that the interlocutor appealed against is erroneous, and that the pursuers are entitled to decree for the sum sued for.

The Court pronounced the following interlocutor:—

"Sustain the appeal and recal the interlocutor appealed against: Ordain the defenders to make payment to the pursuers of the sum of £34, 5s. sterling with interest as concluded for, and decern: Find the defenders liable in expenses in this and in the Inferior Court, and remit," &c.

Counsel for the Pursuers—Ure, Q.C.—Salvesen. Agents—J. B. Douglas & Mitchell, W.S.

Counsel for the Defenders—A. S. D. Thomson—Munro. Agents—Douglas & Miller, W.S.

Thursday, January 12.

SECOND DIVISION.

[Sheriff of the Lothians.

GLASS *v.* ROBERTSON.

Process—Multiplepoinding—Competency—Double Distress.

In an action of multiplepoinding brought in name of the holder of a fund as nominal raiser, the real raiser averred that the nominal raiser had received the fund from A to be held by him for behoof of A's creditors, and to be applied by him in payment of a composition to them. The nominal raiser lodged defences, and averred that he had received the fund with instructions to apply the same *primo loco* in paying his account of expenses against A, and *secundo loco* in paying a composition to A's creditors, and that he was willing, after satisfying his own claims, with the consent of all parties interested, to divide the balance among A's creditors. It was not maintained by the real raiser that there was any dispute among the creditors as to their respective rights *inter se.* The nominal raiser pleaded that the action was incompetent. The Court *dismissed* the action as incompetent in respect that there was no double distress.

This was an action of multiplepoinding brought in the Sheriff Court at Edinburgh in name of J. M. Glass, solicitor, Edinburgh, as nominal raiser, by John Robertson, grocer and wine merchant, Musselburgh, as real raiser. The defenders called were John Robertson, the real raiser, and W. F. Leslie, insurance agent, Musselburgh, as creditors or pretended creditors of the deceased Karl Kupka, ironmonger, Musselburgh, and also Karl Kupka's widow.

The real raiser averred that in 1897 the affairs of Karl Kupka became embarrassed, that he offered his creditors a composition of five shillings in the pound, which was accepted; that "Kupka on various dates handed to the nominal raiser, Glass, who acted as his agent in the matter, sums amounting to £40, to be held by him for behoof of the said creditors, and to be applied by him in payment to them of the said composition;" that when the nominal raiser was about to divide this fund among the creditors Karl Kupka died; that the nominal raiser was requested by Kupka's widow to proceed with the division, and that he undertook to do so, but that he had not fulfilled this undertaking, and that he had been repeatedly requested by the real raiser to divide the fund among the creditors.

Defences were lodged for the nominal raiser, in which he averred, *inter alia*, as follows—"(Ans. 2) Averred that Kupka handed to the nominal raiser sums amounting in all to £30, 1s. 10d., with instructions to apply the same *primo loco* in paying the nominal raiser's account of expenses against Kupka, and *secundo loco* in paying a composition to Kupka's creditors. (Ans. 3) The nominal raiser is advised that on the death of Kupka his mandate to divide the money among the creditors fell, and that he became a holder thereof under a duty to account to anyone having a title to represent the deceased. In order, however, to save trouble and expense the nominal raiser has been and still is ready and willing, provided he obtains the consent of all parties interested, to divide the balance in his hands, after satisfying his own claims, rateably among Kupka's creditors."

The real raiser in his condescendence averred a contention on the part of the nominal raiser to the effect that he held the fund for behoof of the creditors other than the defender Leslie, and an opposing contention on the part of Leslie that he was entitled to a share of the fund along with the other creditors, and that in respect of these two contentions there was here double distress. It appeared, however, from correspondence produced that the nominal raiser had intimated his willingness to rank Leslie's claim, provided it was properly vouched, and in view of this it was not ultimately maintained on appeal that there was double distress for the reason stated on record, but it was nevertheless contended that double distress arose here from the fact, disclosed in the averments of the nominal raiser, that he himself was a claimant upon the fund, whereas the real raiser averred that the nominal raiser held it for Kupka's creditors solely.

The real raiser pleaded—"(3) The defence being untenable, the same should be repelled with expenses."

The nominal raiser pleaded—"(2) The action is incompetent as laid. (3) No double distress."

On 9th June 1898 the Sheriff-Substitute (HAMILTON) issued the following interlocutor:—"Sustains the 2nd and 3rd pleas-in-law for the pursuer and nominal raiser, dismisses the action, and decerns: Finds the real raiser liable in expenses, and remits," &c.

