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FARQUHARSON v. THE EARL OF ABOYNE.

[Fac. Coll. vol. xviii., p. 10; and Ross' Land Rights, vol. i., p. 44.]

ARCHIBALD FARQUHARSON, Esq. of Finzean, *Appellant*;
GEORGE, EARL OF ABOYNE, . . *Respondent.*

House of Lords, 22d April 1818.

CHARTER—TENENDAS CLAUSE—RIGHT OF HUNTING AND FOWLING—DECREE-ARBITRAL.—A party claimed a right of hunting and fowling in the forest of Birse, on two grounds, 1st, That he had, in virtue of his titles, such an interest in the forest, as to carry along with it the accessory right of hunting and fowling. 2d, By express grant, he alleged such right had been conferred on him over the whole forest. Held (1) That the express grant which mentioned hunting and fowling was inept, as being disconform to its warrant. (2), That this mention of such a right was merely in the *tenendas* clause of the charter, but such, without also being mentioned in the dispositive clause, could not give a valid right. And (3), That such a right could not be included within the clause *cum pertinentibus*, as it did not partake of that character, nor was it a natural incident to the right ascertained to belong to the appellant. Affirmed.

The lands of Brass or Birse, had been conveyed by William the Lion, in 1170, to the Bishop and See of Aberdeen, together with the forest of Brass or Birse.

The bishop had, from time to time, granted feu rights of these lands, sometimes with the express right of pasturage in the forest of Brass or Birse, and sometimes with the power and faculty of appropriating and cultivating the same.

Many of these feu rights came afterwards to be vested in the appellant. In particular, he stated that his titles to the lands
1543. of Ennochies and Easter Cluny, were derived directly from the bishop by his predecessors, and were conveyed in the dispositive clause, thus: "Omnes et singulas terras nostras de En-
" nochies et Easter Clune, cum pendiculis et pertinentibus infra
" schyram nostram de Brass vicecomitatem de Aberdeen."

By the *tenendas* clause of this conveyance, it bore to be granted to be held "cum aucupationibus venationibus, pisca-
" tionibus, necnon cum communi pastura libroque introitu et
" exitu et cum liberate et facultate terras non cultas arandi
" lucrandi et appropriandi." The charter of 1559 in regard
" to his other lands, was conceived in the same terms.

What the appellant contended was, that by these feu charters there was conveyed to the vassals the right of appro-

priating such parts of the forests of Birse and Glenaven as he chose to cultivate, and that this clause, although in the *tenendas*, was quite sufficient to convey this right. 1818.

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Further, his lands of Balfadye and Cragbeg, were in like manner feued out by the bishop to Gordon of Cluny, and he disponed them in 1574, to Patrick Gardyne, to whom the bishop granted a charter in the following terms:—"Omnes "et singulas terras de Balfedie et Cragheg, cum earum pen- "diculis et pertinentiis cum communi pastura in forestis de "Brass, Glenfechan et Glenaven, et per singulas erundem "partes ut Auchinspittal, Auchenbreck, Boigiesheil, Grene- "hillock, ceterasq' earum partes prius cultas in domibus "ædificiis et terris arabilibus ac etiam per prius nunquam "cultas tam non nominatis," &c. 1574.

In the tenendas clause of this charter, the lands were conveyed to be held "per omnes rectas metas suas antiquas et divi- "sas prout jacent in longitudine et latitudine in domibus ædi- "ficiis bocis planis moris maresiis viis semitis aquis stagnis rivu- "lis pratis pascuis et pasturis molendinis multuris et eorum "sequelis, *aucupationibus et venationibus per predictas nostras* "*et per forestas de Brass prenominatas et singulas eorum partes* "*suprascript, piscationibus per aquam de Dee adjacen* pe- "tariis turbariis carbonibus carbonariis lignis lapicidiis lapide "et calce silvis nemoribus et virgultis cuniculis conicularis "columbis columbariis fabrilibus brasinis brueriis genestis "&c., *absque tamen prejudicio litere ballivatus nobili et potenti* "*domino Georgio comiti de Huntlie Domino Gordoun de Bade-* "*noch* suisque hæredibus antea concess' *cum potestate terras* "*non cultas arandi lucrandi et appropriandi* ac cum omnibus "aliis et singulis libertatibus," &c., "cum pendiculis et per- "tinen' cum commini pastura in forestes an tedictis," &c. 1708.

These lands having been acquired by the appellant's ancestor, were created into the barony of Finzean in 1708.

