count thereof to be given in, and remit the same when lodged to the auditor to tax and report."

Counsel for Simpson's Trustees—Dean of Faculty (Clark) and Mackintosh. Agents—Webster & Will, S.S.C.

Counsel for Gowans.—Watson and Darling. Agents—Lindsay, Paterson, & Hall, W.S.

Wednesday, March 4.

SECOND DIVISION.

[Lord Gifford, Ordinary.

OGILVY'S TRUSTEES *v.* NATIONAL PROVINCIAL BANK OF ENGLAND AND OTHERS.

Process—Multiplepoinding—Form of Action—Competency.

Under a marriage-contract, power to apportion the shares of the younger children was conferred upon the parents jointly, or, failing the joint exercise of the power, upon the survivor. The spouses executed a joint deed apportioning the shares equally, but revocable by the survivor. After the death of the wife, the husband made advances to his children, and took discharges from them *pro tanto* of their shares. One of the daughters thus received one-fourth of her apportioned share as under the joint deed, and she obtained subsequently advances from other parties, giving in return bonds and assignations in security upon her provisions under the marriage-contract. The father thereupon executed a new deed of apportionment to revoke the prior deed, and dealing with the balance of the fund so far as undischarged by his advances to his children, and subsequently he died. The assignees under the bonds granted by the daughter disputed the validity of this later deed, and claimed payment out of the sums provided under the marriage-contract, and the younger children maintained the contrary. In these circumstances the marriage-contract trustees raised a multiplepoinding. *Held* that although this might not be the best form of process, it was nevertheless competent.

This case came up by reclaiming note against an interlocutor of the Lord Ordinary [GIFFORD], of date 25th November 1873. The action was one of multiplepoinding at the instance of the trustees of the late Peter Wedderburn Ogilvy (pursuers and nominal raisers) against the Rev. C. Chevallier, George Mercer, and Rowley Lascellas, together with the trustees of the National Provincial Bank of England (real raisers), and the whole of the children of the late Mr Ogilvy as individuals (defenders). By antenuptial contract of marriage, dated 15th April 1811, and recorded 5th April 1873, between Captain Peter Wedderburn and Miss Ogilvy of Ruthven, the former, *inter alia*, bound and obliged himself, and his heirs, executors, and successors, in the event of there being a younger child or children of the then intended marriage, male or female, other than the heir who should succeed to his fortune under the destination before written, or in the event of there being only daughters of the said marriage, who should be excluded from his fortune by an heir-male of any after marriage, to make payment to the said younger child or children or daughters, in the event, which occurred, of there being three or more younger children, a sum of £10,000, which was declared to be payable to them at the first term of Whitsunday or Martinmas after the death of the said Peter Wedderburn Ogilvy. It was further by the said antenuptial contract of marriage declared that the said provision in favour of younger children or daughters, in the event of the son of any after marriage succeeding, should be divided among them by the parents jointly, as they should think fit; and failing such division by them jointly, then as the same should be divided by the survivor; and in case of no division being made by the parents or surviving parent, then to be equally divided. The marriage which ensued was dissolved by the death of the lady in 1853. There were issue of the marriage—(1) Lieutenant-Colonel Thomas Wedderburn Ogilvy, who has succeeded to the entailed estate of Ruthven; (2) Lieutenant-Colonel James Wedderburn Ogilvy; (3) Major John Andrew Wedderburn Ogilvy; (4) Jane Wedderburn Ogilvy; (5) Isabella Wedderburn Ogilvy; (6) Anna Wedderburn Ogilvy, who all survived, and Thomas Wedderburn Ogilvy, who predeceased both his father and mother, without issue.

