he was fit for light work at which he could earn about 32s. a-week, and found him entitled to 10s. a-week—which was 3s. less than his employers had offered before the proceedings were instituted. The arbitrator found no expenses due to or by either party.

In his note the only explanation which the arbitrator gives as to the course he followed with regard to the expenses is that having refused a better offer the pursuer is not entitled to expenses. It seems to me that if the workman refused a better offer, not only is he not entitled to expenses, but the employers are entitled to expenses, because if he had taken the 13s. they offered before these proceedings were taken no proceedings would have been necessary, and the workman would have been 3s. a week better off than he is now.

It appears to me that the proper result here is that the pursuer ought to have been found liable in expenses. As has already been pointed out, these proceedings are not judicial proceedings in the strict sense of the term; and here, before any proceedings were initiated, a larger sum was offered than the pursuer ultimately got. I see no reason—and the arbitrator suggests no reason—why the ordinary result should not follow and the pursuer be found liable in expenses.

I propose to your Lordships that we should answer the first question in the negative and the second in the affirmative, and remit to the arbitrator to proceed accordingly.

LORD DUNDAS—I agree, without any doubt or hesitation, that the questions should be answered as your Lordship proposes, and I have nothing to add.

LORD SALVESEN—I am of the same opinion. In the case of the *Fife Coal Company* v. *Feeney*, 1918, 55 S.L.R. 223, to which we were referred, I stated what I considered was the law applicable to a case of this kind, and if there had been any evidence that the arbitrator had applied a judicial discretion to the disposal of the question of expenses, I for my part should not have been disposed to interfere even if I thought he had exercised his discretion wrongly. But the circumstances here, as disclosed, are that on 12th March 1917 an offer of partial compensation of 13s. per week was made on the footing that at that time the respondent was fit for light work. The respondent refused that offer, and thereupon proceedings were taken. The contest between the parties was whether he was wholly incapacitated or only partially incapacitated, and in that contest, which involved the expense of an inquiry into the state of his health, the respondent was wholly unsuccessful. He was found to be fit for light work as from 12th March when the offer was made.

No doubt it remained for the arbitrator to consider in the circumstances how much he ought to award in respect of the workman being only partially incapacitated for work. But when the arbitrator came to apply his mind to that question he found that 10s. was the maximum that he could award in view of the wage that the appellants were willing to pay the man for light work. And then he was referred to the appellants' offer of 13s., and he not unnaturally said that the man had refused a better offer than the award that he could give him. But he seems to have considered that the only question before him was whether in those circumstances he could award expenses against the appellants or whether he ought to give expenses to neither party. He seems not to have considered the obvious point—that the respondent ought to be found liable in expenses as for wholly unnecessary procedure.

In those circumstances I do not think the arbitrator exercised a judicial discretion in reference to this question of expenses, and accordingly I agree that the questions must be answered as your Lordship proposes.

LORD GUTHRIE—The respondent's only case is that it does not appear that there was any concurrence, before the arbitration was initiated, that he should be entitled to 13s. per week, plus what he earned for light work, namely, 32s., which was 3s. above the amount of his previous full wage. That view, while not impossible on the statements in the case, does not necessarily follow, and it seems to me to be inconsistent with the last sentence of the arbitrator's note, which expressly says that the workman had refused a better offer.

The Court answered the first question of law in the negative, and the second in the affirmative.

Counsel for the Appellants—Constable, K.C.—Stevenson. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Christie, K.C. — Macquisten. Agents—Simpson & Marwick, W.S.

Thursday, March 28.

FIRST DIVISION.

[Lord Cullen, Ordinary.

LORD ADVOCATE *v.* MARQUESS OF ZETLAND.

Superior and Vassal—Casualties—Redemption—Vassal Holding of Crown—Feudal Casualties (Scotland) Act 1914 (4 *and* 5 *Geo. V, cap.* 48), *sec.* 5 (1) (*a*) *and* (2).

