head any question of law was involved, or that any improper direction was given, or proper direction omitted. The jury were of opinion, and so found by their verdict, that the blameable conduct of both defenders conduced to the accident, and so caused the injury for which the pursuers seek reparation, and it is a sound and familiar enough proposition that if two parties are in fault —that is, to blame for a state of things whereby another is injured—it is not necessarily or even generally a good defence to either wrongdoer that the consequences of his fault would or might have been avoided had the other acted as he ought.

I think the whole matter was properly left to the jury, and that there are no grounds for disturbing their verdict.

I am therefore of opinion that the exceptions ought to be disallowed and the rules discharged.

The LORD JUSTICE-CLERK, LORD RUTHERFURD CLARK, and LORD LEE concurred.

The Court discharged the rule, and refused the bills of exceptions, and applied the verdict.

Counsel for the Pursuer—D.-F. Balfour, Q.C.—Strachan—Baxter. Agent—William Black, S.S.C.

Counsel for the Tharsis Company—Graham Murray—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Charles Tennant & Company —Jameson—Salvesen. Agent—F. J. Martin, W.S.

Thursday, January 9, 1890.

FIRST DIVISION.

[Sheriff of Roxburgh, Berwick, and Selkirk.

DAVIDSON *v.* THOMSON.

Servitude — Feu-Contract — Counterpart Rights—Acquiescence—Compensation for Loss of Right of Servitude—Interdict.

In the feu-contracts of the proprietors of a block of three dwelling-houses adjoining in a burgh, entered into in 1865, it was provided that B, the proprietor of the centre house, should have liberty of access to his back premises by a passage along the back of the houses belonging to A and C, the proprietors of the two outside houses, and that in consideration of this privilege granted to B that A and C should have the right to sink a well behind B's house and in his ground, and right of access to draw water. Instead of sinking the well the parties made use of a public well in the neighbourhood, and in 1878 a public water supply was introduced into the burgh. In 1879 B and C, acting on a joint plan, added to the back of their houses, B's building covering the greater part of the space provided for the well. A, though aware of the erection of this building, made no objection to it. Eight years after A made an addition to the back of his own house covering the access used by B, who, however, continued to gain access to his back premises by going round A's new buildings.

In an action by A to interdict B from passing round the back of his new buildings, the Court were of opinion that the pursuer had abandoned his right to have a well sunk in the spot specified in the feu-contracts, but *held* that the defender's counterpart right of access had not been lost though the line of access had been varied in consequence of the pursuer's buildings erected in 1887, and interdict *refused.*

Opinion (*per* Lord Shand) that the pursuer had lost his right to sink a well on the defender's ground altogether.

Opinion (*per* Lord M'Laren) that if the pursuer had brought an action in 1879 to interdict the defender from building over the well space, he would only have obtained from the Court compensation for the right lost either in money or by having another spot provided for the purpose of sinking a well.

In the year 1865 Peter Davidson, Alexander Thomson, and William Dobson joined together in building a block of three dwelling-houses in Queen Street, Galashiels. It was arranged that Mr Davidson should have the house to the east, Mr Thomson the centre house, and Mr Dobson the westmost house. Each party entered into a separate feu-contract with Mr Scott of Gala, the superior. It was provided, *inter alia*, in Thomson's feu-contract that "the said Alexander Thomson and his foresaids shall have the liberty and privilege of access to the back of the dwelling-house erected on the area hereby disponed, and to the garden ground and others behind the same, by the mutual entry left at the south-east end of the adjoining feu belonging to Peter Davidson, and by a passage at the back along the whole length of the said Peter Davidson's dwelling-house, extending the said passage to 4 feet in width exclusive of or in addition to the width of the outside stairs at the back of said Peter Davidson's house." The deed provided for a similar access for Thomson by a westward entry on the north-west end of Dobson's feu, and went on to provide and declare "that the said Peter Davidson and William Dobson, and their respective successors and tenants in the properties adjoining to the subjects hereby disponed, shall, in consideration of the foresaid privileges of access given to the said Alexander Thomson, have right respectively to a similar passage 4 feet in width along the back of the said Alexander Thomson's dwelling-house to the well aftermentioned, and shall also have right and liberty to sink or to join in sinking and obtaining water at all times from a well in a space in the area hereby disponed reserved for that purpose 6 feet square opposite the centre of his back wall of the dwelling-house belonging to the said Alexander

Thomson, the one side of said wall to be 8 feet distant and the other 14 feet distant from the said back wall of said dwelling-house." Similarly in Davidson's feu-contract it was provided that "Thomson as proprietor of the adjoining area to the north-west of that hereby conveyed, and his successors and their tenants, shall have the liberty and privilege of access," as described in Thomson's feu-contract; "that Davidson and his foresaids and their tenants shall, in consideration of the foresaid privilege of access given to the said Alexander Thomson, have right to a similar passage 4 feet in width along the back of the said Alexander Thomson's dwelling-house to the well after-mentioned, and shall also have right and liberty to sink or to join in sinking and obtaining water at all times from a well in a space reserved for that purpose 6 feet square opposite the centre of the back wall of the dwelling-house belonging to the said Alexander Thomson."

