wife's annuity. I agree with your Lordship that that was not a new settlement at all, but a mere substitution of one security for another, and that the claim of the Inland Revenue to have duty as for a new settlement upon every change of security is untenable. I agree with your Lordship.

LORD PEARSON—I agree.

The Court sustained the appeal; reversed the determination of the Commissioners of Inland Revenue: assessed the duty of 10s. on the instrument in question as an instrument falling under the head of "deed of any kind whatsoever not described in this schedule" to the Stamp Act 1891; and ordered the said Commissioners to repay to the appellants the sum of £25, 5s., being the excess of duty, and the sums of £10 and £9, 18s. 1d., being the penalties paid by the appellants.

Counsel for the Appellants—Murray—MacRobert. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Respondents—Umpherston—Munro. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Saturday, December 19.

SECOND DIVISION.

[Lord Johnston, Ordinary.

BROWN *v.* CARRON COMPANY.

BROWN *v.* LIVINGSTONE-LEARMONTH'S TRUSTEES.

BROWN *v.* FORBES.

Servitude—Thirlage—Prescription—Negative Prescription—Lands Astricted in Original Charter to Mill no Longer in Possession of Superior, but with Grant of Multures in its Title—Non-Enforcement of Obligation for Forty Years.

The proprietor of a barony estate, including a mill, disponed the mill with the astricted multures of the lands of the barony to A in 1609, and subsequently granted in favour of B a feu charter of the lands containing, in the *reddendo* clause, an obligation of thirlage to the mill. *Held*, in an action by a party deriving right to the mill through A against a party deriving right to the lands through B, that the obligation of thirlage could be extinguished by the negative prescription.

Evidence—Servitude—Thirlage—Prescription—Negative Prescription—Extinction of Obligation by Non-Enforcement.

In an action raised by the proprietor of a mill, the titles of which included a right to the astricted multures of certain lands against the proprietors of these lands, the defenders pleaded that the right of thirlage had been extinguished by prescription. Evidence was led that no mention of thirlage appeared in the leases of the mill for more than forty years; that from time immemorial a large part of the grain had been sold in market or to the miller; that money charges were made for the grinding of all grain other than oats; that the multures of oats were of fluctuating amount; that there was no distinction between the charges for in-town and out-town grain; that no services had been demanded though the mill had been burned down; that the proprietors and tenants of the lands and of the mill, so far back as inquiry could go, had never heard of any claim of thirlage. *Held* that the obligation of thirlage had been extinguished by the long negative prescription.

Robert Ainslie Brown, S.S.C., proprietor of the estate of Manuel, including the mill and mill lands of Manuel, raised actions against (1) Carron Company, proprietors of the lands of Craigend and others; (2) the trustees of Thomas Livingstone-Learmonth, proprietors of the lands of Parkhall and others; and (3) William Forbes of Callendar, proprietor of the lands of West Mains and others, concluding for declarator that the lands therein specified belonging to the defenders and forming part of the barony of Haining or Almond were astricted and thirled to the mill of Manuel for payment to the pursuer of the astricted multures at certain rates, and that the pursuer had good and undoubted right to the multures in all time coming.

The pursuer averred that by contract of sale and alienation in 1609 Alexander Livingstone of Haining (which then included Manuel) granted a disposition of the mill of Manuel with the astricted multures of all and sundry the lands and barony of Haining to Henry Crawford and Christian Menteith, his spouse, and the survivor of them in conjunct fee; that in virtue of a disposition granted in 1903 in favour of the pursuer by the trustees and heir-at-law of George Bayley of Manuel, and the intervening titles of the mill and lands of Manuel, the pursuer was in right and place of the said Henry Crawford and spouse, and thus infeft in the mill of Manuel and the astricted multures of the lands and barony of Haining.

The pursuer further averred that the lands belonging to the defenders formed part of the barony of Haining, and were acquired by the defenders' authors from the said Alexander Livingstone and his successors subsequently to the disposition of the mill in 1609; that a number of the charters of the lands belonging to Carron Company and to Livingstone-Learmonth's trustees, granted by the said Alexander Livingstone and his successors in favour of those defenders' authors, contained [in the *reddendo*] an obligation of astriction to the mill of Manuel.

The defenders, who did not admit that their lands had ever been thirled to the mill of Manuel, averred and pleaded, *inter alia*, that any right of thirlage ever com-

petent to the pursuer's authors or to the proprietors of the mill over their lands had been extinguished by prescription.

On 12th March 1907 the Lord Ordinary (JOHNSTON) pronounced an interlocutor conjoining the actions, and proof was thereafter allowed and led, the import of which sufficiently appears from his Lordship's opinion *infra.*

At the close of the proof the parties agreed, on the suggestion of the Lord Ordinary, that in view of the difficulty and expense involved in the questions arising on the state of the titles, it should first be decided whether, assuming that the pursuer had a good title to a thirlage mill and that the defenders' lands were embraced in the thirl, the right of thirlage still subsisted and had not been lost by the negative prescription.

On 30th September 1907 the Lord Ordinary pronounced an interlocutor sustaining the plea of prescription.

Opinion.—". . . In approaching the proof of prescription the question therefore presents itself thus. The pursuer is the proprietor of a barony mill having on the face of his title a clause astricting or at least acknowledging the astriction of the lands of the barony to it, under the hand of the disponer of the mill, who was at the time infeft in the barony. The defenders may be taken as *ex facie* at least the holders by progress of the barony lands or some of them from the proprietor of the barony who disponed the mill and created or acknowledged the astriction, but there are only in exceptional cases any reference to astriction in their titles.

