The Court sustained the appeal, recalled the interlocutor of the Dean of Guild, and remitted to him to repel the plea-in-law for the respondent James Lee and to proceed as should be just, and decerned.

Counsel for Petitioner (Appellant) — Morison, K.C.—Hon. W. Watson. Agents —Webster, Will, & Company, S.S.C.

Counsel for Respondent—Blackburn, K.C. —Scott Brown. Agent — F. J. Martin, W.S.

Friday, October 22.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

GORDON'S TRUSTEES *v.* THOMPSON.

Servitude—Thirlage—Contract—Agreement to Pay Fixed Sum—Liability of Singular Successor—Discontinance of Mill.

In 1806 the proprietor of lands astricted to a thirlage mill and the proprietor of the mill entered into an agreement by which the proprietor of the thirled lands bound himself and his successors therein to pay certain sums annually in lieu of the multures and other dues, and it was further provided that the proprietor or occupier of the mill should not be bound to afford the use of his mill except of consent and at agreed-on rates. The agreement was recorded in the Register of Sasines and the payments so fixed continued to be made till 1908, when a singular successor in the thirled lands refused to continue the payments on the grounds (1) that the agreement was a personal one which was not binding on singular successors, and (2) that as the mill had been abandoned for more than forty years multures could not now be exacted.

Held that the defender was liable, and decree granted as craved.

On 10th December 1908 Henry Gordon, of Manar, Aberdeenshire, and another, surviving testamentary trustees of the late Alexander Gordon of Dyce in the County of Aberdeen, brought an action against Mrs Mary Stewart or Thompson, proprietrix of the estate of Pitmedden in the Parish of Dyce, for declarator that the defender, as proprietrix foresaid, was due certain sums as commuted multures under a servitude of thirlage and contract of commutation, and for payment thereof.

The defender pleaded, *inter alia* — "(3) The contract for the commutation of the said multures founded on by the pursuers being a personal contract between the parties thereto, and not being binding on the defender, she is entitled to absolvitor. . . . (4) The Mill of Dyce having been abandoned for more than the space of forty years, the pursuers are not entitled to claim any sum in respect of multures from the defender."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (MACKENZIE), who on 25th March 1909 granted decree as craved.

Opinion.—"The pursuers are the trustees of the deceased Alexander Gordon of Pitlurg and Dyce; the defender is proprietrix of Pitmedden.

"The conclusions of the actions are—(*First*) that it should be declared that the defender, as proprietrix of the lands of Pitmedden in the sucken or thirl of the Mill of Dyce in the barony of Dyce, situated in the parish of Dyce and county of Aberdeen, and as a successor in the said lands of Pitmedden of the deceased Alexander Innes of Pitmedden, and the defender's successors in the said lands of Pitmedden, are bound to make payment on the 26th day of May yearly in all time coming to the pursuers, as trustees aforesaid, as heritable proprietors of the said Mill of Dyce, and to their successors in the said mill, of the money value according to the fiars' prices for the year of certain quantities of meal and bere, all under and in terms of a contract between Andrew Skene, sometime proprietor of the barony of Dyce, including the Mill of Dyce, and Alexander Innes, sometime proprietor of the said lands of Pitmedden, dated 24th May, and recorded in the Register of Sasines on 24th May, and registered in the Sheriff Court Books of the county of Aberdeen on 29th May, all in 1806; and (*Second*) that the defender should be ordained to pay the sum of £9, 12s. 9d., the amount due for the year 1908. Payments were duly made under the contract until 1907. The defender is a singular successor of Alexander Innes in the lands of Pitmedden, the estate having been purchased by her late husband in 1897. The question in the case is whether the contract of 1806 is a personal contract merely, and therefore not binding on the defender, a singular successor.