Under these charters and feu rights, now vested in the appellant, he now claimed, in the present action, a right of hunting and fowling over the forest of Birse; and of fishing in the river Dee, and alleged that he and his predecessors had enjoyed the possession of this privilege, without interruption, from the date of the grant in 1574.

On the other hand, the respondent had a conveyance by Gordon of Cluny to his predecessors, dated 2d December 1636, conveying "all and haill the forest of Brass (Birse), upon every "side of the water of Feugh, comprehending the lands after "specified" (Here the whole lands are named), "with all

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" and sundry houses, biggings, yards, tofts, crofts, outsets, " insets, mosses, moors, meadows, commonty, common pas- " turage within the same, and with like commonty and " common pasturage to the tenants and occupiers of the " said lands of Cranna and Haughspittal, in the forests of " Glenaven and Glencat, &c., sheallings, tenants, tenandries " and services of free tenants, haill woods, bogs shaws, timber, " trees and planting presently growing within the said forests, " parts, pendicles, and pertinents whatsoever, lying within " the parish of Birse, and sheriffdom of Aberdeen: Reser- " vand always to the feuars of Birse, qu'hais right, thereof, " proceeds immediately frae me the said Sir Alexander, " commonty, common pasturage to their bestial, and powers " of bigging shealls and ruives through all the rest of the " forest of Birse, excepting only the said lands of Haugh- " spittal and Cranna, conformed to the said infeftments " granted by the said Sir Alexander to them thereupon; as " also reservand Glenaven and Glencat, disponed to Mr John " Ross, parson, of Birse, and William Mortimer, in Glencat, " respective, conform to their rights made thereanent," &c.

The *property* of the *forest* was thereafter sold to the Earl of Aboyne; and by Crown charter (1676) the absolute property of the forest was conveyed to him " cum officio et juris- " dictione forestriæ infra forestas de Morven, Culblane et " Birse," &c.

The Earl of Aboyne having attempted to make encroachments upon the right of commonty and pasturage acquired by the feuars of Birse, a submission was entered into by him and the appellant, in which a decree-arbitral was pronounced,

1755. finding that " the right of property of the said forest belonged " to the within named Earl of Aboyne, *subject always to the* " *restrictions and servitudes after mentioned*, in favour of the " heritors of the parish of Birse." 2d, The exclusive property of certain parts of the forest called Haughspittal and Cranna, and thirty acres thereto adjoining, lying locally within the bounds before described, belongs to the Earl of Aboyne, free of any servitude. 3d, " We find and declare that the lands " of Auchabreck lie also locally within the bounds of the " said forest; and we find and declare that the 50 Scotch " acres of the said lands of Auchabreck, including the stead- " ing, do belong in exclusive property to the said Francis " Farquharson of Finzean, and his heirs and successors, to " be enjoyed, freed and exempted from all servitudes of " pasturage or other servitudes whatsoever, from the said

" Earl, and other heritors of the said parish of Birse, in all " time coming. 4th, That albeit, the property of the said " whole forest of Birse was originally in the said Charles, " Earl of Aboyne and his authors; yet, notwithstanding " thereof, that the said Francis Farquharson of Finzean, for " his lands and barony of Finzean, and his other lands within " the said parish of Birse, and the whole other heritors, sub- " mitters for their respective properties within the said " parish, have, by virtue of their rights, titles, and evidents, " and of their constant and immemorial use and possession, " prescribed and acquired within the bounds of the said " whole forest (except the lands of Haughspittal and Cranna, " and 30 acres thereto adjoining; and also except 50 acres " of the said lands of Auchabreck, as specially circumscribed " and bounded in manner above mentioned), a perpetual " right of servitude of shealing and pasturage for their cattle, " and casting, winning, and away leading fuel, turf, heather, " feal and divot within and furth of the same, in conjunction " with the tenants of the said Earl of Aboyne's lands of " Kirkton of Birse, and the half of Torfinlachie, lying also " within the said parish. And we find the said servitudes do " exhaust the superficial use of the said whole forest, excepting ' the said lands of Haughspittal and Cranna, as aforesaid."

This decree-arbitral, the appellant maintained, did not include the claim now made by him to a right of hunting and fowling in the said forest of Birse, but ascertained his right of property and interest in the same.