"If these be the circumstances, then I think it follows that the thirlage was of *omnia grana crescentia* and not merely of grindable corns, as the thirlage of land implies the thirlage of the crops growing on the lands—*Waughton*, 1635, M. 11,230; *Yeaman*, 1759, M. 16,044. But thirlage has so far at anyrate the quality of a prædial servitude that the obligation to bring the crop of the lands to the mill may be discharged by the negative prescription. Yet in considering the proof of possession or usage it must be kept in view, *first*, that where there are several parcels of one tenement the obligation may be kept in force by the usage of submitting to the thirl by the occupants of one or more parcels though the occupants of the remainder evade it. The nature of the right is anomalous. Its constitution is so to speak prædial; the current obligation is personal and prestable from the occupant, not the owner of the prædium. *Second*, that usage to pay part only of the stipulated multures will preserve the right to exact the whole—*Waughton, supra.*

"But though these be general principles, the circumstances proved must determine whether *de facto* anything has been exacted and paid as multures by virtue of astriction.

"Now, I have examined the proof with some care, and the first thing that I am struck with is that as far back as the local history can take us neither the proprietors of the mill, nor the tenants of the mill, nor the proprietors of the lands in the alleged sucken, nor the tenants of these lands, ever heard of astriction, or of in-town multures, or of any right or claim of thirlage. This is the more remarkable that for a very considerable time beyond the prescriptive period the property of the mill was in the hands of Isaac and George Bayley in succession, two very experienced conveyancers. That the leases of the mill should contain no reference to thirlage is not conclusive, as the lease of the mill of a thirl would imply an assignation of the rights of the owner. But that the leases in earlier times should include the words 'with the astricted multures' or equivalent terms, and that the introduction of these words should cease with the advent of the nineteenth century, is a much more pregnant circumstance, and indicates that the right of thirlage which was then falling into desuetude was with full knowledge and intent abandoned. While dealing with the leases, there is a further matter of some importance to be noticed. It is a necessary consequence of thirlage that the suckeners are liable in mill services. The maintenance of the thirl by exaction and payment of in-town multures involves the perpetuation of the obligation to these services even though not exacted. But it throws light, I think, on the interpretation to be put on the acts of frequenting the mill to be afterwards noticed, that no one has heard even a tradition of mill services being rendered, and that more than forty years ago Mr Isaac Bayley in letting the mill to a new tenant, Peter Roberts, took him bound to maintain both the mill and its adjuncts of dam and lead in repair; and further, that when it was burned down his son George Bayley rebuilt it without calling on the suckeners for cartages or other services.

"With this in view it would, I think, require a stronger proof of resorting to the mill than we have here to resist the implication that the claim of thirlage has long since been abandoned. For what does the proof come to at best. Thirlage over *grana cresentia*, which was the full measure of the right alleged, has never been exacted or suggested within the memory of man. So long as such memory goes all grain not required for use on the farms has been sold off in open market with the knowledge and acquiescence of those in right of the thirlage mill, and no dry multures have ever been heard of. This fact is not conclusive by any means on the authority of *Waughton's* case, *supra.* But it cannot be ignored in considering the weight and complexion of what is proved regarding grindable corn. Now there has been a use of going from some farms to Manuel Mill, particularly with oats—in fact I think the proof is almost confined to oats. But there have been three processes in use at the mill—oatmeal grinding, hashing, and bruising. Now hashing is grinding the whole or unhusked grain for cattle feeding, and though a grinding process is a modern or comparatively modern departure, would be an exception from the suckener's obliga-

tion. Bruising, again, is not a grinding operation at all, and, moreover, is applied to horse corn, and so is doubly excepted from the suckener's obligation. There remains therefore the small amount of oats brought to be ground for domestic consumption on the farms. If the thirlage of *omnia grana crescentia* has been so far as memory goes reduced to this, and if this has been accompanied by the other circumstances to which I have alluded when dealing with the leases, I should require to be satisfied that even the bringing of 'grindable corn' to the mill has been as matter of obligation and not as matter of convenience. And this I am not. Convenience of neighbourhood, satisfaction with the work performed, friendship with the miller, counter transactions of selling grain to him—these have all been the influences in determining such parcels of grain to the mill. There has been no suspicion of obligation on either side, and, in particular, there has been no discriminating charge within the thirl distinguishing in-town grain from out-town. Nobody has heard of in-town multures.

"It is true that oats for meal have always been multured and not paid for in cash, but though this may be a legacy from the old days of astriction, having regard to the generality of the custom, I do not think that it is enough to preserve the flavour of astriction over the parcels of oats which have been brought to the mill to be ground into meal, so that by this one act the whole right of thirlage over *grana crescentia*—for it must be brought up to that—can be held to have been preserved.

"I therefore propose to sustain the defenders' plea on prescription, and to assoilzie them with expenses."

