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yet it had been a familiar idea, upwards of a century ago, that there was such a difference as had been contended for in the present case. In a case reported by Lord Stair, in the year 1681, this distinction was mentioned. I do not take it, that it was there stated as the mere argument from the bar; but I conceive that in this, as in other cases reported by Lord Stair, where a principle adverse to the decision was stated, it was an opinion thrown out by the Court.

"These things considered, and that the judgment gives effect to the intention of the testator, which in equity ought always to be supported as far as it can be done consistently with rules of law, though I feel no conviction,—though my mind inclines to doubt exceedingly, whether the judgment proceeded on safe grounds, yet I own I have not courage to venture upon a reversal, when I am told by a person of such high authority, that the effect of such reversal would be, to put numerous settlements, made even in the course of his own experience, in a situation in which they were not understood by the makers of them to stand. I would therefore have it understood that this consideration alone restrains me, and I would wish that the Court would, in some future case, proper for the purpose, reconsider the principle of their judgment in this case, which, in consequence of this high authority, I think it more safe for the present to let remain unaltered, in the hope that the question may afterwards come again before the Court, to be more maturely settled."

It was therefore

Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *W. Grant, J. Anstruther, Chas. Hope.*

For Respondents, *Wm. Adam, Ad. Gillies, A. Fletcher.*

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JAMES ROBERTSON of Lude, Esq., . . *Appellant;*

HIS GRACE THE DUKE OF ATHOLL, . . *Respondent.*

House of Lords, 2d May, 1798.

PROPERTY—PART AND PERTINENT—SERVITUDE OF PASTURAGE—SUBMISSION.—In a dispute as to the property of certain grazing grounds on the confines of Atholl Forest. Held, (1.) That the property of these grazing grounds belonged to the Duke of Atholl, as part and pertinent of Atholl Forest; but that the servitude of pasturing and grazing sheep, cattle, &c., belonged exclusively to the appellant, (whose barony marched with the Duke's), but subject to the Duke's right of deer hunting thereon. (2.) That when the Duke gave notice of his intention to hunt, the appellant was bound to remove his cattle in order to leave the grounds clear for that purpose. (3.) That the decree arbitral settling these disputes must have effect, and be final.

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This was a suspension and interdict brought by the appellant, to interdict and prohibit the respondent from hunting over certain lands which both parties claimed as their property, situated on the confines of Atholl Forest.

The respondent, in the year 1795, had charged him upon a horning, raised on a decree arbitral, to obtemper and perform the same, in all its clauses, in regard to the respective rights of the parties as ascertained therein, in regard to these lands; whereupon the appellant brought a suspension of that charge, and made the following statements in regard to his right to the grazing or pasturing grounds and shealings in question.—That the barony of Lude at one time was totally disconnected with the Atholl family, his ancestors being the vassals of the crown. Thereafter the barony became the property of Mr. Campbell of Glenorchy, and was by him again conveyed to the appellant's ancestors to be held in feu; and in 1666 the *superiority* was acquired by the family of Atholl.—That disputes arose soon after between the Atholl family and that of the appellant, with regard to certain shealings, that is, grounds situated in the remote and mountainous parts of the country, which are used in the summer season only, when the cattle are removed to them, and the keepers erect huts, called shealings or bothies, for temporary accommodation.—That the Atholl family claimed the shealings in question, as parts of the domain or Forest of Atholl—a tract of country which extends about twenty-four miles in length to ten miles in breadth. This was their hunting field, and sufficiently broad, but did not entitle them to encroach on the property of their neighbours.

In order to end these disputes, it appeared, that, of this date, their ancestors had entered into the following agreement:—"That, for removing all differences betwixt them "concerning the shealings, grazings, and pasturage after-"mentioned, and for regulating their respective possessions "thereof for the time to come, have condescended and agreed, "as by these presents the said John Duke of Atholl con-"descends and agrees, that the said John Robertson of "Lude, his heirs and successors, shall, for hereafter have the "shealings of Craggangorm, Aldnaberry, Bienacloick,* Bie-"nahilrig, Byhoallen, Leadnacallad, and Strondias, graz-"ings and pasturage thereof, as the same are limited and

Dec. 5, 1716.

* In the respondents case, Rienacloick, Rienahilrig, Riethocollen.

