the petition to be served on the three next heirs of entail; and grants warrant for service upon them accordingly," &c. The question before us is, Whether the petition requires any other intimation than that ordered in the first part of the Lord Ordinary's interlocutor. The statute does not require that the petition should be served upon any one in particular; but I am quite clear that § 36 of the statute has no application to this case at all, and the result is that the question what intimation and service should be ordered, beyond that specified in § 34 of the Act, is entirely in the discretion of the Court. The Court then have to consider what the petitioner has to establish under § 2 of the Act, in order to have the prayer of his petition granted. Under that section he must show that he himself was born on or before the 1st August 1848. He must prove his present age; and he must prove that he is in possession of the estate in virtue of the tailzie. These are all matters of fact about which the Court must be very carefully informed, even although there be no contradiction, before they can grant the prayer of the petition. Certainly, were any heir of entail to appear and offer to prove that the petitioner's statements on these points are not correct, we should be bound to admit him, and give him an opportunity of establishing his contradictory assertions. Such being the case, I think we should exercise a wise discretion if we ordered such intimation and service as would secure that the estate and the next heirs of entail should be represented in case they had any interest. I therefore think that the Lord Ordinary has pronounced an interlocutor which, under the circumstances, is most reasonable and judicious. But I do not wish to lay down a general rule. That would require much more consideration; and even then, would hardly be possible, as it must always remain a matter of discretion. I have, however, one observation to make, and that is, that we have not before us in any part of the petition the names and designations of these three heirs of entail. Now, this, I consider, should appear *ex facie* of the petition. It is not, indeed, essential to the success of the petitioner's prayer that these three heirs of entail should be called, but I think that, as it is a matter for our discretion, we ought to have this information, in order that we may exercise that discretion. Consequently, this addition should be made in the narrative, not in the prayer of the petition.

LORD DEAS—I entirely agree with your Lordship. I should have no doubt on reading § 36 of the statute that it applies solely to cases where the consent of certain heirs is required; but it would be a most unreasonable thing to hold that, because you have a case where no consents are required, therefore no heir of entail, and no person, however interested he may be in the matter, shall be entitled to appear and be heard in such proceedings. As your Lordship has pointed out, there are many matters of fact which may or may not be accurately stated; *e.g.*, the very date of the entail may, in the case before us, be disputed. Now, I said that I should have held that § 36 of the Act does not exclude the discretion of the Court, but, as your Lordship has noticed, this is expressly established by the decision in the cases of *Riddell*. That being so, I quite agree with your Lordship that the Lord Ordinary has exercised a sound discretion. I have no wish to lay down a fixed rule, but only to establish the power of the Court to make such order.

LORD ARDMILLAN—The 36th section of the Rutherfurd Act is correctly interpreted by the whole Court in the case of *Riddell*, and we must adhere to that judgment. The first clause of that section only deals with the necessity, and not with the discretion, and the second clause is not to be separated from it. I hold that there is no necessity for calling them; but there is nothing to exclude the discretion of the Court in calling them or not as it thinks fit.

LORD KINLOCH—I agree with your Lordship in he chair. The statute being inapplicable, we have authority for exercising our discretion as to the service to be made. The step taken by the Lord Ordinary is an exceedingly proper step. And, as a general rule, I think the present course should be followed. The names of these heirs should be given us however; as it would never do to grant a general warrant for service to be executed by the petitioner as he chose.

Lord Ordinary's interlocutor affirmed.

Agents for the Petitioner—Murray, Beith, & Murray, W.S.

Saturday, October 29.

FERRIER *v.* CAMPBELL AND OTHERS.

Process—Multiplepoinding—Double Distress. A multiplepoinding was raised by the agent of a trust of a certain fund, which was the balance of the trust funds in his hands at the close of his agency. He himself was one of the trustees as well as agent for the trust-estate, and he brought the action in his character of trustee and not of agent. *Held* the action was incompetent, as the money was in his hands as agent, not as trustee, and he was as such simply a debtor to the trust-estate.

Question, Whether, had the action been otherwise competent, there would have been any double distress, as the only other claim alleged besides that of the trustees, was the "possible claim of a possibly existent claimant?"

This was an action of multiplepoinding raised by Thomas Henry Ferrier, W.S., calling as defenders the representatives of Major James Campbell of Glenfeochan, the trustees of the late Professor Ferrier of St Andrews, the trustees of the late Walter Ferrier, the children of the late Professor Ferrier, the sole surviving trustee of the late John Ferrier, W.S., and Messrs Ferrier & Wilson as the representatives *qua* successors in business of the said John Ferrier, W.S.

The alleged fund *in medio* amounted to about £519, and was the balance remaining in the hands of Mr Ferrier of the funds and effects belonging to the trust-estate of the late Professor Ferrier, at the close of his intromissions therewith on 31st January 1869, he having at that date ceased to be agent for the trust.

