

and expenses to the sum of one hundred and twenty pounds.

Dissatisfied with this modification of the damages, the present appeal was brought to the House of Lords.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Wm. Adam, Ar. Cullen.*

For Respondents, *Alex. Wight.*

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v.
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[M. 4999.]

THOMAS LIVINGSTONE, Esq., of Parkhall,	<i>Appellant ;</i>
JOHN, EARL OF BREADALBANE,	<i>Respondent.</i>

House of Lords, 13th April 1791.

GAME—RIGHT OF SHOOTING IN ANOTHER'S GROUNDS.—Held, that there was no law which entitled a person to enter the uninclosed grounds of another proprietor to shoot game, although the game itself was *res nullius*, and common to all ; as this did not prevent the owner of the ground from debarring all and sundry from entering his grounds, to the prejudice of his exclusive right of property.

The question which arises in this appeal is, Whether by the law of Scotland the proprietor of an estate has a right to monopolize the game upon that estate for the use of himself and particular friends, and to exclude all gentlemen legally qualified from following that amusement over his *waste* and other grounds not specially protected by any particular statute ?

The facts out of which this question arose are : That the appellant, along with a friend, made an excursion to the Highlands of Perthshire, for the purpose of enjoying a few days shooting. They took up their residence in the neighbourhood of Glenquoich, where there is an extensive range of open uncultivated hills belonging to the respondent. They were duly licensed, and the appellant had the necessary land qualification, but had no consent to shoot from the proprietor ; and thus they continued for several days shooting the game on these hills.

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An action of declarator and damages was brought by the respondent, to have it found that the appellant has no right to come on his grounds and to follow, shoot, and kill game, and to have him interdicted and prohibited in all time coming from coming on the respondent's grounds for like purpose in prejudice of his exclusive right and privilege over the game on these grounds.

The respondent also brought a suspension and interdict, which was conjoined with the declarator.

The Lord Ordinary (Monboddo) pronounced this inter-
Aug. 11, 1789. locutor: "Assoilzies the defender, Thomas Livingstone, " from the conclusions of the libel of declarator at the in- " stance of the Earl of Breadalbane; but continues the in- " terdict at his instance against the said Thomas Livingstone, " and decerns; finds no expenses due to either party." On
Dec. 2, 1789. representation, the Lord Ordinary recalled the interdict against Thomas Livingstone, and reserved consideration of expenses till the issue of the cause.

On reclaiming petition to the whole Lords, they pronoun-
June 16, 1790. ced this interlocutor: "Find that the defender has no right " to come upon the pursuer's grounds, or search, range for, " shoot at, or kill the game thereon, without the leave of " the pursuer, and decern and declare accordingly; and in " the process of suspension, suspended the letters simplici- " ter, renew the interdict, and continue the same in all time " coming, and decern: Further, find the defender liable in " expenses to the pursuer."*

* Opinions of Judges:—

LORD JUSTICE CLERK.—"I am entitled to say to all such persons, 'Sir, there is no road there.' I will keep him off by force if I can; and if not, will sue for damages, if I can qualify them. The statutes do not confer a new right, but are of the nature of prohibitory statutes."

LORD HAILES.—"I am of the same opinion. Although the penalties are inflicted in the case of inclosed grounds, it does not follow that it is lawful to go upon uninclosed grounds, without the owner's consent. Is it enough to say, I have a hawk upon my fist, or a gun over my shoulder, to entitle such a person to go on another's grounds? He may be stopt, if the owner have not consented."

LORD DUNSINNAN.—"I am of the same opinion."

LORD ANKERVILLE.—"I am of the same opinion."

LORD MONBODDO.—"The Roman law is out of the question here. It is a matter of public law and policy. And the object of the

Against this last interlocutor the present appeal was brought to the House of Lords.

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Pleaded for the Appellant.—Every animal which is the object of hunting and fowling, being *feræ naturæ*, and in-

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statutes regarding hunting, &c. was to keep our bodies from becoming effeminate.”

LORD ESKGROVE.—“ Right on neighbour’s ground. It would be making all the small proprietors slaves. May be tied up himself ; but he is entitled to turn off the greatest lord when he comes on his estate. If the public has a right, how can the proprietor debar him ?”

