April 2, 1831. the power of bringing to sale; and there is no limit to the sale; and I cannot help wishing, that when we are talking about the landlords' hypothec, the landlords would turn their attention to the tenants, and give them a little relief from the pressure of this law; but upon the law I have no doubt. If this was oppressively used, the landlord would be liable to an action for damages; but the appellant, Mr. Pentland, has been somewhat litigious. He rests quite satisfied with the interlocutor in the first action, and allows it to become final, when he might have appealed against it in that case as well as now. He permits another litigation to be commenced, and then prosecutes it to an appeal. I therefore move your Lordships that this judgment be affirmed; but, in respect of the hardship of the case, I am not disposed to allow costs.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

G. W. POOLE—G. RICKARDS,—Solicitors.

No. 18. TRUSTEES of Stonehaven Harbour, Appellants.—*Lushington—Robertson.*

Sir ALEXANDER KEITH, Respondent.—*Lord Advocate (Jeffrey) Sandford.*

Statute—Clause.—Held (affirming the judgment of the Court of Session), that statutory trustees, under a power to open quarries, had no right to enter to and take stones from a quarry open and worked prior to the statute.

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2d DIVISION.
Ld. Mackenzie.

THE town of Stonehaven is situated on the east coast of Kincardineshire, which is bold and rocky. It is contiguous to the sea, and stands on low ground between the sea and a high bank. In this bank, which is called the Braes of Stonehaven, there has been for time immemorial a quarry called the Red Craig Quarry. In the neighbourhood of the town, and along a great part of the coast, there is an unbroken barrier of rocks, the value of which was said to be very trifling to the proprietors, but the stones which could be excavated from them were well adapted to the building of a harbour. The Red Craig Quarry was in possession of and claimed by the respondent, Sir Alexander Keith of Dunnottar, as his property, under titles from the family of Keith, and more recently from the commissioners on forfeited estates. Although the validity of his title was disputed, it was admitted that he had for several years let the quarry and drawn rents for it.

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In 1825 an act of parliament was obtained (under which trustees and commissioners were named), proceeding on the narrative,—" The harbour of the burgh of barony of Stone-" haven, the head burgh of the county of Kincardine, situ-" ate in the bay of Stonehaven, on the east coast of that part " of Great Britain called Scotland, is of great utility to naviga-" tion in general, being one of the most accessible harbours be-" tween the Firth of Forth and the Murray Firth, and would be " rendered of still greater utility, and more advantageous to " trade and navigation, if the same were enlarged, deepened, and " protected by additional piers and breakwaters, and proper " works erected therein, or in the said bay adjoining thereto, " and if the streets and avenues leading thereto were widened " and repaired, and if rules and regulations were established for " preserving due order within the same." Power was therefore given to erect piers, quays, &c.; and it was " farther enacted, " that it shall and may be lawful for the said commissioners, or " any person or persons appointed by them for that purpose, " and they and such person or persons are hereby empowered, " to open quarries in any waste or common in the said county of " Kincardine (not being farther distant than one mile from the " high-water mark), or within high-water mark on the shores of " the said county, and to dig, gather, and take away therefrom " stones, gravel, sand, clay, furze, heath, rubbish, or other ma-" terials necessary for constructing any of the works authorized " by this act, without making any compensation for the same; " and also to open quarries, and to dig, gather, and take away " therefrom stones, gravel, sand, clay, furze, heath, rubbish, or " other materials (timber excepted) in and out of any grounds, " whether inclosed or not, (not being the ground whereupon " any house stands, nor a garden, orchard, planted walk, lawn, " or avenue to any house, or any piece or parcel of ground set " apart or used as a nursery for trees, previous to the passing of " this act), where the said materials can most easily be found, " within two miles of the said harbour, for the construction of " the said works, making recompense for the damage thereby " occasioned in manner herein-after mentioned: Provided ne-" vertheless, and be it further enacted, that it shall not be lawful " for the said commissioners, or any other person or persons, " under the authority of this act, to dig, gather, take, or carry " away any such materials in or from any inclosed grounds or

April 2, 1831. "lands, until notice in writing shall have been given to the "proprietor or occupier of the premises," &c.

