must be used importing a real right as between the two tenements, not a mere personal arrangement between individuals. I think the missive contains nothing but such a personal arrangement. It simply goes to this, that Mr Lindsay is to sign his concurrence to Mr Martin's then proposed plans, on the understanding that these plans do not involve any building higher than a certain point within 9 or 10 feet of the march. What his signature to the plans was to obtain was a limitation of the plans to this effect. In substance, it was simply that the plans (which the missive implies had not then been drawn out) should be drawn out on this footing. The plans, if proceeded with, were to be proceeded with on this design, and no other. Nothing more, and nothing less than this, is involved in the proposal. It might well be that, as between Martin and Lindsay, if the former proceeded with his plans, he was barred from so executing these plans as to encroach on the 9 or 10 feet. How far he might afterwards change his mode of occupying the back-ground, and effectually, as against Lindsay, apply for leave to deal more largely with the 9 or 10 feet, needs not to be here inquired into. If the proposed plans were proceeded with, Mr Martin personally was, I think, bound, in their execution, to maintain the proposed limitation. But Mr Lindsay could ask no more than that, if these plans were proceeded with, it should be under this limitation. Admittedly, the plans were not proceeded with; and the proposed limitation fell, as I think, to the ground. Mr Lindsay of course retained any right which he had, independently of this letter, of objecting to Mr Martin building on the back-ground. But he could found no claim of servitude on the letter, which contained nothing but a personal arrangement, in its own nature contingent, and the condition of which was never purified. The question, at the same time, is not now between Martin and Lindsay, but between singular successors in both tenements; and as between these I hold *a fortiori* that no right exists.

By the judgment of the Dean of Guild appealed from, this letter has been found to constitute a permanent predial servitude, holding good in favour of Lindsay's tenement against Martin's, whether Mr Martin's then projected plans were carried out or not. And this is so held where very clearly, independently of this letter, there was no servitude *altius non tollendi* in favour of the one tenement over the other; but Mr Martin was entitled to build to any height he pleased up to the march between the properties. It is held that by this letter there was, *eo ipso*, constituted a real right, effectual in all time coming, in favour of the one tenement over the other, and holding good for and against the singular successors in both tenements. I cannot arrive at this conclusion. I consider all that passed to have been at best nothing more than a personal arrangement between the individuals; and the whole arrangement to have fallen to the ground when the proposed plan was not proceeded with. I therefore think that the interlocutor of the Dean of Guild should be recalled, and a judgment pronounced repelling the claim of servitude at the respondent's instance.

The Court accordingly pronounced the following interlocutor:—"Having heard counsel on the appeal, recall the Dean of Guild's interlocutor of 31st August 1871; find that, according to the sound construction of the missives of sale, dated 4th and 7th March 1857, there was not constituted over the petitioner's property, No. 54 Hanover Street, in favour of the respondent's property, any permanent right of servitude *non ædificandi* or *altius non tollendi*, but only an obligation on the purchaser, in consideration of the seller consenting to an application by the purchaser to the Dean of Guild to restrict his proposed buildings under that particular application, in the manner and to the extent stated in the said missives. Remit the cause to the Dean of Guild to proceed farther, as shall be just, and consistent with the above finding," &c.

Agents for Petitioner and Appellant—Menzies & Coventry, W.S.

Agents for Respondent—Thomson, Dickson, & Shaw, W.S.

Saturday, May 24.

SMITH *v.* PENDREIGH AND OTHERS.

Process—Multiplepoinding—Double Distress.

A, one of the partners in a bankrupt firm, handed over to B a sum of money for the purpose of buying off certain creditors who opposed an offered composition. This sum of money was averred by C, in whose employment A was, to have been obtained from him by A for other purposes. The creditors having refused the additional sum offered to them, B retained the money, and C raised an action of multiplepoinding to determine the right to the fund.—*Held* that the action was competent, and objection that there was no double distress *repelled.*

Mr George Pendreigh senior carried on business at Bonnington Mills, near Edinburgh, as a miller and grain merchant, and James Pendreigh, George Pendreigh junior, John Pendreigh, and Thomas Graham Scott, were also in business as grain merchants and mill-masters, under the firm of J. & G. Pendreigh, of which firm they were the sole partners. The said James Pendreigh and George Pendreigh junior also carried on a separate business as brewers, under the same name, but with a different firm, of which the said James Pendreigh and George Pendreigh junior were the sole partners. The estates of the said two firms, and of the said James Pendreigh, George Pendreigh junior, John Pendreigh, and Thomas Graham Scott, were sequestrated on the 16th day of March 1869, and Mr Frederick Hayne Carter was appointed trustee on the sequestrated estates.

The bankrupts, soon after their examination, offered the creditors on both estates a composition of 7s. 3d. per pound, but the offer was opposed by some of the creditors, including Messrs D. M'Laren & Company, of Leith, who believed that the estate was able to pay a composition of at least 9s. per pound. In consequence of this opposition Mr Daniel Smith, at the request of some of the creditors, proposed to Mr George Pendreigh junior that he should buy off the opposing creditors by giving them a sum of money over and above the composition. In pursuance of this proposal Mr George Pendreigh junior, on 29th April 1869, lodged in the hands of the said Daniel Smith the sum of £375 for the purpose of arranging with the opposing creditors. Daniel Smith accordingly paid the above fund to the opposing creditors, and they withdrew their opposition; but having soon after

become alive to the penalties and forfeitures of the 150th section of "The Bankruptcy (Scotland) Act, 1856," they immediately returned the said sum of £375 to Daniel Smith, who retained it in his possession. In consequence of this, Mr George Pendreigh senior, who averred that the money belonged to him, and had been obtained by George Pendreigh junior for business purposes, raised a multiplepoinding in the name of Daniel Smith, as holder of the fund. Besides Mr George Pendreigh senior, the real raiser, Frederick Hayne Carter, as trustee on the sequestrated estates of James Pendreigh, George Pendreigh, John Pendreigh, and Thomas Scott Graham, as above narrated, was called as defender.

