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

Mutrie, June 26, 1810, F.C.; *Mags. of Edinburgh* v. *Macfarlane*, Dec. 2, 1857; *Brown* v. *Burns*, May 14, 1823; *Campbell* v. *Clydesdale Bank*, June 19, 1868; *Western* v. *Macduff*, 2 Chan. App. 72.

SHAND and ASHER, for the respondents, replied—James Oswald had no right to insert the restriction in the respondent's title, if it is to be read as created in favour of Gould. Even if so created, it has been lost by abandonment. So far as concerns the respondent it is *res inter alios acta*. There is no definitely named servient tenement. Nor is there a properly constituted servitude. Gould has no title to insist in enforcing the restriction.

At advising—

LORD PRESIDENT held there were two questions to be decided—(1) Whether the restriction, or servitude, in the disposition applied to the respondent's property? and (2), if that was answered in the affirmative, whether it had been lost by not being enforced against other proprietors. From the terms of the disposition it was manifest a servitude *altius non tollendi* had been created in favour of Gould's property. Whether such a servitude would be held good against property not opposite the servient tenement it was not necessary to say; for a question might arise, whether it was being enforced nimiously or *in emulatione vicini*. But such a servitude, if good at all, was undoubtedly good against property *ex adverso* of the servient tenement. In regard to the second question, before it could be held the servitude had been lost by its non-enforcement against other transgressing proprietors, it must first be settled that Gould had a good right to enforce it against them, and, next, that it was for his interest to do so. It would be going very far to say, that because a man refrained from attempting to enforce that which it was doubtful that he possessed, and in which he had no interest, that he had lost, and was not entitled to enforce, a right which he undoubtedly possessed and in which he had a great interest.

LORD DEAS held that there were three propositions which could not be disputed—(1) that every man has a right to do what he likes with his own property, unless expressly and distinctly restricted; (2) that the party objecting must have a clear title to object, and a substantial interest to do so; and (3), that where restrictions are imposed, if the party objecting has himself infringed them, he cannot object. This question was to be distinguished from one in which there was a common superior to enforce the restrictions laid upon the vassals. Nor was Gould in the position of a superior who has a right to enforce the conditions of the feus. But he had unquestionably a right and a substantial interest to object to the buildings proposed.

LORD ARDMILLAN—I do not think this case difficult; but it touches questions of difficulty, and therefore it requires to be carefully disposed of. The advocator, Mr Gould, is proprietor of subjects marked on a plan and known as No. 1, and situated at the corner of Clyde Street and Maxwell Street; Clyde Street being the south boundary, Maxwell Street the east boundary, and Fox Street, formerly a Meuse Lane, the north boundary. These subjects are valuable, and one element of value is the double frontage to Clyde Street and Maxwell Street. The respondents Messrs M'Corquodale are proprietors of subjects on the north side of Fox Street, and bounded by Maxwell Street on the east.

Both these subjects were formerly the property of James Oswald. They had been originally acquired by his father. They are situated within the city of Glasgow, and are held burgage. In 1814 Mr James Oswald conveyed the subjects now belonging to Mr Gould to Mr Richard Alexander Oswald, who was, I believe, his cousin, and by that disposition he created an obligation to the effect that "no building shall be erected within 50 feet of the north side of the Meuse Lane higher than 32 feet in the side walls." The advocator is seeking to enforce that obligation. He is the proprietor of the subjects disponed, and is in the right of Richard Alexander Oswald. The respondent Mr M'Corquodale is in the right of Archibald M'Lellan, to whom certain subjects north of Fox Street were disponed by James Oswald in 1830. The first question is, On whom was the obligation not to build above a certain height laid by the disposition in 1814? I am of opinion that it was an obligation by the disponer, Mr James Oswald, in favour of the disponee. The stipulation against such high building was not a condition or burden of the rights conveyed, in favour of the rights reserved. It was an accessory privilege of the rights conveyed, and the obligation to maintain the privilege rested on the disponer. It was truly a right of the nature of a servitude *altius non tollendi*—the dominant tenement being the subject conveyed to Mr Gould's author,—the servient tenement being the subject retained by Mr Oswald, the disponer, within the limits specified.

