tiff; and that the defendant then believed him to be the principal in the transaction.

"Thus, the first point for decision in this case is, whether the defenders dealt with Wood as principal in the transaction, and had reason to believe that the rags in question were his property. The Sheriff is inclined to think that this can hardly be maintained in the face of the letter of 1st October 1870, which opens with the statement that the rags had 'been sent by the same party who sent the former lot, and who specifies them as cotton rags No. 2.' The plain meaning of this is, that this unnamed person had sent the rags to Wood for disposal on commission, not that Wood had acquired or purchased them from the same collector. The language used is just what an agent would have employed under the circumstances, and the defenders, as men of business, must have known quite well Wood's position in the matter. If that be so, the pursuer, as principal in the transaction, is still in time to come forward and claim the price of his property.

"The second point is, whether the transaction, at the date of the declaration of Wood's insolvency, was so complete as to vest the pursuer's property in the defender's person. In the letter of 1st October, already referred to, Wood writes:—'I shall feel obliged if you shall have them sorted, and say what price you can give for them.' It is explained by the rag merchants who were examined that this is the common way of doing business. 'When a party with whom we are not familiar brings us mixed rags, we sort them first, and report to him the yield of them—that is, the various classes of rags contained in the lot. After classing them, we say what we are willing to give. If the seller agrees, the bargain is closed.' But if, says another, 'the seller is not content with our price, he can take them away; there is no sale till the price is agreed to.' The defender Mr Gordon Pirie does not contradict this evidence. He says he bought the rags on the footing that the price was to be left to himself, after he had examined them to see what they were worth. This, however, is not the fair meaning of the letter of 1st October, nor was it Wood's own understanding, so far as that can be gathered from his letter to the pursuer of 29th October. It is there assumed that the sale was to be considered unclosed until the value of the rags had been reported on by the defenders. Accordingly, it is not surprising that the defender candidly admits that he would not have held Wood to his bargain had he objected to the price when he came to state what he was willing to pay. Now, that is just what has happened. Nothing more was said on the subject till after Wood's insolvency, and when the price was mentioned it was objected to by the pursuer as much too little. So standing the facts, it cannot be held that there was here any completed sale. It is necessarily implied in the very nature of sale that the parties should be at one in respect to the price (1 Bell's Com., p. 87). If the price is left to the buyer himself, or is to depend on his own measurement, the sale will be held to be complete; but if the concurrence of the seller is necessary, either for the purpose of fixing the price, or for ascertaining the measurement when the price depends upon the quantity, the performance of these things is a condition precedent to the transfer of the property. For these reasons the Sheriff is of opinion that there was here no concluded contract, and that the property still remains in the original owner."

The defenders appealed.

Mr Shand and Mr Maclaren for them.

Mr Balfour in answer.

At advising—

Lord Justice-Clerk—There are two questions which it is necessary to decide in this case—(1) Whether Pirie dealt with Wood as a principal? and (2) On the supposition that he was dealt with as a principal, was there a completed contract of sale? In the event of our being of opinion that the first question should be answered in the negative, it would be unnecessary to consider the second question, because, undoubtedly, if Wood acted as an agent for Lavaggi, and Pirie was aware of that, then there was no completed contract of sale.

Upon considering the proof, I can see no reason for thinking that Pirie dealt with Wood as the agent for another. I had no reason to suppose that Wood was not the principal in the bargain. Nor can I have any doubt that, according to the custom of this particular trade, the bargain was completed. It is true that neither had the price been paid, nor even fixed in money, but the contract was that Pirie should pay for the rags whatever was found ultimately to be their true value after they had been sorted and weighed.

The case therefore involves no question of difficulty in the law of sale, because both parties are agreed that if Wood represented himself as a principal, then Messrs Pirie are entitled to plead his debt to them, by way of set-off, in an action such as this, at the instance of the true owner, for the price of the goods.

The Sheriff is perfectly right in the law which he lays down in the note to his interlocutor, but in my opinion he is wrong in holding, on the proof, that Messrs Pirie were aware that Wood was acting as an agent for another, and therefore I am for recalling his interlocutor, and confirming that of the Sheriff-Substitute.

