

LORD JUSTICE-CLERK—Your Lordship has so clearly expressed the views I entertain in this case that I feel it is quite unnecessary for me to add anything.

LORD ADAM, LORD M'LAREN, LORD KINNEAR, LORD KINCAIRNEY, and LORD STORMONTH DARLING concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Clyde, K.C.—Hunter. Agent—James Purves, S.S.C.

Counsel for the Defenders and Respondents—C. N. Johnston, K.C.—Orr, K.C.—Duncan Millar. Agents—Inglis, Orr, & Bruce, W.S.

Tuesday, June 6.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.

MACGILLIVRAY'S TRUSTEES v.
DALLAS AND OTHERS.

Process—*Multiplepointing*—*Double Distress*—*Competency*.

A testator left legacies of specific sums of money to certain beneficiaries, and after bequeathing the residue of her estate to one of them provided that "in the event of any of the persons to whom legacies are or may be bequeathed by me" dying before payment such legacy should be paid "to the children of such deceiver equally among them, and failing children, then to the executors or next of kin of such deceiver." At her death it was found that the beneficiaries had predeceased the testatrix. One of them having died without children, doubt arose as to who was entitled to the legacy, and it was also suggested that it might be maintained that it had lapsed. Lest such a contention should be advanced not only with regard to the specific legacies but also as to the bequest of residue, the trustees declined to pay the legacies to the representatives of the predeceasing legatees unless they, being also the testatrix's heirs *in mobilibus*, granted a discharge of any possible claim to the residue based on the contention of such a lapse, and on this being refused they raised an action of multiplepointing, in which they made the whole trust estate the fund *in medio*. The children of one of the predeceasing legatees, to whose legacy no one else had advanced a claim, lodged defences, in which they opposed the action as unnecessary and incompetent.

Held that the action in so far as it dealt with the specific legacy was incompetent, the right to participate therein not being in dispute.

This was an action of multiplepointing raised by Alexander Fowler Steele, agent of the Bank of Scotland, Inverness, and William Mackay, solicitor, there, the trus-

tees of the late Mrs Isabella Gollan or Macgillivray, of Geelong Villa, Kenneth Street, Inverness. By her trust-disposition and settlement dated 1st May 1890, with two relative codicils, all recorded 30th May 1903, the testatrix, *inter alia*, bequeathed certain legacies to persons who at her death were found to have predeceased her, including a legacy of £300 to a Mrs Isabella Gollan or Dallas. By the ninth purpose it was provided as follows—"That my trustees shall . . . realise the whole of my means and estate, heritable and moveable, real and personal, and shall pay and make over the residue and remainder thereof (after making payment of or provision for the foresaid debts and legacies) to . . . Mrs Mary Macgillivray or Cameron; and it is hereby declared that in the event of any of the persons to whom legacies are or may be bequeathed by me by these presents, or by any codicil or codicils hereto, deceasing before complete payment of the legacy to which said deceasing person would, if he or she had survived, have been entitled, such legacy shall, so far as not paid to such deceiver, be paid by my trustees to the children of such deceiver equally among them, or failing children, then to the executors or next of kin of such deceiver."

The said Mrs Mary Macgillivray or Cameron, the residuary legatee, was one of the beneficiaries to whom the above-mentioned specific legacies had been bequeathed, and who had predeceased the testatrix.

The trustees were proceeding to pay over the estate when a question arose as to a legacy of £300 bequeathed to a Miss Catherine Gollan, who had died unmarried, which legacy was claimed by her sister on the assumption that Miss Gollan's nephews and nieces were not entitled to participate therein. The trustees submitted, with regard to this legacy, a memorial to counsel, who advised them, *inter alia*, that they should raise a multiplepointing to which the whole parties interested in the legacy should be called as defenders, and also those interested in the residue, in case it might be maintained that the legacy had lapsed.

The trustees, in view of counsel's suggestion as to the possibility of the legacies being held to have lapsed, came to the conclusion that they were not in safety to pay the legacies including the residue without a full discharge, and intimated to the persons claiming as the representatives of the predeceasing legatees that payment could not be made. With the view of avoiding an action of multiplepointing, however, the trustees endeavoured to obtain a discharge from the heirs *in mobilibus* of the testatrix, who would be entitled to the residue of the estate in the event of its being held that the bequests to beneficiaries who had predeceased the testatrix had lapsed. Certain of the representatives of the legatees, being such heirs, refused to grant such a discharge, and the trustees accordingly raised the present action, in which they placed as the fund *in medio* the whole trust estate, including the legacies to the beneficiaries who had predeceased.

