rity; such a document would require express authority to make it binding. On the face of the document itself there does not appear any attempt to bind the defender Cook, for Mrs Cook thereby binds herself personally; and it is not suggested in the document that she acts for her husband or by his authority in so doing. If the pursuer could have shown (as he has averred) that Cook on his return home homologated or ratified the act of his wife, this would have made him liable. But this the pursuer has not done. It is very doubtful if Captain Cook ever knew of the obligation of 1st August. No notice of it is taken in the correspondence with Cook regarding the bank debt, and it is certainly not proved that the terms of that obligation were ever communicated to him, or that he in any way approved of or homologated it. So far therefore as that obligation is concerned, I think Captain and Mrs Cook should be assoilzied. The defender Cook, however, was one of the co-obligants in the bond. along with the pursuer and Mr Elder, and as the latter is now dead and his representative is bankrupt, Cook must, in my opinion, relieve the pursuer of one half of the debt due under that bond to the bank, and this is a liability which Cook does not dispute. To that extent, and on that ground, decree must be pronounced against the defender Cook. With regard to the defender Morrison, the case is by no means a clear one, and I have considered it with considerable anxiety. His obligation is in these terms—(*reads*). This *notandum* at the end of the obligatory letter of 1st August, it is to be noticed, is addressed by Mr Morrison to the pursuer and not to the beneficiaries. It certainly contains words of undertaking, and, addressed as it is, undertaking to the pursuer. Whatever the arrangement or agreement in that letter was, the defender Morrison undertook to see it carried out. This has not been done; and on the whole I am of opinion that Morrison must see the pursuer relieved of his obligation under the bond, reserving to him his right of relief against the other parties who were primarily liable to relieve the pursuer.

Lord Cowan concurred.

Lord Benholme—I concur with your Lordship as to the judgment now to be pronounced in so far as regards Mr and Mrs Cook. With regard to the defender Morrison, the case has presented itself as one of great difficulty to my mind, and at first I was disposed to agree with the Lord Ordinary. I have no doubt that Mr Morrison did not intend to bind himself to do more than to do his best to see the letter of 1st August carried into effect. But then I do not think the pursuer so understood Morrison's obligation. It was Morrison's duty to make his own meaning and intention clear to the pursuer, and if he failed to do so he must bear the consequences. It is a rule of law, and a good rule, that every obligation is to be construed *contra proferentem*, and on that ground and that alone, I have come to agree with your Lordship in deciding this case against the defender Morrison.

Lord Neaves concurred.

Agents for Pursuer—Murdoch Boyd & Co., S.S.C.
Agent for Mr and Mrs Cook—D. Milne, S.S.C.
Agent for Morrison—D. Curror, S.S.C.

Wednesday, November 24.

FIRST DIVISION.

FLOCKHART *v.* KIRK-SESSION OF ABERDOUR.

Poor—Expenses—Heritors—Kirk-Session. Circumstances in which *held* (*dub.* Lord President) that certain funds given for "the poor of the parish," had been administered jointly by the heritors and kirk-session, and that therefore they fell to be transferred to the parochial board under section 52 of the Poor Law Act. No expenses were allowed to either party.

The question at issue in this case was, whether two sums of £323, 12s., and £45, were to be held for behoof of the legal poor of the parish of Aberdour, or of the casual poor. Till 1848 the funds for the support of the poor were provided out of the church door collections, bequests, sums paid for mortcloths and marriages, and the like sources; but in that year a compulsory assessment was introduced. A dispute thereon arose as to whether the above two sums were to be held by the Parochial Board or by the Kirk-Session, who had hitherto held them. On inquiry into their history, it was found that from time to time the surplus funds, after supporting the poor of the parish, were invested in various securities. On 2d March 1735 the Kirk-Session invested a sum of 1550 merks (£86, 2s. 2⅓d.) in the purchase of certain houses from one Andrew Moyes, and the disposition of the subjects executed by him bore to be "to and in favours of Mr John Liston, minister, and the remanent elders and members of the Kirk-Session of Aberdour, and their successors in office, ministers and elders of the said Kirk-Session (for the use of the poor and indigent of the said parochin of Aberdour)." In May 1800 the Earl of Moray bought these houses from the Kirk-Session, and on 2d June, in further implement of the said transaction, executed and delivered a bond by which he bound himself, his heirs, executors, and successors, to content and pay to the said Mr William Bryce, and his successors in office, ministers of the said parish, for themselves, and in name of the remanent members of the Kirk-Session of the said parish, for the use of the poor of the said parish, the said sum of £323, 12s.

