May 26, 1826. interlocutors find that all right and interest in the said estates and bond, which the appellant claimed under the summons of reduction and declarator in the said interlocutors mentioned, were totally excluded, and the subject-matter of the action then before the Court, as to such estates and bond, was res judicata, by the judgment contained in the decreet of the Court of Session of the 5th March 1782, in the said interlocutor mentioned, inasmuch as it appears to their Lordships that it was not competent to the appellant, by the summons of reduction and declarator in the said interlocutors mentioned, to impeach such decreet of the 5th March 1782, so far as the same respected such estates and bond; and such decreet has not been impeached by reclaiming petition or appeal, or any other proceeding competent to impeach the same. And then, my Lords, with respect to other parts of the interlocutors complained of, that they be, and are hereby reversed, so far as the same find that all right and interest which the appellant claims in the leases of Brechin and Panmure, under the summons of reduction and declarator in the said interlocutors mentioned, were totally excluded, and that the subject-matter of the action then in question touching such leases, was res judicata. And then, my Lords, the judgment goes on to state the substance of your Lordships' judgment in this House,—that the Court of Session may see distinctly the ground on which your Lordships reverse that interlocutor, the substance being with respect to the leases, however unfortunate it is, that the cause should be continued, that the case must be reviewed, and that the Court of Session proceed further in respect of the leases, and the other defences, as to them shall seem meet; it being clear that the only effect of your Lordships' judgment in 1819, was to shut out the effect of the decreet-arbitral.

A. FRASER—J. CAMPBELL, *Solicitors.*

---

## No. 35. THE OFFICERS OF STATE, Appellants.—*Sol.-Gen. Wetherell—Miller.*

## THE EARL OF HADDINGTON, Respondent.—*Shadwell—Robertson.*

## et e contra.

*King's Park—Clause—Prescription.*—Held (affirming the judgment of the Court of Session) that a Charter granting the Office of Keeper of the King's Park did not confer any feudal right to the property of it, although it was alleged, that acts of proprietorship had been exercised by the Keeper for more than forty years; but a remit made to review and take the opinion of the other Division of the Court, as to whether the Keeper of the Park be entitled, under the terms of the grant and alleged possession for more than forty years, to work quarries in the Park?

May 26, 1826.

2D DIVISION.
Lord Pitmilly.

THE Palace of Holyroodhouse, in the immediate vicinity of Edinburgh, has attached to it a Royal Park, in which are situated the hills, or rising grounds, called Arthur's Seat and Salis-

bury Crags. Prior to 1646, it does not appear that there was any hereditary keeper of the Park, the Palace having been, till the time of James VI., the usual place of residence of the Kings of Scotland, and the Park being under the immediate care of the household officers. In that year, however, Charles I. granted to Sir James Hamilton, and his heirs-male, a royal charter, by which he constituted them 'hereditarios custodes Roborarii 'nostri lie Park de Holyroodhous omniumque partium et pendi- 'culorum ejus ad eund. pertinen.'; and the grant proceeds— 'Ac dedisse tenoreq. pntis carte nre dare dict. Dno Jacobo Ha- 'miltoun, eiusq. prescript. hereditariu. officium et custodiam 'dict. nri Roborarii, cum omnibus feodis casualitatibus devoriis 'et privilegiis quibuscunq. ad eund. pertinen. cum plena ptate 'prefato Dno Jacobo suisq. predict. faciendi et constituendi sub- 'custodes dict. Roborarii unum vel plures pro eorum arbitrio 'proq. eorum officio exercendo. Nos cum avisamento et con- 'sensu predilecti nri consanguinei et consiliarii nri Therarii 'regni nri Scotiæ, et Dni Jacobi Carmichael nri Therarii depu- 'tati, dedimus, concessimus, assignavimus, tenoreq. pntis carte 'nre damus concedimus et assignamus præfato Dno Jacobo 'Hamiltoun ejusq. prescript. heredie. particularia feoda et om- 'nes devorias ad eund. spectan. cum ptate prefato Dno Jacobo 'Hamiltoun eiusq. prescript. semetipsos aut alios eorum nobus 'haben. eoru. warrantam levandi predict. feoda, casualitates, et 'devorias quascunq. ad dict. Roborarium spectan. omne tpre fu- 'turo, ac pro omnibus annis preteritis debitis et nondu. per- 'solut,' &c. Then there is this clause: 'Inhibendo omnes 'nros subditos, ne directe aut indirecte sub quocunq. pretextu 'possessionis tituli aut juris presumant imiscere semetipsos 'dict. Roborario aut cu——ad eund. pertinen. quocunq. tem- 'pore futuro absq. licentia et jure, a dicto. Dno Jacobo Hamil- 'toun eiusq. prescript. ad id prius obtent. prout illi eorum sumo 'periculo, in contrarium respondere voluerint,' &c. There is also a clause in these terms: 'Mandamus tenoreq. pntis carte 'nre Dominis nri Concilii et Sessionis ut lras dict. Dno Jacobo 'Hamiltoun eiusq. prescript. in hunc effectu. dent et dirigant 'ac nos pro nobis et nris successoribus volumus concedimus et 'ordinamus quod unica sasina nunc per dict. Dnum Jacobum 'Hamiltoun perq. eius prescript. in futurum apud dict. Robo- 'rariu. lie Park capienda sufficiens erit ijs sasina, pro prædict. 'hereditario officio custodie dict. Roborarii cum viridariis et ca- 'sualitatibus ad eund. pertinen.' &c. Then follows the Tenendas clause: 'Tenen. et Habend. predict. hereditarium officium 'custodie, dict. Roborarii cu. anuis feodis et casualitatibus ad

