of cruelty, and aliment claimed to the amount of £750 per annum. Now, on principle I see no objection to the competency of either arrestment or inhibition being based on the conclusions of such a summons, and no case has been referred to which to my mind goes to negative the competency of such diligence. If it is competent, then the question arises in the ordinary way, whether we should recal the inhibition without caution or consignation; or if not, on what conditions? I should not like to commit myself by saying that such diligence will always or generally be recalled in exceptional circumstances. It is not necessary to say that, and I did not mean to commit myself to that opinion in *Symington's* case. I consider it a question of circumstances in each case whether the diligence should be recalled, and if so, on what conditions.

Not only do I see no principle against the competency of such an inhibition, but no direct case has been referred to in which it has been found incompetent. I cannot so construe any of the cases, and I think it would require very strong authority to affirm the proposition.

The question of circumstances in this case is attended with no difficulty. If it is necessary that there should be special circumstances to justify the diligence, I think we have them here. We have the husband's statement under his own hand that he has or had it in contemplation to realise his admittedly large means and to leave the country. I think this is a case in which we should insist upon caution, and to a substantial amount; for it might be of such amount as to stand in the way of the defender in the view of his realising his estate and leaving the country. I think the amount proposed by your Lordship seems very moderate, and I do not see that anything less could be expected to effect the object in view.

LORD MURE concurred.

LORD SHAND—As this summons makes a pecuniary claim and has pecuniary conclusions, I am of opinion, in accordance with the general rule, that it may be the foundation of diligence. No case has been cited in which an action with pecuniary conclusions has been held unsuited for diligence, and it appears to me that if we were to give effect to the defender's argument it might result practically in depriving a wife of the possibility of recovering money from her husband from whom she was obliged to live separate. According to the petitioner's argument, a husband might announce his intention of going away and leaving no provision for his wife, and she would in such circumstances have to stand by without the power of recovering anything from him. This result would be discreditable to our law. Assuming the competency of the diligence, I am of opinion that it is not in every case of separation and aliment that a wife may use such diligence. I think there is great force in the view that while the relation of husband and wife subsists, the wife follows her husband's fortunes for her own interest as well as his, and ought not to be allowed in ordinary circumstances to do such diligence as to hamper or perhaps ruin him in the course of his business. Special circumstances require to be made out; and in this case I think we have them. The ground of diligence might have been that he was *vergens ad inopiam*, but the present case is even stronger, for he has himself announced in a letter his intention of realising his goods and leaving the country. I think a special case has been made out, and that £4000 is a reasonable sum to fix as the condition of loosing the arrestments.

The Court pronounced an interlocutor granting the prayer of the petition to the effect that the arrestments might be loosed upon caution being found to the amount of £4000.

Counsel for Petitioner — Dean of Faculty (Fraser)—Guthrie. Agents—Mason & Smith, S.S.C.

Counsel for Respondent — Lee — M'Kechnie. Agent—H. W. Cornillon, S.S.C.

Tuesday, December 9.

SECOND DIVISION.

PATERSON & OTHERS *v.* MILTON & OTHERS (MAGISTRATES OF ST ANDREWS) AND BAIN & OTHERS.

Burgh—Property and Rights—Powers of Magistrates to Allow New Use of Part of Common Good.

Certain land in a burgh was held by the magistrates for the common good, and in the fulfilment of that purpose was applied as a golfing links for the recreation and amusement of the inhabitants. Part of the land had been feued out without objection, and prescription had followed. Upon the magistrates proceeding to form a road across the links, which *inter alia* afforded an access to the feus in question, it was objected that the act in question was an encroachment upon the rights of the public, and interfered with the privilege of golfing. *Held* that in the circumstances as proved the proposed use of the land in question was *innocuæ utilitatis* and within the discretion of the magistrates.

Remarks per the Lord Justice-Clerk (Moncreiff) on the powers of magistrates to deal with ground held by them for the recreation of the inhabitants.

Process—Joint-Minute—Reclaiming-Note—Effect of a Joint-Minute upon which no Interlocutor had been Pronounced.

Some inhabitants of a royal burgh brought an action against the magistrates and town council, and also against certain of the feuars, for declarator and interdict to the effect that a certain road which the magistrates proposed to allow to be made was an encroachment upon ground appropriated to the recreation and amusement of the community. The magistrates were successful, and the pursuers reclaimed. Before the reclaiming note was heard a new town council had been elected, who, at a meeting held for other business, and at which no notice of motion to that effect had been made, withdrew the defences, and a joint-minute consenting to decree passing against them, and signed by their and the pursuers' counsel, was moved in Court. Some days afterwards, before any

interlocutor had been pronounced on this minute, the council held a second meeting, at which the resolution passed at the first was rescinded. A new minute was then put in process stating the determination of the council to insist in their defences. *Held* that in the circumstances there was nothing to justify the Court giving effect to the joint-minute, and that the cause must proceed, and motion for decree in terms of the joint-minute *refused*.

This was an action of declarator and interdict brought by John Paterson and two other inhabitants of St Andrews against the Provost, Magistrates, and Town Council of that burgh, and as such the Police Commissioners thereof, and also against James Bain and others or their authors, who, under the circumstances narrated below, had feued from the Magistrates of St Andrews about the year 1820 certain plots of ground which had at one time formed part of the links of St Andrews. The purpose of the action was to have declarator—"(*First*) that the Provost, Magistrates, and Town Council hold and are vested in the property of that portion of the links of St Andrews which lies to the east of the Swilkin Burn, subject to the burden and obligation of preserving the said links for the purposes of the game of golf, and for the recreation and amusement of the inhabitants of the said city; (*second*) that the said Magistrates and Town Council have no right to encroach or authorise or permit any encroachment upon the said links, or any part thereof, which shall have the effect of diminishing the space available for the said game of golf or for the recreation and amusement of the said inhabitants; (*third*) that, in particular, the said Magistrates and Town Council have no right to construct or authorise or permit the construction by the other defenders or any of them of a road for carts and carriages along the southern boundary of the said links, being the northern boundary of the several parcels of ground belonging to the other defenders, and feued out to the said defenders or their authors by the said Magistrates and Town Council in and subsequent to the year 1820; and (*fourth*) that neither the said Magistrates and Town Council nor the said other defenders are entitled to use or authorise or permit the use of the portion of the said links adjoining the said northern boundary of the said parcels of ground as an access for carts and carriages to the said parcels of ground, or to the houses or premises of the said other defenders built or situated upon the same." The pursuers also concluded for interdict against the defenders "constructing or authorising the construction of the said road, and from using or authorising the use of the said portion of the said links for the purpose of a cart or carriage access to the said parcels of ground and buildings or premises built or situated thereon, and from in any other way abridging the extent of the said links available for the said game of golf and for the recreation and amusement of the said inhabitants, and from interfering with the full and free use by the said inhabitants of the whole surface of said links for the purposes foresaid in any manner of way."