In the next place, I am of opinion that the obligation in the disposition of 1814 relates to building on the ground on the north side of the Meuse Lane, now Fox Street, and that if the obligation is valid and effectual, and such as the advocator can enforce, then the buildings now proposed by M'Corquodale, and complained of by Mr Gould, are clearly within the space to which the stipulations apply. If the question now raised had been raised between the disponee under the deed of 1814 and Mr James Oswald, I have really no doubt that Mr Oswald was bound by the obligation, and that he could not have erected the buildings to the height and in the place now complained of.

It is now necessary to consider what is the position of M'Corquodale, who acquired from M'Lellan, and whose title to the subjects is contained in a disposition by James Oswald to M'Lellan, dated in December 1830.

Now that disposition to the author of M'Corquodale, sixteen years after the conveyance to the author of Gould, contains a special clause prohibiting buildings of a certain height, to the same effect as in the disposition of the other subjects in 1814, with this important difference,—that in the disposition to Gould's author in 1814 the obligation is on the disponer, but in the later disposition to M'Corquodale's author in 1830 the obligation is on the disponee, and not only so, but it is made a real burden on the subjects conveyed, to be inserted in the subsequent conveyances and infeftments. That obligation now rests on M'Corquodale.

Observe the position of these two disponees. Both derived their rights from James Oswald. By the first disposition in 1814 he undertook an obligation, in the right to enforce which Gould now is, and he conveyed to Gould's author certain subjects to which that obligation gave additional value. Mr Oswald remained bound by that obligation, and Mr

Gould's author was in the right of it, as Mr Gould now is. Then, in 1830, Mr Oswald conveyed to M'Lellan the subjects to which the obligation not to build above a certain height applied, and whereon he could not so build, and he attached to that conveyance, as a condition and a burden on the disponee and on the subjects, the same obligation not to build which he had undertaken in favour of the disponee under the deed of 1814. The first disponee, now represented by Mr Gould, had a privilege which was secured and protected, 1st by the obligation of the disponer Mr Oswald, and 2dly, by the obligation laid as a condition and a burden on the right of the second disponee, now represented by Mr M'Corquodale. Mr Gould could have enforced the obligation against Mr Oswald. Mr Oswald could have enforced the obligation against Mr M'Corquodale. That is the position of the parties. Now, I am humbly of opinion that such circuitous procedure is not necessary, and that Mr Gould is in this process entitled to prevent the erection of buildings by Mr M'Corquodale of the height or character against which both dispositions afford protection. I think that a servitude *altius non tollendi* has been constituted in favour of Mr Gould's property, and that he is entitled to enforce it against Mr M'Corquodale.

It is only necessary to add, that I am of opinion that the rights of Mr Gould in this matter have not been abandoned or relinquished, or lost by acquiescence. Mr Gould has not done anything himself, or given his positive sanction to the act of any other, implying departure from the stipulations in the titles. This is not like the case of *Walker* v. *Renton*, in 1825, where one of the parties himself violated the prohibition and then sought to enforce it against others. Mr Gould does not appear to have done more than Mr M'Corquodale or his authors themselves did in regard to such operations. In other words, he did nothing; and I do not think that, by thus refraining from interference, where no injury was done, and he had no interest to object, he is barred from now taking this objection.

Lord Kinloch—The substantial question raised before us is, whether there lies a servitude *altius non tollendi* on the property belonging to Messrs M'Corquodale on the north side of Fox Street, in favour of the property belonging to Mr Gould on the south side of the same street. This question involves two inquiries—1st, Whether such a servitude was imposed? 2d, Whether, if so, it has been extinguished?

I am of opinion that this servitude was duly imposed by the proceedings taking place in the years 1814 and 1830.