On 15th December 1823 Mr Douglas Morrison, merchant, Kirkcaldy, bequeathed a sum of £50 to the minister and Kirk-Session of Aberdour, directing them to maintain the principal sum entire for ever, and to apply the interest towards the relief of the poor of the parish. This sum, after deduction of legacy duty, was lent to the Earl of Moray, and the acknowledgment of the loan by his factor, and the receipts for interest paid by him, bore to be for behoof of the poor of the parish of Aberdour.

The minutes of the meetings of the Kirk-Session were printed at great length, and it appeared from them that the heritors frequently consulted along with the Kirk-Session in regard to "the poor of the parish." On various occasions the Kirk-Session appealed to the heritors for assistance. On 1st January 1773, *e.g.*, they stated the amount of their funds, and the manner in which their outlay had been made, and "represent that the indigent householders are numerous, and the funds in the session's hands not sufficient for their relief." They also gave in on other occasions lists of the pensioners and poor families, and the heritors assessed themselves for sums to assist the Kirk-Session, which

were to be disbursed by them amongst the most needful families in the usual way.

By the 52d section of the Poor Law Act of 1845 it is enacted, that where any property whatsoever, or any revenues, shall belong to or be vested in the heritors or kirk-session of any parish, or commissioners, trustees, or other persons, on behalf of the said heritors and kirk-session, under any law or usage, or in virtue of gift, grant, bequest, or otherwise, for the use or benefit of the poor of such parish, the parochial board are entitled to receive and administer their said property and revenue, and the kirk-session are thereby authorised and required either to continue to hold such property for the parochial board, or to convey the same over by such proper and requisite deeds as may enable the parochial board to administer the same for behoof of the poor of the parish.

For several years afterwards Mr Greig, inspector of poor, accordingly uplifted the interest of the two sums, and granted discharges in which he signed himself "inspector of poor;" and, under direction of the Board, distributed the amount along with the other poor's funds amongst the poor of the parish. The Kirk-Session alleged that this was only suffered to be done owing to the minister's ill-health; and that Mr Greig was also session-clerk. In 1857 the Kirk-Session disputed the right of the Parochial Board to the funds; and the latter, in consequence, in terms of the statute of 1845, demanded delivery of the bond and obligation, or at any rate that the Kirk-Session should hold the vouchers of debt for behoof of the Parochial Board, and subject to its administration. This was not agreed to, and an offer to refer the matter to arbitration was refused by the Kirk-Session. But, to stay a threatened action of declarator, they agreed to send a committee of their number to confer with a committee of the Board as to the terms of a compromise. An agreement was entered into, in which it was stipulated that the Board should receive the interest of half the cumulo sums; and that the Kirk-Session should administer the interest of the other half, keeping "the inspector of the poor fully aware of the parties so relieved by them and also the Parochial Board informed as to how the said interest is expended." After this agreement had been acted on for some years, a dispute arose in consequence of the Board not being informed as to the details of the expenditure as fully as they wished. Eventually the Kirk-Session complied with the Board's request. But in July 1862 the Kirk-Session intimated to the Board their intention "to resile from the agreement," As no solution of the question was made, on 10th September 1867, Ninian Flockhart, inspector of poor, on behalf of the Parochial Board, brought an action in which he sought to have their right to the sums in question declared, and the Kirk-Session ordained to deliver them up, or to hold them on their behalf, for behoof of the legal poor of the parish, and subject to the administration of the Parochial Board.

