LORD TRAYNER—I agree in the judgment of the Lord Ordinary although I am not sure that I concur in all the reasons he gives for it in his opinion. I understand the Lord Ordinary to say that the trustee having adjudicated upon the reclaimer's claim, and no appeal having been taken against the trustee's deliverance, that it was then too late for the reclaimer to withdraw her claim. If this is the view of the Lord Ordinary I cannot concur in it. As at present advised I think that any creditor claiming in a sequestration may in ordinary circumstances withdraw his claim at any time before receiving a dividend upon it. But I think the reclaimer was barred from withdrawing her claim in this case when she proposed to do so, not because of the trustee's deliverance admitting her claim, but because of what was done by the trustee thereafter. It appears to me that the 65th section of the Bankruptcy Act of 1856 in effect amounts to this—that when a creditor in a sequestration values a security held by him for the purpose of ranking, he virtually offers that security to the sequestrated estate at the value put upon it. Like every other offer it needs acceptance to make it a bargain. The 65th section does not limit the time within which the acceptance must be given, but until it is given I think the creditor may withdraw the offer by withdrawing his claim. After acceptance the bargain is completed, and neither the creditor on the one hand nor the trustee on the other can resile. Now, in this case, the creditor claimed for a ranking, and valued her security at £850. That claim was duly adjudicated on by the trustee, who admitted the claim on 31st December 1901. Admitting the creditor to her ranking, however, did no more than intimate that the trustee did not question the propriety of the creditor's valuation of her security, and if matters had remained in that position the creditor would have been entitled then to withdraw the claim. But according to the admission made at the bar the trustee intimated to the creditor on 22nd January 1902 that he would take over the security in terms of section 65. That I regard as due acceptance of the creditor's offer, and prevented the creditor thereafter from withdrawing her claim as she proposed to do.

LORD MONCREIFF—I agree in the judgment of the Lord Ordinary, but I think that he is right on the ground stated by Lord Trayner. I think that the time at which the offer is accepted and an assignation demanded by the trustee is what is to be looked to. If a first dividend has been paid and nothing has been said by the trustee as to taking an assignation to the security, I think that the creditor is entitled to re-value his security with a view to a second dividend, though not with a view to the first—my impression is that it has been so decided. But if the trustee has demanded an assignation of the security I think it is too late for the creditor to withdraw.

The Court adhered.

Counsel for the Pursuer and Respondent—Salvesen, K.C.—W. Thomson. Agent—John Veitch, Solicitor.

Counsel for the Defender and Reclaimer—Guthrie, K.C.—Constable. Agent—Andrew Gordon, Solicitor.

Tuesday, June 2.

FIRST DIVISION.

GRANT'S TRUSTEES *v.* LEITH HAY.

Servitude—Thirlage—Multures—Submission and Decreet-Arbitral Commuting Multures—Succeeding Heir of Entail not Bound—Entail—Thirlage Act 1799 (39 *Geo. III. cap.* 55), *sec.* 14.

In 1828 two proprietors, one of whom was the heir of entail in possession of lands astricted to a mill belonging to the other, for the purpose of preventing the delay and expense attendant upon prosecuting to a conclusion certain proceedings which had been initiated under the Thirlage Act 1799 for commutation of the thirlage, entered into a submission, under which the arbiter pronounced a decreet-arbitral finding that, in lieu of the mill multures and other prestations then exigible by the proprietor of the mill, and as compensation for the said right of thirlage, certain annual payments of money and meal should be made by the proprietor of the astricted lands to the owner of the mill. The payments were regularly made down to 1892. The astricted lands were held in strict entail by four successive heirs of entail down to 1900, in which year they were duly disentailed.

Held that the present proprietor of the mill was not entitled to exact the annual payments in question from the present proprietor of the astricted lands, in respect (1) that the submission and decreet-arbitral of 1828 were not binding upon the subsequent heirs of entail in the astricted lands who were not parties thereto, and (2) that the origin of the annual payments being admittedly referable to the contract and decreet-arbitral of 1828, which was not binding on the owner of the astricted lands, the presumption that the payments were attributable to a valid title was excluded, and that therefore the continuance of the payments for a period exceeding forty years could not create a prescriptive right to exact such payments.