A trust-disposition and deed of settlement, and of joint apportionment, was executed by Peter Wedderburn Ogilvy and his wife on the 14th April 1828, whereby it was stated that they had jointly exercised the power of apportionment contained in the antenuptial contract of marriage, and declared that the sum of £10,000 should be divided equally among their then existing younger children therein named, being their children above mentioned other than Lieutenant-Colonel Thomas Wedderburn Ogilvy, and the apportionment so made was declared to be revocable by the survivor of the spouses. No other joint allocation or apportionment was executed or exercised by Mr and Mrs Wedderburn Ogilvy. Captain Ogilvy made after his wife's death advances to his children, and obtained from them discharges, and from Jane Wedderburn Ogilvy two partial discharges, dated respectively 15th January and 23d December, both in 1869. Miss Ogilvy's share, it was maintained, if no valid apportionment had been made, would be £2000, less of course the amount of the advances made to her by her father. In this state of matters, the defenders, the Reverend Charles Henry Chevallier, George Mercer, and Rowley Lascellas advanced to Jane Wedderburn Ogilvy (first) the sum of £900, on 10th June 1870; and (second) the sum of £240, on 7th June 1871; for which sums and interest thereon she granted two bonds and assignations in security, whereby she assigned to them her rights and interest in and provision due under the contract of marriage. On 4th April 1872 the other defenders, trustees of the National Provincial Bank of England, advanced to Jane Wedderburn Ogilvy (third) the sum of £270, for which she also granted her bond and assignation in security, whereby she assigned her said rights and interest in and provisions under the contract of marriage to them as trustees. All these bonds and assignations were intimated to Peter Wedderburn Ogilvy, and intimation thereof acknowledged by minute by his agents, on 26th September 1870 for the first, and May 13, 1872, for the second and third. A deed of apportionment, dated 26th November 1870,

was executed by Thomas Wedderburn Ogilvy, on the narrative of the contract of marriage and of the trust-disposition and deed of settlement and apportionment, dated 14th April 1828, and of a power thereby reserved to the survivor to alter, innovate, or revoke the apportionment thereby made; and by which deed of 26th November 1870 he revoked or attempted to revoke the apportionment made in the trust-disposition and deed of settlement and apportionment, and made alternative apportionments. One of these dealt with sums amounting to £4500 of the £10,000, as having been apportioned and discharged, viz., £2000 by James Wedderburn Ogilvy, £2000 by John Andrew Wedderburn Ogilvy, and £500 by Jane Wedderburn Ogilvy. and, on the footing that there remained only £5500 to be apportioned and paid, of this balance he apportioned £150 to Jane Wedderburn Ogilvy, and the remainder between Isabella Wedderburn Ogilvy and Anna Wedderburn Ogilvy equally, but not leaving anything to the deceased son Peter or those in his right. The other alternative was, in case the foregoing apportionment should be found invalid upon any ground, then he, by said deed of 26th November 1870 made another apportionment, viz., a sum of £150 to Jane Wedderburn Ogilvy in addition to the sum of £500, stated to have been discharged, and the residue of the £10,000, so far as not disposed of, among the children entitled to participate therein (other than Jane Wedderburn Ogilvy) equally. The assignees under the bonds granted by Miss Jane Ogilvy disputed the validity of the deed of 26th November 1870, and claimed payment from the £10,000 provided by the contract of marriage of the sums due to them under the bonds in their favour, while the nominal raisers and children of Thomas Wedderburn Ogilvy, other than the oldest son and Jane Wedderburn Ogilvy, maintained the validity of the deed of 26th November 1870, with a view to having effect given to it in connection with and for carrying out the purposes of the trust-disposition and codicils of Peter Wedderburn Ogilvy. In this state of matters the trustees deemed it necessary to bring this action, that the competing rights of parties might be settled, and they admitted only the possession of £150 due to the real raisers. They produced the discharges of the whole younger children other than Miss Jane Ogilvy.

They further (Stat. 2), averred that no claim had been made against them founded on the marriage contract provision, except by the real raisers as in right of Miss Jean Wedderburn Ogilvy. Moreover, that with the exception of Miss Jean Wedderburn Ogilvy, none of the children of the late Peter Wedderburn Ogilvy, who were creditors under the provision, had now any interest in the apportionment of the provision.

The pursuer pleaded—In respect of the competing claims to the sum of £10,000, or part thereof, the pursuers should be found liable in only once and single payment of the said sum, and that to the parties entitled thereto.

The defenders pleaded—(1) No fund *in medio:* (2) No double distress: (3) On a sound construction of the marriage contract and of the joint deed of apportionment of 1828, the survivor of the spouses had power to apportion, and the deed of apportionment was a valid exercise of this power: (4) The multiplepoinding is incompetent, and ought to be dismissed.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 25th November* 1873.—The Lord Ordinary having heard parties' procurators upon the summons and defences and objections by the nominal raisers—Repels said objections; finds the pursuers and nominal raisers liable only in once and single payment, and appoints all concerned to lodge condescendences and claims within eight days, reserving all questions of expenses.

