tute dated 25th April 1921, which disposed of the whole merits of the case, did not contain any words securing to him an opportunity to claim compensation under the Act of 1906. The hardship was, however, more apparent than real. The workman's solicitor might, while addressing the Sheriff upon the evidence in the action of damages, have requested that the judgment, if it should be unfavourable to his client, should reserve his right to claim compensation under the Act of 1906. Or again, when he read the interlocutor of 25th April 1921 unconditionally deciding the action of damages unfavourably to the workman, he might have appealed either for the purpose of having the judgment reconsidered on its merits or for the purpose of asking for an opportunity to institute proceedings under section 1 (4).

I think that, looking to the decisions, we have no course open except to hold that the proceedings in the Sheriff Court subsequent to 25th April 1921, which resulted in the assessment of compensation to the injured workman, were *ultra vires* and void, and must therefore be set aside.

With regard to the other matters to which your Lordship has referred, I have nothing to add to what has been said.

LORD CULLEN—When we had before us formerly the appeal by way of Stated Case relating to this unfortunate accident, the timeousness of the workman's motion for assessment of compensation was very fully canvassed in the argument, and in disposing of the case I ventured to say in my opinion that I thought the authorities relating to section 1 (4), and particularly the case of *Slavin* v. *Taylor* (1912 S.C. 754), necessitated the view that the workman's motion on 7th June 1921 came too late. Having given my best consideration to the argument addressed to us to-day by Mr Stevenson, I remain of that opinion. If it be right, then it follows that the Sheriff-Substitute, when he pronounced the interlocutors which are brought under reduction, was *functus officio*, and that these interlocutors were pronounced without jurisdiction, so that the pursuers are entitled now to have them reduced.

I am unable, like your Lordship, to see any sufficient ground for sustaining the sixth plea-in-law for the defender in this action to the effect that the pursuers are barred *personali exceptione* from pursuing the reduction—a plea in support of which no authority was cited to us.

LORD SANDS—This has been a very protracted litigation. I confess when the case was last before us I had some hopes that the pursuers would be content with having elicited from the Court pronouncements in law in support of the general propositions which it was their interest to maintain, and that they would have been content to let this particular case rest as it had been decided by the Sheriff-Substitute. For reasons which I have no right to criticise because I have not the materials for judgment before me, matters have not taken that course. And now after a considerable interval and much procedure the case is again before us for consideration. The grounds of the Lord Ordinary's interlocutor have not been supported in argument, and as the case has been presented to us I find no reason for differing from the conclusion in law at which your Lordships have arrived, and I concur in the judgment.

The Court recalled the interlocutor of the Lord Ordinary and granted decree of reduction.

Counsel for the Pursuers—Hon. W. Watson, K.C. — Robertson, K.C. — Jamieson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Defender—Mackay, K.C. — W. H. Stevenson. Agents — J. Miller Thomson & Company, W.S.

Thursday, July 17.

SECOND DIVISION.

(Before Seven Judges.)

[Sheriff Court at Cupar.

M'LEOD *v.* MAGISTRATES OF ST ANDREWS.

Reparation — Negligence—Safety of Public —Footpath Crossing Public Golf Links— Pedestrian Hit by Golf Ball—Liability of Magistrates of Burgh—Relevancy.

A girl aged eleven brought an action against the magistrates of a burgh and a player on a golf course over which the magistrates exercised an administrative control, for damages for permanent disfigurement caused by her being struck by a golf ball driven by the player. She averred that she and her mother had taken lodgings in the burgh, and that while walking on a path running parallel to the line of the first hole she sustained the injuries in question, that the path was in dangerous proximity to the line of play, that balls were frequently driven on to or across the path, and that this danger was known to the first defenders, that these defenders put up notices requesting the public not to cross the course but to keep to the paths, and that these notices constituted an invitation to the public to use a part of their property which they knew to be dangerous. The action was defended by the magistrates. *Held* (by a majority of Seven Judges, *diss.* Lord Hunter and Lord Anderson) that the pursuer had stated a sufficient case for inquiry, and proof before answer *allowed.*

Barbara M'Leod, Dennistoun, Glasgow, *pursuer*, brought an action in the Sheriff Court at Cupar against the Magistrates and Town Council of St Andrews and Shereef Mohammed Emin, student, St Andrews, jointly and severally or severally, *defenders*, for payment to the pursuer of £200 damages.

The pursuer averred, *inter alia*—"(Cond. 1) The pursuer is the pupil daughter, aged

eleven years, of Robert M'Leod, formerly of Alexandra Parade, Glasgow, whose present address is unknown, and the action cannot be raised in his name as tutor or his sanction obtained. She resides with her mother Mrs Alexandrina M'Leod, wife of the said Robert M'Leod, who is living apart from her husband in voluntary separation. The said Robert M'Leod has been separated from his wife for over seven years. He does not support her or the pursuer, and has taken no part in the care and upbringing of pursuer. The first-named defenders are the municipal authority of the burgh of St Andrews, and the second-named defender is a student in attendance at the University of St Andrews, and resides at 83 North Street there. (Cond. 2) On Tuesday, 12th June 1923, about 6·45 p.m., when the pursuer and her mother were walking on the path leading from Golf Place, St Andrews, to the seashore there she was struck upon the face by a golf ball which had been driven by the second-named defender from the tee of the first hole of the golf course known as the Old Course. The golf ball was sliced by the player, hit the fence, and ricochetted therefrom, striking the pursuer as aforesaid. (Cond. 3) The accident took place at a point on the said path about two or three yards east of the junction with Grannie Clark's Wynd. The path is a public path maintained by the first-named defenders, commencing at the north end of the street known as Golf Place and leading to the West Sands, a part of the seashore at St Andrews, to which part it is the customary and regular means of access. It is much frequented by the public. The pursuer and her mother, who were on their first visit to St Andrews at the time of the accident, were returning by the said path from the seashore to their residence in town. . . . The pursuer and her mother took up residence in St Andrews at the beginning of the month of June, having engaged lodgings there for the month. (Cond. 4) The first-named defenders are the proprietors of the links of St Andrews, across a portion of which the said pathway runs. Said links are administered by the first-named defenders as public recreation grounds under the St Andrews Links Act 1894, the St Andrews Burgh Extension and Links Order 1913, confirmed by the St Andrews Burgh Extension and Links Order Confirmation Act 1913, and in virtue of the Burgh Police (Scotland) Acts 1892-1911. The public are entitled and are invited by the said defenders to use the said links for walking, recreation, and the playing of duly authorised games. Under powers conferred upon them by the said statutes the first-named defenders have made bye-laws for the regulation of the said links. (Cond. 5) In pursuance of the powers granted under the said statutes a portion of the said lands are laid off and used as a golf course known as the Old Course, and the first-named defenders make a charge to members of the public for playing upon it. The north boundary of the first hole of said golf course adjoins the said path, and a fence marks the boundary and separates the path from the said course. The said first hole runs parallel to the said pathway. With reference to the averments in answer, it is admitted that the Old Course has been used as a golf course and played on as such from time immemorial. It is not known and not admitted that the first hole and the pathway were at the date of the accident in the same positions as they occupied at the time of the passing of the St Andrews Links Act 1894. (Cond. 6) Owing to the proximity of the said hole to the path golf balls are frequently driven by players on to and across it, a considerable portion of the same being within the range of a golf ball sliced by a player of average strength driving from the tee of the said hole. Said driving of balls on to and across the pathway is a menace to the public passing along it and makes the path dangerous to use. The existence of said danger was well known to the first-named defenders and their servants before the date of the said accident. They knew that balls frequently landed on or were driven over the pathway, and that it was probable, and indeed practically certain, that persons using the pathway would be struck. So well aware were the first-named defenders of the said danger that they took steps to insure against claims by members of the public in respect of injuries sustained through being struck by golf balls. The said danger was not patent to members of the public, and the pursuer and her mother were unaware of it. (Cond. 7) The first-named defenders invite members of the public to use the said pathway. At the commencement of the said links at Golf Place, and at a point there near to the eighteenth green, the first-named defenders have placed a notice in the following terms:—'NOTICE.—Members of the public desiring to visit the putting green, West Sands, bathing stations, or pierrot performances are earnestly requested *not* to cross over the golf course but to follow the footpaths round the Royal and Ancient Club House, and keep strictly to the footpaths bounding the first hole of the Old Course. By order. St Andrews Town Council. *June* 1919.' At the junction of the pathway with Golf Place the said defenders have erected a notice-board containing a notice in the following terms:—'NOTICE.—To putting green. To West Sands. To pierrots. Please do not cross the golf course; keep to footpaths. By order. St Andrews Town Council. *June* 1919.' On this notice-board there are arrows which point along the said pathway. There are also two notices on the north side of the said pathway, one near its junction with Golf Place and the other at its junction with Grannie Clark's Wynd, both of which are to the following effect:—'No cycling allowed on the footpath. By order. St Andrews Town Council. *June* 1919.' On the date of the said accident all said notices were exhibited, and were in the respective positions above mentioned. (Cond. 8) The said accident and injuries to the pursuer were due to the fault and negligence of the first-named defenders. It was their

