and recovered by diligence, and it would be unreasonable to remit the parties to a new process when the question can easily be determined now and here.

"But on its merits the plea is untenable. A superior is always entitled to retain a charter till bygone feu-duties or non-entry duties are paid. The vassal cannot claim the charter while he refuses to implement the vassal's obligations. The superior is not bound to receive a vassal who refuses to implement the conditions of the feu. The charter, if delivered without payment of bygones, might be pleaded on as implying their discharge. It might create a difficulty in the recovery of the bygone non-entry duties, for if the fee was once filled a declarator of non-entry could hardly be brought. But however this may be, it seems both law and equity that a superior should not be compelled to do his part as superior unless the vassal at the same time fulfil the obligations incumbent upon the vassal or upon the feu."

The objector reclaimed.

At advising—

Lord President—A sort of mist hung over this case during the discussion, but it rather seems to me to be unattended with any great difficulty.

This is a case of blench-holding of the Crown, which was substituted in place of ward-holding, and there cannot be the least doubt that these lands so held fall into non-entry by the Statute 20 George II. cap. 50; there are certain retour duties payable by the heir, and if the heir refuses, the Crown has the strongest remedy of a declarator of non-entry. In the summons of non-entry there is a statement of the heir's refusal, and a conclusion for declarator that the lands are in non-entry, and also a conclusion for the retour duties till the date of citation, and for the whole rents after the date of citation, and then there is a warrant to messengers-at-arms to destrain for these retour duties. In that way these duties are recoverable. But if the heir comes forward like a dutiful vassal and offers to take entry, the lands having been in non-entry for several years, the retour duties for these years are just as payable as if there had been a decree in a declarator of non-entry, and I can see no objection to the Crown insisting on payment of them.

Now, the noble Lord who is here an objector is an heir, and certain of his lands have been in non-entry for sometime. I see no difficulty and I have heard nothing that makes it impossible, for the Crown to insist upon payment of the retour duties as the price of giving an entry, and if the heir will not pay them then they can fall back upon a declarator of non-entry. The practice of the Barons of Exchequer under previous statutes has no bearing on the question before us. The simple question is, Are these retour duties payable, and can the Crown enforce their payment? These points I have already disposed of. We must adhere to the Lord Ordinary's interlocutor.

Lord Deas—I am of the same opinion.

I have no doubt at all that Lord Aberdeen is in the position of an heir, and is liable for these duties in some shape or another.

I have just as little doubt that if the Crown had brought an action of declarator of non-entry they could have got decree in that action, which, though not a special personal decree, is of the nature of a process of poinding the ground, and the decree would have made them preferable to any other creditors. The only answer to the Crown's demand for payment of these duties, which it appears are fixed by 20 George II. in such cases to one per cent. of the valued rent, is that Lord Aberdeen is applying for an entry and is willing to enter. The Crown of course will enter him if he would only pay the retour duties, and they say if you will not pay them we will not enter you till we get our decree of declarator of non-entry.

The point is very simple, and the whole argument on the part of Lord Aberdeen was just a tissue of plausibilities.

Lord Ardmillan—I have no doubt on this case. The objector's contentions are out of the question.

Beyond all doubt these lands have been in non-entry for about eleven years—that the next heir is liable for non-entry duties is equally true, and the deed of propulsion, although it makes him a disponee, cannot relieve him of his liability as heir.

The question is thus a very simple one. The objector has made use of a great deal of subtlety, but still we cannot take the view suggested by him.

The Court adhered.

Counsel for Objector—Adam. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Lord Advocate — Ivory. Agent—Donald Beith, W.S.

HOUSE OF LORDS.

Tuesday, July 12.

(Before Lord Chancellor Selborne, Lords Blackburn and Watson).

PATERSON AND OTHERS *v.* MAGISTRATES OF ST ANDREWS AND OTHERS.

(*Ante*, vol. xvii. p. 225, 7 R. 712.)

Burgh—Administration of Common Good by Magistrates—Road.

