Everything proposed to be put in issue might be proved without inferring any liability upon the defender. In the case of *Dyer* v. *Munday* (1895), 1 Q.B. 742, the jury had found that the assault was committed by the employees in the course of their employment. Counsel for the defender also referred to the following authorities—*M'Laren* v. *Rae*, December 10, 1827, 4 Murray 381; *Richards* v. *West Middlesex Waterworks Company* (1885), 15 Q.B.D. 660.

Argued for the pursuer—The averment that the assault was committed by the shopman while acting within the scope of his authority as defender's shopman was sufficient. The question whether the circumstances justified that statement was one of fact for a jury. But further, it appeared from the details given that the shopman acted as he did with a view to preventing the pursuer raising a political disturbance in the shop. [Counsel was proceeding in support of this argument to found on the defender's averment quoted above, and referred to by the Sheriff-Substitute, but the Court intimated that they did not desire further argument on this point]. Authorities referred to—*Limpus* v. *London General Omnibus Company* (1862), 1 H. & C. 526; *Ward* v. *The General Omnibus Company* (1873), 42 L.J., C.P. 265; *Dyer* v. *Munday* (1895), 1 Q.B. 742; *Harris* v. *North British Railway Company*, June 30, 1891, 18 R. 1009.

LORD JUSTICE-CLERK—It is quite clear that as it is stated this case is not relevant. It is vain to say that because the wrongous act complained of is said to have been done by the servant while "acting within the scope of his authority," that a right of action is disclosed against the master, no matter what the servant is said to have done, and under whatever circumstances it appears that he did it. Such a general statement is more of the nature of a plea-in-law than an averment of fact, and it requires to be supported by averments showing that in what he did the servant was acting within the scope of his employment. There are no such averments here. On the contrary, it appears that the pursuer and the defender's shopman got into a dispute about politics, and the shopman took upon himself to eject the pursuer from the shop, and in so doing injured him. I do not see how the master is to be liable for that, and accordingly this action must be dismissed.

LORD YOUNG—I concur, and the case seems to me so clear that I do not know whether it is advisable that I should add anything to what your Lordship has said. If there is any truth in the pursuer's averments, he will have a good action against Hector M'Kechnie. But he has not brought his action against him but against his master, and the question is whether the master in the circumstances disclosed in the record is responsible or not. The pursuer says that the shop was under the control and management of Hector M'Kechnie, and that he and M'Kechnie had often spoken in a friendly way about politics, but upon this occasion they ceased to be friendly and M'Kechnie ejected the pursuer and injured him. It appears to me extravagant to suggest that a master could be made liable for this. Suppose two butlers are friends, and one is a Conservative, and the other a Liberal, the one a Roman Catholic and the other a U.P. or a Plymouth Brother, and the one comes on a message for his master to the house where the other is in service, and after the message is delivered they get talking about politics or religion, and they quarrel and one of them ejects the other and injures him, will that give the butler who has been ejected and injured a good ground of action against the other butler's master, if it is averred that the butler who did the injury was acting within the scope of his employment. Such a suggestion is ridiculous. I think this action should be dismissed.

LORD TRAYNER—I agree. The pursuer's case is broadly distinguished from those quoted by the Sheriffs.

LORD MONCREIFF—I am of the same opinion. The pursuer's averments disclose nothing except a private quarrel between him and M'Kechnie.

The Court dismissed the appeal, with expenses.

Counsel for the Pursuer—A. J. Young—Munro. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Defender — Salvesen — T. B. Morison. Agents — Macpherson & Mackay, S.S.C.

Saturday, May 28.

SECOND DIVISION.

[Dean of Guild, Perth.

R. CLARK & SONS *v.* SCHOOL BOARD OF PERTH.

Servitude—De non ædificando—Construction of Special Terms.

The proprietor of ground within burgh was debarred by a grant of servitude from "making any erections, buildings, or other impediments within 14 feet of the west gavel of" a certain house "so as not to interrupt the lights thereof," the granter reserving liberty "to erect a paling at the distance of 3½ feet from the west gavel of the said dwelling-house 5 feet in height." *Held* (*aff.* the Dean of Guild, Perth) that this stipulation did not prevent buildings from being erected on any ground not directly *ex adverso* of the west gavel of the house in question, and in particular did not prevent buildings from being erected up to the southern end of the west gavel on a line running west from that point.