After the houses had been built the proprietors, instead of sinking the well behind Thomson's house as provided for in the feu-contracts, made use of a public well in Queen Street about 40 yards distant from the houses, which they deepened and improved, and in 1878 a public water supply was introduced into the town.

In 1879 Thomson and Dobson, acting on a joint plan, built additions at the back of their houses, which covered part of the original roadway running along the back of their feus, and so far as the building was situated on Thomson's feu also covered up a portion—3½ feet by 6 feet—of the 6 feet of the square space provided for the well in the feu-contracts, the remainder of the well space being covered by Thomson with a coal-house. No objection was made by Davidson to the erection of these buildings, although he was aware of their erection. Down to 1887 Thomson continued to use the mutual passage to the east of Davidson's house, and the roadway round the back of Davidson's house, as stipulated in the feu-contract, until 1887, when Davidson built an addition to the back of his house, which completely covered about 15 feet in length of the roadway at the back of his house. Thereafter Thomson in going to his back premises was obliged to go round the back of this new building. In 1888 Thomson erected another new building to the back of his own house, which superseded the coal-house erected in 1879, and together with the building of 1879 completely covered with permanent buildings the well-space provided for in the feu-contracts. When the materials had been all collected for this building, and the foundations had been cut Davidson objected to the erection of the building, and threatened to interdict Thomson. A proposal was afterwards made by Davidson that the matter should be settled on the footing that Thomson should continue to use the access behind Davidson's new buildings, and should in return give Davidson ground for building a well to the back of his premises. Thomson was willing to give ground for that purpose, but the parties failed to settle the terms of an agreement.

The present action was raised by Davidson to interdict Thomson from trespassing on his ground by passing round the back of his, the pursuer's, premises in order to gain access to his own back premises.

The pursuer pleaded, *inter alia*—"(2) The servitudes in favour of the pursuer and defender respectively being counterparts of a mutual contract, and the defender being unwilling, or having by his own actings rendered himself unable to perform his part thereof, has lost his right to demand performance of the other, and should be interdicted as craved, with expenses."

Proof was allowed, the result of which sufficiently appears from the narrative given above.

On 26th October 1888 the Sheriff-Substitute (SPITTAL) pronounced an interlocutor, by the first ten findings whereof he stated the facts of the case as above set forth, and found "on a view of the whole matter, that the petitioner Davidson had failed to show that Thomson had in any way abandoned or forfeited the right of access to his back premises provided by the feu-contract of 1865 above set forth: Therefore refused the interdict," &c.

On 11th March 1889 the Sheriff (JAMESON) adhered to the first ten findings by the Sheriff-Substitute's interlocutor of 26th October 1888, *quoad ultra* recalled the interlocutor, and granted interdict.

The defender appealed, and argued—The pursuer had stood by and seen the defender alter his building so as to cover the well-space, and had acquiesced in that state of affairs for more than eight years. He had therefore clearly abandoned his right to such a well—*Muirhead* v. *Glasgow Highland Society*, January 15, 1884, 2 Macph. 420. On the other hand, the defender had continuously used his right of access, and had not lost it, though the line of access had been necessarily varied after the erection of the new buildings by the pursuer—*Hozier* v. *Hawthorn*, &c., March 19, 1884, 11 R. 776, *per* Lord Shand, 774. The fact of the abandonment of the one right by the pursuer did not infer the loss of the other right by the defender. Further, the right to the well had never been exercised, as the parties had prepared to make use of a public well in the neighbourhood, and after 1878, when the public water supply was introduced, ceased to be of any value whatever. The only purpose accordingly which the pursuer could have in insisting on this right was to annoy the defender, and have a ground for his action of interdict, but the Court was always averse to granting a servitude *in æmulationem*, and would be slow to grant interdict in such a case as the present—*Gould* v. *M'Corquodale*, November 24, 1869, 8 Macph. 165, *per* Lord President, 167; *Hood* v. *Traill*, December 18, 1884, 12 R. 362.