duty as proprietors having control of the said links to see that the said pathway was safe for members of the public using it, and to give reasonable protection to members of the public against the danger of being struck by golf balls. The first-named defenders were in fault in placing the first hole and the pathway in close proximity, or in permitting them to remain so situated. Being well aware of the danger arising from the proximity of the said hole and pathway it was their duty to protect members of the public against the said danger by adequate warning or otherwise. Having invited members of the public to use the pathway it was their duty to take steps to ensure that the public might use it in safety. The said defenders failed in these duties, and took no steps to warn the public of the danger or to protect them against it. Further, under the St Andrews Links Act 1894 and the St Andrews Burgh Extension and Links Order Confirmation Act 1913, and under the Burgh Police (Scotland) Acts, it was the duty of the first-named defenders to maintain the said links in a reasonably safe condition for the use and enjoyment thereof by the public. It was their duty under the said statutes to maintain the said pathway in a reasonably safe condition for members of the public passing along it. The first-named defenders failed in their said statutory duties by taking no steps to protect the public from the danger of being struck by golf balls on the said pathway. As a result of the first-named defenders' said failures and negligence the accident occurred. With reference to the defenders' statement in answer, explained that the pursuer was proceeding along the pathway in the direction leading to Golf Place. (Cond. 9) It was the duty of the second-named defender before driving from the said tee, in accordance with regulation 17 of the bye-laws made by the said defenders dated 22nd December 1913, copy of which is lodged herewith, to see that no person was in a position of danger, and if such was the case to warn them by shouting 'Fore' before playing, and by allowing such person a reasonable opportunity to get out of range in accordance with said bye-law, which is as follows:—'17. No player shall drive a ball if any person is in a position of danger without first shouting 'Fore,' and allowing such person a reasonable opportunity to get out of range.' The second-named defender failed to give due warning to the pursuer and her mother or to allow them reasonable time to get out of range, and the first-named defenders' servant, the ranger on duty at the said first tee, whose duty it was to start players from the first tee in accordance with the bye-laws, failed to see that the second-named defender complied with said regulation when playing. The said accident was caused by the negligence of the second-named defender in failing to observe the provisions of No. 17 of the bye-laws, and by the negligence of the servant of the first-named defenders in allowing said failure on the part of the second-named defender. (Cond. 10) The pursuer sustained serious injuries to her face. Her chin was so severely cut that she had to have chloroform administered in order that the wound might be cleaned, dressed, and stitched. She will be disfigured for life. At present she is suffering from severe nervous shock which she sustained. The loss and damage are moderately estimated at the sum sued for. . . ."

The pursuer pleaded, *inter alia*—"2. The pursuer having sustained loss, injury, and damage through the fault and negligence of the defenders or of one or other of them, decree should be granted as craved. 3. The accident condescended on having been caused by the fault and negligence of the first-named defenders as proprietors with control of the links of St Andrews, the said defenders are liable to the pursuer in damages therefor. 4. The first-named defenders having invited the pursuer to use the dathway condescended on, and having taken no steps to protect the pursuer from the said accident, are liable in damages therefor. 5. In respect that the first-named defenders failed to discharge their statutory duties to maintain the links or the pathway in a reasonably safe condition for members of the public, and the pursuer having suffered loss, injury, and damage through their said failure, the said defenders are liable to the pursuer in damages therefor."

The defenders the Magistrates and Town Council of St Andrews pleaded, *inter alia*—"2. The pursuer's averments being irrelevant and insufficient in law to support the conclusions of the initial writ, the action should be dismissed *quoad* these defenders. 4. The averments of the pursuer with reference to insurance by defenders against claims contained in condescendence 6 being improper and irrelevant ought to be struck out of the record. 5. The St Andrews Links being held by these defenders under the various Acts condescended on for certain statutory purposes therein set forth, and no fault or breach of said statutory duties being relevantly averred against them, the action should be dismissed *quoad* these defenders. 6. In respect of there being no responsibility on these defenders as proprietors of the Old Golf Course, St Andrews, for the alleged accident, they should be assoilzied."

The second defender did not enter appearance.

On 8th May 1924 the Sheriff-Substitute (DUDLEY STUART) allowed a proof before answer.

The defenders appealed to the Second Division of the Court of Session, and the case was sent to a Court of Seven Judges.

