may not be very perfect, but it cannot be attained at all except by holding that the same parish must support both the father and the children.

These views, I think, prevailed in the case of *Wallace*, 10 Macph. 675. There a deserted wife was supported by the parish of St Nicholas, the birth settlement of her husband, from 1860 to 1869. In 1868 it came to the knowledge of St Nicholas that the husband was living in Stewarton, and that he had acquired a settlement therein. Accordingly, it gave the usual notice, and called on Stewarton to relieve it. Its claim was sustained, because Stewarton was the settlement of the wife, inasmuch as her settlement followed the settlement of the husband. As the Lord Justice-Clerk (Moncreiff) said, the obligation to support the husband included an obligation to support the wife. The husband was an able-bodied man. Nevertheless, St Nicholas recovered from his parish of settlement. It was held that it had given relief in an administrative capacity, and that it was not bound to proceed against the husband.

I allow that some difficulty exists, because of the fact that the husband was an able-bodied man, from which I think it would follow that the wife, after his place of settlement was discovered, had no longer a claim to parochial relief. But if the husband had been a pauper I see no room for question. He cannot have two settlements at the same time, so that the one shall support him, and the other shall perform his obligation to support his wife. The same rule applies to the case of pupil children.

Nor can it, I think, be doubtful that if the children are to be supported by the parish which is maintaining the father, the obligation continues after his death. On the occurrence of that event they became paupers in their own right, but they have no settlement other than the settlement of their father.

I am aware that in the case of *Greig*, 3 R. 642, the Lord President says that the rule that "desertion is equivalent to death admits of no qualification except in this respect, that desertion only remains equivalent to death so long as the desertion lasts. The deserting husband may return, and then a new rule may come in to fix the parish which is to maintain him or his wife and family." The other Judges expressed opinions to the same effect, and I am sensible that they are of great weight. But if they can be read as applicable to the *species facti* which exists here, they were *obiter* only, for they were not necessary for the disposal of the case which was before the Court. A husband had deserted his wife at a time when he had a residential settlement to which the wife became chargeable. More than four years had elapsed from the date of the desertion, so that the husband, if alive, would have lost his residential settlement. The question was, whether the burden of maintaining his wife was thereby transferred to his birth settlement, The Court held, for the purposes of that question, that the desertion was equivalent to death, and that the husband could not lose his residential settlement after his death. They decided nothing more. They did not consider what was to be the effect of the husband being himself chargeable, and known to be chargeable, to another parish. So far as I see, the case of *Wallace* was not quoted, and I am not surprised. It had no bearing on the question which was before the Court.

I am therefore of opinion that the parish of Ormiston is bound to support the children, but only from the date of notice, viz., 27th October 1892.

LORD TRAYNER was absent.

The Court found that the parish of Ormiston was bound to support the three pupil children of George Bathgate from and after October 27th 1892, the date of the statutory notice sent by Prestonpans to Ormiston.

Counsel for the First Party—Ure—G. Stewart. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Second Party—Macfarlane—Younger. Agents—W. & J. Burness, W.S.

Thursday, January 10, 1895.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

M'RAE AND ANOTHER (MACKENZIE'S TRUSTEES) *v.* GRAY AND OTHERS.

Process—Trustees—Exoneration and Discharge—Multiplepoinding—Competency.

Trustees were about to distribute a trust-estate among the beneficiaries when a claim was made against it, which certain of the beneficiaries refused to admit, while others desired that it should be paid. The trustees thereupon brought an action of multiplepoinding against the beneficiaries and the claimant for the purpose of obtaining their exoneration and discharge. They did not aver that the beneficiaries had refused to grant them extrajudicial exoneration and discharge.

Held (*rev.* judgment of Lord Kyllachy) that the action was incompetent.

Expenses—Trustees—Incompetent Action for Exoneration and Discharge—Personal Liability.

Held that trustees who had brought an action of multiplepoinding for their exoneration and discharge which was found to be incompetent, were personally liable for expenses.

