is in question; and that if the purposes are concerned solely with the management of the estate or bequest and the protection of the beneficiary against his own improvidence they must be entirely disregarded and immediate payment must be made to the fiar free of all restrictions. I am bound by that view although I do not agree in it, and think it not warranted by the case of *Chambers' Trustees;* and therefore I approach the consideration of this case on the assumption that if there remains in the second party a vested right of fee he will be entitled to immediate payment.

I asked the second party's counsel whether he maintained that the codicil taken by itself gives the second party a right of fee; he replied that on full consideration he could not maintain that. That view, which is probably sound, seems to me to solve the question put to us, because if the codicil taken by itself does not confer a fee upon the second party its effect is to reduce the second party's interest to something less than a right of fee. If effect is to be given to the codicil the second party can never himself receive any part of the capital of the balance, and that distinguishes this from cases in which, although payment is postponed, the capital must ultimately be paid to the beneficiary or his asignee.

The only question that remains is whether there was anything to prevent the testator from effectually altering his original will in that way. I agree that the safer course would have been for him to have formally and absolutely revoked the original provision in favour of the second party and then to have proceeded to substitute for it the provisions which we find in the codicil; but the codicil, in my opinion, amounts to a clear revocation of the original bequest. No proper question of repugnancy arises, as might perhaps have occurred if these limitations had been inserted in the original will. A condition or modification inserted in a codicil executed after a lapse of time is not quite in *pari casu* with a condition superadded in the same deed to an apparently absolute gift of fee; it records a deliberate change of testamentary intention. And, in my opinion, such a change of mind, that is, the substitution of a liferent for a fee, has here been competently and sufficiently expressed to receive effect.

The Court answered the first question of law in the negative, and found it unnecessary to answer the other question of law therein stated.

Counsel for the First Party—Jameson, K.C.—Hunter. Agents—Fyfe, Ireland, & Dangerfield, W.S.

Counsel for the Second Party—Graham Stewart. Agent — Edward I. Findlay, Solicitor.

Tuesday, June 9.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MAGISTRATES OF EDINBURGH *v.* EDINBURGH UNITED BREWERIES LIMITED.

Servitude—Thirlage—Multures—Dry Multures — Commutation of Multures by Agreement—Law and Custom of Thirl—Singular Successors—Alienation of Mill—No Mill in Working Order—Prescription — Quinquennial Prescription of Multures—Act 1669, *cap.* 9.

By an agreement dated in 1711 between the Magistrates of Edinburgh, as in right of a servitude of thirlage within the burgh to the town mills, and certain brewers within the thirl, for themselves and as having commission from the other brewers, the brewers recognised the town's right of thirlage and bound themselves to pay twelve pennies Scots upon each English barrel of ale as in place of the thirlage and multurage of the said milns. This agreement was acted upon continuously thereafter by the brewers subject to a modification made by agreement in 1861, whereby, upon the narrative of the magistrates' right of thirlage, and the agreement of 1711 and subsequent usage proceeding thereon, the brewers agreed to pay 3d. per quarter of malt instead of twelve pennies Scots per barrel of ale. In an action for arrears of multures by the Magistrates against a brewing company, who in 1889 had acquired one of the breweries within the thirl as singular successors, *held* that by the agreement of 1711 and usage proceeding thereon from that date dry multures as regulated by that agreement and modified by the subsequent agreement of 1861 had become the law and custom of the thirl, and that the defenders had acquired their brewery subject to the payment of such dry multures as a servitude which affected their premises although they were singular successors; that in the circumstances it was no defence either that the Magistrates had parted with their mills, or that by an extension of their premises part of the defenders' malt barns were now outside the thirl; that the defenders were liable for the multures claimed for the period of five years before the raising of the action; and that the pursuers were entitled to prove their claim for multures prior to that period by writ or oath of the defenders in terms of the Act 1669, c. 9.

In July 1901 an action was raised by the Lord Provost, Magistrates, and Council of the city of Edinburgh, as in right of a servitude of thirlage within the burgh, against

the Edinburgh United Breweries, Limited, for recovery of arrears of multures, or commuted multures, for the period from 31st March 1892 to 31st March 1901.

The questions in the case were whether the defenders were liable for certain payments as due under the law and custom of the thirl as originated and regulated by certain agreements, notwithstanding (1) that the defenders had acquired their brewery as singular successors and were not parties to any of these agreements; (2) that their malting premises had been extended and were not now wholly within the thirl; and (3) that the Magistrates had alienated their mills, and, although they had reacquired some of them, were not now in possession of any mill which was in working order.

The following narrative of the facts is taken from the opinion of the Lord Ordinary (KINCAIRNEY)—"The facts, which are complicated, appear to be as follows:—The Magistrates were infeft under certain old charters, of which the earliest is a charter by Robert the Bruce, in certain mills at the Water of Leith known as the Common Mills, and the lands within the royalty were thirled to these mills, the servitude extending to all grain brought into the thirl—*invecta et illata*—to be converted into malt and ground. That is to say, the thirlage was the ordinary thirlage within a burgh.

