others, and there are disagreeables connected with repairs, always going on somewhere in towns to a greater or less extent, which must be put up with, and the occasioning of which will give rise to no claim of damages. But it is proved here that the goods in the pursuer's shop were to a large extent destroyed, so that they had to be thrown out, and that the manner in which the whole operations were conducted was such that people would not resort to the shop, and that the business fell off to an extent which is capable of the most distinct proof, not because of any circuity made necessary by an erection on the pavement, but because the atmosphere of the place was rendered such that people would not pass through it, it being the same atmosphere which prevented customers from coming to the shop, destroyed the goods, and rendered them unsaleable. It is vain to say that damage of that kind and extent was not avoidable, and that repairs and improvements cannot be made without such injury being caused. Being therefore of opinion that the injury is established as matter of fact, without deciding any more general principles of law, I think that sufficient to infer liability to make it good to the neighbour. I do not think that the amount allowed by the Sheriff-Substitute will do more than compensate the pursuer for the direct damage caused by the operations of his neighbour the defender Fraser, for his own purposes and convenience. I am of opinion, therefore, that the judgment of the Sheriff-Substitute ought to be affirmed in substance, and that the pursuer should have decree for £30.

Lord Craighill—I am of the same opinion. It is not necessary to decide the important and difficult questions of law submitted to us.

Lord Rutherfurd Clark—I am of the same opinion. I decide the case solely on the ground that by the defender Fraser's operations injury was caused which might have been avoided.

This interlocutor was pronounced:—

"Find in fact that the operations of the respondent (defender) William Fraser, in the record referred to, were so executed and performed as to occasion real injury and damage to the property of the appellant (pursuer), also in the record referred to, and that the said injury and damage so occasioned might have been avoided by due care on the part of said respondent in the execution and performance of said operations: Find in law that the said respondent is liable in damages to the appellant for the injury and damage so occasioned to his property: Assess the damages at the sum of £30 sterling: Recal the interlocutor appealed against: Ordain the said respondent to make payment to the appellant of the said sum of £30: Find that no misconduct or other ground of action has been proved against the respondents (defenders) Alexander Galbraith & Company, and assoilzie them from the conclusions of the action," &c.

Counsel for Appellant—Guthrie Smith—A. J. Young. Agents—Adamson & Gulland, W.S.

Counsel for RespondentFraser—D.-F. Kinnear, Q.C.—Lang. Agent—J. Young Guthrie, S.S.C.

Counsel for Respondents Galbraith & Co.—H. J. Moncreiff. Agents—Carment, Wedderburn, & Watson, W.S.

Friday, October 21.

SECOND DIVISION.

[Sheriff of Midlothian.

(Before Lords Young, Craighill, and Rutherfurd Clark.)

GALLOWAY AND NIVISON *v.* POLLARD.

Process—Multiplepoinding—Competency—Double Distress—Decree for Expenses in Name of Agent-Disburser.

In an action for delivery of certain documents, a trustee under a voluntary trust-deed was unsuccessful and was found liable in expenses of process. Creditors of the successful party arrested these expenses in his hands, and thereafter the agents for the successful party obtained decree for these expenses in their own names, and charged the trustee as an individual to pay them. The arresting creditors having brought a furthcoming in pursuance of their arrestments, the trustee brought a multiplepoinding for his own protection. *Held* that there was double distress, and that the process was competent—Lord Rutherfurd Clark *dissenting and holding* that inasmuch as the right of the agents disbursers was a right constituted by a decree of Court, the right of the arresting creditors of their client could not compete with it, and that there was therefore no double distress.

