judgment of the Dean of Guild of the burgh of Greenock, and is brought under the 36th section of the Judicature Act (50 Geo. III. cap. 112) on the ground of defect of jurisdiction. The appellant says that the Dean of Guild cannot competently decide the questions raised in the record. Now, the 36th section of the Act provides that there may be advocation on any of the following grounds—[*reads section as above*]. This appeal is not one of the cases specified under the third head, and therefore under the Act of Parliament the appellant required no leave from the inferior Judge to come here. But it is said that the Act of Sederunt of 12th Nov. 1825, passed under the authority of a totally different Act of Parliament—that of 6 Geo. IV. cap. 120—makes it necessary to obtain leave from the inferior Judge before presenting an appeal in any of the cases specified in the 36th section of the Act of Geo. III. The provision of the Act of Sederunt is in these terms—[*reads as above*].

Now, if the effect of this provision is to take away the absolute right of appeal conferred by the 26th section of the Act of Geo. III. in regard to appeals on the ground of want of jurisdiction, it would certainly be a very serious interference with the right conferred by that statute. A judge who exceeds his jurisdiction is just the man to refuse to grant leave to appeal. An objection to the jurisdiction of the judge is just the right of all others which is most sacred. Therefore it would be very peculiar if the effect of the Act of Sederunt were to take away this right. Accordingly, I do not think that that is its meaning at all. I think the phrase "liberty of advocation," though not a very happy one, is just equivalent to the "leave" spoken of in the 36th section of the Act of Parliament. If that is the true construction, then what the Act of Sederunt does is to prescribe the form in which leave is to be obtained in those cases in which it is required; and the Act of Sederunt would read—"leave to advocate must be obtained upon an application by petition to the Court, which must not contain any argument, but shall merely relate the interlocutors to be advocated." That is the prescribed form in which leave is to be obtained. I am quite satisfied that the Act of Sederunt was not intended to go any further.

LORD MURE and LORD SHAND concurred.

LORD DEAS was absent.

The Court recalled the objection to the competency of the appeal.

Counsel for Appellant — Kinnear — Asher. Agents—T. & R. B. Ranken, W.S.

Counsel for Respondent — Robertson — M'Kechnie. Agent—W. B. Glen, S.S.C.

Wednesday, January 19.

SECOND DIVISION.

[Lord Adam, Ordinary.

GRAHAME *v.* SWAN AND OTHERS (MAGISTRATES OF KIRKCALDY).

(Sequel to case reported *supra*, vol. xvi. p. 676, and 6 R. 1066.)

Burgh—Common Good of Burgh—Encroachment by Magistrates on Burgh Property — Equitable Jurisdiction of Court where restitutio in integrum *not reasonably possible.*

The magistrates of a burgh having begun to erect municipal stables on a piece of ground which was vested in them for the common use and enjoyment of the inhabitants of the burgh, a member of the community obtained interdict against that or any other encroachment on the ground in question. Pending the proceedings for interdict the magistrates had completed the stables at a cost of £2000. The complainer thereafter raised an action concluding to have the stables removed. In defence the magistrates offered another piece of open ground, larger and more convenient for public uses. *Held* (1) that in the circumstances of the case *restitutio in integrum* was not reasonably possible, and should not be granted; (2) that the offer made by the magistrates was reasonable and sufficient, and the action therefore *dismissed.*

