nature of a stell-fishing was. It is enough that it was a legal mode of fishing for salmon, till struck at by the prohibition in the statute 20 and 21 Vict., c. 148, § 2. It had been immemorially practised, in different ways, in different parts of the country, generally by rowing out into the stream, as in the case of net and coble, but with this important difference,—that the farther end of the net was either fastened by an anchor in the river, or held by a man in a boat, till the fish were seen or felt to strike the net, which was then immediately carried round them, and drawn to the shore. Its deadly character accounts for its abolition; and I mention its nature for explanation merely.

The case of the *Mags. of Aberdeen* v. *Menzies of Pitfoddel*, 22d November 1748 (M. 12,787), is in no way inconsistent with the case of the *Town of Nairn*. For the ground upon which Menzies was held not entitled to restore the channel of the stream, so as to recover his fishing, was that, although he might have done this *de recenti*, he could not do it after having acquiesced in the change for upwards of twenty years.

My opinion, upon the whole, is that the defender Mr Macbraire was entitled to keep the *solum* of his fishery, or, what comes practically to the same thing, the main flow of the water, in the normal condition in which the same had existed from time immemorial before the accidental and unusual floods in question; and that, as he and his tenants did nothing more than restore the *solum* and flow of the water to that normal condition, they have been rightly assoilzied from the conclusions of this action.

The Court pronounced the following interlocutor:—

"Adhere to the interlocutor, and repel the reclaiming note: Find the pursuers liable in additional expenses, and remit to the Auditor to tax the account or accounts of paid expenses, and to report."

Counsel for Pursuer—Watson, and R. Johnstone. Agents—Hope & Mackay, W.S.

Counsel for Defender, Macbraire — Solicitor-General (Clark), and Macdonald. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders, Berwick Shipping Co.—Trayner. Agent—E. Wallace, W.S.

Friday, March 14.

FIRST DIVISION.

[Sheriff of Dumfriesshire.

STOBBS *v.* CAVEN.

Thirlage — Servitude — Sheriff-Court Act, 1 *and* 2 *Vict. cap.* 119 *sec.* 15—*Jurisdiction—Heritable Right—Relevancy—Decreet Arbitral—Usage.*

The tenant of a mill brought an action in the Sheriff-Court against the owner of lands which were thirled to the mill, concluding for payment of the value of abstracted multures, and the Sheriff on appeal dismissed the action as incompetent, on the ground that it raised a question of heritable right. *Held* (1) that the action was competent in the Sheriff-Court, under the Act 1 and 2 Vict. cap. 119, sec. 15; (2) that a decreet arbitral pronounced in 1787 was good evidence of usage to the effect of proving the wider astriction.

This was an appeal by James Stobbs, tacksman of the mill of Snaid, against a judgment of the Sheriff of Dumfries (Napier), in an action raised by Stobbs against Thomas Caven, proprietor of the lands of Birkshaw, in which he concluded for payment of a sum of £25, being the value of multures said to have been abstracted by the defender. The latter denied his liability, on the ground that his lands were only astricted so far as his grindable corns were concerned, and not the whole growing corns. There was also raised against him a supplementary action, to which he made the preliminary defence that the action was incompetent in the Sheriff-Court in respect that it involved a question of heritable right.

These actions were conjoined, and the Sheriff-Substitute (Hope) pronounced the following interlocutor:—

"*Dumfries, 12th July* 1872.—Having considered the proofs for both parties, and whole process, in the conjoined actions, and debate thereon: Sustains the objection taken by the defender in the course of the examination of James Johnston, a witness for the pursuer, and holds the answer to the question objected to as deleted from the proof: Finds, as matter of fact—1. That the pursuer is tenant under the 'Society in Scotland for propagating Christian Knowledge' of *inter alia*, 'All and whole the Mill of Snaid, and kiln belonging thereto, with the mill lands, multures, knaveship, and sequels, house, offices, and cottages of the same,' situated in the parish of Glencairn, for the term of 19 years from Whitsunday 1866, conform to tack, No. 3-1 of process: 2. That the said Society is heritable proprietor of the said mill, mill lands, multures, &c., by virtue of disposition in its favour by Robert Riddell, Esq. of Glenriddle, dated and registered 16th May 1792, with infeftment and Crown charter of confirmation following thereupon: 3. That the defender is heritable proprietor (1) of the lands of Birkshaw, Crossfield, and Cairnbank; (2) of the lands called Moatland, both of said properties being parts of 'the two merk land of Birkshaw, of old extent, and teinds thereof lying in the barony of Snaid, parish of Glencairn, and shire of Dumfries,' conform to titles produced in process: 4. That the said lands of Birkshaw, Crossfield, and Cairnbank, are held from the superior, *inter alia*, on the condition of the vassal, his heirs, and assignees, and their tenants, 'grinding their whole grindable corns growing on the said lands (excepting teind and seed corn) at the mill of Snaid, and paying multures and other services, conform to use and wont:' 5. That the said lands of Moatland are held on a similar tenure, except that the exemption from paying multures is as regards 'teind and horse corn:' 6. That the said mill of Snaid is a barony mill: 7. That in the year 1784, in consequence of 'questions and differences' having arisen relative to the astriction of the above mentioned and of other lands to the said mill, a submission was entered into between Walter Riddell, Esq. of Glenriddle, and Robert Riddell, his son, the proprietors, and William Brown, the tenant of said mill, on the one part, and sundry persons, including the defender's author, and the then superior of the lands in question, Sir Robert Laurie, on the other part, whereby the said questions, along with a process of abstracted multures before the Sheriff of Dumfries, and a process of declarator of