The pursuer reclaimed, and argued—(1) The astriction of the defenders' lands could not be extinguished by prescription. It was, do doubt, true that servitudes might be so extinguished, but thirlage was not, properly speaking, a servitude — *Harris* v. *Magistrates of Dundee*, May 23, 1863, 1 Macph. 833, *per* Lord Deas at p. 844. In any event, where an obligation of thirlage was contained in a vassal's title it could not be extinguished by prescription, because a vassal could not prescribe against the conditions of his right. It made no difference that the obligation was in favour of a third party and not of the superior. There was no feudal incompetency in the severance of the feu-duty from the superiority either in the original charter or subsequently — Duff's Feudal Conveyancing, pp. 83, 84; *Earl of Aberdeen* v. *Forbes*, 1699, M. 7974; *Nasmyth* v. *Storry*, 1748, M. 10,276. The vassal's obligations no doubt usually consisted in a money payment, but obligations to render services were neither incompetent or unknown—*Duke of Argyll* v. *Tarbert's Creditors*, 1762, M. 14,495; *Monro* v. *Mackenzie*, 1763, M. 14,497. An obligation on the vassal contained in the original charter remained in force though omitted from the charters by progress for more than forty years—Ersk. Inst. ii, 3, 20, 24; Bell's Lectures on Conveyancing, ii, p. 708; *Lennox* v. *Hamilton*, July 14, 1843, 5 D. 1357; *Sinclair* v. *Marquis of Breadalbane*, January 16, 1844, 6 D. 378, *per* Lord Medwyn at p. 389; *Hutton* v. *Macfarlane*, November 11, 1863, 2 Macph. 79; *Hope* v. *Hope*, February 20, 1864, 2 Macph. 670; *Duke of Montrose* v. *Stewart*, March 27, 1863, 1 Macph. (H.L.) 25; *M'Leod* v. *Ross*, 5 Br. Sup. 615. It was thus competent to insert in the *reddendo* of a vassal's charter an obligation of thirlage—see Juridical Styles, 1826 edition, vol. i, p. 21—and such an obligation was unaffected by omission from the charters by progress, and could not be extinguished by prescription — Bankton, ii, 7, 54; Stair, iv, 15, 12; *Ramsay* v. *Burgh of Kirkcaldy*, 1678, M. 15,981; *M'Leod* v. *Vassals of Muiravenside*, 1727, M. 10,772; *Lockhart* v. *His Vassals*, 1736, Elch., *voce* "Multures," No. 2. The plea of prescription could not therefore be taken by those defenders in whose charters appeared the obligation of thirlage to the pursuers' mill. Further, if, as here, the whole lands forming a barony were at any time astricted, and the obligation remained in force against any of the lands, it remained in force against the whole—*Cheap* v. *Ferguson*, 1785, M. 14,520; Stair, More's Notes, vol. i, p. 228; *Chiesley* v. *Dalmahoy*, 1697, M. 15,989; *Thomson* v. *Heritors of Kinglassie* (*Feuars of Gaitmilk* v. *Feuars of Dunfermline*), 1688, M. 10,770; *Waughton* v. *Hume*, 1635, M. 11,230; *Lockhart* v. *His Vassals*, *cit.* (2) Assuming that prescription was a competent plea to the defenders or to any of them, it failed on the evidence. The negative evidence was not sufficient. There must be positive evidence of something inconsistent with the astriction—*Halkerston* (*or Haxton*) v. *Melvil*, 1708, M. 15,997 at p. 16,002; *Thomson* v. *Heritors of Kinglassie*, *cit.* If any of the tenants of the astricted lands went to the mill, that kept the obligations in force against the whole lands—*Stuart* v. *Erskine*, 1741, M. 16,020; *Waughton* v. *Hume*, *cit.* It was not sufficient to operate prescription of thirlage that the tenants of the astricted lands had resorted more to other mills than to the thirlage mill, even without protest from the owner of the thirlage mill — *Hamilton* v. *Hamilton*, 1632, M. 10,768; *Blair* v. *Edgar*, 1712, M. 14,505. If the tenants came at all they could not be heard to say that they came *voluntatis*—Bankton, ii, 7, 54; *Duke of Buccleuch* v. *Vint*, 1766, M. 16,053, at p. 16,054. It made no difference that the multures were not mentioned in the leases of the mill—*Ogilvie and Dakers* v. *Guthrie, &c.*, 1825, 4 S. 288—or that the obligation of thirlage did not appear in the leases of the astricted lands—*Walker* v. *Gray*, 1755, 5 Br. Sup. 839; *Cameron* v. *Burr*, 1808, Hume 740; *Macalester* v. *Duke of Argyll*, June 17, 1831, 9 S. 763. [Counsel also referred on the question of the effect of the Clan Act 1715 on the title to *Forbes* v. *Livingstone*, 1827, 6 S. 167.]

Argued for the defenders (Carron Company and William Forbes)—(1) Thirlage could be extinguished by negative prescription — Act 1617, cap. 12; Stair, ii, 7, 24; Bankton, ii, 7, 61; Bell's Principles, sec. 1032. Thirlage was treated by Stair and