"The contract of 1806 proceeds on the narrative that the lands of Pitmedden had been from time immemorial thirled and astricted to the Mill of Dyce, and had paid and performed in consequence of such thirlage the multures, dues, sequels, and carriages therein set forth, and that Alexander Innes was desirous that the multures, &c., should be commuted into an annual payment in terms of the Act 39 Geo. III, cap. 55, whereby his lands of Pitmedden should be relieved of all future payments and services in kind to the Mill of Dyce. It then sets out that the parties had come to an amicable adjustment of the matters appointed by that Act to pass to the knowledge of a jury in respect of such thirlage, and provides that Alexander Innes, in consideration of Andrew Skene departing, on the conditions specified in the contract, from all claims of thirlage in kind over the lands of Pitmedden from and after 26th May 1807, binds and obliges himself and his successors in the lands of Pitmedden to pay to Andrew Skene and his successors in the Mill of Dyce, multures at the rate set forth in the contract in lieu of

all multures, dues, sequels, services, and carriages exigible in virtue of the thirlage, the same being by mutual agreement converted into money payable to Andrew Skene and his foresaids in all time coming in one sum at the fiars of the county for the year wherein such payment is due, commencing the first payment on 26th May 1808 for the crop of the year immediately preceding, and so forth yearly thereafter for ever, with interest and liquidate penalty in the event of not-payment. It is declared 'that the said Andrew Skene and his foresaids shall in noways by this present contract have any right now competent to them in virtue of said thirlage, whether over the lands of Pitmedden aforesaid or the produce thereof, anywise lessened or restricted saving allenarly their being obliged to accept of the said annual stated payment in money in lieu of the present multures and other prestations before narrated now exigible in kind in virtue of the before-mentioned thirlage.' It is expressly stipulated that the use of the mill is only to be given of consent and at agreed-on rates. The contract also contains a declaration 'that in case the said Alexander Innes or his foresaids shall fail in the performance of their parts of the before-written contract, then and in that case the right of thirlage shall remain with the proprietor of the mill, conform to use and wont as before specified, anything herein contained notwithstanding.' It is provided that the contract should be recorded in the Register of Sasines, and this was done on 24th May 1806.

"The argument for the pursuers was that the obligation to make the money payments stipulated in the contract is one which runs with the lands; that the payments are of the nature of dry multures, the obligation created by the thirlage not being changed in substance but only in the mode of performance. They founded on the *Magistrates of Edinburgh* v. *Edinburgh United Breweries, Limited*, 5 F. 1048, as an authority in their favour. The defender argued that the contract was a personal one which did not affect a singular successor in the lands. The servitude of thirlage was not extinguished, as it would have been if proceedings had been carried through under the Thirlage Act, but was expressly reserved. This was inconsistent with the idea that the payments were dry multures. It was the original right of thirlage which by the contract continued to affect the lands, not the money payments, which were merely conventional debts of a personal nature, not real burdens or burdens of the nature of servitudes.

"They maintained that the case of *Lord Sempill* v. *Leith Hay*, 5 F. 868, is an authority in their favour. There, in a reference between the heir of entail in possession of lands astricted to a thirlage mill and the owner of the mill, the arbiter in 1828 pronounced a decree that in lieu of the multures and other prestations exigible the lands should be subject to the payment of £5 sterling and 8½ bolls of meal yearly, and should be free of thirlage. The decree-arbitral was not recorded in the Register of Sasines. Payments were made under the decree-arbitral down to 1900, when an heir of entail in possession, who was not a party to the submission, disentailed the lands and refused to continue to pay. It was held (1) that the submission did not affect subsequent heirs of entail, and (2) that the payments in implement of the agreement had no prescriptive effect against the lands.

"As regards the first point, the ground of judgment was that an heir of entail could not, by a private and voluntary agreement to commute thirlage, impose a burden on succeeding heirs of entail. In the present case Alexander Innes, who was fee-simple proprietor of Pitmedden, had the power, if he adopted the proper method, of imposing the payments as burdens on his successors in the lands. The question here is therefore different from that raised in *Lord Sempill's* case, and depends for its solution on the terms of the contract, not on any question as to the power of the contracting party.

