their illness was not contracted before Martinmas.

The pursuer might perhaps have had a case if his children had died soon after Martinmas, for it might have been said that they contracted the germs of the disease through the fault of Howat or of his trustees before the new owner acquired the property. Here it is admitted that the illness was not due to the condition of the house before Martinmas, and on that ground I agree with your Lordships that the judgments appealed against should be affirmed.

The LORD JUSTICE-CLERK was absent.

The Court dismissed the appeal and affirmed the interlocutors appealed against.

Counsel for the Pursuer and Appellant—A. M. Anderson. Agents — Emslie & Guthrie, S.S.C.

Counsel for the Defenders and Respondents—Graham Stewart. Agents—J. & J. Galletly, S.S.C.

Tuesday, January 15.

FIRST DIVISION.

PORTEOUS *v.* HAIG.

Servitude—Thirlage—Statutory Commutation—Dry Multures—Discontinuance of Mill—Thirlage Act (39 *Geo. III. cap.* 55).

The statutory commutation of the servitude of thirlage under the Thirlage Act 1799 has the effect of extinguishing the servitude and substituting a payment therefor, and accordingly the right to demand annual payments fixed by decree under the Act is not extinguished by the discontinuance of the mill in favour of which the servitude originally existed.

Dry multures still continue to be exigible notwithstanding the discontinuance of the thirl mill.

Spottiswoode v. *Pringle*, July 14, 1849, Hope Collection, vol. 359 (11.); Rankine, Landownership (3rd ed.), 400, note, *followed.*

Forbes' Trustees v. *Davidson*, July 14, 1892, 19 R. 1022, *distinguished.*

This was a special case presented for the opinion and judgment of the Court, in which the questions for decision were whether (1) payments for multures commuted under the Thirlage Act 1799 (39 Geo. III. c. 55), and (2) dry multures, were still exigible notwithstanding that the thirl mill had ceased to exist.

The parties to the case were (1) James Porteous, of Tufthills, Kinross, and (2) Alexander Price Haig of Blairhill.

The following facts were stated in the case:—"The first party is heritable proprietor of the lands of Tufthills, in the county of Kinross, conform to disposition in his favour, dated 10th and recorded 12th November 1892. Included in the said disposition there is a conveyance of Kinross Mill, which, however, at the date thereof was no longer in existence. The said mill was formerly a thirl mill, and the lands of Carsegour, Middle Tillyochie, and East Tillyochie, of which the second party is proprietor, were formerly astricted thereto. In 1806 and 1809 petitions were presented under the said Act (39 Geo. III. c. 55) by, *inter alios*, the proprietors of the lands of Carsegour and the Tillyochies for commutation of their thirlage. The rights of thirlage stated by the applicants consisted principally of multures and knaveships, but also included services in assisting in building and repairing certain parts of the mill-house, maintaining the roof, casting the dam, upholding certain parts of the troughs, and driving mill-stones, which services the applicants had been in the practice of rendering. The whole of these were found by the Sheriff in terms of the statute relevant to pass to the knowledge of the juries. After certain procedure verdicts were finally pronounced by the juries on 23rd November 1807 and 9th January 1810 respectively, commuting the thirlage of, *inter alia*, the said lands of Carsegour, Middle Tillyochie, and East Tillyochie, and the verdicts were registered as directed by the statute in the Particular Register of Sasines, &c., for Kinross on 3rd December 1807 and 11th January 1810 respectively. After the commutation had been made as aforesaid the owners of the said mill, which came to be held along with the estate of Tufthills, received payment from the predecessors of the second party, proprietors of the astricted lands, of the value of the commuted multures in lieu of the old multures, sequels, and services. In or about the year 1884 Kinross Mill was burnt down. In 1890 part of the site thereof was sold by the author of the first party under reservation of all thirlage rights. In 1892 the remainder of the site, along with adjoining mill lands, passed to the first party under the disposition above referred to. The first party has sufficient space on the remaining part of the old site and the adjoining mill lands on which to erect a new mill, but he has at present no intention of doing so. Payment of the commuted multures and services continued to be made by the second party and his predecessors to the owners of the mill and the site thereof up till 1897. Since that time the second party has refused to make the said payments, on the ground that they are no longer due. The second party has also since the said date refused to make payment of the sum which was previously paid by the proprietors of Carsegour to the proprietors of Kinross Mill as dry multure. The said dry multure was paid for bear growing on the lands of Carsegour, which were free from ordinary thirlage in regard to the said crop. In respect of the 14th section of the Act 39 Geo. III. c. 55, the said dry multure was not referred to the juries in 1807 and 1810. It consisted of three firlots of oats and two firlots of bear, and had been paid from time immemorial."