thirlage and payment before the Court of Session, were referred to Alexander Wight, Esq., advocate, as sole arbiter: 8. That the said Alexander Wight, after sundry procedure, issued a decreet arbitral, dated 22d June 1787, whereby *inter alia* he found that 'the lands of Birkshaw are astricted and thirled to the mill of Snaid for their whole growing corns, seed and horse corn excepted,' and decerned and ordained 'the heritors or possessors of the said lands to frequent the said mill with their whole growing victual to be grinded thereat, seed and horse corn excepted, and to pay therefor the multures and services following, viz.:— . . . . the lands of Birkshaw, in the twenty-fifth grain of multure, and that over and above the thirty-second grain of the whole corns growing on these lands, of knaveship and sequels,' and also decerned and ordained 'the foresaid rates of multure to be chargeable on the respective lands above mentioned, and to be the rule of settling betwixt the miller of the mill of Snaid and the heritors, tenants, and possessors of the foresaid lands, in all time coming;' 9. That the said submission contains a clause of registration for preservation and execution, and that in virtue thereof said submission and decreet arbitral were recorded at Edinburgh, in the books of Council and Session, on the 22d day of June 1787, conform to extract therefrom, contained in No. 3-2 of process: 10. That from time immemorial, or at least since the date of the said decreet arbitral, the defender and his predecessors in the lands libelled have been in use to frequent the mill of Snaid with their whole growing corns, except as after mentioned, and to pay multures, knaveship, and sequels to the tenants of said mill, either in kind, at the rates specified in said decreet arbitral, or by a commuted money payment: 11. That the said mill is in good order, and sufficient for grinding all corns except wheat, and has been so since the pursuer became tenant thereof, except during the latter part of the year 1866 and the beginning of 1867, when the buildings and machinery were undergoing repairs and improvements: 12. That during the last-mentioned period the defender sent 116 bushels of oats to be ground at Milton Mill, Dunscore, in consequence of the pursuer being unable to grind the same: 13. That since the pursuer became tenant of Snaid mill the defender has paid multures and knaveship at the rates foresaid, by allowing them to be deducted in kind from the grain which he sent to be ground there; 14. That he has not during that period sent thither the whole grain grown on the lands libelled, after deducting seed and horse corn; that, in particular, and in the manner set forth in the subjoined note, he failed to send to the mill 135 bushels of oats of crop 1866, 70 bushels of barley and 160 bushels of oats of crop 1867, 9 bushels of barley and 219 bushels of oats of crop 1868, 10 bushels of barley and 16 bushels of oats of crop 1869, and 328 bushels of oats of crop 1870: 15. That the value in money of the 1-25th and 1-32d of said quantities of barley and oats, according to fiars prices of the respective years mentioned, would have been for crop 1866, £1, 10s. 5¾d.; for crop 1867, £3, 2s. 10¾d.; for crop 1868, £2, 15s. 6¾d.; for crop 1869, 6s. 0½d.; and for crop 1870, £3, 5s. 2¾d.; amounting in all to the sum of £11, 0s. 2½d.: Finds in law. 1. That the preliminary plea in the defence to the supplementary action was not competently stated, in respect that no such plea was stated in the defence to the original action; but, 2. That at all events said plea is untenable, in respect that the alleged question of heritable right, which was only raised by the defender himself, is *res judicata*, as set forth in the subsequent findings; 3. That the decreet arbitral founded on by the pursuer having been pronounced in a submission, the contract of which contained a clause of registration, and having been recorded in the books of Council and Session, has the same effect as a decree of the Court of Session; 4. That both the defender's author and the superior for the time being of the defender's said lands having been parties to the contract of submission, said decreet arbitral is conclusive against the defender as to the question of the extent of the thirlage of his lands embraced in the conjoined summonses; 5. That the terms of the defender's charters cannot over-ride those of said decreet arbitral, in respect that said charters were granted by a superior whose lands were thirled to the mill in question, and who was himself a party to the submission, or by his heir, and that subsequently to the date of said decreet arbitral; that, in any event, the terms of said charters are not such as to warrant the defender's contention that he is only bound to frequent the mill with his whole 'grindable' corns; therefore repels the defences, and decerns against the defender for the sum of eleven pounds and twopence halfpenny, being the converted value of the multures, sequels, and knaveship of the grain abstracted by him as aforesaid, with interest as libelled: Finds the defender liable in expenses; allows an account thereof to be given in, and remits the same, when lodged, to the auditor to tax and report. Nine words and '£1, 16s. 7½d.,' and '£9, 10s. 7½d.' deleted before signing.