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" bounded in manner underwritten, (here the boundaries " are described), and that for the grazings of his own and " his tenants' horse, nolt, sheep, and goats allenarly, but no " ways for tilling and labouring; with this provision and " condition, that the said John Robertson and his tenants " shall keep and observe the ordinary time of going to and " coming from the shealings with their bestial yearly, that is " observed by the rest of the country in coming and going " to their shealings, and shall not keep any sort of dogs " within the said bounds; and likewise providing, that it shall " be always lawful to his Grace and his successors, or " any others empowered by them, to seize and apprehend " any of the bestial that be found pasturing without the " bound foresaid here condescended upon, as any other " bestial uses to be taken within the forest of Atholl; and " providing likewise, that nothing herein contained is to " hinder and prejudice his Grace and his foresaids in their " right of hunting on the said grazings and shealings, as he " and his predecessors have been in use to do anytime here- " tofore. Likeas, on the other part, the said John Robert- " son, by these presents, passes from all claim or pretence " he has unto the shealings of Renagoy and Braedandearg, " with the grazings and pasturage of the same in all time " coming; and obliges himself, his heirs and successors, to " pay to his Grace and his foresaids yearly, two sufficient " wedders for each of the said shealings of Craggangorm, " Aldnaherry, Bienalock, Renahilrig, Rethoiollan, Leadna- " callad, and Strondias, being in whole fourteen wedders, " and that at the term of Lammas yearly, beginning the first " year's payment thereof at Lammas next, and so forth at " the said term, in all time coming; and whenever his Grace " intends to hunt upon the grazings and shealings foresaid, " the said John Robertson obliges himself and his foresaids, " upon due advertisement given him, to remove his own " and tenants' bestial therefrom, eight days off before the " hunting begins; but prejudice to him nevertheless, after " the hunting is over, of bringing back to the said grazings " and shealings their said bestial to pasturage and graze " thereon, during the ordinary time before mentioned."

It was alleged that nothing explicit appeared as to the right of property in this agreement; but the appellant contended that a right of property was to be implied in him, from the expressions, that he was *to have them thereafter.* He further stated that this agreement had been entered into by the then

proprietor of Lude, while committed for high treason, and under the charge of the Atholl family, and was granted by fear and by coercion. He also founded on the acts of Geo. the First, c. 54, for the more effectual securing the peace of the Highlands of Scotland, declaring that all clauses in charters or agreements, whereby personal services of hosting, hunting, and watching and warding, are agreed to be payable, are done away with, and a certain sum of money ordered to be paid in lieu thereof. He stated, that his obligation of personal service to remove his cattle, and leave the grounds free to the respondent for the purpose of hunting, was, by that act, rendered null and void.

It was further stated that he, in the year 1760, had entered into a submission of their respective rights with the late Duke of Atholl, whereby they referred to the final sentence and decree arbitral to be given and pronounced. "All and sundry questions, claims, and differences standing "between them to John Mackenzie, Esq., W.S."

It further appeared, that, under this submission, the arbiter had pronounced a decree arbitral, finding, 1. The above contract or agreement of 1716 "to be a subsisting and effectual deed, "binding on both parties and their heirs, for regulating the "respective rights and interests of the seven shealings or graz-"ings in all time coming. 2. That the property of the said "seven shealings, (subject to the servitudes after mentioned), "did, and does belong to the said James Duke of Atholl and "his foresaids, as part and pertinent of their forest grounds of "Beneglo, &c., which are parts and pertinents of the Forest "of Atholl. 3. That James Robertson of Lude, and his "heirs and successors, have the sole right and servitude of "shealing and pasturage of and upon the seven shealings, "whereof the right of property is hereby ascertained to be in "the said Duke of Atholl, and that for the purpose of grazing "and pasturing of the said James Robertson and his tenants, "their horses, nolt, sheep, goats, milk cows, oxen, bulls, stots, "&c., but that they cannot take other peoples cattle to pas-"ture thereon. And that the Duke cannot hurt or prejudice "the said right of servitude, by grazing or pasturing his own "cattle, but has right to hunt thereon, as in the said contract, "giving notice to Mr. Robertson to clear the grounds of his "cattle for that purpose."

June 18, 1761.

