

of the said roads: Find that the pursuers are in right of certain bonds, or parts thereof, being the seven bonds mentioned in the conclusions of the summons, granted by the road trustees, acting as trustees on certain special bonds; Find that, besides and apart from any personal obligations created by the said bonds against the granters thereof as individuals, the said bonds respectively, by their terms, convey in security only the tolls of the special roads therein mentioned, and do not convey in security the tolls leviable on other roads not specially mentioned therein: Find that the Acts of Parliament and minutes of the road trustees founded on by the pursuers do not entitle the pursuers, as creditors in the bonds founded on by them, to payment of the said bonds, or any part thereof, from the tolls or revenues of any other roads than those specially mentioned in the bonds, in competition with creditors holding securities over the tolls of such other roads; and that the pursuers, as in right of the bonds libelled, or part thereof, are not entitled to rank *pari passu* with creditors holding such securities over such other roads under the charge of the Renfrewshire Road Trustees: But Find that, after providing for the construction, maintenance, and repair of the whole roads under their charge, and the annual interest of debt specially secured thereon, and all other preferable charges, the Renfrewshire Road Trustees are entitled and bound to apply any surplus of the whole tolls and revenues of the said roads which may be in their hands, annually to payment of the interest due on the several bonds sued on, in so far as the tolls leviable upon the roads specially mentioned in the said bonds may be insufficient for that purpose, *pari passu* with any other creditors who may have advanced money to the said trustees for behoof of the said roads, but who hold no special security over the same: And to this extent and effect, and no further, decern against the defenders, as clerks to and representing the Trustees of the Renfrewshire Roads, for payment of the sums concluded for; but reserve to all creditors holding securities over all or any of the revenues of the said roads their whole rights and interests therein: Find the pursuers entitled to expenses, and remit to the auditor to tax and report."

Counsel for Pursuer—Watson and Crawford.
Agents—W. & J. Cook, W.S.

Counsel for Defenders—Solicitor-General (Clark),
Kinnear, and Balfour. Agents—Morton, Neilson
& Smart, W.S.

Friday, December 12.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MACBRIDE v. CAMPBELL.

Multiplepointing—Mandatory.

In a case where an Englishman, against whom a claim was made by a Scotchman, deposited a sum of money in the hands of a

third party in Scotland to satisfy that claim in the event of the debt being constituted, and the claimant thereupon raised an action of multiplepointing,—held (*diss.*, Lord Deas), that this was incompetent, and the Englishman was not bound to sist a mandatory in an incompetent process.

James Campbell, horse-dealer in Newcastle, and James Clark, horse-dealer in Glasgow, had various business transactions, in the course of which they incurred certain liabilities to each other. Campbell had sold Clark a brake, and Clark had sold Campbell some horses, and a difference having arisen as to the payments under these sales, it was mutually agreed that Campbell should abandon an action which he had raised against Clark for £50, the price of the brake; should get the brake back, and should deposit in the hands of James Macbride, writer in Glasgow, the sum of £26, 10s. 6d. to meet Clark's claim against him, in the event of the latter constituting his debt. This was done, and Clark then proceeded to raise an action of multiplepointing in the Sheriff-Court of Glasgow, in name of Macbride as nominal raiser, seeking to be preferred to the fund *in medio*. On February 21, 1873, the Sheriff-Substitute, on Clark's motion, ordained Campbell to sist a mandatory, and on his failure to do so, on March 17, preferred Clark to the whole fund *in medio*. Against this interlocutor Campbell appealed, and on June 6, 1873, the Sheriff (BELL) pronounced the following interlocutor:—

"Glasgow, 6th June 1873.—Having heard parties' procurators on the appeal of the claimant Campbell, and reviewed the process,—finds that said claimant, not being entitled to appeal against the interlocutor of 21st February last, ordaining him to sist a mandatory, allowed decree by default to go out against him on 17th March last, that he might then have an opportunity of bringing both interlocutors under review; finds that the said claimant, being admittedly domiciled in England, is not entitled in this multiplepointing to maintain his preferable right to the fund *in medio* over the claimant Clark without sisting a solvent mandatory; therefore adheres to the first of said interlocutors; but, in respect he now undertakes to sist such mandatory, recalls the interlocutor of 17th March last, and prorogates the period for the mandatory being sisted for eight days from this date."

Campbell still failed to sist a mandatory, and the Sheriff having given decree against him, he appealed to the Court of Session.

It was argued for him that the action was incompetent, there being no double distress, and that, in any case, a defender was not bound to sist a mandatory.

Authorities—*Dennistoun v. Stewart & Co.*, Dec. 8, 1853, 16 D. 154; *Simla Bank v. Hume*, May 21, 1870, 8 Macph. 781; *Russell v. Johnstone*, June 1 1859, 21 D. 886.