This was a special case, in which the parties were (1) the testamentary trustees of the late Robert Grant of Druminnor, Aberdeenshire, proprietors of the estate of Druminnor and, *inter alia*, of a thirl mill situated on said estate, known as the mill of Barflatt, and mill lands and multures thereof; and (2) Charles Edward Norman Leith Hay of Rannes and Leith Hall, Aberdeenshire, proprietor of the lands of Kirkhill, includ-

ing the lands of Towie of Clatt, which with other lands, known as Westhills and Marchmar, were at and prior to the date of the submission and decreet-arbitral after mentioned astricted to the said mill of Barflatt.

The fabric of the mill of Barflatt was destroyed by fire in 1874, and had not been rebuilt.

From 1798 to 1900 the lands of Kirkhill and others were held under and in virtue of a deed of entail, the heirs of entail who possessed the said lands, as heirs of entail in possession during these years, being as follows:—(1) From 1798 to 1838 Major-General Alexander Hay of Rannes; (2) from 1838 to 1862 Major, afterwards Sir Andrew Leith Hay, of Rannes; (3) from 1862 to 1897 Colonel Alexander Sebastian Leith Hay; and (4) from 1897 to 1900 the said Charles Edward Norman Leith Hay, the second party. On 10th November 1900 the said entailed lands and estate of Kirkhill and others were disentailed under the authority of the Court of Session at the instance of the second party, and from that date the estate had been possessed by him as fee-simple proprietor thereof.

In 1825 General Alexander Hay, at that date heir of entail in possession of Towie of Clatt, Harry Leith Lumsden, at that date the proprietor of Westhills and Marchmar, and Robert Grant senior, at that date proprietor of Druminnor, including the mill of Barflatt, agreed that the said Robert Grant senior should apply by petition to the Sheriff of Aberdeenshire in terms of the Statute 39 Geo. III. cap. 55, to have the thirlage of the said lands of Towie of Clatt and Westhill and Marchmar to the said mill of Barflatt commuted into an annual payment. In pursuance of this agreement Robert Grant senior presented a petition to the Sheriff in terms of the statute, to which General Alexander Hay, as heir of entail in possession of the lands of Towie of Clatt, was, *inter alios*, called as respondent. The petition was served and certain preliminary steps under it were taken, but it was not proceeded with, and no decree was ever pronounced therein. Thereafter the said General Alexander Hay and Major Andrew Leith Hay, his eldest son, and heir-apparent under the entail, and the said Harry Leith Lumsden, on the one part, and the said Robert Grant senior, on the other part, considering it expedient to prevent the delay and expense attendant upon carrying on said suit before the Sheriff, and with the view of bringing the same to a speedy conclusion, entered into a submission, dated 2nd, 8th, and 10th May 1828, whereby they appointed William Leslie of Warthill sole arbiter, mutually chosen by them, to settle, ascertain, and determine the whole rates, both meal and money prestations, to be paid and performed in all time coming by the occupiers of said lands under thirlage as aforesaid, beginning with crop 1826.

William Leslie accepted of the said submission, and thereafter pronounced and issued a decreet-arbitral thereunder, dated 20th June 1828. No registration of this decreet-arbitral was made in the Register of Sasines. By this decreet-arbitral Mr Leslie found and decerned that in lieu of the mill multures, services, and other prestations then exigible from the said thirled lands of Towie of Clatt the said lands should in future be subject to the payment of £5 sterling in money and 8½ bolls of meal, at 8 stone per boll, Amsterdam weight, yearly, and in like manner found and decerned that the lands of Westhills and Marchmar should be subject to the payments therein specified, and in consequence thereof that the said whole astricted lands should be freed and relieved from all thirlage and astrictions to the said mill of Barflatt, which several annual payments he did thereby declare to be a just, fair, and equal value and compensation for the said right of thirlage to the said Robert Grant senior, and of all and every service, prestation, or restriction thereto annexed or thitherto enjoyed by him as proprietor of the said mill, and did appoint and ordain the same, beginning with crop 1826, to be paid to and accepted by him in terms of the foresaid Statute 39 Geo. III. cap. 55.

