whether a limited liability company can be made responsible for fault.

Your Lordships have made it clear that there is no room for such a doubt. A limited liability company, or any other company, which delegates to any person the duty of taking their place, and fulfilling their duties towards their servants, is certainly bound by the actings of such person. He represents them fully, and his fault is their fault. But assuming that the defenders are responsible for any fault on the part of Mr Morton, I agree with your Lordships that there is no fault averred here which could make either Mr Morton himself or the company which he represents responsible to the pursuer for the injury he has suffered through the accident in question. I think it is not a material consideration in this case that the scaffold which fell had been put up for fourteen years, and had been used in such a way as to be reduced to an unsafe and decayed condition. It was being taken down because it was no longer needed, and whether it had decayed or not is immaterial to the question. The question to be tried is, whether, given the scaffold as it was at the time when the order was given to demolish it, there was any failure on the part of Mr Morton in the fulfilment of the defenders' duties, or of his own as representing them, to see that it was done with ordinary precautions for the safety of the men. Now, there were no orders given to the pursuer or his fellow-workmen as to how the work was to be done, and, as your Lordship in the chair remarked, it is not said and it does not appear that it was in the least degree necessary for the pursuer to go upon this scaffolding where he received his injury for the purpose of doing that which he was instructed to do. But even if it had been otherwise, and it had been stated that it was necessary for him to go upon the scaffolding, it is not averred that he had not sufficient skill to judge for himself whether it was safe or in what respect it was unsafe.

The case which comes nearest to this is the case of *Flynn* v. *M'Gaw*, but the report of that case shows that the record in it contained two averments which distinguish it from the present case. The pursuer there averred, first, that the work to which he was sent was work requiring more skill than could be expected from an ordinary workman, and therefore that it was necessary to have a skilled foreman having special knowledge to direct the operations; and secondly, it was averred that the foreman who was appointed to overlook the operations and superintend them was incompetent for the position in which he was placed. These two averments, it appears, were just enough in that case to induce the Court (with a very strong dissent on the part of one of the Judges) to hold the action as relevant.

In this case we have neither of these elements, and I think they are quite sufficient broadly to distinguish this case from that of *Flynn*.

I agree therefore that the Lord Ordinary is right in his conclusions, and that the reclaiming-note should be refused.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Appellant—P. J. Blair. Agent—A. C. D. Vert, S.S.C.

Counsel for the Respondent — Comrie Thomson—Burnet. Agents—Winchester & Ferguson, W.S.

Wednesday, February 15.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

FRASER'S EXECUTRIX *v.* DALE AND OTHERS.

Process—Multiplepoinding—Competency—Double Distress.

An executrix being in possession of funds to which W was entitled to succeed, was sued for payment thereof by the trustees under an alleged deed of assignment granted by W for behoof of her creditors. The executrix also received a letter from W intimating that she would hold the executrix liable if she paid the funds away to anyone but herself personally.

Held that the executrix had been subjected to such double distress as rendered an action of multiplepoinding at her instance competent.

Miss Eliza Fraser died on 13th July 1885, and her only surviving sister was decerned as her executrix-dative. The deceased left personal estate which fell to be divided, one-half to her sister the executrix, and one-half to the children of a sister who had predeceased leaving two children, viz., Eliza Murray Wallace, and James Murray Wallace. At the date of Eliza Fraser's death James Murray Wallace had not been heard of for many years. The share falling to him in the event of his survivance amounted to £219, 18s. 8½d. On 26th May 1892 it was found by the Sheriff-Substitute of Aberdeen, in a petition under the Presumption of Life Limitation Act 1891 at the instance of Eliza Murray Wallace, that James Murray Wallace must be presumed to have died on 26th February 1880.

Thereafter the executrix of Eliza Fraser raised an action of multiplepoinding against Eliza Murray Wallace, and against Albert Dale and others, trustees under a deed of assignment alleged to have been granted by the said Eliza Murray Wallace, for the purpose of having it determined which of the defenders was entitled to receive the foresaid sum of £219, 18s. 8½d.

The pursuer after setting forth the facts already narrated, averred — "(Cond. 5) Under and in virtue of an alleged indenture or deed of assignment, referred to and produced in an action presently pending in the Court of Session at the instance of the

defenders the said trustees, against the pursuer and real raiser hereof, the defenders, the said trustees, claim payment of the said sum of £219, 18s. 8½d., and have raised said action against the pursuer and real raiser therefor . . . (Cond 6) Explained that the pursuer has, *inter alia*, received from the said Eliza Murray Wallace a letter dated 19th August 1892, in which she states —'I beg to intimate to you that I claim to receive payment of the sum of £219, 18s. 8½d. with interest, and that in the event of your paying the fund to any person other than myself personally, I will hold you liable.'"