LORD GARDENSTONE.—“ Same opinion. A man that is qualified may hunt any where *without leave*, and not liable to *penalties*.”

LORD SWINTON.—“ There is no property in game, but right of hunting may be exclusive. Damages for infringement, or, in case of penal nature, there may be the *actio injuriarum*.”

LORD ROCKVILLE.—“ Of same opinion.”

LORD PRESIDENT.—“ This is a question upon the Game Laws. It never can be said that game is *property*, without actual *possession* ; but every man is proprietor of his *grounds*, and entitled to the exclusive possession of them, if subject to no servitude.

“ The question is, Whether there be any thing in the nature of game, or in the laws relative to it, which gives to other men a common use or possession of my estate for the purpose of hunting, or fowling, or fishing upon it ? No man can claim a road or passage through another man’s property, even for the purpose of going to church, without a servitude, far less for amusement of any kind, however necessary for health. He cannot, without the proprietor’s leave, insist to range through his grounds in quest of hidden treasures or precious stones, &c. though these last are said to be *res nullius quo cedunt occupanti*.

“ So soon as property is established, every man becomes entitled to the exclusive right of exercising it, nisi lex vel conventio, vel testatoris voluntas obsistat.

“ The fish running in any stream are the property of nobody till caught, any more than the *aqua profluens*, or the air, or birds flying in the air ; but the banks of the river, and even the *solum* of it, may be private, and may be defended against any encroachment or access whatever.

“ The texts of the civil law are clear upon this head, and all the writers on that law.

“ The law of England fully explained by Blackstone ; and the respondent (appellant) has not been able to show an authority in his favour from the law of any other country.

“ The law of Scotland, is founded partly on the civil and partly on

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capable of appropriation, is common to all mankind. It has therefore been held, in the original state of society, that as they were the property of no individual, the right of seizing them, or, in other words, the right of hunting them belonged *de jure* to all parties without distinction.

the feudal law ; and neither of these are favourable to his claim. By the principles of the feudal law, all territorial rights flow from the sovereign. Some pass as part and pertinent of lands, others require express grant, being *inter regalia minora*, such as salmon fishery. The common rights of fowling and fishing are in every charter along with other enumerations which are pertinent of land-property ; and the charter always means to give such rights *exclusively* to the grantee, unless there be some special qualification or exception. When a commonty alone is meant to be given, this is expressed, or it must be acquired as part and pertinent of some other estate, by prescription or by special contract. It is not usual for charters to grant rights which are common to all mankind, such as walking along a high road, or sailing in the sea. It would be nugatory to grant such privileges by a charter.

Balfour, p.
140, c. 18,
and p. 141,
c. 19.

“ The old authority referred to in Balfour is not conclusive, every other authority, ancient and modern, stands clearly the other way.

“ Doubt if there be at present any qualification, the act 1685 being out of the question, and the act 1621 considered as obsolete even in Sir George M'Kenzie's time, though now it is thought otherwise ; but it is well observed by Blackstone, that the statutory regulations in general, were not meant as qualifications in the sense contended for by the respondent (appellant). They were generally meant to provide against poaching, and to preserve game from being destroyed at certain times and in certain ways, or by low people, and to inflict penalties, as an easier mode of redress, in certain cases, than the common law action of trespass or damages. But there is no statute which either says or implies, *that exclusive rights shall be made common*, or means in any degree to affect the great and fundamental question of right of property at common law.

“ If the defender (appellant) can show that he and all others are entitled at common law to a promiscuous use of the pursuer's (respondent's) estate, for hunting and fowling, no statute exists which can be construed to take that right from him ; but if he has not that right at common law, no statute exists under which he can lay claim to it.

“ Neither does *expediency* require that the rights of hunting should be made common. It is better that any interference with the property of another, should rest upon courtesy and good will, than upon compulsion. If it be declared lawful for every man, who has a plough-gate of land, to enter upon his neighbour's grounds with horses, and

By the Roman law, all animals *feræ naturæ* became the property of him by whom they were seized, whether taken on his own ground or within that of any other: and although by that law every landholder was entitled to forbid all other persons from hunting or fowling on his estate, yet what was taken there became equally the property of the hunter or fowler, as if he had kept within the limits of his own territory; and it was only competent for his neighbour to have an *actio injuriarum*. So laid down by Vinnius and by Voet, v. 2. 1, p. 721.