Lords Cowan, Benholme, and Neaves concurred.

Agents for Appellant—Henry & Shiress, W.S.

Agents for Respondents—Tods, Murray, & Jameson, W.S.

Friday, January 12.

FIRST DIVISION.

BANNATINE'S TRS. *v.* CUNNINGHAME.

(*Ante*, vol. v., p, 516, 641.)

Process—Reclaiming-Note—Judicature Act (6 *Geo. IV, c.* 120), § 17—*Court of Session Act* (31 *and* 32 *Vict. c.* 100), §§ 52, 53, and 54.

The Lord Ordinary on 15th July 1871 pronounced an interlocutor, which, in connection with a previous interlocutor, disposed of the whole merits of a cause, and by which he appointed the cause to be put to the roll for the disposal of the question of expenses; and by an interlocutor, dated 2d November 1871, he found the pursuers entitled to expenses. *Held* that a reclaiming-note presented by the defender on the 10th November against the interlocutor of 2d Movember, competently brought under the review of the Inner House, not only the interlocutor of 2d November, but the interlocutor of 15th July and previous interlocutor.

Succession—Apportionment Act (4 *and* 5 *William IV, c.* 22.

Held that the Apportionment Act does not regulate the succession of a fee-simple proprietor, but applies only to the case of a party having a terminable interest in an estate.

Negotiorum Gestio.

Where a person, from friendship and the necessity of the case, takes upon him the management of affairs which require immediate execution, he is accountable only for gross omissions.

By marriage-contract, between the defender and his deceased wife Mrs Allason Cunninghame, proprietrix of the estate of Logan, the defender renounced and made over to her his *jus mariti* and right of administering her estates, heritable and moveable. Mrs Cunninghame conveyed by the marriage contract to the defender "for his liferent use thereof allenarly during all the days of his life after her death," her estate of Logan. By her disposition and settlement she afterwards conveyed to the late Richard Bannatine the estate of Logan, subject to the liferent of the defender; and also her whole heritable and moveable estate; and she appointed Mr Bannatine to be her sole executor.

Mrs Allason Cunninghame died on 20th March 1851. Mr Bannatine was then a staff-surgeon in New Zealand. Copies of Mrs Cunninghame's testamentary writings were sent out to him by her agent, and Mr Bannatine was requested to send home a power of attorney to enable some person to act for him. After a good deal of delay Mr Bannatine, in 1853, sent home a power of attorney in favour of the defender, who had in fact previously taken upon himself to act where it was necessary for Mr Bannatine. Mr Bannatine returned home in 1854, and resided at Glassnock, about four miles from Logan, till his death in 1867.

During his life Mr Bannatine does not appear to have raised any question as to Mr Cunninghame's actings in regard to Mrs Cunninghame's executry, but after his death Mr Bannatine's trustees brought an action of count and reckoning against the defender, which has already been the subject of much litigation. The summons concludes for an accounting against him in two capacities—(1) as factor and commissioner for the late Richard Bannatine, and (2) as an individual, for intromissions with the rents of Logan, due and current at the time of Mrs Cunninghame's death.

On the 18th November 1870 the Lord Ordinary (MACKENZIE) pronounced an interlocutor:—"Finds that the late Mrs Allason Cunninghame having died on 20th March 1851, the late Richard Bannatine, as her executor, became entitled—1st, To the agricultural rents of the estate of Logan for the crop and year 1850, and to all the antecedent rents; 2d, to the proportion corresponding to the period of Mrs Allason Cunninghame's survivance, from 11th November 1850 to 20th March 1851 inclusive, of the first moiety of the agricultural rents for crop and year 1851 inclusive, which were legally due at Whitsunday 1851, although by convention payable only at the term of Martinmas following; 3d, to the mineral rents or royalties payable at Martinmas 1850; and, 4th, to the proportion of the mineral rents or royalties for the half-year ending at Whitsunday 1851, and then payable, corresponding to the period of Mrs Allason Cunninghame's survivance, from 11th November 1850 to 20th March 1851 inclusive, all just allowances and deductions in respect of charges on such rents and royalties being made: Reserves all questions of expenses, and of new remits the cause to Mr Alexander Weir Robertson, C.A,, to proceed with the remit made to him by the interlocutor of 2d February 1870."

