about the general provisions in the trust deed which we are not in a favourable position to consider, I think the clause that I have adverted to compels us to hold that the trust-disposition and settlement impliedly revoked the destination in the disposition of 1878.

On these grounds, I am of opinion that the decision of the Sheriff-Substitute should be affirmed.

LORD JUSTICE-CLERK—I am of the same opinion. I think the clause to which Lord Ardwall has referred is quite sufficient for the decision of the case. The expression there "I wish" is plainly the expression of a direction which the testator had desired should be put into his disposition and deed of settlement by those who drew it up for him, and it is plainly also an expression which cannot be left out of view in deciding how a title should be made up to the subjects in question. I have no doubt that, assuming a case in which there was a clause such as is expressed here—I wish that my daughters shall have the use of Haymount and reside there till the youngest daughter is twenty-one, and their aunt to reside with them—trustees, whatever their powers otherwise under the deed might be, would be interfered with by the Court if they did not carry out that wish, but tried to put his estate in such circumstances as the daughters could not live at the place where their father desired them to live. I therefore think that it is very clearly implied that the testator intended that Haymount should be carried by his general disposition of his estate, and that accordingly we should affirm the judgment of the Sheriff-Substitute.

LORD ORMIDALE—I am entirely of the same opinion. I only wish to add that while it is not necessary, in view of the grounds on which your Lordships propose to decide the case, specially to consider the terms of the destination, I am not prepared as at present advised to assent to the view of Mr Christie that the words "and their assignees" make no difference on the construction of the clause.

LORD DUNDAS was absent, and LORD SALVESEN was sitting in the Lands Valuation Appeal Court.

The Court dismissed the appeal.

Counsel for Petitioners—J. A. Christie. Agent—William Black, S.S.C.

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*Tuesday, February 7.*

## SECOND DIVISION.

[Lord Ormidale, Ordinary.

## COLONIAL MUTUAL LIFE ASSURANCE SOCIETY, LIMITED *v.* BROWN AND OTHERS.

*Process—Multiplepoinding—Competency—Double Distress.*

A creditor arrested in the hands of an insurance company a sum under a policy which had become payable to his debtor, and for which the debtor had granted a discharge. The insurance company having raised a multiplepoinding, the arrester objected to the competency thereof on the ground that there was no double distress. *Held* that the multiplepoinding was competent.

On 3rd May 1910 the Colonial Mutual Life Assurance Society, Limited, having their registered office at Melbourne and their head office for the United Kingdom at 33 Poultry, London, *pursuers* and *real raisers*, brought an action of multiplepoinding against (1) John Brown, formerly residing in Edinburgh and then residing in Jersey City, near New York, U.S.A., who was described as *common debtor*, and (2) Poole & Company, accountants, Edinburgh, and Alexander Wilson Poole, accountant there, the sole partner thereof, who were described as "creditors or pretended creditors of the said John Brown," all *defenders*, to have it found that they were only liable in once and single payment of the principal sum of £105, 10s., including cash profits, due under a policy in name of the common debtor effected with the pursuers. In terms of the policy this sum became payable within one calendar month after proof to the pursuers that John Brown had survived 21st March 1910, the date of the maturity of the policy. On or about 26th March 1910 the defenders Poole & Company used arrestments to the extent of £400 in the hands of the pursuers to found jurisdiction against John Brown and also on the dependence of an action in the Court at Edinburgh against him. In this action Poole & Company obtained decree for £272, 10s. with expenses. Following on this action they raised on 20th April 1910 an action of furthcoming in the Sheriff Court. The pursuers thereupon, on 3rd May 1910, raised the present action of multiplepoinding in which they stated that the sum due under the policy was claimed by John Brown, and that the arrestments used by Poole & Company to found jurisdiction were irregular in form. At the discussion in the Inner House it was stated at the bar that John Brown had sent to the pursuers from the United States a discharge dated 24th March 1910, on receipt of which they were entitled, if not interpelled, to pay the fund. It was also stated that the Sheriff-Substitute had, on 28th June 1910, dismissed

the action of furthcoming on account of an irregularity in the arrestments, and that this interlocutor had been affirmed by the Sheriff on 19th July 1910.

The defenders Poole & Company and A. W. Poole lodged defences, in which they pleaded, *inter alia*—"(1) There being no double distress, the action is incompetent and should be dismissed, with expenses. (2) In respect that the defenders Poole & Company are alone entitled to the fund *in medio*, they should in the circumstances condescended on be ranked and preferred thereto with expenses. (3) In respect that the pursuers and real raisers have pled and established that the said arrestments *ad fundandam jurisdictionem* were invalid, they are barred *personali exceptione* from raising and insisting in the present action and should be found liable in expenses to the defenders."

