on the opinion expressed by Lord Shand in the case of *Carlberg* v. *Borjesson*, decided by the First Division of the Court of Session in the year 1877. There the Court held that the usual warrant to arrest and dismantle did not authorise the messenger to bring the vessel back to port after she had sailed. But Lord Shand indicated an opinion that a warrant to bring a vessel into port while she was still within the jurisdiction of the Court, might, on a special statement, be granted by the Judge Ordinary. In the present case, a special statement having been made that the captain was about to obey the instructions of his employer and to sail with the yacht to Germany, in disregard of the arrestment, Lord Shand gave effect to his opinion formerly expressed, and granted a warrant to bring the yacht into port in order that she might there be dismantled. His Lordship held that under the Admiralty Act, 1 William IV. chap. 69, sec. 21, the Lord Ordinary on the Bills has this power in vacation. The section of the Admiralty Act referred to provides that "the High Court of Admiralty be abolished, and that hereafter the Court of Session shall hold and exercise original jurisdiction in all maritime civil causes and proceedings of the same nature and extent in all respects as that held and exercised in regard to such causes by the High Court of Admiralty before the passing of this Act; and all applications of a summary nature connected with such causes may be made to the Lord Ordinary on the Bills."

His Lordship in granting the application stated his opinion that the Sheriff as Judge Ordinary was entitled in similar circumstances to grant such warrants where the defender is on any ground subject to the jurisdiction of the Sheriff.

Agent—Andrew Wallace, Solicitor.

HOUSE OF LORDS.

Wednesday, July 26.

(Before Lord Chancellor Selborne, Lords O'Hagan, Blackburn, Watson, and Bramwell.)

GRAHAME *v.* THE MAGISTRATES OF KIRKCALDY.

(*Ante*, vol. xviii. p. 248, and 8 R. 395.)

Nobile Officium—*Equitable Compensation—Legal Rights—Burgh*—Actio popularis.

A Court of Equity has a discretion in highly exceptional cases to withhold from parties the legal remedy to which they would in ordinary cases be entitled as a matter of course.

An inhabitant of a burgh had obtained interdict against the magistrates to prevent them building on a particular piece of ground dedicated to the public uses of the burgh. While this process was in dependence the magistrates proceeded with the building, and completed it before interdict was granted; the building was for public purposes. The complainer then brought an action for declarator of the public right, and decree against the magistrates to remove the building; the magistrates offered to convey to the community a piece of ground in every way as suitable for public purposes in lieu of that now occupied by buildings. *Held* (*aff.* judgment of the Court of Session) that this offer was a reasonable offer, and that in respect the interest of the pursuer was as one of the community, the Court was entitled to apply the rule stated above, and to refuse the remedy asked in so far as the removal of the building was demanded.

Opinion, that if the pursuer had sued as an individual to enforce his own private right and interest in similar circumstances the Court could not have denied him his full legal remedy.

Interdict—Process—Expenses.

Held (*rev.* judgment of Court of Session) that the pursuer was entitled to decree of declarator and to his expenses in both Courts, in respect the magistrates had gone on to complete the building after the process of interdict had been brought, and had not proposed to recognise the rights of the community except in so far as they might be forced to recognise and make provision for them by the pursuer's action.

Question whether the case of *Begg* v. *Jack*, October 26, 1875, 3 R. 35, was well decided.

This action was decided by the Second Division of the Court of Session on 19th January 1881, and is reported *ante*, vol. xviii. p. 248, and 8 R. 395. The Court assoilzied the magistrates on their lodging in process a conveyance of the ground which they proposed to substitute for the ground claimed by the pursuer as public property, and held to be so in the former process, which was decided on June 19, 1879, and is reported in 16 Scot. Law Rep. 676, and 6 R. 1066.

The pursuer appealed.

At delivering judgment—

Lord Watson—My Lords, had the present action been the only proceeding taken by the appellant in order to vindicate his rights as an inhabitant of the burgh of Kirkcaldy, I should have had little difficulty in coming to the conclusion that, admitting the right of the community to have the whole area of the South Links kept free from buildings, the Court was nevertheless justified in refusing to ordain the stables in question to be taken down.