Erskine as a servitude (Stair, ii, 7, 16; ii, 12, 24), but if it could not be regarded as a servitude it was simply an obligation, and in either case prescription was a competent mode of extinction—Stair, ii, 7, 4; Ersk. Inst. iii, 7, 12; ii, 9, 37; *Graham* v. *Douglas*, 1735, M. 10,745; *Tarsappie* v. *Pittendriech*, 1685, M. 10,770; *Macdowal* v. *Cleghorn*, 1783, M. 16,068; *Stuart* v. *Erskine*, *cit.* While it was, no doubt, true that a vassal could not prescribe against the conditions of his feu, that did not prevent the extinction by prescription of an obligation of thirlage contained in a vassal's charter if the obligation were in favour of a third party—*Duke of Montrose* v. *Stewart*, *cit.*, per Westbury, L.C., at p. 28. Nor did the insertion of the obligation in the *reddendo* of the charter perpetuate it or protect it against prescription. The purpose of the *reddendo* was to fix the nature and extent of the vassal's obligation to his superior—Ersk. Inst. ii, 3, 24. The cases cited by the pursuer in support of his contentions that an obligation contained in an original feu-charter was not lost by its omission from the charters by progress, and that an obligation of servitude or thirlage so constituted could not be extinguished by prescription, were all, with the possible exception of *Ramsay* v. *Burgh of Kirkcaldy*, cases, where the obligation was in favour of the superior, and where the question arose between vassal and superior, while in *Ramsay* v. *Burgh of Kirkcaldy* it was not clear whether the question was between superior and vassal or not. Further, that case had not been followed, and had been overruled on one point—*Steedman* v. *Horn and Young*, 1722, M. 16,013. The obligation of thirlage could thus, even if contained in the titles of the astricted lands, be extinguished by prescription. (2) On the evidence it was clear that there had been prescription. Where the suckeners had openly and freely gone past the mill for more than forty years, that would be sufficient to prescribe immunity. It was proved here that there had been no exaction of mill services or of sequels for more than forty years; that no difference had been made between in-town and out-town multures; that the payments to the miller were mostly in money, and that the greater part of the grain was sold; and that neither the miller nor the defender's tenants ever heard of the astriction. Further, the leases of the mill contained no mention of multures, as they ought to have done if the right still subsisted—Hunter, Landlord and Tenant, 4th ed. p. 258. *Walker* v. *Gray*, and *Ogilvie and Others* v. *Guthrie*, were not authorities to the contrary. It was thus clear that the tenants on the lands in question went to the mill as members of the public. There was no authority for the proposition that there must be positive proof to establish prescription, and the authorities cited by the pursuer did not support that view. To elide prescription it must appear that the suckeners ordinarily came to the mill and paid the insucken multures—*Heritors of Keithick* v. *Feuars*, 1665, M. 11,292; *Hamilton* v. *Hamilton*, *cit.*, *Halkerston* v. *Melvil*, *cit.*, and *Blair* v. *Edgar*, *cit.*, did not deal with prescription. Counsel also referred to *Skene* v. *Reddie*, 1775, M. 16,062, 2 Hailes 675; *Cassilis* v. *Heritors of Maybole*, 1682, M. 15,987; *Town of Edinburgh* v. *Alvis*, 1707, M. 15,994; *Preston* v. *Ebred*, 1664, M. 7976; *Skene* v. *Simpson*, 1774, M. 10,746.

Counsel for the defenders, Livingstone-Learmonth's Trustees, adopted the argument for the other defenders, and also cited *Maxwell's Trustees* v. *Bothwell School Board*, July 14, 1893, 20 R. 958, 30 S.L.R. 885; *Hamilton* v. *Scolland*, 1807, Hume, 461; *Forbes* v. *Livingstone*, *cit.*

At advising—

LORD LOW—The mill of Manuel, as proprietor of which the pursuer sues these actions, appears in ancient times to have formed part of the barony of Haining. The mill appears to have been given off for the first time in 1609, when, in implement of a contract of sale and alienation, Livingstone of Haining granted a disposition of the mill with the astricted multures of all and sundry the lands and barony of Haining, to one Henry Crawford and Christian Menteith, his spouse, and the survivor, in conjunct fee. It is not necessary to consider the precise terms of the clause of thirlage in the disposition of 1609, nor to trace the series of titles by which the pursuer seeks to connect himself with that disposition, because the only question which we have to determine is whether, assuming that the pursuer has a good title to the multures disponed in 1609, his right has been lost by the long negative prescription.

The Lord Ordinary has answered that question in the affirmative, but he has drawn no distinction between those cases in which there is in the original grant of the astricted lands an express obligation to pay multures to Manuel Mill, and those cases in which there is no such express obligation. It was, however, anxiously argued before us that the distinction is of vital importance. In a number of cases the obligation is contained in the original grant of the lands and forms part of the *reddendo;* and the argument was that that obligation was a condition of the grant which ran with the lands, and which therefore, whether repeated in subsequent investitures or not, could not be extinguished by non-enforcement on the mill-owner's part and non-performance on the landowner's part, however long continued. It was further argued that the obligation was not the less a condition of the grant in that it was conceived in favour, not of the granter, but of a third party.

I agree that the obligation must be regarded as being one of the conditions of the grant, not solely or chiefly because it is inserted in the clause of *reddendo*, but because it is an obligation of a continuing nature which relates to the lands, and which is plainly intended to affect the lands into whosesoever hands they may come. I agree also that there is no legal

impossibility or incompetency in making part of the *reddendo* payable to someone other than the superior. But these considerations do not go very far to solve the question.

It may be that if a superior in granting a feu-right thirled the lands feued to his mill, the successors of the granter in the superiority could enforce the obligation against successors of the vassal in the feu, whether it had been repeated in subsequent transmissions of the feu or not, and that the superior's right would not be extinguished *non utendo*. But that would be because the relationship of superior and vassal continued to exist in terms of the continuing contract by which that relationship was originally constituted, and the vassal could not be allowed to repudiate an essential condition of the contract upon which alone his right to possess the lands rested.

When, however, the superior in feuing the lands stipulates that a certain condition shall be prestable, not to him, but to a third party, no relationship of superior and vassal is constituted between the feuar and the third party. Between those two there is neither privity of contract nor privity of estate, and certainly the third party does not acquire the remedies peculiar to a superior for enforcement of the condition.

What, then, is the nature of the right of the owner of a mill as against a proprietor of lands, a condition of whose grant is that the lands shall be thirled to the mill, and the owner of the mill not being his superior? It seems to me that the millowner is either in right of a personal obligation imposed upon the proprietor of the lands to bring his corn to be ground at his mill, or the millowner is proprietor of the dominant tenement in a servitude in which the land which is held under the obligation of thirlage is the servient tenement.