In an action brought by the Crown against a vassal to fix the amount payable for redemption of the casualties of his holding under the Feudal Casualties (Scotland) Act 1914, *held* (*rev.* Lord Cullen, *dis.* the Lord President) that the Crown was not entitled to one year's free rent as composition upon the entry of a singular successor of the last-entered vassal, and that consequently that rent could not be taken as the highest casualty for the purpose of calculating the compensation payable as redemption.

The Feudal Casualties (Scotland) Act 1914 (4 and 5 Geo. V, cap. 48), section 5, enacts—"(1) The compensation payable on the redemption of casualties under this Act shall (failing agreement) be fixed as follows: —(*a*) In cases where casualties are exigible on the death of the vassal the compensation shall be such sum as will, with the addition of simple interest at the rate of four per cent. per annum, produce one and a-half times the highest casualty on the arrival of the time at which the next casualty might be expected to become exigible: Provided that if at the date as at which compensation is to be fixed, and after payment of such casualty (if any) as may then be exigible, the state of the title is such that the next casualty may be relief, and the amount of such relief is less than the amount which would be payable as composition, the compensation shall be fixed on the assumption that the next casualty will be payable on the expiry of the period of twenty-five years from the date as at which compensation is to be fixed, or otherwise on the arrival of the time when the next casualty might be expected to become exigible, whichever period is the greater. . . . . (2) The compensation payable on the redemption of casualties under this Act shall (failing agreement) be fixed as at the date of notice given in terms of section 11 of this Act. . . ."

The Lord Advocate, on behalf of the Commissioners of Woods, Forests, and Land Revenues, *pursuer*, brought an action against the Marquess of Zetland, *defender*, concluding for decree—"(First) that a notice dated and served on 16th March 1916, in virtue of the provisions of the Feudal Casualties (Scotland) Act 1914 (particularly section 11), by the Crown Receiver upon the defender as proprietor of the lands and others particularly described in a charter of resignation and confirmation by His late Majesty King George III in favour of Sir Thomas Dundas, Baronet in liferent, and the heirs-male of his body, dated the 6th day of August, written to the seal and registered the 31st day of October and sealed the 1st day of November, all in the year 1787, and hereinafter libelled, and requiring the defender to redeem all the casualties exigible in respect of the Crown's estate of superiority in the said lands, is valid and effectual and binding upon the defender: (Second) that the defender is bound under the provisions of the said statute to redeem as at 16th March 1916 all the casualties incident to the Crown's said estate of superiority and exigible in respect of the defender's estate of property and mid-superiority in the said lands, and to make payment to the pursuer of the compensation provided in terms of the said statute; and (third) that the said compensation payable on the redemption of said casualties falls to be fixed or adjusted on the basis that the Crown is entitled to assess casualties of composition payable to the Crown's said estate of superiority at one year's real free rent of the said subjects; and whether decree is pronounced in terms of the foregoing declaratory conclusions or not the defender ought and should be decerned and ordained by decree foresaid (1) to exhibit and produce before our said Lords a statement or account showing the particulars and amounts of the real rental of the lands and other heritages embraced in the said notice, and of feu-duties, public burdens, cost of repairs, and other usual deductions recognised by law in ascertaining the free rental thereof."

The pursuer *pleaded, inter alia*—"2. The compensation payable to the Crown's estate of superiority in respect of the redemption of the casualties on the estates mentioned in the said notice falls to be fixed on the basis that the Crown is entitled to assess casualties of composition at one year's real free rent of the said subjects, and decree ought to be granted in terms of the third declaratory conclusion of the summons."

On 4th April 1917 the Lord Ordinary (CULLEN) found—"(1) That the defender is, under the Feudal Casualties (Scotland) Act 1914, bound to redeem as at 16th March 1916 all the casualties incident to the Crown's estate of superiority in the lands mentioned in the summons held by the defender of the Crown; (2) that according to the defender's tenure of the said lands the amount payable by the defender by way of redemption of casualties as aforesaid is regulated by the provisions of section 5 (1) (*a*) of the said Act; and (3) that on an application of these provisions to the present case the words 'the highest casualty' occurring in them import the amount of 'a year's maill as the land is set for the time' within the meaning of these words as used in the Act 1469, cap. 36," and reserved all questions as to the amount payable by the defender not covered by the above findings, and granted leave to reclaim.

