

- No 2. the inclosures, or upon the grounds of the chargers or their tenants, and from trespassing upon said inclosures, till such time as this suspension shall be discussed; and that under the penalty of L. 5 Sterling *toties quoties*, to be levied from the suspender, or any of them, conjunctly and severally.'

Reporter, *Edgefield*.Act. *Rae*.Alt. *Burnet*.

J. M.

*Fel. Dic. v. 3. p. 248. Fac. Col. No 118. p. 278*1778. *March 3.*MARQUIS OF TWEEDALE *against* HUGH DALRYMPLE, and Others.

No 3.

No person is entitled to hunt upon the inclosed grounds of another, without the consent of the proprietor.

THE Marquis of Tweedale brought an action against Mr Dalrymple, and others, in which he charged them with having broke into his park of Yester with horses and hounds, either in pursuit of game, or to search for it. The chief object of the action was to have it found and declared, 'That neither they, nor any person, has right to hunt game within said inclosures without leave of the pursuer.'

The defenders *admitted*, That they were liable for all damages done by them on the grounds of others, in the course of the sport; but *insisted*, that, as they were possessed of the legal qualification, they were entitled to hunt on all grounds without restriction. In support of this defence,

*Pleaded* for the defenders; Animals *feræ naturæ* are *res nullius*, and, wherever they are found, every one is equally entitled to acquire a property in them by occupancy. Hunting these animals, therefore, without express enactment in its favour, is free and common to all, in as far as municipal law has not denied or restricted the use of it.

The ancient law of Scotland left the exercise of hunting, without restriction, to the whole inhabitants; M. T. C. B. c. 52. Forrests and warrens are mentioned as exceptions, into which game could not be pursued; and the exception confirms the general rule, that game could be followed on every other property.

Hunting and hawking are favourites of the law, and considered in our ancient statutes as the only lawful method of killing the game. The old acts for preserving the game proceed on this principle.—Guns, bows, and all other methods, are prohibited, act 1551. c. 9.—1555. c. 58.—act 1597. c. 270. And, when killing game by fowling-pieces and pointers was admitted of, yet it was under the severe restrictions of the act 1685. c. 20. But hunting, encouraged by law as a manly exercise, was not denied to those excluded by this statute from fowling. No qualification is at this day necessary to hunting, but that required in the act 1621, c. 31, ratified by the act 1685, c. 20. viz. the having a plow of land in heritage.

Where a right is given by the law, what is necessary to make it effectual is presumed to be given. To render effectual the right of hunting, thus recognized by the statute, it is necessary that the qualified persons should at least be entitled to follow the game into the fields and inclosures of others, where the chase leads, if not to search for game there. This is requisite to any exercise whatever of the sport. If it is denied, the right of the qualified persons to hunt is entirely defeated.

Usage supports the plea of the defenders. During the many ages in which hunting has been universal, no such challenge as the present has ever been made.

It was *pleaded*, as a favourable speciality, that the defenders were in pursuit of a fox; and only hunted foxes, which are noxious animals.

*Answered* for the pursuer; The right of property in a subject implies the exclusive use of it. No one is entitled even to range over open fields, if the owner refuses to allow him that use of his property, still less to enter inclosures. The proprietor by inclosing his grounds, *rebus ipsis et factis*, prohibits the entering into them without his leave. These are the general principles flowing from the nature of property. The question is, whether common law, or statute, has established an exception in favour of hunting?

In the Roman law, it is expressly laid down, that no one has a right to hunt on the grounds of another, without the owner's leave; l. 1. § 1. ff. 9. A. R. D. The owner of the lands had no property in the game itself. But hunting game on his lands was an use of them, which his right of property entitled him to prohibit any person from usurping, without his consent.

The common law of Scotland is the same; Craig, l. 2. *dieg.* 8. § 13.; Stair, b. 2. t. 3. § 76. Hunting was no doubt common to all in this respect, that, where the proprietors of the lands gave no obstruction, the law made no distinction of persons. High and low were equally entitled to hunt, until the act 1621, c. 31.

This statute deprives the excluded persons of the exercise of the sport itself, so that they cannot hunt even on their own grounds. But no new right is bestowed on the qualified persons. The benefit of the act, as to them, is entirely negative, in not depriving them of what right they had at common law, previous to the act. But, as they had none to hunt on the grounds of others without their leave, they have as little to insist for that privilege after the act as before it. Nor is it any argument, that, without being allowed to pursue the game into the property of others, the sport may be baffled. All that follows from this is, that, besides the permission of the legislature to the sport itself, it is necessary, in order to the effectual exercise of it, to have the permission of the proprietor of the grounds where it is to take place. This is requisite where even the most useful occupations favoured by law are to be exercised on the property of others.

No 3.

As hunting is a favourite amusement, it meets with no obstruction from proprietors. But no right can be founded on such permission. Were it a known servitude, hunting on the fields of one could never establish any right over the fields of another. But no such personal servitude over lands is known in the law, or acquirable by usage. The proprietor is, at any time, entitled to prohibit this trespass on his property, however much he may have formerly overlooked it.

In so far as respects the hunting within inclosures, property is not only protected by common law, but by statute. The act 1555, c. 51, anent hunting and hawking, ratified by act 1685, c. 20. provides, 'That no person range other men's woods, parks, hainings, dikes, or brooms, without licence of the owner of the ground.' Penalties are annexed by the act, for the transgression of it; and it is renewed and ratified by the act 1685, c. 20.

It is of no consequence that the fox is a noxious animal. The object in hunting is the sport, and not the destruction of these animals, for which other means are more effectual. The statute 1555, c. 51. makes no distinction whether it is fox or hare that is hunted.

Where inclosures are broke into in this manner, the pecuniary loss may be but a small part of the injury sustained. Mischief done to favourite objects of improvement and ornament, young plantations, &c. cannot receive an estimation. Reparation of the pecuniary damage, therefore, is not sufficient. The pursuer is entitled to have this invasion of his property declared unlawful. He can then take such means to prevent it for the future, as every one has a right to use in defence of his property.

*Replied* for the defenders, to the pursuer's argument from the act 1555; That, although it might meet the defenders claim, in so far as relative to the searching for game within inclosures, yet, it ought not to be extended to the following game thither, to which it was said the word 'range' in the statute did not apply.

This cause was advised on memorials, and a hearing in presence.

THE COURT were of opinion, That the act 1555 extended to the following, as well as searching for game; and, being a subsisting statute, ratified by act 1685, c. 20, was sufficient for the decision of the present question, relative solely to the right of hunting within the inclosed grounds of another, against his will. THE COURT found, 'That the defenders were not entitled to enter or come into the deer-park, or other inclosures of the pursuer, without his consent, either for hunting or following game, or drawing cover, and searching for game.'

*Act. Sol. General, Ilay Campbell.*

*Alt. Crosbie, Brown, M'Cormick*

*Fol. Dic. v. 3. p. 248. Fac. Col. No 17. p. 30.*