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

there was any necessity for a consultation. I therefore think that the objection should be repelled.

Again, there was a consultation on 12th May 1873 with a view to the debate in the debate roll. The propriety of this fee depends very much upon the fees which counsel received during the course of the debate. We see six guineas and five guineas were sent with instructions for debate. The debate led to a sort of parenthetical proceeding in the shape of a proof, and for this eight guineas and six guineas were sent to counsel, and then there were continuance fees of four guineas and three guineas. So the fees appear to have been ample without the additional charge for consultation fees. The Auditor has come to this conclusion, and I think that we should approve of his decision.

The only other point in the Outer House is the proposal to charge for the agent going to London to the examination of havers. That charge is inadmissible. Such a charge is never allowed except where there are very peculiar circumstances, and there are no such circumstances here.

In the second place, as to the objections applicable to the Inner House.

There are many cases in which it is quite proper that three counsel should be employed, but not just that the unsuccessful party should pay for the three counsel. This is such a case. It was a heavy and difficult case, and the agent was quite right to employ three counsel, especially as the leading counsel was absent in the Outer House. If, when the case came to the Inner House the agent had dropped out one of the two counsel employed in the Outer House he would have acted injudiciously. That however is not the question, but, is this the kind of case in which the unsuccessful party must pay for three counsel? This was a difficult case in point of law, but in a case, however difficult, which turns upon matters of law, the counsel who actually conducts the argument must apply himself to every point in the case. The kind of case in which three counsel are chargeable against the unsuccessful party are cases in which there may be a sub-division of labour, as in the case of a heavy trial by jury, when the labour of preparing may be divided among the counsel, and in many other cases, such as the deathbed case between the parties to this case, where it is easy to see that there may be sub-division of labour. But there could be none here, for the same labour must have been gone through by each of the three counsel. I am therefore for disallowing the charge for three counsel.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the Auditor's report on the defender Sir Archibald Douglas Stewart's amount of expenses, No. 209 of process, and also on the notes of objections for the defender and pursuer respectively, Nos. 211 and 210 of process, —Repel all the said objections, but disallow the charge of £43, 12s. 4d. for a third counsel, reserved by the Auditor for the determination of the Court: Approve of the Auditor's report subject to the disallowance aforesaid, and decern accordingly against the pursuer for payment to the defender of £503, 17s. 6d., being the balance of the said amount as taxed which remains after deduction of the sum now disallowed."

Counsel for Pursuer—Keir. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defender—Mackay. Agents—Dundas & Wilson, C.S.

Thursday, March 5.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

TURNBULL *v.* M'LEAN & CO. *et e contra.*

Contract—Delivery—Breach--Ground for Rescinding.

A having contracted to deliver to B a quantity of coals f.o.b., at a certain port, and to supply so much of them per month, *Held* that on B's refusal to pay for the coals of the past month, alleging small counter claims, A was entitled to stop delivery.

On 20th May 1873 an action, was raised at the instance of George Vair Turnbull, merchant in Leith, against Hugh M'Lean & Co., coal merchants, Glasgow. The summons concluded for payment of (1) £113, 8s. 5d., and (2) £1261, 7s. 6d.—in all £1374, 15s. 11d., under deduction of £484, 0s. 11d., the balance of an account due by the pursuers to the defenders.

There was also a counter action raised on May 27, 1873, by Messrs M'Lean, and concluding for a sum of £680, 0s. 7d.

The Lord Ordinary, on 24th June 1873, conjoined the two actions.

On 21st February 1872 Hugh M'Lean & Company made an offer to Turnbull, Salvesen, & Company, merchants in Leith (of which firm the pursuer and Christian Salvesen, merchant, Leith, were the only partners) in the following terms:—"Sold to Messrs Turnbull, Salvesen, & Coy., Leith, Five thousand tons Clelland Ell coal as per sample, at the price of Nine shillings and eightpence per ton f.o.b. Granton, or if shipped at other ports the excess dues to be added, or if less than the Granton dues, to be deducted from said price." On 23d February 1872 Turnbull, Salvesen, & Company accepted the offer formally, but added the following condition. "We also stipulate the forfeiture of threepence per ton for all coals which are sent to us and not addressed to ourselves. We do not expect that you have any objection, as in a previous letter you intimated to us that addressing the waggons to your good selves should be discontinued." On 26th February 1872 the defenders wrote to the pursuer *inter alia*, —"We cannot agree to the forfeiture of threepence per ton on coal not addressed to you. We are quite willing, however, to address the coal to you provided it does not interfere with our getting the shipping allowance of fourpence per ton. If you guarantee us this, we shall address them all to you." The next letter was also from the defenders, —"*Glasgow, 4th March* 1872.—Dear Sirs,—According to verbal arrangement with your Mr Turnbull, we confirm having sold to you Ten thousand tons Wishaw Main coals at Nine shillings and threepence per ton f.o.b. Granton. Delivery in equal quantities per month during the course of the present year. Please reply confirming." To this letter the following reply was sent:—*Leith, 5th March* 1872.—Dear