completion would be to deny effect to the provisions of the Statute of 1874.

But it is said the deed is a bilateral deed—a sort of contract—and that it could not be completed because some of the trustees did not accept until after Mrs Tener's death. I think this objection groundless. Whatever be the form of the deed, it is in substance a unilateral deed of grant and gift by Mrs Tener by which she gave Salem Chapel for the use of the congregation. It was a mistake in point of form in Mr Tener to call it an indenture. It was a deed poll. The trustees were not contracting parties; they were simply donees—administrators of the gift. They might accept at any time, any number of them, and even if they all had declined to accept, the gift would not have been void, but the Court would have appointed a judicial factor or other trustees to administer the trust.

But, in point of fact, two trustees actually accepted during Mrs Tener's life the final gift which she had made *inter vivos*, and which she herself by delivery of the deed had made irrevocable. I think this is enough. There was nothing to prevent the other trustees from accepting at any time, and the interval of two years before the signature of the last acceptor is finally attested is of no consequence. I think, therefore, the deed must receive effect according to its true meaning and intent, and in accordance with the admitted intention of the donor.

The Court therefore answered the first two questions in the affirmative, and found it unnecessary to answer the third.

Counsel for First Parties (Tener's Trustees)—R. V. Campbell. Agent—Alexander Wylie, W.S.

Counsel for Second Parties (Tickle and Others)—Balfour—M'Kechnie. Agent—William Archibald, S.S.C.

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*Saturday, June 28.**

SECOND DIVISION.

[Lord Adam, Ordinary.

GRAHAME *v.* THE PROVOST AND MAGISTRATES OF KIRKCALDY.

Property — Commonty — Encroachment — Right of Municipality to Erect Buildings on Burgh Property.

The magistrates of a burgh sold to themselves, in their capacity of police commissioners, a portion of the burgh property, on which they proposed to erect stables, &c. An inhabitant of the burgh sought interdict against this proceeding, as an encroachment upon ground which had been by the terms of the original grant from the Crown and by immemorial usage dedicated to the use and recreation of the inhabitants. Interdict granted, on the ground that upon a construction of the titles, and upon the facts as proved, these subjects were held by the magistrates for behoof of the community, but under dedication to public uses, and that they could not be dealt with in any way inconsistent with that common use and the enjoyment of the inhabitants generally.

Observed per Lord Ormidale that the case of a sale by the magistrates to a stranger who purchased in *bona fide* might have been different.

Observations per the Lord Justice-Clerk (Moncreiff) on the Burntisland case, reported in the note to *Home and Milne* v. *Young*, Dec. 18, 1846, 9 D. 293.

* Decided June 19, 1879.

This was a suspension and interdict at the instance of James Grahame, dyer, Kirkcaldy, against Patrick Don Swan and others, being the Provost, Magistrates, and Town Council of that burgh, and also Commissioners of Police under "The General Police and Improvement (Scotland) Act 1862." The complainer prayed for interdict against the respondents "from in any way encroaching upon that portion of the South Links or south commonty of Kirkcaldy which is now or was recently in grass, and which now remains or recently remained unfeued, and which extends from Burleigh Street of Kirkcaldy on the north, to the vennel called John Loudoun's Wynd on the south, and from property belonging some time to the heirs of Thomas Meldrum and other properties on the west, to the seaflood on the east, . . . and in particular . . . from encroaching upon that portion of the South Links or south commonty which is commonly named or known as the Volunteers' Green, being part of the common good of the burgh of Kirkcaldy." There was also a prayer for interdict against the erection of stables or any buildings which might prejudice the rights of bleaching, drying clothes, &c., which belonged to the inhabitants. These the complainer averred he had enjoyed for many years along with the other inhabitants. The charter of the burgh of Kirkcaldy was granted by Charles I., and dated February 5, 1644. It confirms an earlier charter granted by David II. It contained, *inter alia*, the following clause:—"Cum acris burgalibus et communi mora et lie moss et muirlands cum territorio de Kirkcaldie aliisque juribus et pertinen . . . et territorium suprascript per presentis carte nostre tenorum declaratur salinas de Kirkcaldie fore, viz., a vico vocat John Lowdoun's wynd ad orientalem pontem." From 1644 down to 1754 the subjects referred to above remained the property of the magistrates for the public purposes of the burgh. One-third at least had always been kept in grass for drying, bleaching, and recreation purposes. On 18th March 1754 the municipal authorities entered into a feu-contract with Robert Whyte, then provost, whereby in consideration of the sum of £1 Scots money instantly paid, and £34 Scots money of annual feu-duty, and in conformity with an Act made by the General Convention of Royal Burghs in July 1753, authorising the magistrates of Kirkcaldy to feu out that part "of the property, lands of the said town, called South Links, lying on the south side thereof," they disponed to him certain subjects thereon, "but under the limitations and restrictions underwritten, viz., that there shall now and in all time coming be reserved to the inhabitants of Kirkcaldy one-third part of said links in grass as at present, for drying linen clothes, allenarly, and free access thereto at all times for that end." There was a provision that certain roads be left

