

capital of this trust in favour of a statutory board which is necessarily external to and independent of the trust; and the proposed arrangement between the two bodies does not and could not give to the trustees any such control and management of the alienated property as to obviate this radical objection. I have heard no adequate answer to the trenchant remarks of the reporter upon this head.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court refused the petition.

Counsel for the Petitioners—J. B. Young.
Agents—Mitchell & Baxter, W.S.

Tuesday, June 27.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

MURRAY v. MAGISTRATES OF FORFAR.

Burgh—Qualified Right of Property—Market Muir—Immemorial Usage for Purposes of Recreation—Powers of Magistrates.

A Crown charter of confirmation and novodamus dated 1665 conveyed to the magistrates and community of a royal burgh, said burgh “with all muirs,” &c. After the muirs adjoining the town had from time immemorial been used, primarily for markets, but also for purposes of recreation, the magistrates were held not to be entitled under their powers of administration to lease a small portion of it to be covered with an auction mart, although they maintained that that method of holding markets had superseded in public favour the former one of open markets, and would increase the funds of the burgh which had suffered by the falling off of market dues.

Held, however, that the powers of the magistrates were not thus limited with regard to ground now forming part of the muir, but which had been acquired within the prescriptive period, in exchange for land held under no restriction, and which was not proved to have been dedicated to the public for purposes of recreation.

Question reserved as to the rights of the public to unenclosed land belonging to the burgh which they had used for the purposes of recreation for the prescriptive period, but of which the magistrates had on all suitable occasions asserted they were the proprietors.

Dr William Fettes Murray, Forfar, brought an action of suspension and interdict against the Magistrates and Town Council of Forfar to have the proceedings complained of suspended, and the defenders interdicted from “selling, feuing, letting, or

in any other form alienating any part he portion of the muir situated within tor burgh of Forfar known as the Market Muir, and from encroaching or building upon or enclosing the same, or otherwise interfering with the same, so as to impede or obstruct the complainer, or any other inhabitant of the said burgh, in freely using, possessing, and enjoying the same for the purpose of playing such games thereon as golf,shinty, cricket, football, and quoiting, and for exercise and recreation in general, or in approaching or entering upon or traversing the same from all points and in all directions, and from letting, feuing, selling, or otherwise alienating or exposing to let by public roup, or negotiating for letting, feuing, selling, or otherwise alienating that piece of ground, part of the said muir situated on the north side of the prison and Sheriff Court Buildings, and extending from the march stone of the prison ground northward 132 feet or thereby, and from the east in a line with the prison east wall westward along the boundary wall of the Sheriff Court Buildings 230 feet or thereby, and consisting of one acre imperial or thereby; and specially, without prejudice to the above written generality, from exposing the said piece of ground for let by public roup on a lease of ten years, and upon the conditions already prepared and adjusted with reference to a roup to be held upon the 19th day of March 1892.”

The complainer stated—(Stat. 2) “Forfar is one of the ancient royal burghs of Scotland, but the infeftments, confirmations, documents, and erection of the burgh having been lost and destroyed during the usurpation, His late Majesty King Charles II., by charter of confirmation, passing under the Great Seal on 9th May 1665, ratified and confirmed the ancient erection and all the lands, tenements, houses, muirs, and marshes, multures, fishings, liberties, privileges, immunities, commodities, and others pertaining and belonging to the same, whereof the provost, bailies, councillors, burgesses and inhabitants of the said burgh, and their predecessors were in any former time possessed, and of new gave, granted, and disposed to the provost, bailies, councillors, and community of the said burgh and their successors in perpetuity, the said burgh, with all infield and outfield lands, houses, tenements, yards, acres, tofts, crofts, milns, multures, muirs, towards the south and the north, and all other muirs, marshes, meadows, lochs, woods, fishings, temple lands and other lands howsoever designed, lying within the burgh and pendicles of the said burgh and territories thereof, the fee-farm, cess, and feu-farm duties thereof, and annual rents due from the same in any past time to the priory of Restenneth, abbacy of Cupar, or lordship of Torphichen, with the teinds, privileges, immunities, casualties, pasturages, parts, pendicles, and pertinents thereof whatsoever, as well near as at a distance lying, pertaining, and belonging to the said burgh, or which are known to pertain and belong to the same,

to be used and enjoyed in all time coming by the said burgh, the provost, bailies, councillors, and community thereof, and their successors in perpetuity, as part of the common good thereof."

(Stat. 3) "The muir to the north of the town referred to in the said charter had from time immemorial, and has been from the date of the charter down to the present time, possessed and administered by the Magistrates and Council in trust for the community. The inhabitants of the burgh have from time immemorial and down to the present time resorted to and possessed and used the muir not only as a public market-place as after mentioned, but also for walking and exercise, and for the purposes of playing such games thereon as golf, shinty, cricket, football, and quoiting, and for other exercises and recreations, and for bleaching clothes. But in consequence of a portion having been taken compulsorily for the purpose of making a line of railway, which is now part of the main line of the Caledonian Railway Company, and in consequence of certain recent illegal alienations by the Magistrates and Council of pieces of ground on its boundaries, it has been within the past century diminished in extent."

(Stat. 4) "In its present condition the muir is bounded upon the west by the highway leading from Forfar to Brechin, on the north by the cottages and gardens which form a small village called Zoar within the royalty, on the east by the ground taken in or about the year 1848 for the railway aforesaid, and on the south by two portions of ground, originally parts of the muir, but alienated by the Magistrates and Council in the years 1841 and 1868 respectively for the purpose of building a county prison and the Sheriff Court-house. On the western side there is no fence or barrier separating the muir from the highway referred to, and the inhabitants of the burgh and the public have for many years entered the muir by leaving the highway at any point on this side. The inhabitants of the village of Zoar and people resorting there have also from time immemorial entered it by crossing the northern boundary at any point. On the east side there is a stone wall which the railway company erected after acquiring the ground before mentioned. On the south side there is also a stone wall, which, however, is not continued to the eastern boundary, and room is thus left for access for foot-passengers, carts, and carriages to the muir on that side. A plan of the muir is herewith produced and referred to."