"*Note.*—There is great force in the objections stated by the pursuers and nominal raisers to the competency of the present action of multiplepoinding. It is, to say the best of it, a very awkward mode of raising the true question at issue, and the Lord Ordinary heard no good reason why the question was not raised by an ordinary action of declarator and payment, calling all parties interested. Plainly that was the natural and best form of process.

"Still, after considering the whole circumstances, the Lord Ordinary has not found himself compelled to throw out the present action, and thus cause expense and delay which in his view are unnecessary. He thinks the real question at issue—a question of some delicacy as to the validity and effect of the successive deeds of apportionment—can be well enough tried in the present action—tried quite efficiently —and that none of the parties will suffer prejudice from the mere form of process. In strictness, also, the Lord Ordinary thinks that he is not compelled to throw out the action on the grounds either that there is no fund *in medio*, *or* that there is no double distress.

"Admittedly the action of multiplepoinding would have been good if the children had not discharged their rights under the marriage-contract. There would have been an admitted marriage-contract fund of £10,000, and a dispute among five children as to how it was to be apportioned. If even any one child claimed a larger share than the other children admitted, then, *quoad hoc,* there was double distress, and a multiplepoinding would have been competent at the instance of the holders of the fund. Cases like this very often arise, and a multiplepoinding is quite a proper process for the distribution of a marriage-contract fund when questions arise about its apportionment.

"But the objectors say that all the children excepting Miss Ogilvy have renounced their shares of the £10,000, and that thereby the claim of Miss Ogilvy and her assignees is a simple petitory claim But this renunciation was never intimated to the nominal raisers in such form as to make it quite safe for them to rely that no claim remained in the other children.

"The deeds, the last of which is dated only on 11th April 1873, were never communicated, and it is possible there may be questions as to the effect of these deeds.

"There is no practical difficulty in raising the competition. The fund *in medio* may be held to be the utmost share which Miss Ogilvy claims, and the competitors will be, first, Miss Ogilvy and her assignees, and second, the general testamentary trustees or the residuary legatees to whom the rights of the renouncing children have inured.

"All questions of expenses are reserved; and expenses can be dealt with quite as equitably in this process as in a declarator."

The trustees reclaimed.

Argued for the reclaimers (pursuers and nominal

raisers)—This multiplepoinding is not competent; there is no double distress; there are no competing interests. It is simply a question between Miss Jane Ogilvy and the trustees on her father's estate, and accordingly such a form of action is not workable. Miss Ogilvy was no better than a creditor on her father's estate under the obligation of the marriage-contract, and that whether her claim be limited to £2000 or not. Each child was a creditor for its own share. But all the claims of the children, other than Miss Ogilvy, have been satisfied, and each of them has granted a discharge of those claims; they accordingly have no interest in the matter. There can be no doubt that a petitory action would have been perfectly competent, and any contrary plea would have failed. Suppose the trustees had tried to raise a multiplepoinding. It would have been a multiplepoinding only as regards Miss Jane Ogilvy's share, and she would have objected to be burdened with the expense of bringing such an action into Court. What we really have here is no more than a process for ascertaining the amount of the debt due by the trustees to Miss Ogilvy. There is no competition by the other children—the discharges free the estate *quoad* them. If an action in this form is to be allowed at all, it must surely have been raised by the trustees, and not so as to burden Miss Ogilvy with the expense.