The situation of the road about which the question at issue arose need not here be specified; it is fully explained in the note of the Lord Ordinary *infra*.

The pursuers averred, *inter alia*, that since the erection between 1870 and 1875 of certain houses on the feus granted in 1820 "the portion of the links in question" (that next the houses) "has gradually come to be used as a cart and carriage access to the said houses." They also averred—"(Cond. 10) The effect of the said use of the said portion of the links has been seriously to encroach upon the area of the links, and seriously to interfere with the said servitude and privilege of golfing as enjoyed over the said links from time immemorial. The ground in question, which is within the ordinary golfing course, and close to one or more of the golf holes, has ceased, in consequence of the use to which it has been illegally put, to be covered with grass, and it is ploughed up with cart ruts, and especially in wet weather has become a source of inconvenience to golfers and a serious detraction from the amenity of the links. (Cond. 11) The individual defenders, or some of them, nevertheless insist upon using the said portion of the links for the purpose of a cart and carriage access to the said feus, and they profess in so doing to have the authority or permission of the defenders the Magistrates and Town Council. Moreover, negotiations have for some time been on foot between the said feuars and the Town Council for the purpose of having a regular made road constructed upon the said portion of the links along the said northern boundary of the said feus, and the said feuars and the majority of the Town Council are, as is believed and averred, about to proceed with the construction of such a road, to the great detriment of the links and the prejudice of the pursuers and the other inhabitants of the burgh. The present action has in these circumstances become necessary."

The Provost and Magistrates in answer stated, *inter alia*—"(Stat. 3) The links . . . are held by the present defenders, as by their predecessors, from time immemorial for behoof of the inhabitants, and, *inter alia*, subject to the obligation of preserving the same for the purposes of the game of golf and for the recreation and amusement of the inhabitants. With due regard to these purposes, and acting for the public interest, the present defenders and their predecessors have always from time to time, as occasion arose, exercised powers of administration and management over the links now in question. (Stat. 4) Among such acts of administration and management by or by authority and permission of the defenders or their predecessors are (1) the letting of the pasturage and the regulation of bleaching clothes on the links; (2) the widening of the links to the north within the last forty years; (3) the opening of a new macadamised road across the links from Clark's Wynd to the sea, in lieu of an old road in the same direction, conform to minutes of Council dated 31st March and 7th April 1845; (4) the construction of the sloping walk or terrace referred to in the condescendence, conform to minute of Council of 15th October 1849; and (5) the levelling, filling up, and terracing of the ground to the south of the club-house, also referred to in the condescendence, conform to minute of Council of 1st June 1854 . . . . (Stat. 6) The question whether or not the road in dispute is to be allowed falls within the powers of administration and management which have been exercised in the like cases by the defenders and their predecessors from time immemorial. There

has been for a considerable time a practice of carts or carriages passing over the south side of these links, and latterly this practice has increased. If this practice were regulated and the passage of carts or carriages confined to a properly made road along the south side of the links, the public convenience would be consulted, without detriment to the public use and enjoyment of the links, and the golfing course would be better preserved than at present. These defenders are not, however, under any obligation to allow any such road to be made, and their interest and object in their present compearance are to maintain their exclusive right to resolve and determine whether or not the road is to be allowed, upon due consideration by them of the public interest and of the purposes of golfing and others, for which these links are held by them."

The defenders Bain and others averred that they were entitled (first) by prescription, and (second) by consent of the Magistrates, to the use of the ground as a cart and carriage access to their feus.

The pursuers pleaded, *inter alia*—"(1) The ground in question, forming part of the links of St Andrews, and being held by the defenders, the said Magistrates and Town Council, subject to the obligation of preserving the same for purposes of recreation, and particularly for the purposes of the game of golf, the conversion of the said ground into a road for the purpose of affording a cart and carriage access to the said feus and buildings thereon is illegal, and in violation of the rights of the pursuers and the other inhabitants of the city. (2) *Separatim*, and in any view, the construction of a road upon the said portion of the links, or the use of the said portion of the links for the purpose of a cart and carriage access is illegal, as being a material interference with the due exercise by the pursuers and others of their right of golfing over the said links. (3) The rights of the pursuers and of the inhabitants of the city in and over the said links, and the said portion thereof, being as hereinbefore set forth, the pursuers are entitled to decree in terms of the declaratory conclusions of the summons."

The defenders the Provost and Town Council pleaded, *inter alia*—"(2) The question of the formation of the road falls to be determined exclusively by the present defenders in the exercise of their powers of administration and management. (3) The road in question being capable of being formed with advantage to the public, and without injury to the golfing and other rights over the links, the pursuers' conclusions against the present defenders are unfounded."

The defenders Bain and others pleaded—"(2) The defenders are entitled to access to their properties by carts and carriages over the links (1st) by virtue of prescriptive right, and (2d) *separatim*, by the consent of the Magistrates and Town Council in the due exercise of their administrative rights over the said links, and decree of absolvitor should be pronounced accordingly. (3) The formation of a macadamised road by or with the consent of the Magistrates and Town Council being lawful and *innocuæ utilitatis*, the action, in so far as relating thereto, cannot be maintained."

The Lord Ordinary (CURRIEHILL) allowed a proof, the import of which sufficiently appears from his Lordship's note and from the opinion of the Lord Justice-Clerk *infra*.

On 16th July 1879 his Lordship pronounced an interlocutor finding that the two first declaratory conclusions of the summons were unnecessary, and dismissing the same; *quoad ultra* assoilzieing the defenders from the remaining conclusions of the action, and decerning.

"*Note of opinion at advising.*—This case involves questions of very considerable importance to the Magistrates and community not only of the burgh of St Andrews but of all burghs and public places in Scotland. Three persons, inhabitants of St Andrews, have raised this action against the Magistrates and Council of the burgh, and against certain persons who are feuars or occupiers of ground and houses adjoining the links of St Andrews, in which they ask for decree of declarator (1) that the Magistrates and Council hold the links subject to the burden and obligation of preserving the same for the purposes of the game of golf and for the recreation and amusement of the inhabitants of the city; and (2) that the Magistrates and Council have no right to encroach or authorise or permit any encroachment upon the links or any part thereof which shall have the effect of diminishing the space available for the game of golf and for the recreation and amusement of the inhabitants. There is no doubt that these two conclusions which the Court are asked to affirm are sound and correct legal propositions; and accordingly it has never been disputed on the part of the defenders that the Magistrates hold the links for no other purposes than those which are here set forth. The Court, however, is not in use to affirm by judicial decree propositions which no one disputes; and I therefore purpose to dismiss these first two conclusions as unnecessary.