open through the links. These subjects were reconveyed in 1788 to the municipality by Robert Whyte's representatives. The reconveyance conveyed the subjects "always with and under the limitations and restrictions specified in the said feu-contract."

The complainer averred that from Martinmas 1787 to 1854 the subjects described in the prayer of the note, and which were the subjects to which the before-quoted limitations and restrictions applied, were in grass, and used exclusively for the purpose of drying and bleaching clothes and linen, and were always open and patent to the whole inhabitants of the said burgh.

In 1854 an action of interdict was brought by Walter Heggie against the magistrates, who proposed to build upon a part of the subjects in question, and the Sheriff-Principal after proof was led, and a visit to the ground, pronounced an interlocutor with these findings, *inter alia*—"(5) Finds that the Magistrates and Council of Kirkcaldy are proprietors for behoof of the community of the South Links of Kirkcaldy, comprehending, *inter alia*, the Volunteers' Green and the enclosure to the west end of it, on which the building in dispute is in the course of erection, but under the limitation and reservation that one-third part of the said links shall be reserved to the inhabitants for drying linen clothes thereon; (6) finds it not denied that a large portion of the said links as acquired by the magistrates has been from time to time feued out by them for building purposes, and that the remaining portion, including the Volunteers' Green and the said enclosure to the west of it, are not equal to more than one-third of the whole links, as the same were originally acquired by them; (7) finds that about the year 1836 the portion now occupied by the Volunteers' Green was enclosed and furnished with conveniences for a bleaching and drying green for the public of Kirkcaldy, and that it continued to be used for these purposes; (8) finds that about the year 1838 the westmost portion, being that in dispute, was enclosed with stone walls, and used by the magistrates for a dung depot, and it was used down to 1848, when the depot was removed to the railway station, and since 1848 it has been let by the magistrates for the site of public shows, caravans, and the like purposes; (9) finds that previous to the said portion of the links having been so enclosed they were open and waste land traversed in all directions, and at high tide covered by the sea to a large extent, and *inter alia* used, on such parts of them as contained grass, for the purpose of bleaching and drying clothes—in particular, finds that the westmost portion was more broken and less fit for such purposes than the east, being often covered with filth and rubbish, and the north portion of it occupied with dung-pits; (10) finds that the respondents have failed to prove their averments that for forty years and upwards no part of the ground occupied by the said westmost enclosure has been used for bleaching and drying clothes; on the contrary, finds that patches of it were occasionally used for such purposes by a few individuals up to about thirty-six years ago, but not later."

Since that date the subjects in question had been in grass, and had been used by the inhabitants of the burgh for the purposes mentioned above. A bill was promoted in Parliament in 1876 for extending the municipal and police boundaries of the burgh, and for other purposes, and containing, *inter alia*, a provision empowering the sale of the Volunteers' Green, but that provision was afterwards struck out.

The magistrates, it was averred, had now reduced the area of the links, which was reserved in grass, to one-fifth, and they now proposed to erect stables in violation of the restriction imposed by the titles, and to the prejudice of the interests of the inhabitants.