"*Note.*—The points argued at the debate in this case were much more numerous and important than would appear to arise from a perusal of the record, and after long and anxious consideration the Sheriff-Substitute is of opinion that the pursuer is entitled to a judgment in his favour. The action is founded on a decreet-arbitral by which the nature and extent of the thirlage of defender's lands to the mill of Snaid was determined in the year 1787. This decreet is quite explicit in its terms, and it is not disputed that the proprietor and superior of the lands in question for the time being were parties to the submission. Mr Collow, the proprietor, disponed the lands of Birkshaw in 1791, and the disponee sold them the same year to Dr Bryce Johnston, to whom the superior, Sir Robert Laurie, granted a charter of confirmation, in which the nature of the thirlage was expressed in terms said to be at variance with those of the decreet arbitral. Dr Bryce Johnston disponed the lands to trustees, with power to sell, by disposition recorded in 1805, and the trustees disposed of them in lots shortly afterwards. The defender has become proprietor of several of the lots, partly by purchase and partly by succession to his father and an uncle who had received portions of the lands from their father, one of the purchasers from Johnston's trustees.

"The defender contends that the decreet arbitral is not binding on him, because he is only a singular successor to the proprietor who entered into the submission, and because his titles show that his lands are only astricted as regard his 'grindable grain,' which, he says, means 'what he has occasion to grind for his own use.'

"In support of the first of these contentions, the defender relies on a passage in Erskine (B. ii. t. 9,

§ 21). In treating of the different modes of constituting thirlage, the writer says:—'Every landholder can astrict his own lands by any proper obligation, even in a writing apart, with the consent of such of his tenants as have subsisting leases. And though such personal deeds cannot hurt singular successors in the lands without the possession of the dominant tenement acquired previously to the right of the singular successor, yet the most slender acts of possession have been adjudged sufficient for that purpose.'

"It occurs to the Sheriff-Substitute to observe upon this passage. *First*—That the entering into a submission to settle 'questions and differences relative to the astriction of the above-mentioned lands to the mill of Snaid' is not the same as 'establishing thirlage directly,' which is what Erskine speaks of. The lands were astricted before. The Sheriff-Substitute thinks that this is apparent, and it is a pity, if there be any doubt on the subject, that the charter of Mr Collow had not been recovered and produced in process, or produced if the defender has it. The 'questions and differences' must have been, like the present, as to the extent of thirlage, and also as to the rate of multures, &c., and there is nothing to show that by the decreet the lands of Birkshaw were thirled for the first time. Indeed that would have been impossible, for thirlage is not constituted in that way, although it may be declared, if disputed. *Second*—Even if this were one of the 'personal deeds' referred to, it appears to the Sheriff-Substitute that there had been possession before the lands passed to a singular successor. The minute book, No. 3/2 of process, shows that two years after the date of the decreet the tenants of the astricted lands (including Birkshaw) were summoned before the Barony Court to answer to any complaints at the instance of the miller. The latter complained of the non-performance of certain services, and the non-delivery of certain furnishings for the maintenance of the mill, mill-dam dyke, and watergate, due under the decreet arbitral, and obtained decree against them. This shows that the decreet arbitral was being enforced, as was natural, and the fact that no complaint was made of the non-payment of multures, &c., gives warrant for an inference, which (especially at this distance of time) is as good as proof, that the decreet was being implemented in other respects; and this becomes more certain if it be seen that after the sale of the lands the payment of similar multures was continued. *Third*—This objection might have been good in the mouth of the first singular successor (provided always that there had been no possession), but it seems to the Sheriff-Substitute not to be available to the defender, if his predecessors, especially those to whom he succeeded, recognised the decreet by payment.

"If, then, the decreet arbitral cannot be set aside by this personal objection, what is its effect? The Sheriff-Substitute has expressed in his interlocutor what seems to him the law on the subject. He thinks that the matter in dispute became *res judicata* by the decreet arbitral, which was expressly intended to come in place of decisions of the several courts before whom the actions which were referred to were depending. It is not, therefore, necessary to consider the question of usage as bearing upon the nature of the thirlage to which the pursuer and his landlords have right by their titles. That thirlage is expressed in indefinite terms, and in such case the law is that 'usage must determine the nature and degree of the servitude.'