"But then the summons goes on to conclude that the Magistrates and Council have no right to construct, or authorise the other defenders to construct, a road for carts and carriages along the southern boundary of the links—being the northern boundary of the several parcels of ground belonging to the other defenders, and feued out to them or their authors by the Magistrates in and subsequent to the year 1820—and that the Magistrates and Council are not entitled to authorise or allow the use of that road as an access for carts and carriages to the premises which have been built upon the feus.

"The history of these feus seems to be, that somewhere about the year 1820 the Magistrates, clearly in violation of the rights of the community, feued out to a number of persons—the predecessors of the other defenders—a long narrow strip of ground which then formed the southern margin of the links; and they undoubtedly thereby made a very great encroachment upon the rights of the community. Nobody, however, appears to have interfered with them at the time in the way of taking legal steps to prevent the encroachment or to obtain the restoration of the ground to the community. And the ground has now been enclosed on the side of the links by a stone wall, and covered with houses and other buildings, most of which have their fronts to the turnpike road leading from the railway station to the town, although some—and particularly three large houses recently erected—have their fronts

to the links. Very soon after 1820, however, the illegality of these feuing operations was recognised by the Magistrates themselves and the whole community; and ever since that time there has been a general understanding between the Magistrates and the community—and particularly the Royal and Ancient Golf Club, as representing the golfing portion of the community—that the northern boundary of these feus should in time coming be held to be the southern boundary of the links appropriated for the recreation and enjoyment of the inhabitants.

"Now, it is proposed, with the sanction of the Magistrates, that a macadamised road about twenty-two feet wide shall he formed all the way along the southern margin of the links immediately under the northern boundary-wall of those feus from the Swilkin Burn up to the public street, which is now known as Golf Place, and it is proposed that the road when formed shall be used not merely by the feuars in question as an access to their houses, but by every member of the community who may desire to use it as a public road and thoroughfare for foot-passengers, carts, carriages, and other vehicles. The pursuers object both to the formation and use of the road on several grounds, which are stated in their pleas-in-law, and which are to the effect (1) that 'the conversion of any part of the links, and particularly of the part in question, into a road for the purpose of affording a cart and carriage access to the said feus and buildings erected thereon, is illegal and in violation of the rights of the pursuers and the other inhabitants of the city;' and (2), and separately, 'that the construction of a road upon said portion of the links or the use of the said portion of the links for the purpose of a cart and carriage access is illegal, as being a material interference with the due exercise by the pursuers and others of their right of golfing over the said links.' I apprehend that the distinction between these two pleas-in-law is this, viz., that the second assumes that on general grounds it is illegal for the Magistrates to convert any part of the links into a public road for carts and carriages to the prejudice of the public right of golfing and recreation; while the first rests on the special ground that it is an illegal encroachment on and violation of the right of the public to convert any part of the links into a road for the exclusive benefit of certain individual feuars as contradistinguished from the community. I do not think that as a general legal proposition this plea was seriously resisted by the defenders, and if the case presented by the pursuers at the proof had been of the nature assumed in this plea, I should have had little hesitation in sustaining the conclusions of the summons. But although it is impossible not to see that the feuars along the proposed line of twenty feet will probably benefit by its formation to a greater extent than other members of the community, it is quite clear that the whole public will have full use of the road. So that the first plea-in-law for the pursuers is unfounded in fact and cannot be sustained.

"But while such is my opinion on this branch of the case, I desire it may be understood that I cannot hold that the defenders, the feuars, have made out any case in support of their plea that they have a prescriptive right of access to their feus by a road in the line of the proposed road. On the contrary, their case entirely fails in reference to that plea, and if they are to have access to their feus by means of this road, it is solely as members of the public, and not in virtue of any right privately acquired by prescription or otherwise. This was the impression which was made upon my mind by the evidence yesterday on this branch of the case, and it has not been removed by the remarks which have fallen from the counsel for the feuars to-day.

"I am of opinion that the evidence upon this point is extremely meagre and very unsatisfactory. I do not think there is any evidence whatever of a defined line of road having ever existed in this particular locality except during a comparatively short period. Certainly there was none prior to 1820, when the feus were originally given off. There is some slight evidence that occasionally carts with clothes for bleaching were taken from the Scores across the links, in such a way probably as to avoid the golfing course, down to the bleaching green, which was on the banks of the Swilkin Burn; but that is a very different thing from the kind of case which is now being claimed by the defenders, who maintain that they, as proprietors of ground adjoining the links have by long usage acquired a prescriptive right to use this line of road. As their feus did not exist prior to 1820, they cannot found upon any usage which may have been allowed to the inhabitants of the northern part of St Andrews before that time. It seems that the feus were built upon and enclosed with a boundary-wall along the links somewhere between 1820 and 1830 or 1835, for the feus appear not to have been all occupied before 1835 or 1836. Then what is the evidence as to the use of this alleged road after those feus began to be occupied? Certainly it is quite clear there never was any formed road, or anything in the shape of a formed road, at all events prior to the terrace which was formed by Provost Playfair about 1849 or 1850. There does seem to have been an occasional use on the part of some of the feuars—not all of them—in the way of occasionally bringing a cart of coals to their back-doors in the wall; and a golf-club maker named Philip, who seems to have had some little business as a carpenter, occasionally sent a cart of wood down the side of the links to the public road; but with these exceptions, which were very occasional, there is no evidence at all satisfactory to my mind to establish the fact that any road existed or was in use as a regular access to the back grounds of the feus in question prior to 1849.

"In order to acquire a prescriptive right to a road over the links the feuars must prove that their usage was regular and continuous, and in the line contended for, and was a usage adverse to the rights of the public, and of the Magistrates as the guardians of the public interests. But the proof shows that the alleged usage was at the most only tolerated, and that prior to 1849 it was only occasional, and was of such a kind as could not do any harm to the links or cause any interference with the privilege of golfing. We have it in evidence that the ground there was very rough and uneven, overgrown with rank grass, and full of hillocks and hollows, and that in 1849 Provost Playfair, who did so much for the embellishment of St Andrews, thought it would be an improvement to have the ground levelled, the hollows filled up with material obtained in

the neighbourhood, and the whole covered with turf and kept in grassy sward, so that persons might walk along it and enjoy a view of the links with much more comfort and satisfaction than was practicable in the original state of the ground. It would also seem that after this terrace was formed short-holes were occasionally laid down there for the purpose of golf, although these have been long ago transferred to another part of the green. But the important matter in connection with the formation of this terrace is, that it was not made as a public road for carts and carriages, or even as a private access for carts and carriages to the feus in question. The best means, indeed, were taken to prevent it from being used in that way by a row of stobs or stakes being put across the terrace at either end, so that *de facto* the terrace was rendered impassable for carts and carriages; and these stobs remained until a few years ago. It appears from the evidence that now and then a cart went round these posts and got to the back doors with coals, or took away a load of manure; but that was plainly an occasional and furtive use of the terrace, and I can only look upon the erection of these posts as an assertion on the part of the Magistrates of their right to interfere with the use of any part of the links, and particularly of the part in question, as a cart or carriage access to those feus only. And for a period of upwards of twenty years after 1849 the existence of these posts effectually prevented any regular or systematic use of the terrace as a road or access to the feus. As, therefore, no such road or access could have been in use prior to 1820, and as between 1820 and the present time there was an effectual interruption for twenty years of any such use of the terrace, even assuming such use to have been regular and general before 1849, it is impossible for the defenders to maintain successfully the plea of prescriptive right which they have put forward.

