1819.

ALEXANDER v. MARK, &c.

Poor JOHN ALEXANDER, . . . *Appellant;*

WILLIAM MARK of Markston, and JOHN MACKIE, ... *Respondents.*

House of Lords, 7th April 1819.

SERVICE—PROPINQUITY.—Circumstances in which the appellant failed to establish his preferable right to succeed and be served heir to the deceased Quinten Alexander.

The respondents having been served as nearest and lawful heirs to Quinten Alexander by a general service obtained before the Magistrates of Canongate, the appellant brought a reduction of that service, stating his propinquity to the said Quinten Alexander, and alleging that he was a nearer heir than the respondents.

After a long proof was led, the Court sustained the defences stated for the respondents, and dismissed the appellant's action.

Mar. 11, 1809.
Feb. 10, 1810.

Against these interlocutors the present appeal was brought, stating chiefly the facts and circumstances disclosed in proof on both sides; and commenting upon some written documents adduced for the appellant, which bore intrinsic evidence of forgery. The House of Lords affirmed the judgment of the Court of Session.

For the Appellant, *Sir Saml. Romilly, Fra. Horner, John Cuninghame.*

For the Respondents, *John Leach, Geo. Cranstoun, Adam Duff.*

[Fac. Coll. Vol. xvii., p. 384.]

1819.

THE EARL OF ABOYNE. v. INNES.

The EARL OF ABOYNE, ... *Appellant;*

LEWIS INNES, Esq., ... *Respondent.*

House of Lords, 10th July 1819.

RIGHT OF FOWLING—IMMEMORIAL POSSESSION—SERVITUDE.—The respondent claimed a right of fowling in the forest of Birse, belonging to the appellant, and which was conveyed to him along with his lands as a privilege thereto belonging. He had also immemorially possessed and exercised this right, and had given permission to friends to fowl. The appellant had the whole property of the forest vested in him, besides the office of forester, and attempted to reduce the respondent's right. Held

that there was a right of fowling vested in the respondent, and that he might give permission to his qualified tenants, friends, or visitors to shoot thereon. Opinion that a judicial admission in the summons, that there was such right, was effectual in law to establish it.

This case was of the same nature as the case between the appellant and Mr Farquharson, reported *ante* p. 380.

The respondent, Mr Innes, however, claimed his right of hunting and fowling in the forest of Birse, under a conveyance to him of his lands, "cum privilegio et libertate aucupandi, piscandi, ac cum communi pastura in forestis nostris de Birse, Glencat, Glenavon, et Lendrum," &c. Since his infeftment in this form in 1681, the same rights and privileges had been regularly repeated and expressed in all his subsequent titles.

This, however, did not satisfy the appellant, who brought an action of declarator against Mr Innes, at the sametime that he brought the action against Mr Farquharson. It appeared, that both actions had gone on together, for the interlocutors of the Lord Ordinary (Meadowbank) which disposed of Mr Farquharson's case, contained this finding in May 12, 1809. regard to the present: "And with regard to Lewis Innes, "in respect of the admission by the Earl in his summons, "that Mr Innes has a right of fowling and hunting over the "forests of Birse and Glencat; and in respect that this privi- "lege implies, from the very nature of it, a right to commu- "nicate the same to friends, gamekeepers, and assistants, when "conferred without an express restriction in that respect: "finds the letters orderly proceeded in the suspension, and "sustains the defences in the declarator, and decerns."*

The Earl in a representation made an effort to retract his admission as to the right of fowling, but the Lord Ordinary adhered; and in a reclaiming petition to the Court, the judges of the Second Division pronounced this interlocutor: Dec. 19, 1809. "Refuse the petition, and adhere to the interlocutor reclaimed "against, in so far as it finds that Lewis Innes has a right of "fowling, or *privilegium et liberatem* aucupandi, over the "forest of Birse and Glencat; but recall the interlocutor, in

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* Lord Ordinary's Note:—

"I have only to add, that I should have construed Mr Innes' "grant of hunting very differently, had it not been for a judicial "admission, against which I do not think the Earl can be re- "poned."

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THE EARL OF ABOYNE. v. INNES.