The pursuer and nominal raiser objected to the action as incompetent, on the ground that there was no averment of double distress.

The Lord Ordinary (GIFFORD) pronounced the following interlocutor and note:—

"*Edinburgh*, 14*th March* 1872.—The Lord Ordinary having heard parties' procurators on the summons, and on the objections for the nominal raiser, No. 5 of process, allows the summons to be amended as proposed; and this having been done at the bar, and parties farther heard, repels the objections to the competency of the action of multiplepoinding, and finds the nominal raiser liable only in once and single payment, but reserving to the nominal raiser all claims of retention or other claims competent to him as accords: Appoints the summons and process to be intimated to Messrs D. M'Laren & Company, merchants, Leith, and to the individual partners of that firm; and appoints all concerned claiming an interest in the alleged fund *in medio* to lodge condescendences and claims by the second box-day in the ensuing vacation, and reserves meantime all questions of expenses.

"*Note.*—At first sight the nominal raiser's objections appear very strong, and the Lord Ordinary was greatly impressed with the argument submitted in support thereof. Even as amended, the summons scarcely avers double distress, but only that competing claims may possibly arise.

On farther consideration, however, the Lord Ordinary thinks that the present case is exceptional, and that the action of multiplepoinding is competent. The circumstances are very peculiar. On the face of the nominal raiser's objections he himself has no right to the fund. He holds it merely as trustee either for the party from whom he received it—Mr Pendreigh junior—or for the party to whom the money really belongs. The real raiser claims it on the ground that the money is his property; and it is plain that in a direct action the nominal raiser could not pay in safety without calling Mr Pendreigh junior, his trustee, and probably Messrs M'Laren. Thus an action of multiplepoinding is really fairly required for the nominal raiser's exoneration, and he seems to have no legitimate interest to object thereto, and to insist upon being cited in an ordinary petitory action. All questions of expenses are reserved, and the nominal raiser will be kept safe and *indemnis*. As Messrs M'Laren may have an interest in the fund, intimation to them seems proper."

The pursuer and nominal raiser reclaimed.

WATSON and TRAYNER for him.

SOLICITOR-GENERAL and J. G. SMITH for defenders.

LORD PRESIDENT—I entirely agree with the Lord Ordinary in thinking that this is a proper case for a multiplepoinding.

The other Judges concurred.

Agents for Pursuer—Scarth & Scott, W.S.

Agent for Real Raiser and Defender—William P. Anderson, S.S.C.

Saturday, May 24.

HUTCHISONS & WEIR *v.* BEVERIDGE.

Contract—Arbitration.

In a contract for building a mansion-house it was provided that whatever additional work might be done, or whatever deduction might be necessary in consequence of alterations, the value should be calculated according to a schedule of prices by the architect, whose calculation should be held final or binding. It was further provided that in case any difference should arise as to the true meaning of the contract, or as to the execution of any part of the work, or as regarded the implement or carrying into effect of the provisions contained in the contract, the architect should be sole arbiter. The mason work was finished, with some alterations, but a difference arose between the parties as to payment. *Held* that a petition presented by the builders, praying that the Court should ordain the proprietor to deliver up the contract to the architect, in order that, as arbiter under it, he might determine the claims of the parties, was irrelevant, and should be dismissed.

By contract, dated in June and August 1870, Hutchisons & Weir, builders, Dunfermline, contracted to execute the mason work of a mansion-house which Mrs Beveridge, of Hospital Acres, was about to erect. The said contract provided as follows:—"Declaring that whatsoever additional work may be done beyond what is shewn on the said plans, and stated in the said specification, or whatever deduction there may be in consequence of such alterations, the same shall be ascertained and fixed, and the value thereof calculated according to the said schedule of prices, and that by the said Peter Maccallum or other architect for the time, whose calculation shall be held to be final and binding on the parties, and should any additional work be done which is not priced in the said schedule of prices, the said Peter Maccallum or other architect for the time, shall fix the price to be paid therefor, and his decision shall be final and binding on the parties." By the said contract it was further provided as follows:—"And in case any difference or differences shall arise with respect to the true meaning of the present contract, or as to the execution of any part of the work, or as regards the implement or carrying into effect of the provisions herein contained, the whole parties hereto submit and refer such difference or differences to the determination of the said Peter Maccallum, whom failing, of such other architect as may be appointed by the said first party, as sole arbiter, and they hereby bind and oblige themselves, and their respective foresaids, to abide by and fulfil whatever he shall determine in the premises, in whole or in part, by decree or decrees arbitral, whether interim or final, to be pronounced by him." Under this contract the mason work of the house was completed. But certain additional work beyond what was shewn on the plans was done, for which Hutchisons & Weir claimed additional