May 26, 1826.

May 26, 1826. ‘ eund. pertinen. prefato Dno. Jacobo Hamiltoun, eiusq. pre-
‘ script, de nobis et successoribus nris in libera alba firma,
‘ feodo et hereditate in perpetuum, per omnes rectas metas suas
‘ prout jacent in longitudine et latitudine cum libero introitu et
‘ exitu, cumq. omnibus et singulis libertatibus commoditatibus
‘ proficuis asiamentis ac justis suis pertinent. quibuscunq. tam
‘ non nominat. qua. nominat, tam subtus tra qm. supra tram
‘ procul et prope ad dict. officium spectan. seu juste spectare
‘ valen. quomodo libet in futuru. libere quiete, plenarie integre,
‘ honorofice, bene et in pace, sine aliquo impedimento, revoca-
‘ tione, contradictione, aut obstaculo aliquali; Reddendo inde
‘ annuatim prefatus Dns. Jacobus Hamiltoun eiusq. prescript.
‘ nobis et succoribus nrs unu. denariu. usualis monete regni
‘ nri Scotie ad festum Pentecostes nomine albe firme, si petatur
‘ tantum.’

In 1690, Thomas, Earl of Haddington, acquired right to this office, by adjudication from the family of Hamiltons; and thereafter obtained from William and Mary a crown charter, destining the office to the heirs of entail of the honours and estates of Haddington. The grant bears to be—‘ Predilecto
‘ nostro consanguineo Thome Comiti de Hadingtoune, Domino
‘ Binning et Byres, et hæredibus masculis de corpore suo legit-
‘ time procreand; quibus deficien. aliis suis hæredibus talliæ
‘ et provisionis in juribus et infeofamentis suis comitatus et sta-
‘ tus de Hadingtoune, content. ejusque assignatis quibuscun-
‘ que hæreditarie et irredimabiliter, totum et integrum hære-
‘ ditarium officium et custodium Roborarii nostri lie Park de
‘ Halyrudhouse, cum omnibus redditibus proficuis, divoriis, vi-
‘ ridariis, feodis, casualitatibus, privilegiis, et emolumentis qui-
‘ buscunque, ad idem spectan. et pertinen, cum potestate admit-
‘ tendi et constituendi, etiam expellandi subcostodes, unum vel
‘ plures, in dict. Roborario, pro dict. Comitis de Hadingtoune,
‘ ejusque prædict. eorum arbitrio Ac etiam cum plena potestate
‘ levand. et recipiend. annuos et terminos reditus, proficua et
‘ divorias ad id. pertinen. omni tempore futuro, jacen. infra,
‘ vicecomitatum nrum de Edinburgh.’ Then there is this clause:
‘ Quodquidem totum et integrum dict. hæreditarium officium
‘ et custodia dict. Roborarii lie Park de Halyrudhouse, cum in-
‘ tegris proficuis privilegiis et casualitatibus id idem pertinen.
‘ ad Dominum Jacobum Hamiltoun, militem, filium et hære-
‘ dem deservit. et retornat. quond. Jacobi Hamiltoune de Priest-
‘ field, perprius hæreditarie pertinuerunt. tent. per illum, de
‘ nobis nostrisque successoribus tanquam ejusdem legitimis su-
‘ perioribus, et quæ per ipsum ejusque legitimos procuratores,

