particular kind into which they had entered. I am satisfied that they have stated no case for damages, upon the principle of the case of *Dobie* referred to by the Lord Ordinary.

LORD M'LAREN—I agree with your Lordships and the Lord Ordinary. I think your Lordships are right in deciding the case upon relevancy.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers—G. W. Burnet. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders—W. Campbell. Agents—Menzies, Bruce Low, & Thomson, W.S.

Thursday, July 14.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

FORBES' TRUSTEES *v.* DAVIDSON.

Servitude — Thirlage — Agreement to Pay Fixed Sum in Lieu of Insucken Multures, Discontinuance of—Personal or Real—Title to Sue.

By deed of submission dated in 1814 between certain persons "proprietors connected with the sucken and thirlage of the meal mill of N" on the one part, and the proprietors of the said mill on the other, proceeding on the narrative that it was expedient that the servitude of thirlage should be compensated or commuted by a fixed annual payment in lieu and satisfaction of the said right of thirlage, and of all services, prestations, and restrictions incident thereto; and in order to prevent disputes in the exaction and payment of the multures and sequels at the mill; and that the intake and mill run of the mill had been attended with inconvenience and loss to the proprietors of the mill and to the proprietors and tenants astricted, and that the millowners were "willing to take the whole responsibility of keeping up and supporting the intake and aqueduct to the meal mill in all time coming, both for their own improvement and the more immediate service and accommodation of the sucken," on payment of an annual sum by each of the parties submitters as compensation in lieu of multures, sequels, and mill services—the parties therefore submitted to the arbiter all differences and disputes presently subsisting between them with regard to the said annual compensation, declaring that this compensation should in no ways prejudice the proprietors of the mill of their claim to outsucken multures.

By decree-arbitral the arbiter fixed the sums payable by the respective heritors and suckeners, as in full of all demands that the proprietors of the mill could have against the said heritors and suckeners for multures, sequels, and services, and ordained the proprietors of the mill to accept the same yearly and termly in all time coming.

In 1878 the proprietors of the mill sold it, the disposition conveying, *inter alia*, the "haill multures, sucken, sequels, and knaveships of the said mill, and all haill parts, privileges, and pertinents thereof."

Shortly after buying the mill, the purchasers resolved to discontinue it, and in great part demolished the building. One of the parties found liable in an annual payment under the decree-arbitral thereupon declined to make any further payment, and the purchaser of the mill brought an action to enforce payment, admitting that he had no intention of rebuilding the mill.

Held (*rev.* judgment of Lord Kincairney—*dub.* Lord Rutherfurd Clark) that on a sound construction of the submission and decree-arbitral, it was a condition of exacting the payments found due by the arbiter that the mill should be in a working condition, and therefore as it was admitted that there was no intention of rebuilding the mill, that the defender fell to be *assoilzied*.

By deed of submission dated June 1814 between certain proprietors "connected with the sucken and thirlage of the meal mill of Nairn," including Sir David Davidson of Cantray upon the one part, and Arthur Cant and James Houston, proprietors of the said mill, upon the other part, the parties, "Considering that the servitude of thirlage and right of mill services incident thereto are very unfavourable to the general improvement of the country, by checking the industry of the occupiers of the grounds, and by occasioning troublesome and expensive litigation, and that it is highly expedient that such servitude should be compensated or commuted by a fixed annual payment in lieu and satisfaction of the said right of thirlage, and of all services, prestations, and restrictions thereto incident or pertaining; and in order to prevent any disputes which may arise in the exaction and payment of the multures and sequels at the meal mill of Nairn, and considering that the intake and mill run of the said mill has at all times been attended with considerable trouble, loss, and inconvenience both to the proprietors of the mill and to the proprietors and tenants astricted to the thirlage thereof, and that the said Arthur Cant and James Houston are willing to take the whole responsibility of keeping up and supporting the intake and aqueduct to the meal mill in all time coming, both for their own improvement and the more immediate service and accommodation of the sucken, upon having ascertained and being paid a certain annual sum by each of the parties submitters as a compensation in lieu of multures, sequels, and mill services; and the said parties submitters having entire trust and confidence in the know-

ledge, skill, and ability of Sir George Abercromby of Birkenbog, Baronet, they hereby submit and refer to him as sole arbiter, chosen by and between the said parties, all differences and disputes presently subsisting between them with regard to the annual compensation which the said parties proprietors connected with the thirlage of Nairn ought and should pay to the said Messrs Arthur Cant and James Houston as proprietors of the said meal mill of Nairn, for their respective multures, sequels, and mill services now pertaining thereto, and the term of payment of such annual compensation; But declaring that this compensation shall in no ways prejudice the said Arthur Cant and James Houston of their claim of out-sucken dues for such corn as may be ground at their mill either by the parties' submitters, their tenants, or others: Declaring also that the present submission shall not affect the proprietors for such lands as are presently under lease until the expiry of these leases, but that the tenants of these leases shall continue to pay and perform the present multures and services until the expiry of their leases, or, in their option, accede to the compensation to be granted by this submission and decreet-arbitral to follow hereon; But declaring also that this option shall not be in the power of these tenants unless they shall accede thereto previous to a decree being pronounced in this submission, with power to the said arbiter to receive the claims of parties, take all manner of probation thereanent by writs, oaths of parties or witnesses, as he may think proper and fit for determining the matters hereby submitted: And whatever the said arbiter shall determine in the premises . . . the parties submitters hereby bind and oblige themselves, their heirs and successors, to implement, fulfil, and perform."