"If it had been necessary, the Sheriff-Substitute would have felt constrained to decide in favour of the pursuer on this ground also, as it appears to him that the evidence, when carefully weighed, preponderates in his favour. He only notices the question of usage at all because the summons proceeds partly on an averment of it, and it seemed to him that it might be necessary, as a matter of form, to affirm that averment if the evidence permitted it. He is not sure that it was necessary to insert this in the summons. It is to some extent inconsistent with the nature of the action, but of course the averment that 'the defender has been in the constant and immemorial use . . to frequent the said mill with his whole growing victual to be grinded thereat, seed and horse corn excepted,' does not apply to the recent period during which the abstractions are said to have taken place.

"The practice so largely prevailing, of commuting the multures into an annual money payment, has rendered direct evidence of what the tenants were paying multures on less available; but it seems to the Sheriff-Substitute that the system of compounding directly points to the fact of the lands of the compounders being thirled in *omnia grana crescentia*. The system is adopted for the purpose of saving a great deal of trouble to both parties—trouble caused to the farmer by having to keep a note of his produce, and of the different ways in which it is used or disposed of; and caused to the miller by having to keep a check upon the farmer. There is little trouble, and no chance of deception, when the multures are kept off in kind at the mill, if only the 'grindable grain' be astricted, and therefore the system of compounding has only a *raison d'etre* in the case of the heavier thirlage.

"It may be proper to make some observations on the terms of the defender's titles. If the decreet arbitral be binding, or if usage has confirmed the miller's—or his londlord's—title to the heaviest thirlage, the Sheriff-Substitute cannot see how deeds granted by the superior of the thirled lands (who was one of the parties to the submission) after the date of the decreet, and of course without the knowledge of the dominant proprietor, can alter the right of the latter. If the superior of the defender's lands could alter the extent of the thirlage in this way, what was there to prevent him from doing away with it altogether by granting charters without any mention of it?

"But the terms of the charters are not so clear as the defender thinks. The expressions 'teind and seed corn,' and 'teind and horse corn,' have no application at all, if only the grindable corns be astricted, *i.e.*, if the expression 'grindable corns' is to have the interpretation for which the defender contends, and which usage appears to have given to it, viz., 'such of the corns as the tenants have occasion to grind, whether for the support of their families or their other uses within the thirl.'

"As Erskine observes, 'all the grindable corns growing on the lands,' in the proper sense of the words, is precisely of the same import with the phrase 'all growing corns,' for all corn is grindable. It is only by usage that the sense has been restricted. But the phrase in defender's charters contains other words, which are inconsistent with this restricted meaning. The seed and horse corn are

not excepted from what the farmer requires to grind, but are taken from what he does not require to grind, therefore the exception has no meaning except in the case of thirlage of 'all growing corns.' This was argued in the case of *Kyd* v. *Milne*, &c., where a pursuer was successful in having the term 'grindable corns,' with a similar exception to the present, held to mean thirlage of all growing grain, the usage being in favour of the latter. Other cases to the like effect might be cited.

"It is probable that at the time when the clause in question was originally inserted in the charters of Birkshaw it was meant to have the more extended signification. It is also very probable that its meaning and effect were part of what the arbiter considered under the submission, and that the old form was continued, notwithstanding the decreet, in subsequent transmissions of the property as matter of style. There might be a difficulty in the matter of conveyancing in changing the terms of holding, but as long as the decreet was recognised the want of change would not signify.

"From the defender's point of view of his titles, these exceptions must be held to be of no moment whatever, and it will not do to hold them *pro non scriptis* because they happen to favour the pursuer's case.

"In itself the point just discussed trenches somewhat upon an heritable question, but in the present case, especially in reference to the effect of the decreet arbitral as constituting a *res judicata*, the Sheriff-Substitute did not see how he could avoid dealing with it.

"If then, the defender's lands are astricted as to all growing corns, the next question is—Has there been abstraction of multures?

"It is quite evident that there has. Indeed, the fact of the defender maintaining that his thirlage is only the lighter points to that, for it is not likely that he would have fought the question if *de facto* he had all along been sending his whole corn, except seed and horse corn, to the pursuer's mill.

"It is much more difficult to discover what has been the amount of the abstractions. That must always be a difficult matter. Erskine says, 'The quantity of abstractions is commonly referred to the oaths of the abstractors, because by the nature of the offence no other full evidence can be had of the different abstractions, and of the extent of them.' (2, 9, 32.)

"In considering the evidence, the Sheriff-Substitute has found little that can be relied on beyond the defender's own admissions.

"He has been favoured by states made up by both parties, showing the results which they respectively deduce from the evidence, but he has been unable to concur with either view.

"The mode adopted by both parties has been to try and fix the yield of the lands for each year, and then account for its disposal in various ways, but this has proved very unsatisfactory. The pursuer brought two witnesses, who did not see the crops, and could only make an estimate for three years back, and that upon very general data.