The Lord Ordinary (ORMIDALE) found for the pursuer in terms of the declaratory conclusion. Before deciding in regard to the other conclusions the Kirk-Session reclaimed.

SHAND and ASHER, for the reclaimers, argued—The funds in question do not belong, and never did, to the heritors of the parish. They were vested in the Kirk-Session of the parish in their own right, and not in any respect on behalf of the heritors of the parish. No part was acquired from the heritors. The heritors never interfered with its administration. As to the larger sum, the heritors cannot get the money transferred to them under the 52d section of the statute, unless the bond was in favour of the heritors and Kirk-Session for behoof of the poor, *i.e.* the legal poor. The funds must remain in the hands of the Kirk-Session, if the Board do not make out a clear right to them. There was no joint administration of the fund. As to the bequest, the Board must establish that the donor meant the Kirk-Session as trustees for the heritors and Kirk-Session for behoof of the legal poor. The terms of the codicil are "the poor of the parish;" and these are not necessarily the legal poor. Authorities—*White* v. *Kirk-Session of Kinglassie*, June 14, 1867; *Liddle* v. *Kirk-Session of Linlithgow*, July 14, 1854; *Hardie* v. *Kirk-Session of Bathgate*, November 15, 1855.

GIFFORD and WATSON, for the pursuer, replied—"Poor" and "poor of the parish" mean legal poor. The property was all along held and administered jointly, or under the supervision of the Board. The actings of the Kirk-Session, and their making the agreement, were a recognition of the rights of the Board. The heritors did not interfere till the funds were insufficient for the support of the poor. Their self-assessment was in supplement of the church funds. Formerly the heritors were few and non-resident; and therefore they did not interfere with the administration of the funds. In any event the Kirk-Session are bound by the terms of the compromise.

At advising—

LORD DEAS—The question in this case is whether two sums, one of upwards of £300, and the other of £45, owing by the Earl of Moray as debtor, and standing in name of the minister and Kirk-Session of Aberdour as creditors, fall to be transferred to the parochial board for behoof of the poor of the parish in virtue of the Poor Law Act?

Now the Kirk-Session maintain that these funds are held by them for behoof of the occasional poor; and I can have no doubt that nothing could be more expedient than that the Kirk-Session should retain the funds under dispute for these purposes, and that this would in many cases be desirable not only for the sake of humanity, but often would tend to save the regular poor funds by preventing persons becoming permanently burdens on the fund. But the question is not what is expedient, but what is the construction and effect of the Act? The substance is, that all funds held by the minister and Kirk-Session for themselves and the heritors jointly, or administered by them for the heritors, must be transferred to the Parochial Board, if required.

I am in favour of the principle laid down in the cases of *Bathgate* and *Linlithgow*, that the words "for behoof of the poor" do not necessarily mean for behoof of what we call "the legal poor." It is a question of circumstances in each case whether the funds are of that nature or not. This principle was fully recognised in the *Kinglassie* case, which more resembles this case than those of *Bathgate* and *Linlithgow* do.

The question then arises, whether the larger of these funds has not been so held by the minister and Kirk-Session that in terms of the statute it must be transferred to the Parochial Board. When I look at it in this light I think it has been so held by the heritors and Kirk-Session jointly. If it has been held for distribution amongst the poor indiscriminately by the minister and Kirk-Session, I should not hold it necessary to have it transferred.

But it is evident from the records that it has been distributed for the heritors. It would be unprofitable to go into all these minutes and records. But it is clear beyond question that at least from 1777 downwards the funds were administered by the Kirk-Session under direction of the heritors. Its distribution was by the sanction of the heritors; and also they all along occasionally supplemented it. In short it was administered jointly. It is perfectly evident, too, that had the heritors not assessed themselves voluntarily and otherwise, the very capital of the fund would have been used up long-ago. It is not possible to say that for the whole of this period the fund has not been administered jointly for behoof of the heritors and Kirk-Session. And if it cannot be denied, then, in the very terms of the statute, it falls to be transferred to the Parochial Board.