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The more modern states of Europe have, in general, departed considerably from the Roman law, in limiting this natural right of mankind, by various modifications, defining to what particular persons the privilege of hunting was to be permitted, and in what manner it was to be exercised; so that in this and some other countries, the power of appropriating wild animals by occupation, which *jure gentium*, was common to all, came to be *inter regalia*, and communicable only by special grant from the sovereign; and in others, to be enjoyed only by persons of a particular rank, or by owners of a certain extent of land, *per modum privilegii*.

In Scotland, the right of hunting has always been an important object of public polity, which it was the business of

dogs, and attendants, or even alone and on foot, in quest of game, without leave asked or given, it is probable he will meet with many difficulties and obstructions, and perhaps methods will be taken to prevent even the existence of game upon that property, whereas the contrary will be the effect of allowing every man to be the master of his own property, and to give such indulgences to others as he may be disposed to allow. This argument had a good deal of effect in the case of the Marquis of Tweeddale, (see Sess. Papers, vol. 34, No. 63, see also *Kelly v. Smith*, 27 June 1780.) Besides, if the claim is limited to the case of open grounds, it may easily be evaded by the slightest inclosure, such as a few turfs laid upon one another, called in Scotland a feal dyke.

“The very circumstance of limiting the claim in that manner, shows that it does not exist: for if there be such a common property, or right to the killing of game, upon what principle should any individual be entitled to limit or exclude that right, by inclosing his grounds? If every proprietor in Scotland follows this course, what becomes of the common right of hunting?”

LORD HENDERLAND.—“Of same opinion.”

From Lord President Campbell's Session Papers, lviii.

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the legislature to regulate in such a way as to encourage and preserve among the nobility and gentry a taste for those manly exercises which were supposed to be the likeliest means of keeping alive their martial spirit. The multiplicity of statutes on this subject demonstrate this.

It will be found, that through the whole of these statutes the legislature had in view, 1. To preserve the game, by fixing certain limitations, both as to the time and manner of killing; and, 2. To prevent an amusement, which although permitted to all indiscriminately, it was afterwards judged proper to make the exclusive privilege of the nobility and gentry, as being more suited to their station in life. Although landed property, to a certain extent, is now essential towards qualifying a person to hunt or fowl, yet the exercise of this right is understood to be general, and to extend over the whole country, wherever game is to be found. It accordingly appears that from the earliest period of the law of Scotland, this general right of hunting on the grounds of other men, (except in the case of animals enclosed in a park or warren, which in some respects were private property,) hath been considered incontrovertible.

The 52d chapter of the Form and Manner of Holding Baron Courts, says, That in the time of King Alexander, “Na manner of waters were defended from fishing of salmond but waters runnand to the sea, nor zet was not defended nor forbidden to any man to hunt, nor to chase the hare and the fox, and other wild beasts, without forests and warrandes quheresoever they were founden;” and President Balfour, in his Practics, quotes the above treatise as legal authority. “Item, It is leisome to all men to chaise hares, foxes, and all other beasts, beand without forests, warrens, parks, or wards.”

The first restriction in the killing of game is the 10th chap. of Robert the III., which forbids the killing of hares in the time of snow. The next statute is that of 19 James I. anno 1424, cap. 36, whereby a fine is imposed on stalkers. In the same king's reign, it was enacted, 1427, cap. 108, “That na patricks, plovers, black cocks, gray hens, na mure cocks, nor such fowls, be tane with na manner of instrument, fra the beginning of Lentron quhil August, under the pain of 40s.”

The act 1474, cap. 60, is the first which introduced any prohibition with respect to the killing of game. It enacts, “That na man slaie daes nor raes nor deare, in time of

“ storm or snow, or slaie any of their kiddes, under the
 “ paine of x punds ; and that na man hunt, schute, nor slaie
 “ deares nor raes in otheres closes or parkes, &c. under the
 “ paine of punishment of theft.” There is, however, no
 prohibition in this act in respect to hunting or shooting in
 open grounds, at the proper season of the year, because
 the legislature held that to be competent to all subjects.