This was an action at the instance of James Grahame, dyer, Kirkcaldy, against Patrick Don Swan and others, the magistrates of that burgh, for declarator (1) that a portion, particularly described in the summons, of the South Links or South Commonty of Kirkcaldy was vested in the Provost, Magistrates, and Council of Kirkcaldy "on condition that the same should be kept in perpetuity for the use and enjoyment of the inhabitants of Kirkcaldy, for the purpose of bleaching clothes, recreation, and other similar purposes;" "(2) that from time immemorial, or at all events for forty years, the said portion of the said South Links or South Commonty has always been open and patent to the whole of the said burgh of Kirkcaldy, and that the said inhabitants have, for the said period, used, possessed, and enjoyed the same without hindrance, prohibition, or interruption, for drying and bleaching clothes, recreation, and other similar purposes; (3) that the defenders have no right or title to dig foundations in, or in any way to trench or cut up for building purposes, the said lands, nor to erect stables or any other buildings or erections of any kind thereon, or on any part thereof; and (4) that the erection by the defenders of stables or any other buildings or erection upon the said portion of the said South Links or South Commonty, or any part thereof, was and is illegal, unauthorised, unwarranted, and was and is to the prejudice of the rights and interests of the pursuer and other inhabitants of the burgh of Kirkcaldy in so far as regards his and their rights of bleaching, drying clothes, and other rights competent to them in, upon, or over the said lands." Further, the pursuer concluded for declarator

that the defenders had no right to erect stables or any other buildings on the ground in question, and that the erection of such buildings was a use of the ground "to the prejudice of the pursuer and the other inhabitants of the said burgh of Kirkcaldy." Further, whether decree of declarator should be pronounced in terms of the declaratory conclusions or not, the pursuer concluded that the defenders should be ordained "(*first*) to take down the stables and other buildings erected upon the said piece of ground, to remove the same, and the whole materials of which they are formed and composed of, from the said portion of the said South Links or South Commonty; and (*second*) to restore the said portion of the said South Links or South Commonty to the state and condition in which it was at and prior to the putting up of the said stables, buildings, and erections." Failing such removal by the defenders before expiry of the days of charge, the pursuer concluded that he be authorised to remove the stables, buildings, and other erections at the expense of the defenders.

In a previous process of suspension and interdict between the same parties, *supra*, vol. xvi, p. 676, and 6 R. 1066, the Lord Ordinary (ADAM) on 4th January 1879 pronounced an interlocutor interdicting the magistrates from encroaching on the ground in question, from digging foundations or cutting trenches in it, and from erecting stables or other buildings on it. On 19th June 1879 the Second Division adhered to this interlocutor, but meantime superseded extract. Pending that process of suspension and interdict, in which interim interdict had not been granted, the magistrates being under obligations to contractors for the works, completed the erection of the municipal stables on the ground in question, which it was the object of the suspension and interdict to prevent them from building. The cost of the stables was £2000. The pursuer now brought this action to have them removed.

He pleaded, *inter alia*—"(5) The question of the pursuer's rights being now *res judicata*, he is entitled to have the said buildings removed and to have the ground restored to its former state, as concluded for."

The Provost and Magistrates defended the action.

They pleaded—"(2) The defenders having acted in *bona fide*, and having offered a full compensation for the ground in dispute, the pursuer is not entitled to decree as concluded for."

The Lord Ordinary (ADAM) on 23d June 1880 pronounced this interlocutor:—Finds and declares in terms of the declaratory conclusions of the action: Further, ordains the defenders to take down the stables and other buildings erected upon that portion of the South Links or South Commonty of Kirkcaldy mentioned in the conclusions of the action, and to remove the same, and the whole materials of which they are formed and composed, from the said ground; and further ordains the defenders to restore the said portion of the said South Links or South Commonty to the state and condition in which it was at and prior to the putting up of the said stables and other buildings, and decerns."

He added this note:—"This case is the sequel of a former case between the same parties decided by the Court on 19th June 1879, and reported 6 Ret. 1066.

"It is with regret that the Lord Ordinary has pronounced the preceding interlocutor, but he does not think that any other alternative is open to him.

"It is not a case in which the proceedings of the defenders, which have been found to be illegal, can be met by any pecuniary compensation to the pursuer. The compensation, accordingly, which the defenders offer to give, is to provide another piece of ground of greater size, and in a more convenient situation than that of which they have wrongously taken possession. In other words, they propose to give another 'Green' in place of this one, in another though not far distant part of the town. The 'Green' proposed to be substituted may probably be in a more convenient situation for many of the inhabitants of the town, but it would not appear to be so for the pursuer and other inhabitants who live in the vicinity of the present one. It appears to the Lord Ordinary that such inhabitants have reasonable grounds for objecting to the proposal, and that they are entitled to insist that matters shall remain in that respect *in statu quo*. The proposal now made by the defenders seems to be similar to that which they recently endeavoured to obtain authority to carry into effect by Act of Parliament, but which the Legislature refused to authorise.

