

This being so, the moneys of this trust will, under the proposed scheme, in no way go in relief of the ratepayer. It is true that this "School Board has already in operation a secondary department." But the School Board, while it may quite well have such a department in operation, is not, in a fair exercise of its statutory powers, entitled to impose rates for its establishment or its maintenance; nor could it legitimately so administer the establishment, of which the secondary department forms part, as to make a deficit caused by the secondary department fall upon the ratepayers. Accordingly, I think that the amendment of the scheme enables it to escape the just criticism of the reporter.

I may add that the principle to which the reporter refers was only incidentally illustrated in the *Prestonpans* case, but it is of unquestionable soundness. If some educational or charitable purpose be one for which it is lawful to impose rates, or to the accomplishment of which public moneys are already dedicated, then it is plain that to give the money of a charitable trust to that purpose is not to further the purpose which is already provided for, but to relieve the ratepayer or the taxpayer, as the case may be, who is by statute made the debtor in an obligation. The Court, if it were to make such an application of trust money, would, under the guise of promoting a purpose which once depended on charity, be ignoring the facts that by legislation that purpose had passed out of the region of charity into that of obligation on the ratepayers, and that a charity devoted to the recipients of education is misapplied if devoted to the givers of education, whether voluntary or compulsory.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court granted the application as amended, with expenses out of the funds of the trust.

Counsel for the Petitioners—Jameson—
Craigie. Agent—Robert Stewart, S.S.C.

Thursday, March 5.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.]

MARQUIS OF HUNTLY AND OTHERS
v. NICOL.

Res judicata—Regulation of Exercise of Heritable Right—Servitude—Privilegium aucupandi—Admissibility of Opinions to Control Effect of Decree.

The proprietor of the lands of B was infeft "cum privilegio et libertate aucupandi," in the forest of Birse, the property of which was in the proprietor of the lands of A, which were totally independent of the lands of B.

In 1819 the House of Lords affirmed a decision of the Court of Session to the effect that the right of the proprietor of B over the forest of Birse was a heritable right, and that the same might be exercised by the proprietor of B personally, by his gamekeeper, and by any friend to whom he might give permission, whether his tenants on B or not.

The opinions of some of the individual Judges in the Court of Session were inconsistent with the decree pronounced as aforesaid.

In 1858, in an action raised by the proprietor of A to limit the right of the proprietor of B over the forest, the Court of Session found that the question was *res judicata* in respect of the previous decision.

An action having been raised in 1895 by the proprietor of A against the proprietor of B, to have it declared that the right of the latter over the forest was limited in certain respects, and in particular that he might not let the shooting over the forest, or kill game there for the purpose of selling it—*held* (*aff. judgment of Lord Stormonth Darling, Ordinary*) that in terms of the interlocutor affirmed in 1819, the proprietor of B was entitled (1) to let the shooting over the forest, (2) to sell the game shot there, the proprietor of A having no interest in the question of its disposal, and generally that absolutor must be pronounced in respect that the action was not one for regulating the exercise of the heritable right belonging to the proprietor of B, but for raising anew a question already decided.

Question (*per Lord M'Laren*) whether in a question of *res judicata* even the collective opinion of the Court may be referred to for the purpose of controlling or limiting the effect of its decree.

By instrument of sasine dated 1721, Alexander Ross, of Tilliesnaught, now called Ballogie, was infeft in the said lands of Tilliesnaught "cum privilegio et libertate aucupandi et piscandi ac cum communi pastura in forrestis de Bris Glencat Glencaven et Lendrum . . . nec non cum speciali libertate et privilegio scindendi ligna in forresta de Bris conservandi et ædificandi toflas [keeping and bigging sheilds] in eadem forresta ac in forresta de Lendrum pro proprio usu dict Alexandri Ross ejusq prædict et eorum tenen dict terrarum modo solit et consuet per dict Alexandrum Ross ejusq authores et prædecessores."

