

The Court sustained the objection stated to the relevancy of the indictment.

Counsel for the Panel—Watt, K.C.—J. R. Christie. Agents—Alexander Jubb & Taylor, Writers, Glasgow—Simpson & Marwick, W.S.

Counsel for the Crown—Younger, A.-D.—Tait. Agents—J. N. Hart, Procurator-Fiscal of Lanarkshire at Glasgow—Crown Agent.

COURT OF SESSION.

Thursday, March 7.

OUTER HOUSE.

[Lord Low.

HIGHLAND RAILWAY COMPANY v. BRITISH LINEN COMPANY.

Process—Multiplepinding—Competency—Objection that there is no Ascertained Fund in medio.

In an action of multiplepinding in which the alleged fund *in medio*, as averred by the real raisers, consisted of an instalment said to be due on a certain date by a railway company to a firm of contractors, the nominal raisers, the railway company, objected to the competency of the multiplepinding upon the ground that no instalment was due at the date mentioned, because under the contract a certificate by the company's engineer was to be a condition-precident to any instalment becoming due, and that no such certificate had been granted. *Held* that this was not a valid objection to the competency of the multiplepinding, in respect that it amounted to nothing more than that the amount of the instalment due had not been ascertained.

This was a multiplepinding, in which the Highland Railway Company were the pursuers and nominal raisers, and in which the British Linen Company, Messrs Chisholm & Company, contractors, 11 Queensgate, Inverness, and William Alexander M'Lean, storekeeper, Cabuie Road, Auchnasheen, Ross-shire, were the defenders, the British Linen Company being the real raisers.

The British Linen Company averred as follows:—“(Cond. 1) The firm of Chisholm & Company, contractors, Inverness, were employed by the Highland Railway Company to carry out the Dornoch Railway contract, and under said contract monthly instalments of the contract price fell to be paid to said firm by said Railway Company at the end of each month. (Cond. 2) The said firm of Chisholm & Company in the beginning of 1900 applied to the defenders the British Linen Company at their branch office in Inverness for a temporary overdraft. . . This overdraft was allowed on condition of Chisholm & Company agreeing

that the Highland Railway Company should pay to the British Linen Company all monthly instalments payable to them (the said Chisholm & Company) by the Highland Railway Company in respect of the Dornoch Railway contract. Chisholm & Company accordingly addressed to the Highland Railway Company, and handed to the bank's agent, a letter in these terms—‘31st March 1900.—Please hold to the order of the British Linen Company Bank, Inverness, all monthly instalments due to us in respect of the Dornoch Railway contract. This order not to be withdrawn without the consent of the said bank. The receipts will be signed by us in the usual way, and as if the money were paid to us direct.’ . . . (Cond. 3) The said Railway Company agreed to act upon said letter, and in compliance with the directions thereby given the monthly instalment due on 31st May, and all subsequent instalments prior to the instalment due on 31st October, were duly paid by the said Railway Company to the British Linen Company at their Inverness branch, and placed to the credit of Chisholm & Company's account. (Cond. 4) On 31st October an instalment of £316 was due to Chisholm & Company by the Highland Railway Company. On the morning of that day the Highland Railway Company received a letter from Chisholm & Company purporting to withdraw the authority previously given by them to the Railway Company to pay the said instalment to the bank. The said sum of £316 forms the fund *in medio* in the present action. (Cond. 5) Upon 1st November 1900 an arrestment was executed in the hands of the said Railway Company by virtue of a deliverance dated 31st October 1900 containing warrant to arrest on the dependence of a petition and action raised in the Sheriff Court at Inverness at the instance of the defender William Alexander M'Lean, storekeeper, Cabuie Road, Auchnasheen, Ross-shire, against the said Chisholm & Company purporting to arrest the sum of £300, less or more, addebted and resting-owing by the said Railway Company to the said Chisholm & Company, or to any other person or persons for their use or behoof. (Cond. 6) The Highland Railway Company have intimated that they have a claim against Messrs Chisholm & Company for about £30 in respect of carriage of materials, and this may form a claim upon the fund *in medio*. The said Railway Company, by letter dated 12th November 1900, addressed to the bank's agent at Inverness, admitted that a sum of £316 was due to Messrs Chisholm & Company, but stated that in view of the said letter of 31st October from Messrs Chisholm & Company purporting to withdraw the authority previously given, and of the said arrestment, it was impossible for them to hand over to the bank their cheque for £316 already signed until their right to it was established in an action of multiplepinding. The said Railway Company still refuse to pay to the real raisers the said instalment of £316, and the present action has been rendered necessary, and

is brought in order to have the rights of parties determined."