"The second branch of Lord Kinnear's opinion in *Lord Sempill's* case, which negatived the right to insist upon a continuance of the payments which had been made for the prescriptive period, was based on the view that the payments which were said to constitute the prescriptive right were made in consequence of a contract which was not binding on the then owner of the estate; and that it was therefore impossible to presume, in contradiction of that agreement, that they were made in virtue of an antecedent right which would be valid against him and all other owners of the land.

"If, however, in the present case, the contract of 1806 was entered into by a party who was not an heir of entail, but a fee-simple proprietor—if it was intended not to change the substance of the obligation but only the mode of performance—then the sums made payable may be regarded substantially as of the nature of dry multures. This was the view taken by Lord Kincairney of the decree-arbitral in *Forbes' Trustees* v. *Davidson*, 19 R. 1022. Lord Rutherfurd Clark's view also was that the decree made a change in the debt only, by fixing a round sum instead of one of varying amount, but that the creditor remained the owner of the mill for the time being, and the debtor the owner of the lands. The reason why the pursuer in that case failed was because there was an express obligation on the proprietors of the mill to maintain it. The mill had been demolished, and it was therefore held the claim was not enforceable, as the pursuers were unable to fulfil their part of the contract. This being the basis of the judgment, it does not appear to me to conflict with the opinions above referred to, though the result was different from that reached by the Lord Ordinary (Lord Kincairney).

"The opinion of Lord Trayner in *Forbes'*

case was referred to by the defender, who founded on the passage in which it is stated that if the annual payments fixed by the arbiter were to be in extinction and discharge of the servitude, then the right and obligation must be held personal. In the present case, however, the servitude of thirlage is not extinguished by the contract of 1806; it is expressly declared that it shall in no ways be lessened or restricted. The contract of 1806 does not create a new right; it fixes the extent of an existing right, which undoubtedly affected the lands; and it was recorded in the Register of Sasines.

"In the *United Breweries*' case the Magistrates of Edinburgh, who owned certain mills, and the brewers had in 1711 made an agreement by which the latter recognised the town's right of thirlage, and bound themselves to make certain payments as in place of the thirlage and multurage of the town mills. This agreement was acted on until 1861 when, by a new agreement, which proceeded on the narrative of the thirlage, the agreement of 1711, and subsequent usage, an alteration was made in the amount of the payments. It was held in an action raised in 1901, against the owners of a brewery held on a singular title, for payment of arrears from 1892 to 1901, that by the agreement of 1711 and usage proceeding thereon, dry multures, as regulated by that agreement and as modified by the agreement of 1861, had become the law and custom of the thirl, binding on singular successors in the breweries within the thirl. The judgment of the Lord Ordinary (Lord Kincairney), which was affirmed, proceeded on the view that the agreement of 1861 was not a mere personal contract, but a deed which expressed the measure of the thirlage. The view expressed by Lord Trayner was that the agreement of 1711 being one between the holders of the right of thirlage on the one hand, and all the suckeners on the other, made dry multures the law and custom of the thirl; that if payment of dry multures was the recognised law and custom of the thirl for more than the prescriptive period, it imposed the payment of dry multures as a servitude, or quasi-servitude, on the lands within the thirl (which needed neither sasine or publication in the records to make it effectual), and which affected the holders of such lands though singular successors. The chief points adverted to, in the opinion of Lord Moncrieff, were that the agreement of 1711 was intended to be permanent, and that the rates fixed were in substance dry multure.

"It appears to me that what the Court held in the *United Breweries*' case that the whole suckeners within the thirl could do, could equally well be done by the owner of Pitmedden, so as to bind singular successors in that estate. Upon a construction of the contract of 1806 I regard it as a deed which expressed the measure of the servitude of thirlage, and not merely a personal contract. It has been acted on for a hundred years.