'ejus nomine ad hunc effectum specialiter constitut. et patentes May 26, 1826.
'literas, in manibus dict." &c.—" Et volumus et concedimus
'proque nobis et successoribus nostris, decernimus et ordina-
'mus, quod unica sasina per traditionem terræ et lapidis solum-
'modo nunc per præfat. Thomam, Comitem de Hadingtoune,
'perque ejus prædict. omni tempore futuro super solo cujusvis
'partį sdict. Roborarii ſie Park de Halyrudhouse, capiend. sta-
'bit valida et sufficiens erit iis sasina, pro toto et integro, præ-
'dict. hæreditario officio et custodia dict. Roborarii, cum inte-
'gris redditibus, proficuis, privilegiis, et casualitatibus, ad id.
'pertinen. et spectan, quocirca, et cum omnibus quæ inde sequi
'poterint, nos pro nobis et successoribus nostris, cum avisa-
'mento et consensu prædict. dispensavimus tenoreq. pntis cartæ
'nostræ dispensamus in perpetuum, tenend. et habend. totum
'et integrum prædict. hæreditarium officium et custodiam dict.
'Roborarij de Halyrudhouse, cum omnibus et singulis inte-
'gris redditibus, proficuis, divorijs, viridarijs feodis casuali-
'tatibus, privilegijs et immunitatibus quibuscunque ad idem
'pertinen. et spectan. particulariter et generaliter supra men-
'tionat. jacen. modo predict. præfato Thomæ, Comiti de Ha-
'dingtoune, et hæredibus masculis, talliæ et provisionis, et as-
'signat. prædict. de nobis et successoribus nostris, in libera
'alba firma, feodo, et hæreditate, in perpetuum, per omnes rec-
'tas metas suas,' &c.

On this charter the Earl took infeftment, and the office now belonged to the present Earl of Haddington.'

Salisbury Crags form a bold and precipitous line of rocks, and, being in the immediate neighbourhood of the Palace, add greatly to its ornament and amenity. The rock is of a nature well adapted for paving streets and forming roads; and quarries having been made in them to a large extent, under leases granted by the Earl of Haddington to the Magistrates of Edinburgh, and to certain road trustees, the Officers of State raised an action against the Earl, bearing, '. that the said office of
'keeper and ranger, which the said Charles Earl of Hadding-
'ton enjoys, although it may give right to the annual profits
'of the said Park, vest in him no right to the property itself—
'that remains with us, and our royal successors, and of which
'there has been no grant, or deed of alienation, in favour of
'the said Earl, or his predecessors in the said office; he and
'they being bound to administer the same salva substantia, and
'not entitled to exhaust, or dilapidate, or alienate, either par-
'tially or totally, the property itself, by operations of any sort:

May 26, 1826. ‘ That notwithstanding this clear and distinct grant, the said ‘ Charles, Earl of Haddington, and others deriving, or pretend- ‘ ing to have authority from him, have thought proper, without ‘ any right or title whatever, to exhaust and dilapidate the pro- ‘ perty of the said Park, by opening quarries, and working the ‘ same to a great extent, by which operations the property of the ‘ said Park is materially hurt and deteriorated.’ The summons then concludes, that it should be declared, that ‘ the said Charles, ‘ Earl of Haddington, and his successors in the office of keeper ‘ and ranger of our said Park of Holyroodhouse, have no right of ‘ feudal property thereto, and no right or title to work quarries, ‘ or to do or authorise any act or operation by which the pro- ‘ perty of the said Park may be in any wise dilapidated or ex- ‘ hausted;’ and therefore ought to be decerned and ordained ‘ to cease and give up working the said quarries, and to desist, ‘ in all time coming, from doing any act or operations by which ‘ the property of the said Park may be in any ways injured, di- ‘ lapidated, exhausted, or deteriorated.’

In defence, the Earl pleaded, 1. That although he had no feudal right in the property of the soil, yet he held a feudal grant, conveying to him the office, with all the emoluments arising out of the Park; that quarries had, prior to its date, been worked as a source of profit; and that therefore he, by virtue of this grant, was entitled to continue these workings so as to derive these emoluments; and, 2. That his titles, with a possession for nearly 200 years, gave him an absolute right to work these quarries, by virtue of the positive prescription.

On the other hand, it was contended by the Officers of State, 1. That although it may be true that the Crown, as absolute proprietor of the Crags, might have permitted quarries to be made, and the rock to be carried away, yet, as the Earl was merely the keeper, or preserver of the Park, and had no right of property, he could not lawfully so far invert the nature of his office as to destroy and carry away that which was intrusted to his safe keeping; 2. That such a title could never give a right of property by the longer possession, and therefore there were no termini habiles for the plea of prescription; and, 3. That, in point of fact, there had not been that possession which was necessary to prescription.

