Sept. 23, 1831. The House of Lords ordered and adjudged, That the judgment appealed from be altered as regards the costs, and quoad ultra affirmed.

EVANS, STEVENS, and FLOWER,—Solicitors.

No. 44. THE OFFICERS OF STATE, Appellants. — *Attorney General* — *Solicitor General* (*Cockburn*).

EARL OF HADDINGTON, Respondent. — *Dr. Lushington* — *Mr. Anderson.*

King.—Found (reversing the judgment of the Court of Session), that the keeper of the King's park of Holyrood House is not entitled to work quarries in the park to any extent.

Sept. 24, 1831.

2D DIVISION.
Ld. Pitmilly.

WHEN this case was formerly before the House of Lords on appeal* their Lordships (May 25, 1826,) ordered and adjudged, "That so much of the interlocutor of the 24th of June 1823, "complained of in the said appeal, as finds that the defender "has no feudal right of property in the park of Holyrood House, "be, and the same is hereby affirmed: And it is further "ordered, that as to the remainder 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 this remit is made do require the "opinion of the other judges of the said Court of Session in "writing upon the questions of law which may arise in the "same, which opinion the said other judges are required to "give; and after such review the said Court do and decern in "the said cause as may be just."

The Court, in applying the judgment of the House of Lords,

---

* 2 Wilson and Shaw, 468. In the Report of the Speech of Lord Gifford, p. 480, line 12, "Lord Haddington" has, by mistake, been printed instead of "Officers of State."

adhered " to so much of the interlocutor of the 24th June 1823 " as finds that the defender has no feudal right of property to " the park of Holyrood House; and in order that the remainder " of the said interlocutor, and the other interlocutors com- " plained of in the appeal, may be reviewed, as ordered by the " said judgment, appoint the parties to give in cases." Sept. 24, 1831.

Cases were accordingly given in, and thereafter the following questions were laid before the Judges of the First Division and the permanent Ordinaries for their opinion:—

" 1. Whether the grant in 1646 in favour of Sir James " Hamilton, and the subsequent grants which have been found " to convey no feudal right of property in the park of Holyrood " House, do or do not, when the terms of the grants and the " proof of usage are taken under consideration, import a right in " the grantees of quarrying stones in the park, and of drawing the " profits arising from such quarrying according to use and wont?

" 2. Whether such right has been established and confirmed " by prescription?

" 3. Whether it is competent for the pursuers, under the " present summons, to complain of any abuse or excess sup- " posed to have been committed by the defender in the exercise " of his alleged right of quarrying? or what is the proper method " of obtaining redress, if the right of quarrying, according to " immemorial usage or to a certain extent, is held to belong " to the defender? and if the object is to limit and control the " exercise of this right according to such usage, or within certain " defined bounds?

" 4. Whether the grant imports a right to work the quarries " without limitation? and if the right is limited, what are, in " law, those limitations? and have they been exceeded by the " operations complained of in the summons?

On which the consulted judges delivered the following opinions:—

Lord President, Lords Balgray, Gillies, and Corehouse.— " (1.) The grant, in 1646, in favour of Sir James Hamilton, and " the subsequent grants, convey no feudal right of property in " the soil of the park; but they convey a feudal right to the " office of keeper of the park, and to all the emoluments be- " longing to that office. We are of opinion, therefore, that " those grants import a right in the grantees of quarrying stones

Sept. 24, 1831. " in the park, and of drawing the profits arising from such " quarrying to the extent sanctioned by usage, and no further, " because the emoluments of the keeper not being defined in " the grant, nor by the common or statute law, can be ascer- " tained by usage alone. (2.) We do not think that the law of " prescription applies to the case. The right of the Earl of " Haddington depends on the import of his grant, to explain " which it is necessary to refer to usage; but the grant itself " is unchallenged, and requires no prescription to establish or " confirm it. (3.) As the present summons contains a conclu- " sion to have it found that the defender 'has no right or title " to do or authorize any act or operation by which the property " of the park may be in any way dilapidated or exhausted,' we are " of opinion that it is competent for the pursuers, under their " summons, to complain of any abuse or excess supposed to " have been committed by the defender in the exercise of his " alleged right of quarrying, provided it be an abuse or excess " that tends to injure the park. (4.) We are of opinion that the " grant does not import a right to work the quarries without " limitation, or, as already said, to any greater extent than is " sanctioned by usage. We think there is evidence in process " that the keeper of the park has been in use, from the date of " the grant, to quarry and sell, or to permit others for his behoof " to quarry and sell, stones for the purpose of causewaying the " streets of Edinburgh, and perhaps for some other purposes in " the city and neighbourhood; but we do not think that sufficient " evidence has yet been adduced to determine the limitations of " the right, or to prove whether they have been exceeded or not " by the operations complained of. This may be made the subject " of further inquiry."

Lord Craigie.—" By the original grant in 1646 to the de- " fender's ancestor, the office of keeper of the King's park of " Holyrood House, formerly personal and temporary, was feu- " dalized and made perpetual; but the import and effect of the " right, as well as the extent of the emoluments pertaining to " the office, continued the same. It seems impossible by any " construction to establish by it, or by the subsequent investi- " tures, which are in the same terms, an immediate right to the " property of the soil, or to the mines or minerals to be found " in the lands. The defender's predecessors, in exercising the

Sept. 24, 1831.

" right of keepership, could not warrantably, in any way or " form, render the grounds of the park less fit for a royal re- " sidence, or prevent the king or his family, or individuals " having the use of the palace, from enjoying all the accom- " modations to which he was entitled while the keepership re- " mained in its original state. They could not be permitted to " do any thing which would diminish the advantages of the " park, or even the beauty or amenity of the place. As to the " emoluments of the office, if the nature and extent of them " at the date of the original grant could be established, these " and these only could be demanded at this time; and although " they cannot now be correctly ascertained, this much appears, " that besides the keeper's house, and the use of the grounds " not necessary for the King and his household, the keeper had a " small annual salary, varying in amount at different times, he " being obliged to employ under-keepers and to prevent intruders, " and occasionally to supply certain quantities of hay and fodder, " which might be wanted at the palace. As to the working of " the quarries for sale, it could not be in the contemplation of " any of the parties. It appears that the magistrates of Edin- " burgh were authorized to take stones for paving the streets from " that part of the rock called Salisbury Craigs, in general, with- " out consulting the keeper, although some compensation might " be made for the injury to the grass, and disturbing the cattle " and sheep; and there seems to be no reason to doubt, that after " the accession of the royal family of Scotland to the English " throne, while on the one hand the salary of the keeper would " be discontinued, he, on the other hand, would be relieved " from his services at the palace, as well as from giving in an " account of his intromissions, if at any time required. In this " way, however, the rights of the Crown, and the corresponding " services, or other limitations incident to the right of the keeper " of the park, suffered no alteration; and at this time, were " the King to establish his residence at Holyrood House, or to " give the use of the palace to any one, it could not be war- " rantably asserted that the keeper had acquired any broader or " better right. Indeed it is not asserted that the general extent " of the defender's right, as it originally stood, has been in any " degree improved; and with regard to the working of the " quarries for sale, it may be plainly traced to a misconception

Sept. 24, 1831.

" on the part of the agents and managers of the family of " Haddington, who confounded the feudalized right of the " keepers of the park with a grant of the property. This ap- " pears from the terms of the leases exhibited in the appendix " to the cases. The whole of them, without one exception, " give to the earls the designation of 'heritable proprietors' " of the lands; thus ascribing the exercise of a power which they " had not to a right which never could be justly claimed by " them, and which is now abandoned. In such circumstances " the defender and his predecessors could acquire no right by " prescription, because the title to which they ascribe their " right did not exist; but although they had been possessed of " an ex facie title, it does not appear that the possession of the " keeper, occasional and fluctuating as it seems to have been, " would create a right of any sort against the true owner. It " may be possible for an adjoining proprietor, by possession held " as part and pertinent of his lands, to acquire a right of servi- " tude over the property of his neighbour; but it seems quite " impracticable for one, having a right as perpetual keeper of " a park or forest, to acquire by possession a right to a servi- " tude not warranted by but inconsistent with the nature and " tenor of his right. If this opinion is well founded, the judg- " ment of the Court will be in terms of the declaratory con- " clusions of the libel. It is quite unnecessary to allege the abuse " of a right where no right exists; and although it may be some- " what irregular to allege abuse without a formal proof, yet in a " case of such notoriety it cannot be thought unwarranted to say, " that holding, or supposing that the defender had a right of " quarrying for sale, he could not be permitted to exercise the " right in the manner practised for many years past."

Lord Cringletie.—" In 1554 the city of Edinburgh, as is " proved by its records, had the privilege of quarrying stones " in the park for paving its streets, and I think that the city " exercised this privilege by their own workmen down to 1664. " Certain it seems to be that they continued to do so thirty-one " years after the office of keeping the park was granted to Sir " James Hamilton, because the records of the city, in 1675, prove " that Bailie Hay was appointed '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 the proceedings between the city and Andrew Sinclair, " so late as 1764, lead to the self-same conclusion, as he at that " period offered to furnish causewaying stones to the city to re- " lieve them from the payment of 20*l.* which they paid yearly to " the tacksman of the park for the privilege of taking stones, and " to purchase all the tools and implements which the city then " possessed for quarrying for themselves. In 1711 the then Earl " of Haddington let to David Smith the park for nine years, " but prohibited him to win any stones except for causeways, " which must have been for the use of the town. In 1748 the " earl's commissioners let to George Knox the park as last pos- " sessed by David Smith; so that, as the lease to the latter was " for nine years only, he must have possessed for eighteen years " by tacit relocation; and in the lease to Knox, which was for " twenty-one years, he was empowered ' to open and work stone " quarries and causeway stones in any part of the ground of " the said lands, and to sell and dispose of the stones worked " out of the same at their pleasure.' This is the first time the " indiscriminate working of stone appears to have been let by the " Earls of Haddington; and indiscriminate it may well be called, " as Knox might have opened a quarry under the windows of " the palace, and covered the surface of the fine grass with " rubbish.

" It does not, however, appear that he used his right, or " worked the quarries at all; but it is probable (although the " fact is not established) that in 1764 he had sublet the right " of quarrying to Andrew Sinclair, because it was in that year " Sinclair entered into the agreement with the city to which I " have alluded, which he could not have done without powers " from Knox, as his lease of the quarries was then current. " Such seem to me to be the facts appearing by the evidence " in process, so that the Earls of Haddington never wrought the " quarries in the park, nor let them till 1748. In that year they " were let to Knox; but until 1764 there is no evidence of their " having been worked for any other purpose than paving the " streets of Edinburgh. I do not think it necessary to detail " the words of the grant, in 1646, by his Majesty Charles the " First to Sir James Hamilton. It is established now beyond " dispute that it did not convey the feudal property to the

Sept. 24, 1831.