Opinion, from which the *facts* of the case appear:—"The defender is Crown vassal of the lands referred to in the summons. The present action has been brought against him by the Crown to have him ordained to redeem the casualties incident to the Crown's estate of superiority in terms of the Feudal Casualties (Scotland) Act 1914. The case is one falling under section 5 (1) (*a*) of the Act—that is to say, a case where casualties are exigible on the death of the vassal. The redemption value turns on the amount of the 'highest casualty' within the meaning of said section 5 (1) (*a*). There is no taxation of casualties under the tenure, and if the defender had held the lands of a subject-superior the highest casualty ruling the calculation of the redemption money would have been the composition of one year's rent payable in respect of the entry of a singular successor. The Crown here seeks to apply the same rule. The defender disputes the claim, maintaining that the composition of a year's rent in respect of the entry of singular successors has no place in Crown holdings. He has offered to redeem on the footing of taking as the measure one-sixth of the valued rent of the lands in place of one year's rent. The question thus raised is of general application to Crown holdings such as that of the defender.

"The origin of the composition of one year's rent to which subject-superiors at least became entitled in respect of the entry

of a singular successor to a feu is well understood. But it may be desirable to resume the matter briefly by way of opening up the arguments of the parties.

"Originally feudal fees were strictly personal and held for military or analogous services. In course of time feudal practice came to admit the right of the vassal's heir to take up the grant. Later, under changing conditions of social life, there came in gradually the more modern conception of a feu whereby grants were made by superiors for a reddendo in money or money's worth. Until the passing of the Clans Act of 1747, however (20 Geo. II, cap. 50), no superior, at least no subject-superior, was under any obligation to grant an entry to a singular successor under a voluntary transmission of the feu presenting himself for entry as such. But long prior to 1747 a way to the entry of singular successors had been opened up by statute, and although the way in the case of voluntary disponees was originally and technically an indirect and circuitous one, it latterly had in practice come to be a direct one.

"The leading statute is that of 1469, cap. 36, dealing with apprisings. But before referring to it in more detail I may observe that long prior to it there had existed in Scotland provision for diligence against a debtor's lands for payment of his debts. The matter is, of course, somewhat obscure at this distance of time. In the reign of Alexander II there was passed an Act (cap. 24) which provided that if a landed debtor or his tenants had moveable goods, these goods should, first of all, be distrained for payment of the debt, but that failing satisfaction of it in this way the sheriff and King's servants should sell the debtor's lands, and on such sale taking place the sheriff if the lands were held of the King was directed to 'infeft the buyer by ane precept.' In the case of lands held 'of ane baron' the baron was given an option to buy them, failing which and if there was another buyer the sheriff was directed to infeft that other buyer in the lands 'in sic forme as the debtour possessed them.' And it was further enacted that the baron, at the command of the sheriff, should receive the buyer 'to be his tennant, and should give him sic possession as the debtour had.' Anticipating the argument a little, I may point out that under this ancient statute power was given to the sheriff to grant infeftments to buyers in the case where the lands sold were held of the Crown equally as in the case where the lands were held of a 'baron' or subject-superior.

"The Act of 1469, cap. 36, proceeds on a preamble setting forth the hardships to tenants of a landed debtor pursued for his debt in having their moveables distrained for such debt, and it goes on to make provisions for alleviating the hardship. The details of these I need not go into at length. The material point is that the Act provided for the 'apprising' of a debtor's lands and, *inter alia*, enacted that the 'overlord' should be bound to give an entry to the appriser on payment of 'a year's maill as the land is set for the time.'

"The more ancient form of 'apprising' of a debtor's land came to be superseded by the process of adjudication. By the Act 1669, cap. 18, it was enacted that 'the superiors of lands' should not be bound to enter adjudgers save on the same condition of payment of a 'year's rent of the lands' as had applied to apprisers.