The first party contended that he and his assignees and successors in the said commuted payments and dry multures

were entitled to exact the same in all time coming, and that such right did not depend upon the existence of the said mill. As regards both the commuted payments and the dry multure, the second party contended that these were of the nature of servitudes, which were necessarily extinguished, or at anyrate which could not be enforced by reason of the destruction of the mill, which was the dominant tenement With respect to the commuted payments, the second party further contended that as these were partly fixed in commutation of the suckener's services in upholding the mill and its appurtenances, the mill-owner was bound to uphold the mill as a condition of exacting them.

The following was the question submitted to the Court:—"Is the first party entitled to exact payment from the second party, (1) of the sums commuted in the said verdicts so far as applicable to the second party's lands, and (2) of the dry multure applicable to the said lands?"

The Thirlage Act 1799 (39 Geo. III. cap. 55), enacts as follows: — "Whereas it is found by experience that the servitude of thirlage and right of mill services incident thereto in that part of Great Britain called Scotland are very unfavourable to the general improvement of the country by checking the industry of the occupiers of the ground, and by occasioning troublesome and expensive litigation; and that it is highly expedient that it should be allowed to persons subject to such servitude to compensate or to commute the same 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 some cases to make an entire and complete purchase of the same for a fair and adequate price: Therefore be it enacted . . . that from and after the passing of this Act it shall and may be lawful for the proprietor or proprietors of any lands or tenements thirled or astricted to any mill in that part of Great Britain called Scotland, or to the proprietor of any mill to which the lands or tenements of any other person or persons are thirled or astricted, who shall be desirous to have such thirlage or astriction changed or commuted into such annual payment, to apply to His Majesty's sheriff or steward-depute of the county or stewartry in which such lands or tenements and mills are situated, or to his substitute, by a petition setting forth such his or their desire, and specifying the lands and tenements so thirled which he or they is or are desirous should be freed from such thirlage, and the mill or mills to which such lands or tenements are so thirled, and also the nature of the thirlage, the several species of corn or grain over which it is extended, the quantity of multure paid for grinding every sort of grain, the services dependent on the right, and the total amount of the multures and other dues claimed or allowed to be due, . . . which petition and answers the sheriff or steward-depute or his substitute shall immediately take into consideration, and within thirty days shall make an order or decree finding and declaring the precise matters in the said petition and answers which are relevant to pass to the knowledge of a jury in manner after mentioned; and twenty days from the date of such order or decree having elapsed, or in case of any advocation, suspension, or other stay by the authority of a superior court, within ten days after such advocation, suspension, or other stay has been discussed and removed, the sheriff or steward-depute or his substitute shall pronounce an interlocutor appointing a jury to be summoned on a certain day, to be expressed in the said interlocutor, at the distance of not less than thirty and not more than forty days from the date of such interlocutor, to give their verdict or determination on the matters contained in the said petition and answers and decree made thereon by the said sheriff or steward-depute or substitute, or by a superior court, in such manner and for such purpose as hereinafter is directed; and the said sheriff or steward-depute or his substitute is hereby directed and required to summon an assize, . . . who shall be sworn and coustitute a jury for the determination of the annual value of the thirlage, services, and prestations thereto annexed which is submitted to their consideration; before which jury and the said sheriff or steward-depute or substitute the said petition and answers and decree, together with such evidence as any of the parties may incline, shall be laid; which evidence shall be taken in writing and remain for four years at least upon record in the Court where it was taken; and after deliberating thereon and hearing parties and their procurators, if they shall desire to be heard, and upon a due consideration of all the circumstances of the case, the said jury shall, by their verdict or determination, fix and ascertain the amount of such annual payment in grain of such kinds and in such quantity and amount as to the said jury shall appear to be a just, fair, and equal value and compensation for the said right of thirlage, and all and every service, prestation, or restriction thereto annexed or incident; of which verdict or determination an abbreviate shall be registered by any of the parties in the General Register of Sasines at Edinburgh, or the particular register for the said county or stewartry, within sixty days after the pronouncing of such verdict or determination. . . . 5. And be it further enacted, that after such verdict and determination as aforesaid the servitude of thirlage, and all services, prestations, and restrictions pertaining or any way incident thereto, so valued by the said jury, shall cease to be exigible from or binding upon either or any of the parties, but that in lieu thereof the said proprietor or proprietors, occupier or occupiers of the thirled lands or tenements shall be bound and obliged to pay, and the proprietor of the mill to which the said lands or tenements are thirled shall be bound and obliged to receive annually, at