"I accordingly regard the *United Breweries*' case as an authority for the pursuers.

"The payments being of the nature of dry multures, the fact which is admitted that the Mill of Dyce does not now exist as a mill, is not a defence to the claim—*Porteous* v. *Haig*, 3 F. 347. It is, moreover, made matter of express contract that the proprietor of the Mill of Dyce shall not be obliged to afford the use of his mill except by agreement.

"Upon the whole matter I am of opinion that the pursuers are entitled to decree in terms of the conclusions of the summons and with expenses."

The defender reclaimed, and argued—The contract of 1806 on which the pursuers founded was a personal one and not binding on the defender, who was a singular successor. In order to be a permanent contract there must be an extinction of the servitude. There had been no such extinction but merely a change in the method of performance. Such a contract could not found a valid prescriptive title—*Lord Sempill* v. *Leith Hay*, June 2, 1903, 5 F. 868, at p. 874, 40 S.L.R. 658; *Porteous* v. *Haig*, January 15, 1901, 3 F. 347, at p. 354, 38 S.L.R. 258. Moreover, the millowner was not now in a position to grind, and consequently could not enforce an agreement which was mutual in its obligations—*Forbes' Trustees* v. *Davidson*, July 14, 1892, 19 R. 1022, 29 S.L.R. 887. There could be no claim for dry multures without an extinction of the servitude of thirlage, and that being so the case of the *Magistrates of Edinburgh* v. *Edinburgh United Breweries, Limited*, June 9, 1903, 5 F. 1048, 40 S.L.R. 666, relied on by the pursuers, was inapplicable.

Argued for respondents—The Lord Ordinary was right. The contract of 1806 was a permanent one intended to run with the lands, and was therefore binding on the defender. This was a claim for dry multures, and forty years' payment following on such an agreement as existed here was sufficient to constitute a valid right to payment—*Magistrates, &c. of Cupar* v. *Leeds and Others*, June 19, 1777, M. *voce* Thirlage, Appendix 1; *Magistrates of Edinburgh* v. *Edinburgh United Breweries, Limited* (*cit. supra*). The fact that the millowner was no longer in a position to grind was immaterial, for the contract provided that the proprietor of the Mill of Dyce should not be obliged to provide a mill.

LORD PRESIDENT—This is a case in which the proprietor of the lands, including the Mill, of Dyce sues the proprietrix of the lands of Pitmedden for certain payments of the nature of dry multures. That is resisted. The state of affairs under which the case arises is this. There is no controversy between the parties that in ancient times the lands of Pitmedden were duly astricted — and have been from time immemorial—to the Mill of Dyce; but in the year 1806 the then proprietors of the two lands, considering the terms of the then recent Act of Parliament of 1799,

which provided for a method of extinguishing thirlage and making instead thereof a commuted payment, entered into a contract in which they recited their desire to be done with the thirlage, recited the fact of the Act of Parliament, next said that they had come to agreement upon the points which under the procedure of the Act of Parliament it would have been necessary to submit to a jury, and accordingly had made the contract following. Then the contract goes on to say that the proprietor of Pitmedden binds himself and his successors in the lands of Pitmedden to pay to the proprietor of Mill of Dyce and his successors "multures, dues, and sequels thereof" to an extent therein enumerated, which are declared to be converted into money, and which would be dry multures. The contract then goes on to the effect that the proprietor of the Mill of Dyce is not to have any right competent to him in any way lessened except that he must accept of money instead of the prestations of thirlage; and then, on the other hand, it is provided that the proprietor of Pitmedden shall be for ever relieved from any payments or servitudes to the Mill of Dyce presently affecting the lands of Pitmedden; and both parties declare that from and after the 26th May 1807 the proprietor of the Mill of Dyce shall not be obliged to afford the use of his mill or to give work and service thereat to the proprietor or occupiers of the lands of Pitmedden unless by consent. And then there is a declaration that in case the proprietor of Pitmedden shall fail in the performance of his part of the contract, then the right of thirlage shall remain with the proprietor of the mill.

