the defenders, the Lords unanimously adhered to that judgment. And they refused a second reclaiming petition for Mr Colquhoun, without answers. No 5.

Lord Ordinary, *Monboddo.* Act. *Baillie.* Alt. *Cullen.* Clerk, *Sinclair.*

C. *Fol. Dic. v.* 3. *p.* 248. *Fac. Col. No* 228. *p.* 354.

1790. *June* 16. EARL of BREADALBANE *against* THOMAS LIVINGSTON.

No 6.
No person, however qualified by law, is entitled to hunt or kill game on the grounds of another without his consent, though open and uninclosed.

MR LIVINGSTON, a gentleman of considerable landed property, having for several days taken the diversion of killing game on some muirs belonging to the Earl of Breadalbane, but without having previously asked his Lordship's permission; the latter instituted against him an action of declarator.

The summons set forth, that, by the common law of Scotland, every person was debarred from searching for, hunting, shooting, or killing game on the property of another, without the leave or consent of such proprietor; and concluded, that it ought to be found and declared, that the defender had no right to come upon the pursuer's grounds, or to search for or kill game thereon without the pursuer's leave.

Pleaded for the defender; The determination of this question is not left to general inquiries into the common law. From a series of our statutes, the right of persons qualified to kill game, instead of being limited to their own private property, appears evidently to extend over the whole kingdom, with the exception of inclosures, and a few other particular places.

Though in some countries, as England or France, game is *inter regalia*; in Scotland, the animals that come under that denomination being *res nullius*, they, according to the principles of the Roman law, *cedunt occupanti*. Hence the right of killing game, prior to certain statutory restraints, was here universal. Of those restraints the object was twofold; both the preservation of the game itself, and the general benefit of the community.

Prior to the time of Robert III. the exercise of hunting, 'except in forests, 'warrens, or parks,' appears to have been perfectly unlimited; Mod. ten. cur. baron. c. 52. The first restriction that occurs, is one by stat. 10th of that Prince, against the killing of hares 'in the time of snow,' under the penalty of a fine to the owner of the ground;' which plainly implies, that at other times the hunter had right to kill hares, and undoubtedly not less all the different sorts of game, on the grounds of any of the people.

The same inference is to be made from the next act of Parliament that has a direct reference to the point in question, viz. that of 1474, cap. 60. It prohibits hunting or shooting 'in others closes or parks.' But if this only was unlawful, to hunt or shoot in open grounds must have been permitted to all the subjects.

In like manner, when the statute of 1555, cap. 51. ordains, 'that no person 'shall range other mens' woods, parks, hainings within dikes or brooms, with-

No 6. ‘ out license of the owner of the ground,’ it imports a virtual declaration of the lawfulness of that liberty when taken in places of a different description.

The act 1600, cap. 23. which establishes certain regulations, both for the preservation of the game, and for the advantage of the people, sets forth the importance of hunting, ‘ as the only means to keep the hail lieges bodies from ‘ becoming altogether effeminate.’ But had it depended on the caprice of individual landholders, whether or not those means could be employed, hunting would not have been considered as an object of general police; much less one of so great consequence.

By the statute of 1621, cap. 31. the possession ‘ of a ploughgate of land in ‘ heritage,’ is declared to give an exclusive title to hunt; which however would have been mockery, if the person so qualified had been confined in the exercise of his right to the narrow limits of his own property.

The last of the game laws passed by the Parliament of Scotland, is the statute of 1707, cap. 13. which contains this enactment, ‘ That no fowler, or any other ‘ person whatsoever, shall come within any heritor's ground, without leave ‘ asked and given by the heritor, with setting dogs and nets, for killing fowls ‘ by nets;’ an enactment which plainly supposes that in other cases no such allowance is necessary, because in persons qualified, hunting is then a matter of right.

Thus the idea of the Scottish legislature is apparent, and in conformity to it has always been the general sense of the country. Nor can a single instance be pointed out, where the pursuing or killing of game, in open or uninclosed grounds, has been found by any court of law to be a trespass in qualified persons. In the case of Watson of Saughton *contra* the Earl of Errol, No 2. p. 4991., an interdict was indeed pronounced, prohibiting the latter to hunt within the inclosures, or upon the ground of the former, until the issue of the question; but it was never brought to a determination. That of the Marquis of Tweeddale *contra* Dalrymple, No 3. p. 4992. was an action entirely confined to trespassing within inclosures, which shewed the pursuer's sense of the right, in respect of the grounds that lay open.