Certain questions having arisen between the proprietor of the lands of Aboyne, who had a grant of the royal forests of Birse and Glencat, of which he was forester, and the proprietor of Ballogie, with regard to their respective rights over the said forest of Birse, the dispute was referred to arbitration in 1755, and an award was pronounced to the effect that the right of property of the forest belonged to the Earl of Aboyne. The rights of common pasturage

were also dealt with in the award, which, however, contained no finding (for no such claim had been made in the reference) as to a right of shooting in favour of the laird of Ballogie.

In 1797, and for several years afterwards, Mr Innes, the then proprietor of Ballogie, let the house to a friend, along with the privilege of fowling over the forests of Birse and Glencat.

In 1808 the Earl of Aboyne raised an action against Mr Innes to have it declared that he had the only undoubted right of property in the forests of Birse and Glencat, subject only to the restrictions and servitudes specified in the decree-arbitral of 1755, and "subject also to the further personal privilege in favour of Lewis Innes, Esquire, as proprietor of the lands of Tilliesnaught or Ballogie, of shooting wild fowl in the said forests."

On 12th May 1809 Lord Meadowbank found "with regard to Lewis Innes, in respect of the admission by the Earl in his summons that Mr Innes has a right of hunting and fowling over the forests of Birse and Glencat, and in respect that this privilege implies, from the very nature of it, a right to communicate the same to friends, gamekeepers, and assistants, when conferred without an express restriction in that respect, sustains the defences in the declarator" (see F.C., June 22, 1813, p. 385).

The pursuer having reclaimed, the Court adhered with regard to the right of fowling, and remitted to the Lord Ordinary to hear parties as to the extent of Mr Innes's privilege, "and particularly whether it is communicable as the ordinary right or franchise of hunting and fowling."

On 13th November 1812 Lord Meadowbank pronounced the following interlocutor:—"Observing that the usage alleged by Mr Innes prior and subsequent to the decree-arbitral 1755 is not controverted by the Earl, Finds that the liberty and privilege of fowling conferred by the defender's titles is *presumptioe 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, so 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 privilege may lawfully be exercised by the defender personally, or by his gamekeeper duly authorised for that purpose, or by any qualified friends whom he may permit, whether his tenants on Ballogie or not, or whether the defender be personally present or not, but always in such way and manner as not to be abusively exercised or encroach unrea-

sonably 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."

On 25th May 1813 the Court adhered (*Earl of Aboyne v. Innes*, F.C. June 22, 1813), and this judgment was affirmed by the House of Lords on 10th July 1819, 6 Pat. App. 444.

In 1855 the Marquis of Huntly, who had succeeded to the estates of Aboyne, raised an action against James Dyce Nicol, the then proprietor of Ballogie, to have it found and declared that he had the sole and undoubted right of hunting and fowling within the forest of Birse, subject only to any *privilegium aucupandi* which might be established by Mr Nicol, and that such privilege was one personal to Mr Nicol and his successors in Ballogie, and could only be exercised by Mr Nicol personally or by a gamekeeper duly authorised by him, and that Mr Nicol, by granting undue authority to strangers and others to shoot, and by killing or employing others to kill game for sale, had been guilty of molesting and disturbing pursuer in the enjoyment of his lands.

The pursuer contended that in deciding the former case Lord Meadowbank had proceeded on a judicial admission by the proprietor of Aboyne, which he averred had been inadvertently and erroneously made by the proprietor's agents. The Court, however, sustained the defender's plea of *res judicata* on the ground *inter alia* that on a review of the procedure it appeared that the decision of the Court had been arrived at, not on the admission referred to, but on a construction of parties' titles—*Marquis of Huntly v. Nicol*, Jan. 9, 1858, 20 D. 374, 30 S.J. 211.

Thereafter the Marquis of Huntly and Mr Nicol entered into an agreement for referring the determination of their respective rights to arbitration. The reference never took place, and an *interim* division of the forest for shooting purposes was entered into by agreement between the parties in 1858, which was from time to time renewed, and which was acted upon down to 1894 or thereby.

In attempting to adjust a new deed of submission differences arose between the parties, and in 1895 the present Marquis of Huntly and his trustees raised this action against William Edward Nicol of Ballogie.

