tion raised in each of them relating to value only, and the dicta of Lord Lee in *Berwick*, 15 R. 629, in delivering an opinion as to the proper value to be entered, do not appear to me to be couclusive on the matter of competency, for they are based on an admission made and the then settled practice in similar cases.

With regard to the second objection, as I read the agreement between the pursuer and the magistrates, it is a lease of lands and heritages. It is called a lease and the consideration paid is called rent. The duration of the lease is for five seasons, a season being from April to October in each year, and the subjects of let are called refreshment stances. His right of occupation, though no doubt restricted, is exclusive; and the restrictions are not of such a nature as in any way to derogate from his character as tenant. What is let to him is not the "exclusive right of selling" anything, nor is it similar to the "exclusive privilege" of supplying cab accommodation at a railway station—*North British Railway Company* v. *Greig*, 4 Macph. 645. It is a let of certain small areas of ground as refreshment stances. *Popular Amusements, Limited* v. *Assessor for Edinburgh*, 1909 S.C. 645, does not support the pursuer's contention. While it was held in that case that the appellants to whom certain portions of ground which had been let to an exhibition committee had been allocated by the committee were not in the position of lessees, that was on the ground that the lease to the committee expressly excluded subtenants and assignees.

The Lord Ordinary has dealt with the further question, whether apart from the entry in the valuation roll the pursuer has or has not been duly assessed by the magistrates and parish council. And I think this is a question of vital importance. The Valuation of Lands Act is not a taxing Act. Its purpose is the ascertainment of the value of lands and heritages. The determination of the validity of an assessment cannot be arrived at without a consideration of the provisions of the assessing statutes, viz., the Burgh Police Act and the Poor Law Act, and in my opinion the averments of the pursuer are insufficient to raise the question to which he wishes an answer, for no reference at all is made by him to the statutes in question. *Non constat* that if the entry in the valuation roll is erroneous it necessarily follows that the rating authorities, the magistrates and parish council, were not, under the powers given them thereanent, entitled to proceed as they have done. It seems to me that it was necessary for the pursuer to make some averments showing that the entry in the valuation roll being such as it is the defenders were under their assessing statutes disabled from imposing and levying the taxes complained of. But, I repeat, he makes no reference at all to the Burgh Police Act or the Poor Law Act, or to the assessment rolls of the defenders. He does not aver that the entries therein are erroneous or incompetent. He does not even tell us what they are. Accordingly I think that his case on this ground is irrelevant, and that it is not necessary to examine the various sections of the assessing statutes to which we referred at the debate.

LORD DUNDAS was absent.

The Court pronounced this interlocutor—

"Refuse the reclaiming note: Adhere to the said interlocutor, and in supplement thereof sustain the first and third pleas-in-law for the defenders Alexander Walker and others, and the fifth plea-in-law for the defenders the Parish Council of Ayr: Of new dismiss the action, and decern. . . ."

Counsel for the Reclaimer (Pursuer)—Fraser, K.C.—W. A. Murray. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents (Defenders) Alexander Walker and Others—Hon. W. Watson, K.C.—Normand. Agents—T. and W. Liddle, Maclagan, & Cameron, W.S.

Counsel for the Respondents (Defenders) the Parish Council of Ayr—Guild. Agents—M. J. Brown, Son, & Company, S.S.C.

Saturday, December 10.

SECOND DIVISION.

[Dean of Guild Court at Edinburgh.

STEPHEN *v.* BROWN'S TRUSTEES.

Property—Servitude—Accretion—Grant of Negative Servitude a non domino—Subsequent Acquisition by Grantor of Servient Property—Jus superveniens.

Accretion operates to validate a grant of a negative servitude over property not at the time in the ownership of the granter but subsequently acquired by him.

By disposition dated January 1781 A disponed to B a plot of ground with a right of servitude *non altius tollendi* over another plot of ground which A did not at that time own, but to which, by disposition dated November 1781 in his favour by the owner of the ground he subsequently acquired right. In an action between a singular successor of A and a singular successor of B, *held* (*diss.* Lord Hunter) that the original grant had been validated by accretion.

