Nov. 10, 1813.

LIABILITY OF OWNER FOR REPAIRS DONE TO A SHIP.

Judgment of Court below (except as to the ground of hypothecation, which was expunged) affirmed, with 60*l.* costs.

Judgment.

Agent for the Appellant, MUNDELL.
Agent for the Respondents, WATKINS.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

DEMPSTER and others—*Appellants.*
CLEGHORN and others—*Respondents.*

Nov. 26—29, 1813.

SERVITUDE.—ST ANDREW'S GOLF CAUSE.

SERVITUDE, or right of playing golf without obstruction on the golfing links of St. Andrew's, claimed by certain persons, inhabitants, of that city and members of the St. Andrew's Golf Club, on the ground of immemorial custom, for the inhabitants, *and all others* choosing to resort thither for the purpose of playing golf. The title of the Respondents to pursue in the above character sustained by the Court of Session; but, on account of discrepancies, real or supposed, between the different interlocutors, the whole cause remitted for review.

1797 Feu of St. Andrew's golfing links to Lord Kellie.

IN 1797, the magistrates and town council of St. Andrew's, proprietors of the golfing links in the neighbourhood of that city, sold these links to the Earl of Kellie, who was then Provost of St. Andrew's. The links were immediately before this let to a person of the name of Ritchie, in whose lease there was this condition among others:—"*The tacksman shall not have it in his power to*

" *make use of the links as a warren: but the ma-*
" *gistrates shall have power to give orders at any*
" *time for the destruction of the rabbits on the said*
" *links in such way and manner as they please,*" &c.

In the feu disposition to Lord Kellie, the magistrates, &c. conveyed to him " *all and whole the* " *lands belonging to the patrimony of the city of* " *St. Andrew, called Pilmore, with the remanent* " *links and commonty of the said city, with the* " *whole parts, pendicles, and privileges thereto* " *belonging, as the same were lately possessed by* " *James Ritchie, tenant thereof: reserving to the* " *burgesses of the said city, standing in the stent* " *roll, allenarly power and liberty to cast and* " *win divots upon the said links and commonty, for* " *flanking and rigging, conform to use and wont,* " *and also for repairing the town's mills, leads, and* " *dams, under the reservation always that no hurt* " *or damage shall be done* THEREBY *to the golf* " *links, nor shall it be in the power of any pro-* " *prietors of said Pilmore links to plough up any* " *part of the said golf links in all time coming:* " *but the same shall be reserved entirely as it has* " *been in times past, for the comfort and amuse-* " *ment of the inhabitants and others who shall re-* " *sort thither for that purpose.*"

Terms of the feu disposition.

It appeared that Lord Kellie did not conceive that he was under any restraint as to keeping rabbits, (to which kind of stock the ground seemed to be best adapted,) and accordingly he let the links to a tenant, with liberty to stock and use them as a rabbit-warren; and, in order to improve the stock, promised to send him some breeders from his own

Lord Kellie lets the links, with liberty to stock with rabbits.

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links at *Cambo*. Lord Kellie, in 1799, sold the links to the Dempsters, holding out to them the same advantages as to the keeping of rabbits. The Appellants let them to a tenant, with liberty to stock with rabbits; and he having proceeded to do so, certain members of the Golfing Society of St. Andrew's, and inhabitants of that city, alarmed lest the golfing course should be injured or destroyed by the holes and scrapes of the rabbits, raised an action of declarator in the Court of Session against the Appellants, concluding in substance,—"1st, *To have* "*it found and declared that the Pursuers* AND "OTHERS *had good and undoubted right, at all* "*times, and on all occasions, to resort to the links* "*and play at golf there. 2d, That the Defenders* "*(Appellants) should be prohibited from hindering* "*or molesting them. 3d, That the Defenders* "*should be ordained to desist from* PUTTING *or* "KEEPING *rabbits, or doing any thing to injure the* "*golfing course, and should be ordained to remove* "*from the links the rabbits introduced by them* "*therein, and to keep the said links in the same* "*order as they had been in for ages in times past.*" A neighbouring proprietor, of the name of *Cheape*, was also a party to the summons, on the ground that the Defenders' rabbits infested his property; and there was a conclusion, that on this account too the rabbits should be removed, &c. The magistrates and town council of St. Andrew's were not parties to this summons.

1799. Sale of the links to the Appellants (Dempsters.)

Action of declarator.