R. Clark & Sons, undertakers, Perth, presented a petition to the Magistrates of

Police of the Royal Burgh of Perth, as the Dean of Guild Court thereof, for authority to erect certain buildings upon ground belonging to them.

Objections were lodged by the School Board of Perth and by William M'Caul, who founded upon a stipulation contained in a disposition granted by the petitioners' author in favour of their (the objectors') author, which stipulation was also embodied in the sasine following on that disposition. It was as follows—"And it is hereby expressly declared that me" (*i.e.*, the petitioners' author) "and my successors are to be secluded and debarred from making any erections, buildings, or other impediments within 14 feet of the west gavel of the dwelling-house hereby disponed, so as not to interrupt the lights thereof; but I, the said John Duncan, am to have a liberty, if I chuse, to erect a paling at the distance of 3½ feet from the west gavel of the said dwelling-house 5 feet in height."

The objectors also founded upon the following provision contained in the disposition granted in favour of the petitioners by their immediate authors—"Declaring also that the servitude hereinbefore constituted by the said declaration and restriction shall be over and above, and without prejudice to, a servitude of a similar character presently existing over the said yard or vacant ground, or part thereof, in favour of William M'Caul's foresaid tenement, bounding the said yard or vacant ground on the east whereby the proprietors of the said yard or vacant ground are excluded and debarred from making any erections, buildings, or other impediments within 14 feet of the west gable of William M'Caul's foresaid tenement, so as not to interrupt the lights thereof."

In virtue of these provisions in the titles the objectors claimed that the petitioners were not entitled to build on any ground which came within 14 feet measured in any direction from any part of the west gavel of the dwelling-house referred to, and that as the buildings proposed to be erected were partially in that position authority for their erection should not be granted.

The further facts in the case, so far as important, sufficiently appear from the Dean of Guild's interlocutor and note.

On 24th February 1898 the Dean of Guild pronounced the following interlocutor:—"Having heard the agents for the petitioners and the compearing respondents, and considered the closed record, plans, and whole process, Finds that the lands belonging to the petitioners and the adjoining lands belonging to the compearing respondents and the respondent James Nairn respectively originally formed one subject, which belonged to John Duncan, wright in Perth: Finds that by disposition, dated 20th March 1798, the said John Duncan conveyed the subjects, now belonging to the compearing respondents, to Alexander Bald, shipmaster in Perth: Finds that it is provided in said disposition that the said John Duncan and his successors in the remaining lands were to be secluded and debarred from making any erections, buildings, or other impediments within 14 feet of the west gable of the dwelling-house thereby disponed so as to intercept the lights thereof: Finds that the petitioners are not proprietors of part of the subjects upon which the servitude constituted by said disposition was imposed: Finds that the workshop proposed to be erected by petitioners, and for which they ask warrant, is not to be erected within 14 feet of said gable, and will not intercept the lights thereof: Therefore repels the objections of the compearing respondents, and grants warrant as craved," &c. He also found the compearing respondents liable in expenses.

Note.—"The only objection the compearing respondents have to the petitioners obtaining warrant as craved is that the petitioners propose to place the north wall of their intended workshop within fourteen feet of the west gable of their, the respondents', tenement in violation of the servitude of lights in their favour imposed on the petitioners' property. The petitioners admit that such a servitude has been constituted in favour of the objector's tenement, but deny that their buildings will in any part come within the restricted area.

"It seems that in 1798 the different subjects which now belong to the petitioners, the compearing respondents and the respondent Nairn (who does not appear to object) respectively, belonged wholly to Mr John Duncan, who conveyed the portion of his subjects which now belongs to the compearing respondents to Alexander Bald, and in the disposition he imposed a servitude on the subjects retained by him for the benefit of those sold to Mr Bald.

"The remaining subjects which belonged to Mr Duncan were subsequently divided in the course of various transmissions, and the state of matters now is that the respondent Nairn is proprietor of the ground directly west of the west gable of the objectors' property, and the petitioners are proprietors of the ground to the south of Mr Nairn's property. Thus the northern boundary of petitioners' property on which they propose to build runs due west from the south end of the west gable (for the benefit of which the servitude was imposed) along the southern boundary of Mr Nairn's property.