Prior to the raising of the action Duncan Forbes Dallas and others, the children of the said Mrs Isabella Gollan or Dallas, had raised an action to recover the amount of the legacy bequeathed to their mother, but the trustees refused to pay over the legacy unless the said children, as among the heirs *in mobilibus* of the testatrix, agreed to grant a discharge *quoad* any shares they might be entitled to of the residue of the estate in the event of the being held that the bequests to predeceasing beneficiaries had lapsed. Mrs Dallas' children now lodged defences to the action of multiplepointing, and pleaded—“(1) The action is unnecessary. (2) There being *ex facie* of the summons no double distress and no conclusion for exoneration and discharge, the action is incompetent and should be dismissed. (3) There being no double distress upon the sum of the said legacy of £300 to the late Mrs Isabella Gollan or Dallas, and no difficulty in obtaining a discharge from the defenders, who are the parties entitled to payment thereof, and there being no conclusions for exoneration and discharge, the action is incompetent and should be dismissed. (4) In any event the action is incompetent and should be dismissed *quoad* the said legacy.”

At the bar the pursuers and real raisers asked leave to amend the summons by inserting a conclusion for exoneration and discharge which had been inadvertently omitted.

On 15th November 1904 the Lord Ordinary (STORMONTH DARLING) pronounced this interlocutor:—“Repels the defences for the defenders Duncan Forbes Dallas and others; allows the summons to be amended as proposed at the bar; finds the pursuers and real raisers liable only in once and single payment of the fund *in medio*; appoints all parties claiming an interest in the said fund to lodge their condescendences and claims in ten days; finds the said defenders liable in expenses in connection with the lodging of the said defences.” . . .

Opinion.—“Questions as to the competency of actions of multiplepointing are questions of process, and although they have in the past given rise to much ingenious discussion, they are not generally questions involving any very substantial interests as between the parties. I cannot say that this case is any exception to the rule.

“Now the competency is here challenged on the ground that there is no double distress. It is also said that there is no conclusion for exoneration of the trustees, who are the real raisers; but that matter will be put right by the offer of pursuers' counsel to amend his record, the omission of the conclusion having been purely an oversight. Substantially, however, the question turns on whether there is double distress.

“Now, the testatrix whose will is in question provided by the ninth purpose of her settlement that ‘in the event of any of the persons to whom legacies are or may be bequeathed by me by these presents, or by any codicil or codicils hereto, deceasing before complete payment of the legacy to which such deceasing person would, if he

or she had survived, have been entitled, such legacy shall, so far as not paid to such deceiver, be paid by my trustees to the children of such deceiver equally among them, or failing children, then to the executors or next of kin of such deceiver.’

“I do not require to consider at this stage whether there is any ambiguity lurking under these words. It is enough that counsel, when the trustees consulted him, advised that questions might be raised as to the meaning of the clause which I have read—in other words, as to whether the clause prevented a lapse, and if they did prevent a lapse, who were the persons brought in by the clause. He gave this advice at a time when the trustees had paid a number of legacies about which there was no question, but when there were still certain legacies claimed by the representatives of predeceasing legatees. The important thing about the clause is that it plainly applies equally to the legacies in that position and to the residue; and when the trustees received this advice they, properly enough, set about inquiring who the next of kin of the testatrix were, in case any question might be raised as to the legacies and the residue having lapsed. Then arose the claim by the representatives of one of the predeceasing legatees to a small legacy, they being the children of the legatee. Nobody up to that point had suggested any doubt as to their right, but the trustees, having received the advice which I have mentioned, pointed out to the claimants that there might be a question, and that, if it were raised, the same question would apply to the residue; and (not unreasonably I think) they stipulated that, if they paid the legacy without judicial authority, they should obtain from the claimants—who were also, as it happened, in the class of next of kin of the testatrix—some kind of assurance that they would not raise the question of lapse with regard to the residue. I confess I should have thought that this demand would have been assented to, because the same clause of conditional institution regulated both legacies and residue, and persons who were claiming a legacy on the ground that there was no lapse could not consistently claim residue on the ground that there was a lapse. However, the claimants of the legacy declined to give the assurance which was demanded—an assurance which was put in the form of a demand for a discharge in particular terms. I do not enter into the question as to whether these terms were the best that could have been devised, because no question was raised as to the terms of the discharge. The demand was met by a blank refusal, and it is on this refusal that the real raisers of the multiplepointing in article 6 of their condescendence found as creating double distress.