"Following on the Acts of 1469 and 1669 above referred to, the disponee under voluntary transmission (in the case of lands held of a subject-superior at least), although not thereby provided for, found his way of forcing an entry. He could not present himself to the superior in the guise of a voluntary disponee. With the co-operation of the disponer, who granted the necessary bond, he presented himself, after due procedure on the bond, as an appriser or adjudger, tendered as such the necessary year's rent, and obtained an entry. This circuity of procedure on the part of the voluntary disponee was of no special advantage to the superior. And thus prior to 1747 it had become the general practice for subject-superiors to grant entries to voluntary disponees on payment of the amount of a year's rent of the lands without requiring them to go through the procedure necessary to enable them to present themselves in the guise of apprisers or adjudgers. This result of the Acts of 1469 and 1669 was deeply deplored by conservative feudalists like Sir Thomas Craig, who resented it as a species of fraud on superiority rights.

"The 'Clans Act' of 1747 (20 Geo. II, cap. 50) was aimed mainly at breaking up the power of the 'clan' system in Scotland. *Inter alia* it enacted by section 12 as follows —'And whereas the methods of procuring entry by heirs or singular successors or purchasers of lands in Scotland that are held of subject-superiors, heretofore practised, are tedious and expensive, be it therefore enacted by the authority aforesaid that from and after the said twenty-fifth day of March it shall and may be lawful and competent for any person who shall be duly served and retoured heir to any of his predecessors in any lands or heretages in Scotland, and to any person who shall purchase or acquire such lands or heretages from the former proprietor or vassal who was duly vested and seized therein, and who shall obtain from such vendor or former proprietor a disposition or conveyance, containing a procuratory of resignation in favour of such purchaser or disponee, to apply to the Ordinary on the Bills in the Court of Session for the time being, praying a warrand for letters of horning to charge the superior, of whom such lands or heretages were respectively held, to receive or grant new infeftment to such heir or purchaser respectively; and upon production to the Lords of Session of a special retour of the petitioner or party so applying in any such lands or heretages, or upon production of a disposition or conveyance bearing a procuratory of resignation in favour of such petitioner, it shall and may be lawful for

the said Lords of Session, and they are hereby authorised and required, to grant warrand for letters of horning, upon fifteen days, to charge the superior or superiors in the lands contained in such special retour or procuratory of resignation to receive or grant new infeftment to such heir, purchaser, or disponee respectively.'

"This enactment, it is to be observed, is expressly limited to feudal grants held of subject-superiors. On this fact the defender, as I shall hereafter mention, founds an argument.

"Section 13 went on to enact as follows:—'Provided always that no superior shall be obliged to give obedience to such charge unless the charger at the same time shall pay or tender to him such fees or casualties as he is by law entitled to receive upon the entry of such heir or purchaser; and that it shall and may be lawful for every such superior to show cause why he ought not to be compelled to give obedience to such charge, by offering a bill of suspension in the usual manner to the Court of Session.'

"On the terms of this enactment it is to be observed that it purports to speak of the casualties which a subject-superior 'is by law entitled to receive' on the entry of a purchaser, whereas, strictly speaking, a purchaser as such could not prior to the Act have forced an entry, nor was the superior 'entitled to receive' any casualty from him save by refusing him an entry and resorting to a declarator of non-entry until the purchaser, by adoption of indirect methods, was enabled to present himself for entry in the guise of an appriser or adjudger tendering a year's rent as such. The due construction of section 13 of the Act of 1747 was in the case of *Earl of Home* v. *Lord Belhaven and Stenton*, 1903, 5 F. (H.L.) 13, 40 S.L.R. 607, authoritatively held to be that the casualty which the superior is therein spoken of as 'entitled to receive' was the year's maill of the lands which by the Acts of 1469 and 1669 an appriser or adjudger was bound to pay for entry, although the superior was not entitled to receive it save in the indirect manner I have indicated.

