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

mentioned . . . with entry as at the term of Martinmas 1867: To be holden the said lands and others hereby disponed *a me vel de me.*"

The defender objected to the proposed disposition, and maintained that the only proper mode of carrying out the minute of agreement was by feu-contract, making the stipulations conditions of the feu. Alternatively, he suggested that a clause should be inserted in the draft-disposition after the clause reciting the conditions, to the following effect:—"And further declaring, that in the event of the said Thomas Corbett or his foresaids in any way failing to implement or contravening any of the stipulations of the said minute of agreement, all deeds granted and acts done in contravention thereof shall, in themselves, be void and null; and, immediately on the said failure to implement or contravention taking place, the said Thomas Corbett and his foresaids shall thereupon forthwith, *ipso facto*, irritate and forfeit their whole right or title to the subjects hereby disponed, and the same shall revert to me, or my heirs, assignees, or other successors, as my or their own absolute property, freed and disburdened of all right thereto on the part of the said Thomas Corbett or his foresaids; and it shall be lawful to me or my foresaids to make up our right and title to the said subjects by declarator or adjudication, or any other method competent by law."

Solicitor-General and Asher, for the defender, argued—The true meaning of the parties was that the stipulations contained in Article 4 of the minute of agreement should be conditions of the right, binding on the purchaser and his singular successors, at least for ten years. The defender was entitled to have the agreement carried out by a deed which should make the conditions effectual.

Watson and Balfour, for the pursuer, founded strongly on the fact that at or about the date of the sale of the ground in question to the pursuer, the defender had sold all his remaining lands of Cessnock to the trustees of the Clyde Navigation, and they argued that anything like the constitution of a servitude over the lands was out of the question, there being no dominant tenement to which it could attach. They maintained that the pursuer was entitled to a disposition in ordinary form, as proposed.

At advising—

Lord President—This is an action to enforce implement of a sale of property. The conclusions of the summons are that the defender should be decerned and ordained, on receiving payment of the price, to execute and deliver a formal and valid disposition of the subjects in favour of the pursuer, and his heirs and assignees, containing the usual clauses. The defence pleaded against this action was—(1) that the pursuer, having violated the agreement and incapacitated himself from implementing his part thereof, has thereby forfeited his right to enforce implement thereof against the defender, and (2) that in the event of the pursuer being found entitled to a conveyance from the defender, the latter is entitled to have inserted in the disposition to be granted by him such clauses as may be necessary for giving effect to the whole stipulations in the agreement. When this cause came before the Lord Ordinary in a closed record, his Lordship allowed the parties a proof before answer. The meaning of the interlocutor was that the defender was to be allowed an opportunity of establishing his allegations of breach of contract by the pursuer. On a reclaiming note, we held that there was no relevancy in these allegations. It appeared to us that the only question was in what form of deed the seller was bound to give implement of the contract. We appointed the pursuer to lodge a draft of the disposition which he proposed the defender should execute. A draft-disposition has since been lodged, which is objected to by the defender, who suggests particularly the insertion of a clause, the object of which is practically to make the conditions in the minute of agreement real burdens on the estate, binding on singular successors. The question before us is whether the defender is entitled to have a clause to that effect (for I do not intend to discuss the phraseology of the particular clause proposed by the defender), inserted in the deed.

For this purpose it is necessary to examine the terms of the original agreement:—

"The first party agrees to sell to the second party, and the second party agrees to purchase from him, that piece of ground, part of the lands of Cessnock," which is then described "on the terms and conditions following, *videlicet.*" The first article relates to the price. There is no difficulty as to the extent of the ground, or the price.

"2. The term of entry shall be Martinmas 1869, when said price shall be payable, with interest at the rate of 5 per cent. per annum thereafter until payment." At that term of Martinmas, the defender not being willing to grant a disposition, but standing upon his allegations of breach of contract by the pursuer, the price was consigned.