Alexander Stephen, shopfitter and cabinet-maker, 1 Queen Street, Edinburgh, *petitioner*, presented a petition in the Dean of Guild Court at Edinburgh in which he craved warrant to extend the west front, and to raise the walls and form one storey above the street, so as to make an office over the ground floor with entrance from Queen Street. *Inter alios*, Isabella Morrison Geddes or Brown, widow of the late Marcus John Brown, and Roderick Geddes Brown, S.S.C., Edinburgh, Mr Brown's trustees, were called as *respondents*, and lodged answers in which they maintained that the proposed erections were prohibited by a right of servitude *non altius tollendi* in their favour.

The following narrative of the *facts* of the case is taken from the opinion of Lord Hunter — "The servitude upon which the appellants found is said to be contained in the disposition by John Brough [the petitioner's author] to William M'Conochie, the appellants' author, dated 17th January 1781. In that deed, after the dispositive clause, there is this provision—'With a servitude upon the area at the back of the said tenement disponed by me to the said James Walker and Richard Lake, and upon that part thereof still belonging to me and likewise upon the area or lot of ground disponed by Archibald Hope, Esquire, secretary to the Royal Bank, to the said James Walker, viz. —That I and the said James Walker and Richard Lake and our foresaids shall neither make the buildings presently erected on the said areas of a greater height than 8 feet, nor shall erect any other buildings thereon of a greater height in time coming nor put any vents in any buildings already erected or which shall hereafter be erected on that part of the foresaid area disponed by me the said John Brough to the said James Walker and Richard Lake nor upon the other part thereof which is still in my possession, under which servitude our rights to the said areas are expressly burdened.' At the time when this disposition was granted John Brough was not proprietor of the bulk of the ground over which a servitude bore to be granted in favour of the appellants' author, and in particular was not proprietor of the ground over which the present servitude is claimed. But by disposition and assignation by James Walker to him, dated 30th November 1781 and recorded 15th August 1785, John Brough acquired a portion of the area referred to as having been disponed by Archibald Hope to James Walker. In the argument before us the appellants limited their claim of servitude to this portion of the area. Their contention before the Dean of Guild appears to have been more extensive, but with that we are not now concerned."

The respondents *pleaded, inter alia*—"4. These respondents having rights of servitude over the said ground constituted by probative writs, and the proposed buildings being in contravention thereof, the petition should be dismissed with expenses."

On 4th August 1921 the Dean of Guild repelled the pleas-in-law for the respondents and granted warrant as craved.

The respondents (M. J. Brown's trustees) appealed to the Court of Session, and argued —The disposition of 1781 by John Brough in favour of respondents' author contained a valid grant of a servitude *altius non tollendi* over the ground in question. It was true that Brough at the time of granting the deed had not a feudal right to the ground over which the servitude was granted, but he subsequently acquired such a right. His original grant was thus fortified by accretion, and became valid against all singular successors in the ground—*Swans* v. *Western Bank*, 1866, 4 Macph. 663; *Smith* v. *Wallace*, 1869, 8 Macph. 204, 7 S.L.R. 122. The fact that this was a servitude and a negative servitude did not make any difference to the operation of the principle—Ersk. Inst. ii, 7, 3. If accretion operated to validate a title to the subjects, it must operate to validate a particular use of them. The case of *Sivright & Wilson* v. *Borthwick*, 1828, 7 S. 210, founded on by the petitioners, was different, because the disposition showed that the grant of servitude contained in the minute of sale had been departed from — Rankine on Landownership, p. 427. Negative servitudes were effectual by mere force of the grant—Bell's Prin., secs. 990 and 994.

