No. 17. GEORGE PENTLAND, Appellant.

JAMES BOOTH, Trustee for the Royal Exchange Assurance Company, and others, Respondents.

Process.—Landlord and Tenant.—Held (affirming the judgment of the Court of Session), that it is competent for a landlord to insist in an action of mails and duties, and a process of sequestration, against a tenant, at one and the same time; but costs of appeal refused to the landlord.

March 31, 1831.

2D DIVISION. Ld. Mackenzie.

LADY ELIBANK was proprietrix of the estate of Bachilton; and in April 1805 she and Lord Elibank, in consideration of a certain sum of money, agreed to pay an annuity of £450 during her life to the Royal Exchange Assurance Company. In security thereof, they disponed the estate of Bachilton to James Booth, in trust for the Company, to the extent of the annuity, and quoad ultra for themselves. Infeftment was taken in the same month, and the trustee drew the rents through the medium of a factor.

On the 4th of April 1817 Lord Elibank, with consent of his wife, granted a missive to Pentland in the following terms:—"I "have received yours, making me an offer for an improving "lease, on expiry of the present leases, of the lands of Bachilton, "to be in your option as to the length or mode of lease, accord-"ing to the act of parliament regarding leases on entailed "estates; you agreeing to build, at your own expense, a farm-"house and offices to the extent permitted by act of parlia-"ment, or having recourse against the heirs of entail for the ex-"pense laid out, and that expense regularly reported, as in like "cases so authorized, interest being allowed during the lease for "the monies so laid out, you paying me the rental, as now paid, "of £660 sterling, this agreement to be drawn up on stamped "paper in proper time and due form, and to be binding on both "parties. I accept your offer, and I am, &c." This missive was subsequently challenged by Lord and Lady Elibank, but it was sustained; and they were ordained, in an action at the instance of Pentland, to execute in his favour a lease in terms of it. In the month of February 1822 they executed a lease which contained the following clause:—"And in respect that the whole farm-"steadings, houses, and biggings on the lands and estate hereby "let are uninhabitable, great part of them having fallen down "through decay and old age, full power and liberty is hereby

" given to the said George Pentland and his foresaids to take " down the whole of these steadings, houses, and biggings in " any way he or they may consider best, and to use the ma- " terials thereof as he or they may think proper; and the said " Right Honourable Janet Oliphant Lady Elibank, with advice " and consent foresaid, and the said Right Honourable Alex- " ander Lord Elibank her husband, for himself and for his " interest, bind and oblige themselves and their foresaids im- " mediately to expend, upon building a new steading or stead- " ings, as may be found most advisable by the tenant, and for " repairing the mills, pigeon-house, and other outbuildings on " the estate, the sum of £3,200 sterling; and in the event " that the tenant and his foresaids shall advance for the pro- " prietor the proportion of that sum which, in terms of the " act of parliament referred to, can be rendered an existing " charge upon the next heir of entail in the said estate, the " said Right Honourable Janet Oliphant Lady Elibank, with " advice and consent foresaid, and the said Right Honour- " able Alexander Lord Elibank her husband, for himself and " for his interest, bind and oblige themselves to adopt the ne- " cessary measures prescribed by the statute for rendering such " sum an existing charge against the succeeding heirs of entail, " and to assign and convey such claim to the tenant and his " foresaids, in such shape and form as he may find necessary, " in security of his obtaining repayment of such advance if " made by him, as well as to allow him and his foresaids de- " duction out of the yearly rent, payable as before specified, of " the interest of such sum or sums as may be so advanced by " him, for the purposes aforesaid, from the period of advancing " the same, till he be repaid." Pentland enjoyed possession in virtue of this lease. March 31, 1831.

In July 1824 Booth, as trustee for the Assurance Company, brought an action of maills and duties against Pentland, concluding for payment of the rents of crops, 1822 and 1823, and of those to fall due in time coming during his lease. In defence Pentland pleaded, that as Lord and Lady Elibank had failed to implement the above obligation in the lease by erecting houses, he was entitled to retain the rents in liquidation thereof. The Lord Ordinary, on the 12th of May 1826, decerned for the rents of the years from 1822 to 1825 inclusive, and issued the subjoined note of his opinion. " Note.