On 1st December 1910 the Lord Ordinary (ORMIDALE) repelled the first plea-in-law for the compearing defenders, found the pursuers liable only in once and single payment, and allowed all parties claiming an interest in the fund *in medio* to lodge their condescendences and claims within fourteen days.

The defenders having obtained leave, reclaimed, and argued—There was here no double distress. The arrestment was bad before this action was raised, and even if it was good one arrestment would not entitle an arrestee to proceed with a multiplepoinding. No doubt double distress did not mean double diligence. It was enough if there were a depositary and two conflicting claimants. But here there was no common debtor and no competition. John Brown, described as such in the summons, was debtor to nobody but Poole & Company, and if he had a claim against the pursuers, these defenders could enforce their claim through him. Actions of multiplepoinding by trustees for exoneration and discharge, or by depositaries, were in a different position and did not require a common debtor — *M'Dowall & Neilson's Trustee* v. *Haggart & Company*, December 15, 1905, 8 F. 235, 43 S.L.R. 187. An arrestee could not bring a multiplepoinding unless there was a conflict among creditors. There was no case where an arrestee following on one arrestment had been held entitled to bring a multiplepoinding. *Winchester* v. *Blakey*, June 21, 1890, 17 R. 1046, 27 S.L.R. 811, was a typical illustration of the rule, as there was there a true competition of creditors for the fund *in medio*; on the other hand, in the case of *Clark* v. *Campbell*, December 12, 1873, 1 R. 231, 11 S.L.R. 138, which was analogous to the present case, the action was held incompetent.

Argued for the pursuers—The competency of the multiplepoinding was to be judged of as at the date of the summons, *i.e.*, as at 3rd May 1910. At that date the policy had matured and become payable. Further, it was not decided that the arrestment was bad until long after the summons was raised, the date of the Sheriff-Substitute's judgment to this effect being 28th June, and of the Sheriff affirming, 19th July. There was, therefore, sufficient double distress here to justify a multiplepoinding, and it had already been decided in *Scott & Others* v. *Drysdale*, May 22, 1827, 5 S. 643 (689), that if there were competing claims one arrestment was sufficient. In the case of *Clark* v. *Campbell*, *cit. sup.*, there was only a dispute between a creditor and his debtor, and the action was raised by the latter. The present case was analogous to *Royal Bank of Scotland* v. *Price*, January 24, 1893, 20 R. 290, 30 S.L.R. 339, and *Fraser's Executrix* v. *Wallace's Trustees*, February 15, 1893, 20 R. 374, 30 S.L.R. 421, and *a fortiori* of *Commercial Bank of Scotland, Limited* v. *Muir*, December 1, 1897, 25 R. 219, 35 S.L.R. 174, in all of which the competency of a multiplepoinding had been sustained.

LORD JUSTICE-CLERK—It has been said in more than one case, and emphatically in a recent case, that all questions relating to the competency of an action of multiplepoinding are questions of practice, and I am unable to see anything in this case to distinguish it from decided cases establishing the practice. There is one case in which I should have had considerable doubt, and in which the Lord President expressed doubt as regards the competency of such an action. I refer to the case of the *Commercial Bank of Scotland* v. *Muir* (1897, 25 R. 219), in which there was a deposit-receipt in name of two persons jointly. The sum deposited could only have been uplifted on the signature of both those persons, and they might have made their own arrangements for uplifting it. The fact that an action of multiplepoinding was held to be competent in that case shows how far the practice has gone.

In this particular case we have the question whether when one party uses arrestments and another party indicates an intention to compete with the arrestor, there is sufficient ground for an action of multiplepoinding, There is no doubt it is unnecessary that there should be arrestment by both of the parties who assert a right to the fund *in medio*. So early as 1827 we have the case of *Scott* v. *Drysdale* (5 S. 643), in which the particulars in the rubric are as like the material facts in this case as possible. That case was well considered and the judgment of the Lord Ordinary was reversed.