It appears to me that a Superior Court having equitable jurisdiction must also have a discretion, in certain exceptional cases, to withhold from parties applying for it that remedy to which in ordinary circumstances they would be entitled as a matter of course. In order to justify the exercise of such a discretionary power there must be some very cogent reason for depriving litigants of the ordinary means of enforcing their legal rights. There are, so far as I know, only three decided cases in which the Court of Session—there being no facts sufficient to raise a plea in bar of the action—have nevertheless denied to the pursuer the remedy to which in strict law he was entitled. These authorities seem to establish, if that were necessary, the proposition that the Court has the power of declining upon equitable grounds to enforce an admittedly legal right, but they also show that the power has been very rarely exercised.

The earliest case is that of *Macnair* v. *Cathcart* (Mor. Dict., p. 12,832). In the year 1777 Lord Cathcart purchased a small plot of ground from A, who in 1764 had made up a title by service as heir of the feuar last infeft. His Lordship, who was proprietor of the ground adjacent, at once proceeded to throw a portion of the plot into a new street which he was then forming, and built part of each of the two new villas upon the remainder. In 1795, B, who, and not A, was the true heir of the deceased feuar, returned from foreign parts and brought an action for the purpose of setting aside the title made up by A, as well as the disposition by A to Lord Cathcart, and of recovering possession of his inheritance. The right of B to the property of the plot in question was undeniable, and there was no room for the plea of acquiescence as in bar of his action, because the service of A and the sale to Lord Cathcart had been carried through during his absence from the country, and without his knowledge. But the Court having regard to the great inconvenience which would result from giving effect to the pursuer's legal rights, refused to grant decree of reduction and removing, and permitted Lord Cathcart to remain in possession as owner of the land in dispute upon condition of his paying full compensation to B.

The next case is that of *Sanderson* v. *Geddes*, decided by the First Division of the Court on July 17, 1874, 1 R. 1198, where the facts were these. The proprietor of a house having a mud gable, four feet thick, built a second tenement at the end of the gable, which thus became in fact mutual; and then by *mortis causa* deed conveyed the original dwelling to A and the new house to B. At his death A took down the mud gable and built one of stone and lime, two feet thick, upon that portion of the old site which was next to B's house, and so gained two feet of interior space for his own. After the erection of the new gable was completed, B, who had made no objection to A's operations, although if not aware he might have informed himself of their progress, brought an action concluding for its removal. The Court refused to ordain its removal, but held that B was entitled to use it as a mutual gable upon making the usual payment, under deduction of such sum as might represent the benefit which A had obtained by his encroachment. The effect of the judgment was not, as in the case of *Macnair* v. *Cathcart*, to deprive the owner of his right of property in the *solum*. It merely deprived him of the exclusive use and possession of his property until the new gable became ruinous or was pulled down.

The last authority to be found in the books is *Begg* v. *Jack*, October 26, 1815, 3 R. 35, and in regard to that decision I desire to say that whilst it may fairly be accepted as an authority in favour of the equitable jurisdiction of the Court in such cases, I am not satisfied that the result at which the Court arrived is such as your Lordships ought to approve. Two feus in the suburbs of Edinburgh were separated by a garden wall. A, the proprietor of one of them, insisting that the wall was entirely built on his land, proceeded to pull it down, and to erect on its site a gable wall several storeys in height. B and others, the proprietors of the other feu, maintained that half of the site of the old wall was their property, and objected from the first and throughout to A's operations. The facts are correctly summarised by Lord Gifford, who says (p. 42)—"It is clear that the pursuers (B and others) never consented, either expressly or by implication, to the gable in question being erected on their ground. On the contrary, I think the correspondence shows that the pursuers all along objected, and warned the defender that he was proceeding at his own risk, while at the same time they were negotiating terms of agreement or arrangement. No agreement, however, was come to, the parties having differed as to the responsibility for any damage which might be occasioned to the schoolroom." The Court held that one-half of the site of the wall was the exclusive property of the pursuers, but they refused to ordain the removal of the new gable, and allowed it to stand, upon the condition that the pursuers should be entitled, if they chose, to use it as a mutual gable without making the customary payment to A in respect of that privilege. The pursuers had, unfortunately for themselves, expressed their willingness in the course of the dispute to compromise it upon the terms ultimately forced upon them by the Court, and that seems to have been one of the leading grounds of the judgment against them, which humbly appears to me to trench upon private rights of property to an extent altogether unwarranted by any previous authority in the law of Scotland. The practical effect of the judgment was, that the Court gave the wrongdoer compulsory powers to acquire part of his neighbour's property which in spite of remonstrance he had illegally appropriated.

