income of the share of the residue vested in the trustees, and directed by interlocutor of 3d November 1882 to be applied by them in compensation of the legitim received by Mrs Millar, Finds (1) that the said income is to be applied by Mr Snody's trustees half-yearly, or annually as it accrues, towards compensating such of the residuary legatees as have suffered pecuniary loss in consequence of the withdrawal of legitim from the trust-estate, until the amount of such loss and interest shall be wholly made up and compensated by such periodical payments: Finds (2), with respect to Mrs Millar's children, that according to the true construction of the trust-deed these claimants were entitled to a share of residue, burdened with their mother's liferent right, and under deduction of the sum of money stated by the truster to have been advanced by him to or on behalf of Mrs Millar and her son in his lifetime, but that Mrs Millar's legitim has suffered abatement to the extent of £1085, 17s. 9d. in consequence of the said advances being to that extent imputed to legitim, and that the share of residue falling to the children is thereby enlarged to a greater extent than it is diminished by the withdrawal of legitim: Finds therefore that the claimants, Mrs Millar's children, are not entitled to participate in the division of the said income: Finds (3), with respect to the claimants Mrs Gibson's trustees, that according to the scheme of division approved by the Lord Ordinary their loss through the withdrawal of legitim is £686, 7s. 11d., being the difference between £3379, 0s. 5d., the value of their interest, inclusive of the whole legitim fund, and £2692, 12s. 6d., the value thereof after giving effect to Mrs Millar's claim: Finds (4), with respect to Mrs Wallace's children, their loss through the withdrawal of legitim is the like sum of £686, 7s. 11d., being the difference between £3105, 0s. 5d., the value of their interest under the settlement, and £2418, 12s. 6d., the value thereof after giving effect to Mrs Millar's claim: Therefore appoints the said trustees to make payment to the claimants George Gibson and others, trustees of Mrs Gibson, and to Mrs Wallace's children, annually or half-yearly, and in equal shares, of the free surplus income of the trust, until the said two sums of £686, 7s. 11d. of loss, with interest, shall be wholly compensated or extinguished."

Against this the claimant W. S. Millar reclaimed, and argued—That the £1085 was truly a debt due to the trust-estate by the party claiming legitim, and that it had nothing to do in any way with legitim. The loss falling on each of the other two claimants was one-third of the total loss, and the remaining third, or £686, 7s. 11d., was the amount of the loss sustained by Mrs Millar's family. This was a case in which the doctrine of compensation was clearly admissible.

Counsel for the respondents (Snody's trustees) were not called upon.

At advising—

Lord President—This is not a case in which it was necessary for us to call upon the respondents for any reply. The Lord Ordinary has expressed quite clearly the ground of judgment, though I think it is possible to express it even more shortly than he has done.

The doctrine of equitable compensation upon which the appellant has relied can only apply where a case of loss has actually been made out, and if from any cause a party taking under the will obtains more than he would otherwise have got in the ordinary course through a third party claiming legitim, then it appears to me that no case for the application of the doctrine of compensation arises.

Lords Mure, Shand, and Adam concurred.

The Court adhered.

Counsel for Appellant—Pearson—Shaw. Agent—William Asher, S.S.C.

Counsel for Respondents—Darling. Agents—Scott Moncrieff & Trail, W.S.

Friday, May 13.

SECOND DIVISION.

[Sheriff of Fife.

BETHUNE AND OTHERS *v.* DENHAM.

Interdict—Golf Links—Possessory Judgment.

The right belonging to the inhabitants of St Andrews and others of golfing over the Links of St Andrews, or Pilmour Links, was by usage confined to the golfing course, which was marked out by march-stones. In the title of the proprietor of the Links, who derived his right from the Magistrates of St Andrews, was this declaration—"Nor shall it be in the power of any proprietor of said Pilmour Links to plough up any part of the said golf links in all time coming; but the same shall be reserved entirely, as it has been in times past, for the comfort and amusement of the inhabitants and others who shall resort thither for that amusement." In 1881 the proprietor granted, with the concurrence of the grazing tenant, a lease for seven years in favour of certain persons on behalf of the St Andrews Ladies' Golf Club of a small piece of ground forming part of Pilmour Links, lying to the east of the golfing course. It was declared by the lease that the piece of ground so let was to be made use of for the purpose of golfing or putting by the members of the club, and those having permission from the club, but no others. An earlier missive of lease for the same purpose had been granted in 1868, for five years from Martinmas 1867, and from the expiry of that period the right of the club had been continued by tacit relocation.

An inhabitant of St Andrews, not a member of the club, on an occasion in 1885 golfed or putted on the said pieces of ground in the exercise of an alleged right. The club brought an action of interdict against him. The respondent maintained that the proprietor was not entitled to grant an exclusive right to the club of the ground in question. It was proved that the club had been in exclusive possession of the ground since 1867 under the above-mentioned missive and

lease, and that it was not part of the ordinary golfing course. *Held* (*diss.* Lord Young) that the pursuers were entitled to a possessory judgment, and interdict *granted.*

This was an action for interdict in the Sheriff Court of Fife at Cupar by Lieutenant-Colonel Bethune, Major Boothby, and H. S. C. Everard, all residing at St Andrews, on behalf of the St Andrews Ladies' Golf Club, against James Glover Denham, of No. 3 Pilmour Links, St Andrews.

The pursuers averred that they were tenants of a small piece of ground, about 158 yards in length, forming part of Pilmour Links, lying on the east side of the golfing course of St Andrews, and immediately northward of the mouth of the Swilkin Burn.

The lease under which they held the ground was dated in 1881, and bore to be between Mr George Clerk Cheape, Esq. of Strathtyrum, proprietor of Pilmour Links, with consent of John Millar, his grazing tenant, and the pursuers on behalf of the club. By this lease the pursuers became tenants of the ground in question for seven years from the term of Martinmas 1880 at a yearly rent of £4. After describing the ground the lease proceeded—"Excepting from said piece of ground hereby let any portion thereof over which the inhabitants of St Andrews may be entitled to exercise the liberty and privilege of bleaching under the feu-rights of the said Links granted by the Town Council of St Andrews in favour of the proprietors' authors and predecessors, and declaring that the said inhabitants shall not be interrupted or molested in exercising such liberty and privilege," . . . "which piece of ground hereby let is to be made use of for the purpose of golfing or putting by the members of the St Andrews Ladies' Golf Club, and by such other persons as the said club may allow, but by no others." Prior to the date of the lease the Ladies' Golf Club had held the same piece of ground since 1867 at a rent of £2 per annum, payable to the grazing tenant.

The pursuers stated that a golf course had been formed on this piece of ground; that since 1867 the club had been in existence, and had since then, or for at least seven years prior to June 1885, enjoyed uninterrupted peaceable possession and use of this piece of ground for the purpose of golfing or putting. They stated that on or about the "13th day of June 1885 the defender [who was a householder in St Andrews, and was admittedly not a member of the Ladies' Club], after being duly warned by Thomas Morris, golf-club maker, St Andrews, the custodier of the said [Ladies'] golf course, golfed or putted over the said piece of ground or golf course, and refused to desist although requested by Morris to do so."

They craved the Court "to interdict the defender from golfing or putting" on the said piece of ground, "or in any other way interfering with or disturbing the pursuers and the members of the St Andrews Ladies' Golf Club in the possession of the same."

The defender averred that it was *ultra vires* of Mr Cheape and the tenant to let the Pilmour Links for the purpose of giving any person a private right over any part of them, maintaining that the inhabitants of St Andrews had a right to the ground in question for bleaching and recreation, including golf, which they had exercised from time immemorial.

He referred to the history and titles of the St Andrews Links, from which it appeared that on 4th December 1799 the Magistrates of St Andrews granted a feu-disposition of the greater part of St Andrews Links, otherwise called Pilmour Links, including the ground in question, to Messrs Charles and Cathcart Dempster, Mr Cheape's authors, with the following reservations—"Reserving always to the town of St Andrews the whole ground to the eastward of the Swilking Burn, which burn is hereby declared to be the boundary betwixt the subjects now sold and these hereby reserved; as also reserving the bleaching-ground to the west thereof, as particularly marked out by march-stones placed therein, on which the inhabitants of St Andrews are to have the liberty and privilege of bleaching in all time coming; as also reserving to the burgesses of said city standing on the stent-roll allenarly power and liberty to cast and winn divots upon the said links and commonty for flanking and rigging, conform to use and wont, as also for repairing the town mill-leads and dams, under the reservation always that no hurt or damage shall be done thereby to the golf links, nor shall it lie in the power of any proprietors of said Pilmor Links to plough up any part of said golf links in all time coming; but the same shall be reserved entirely as it has been in the time past for the comfort and amusement of the inhabitants and others who shall resort thither for that amusement." He stated that the Links now belonged to Mr George Cheape of Strathtyrum under this title as successor of the Dempsters, and that the inhabitants of St Andrews, of whom he was one, had a right to play over the whole of St Andrews Links, including the ground in question, and not merely over the portion of them reserved as the golf course.

The pursuers on the other hand maintained that the Links of St Andrews or Pilmour Links extended to about 280 acres, but that the golf course or golf links, over which the inhabitants had a right to golf, extended to 10 or 12 acres, and had been specially marked off by march stones at a date prior to 1821. The ground in question lay to the eastward of the golf course so marked off.

The pursuers pleaded—"(2) The pursuers and the St Andrews Ladies' Golf Club having been tenants of the ground in question, and having enjoyed uninterrupted, peaceable, and exclusive possession thereof for golfing or putting since the institution of the club in 1867, or for at least seven years prior to 13th June 1885, they are entitled to a possessory judgment."

