A misconception ran throughout the argument for the panel on two points as to the power of the prosecutor to raise a second indictment for the same offence, while a prior indictment remains undisposed of, and also in regard to the effect of the prosecutor on the day of compearance not moving the Court to have the diet called. On the first of these points it was assumed that before a second indictment can be preferred the first must be in some way brought to a judicial termination; and as to the second, it was argued that the non-calling of the diet, after the panel has pleaded and the relevancy has been sustained, is equivalent to a *simpliciter* desertion of the libel, and bars the raising of a second indictment.

Now, as to the second of these points, it must be kept in mind that the calling of the diet is the act of the Court. It is generally called on the motion of the prosecutor, but I do not doubt that, whether he has pleaded at a former diet or not, the panel may move the Court to call the diet on the day of compearance, and that unless the prosecutor show cause to the contrary, the Court may, if they should think the proceeding oppressive, desert the diet *simpliciter*. In practice this is not done, for the Court would not require the prosecutor to proceed unless it appeared that he had no reasonable ground for not doing so; and until the trial of the indictment has commenced, and an assize has been sworn, the prosecutor is practically master of his instance. But even if the Court did desert the diet *simpliciter*, in respect of the non-appearance and non-insisting of the prosecutor, it does not necessarily, although it certainly would ordinarily, follow, that the prosecutor could not raise a new indictment, as Hume very clearly shows, vol. ii., p. 277. The prosecutor might, on the calling of his second indictment, support his new instance by proving reasonable cause for his not having insisted in the first. The only case in which desertion of the diet *simpliciter* has that effect necessarily, is when it proceeds on the motion of the prosecutor himself.

It seems therefore quite certain that the mere not calling of the diet under the first indictment in this case had no farther effect than that the instance fell. But even if the instance had not fallen, and the term to which the diet was continued were still current, the prosecutor might raise a new indictment, and might proceed with it, provided he entered on the records an abandonment of the first. This was the subject of a very deliberate decision, after full argument, in the case of *Edgar*, in 1817, in which case, after directing a search for precedents, which will be found in the full report of the case, the Court came to that determination. In that case the panel had pleaded, and the Court had ordered informations on the relevancy of the indictment, and meanwhile continued the diet to another day. While the period was still current, the prosecutor raised a new indictment. It was maintained for the panel, as here, that after he had pleaded he was in the hands of the Court, and that the indictment must either be prosecuted to a conclusion or *simpliciter* abandoned. But the Court did not sustain that view; but, after considering the precedents, they sustained the second indictment as well served, but would not allow it to proceed until the prosecutor had formally passed from the first. The proceedings, which were long, and conducted by the highest counsel at the bar, and particularly the summary of precedents, well deserve to be consulted in the separate report.

In the present case, however, the instance had fallen, and there remained no obstacle to proceeding with the second indictment.

I should have been of this opinion had the second diet in this case been an adjourned diet. But it was truly an original diet. Under the Sheriff Court Act the first diet is not a diet for trial, for no assize and no witnesses attend. The prosecutor cannot proceed to trial. It is a separate judicial proceeding under which, no doubt, the relevancy of the libel may be conclusively determined, and at which the prisoner, if he plead guilty, may be sentenced; but which does not abridge in any way the rights of the prosecutor or the panel when the case comes to be tried. The citation to the second diet is contained in the same writ, and is as original as that to the first; and the not calling of the second diet has precisely the same effect as if the first had never taken place. The prisoner has again to plead, and, excepting that the relevancy has been found, the case proceeds as if there had been only one diet. I think, therefore, we should sustain this indictment.

The other Judges concurred, reserving their opinions on the question how far desertion of the diet *simpliciter* by the Court, otherwise than on the motion of the prosecutor, would bar a second prosecution.

The Court repelled the objection, and, on the motion of the Lord Advocate, deserted the diet *pro loco et tempore*.