In each of these three cases the object of the action was to recover possession of the pursuer's estate of fee, and to oust the party by whom it had been invaded. I do not mean to suggest that the owner of a servitude is not entitled to the same protection from the Court against invasion of his right as a proprietor of the soil. But the appellant sues neither as the owner of land nor as the proprietor of a dominant tenement, and as such in right of a servitude. He does not even sue as the owner of property within the burgh of Kirkcaldy, but as one of the community of the burgh. The right and interest of a burghal proprietor whose property is near to or abuts upon the South Links differs in degree from the right and interest of a person whose connection with the burgh is dependent upon residence alone. The interest of the one may be proprietary in this sense, that an alteration in the condition of the Links will affect, not a personal convenience merely, but the value of his property, into whose hands soever it may come. The right and interest of the other is personal and transient, and cannot be distinguished from that of the rest of the inhabitants of the burgh. This suit is truly an *actio popularis*, inasmuch as it is brought for the vindication of a right common to all the inhabitants, and in disposing of it the Court must, according to my apprehension, consider, not the interest of the individual pursuer, but the interest of the general community.

Now, it is conceded in this case that the respondents have, contrary to the right of the community, spent nearly £1900 of their ratepayers' money in erecting stables upon a portion of the South Links nearly a quarter of an acre in

extent. The stables are required for police purposes, and the outlay would have been unobjectionable had it not been made upon the Links. The respondents have since acquired about half an acre of ground at some distance from the Links for a present payment of £250 and an annual feu-duty of £14, 14s. 7d., which they offer to dedicate to the use of the community in lieu of the present site of the stables. The learned Judges of the Second Division were very clearly of opinion, and so far I have no difficulty in agreeing with them, that, although the appellant asserts the contrary, it would be much more for the advantage of the community to accept the substituted ground and allow the stables to stand, than to ordain the stables to be pulled down, seeing that in that case they must be rebuilt elsewhere at the expense of the burgh ratepayers, who may be taken as fairly representing the bulk of the community. On that ground their Lordships have refused to decern for removal of the stables.

The difficulty which I have felt in regard to the interlocutor under appeal arises from the circumstance, which is not noticed in any of the opinions delivered in the Court below, that before the present action was instituted the appellant had obtained decree in a process of suspension and interdict directed against the respondents in relation to the erection of these stables. The application for interdict was made upon the 4th May 1878, and the respondents appeared and disputed the right of the community on various grounds. As an alternative defence the respondents alleged that at the date of raising process mason-work had actually been executed to the value of £312, 17s. 10d.; that materials had been laid down on the ground of the value of £336, 17s. 11d.; that part of the buildings were ready for roofing; and that they had made contracts for the completion of the work; and upon these allegations they pleaded that the application was not presented in time, and ought therefore to be refused. There was no interim interdict, and the respondents went on with the work, and completed it during the dependence of the process, which came to final judgment upon the 19th June 1879. On that date, after both parties had led proof of their averments, the Second Division of the Court, adhering to the interlocutor which had been pronounced by the Lord Ordinary, overruled all the pleas stated by the respondents, and interdicted them, *inter alia*, "from erecting stables or any buildings or erections of any kind" upon that portion of the South Links which is now in dispute, or any part thereof.

As between the appellant and the respondents the judgment of the 19th June 1879 is now *res judicata*. It was not disputed at the bar that the final decree, prohibitory in a process of suspension and interdict, draws back to the date of the application, and strikes against everything that has been done by the respondents after that date. It would, in my opinion, be most unfortunate were a respondent who has proceeded with his operations during its dependence to be held at the end of the litigation to be in any better position because there has been no interim interdict. The rule of the law of Scotland is *pendente lite nihil innovandum*, and whatever a party chooses to do after the matter is litigious he does it at his own risk. The ordinary and legal result of the final interdict is that the party who has obtained it has a right to apply for and obtain a judicial order to undo that which has been so done, and it has always been regarded as a necessary consequence of that right that the order for removal must be extended to that which had been erected before the litigation began.