The respondents' statement of facts was, *inter alia*, as follows:—"The common muir of Kirkcaldy is now feued out with the exception of the Volunteers' Green, which is enclosed and used by the inhabitants for bleaching purposes. The ground in dispute is to the west of the Volunteers' Green, and is separated from it by a road or street called Burleigh Street. It has been in the possession of the magistrates without interruption since at least the year 1788. In 1838 it was enclosed, and has since been used, for various purposes connected with the town, but it has never been used for bleaching. Indeed, within human memory it has not been in grass so as to make it suitable for bleaching, and could not be so used at the present. Moreover, no possible advantage is to be gained by its being so employed, as sufficient provision is made for bleaching on the Volunteers' Green, immediately adjacent. In their capacity of police commissioners the magistrates some time ago resolved to erect on the vacant ground in question stables and other buildings necessary to be provided in connection with the police of the burgh. It cannot be disputed that this was a proper act of administration on their part. The buildings were necessary, the ground was suitable, and no other possible use of the least benefit to the public to which it was or could be put was interfered with. In point of fact, no objection was made by any of the inhabitants except Mr Heggie, whose property overlooks the ground in question towards the sea, and whose interest it is that it should remain unbuilt upon. On the 7th of June 1877, soon after the resolution of the respondents had been taken, a letter was received from Mr Heggie's agent threatening an interdict, and intimating that that gentleman was 'determined to oppose any further encroachment on the rights of the public, more especially looking to the unpleasant use that it is proposed to be made of the ground,' but after some correspondence his opposition dropped, and until the present application no further movement was made on the part of any person resident in the burgh to stop the operations. The estimated cost of the buildings is £1342, 5s. 11d. So far back as the 13th of July 1877 the respondents *qua* commissioners of police gave notice in the newspapers that to meet this expenditure they intended to borrow the sum of £1100. The purpose of the loan was expressly stated in the advertisement to be for the erection of stables, dwelling-house, fire-engine-house, and other offices for their use on the ground in question, being 'the piece of ground lying betwixt the Volunteers' Green and the western boundary of the ancient royalty of Kirkcaldy.' The contracts were settled on 28th January 1878. At the time this note was served, mason-work to the value of £312, 17s. 10d. was actually executed, and materials had been laid down on the ground, not fixed, but ready for

fixing, of the value of £336, 17s. 11d. At least one-half of the buildings requiring roofing were ready for the roof. Further, all the steps necessary for a conveyance of the ground from the proprietors, the magistrates and town council of the burgh, to themselves as police commissioners, have been for some time completed in terms of the Police Act and relative statutes. Valuators were nominated by deed of nomination, dated the 10th of November 1877, and they having fixed the value at £290, 13s., that price has been paid, and a disposition executed and delivered to the police commissioners, dated the 28th of January, and registered in the Particular Register of Sasines for the burgh of Kirkcaldy the 11th of February 1878. For more than a century, by the custom of the burgh of Kirkcaldy, a certain portion of the links has been reserved in grass for drying clothes, but for more than forty years, or past human memory, the said use has been confined to that part of the links called the Volunteers' Green. No complaint has ever been made that this was insufficient for the public requirements, which, in point of fact, it was not, and the feuing of the remainder of the links, which was in operation so early as 1754, has been with the sanction and acquiescence of all parties."

The complainer pleaded, *inter alia*—"(1) The prayer of the note ought to be granted in respect of the restrictions and limitations imposed by the titles. (2) The said ground having been used as a commonty for the purposes condescended on from time immemorial, the respondents are not now entitled to change its character. (4) The ground mentioned in the prayer of the note being held by the magistrates and council in trust for the public purposes specified, they are not entitled to defeat the rights of the public therein."

The respondents pleaded, *inter alia*—"(4) The writs founded on are insufficient to constitute the rights claimed by the complainer as one of the public over the ground in question. (5) If any such right ever existed, it has been lost *non utendo*. (8) The said ground being the property of the magistrates as representing the community, and subject to no such servitude as is alleged, its application in the manner proposed was a just and proper act of administration on the part of the respondents, and within their powers."

The Lord Ordinary (Adam) after proof, the purport of which appears from the note to his interlocutor and from the opinions of the Court (*infra*), pronounced an interlocutor, in which he interdicted the respondents "from in any way encroaching upon that portion of the South Links or South Commonty of Kirkcaldy which is now or was recently in grass, and which now remains . . . unfeued, and which extends from Burleigh Street . . . on the north, to . . . John Loudoun's Wynd on the south," &c., and also "from digging foundations in, or in any way trenching or cutting up for building purposes, the said lands," and "from erecting stables or any buildings or erections of any kind thereon." He added this note:—

"*Note.*—The South Links or common muir of Kirkcaldy lies between the town and the sea. It has been to a large extent feued by the magistrates of the burgh, and has been built upon. The question in this case is, whether the respondents, who are the present magistrates, are entitled to build stables and other erections for the use of the burgh on a portion of it which is still unbuilt upon, bounded by Burleigh Street on the east and Loudoun's Wynd on the west?

