LORD RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for Pursuers—J. P. B. Robertson—Graham Murray. Agents—Gordon, Pringle, Dallas, & Co., W.S.

Counsel for Defender — Solicitor - General (Asher, Q.C.) — Guthrie. Agents — Carment, Wedderburn, & Watson, W.S.

Tuesday, November 13.

SECOND DIVISION.

[Lord Fraser, Ordinary.

HEMMING *v.* DUKE OF ATHOLE.

Superior and Vassal—Feu-Charter—Reservation of "all Deer that may be found at any time within the Bounds of Estate."

A proprietor, who held his lands under a disposition which contained a reservation to the superior of "all deer that may be found at any time hereafter within the bounds" of the estate, brought an action to declare that the superior, who had let the adjoining lands as a deer forest, had no right or title to go on his lands for the purpose of hunting or stalking deer, and further to interdict the superior, and all others acting on his authority, from going on the lands for that purpose. The Court *granted* decree as craved, being of opinion that the reservation conferred on the superior, not a franchise of hunting on the pursuer's lands, but merely a right of property in the deer taken on them.

Question, Whether a mere estate of superiority can sustain a franchise of hunting deer on the vassal's lands?

Richard Hemming, proprietor of the lands of Glasschorrie and Riechal, Blair-Athole, brought this action against the Duke of Athole, his superior in the lands, for declarator "that the defender had no right or title to go upon the said lands of Glasschorrie and Riechal in pursuit or for the purpose of hunting or stalking deer;" and further, "to have the defender, and all others acting in his name or with his authority, or pretending to derive right from him, interdicted from going upon the said lands in pursuit of or for the purpose of hunting or stalking deer."

The pursuer bought the lands in 1852 from Captain Beaumont, R.N. They had been originally acquired in feu in 1737 from the Duke of Athole by Gilbert Steuart of Fincastle, and the charter contained a reservation in the following terms:—"Reserving to us and our foresaids the haill mines and mineralls that may be found within the bounds of the sd. shealling and grassings, of whatever nature or quality, with the liberty of digging, winning, and leading away of the same, and building houses for the accommodation of the mynners, But with this condition, that we and our foresaids be oblidged to satisfy the ffeuars and possessors of the lands for the time for what damnage shall happen thro' breaking the ground, building the houses, and making ways through the lands, and in searching for, winning, and away-leading of the said mynes and mineralls: And we bind and oblidge us and our heirs and successors duly and lawlly. to infeft and saize the said Gilbert Steuart of Fincastle and his forsds. in the foresaid lands and sheallings of Glasschoirie and Reichal; But reserving to us and foresaids all the deer that may be found at any time hereafter whn. the bounds of the said sheallings: To be holden," &c. In the precept of sasine contained in the said original feu-right and disposition, infeftment was directed to be given as follows:—"To be holden of us for yearly payment of the said feu-duty of one hundred merks and other prestations @ written; and with and under the reservation of the deer and mines and mineralls as above mentioned." This reservation entered the pursuer's title.

The pursuer stated, and it was admitted, that the defender was proprietor of certain lands adjoining his, and had let a portion of his property with the shootings, and with permission to the tenant to hunt deer over the ground belonging to the pursuer. He averred that in the shooting season of 1882 this tenant entered upon and traversed his (pursuer's) property in pursuit of deer; further, that from time immemorial "no such right or privilege of hunting and killing deer on the pursuer's property has been exercised by the defender or his predecessors, or anyone acting with their authority. But the defender now asserts that he has such a right, and means to exercise it himself, or by his servants or tenants, without leave of the pursuer."

The defender averred that the permission given to his tenant to hunt deer over the pursuer's land was given in exercise of the right to the deer "reserved to his authors and himself in the original feu-right and subsequent writs which form the pursuer's title, which reservation duly qualifies the pursuer's infeftment."