In this case the record is unfortunate in terminology, but this does not affect the result. I think the case falls within the passage in the opinion of Lord M'Laren in the case of *Winchester* v. *Blakey* (1890, 17 R. 1046), in which his Lordship says—"The practice of our courts, however, warrants a much greater latitude in the case of the holder of the fund than in the case of the competitors, and for the reason that the holder of the fund can never raise a direct action, and is not bound to remain a depository till the day of his death or till the disputing parties agree to settle their claims. He is entitled to be relieved by

means of an action of multiplepoinding after a reasonable time, and accordingly it is a sufficient justification of the institution of the action, and is the criterion of its competency, that the claims intimated make it impossible for the depository to pay to one of the parties without running the risk of an action at the instance of the other." That, I think, applies quite clearly to this case. Therefore I have no hesitation in holding that the judgment here ought to be the same as in that case.

In the case of *M'Dowall* v. *Haggart & Co.* (1905, 8 F. 235), decided in this Division, I see that I gave the leading opinion. If it was the case that before that decision it had been held that competing claims were sufficient ground for an action of multiplepoinding, then it is abundantly clear that this action is competent. Now it had been so held prior to the decision in *M'Dowall's* case. It was distinctly so decided by the First Division in the case of the *Commercial Bank of Scotland* v. *Muir* that it was so. The position of parties here is, in my opinion, practically the same, and I am therefore of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD ARDWALL — I have had a little difficulty in this case, and I was impressed by Mr M'Kechnie's argument on one or two points. He certainly pointed out one blot on the record, in that the summons calls Mr Brown the common debtor, but although that is so, I do not think that a mistake of this sort entitles us to throw out the action. I also see that there are some very unsatisfactory statements made by the pursuers on record, but after all it has been admitted that there is here an arrestment and also a claim on the fund, and I think the existence of these two claims forms a good ground for bringing a multiplepoinding.

The practice has now got very far away from the double distress which was required in the days when this was held to mean legal distress. I think the position is well summed up by Lord Kinloch in the case of *Russel* v. *Johnston*, 1859, 21 D. 886, where he says—"In the original conception of the process the proper ground of a multiplepoinding was double distress in the strict sense of the term, or, in other words, competition created by rival diligence. But in later times it has not been thought indispensable to have double diligence, but double claims to the same fund have been thought sufficient. It is still, however, necessary to the validity of the action that there should be a true case of double claims to one fund or property on separate and hostile grounds." I think that this case supplies the requisites above described. We have claims by an arresting creditor and by another person who is truly the proper creditor of the real raisers, because he is the party to whom they are by the terms of their policy obliged to pay the fund *in medio* if not interpelled. In these circumstances, and considering further that Mr Brown is furth of Scotland, being resident in Jersey City, U.S.A., I consider that this is a case in which the raising of an action of multiplepoinding was a proper step for the assurance company to take for their own exoneration, and also for the purpose of seeing that the money due to Mr Brown was not paid away without judicial sanction. Accordingly I am of opinion that the Lord Ordinary's judgment should be adhered to.

LORD MACKENZIE—The principles to be applied in determining whether this multiplepoinding is competent are not really in dispute. It is not necessary that there should be double diligence if there are two competing claims on the fund. In the case where the action is brought by the holder of the fund the Court is always disposed to regard more favourably a multiplepoinding as a suitable process to determine which of two claimants is entitled to the fund. In the present case the pursuers and real raisers, the Colonial Mutual Life Assurance Society, Limited, have no interest in the question other than this, that they are bound to see that the proper party receives payment of the sum due under the policy taken out in their office. This policy was taken out in the name of a certain John Brown, now residing in the United States of America. It matured on 21st March 1910, and amounted to £100 with tontine cash profits of £5, 10s., this amount being payable within one month after proof to the pursuers that John Brown survived the above date.

On the record two salient facts appear. First, it is averred by the pursuers and real raisers that the sum due under the policy is claimed by John Brown. Secondly, there is this fact:—the second plea of the defenders is to the following effect:—"In respect that the defenders Poole & Company are alone entitled to the fund *in medio*, they should, in the circumstances condescended on, be ranked and preferred thereto with expenses." I think we have here a plain case of adverse claim to the same fund. Of course a mere bald statement that there are certain claims on the fund would not be sufficient, but an explanation is given of the nature of the claim of John Brown. It was stated at the bar that he sent across a discharge dated 24th March 1910, on receipt of which the real raisers (if not interpelled) were entitled to pay the fund. The real raisers also set out that arrestments were used in their hands on 26th March 1910. The present action was brought on 3rd May 1910. It was admitted that it was only on 28th June that the Sheriff-Substitute decided that owing to an irregularity in the arrestments the furthcoming following on them was bad. That judgment was affirmed by the Sheriff on 19th July 1910, so that at the date of the present action there were competing claims on the fund. It is plain the matter will not be allowed to rest here, because Poole & Company having got decree for £272, 10s. against Brown, are creditors of his, and it was stated frankly at the bar that it was their intention to make good their claim against him out of

the fund held by the pursuers and real raisers. It appears to me that these facts speak for themselves. There is a question between Brown and Poole & Company, and therefore the case falls within the principles already referred to. The argument was used that there was only one arrestment and therefore no double distress, but I am unable to see why, if in the case of an assignation a true competition has been held to arise between the assignor and the assignee, which was the case in *Fraser's Executrix*, 20 R. 374, there should not equally be double distress here. An intimated assignation interpels the debtor from paying just as a duly executed arrestment. I therefore agree that there is here double distress and that the Lord Ordinary is right.

