proved nothing, as Edinburgh was the *commune forum*. The absence of jurors might be of consequence if this were a criminal case, but was of no consequence in a civil appeal. Professor Aytoun, when Sheriff of Orkney and Shetland, had frequently attended the Inverness Circuit, and in 1855 his attendance there in his official capacity was recorded in the minute book of Court.

The LORD JUSTICE-CLERK repelled the objection in respect of the terms of the precept. He and the other Lords of Justiciary had invited the lieges of Orkney and Shetland to bring their complaints to this Circuit, and it was impossible to refuse to hear them when they came in obedience to that invitation. He was not moved by the practice on which the objector mainly relied, for it entirely depended on the public prosecutor whether a case was tried at Circuit or at the High Court.

Counsel were then heard on the merits, and in the end the appeal, which involved no point of interest, was dismissed, the appellant being found liable in £3, 3s. of modified expenses.

Agent for Appellant—M. Maclennan, Solicitor, Inverness.

Agents for Respondent—Stewart, Rule, & Burns, Solicitors, Inverness.

COURT OF SESSION.

Saturday, October 29.

FIRST DIVISION.

DAVYS, PETITIONER.

Disentail—Notice to Next Heir—Rutherfurd Act, 11 *and* 12 *Vict. c.* 36, § 36. *Held* that the 36th section of the Rutherfurd Act only applied to the cases where consents are required. That even in these cases it did not exclude the discretion of the Court, and that in cases where no consents were required the matter of service was entirely in the discretion of the Court.

This was a petition for authority to record an instrument of disential, presented under the Rutherfurd Act and the Entail Amendment Act 1853, by Richard Campbell Davys, of Askomill, in the county of Argyle, to the First Division of the Court of Session. It set forth that he was heir of entail in possession of the lands of Askomill and others, in virtue of a deed of entail executed in the year 1849, by the trustees of the late Peter Campbell of Askomill, conform to his trust-disposition and settlement dated 9th April and 15th August 1838. The petitioner succeeded to these estates as heir of entail to his mother, the institute, who died in 1851, and he now stands duly infeft therein. The petition then proceeds to narrate the 1st and 2d sections of the Rutherfurd Act, 11 and 12 Vict. c. 36, giving the petitioner power to disentail, as also the 28th section of that Act, fixing the date of the deed of entail in question, and the 4th section of the Entail Amendment Act, 16 and 17 Vict. c. 94, altering the procedure in disentails. The petitioner was born on the 13th July 1849, and the constructive date of the entail was, under the 28th section of the Rutherfurd Act, previous to the 1st August 1848, notwithstanding the actual date thereof. The petition concludes:—"That, in terms of the said 4th section of 16 and 17 Vict., cap. 94, the petitioner has executed, and herewith produces, an instrument of disentail, in the form prescribed by the said Act of 11 and 12 Vict., cap. 36, of the said entailed estate.

"That the petitioner is desirous to acquire the said estate in fee-simple, and for this purpose makes the present application to your Lordships, in terms of the foresaid statutes, and of the statute 31 and 32 Vict., cap. 84, entituled "An Act to amend in several particulars the Law of Entail in Scotland," and relative Acts of Sederunt, for authority to have the said instrument of disentail recorded in the Register of Tailzies, in terms of the said statutes.

"May it therefore please your Lordships to appoint this petition to be intimated in the minute-book and on the walls in common form, and to be publicly advertised, once in the *Edinburgh Gazette*, and at least once weekly for three successive weeks, or for such longer period as your Lordships shall deem fit, in the *North British Advertiser* and *Daily Review* newspapers, or such other newspaper or newspapers as your Lordships shall appoint; and on resuming consideration of this petition, and after such inquiry into the facts of the case as to your Lordships shall seem fit, and on being satisfied that the procedure under the petition is in conformity with the provisions of the said statutes and relative Acts of Sederunt, to grant warrant to and ordain the keeper of the register of tailzies to record the said instrument of disentail in the said register, in terms of the said statutes; or to do otherwise in the premises as to your Lordships shall seem proper."

Upon this petition the Lord Ordinary Mackenzie pronounced the following order for intimation and service:—"The Lord Ordinary appoints this petition to be intimated on the walls and in the minute-book for fourteen days, and to be advertised in the *Edinburgh Gazette* and newspapers mentioned in the prayer of the petition, in terms of the statutes; Further, appoints the petition to be served on the three next heirs of entail; grants warrant for service on them accordingly; and ordains them, if so advised, to lodge answers to the petition within fourteen days after service if within Scotland, and thirty days if furth thereof."

Against this interlocutor the petitioner reclaimed.

DUNCAN, for him, objected to the Lord Ordinary ordering service upon the next three heirs of entail, and ordaining them to lodge answers, &c. He contended that this was a case in which the petitioner was entitled to disentail without any consent, hence no party could appear and oppose the petition on the merits. That could only be done on the title to sue, and that question could not be opened up on a petition. The Act did not direct or authorise this service, and in consequence of one of the heirs being resident abroad, the order was a hardship on the pursuer. He referred to the cases of *M'Dougall*, 9th March 1850, 12 D. 906, and *Milles Riddell*, 13th July 1853, 15 D. 904.

At advising—

LORD PRESIDENT—This is a point of practice which we have for the first time to consider here. We have to determine in what way this petition to record a disentail is to be published and made known to those interested. The Lord Ordinary has appointed this petition "to be intimated on the walls and in the minute-book for fourteen days, and to be advertised in the *Edinburgh Gazette* and newspapers mentioned in the prayer of the petition, in terms of the statutes." He "further, appoints

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,