The defender pleaded—"(4) The ground in question forming part of the Links of St Andrews, otherwise called Pilmour Links, having been conveyed to Mr Cheape's predecessor, and being held by him under the condition that no part of said golf links should be ploughed up at anytime, but that the same should be reserved entirely as it had been in times past for the comfort and amusement of the inhabitants of St Andrews and others who should resort thither for that amusement, it was *ultra vires* of Mr Cheape to grant the lease conferring the exclusive right of golfing or putting on said ground on the members of the St Andrews Ladies' Golf Club, and such other persons as the said club might allow, and the

same must therefore be held *pro non scripto.* (5) The inhabitants of St Andrews and others having enjoyed the right of bleaching clothes, of walking, of playing golf, and of otherwise amusing themselves on the ground in question from time immemorial, the pursuers are not entitled, by interdict or otherwise, to prevent the defender exercising these rights."

It appeared that the defender had on the occasion complained of putted on the ground in question, after calling the attention of the custodier of the green to what he was about to do, in order to raise the question in dispute.

Interim interdict was granted by the Sheriff-Substitute, and thereafter by the Sheriff, in the terms mentioned by the Sheriff at the close of his note, *infra.* An appeal was taken to the First Division of the Court of Session for jury trial, in which issues were ordered to be lodged. The appeal was on 6th January 1886 refused, and a remit was made to the Sheriff to proceed. The Sheriff-Substitute had declined.

Thereafter a proof was taken before the Sheriff (MACKAY), the import of which appears from the interlocutor and note of the Sheriff, and the opinions of the Judges *infra.*

On 6th November 1880 the Sheriff, having viewed the Links, and in particular the piece of ground in question, pronounced this interlocutor:—"(5) That the piece of ground in question, although situated within that part of the Links now commonly called the St Andrews or Pilmour Links, which form a portion of the subjects contained in the feu-disposition of 1799, is entirely outwith the ordinary golf course marked out on the Links at some date prior to the year 1821, and also outwith the course now used, which, with one or two deviations in the form of widening the course, is the same as that so marked out; (6) that some portion of the said piece of ground in question was at one time used for the purposes of bleaching in respect of the servitude of bleaching contained in the title of the proprietor of the Links, but that the practice of bleaching has considerably diminished in recent years, and so far as regards the ground in question, practically has ceased for nearly twenty years; (7) that no person has come forward to assert the claim of the inhabitants to any part of the ground in question for bleaching purposes, and that there are neither the parties nor the materials in the present process necessary for defining the extent of the bleaching servitude; (8) that the defender has not proved possession, by himself or any of the inhabitants of St Andrews, of the piece of ground in question for the purpose of playing the short or putting game of golf, or any possession by him or them of such a kind as to restrict the proprietor from granting the exclusive use thereof to the pursuers' club for the purpose of playing the said short or putting game; (9) that the defender has not proved that the use of this piece of ground for the purpose of the short or putting game is inconsistent with, or will in any way interfere with, the ordinary and habitual practice of the game of golf as played from time immemorial, or, at all events, for much more than the prescriptive period, by the inhabitants of St Andrews and others, on the golf course and parts of the Links adjacent thereto: In these circumstances, finds in law that the pursuers are entitled to interdict against the defender: Recals the interim interdict granted on 21st July 1885, and in lieu thereof interdicts the defender from playing the putting or short game of golf on the piece of ground described in the prayer of the petition, or from in any other way interfering with or disturbing the pursuers and the members of the St Andrews Ladies' Golf Club in the possession or occupation of the said piece of ground for the purpose of playing the putting or short game of golf: Finds the defender liable in expenses.

"*Note.*—This is a petition for interdict against the defender golfing or putting on a part of the Links of St Andrews belonging in property to Mr Cheape of Strathtyrum, and let by him to the pursuers, the St Andrews Ladies' Golf Club. The defender, who is an inhabitant of St Andrews (for the plea against his title has been waived), claims as such a right to golf on any part of the Links, and to use any holes, by whomsoever and wherever made, for the purpose of the game. He accordingly played on the occasion referred to in Cond. 4, upon the ground here in question, and was turned off by Thomas Morris, who has been employed since the commencement of the Ladies' Club in 1867 to take charge of the ground for it. He still asserts his right to play the putting game at this place although not a member, and without the leave of the club, and the present action has been brought to prevent him. His defence is founded upon a reservation contained in the title of Mr Cheape, whose author Dempster acquired this part of the Links which lies west of the Swilkin Burn under the reservations quoted in the first finding of the interlocutor. The reservation in favour of golfing is that which the defender specially seeks to vindicate for himself and the other inhabitants. But he refers to the other reservations, and specially that in favour of bleaching, in support of his argument. He also led proof as to the possession for the prescriptive period in support of his construction of the title.

"The pursuers put their case chiefly—indeed, almost exclusively—upon their right to a possessory judgment, but their proof also covered the prescriptive period. They have a lease from the late Mr Cheape of Strathtyrum of the piece of the Links in question, for the purpose of golfing or putting by the members of the St Andrews Ladies' Golf Club, 'and by such other persons as the said club may allow,' but under an exception of any portion over which the inhabitants of St Andrews may be entitled to exercise the liberty and privilege of bleaching, and a declaration in favour of the burgess' right of casting and winning divots according to use and wont. Prior to their entry at Martinmas 1880 under this lease, the term of which is seven years, the Ladies' Club had possessed the ground for five years under a missive offer dated ' March 1868, agreeing to take the ground in question (or almost the whole of it) for the purpose of golfing and putting by the members of the Ladies' Golf Club, and by such other persons as the club may allow, for five years from Martinmas 1867.' Tacit relocation followed on the expiry of the five years down to the commencement of the present lease. It is contended by the pursuers that their possession has been in conformity with the leases, and that the Ladies' Club has had exclusive possession for the special purpose claimed since its formation in 1867, and certainly for the

last seven years. A lease is a sufficient *prima facie* title to support a possessory judgment, and on the question of possession the Sheriff is of opinion that the pursuers have proved exclusive possession of sufficient quality for such a judgment—*Hume* v. *Scot*, Dec. 1, 1676, Mor 10,641; *Young* v. *Cunningham*, June 22, 1839, 8 S. 959; *Anderson* v. *M'Callum*, Nov. 3, 1857, 20 D. p. 2; *Begbie & Co.* v. *France*, Nov. 24, 1857, 20 D. p. 81. It is needless to go into the details of the proof. There is undoubtedly evidence of toleration of play by others, and a good deal of play appears to have gone on at times and seasons when the members of the club were not playing. But it is very clear that the only habitual and regular play in assertion of a right was by the members of the club, and there was constant practice of challenge when strangers or persons ignorant of the club rules played so as to interfere with the members of the club. No one refused to leave when challenged, according to the evidence of Thomas Morris, and his evidence on this point is confirmed by the pursuers' other witnesses, and not contradicted by the defender's. The evidence as to the players of the ordinary game following their ball when it lit on the ground in question is irrelevant, for this is not the right either asserted or denied in the present case. The right asserted is a right to use the holes made and the ground prepared by the Ladies' Club for the short or putting game. If the case had been one of heritable property, the Sheriff would therefore have held the pursuers clearly entitled to a possessory judgment.

"But the question relates to a servitude. No doubt the point has been mooted whether the right of golfing is a proper servitude, and there may be cases where it is, strictly speaking, rather a qualification or condition of a trust title like that of the magistrates for behoof of the community, but where, as here, it is imposed by reservation on the property title of a third party in favour of the inhabitants of a burgh, there is a dominant and servient tenement, the latter of which is subject to a burden in favour of the former, restricting to that extent, but not otherwise, the right of property. This is just a description of a real servitude, and there appears no reason why it should not be called by that name. It is in fact included in the category of servitudes both by Judges and legal writers in modern times. It was not a servitude known to the Roman law, but it has become well known in Scotch law, and though its character differs from ordinary servitudes in respect that its immediate object is amusement merely, it does not appear to differ in any other essential respect.

"Now, the Sheriff Court Act of 1878 extends the jurisdiction of the Sheriff to questions touching either the constitution or the exercise of real or prædial servitude, and it was held in *Gow's Trustees* v. *Mealls*, 28th May 1875, 2 R. 729, that where it was competent for the Sheriff to decide on the merits on a claim for servitude, it was incompetent for him to decline and confine himself to merely a possessory judgment. The question of the merits was raised in that case by the pursuer, and it is here raised by the defender, but the proprietor's titles have been produced, and proof has been led relative to the prescriptive period as well as to the possessory period. It may be a disadvantage for the defender that no decision in the present case will be *res judicata* in a question with the proprietor of the Links, but it is the defender who asks for a judgment on the effect of the titles and prescriptive possession. No motion has been made by him to have the proprietor sisted, or intimation made to him of the present process. The Sheriff, though with some difficulty, has come to be of opinion that he is not entitled to decline to consider the larger question which the defender has raised. The case appears to come within the rule stated by the Lord Justice-Clerk in *Gow's Trustees*:—'When a possessory judgment regarding an heritable right is made the foundation of action in the Sheriff Court, it is implied that the Sheriff is not in a position to settle the ultimate dispute between the parties, but he can only regulate possession *ad interim* until the parties have obtained a decision of the Supreme Court on the merits of their case. But here the question is one of servitude; the Sheriff is competent to deal with it unreservedly, and ought to have entertained and disposed of the merits of the question.'

"It at one time occurred to the Sheriff that as a declarator before the Supreme Court would undoubtedly have been a more appropriate mode of settling the question as to the exact limits of the rights of property and servitude respectively in this portion of the Links, and as neither the Magistrates of St Andrews nor the proprietor of this part of the Links are parties to the present proceedings, he might, without deciding the case expressly upon the possessory judgment, hold that the *status quo* should be preserved until a declarator had been brought. But to decide nothing except the question of the appropriate form of action would scarcely be satisfactory to anyone, and certainly not to the defender. It is not his fault that, contrary to the more usual practice, the interdict process has been brought in the name of the tenant only, without the concurrence of the landlord. The parties have supplied the Sheriff with materials and argument sufficient to decide in a question, at all events with the defender, the issue he has raised, and the Sheriff has felt bound to decide it. His opinion is that the servitude of golfing imposed upon the property title of the Links is not such as to prevent the proprietor from granting the possession of the portion here in question to the pursuers' club for the purpose of playing the short or putting game, to the exclusion of its use for that purpose by the defender as an inhabitant of St Andrews, so long as the possession so granted does not interfere with the ordinary course of the game on the Links as played by golfers generally, and required for the number of persons who are in the habit of playing. The Sheriff further thinks that the evidence of possession during the last forty years is not in the least inconsistent with, but on the contrary confirms, this view of the title.

