poor roll under the Act of Sederunt of 21st December 1842 for the purpose of bringing an action against the Reformed Presbyterian Presbytery. The Second Division remitted the case to the reporters on the *probabilis causa*. The reporters stated that they were "equally divided in opinion upon the application, and we would therefore respectfully leave the same with the Court to be disposed of by them as they may think proper."

The presbytery argued—Though the reporters were equally divided in number as to whether there was a *probabilis causa* or not, the fact was that the two counsel who acted as reporters were of opinion that he had not, while the two agents were of opinion that he had. That being so, it must be held that he had not a *probabilis causa*, and the application therefore ought to be refused —*Clark* v. *Campbell*, July 6, 1833, 11 S. 908; *Carr* v. *North British Railway Company*, Nov. 1, 1885, 13 R. 113. In the case of *Marshall* [*infra*] a counsel and agent were on each side.

Argued for Mr Shanks—It was the practice when the reporters were divided in opinion as to whether there was a *probabilis causa* or not, to hold that the application ought to be granted —*Marshall* v. *North British Railway*, July 13, 1881, 8 R. 939; Mackay's Court of Session Practice, i. 337.

At advising—

Lord Justice-Clerk—I am inclined to refuse this application solely on the ground that the party has not produced any reason for showing that we should interfere. The reporters to whom the case was remitted have not found that he has a *probabilis causa*, and I see no reason why we should interfere.

Lord Young—I am for refusing the application, although I am not disposed to assent to any universal rule as to refusing such applications. The permission to be put upon the poor's roll is an indulgence granted to poor people so that they may conduct a litigation and to prevent hardship to them. The professional bodies appoint certain of their members who undertake the duty of seeing, if any person thinks he is aggrieved, he should have the means of bringing his case before the courts, even if he has not means to do this in an ordinary manner, and all our proceedings are taken for their protection, and against the lawyers for the poor being called upon to give their help to unworthy persons. As the Lord President points out in a case that was cited to us, all the precautions taken by the court are taken for the protection of the lawyers and agents appointed by professional bodies at the order of the Court. The remit used to be to the lawyers for the poor themselves, but it was thought better to remit the cases to uninterested parties to see whether there is a *probabilis causa*. I think that it is right that the Court should look at the kind of case that is submitted to the reporters, and I do not think that this is a kind of case on which we should look with great consideration. A clergyman wishing to have it ascertained in the Court of Session whether his views or those of certain other persons in his church are right seems to me not a case which we can view with much favour. I think this application ought to be refused.

Lord Craighill—I concur. In the ordinary cases the privilege of admission to the poor's roll will not be granted unless the reporters who are appointed for that purpose report that the applicant has a *probabilis causa*, and where the lawyers appointed for that purpose are divided in opinion there can be no such report presented; if there were, the Act of Sederunt would have no meaning. I do not, however, say that this must be a universal rule, but I do not think that there is anything in this case to make us deviate from the general rule.

Lord Rutherfurd Clark—I agree, and I base my opinion upon the special kind of case that the applicant here proposes to bring before the Court.

The Court refused the application.

Counsel for Applicant—Orr. Agent—Hugh Brown jun., W.S.

Counsel for Presbytery—M'Kechnie. Agent —D. Maclachlan, S.S.C.

Friday, March 12.

FIRST DIVISION.

[Dean of Guild Court.

BLAIR *v.* DUNDAS AND OTHERS (TRUSTEES FOR THE EDINBURGH ASSEMBLY ROOMS).

Property—Building Restriction—Negative Servitude—Light—Servitus luminum—Ne luminibus officiatur.

A feuar of ground in Edinburgh built somewhat within the boundary of his property, leaving a passage at the side. An adjoining feuar from the same superior, whose title was earlier in date, opened out in his gable-wall windows looking into the passage. After these windows had been in use for more than the prescriptive period the owner of the first-mentioned building and of the passage proposed to build nearer the margin of his property, with the result of depriving these windows of the light they enjoyed. *Held* that he could not be restrained from doing so, since there was not in the titles or by any other writing a servitude of light and air constituted in favour of the tenement in which the windows were placed, and such a servitude being of a negative character could not be acquired by prescriptive use.