Argued for respondents—A multiplepoinding is here a very suitable form of action. There are two sets of pursuers—(1) Those who hold assignations to the extent of £1100; (2) the National Provincial Bank of England, who hold the bond and assignation in security for £270. Both these claim on the £10,000. The answer of the trustees is, we have but £150, and you can only claim on that. A multiplepoinding is competent because: (*a*) you have two claimants on a fund which wont meet both or either; (*b*) the trustees deny having more than a certain sum. [LORD NEAVES—I suppose your assignations were intimated.] They were so. We think undue weight has been given to what are termed discharges of their shares in this fund by younger members of Patrick Wedderburn Ogilvy's family. These bear no analogy to discharges of legitim by a father during his lifetime. Such discharges are not at all competent in the case of a fund for apportionment. [LORD JUSTICE-CLERK — You think, that because the father has the power of raising or lowering the amount, he cannot discharge.] I think so. These discharges are not one of them acts of apportionment. They are of no value whatever. Although there is a general discharge, there is no indication of the amount apportioned, and therefore it would have been quite competent for Mr Ogilvy subsequently to have apportioned any sum. There was at this date no apportionment at all, and there never was one until by the truster's death the deed under which the trustees are acting came into operation. Observe the terms of the deed of trust. This is the first and the only apportionment. This is not a question of the distribution of the estate, but of the distribution of that which is a debt upon the estate. [LORD JUSTICE-CLERK—The very statement of all these matters would seem to show that they should be raised by some more direct mode than by that of multiplepoinding. It is usual to employ actions of reduction.] In the case of *M'Donald's Trs.*, 11 Scot. Law Rep. p. 290 a multiplepoinding was employed. (1) The great object of a multiplepoinding is to give to every one that notice which is requisite, and enable the Court to deal with all the questions without considering the effect on the interests of any one called in the multiplepoinding who has not appeared, and (2) it avoids any direct strife, and allows each to judge of his own interests and claim, and to act accordingly.

At advising—

LORD BENHOLME—The question before the Court is whether this action is incompetent. It is said to be so in consequence of the discharges put in. It humbly appears to me that this is not a good objection.

LORD NEAVES—I think the action is competent.

LORD ORMIDALE—I have had great difficulty in this case in coming to the conclusion at which I have arrived. At the same time, the matter is one of procedure, and the Lord Ordinary, although he had some difficulty also, and observes that "it is, to say the best of it, a very awkward mode of raising the true question at issue," and further, that he had "heard no good reason why the question was not raised by an ordinary action of declarator and payment calling all parties interested. Plainly," he adds, "that was the natural and best form of process." But then his Lordship goes on to state that the question *may* be tried in this form, and that he is loth to throw out the present action now that it is once here.

It must however be borne in view that a multiplepoinding is a form of action that entails very serious consequences. A consideration of the character of such an action shows this—it calls all parties in any way connected with the questions at issue into the field, all who are called may come into Court and state their claims if so advised, and all this causes very heavy expense which would not be incurred in an ordinary petitory action. I am therefore inclined to think that unless there be double claims and double distress a multiplepoinding is not ordinarily competent. The way in which to raise questions like these before us is by an action brought by the creditor against the debtor,—as it is we have nowhere the proper pursuer and defender. The Lord Ordinary says "the fund *in medio* may be held to be the utmost share which Miss Ogilvy claims, and the competitors will be, first, Miss Ogilvy and her assignees; and, second, the general testamentary trustees or the residuary legatees to whom the rights of the renouncing children have inured." There are really just two sets of parties here, though no doubt there may be a question between the pursuers themselves. That often is so, but where is the double distress, where is the double claiming in the multiplepoinding? I have never seen a multiplepoinding in which that is not brought out on the face of the summons. There are other cases of conflict and of double claim arising on a trust fund determined by a deed, and those also, on a reference to the styles, I find should be brought out *ex facie* of the summons, and unless it be so the action must be thrown out as irrelevant. I have been unable here to find any such double claim or double distress requiring a multiplepoinding to be brought. These children who have got their shares cannot be affected by any judgment that might be pronounced between the nominal raisers and the real raisers.

These are the grounds on which I feel great

difficulty in sustaining an action of this kind, which must cause expense, and heavy expense, on the fund *in medio.*

At the same time, while stating these views to prevent the precedent in a case of this kind being appealed to, and while anxious to guard against any sanction of such a principle, there might be a great hardship involved in throwing the action out of Court, and I am inclined to sustain it now that it is here.