On 8th December the arbiter issued a decree-arbitral, of which the following were the findings—"*Primo*, I find that the annual compensation to be paid by the heritors and suckeners to the mill of Nairn who are parties to the aforesaid submission in lieu and satisfaction of the multures, sequels, and services they presently pay and perform, shall in all time coming be the sum of £50, 0s. 1½d. sterling yearly, and that the said sum shall be exigible from the different heritors and suckeners in proportion following, viz., *inter alios*, Sir David Davidson of Cantray, the sum of £13, 0s. 6¾d. sterling, . . . and which proportions shall be in full of all demands that the proprietors of the mill can have against the said heritors and suckeners for multures, and sequels, and services; and I ordain the proprietors of the mill to accept the same accordingly, and that the commencement of the payment of said proportional sums of money shall be at the time of Candlemas 1816 for crop and year 1815, and so forth yearly and termly in all time coming: *Secundo*, I decern that the proprietors of such lands as are under lease shall not be liable in payment of the aforesaid proportional sum in so far as they may affect the lands under lease until the expiry of these leases, but that the tenants of these leases shall continue to pay and perform the present multures and services until the expiration of the said leases: *Tertio*, I find and decern that this compensation shall in no ways prejudge or render ineffectual the claims of the said proprietors of the mill for outsucken dues on such corn as may be ground at their mill either by the parties submitters, tenants, or others, and that the suckeners who are not parties to this submission shall be liable in the same multures and services as were formerly paid and performed by them: Declaring always that nothing herein contained shall invalidate or infringe any right competent to the proprietors of the mill when repairing the mill dam, and the lead or aqueduct conducting the water to the mill, to take stones, turf, or other materials from the lands of any of the neighbouring heritors, or to deepen and clear the same, conform to use and wont."

By agreement dated in 1866 between Arthur Cant and Matthew Cant, then heritable proprietors of the said mill, of the first part, and Hugh Davidson, Esq. of Cantray, and others, proprietors of lands in the sucken or thirlage of the said mill, of the second part, it was, *inter alia*, agreed that one-fourth, or 25 per cent. of the converted multures, &c., payable in terms of the foresaid decreet-arbitral should, from and after the term of Candlemas 1865, be struck off and discharged for the future. Under the said agreement the suckeners had power to redeem the converted multures, &c., and this power was exercised by them all, with the exception of Davidson of Cantray and three others. The amount of the converted reduced multures, &c., payable annually by Davidson at the term of Candlemas in respect of lands held by him was £4, 1s. 4½d. The suckeners who did not redeem bound themselves and their respective heirs and successors by the agreement to pay to the proprietors of the mill, and their heirs and successors in the mill, the conversions at the reduced rate yearly in all time coming during the not-redemption thereof, with interest from the respective terms of payment at 5 per cent. per annum, and they further bound themselves to take "any steps they may be advised to take for rendering the arrangement binding in the future on those who do not now redeem, such as a verdict under the Multures Conversion Act."

In 1878 Arthur Forbes of Culloden purchased the Nairn Mills, conform to disposition granted by Arthur Cant and Matthew Cant in his favour dated 10th and 13th May and recorded in the Division of the General Register of Sasines applicable to the county of Nairn the 21st day of May, and in the Particular Register of Sasines, Reversions, &c., kept for the burgh of Nairn the 22nd day of June, all in the year 1878. By said disposition there were conveyed, *inter alia*, "All and haill the two halves of the Mill of Nairn . . . . together with the mill-house and houses at Milltown following the said two halves of

the said mill, haill multures, sucken, sequels, and knaveships of the said mill, and all haill parts, privileges, and pertinents thereof." The said disposition also conveyed the granters' "whole right, title, and interest, present and future, in the whole lands, mills, and other subjects hereby disponed, with their pertinents." The disposition also contained the usual clause of assignation of writs, the inventory annexed making special mention of the above submission and decree-arbitral.

In June 1891 the trustees under the trust-disposition and settlement of Mr Forbes (who had died in 1879) brought an action against Hugh Davidson of Cantray, son of Hugh Davidson, the party to the agreement of 1866, and grandson of Sir David Davidson, the party of the submission of 1814, concluding for declarator "that the defender, as a proprietor of lands in the sucken or thirlage of the mill or meal mill of Nairn, and as heir-at-law of or otherwise representing the deceased Sir David Davidson, sometime of Cantray, and the deceased Hugh Davidson, Esquire, sometime of Cantray, and the defender's heirs and successors in the said lands, are bound to make payment to the pursuers, as heritable proprietors of the said mill, and their heirs and successors in the said mill, of the sum of £4, 1s. 4½d., being the reduced rate of the converted multures, sequels, and services pertaining to the said mill from the said lands, under and in terms of" the submission of 1814, . . . "and under and in terms of" the agreement of 1866, . . . "and that yearly and in all time coming during the not-redemption thereof, at the term of Candlemas in each year, with interest thereon at the rate of 5 per centum per annum from the respective terms of payment till paid: And further, our said Lords ought and should decern and ordain the defender to make payment to the pursuers of the sum of £55, 18s. 8½d. sterling, being the amount of the arrears of said converted multures due by the deceased Hugh Davidson, Esquire, and by the defender, as at Candlemas 1891, with interest thereon at the rate of 5 per centum per annum from the term of Candlemas, 2nd February 1891, until payment thereof."

The pursuers set forth the deeds and proceedings above narrated. They further stated that the defender's father and grandfather had regularly paid the sums due by them under the decree-arbitral and the agreement down to and inclusive of crop 1879, but that since then they had declined to pay anything.

The pursuers pleaded — "(1) The defender, as heir-at-law of or otherwise representing on a passive title the said Sir David Davidson of Cantray and Hugh Davidson of Cantray, being liable to the pursuers in payment of the annual sum set forth in the summons, under and in terms of the decree-arbitral and agreement libelled on, and he having delayed or refused to make payment, the pursuers are entitled to decree as concluded for, with interest and expenses. (2) The pursuers are entitled to decree as concluded for, in respect that the said writs constitute a valid servitude affecting the defender's lands; and *separatim*, in respect that such a servitude has been constituted by prescriptive possession."

The defender stated that he possessed the estate as heir of entail, and represented his grandfather and father in that capacity only; and further averred that the mill had been demolished in 1879, and that by an agreement with other parties (the nature of which sufficiently appears from the Lord Ordinary's opinion) it was *ultra vires* of the defenders to restore it.

The defender pleaded—"(1) No title to sue. (4) The right to multures has been extinguished by the demolition of the subject, and the claim, so far as founded on the submission, is not enforceable, seeing that the pursuers are unable to fulfil their part of the contract. (5) The agreement for payment of said sums did not transmit against the defender, he being an heir of entail, and he is not bound to pay said sums."

A proof was allowed. The evidence showed that the defender represented his grandfather Sir David Davidson only as heir of entail of Cantray, but that he was residuary legatee of his father, and had as such received considerable estate. It was also established that the Mill of Nairn had been demolished, and that there was no intention or probability of restoring it.