The pursuers and nominal raisers, the Highland Railway Company, objected to the competency of the action, and stated that under their contract with Chisholm & Company the monthly and all other payments were conditional upon the contractor's obligation being fulfilled, that there was no instalment due on 31st October except under the conditions of the contract, and that few, if any, men were working on that date, and the contractors were then hopelessly insolvent. They denied that on 31st October an instalment of £316 was due to Messrs Chisholm & Company by them, and explained that by the contract it was provided that a certificate by the company's engineer should be a condition-*precedent* to said instalments becoming due, and that no such certificate was granted. The estates of Messrs Chisholm & Company were sequestrated on 13th November 1900. The Highland Railway Company set forth certain claims, due and contingent, made by them against Messrs Chisholm & Company, and averred that they were entitled to impute towards satisfaction of these claims any debts which might be due by them to Messrs Chisholm & Company.

The Highland Railway Company pleaded, *inter alia*—“(1) There being no fund *in medio*, the action is incompetent, and ought to be dismissed, with expenses.”

The British Linen Company (the real raisers) pleaded, *inter alia*, as follows—“(2) The nominal raisers' objections are irrelevant.”

Argued for the nominal raisers (Highland Railway Company). There was here no fund *in medio*, in respect that the condition-*precedent* to the instalment on 31st October becoming due, viz., the granting of the engineer's certificate, was not fulfilled. The fact that there was no fund *in medio* rendered the action incompetent. In the cases cited by the real raisers there had originally been a fund *in medio* in existence.

Argued for the real raisers (British Linen Company). The objection that there was no fund *in medio* was not a valid objection to the competency of the action—*Crombie v. Christian's Trustees*, May 13, 1830, 8 S. 745; *Miller v. Ure*, June 23, 1838, 16 S. 1204; *Mackay's Manual of Practice*, 386.

LORD LOW—“I am of opinion that the pursuers' plea is not well founded. In terms of the contract Chisholm & Company were to be paid by the Railway Company instalments of the contract price on the engineer's certificate as the work proceeded.

“Chisholm & Company borrowed money from the British Linen Company, and by agreement with the bank they gave to the Railway Company a letter asking them ‘to hold to the order of the British Linen Company Bank, Inverness, all monthly instalments due to us in respect of the Dornoch Railway contract. This order not to be withdrawn without the consent of the said

bank. The receipts will be signed by us in the usual way, and as if the money were paid to us direct.’

“The real raisers make this averment—‘Said letter was handed to the Railway Company on 29th May 1900. The said Railway Company agreed to act upon said letter, and in compliance with the directions thereby given the monthly instalments due on 31st May, and all subsequent instalments prior to the instalment due on 31st October, were duly paid by the said Railway Company to the British Linen Company at their Inverness branch, and placed to the credit of Chisholm & Company's account.’ That is admitted. So therefore it is admitted that the instalments became due and were paid on the 31st day of each month down to and including 30th September 1900. This action relates to the instalment due on 31st October. The only thing which the Railway Company say against that is, that no engineer's certificate was given fixing the amount of that instalment. That may very well be, and the precise amount of the instalment may not be ascertainable in any other way than by getting the engineer's certificate. But the fact that the certificate was not obtained does not result in there being no instalment due. It merely means that the amount is not ascertained. That was at least the view which was taken by the Railway Company's own representative, their secretary, because a letter by him is produced in which he wrote to the bank telling them that he was sorry he could not pay the instalment because Chisholm & Sons had withdrawn their order to pay to the British Linen Company, and that the instalment had been arrested by another creditor, and recommended that the bank should bring an action of multiplepounding. The only question is the amount of the instalment, and that is a matter which will be dealt with on the condescendence and answers thereto.

“I shall repel the defences in so far as directed to the competency of the multiplepounding, and then pronounce the usual first order for claims, because I do not think we can have the ascertainment of the amount of the fund *in medio* until all the parties who propose to claim and who are interested are in the process.”

Counsel for the Pursuers and Nominal Raisers—Macphail. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Defenders and Real Raisers—Solicitor-General (Dickson, K.C.)—G. C. Steuart. Agents—Mackenzie & Kermack, W.S.