ment ground, and that the present feu-duty was easily recovered, but from tenements it was not, whether allocated or not.

At advising—

LORD JUSTICE-CLERK—The stipulation in the title in this case, which forms the basis of the defence against the pursuers' declarator, is very distinct and clear. It is, that the pursuers' author was taken bound to "build and maintain" upon the ground conveyed—"a dwelling-house of the value of not less than £800, according to a plan to be approved of by the said Governors, . . . and such house shall not be built nearer to the road or street on the north thereof than 26 feet, unless a deviation therefrom shall be specially sanctioned by the superiors." The object of the pursuer's declarator is to have it found and declared that the pursuers are entitled to take down and remove the house which was built in accordance with this condition of the title, and that they are entitled to erect tenements of dwelling-houses on the ground "as they may think proper." It appears to be very clear, that if such a declarator had been brought immediately after the feuars had built the house, the erection of which was a condition of their holding the feu, no decree in their favour could have been given. If therefore they have a right now to such a declarator, it must be from some new agreement between them and the superiors, or because of some change of circumstances which acts as a bar to the defenders enforcing the stipulation to which the pursuers agreed as a condition of their obtaining their right. Now, it cannot be contended with any force that the superiors have agreed either to the house being removed or to tenements being erected on its site and on the 26 feet in front of it on the north side. As regards change of circumstances, it is contended that because the pursuers have been allowed to erect tenements along the north side of the feu, therefore it must follow that they can do so over the whole feu. To that construction I am unable to give any assent. There is nothing in the fact that there are tenements on another part of the ground to militate against the right of the defenders to insist on the maintenance of the obligation I have quoted, with which the erection of these tenements has not in any way interfered. The house approved of by the defenders stands where it did, and the 26 feet between it and the road on the north stands still unoccupied by buildings, and that something has been done on another part of the feu to which the obligation does not apply, seems to me to form no ground for saying that the pursuers have acquired any new right inconsistent with the obligation, or that the defenders have lost their right to insist upon the observance of an express and definite obligation, if they consider it to be in their interest to do so, whether as regards the particular feu itself or as regards the general interest of their estate of which it formed a part.

This is not a question of putting an existing building to some new and different use to that to which it was originally put when a feu was first given off and a building erected. It is a proposal to remove altogether what was erected in fulfilment of the obligation to build a house approved of by the superiors and to occupy with buildings ground on which it was not permissible to put the building stipulated for. Even if it were necessary for the superior to show an interest to insist on observance of the obligation (which I do not hold that it was), *prima facie* the superior's interest cannot be doubted. The stipulation itself implies interest, and I am quite unable to see how that interest has been taken away. It certainly is not taken away by anything that has been done upon the south side of the feu, and as regards what has been done at the eastern corner, consent was obtained for a consideration. But such a consent can never be founded on to extinguish rights in regard to another part of the feu where no consent has been given, and where the superiors have all along insisted on the express stipulation in the title being carried out.

This case in no way resembles the numerous cases in which rights of a body of feuars *inter se* have suffered extinction by things being permitted to be done which subverted the original conditions and rendered them incapable of enforcement in their entirety. It is a question solely between one superior and one vassal, and I have no hesitation in holding that the Lord Ordinary has rightly decided that the pursuer's contentions are untenable and that the defenders are entitled to absolvitor.

LORD KYLLACHY—I concur, and have nothing to add. I am quite satisfied with the Lord Ordinary's judgment.

LORD STORMONTH DARLING and LORD LOW concurred.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—Ure, K.C.—M'Lennan, K.C.—Sandeman. Agents—Martin & M'Glashan, S.S.C.

Counsel for the Defenders (Respondents) Shaw, K.C.—W. J. Robertson. Agent—Alex. Heron, S.S.C.

Friday, December 15.

SECOND DIVISION.

[Lord Low, Ordinary.

CONNAL & CO. LIMITED *v.* REID AND OTHERS.

CLYDE NAVIGATION TRUSTEES *v.* REID AND OTHERS.

Process—Multiplepoinding—Competency—Double Distress.

A & Co., timber merchants, shortly before bankruptcy granted to B & Co., timber measurers, one of their creditors, delivery orders applicable to certain lots of timber which were lying

at D & Co.'s yards. A & Co. having become bankrupt, the timber was claimed by E, their trustee, and also by B & Co.; and an agreement was entered into between them that the timber should meanwhile be sold in the ordinary course of business, and the proceeds deposited in bank in their joint names. Portions of the timber were sold and the proceeds deposited.