" grantee; it is equally indisputable that it did not convey,
" per expressa, the mines and minerals. And with regard to
" the charter in 1691, it does not appear to me to make any dif-
" ference. It is a charter of progress, containing no novodamus
" by the Crown, and its dispositive clause is nearly in the same
" words with the original grant. The tenendas are somewhat
" broader than that clause in the first grant; but this cannot make
" any difference on the right, as every one knows that in rights
" flowing from the Crown the tenendas is a matter of mere form,
" and cannot add to the right contained in the dispositive part
" of the charter. See Erskine, b. ii. tit. 3. sect. 23d and 24th.
" The right, then, is merely that of the office of keeper of the
" park, 'with all the fees, casualties, dues, and privileges be-
" longing to the same;' and whether these words shall be con-
" strued to extend to the fees, casualties, &c. of the park or of
" the office does not appear to me to make any difference. It is
" established that the grant conveyed no right of property, and
" it is clear that it did not convey the mines and minerals.
" There is no evidence of the quarries having been wrought,
" either by the proprietors or any one else, except the city of
" Edinburgh, for causewaying its streets, either before the grant,
" at its date, or for 100 years after; so that the only possible fee,
" profit, casualty, or dues that could then exist was a fee or
" casualty paid by the city for the right of carrying away stones.
" To that I am of opinion the keeper of the park was and
" may be still entitled, but that is altogether different and dis-
" tinct from the right of working the stone-quarries. If the
" city choose to desist from taking these stones, the payment
" must cease. It being established that no right of feudal property
" was granted, I am of opinion, that even if the quarries had
" been wrought in 1646, it would not be legal to explain the
" grant to the Earls of Haddington, by the use of the sub-
" ject, while the feudal property and the possession were united.
" A life-renter of an heritable subject has not the feudal property,
" which comprehends the jus disponendi as well as of utendi et
" fruendi; and therefore he cannot explain his right of life-rent
" by the use that was made of the subjects life-rented by the full
" proprietor. The life-renter cannot cut timber, nor work stone
" quarries or coals, although both of these may have been done
" by the proprietor, and I think that this rule must be applied to

Sept. 24, 1833.

" the grant in question. As to the right having been acquired " by prescription, there seems to be no doubt that there has " been possession by working the quarries since 1764; but pos- " session is of no sort of importance in a question of prescription " of right to a feudal subject, unless there have been a legal title " on which prescription was to begin its course. Lord Haddington, " no doubt, has a feudalized right of the office of keeper of " the park, with all the ' fees, casualties, dues, and privileges " belonging to the same;' but such a right of keeping appears " to me to apply exclusively to the surface, and not to the per- " mission of taking and carrying away the solid substance of the " grounds, such as the mines and minerals. As it is impossible " to dispute for a moment that the minerals in the bowels of the " earth are a part of the ground, or that, when land is conveyed " in full property to any one, the conveyance does not compre- " hend every thing from the surface to the centre of the earth, it " appears to me to follow directly that the finding that the noble " defender ' has no feudal right of property in the park of " Holyrood House ' finds also that he has no title on which he " can acquire a prescriptive right to the minerals, among which " I comprehend the rocks of stone. I answer, then, to the first " query proposed by the Court, that the grant to the noble de- " fender's predecessors does not import a right to quarry stones " in the park, or of drawing any profits therefrom, except any " consideration that may be paid by the city of Edinburgh for " taking paving-stones for its streets. 2d. I do not think that " the right has been or could be acquired by prescription, since " there is no title on which it could begin to take its course. " 3d. I am of opinion, that as the noble defender has no right " to the quarrying of stones, the present action is quite appro- " priate to have that declared. But although it were the opinion " of the Court that his Lordship has a limited right, I think, " that as the Court are empowered, under the summons in this " action, to declare in terms thereof, so they are authorized to " declare only a part; that is, to limit the right of the pur- " suers, and, as a matter of course, to assoilzie the noble " defender quoad ultra. The 4th question is answered by what " I have observed on the other three. I can only add, that I " cannot conceive in what abuse can consist if the operations " complained of in the summons do not amount to it, unless it be,

Sept. 24, 1831. " that it might consist in opening a quarry close to the pa-
" lace. But if there be a right to quarries in general, the noble
" defender is entitled to work them every where; and there
" can be no abuse in using the right if it be not done in mere
" wantonness."

Lords Meadowbank, Medwyn, and Newton.—" (1.) The grant
" in 1646, in favour of Sir James Hamilton, and the subse-
" quent grants, convey no feudal right of property in the soil
" of the park, but they convey a feudal right to the office of
" keeper of the park, and to all the emoluments belonging to
" that office,—the office, which was previously personal and tem-
" porary, being now made a feudal grant, and perpetual in the
" person of the grantee and his heirs male. We are of opinion
" therefore, that those grants import a right in the grantees
" of drawing the profits arising from the park to the extent
" sanctioned by the usage at the time of the grant, or imme-
" diately subsequent to it, and no farther; and that the emolu-
" ments of the keeper, not being defined in the grant, can be
" ascertained by such usage alone. (2.) We do not think that
" the law of prescription applies to the case. The right of the
" Earl of Haddington depends on the import of his grant, to
" explain which it is necessary to refer to usage. If the grant
" were challenged, prescription would establish or confirm it.
" But the grant is not challenged; it is only the import of it
" which is the subject of discussion. It would also afford a title
" to prescribe in a question with any conterminous proprietor
" as to the boundaries of the park; but it can afford no title of
" prescription against the granter, to the effect of altering the
" nature of the grant, or extending the powers of the keeper, so
" as to give him those of a feudal proprietor. (3.) As the pre-
" sent summons contains a conclusion to have it found that the
" ' defender has no right or title to do or authorize any act or
" operation by which the property of the park may be in any way
" dilapidated or exhausted,' we are of opinion that it is com-
" petent for the pursuers, under their summons, to complain of
" any abuse or excess supposed to have been committed by the
" defender in the exercise of his alleged right of quarrying, pro-
" vided it be an abuse or exercise that tends to injure the park.
" (4.) We are of opinion, that as the grant does not contain
" any express right to work the quarries, a right to do so can

" only be claimed in virtue of a usage at the date of the grant,
" and that it cannot be carried to any greater extent than is
" sanctioned by such usage. We think there is evidence in
" process that prior even to the date of the grant, and subse-
" quent thereto, the magistrates of Edinburgh were allowed to
" quarry stones for the purpose of causwaying the streets of
" Edinburgh; but we do not see any evidence adduced or
" offered, that at the date of the grant, or for many years
" after this date, the keeper worked quarries for general sale;
" nor do we think that such a practice would have been con-
" sistent with the purpose of the grant, which, while it gave a
" valuable office to a favoured subject and his descendants, was at
" the same time intended to preserve the park in a proper state
" for being an appendage of a royal residence. The evidence laid
" before the Court, in the case between the Earl of Had-
" dington and the first minister of Canongate, shows that the
" town of Edinburgh contributed (1541) to build the wall round
" the park, and also that they agreed to put on gates, and to
" build up (1554) the slaps in the park dike, occasioned proba-
" bly by their quarrying the causeway-stones. Although, for the
" improvement and benefit of the capital of the kingdom, the
" King might allow stones to be taken from the park, for which
" privilege the town seems to have thus assisted in inclosing it
" we do not think that against the will of the Crown any such
" limited use of the quarry could be continued, far less extended,
" by the keeper, whose duty it was to guard the subject of the
" grant from all encroachments, to the effect of quarrying for
" general sale, or that any such extension has been secured
" from challenge from not having been previously checked. We
" therefore are of opinion that the keeper has not the right of
" working quarries within the park for sale generally; he may,
" however, quarry stones for the use of the subject itself."

Lord Mackenzie. — " (1.) I think that the right of the noble
" defender is only that of heritable keeper of the King's park of
" Holyrood House, with the power of levying the profits of that
" park for his own use. There appears nothing to show that this
" park was ever intended to be disparked, to be wholly separated
" from the royal palace to which it was attached (which remains
" a royal residence at this day), and to be converted into ordinary
" property, in which the King had no longer any right or interest

Sept. 24, 1831.

" at all. On the contrary, this idea is excluded, not only by the " terms of the charters, but, so far as appears, by the general " state of use and possession, ever since the date of the first grant. " I do not think, therefore, that the defender has, generally, right " to dispose of this ground, so that it shall no longer remain " a park — exempli gratia, to turn it into streets, or villas, or " private gardens, or markets, or manufactories, or work-yards, " or nursery-grounds, &c., as if it were ordinary landed property " in the vicinity of the town. He is to keep it as a park, and " to take to himself the profits of it as such. Of course, then, " abstracting from special grounds, he cannot have a right to " work quarries in this park for sale, that being eminently in- " consistent with the keeping of a park, consuming and alienating " the solum, turning the pasture into waste and rubbish, and " being of such a nature that it can never stop till this park, " which consists mostly of grass above rock, is destroyed. But " it is said, that working quarries for sale may be construed to " be part of the profits of the park conveyed to the hereditary " keeper by the charters, and that this interpretation is forced " upon the words by proof that there were quarries in the park " worked for sale prior to and at the date of the original grant, " the price of the stones wrought out forming part of the " ordinary profits of the park at that time. There might, I " think, be difficulty in admitting the relevancy of this, even " if it had been correct in point of fact. It would be some- " what difficult to hold, that because, while under the disposal " and control of the royal proprietor, quarries had been " wrought to some extent, which working of course he might, " and indeed must, have been ready to stop at any time, if it " became materially injurious to his park, therefore he must, in " making a grant of hereditary keepership of this park to a sub- " ject, with right to levy the profits of it without account, " have intended to authorize the perpetual continuance and " unlimited extension of this quarrying by the keeper at his mere " pleasure, and without control, even to the injury or destruc- " tion of the park. But it is needless to go into that, for I do " not see any proof that there was any quarry wrought for sale " in the King's park at the time of the first grant, or for a " great many years after it. The town of Edinburgh seems to " have had some sort of limited privilege of taking stones for

Sept. 24, 1831.

