GAME.

1752. *December* 1. GREGORY *against* WEMYSS of Lathockar.

No 1.
Power is not given by any statute for summarily seizing either the person of a common fowler, or his guns and nets.

THE broad lands of Leuchars lying in run-ridge, belong partly to the barony of Leuchars, the property of the York-Buildings Company, and partly to the lands of Earlshall in possession of Wemyss of Lathockar, in right of the heiress his spouse. The barony of Leuchars is under a long tack, to which an infant having right, Mr David Gregory, Professor of mathematics in the University of St Andrews, one of the tutors, was in use to hunt on these lands.

One day Mr Gregory, hunting for partridges in said broad lands, accompanied with Robert Baird the ground-officer of Leuchars, who carried a spare gun to save frequent charging, Mr Wemyss attacked the servant and wrested the gun out of his hands. This produced a process before the Sheriff-depute of Fife, who found, 'That it was unwarrantable in the defender to seize the gun 'libelled, and therefore decerned the gun to be restored, and for expenses of 'process. But in respect it did not appear that the pursuer was entitled to 'hunt, assoilzied from damages.' This cause being removed to the Court of Session by advocation, the defender *urged* this point, That Baird was a common fowler, and that by the act 13, Parliament 1707, the defender was entitled to apprehend Baird, and take his gun from him. The pursuer *denied* that Baird was a common fowler; but, to avoid a proof in a trifling cause, supposing the fact, he betook himself to the relevancy that there is no authority from the act 1707, nor from any statute, to seize or apprehend *via facti* Baird's gun; for 1*mo*, Baird was not in terms of the clause hunting, but only carrying his master's gun. 2*do*, It is only the common fowler's own gun which can be forfeited. 3*tio*, No power given by any statute for a summary seizure, either of the person of a common fowler or of his guns or nets. And the describing an informer as an apprehender, will not bestow a privilege contrary to common law. 4*to*, That by the word apprehender cannot be intended a power of summary seizure, must be clear from this, that if it has such a meaning, it must bestow a power to seize the person of the common fowler as well as his gun, which would be singular and unprecedented.

'THE LORDS repelled the reasons of advocation, and remitted the cause.'

No 1. *N. B.* The act *5to Annæ, cap.* 14, does not support the defender's interpretation of the statute 1707; for it only impowers landlords within their own manor's to take hares, pheasants, &c. from higglers and others who are not qualified to have the same.

Fol. Dic. v. 3. *p.* 248. *Sel. Dec. No* 26. *p.* 29.

*** This case is also reported in the Faculty Collection:

1753. *February* 3.

As Mr Gregory, attended by one Baird, was beating about for game on the lands of Leuchars, Mr Wemyss, a neighbouring heritor, came up and seized the fowling-piece which Baird carried. Gregory *insisted*, before the Sheriff-depute for the county of Fife, that the fowling-piece, as being his property, should be restored to him. The Sheriff found, 'That it was unwarrantable in 'Wemyss to seize the gun libelled; and therefore found him liable in restitu-'tion of it, in as good case as when he took it.'

Wemyss advocated the cause; and *pleaded*, That Baird was a common fowler, and had no licence to shoot from the proprietor of the lands of Leuchars, and therefore that he was within the 13th act, Parliament 1. Queen Ann, which provides, 'That no common fowler shall presume to hunt on any grounds, 'without a subscribed warrant from the proprietors of the said grounds, under 'the penalty of L. 20 Scots, besides forfeiting their dogs, guns, and nets, to 'the apprehenders or discoverers.' That if the forfeiture of the dogs, guns, and nets, mentioned in the statute, had been given only to the discoverer, or other prosecutor who should sue for them in the courts of law, the purpose of the legislature to preserve the game would have been ineffectual; for that if common fowlers (who are generally vagrants, their persons little known, and the places of their abode uncertain) should once escape, it would be difficult to bring them to justice; therefore it is that the legislature, introducing another remedy, at once more summary and more effectual, has permitted their dogs, guns, and nets, to be *brevi manu* apprehended, and thereby forfeited to the apprehenders; agreeable to which interpretation of the statute, the universal practice has been, and no action of damages has ever been brought by any common fowler, whose dogs, guns, or nets, have been so forfeited; from all which, Wemyss subsumed, that he had the authority of law for what he had done.

Pleaded for Gregory; The words of the statute, apprehenders or discoverers, are evidently synonymous terms, and relate to a legal prosecution; were a summary apprehension and forfeiture permitted, the cognizance of the offence would be vested in the person to whom the benefit arising from the penalty would accrue; a regulation so contrary to the genius of law in general cannot be introduced, otherwise than by express statute.

'The Lords repelled the reasons of advocation, and remitted the cause.'

Reporter, *Lord Elchies.* Act. *R. Mackintosh.* Alt. *R. Dundas.*

D. *Fac. Col. No* 58. *p.* 85.

1763. *August* 9.