Agent—Q. M. Wright, Inverary.

COURT OF SESSION.

Friday, May 24.

FIRST DIVISION.

COWAN *v.* STEWART.

Servitude—Non ædificandi—*Constitution of—Missives of Sale.*

Circumstances in which it was *held* that an undertaking not to build except in a certain way upon the back ground, occurring in missives of sale of a portion of a house, was not the constitution of a negative servitude, but only an agreement of a temporary character.

This was an appeal from the Dean of Guild Court of Edinburgh, in a petition at the instance of James Cowan, proprietor of No. 54 Hanover Street, craving warrant to make certain alterations and additions to the said premises. The object of the petitioner was to remove the present back buildings, and erect a saloon and other premises in connection with the main tenement, which had been turned into shops. He was opposed by the proprietor of No. 50 Hanover Street, being the corner of Hanover Street and Thistle Street, whose back ground, having a frontage to Thistle Street, had already been built on. The proposed erections would consequently block up the back lights of the Thistle Street tenement, belonging to the respondent Mr Stewart. The ground upon which Nos. 50 and 54 Hanover Street have been built was originally feued by the same person who erected the Hanover Street houses,

with a common stair running between them to give access to their upper flats, which was called No. 52. There was no servitude in the titles of either property over the back ground of the other. In the year 1857 the sunk and two first floors of No. 54 were in the hands of a Mr Martin; and the whole of No. 50, including the upper storeys opening off the common stair, as well as the large tenement built on the back ground and facing Thistle Street, belonged to a Mr Lindsay. Mr Lindsay was also proprietor of the two upper flats of No. 54, opening off the common stair. In that year Mr Martin contemplated altering the dining-room floor of No. 54 into shops, communicating with a building to be erected on the back ground, and at the same time he bought from Mr Lindsay the two topmost flats of No. 54, so that he became proprietor of the whole of that tenement. The missives of sale which passed between the parties was as follows:—

"*Edinburgh*, 4*th March* 1857.

"Thomas Lindsay, Esq.,
Lindsay Place, Edinburgh.

"DEAR SIR,—On the part of Mr James Martin, stationer, Edinburgh, I hereby offer to purchase from you the two upper flats belonging to you in No. 52 Hanover Street, Edinburgh (north side of the common stair), with the cellars and pertinents thereto belonging, and also the cellars and sunk area in the front of No. 54 Hanover Street, lying to the north of the outside stair leading into the said common stair, and the right and privilege to Mr Martin, as proprietor of the house No. 54 Hanover Street, to make a communication from the upper flat of that house into said common stair, and with free ish and entry thereto by said common stair, at the price of £950 stg., payable on delivery by you of a valid disposition and progress of writs, Mr Martin's entry to be as at Candlemas last. It is a part of this arrangement that, as Mr Martin contemplates making alterations on the tenement No. 54 Hanover Street, by converting the same into one or more shops, with a saloon or saloons at the back thereof, you, as proprietor of the property lying to the south thereof, shall sign your concurrence to such plans, immediately on their being made out, they being made to the satisfaction of Mr William Beattie, builder, and on the understanding that Mr Martin does not intend to erect on the southmost 9 or 10 feet of his back ground, at present unbuilt upon, lying next your tenement, any saloon or other building higher than 13 feet above the floor of the present dining-room flat of No. 54 Hanover Street. Mr Martin is to pay the expense of the disposition in his favour.

"Your acceptance will conclude the bargain.

"ANDW. FYFE.

"*Edinburgh, March 7th*, 1857.

"I hereby accept of the above offer.

"THOMAS LINDSAY.