If we examine the minutes of the Kirk-Session we find that the heritors were concerned in the administration of these funds. Just take the minute of 27th March 1777. It begins "the Session report to the meeting of heritors called to meet this day at the desire of the Sheriff-Depute of Fife, the following state of the poor's funds." And then it gives the statement; and goes on to give the list of pensioners; and ends by saying—"that there are several other poor householders in the parish that would need support, but which the Session are not able to take upon their funds." And there are other minutes, *e.g.*, in 1782, 1783, 1787, 1794, 1796, in which the Kirk-Session report their proceedings to the heritors and ask for assistance to supplement the funds in their hands.

If that be so there is not any ground in point of law that would entitle as to say, since the minutes bear that the occasional poor were also relieved that therefore this fund should not be transferred.

In regard to the smaller fund, though a different question might be raised, I do not find any ground sufficient to bring me to a different conclusion in regard to it. And I therefore think it must be transferred also.

Lord Ardmillan—I have always expressed an opinion that it would be well if there was a fund for relief of the occasional poor separate from the regular poor's funds. But the point in this case is, Who is entitled to the possession of these funds?

I cannot say that this case is ruled by the authority of the decision in the case of *Kinglassie*. There are some points of distinction, and I am disposed to consider this case as differing in some respects from that of *Kinglassie;* the differences being favourable to the pleas here maintained for the Kirk-Session of Aberdour. But, admitting the present case to be more favourable to the Kirk-Session than was the case of *Kinglassie*, I am humbly of opinion that the judgment of the Lord Ordinary is right.

That the Kirk-Session are trustees of the fund in question for the "poor of the parish" is admitted. The question is, For whom are they trustees? The words "poor of the parish" in the documents creating this trust do not necessarily mean the same as in the Poor Law Act of 1845. The true meaning of the words in the particular writing must be ascertained by inquiry into the origin of the fund, its investment, its administration, and its distribution. That such inquiry is legitimate, appropriate, and necessary, is recognised in the cases of *Bathgate, Linlithgow*, and *Kinglassie*. That is now matter of settled law. The results of the inquiry may be various, and from these results special cases, depending on special circumstances, may arise: and the decision in such special cases is not authority in a different case.

I can not say that there is, in construing these old writings, long before 1845, any considerable presumption at starting in regard to the meaning of the words. I have gone carefully into the inquiry with my mind free from any such presumption, seeking in the records, minutes, accounts, and whole circumstances, materials for construing the words "poor of the Parish" in the title to the land, and in the bond by Lord Moray. Each party here claims the whole fund. Nothing less was demanded. No suggestion has been offered at the bar of the divisibility of the fund, so that part may go to the Parochial Board and part to the Kirk-Session; and, however desirable and perhaps salutary such division may be, I do not think it is possible for the Court now to adopt it, though I have more than once during these discussions felt disposed to take that view. But I cannot see my way to it. I do not find sufficient materials for arriving at that conclusion.

Forced to select between the two claims, I have come to be of the opinion expressed by Lord Deas, in regard to both the sums in question, and I shall not repeat what he has explained.

Lord Kinloch—There are two funds here in question. The controversy as to each is, Whether, anterior to the Poor Law Amendment Act, it belonged to the heritors and Kirk-Session for behoof of the legal poor, or was vested separately in the Kirk-Session for a discretionary distribution by that body among the indigent persons in the parish—whether possessing a legal claim to relief or not?

With regard to the first of these funds, being the sum of £323, 12s., lying on Lord Moray's personal bond to the minister and Kirk-Session, "for the use of the poor of the said parish," I have come to the conclusion that it must be held to have belonged to the heritors and Kirk-Session for behoof of the legal poor. The case, on the evidence, is a weaker case on which to rest this conclusion than the case of *Kinglassie*, recently decided in this Court; but, applying the principles of that case, I think the same result must be held to follow.