March 31, 1831. " — The Lord Ordinary thinks that the defender is not in bonâ " fide to plead retention, upon the stipulation of expenditure by " the landlady in the new lease, against the claim of the an- " nuitants for payment of the rents, to the extent sufficient for " payment of the annuity. The Lord Ordinary thinks, that " under fair ordinary administration, and with a just regard to " the interest of the annuitants, Lady Elibank could not, in the " circumstances of the case, grant, nor the defender accept, any " new lease or new stipulation, qualifying the previous missives, " which should prevent the rent from being payable annually, at " least to the amount necessary for payment of the annuity; " and therefore that the defender is not in bonâ fide to plead " to this effect the stipulation which was taken. The Lord Ordi- " nary does not think reduction necessary to exclude a plea of " that sort. That the right of the pursuer is not exclusive of all " administration by Lady Elibank and her husband seems to " be settled by the decision of the Court, of which the statement " was not, in so far at least, denied by the pursuer."

Pentland paid these rents, and also that of 1826; but having resisted payment of that for 1827, Booth revived the action of maills and duties, and at the same time applied for and obtained from the Sheriff of Perthshire a warrant of sequestration of Pentland's effects in security and payment of the rent 1827.

In the meanwhile Lord and Lady Elibank had executed another trust-deed in favour of Patrick Campbell, who, in virtue thereof, also applied for and obtained a warrant of sequestration against Pentland. Of these processes Pentland brought advocations to the Court of Session, ob contingentiam of the action of maills and duties. He then maintained that the procedure against him was ruinous and oppressive—that he was entitled to retain his rents in security of implement of the clause in his lease, and that at all events he was not in safety to pay to Booth in respect of the claim made by Campbell. The Lord Ordinary having decerned against him for the rent of crop 1827, and found him liable in expenses, he reclaimed; and the Court, on the 5th of December 1829, pronounced this judgment: " In " respect that, on the part of Patrick Campbell, trustee for Lord " and Lady Elibank, it has been expressly admitted at the bar " by his counsel that the pursuers in this process are preferable " to him in their claim to the rents decerned for by the inter-

"locutor of the Lord Ordinary under review, the Lords adhere "to that interlocutor, and refuse the prayer of the note."* March 31, 1831.

Pentland appealed.

Appellant.—1. The procedure against him has been both incompetent and oppressive. The lease contains a clause of registration, in virtue of which diligence could issue against him for payment of the rent; and therefore a separate action of mails and duties was only calculated to create expense. But the respondent had recourse, not only to such an action, but also to a separate process of sequestration; so that while he was thus insisting before the Court of Session for payment of the rent of 1827, he was also making the same demand before the Sheriff of Perthshire in the process of sequestration. The appellant was not bound to defend himself in both of these processes, but was entitled to have one or other of them instantly dismissed. In addition to this oppressive procedure, he was subjected to the expense of defending himself against a separate action by the trustee of Lord and Lady Elibank.

2. As dispositions have been granted to two parties having separate interests, viz. the respondent and Campbell, the appellant is not in safety to pay to the respondent, and the interlocutor of the Court below can afford him no protection. An interlocutor is good evidence of the judgment of the Court, but it is no evidence whatsoever of a statement made by a party. If the statement had been entered by the party or his counsel on the record, it might be evidence against him; but there is nothing appearing on the record to warrant what is set forth in the interlocutor, which confessedly rests on a mere supposed oral statement made at the bar. It, however, necessarily admits the relevancy of the appellant's objection.

Respondent.—1. By the law of Scotland double remedies for payment of debt are competent. A creditor may proceed, not merely against the person, but also at the same time against the property. The respondent was no party to the lease; he had therefore no right to proceed by diligence in virtue of it against the appellant, but was entitled to bring his action of mails and duties. The decree in that action would entitle him to proceed against the appellant's person, but it would not have the effect

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* 8 Shaw and Dunlop, No. 85.

March 31, 1831.

to constitute his right of hypothec real over the stocking on the lands. To accomplish this it was necessary to have recourse to a process of sequestration, otherwise the security might have been lost altogether.