"The Lord Ordinary does not think that any question arises as to whether the proposed erection of stables is a prudent act of administration on the part of the respondents. Neither does he think that any question of servitude arises. He thinks that the question which arises for decision is similar to that decided in the case of *Sanderson* v. *Lees*, viz., whether the title of the respondents to the ground in question is so qualified that they are bound to keep it in all time free and open for the use, enjoyment, and recreation of the inhabitants of the burgh, of whom the complainer is one?

"If this be so, it follows that it is not necessary that the complainer should prove that the ground in question has been used and enjoyed by the inhabitants of the burgh for any particular purpose, such as the bleaching of clothes. All acts of the inhabitants showing that they have had the free use and enjoyment of the ground will be relevant in support of the complainer's case. On the other hand, acts of possession proved by the respondents will not be material unless they are inconsistent with and exclusive of such use and enjoyment on the part of the inhabitants.

"The title of the respondents to the ground in dispute consists of a charter of confirmation by King Charles I., dated 6th February 1644. By this charter there is disponed to the magistrates the burgh of Kirkcaldy, with all the lands of the same, '*necnon cum acris burgalibus et communi mora—a vico vocat John Lowdoun's wynd ad orientalem pontem.*' It is not disputed that the ground in question is a part of the common muir here mentioned. It is not alleged that the muir is or was common in the sense of being held by the burgh in common with any adjoining proprietors. It appears therefore to the Lord Ordinary that the description here given of it as a common muir implies that it was at this date used and enjoyed by the inhabitants in common.

"On the 18th March 1754 the bailies and magistrates feued the South Links to Robert Whyte, then Provost of the burgh. It was feued under the condition that there should be reserved in all time coming to the inhabitants of Kirkcaldy one-third part of 'said links in grass, as at present, for drying linen cloths allenarly, and free access thereto at all times for that end,' and provision was made for certain roads and accesses. The subjects were reconveyed to the magistrates by Robert Whyte's representatives in 1788 under the same conditions. It would appear that no infeftment had followed on these deeds, and neither party founded on them as affecting the respondents' title, and the Lord Ordinary has disposed of the case on that footing. The deeds were founded on, however, by the complainer, as showing that at their dates the links were in grass, and that the inhabitants had full access to them at all times.

"As regards the use and enjoyment which has been had of these links by the inhabitants, it appears that they had been originally 8·172 acres in extent, and that prior to the year 1803 or 1804 the magistrates had from time to time granted feus of part of them to the extent of 6·976 acres. Since that time there appears to have been no feuing or building. There was thus left a part of them,

1·196 acres in extent, unbuilt upon. This ground was formerly divided into two parts by a ditch, which crossed it in the line in which Burleigh Street now runs. It appears to the Lord Ordinary that the whole of this ground was at one time known by the name of the Volunteers' Green, although latterly that name has become appropriated to that portion of the ground which lies to the east of Burleigh Street.

"In the year 1854 there was a litigation between a Mr Heggie and the magistrates with reference to the proposed erection by the magistrates of a building on a part of the ground in question.

"In that case an inquiry took place as to the use and possession which had been had of the ground by the inhabitants, in which many aged witnesses were examined. The result of that evidence seems to the Lord Ordinary to be very accurately stated by the Sheriff in an interlocutor of date 15th August 1854.

"He describes the ground as having been open and waste land traversed in all directions, and at high tides covered by the sea to a large extent, and *inter alia* used, on such parts of them as contained grass, for the purpose of bleaching and drying clothes, and that the westmost portion (the ground now in dispute) was more broken and less fit for such purposes than the east, being often covered with filth and rubbish, and the north portion of it occupied by dung-pits.

"On 2d July 1834 the town council authorised the Dean of Guild to remove all encroachments on the town's commonty, and to attend that no gates be allowed to be erected that might interrupt the public in using the said commonty.

"The ground appears to have continued in the condition above described till the year 1836, when the portion of it to the east of Burleigh Street, and which is now known as the Volunteers' Green, was surrounded by a wall, and converted into a bleaching green, being supplied with water and other conveniences. This was done by public subscription, supplemented by the magistrates. It has since continued to be used as a public bleaching green.

"With reference to the remaining or western portion of the ground, it appears that in 1832 the magistrates let it to a body called the burgh trustees, who were at that time responsible for the lighting and cleaning of the burgh.

"The trustees began about the year 1834 to deposit the dung of the town there. In 1838 the trustees surrounded it by a wall, but there was no gate in the wall, and the inhabitants had full access to it as before.

