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

payment; while, on the other hand, certain parts of the work were not executed, and for these Mrs Beveridge claimed deduction of the price,—and in reference to these claims disputes arose between the parties.

In these circumstances Hutchisons & Weir presented a petition, in which Mrs Beveridge was respondent, to the Sheriff-Substitute, praying him "to decern and ordain the respondent instantly to deliver the said contract between the respondent, on the one part, and the petitioners, Hetchisons & Weir, and other parties therein named, on the other part, and that to the said Peter Maccallum, architect in Dunfermline, as the acting architect and sole arbiter nominated therein, to be retained by him so long as the same may be necessary, for the purpose of proceeding with and determining the claims of the petitioners, Hutchisons & Weir, under the submission therein contained between the respondent and the petitioners, Hutchisons & Weir."

The Sheriff-Substitute (LAMOND) pronounced the following interlocutor:—

"*Dunfermline, 28th February* 1872.—The Sheriff-Substitute having considered the closed record and productions, and heard parties' procurators; Finds that the petitioners have not set forth facts relevant or sufficient to support the prayer of the petition, therefore dismisses the petition, and decerns; Finds the respondent entitled to expenses, of which allows an account to be lodged, and remits the same to the auditor to tax and report."

The petitioners then appealed to the Sheriff (CRICHTON) who adhered to the judgment of the Sheriff-Substitute.

The petitioners appealed to the Court of Session.

RHIND for them.

At advising—

LORD PRESIDENT—This petition is utterly absurd, for the contract, in as far as the parties are concerned, has been executed. The only matter between them is, that the price which is due has not been paid, and for this an action might be raised. The builders are entitled to extra pay for additional work, and the employers, on the other hand, are entitled to deduct for work contracted for, but not executed. This is a mere matter of calculation, which the architect is a fitting person to make, but it has nothing to do with the submission, and even if it had, why should the petitioners ask the Court to order delivery of the contract?

The other Judges concurred.

The Court refused the appeal, with expenses.

Agents for Petitioners—Menzies & Cameron, S.S.C.

Agents for Respondents—Duncan & Black, W.S.

Tuesday, May 28.

MACKENZIE AND OTHERS, PETITIONERS.

Trust—Appointment of New Trustee—Trusts (Scotland) Act, 1867, 30 *and* 31 *Vict. c.* 97.

Held that the provisions of the Trusts (Scotland) Act, 1867, are not applicable to the case of paid trustees.

This was a petition at the instance of a majority of the creditors of the late firm of Mackenzie & Duncan, engineers in Bathgate, with concurrence of the surviving partner, and the representatives of the deceased one, praying the Court to appoint a trustee under the 12th section of the Trusts Act, 1867, which provides that "when trustees cannot be assumed under any trust-deed," the Court may, upon the application of any party having interest in the trust-estate, "appoint a trustee or trustees under such trust-deed, with all the powers incident to that office."

The trust-deed here was one for behoof of creditors, and provided for suitable remuneration to the trustee. It did not provide for the election or assumption of any new trustee, and the original trustee having died without having completed the winding-up of the estate, the present petition was brought before Lord Ormidale, who reported the case to the First Division, the question being whether the Act of 1867 included paid trustees.

R. V. CAMPBELL for the petitioners.

The Court had considerable difficulty in deciding the question, from the vague terms of the Act. These were comprehensive enough to include all trusts whatsoever, but it was undoubted that the previous Trust Acts referred only to "gratuitous trustees," and here these words were defined without being once used in the rest of the statute. On the whole, however, its other provisions seemed inconsistent with the idea of extending its operation to paid trustees.

The following is Lord Kinloch's opinion:—

LORD KINLOCH—The trust-deed under which this petition asks the Court to appoint a new trustee, is a trust-deed granted in connection with the affairs of a copartnery, and granted in favour of a trustee for creditors, who is to receive a remuneration for his trouble. I am of opinion that this trust-deed does not fall within the purview of "The Trusts (Scotland) Act, 1867," and that therefore the petition should be refused.

The Acts 24 and 25 Vict. c. 84, and 26 and 27 Vict. c. 115, by which various powers and privileges were conferred on trustees, are clearly confined to the case of gratuitous trusts, for so they are declared, in so many words, to be. The Acts do not limit their provisions to *mortis causa* deeds; but it is plain that these were mainly in the view of the Legislature. It is in these that gratuitous trustees are chiefly found. And the whole powers and privileges conferred are such as are peculiarly appropriate to the case of *mortis causa* deeds.

The after Act of 1867, which is that now relied on, begins with an additional definition, *inter alia*, of the words "gratuitous trustees." Such a definition would be altogether idle and out of place if the intention of the statute was to bring all trusts whatever within its operation, whether gratuitous or not. In the second section it is provided —"In all *such* trusts the trustees shall have power to do the following acts, when such acts are not at variance with the terms or purposes of the trust." A power is then given to appoint paid factors and law-agents, to discharge trustees who have resigned, and to do certain other things. In section 3 the statute uses an apparently more general phrase, and says—"It shall be competent to the Court of Session, on the petition of the trustees under *any* trust-deed, to grant authority to the trustees to do any of the following acts." Power is then given to sell, feu and let, borrow money on, or excamb the trust-estate. A variety of clauses follow, all prefaced with the same general introduction; amongst which is the 12th, now founded