the mill where the multure under the former servitude of thirlage was in use to be paid, or at some other convenient place to be fixed by the jury, such quantity or amount of corn or grain of such kind or sort, kinds or sorts, as the said jury shall in manner aforesaid determine to be a just compensation or equivalent for such right of thirlage, or in the option of the payer, the value of such corn or grain in money, according to the value or price put upon such kind or kinds of corn or grain by the fiars of the county in which the grain is payable for the year within which such payment is due. . . . 10. And whereas the annual payment to be adjudged under this Act to the proprietor of a mill in lieu of the multures, mill services, and other rights from which the lands thirled are to be thereby relieved is meant and understood to be of equal value, and a full compensation for the discharge thereof, and in no ways to take from or diminish the value of his right as proprietor: It is further hereby enacted and declared that the discharge of the multures, mill services, and other rights belonging to a proprietor of a mill, as to the whole or any part of the lands astricted to it, and the substitution of an annual payment by way of compensation in place thereof in the manner above provided for, shall afford to such proprietor no ground or pretence for claiming relief from any part of the cess or land tax payable by him in respect thereof. 11. And whereas there is a kind of thirlage known in the law and practice of Scotland called a thirlage of *invecta et illata*, to which sundry towns . . . and the inhabitants thereof are subject, which thirlage it is expedient to allow to be purchased by the persons subject to the same, be it therefore enacted that if any inhabitant or inhabitants of such town . . . shall be desirous to purchase an exemption from the said servitude of thirlage, . . . it shall be lawful and competent to them to apply in manner above mentioned to the sheriff, . . . who shall take such proceedings and summon a jury in such manner as is hereinbefore particularly directed, which jury shall by their verdict fix and determine the full value in money of such right of thirlage in perpetuity, . , . on payment of which to the proprietor of the mill, such town . . . or such inhabitant or inhabitants thereof, formerly subject to such thirlage, shall thenceforth be for ever freed and relieved from the same. 14. Provided always, and it is hereby expressly enacted and declared, that nothing hereinbefore contained shall apply to the case where a permanent annual payment, either in money or grain, is already fixed or established under the name of dry multure in lieu of the servitude of thirlage, but reserving, nevertheless, to either party, as well the proprietor of the dominant as of the servient tenement, to apply in manner hereinbefore directed for commutating or compensating by such fixed annual payment as hereinbefore mentioned, all mill services and other prestations and restrictions, if any such are exigible, over and above the sum of money or grain payable in name of dry multure as aforesaid."