Note.—(*After a narrative of the facts.*)—"The Lord Ordinary is of opinion that Mrs Allason Cunninghame having survived the legal term of Martinmas 1850, there vested in her by such survivance, and descended to her executor, the whole rents of the estate for that year, including the mineral rents and all antecedent rents, although some of these rents, by convention, may not have become payable until after her death.

"As regards the rents of the estate, including the mineral rents for the half-year current at Mrs Allason Cunninghame's death, the Lord Ordinary is of opinion that Mr Bannatine, as her executor, is entitled to a share of these rents corresponding to the period of her survivance after the term of Martinmas 1850. He considers that the provisions of the Apportionment Act, 4 and 5 William IV, chapter 22, regulate this matter. The terms of the marriage-contract, by which the liferent of the estate of Logan is conferred upon the defender, are also in favour of this view.—See Erskine, 2, 9, 64, and 67; *Campbell*, 6 D. 1426; *Blackie* v. *Farquharson*, *ib.* 1456; *Weir's Executors* v. *Durham*, 8 Macph. 725."

A report was accordingly issued by Mr A. W. Robertson, in obedience to the remit of the Lord Ordinary, bringing out a balance, including interest, of £2304, 7s. 10d. against the defender as at 8th January 1869. A number of objections were taken by the defender to the report, which it is unnecessary to go into in detail. Most of them involved the amount of diligence incumbent on the defender in his actings as *negotiorum gestor* for Mr Bannatine. The accountant debited him with all sums received as rents falling under the interlocutor of the Lord Ordinary, which were entered in the rental book of the estate of Logan, and refused to give him credit for sums entered in the same book as incurred to tenants, and entered in the rental book as payments to account of rents, after the date of Mrs Cunninghame's death, no vouchers being produced either to instruct the sums, or to show that the accounts were incurred before the date of her death. Certain arrears of rents were noted as abandoned in the rental book. These the accountant held the defender was not entitled to abandon without doing exact diligence, and accordingly debited him with the amount.

On the 15th July 1871 the Lord Ordinary pronounced an interlocutor, in which he repelled the defender's objections to the accountant's report, with one exception; decerned against the defender for the balance; and appointed the case to be put to the roll for the disposal of the question of expenses.

On the 2d November his Lordship pronounced the following interlocutor:—

"*Edinburgh, 2d November* 1871.—The Lord Ordinary having heard counsel on the question of expenses, and considered the process, finds the pursuers entitled to expenses, subject to modification; allows an account of said expenses to be given in, and remits the same, when lodged, to the auditor to tax and to report."

Against the interlocutor of 2d November 1871 the defender obtained leave to reclaim. He ac-

cordingly, on the 10th November, lodged a reclaiming-note, admittedly for the purpose of bringing under review, not only the interlocutor of 2d November 1871, but the previous interlocutors of 18th November 1870, and 15th July 1871. A debate on the competency took place, turning chiefly on the construction of 6 Geo. IV, c. 120 (Judicature Act), § 17, and 31 and 32 Vict. c. 100, (Court of Session Act, 1868,) §§ 52, 53, 54.

MILLAR, Q.C., and CRICHTON objected to the competency of the reclaiming-note to bring under review the interlocutor of 15th July 1871, and preceding interlocutors. The interlocutor of 15th July had, taken along with the previous interlocutor, disposed of the whole merits of the case, and therefore a reclaiming-note could and ought to have been taken within twenty-one days. This not having been done, that interlocutor is now final.

SOLICITOR-GENERAL and MARSHALL for the defender.