The Lord Ordinary found it instructed, ‘ That, prior to the ‘ date of the original grant in 1646, stone quarries were wrought ‘ in the Park of Holyroodhouse, and emoluments were derived ‘ from them. And in respect, the said original grant, and re- ‘ newed grants, in favour of the defender’s predecessors, confer

'the office of keeper of the Park, and along therewith all the profits and emoluments of the Park, finds, that with reference 'to the usage anterior to the grant, the terms of the conveyance 'import a right in the grantees of working the quarries in question, and this independently of the clause of tenendas, which, 'although it make reference to minerals, would not be effectual 'to convey any subject, which was not either in express terms, 'or by legal construction, carried by the dispositive clause: 'Finds, that the construction now put on the terms of the grant 'is confirmed by the usage that has taken place since its date; 'and, separatim, finds, that such being the import of the grant, 'the defender's right to the quarries is established by the positive prescription. On these grounds sustains the defences, assoilzies the defender, and decerns.' May 26, 1826.

Against this interlocutor the Officers of State reclaimed; but the Court, 'in respect no abuse is alleged to have been committed,' adhered. The Officers of State then presented a second petition, and alleged, that there had been great abuse; that, in particular, during the four years subsequent to 1815, between 46,000 and 60,000 tons of the rock were carried away, being about 12,000 tons annually; and that, in the operation of quarrying, there had not been less than 36,000 tons excavated each year, being about 100 tons a-day. The Court, on the 24th June 1823, on advising the petition with answers, found, 'that the defender has no feudal right of property to the 'Park of Holyrood-house, but quoad ultra adhered.' *

*Lord Craigie.*—If this question had arisen in the course of the first year after the date of the grant, I do not think Lord Haddington could have maintained the plea he now does. The tenendas clause merely states the subjects over which his duty of keeper extends; but if it appeared that there were certain profits attached to his office, he would have right to them. Such an office, however, could never confer on him a right of property in the ground itself. It is similar to an irrevocable power of factory, which no length of possession could ever convert into a title of property: Therefore, there is here no title to found prescription; and even if there was, I doubt whether the possession be sufficient.

*Lord Glenlee.*—I see no reason to alter the interlocutor. If it be supposed to sanction the idea of Lord Haddington having a feudal title, I think it should be varied to that effect, and a

---

* See 2 Shaw and Dunlop, No. 397.

May 26, 1826. finding inserted that he has no such title. The interlocutor, however, only imports, that Lord Haddington has been accustomed to work the quarries as part of the profits of his office, and is entitled to do so, if he do not go too far. It is therefore open to the Crown to show that there is an abuse; but this has not yet been done satisfactorily.

*Lord Robertson.*—It is quite clear that Lord Haddington has no feudal title; but his charter conveys to him all the profits and emoluments of the park. If the Officers of State could point out precisely what these are, and that they do not include those claimed by Lord Haddington, then he might be restricted to them. But, in absence of any such specification, we must look to possession as explanatory of his rights; and from that we see evidence of his having drawn emoluments from the quarries for a long period without objection.

*Lord Bannatyne.*—I think the interlocutor ought to be altered. It no doubt appears, that, prior to the grant, the quarries were worked to a limited extent; but the grant, if it had the effect to give right to work these quarries, could not exceed the profits formerly acquired from that source.

*Lord Justice-Clerk.*—I think the interlocutor right. Undoubtedly Lord Haddington has no right to the property; but there is a broad and sweeping grant to him, of all the profits and emoluments attached to the office, and which are derivable either from above or below ground. At its date, quarries were worked, and profit thence derived; and possession has followed on this for a great length of time. We may find that he has no feudal title; but in other respects the interlocutor is right.

Both parties appealed.

*Appellants (Officers of State.)*—An abuse by the respondent in the exercise of this right was distinctly alleged, and is repeated. But if the respondent has a prescriptive right to work the quarries, it was a manifest inconsistency in the Court to qualify the interlocutor by the limitation, of 'no abuse alleged.' The heritable right acquired by the respondent, is not of the soil, or the profits of the soil, but of the office, and profits of the office; and that right does not authorise him to destroy the very subject of which he is the keeper and custodier. There being no original right to the solum, prescription cannot avail the respondent. There is no title on which to prescribe. The workings alleged to have taken place, arose from consuetudinary privileges, and not through grants by the keepers. Until 1814, when the ravages

began, there had been, for the sixty years previous, no leases by the Haddington family, under which quarries were worked. May 26, 1826.