(Stat. 5) "The said muir is known to the inhabitants and the public as the Market Muir in consequence of certain public horse and cattle markets having from time immemorial been held thereon on eight particular days in the year under the ancient franchise of the burgh."

(Stat. 6) "The present Magistrates and Council have recently been negotiating an alienation of a portion of the muir to a company which is in course of being formed for the purpose of carry-

ing on an auction mart there. The portion of ground referred to is a portion about one acre in extent, lying to the north of the prison, and to the west of the south access above mentioned. The effect of such an alienation will be to diminish the extent of the muir, and so to lessen the use thereof by the inhabitants for the purposes aforesaid. . . . The Magistrates and Council directed the town-clerk to advertise that a lease for ten years of the said piece of ground would be exposed to public roup by the Magistrates and Council on the 19th day of March, and such an advertisement was inserted in the local newspapers, and circulated on posters throughout the town. The respondents also prepared and adjusted conditions for letting the said piece of ground, wherein the same was described as in the prayer of the note, and which included a condition that the purchaser should 'devote said piece of ground to the use and business of an auction mart for the sale thereof of horses, cattle, sheep, swine or the like animals, and also agricultural produce and implements, and for other like purposes,' and a further condition that within three months he should 'erect all necessary sheds, bughts, apparatus and fencing connected therewith, of the value at least of £600.'"

The respondents admitted that the extent of the muir "has during the present century, been diminished by portions being compulsorily taken for railway purposes, and pieces of ground on its boundaries having been feued by the Magistrates and Council for behoof of and with the assent of the community, from time to time, most of these feus having been given off between 1840 and 1867. Admitted that the ground delineated on the plan produced by complainer is bounded and accessible on its western and southern sides as stated, under reference to the plan. Explained that about three acres lying on and adjacent to the southern, western, and northern sides of the land so bounded, shewn on said plan by a diagonal line, does not form part of the Market Muir, but was acquired from the proprietors of the Carse estate by the Magistrates and Council in excambion for another piece of ground belonging to the Magistrates and Council." And explained "that from time immemorial or the date of said charter the main or primary use of the said Market Muir has been as a place for conducting sales of horses, cattle, and other bestial, and of agricultural produce and other commodities, for the purposes of producing revenue to the burgh, the mode of exercise of the said use being chiefly by markets and fairs, with their incidents. The said charter grants various lands, with certain privileges, 'una etiam cum hipodomedario foro die jovis quod nos cum consensu antedict mutamus a die veneris ad die antedictam et similiter cum potestate tenendi forum singulis diebus jovis pro venditione boum vaccarum aliarumq bestiarum ab octavo die mensis Junij ad primum die mensis Octobris anuatim Ac etiam quatuor liberas nundinas annuatim tenen intra dict burgam et libertatem ejusdem dictam nundinarum jos cipiend vige-

simo sexto die mensis Junij et per spatium quatuor dierum continuend alium decimo quinto die mensis februj alium decimo quinto die Septembris et alium vigesimo quarto die mensis Octobris annuatim et unamquamcunq eorundem perspatium octo dierum continuend cum colonijs customis casualitibus previligijs et emolumentis ad dictas liberas nundinas et fora pertinet spectar idq preter et ultra annua nundinas annuatim per prius observatas et tentas die Santi Jacobi vulgo at Sant James day apud et circa burgum nrum de forfar anuatim per spatium octo dierum et similiter cum omnibus alijs pris annis reditibus censibus devorijis alijsq quibuscunq quorum prepositi halivi consules et comunitas dicti burgi nrij de Forfar vel burgenses ejusdem quovis tempore preterito in possessione fuerunt.' In modern times the stated markets have been held monthly from April to November. The Magistrates and Council have all along taken toll and custom on the animals and others sold, and granted permission to erect tents, stands, shooting-galleries, shows, circuses, both on market and other days, for which they have exacted dues or rents. They have all along exercised the right of controlling and regulating the uses of said ground. By their permission the local corps of volunteers has been and is drilled on said ground. Until twelve years ago the grazing of the said muir was regularly let by the Magistrates and Council. Of recent years the revenue derived from markets and fairs has greatly fallen off in consequence of an auction mart having been started in the town, and the holding of markets having come to be comparatively little required or resorted to. They further explained that the conditions of the proposed lease "are intended to secure that this portion of the Market Muir shall be devoted to its primary use as aforesaid, and that further decrease in the revenue of the burgh from sale of cattle, etc., be prevented. In the view of the Magistrates and the community, the letting to responsible persons at the rate proposed or other reasonable rate of this corner piece of ground, or other piece of ground adjacent to the southern boundary, for weekly sales of live stock as proposed, is that mode of exercising and enjoying the primary use of the Market Muir which is at the present time the most convenient for the public and profitable to the burgh. Further, the said conditions oblige the accepted lessee on the termination of his lease to remove all erections and restore the ground to its former state."

The complainer pleaded—"(1) The ground mentioned in the prayer of the note having from time immemorial been held by the Magistrates of Forfar for the purpose of public markets, and so far as not interfering with such purpose, for the use of the public for exercise or recreation, interdict should be granted as craved. (2) The ground mentioned in the prayer having from time immemorial been dedicated to the inhabitants of the burgh of Forfar for purposes of recreation and exercise, and other similar purposes, and being held by the Magistrates and Council upon trust to permit

and secure that it should be in all time so used, interdict should be granted as craved. (3) The said ground having from time immemorial been possessed and used by the inhabitants of Forfar for purposes of exercise and amusement, interdict should be granted as craved."