Argued for the pursuer—The two rights—to the well on the one hand and to access on the other—were counterpart obligations in the feu-contracts. The Court would therefore be slow to hold that one obligation had ceased and not the

other. The defender was seeking unwarrantably to retain a privilege, while he refused to perform the obligation giving him a right to said privilege. If a person was either unable or unwilling to perform his part of an obligation he could not demand performance of the counterpart — Stair, i. 10, 16; Ersk. Inst. iii. 3, 76; *Tennent* v. *Napier Smith's Trustees*, May 31, 1888, 15 R. 671. Further, the defender had acquiesced in the loss of his right by not objecting to the erection by the pursuer of his additional buildings in 1887.

At advising—

LORD PRESIDENT—While I think that the two rights, of access on the one hand, and of sinking a well on the other, are counterparts of one another in the original feu-contract, it does not seem to me by any means to follow that if one of their rights is abandoned, the other necessarily falls. On the contrary, if one party choose to abandon the right which he has, the right which is the counterpart of it does not fall unless he binds his neighbour to abandon it. One right falls but not the other. This, I think, is well illustrated in the present case. No doubt when these three tenements were built it was a reasonable and expedient arrangement that there should be means provided for sinking a well for the use of the three tenements. At that time there was no supply for the use of the town generally, but every building depended on its own resources, or on some public well in the neighbourhood. Now, it so happens there was such a well in the street which these tenements fronted—Queen Street—and after erecting the houses bethought them whether it would not be better to take their water from the public well in Queen Street instead of expending money in sinking a well where after all no water might be found. Now, the public well, it appears, required some improvement to make it adequate for the new tenements, and instead of spending money on sinking a well the parties expended a sum on improving the public well, by which they rendered it adequate for their wants, and then in 1878 the public water supply was introduced into the town.

In these circumstances the value of the right to a well for the three tenements was really extinguished, and it would have been a very foolish speculation for the parties if they had done so to have expended money on sinking one. And accordingly so clearly was this the undertaking of the three parties—Davidson, Thomson, and Dobson—that Thomson and Dobson erected a tenement in 1879, partly on Thomson's ground and partly on Dobson's, part of the building on Thomson's ground covering almost the entire space set apart for the well, and all this was done with the tacit consent of Davidson. I think that amounts to an entire abandonment by Davidson, the pursuer, of his right to sink a well at least in the particular place set apart for that purpose in the original feu-contract. I do not imagine that a man can stand by and see a house built over ground where he maintains that he has a right to such a well, and thereafter insist that he has a right to sink a well there. Whether the pursuer may or may not be entitled to have a well sunk elsewhere is not the question before us in this case. What he complains of is that the place designed for the well has been wrongfully taken from him, and he therefore contends that the counter stipulation for access to the back of the defender's premises must come to an end. I do not think that can be maintained. I give no opinion on the question whether or not the pursuer is entitled to have another space provided for a well, but on this I am very clear that he is not entitled to interdict the defender from using his right of access round the back of the pursuer's buildings, because the well can no longer be sunk in the place originally designed for it.

As regards the right of access itself I have no difficulty. Originally a straight line of roadway ran along the back of the buildings immediately adjoining the staircases leading to the upper flats of the three tenements. When the parties began to extend their premises to the back, they necessarily encroached on this line of roadway. No one could build to the back without doing so. When operations of that kind took place it seems a matter of course that the roadway had just to be diverted further to the south to make room for the buildings. All the three proprietors built to the back of their premises. Thomson and Dobson began in 1879, but Davidson adopted the same course in 1887, and but for the difficulty arising as to the loss of the well, I do not understand that the pursuer contends that he would have been entitled to shut up the access behind his own building without giving another access in its place. It all comes back to the well, and if the loss of the well is not a sufficient reason for granting interdict, there is, so far as I can see, no other reason. I am clearly of opinion that it is not a sufficient reason, and therefore I propose that we should recal the judgment of the Sheriff, and revert to that of the Sheriff-Substitute.