"The feuars, however, plead that they have a right of access to their properties by carts and carriages over the links, and by the line of road in question, in virtue of the alleged consent of the Magistrates and Council, in the due exercise of their administrative rights over the links. This plea was maintained at the debate, not so much upon the evidence, as upon the assumed right of all the inhabitants of the burgh, unless and until prevented by the Magistrates, to traverse the links with carts and carriages. It was urged that they have a right as members of the community to use any part of the links as an access to their feus, either on foot or by means of carts or carriages or horses, in any way they may think proper, subject always to the regulation of the Magistrates, and that there is a presumption, unless there be a special regulation to the contrary by the Magistrates, that they may drive at will carts and carriages over any parts of the links to and from their respective properties. That is a proposition which I should be very slow to endorse, for I do not think that such is the nature of the right which individual members of the community have over a subject such as the links of St Andrews, which are held by the Magistrates for the recreation and enjoyment of the whole community. I do not think that traversing the links with carts and carriages conveying goods to the buildings of individual feuars, or carrying refuse from them, are purposes at all consistent with the uses which the public are entitled to exercise over the links. And it is, moreover, clearly established by the proof that the Magistrates have never consented to any such indiscriminate use of the links, and have never, until now or quite recently, consented to the formation or use of any line of road upon the links which could be available to the feuars as an access to their feus.

"And this brings us to the consideration of that which is the main and most important question in the present case, namely, Whether the formation and proposed use of the road in question is a violation of the duty incumbent on the Magistrates to protect the rights of golfing, walking, and general recreation which the inhabitants are entitled to exercise over the links of St Andrews? We have had a great deal of evidence of various kinds as to the effect which the formation of this road will have upon the links. The pursuers maintain that it will be most detrimental to the links as golfing ground, and that every member of the community is entitled to golf over every inch of the links. Now, no doubt the community are entitled to golf over every available and practicable part of the links, but golf is not the only purpose for which those links are held by the Magistrates. They are held for the general use and recreation of the inhabitants, and for the advantage of the community generally. The question, therefore, really comes back to this, viz., Whether the formation of this road, assuming it to be otherwise an expedient proceeding, will have the effect of interfering to any appreciable extent with the right of the public to golf over the links of St Andrews?

"Now, I must say that upon the evidence I am perfectly satisfied that it will not constitute the least interference with the right of golfing upon those links. It will be an operation *innocuæ utilitatis*, or, as that was felicitously translated by Mr Whyte Melville in his evidence—'It will be no disadvantage to any, and a considerable advantage to many.' It will be of great advantage to a large proportion of the inhabitants of St Andrews—those who inhabit the Scores and all the northern part of the city—as an access to and from the railway station. We must keep in view that the circumstances of St Andrews have been very considerably changed during the last twenty years and since the opening of the railway. The town is now very much more frequented than it ever was, and the proximity of Dundee and the facilities afforded by the opening of the Tay Bridge—as some of the witnesses have said—bring hosts of excursionists during the summer months, particularly from Dundee, who spread themselves over the whole town. It would be a very great advantage indeed to have, in addition to the turnpike road, another road in the proposed line to and from the railway station, by which parties going to and from the station can go along the side of the links without spreading over the whole course and interfering with the golfing. And it is to my mind clearly proved that the formation of the road will not to any extent interfere with the privilege of golfing. I therefore think that the formation of the road is unquestionably an operation *innocuæ utilitatis*, and falls fairly within the administrative powers which are vested in the Magistrates.

"The rights of the public in a place like the

links of St Andrews are of a very sacred description, and must not be lightly interfered with, and the Magistrates must not think that they have it in their power to make roads wherever they think fit over the links, and thereby interfere with the comfort and privileges of the community. They must have due regard to the rights of all classes of the community. There are some who wish to golf—a great proportion wish to golf—there are some who wish simply to walk, and there are others who wish to drive. But if it is possible to adapt the links to the use of all these classes of the community, so that each shall have his fair share in the enjoyment of the links, I think the Magistrates are quite entitled to do so, and unless it were made clear to the Court that they are abusing their discretionary powers the Court will be very slow indeed to interfere with their management. The case of *Sanderson* v. *Lees*, 22 D. 24, was referred to by the pursuers in support of their contention that the formation of this road is a violation of the rights of the community. But in that case, and in many others resembling it, the encroachments complained of and prohibited by the Court were substantially alienations of the links or public recreation grounds to private individuals, with the effect of absolutely excluding the public from exercising any right over the same. And if such had been proved to be the probable effect of the formation of this road, I would have without difficulty decided in favour of the pursuers. But, as I have already said, no such effect can be reasonably anticipated from the formation of the road now in question. None of the privileges or rights of the public will be interfered with by the mere formation of the road, and it will be the duty of the Magistrates to see that the road is not used in such a manner as to interfere with any class of the community, and for this purpose they may and ought to issue such regulations regarding wheel traffic as they shall think necessary or expedient. On the whole matter, I am of opinion that the pursuers have failed to make out any case for the declarator which they ask, or for interdict against the formation of the road. As I think that the first two conclusions of the summons are quite unnecessary, I shall dismiss them; and *quoad ultra* I shall assoilzie the defenders, with expenses."

The pursuers reclaimed.

