

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

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

right upon the actings of parties under the contract which Mr Leith Hay now rejects as not binding upon him.

The Court answered the question in the negative.

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

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

Tuesday, June 9.

SECOND DIVISION.

MILLER RICHARD'S TRUSTEES v. MILLER RICHARD.

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

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

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

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

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

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

the fourth purpose he provided—"I leave the whole rest, residue, and remainder of my means and estate to and among my children, Herbert Miller Richard, Walter Cecil Richard, Charles Richard, Leslie Fitzroy Richard, Ernie Noel Richard, and William Raymond Richard, and any other children who may be hereafter born to me, equally share and share alike, the share of any dying before or after me without leaving lawful issue to accresce to the survivors, and the issue of any predeceasing the term of payment leaving lawful issue surviving being entitled to the shares original and accruing to which their parent would have been entitled had he or she survived, and that equally among them. . . . And I declare that the shares of residue falling to the beneficiaries before indicated shall be payable to them, so far as not retained by my trustees to provide the annuities or advances before mentioned, as soon as conveniently may be after my death."

By the codicil dated 13th July 1902 the testator provided as follows—"Considering that my son Herbert Miller Richard has from time to time incurred debts to a large amount, which I have paid for him or assisted him in securing, and that I am forced to the conclusion that he is unable to control his capital expenditure: Therefore I direct my trustees, on making the division of residue provided for in the fourth purpose of my said trust-disposition and settlement, not to pay over to my said son Herbert Miller Richard the share of my estate apportioned to him, but my trustees shall pay over out of his said share a sum of £2000, which will be sufficient for repayment of the debt secured on his expectancy from my estate, which, so far as known to me, is £500, and which will leave him a sum in hand which I trust he may make good use of. And I direct my trustees to hold the remainder of the share so apportioned to my said son, and invest the same in suitable investments, paying him for his life rent alimentary use the income thereof at such intervals as they may find convenient and expedient. And I declare that this provision is and shall be strictly alimentary, and shall not be assignable by my said son nor attachable by diligence of his creditors, providing always that my said son shall have power to dispose by will or deed of provision of the capital sum so retained on his death. And I declare that the foregoing provisions in favour of my said son are in full of all legitim, bairns' part of gear, or legal share of heritage or moveables which it is competent to my said son to demand at my death. And in the event of the said provisions not being so accepted by my said son as in full of all claim competent to him, I direct my trustees to pay him his legitim only, deducting therefrom the amount of the advances made by me during my lifetime to him or on his account, and sums for which my estate may be liable to third parties on his account."

By the codicil dated 1st November 1901 the testator provided that a sum of £400, which he had advanced to his son Herbert

Miller Richard, should form a deduction from the provision falling to him under the settlement.

After the testator's death the trustees, in terms of said codicil of 13th July 1902, made payment to Herbert Miller Richard of the sum of £2000 therein directed to be paid to him, and set aside for his behoof the balance of the one-sixth of the residue of the estate so far as the same had come into their hands and was available for division. The remainder of the residue was subject to (1) a life rent of a portion thereof in favour of Mrs Richard senior, and (2) certain life rent annuities in favour of Mrs Kate Lindsay or Richard, widow of the testator.

A question arose between the trustees and Herbert Miller Richard as to whether he was entitled to payment, for his own absolute use, of the sum so set aside for his behoof by the trustees, and consequently of his share of the remainder of the residue of the trust estate when the same should be available for division. The trustees maintained that in terms of said codicil dated 13th July 1902 they were bound to retain the balance of the share of residue falling to Herbert Miller Richard and invest the same for his behoof, paying him only the annual income thereof as an alimentary provision, and that he was entitled only to dispose thereof by testamentary deed. Herbert Miller Richard maintained that he was vested with the fee of said share of residue, and that he was entitled to immediate payment thereof so far as the residue was now available for division, and to the balance as the said life rent and annuities respectively expired.

For the settlement of these points a special case was presented for the opinion and judgment of the Court by the trustees as first parties and Herbert Miller Richard as second party.

The questions of law were as follows:—“(1) Is the second party vested in the fee of one-sixth of said residue, under deduction of the said sum of £400? (2) In the event of the first question being answered in the affirmative, is the second party entitled to immediate payment of the said one-sixth share of residue, so far as the same is now available for division, and to the balance as the said life rent and annuities respectively expire?”