The respondents pleaded, *inter alia*—" (3) The letting of the specified portion of ground on the conditions stipulated not being in contravention of the trusts on which the Magistrates and Town Council hold the same, or of any right in the complainer, the complainer is not entitled to interdict."

The note was passed, interim interdict being refused.

Upon a record being made up, the Lord Ordinary (KINCAIRNEY) allowed a proof, the import of which sufficiently appears from his Lordship's opinion, and upon 12th November 1892 pronounced the following interlocutor:—"Finds (1) that the Market Muir of Forfar consists of two portions—the one held under the original Crown charter dated in 1665, the other acquired by the Magistrates by excambion with the proprietrix of the adjoining lands of Carsegray in 1853; (2) that the present Market Muir is shown on the plan No. 67 of process by a space coloured green, and that the boundary between the new and old parts of the muir is shown on said plan by a red line drawn across the said space coloured green; (3) that the old portion of the muir has from time immemorial, and that the new portion thereof has from the date of the acquisition thereof, or shortly thereafter, been used as a place for holding markets, and also for the purposes of public recreation; (4) that the Magistrates hold the old portion of the muir subject to the public right of recreation thereon, and are not entitled to alienate any portion thereof, or to let it on lease, or to withdraw it from such public use; (5) that the Magistrates hold the new part of the muir without any such limitation: Therefore interdicts, prohibits, and discharges the respondents, the Magistrates of Forfar, and their successors in office, and all others acting by their authority or upon their instructions, in terms of the prayer of the note, so far as it refers to the ground forming part of the original muir: *Quoad ultra*, and so far as the said prayer refers to the portion of the muir acquired by excambion as aforesaid, refuses the said prayer, and decerns: Finds the complainer entitled to expenses, modified to two-thirds of the taxed amount thereof, &c.

"*Opinion.*—The complainer is an inhabitant of the town of Forfar, and the respondents are the Magistrates of Forfar. The question between them is, whether the Magistrates have power to let a portion of the Market Muir for ten years, to be used by the tenants as an auction mart.

"The Magistrates have advertised that a portion of the muir is to be let by public roup, and it is averred that certain conditions of roup have been prepared. These conditions have not been produced in the process, but from the pleadings and evi-

dence it may be taken that what the Magistrates mean to do is to let the part of the muir in question under the condition that it is to be used as a mart or market for the sale of live stock and agricultural produce and implements. The proposed transaction involves (1) the exclusion of the public *qua* such from the portion of the muir to be let; (2) the use of it by the tenants as an agricultural market; (3) the surrender by the Magistrates of their power *quoad ultra* to regulate the use of it.

"This is the transaction which the pursuer seeks to prevent by this interdict. He maintains that the Market Muir has been dedicated to the public of Forfar for the purposes of recreation, that it is held by the Magistrates in trust for that use, and that therefore no part of it can be lawfully withdrawn from that public use.

"The Magistrates maintain that the proposed lease of a part of the muir for use as an auction mart is within their powers.

"The question is therefore, not whether the Magistrates have power to alienate or feu the whole of the muir or any part of it for any purpose they please, but whether they can lawfully devote a part of it to this particular use. Neither, on the other hand, is the question whether they can permanently occupy a stance for holding markets under their own control, but whether they can let a part of the muir to tenants for that purpose.

"The Market Muir of Forfar is an open space, slightly exceeding 9 acres in extent, situated in the vicinity of the town, on the north-east side of it. It may be described generally as lying between the public road to Brechin on the west side and land occupied by the Caledonian Railway on the east side. On the north of it is a small village or aggregate of feus called Zoar, and on the south are the county and prison buildings, and enclosed ground connected with them. It is the ground coloured green on the plan No. 67 of process. The site which it is proposed to enclose and use as the auction mart is shown on that plan, and is on the south side of the muir.

"The proof of public use of the muir for the purpose of recreation is, I think, much the same as is usually led in such cases. There are no records which carry it back beyond living memory; but it has been proved that the public have been in the use of playing various games on the muir, such as golf, cricket, shinty, and other games, and of using it generally as a public green without any direct permission from the Magistrates or any direct interference by them, and that a part of the muir has been so used from time immemorial. It could not have been otherwise, for it was inevitable that an unenclosed space of ground in the immediate vicinity of a town should be put to such uses. It has been maintained that the proof as to playing golf, contemptible and ridiculous; and it is true that the muir was never a very ample space, and never was, and certainly

is not now, the ideal of a golfing links according to present requirements. Still I think that the proof of the public use of it for playing games, such as they were, is as much as could be reasonably expected. It is monotonous, uniform, consistent, and frequently repeated, and it appears to me that there is really not much room for dispute as to this matter of fact.

"Perhaps the most striking proof of the use of the muir for public recreation is to be found in the conditions of roup of the grazing of the muir from 1850 downwards, in which there is expressly reserved, in terms which somewhat vary in different years, liberty to the inhabitants 'of playing at golf and other games thereon.'

"I do not therefore intend to go into any examination of the evidence; it would serve no good purpose to do so. I think that on this point, and apart from certain very important specialities, the case cannot be distinguished from *Grahame v. Magistrates of Kirkcaldy*, 192, June 1879, 6 R. 1606; July 19, 1881, 8 R. 395, and cannot be easily distinguished from the case of *Sanderson v. Lees*, November 25, 1852, 22 D. 24, in relation to the links of Musselburgh. But the specialities are very important and require careful consideration.

