No 4.

Nor can the act 1685 be set in opposition to this statute. That temporary enactment, for its endurance, seems to have been limited to seven years, required not only the qualification of L. 1000, but a license from the masters of the game. These masters of the game have long since ceased to exist; nor have any others been appointed in their stead; and therefore, as it will be acknowledged that this law has either wholly preserved or wholly lost its authority, it follows, that the latter is the truth; its regulations so far being evidently nugatory. Accordingly the statute 1707, c. 5. prohibits only a common fowler to hunt on any ground when he has not a subscribed warrant from the proprietor of the ground, without distinguishing the extent of the property or qualification 'of any nobleman or heritor' who is such proprietor; only it is to be presumed, that by the term heritor, according to the sense of the act 1621, is there meant a person possessed of a ploughgate of land in heritage.

The judgment of the COURT was, 'That, by the common law of Scotland, all men have right and privilege of the game on their own estates or property; that, by the act 1621, this right and privilege, or qualification, was confined to persons who had a ploughgate of land or more of property; that the act 1685 ratified and confirmed the general rule laid down in the said act 1621, but introduced a new regulation respecting the particular mode of hunting with fowling-pieces and setting-dogs, under an exception to those possessed of L. 1000 Scots of valuation, and having license from the masters of the game; that no evidence had been laid before the Court of the said regulation and exemption ever having been in observance since the Union, and that they are now in desuetude: That the appellant having more than a ploughgate of land in property, had a right, and was qualified by the law of Scotland, to hunt, subject to all regulations of the game: That he was not liable to the fines imposed by the act of the 13th of his present Majesty: And therefore they reversed the decree of the Justices of the Peace appealed from; but, in respect of the circumstances of the case, found no expenses due.'

For Appellant, *Blair, R. Dundas,* For Respondent, *G. Fergusson, H Erskine, Tait.*

S. *Fol. Dic. v.* 3. *p.* 249. *Fac. Col.* (APPENDIX.) *No* 87. *p.* 143.

1785. *August* 6. JAMES COLQUHOUN *against* JAMES BUCHANAN, and Others.

No 5.
Distinction between hunting foxes for the purpose of sport, and the pursuit of these animals by farmers for the preserva-

JAMES BUCHANAN, and other farmers his neighbours, having traversed the fields, and gone over the fences belonging to Mr Colquhoun, in pursuit of foxes, were, on a complaint entered by him, found liable by the Sheriff of the county in the penalties annexed, by the statute 1685, to 'the breaking down or filling 'up any ditch, hedge, or dike, whereby ground is inclosed,' and to 'the leaping, or suffering horse, nolt, or sheep, to go over any ditch, hedge, or dike.'

The defenders preferred a bill of advocation, justifying their proceedings as

No 5. tion of their flocks. The farmers were found entitled to enter inclosures.

necessary for the protection of their sheep; when, in support of the judgment of the Sheriff, Mr Colquhoun

Pleaded; It is now a fixed point, that landed gentlemen, qualified to hunt, may not, even in the pursuit of foxes, or other noxious animals, enter the inclosures of any proprietor without his consent, Marquis of Tweeddale *contra* Hugh Dalrymple and Others, No 3. p. 4992. The security of owners of land, in the undisturbed and exclusive use of their property, was justly deemed more essentially connected with the general welfare, than the destruction of foxes, though accomplished by men to whom it had been permitted by the legislature as an amusement, and who, at the same time, were possessed of a fortune sufficient to insure an indemnification to those whose grounds they might occasionally injure. It cannot then be imagined that a distinction is to be made in favour of the defenders, to the effect of encouraging idleness and dissipation in the lower ranks, and of affording to them a pretence of breaking into inclosures, and committing damage which they are utterly unable to repair. Indeed, to obviate a distinction apparently so inconsistent with the genius of our law, it would be sufficient to observe, that the statute on which the defenders have been condemned, is general, and admits not an exception from motives of utility, in favour of any class of men whatever.

Answered; The statute 1685 was not made to convert the acts therein specified, into delinquencies in every case, but to restrain, by an additional sanction, such proceedings as were before punishable as trespasses at common law. In no case, therefore, can the penalties be due, where the entry into the ground, or breaking into the inclosures, though not permitted by the owner, is yet in its own nature lawful, or even merely justifiable. Hence they could not be demanded from one who, in pursuing a mad dog or a thief, had entered the lands of another, whether inclosed or not. And to the same principle must be referred the custom of extirpating foxes in the manner here followed, as has been immemorially done in those parts of Scotland where the employment of the inhabitants consists in rearing sheep, or other animals liable to be destroyed by foxes. It is indeed so clearly grounded in natural reason, as to be observed even among those European nations where, besides the prohibition arising from the rights of landed proprietors, the animals known under the denomination of game, are protected as a part of the royal prerogative, or exclusively appropriated to persons of the highest rank. Perezius, lib. 11. tit. 44.; Blackstone, book 3. chap. 12.

It seemed to be admitted by the defenders, that they were obliged to repair any damage occasioned by them; and by the pursuer, that his inclosures had not been hurt at this time.

The Lord Ordinary sustained the reasons of advocation, and found expenses due. After advising a reclaiming petition for Mr Colquhoun, with answers for

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-