"3. The second party shall also, from and after the term of Martinmas 1869, free and relieve the first party of a proportion of the feu-duty, stipend, cess, and other burdens specified in the titles, if any, of his lands of Cessnock, corresponding to the extent of the said piece of ground."

Taking these articles of agreement only, there seems to be a perfectly good missive of sale, which gives rise to an obligation on the seller to give a disposition with the usual clauses, and, amongst others, an obligation to infeft *a me vel de me.* But certain other clauses follow about which the present question has arisen.

"4. The second party shall forthwith proceed to erect on the said piece of ground dwelling-houses of a suitable description for working-people, and of a good and substantial style of workmanship; and the fronts thereof, towards said intended street, shall be built of at least good hammer-dressed or squared ruble in courses; and the second party 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 said term of entry." The pursuer contends that this is a mere personal obligation. The defender contends that it is to be implied, for it is certainly not expressed, that it is to form a real burden on the subjects, or on the pursuer's title—in other words, that it is to be a condition binding on singular successors. He has proposed a clause for the purpose of giving effect to this contention. It must be observed that at the same time at which the defender sold this piece of ground to the pursuer, he sold all his remaining lands of Cessnock to the trustees of the Clyde Navigation. This seems to have taken place on the very day of the sale to the pursuer, at all events, it was before any proceedings had been taken to adjust the title of the pursuer. The de-

fender having thus sold the rest of his property without giving to the purchaser any right under these clauses in his agreement with the pursuer, the idea of a servitude is out of the question.

Passing over articles 5 and 6, we come to article —"7 The second party shall be entitled to require the whole or any part of the price of the ground, or any portions thereof, to be converted into a feu-duty or feu-duties, at the rate of 5 per cent. per annum, and to have the same allocated on the several lots into which the said ground may be divided by him, in sums corresponding to the extent of said several lots." The following clauses are intended to apply only if the purchaser elects this mode of carrying out the sale. It is unnecessary to discuss them, as the purchaser has clearly signified his intention of taking the former alternative, viz., receiving a disposition in ordinary form.

With respect to the demand of the defender to have the obligation in article 4 inserted as a resolutive condition of the purchaser's right, I consider it one entirely unjustified by the contract between the parties. The clause proposed by the defender is that the obligation to erect these houses shall be fortified in this way—that if the obligation is contravened, everything done in contravention shall be void and null, and that the right of the contravener to the subjects shall be forfeited. A clause like this is a very singular part of a disposition. It is difficult to see how it is to be kept up in the titles after the purchaser is entered with the superior. After he has been duly entered, can a person who has nothing to do with the property step in and deprive the superior of his vassal? But apart from the feudal difficulty, and looking to the mere construction of the agreement, there is no doubt that the defender cannot make this, or any similar demand. I am of opinion that the agreement in question is a mere personal agreement. If the defender has any other objection to offer to draft disposition, consistent with holding that the obligation is to be considered as merely personal, we shall hear him, but I consider that the objection hitherto taken is bad.

Lord Deas—I understand that the question before us is, Whether these stipulations about building houses of a certain class are to enter the disposition in the form of a personal obligation, or in the form of a real burden, or, which is the same thing, as conditions of the right? That the latter can be done, I have no doubt. In the case of *Tailors of Aberdeen* v. *Coutts*, which related to a burgage holding, conditions were held effectual against singular successors. I could not have refused the admission of such conditions in the form of a real burden, on the ground that they were inextricable, if it appeared that the parties had agreed to them. When there is an agreement by missives of sale, I consider that the disposition to follow must be made to suit the purpose and intention of the agreement. The appropriate clauses must be inserted in the disposition, which shall make what is agreed upon effectual. If it appears from the nature of the stipulations agreed on that they can only be carried out by clauses making them real burdens, that must be done. But was that intended or implied here? If these conditions about building had been permanent in their nature, I should not have been prepared to say that the clauses contended for by the defender were not to go in. But nothing is stipulated for of a permanent character. I do not see how you can hold that an agreement that a certain state of things shall exist for ten years can be made a real burden, which is necessarily permanent in its nature. At all events, an agreement to this effect is so anomalous that it would require to be very distinctly expressed. Therefore I agree with your Lordship to this extent, that there is nothing in the agreement to entitle the seller to say that the stipulations shall be conditions of the right. But I am equally clear that the conditions must go into the disposition in their terms, by which I do not mean, that as only two persons are mentioned in the agreement, the seller and the buyer, the disposition is to be so expressed that the conditions shall be enforceable only by the man who sells, and only against the man who buys. In missives of sale it scarcely ever happens that anything is said about heirs and successors. But when you come to frame the disposition you add to the names of the individual seller and buyer their respective heirs and successors.