Argued for the appellants—The danger of walking over a golf course must be assumed to be known to the public. It was impossible to put pathways on golf links which would not be exposed to danger. The pursuer did not aver that if this path had been placed further away the accident would not have happened. A notice would have made no difference, and there was no case on record for notice. The Corporation were entitled to assume that all ordinary precau-

tions would be taken by those who played, and that all who used the links, whether public or players, would act with reasonable care — *Davidson* v. *Aberdeen Magistrates*, (O.H.) 1919, 2 S.L.T. 213; Beven on Negligence, vol. i, p. 51. The averments of fault in the present case were not sufficiently specific—*Johnston* v. *Magistrates of Lochgelly*, 1913 S.C. 1078, 50 S.L.R. 967. This was a case of pure accident—*Gray* v. *Douglas*, 1890, 17 R. 858, 27 S.L.R. 687—or of *volenti non fit injuria*—*Hastie* v. *Magistrates of Edinburgh*, 1907 S.C. 1102, 44 S.L.R. 829: *Stevenson* v. *Corporation of Glasgow*, 1908 S.C. 1034; 45 S.L.R. 860. In the present case there was nothing analogous to a trap—*Hendrie* v. *Caledonian Railway Company*, 1909 S.C. 776, 46 S.L.R. 601. The present case was analogous to the case of the cricket ball—*Ward* v. *Abraham*, 1910 S.C. 299, 47 S.L.R. 252. *Castle* v. *St Augustine's Links, Limited*, 1922, 38 T.L.R. 615, where the liability of a golf club was sustained, was a case of private links laid down beside a public road, and in that case Sankey, J., expressly reserved his opinion as to public links, which he said made a different case altogether.

Argued for the respondent—The pursuer had relevantly averred that if the path had been farther away there would have been no accident. The defenders' notice warning the public not to cross the golf course, but to keep to the footpaths, was an implied guarantee that people staying on the path would be safe. It could not be assumed that members of the public would know that golf balls might be driven across the path. It was not necessary for the pursuer to aver what precautions the defenders ought to have taken—*M'Fee* v. *Police Commissioners of Broughty-Ferry*, 1890, 17 R. 764, 27 S.L.R. 675. The cases of *Hastie* v. *Magistrates of Edinburgh* and *Stevenson* v. *Corporation of Glasgow* (*cit. sup.*) were cases of obvious danger, which the present case was not. The pursuer had relevantly averred negligence against the defenders—*Geddes* v. *Proprietors of Bann Reservoir*, 1878, 3 App. Cas. 430, *per* Lord Blackburn at p. 456; *Reilly* v. *Greenfield Coal and Brick Company, Limited*, 1909 S.C. 1328, *per* Lord Dunedin at p. 1336, 46 S.L.R. 962; *Brierley* v. *Suburban District Committee of County Council of Midlothian*, 1920, 2 S.L.T. 80.

At advising—

LORD PRESIDENT (CLYDE) — The only question in the case is whether the discretion exercised by the Sheriff-Substitute in allowing a proof before answer ought to be interfered with. I have referred to it as a question of discretion because the allowance of a proof before answer involves no decision either on the merits of the case or upon the relevancy of the action but is merely a determination that it is not safe to dispose of the action without inquiry. So far as I am concerned I find myself in the same position as the Sheriff-Substitute. I have the gravest doubt whether on inquiry it will turn out that this pursuer has any case at all. But what makes me think that the Sheriff-Substitute has exercised a wise discretion is what is contained in condescendence 8 of the pursuer's record. It requires to be remembered in reading that condescendence that it is common ground that the defenders have (by statute as it happens) an administrative control over the links, and particularly over the roadways and pathways which cross the links. I am far from indicating any approval of the proposition which is suggested by the averments in condescendence 8, viz., that the defenders are under obligation to "guarantee the safety of the public," which was the phrase Mr Watson used in argument, or "to ensure the safety of the public" which is the phrase actually used in condescendence 8. But I think the averments in question involve this, that the defenders were in fault in allowing the pathway to be in such close proximity to the line of play at the first hole. The meaning I think is that the pursuer charges the administrators of the links with placing, or more correctly with maintaining, that pathway in a position which unnecessarily exposed the public to risk. I am not prepared to say, without knowing anything about the facts and circumstances, that it is impossible (however improbable) that that should form a good ground of action against the Magistrates. If the Court is allowing a proof before answer, the less it allows itself to indulge in a discussion of the merits or of the principles upon which the case may turn out to depend the better. I therefore propose to say no more except that in my opinion the course taken by the Sheriff-Substitute in his discretion was the right one.

LORD JUSTICE-CLERK (ALNESS) — The question in this case is whether the action should be dismissed as irrelevant, or whether the pursuer is entitled to an opportunity of endeavouring to prove the averments which she has made. The pursuer is a pupil, aged 11 years, to whom a *tutor ad litem* has been appointed by the Court. She avers that she has been disfigured for life by being struck by a golf ball, and she attributes blame for her injuries *first* to the municipal authorities of the burgh of St Andrews, and *second* to one Mohammed Emin, who drove the ball which hit her. Mohammed Emin has not entered appearance to defend the action The first-named defenders, hereinafter called "the defenders," have, however, lodged defences, and they maintain that the action in so far as it is directed against them is irrelevant and should be dismissed. The Sheriff-Substitute after argument has repelled that plea and has allowed a proof before answer. We have to decide whether his interlocutor should be affirmed or reversed.

The pursuer avers that she and her mother came to St Andrews in the beginning of June 1923 and took lodgings there. On 12th June they were walking on a path which runs parallel to the line of the first hole, and which is separated from it by a fence, when the pursuer was struck on the face by a golf ball which had been driven by Mohammed Emin from the first tee.

The pursuer avers that the path in question is a public path, which is maintained by the defenders, which is much frequented, and which is the customary and regular means of access to the seashore. The pursuer further avers that the defenders are proprietors of the links on which the path runs, and that the public are entitled and invited by them to use the links for the purpose of walking and recreation. The pursuer proceeds to aver that because of the proximity of the path to the line of the first hole golf balls are frequently driven on to and across it; that this constitutes a menace to the public using the path, and makes its use dangerous; that the existence of this danger was known to the defenders before the date of the accident; that they knew that golf balls frequently landed on and were driven over the path, and that it was probable and indeed practically certain that persons using the path would be struck, but that that danger was not patent to members of the public, and that the pursuer and her mother were ignorant of it. The pursuer further founds on the terms of certain notices which were placed by the defenders at the links. The most important of these notices are the first and the second. The first is in these terms—"Members of the Public desiring to visit the Putting Green, West Sands, Bathing Stations, or Pierrot Performances are earnestly requested not to cross over the Golf Course, but to follow the footpaths round the Royal and Ancient Club House and keep strictly to the footpaths bounding the first hole of the Old Course." The second notice is in the following terms:—"*Notice.*—To Putting Green; To West Sands; To Pierrots. Please do not cross the Golf Course, keep to footpaths." These notices were duly exhibited at the date of the accident to the pursuer. It is averred by the pursuer that the accident which befell her was due to the fault of the defenders, and that it was their duty, as proprietors of the links, to see that the path was safe for members of the public using it, and to protect them against the danger of being struck by golf balls. The pursuer further avers that the defenders were in fault in placing the pathway so near the line of the first hole and that it was their duty to protect the public against danger by adequate warning or otherwise. It is said that having invited the public to use the path the defenders should have taken steps to insure their safety but that they took none. The accident is said to have occurred from this failure in duty on the part of the defenders. Such in brief is the pursuer's case as averred on record. The essential averments of the pursuer may be thus summarised—That the path to which I have referred is too near the line of the first hole, that golf balls are often driven on to and across it, that it accordingly was a dangerous place, that the defenders knew this, but that the pursuer and her mother did not, and that the defenders, instead of minimising the danger or of warning the public against it, as was their duty, invited them to incur it. In short, the pursuer's case is that the defenders invited the public, including the pursuer, to use a part of their property which they knew to be dangerous but which the pursuer did not. *Prima facie* that seems to me to be a perfectly relevant case.