Held (*aff.* judgment of Court of Session) that the magistrates of a burgh who held certain ground for the recreation of the public were within their rights of administration in constructing a macadamised road for public use over a part of that ground, it being proved that the road did not interfere with such forms of public recreation as were in use to be practised thereon; but that it was not within the power of the magistrates to alienate the *solum* of the said road, or to suffer the commissioners of police or any other body to acquire rights of administration over it, and judgment of Court of Session altered so as to ensure this condition.

Expenses—House of Lords—Where Interlocutor Altered but Affirmed.

No expenses allowed to a party who had been successful as appellant in upholding the judgment of the Court of Session, in respect that an important qualification was adjected to that judgment by the House of Lords.

This was an appeal from a judgment of the Second Division of the Court of Session, of date December 9, 1879, *ante*, vol. xvii. p. 225, 7 R. 712. The House heard the appellants' counsel, and on the question of expenses counsel for the respondents also.

At delivering judgment—

LORD CHANCELLOR—My Lords, the object of this appeal, as it appears to me, has practically been to limit the power of the Magistrates and Town Council of St Andrews over the links of St Andrews to a greater extent than that which has been thought necessary or right by the Court of Session. I take the material facts upon which the case is to depend as they are stated in the answers for the Provost, Magistrates, and Town Council of St Andrews, who admit that the links are held by them, as by their predecessors, from time immemorial for behoof of the inhabitants, and, *inter alia*, subject to the obligation for preserving the same for the purposes of the game of golf, and for the recreation and amusement of the inhabitants, but that with due regard to these purposes and acting for the public interest the present defenders and their predecessors have also from time to time as occasion arose exercised powers of administration and management over the links now in question.

One of the acts which they say they have been accustomed to perform in the course of that administration and management is the letting of the pasturage and the regulation of bleaching clothes on the links, and another is the construction of a sloping walk or terrace, much insisted upon by the pursuers, in conformity with the minute of council made in the year 1849, and further, the levelling, filling-up, and terracing of the ground to the south of the club-house used by the golf club, in conformity with the minute of council of 1854. It appears by the evidence that these allegations are well founded, and the question arose, whether, consistently with the admitted obligation on the one hand, and the exercise of the asserted and proved powers of administration and management on the other, a certain metalled or macadamised road which the corporation think it expedient to make along the outside boundary of the links, where that boundary adjoins certain feus let off by them many years ago (which feus must be assumed to be no longer in point of law part of the links), should be made by them.

My Lords, so far as the question is one of titles, I collect that the admitted obligation is proved by ancient and immemorial use rather than by any express trust limiting the right of property which the corporation have by their titles. I assume of course that this usage is quite sufficient to establish an obligation, which indeed is admitted as I have said, but the titles being in themselves general it would follow that not only the power of administration and management, but also any usufructuary interest which may be consistent with the admitted obligation, would remain to the corporation under these titles, and that, as it appears to me, casts upon the pursuers, who ask for an interdict to restrain the corporation either from making the road in question or from permitting any road to be used in that place for traffic by carts and carriages, the obligation of showing that the making or permission of such a road or use would contravene the admitted or proved obligations. The first of these obligations is that of preserving the links—I take it, as far as necessary for this part of the case, for the purpose of the game of golf. With regard to that, my Lords, the state of the evidence is this:—The direct, ordinary, and proper course of the game of golf is not over the ground which would be occupied by the *solum* of this road, although in the course of the play balls may be struck from time to time so as to pass over or to be upon this part of the ground, and in that sense it is not excluded from the golf course. But it is outside the course proper, and it would rather be a deviation from the course of the play—whether intentional or not I do not enter into—it would rather be a deviation than otherwise that the game might have to any extent to be actually played over this particular piece of ground. In that state of things there can be no better evidence to rely upon as to whether this alteration of the surface and this permission of the use of carts and carriages will substantially interfere with the obligation of preserving the ground for the purposes of the game of golf, than the consentient evidence of those witnesses who are most skilled in and best understand the game. Of these witnesses we have had the evidence before us of a very considerable number, and the general result of their evidence is that the making of the road will certainly not substantially interfere with the due prosecution of the game, and that such variation in the state of the ground as it would introduce in the event of balls finding their way there would rather add to than detract from the interest of the game—giving fresh opportunities for skill rather than the contrary.