At advising, on the question of competency—

LORD PRESIDENT—There is no dispute that the interlocutor of 15th July 1871 disposes of the whole merits of the cause in the language of section 17 of the Judicature Act, 1825, or that, taken along with a previous interlocutor, it disposes of the whole subject-matter of the cause in the language of section 53 of the Court of Session Act, 1868. This interlocutor of 15th July appoints the cause to be put to the roll for the disposal of the question of expenses. The cause having been put to the roll, the Lord Ordinary, on the 2d November, finds the pursuers entitled to expenses, subject to modification. This mode of dealing with the question of expenses is not strictly in accordance with section 17 of the Judicature Act. That section enacts —"that in pronouncing judgment on the merits of the cause, the Lord Ordinary shall also determine the matter of expenses, so far as not already settled, either giving or refusing the same in whole or in part." This section has been the subject of construction by decisions. It has been held that if the Lord Ordinary says nothing about expenses, he is not violating the rule, but is held as refusing expenses to either party. It is further held that if he reserves the question of expenses, that is consistent with section 17: he does in two interlocutors what the statue apparently requires him to do in one. This is what the Lord Ordinary has substantially done here. The question comes to be, whether the interlocutor of 15th July 1871 is an interlocutor which so entirely exhausts the cause that it is within the meaning of section 53 of the Act of 1868. The object of the Act of 1868 was to diminish the number of reclaiming-notes as much as possible. If an interlocutor disposing of the merits, but reserving the question of expenses, must be reclaimed against within a certain number of days, or else become final, then at the end of every cause in which such an interlocutor is pronounced there must be two reclaiming-notes. That would certainly defeat the object of the statute. But everything depends on the meaning of section 53. It provides that it shall be held that the whole cause has been decided in the Outer House although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause. So far, I do not think that any of the expressions used in this clause have reference to the question of expenses. I do not think that the question of expenses can be held to be "one of the questions of law or fact raised in the cause." But the present question depends rather on the words which immediately follow; and it appears to me that in those expressions the Legislature must have had in view section 17 of the Judicature Act. The words which follow are, "but it shall not prevent a clause from being held as so decided that expenses, if found due, have not been taxed, modified, or decerned for." I think there are just two alternatives before the mind of the Legislature, viz., the case in which expenses are found due, and the case where expenses are found not due. The 17th section of the Act of Geo. IV. specifies "giving" or "refusing" expenses. The new Act says that if expenses are found due it shall not prevent the cause from being held to be decided in the Outer-House that the expenses have not been taxed, modified, or decerned for. In the case where expenses are found not due there is no necessity for any provision. There is nothing more to be done, not only in the meaning of the Act, but in every possible meaning; the Lord Ordinary cannot possibly pronounce another interlocutor. The alternatives being that the expenses have been found due, or found not due, the framer of the statute leaves the case where they are found not due to work itself out, and confines his directions to the case where they are found due.

But here occurs the case in which expenses are neither "given" nor "refused," neither "found due," nor "found not due," but are left in this position that the Lord Ordinary says, "I want to hear further argument before I put the final stroke to my judgment." Until the Lord Ordinary has done so he has not done all that was contemplated either by section 17 of the old Act, or section 53 of the new Act. If it was imperative on the party to reclaim against the interlocutor disposing of the merits, there would be the further necessity of reclaiming against the interlocutor awarding expenses. The contemplation of the statute is that only one interlocutor, other than those pronounced in the preparation of the cause as provided for by section 28, can be reclaimed against without leave. The result is that the interlocutor disposing of the merits of the cause is incomplete, but may be made complete by the subsequent interlocutor, and the two interlocutors together make such a judgment as was contemplated either by the old or the new statute. Then comes in the operation of section 52 of the Act of 1868, that a reclaiming-note against the interlocutor of 2d November brings up the interlocutor of 15th July, and every other interlocutor which has not been reclaimed against, for that exception is plainly implied. The words of section 52 are so broad and comprehensive that, if this is a competent reclaiming-note against the interlocutor of 2d November, it brings up the whole prior interlocutors. Is this, then, an incompetent reclaiming-note altogether? That has not been contended. I am therefore of opinion that the objection to this reclaiming-note, as a process of review of the interlocutor of 15th July, is bad.

The other Judges concurred.

The Court accordingly found that the reclaiming-note against the interlocutor of 2d November 1871 competently brought under review the interlocutors of 18th November 1870 and 15th June 1871.

Parties were then heard on the merits.

SOLICITOR-GENERAL and MARSHALL, for the defender, maintained that the Apportionment Act (4 and 5 Will. IV, c. 22) applied only to the succession of parties who had a limited interest in a

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