"The title of the Magistrates is a Crown charter of confirmation and novodamus, dated 9th May 1665, which contains a grant, *inter alia*, of 'muirs;' but there is no mention in the charter of commons or common muirs. There is a grant of markets to be held on certain days of the week between June and October. Although the time for holding these markets is prescribed, the place on which they are to be held is not prescribed.

"The position and history of the muir, to which it is necessary to attend, are conveniently exhibited on three plans—No. 67 of process, produced by the complainer, and Nos. 79 and 80, produced by the respondents, plans which substantially agree, so far as the points of consequence in this case are concerned, and which have not been challenged in any material particular.

"Plans Nos. 79 and 80 show the muir as it was at the time when the evidence first finds it, and No. 80 shows besides the manner in which it has been changed from time to time. Plan No. 67 shows it as it is at present. The ground shown to the right of the strongly coloured line drawn across plan No. 80 is the old muir. No part of the ground shown to the left or west of that line formed part of the old muir.

"The old muir extended to somewhat about 30 acres imperial, but a large portion of it has been sold or feued or taken compulsorily by railway companies. The dates of these various abstractions are not brought out so clearly as might be desired. There is no trace of any feu before 1830 or about that date. There is a minute of the Magistrates, dated 21st January 1833, relating to a proposed feu for the Forfar Gas Works, but it seems doubtful whether that transaction was carried out, and whether

the Gas Works were placed on a feu off the Market Muir. A minute dated 22nd February 1837, seems to show that feus were then given off from the north part of the muir, and that houses now forming part of the village of Zoar were built on them. In or about 1841 the ground was feued on which the prison is built. In or about 1842 ground was taken from the Market Muir for the station of the Arbroath and Forfar Railway. Other feus were afterwards given off, and a very large part of the muir at the west was taken by the Midland, afterwards the North-Eastern Railway Company. If the precise date at which this important diminution of the muir took place has been stated, the passage in the proof in which it has been so stated has escaped me. A minute of 4th September 1854 seems to point to that date, but there is evidence which seems to indicate an earlier date.

"In 1853 a contract of excambion was entered into between the Magistrates and the heiress of entail in possession of the adjoining estate of Carsegray, whereby lands belonging to the Magistrates, but unconnected with the muir, were exchanged for portions of Carsegray, some but not all of which adjoined the Market Muir on the west, and were situated between it and the Brechin Turnpike Road. The contract is dated 7th and 8th July 1853, but the term of entry is stated to be Martinmas 1851, although at that date the proprietrix of Carsegray had not obtained authority to excamb. The eastern boundary of the portions of Carsegray contiguous to the Market Muir which was thus disposed to the Magistrates is shown by the red line drawn across the muir on the plan No. 67, and the coloured line on the plan No. 80 of process, between which lines I have not discovered any difference of consequence. This line cuts the site of the proposed auction mart. Part of it is on the old muir, and part of it on the land acquired by this excambion. I do not think it appears distinctly or conclusively whether the abstraction of the land on the east by the Midland Railway Company, or the acquisition of the excambed land on the west took place first. It is a point which could easily have been put beyond doubt.

"Shortly or immediately after the excambion, the ground which adjoined the Market Muir was occupied and treated as part of the muir. It is of some importance, however, to notice that the ground so added to the Market Muir extended southwards beyond the present muir. The ground on which the County Buildings is built was treated as part of the Market Muir until it was disposed to the Commissioners of Supply in 1870. It is described in the disposition as part of the Market Muir.

"Whether the Magistrates had right to feu the Market Muir or not, it is quite certain that they thought they had a right to do so, for in 1853 they had a feuing plan of it prepared, and they continued to grant feus off it from time to time down to 1876.

The ground so feued was chiefly ground on the east side of the muir, between the prison and the ground occupied by the railway. They did this it may be said habitually, and, of course, as they were Magistrates dealing with the common good, they did it publicly, all the feus having been given off by public roup.

"So far as living memory goes back public markets have always been held on the Market Muir, and its name sufficiently indicates that that was its primary purpose. They do not appear to have been strictly limited to the days specified in the charter. The Magistrates were in use to sell the market dues annually by public roup, and it is said that the price obtained for these market dues has recently been very greatly diminished. This has occurred in consequence of a change of custom or of fashion in that matter. Auction marts, it is said, are superseding public markets, which I suppose may be taken as matter of public knowledge. A mart has recently been opened on a feu given off the Market Muir, and probably has diverted business from the ordinary market; and the Magistrates have come to think that the only way in which markets can now be advantageously carried on and their right of holding markets advantageously exercised is by establishing an auction mart of their own and letting it to a tenant.

"But according to the mode in which markets have hitherto been held on the market muir, no hindrance has been offered to the use of the muir for purposes of recreation, except while the market lasted, and to the extent to which the market affected such use. There seems to be no doubt that during market time the muir remained an open space to which the public had access just as at other times.

"Now and again the muir was put by the Magistrates to other uses. They let the grazing of it. They permitted volunteers to drill on it. They allowed shows to be put up on it from time to time, and annual games to be celebrated.

"I do not think there are any other facts in the case requiring notice; and from what has been said it will appear that the salient features of this case are these—(1) The charter contains no grant of common ground; (2) the primary use of the muir must be held to be for holding markets; (3) the old part of the muir has been used for purposes of recreation from time immemorial, and the other part of the muir, since it was acquired, not quite forty years ago; (4) various portions of it have been alienated publicly from time to time; and (5) the present proposed alienation is for the purpose of a market. The most important specialties are (1) that the muir is primarily a site for holding markets; (2) that part of it was acquired by excambion in or about 1853; and (3) that the use now proposed is use for a market.