If the former view be taken, I see no reason why the obligation should not be capable of being extinguished by the operation of the negative prescription like any other personal obligation.

I think, however, that the sounder view is that thirlage falls under the rules applicable to servitudes. No doubt, as Mr Bell points out, it is not, strictly speaking, a servitude. But it is of the nature of a servitude, and is so treated by Stair, Bankton, and Erskine, while I think it has been consistently recognised in the many cases which have arisen in regard to thirlage that the general rules regulating prædial servitudes are applicable. It cannot be disputed that the general rule is that a servitude may be extinguished *non utendo* for the prescriptive period, and I think that it must also be regarded as settled that the fact that the servitude has been imposed by the original grant of the servient tenement does not exclude the rule. There is not indeed, very much authority upon this point, but what there is seems to me to be quite distinct. Thus Stair (ii, 7, 4) says—"Servitudes are also extinct by prescription of liberty. . . . In our long prescription of forty years, simple forbearance of the use may suffice, as presuming the will of the party to be to relinquish the servitude, and to suffer liberty to be recovered; and when the servitude is constituted by writ the same will be the effect, seeing the writ and obligement prescribe, not being used or acclaimed forty years."

Then Erskine (iii, 7, 12), after saying that a vassal cannot prescribe immunity from feu-duties, services, and casualties of superiority, continues—"This doctrine is not applicable to a right of servitude, which is in no sense a right of lands, or a necessary concomitant of property, but is extinguishable; and therefore he who is subjected to that right may plead an immunity from it by the non-usage of him who is entitled to it, though he himself should have no positive title of prescription in him, or even though the servitude should be expressed in that very charter by which he holds the servient tenement—*Graham*, February 7, 1735, M. 10,745—for *bona fides* is not necessary to the long negative prescription."

There is further the case of *Graham* v. *Douglas* (M. 10,745), cited in the passage from Erskine which I have quoted, the circumstances of which were these—The proprietor of two tenements sold one of them with a servitude of pasturage over the other. The seller subsequently feued out that other tenement under burden of the servitude, and the proprietor of the dominant tenement having for forty years neglected to exercise his right, it was held that the servitude had been extinguished. That judgment was pronounced in 1735, and since that date I am not aware of any case having been brought into Court in which the question has been raised. It therefore seems to me that the judgment in *Graham* v. *Douglas* must be regarded as having settled the general law.

I did not, indeed, understand the learned counsel for the pursuer to dispute the soundness of that judgment when applied to proper prædial servitudes, but he contended that a different rule had been adopted in the case of thirlage, and he quoted the decisions in *Macleod of Muiravonside* v. *His Vassals* (M. 10,722), and *Ramsay v. Town of Kirkcaldy* (M. 15,981).

In regard to the former case it is sufficient to say that the question arose between a superior and his vassals, and therefore the judgment has no application to the present case, where no such relationship exists.

The case of *Ramsay*, however, was not a case between superior and vassal, and one of the findings in the judgment of the Court, as given in the report, certainly at first sight appears to support the proposition for which the pursuer contends. The action was at the instance of the owner of the West Mill of Kirkcaldy, to which the town was by its charter astricted for "all victual which was brought within the town and tholled fire and water there." One of the questions raised was this—the pursuer claimed, and the town denied, liability for multures of meal brought into the town already ground. The town maintained (1)

that meal did not fall under the clause in the charter; and (2) that even if it did so the servitude had been extinguished by non-payment of meal multures for forty years. The pursuer replied (1) that meal fell within the astriction in the charter in respect that it tholled fire and water in the town; (2) that the running of prescription had been interrupted; and (3) "that the town" (I quote from the report) "by the *reddendo* in their charter were obliged for these multures to this mill, which therefore no prescription could take away." The judgment of the Court upon these questions is stated in the report thus—"As to the meal bought in their markets, the Lords, before answer, ordained the custom of this and other mills to be proved by either party and sustained the exception of prescription, and the reply of interruption, and the duply that those multures were in the *reddendo* of the town's charter, and found that thereby they could not fall under prescription."

I think that the proof of custom must have been allowed with the view of determining whether meal fell within the description in the charter of "victual" which "tholled fire and water," and it seems to be plain enough that the Court answered that question in the affirmative. Beyond that, however, I am unable to say, although I have studied the report with much care, what was decided. No doubt if the last finding be read alone it affirms the proposition for which the pursuer contends; but that finding must, I think, be read along with those which precede it, and if so read, then the inference is that the finding cannot have been in the unqualified terms stated in the report, because whatever the actual finding was in regard to the effect of the astriction being incorporated in the charter, the plea of prescription was to some extent and effect sustained.

Further, if it was decided that in the case of thirlage the fact that the burden is imposed by the original charter of the servient tenement altogether excludes the plea of prescription, the judgment was one of very great importance, yet I do not find it referred to in subsequent cases (so far as my researches have gone) or in the text writers, except as having been overruled in regard to another point by subsequent decisions.

I am therefore of opinion that the pursuer derives no aid from the case of *Ramsay*, and I see no reason in principle why thirlage should not, like other servitudes, be capable of being extinguished by the operation of the long negative prescription.

The only other question which it is necessary to consider is whether non-enforcement and non-performance of the obligation for the full period of forty years has been proved. I am of opinion that that question must be answered in the affirmative, and I agree so entirely with the views expressed by the Lord Ordinary and of my brother Lord Dundas, who has been good enough to show me his opinion, that I do not think it necessary to go into the details of the evidence.