Before the case was put out for hearing in the Inner House rolls the Town Council, which defended the action, went out of office in ordinary course. The question relating to the road was the test question at the new election of Magistrates and Town Council, and when the new Council first met it appeared that out of 29 members 15 were in favour of the contention of the pursuers. Accordingly, at the first meeting of the new Council, held upon November 7, 1879, when the business consisted of the appointment of the several committees of Council according to the custom in burghs at the first meeting after the election of a new Council, and, *inter alia*, of the appointment of a law committee, it was resolved by a majority of one to instruct that committee to withdraw the defences which the late Council had stated to the action, and which the Lord Ordinary had sustained, "on condition that the pursuers should relieve the Town Council of any expenses which may have been incurred." The law committee accordingly instructed the Edinburgh agents for the Council to communicate with the agents for the pursuers, with a view of arranging the case on this footing. The pursuers having agreed to these terms, a joint-minute was prepared in which counsel for the defenders "craved leave to withdraw the defences lodged in names of the Provost and the majority of the Magistrates and Town Council of the city as representing the community thereof, and as constituting the Town Council of the city, and counsel for the pursuers agreed to the same being withdrawn, and both parties craved the Court to allow that to be done, no expenses being found due to the pursuers by the defenders the Town Council. This minute was lodged in process on 14th November 1879, and on 18th November the counsel for the defenders the Town Council, and the counsel for the pursuers, both appeared at the bar and moved the Court to interpone authority to the joint-minute. Counsel for the feuars also appeared and objected to authority being interponed, on the ground that the feuars had a *jus quæsitum* in the matter, there being a contract of litiscontestation between them and the Town Council, by virtue of their being both defenders to the action which had proceeded to decree in the Outer House. The Court pronounced no interlocutor. On the same evening there was held a meeting of Council called by the Provost, in consequence of a requisition to him to call a meeting "to reconsider the resolution adopted by the Council on 7th curt. with reference to the links road case." By this time, owing to a change of opinion on the part of one member, the majority of the Council had ceased to be in favour of the pursuers' contention, and was of opinion that the defences should be insisted in. The fifteen members who formed the new majority were the only members who attended the meeting called as above narrated for the evening of the 18th November. The minority however lodged a signed protest, which so far as material was in the following terms:—"(1) That the resolution adopted by the Town Council on 7th curt. has already been carried into effect, the pursuers having accepted the offer made by the Town Council, and agreed, on the defences for the town being withdrawn, to pay the whole expenses incurred by the Town Council, as the same may be taxed as between agent and client, and a joint-minute for the Town Council and the pursuers having since been signed by the counsel of both parties and lodged in process. (2) That it is incompetent, even if the resolution had not been carried into effect, to reconsider the proceedings of an ordinary meeting of the Town Council except at the next ordinary meeting, at which alone the minutes of the previous meeting can competently be read. (3) That the proposed special meeting is further incompetent, in respect the matter for which the requisitionists have required the special meeting is not *res noviter veniens ad notitiam*, and no notice of the proposed special meeting was given at the ordinary meeting by which the resolution was adopted. And we, the undersigned, further protest against any liability on the part of the Town Council, or ourselves as individuals, for expenses to which the Town Council or individual members may be subjected in consequence of any attempt at

the proposed special meeting to rescind the resolution of 7th inst.; and having taken instruments in the hands of the town clerk, we hereby decline to attend the proposed special meeting." The majority, however, passed a resolution reversing the decision of the Council of the 7th November, and the agents for the Council were instructed to proceed with the case.

The case was in the roll of the Second Division for 25th November, and when it was called on that day counsel for the pursuers moved for decree against the Town Council on the ground that by the joint minute lodged on 14th November, and which counsel for the Town Council had himself moved in Court on the 18th, the case as between the pursuers and the council had been settled by an agreement from which the latter had no power to resile.

They argued—(1) A minute signed by counsel for a party was as binding as if signed by the party himself—*Duncan* v. *Salmond*, January 4, 1874, 1 R. 329; while *Duncan's Factor* v. *Duncan*, June 3, 1874, 1 R. 964, showed that where a party had by minute abandoned his claim in a multiplepoinding and a decree of preference had followed thereon, he could not afterwards withdraw that minute. (2) A Town Council was as much bound by such a minute as an ordinary litigant—*Smeaton* v. *Police Commissioners of St Andrews*, December 10, 1868, 7 Macph. 206; March 20, 1871, 9 Macph. (H. of L.) 24. (3) Here, there being a bilateral agreement embodied in a minute signed by counsel for both parties, the authority of the Court was not required. There was no *locus pœnitentiæ*. Cases of unilateral agreements, such as *Cormack* v. *Waters*, June 25, 1846, 8 D. 889, and *Muir* v. *Barr*, February 2, 1849, 11 D. 487, did not apply. (4) Even if the authority of the Court were required, it fell to be given as matter of course. It was enough that the parties moved the Court to interpone authority. Authority was not interponed when the minute had been moved in the Single Bills, only because of the opposition of the feuars. But they had no title to oppose the motion. There was no contract of litiscontestation between the two sets of defenders; each was called for his own interest, and maintaining a separate defence. Therefore authority ought to have been interponed when the motion was made, and it must now be held to have been interponed.

Argued for the Town Council—The authority of the Court was required to such a minute. Lord Fullerton in *Cormack's* case, *supra*. Until authority was interponed, counsel had the same right to withdraw the minute which he had to move it. The Town Council therefore craved leave to put in a new minute, withdrawing their consent to the former minute.

At advising—

Lord Justice-Clerk—This question arises in the middle of a lawsuit which has run its full course before the Lord Ordinary, and on which a final judgment has been pronounced. In that state of matters one of the parties lodged a minute in which he craves leave to be allowed to withdraw his defences, he being a successful party, and consents to decree going against him to that effect on condition of payment of his expenses. That party is the Town Council of St Andrews, and it appears that at the first meeting of the Town Council after the recent election a motion to that effect was tabled and was carried by a majority of one. It seems also admitted that there was no notice given of that motion, and of course the litigation up to that time had proceeded with the concurrence and by the authority of the Town Council as a corporation. On that taking place a second meeting is called—a special one—by certain members of the Town Council, for the purpose of rescinding that resolution, and Mr Campbell, the counsel who signed the minute in this process, now says he does not make this motion to withdraw the defences—and that is all we have here.

The question is, whether we are in a position at present to find that the Town Council are not, or at least ought not, to be any longer in the position of defenders, or to open their mouths to defend the judgment they obtained from the Lord Ordinary. I do not mean to express any opinion upon many of the questions that have been raised. I have come to this result, that on the present state of circumstances I do not see there is sufficient evidence that can justify us in turning the Town Council out of the process. In the first place, the meeting at which the resolution was brought forward was one which was the statutory meeting for the appointment of office-bearers, and, so far as I can see, for no other business. The circulars sent out do not indicate that any other was to be taken up, and, where a question of this kind arises, relating to the authority for going on or withdrawing from a pending litigation in which important vested rights have already been obtained on the part of the Town Council, I certainly should have desiderated that full notice should have been given of the intention to raise the question whether or not the litigation should be abandoned.