There is a want of conclusive evidence as to the origin of the fund. It appears that in 1783 the Kirk-Session bought certain houses and ground, the title to which was taken to the minister and kirk-session "for the use of the poor and indigent of the said parish of Aberdour," and which afterwards were sold to Lord Moray, and his bond taken for the price. But it is not shown from what precise source the money was derived by means of which the purchase by the Kirk-Session was made. Presumptively it was taken from what was called the poor's box; but whence the money was derived before its being put into the box is not made manifest. Probably it was drawn from various sources, in some of which the Kirk-Session was exclusively interested, in others the heritors and Kirk-Session jointly. But there is no evidence to show how much was of one, how much of the other, category; or whether it did not belong exclusively to one or other of the two.

It is plain that at this time, and for long afterwards, the practical administration of the funds for the poor in this parish was, with the acquiescence of the heritors, altogether in the hands of the Kirk-Session, both as regarded the legal and

the casual poor. The fact, therefore, of the title to these houses and ground being taken in name of the Kirk-Session goes but a very little way towards proving that this was a sessional and not a parochial fund. Everything in regard to the poor was, in this parish, as at the time largely throughout Scotland, done in name of the Kirk-Session; and the fact of the title to the houses and ground being taken in name of the Kirk-Session affords no ground for holding—indeed scarcely any ground for presuming—that a sessional and not a parochial fund was intended to be constituted.

But I think a great deal more stress is to be laid on the circumstance that the title, whilst taken to the minister and Kirk-Session, is taken to them in express terms for the use of the poor of the parish, without limitation or explanation. I cannot adopt the view that a title so taken is to be considered as not meaning one thing more than another till explained by the subsequent transactions. I do not consider its expressions as of so fixed and exclusive a meaning as to denote in all cases nothing but the legal poor, and to be unsusceptible of construction by usage. The contrary of this was very clearly settled in the case of *Kinglassie*. But, *prima facie*, I think that such a title infers a trust for the legal poor of the parish, and throws on the Kirk-Session the *onus* of establishing that it was intended to constitute a purely sessional fund, to be distributed at the discretion of the session. In its corporate character, the Kirk-Session was, at the date of these transactions, vested with the office of trustee and administrator for the legal poor. The one-half of the church collections was given to it as a fund for discretionary distribution. But this was an exceptional fund, as were also any others involving such discretionary distribution—such as a sum left for this express purpose by way of legacy or the like. In order to bring any particular fund under the exceptional category, I think the Kirk-Sessionare bound to prove, as I think they may do from facts and circumstances, that the fund came to them, and was held by them, for their own discretionary distribution. Unless they do so, I think they do not overcome the presumption arising from the words which give the fund to them for the use of the poor of the parish—meaning, as I think the phrase presumptively means—the legal poor. I expressed this opinion in the case of *Kinglassie*, and I still retain it.

The question, therefore, by the answer to which the controversy in the present case is to be decided, is, I think, Whether the Kirk-Session—on whom, in my view, the *onus* lies—have proved by facts and circumstances extrinsic to the title that the fund was vested in them as a proper sessional fund for their own discretionary distribution? When the question is brought to this issue, I think that no doubt can be entertained as to the judgment to be given. In the transactions which took place posterior to the acquisition of these houses and grounds, there is not the slightest trace of the fund being administered by the Kirk-Session as a separate sessional fund distributable at their discretion. It was managed and administered indiscriminately with the other poor's funds of the parish. It was given up indiscriminately with the rest in the reports and accounts presented from time to time to the heritors; and the heritors made from time to time a contribution by voluntary assessment, the amount of which was fixed on the footing of there being no difference between this and the other poor's funds. It is true that all the funds administered, from whatever source arising, seem to have been indiscriminately used for the relief of both legal and casual poor. But the fact that it is on this account impossible to say how much was bestowed in one way, and how much in another, must, I think, be held to tell against the Kirk-Session in the present question; because it prevents them from establishing that clear demarcation which I consider necessary to the establishment of their case. If this confusion prevents the Kirk-Session from showing that this fund was all along kept apart for discretionary distribution as a sessional, not a parochial fund, the result is simply that they are unable to satisfy the *onus* which, I think, lies on them. The Kirk-Session is in the present case in no different position from that in which the Kirk-Session of every parish stands, in my apprehension, in every such case. They must show by clear and indisputable evidence that the fund in question was administered by them on the express footing of its being a proper sessional fund, separate and distinct from the other poor's funds of the parish. The Kirk-Session of Aberdour have failed to do so; and therefore I think that this must be held as in the same situation with the parochial funds generally, which are administered for behoof of the poor; in other words, must be held to be a fund belonging at the date of the Poor Law Amendment Act to the heritors and Kirk-Session, as jointly forming the administrative body in the eye of the law.