" paving. I see in the History and Life of King James VI. " (page 395), lately printed, that in 1616 'express command " was directed from Court to repair all common and straight " wayis and passageis with calsayis of stane wark.' Now, it is " very probable that on this or similar occasions the magistrates " of Edinburgh obtained permission from the King to take stones " from the park, without any intention on the part of his Ma- " jesty to open perpetual quarries in his park, for profit either " to himself or his keeper. This privilege of the town, there- " fore, goes no length to show that there were quarries in the " park wrought for sale, and of which the product could be " regarded as the profits of the park; and I do not see any " thing in the proof of usage which can support the right of " working quarries in the park, more than any other alienative " or destructive disposal of it. (2.) I do not think that such " right could be acquired or can be supported by the positive " prescription of forty years. It is curious that the four leases " which the noble defender has produced to aid this plea are " all granted by the keeper, not as such, but as 'heritable " proprietor,' so that it might rather seem the noble defender " ought to plead prescription of the property altogether by " virtue of the possession on these leases. But I see no room " for any plea of prescription in the case. I do not think that " the grant of keepership, abstracting from any extensive inter- " pretation of the profits granted to the keeper from usage " prior to and at its date, furnishes a title for positive pre- " scription of the property generally, or of right to any exercise " of property that is beyond the keepership, and therefore do " not think it furnishes a title for prescription of a right of so " decidedly consumptive and alienative a kind as this. Nor " indeed is it, or can it be said, that there has been any possession " of such a kind as could warrant prescription generally of the " right of ordinary property in this subject, and dispark it, wholly " excluding the King's right and interest in it. It has not only " been held by the title of keepership of a park, but seems to have " been possessed as the King's park generally. In this situation " I cannot see how it is possible to hold that any partial use of " unnoticed alienative disposal for forty years by the keeper " could give a prescriptive right to continue such disposal after " it was objected to by the King, and to go on with it to an

Sept. 24, 183 . "unlimited extent. (3.) As the summons contains a conclusion "to have it found that the 'defender has no right or title to do "or authorize any act or operation by which the property of "the park may be in any way dilapidated or exhausted,' I am "of opinion that it is competent for the pursuers, under their "summons, to complain of any abuse or excess supposed to have "been committed by the defender in the exercise of his alleged "right of quarrying, provided it be an abuse or excess that tends "to injure the park. (4.) I think there is no right to work "without the King's leave, for general sale, to any extent. If any "limitation at all was applicable to such a right, I think it must "be this, that the quarrying should stop as soon as it became "materially hurtful to the park in any respect."

Lord Moncrieff.—"(1.) It is a settled point that the noble "defender has not, under the charters, any feudal right of property "in the King's park. He has, however, a feudal title in the office "of keeper of the park, with the profits and emoluments which "may be held to belong to it; and this being an estate of inherit- "ance in his person, I conceive that, in regard to all the benefits "clearly attached to it, the right established in it goes far beyond "a mere power of custody under any commission from the Crown. "The right is so vested that not only it could not be recalled by his "Majesty, but I humbly apprehend that, except with reference "to the actual use of the palace as a royal residence, it would not "be competent for the Crown to resume any use or command of "the grounds of the park for profit, whereby the keeper's estab- "lished enjoyment of it might be destroyed or materially injured. "But, as there is still no title of property carried by the grants, "and as the beneficial uses are not therein defined, otherwise than "by a reference in general terms to the issues and profits, either "of the office, or, as I rather think, of the park itself, the nature "and measure of them must be determined by principles of law, "or by usage legitimately applied to those principles. In general, "titles affecting property in land, which consist in a right of "custody, possession, and enjoyment only, are confined to the "ordinary uses of the surface, as capable of yielding annual fruits, "and do not extend to the working of minerals or other extraor- "dinary acts, whereby a part of the subject itself is withdrawn or "destroyed, or the nature of it may be essentially and permanently "changed. If the present question, therefore, depended simply

" on the terms of the grants, without any usage to explain them, Sept. 24, 1831.
" I should be of opinion that the Earl of Haddington, as keeper,
" had no right to work quarries within the park, except, perhaps,
" for the necessary uses of the palace or the park itself. But,
" attending to the peculiar nature of the right, and to the consi-
" deration that the Crown has, in my apprehension, effectually
" alienated from itself the command of these grounds for any
" purpose of profit or emolument, I am further of opinion, that
" the ordinary presumption arising from the limited nature of the
" title may be overcome by usage, and that the terms of the grant
" are sufficient to carry a right to the profits arising from stone
" quarries, in so far as there has been a usage by the keeper of
" working such quarries, and drawing the profits. This right,
" however, supposing it to exist, may be liable to an exception or
" limitation to which I shall advert in answering the fourth ques-
" tion stated. (2.) I am of opinion that the law of prescription
" does not apply to the case. The charters and seisines held by
" the defender would afford a very good title of prescription if
" the question related to the validity of the grant, because the law
" of positive prescription does certainly apply to heritable rights,
" which are not titles of feudal property. But here the validity
" of the title is admitted, and the only question is, what it carries.
" This must be determined by the terms of the grant; and though
" I think that these terms may be explained by usage, I do not
" hold that any right has been acquired by positive prescription
" which may not, by fair construction, be taken to be compre-
" hended in the grant, as so explained. (3.) I am of opinion that
" the terms of the summons are sufficient to entitle the pursuers to
" complain of any abuse or excess in the exercise of the assumed
" right of quarrying, in so far as a relevant case for such complaint
" can be established. (4.) I am of opinion that the grant does,
" neither by its own terms nor under any just construction of it,
" as explained by usage, import a right to work quarries without
" limitation. I think that the limitations of it in law must be
" found in two principles.—1. That it cannot go beyond the
" general nature of the usage on which it rests; and, 2. That
" it cannot, either in acts apparently of the same kind with those
" embraced by the usage, or in any other manner, be carried to
" such an extent as to destroy or materially injure the park.
" Under both principles I should hold any attempt to open a

Sept. 24, 1831. "quarry, in any situation where it would directly affect the cha-
"racter of the palace as a place of residence, to be excluded; and,
"under the second, I think that the working even of quarries, the
"use of which has been practised to some extent since the date of
"the grant, may be carried to such an extent as, by producing
"evident injury to the park, to become inconsistent with the
"nature and spirit of the grant. I am further of opinion that
"there is sufficient evidence of a usage by the keeper of quarrying
"and selling, or permitting others for his behoof to quarry and
"sell, stones for laying the causeways of the city of Edinburgh.
"I think it very doubtful whether the evidence establishes a usage
"beyond this during any long or connected period, though,
"perhaps, it might be shown to extend to some other public
"purposes in the city and the neighbourhood. I do not think that
"there is any proof of a usage of quarrying for general sale or
"exportation; and in answer to the last part of the question, so
"far as the materials in process enable me to form an opinion, I
"think, on the one hand, that the operations in quarrying had
"gone beyond the limits of the previous usage; and, on the other,
"that there is not sufficient ground for holding that, up to the
"date of the summons, those operations had done any material
"injury to the park. But, I am of opinion, that if such quarrying
"should be continued for a farther course of years, to the extent
"lately practised, as represented by the pursuers, it must pro-
"duce such material injury."

The Second Division of the Court, on resuming consideration of the case, delivered the following opinions:—

Lord Justice-Clerk.—"I have read the papers in this case
"with all the attention in my power, and also the opinions of the
"learned judges, whom we were called on to consult by the remit
"from the House of Lords. We have these opinions now before
"us, and I shall shortly state what is the result of the opinion to
"which I have come. And in the first place, with the exception
"of one point, entertaining, I fairly own, some doubt as to the
"application of the doctrine of prescription at all to this case,
"under the circumstances in which it is presented,—with this ex-
"ception, I freely confess, that on considering the case with all the
"attention in my power, and looking to the supposed difficulties
"in reconciling the judgment of this Court with that of the court
"of last resort, I retain the opinion which I had formerly formed.

Sept. 24, 1831.

" It appears to me impossible to doubt that this grant is one of a " very singular and anomalous nature. It is not a mere hereditary " grant of the keepership of the park, for it is as clear to me as " the sun at noonday that there is conveyed to Lord Haddington, " not the custody and keepership of this park merely, but also the " whole profits, benefits, emoluments, advantages, and valuable " considerations which were derivable from that office, which were " given to him and his heirs in the most unqualified manner. " These have been feudalized in his person, and under the grant " he is entitled to enjoy them. Then the question comes to be, " whether this be a right which carries what were the advantages " and emoluments at the date of the original grant to Sir James " Hamilton in 1646, and the conveyance to Lord Haddington's " family in 1691, which, if possible, was more extensive in its terms; " and, if the right does carry these benefits, what were the advan- " tages which, on his entering on the office, he was entitled to enjoy, " and he and his predecessors have continued to derive from it " since that time? Now, my Lords, here my opinion is very much " the same with that embraced in the opinion of Lord Moncrieff, " which is most accurate and able, and with the opinions of the " Lord President and the three judges who concur with him. In " the first place, I think that nothing which, by usage, the defender " has had and possessed as his own, can be taken away from him; " in the second place, I think that his right is not of an unlimited " nature, and that he is not arbitrarily entitled to extend the words " of the grant, in exercising it, so as to abuse the right. If it were " discovered, for example, that there was a valuable quarry under " the walls of the palace, it is altogether out of the question to hold " that he would be entitled to open and work it to the utter de- " struction of the very subject he is bound to preserve. I have not " the slightest shadow of a doubt that he is not entitled so to extend " such a grant. With regard to the other matters, we are not " bound to answer all the points that may be started; we are " only bound to answer the questions of law; and when I say, that " while the right is to be regulated by usage in its exercise, and is " not of an unlimited nature, and that prescription does not " apply to such a case, there appears to me to remain only one " other point for consideration, and which was also under con- " sideration in the House of Lords. We qualified our interlocutor, " adhering to the Lord Ordinary's judgment, by inserting the

Sept. 24, 1831.

" words, ' in respect no abuse is alleged to have been committed ;' " and I am of opinion, although it has been said that we cannot " get at that under this summons, that this summons does permit " the Court to inquire into the question, Whether there has been " any abuse by the defender of his right? I think we are entitled " to dispose of that matter under this summons; but while this is " my clear opinion, there is an observation made in the concluding " part of the opinion of my Lord President, and of the other " judges who concur with him, in which I entirely agree, that ' we " do not think that sufficient evidence has yet been adduced to " determine the limitations of the right, or to prove whether " they have been exceeded or not by the operations complained " of.' I do not think we have materials before us at present for " judging of that question, whether there has been that gross abuse " which exceeds the limits of the grant. It is stated in the case " for the officers of state, that there has been a large quantity of " whinstone taken away, &c. All this may be very well, and so " may be the matter as to the disfiguring of the crags, and in- " juring the beauty and amenity of the park, as a matter for " further inquiry; but at present I do not think we can de- " cide upon them. At present I am of opinion that Lord " Haddington is entitled to enjoy the full advantages of his office, " both according to ancient and more modern usage,—both ac- " cording to the practice when he entered into it, and by the " practice for a length of time, from which it appears that he " derived emolument from quarrying stones within the park. " That is my opinion, unless there is an undertaking, on the part " of the pursuers, to prove that there has been an actual abuse of " such right."

