'respondents: And it is further ordered, that the appellants be at 'liberty to proceed in the Court of Session, for the purpose of 'bringing before the said Court such parties as may be necessary 'according to this finding; and thereupon, or in case the ap-'pellants shall not proceed to bring the parties before the Court 'within a reasonable time to be appointed by the said Court, 'then the said Court shall proceed in the said cause, and do 'therein as shall be just.'

July 8. 1822.

Respondents' Authorities.—(1.)—3. Stair, 1. 19; 1690, c. 26; Gordon v. Campbell, Jan. 1729, (14384); 3. Ersk. 9. 11.

A. Mundell,—Spottiswoode and Robertson,—Solicitors.

(*Ap. Ca. No.* 30.)

No. 42.

R. Menzies, W. S. Appellant.—*Warren—Clerk—Irving.*
John Earl of Breadalbane and Holland, Respondent.—*Jardine—Davidson—Evans.*

Superior and Vassal—Clause.—Held, (affirming the judgment of the Court of Session,) that a clause by which a superior reserved in a feu-contract right to the mines and minerals, did not give him right to a quarry of freestone situated within the lands.

July 17. 1822.

2d Division.
Lord Pitmilly.

In the year 1699, King William III., by a charter under the Great Seal, granted to John Marquis of Atholl, (proprietor of extensive estates in Perthshire,) and his son in fee, 'omnes et 'singulas auri fodinas, argentarium metallum, seu fodinas ar-'genti, molybdinam, seu fodinas plumbi, fodinas stanni, fodinas 'cupri, et alia mineralia, colores et metalla quæcunque, de qui-'buscunque naturâ, generibus, vel qualitate eadem sunt, hactenus 'inventa, vel quæ ullo tempore in posterum infra totas bondas 'dict. terrarum et comitatûs de Atholl comprehenden. ut in 'infeofamentis earundem, jacen. infra vicecomitatum de Perth, 'et infra bondas omnium aliarum terrarum, dominiorum, baro-'niarum, aliorumque, sub quâcunque designatione eadem sunt, 'ad eos pertinen. et spectan., tam in superioritate quam in pro-'prietate, ubicunque eadem jacent. infra dictum regnum invent. 'erunt, cum omni jure, titulo, et interesse quibuscunque quæ 'nos vel nostri successores habemus, vel alio modo habere, cla-'mare, vel ad easdem, vel ad aliquam partem seu portionem ea-'rundem, ullo modo pretendere poterimus; cum plena potestate 'prænominato Joanni Marchione de Atholl, et dicto suo filio, 'ejusque antedictis, lucrare, operare, scrutare, et adinvenire 'prædict. fodinas, mineralia, colores, et metalla infra aliquam 'seu quamlibet partem terrarum generaliter et particulariter su-

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'præ mentionat.; et ad hunc effectum defodere, operare, et lu-
'crare descensus, caudas lie shanks, perpendicula lie levels, for-
'mas et arcus lie vaults, et sentinas seu latrinas lie sinks, infra
'fodinas, mineralia, colores, et metalla; ac etiam cum privilegio
'et potestate viarum et transitorum lie passages ad easdem et ab
'iisdem, et generaliter omnes et singulos alios modos et methodos
'requisitos ad easdem operand. et lucrand. seu vincend. agere,
'uti, et exercere, uti præfato Joanni Marchioni de Atholl, ejus-
'que filio suisque præscript. placuerit, et iis expediens videbi-
'tur; et super prædict. fodinis, metallis et aliis, ad libitum uti,
'disponere, et easdem, et omnes commoditates et proficua earun-
'dem, ad eorum proprios usus et utilitatem plenarie et integre
'applicare; et similiter cum potestate præfato Joanni Marchioni
'de Atholl, et dicto suo filio, suisque supra specificat., liquefacere
'seu dissolvere, et excoquere seu concinnare, purgare seu eli-
'mare dict. metalla et mineralia, ad eadem extra mare transpor-
'tare, (exceptis auro et argento, quæ per leges exportari prohi-
'bentur); et generaliter cum omnibus et singulis aliis libertati-
'bus, privilegiis, et immunitatibus quibuscunque pertinentibus,
'vel quæ per leges et praxin prædicti regni gavisæ et possessæ
'fuerunt, vel ad ullas fodinas et opera apud easdem ullo modo
'pertinere aut spectare, dignosci poterint.'