Appellants object to the title of Respondents to

The Defenders objected *in limine* to the title of the Pursuers to insist in the action; the ground of which objection was, that the Pursuers did not

state themselves to be owners of heritable property in the neighbourhood, and that, by the law of Scotland, a predial servitude, such as this, could not subsist without a dominant as well as a servient tenement; and that a personal servitude could not subsist for longer than the life of the person dominant: and, in support of these propositions, they cited, Stair. b. 2. t. 6. s. 1.—Bankton, b. 2. t. 6. s, 1.—*Burgesses of Dunse v. Hay*, Nov. 22, 1732, Kames.—*Burgesses of Kelso v. Duke of Roxburgh*, decided by the House of Lords March 18, 1757.—*Cochrane v. Fairholm*, Fac. Coll. Feb. 8, 1759.—And it was argued, also, that other individuals of the infinite multitude of golfers might direct their conclusions against black cattle and sheep upon the same ground of their being injurious to the golfing course; and that no decree made against parties of this description could afford the Defenders a *res judicata* to protect them against future proceedings by those who had not been heard for their interests.

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The Pursuers contended that the authorities cited by the Defenders did not apply, or that they had been disregarded in later decisions:—*Sinclair v. Magistrates of Dysart*, Feb. 10, 1779, Fac. Coll.—*Coomb v. Magistrates of Edinburgh*, Jan. 16, 1794.

The cause being reported to the Court by *Polkamnet*, (Ordinary,) they pronounced an interlocutor "*sustaining the title of the Pursuers to insist* "*in the action*," without saying any thing as to Cheape.

May 17, 1805. Interlocutor of the Court of Session sustaining the title of the Pursuers (Respondents) to insist in the action.

The cause being remitted to the Lord Ordinary,

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Condescendance of the Respondents.

the Pursuers gave in a condescendance, offering to prove, "*that at and previous to the time of the "entry of the Defenders, there were but few "rabbits in the links, and that all persons were "allowed to take and kill them for their own use; "that the Defenders protected the stock, and intro-"duced rabbits from other quarters; that the num-"ber had greatly increased, and that this was at-"tended with considerable injury to the golfing "course, &c.*"

Answers.

The Defenders, in their answers, admitted that they had protected the rabbit stock, and insisted on their right to do so; but denied that the golfing course was thereby injured. A separate condescendance was given in for Cheape, who stated that his property was infested by the rabbits of the Defenders, and that he had a right to have that species of stock removed or destroyed; to which the Defenders answered that Cheape had a stock of rabbits of his own, by which alone his property was infested.

Proof.

A proof having been led, it appeared, from a contract between the town and the Archbishop of St. Andrew's, in 1552, and from the tacks granted by the town, and a variety of oral testimony, that rabbits had always existed in the links, and that the tenants sometimes protected them for their own exclusive use; though Ritchie, the tenant before mentioned, being expressly restrained from using the links as a rabbit-warren, encouraged the destroying of the rabbits as injurious to the sheep, which was his stock. There was much contradictory evidence as to the question, Whether or not

all injury to the golfing course, from the holes and scrapes of the rabbits, might not be prevented at a small expense, and with a little attention?

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About this stage of the proceedings, the magistrates of St. Andrew's sisted themselves as parties; but it appeared, from the interlocutor pronounced, that the Court had rather proceeded on the ground of the Pursuers' title as before sustained. The interlocutor (Feb. 19, 1806) was as follows:—

Magistrates of St. Andrew's sist themselves as parties.

Feb. 19, 1806. Interlocutor declaring in terms of the libel.

"*The Lords having advised the state of the* "*process, testimonies of the witnesses adduced, and* "*heard counsel for the parties thereon in their* "*own presence, with the minute now given in for* "*the magistrates of St. Andrew's, sisting them-* "*selves as Pursuers in this action,* THE TITLE OF "THE PURSUERS BEING ALREADY SUSTAINED BY AN- "INTERLOCUTOR NOW FINAL; *the Lords find, de-* "*cern, and declare, in terms of the conclusions of* "*the libel, excepting in so far as the same con-* "*cludes for removing the Defenders from the links,* "*and that they should be obliged to destroy the* "*rabbits, and for damages and expenses of process;* "*but find and declare, that the Pursuers and the* "*inhabitants of St. Andrew's* AND OTHERS HAVE "RIGHT TO TAKE, KILL, AND DESTROY THE RABBITS "UPON THE SAID LINKS, *as they were formerly in* "*use to do; find the Defenders, conjunctly and se-* "*verally, liable to the Pursuers in the full ex-* "*pense of contract, but in no other expense, and* "*decern.*"

A reclaiming petition having been given in against this interlocutor, the Court recalled it, to

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a certain extent, by another interlocutor of May 18, 1806, for the reason there stated.