The pleas in law which the appellant maintained, were, therefore, 1st, That he had, in virtue of his titles, such an interest in the forest as to carry along with it the accessorial right of hunting and fowling over it; and 2d, That he had vested in him by these titles, an express grant of the right or privilege of hunting and fowling in the said forest of Birse. It was answered, that the respondent had vested in him by his superior right, a twofold title of *property* and *forestry*. In virtue of the former, he was entitled to prevent all from hunting and fowling in his forest. In virtue of the latter, he was entitled to exclude all others from hunting and fowling; and that the rights of property and forestry were in no way altered or affected by the decree-arbitral in 1755.

The Lord Ordinary (Meadowbank), after several interlocutors to the same purport, pronounced this interlocutor:—

" Finds that the franchise or liberty and privilege of hunting and fowling in the forest of Birse, is not a prædial ser- Nov. 18. 1812.

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" vitude, nor entitled to the legal characters thereof. Finds, " further, that it cannot be maintained as incident or per- " tinent of the particular rights specified in the decree-arbi- " tral, as belonging to Finzean in that forest, and, *quoad* " *ultra*, takes the case to report, and ordains information to " be boxed in fourteen days."*

* Note by the Lord Ordinary :—

" The Lord Ordinary is quite convinced that a right of hunting " and fowling cannot be a prædial servitude, ubi prædium servit " prædio. The argument, on this point, in Lord Aboyne's obser- " vations on Mr Farquharson's additional memorial, appears to " the Lord Ordinary equally acute and solid; and in the same " manner as the right in question could be no ways serviceable " to the dominant tenement, or the occupation under that right, " be any measure of the extent of subject acquired, so may it also " be observed, that the recognized way in which the right is " exercised, where friends and neighbours that have a taste for " the amusement exercise it for generations, while the owners " utterly neglect it, would long ere now have rendered the right " an object of such universal acquisition, if capable of it as a " servitude, that a reciprocity of right to the sports of the field, " would long ere now have been established over Scotland.

" The Lord Ordinary also retains his former opinion, that the " right, as declared by the decreet-arbitral, cannot be converted, " in legal construction, into such a right of property, that the " franchise of hunting and fowling can be ascribed as incident to " it. He is very ready to believe that the arbiters had something " afloat in their heads, which would have induced them to declare " a proper *jus superficiei*, had they understood how to form a clear " conception of the thing. We want the name, which the Ger- " mans have, but we have the substance of such a right. A " feudal grant of an estate, reserving all minerals of every de- " scription from a few feet, say five or ten feet under the surface, " with a liberty of access, is a good feudal grant, and confers an " estate to be valued in the cess books, and confers all qualifications " of landed property; and this is correctly a *jus superficiei* only. " But the arbiters, instead of conferring this in commonty, or " anything legally like this, have contemplated only the ordinary " rights of servitude, as sufficiently adequate to their purpose; " and though, in conferring them they declare, 'and thus the " 'superficial uses of the soil are exhausted,' can courts rectify " this incorrect apprehension of the arbiters, and bestow a *jus* " *superficiei*, where they, in express terms, confer only servitudes? " It is thought, that in construing titles, Courts are bound to " follow the views of the persons who frame them, and that they

Lord Meadowbank had, by a previous interlocutor, found that the appellant had no right of common property, but only rights of servitude in the forest. The case in this declarator at the Earl's instance came then before the Court on these informations, directed to the discussion of two points: 1st, Whether the appellant had a right of hunting under his titles and alleged possession? 2d, If he had, was it virtually cut down by the decree-arbitral?

The Court, of this date, found, "That the defender has May 26, 1813.
"not produced a sufficient title for conferring a right to the
"franchise in question; and, therefore, in the declarator

"must not assume the power of transmitting titles from one class
"of rights to a superior, although they may conjecture that those
"persons, if better advised, might probably have done so. This,
"indeed, would be to amend rather than to interpret; and, though
"in forming a construction, and weighing evidence, Courts
"must often content themselves with probabilities, and even in
"construing titles, must, under a general uncertainty, adopt what
"appears most probable; still it is thought, that when they have
"clear technical expressions to interpret, they can never be
"justified to make these bend to mere probabilities of what might
"have been done, but what was not done.