The pursuer pleaded—"(1) The defender has no right, as superior or otherwise, to enter upon the pursuer's lands for the purpose of hunting deer. (2) In respect that the defender asserts a right and intention to traverse the pursuer's lands in pursuit of deer, the pursuer is entitled to interdict as craved."

The defender pleaded—"(2) In respect of the reservation in the pursuer's title in favour of the defender, the defender should be assoilzied."

The Lord Ordinary (FRASER) pronounced this interlocutor:—"Finds that the pursuer is proprietor of the lands and sheallings of Glasschorrie and Riechal, and that the defender is the superior of the said lands: Finds that in the original feu-charter, dated in 1737, the defender's predecessor granted the said lands to the predecessor of the pursuer with a reservation in the following terms:—'But reserving to us and foresaids all the deer that may be found at any time hereafter whn. the bounds of the said sheallings; To be holden,' &c.: Further, finds that in the precept of sasine contained in said original feu-charter infeftment was directed to be given as follows:—'To be holden of us for yearly payment of the said feu-duty of one hundred merks and other prestations @ written; and with and under the reservation of the deer and mines and mineralls as above mentioned': Finds that said reservation is contained in the pursuer's own title, and qualifies his right: Finds that the defender

is proprietor of lands adjoining to Glasschorrie and Riechal sheallings, and has let these lands to tenants, to whom he has given permission to hunt and stalk deer over the said sheallings belonging to the pursuer: Finds in law, that in virtue of said reservation the defender has both right and title to go upon the said sheallings in pursuit of deer, and may lawfully grant authority to said tenants to hunt deer upon the pursuer's lands; therefore assoilzies the defender from the conclusions of the summons, and decerns.

"*Note.*—The title of the pursuer, which flows from the defender and his predecessors, contains two reservations in the disposition of the lands which stand upon the same footing, and are of equal legality—1st, a reservation of mines and minerals, and 2dly, of deer that may be found within the bounds of the sheallings. The question here has reference to the second of these reserved rights. It is not unlawful to make such a reservation, and the plain meaning of it is to give a right to the superior who reserved it to stalk deer over the pursuer's lands. The pursuer may not be obliged in any way to take precautions for the preservation of the deer, or be active in using means to stimulate their increase. Sheep and deer do not associate well together; but the pursuer is not bound to limit the number of sheep he may put upon his shealling for the accommodation and comfort of the deer. At the same time he must understand that he cannot do anything which will interfere with a right to stalk the deer so expressly reserved to the superior. Nor is this right personal to the superior, so that he alone or by members of his family could exercise it. It is within his power to authorise the tenants of his neighbouring lands to take advantage of the privilege—*Earl of Aboyne* v. *Innes*, June 22, 1813, F.C.—*aff.* on appeal, 6 Pat. 444. The result consequently is that the defender must be assoilzied."

The pursuer reclaimed, and argued—The reservation or restriction contained in his disposition had been harshly construed by the Lord Ordinary. It was capable of other constructions. It might mean either (1) a right to the deer themselves, or (2) a right merely to recover any deer which might have chanced to have strayed. It was a rule of law that where restrictions on right of property had to be construed, the one which was least burdensome to the vassal was to be accepted. Either of the two, then, suggested by the pursuer ought here to be adopted. But (2) a reservation of hunting deer could not be transmitted against a singular successor, inasmuch as it was not a feudal, but only a personal right—*Birkbeck* v. *Ross*, December 22, 1865, 4 Macph. 272; *Campbell* v. *M'Lean*, April 4, 1870, 8 Macph. (H. of L.) 40. It was too indefinite a right to pass against a singular successor. The case of *Earl of Aboyne* v. *Innes*, cited by the Lord Ordinary as favourable to the defender, did not support his position, because it was expressly held that while a privilege such as this could be exercised as a servitude by a dominant tenement, it was not one of which profit could be made by letting to tenants.