"Some of the inhabitants in the neighbourhood complained of the ground being put to this use, and threatened legal proceedings, and in 1848 the dung was removed and the place put into some sort of order. Since that time the inhabitants have had unrestricted access to it. It certainly presented no convenience for being used as a bleaching-green, but the poorer inhabitants in the neighbourhood have since constantly used the few patches of grass which grew on it for the purpose of drying and bleaching their clothes. Quoits were played on it for many successive years, although it appears that in one year (1863) the burgh had exacted a rent of £2. Exhibitions of horsemanship occasionally took place there, and on three occasions, one in 1855 and two in 1856, the magistrates received a small rent for the liberty granted. A theatre was also erected on the ground, but was removed in a few months, but whether or not in consequence of the remonstrances of the inhabitants who had protested against this use of the ground does not appear.

"The Lord Ordinary accordingly thinks that it is proved that the inhabitants of Kirkcaldy have possessed from time immemorial this part of the links for the purposes of walking, bleaching clothes, and recreation. He also thinks that it is proved that the respondents are encroaching on the immemorial possession of the inhabitants, as established by the proof, and therefore that the complainer is entitled to interdict.—*Sanderson* v. *Lees*, Nov. 25, 1859, 22 D. 24; *Home* v. *Young*, Dec. 18, 1846, 9 D. 286.

"It is true that the magistrates have from time to time granted feus of a portion of the links, but that fact also occurred in the case of *Sanderson* v. *Lees*, and the Lord Ordinary does not think that it can prevent the inhabitants from vindicating their right to the portion of the links which still remains unbuilt upon.

"The Lord Ordinary was referred to the case of *The Magistrates of Edinburgh* v. *The Magistrates of Leith*, July 10, 1877, 4 Ret. 997, but it appears to him that the facts in that case do not at all resemble the facts in the present case, so as to warrant a similar decision. The ground in that case seems to have been considered by the Court to have been a vacant unfeued building stance, to which the public never had any right."

The respondents reclaimed.

At advising—

LORD JUSTICE-CLERK — Some important questions are raised in this case, although the subjects are of no great value. I so completely concur in the views indicated by the Lord Ordinary in his note that it is unnecessary to go into the matter at any great length; but my opinion may be shortly and generally indicated.

The claim is made on behalf of certain members of the community of Kirkcaldy to the free use of this ground. I agree with the Lord Ordinary that the claim is one of property and not servitude, and the magistrates themselves admit that the position in which the ground now stands as regards their title and rights has existed from time immemorial. I think it right to begin with this observation, as it appears to me to clear away a good many of the difficulties which otherwise must surround the case. The contention then comes to be, that the Commissioners of Police by the purchase of this ground from its owners—that is to say, from the Provost, Magistrates, and Town Council of Kirkcaldy—are entitled to extinguish subordinate rights. But it appears to me that the plain and simple state of the question here does not depend upon subordinate rights at all. It is a claim by the community to have the rights they possess and have acquired left to them as regards this piece of ground undisturbed. If a question of the same character as that raised in the Burntisland case, reported in the note to *Home* v. *Young*, 9 D. 293, were again to come up for decision, I confess I should have great difficulty in giving effect to the judgment pronounced, for to my mind it was not a satisfactory one. The true effect and working

of the 7th section of the Lands Clauses Act 1845 has since that time been carefully sifted, and in point of fact the judgment then pronounced came to little as regards the general principle. In any view, I should have been loath to hold that magistrates in their capacity of police commissioners could purchase from themselves in their other capacity of magistrates that which they could not purchase from anyone else. The view I take of the present case, however, obviates the necessity for any such considerations.

There was, however, a matter referred to at the conclusion of the debate to which I wish shortly to draw attention. The magistrates in 1876 applied for an Act of Parliament, which as originally drafted contained a proposal for taking the Volunteers' Green practically away from the community by sale. This proposal, however, was not carried through, and accordingly the Act does not give the power of selling the Volunteers' Green, but, on the contrary, expressly excludes it. This again narrows the whole matter here to one point—Was this portion of ground part of the Volunteers' Green, or was it not? If it was, clearly any alienation is prohibited by statute. I do not entertain any doubt as to the identity of the ground with that referred to in the titles.

On the whole, without further entering into the matter, I am satisfied that the Town Council have failed in satisfactorily establishing their right—indeed the indications are all on the opposite side; thus we have the enclosure in 1836, the walling in 1848, and the letting of grass, and so forth. If the ground had been dedicated, or whatever term be applied, to any purpose, the magistrates must respect that purpose. As to evidence of the use of the ground for bleaching purposes, I think the possession has been very fragmentary, but, on the whole, my opinion without hesitation is that the town council here are entirely wrong in point of law, though I wish expressly to say that I cannot doubt they have acted for what were in their opinion the best interests of the community. I think accordingly that your Lordships should affirm the judgment of the Lord Ordinary.