Upon these missives a regular disposition followed, which, however, omitted all notice of the understanding that Mr Martin was not to build upon the southmost 9 feet or 10 feet of his ground, &c. The petitioner and appellant now stands in the room of Mr Martin, and the respondent in that of Mr Lindsay. Mr Martin did not carry out the alterations contemplated in 1857, and referred to in the missives of sale. The application made to the Dean of Guild in that year was allowed to drop. The present petitioner, however, now proposed to carry out Mr Martin's intention on a more extended scale, and without any reference to the agreement between Martin and Lindsay. The respondent consequently objected, and pleaded, *inter alia*—"By the foresaid missive letters of sale a permanent negative servitude was created in favour of the said Thomas Lindsay and Mrs Hart, as his successor in the foresaid subjects, whereby she is entitled to prevent any erection on the back-ground to the north belonging to the petitioner, within 10 feet of the south boundary wall of said back-ground, which shall exceed 13 feet in height, and the erection now proposed being of that description, the warrant craved should be refused."

The Dean of Guild pronounced the following interlocutor:—

"*Edinburgh*, 31*st August* 1871.—"Having considered the closed record and whole process, and heard parties' procurators—Finds (1) That upon the sale of the property now pertaining to the petitioner by Mr Thomas Lindsay to Mr James Martin, there was constituted by the missives of sale, dated 4th and 7th March 1857, a servitude over the petitioner's property, No. 54 Hanover Street, in favour of the respondents' property, to the effect that the proprietor should not erect on the southmost 9 or 10 feet (virtually 9 feet) of his back ground, lying next the respondents' tenement in Thistle Street, any saloon or other building higher than 13 feet above the floor of the dining-room flat of No. 54 Hanover Street; (2) That the Joint-Minute of 22d March 1865, upon which the former warrant proceeds, does not import a discharge of the said servitude, but only a consent to the particular building specified in said minute; (3) That the building plan annexed to the petition provides for the occupation of the space of 9 feet, subject to the foresaid servitude *non ædificandi* by a building of two storeys much exceeding the limit of 13 feet in height, allowed by the said missives; (4) That the said intended building would have the effect of darkening certain of the respondents' windows; (5) That in point of law the respondents, in virtue of the said missives, have a good title to prevent the erection of a building in terms of the present application: Therefore refuses the prayer of the petition, and decerns, reserving to the petitioner to build upon any part of said back ground distant not less than 9 feet from the respondents' said wall, and subject to the approval of the Court under any future application: Finds the petitioner liable to the respondents in the expenses of process, and remits to the Clerk of Court to tax the account thereof, and to report."

The petitioner appealed.

Solicitor-General (CLARK) and ASHER for him.

SHAND and STRACHAN for the respondent.

At advising—

LORD PRESIDENT—This is a petition at the instance of Mr James Cowan, the proprietor of the tenement No. 54 Hanover Street, in which he craves warrant from the Dean of Guild to enable him to build on the back ground adjoining the said tenement. The Dean of Guild has found that, on the sale of the property now pertaining to the petitioner by Mr Thomas Lindsay, to Mr James Martin in 1857, there was constituted by the missives of sale a servitude over the petitioner's property No. 54 Hanover Street in favour of the respondent's property No. 50 Hanover Street, to the effect that the proprietor should not erect on the southmost nine or ten feet of his back ground, lying next the respondent's tenement in Thistle

Street, any saloon or other building higher than thirteen feet above the floor of the dining room flat of No. 54 Hanover Street. Now, if the Dean of Guild is right in holding that this servitude is duly constituted, there is an end of the case.