On 26th March 1892 the Lord Ordinary (KINCAIRNEY) repelled the defender's pleas-in-law, sustained the title of the pursuers, and decerned in terms of the conclusions of the summons.

"*Opinion.*—This action has been brought by the trustees of the late Mr Forbes of Culloden, as proprietors of the Mill of Nairn, against Mr Davidson of Cantray, for declarator of their right as owners of the mill to certain sums as commuted multures, and to recover payment of the arrears of commuted multure, said to amount to £55, 18s. 8½d.

"The declaratory conclusion is directed against the defender as proprietor of lands within the thirlage of the mill, and as representing Sir David Davidson and also Hugh Davidson, successively of Cantray; and the conclusion is that the defender as such proprietor and representative, and his heirs and successors in the lands of Cantray, are bound to make payment to the pursuers as heritable proprietors of the mill, and their heirs and successors in the mill, of £4, 1s. 4½d. annually, as the reduced rate of the converted multures, sequels, and services due by the defender under a decreet-arbitral dated 8th December 1814 and an agreement executed in 1866.

"I understand that the right of burden of thirlage does not appear from the titles of either party, but is said to have been constituted or proved by the decreet-arbitral and the submission on which the decreet is based.

"The deed of submission was between various persons, including Sir David

Davidson, the defender's predecessor in the lands of Cantray, 'proprietors connected with the sucken and thirlage of the meal mill of Nairn,' on the one part, and the proprietors of the mill on the other part. It proceeds on the narrative that it was expedient that the servitude of thirlage should be compensated or commuted by a fixed annual payment in lieu and satisfaction of the said right of thirlage, and of all services, prestations, and restrictions incident thereto; and in order to prevent disputes in the exaction and payment of the multures and sequels at the mill; and that the intake and mill-run of the mill had been attended with inconvenience and loss to the proprietors of the mill and to the proprietors and tenants astricted, and that the millowners were 'willing to take the whole responsibility of keeping up and supporting the intake and aqueduct to the meal mill in all time coming, both for their own improvement and the more immediate service and accommodation of the sucken,' on payment of an annual sum by each of the parties submitters as compensation.

"On that narrative the parties submitted their differences to the arbiter, binding themselves, their heirs and successors, to implement the decreet-arbitral.

"By his decreet-arbitral the arbiter found (1) that the annual compensation to be paid by the heritors and suckeners to the mill who were parties to the submission, in lieu and satisfaction of the multures, sequels, and services they then paid and performed, should in all time coming be £50, 10s. 1½d. yearly, and that of that total sum £13, 0s. 6¾d. should be exigible from Sir David Davidson, and the other sums specified from the other parties submitters, and that these payments should be in full of all demands that the proprietor of the mill could have against them for multures, sequels, and services; and he ordained the owners of the mill to accept payment of the sums specified, and found that the payment should be made annually and in all time coming; (2) he made provisions for the case of tenants, which need not be here noticed; (3) he found that the compensation should not affect the claims of the owners of the mill for outsucken dues on such corn as might be ground at the mill by the parties submitters or others, and that the rights of the millowner to take stones, turf, or other materials for repair of the mill-dam and aqueduct, conform to use and wont, should not be invalidated.

"The narrative and various heads of the submission and of the decreet-arbitral bear a considerable resemblance to the provisions of the Statute 39 Geo. III. c. 55, for commutation of thirlage, and may have been framed on the lines of the Act, although there are differences in important particulars.

"From the terms of the submission and decree it appears that the whole of the persons astricted to the mill were not parties to the reference; that it was contemplated that the mill should be kept up, but that the parties submitters were to be subject to no demand from the millowner except for the annual sums allocated on them. They were thenceforth under no obligation to resort to or serve the mill. The only other vestige of burden remaining on their lands consisted of the right of the millowner to take materials for repair.

"This decreet-arbitral was duly implemented, and the sums thereby allocated were paid to the millowner by the various heritors, including Sir David Davidson and Hugh Davidson, his successor in the lands of Cantray.

"In 1866 an agreement was entered into between the owners of the mill and certain heritors, including Hugh Davidson of Cantray, whereby the sums to be payable by them were reduced and readjusted, the yearly sum payable by Mr Davidson being fixed at £4, 1s. 4½d., which sum he thereby bound and obliged himself and his heirs and successors to pay to the millowners and their heirs and successors in the mill. From this deed it appears that various heritors redeemed their annual payments for a fixed sum, and that only four of them —one of whom was Mr Davidson of Cantray—remained liable for annual payments. These reduced payments were also duly made for some time after the date of the agreement.

"In 1878 the late Mr Forbes of Culloden purchased the mill. The disposition bears to convey to him the mill, with the 'haill multures, and sucken, sequels, and knaveships of the said mill, and haill parts, privileges, and pertinents thereof,' and also the granter's 'whole right, title, and interest, present and future, in the whole lands, mills, and other subjects.'

"The pursuers say that the stipulated payments due by the proprietor of Cantray have fallen into arrear, and that the defender disputes his obligation to pay them.

"The defender explains that the purchase of the mill by Mr Forbes was made with the consent and concurrence of various proprietors of the salmon fishings (of whom the defender was not one), with a view to the improvement of the salmon fishings in the Nairn; that the object in view involved the disuse of the mill; and that Mr Forbes had come under obligations which put it out of his power, at least without the consent of the parties with whom he had contracted, to restore or use it; and that in point of fact the mill had fallen into total decay, and was wholly unserviceable as a mill.

"This has all been proved, and is indeed substantially admitted by the pursuers by a minute in which they, *inter alia*, state the 'mills have not been worked since Martinmas 1879, and the buildings and machinery have in consequence fallen into a state of disrepair and are not now in working order, and that the pursuers have no present intention of repairing or working the mills.'

"It is in evidence that the mill is past repair, and that it would be more economical to build a new mill than to repair the old one.

"It has further to be noticed that the

lands of Cantray are now admitted to be possessed under an entail, and that the defender does not represent his ancestor Sir David except as heir of entail. But it is alleged that he represents his father *titulo lucrativo*.

"The questions are, whether under these circumstances the pursuers are *in titulo* to demand, and the defender under obligation to pay, the annual sum at which the multures and services for Cantray have been valued, and whether the obligation to pay it is a burden on the lands of Cantray? I have found these questions difficult, but have ultimately formed the opinion that they should be answered in the affirmative.