Lord Pitmilly.—" My Lords, as I was Ordinary in this case, " and as I think some misapprehension has been entertained in " regard to the interlocutor which I pronounced, I wish to make " a few observations; and I shall begin what I have to state by " making some remarks on the points which I think it compe- " tent for us to decide under this summons. My Lords, when " this case came before me in the Outer House, I paid parti- " cular attention to the terms of the summons, and I saw, as it " appeared to me, evidently two different grounds on which the " action was rested, which seemed to me not only distinguished " from each other, but to stand opposed to each other, so that

" if the one be adopted the other must be relinquished. The " Crown may say, first, that Lord Haddington has no right at " all to the quarries—that they are part of the soil and substance " of the property to which he has no right; or, second, the " Crown may admit that he has a right to work the quarries, " but that he is under control, and must be regulated by use " and wont in the exercise of the right. Now it is quite plain " to me that these two pleas are directly opposed to each other, " and that the one cannot be called in to assist the other. If " there be no right to the quarries at all on the one hand, " there is and can be no question as to the extent to which the " right may be used; there is no need of such a question, and " there is no room for inquiry into it. On the other hand, " if it be said that the defender has exceeded his power in " working the quarries, does not this necessarily proceed on the " admission that he has right to work them to some extent? " I wish to attend to this, in order to see on which of the " grounds it is taken up by the pursuers. Now, the conclusion " of the summons is, 'that the said Charles Earl of Haddington " and his successors in the office of the keeper and ranger of " our said park of Holyrood House, have no right of feudal pro- " perty thereto, and no right or title to work quarries, or to do " or authorize any act or operation by which the property of " the said park may be in any ways dilapidated or exhausted.' " These are the whole conclusions of the summons; and I hold " that they are just one conclusion—that the defender cannot have " right to work quarries at all, and that there is nothing else " brought to an issue in this summons. There is no conclusion as " to his right if he does not go to excess in working, but it is a " conclusion that he has no right whatever. Some of the judges, " in their opinions, seemed to think it competent to inquire into " this matter, and referred to the conclusion, that the 'defender " has no right or title to do or authorize any act or operation " by which the property of the park may be in any way dilapi- " dated or exhausted.' But I think that is just a repetition of " the conclusion that he has no right to work at all; and therefore " I would have expected, that if there was to be any thing of the " nature of an admission as to his right to be founded on, that it " should have been stated in the summons alternatively. But " there is nothing of the kind to be found in it. I have read the

Sept. 24, 1831.

" summons again and again, and there is no such thing contained " in it. I make these remarks, because I think that the inter- " locutor which I pronounced has been misunderstood. It has " been said that this interlocutor establishes an unlimited right to " work quarries. I am sure it was not intended to do so, and " when it is attended to I think this will be evident; it merely " gave an absolvitor from a summons which contained only a " conclusion that the defender Lord Haddington had no right to " work quarries at all, but certainly did not find that he was " entitled to work them without control or limitation. I think " his Lordship is limited by usage and by his grant; but I did " not think it necessary to find any thing as to that, as there was " nothing regarding it in the summons. I still think, as the " summons is expressed, it is merely to have it found that Lord " Haddington had no right to work quarries at all, and that there " is nothing else brought before us by it in this action. If I must, " however, go into the merits of the case, the first question is, " Whether these grants, taken along with the usage, import a " right in the grantee to quarry stones, and derive profit from so " doing? Now, I agree with the majority of the consulted judges, " and with the former interlocutor, in answering this question in " the affirmative. It is a grant, I think, of the office of keeper of " the park, with all the emoluments and profits belonging to the " park, of every kind, and is expressed in very broad and com- " prehensive terms,—the emoluments and profits belonging to the " park, and not merely to the keeper of the park. These are, in " the first place, the words of the grants themselves; but, in the " second place, there were not at first any emoluments or profits " belonging to the office; and if there were, it would have been " necessary to enumerate them; but although there were no " profits belonging to the office, there were profits of the park— " there were grounds—there were quarries that might give profit, " and the usage of two hundred years confirms the words of the " grant. He has right only to the fruits, and to no part of the " solum; but the extent to which the right of working exists " must be measured by the words of the grant, and the usage that " has followed upon it. On the next question I shall say very " little, viz. whether Lord Haddington has established a right by " prescription? I have certainly very great doubts if prescription " can apply to this case, since I have read the opinions of the

" consulted judges, and which, I confess, have rather led me to " alter the opinion I formerly entertained, although I am still " somewhat at a loss to see why prescription may not apply to " such a case. The only remaining question is, whether Lord " Haddington has a right to extend the working, or may be " limited in its exercise? I have already said that I do not think " this point is embraced by the present summons; but if it is " competent to consider it under this summons, I am clear that " the defender must be limited by the usage and terms of the " grant; and agree with the other judges in this; and I also agree " with them in opinion that the limits are not precisely brought " before us, and that we cannot decide this until we have further " information and inquiry."

Lord Glenlee.—" Although Lord Haddington might have " exercised the right of quarrying for sale, yet he is not entitled " to use this to the destruction and dilapidation of the subject " itself, to which he has not any right. He is bound not to " destroy the subject; that is a perpetual condition, against which " he can never prescribe. The Court, by its first interlocutor, " assoilzied from the action, but did so in respect there was no " abuse alleged; but if they now allege such abuse, where is the " difficulty of inquiring into it in the process, when there is a " conclusion against the exercise of the right at all? If the " recent usage had been that of quarrying to a very great extent, " I am not prepared to say he is entitled to continue that."

Lord Justice-Clerk.—" We must endeavour, the best way we " can, to extract and discover what, upon the whole opinions, is " the judgment we are to pronounce, which must be in terms of " the opinions of the whole judges, without regard to the division " of the Court in which the case happens to be. Now, from the " opinions, it appears to me that Lords Craigie, Meadowbank, " Newton, and M'Kenzie, although there are shades of difference " between them, yet generally are in favour of the pursuers.

" The opinions of my Lord President and the three other " judges who concur with him in his opinion, and Lord Moncreiff, " as I draw the conclusion at least from his lordship's opinion, are " generally in favour of the defender. These are five opinions, " and there are two of the judges present who concur in that view. " Lord Glenlee's opinion, I think, was more qualified."

Lord Cringletie.—" I think there has been a usage of quarry-

Sept. 24, 1831.

" ing stones for supplying the streets of Edinburgh; but I imagine " none of us has an idea that the defender has a right, under this " grant, of quarrying for general sale. The difficulty, therefore " is only in framing the limitation of his right; for we may find " that he has no right to quarry for general sale, and I have no " difficulty in coming to that conclusion."

Lord Justice-Clerk.—" It is very difficult to criticise these " opinions so as to come to a satisfactory result. But I think " there are some points upon which we are all agreed:—1st, we " are agreed that prescription does not apply to the case; 2d, " that the right is not of an unlimited nature, but that it must be " qualified by usage; and, 3d, that any abuse or excess in the " exercise of the right may be restrained. We are all agreed upon " these. But to say that there is any thing proved as to the excess " is difficult; it is difficult to point out where it begins or ends. " I therefore think, that if we embody these three findings in an " interlocutor, and order a condescendence upon the question of " excess or abuse of the right, we do all that is consistent with " the case as it stands now."

The Court then pronounced this judgment (4th June 1830): *

" In addition to that part of their former interlocutor of the " 24th June 1823, affirmed on appeal by the House of Lords, " and in terms of that affirmance adhered to by their interlo- " cutor of 9th June 1826, finding, 'That the defender has no " feudal right of property in the park of Holyrood House:' " find, that in opposition to or inconsistently with the terms " of the grant from the Crown, which is the defender's title of " possession, there are not termini habiles for any plea of the " positive prescription in defence against the conclusions of this " action, and repel that defence accordingly: find, that in consis- " tency always with the peculiar nature and terms of the grant " from the Crown to the defender's ancestors and authors, the con- " ditions and extent of his right must be explained, defined, and " regulated by ancient and continued usage: find, that from time " immemorial quarries for stones have been opened and worked " within the park of Holyrood House by the defender's ances- " tors and authors; but further find, that the defender's right " in that respect is of a limited nature, and that he has not a

---

* 8 Shaw and Dunlop, p. 867.

" right to work such quarries for general and unlimited sale; " and before further answer as to the nature, special purposes, " or extent of any limited right in the defender of opening and " working quarries, allow the pursuers to give in a special con- " descendence of what they aver and offer to prove as to the " usage in these respects, both ancient and recent; and, when " given in, allow the defender to give in answers thereto."

The Officers of State appealed, in so far as the interlocutors of the Court " do not find or imply that the Earl of Haddington " has no right whatever to work quarries in the park of " Holyrood House."

Lord Chancellor.—I am now about to assign the reasons why I feel it my duty to advise your Lordships to take the course which appears to me, with great humility, unavoidable in this case—I mean, altogether to reverse the judgment of the Court below. My Lords, if, upon examining the grounds of the decision, with all the respect which it is possible to feel for the very-learned persons who have concurred in supporting this judgment, I had found that the facts were undeniably as they assume them to be, and that the whole difference of opinion in the case was upon a point of law applicable to an unquestionable state of facts, I should then, in deference to the judgment which has been given and the authority of those learned judges, have taken more time to consider it before I advised your Lordships to reverse the judgment. But upon the best attention I can bestow upon the case, assisted by the arguments of the learned counsel, upon whom I pressed from time to time the difficulties as they struck me, I find that their Lordships have, as is but too common in Scotch decisions, taken facts for granted, and proceeded to argue and decide upon the law long before they had entitled themselves to raise the legal question, inasmuch as the facts were not established in evidence. I have no hesitation whatever in the course I am to pursue, having also an opinion, that even if the facts had been as they were gratuitously assumed to be, there is little to support this judgment in point of law.

Now, my Lords, the claim here is of a very singular nature, it must be confessed of a nature wholly novel in this country, and (as I gather from the silence of the cases in the books and of the learned advocates in this cause) equally novel in Scotland. The Crown, in the exercise of an undoubted prerogative, conferred upon the ancestor of the Earl of Haddington, Sir James Hamilton, in the year

Sept. 24, 1831.

1646, (it is said, but not proved,) in consideration of a debt of 10,000*l.*—but that is unimportant—the office of heritable keeper of the Royal Park of Holyrood House, an office of a nature sufficiently known, as well as the office of keeper of royal palaces in Scotland; one noble member of this House being the keeper of one palace, and another the keeper of another, and other noble members keepers of royal parks. Accordingly, my Lords, that office was conferred upon the Earl of Haddington's ancestor. But if I should say that it was created in his person, he being apparently the first enjoyer of it, I should certainly not go beyond the facts which appear here in the cause; for it is much more like the creation of an office for the first time than any thing else; at all events we have not any thing to show that any person exercised it before, and much less in what manner the privileges belonging to it had been enjoyed, or what the amount of those privileges had been. Now, my Lords, this appears to me to be a fact of the utmost importance, and a fact which, however important, has been wholly omitted in the consideration of the learned judges in the Court below, albeit they assume to found their opinions upon what they call the kind and extent of the usage. For what avails it to tell me how a certain person exercised certain acts on a certain property or in a certain respect, if you do not show me that that person was clothed with the particular title or with the particular office in respect of which the present claimant pretends a right to exercise the same acts? What avails it to show that stones were quarried and taken by certain persons for certain purposes at and before the time of the grant, if you do not show that those persons took the stones in the same capacity in which the Earl of Haddington claims to take them now, or that certain other persons at that time were suffered, by a person standing in the same situation in which stands the Earl of Haddington now, to take those stones, either by an acknowledgment to him for leave, or at all events by his grant of permission? But I go a step further: I suppose even that a person then in the office of keeper of the park had existed; then, no doubt, any act and permission by him given to others to take the stones would have come much nearer an act of usor, of which the present earl might have had a right to avail himself. But even if it had come to that there would still have been an interval cutting it off from the present case, and in my apprehension effectually preventing its application; for the nature of the office of keeper of the park might be well such as to make him the proper quarter to which applications should be made by others for leave to take those stones, and such grants of permission might well be construed as having taken place in the exercise of the Crown's right to allow or to

refuse leave to take the stone, that right of the Crown being exercised through the medium of the heritable keeper of the park. But there is no occasion for arguing as to what might have been the import of any such fact, if there had been such a fact in the cause, for there is nothing like it—there is no vestige of evidence—it is not even asserted in the pleading or parole arguments of the counsel, that, prior to the grant of 1646, there was such an office as heritable park-keeper in any body; and therefore I see no ground whatever—I see no possibility of the existence of a fact such as that which the majority of the learned judges seem to have assumed, namely, that there was any usor at and before the grant of Charles the First. But even if there had been, what signifies an usor, as I before urged, unless it was an usor by a person claiming in the same capacity as that in which the Earl of Haddington claims? Sept. 24, 1831.