"*The Lords having heard this petition in respect* "*that the interlocutor reclaimed against, in so far* "*as it does thereby find and declare, that the Pur-* "*suers, the inhabitants of St. Andrew's and others,* "*have right to take, kill, and destroy the rabbits* "*upon the said links, as they were formerly in use* "*to do, goes beyond the conclusions of the libel;* "*they recall the said finding as incompetent,* in hoc "statu, *without prejudice to the question when* "*tried in a proper shape; but* quoad ultra, *adhere* "*to the interlocutor complained of, and refuse the* "*desire of the petition.*"

Appeal in the declarator.

Against these interlocutors the Defenders appealed.

In the mean time, the golf club and magistrates of St. Andrew's caused a multitude of the inhabitants to be assembled, who proceeded to destroy the rabbits. The Defenders presented a bill of suspension, and prayed an interdict, which was granted; and the cause having been reported by *Lord Armadale*, the Court pronounced the following interlocutor:—

Suspension by Appellants, and interdict granted, 29th Dec. 1806.

Interlocutor in the suspension.

"*Upon report of Lord Armadale, and having* "*advised the mutual informations for the parties,* "*the Lords find, that the Chargers must confine* "*themselves to what has been the immemorial prac-* "*tice of killing rabbits on what is denominated the* "*links or common of St. Andrew's, exclusive of* "*such parts thereof as shall happen to be under* "*crops, at the time; and to this extent, find the*

" *letters orderly proceeded, and recall interdict, but* " quoad ultra *suspend the letters, and decern.*"

Against this interlocutor, likewise, the Suspenders appealed. The Respondents entered their cross appeals against the interlocutor, 19th Feb. 1806; in the *declarator*, in as far as *it did not find that the Appellants were obliged to destroy the rabbits and preserve the links entire;* and, in the *suspension*, against the interlocutor granting the interdict.

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Appeal in the suspension. Cross appeals by the Pursuers (Respondents.)

Romilly and *Brougham* (for Appellants in original, and Respondents in cross appeals.) There was no foundation for this action in the law of Scotland, or that of England, when considered with reference either to the nature of the servitude, or the character in which the Pursuers claimed. As to the nature of the right, it was quite unknown in the law of Scotland. The servitudes were predial or personal. The predial required a dominant as well as a servient tenement, except in the case of those rights to which ministers were entitled by statutes of 1593, cap. 165; and 1663, cap. 21. Here there was no dominant tenement. Personal servitudes were constituted in favour of particular persons, and expired with the individuals. But the servitude here was claimed for the whole society of golfers,—for all those who actually were golfers, or who chose to become so. Any one making the tour of Scotland might come under the description. The magistrates had only sisted themselves as parties after the interlocutor sustaining the title of the other pursuers had become final. These other parties were numerous and various, golfers, inhabitants

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of St. Andrew's, and all others, and two persons besides,—*pro omnibus, et quibusdam aliis.* There were no personal servitudes but life-rents. The case of *Sinclair v. Town Council of Dysart* had no analogy to the present. The corporation was there the party. The right to keep rabbits was implied in the right of property, (Ersk. b. 2. t. 6. s. 7.;) and the keeping them was enjoined by statute, (1503, cap. 74.) Nothing therefore could restrain the Appellants in this respect, except an express prohibition; and here there was no such prohibition. The game of golf was prohibited by the statute law of Scotland, (Acts of 1457, cap. 62; and 1497, cap. 32.) Their Lordships had remitted the case of *The Earl Morton v. Stuart*, (*vide ante*, vol. i. p. 91,) where a species of prescription had been allowed by the Court below very far short of this.

Adam and *Horner* (for Respondents.) The magistrates at least were proper parties, and the previous defect in this point (if any) was cured when the proper parties came. The Appellants were bound by contract to keep the links in a state fit for the full enjoyment of the amusement of golfing, and this could not be done if the rabbit stock were to be encouraged. The acts prohibiting golf were intended merely for the encouragement of archery and warlike exercises, and fell into desuetude when gunpowder came to be generally used. The right of property, it was admitted, carried with it the right of keeping rabbits; but then the property might be conveyed by special contract, short of this right; and here every thing was pro-

hibited which had a tendency to render the links less fit for golfing. The inhabitants of a borough might have such a right as this, (*Tod and Stoddart v. Magistrates of Edinburgh*, May 17, 1805, Fac. Coll.) And so the law was in England. There was no authority for saying that there was no personal servitude but life-rents. It had been settled, in the case of the town of Dysart and others, that the inhabitants of a burgh might have such a servitude. In England, the inhabitants of a vill or parish might have a right over the soil of an individual's ground for their recreation, (*Fitch v. Rawling and others*, 2 H. Black. 393.—*Abbot v. Weekly*, 1 Lev. 176.) The inhabitants here might, in case their rights had been sacrificed, have had an action against the magistrates for breach of trust.

