in his wife and family, for in that case the invariable effect is that the wife has thereupon to attend to him and to those in the house with her, and he becomes a proper object of parochial relief with his wife and family in addition. A wife in such a position could do very little for the support of her husband, and any earnings she can make must be applied to the maintenance of herself and her husband and family. In this case the circumstances are quite different. The wife is entirely freed from any liability to maintain her husband out of her earnings, and she is just as much the party who is bound to maintain herself as a widow or deserted wife or an unmarried woman, and therefore it appears to me that the simple answer to the question whether this woman is a proper object of parochial relief is the fact that she is an able-bodied woman. I am therefore of opinion that the inspector was right in not treating this woman as a proper object of relief. I am disposed to think with the Sheriffs that she is an able-bodied woman, but in this sense only, that though she is unfit for heavy work she is quite able for the performance of light work from which she can derive means for her subsistence. But it is said for her that though she is able to perform light work she is not able, owing to her weak health, having had an attack of rheumatic fever some years ago, to continue to do so for any length of time. Even taking that statement as correct, I do not think she is a proper object of relief, although she may be a fitting object for casual relief. It is proper and necessary to look at the general principle of the case and to decide it on the general principle, viz., that she is an able-bodied woman and not a proper object of parochial relief, and being of that opinion I agree with your Lordships in the opinion that the interlocutors of the Sheriffs should be recalled.

But while I am of that opinion, I further think that the case is one in which the inspector should look after the woman and give her such casual relief from time to time as her circumstances may render necessary.

The Court recalled the interlocutors of the Sheriffs and found that the applicant was not entitled to relief.

Counsel for Appellant—Burnet—Low. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondent—Robertson—Dickson. Agent—Thomas M'Naught, S.S C.

Saturday, July 3.

SECOND DIVISION.

[Lord Craighill, Ordinary.

MP.—GOWANS AND OTHERS.

Process—Multiplepoinding—Competency—Beneficiary.

Held that a beneficiary under a trust who disputed with the trustees as to the validity of the claim of one of the creditors of the trust, could not competently bring an action of multiplepoinding in name of the trustees to settle the question.

John Robb, a builder and contractor at Tynecastle, Dalry, Edinburgh, died on 30th October 1875, leaving a trust-disposition and deed of settlement in favour of James Gowans and others as trustees, by which he conveyed to them his whole estate, giving them full power to carry on his business. The trustees accordingly entered on the management of the estate on his death, and proceeded to realise it though it was heavily burdened with debt. This they did at fair prices with the exception of two tenements of houses situated at Tynecastle, for which they were unable to find a purchaser. As it was evident that the estate would not pay the ordinary creditors in full, and as there was thus a danger that the widow and children might be left wholly unprovided for, they arranged with all the creditors except one that they should receive six and eightpence per pound in full of their claims. In consequence of further embarrassments, however, it was found impossible at once to raise the money. Towards the end of 1879 they received an offer for the tenements at Tynecastle of £4000, which they accepted, and the result of this improved condition of the trust-funds was that they were enabled to arrange with most of the creditors to accept 10s. per pound as in full of their claims. On this footing most of the claims were discharged, the only creditor whose claim was of considerable amount as yet unpaid being Mr Gowans, whose claim amounted to £1010, 17s. 2d. This claim was made up of six bills granted by the truster amounting to £955, 12s. 9d., and an open account due by him at the date of his death of £55, 4s. 5d. In this claim Mr Gowans had agreed to accept the composition of 10s. per pound.

Mrs Robb, the widow of the truster, in virtue of her interest in the fund *in medio* under the terms of her husband's trust-deed, and her sons in virtue of their legal rights, disputed the claims of Mr Gowans, and raised an action of multiplepoinding in the name of the trustees as pursuers and nominal raisers against the beneficiary and the trustees, and pleaded—"(3) There being no foundation for the claim of James Gowans, the trustees have no right to retain the funds in their hands to meet the same, or to pay the claims, in the face of the real raisers' objections to such claims."

The trustees in their third plea-in-law pleaded that the action was incompetent, in respect—(1) That *ex facie* of the summons there was no double distress. (2) That the averments in the condescendence contained only the assertion of a claim against the holders of the fund which might have formed the ground of an ordinary petitory action.