"The defenders the Edinburgh United Breweries, Limited, carry on business at the Edinburgh and Leith Brewery, 212 Canongate. They are the successors in business of the Edinburgh and Leith Brewing Company, who carried on the business of brewers there for a very long period, and the defenders took over their brewery and business in 1889, and they have since carried on the business of brewers there and ground malt in those premises.

"The premises of the Edinburgh and Leith Company were originally situated wholly within the royalty, that is to say, within the thirl, but it appears that about forty years ago—the time has not been stated more precisely—these premises were extended, and the new portion was built partly beyond the royalty and in the regality of the Canongate. Much the larger part of the defenders' premises, however, is within the royalty, and the operations of kilning and grinding are wholly carried on there. Some of the malting floors are, however, in the Canongate and beyond the royalty.

"In 1711 the Magistrates brought an action against two brewers, who carried on business at the West Port, to have their right of thirlage declared, and these brewers brought an action against the Magistrates for declarator of immunity from thirlage. These actions were conjoined, and in them the Magistrates were successful, and excerpts from the decree of the Court of Session have been produced. These excerpts do not disclose the case of the brewers; but this is of the less consequence because the Edinburgh and Leith Brewing Company were not parties, and because the decision was followed by an agreement between the Magistrates and the two brewers (defenders) 'for themselves, and as having power, warrant, and commission from the other brewers of Edinburgh.' This commission has not been produced, and it does not appear that it was granted by the Edinburgh and Leith Brewing Company. The agreement is in some respects peculiar. It affirms the right of the town 'to the thirlage and multurage of the millns commonly called the eleven common millns in the Water of Leith,' . . . and that the brewers residing within the liberties and privileges of the town 'have bein astricted to grind their malt at the said millns for severall ages bygone.' The agreement then sets forth at length the proceedings in the actions, and states that the brewers mentioned 'for themselves and their said constituents' ratified the town's right of thirlage and multurage of the said eleven common mills and the decreet of the Court, and bound themselves 'and their constituents, and their heirs, executors, and successors' to pay for behoof of the town twelve pennies Scots upon each English barrel of ale or beer, which was thereby declared 'to be in place of the thirlage and multurage of the said milns,' the Magistrates on the other part agreeing to allow to the brewers the use of handmilns so long as the said twelve pennies Scots per barrel of ale was punctually paid. The agreement further declares that 'notwithstanding of the above commutation of the said thirlage and multurage to an constant duty,' . . . 'yet the foirsaid constitution of thirlage and multurage against the haill brewers' . . . 'shall stand firme and stable in all tyme coming, and shall be a valid astriction against all the said brewers and all others who shall hereafter follow the said imployment for payment of the said thirlage and multurage: But prejudice always to the above settlement, terms, and conditions yrof in any sort as to all those brewers who agree to the samen, and to that effect shall subscryve an Act to be made in the Books of the Councel of the said good toun for that end, so that those who shall not subscryve the samen shall be excluded from the benefite of the foirsaid settlement ay and whill they subscryve the samen, and the foirsaid decreet of constitution of thirlage and multurage, or any oyr decreit of constitution for heirafter to be obtained, shall be put to full execution against them without any favour or abaitment.' . . .

"There has been no proof that any Act in the Books of the Council has been subscribed by the Edinburgh and Leith Brewing Company.

"By a decreet-arbitral which followed this agreement the Lord President as arbiter ordained the brewers to pay the sums agreed on 'in all time coming.'

"The parties differ as to the nature of the transaction expressed in the agreement and decreet-arbitral, the defenders contending that it was a temporary arrangement which either party might bring to an end, the pursuers that it was intended to

be and was a permanent settlement.

"It appears to be sufficiently proved that this agreement was acted on not only by the brewers who were parties to it but by other brewers also, and in particular that the Edinburgh and Leith Brewing Company paid dues in accordance with it.*

"In 1734 the Magistrates granted a feu-charter of eight mills to the Incorporation of Bakers. The feu-charter contained, among other things, a provision that if any of the brewers should choose to grind their malt at the mills the Incorporation should have ready one or more mills fit to grind such malt. The astriction and multures in use to be paid by the bakers themselves at five of the mills was conveyed to them by this charter, but every other right of thirlage, as I read the deed, which is far from clear, was reserved, or attempted to be reserved to the town.

"I do not quite understand how it was that the number of the mills seems to have changed from time to time. There were apparently only eight at this time instead of eleven at the date of the agreement, but I understand that in 1734 the town disponed by feu-charter to the Bakers Incorporation all the mills then in their possession, and retained none in their own hands. But it is averred by the pursuers, and has not been disputed, that in 1891 the pursuers reacquired the *dominium utile* of two of the mills, Mars Mill and the West Mill.

"Notwithstanding the disposition of the mills to the Bakers Incorporation the payments fixed by the agreement of 1711 and the decree-arbitral continued to be paid by the brewers, and among others by the Edinburgh and Leith Brewing Company, until 1853, when a new arrangement was made which was embodied in a minute of agreement between the Magistrates and the brewers, dated in July 1861. To this agreement the Edinburgh and Leith Brewing Company was a party.