The Edinburgh Assembly Rooms were built in 1786 on part of the extended royalty of the City of Edinburgh then being feued out by the Magistrates of Edinburgh. The charter to the trustees of the Assembly Rooms, which was granted in 1789, conveyed to them two pieces of ground whereon the Assembly Rooms and Music Hall now stand. These buildings covered the whole ground feued except passages at either side of the buildings, which passages were used for carriages, &c.

In 1787, subsequent to the erection of the Assembly Rooms, a charter was granted in favour of John Brough, wright, to the stance of ground immediately to the east of that upon which the Assembly Rooms had been built, the stance being described as bounded "on the west by the east

passage into the Assembly Rooms." Shortly before the date of this charter Brough had erected upon this stance a four-storied tenement with certain of its windows looking into the space left vacant as a passage at the side of the Assembly Rooms. No right of servitude in favour of this tenement appeared in the title granted to Brough nor in those of the proprietors of the Assembly Rooms.

In 1863 Robert Blair, being then proprietor of the street and sunk flats of this tenement, obtained warrant from the Dean of Guild for certain alterations which, *inter alia*, involved making a new window looking into the passage. The plan was submitted to the directors of the Assembly Rooms, and their secretary Mr Stewart endorsed it—"We agree to the alterations proposed—For the Directors of the Assembly Rooms, JOHN STEWART, *Secy.*" In this process the Assembly Rooms trustees denied Mr Stewart's authority so to indorse the plan. Blair also acquired other portions of the tenement in 1861 and 1863.

In April 1885 a petition was presented in the Dean of Guild Court, Edinburgh, by Robert Dundas of Arniston and others, trustees for the proprietors of the Assembly Rooms, in which it was stated that they were desirous of making certain alterations on the approaches to the Rooms, and especially of erecting over a portion of the ground used for passages new walls to be placed against the existing gables and carried up, to form certain side rooms, &c., all conform to plans produced. They craved authority to proceed with the work. They averred that the passages used by them as side entrances to the rooms were within the boundaries of their property as described in their charter, and that it had been possessed and occupied by them as their exclusive property for upwards of 100 years. They denied that any right of servitude or restriction of any kind was created at any time over their property in favour of any of the respondents, or that any consent, express or implied, was given to the acquisition of a servitude of light and air in favour of the respondents' predecessors.

Answers were lodged for Robert Blair and others, conterminous proprietors. Blair was the only respondent who insisted on his objections in the Court of Session.

Blair averred that trusting to the continued existence of the said carriage passage, windows were opened by his predecessor in the base and upper flats, depending for their light on the existence of the said passage, and that no objection to these windows was ever taken by the petitioner's predecessors. He also founded on his having obtained the consent of the directors to opening out the new window in 1863 as above stated, and contended that the petitioners were barred from shutting up the light to it; further, that he and his predecessors had long ago prescribed servitudes of light and air over the passage, and that the proposed alterations would block up three windows on the ground floor and two on the second, and deprive this property in great part of light, and so reduce its value.

He also alleged, that in accordance with a resolution of 1782 that the plans should be approved of before a feu was granted, the plans of the Assembly Rooms had been exhibited to and approved by the town council before their charter was granted, and these plans showed a passage at the side, and formed a condition of the granting of the feu-charter to them, and that their feu was granted subsequently to that of his own author Brough.

By interlocutor of 6th August 1885 the Dean of Guild found, *inter alia*, that no evidence had been founded on or produced competent or sufficient to establish the right of servitude claimed by the respondents, and he therefore granted warrant in terms of the prayer of the petition.

Blair appealed to the Court of Session.