*Respondent* (*Earl of Haddington.*)—The titles founded on, convey to the respondent the right now challenged. His predecessors enjoyed it in its fullest latitude, and he is entitled to continue the same enjoyment. If it were possible to entertain a doubt as to the force and effect of these titles, the long possession which has followed would show what the interpretation ought to be. Besides, a complete title has been obtained by prescription. There has been no abuse, and the respondent never pretended that, in the proper and strict sense of the word, he had a feudal right to the property of which he holds the office of hereditary keeper. But still his titles warranted him in doing that which he and his predecessors have for centuries done.

The House of Lords ordered and adjudged, 'that so much of 'the interlocutor of 24th June 1823, complained of in the said 'appeal, as finds that the defender has no feudal right of pro- 'perty in the Park of Holyroodhouse, be, and the same is here- 'by affirmed: And it is further ordered, that as to the remain- 'der of the said interlocutor, and as to the other interlocutors 'complained of in the said appeal, the cause be remitted back 'to the Court of Session in Scotland, to review the same: And 'it is further ordered, that the Court, to which the said remit 'is made, do require the opinion of the other Judges of the 'Court of Session in writing, upon the questions of law which 'occur in the same; which opinion the said Judges are required 'to give; and after such review, the said Court do decern in 'the said cause as may be just.'

Lord Gifford.—My Lords, This is a case in which the Officers of State in Scotland are the appellants, and the Earl of Haddington is the respondent, which has been brought by appeal before your Lordships. The question in this case is, whether the Earl of Haddington, who is, it appears, hereditary-keeper of the King's Park of Holyrood-House, near Edinburgh, has a right in that character to work and carry away and dispose of the rocks and minerals which that Park contains, without the consent of the Crown, in whom the feudal property is still vested.

My Lords, it appears that under very ancient grants of this office—the earliest in the year 1646—the Crown, by a charter in that year, granted the office of custodier of this Park to Sir James Hamilton and his heirs. Afterward this office was acquired by an ancestor of the present Earl of Haddington, who, in the year 1691, obtained a charter of resignation from the Crown. By virtue of this grant, this office has remained in the

May 26, 1826. Earl of Haddington, and the ancestors of the present Earl of Haddington. It appears, my Lords, that in this Park are certain rocks, called Salisbury Crags, which are very near the city of Edinburgh, and which contain quarries of stone; and that the Earl of Haddington claiming a right to work these quarries in respect of his office of hereditary keeper, has for several years past, and particularly from the year 1814, been working these quarries to a very considerable extent. In consequence of his so working them, the attention of the Officers of State, who are bound to protect the interests of his Majesty in Scotland, being called to the subject, they, in the year 1819, instituted an action of declarator against the Earl of Haddington, by which they sought to have it declared. (His Lordship here read the conclusion of the summons.)

My Lords, to this action defences were lodged on the part of the Earl of Haddington, in which he stated that those quarries had been worked from time immemorial, or at least before the time of the earliest grant in the year 1646; and that he having a right to all the casualties, emoluments, and advantages of the Park, was entitled to continue to work those quarries for his own benefit; he also contended, that although he had no feudal right in the soil itself, yet that those quarries were to be considered as part of the perquisites of the office; and that it appeared from the evidence which he adduced in the cause, as to the working of those quarries by his predecessors, that that fact, coupled with the nature of the grant possessed by him, entitled him to work those quarries.

The original grants in 1646, grants to Sir James Hamilton and his heirs-male. (His Lordship then read the words of grant.) My Lords, the charter granted to the Earl of Haddington, the hereditary office, 'Custodiam Roberarii nostri lie Park de Holyrudhouse cum omnibus re-'ditibus proficuis divoriis viridariis feodis casualitatibus privilegiis et emo-'lumentis quibuscunque ad idem spectantibus et pertinentibus;' also, the power of constituting and of dismissing park-keepers in the said Park; and then there is the tenendas clause, as it is called, the effect of which was to grant this office to him and his heirs, together with all the privileges, and as some argument has turned upon that, it will be necessary to call your Lordships' attention to it. (His Lordship then read the tenendas clause.)