"The Clans Act thus made this change on the pre-existing law that a disponee under voluntary transmission of a feu held of a subject-superior thereby became entitled as such to obtain an entry from the subject-superior on paying the year's rent formerly available as a condition of entry only to apprisers or adjudgers. It was a change in form. The voluntary disponee was relieved from the necessity, according to the previous law, of presenting himself by a circuity of procedure in the guise of an appriser or adjudger.

"I pass over various statutes subsequent to 1747 dealing with the simplification of titles to land, and in particular the modes of obtaining infeftment and entry, and come to the Conveyancing Act of 1874 (37 and 38 Vict. cap. 94). This Act made a very sweeping innovation on previous feudal practice and conceptions. Prior thereto entry to a feu required a writ from the superior, in the absence of which when the occasion arose the lands fell into non-entry. I do not think it necessary to set out in great detail the provisions of the Act. It introduced the novel conception of implied entry with the nearest superior whose right of superiority was not defeasible at will, obtained by the due recording of a title in the Register of Sasines, thus superseding the need for any writ by progress from the superior. But it safeguarded the superior by enacting, section 4 (3), that 'Such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of such entry; and all rights and remedies competent to a superior under the existing law and practice, or under the conditions of any feu right, for recovering, securing, and making effectual such casualties, feu-duties, and arrears, or for irritating the feu *ob non solutum canonem*, and all the obligations and conditions in the feu rights prestable to or exigible by the superior, in so far as the same may not have ceased to be operative in consequence of the provisions of this Act or otherwise, shall continue to be available to such superior in time coming; but provided always that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act, or by the conditions of the feu right, have required the vassal to enter or to pay such casualty irrespective of his entering.'

"And sub-section (4) of section 4 enacted—'No lands shall after the commencement of this Act be deemed to be in non-entry, but a superior, who would but for this Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands, whether by succession, bequest, gift, or conveyance, may raise in the Court of Session against such successor, whether he shall be infeft or not, an action of declarator and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action; and any decree for payment in such action shall have the effect of and operate as a decree of declarator of non-entry according to the now existing law, but shall cease to have such effect upon the payment of such casualty and of the expenses (if any) contained in said decree; but such payment shall not prejudice the right or title of the superior to the rents due for the period while he is in possession of the lands under such decree, nor to any feu-duties or arrears thereof which may be due or exigible at or prior to the date of such payment, or the rights and remedies competent to him under the existing law and practice for recovering and securing the same; and the summons in such action may be in or as nearly as may be in the form of Schedule B, hereto annexed.'

"It will be observed, on the terms of sub-section 4 of section 4 above quoted, that it provides a remedy to the superior, notwithstanding an implied entry, for recovery of 'any casualty exigible by him.' A casualty of composition in respect of the entry of a

singular successor was never 'exigible by' a superior in the sense of his having a direct petitory action concluding for payment of it. The superior's remedy in the case of a feu becoming vacant was an action of declarator of non-entry, decree in which gave him right, *inter alia*, to the fruits of the feu after decree, until the price of entry —a year's rent—was tendered by the singular successor. The Act of 1874, while abolishing non-entry, gives the superior from whom a writ by progress is no longer required an equivalent remedy -that is to say, he is authorised on the occurrence of what would have been but for the Act of 1874 a vacancy of the feu to pursue a statutory form of action, the effects of which are equivalent to the effects of a declarator of non-entry prior to the Act, until he is tendered payment of the casualty which under the prior law would have avoided or terminated the operation of a declarator of non-entry. The said statutory form of action does not give a direct petitory claim to the superior. Against it no implied entry by virtue of the Act can be pleaded as excluding it. Thus the superior, notwithstanding an implied entry, is left by the Act virtually in the same position as he held before it *quoad* recovery of casualties.

"So far as I have gone in the foregoing historical survey, limited to the position of the subject-superior, I do not think I have stated anything which is controversial between the parties. I now turn to consider the defender's case, which consists in differentiating Crown superiorities from superiorities held by subject-superiors *quoad* the conditions of entry.