Argued for the first party—The value of the right of thirlage which was commuted under the statutory proceedings was not the amount of the gross receipts taken by the proprietor of the mill, but the net profit remaining after deducting the working expenses of the mill. But according to the second party's contention the proprietor was bound to keep up the mill and pay the expenses of doing so, and yet he was only entitled to receive what had been shown to be the net profit after deducting such expenses. The obligation to keep up the mill was an incident of the servitude of thirlage, and that service in fact no longer existed, for the commutation which was introduced by the Act of 1799 was intended to put an end to the servitude of thirlage, and the incidents attached thereto, and to introduce a new arrangement by which a real burden was placed on the land in the shape of an obligation of payment, in place of the old servitude—*Duchess of Sutherland* v. *Reid's Trustees*, February 25, 1881, 8 R. 514. The case of *Spottiswoode* v. *Pringle*, July 14, 1849; Rankine on Landownership (3rd ed), p. 400, Hope Collection, vol. 359 (11), referred to by the second party was precisely in point. (2) Dry multures were due under an arrangement equivalent to a statutory composition, the suckener being absolved from the obligation to take his corn to the mill to be ground, and the payment being accepted as compensation by the millowner for his loss of profit in consequence of not grinding the corn. Clearly, therefore, as the service to the mill had been extinguished, there was no obligation to keep up an efficient mill—Bell's Prin., sec. 1018; Erskine ii., tit. 9, sec. 28; Stair, ii., 7, sec. 16; *Stuart* v. *Erskine*, 1741, M. 16,020; *Kinnaird* v. *Drummond*, 1675, M. 10,862; *Elphinston* v. *Leith*, 1749, M. 16.026.

Argued for the second party—(1) The effect of statutory commutation was not the substitution of a new right for a previously existing one, but merely the liquidation of the annual prestations in respect of it. Accordingly the old conditions of thirlage still prevailed, and one of these was that the mill must be in existence. It was true that the unreported case of *Spottiswoode* v. *Pringle* appeared to negative this contention directly, but on the other hand it was strongly supported by *Forbes' Trustees* v. *Davidson*, July 14, 1892, 19 R. 1022. It was true that the question there did not arise under the Act but under a deed of submission between the parties, but the terms of the submission were based upon the words of the Act, and there was no distinction in principle. (2) From the mode of the constitution of a right to payment of dry multures, viz., continuous payment of them for 40 years, it seemed clear that the original condition of payment—the existence of a mill—was not abrogated. It could not be the case that this condition was operative during the 40 years and ceased to be so at their expiry. In the

case of *Kinnaird* v. *Drummond*, *supra*, dry multures were treated as being in the position of a servitude, and if they were so, necessarily they must be in favour of a mill as the dominant subject, and would come to an end with it.

At advising—

LORD PRESIDENT—The first and most important question is whether a commutation under the Act of 39 Geo. III, cap. 55, such as was effected by the verdicts of 23rd November 1807 and 9th January 1810, and the registration of them in the Register of Sasines, operates as an extinction of the servitude of thirlage, *quoad* the lands of the heritors, or merely as a liquidation or ascertainment of the amounts to be paid annually by them in respect of that servitude, upon the footing that it still continues to exist? The solution of the question depends upon the terms of the Act, which I shall now consider.

The Act proceeds upon the preamble that it is found by experience that the servitude of thirlage, and right to mill services incident thereto in Scotland, are very unfavourable to the general improvement of the country, by checking the industry of the occupiers of the ground, and by occasioning troublesome and expensive litigation, and that it is highly expedient that it should be allowed to persons subject to such servitude to compensate, or to commute, the same by a fixed annual payment in lieu and satisfaction of the right of thirlage, and of all services, prestations, and restrictions thereto incident or pertaining, and in some cases to make an entire and complete purchase of the same for a fair and adequate price. This preamble would lead one to expect that provision would be made by the enacting clauses of the Act for putting an end to a servitude which produced such injurious results, either in consideration of a fixed annual payment or of a sum down, and this appears to me to be the effect of these clauses.