What is said against it? It is said that the pursuer, who was walking in the vicinity of St Andrews golf links, where golf has been played from time immemorial, should have appreciated the danger created by flying golf balls, and that she took the risk of any danger so created. Now in the first place *sciens* and *volens* are two different things. Whether a person is *volens* is, I have always understood, a question of fact to be determined on evidence. It seems to me impossible to affirm on the pleadings that a girl of 11 years of age from Glasgow, who was on the path which was separated from the golf course proper by a fence, must be held to have appreciated and undertaken the risk of a golfer, so to speak, hitting his ball to cover point, and of her being struck by it. In any event, the pursuer specifically avers and offers to prove that she did not know of the danger. Am I to disbelieve and disregard that distinct averment of fact? The idea seems to me to be wholly inadmissible. And yet that is in effect what the defenders invite us to do. The fallacy underlying much of the defenders' argument appears to me to be that it assumed an entire familiarity by each member of the public not only with all the normal incidents but also with all the nuances and eccentricities of the game. The assumption seems to me to be an unduly large one. The defenders made much of the absence from the pursuer's record of certain other averments which they desiderate, and to these omissions I shall presently advert. Meantime I content myself by saying that the advantages of adding these averments is not very obvious, if when made they are to be treated, like the averments with which I have been dealing, with incredulity and brushed aside. It was said that in cases such as *Hastie* (1907 S.C. 1102) and *Stevenson* (1908 S.C. 1034) averments such as the pursuer here makes were made and were in effect disregarded by the Court. But these cases cannot be equiparated in their facts to the present case. They concerned a stream of water and a pond respectively, and these dangers were as obvious to the pursuer as they were to the defenders. But I entirely decline to accept the view that the latent possibility of a golf ball being sliced many yards to the right was necessarily as obvious to the pursuer as it was to the defenders, whose knowledge of such happenings in the past the pursuer offers to prove. I refuse to hold that the pursuer's averment is irrelevant on the ground that it must without inquiry be deemed to be incredible and false.

It is further said that the pursuer has not relevantly averred the precautions which the defenders neglected in order to abate or remove the danger of which complaint is made. I cannot accept that view. The pursuer says the path was placed by the defenders too near the line of the first hole

to be safe, and that they were in fault in placing it there. If that does not mean that the path should have been placed at a greater distance from the line of the first hole, then the English language ceases to have any meaning to me. It is nothing to the point to argue as the defenders did, that even if they had done this the pursuer and other members of the public might still have walked near the railing on the grass. The difference is that in that case the defenders would have no responsibility for any resulting injury. The element of invitation would then be missing.

But the pursuer also avers that it was the duty of the defenders to protect the public against danger by adequate warning or otherwise, and that they took no steps to warn the public. To argue as the defenders did that it is not averred by the pursuer how that warning should have been given appears to me to be unduly meticulous. It might, no doubt, have been better had the pursuer expressly said that the warning should have been given by a notice board. Speaking for myself, if the defenders had been as prodigal in erecting notices warning the public of the dangers of the paths as they were of notices which invited the public there, and which, to say the least, suggest the comparative safety of these paths, I think the pursuer would have been out of court. So far from doing this, the defenders in effect sought to herd the public on to the footpaths.

Something was said—and I may as well advert to it at this stage—to the effect that if the pursuer is right in this case, and if the defenders are wrong, then certain preposterous consequences would follow with regard to the roads adjoining golf courses at other places, *e.g.*, Musselburgh, Gullane, and North Berwick. By being "right" I take it that the defenders mean being right in the end of the day. With that possibility we have nothing whatever to do at this stage. Despite anything which we may now decide, it may well be that the Town Council of St Andrews, as it was phrased in a historic case, may at the end of the proof "emerge triumphant defenders." The defenders are really crying out before they are hurt. We are merely concerned at this stage with the question whether the pursuer's averments suffice to entitle her to inquiry. These averments may be hopelessly discredited in the course of the inquiry which will follow, in which event the dire consequences predicted by the defenders will not materialise.

It was also argued by the defenders that the pursuer does not aver that she read and relied on the terms of the notices, and that therefore they have no relevance to the problem under consideration. I do not agree. Had the pursuer founded on the notices in order to justify her presence in a place where it was suggested she had no right to be, I can appreciate the force of the argument. But the pursuer has no need to invoke the assistance of the notices for that purpose. The terms of these notices may not strengthen the pursuer's case, but they may weaken the defenders' case. They exhibit clearly the attitude of the defenders towards the free and public use of the pathways, one of which at least is alleged by the pursuer to be dangerous. The defenders also allege that the notices were not put up in the interests of the public but in the interests of golfers. I fail to understand how the public can be expected to draw that inference. If that be the purpose of the notices, all I can say is that they appear to me to be somewhat infelicitous and inconclusive in their terms.

The defenders further argued that the proof claimed by the pursuer could add nothing material to the information which the pleadings of parties yield. That is not my opinion. It is averred by the pursuer that the path was dangerous. That is denied. It is averred by the pursuer that the defenders knew of the danger. That also is denied. Again it is averred that the pursuer was ignorant of the danger. That too is denied. The parties in truth are sharply at issue regarding the most vital matters which bear upon the liability of the defenders.

A good deal was said about the statutes under which the defenders administer the links. I agree with the learned Sheriff-Substitute that the pursuer has no case on these statutes which differs from her case at common law. Indeed I understood the pursuer to admit that. I will only say with regard to the statutes that the leading Act of Parliament, of date 1913, is entitled "An Act to empower the Commissioners of the City and Royal Burgh of St Andrews to acquire the links of St Andrews for *a public park and recreation ground and for other purposes.*" And the 7th section of the Act provides—"The Commissioners shall hold and maintain the links as a public park and place of public resort and recreation for the inhabitants of the burgh and others resorting thereto, and may erect and maintain thereon shelters and other conveniences, and form, improve, and maintain roads, footpaths, and walks thereon, and do such other things as from time to time may appear to them expedient for the use and enjoyment of the links by the public." It is noteworthy that golf is not mentioned either in the title of the Act or in the section which I have quoted. No doubt, however, it figures in the schedule. But the dominant idea in the statute appears to be, not that the links are dedicated to golfing purposes, but that they are to be a public park and place of public resort. It follows that, subject to the stereotyping of the Old Course in the manner which the schedule enjoins, the defenders must administer the links on that footing.