The action concluded for declarator "that the *privilegium et libertas aucupandi*, or privilege and franchise of fowling which the defender possesses under his titles to the estate of Tilliesnaught or Ballogie, is a privilege or franchise personal to the defender as proprietor of the said estate, and to his successors therein, and that it can only be exercised (1) by himself, as proprietor foresaid, and his successors foresaid, personally; (2) by his or their gamekeepers and assistant gamekeepers shooting under his or their orders for the supply of his or their house of Ballogie; and (3) by his or their friends to whom he or they may have given permission, whether such friends are tenants in the house and lands of Ballogie, or are unconnected with the said estate;

and further, that it can only be exercised by the defender and his foreshaids in such a way and manner as not to encroach unreasonably upon the pursuers' said rights: That the defender and his successors in the said estate are not entitled, in the exercise of said privilege or franchise, (1) to kill, by himself or themselves, or by his or their gamekeepers or assistant gamekeepers, or by his or their friends foreshaid, game for sale either privately or in open market; or (2) to exercise the said privilege or franchise personally, and at the same time communicate the same to his or their friends foreshaid not accompanied by himself or themselves; or (3) to communicate the same to more than one friend foreshaid at one and the same time; or (4) to lease or otherwise transfer for hire or for valuable consideration in money or money's worth the said privilege or franchise either to his or their friends foreshaid, or to strangers not being tenants of the house and lands of Ballogie; or (5) to lease or otherwise transfer for hire or for valuable consideration in money or money's worth the said privilege or franchise either to his or their friends foreshaid or to strangers being tenants of the house and lands of Ballogie, or otherwise to include the said privilege or franchise in any lease of the house and lands of Ballogie as a pertinent thereof, or as a part and pertinent of the subject let; or at least (6) that he and they are not entitled to lease or otherwise transfer for hire the said privilege or franchise, and at the same time to exercise the same personally; or (7) to lease or otherwise transfer for hire the said privilege or franchise to more than one tenant at one and the same time: Or otherwise, that the defender is only entitled to exercise said privilege or franchise of shooting in such way and manner and subject to such conditions and under such limitations and regulations as our said Lords may, on consideration hereof and of the process to follow hereon, fix and determine."

The pursuers pleaded—"(1) The defender having no right of shooting under his titles, his right is to be construed in terms of the judgments of the Courts condescended on. (2) In terms of said judgments, the defender's right of shooting can only be exercised by himself, his servants, gamekeepers, and friends. (3) The defender is only entitled to exercise the said right by way of sporting, and is not entitled to exercise it for profit, and, *separatim*, cannot communicate or let it to others for profit."

The defender averred "that his right of fowling is, and has been finally declared to be, co-ordinate and co-effective with any right on the part of the pursuers, and that he is entitled to let his sporting rights in said forests, along with one or other of the mansion-houses on the estate of Ballogie; but he does not maintain any right, nor has he any desire or intention, to encroach unreasonably on the pursuers' rights."

The defender pleaded, *inter alia*—"(2) *Res judicata* in respect of the said proceedings. . . . (4) The defender ought to be assoilzied, in respect that under his titles,

and in accordance with the judgments referred to on record, he has sporting rights and privileges in said forests co-ordinate and co-effective with those of the pursuer. (5) The defender being entitled to exercise his said rights, either by himself personally or by his keepers, or by any friends whom he may permit, whether tenants on Ballogie or not, or whether he is personally present or not, but always in such way and manner as not to be abusively exercised, or encroach unreasonably on or absorb the pursuers' said rights, the present action must fail."

On 20th December 1895 the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor, by which he found (1) that by final judgment of the Court on 9th January 1858 "it is *res judicata* that the findings in the interlocutors pronounced by this Court and affirmed by the House of Lords" in the action raised in 1808, and determined by the House of Lords in 1819, are *res judicata* as to all matters therein dealt with, between the proprietor of the forest of Birse and the proprietor of the estate of Ballogie; (2) that "in so far as the conclusions of the present action refer to matters not expressly dealt with by the foreshaid interlocutors and judgments, the defender's *sprivilegium et libertas aucupandi* in the forest of Birse is not subject to the conditions and limitations contended for by the pursuer: Therefore sustains the defender's second, fourth, and fifth pleas-in-law, and assoilzies him from the whole conclusions of the summons."