My Lords, that is the consentient evidence, and I cannot but observe, that regarding the matter from that point of view, it does not seem to me to be probable that this interference with the ground for the purpose of golf would be more prejudicial or make a substantially greater difference than the acts which are admitted to have taken place upon former occasions, which was to some extent rather impressed into their service by the appellants, because that construction of the sloping walk or terrace instead of the rough ground with many holes in it, which took place under the presidency of Sir Hugh Lyon Playfair in or after 1849, was at least as material an alteration as this can be, and the object with which that was done, when seats and barriers were placed for the accommodation of spectators, attracting a large number of people, would be at least as likely to interfere in some degree with the course of the game as the occasional traffic backwards and forwards over a macadamised road would be.

So far, therefore, as the obligation of preserving the ground for the purpose of the game

of golf is concerned, I come to the same conclusion as that at which the Court of Session arrived, namely, that there is no substantial interference with that obligation, and that the road may be reconciled with its due observance.

Then, with regard to the recreation and amusement of the inhabitants, it appears to me that convenient means of access not interfering with the use of the ground for any necessary purposes of the game are rather in aid of the recreation and amusement of the inhabitants than the contrary. Nor can I admit that it makes in that respect any difference if the fact be, as I have no doubt it is, that there are some particular inhabitants, namely, feuars having houses upon the ground adjoining the road, to whom the making of this road would be in a special degree convenient. Therefore, my Lords, I agree substantially with the view which was laid down both by the Lord Ordinary, and unanimously before the Second Division of the Court of Session, but the question that remains is this, Whether the manner in which the said Division thought it right to guard the decision so far in favour of the defenders is sufficient for the purpose?

Now, as I understand the view of the Second Division, they were clearly of opinion that it would be contrary to the admitted obligations of the corporation for them to alienate any part of the *solum* of the ground in question or to abdicate the administration and control of it, and so far they have expressed their intention on the face of the words which they introduced into the interlocutor of the 9th December 1879. But I collect further, and I also think it generally follows from the principle which guided them upon that point, that they thought it would be inconsistent with the obligation under which the corporation lay either to grant private easements, right-of-way, or others over this ground to particular individuals, or, which is a larger operation of the same kind, having made this road, to dedicate it to the public and so create a public easement, to that extent abdicating their existing power of administration and control.

Now, my Lords, that appears to me to be a matter of considerable importance, and in my judgment goes some way to justify the present appeal, because in the absence of words which make that clear, and make it further clear that it is not only inconsistent with the duty of the corporation to grant such rights, but also part of their duty to prevent them being acquired from the neglect of the use by them of their proper office—taking that view, I am bound to say that I think the interlocutor as it stands did not give the public of St Andrews (here represented by the present pursuers, the appellants) that amount of protection and security which was necessary to give effect to the opinion of the Court as far as it was in their favour.

Now, my Lords, taking that view, your Lordships have considered what variation of the interlocutor would be proper for the purpose of completely securing that object, and I propose to your Lordships to vary the interlocutor of the 9th of December 1879 by omitting from the declaration therein contained the words "but are bound to retain the same in their own hands for behoof of the community of the burgh," and substituting the words "but are bound to retain the portion of the links in question in their own hands for behoof of the community of the burgh, so that any road which may be formed thereon shall remain in all time coming a portion of the said links, held in the same way, subject to the uses, and for the same purposes as any other portion of the said links, and that the said Provost, Magistrates, and Town Council are bound to take such steps as may be requisite to prevent either the Police Commissioners of St Andrews or any other person from acquiring any title thereto or any right to interfere therewith, so that it may be always in the power of the said Provost, Magistrates, and Town Council to take away or alter such road, and in the meantime to restrict and regulate the traffic thereon."

