state, and was not intended to regulate the division of the succession of a fee-simple proprietor. This has been expressly decided in England, on grounds that must be conclusive here. Accordingly no part of the rents legally due at Whitsunday 1851 fell into Mrs Cuninghame's executry.

Authorities—*Browne* v. *Amyot*, March 22, 1844, 3 Hare's Chancery Reports, 173; in *re Clulow's Estate*, April 28, 1857, 3 Kay & Johnston's Chancery Reports, 689. The same construction is implied in *Baillie* v. *Lockhart*, April 23, 1855, 2 M'Q. 258.

On the diligence incumbent on a *negotiorum gestor* they referred to Erskine, b. iii, t. 3, sec. 53. "Where the *gestor*, from friendship and the necessity of the case, takes upon him the direction of an affair which requires immediate execution, he is accountable only for gross omissions;" so Bell's Prin. 540. This was the measure of responsibility to be applied to the defender. It is sufficient if he account for actual receipts; and the rental book, which proves the charge against him, must be taken with its qualifications.

The Court gave effect to both contentions on the part of the defender, and remitted the cause back to the Accountant to report accordingly.

Agent for Pursuers—W. K. Thwaites, S.S.C.
Agents for Defender—A. & A. Campbell, W.S.

Friday, January 12.

SECOND DIVISION.

THOMSON & OTHERS *v.* GEILS.

Interdict—Servitude of Water—Invasion of Private Property.

A well of spring water had been used by the public of the neighbouring town for many years without any objection by the proprietor of the lands upon which it was situated. The proprietor having for private reasons cut off the supply of water to this well—*Held*, in an action of interdict at his instance, that the public were not entitled *via facti* to remove the obstructions to the flow of the stream which he had erected upon his own property.

In this action of interdict, originally brought by Mr Geils of Geilston in the Sheriff-court of Dumbarton, the Sheriff-Substitute (STEELE) assoilzied the defenders, who were certain inhabitants of Dumbarton, on the ground that the conduct of the complainer in *brevi manu* disturbing the course of a stream of water which had been used for time immemorial by the public, justified the latter in removing the obstacle so set up by the pursuer.

On appeal the Sheriff (HUNTER) reversed.

The nature of the question appears sufficiently from his interlocutor and note.

"*Edinburgh*, 31*st May* 1871.—The Sheriff having resumed consideration of the cause, recalls the interlocutor appealed against, finds that it is proved that the defenders John Hunter and Samuel M'Cart or M'Hard did illegally and unwarrantably trespass on the lands of the pursuer, and did serious injury thereto, by entering thereon and digging a trench or hole therein; and in respect of the said findings, and of the reasons set forth in the note hereto annexed, interdicts, prohibits, and discharges the said defenders from trespassing upon the said lands; finds them liable to the pursuer in expenses, subject to modification, appoints an account thereof to be lodged, and when lodged, remits to the Auditor of Court to tax and report, and decerns; finds that it is not proved that the defenders William Thompson, Alexander Smith, Robert L Pinkerton, and George Banks trespassed on the pursuer's lands, and in respect of the said finding, and of the reasons stated in the note hereto annexed, assoilzies the said defenders from the conclusions of the action; finds the pursuer liable to them in expenses, subject to modification, appoints an account thereof to be lodged, and when lodged remits to the Auditor of Court to tax and report, and decerns.

"*Note.*—This action originated in a petition presented by the pursuer for interdict against the defenders, and certain other persons, from trespassing on his lands of Dumbuck. The trespass alleged was of a serious character, and the defence, after detailed allegations, amounted, in substance, but not in form, to the position that the defenders had a right to act as they did.

"The subject on which the trespass was alleged to have been made, and the character of the right claimed by the defenders, demand examination. The subjects are, undoubtedly, the property of the pursuer, as shown by his title produced. The portions of them over which the defenders claim certain rights of possession, and of doing certain acts, consist of a private road leading from a public road to a quarry, the property of the pursuer, of a foot-path leading through a wood to a spring of water, or well, both of which are the pursuer's property, and of a right of drawing water from that well. The rights therefore claimed would, in a question of servitude, be styled the right of *via et aquæ haustus*. The basis of the claim of the defenders is that of public right—that the public, of which they are a component part, have a right to enter upon the pursuer's lands and draw the water, and that if the exercise of it be resisted by the pursuer they are entitled to assert their right by operations *brevi manu*.