On 15th Nov. 1814 Mr James Oswald, then and for sixteen years afterwards the proprietor of what is now Messrs M'Corquodale's property on the north of Fox Street (which was then called "the Meuse Lane"), conveyed to Mr Gould's predecessor the property *ex adverso* on the south of that street. By the deed of conveyance it is declared "that no buildings shall be erected within fifty feet of the north side of the Meuse Lane 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." To this Mr James Oswald, the proprietor of the property on the north of the Meuse Lane, expressly bound himself.

There are strong grounds for holding that, even without going farther, there was here the constitution of a servitude *altius non tollendi* on the property to the north in favour of Mr Gould's property to the south of Fox Street. It is trite in our law that to constitute a servitude nothing more is necessary than a writing executed by the proprietor of what is intended to form the servient tenement, declaring the burden; there being no words of style requisite, nor any other than are necessary to make the purpose clear. It is unnecessary that this writing should enter the title-deeds of the property, although it generally does so. Certainly it is not less effectual that the writing is contained in the disposition of the dominant tenement, than if it was embodied in a separate scrap of paper. In the case of a positive servitude, possession must pass on the writing to make the servitude effectual against a singular successor. In the case of a negative servitude, such as that of *altius non tollendi*, to which possession is inapplicable, the written deed is stated by the authorities as by itself sufficient. This, unquestionably, imposes a disadvantage on singular successors, to whom the writing may be unknown; but so the law is laid down, and the anomaly itself is commented on by the institutional writers. The employment of such words as are here used by a disponer in a disposition of ground contiguous to that on which he placed the burden, was found sufficient, without anything further, to constitute an effectual servitude in the case of *Gray* v. *Ferguson*, 31st Jan. 1792, Mor. 14, 513, a decision sanctioned and followed in several after cases.

But still more occurred in the present case, for on 8th Dec. 1830 Mr James Oswald, by whom this servitude was undertaken, disponed the subjects on the north to the predecessors of Messrs M'Corquodale, with a declaration made a real lien, and appointed to be engrossed in all the after title-deeds, "that no buildings shall be erected within fifty feet of the said street or lane called 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," a repetition of the very words by which the servitude was constituted in the deed of 1814; and admittedly this declaration continued, and still continues, inserted in the title-deeds of Messrs M'Corquodale. The constitution of the servitude was thus confirmed in the most conclusive manner; for it was introduced, and still remains, in the titles of both servient and dominant tenement. It is scarcely possible to conceive a clearer case of established servitude under our law. It is of no materiality that the subjects are held burgage; and not under a common feu-superior. It is not being under the same superior which constitutes the necessary relation. It is the existence of written deeds, in regard to contiguous subjects, however held, which places one subject in the position of a servient, the other in that of a dominant tenement. This relation is clearly established by the deeds now referred to.

The only question which remains is, whether the servitude thus imposed has been extinguished? and I think that no other answer can be returned except one in the negative. It is an undoubted principle, of great value in our law, that where a general arrangement has been made for the benefit of a number of proprietors, bound by a common tie, as where they are all vassals under one common superior, and the arrangement has been de-

parted from in a considerable number of instances without objection from any quarter, it shall be held no longer binding against any one. There is a clear and manifest equity in so holding; and it has been held in more than one case. But there is no room for the application of the principle in the present case. The state of fact is simply that Mr James Oswald was proprietor of a certain portion of ground on the north of Fox Street, and a certain portion of ground on the south opposite the other. There was no feuing plan or other general arrangement engaged in as to Fox Street. So much the contrary of this is the fact, that there is a considerable portion of ground on both sides of the street, (coloured blue in the process plan) which was admittedly left free from all restriction. Mr Oswald, in following out his own views for the disposal of his ground, laid the property to the north under this servitude in favour of the property to the south. Two tenements to the north have been built above the prescribed height, without objection from Mr Gould. He explains his reason to have mainly been, that these buildings not being directly opposite to his ground—on the contrary considerably to the west—he had no interest to interfere. I think it very clear that his acquiescence in these two instances (from whatever reason arising) cannot be pleaded against him in the case of Messrs M'Corquodale, where the property, being directly opposite to his, a clear interest to object has emerged. He cannot be held to have abandoned his right in this specific case by his waiver, whether express or implied, in the two others. And his right to object to the building now proposed to be raised far above the specified height on the north side of Fox Street, stands, I think, undiminished and entire.