E having discovered that the timber was lying in D & Co.'s yards, and not as he had supposed in B & Co.'s actual custody, raised an action of multiplepoinding in name of D & Co. and the Bank, as nominal raisers, the fund *in medio* being the unsold timber and the sums deposited. B & Co. objected to the competency of the action on the ground that there was no double distress.

Held (*following Commercial Bank of Scotland v. Muir*, Dec. 1, 1897, 25 R. 219, 35 S.L.R. 174) that as there were two competing claimants to funds in the hands of a third party the action was competent.

Expenses — Multiplepoinding — Multiplepoinding where Dispute might have been Decided by Direct Action—Expenses of Raising the Action.

Question whether, in the event of the real raiser of a multiplepoinding being unsuccessful in his claim, the general rule of allowing him the expenses of bringing the action out of the fund *in medio* would be followed if the dispute could have been equally well determined in a direct action at his instance against the other claimant.

The first of these actions was an action of multiplepoinding, in which Connal & Company, Limited, storekeepers, Glasgow, and the National Bank of Scotland Limited were pursuers and nominal raisers, and (1) Robert Reid, C.A., Glasgow, trustee on the sequestrated estates of M'Dowall & Neilson, timber merchants, Glasgow, and (2) Hagart & Company, timber measurers, Glasgow, were defenders, Robert Reid being also real raiser; and in which the fund *in medio* consisted of certain lots of timber lying in Connal & Company's yards, and certain sums contained in certain deposit-receipts issued by the National Bank of Scotland in favour of Hagart & Company and Robert Reid.

The second action was also an action of multiplepoinding, in which the parties were the same as in the first, except for the fact that the Clyde Navigation Trustees took the place of Connal & Company, and that the fund *in medio* consisted of certain other lots of timber lying in the yards of the Clyde Navigation Trustees, and certain other deposit receipts granted by the National Bank of Scotland in favour of the same parties. The circumstances, the pleadings, and the interlocutors in both cases were otherwise identical.

The facts are set forth in the opinion of the Lord Ordinary in the case of *Connal & Co., infra*. The agreement referred to by the Lord Ordinary in his opinion, and by the defenders in plea 4, was contained in the second and third of the letters which follow:—

1. Letter, Connal & Co., Ltd., to Robert Reid, dated 7th October 1903.

"*M'Dowall & Neilson's Seqn.*

"We are in receipt of yours of date intimating your appointment as judicial factor on the sequestrated estates of Messrs M'Dowell & Neilson. In reply to your note, we have to inform you that all timber stored on their a/c in our yards is under the control of Messrs Hagart & Co., measurers, Yorkhill Wharf, who are, subject to our lien for rent, the real custodians of the timber, and who take all responsibility for it, so that intimation should be made to them."

2. Letter from Hagart & Co's. Agents to Reid's Agents, dated 22nd January 1904.

"*M'Dowall & Neilson's Sequestration.*

"*Reid* v. *Hagart & Company.*

"Adverting to the writer's interviews with Mr Donaldson and Mr Reid, we have now to state that our clients are prepared to allow the timber to be sold on the following conditions;—1. The salesman to be Mr Cant, and he is to be instructed to sell by private bargain at the best prices in the market—not hurriedly, but in the usual course of his business. 2. In all questions of law or procedure at law the money proceeds of the sale are to be held as in the custody and possession of Hagart & Co., just as the timber is, and it is to be subject to their liens and claims of every description in the same manner as the timber. 3. Generally, Messrs Hagart & Co's. position is not to be prejudiced in any way by their parting with the timber and allowing it to be sold, and the trustee is not to be at liberty to base any plea on the sale in derogation of our clients' right. On the other hand, the trustee's pleas in the action now pending before the Court are not to be prejudiced either, but will be reserved by him entire. 4. Subject to above reservation of the pleas and rights of both parties, the proceeds of sale are to be consigned in the National Bank of Scotland, St. Vincent Street, Glasgow, in name of Hagart & Co. and of Mr Reid, to await the final issue of the legal proceedings."