"It is maintained by the defender that the obligation on the heritors was conditional on the continuance of the mill in a serviceable condition; that no payments were due when it was not in such a condition; and that therefore no arrears were due; and that as the mill is now in a state of complete ruin, and as the owner has admittedly no intention of restoring it, the obligation had come to an end altogether.

"I cannot concur in that argument, and I think that by the award the sums allocated were imposed without reference to the future condition of the mill. Apart from the decreet-arbitral and subsequent agreement the legal position was this: The mill was the dominant tenement; it was in no respect a servient tenement. There was no obligation to maintain it for the convenience of the sucken. The heritors could not have insisted on its continuance. They were bound to take their grain to it to be ground as long as it was serviceable. When it was not serviceable they were not bound to do so, and were not liable to any action for abstracted multures. If the millowner chose to allow the mill to become unserviceable the only consequence was that he lost his multures.

"Now, the decreet-arbitral does not purport to impose any new obligation on the owner of the mill in regard to its maintenance. Neither does it seem possible to imply, in the obligation to pay, a condition that the obligation was to be prestable only so long as the mill endured. It is, on the contrary, found expressly and unconditionally that the allocated sums are to be paid in all time coming. The heritors had not before the agreement any right to insist that the mill should be kept up for their convenience, and they could certainly acquire no such right by being relieved of all obligation in connection with it. The heritors remaining charged with annual payments were in this respect in the same position as those who had compounded by a slump payment, and it would seem out of the question to hold that these latter had any right to interfere in regard to the upkeep of the mill.

"The defender maintained that there were clauses in the decreet-arbitral which imported an obligation to maintain the mill. But I think that his construction is erroneous. It is true that it was clearly contemplated that the mill should be continued. But that is easily accounted for, because there were apparently other suckeners whose obligations were not commuted; and, besides, the parties submitters, and probably other persons outside of the sucken, might still resort to the mill and have their corn ground at the ordinary market rates. The defender referred in particular to the clause in the submission to the effect that the proprietors took the responsibility of supporting the intake and aqueduct in all time coming for their own improvement and for the immediate service and accommodation of the sucken. But it is, I think, clear that that does not mean that the millowner undertook an obligation to all the suckeners to maintain the intake and aqueduct, but only that they guaranteed the parties to the submission that no part of the cost of that maintenance should fall on them.

"The decreet-arbitral therefore appears to me to import and create an obligation on the heritors to pay the annual sums specified, which obligation was to be perpetual and entirely independent of the condition or continuance of the mill.

"The position of the millowners therefore was this: they were owners of the mill, and they were creditors in an obligation for the annual payment of the sums stipulated.

"The next question is, whether that right to the annual payments was a separate right unconnected with the mill, or was so connected with it and attached to it, as to pass to the late Mr Forbes by the disposition in his favour of the mill and mill services. The pursuers have no special assignation to it, and if it was a separate personal right it would not, I think, be covered by the disposition or pass by the assignation to writs, on the principle of the case of *Spottiswoode* v. *Seymer*, 1853, 15 D. 458, and other authoritative cases to the the same effect, of which the most recent is *Durie's Trustees* v. *Elgin*, July 19, 1889, 16 R. 1104.

"It was manifestly the intention of the parties to the submission that the right should be attached to the mill, and should pass with it, and there seems no doubt that the intention of the former millowners was to convey it to Mr Forbes; and I am of opinion that they did convey it. I think that it was not an independent right, but a right inseparable from the mill, and passing by a disposition of the mill and mill services, on the ground that the decreet-arbitral did not operate any change on the substance of the existing obligation which burdened the lands; and that it did not disburden the lands, but merely effected a change on the mode of the implement of the obligation.

"I think, therefore, that the defender's plea to title falls to be repelled, and that the defender is liable to pay the modified amount of multure fixed by the agreement, and also the arrears, on the assumption (as to which I understand no question was raised) that the amount of them is correctly stated, and on the further assumption that the defender represents his father

Hugh Davidson *titulo lucrativo*, as to which no question was raised.

"The question remaining is, whether this obligation is merely a personal obligation on the defender as his father's representative, or whether it has been imposed as a burden on the lands of Cantray. It is said that it cannot be a burden on the lands of Cantray because Sir David Davidson and the late Hugh Davidson were merely heirs of entail without power to burden the lands to that effect. But I think that as the transaction was not really a constitution of a new burden on the estate, but a commutation of a burden previously existing, that objection may be overruled, as a like objection was in the case of *The Magistrates of Dysart* v. *Rosslyn*, November 27, 1832, 11 S. D. 94.

"But the question remains, whether the obligation has been made a real burden on the lands. No doubt the intention was to impose a real burden by substituting the payment of a regular annual sum for occasional payments of sums or the occasional delivery of victual. But it is not so clear that that purpose was effected.

"On the one hand, there is great difficulty in holding that lands are burdened with an obligation to pay money which does not enter the register of sasines; and it cannot escape observation that this case differs from cases of commutation under the statute in two respects—in the first place, because the decreet-arbitral has not the aid of statutory authority; and in the second place, because there is no provision for recording it in the register of sasines, as there is in the statute for recording the award of the statutory jury.

"I have come with hesitation to think that the manifest intention of the parties may receive effect on the ground already expressed, that the obligation was not changed in substance but only in the mode of performance, and that the sums made payable by the decreet-arbitral and agreement are substantially of the nature of 'dry multure.'

"I think that the obligation to pay dry multure, although it be an obligation to pay money which does not enter the register of sasines, has been recognised as a servitude affecting the lands astricted. Thus in *Stewart* v. *Erskine*, 1741, where the tenants of astricted lands had not resorted to the mill for forty years, but had paid dry multure, they were held to have acquired immunity from the servitude except the dry multure; and in *Kinnaird* v. *Drummond*, 1675, M. 10,862, a servitude of thirlage was held to be constituted by the payment of dry multure for forty years; and Erskine recognises the payment of dry multure as an unquestionable mode of constituting the servitude of thirlage—Erskine ii., 9, 28.