"so far as it finds he has a right of hunting, and remit to "the Lord Ordinary to hear parties as to the extent of his "privilege, and particularly, whether it is communicable, as "in the case of the ordinary right or franchise of hunting "and fowling."

The respondent stated, that with respect to the right of *hunting*, as contradistinguished from *fowling*, it was not of the slightest consequence to him, whether he should be found entitled to exercise it or not, because, for many ages past, the only kind of sport furnished by the grounds in question, had consisted in the seizure of winged game, and he had granted permission to some of his tenants on his lands to hunt and fowl for these.

The extent of the respondent's right having thus been remitted to the Lord Ordinary, the respondent pleaded that the right ought to be liberally construed—that the right of seizing and killing wild animals had been common to all, without exception in the earliest period of mankind—that no positive institution existed in the nations of antiquity abridging this right. In the Roman law, it was declared

Inst. l. ii. t. 1, § 12. "feræ bestiæ et volucres, et omnia animalia quæ mari, cœlo "et terra nascuntur, simul atque ab aliquo capta fuerint, "jure gentium statim illius esse incipiunt: Quod enim nul-"lius est, id naturali ratione occupanti conceditur." It is

Ibid. indeed, declared, in the same law, that a person shall not hunt on his neighbour's grounds; but the power of the proprietor to exclude intruders, was necessarily inherent in the right of property, and was by no means founded on any notion connected with the preservation of game.

Even on the principles of the ancient forest laws, the right must be favourably construed, because the origin and object of the forest laws was to preserve a cover for the deer, and to provide venison. And even, supposing the forest of Birse still retained its legal character, and privilege as such it must follow, that the respondent truly enjoys a right of *forestry* therein, including even *vert and venison*, or, at least, such as now frequents the ground. That the right of fowling in the forest of Birse was by no means a *servitude* merely, as the appellant contends, but is a right of property. Nor is it what he also alleges it to be, a *personal privilege*, for that would reduce it to a personal servitude, which is a right unknown in our law. The respondent contended that he had, from the general words used in his title-deeds, a right of killing wild fowl in the manner most convenient and beneficial

to himself; and that he had from time immemorial exercised that right, and is consequently entitled to found *on immemorial usage* as the best interpreter of the extent of his right.

The Lord Ordinary (Meadowbank) pronounced this interlocutor: "Having considered these interchanged memorials "and condescendences for the Earl of Aboyne, pursuer, and "Lewis Innes, Esq., defender; and observing that the usage "alleged by Mr Innes, prior and subsequent to the decreet-"arbitral 1755, is not controverted by the Earl: Finds, that "the liberty and privilege of fowling, conferred by the de-"fender's titles, is *presumptione juris et de jure*, a grant by a "*verus dominus*, effectually burdening the right of property "in the forest of Birse belonging to the pursuer, with the "office and privilege of forester connected therewith: Finds, "that the liberty and privilege so conferred on the defender, "is a franchise, conferred as an heritable right, rendered an "appendage to the property of Tilliesnaught or Ballogie; "and as it affects a district created a royal forest, under the "guardianship of a forester, and appears to be co-ordinate "and co-effective with the rights of the grantee thereof, must "be considered as a franchise, entitled, as far as it goes, to "the benefit of such an establishment, and to a fair and "liberal construction as to the exercise thereof, according "to use and wont: Finds, that the said privileges may be "lawfully exercised by the defender personally, or by his "gamekeeper, duly authorized for that purpose, or by any "qualified friends whom he may permit, whether his tenants "on Ballogie or not, or whether the defender may be per-"sonally present or not; but always in such a way and man-"ner as not to be abusively exercised or encroach unreason-"ably on, or absorb the general right of fowling as well as "hunting, belonging to the pursuer, over the said forest; and "decerns and declares accordingly. And as the case has "been very ably and learnedly argued in a manner which "does honour to the counsel on both sides, dispenses with "any representation."*

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* Note by the Lord Ordinary:—

"The point not being before the Lord Ordinary, he does not think himself entitled to decide it. But he doubts of the competency of granting to the tenant of Ballogie in a manner not recallable for abuse, a permission to shoot. Such a permission, if exercised in a certain way, may be destructive to the game of the forest, yet could not be recalled by Mr Innes, nor easily regulated

1819.