My Lords, it was suggested by the learned counsel for the respondents—the Provost and Magistrates—that there should be words introduced to prevent any encouragement being held out by the form of the declaration which your Lordships proposed to introduce to anything like a capricious or arbitrary exercise of their powers. My Lords, I cannot see that there would be any such encouragement, and, on the other hand, any words that might be introduced for the purpose of discouraging any particular exercise of the powers could hardly be reconciled with the opinion which your Lordships entertain that it is necessary for the Provost, Magistrates, and Town Council to retain in that respect their whole legal power unimpaired and unprejudiced by the personal exercise of the discretion in their hands.

My Lords, nothing now remains but to consider the question of costs. Now, upon that point I am bound to say that I think it is right for your Lordships to bear in mind not only the fact that the alteration now proposed to be made in the interlocutor of 9th December 1879 was wanted to give to the appellants and the interests which they represent the security now given, but also that before the action was brought the attitude of both sets of respondents was such as in my opinion to justify—I do not say the form of the action—but the institution of some action for the purpose of obtaining from the Court such declarations as will now have been obtained. It is evident to me that the Provost, Magistrates, and Town Council of St Andrews in what had previously passed had been acting upon an assumption of their having larger powers than those which the Court of Session and your Lordships' House recognised—powers, that is to say, whether upon a bargain as with the individual feuars or otherwise, to dedicate to the public this particular part of the ground for the purpose of a public highway. That, however, your Lordships think they have not, and it does appear to me that their whole proceedings down to the time when the action was brought were not only such as to justify the pursuers in thinking that they claimed and might exercise that power, but such as necessarily to justify your Lordships in the conclusion that they did intend to assert that power, that they had intended the use of it, and might revert to that intention afterwards, and even in their pleadings in this action I fail to perceive anything like a renunciation of this power. Under these circumstances it seems to me that the manner in which the Court below has dealt with the

costs is at least sufficiently favourable to the respondents, and that the costs of this appeal ought not to be thrown upon the appellants, though on the other hand, of course, I do not propose that they should be given the other way.

As to the costs, therefore, what I should propose is, that the variation which I have read being made there should be no costs in this appeal.

Lord Blackburn—My Lords, I have come to the same conclusion as that stated by my noble and learned friend. The Provost, Magistrates, and Town Council of St Andrews hold as part of the common good of the town a portion of the links. They once had a much more extensive estate, but like a great many other municipal corporations in Scotland they have got rid of a great part of their landed property; still they do hold a portion of the links, some ten acres or so, in their own possession. Their title-deeds do not place any restriction upon the manner in which they are to hold them, but I take it to be the established law of Scotland that a municipal corporation may hold lands subject to an obligation to allow the inhabitants such uses as use and wont over a prescriptive period have established that the inhabitants of the town are entitled to. I do not by any means think that that is an incident attached to the fact that the estate is held by the corporation as part of its common good. In old days when corporations had extensive estates, there were many portions of estates treated like any ordinary gentleman's estate, in which no one could dream there was any such right as a right to be established by prescriptive usage.

In the present case there is no controversy about it all. It is admitted that the municipal corporation of St Andrews do in fact hold the lands subject to the rights of the inhabitants of St Andrews to use them, for golf principally, and for other objects of recreation, and I think that in modern times it is not going at all too far to say, as the Judges have done, that that is the primary and principal object for which they are held; still, subject to that primary and principal object, the municipal corporation has held the lands, with the right to make any use, or, to quote from the words of Lord Gifford, "to do anything which does not destroy or injure the primary purposes for which the land is held, namely its public enjoyment for golfing or otherwise." They have the right to do anything that does not injure or interfere with those primary purposes; they have not the right to do anything which does interfere with those primary objects.