"This alleged right does not exist. The locality over which the exercise is claimed is as unlike a "public place" as can well be imagined. It is situated in a sequestered dell among the crags and woods of the picturesque Kilpatrick Hills. No public road or way leads through it. There is no access by it from one public place to another, or to a navigable river, or port, or any of those subjects which have the characteristics of "public places," or as open to the use of the public. The whole locality is property as strictly private, and of which the owner has the exclusive right and possession in a question with the public, as he has of his house or garden.

"Nor have the public ever had any use or possession of it, nor could they so have for the obvious reasons already stated. The defenders, indeed, are pleased to style themselves, and others of the inhabitants of Dumbarton and neighbourhood, as constituting the "public," and so to assert a public right. Here there is error and delusion, which lie on the surface. The "public" is a very significant and comprehensive term, which includes not merely the inhabitants of the realm, but those of the empire, and of all friendly States. These are the persons who are entitled to enforce public rights, as in the case of highways, ports, or navigable rivers. But here this comprehensive term is applied to a portion of the inhabitants of the burgh of Dumbarton, or living within the distance of a mile or two from it. It is self evident that the

phraseology is as much opposed to the well known rules of public law as it is to common parlance.

"Nor is support to the claim thus made derived from the terms of a minute which, in the course of the procedure, was lodged by the pursuer. In it he admits that public use has been made of the well commonly called "Strowan's Well," of the footpath and the road, for a period of about seven years, and therefore that, in so far as that use is concerned, he does not insist for interdict. This phraseology cannot confer a public right. It is nothing more than a statement that the pursuer has, for the time mentioned, tolerated the access of strangers to the roads and to the well. But these remain his private property as much as ever, and he had, and has a right to recal this indulgence or toleration, and to exclude all who, without his permission, would attempt to use the roads, the footpath, or the well. The doctrine of "dedication" of private property to public use is not known in the law of Scotland, as decided in the case of *Cumming and Others* v. *Smollett and Others*, July 10, 1852.

"Whether a public right over property strictly private, and nowise available for any public purpose, can be acquired for the public by continued use for forty years, may be deemed to be a question of some difficulty which has not hitherto been solved. It is matter of notoriety that the domains of the great landed proprietors have for a long series of years been thrown open for the admission of the public—in the literal sense of the word—to people of every land, and of every tongue. But it has not been traced that, according to the view of publicists, they became *publici juris*, or that the proprietor was deprived of his right to exclude the public whenever he pleased. Assuming, however, that such a right could be so constituted, here there is no proof of immemorial use or possession. In a proof to be afterwards more specially referred to of three subordinate questions, while no attempt was made to adduce full and regular proof of possession, one witness said that he had used the well for forty years, and another said he had known it for thirty-five years. Their testimony was incompetent, as it was alien to the matter sent to proof; but, assuming its competency, it could not have proved possession, which could have been done only by a pregnant, precise, and regular proof.

"The alleged right of the defenders therefore is certainly not a public right; and, if a right exists at all it must resolve itself into a right of servitude. No right of servitude is alleged by the defenders, as doubtless they deemed it more safe to shelter their aggressions under the vague and indefinite assertion of a public right, however untenable.

"A right of servitude the defenders have not, and cannot have for decisive reasons.