"I think it now completely settled that questions of this nature as to the limits of the powers of magistrates of burghs in dealing with burgh property are not questions in the law of servitude, or in the law

of prescription, but questions as to the quality of the title of the magistrates. Farther, it is clear that the magistrates have full power to alienate the heritable property of a burgh, unless a condition or quality limiting their powers be impressed on their title either by its express terms or by usage interpreting their title—*per* Lord Watson in *Paterson v. Magistrates of St Andrews*, July 27, 1881, 8 R. (H. of L.) 117, 124.

“The absence in the title of any grant of common muir is a point to be noticed, but it is not at all conclusive. There was such a grant in the Crown charter in *Grahame v. Magistrates of Kirkcaldy*, and that formed a point of importance in that case. That speciality has, I think, not occurred in the other cases. But the effect of inveterate use of a green or muir for public recreation is so to interpret the Crown grant as to make it equivalent to a grant of common ground for public uses. This effect of usage is explained elaborately by Lords Curriehill and Deas in *Sanderson v. Lees*; and in this case I am of opinion that the public usage would have been enough to interpret the Crown grant to that effect if that had been the sole question.

“But it is said that the fact that this field has been from time immemorial a market muir prevents the inference of dedication to the public for purposes of recreation, and accounts for the ground being left open and vacant without the necessity of such an implication. There may probably be cases in which a public use of a green forming part of the common good of a burgh may not have been such as to warrant the inference of dedication to that use. Such a case was referred to by Lord Ormisdale in *Grahame v. Magistrates of Kirkcaldy*, 6 R. 1074 (*supra*). But I have formed the opinion that the character and amount of the public use which was made of this market muir warrant the conclusion that the old part of the muir was by the Crown grant dedicated to public uses. In this matter I give considerable weight to the reservations in favour of the public in the conditions of roup of the common good and, *inter alia*, of the grazing of the Market Muir. It appears to me that the conclusion that the muir was dedicated to public uses is the legitimate deduction from the principle of the decisions in the cases of *Sanderson v. Lees*, *Grahame v. Magistrates of Kirkcaldy*, and in the earlier cases of *Home v. Young* in regard to the burgh of Eyemouth, and *Kelly v. Magistrates of Burntisland*, 9 D. 286, and 293 note.

“I think, however, that this muir was not dedicated to public uses solely, but to use as a public market also, and I am disposed to hold primarily. But these two uses are compatible, and it appears to me that this muir was not the less a public green because it was a market muir. If dedication to public uses, and a corresponding limitation and qualification of the Magistrates' title, would be a justifiable inference from the proof of public use, apart from the question of use for markets,

then that inference does not appear to be prevented, checked, or invalidated by the fact that the Magistrates had from time immemorial selected this same muir as the place for holding their markets. The point is somewhat novel, and perhaps difficult; but I think it is in accordance with the principle of the previous cases referred to to hold that this double use is presumably coeval with the title, and indicates dedication to this double purpose.

“It was argued that the practice of the Magistrates in granting feus off the Market Muir ought also to be held to interpret the title, and to show that the muir was not dedicated to public uses, and on that account inalienable, but was merely part of the common good. This same peculiarity, however, existed in the Musselburgh and Kirkcaldy cases, and in the Kirkcaldy case almost the whole of the public green had been feued. But it was held not to prevent the conclusion that further encroachments were illegal.

“In this case no feus off the Market Muir are on record earlier than 1833, and if the question as to the legality of the earliest feu had then been raised, the question would really have been the same as it is now. The view taken in the Kirkcaldy case seems to have been that all these feus were breaches of trust which could not to any extent warrant their repetition. This was not indeed the view expressed by Lord Young in the second stage of the Kirkcaldy case, January 19, 1881, 8 R. 395. His Lordship appeared to have held that such alienations were lawful until challenged; at least that they could not be gone back on. Following the cases of *Sanderson* (Musselburgh) and *Grahame* (Kirkcaldy), I hold that the previous alienations of the Market Muir do not of themselves afford any answer to the complainer's case.

“It was further very forcibly argued that the proposed lease was within the Magistrates' power as being a legitimate method of using the muir for its primary purpose as a market place. It was said that in consequence of the change of fashion and custom in that matter the markets could not be otherwise held. I was much impressed with this view of the case, but I have come to doubt its soundness. For the manner in which it is proposed to use the muir for the purpose of holding markets is quite different from the powers of holding markets conferred by the charter, which imply only an occasional use of the ground on which the markets are held, and (when the practice is taken into account) a use which does not exclude the public, and a use which is not incompatible with that other use to which the muir was devoted.

“The holding of markets in accordance with the Crown grant, and in accordance with the practice which followed, was consistent with the dedication of the whole muir to public purposes. But the use to which it is now proposed to put the particular portion of the muir in question is, of course, subversive and destructive of these purposes so far as regards that portion of the muir. I am further of opinion that it

is not competent for the Magistrates to give up their right of control over this part of the muir for a period of ten years. This opinion is warranted by and is based on the opinions expressed in the House of Lords in the case of *Paterson v. Magistrates of St Andrews*.

"My opinion, therefore, is that the old muir is held by the Magistrates with right to hold markets on it in the manner expressed in the Crown grant and in accordance with immemorial practice; but that they also hold it as a recreation ground for the use of the public; that that dedication to the public is and was a quality of their title; and that the proposed lease would be at variance with the quality and condition of their title, and *ultra vires*.

"I am unable to see, however, that these principles apply at all to the portion of the market muir acquired by excambion. The Magistrates have not held that land as yet for forty years, or had not at the date of the action. But suppose they had, I do not think that would have been of importance, because there is no question of prescription in this case, but of implied condition in the Magistrates' title.