"This deed proceeds on the narrative that the Magistrates are in right of the servitude of thirlage over the whole lands within the ancient royalty to the town mills, and that the places where the brewers carried on their trade were within the thirl and subject to the servitude, and on the narrative of the agreement of 1711 and of the decree-arbitral by the Lord President, and that the agreement and decree-arbitral had been acted upon, and that the commutation money thereby fixed had been exacted and paid, that certain differences had arisen, and that to settle these differences it had been agreed that the charge for commuted multures should thereafter be assessed at a fixed rate upon the malt used by the brewers (instead of on the ale), therefore it states the brewers had agreed after 1st June 1853 to pay 3d. per imperial quarter on the quantities of malt used in the manufacture of ale and beer within the ancient royalty in all time coming, 'and that in full satisfaction and in lieu of all claims of commuted multures and thirlage exigible upon mills used by the second parties respectively' (the brewers) 'in the manufacture of ale and beer within the said ancient royalty . . . and of the payment upon ale and beer under said contract of agreement and decreet-arbitral, which payment upon ale and beer shall accordingly cease and determine at 1st June 1853 in so far as regards the second parties.' But reserving the rights of the town against all other brewers within the royalty.

"It is proved that this agreement was duly acted on, and that payments were made in accordance with its provisions from 1st June 1853 to 31st March 1892.

"The defenders, as has been said, acquired the business and premises of the Edinburgh and Leith Brewing Company in 1889, and they made the payments settled by the agreement of 1861 from the time they acquired the premises in 1889 until 31st March 1892. After that date payment was refused. But this action was not raised until 1901.

"During all the time when the payments fixed by the agreements of 1711 and 1861 were paid no services were rendered by the pursuers as owners of the mills and none were ever asked.

"The West Mill and Mars Mill and the site of another mill, Greenland, which were reacquired by the burgh in or about 1891, are all that remain to the town of the eleven mills which belonged to them in 1711. There are other buildings, it appears, which at that time were mills, and which still exist as buildings, but not as mills, but they do not now belong to the city.

"The West Mill and Mars Mill were not at the date of the action, and had not for a long time been, in a condition to be used as mills. These were not so in 1891, and they could not be put in such a condition without an expense beyond their value as mills. I do not understand that there has been any offer to put them in such a condition.

"I understand that the parties are agreed as to the quantities of malt used by the defenders in brewing at their brewery, or are prepared to adjust the figures, and a statement has been lodged which may afford the basis of such an adjustment."

The pursuers pleaded—"(1) The pursuers being in right of and vested with the servitude of thirlage over the whole lands within the ancient royalty of the burgh of Edinburgh, and the defenders being suckeners therein, the defenders are bound to pay the pursuers the multures, sequels, and other duties sued for. (2) The defenders are liable in payment of the duties fixed by the agreement of 1861, in respect that (*a*) they have recognised said agreement and paid duties in terms thereof; (*b*) the said duties are payable according to the custom of the thirle; (*c*) the said duties were, by the agreement entered into by the defenders' authors, imposed as a servitude on the premises now occupied by the defenders; and (*d*) the defenders, as successors of the said Edinburgh and Leith Brewing Company, have undertaken liability therefor. (3) The defenders are, in any event, liable in payment of the

*Apparently from 1821 to 1889, a period of 68 years.

duties fixed by the agreement of 1711, in respect that (*a*) the said duties are payable according to the custom of the thirle; and (*b*) the said duties are a servitude imposed on the premises now occupied by the defenders."

The defenders pleaded—"(5) The right to exact payment of the multures claimed has been extinguished in respect that none of the dominant mills are now existent as mills in the possession of the pursuers. (7) The agreements founded on not being binding on the defenders, the defenders are entitled to absolvitor. (8) Prescription."

The Act 1669, cap. 9, enacts as follows:— . . . "Multars not pursued for within five years after the same are due . . . shall prescrive in all time coming; except the saids . . . multars shall be offered to be proven to be due and resting owing by the defenders their oaths, or by a special writ under their hands acknowledging what is resting owing."

On 2nd April 1902 the Lord Ordinary pronounced an interlocutor in the following terms:—"Finds that the Quinquennial Prescription 1669, c. 9, applies to the pursuers' claim, and sustains the eighth plea-in-law for the defenders, so far as it refers to the Quinquennial Prescription: *Quoad ultra*, under reservation of all the pleas of parties, allows the parties a proof of their respective averments, and to each a conjunct probation."

The nature of the proof sufficiently appears from the narrative quoted above.

On 19th November 1902 the Lord Ordinary pronounced the following interlocutor:—"Repels the pleas-in-law for the defenders: Finds (1) that the pursuers are in right of the servitude of thirlage over the ancient royalty, and that the defenders are suckeners therein; (2) that the multures have been fixed by the agreements dated 3rd May 1711 and 2nd August 1861; (3) that the defenders are liable for the multures for the period for five years from the date of raising the action as fixed by the said latter agreement: Appoints the pursuers to lodge a statement of said multures: Grants leave to reclaim."

Opinion.—"This is an action by the Magistrates of Edinburgh, as owners of the common mills of the burgh, against the Edinburgh United Breweries, Limited, for recovery of arrears of multures, or commuted multures, for the period from 31st March 1892 to 31st March 1901. But I have found by interlocutor dated 2nd April 1902 that the Act 1669, c. 9, applies, and that the pursuers' claims must therefore be limited to arrears for five years before 13th July 1901, when the action was raised. A proof has been taken, and the question to be decided is what sum, if any, is due for arrears of multures during that period. The action is not a declarator, and does not directly relate to future multures, but only to the alleged arrears.