"1. Although the subjects in question might be dealt with as a servient tenement, no dominant tenement exists. The defenders do not allege that they have the title to a tenement in favour of which a servitude could be so constituted. They do not form even an aggregate body, but consist of isolated individuals, some of them residing within the burgh of Dumbarton, and others at some distance from it. But such persons cannot either, in fact or in law, have the requisites of a dominant tenement. In the case of *Sinclair* v. *Magistrates of Dysart*, Feb. 10, 1779, it was decided and affirmed, on appeal, that a right might be, and had been, acquired by the Corporation of the town of Dysart, for the use of the burgesses, and other inhabitants. But here the right is claimed by the defenders as residing in or near Dumbarton, for themselves and the public. In the case of the *Duke of Roxburgh* v. *Jeffrey*, Nov. 17, 1753, it was held that by immemorial usage the inhabitants of a burgh of barony could not acquire a servitude over lands, having themselves no tenement for the benefit of which they could acquire it. The doctrine would apply here *a fortiori* if a servitude were claimed, as it would be claimed only by a portion of the inhabitants of the burgh, and by certain persons residing without its bounds.

"2. In the case of *Carson* v. *Miller*, March 13, 1863, it was held to be fixed law that possession for seven years without a title is not sufficient to entitle a party claiming a servitude right of passage to a possessory judgment. No title of any description is even alleged by the defenders, and the proof of possession obviously does not extend beyond seven years, and as it is founded mainly on the admission made by the pursuer, nothing further has been established than mere tolerance.

"As shown under the discussion relative to the existence of a public right, there has not been, and there could not be, for the reasons there stated, a proof of possession of a servitude for time immemorial, even assuming that such a right could be held to exist without production of a title.

"3. There is nothing in the minute lodged by the pursuer, but the contrary, on which a right of servitude can be founded. After the case was somewhat advanced a proof was allowed by the Sheriff-substitute, but it was limited to three specific points—that the defenders threw down the stone wall, dug a trench or hole in the ground of five feet deep, and thereby injured the roots of his trees. To these three points the proof was necessarily limited, but there was much matter proved by the defenders either upon cross-examination or afterwards in chief which far exceeded, and wholly differed from, the matter allowed. There was no plea of justification on the record, but under the cross-examination of the pursuer's proof matter which could only be dealt with as in justification was admitted, and of such matter the proof by the defenders almost wholly consisted. But it is self-evident that proof of such matter was incompetent and irrelevant, and therefore that, in dealing with the proof, it must be eliminated.

"Although not precisely expressed, it is obvious that the Sheriff-substitute deems that the defenders Hunter and M'Hard had a right to enter upon the pursuer's lands and to dig a trench. This proceeding he justifies by a reference to the case of the *Trustees of the Glasgow and Carlisle Road*, Dec. 10, 1825. But the distinction between that case and the present is obvious, for according to it unwarranted obstructions had been placed by the trustees to shut up what was confessedly a public road, and these it was held could be removed *brevi manu* by parties having interest, if done *de recenti*. Nor is the case of *Calder* v. *Learmonth*, Jan. 27, 1831, in point. There the road is described in the marginal abstract as a servitude road, and that the obstructions might be immediately removed by parties having a right to the servitude. But this reading does not appear to be warranted by the tenor of the decision, which simply bears that the old road (nothing is said of its nature) had not been legally shut up by the road trustees, and therefore to that extent interdict was granted by the Lord Ordinary, whose judgment was affirmed by the Court. But even supposing it had referred to a servitude road, it could not have

been available here where no servitude has been proved to exist. Even had these cases been more available than they are, the acts of the defenders could not have been justified. An obstruction might be removed, but it is a very different act to dig a large hole or trench on the pretence of restoring a right, whether public or of servitude. A servitude does not deprive the owner of the use of his property. If, indeed, in the use of it he does an act which may render the servitude valueless, the owner of the dominant tenement will have his action for restoration and damages, but he is not entitled to right himself *brevi manu*. Against such an attempt the owner is entitled to protect himself by an interdict.

"In dealing with the question of expenses the Sheriff has been governed by what he deems to be equitable considerations. A gross and deliberate trespass has been proved against the defenders Hunter and M'Hard, and therefore the Sheriff has found them liable in expenses; but he has found them so liable under modification, as he deems that they may have been misled by the continued tolerance of the pursuer. He has found the pursuer liable to the other defenders, because he deems that as to them there is not evidence that they were participant in the acts of trespass, but he has found these expenses subject to modification by reason of the misconduct of the cause in adducing a long proof consisting of matter of which there had been no foundation laid, and which nowise touched upon the point sent to proof, and which in all respects was incompetent and irrelevant."