Whether this obligation be of the precise nature of an obligation to pay dry multure or no the fact that there may be a servitude affecting the lands consisting of an obligation to continue the annual payment of a fixed sum in name of dry multure shows that the objection that this obligation does not appear in the register of sasines is not conclusive against the obligation being held to be charged on the lands.

"I therefore come to the conclusion that there was constituted by the decreet-arbitral and agreement an obligation which subsisted notwithstanding the disuse of the mill, and which burdened the lands of Cantray and passed by the disposition of the mill and mill services, and which is now exigible by the pursuers as owners of the mill, although in disuse against the defender and his successors in the lands.

"It was argued that if that view were correct it affirmed the existence of a servitude without a dominant tenement, which was said to be impossible, and contrary to the first principles of the law of servitudes.

"But the obligation of thirlage, although it has been generally regarded as a servitude, is certainly a servitude of a most anomalous kind, differing from all other servitudes in its most characteristic features, so that it has often been disputed whether it be properly speaking a servitude at all, and certainly the principles applicable to servitudes must be applied with much caution to questions of thirlage. It seems well settled that the total destruction of a mill does not of necessity extinguish the servitude of thirlage which was connected with the mill, but that the burden will revive if within forty years the mill be re-erected on the same site, or on a site as conveniently situated for the lands within the thirl—*Kinloch* v. *Morrison*, December 18, 1830, 9 S. D. 244; *Harris* v. *Magistrates of Dundee*, May 29, 1863, 1 Macph. 833. If it be not re-erected within that time, apparently the obligation would be lost by the negative prescription if not continued by written agreement. But that is no more than would happen by non-exaction of the burden for forty years although the mill existed—*M'Dowall* v. *Cleghorn*, December 2, 1782, M. 16,086.

"It is true that the insucken multures cannot be exacted so long as there is no mill capable of grinding the corn brought to it. But I cannot see that the decay of the mill could afford a defence against a demand for dry multures, or a defence against a demand for payment of sums ascertained and imposed on the footing of unconditional and perpetual obligation, and of relief from all further obligation in reference to the mill.

"On the whole, and on the understanding that the amount of the arrears due is correctly stated, I think that the title of the pursuers should be sustained, and that decree should be pronounced as concluded for."

The defender reclaimed, and argued—The submission of 1814 and decree-arbitral following upon it might be regarded in one or other of two lights. They might be regarded either (*a*) as fixing a money payment in extinction of the servitude of thirlage, or (*b*) as leaving the servitude still standing and merely liquidating the annual prestation payable in respect of it. In

either view the defender was entitled to prevail. The sounder view probably was the first—that the right of thirlage had been extinguished, and a merely personal obligation to pay money substituted. The submission proceeded on the narrative that thirlage was a nuisance and should be extinguished. The operative clause of the submission provided for the payment of "compensation" for this extinction, not for the "commutation" of the thirlage, and the decree-arbitral determined what should be paid as compensation. Had the parties proceeded under the statute, the money payment would have run with the lands, but they did not; consequently it was a personal obligation to pay money only. In that view the pursuers had no title, for the right to the money had not been assigned to their author, Forbes of Culloden. Nor did the obligation transmit against the defender, who represented his grandfather as heir of entail only. But (*b*) even if the servitude was regarded as still existing, the defender was entitled to prevail, for the mill had been demolished, and, it was not disputed, would never be restored; and that being so, the sums fixed by the arbiter, whether they were regarded as dry multures or as commuted multures, could not be exacted, it being a condition of such exaction that the mill should be in existence. It was, at all events, the reasonable construction of the submission and decree-arbitral that the mill should be in existence as condition of exacting the sums found due.

Argued for the pursuers—Even if the sum sued for was regarded as founded on a personal obligation merely, the pursuers ought to prevail. For the right had been well assigned to their author under the assignation to writs, and the defender at all events represented his father personally, and his father was a party to the agreement of 1866. The true view, however, was that the submission and decree-arbitral did not extinguish the servitude, but merely liquidated the annual prestations in respect of it by fixing an annual money payment. In that view, the defender, even as heir of entail, was bound, for an heir of entail was entitled to commute a burden already existing on the entailed estate—*Magistrates of Dysart* v. *Rosslyn*, November 27, 1832, 11 S. 94. The effect of the submission and decree-arbitral was to provide for the payment of dry multures in the future. Dry multures were not the same as abstracted multures. The latter were damages for not bringing corn within the thirl to be ground at the mill, whereas dry multures were a perpetual payment to be free of the obligation to send grain to the mill. The former could not be exacted unless the mill were in existence and fit for grinding, but no such condition attached to dry multures. That was the necessary result of the authorities, although it had never been in terms so decided—*Kinnaird* v. *Drummond*, 1675, M. 10,862; *Stuart* v. *Erskine*, 1741, M. 16,020; *Maxwell* v. *Glasgow University*, 1745, M. 16,022; *Elphinstone* v. *Leith*, 1749, 16,026. It would be inequitable to require that the mill should be kept standing when there was no obligation to send grain to be ground at it. That this was the nature of the rights here was plain from the terms of the submission and decree-arbitral, and was supported by the practice of about seventy years.

At advising—

LORD JUSTICE-CLERK—The pursuers ask declarator that they have right to a sum of £4, 1s. 4½d. per annum from the defender as proprietor of lands in the sucken or thirlage of the mill of Nairn, that sum being the reduced rate of converted multures, sequels, and services pertaining to the mill from his lands. Their declarator is based on a decreet-arbitral dated in 1814, which was issued in a submission between the then proprietors of the mill and the proprietors of land in the sucken or thirlage. The question is raised whether the defender is proprietor of the subjects or holds them only as an heir of entail. But in the view I take of the case this point is of no consequence.