Section 1 enacts that it shall and may be lawful for the proprietors of any lands or tenements thirled or astricted to any mill in Scotland, or to the proprietor of any mill to which the lands or tenements of any person are thirled or astricted, who shall be desirous to have such thirlage or astriction changed or commuted into an annual payment, to apply to His Majesty's sheriff or steward-depute of the county or stewartry in which such lands or tenements and mills are situated, or to his substitute, by a petition setting forth his or their desire, and specifying the lands and tenements so thirled, which he or they is or are desirous should be freed from such thirlage. The words "changed or commuted into an annual payment," and "should be freed from thirlage," seem to me to point plainly to an extinction of the servitude, not merely to a liquidation of the amount payable upon the footing of its remaining in force.

Provison is made for an assize being summoned, after certain preliminary procedure, who shall constitute a jury for the determination of the annual value of the thirlage, services, and prestations, and after hearing evidence the jury shall by their verdict or determination "fix and ascertain the amount of such annual payment in grain of all such kinds and such quantity and amount as to the said jury shall appear to be a just, fair and equal value, and compensation for the said right of thirlage, and all and every service, prestation, or restriction thereto annexed or incident." Provision is also made for registration of an abbreviate of the verdict or determination by any of the parties in the General Register of Sasines at Edinburgh, or the particular register for the county or stewartry, within sixty days after the verdict is pronounced. Upon this provision it is to be observed that what the jury have to ascertain is not the amount of the multures which have been paid, or the services or prestations which have been rendered, but the "value and compensation for" the right of thirlage, and these services. The multures paid by the suckeners (insucken multures) were generally larger than the market value of the grinding, which would be roughly defined by the outsucken multures charged to persons not owning or occupying astricted lands, and the value of the thirlage would, in so far as the multures were concerned, be the difference, or something rather less than the difference, between the insucken and the outsucken multures—in other words, the grinding profit which the owner of the mill derived from the lands being astricted. This, however, would not be an ascertainment or liquidation of anything payable under an existing servitude of thirlage. The provision for the registration of an abbreviate of the determination in the General Register of Sasines supports the view that the lands were disburdened of the servitude of thirlage which had previously existed upon them, and were for the first time subjected to a different charge, viz., "the value and compensation for" the right of thirlage and incidental services.

This view is further confirmed by section 5 of the Act, which provides that after the verdict and determination already mentioned, the servitude of thirlage, and all services, prestations, and restrictions pertaining or in any way incident thereto, so valued by the jury, shall cease to be exigible from, or binding upon, either or any of the parties, but that in lieu thereof the proprietor of the thirled lands shall be bound and obliged to pay, and the proprietor of the mill to which the lands are thirled shall be bound and obliged to receive, annually, at the mill where the multure under the former servitude of thirlage was in use to be paid, or at some other convenient place, to be fixed by the jury, such quantity or amount of corn or grain, of such kind or sort, or kinds or sorts, as the jury shall determine to be "a just compensation or equivalent for such right of thirlage," or in the option of the payer, the value of such corn or grain in money. This

section seems to me to indicate that the effect of the commutation was to extinguish the servitude, substituting for it a money payment, which is not a servitude. The same view is borne out by section 10 of the Act.

Although no question arises in the present case as to the thirlage of *invecta et illata* to which some towns or other populous places were subject, the provisions for the purchase of that thirlage contained in section 11 are not immaterial as indicating the general purpose and intention of the statute. It provides for the purchase of exemption from the servitude, a jury being summoned who by their verdict are to "fix and determine the full value in money of such right of thirlage in perpetuity," and on payment of the money to the proprietor of the mill, the town, or place formerly subject to such thirlage "shall thenceforth be for ever freed and relieved from the same." This again points to an extinction of the thirlage, not merely to the regulation of it, or the ascertainment of the sums payable under it as an existing servitude.