JAMES WATSON of Saughton, THOMAS CRAIG of Rickerton, JOHN CHRISTIE of Baberton, GEORGE INGLIS of Redhall, and JAMES CARMICHAEL of Hailes, *against* JAMES Earl of ERROL, and the other Noblemen and Gentlemen of the Edinburgh Hunt, and RICHARD VARY their servant.

No 2.
An interdict issued against persons, altho' possessed of the legal qualifications, who had hunted in inclosed grounds, without the permission of of the proprietor.

IN May 1762, a petition and complaint was exhibited to the Sheriff of Edinburgh by the pursuers, with concourse of the fiscal, against Richard Vary huntsman of the Edinburgh pack of hounds, for breaking down and leaping over their hedges and ditches, and riding through sown corn, and for hunting a pack of hounds, which he was not entitled to do; and therefore praying, that he might be discharged to hunt in time coming; that he might be found liable in damages to the complainers; and that he might be fined in the sum of L. 50 Sterling for contempt of the law, &c.

A proof having been taken, the Sheriff found it proven, 'That the defender 'Richard Vary has hunted with a pack of hounds on the grounds belonging to 'the complainers James Watson and James Carmichael of Hailes, after the 'wheat thereon was brierded, and that he once brushed through the hedge of 'an inclosure belonging to the said Mr Carmichael; Found, that the said de-'fender had no right to hunt with the said pack of hounds on the grounds be-'longing to any of the complainers; and therefore prohibited and discharged 'him from hunting thereon in time coming, with certification.' And found the 'defender liable to the said Mr Watson and Mr Carmichael in damages and 'expenses, and modified the same to L. 2 Sterling; as also, fined and amer-'ciated the said defender in L. 5 Sterling, payable to the procurator fiscal of 'Court; and granted warrant to any of the officers of court to apprehend and 'incarcerate the defender in the tolbooth of Edinburgh, the keepers where-'of were ordered to receive and detain him, until he should pay the said two 'sums.'

Against this interlocutor Vary petitioned, setting forth, that he was only a servant; and therefore praying, that procedure might be sisted till the gentlemen of the hunt might be called in the process.

The sheriff upon answers, refused this petition; upon which the Earl of Errol and others raised a suspension; in which they *insisted*, That, by law, they were entitled to hunt where they pleased, and were entitled to keep Vary as their servant to take care of their dogs.

Lord Edgefield Ordinary on the bills reported the same to the Court; upon which the following interlocutor was pronounced:

'THE LORD ORDINARY, after advising with the Lords, passes the bill upon caution, prohibiting and discharging Richard Vary, the Earl of Errol, and others, contributors to the Edinburgh hunt, suspenders, or any in their company, from hunting or pursuing game by themselves, or with horses, within

No 2. the inclosures, or upon the grounds of the chargers or their tenants, and from trespassing upon said inclosures, till such time as this suspension shall be discussed; and that under the penalty of L. 5 Sterling *toties quoties*, to be levied from the suspender, or any of them, conjunctly and severally.'

Reporter, *Edgefield.* Act. *Rae.* Alt. *Burnet.*

J. M. *Fol. Dic. v.* 3. *p.* 248. *Fac. Col. No* 118. *p.* 278

1778. *March* 3.

MARQUIS of TWEEDALE *against* HUGH DALRYMPLE, and Others.

No 3.
No person is entitled to hunt upon the inclosed grounds of another, without the consent of the proprietor.

THE Marquis of Tweedale brought an action against Mr Dalrymple, and others, in which he charged them with having broke into his park of Yester with horses and hounds, either in pursuit of game, or to search for it. The chief object of the action was to have it found and declared, 'That neither 'they, nor any person, has right to hunt game within said inclosures without 'leave of the pursuer.'

The defenders *admitted*, That they were liable for all damages done by them on the grounds of others, in the course of the sport; but *insisted*, that, as they were possessed of the legal qualification, they were entitled to hunt on all grounds without restriction. In support of this defence,

Pleaded for the defenders; Animals *ferœ naturæ* are *res nullius*, and, wherever they are found, every one is equally entitled to acquire a property in them by occupancy. Hunting these animals, therefore, without express enactment in its favour, is free and common to all, in as far as municipal law has not denied or restricted the use of it.

The ancient law of Scotland left the exercise of hunting, without restriction, to the whole inhabitants; M. T. C. B. c. 52. Forrests and warrens are mentioned as exceptions, into which game could not be pursued; and the exception confirms the general rule, that game could be followed on every other property.

Hunting and hawking are favourites of the law, and considered in our ancient statutes as the only lawful method of killing the game. The old acts for preserving the game proceed on this principle.—Guns, bows, and all other methods, are prohibited, act 1551. c. 9.—1555. c. 58.—act 1597. c. 270. And, when killing game by fowling-pieces and pointers was admitted of, yet it was under the severe restrictions of the act 1685. c. 20. But hunting, encouraged by law as a manly exercise, was not denied to those excluded by this statute from fowling. No qualification is at this day necessary to hunting, but that required in the act 1621, c. 31, ratified by the act 1685, c. 20. viz. the having a plow of land in heritage.