"It was contended for the pursuers that the 'Golf Links' in the proprietor's titles were not identical with the Pilmour Links, and did not include the piece of ground in question, which is admittedly outwith the golf course, as pointed out by the stones placed there prior to the year 1821, and they tried to limit the term 'Golf Links' to the 'Golf Course.' There is certainly room for argument on the question whether the

Golf Links are not a more restricted area than Pilmour Links in the widest sense of the term. But for the purpose of this case it is sufficient to say that, in the opinion of the Sheriff, the term 'Golf Links' cannot be restricted to the 'Golf Course,' or strips of the Links varying from 72 to 195 yards in breadth, marked out by stones, on which the ordinary game is generally played. A golf course is not like a race course, a limited space, passing beyond which is the loss of the game. It happens frequently with bad players, and sometimes in bad weather with good, that the ball falls outside of the course. This, in fact, is one of the hazards of the game, and the practice of following the ball wherever it falls on the Links has always been allowed, and is the only penalty on the unskilful or unfortunate player. The title from the burgh in favour of Mr Cheape's authors is quite wide enough to cover under the expression 'Golf Links' the whole Links on which any part of the game is played, in the manner in which it is played, according to use and wont, and this includes a much larger tract of ground than the course proper, and cannot be held to exclude in this sense that part of the Links here in question where the ball has frequently to be followed. But it does not follow that the extent of the servitude over the Links outside the golf course and that over the course itself is the same. This point was very carefully considered in the recent case of *Paterson* v. *The Magistrates of St Andrews*, 27th July 1881 (H. of L.), 8 R. 117, particularly by Lord Watson. That learned Lord observed—'Then it is said you must leave untouched everything outside of that course which can be shewn to be a part of the Links to which a ball may be driven in playing the game of golf. I entirely demur to that proposition. The contention to which I am prepared to give effect really comes to this, that whatever is outside of the proper golfing course may be turned to various purposes so long as these are not inconsistent with the game of golf.' If this observation had been merely an *obiter dictum* of so distinguished a lawyer, it would have been entitled to the highest respect, and the Sheriff would have been very slow to decide anything which could conflict with it. But it was in reality the ground of judgment in that case, which is a binding, and the Sheriff thinks a conclusive, authority on the present. For the decision in that case was that the Magistrates of St Andrews were entitled to use or allow the use of a portion of the Links outside of the proper golf course for the purpose of a road, so long as this use did not interfere with the game of golf, to which that part of the Links, including the site of the road, had been dedicated by immemorial usage. It is true that case related to part of the Links east of the Swilkin Burn retained by the Magistrates, and not to the part here in question, which they have alienated to a third party. It is settled law, and was assumed by all the Judges both in the Court of Session and House of Lords, that such alienation, if absolute and total, as in the case of feus for houses, though open to challenge prior to the year of prescription, was not so after they had run. Here the alienation to Mr Cheape's author was not absolute or total, for while the Magistrates in 1799 transferred the property, they reserved certain uses for behoof of the inhabitants, one of which was golfing, as the inhabitants had exercised it, according to the use and wont of such exercise. It necessarily follows that the measure of the burden or restriction on the property of their disponee is precisely the same in extent as the qualification of their own title prior to the disposition. The use of a portion of the Links as a private or semi-private ground for the practice of the short or putting game, without interfering with the right of the golfers to follow their balls outside of the course, cannot be said to be in any way inconsistent with the game of golf as habitually played on the Links. If the defender had considered this case, the course of which was followed with great interest by the golfing public, and its necessary consequences, the Sheriff cannot help thinking that he would not have challenged the present proceeding, in which, though nominally defender, he is really the pursuer, for on the occasion referred to in the pleadings and proof he played or attempted to play the putting game on this ground for the purpose of being, and with the knowledge that he would be, prevented.

"It is unnecessary to enter minutely into the evidence of possession during the prescriptive period. The Sheriff does not doubt that, with such titles as are here in question, a servitude right might be modified either by extension or restriction, upon clear proof that there had been the exercise of a wider right by the persons entitled to the servitude, or a further limitation of the right of property by the owner of the property subject to it. But there is no evidence whatever adduced by the defender to shew that the proprietor of the ground, who *prima facie* on the titles has the whole uses not reserved, was restricted *de facto* by the exercise of such a right as the defender here claims. His claim amounts to this, that any inhabitant of St Andrews might make on any part of the Links outwith the golfing course a set of holes for the purpose of playing the short or putting game, without the consent of the proprietor of the ground. Nothing of this sort has ever been attempted. The ground was open, and no one was prevented from walking on it. Games, such as football and cricket, which are played on the surface and require no operations on the soil by digging, were challenged, though not always with complete success, by the Strathtyrum watchman, Robert Hunter. But no one tried to play the short game of golf at this place, which implies cutting holes in the ground, and dressing and preparing the green, until the pursuers' club did so with the sanction of the proprietor and the grazing tenant. It would be a more delicate question whether, if the number of players, or possibly improvements in the game, required an extension or enlargement of the course, this might not be claimed on the part of the inhabitants; but no such question has been raised. Apart from the decision in the case of *Paterson* the view of the law to which effect has been given in the present judgment derives strong support from the opinion expressed by Lord Eldon in the case of *Dempster* v. *Cleghorn*, Nov. 29, 1813, 2 Dow's App. 40, as to the links here in question, and the procedure adopted by the Court of Session in the case of *The Magistrates of Earlsferry* v. *Malcolm*, June 12, 1829, 7 Sh. 755, and Nov. 23, 1832, 11 Sh. 74.

"In the case of *Dempster* there was no final de-

cision, but Lord Eldon's opinion, when he remitted the case to the Court of Session, was very adverse to any limitation of the proprietor's right of property, except what was established by the actual exercise of the servitude right.

"It appears probable from the evidence of Mr Grace in the present case that the defining the course by stones may have been a consequence of that remit, and of some arrangement between the parties as to the course upon which the game was to be played. This, however, is not established by proof, and all that is certain is, that no further judicial proceedings were taken by the pursuers to limit the proprietor's right. As to the decision in the Court of Session (*Cleghorn* v. *Dempster*, Morison, 16,141), which was practically superseded by the remit, it may be observed that it proceeded upon the basis, whether well or ill-founded, that the golf ground had been damaged by the rabbits of the proprietor, that is to say, damaged for the purposes of golf. There is no room in the present case for pretending that there has been any damage done by the use the proprietor has granted of a portion of the Links to the Ladies' Club. In the *Earlsferry* case, 7 Sh. 755, in which it was decided that the burgh of Earlsferry had a servitude of golfing over the Ferry Links, the property of which was claimed by Malcolm, the Court itself took the necessary steps for marking out a course. A remit was at first made 'to Mr Jameson, then Sheriff-Substitute of Fife, to settle the best and most convenient track for the exercise of golfing,' and the burgh having thereafter objected to his report, and craved a new remit to experienced golfers, 'the Court remitted to Messrs Walter Cook, W.S., and John Taylor, Attorney in the Exchequer, to examine the ground in question, to lay out a proper course thereon sufficient for the due exercise of that amusement, having a due regard to all the circumstances of the case, and to the mutual rights and claims of the parties' (11 Sh. 74), and their report being returned the Court decerned in terms of it.

"The defender raised a side issue, which, although it bulked a good deal in the proof and argument, is of a somewhat singular character. He contended that part, or possibly the whole, of the ground now used by the Ladies' Golf Club was subject to the servitude of bleaching, and had been constantly used for that purpose, and that it was impossible that the short game of golf could be played consistently with the exercise of the servitude of bleaching. The result of success in this argument would be to exclude not only the Ladies' Club but also the defender from the ground, or so much of it as is subject to the bleaching servitude, although the object of the defender is to obtain for himself and the other golfers the right to play the short game there. There is undoubtedly a servitude of bleaching on part of the Links, and one of the reservations in the title of Mr Cheape's author is of the bleaching ground to the west of the Swilkin Burn, as particularly marked out by march-stones placed therein, on which the inhabitants of St Andrews are to have the liberty of bleaching in all time coming. The proof as to bleaching, shortly, was that about twenty years ago there was a good deal of bleaching on both sides of the Swilkin Burn, and, in particular, on a part of the ground now used by the Ladies' Golf Club, which went by the name of the dining-room, as marked on plan No. 39 of pro., and probably also on other convenient spots within that ground. The neighbourhood of the burn from which water was got naturally made this a suitable place for bleaching.