The practical conclusion is, that the Dean of Guild has gone wrong in granting the petition of Messrs M'Corquodale for leave to erect the building in question; and that this petition ought to be refused.

Agents for Advocator—Ronald & Ritchie, S.S.C.
Agents for Respondent—J. W. & J. Mackenzie, W.S.

Wednesday, November 24.

HUNTER *v.* MILBURN.

(*Ante*, vol. vi, p. 525.)

Arbiter—Award—Building Contract. Circumstances in which *held* that all the points of dispute under a building contract fell under the award of an arbiter, and that no sufficient reason had been stated for interfering with the award.

The pursuer undertook to perform the mason work of a house for the defender under a contract which specified precisely how and with what materials the work was to be done; stipulated for periodical payments; imposed a penalty of one pound per day in the event of delay not due to the weather; and provided for the reference to Mr Henderson, as arbiter, of "all matters of dispute relating to the carrying out of the several works to the full intent and meaning of the plans and specifications." The house was not completed in time, nor exactly according to the specification; and the defender refused payment of the balance of the price. The Sheriff-substitute (CAMPBELL), and the Sheriff, held that action for the balance was excluded by the clause of reference. But, on appeal, the Court recalled these interlocutors and pronounced the following interlocutor:—

"*Edinburgh, 26th May* 1869.—The Lords having considered the appeal and record in this case, and heard counsel for the parties, recal the interlocutor of the Sheriff-substitute and Sheriff submitted to review: Find that the present action is not excluded or barred by the clause of reference in the building contract between parties; supersede consideration of the cause for four weeks from this date, that parties may have an opportunity of bringing before the arbiter the question in dispute between them, in terms of the said clause of reference: Find the pursuer entitled to expenses hitherto incurred in this Court, and also expenses in the inferior Court since the date of closing the record; allow an account to be given in, and remit to the auditor to tax the account when lodged, and to report."

The questions in dispute were accordingly submitted to Mr Henderson, who gave his award on 22d July 1868. The part of his award in regard to the points in dispute was as follows: "That, although the said Isaac Hunter hath not performed and fulfilled the whole of the conditions contained in the specification relating to the erection of the said dwelling-house and premises, the said dwelling-house and premises are not at all lessened in stability from the fact that the foundations are not quite so deep as they should have been if the said specification had been duly observed, as part of the foundations are upon solid rock. That some of the walls are thicker than the said specification requires, which is the cause of the footings not projecting so much as the said specification required. That the cost of making deeper excavations and the extra walls would be 50s. or thereabouts. That although the damp courses are higher up than the specification required, they will effectually keep out the damp. That the mistake in the levels should have been observed and corrected by a clerk of the works, who should have been appointed by the defendant. That the house has not shrunk more than usual where a new building is attached to an old one. That the stone of which complaint is made is equal in quality to the stone mentioned in the specification, and the defendant's uncle, William Milburn, who acted as his agent, agreed to the difference. That the steps are much stronger than they would have been if built according to the specification: And I do further award that the said George Milburn, his executors or administrators, shall pay to the said Isaac Hunter, his executors or administrators, the sum of £158, 9s."

The pursuer now sought to have this award enforced; but the defender objected on various grounds. He said that the damp courses were not laid in terms of the specification; and though the building might be good it was disconform to the specification. The foundation was not as deep as stipulated, and that the stones were from a different quarry.

SOLICITOR GENERAL and BALFOUR, for the pursuer, argued—Every point has been before the arbiter and considered and decided by him. The damp courses are held by him as satisfactory; and there is no averment on record that they are insufficient. There was no need to quarry out the foundation to the stipulated depth, as the foundation proved to be rock; and the arbiter has made a deduction for the expense thereby saved to the