1814.

ROBERTSON v. THE DUKE OF ATHOLL, &C.

3. The deed of entail and relative parts of Alexander Welsh's settlement were recognized by William Welsh, and homologated and approved of by him, in such a manner as to cut off all pretence of prescription having commenced, until infeftment was obtained on the foresaid charter of adjudication, 1793.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,

"This was an appeal to your Lordships in the cause of Welsh *v.* Maxwell. Upon the best examination I have been able to give to the subject, and the principles to be applied to the consideration of the case, if none of your Lordships should be of a different opinion, it appears to me the judgment in the case ought to be affirmed." *

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

For Appellants, . *William Adam, David Cathcart.*
For Respondent, *Sir Saml. Romilly, Thos. W. Baird.*

NOTE.—Mr Napier, in his Commentaries on Prescription, has some excellent remarks on this case.

(Driving Deer from Common.)

MAJOR-GENERAL ROBERTSON of Lude, - - *Appellant.*

THE DUKE OF ATHOLL and DUNCAN ROBERTSON, sometime his Tenant, - - - *Respondents.*

House of Lords, 1st December 1814.

COMMONTY—RIGHTS OF DO.—The Common of Glentilt and Glenfender belonged in common to the Duke of Atholl and General Robertson, and was let to small farmers as pasture lands, for pasturing cattle, &c. The Duke's forests were in the neighbourhood, and the question arose, whether the Duke had right to give orders to his tenants to drive the deer off the Common, to the prejudice of General Robertson's right of hunting and killing the deer on the Common?—Held that the Duke might do so.

The respondent, the Duke of Atholl, stands heritably infeft "in toto et integro comitatu de Atholl, &c., cum libera fores-

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* From Mr Gurney's Short-hand Notes.

tria de Benchrombie, omnibusque alliis liberis forestriis dict. Comitatus, officio forestriæ, et priviligiis ejusd."

Of the forests in which the respondent, the Duke, and his ancestors, had been thus infeft, the lands or forest called Benyglo, Benvurich, and Tarff, form a part; and between that part of the forest ground called Benyglo on the east, and a part of it called Glentilt on the west, there is interjected a stripe of ground extending from north to south, about three or four miles in length, and above half a mile in breadth, which is called the Common of Glentilt and Glenfender. This stripe of ground called Glentilt and Glenfender has, for time immemorial, been possessed as a common property, and used, as was alleged by the noble respondent, for pasturing sheep and cattle by the family of Atholl, and that of Robertson of Lude. The noble respondent further stated, that about thirty different farms belonging both to the family of Atholl, and also to the family of Lude, had always enjoyed servitudes of pasturage and fuel, peat and divot, on the said commonty. From a plan exhibited, he also showed that the interest of the appellant was trifling, compared to what his was in the common. He also stated that he had given his small farmers, who had rights of pasturage on this common, instructions to drive the deer from the common back to the forest, and that Duncan Robertson, the other respondent, who was the Duke's tenant, had received instructions from the Duke, so to drive away the deer from the common.

The appellant, on his part, stated, that in virtue of their common right in this common, each of the proprietors, that is, the Duke and the appellant himself, was entitled to hunt and kill the deer, and all other wild animals resorting to the common, and this privilege, which is inherent in their right of property, can neither be lost *non utendo*, nor abridged by the more extensive exercise of it on the part of the other proprietor. The Duke of Atholl, therefore, could not, as was here done, arrogate to himself the right of driving away the deer from the common in order to send them to his own neighbouring forests, and thereby destroy the appellant's right of sport and of killing the game.

It was admitted by Duncan Robertson, that from Autumn 1803 he had turned off the deer which were trespassing on his farm of Fassacharie, and the common which adjoined to it, and on which he had a right of pasturage. He also stated, that if a tenant required any authority to prevent the pasture, for which he paid a *bona fide* rent, from being depastured by

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other cattle, or by wild animals, *most assuredly* he had that authority from the Duke.

These were the respective statements of parties, in a complaint brought by the appellant, before the Sheriff. The Sheriff dismissed the complaint, stating that, whether Robertson acted as a tenant of the Duke, having a right to pasture on the common, or by the authority of the Duke, as his servant, he was entitled to drive off the deer, to prevent the pasture from being hurt.

The appellant brought this judgment under review of the Court of Session. After various interlocutors, the parties were allowed a proof, chiefly as to the fact of driving off the deer, and whether this applied to the whole common, or only to that portion of it where Duncan Robertson had his right of pasture.

The proof bore very much on this, that the Duke's factor having heard that General Robertson's gamekeeper was in the pratice of killing deer on the common, he gave orders to Duncan Robertson, to be careful in driving the deer from the common into the forest, in order to prevent them from being killed on the common.

Dec. 19, 1809. The Court, after a proof, sustained the defences, and assoilzied the defenders from the whole conclusions of the libel, and decerned.

A reclaiming petition was given in, which was ordered to be answered. In his answers, the Duke admitted, "that the "appellant may kill deer any where. He also admits, that "wild animals have no owner, and may be appropriated by "the first occupant." But, he argued that, by the evidence on both sides, it was clear that the appellant had totally failed in the proof of the allegation, that he and his predecessors were in the immemorial practice of killing deer on the common, and the Court adhered.

May 22, 1810. On appeal to the House of Lords these interlocutors were affirmed.

For the Appellant, *Sir Saml. Romilly*, *John Haggart*, *D. M'Farlane.*

For the Respondents, *Wm. Adam*, *Ar. Fletcher.*