"The claim is stated under three alternatives—(1) under an agreement with the Magistrates in 1711; (2) under an agreement dated 1861; and (3) if liability be not established under either of these agreements, then the pursuers claim the arrears of multures according to the custom of the thirl, which, according to them, would amount to a larger sum than could be claimed under either agreement.

[*After the above narrative of the facts his Lordship proceeded*]—"These are the facts on which it has now to be determined what sums are due to the pursuers for the five years preceding the action either under the agreement of 1711, or the agreement of 1861, or under the servitude of thirlage if neither agreement be held applicable.

"There seems no doubt that antecedent to the agreement of 1711 the pursuers were vested with a right of thirlage over grain brought into the royalty, nor any doubt that the premises in which the Edinburgh and Leith Brewing Company then carried on their business were wholly within the royalty, and therefore within the thirl. The extension of their premises beyond the thirl at some subsequent time not definitely fixed could not relieve them from that obligation—for they continued as before to perform the greater part of the necessary operations, the kilning and the grinding and part of the malting, within the royalty. The fact is, that some of their malting floors were beyond the thirl, but that made no difference as to subjection of the grain to the thirl.

"But in 1711 there could be no doubt as to the right of the pursuers or the obligation of the defenders. The question was, in fact, tried in the action between the Magistrates and the two brewers who carried on their business in the West Port. Although the present defenders, it is true, do not represent the parties in that cause, still the judgment in favour of the Magistrates may be referred to as a decision on the point in question. It is clear that if this question had been raised at that time the Magistrates must have been successful.

"The agreement of 1711 followed the decree. The clauses of that deed have been referred to. It is mainly a commutation of the multures payable to the pursuers to a sum of 12d. Scots for each English barrel of ale. But it affirms the continuance of the thirlage 'in all time coming,' and it also affirms that the agreement should form 'an firme and lesting rule for payment of the sd. thirlage and multurage in all tyme comeing.' I do not doubt that this was not an arrangement from which the parties could draw back at pleasure, but was an onerous bargain by which they were permanently bound.

"Although the Edinburgh and Leith Brewing Company apparently paid dues in accordance with this agreement, I am not prepared to say that it is proved that they became parties to it, although it is not improbable that they did. But in view of subsequent circumstances it does not seem necessary to determine that point.

"Not long after this agreement the Magistrates granted to the Bakers Incorporation the feu-charter of eight mills above mentioned. What was the reason

for this charter or the consideration for it does not appear. The deed is a very peculiar one, for while it conveys to the Bakers Incorporation the astriction and multures in use to be paid by themselves, it carefully, as I read it, preserves to the town all its other rights of thirlage. The defenders have contended that the deed had the effect of totally destroying the right of thirlage. That view of it does not seem to have been taken at the time, because the commuted multures continued to be paid by the brewers just as before. Had the brewers who were parties to the commutation of 1711 objected to pay the commuted multures on the ground that the town had parted with their mills, I think they could not have succeeded; on the principle applied in the case of *Porteous* v. *Haig*, January 15, 1901, 3 F. 347, it would have been held that it did not signify to them what the town did with their mills.

"But if that objection had been taken by the Edinburgh and Leith Brewing Company, who were not parties to the agreement, I cannot say what would have been said. It might have been held that the objection was bad, looking to the very peculiar character of the deed. But the point might have depended on the extent to which that company had adopted the agreement and bound themselves by it, about which there is no information.

"But at this distance of time it seems out of the question to object to the pursuers' title then, and it must be held that the brewers acknowledged the pursuers' title notwithstanding the charter to the Bakers' Incorporation. I am not in the circumstances prepared to hold that the relations of the pursuers and defenders were affected by that deed.

"The commutations of multures effected by the agreement of 1711 continued to be adopted by all the brewers and by the town until 1853, that is, for above 140 years, and in 1861 a new agreement was come to, which, so far as I can see, is an existing agreement still.

"The main if not the only purpose of that agreement was to substitute a rate on malt for the 12d. Scots per English barrel of ale, which was the rate fixed by the agreement of 1711. In other particulars the two agreements are substantially the same. The difference between them is a difference of form, not of substance. In the latter deed, as in the former, the right of thirlage of the town is acknowledged, and the astriction of the places where the second parties carried on the trade of brewing. There is, however, this very material difference between the two deeds, that the Edinburgh and Leith Brewing Company was a party to the latter.

"Whatever else may be said of this latter deed, it certainly excludes all claim by the pursuers under the deed of 1711. It may be that the pursuers could never have made any claim against the defenders on that deed because the defenders were not parties to it; but the agreement of 1861 removes all difficulty on that point, and leaves the question in the case to be whether the rights of the parties are to be determined by the latter agreement.

"I do not leave out of view the pursuers' claim in the action (about which little or nothing was said in the debate) to be paid independently of agreement according to the customary rates of the thirl. I am not sure that there was evidence on that point. But it appears to me that had there been no agreement the pursuers could not have succeeded, because during the years to which this action applies they had no mill capable of grinding, and did not offer to supply one, which is, I think, a conclusive answer to a demand for uncommuted multures.