LORD SHAND—I agree with the Sheriffs and with your Lordship in thinking that the obligations in these feu-contracts were mutual obligations counterparts of each other. I think the pursuer is right when he says that the effect of the titles is, that as he had agreed to allow the road in question to pass at the back of his property, he was entitled to an access to the place where the well was to be sunk and to sink the well in that place. The pursuer was entitled to prevent the well being built over, and if he had applied for interdict when the defender proposed to build over it he would have been entitled to interdict. But there was nothing to prevent him from abandoning his right. When the building was being put up he was entitled to say, "I object to that building," and there would have been no answer to the objection. Having regard to the circumstance that the one obligation was the counterpart of the other, I think he was also entitled to say, "If you go on with your building I

shall close up the road;" and if in the face of a notice to this effect the defender had covered up the well he must have submitted to the loss of the road, for the pursuer's acquiescence in that case would have been conditional only. A third course was open to the pursuer; he might be quite willing to acquiesce in the closing up of the well but to continue to allow the use of the road.

Now, it appears there was a good reason for allowing the well to be closed up, for the right to it had, in the view of all the parties, become of no value. That was, I believe, the reason which induced the pursuer to acquiesce. It does not, I think, matter whether the right was of value or not if he did in fact acquiesce, and I think on the evidence that he did so.

Now, he acquiesced on the footing that the road was to continue to exist. If he had intimated that, if the well was to be covered, up he would shut up the road, the defender might have abandoned his building, and it appears to me that because the defender might have so acted it was incumbent on the pursuer to make it clear in good time, and before the building was completed, that his acquiescence was conditional only. He did not, however, make any intimation of the kind, and the buildings have been up for upwards of eight years. When he made intimation in 1888 that he now meant to close the road the defender was entitled to say, "You shall not close the road, or if you do you must allow me a substitute," for the obligation to allow the use of the road still subsisted. The defender's position is quite clear; he was willing to allow the road to be closed in the altered position of affairs, but his acquiescence was conditional. He required that he shall have a substituted road, and he showed that by using all along the substituted road, going round the new building which Davidson erected. The use of this substituted road was the sole ground on which he acquiesced in the closing of the old road.

The result then is this, that the pursuer acquiesced in the closing up of the well. But the defender, eight years afterwards, acquiesced in the road being closed only on condition of getting a substitute road, which he is therefore entitled to have.

As your Lordship has said, it is no part of our decision in this case to determine a question as to the pursuer's right to have another well, but for myself I may say I think he would find it most difficult to establish any such right, for the right to dig a well was restricted to a defined and limited space, and he acquiesced in that space being built over. But even though he has now lost that right, for the reasons now stated, I do not think that the defender in the circumstances lost his right to a road past the pursuer's property.

LORD ADAM—I am of opinion that the rights for which Davidson and Thomson stipulated were both valuable rights. I do not doubt that they were counterparts of each other, or that if either party had attempted to invade the other's right he might have been stopped by an interdict.

But one of these rights ceased to be of any value, because in 1878 water was brought in to supply the whole town. While that is so, it appears to me that facts and circumstances have taken place which show an abandonment by Davidson of his right to have a well on Thomson's ground. Thomson and Dobson built together a building, the effect of which was that the ground left for sinking the well, which was six feet square, was covered to the extent of three and a-half feet by permanent buildings. That was as entirely inconsistent with the subsistence of Davidson's right as if the whole area had been built over. It is vain to say that Davidson had it still in his mind to sink a well on the remaining portion.

There is sufficient reason then for holding that all parties, especially Davidson, with whom alone we are concerned in this case, consented to these operations being performed on the ground. He saw these operations going on, and he made no objection during eight years. That I read as abandonment by him of his right.

But Davidson having abandoned the stipulation in his favour as worthless, does it follow that the counter stipulation is to be held as abandoned, it being still valuable? I do not follow the reasoning of the Sheriff by which he reaches the conclusion that it was. Thomson had still a right to insist on the original obligation of access. If Davidson had erected no buildings, the access would have still been in its original state. But in 1888 Davidson put up certain buildings which covered the original road. All that time Davidson allowed Thomson to use the substitute road. It may be—I give no opinion on it—that if Davidson had said—"I'll not allow you to go round at the back of my property," Thomson would have had a right to say—"Then you shall not cover over my access with buildings." But Thomson, without interruption, and, as I think, in exercise of a right, went round at the back of Davidson's buildings.

I agree, therefore, that the Sheriff has gone wrong. Thomson's right, I think, is still in full vigour, and he is entitled to this substituted road.