Matters remained in this posture until 1791, when the respondent gave the appellant notice, eight days before, of his intention to hunt on these grounds, so that he might remove his cattle therefrom. The appellant declined to com-

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ply with this request, and brought a suspension and interdict. Interim interdict was granted, and the bill allowed to be answered. No answers were lodged; and the matter lay over in this state until the charge given on the horning in 1795, when the present suspension and interdict was brought.

Dec. 1, 1795.

The Lord Ordinary "repelled the reasons of suspension; "Finds the letters orderly proceeded in terms of the decreet "arbitral charged upon, and decerns accordingly." And, on repeated representations, the Lord Ordinary adhered.

A reclaiming petition having been brought, in which the appellant contended that it would be extremely hard if his right to these grazing grounds was to be subject to a course of hunting whenever the Duke pleased. That such a right, exercised even more than once in a year, would be tantamount to destroying the right of pasturage altogether. That even if exercised once in every year, it must entail heavy expense upon the appellant and his tenants, and that the Duke's past possession or exercise of this right had never been according to this measure of his right, but only at long intervals.

Whereupon his Grace's counsel gave in this minute, "Mr. "Charles Hope, for the Duke of Atholl, represented, that "though the Duke's right of deer hunting was unlimited, "yet he had never exercised it in an emulous manner, and, "to avoid every supposition that it might be so exercised in "future, he, as counsel for his Grace, did agree that Mr. "Robertson's sheep, cattle, and bestial, should not be re-"moved from the pasture, in order to said deer hunting, "oftener than once in every year or season, and should be no "longer kept from the pasture than eight days at a time, "exclusive of the eight days they are to be removed pre-"vious to such hunting commencing."

The following interlocutor was thereupon pronounced:

Jan. 31, 1798.

"The Lords having advised the petition, and answers thereto, "and the foregoing minute, find that the decreet arbitral in "question was a legal and valid transaction, and must have "effect; reserving to all parties concerned the right of "complaining, if any attempt shall be made to exercise the "privileges therein specified in any oppressive manner, or "contrary to the act 1 Geo. I. c. 54. Find that the right "of hunting, as explained and restricted by the said minute, "is not contrary to the statute, and therefore find the let-"ters orderly proceeded, and decern."

A further concession having been conceded to the appel-

Feb. 20, 1798.

lant, the Court again pronounced this interlocutor: "Of con-

" sent, find that Mr. Robertson's sheep, cattle, and bestial, " shall not be removed from the pasture in any year, sooner " than eight days immediately preceding the 1st September " yearly, when the hunting may commence, and not sooner; " and, with this variation, adhere to their former interlocu- " tor reclaimed against, and refuse the desire of the peti- " tion."

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

*Pleaded for the Appellant.*—The obligation alleged to be incumbent on the appellant, to remove his cattle from the pastures when the noble respondent desires it, even if it were legal, cannot be enforced in the way attempted, to which the Court has given its sanction by the decree appealed from. That obligation was created by, and still rests on the instrument or contract 1716. The award of 1761 makes no order upon the subject, but only says, " That the " right of pasturage shall be exercised, without prejudice to " the Duke's causing Mr. Robertson and his tenants remove " their cattle when a deer hunting is intended, in terms of the " contract." It seems perfectly evident, therefore, that the respondent, to attain his object, must proceed upon that contract, and not upon the award. But, neglecting the suspension and interdict obtained in 1791, and without any previous notice given in terms of the contract 1716, the respondent has chosen to proceed by charging the appellant upon the award of 1761, to perform generally what is thereby incumbent upon him, and to pay the penalty as for nonperformance, and the Court finds the letters orderly proceeded, that is, that the charge given, though explained to relate to a matter *out of the award*, is regular, the consequence of which is, that the appellant must do whatever the respondent desires, or go to gaol. He submits that the respondent ought to have proceeded by way of a regular action laid on a breach of performance alleged, which in the course of the action must be proved. It is impossible that the appellant can be compelled actually to remove his cattle, and it is equally impossible that he can force his tenants to remove theirs, which shows the erroneous nature of the present proceeding. If the appellant is under a legal obligation, and does not perform after notice, the respondent may summon him for damages, but not otherwise. 2. If the rights and interests of the parties in the soil or property, and in the use of the lands in question can be inquired into