Thereafter, in 1707, the Marquis—now Duke of Atholl—feued the lands of Bolfracks (forming part of the estate of Atholl) to Alexander Menzies by a feu-contract in which there was this reservation: 'Reserving always to the said John Duke of Atholl the 'haill mines and minerals that may be found within the bounds of 'the said lands of Bolfracks, of whatsoever nature or quality, with 'the liberty of digging, winning, and away leading the same; but 'with this provision, that the said John Duke of Atholl and his 'foresaids be obliged to satisfy the feuars and possessors of the said 'lands for the time for what damage shall happen through breaking 'of the ground, and making ways through the lands in searching 'for, winning, and away leading the said mines and minerals.' In these lands there was a quarry of freestone which had been discovered in 1723, and which, it was alleged, was of a singular and uncommon nature, being admirably suited for ornamental architecture, and highly valuable from the circumstance, that this quality is not possessed by any other stone in that district of the country.

The right to the superiority, and to the above reservation, was subsequently acquired by the appellant Mr. Menzies, and the lands were purchased by the respondent, the Earl of Breadalbane. The Earl having commenced to build a mansion-house at Taymouth, and having claimed the exclusive right to this quarry, from which

he extracted stones for the purpose of building, the appellant Mr. Menzies raised an action to have it found that he had the sole and exclusive right to the mines and minerals within the lands, and in particular to the quarry, with the whole stones contained in it, in virtue of the above clause.

In defence against this action the Earl maintained, That the clause of reservation by the superior was merely intended to include those mines and minerals that had been conveyed by the charter of 1699, which was confined to metals, and had no reference to stones, or any similar substances: that the term 'mineral' did not embrace stones, and such a construction would have the absurd effect of entitling the superior to every stone on the property.

By Mr. Menzies it was answered, That the object of the charter was merely to convey the mines and metals which belonged to the Sovereign jure coronæ; and as the Marquis of Atholl was (independently of that charter) proprietor of all the other minerals within the lands, he had full power to reserve to himself the stones, &c. within them;—that the words in the reservation comprehended every substance of the nature of the stone in question, although only used for the purpose of building; and that he did not pretend that he had right to every stone within the lands, but only to those of a valuable nature.

The Lord Ordinary found, 'That the reservation contained 'in the original feu-charter of the lands of Bolfracks in 1707 to 'Alexander Menzies, 'of the haill mines and minerals that may "be found within the bounds of the said lands of Bolfracks, of "whatsoever nature and quality, with the liberty of digging, "winning, and away leading the same,' being expressed in the 'broad and comprehensive terms above recited, without any ex'ception under which the quarry in question might have been 'understood to have been included, and with the single provision 'that the superior should satisfy the feuar or possessors for the 'surface damages occasioned in searching for, winning, or leading 'away the mines and minerals, must be held to have compre'hended the quarry or mine in question, with the stone thereof; 'and the liberty of digging, winning, and away leading the same, 'on paying surface damages; and on these grounds decerned in 'terms of the declaratory conclusions of the libel, and appointed 'the pursuer to state in a condescendence the amount of the da'mages claimed by him.'

Against this interlocutor the Earl of Breadalbane having reclaimed, the Court altered, sustained the defences, and assoil-

July 17. 1822. zied him from the conclusions of the libel; and to this interlocutor they adhered on the 10th of June 1818. *

Mr. Menzies having appealed, the House of Lords 'order-'ed and adjudged, that the interlocutors complained of be af-'firmed.'

Lord Chancellor.—My Lords, there is a cause of Menzies and the Earl of Breadalbane, which involves the question as what was meant by a reservation of all mines and minerals of whatsoever nature or quality; and the question is, Whether, under the words 'mines and minerals,' there is included a reservation of quarries of stone? That reservation is not contained in a lease, but in a feu; and I take it, there is a very great difference as to the principles that are to be applied to the construction of a feu and a lease—it is a question of a very different nature. In the case of a lease, the object is to give the benefit of the enjoyment of the surface to the lessee. Unless you reserve specially, every thing is supposed to be let that can be actually enjoyed,—every thing that the lessor or lessee can enjoy; but, taking it that the lessee cannot work the mines, minerals, stone quarries, and so on,—which he cannot do, for that would be accounted waste,—still, if a power to work them is not reserved in the lease, the lessor cannot enter and enjoy without the lessee's permission: that is the principle we act upon. On the other hand, in the case of a feu, every thing is given that is not specially reserved. It does appear to me to be the better opinion, that mines and minerals in this feu did not mean stone quarries, and that the opinion of the majority of the Judges is therefore right; the consequence of which will be, that the judgment should be affirmed.

Spottiswoode and Robertson,—J. Chalmer,—Solicitors.

(*Ap. Ca. No.* 31.)

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* See Fac. Coll. 10th June 1818, No. 169, where it is said, that 'upon advising 'a reclaiming petition for the defender, with answers, three of the Judges were of 'opinion that the stone in question was not such a substance as fell within the re-'servation; the remaining Judge was of opinion that the terms of the reservation 'were so broad as to comprehend it. Upon advising a reclaiming petition for the 'pursuer, with answers, four of the Judges thought the interlocutor of the Court 'right; the remaining Judge still doubted of it.'