James Pollard, chartered accountant in Edinburgh, was trustee under a disposition executed for behoof of creditors by James Smith, merchant in Kirkliston. In that capacity he raised an action in the Sheriff Court of Midlothian against Meikle & Wilson, accountants in Edinburgh, for delivery of certain books belonging to Smith which were in their hands, and which they claimed a right to retain for payment of work done in connection with them. Pollard having succeeded in this action in the Sheriff Court, Meikle & Wilson appealed, and the Second Division on 6th November 1880 (*ante* vol. xviii. p. 56, 8 R. 68) recalled the Sheriff's judgment, and found them entitled to retain the books, and to expenses against Pollard in both Courts. These expenses amounted in all to £33, 1s. 11d. Pollard having had in his hands a further sum belonging to Meikle & Wilson, this sum, added to the expenses thus found due to them, amounted to £57, 4s. 9d. On 18th November 1880 creditors of Meikle & Wilson used arrestments in Pollard's hands for the sum of £50 due by Meikle & Wilson to them; and this arrestment was followed by others on 14th December and 21st February following. On 26th January 1881 the Auditor's report in the Sheriff Court action above alluded to was approved of, and the Court decerned for the expenses found due by the preceding interlocutor in name of William Galloway, S.S.C., who had acted for Meikle &

Wilson in the Sheriff Court, and of Abraham Nivison, S.S.C., who had acted for them in the appeal as agent-disburser. Galloway and Nivison then applied to Pollard for payment of these expenses, and the former gave him a charge for the amount decerned for in his favour. One of the arresting creditors raised a furthcoming against Pollard as arrestee and Meikle & Wilson as common debtors. Pollard then raised a process of multiplepoinding in the Sheriff Court of Midlothian, condescending on the sum of £57, 4s. 9d. above mentioned as the amount of the fund *in medio*, and calling as defenders Meikle & Wilson, the arresting creditors, and Galloway and Nivison. Galloway and Nivison pleaded that Pollard being liable to them as an individual in the expense due to them they were incompetently called, and that there was no double distress.

The Sheriff-Substitute (HALLARD) sustained their contention and dismissed the process *quoad* them, with this note:—"The claim of the defenders Galloway and Nivison, under the judgment of the Court of Session, is a personal one against the pursuer of this multiplepoinding. Implement at their instance cannot therefore be stopped by alleging such claims as form the main part of the pursuer's record. The pursuer is trustee for Smith's creditors, and arrestments have been used in his hands both by creditors of creditors to attach a share of the funds to be distributed, and by creditors of the debtor to attach the reversion. There may be double distress as to these liabilities of the pursuer as a trustee, but there is no double distress as to Nivison and Galloway's claims, which are liquid undisputed claims against the pursuer personally. Between these claims, which are practically one against the pursuer as an individual on the one hand, and the claims upon the trust-estate under the pursuer's administration on the other, there is not—there cannot be—a conflict. The ground for a process of multiplepoinding, therefore, fails so far as these two defenders are concerned."

The Sheriff (DAVIDSON) on appeal recalled this interlocutor, and repelled the plea of Galloway and Nivison, with this note:—"Of course there is no consideration at present as to how the fund *in medio* is to be distributed. The only question now is, Is the plea of Galloway and Nivison, that the action is incompetent so far as they are concerned, well founded? The position of matters seems to be this:—Meikle & Wilson obtained a judgment against the pursuer in the Court of Session on the 6th of November 1880, in which they were found entitled to their expenses. There were then, apparently, some funds of theirs in the hands of the pursuer, and the expenses to which they were thus found entitled increased these funds by the amount of the expenses due to them. On the 18th of November 1880 an arrestment was used in the hands of the pursuer of all funds due to Meikle & Wilson. Other arrestments followed. On, but not before, 26th January 1881, Galloway and Nivison obtained decree in the Court of Session in their own names as agents-disbursers for the amount of expenses that had been found due to Meikle & Wilson on the 6th of November previous. In these circumstances the pursuer brings this action to ascertain to whom he is to pay. He says all the funds of Meikle & Wilson, including my debt to them for the expenses of the action, have been attached.' Surely he is entitled to have his question as to the rights of parties judicially answered. If, immediately on decree being given, Mr Pollard had paid the expenses into Meikle & Wilson's hands, and obtained a receipt for them, could Galloway and Nivison have again demanded the expenses from him on the 26th of January? But the Sheriff is not now considering who is the preferable claimant."