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The like conclusion is to be drawn from the statute 1535, cap. 13. From the preamble of the act 1551, cap. 9, it appears that a great many deer, roe, wild beasts, and wild fowls, had been killed by shooting at them with particular instruments, to wit, half-hag, culvering, and pistolet, to the great hindrance of the noblemen of the realm's getting the pastime of hawking and hunting, and accordingly such manner of killing game was prohibited, “ under the pain of death.” But Sir George Mackenzie, in his Observations, says, “ that this act, inflicting the pain of death, and confiscation of moveables upon such as shoot deer, wild fowl, or wild beasts, is deservedly in desuetude.”

The act 1555, cap. 51, is of still greater importance to the present question, for it provides specially that no man will go into his neighbour's grounds, hunting or hawking, when the corn is on the ground, nor go into wheat fields at these times of the year, till the same be cut down ; thus showing that the right otherwise was so absolute and undoubted as to require an enactment to restrain it, and to prevent coming on the grounds even while the corn was still uncut.

The act 1621, c. 31, enacts that “ no man hunt nor hawk at any time hereafter, who hath not a ploughgate of land in heritage, under the pain of £100.”

By the act 1685, c. 20, all persons except those heritors who are possessed of £1000 of valued rent, and had an express license from the masters of the game, were prohibited from killing game with setting dogs. But it is now a settled point that this act was never in observance since the Union, and is therefore in desuetude.

The last statute passed in the parliament of Scotland relative to this subject, is the act 1707, c. 13, which, after pointing out the season during which game might be killed, and the penalty attending a breach of the enactment, proceeds to enact, “ That no common fowler shall presume to hunt on any grounds without a subscribed warrant from the proprietor of the said grounds, under the penalty foresaid, besides forfeiting their dogs, guns, and nets, to

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“ the apprehenders or discoverers : And it is further pro-
 vided, That no fowler *or any other person whatever*, shall
 “ come within any heritor’s grounds, without leave asked
 “ and given by the heritor, *with setting dogs and nets*, for
 “ killing fowls by *nets* ; and if any common fowler shall be
 “ found in any place with guns and nets, having no license
 “ from the nobleman or heritor, they shall be sent abroad as
 “ recruits.”

From all these statutes, it clearly appears that it has been the constant understanding of the legislature, during the course of several centuries, that no landowner could prevent a person duly qualified from hunting or killing game on his open and unenclosed grounds not under crop. The appellant found himself in possession of an estate of the required value, handed down to him by his ancestors, one invaluable franchise appertaining to which he understood to be, the privilege of hunting and killing game. And as none of the acts above quoted refer to waste or hill grounds, he conceived that he was exercising a legal right in shooting over the grounds in question.

Pleaded for the Respondent.—It is an established principle, founded in the very nature of property, that every man is entitled to the exclusive possession of his own property, and to debar all others from entering upon it for any purpose, unless when the owner is laid under restraint by special statutes, or another has acquired a privilege of servitude by grant or prescription, or where the public safety may require ; as in pursuing criminals, or destroying noxious and dangerous animals. The animals which come under the description of game, being *feræ naturæ*, are held in the law of Scotland, as in the Roman law, to be *res nullius*, and to belong to the occupier ; but although the property of them, when killed, belongs to *the killer*, it does not follow, that every person is entitled to search for, pursue, or kill those animals, upon the soil of another, in order to acquire such property. There is no proper connection between the premises and that conclusion. By the Roman law, the right of killing was free to all ; but it strictly preserved the rights of the owner of the soil from being encroached on for that purpose.

Such also is the law of Scotland : Stair says, “ Cum occupationibus venationibus,” signify privilege to kill fowls, “ fishes, and wild beasts upon the owner’s grounds, from “ which he may *debar* others entirely, by hindering them to

“ come upon the ground. But the vassal hath no property
 “ in the wild beasts, fowls, or fishes, which belong to none,
 “ for they are proper, only by excluding others to come
 “ upon the ground, the vassal having the sole occasion of
 “ taking such as are *found* there.” Lord Bankton speaks to
 the same purpose.