Argued for the first parties—(1) The second party was not vested in the fee of one-sixth of the residue. His right was of a more limited character, viz., that of a life rent coupled with a power to dispose by will. No right to the fee was conferred on him by the trust-deed, as according to its terms vesting was postponed till the date of payment. Even if the will was held to give a right of fee, the codicil came in its place and destroyed that right—*Alves v. Alves*, March 8, 1861, 23 D. 712; *Douglas's Trustees v. Cochran*, November 6, 1902, 5 F. 69, 40 S.L.R. 103. 2. Even if there was a fee vested in the son, he was not entitled to immediate payment. The right of fee was qualified by the terms of the codicil. In the present case there was a specific trust-

purpose that could only be fulfilled by keeping up the trust. That purpose was to make the provision in favour of the second party alimentary. The case fell under the rule laid down in *Russell v. Bell's Trustees*, March 5, 1897, 24 R. 666, 34 S.L.R. 497, and the opinions of the Judges in *Chambers' Trustees v. Smith*, April 15, 1878, 5 R. (H.L.) 151, 15 S.L.R. 541. The present case was in a more favourable position for the trustees than *Russell's Trustees*, *supra*, because in the present case the trustees had no power to hand over to the second party any part of the capital. The present case could be distinguished from *Miller's Trustees*, *infra*, because in *Miller's* case the full enjoyment of the fee was in the beneficiary, while in the present his right was definitely limited to an alimentary provision.

Argued for the second party—There was only one debateable question in the present case—Was or was not the fee of one-sixth of the residue in the second party? After the decision in *Miller's Trustees v. Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236, followed by such cases as *Wilkie's Trustees v. Wight's Trustees*, November 30, 1893, 21 R. 199, 31 S.L.R. 135; *Hargrave's Trustees v. Schofield*, October 25, 1900, 3 F. 14, 38 S.L.R. 9; and *Yuill's Trustees v. Thomson*, May 29, 1902, 4 F. 815, 39 S.L.R. 668, the law was clear that no one can be vested with a fee unburdened with the liferent of a third party without having the right to demand immediate payment from the trustees. A testator could not limit the enjoyment of a right of fee by a beneficiary of sound mind and of full age by means of restrictions. The only exception to the rule was where there was a contingent right in favour of other beneficiaries—*Graham's Trustees v. Graham*, November 30, 1899, 2 F. 232, 37 S.L.R. 163. In the present case the fee had vested in the second party, as the codicil did not recal the gift of fee conferred in the will, but only imposed restrictions with regard to payment. *Chambers' Trustees* and *Russell's Trustees* were quite distinct from the present case. In both of these cases there was held to be no fee in the beneficiary, but only a vested interest which the trustees could take away.

At advising—

LORD JUSTICE-CLERK—The opinion I have formed on this case is that the testator has by his codicil deprived his son Herbert Miller Richard of any right in fee to any further sum than the £2000 which the trustees are directed to pay to him, and has limited his interest in the share which he gave him by the will to an alimentary liferent, giving him the power only to test upon the capital. The codicil appears to me to express unmistakably the intention of the testator, proceeding as it does upon the narrative that he has come to the conclusion that his son "is unable to control his capital expenditure," for which reason he forbids the paying over to him of more than £2000, and directs that the trustees shall hold the remainder of what he had formerly apportioned to his son

and pay him the liferent. He is accordingly not intended to receive the capital at any time. The direction to pay the restricted sum, taken along with this clause, is, I hold, conclusive against a gift of fee of the remainder. And in consistence with this is the further direction that if his son refuses to accept what is provided for him in the codicil, then the trustees are directed to pay him his legitim under deduction of advances. It is impossible to read that clause consistently with reading the previous part of the codicil as intended to confer a fee such as is maintained on his behalf.

I am therefore of opinion that the first question should be answered in the negative, and if it be so answered the second question does not require to be answered.

LORD YOUNG concurred.

LORD TRAYNER—I am not prepared to say that a right of fee in one-sixth part of the residue of his father's estate was vested in the second party by the terms of his father's settlement. But whatever right was thereby conferred upon him was in my opinion revoked by the codicil of 13th July 1902. Under that codicil the only right conferred on the second party was a right of alimentary liferent with a power to test. I would therefore answer the first question in the negative, and it follows that the second question does not require to be answered.

LORD MONCREIFF—What we have to decide is whether under the decisions, in particular *Miller's Trustees* and *Yuill's Trustees*, we are precluded from giving effect to the intention of the testator clearly expressed in his second codicil that the interest of his son Herbert Miller Richard, the second party, in the balance of the share destined to him in the original will should be confined to an alimentary liferent. I am of opinion, though not without some doubt as to the scope of the decisions which I have mentioned, that effect can be given to the testator's intention without running counter to those decisions.

The second party claims immediate payment of the capital of the balance of his share remaining after deduction of the £2000 paid to him as directed by the truster. The codicil says expressly that he is to be given only an alimentary liferent of it coupled with a limited power or faculty of disposing of it by will or provision.

In the cases of *Miller's Trustees* and *Yuill's Trustees* it was conceded that notwithstanding a gift in fee, the trustees would be entitled to withhold payment if retention of the capital were required for the fulfilment of other trust purposes. Unfortunately there is no precise definition of "trust purposes" which will warrant such retention. But I am disposed to think, on a consideration of the opinions of the majority in the two cases, that we must now hold that in order to warrant retention where a fee is given the trust purposes must be connected with other objects and persons than the beneficiary whose share

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

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

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

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

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

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

Tuesday, June 9.

SECOND DIVISION.

[Lord Kincairney,
Ordinary.]

MAGISTRATES OF EDINBURGH
v. EDINBURGH UNITED BREWERIES
LIMITED.

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

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

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