From and after the date of this submission no insucken multures or services were paid or performed to the proprietor of the mill of Barflatt in respect of the said lands of Towie of Clatt, but the heirs of entail in possession of these lands paid yearly to the proprietor of Druminnor, from 1828 down to 1891, the commutation payments of £5 sterling and 8½ bolls of meal before specified, fixed by the said decreet-arbitral as exigible in respect of these lands. The last payment was made in the year 1892 for crop 1891. Since then no payments had been made, and the second party had refused to make any further payments of the said amounts, maintaining that he was not liable therefor.

The first parties contended that they were entitled to exact the said commutation payments from the second party.

The second party contended that he was not bound to pay the same, in respect that the submission and decreet-arbitral did not extinguish the servitude of thirlage to the like effect and extent as if proceedings under the foresaid statute 39 George III. cap. 55, had been duly followed out; that the said General Alexander Hay, as heir of entail in possession of the said lands of Towie of Clatt, and the said Major Andrew Leith Hay, his eldest son, had no power, by submission or other voluntary transaction, to subject the said entailed lands of Towie of Clatt to a permanent money burden in exchange for a servitude of thirlage, and that the said mill of Barflatt was non-existent, and had not been rebuilt since it was destroyed by fire in the year 1874.

The question of law for the opinion of the Court was as follows:—"Are the first parties entitled to exact from the second party the said payments of £5 sterling and 8½ bolls of meal yearly?"

Argued for the first parties—The contract entered into in 1828, by which the predecessor of the second party, at that time the heir of entail in possession, with the concurrence of his eldest son, the heir appar-

ent, agreed with the predecessor of the first parties, the owner of the thirl mill, that the thirlage should be commuted for an annual payment, to be fixed by a named arbiter, was binding upon subsequent heirs of entail. It was unnecessary that the parties to the agreement of 1825 should go through the whole of the litigious proceedings contemplated by the Statute 39 Geo. III. c. 55. What was done in 1828 was merely to substitute an arbiter for a jury. The parties were compulsorily before the Court, and it was within their power to work out the question at issue between them in the way they had adopted. This was a valid contract, and the award was binding on both the parties and their successors. A succeeding heir of entail represented his predecessor, and was bound by the acts of his predecessor in the case of administrative obligations relating to the estate which were not in contravention of the entail or in *mala fide*—*Innes* v. *Hepburn*, May 18, 1859, 21 D. 832. This was an administrative arrangement, and not an alienation. The contract, followed by the submission and decreet-arbitral, did not extinguish the servitude, but merely liquidated the annual prestations in respect of it by fixing a definite annual payment. The effect was to provide for the payment of dry multures in future, and the payments made down to 1892 were really dry multures—*Porteous* v. *Haig*, January 15, 1901, 3 F. 347, 38 S.L.R. 258. The decision in *Forbes' Trustees* v. *Davidson*, July 14, 1892, 19 R. 1022, 29 S.L.R. 887, proceeded on the special ground that it was a condition of the right to exact the payments found due by the arbiter that the mill should be working. In this case there was no such condition. Even if the contract was not binding on the second party, the fact that the payments had been made annually by the second party and his predecessors without question for seventy years gave the first parties a good prescriptive right to exact the payments—*Stuart* v. *Erskine*, 1741, M. 16,020. There was in the agreement between the parties' authors at least a title *ex facie* good, which furnished a basis for the running of prescription. Dry multures continued to possess many of the attributes of servitudes—*Kinnaird* v. *Drummond*, 1675, M. 10,862. Prescription was sufficient to base a right of exacting dry multures, and the continued existence of the mill was immaterial in the case of dry multures —Ersk. ii., 9, 8; Bell's Prin. section 1018; *Stuart* v. *Erskine*, 1741, M. 16,020. As there was no question of singular successors, it was unnecessary to record the decree of commutation in the Register of Sasines. Even under the Act 39 Geo. III. c. 55 the failure to record a decree of commutation of thirlage did not involve the nullity of the decree—*Duchess of Sutherland* v. *Reid's Trustees*, February 25, 1881, 8 R. 514, 18 S.L.R. 329. In any view, if what was done here was regarded as merely the basis of prescription, there was no need of recording.