The pursuer therefore had no more right to prohibit the defender from hunting in his muirs, than he would have had to forbid the entrance there of the officers of the law engaged in the pursuit of a criminal, or of the people of the neighbourhood in the act of destroying a mad dog, a fox, or other noxious animals, Colquhoun *contra* Buchanan, No 5. p. 4997.

Answered; Exclusive possession is implied in the very nature of property. In all cases therefore where no servitude has been constituted, or statutory restraint imposed, and where the public safety does not interfere, a man has the same right to exclude all others from access to his landed property, that he has to debar them from entering into his house, or from using his furniture or clothes.

Nor because animals *feræ naturæ* belong to the occupier, does it follow, that any person is entitled to pursue or kill them on the grounds of another. This obvious distinction is noticed in the Roman law. *Non est consentaneum*, says a Roman lawyer, *ut per aliena prædia, invitis dominis, aucupium faciatis*, l. 16. ff. de servitut. præd. rust. Vid. etiam Inst. lib. 2. tit. 1. § 12.—l. 3. ff. de acquir. rer. dom. In the law of Scotland it is not less clear. Lord Stair, speaking of the killing of game, adds, 'From which the fiar may debar others indirectly, 'by hindering them to come upon his ground,' b. 2. tit. 3. § 76. So also Craig, lib. 2. dieg. 8. § 13.; Bankton, b. 2. tit. 1. § 2.; Erskine, b. 2. tit. 6. § 6. No 6.

The first authority appealed to by the defender, entitled, 'The manner of 'holding baron-courts,' as it appears from the observations of Skene, subjoined to his treatise *de verborum significatione*, is of very doubtful authenticity, and deserving of little regard.

With respect to the statutes that have been quoted, the argument founded on them is sufficiently obviated by the principle, that a common law-right is never taken away by implication. But there is not here any thing of that tendency even implied. It is not unusual to protect common-law rights by additional sanctions or penalties; of which the acts of 1474, against the robbing of dovecotes and the like,—of 1503, against slaying salmon in forbidden time,—of 1587, against destroying plough-graith in time of tillage, and houghing oxen in time of harvest,—of 1661, 1685, and 1686, against the breaking down of inclosures,—and of 1698, and 1st George I. against the destroying of growing timber, are examples. The superadding then of such sanctions as occur in the above-mentioned statute of Robert III. and in acts 1474 and 1555, is not in any case evidence, that no right previously existed at common law. Of course, it affords as little proof of the want of a common-law right in similar or analogous cases.

In the latest enactment indeed that was mentioned, that of 1707, a prohibition without a penalty occurs as to a particular method of killing game. But the object of this law seems to have been, to make a distinction between that and the ordinary or fair modes of fowling; so that though a *non repugnantia* merely on the part of the owner of the ground were to be held in regard to the latter as a sufficient indication of consent, a special or express 'leave asked and 'given' should be required to justify a practice so destructive as the first mentioned method.

The statutes of 1600 and of 1621 are to be regarded as sumptuary laws, intended to restrain the passion for an expensive amusement among the lower ranks of the people, without discouraging the exercise of it in those of superior condition. Nor is there any inconsistency between the prohibition as to one class of persons, or the permission as to another, and at the same time leaving it to the latter to avail themselves of the privilege, by obtaining from individual proprietors, freedom of access to their grounds.

No 6.

The decisions quoted on the other side are evidently of little importance, if indeed they do not rather support the plea of the pursuer.

The LORD ORDINARY 'assoilzied the defender from the conclusions of the libel of declarator.'

The question was then brought under the consideration of the Court by a reclaiming petition and answers.

Observed on the Bench; The right contended for by the defender is of a very anomalous description, as it may confessedly be annihilated at the pleasure of every proprietor who chooses to interrupt it by a wall or fence.

THE LORDS were unanimous, having no difficulty to decern in the action of declarator.

Lord Ordinary, *Monboddo.* Act. *Rolland et alii.* Alt. *Wight et alii.* Clerk, *Sinclair.*
S. *Fol. Dic. v.* 3. *p.* 248. *Fac. Col. No* 140. *p.* 276.

*** This cause was appealed:

THE HOUSE OF LORDS, 13th April 1791, 'ORDERED, That the appeal be dismissed, and the interlocutors complained of affirmed.'

See APPENDIX.