3. Letter, Reid's Agents to Hagart & Co's. Agents, dated 29th January 1904.

"*M'Dowall & Neilson's Sequestration.*

"*Reid* v. *Hagart & Co.*

"We have now had an opportunity of submitting to the trustee and commissioners your letter to us of 22nd curt., but they, like ourselves, do not quite understand conditions 2, 3, and 4, as expressed by you. They are willing that the timber should be sold by Mr Cant by private bargain at the best prices he can obtain in the usual course of his business, such sale to be under reservation of the rights and pleas of both parties, and the proceeds of sale to be consigned in bank in joint names of your clients and the trustee to await the issue of the legal proceedings, such proceeds to be held as a surrogatum for the timber."

The defenders, Hagart & Co., pleaded, *inter alia*—"(2) There being no double distress, the

action is incompetent and should be dismissed. (4) The real raiser is not entitled to bring the present action (*a*) in respect it is a breach of the agreement above set forth, and (*b*) the defenders have, on the faith of said agreement, parted with the possession of the said goods and allowed the same to be sold. (5) Under the terms of said agreement the alleged fund *in medio* is, in a question with the real raiser, in the custody and possession of the defenders. (6) There being no competing claims to the property in the fund *in medio* the action is incompetent."

On 20th June 1905 the Lord Ordinary (Low) pronounced the following interlocutor in both actions:—"Repels the defences for the appearing defenders, and decerns: Appoints the cause to be enrolled for further procedure, and grants leave to reclaim: Finds the said defenders liable in expenses from the date of the calling of the summons herein to the date hereof."

Opinion. — "The circumstances under which this action of multiplepoinding was brought are these.

"Certain lots of timber belonging to the bankrupt firm of M'Dowall & Neilson were stored in the timber yards of the pursuers and nominal raisers, Connal & Company. The defenders Hagart & Company are timber measurers, who acted for M'Dowall & Neilson in measuring the timber and storing it in Connal & Company's yards. M'Dowall & Neilson were due to Hagart & Company certain fees and charges for the services which they had rendered, and it appears that the latter had also made advances to the former. Shortly before their bankruptcy M'Dowall & Neilson granted delivery orders for the timber in favour of Hagart & Company. These orders appear to have been granted upon the assumption that the timber was truly in the custody of Hagart & Company, and not of Connal & Company. Upon the same assumption Mr Reid, M'Dowall & Neilson's trustee, brought an action against Hagart & Company for delivery of the timber. During the course of that action the parties came to an agreement (which I shall presently refer to more particularly) that the timber should be sold by a gentleman named, as opportunity offered, but that Hagart & Company's position should be in no way prejudiced by the sale of the timber. Ultimately Mr Reid abandoned the action, the reason alleged being that he discovered that the timber was not in the custody and possession of Hagart & Company but of Connal & Company.

"Part of the timber was sold under the agreement to which I have referred, and the proceeds were deposited in the National Bank in the names of Hagart & Company and Mr Reid. These sums and the portion of the timber which has not been sold form the fund *in medio*.

"In these circumstances Hagart & Company maintain that there is no double distress, and that an action of multiplepoinding is therefore incompetent. They pointed out that while Mr Reid claims the timber or its proceeds as being the property of the bankrupt firm, they claim only a right of retention in respect of the fees and charges and advances.

"Now as regards the money deposited in bank I do not think that there is much substance in the distinction taken by Hagart & Company between the character of the two claims. Hagart & Company say that, although the timber was stored in Connal & Company's yard, it was under their control, and that they were therefore in a position to retain it, and were entitled to retain it against the debt due to them by M'Dowall & Neilson; that the money is in the same position as the timber; and that they have the same right to retain the money as they had to retain the timber which it represents. That may be quite true, but if a person is entitled to retain money belonging to another which is in his possession against a debt due by that other to him, that simply means that he is entitled to apply the money in payment of the debt so far as it will go. Therefore Hagart & Company's claim is, in substance, a claim for the deposited money just as much as Mr Reid's claim is.

"That being the position of matters, I think that the case of *Commercial Bank of Scotland* v. *Muir* (25 R. 219) is an authority for holding that so far as the deposited money is concerned the action is competent. That was also a case where two parties had deposited money in bank in their joint names, and where one of them maintained that he had right to the whole of the fund, and the other that he had right to half of it. It was held by the First Division that the action was competent. Lord Adam said—'There are two competing claimants to funds in the hands of a third party, and that, I think, is enough to make the action competent.' In like manner Lord Kinnear said—'The substance of the matter is that there is a dispute as to the right of these two persons to the whole or part of this sum, and therefore there is, in my opinion, a sufficient competition to support the action of multiplepoinding.'