Now the argument of the defender is this. He says—True it is that there was this contract, and that the contract was binding upon the original contractor Alexander Innes, but I am a singular successor of Alexander Innes; I am therefore not bound by any contract of his. And when we look at this contract, from the terms of it it is apparent that the right of servitude as such is never properly extinguished. It may be that the method of payment is fixed by contract and by usage following thereon—for all parties admit that there has been a usage of payment for forty years following on this contract—it may be that the method of payment has been altered, but none the less that is merely a method of performing the servitude, and inasmuch as the servitude is not extinguished I am entitled to say, Where is your mill? And inasmuch as it is admitted that there is now no mill, then I cannot be asked to make the payment.

I think I have there fairly put the argument of the defender. I say, first, that I am perfectly content with the way in which the Lord Ordinary has put his judgment, and so far as his note is concerned I really have nothing to add. But I can put, I think, my own view of the case in another and almost shorter manner. There is no question that there was here a good contract between the parties now dead. Was that a personal contract, or was it a contract running with the lands? Of course we know that there are only certain classes of contract that can be made to run with the lands, and I need not go through the very strict rules which it is necessary to follow in order that contracts may run with the lands. But I think it is quite clear that a contract for the exaction of dry multures, instead of the exaction of proper multures, can be made to run with the lands, because if it could not, then there could be no proper obligation for dry multures at all. There is no question that dry multures can be constituted by a prescriptive use of payment. The whole meaning of constituting by a prescriptive use of payment is that the effect is to make good the obligation, although that obligation is not in the sasine of either party. If that is so, then it must be in the same category as ordinary servitudes are, which we all know can run with the lands even although there is no mention in the sasine. I therefore come to the conclusion that there can be no doubt that this contract was made to run with the lands, and does run with the lands. Well, then, I do not really care whether, strictly speaking, the old contract of thirlage is really displaced by this new agreement for payments of the nature of a dry multure, or is merely in abeyance and still exists, because in either case the same result seems to me to follow. Why is it that in an ordinary case the proprietor of the mill cannot recover his multures without proffering the mill? It is, of course, that each person must perform his own part of what is a mutual arrangement and contract; and consequently if the proprietor of the mill is not in a position to offer a mill, he cannot ask the other person to pay his proper multures, which depend upon the corn ground. But here each person is in a position to perform his part, because once you have the fact that the contract runs with the lands, then the contract not only settles that the payment, instead of being a payment of proper multures, is to be a payment of dry multures, but it also settles in terms that the proprietor of the mill is not to be obliged to afford the use of his mill to the other party. Standing on that, therefore, if the contract runs with the lands, he was perfectly entitled to allow his mill to go into disrepair if he chose. Accordingly I think it is a simple case of a standing contract where the one person asks for the performance of his part by the other, and is not in a position to be put into bad faith by that other asking him to do anything on his part which he has a right to ask him to do. On the whole matter, therefore, I am of opinion that the Lord Ordinary's judgment is right, and that we should adhere.

LORD KINNEAR—I am entirely of the same opinion, and have nothing to add to what your Lordship has said and to what is said by the Lord Ordinary.

LORD JOHNSTON—I agree.

LORD M'LAREN was absent.

The Court adhered.

Counsel for Pursuers (Respondents)—Constable, K.C. — Mackenzie Stuart. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defender (Reclaimer)—Hunter, K.C.—D. Anderson. Agents—Skene, Edwards, & Garson, W.S.

Tuesday, October 26.

FIRST DIVISION.

CHERRY AND ANOTHER *v.* PATRICK.

Trust—Trustee—Removal—Nobile Officium—Action by Trustee against Trust Estate—Refusal to Resign.