This being the state of the fact, I will go a step aside to illustrate this point in observing upon the language of the grant, which is very material. We find that the grant was made to Sir James Hamilton and his heirs of this office—"hereditarium officium et "custodiam dicti nostri roborarii, cum omnibus feodis, casualita- "tibus, divoriis, et privilegiis quibuscunque ad eundem perti- "nentibus, cum plena potestate prefato domino Jacobo suisque "predictis, faciendi et constituendi, sub custodes dicti roborarii "unum vel plures pro eorum arbitris pro que eorum officio exer- "cendo." Now, my Lords, I shall refer for the present only to the tenendas clause, which states, "omnibus et singulis libertatibus "commoditatibus, proficuis, asiamentis, ac justis suis pertinentibus "quibuscunque, tam non nominatis quam nominatis, tam subtus "terra quam supra terram." But, it is a matter to be proved what those profits and advantages, under the ground as well as over the ground, are, which belonged to the office, because it instantly follows "ad dictam officium spectantibus seu juste spectare "valentibus quo modo libet in futurum." Now, with respect to the tenendas clause, it is hardly necessary to remind your Lordships that the granting part of the instrument (the dispositive part, as it is called in Scotland,) formed the operative part of the grant, and that the office of the tenendas clause is strictly to state the person from whom holden, and to state the kind of the holding or tenure, and not to alter or enlarge the grant. This, which is always the office of that clause, has been undoubtedly of late years—for the last one hundred and fifty years—still more peculiarly its office, since, I believe, it is understood among conveyancers in Scotland that during that period the tenendas clause is of such a nature that it could always be dispensed with, because a good deal is generally now inserted in the dispositive part which used to form part of the

Sept. 24, 1831.

tenendas clause. However, as this grant was executed some time ago, it may be taken that it was not so then; still at that time the tenendas clause most undeniably could not extend to grant what is here claimed, even if it were quite clear, that if that had been in the dispositive clause, it would have made an end of the case. But I think that is by no means clear, for I have to remind your Lordships of what the Court below does not seem to have been sufficiently impressed with, or rather, I should say, which they do not seem to have been startled at, and which a learned predecessor of mine in this situation, on looking at it as an English lawyer, was so much struck with, namely, the very extraordinary nature of this claim to be made by a person, the keeper, the custos, the preserver of a park. That he should have a right of killing game, there can be no doubt, would have been natural and easily intelligible; that he should, even as in the case of some of the forests in England, have certain cow pastures of a limited extent I can easily understand, for those things are not alien to or inconsistent or repugnant with the nature of the office of a park-keeper; but when a claim is set up to a right of going at once from keeping the park to digging quarries, and taking the mines and minerals under the surface, it seems the most extravagant demand that can be made by any person, by any officer, or through any prescription, feudal or other; but it appears still more repugnant to the nature of the office when it is recollected that this is a claim made by the representative of the grantor, for the purposes of the grant, that is to say, of keeping the park for the profit or the pleasure of the grantor, and yet he is to set up, as against that grantor, a right—not to keep, but to take—not to preserve, but to destroy—not to hold and superintend and protect, and exclude intruders and destroyers and committers of waste, for the sake of the Sovereign who appointed him to hold the office under him, but, in despite of the Sovereign, to destroy and spoil and waste himself. A waste of a grosser kind cannot be conceived by a lawyer than that of actually taking the ipsum corpus of the premises under his custody, destroying it irreparably and for ever. And when I put a question to the learned counsel as to what limits he placed to the right, he was in exceeding great difficulty, for he said he did not mean to go so far as to say that a man who was appointed to keep a park had a right to destroy it altogether; he did not mean to say that he had a right wholly to take away the quarries, but only that he had a right to take the quarries, so that he did not take the whole. Then I asked the learned counsel where the line was to be drawn; and whether he would keep within his right, if he left any part whatever of the stones standing, and fell short of taking the whole. No, the

learned counsel said, he was to do it in an ordinary way. It is to my mind not quite intelligible that a man has a right to destroy any subject-matter of a grant in an ordinary way, because that destruction is not an ordinary act. The taking away is not an ordinary act. It is irreparable as far as it goes. It may not destroy the whole matter, but destruction of one half is destruction just as much as destroying the whole. It is not destruction of so much, but, as far as it goes, it is as complete a destruction as the destruction of the whole. But it is said he may do it in the usual way. Then that brings us back to the question, whether there is any way usual, upon which I have already said something, and shall presently say something more. Now, I mention these things to show how utterly irreconcileable with the nature of the office the right claimed appears to be, and how little it comes within the description of the things granted; casualties, which are things accruing from time to time, and duties, which are rights, in respect of things that are not destructive of the matter. But this is destructive of the matter committed to the grantee for safe keeping, and it is most obvious how little this manner of dealing with the freehold comes within the terms of the grant. No doubt their Lordships have found, though they did not find at first, but they now all admit, that this is not a feudal right, that the grant is not feudalized; but they all in one voice admit, and your Lordships' House confirmed that finding, that there is no feudal right in the subject-matter of the grant conveyed, but all that is feudalized in this party is a right to the office of heritable park keeper—preserver for the Crown of the subject-matter assigned to him. Sept. 24, 1831.

Now, we come to the question which is raised by the learned judges in the Court below, and upon which they have decided; and you have the weight of the authority of four most learned judges one way, and you have, I think, seven, or at all events six, the other way. We are then, not only to count the number of judges, but to weigh their reasons; and your Lordships shall hear what they say in answer to the main question, number 4, and whether or no I have been justified in stating to your Lordships that they have made a present of the fact in order to raise a question of law: "We are of opinion that, as the grant does not contain any express "right to work the quarries, a right to do so can only be claimed "in virtue of a usage at the date of the grant; and that it cannot "be carried to any greater extent than is sanctioned by such "usage." Then when their Lordships were pressed by the argument, whether this did not go to giving a power to the keeper of the subject-matter to destroy the subject-matter altogether, for he might proceed to quarry under Holyrood House windows, "No," say

Sept. 24, 1831.

the learned judges, "we will adject the qualification to our judgment; "we adhere to the interlocutor of the Lord Ordinary, 'in respect "no abuse is alleged to have been committed.'" Now, I want to know whether it is possible for a lawyer to understand that, except in one of two cases, either that the right was unlimited, or that the right was limited. If the right was unlimited, there can be no abuse whatever. If the right was limited, how, by possibility, can you discover in what manner their Lordships considered that the right was limited, or could be limited, unless, by adverting to the judgment, you find it there stated? The opinion, in answer to the fourth question of the four consulted judges, is that which I have already stated, that it can be carried to no greater extent than is sanctioned by usage. Does this mean usage up to the present time from the year 1646, or does it mean contemporaneous usage? Because, if it means usage since the grant, unless it be contemporaneous usage, (which is a good exposition of the doubtful meaning of a grant,) I do not comprehend how what a man has done under a grant adversely to the grantor can be said to enlarge the subject granted to him, much less can I understand it if his dealing has been very recent, as I think I shall show your Lordships that it has been. But the keeper of a park, who is in the situation of an officer under the grantor, stands in a perfectly different situation from either a grantee feudally, or a grantee even for a very long term of years, or for a succession of lives; at all events he stands in a perfectly different situation from a feudal grantee, a vassal under the grantor, or of a person to whom there has been an absolute alienation. A park-keeper stands in a perfectly different situation, because a park-keeper may be allowed to do a number of things by his master without thereby acquiring a right. The Crown is his principal, and he is merely its agent to keep the park. Suppose there had been a connivance on the part of the Crown, from favour to him, allowing him to take this stone, it does not follow that his right is thereby established, as in the case of an adverse enjoyment by one person against another, the first-mentioned person being the vendee, and the last-mentioned person being the vendor. The relation of the two parties would materially alter the import and effect of that language, even if that existed in fact, which I shall presently show does not. Then comes this remarkable passage, which is the corner-stone of the opinion of these learned persons, and to which, therefore, I solicit once and again particular attention:—"We think "there is evidence in process that the keeper of the park has been "in use, from the date of the grant, to quarry and sell, or to per-"mit others for his behoof to quarry and sell, stones for the purpose "of causewaying the streets of Edinburgh, and perhaps for some

" other purposes in the city and neighbourhood." Now, this ex- Sept. 24, 1831.
pression " perhaps " was just one of the things in this singular but important passage which first excited my attention, and made me suspect the inaccuracy of the whole; because to say there is evidence in process of a certain fact, I can understand, and upon reading that expression I should never have doubted that I should find the fact in the process; but to say there is evidence of that fact, and " perhaps " of another fact, I cannot understand, because either there is evidence of it or there is not. There can be no " perhaps " about it, unless they mean to say that the evidence is of a very doubtful nature, and that it is possible it may go farther than that, which it can be strictly taken to prove, whether it is confined to causewaying the streets or to some other purposes; but there is no doubt of that, because it is easy to see if there is any other purpose mentioned. How, therefore, can these words that come under the " perhaps " have any accurate place in the opinion? But passing this by, I have looked into the whole process, and I have not found any evidence; I have called upon the learned counsel for the respondent to show the evidence of this, and they have referred me to something, but I apprehend to nothing which can be called evidence of any such fact; and I pray of your Lordships to see how these very learned lawyers assume the fact in order to get at the point of law. They say, " We think there is evidence in " process;" that is to say, documentary evidence, because that which in the Scotch law is called evidence in process is a perfectly well known and technical phrase, and it means some document in the process legitimately proved, and in the possession of the Court. Now, where are the documents which, even according to the laxity of the Scotch practice in matters of evidence, prove this following proposition, that the keeper of a park—nobody else—(for if it were any body else it would avail nothing) has been in use from the date of the grant of 1646 to quarry and sell, or to permit others to quarry and sell for his behoof? I will tell your Lordships what that means; if this finding was correct there ought to have been legal evidence in process, receipts from different park-keepers or their stewards, now dead, charging themselves with the receipt of monies from different individuals who had leave to quarry and take away stones from Holyrood House Park. That is the sort of evidence which, to an English lawyer's mind, is described by these words; or else depositions perpetuated, which have become evidence of persons who, of their own knowledge, stated that different persons had at different times actually applied for and obtained leave to quarry from the park-keeper, and had paid to the park-keeper and his agents monies or other considerations for that leave so obtained.