"In so far as the fund *in medio* consists of the unsold portion of timber, I have more difficulty, but I think that it is substantially in the same position as the consigned money. It is admitted that the timber is stored in Connal & Company's yard, but Hagart & Company say that it was stored in their name and was under their control, and that they are entitled and are in a position to retain it as against Reid, first in respect of an agreement between them and the bankrupts that they should hold the timber in security of advances made to the latter, and, second, in respect of a lien which they allege over the timber in respect of their fees and charges. I think that that is a case of competing claims to the timber in Connal & Company's yard, and that it therefore falls within the rule laid down in *Commercial Bank* v. *Muir*. It is true that the question might have been determined in an action of declarator by Reid against Hagart & Company, but the same argument was rejected in the *Commercial Bank* case.

"Hagart & Company, however, further maintain that the action is entirely excluded by the agreement to which I have already referred, which was entered into during the course of the previous action at the instance of Reid *v.* Hagart & Company. The latter maintain that that was an agreement to the effect that the timber should in all questions between them and Reid be regarded and dealt with as being in their actual custody and possession, and that the proceeds of timber sold should be in the same position. They accordingly argue that the present action, in which Reid's claim is based on the assumption that the timber was never in the custody and possession of Hagart & Company, is barred by the agreement. Now the agreement was embodied in several letters, a portion of one of which only is quoted by the defenders in their answers. I have already said that the occasion of the agreement was that Reid had brought an action against Hagart & Company for delivery of the timber upon the footing that it was in the custody and possession of the latter, and the object of the agreement was to allow of the timber being realised to the best advantage without thereby prejudicing the position and right of Hagart & Company. I am of opinion that the letters, when read in the light of the circumstances in which they were written, constitute an agreement that the price of timber which might be sold should come in place of the timber, and that Hagart & Company should have the same rights in all respects to the price as they would have had to the timber if it had not been sold. But I cannot read the letters as being a contractual admission by Reid that the timber was in fact, or was in all questions between him and Hagart & Company, to be treated as being in the custody and possession of the latter.

"I am therefore of opinion that the present action is not barred by the agreement."

The defenders Hagart & Company reclaimed and argued—A multiplepoinding was not a competent form of process, there being here no fund in the hands of a third party as to which two other parties were in dispute. The timber was to all purposes in their own custody. That was distinctly recognised in the agreement (Sect. 2), and, apart from the agreement, Connal & Company's letter of 7th October 1903 showed that Connal & Company held the timber solely for them, and were under no obligation to anyone else. There was therefore no stakeholder, and the essential object of a multiplepoinding was the exoneration of a stakeholder. The money—*vide* the agreement—was in exactly the same position as the timber. Reid should therefore have raised a direct action against them. *Commercial Bank of Scotland* v. *Muir*, December 1, 1897, 25 R. 219, 35 S.L.R. 174, founded on by the respondent, was not to be extended, and *Connal* v. *Ferguson*, February 19, 1857, 19 D. 482, dealt only with trust funds, and there was no argument as to competency. The present case was analogous rather to *Russel* v. *Johnston*, June 1, 1859, 21 D. 886; *Clark* v. *Campbell*, December 12, 1873, 1 R. 281, 11 S.L.R. 138; *Royal Bank of Scotland* v. *Ellis*, 10 S.L.T. 167. The practical objection to a multiplepoinding was that they would, even if successful, be subjected to the real and nominal raiser's expenses—*Hepburn's Trustee* v. *Rex*, July 17, 1894, 21 R 1024.

Argued for the respondent Reid—The action was competent, there being no competing claims to timber and money in hands of third parties—*Connell* v. *Ferguson*; *Commercial Bank of Scotland* v. *Muir* (*cit. sup.*). The timber was *de facto* in the hands of a third party, Connal & Company, and the agreement, justly construed, meant only that the proceeds of such portions as might be sold were to be in the same position as the timber had been. It was not an agreement that the timber was in Hagart & Company's possession. If, however, it turned out on the litigation upon its merits that he was wrong, he was willing to pay the nominal raiser's expenses, and to forego his claim to his expenses as real raiser out of the fund.