"The evidence as to the march-stones defining the bleaching ground is by no means clear and consistent. Some of them have been removed, and there is a conflict about at least one still extant, whether it was a march-stone of the bleaching-green. It would be a waste of time to go into *minutiæ* on these points, but the Sheriff thinks that the three stones in a line still remaining tend to confirm the fact deducible from the other evidence that a part of the ground in question had been used for bleaching. They indicate the line, or a portion of the line, of the south boundary, and the Swilkin Burn may be taken as the east boundary in a question with the proprietor of this part of the Links. But the northern and western boundaries are not made out by existing march-stones or any other clear evidence. The parties described the boundaries in this way, as the Swilkin Burn is called the east boundary in the titles, and the Sheriff has followed their example, although more strictly, according to compasses, this part of the burn would be called the south boundary, and the other boundaries relatively altered. If this case had been a declarator to establish the extent of the bleaching area it would probably have been necessary to dismiss it for want of sufficient evidence. But no such declarator has been raised. On the contrary, the persons interested in the servitude of bleaching have from motives of good neighbourhood or policy abstained from interfering with the sport of the Ladies' Club, and changed to some extent the part of the Links used for bleaching. The bleaching here practised was never for wholesale or manufacturing purposes, but only for family purposes. The old-fashioned mode of exposing clothes or linen for a considerable period in the open air, to whiten the colour, has gradually become little more than ordinary washing and drying. Other sources of water supply and facilities for washing have to some extent lessened the use of the Links for this last purpose, but it is still practised to a considerable extent. Those practising it probably suffer a little inconvenience from now using part of the Links somewhat further from the burn, but, on the other hand, they are nearer the whins on which the clothes are dried. While the Sheriff thinks it right so far to explain the practice disclosed by the proof led in this case, he feels bound, in the absence of the proper parties raising the proper issue, not to express any opinion as to the local limits of the servitude of bleaching, or how far these might be altered by custom short of the years of prescription, or be subject to regulation by the Court. He thinks it enough to say for the disposal of this part of the case, that the defender is not here vindicating the right of the inhabitants of St Andrews to a bleaching ground, but is asserting a right to play golf in a particular way on a portion of the Links outside the ordinary course. His right to do so either upon the titles alone or upon the titles and prescriptive possession are the issues which he has raised, and, in the opinion of the Sheriff,

failed to establish. A special argument with reference to the bleaching servitude was founded upon the terms of the pursuers' lease, which excepts from "the ground let any portion over which the inhabitants of St Andrews may be entitled to exercise the liberty and privilege of bleaching under the feu-rights of the said Links granted by the town in favour of the proprietor's authors and predecessors, and declares that the said inhabitants shall not be interrupted or molested in exercising such liberty and privilege." It was argued upon this clause that the present pursuers had no title to sue, in so far as the ground used by them, or part of it, was *de facto* part of the portion of the Links subject to the servitude of bleaching. This no doubt is the most plausible mode of bringing the bleaching question into the present case. It must be kept in view, however, that bleaching is not practised at all times and seasons, and possibly the clause of exclusion may be qualified by the declaration of its purpose, namely, "to prevent the inhabitants from being interrupted or molested in exercising the privilege of bleaching." But however this may be, the clause was evidently inserted for the benefit of persons claiming the bleaching privilege, and for the protection of the proprietor in case any claim was made by them. No claim has been made, and the present judgment will not affect such claim if made by the proper parties. The present position of matters is that the ground in question is not used for bleaching. There are not, as explained in a former part of this note, materials in the present process for defining the limits of the bleaching servitude. Nor is this the proper process for doing so. In these circumstances it does not seem legitimate to the Sheriff for the present defender to use this clause as a defence to the present action. The pursuers are therefore, in the opinion of the Sheriff, entitled to interdict, but the terms in which it is to be granted require careful consideration. The prayer originally was to interdict the defender from "trespassing and golfing or putting" on the ground in question, or in any other way interfering with or disturbing the pursuers and the members of the St Andrews Ladies' Golf Club in the possession of the same. The words "trespassing and" were deleted by amendment before the record was closed, and the pursuers explained at the debate that by the word "golfing" was meant only putting or playing the short game. An interdict should, however, be free from any possible ambiguity, and the right of following the ball in the ordinary game is not intended, any more than walking on this part of the Links, to be prohibited. The only things which the defender is prohibited from doing are playing the short game at the set of holes and on the ground prepared and kept up by and at the expense of the Ladies' Club outwith the ordinary course, and from interfering with the members of the Ladies' Club in their play. The interdict will accordingly be slightly modified in its terms. The Sheriff has considered whether this modification and the original prayer having been too wide should lead to any modification of expenses, but the defender having failed in the substantial issue in the case, which he himself raised, the Sheriff is of opinion that he must bear the whole expenses."

The defender appealed to the Second Division of the Court of Session. On the case appearing in the Single Bills Lord Young intimated an opinion that the appeal should have been to the First Division as the case had been there formerly. The case was, however, sent to the roll.

The appellant argued—Mr Cheape had no title to give a lease to any private person or club of any part of the Links of St Andrews so that the lessee should have the right to keep any member of the public from using and enjoying the whole Links subject to the reservations in the title and Mr Cheape's right of letting the pasturage. The public had a right over the Golf Links for their comfort and amusement, and the term Golf Links included the whole of Pilmour Links. A party could not plead against his own title. Mr Cheape's title was granted under reservation of the whole Links for the amusement and comfort of the inhabitants of St Andrews—*Grahame* v. *Magistrates of Kirkcaldy*, June 19, 1879, 6 R. 1066. There was no inconsistency between the decision in the case of *Paterson* and the judgment which the appellant sought here, as in that case the decision was given on the ground that the interference with the Links was for the public benefit, while here the pursuers sought to exclude the public from the Links—*Paterson, &c.*, v. *Magistrates of St Andrews, &c.*, March 10, 1880, 7 R. 712; *affd.* 8 R. (H.L.) 117. The respondents could not obtain any higher right from Mr Cheape than he himself had, and the bleaching-ground was expressly reserved in the Dempsters' title from the Magistrates. It was shown by the proof that the bleaching-green formed a great part of the piece of ground said to have been given to the Ladies' Golf Club under this lease, but the reservation in the original title was a reservation of the ground and not merely of the use of it. Therefore Mr Cheape could not validly lease this portion of the Links to a private association—*M'Kerron, &c.*, v. *Gordon*, Feb. 15, 1876, 3 R. 429; *Sanderson* v. *Magistrates of Musselburgh*, Nov. 25, 1859, 22 D. 24.

Argued for the respondents—The question comes to be, whether the piece of ground described in the lease of 1881 is or is not part of the golf course? It is not. There is a distinction to be made between Pilmour Links and the Golf Links. The latter is only about 12 acres in extent, while the former is 280 acres. The public have a right of golfing over the Golf Links, but they have no right over the other parts of the Links, although they are not usually interfered with. There is no right of amusement or comfort as spoken of in the original feu-charter except over the golf course. The rights which were given by the Magistrates of St Andrews to the Dempsters have now been confirmed by prescription. Even if the right of golfing had originally extended over the whole of the Links, the case of *Earlsferry* showed that the right could be restricted to a particular course—*Dempster* v. *Cleghorn*, Dec. 31, 1813, 2 Dow's App. 40; *The Magistrates of Earlsferry* v. *Malcolm*, June 12, 1829, 7 S. 755, and Nov. 23, 1832, 11 S. 74; *Dyce* v. *Lady James Hay*, July 10, 1849, 11 D. 1266. With regard to the bleaching question, that could only come up in a question as to Mr Cheape's title, which really was not under consideration here, as all that was asked was a possessory

judgment. Here the Ladies' Golf Club had been in existence for 20 years, and the members had for that time played the short game over the same ground, first under a lease, then they held the ground by tacit relocation, and finally they got a lease in 1881, and their right to the use of the ground had never been challenged. That was sufficient to entitle them to a possessory judgment.

At advising—

LORD JUSTICE-CLERK—This is a question relating to certain proceedings on the Links of St Andrews. The petitioners, who stand as pursuers of the action, are a certain association called the Ladies' Golf Association of St Andrews, the object of which is to provide a green for the playing of the short game of golf by the ladies who are members, and to provide not only that the ground shall be made fit for that purpose, but that there shall be a certain amount of protection and privacy in the pursuit of the game. Although called a Ladies' Club, it is an association to which men as well as ladies may be elected like an ordinary club, and the persons whose names are put forward in this application to the Sheriff are members and office-bearers of this club. The object of the application is to prevent the respondent from using or obstructing the ground in question for the purpose of playing the short game, and from obstructing the members of the club, or the persons who have the charge or control of the green, in the exercise of what they hold to be their powers.

It seems that the title of this association and of the representatives and office-bearers, who are pursuers of the action, is a lease from the tenant of Mr Cheape, who holds a title to the Links as a whole. I shall have to speak about that title immediately. Meantime the right of the association is that of a sub-lease granted by the agricultural tenant of a certain portion of the Links for the purposes I have mentioned.

I do not know that we have any distinct statement as to the actual extent of the ground, but out of a very large portion of waste ground running along the sea-margin, extending to a couple of miles or so, it cannot be more than a couple of hundred yards either way which are dedicated to the purposes of this association. The petitioners represent the association, and Mr Denham defends upon the part of himself and the public. The petitioners say that Mr Denham has interrupted the game that is played upon this part of the Links—that he has obstructed the members of the association in the exercise of what they believe to be their right. He says he is entitled to play when he pleases, and as he pleases; that as a member of the public he is entitled to walk over this ground, or to use it in any way in which the ground may be used; and that the association have no right and the tenant has no right to exclude anybody from any part of the Links for any such purpose.

I must say I regret that a question of this kind, which really after all relates only to a social recreation, and involves no practical or substantial right that I can see, should have been made the subject of a litigation. And it appears to me—and I make the remark in reference to both sides—that a little tact, and a little gentleness, and a little good feeling, might have adjusted this very keen dispute without the necessity of the intervention of a court of law. But since we have it here we must decide it.

Now, it is not unimportant to notice that there is here no great legal question. When I say that I mean that there is no substantial right in question. Mr Denham does not say that he himself suffers any injury by what is done. He does not say—or at all events he can hardly say—that he wants to play upon this ground at the short holes, for he says in his record, and he leads evidence to establish it, that it is part of the Links which he does not mean to use for the purpose of playing golf; if it were so occupied the regular game would be as much interfered with as he says this Ladies' Club interferes with it. That, I say, is not the nature of the case at all. He says the public have a right—a *jus spatiandi*—over the whole of these Links of St Andrews, and that nobody is entitled to interfere with him or them in the exercise of that right.

On the whole matter which has been raised in this case I agree with the Sheriff, and in substance with the grounds he has given for his judgment. I shall only make a remark or two on the more salient points brought out.