Now, the summons here applies (I pass over the two first conclusions, which are merely general statement) to have it declared that "the magistrates and town council have no right to encroach or authorise, or permit any encroachment upon the said links, or any part thereof, which shall have the effect of diminishing the space available for the said game of golf, or for the recreation and amusement of the said inhabitants; (Third) that, in particular, the said magistrates and town council have no right to construct or authorise or permit the construction by the other defenders or any of them of a road for carts and carriages along the southern boundary of the said links; and (Fourth) that neither the said magistrates and town council nor the said other defenders are entitled to use or authorise or permit the use of the portion of the said links adjoining the said northern boundary of the said parcels of ground as an access for carts and carriages."

Now, the proposition put forward there, that those two purposes are under the circumstances and in every way to be beyond the power of the Provost, the Magistrates, and the Town Council, I think it is perfectly plain is too wide a proposition a great deal. Such things may be done in such a way as to interfere with the primary purposes for which the lands are held, namely, golfing and recreation, in which case I agree that they should not be done. On the other hand, such things may be done in such a way as not to interfere with this use, and though the motive may be a wish to give an advantage to a particular person who owns a house, or any other particular motive they like, yet so long as it does not injure or interfere with the rights which the inhabitants possess to have those lands preserved for the public recreation and enjoyment, more particularly for the game of golf, I do not see that they have any right to complain or to claim any injunction.

Now, it is upon that that the principal questions arise afterwards. The summons obviously claims too much, and I think when the evidence is gone into it will be seen that the making of such a road—that is to say, as far as macadamising the road and allowing carts and carriages to travel along it are concerned—would clearly not to that extent interfere with the game of golf at all, nor do I think it would interfere with the *jus faciendi*. You cannot put a precise limit to it; it must depend a good deal upon the discretion of those who have the management of it; but even as regards allowing carts and carriages to carry traffic to houses alongside of it, I do not see that that would at all interfere with the enjoyment of the ground.

I can quite imagine there might come a change in course of time if the town of St Andrews were to grow as great as the town of London, and if a traffic were to go along that road as heavy and great as the traffic which now goes along the Strand. I can imagine that then it would interfere with the enjoyment of the links, but that is a remote contingency not particularly like to happen. At the present time, as things exist, the making of the road and throwing it open to be used by the inhabitants for the time being would not be a matter that would interfere with the primary purpose for which the magistrates hold the land. Now, we come to the purpose which I think really was the more important purpose, though it was not very clearly kept in view by those who brought the summons and instituted the action originally. It does appear, I think (more from a confused notion about what their rights and powers were than from any intention to do wrong in any way), to have been the notion entertained by the town council in 1874 or 1875 that they had the power under certain circumstances to make or allow another person to make the road and sell it to the feuars, or give them the right to use it in future—to part with their rights so that they would no longer have control over it at all. If they did that, I certainly think that

whether at the present moment it would interfere with the public right of recreation or not, it is very likely that it would in time injure it. I think the Court below has very properly said that that being so they should express themselves in their verbal judgment in such a way as to make it clear that the Provost and Town Council should not do it, and that there should be some terms put into their interlocutor (that being the way in which they thought it would be best done) to secure that the Provost and Town Council if they made this road, though they might allow traffic to go on it, were still to preserve the full control over it and to hold it subject to all the rights which the inhabitants possess for recreation, not in particular but in general; and that the Provost and Town Council should keep to themselves the power of regulating the traffic, so as to keep the road whilst the traffic went on it in such a state as that it should not be a nuisance to those in pursuit of recreation. I can perfectly understand that they might make an order that carts carrying manure, for example, should not go along the road from one place to another—or possibly that the more offensive descriptions of traffic generally should only be driven through it by night, and, in fact, as to many of the numerous purposes as to which bye-laws might properly enough be made; but still they must preserve their powers, and must take care that they do not part with the road so that nobody else occupies a right paramount to the corporation. I think that object is very clearly expressed in the verbal declarations, but when it came to be put into the interlocutor it was not so fully expressed; consequently I think there was very considerable reason to doubt whether there might not be future litigation arising upon the subject of what was decided and what was meant. Upon that ground I think it most desirable to alter the declaration in such a way as to make it perfectly clear in future what are the limits of the powers of the Provost and Town Council of St Andrews in respect of those links, and also to make it clear that the right of the inhabitants to object to their control is limited to the right to object to their doing something which would interfere with or injure the primary purposes for which the lands are held, namely, the enjoyment of the inhabitants.