"It is said that the implied limitations of the Magistrates' title apply to this piece of ground, because it was a *surrogatum* for the land taken by the railway company. But that settlement is, I think, *gratis dictum*, and I can find no proof of it.

"I cannot doubt that when the Magistrates acquired this ground they could have done what they pleased with it—that is to say, consistently with their duties as Magistrates; and if they had that power then, I do not see that anything which has happened since has taken that power away. There is really no proof of inalienable dedication to public uses. That was not the mind of the Magistrates, for after the southern portion of it had been added to the muir it was given off in feu to the Commissioners of Supply, an act inconsistent with the idea of dedication to public uses, for which idea I can find no ground or reason.

"I am therefore of opinion that it is not lawful for the Magistrates to grant the lease which they propose of any part of the old muir, but that it is competent for them to grant a lease of the excambed ground. For the purposes of this case I assume the correctness of the plan No 67 of process. Whether it would be illegal for them to give up their accustomed markets and to start a mart of their own on the excambed ground, or on other ground belonging to the burgh, is a question which I consider not to be raised in this action. I do not wish to indicate any opinion that there would be any illegality in doing so."

Both the complainer and respondents lodged reclaiming-notes. The latter argued—As to the old part of the muir—(1) The Magistrates held it by a Crown charter of 1665 which contained no restrictions, and restrictions to have effect must be coeval with the title. They had therefore an absolute title. This had always hitherto been recognised, for no exception had ever

been taken to their feuing the ground as they had frequently done. They had also given the ground to the volunteers for drilling, and to travelling shows, &c., which implied exclusion of the public. (2) If the ground was held irrevocably dedicated to market uses, they were not acting so as to prejudice that use, and therefore within their rights—*Paterson, &c. v. Magistrates of St Andrews*, July 27, 1881, 8 R. (H. of L.) 117 (Lord Watson, pp. 124-126). But further, they were carrying out that purpose. They were promoting the new method of an auction mart which the public preferred to the ancient open market, and which would benefit the burgh by increasing the dues. (3) There was no restriction on their rights in favour of games, &c. These had always been tolerated because the ground was lying waste and not required. It was out of the question to compare the insignificant games which had been played to the exercise of the right of golfing over courses like St Andrews and Musselburgh. The reservation in the leases of grazing founded on was inserted merely to protect the Magistrates against any troublesome claims at the instance of their lessees. The old market took up 4½ acres, the new stance only 1 acre. Therefore the right of recreation, if it existed, was not materially affected, and in any case an offer they had made to supply an acre out of the new portion of the muir was a sufficient answer to the interdict—*Grahame v. Magistrates of Kirkcaldy*, January 19, 1881, 8 R. 395. The Magistrates were acting in accordance with their rights and duties as administrators of the burgh's property. It would require a very strong case to set up this claim at the instance of a single individual against the actings of the Corporation approved of by the majority as for the best interests of the burgh. In any case the interdict granted was far too sweeping. It took away from the Magistrates all right to regulate access to the muir, &c. As to the excambed portion of the muir—it had been acquired in exchange for ground admittedly subject to no restriction and had not itself been dedicated to the public. The use of it by the public did not extend over the prescriptive period of forty years.

Argued for the complainer—This was an attempt to completely shut off an acre of the muir from the public, not while a monthly market or an occasional cricket match or drill was being held, but continuously. That was *ultra vires* of the Magistrates, who held this muir for the purposes primarily of markets, but secondarily subject to a right of recreation. That was "a quality of their right of tenure" and it was immaterial whether that quality had been impressed by the terms of the original grant or demonstrated by immemorial usage, which here had been clearly made out. Their previous granting of feus if *ultra vires* could not strengthen their present position. The case was ruled by the following—*Home v. Young* (Eyemouth), December 18, 1846, 9 D. 286; *Kelly v. Magistrates of Burntisland*, 1811, re-

ferred to in 9 D. 293; *Sanderson v. Lees* (Musselburgh Links), November 25, 1859, 22 D. 24; *Grahame v. Magistrates of Kirkcaldy*, June 19, 1879, 6 R. 1066—a case even stronger than the present one; *Paterson v. Magistrates of St Andrews*, *supra*. The powers of magistrates as to regulation, &c.—which they had here gone beyond—were fully set forth in *Blackie, &c. (Market Gardeners) v. Magistrates of Edinburgh*, February 5, 1884, 11 R. 783, and February 18, 1886, 13 R. (H. of L.) 78. The idea of tolerance was out of the question; the community could not be tolerated by the Magistrates, who were truly the directors or managers for the community. The portion acquired by excambion had been disposed to the Magistrates “for behoof of the whole body and community,” and it had been used just as the older portion had been for purposes of recreation. It must therefore be held to have been dedicated to the public, consequently use for the prescriptive period was not necessary.

At advising—

LORD M'LAREN—The case which we are considering originated in a note of suspension and interdict in which the complainer seeks to restrain the Magistrates and Council of the royal burgh of Forfar from “selling, feuing, letting, or in any other form alienating” any part of the market muir so as to interfere with the use of the muir for playing golf and other games, and for exercise and recreation. This prayer is specially directed against a proposal on the part of the Magistrates and Council to grant a lease of a part of the muir for the purpose (as explained in the statement of facts) of providing a site for an auction-mart for the sale of horses and cattle.