In order to show that quarries have been worked within the Park anterior to this grant, there were produced certain entries from the Town-Council books of the City of Edinburgh, the earliest of which, I think, is dated 15th of June 1554, and is in these terms:—'The quhilk day the 'Provest, Baillies, Counsale, Dekyns of Craftis, with ane gret part of 'uther honest men of the burgh, at the requeist of Mare Dowrair and 'Regent of yis realm, moder to our soueraine Lady ye Queins Grace, 'comperand be my Lord of Dunfermling and Sir Johnne Campbell of 'Lunde, Knycht, her Gracis master houshald, consentit to big on yair ex-'pensis ye haill sloppis in ye park dike circulit about Arthour Sett, Sa-'lisberie and Duddingstoun Craggis, under protestatioun yeit the samin 'prejudgit nocht them anent ye calsey stains quhilk yai wer in use to get

'furth of the saidis cragis quhen yae had ado yrwith.' From which it appears, that at that time the city of Edinburgh was accustomed to take stones from those Crags. At that time, I should state to your Lordships, it should seem the Park was in the hands of the Crown. There had been no grant at that time of this hereditary office of the keeper of the Park. May 26, 1826.

Then, on the 28th of March 1559, there is this entry:—'The same 'day compard John Robertson, flesher and tacksman to the King's G. of 'his M. Park and was content and consentit that the toun sall half yearly 'calsey stains furth of the samen, not hurtand his corne, gress, or guids, 'and repairand the skayth in caise ony be sustained.' From this it appears that Mr Robertson, who was at that time the tacksman of the Park, consented that the town should carry stones out of the Park, not hurting his corn or grass. There are other entries somewhat to the same effect in the years 1664, 1668, and 1675; and then after the grant to Sir James Hamilton, there is an entry on the 3d of December 1675, by which the Council 'recommends to Bailie Hay, the treasurer, and Deacon Ha-'milton, to speak with Sir James Hamilton, that in setting of the King's 'Park, there be liberty reserved to the good town to win stanes, and lead 'the same from the said work, for helping and making the public calseys.' And on 15th of December 1675 there is this entry:—Report was made by Bailie Hay, 'that he having met with Sir James Hamiltoune, anent a 'liberty to be reserved for the town to wine calsey stones out of the 'King's Park, which the said Sir James Hamiltoune most willingly con-'descended to, that the town should have that liberty.'

My Lords, it does not appear to me that any inference is to be derived from these entries; that the keeper at that time claimed a right to those stones produced, and many of those quarries, he being the keeper of the Park. It appears that his consent was necessary to enable the town to get stones for the purpose of paving the town, and other public uses for which they were required; and it does not appear to me that it is to be inferred, that the keeper himself claimed a right to the profit arising from the stones, which were thus taken by the town. It is true, that in 1680, there is an entry in the Town-book of Edinburgh, that 'the Council ap-'poynts Magnus Prince, town threasurer, to pay to the relect of Alexan-'der Todrig, keeper of the King's Park, the soume of fourtie pounds Scots 'money, and that for two thousand and fyve hundred calsey stanes, at 'sixteen pounds Scots per thousand, furnished be the said deceast Alex-'ander Todrig to the good toun, conforme to a particular accompt, yra-'nent thir presents shall be a warrand.' Then, on 20th January 1697, there is an entry, that 'the Council upon the threasurer's report, that he 'had appointed several persons to furnish calsey stones, which are now 'ready to be carried out of the King's Park, do therefore appoint the 'threasurer to advance money for that use, and to cause carry the said 'stones to ane convenient place for the use of the good town, whereanent 'thir presents shall be a warrand.' But, my Lords, certainly in the last century, since 1691, my Lord Haddington's predecessors appear to have

May 26, 1826. granted tacks and leases from time to time, authorising the lessees and tacksmen to take stones out of the Park, 'to open and work stone quar-'ries and causeway stones in any part of the grounds of the lands, and 'to sell and dispone upon the stones workt by them out of the same at 'their pleasure.' Therefore, certainly it should seem that in these tacks the keepers of the Park did take upon themselves to dispose of the produce of the quarries; and from the year 1814 down to the present time, those quarries have been worked to a very large extent indeed by my Lord Haddington. It is stated in the case, that in 1818, 2920 cubic yards had been quarried from Salisbury Crags, for the purpose of making the new Calton Road; and since that time, immense quantities of stone have been taken.