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Lord Eldon (Chancellor.) Since their Lordships were last called upon to give attention to the cause of *Dempster v. Cleghorn, &c.* in the declarator and suspension, he had felt it his duty—a laborious, but, at the same time, not altogether unentertaining duty—to look at the whole of the pleadings in the cause. The case was represented at the bar as one of great importance, and justly; for, if it was understood to be such as the Pursuers contended it was, it went almost to the destruction of the whole of the Defender's property. On the other hand, this game of golf was an useful exercise, and appeared to be a very favourite pastime in North Britain. He had hardly ever known a cause in which a warmer

Nov. 31. Judicial observations.

This cause one of great importance.

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interest appeared to be taken. The corporation, the professors, students, inhabitants of St. Andrew's, &c. appeared to be as much alarmed at this increase of rabbits, as, according to Pliny, the people of the Baleares were when they sent to Augustus for a military force to suppress them.

Declarator.. Parties.

The summons in the declarator was at the instance of Hugh Cleghorn, Esq. Dr. James Playfair, who stated himself to be Principal of the United College of St. Salvador and St. Leonard; and others who described themselves as inhabitants of St. Andrew's; Thomas Earl of Kellie, who was described as Captain of this golfing society; and others who appeared not to be inhabitants, but who lived in the neighbourhood of St. Andrew's; for themselves, and for behoof of the other inhabitants of the city of St. Andrew's, *or others who might resort thither for the purpose of enjoying the comfort, exercise, and amusement of playing golf on the golfing links of St. Andrew's.* These Plaintiffs, (as they would be called in England,) their Lordships would observe, were persons who sued on account of the interruption stated to be created to the playing at this game of golf. But the summons was also at the instance of James Cheape and Jolín Hood, who were suing, not on account of the obstruction to golfing, but on account of the injury done to their property by this increase of rabbits. That, if not an objection to the summons, was certainly a singular mode of proceeding, as one summons was made to serve for two suits of perfectly different natures; and the interlocutors took no notice of the additional

One summons made to serve for two distinct causes.

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expense to which the Defenders might be put by the combining of the two suits, one of which might be groundless, and the other well founded.

Summons stated.

The summons, to which he prayed their Lordships' particular attention, stated, "that whereas "the inhabitants of the said city of St. Andrew's, "the professors and students of the University "thereof, the gentlemen in the neighbourhood, "*and all others who chose to resort thither for the* "*purpose of playing golf, have, for time immemo-* "*rial,* enjoyed the constant and uninterrupted pri- "vilege of playing golf on that ground lying on the "north side of the said city, known by the name of "the links, Pilmore links, or golf links of St. An- "drew's; the magistrates, town council of the said "city, knowing that the inhabitants thereof, and "other Pursuers, had good and undoubted right to "exercise the said privilege, to prevent any inter- "ruption thereof, in the tacks which they granted "of the said links, not only declared that the inha- "bitants and others who should resort thither for "the purpose of playing golf, should have right "and liberty so to do, *as they had done in former* "*times past memory of man;* but, in order that the "said golf links might be preserved in the same "good order for golfing *in which they had been kept* "*for past ages,* the magistrates and town council "appropriated the said grounds for the pasture of "sheep, and restricted the tenant that he should "not plough any part of the said golfing course, "nor cast feal or divots thereon, *nor use the same in* "*any way by which the said golfing course might be*

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" *injured* ;"—and under these last words they might go the length of arguing that the tenants could not keep black cattle on the links, as these too might injure the golfing course ;—" and declared that the tacks-" man, or tenant, should not have it in his power " to make use of the said links as a rabbit-warren."

Sale of the links, and reservations.

The summons then stated the sale of the links by public roup. " But (the magistrates and town " council) knowing that the inhabitants and golfers " had, *for time immemorial, and long past the years* " *of prescription, and long past the memory of the* " *oldest person living*, enjoyed the constant and " uninterrupted privilege of playing golf on the " golfing course of the said links, and that they had " good and undoubted right to continue in the en-" joyment of the said privilege, without interrup-" tion, in all time coming, they, by a condition in " the articles of the said roup, expressly reserved to " the burgesses of this city, (St. Andrew's,) stand-" ing on the stent roll allenarly, power and liberty " to cut and win divots upon the said links, and " commonty for flanking and rigging, conform to " use and wont ; also for repairing the town's mills, " leads, and dams, under this reservation always, " *that no hurt or damage shall be done* THEREBY *to* " *the golf links*, and that it should not be in the " power of the *feuar*, or his foresaids, or any suc-" ceeding proprietor of the said Pilmore links, *to* " *plough up* any part of the said golf links in all " time coming."