Blair had originally claimed not only a servitude of light but also a right-of-way by the passage on the east side of the Assembly rooms; this contention he did not insist on.

The Court allowed a proof in consequence of amendments made by the appellant on his record. No additional facts requiring to be noticed were elicited.

Argued for the appellant—This was a case of negative servitude by implication. The windows had been there for more than a century, and the Court should interfere to prevent their being now blocked up. At the time when the feu was granted all plans of houses to be built on this ground had to be approved of by the town council, and therefore the presumption was that the plans of this tenement, which contained a number of the present windows, were so approved of. The town were superiors of the whole lands, and therefore plans then approved of by the superiors ought not now to be interfered with.

Authorities—*Boswell* v. *Magistrates of Edinburgh*, July 19, 1881, 8 R. 986; *Herron* v. *Grey*, November 27, 1880, 8 R. 155; *Argyleshire Commissioners of Supply* v. *Campbell*, July 10, 1885, 12 R. 1255; Stair, ii. 79; Bell's Prin. 994; Ersk. Inst., ii. 10, 35.

Counsel for the respondent were not called upon.

At advising—

LORD PRESIDENT—This case comes up on appeal from the Dean of Guild of Edinburgh, and the parties to it are the directors of the Assembly Rooms and an adjoining proprietor on the east. The titles are derived in the case of both proprietors from the Magistrates of Edinburgh about the end of last century, when the tenements were erected. There is no restriction of any kind so far as we can see in the titles of either of the parties, and the law applicable to the case therefore is, *prima facie*, that each of these proprietors is, like every other unrestricted owner of property, entitled to build upon his ground, and to the extreme verge of his ground, as high a building as he chooses, unless there is some municipal regulation to prevent excessive height, of which we know nothing.

For some considerable time the ground of the owners of the Assembly Rooms has been occupied by a building with which we are all quite familiar. The main building does not occupy the entire ground belonging to the owner; but there is a passage left on either side of it, entering by a gate, which it is proved has always been kept locked except when required by the directors to be open for the purpose of access. Thus there comes to be a passage of considerable breadth between the building actually erected on the ground of the

owners of the Assembly Rooms and the adjoining tenement of Mr Blair, but that ground is the exclusive property of the owners of the Assembly Rooms.

The servitude claimed by Mr Blair is a negative servitude, and nothing else; at one time on the record he claimed a right of passage through the passage left on the eastern side of the Assembly Rooms, but that is given up, and the only claim now made is a servitude of light. He has made windows in the east gable of his tenement, and these windows he has enjoyed the use of for a period long past the years of prescription, but without any written constitution of a servitude.