Sept. 24, 1831.

My Lords, there is not a tittle of evidence of that sort; and there is not only no evidence of the park-keeper having done so, but there is no evidence of any other person having done so. Now, my Lords, these things are very tiresome, but they must be gone into, because this is about the twentieth time since I have sat in this House that I have had occasion to complain of the total absence of strictness of rule in the Scotch courts with respect to the admissibility of evidence; and I had, two days ago, to complain of a decision being grounded upon a minute made behind a man's back —a minute stating that he was present, and agreed to a certain deed of trust and accession; and the Court had gone upon this as legal evidence, and the counsel had argued that it was good evidence, because it was a minute. I have now to deal with just the same species of evidence, which has been received with the sanction of some of the most learned judges of the Scottish bench. I, however, impute to them no manner of blame for this. It is an oversight necessarily incident to the novelty of their situation; but it is therefore the more useful, that when such matters are brought before your Lordships they should be calmly investigated, and suggestions respectfully, and with the utmost spirit of deference and good will towards those very learned persons, thrown out for their consideration in future.

My Lords, the first evidence * relied upon to show this fact, that

---

* The following excerpts from the council records of the city of Edinburgh, and extracts tack, are the evidence relied on in the Court below to which his Lordship adverts:—

Edinburgh, 15th June 1554.—The quhilk day the provest, baillies, counsale, dekyns of craftis, with ane gret part of uther honest men of the burgh, at the requiest of Mare Dowriar and regent of yis realm, moder to our Souerane Lady ye Quein's grace, comperand be my Lord of Dunfermling, and Sir Johnne Campbel of Lunde, knycht, her Gracis master houshald, consentit to big on yair expensis ye haill sloppis in ye park-dyke, circulit about Arthour Sett, Salisberie, and Duddingstoun Craggis, under protestatioun, vat ye samin prejudgit nocht them anent ye calsey stanes quhilk yai wer in use to get furth ye said craigis quhen yai had ado yr with.

Edinburgh. 28th March 1599.—The same day compeiret John Robertsoun, flesher, and tacksman to the King's G. of his M. park, and was content and consentit that the toun sall haif yair calsey staynes furth of the samen, not hurtand his corne, grass, or guids, and repairand the skayth in case ony be sustained.

Edinburgh. 28th October 1664.—Appoints the threasurer to agree with the layers of the calsey for wining of calsey stones out of the park, for the service of the toun's common calseys, of such square and thikness as sall be prescryvit to them.

Edinburgh, 24th October 1668.—The counsell grants warrand to the threasurer to agree wt any persone for winning of stones in the park for the use of the calsey.

Edinburgh, 3d December 1675.—The council recommends to Bailie Hay, the

after the year 1646 the park-keeper had quarried for his own profit, is an extract from the council's records of the city of Edinburgh, Sept. 24, 1831.

---

threasurer, and Deacon Hamiltoune, to speak with Sir James Hamiltoune, that in seting of the King's park yr be libertie reserved to the good toun to wine stains, and lead the same from the said wark, for helping and making the public calsey.

Edinburgh, 15th December 1675.—The same day report was made be 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 condescended to, that the toune should have that liberty, with this provision and declaration, that if, in the winning of stones and carrying them off the ground there be any prejudice done to his tacksman, that as for that damage he was willing that the toun should take two persones, and his tacksman other two, to whom the liquidation of the damage is to be referred to their discretion.

Edinburgh, 19th March 1680.—The said day the council appoynts Magnus Prince, toun threasurer, to pay to the relict of Alexander Todrig, keiper of the King's park, the soume of fourtie pounds Scots money, and that for two thousand and fyve hundred calsey stones, at sexteen pound Scots per thousand, furnished be the said deceist Alexander Todrig to the good toun, conforme to a particular accompt, qranent thir presents shall be a warrand.

Edinburgh, 20th January 1697.—The same day 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.

It is appointed, contracted, finallie agreed, and endit, betwixt ane noble earle Thomas Earle of Haddingtone, and heritable proprietor of the park underwrn, on the ane pairt, and David Smith, pnt., possessor of the said park, on the other pairt, as follows; that is to say, the said noble earle has set in tack and assedatione, and be the tenor hercof, for the rent and duetie under written, in tack and assedatione letts to the said David Smith, (secluding his airs, exers, assignees, and all others, his representatives,) all and haill the park of Halyrudhouse, the grass and pasturage y'rof, with houses, biggings, meadows, and haill pertinents of the samyne as pntly possessed be him, and formerly be Andrew Dubissone and Christian Lawrie his spouse, for all the years and time of nyne years (he being on life himself) next and immediately following the term of Candlemas next 1712 years; which is hereby declared to be his entry thereof, by virtue of this tack, as being the expiring of ane year's possession thereof by him without tack, and from thence furth this present tack to continue; and the said park, houses, grass, pasturage, meadows, and pertinents thereof to be peaceably brooked and possessed by him, he being on life, during the said space and years of nine years from and after the said term of Candlemas next, without any revocation, obstacle, or impediment whatsomever; which tack and assedation above written the said noble earle binds and obliges him, his airs and successors, to warrand to the said David Smith, as above expressed, at all hands, and against all deadly. For the which causes, and on the other parte, the said David Smith binds and obliges him, his airs, executors, intromitters with his lands; heritages, goods, and gear, and successors whatsoever, thankfullie to content and pay to the said noble earle, Thomas Earle of Hadinton, his

Sept. 24, 1831.

a hundred years before, in June 1554; it is, that "the magistrates "and council, at the request of Mary, the Queen Dowager and

---

airs or assignees, or to his factors in his name, yearly and ilk year during the space of this present tack, the soume of four thousand ane hundredth twenty-five merks Scots money, at two terms in the year, Lambas and Candlemas, by equal portions, &c. And sicklike, the said David Smith obliges him and his foresaids, that neither he nor any other, by their order or knowledge, shall not plow up any part of the said park, nor cast any faile or divotts, or winn any stones for building (except causeway stones), in any part thereof, except what sall be necessary for repairing the saids houses during this present tack; and they shall flit and remove themselves, their families, subtenants, &c. &c.

At Edinburgh, the 12th April 1717.—Which day the honourable the magistrates and council of the city of Edinburgh being assembled, the council, with the extraordinary deacons, authorized and empowered Robert Wightman, present threasurer, to agree with David Smith, tacksman of the King's park, for liberty to dig for calsey stanes, and carrieing the same off for the good town's use, for such an number of years, and for such an yearly rent as he can best agree, whereanent thir presents shall be a warrand.

It is contracted, agreed, and ended betwixt Mr. Charles St. Clair of Hermiston, advocate, as commissioner for Thomas Earl of Haddington, heritable proprietor of the lands and others under written, conform to a commission and factory granted to him, dated the day of on the one part, and George Knox, second lawful son to Archibald Knox of Mayshiell, on the other part, as follows;—that is to say, the said Mr. Charles St. Clair, as commissioner foresaid, sets, and in tack and assedation, for the yearly rent and tack-duty under written, lets to the said George Knox and his heirs allenarly, secluding assignees and subtenants, all and haill the park of Holyroodhouse, with the grass and pasturage thereof, houses, biggings, yards, meadows, parts, pendicles, and haill pertinents thereof, as the same were last possessed by David Smith, late tacksman thereof, lying within the sheriffdom of Edinburgh, and that for all the days, years, and space of twenty-one years next and immediately following his entry thereto, which is hereby declared to have been and begun to the arable land at the term of Martinmas last, and to be and begin to the houses, grass, and pasturage at the term of Candlemas next, and to the working of the quarries upon the 1st day of April next, and from thenceforth to continue and endure to be peaceably possessed and enjoyed by the said George Knox and his foresaids during all the years of this present tack, which the said Thomas Earl of Hadinton, his heirs and successors, are hereby bound and obliged to warrand to the said George Knox and his aforesaids at all hands, and against all deadly, as law will; for the which causes, and on the other part, the said George Knox as principal, and the said Archibald Knox of Mayshiell, his father, as cautioner and surety for and with him, bind and oblige them, conjunctly and severally, their heirs, executors, and successors whatsoever, to make a good and thankful payment to the said Thomas Earl of Hadinton, his heirs and assignees, of the sum of two hundred and fifty pounds sterling yearly, at two terms in the year, Whitsunday and Martinmas, by equal portions. And it is hereby agreed to by both parties that the said George Knox and his foresaids shall have liberty to open and work stone quarries and causeway stones in any part of the grounds of the said lands, and to sell and dispose upon the stones workt by them out of the same at their pleasure, &c. &c. And, lastly, it is hereby communed and agreed upon

" Regent of the realm, consented to build, at their own expense, Sept. 24, 1831.
" the whole slopes in the park-dyke round about Arthur's Seat,

---

by both the saids parties, that the persons to whom the quarries now going upon the saids lands are presently let shall have the liberty of carrying off what stones are already wrought by them, or shall be wrought by them before the said George Knox his entry thereto, till the first day of April next to come, &c.

At Edinburgh, the 22d February 1764.—Which day the right honourable the lord provost, magistrates, and council of the city of Edinburgh being assembled, anent the memorial given in for Andrew St. Clair, merchant in Edinburgh, setting furth, that the memorialist, Mr. St. Clair, was tacksman of the stone quarry in the King's park, and thereby had occasion to carry on a very extensive work, for which purpose he has a great number of hands daily employed in making causeway stones for pavement. As the good town has frequent occasion for such stones for paving the streets and avenues, the memorialist apprehended it would be for the advantage of the good town, as well as for him, if they could agree upon terms for the memorialist's furnishing the town from time to time, during the continuance of his lease, with such stones as they have a demand for, and with this view Mr. St. Clair offered the following conditions:—That the memorialist should become bound to supply the good town with whatever quantity of dressed or undressed stones they might require during his lease at or till the day of April one thousand seven hundred and seventy, at the following rates, viz. best dressed stones at eight shillings and sixpence per ton, and undressed stones at one shilling and eight-pence per cart, each cart containing 12 cwt., both to be delivered without further charge anywhere within the libertys of the town as occasion requires, and to oblige himself to free and relieve the town of the sum of twenty pounds sterling, which they at present pay annually to the tacksman of the King's park for the liberty and privilege of working stones there. On the other hand, it is proposed that the town council become bound to take all the stones they have occasion for, for the use of the city and liberties, from the memorialist, during such space as shall be agreed upon, and not to supply themselves with stones any where else without the consent of the memorialist, and to pay at the prices stipulated for such stones as are furnished once in the year. Lastly, that the workmen employed by the town may not be thrown idle, the memorialist proposed to engage and become bound to employ such of them in his service as are experienced in such work, while they continue to work to the satisfaction of the memorialist's overseer, and to allow them such wages as they give their other workmen. If these terms were agreeable to the council, it was proposed that a contract be entered into betwixt them and the memorialist upon stamp paper, containing a penalty and other clauses requisite, as the memorial under the hand of the said Andrew St. Clair bears. Which being read in council, the same was remitted to Bailie Hamilton and his committee, and they to report. Accordingly the following report was this day given in; viz. the committee subscribing, to whom the memorial of Andrew St. Clair, merchant in Edinburgh, offering to contract for furnishing the city with causeway stones, and a proposal by Robert Campbell, merchant in Stirling, to the same purpose, were remitted,—report that they had taken pains to compute the cost of the causeway stones for some years past, and find that it has never been less than eight shillings and sixpence per ton for drest stones, and three shillings three-pence one fourth per ton for undrest stones, besides tear and wear of quarry-graith, &c. That, upon inquiry, they likewise find the stones of the rock in the King's park have by experience been

Sept. 24, 1831.