Of course the Town Council are entirely the masters of the process. They may go on or they may stop, as they please, unless indeed the feuars have an interest to prevent them. But where the Court are asked to interpone their authority under those circumstances, I think that we are entitled to see that the whole matter has been fairly and regularly taken up so that the voice of the Town Council should be fully heard and expressed. I have an opinion that that has not been done. I do not set any store by the second meeting any more than the first. It is for the pursuers, if they think that the Town Council really intended to withdraw, to make that quite clear, which they could do in the regular way; and in the meantime we have this process, we have the defences for the Town Council, and we have a statement from their own counsel that they mean to insist in them. In these circumstances, as I have already said, without giving any opinion on questions that might arise if this matter should again be canvassed in the Town Council and a deliberate resolution come to—on that I shall say nothing—I am not prepared, against the wish of the party who originally intimated the motion and has now withdrawn it, to prevent the Town Council from maintaining their defences under this reclaiming-note.

Lord Ormidale—I do not dissent from the views your Lordship has now expressed, though I might perhaps feel a little more difficulty in regard to the result at which you have arrived. But looking at the whole matter I do not at present

see on the papers that are before us, and on the evidence on which we are to proceed, that we can do anything else. I find, in the first place, an excerpt from the minutes of the Town Council of St Andrews of 7th November, and the resolution they come to then is conditional, which I think it is very important to keep in view. They only agree to withdraw their defences on the condition of the pursuers agreeing to relieve the Town Council of any expenses which may have been incurred. The law committee, to whom the matter is remitted by the Town Council at that same meeting, put themselves into communication with the agent for the pursuers, and instruct their agent to call upon the agent for the pursuers, and from the letters which followed it is obvious that that was done. The pursuers' agent agreed to the payment of the expenses on the defences being withdrawn, and the way in which it was arranged that those defences should be withdrawn was through this joint-minute signed by counsel. Now, one of those counsel is the counsel for the Magistrates, and he was, I think, very effective in his strictures upon that joint-minute. He says it was a minute upon which the authority of the Court fell to be obtained before the defences could be withdrawn. That is the way in which he proposed to carry out the resolution of the Town Council, and he signed this minute and made a motion to the effect that the authority of the Court should be obtained to the effect of the defences being withdrawn. He now says that before the thing was done he was entitled to withdraw his consent, and was not bound to proceed to make the motion. Nobody now makes a motion on behalf of the Town Council; and, on the contrary, they are resisting any attempt to have the defences withdrawn. They could only be withdrawn in the manner which has been arranged—by the parties coming to the Court and getting authority to do so. That motion has not been made, and the Court has not given leave, and in that state of matters I agree with your Lordships that the Town Council are not excluded from the action.

Lord Gifford—I am of the same opinion, and I concur in the view taken by your Lordship in the chair. This is an attempt to stop a litigation upon which a judgment on the merits has been pronounced, by an allegation of a private compromise, because there has been no judicial affirmation of that compromise. When such a question arises, what can the Court do but allow the case to go on, leaving it to the parties to make good their private compromise if they can? It is enough for the Court to say they are not satisfied on conclusive evidence that the case has been finally settled. We are not in a position to turn the Town Council out of the action, and prevent them maintaining the judgment *in toto*, and therefore, whatever may be the effect of what passed between the parties, I agree with your Lordships, reserving all opinion upon the other matters raised, that it is enough that the parties are not out of Court, and therefore we must go on to hear the case on the merits.

Argued on the merits for the reclaimers (pursuers)—The road might possibly be a benefit to the community, but it must also be a benefit in the way of golfing and recreation—those being the purposes for which the Magistrates held the links. Now (1) apart from golfing, this was an encroachment; (2) the proof showed that it was a disadvantage to ordinary golfing. The feuars' case was that the town having allowed them an unlawful encroachment in 1820, they were entitled to have further encroachment now, for the sake of having a shorter way from their houses to the railway station. It was not proved that the road served any public purpose at all—in any event, the purpose was not connected with recreation.

Argued for the Town Council—This was an act of fair administration, and did not interfere with golfing. As to the legal nature of the right of administration—*Magistrates of St Andrews* v. *Wilson* (Mussels Case), July 20, 1869, 7 Macph. 1105.

Argued for the feuars—(1) *De facto* the ground was used as a road. It was only proposed to make it better. (2) The proof showed that before 1820 the ground was used as a cart-tract.

Authorities—*Sanderson* v. *Lees*, Nov. 25, 1859, 22 D. 24; *Dempster*, 2 Dow 40; *Warrender* v. *Magistrates of Edinburgh*, June 5, 1863, 1 Macph. 887; *Graham* v. *Magistrates of Kirkcaldy*, June 19, 1879, 6 R. 1066.

At advising—

Lord Justice-Clerk—The pursuers in this action support their demand on the ground that the contemplated operations are beyond the power of the Magistrates as trustees for the community of the burgh, and would be inconsistent with and injurious to the purposes for which alone the links of St Andrews have been enjoyed by the community and held by the Magistrates according to use and wont. They also maintain that the feuars whose feus abut on the ground in question have no separate right to use the ground in question as a cart or carriage access, either under their titles or by reason of prescriptive possession.

The Magistrates reply that the contemplated use of this portion of the ground is not beyond their power of administration, and would not be in any respect injurious to the enjoyment of the use of the links by the community according to use and wont, while the feuars maintain that they have acquired the right so to use the ground in question, as pertinent to their holdings, by prescriptive possession.

The Lord Ordinary has assoilzied all the defenders, and I am relieved by the clear and distinct narrative contained in his Lordship's note from entering in further detail into the origin and nature of this controversy, and shall proceed at once to give my opinion on the argument which has been addressed to us from the bar.

There are some questions of fact raised which it is important to resolve, in order to bring clearly out the principles of law on which our decision must turn.

First, in regard to the contention maintained by the feuars, that they have acquired, under their titles or by prescription, a right to use the track in question as an access for wheeled vehicles, it is unnecessary for me to consider the evidence on this head at length, for I entirely agree with

the Lord Ordinary that the feuars have no such right under their titles, and that they have completely failed to establish the alleged use. It seems sufficiently clear that these feus were originally a violation of the rights of the community, although, as they were granted in 1820, prescription has placed them beyond challenge. They front the public road called Windmill Street, and have a back entrance opening on the links; but until 1849 the configuration of the ground made it impossible for carts and carriages to pass along that way. The ground was levelled by Sir Hugh Playfair, the provost of St Andrews, in 1849, but posts were then placed to prevent wheeled vehicles passing along by that route; and although these posts have long since disappeared, there has been no such possession by the feuars as could have amounted to prescriptive use. The attempt to prove that this was a line of road substituted for a former one has, as it appears to me, been entirely unsuccessful.

Secondly, it appears very clearly proved that of late this strip of ground, although not metalled, and substantially remaining in its natural state, has been used continuously as an access, both to the feus and to the railway station. The witness David Anderson, who has a workshop abutting on this ground, says "that the railway carts take advantage of it in going up and down between the town and the station. They pass our door three or four times a day. The omnibus from the train also passes constantly." From this I conclude that some object of convenience is served by this use, otherwise it would not have been resorted to. I infer that this line of road, if rendered more easy of transit, would be to some extent of service to the community as well as to the feuars.