There is, however, an argument which was urged by the pursuer, which I think it desirable to notice. It appears from the evidence that a number of the tenants of the astricted lands have from time to time, within the forty years, brought some corn (oats, I think) to be ground at Manuel Mill, and accordingly the pursuer contended (1) that that must be presumed to have been done pursuant upon the astriction; (2) that it was irrelevant to say that these tenants knew nothing of the astriction, but came to the mill merely because it was convenient to do so; and (3) that therefore the running of prescription had been interrupted at all events in regard to the kind of corn which had been brought to the mill.

Now, I can understand that if the owner of astricted lands brought corn to the mill and paid insucken multures (which, I may observe, seem to have been invariably higher than outsucken multures), he could not be heard to say that he did not intend to recognise the astriction but came voluntarily. That was the ground of judgment in the case of *Hamilton* (M. 10,768), which the pursuer cited. But in the present case I think I am right in saying that no instance has been adduced in which the multures specified in the original grants have been paid, while it is proved that the same multures were charged whether the corn was brought from astricted lands or not. Further, no inference can be drawn from the fact that payment for grinding corn was frequently made in kind, because that was a common practice even where there was no thirlage. It therefore seems to me that the circumstances of this case raise no presumption which cannot be, and has not been, rebutted by evidence to the contrary.

I am therefore of opinion that the interlocutor of the Lord Ordinary was right and should be affirmed.

LORD DUNDAS—I am of the same opinion. Two matters were argued before us which require to be decided. It was urged for the pursuer (*first*) that some of the defenders' titles contain, as part of the *reddendo*, clauses of astriction to his mill of Manuel, and that he is entitled to enforce this obligation as a real condition of the defenders' tenure, apart from any question as to the exercise or disuse of the right of thirlage by his own authors in time past; and (*second*) that even if his right is only one of servitude or *quasi* servitude, the proof discloses that there has not been such complete disuse as to extinguish the right by force of the negative prescription.

1. The first of these arguments is not noticed by the Lord Ordinary in his opinion, though we were informed that it was maintained in the Outer House; but it was very fully and ably supported at the discussion before us. I think the argument is ill-founded. The enforcement of a condition of tenure seems *ex figura verborum* to be pleadable only as between superior and vassal—the parties betwixt whom the tenure was created and subsists; but the pursuer is not the superior of the defenders, or any

of them, and has not, in my opinion, any privity of contract which might entitle him to enforce conditions upon which they hold from their superior. It is trite law that a vassal cannot prescribe immunity from the feu-duties or other essential conditions of his tenure; but this is just because the right to these, being inherent in and essential to the superiority itself, is accounted as an estate in the land, and the vassal cannot prescribe an immunity against the terms of the title upon which alone he holds the ground. But the contrary is the case with one who is not the superior, but merely creditor in a burden created by way of servitude or otherwise, which is not a right of land or a necessary concomitant of property, but may be extinguished by the negative prescription (Ersk. Inst., iii, 7, 12). It is in this latter position that, in my judgment, the pursuer stands. Mr Clyde urged on his behalf, and I agree, that there is no feudal incompetency in making part of a *reddendo* prestable, not to the superior, but to a third party. He furnished one or two instances, and I assume that others might be found, where part even of the feu-duty was so treated in old charters. But this does not, in my judgment, materially advance his argument; for it seems clear that the third party could not in such a case resort, upon non-payment of his feu-duty, to the remedies peculiar to a superior, and there is nothing, so far as I am aware, to show that his right to the feu-duty might not, as in the case of any other real burden, be extinguished entirely if he failed to demand it for forty consecutive years. We were also referred to a passage in Mr Duff's Treatise on Feudal Conveyancing (1838), at pp. 83, 84, dealing with the rights in this matter of Lords of Erection, where "a statutory burden has been created in favour of parties not superiors of the subjects"; but the learned author justly (as I think) observes that this peculiar position is "merely statutory, and apparently inconsistent with feudal principles." Then Mr Clyde founded strongly upon the case of *Ramsay*, 1678, M. 15,981 (and see sequel —1680, M. 15,984) as conclusive in favour of the pursuer's contention that he can enforce against the defenders, though he is not their superior, the obligation said to be contained in their *reddendos*, and that no question as to negative prescription is relevant for consideration. The chief matter in dispute in *Ramsay's* case was whether or not the defenders were liable to a double thirlage duty, and it may be noted in passing that the decision in favour of the liability is apparently inconsistent with the later case of *Steedman* (1722, M. 16,013). But Mr Clyde founded upon the last sentence of the report in *Ramsay's* case, which narrates that "as to the meal bought in their markets, the Lords, before answer, ordained the custom of this and other mills to be proved by either party, and sustained the exception of prescription, and the reply of interruption, and the duply, that these multures were in the *reddendo* of the town's charter, and found that thereby they could not fall under prescription;" and he urged that the concluding words import a distinct finding to the effect that, inasmuch as the multures appeared in the defenders' *reddendo*, the right of the pursuer (though not superior) to demand them could not be affected by the negative prescription. I confess that a careful study of the report of *Ramsay's* case, even with the explanations offered us by counsel, leaves me in great perplexity as to what precisely was decided by the Lords. I agree in the comments upon the case made by my brother Lord Low, and I am not prepared to accept it as an authority—apparently the sole one—for the proposition that because multures are found in a vassal's *reddendo*, a pursuer who is not the superior can found upon this obligation as a condition of the vassal's tenure against which the negative prescription cannot be pleaded in a question with the pursuer. The proposition seems to me to be inconsistent with legal principle and incompatible with at least two of the later decisions of the Court, viz., *Thomson*, 1689, M. 10,770, and *Graham*, 1735, M. 10,745. In *Thomson's* case (*Feuars of Gaitmilk* v. *Feuars of Dunfermline*) the pursuer, who apparently was not the defender's superior, alleged that he and his authors were infeft in the mill with the astricted multures of the parish "for a particular thirle-duty, which the defenders denied, and yet it was in the *reddendos* of their own charters and rights." Now, if Mr Clyde's argument is correct, that allegation must, if well founded, have excluded all questions of proof as to prescriptive disuse; yet the Lords apparently allowed a proof of the facts upon that issue, and decided the case on the evidence. In *Graham's* case the rubric bears that "a servitude of pasturage, though engrossed in the rights both of the dominant and servient tenement, was found liable to the negative prescription." The arguments are instructive, but I need not quote them. "The Lords sustained the defence of prescription." This decision also seems incompatible with that of *Ramsay*, if the latter was really to the effect contended for by Mr Clyde. The pursuer can, I think, derive no help from such cases as *M'Leod*, 1727, M. 10,772, where in an action at the instance of the superior for abstracted multures it was held that "the astriction being established in the defender's charters they could perceive" (qu. prescribe?) "no right or immunity contrary to the tenor thereof."