Opinion.—"This summons contains conclusions which are expressly covered by the judgments of this Court and the House of Lords, in the action instituted in 1808 by the then Earl of Aboyne against the then Laird of Ballogie. As regards these conclusions there is a double *res judicata*, because the judgments in the action of 1808 were found to be *res judicata* in the case of *Marquis of Huntly v. Nicol*, January 9, 1858, 20 D. 374, and that judgment is itself *res judicata* against the present pursuers. As a matter of form, therefore, it is necessary to sustain the plea of *res judicata* with regard to all the matters expressly decided in the earlier of these cases. There remain, however, certain conclusions which were not dealt with in express terms by the judgments of this Court and the House of Lords, though I think they are all, or nearly all, covered by the *ratio decidendi*. A few of these seek to lay down some exceedingly minute and rather fanciful restrictions on the defender's right of shooting, but the main question raised by this action (and that to which I suppose it really owes its origin) is whether the defender is entitled to let his right of shooting in the forest of Birse either with or without the house of Ballogie.

"The ruling document with regard to the defender's right is Lord Meadowbank's detailed interlocutor of 13th November 1812, which was affirmed by the Inner House and the House of Lords. The main propositions established by that interlocutor are (1) that the defender's liberty and privilege of fowl-

ing is a heritable right attached to the property of Ballogie; (2) that it is co-ordinate and co-effective with the rights of Lord Huntly; (3) that it is entitled to a fair and liberal construction as to its exercise, according to use and wont; (4) that it may lawfully be exercised not only by the defender personally, but by his gamekeeper and by any friends to whom he may give permission, whether his tenants on Ballogie or not, and whether he is personally present or not; and (5) that it must not be abusively exercised so as to encroach unreasonably on or absorb the general right of fowling belonging to the pursuers.

"It is true that these propositions do not expressly affirm Ballogie's right to let the shootings, and the pursuers point to some expressions in the opinion of the Judges to the effect that it would be an abuse if he were 'to dispose of the game for profit,' or 'to farm out the right as a means of profit or advantage.' But these are only expressions of one or two individual Judges; and I think they are to be ascribed to the prevailing sentiment of the time, which was undoubtedly against the notion of making money out of a sporting right. It is consistent with this that Ballogie seems in his pleadings to have disclaimed the idea of letting the shootings for hire, although Ballogie House had been occupied as shooting quarters by a succession of tenants, who had claimed the right to shoot in the forest. That being a fact in the full view of the Court and the House of Lords, it is significant that they did not assert in their interlocutors any exclusion of Ballogie's right to let, but, on the contrary, declared that he might give permission to shoot to any of his friends, whether tenants on Ballogie or not. I observe that Lord Glenlee says—'As to the tenants in the house of Ballogie, it is very extravagant to say that they must not shoot.' Now, these were tenants paying a rent for the house—a rent no doubt enhanced by the sporting rights attached to it—and it is to my mind too fine a distinction to say that the right may be exercised by a tenant of that description and not by one to whom the shootings are let *eo nomine*.

"In short, it seems to me that once you reject the idea, as this Court and the House of Lords did, that this was a personal privilege in favour of the Laird of Ballogie (like the privilege of rod fishing in the case of *Duke of Richmond v. Duff*, 5 Macph. 310), and affirm that it is a heritable right, co-ordinate and co-effective with that of Lord Huntly, it follows that there is no limitation in the right except that which arises from the fact that it is a joint one, and therefore to be exercised *civilliter*. The finding to that effect in Lord Meadowbank's interlocutor remains, and there is no averment in the presentation that the defender's mode of exercising his privilege has unfairly encroached on the right of the pursuers in its character as a joint right."