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Mr. Erskine, after laying it down :—“ That the right of
 “ hunting, fowling, and fishing, within one’s own ground,
 “ naturally arises from one’s property in the lands, but is
 “ restricted by sundry statutes,” adds, “ *It has lately been*
 “ *made a doubt*, whether a person qualified to kill game
 “ may hunt or shoot within another man’s property without
 “ a trespass. Indeed the act 1707, c. 13, which prohibits
 “ all, without exception, to come within their neighbour’s
 “ property with setting dogs and nets, without the proprie-
 “ tor’s consent, seems to take for granted, that a person
 “ qualified may hunt on any ground with hounds or grey-
 “ hounds, or shoot with a fowling piece ; provided he does
 “ not use a net. But surely such privilege carries with it a
 “ most severe limitation upon property, and, besides, hath a
 “ manifest tendency to destroy the game.”

The appellant attempts to maintain, that, according to
 the earliest writers on the law of Scotland, the general right
 of hunting upon the grounds of others (except in the case of
 parks and warrens) is clear and incontrovertible ; but the
 single authority he quotes is that of President Balfour. But
 as Balfour states this upon the authority merely of The
 Forms of Barons Courts, a treatise destitute of any legal
 authority whatever, no regard can be paid to it.

None of the statutes respecting the game take away or
 infringe the right which an owner has at common law, to
 prevent others from coming on his property. The general
 object of the statutes was, the preservation of the game, by
 laying down regulations as to the time and manner of kill-
 ing the animals which came under that description, and also
 as to the persons to whom this right was allowed. Of such
 a nature is the statute 1555, c. 51, founded on by the appel-
 lant. The subsequent acts also, specially commented on by
 the appellant, are of a similar nature, and to a like object.
 From all these statutes, there is nothing to warrant the con-
 clusion that owners of land are not entitled to the exclusive
 right of their property, and to debar all others whatever
 from entering and encroaching on their grounds for any
 purpose whatever, much less for the purpose of killing

1791. game. Such indeed is a breach of the law. It is an act of
 _____ trespass, punishable in a criminal manner.
 MAGISTRATES OF ANNAN v. SHORTREID, &c.
 After hearing counsel, it was
 Ordered and adjudged that the interlocutors be affirmed.
 For Appellant, *T. Erskine, Alex. Wight.*
 For Respondent, *J. Anstruther, Tho. Macdonald.*

THE MAGISTRATES of the Burgh of Annan, *Appellants ;*
 MRS. NANCY SHORTREID OR JOHNSTONE, }
 Widow of the late William Johnstone, } *Respondent.*
 Writer to the Signet, . . . }

House of Lords, 15th April 1791.

IMPRISONMENT OF DEBTOR—LIABILITY OF MAGISTRATES.—A messenger having apprehended his debtor, and given him to the Lord Provost of the burgh, for the purpose of having him imprisoned in the common jail. Instead of this, he was put into a room adjacent to the court room, where he enjoyed the privilege of open jail. Held, that the magistrates were liable in payment of the debt, for not instantly incarcerating the debtor in the common prison.

This was an action raised by the respondent against the provost and magistrates of Annan, for not having properly incarcerated her debtor, after he was handed over to the provost by a messenger at arms for that purpose, the said debtor having been apprehended under a caption for a sum of £1326. at her instance ; and instead of being put at once into the common jail or prison of Annan, he was kept and detained all night at an inn or tavern, being part of the evening under the charge of the provost, and part left to himself unguarded,—the provost having left him at ten o'clock at night until breakfast time next morning ; and then only put him into a room adjacent to the court room, and not into the common jail, under lock and key, which was giving the prisoner, what was called in Annan the privilege of open jail.

The party apprehended was the sheriff-depute of the county of Dumfries ; and the reason why he was not put in the jail was, as alleged by the provost, that there was no fitting accommodation for the prisoner there—it being full. The debtor sometime thereafter took out cessio ; and, on its being opposed by the respondent, she consented to with-