George M'Rae, stone polisher, Peterhead, and others, were the testamentary trustees of the late Hector Mackenzie, who died in 1893. The trust-estate amounted to about £300 (less legacies of £40, Government duties, and expenses of administration), and

consisted entirely of certain rights of succession vested in the testator as heir-at-law to two brothers, who had predeceased him, and had died abroad. For ten years prior to 1892 Mackenzie had received relief from the Parochial Board of Peterhead, amounting in all to £64, which had been paid in ignorance of his rights of succession. This sum the Parochial Board sought by action to recover from the trustees. Of the four beneficiaries, two were willing to acquiesce in the claim being met, while two refused to sanction payment. The trustees, who were prepared to distribute the estate among the beneficiaries, thereupon raised an action of multiplepoinding against all the beneficiaries and the Parochial Board of Peterhead, in which the whole trust-estate formed the fund *in medio*, to have it found and declared that they were only liable in once and single payment of the estate, and in order to be exonered and discharged of the office of trustees.

The pursuers stated that, having been advised that the claim of the Parochial Board was unfounded, they had considered it their duty to state a defence to the action, and had called upon the dissentient beneficiaries to relieve them thereof. "The pursuers do not desire, in view of the antagonistic positions taken up by the beneficiaries, to act longer in the trust, and they have therefore called the whole parties claiming to participate in said estate in the present action for the purpose of obtaining judicial exoneration of their intromissions as trustees foresaid, and to enable the respective claimants of the fund *in medio* to be ranked and preferred thereto according to their respective rights and interests."

They pleaded, *inter alia*—"(2) Questions having arisen in regard to the distribution of the trust-estate, as condescended on, the pursuers and real raisers are entitled to raise the present action for their exoneration, and decree should be pronounced therein as concluded for."

The dissentient beneficiaries pleaded—"(1) The action is unnecessary. (2) There being no double distress and no competing claims among the residuary legatees the action is incompetent. (3) The claim made upon the trust-estate by the Parochial Board of the parish of Peterhead being one that can competently be decided in the action raised at their interest, the pursuers have no interest to insist in the present proceedings, and the action should therefore be dismissed. (5) In the circumstances, the pursuers should befound individually liable in expenses."

The pursuers subsequently allowed the action at the instance of the Parochial Board to go against them by default, the dissentient beneficiaries having refused to take up the defence.

Upon 12th December 1894 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Repels the objections to the competency of the action: Finds the pursuers liable in only once and single payment, and appoints all parties claiming an interest in the fund *in medio* to lodge their claims within ten days: Finds the pursuers entitled to the expenses of the discussion of the competency as against the objectors," &c.

The dissentient beneficiaries reclaimed, and argued—The action was incompetent. There was no double distress—*Russel* v. *Johnston*, June 1, 1859, 21 D. 886, especially judgment of Lord Kinloch, Ordinary, which was approved in *Fraser's Executrix* v. *Wallace's Trustees*, February 15, 1893, 20 R. 374. There was no allegation that the beneficiaries had refused to grant extra-judicial exoneration and discharge; indeed, they were quite willing to do so. In any case, the whole estate should not have been thrown into Court, but only the £64, as to which the difficulty had arisen—*Macnab* v. *Waddell*, May 30, 1894, 21 R. 827.

Argued for the trustees—The action was competent—*Dunbar* v. *Sinclair*, November 14, 1850, 13 D. 54; *Blair's Trustees* v. *Blair*, December 12, 1863, 2 Macph. 284; *Jamieson* v. *Robertson*, October 23, 1888, 16 R. 15. The cases in which such actions had been held incompetent had been raised by beneficiaries, not by trustees. This was not merely an action of multiplepoinding, but was also an action for exoneration and discharge. A dispute as to the distribution of the estate having arisen, the trustees necessarily brought this action for their own protection. They might have been held personally liable by the one set of beneficiaries if at their own discretion they had unsuccessfully contested the claim of the Parochial Board, and by the other if they had paid the claim without litigating. That claim being for £64, with possible expenses of litigation, bore such a large proportion to the whole estate it was right to make the whole estate the fund *in medio*.

At advising—

LORD ADAM—The question in this case is as to the competency of an action of multiplepoinding raised at the instance of two gentlemen, who are the trustees of the late Hector Mackenzie. There are two grounds stated upon which the action is said to be competent—first, because there was double distress; and secondly, that in any view the trustees were entitled to throw the estate into Court because they required judicial exoneration. The first reason for bringing the action, which is mixed up with the second reason, arose in this way—The late Hector Mackenzie received parochial relief for ten years in ignorance, until shortly before his death, that a brother had died leaving him a considerable sum. The Parochial Board brought an action against Hector Mackenzie's trustees for repayment of £64, the amount of relief granted by them. Two of the beneficiaries objected to this claim being met, and it is in respect of that claim against the trustees that there is said to have been double distress. It is said that there was a claim by the Parochial Board and a claim by the beneficiaries as to the same money, and that that constituted double distress. Now, the claim of the Parochial Board if good was only a claim of debt against

the trust-estate, and was not in the class with the claim by the beneficiaries. There was therefore not double distress in the ordinary sense of the term.

