(*Court of Justiciary.*)

1780. *June* 27. JOHN KELLY *against* JOHN SMITH.

No 4.
The only qualification now subsisting, for the killing of game, is that of a ploughgate of land in heritage, by act 1621.

A COMPLAINT was presented to the Justices of the Peace for Ayrshire, in the name of Kelly, huntsman to a gentleman of that county, against Mr Smith, an officer in the army, and proprietor of a small estate in the said county, setting forth, that the latter had incurred the penalties and forfeitures of the statute, the 13th of his present Majesty, entitled, 'An act for the more effectual preservation of the game in that part of Great Britain called Scotland,' and enacting, 'That every person whatsoever not qualified to kill game in Scotland, 'who shall have in his or their custody, or carry at any time in the year, upon 'any pretence whatever, any hares, partridges, pheasants, moor-fowls, ptarmi-'gan, heath-fowl, snipe, or quail, without the leave or order of a person quali-'fied to kill game in Scotland, for carrying such hares or other game, and for 'having the same in his or their custody, he shall for the first offence forfeit 'and pay the sum of 20s. and for every other subsequent offence the sum of '30s. Sterling.'

The Justices having on this statute given sentence against Smith, he appealed from their judgment to the ensuing Circuit-court of Justiciary for the district. The Judge however on that circuit, (Lord Hailes), considering the question as unprecedented before the supreme Courts, certified it to the High Court of Justiciary at Edinburgh; who ordered, that the cause should be pleaded in their presence; and afterwards, that the argument upon it should be stated in informations.

Kelly, who was respondent in the appeal, enforced his complaint in the following manner: The maxim of the Roman law, *Res nullius cedunt occupanti*, is not received in this nor in any other country where the feudal system has prevailed. By that constitution there can exist no *res nullius* within the territory of a state; its maxim being, that such things as otherwise would be *res nullius*, become the property of the Sovereign: *Res nullius sunt Domini Regis; Consuet. Feud. lib.* 2.; *Reg. Mag. lib.* 4. Hence, in particular, game of all kinds are *inter regalia:* For as, by the Roman law, they were *res nullius*, so neither under the feudal governments was it ever understood that the right to them could be comprehended in the private property of lands. Having then no other proprietor, they necessarily *cedunt Domino Regi.* This rule being derived to us from a source which is common to almost all the states of Europe, is, with respect to Saxony, supported by the authority of Struvius, in his *Syntagma, ad tit. D. de A. R. D.*; of Voet. *ad eund. tit.* as to Holland: and of Burn, vol. 1. tit. GAME, p. 218.; and Blackstone, vol. 2. 413. 415. 418. respecting England. The *Leges Forest. cap.* 17. § 2. shew the prevalence of the principle in Scotland; and hence have proceeded the many interpositions of our legislature in regulat-

No 4. ing the game, such as Stat. Rob. III. c. 10.;—1424, c. 36.; 1457, c. 88.; 1474, c. 60.

In this manner it is evident that, without a special right or qualification flowing from the Sovereign or State, no man is entitled to kill game in this country, notwithstanding his being possessed of landed property.

Our legislature from time to time have granted such qualifications by general laws; but the only one which now subsists is that introduced by act 1685, c. 20. and thus expressed, 'Considering that setting-dogs, and other engines 'for killing of fowl, is a great cause of the scarcity of game, we do hereby pro-'hibit and discharge all persons to have or use setting-dogs, unless he be an 'heritor of L. 1000 of valued rent, and have the express license of the masters 'of our game within their several bounds, under the pain of 500 merks *toties* '*quoties*, in case of failzie: And we do hereby discharge all common fowlers, 'and shooters of fowls, or any other persons, except they be domestic servants 'to noblemen or gentlemen who are heritors of L. 1000 of valued rent, to have 'or make use of setting-dogs or fowling-pieces, under the pain of escheat of 'such dogs or guns, and imprisonment of their persons for the space of six 'weeks, *toties quoties*.' This enactment evidently repeals the act 1621, if that statute be understood as importing any qualification.

Answered by the appellant; It does not appear that the maxim of the feudal law now referred to was ever, in this country particularly, applicable to game. Foreign authorities are resorted to in vain, while our own are express against that idea; Craig, lib. 1. dieg. 16. § 38.; Stair, b. 2. tit. 3. § 69. If that maxim could be applied to hunting, it would certainly be no less applicable to fishing. But why then are salmon-fishings alone *inter regalia?* If it applied to hunting, why is the right of killing swans in particular noticed by Lord Stair as a *regale?* and why by our old law were those severe penalties mentioned in the *Leges Forestarum* confined to the killing of deer? Indeed, in that ancient collection, cap. 17. the otherwise unlimited right of hunting is explicitly acknowledged.

The idea therefore of the several qualifications required by the legislature for exercising this common right, as if they were of the nature of special or peculiar grants, is plainly erroneous. They are truly regulations of public police, introduced for the general benefit of the community; and the only question now to be determined is, whether those of the act 1621, or those of 1685, are at this day in observance? Prior to the year 1600, our legislature, by various enactments, regulated indeed the manner in which the right of killing game was to be exercised, but made no distinction of persons, as entitled or not entitled to that favourite sport. The act, cap. 23. of that year, excluded from it 'sik as 'by their revenues could not bear the chargings and burdings of the halks, 'hounds, and dogs, requisite in sik pastymes.' And in the same spirit the statute 1621,, c. 31. proceeded to reduce this indefinite description to a more precise and determinate standard, by ordaining, 'That na man hunt nor haulk 'at any time hereafter, who hath not a plough of land in heritage, under the 'pain of one hundred pounds.'

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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