The defenders Albert Dale and others lodged defences, in which they objected to the competency of the action on the ground that there was no double distress.

A minute was thereafter lodged for Miss Eliza Murray Wallace, stating that she declined to allow the pursuer and real raiser to pay over the fund *in medio* to the other defenders, and that she had put in an appearance in the action, and intended to claim the fund *in medio*.

The alleged deed of assignment founded on by the defenders Albert Dale and others was dated 30th June 1890. The parties thereto were (1) Miss Wallace, (2) Albert Dale and others, therein called the trustees, and (3) certain parties who were creditors of Miss Wallace. It bore that Miss Wallace assigned and made over to the trustees, *inter alia*, the whole estate or effects to which she was or might be entitled, on proving that her brother James Murray Wallace was dead, in trust for payment of the debts due to her creditors, and for payment of any surplus that might remain to herself.

On 18th January 1893 the Lord Ordinary (WELLWOOD) sustained the objection to the competency and dismissed the action.

"*Opinion*—There is here no proper double distress.

"The trustees under the deed of assignment executed by Miss E. M. Wallace brought a direct action against the real raiser as holder of the share of Miss E. Fraser's executry estate, to which their constituent Miss Wallace has been found entitled.

"That fund is expressly conveyed to the trustees by the assignment, which is certainly not revocable at the pleasure of Miss Wallace, and the trustees are given full power to uplift it and apply it for the trust purposes. The claim which is said to constitute double distress is made by Miss Wallace herself, and made solely on the ground that she desires to call her trustees to account, representing that on an accounting a balance will be due to her.

"If a multipleponding were competent in such circumstances, any debtor to a trust could throw the trust into Court whenever interpelled by the truster, or the truster could raise a multipleponding in the name of the debtor whenever he was dissatisfied with the actings of his trustees.

"It seems to me that the debtor's proper course here is to account to Miss Wallace's trustees if satisfied of the validity of their title, and the truster's remedy is to call her trustees to account, if she thinks fit, in the usual way.

"Another course was suggested by the trustees, the defenders Albert Dale and others, as to the competency of which I express no opinion, that Miss Wallace might appear for her interest in the action at their instance against the real raiser.

"On the whole matter, I think there is here really only one claim which has been assigned by Miss Wallace to her trustees, and Miss Wallace being thus divested until the trust purposes are fulfilled, she has, at most, a contingent and reversionary interest in the fund, the existence or amount of which interest is at present uncertain.

"I have the less hesitation in dismissing the action that I think it appears from the correspondence in process that the real raiser, or at least her agents, have throughout made Miss Wallace's cause their own, and acted in concert with her."

The pursuer and real raiser reclaimed, and argued—The real raiser had no personal interest in the disposal of the fund which she held, but was ready to pay it to whoever might be found to be legally entitled to receive it. The fund, however, was claimed directly both by the minuter, and by the respondents. There were thus two distinct claims based on separate and hostile grounds, creating such double distress as entitled the executrix to raise an action of multipleponding—*Russell* v. *Johnston*, June 1, 1859, 21 D. 886, *per* Lord Kinloch, p. 887; *Lattimer* v. *Wright and Others*, November 6, 1880, 18 S.L.R. 57; *Winchester* v. *Blakey*, June 21, 1890, 17 R. 1046. An executrix was not bound to investigate the grounds on which competing claims to the fund in her hands were rested, much less to assume the responsibility of deciding between them; nor would the Court impose such a duty upon her, or any other uninterested holder of a fund. Further, Miss Wallace's right was the foundation of the right of the trustees, and she said that she had revoked the assignation on which their right was based.

Argued for the minuter, Miss Wallace—The minuter disputed the validity of the deed of assignment, and her claim was a direct claim to the fund, made *in bona fide*, and intended to be pressed. Being antagonistic to the claim of the trustees, it created double distress.