A trustee raised an action against his co-trustees and himself in which he sought payment of a certain sum out of the trust estate. The claim involved a charge of personal dishonesty against the truster. The trustee having refused to resign, the Court on the petition of two out of the other three co-trustees *removed* the trustee from his office.

Mrs Alice Adamson or Cherry, widow of James Cherry, and the Reverend Alexander Copland, two of the four testamentary trustees of the said James Cherry, presented a petition to the Court for the removal from office of Hugh Patrick another trustee. The fourth trustee was a Mr Robert Paton. The truster had been interested to the extent of one-third in a public-house business at 362 Main Street, Bridgeton, Glasgow, the remaining two-thirds interest belonging to Mr Patrick.

The petitioners, *inter alia*, averred—"For some time after the trust came into existence matters proceeded smoothly, but latterly there has been much friction among the trustees, and the affairs of the trust have now been brought to a standstill. In January 1909 Mr Patrick made a claim against the trustees in connection with the late Mr Cherry's management of the business at 362 Main Street, Bridgeton, Glasgow. This claim, which was originally for £500, was put later at £306, 3s. 9d., and in an action at present pending in the Court of Session by Mr Patrick against the trustees it is stated at £283, 18s. 6d. A print of the record in this action, showing the nature of the claim, is herewith produced and referred to. [*From this it appeared that the claim involved a charge of dishonesty against Mr Cherry.*] No details of the claim have ever been submitted to the trustees. The petitioners consider that Mr Patrick ought not to take part in the consideration of this claim, both because it is a claim made by himself against the trust estate, and also because it involves a charge by him of personal dishonesty against the late Mr Cherry. They have, accordingly, asked him to resign office as a trustee before consideration of the claim is taken up. He declines to do so, however, and in this attitude he is supported by Mr Paton, so that there is a deadlock in the administration of the trust."

Answers were lodged for the respondent in which he stated, *inter alia*—"The respondent has always been willing and anxious to perform his duty as a trustee under the said trust-disposition and settlement, and there is no ground for the demand made by the petitioners that he should resign or for his removal. There is no antagonism between his interest as a trustee and as an individual, and the respondent is quite able and willing to perform his duties as trustee without any prejudice being suffered by the said trust estate."

Argued for the petitioners—The position of the respondent suing the trust made it impossible for him to remain as trustee.

Argued for the respondent—No deadlock had occurred and no charge of dishonesty or fraud was made against the respondent. In these circumstances there was no good ground and no precedent for removing him from office.

LORD PRESIDENT—This is a petition at the instance of two of the trustees of a deceased publican, and prays for the removal of another trustee. The deceased publican died and left behind him practically nothing except certain interests in public-house businesses. He left four trustees—his wife and a clergyman, the petitioners; one trustee who is an insurance agent; and the respondent, who is a wine and spirit merchant. This wine and spirit merchant was associated with the deceased truster in some of his businesses, but not in all. Now the only relevant averment made by the petitioners is this, that the respondent has raised an action against the body of trustees, of whom he is one, in which he seeks payment of a sum of between £200 and £300, upon the allegation that this sum is due by the trust estate in respect of what really—I need not mince my words—in respect of what really comes to a charge of falsehood and fraud on the part of the deceased truster. This action the petitioners naturally feel a wish to resist; and I confess that the moment the facts are stated it seems to me perfectly impossible for a person to occupy at one and the same moment the position of being the pursuer against the trust estate upon the ground that the truster had cheated him, and at the same time be one of the body of trustees whose business it is to defend the action. Of course this is a supervening disability, because no such action was mooted at the time of the truster's death, and I am not giving any opinion on the merits of this matter, of which I know nothing. I am willing to assume that the respondent thinks it his duty to himself to raise this action. So be it. Mr Sandeman has said that there is no precedent for such a petition, but I do not think that any precedent is needed, but only a little common sense. As there is nothing said against the gentleman except that he is in this impossible position, we