The case itself appears to me to turn entirely upon the construction of the documents referred to in the interlocutor of the Dean of Guild, and called missives of sale. In order to deal with that question of construction, it is necessary to attend to the condition of the two properties at the time these missives were entered into. The two tenements 50 and 54 were originally built by the same person, but they very soon came into the hands of different proprietors. It was then open to the proprietor of 50 to build over every available inch of his back ground, and in like manner it was open to the proprietor of 54 to build over the whole of his back ground. The back ground of 50 was accordingly built over at a very early period, the temptation being that the ground had a frontage to Thistle Street as well as to Hanover Street, being a corner tenement, an advantage which No. 54 had not. This accounts for the earlier building upon No. 50. But in the year 1857, when the transaction between Lindsay and Martin took place, Martin was proprietor, not of the whole of 50, but only of three storeys of it, the two upper storeys belonging, along with 54, to Mr Lindsay. The object of Martin was to get possession of the two upper storeys of 50, and as soon as he obtained these he would become proprietor of the entire tenement as it originally stood. Now, Mr Martin's agent hereupon writes this letter to Mr Lindsay—(*reads missives of sale*). Now, so far this document admits of no doubt at all as to its construction. The subject of the sale is completely defined, and the privileges to accompany it are distinctly specified, and the price fixed which is to be given, not merely for the subject, but for the relative privileges. What follows in this letter is a different matter altogether, and does not appear to me to stipulate for anything to be given to Mr Martin as a part or pertinent of the principal subject, for which he gives £950. I think all these are stated in the first part of the letter. What follows is this—"It is a part of this arrangement that, as Mr Martin contemplates making alterations on the tenement No. 54 Hanover Street, by converting the same into one or more shops, with a saloon or saloons at the back thereof, you, as proprietor of the property lying to the south thereof, shall sign your concurrence to such plans immediately on their being made out, they being made to the satisfaction of Mr William Beattie, builder, and on the understanding that Mr Martin does not intend to erect on the southmost 9 or 10 feet of his back ground, at present unbuilt upon, lying next your tenement, any saloon or other building higher than 13 feet above the floor of the present dining-room flat of No. 54 Hanover Street." This is the part of the letter or missives of sale said to constitute a servitude in favour of the property No. 50 Hanover Street, over the back ground of No. 54.

Now it must be kept in mind that previously to the date of the letter the proprietor of No. 54 was absolutely unrestricted. Therefore if this is the constitution of a servitude it is the constitution of one over a subject primarily free from servitude of any kind. And also, that, if it was such, it was the constitution of a very valuable right in favour of the property No. 50. The proprietor of No. 50 had built his Thistle Street tenement with windows looking to the back, and therefore liable to be blocked up. The effect of this servitude, if constituted, would be to prevent the total blocking up of these back windows of the Thistle Street tenement by building on the back ground of No. 54. Now, it occurs to me to enquire what was the consideration given for this right, and I think it is difficult to find any. All that Mr Lindsay is taken bound to do is to consent to certain plans of proposed back buildings which Mr Martin is proposing to erect—that is to say, not to oppose him in the Dean of Guild Court. Now this appears to me at least a very inadequate consideration, and therefore one cannot help, even at first sight, doubting whether there was any intention to constitute a permanent servitude. The true construction of this part of the letter, in my opinion is, that as Mr Martin was then going to the Dean of Guild Court with plans for certain proposed buildings which would not interfere with Mr Lindsay's back light, his agent made it an understanding that Mr Lindsay should make no objection, and so expedite matters before the Dean of Guild. In short, it appears to me that this undertaking was confined entirely to the contemplated application to the Dean of Guild, and as Mr Lindsay's consent was confined to that particular application, so, on the other hand, the undertaking of Mr Martin not to build on the southmost 9 or 10 feet of his back ground was also confined to that particular application. This seems also to be borne out by what follows. It is quite true that a document of this sort is sufficient to constitute a servitude without the obligation entering the title, and I don't mean to say anything against that rule, but when a servitude is inserted in missives of sale, and the missives of sale are followed by a disposition, it is at least highly probable that the party in whose favour it is will see it entered in the formal deed. Now when you come to the disposition in this case you find that everything for which the £950 was paid very carefully stated and made the subject of conveyance, and then there follows a provision that Martin is to maintain the roof. This he would probably have been bound to do at any rate, but it shews how careful parties were that nothing should be omitted. But there is no mention throughout the deed of the alleged servitude. And though it is not necessary, it is at least singular that there should be none. But then, still farther, we have the utter inadequacy of the consideration, and the more reasonable explanation which I have given of the understanding—namely, that it referred to the particular proposed application to the Dean of Guild in 1857, and to that only. But Mr Martin abandoned the application and his proposed erection, and up to the present time nothing has been done either as to the application or as to any other building. Now, under these circumstances, the conclusion to which I have come is, that the construction contended for by the respondent is untenable, and I therefore differ from the Dean of Guild, and think that he is bound to proceed to consider the petition.