The Lord Ordinary (CRAIGHILL), in respect of the decision of the Inner House in the case of *Kyd* v. *Waterson*, recently pronounced, found that from the statements on the record there had been no double distress, and therefore dismissed the action. His Lordship appended the following opinion to his interlocutor:—

"*Opinion.*—I have listened with great attention to the arguments advanced on both sides, and have been somewhat reluctantly led to the conclusion I have come to. Notwithstanding all that has been so ably presented by Mr Guthrie, I cannot see that there is any distinction between this case and the case of *Kyd*

v. *Waterson*, decided the other day. I think this case is ruled by that decision. There was a controversy there with regard to the rights of parties in trust-funds, and it was sought to bring a multiplepoinding in name of the trustee. No doubt there was not a very clear and satisfactory condescendence of the facts and circumstances out of which those disputes had arisen, or with reference to the right of one of the parties, compared with the right of the others, in those funds. It was plain enough, however, in my opinion, that there were controversies which at one time or another must be decided, and that the sooner the decision was pronounced the better. So I would have held here that a day of reckoning must come, and that the sooner it came the better for the trustees and for the satisfaction of the claims of the beneficiaries. If trustees are to be left to follow their own will, without directions from the Court, they must answer for it that they have not entertained claims which ought to have been rejected. At the same time, the Inner House thinks that trustees are masters of the situation, and are not to be controlled, and my interlocutor must accordingly be somewhat in these terms:—Having heard parties' procurators on the closed record, in respect of the decision of the Inner House in the case of *Kyd* v. *Waterson*, recently pronounced, finds that from the statements on the record it does not appear that there is double distress: Therefore dismisses the action, and decerns.

"I regret having to follow this course extremely. What has been done in the case of *Kyd* v. *Waterson* is inconsistent with all my ideas, and with my reading of all the authorities on the subject. Should the decision referred to become the rule and practice it will materially diminish the utility of actions of this nature. It materially circumscribes the circumstances in which such actions may be made available, and the comprehension as well as the efficacy of a multiplepoinding are therefore most materially diminished. A multiplepoinding, regarded as it must now be regarded, is no longer a congeries of all actions—no longer a solution of troubles while the thing is still open, and when the liabilities of all, so to speak, will be determined before anything past recall has been performed. Notwithstanding that, I must take my instructions from the Inner House, but I repeat that I pronounce this interlocutor with the greatest possible regret. If I could find a distinction which I could regard as in substance a distinction I would avail myself of it, and allow the Second Division another opportunity of saying whether I was right or wrong. But seeing no distinction, I will follow the judgment in *Kyd* v. *Waterson*; and I will be happy to find that I have misapprehended their judgment, and that what I ought to have done was, irrespective of that judgment, to find that there was double distress."

Mrs Robb reclaimed, and argued that the action was competent.

Authorities—*Miller* v. *Ure*, June 23, 1838, 16 Sh. 1204; *Ker* v. *Gulland*, Jan. 31, 1840, 2 D. 506; *Carmichael* v. *Todd*, March 2, 1853, 15 D. 473.

At advising—

Lord Ormidale—I think in this case the matter in dispute may be well determined without further argument. While I do not say that cases may not arise when a multiplepoinding is a convenient process for determining the question in dispute, I see here in this case no good grounds for entertaining such a process, but on the contrary I see many for dismissing it.

The action is brought in the name of the trustees (who are not desirous of bringing the action at all, but on the contrary are objectors to it), at the instance of the widow and sons against the beneficiary and the trustees. The latter, who I repeat are desirous of doing their duty properly, object, and rightly too in my opinion, for the only effect will be to fritter away the trust-estate in unnecessary litigation. Now, if the action is sustained, the first motion that will be made will be one for expenses to come out of the funds. Why should this trust-estate be frittered away by such expense unless it is absolutely necessary? If a direct action of count and reckoning were brought (and this would be the proper course) against the trustees, then the funds would remain intact and the parties in the wrong would be personally liable in expenses. In other words, if the beneficiary could show that the trustees had been neglecting their duty as trustees, *e.g.*, had paid away sums of money wrongly, they would be made liable for their neglect. So that in any ordinary case (and this is one) if a direct action of count and reckoning be brought and a party be found to have acted wrongly, he will be directly liable for the funds and expenses of the process, and the trust would thus be left intact. If the process were allowed to go on in the ordinary way (and this is a very simple trust we are dealing with), the parties claiming have only by letter to ask the trustees to sustain their claims, and this is clearly the right course in such a case. Here (the fund being in process) nobody can get payment. Each creditor must come with his claim, and then if there are disputes a record will be made up. The trustees have here a duty to perform, and a power to compromise claims, and indeed they are in course of compromising claims, and expect to pay 10s. in the pound, so that in my opinion the Court ought not to interfere with them to the effect of stopping the powers which have been clearly given them. The Lord Ordinary has dismissed the action, and I am for sustaining his judgment.

The Lord Ordinary is indignant at our decision in the case of *Kyd* v. *Waterson*, and it is out of respect to this that he gives the present judgment now brought under review. According to my recollection of the case it was quite well decided. The Lord Ordinary seems to think he is doing us a favour in giving us another chance of going back on our decision, but I have only to say for my own part that I entirely approve of it and shall continue to do so.