The footpath is the property of and under the control of the defenders, and they invite the public to use it. In these circumstances it appears to me to be in accordance with the authorities that if an adult were injured by reason of a hole in the path or if had the path been fringed with bushes on which poisonous berries grew and a child had eaten them, both the adult and the child would have a right of action. But the defenders, for some reason which I fail to

comprehend, maintain that if the danger is not on or beside the footpath but comes from above it, they are exempt from liability. The distinction appears to me to be somewhat arbitrary. I quite see that it may be open to the defenders to comment on the difference in the quality of the danger in the cases which I have figured, but that plea appears to me to arise not now but on the facts when these are ascertained.

I think it unnecessary to examine in detail the authorities which were cited in debate. This case seems to me to depend on familiar and well-settled principles of law, which suffer no impairment in any case cited to us. To resume the whole matter, the pursuer has relevantly averred a danger existing upon the defenders' property; knowledge by the defenders of that danger; ignorance by the pursuer of it; failure by the defenders to abate or remove the danger; and specification of the manner in which they should have done so. However bleak the pursuer's outlook in the inquiry for which she asks may be, I must own that I am at a loss to conceive what further or other averment she could reasonably be required to make in order to warrant that inquiry.

I am therefore of opinion that the weapons of ridicule and reasoning which were employed by the defenders in argument alike fail, that the judgment of the Sheriff-Substitute should be affirmed, and a proof before answer allowed.

LORD SKERRINGTON—I think that the pursuer has averred a sufficient case for inquiry upon the question whether the defenders used reasonable precautions in order to secure that a footpath designed for the use of the public should be as little dangerous as the circumstances permitted. I therefore think that the interlocutor of the Sheriff-Substitute should be adhered to.

LORD CULLEN—The pursuer's case appears to me to be a very thin one; but the Sheriff-Substitute who, as his note shows, has given very careful consideration to it has allowed a proof before answer, preferring not to dispose of the case until the actual facts have been duly ascertained. Agreeing with your Lordships I see no sufficient reason for disturbing that interlocutor.

LORD ORMIDALE—I agree with your Lordship. As there is to be a proof before answer I do not propose to discuss the merits or examine the many authorities that were cited.

LORD HUNTER—It is sometimes said that when a judge of first instance has allowed a proof before answer he has merely exercised his discretion of suspending judgment until he has been seised of the facts, and that a Court of Appeal should not readily interfere with such exercise of discretion. This is true enough. At the same time if a judge in a Court of Appeal is satisfied that the full proof of everything that has been specifically averred would not justify a decision in the pursuer's favour, I think he is bound to give effect to his view. At the conclusion of the first debate I formed the opinion that the pursuer's averments were not relevant to justify inquiry. The discussion before seven Judges has not caused me to alter or qualify that opinion.

On 12th June 1923 the pursuer, who is aged 11 years, and her mother, were walking on a path leading from Golf Place, St Andrews, to the seashore, when she was struck and injured by a golf ball. The ball is said to have been driven by a Mr Mohammed Emin, who was a student at the University of St Andrews. He was also made a defender to the action, but he has put in no defences. Before the action was served he appears to have left Scotland and returned to his own country, which is said to be Arabia. From a plan produced, to which both parties made reference, it is evident that the ball which struck the pursuer and which ought to have been hit in the direction of the first hole was a badly sliced ball. Although the pursuer was proceeding along a pathway in the direction of the first tee of the Old Course at St Andrews at the time she was struck, she was none the less walking upon part of the links of St Andrews. From time immemorial the public have been in use to play the game of golf over these links. They have also used the links as a place of public resort and recreation. The rights of the public and the rights and duties of the Town Council of St Andrews in the links have been made the subject of statutory recognition. The St Andrews Links Act 1894 proceeds upon the narrative that the links have been used for playing golf and other games and for recreation and other purposes, and that it is expedient that they should be acquired and held by the Town Council as a public park and place of public resort and recreation, and that facilities for playing golf and other games should be improved and increased, and provision made for the laying out of new courses and the management thereof. The purposes for which the links were to be acquired are defined in section 7. They are the holding and maintaining the links as a public place and place of public resort and recreation for the inhabitants of the burgh. Power is given to the Town Council to form, improve, and maintain footpaths and walks on the links. By section 8 the Council may from time to time allocate or appropriate any parts or portions of the links to the playing of golf or other games thereon, and maintain the present golf course on the links, and lay out and maintain new and additional golf courses thereon. The management of the golf courses is given to the Royal and Ancient Golf Club of St Andrews, who in time past had kept up the golf club at their own expense, subject to the condition that the actual management should be in the hands of a committee consisting of five members of the Royal and Ancient Club and two nominees of the Town Council. This is evidenced by an agreement between the Town Council and the Royal and Ancient Club, which is set forth in the Second Schedule to the Act. By section 11 of the Act the agreement is to have the same force and effect as if its provisions had

been incorporated with the Act. The fourth purpose of the agreement provides that the Royal and Ancient Club are, at their own expense, to maintain the present golf course in as efficient a state as heretofore, the course consisting of the eighteen holes as they have been in use to be played. The relationship of the Town Council and the Royal and Ancient Club to the courses is recognised in similar terms in the St Andrews Burgh Extension and Links Order Confirmation Act 1913. By the agreement between the Club and the Council scheduled to this Act the Club are taken bound to keep and maintain as hitherto the Old and New Courses in an efficient state at the sole expense of the Club. In their answer to the fifth article of the condescendence the defenders say that the first hole and the pathway were, at the date of the alleged accident to the pursuer, in the same position as they occupied at the time of the passing of the St Andrews Links Act 1894. This statement is not admitted by the pursuer upon record. It is not, however, suggested that the first hole is in any different position from what it has occupied from time immemorial, and at the discussion the pursuer's counsel admitted that the pathway had been in its present position for more than twenty, if not more than thirty, years.