LORD M'LAREN—Under the title-deeds the pursuer had a right of servitude of drawing water from a well in the defender's garden to be formed on a spot defined in the plan, and the defender to a servitude of access through the pursuer's property, which was also in a definite line laid down on the same plan. Neither of the servitudes have now a real existence in the localities appropriated to them, but it is quite possible by means which the law recognises—by means of substitutes—that either one or both rights may still be maintained. The servitude of water was the one first put an end to in 1879, when the defender extended his house over the ground appropriated to the well. That was followed at a comparatively recent period by the pursuer extending his house over the ground appropriated to the defender's access. Now, in order to see how the rights

of parties stand it is necessary to go back to the time when the first innovation upon the mutual obligations took place. If, when the defender built over the well, the pursuer had brought an action to have the counterpart obligation rescinded, or to interdict the defender from putting up the buildings, would he have prevailed? In my opinion the Court would have granted him neither the one remedy nor the other, but would have given him compensation for loss of the water right either in the shape of money, or in the form of a substitute well, because if water can be found in any definite spot, it can always be found in a spot a few yards distant, and equally convenient. Such, I think, was the right of the pursuer after the well was covered over, viz., a right to compensation, not to recission of the counterpart obligation.

There is a good deal of evidence to the effect that this water right was of little value at the beginning, and became of no value at all in consequence of the introduction of the water supply, and if so it is very easy to infer acquiescence by the pursuer in the defenders' operations which were destructive of the right, because it is more easy to conclude that there has been abandonment of a worthless than of a valuable privilege. I am accordingly very much disposed to think that the evidence goes to prove the abandonment of the right to the well. If this were clearly established it would be sufficient for the decision of the case, but there is at least some evidence to the contrary, because an attempt was made, perhaps after the lapse of some time, by the pursuer to extract from the defender a promise to form a new well. If however the facts do not amount to abandonment, I reach the same conclusion, because the fact that the interference with the right to the well was made without the pursuers' consent, but at the same time without his active opposition, does not give him a right to demand recission of the defenders' right of access, but only to have compensation for the right he has lost. I give no opinion on the question whether the pursuer has a right to a well, but I am clearly of opinion that the action directed against the defender to interdict him from using his right of access is not well founded, and that the defender is entitled to absolvitor.

The Court recalled the Sheriff's interlocutor of 21st March 1889, repeated the findings in fact in the interlocutor of the Sheriff-Substitute of 26th October 1888, refused the interdict, and decerned.

Counsel for the Pursuer (Respondent)—Asher, Q.C.—M'Lennan. Agent—Thomas Liddle, S.S.C.

Counsel for the Defender (Appellant)—Wilson. Agent—John Kinmont, S.S.C.

Friday, January 10.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

STRAIN *v.* STRAIN.

(*Ante*, vol. xxiii. p. 90.)

Husband and Wife—Separation and Aliment—Cruelty—Adherence—Jurisdiction—Competency.

A wife obtained decree of separation, "*a mensâ et thoro* in all time coming," on account of her husband's cruelty and in consequence of his having communicated to her venereal disease. Four years afterwards the husband raised an action against his wife to have it declared that there no longer existed any ground for the defender living separate from him, and that the decree of separation should be recalled and the defender ordained to adhere to him. The defender refused to adhere. *Held* that the Court could not recal its own finding pronounced in a decree *in foro*, and that the decree in question was not revocable except by the joint consent of the spouses, and the action *dismissed* as incompetent.

In January 1885 Mrs Mary Thomson or Strain raised an action of separation and aliment against her husband Hugh Strain junior, colliery manager, Merrybank Cottage, near Airdrie, on the ground of cruelty.

In the proof allowed by the Lord Ordinary it was established that the defender had communicated venereal disease to the pursuer.

On 20th March 1885 the Lord Ordinary granted decree of separation, and ordained the defender to separate himself from the pursuer *a mensâ et thoro* in all time coming. To this interlocutor their Lordships of the First Division upon 4th November 1885 adhered.

On 19th February 1889 Hugh Strain junior raised this action against his wife to have it declared that there no longer existed any ground for the defender living separate from him, and that the decree of separation should be recalled. He averred that he was now entirely free from venereal disease, that he had put himself under the care of several medical men of eminence in Glasgow for treatment, and he offered to produce certificates from them in support of his averments, or to submit himself for examination to any medical man whom the defender might name. He also professed affection for the defender, and expressed penitence for the past. The defender refused to resume cohabitation with the pursuer, and pleaded *inter alia* that the present action was incompetent.

On 21st June 1889 the Lord Ordinary (M'LAREN) found that the decree of separation and aliment in the action at the defender's instance against the present pursuer, pronounced by the Lords of the First Division on 4th November 1885, was not subject to recal, and he dismissed the action.

"*Opinion.*—In this case the pursuer asks for a declaratory judgment to the effect