"The Lord Ordinary was referred to the case of *Couper & M'Leod* v. *The Edinburgh Improvement Trustees*, July 18, 1876, 3 Ret. 1106, but he does not think that it applies to the present case."

The defenders reclaimed, and argued—Where an encroachment of this nature has been made, and full compensation is offered, the Court will not do mischief by ordering removal merely because the other party stands on his right. The general principle of *Begg* v. *Jack*, 26th October 1875, 3 R. 35, was that in all such cases there is in the Court an equitable power to award an equivalent where *restitutio in integrum* is not reasonably possible. The pursuer affects to be suing in the public interest an action which if he succeeds will cost the community £2000.

At advising—

LORD GIFFORD—This case the Lord Ordinary very properly calls a sequel to a former case between the same parties, having reference to the same piece of ground—a part of what is known as the Volunteers' Green—at Kirkcaldy, of which the inhabitants of that town have hitherto had full and unrestricted use. Both cases have been raised at the instance of the respondent Grahame, who comes forward as a member of the community to prevent the magistrates encroaching upon the ground in question. In the former case the respondent succeeded in having it decided that the magistrates were not entitled to encroach upon it so as to deprive the community from getting the use of it as a bleaching-green and applying it to some other purpose, even although that other purpose was one in which the community were interested. That has been the decision of this Court.

But then Grahame comes with this action, asking the Court to remove, or order to be removed, from that ground, a stable, or a set of stables, of

considerable extent, erected by the magistrates as the town's stables at considerable cost; and the question is, whether the Court are to accede to this motion or not—the motion, namely, to order the removal of these stables from the Volunteers' Green, at whatever risk or cost.

Now, this is a case in which the pursuer is founding and insisting on his strict legal rights. He says, that it is for the interest of the community, of which he is a member, that this piece of ground, which has hitherto been put to all sorts of common purposes, should and must at all hazards, and at whatever cost, be kept clear of all erections. He cannot, and he does not, aver that the community are so interested in it that the expense of the removal will not virtually cost the community more than it is worth; but he says the Court are bound, without considering questions of expediency, or, generally, the interest of the community at all, to order the removal of the buildings as the logical sequence of their former judgment. Now, I cannot but record my dissent from that proposition. I do not think it follows that because a party is successful in a declaratory action—an action declaring that a certain piece of ground shall not be put to any except certain uses—any buildings that may have been put upon it are simply to be removed. Cases have been referred to by counsel for the appellants, and I think there are a great many others which have not been referred to, where, encroachments having been made in excusable circumstances, the Court declined to order the demolition of the buildings, as that would not be doing substantial justice between the parties where their interests could otherwise be sufficiently protected.

Now, the question in this case is, what is the fair construction of the respondent's rights as a member of the community in the circumstances which have arisen? In neither of the actions is anything of the nature of a servitude claimed. In the declaratory action it was sought to be declared that the ground in question is vested in the magistrates and council on the condition that the same should be kept in perpetuity for the use and enjoyment of the inhabitants of Kirkcaldy for the purposes of bleaching clothes, recreation, and other similar purposes; that the defenders have no right or title to dig foundations in, or in any way to trench or cut up for building purposes, the said lands, nor to erect stables or any other buildings or erections of any kind thereon, or on any part thereof, and so on. We heard nothing, and we have heard nothing yet, of rights of servitude of view, or right of seeing over this disputed ground. That was not the case at all; if that had been the case, its complexion would possibly have been considerably changed. That would have been a right—a special right—of certain uses in this ground. The claim was and is that this ground is held under titles for behoof of the community of Kirkcaldy, who seem to have used it chiefly, if not solely, for a bleaching-green. It may have been put to other common purposes, but substantially it was a bleaching-green. Men may have played quoits over it, or other games, and children may have tumbled about upon it, but these were all accessory to its use as a piece of open grass-covered ground.