The note was passed in the Bill Chamber, but interim interdict was refused. Thereafter a proof was allowed by the Lord Ordinary, and a great number of witnesses were examined regarding the past possession and use of the market muir, which, as stated by the Lord Ordinary in his first finding, consists of two portions, the one held under the original Crown charter, dated in 1665; the other acquired by the Magistrates by excambion with the proprietrix of the adjoining lands of Carsegray in 1853. By his fourth and fifth findings the Lord Ordinary declares that the Magistrates hold the old portion of the muir subject to the public right of recreation thereon, and are not entitled to alienate any part of it, and that the Magistrates hold the new part of the muir without any such limitation. These declaratory findings have been brought under review by separate reclaiming-notes, and in regard to each the question arises whether the title of the Magistrates and Council is affected by the use claimed—in other words, whether it is a quality of their right and title that the subjects are to be held in perpetuity for the uses of a market-place and place of public recreation.

With respect to the old portion of the muir it is proved beyond dispute that the markets referred to in the charter of King

Charles were held there four times in the year under the authority of the Magistrates, and that these quarterly markets were only quite recently discontinued in consequence of a preference for other modes of sale. The complainer has also proved by the concurring testimony of a great number of witnesses that, subject to the prior claims of the market, this muir has been used for forty years or time immemorial as a place of recreation. It may be sufficient to refer on this subject to the evidence of Mr Doig, Provost of Forfar, who though a respondent is examined as a witness for the complainer. This gentleman is in his seventy-second year, has resided in Forfar all his life, and has been three times Provost and twenty-five years a member of the town council. His evidence-in-chief is to the effect that the inhabitants have always had access to the muir; that he was in use to play games on it when a young man, and that in times within his recollection quoits and ninepins, and more recently cricket and football, have been played on the muir without objection or hindrance. And in answer to the Judge he adds—“The use of the muir by the inhabitants has not been restricted by the Magistrates in any way but has been regulated.” It is indeed unnecessary to examine the complainer's evidence on this subject, because the respondent's witnesses (with one exception) admit, either in chief or in cross-examination, that the old muir has always been available to the inhabitants as an open space and for out-door sports of the kind described. It is a significant circumstance that while it has been the practice to let the muir for grazing, the conditions of let of the muir since 1850 contain a reservation of the right of the inhabitants “of playing at golf and other games thereon.”

It thus appears that the state of the facts with respect to possession and use of the muir for recreation is identical with that which was established by a minute (equivalent to a special verdict) in the case of *Sanderson v. Lees*, with respect to the links of Musselburgh. Now, in the Musselburgh case the title to the links was an ancient charter, and according to Lord President M'Neill the mere fact of the immemorial use of the ground as a place of recreation sufficed to establish a right on the part of the burgesses to this specific use, on the principle that it was a “quality of the right” in the person of the Magistrates that the links were to be open to the burgesses and available for the game of golf. This principle has been applied in subsequent cases, and was approved by the House of Lords in the St Andrews case. On this question accordingly I have no difficulty in concurring with the Lord Ordinary.

In reviewing the subject of the fifth finding (which relates to the right claimed to the specific use of the portion of the muir acquired by contract in 1853) it is necessary to consider how far the principle of the decision in the case of *Sanderson v. Lees* admits of extension. I need hardly say that this was not the first case in

which the rights of burgesses to the use of common land were recognised by the Courts; these rights had been recognised in the older case of *St Andrews*, and in the cognate case of *Eyemouth*, a burgh of barony. But the principle is perhaps most fully and clearly developed in *Lord Colonsay's* judgment, which is also important in another way, because it was there laid down that the administrators of the burgh property cannot found upon their acts of alienation or dilapidation of the common property in derogation of the right of the burgesses to the use of what remains.

It appears to me that in the most extended view which can be taken of the constitution of public rights of this description there are at least three ways in which a public use of burgh property may be acquired. The land may be appropriated to public uses in the charter or original grant; the land, after it is vested in a public body such as a town council, may be irrevocably appropriated to public uses by the act of the town council itself, and again it may be so appropriated, or rather the inference may be drawn that it was originally appropriated, to public uses from evidence that the land has been so used and enjoyed for time immemorial.

Now, with respect to the land acquired by the burgh in 1853 the evidence and arguments do not in my apprehension establish a right on the part of the public in any of these ways.

The lands were acquired from *Mrs Gray of Carse* in exchange for lands of equal value previously held by the burgh as an investment. It is not suggested, and there is not an atom of evidence to prove that the lands given in exchange were subject to any public use or trust whatsoever, the contract of excambion contains no declaration of trust, but merely sets forth what is substantially a transaction of purchase and sale completed in the usual way, and it follows that the right of the town council in the lands acquired from *Mrs Gray* was as unqualified as their right to the lands which they conveyed to her. It certainly cannot be said that this is a case of appropriation to public uses by express grant.

But, further, there is no evidence of the existence of an intention on the part of the town council, either before or after the exchange, to appropriate the lands acquired from *Mrs Gray* to public uses, or to treat these lands as a place of recreation or as an addition to the *Market Muir*. The excerpts from the burgh records which have been furnished, if they prove anything, prove an intention to treat the newly acquired property as an investment, because the first thing done by the town council after the bargain was made, and even before the execution of the conveyance, was to direct the preparation of a feuing plan of the 19 acres with a view to re-sale. This was done, and from time to time parts of the land acquired from *Mrs Gray* were feued when offers were made which the town council considered advantageous. Again, it cannot well be maintained that the inhabitants or burgesses

have acquired a right to restrain their council from alienating this property by immemorial use, and for this conclusive reason, that the title of the burgh was obtained within the prescriptive period, and such use as the public has enjoyed falls short of the period of forty years, which in our law is taken to be equivalent to immemorial possession in questions of public rights, or use explanatory of such rights.