In these circumstances it appears to me that the case falls to be decided according to a very well settled rule of law, namely, that a negative servitude of this kind cannot be constituted except by grant, and in particular that it cannot be constituted by prescriptive use. That is laid down in very emphatic terms by Mr Erskine in the passage referred to in the course of the discussion [ii. 10, 35], and I am not aware that that doctrine so established by Mr Erskine has ever been impugned or indeed modified to any extent whatever. On the contrary, it is a doctrine adopted in terms by Professor Bell in his Principles [994], in which he distinctly states that "negative servitudes can be constituted only by grant, being incapable of possession, and so of prescription. The deed must be authentic and binding, but does not require sasine or publication in the record. It must also be in such terms as unequivocally to create a burden on the proprietor of the servient tenement." Now, is there any appearance here of any writing that can be said to constitute such a servitude, or that contemplates the idea of the existence of such a servitude? That, I think, is really conclusive of the case. But I should just like before concluding these few observations to refer to the case which I think particularly illustrative of this doctrine of the law—I mean the case of *Morris* v. *M'Kean*, reported in the 8th volume of Shaw [564, 19th Feb. 1830]. The report bears that "the respondent M'Kean was proprietor of a house in the Sandgate of Ayr, which was bounded by a close belonging to the advocator Morris, whose own house was situated on the opposite side of the close. M'Kean's house had been built in 1739 by his grandfather, who while it was in the course of erection had written, on the 22nd of June, the following letter to the proprietor of the close now belonging to Morris—"Sir, as you complain that I should have windows in the sidewall of the house now building by me next your close in the Sandgate of the tenement possessed by Adam Bell I assure you I shall put close glass in these windows, so as there shall be no access through to your close, and it noways troubled by these windows." The windows were erected accordingly. They proved satisfactory to Morris and his predecessor, and they continued to be enjoyed without interruption from the date of that letter down to the year 1827, the best part of a century, "when Morris being about to erect some buildings in the close, which would obstruct the light of the windows, M'Kean applied to the Dean of Guild praying for an interdict." That case came to this Court, the Dean of Guild having granted the interdict, and Lord Cringletie, the Lord Ordinary, pronounced this interlocutor—"In respect that the close in which the respondent wants to prevent the advocator from building is the latter's private property; that a *servitus luminis* or *ne luminibus officiatur* cannot be acquired over contiguous property by mere lapse of time, during which light has been admitted into windows; that by the letter founded on by the respondent, dated the 22d of June 1739, the then proprietor of the respondent's house admitted the close to be the property of the advocator, and agreed that the windows to be put into the house should in no way trouble the said close: Finds that though windows were then permitted to be put into the house, such permission did not extend to the advocator's author giving up the right of using his close, as he might have afterwards occasion to do, but amounted to a mere permission to the respondent's author to have these windows as long as the advocator's author should have no occasion to disturb them, and therefore advocates the cause, assoilzies the advocator from the conclusions," &c. Now, that interlocutor was taken to the Inner House, and Lord Glenlee, in giving what appears to be the chief opinion, says—"It did appear to me that this unilateral letter, with reference to some debate between the parties, does not amount to a written constitution of servitude. No doubt the proprietor of the close could not say, You shall not have lights to my close, but he was quite entitled to say, You shall not have windows so constructed as to afford means of access or nuisance; and this letter is just to obviate this only cause of complaint, by agreeing that the windows shall be made close windows; and otherwise things were just to remain as if nothing had been said about it, you retaining the right to have the windows, and I retaining the right to build them up. Mr Keay [M'Kean's counsel] is right in saying that the case is the same as if there had been a judicial interdict against making open windows, but that would not have implied a servitude, no obligation being constituted against the owner of the close that he was not to exercise his right of building on his own property."

Now then, be it observed, there were windows erected in M'Kean's tenement, and with the perfect knowledge and assent of the proprietor of the close. Indeed, it appears to me, and I think Lord Glenlee intimates that distinctly in his opinion, that Morris could not have had any right to prevent M'Kean from using those windows, or from throwing out windows in any part of the gable looking out on the close. It was his undoubted right to make that operation *in suo*, but it was as much the right of the other to build up these windows when he chose by erecting a building on his own property. Now, that is the state of the law as regards the negative servitude, I think perfectly in accordance with the two institutional writers to whom I have referred, and it is directly applicable to the present case. It rather appears to me that even if Mr Stewart had had authority from the directors of the Assembly Rooms to assent to these windows being made or those shutters being put on, or whatever was done at that time, that is not necessarily to be read as a restriction of the right of property or ownership of the Assembly Rooms. But what was done

seems to me merely to come to this, a consent merely that so long as matters remained in the same position as they then were those windows might be used and the shutters put on. But really that is not an element in the case here at all, because there is no evidence whatever that the secretary of the directors of the Assembly Rooms had any right to grant the permission which he did, and without a proof of that it is not to be implied as an authority belonging to the office of the secretary of such an institution.

I am therefore clearly of opinion that this appeal should be refused, and the case remitted to the Dean of Guild.