Lord Gifford—I concur in the views expressed by your Lordship. I am not against the competency of a multiplepoinding in the ordinary circumstances where the trust is in difficulties, where there is a competition as to who are to claim under the trust, or where legal questions have arisen as to vesting; but in the present case we have nothing like it. There is no dispute possible about the beneficiary's interest in the trust-estate, the only circumstance here pointed at being that the trustees are trying to compromise with

one of the creditors on the estate, Mr Gowans, whose claim is on bills, in order to settle for a less sum. The widow and children object to this, and think it serious enough to make it necessary for them to put the matter in the hands of the Court. This is just as much as saying that when any dispute arises as to what is due to one creditor the trustee is to be superseded altogether, and this action has been clearly brought to stop the management of the trustees. To some extent these are questions of circumstance, but that is no reason for throwing the whole estate here into the hands of the Court. I concur then in dismissing the action. As to the case of *Kyd* v. *Waterson*, I remember the case perfectly well. It dealt with the private trust for creditors of a bankrupt debtor, and the idea was that on any dispute the Court should become the distributor of the bankrupt estate. We said "Sequestrate if you like; but we are not trustees in bankruptcy." The case is quite different from the present, and is no authority in point, but is nevertheless in my opinion well decided.

Lord Young—I am of the same opinion. The trust here is a testamentary trust by a deceased builder who had carried on a speculative business and whose estate consisted of building stances more or less in an advanced state heavily loaded with debt. The only prospect of making anything out of the business was to effect a beneficial arrangement with the creditors by getting them to take a dividend.

The truster died in October 1875, and he gave his trustees full powers to carry on his business. These trustees are therefore the trustees of this speculative builder and contractor, appointed for the purpose of administering on his death any affairs which involve building. Accordingly in 1877 or 1878 they made an arrangement with some of the creditors to take a dividend of six and eightpence in the pound. Fortunately they could not raise the money, and the arrangement fell through. I say fortunately advisedly, because in 1879 the unsold property turned out of value not previously thought of, namely, of the value of £4000. An arrangement was then made by which most of the creditors were induced to accept ten shillings in the pound. The only claim which is still unpaid of considerable amount is that of Mr Gowans, who has agreed to accept the composition of ten shillings in the pound, and it is as to his claim that this action of multiplepoinding has been brought. Now, why should we interfere with the management of the trustees? It is their duty to consider each claim; if they think it reasonable they will entertain it, if manifestly frivolous they will dismiss it. The Lord Ordinary says it is with extreme regret that he is not able to allow a multiplepoinding here. It is pleasant to see such a healthy appetite for judicial administration, but I think that a multiplepoinding would be altogether incompetent. There is no authority for it, and none of the cases touch it. I agree, then, with your Lordships in thinking that the action should be dismissed. As to the case of *Kyd* v. *Waterson*, which the Lord Ordinary has referred to, I concur with your Lordships. As Lord Gifford says, it was a case of a farmer who executed a disposition *omnium bonorum* in favour of a friend with directions to pay his creditors. A creditor then brought a multiplepoinding in name of the voluntary trustee—that is to say, he asked the Court to execute the trust. We said—"Is your debtor solvent? If so, bring an action against him, and you will get payment if the debt is really due. If he is insolvent, his estate will be administered by the bankruptcy laws." But a multiplepoinding brought by a non-acceding creditor to administer a trust which he repudiates is altogether incompetent, and yet this has alarmed the Lord Ordinary as to the comprehension of multiplepoindings. He says—"Should the decision referred to become the rule and practice, it will materially diminish the utility of actions of this nature. It materially circumscribes the circumstances in which such actions may be made available, and the comprehension as well as the efficacy of a multiplepoinding are therefore most materially diminished. A multiplepoinding, regarded as now it must be regarded, is no longer a congeries of all actions—no longer a solution of troubles while the thing is still open, and the liabilities of all, so to speak, will be determined before anything past recal has been performed." It is a congeries of actions because each claim is the one necessary to establish the debt; it is a bundle of as many actions as there are claimants, with different grounds of action. But how this interferes with multiplepoindings which are competent I do not see, and there is no explanation given, and therefore I think that the Lord Ordinary has been either misapprehended or his words misprinted.

The Lord Justice-Clerk was absent.

The Court sustained the third plea for the nominal raisers and objectors, and dismissed the action.

Counsel for Real Raiser and Reclaimer—Kinnear—Rhind. Agents—Simpson & Wallace, S.S.C.

Counsel for Nominal Raisers and Respondents—Solicitor-General (Balfour)—Lang. Agents—Paterson, Cameron, & Co., S.S.C.

Wednesday, July 7.

SECOND DIVISION.

WEST STOCKTON IRON COMPANY *v.* NIELSON & MAXWELL.

Agreement—Construction of.

Held (*diss.* Lord Young) that where goods of a certain nature and quality are ordered from a manufacturer, it is not a good ground for refusing to accept delivery of goods tendered in implement of the contract that they are not of his own manufacture, provided that they are of the nature and quality stipulated for.

On 6th November 1877 Messrs Nielson & Maxwell, iron and metal merchants in Glasgow, wrote to Messrs Armstrong Brothers, brokers there, the following letter:—"Please let us know your lowest price for 200 tons of plates, consett limits; quality to pass Lloyd's inspection; for delivery from now till end of June 1878." On 8th November Armstrong Brothers replied as follows:—"Our friends, the West Stockton