Now, the only other question which arises is the question of costs. The general rule of your Lordships' House is that if the appeal be dismissed it should be dismissed with costs, but when it appears from the result of the appeal, upon some subordinate or it may be substantial part of the case, that the appellants were justified in coming to this House, then it is generally said, that although the costs go to the victor, in that case, as in this, there would be no thorough victory to either side, and therefore the question would be as regards the costs, how far that would apply to the present case. It is never very easy to be quite clear about such a point as this, but I think the interlocutor being varied as proposed, there is a sufficiently important object attained by the appellants in coming here to make it proper to say that the appellants should not pay the costs of the appeals, though I also agree that there is nothing to entitle him to get costs from the other side. In every other respect I agree with the motion which has been made by the noble and learned Lord on the woolsack.

Lord Watson—The only questions which have been argued at your Lordships' bar relate to the powers of the Magistrates and Town Council of St Andrews as proprietors and administrators of that part of the common good of the burgh which consists of these two portions of the links. *Prima facie* the common good of the burgh vested in the magistrates generally under very ancient titles is simply property held by them which they can dispose of as freely, so long as they keep the interests of the burgh in view, as a private proprietor can deal with his own land. But in this case the part of the common good in question is subject to a special trust for behoof of the community, or, in other words, the inhabitants and burgesses of the burgh of St Andrews. That right in the burgesses does not require to be constituted by writing; it can be constituted by writing; it can be constituted and generally is constituted by immemorial usage—that is to say, by a course of enjoyment for a prescriptive period of at least forty years. In the present case there are abundant indications that the inhabitants did possess that right at a somewhat distant period; but your Lordships are saved from making any inquiry into that question, which is one of fact merely, by the judicial admission given by the magistrates, to the effect that they do hold that part of their property under trust to preserve it for the recreation by golfing of the inhabitants.

Now, my Lords, although they hold it subject to these rights on the part of the inhabitants, the magistrates and council remain undivested to any further extent of their proprietary rights, and are therefore entitled either to make or to sanction any other uses to which the property is convertible, so long as those uses are not inconsistent with the due enjoyment by the burgesses of the rights vested in them by law. That would depend to a very great extent upon the amount of the population and the amount of the golf played or recreation taken. Uses which would be perfectly legitimate and proper in a thinly populated burgh may become very illegitimate and very improper, and may constitute invasions of the burgesses' rights, when practised where there is a large population.

Now, my Lords, what the magistrates and town council were proposing to do at the time when this action was raised appears to me to have been this—they were acting upon the assumption that it was within their competency to confer upon the public at large (because they did not venture to deal with those correspondents other than as members of the public) a right-of-way over that portion of the ground which it was their duty to preserve for purposes consistent with the rights of the inhabitants, and they justified their position upon the ground that as matters stood at that date no right of the inhabitants would be invaded thereby. I think that was a mistaken view of the law and of the extent of their power, because they would thereby be vesting in the others a right which might become inconsistent with the rights of the inhabitants at some future time.

The appellant brought this action no doubt

with a view to stop the threatened proceedings, but he did not limit the conclusions of his summons to the actual proceedings which the council were threatening to take, but made them so wide that if given effect to they would establish this proposition, that wherever a right of golfing or of recreation exists the magistrates cannot give a comfortable or convenient right of passage over the ground reserved for that purpose, although the so giving it may not interfere to the smallest extent with the rights reserved to those people. On the other hand, the defence set up in this case appears to me to amount on the part of the magistrates and council to a justification of that which they proposed to do as falling within their discretion; and beyond that a separate defence was set up by the feuars, to which I shall not refer, because it has not been insisted upon at your Lordships' bar.