Argued for the second party—The parties to the transaction in 1825, instead of proceeding under the Act 39 Geo. III. c. 55, had entered into a personal and voluntary agreement for the commutation of the thirlage by a submission to an arbiter. The result was a personal obligation on the heir of entail then in possession, which was not binding on his successors. The position was similar to the cases under the Lands Clauses Consolidation Act, in which it was held that heirs of entail were not bound where the statutory procedure was not followed—*North British Railway Company* v. *Renton*, January 15, 1864, 2 Macph. 442. In order to bind subsequent heirs the procedure of the Act must be followed strictly, and the attempt of the arbiter to subject the entailed lands to the real burden of a permanent money payment in commutation of the servitude of thirlage, irrespective of whether the mill continued to exist, could have no effect against successors in the entailed estate. Further, there was no registration in the Register of Sasines, so that this was an attempt to create a real burden without infeftment. The fact that payments had been regularly made under the award for more than forty years, probably in ignorance of the legal rights of the parties, was no reason for holding the second party bound. The origin of these annual payments was admittedly the contract of 1828. That being so, the annual payment was explained, and there was no room for the operation of prescription, because the first requisite for prescription was wanting, viz., a title to which the possession (*i.e.*, the payments) was referable. The fact that the payments had their origin in this contract, which was insufficient to bind successors, made it impossible to assimilate the payment to dry multures. The cases referred to on the subject of such multures had therefore no application in the present case. The first parties could not maintain that the right of thirlage could be enforced, since the mill had been destroyed in 1874 and had not been rebuilt.

At advising—

LORD PRESIDENT—The question in this case is whether a decreet-arbitral pronounced in a submission entered into by two proprietors, one of whom was the heir of entail in possession of lands astricted to a mill belonging to the other, by which decreet-arbitral it was found that in lieu of the mill-multures, services, and other prestations then exigible by the proprietor and tenant of the mill certain payments of money and meal should be made by the proprietor of the astricted lands to the owner of the mill, is effectual against a subsequent heir of entail in the astricted lands.

The first parties, as testamentary trustees of the late Robert Grant, are proprietors of the estate of Druminnor, in the county of Aberdeen, including a thirl mill on the estate known as the mill of Barflatt, and mill lands and multures thereof. The fabric of the mill was destroyed by fire in the year 1874, and it has not been rebuilt.

The second party is proprietor of the estates of Rannes and Leith Hall, in the

county of Aberdeen, including the lands of Kirkhill and others, which were duly disentailed in 1900. From 1798 to 1900 the lands of Kirkhill were held under a strict entail from 1798 to 1838 by one heir of entail, from 1838 to 1862 by another heir of entail, from 1862 to 1897 by a third heir of entail, and from 1897 to 1900 by the second party, who disentailed them in that year.

The lands of Kirkhill belonging to the second party include the lands of Towie of Clatt, which with other lands known as Westhills and Marchmar, belonging to Mr Lumsden of Auchindoir, were at and prior to the date of the submission and decreet-arbitral after mentioned astricted to the mill of Barflatt.

In 1825 the heir of entail in possession of Towie of Clatt and the proprietor of Westhills and Marchmar agreed with the proprietor of the mill of Barflatt that a petition should be presented to the Sheriff of Aberdeen in terms of the Act 39 Geo. III. c. 55 (the Commutation of Thirlage Act of 1799) to have the thirlage of the lands of Towie of Clatt and Westhills and Marchmar to the mill of Barflatt commuted into an annual payment, and a petition under the Act was duly presented, but it was not proceeded with, and no decree was ever pronounced under it. Instead of carrying the proceedings under the Act to a conclusion the owners of the astricted lands and the eldest son and heir-apparent under the entail of the astricted lands of Towie of Clatt on the one part, and the proprietor of the mill on the other part, entered into a submission dated 2nd, 8th, and 10th May 1828, whereby they appointed William Leslie of Warthill sole arbiter mutually chosen by them to settle, ascertain, and determine the whole rates, both meal and money and prestations to be paid and performed in all time coming by the occupiers of the lands under thirlage as aforesaid beginning with crop 1826. This submission seems to have contemplated rather a liquidation or ascertainment of the liabilities under the thirlage as a continuing servitude than the extinction of that servitude, but the parties and the arbiter appear to have interpreted it as contemplating the extinction of the servitude in consideration of certain annual money payments.