The pursuer in condescendence 6 avers—"Owing to the proximity of the said hole to the path, golf balls are frequently driven by players on to and across it, a considerable portion of the same being within the range of a golf ball sliced by a player of average strength driving from the tee of the said hole. Said driving of balls on to and across the pathway is a menace to the public passing along it, and makes the path dangerous to use. The existence of said danger was well known to the first-named defenders and their servants before the date of the said accident. They knew that balls frequently landed on or were driven over the pathway, and that it was probable, and indeed practically certain, that persons using pathway would be struck." In argument it was maintained for the pursuer that these averments of themselves entitled her to the proof allowed by the Sheriff-Substitute. I do not agree with this view. It is manifest that if links are used as of right for purposes of resort and for playing the game of golf, there must be some risk of a member of the public being struck either owing to the carelessness of the player or because of his or her own failure to exercise reasonable care to avoid being struck. So far as the situation of the first hole is concerned, responsibility rests with the Green Committee and not with the defenders, and in view of the terms of the agreement as to maintaining the Old Course at St Andrews it is doubtful if that body would have the right to make any radical change on the nature and situation of this hole. The bare statement by the pursuer that the defenders were in fault in placing the path in such close proximity to the line of the first hole appears to me quite insufficient to justify us in sending the case to trial or allowing a proof before answer. The statutory discretion conferred upon the defenders as to forming and maintaining footpaths on the links appears to involve the prospect of the pathways being in close proximity to the line of play, or for that matter of actually crossing the line of play, as is the case with certain of the paths. The pursuer does not allege that in placing the path where they did the defenders exercised a bad discretion. She does not indicate that the pathway on which she was struck could appropriately have been placed anywhere else. In particular she does not say it could have been so placed as to ensure the safety of any person using it. If the case for the pursuer is that the defenders are bound to guarantee the safety of all persons using the paths, they can discharge that duty only by stopping entirely the game of golf or by excluding the public from the links. It is not within their power to adopt either of these courses. It may be noted that the pursuer nowhere avers that the practice of other public authorities who have to regulate the use of public links over which the game of golf is played shows that the actual situation of the path constitutes an unreasonable or unnecessary danger to the public.

The liability of the defenders as owners of the links can only arise from their having failed to take reasonable precautions to prevent the occurrence of such an accident as occurred. No doubt the pursuer has a general averment that while the defenders were bound to maintain the pathway in a reasonably safe condition for members of the public passing along it, they failed in that duty by taking no steps to protect the public from the danger of being struck by golf balls on the pathway. I do not think, however, that such a general averment is sufficient. There must be a statement as to the precaution or precautions which in the circumstances the defenders ought to have taken. In *Johnstone* v. *Magistrates of Lochgelly* (1913 S.C. 1078) Lord Dunedin said (at p. 1086)—"There is no responsibility for negligence—that is, for the neglect of some duty which the person charged with neglect owes to the person injured—until it has been first established that there is such a duty in law. The pursuer must aver facts out of which a duty of taking care arises, and I do not think it is at all sufficient to say, after setting out a history of an accident such as I have referred to in this case, that it was the duty of the defenders to take precautions to prevent injury to a child. It is necessary further to say what the precautions were which they were bound to take, and which they failed to take, and therefore one looks to see whether there is any averment of a duty to take some precaution which the defenders are said to have omitted." An examination of the averments made by the pursuer disclosed certain suggestions as to precautions which it is averred ought to have been taken by the defenders. In condescendence 8 she suggests fault because the pathway was in close proximity to the first hole—an averment with which I have

already dealt. The pursuer also says on record that it was the duty of the starter to give warning to the pursuer and her mother to allow them a reasonable time to get out of range. Nothing, however, was made of this point in argument. This is not surprising, as it appears that the starter is not in the employment of the defenders, and there is nothing to indicate that the giving of such warning falls within the duties ordinarily discharged by starters on golf links. According to the bye-laws a player is not entitled to drive a ball if any person is in a position of danger without first shouting "fore" and allowing such person a reasonable opportunity to get out of range. There appears to be an entire absence from the record of any averment indicating that the defenders failed to take any definite precaution which is usually taken where a path lies through or to the side of a golf links.

Reliance was placed by the pursuer upon the existence of certain notices that appear near the pathway in question. They are set out in condescendence 7. As I read them they are placed where they are to prevent members of the public as far as possible from getting in the way of golfers with the result of impeding the game and increasing the risk of their being struck. They do not suggest that people using the paths are necessarily free from the risks of careless or unskilful golfers, or their own failure to keep out of the way of balls that are inaccurately hit. They do not amount to a prohibition against walking on the part of the links more immediately devoted to the game of golf, and I doubt if the defenders have the right to enforce such a prohibition. I do not think the pursuer's allegation that it is the duty of the defenders to warn the public of the danger incurred from the proximity of the path to the line of play to the first hole is sufficient to justify inquiry. All parties frequenting these paths on the links are aware or ought to be aware that badly directed balls may strike them if they are not careful. The pursuer does not suggest what kind of warning it would be proper for the defenders to give, and I do not know what form it would require to take so as to serve a useful purpose.

In holding that the pursuer has made averments which if established would or might infer liability against the defenders, the Sheriff-Substitute appears to have proceeded upon legal pronouncements made in cases which are known as trap cases, and cases arising from failure to keep streets in a reasonably safe condition for use as public thoroughfares. He refers in particular to a statement of Lord Shaw in *Taylor* v. *Glasgow Corporation*, 1922 S.C. (H.L.) 1, at p. 10. That was a case where the Glasgow Corporation were sought to be made liable by a father for the death of a child who had eaten poisonous berries in the Botanical Gardens, Glasgow. The allegations were that these berries were grown on trees in grounds open to children, and in the vicinity of a playground; that they were of an alluring and attractive character to children, who were tempted to eat them in ignorance of the danger they ran—a danger which ought to have been known to and appreciated by the defenders. Lord Shaw, however, is careful to point out that the duty resting upon statutory guardians of rendering grounds open to the public reasonably safe does not include an obligation of protection against dangers which are themselves obvious. Then he adds that "dangers which are not seen and obvious should be made the subject either of effectively restricted access or of such express and actual warning of prohibition as reaches the mind of the person prohibited." I think that the danger, such as it is, of being struck by a golf ball when you are walking on a path situated upon links on which the game of golf is being played falls within the former and not the latter category.

As regards the street cases—*Innes* (M. 13,189) and *M'Phee* (17 R. 764)—I do not think that a statement of law as to the duty of the custodiers of a public street to secure its being reasonably safe for use by removing obstacles from the surface has any necessary application to the case of a footpath or footpaths which a public body has statutory authority to construct upon links which are used for the purpose of playing golf or of other forms of recreation.

The present case appears to me to come within the principle upon which the cases of *Hastie* v. *Magistrates of Edinburgh* (1907 S.C. 1102) and *Stevenson* v. *Glasgow Corporation* (1908 S.C. 1034) were decided. In the latter case a child was drowned while playing in the Botanical Gardens, Glasgow, by falling into the river Kelvin. The Town Council of Glasgow were sought to be made liable in damages for having failed to fence the banks of the river so as to prevent children falling into the water and being drowned. Notwithstanding averments to the effect that the town council were negligent in not adopting this precaution, the First Division dismissed an action of damages brought by the father of the child as irrelevant. In the course of his opinion Lord Kinnear pointed out that a person going upon property even by invitation is expected to use reasonable care for his own safety, and then added (at p. 1042)—"He is to look out for all the ordinary risks that are necessarily incident to the kind of property that he is going upon, but on the other hand it is held that he is not to be exposed to any unusual danger known to the proprietor and not known to people who may come upon premises with which they are not familiar."

On the whole I think that the appeal ought to be sustained and the action dismissed.

LORD ANDERSON—In this case the Sheriff-Substitute has allowed a proof before answer. If I had thought that there were facts to be elicited which would aid in the determination of the question of the defenders' liability I should not venture to disturb that interlocutor. I am satisfied, however, that all relevant and material

facts bearing on that question are either admitted or are matter of common knowledge, and that the action can therefore be disposed of at this stage.