But then it is said that of the four residuary legatees two were for admitting the claim of the Parochial Board, while two were for resisting it, and the trustees say that they did not know what to do. They go on to state that "having been advised that the said claim was unfounded, they considered it their duty to state a defence to the action" brought to enforce it, "and they have called upon the present defenders to relieve them thereof." After having done that, and without taking any steps to find out whether or not they would experience any difficulty in getting their discharge, they bring this action. No question having arisen as to their discharge, which we are now told the defenders were quite willing to give, they bring this multiplepoinding, and the ground which they state for doing so is this—"The pursuers do not desire, in view of the antagonistic positions taken up by the beneficiaries, to act longer in the trust, and they have therefore called the whole parties claiming to participate in said estate in the present action for the purpose of obtaining judicial exoneration of their intromissions as trustees." The only reason they give, therefore, is, that they apprehend some trouble in administering the estate in the future, and they propose to put an end to their administration by this multiplepoinding. This procedure is altogether premature. If they had been able to say that the beneficiaries refused to grant them an extrajudicial discharge the case would have been different, but they are not entitled, merely because they anticipate trouble, to take this course. I am unable therefore to concur with the judgment of the Lord Ordinary, and think this multiplepoinding should be dismissed as incompetent.

LORD M'LAREN—It is not maintained here that there was any difficulty of construction of the trust-deed under which the trustees are acting. This is always recognised as a ground on which the trustees, acting after due reflection, and in order to benefit the trust, may institute an action of multiplepoinding. There was no competition between the different sets of beneficiaries; there was no competition between creditors, which in general would only arise where the estate was insolvent. So far as we know the estate is solvent, and there is only one creditor, viz., the Parochial Board, who claim as alimentary creditors in respect of relief granted to the deceased.

It is not very clear on what grounds the right to institute this action is maintained, but the proposition seems to be that, whenever one of a body of beneficiaries objects to the trustees satisfying a claim made against the estate, this is equivalent to an objection to their administration such as would justify the trustees in bringing an action of multiplepoinding. I should be sorry if any such idea got abroad or were countenanced by the profession. It would be fatal to the private administration of trust-funds, which is in general the most economical and the best. If a beneficiary objects to a claim being met, I am not prepared to say that the objection should have weight given to it if the trustees are persuaded that the claim is well-founded. That is why the administration has been put into their hands for them to deal with the estate as they think right. They must have the courage of their opinions; they are entitled to take legal advice if they think it necessary. If the trustees are satisfied the debt is due, it is their business to pay it notwithstanding the remonstrances of discontented beneficiaries, or they may call upon the creditor to constitute his claim. I am not disposed to say that trustees are to defend the claim and put the estate to expense unless they think that they have a fairly arguable defence. Here, I assume, they thought they had none, because they have allowed decree to go against them by default.

It was suggested that a multiplepoinding might have been brought as to the part of the trust-estate in dispute, but I cannot look upon this £64 as a separable part. I rather think it is a case where the trustees, if they saw good grounds for doing so, might defend the action brought by the Parochial Board, making their expenses a valid charge against the trust-estate.

In the circumstances I agree with Lord Adam in thinking that a multiplepoinding was not a competent form of procedure, and that the action should not be allowed to proceed further.