It may be assumed that as a matter of fact the excambied land has been used by the burgesses of Forfar ever since its acquisition very much in the same way as the old *Market Muir* was used. Such appears to be the import of the evidence as a whole, and although witnesses for the respondents profess to take a distinction between the public uses of the two portions, it may be surmised that they are speaking rather of a distinction of right existing in their own minds, than of a distinction in the actual and observed use of the lands taken by the public. We see from the plans and the evidence that the lands acquired in 1853 are adjacent to the *Market Muir*, and being unenclosed and unoccupied it was inevitable that they should be treated as if they were a part of the *muir*. But I know no principle of law which will support the complainer's contention that such use (not extending to the prescriptive period) will be equivalent to an appropriation of the land to purposes of public enjoyment, because it is necessary to an effective appropriation of a subject to public uses that this shall be done with the consent of the owner or administrator of the subject, as well as that of the public or class of persons by whom the use is claimed.

Where the title is ancient and the usage is uniform, the antecedent consent of the corporation (or superior in the case of village communities) is presumed. But in the present case the conditions for such a presumption do not exist.

It is not necessary to consider what would be the effect of a use of unenclosed land by the public existing for a period exceeding forty years. Supposing the town council to assert their rights as proprietors on all suitable occasions, I hesitate to say that a proprietor should be held to lose his rights, or to have assented to a qualification of his rights by the mere fact that members of the public have walked or sported on the lands, and that the proprietor has not treated their acts as a trespass. But as this question may arise hereafter, I do not wish to give an opinion upon it.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred,

The Court pronounced the following interlocutor:—

“The Lords having considered the reclaiming-note for the Magistrates and Town Council of the burgh of Forfar, together with the reclaiming-note for the complainer *William Fettes Murray*, Doctor of Medicine, both against the interlocutor of Lord Kincairney dated 12th November 1892, and heard counsel for the parties thereon,

Vary the said interlocutor: Find that so much of the present Market Muir of Forfar as is held of the Crown under the charter of 1665 has been immemorially possessed and used by the burgesses and inhabitants of Forfar as a place of public recreation, and that such use is a quality of the respondents' right and title: Therefore (and under reference to the plan No. 67 of pro.) interdict, prohibit and discharge the respondents from selling alienating, or leasing (except for pasturage) any part of the said muir held by them under their Crown charter dated in 1665, and from building thereon or enclosing any part thereof, and decern: *Quoad ultra* refuse the prayer of the note; adhere to the said interlocutor in so far as regards the finding for expenses incurred prior to the presentation of the reclaiming-note; and *quoad ultra* find no expenses due to or by either party."

Counsel for the Complainer—H. Johnston—Law. Agents—J. & J. Galletly, S.S.C.

Counsel for the Respondents—Jameson—N. J. D. Kennedy. Agents—T. J. Gordon & Falconer, W.S.

Wednesday, June 28.

FIRST DIVISION.

MITCHELL, PETITIONER.

Churchyard—Burial—Disinterment—Petition by Widow for Authority to Remove Deceased Husband's Remains.

A widow petitioned the Court for authority to remove her husband's remains from one churchyard to another. The petition having been served on the clerk to the heritors of the parish in the churchyard of which the body was interred, and on the next-of-kin of the deceased, and no answers having been lodged, the Court *remitted* to the Sheriff to inquire into the facts set forth in the petition, with power to proceed as should be just.

This was a petition at the instance of Miss Maggie Mitchell for authority to disinter the remains of her deceased husband, which had been interred in the churchyard of the parish of Gamrie, in order that they might be removed to the churchyard of the parish of King Edward for interment therein. The petitioner craved the Court to appoint the petition to be intimated upon the walls and in the minute-book, and to be served upon the clerk to the heritors of the parish of Gamrie, as representing said heritors, and upon the deceased's three sisters, who were his next-of-kin.

The statements of the petitioner were substantially to the following effect—Her husband had died on the 24th June 1892. He had three sisters who survived him. They had been adverse to the deceased

marrying, had conceived a groundless dislike to the petitioner, and had always treated her coldly. When her husband died the petitioner had been so overcome with grief that she had been unable to give directions for the funeral, and the place of interment had been determined by her eldest sister-in-law, who gave directions that the deceased should be buried in Gamrie churchyard. The deceased accordingly had been interred there on 29th June. Though resident in Gamrie parish the family had attended the parish church of King Edward, and had always been associated with the concerns and interests of that parish. On going to visit her husband's grave in Gamrie churchyard shortly after the funeral, the petitioner had found the churchyard to be in an offensive and deplorable condition from neglect. His sisters-in-law also refused to allow the petitioner to erect a tombstone to her husband's memory unless the inscription to be put upon it received their approval. They had further expressed themselves to the effect that they would take care that when the petitioner died she should not be laid beside her husband. Although it might not be in their power, the petitioner believed they would seek to prevent her remains being laid beside her husband's. The petitioner had purchased burying-ground in the churchyard of the parish of King Edward, and in the circumstances she deemed it desirable to have her husband's remains removed there. There were no bodies buried above that of the deceased, and the disinterment would cause no disarrangement of the burying-ground, or removal of tombstones, or other interference with the rights of third parties.

The Court ordered intimation and service as craved. No answers were lodged.

The petitioner argued—That though there was no direct authority upon the point, the Court clearly had jurisdiction to entertain an application of this kind—*Wright v. Wright*, October 20, 1881, 9 R. 15. [The LORD PRESIDENT referred to Lees on Sheriff Court Styles (3rd ed.), p. 161.]

The Court pronounced this interlocutor:—

“The Lords having heard counsel for the petitioner upon the petition, no answers having been lodged, remit to the Sheriff to inquire into the facts set forth in the petition, with power to proceed in the said petition as shall be just.”

Counsel for the Petitioner—Salvesen. Agent—Alex. Morison, S.S.C.