Argued for the defenders and respondents—The real question was whether the trustees had a valid title to discharge the executrix. That was not a question appropriate to a multipleponding—*Moncrieff* v. *Bethune*, June 1, 1844, 6 D. 1100; *Connell's Trustees* v. *Chalk*, March 6, 1878, 5 R. 735. Besides, it could be conveniently settled in the direct action brought by the respondents against the executrix which had been raised prior to the multipleponding, and to which the minuter had been invited to become a party. The Court would not readily extend the scope of the action of

multipleponding, and always required that these should be separate and distinct claims founded on hostile grounds—*Kyd* v. *Watherston, &c.*, June 5, 1880, 7 R. 884; *Robb's Trustees* v. *Robb, &c.*, July 3, 1880, 7 R. 1049; *Dennistoun* v. *Stewart & Company*, December 5, 1853, 16 R. 154. The claims here were not of that character, as one source of right was common to the minuter and to the respondents. She could only take the fund through them, and her claim was merely a rider upon that of the respondents. In any view, there was no relevant statement of double claims. Bare intimation of a claim such as the minuter made was not enough to constitute double distress. It must first be contituted—*Clark* v. *Campbell*, December 12, 1873, 1 R. 281. Further, the holder of a fund was not entitled to accept the fact of two claims being made as sufficient ground for raising a multiplepoinding. He must be able to show that there was some reasonable foundation for both claims. In this case the terms of the assigation were sufficient to show that the minuter had lost all direct right to the fund *in medio*, and that her sole right was to an accounting by the trustees. The action was therefore incompetent.

At advising—

LORD PRESIDENT—The Lord Ordinary has described the contention or claim which is here said to constitute double distress in his note, and he states it thus—"The claim which is said to constitute double distress is made by Miss Wallace herself, and made solely on the ground that she desires to call her trustees to account, representing that on an accounting a balance will be due to her," and dealing with the claim on that footing, his Lordship holds, not unnaturally, that there is no double distress—that is to say, that the executrix is in safety to pay to Miss Wallace's trustees on the footing that Miss Wallace has her remedy against the trustees in respect of any rights she may possess. But in the discussion before us the argument turned on the claim made by Miss Wallace against the executrix in the letter set forth in the record, and which is alleged by her to constitute double distress, and when we look at the letter it seems to me to make quite a different claim from that which the Lord Ordinary has described, because it contains no hint that the claimant's rights are consequent on the trustees' rights, or are to be made good out of the funds in the trustees' hands, but it is antagonistic to the right of the trustees to receive any money at all from the executrix. The letter is in these terms—"I beg to intimate to you that I claim to receive payment of the sum of £219, 18s. 8½d., with interest, . . . and that in the event of your paying the fund to any person other than myself personally, I will hold you liable." Now, that is very pointedly expressed, and is evidently directed against the competing claim of the trustees to receive payment. The word "personally" emphasises the context, and makes it plain that the letter contains a warning to the executrix not to pay the fund over to the writer's trustees. Therefore I cannot help thinking that we have to decide a different question from that which the Lord Ordinary considered, and I say so because the respondents explain that we cannot take the argument otherwise than on the footing of what is said by the real raiser in her condescendence, and therefore I feel myself limited to the consideration of the claim made to the executrix in this letter.

On the question whether the real raiser has set forth a case of double distress in the sense in which that term is now understood, I am quite willing to take the definition urged upon our acceptance by Mr Johnston, which is given by Lord Kinloch in the case of *Russell* v. *Johnston*, June 1, 1859, 21 D. 886. I think the claim made in Miss Wallace's letter comes up to what is there required, and is an intimation of a competition created by "double claim to one fund on separate and hostile grounds," each party claiming to have the right to receive the money. I could quite understand that the question whether or not there was double distress might become contentious, and even be matter of evidence, if it was said in answer to the real raiser, "You take this letter as creating double distress, but it does not represent the true claim of the writer." I could understand that the effect and saliency of such a letter might be destroyed on the consideration of what were the true facts of the case, and that it might be made out that there was no case of double distress. But here, as I have said, the argument rests on the terms of the letter, and I find it to contain a clear intimation of a claim hostile to that of the trustees, while there is no doubt as to the claim of the trustees, for they have already brought the executrix into Court in another action. Taking the case therefore on the averments, and not on the representations made to the Lord Ordinary as to the real character of Miss Wallace's claim, I think there is such double distress as to render an action of multiplepoinding competent.

LORD ADAM—It appears to me that there are here two distinct competing claims, one by Miss Wallace and the other by the trustees under the deed of assignment. Her claim is not, as was apparently argued before the Lord Ordinary, a claim of accounting against the trustees, but a distinct claim that the fund *in medio* should be paid over to her. If her claim as set forth on record had been on the face of it a mere claim of accounting against her trustees, that would be a very different case, but, as I have said, that is not the nature of her claim, and I think that upon the averments made on record there is a relevant statement of double distress.