Argued for the petitioner—All that the obligation imported was that Brough should make an arrangement with the other proprietors that a servitude should be imposed on their property. This was a mere personal obligation and its breach could only found a claim of damages. Brough, it was true, subsequently acquired the neighbouring property, but he did not acquire a right of servitude over it, and therefore accretion could not operate. Accretion only operated when the actual property which was granted without title was acquired by the grantor. A servitude could only be granted by a person who was infeft. Accretion had never been applied to a servitude, and more especially to a negative servitude, which had always been regarded as anomalous. Negative servitudes did not enter the register and were a very exceptional feature of land rights—*Sivright & Wilson* v. *Borthwick, cit.*; *Cowan* v. *Stewart*, 1872, 10 Macph. 735, 9 S.L.R. 471. Accretion had never been held to make a personal right real, which was what the respondents were trying to do. It was an equitable doctrine, but servitudes were *strictissimi juris* and did not permit equity to fortify them. This applied especially to negative servitudes. In construing restrictions on property the presumption was for freedom—*Russell* v. *Cowpar*, 1882, 9 R. 660, 19 S.L.R. 443. On the question of interest, *Gould* v. *M'Corquodale*, 1869, 8 Macph. 165, was referred to, and with reference to a previous dispute as to the same ground *Greenhill* v. *Allan*, 1825, 4 S. 160.

At advising—

LORD JUSTICE-CLERK—As this case was presented in the argument before us it depended entirely on a sharp point of law which does not seem to have been argued before the Dean of Guild, viz.—What is the basis and application of the doctrine of accretion; or, to put it concretely, what is the effect of that doctrine when applied to the two dispositions dated respectively 17th January and 30th November 1781? The former of these, a disposition by John Brough to William M'Conochie, the author of the appellants, purported to grant a servitude over at least part of the respondent's ground in favour of the appellants' author. At its date, however, the ground of the servient tenement did not belong to the granter John Brough, but by the later disposition of November 1781 he became proprietor thereof. As I understood the

argument it was not disputed that if Brough had in January had the rights which he acquired in November a valid servitude would have been created, and the judgment of the Dean of Guild appealed against would have had to be recalled and the case remitted to the Dean of Guild.

The doctrine of accretion and its effect was very fully considered in the cases of *Swans*, 4 Macph. 663, and *Smith*, 8 Macph. 204. In the case of *Swans* the Lord Ordinary (Lord Barcaple) said in his note (p. 665)—"The plea of the suspenders raises the question whether the maxim *jus superveniens auctori accrescit successori* applies where there was no right of any kind, or at least no right constituted by writing, in the person of the author when he granted the conveyance." He pointed out that the rule was derived from civil law and was not a rule of feudal conveyancing, and came to the conclusion that the doctrine of accretion did apply in the case of a disponer who acquired right to the subject after the date of the disposition, even where the granter had no right at the date of the disposition. Lord Barcaple's interlocutor was adhered to. Lord Ardmillan said the doctrine of accretion "is not a principle of feudal law" but "is not repugnant to feudal law." He adds —"A muniment of a right devolving on the granter must accresce to the title of the grantee." In my opinion that phrase (muniment of a right) is quite apt to describe a deed such as the disposition of November 1781 in this case. In the case of *Smith* the views given expression to in *Swans'* case were confirmed. Lord Kinloch said (p. 211) —"I think the general principle is that the accrescing right is to be considered, as in legal construction, anterior in date to the disposition which it fortifies in all respects whatever." It "is to be held, to all effects whatever, in the position of a deed anterior in date to the deed it fortifies." The Lord President agreed in thinking that accretion operated to the effect of "drawing back" to the previous deed.

I am therefore of opinion that so far as its legal effect on this question of servitude is concerned, the disposition of November 1781 must be read as if it had been granted at the date of the prior disposition of January 1781, and that accordingly the plea that the right to the servitude in question was granted *a non domino* fails. I can find no warrant for distinguishing a right of servitude, even of a negative servitude, from any other right so far as the application of the doctrine of accretion is concerned.

It was also argued by the respondent before us that the appellants had no interest to insist on the enforcement of the servitude which they relied on. I was not convinced by the respondent's argument before us on this point. But in my opinion this question of want of interest has not been properly or sufficiently raised on the record as that now stands.