William Leslie accepted of the submission, and thereafter pronounced and issued a decreet-arbitral thereunder, dated 28th June 1828. By it Mr Leslie found and decerned that in lieu of the mill-multures, services, and other prestations then exigible from the thirled lands of Towie of Clatt, these lands should in future be subject to the payment of £5 sterling in money, and 8½ bolls of meal at 8 stone per boll, Amsterdam weight, yearly, and in like manner found and decerned that the lands of Westhills and Marchmar should be subject to the payments therein specified, and that in consequence thereof the whole astricted lands should be freed and relieved from all thirlage and astriction to the mill of Barflatt, which several annual payments he declared to be a just, fair, and equal value and compensation for the said right of thirlage to Robert Grant senior, and of all and every service, prestation, or restriction thereto annexed, or hitherto enjoyed by him as proprietor of the mill, and appointed and ordained the same, beginning with crop 1826, to be paid to and accepted by him in terms of the Statute 39 Geo. III. c. 55.

From the date of the submission and decreet-arbitral no insucken multures or services were paid or performed to the proprietor of the mill of Barflatt in respect of the lands of Towie of Clatt, but the heirs of entail in possession of these lands made yearly to the proprietor of Druminnor from 1828 down to 1891 the payments of £5 sterling and 8½ bolls of meal before specified, fixed by the decreet-arbitral as exigible in respect of these lands. The last payment was made in 1892 for crop 1891, and since then no payments have been made, the second party, as proprietor of the lands of Towie of Clatt, maintaining that he is not liable therefor.

The first parties contend that they are entitled to exact the payments from the second party, while he maintains that he is not bound to make them. He submits that the heir of entail in possession of the lands of Towie of Clatt and his eldest son had no power by submission or other voluntary transaction to subject these entailed lands to a permanent money burden in exchange for a servitude of thirlage, and that no claims could now be made in respect of that servitude, in respect that the mill of Barflatt is non-existent, not having been rebuilt since it was destroyed by fire in 1874.

I am of opinion that the contention of the second party is well founded. The question may be tested by supposing that such a submission or voluntary transaction had been entered into without any proceedings having been instituted under the Thirlage Act, and it seems to me that any burden of the nature in question attempted to be imposed upon the lands by an heir of entail in possession would have been ineffectual against the subsequent heirs, and might possibly have formed a ground for the next heir claiming right to the lands in respect that the heir in possession had incurred an irritancy. A commutation under the Act derives its sole efficacy from the Act, and where the procedure provided by the Act is not followed out *modo et forma*, but a voluntary agreement is substituted for the statutory procedure, it appears to me that such a voluntary agreement has no binding force or effect against subsequent heirs of entail.

The first party maintained that even assuming that the arrangement would have been invalid apart from prescription, it has been validated by the fact that payments were regularly made under the award for a period exceeding forty years. It appears to me, however, that the agreement, the nature and character of which are well known, does not afford a habile title for such prescription. The first party also maintained that the only deviation

from the provisions of the Thirlage Act consisted in substituting an arbiter for a jury, and upon this it is enough to say that where the statutory procedure is not adopted the thing done derives no protection from the statute. If there had been a proper statutory commutation, something would have been allowed for mill services and charged as a permanent burden on the estate, but there is nothing of the kind here. Further, there was no provision for registration of the award in the Register of Sasines, and it was never made real so as to affect the estate.