The other fund now in question consists of a sum of £45, also lying on personal bond by Lord Moray, to whom it was lent. This fund is so far differently situated from the other that its origin is clearly traced. It is the product, less legacy duty, of a legacy of £50 left by Mr Douglas Morison, merchant in Kirkcaldy, by his trust-settlement, *mortis causa*. In this settlement, as originally framed, it appears in these simple words:—"To the Kirk-Session of Aberdour, £50." If matters had rested here there could be no doubt that this constituted a proper sessional fund, to be disposed of at the discretion of the Kirk-Session. But a codicil was added to the settlement, directing the trustee "to take the minister and Kirk-Session of Aberdour bound, on paying them the within-mentioned sum of £50 sterling, to put out the same at interest, and to apply the interest thereof towards the relief of the poor of the parish, but to allow the principal sum to remain entire for ever." This places matters in the same position as if the sum had been originally given "to the Kirk-Session of Aberdour, the interest to be applied year by year towards the relief of the poor of the parish." The terms of the original title thus infer the same presumption as in the other case. It seems plain on the documents that, whatever might be done at first, this sum, like the other, ultimately fell into the general mass of the poor's funds; and, on the whole matter, I cannot find sufficient grounds for drawing a distinction between the two funds.

LORD PRESIDENT—In so far as regards the second fund in dispute, I agree with all your Lordships. If the judgment had stood upon the bequest alone, I think the decision must have been otherwise. But by the codicil it is expressly stated that the sum bequeathed is to be put out to interest, and the interest applied "towards the relief of the poor of the parish." I think "legal poor" must be held here to mean "poor of the parish." I quite concur with a remark by Lord Curriehill, in the *Kinglassie* case,

that a person wishing to make a benevolent bequest would naturally give it to the casual poor, not to those who have a claim on the land owners, for that is in reality a bequest to the ratepayers.

In regard to the larger fund, I have great hesitation and difficulty in coming to the same opinion as your Lordships. I think this case differs from the case of *Kinglassie*, and much more resembles those of *Bathgate* and *Linlithgow*. And in a careful perusal of the opinion of Lord Curriehill in the *Kinglassie* case, I think he would have felt the same hesitation in this case that I do.

This fund was invested in land; and what was done in regard to it was at first only by the Kirk-Session. It was of a mixed character; and the heritors of this rural parish were no doubt well pleased to leave the administration in the hands of the Kirk-Session. But there is no doubt, from the earlier minutes of the Kirk-Session, that they gradually came to administer it as if it was a fund purely their own. This seems to have been unknown to the heritors. And for a long time the Kirk-Session so managed it; and finally invested it on a bond by Lord Moray. Now, there can be no doubt that even at that time the Kirk-Session were receiving aid from the heritors. The Kirk-Session were well off in funds, much more so than now-a-days. They had half of the collection at the church door for the casual poor. And, also, they had dues to a considerable amount from mortcloths, banns, &c., much greater than they have now. I therefore cannot avoid coming to the conclusion that the Kirk-Session had at that time considerable funds entirely their own, and that they held this fund as to be so administered. I should therefore feel inclined to see if there was no way of allocating the fund between the parties. One half to each is a rough way, and it might be unsatisfactory. I think, however, we may look at it thus,—that the Parochial Board are *in petitorio*, and that the *onus* lies on them of proving their right to this fund. The result would therefore be that the fund should be left in the hands of the Kirk-Session. But though I have thought it necessary to state my strong reasons for hesitating to come to the same view as your Lordships, having stated these views, I shall not do more than express my hesitation in concurring with the judgment about to be pronounced. And, therefore, the decision of the Court is, to adhere to the Lord Ordinary's interlocutor.