The pursuer reclaimed, and argued.—The Lord Ordinary was wrong. The present action was not an attempt to revive old questions already decided, but was directed to finding out what the decisions meant, and

how far they could be held to go. Lord Meadowbank had purposely avoided determining the question whether Ballogie could let the shooting, and had in his note expressed grave doubts as to whether he could. The other Judges, too, had said much that threw light on the interlocutor, and entitled the pursuer to raise the question of the extent of Ballogie's right. Lord Craigie thought Mr Innes could give no stranger a right to shoot. The Lord Justice-Clerk had said that Lord Aboyne would be entitled to interfere if Ballogie were to farm out the shooting as a means of profit or advantage. Such expressions showed that the interlocutor was susceptible of interpretation. The present case was *a fortiori* of that of *Campbell v. Campbell*, January 24, 1809, F.C., for the defender's right here was much lower than that of a co-proprietor of a common. In the contemporary case of *Earl of Aboyne v. Farquharson*, November 16, 1814, F.C., *aff.* 6 Pat. App. 380, Lord Aboyne had got the declarator he sought.

Argued for the respondent.—The Lord Ordinary was right. The question raised by the pursuer here had been determined already, or at all events it had so been held by the Court. In order to prevail, therefore, the pursuer must first reduce the interlocutor of 1858—*Ross v. Mackenzie*, May 27, 1836, 14 S. 845—and after that he must bring an action expressly to declare the meaning of the former interlocutors—*Park's Curator v. Black*, March 8, 1870, 8 Macph. 671. The present action was therefore incompetent. It really proceeded upon the assumption that the defender's *privilegium* was purely personal, like the right of fishing in the *Duke of Richmond v. Duff*, January 25, 1867, 5 Macph. 310. But a right was none the less heritable that it could not be classified with any of the familiar servitudes—*Murray v. Peddie*, May 25, 1880, 7 R. 804; and if one thing had been decided by the Court in the old case it was that this was a heritable right. Upon the merits of the decision of the Court in 1813, it was plain that the second branch of the case raised the question of the communicability of the right and no other, and that question had been determined on the construction of the titles. No doubt some of the *dicta* were unfavourable to the defender's contention, but the practical result of the decision was that letting must be allowed, because it would be a novelty to have a heritable right which could not be communicable for profit. As appeared from the report in Paton, Lord Meadowbank had by interlocutor of 12th November 1813 explained the expression "qualified friends" as meaning "any persons whom Mr Innes may permit that may lawfully exercise that permission." Lord Meadowbank's doubts referred rather to Aboyne's remedy than to Ballogie's right. All he really meant was that Ballogie could grant no higher right by tack than he possessed himself. The right as determined by the interlocutor was co-extensive with that of the grantee of a royal forest, and that at one time at all events had been very ample,

and permitted the forester to hunt over other people's lands—*Marquis of Athole v. Laird of Faskally*, M. 4653. See also *Duke of Athole v. MacInroy*, February 28, 1862, 24 D. 673. In certain circumstances, no doubt, the Court would regulate the defender's exercise of his undoubted right, but the pursuer here made no complaint of the defender's conduct, and had not called on the Court to lay down rules for his enjoyment of the privilege. [The defender also criticised in detail the several heads of the pursuer's declaratory conclusions.]

At advising—

LORD M'LAREN—[whose opinion was read by LORD ADAM]—By a judgment of the Court of Session affirmed by the House of Lords in 1819 it was found that the then proprietor of Ballogie had a heritable right of fowling in the forest of Birse, the property of Lord Huntly's predecessor. By a second judgment of this Court, pronounced on 9th January 1858, the first judgment was held to be *res judicata* in a question between the successors in title of the first parties, and it is no longer open to question that the *privilegium aucupandi*, whatever may be its value or extent, is a pertinent of the estate of Ballogie. The present action is instituted for the purpose of defining or limiting the right, the point of chief interest being the conclusion that the defender is not entitled to let the shooting.