Lord Deas—From this case it appears that in the spring of 1857 Mr Lindsay was proprietor of a tenement No. 50 Hanover Street, which forms the corner of Hanover Street and Thistle Street. He was likewise proprietor of the two upper storeys of the adjacent tenement, No. 54, and he was more-

over proprietor of the tenement the lights of which are now in dispute, and which is built on the back-ground of No. 50, and fronts Thistle Street. These tenements form the corner of Hanover Street and Thistle Street, and in the angle behind them is situated the portion of ground now in dispute, which then belonged to Mr Martin, who was at that time proprietor of the three under flats of No. 54. In that state of matters the purchase was made by Mr Martin from Mr Lindsay of the two upper flats of No. 54, with the cellars and other pertinents in the front area. It is upon the occasion of that purchase by Martin from Lindsay that the document on which this case turns was granted, and the question is whether by that missive Martin effectually agreed to lay his back-ground under a servitude of lights in favour of Lindsay's Thistle Street tenement. Now, there is no doubt at all that according to our law and practice it was actually competent for Martin, by a mere missive or document of this kind, to lay the property belonging to him under a servitude of lights to Lindsay, which should be effectual against singular successors. I do not quote authorities, because there is no doubt about it. There may be some inconsistency in that law. I think there is, and that it would be better if it were altered. For our system of records enables a purchaser to ascertain all or almost all the burdens on landed property, but does not enable a purchaser to ascertain whether such an important servitude as this exists. In fact singular successors just take their chance of the existence of such documents; and so long as the language is intelligible, they must receive effect. However, I entirely agree that at the time of the transaction Mr Martin was under no obligation to preserve the lights of Lindsay's Thistle Street tenement. Lindsay and his predecessors were taking their chance of the ground being built upon. That very fact makes it a most natural thing that Lindsay, in disposing of those two storeys of 54 Hanover Street to Martin, should make a stipulation against that grievous injury which Martin had at that time power to inflict upon his Thistle Street tenement. There can be no doubt, therefore, that it was a most valuable privilege which Mr Lindsay was to acquire. I took an opportunity lately of going to inspect the locality, and it is quite plain to anybody that goes to see it that it would be of the greatest value to the proprietor of the tenement in Thistle Street to have the privilege of lights. For the result of building upon the whole back ground of No. 54 would be to make the Thistle Street house uninhabitable, and certainly unhealthy. On the other hand, however, the concession which Mr Martin was to make was by no means of such value to him as the advantage which Mr Lindsay would gain. He was merely to keep his buildings above the dining-room floor nine feet back from his boundary line. This would have diminished the value of his property very little, indeed, to him. On the contrary, it would enable him to have side lights to his own back buildings, and so, even for his own advantage, it would be better to keep his building back there nine feet. If, then, the privilege to the one was so valuable, and the concession on the part of the other so slight, there is not the least improbability that the agreement should be entered into, and the sense in which I am inclined to interpret it—namely, as a negative servitude. There were some objections taken at the bar which your Lordship has not thought necessary to notice,—such as, that the missives were only signed by an agent. But as Mr Fyfe was undoubtedly acting as agent for Mr Martin, we must deal with the document just as if signed by Martin himself.