Condition in the articles of

Here the summons specified the acts prohibited, but then followed the general words,—" BUT THE SAME SHALL BE PRESERVED

" ENTIRELY AS IT HAS BEEN IN TIME PAST, for the " comfort and amusement of the inhabitants and " others who shall resort thither for that purpose."

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If the cause should be considered as resting on this ground in the summons, then the question would be, Whether the links had been preserved entirely as *in times* PAST? This was the utmost that was claimed.

sale that the golf links should be preserved as in times past.

Then the summons stated that Lord Kellie, who was represented as Captain of these golfers, had become the purchaser, and that he sold the links in question to the Appellants. It had occurred to him, from what had passed at the bar, that Lord Kellie, after he had become the purchaser, certainly thought that it had been allowed to keep rabbits on these links, or that *he* might do it, as he had granted a missive, with a view to a lease of the ground, giving liberty to stock the links with rabbits; and it was material to observe that the town-clerk of St. Andrew's, who appeared to be also secretary to the golfing society, seemed to have acted as Lord Kellie's man of business in this transaction.

Lord Kellie, who purchased the links from the town, thought himself entitled to stock with rabbits.

First branch of the summons. Complaints of the golfers.

The summons went on to state, " that the " Dempsters, regardless of the rights of the Pur- " suers, and Begbie, the tenant, had stocked the " links with rabbits, by bringing rabbits in great " numbers from other grounds; and which rabbits, " thus introduced into the links, made holes and " burrows in the ground of the golfing course, " whereby the same was already much injured, " and, if not prevented, would soon be rendered " unfit for playing golf." It then went on to state

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that part of the case which related to Cheape and his tenant Hood.

Their Lordships would then advert to what the summons asserted, and what it did not assert.

Respondents assert their right as founded on immemorial enjoyment and prescription.

First, it asserted that the Pursuers had a right paramount to any feu, grant, or disposition, of these links, founded on immemorial enjoyment and prescription; and that the reservations made by the corporation were in view of a right antecedently existing, and not depending merely upon any present contract, or right not created, but acknowledged as founded on prescription.

No allegation *in the declarator* that all had a right to go upon the links and kill rabbits.

Their Lordships would also observe that there was no allegation that *all* had a right to go upon these links to kill rabbits, as was contended in the other cause. There was no such allegation here in the first cause.

Second branch of the summons. Complaints of Cheape, &c.

Then as to that part which related to Mr. Cheape and his tenant, the summons stated, "that the said "rabbits, thus brought into the said links, tres- "passed upon the farm of Balgrove, belonging to "the said James Cheape, and possessed by the said "John Hood, as tenant therein, (and which are "separated from the links for more than a mile "by a road only), by coming over in great num- "bers and destroying the crops in summer and the "wheat and turnip in winter; and upon which "road the said Charles and Cathcart Dempster, "and James Begbie, their tenant, have of late set "traps and stamps in great numbers, and have also "strewed poison and other noxious drugs on the "said open links, by which the said John Hood "and several others have lost dogs, and which has

" obliged the said James Cheape and others to keep " their dogs locked up to prevent their being de- " stroyed, by which they have suffered considerable " damage and inconvenience."

And then it stated that, " true it was, that the " Pursuers and others, as being entitled to the said " privilege of playing golf on the said links, and " on that account entitled to restrain the proprietor, " tenant, and possessor thereof from injuring the " ground on the golfing course, or from doing any " thing that may render the course unfit or incon- " venient for golfing, have often desired the said " Charles Dempster, &c. &c. not only to desist " from forming the said links into a rabbit-warren, " or doing any other thing whereby the said golfing " course may be injured; but also to *have removed* " *or destroyed the rabbits* introduced by them, &c. " into the said ground, and to preserve the same " in the same state and good order for golfing *as it* " *has been for ages past*." This allegation had set him right in one particular, with respect to which he had been misled by the interlocutor, which re- presented the summons as concluding for the re- moval of the *Defenders* from the links; whereas, it only concluded for the removal of the rabbits.

Then, having thus stated their case, in which their Lordships would observe what issues were joined and what were not joined nor mentioned, the summons went on to allege, "that it ought and " should be found, decerned, &c. that the Pur- " suers, inhabitants of St. Andrew's, and others, " who, by themselves, their predecessors, and au- " thors, have enjoyed the free, immemorial, and

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"uninterrupted privilege, &c. and others who may "resort thither for the enjoyment of the exercise, "comfort, and amusement of playing golf, have "good and undoubted right and title, at all times, "and on all occasions, to resort to the said golfing "links, &c. and enjoy the comfort and amusement "of playing golf, &c. in the course that has, *for "time immemorial, been used for that purpose.*" Here, too, the Pursuers rested on prescription; and then it went on to allege, "that the Defenders "ought to be decerned, &c. to desist from PUTTING "or KEEPING rabbits in the said links, (their Lordships would mark the term *putting* as well as *keeping*:) and then it prayed, "that the Defenders "might be decerned to pay damages to Cheape and "Hood, and to remove or destroy the rabbits to "prevent such damage in time coming."