"Both of them admitted that they did not make any allowance for dry seasons, of which there were several during the period in question, and one of them said, 'I do not think that any one could estimate the yield in such seasons except the person in possession.'

"The pursuer, then, has not proved the yield even for the three years. The defender, instead of knowing from farm books or otherwise what the yield of his crops really was, has only made estimate, and that is manifestly an insufficient one, if his consumption was as he states it, for he has shewn more to be consumed than was produced.

"Finding it impossible to fix the yield, the Sheriff-Substitute has endeavoured to find direct evidence of abstraction, but here he has been obliged to rely very much upon estimates formed from the admissions of the defender. He has endeavoured to ascertain (1) what the defender must have consumed over and above seed and horse corn; (2) what he sent to other mills to be ground, and (3) what he sold in excess of what he bought for change of seed.

"On the first point the defender's evidence was not very precise, and the Sheriff-Substitute thinks that the result arrived at cannot be said to be unfavourable to him in the circumstances.

"Defender admittedly kept more horses than were required for working his farm. At the time of his examination he had nine. He rears horses, having had a foal born in each of the years in question, and he keeps a 'pony.' It is not too much to assume that, besides the four horses which he needed to work his farms, he kept one foal and one 1 or 2 year-old in each year, besides the pony. The Sheriff-Substitute does not think that the feeding of these falls under the term 'horse corn.' A farmer may buy his horses when he needs new ones, instead of breeding them; and if the defender bred any for selling he could have no claim to feed them in this way. Again, the pony, however useful, is not employed in working the farm. Many a farmer contents himself with driving one of his work horses, and if the defender is able to drive more luxuriously, the miller should not, in effect, be made to contribute towards the expense.

"By the defender's admission, the pony gets about 78 bushels of oats in the year, and the foals about 26 each. The sheep admittedly get some corn, and that has been taken at 10 bushels a year, as estimated by defender's brother. The cattle and pigs get some too, and the same quantity for them cannot be called a high allowance. The surplus of sales over purchases, and the amount ground at other mills, are taken as directly proved.

"The Sheriff-Substitute has calculated the value of 1-25th and 1-32d of each year's abstractions in money at the fiars prices for each crop, as shown in the annexed table. The amount brought out is not large, but the action is important, as fixing a principle for the future, and as affecting other farmers.

"The defender argued that the knaveship is not due when the corn is not ground at the mill, but the law is otherwise, and justly so. Erskine, 2, 9, 32.

"The evidence does not bear out the statement that the pursuer's mill is so defective as to oblige the defender to frequent others with his barley. It appears to be in as good a state of efficiency as most country mills, and capable of grinding barley meal at least. The Sheriff-Substitute is not aware of any law by which he can hold the pursuer bound to make fine barley flour, any more than oat flour, if such a thing were desired."

The defender appealed to the Sheriff (NAPIER), who pronounced the following interlocutor—

"*Edinburgh, 7th December* 1872.—Having resumed consideration of this case, with answers for the pursuer to the reclaiming petition for the de-

fender, the proof *in causa*, and whole process, recalls the interlocutor appealed against, and sustains the preliminary plea for the defender as noted at the conclusion of pursuer's supplementary summons, viz., that the action is incompetent in the Sheriff-court, in respect that it involves a question of heritable right:' Therefore dismisses this action accordingly, and finds the pursuer liable in the expenses, of which allows an account to be given in, and remits the same when lodged to the auditor to tax and report.

"*Note*—The Sheriff-Substitute's first finding in law is to the effect, 'That the preliminary plea in the defence to the supplementary action was not competently stated, in respect that no such plea was stated in the defence to the original action.' The Sheriff cannot agree to this technical proposition. He thinks that the preliminary plea in question is of that nature that it may be stated or mooted at any stage of the proceedings; and if entirely omitted by the party entitled to plead it, it is eminently *pars judicis* to give effect to it if well founded. Moreover, the Sheriff observes that the Sheriff-Substitute, in his note to his interlocutor, of date 10th October 1871, allowing a proof before answer, states that the question was mooted at debate whether the matter in dispute between the parties was not a question of heritable right, and whether therefore the action was not incompetent in the Sheriff-court,' and he adds, in reference to that preliminary plea, that, 'after carefully considering the arguments and authorities on both sides, he thinks it advisable to have a proof before answer, as it seems to him that the case may not be entirely a question of heritable right. The cases quoted seem to show that the heritable questions which may possibly arise can be competently decided in the Sheriff-court, in an incidental way, but he gives no decision on that point.' The Sheriff, upon a reclaiming petition for the defender, affirmed the *hoc statu* view of the question (being, no doubt one of some nicety) which his Substitute had taken, reserving the preliminary plea, and so the case went to proof before answer.