If the judgment of the 19th June 1879 had been a decree capable of being put into execution without the intervention of the Court, it would have been too late to consider whether these buildings ought or ought not to be taken down, but the appellant has no means of enforcing it except by a new application to the Court for an order of removal. Even in that application it is, in my opinion, too late for the respondents to resist the granting of the order upon considerations which either were or might have been competently pleaded by way of answer to the note of suspension and interdict. If the Court were to entertain such pleas at that stage of the procedure it would be practically reviewing its own final judgment upon grounds which had been pleaded or which the party was bound to plead in the suit in which that judgment was pronounced. If, however, there be *res noviter* affecting the relative position or rights of the litigants which have emerged since the date of the final judgment, the Court is not only entitled but bound to take cognisance of them, and to consider whether in the altered circumstances of the case the decree previously granted ought or ought not to be enforced.

My Lords, if the controversy between the appellant and the respondents had related to a heritable right the private property of the appellant, I should have been very clearly of opinion that the judgment of the Second Division could not be sustained, and it is with great difficulty that I have ultimately come to the conclusion that the circumstances of the present case are sufficient to justify a refusal of the remedy which the appellant asks. In arriving at that conclusion I have been mainly influenced by these considerations—First, that the community of the burgh whose rights are at stake has an interest on both sides of the present litigation; and secondly, that the tender of a substituted piece of ground is in this sense *res noviter*, that the ground was not the property of the burgh or under the control of the corporation at the time when the appellant obtained decree of interdict. Were the appellant seeking to enforce the decree which he holds in his own private right and interest, I do not think the considerations of inconvenience and pecuniary loss to the respondents, arising from the position in which they had placed themselves by their own acts, would afford a relevant answer to his demand in the present action. But these considerations assume a very different aspect when the necessary result of disregarding them will be to inflict that loss and inconvenience upon the community whose interest the appellant represents. In the peculiar circumstances of this case I do not think it is too late to consider the interest of the community, and I agree with the Court below that their interest will be better served by giving them the field recently acquired by the Corporation in exchange for the portion of the Links of which they have been deprived, instead of granting an

order which will have the practical effect of charging the community or the common good of the burgh with the whole expense of taking down the stables and re-erecting them upon a new site.

It was suggested in argument by the appellant's counsel that the cost of restoring the ground in dispute and rebuilding the stables ought to be laid upon the individual members of the Corporation. But the present action is brought for the purpose of imposing liability upon the Corporation and its corporate estate, and not upon individuals. I cannot regard the proceedings of the respondents in building upon ground which they were under a legal duty to keep open for the use of the inhabitants as at all praiseworthy, and they were certainly not *bona fide* in any proper sense of that term. The most that can be said for the respondents is that they did not act *mala fide*, and I am not prepared to hold that they ought to be made personally responsible for the consequences of what they have done in violation of the rights of the community. As a member of the community the appellant has an unquestionable title to vindicate the customary rights of the inhabitants to use the South Links for bleaching and other purposes; but no member of the community has a title to call the respondents to account generally for their maladministration of the common good of the burgh. The respondents are not answerable for their administration of the burgh property as if they were trustees for the community. Except in so far as its actings may interfere with the personal uses which an inhabitant is entitled to make of the burgh property the Corporation is only accountable to the Crown for its administration of that property. The law is so stated by Mr Erskine (b. 1, t. 4, s. 23), and was affirmed by the Court in the case of *Mollison* v. *Magistrates of Inverary*, 14th December 1820, F.C.

But assuming that the respondents are not to be ordained to remove the stables, the appellant has still, in my opinion, good reason to complain of the interlocutor of the Second Division, in respect that (1) it assoilzies the respondents from the whole conclusions of the action, including the declaratory conclusions, and thus negatives the appellant's right, which is admitted on all hands; (2) it throws the action out of Court in respect of the offer made by the respondents to give substituted ground; and (3) it leaves the appellant to pay the whole expenses of process incurred by him.