The first parties relied upon the case of *Stuart* v. *Erskine*, M. 16,020, November 17, 1741, in which it was held that tenants of astricted lands not having been in use to come to the mill for the space of forty years, but having been in use to pay a dry multure for bear, immunity was acquired by the negative prescription, except as to the dry multure, and contended that the payments made down to 1891 were of a character similar to the dry multure, and kept the servitude alive. It does not, however, appear to me that the payment of the £5 and the 8½ bolls of meal from 1826 down to 1891 were for the purposes of the present question similar to the dry multure in the case of *Stuart* v. *Erskine*.

For these reasons I am of opinion that the question put should be answered in the negative.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I also am of opinion that the question must be answered in the negative, although I am not sure that I follow completely the entire argument which is set forth in the case as the contention of the second party, and which has been quoted by the Lord President. I do not think the destruction of the mill of Barflatt in 1874 is a fact relevant to the only question we have to decide. Whether it would preclude the first party from enforcing the original right of thirlage if the mill were now restored is a question which is not raised and cannot be determined in this case. The only question is whether the first parties are entitled to exact a yearly payment of £5 sterling and 8½ bolls of meal from the second party as proprietor of the lands of Kirkhill and others including the lands of Towie of Clatt in the county of Aberdeen. These lands are now held in fee-simple, but from 1798 till 1900 they were held under the fetters of an entail; and they were so held by the present owner from 1897, when he became heir of entail in possession, until 1900 when he disentailed. It is not alleged that on disentailing he subjected himself or his estate to any burden in favour of the first parties which did not validly affect the entailed estate and the successive heirs of entail in possession prior to the registration of the instrument of disentail in 1900. The first question therefore is whether the contract by which in 1828 General Hay, then the heir of entail in possession, and his eldest son and heir-apparent agreed with the owner for the time being of the thirl mill that the thirlage should be commuted for an annual payment to be fixed by Mr Leslie of Warthill as sole arbiter was binding upon subsequent heirs of entail; and I am of opinion with your Lordships that it was not so binding, and consequently that the award pronounced by Mr Leslie creates no liability against the second party Mr Charles Edward Leith Hay. If the parties to this transaction in 1825 had chosen to proceed under the Act 39 Geo. III. c. 55, it is not disputed that a permanent annual payment in money or grain might have been effectually fixed upon the entailed estate by the verdict of a jury duly recorded in the Register of Sasines. But that would have been a burden imposed upon the heirs of entail by force of the statute and made real by entering the infeftment. But instead of following the statutory procedure the parties chose to substitute for it a private and voluntary agreement to commute the thirlage by submission, and no statutory force or effect whatever can be ascribed to the award following upon that agreement. Its whole force and effect is derived from this contract of submission. I do not doubt that this may have been a perfectly good contract followed by a perfectly effectual award as between the actual parties to it, and also as between their respective representatives if the persons now in right of the two estates had in fact represented the contracting parties. But I take it to be clear in law that an heir of entail while he takes the estate subject to any real right which may have been validly made to affect it in the hands of his predecessor, is in no way bound by his predecessor's personal contracts or such of them as purport to impose obligations upon future heirs of entail. We had occasion to consider the law on this point very recently in the case of *Lord Galloway* v. *The Duke of Bedford*, 4 F. 851, 39 S.L.R. 692, and without repeating the argument I adhere to the opinion then expressed. It follows, in my opinion, that when the second party succeeded to the entailed estate in 1897 he came under no obligation to make the payments in dispute.

The second question is whether the first parties have not acquired a prescriptive right to insist upon the continuance of payments which have been made annually without question for nearly seventy years; and if the origin of such payments had not been known and admitted, it might have been a reasonable presumption in law that they were dry multures which the first parties must be supposed to have exacted by virtue of an undoubted right. But to create a prescriptive right, possession and enjoyment must be referable to some title, actual or presumed, sufficient to create the right, and the basis of fact on which the parties are agreed that their legal rights must be determined is that there is no such title and that none such can be presumed. It is part of the special case, to which the parties have agreed, that the payments which are said to