Galloway and Nivison appealed to the Second Division, and argued—There was no double distress. Pollard was liable for these expenses as an individual, and had no defence. Besides, the claim of the agents-disbursers for the expenses was by well-settled law a preferable claim against the party found liable in them, and therefore they ought to have been paid without dispute. And Pollard was not entitled to diminish the fund by the expense of raising a process of multiplepoinding.

Argued for Pollard—There was a competition among those entitled to the fund *in medio*, and the true question was not which of the competing claimants had the stronger claim, but whether Pollard was bound to pay to the agents-disbursers, in the teeth of the arresting creditors' diligence, without the protection of this multiplepoinding.

At advising—

LORD CRAIGHILL—The present appeal brings up for review a judgment pronounced by the Sheriff of Midlothian in an action of multiplepoinding depending in his Court. The pursuer of the action, Mr Pollard, sought to bring a fund into Court in order that the right of competing creditors might be decided by the Court. The appellants here, Messrs Galloway and Nivison, who were called as defenders in the action, appeared and opposed the competency of the process, upon the ground that there was no double distress. The Sheriff-Substitute adopted that view, and dismissed the action, but the Sheriff on appeal to him recalled this interlocutor and repelled the objection to competency. This is the judgment the merits of which are now to be determined. I am of opinion that the interlocutor is right, and but for the circumstance that there is a difference of opinion on the bench I would feel no hesitation in coming to this conclusion.

The circumstances are these—Mr Pollard was in litigation with Meikle & Wilson in the Sheriff Court, and there he was successful, but upon appeal to this Court the judgment of the inferior tribunal was reversed, and Mr Pollard was found liable to Meikle & Wilson in the expenses of process. After the interlocutor by which this was determined had been pronounced, a creditor of Meikle & Wilson arrested in the hands of Mr Pollard any moneys that might be due by Mr Pollard to them, meaning thereby to attach the expenses in which Mr Pollard had been found liable. Subsequent in date to this arrestment the Auditor's report on the expenses in which Mr Pollard had been found liable was approved of on the motion of Messrs Galloway and Nivison, and decree for the taxed amount was given in their favour as the agents-disbursers. In this situation the arresting creditors, who have brought a furthcoming, insist upon payment from Mr Pollard, and their purpose is, if they can obtain it, to take decree in the furthcoming

by which payment will be compelled. On the other hand, Messrs Galloway and Nivison threaten to charge upon the decree which they hold, and the consequence was, that as Mr Pollard was pressed by both, and was apprehensive that if he should pay to either he might also have to pay to the other, the action of multiplepoinding referred to was raised by him for his own protection. If there was no double distress the action was incompetent, but if there was double distress the action was properly brought. It appears to me that the circumstances afford conclusive evidence of double distress. There is an arrestment by one creditor followed by a furthcoming. There is a threatened charge by another creditor upon a decree, and if these elements will not constitute double distress it seems to me that this can never be established. No doubt, were the merits of the controversy between the competing creditors *hujus loci*, we might be of opinion that the claim of Galloway and Nivison is the one that must be sustained. But the merits of the competition are not now presented for decision, and it would be an inversion of the course of procedure in actions of this character if the competency of this particular process were to be decided upon the assumption as to the merits of the claims which are in controversy. The counsel for the appellants spoke very confidently of assured success. He said there can be no doubt about the result, and he urged that the pretensions of the arresting creditors ought at once to be dismissed from consideration. In the end this opinion may be proved to be correct, but those experienced in the proceedings of courts of law will be disposed to think that such an anticipation would be an unsafe basis of judgment on the present occasion. All that Mr Pollard desires is that he should be relieved from the risk to which he is exposed. The very purpose of an action of multiplepoinding, where there is double distress, where there is serious competition between creditors of the common debtor, is to enable the holder of the fund to follow a course by which, in paying his debt, as he will do when he brings money into Court, he will be relieved from further liability to any of the competing creditors of the common debtor.

These are the views upon which the Sheriff proceeded in giving the judgment reclaimed against. They are also my views, and for that reason I am of opinion that the appeal ought to be dismissed and the interlocutor appealed against affirmed.