Note.—"The Sheriff-Substitute is of opinion that there is no warrant for this multiplepoinding, and that Mr Robertson's proper remedy lay in raising an ordinary action against Mr Glass, if that gentleman refused to recognise his claim to a share of the fund in question."

The real raiser appealed to the Sheriff (RUTHERFURD), who on 8th June 1898 issued the following interlocutor:—"Finds that the action is incompetent in respect of there being no double distress: Therefore adheres to the Sheriff-Substitute's interlocutor of 9th June 1898: Dismisses the appeal: Finds the real raiser liable to the nominal raiser in the expenses of the appeal, and remits the case to the Sheriff-Substitute."

Note.— . . . "It therefore appears that while there is a fund for division in the hands of the nominal raiser, there is no dispute as to the persons entitled to participate, and no proper competition by rival claimants, for it is not alleged that any of Kupka's creditors asks more than a dividend upon his claim. Moreover, the nominal raiser does not ask to be discharged judicially, and the present action has been raised by one who is not the holder of the fund. In such a case, as Lord M'Laren pointed out in the case of *Winchester* v. *Blakey*, 1890, 7 R. 1050, there must be 'double distress in the strict and proper sense of the term,' that is, of course, distress created by competing diligence. The Sheriff is therefore of opinion that the action is incompetent and must be dismissed."

The real raiser appealed, and argued—There was here double distress. The nominal raiser claimed a preference for his own account. The creditors maintained that the whole fund was payable to them, the nominal raiser having received it in trust for that special purpose. The nominal raiser was both holder of the fund, and also a claimant upon it as an individual. His *persona qua* holder was quite distinct from his *persona qua* claimant. There was at least a competition with regard to part of the fund. In such circumstances a multiplepoinding was competent—*Commercial Bank of Scotland, Limited* v. *Muir*, December 1, 1897, 25 R. 219. There was also here a dispute as to the amount of the fund *in medio*. Further, there was here a controversy as to a fund upon which various parties had claims, and these claims could be more conveniently considered and decided upon in this form of action than in any other. It was not conclusive against the competency of the action that most of the questions at issue between the parties here could have been settled in an accounting brought by the real raiser against the nominal raiser.

Counsel for the nominal raiser were not called upon.

LORD JUSTICE-CLERK—The fund here is in the hands of Mr Glass, who is nominal raiser. The real raiser is a creditor of the late Mr Kupka. There is no dispute as to who the participants in the fund are. They are the creditors of the late Mr Kupka. Mr Glass says that he is to get payment out of it of his expenses, and that then the fund is to be divided amongst Kupka's creditors. But there is no creditor who asks more than such dividend as is represented by the sum in Glass's hands. These claims at present are not constituted. That is a matter of business which is still to be completed, but it does not appear to me that in this fact there is any ground for holding that there is double distress here.

LORD TRAYNER — I am of opinion that the Sheriff has come to a right conclusion. This is an action of multiplepoinding raised in the name of Mr Glass by Mr Robertson (one of Kupka's creditors) as real raiser. Now, there is no question about Robertson's claim. No one disputes his right to such dividend upon his debt as the estate of his debtor can yield. In the same way, in regard to Leslie, he is another creditor, and there is no dispute as to his right to a similar dividend. There are no two persons competing for the same fund — the one to the exclusion of the other. The only way in which Mr Robertson has endeavoured to show that there is such a competition is this—he says that Glass is claiming upon the fund which Robertson and Leslie are also claiming upon. But that is really not so. Mr Glass does not make any claim on the dividends due to either Robertson or Leslie. He disputes their statement as to the amount of the fund in his hands available for distribution among Kupka's creditors, but that is not a dispute which gives rise to double distress. There is no double distress unless there are competing claims on the same fund. That is wanting here, and as a multiplepoinding is only competent when there is double distress, I think the Sheriff has properly dismissed the case.

LORD MONCREIFF — I am of the same opinion. It is stated in the record that double distress is caused by the holder of the fund, Mr Glass, taking up the position that he holds the fund for the creditors of Kupka other than Leslie (Cond. 4). The Sheriff seems to have disposed of the case on the footing that this was the question he had to decide, and he says rightly that it is clear from the correspondence that the position of the real raiser upon that matter is not well founded, because the correspondence shows that the holder of the fund was willing to divide the money amongst all the creditors, including Leslie.

