to me that because two persons may have a claim to one-half of the estate, that affords no ground for throwing the whole estate into Court, the effect of such a course being to oust the trustee from her right to administer the estate. I do not think that that course is competent, and I therefore concur with your Lordship.

LORD M'LAREN and LORD KINNEAR concurred.

The Court recalled the interlocutor of the

Lord Ordinary and dismissed the action as incompetent.

Counsel for the Nominal Raiser—H. Johnston—Chree. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Real Raiser—C. S. Dickson—Abel. Agents—Gill & Pringle, W.S.

## HIGH COURT OF JUSTICIARY.

Monday, March 19.

(Before the Lord Justice-Clerk, Lord Kincairney, and Lord Stormonth Darling.)

MADIN v. M'LEAN AND OTHERS.

*Justiciary Cases—Public-House—Club—Excise Licences Act 1825 (6 Geo. IV. c. 81), sec. 26—Inland Revenue Act 1880 (43 and 44 Vict. c. 20), sec. 43.*

The rules of admission to membership of a working-men's club provided that intending members should be enrolled in a register (subject to a power of rejection by the committee of the club), and should pay an entry-money and subscription. In practice these rules were disregarded, and the bar-keeper was authorised by the committee to admit any person whose appearance was in his opinion respectable on payment of the quarterly subscription of threepence, without either enrolment or payment of entry-money.

*Held* that the club, by reason of its permitting such a system of admission in violation of its rules, was not a *bona fide* club, and that a sale of spirits to a member so admitted was a sale requiring an Excise licence.

James M'Lean, James Neill, and David Nairn, the chairman, secretary, and treasurer of the Committee of the Montrose Working-Men's Club, were charged in the Justice of the Peace Court at Montrose at the instance of Charles Henry Madin, officer of Inland Revenue, with selling spirits without a licence, in contravention of section 26 of the Excise Licences Act 1825, as amended by the 43rd section of the Inland Revenue Act 1880. The spirits were sold to John Mitchell, Supervisor of Inland Revenue, by Alexander Cathro, the bar-keeper of the club, within the club premises. In defence it was maintained that the club was a *bona fide* club, and that the spirits had been supplied to Mitchell after he had been duly admitted a member. The Justices sustained this defence and dismissed the complaint.

A case was stated to the High Court at the instance of the Inland Revenue, and the following facts were found proved—The Committee of Management of the club, which consisted of seven members, including the accused, had power to manage the club in conformity with the constitution and bye-laws of the club.

Alexander Cathro, who was a member of the club, had been engaged by the committee to act as club-master and bar-keeper, and was responsible to the committee.

On 28th July, Mitchell, who was then a stranger to Cathro, visited the said premises and requested to be supplied with drink. He was refused, not being a member. He then asked Cathro how he could become a member, and being told, was, at his own request, admitted a member of the club and supplied with a ticket of membership (for which he paid threepence for three months) by Cathro, who had authority to admit those whom he knew or from whose appearance he could gather would be respectable members. Members are admitted for a year upon payment of one shilling for a ticket, for half-a-year upon payment of sixpence, and for three months upon payment of threepence. Cathro considered that Mitchell would make a suitable member, and supplied him with a ticket on which were printed the bye-laws of the club.

Mitchell, after admission as a member, asked for a nip of spirits, which Cathro supplied, and for which Mitchell paid twopence. Mitchell was not introduced or proposed for admission as a member of the club. Cathro was the servant of the Club Committee, and acted in accordance with their instructions in admitting Mitchell a member of the club, and supplying him, as a member of the club, with spirits.

There was put in evidence by the respondents the following excerpt from "Conditions of Membership" of the club:—

"Membership of the club shall be constituted by the payment in advance of threepence quarterly, sixpence half-yearly, or one shilling annually, and enrolment in the register of members, but only members who are enrolled for a year current at the time of the general meeting shall have a voice in the management of the club."

"After the 1st day of June 1893, each person desirous of becoming a member of the club shall pay the sum of sixpence of entry-money besides the ordinary subscription."

"The committee shall have power to reject persons wishing to become members, or to expel those who may be disorderly, and generally to enforce the rules."

The question of law for the opinion of the Court was—"Whether, upon the facts stated, we were justified in holding that the said club was a *bona fide* club, and that Mitchell was duly admitted a member thereof, and that the sale of spirits to him was not a sale for which an Excise licence to retail spirits was required by the respondents."

Argued for the appellant—(1) Assuming that the conditions of membership were in force, Mitchell was not duly elected a member. These conditions required, besides payment of the subscription for three months, enrolment in the register of members, and also the payment of