"Having now the whole case before him, and after a careful consideration of the proofs, arguments, and authorities, the Sheriff has come to the conclusion that the whole process substantially involves a question of heritable right, and that to deny, as in this case, the extent of a right of thirlage, and to question what it really embraces and comprehends, is as truly a question of heritable right in its nature, as to deny the constitution of the thirlage *in toto*.

"Having come to this view, the Sheriff feels himself constrained to decline his own jurisdiction in the matter; and such being his judgment, he does not see how he can avoid finding the pursuer of the incompetent action liable in expenses."

The defender appealed.

Parties were first heard on the question of the competency of the action in the Sheriff-Court.

Argued for Stobbs — Thirlage is a servitude. Servitudes by the Sheriff-Court Act, 1 and 2 Vict. c. 119, § 15, are within the jurisdiction of the Sheriff, and the Sheriff was therefore wrong in dismissing the action on the ground of incompetence.

The extent of the thirlage is *res judicata* by Mr Wight's award, which had the effect of a decree of Court in an action of declarator. This is a petitory action, and the only conclusion in the summons is for payment of a sum of money; there is no declarator; there is only a statement of the grounds on which the conclusion is based. The foundation of the action is a right of servitude, and the Sheriff has jurisdiction to dispose of that without another action being brought and decided in the Court of Session declaratory of the right. Power was given to the Sheriff by the Act of 1838 to try *all* questions between parties regarding prædial servitudes; the only question here is as to the extent of the servitude, not as to its existence or constitution.

Argued for Caven—The Act of Parliament has reference rather to those servitudes which do not require a written title. Thirlage is not strictly a servitude properly so called; according to Bell it is more of the nature of a tax than a servitude. Admitting that the right exists to a certain extent, the question arises whether the right in its wider form has been constituted by the decreet arbitral and immemorial use. "Real" and "prædial" in the statute are synonymous, so that in fact the question comes to be whether thirlage is a prædial servitude. There is a further question, whether this action, though competent in the Sheriff-Court to the landlord, is so to the tenant.

At advising:—

Lord President—This is a case in which the Sheriff on appeal has dismissed the action as incompetent. Now it is necessary first of all to ascertain what is the question which the action raises.

The summons concludes for payment of £25 sterling, "more or less, as may be ascertained in the process to follow hereon to be the converted value of the multures, knaveship, and sequels corresponding to the quantities of grain severally abstracted by him from the said mill during the five years bye past," and the grounds of action, as shown in the awkward manner of Sheriff-court summonses, are that the defender has been in the constant use to send his whole growing corn to the pursuer's mill, or to pay certain multures, knaveship, and sequels, and this is further confirmed by a reference to a decreet-arbitral, dated 22d June 1787, pronounced by Mr Alexander Wight, advocate, on a submission entered into between the then proprietors of the mill of Snaid on the one part, and the defender's authors on the other. The ground of defence is that it was not the whole growing corns that were astricted to the mill, but only the grindable corns, and as the defender is willing to pay for them, he asks for absolvitor from the conclusions of the summons. It seems to me that the question raised here is not merely whether the defender owes the pursuer £25, but also if by the nature and terms of thirlage he is astricted as regards his whole growing corns, or only as regards the grindable corns, and that depends on the constitution of the right of thirlage. This the Sheriff has found to be a question of heritable right—perhaps it may be, but it is a question regarding a right of thirlage, and it is argued that the Sheriff's jurisdiction, as extended by the Act 1 and 2 Vict. c. 119, § 15, embraces such questions. The precise words of the section are important as applicable to the present case. It is enacted "that the jurisdiction, power, and authority of Sheriffs in Scotland shall be and the same are hereby extended to all actions or proceedings relative to questions of nuisance or damages arising from the alleged undue exercise of the right of property, and also to questions touching either the constitution or the exercise of real or prædial servitudes." It is not merely that the Sheriff is entitled to entertain

questions regarding prædial servitudes, but his jurisdiction is extended to all questions touching either their constitution or exercise. The only question is, whether this is an action or proceeding of the kind referred to in the Act. It is contended on the one hand that thirlage is not a prædial servitude at all, and if that argument be correct, the operation of the statute is of course excluded. As a matter of speculative theory, opinions of course may differ, whether thirlage ought to be classed among servitudes or contracts, but such speculations have no place here; all we have to consider is how it is classed by the law, and when we find the three great institutional writers all calling it a servitude, I think there cannot be much doubt that it was meant to be included in the statute. Then, again, it has been contended that although the Sheriff's jurisdiction is extended to actions touching the constitution or exercise of real or prædial servitudes, this does not entitle him to entertain declaratory actions. I see no necessity for his doing so, but when in an otherwise competent action an objection is made that it involves a question of heritable right, I think the section of the statute is a sufficient answer, though without the statute I should doubt if the Sheriff-Principal were not right. It is suggested, further, that the pursuer, as tacksman, has no right to try the question. That might have been a formidable objection if he had raised a declaratory action, which he is not doing. His action is a petitory one, concluding for the value of his abstracted multures, and because this question raises the further one of right, the pursuer is led to insist that his right is to all growing corns—and he is quite entitled to insist in that general question of right, because it is raised by the defender. I think the action is perfectly competent.