LORD ORMIDALE—This case is one of a class of great interest and importance to the inhabitants of towns or burghs, involving as it does the rights on the one hand of the magistrates and council or other administrators of such communities, and the rights on the other hand of the inhabitants.

The question relates in the present instance to a small part of what is called the common muir or South Links of Kirkcaldy; and the important inquiry is, for what purpose is that common vested in the respondents as the Magistrates and Town Council of Kirkcaldy? Is it vested in them just as any other property they may hold, or for the special and exclusive use, recreation, and enjoyment of the inhabitants generally?

In entering upon this inquiry it is of importance to keep in view that the complainer, whose title as an inhabitant of Kirkcaldy to insist in the present action has not been disputed, does not maintain that the right asserted by him is merely that of a servitude of bleaching or any other servitude. What he maintains is that the ground in dispute is a bit of a muir to which the whole inhabitants have had right in common for the bleaching or drying of clothes and for recreation and enjoyment generally; and that this right in the inhabitants has been coeval with the title of the respondents themselves, and so qualifies it as to render it incompetent for them to deal with the ground or any part of it in any way inconsistent with the common use and enjoyment of the inhabitants.

It is also right that it should be kept in view that no question was raised by the respondents in regard to the form of action—both parties being desirous of having the real matter in dispute determined under the present suspension and interdict without the necessity of resorting to a declarator or other form of action.

To come, then, at once to the rights of parties, there cannot now, having regard to the authorities referred to by the Lord Ordinary, and particularly the case of *Sanderson* v. *Lees*, be any doubt in law as to the right of the complainer, provided he has established in support of it the requisite facts. The only question, then, as it appears to me, that either was or could have been raised comes to be substantially one of fact depending upon the proof. Nor does it appear to me that there is any serious difficulty as to the import and effect of the proof. It is no doubt true, as was well put by the counsel for the respondents, that it will not do to leap to the conclusion that the complainer is right in his contention merely because the proof shows that the bit of ground more immediately in dispute, or the larger space of which that bit formed or forms a part, has been shown to have been used by the inhabitants of Kirkcaldy when not otherwise occupied, for it is only natural, and what perhaps always occurs, that the young people and idlers of a town resort for their recreation and enjoyment to any and all pieces of open and otherwise unappropriated ground in the neighbourhood. Quite sufficient, however, has been disclosed by the proof in the present case to show that the use of the ground in dispute by the inhabitants of Kirkcaldy, in place of being merely of that character, has been very different—so different as to denote unmistakeably, I think, that it was in the exercise of rights similar to that which was vindicated for the inhabitants of Musselburgh in the case of *Sanderson* v. *Lees*. The present case is, I am inclined to think, a stronger and more favourable one for the inhabitants of Kirkcaldy than was that of *Sanderson* v. *Lees* for the inhabitants of Musselburgh. In that case the inhabitants had to rely upon evidence of immemorial possession alone, while here there is not only such possession, but what appears to me the very important charter of Charles I., of 5th February 1644, by which Kirkcaldy was erected into a royal burgh, and which at the same time gives the bailies and councillors, for themselves and the community, right to certain subjects, "*et cum communi mora et lie moss et muirlands.*" That there had been therefore a common muir—that is to say, as I take it, some ground enjoyed and used as a common by the inhabitants of Kirkcaldy at and prior to the erection of the burgh—there is no reason to doubt; and at any rate this, I think, has been put beyond all question by the proof independently of the charter of erection of Charles I.—a proof partly composed of written evidence from the records and minutes of the Magistrates and Town Council of Kirkcaldy themselves. There is first the disposition—a feu-right—by them of part of the ground in 1753 in favour of Provost Whyte,

and the reconveyance by him to the burgh in 1788, in both of which deeds there is an express reservation in favour of the inhabitants generally of Kirkcaldy of one-third of the South Links "in grass as at present for drying linen cloths, allenarly." It is true that this reservation is limited and special, but it shows notwithstanding that the South Links, the identity of which with the common muir referred to in the charter of erection was not disputed at the debate by the respondents, were held by the Provost, Magistrates, and Town Council of Kirkcaldy for the use of the inhabitants in a manner different from the ordinary burgh property. And the proof otherwise shows that although the reservation as expressed in the deeds to and by Provost Whyte was limited and partial, the right of the inhabitants was much more general—as general as that now claimed for them by the present complainer.