Allegation that it ought to be decreed that the Appellants should desist from *putting* or *keeping* rabbits on the links.

To this summons, it would be observed, the magistrates of St. Andrew's were then no parties.

The magistrates of St. Andrew's no parties to this summons.

Then the Court, having advised this summons of declarator, went on to make what was called its grand decerniture. "The Lords of Council and "Session, &c. sustain the title of the Pursuers, and "decern, &c. that the Pursuers, inhabitants of St. "Andrew's, and others, who, by themselves, their "predecessors, and authors, have enjoyed the free, "immemorial, and uninterrupted privilege before "mentioned, and others who may resort thither "for the enjoyment of the exercise, comfort, and "amusement of playing golf, have good and undoubted right and title, at all times, and upon all "occasions, to resort to the said golfing links of St. "Andrew's, and there to exercise the privilege, and

Decerniture of the Court of Session.

" enjoy the comfort and amusement, of playing " golf on the said links, in the course that has, *for* " *time immemorial*, been used for that purpose; " and decern, prohibit, and discharge the said " Charles Dempster, &c. from hindering, molest- " ing, or interrupting the said Pursuers, or others, " the inhabitants of the said city of St. Andrew's, " or the said other Pursuers, *or any other persons* " who may resort thither for the purpose of enjoy- " ing the comfort, &c. of playing golf on the said " links, in the free and uninterrupted exercise of " the said privilege, and ordain the said Defenders " from PUTTING or KEEPING rabbits on the said " links, or doing any other act by which the links " might be rendered less convenient for playing " golf, &c.; and ordain the Defenders to keep and " preserve the links, or course of golfing, in the " same state, and good order, and entirety, as *they* " *have been for ages in time past*." Then (without saying any thing as to Cheape and his tenant) the Court found the Defenders (Appellants) liable in the full expense of extract, which expense was probably much the same as if Cheape had not been a party.

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The magistrates had at length assisted the Respondents, and he wished to have an explanation of this difficulty. The case had been argued on two grounds:—1st, The title of the Pursuers independent of the acts of the corporation, the only ground on which the Court had given an opinion. 2d, Their title as flowing from the acts of the corporation. As to the former, they had to consider what was the nature of the servitude, who they were that

Two grounds of title:—1st, Title of Pursuers independent of acts of corporation. 2d, As flowing from acts of corporation.

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claimed it, and whether they could be entitled to it independent of the acts of the corporation. Then, as to the latter point, it was said the Pursuers had their title *by virtue of the acts of the corporation*; and therefore it was to be considered whether the Court below had given any opinion on this latter point. No:—the Court had said that the title of the Pursuers, independent of the acts of the corporation, had been already sustained by an interlocutor now become final. But suppose their Lordships thought that the title depended on the acts of the corporation, how were they to deal with the interlocutor, when the Court below had given no opinion on the second ground of title?

Title of Pursuers to insist in action, on ground of prescription, sustained by the Court below before magistrates sisted themselves as parties.

Effect of interlocutors as connected with the summons and each other.

One of the interlocutors had found, "*that the* "*Pursuers, inhabitants of St. Andrew's, and others,* "*had right to take, kill, and destroy the rabbits* "*on the said links.*" But this was not claimed by the summons, and the Court could not carry the matter further than the conclusions of the summons had done; and if the magistrates came in for the rights of third parties under their charters, still the same objection applied. But supposing this to have been set right in the next interlocutor, see in what inextricable confusion the interlocutors, taken altogether, were involved in the declarator and suspension. In one interlocutor, the Appellants were assoilzied from the conclusions in the libel, as far *as related to their destroying their own rabbits*; but it was found that the *Pursuers had a right to destroy them*. In the next interlocutor that latter finding was recalled as incompetent *in hoc statu*; so that the effect of these interlocutors was to negative the

alleged obligation on the Defenders to destroy their own rabbits; and as to the other point, the right of the Pursuers to destroy them, they suspended giving any opinion upon that till the question came regularly before them.

The suspension.