The Links of St Andrews consist, *inter alia*, of four 18-hole golf courses—the Old Course, the New Course, the Jubilee Course, and the Eden Course. The links are public in a twofold sense. As regards golfers any player on paying the prescribed charges is entitled to play on any of these courses. As regards the public the links are open to all members of the public for purposes of ordinary recreation. It is undoubted, however, that the primary purpose for which the links exist is the playing of golf. This is clear from these circumstances—It is matter of admission and common knowledge that, so far at least as the Old Course is concerned, golf has been played from time immemorial, and the provisions of the bye-laws applicable to the links show that all other public purposes are to be subordinated to that of playing golf. Thus bye-law 1 enacts that no game other than golf shall be played on the links. Bye-law 19 provides that every person walking, sitting, or otherwise using the golf courses shall be bound to move out of the line of play of golfers immediately on being requested to do so. Bye-law 35 provides that persons using the links or Bruce Embankment for the purpose of walking or recreation shall keep off the ground occupied by the players of any duly authorised game at the time when such game is proceeding. It is important to note the exact rights enjoyed by these defenders with reference to the links. They were acquired by the predecessors of the defenders, who were then the Burgh Commissioners, in the year 1894 by the St Andrews Links Act of that year. The preamble of that Act is not without interest and importance. It is therein stated that from time immemorial the links had been used for playing golf and other games and for recreation; that prior to 1797 the whole of the links had belonged to the burgh but had thereafter been almost entirely alienated; and that the number of persons resorting to the links for golf and other purposes had largely increased with the result that the golf course was frequently overcrowded. The Act accordingly authorised the Burgh Commissioners to take the links for the purposes of the Act (section 4). The purposes for which the links were to be acquired were declared to be for public resort and recreation for the inhabitants of the burgh and others resorting thereto, and power was given to form, improve, and maintain on the links roads, footpaths, and walks (section 7). Power was granted to allocate or appropriate any parts or portions of the links to the playing of golf or other games, and to "maintain the present golf course [that is, the Old Course] on the links," it being declared that the said golf course was not to be leased or let but was to "remain available for the use of the public generally" (section 8). The Second Schedule to the Act sets forth an agreement, which is confirmed by the Act (section 11), between the Burgh Commissioners and the Royal and Ancient Golf Club of St Andrews. The preamble to said agreement sets forth that the Royal and Ancient Golf Club had in time past kept up and managed the Old Course and that it was expedient that the club should continue to manage that course and the New Course which was about to be constructed. The agreement therefore provided (third) that these two golf courses should be managed by a committee consisting of five members of the Royal and Ancient Golf Club and two persons nominated by the Magistrates and Town Council of St Andrews. This Committee was to be called the Green Committee of St Andrews Links. The said agreement further provided (fourth) that the Royal and Ancient Golf Club should at their own expense maintain the present golf course [the Old Course] in as efficient a state as theretofore, "which course consists and shall consist of the eighteen holes as they have been in use to be played." The Act of 1913, *inter alia*, conferred powers of making charges for playing golf on the links and of framing bye-laws for the regulation of the links and golf courses thereon.

From all this these propositions seem to be established—(1) That the primary purpose for which the links exist is the playing of golf, to which all other public uses are subordinated. (2) That the management of the Old Golf Course, in the vicinity of which the pursuer was injured, is in the hands of said Green Committee. (3) The said committee is interpelled by statute from making any material alteration on the configuration of the Old Golf Course.

As regards the course proper the pursuer makes no suggestion that anything should or could have been done thereon to ensure greater safety to the non-golfing public. With reference to the *locus* of the accident the pursuer, according to her averments, was struck near the point where the path on which she was walking is intersected by the road known as Grannie Clarke's Wynd. This wynd crosses the golf course from south to north and terminates at the sea-beach. It traverses the line of play of the first and eighteenth holes. The boundary of the links is the high-water mark of the tide, and therefore the place where the pursuer was struck and the path on which she had been walking are parts of the links to which the public has free access at all times. The distance of the point at which the pursuer was struck from the first tee seems to be 80 yards or thereby. Between the path on which the pursuer was walking and the golf course proper there is a low fence with a single rail laid on stout posts. The said fence has obviously been placed there for the purpose of keeping the non-golfing public off the line of play, and its peculiar structure has doubtless been chosen to enable golfers to get easily over or under it to reach balls which have been sliced. The curious feature of the present case is that the said fence plays an important causal part in the accident and yet no complaint regarding it is made by the pursuer and no suggestion made that it should be removed. The fence indeed was causally a

sine qua non in the accident. But for its presence the accident would not have occurred, and yet the defenders are not blamed for having it there. This cannot, however, be regarded as surprising, because it is plain that the fence serves a useful purpose in having some effect in keeping non-golfers away from the line of play. But the part played by the fence in the accident increases the difficulty of the pursuer's case. If the defenders have a duty of taking care of the non-golfing public it must surely be with reference to contingencies which it is possible to foresee. The accident to the pursuer seems to me to have been unique. A similar accident probably never happened before and may well never occur again, and yet the pursuer's complaint is that the defenders did not take precautions to prevent it. It is also noteworthy that the pursuer has been unable to allege that any person on the north side of the said fence has ever been struck by a golf ball. Sliced balls undoubtedly cross the fence; I take the case on the pursuer's allegation that they frequently do so. But no person apparently has suffered from all this. Why then should the defenders have done anything to alter the existing conditions of the *locus*? What warning did they have that it was dangerous? None. Nothing had happened on the pursuer's showing to indicate to the defenders that the place was dangerous. On the assumption which the defenders were entitled to make that persons using the path would likewise use their eyes and ears and avoid obvious risks the defenders were entitled to conclude from the history of the past that the path on which the pursuer was walking or standing was quite safe.

The true cause of the accident is disclosed by the pursuer's averments in condescendence 9. The primary cause was the unskilful play of the non-compearing defender. For this lack of skill the defenders cannot be held responsible. Bye-law 18 prescribes the duty of a player with reference to a person thought to be in a position of danger, namely, to shout "fore." It is probable that the player gave no warning to the pursuer, as he would not anticipate so pronounced and fatal a slice. The suggestion that the ranger on duty, that is, the starter, has any duty in enforcing this bye-law is extravagant.

The pursuer founds on the terms of two notices, which are referred to in condescendence 7, and which enjoin the public to use certain footpaths, including the footpath in question. These notices are, in my opinion, primarily in the interests of golfers, to ensure for them, as far as that can be secured, a clear course. They are displayed, secondarily, in the interest of non-golfers, to keep them off the line of play. But I am unable to read the notices as importing or suggesting any guarantee of safety by the use of the footpaths or as absolving those using these paths from taking ordinary precautions for their own safety. The averments of the pursuer as to these notices, however, are entirely lacking in relevancy. She does not aver that she was using the footpath in response to the invitation alleged to be contained in the notices and in reliance on the guarantee of safety said to be implied by their terms. The presence of the notices and their terms seem therefore to have no bearing on the case.