But there is farther stipulated by Mr Martin that he should have an entry from the upper floor of his then existing property in No. 54 Hanover Street into the common stair that ran between 50 and 54. Now, there can be no doubt whatever that that was a very valuable consideration given him on the part of Mr Lindsay. Martin wanted to convert the lower portion of his house into shops, which he could hardly have done without the privilege of opening up an entry into the common stair from his upper storey, otherwise he must have sacrificed a large part of his frontage. It was therefore part of the bargain, and it is of no importance in what part of the missives you find the stipulation. Then we are told that it was part of the arrangement "that, as Mr Martin contemplates making certain alterations on his tenement 54 Hanover Street, Mr Lindsay should sign his concurrence to the plans (those plans being, as far as I can see, plans of the whole operation contemplated); and that on the understanding that Mr Martin does not intend to erect on the southmost 9 or 10 feet of his back-ground, at present unbuilt upon, lying next your tenement, any saloon or other building higher than 13 feet above the floor of the present dining-room flat of 54 Hanover Street." To my mind nothing can be clearer than that this is part of the agreement, and is just equivalent to an absolute undertaking by Mr Martin that he is not to erect any building in contravention of its terms. Now, if that is the natural and reasonable construction of these missives, is there anything in the fact that Martin did not find it convenient to go on with all the plans which he had entertained? He had it in his power to go on if he liked. In point of fact, I understand that he did go on with the most important part of his operations, and did alter his premises into shops, and the only thing that he did not do was the building of that back-saloon. I cannot see how this can be held an abandonment of the agreement. But then it is said, that the servitude not entering into the disposition of the Hanover Street tenement, shows that it either was abandoned, or never seriously intended. The disposition was not a deed in which, under ordinary circumstances, it should have been inserted, for it was not a disposition of the servient tenement. The conclusion I come to therefore is, that these missives were intended to, and did constitute, a negative servitude.

Lord Ardmillan—I have felt this question to be attended with difficulty; and that difficulty has been increased by an inspection of the premises, which has satisfied me that the position of the respondent is entitled to favourable consideration, because substantial injury to the property of the respondent appears to be the result which will follow the petitioner's proposed alterations.

Still, I have, on mature reflection, though after much hesitation, arrived at the conclusion that the petitioner has presented and instructed a claim which cannot be refused.

I think that we may now assume it to be settled and recognised as law, that a negative servitude, if clearly expressed in writing, may be effectually constituted without possession, which indeed is scarcely appropriate, and without entering the re-

cords. I am not disposed, in deciding this cause, to disturb the received law on the matter, though its expediency may be doubted. But assuming this state of the law, I still think that it is essential to the constitution of such a servitude in such a manner, that the expression of intention in the constitution of the servitude shall be clear and unequivocal. I therefore view the question before us as a question of intention, to be gathered from the construction of these missives. The condition in the missives, of which I need not again repeat the terms, which your Lordship has explained, is certainly not clearly expressed. I do not doubt that Mr Martin was sufficiently represented by Mr Fyfe, who signed the missive. But there are no words of obligation definite and precise; and the expression of intention, which is said to be equivalent to obligation, is not necessarily the expression of permanent intention, and is not repeated in the disposition, and never, at any time, assumed a more formal shape. The omission of that expression of intention from the investiture is not conclusive against it, for it might be constituted notwithstanding. But, in considering the question of intention as gathered from a fair construction of the missive, it is surely a fact of importance that there was no previous servitude or obligation, and that the words founded on are omitted in the disposition by which the contract of sale was effected.

When missives are followed and superseded by a formal disposition in which the price or consideration is accepted and discharged, the conditions of sale must be sought in the formal disposition, which is the embodiment of the completed contract, and the record of the deliberate intention of the parties. But in this disposition—in the deliberate record of what the parties meant—this obligation, which is said to express and to constitute the servitude, does not appear. It is not repeated, nor mentioned, nor in any way referred to; and in the question of intention that is important. Nothing but a clear expression of obligation in the missive can atone for its entire omission in the disposition. That clear expression is here wanting. Even on the petitioner's argument, in construing the missives, the expression of abiding obligation is only reached by inference from the expression of present intention. That inference can scarcely be permitted where the parties have embodied their deliberate intention in a formal writing of later date.