“The question therefore comes to be a very narrow one—whether the refusal on the part of the very persons who now say that there is no double distress to give an assurance that they will not claim the residue on the footing of lapse, is equivalent to double distress. I cannot say that it is

not. The existence of double distress does not require anything of the nature of a formal demand. It is enough, I think, when an action of multiplepointing is proposed by trustees, that beneficiaries refuse to say whether they are to raise a substantial question or not. If, therefore, the action of the defenders here amounts to that—and I think it does amount to that—it seems to me that the plea of the trustees is a good one, and that the defence of incompetency fails.

“That being so, I shall allow the summons to be amended by the insertion of a conclusion for exoneration, and I shall repel the defences, find the pursuers liable in once and single payment, and order claims in ten days. The direct action for the payment of the legacies I shall sist to await the result of the multiplepointing. I shall grant leave to reclaim, and allow pursuers the expenses caused by the lodging of the defences.”

The defenders reclaimed.

The following cases were cited:—(1) By the reclaimers—*Connell's Trustee v. Chalk*, March 6, 1878, 5 R. 735, 15 S.L.R. 413; *Fleming v. Brown*, February 6, 1861, 23 D. 443; *Laing v. Laing*, March 20, 1895, 22 R. 575, 32 S.L.R. 443. (2) By the pursuers and real raisers—*Mackenzie's Trustees v. Sutherland*, January 10, 1895, 22 R. 233, 32 S.L.R. 172; *Commercial Bank of Scotland, Limited v. Muir*, December 1, 1897, 25 R. 219, 35 S.L.R. 174.

At advising—

LORD PRESIDENT—This is a reclaiming-note against the interlocutor of the Lord Ordinary finding the pursuers and real raisers of a multiplepointing liable only in once and single payment of the fund *in medio*, and appointing parties to lodge claims. The contention is that the multiplepointing is incompetent.

The criteria on which the competency of a multiplepointing depends are, I think, very well stated in brief form by both Lord McLaren and Lord Kinneir in the case of *Commercial Bank of Scotland v. Muir* (25 R. 219). Lord McLaren there, at p. 221, says—“The determination of the competency of a multiplepointing is not quite so simple a matter as might appear from the numerous cases in which no dispute as to the competency is raised, but there must, at least, be a fund in mutual custody, a dispute as to the persons entitled to the fund and competing claims made to it, and in general a demand on the holder by one or more of the disputants.” His Lordship goes on to point out that the degree of strictness with which these requisites have to be complied with necessarily varies according to the particular circumstances. Lord Kinneir in the same case (at p. 222) says—“It comes to this, that we must see that the claims which are said to be competing are not mere random claims, but are real and intelligible claims upon a fund *in medio* set forth upon grounds which may or may not be well founded in law, but which are at least stated with sufficient precision to show that there is in

truth a double claim upon one fund maintained by persons having hostile interests.” I am entirely satisfied with these distinctions as general rules, and I proceed to apply them to this case.

The matter arose out of the will of a Mrs Macgillivray. So far as is material for the present purpose it is enough to say that in the second purpose of her trust-disposition and settlement she left a set of specific legacies, and, *inter alia*, a specific legacy of £300 to a Mrs Dallas, whose representatives are the reclaimers. Mrs Dallas predeceased the testatrix, and therefore, in accordance with the ordinary rule, if nothing more had been said, the legacies would have lapsed. But by the ninth purpose of her trust-disposition the testatrix provided as follows:—[*His Lordship quoted the ninth purpose*].

Under this provision it was clear that if any particular legacy could not be paid because of the death of the legatee, there was substituted for the original legatee his or her children, if the legatee left children, and failing children, the executors or next of kin of the legatee. Nobody ever seems to have thought that any other result was possible, when a question arose with regard to a special legacy left to a certain Catherine Gollan. Catherine Gollan predeceased the testator, without children. Accordingly, the question arose as to who were her “executors or next of kin.” She had left a testament under which she had nominated an executor. She had been survived by a brother and sister, as well as by certain nephews and nieces. The question thus arose whether, under the substitution of executors and next of kin in the ninth purpose, the persons who were entitled to Catherine Gollan's legacy were her executor-nominate, or her brother and sister who were the next of kin at her death, or whether the Moveable Intestate Succession Act came in, so that the nephews and nieces were entitled to participate. These matters having been mooted, the trustees under Mrs Macgillivray's settlement took an opinion of counsel. Counsel advised that the words “executors or next of kin” designated the class of persons who were nearest in kin to Miss Gollan at the date of her death, to wit, her brother and sister. He indicated, however, that this construction of “executors or next of kin” might not be accepted, and that, in order to exclude the possible claims of the nephews and nieces, who on another construction of these words would be entitled to participate, the trustees should raise a multiplepointing. Then he added—“To this action they should call the whole of Miss Gollan's brothers and sisters and their representatives, and also . . . other persons interested in the residue of the trust estate, in case it might be suggested that the legacy has lapsed.” Now, nobody had suggested that, and counsel himself did not suggest that it was likely. But the suggestion caused the trustees disquietude, and seeing that it would apply to other legacies as well as that to Miss Gollan, the trustees intimated that they could not pay the

special legacy to the children of Mrs Dallas.