The defender replied—(1) A reservation of deer as deer was absurd. The Court will give a reservation a fair though a strict construction, and will not give it a judaical construction. This reservation could mean nothing else than hunting deer. The question of finding deer was not raised in this summons. The real question was as to the defender's right to follow deer which had strayed on to the pursuer's lands from conditions of wind. (2) A right to stalk deer was a known feudal right, and a perfectly competent feudal reservation. It was an incident of feudal property reserved from the totality of property by the superior. It was in fact a privilege or franchise recognised by the law of Scotland as capable of reservation. Salmon-fishing, in like manner, was a separate estate, and could be disponed to another, and a right to it be reserved by the superior—*Duke of Richmond* v. *Duff*, January 2, 1867, 5 Macph. 310 (Lord Deas' opinion); *Duke of Athole* v. *Mackinroy*, February 28, 1862, 24 D. 673; *Livingstone* v. *Earl of Breadalbane*, 1791, 3 Pat. App. 221 (Lord President's opinion); *Pollock, Gilmour, & Company* v. *Hervey*, June 5, 1828, 6 S. 913. The case of *Earl of Aboyne* v. *Innes*, June 22, 1813, 17 F.C. 384—*aff.* July 10, 1819, 6 Pat. App. 444, was the counterpart of this, for what was made matter of reservation here was there made matter of disposition, which was held good, and *a fortiori* a similar reservation was good. (3) The reservation was not uncertain and indefinite, and could be transmitted against a singular successor—*Tailors of Aberdeen* v. *Coutts*, August 3, 1840, Ross' Leading Cases, Land Rights, vol. iii. p. 869.

At advising—

Lord Young—The pursuer asks for a decree of declarator negativing any right on the part of the defender to enter his lands of Glasschorrie and Riechal "in pursuit of, or for the purpose of hunting and stalking deer." The defender maintains that he has such right, and so resists the declarator. The question depends on the meaning and legal validity of a reservation in the original charter of the lands granted in 1737 by the defender's ancestor to the pursuer's predecessor in title of "all the deer that may be found at any time hereafter within the bounds" thereof, and repeated in the pursuer's own title, which is an ordinary seller's disposition dated in 1852.

And, first, as to the meaning of the reservation, the defender contends, and the Lord Ordinary has decided, that "the plain meaning of it is to give a right to the superior who reserved it, to stalk deer over the pursuer's lands." I am unable to say that I think this is the plain meaning of the words in which the reservation is expressed. Whether they are capable of that meaning, so that we might impute it on evidence of contemporaneous usage or conduct under them, showing that the parties so understood and intended, is a question which we need not consider, for no such usage is averred. The pursuer avers (cond. 3) that "for time immemorial no such right or privilege of hunting and killing deer on the pursuer's property has been exercised by the defender or his predecessors, or anyone acting with their authority," and the defender, making no averment of any exercise of the right alleged prior to 1882, and not asking a proof, demands judgment on the plain meaning of the reservation as it is expressed in the charter, and has obtained it in his favour from the Lord Ordinary.

Deer—meaning wild deer—are not the subject

of property while at large, and when "found," in the sense of killed or captured, they become the property of the finder, and I should have thought the *prima facie* meaning of the words in question was that the property of deer taken on the pursuer's lands should be yielded up by him to the superior of the lands. This, which is very different from a franchise of hunting deer on the lands, is quite intelligible, and may possibly be valuable, though no doubt of less value than the franchise. Such a right reserved to the superior of the Athole estates—whether the Crown or a subject—would no doubt be of considerable value. It would, indeed, be the exact value of the deer "found"—that is, taken—on the estates by the defender, or others having right to hunt them. In the case of Glasschorrie and Riechal it may be possibly worthless, and indeed so it has proved to be for the century and a half during which it has existed. I am not on that account disposed now to interpret it as importing a franchise of hunting, which might and, if the Lord Ordinary's view is sound, would imply a severe restriction upon the owner in the use of his property. The Lord Ordinary says distinctly that it follows from his judgment that the pursuer "must understand that he cannot do anything which will interfere with a right to stalk the deer"—in other words, must keep his property as a hunting ground for his superior. I am unable to assent to this as according to the *prima facie* meaning of the reservation.