The grounds which he stated for raising this process of multiplepoinding, instead of paying over the said balance to his employers, Professor Ferrier's trustees, of whom he himself was one, were:—that the late John Ferrier, W.S., the father of Professor Ferrier, had, while a partner in the firm of James and John Ferrier, W.S., afterwards James,

John, and Archibald Ferrier, W.S., placed to his own credit in the books of said firm certain sums belonging to the trust-estate of the late Major James Campbell of Glenfeochan. This he did during the years 1796–1802, and for some purpose now undiscoverable. The firm of James and John Ferrier having passed through several changes has now become that of Messrs Ferrier & Wilson, W.S. The trustees of the said John Ferrier did not ascertain and pay off this debt to the representatives of Major Campbell, but on the contrary handed over the residue of the estate of John Ferrier to Professor Ferrier, the residuary legatee. The claim of Major Campbell's representatives, therefore, remained unsettled, and he alleged that it had become necessary for the good of all parties concerned to raise the present action of multplepoinding.

WATSON and HUTCHISON for the pursuer and reclaimer.

LORD ADVOCATE YOUNG and BLAIR for the objectors and respondents, Professor Ferrier's trustees.

At advising—

THE LORD PRESIDENT—This is a most singular summons of multiplepoinding, and there are so many apparent grounds of objection that one is almost embarrassed in dealing with them. However, on the very face of the summons there seem to be no grounds whatever for the process. It is raised here with the object of distributing funds in Mr Thomas Ferrier's hands, being the balance due by him to the trust-estate of the late Professor Ferrier of St Andrews, to which trust he acted as agent. In January 1869 Mr Ferrier's agency ceased, and he was then debtor to the trust in the sum of £519 or thereby, which is stated to be the fund *in medio* in this action. Mr Thomas Ferrier, besides being agent, was himself one of the five trustees of the late Professor Ferrier. Now, he appears on his own shewing to raise this multiplepoinding as trustee? If so, I think it is surely incompetent, because the money is in his hands not as a trustee, but simply as a debtor to the trust-estate. If, on the other hand, he were to acknowledge that the money was in his hands as agent, which is clearly the case, but were to say that it remained undivided, and that there was a competition of claims on the fund; then that would seem to me to be equally untenable in point of fact. The first claim, and an undoubtedly just one against him, is that of the trustees, whose agent he was. But what is the other? It is the claim of certain supposed heirs of Major Campbell of Glenfeochan, who may have an existence and who may not—we know nothing and he can tell us nothing about them—and what is their claim, supposing it to be made? It is one against Mr Ferrier, upon the ground that he is the business representative of certain legal firms. That may be the case, but it can give the supposed claimant no right against this £519. They may have a very good claim against Mr Ferrier, but they have no right against this fund in competition with the trustees of Professor Ferrier. There are no *termini habiles* whatsoever for a multiplepoinding, and I am not even satisfied that there are any double claims, for I am not at all clear that there are any such persons as the representatives of Major Campbell of Glenfeochan.

LORD DEAS—There is no room for any dubiety as to the way in which Mr Ferrier brings this summons of multiplepoinding. He himself says in the summons that he, the said Thomas Henry Ferrier, as one of the trustees of the late Professor Ferrier, is the real raiser. He raises this process as trustee, though he is only one of five trustees. If he can do so, it seems to follow that the other four could raise a similar process. And a multiplepoinding being already a congeries of actions, we should have a congeries of congeries. But then, although he stated this at the outset, he goes on to make other statements perfectly inconsistent. He goes on to say that the sum in question is the balance in his hands as agent belonging to these trustees, of whom he himself is one. The trustees were therefore, upon the face of the summons, his creditors, and his only creditors. They are entitled and bound to give him a discharge. If this had been an action by the trustees or their quorum, a nice question might have been raised, whether or no there was double distress. It might have been a question whether the possibility of a claim being made by a possibly existing person is enough to raise double disteess. But that is not the action before us. The action is not raised by any person legally entitled to hold the funds. The pursuer's duty was, as soon as required, to pay the funds over to the trustees. I do not see that the mere fact of his being also a trustee makes any difference. He was still acting as the agent of the trust. Nor do I see either danger or hardship that can result to him in being obliged to make such payment to the trustees. Would it make him any more personally liable that, having at one time a fund belonging to the trust estate in his hands as agent for the trust, he paid that sum over into the hands of the trustees on being required to do so. I cannot think so. And, over and above this, I do not see why he should not insist upon paying over the sum to-morrow, and take a discharge from the trustees, and then, if he likes, resign his trusteeship.

Lord ARDMILLAN concurred.

LORD KINLOCH—I am of the same opinion. How does the pursuer justify this action of multiplepoinding? simply by telling us that some people are coming about him and saying that they have possible claims against the trust estate of Professor Ferrier, and asking him to keep this money for their behoof. This can never amount to double distress. I think that the Lord Ordinary was right in dismissing this process as incompetent.

The Court adhered.

Agents for the Pursuer and Reclaimer—Ferrier & Wilson, W.S.

Agents for the Objectors, Professor Ferrier's trustees,—Hunter, Blair, & Cowan, W.S.

Saturday, October 29.

SECOND DIVISION.

SCOTT *v.* STEWART.

Proof—Promise of Marriage—Reparation. Circumstances in which *held* that a man who had been for years carrying on a courtship had made an implied promise of marriage, and was liable in damages for breach thereof.

This was an appeal from the Sheriff-court of Perthshire, in an action at the instance of Catherine Scott, Auchnahyle, Pitlochry, against