THE EARL OF ABOYNE *v.* INNES.

May 25, 1813. June 22, 1813.

On reclaiming petition to the Court, the Court refused the prayer of this petition, and adhered to the interlocuters reclaimed against.

On presenting a second reclaiming petition the same was unanimously refused, "in respect that any abusive exercise "of the defender's right is sufficiently guarded against by the "interlocutor of the Lord Ordinary, adhered to by the "Court."*

The appellant presented another reclaiming petition, having reference to a supposed ambiguity in the Lord Ordinary's interlocutor in regard to the word "qualified," used in reference to his power to grant permission to others. The Court remitted to the Lord Ordinary to hear parties on that point. The Lord Ordinary (Meadowbank) pronounced this interlocutor:

Nov. 12, 1813.

"Having considered the petition for Lewis Innes "and remit by the Court, and having heard counsel, and "advised the minutes of debate since put in, and recollecting "distinctly his own meaning by the term 'qualified,' in the "interlocutor of the 13th November 1812, was to avoid "giving any appearance of sanction to the fowling of persons "as assistants, friends, or visitors, who had not taken out "licenses as gamekeepers, or as otherwise entitled to shoot, "and by no means any restricted technical sense of being "qualified under any one statute, or under even statutes "hitherto enacted in contradistinction to statutes that here-"after may be enacted, and being of opinion that the legal "construction of the import of this term is entirely consistent "with the meaning he entertained in pronouncing the inter-"locutor, and that it is competent for this Court to declare "that legal construction after, as well as before, the lapse of "the reclaiming days: Finds, that by the expression in the

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by legal interposition; and yet the forester, the Ordinary thinks, might have such ground of complaint, as that Mr Innes ought to recall the permission so abused, were it in his power so to do. If it is conferred by tack, it therefore should be declared subject to the recall for excessive or abusive use."

* Opinions of the judges:—*Vide* Fac. Coll. Lord Meadowbank, in giving his opinion as one of the judges, seems to have altered his original opinion as to the respondent's right, founding it chiefly on his titles and possession, and not on the *admission* in the summons. His Lordship stated, "I think there is a good "right *without the confession;* there is the long usage of the tenant "both before and after the decree-arbitral."

" interlocutor 'any qualified persons whom he may permit,' " whether his tenant at Ballogie or not, is meant any persons " whom the petitioner may permit, that may lawfully exercise " that permission, whether his tenants in Ballogie or not, and " that this is the true construction of the passage of the inter- " locutor in question, and decerns."

Against this interlocutor the appellant reclaimed by petition to the Court, but the Lords adhered. Dec. 7, 1813.

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

After hearing counsel,

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

For the Appellant, *Sir Sml. Romilly, Thos. W. Baird, Fra. Horner.*

For the Respondent, *John Leach, Hugh Lumsden.*

[Fac. Coll., Vol. xix., p. 394.]

WILLIAM MAULE, Esq., great grandson of Dr Henry Maule, Lord Bishop of Cloyne, in the Kingdom of Ireland, and heir-male and representative of the family of Panmure in Scotland, pursuer, . . } *Appellant;*

The Honourable WM. RAMSAY MAULE of Panmure, defender, . . . *Respondent.*

House of Lords, 10th July 1819.

PRESCRIPTION—ENTAIL OF LEASES—DECREE-ARBITRAL—REDUCTION—RES JUDICATA—HOMOLOGATION.—The appellant claimed certain property, as well as leases of property, part of the Panmure estate, settled on him by deeds of entail. The respondent stated that these entails had been held by a decree of the Court in 1782, to be prescribed, and he also founded on a decree-arbitral, wherein these rights were put in issue and finally settled. The appellant brought a reduction of this decree-arbitral, but not of the decree of the Court. The Court of Session repelled the reasons of reduction; and on appeal to the House of Lords, the cause was remitted for reconsideration, and under this remit the Court generally sustained the defences pleaded for the respondent. Reversed in the House of Lords,