create a prescriptive right were made in consequence of a contract which we find not to be binding upon the present owner, and it is impossible to presume, in contradiction of that agreement, that they were made in virtue of an antecedent right which would be valid and effectual against him and all other owners who may succeed to him. From 1826 to 1862 they were made by successive heirs in possession who were parties to the contract and therefore bound by it, and it is obvious that their performance of their contract can no more affect the right of the present owner than the contract itself could. From 1862 to 1892 Colonel Sebastian Leith Hay, who was not bound by the contract, continued to pay, whether from ignorance of his right or because he chose for whatever reason to make payments which he might have resisted does not appear, But the second party, who would not have been bound by his contract, is just as little bound by his mistake. And in either case the admitted fact is that all the payments were made in virtue of the contract and award, and therefore we cannot hold that they were made in virtue of any right which can be made good against the second party.

I should have had doubts as to the soundness of this argument if it implied that the first parties had lost their right of thirlage by reason of the submission and award, or of the subsequent usage. The second party could not take advantage of the contract and at the same time reject its obligations. But I think no such consequence is involved in the argument. The first parties do not seek to have it found that the right of thirlage still subsists, and they cannot do so at present because they are not in a position to render the corresponding services. Whether, if they were to put themselves in a position to do so, they could enforce the thirlage is a different question, but it is a question which, as I have said, does not arise at present, and I desire to express no opinion upon it, except in so far as it may be necessarily involved in the determination of the question in hand. But it is necessary to see whether the argument we sustain involves an inequitable consequence, and I am of opinion that it does not, because the very same reasoning which gives the second party a good answer to the claim of a prescriptive right to the annual payments of money and grain would afford to the other parties an equally good answer against him if he were to maintain that the thirlage was lost by non-user during the period from 1826 to 1892. It would be impossible for him to found a prescriptive immunity on a non-user which he must admit was not referable to any discharge or abandonment of the right, but to an agreement, now brought to an end, to substitute a money payment for the actual performance of the thirlage. This is probably not a practical question, and if it became one the second party might for anything I know have a good defence on other grounds. But all that it is necessary to say at present is that neither of the parties can found a prescriptive right upon the actings of parties under the contract which Mr Leith Hay now rejects as not binding upon him.

The Court answered the question in the negative.

Counsel for the First Parties—H. Johnston, K.C.—Cullen. Agents—Tawse & Bonar, W.S.

Counsel for the Second Party—C. K. Mackenzie, K.C. — G. Moncreiff. Agents — Mackenzie, Innes, & Logan, W.S.

Tuesday, June 9.

SECOND DIVISION.

MILLER RICHARD'S TRUSTEES *v.* MILLER RICHARD.

Succession — Vesting — Fee or Liferent — Repugnancy—Fee in Trust Settlement Impliedly Revoked by Codicil Giving Alimentary Liferent.

By his trust-disposition and settlement a testator "left" the whole residue of his estate to and among his children equally, share and share alike, and declared that the shares should be payable as soon as conveniently might be after his death.

In a codicil the testator, considering that he had been forced to the conclusion that H, one of his sons, was unable to control his capital expenditure, directed his trustees on making the division of the residue provided for in the trust-disposition and settlement, not to pay over to H the share of the estate apportioned to him, but to pay him a specified sum, and hold and invest the remainder and pay him the income for his liferent alimentary use. The testator further declared that this provision was to be strictly alimentary, and not assignable by his son or attachable by his creditors, providing always that his son should have power to dispose by will or by deed of provision of the capital sum so retained on his death. It was further declared that these provisions were in full of legitim.

Held that, assuming the settlement to have conferred a fee on H, the right of fee, although not expressly revoked, had been taken away by the codicil, and that H was only entitled to an alimentary liferent, with a right of disposal of the fee by testamentary deed.

Walter Miller Richard died on 13th August 1902, leaving a trust-disposition and settlement dated 9th January 1900, and two codicils dated respectively 1st November 1901 and 13th July 1902, whereby he conveyed his whole estate to trustees for the purposes therein set forth. The testator was survived by his widow and six children.

By the third purpose of his trust-disposition and settlement the testator made certain provisions for his widow, and by