Thirdly, the most important question of fact raised in the proof is whether the proposed road, if made, would injure this part of the links as a golfing course, which is the use to which it has been hitherto put. On this subject there is some conflict of evidence, but I do not think it is left in any real doubt. We have among the witnesses ten of the best known amateur players, belonging to the class on which the celebrity and popularity of St Andrews as a resort of golfers mainly depends, giving an unhesitating opinion that a metalled road along that line would be productive of no injury whatever to the golfing course; and I take for granted that as these gentlemen have no interest whatever in this question excepting that of their favourite pastime which attracts them to the place, if it were an injury of any kind they would be the first to complain of it. I should not think of placing against this preponderating body of testimony that of the professional golfers, however respectable, that is of the men who live by the patronage and employment of the amateur players. Without saying anything disparaging of these men, I think that cannot be a substantial injury to the golfing course which the great body of the most skilled amateurs do not consider in that light; nor is any satisfactory explanation given in the evidence of the undoubted fact that three of the most prominent of the professional witnesses seem not long ago to have supported the project which they are now called to condemn. I come therefore without hesitation to the conclusion that the proposed road, if made, would not have any material or substantial effect to the disadvantage of the golfing course, or to any other interest involved in this inquiry.

The legal question therefore which we have to solve is, Whether if this projected road would be a benefit to the feuars, and also to the community, while it injures no one, it is or is not beyond the power of the Magistrates to construct it or to sanction its construction?

The law on this head has been frequently laid down, and is not doubtful. We had occasion to review all the authorities in the recent case of *The Magistrates of Kirkcaldy*, 6 R. 1066. It is fixed that the magistrates of a burgh are not entitled to alienate open ground of this description, but that they must hold it for the use and enjoyment of the community of the burgh as it has been used in time past according to use and wont. This was settled in the case of *Sanderson* v. *Lees*, 22 D. 24. The same rule will prevent the magistrates from making or sanctioning any permanent use of the land other than that to which it has been wont to be applied, such as erecting buildings and the like; and so we found in the case of *Kirkcaldy* that the town could not build a stable or offices on ground which the public were wont to use for bleaching; but by the hypothesis here, the ground in question, although metalled as a road, will not be withdrawn from those purposes of recreation to which it has hitherto been applied. The question is, Have the Magistrates the power so to use it?

The case is narrow, and the lines of distinction among some of the authorities are of the faintest. But I have come to the opinion that this is an act of fair and reasonable administration, and so within the discretion of the Magistrates. I think they may allow the surface of this strip of ground to be so metalled and so used as is proposed, so long as they think that operation and use conducive to the benefit of the community, and consistent with the ordinary purposes of recreation to which the ground has hitherto been put. There is no obligation incumbent on the civic authorities to keep every square yard of these commons in grass. They may make footpaths through them, or flower beds, or clumps of plantation, where these do not interfere with their more primary destination. They might maintain a lawn-tennis ground, or a skating-rink, or an alcove for a band of music, and they might gravel or causeway or pave the accesses leading to these places. I think they might make at St Andrews a terrace-walk adjoining the sea-beach, if this were out of the way of the golfing course; nor would it affect their right whether it were retained in grass or not. All these things are pure acts of ordinary and reasonable administration, which not only do not infer any alienation of the *solum*, but do not effect any permanent alteration on the surface, as these uses are in their nature temporary. A right to afford an access to the community over ground belonging to themselves might in some circumstances be sustained, even to the partial prejudice of some of the purposes which it had formerly subserved; but no such case is presented here. The operations in question infer only an alteration of the surface, which, while useful to the community, does not to any extent limit or impair the enjoyment of the primary and special uses to which it has been devoted.

I am, however, of opinion that the Magistrates

and Town Council as administrators cannot devolve either the property of the proposed road or the administration of it on any third party. It must remain in their own hands and under their own control as the property of the burgh. I propose, therefore, that we should adhere to the Lord Ordinary's interlocutor, but with this declaration, that the Magistrates have no right to alienate the *solum* of the ground in question, or the administration and control of the same, but are bound to retain the same in their own hands for behoof of the community of the burgh; and, before answer on the defenders' motion for expenses, allow the parties to put in their respective accounts.

Lord Ormidale—I must own that my consideration of this case has not been without some jealousy and misgiving that the proceedings complained of might operate as a diversion to some extent of the links of St Andrews from their primary uses.

The links are not the property of the Corporation in the ordinary sense, but are held by them to be kept and administered for the recreation and amusement of the inhabitants. These are certainly the primary uses of the links. They cannot competently, therefore, be alienated or diverted to any purposes inconsistent with these uses. And yet a portion of the links was admittedly alienated and given out in feu in 1820; and it cannot be doubted that the proposed road or drive now objected to, running, as it does, parallel to the feus of 1820, while serviceable to the public generally, will be chiefly so to persons going to and from the feus.

The question comes, therefore, to be, Whether that portion of the links which is to be appropriated to the proposed road will not practically amount to an alienation to that extent of the links, or at least a diversion of them from their primary and legitimate uses?

After a careful consideration of the proof and whole proceedings, I have, on the grounds stated by your Lordship and the Lord Ordinary, and having regard to the qualification of the Lord Ordinary's interlocutor as suggested by your Lordship, come to be satisfied that this will not be so. It is not proved, I think, that the proposed road will at present be injurious or prejudicial to golf playing, which is the chief recreation or amusement practised on the links of St Andrews, or to any other object or interest. This being so, and on the understanding that by the interlocutor to be pronounced the right and duty of the Magistrates and Town Council of St Andrews to prevent the road becoming in the future a diversion of the links from their primary uses will be declared, I think it will not be beyond the administrative powers of the Corporation to sanction the road.

Lord Gifford—I have reached, and without any serious difficulty, the same result as that come to by the Lord Ordinary and by your Lordships.

If it could have been shown that the Magistrates of St Andrews were contemplating any alienation of any part of the public links which are vested in them in trust for behoof of the inhabitants, and for purposes of public recreation and amusement, or if it could have been shown that the Magistrates had proposed to do anything which would in the slightest interfere with the public uses for which alone the lands in question are held, this Court would not hesitate at once to interfere. Having in view the frequent instances which have occurred, not in St Andrews only, (although the history of its past administration is not spotless), but in burghs throughout Scotland, of gradual encroachments upon public commonties, I should regard with the utmost jealousy anything in the least approaching such encroachment, or any attempt, however apparently trifling or unimportant, to divert the public recreation ground of the inhabitants to other or to different uses, or to apply or dedicate the smallest portion of such public lands to any purpose inconsistent with or injurious to the primary purposes for which the trust is constituted. When lands are held for the purposes of public recreation of any kind, whether for the game of golf or for other games, or simply as open ground for walking or for recreation, it appears to me that that is a trust of a very sacred character, the observance of which should be very strictly and very jealously watched.