Dealing with it, therefore, as substantially a bleaching-green, the question comes to be, part of it having been illegally and improperly taken away by the magistrates, what is to be done to remedy the error they committed?

The magistrates say, and I think say very reasonably—"We are very sorry about this. We have taken a piece of this ground,"—something less than an acre I think it is—"and so far encroached on the bleaching privileges of the community. But we are quite willing to restore what we have lost, not quite fourfold, but to the extent of twice as much as has been taken away; and although the ground we will thus substitute will be in another place, it will be equally applicable to the purposes of walking or breathing the air, and it will also be a bleaching-green." No doubt this substituted ground is not in the same neighbourhood; it is a quarter of a mile away or something of that kind. But it so happens that the ground which has been improperly abstracted for bleaching purposes was adjacent to the existing bleaching-green; and nobody who considers the position of the two greens for a moment can doubt that the new green which is proposed will relieve the pressure on the old bleaching-green, coloured yellow on the plan. This will make the new bleaching-green as good as if it were beside the old, because the inhabitants who adjoin the new bleaching-green—coloured green on the plan—will no longer resort to the "yellow" green, which will thereby be substantially enlarged for those in the immediate vicinity.

Now, it does appear to me that this is a fair and reasonable proposal; and unless there is an absolute law compelling me to order the buildings to be taken down and the ground to be restored to its former condition—not a very good or sweet condition, even at the best—I am disposed to give effect to the offer the magistrates have made, and to find that in respect of that offer the magistrates are not bound to demolish the buildings which have been erected on this vacant piece of ground.

But it is further said that these buildings have been put up by the magistrates, not in any ignorance of the claims of the respondent, but in the face of an interdict which was applied for. Now, I think it sufficiently appears—it was even so stated by Grahame's counsel—that there was a great deal done before the interdict was sought. The walls were up to the height of six feet. Substantially the whole of the contracts had been entered into, although the wright's was not signed until, I think, the 8th of May. The mason's contract had, at all events, been signed some time previously, and the work, as we all now know, was being proceeded with. I think we have enough to prove—it came out incidentally, to say the least, in the former case—that several hundreds of pounds were expended. That, I think, was substantially carrying on the contract; and if the same question had been raised at that time it would have been a fair answer to have said—"Oh! no; don't let us lose these £700 or so that have been expended. We will give you another piece of ground, which will be more than an equivalent."

I am disposed, therefore, on the whole matter, to sustain the defence of the magistrates so far as it is covered by the second plea stated for them, and to say that although they have done wrong they are not now to be compelled to demolish the buildings which they have erected in

error—which would be to lose absolutely every sixpence which has been expended on the ground—but that they have made offer of a fair equivalent to the community—for it is the community we are dealing with—by tendering the substituted bleaching-green. I think the result thus arrived at will be the fair one. Indeed, I have no doubt as to the equity of the case at all.

Lord Young—Such cases are always cases of circumstances, and of more or less nicety according to the facts on which they stand. It appeared to me from the time I understood this case, and it appears to me now, that the true consideration is, what is the interest of the community itself? Not that we are to enter upon nice questions on that head, but that if there be strong and preponderating interest one way or another, it appears to me that we are at liberty in regard to it, and being at liberty are reasonably bound to give effect to that which appears to be the strong preponderating interest of the community. The magistrates of Kirkcaldy are proprietors of the ground in question, called the Volunteers' Green, for behoof of the community. As matter of title, I suppose they hold it upon royal grant, as part of the common good. Now, it is very important that open spaces should be preserved in towns, and especially in growing towns like Kirkcaldy, for air and recreation, and such useful purposes as are consistent with these things, and drying clothes too, which is all that is meant by bleaching here—putting out things to dry after a washing; and the magistrates, as proprietors for behoof of the community, and the guardians of the interests of the community, are not at liberty to change the use of pieces of ground which have from time immemorial been kept as open spaces for air and light and exercise, drying clothes, and so forth. If they propose to interfere with that very wholesome and beneficial use, any of the members of the community may have a remedy by resorting to this Court. That is my view of the law of such cases, and I assume that it was upon that view of the law that the Court proceeded in that application for interdict at the instance of the present pursuer against the magistrates, of which we have heard so much. Grahame said—"You, as the proprietors of this piece of ground for behoof of the community, and the guardians of the interest of the public in the matter, are not entitled to divert this piece of ground from its established wholesome use, in the continuance of which the community is interested." The Court granted interdict in the interest of the community.