2. The infeftment in favour of the respondent was many years prior to the deed in favour of Campbell, and therefore, without any admission on Campbell's part, was clearly preferable to and exclusive of his right. Accordingly, he judicially admitted this, and this admission is ingrossed in the judgment, and he does not appear as a competing party. The appellant therefore is in perfect safety to pay to the respondent.

LORD CHANCELLOR.—My Lords, in this case I can have little hesitation in recommending your Lordships to affirm the interlocutor appealed from. The only point upon which it may be necessary to say a word is that insisted upon by the counsel for the appellant, touching the two actions. Now, it may be very true that a hardship arises to a party, in particular cases, from the structure of the law in this respect. There may be two remedies, yet the second so far inconsistent with the first that it may render the party against whom it is given incapable of complying with the requisition of the first. For instance, a party owing money is arrested and put into prison; he thereby loses the benefit of his labour, out of which the debt might be paid. No doubt it may be exceedingly hard for the debtor that the creditor should be at liberty to disable him from satisfying his lawful demand. So, when a distress is laid upon a farm, there is an end of all power to provide for payment of the rent; and it may be exceedingly hard that an action should be brought for rent, when by distraining the landlord gets hold of the property of the tenant, out of which the rent is to be satisfied. Nevertheless it is perfectly clear by our law that you may first arrest the debtor, and by force of that arrest deprive him of the means of paying the debt; so that, unless he has goods and chattels, subject to the concurrent remedy against the goods, as well as taking the body in execution, he cannot obtain by his labour wherewithal to pay the debt. In like manner the landlord may distrain the stock and crops out of which the rent may be payable, but he may at the same time do more; having issued a warrant of distress, he may the same day bring an action, and recover the amount of the rent reserved in the lease. Our law, however, by a statutory provision that exists not in the Scotch law, prevents in a great measure the conflict of the two proceedings, by limiting the possession under the distress to a small number of days. But it by no means follows, that because a hardship may arise out of or an oppressive use be made of legal remedies, the party seeking to avail himself of them

has not a right to do so. We must go by the law as it now stands. Now, the Scotch law provides that one form of proceeding being adopted at the same time with another, the party so dealing shall be put to his election, the other party being entitled to a plea of lis alibi pendens. This was attempted here, but it was found incompetent; and it is easy to see upon what ground that plea was so held. To support such a plea there must not only be the same parties, but the same subject matter. If there had been two sequestrations, or if there had been two actions of maills and duties, the lis pendens would have been a bar to the second action; but here it is, alio intuitu; it is an action of sequestration. With us the landlord distrains of his own authority. In Scotland he must go to the Court, and have a process of sequestration; but then he has more power than we have here; he is stronger in the second stage of the proceeding than we are. In the first stage he must go to the judge. Here, having levied the distress, we are restrained to a certain number of days; there, having once got the sheriff's warrant, there is no limit fixed to the time within which the distress must be brought to sale; but the object of that is security, to obtain the effect of the landlord's hypothec over the crop, to prevent the goods being removed off the ground, and not an action for maills and duties. For a sale it may be more effectual; it is a proceeding in rem, and accompanied with instant recourse against the property; possession is given under the sequestration; the goods are exposed to sale; and the action of maills and duties is brought against the person, through which you can obtain recourse against the goods. It is true, you may, if the demand is not complied with, obtain execution against the person at the same time also; but in the other case—and I state this to show how totally different the actions are—it is a security by which you take possession by making your hypothec effectual;—you take possession of the crops until you are paid. I admit there is a great hardship in a man keeping hold of that, and he may use it oppressively at the same time that he is going against the party for the maills and duties, there being no limit as to the power of keeping hold of the subjects in question; but it is rather a rhetorical than a strict view of the subject to say that you, at one and the same time, bring your action for the payment of the rent, and take the property out of which the rent is to be paid. The rent of the current year ought to be satisfied out of the crop upon the ground at the time the rent was due for the bygone time. The action was for the maills and duties of 1827, was it not?

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Robertson.—It was for each year, and the sequestration was for the payment of the rent just due, and the rent to come due.

Lord Chancellor.—So far it is rather a hardship that he should be subject to this double remedy; because making the hypothec effectual by sequestration goes beyond a mere security,—it gives

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.

April 2, 1831.

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.