I am therefore of opinion that the pursuer's argument upon this head of the case must fail.

2. The question remains whether the pursuer's right of thirlage, assuming it to have existed at some time, has not been extinguished by force of the negative prescription. That is really a question of fact. It is, I think, unnecessary to discuss whether or not thirlage is correctly described as a servitude. It has sometimes been pointed out that it is not so, "strictly and properly speaking" (per Lord Deas in *Harris*, 1863,

1 Macph. 833, 844, *cf.* Bell's Prin., section 1017). But it is treated by the institutional writers as a prædial servitude, and must now, I apprehend, be so dealt with in our law and practice—*Stobbs*, 1873, 11 Macph. 530, *per* Lord President Inglis, p. 537. There seems to be no doubt that a right of thirlage may be lost *non utendo*—Stair, ii, 7, 24; Ersk. Inst. ii, 9, 37; Bankt. Inst. ii, 7, 61; Bell's Prin., 1032—in whole, *e.g.*, *Macdowal*, 1783, M. 16,068, or partially, *e.g.*, *Bruce Stuart*, 1741, M. 16,020. The question must depend on the evidence in each case. Mr Clyde contended that the right would not be extinguished unless the mill had ceased to exist or had been practically deserted for a period of forty years. This is, I think, putting the matter too high. The cases seem to show that it is not enough to prove that more frequent resort has been made to other mills during the prescriptive period if the suckeners have "continually" carried some part of their grain to the mill of the thirl—*Hamilton*, 1632, M. 10,768—and that "going to other mills sometimes was no interruption if the defenders came ordinarily to the pursuer's mill and paid insucken multures"—*Keithick*, 1665, M. 11,292—but the matter is probably one of degree—*Tarsappie*, 1685, M. 10,770. It may also be that the defenders in such cases cannot plead that their resort to the mill and payment of insucken multures was "a voluntary deed and not done as astricted, but was done as a free miller"—*Hamilton, sup. cit.*—for to quote from the pursuer's argument in *Duke of Buccleuch*, 1766, M. 16,058, where, however, the decision was in favour of freedom, "the acknowledged uniform practice of grinding their malt at the mill will in law be imputed to their subjection and not to their choice, to their obedience and not to their civility." It has also been said, *e.g.*, *Thomson, sup. cit.*, that the evidence in favour of immunity must be of a positive and not merely a negative character. But keeping all this in view, I think that in the case of thirlage, as in that of any other right which may be lost by disuse, the facts must be viewed broadly as a whole in order to determine whether or not freedom has been prescribed; and if the facts here are so regarded, the Lord Ordinary's conclusion appears to me to be perfectly right. I agree with his Lordship's observation that "as far back as the local history can take us neither the proprietors of the mill, nor the tenants of the mill, nor the proprietors of the lands in the alleged sucken, nor the tenants of these lands, ever heard of astriction, or of in-town multures, or of any right or claim of thirlage;" and the evidence to my mind points strongly to the gradual desuetude and abandonment of any right which may once have existed. It appears, *inter alia*, that from time immemorial the grain so far as not required for use on the farms has not been brought to Manuel Mill, but has been openly sold in market or to the miller himself, and no dry multures have ever been heard of; that money charges were made for most of the grain brought for grinding or milling; while so far as oats were "multured," the multures were of uncertain and fluctuating amounts, bearing no apparent relation to the multures described in the summonses; that there has been no distinction in charge between in-town and out-town grain; that no "services" have been demanded, though the mill has been burned down and the dam has thrice burst; that the defenders' titles have borne no reference to thirlage since about 1858 and the leases of the mill for a much longer period; that no such reference appeared in the advertisement of the mill to be let in 1862, or in the particulars of the estate when the pursuer recently bought it; and (for what it may be worth) that the late proprietor in a letter in 1862 described the multures as "*nil.*" The above is a summary or outline of some of the salient facts of the case, which seem to me to justify the Lord Ordinary's conclusion. I think the pursuer has entirely failed to prove the averments he made on record against the several defenders to the effect that from time immemorial, or at least for more than forty years, they and their predecessors and authors and their tenants have resorted to Manuel Mill, and have carried the whole corns growing upon their said lands to be grinded thereat and have paid the multures specified in the summonses. The second head of the pursuer's argument, like the first, must therefore in my opinion fail.