Now, I have observed in the course of the argument here what appears to me to be according to the law of the matter, that if no one interfered, or called the conduct of the magistrates in question in dealing with community property, or proposing to deal with it in a manner inconsistent with the public interest in it, their title is abundantly sufficient to give anybody a right to build houses. Why, Scotland in all its considerable towns is covered with illustrations of the law being to that effect; for there is scarcely a piece of ground—an open space of ground—dedicated to the use of the community for air and recreation, that has not been diminished in size by being encroached upon by buildings erected under titles granted by the magistrates. They have been diminished, all of them, and some of them very notably so. In Edinburgh we have several instances of it. There is no question about the title of the magistrates to do that; and no question about the right of this Court, on a complaint of any of the community, to hinder the magistrates from so acting as to interfere with the legitimate interests of the community or to preserve the *status quo*.

Here it so happens that when the Court was appealed to for that purpose they refused to restrain the magistrates, they being under contracts to erect these stables, and having proceeded a certain length with the erection of them. In the result they took the view that it was in the interests of the community that the space should be kept open, but before that was determined the buildings were completely up, and the present application is to have them demolished. It so happens that they can be demolished at a cost to the community of about £2000; but the demand of the respondent would, no doubt, have been the same if the cost of the demolition had been £10,000 or £20,000—any sum you choose to instance. Mr Kinnear said you might figure an instance in which the interest would be so large against granting an order for the removal of buildings which ought not to have been erected, that the Court in the exercise of its reasonable discretion would refuse to direct their removal. Now, that is the very test we have to apply in this case. The building may have been of such a kind or of such an extent that we might not have hesitated to order its removal. On the other hand, the building might be such, that it would really not be acting according to the reasonable discretion committed to us, in the interests of the very public in whose interest the action bears to be brought, to order the removal of the buildings. And I think that is the present case. It is only £2000, to be sure, but that is a considerable sum taken in connection with a little bit of ground with such a history as this ground—not the Volunteers' Green, be it remembered, but a little bit of it—which, therefore, according to the evidence about it—and I am taking the *precis* of it as given in the report of the former case, which I have read—has been kept in a very nasty manner.

In these circumstances, and seeing that the erection of these buildings was entered upon not contumaciously, but *bona fide* in the interests of the community, I am not prepared to say we should order them to be removed at that cost. And the cost would be not merely the pecuniary loss — for I give the magistrates credit for being reasonable and intelligent guardians of the interests of the community; and they have determined, I suppose with the approbation of the councillors elected by the public themselves, that this is the most convenient place for the municipal stables. Therefore the pursuer here does not ask us merely to demolish the buildings. We are not merely to order their removal, and destroy the labour and material to the extent of £2000—utterly destroy it,—but we are to disappoint the community itself in the convenience which has been accomplished—a convenience which the magistrates say is a convenience for them. In such circumstances I am not prepared to order the removal of these buildings, and I would not be prepared to order their removal

even if there were more of them. I suppose the ground is under a quarter of an acre in size. It is a very little bit of ground altogether, and there is a large space of vacant ground adjoining on the opposite side of the street, which appears always to have been used in a more respectable manner than this part in question has been. It would be a stronger case of the kind if the ground had been less, only some square yards perhaps; but it would only have been stronger for proceeding on such grounds as I have been indicating; the principle would have been the same. Therefore, if there were any more buildings, I should not have ordered their removal.