The deed of submission and the decree-arbitral have in their terms considerable resemblance to the provisions of the Commutation of Thirlage Act (39 Geo. III. c. 55), and the procedure thereunder, but there are differences in material particulars. It is important to look at the exact terms of the submission, for whatever conditions were there entered were binding, and neither party could enforce anything ordered in the decree-arbitral unless he fulfilled any undertaking entered into by him as a condition on which others became parties to the submission. The submission was for the fair ascertainment of the sums to be paid by the different proprietors within the sucken in all time coming in the light of the agreement between the parties as expressed therein. Now, the submission sets forth a general narrative of the expediency of commutation by a fixed annual payment in lieu of the right of thirlage and all incident services, prestations, and restrictions. It then sets forth that the submission is entered into to prevent disputes regarding exaction and payment of the multures and sequels, and proceeds—"And considering that the intake and mill run of the said mill has at all times been attended with considerable trouble, loss, and inconvenience both to the proprietors of the mill and to the proprietors and tenants astricted to the thirlage thereof, and that the said Arthur Cant and James Houston are willing to take the whole responsibility of keeping up and supporting the intake and aqueduct to the meal mill in all time coming, both for their own improvement and the more immediate service and accommodation of the sucken, upon having ascertained and being paid a certain annual sum by each of the parties submitters as a compensation in lieu of multures, sequels, and mill services." The question truly is, what is the effect to be given to this paragraph. I agree with the Lord Ordinary that in the ordinary case there is no obligation on the proprietor in

right of the thirl to maintain the mill. The only effect of his allowing the mill to become unserviceable is that he loses his multures. But the Lord Ordinary says that the decreet-arbitral imposed no new obligation on the owner of the mill, and that the heritors had no right before to insist that the mill should be kept up for their convenience. That is quite true, but equally it is true that the conditions expressed in the submission are the law of the application of the decree-arbitral, and that without the decree-arbitral the proprietor of this mill, if he ceased to provide a mill to which his suckeners could resort, could not draw his multures. But the contention of the pursuers is that the effect of the submission and decreet-arbitral was to give the owner of the mill a right in all time coming to exact multures although there was no mill maintained to which the suckeners could resort to have their grain ground should they so desire. I am not satisfied that the suckeners entered into any such agreement. In order to come to that conclusion it would be necessary to read the clause regarding the intake and aqueduct of the mill as meaning only that the proprietors and tenants astricted to the thirlage were to be relieved of the trouble, loss, and inconvenience falling on them in connection with their upkeep while the mill should continue to exist. I cannot so read the clause. It seems to me that the undertaking of the responsibility of keeping up and supporting the intake and aqueduct in all time coming, if it is to be given any effective meaning at all, must be held to apply to a mill to be kept in operation, more particularly when one of the purposes of this undertaking by the one party is declared to be "the more immediate service and accommodation of the other party." I hold that under these words the mill-owner is submitting the question what he is to receive, and the suckeners are submitting the question what they are to pay in all time coming, in respect that in all time coming the intake and aqueduct are to be maintained by the owner of the mill, such maintenance being, *inter alia*, for their service and accommodation. But they could be of no service or accommodation to them unless in connection with a mill in working order, and therefore the clause seems to me to have no meaning consistent with the reason of the thing unless it meant that a mill being to be maintained, the mill-owner undertook to keep for it an efficient intake and aqueduct so that the sucken might be served and accommodated by the mill, and that the arbiter was to take into consideration in fixing the annual payment the service thus undertaken to be rendered in the future by the mill-owner at his own charges, as being in the suckeners' interest as well as his own. According to the view of the pursuers, their authors would have been entitled immediately upon the issue of the decree-arbitral to pull down the mill, thus rendering the intake and aqueduct useless, whether they maintained them or not, and to exact the dues fixed by the arbiter "as a compensation in lieu of multures, sequels, and mill services," without doing anything for that service and accommodation of the sucken which the submission expressly provides for, and calls the arbiter to consider in fixing the compensation. That seems to me to be an unfair construction of the terms of the submission. That submission plainly intended that the arbiter should ascertain a value for this relief service which the owner of the mill undertook, and the arbiter could put no value upon it unless it was to be rendered in some degree, and if to be rendered he could put no measure of value upon it except under the words "in all time coming." In any other view his position as an arbiter called upon him to value, among other things, compensation for a service to be given by perpetual annual payment, which service there was no obligation to render at all, or which might cease to be a service at all at the option of the party drawing the compensation, while the compensation would continue exigible in perpetuity.

I therefore differ from the view taken by the Lord Ordinary, and think that his interlocutor should be recalled, and that the fourth plea-in-law for the defender should be sustained.

LORD YOUNG—This is a case of a very unusual character, for we do not often at the present day have any question about thirlage, but it has that sort of interest which attaches to things of ancient date.

On the case itself I agree with your Lordships and differ from the Lord Ordinary. I am not sure that I do not even go further, for I more than doubt the pursuers' title to sue—not technically their title to sue, but whether they have any title whatever. Assuming that there is an obligation on the defender to pay the yearly sum sued for, I more than doubt whether the pursuers have any title to receive it.

The title which the pursuers produce is a disposition in favour of Arthur Forbes of Culloden, dated in 1878, giving him right to "All and haill the two halves of the Mill of Nairn . . . together with the mill-house and houses at Milltown following the said two-halves of the said mill, haill multures, sucken, sequels and knaveships of the said mills," and so on. But his case in support of his demand is that we have here no concern with the multures, sucken, or sequels or any thing connected with the mill unless the proprietor of the mill for the time being was also creditor in a certain money obligation. The question truly is whether there is any obligation unconnected with thirlage and multures, incumbent on the defender and enforceable by the pursuers. My opinion is that there is no such obligation. I think the pursuers have set forth no obligation on record unconnected with the mill and its multures, or which could survive the extinction of the thirlage of the mill.

It is almost superfluous to observe that according to our old law on the subject a right of thirlage cannot continue to be exer-