The pursuer's averments seem to me to be irrelevant on another ground. There is no clear averment of the particular act of negligence of which the defenders are alleged to have been guilty. It is not said that they failed to do something which is usually done at other public golf courses, nor could such an averment be made, because the game is controlled and conducted and the links constructed at St Andrews just as is done at North Berwick or any other well-known public course.

If condescendence 8, which contains the averments of fault, is stripped of verbiage, there are two, and only two, allegations of negligence made against the defenders. (1) It is said that the footpath is dangerously near the line of play from the first tee. It is obvious that this averment cannot be held to be pertinent or relevant when it is kept in mind that another path, to wit, Grannie Clarke's Wynd, actually crosses the line of play, and there is no suggestion that it is dangerous. (2) It is said that the defenders should have given adequate warning against the danger of sliced balls. No suggestion is made as to the form which this warning should take. This seems to me to be fatal to relevancy, as it is impossible for a Court of law to decide that a defender is negligent if it is not said what he should have done (see the opinion of Lord President Dunedin in *Johnston*, 1913 S.C. 1078, at 1086. But the defenders have made provision by bye-law 18 to ensure that the warning usually given should be made by golfers. It is not said that any other golf authority does anything more than this, and I am unable to hold that the defenders were bound to do anything more. As to the suggestion that notices displaying the phrase "beware of golf balls" or similar words should be erected, it seems to be met by these considerations—(1) It is not said that this practice is followed on other courses, and (2) the public frequenting a golf course are presumed to know that danger from flying golf balls will be encountered. I am clearly of opinion, on the general question raised by the case, that the defenders are under no legal obligation to take any precautions to protect non-golfers from the risk of being struck by a golf ball on the links. The defenders, in my opinion, state the law with complete accuracy when they say in answer 3—"All parties who use the links do so at their own risk and on their own responsibility, at least so far as these defenders are concerned."

The defenders are said to be interested in and responsible for the footpath in question in a two-fold capacity—(1) As proprietors with control of the links, and (2) as the road authority of the burgh, the path in question being said to be a "street" in the sense of the Burgh Police (Scotland) Acts. Dealing first with the case made against

the defenders as proprietors of the links, it is important to ascertain with precision what are the duties of a public authority with reference to a public park under their control. It has to be kept in mind as an essential fact in this case that the public have a statutory right to use the links for golf or other recreation. The public have thus equal opportunity with the defenders of making themselves acquainted with obvious dangers to be encountered on the links. The present case is thus different from such a case as *Indermaur* v. *Dames* (L.R., 1 C.P. 274), where the owner of private property has special opportunities, not open to those occasionally invited to the property, of ascertaining what are its risks and dangers. No invitation, express or implied, is needed by the public for user by them of the links. The cases in which it has been attempted to make local authorities having control of public parks responsible for accidents happening therein may be divided into two classes, those in which the danger was hidden, and those in which it was obvious. The former class is what is known as the "trap" type of case, and the circumstances which impose liability on the local authority are these—(1) That there is a certain allurement or attraction, and (2) that there is a lurking danger not obvious to the person attracted but presumed to be known to the local authority, that is, to their officials who actually control the park. The case of *Taylor* (1922 S.C. (H.L.) 1), in which there was an alluring poisonous berry in a public park, is a typical illustration of this class of case. It is not suggested that these elements of allurement and trap are present in this case. The other class of case in which it has been attempted to impose liability on local authorities is that in which the danger is obvious, that is, where it is just as easy for a member of the public as for the local authority's officials to perceive and estimate the risk. Examples of this type of case are *Hastie*, 1907 S.C. 1102, *Stevenson*, 1908 S.C. 1034, and *M'Kenna*, *supra*, 356. Where the danger is obvious in this sense the local authority is not responsible for injury sustained by reason of that danger (*per* Lord Shaw in *Taylor*, p. 10). In the present case the danger was just as obvious to a member of the public as to the defenders' officials. It may well be the case that the pursuer did not know or realise the danger. But this circumstance will not avail if the risk was obvious. It is assumed that everyone knows that fire burns, although some children may be ignorant of this fact. The management of the links at St Andrews would be impossible if it were not assumed that every person visiting the links knew that golf was played there, and that golf was a danger to non-golfers walking on the links who took no precautions for their own safety. It seems to me therefore that there was no duty on the defenders to protect the pursuer from a risk which was obvious.

Assuming that the path in question was a "street" in the sense of the Burgh Police (Scotland) Acts, the obligations of the defenders in connection therewith are well defined and settled. Such cases as *Innes* (M. 13,189), *Dargie* (17 D. 730), and *M'Fee* (17 R. 764) decide that road authorities are responsible for the *structure* of a street. Their duty is to keep the street free from dangers so far as its surface is concerned. But it has never hitherto been suggested that road authorities are responsible for accidents resulting from the mode of user of the street. It has never hitherto been maintained that road authorities are responsible for accidents resulting from runaway horses or negligently driven motor cars or from stones or golf balls improperly invading the roadway. Limitation of the liability of road authorities to structural defects is in no sense arbitrary. It is based on this rational consideration that the road authorities can control the structure of the street but they cannot possibly control the way in which the street is used. I am therefore clearly of opinion that the defenders as road authority had no duty to protect the pursuer from golf balls which might invade the footpath.

It appears to me to be futile to suggest that if the Sheriff-Substitute's judgment is affirmed the main point in the case will not, *ipso facto*, be decided. It would thereby be implied that the defenders had negligently failed to do something that they ought to have done, it does not appear what. Exactly the same attack could be made on those responsible for the management of other public golf courses, such as Musselburgh, Gullane, North Berwick, and Dunbar. The case is therefore of the highest importance to those who are charged with the duty of managing these public links. That feature of the case must be my excuse for having dealt so fully with it.

I am for sustaining the appeal and dismissing the action as irrelevant.

The Court affirmed the judgment of the Sheriff-Substitute.

Counsel for the Pursuer (Respondent)—W. T. Watson, K.C.—Strachan. Agents—Patrick & James, S.S.C.

Counsel for the Defenders (Appellants)—MacRobert, K.C.—S. M'Donald. Agents—Warden, Weir, & Macgregor, S.S.C.

Thursday, July 17.

SECOND DIVISION.

(Before Seven Judges.)

[Lord Constable, Ordinary.

ADAIR AND OTHERS *v.* DAVID COLVILLE & SONS, LIMITED.

(Reported *ante*, 59 S.L.R. 482.)

Process—Sheriff—Jury Trial in Sheriff Court—Questions Proponed by Sheriff to Jury—Failure to Embody Common Law Case in Questions—No Note of Evidence Taken—Application of Verdict—Miscarriage of Justice—Reduction.

The widow and children of a tractor engineman who was killed by an ex-