Besides the charter of erection of the burgh of Kirkcaldy, the great importance of which as bearing on the question here in contention between the parties has been already noticed, there is (1) a great body of parole testimony by living witnesses in and connected with Kirkcaldy, of all ages and conditions, and which, in my opinion, tend very strongly to support the complainer's case. There is also (2) the evidence of persons now dead, which had been taken in the case of *Heggie* v. *The Magistrates of Kirkcaldy*, involving a similar question to the present. And there is (3) the evidence afforded by the minutes or records of the Magistrates and Town Council of Kirkcaldy themselves, in which, especially the minutes from 1819 downwards, mention or allusion is made to the ground in dispute—or rather the larger space, of which the ground in dispute is a small part—as a common or commonty, to the use of which the inhabitants of Kirkcaldy had right, as contended for by the complainer.

It seemed to be thought, however, on the part of the respondents at the debate, that if they could show that the inhabitants of Kirkcaldy had not continuously possessed the ground for forty years or time immemorial, for a special and definite purpose, such as the bleaching or drying of clothes, that the claim of the complainer must fail. But that view could only be of consequence if the complainer's claim had been one of servitude. But when it is considered that his claim to the ground is not to a servitude at all, but to a right much more comprehensive, a right to the use in every lawful manner not inconsistent with it being common to all the inhabitants—the circumstances of the possession not being continuous, special, and definite—is all the stronger and more favourable for him.

Neither do I think that the respondents' plea, founded upon their allegation in the third article of their statement of facts, can be given any effect to. At best the transaction there referred to was, on the respondents' own showing, inchoate when the present note of suspension and interdict was presented; and, at any rate, if the respondents were not entitled to deal with the ground in question in any way inconsistent with the right of the inhabitants, no attempt by the magistrates and council *qua* such to make over the ground to themselves *qua* commissioners of police can or ought to prevail—the more especially as it appears from the correspondence which passed between the complainer's agents and the town-clerk of Kirkcaldy shortly before the litigation commenced, that any attempt to encroach upon the rights of the inhabitants as now asserted would be resisted. The result might be different if a stranger, in ignorance of the true rights of the inhabitants, had in good faith acquired a title to the same part of the common in question from the respondents. Such an acquisition might perhaps be unchallengeable. But I have no idea that a transference of the respondents in one capacity to themselves in another capacity is of that description, or is entitled to the same measure of protection. Nor can I think that the disposal already of the greater part of the common can justify or warrant the disposal of what remains. In *Sanderson* v. *Lees* some of the common property had been feued away without challenge, but that was not considered to be any bar to a challenge of the disposal of what remained, and neither can it operate as a bar here.

Upon the whole, and for the reasons stated, I have little or no difficulty in concurring with your Lordship in opinion that the Lord Ordinary's interlocutor is right, and ought to be adhered to. I have to add that I entirely concur with your Lordships in thinking that there is no reason for impuguing the good faith of the Provost and Magistrates of Kirkcaldy, and that indeed was conceded at the bar.

Lord Gifford—I entirely concur in the views expressed by your Lordships and by the Lord Ordinary. Although this piece of ground is not very large or very valuable, yet the question which has been raised with regard to it is one of great importance to all burgh communities. A burgh such as Kirkcaldy may own property in two different and perfectly distinct ways. First of all, the burgh may hold land as an ordinary commercial subject, and may in such a case of course exercise powers of feuing, leasing, selling, and so forth. Secondly, the burgh may own lands for the common use of all the inhabitants.

The question here is, In which of these two ways this portion of land was held? In *Sanderson* v. *Lees* it was held that the determination of such a point depended upon usage; and I think that here too the test is how the common has been used from time to time by the inhabitants of Kirkcaldy. There was a peculiarity in the title by which in 1644 the burgh got these lands, and which is referred to in the Lord Ordinary's note. It is, I am satisfied, a portion of the "common muir and moss of Kirkcaldy," and we have thus a strong presumption raised at once. As the history of the burgh goes on, this becomes clearer; for when in 1764 the magistrates, by a transaction of doubtful legality, feued land to the Provost, they reserved one-third part in grass. We see thus that in 1764 it was in grass, and was part of the links of the burgh. I do not read this dedication of one-third as a restriction on the title. Carrying the history of this ground down to the present time, we see that it has been of an open and unenclosed character ever since. An encroachment on a piece of the ground will not entitle the magistrates to take the whole of it.