In the first place, this is a possessory question, and the question to be answered is, Has there been possession upon the alleged right, and for what period? The right itself, as I have already had occasion to remark, depends upon the lease granted by the agricultural tenant to this Ladies' Club. The lease is dated the 15th and 16th February and the 2d March 1881, and it professes to proceed between George Clerk Cheape, Esq. of Strathtyrum, proprietor of Pilmour Links, with consent of John Millar, sometime residing at Luthrie House, by Cupar, the tenant of the said Links, of the first part, and the pursuers, on behalf of the St Andrews Golf Club, of the second part. Therefore both proprietor and tenant unite in giving this right. The ground is described as lying on the east side of the golf course, and the period is for five years. But there is this exception—"Excepting from said piece of ground hereby let any portion thereof over which the inhabitants of St Andrews may be entitled to exercise the liberty and privilege of bleaching under the feu-rights of the said Links granted by the Town Council of St Andrews in favour of the said proprietor's authors and predecessors, and declaring that the said inhabitants shall not be interrupted and molested in exercising such liberty and privilege, and also that the burgesses of the city of St Andrews standing on the stent-roll allenarly shall have power and liberty to cast and winn divots on said piece of ground for the purposes specified in said feu-rights, conform to use and wont, . . . which piece of ground hereby let is to be made use of for the purpose of golfing or putting by the members of the St Andrews Ladies' Golf Club, and by such other persons as the said club may allow, but by no others." Therefore, as far as the direct right is concerned, it seems that this right of occupation for five years, and use for the purpose therein described, is sufficient. Whether the tenant or the proprietor had the right to grant it is another affair, but that there is an ostensible, apparent, colourable title on the part of the persons who have made this application seems to be undoubted. The defence to the action is sub-

stantially a defence to the effect that there was no power on the part either of the tenant or the proprietor to grant the right. If there has been possession upon that right, I doubt whether that is a relevant plea on the part of the respondent. I say if there has been possession, and that question must be considered.

This Ladies' Association has existed for twenty years by this time. It was formed in 1867, and it has remained in the exercise of these or of similar rights ever since, and that without any challenge. Therefore in this possessory action the grantees—the Ladies' Association—are entitled to maintain their possession until their title or the title of their authors shall have been directly challenged and set aside. I do not think it necessary to found very strongly upon that, because, apart from that, I can see grounds upon which the prayer of the petition can be sustained.

As regards the right of Mr Cheape, the owner, and the agricultural tenant, to grant this right, the question seems to stand thus—It is not pretended, and cannot be pretended, that the agricultural tenant was bound to keep the Links, which were under his lease, free from all obstructions to persons who were walking on the Links. There were two conditions in his title, and of any breach of them no doubt the public would be entitled to complain. But beyond that, for the fair purposes of the lease, I imagine it is impossible to say that he was bound to prevent all obstructions being made to the persons who traversed the Links. The reverse is quite manifest, because he was entitled to plough up the ground—he was entitled to use the ground for crops. There is no restriction of any kind or description upon that use of the ground if he did not interfere with the golf course, or with the bleaching-green. He was, apart from these two restrictions, entitled to use the ground for every purpose available to an agricultural tenant holding the ground. He could, I repeat, crop it, although that cropping would necessarily interfere with persons simply walking over the ground.

If that be so, then that proposition on the part of the defenders must be thrown aside. The defenders have no right to say they have an absolute right to walk over every part of the ground. They may walk over it if it is not used for a purpose that renders walking improper or inexpedient. The tenant acting on the proprietor's title is entitled to all possession and enjoyment of the ground not inconsistent with golfing and bleaching by the inhabitants.

But this is not the first time that the nature of these Golfing Links has been the subject of judicial inquiry. As far back as 1813 there was a well-known case with a predecessor of Mr Cheape's, which went to the House of Lords. The complaint there was, on the part of persons acting for the golfing public, that an inroad of rabbits had taken place, in consequence of certain actings of the tenant, which inroad threatened to destroy the golfing course itself, and to put an end to the enjoyment of the inhabitants in that particular. That case came to an end by the rabbits coming to an end; but there are some remarks of Lord Eldon remitting the case back to this Court that are not unworthy of observation. The title of the Dempsters was conceived in terms similar to those we are now considering, and those terms were considered in that case. Lord Eldon makes this remark about the right of the public, as in a question with the proprietor and tenant. After stating all the views that had been suggested on the part of the complainer, he says—"But the question was whether the right to play at golf was not to be enjoyed, only consistently with all the uses to which the land could properly be applied." Then he goes on—"The strong impression on my mind was that this right could not be supported to the extent of depriving the defenders of the use of their property." Therefore I conclude that if the golf course is kept unimpaired, and bleaching is not interfered with, there is no such limit, as the defender contends for, to the tenant's or proprietor's use of this subject. It is not the law of the case, and it is not the nature or principle of the right, that a tenant can do nothing to prevent the public from walking over such parts of the Links as are not part of the golfing course, and are not part of the bleaching green.

Some criticisms have been made on the nature of Mr Cheape's title, as to what the golfing Links consist of. I think it is manifest that in the sense of Mr Cheape's right a larger area is intended than the golfing Links. The golfing Links is the golfing course, and the tenant is taken bound not to plough that up—implying that he might plough up the rest. The bleaching-ground again is protected, and the tenant has no right to interfere with that. If there were any good ground of complaint on the part of the bleachers, that would no doubt be a breach of the condition on which the ground is held; and these conditions as regards bleaching and golfing run through all the deeds, but apart from that there is no restriction.

Something was said as if the magistrates had no power to bestow upon Dempster, or to bestow upon Cheape, any right of the kind. But I am afraid it is too late to maintain that. Long possession is sufficient at all events for this case, and I do not think it necessary to go into that.

If all that be so, the next question is—Does this ground, let for the purpose mentioned to this Ladies' Club, interfere with golfing or with the bleaching to which the inhabitants are entitled? I am of opinion that it is as clearly proved, as anything can be proved, that it does not in the slightest degree interfere with the golfing course. There is no complaint from anybody that it does. The description of the Links that we have in the evidence makes that perfectly plain. If by any chance, in a high wind, a golf ball is landed on the ladies' ground, the golfer may go there to drive it off. But beyond that there is no interference, because the ladies' course is between the general course and the sea, in a detached, remote portion of the ground. Then what is the complaint? It is simply this, that Mr Denham is not allowed to go upon the Links, which have been made on behalf of the ladies, and that he is prevented from playing golf there. Was it a reasonable use by the proprietor or tenant of the ground, that this bit of ground should be set apart for this purpose, so that that comfort and privacy might be secured which were essential if the project of the Ladies' Club were to be carried out? I think it was. And when I find that that use has existed

for twenty years, and that no injury, intelligible or stateable, has been sustained by anybody—when I find on the contrary that it has been found to be a proper and pleasant mode of enabling ladies to take part in the great staple of St Andrews—I must own I do not come to the consideration of the question with any prejudice or bias in favour of the defender. It seems to me that it was an unnecessary question to raise, and that there is no substantial interest lying at the bottom of it.

Having come to that conclusion, I am of opinion that this was a just exercise of the tenant's right of possession. I will not say what the case might have been if the ground had been of any extent. That might have raised a different question altogether. That the tenant might for his own use, for instance, maintain a lawn tennis ground, or a cricket ground, or anything of that kind, I cannot for a moment doubt. He might have fenced in part of it for cropping purposes without subjecting himself to any interference on the part of the public, and although the use in question was not of an agricultural nature, I think the tenant's right of possession, as long as the landlord is satisfied, is amply sufficient to maintain him in what has been done.

That is the general view of the question which I take. The question is an interesting one, and I think it has been well decided by the Sheriff.

Lord Young—If the appellant has no legal right to go upon the piece of ground in question, or (assuming his right to go upon it) has no right to play the short game of golf upon it, he may no doubt be interdicted from going or playing as the case may be, at the instance of the proprietor or any other having lawful title to prevent him. But the interdict complained of is from playing the short game of golf on the ground, "or from in any other way interfering with or disturbing the pursuers and the members of the St Andrews Ladies' Golf Club in the possession or occupation of the said piece of ground for the purpose of playing the putting or short game of golf." Now, this language which I have quoted from the Sheriff's interlocutor creates a confusion, of which I think the case ought to be cleared. If the question regards the appellant's right to be on the ground at all, it is simple enough, whatever difficulty there may be in answering it. If, again, it assumes his right to go upon it, and only negatives his right to play short golf on it, it is still simple, although the answer may be more difficult. But if it is only sought to negative his right to "interfere with and disturb" others in making a similar use of it, I have to observe that the appellant never asserted, and before us distinctly disclaimed, any such right, so that there is no question before us at all, and we should only have to recal this negation by interdict of a right to interfere with and disturb others which was never asserted.

I did what I could in the course of the argument, but unsuccessfully, to bring the case to a single issue. The respondents' counsel seemed to me to maintain their case thus—*First*, the appellant is not entitled to go on the ground at all; *second*, at least he is not entitled to play short golf on it; *third*, and still further, at least he is not entitled to disturb or interfere with the members of the Ladies' Golf Club in so playing, and has in fact done so or asserted a right to do so. Each of these three contentions was of course accompanied by the further contention that the respondents are entitled to prevent him by interdict at their instance.

The ground which is thus sought to be fenced and protected by interdict is a part of the Links of St Andrews not enclosed or defined by any natural or apparent boundaries. Something was said in the course of the argument about its being formed—that it was formed ground. It was not formed ground at all. The outside limit of the expenditure would be £10 for many years; but there was really no more formation than you would expect in the case of boys making on a bit of ground where they were to play football. It might cost a few pounds to clear away some hillocks and whins; but formed ground so as to present any different appearance from the rest of the Links there is not. But the limits of it are capable of being ascertained by measurement. It was in 1881 let by the proprietor of the Links to three gentlemen "on behalf of the St Andrews Ladies' Golf Club" for seven years from Martinmas 1880, "for the purpose of golfing or putting," but terminable by the proprietor at any term of Martinmas on a month's notice. These lessees are the pursuers of this action, and their title is the lease. They have no other.

It is therefore to be observed at the outset that the pursuers' only title, terminable at any term of Martinmas on a month's notice, absolutely expires at Martinmas 1887. The Sheriff nevertheless is at pains to inform us that he has not considered or dealt with the case as of a possessory character, to protect the pursuers against disturbance while their very temporary and indeed precarious title subsists, but as involving the decision of a question between the proprietor of the Links of St Andrews and the public.