Lord Justice-Clerk—There is no doubt that the question of the competency of a multiplepoinding has had a history. It is, of course, a question of practice, and of practice only. There is no possible interest in it except as a question of practice, and it is really for the Court to decide what the practice is. It is plain that, if it has been the practice of the Court to hold that where such a state of matters exists as we have here a multiplepoinding is competent, then I think it would be improper to go back upon that to something which has been abandoned. The question could not have been more clearly decided than in the case of *Muir*, upon which the Lord Ordinary relies. If it was the case that before that particular litigation took place it was held that where there were two competing claimants to a fund in the hands of a third party that was not sufficient to make an action of multiplepoinding competent, it was distinctly decided there by the First Division that it was so. The words are very distinct that where there are two competing claimants to funds in the hands of a third party, that is enough to make the action competent. Therefore I have no hesitation or doubt in holding that this action is competent. There is a great deal to be said for the point taken by Mr Hunter and Mr Chree with reference to the payment of the real and nominal raiser's expenses out of the fund *in medio*. That might have made difficulties in this case at a later stage if we reserved the question of expenses. But that difficulty is now out of the way, because Mr Cooper has very properly said that if it turns out on the litigation upon its merits that his clients were wrong, he has no objection to his clients being refused the expenses incurred by him as real raiser out of the fund *in medio*, and found liable in any expenses found due to the nominal raisers. That

being so, I think we should adhere to the Lord Ordinary's interlocutor, reserving the question of expenses, and I should suggest that power be given to the Lord Ordinary to dispose of the expenses of this reclaiming note, and of the expense of raising the action of multiplepoinding, so that there will be no need for the case to come back here unless something is done of which any of the parties may have reason to complain.

LORD KYLLACHY—I am entirely of the same opinion. I agree with the Lord Ordinary's construction of the correspondence, and think with him that it forms no bar to this action. I agree with him also that the case of *Muir* decides practically the question of the competency of a multiplepoinding in the circumstances which exist here.

LORD STORMONTH DARLING—I concur.

LORD LOW—I am of the same opinion. If it had not been for the case of *Muir* I should have had great difficulty in holding that this multiplepoinding was competent. I remain, however, of the opinion which I expressed in the Outer House that there is no substantial difference between the circumstances of this case and that of *Muir*, and I think that it is desirable that when a rule of practice has once been laid down it should be followed.

The Court pronounced this interlocutor—

"Refuse the reclaiming note, adhere to the said interlocutor reclaimed against and remit the case back to Lord Salvesen to proceed therein: Reserve the question of the expenses of the Reclaiming note, appoint them to be expenses in the cause, and authorise the Lord Ordinary to deal with them at the conclusion of the cause."

Counsel for Defenders and Reclaimers, Hagart & Company—Hunter, K.C.—Chree. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Defender, Reid, Real Raiser and Respondent — Cooper, K.C. — MacRobert. Agents — Drummond & Reid, W.S.

Agents for Pursuers and Nominal Raisers —Webster, Will, & Company, S.S.C.

Saturday, December 16.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

PARK *v.* MAVER.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 2, *sub-sec.* 1—*Claim for Compensation —"Claim" means a Demand for Definite and Specified Sum.*

By section 2, sub-section 1, of the Workmen's Compensation Act 1897 it is provided that proceedings for the recovery under the Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable, and "unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident."

A workman was injured on 16th August 1904. On 20th September 1904 his law-agent wrote to the employers as follows—"I am instructed" on behalf of the workman "to give formal notice of the claim arising in respect of injuries received by him whilst in your employment on 16th August 1904. . . . I understand you are already acquainted with the circumstances, but it is necessary to give you notice in order to found proceedings should these be necessary for obtaining compensation."

On 14th August 1905 the workman brought an arbitration in the Sheriff Court.

Held (*following Bennett* v. *Wordie & Co.*, May 16, 1899, 1 F. 855, 36 S.L.R. 643) that the letter was not a "claim for compensation" in the sense of the Act, inasmuch as it did not contain a demand for a definite and specified sum, and that consequently the arbitration proceedings of 4th August 1905 were not maintainable.

Powell v. *Main Colliery Co., Limited*, [1900] A.C. 366, *commented on.*

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 2 (1), enacts—"Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof, and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death: provided always that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause."

The following case in an appeal under the Workmen's Compensation Act 1897 was stated by one of the Sheriff-Substitutes of Aberdeen, Kincardine, and Banff (ROBERTSON) — "This is an arbitration in which the respondent claims compensation from the appellant to the amount of 17s. weekly as from 30th August 1904, but under deduction of £38, 11s. 11d. paid to account, with expenses.

"The grounds of the claim are that the respondent was employed by the appellant on 16th August 1904 at the erection of a house. The building was then over 30 feet in height, and scaffolding was being used for its construction. The respondent, while engaged at said building on said date, sus-