I am not disposed to give the opinion that this obligation cannot be enforced against singular successors. When you speak of a personal obligation as distinct from a real burden, you do not mean an obligation on the individual only, and not on his heirs and successors. The heirs and successors of the purchaser must be taken bound. Whether singular successors may be able to shake themselves free on some ground of law is not before us at present, but that the terms of the deed must be made obligatory on heirs and successors I have no doubt.

On the present question, whether the conditions are to be made real burdens, I do not differ from your Lordship.

Lord Ardmillan—My opinion is grounded very much on the position of the parties in point of fact. Mr Robertson sells a piece of ground to the pursuer, part of the lands of Cessnock. At the same time he parts with the whole remaining lands of Cessnock. Anything of the nature of a servitude is therefore excluded by the consideration that the seller has no land which can be considered in such a question as the dominant tenement. I hold that the obligation is entirely personal. The seller is bound to give to the purchaser a disposition fairly carrying out the stipulations in the agreement. The seller proposes that they shall be made real burdens on the estate, and demands that this character shall be set forth in the disposition, and fortified by irritant and resolutive clauses. It must be observed that the obligation is of a temporary character. Taking all the circumstances into account, I think that the obligation is one which the seller is not entitled to have inserted as a real burden on the subjects.

That disposes of the question before us. There are great difficulties in the way of making an obligation of this kind effectual as a real burden, when there is never constituted any feudal relation between the parties, but only the relation between buyer and seller. But I do not go upon this. I look to what was intended by the agreement.

As to the insertion of the words "heirs and successors," the party who purchases and his heirs and representatives are necessarily bound. But if the effect of these words is to make singular successors bound when they are not otherwise bound, this would be doing *per ambages* what we have refused to do directly, and I should be against allowing their insertion.

LORD KINLOCH—The substantial question to be decided by us is, Whether, in the disposition by the defender to the pursuer, by which is to be carried out the agreement of sale by the former to the latter, there is to be inserted not merely the personal obligation undertaken by the pursuer (the purchaser) to build workmen's houses on the ground, and to keep it unemployed for any other purpose for ten years; but a further clause declaring that, if this obligation is not fulfilled, any deeds to the contrary should be null and void, and the right to the subjects should be irritated, and revert to the disponer.

I am clearly of opinion that the seller has no right to have this clause inserted in the disposition. In adjusting a disposition to follow on a minute of sale the exact terms of the agreement are to be embodied, together with all the usual clauses proper to a disposition. Very clearly an irritant and resolutive clause like what is proposed is not a usual clause, but requires a special contract for its insertion. On the face of the minute of agreement there is nothing but a personal obligation on the disponee to build the houses, and to keep the ground unoccupied for ten years in any other way. To insert a clause irritating the right if the obligation is not fulfilled, is to insert something not contained in the agreement, and *prima facie* going far beyond its scope. It would therefore be making the disposition not the same thing with, but something different from, the agreement, and doing for the parties what they have not done for themselves. This the Court cannot do.