When it is proposed to define a right or, which is the same thing, to determine its quality and incidents, it is best to begin by referring it if possible to some known category. But in this case I am at a loss to understand what species of right the Court and the House of Lords intended to award to Mr Nicol's predecessor. As the right is of the nature of a qualified use of another man's property, the nearest analogue would be a right of servitude; yet I should not call it a servitude, because the servitudes which the law has recognised are motivated by some consideration of convenience or utility to the dominant estate as an estate, and I cannot see how it can be represented as an advantage to the estate of Ballogie that its proprietor should have the right of shooting in the forest of Birse. Again, I can understand that the proprietor of Birse should come under a perpetual obligation to permit Ballogie to shoot in the forest. But such an obligation would only be binding on the obligant and his heirs, and not as in this case on purchasers or singular successors. Lastly, if there had been a relation of tenure between the estates of the pursuer and the defender, the privilege might be referred to the principle of conditional grant, but there is no evidence that the one estate ever held of the other, or that the two had ever formed parts of a larger estate.

It is, however, satisfactory to find that the original judgment stands in little need of explanation. I agree in the ground of judgment suggested by the Lord Ordinary, that we are merely interpreters of the original decree. Now, by that decree it is found that the privilege may be exercised

by the defender personally, by his game-keeper, and by any friends to whom he may give permission, whether his tenants on Ballogie or not. This is a very wide power of delegation, going far beyond predial servitude. Even if the decree had said no more than that the privilege should be communicable to tenants, I should have held that the defender was entitled to let the shooting along with a residence on Ballogie estate, because in such a case it is an impossible position to say that you may let the house and give the shooting but shall not let the house and let the shooting. Whatever rent is given by a tenant who has the house and shooting is necessarily a consideration for the shooting as well as the use of the residence. But I am prepared to go further and to hold that, consistently with the original decree, the defender may let the shooting to one who does not hold a lease of any part of the lands of Ballogie. I also agree with the Lord Ordinary in thinking that some of the expressions used by individual Judges are not consistent with the decree. In a question of *res judicata* I doubt whether it is permissible to refer even to the collective opinion of the Court for the purpose of controlling or limiting the effect of its decree, and it is quite certain that the opinions of individual Judges not concurred in by a majority of the Court cannot be used for such a purpose.

The only other point which was specially argued at the debate before us was the conclusion that the defender and his tenants were not entitled to shoot the game for sale. Now, this is not an action of regulation; but I understand it to be admitted that the defender's privilege is a sporting privilege, and that the shooting must be conducted in a fair and sportsmanlike manner, and consistently with the existence of an equal right in the pursuer.

But if the defender uses his right of shooting fairly, and does not encroach, it can be of no consequence to Lord Huntly what becomes of the birds which may be killed in the exercise of the defender's privilege. The absence of interest on the part of the pursuer seems to me to be a sufficient reason for negating this conclusion.

The considerations which I have stated suffice, in my opinion, for the disposal of the whole case, and I think that the reclaiming-note should be refused.

LORD KINNEAR— I agree with Lord M'Laren that if we had been called upon by this action to determine the validity of the right in question, or to found its character upon the general principle of law, it would have been necessary for us to consider how far it answered to the legal definition either of servitude or of estate in land, or of some other recognised legal right; because although the owners of land may confer what rights of use and enjoyment over an estate they please by personal contracts which may be binding on themselves, they cannot create new heritable rights or new incidents of pro-