The Lord Ordinary appears to have been impressed by the association, as he regarded it, of the reservation in question with the familiar reservation of mines and minerals. But they seem to me to be in rather striking contrast. The reservation of mines and minerals, with right and liberty to work them, is expressed in the usual and familiar language of such a reservation, and that in the dispositive clause, and as a limitation of it. The reservation in question is not in the dispositive clause at all, but a parenthesis of the obligation to infeft, and in such words as it was admitted were never before used to express a right of hunting.

What I have said is sufficient for the decision, and I am accordingly of opinion that the interlocutor ought to be reversed.

We had an argument on the question whether a mere estate of superiority could sustain a franchise of hunting on the vassal's lands. The question has not previously occurred, and as it does not arise here according to the meaning of the reservation as I construe it, I reserve my opinion upon it.

Lord Craighill and Lord Rutherfurd Clark concurred.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming-note for the pursuer against Lord Fraser's interlocutor of 21st June last, Recal the said interlocutor, and find, declare, and decern in terms of the declaratory conclusion of the action: Find the pursuer entitled to expenses," &c.

Counsel for Reclaimer—Gloag—A. J. Young. Agents—J. & J. Galletly, S.S.C.

Counsel for Respondent—J. P. B. Robertson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, November 16.

FIRST DIVISION.

[Lord Fraser, Ordinary.

MAIN AND OTHERS (KERR'S TRUSTEES) *v.* STORRAR AND ANOTHER (MRS KERR'S TRUSTEES).

Loan—Proof of Loan—Promissory-Note—Evidence—Sexennial Prescription of Bills and Notes.

In a multiplepoinding a claim was made which was founded upon an indorsation of a promissory-note, and on a decree in absence for the amount of the debt contained therein obtained after the note was prescribed. The debtor under the note, who was a competing claimant, admitted the granting of the note, but explained that the payee in the note had abandoned all claim under it, and that the indorsation was made after the bill was prescribed. The Lord Ordinary allowed a proof *prout de jure*, and thereafter sustained the claim of the granter of the note. *Held* that the proof ought to have been only by writ or oath of the granter of the note, but that proof at large having been taken without objection, it must be given effect to, and (on the evidence) that the assignee of the note had acquired it after it had prescribed, and that the alleged resting-owing of the debt had not been proved.

The deceased John Kerr, who was a banker in Stranraer, died in 1863, leaving a settlement by which he conveyed his estate to trustees for certain purposes. He was survived by a widow, Mrs Eleanor Grundy or Kerr, and three children by his first marriage, one of whom, Thomas Ker, need only be here mentioned. Mrs Kerr died in 1878, and the estate of her husband fell to be wound up after her death. Mrs Kerr left a trust-disposition under which Alexander Storrar and others were trustees.

Thomas Ker went to Canada prior to the year 1859, and embarked in business there. On 9th January 1856, before going abroad, he had granted to Miss Agnes Morland, a relative of his father, whom his father was in use to assist in matters of business, a promissory-note for £700 for value received, he having received a loan of that amount from her. Three successive payments only of interest on this note were made by Thomas Ker. Miss Morland died shortly after Mr Kerr.

In 1870 Mrs Kerr raised in the Court of Session an action against Thomas Ker for £700, with interest from 9th January 1859, using arrestments to found jurisdiction. In this action Mrs Kerr, after setting forth the borrowing by Thomas Ker of the £700, and the granting of the note, averred that Miss Morland had assigned the debt of £700 to her, with interest accrued and to accrue from 9th January 1859. She pleaded that Thomas Ker was indebted and resting-owing to her the sum of £700 with interest. The action (the summons in which was served edictally) was undefended, and decree in absence passed against Thomas Ker.

Following on this decree Mrs Kerr used arrest-