It appears to me that the appellant ought to have a declaratory decree affirming the rights of the community in the piece of ground in question, and that the action must be kept in Court until the substituted ground has been properly laid out and dedicated in perpetuity to the uses of the inhabitants. I am also of opinion that the appellant ought to have his expenses in the Court below as well as the costs of this appeal. I cannot understand why the Judges of the Second Division refused him even the expense of bringing the action into Court, although it was raised in the beginning of March 1880, and the respondents did not acquire the ground which they offer until the month of November following. I cannot discern in these proceedings any indication of a desire on the part of the respondents to recognise the right of the community except in so far as they might be compelled by legal process. The appellant's action appears to me to have been raised in the interest and carried on for the benefit of the community, and to have been necessary for the vindication of their right.

[His Lordship concluded by moving the House to order and adjudge in the terms quoted at the end of this report.]

Lord Chancellor—My Lords, I concur entirely in the judgment which my noble and learned friend has just moved. It is inseparable from the principles of equitable jurisdiction that its exercise may be withheld where on the balance of conflicting considerations the reasons against the interference of a Court of Equity are found to preponderate. In England before the Judicature Act the result under such circumstances would generally have been to leave the parties to their rights and remedies at law. But in cases of public or charitable trusts (and the present case is one which in England would be deemed to be of that nature) the English Court of Chancery would always have felt itself bound to pay regard to the general benefit of those interested in the trust; and might on that principle have given its sanction, on proper terms, to any arrangement which might appear on the whole to be beneficial under the actual circumstances, even when that which was in strictness illegal and unauthorised might have been done by the administrators of the trust. In Scotland the legal and equitable jurisdictions have always been united; and the natural result of that union is that strict legal rights ought not in such a case as the present to be enforced without regard to the discretion which, from the nature of the subject-matter and of the interests of all those concerned in it, ought to be exercised by a Court of Equity.

The great difficulty in this case has arisen from the interdict granted in the former suit. But I cannot think that this ought to be an absolute bar to the discretionary power of the Court when the whole matter (including some new circumstances) comes before it in a subsequent suit to do what may seem on the whole to be most proper and beneficial.

This is the view which has prevailed in the Court below; and I willingly concur in the motion as to the proper mode of dealing with this appeal which has been submitted to your Lordships by my noble and learned friend, who is so familiar with the law of Scotland. The order which he has proposed will give full effect to the governing principle of the decision of the Court below, while it will correct the error into which that Court has fallen from a too exclusive and summary regard to that principle, and it will also give the appellant—what I think he is clearly entitled to—his costs of the proceedings which he has properly taken to rectify acts wrongfully done by the respondents, and which have resulted in an equitable settlement of the matters in dispute which could not otherwise have been made by lawful authority.

Lord O'Hagan—My Lords, on the substance and merits of this case I have had no doubt, since I heard the argument, that the respondents should succeed. The only question of apparent difficulty has arisen as to the effect of the suspension and interdict—pronounced whilst the build-

ings, the subject of the controversy, were in progress—in fettering the discretion of the Court.

The Lord Ordinary did not grant an interim interdict, but final judgment was given by the Court of Session on the 19th June 1879, founded on the view that the respondents as magistrates and town councillors were in error in not keeping the public common, otherwise the links, of the burgh of Kirkcaldy, free and open for the use of the inhabitants as a bleaching-green and for their recreation, but had, on the contrary, determined to erect, and had partially erected, upon it stables and other buildings for the purposes of the municipality. The respondents, before the institution of these proceedings, had been allowed to advance a considerable way with those works without interruption or protest. Their estimates had been made; their contracts were completed; the walls of the buildings were six feet in height, and a good deal of the public money had been expended, and, in the absence of an interim interdict, the respondents, convinced, as they say, that they had a right to do so—bound by their contracts, and believing that the buildings were required for public purposes—proceeded to complete them. In strictness they had no right to proceed. The interdict finally pronounced had retroactive force relating back to the commencement of the suit, and condemning any works executed in the intervening period in contravention of its purpose and its terms. Those works having been prosecuted *pendente lite*, were technically tainted with illegality, and liable to be abolished.