" Salisbury and Duddingstoun Craigs, under protestation that the " same do not prejudice them in respect of the calsey stones which " they were used to get out of the said craigs when they had to do " therewith ;" that is, when they had occasion. Now this is only that they, in undertaking to build upon a certain spot, protested that they should still have a right to stones for their use. But I need hardly tell your Lordships that this is no evidence at all; even if the town council were the party, instead of the park-keeper, it would be no evidence, because an entry in a book of any man's predecessors is no evidence for the man who claims under him.

---

found the best in every respect; and as they cannot see how Mr. Campbell could provide the town with these stones, were of opinion, that if Mr. St. Clair will undertake to furnish them in terms of his said memorial, viz. drest stones, that is, equal to the best causeway stones that have been used in paving the streets of Edinburgh, at seven shillings per ton, of such size and dimensions as the town's overseer shall require from time to time, and rough or undrest at one shilling and sixpence per cart, each cart containing twelve hundred weight, the price at which Mr. Campbell offers to furnish them, the town council should enter into a contract with Mr. St. Clair for that purpose, he, as offered in his memorial, taking off the town's hands Knox's tack, and paying the rent from Candlemas last, and purchasing the town's quarry-graith and tools at a valuation, and also engaging to employ all the town's layers, hewers, and dressers, except when the town has occasion to employ the layers in paving the streets, the town treasurer to pay annually at Whitsunday for what stones are furnished, beginning the first term's payment at Whitsunday one thousand seven hundred and sixty-five, as the report under the hands of the said committee bears. Which being considered by the magistrates and council, they, with the extraordinary deacons, approved of the said report, and authorize Bailie Walter Hamilton to enter into a contract with the said Andrew St. Clair accordingly, containing a clause for a mutual break at the end of three years; with a proviso, that the city shall have the use of the stones already quarried without any payment, and also such old stones as may be lifted, and again employed when causewaying the streets.—Extracted from the council records, &c.

It is contracted, agreed, and ended betwixt Thomas Earl of Hadinton, heritable proprietor of the lands under written, on the one part, and George Knox, tenant in Holyroodhouse Park, on the other part, as follows; that is to say, the said Thomas Earl of Hadinton hath set, and by these presents, in tack and assedation, for the yearly rent and tack-duty under written, lets to the said George Knox and his heirs allenarly, excluding assignees and sub-tenants, all and whole the park of Holyroodhouse, with the grass and pasturage thereof, houses, biggings, yards, parts, pendicles, and pertinents of the same, (excepting hereof the whole stone and sand quarries, and the houses belonging to them in the said park, with free ish and entry thereto, which the said earl reserves for himself, or to set to others,) all presently possest by the said George Knox, &c.; and that for the space of three years next and immediately following his entry thereto, which is hereby declared to have been and begun to the houses, yards, grass, and pasturage at the thirteen day of February last one thousand seven hundred and seventy-one years, notwithstanding the date hereof.—Rent, 400*l.* sterling.

Sept. 24 1831.

It only shows that ninety years before the date of the grant in question the town council—not the park-keeper, but the town council—pretended to have a right to take stones; that is all it amounts to. It proves nothing in respect to the park-keeper; it is not even evidence to prove any thing respecting the town council. Then it is stated, that the same practice is further proved in 1599, about fifty years afterwards: "The same day appeared "John Robertson, flesher and tacksman to the King, of his Majesty's "park, and was content and consented that the town shall have "their calsey stones forth of the same, not hurting his corn, grass, "or goods, and repairing the skaith in case any be sustained." Now every lawyer knows this, that if my tacksman or tenant consents to do a thing, that gives no right to any body against me, unless it is proved that he told me; you must prove that I knew of it. But all that is said is that the tacksman was consenting, and there is nothing about the park-keeper. I am supposing now that this would be evidence of his consent, which it would not, because an entry in the council books is no evidence of the man having come there to consent. Those two entries are prior to the date of the original grant of the office. Then, we come to 1664, the period after the grant, when there was a park-keeper: "On the 28th "of October 1664 there is the following entry in the council re-"cords: 'Appoints the treasurer to agree with the layers of the "calsey for winning of calsey stones out of the park, for the ser-"vice of the town's common calseys, of such square and thickness "as shall be prescribed to them.'" That is an entry of the council appointing them to agree with the layers of the cause-way, (that is to say, the paviors of Edinburgh,) for winning stones out of the park, and that is no evidence at all. Then comes, in 1688, this entry: "The council grants warrant to the treasurer to agree "with any person for winning of stones in the park for the use of "the calsey." Now, that is no evidence; but if it were, it does not prove that the town-council claimed a right in those days to take stones from the park. No doubt my opinion is, that, upon the whole, there is reason to believe that from time to time the Crown has given leave to the town to procure stones for paving out of the park, as lying handy to the town; but then it was only through favour. Then, my Lords, the first entry in which the keeper is introduced is about thirty years after the date of the grant, namely, in 1675. How far a usage which begins thirty years after the grant, that is to say, when both the grantor and the grantee are removed,—how far that amounts to contemporaneous usage, which is to be considered as expository of a doubtful usage, I leave your Lordships to judge, even if it were usage; but I shall show you

Sept. 24, 1831.

that it is not even the shadow of usage. It is like any thing rather than what the learned judges describe it to be. The entry is dated the 3d of December 1675, and it says, "The council recommends "to Bailie Hay the treasurer, and Deacon Hamilton, to speak with "Sir James," that is the park-keeper, "that in setting of the King's "park there be liberty reserved to the good town to win stones, "and lead the same from the said work, for helping and making the "public calseys." Now, what does this amount to? That when he is making a lease of the park, as park-keeper to the King, he shall take care to reserve — what? Not a right to quarry and take stones, but leave to go over the surface in spite of the tacksman — without which reservation it would be a trespass — and do what? Exercise the right which they claimed before? It is not that. Did they desire the bailies to speak to the park-keeper to give them leave to take stones? That would have looked somewhat like asking leave of the park-keeper, though I should still say that I thought it very doubtful evidence, for it might not have been the park-keeper as representing his master, the Crown. But it is not so; it is, that he should reserve leave to go over the demised park, and in spite of the rights of the tacksman under that demise, that they shall not be held trespassers in going over it to work at the quarry, for the purpose of taking what they pretend they had a right to take, and which they did not at all ask the park-keeper for leave to take, namely, to quarry there for stone. Then, on the 15th of that month, comes this entry: "The same day report was made by Bailie Hay, that "he having met with Sir James Hamilton," that is, the keeper of the park, "concerning a liberty to be reserved for the town, to win "calsey stones out of the King's park, which the said Sir James "Hamilton most willingly condescended to, that the town should "have that liberty, with this provision and declaration, that if, in "the winning of stones and carrying them off the ground, there "be any prejudice done to his tacksman, that, as for that damage, "he was willing that the town should take two persons, and his "tacksman other two, to whom the liquidation of the damage is "to be referred to their discretion." Now, what is this? It is not that Sir James Hamilton gave them a right to quarry. If it had been so, it might have been said to be the exercise of an act of ownership as to the quarry, though still it might be better referred to his office as park-keeper. But it is not that; it is no exercise of that right by him; he gives no leave to take the stones; they only say, that he condescends to their request of reserving, as against his tacksman, a right for them to go over the grass, they paying reasonable damage for any injury they may do to the same. It is not a right to quarry. He does not say a word about that,

but he gives them power to go over the grass; and if they spoil the pasture, they are to pay the tacksman for the damage. Now, is this any thing approaching to the usor of a right, or the claim of a right, or even the mention of a right? Is there any thing even mentioned about the right to take stones out of the quarry? It is quite another thing. Then there is a subsequent entry, by which it appears that payment was actually made by the town for paving-stones which they received. Now this is, no doubt, what the learned judges mean when they say that there is evidence in process of the park-keeper quarrying, or permitting others to quarry for his behoof, and they besides think they have got strict legal evidence of his receiving money for the leave to quarry. But I will show your Lordships what that supposed evidence is. It is an entry of the 19th of March 1680 in the books of the town, not of the park-keeper: "The said day the council appoints Magnus Prince, "town treasurer, to pay to the relict of Alexander Todrig, keeper "of the King's park, the sum of 40*l.* Scots money, and that for two "thousand and five hundred calsey stones, at 16*l.* Scots per thou-"sand, furnished by the said deceased Alexander Todrig to the "good town, according to a particular account, whereof these pre-"sents shall be a warrant." Now, this is not only no evidence whatever to prove the fact of the payment, but it is not admissible. No judge is allowed by the law of the land to look at that document. It is not evidence to prove the fact. If they had found an entry in a book by the park-keeper himself, or his bailiff or steward or other agent, charging himself with the receipt of 40*l.*, and stating that the 40*l.* was received as a consideration for so many thousand calsey stones, that would have been strict legal evidence of the fact. But this is only an entry in the books of the person who paid the money, which by law is no evidence whatever to prove that he paid the money. My agent, or myself, entering in my books that I have paid money, is no evidence that I paid it. If I enter that I have received money, that charges me with receiving it; but this is a man's entry in his own books, used by the learned judges as what they call "evidence in process" to prove the receipt of money; so that, if A's book is found, saying that he paid over to B, it is to be set up by B as evidence that he received money. But, marvellous to tell, it does not even purport that the money was paid; it does not say a word about the money being paid. It is, "The said day the "council appoints Magnus Prince, town treasurer, to pay to the "relict of Alexander Todrig" certain sums of money; but non constat that Magnus Prince did pay. Magnus Prince, like many other magni principes, may not have paid. He may have got the money to pay, and never paid it over to any body. It is only an order

Sept. 24, 1831.