After hearing parties on the merits—

Lord President—The appellant's mill was a barony mill. When it came into existence, or when the thirl was constituted, we have no evidence. There is no dispute that the pursuer is tenant of the mill of Snaid. As to the title of the defender, however, we are left in a position of considerable embarrassment. For Birkshaw and Moatland were disposed of in lots shortly after 1805, and the defender has become possessor of several of these, partly by purchase and partly by succession. We have only the evidence of charters by progress. We have one in 1792, two in 1811, one in 1841, and one in 1854, but with these before us I think we must hold that in the titles of the servient tenement the servitude is described in these terms—"their tenants grinding their whole grindable corns growing on the said lands (excepting teind and seed corn, or teind and horse corn) at the mill of Snaid, and paying multures and other services, conform to use and wont."

This astriction may be regarded as meaning either that the thirl extended to the whole *grana crescentia*, or that it extended only to such portions as the cultivator of the soil for the time required or chose to grind. Legal authorities—for example, Hume—have said that the expression "grindable corn" is an equivocal and elastic term, and liable to be explained by possession. The pursuer says that it is "the whole growing victual" on the defender's lands which is astricted to the mill of Snaid, and the defender, on the other hand, says that it is "only the grindable corns that are so astricted." Now it may be observed that if "the whole growing corn" means only the corn actually ground at the mill, the exception of "teind and seed, or horse corn" would be very useless, for that could never be sent to the mill to be ground.

In tracing back the history of the thirl, we come upon one very remarkable piece of evidence—for it is as such I regard it—I mean the decreet-arbitral. It is not possible to read the decreet-arbitral, and the submission upon which it proceeds, without seeing that the question which arose for decision, and the question which was decided, was just the question raised now, viz., whether the thirl extended to the whole growing corn or was restricted to the corn actually ground. Mr Wight (the arbiter on that occasion) determined, in a very clear and absolute manner, that the definition of the thirl was "the whole growing corn." Therefore it is plain, as an inference from the decreet-arbitral, that at that time, and for many years previous, the tax was upon *omnia grana crescentia*, for it is impossible that a lawyer of the standing and ability of Mr Wight could have pronounced such a decreet had the facts not been made evident to him upon very substantial grounds. Further, it appears that from 1785 down to the date of the decreet-arbitral, tenants and possessors of lands subject to the thirl had all paid or settled on the footing of the larger astriction.

So that here is evidence of usage of a most distinct and precise kind. Then we find this usage immediately followed by a process in which decreet-arbitral receives effect—a decreet pronounced at a time when evidence was available, which we have not got now.

That affords a very strong commencement and foundation for the usage on which the pursuer's case depends. There is no very satisfactory evidence after that till we come to 1828, but then there is evidence which, while not so clear and strong as is desirable in the case of such a heavy burden as a thirl, is nevertheless sufficient, I think, to show that the usage was to pay dues on *omnia grana crescentia*. The evidence of the witnesses, especially Kennedy, if trustworthy, leave no doubt as to what was the usage; and this usage comes down to 1866. It appears to me, therefore, that the pursuer has sufficiently made out his case. I am not prepared, however, to adhere to the interlocutor of the Sheriff-Substitute, which is in some respects based on a wrong foundation.

Lord Deas—This is an action at the instance of the tenant of the mill. The mill was let on a lease of nineteen years, with a right to all the "multures, knaveships, and sequels," &c. and so there is no doubt that he is entitled to insist on payment of these dues from everybody. Accordingly, the pursuer raises this action. I greatly doubt if he was bound to produce any title except his tack, provided he proves possession of his right during the possessory period of seven years. If, however, it was necessary to produce any other title, the production of those before us was sufficient.

The only doubtful point is, whether the compositions of the thirlage dues were made on the footing of the one kind of thirl or the other. I think, upon the evidence, they were made on the footing of the wider astriction, and I agree with your Lordship that the pursuer is entitled to payment as claimed.

LORD ARDMILLAN — If there were no defence such as has been stated in this action, no dispute could have been raised. In this case the legal question is raised entirely by the defender's plea. He says "I don't dispute that my lands are thirled to your mill, but it is only to the extent of the corn actually ground at the mill." The pursuer, on the other hand, says that he is entitled to thirlage dues upon *omnia grana crescentia*.

Now I feel very strongly that the claim of the pursuer is one for which the law has no favour, and it cannot be given effect to without strong proof, and the milder form of thirl must be preferred unless there is very good ground for setting up the heavier. I admit the pursuer has strong ground on the decreet-arbitral, and a very good foundation; and, in the second place, I think a good aid to this is the fact that the titles of the other side are susceptible of a reading which by no means necessarily supports the defender's contention.