It is a feature of the case, and in my opinion of first-rate importance, that the defender does not question the pursuers' right to use the ground let to them for the purpose specified in their lease, but on the contrary admits it, and as I have already noticed, does not assert, but emphatically repudiates, any right on his part to interfere with or disturb them when so using it. It is not indeed averred or suggested by the pursuers on the record that the defender denied their right thus to use the ground, or that he ever interfered with or disturbed them when so using it, or threatened to do so. The only case presented to us by the pursuers on the record is that by their lease this piece of ground is club premises, from which accordingly the club is entitled to exclude all who are not members of the club; and the defender's only case is a denial of this, together of course with the affirmative contention (on which indeed the denial rests) that the ground is part of the public Links of St Andrews, and incapable of being made club premises with an exclusive right of use by the club members.

I think this is so important in the case that I must take leave to direct attention to the pursuers' condescendence. Their only averments as regards the appellant's conduct is in Cond. 4., and this is the averment upon which they justify their application for interdict to prevent him interfering with or disturbing them:—"(Cond. 4) On or about the 13th day of June 1885 the de-

fender, after being duly warned by Thomas Morris, golf-club maker, St Andrews, the custodier of said golf course, golfed or putted on the said piece of ground or golf course, and refused to desist, although requested by Morris to do so."

There is not another averment regarding him, except that he is not a member of the golf club. Let me also ask attention to the only evidence regarding his conduct, upon which this interdict—which I should myself have regarded as of an offensive character—against disturbing the members of the club when enjoying their sport, is asked. In the first place, let me take the account of Mr Morris, the custodier for the club. He says—"I don't remember ever seeing Denham playing on the ladies' ground before 13th June 1885." He had played there often before, but Mr Morris says he does not remember ever having seen him.

Therefore the conduct in respect of which he is so challenged in this action is his conduct on 13th June, and here it is—"He was at my shop door, which is nearly opposite the ladies' ground, that day. Somebody spoke about some ladies having been asked to go off the ladies' ground, and Denham asked me whether I would check him. I said I would if he went and played there. He said he would go, and he went and played with Robert Kirk on the ladies' ground. I asked him if he was a member of the club, and he said, No. I asked him to go away, and he said, No, he would not go. I don't know if he said he had a right to be there. I told him I would report him to the secretary of the club." That, I repeat, is the evidence of his conduct upon which this interdict against his interfering with or disturbing the members of the Ladies Golf Club is founded. Here is his own account of it, which I think is not unimportant to attend to:—"In June 1885—[that is, the 13th of June, for it is obviously the same day]—the wife of the Town Clerk of Musselburgh and another lady were ordered off. I was very angry, and I told Tom Morris that he ought not to attack strangers—he ought to attack me. He said he would report me if I played there. I went and borrowed a club and played. I was reported, and then these proceedings were taken." Now, so far as the evidence and averments go, these passages and evidence constitute the whole averments and evidence upon which this application is founded. I say, therefore, it is impossible, I think, to doubt that the action was brought in order to have this question, and no less or inferior question, tried and decided—the question, namely, whether they were entitled to prevent him from playing there at all, even when they were not there themselves, and when their playing could not by possibility be interfered with or disturbed.

But this is manifestly a very large question, and of interest to the proprietor of the Links on the one hand, and the people of St Andrews, and indeed the public at large, on the other.

Is it fitting that it should be tried between the parties before us, and determined by a judgment which cannot be otherwise than ephemeral? Had the pursuers presented a case of any rude or even unmannerly acts and conduct of the defender, whereby they were interfered with or disturbed when playing on the ground, it would, I think, have been one of another character from that which they have presented.

I should myself have been disposed in this case and between these parties to decline deciding this large legal question, involving the consideration of title-deeds and evidence of ancient possession and usage continued to the present day, and affecting the proprietor, the burgh of St Andrews, and the public at large. But if this question is to be entered on and decided to any effect whatever, I think it right to say at the outset that we must be on our guard against allowing our minds to be affected by any such considerations as that right feeling ought to restrain any individual or number of individuals from throwing obstacles in the way of the appropriation of an inconsiderable part of these public Links (assuming them to be public), to the exclusive use of a Ladies' Golf Club. It is indeed called a Ladies' Golf Club, but it consists of 1000 members, of whom one-half may be ladies, the other half being men. These are obvious enough considerations, on both sides of the question, of good feeling. Ladies and their male companions for the time when playing any game on open public ground will always be treated courteously and allowed all proper precedence by gentlemen, and there is no averment, suggestion, or trace of evidence, that any such courtesy was violated by the defender. On the other hand, the assertion of any exclusive right or privilege on open public ground by the members of a private self-constituted club is not unnaturally regarded as invidious, and resisted accordingly. But I repeat that in my opinion we cannot take any account of this topic in considering what is the legal character of the ground, and the right of the public over it, looking to the titles and the usage.

The Links of St Andrews are very well and generally known. I have, I think, only seen them once, and that is more than forty years ago. They consist of a tract of rough and comparatively barren ground, extending to some hundreds of acres, quite open and unenclosed. They may have been, and no doubt were, diminished in extent by enclosing and cultivating and even building on parts at periods more or less remote. Of such diminution of course I take no account. It has occurred with regard to all open ground, not unfrequently in gross violation of the rights of the public, and still more frequently of the rights of inhabitants of burghs or towns. In such cases when the enclosure and appropriation to private use has existed for the prescriptive period any original wrong, however clear, is irremediable. There are familiar instances of this in the neighbourhood of Edinburgh, Musselburgh, and many other places. I accordingly confine my attention and observations to the open and unenclosed Links of St Andrews as now existing. To these the inhabitants of St Andrews and the public at large have always had access, free and unrestricted, for all purposes of legitimate and healthy recreation and amusement, the proprietor taking no other use of them than such pasturage as did not interfere with the public use. The most notable public use has been playing golf, for which a course has always been marked off, a course being necessary for the game. But the course has been varied and extended from time to time, according to the

exigencies of the day, and the course is no limit to the players any more than to the balls which the players follow over the Links to any distance off it, playing back from wherever the ball alights. Nor is it, so far as I can see, anything to the purpose to say that only bad players or bad shots send the balls far off the line of the course, for bad players are probably as numerous as good, and bad shots are certainly as much part of the game as good shots. Over the whole Links there is and always has been all sorts of exercise and recreation, by grown people, boys and children—walking, running, leaping, football playing, sitting, lying, lounging, indeed everything the public may do without manifest impropriety on perfectly open and unrestricted ground.

Now, what is the first and leading proposition of the pursuers which they ask us to affirm as essential (according to this their first and leading contention) to the interdict which they ask? It is that this public use of the Links from time immemorial, continued without question or interruption down to the present time, has been and is not of right, but by the mere tolerance and permission of the proprietor and revocable by him at pleasure. I asked whether there was any distinction between the piece of ground immediately in question and the rest of the Links, and the answer was, None whatever, with perhaps the exception of the marked-out golf course. Again, I asked if there was any distinction between Mr Denham (the defender) and any other man, and the answer was, None. The pursuer's counsel accordingly faced the proposition, and maintained it, that their lessor may, if their lease is good, exclude the public from the whole Links, except, perhaps, from the golf course. When, therefore, the pursuers defend and maintain the exclusive right and privilege which, as they contend, their lease gives them, by pleading the lessor's title, they must and in fact do carry their argument on that title the length which I have now stated. And indeed it is clear that if (leaving out of view the golf course) the proprietor of the Links may, by virtue of his property title, make club premises of the piece of ground in question for the privileged exclusive use of the pursuers, he may also deal in the same manner with the whole Links, and make them all club premises, with the like privileged and exclusive use, granted to a club or any number of clubs. Or he may—for it is really the same proposition—take them all into his own occupation, and exclude the public therefrom either by a wall or an interdict (although the cost of an interdict would generally build a pretty good wall), or by making a use of them, as by building, which would exclude any public resort or use such as has heretofore been enjoyed.

The argument is that the lessor's title is a fee-simple property title, and that the terms of it are not such as to put him under any restriction or limitation as to the use of it, or to permit the continuance longer than he sees fit of the use hitherto made of it by the inhabitants of St Andrews and the public. I have examined the title, and do not think this proposition by any means clear, and, on the contrary, looking to the source from which it came, viz., the Magistrates of St Andrews, and the proved and indeed admitted fact that with respect to the whole Links now open and unenclosed there has never been any interference with the public use, I incline to the opinion that it is unsound. There is much in the title which admits of and requires construction, and the actual use and possession which have been had of the subject of it ever since its date may, as between the parties to it—I mean the Magistrates of St Andrews and the present owner—be appealed to as influencing the construction. I cannot pronounce it a *prima facie* unsound argument that neither the inhabitants of St Andrews nor the public shall be prejudiced by the mere existence of a grant, in whatever form, which was never used to their prejudice, their actual use and enjoyment never being interfered with. But neither the magistrates (the authors of the title, and the proper guardians of the public rights) nor the proprietor by the title are before us, and although they will certainly not be affected by any decision we pronounce as a judgment making it *res judicata* binding on them, yet they will be affected, and the one or the other very prejudicially, by a decision in this Court of the very question between them, or in which they are interested or involved, in the determination of this paltry, and, I rather think, personal dispute between the parties actually before us. I must therefore decline for myself to take part in the decision of this large question, which the pursuers' counsel argued before us as essential to the remedy asked, or to say more on it than I have done. Indeed I have said so much only to point out its extent and importance, and the inexpediency, I venture to think the impropriety, of entertaining an application by a party whose right is so temporary that it will expire in about six months for an interdict the granting of which would involve the decision of it.

I have spoken of the respondents as "lessees," and perhaps the name is not inappropriate. But I have to point out that they are not lessees of lands. The land was already let for pasture (and it could be let for nothing else), and what the respondents call their lease is in truth and legal effect nothing more than a permission which the owner and pasture tenant concur in giving them to play a certain game upon it. The words are, "which piece of ground hereby let is to be made use of for the purpose of golfing or putting by the members of the St Andrews Ladies' Golf Club, and by such other persons as the said club may allow, but by no others." To say that the ground is let, and that the respondents are tenants of the ground, is I think an erroneous use of language. Is it doubtful that a simple leave or permission, written on a card or a slip of paper, to play golf or put on the ground would have had exactly the same effect? The words "but by no others" are curiously introduced, but the meaning may perhaps be taken to be that the lessors warrant the lessees against the existence of any right in others to golf or put on the ground.