Apart from this, I am not quite satisfied that a permanent obligation, with a relative right of enforcement of the nature of a servitude, was really intended by the parties in execution of the missive and acceptance. I do not perceive any proper counterpart to such a permanent obligation, and it is very possible that, as explained by your Lordship, all that was meant was a temporary statement of intention to meet a temporary proposal or arrangement, which was not carried into effect; but the matter was put on a different footing by the disposition.

Accordingly I am, on the whole, though certainly with hesitation, disposed to concur in recalling the interlocutor of the Dean of Guild, and remitting to him to consider and dispose of the merits of the petition.

Lord Kinloch—The point raised by this appeal is whether a servitude *altius non tollendi* lies in favour of a tenement in Thistle Street, Edinburgh, over the back ground of an adjoining tenement to the north in Hanover Street. This servitude is said to be constituted by a missive letter, dated 4th and 7th March 1857, granted by Mr Andrew Fyfe, as representing the proprietor of the tenement in Hanover Street, in favour of Mr Thomas Lindsay, the then owner of the Thistle Street subject.

I do not doubt that it is competent to constitute a negative servitude, such as that *altius non tollendi*, by a mere missive letter passing between the proprietors of the two tenements. It may be thought an error in our law to admit the imposition of so serious a burden on singular successors by a document which may remain entirely latent, there being no register of such servitudes, and from the nature of the servitude, which is one of abstention merely, no published possession. But so I think the law to ordain. It is not the less true, in my apprehension, and holds all the more on account of the innate obscurity of the servitude, that the missive constituting the servitude should be expressed in clear and unambiguous terms. It must, beyond all doubt, import a permanent real right in favour of the one tenement over the other, not a mere personal or temporary arrangement between the individuals concerned.

I am of opinion that the letter relied on in the present case is not so expressed as to constitute a predial servitude. I assume the authority of Mr Fyfe, the writer, to represent Mr James Martin, on whose behalf it was written. Mr Martin thereby proposed to purchase from Mr Lindsay two upper floors in No. 52 Hanover Street, and the cellars and sunk areas in front of No. 54, as also "the right and privilege to Mr Martin, as proprietor of the house No. 54 Hanover Street, to make a communication from the upper flat of that house into the common stair, and with free ish and entry thereto by said common stair," for the sum of £950. This sum I consider, on the terms of the missive, to be the full consideration for the rights so purchased. The missive proceeds—"It is a part of this arrangement, that as Mr Martin contemplates making alterations on the tenement No. 54 Hanover Street, by converting the same into one or more shops, with a saloon or saloons at the back thereof, you, as proprietor of the property lying to the south thereof, shall sign your concurrence to such plans immediately on their being made out, they being made to the satisfaction of Mr William Beattie, builder, and on the understanding that Mr Martin does not intend to erect on the southmost 9 or 10 feet of his back-ground, at present unbuilt upon, lying next your tenement, any saloon or other building higher than 13 feet above the floor of the present dining-room flat of No. 54 Hanover Street."

It is mutually admitted on the record that Mr Martin never carried out the proposal here mentioned of building on the back-ground. Nevertheless, the respondent contends that the effect of this letter was, whether such building proceeded or not, to constitute in favour of Mr Lindsay's tenement, now held by his constituent as singular successor, a permanent predial servitude *altius non tollendi* over Mr Martin's, now Mr Cowan's, back-ground, to the extent of 9 or 10 feet from Mr Lindsay's march.

I cannot give such effect to the letter in question. I think it destitute of those expressions necessary to constitute a real right in favour of the one tenement over the other. I do not hold that there are any *voces signatæ* essential to the constitution of such a right. But I hold that words

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