If I be right in thinking that the effect of proceedings being taken under the statute is to extinguish the servitude of thirlage in consideration of money payments in one form or another, it, in my judgment, follows that there can be no obligation upon the millowner to maintain the mill, and that his ceasing to do so cannot have the effect of discharging the liability of the owners of the lands, which were formerly astricted, to pay the compensation for the extinction of the servitude ascertained in terms of the statute. If it had been intended that the maintenance of the mill should be a condition of the commutation money being exigible, this would have been expressed in the statute, as there could be no ground for holding such a condition to be implied. The view that the statute did not contemplate that there should be any obligation to maintain the mill after the commutation, is confirmed by the provision in section 5, that the jury might fix, as the place of payment of the commutation money, either the mill or "some other convenient place."

The question now considered has not, so far as I am aware, been decided in any reported case, but it was decided *in terminis* by the Second Division of the Court in the unreported case of *Spottiswoode* v. *Pringle* (July 14, 1849, mentioned in Rankine on Landownership, 3rd ed., p. 400). From the session-papers in that case it appears that Mr Sandilands of Couston in the year 1801 took proceedings under the Act 39 Geo. III. cap. 55, against the joint proprietors of the mill of Torphichen, to which his lands were astricted, for obtaining a commutation of the thirlage by the verdict of a jury, as also that the commutation was duly effected, and the verdict of the jury duly registered in the Register of Sasines. The estates of a successor of Mr Sandilands in the lands of Couston were sequestrated in or about the year 1848, and in the sequestration Mr Pringle, "as half proprietor of Torphichen Mill," made a claim for converted multures for crops 1836 to 1844, both inclusive. The trustee in the sequestration at first ranked this claim, but after a dividend had been paid upon it he discovered "that Torphichen Mill has been in ruin for a number of years past, at least during the period for which the said claim is made," and he accordingly repelled the same, "reserving his right to recover payment of the sum he paid to account thereof by mistake, while in ignorance of the disability or non-existence of said mill." Mr Pringle appealed to the Sheriff of the county (Linlithgow) against this determination, and the question was fully argued in a minute of debate and answers, and after considering these the Sheriff found Mr Pringle entitled, "notwithstanding the destruction of Torphichen Mill, to the converted multures libelled, and to all arrears of the same," therefore recalled the judgment of the trustee appealed upon, and sustained the claim of the appellant. The case was brought by appeal before the Second Division of the Court, and they on 14th July 1849 recalled the interlocutor of the Sheriff, and found "that Mr Pringle is to be ranked for the amount of the converted multures for the years contained in the claim," and remitted to the Sheriff to proceed accordingly. The decision of the Second Division on the merits was the same as that of the Sheriff, whose interlocutor appears to have been recalled merely in order that the judgment might be put into a more correct form.

Although the question was not raised for decision in the case of the *Duchess of Sutherland* v. *Reid's Trustees* (8 R. 514), Lord President Inglis expressed an opinion as to the Act of 39 Geo. III. cap. 55, which had an important bearing upon it. His Lordship said—"It is important, I think, that this is, in the highest sense, a remedial statute. It is intended to put an end to a highly disadvantageous relation between the owners of a barony mill and of the lands thirled to it. We are therefore bound to give it a liberal interpretation in favour of the object proposed to be obtained by the statute."

The second party founded strongly upon the case of *Forbes' Trustees* v. *Davidson* (19 R. 1022), but the decision in that case proceeded upon very special circumstances, and it does not appear to me to be at variance with the views now expressed. The question arose, not under the Act of 39 Geo. III. cap. 55, but under a deed of submission dated in 1814, entered into between "certain 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; and the Court held that upon a sound construction of the submission and decreet-arbitral, it was a condition of the right to exact the payments found due by the arbiter that the mill should be in a working condition, and that, as it was admitted that there was no intention to rebuild the mill, the defender should be assoilzied. The Court

were of opinion that, upon a sound construction of the agreement, it provided for the relation of the parties under the servitude of thirlage continuing, subject to pactional regulations, not for the termination or extinction of that servitude. I may add that the case of *Spottiswoode* v. *Pringle* does not appear to have been brought under the notice of the Court in that case.