LORD M'LAREN—If this action of multiplepoinding had been brought by Miss Wallace in name of her father's executrix, I do not suppose your Lordships would have differed from the Lord Ordinary, that

there was no such double distress as to render the action competent, but in practice there is admitted to be a distinction between actions of multiplepoinding raised by a claimant and actions instituted by the holder of a fund for the purpose of keeping himself safe and securing his discharge. I agree with Lord Kinloch's *dictum* in *Russell's* case, that without an action being brought or diligence used if two hostile and separate claims are made to the same fund, double distress is created, and the holder of the fund is entitled to bring a multiplepoinding for his own protection, but it is not enough that the claimant should merely write to the holder stating on what grounds his claim is based. I was very much impressed by the criticism made by Mr Johnston on Miss Wallace's letter, and I think that this is a very thin case, because while the letter conveys a distinct intimation of a claim to the fund with a threat of personal liability in the event of the holder parting with it to anyone else, it does not contain any statement of the ground of the claim. But that letter is admitted to be the sequel of other correspondence of which we are not in possession, and I think we must take it from what we have heard that the executrix has been made aware of the nature of the claim made by Miss Wallace, namely, that she disputes the efficacy of the deed of assignment. I am anxious in anything I say to guard myself against being supposed to assent to the proposition that it is enough for two persons to write to an executor intimating that they have claims to the funds in his hands, and not stating the nature of their claims, to justify the bringing of an action of multiplepoinding. I think we are entitled to look at all the circumstances to see whether there is a real double claim by hostile parties, as Lord Kinloch puts it, and I think that here there is a real claim of the kind. I therefore agree with your Lordships that the action is competent.

Lord Kinnear — I am of the same opinion. I think it was conceded by Mr Johnston—and very properly conceded—that we were to consider this as a case of multipleponding raised *bona fide*, and pay no regard to the allegation that it has been brought by the real raiser in collusion with someone else, and that being the position of matters I think the question of competency must be determined by reference to the averments made by the real raiser in her condescendence. Now, looking to these alone, I agree with your Lordships that they disclose a perfectly clear, though perhaps a somewhat narrow case of double distress. The real raiser is an executrix, and her direct creditor is Miss Wallace, to whom as executrix she is bound to account for the fund in her hands. She alleges that someone else has intimated a claim to this fund which is directly payable to Miss Wallace, and the claim is founded upon an assignation granted by Miss Wallace for trust purposes. That claim being intimated, Miss Wallace meets it by the very peremptory interpellation contained in her letter quoted on record. In the whole circumstances disclosed on record I can see no reason why the executrix should take the pains to ascertain and determine which of the claimants is right in law, or should take the risk of deciding the question for herself. I think she is quite entitled to say that she has no interest in the dispute between them, and that when the dispute is settled she is quite ready to pay whichever party is found entitled to receive the fund. It appears that the trustees under the deed of assignment have brought an action against the executrix to have their right to the money determined. Now, if they had thought fit to call in that action the granter of the deed of assignment—the only person interested in disputing their claim—no further process would or could have been raised in this Court, because there would have been a suitable process in existance for determining the questions raised binding on both parties. But the trustees did not do that, and I think in the circumstances that the course taken by the executrix was quite justified.

I agree with Lord M'Laren that if an action of this kind were raised by a competing claimant we would then scrutinise the terms of the condescendence more rigorously than where the action is brought by the holder of the fund, because the real raiser in such a case undertakes to set forth his own case, and if he is to set forth a real case of double distress he must aver a relevant ground of claim. But where the real raiser is the holder of the fund he is not bound to know the exact nature of the competing claims, and all that he is required to do is to make a relevant statement of their having been competing claims made to him. At the same time I agree with Lord M'Laren that it is not enough for the real raiser merely to say that claims have been made to him, without stating some ground for them, but the material fact here is that the claim which is said to be too vague is the claim by the true creditor, and in such a case I do not think that the executrix is called upon to ascertain whether the true creditor has or has not made a valid assignation of her rights.

The Court recalled the interlocutor of the Lord Ordinary, and repelled the objection to the competency of the action.

Counsel for the Pursuers and Real Raiser—Salvesen—Younger. Agent—W. Croft Gray, Solicitor.

Counsel for the Defenders Albert Dale, &c. — H. Johnston — N. J. D. Kennedy. Agents—Rusk & Miller, W.S.

Counsel for the Defenders Eliza Murray Wallace — Constable. Agent — William Balfour, Solicitor.