"The question therefore comes to be whether they are entitled to recover the multures according to the estimate of the agreement of 1861.

"Had an action of this sort been raised by the Magistrates against the Edinburgh and Leith Brewing Company after completion of the agreement of 1861, I do not see what answer that company could have given. It would have been merely an action for fulfilment of a contract which they had signed.

"The question therefore is whether anything has happened since which could afford the Edinburgh and Leith Brewing Company any defence; and I shall afterwards consider what difference arises from the fact that the defenders are not the Edinburgh and Leith Brewing Company but the United Breweries Company.

"In the first place, the premises of the brewery have been extended and are now in part outside of the thirl. I have already adverted to this circumstance, and have expressed the opinion that it could not relieve the defenders from the obligations of the thirl.

"In the next place, it appears that the only mills belonging to the pursuers during the years to which the action relates were unfit to fulfil the obligations of the thirl. I do not know how that was in 1861, but I assume that they were then sufficient. The insufficiency of the mills would have formed a sufficient defence had the multures not been commuted. But I think it does not form a good defence to an action for commuted multures. I take it that the case of *Porteous*, above cited, is sufficient authority for this proposition. No doubt that case differed from the present case in this, that there the multures were commuted under the Act 39 Geo. III. c. 55, which no doubt is an important difference. Still I think the case applies in principle.

"The defenders cited *Forbes' Trustees* v. *Davidson*, July 11, 1892, 19 R. 1022, in which, in an action for commuted multures, the defender was assoilzied because the mill had been destroyed. But in that case the judgment proceeded on a special clause in a decree-arbitral by which the commutation had been effected, which was held to imply an obligation to keep up the mill.

"There is no such clause in either agreement in this case.

"There is a speciality in this case out of which, however, no question has arisen,

which is this, that the dominant tenement does not consist of a single mill but of many mills. Now, if the mills had been so sold as to leave room for the contention that there was more than one creditor in the obligation, I do not say that a question of some difficulty might not have arisen about which I of course express no opinion.

"The principal change which has occurred since 1853 has, however, been this, that the brewery has changed owners, and I understood that the present defenders are the singular successors of the Edinburgh and Leith Brewing Company.

"The defenders contended that the agreement of 1861 is a mere personal contract which does not run with the lands, and does not bind the defenders, who do not represent the Edinburgh and Leith Brewing Company. This, no doubt, is a somewhat delicate point, but I am of opinion that the contention is not well founded. I think that the agreement of 1861 was not a mere personal contract, but a deed which expressed the measure of a servitude of thirlage. Keeping in view the fact that the agreement of 1711 was acted on, I think the two agreements must be read together, the latter being a continuation of the former, containing a mere modification of its terms. In any view, the Edinburgh and Leith Brewing Company were in 1853 in the position of having paid dry multures since 1711, which payments without any writ inferred a servitude of thirlage—*Kinnaird* v. *Drummond*, 1695, M. 10,862.

"The agreement of 1861 was not a new commutation of the thirlage. But it bears to have been entered into in order to effect 'the establishment of a more satisfactory mode of ascertaining and collecting the said commuted multures,' and it provides not for any alteration of the multures as commuted by the earlier agreement, but merely for an alteration of the mode in which the 'said commuted multures' should thereafter be assessed; and I am of opinion that when the defenders took over the subjects from the Edinburgh and Leith Brewing Company they took them subject to a servitude of thirlage measured by the dry multures which had been fixed by the agreement of 1711, and were payable according to the method agreed to by the later agreement, which method had been followed from 1853 to 1892.

"On the whole, I am of opinion that the pursuers are entitled to recover multures for the period of five years from the date of the action, calculated as provided in the agreement of 1861."

The defenders reclaimed, and argued—The agreement of 1711 was optional to the brewers, who were not bound by it unless they chose to subscribe it; it substituted a merely personal obligation to pay money for the thirlage. When in 1734 the city feued the mills to the Incorporation of Bakers they lost the thirlage which had been constituted to the town mills, and which could not pertain to a mere superiority but required a mill or mills as a dominant tenement—*Magistrates of Edinburgh* v. *Alexander*, 1710, M. 8899, Stair, ii. 7, 15; *Ballardie*, 1781, M. 16,063, at p. 16,067. Nothing short of express reservation in the feu-charter to the bakers could preserve the right of thirlage to the city—*Douglas* v. *Earl of Murray*, 1621, M. 10,851. The right of thirlage accordingly either lapsed in 1734 or was conveyed to the bakers; in the latter case it was extinguished on the expiry of the period of the long negative prescription, during which multures were never exacted by the Bakers—Stair, ii. 7, 24. The agreement of 1861 was personal, it never entered the record, and did not bind the defenders as singular successors, the commuted multures payable thereunder not having been commuted under the Thirlage Act 1799 (39 Geo. III. cap. 55), and not being dry multures, the non-existence of mills in working order was fatal to the pursuers' claim—*Forbes' Trustees* v. *Davidson*, July 14, 1092, 19 R. 1022, 29 S.L.R. 887; *Porteous* v. *Haig*, June 15, 1901, 3 F. 347, 38 S.L.R. 258. Payments under the agreements referred to were fluctuating, and therefore were not dry multures—Bankton, ii. 7, 45; *Kinnaird* v. *Drummond*, 1675, M. 10,862 (second report), Ersk. ii. 9, 28. Even dry multures were a pertinent of property in a mill or mill-site. The pursuers had reacquired in 1891 only a part of the dominant tenement, and there were mills in the hands of other proprietors who had as good a title to sue as the pursuers—*Clark's Trustees* v. *Hill and Others*, February 29, 1828, 6 S. 659; the pursuers' contention would therefore subject the defenders to double demands for payment of multures. Even if multures were found due, the defenders were only liable upon grain that "tholed fire and water" within the thirl; this signified being steeped and kilned—*Cassilis* v. *Heritors in Maybole*, 1682, M. 15,987; *Magistrates of Haddington* v. *Bakers of that Town*, 1788, M. 16,071; *Heriot's Hospital* v. *Alvis*, 1707, M. 15,994; nearly half of the defenders' malt was steeped and kilned in portions of their premises situated outside the thirl.

