

1805. May 17. CLEGHORN and Others, *against* DEMPSTER.

The links of St. Andrew's have, from time immemorial, been used by the inhabitants and the neighbourhood for the purpose of playing at golf. The links belonged in property to the Magistrates for the burgh, who let the ground to tenants as pasture. It also contained a breed of rabbits, not, however, very numerous. The Magistrates of St. Andrew's feued out the ground in 1797, with the following reservation: Reserving to the burgesses of this city, standing 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 mill-leads and dams; under this reservation always, that no hurt or damage shall be done thereby to the golf links; nor shall it be in the power of the feuer, or his foresaids, or any succeeding proprietor of the 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 amusement of the inhabitants, and others who shall resort thither for that purpose: All which reservations are to be engrossed in the rights to be granted to the purchaser, and to be declared real burdens affecting the said lands of Pilmore Links, and appointed to be engrossed in the disposition and infeftment to follow thereon, and in all the future transmissions of the said lands."

The links having become the property of Charles Dempster, merchant in St. Andrew's, he let them to a tenant for a rabbit-warren. The golfers who used to resort to it, conceived that this rendered it unfit for the enjoyment of their usual amusement, by the rabbits burrowing in it, so that it was not reserved "entirely, as it has been in times past, for the comfort and amusement of the inhabitants, and others who shall resort thither for that purpose."

An action of declarator was accordingly brought, in the name of Hugh Cleghorn, and a number of other persons, to have it "declared, that the said pursuers, inhabitants of the said city 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 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 these defenders and their tenants, and all and either of them, ought and should, by decree foresaid, be decerned, prohibited, and discharged, from hindering, molesting, 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 enjoying the privilege, comfort, and amusement of golfing, or playing golf on the said links, in the free and uninterrupted exercise of the said privilege: And the

No. 96.

The Magistrates of St. Andrew's having feued out the links, with a reservation in favour of "the inhabitants, and others who shall resort thither for the purpose of golfing," the inhabitants at large were found entitled to enforce the reservation.

No. 96. said defenders ought and should be decerned and ordained, by decree foresaid, to desist from putting or keeping rabbits in the said links, or doing any other act or deed, by which the said links or golfing course may be injured, or rendered less convenient for the purpose of playing golf, or by which the said pursuers may be interrupted in the free exercise of the said privilege."

Besides denying that any harm had been done to the golfing ground, Dempster questioned the title to pursue. On this point, the pursuers

Pleaded: The right by which this property is held, contains a reservation in favour of the pursuers, which is declared to be real, and is appointed to be engrossed in the infestment. This, then, is a servitude legally constituted; as it is always lawful to the proprietor to reserve any use of the property, by which the convenience, comfort, or health of those having right to such use, might be promoted. Every person may use his own property as he pleases; nor does the law prevent him from purchasing the use of what belongs to another. In the sale of his own property, he may stipulate in favour of himself any restraint upon the purchaser's use of it; and nothing can prevent him from establishing this reservation for the benefit of some other totally distinct from himself; Stair, B. 2. Tit. 7. § 5; Town of Dysart against Sinclair, 10th February, 1779, No. 22. p. 14519. This is not properly a personal servitude; as the town of St. Andrew's is the dominant tenement, the inhabitants have acquired a right, or rather the privilege has been reserved to the whole inhabitants; each individual may therefore apply to a court of law whenever it is violated. Were it not so, the privilege would be of little use indeed. Nor is the case in the least degree more doubtful, that the reservation was in favour of one who was no party to the transaction; Cleland against Stewart Mackenzie, 21st February, 1739, No. 9. p. 4506; because the reservation qualifies the right under which the ground is held, and the proprietor cannot object to the condition under which he received it.

Answered: A personal servitude must cease with the life of the person in whose favour it is constituted; but a servitude, to endure for any length of time, can never be established, except in favour of a dominant tenement, the owner of which may stand as a creditor against the owner of the servient tenement. There must always be some person with whom he may deal, and from whom he may obtain a discharge, if he has fulfilled the duty of a servient tenement; it cannot be bestowed upon a whole class of individuals, such as every person who plays golf. There must always be a tenement in the constitution of a servitude; Feuers of Dunse against Hay, 22d November, 1732, No. 4. p. 1824; Jeffrey against Duke of Roxburgh, 15th February, 1755, in House of Lords, No. 20. p. 14517; Cochrane against Fairholm, 8th February, 1759, No. 21. p. 14518.

The reservation made by the Magistrates, preserves to them a controul over their disponee, but it gives this right to no other person; for when the Magistrates reserved the right to themselves, they did not, and could not, at the very same moment, transmit this right to another; more especially when it is contended, that this other is the indefinite multitude who play golf. The right of controul

exists in the Magistrates for ever ; for this they have stipulated in the titles under which the property is held ; but it exists no where else. The Magistrates, however, have offered no complaint against the use to which the links are now converted.

The title of the pursuers was sustained, and the cause remitted to the Lord Ordinary to receive a condescence of the damages.

The Court held it to be clear, that the reservation in the feu so qualified the right of the defender, that he was bound to suffer no damage to be done to the golf ground ; and that, if it had been damaged, there was a right somewhere to prohibit the continuance of it. This right, in terms of the grant, exists in the town or community of St. Andrew's ; and, consequently, in all the individual inhabitants composing that community. They are entitled to insist in the same manner ; as, in Tod and Stodart against Magistrates of Edinburgh and Glass-House Company, some years ago, the Court held, that the Magistrates were not entitled to limit the public in the use of the race ground, and access to the sands of Leith for bathing, &c. ; and a complaint was sustained at the instance of some of the inhabitants of Leith for an encroachment on that ground.

Lord Ordinary, *Polkemet.* Act. *J. Clerk.* Agent, *Ad. Bruce.*
 Alt. *Gillies.* Agent, *Geo. Tod.* Clerk, *Colquhoun.*

F.

Fac. Coll. No. 209. p. 467.

Apparent Heir may pursue Exhibition *ad deliberandum* ; See EXHIBITION
 AD DELIBERANDUM.

Whether an Apparent Heir can pursue for Rents ? See HEIR APPARENT.

An Apparent Heir may defend ; IBIDEM.

Title supervening after Process ; See QUOD AB INITIO VITIOSUM.

Title requisite to Reductions and Improbations ; See IMPROBATION.

Title in Removings ; See REMOVING.

Title to Pursue, according to the law of a foreign country ; See FOREIGN.

Title to Pursue *ad vindictam publicam* ; See KING'S ADVOCATE.

Whether a Society may sue without being incorporated ? See SOCIETY.

See PROCESS.

See JUS TERTII.

See APPENDIX.