The result therefore is that in my opinion we should allow the appeal, recal the judgment appealed against, and remit to the Dean of Guild to proceed as accords.

LORD ORMIDALE—By disposition dated 17th January 1781 John Brough disponed certain subjects to William M'Conochie, together with, *inter alia*, a servitude in the following terms—"And also with a servitude upon the area at the back of the said tenement disponed by me to the said James Walker and Richard Lake and upon that part thereof still belonging to me and likewise upon the area or lot of ground disponed by Archibald Hope . . . to the said James Walker, viz., that I and the said James Walker and Richard Lake and our foresaids shall neither make the buildings presently erected" thereon "of a greater height than 8 feet, nor shall erect any other buildings thereon of a greater height than 8 feet. The portion of the foregoing grant of servitude with which this case is more particularly concerned is contained in these words "and likewise upon the area or lot of ground disponed by Archibald Hope . . . to James Walker." That area or lot of ground was subsequently on 30th November 1781 disponed by Walker to Brough. It is the effect of this subsequent acquisition by Brough of a property interest in the subjects which we have to determine. The petitioner in the Dean of Guild proceedings is now in right of the subjects disponed by Hope to Walker and by Walker to Brough. The respondents are now in right of the subjects disponed to M'Conochie, and the question is whether the respondents are entitled to enforce the servitude granted by Brough to M'Conochie. The respondents found on the law of accretion.

It is not disputed that when the granter of a disposition has at its date no right to the subject he dispones, but acquires such a right by subsequent title, the disposition is validated by accretion (*Swans* v. *Western Bank*). In the present case what Brough granted to M'Conochie was not a right of property but a right of servitude, and the petitioner contends that as Brough had at the date of the grant no proprietary right in the subjects it was inept, and that its invalidity was not cured on his subsequent acquisition of the subjects. The rule as to negative servitudes like the servitude in question is, he says, an anomaly in the law of Scotland and ought not to be extended, and the principle of accretion has therefore no application. They found on a dictum of the Lord President (Hope) at p. 213 in the case of *Sivright*, 7 S. 210. That dictum was merely *obiter*, and the doubt expressed by his Lordship was not, I venture to think, well founded. In my opinion the grant of servitude, invalid at its date, was validated by the subsequent acquisition by the granter of a proprietary interest in the subjects. It cannot be disputed that it was in Brough's power once he was infeft in the subjects to make a valid grant. But on the principle of accretion it seems to me that such a supplementary grant was unnecessary, for the right subsequently acquired by Brough is held *fictione juris* to have been possessed by him from the first so as to make it available to M'Conochie. In *Smith* v. *Wallace* Lord Kinloch (at p. 211) puts it thus—"I think the general principle is that the

accrescing right is to be considered as in legal construction anterior in date to the disposition which it fortifies in all respects whatever." It may be that on a very strict rendering of the brocard *jus superveniens auctori accrescit successori* no right of servitude supervened to Brough as he himself was the author of it. But there did come to him a right to grant a servitude, and that, I think, on the authorities, must be held to have been in him antecedent to his grant of servitude and covered by the warrandice clause in his disposition to M'Conochie. His title—incomplete it may be at the date of the grant—became complete and unexceptionable as at that very date—*Glassford's Executors* v. *Scott*, 12 D. 893. It sufficiently appears from the pleadings as they at present stand that these respondents have an interest to enforce the servitude.

LORD HUNTER—[*Read by Lord Salvesen*] —The appellants maintain that the lining granted by the Dean of Guild would sanction the erection of buildings in violation of a right of servitude to which they lay claim over a portion of the ground referred to in the prayer of the petition. If this contention is well founded the interlocutor of the Dean of Guild would require to be recalled and the case remitted to him either to refuse the prayer of the petition or to grant a restricted lining.