That being the case, mainly upon the composite view of the evidence which I have indicated, I think the miller has, on the whole, discharged himself of the heavy burden of proof which unquestionably lay upon him.

LORD JERVISWOODE concurred.

The Court pronounced the following interlocutor:—

"Recall the interlocutor of the Sheriff-Substitute of 12th July 1872: Find that the pursuer (appellant) is tenant of the Mill of Snaid under a tack for nineteen years from Whitsunday 1866: Find that the defender's (respondent's) lands are thirled to the said mill: Find that for a period past the memory of man the defender has payed multures to the tenant of the said mill upon all grain grown on the ground of the said lands, excepting seed and horse corn, at the rate of 1-25th grain of multure, besides 1-32d grain as knaveship, or has paid a sum of money annually as a commutation of the said rates on all grain grown on the said lands: Find that the defender has refused to pay any multures for the years 1866, 1867, 1868, 1869, and 1870; Find that the quantities of grain on which multures at the above rate are payable are, for the year 1866, 135 bushels of oats; for the year 1867, 70 bushels of barley and 160 bushels of oats; for the year 1868, 9 bushels of barley and 219 bushels of oats; for the year 1869, 10 bushels of barley and 16 bushels of oats; and for the year 1870, 328 bushels of oats: Find that the value in money of the 1-25th and 1-32d of said quantities of barley and oats, according to the fiars prices of the respective years mentioned, would have been, for crop 1866, £1, 10s. 5¾d.; for crop 1867, £3, 2s. 10¾d.; for crop 1868, £2, 15s. 6¾d.; for crop 1869, 6s. 0½d.; and for crop 1870, £3, 5s. 2¾d.; amounting in all to the sum of £11, 0s. 2½d. sterling: Therefore repel the defences, and decern against the defender for payment to the pursuer of the said sum of £11. 0s. 2½d. sterling, with interest as libelled: Find the defender liable in expenses, both in this Court and in the inferior Court; allow accounts thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Counsel for Appellant — Watson and Balfour. Agents—Tawse & Bonar, W.S.

Counsel for Respondent — Solicitor-General (Clark) and M'Kie. Agents — Scott, Bruce, & Glover, W.S.

Friday, March 14.

FIRST DIVISION.

[Lord Jerviswoode, Ordinary.

FRASER *v.* LORD LOVAT.

Entailed Estate—Relief — Executry—Vouching of Accounts.

Circumstances in which an executor was *held* entitled to relief against an entailed estate for various accounts paid by him as executor.

In this case there were conjoined actions of declarator and relief, whereby the pursuer, Mr Fraser of Abertarff, sought to have it declared that certain debts alleged to have been paid by him as representing his grandfather were to be charged as burdens on the entailed estate of Abertarff, to the relief of the executry. The claim arose under a clause in a deed of 1808, by which the estate was declared to be subject to the burden of payment "of all my just and lawful debts due and addebted, or which may be due or addebted, by me at my death." The questions now under consideration related to the proofs of the debts being (1) due at the death of the entailer in 1815; (2) paid by or on behalf of the pursuer. A report was made by Mr Gillies Smith, C.A., on a remit from Lord Jerviswoode, and both parties raised various objections to it, chiefly on questions of vouching.

Lord Jerviswoode pronounced the following interlocutors:—

"*Edinburgh, 9th January* 1872.—The Lord Ordinary having heard counsel on the objections to the Accountant's Report, and on the whole cause, and having made avizandum with the debate, productions, and whole process, and considered the same—Finds, 1st, That the several sums, amounting in all to £7043, 8s. 2²d., as reported under Head I. of the Report, are established as debts of the deceased Honourable Archibald Fraser of Lovat, due by him at the date of his death, and paid by or on behalf of the pursuer, as set forth in the Report: 2d, That the further sum of £82, 12s. 3d., as reported under Head II. of the Report, is also sufficiently vouched as there stated; 3d, That the sums forming the items stated in Head III. of the Report are debts which were incumbent on the said deceased at his death (though not then paid), to the amount of £4333, 11s. 3½d., and that to said extent the said debts are to be held as paid by or on behalf of the pursuer; 4th, That the several items contained in Head IV. of the Report, and of which the sum of £1708, 5s. 5⁶d. is composed, are sufficiently instructed as debts of the deceased, and as paid by or on behalf of the pursuer; 5th, That the debt stated as paid to Sir William Fraser, Bart., and amounting, with interest to 11th November 1815, to £2438, 2s. 7d., is to be in like manner dealt with as due by the deceased at the date of his death, and paid by or on behalf of the pursuer; 6th, That the several items falling under the 6th branch of said Head IV. of the Re-