Argued for the respondents—Whether the agreement of 1711 was personal or no, and whether the payments thereunder were dry multures or no, by those payments the law and custom of the thirl had been established—Ersk., ii. 9, 28, and 30. Dry multures were not necessarily fixed sums; it was sufficient if the standard of payment was fixed—*Porteous* v. *Haig*, *cit. sup.*, Lord President, 3 F., at p. 354; Ross' Lectures, 170; Bell's Prin. 1018. The payments sued for were due under the law and custom of the thirl established by usage—*Beattie* v. *Low*, 1787, Hume, 729; *Cockburn* v. *Brown*, 1682, M. 10,742; *Dickson* v. *Smith*, 1808, Hume, 741; the usage of the thirl was binding on the defenders as singular successors in lands within the thirl—*Macdowall* v. *Milliken's Trustee*, 1798, Hume, 737. The non-existence of the mills in working order did not deprive the pursuers of their right to recover payment of the multures. They could grind at the mills reacquired in 1891 if put in working order, and were prepared to do so if wanted. The case of *Forbes' Trustees*

v. *Davidson, cit. sup.*, was a decision on the construction of a contract; the present case was within the principle of *Porteous* v. *Haig, cit. sup.* Nor did the feuing of the mills to the Incorporation of Bakers in 1734 deprive the pursuers of their right to thirlage, the feu having been granted under effectual reservations, and the town having remained in right of the thirlage, and being in a position to substitute new mills for the old ones—*Hunter* v. *Chalmers*, July 16, 1858, 20 D. 1311; *Harris* v. *Magistrates of Dundee*, May, 29, 1863, 1 Macph. 833. Further, it could not be maintained that the pursuers had lost their right, looking to the long course of payments by the brewers within the thirl, whereby the pursuers' possession of the right had been conserved without interruption—Ersk., ii. 9, 21; *Pitarro* v. *Stewart*, 1673, M. 14,503; Bell's Prin. 1021; Stair, ii. 7, 16. The defenders' predecessors could not be presumed to have made payments for over 150 years which were not due—Ersk., ii. 9, 28. These payments were dry multures, or multures commuted by agreement, and in either case they were due irrespective of the existence of the mills. It was immaterial to consider whether the defenders' malt was steeped and kilned within the thirl; "tholing fire and water" extended to the brewing as well as the making of malt—*Ramsay* v. *Town of Kirkcaldy*, 1680, M. 15,984; *Brewhouse* v. *Robertson*, 1741, M. 16,020.

At advising—

LORD TRAYNER—With the exception of a single point, to which I shall afterwards advert, I agree practically in the decision of the Lord Ordinary, and I do not know that I can usefully add anything to what his Lordship has said. I may, however, quite briefly state the view which I take of this case.