The minute of restriction referred to by the Sheriff is as follows:—

"While the petitioner is satisfied that the respondents and the public have no legal right of way over any part of his estate or to any well therein, he admits that public use has been made of the well (the sides of which were recently built with brick), commonly called Strowan's Well, which is situated on the banks of Gruggie's burn, and between that burn and the wood referred to in the process, and is distant about 231 yards or thereby in a straight line from the point where the petitioner's quarry road leaves the Dumbuck Branch Turnpike Road; and farther, that public use has been made of said quarry road up to the quarry entrance by foot passengers, and thence of a footpath along the margin of the said burn to said well, and these as an access for foot passengers to said well. This use has been so made from and since the time that the commen lands adjoining said quarry road, and formerly belonging to the town of Dumbarton, and through which a footpath ran, were purchased and enclosed by the late Mr Humphrey Campbell, which is upwards of seven years ago. Therefore the petitioner does not insist for interdict in so far as said well and said footway thereto from said turnpike are concerned, but insists in his petition *quoad ultra*. And he reserves to vindicate his legal rights in a competent Court, where the question will not be limited to a mere question of possession."

The respondents appealed.

The Solicitor-General and Lang for them.

Watson in answer.

At advising—

Lord Justice-Clerk—I have no difficulty in coming to the conclusion with the Sheriff, that interdict should be granted to the limited extent stated in the minute of restriction. A stream runs through the lands belonging to Mr Geils, forming a well, to which the inhabitants of Dumbarton for time immemorial have resorted to draw water. Some years ago a basin was formed for the well by public subscription, near to the public road, but upon Mr Geil's lands, and without opposition upon his part. But he afterwards resolved to remove this basin to the highway. The pipes conducting the water to this new basin were cut by the inhabitants and removed. Mr Geils then retaliated by cutting off the supply of water from his stream, and draining it off into a piece of waste ground. Whether he had a right to do this or not is not raised in the present question, and I give no opinion upon it. I am not prepared to say that the right of going upon the lands of a private individual for water might not be vindicated by the public. But the proper course to vindicate their right was to apply to the Courts of law; instead of doing this, certain parties invaded Mr Geil's lands, and proceeding up the stream, *via facti* removed the obstruction put up by Mr Geils. In doing this they were acting illegally, and therefore this action of interdict is justified.

The minute of restriction given in by Mr Geils seems to me to concede to the public every concession which they can reasonably require, and it is to be hoped that this unfortunate dispute may now be settled.

The other Judges concurred.

Agents for Appellant—D. Crawford, and J. Y. Guthrie, S.S.C.

Agent for Respondents—A. S. Douglas.W.S.

Wednesday, January 17.

FIRST DIVISION.

CORBETT *v.* ROBERTSON.

(*Ante*, vol. vii, p. 631).

Contract of Sale—Conditions—Real Burden—Personal Obligation.

Held, on a sound construction of a minute of sale of land, that certain conditions therein were intended only to be personal obligations against the purchaser, and that the seller was not entitled to have them embodied in a deed as real burdens on the estate.

In obedience to the interlocutor of 8th July 1871, a draft-disposition was lodged by the pursuer.

The disposition, after referring to the minute of agreement, proceeds—"Therefore I do hereby sell and dispone to the said Thomas Corbett and his heirs and assignees whomsoever, heritably and irredeemably, all and whole that piece of ground, ... And declaring, as it is hereby provided and declared, in terms of the said minute of agreement, that the said Thomas Corbett shall forthwith proceed to erect on said piece of ground dwelling-houses of a suitable description for working-people, and of a good and substantial style of workmanship, and that the fronts thereof towards said intended street shall be built of at least good hammer-dressed or squared rubble in courses; and that the said Thomas Corbett shall be restricted from erecting any other buildings than those above provided for on said ground, or making any other use thereof, or disposing of the same for any other purpose, during the period of ten years from and after the term of entry after