Under these circumstances, the case came before the Lord Ordinary upon the question, whether or not, under the grant of the office of keeper, and the profits attached to that office, coupled with the acts of possession for a long series of years by the Earl of Haddington and his predecessors, the Earl had a right, as part of those profits, or having a right to the soil under that original grant, to work those quarries to an indefinite extent for his own benefit, and my Lord Ordinary pronounced this interlocutor. (His Lordship then quoted the interlocutor.) This interlocutor, therefore, goes to the extent of establishing an unlimited right in the Earl of Haddington to work those quarries. This cause then came before the Second Division of the Court of Session; and upon its coming before them, a very great diversity of opinion was entertained by the learned persons constituting that Division; a majority, however, of them were of opinion, that the right of the Earl of Haddington was established by evidence in the case, and by the grant; but still they seem to think that it could not be an unlimited right, because, to be sure, if it were an unlimited right, by means of the supposed profits of this office, the whole of the substance of the Park might be carried off by the Earl of Haddington. Feeling this difficulty, they seemed to think that his right must be a limited right; but to what extent was the difficulty? But feeling the difficulty, they thought they hit it by inserting these words in their judgment, which I am about to read to your Lordships. They adhered to the Lord Ordinary's interlocutor, by which he found an unlimited right in these quarries, but they added the qualifications, 'that in respect no abuse is 'alleged to have been committed, adhere to the interlocutor complained 'against, hoc statu.' Now, my Lords, that interlocutor, perhaps, is, with great deference to the Court of Session, very difficult to be understood. If they had said in this interlocutor, 'My Lord Haddington has a limit-'ed right—limited to such and such an extent, and it has not been proved 'before us that he has exceeded that limit,' to be sure, one could then have understood the nature of those words. But your Lordships will observe that the Court adhere to the Lord Ordinary's interlocutor, but they add these words, 'In respect no abuse is alleged to have been 'committed, adhere to the interlocutor reclaimed against, hoc statu.' This interlocutor did not satisfy the Officers of State, and they, by a re-

claiming petition, brought the matter again under the consideration of that Division of the Court of Session; and on its being brought again under their review, they, feeling the difficulty of the case, came to this conclusion, to which they had not previously arrived, that it was quite clear that my Lord Haddington, under this grant of the office, notwithstanding the supposed possession, had no feudal right of property in the Park of Holyrood-House, and therefore they found, 'That the defender has no feudal 'right of property to the Park of Holyrood-House.' This was with the view to guard against a conclusion which might otherwise, perhaps, have been derived from the Lord Ordinary's interlocutor, that that interlocutor had established a feudal right of property in the Park. But, however, on consideration, they were all of opinion, and I apprehend they came to that conclusion with great propriety, that this grant of office, with general profits, did contain no feudal right of property to the Park of Holyrood-House, but they still found that he had a right by virtue of his office, and in consequence of this long supposed possession, to take the stones, and to work these quarries, still adhering to that qualification of the interlocutor, that no abuse has been alleged. May 26, 1826.

My Lords, with all that deference and respect which I sincerely entertain for the decision of the Court of Session, I must confess to your Lordships, that I feel a little difficulty in reconciling the different findings of these interlocutors. That they were quite right in finding that Lord Haddington had no feudal right in the Park, there is no doubt, and there is no objection at all by Lord Haddington against that finding; but as the interlocutor now stands, the Lord Ordinary has found an unlimited right in Lord Haddington to work those quarries—there is no qualification; and in regard to the words introduced, 'in respect that no abuse has 'been alleged,' I think that your Lordships will see that it is extremely difficult to apply those words to the finding of the Lord Ordinary, for if it were an unlimited right, I do not see how any abuse can be committed. If it were a limited right, (and the Court of Session has found what was the extent of that right,) and if no abuse of that right so limited had been established, then the interlocutor would have been perfectly intelligible.

I do not feel it necessary to trouble your Lordships with the opinions of the learned Judges at length. They have given very elaborate opinions, and considered the question as one of no ordinary difficulty. It is a question of difficulty and of importance, both as it respects the rights of the Crown, and as it affects my Lord Haddington. If Lord Haddington has that right, I will say no more, than that the ordinary right he has to work the quarries must have been as part of the profits of his office. It is very true, that it appears to be admitted, that, by virtue of the office of hereditary keeper of the Park, he is entitled to the pasturage of the soil; but it is a very different thing, whether a keeper is entitled to the soil itself; and as has been put in this case, what is to prevent my Lord Haddington from sinking a mine, or making a quarry, close to Holyrood-House? Perhaps your Lordships are aware that Holyrood-House is si-

May 26, 1826.