[*His Lordship then gave the narrative of the facts quoted supra, and continued*]—Negative servitudes occupy an anomalous position in the law of Scotland. To their constitution writing is essential, but it is not necessary that the existence of the servitude should be disclosed in the titles of the owners of either the dominant or the servient tenements. The grant constituting the servitude must, however, be by the proprietor of the servient tenement, and so far as I know this is the first case where it has been maintained that the grant is valid although made by one who at the time of his grant had no proprietary interest in the subjects. The appellants admit that in January 1781, when Brough disponed to their author, no valid servitude in favour of the latter was created by the words to which I have referred, and that at the most a personal obligation was imposed upon the granter to secure a servitude in favour of the grantee, or failing his succeeding in this to pay damages. They contend, however, that on a sound application of the doctrine of accretion their author acquired a good right of servitude over that portion of the area to which Brough afterwards obtained a title. According to Stair (iii, 2, 1)—"Whatever right befalleth to the author after his disposition or assignation, it accrescth to his successor to whom he had before disponed, as if it had been in his person when he disponed and as if it had been expressly disponed by him." Erskine says (ii, 7, 3)—"The supervening right is by a fiction of law considered to have been in the disponer at the date of the transmission, and at that time made over by him to the disponee." In his Principles (section 882) Professor Bell expressed a doubt whether accretion would take place if the granter of the precept have at the time no right to the subject but acquire a right by subsequent title. This doubt was held not to be well founded in the case of *Swans* v. *Western Bank* (1866, 4 Macph. 663), where it was decided that where the granter of a disposition has at the time no right to the subjects he dispones but acquires a right by subsequent title the disposition is validated by accretion. The Lord President said—"I have always been under the impression that even where there was no completed right in the disponer the subsequent title acquired by him accresced to his disponee. I think that is the fair reading of our early institutional writers, who treat of this matter broadly and in language apt for comprehending this very question." Lord Ardmillan in the same case said—"I do not think that the maxim *jus superveniens auctori accrescit successori* is a brocard of feudal law. When a conveyance has been granted by a party with an imperfect right, a wrong is done to the disponee, and if the granter subsequently acquires a muniment of the right he has conveyed, law will not allow him to say that he has acquired it for his own benefit to the prejudice of his disponee, and therefore it accresces to the disponee."

The question now arises, whether if a grant of servitude is made by one who has no proprietary interest in the servient tenement, the grant is made effectual in whole or in part against singular successors of the granter by the subsequent acquisition by him of the whole or part of the land over which the servitude is granted. It may be observed that in cases where accretion has been held to apply it is the subsequent acquisition of a right in the subject with which the granter has dealt that accresces to the grantee. To take the typical case—If A grants to B a disposition of property belonging to C, the subsequent acquisition by A of the right of property in the subject of the grant accresces to B. In the present case what Brough granted to the appellants' author was not a right of property but a right of servitude. His subsequent acquisition of the right of property in part of the property put him in the position of being able to grant a servitude, though not over the whole of the subjects. He had, however, no right of servitude in himself which could accresce to his grantee. The latter was placed in this more favourable position, that if the obligation in his disposition remained valid and outstanding he could sue Brough or his heirs to constitute the servitude.

It may be said that as Brough was under obligation to grant a servitude over the area which he subsequently acquired, it is only equitable that he should be held to fulfil his obligation on completing his title. This argument is sound enough so far as Brough and his heirs are concerned. It does not, however, appear to me to apply where the contention is that the burden is real and affects the title of singular successors. An examination of the grant of servitude founded on shows on its face that it is bad as constituting a real burden, for

it is made to affect lands of which the granter is not proprietor. In most cases where accretion has been held to operate, the grant has been on its face good, but the granter has had either no title or at best an imperfect title to the ground. At this distance of time it is impossible to say what were the intentions of parties with reference to the servient ground, but on the appellants' own admissions the servitude was not made effectual to them over the portion of the area belonging to Walker not acquired by Brough in 1781.