The question of difficulty suggested, I think, by one of your Lordships, was whether the final decree did not disable the Court from entertaining the proposal of the respondents to have the buildings maintained on the substitution of another piece of land for that on which they had been placed, with equal convenience for bleaching and recreation to the Kirkcaldy public, and with substantial saving to their municipal treasury. This one consideration seemed to me material, as impeaching the jurisdiction of the Court to contravene and nullify its own antecedent act, even for objects of public advantage. But I have come to the conclusion that it ought not to prevail. The point so raised is one of practice; and of the practice in Scotland the Judges of Scotland are more competent to speak. In this case all the facts capable of raising the question were necessarily forced on the attention of the Court of Session. It had before it the note of the Lord Ordinary distinctly and expressly pointing to the conduct of the respondents as illegal, and incapable of pecuniary compensation, but resting his decision against them on the ground of the convenience of the inhabitants, and not of his own incapacity to consider the offer of substitution. And the facts as to the progress and completion of the works whilst the cause was pending are clearly stated throughout the judgments on the action of declarator. So that this point, if it was tenable at all, must have been inevitably suggested to those most qualified to decide upon it. It was not hinted at by any of them, and the counsel for the appellant did not put it forward. I think it not too much to say that the abstinence from allusion to such an argument is persuasive proof of its invalidity.

But in addition to this, the point has been discussed with clearness and force by my noble and learned friend Lord Watson, whose mastery of Scottish law and practice enables him best to judge of it. I have had the advantage of reading his opinion, and in connection with the matter I have mentioned it fully satisfies me that the Court of Session was not precluded, and this House is not precluded, by any lapse of jurisdiction from dealing with the subject freely, and doing what is required by equity and reason. The peculiarity of the case, as involving the general interests of a community the membership of which alone entitles the appellant to be heard, and the occurrences which since the pronouncing of the decree of interdict have enabled the respondents to make a proposition apparently conducive to those interests and compensative for the errors into which they fell, with an earnest desire to do their duty — these things are of great weight in justifying the action of the Court of Session, and accounting for the want of remonstrance against the jurisdiction it assumed on the single ground on which it might plausibly have been offered.

Getting rid of this objection the case seems to me to be a clear one. I adopt the words of Lord Gifford in *Begg* v. *Jack*, 3 R. 43—"There is an equitable power vested in the Court, in virtue of which, when the exact restoration of things to their previous condition is either impossible, or would be attended with unreasonable loss and expense quite disproportionate to the advantage it would give to the successful party, the Court can award an equivalent. In other words, they can say upon what equitable conditions the building should be allowed to remain where it is, although it has been placed there without legal right." That opinion is supported by several Scottish cases of undoubted authority, and seems to me quite in accordance with sound principle and the practice of English Courts of Equity, and if it be sustainable, the facts of the case abundantly justify the decision of the Court of Session.

The respondents erred, not by any act of malversation or self-seeking, or wilful neglect of their obligations to the community to which they were placed in a fiduciary relation. They were only wrong in applying to one purpose a little bit of land which they were legally bound to apply to another; but the purpose to which they applied it was a good one, and promotive of the general welfare, and they seek condonation of their mistake by the substitution of another bit of land, which in its position and in its capabilities is as valuable to the burgh as that which for the service of the burghers has been utilised in another way. In such a case it is necessary for the justification of such a substitution to show, in the words of the Lord Justice-Clerk, "that on the one hand no interest will be endangered, and on the other that great loss will be incurred." This has been done in the case before us. The Court has come to the conclusion that Kirkcaldy will have a satisfactory equivalent for the loss of the means of bleaching and recreation of which the appellant in its behalf complains, whilst it is spared the cost of the removal of buildings in themselves useful to it, which could only be done at the expense of some £2000. The *cy près* principle was never more judiciously applied than in the acceptance of such an equivalent,

and it should scarcely be refused on the pressure of an unreasonable litigant who has no personal right to assert and no personal wrong to remedy —who proceeds only in the name of his fellow burghers, and declines any arrangement which might do them a service or save them from an injury, relying on a rigid and high-handed claim for restoration to the *status quo* without regard to consequences.

Taking this view, I have no doubt at all that the interlocutor of the Court below, modified as has been suggested by my noble and learned friend, should be adopted by the House.

Lord Blackburn—My Lords, I have had the advantage of reading the opinion of my noble and learned friend Lord Watson, in which I agree. I never felt any doubt that if the Court of Session had a judicial discretion to refuse to order buildings which have been wrongfully erected to be removed on the grounds that substantial justice between the parties would not be thereby done, and that the defenders were in a position to offer a sufficient equivalent, which would be more beneficial for the pursuers and less burthensome to themselves, this discretion was in the present case properly exercised by the Court.