It is said that to insert this clause is the only sure method of rendering the obligation effectual against singular successors. I will not pronounce on this question. I am not called on to do so. Supposing that this was the case, it would be no good ground for inserting the clause, but emphatically the reverse. It would be simply giving to the disponer something beyond what he stipulated for. We are not authorised to insert in dispositions clauses executorial, or the best clauses we can conceive for making the obligations effectual. If the parties did not contract for such clauses, we are not warranted to insert them. For this reason, I cannot sanction the insertion of the proposed clause. But I desire distinctly to be understood as not thereby pronouncing on any question of right, connected either with the omission or the insertion of the clause. I do not say that the obligation is ineffectual without the clause, either against one party or another; neither do I say what extent of right the clause would give if inserted. I say no more than that I do not think the clause ought to be inserted in the disposition as a matter of right on which the disponer can insist, leaving to the disposition all its legal effects without this express insertion.

The case was continued to enable the parties to make some alterations on the draft disposition.

Agents for Pursuer—Maconochie & Hare, W.S.
Agents for Defender—J. & R. Macandrew, W.S.

Wednesday, January 17.

AINSLIE *v.* TAINSH.

Parish—Schoolhouse—Right of Minister to Vote at Meetings of Heritors—Statutes 1696, *c.* 26, 43 *Geo. III. c.* 54.

In a process of suspension and interdict at the instance of one of the qualified heritors of a parish against the minister of the parish—*held* (diss. Lord Deas) that the minister is not entitled to attend and vote at any meeting of the qualified heritors of the parish for the purpose of considering the state or condition of the existing parish schoolhouse, or any motion, proposal, or resolution for the repair, alteration, or renovation of the same; but *held* that the minister is entitled to attend and vote at a meeting of the qualified heritors for the purpose of considering any motion, proposal, or resolution relating to the alteration of the site of the schoolhouse.

This was a note of suspension and interdict presented by Mrs Mary Ainslie of Moreham Mains, wife of Robert Ainslie, Esquire of Elvingstone, with consent of her husband, and by Robert Ainslie for his own right and interest, against the Rev. John Grant Tainsh, minister of the parish of Moreham.

Mrs Ainslie is one of the heritors of the parish of Moreham entitled to vote at meetings of heritors in relation to the parish schoolhouse, under the Acts 1696, c. 26, and 43 Geo. III. c. 54. There is only one other qualified heritor in the parish, the Earl of Wemyss.

On the 20th June 1870 a meeting of heritors of the parish of Moreham was intimated as follows:—

"*Moreham*, 20*th June* 1870.

"*Notice of Meeting.*

"There will be a meeting of the qualified landed heritors, and others, of this parish, held in the schoolhouse on Thursday, the 21st day of July next, at 12 o'clock noon, for the purpose of proceeding with the erection of a new schoolhouse, arranging as to tradesmen, imposing an assessment for the purpose, and such other business as may be brought before the meeting.

"DAVID LOWDEN, *Heritors' Clerk.*"

As some dispute had already arisen between Mr Ainslie and Mr Tainsh as to the right of the latter to attend meetings of the heritors, and to vote in questions relating to the schoolhouse, Mr Ainslie on the 6th July wrote to Mr Tainsh to ask whether he intended to be present at the meeting to be held on the 21st, and to vote on the subjects to be brought under consideration of that meeting, adding, that in the event of Mr Tainsh having such intentions, he would be under the necessity of adopting measures to prevent him acting upon it.

Mr Tainsh replied:—

"*Moreham Manse, Haddington, 7th July* 1870.

"Dear Sir,—I do'nt know what I may do on the 21st; but I have been advised that I may act; and, as Lord Wemyss admits my right, it is likely that I may be present at the meeting, and vote, if necessary.—Yours truly,

"JOHN G. TAINSH."

The present note of suspension and interdict was then presented, in which the complainers prayed the Court "to interdict, prohibit, and discharge the respondent, the said Rev. John Grant Tainsh, from attending and voting at a meeting of the qualified landed heritors of the parish of Moreham, to be held in the schoolhouse of said parish on Thursday, the 21st day of July 1870, in so far as the said meeting is to be held for the purpose (as set forth in the circular calling said meeting) of proceeding with the erection of a new schoolhouse for said parish, arranging as to tradesmen, imposing an assessment for the purpose; and from attending