I am of opinion, however, that the pursuers of the present action have altogether failed to establish any case whatever against the Magistrates and Council of St Andrews, or against any of the other defenders in the present action.

In the first place, I think that no alienation of any part of the links, however small, is proposed or intended by the Magistrates and Council of St Andrews. It is not said that they are going to feu or dispone any portion of the lands to anybody whomsoever, or to grant any deed of any kind in favour of anybody, nor do they propose to grant any servitude or subordinate right of any kind over any portion of the public ground. It was said, indeed, that if a road were made in the situation proposed it would become one of the public streets of St Andrews, and would become vested by the mere making of it in the statutory Commissioners of Police. If there were any danger of this happening, it could easily be guarded against in many ways,—for example, by putting posts or a gate at either of its extremities, or simply by recording in any competent form that the road which the Magistrates propose to form along a portion of the southern boundary of the links shall remain in all time coming a portion of the said links, held in the same way, subject to the same uses, and for the same purposes in every respect as any other portion of the said links, and that neither the Police Commissioners of St Andrews nor any other person whatever shall have any title thereto or any right to interfere therewith. Perhaps a declaration to this effect might be inserted in the judgment to be pronounced by this Court, as a convenient and public place for making such a declaration.

Now, if there is to be no alienation of the ground, and no new right constituted over it in favour of anybody, and if any risk of implied or presumed alienation is guarded against, the only remaining question will be, Whether it is within the fair and reasonable right of administration vested in the Magistrates and Council to construct the road in question, and whether its construction will in any degree interfere with, injure, or prejudice any of the primary uses for which the links of St Andrews are held?

It was admitted, and I think it could not pos-

sibly be denied, that the Magistrates and Council of St Andrews have certain administrative powers and certain administrative duties in relation to the public links. They may make convenient footpaths where necessary, and, if space permitted, even carriage drives; they might erect seats in convenient places, make and repair foot-bridges over the burn, and, in short, do whatever is necessary to secure the full use of the land and the full enjoyment of the public whether by the game of golf or otherwise. In this administration the only limitation is that the Magistrates and Council shall not do anything which destroys or injures the primary purpose for which the land is held, namely, its public enjoyment by golfing or otherwise. They must not on pretence of making public promenades destroy or injure it as a golfing ground, or impair the use by the public as it has been enjoyed from time immemorial.

This led to the question, in fact, Whether the road proposed would in any degree be injurious to the game of golf as practised, or would make the ground less fit than hitherto for that game? Now, on this point I agree with the Lord Ordinary and with both your Lordships that the evidence is really conclusive that the game of golf as now practised will not in any degree, or in any appreciable degree, be injured or prejudiced by the formation of the proposed road. The evidence of skilled golfers on this point is really all one way. Indeed, many of them appear to regard the proposed road as an improvement to the ground, considered purely and solely as a golfing ground.

This seems to be enough to dispose of the whole case. If there is to be no alienation of the links or any part thereof, if no new right or burden is to be constituted or created over any part of the ground, and if no harm or injury or prejudice is to be suffered by any golfer or by any human being who has a right to resort to the links, then this Court will never interfere with a mere act of administration of the Magistrates and Council, which, while it may afford convenience or comfort to some of the inhabitants, will do no conceivable harm and create no conceivable inconvenience to anybody. It will be always in the power of the Magistrates and Council to take away or alter the road in the exercise of the same right of administration under which, and under which alone, they propose to make it.

The Court accordingly pronounced an interlocutor refusing the pursuers' motion to interpone authority to the joint-minute between them and the Town Council, "in respect the defenders the Provost, &c., have . . . departed from the same;" and they further adhered to Lord Curriehill's interlocutor, "but with this declaration, that the said defenders the Provost, Magistrates, and Town Council of St Andrews have no right to alienate the *solum* of the ground in question, or the administration and control of the same, but are bound to retain the same in their own hands for behoof of the community of the burgh, and decern; and before answer, on the motions of the defenders for expenses, allow them to put in their respective accounts."

Counsel for the Pursuers (Reclaimers)—Kinnear — Mackintosh. Agents — Mitchell & Baxter, W.S.

Counsel for the Town Council and Magistrates of St Andrews, Defenders (Respondents)—R. V. Campbell. Agents—Maitland & Lyon, W.S.

Counsel for James Bain and Others, Defenders (Respondents) — Asher — J. P. B. Robertson. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, December 13.

FIRST DIVISION.

RICHARDSON *v.* LE CONTE.

Issues—Action for Judicial Slander—Counter-Issue of Veritas.

Terms of issues adjusted for the trial of an action of damages for judicial slander where there had been a question between the parties whether a counter-issue of *veritas* should cover the statements as innuendoed by the pursuer.

This was an action of damages for judicial slander raised by Robert Richardson, a sheriff-officer in Edinburgh, against John Le Conte, an engraver there. Le Conte had raised an action against a Mr William Scott Douglas on 20th June 1879, in which there was no conclusion directed against Richardson, but on the narrative that Douglas had formed a scheme for obtaining possession of Le Conte's property, and aggrandising himself at his expense, it was averred—"Said scheme was carried out in the following manner, viz.—'On or about 20th May 1879 the said Robert Richardson went to the pursuer's residence, and on the instructions of the defender executed a pretending poinding and valuation of certain effects therein, including said works of art and the pursuer's household furniture, of the value of £130, but instead of making a proper inventory and valuation, as the said sheriff-officer was bound to do, he wilfully put a false and absurdly low value upon said valuable property; and in order to conceal the false and fictitious nature of said valuation he illegally and wrongfully slumped a vast number of articles into a very few lots" . . . [these lots as specified amounted in all to the sum of £12, 4s. 1d.] . . . "whereas the true value of said articles exceeded the sum of £130. And thereafter, on or about the 23d May, the said Robert Richardson and two assistants came to the pursuer's house and made a pretended sale of said articles to the defender, in slump, at the sum of £12, 4s. 1d., or at all events declared them to belong to him as at that value, in payment and satisfaction of his alleged debt of £12 of principal, with 4s. 1d. of expenses.'"

It was averred that these statements were false and calumnious of and injurious to the pursuer, and were inserted in the said condescendence maliciously and without probable cause, and that "they were not pertinent or necessary to the conclusion in said action, and the pursuer has thereby been injured in his character, his business, his business prospects, and his feelings. They falsely make it appear that under the pretence of covering a sum of £12, 4s. 1d., under a decree for that amount, he had consented to act, and acted, upon the illegal or improper instructions of Mr Douglas to