But is this a kind of right to which the doctrine of possessory judgment is applicable?—for this is the doctrine to which the respondents appeal in the alternative and minor view of their case. I venture to think not; and there is no instance in the books of a possessory judgment founded on any right in the least degree like this. In the first place, their lease gives them no

title whatever to exclude others from the ground, and they have never attempted to do so, though the ground is a place of common resort by the public at large, and with seats erected on it for the use of all comers. In the second place, the respondent's right to golf and put on the ground is not questioned, and so requires no protection by possessory judgment, even if that remedy were otherwise applicable. In the third place, it is to me at least a novel proposition that such a warranty by the lessor as I have assumed to be imported by the words, "but by no others," can be the ground of a possessory judgment, or of any remedy whatsoever except an action on the warranty against the granter of it.

But the respondent's enjoyment—for I think the term "possession" inapplicable—of the exclusive permission which they allege to have been guaranteed to them has not been peaceable and uninterrupted; not that they were ever hindered from making the use permitted to them, but that their claim to hinder others was not by any means universally or even generally allowed or assented to. But it is this claim to exclude others which is alone in dispute, and for the vindication of which alone the protection of a possessory judgment is claimed. The facts proved are in my opinion sufficient to negative it. It is said that no other—no inhabitant of St Andrews or member of the public—has a title which can *prima facie* compete with their permission from the proprietor. But this, it will be observed, is simply returning to the argument on the proprietor's title as exclusive of any right in the inhabitants of St Andrews or the public, which, if sound, requires no aid from the doctrine of possessory judgment. Apart from that argument the public have a *prima facie* right founded on the possession and usage of ages.

I may say that I am unable for any practical purpose in the case before us to distinguish between long golf and short golf. I regard both as simply golf, which may, I suppose, be lawfully played in various ways. The game is just as subject to variations as any other game in the world. The use prescribed in the respondent's lease is "golfing or putting," and the name of their club is the "Ladies' Golf Club." The right asserted, if good at all, must be good for "golf" in general. No principle was stated to us, and none occurs to me, on which the proprietor of the Links may appropriate a part or the whole of them (excepting perhaps the existing golf course) to the exclusive use of clubs or individuals for short golf but not for long golf. I must therefore regard the respondents as contending and struggling for the proposition that the proprietor of these links is legally entitled to appropriate the whole or any part of them to the exclusive use and enjoyment of such persons or clubs as he may from time to time be pleased to favour. This, in my opinion, is the proposition which, as urged by the respondents, on their temporary and precarious permission, the appellant resists, and which he is, in my opinion, justified and well founded in resisting.

I am of opinion that the judgment granting interdict ought to be reversed, and that the application for it ought to be dismissed, and with expenses.

Lord Craighill—The history of this case is fully related by the Sheriff in the note annexed to his interlocutor, and it will not be necessary for me to present anything like a full recapitulation of the facts as introductory to the grounds of my opinion. A comparatively brief statement of some particulars seems to be all that is required.

The pursuers are the trustees of the St Andrews Ladies' Golf Club, and to them in that character there was granted in February 1881 a lease for seven years from Martinmas 1880, by Mr Cheape of Strathtyrum, the proprietor of the Links, of the piece of ground described in the record, the purpose for which this was granted being that the ground so let was to be made use of for golfing or putting by the members of that club, and by such other persons as the club may allow, but by no others. There was excepted, however, from the said ground "any portion thereof over which the inhabitants of St Andrews may be entitled to exercise the liberty and privilege of bleaching under the feu-rights of the said Links granted by the Town Council of St Andrews in favour of the proprietor's authors and predecessors." An earlier lease of what was substantially the same subject was for the same purpose granted to the trustees of the Ladies' Club in 1868. That lease was for seven years, and from its expiry the right thereby conferred was continued by tacit relocation till the lease still current was granted. Possession of the ground was taken, and has been continued till the present time, peaceably and without any interruption. The ground was put into order at considerable expense, and the funds of the club were the source from which this cost was defrayed. There was no contributory outside the club. Shortly prior to the institution of the present action, which was brought in June 1885, the appellant made pretensions to participation in the use of the ground which had been thus converted into a green for putting, or for the short game of golf. This the club thought an intrusion, and it was complained of, but was persevered in, and the defender not only played round the course himself, but sent friends who happened to be visitors to him at St Andrews to enjoy themselves on this green. The consequence was that Morris, the keeper, turned them off, and it was for the purpose of preventing such disagreeable occurrences that the present action was instituted. The Sheriff has given interdict, not precisely in the terms prayed for in the pursuers' petition, but in the terms set forth near the end of his interlocutor. He "interdicts the defender from playing the putting or short game of golf on the piece of ground described in the prayer of the petition, or from in any other way interfering with or disturbing the pursuers and the members of the St Andrews Ladies' Golf Club in the posession or occupation of the said piece of ground for the purpose of playing the putting or short game of golf." The pursuers are satisfied with what the Sheriff has done, but the defender is not satisfied, the consequence being the present appeal at his instance to this Court for a review of the interlocutor.

I agree in the result at which the Sheriff has arrived, and adopt most, if not all, of the grounds on which he has proceeded. But the judgment, I think, ought merely to be of a possessory character, which indeed was all that was asked or expected by the pursuers, for it is

explained by the Sheriff that the pursuers put their case chiefly, indeed almost exclusively, upon their right to a possessory judgment. But he adds that their proof also covers the prescriptive period, and in this situation he thought, having in view the case of *Gow's Trustees*, 28th May 1875, 2 R. 729, that it was not only right but necessary for him, in fulfilment of the relative provision of the Sheriff Court Act 1878, to pronounce what should be an ultimate judgment upon the rights of those concerned in the litigation. The Sheriff, however, in so concluding, overlooked the manifest distinction between the present case and the case of *Gow's Trustees*. In the latter case both competing proprietors were parties to the action. In the present case the proprietor is not a party, and any judgment effectually to be an ultimate judgment on the question or questions in controversy would not for this plain reason be obligatory upon the proprietor of the Links. The plain course is to deal with the case as one in which all that is asked or ought to be granted is a possessory judgment.

Upon the proof it is plain that the Ladies' Golf Club, represented by the pursuers, have been in possession of the ground in question for the last eighteen years, and indeed this was not disputed, but on the contrary was admitted by the counsel for the defender. Possession, however, is of itself not all that is required to make out a right to a possessory judgment. There must be a competent title as well as possession. And in truth the controversy between the parties is not whether there has been possession, but whether the title on which possession has followed, is available as a ground on which they have a right to be protected till the contrary is established in an action of reduction or declarator, or one where the two are combined.

The chief ground on which the pursuers' title is objected to is the reservation from the lease of any portion of said ground over which the inhabitants of St Andrews may be entitled to exercise the liberty and privilege of bleaching under the feu rights of the said Links granted by the Town Council of St Andrews in favour of the proprietor's authors and predecessors. None of the ground in question has been claimed by any one as a portion of the bleaching-green, and before the lease to the pursuers could be invalidated by this reservation it behoved to be shown by those who pled upon this clause that the bleaching-green, or a portion of it, was within the ground. There has been a proof upon this subject, and the result, as I think, is that this part of the defender's case has not been established. But, besides, there has been the possession of the pursuers. Not only has there been no bleaching, but there has been possession by the pursuers of such a kind as excludes the idea that any part of what was let to them was part or parcel of the bleaching-ground, marked by march stones, which was reserved by the magistrates from their feu-disposition to the Dempsters, who are the authors of the present proprietor of the ground. This last consideration is of itself decisive, for continuous, uninterrupted, peaceable possession for the period requisite to give right to a possessory judgment leads presumptively to the conclusion that the bleaching-green referred to was outside the ground leased to the pursuers.

The defender further pleads the invalidity of the lease on the ground that the ground in question forming part of the Links of St Andrews, otherwise called Pilmour Links, was conveyed to Mr Cheape's predecessor, and was held by him under the condition that no part of the said Golf Links should be ploughed up at any time, but that the same should be reserved entirely as it had been in times past for the comfort and amusement of the inhabitants of St Andrews and others. There are obvious grounds for which this plea in this action must be rejected. In the *first* place, the right of the pursuers to a possessory judgment cannot be affected by anything which is presented in this plea. The landlord had a title; he granted a lease to the pursuers, which formed a title; and there is the possession on both titles. In the *second* place, the ground in question is not part of the Golf Links. There is evidence as to this. The Sheriff went and he viewed the ground; and on consideration of the case as presented in the proof and in the Sheriff's explanatory note, it is plain to me that what I have just stated and what he has found is the true conclusion.

In this plea the defender also contends that Pilmour Links were reserved entirely as they had been in times past for the comfort and amusement of the inhabitants of St Andrews and others who should resort thither for the game of of golf. An examination of the feu-disposition to the Dempsters suggests or rather shows that Pilmour Links and the Golf Links do not cover the same area. They are different things—the one being larger than the other—the Golf Links, in other words, being within Pilmour Links. This interpretation is not new. It is that which is involved in the decision of the case of *Paterson*, 27th July 1881, 8 R. (H. of L.) 117. Speaking of the Golfing Links, Lord Watson observed:—"Then it is said you must leave untouched everything outside of that course which can be shown to be a part of the Links to which a ball may be driven in playing the game of golf. I entirely demur to that proposition. The contention to which I am prepared to give effect really comes to this, that whatever is outside the proper golfing course may be turned to various purposes, so long as these are not inconsistent with the game of golf." The ground in question is admittedly, at any rate upon the clearest evidence must be held to be, outside of the Golfing Links. To play upon this putting ground does not interfere with the play of those who follow the regular game, and therefore there is not even a plausible pretext for this part of the contention which the defender has urged.