Now, however, Mr Morison puts his case upon another ground, which is that there is a competition between Leslie and Glass, the holder of the fund, who maintains his right to retain part of the fund to pay a debt due to himself. That does not constitute double distress. The proper course is, in that case, for Leslie to raise a direct action against Glass. I therefore think this action is incompetent.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Affirm the interlocutor appealed against: Of new dismiss the action, and decern: Find the real raiser liable to the nominal raiser in expenses in this Court, and remit," &c.

Counsel for the Real Raiser—T. B. Morison. Agent—Marcus J. Brown, S.S.C.

Counsel for the Nominal Raiser—Salvesen—J. C. Watt. Agent—J. M. Glass, S.S.C.

Friday, January 13.

FIRST DIVISION.

[Sheriff of Perth.

M'EWAN v. SHARP.

Process—Appeal from Sheriff—Final Interlocutor—Competency—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 53.

In an action raised in the Sheriff Court craving for declarator that the pursuer was proprietor of certain subjects, and that the defender should be ordained to remove a shed erected by him partly on those subjects, the Sheriff pronounced an interlocutor whereby he gave decree of declarator as craved, ordained the defender to remove the shed, found him liable in expenses, and "continues the cause and remits the same to the Sheriff-Substitute."

The defender appealed to the Court of Session, whereupon the pursuer (founding upon *Governors of Strichen Endowments* v. *Diverall*, November 13, 1891, 19 R. 79) objected to the appeal as incompetent, in respect that the interlocutor appealed against was not final in its form, and did not dispose of the whole subject-matter of the cause.

The Court, following the case of *Malcolm* v. *M'Intyre*, October 19, 1877, 5 R. 22, *repelled* the objections to the competency of the appeal.

Counsel for the Pursuer—Gloag. Agents—Mylne & Campbell, W.S.

Counsel for the Defender—W. Campbell, Q.C.—Munro. Agents—Sibbald & Mackenzie, W.S.

Saturday, January 14.

FIRST DIVISION.

POLLOK *v.* JONES' HEIR-AT-LAW AND OTHERS.

Process—Proving the Tenor—Adminicles.

In an action of proving the tenor of a disposition of lands granted in 1842, and the sasine following thereon, *held* that an extract of the sasine was sufficient to prove the terms of the deeds.

Process—Proving the Tenor—Casus amissionis.

Evidence of *casus amissionis* which *held* sufficient in an action of proving the tenor of a disposition of lands, and the sasine following thereon.

Observed that it is well settled that less full evidence of *casus amissionis* is necessary where a deed is not extinguishable by destruction than in the case of deeds which are so extinguishable.

Process—Proving the Tenor—Necessity of Calling Representatives of Granter—Res judicata.

Decree *granted* in an action of proving the tenor of a disposition of lands granted in 1842, of which the sasine was recorded, although the pursuer had failed, after inquiries, to discover the representatives of the granter, and had consequently not called them *nominatim* as defenders.

Observed that the decree would not be *res judicata* against the representatives.

This was an action of proving the tenor raised by Robert Pollok and John Auld M'Taggart. The pursuers were proprietors of a piece of ground in Glasgow, their titles to which had all been lost prior to a disposition granted in 1854 by John Campbell Colquhoun and others as trustees for the Society for Erecting Additional Parochial Churches in the City and Suburbs of Glasgow, in favour of the moderator and clerk of the Presbytery of Glasgow as trustees for the parish of Springburn. Infeftment was not taken on that disposition until 1897, when a notarial instrument was executed in favour of the then trustees for the parish of Springburn, and duly recorded in the Burgh Register of Glasgow, 15th October 1897. From disponees of these trustees for the parish of Springburn Mr George Charles Chapman acquired the subjects in question in February 1898, and he entered into a contract of ground-annual with the pursuers in July 1898 whereby they became proprietors of the ground. They then raised this action against the representatives of all the parties through whose hands the lands had passed since 1842, to prove the tenor of (1) a disposition granted in 1842 by William Jones, the then proprietor of the subjects, with the consent of the trustees of the then deceased James Shepherd, in favour of John Campbell Colquhoun and others as trustees designed above, and (2) instrument of sasine following thereon.

The pursuers averred that the deeds of which they sought to prove the tenor were the titles immediately preceding the disposition by John Campbell Colquhoun and others in 1854 above referred to, and that they were therefore the foundation of a prescriptive progress of titles.

It was further averred—"(Cond. 5) The pursuers have made every endeavour to find the principals of the deeds the tenor of which is sought to be proved, but without success. They believe and aver that while in the hands of the said Society for