If these views are correct, it is unnecessary to discuss or decide other topics indicated rather than argued during the lengthy and learned debate with which we were favoured, *e.g.*, (*a*) the statement that while the pursuer claims a right of thirlage over *omnia grana crescentia*, the defenders' titles nowhere import a wider obligation than one in regard to corns tholing fire and water; (*b*) the contention that since 1716 Parkhall has been held on a charter the *reddendo* whereof bears no reference to thirlage, but consists only in the delivery of one white feather if asked *pro omni alio onere*, and that Parkhall has thus got rid entirely of any liability to thirlage which might have existed in virtue of the earlier charter; and (*c*) the allegation made for Mr Forbes, of Callendar, that no liability can in any view be established against him because none of his titles contain any reference to thirlage, and it is not enough to say that his lands form part of a barony even if other portions thereof should be held validly astricted to the mill of Manuel.

LORD ARDWALL concurred.

LORD LOW intimated that the Lord Justice-Clerk (who was absent when the case was advised) concurred.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Clyde, K.C.—W. Thomson. Agent—Party.

Counsel for the Defenders (Respondents), Carron Company—Cooper, K.C.—Chree. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defenders (Respondents), Livingstone-Learmonth's Trustees — Macfarlane, K.C. — Chree. Agents — Elder & Aikman, W.S.

Counsel for the Defender (Respondent), William Forbes — Cooper, K.C. — Chree. Agents — Graham, Johnston, & Fleming, W.S.

Tuesday, January 5, 1909.

FIRST DIVISION.

(SINGLE BILLS.)

M'CUAIG *v.* M'CUAIG.

Process—Title to Sue—Dominus Litis—Expenses—Caution for—Assignation to Law Agent in Security of Charges and Outlays—Motion to Sist Agent as Party to Cause.

In the course of proceedings in the Sheriff Court for service as heir in certain property, the petitioner (whose claim was disputed) assigned to his law agent his whole interest in the subjects in question in security of the latter's business account and outlays. The assignation, which was absolute in its terms, was qualified by a back-letter stating that it was really in security of the agent's advances, and that the security was limited to £400. The value of the property was about £5000. In an appeal at the instance of the petitioner, whose claim had been repelled, the respondent lodged a note craving that the agent should be sisted as a party to the cause, or otherwise that the appellant should be ordained to find caution.

Held that as the appellant was not suing for behoof of another, but was himself the true *dominus litis*, there was no ground for making his agent a party to the cause, or for ordaining the appellant to find caution, and note *refused*.

John M'Cuaig, Drumleach, Kintyre, Argyllshire, brought a petition in the Sheriff Court at Glasgow for service as heir in special to his deceased brother Angus M'Cuaig in certain subjects in Glasgow. A competing petition was presented at the instance of Donald M'Cuaig, Germiston, South Africa, a nephew of the said Angus M'Cuaig. The Sheriff-Substitute having upheld the claim of Donald M'Cuaig, John M'Cuaig appealed. On 5th January 1908 the respondent presented a note to the Lord President, in which he stated, *inter alia*—"It has come to the respondent's knowledge that in or about the month of August 1908 the appellant in the course of the said proceedings assigned to Mr John Macalister, writer, 81 Bath Street, Glasgow, his law agent, his whole interest in the heritable and moveable estate of the said deceased Angus M'Cuaig, including his whole interest in the subjects to which in the said proceedings he sought to obtain himself served as heir in special, and that the assignee thereafter duly intimated the assignation to the executrix-dative of the said deceased Andrew M'Cuaig. The appellant is a labouring man in humble circumstances, and the respondent believes and avers that he is not possessed of any means beyond his interest in the estate of the said deceased Angus M'Cuaig, which he has assigned in favour of the said John Macalister."

The prayer of the note was as follows:—"May it therefore please your Lordship to move the Court to appoint the said John Macalister to sist himself as a party to the appeal, or alternatively to ordain the appellant to find caution for the respondent's expenses therein."

It was stated and admitted at the bar that the assignation referred to was qualified by a back-letter dated 11th November 1908, declaring that the assignation was in security of advances and of any business account and outlays incurred to the assignee, not exceeding in all the sum of £400. The value of the subjects in question was £5000.

Argued for respondent—The appellant had divested himself of all interest in the subject-matter of the action in favour of his agent Macalister, and, accordingly, he was not entitled to sue without finding caution for expenses. The person who had the real interest was Macalister, and that being so he should be ordained to sist himself. The respondent was not bound to litigate with a person who had no interest, and against whom therefore no effectual judgment could be obtained. *Esto* that the appellant had the reversion, the principle on which a party would be compelled to sist himself did not depend on whether or not he had the reversion, but on whether he was or was not likely to benefit by the litigation—*Fraser* v. *Dunbar*, June 6, 1839, 1 D. 882; *Walker* v. *Kelty's Trustee*, June 11, 1839, 1 D. 1066. The person who would really benefit here was Macalister. He was the true *dominus litis*.

Argued for appellant—The appellant had clearly the real interest in the litigation. The assignation was qualified by a back-letter declaring that it was really in security of a sum which in any event could not exceed £400, whereas the value of the property in question was more than ten times that amount. The appellant and not Macalister was the true master of the litigation, for he had command of it. The mere fact that Macalister was supplying the funds did not make him the *dominus litis*. The test of the matter was this—"Was the appellant acting not as principal but as agent?"—*Fraser* v. *Malloch*, February 8, 1896, 23 R. 619, *per* Lord Kyllachy at 625, 33 S.L.R. 594. The facts here showed that the appellant was acting as principal, and that being so the respondent was not entitled either to have Macalister sisted or to have the appellant ordained to find caution.

LORD PRESIDENT—This is a case in which there is a competition as to the right of