Then followed the suspension. The magistrates had raised the people by a kind of conscription for the destruction of the rabbits, and they were destroyed in great numbers. The Appellants then gave in their bill of suspension, which was nothing more than saying this, "Pray prohibit them from "killing our rabbits till the question is tried." The Court had said in the declarator, that it could not declare the right till the question came to be tried; and therefore *no right had been established.* But, in the suspension, the Court found, "*that the* "*Chargers must confine themselves to what has* "*been the immemorial practice of killing rabbits on-* "*what was denominated the links or common of* "*St. Andrew's, exclusive of such parts thereof as* "*should happen to be under crops at the time.*"

Now, how did they come at the conclusion that this was *the immemorial practice?* Why thus:— The interlocutor in the former cause, which had, in terms of the libel, said that the Defenders should not *keep* rabbits, implied that they might be *killed,* though they had altered that part of the interlocutor which found that the inhabitants had a right to kill and destroy, no such right having been claimed. And yet, having struck out of the interlocutor in the former cause that part which found the right of the inhabitants to kill and destroy the rabbits, in the

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suspension they found the right to *kill* out of the words *not keep!*

The Defenders complained of this in another way. The Court below had looked at the proof in the other cause, which was no proof in this; and if it were, the Court could not properly have looked at it as to this point, because the right was not alleged in the summons. These were inconsistencies which required explanation. He was as friendly to the game of golf as any one, and, if he were a St. Andrew's student, he should be as sorry to lose that pastime as any other advantage to be derived from that University, or any other University. But the question was, Whether a servitude could be supported which subverted the use of the property over which it was claimed? If there was a reservation, had they the full benefit of that reservation? The links were to be kept as in times past. How had they been kept in times past? There always had been rabbits there. They said sheep had been kept there, and was the best stock. But were the Defenders prevented from keeping any other animals than sheep? But the sheep had been tried, and had rather failed. But then it was said that this was a wrong kind of sheep. Did they mean to say that the Defenders had a right to keep only one sort of sheep? Look at the leases; even Ritchie's lease did not exclude rabbits, but divided the right of destroying them between the magistrates and tenant. How was the matter to stand as to other animals? Their Lordships probably never had seen any of these nice golf balls; but if they happened to get

Whether a servitude could be supported which would render the property over which it was claimed useless to the proprietor.

Even Ritchie's lease did not exclude rabbits.

into what black cattle sometimes left behind them, it would be as bad as getting into a rabbit scrape; and the same observation, to a certain extent, might be applied to horses and sheep. But the question was, Whether the right to play at golf was not to be enjoyed only consistently with all the uses to which the land could properly be applied? It had not yet been proved that the Pursuers had a right to *kill* the rabbits, and the Defenders were forbidden to *keep* them. Then, if they were neither to be *destroyed* nor *kept*, what was to be done with them?

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They also said that English and other rabbits had been introduced;—but what then? A single pair would, from the extraordinary fecundity of the animal, soon fill the whole of the ground with rabbits, if the stock were protected. And it had been properly asked, how were those that had been introduced to be distinguished from them that had been there before? The strong impression on his mind was, that this right could not be supported to the extent of depriving the Defenders of the use of their property.

Lord Eldon (Chancellor.) He had before adverted to the difficulties which presented themselves in the examination of this cause, and he then stated, what he now repeated, that, inasmuch as it appeared to all that this cause must be remitted, it was important that the Court below should understand the nature of the difficulties under which this House laboured.

Dec. 3. Farther observations.

The summons in the declarator stated that the Title.

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title was not only in persons composing the golf club of St. Andrew's, and the inhabitants; but also in all others choosing to resort thither for this amusement of playing golf.

In cases referred to in the cause, the title in the corporation for use of burgesses, &c.

In looking into the separate cases which had been referred to in the course of the cause, where the servitudes, though not connected with a dominant tenement, were yet not absolutely personal, it would be found that these were claimed by the corporation for the use of the burgesses and other inhabitants. But of what description were these privileges, which were stated to be not merely in the corporation and inhabitants, but also in *all others*?

He had stated that the title so put had been affirmed by an interlocutor which had become final before the magistrates had sisted themselves as parties. At the bar here, the title had been more strongly argued on the ground of the acts of the corporation, reserving the privilege by contract; and certainly it was a different question whether such a title could be set up by prescription, and whether it might be reserved by bargain. But, on looking at the record, it appeared that the Court had given no judgment on the question of title, as founded on the acts of the corporation. The title, independent of these acts, had been sustained by an interlocutor which had become final; and on this ground the other interlocutors had proceeded, and not on the ground of any title as flowing from the acts of the corporation. Then could their Lordships decide upon a point of law which had not been under consideration in the Court below?

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Difficulty in understanding the interlocutors.