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at present, they must be taken as explained or ascertained by the alleged contract 1716, and the decree arbitral 1761, the parties not having brought any reduction of those instruments. The dominium or property is declared to be in the respondent, but the substantial and exclusive beneficial interest is adjudged to be in the appellant as *a right of servitude.* Strange and anomalous as this must appear to be to every person acquainted with the tenures and mode of conveyancing in Scotland, and still more strange, when a servitude of hunting in favour of the respondent is found to be ingrafted on the servitude of pasturage—showing thus a servitude upon a servitude; yet things must be considered as on this footing; and the question is, Whether the obligation on the appellant to remove his sheep, &c. from the pastures whenever the respondent signifies his intention to hunt upon the shealings, and to keep them off while the hunting lasts, is legal, or can or ought to be enforced? 3. Such obligation, if binding, is contrary to and made null by the act Geo. I. c. 54, which abolished personal services of this nature. 4. The question must now be judged of without regard to the respondent's concessions, or the modifications of the Court below. 5. Besides, the obligation is against the common law, and such as courts of law cannot and ought not to enforce. It amounts to this, that a large tract of country shall be laid waste and diverted from all useful purposes at the pleasure of the respondent, perhaps half a dozen times in the year—a hardship to which the appellant ought not to be subjected.

*Pleaded for the Respondent.*—1. The right of hunting over the grounds in question is ascertained to belong to the respondent, by the solemn conventional agreements alluded to. The contract 1716 and decree arbitral 1761, in which the property of the grounds in question is declared to belong to the respondent; and the limited right of servitude of pasturage confirmed to the appellant, expressly declare that this servitude shall, among other things, be burdened with the respondent's right of hunting; and these deeds, so explicit, and remaining in full force and effect, foreclose all question on the subject. 2. The statute alluded to has no bearing upon the question, having reference to the assembling of the clans in the Highlands. 3. The respondent's concessions to the appellant have been ill requited, by the present vexatious and frivolous appeal.

After hearing counsel,

The LORD CHANCELLOR LOUGHBOROUGH said,

"My Lords,

"This case, on the part of the appellant, appears to me to be the most frivolous and litigious that I recollect to have seen in this House; though I am sorry to say that your Lordships have had occasion to determine upon several litigious appeals, in the course of the last and of the present Session of Parliament.

"The object of the present appeal is sufficiently obvious, though it is by no means what the printed papers profess it to be. The facts are these:—The appellant's family, for a long tract of time, have enjoyed a grant or right of pasturage over lands, the property of the respondent's family. This right has been acknowledged on the part of the respondent's family; but subject, as is declared by a contract entered into between the parties in 1716, to a right of hunting on the part of the latter. By this contract, it is clearly ascertained that the family of Lude had merely a *servitude* of pasturage; they thereby disclaimed the right of property. It would be a contradiction in terms to say that a person had a right of servitude upon his own lands.

"For some time after the date of this contract, no dispute took place with regard to the right of hunting; in fact it was not exercised; and, from non-usage, a question was raised of the existence of it. A reference was thereupon entered into, to Mr. Mackenzie of Delvin, a gentleman of great note and eminence in the profession of the law, and well acquainted with the matter in dispute, being the neighbour of both parties. He made an award, confirming the contract 1716, and settling several particulars, which by it were left loose and undefined; and then again the matter for a considerable time rested.

"Though totally inapplicable to the present cause, the appellant has made a statement, that the property of the lands over which, by the contract 1716, the servitude of pasturage is declared, belonged anciently to his family, but had been wrested from them by the tyranny of the respondent's family. He has gravely introduced into the cause a story, that, after the rebellion 1715, a brother of the then proprietor of Lude had been committed for treason to the custody of the then Duke of Atholl, and that the Duke had, by coercion, on account of this person, compelled Mr. Robertson of Lude to enter into the contract 1716. But of this not a shadow of evidence was attempted to be brought.

"Previous to the commencement of the proceedings which gave rise to this cause, various contraventions are stated to have been committed by the appellant, such as keeping swine, and shooting upon the premises. In point of fact, there were contraventions of the contract, but it was said that the guns were kept to kill foxes. At last the respondent gives notice to the appellant that he meant to hunt upon the shealings, and desires him to make

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the grounds clear for that purpose, in compliance with the award. To this the appellant gave a direct refusal, and a disclaimer of the award.