The pursuers are in my opinion vested in a right of thirlage which entitles them to exact multures on grain brought within the thirl for grinding or brewing. This right stands not only on the terms of the royal grant in favour of the pursuers but also on a judicial decree, both of which are before us. The defenders are brewers within the thirl, and within it grind and malt their grain. They are therefore *prima facie* liable in multures to the pursuers. They maintain, however, that they are not so liable, mainly on the ground that the pursuers have long ago parted with their mills, and not being able now to render the necessary services are not entitled to exact multures. It is of course quite clear that where the mill no longer exists the suckeners cannot take their grain to it, and the ordinary multures in that case cannot be exacted. But it is equally clear and well decided that a claim for dry multures may be maintained against a suckener even where there is no mill. It is not necessary for the holder of the right of thirlage to have or maintain a mill in order to entitle him to insist on payment of dry multures. And this is so from the very nature of the case. Dry multures are paid by the suckener to discharge him from the necessity of resorting to the mill to which his lands are thirled. He agrees to pay so much, without any service in return, in order that he may be at liberty to take his grain for grinding anywhere he pleases. Coming thus under an obligation to pay so much to the holder of the thirl (without any service in return) in commutation of the ordinary multurage the mill which is not required may be given up. Accordingly, if what the pursuers are entitled to is payment in name of dry multures it is quite irrelevant to inquire whether they have a mill or not. It is obvious from what I have said that an obligation for dry multures must, in the first instance at least, be the result of an agreement between the holder of the thirl and the suckener. The defenders say they never made any such agreement. As regards this view of the case the facts are these. In 1711 the pursuers' predecessors entered into an agreement with certain persons, brewers in Edinburgh acting for themselves and for "the other brewers in Edinburgh, conform to their commission granted to them thereanent," whereby the suckeners, who were by name parties to the agreement, for themselves "and our said constituents" bound themselves to pay to the Town of Edinburgh "Twelve pennies Scots money for each Inglish barrel of ale" which was thereby declared "by consent of both the saids parties . . . to be in place of the thirlage and multurage of the said millns." The agreement provides that the town's right to the ordinary multures should stand good against all brewers (other than those with whom the agreement was made) without prejudice to any brewer taking the advantage of this agreement who might subsequently give his consent and adhesion thereto. There is no evidence that any brewer or other suckener gave any subsequent adhesion to the agreement, nor is there any evidence that any suckener thereafter elected to pay the ordinary "thirlage and multurage of the said millns." I think the reasonable inference from the language of the agreement is that the whole brewers, carrying on their trade within the city of Edinburgh at the date of the agreement were parties thereto, and that the provision as to others being bound for ordinary multures unless they acceded to the agreement had reference to other suckeners who might come within the thirl at a later date. This agreement was acted on by the pursuers' predecessors and by the brewers within the limits of the thirl, down to the year 1853—that is, for upwards of 140 years. In the year 1861 the pursuers of the first part entered into an another agreement with certain brewers carrying on their business in Edinburgh on the second part, the narrative of which set out that the pursuers were vested with the right and servitude of thirlage over the whole lands within the ancient royalty of Edinburgh, and that the second parties carried on their trade within the thirl and "subject to the said servitude." The agreement further narrated that "the agreement of 1711

was acted upon by the Lord Provost and Magistrates of Edinburgh and by the brewers within the limits of the said thirl, and the commutation money thereby fixed was exacted by and paid to the city." The agreement proceeds to refer to certain differences and disputes which had arisen in regard to the ascertainment and collection of the commuted multures, and that the parties had agreed (to state the effect of the agreement shortly) to pay, as from the 1st June 1853, the sum of threepence per imperial quarter on the entire quantity of malt used by the second parties, and this in lieu of the commuted multures agreed to under the deed of 1711.

To neither of these agreements were the defenders parties, although the Edinburgh and Leith Brewing Company (whose singular successors the defenders are) were parties to the agreement of 1861. In this state of the facts the defenders maintain (1) that the agreements of 1711 and 1861 are not binding upon them, as they were not parties to either, and do not represent anyone who was; (2) that being bound by no agreement to pay dry or commuted multures, their only liability is for ordinary multures; but (3) that as the pursuers have no mills and can render no services ordinary multures are not exigible. I agree with the defenders in thinking that they are not bound by the agreements of 1711 and 1861 as personal contracts. To these contracts or agreements the defenders were not parties, and the fact that they are singular successors to persons who were parties to the agreements *per se* imposes no obligation upon them. But the agreements, in their result, are more than mere personal contracts imposing merely personal obligations on the parties to them. The agreement of 1711 being one between the holders of the right of thirlage on the one hand, and the suckeners on the other (and I repeat presumably *all* the suckeners at the time) made dry multures the law and custom of the thirl. That was not altered by the agreement of 1861, which on the contrary recognised that that was the effect of the agreement of 1711, and only introduced a new method of ascertaining the amount of the dry multures payable by suckeners. Now, if payment of dry multures was the recognised law and custom of the thirl, as I think it was, for more than the prescriptive period, it imposed the payment of such dry multures as a servitude or *quasi* servitude on the lands within the thirl (which needed neither sasine nor publication in the records to make it effectual) and which now affects the holders of such lands, whether acquired by singular title or otherwise. This, I think, is the ground of the defenders' liability.

I do not make any remark on the minor point raised by the defenders, that part of their lands are not within the thirl. I agree with the Lord Ordinary's views upon this point.

The point on which I differ from the Lord Ordinary is this. He has held that the pursuers are only entitled to recover the multures exigible for the five years prior to the raising of the present action, because by the provisions of the Act 1669, cap. 9, the quinquennial prescription is made to apply to multures. The Act however does not cut off the right to recover multures due for more than five years. It only limits the mode in which their resting-owing can be proved to the writ or oath of the suckener. It is, therefore, still open to the pursuers to prove by a restricted proof the defenders' indebtedness for the multures claimed as due for a period antecedent to the five years before the raising of this action.

My view therefore is, that we should affirm the interlocutor of the Lord Ordinary, but add to it that the pursuers are entitled to establish their claim for multures prior to 13th July 1896 by the writ or oath of the defenders.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF—The main difficulty in this case arises from the fact that for upwards of 150 years—from 1734 till 1891—the City of Edinburgh was not owner of at least nine (perhaps all) of the town mills. In 1734 the town feued out to the Incorporation of Bakers nine of the common mills on the Water of Leith, and it was not until 1891 that the town reacquired three of the mills. It was forcibly argued for the defenders that the effect of this alienation of the dominant tenements, the mills and mill lands, was to extinguish the town's right of thirlage notwithstanding that payments had been made to the town between 1734 and 1891 by all the brewers within the thirl. What we have to decide is whether the pursuers have made out that there are circumstances in this case which prevent the consequences which would naturally follow from the alienation of the dominant tenement. Although with some hesitation I am disposed to think that having regard to the history of the thirl during nearly two centuries the town has not lost its right to the commuted or dry multures for which the pursuers sue.