My Lords, I am of opinion with your Lordships that the Court of Session were quite right in holding that the appellant has entirely failed to show that the present use of a metalled road along the line proposed will have the slightest effect in interfering with the privileges of the golf community. The evidence upon that point appears to me to be all one way. There is undoubtedly the proper golf-course outside of which this line of road is, and that must not be interfered with.

But no one proposes to interfere with it. Then it is said that you must leave untouched everything outside of that. I entirely demur to that proposition; the contention to which I should rather give effect really comes to this, that whatever is outside of the proper golfing course may be turned to various purposes so long as it is NOT absolutely inconsistent with the game of golf; and really the speculation as to whether it is better to have a road with ruts in it, or a metalled road, or a piece of rough grass with hollows and heaps, is after all rather a fanciful question than a question having any substance in it.

That being the case, my Lords, we are narrowed to the question of regulation. I do not think much is made of it in the record, and still less is made of it in the evidence in the case. I see nothing which can suggest to me that the present use of that road by vehicles as well as by pedestrians will in the least degree encroach upon the privileges which the community are entitled to exercise. It may very well be that upon special occasions—indeed, it may come to be that upon ordinary occasions—it may be necessary for the magistrates to exercise some right of regulation over the traffic. There are kinds of traffic which are mentioned in the evidence, such as carting coals and so on, which do not seem very consistent with recreation; but it is obvious that those might be regulated so as not to interfere with the use of the ground by the inhabitants at those times of the day when ordinarily people are in the habit of taking their recreation. And then it is a possible thing that some day or other, as has been suggested by my noble and learned friend opposite, such a change may come over St Andrews that it may become necessary in the due exercise of their administrative powers for the town council to take away this right of road. One cannot anticipate that such a thing will immediately occur, but it may, and it certainly is within the rights of those who can read this reservation in their favour, or this right in their favour, to have recreation and to play golf upon the links, that they are quite entitled to have a judgment which will prevent the magistrates from making such an alienation at the present moment as may come at any future period into collision with the rights which undoubtedly are of primary importance upon this piece of land.

I therefore entirely approve of the declaration which has been proposed by my noble and learned friend on the woolsack, because it appears to me to settle as definitely as a court can by anticipation the limits within which the discretion of the magistrates must be exercised, and it lays upon them the imperative duty which they were at the time this action was raised—according to my reading of the record—about to neglect, the duty not only of abstaining from doing any act or deed by which a right would be created in others, but the further duty of taking steps to prevent others from acquiring that right. Upon the matter of costs I entirely agree with my noble and learned friend upon the woolsack.

The House ordered that the interlocutor of the 9th December 1879 be varied by omitting from the declaration therein contained the words "but are bound to retain the same in their own hands for behoof of the community of the burgh," and substituting the words "but are bound to retain the portion of the links in question in their own hands for behoof of the community of the burgh, so that any road which may be formed thereon shall remain in all time coming a portion of the said links, held in the same way, subject to the same uses, and for the same purposes as any other portion of the said links; and that the said Provost, Magistrates, and Town Council are bound to take such steps as may be requisite to prevent either the Police Commissioners of St Andrews or any other person from acquiring any title thereto or any right to interfere therewith; so that it may always be in the power of the said Provost, Magistrates, and Town Council to take away or alter such road, and in the meantime to restrict and regulate the traffic thereon." That in other respects the interlocutor be affirmed, with no costs of the appeal.

Counsel for Pursuers (Appellants)—Herschell, S.-G. — Webster, Q.C. Agents — Mitchell & Baxter, W.S., and Simson & Wakeford.

Counsel for Defenders (Respondents) the Magistrates of St Andrews—Benjamin, Q.C.—R. V. Campbell.

Counsel for other Defenders (Respondents)—Balfour, S.-G. — Haldane. Agents for both Respondents — Tods, Murray, & Jamieson, W.S., and Connell, Hope, & Spens.