Lord Young—I concur with Lord Craighill. I must say that I think it is a pity that this question has been raised, rather than that the question should be tried between the arresters and the holders of the decree. I do not think that a party who has no good claim to a fund at all, whose claim on the contrary is totally unsound, but by the making of which claim he justifies the debtor in resorting to a multiplepoinding, is to be allowed to reduce the fund to the party legally entitled thereto. I repeat what I said during the discussion, that there have been cases in the past, and may be again in the future, where the expenses of a multiplepoinding rendered necessary by an unreasonable claim are imposed on the persons lodging such a claim, and in which no part of the expenses of the cause, even those for bringing it into Court, are put on the party so bringing it.

Looking at the judgment of the Sheriff, it appears that the raiser Pollard was, as Smith's trustee, liable to Meikle & Wilson in the expenses of a previous action. In these expenses Meikle & Wilson had obtained decree. It was found by decree in that action that he, Pollard, was liable in these expenses. This was a liability established by a judicial finding, and was extractable. Now, the creditors of Meikle & Wilson have arrested the expenses found due by this decree in Pollard's hands. I do not say that that arrestment was competent. I give no opinion on that point; but arrestments were used, and were followed by an action of furthcoming which is now in dependence. On the Auditor's report of expenses being approved, the agents-disbursers asked for and got decree in their own names. It may be and probably is good law that the decree in their names is preferable to arrestments on the preceding finding, but the arresters do not admit that, but raise an action of furthcoming. They are proceeding on a different view of their right. In these circumstances Pollard, who admits his liability to pay the money to some one, would doubtless be satisfied to pay it to Galloway and Nivison on their undertaking to protect him against the arresting creditors. They, however, would not do that, and say "our claim is too clear;" and Mr Pollard says—"I am not bound to pay both, and am not interested in the question at all; let the party who has a right to the money be found entitled to it in the course of judicial proceedings. I am not going to pay both. You must fight the question between yourselves." And so he raises a multiplepoinding. The Sheriff, with whom Lord Craighill concurs, thinks that is not an unreasonable or illegal position to take up, although very possibly the competition between the arresters and the agents-disbursers may be very easily decided. I concur in that opinion.

Lord Rutherfurd-Clark—This to my mind is an important question of procedure, and I regret that I am called on to decide it after so little argument and so little citation of authority. I regret it all the more as I am not able to concur in the decision which is about to be pronounced.

The case stands thus—The raiser of this multiplepoinding had a litigation with Meikle & Wilson. It was unsuccessful, and Meikle & Wilson were found entitled to expenses. After this finding was pronounced arrestments were used in the raiser's hands at the instance of certain creditors of Meikle & Wilson. But Meikle & Wilson obtained no decree for their expenses. On the contrary, decree was pronounced in favour of Galloway and Nivison as agents-disbursers. There has been no attempt to set aside that decree.

The raiser has brought this action of multiplepoinding in order to distribute under judicial authority the sums of money which by decree of this Court he has been decerned to pay to Galloway and Nivison. He maintains that there is double distress by virtue not only of the arrestments which have been used in his hands, but of an action of furthcoming which has followed upon them. Galloway and Nivison object to the

competency of the action, and in my opinion their objection is well founded.

The debt due to the objectors has been ascertained in the most formal manner—viz., by the decree of this Court. The raiser has no defence against their claim, nor indeed does he offer any. His case is simply that he is not in safety to pay what the Court has ordered him to pay by reason of the arrestments and the furthcoming.

In my opinion nothing can be interposed between the objectors and implement of the decree save a claim made under the decree itself, as, for instance, under arrestments used by creditors of the objectors. To hold otherwise would be to set aside the decree; and to sustain this multiplepoinding is to hold that it is possible for the Sheriff to deprive the objectors of the benefit of their decree, and to assign the money due under the decree to a claimant who has no right under or through the persons holding it. Hence, in my opinion, the multiplepoinding is incompetent, because there is no double distress.