The facts, therefore, were that here was a special legacy which on the face of the settlement it was absolutely clear was given to the children of the deceased Mrs Dallas, and nobody had ever said anything to the contrary. Applying the tests your Lordships have laid down, it is quite out of the question that people are to be entitled to cause all the expense of a multiplepointing just because at the end of a counsel's opinion on the question of discharge he put a suggestion that possibly it might be suggested that some other persons might have a right.

Accordingly, I am of opinion that when this multiplepointing was raised, there was no ground for having a multiplepointing in which all these special legacies were included. The multiplepointing which counsel really contemplated was one concerned only with Miss Gollan's legacy.

In ordinary circumstances the result of that view would be to dismiss the action; but then I think that certain circumstances have arisen since the multiplepointing was brought which do show that there is room for a multiplepointing though not exactly this multiplepointing. That being so, your Lordships will be very unwilling to cause additional expense if that can be avoided.

The doubts that have arisen are these—(1) There is a legacy to the Free Church. At the time the multiplepointing was raised there could be no question as to who were the Free Church, because the judgment of the Court of Session had not then been reversed by the House of Lords. But it is common knowledge that after the reversal in the House of Lords there are two bodies that might claim the legacy. (2) There is another matter which raises a question which might probably be argued. In the clause I have read there is a provision substituting the children or executors and next of kin of predeceasing persons as the only persons to whom legacies may be paid. I can conceive that a question may be raised as to whether that provision applies to the residue itself.

Both these questions seem to me to be questions which the trustees are entitled to raise in a multiplepointing, and therefore I should not wish to turn this action out of Court. I would therefore propose that your Lordships should find that the action is incompetent in so far as it deals with this special legacy, but instead of the action being dismissed, that it should be remitted to the Lord Ordinary to see that the pursuers and real raisers should have an opportunity of amending their condescendence of the fund *in medio* and thereafter proceeding with the action.

LORD M'LAREN—I concur. I only add a sentence upon the point of the criterion of double distress in a multiplepointing. It might at first sight appear hard on trustees that they should be put into the position of having to administer an estate where there is a doubt as to the person entitled, but where the parties have not put forward competing claims. In such a

case it seems to me the duty of the trustees would be, if they are advised by counsel as to which of the parties has the better right, that they should communicate with the other party and ask that other party whether he wishes that his legacy should be made the subject of an action—whether he makes a claim to it or not. If he says he makes no claim to it, then they are in safety to pay in accordance with the opinion they have got. If he says he does make a claim, and that they pay it to the other party at their peril, then I do not think there could be much doubt, if the sum were a substantial sum, that the trustees would be justified in taking the case into Court.

In this particular case I agree with your Lordship there are questions—though not questions agitated when the multiplepointing was raised—that make it desirable that the rights of parties in this estate should be the subject of judicial determination.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

“Recal said interlocutor: Find that the action is incompetent in so far as it submits for adjudication the special legacies mentioned in article 3 of the condescendence other than that to Miss Catherine Gollan, and remit to the Lord Ordinary to proceed in accordance with this interlocutor, and decern: Find the defenders entitled to expenses,” &c.

Counsel for the Pursuers (Real Raisers) and Respondents—Mackenzie, K.C.—Macphail. Agent—Forrester & Davidson, W.S.

Counsel for the Defenders and Reclaimers—Kennedy—J. B. Young. Agents—Forbes Dallas & Company, W.S.

Tuesday, June 27.

FIRST DIVISION.

HOPE v. DERWENT ROLLING MILLS COMPANY, LIMITED.

Jurisdiction — Arrestment jurisdictionis fundandae causa — Amendments Subsequently Made in course of the Action.

Held that an arrestment *jurisdictionis fundandae causa* constitutes a proper foundation for jurisdiction in an action, although the action is subsequently altered and amplified by amendments, provided that these amendments are competent.

Process — Amendment — Competency of Amendments—Summons Laid on Bill of Exchange—Insertion of Alternative Conclusion and Averment of Circumstances in which Bill was Granted.

In an action originally laid on a bill of exchange drawn by the pursuer upon and accepted by the defender, *held* that an amendment inserting an alternative conclusion for payment of