tuate close to this Park—the Park extending up to it and round it. I do not know whether the Court of Session meant to find that Lord Haddington was entitled to work only ancient quarries—those that may be considered from usage to be ancient quarries, but they have not so expressed it in any of these findings. My Lords, considering, therefore, the discordance of opinion of the Learned Judges in this case, and considering also the very great importance of this opinion to the Crown, as also to the Earl of Haddington, I really should propose to your Lordships in this case, to affirm the interlocutor, finding that the defender has no feudal right of property in the Park, which I think that your Lordships ought to do, there being no difficulty upon that question; and that your Lordships should do that, because I observe that Lord Haddington, in his petition of appeal, has not confined his appeal to the other parts, but has appealed generally, it may be well to affirm that part of the interlocutor; but in respect of the rest, in order that the question may be more maturely considered, and that the Court of Session, if they should be ultimately of opinion that my Lord Haddington has a limited right, may have an opportunity of defining what is the extent of that right, which at present remains undefined in this interlocutor, I should propose, my Lords, to refer back the cause upon the other findings of these interlocutors, for the review of this branch of the Court of Session, and considering the importance of this case, I should propose to your Lordships to do in this, as I have ventured to propose in other cases, to desire that that Division of the Court of Session would take the opinion of the other Division of the Court of Session, upon these very important questions.

My Lords, I apprehend that no injury will be sustained in the meantime, to the rights of the Crown, supposing, and it is not for me to state what the ultimate decision of the Court may be—but supposing it should be ultimately decided against the Earl of Haddington, I feel quite satisfied, that nothing will be done in the meantime which can injure the property in question, beyond that fair exercise of right which is at present established.

For these reasons, therefore, my Lords, on this occasion I have rather cautiously abstained from going more fully into the arguments of the case, in order that the question may not be prejudiced by anything that passes here, before the Court of Session has had an opportunity of reviewing and considering the findings of these interlocutors, and taking the opinions of the other Judges. Without further observations in this case, I should propose to your Lordships to come to that judgment I have suggested; to affirm the interlocutor, finding that the Earl of Haddington has no feudal right to the property in this park, and that as to the remainder of the said interlocutor, to remit the case back to the Court of Session to review the same, and directing the Division in which it was pronounced, to require the opinion of the other Division of the Court.

*Appellants' Authorities.*—Bannatyne, June 25, 1624. (12769.)—2 Ersk. 3. 23.—Lord Aboyne, Nov. 16, 1814. (F. C.)—2 Ersk. 9. 59.—2 Stair, 6. 4.—Manwood, p. 143.—1 Coke, 536.—3 Ersk. 7. 4.—2 Stair, 12. 16.—3 Ersk. 7. 10. and 12.—Forbes, Jan. 31, 1822. (1 Shaw and Ball, No. 322.) May 26, 1826.

*Respondent's Authorities.*—King's Advocate, (2 Dict. 102.)—Lord Kennet, Mar 1, 1769. (10781.)

A. MUNDELL—SPOTTISWOODE and ROBERTSON, *Solicitors.*

---

JAMES BRYCE, Appellant—*Keay—Campbell.* No. 36.

JOHN DICKSON and Others, Interdictors of JAMES BRYCE; and ANDREW STEELE, his Agent, Appellants—*Shadwell—Abercromby.*

WALTER GRAHAM, Respondent—*Warren—Miller.*

*Idiotry and Furiosity.—Tutor and Curator.*—The Court of Session having appointed a curator bonis to a party alleged to be fatuous; and on an application by him and his interdictors having refused to recall the appointment, and repelled an objection that his fatuity could only be ascertained by the verdict of a Jury; and having found both his interdictors and agent liable in expenses to the curator,—the House of Lords remitted to review the judgments on the merits, reserving the question of expenses.

DAVID BRYCE, merchant in Edinburgh, died possessed of heritable and moveable property, amounting in value to several thousand pounds. He left a brother, the appellant, James Bryce, (who was a Student of Divinity, and had been admitted to trials, but rejected), and a sister Mary, who was married to the respondent, Walter Graham, residing near Edinburgh. In 1816, and soon after David's death, Mary Bryce, with concurrence of her husband, presented a petition, under the act of sederunt 13th February 1730, to the Court of Session, setting forth that James was in such a state of mental imbecility as disabled him from attending to his affairs; and this was supported by the certificate of Mr Abercromby, a medical gentleman, who had been for several years acquainted with him; not on oath, but simply on soul and conscience. The petition was intimated, in common form, by affixing copies on the walls of the Outer and Inner-House—but not to James Bryce personally. No appearance being made by him, the Court appointed Walter Graham to be his curator bonis, in terms of the prayer of the petition. Graham then found caution according to the act of sede- May 26, 1826. 1ST DIVISION.