In virtue of this authority, and alleging that the Red Craig Quarry was situated within a mile from high-water mark, and part of a waste or common, the trustees intimated their intention to enter the quarry, and excavate stones for the use of the harbour, without making any compensation to Sir Alexander Keith. In the course of the discussion which ensued relative to their right to do so, they farther founded upon a feu contract between the Keith family and certain feuars of Stonehaven in 1624, which contained this clause: "Whilk persons and inhabitants "that shall happen to be feuars in the said town in all time "hereafter shall have property belonging only to the said feuars "and feus thereof, the commonty and privileges after mentioned, "viz. in commonty of pasturage of all and haill the Braes of "Stonehaven, as wind and weather shears, betwixt the common "way that passes on the west end thereof to Montrose, eastwith to "the Bridge of Downie," &c.: "As likewise, for upholding of "the common weal of the said town, of building of bridges and "calseys, the said noble lord, for himself and his foresaids, has "dispensed, and by thir presents dispenses with, in favour of the "said inhabitants, to be employed as said is, the whole land-"customs within the said town and privileges thereof in all time "coming, and for collecting and ingathering thereof, and fur-"thering of all common works requisite and justly for that "effect, to all persons having interest, it is specially conde-"scended that the said noble earl, his bailies, ane or more, with "ane neutral man chosen amongst the said inhabitants, who shall "do for them as conjunct bailie, shall in one voice pronounce "and give out sentence in all actions civil concerning the com-"mon weal of the town," &c.

It was alleged by the trustees, that the feuars had thenceforth enjoyed the privilege of taking stones from the quarry, and had derived a revenue by letting the braes and selling the stones. Sir Alexander admitted that the feuars had been allowed occasionally to take stones for their ordinary purposes; but he alleged that this was a mere tolerance, and that at all events it could not warrant a more extensive right than that which had been possessed. The trustees did not aver that they had any title to this feu contract; but Sir Alexander intimated his readiness to argue the question, on the supposition that they had obtained such a title.

Against the threatened act of the trustees he presented a bill of suspension (which was passed), in which he prayed that the appellants should be prohibited "from entering upon "and opening quarries in the suspender's said lands and barony "of Dunnottar, or any part thereof, more especially his said "quarry of Red Craig, and from quarrying or carrying away "stones or other materials therefrom, without making good to "the suspender and his tenants in the said lands and quarry all "damage occasioned by their proposed operations, and paying "for stones or materials used or taken by them therefrom." April 2, 1831.

The Lord Ordinary suspended the letters simpliciter, found the trustees liable in expenses, and issued the subjoined note of his opinion: "The feuars of Stonehaven appear to have no "title to any thing but the pasturage of the braes. This is plain "from the words of their contract of feu, when stated with "accuracy (which has been too much neglected); and then "there seems to be no doubt that the suspender has title and "possession sufficient to exclude strangers, and the chargers "seem to be strangers, for the act of parliament appears not "applicable to quarries existing as open quarries previous to its "date."

The trustees having reclaimed, and it being pleaded, that as the question truly at issue related to the Red Craig Quarry alone, whereas the Lord Ordinary's judgment, taken in connexion with the prayer of the suspension, applied to the whole estate of Dunnottar, parts of which might fall under the powers conferred by the statute, the Court, "in respect of it being admitted by the "suspender and understood that the interlocutor reclaimed "against shall apply only to the Red Craig Quarry," adhered.*

The trustees appealed.

Appellants.—1. It is not disputed by the respondent that the quarry is situated within a mile of high-water mark; but his defence is rested on the ground that no power was conferred upon the appellants to work quarries which had been opened previous to the statute, and to this the Court below had given effect. Although it is true that power is given to the appellants to open quarries in any waste or common, yet it was never in-

* 7 Shaw and Dunlop, No. 205.

