1778. *February 25.* GEORGE, MARQUIS of TWEEDDALE, *against* HUGH DALRYMPLE and JOHN NISBET and OTHERS.

GAME.[1]

Hunting within the inclosures of another, against his will, not lawful.

[*Faculty Collection, VIII.* 30; *Dict.* 4,992.]

HAILES. I am sorry for this action, in which persons connected with me are defenders. It would have been better if they had sent an apology to the pursuer, ascribing their trespass to the eagerness of the chace: but, instead of this, they have grown warm, and they have continued warm: the consequence is, that we are called to give a judgment on a very general point,—a thing which the Court would wish to avoid.

I lay the English law out of the question: the English law is the best law in England; and the Scottish law in Scotland. As I do not hear that Lord Stair is quoted in Westminster-hall, I see no reason why Sir William Blackstone should be quoted in the Court of Session. Indeed, the quotation from him will not much illustrate the case; for he begins with saying, that the poor may glean after the reapers, in England: now, the direct contrary is the law with us. And if that paragraph in Blackstone is contrary to our law, why should we expect any illustration of our law from the next paragraph? We have an express statute to walk by,—the Act 1555, which goes directly against the plea of the defenders: this act was revived, and ratified in 1685; and if there was any ambiguity in the word *range*, in the Act 1555, it is removed by the interpretation *hunt*, in the Act 1685. But, indeed, the word *range* is sufficiently clear,—it respects the two chief modes of hunting known in those times,—the driving all the game to one place, and the catching birds in nets: the exempting of inclosures, parks, or hainings from being hunted in, or ranged, was no new thing; for the passage in the Baron Laws, published by Skene, and quoted for the defenders, shows that, in the opinion of that compiler, king's forests and *warrens* were exempted. Now, this is the very thing provided by the statute 1555; for *warren* does not mean, as in modern language, a place for breeding rabbits, but any inclosed, or preserved, or *hained* place for animals of whatever sort. Thus there was a warren for fish, for birds, for animals of other sorts, as may be seen in *Du Cange* and the other glossaries; it is from the Anglo-Saxon *wairen*, which means to *inclose* or *circumscribe*; and, in the language of the Lothians at this day, *wear* means to surround or keep in.

As to the right of following the game into inclosures, if the law allows not entering into inclosures at all, such exception cannot be made. I know that it is difficult to restrain hounds and hunters. But, if hunters cannot restrain their hounds and themselves, they must go somewhere else where the law of the land does not interfere with their sport. Indeed, the defender's argument is somewhat singular: "we drive the fox into an inclosure, and then we must be

at liberty to break down the inclosure, to drive him out again." As to the right of following the fox, considered in the light of a noxious animal, I am not moved with that plea: there are various statutes for destroying birds of prey, such as hawks, rooks, &c. and every one is called to be active in destroying them: yet, if 400 or 500 men should go out of Edinburgh, to the seat of a gentleman who has many rooks' nests on his trees, and should beat down his gates, force their way through his fences, and clamber up to the top of his trees, in order to destroy the rooks' nests, I should consider this as a violent trespass, and not an act done in obedience to the law. Every man ought to assist in destroying noxious animals, but still according to his situation and state, and so as not to violate one statute in following out the spirit of another: when the efforts of individuals are not sufficient to destroy such noxious animals, the interposition of the judges, in their several jurisdictions, is necessary, and, on proper information, will be granted.

GARDENSTON. This cause is not to be judged of according to the original rights of mankind, but according to the rules of law, and especially of our own law. The Roman law is nearer to the purpose; but still it is not our law: we must seek for a decision in the principles of the feudal law. By it, as by the law of England, also, the game belonged to the king. See Burns' *Justice of Peace;* a most intelligent book, though with a modest title. The same is the case with us: hence grants of land contained clauses *cum venationibus aucupationibus.* To this purpose both Craig and Stair speak. After grants of game were made, every man had a right to the game on his own lands; and hence I think that any man may follow the game which he has started, even into his neighbour's ground; for, otherwise, the grant of game would be elusory. But the question is, How far has this general right been limited by common law? Our statutes have limited it. The Act 1621 makes a very moderate restriction to a ploughgate of land; for it held that inferior landholders were not of a station entitling them to costly amusements: A higher qualification, that of L.1000 Scots, was required: what farther has the law done in the way of limiting the right to game? The Act 1555 is the great text in this cause: in it there are *three* restraints. 1. Hunters shall not touch wheat at any time. 2. No other species of grain while growing. 3. Shall not, in pursuit of game, break down fences or enter inclosures. It is said that it is lawful to pursue a fox: our ancestors, if that distinction had been stated to them, would probably have doubted as to its expediency; but, indeed, no such distinction is made.

COVINGTON. This action is peevish, and is contrary to every received opinion in law. Property, however sacred, must yield to public utility. I have always held the proclamations against hunting within certain limits in the highest contempt. Game is not the property of any person: it is in its nature incapable of property. The crown may give a privilege of hunting, but the game is *res nullius.* I may trespass in coming on another man's ground; but still the game, caught or killed, is my property. Every man, not limited or restrained by law, is entitled to kill game on his own ground, and in open ground: *here* the pursuit was in inclosed ground: the defence, that the hunters were in pursuit of a noxious animal raised in another's ground: it is impracticable to prevent dogs from going into inclosures. If it is right to follow a mad dog every where, it is right to follow a fox. The Marquis of Tweeddale is liable in an ac-

tion for sheltering foxes. As to the Act 1555, it prohibits the *beating* for game, not the *following* of game.