He had stated that he had found infinite difficulty in understanding the interlocutors of the Court below. In one of the interlocutors they had found that the Defenders had no right to *keep* rabbits, but negatived the alleged obligation upon them (the Defenders) to *destroy* their own own rabbits; finding, however, that the Pursuers, inhabitants,, and *others*, had a right to *destroy* the rabbits; and if it had rested there, to be sure one could have understood what was meant; because, if others had a right to *destroy* the rabbits, that might sufficiently prevent their being *kept*. But, on reviewing this interlocutor, the Court found that they were wrong in declaring the right in the Pursuers to kill and destroy the rabbits, and recalled this part of the interlocutor. That reduced the finding to this,—that the Defenders were *not* to *keep* rabbits, but they were *not bound* to *destroy* or to *remove* them. If, then, they were *not bound* to *destroy or remove* them, (nobody else having a right to do so,) and yet were bound *not to keep* them, what was to be done?

Then it had been stated that English rabbits, and rabbits from other parts of Scotland, had been introduced; and it had been contended that all the rabbits ought to be removed; and then it was said that part of them ought to be removed. But it had been properly asked, how they were to distinguish the rabbits that had been lately introduced from those that had been there before? The thing was totally inextricable.

But they had further to observe the confusion, not only in the *declarator*, but in the *suspension*.

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Much had been said about *scrapes* in the course of the proceedings in the cause, but their Lordships could not easily extricate this cause out of the scrapes in which it was involved. The object of the suspension was to prevent the magistrates from assembling all and sundry, by beat of drum, to proceed in a body to expel or kill these rabbits. The Court had said, "that they had no right to kill "them, except on what was denominated the links "or common of St. Andrew's, exclusive of such "parts as should happen to be under crop at the "time." No proof was taken in the second cause. There was no admission in the papers. They could not regularly look at the proof in the former cause, not only because it was no proof in the second cause, but also because the Court had said that, upon that cause, they could not decide the question as to the right of the Pursuers to kill the rabbits. It was necessary, then, to remit both causes, that the Court below might review all the interlocutors.

In deciding the 2d cause, the Court ought not to have looked at the proof in the former,—and why.

He regretted the existence of the necessity to send this back again; but it was a strong thing to say that all who chose to do so might play at golf on a man's ground, and, for that purpose, destroy all the produce which it was best calculated to yield, and prevent its being used for those ends to which alone it could be applied beneficially for the owner. If it were possible to feed black cattle there, he had before observed that, if these balls got into what they occasionally left behind them, they would be in a worse *scrape* than if they got into a rabbit scrape! He repeated, that since the time of the application to Augustus by the people of

Strong thing to say, that all who chose to do so might, for the purpose of playing golf on a man's ground, prevent its being used for the ends most beneficial to the owner.

the Baleares for a military force to suppress the rabbits, he believed that there never had been a contest between men and rabbits carried on with so much spirit.

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Judgment. (Terms of the remit.)

" It is ordered and adjudged that both the said " causes be remitted back to the Court of Session " in Scotland to review all the interlocutors com- " plained of; but, in the first place, to review the " several interlocutors complained of in the process " of suspension upon such grounds as shall be sub- " mitted to them, and, in reviewing them, to con- " sider whether there is any proof duly made in any " proceedings between the parties which could be " properly resorted to, in the said process of sus- " pension, as establishing any such immemorial " practice of killing rabbits on the links of St. An- " drew's, or any part thereof, as appears to be pre- " sumed to have existed by the terms of the inter- " locutor of the 10th, and signed the 11th, June, " 1807, complained of in the process of suspension; " to which practice it is, in the said interlocutor, " declared that the Chargers must confine them- " selves, and having regard to the interlocutor of " the 13th May, 1806, in the action of declarator, " which recalled as incompetent the finding in that " proceeding, that the Pursuers and others had right " to take, kill, and destroy the rabbits upon the " said links as they were formerly in use to do. " And it is further ordered that the said Court of " Session do, after such review of the interlocutors " in the process of suspension, proceed as to them

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" shall seem meet; and also proceed as to them " shall seem meet after their review of all other the " interlocutors."

Agent for Appellants, CAMPBELL.
Agent for Respondents, CHALMER.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MACDONELL and others—*Appellants.*
MACDONALD—*Respondent.*

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ASSAULT.

IN an action for damages for an assault against several persons, evidence admitted of two previous assaults on the Pursuer by one of the Defenders, (probably to show malice and premeditation in that particular Defender.) A certain sum, by-way of damages, decreed against all of them, (under the circumstances,) *conjunctly* and *severally*; and a *judicial remit* made to the Lord Advocate " to consider whether the " principal Defender ought any longer to remain in the " Commission of the Peace, &c." Judgment of the Court below remitted for review as to this last part—it being apprehended that such a remit to the Advocate was irregular—but affirmed as to the rest.

Action. 1805.

IN 1805, *Donald Macdonald*, surgeon of the garrison of Fort Augustus, brought an action in the Court of Session against *Macdonell* of *Glengary*, and five other persons, his dependants, charging them with having been guilty of an outrageous as-