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tended that this was to prevent them from having the benefit of quarries already opened; on the contrary, authority was granted to them "to dig, gather, and take away therefrom stones, gravel, "&c., or other materials necessary for constructing any of the "works." This the respondent alleges is to be construed as conferring a power to take stones and other materials from those quarries only which are opened by the appellants, whereas it is perfectly clear that the word "therefrom" has reference to wastes or commons, and consequently authority is conferred on the appellants to take materials from any waste or common situated within the above limits. Now the Braes of Stonehaven, in which the quarry is situated, are confessedly within the limits; and it is proved by the contract of 1624, and by the admitted facts, that the Braes are a common, and it cannot be disputed that they are also literally a waste.

But, 2. The respondent has no valid title to the quarry, while, on the other hand, the feu contract of 1624 in favour of the feuars, (to which the appellants can, if necessary, obtain right,) with the possession following thereon, bestows upon them a complete right to take stones from the quarry.

Respondent.—1. The sole question is, Whether the appellants shall be allowed to take stones from the quarry without making compensation to the respondent? but nothing is more directly contrary to the spirit of British legislation than that the property of any private person shall be seized for public purposes without compensation. When words, therefore, are found in a statute which apparently have this tendency, they must be strictly interpreted as inconsistent with those general principles which regulated the legislature. Under the statute in question, the appellants are merely empowered to open quarries in any waste or common. If it had been intended to empower them to appropriate to themselves quarries which had been already opened and in the possession of others, this would have been explicitly stated, because this would have been an encroachment on the existing rights of private individuals, and the act would not have been passed unless either their consent had been proved or compensation provided; but the Red Craig Quarry has been open from time immemorial; and from the mode in which the statute was expressed the respondent could not possibly suppose that it was meant to deprive him of his property, and therefore he did not oppose it, which otherwise he would have done.

Neither can it be maintained, consistently with the above principle, that the word "therefrom" refers to open quarries; it plainly relates, either to the quarries opened by the appellant, or to wastes or commons where there are no open quarries; and the meaning is, that from these, and not from existing quarries, the appellants may take materials for building the harbour. April 2, 1831.

2. As the respondent is merely defending his possession, it is unnecessary for him to do more, in a question with one who has no valid title, than to show that he is lawfully in possession; but his title is perfectly good; the feu contract confers upon the feuars only a servitude of pasturage; and even supposing that it could be construed so as to give them right to take stones from the quarry, this must be limited to ordinary purposes, and cannot be extended to the effect of enabling them to build a harbour.

LORD CHANCELLOR.—My Lords, in this case I do not propose to trouble your Lordships at any length with the reasons upon which I shall humbly advise you to affirm the decree pronounced by the Court below. It is perfectly clear, when you look at the construction of this act, that the trustees of the harbour were mere trespassers as far as regards their claim, whatever may be the right of the feuars. I should rather say, that I can see no right that the feuars have; but the trustees are not the feuars; they have no privity with them, much less any identity; and the consequence is, they rest their title entirely upon the act. When you look into the clause, it is quite clear from the first branch of it what is meant, though it is inartificially drawn, as many of these private acts of parliament are; and a great misfortune it is to this House and every other Court. Many days of argument would be saved if they were drawn in a more careful and technical manner, so as plainly to state their intent, and not leave the Courts, as in cases of wills made by ignorant persons, to discover a meaning where the authors may have had none. This clause, however, leaves no doubt of the right to open quarries upon commons and waste places within a mile of high-water mark, and the trustees have a right to do that without compensation. Then come the words, "and to dig, gather, and take "away therefrom stones, gravel, sand," and so on. Now it is said, though the term "quarries" is not the last antecedent to which the "therefrom" can apply, it can, however, apply to nothing else. What is the other antecedent? "Any waste or common within "high-water mark." You are to dig and carry away and gather the stones, sand, gravel, and so on, "therefrom," that is, from the wastes