perty which will affect successors or successive owners of land beyond such as are already recognised by the law of the country. But then it is decided in terms in the first place that this is a valid right, and in the second place that it has certain legal consequences and incidents, and that being finally determined by a judgment of the House of Lords, it appears to me that the question whether it is more or less analogous to servitude on the one hand, or some other legal right on the other, becomes a mere question of classification which it is not necessary for us to determine in order to dispose of this action. We have the very high authority of Lord Corehouse for saying that it is a predial servitude inasmuch as the law does not recognise a right of shooting as a separate estate which can be created by tack or infettment, apart from property in land, and on the other hand, as his Lordship points out, the law has recognised the possibility of annexing to a dominant estate a right of this kind to be exercised over a servient estate. However that may be, it appears to me, as Lord M'Laren has said, that all we have to do now is to apply the conclusions of this summons to the terms of the interlocutors affirmed by the House of Lords in order to see whether we can sustain any of the conclusions of the summons or not. Now, I think that the determining consideration is that it has been decided that this right is not a mere personal privilege but a heritable right, and I should have been disposed to think that, if that were all that had been decided, it would follow as a consequence from that determination that it might be exercised not only by the person in whom it was originally vested, but also by any person to whom he communicates it; because the moment it has been established that it is a heritable right, constituted by the infettment of the owner of the dominant tenement, all the considerations that can be suggested for its limitation on the ground of its being a personal privilege necessarily fly off. It must be one or the other. It is either personal privilege or real right, and the House of Lords have determined that it is the latter. But then the interlocutor goes on to describe the method by which it may be exercised. That appears to me to place all the questions raised in the summons beyond dispute, because it comes to this, that being a heritable right it may be exercised either by the proprietor of Ballogie personally, or by his servants whom he authorises to exercise his own right, or by anybody to whom he chooses to transfer it, subject to only one qualification, that he is to transfer to his friends, whether they are his tenants or not, provided only they be qualified, and he may also so transfer it to them that they may exercise it whether he is personally present on the ground or not. Now, that appears to me to express an unqualified power to transfer the right subject to this condition only, that the transferee shall be qualified according to law to exercise the right of fowling upon the land, and that refers, I think there can

be no doubt, to the property qualification by which the privilege of hunting and hawking was confined to persons holding a plough of land in heritage. We are not to consider how far that qualification or limitation of the right is now operative, if it be operative at all, for no question is raised by the summons upon that special point, but subject to that qualification, which appears to me to explain the peculiarity by which the extent of the rights of the parties is previously defined in the interlocutor, the judgment finds that the proprietor vested in the right may transfer it as he pleases. Then it goes on to express another limitation which Lord M'Laren has put into the appropriate language which we should use now in such a case—that the right is to be exercised in a sportsmanlike manner—by saying that it is not to be unreasonable, or absorbing the general right of fowling belonging to the granter of the right. I have therefore come to the same conclusion as Lord M'Laren, that there are no grounds for introducing into this right any of the specific limitations for which the summons concludes. In the first place, it would be directly contrary to the terms of the interlocutor if we were to find that the defender is entitled only to exercise his right as proprietor either personally, or by his friends when he is personally present. Then I can find no grounds in the interlocutor for holding that it is to be exercised only for the supply of the house of Ballogie, which is the second conclusion of the summons. The final terms of the third conclusion of the summons may be perfectly correct, that the right can only be exercised by the defender and his foresaids in such way or manner as not to encroach unreasonably on the pursuer's rights, but that is a conclusion leading up to specific regulations for the exercise of the right, and, as Lord M'Laren has pointed out, this is not an action for regulation or one in which we could proceed to make regulations. Therefore that, as a mere general declarator, is unnecessary, and does not give the pursuer any sufficient title or interest to have that qualification declared in his favour if the more specific conclusions are unsound. Then when the summons goes on to have it found and declared that the privilege is not to be exercised except in a certain specific manner, I agree with Lord M'Laren, for the reason given, that all these limitations are unsupported by the terms of the judgment and finding. If the proprietor of Ballogie, as having a right in connection with that estate to shoot over the pursuer's lands, is entitled to transfer that right, and to exercise it by his servants as well as by himself, I am unable to find any ground for the limitation suggested, viz., that he is not to make such conditions as he pleases with his assignee as to the terms on which, between them, the right is to be exercised. And, again, if he has the right to kill game unlimited by any condition except a concurrent right in the pursuer to shoot over the lands, I am unable to see any ground for limiting the uses that he may make of the game that has been killed so as

to exclude its being used for any other purpose than the consumption of his own house of Ballogie. I entirely concur with the opinion of Lord M'Laren, and with the Lord Ordinary's interlocutor.

LORD ADAM concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuers—H. Johnston—W. Campbell. Agents—Henry & Scott, W.S.