At advising—

LORD PRESIDENT—We have now to dispose of the objections to the competency of this action of multiplepointing. The circumstances of the case are simple enough. An action was raised in the Sheriff-Court of Glasgow, at the instance of James Campbell against James Clark, for payment of the price of a brake. As a defence to this action, Clark stated a counter claim against Campbell, and an arrangement was made between them, the condi-

tions of which were that Campbell should get back his brake, and that he should deposit in Mr Macbride's hands a sum of money sufficient to meet Clark's claim, and this sum was accordingly deposited by him in security. On that occasion Macbride wrote the following letter to Campbell, "As you wish to get away the brake, you have handed to me £26, 10s., being the sum and expenses claimed by Mr Clark from you. I shall, before paying the money to Mr Clark, give you or your agent, Mr James Dunbar, two days' notice in writing, and if you object in writing in course of post to my paying Mr Clark, I shall retain the amount until the matter is settled either in Court or extrajudicially."

Now the next thing to notice is, that Campbell did not admit Clark's claim, and so Clark was bound to constitute his debt. He does not do that but raises this action of multiplepointing. The objection to this is unanswerable. The money was deposited in Macbride's hands for a particular purpose, namely, satisfying Clark's claim, but he cannot get the money until he establishes that claim, and so this multiplepointing is raised by Clark simply to constitute a debt against Campbell. That is obviously quite incompetent. There can be no competition between parties, because Campbell simply denies that he owes the sum which has been deposited, and if Clark establishes his claim he at once silences Campbell's objection. There is only one case to which I mean to refer as an authority, the case of *Middleton v. Milne*, 21 Dec. 1843, 6 D. 316. In that case certain trustees under a trust-settlement had paid the debts of the truster and disposed of the remainder of the trust-estate in terms of the settlement, with the exception of a sum of £1,200 which was the amount of certain legacies. Certain parties, who claimed to be creditors of the truster as next of kin of his former wife, raised an action of multiplepointing in name of the trustees as nominal raisers. The trustees lodged objections to the summons, on the ground that there was no double distress, the only disputed claim against the estate being that of the real raisers themselves, and the Court unanimously gave effect to the objection, on the ground that if the creditors had succeeded in constituting their claim they would have been clearly preferable. That is an exactly parallel case, for if Clark succeeds here in establishing his claim it is clear he must get the money; if not, it is Campbell's. There was another question raised by the respondent, whether the appellant was not bound to sist a mandatory. I think not, because even though he failed to do so, we could not sustain this process, which I hold to be incompetent.

LORD DEAS—This action was raised in the Sheriff-court of Glasgow on 27th May 1872. It went on till 15th Oct. 1872, and up to that time this defence was never stated. There had been decree before that, and it was only by the interlocutor of 15th October that the preliminary defence was allowed to be lodged. The same party went on delaying and, as we see by a variety of subsequent interlocutors, causing all the expense and delay he could. Then he was ordered to sist a mandatory and allowed decree to go against him, and then he brought the case here by appeal. The direct question therefore is, was he bound to sist a mandatory? I think he was. There has been a great deal of litigation here, and I cannot see any difference be-

tween this and any other preliminary plea. I do not say that the matter might not have been so plain and clear as that we might not have taken a short-hand course and dismissed the action at once, but it is not so. There is a considerable amount of doubt and question about it. The Sheriff decided that a mandatory should be sisted, and I think that before parties can be heard on the other objection that ought to be done. As to the objection itself, I can see no incompetency in the matter. They had a litigation and agreed to deposit a sum of money in Macbride's hands. I see nothing which leads me to suppose that that was merely till the debt was constituted by one against the other. Macbride was not bound to be depositary for ever, and he might fairly raise a multiplepointing in order to compel them to settle the matter. It might turn out in the end that the multiplepointing was unnecessary, and the party who raised it might be found liable in expenses; that has often happened, but there is a difference between unnecessary and incompetent. I do not think that the case of *Middleton*, referred to by your Lordship, is applicable at all. The two men litigating here are admittedly the only two having an interest in this sum, but in that case there was only one claimant.

LORD ARDMILLAN—I do not think that we can dispose of the question of the mandatory without at the same time considering the question of competency. I agree with Lord Deas as to the proceedings in the Sheriff-Court. Campbell has been all along very unwilling to appear, and so there is a presumption in favour of the mode of litigation. If Clark, instead of raising an action against Campbell in England, had deposited a sum of money in Macbride's hands and then raised a multiplepointing, he would be raising an action against an Englishman and compelling him to appear in a Scotch Court, and in that case we are forced to consider the question of competency. I have no doubt that here there is no double distress, and that view is borne out by the case of *Middleton*, and by the cases of *Arnot v. Stewart*, 23 Feb. 1843, 5 D. 715, and *Scott Moncrieff v. Thomson*, 1 June 1844, 6 D. 1100.

I agree that here the incompetency is evident, and so I cannot hold that Campbell is bound to sist a mandatory in a Scotch Court.

LORD JERVISWOODE concurred.

The Court pronounced the following interlocutor:—

"Recal the whole interlocutors pronounced in the inferior Court subsequent to the interlocutor dated 25th October 1872: Sustain the objection to the competency of the action. Dismiss the action as incompetent, and decern: Find no expenses due to either party in the inferior Court: But find the appellant entitled to expenses in this Court: Allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Appellant—M'Kechnie. Agent—P. H. Cameron, S.S.C.

Counsel for Respondent—Scott. Agent—A. K. Morison, S.S.C.