that the leases or agreements for leases of the several possessions of the appellants did not expire till Whitsunday 1815; and that the appellants are entitled to be paid and reimbursed, the amount of the damages severally incurred or sustained by them for or by reason of their having been respectively removed from their farms previously to such expiration of their leases or agreements for leases, including such costs as they have respectively reasonably been put to, or have reasonably sustained in the Courts below, or upon hearing their appeal. And, by consent, let such amount be ascertained by Dr Andrew Coventry, Professor of Agriculture in the University of Edinburgh, who shall report such amount to the Court of Session. And it is further ordained that the said cause be remitted back to the Court of Session, to do therein as to the said Court shall seem just, consistently with this judgment.

For the Appellants, *J. Haggart, D. Macfarlane.*
For the Respondent, *Wm. Adam, Ar. Fletcher.*

NOTE.—Unreported in the Court of Session.

(Muir-burning).

Major-General ROBERTSON of Lude; JOHN STEWART, his Cowherd, and JAMES JACKSON, his Tenant, . . . } *Appellants;*

The Most Noble the DUKE OF ATHOLL, *Respondent.*

House of Lords 5th July 1815.

DAMAGES FOR MUIR-BURNING.—In prejudice to the proprietor of Atholl forest, of his right of deer hunting and muir-game on part of the forest over which the appellant held a servitude of grazing his cattle, the appellant, General Robertson, set fire to the heath on that part. Held him liable in damages.

This case arose out of the circumstances of the appeal between the same parties reported *ante*, vol. iv. p. 54.

There the property of the seven shealings was held to be in the Duke, and a right of servitude of grazing his cattle on the same found to belong to the appellant, General Robertson, subject to the Duke's right of deer hunting, the latter always giving notice previous to his intention of hunting, so that the appellant's cattle might be removed.

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It appeared that the appellant, General Robertson, had not been satisfied with this adjustment of the rights of parties; and, accordingly, in order to frustrate the right of deer hunting, he set fire to the heath on the seven shealings, in the years 1806 and 1807.

An action of damages having been brought, by the respondent, against the appellant and his tenant, &c., for burning the heath, the Lord Ordinary found the summons relevant,

Feb. 25, 1808.

and that damages were due. On several reclaiming petitions to the Court, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—It is established by the evidence produced in the action for reducing the contract 1716, and award 1761, that the seven shealings or grass farms in question were the undoubted property of the family of Lude, before the date of that contract; and the only right now remaining in the Duke of Atholl is the right of deer hunting on the seven shealings. It is clear that this right cannot be exercised *emulously*. Due regard and respect must be paid to the superior rights of property; and the sole object in burning the heath was that this right of property might be more effectually secured, and the pasture land improved by it. It could not be to deprive the deer of a cover, for they had their own forest to go to, while, by improving the pasture, by burning the heath, he was increasing the quantity of food for those deer, so that the Duke had no interest to plead damage or hurt from the burning the heath.

Pleaded for the Respondent.—The contract 1716, and the award 1761, alluded to, expressly set forth that the appellant's right over the seven shealings "shall be without prejudice "always to his Grace the Duke of Atholl," to hunt the deer on the said shealings. This right, therefore, being established, the respondent had a material interest in preserving the heath on the seven shealings. Prior to that event, these shealings, which extends to 4500 Scots acres were the best grounds in Atholl for the shooting of muirfowl, and had always yielded a great yearly return of muir-game. The decree-arbitral does not find the property of the seven shealings to belong to the appellant, General Robertson. On the contrary, it finds that the property of these shealings is in the respondent, and a servitude of pasturage only in him; and although this decree-arbitral contains nothing about muir-game, yet it fixes the right of property, which is sufficient to comprise the right of

shooting grouse or muir-game. The burning of heath, such as was done here, could not improve the pasture. It was not a moderate or partial burning, but an entire burning of the surface of the whole ground, and was only resorted to in order to deprive the respondent of his just rights, and to prevent the exercise of hunting the deer, and to destroy his muir-game.

After hearing counsel, and due consideration had of what was said on either side, the Lords find that the Duke of Atholl is entitled to damages on account of the muir-burning complained of. It is, therefore, ordered that the cause be remitted back to the Court of Session, to review all the several interlocutors complained of, and to do therein what may be meet and just, consistent with this finding and declaration.

For the Appellant, *Sir Saml. Romilly, John Haggart, D. MacFarlane.*

For the Respondent, *Wm. Adam, Ar. Fletcher.*

NOTE.—Unreported in the Court of Session.

(Division of Commonty.)

Major-General ROBERTSON of Lude, . . *Appellant;*
His Grace the DUKE OF ATHOLL, . . *Respondent.*

House of Lords, 5th July 1815.

DIVISION OF COMMONTY.—In an action for division of commonty, objections were stated to the procedure of the sheriff in taking the proof and other procedure before him under remit of the Court, but these were repelled.

The respondent and appellant, being proprietors of lands in the neighbourhood of each other, possessed a common right, or right of commonty, in a piece of ground called the common of Glentilt, as set forth in a previous appeal; and this was an action of division of commonty brought by the appellant's father to have that common divided under the statute, which action was, after his father's death, insisted on by the appellant.

The parties' interested in the common were the appellant and respondent, together with the minister of Blair.

The Court remitted to the sheriff-substitute of Perthshire,