It is true that there are two claims on the same fund. But I have always understood that the mere fact that two persons make a claim on the same fund does not amount to double distress. Each claim must have a possible legal basis, and in my opinion this cannot be predicated of a claim by a stranger to a decree, who maintains that it shall not be implemented. It is no doubt hard on the raiser that he is harassed by diligence at the instance of the creditors of Meikle & Wilson. But he is in no worse position than any other person against whom unconsidered or reckless lawsuits are brought. His defence against the furthcoming simply is that he had no funds.

It has been said that the unsuccessful claimant may be made to pay the whole expenses of the multiplepoinding, and that in this way all interests will be served. But if the multiplepoinding is competent, the raiser is entitled, in accordance with what I believe to be the invariable practice of the Court, to have his expenses out of the fund *in medio*. This, in my opinion, is his right.

The Lords refused the appeal, with expenses.

Counsel for the Appellants—J. C. Smith—Strachan. Agent—R. Broatch, L.A.

Counsel for Respondent—Mackintosh--Guthrie. Agent—J. F. Mackay, W.S.

Tuesday, October 25.

FIRST DIVISION.

[Sheriff of Aberdeen and Kincardine.

DAVIDSON *v.* THE UNION BANK.

Trust—Trust-Deed for Behoof of Creditors—Accession.

Held that a demand for an interim dividend made by a bank on a trustee under a trust-deed for behoof of creditors, did not amount to accession, so as to bar subsequent action by the bank for recovery of their claim against the insolvent.

The Union Bank of Scotland sued William Davidson, plumber, Aberdeen, in the Sheriff Court of Aberdeen, for payment of £152, 3s. 10d., being the balance due to the bank on his account-current with them. The accuracy of the account was admitted, but the following facts were stated in defence:—The circumstances of the defender having become embarrassed, he granted a trust-deed for behoof of creditors on 3d June 1880, and a trustee was appointed to realise his estate. In the course of the negotiations which ensued, the agent for the Union Bank wrote to the trustee, asking that, as the bank was pressing for recovery of their debt, and as certain assets had been recovered by the trustee, he should pay an interim dividend.

On these facts the defender pleaded—"(1) The pursuers having acceded to the said trust-deed, they are, especially under the circumstances stated, barred from suing the present action except to the extent of obtaining a decree of constitution at their own expense, and they are barred from taking proceedings against the defender thereon."

The Sheriff-Substitute (Dove Wilson) decerned against the defender. He added this note:—"The debt is admitted, and no discharge is produced; but it is said in the defence (so far as relevant) that the pursuers have consented to a trust settlement of the defender's affairs, to the effect of preventing them from doing anything to recover their debt except await the action of the trustee.

"The proper evidence of such a consent is either actings or writings, and parole evidence is not admitted except for the purpose of making these intelligible. No writing of consent is produced; but it is said that the pursuers lodged a claim with the trustee, and there are produced certain letters showing that they were willing to accept a payment from him to account. But nothing has followed on these actings. The trustee has not paid anything, but prefers (it is said) using the trust-funds in a litigation, which (it is again said) is more for the benefit of the insolvent than of his creditors. The pursuers now prefer to recover their debt in the ordinary way, and it is difficult to see what has happened to prevent them. Merely being willing to accept payment from the trustee cannot be pleaded as an election to take him as their sole debtor in place of the insolvent."

On appeal, the Sheriff (Guthrie Smith) adhered.

The defender appealed to the Court of Session, and argued that, on the above facts, the bank must be held to have acceded to the trust-deed, and to be therefore barred *personali exceptione* from succeeding in this action.

Authorities — 2 Bell's Comm. (3d ed.) 499; *Marianski* v. *Wiseman* (*M'Lean's Trustee*), March 10, 1871, 9 Macph. 673; *Athya* v. *Clydesdale Bank*, Jan. 28, 1881, 18 Scot. Law Rep. 287.

The Lords, without calling upon counsel for the respondent, refused the appeal.

Counsel for Appellant—Trayner—J. M. Gibson. Agent—William Officer, S.S.C.

Counsel for Respondents—Wallace—Maconochie. Agents—J. & F. Anderson, W.S.