LORD KINNEAR—I agree, although at one time I thought the point a narrow one. If it had appeared that the trustees could not obtain complete exoneration without judicial procedure, I should have desired further time for consideration. But it now appears from what Mr Abel has stated, and nothing was said to the contrary, that there will be no difficulty in the trustees obtaining an extrajudicial discharge. If that be so, the position is that the whole trust-estate has been thrown into Court because of a single claim of debt, the validity of which is said to have been disputed by some of the beneficiaries. Now, I am not prepared to say that, if beneficiaries object to a claim against the estate, the trustees are bound to decide the question for themselves, and to make payments upon their own responsibility which they know may be challenged by the beneficiaries when they come to give an account of their trust. Gratuitous trustees are not bound to run any such risk. If they think a claim should not be resisted, although it is disputed by the beneficiaries, I think they are entitled, for their own safety, to obtain a judicial decision of the point in dispute, and if they raise a multiplepoinding for that purpose, its competency does

not depend upon double distress, but upon the right to exoneration. But then it has been decided that the mere existence of a dispute as to a single debt of the testator's is not a sufficient reason for throwing a whole trust-estate into Court, and, although it does not appear that in any of these cases the trustees themselves were the real raisers of the multiplepoinding, I do not think that should make a difference, unless it can be shown that the multiplepoinding was required for their exoneration. It is not reasonable that every creditor and every special legatee should be compelled to come into Court and lodge a condescendence and claim before he can obtain payment because of a question about some other claim—it may be of inconsiderable amount—with which he has no concern, and which cannot affect his own either in principle or amount; and therefore, if this action had been otherwise well founded, it appears to me that the fund *in medio* should not have included the entire estate. There is nothing alleged to make the process competent, except as to the particular sum in dispute. But I agree that even as to that sum the multiplepoinding is unnecessary. The averment is that the trustees informed the beneficiaries that a claim had been brought against the estate which they were advised was not well founded. It is not surprising that some of the beneficiaries should have said that, if that were so, it ought not to be paid. But it now turns out, as we were told at the bar, that it is a good claim, and that it must be paid. I agree that in these circumstances the action was premature.

The LORD PRESIDENT concurred.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action as incompetent.

The reclaimer moved for expenses against the trustees as individuals.

LORD PRESIDENT—My view is that these trustees would have got exoneration and discharge in due course without resorting to this unusual procedure for their own protection, and, as they have used inept and inappropriate means, I think they must be held personally liable.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I have doubts, but on a question of expenses I am not prepared to dissent.

Counsel for the Pursuers—Cheyne—Cook. Agent—Horatius Stewart, S.S.C.

Counsel for the Defenders—Abel. Agent—Alex. Morison, S.S.C.

Friday, January 11.

SECOND DIVISION.

[Sheriff-Substitute at Hamilton.

AITKEN AND OTHERS *v.* MERRY & CUNINGHAME, LIMITED.

Interdict—Trespass—Private Road—Coal Mine—Use of Private Road leading to Coal Mine and Colliers' Houses—Pickets.

The tenants of a colliery built on land, let to them along with the mine, houses which were occupied by miners employed in the colliery. These houses and the coal mine were approached by a private road through land included in the lease.

Early one morning a picket composed of members of a miners' trade union, none of whom were employed in the colliery, entered the private road in spite of the remonstrances of the mine officials, and attempted to persuade the miners inhabiting the houses not to work on that day.

The tenants of the colliery brought an action of interdict against the members of the picket. The defenders alleged but failed to prove that the miners inhabiting the houses desired to be interviewed by the picket.

Held that a trespass had been committed by the picket, and interdict *granted* against their trespassing on the private road or the lands adjoining occupied by the pursuers.

Sheriff—Process—Proof—Mode of Recording Evidence—Sheriff Court Act 1853 (16 and 17 *Vict. cap.* 80) *sec.* 10—*Evidence Further Amendment Act* 1874 (37 *and* 38 *Vict. cap.* 64).

Observed by Lord Young that it is the duty of the Sheriff hearing a proof to dictate the evidence to the shorthand writer, and that the practice of permitting the shorthand writer to take it down at length was irregular and contrary to statute.

Messrs Merry & Cuninghame, coal and ironmasters, Glasgow, raised an action in the Sheriff Court at Hamilton, against William Aitken and other miners at Blantyer, praying the Court to interdict the defenders from "entering or trespassing" upon any portion of the lands of Bardykes, Spittal, or Mavishill, or any of the private roads therein, so far as the said lands or roads were occupied and possessed by the pursuers in connection with their colliery known as Bardykes Colliery, and to grant interim interdict.

The facts of the case were as follows:—The pursuers were tenants of the colliery known as Bardykes Colliery near Blantyre in virtue of a thirty-one years' lease dated in 1879. By the said lease powers were conferred on them, *inter alia*, to make and use the roads necessary for their workings under the lease, to build workmen's houses, and to take and occupy any portions of the surface required for the above