cised after the mill has ceased to exist. The extinction of the mill does not indeed extinguish the right of thirlage, but so long as the mill does not exist the right of thirlage was suspended, although if the mill was restored at any time within forty years the old abomination was restored with it. In so describing this ancient and semi-barbarous branch of our law I do not mean to imply that in very early times there was not a great deal to be said in support of it, as being an encouragement to the building of mills for the use and profit of the neighbourhood, but by the time of Mr Erskine, and still more strongly in Mr Bell's time, it had come to be regarded as a very obnoxious portion of our law. Now, it always was a part of that law that the right to make demands within the thirl depended on the mill being kept up. There was no obligation on the tenants to send their grain to be ground at the mill. They might send it to another mill, or they might export it if they chose. If they so chose, their only obligation was to pay the insucken multures for the grain which they might have sent to be ground at the mill. Nor on the other hand was there any obligation on the mill-owner to grind the grain of the tenants, but his having the mill in a condition ready for grinding was the condition of his getting the multures. But if the grain was sent to the mill and was ground, then what the tenants had to pay was the market price of grinding, plus the special tax, that is to say, the insucken multures, the outsucken multures being just the fair market price for grinding. If the grain was not sent, there being no obligation to send it, then there was no obligation to pay the market price for grinding, but there was still the obligation to pay the special tax or insucken multures. Now, there was a variety of practice in different thirls, and it appears to have been the practice in this thirl, if the grain was not sent to the mill, to find out the quantity which had been grown but not been sent, and the suckeners who had not sent the grain were under obligation to pay the insucken multures, minus the outsucken multures, on that quantity, that is to say, they had to pay the tax but not the ordinary market price for grinding. Then the tax was estimated in grain and not in money, so that what had to be done was first to find out the quantity of grain which had been produced in the thirl and not sent to the mill, then to fix the amount of that which was due to the mill-owner as multures, then to convert that quantity into its money value, and then to pay this money tax to the mill-owner. This practice it was found gave rise to disputes almost every year, and no wonder. Besides these disputes there seems also to have been some dispute about the intake and mill run, which apparently were upheld partly by the mill-owner and partly by the suckeners. Such disputes were naturally felt to be very inconvenient, and accordingly in 1814 an agreement was entered into between the suckeners on the one hand and the proprietors of the mill on the other. It sets out in the preamble, very much in the words of the statute, the inconveniences of the servitude of thirlage, and also "considering that the intake and mill run of the said mill has at all times been attended with considerable trouble, loss, and inconvenience both to the proprietors of the mill and to the proprietors and tenants astricted to the thirlage thereof, and that the said Arthur Cant and James Houston"—the proprietors of the mill—"are willing to take the whole responsibility of keeping up and supporting the intake and aqueduct to the meal mill in all time coming both for their own improvement and the more immediate service and accommodation of the sucken, upon having ascertained and being paid a certain annual sum by each of the parties submitters as a compensation in lieu of multures, sequels, and mill-services; and the said parties submitters having entire trust and confidence in the knowledge, skill, and ability of" the arbiter named, "they hereby submit and refer to him." What? "All differences and disputes presently subsisting between them with regard to the annual compensation which the said parties proprietors connected with the thirlage of Nairn ought and should pay to the said Messrs Arthur Cant and James Houston as proprietors of the said meal mill." Now, what were the disputes presently existing between these parties. There could be none except those regarding the amount of the multures which the owners of the mill were entitled to receive and the suckeners were bound to pay. The disputes and differences, we are told, included also the dispute regarding the upkeep of the intake and the mill-run, but this dispute was settled by the parties themselves without the interposition of the arbiter, and the disputes and differences on which the arbiter was called on to give a judgment was an annual estimate of the grain which might have been sent to the mill but was not, and the difference in money between what was actually paid to the proprietors of the mill and what ought to have been paid. It was in regard to this that the disputes and differences had recurred every year, and it was with the view of preventing such disputes in the future that the arbiter was appealed to in order to fix the amount of the tax which should thereafter be paid. But there is nothing in the submission, as far as I can see, to suggest the idea that the mill may be dispensed with altogether and yet that the tax which the arbiter had fixed should continue. It is enough to say that the condition which the law implies with regard to every thirlage—the condition, namely, that in order to entitle the mill-owner to exact the multures the mill must be in an efficient state for grinding the corn sent to it—will be implied in this submission unless there is clear stipulation otherwise. I cannot here find any such stipulation. There is none in what I have read. On the contrary, what the mill-owners undertake is the support of the intake and mill-lade in all time coming for the accommodation of the sucken. And

then there is the declaration that "this compensation shall in no way prejudice the said Arthur Cant and James Houston of their claim of outsucken dues." That is to say, the parties contemplate that grain might be sent to be ground at the mill, in which case outsucken dues were to be paid, and these only because the insucken dues would be paid in the form of the tax as fixed by the arbiter. Now, if there had been any immediate prospect of discontinuing the mill, I hardly think that the parties would have made such a provision. It seems to me to indicate the reverse of an intention to discontinue the mill.

Taking that view, I think it is sufficient for the decision of the case that the mill has ceased to exist. The mill has ceased to exist, and therefore the right to demand insucken multures, however their amount may have been fixed, has ceased also. If this obligation to pay £4 a-year is independent of the thirl altogether, where is Mr Forbes' title to enforce that obligation? He, or rather his representatives who are here now, have produced none. If you have here a claim for multures, then the right to demand multures is dead and gone; if you have a claim for something else not multures, then Mr Forbes and his trustees have no title to enforce such a claim.

LORD RUTHERFURD CLARK — I confess that I have felt some difficulty in this case. If it had been necessary to hold that the decree-arbitral effected a change in the relations of debtor and creditor, I should not have been able to reach the same conclusion as your Lordships. I think that the decree made a change in the debt only, by fixing a round sum instead of one of varying amount, but made no change in the debtor or the creditor. I think the creditor remained the owner of the mill for the time being, and the debtor the owner of the lands. But I think that the decision may be put on the ground that the decree-arbitral implies an obligation on the owner of the mill to keep up the mill as a condition of maintaining an action for the sum here sued for. I have some doubt, but I think the decree-arbitral may be so read, and that would justify our decision, because the pursuer has not kept up the mill.

LORD TRAYNER—The claim which the pursuer seeks to enforce against the defender is based upon a decree-arbitral pronounced in the year 1814, and in disposing of that claim it is necessary to have regard to the terms of that decree-arbitral and the deed of submission upon which it followed. The deed of submission proceeds upon the narrative that it is highly expedient that the servitude of thirlage, to which it refers, should be commuted or compensated by a fixed annual payment "in lieu and satisfaction of the said right of thirlage, and of all services, prestations, and restrictions thereto incident or pertaining;" and in order to prevent any disputes which may arise in the action and payment of the multures and sequels at the meal mill of Nairn, the parties to the submission referred to the decision of the arbiter named the fixing of the amount of annual compensation "the parties proprietors connected with the thirlage" should pay to the proprietor of the mill for their respective multures, sequels, and mill services, and the term of payment of such annual compensation. This deed also narrates—and it is a condition of the submission—that the proprietors of the mill are willing to take the whole responsibility of keeping up and supporting the intake and aqueduct to the mill in all time coming, "both for their own improvement, and the more immediate service and accommodation of the sucken," on being paid the foresaid annual compensation. The arbiter accordingly by his decree-arbitral, fixed a certain sum, payable at Candlemas of each year, as the annual compensation to be paid by the heritors and suckeners, parties to the submission, "in lieu and compensation of the multures, sequels, and services they presently pay and perform, and which shall be paid and received" in full of all demands that the proprietor of the mill can have against the said heritors and suckeners for multures, sequels, and services." The arbiter further finds that the annual compensation fixed by him shall not prejudice the claim of the proprietor of the mill for outsucken dues on such corn as may be ground at the mill, either by the parties submitters or others; nor their claims against the suckeners who were not parties to the submission.