LORD DUNDAS was absent, and LORD SALVESEN was sitting in the Lands Valuation Appeal Court.

The Court refused the reclaiming note, adhered to the interlocutor reclaimed against, and remitted the cause to the Lord Ordinary to proceed therein.

Counsel for Pursuers and Real Raisers (Respondents)—M. P. Fraser. Agents—Fyfe, Ireland, & Co., W.S.

Counsel for the Compearing Defenders (Appellants)—M'Kechnie, K.C.—A. A. Fraser. Agent—Sterling Craig, S.S.C.

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*Tuesday, February 7.*

## SECOND DIVISION.

[Sheriff Court at Hamilton.

## KANE *v.* MERRY & CUNINGHAME, LIMITED.

*Master and Servant—Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident "Arising Out of" Employment.*

A brusher in a mine who had finished his work for the day jumped on the last of three hutches which were being taken by a pony to the pit bottom. On the way he was knocked off the hutch by his head coming into contact with two crowns which were below the ordinary pit level, and he sustained serious and permanent injury. A special rule, of which the injured man was cognisant, forbade miners from riding on the hutches. *Held* that the injury was not caused by an accident "arising out of" the workman's employment within the meaning of the Workmen's Compensation Act 1906.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1), enacts—"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation. . . ."

Simon Kane, Motherwell, having claimed compensation under the Workmen's Compensation Act 1906 from his employers Merry & Cuninghame, Limited, coalmasters, Glasgow, the matter was referred to the arbitration of the Sheriff-Substitute at Hamilton (A. S. D. THOMSON), who assoilzied the defenders, and at the request of the appellant stated a case for appeal.

The following *facts* were admitted or proved—"(1) That the pursuer on 30th October 1909 was employed in the respondents' pit as a brusher, and on said date, having finished his work for the day about 10·30 p.m., came with the other workmen to a lie on his way to the pit bottom. (2) That the pony-driver at this time was proceeding to draw three hutches of dirt from the lie to the pit bottom, and the appellant seeing the rake of hutches going off jumped on the rearmost hutch for the purpose of getting a ride to the pit bottom. (3) That in getting on to the hutch his lamp in some way went out, and the pony-driver failed to notice that he was riding on the hutch. (4) That on the way to the pit bottom the appellant was knocked off the hutch by his head coming in contact with two crowns which were considerably below the ordinary pit level, and that he in consequence sustained a fracture of the spine which involves a serious and permanent injury. (5) That it is one of the special rules in said pit (and notices thereof are duly posted up in the pit) that miners are forbidden to ride on hutches, and that this rule is well known to the miners and was well known to the appellant. (6) That in these circumstances the accident did not arise out of and in the course of the appellant's employment, and that he is not entitled to compensation. I therefore assoilzied the defenders and found them entitled to expenses."

The *questions of law* were—"(1) In the circumstances was the arbiter right in holding that the appellant was guilty of a breach of the special rules of said pit? (2) Assuming that the appellant was guilty of such breach, was the arbiter right in deciding that in the circumstances above stated the appellant was not injured by accident arising out of and in the course of his employment?"

Argued for appellant—The first question was clearly one of fact, and the arbiter's finding in regard to it was not challenged, but he had erred in his finding on the second question. Breach of a special rule, even in the circumstances here found proved, did not take a man out of his employment. "Employment" was not limited to the period of effective work. Even if he adopted a wrong and dangerous method of doing his work he was not thereby taken outside his employment—*Durham* v. *Brown Brothers & Company, Limited*, December 13, 1898, 1 F. 279, 36 S.L.R. 190. Breach of a rule might be serious and wilful misconduct—*Dobson* v. *United Collieries, Limited*, December 16, 1905, 8 F. 241, 43 S.L.R. 260—but that was not the question at issue here. The present case came very near the case of *Glasgow Coal Company, Limited* v. *Sneddon*, Feb.