For the reasons now given I am of opinion that the first party is entitled to exact from the second party payment of the sums commuted in the verdicts in so far as applicable to the second party's lands, although Kinross Mill is no longer in existence.

The second question relates to dry multures, to which the Act of 39 Geo. III. c. 55, does not apply, and which consequently were not dealt with by the juries in 1807 and 1810. Dry multures are duties or money paid to a millowner by the owner or occupier of land at some time astricted to the mill, whether the grain grown on the land is or is not ground at the mill. The right to exact such multures is acquired by payment of them continuously for forty years, implying an agreement to pay and accept them. Dry multures are paid in consideration of the millowner absolving the suckener from an obligation to take his corn to the mill to be ground, and the payment is made and accepted as compensation to the millowner for the loss of profit which he sustains in consequence of the grain not being ground at his mill. The amount of the dry multure would therefore practically correspond to the difference beeween the insucken and the outsucken rates for grinding. This being so, the question comes to be, whether the proper inference from a course of payment for a period greatly exceeding forty years is not that the agreement to pay and accept the dry multure was a permanent, not a temporary, arrangement, and this seems to me to be the just inference in the circumstances. But if it must now be assumed that the millowner agreed permanently to acquit the landowner from all obligations to the mill in consideration of his undertaking to pay the dry multure in perpetuity, and that the landowner assented to this, the effect was, in my judgment, to make a permanent commutation of the thirlage, resulting like the statutory commutation in the extinction of the servitude, and if the servitude was extinguished there could be no obligation to maintain the mill as a condition of the right to exact the dry multure. The conclusion that the mill was to be kept up notwithstanding the agreement permanently to pay and accept the dry multure could only be reached by supposing that it was an implied condition of the agreement that an efficient mill should be maintained on the dominant estate, and it would be contrary to good sense to read into any agreement by mere implication a condition from which neither of the parties to it could derive any benefit. For these reasons I am of opinion that the second question put in the case should, like the first, be answered in the affirmative.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court answered both branches of the question in the affirmative.

Counsel for the First Party — H. Johnston, Q.C.—Cullen. Agents—Alex. Morison & Co., W.S.

Counsel for the Second Party—Rankine. Q.C.—Constable. Agents—John C. Brodie & Sons, W.S.

Tuesday, January 15.

FIRST DIVISION.

THOMSON *v.* EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED.

THOMSON *v.* KERR.

Expenses — Several Defenders — Conjoined Actions—One Defender Successful—Liability for Expenses of Successful Defender —Liability of Defenders inter se.

In an action of damages for personal injuries alleged to be due to the fault of the defender, the defender in defence averred that the accident in question was solely due to the fault of a third person. In consequence of this averment the pursuers raised an action of damages against this third person. The two actions were conjoined, and were tried together before a jury upon separate issues. The jury found that the original defender was alone responsible for the accident, and that he was liable in damages to the pursuers, and returned a verdict in favour of the second defender. *Held* that the pursuers and the successful defender, both in the separate and conjoined actions, were entitled to expenses against the original defender.

Observed (*per* Lord M'Laren) that the effect of conjoining the actions was that the case must be treated as if it had been originally raised against two defenders called in one summons.

Opinion reserved by Lord Kinnear upon the question whether the same result as regards liability for expenses might not have followed even if the actions had not been conjoined.

On 1st September 1900 Miss Nellie Turner Thomson and Miss Margaret Thomson, dressmakers, London, were passengers on a touring coach belonging to John Kerr, coach-hirer, Edinburgh, which was driven by his son. They went to Roslin on the coach, and were returning to Edinburgh, when on reaching the Braid Hills terminus of the tramway car lines, the coach collided with a cable car belonging to the Edinburgh and District Tramways Company, Limited, and the pursuers were thrown to the ground, sustaining injuries