"The appellant, therefore, applied to the Court of Session for an interdict to prevent the enforcing of the award, which he obtained, and this measure was acquiesced in by the respondent, and so that step of proceeding fell to the ground.

"The respondent afterwards gave the appellant a charge to fulfil the decreet arbitral, a mode of proceeding which, though unknown in this country, has been long established in the courts of law in Scotland. In the case of intermixed or clashing rights between different parties, the Court of Session will interfere to declare and define their several rights, which the courts of law here would not do, but would wait till an action for trespass were brought by some of the parties.

1 Geo. I. c. 54.

"To this charge Mr. Robertson took a most frivolous, and indeed ridiculous defence;—namely, that by an act of Parliament for the public policy of the kingdom, made to prevent the gathering of large bodies of people together, to the number of three or four hundred, for hunting and other purposes, which had been found very dangerous to the national safety, the right of hunting claimed by the Duke was abolished. This is totally different from the rights thereby abolished, for which satisfaction was directed to be given to the proprietors of them, under the inspection of the Court of Session. Is it possible seriously to maintain that any common exercise of this right of hunting, on the part of the Duke, without calling out the country, can be deemed to be contrary to this act of Parliament?

"It was further argued by the appellant, that this right might be exercised invidiously. This could only have been in two ways, by giving vexatious notices to clear the ground, which were not acted upon, or by continuing upon the ground for a length of time that would be destructive of the right of pasturage. In both these cases I have no doubt the appellant would have had a good ground of action; and, in the last of them, to support this defence, it must be further supposed that the Duke would persevere in this laborious exercise on the same spot for the great part of the summer.

"But, to do away all objection on these heads, the counsel for the respondent reduced his right of hunting to as small a scale as it could be supposed to exist on:—and, in consequence of such restriction, the Court pronounced the interlocutors appealed from.

"Though it be obviously contrary to the terms of the contract and award, and indeed a manifest contradiction in terms, the appel lant has still distinctly stated to your Lordships, that the property of the premises is in him. All that the Court has done appears to me to be completely favourable to the appellant; the right of hunting was fixed by the decree in a manner so as hardly to be felt by him. I am at a loss, therefore, to conceive what could have induced him to challenge it; but it seems to be of a piece with the most unwarrantable charge that he has brought against the Atholl family;

or devised for the purpose of obscuring the right of property in the premises, if the decrees should be reversed.

"I therefore submit that the appellant, by his vexatious conduct, has called upon your Lordships that some costs should be given against him, to mark your opinion of it. If the situation of the parties had been different, it would have been proper to go a greater length; but, as it is, I must move that the decree be affirmed, and that the appellant do pay to the respondent the sum of £100 for his costs."

It was accordingly

Ordered and adjudged that the appeal be dismissed, and that the interlocutors be affirmed, with £100 costs.

For the Appellant, *Sir John Scott*, *W. Grant*.
For the Respondent, *Wm. Adam*, *Wm. Tait*.

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(M. 5597.)

MAJOR ALEXANDER KYDE, in the East India Company's Service, . . . *Appellant*;

JOHN DAVIDSON, Trustee of Mrs. LINDSEY, Heiress at Law of Colonel Kyde, &c., *Respondents*.

House of Lords, 16th May 1798.

WILL—HERITABLE BONDS—HERITABLE OR MOVEABLE.—An officer in India, and in the East India Company's service, remitted home to his attorneys in England, two sums of £2500 and £3000, with instructions to lay out the same in landed security. This was done accordingly, and the bonds taken in their name in trust for him. Sometime afterwards, he, being then still in India, made a will appointing trustees, and, after leaving several legacies, bequeathed the residue to the appellant. Mrs. Lindsey, as his heiress at law, having claimed the heritable bonds, which no will could carry. Held her entitled to these.

Colonel Kyde being in India, in the East India Co.'s service, remitted certain sums of money to his attorneys in Great Britain, with instructions to lay out the same *in land security*. In June 1780 £2500 of this money was, in terms of his instructions, invested in heritable security over estates in Forfar, Scotland, the rights being conceived in favour of the attorneys, *in trust for behoof of Colonel Kyde*. In 1786 the attorneys laid out £3000 more on an assignation to an heritable security and debt over the same estate.

In 1793 Colonel Kyde, still in India, made his *will*, ap-