Counsel for the Defenders—Sol.-Gen. Murray, Q.C.—Dundas. Agents—Auld & Macdonald, W.S.

Thursday, March 5.

FIRST DIVISION.

[Lord Moncreiff, Ordinary.]

MOUNSEY (DUNN'S TRUSTEE) v.
HARDY AND OTHERS.

Proof—Loan—Writ of Debtor—Parole Evidence—Writ of Executor—Delivery—Cheque.

Documents insufficient to prove a contract of loan are insufficient to let in parole evidence of the loan; for parole evidence is not admissible except for the purpose of establishing facts extrinsic to the writing, so as to enable a creditor to prove the loan, not by the parole evidence itself, but by his debtor's writ. *Laidlaw v. Shaw*, March 5, 1886, 13 R. 724, distinguished; *Williamson v. Allan*, May 29, 1882, 9 R. 859, explained and approved.

In a multiplepointing raised for the purpose of distributing the estate of a deceased testator, a claimant averred that she had "from time to time made loans of money to him, several of which were of small amount," and that in 1865 she advanced him on loan a sum of £200, the total amount of the alleged loans being £390. In support of her averments the claimant produced (1) a cheque for £200 drawn by her in 1865 in favour of deceased, marked paid by the bank, but not endorsed by any payee; (2) an affidavit and schedule by the executrix of the deceased for return of inventory duty, which bore that at his death there had been outstanding, *inter alia*, a debt of £200 due to the claimant, which the executrix had paid; (3) a probative minute of agreement between the executrix and a son of the deceased, whereby the latter agreed to take over the stock and plenishing of a farm for a certain sum, less the amount of certain debts due by the trust estate which he undertook to pay. To this minute was appended a state of the trust funds, showing, in addition to the foresaid debts, a debt due to the claimant of

£390. The state was signed by the parties to the agreement, and tested, and a docquet was added to the minute and state, signed by the testator's children, beneficiaries under the settlement, approving of the transaction recorded in the minute, and approving and holding as correct the state of the trust funds.

Held (rev. judgment of Lord Moncreiff, Ordinary, who had allowed a proof) that the claim must be repelled on the grounds (1) that the cheque afforded no evidence that the claimant's money had been drawn by the deceased, (2) that the affidavit was not evidence of the existence any more than it would have been evidence of the payment of the debt, (3) that the minute with accompanying state and docquet not being obligatory in itself, and not having been delivered to the claimant, was ineffectual to prove the debt; and therefore (4) that the principle above stated applied. *Duncan's Trustees v. Shand*, January 7, 1873, 11 Macph. 254, approved.

Observed (per Lord Kinnear) that even if the third document produced had purported to be an admission of debt by the executrix addressed to the claimant, and put into her hands to be held as her document, it would not be binding on the trust estate unless and in so far as the executrix was beneficially interested therein. *Briggs v. Swan's Executors*, January 24, 1854, 16 D. 385, and *McCalman v. McArthur*, February 24, 1864, 2 Macph. 678, explained and approved.

By trust-disposition and settlement Thomas Dunn, who died in 1865, gave and disposed to and in favour of certain trustees his whole means and estate for certain trust purposes.

These purposes were the payment to his widow of the free income of his whole estate, and upon her death the division of his estate among his children in equal shares. The testator was survived by his wife and eight children.

On the death of the widow, who was the sole surviving trustee of her husband, in 1893, the pursuer and real raiser of the present action was appointed trustee by the Court. The trust estate when realised amounted to £1193, 4s., and constituted the fund *in medio*.

Certain questions having arisen with regard to the distribution of the trust estate, the trustee raised an action of multiplepointing to determine the rights of the several claimants.

A claim was lodged among others for Mrs Marion Brodie or Tait, formerly Mrs Smith, who averred—" (Cond. 2) The claimant Mrs Tait was the sister of the late Mrs Agnes Brodie or Dunn, wife and afterwards widow of the truster, and was on friendly terms with the truster Thomas Dunn during his life. She from time to time made loans of money from her separate estate to the truster, several of which were of small amount; but in particular, on or