that he should pay, and it does not even prove that they who gave the order issued the money to pay; but, supposing that they had issued the money as well as the order, it is not proved that Prince did pay it; and, if it were entered that he had paid it, still it would be no evidence that it was received. Yet this is what they call "evidence in process," and it is just as good as the rest. Then comes an entry on the 20th of January 1697:—"The same day "the council, upon the treasurer'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 trea-"surer to advance money for that use and to cause carry the said "stones to any convenient place for the use of the good town, "whereunto the presents shall be a warrant." Now, what is that? It has nothing to do with the quarrying; it is for taking the stones away. Then we come to 1711, and that is a lease from Lord Haddington to David Smith, in which David Smith "obliges "him and his foresaids, that neither he, nor any other by their "order or knowledge, shall plough up any part of the said "park, nor cast any faill or divotts, or winn any stones for building "(except causeway stones), in any part thereof, except what shall "be necessary for repairing the said houses during the present "tack." Then comes, in the year 1717, the following entry in the records:—"The Council authorized and empowered Robert Wight-"man, present treasurer, to agree with David Smith, tacksman of "the King's park, for liberty to dig for calsey stones, and carrying "the same off for the good town's use, for such a number of "years and for such a yearly rent as he can best agree, whereunto "these presents shall be a warrant." Now this only proves, according to the effect of the observation I have already made, that the town did agree with the tacksman for liberty to dig causeway stones, and carry them off for the use of the town. Your Lordships have seen before that the town did not ask leave to dig; but it appears here that they asked leave to carry off what they had quarried, which they would not have had a right to do without the leave of the tacksman. But at all events the reservation of David Smith, bargaining that he should not win any stones, is merely an acknowledgment of a man's tenant made to himself, by a private instrument between them, behind the back of the over-landlord, the Crown, by which the tenant agrees not to take the stones. Does that vest the right of the stones in the landlord? No such thing;—any thing but that. There is, my Lords, a class of evidence which is very frequently resorted to in courts of law, and which does not, perhaps, prove much; but still it is competent proof, and always goes for something. In cases where one party or

Sept. 24, 1831.

another is entitled to minerals under the ground, or to certain rights of cutting timber, it is a common thing to produce leases from various lessors in succession to various tenants by which they convey those rights for a consideration; and if there is proof that that consideration has been paid by those tenants to those lessors, that is held to be evidence. It is never very strong evidence perhaps; but it is held, in the absence of other proof, to be enough, when there is no counter-evidence, and nothing repugnant in the nature of the right of the landlord;—it is held to be a sort of proof, upon the ground that no person would pay for what was worth nothing. It is a sort of admission of those persons, against their own interest, that there was something purchased. But then in all these cases there is a consideration, and the whole value of the evidence (without which it has no weight whatever, not so much as dust in the balance,) arises from a consideration having been paid, or at all events agreed to be paid, by those lessees. But here David Smith, the lessee, makes no such agreement; here the party leasing stipulates nothing. David Smith pays no rent for taking the stones, he receives no abatement of rent for not taking the stones, but all he does is to covenant that he shall not take those stones, except in a particular way. Now come one or two other cases in which the rent of 250*l.* is mentioned. In the year 1748 there is a lease "at the rent of 250*l.*, for the period of twenty-one "years immediately following the entry of the tenant, which entry "is declared by the lease to have been and begun to the arable "land at the term of Martinmas last 1748, and to be and begin "to the houses, grass, and pasturage at the term of Candlemas "next, and to the working of the quarries upon the first day of "April next." Then, that lease being merely a bargain between the parties, the question is, whether there is any evidence in the cause that it was fulfilled by the actual payment of the rent? But here it is said, "There is a book produced (I suppose in "process) kept by that individual,"—that is to say, George Knox the tenant, not the landlord,—"which has recently been recovered "from his representatives, beginning in the year 1755, and ending "in 1757, and containing accounts of the stones sold on credit from "the quarry for paving and building, and also entries of the wages "paid to the quarriers and other workmen." Now this only shows, and it is evidence to that extent upon the principle I have already laid down, that Knox, the tenant, sold under this tack those stones for a profit. My Lords, this is the only thing like evidence which I can perceive, the only tittle of evidence to support the proposition upon which the judgment proceeds, that there is proof in the cause of the keeper of the park having permitted persons, for his behoof, to quarry and sell stones. But there is not a tittle of evidence of

Sept. 24, 1831.

its being for the behoof of the park-keeper; there is only evidence that George Knox sold and received the price of some of those stones. From the loose way in which evidence is dealt with in the Court of Session, I am not sure that there is evidence of the money having actually been received; it only says that it contained an account of stones sold on credit. That would be no evidence at all. It is no evidence to charge me with a payment that a book is produced in which I say, "I sold stones for ten pounds, to be paid a year "hence;" that is not admissible. If I say, I sold stones to be paid a year hence, having received *5l.*, or having received 10*s.*, that is evidence to charge me with the receipt of *5l.* or 10*s.*, but it is no evidence of payment that I make an entry of having sold at a credit; it is not even admissible to prove that I did sell them. Therefore I should be noways surprised, if, upon the production of that book, it were found to prove absolutely nothing. As to the entry of wages paid to the quarriers and other workmen, that, for the reason I have given, is clearly not evidence. Then we come to the memorial from Andrew Sinclair, a merchant in Edinburgh. That memorial is no evidence whatever. It states that he obliges himself to relieve the town of *20l.* which they annually pay to the tacksman of the King's park for the liberty and privilege of working stones there: that is no evidence. Then it is said that there was a committee of the town council appointed to report, and they report that the council shall enter into a contract only upon certain terms: that is no evidence at all. This brings us to the year 1771, in which there was another lease granted by Lord Haddington to George Knox for the period of three years at an increased rent of 400*l.*, excepting quarries, in these words: "Excepting herefrom the whole stone and sand "quarries, and the houses belonging to them in the said park, with "free ish and entry thereto, which the said earl reserves for him-"self or to sett to others." I need not remind your Lordships that this is no evidence whatever, except that such a lease was granted, and that such an exception was made. It is quite immaterial to this question what part he chose to let, or what he chose to reserve. Indeed his not letting the quarries might be because they were not his to let. Then the practice stated in 1777, I dare say, was considered as proving very much. In the factory account for the year 1777 of Mr. Craig, factor for the earl, there is the following entry: "25th September 1777.—Received from David Waugh, rent of "Holyrood House Park, 460*l.*, and for quarries, 40*l.*;" and then it says, that "Waugh continued in possession and paid the same rents "until Candlemas 1780;" and that is the whole evidence in the cause. I see nothing else, from beginning to end, to prove the proposition of the learned judges, which they say is fully proved in the cause, "that the keeper of the park has been in use, from the date

"of the grant, (that is, from the year 1646,) to quarry and sell, or "to permit others for his behoof to quarry and sell, stones for the "purpose of causewaying the streets of Edinburgh, and perhaps "for some other purposes in the city and neighbourhood." My Lords, I thought it worth while to go into this matter for the purpose of showing that it is not premature in your Lordships to reverse this decision, when you find the grounds upon which these learned judges purport to rest this judgment wholly fail in point of fact. But with respect to the thing in question—the subject-matter of this claim—I cannot help reminding your Lordships of how high a nature the right to the soil and to the sub-soil, to quarries and minerals, is held to be. Your Lordships are aware, that in our law the grant of the mines and minerals in a certain district is of itself sufficient, if followed by livery of the whole, to carry the whole freehold. If there be a feoffment of the mines and minerals of a certain district, and livery of seisin of the whole given, the whole freehold interest passes under that. My Lords, there is a nicety in our law which is different from the law of Scotland, and which makes the argument I am about to urge against that decision very much stronger. There is somewhat of a refinement in our law which does not exist in the Scotch law with respect to open and closed mines. If there shall be a lease for lives or for years, and nothing is said of mines at all, the lessee for life or for years, by the English law, may work the open mines, but he cannot open new ones. If there is the same lease, and mines are mentioned, and there are open mines, he still may work those open mines, and he cannot open new mines; but if the lease mention mines, and there is no mine open, the law is, that the lessee for life or for years may open and work all mines that he can find. The Scotch law is totally different from this. It is laid down by Mr. Erskine, and he quotes cases which fully bear out his statement, that if the vassal takes a freehold, even if all the mines and minerals are reserved, he takes the stone quarries, because they are held to be part and parcel of the soil, and to pass with the soil. It is laid down by the same learned writer that the life-renter does not take such part of the soil as quarries, by words of general conveyance, without express grant; and though any mines, coal or quarry, be already opened, unless there be express words granting the mines, coal or quarry, they do not pass either to a lessee for life or to a lessee for years. Mr. Erskine lays down and cites decisions as authority for that proposition. Now, my Lords, if this be so, does it not clearly and plainly follow that the decision of the Court of Session was well founded, which has been affirmed upon appeal in your Lordships house, and which negatives the proposition, that any right to the body of the freehold—to the substance and corpus of this park—

Sept. 24, 1831.

passed by the grant of the office of park-keeper, but that it continued in the grantor, the Crown, and did not pass by the grant, which said nothing whatever of those quarries; because, according to this authority, if there had been tenant for life or tenant for years, the lease constituting his tenancy would have given him no right, without an express grant, to open a single mine that was not open, or even to continue to work the mines that were open, unless the right were given by express words. It is considered to remain in the lessor, and not to pass by a grant out of him, unless it is expressly mentioned. My Lords, upon these grounds it was, as I can gather from Lord Gifford's argument in this case when it was last before your Lordships, that he felt totally at a loss to conceive the ground upon which the learned judges in the Court below could conceive that the grant of the office of park-keeper, without more, constituted in the park-keeper a title to take away the whole body of that park over which he was appointed keeper.

My Lords, having had recourse to the arguments of the Court, I have looked into the way in which some of the Judges of the First Division attempt to illustrate the proposition more generally dealt with by the Judges of the Second Division, and I certainly can find nothing to satisfy me in the least, either upon the general question, if usor were out of the case, or upon the disputed fact, of which I say there is no evidence in the cause, that prior to the grant, or even contemporary with the grant, there was any usor by the grantee or his predecessors (of whom he indeed had none), to any extent whatever of the right now claimed. I have thought it necessary to trouble your Lordships, out of my respect for the Court below, with these reasons as illustrative of the grounds upon which I am about to move your Lordships to reverse this decision; and I have thought it right also to point out the doors that are opened to irregularity by the practice of allowing averments to supply the place of proof, and permitting that to be taken as proof which is any thing and every thing rather than legal evidence.

The House of Lords ordered and adjudged, That the interlocutor complained of be reversed.

Appellants' Authorities.—2 Ersk. 9, 57—59; Forbes, 31st January 1822 (Fac. Col.); Facculati Lexicon, Ducange Glossarium; Lord Aboyne, 16th Nov. 1814 (Fac. Col.); Earl of Nottingham's Case, Manwood, 143; Lord Coke's Inst. 233, 536; Lear's New Forrest, 201; Earl of Haddington, 2 Wilson and Shaw, 478; 3 Ersk. 7, 12; Forbes, 29th Nov. 1827 (Fac. Col.)

Respondent's Authorities.—Stat. 1617, c. 12.

MUNDELL—SPOTTISWOODE and ROBERTSON,—Solicitors.