No expenses were allowed to either party.

Agents for Pursuer — Wotherspoon & Mack, S.S.C.

Agents for Defenders—Adamson & Gulland, W.S.

Wednesday, November 24.

GOULD *v.* M'CORQUODALE.

Servitude—Acquiescence—Altius non tollendi. A disponed part of his property to B, under a restriction not to build on the rest of it above a certain height. Thereafter he disponed to C, under this restriction, the part of his property opposite B's, and the rest of it to other parties. D acquired B's property, and E C's. The other proprietors transgressed the restriction unopposed by D; but when E sought to do so, D objected. *Held*, (1) that a valid servitude *altius non tollendi* had been created at least on E's property in favour of D's; and (2) that D had not lost his right to enforce it against E by not seeking to enforce it when the other proprietors transgressed the restriction, he having no interest and a doubtful right to do so.

On 25th May 1868 M'Corquodale, on behalf of his firm, who are printers and stationers in Glasgow, presented a petition for lining in the Dean of Guild Court of Glasgow, craving warrant to erect certain buildings on their property in Maxwell Street and Fox Street, Glasgow. Gould is proprietor of buildings on the opposite side of Fox Street, which are partly in front of M'Corquodale's ground. He acquired the ground in 1844 from Richard Alexander Oswald, who obtained it in 1814 from James Oswald, proprietor of both the subjects and some other ground adjoining. In the disposition to R. A. Oswald it was declared "That no building shall be erected within fifty feet of the north side of the meuse lane (Fox Street), higher than thirty-two feet in the side walls, and the roofs of the said buildings shall not in height exceed one-third of the width of the building over the walls." This was declared to be constituted a real burden on the land. M'Corquodale acquired his holding from James Oswald in 1830; and in his titles the same restriction was inserted. But he asserted that when this disposition was made of the property, James Oswald, the disponer, was not proprietor of the subjects Gould possesses; and therefore that he had no more right than a total stranger to insert this restriction in his title. He further asserted that, even if the restriction ever existed, it had been abandoned; and that the neighbouring proprietors, in whose titles it equally existed, had been allowed uninterruptedly to make similar erections. Gould averred that he himself, not being restricted in the height to which he might build, intended to erect a higher tenement which would be deprived of its light unduly if M'Corquodale was allowed to build higher in violation of the restriction in his titles. He stated that he had paid £2150 for the property, and had since received offers of far greater amount for it. He had refused an offer of £6000, and had expended nearly £2000 in improving the ground. The erections proposed would lessen the rent of his property in letting to the extent of £80 or £100. The erections made by other proprietors were made many years ago; and were completed before he was aware.

On 23d July 1868 the Dean of Guild pronounced an interlocutor repelling the objections to the petition, and granting the warrant craved for. Gould advocated; and after some discussion, a proof was allowed to both parties of their averments. The case now came before the Court as a discussion on the proof.

SOLICITOR-GENERAL and BALFOUR, for the advocator, argued—The proposed erections are in violation of his title and also of the titles of the respondent. A valid and effectual servitude *altius non tollendi* is constituted in his favour. The averments of acquiescence or abandonment are irrelevant and insufficient. He might not care to oppose the erections that were not opposite his own frontage, or in a certain direction. No words of style are requisite to create a servitude; an agreement even in writing apart is sufficient. The restriction is valid, either as a real burden, a personal obligation, or a servitude. Authorities—*Gray*, M. 14,513