"Still, however, there seems to remain some room for discus-
"sion. A franchise of fowling in the forest has been admitted
"as belonging to Mr Innes's neighbouring property, Whether
"admitted *per incuriam* (as is said) or not, the existence of it, as
"a legal right, has been recognised by the final interlocutor of
"this Division, and the Ordinary does not see any reason to
"doubt the validity of such a franchise. As the Crown might
"create and confer rights of forestry, privileges within these, may
"be conferred heritably on adjoining properties. Two questions
"therefore, arise; first, Had Mr Farquharson, under his titles
"and inveterate possession by gamekeepers (as alleged), a right
"to such a franchise? Second, If he had, does not the decree-
"arbitral cut it down virtually by the limited sort of rights which
"it recognised, although neither the parties, nor the arbiters,
"appear to have paid any attention to the rights of hunting and
"fowling, and the enjoyment of that right among all the parties,
"appears to have remained on the same footing, subsequent to
"the decree-arbitral as before it? If the parties incline, the
"Ordinary will take the cause to report, with a view to this
"point, but he is not disposed to give so much credit to the other
"two points, as to extend the report to them also, which, indeed,
"he thinks would tend to distract the attention of the Court from
"that point, where it appears to him there is any real difficulty."

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" repel the defences, and decern in terms of the libel; and " in the suspension, suspend the letters *simpliciter*, and decern " accordingly, but find no expenses due."

Nov. 16, 1814. On advising another reclaiming petition, the Court adhered.* The cause went back to the Lord Ordinary, on the representation formerly given in against the interlocutor, finding that the franchise of hunting or fowling, was not a

Nov. 25, 1814. Jan. 27, 1815. Feb. 9, 1815. prædial servitude. His Lordship refused two representations on this point. And, on reclaiming petition, the Court adhered.

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

Pleaded for the Appellant.—The right of the respondent over the surface of the forest of Birse, is not greater than that of the appellant, and, therefore, is not such as can entitle him to exclude the appellant from any use of the surface which he claims himself. By the ancient titles of the appellant, his right in it is that of common property, and by the decree-arbitral, 1755, the superficial use of the forest is declared to be exhausted by the rights of the parties' submitters, which, so far as regards it, are declared to be equal.

2d, The property in the mines and minerals cannot give any right to the superficial use of the forest, and can only entitle the proprietor of these to exclude all others from the use of the mines and minerals; but cannot entitle him to exclude a person having an equal right with him in the surface, from making a use of that surface which he claims as his own privilege, but from which he seeks to debar the other. Besides, the appellant has, by express grant from the proprietor of the forest, a right of hunting and fowling in this forest; and in a question with any person deriving right subsequently from the proprietor, this grant must be effectual, more especially when, as in this case, prior rights are expressly reserved in the subsequent grant. Nor is it any objection that this express grant only appears in the tenendas clause of his charter, because various important privileges were formerly conveyed in the *tenendas* clause of charters; and these were effectual when contained in charters flowing not from the Crown, but from subjects; more especially if the grant be made for a valuable consideration, as was the case here.

3d, A charter by progress is understood to include every

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* For opinions of the judges in the Court of Session, *vide* Fac. Coll., vol. xviii., p. 17.

right and privilege contained in the original charter, unless it be expressly altered; and, therefore, the words *aucupationibus venationibus*, in the modern charters, are just the abbreviated and equivalent form of expression for *aucupationibus et venationibus per forestas de Bras prænominatas et singulas earum partes.*

The appellant is expressly infeft in the barony of Finzean, comprehending, among other lands, Balfadye and Cragbeg, "*cum omnibus et singulis partibus, pendiculis, privilegiis et* "*pertinentiis, omnium dictarum terrarum.*" One of the privileges in which he is thus infeft is, the *privilegium et facultas aucupandi et venandi infra forestas de Birse.*

Pleaded for the Respondent.—1st, The respondent, as being proprietor of the forest, both by his title-deeds and by the express terms of the decree-arbitral of 1755, and being vested also with the office and jurisdiction of forestry, has the only good and exclusive right to hunt and shoot in the forest, unless the appellant can show a joint or common right of property therein, or feudal grant of hunting and fowling proceeding from one, who himself had a legal right to confer such grant.

2d, The appellant has shown no right of joint or common property in the forest. Neither has he shown any express grant of hunting or fowling in any of his titles, ancient or modern. The expression "*cum communitate,*" which the appellant would interpret into a common or joint right of property, is well known to mean nothing more than the *servitude* of commonty or common pasturage. And the other clause, "*cum venationibus, aucupationibus,*" refers only to hunting and fowling upon the grantee's own lands, not upon the lands of third parties. It is no answer to this to say, that the charter in 1574 of Balfadye and Cragbeg, contains a right to hunting and fowling, not only through these lands, but also "per forestas de Birse," because the mention there of such, seems to have proceeded from mistake, and is inept, it being disconform to the terms of the *resignation*, which does not mention hunting and fowling, and which formed its only warrant, and consequently the clause was not repeated in the subsequent renewal of the investitures of those lands from 1574, down to the present time. But the clause founded on by the appellant in this charter, and in all the other titles to which he refers, appears only in the *tenendas* clause, and, therefore, is wholly incompetent to confer such right over the property of a third party.