As to the evidence of possession, I do not require to enter into it, as Lord Ormidale and the Lord Ordinary have fully considered it. The right here is not that of servitude capable of

being lost *a non utendo*, but rather a right of the public of Kirkcaldy, vested in the corporation for them.

The only remaining question is, Whether this ground is truly part of the commonty termed the Volunteers' Green? I think that has been clearly established, and consequently that the neglect shown as regards this angle of ground will not place it in a different position from the rest. Power is given to sell the other greens, but not thus to deal with the Volunteers' Green. Although the corporation cannot divert this ground from the public use, they maintain that it is within their power to sell to themselves as police commissioners. I do not see how this can be, for I am not satisfied that the clauses of the Police Act give to the magistrates as police commissioners any broader right to take lands than they would have had as magistrates.

The Court adhered, superseding extract till 20th October.

Counsel for Pursuer (Respondent)—Dean of Faculty (Fraser)—Kinnear—M'Kechnie. Agents—Curror & Cowper, S.S.C.

Counsel for Defenders (Reclaimers)—Guthrie Smith—A. Gibson—Pearson. Agents—H. & H. Tod, W.S.

Saturday, June 28.

FIRST DIVISION.

[Exchequer Cause.

ROGERS *v.* INLAND REVENUE.

Revenue—Income-Tax Act (5 *and* 6 *Vict. cap.* 35), *Schedule* (*D*) *and sec.* 39—*Liability of Ship-Captain for Income-Tax—Where Absent from Great Britain during Whole Year.*

The captain of a British ship was absent in charge of his vessel during the entire year to which an income-tax assessment applied, but his wife and family lived at home in his house in this country. *Held* that he was liable in the assessment.

In this case David Rogers, master mariner, appealed to the Income-Tax Commissioners for the Kirkcaldy district of Fifeshire, against an assessment under Schedule (D) of the Income-Tax Acts for the year ending April 5, 1879, on the sum of £240. It appeared that he had been absent from Great Britain in command of his ship during the whole year of assessment, but that he possessed in his own name a house at Innerleven, in Fifeshire, where his wife and family had resided during the year in question, that he had no dwelling-house in any other country, and that he would return to Great Britain when ordered by his employers, as he had no present intention of residing out of it.

By 5 and 6 Vict. cap. 35 (Property Tax Act), sec. 39, it was enacted "that any subject of Her Majesty whose ordinary residence shall have been in Great Britain, and who shall have departed from Great Britain and gone into any parts beyond the seas, for the purpose only of occasional residence, at the time of the execution of this Act, shall be deemed, notwithstanding such temporary absence, a person chargeable to the duties granted by the Act as a person actually residing in great Britain, and shall be assessed and charged accordingly (in manner hereinafter directed) upon the whole amount of his profits or gains, whether the same shall arise from property in Great Britain or elsewhere, or from any allowance, annuity, or stipend (except as herein is excepted), or from any profession, employment, trade, or vocation in Great Britain or elsewhere."

The Commissioners confirmed the assessment.

The appellant having obtained a Case for the opinion of the Court of Exchequer, argued—This case was not within *Young* v. *Inland Revenue*, July 10, 1875, 2 R. 925, inasmuch as here the appellant had been absent from Great Britain during the entire year of assessment. [The Lord President referred to *Brown* v. *M'Callum*, Feb. 14, 1845, 7 D. 423.]

The respondent was not called on.

At advising—

LORD PRESIDENT—I have no doubt about this case at all. It is ruled by the case of *Young*. Every sailor has a residence on land, as Lord Mackenzie very well puts it in the case of *Brown* v. *M'Callum*, and the question is, Where is this man's residence? The answer undoubtedly is, that his residence is in Great Britain. He has no other residence, and a man must have a residence somewhere. The circumstance that Captain Rogers has been absent from the country during the whole year to which the assessment applies does not seem to me to be a specialty of the least consequence, That is a mere accident. He is not a bit the less a resident in Great Britain because the exigencies of his business have happened to carry him away for a somewhat longer time than usual during this particular voyage.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

Counsel for Appellant—Dean of Faculty (Fraser)—Scott. Agents—J. & J. Galletly, S.S.C.

Counsel for Inland Revenue—Solicitor General (Macdonald)—Rutherfurd. Agent—Solicitor of Inland Revenue.