The thirl in its broadest sense is the ancient royalty. Under the charter of King James VI. in 1603 the town obtained a grant of the mills and mill lands and multures within the royalty in the widest terms, including the then existing twelve common mills on the Water of Leith, all multures, &c., thereof, with power to erect more mills in such places as they should judge most convenient. At the same time I understand that originally the breweries were thirled to particular mills within the royalty.

In 1711 a litigation took place between the town of Edinburgh and certain brewers, in which the town succeeded in having their right of thirlage declared, and the brewers within the thirl interdicted from grinding their malt elsewhere. But by an agreement dated 3rd May of same year, 1711, between the town and six brewers in Edinburgh "for themselves, and as having power, warrant, and commission from the other brewers of Edinburgh," it was agreed that in consideration of a payment of cer-

tain fixed rates, which were declared to be "the rule of payment . . . in place of the thirlage and multurage of the said millns," the brewers and their constituents should be allowed the free use and practice of hand millns within the royalty and barony. It was also provided that all other brewers who might agree to the terms of this agreement, and indicate their agreement by subscribing in the books of the Council, should have the benefit of the commutation, but that those who should not subscribe should be excluded from the benefit of the settlement, and against them the decree of constitution should be fully enforced.

On this agreement the following observations are to be made:—*First*, it was an agreement between the town and all the existing brewers within the thirl, and was intended to be permanent; *secondly*, it provided for brewers who in future should start business within the thirl obtaining the benefit of the settlement; and *thirdly*, the rates fixed in the agreement were in substance dry multures, payment of which absolved the brewers from the necessity of resorting to the town's mills.

Next came in 1734 the feu-charter by the city in favour of the Incorporation of Bakers. It is a peculiar deed, but I think it is plain that while the city thereby alienated the *dominium utile* of the nine mills and mill lands they did not intend to part with their right to some at least of the multures, and in particular they intended to reserve right to the commuted or dry multures payable by the brewers under the agreement of 1711. They did not unreservedly convey the multures along with the mills; for instance, the five mills on the Water of Leith first mentioned are feued out "with the astriction and multure in use to be paid by the bakers at the said five mills." In connection with the remaining four mills there is no express grant of multures, and the passages in the appendix (which I do not stop to read) show clearly that the city understood that they still retained right to payments of multures either directly from the brewers or through the Incorporation of Bakers should the brewers prefer to have their malt ground in the said mills. Now, if a question had arisen within the years of prescription after 1734 it might have been open to the brewers to maintain that the alienation of the mills by the town was inconsistent with the retention of the town's right to the multures. This might have been an arguable question even as regards dry multures. The owner of the mill is not bound in the ordinary case to keep up the mill for the benefit of a sucker who has agreed to pay dry multures, and perhaps it logically follows that he is at liberty to sell the mill and the mill lands, though this is not so clear.

I think it is not necessary to decide that point, because all the brewers within the royalty by uniform payments from time immemorial interpreted the town's rights under the agreement of 1711 as affected by the agreement with the Incorporation of Bakers in 1734 in the sense for which the pursuers now contend, viz., that the town never lost right to the commuted or dry multures payable under the agreement of 1711. Notwithstanding the alienation of the mills all the brewers continued to pay the dry multures in terms of the agreement of 1711 without asking for or receiving any services. The effect of those payments for more than 150 years was in my opinion to establish permanently the rule or law of the thirl as contended for by the pursuers.

The agreement of 1861 did not affect the force and effect of the uniform payments previously made under the agreement of 1711. The agreement of 1861 was simply substituted for that of 1711, and contained a modification of the rates fixed by the older agreement. Therefore, when in 1889 the defenders took over the brewery from the Edinburgh and Leith Brewery Company, it was subject to a servitude of thirlage established three times over by prescription, if not by express agreement, payments under which were regulated by the agreements in question. In point of fact the defenders' immediate predecessors paid first under the agreement of 1711 and afterwards under the agreement of 1861, from 1821 to 1889, a period of sixty-eight years.

In this view it is not necessary to consider the more doubtful question whether the town's right, assuming it to have been otherwise defective, has been or could be cured by the reacquisition in 1891 of some of the mills or by the building of others.

On the whole matter I am of opinion that the Lord Ordinary has come to a sound conclusion on this abstruse question, and I agree generally in the reasons which he gives in his elaborate note.

The Court pronounced an interlocutor in the following terms:—

> "Refuse the reclaiming-note: Adhere to the said interlocutor reclaimed against, with this addition, that the pursuers are entitled to prove by writ or oath of the defenders their claim for multures prior to 13th July 1896: Remit the cause to the said Lord Ordinary to proceed therein," &c.

Counsel for the Pursuers and Respondents—Dean of Faculty (Asher, K.C.)—Cooper. Agent—Thomas Hunter, W.S.

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