Separately, the intention of the arbitration and meaning

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of the decree-arbitral, was to settle every existing right of the parties *inter se*, and it must therefore be held to extinguish the present claim. The more especially so, when it is considered, that by the express terms of that decree it is instructed, that the appellant has a right to certain servitudes over the forest, and nothing more; these being the ordinary servitudes of pasturage, fuel, peat, and divot. The right of hunting or fowling is not a prædial servitude; it has nothing in it analogous to such servitude; neither is it a pertinent of any of the rights specified in the decree-arbitral, as belonging to the appellant.

After hearing counsel,

LORD CHANCELLOR (ELDON) said,

"My Lords,*

"This is a case which turns on what is termed the *tenendas* clause in a very ancient charter. The appellant complains that the Court has not given full effect to the claim he makes under this title.

"All the judges of the Court below agree in this, that, in regard to all matters conveyed in a charter, you are to look at the dispositive, and not at the *tenendas* clause; and that if such matters are not included in the dispositive clause, or fall naturally under it *as pars ejusdem rei*, they are not carried to the disponee, by being mentioned in the tenendas clause.

"It appears to be unquestionable, that this is the modern doctrine of the law of Scotland. By modern, I mean the doctrine of the law, as far as the same can be discovered from the books, and writers on the Scotch law.

"Lord Meadowbank, a judge of much research, differed from the other judges. He said, that in very ancient times, rights of property were conveyed by the tenendas clauses of charters, which were not noticed in the dispositive clauses; that usage had followed upon these, and that if you were to apply the modern doctrine of the law to such cases, you might disturb many rights depending upon such charters.

"Many ancient charters were produced, in which it was stated that rights of property were conveyed by the tenendas clause; and it was said that many more such rights might be produced. The natural way of proceeding in a case like this would be to agree, that such was the modern meaning of charters, but to inquire, if such was also the meaning of every ancient charter; and I thought at one time it might be right to remit the cause to see if Lord Meadowbank's doctrine on these ancient charters was well founded or not.

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* From Mr Gurney's short-hand notes.

"I take occasion here to say, that I never have been active in remitting questions arising on appeals from Scotland for further consideration from any other cause than this, to seek for further information from those sources from which it may be got.

"I have a disinclination to these remits. I know they are in all cases expensive; I see, too, that they are sometimes misunderstood, and your Lordships will probably have occasion to see before this session concludes, that they are sometimes not very respectfully treated.

"I do not mean that your Lordships should decide this appeal to-day, but that it should stand over till the second cause day after the ensuing recess. I shall, in the meantime, endeavour to obtain information on the point to which I have alluded, when such information can with propriety be asked for.

"If I were to decide to-day, I should move to remit this cause; but I deem it better to adjourn further consideration till the second cause day after Easter, to give time to consider, whether there should be a remit or not."

On 22d April 1818, *Case Resumed.*

"My Lords, your Lordships will recollect, that this is a question as to what is the effect to be given to the mention in the *tenendas* clause of a subject different from the property conveyed by the dispositive clause, and that the judges of the Court of Session, by a large majority (only one individual, indeed, dissenting), thought that a gift only in the *tenendas* clause could not be sustained. A judge, lately dead, of great eminence entertained a doubt, whether there could not be a grant of a separate subject by the *tenendas* clause of an ancient Scottish instrument. I stated to your Lordships, when I last addressed you on this subject, that I should make inquiries into that point; and I have not failed to do so. I do not mean to say that in no case the gift of a subject in the *tenendas* will not enlarge the gift in the dispositive clause; but in this case, it is my opinion, that, laying aside altogether the consideration of the decreet-arbitral (which alone might, perhaps, dispose of the question) the expressions in the tenendas clause could not operate to extend the property conveyed by the dispositive clause.

"This being my opinion, I must move your Lordships to affirm the judgment of the Court below."

It was ordered and adjudged, that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Mat. Ross, John Clerk, J. H. Forbes, W. G. Adam.*

For the Respondents, *Sir Saml. Romilly, Thos. W. Baird, Fra. Horner.*