In this state of the facts, I think the annual compensation fixed by the arbiter (which is what the pursuer is now claiming) may be regarded in either of two different aspects. Either (1) it is an annual payment in extinction and discharge of the servitude itself, or (2) it is a sum fixed to take the place of the insucken dues—the fixing of which would prevent disputes as to the "exaction and payment of the multures and sequels at the meal mill of Nairn." Regarded in either of these views, according to my opinion, the pursuers cannot prevail. If the annual payment is regarded as the price paid or agreed to be paid for the extinction or discharge of the servitude itself, then it appears to me that the obligation to make the payment is one binding upon the person who gave it, and one which may or may not transmit against his representatives according to circumstances, but the right to enforce the obligation is in the person to whom that obligation was granted or his assignee. The right and the obligation are alike personal; they do not attach in the one case to the mill lands, nor in the other to the lands within the thirl. The servitude being discharged, the owner of the mill lands cannot enforce it or take benefit from it; the lands within the thirl cannot be bound or burdened by a servitude which has been discharged. The title to the mill lands, granted to the pursuers' author after the servitude had been ex-

tinguished, gave him no title to the price of that which, although formerly a pertinent of these lands, was no longer so at the date of the conveyance in his favour. To put the pursuers in the position of creditor in the obligation in question something more was necessary than the title to the lands; there was needed an assignation to the debt. This, however, the pursuers or their author never had, and in this view of the case I think the pursuers have no title to sue—that is, to receive the amount sued for.

On the other hand, if the annual payment is only a charge on what previously existed—if it is the substitution of a fixed sum payable at a fixed annual term in place of a sum to be ascertained each year according to the circumstances of the time—then the pursuers' claim is one still for multures. It is still the claim which the proprietor of the mill has against the suckeners. No multures, however, are due or exigible unless there exists a mill to which the suckeners may resort for the grinding of their grain; and here there is no longer any mill, consequently there can be no claim for multures. I see nothing in the deed of submission or in the decree-arbitral which entitles the proprietor of the mill to claim multures, or any fixed amount payable in place thereof in the event of the mill ceasing to exist. Both deeds plainly contemplate that the mill will be maintained. More than that, the narrative of the deed of submission, in which it is stated that the proprietors of the mill "are willing to take the whole responsibility of keeping up and supporting the intake and aqueduct to the mill," may fairly enough be read as imparting an obligation on them to keep up the mill. The mill, including the intake and aqueduct, was partly maintained by the suckeners. It was for that they gave the "services" along with the multures. But the proprietors of the mill, by the deed of submission agreed to, have a sum fixed to cover multures, sequels, and service—that is, to take one payment in lieu of their various claims against the suckeners, and thenceforward to relieve the suckeners not only of the multures but of the service also. Now, it can scarcely be supposed that the suckeners were compounding in money for services which were never to be rendered—paying, that is, for work which was never to be done.

The statement in the narrative of the deed of submission amounts to this, that in addition to their obligation as proprietors of the mill, relative to its maintenance, they undertook in addition the obligations thereanent incumbent on the suckeners, in consideration of the annual payment or compensation to be fixed by the arbiter. Their obligations in reference to the maintenance of the mill was in no way diminished or discharged; they were, on the contrary, increased as matter of agreement.

I think the fixed annual payment was to come in place of the then existing obligations binding on the suckeners; but it did not discharge the mill proprietor of the corresponding obligation upon him to keep up the mill, on the fulfilment of which depended his right to enforce the obligation by the suckeners to him.

The Court recalled the Lord Ordinary's interlocutor, sustained the defender's 4th plea-in-law, and assoilzied him from the conclusions of the summons.

Counsel for Pursuers and Respondents—H. Johnston—W. Campbell. Agents—Skene, Edwards, & Garson, W.S.

Counsel for Defender and Reclaimer—D.-F. Balfour, Q.C. — Guthrie Smith. Agents—Macrae, Flett, & Rennie, W.S.

Thursday, July 14.

SECOND DIVISION.

PEARSON (REEVE'S EXECUTOR) *v.* PEARSON AND OTHERS (REEVE'S TRUSTEES).

Succession—Vesting—Destination-over.

A testator directed his trustees to pay the liferent of his estate to his widow, under burden of maintaining his unmarried daughters and such of his sons as should require assistance; after her death to pay an annual sum equally to his sons, and the balance of income equally among his unmarried daughters, while two remained unmarried; after the death of the widow and the death or marriage of all the daughters but one, to dispone to his sons certain heritable subjects, but each under the burden of an annunity of £15 to the surviving daughter, and to pay "to each of my daughters, married and unmarried, without restriction, and not exclusive of the *jus mariti* of their husbands, the sum of £1500 sterling at the first term of Whitsunday or Martinmas after the death of my wife, and after the death or marriage of all my daughters but one; and it is hereby specially provided and declared that the issue of a daughter predeceasing the period for payment of the aforesaid provision of £1500 shall have right equally among them to their mother's provisions." The sons were appointed residuary legatees.

The testator was survived by his widow, one son, and three daughters. After the death of the widow and a daughter, the second daughter died leaving a settlement disposing of her share of her father's estate.

In a question between her executor and the representatives of her brother, the residuary legatee—*held* (Lord Young *diss.*) that a legacy or provision of £1500 from her father's estate did not vest in her, and that the sum of £1500 continued to form part of the residue of her father's estate.

Thomas Reeve of Edenpark, Cupar-Fife, died upon 2nd August 1843. He left a