Braxfield. I have not much studied the present game law. I would wish to have one general law on the subject, made of *whole cloth*, as the vulgar expression is: some questions of considerable difficulty might arise on the game laws, such as the right of beating up for game in the uninclosed ground of another man, or the following game in such circumstances. But of such questions we are not called to judge. I think that the defenders have no right to enter into the inclosures of the Marquis of Tweedale. This is laid down in the Act 1555; and, independent of it, the Marquis would, at common law, have a right to exclude the defenders. How did matters stand before any positive statute? Wild beasts are *feræ naturæ*, and no man's property: therefore *fiunt primo occupanti*. But, although this was the rule in the civil law, yet, by that law, land was the subject of property: the consequence is, that he who has property may prevent any person from setting his foot upon it. The civil law points out that a proprietor is entitled to hinder any person from coming upon his ground for the purpose of hunting. Even in Scotland, wild beasts, being *feræ naturæ*, were not the property of the crown: any person who kills a wild creature has the property of the creature killed, although, in killing, he may be guilty of a transgression; but then the case will be in Scotland, as in the civil law,—"the land is property, and I may hinder any person from coming into my grounds." Formerly, any man might kill game on his own property, however small. What alteration have the statutes made?—they have limited, not enlarged the right of hunting. I think that no man is entitled, at common law, to beat for game on another man's ground; but the statute 1555 ascertains this with perfect precision. I know not how far the doctrine on the other side may go: doors may be broken open, or park-walls pulled down. I do not distinguish between the case of a fox, a noxious animal, and that of any other animals; the same principle which would entitle one to *follow* a fox would entitle one to *beat* up for him within an inclosure. This, however, is not contended for: this proves that the principle is erroneous. Whenever such noxious animals come to be the object of public attention, the defenders may, in a court of law, complain of the Marquis of Tweeddale for harbouring them.

Kaimes. That matter of the game is one of the most intricate things that is to be found in law. While the country was not improved, hunting hurt nobody: as improvements advanced, the law interposed, not as if doing damage had been lawful before the law interposed. It is said, that the defenders might go into inclosures, *paying damages*: this new. No man can make free with another's property *willingly*, on paying damages: it is only in the case of *accidental* offence that the offer to pay damages is admitted by way of excuse. A man takes off my hat, carries it away, and, sometime after, returns it, saying, "I am willing to pay your damages; what are they?" or, in like manner, he makes me dismount, and uses my horse, and then he says, "there is no harm done; I will indemnify you." This will not do: there is no law for it. There is great public spirit here to drive a fox out of another man's ground: as to following the fox, how do I know that you are following the fox; and how am I to distinguish between a thief and a fox-hunter? If the dogs go in, and the masters stay without, I shall be very ready to find an excuse for the masters.

Alva. Any man that has a right to hunt may go out of his own territory and follow his game into the territories of another; but the going into inclosures is a very different thing. A man, having L.1000 Scots of valued rent, may go into his neighbour's open ground, but not into his inclosures.

Auchinleck. I doubted at first. But when I made the case my own, and figured to myself a number of gentlemen hunting a fox in the midst of my plantations, which have cost me so much money, I saw that it would not go down: *here* there is this aggravation, that the pursuer had notified his resolution not to permit hunting within his inclosures.

Elliock. I am clearly of opinion that no man has a right to set his foot on my ground without my leave; and, therefore, I wish that the conclusions of the declarator had been wider than they are. The civil law is a rule to us, because it is agreeable to common sense. After the fall of the Roman empire, the right of hunting was reserved by the leaders of nations: when lands were granted afterwards, this right was communicated to those persons who had got lands; but it never entered into any man's imagination that he had a right to hunt on another's manor. Can a man say that he has a right to hunt in Annandale because he has an estate in Caithness: no law authorises this. There have been many trials in England, and it has been always held a trespass to go upon another's grounds. It often happens, that, at a fox-chase, all parks are laid open; but this is of consent, not of right: the law is not made against dogs and horses, but against men: dogs and horses, without the will of their masters, may chance to overleap inclosures: in such cases the masters will not be censurable.

Justice-Clerk. For some centuries it has been the great object of the legislature with us to encourage inclosing and whatever goes under the general name of *policy*. Opposed to that, there is a right of hunting. I am at no loss to determine *which* is the pre-eminent right. The statute 1555, having hunting in its view, enacts a prohibition as to the mode of hunting, in express words. The word *range* cannot be limited to the beating up for game; and no hunter ever understood it in that sense: the statute 1555 has not gone into desuetude; for, in the very last of our statutes, where the matter of game was taken into consideration, and in a statute calculated to extend the rights of the great, in the statute 1685, the statute 1555 is ratified in the fullest sense. As to the law of England, I am little concerned when I see the law laid down in our own statute-book; but I suspect that that law differs not much from ours. If the defences here pleaded are good, the consequences will be dreadful; and the most valuable property may be violently (*effractione*,) invaded.

On the 25th February 1778, "The Lords repelled the defences, and found the defenders liable in damages and expenses."

Act. A. Murray, Ilay Campbell. *Alt*. Charles Brown, E. M'Cormick, A. Crosbie.

Reporter, Auchinleck. Hearing in presence.

Diss. Covington; Westhall did not vote.