Had the case of *Macnair* v. *Cathcart* occurred in England, I think the plaintiff would have recovered possession in ejectment without asking for the aid of a Court of Equity, and when he recovered possession he might have pulled down the two ends of Lord Cathcart's villas unless paid whatever sum he demanded, and as there appears, on the facts as reported, to have been no ground on which a Court of Equity could have interfered, the defendant must either have refused to pay anything, leaving the plaintiff to do what would be no benefit to himself but very annoying to the defendant, or have paid what the plaintiff's conscience permitted him to demand. It was, and I suppose still is, usual when a case is likely to involve such points, to try to get it referred to an arbitrator, with power, amongst other things, to order what is just to be done. It seems from that case that the Court of Session have the powers which an arbitrator under such a reference would have had. I agree that such a power should not be lightly exercised, and I concur in the doubt expressed by the noble and learned Lord opposite (Lord Watson) whether it has always been properly exercised, but in the present case I think it is rightly exercised.

I also agree that it is important that such a point should be raised at as early a stage of the pleadings as it can reasonably be raised. I am glad that he has been able to come to the result that it was not too late to raise it in the present case. I do not pretend on a question of Scottish pleading to form an opinion of any value.

As to the form of the order of this House, I concur in that which is proposed.

Lord Bramwell—My Lords, I concur, and I have nothing to add.

Interlocutor appealed from reversed: Declared that the portion of the South Links or South Commonty of Kirkcaldy, which extends from Burleigh Street of Kirkcaldy on the north, to the vennel called John Loudoun's Wynd on the south, and from property belonging sometime to the heirs of Thomas Meldrum, and other properties, on the west, to the sea-flood on the east, as the said portion is marked off and coloured red on the plan produced, was vested in the respondents, the Provost, Magistrates, and Council of the burgh of Kirkcaldy, on the condition that the same should be kept in perpetuity for the use and enjoyment of the inhabitants of Kirkcaldy, for the purposes of drying or bleaching clothes, and of recreation; that from time immemorial, or at all events for forty years prior to the erection of the buildings after mentioned, the said portion of the said South Links or South Commonty had always been open and patent to the said inhabitants of the said burgh of Kirkcaldy, and that the said inhabitants had for the said period used the same without hindrance, prohibition, or interruption for drying or bleaching clothes and for recreation; that the erection by the respondents in or about the year 1878 of stables and other buildings or erections upon the said portion of the said South Links or South Commonty was illegal, unauthorised, and to the prejudice of the rights and interests of the appellant and other inhabitants of the burgh of Kirkcaldy, in so far as regards his and their rights of drying or bleaching clothes and of recreation over the said ground; and that the appellant ought to have decree to that effect under the declaratory conclusions of his summons: Further declared, that in present circumstances, and having regard to the offer made by the respondents to provide the ground described in the feu-charter granted by Mrs Emma Eliza Munro Ferguson and others, testamentary trustees of the late Robert Munro Ferguson of Raith and Novar, to and in favour of the Magistrates and Town Council of Kirkcaldy, dated 18th, 24th, and 30th December 1880, and recorded in the Division of the General Register of Sasines applicable to the county of Fife the 15th day of July 1881, as an equivalent for the portion of the South Links or South Commonty of Kirkcaldy hereinabove described, it is not expedient or for the interest of the community of the burgh that decree should be granted for the removal of the said stables and other buildings. Subject to these declarations, cause remitted to the Second Division of the Court of Session with these directions, that upon the said ground proposed to be substituted for that part of the South Links which has been wrongfully appropriated by the respondents being properly laid out and dedicated to the uses of the community to the satisfaction of the Court, the Court shall find it to be unnecessary further to dispose of the declaratory conclusions of the summons, and shall assoilzie the respondents from the remaining conclusions thereof. Respondents to pay to appellant the whole expenses of process incurred by him in the Court below, and also the costs of the appeal to this House.

Counsel for Grahame — Crossley, Q.C. — M'Kechnie. Agents—Curror & Cowper, S.S.C., and W. Robertson.

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