None of the cases relating to negative servitudes to which we were referred appears to have any bearing upon the present question except perhaps the case of *Sivright* (7 S. 210), where it was decided that a negative servitude expressed in a minute of sale but not in the subsequent titles had been impliedly departed from. The question raised was different from that raised in the present case, but in his opinion the Lord President said—"I doubt, however, whether such an obligation by a person who is not infeft be good in a question with a singular successor, more especially in relation to a negative servitude on which there can be no possession. It may be good against heirs, but here I am satisfied that there is no subsisting obligation."

I think that the appeal should be dismissed on the ground that the appellants have not shown that they have a valid right of servitude over any portion of the ground affected by the Dean of Guild's lining.

LORD SALVESEN, who was present at the advising, did not hear the case.

LORD DUNDAS was absent.

The Court allowed the appeal, recalled the judgment appealed against, and remitted the case to the Dean of Guild to proceed.

Counsel for the Petitioner and Respondent—D. P. Fleming, K.C.—Jas. Stevenson. Agents—A. & W. M. Urquhart, S.S.C.

Counsel for the Respondents and Appellants — W. T. Watson, K.C. — Patrick. Agents—M. J. Brown, Son, & Company, S.S.C.

HOUSE OF LORDS.

Friday, January 20, 1922.

(Before Viscount Haldane, Viscount Finlay, Lord Dunedin, Lord Shaw, and Lord Sumner.)

COSTELLO *v.* ROBERT ADDIE & SONS (COLLIERIES), LIMITED.

(In the Court of Session, January 28, 1921, S.C. 356, 58 S.L.R. 286.)

Workmen's Compensation—"Out of and in the Course of the Employment"—Breach of Statutory Rule—Miner Returning to Shot-hole within Prohibited Time—"If a Shot Misses Fire"—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Explosives in Coal Mines Order of* 1*st September* 1913, *sec.* 3 (*a*).

Paragraph 3 (*a*) of the Explosives in Coal Mines Order of 1st September 1913 provides — "If a shot misses fire the person firing the shot shall not approach, or allow anyone to approach, the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means."

Two shots were laid close together in a mine by two miners A and B, each of whom applied a light to his respective fuse. Both A and B were of opinion that A's fuse had failed to ignite, but they retired to a place of safety as B's fuse was burning. B's shot went off, and thirty or forty minutes thereafter A returned to the shot-hole for the purpose of lighting the fuse attached to his shot. As he approached his shot it went off and he was seriously injured. The arbitrator found as a fact that A had failed to light the fuse of his shot. *Held* (*aff.* judgment of the Second Division) that A's shot had missed fire within the meaning of the Order, and that as A had contravened the Order in approaching the shot-hole within an hour the accident did not arise out of and in the course of his employment.

The case is reported *ante ut supra.*

The claimant appealed to the House of Lords.

At delivering judgment—

VISCOUNT HALDANE—In this case I have had the opportunity of perusing the judgment which has been prepared by my noble and learned friend Lord Dunedin. That judgment entirely expresses my own view and I desire to adopt it.

My noble and learned friend Lord Sumner has requested me to say that he concurs.

VISCOUNT FINLAY—I also concur with the judgment which has been prepared by my noble and learned friend Lord Dunedin, and I have nothing to add to it.

LORD DUNEDIN—In this appeal I take the narrative of the essential facts of the case from the Case which was stated by the arbiter, the Sheriff-Substitute, in a workman's compensation case for the opinion of the Court of Session—"The pursuer (who is now the appellant) and his mate Alexander Fisher had in the course of and as part of their employment to prepare and fire two shots in the pavement of their working-place. The appellant prepared one and his mate the other, each with a detonator and with a fuse attached thereto. The shots were from 2½ to 3 feet apart. The men then proceeded to apply a light to their respective fuses. Fisher was successful in lighting his. Both the appellant and Fisher were of the opinion that the appellant was unsuccessful in lighting his. As, however, Fisher's fuse was burning it was necessary for them to seek a place of safety. This they did accordingly till they heard Fisher's shot go