LORD JUSTICE-CLERK—My Lords, the Lord Ordinary has in this case sustained the competency of the multiplepoinding. There is no question here raised except an ordinary claim of debt. Certainly there is no double distress, as the children have discharged their claim. The case resembles that of *Crichton* v. *Irvine*, 14 S. 632, where Lord Corehouse says "It may be observed there is no double distress here nor the least prospect of it. There is but one creditor who demands a judicial decision on his claim, all the rest have bound themselves to abide by the decision of the trustees, which they consider by far the cheapest and most convenient method of winding up the affairs of the deceased. The Lord Ordinary has thought it right to state his views at length, because the process of multiplepoinding, of the greatest utility where it is properly applied, has recently been attempted in cases to which it is totally inapplicable, and as it is sometimes styled a congeries of actions, there seems to be a notion that it may be made to supersede every other form of action."

I entirely concur in these remarks, but in the circumstances, and considering the hardship that would otherwise be involved, I do not interpose a dissent from the opinions of the majority of your Lordships.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note, Refuse the note, adhere to the interlocutor of the Lord Ordinary, and remit to his Lordship to proceed with the case, reserving all questions of expenses.

Counsel for Nominal Raisers (Reclaimers)—Clark, Q.C., and Mackintosh. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Real Raisers (Respondents)—Watson and Asher. Agents—Webster & Will, S.S.C.

[*I.* Clerk.

Wednesday, March 4.

FIRST DIVISION.

PADWICK *v.* STEWART.

(*Ante*, p. 262.)

Expenses—Fees to Counsel—Consultation Fees—Examination of Havers.

In a case involving difficult points of law and a lengthened argument—(1) Fee to third counsel in Inner House disallowed; (2) Fee "to counsel with joint print of documents, and to consider whether other documents should be printed," disallowed; (3) Consultation fee before debate in procedure roll, disallowed; (4) Consultation fee before debate in debate roll disallowed, in respect that the fees during the continuance of the debate were sufficient; (5) Fee to counsel for attending examination of havers, disallowed; (6) Fee to Scotch agent for attending examination of havers in London, disallowed.

This case, which related to the validity of an entail and an alleged sale of the entailed estate, involved difficult questions in point of law. The Court decided in favour of the defender, and the case now came up upon the Auditor's report.

The defender had stated a charge for fees to third counsel in the Inner House debate, and this charge the Auditor reserved for the determination of the Court. It appeared that the defender was only represented by two counsel in the Outer House, and the senior counsel was only taken in when the case went to the Inner House.

The Auditor had disallowed the following charges:—(1) Fee of £2, 2s. to counsel "with proof of joint print of documents, and to consider as to whether other documents should be printed." (2) Fee to senior and junior counsel respectively of £4, 4s. and £3, 3s. for consultation before the debate in the procedure roll. (3) Fee to counsel respectively of £4, 4s. and £3, 3s. for consultation before debate in the debate roll. It appeared that counsel had received £6, 6s. and £5, 5s. with instructions for debate, £8, 8s. and £6, 6s. for a short proof during the currency of the debate, and continuance fees of £4, 4s. and £3, 3s. (4) Fee to counsel of £2, 2s. for attending examination of havers; (5) Charge of £10, 10s. for agent going to London to attend examination of havers. The Auditor in this case, although disallowing the fee charged, allowed £2, 2s.

The defender contended that the fee for third counsel should be allowed in the Inner House on account of the length and difficulty of the case, which involved very intricate questions of law, and the debate in which continued for nearly seven whole days. The other charges should be allowed considering the difficulty of the case and the interests at stake. In regard to the fee for the agent attending the examination in London, at all events the Auditor's allowance should be sustained.

The pursuer contended that the third counsel in this case should not be allowed, as it was not one of those cases in which different parts of the work could be done by different counsel.

At advising—

LORD PRESIDENT—The objections stated for the defender apply to the procedure in this case in the Outer House, and that stated for the pursuer applies to that in the Inner House.

First, in regard to the objections applicable to the Outer House.

The fee to counsel for revising the joint print with the view of considering what documents should be printed in addition, and also the fee to counsel at the examination of havers, are both points particularly for the examination of the Auditor, who has had all the procedure in the case before him, and it would be improper to interfere with his discretion.

As to the consultation fees of 20th November 1871, before the debate in the procedure roll, it is important to remember that counsel considered the case carefully at the adjustment of record, and received adequate remuneration. The debate in the procedure roll could lead to nothing but an order putting the case in shape, and I do not see that