April 2, 1831. and commons. I do not think it applies to the other antecedent "quarries." The meaning of that clause is quite well known in all bridge acts, quarry acts, and road acts. You want stones and rubbish to fill up the interstices in making piers, as well as for putting metal upon the roads; and the right of taking stone without compensation is expressly given by these sort of words, to dig and carry away. When you say dig, gather, and take away from waste places, it is not the stones you quarry, but the stones you find loose. When digging is mentioned, it is "therefrom;" but when quarry is referred to, you are to open quarries;—and for this obvious reason, the Legislature never would have given a power to these trustees, without compensation, to go to a quarry already opened, that belonged to Sir Alexander Keith or to the feuars, or both or neither, and carry away the stone. Can we say the Legislature meant to give the right to work a quarry already in use, and, without compensation, to carry away the stone, merely because it was convenient—because it lay handy? If it is handy, that is a reason why they should pay for it; but it is said Sir Alexander Keith may make high terms. To be sure—it is his property; if it is not his, it belongs to the feuars; but the parties to whom it does not belong are the harbour trustees. They come and claim it; that is, they say it is an open quarry—a quarry in use—and it is a valuable possession. They admit it is so valuable that it was a subject of controversy, but that Lord Keith renounced his right in favour of the present respondent; and it is admitted that Sir Alexander Keith got a rent, as far back as 1811, of above £23; and as rents will rise in the course of time, when more buildings are going on, it may be worth £240. At all events it is worth something—it is a quarry in actual work. Could the act mean to include, under the power of opening quarries in waste lands, those which were actually opened? But if it meant that they should go and take advantage of all the expensive works at a quarry, would it not have said so? or said you may take stones from quarries already opened? There was Red Craig Quarry staring them in the face. If the trustees knew they could calculate upon it, their not mentioning Red Craig Quarry is a remarkable circumstance in their conduct; and it reflects no credit upon them, in my opinion, if they mean to say, that when they drew the clause they abstained from putting that into the act, in order to bring it under the general sweeping power of digging stones in waste places. Then it is said, Sir Alexander Keith has not made out his title; but it is not necessary. He has exercised acts of ownership. I have seen trespass maintained upon infinitely less evidence in the case of a quarry; he uses it, and lets it, and obtains rent, by the admission of the appellants, twenty years ago. Suppose

Sir Alexander Keith has not such a title as would stand the test in an action in which the title was in question, that will not benefit the appellant, for this is an action only to interdict the commissioners, who have no right to act as they have done. It is upon this ground that the learned judge Lord Mackenzie, than whom there is none more sagacious, held that this is an action against a stranger. It is upon this ground, and consistently with all principle, that I feel there can be no doubt the decision below was right; but it is objected, that this will decide that Sir Alexander Keith has a right to the price. It decides no such thing; it only decides, in hoc statu, that the commissioners shall not go on digging what he denies them right to; or, if they go on digging, they shall make him compensation; that is, if they go on with their proceedings, which are against law. It is to prevent them from going on, and not to raise the question, whether or not he is entitled to the price. If he brings his action for that, he must show his title; but if they go on they shall pay for what they take; than which there cannot be any thing more equitable and according to principle, or less raising the question of Sir Alexander Keith's title. It appears to me, upon the whole, if one were to go out of the way to notice it, that he has a right, and a better right than any one else. If he has no right, the feuars may have some right, though that does not appear to be very clearly established. The Lord Ordinary thought they had not established it. We are not called upon to say whether they have or not. It is only necessary to say, that the appellants are not the feuars, but are mere trespassers. The appeal must be dismissed. April 2, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellants' Authorities.—Wolfe Murray, Dec. 8, 1808 (F. C.); Feuars of Dunse, Nov. 22, 1732 (1,824); Leslie, Nov. 27, 1793 (14,542).

Respondent's Authorities.—2 Ersk. 2, 9, 14, 34; Leslie, Nov. 27, 1793 (14,542); 2 Ersk. 9, 4; Feuars of Dunse, Nov. 22, 1732 (1,824).

J. DUTHIE—MONCREIFF, WEBSTER, and THOMSON,—Solicitors.