"Such being the position of the various properties, so far as they bound each other, the objectors contend that the restriction against building within 14 feet of their gable wall, besides applying to the ground in front of the wall, extends to all ground within the radius of 14 feet from each end of it. That is, as they argued in the present case, the prohibited area is not only the 14 feet lying immediately due west of the southern termination of the gable wall, but the area lying within the segment of a circle drawn from that point to a point 14 feet due south of the wall. They base their argument on the phraseology of the clause imposing the servitude that John Duncan and his successors 'are to be secluded and debarred from making any erections, buildings, or other impediments within 14 feet of the west gavel of

the dwelling-house hereby disponed so as not to interrupt the lights thereof;' and they contend that this restriction extends at the point where the gable terminates to every portion of ground within a radius of 14 feet of any part of the gable wall, where an erection would interfere with its lights. I cannot accede to this view. I consider that the plain meaning of these words is that the 14 feet are to be measured straight out and at right angles with the line of the gable wall, and that to give them the meaning for which the compearing respondents contend is to place on them a very strained meaning indeed. It is a well-known principle of law that if two meanings can be placed on the construction of a clause imposing a servitude, that meaning is to be given effect to which is most favourable to the servient tenement.

"If a servitude such as the one under consideration were intended to extend over ground not exactly opposite the gable wall, it would require to be constituted in exact and unambiguous terms. I therefore hold that the ground on which the petitioners propose to build is not affected by the servitude in favour of the objectors, and that they are entitled to the warrant they crave."

The compearing respondents appealed, and argued—To interpret the stipulation founded on by the objectors as the Dean of Guild had done, was to read into the clause the words "*ex adverso*" between "14 feet" and "of the west gavel." This was not legitimate. If no such qualification was read in, then the plain meaning of the words was as maintained by the objectors. A building in the position of that proposed would seriously interfere with the light coming to the gavel in question.

Counsel for the petitioners were not called upon.

LORD JUSTICE-CLERK—I have no doubt in this case. The maxim referred to by the Dean of Guild is sound. If two meanings can be placed on a clause imposing a servitude, that meaning is to be given effect to which is most favourable to the servient tenement. On this principle, even if the meaning of the clause was doubtful, the petitioner would be entitled to prevail, and on that ground alone I am prepared to agree with the Dean of Guild's judgment. But I am prepared to go further. I think the clause cannot be reasonably read as the objectors propose to read it. It means that the light of the gable referred to is not to be interrupted by having any other building built on to it. In my opinion the Dean of Guild's interlocutor is right and ought to be affirmed.

LORD YOUNG—I agree.

LORD TRAYNER — I think the reading which the Dean of Guild has adopted is the only possible reading of the clause in question.

LORD MONCREIFF — I am quite of the same opinion.

The Court dismissed the appeal, and affirmed the interlocutor appealed against with expenses, and remitted the cause to the Dean of Guild to proceed therein as accords.

Counsel for the Petitioners — Dundas, Q.C. — Dewar. Agents — Carmichael & Miller, W.S.

Counsel for the Respondents—W. Campbell—Constable. Agents—J. & J. Galletly, S.S.C.

Tuesday, May 31.

OUTER HOUSE.

[Lord Kincairney.

LIDDALL *v.* SCHOOL BOARD OF BALLINGRY.

Process—Proof—Copy of Evidence.

Notice to certify notes of evidence *ad interim*, in order that parties might use them without obtaining a copy, *refused.*

In this action proof was led and adjourned for a considerable time. Before the adjourned diet the pursuer moved the Court to certify *ad interim* the note of the evidence led for the purpose of enabling his counsel to see it before closing his proof. The Lord Ordinary (KINCAIRNEY) refused the motion, observing that parties might obtain a copy of the evidence in the usual way.

Counsel for the Pursuer — Galloway. Agent—F. M. H. Young, S.S.C.

Counsel for the Defender — Constable. Agent—W. J. Lewis, S.S.C.

Friday, June 3.

SECOND DIVISION.

GRANT'S TRUSTEES *v.* GRANT.

Trust—Conditional Bequest—Provision—Condition held Void because contra bonos mores—"Not to Reside with Parents."

In his trust-disposition and settlement a grand-uncle directed his trustees to pay the income of half of the residue of his estate to a grand-niece, who, ever since she was two years of age, had resided with him apart from her parents, till she attained majority or was married, and on either of these events occurring to pay the capital over to her, but he directed that the grand-niece should forfeit all right to any interest whatever in his estate if before the capital was so paid she returned to live with her parents. The truster died when the grand-niece was twelve years of age. Her parents were both alive and of good character.

Held that the condition attached to the bequest was null, being *contra bonos*