But we have more than that here, and I attach great importance to it, although in my view of it it is a subsidiary and not the primary part of the case. The primary part of the defence in my view is that which I have been stating. But the further and subsidiary matter is nevertheless also of importance. It is this, that the magistrates and council, who are the intelligent and reasonable guardians of a community's interests, have shown us on this record—and it is not substantially disputed—that they are prepared to provide another piece of ground for the purpose of bleaching and recreation, of greater size and more convenient situation. I take it that they will do that; and I think it should be put in the judgment as a condition of the buildings being allowed to remain that they will provide another piece of ground. It seems to be according to Lord Gifford's opinion, in which I concur, that the magistrates and council shall do that. It is their own undertaking, and I think they will do it. They have indicated the position of that substituted piece of ground by marking it on the plan before us, and they promise upon their responsibility as magistrates, and the guardians of the community's interest, to provide another piece of ground for the purposes of bleaching and recreation, of greater size, and in a more convenient situation.

For these reasons, I entirely concur in sustaining the second plea-in-law which is here put forward in defence, and in refusing the conclusion of this action.

Lord Justice-Clerk—I entirely concur in the result at which your Lordships have arrived. The position of the case is this:—The community, through one of their number, bring this proceeding for interdict against the administrators of the common good—the magistrates—on the ground that the magistrates have been making use of the property of the burgh which is beyond the right, beyond their trust, and beyond their power. We have found that that is so, and we have interdicted them from building or erecting buildings upon this ground, or in any way interfering with it so as to prevent the public purposes which we have held it was substantially intended to serve. It indeed turned out that there had been a much larger piece dedicated to those purposes at one time, and it had been, it was alleged, improperly diminished; but length of time had prevented any question, to say nothing of Parliamentary interference.

In this case, before the interdict was granted, a certain part of the buildings complained of were in course of erection, and they were indeed erected before judgment was pronounced. The question is, whether to carry out that judgment it is essential that those buildings should now be removed? It is said they can only be removed at a cost of a couple of thousand pounds to the community, or to those who illegally put them up, but that that is no matter, and that they must be removed at whatever cost. In my opinion, there is only one ground upon which the contention in the negative can rest, and that is, that although any benefit which the community might have derived from the buildings could not for a moment protect them in law, yet that as the magistrates were in a position to offer a fair and reasonable equivalent, seeing that *restitutio in integrum* was not reasonably possible, that offer should be accepted instead of *restitutio in integrum*, and instead of specific implement of the findings of the interlocutor.

But I think we are entitled to consider the question further. It is not a matter of whether the existing buildings will be more convenient for the community than if they were removed to another place. The question is, whether or not the offer of ground to fulfil the specific purpose to which the ground was originally dedicated should come in place of specific implement of the findings referred to? I must confess I should have expected a citation of authorities on this matter; but it seems to me to be within the equitable powers of the Court—where we are satisfied on the one hand that no interest will be endangered, and on the other hand that great loss will be incurred—to authorise a party to accept an equivalent for a right of this kind. I am much mistaken if there are not a great many instances to be obtained of public rights to the use of open spaces, of public rights to wells, and other rights of that kind, being dealt with in that way—an equivalent equally convenient, and much less burdensome to the party involved, being given.

I am disposed to dispose of the case solely on that ground. I do not find in this record, nor do I hear it from counsel, that if the suggestion of the parties here as a mode of settling the case were adopted, the rights of the community would not be effectually protected and preserved.

Therefore we shall sustain the second plea in law stated for the magistrates, and the defenders in respect thereof shall be assoilzied, on condition that the ground offered as an equivalent, and coloured green on the plan, be given.

Thereafter the magistrates executed a disposition in favour of themselves for the public interest of the piece of ground which they offered on record to provide in lieu of that taken by them, and the Court on 19th January 1881 recalled the interlocutor of the Lord Ordinary and sustained the second plea-in-law for the defenders.

Counsel for Pursuer — Kinnear — M'Kechnie. Agents—Curror & Cowper, S.S.C.

Counsel for Defenders—Trayner—A. Gibson. Agents—H. & H. Tod, W.S.