Lord Shand—It is quite true that for upwards of 100 years the property which now belongs to Mr Blair has been upon its west side lighted, so far as regards several of its rooms, by windows some of which were originally built with the building—that is, put in when the building was erected, and one of which at least was inserted at a more recent time. But having got that fact in the case, I think there is in the case nothing else to which Mr Blair has appealed which will support this alleged right of servitude. He holds his property by one title, the directors of the Assembly Rooms hold their property from the same superior on another and separate title. There is no condition in either of these titles which can be held to create a servitude of any kind as between these two properties. The only suggestion that has been made of something of the kind being implied is, that in describing the property of the Assembly Rooms on the west Blair's title contains as a western boundary the lane or passage between it and the adjoining property—that is, the passage into the Assembly Rooms—but that passage is entirely the property of the directors of the Assembly Rooms. It is entirely for their use and for nothing else, and it was quite properly described as the western boundary of the subject. It is not like a lane or passage which was open to the public or to which Mr Blair or his predecessors had any right whatever. The case therefore appears to me to be a very simple one, and must be determined on the broad principle, that although persons may take the benefit of a vacant space adjoining their property for the purpose of having windows into it and light derived in that way so long as that property is not built upon, that cannot in any way hinder the proprietor from building on his property and blocking those lights. In short, as your Lordship has stated, a negative servitude must be specially constituted by an obligation in writing. Then in regard to the opening of a window at a comparatively recent date, it is said that the consent of the directors of the Assembly Rooms was given to that proceeding. But it appears to be quite plain that there has been no proof that the directors gave any such consent. And I rather am disposed to concur with your Lordship that, even if such consent had been given in the ample terms in which we have it, it could not confer a right permanently to keep a window there. I think the consent might be in such terms as to show that the adjoining proprietor was therein agreeing to give a permanent right to light by that particular window so opened up. I do not think this case upon the consent which was given would amount to that. Accordingly I agree with your Lordship in thinking that we must hold that no good objection has been stated on the part of Mr Blair to the erection of the buildings which it is proposed to erect.

Lord Adam—There are no restrictions in the titles of either party to this case prohibiting them from doing what they liked with their own property, or building to the verge of it if they choose. The claim therefore of the appellant simply comes to this, a claim of servitude *ne luminibus officiatur* over the respondent's property. That claim is founded entirely upon his having had windows opening out on this passage for a period extending over nearly 100 years—that is his whole case. He has produced no writing constituting such a servitude, and none such exists, and I hold it to be perfectly clear that no such negative servitude can be proved or constituted without writing. The only suggestion of writing here is the alleged consent given by the secretary of the respondents to the opening of a window looking into this close. Now, even assuming authority to have been given by the directors to Mr Stewart, I should have been far from thinking that was sufficient to constitute such a servitude. All that was done was this. Certain proposed alterations to be made by the appellant on his own ground were shown to the secretary of the Assembly Rooms, and all that official did was to give a general consent to those buildings, as he says himself, looking to the fact that they did not encroach on the property, which they did not. He also says that he did not notice anything about the window, but he knew he could not object to it. Now, in such circumstances to spell out the constitution of a grant of servitude from proposed alterations containing the simple element of a window looking out upon this lane is quite hopeless.

I have therefore no difficulty in concurring with your Lordships.

The Court refused the appeal and remitted the case to the Dean of Guild.

Counsel for Appellant — Pearson — Dickson. Agent—George Barrie, Solicitor.

Counsel for Respondents—D.-F. Mackintosh, Q.C.—Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, March 12.

FIRST DIVISION.

THE LIFE ASSOCIATION OF SCOTLAND *v.* CALEDONIAN HERITABLE SECURITY COMPANY AND LIQUIDATOR.

Public Company—Powers of Directors—Guarantee—Liquidation—Ultra vires.

The directors of a heritable company which had lent a sum of money upon a postponed heritable security, in order to prevent an immediate sale of the subjects by the prior bondholder, entered into an agreement with him guaranteeing to him the interest of his bond, and payment of certain incidental expenses. In the liquidation of the company, which occurred shortly after this