These, shortly stated, are the views of the case on which I proceed, and they seem to me to be full justification of the interlocutor of the Sheriff, against which the defender has appealed to this Court. There is, I think, no difficulty whatever in the way of such a decision.

Lord Rutherfurd Clark—The lands called Pilmour belonged at one time to the patrimony of St Andrews. But they were sold to the Messrs Dempster in 1799, and were acquired about 1820 by Mr Cheape of Strathtyrum, to whom they now belong.

In the disposition to the Dempsters there was

reserved to the town of St Andrews the bleaching-ground to the west of the Swilkin Burn, as marked out by march stones, on which the inhabitants of St Andrews were to have the right and privilege of bleaching. It was contended by the defender that the ground itself was excepted from the conveyance. But, in my opinion, this is not the true construction of the disposition. I think nothing more was reserved than a servitude. I notice this matter, as some argument was founded on it, though in my judgment it had little relation to the question which we have to decide.

The disposition contains a further reservation, which is thus expressed—"Under the reservation always that no hurt or damage shall be done thereby to the Golf Links, nor shall it be in the power of any proprietor of said Pilmor Links to plough up any part of said Golf Links in all time coming; but the same shall be reserved entirely, as it has been in times past, for the comfort and amusement of the inhabitants who shall resort thither for that amusement."

The same reservations are continued in the title of Mr Cheape, and though he is not a party to this process, it may be taken as certain that they are binding on him. As I have already said, we are not concerned with the servitude of bleaching. The matter with which we have to deal is the right or privilege of golfing, which is reserved to the inhabitants of St Andrews and others who may resort to the Links for that amusement.

After Mr Cheape had acquired the lands of Pilmuir, or, as they are otherwise called, the Pilmuir Links, a plan of these links was prepared by A. Martin, surveyor, dated 8th December 1821, "with the golfing course thereon as marked off with stones." It is probable that the golfing course so defined was the part of the Pilmuir Links on which the public were at that time accustomed to play golf. It is certain that, with some trifling exceptions, which it is not necessary to notice, the public have since that time been in use to play golf on this course, and on no other part of Pilmuir Links. It is true, as we are informed, that from the unskilfulness of the player, or from the force of the wind, the ball is sometimes driven beyond the course, and that on these occasions it is played from the place where it lies. I see no reason to doubt that in doing so the player is within his right. The golfing course was defined as the part of the Links on which the game was to be played; but, having regard to the inveterate usage, I do not think that we can be called to construe the limitation so strictly as to hold that the player may not play his ball from a place beyond the course, when, from the causes to which I have alluded, it may lie beyond it.

With the qualifications to which I have referred, the game of golf has been strictly confined to the golfing course. I cannot doubt that the golfing course is not co-extensive with the Pilmuir Links. The whole usage which has followed on the conveyance of 1799 is inconsistent with that idea, and the expression of the disposition itself is equally inconsistent with it. For the proprietor of Pilmuir Links is prohibited from doing any damage to the Golf Links, and from ploughing any part of the Golf Links—prohibitions which, in my judgment, cannot by possibility be extended to the whole subjects which were conveyed.

As Mr Cheape is not a party to this process, we cannot determine what his rights are, or what are the rights of the public. But *prima facie*, and in the absence of the proper parties, I can say no more, than that the right of the public to play golf is confined to the golfing course, with such aberrations, as I may call them, as are incidental to the game. This has been the usage, and for the purposes of this case I take the usage to be the measure of the public right.

Some twenty years ago Mr Cheape let a portion of the Links to certain gentlemen as trustees of the Ladies' Golf Club, with the exclusive right of playing what is called the short or putting game of golf thereon. It is quite certain that this ground does not form part of the golfing course. Indeed the defender does not say that it does. The ground so let was made suitable for the practice of the game, and it was somewhat enlarged by the present lease, which was granted in 1881. I think that it has been proved that the members of the club have been in the exclusive possession of the right and privilege which they acquired by the leases. It is possible that persons other than members of the club have played on the ground so let. But this has been so exceptional that to my mind it requires no notice. It is certain that no right could be thereby acquired, and it is equally certain that the public have had no possession of which they would be deprived by the interdict which is asked by the pursuers.

The defender conceived that he had a right to play the short game of golf on the ground let to the pursuers, and in that belief he proceeded to play it. I do not question his good faith. I believe that he honestly thought that he was entitled to do so. He was warned off, and as he insisted on his right the present action was raised.

It seems to me that the defender cannot succeed unless he can show that the public have a right to play golf elsewhere than on the usual golfing course. He contends for this right. But from what I said it will be seen that I see no ground for thinking that such a right exists. It is probable that it may, notwithstanding the usage to the contrary, but if it does, the defender must establish the existence of it in a declarator to which Mr Cheape is a party. This is a mere possessory action. We cannot determine any question of right. We can only maintain the possession as it has been in the by-past years.

In saying that the defender has no right to play golf except on the usual golf course, I do not dispossess him of any right of which he or any member of the public has been in possession. It is said that the public have been in use to walk over the whole of the Pilmour Links without restraint. Probably that may be true. But whether they have done so in the exercise of a right, or by the tolerance of the proprietor I cannot judge. No such question can be raised or determined in the present process. But this *jus spatiandi*, if it exist, is a very different thing from playing golf, and although the one may belong to the public the other may not. It is enough for me that our judgment is limited to the playing of golf on the ground in question, and in interdicting the defender from doing so, we do not interfere with any other right which he may possess.

It was argued that the ground over which the pursuers claim right included a portion of the bleaching-green, and that it is not included in their lease. I do not think that this is so. But we are not much concerned with this question. There is no complaint that the right of bleaching has been interfered with. If the contention of the defender were well founded, it could only prove that the pursuer had no title to a small portion of the ground on which they are in use to play, but the defender would take no benefit thereby. The true question is, whether the defender can play golf beyond the usual course, and inconsistently with the settled usage. This I think he cannot do.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties in the appeal, Find in fact (1) that the golfing course of the Links of St Andrews is defined and marked out by march stones; (2) that the piece of ground described in the prayer of the petition does not form part of the course; (3) that since the term of Martinmas 1880 the St Andrews Ladies' Golf Club, the association represented by the pursuers, has had exclusive possession of the said piece of ground under a lease granted by the proprietor thereof to the pursuers, and had such possession during the thirteen years preceding the said term under a missive of lease with him: Find in law that the defender is not entitled to disturb the said association in their possession of the said piece of ground: Therefore dismiss the appeal; affirm the judgment of the Sheriff appealed against: Find the pursuers entitled to expenses in this Court."

Counsel for Appellant—M'Kechnie—Dickson—Salvesen. Agents—Mitchell & Baxter, W.S.

Counsel for Respondents—D.-F. Mackintosh, Q.C.—Gillespie. Agents—Mackenzie & Kermack, W.S.

Saturday, May 14.

FIRST DIVISION.

[Lord Trayner, Ordinary.

MASTERTON AND ANOTHER *v.* ERSKINE AND OTHERS.

Judicial Factor—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 29), *sec.* 164—*Recal.*

In a petition under the 164th section of the Bankruptcy (Scotland) Act 1856, for the appointment of a judicial factor upon the estate of a person who had died intestate, the petitioners were heritable creditors upon the estate, with concurrence of the widow of the deceased. They stated that there was no one interested in the estate then resident in Scotland to administer it. On 6th November 1886 a factor was appointed. Subsequently two brothers of the deceased came to Scotland from America, one of whom was appointed executor-dative of the deceased, the other being his heir-at-law. On 2d December 1886 they presented a petition for recal of the factory, stating that they were willing to administer the estate for behoof of all concerned, and that after deducting the petitioners' debts there was a considerable surplus. The heritable creditors and the factor lodged answers objecting to the recal. A remit was made to the Accountant in Bankruptcy to inquire into the condition of the estate, and he reported that he was unable to state whether or not the heritable property, if exposed for sale, would realise enough to pay off the bonds in full. The moveable estate was hypothecated in security of other debts. The petitioners returned to America before the application was disposed of, having granted a factory and commission. *Held* that the matter was entirely within the discretion of the Court; that the creditors were entitled to have their interests protected; and that there had been no change of circumstances which would justify the recal of an appointment competently made. Petition *refused.*

*Process—Petition for Recal of Factory—*20 *and* 21 *Vict. cap.* 56, *sec.* 4—*Competent in Outer House.*

Held (by Lord Trayner, Ordinary) that the appointment of a factor under the 164th section of the Bankruptcy (Scotland) Act 1856 can competently be recalled in the Outer House.

John Masterton, civil engineer, Edinburgh, died there on the 9th October 1886, intestate, leaving a widow but no family.

Upon the 18th October 1886 a petition was presented, under section 164 of the Bankruptcy (Scotland) Act 1856, by certain heritable creditors, with the consent and concurrence of the widow, Mrs Jane Field or Masterton, praying for the appointment of a judicial factor upon the estate of the deceased, which consisted, so far as the petitioners were aware, of the following:—£1000 of Anglo-American Telegraph Stock, £500 Great Eastern Railway Ordinary Stock, ten shares in the North British and Mercantile Insurance Company, certain heritable subjects in Bonnington Road, Bangor Road, and Breadalbane Street, Leith, an interest (amount unknown to the petitioners) in the Craiglockhart Estate Company, and in heritable property belonging to a building syndicate in Dundee.

The nearest-of-kin of the deceased were his two brothers, James Masterton and William Masterton, both resident in Philadelphia, United States of America.

Upon 6th November 1886 the Lord Ordinary appointed Mr Ebenezer Erskine Scott judicial factor upon the said estate.

Upon 2nd December 1886 a petition was presented by the said William Masterton and others, praying for the recal of Mr Scott's appointment as factor foresaid.

The petitioner William Masterton averred that as soon as he heard of his brother's death he authorised a mandatory to act for him in relation to his deceased brother's estate, and that upon 19th November 1886 he was appointed executor-dative *qua* next-of-kin of the said John Masterton. He also alleged that he had returned to this country and was ready to perform his duties as executor; that the petitioners were the whole parties (except the widow of the deceased) who were entitled to succeed to his estate; that after de-