"The broadest position maintained by the defender is that the Crown never had at any time in the history of the feudal law right to refuse an entry to a singular successor. This remarkable proposition is sought to be founded on two passages in Bankton's Institutes, iii, 2, 53, and ii, 3, 48. In the first of these Bankton says—'In adjudications of lands holden immediately of the Crown, no year's rent is exigible by the Barons of Exchequer at passing the charter, which is compounded for according to the stated rules of Exchequer; for the lieges are all alike the King's subjects, and therefore there is no reason for exacting a composition for the change of the vassal.'

"In the second passage Bankton says—'If the superior pleases, he may according to the provision in the old statute refuse to receive the adjudger, and may undertake payment of the debt, at least to the value of the lands, and take the lands to himself, which is termed *Retractus feudalis;* but that will not hinder the creditor from insisting for the remainder against the debtor if the value of the lands does not satisfy his debt, nor the debtor from redeeming within the legal in the same manner as if the right had remained with the creditor; nor can the superior in that case demand a year's rent, the adjudger not having been received. This option is never used by the Crown, but charters on adjudications pass of course, as indeed they do on voluntary rights; all the lieges being the King's subjects, he cannot have prejudice by the change of his vassals.'

"The above extreme proposition for the defender was not urged with much insistence by his counsel, and I do not say more about it than that I reject it.

"The next alternative position taken up by the defender is that the Crown long ago, and prior to the Act of 1469 already mentioned, relinquished, so as to become *legally divested of*, the right to refuse entry to singular successors of vassals in Crown holdings, whether these singular successors were voluntary disponees or were apprisers or adjudgers, and that the Act of 1469 and also the Act of 1669 do not relate to Crown holdings at all but relate solely to holdings of subject-superiors, so far as regards obligation to enter and the corresponding price of entry. This proposition appeals to what has been the practice of the Crown in granting entries.

"Now there is no doubt that while relief duty has admittedly always been exacted by the Crown on the entry of heirs in Crown holdings, there has prevailed for several centuries a practice on the part of the Crown of freely entering singular successors, whether by way of voluntary transmission or under real diligence, on easy terms. The actual terms exacted were for a long time varying, but the rule intended to apply was that the applicant for entry should pay the reasonable expenses connected with the granting of entry to him.

"Subject to such payment the general practice of the Crown seems to have been not to refuse an entry. There is no dispute between the parties as to the long existence of this practice. The difference between them is that while the Crown maintains the practice to have represented an indulgent course towards Crown vassals, the defender maintains that it defined and limited the Crown's legal right.

"The said Crown practice, which is referred to by institutional writers in terms which I shall advert to in a moment, goes back to some period prior to the Act 1578, cap. 66, but it is impossible to assign more definitely a date to its beginning. The Act of 1578 was one 'anent double confirmation of feus of kirk lands and lands holden immediately of our Sovereign Lord.'

"The preamble of the Act is as follows—

"'Forsameikle as it is statute and ordained, be Act of Parliament maid in our Soveraine Lordis dearest Mother's time that na infeftment of Kirk-landes, set sen the viij. day of March the zeir of God ane thousand five hundreth lviij. zeiris, suld be of ony force or effect without the samin war dewlie and lauchfullie confirmed be our Soveraine. And als forsameikle as it happenis that doubil infeftments of few-ferme of ony portion of land is given be ane Ecclesiastical person to divers persones, & sum times be divers Ecclesiastical persones, to wit, the predecessour and successour, to divers persones in few-ferme, and zit nouther of the saidis infeftments can take effect or be of avail without they be dewlie and lauchfullie confirmed be our Soveraine Lord. And alswa it is oft-times seene that con-

firmations are granted of baith, the saidis divers infeftmentes, at divers times be the sute of the parties: like as it is founden be sundry ordinances of the privie Councel that our Soveraine Lord, and his hienesse Compositours, aucht not to deny his confirmation, upon the reasonabil expenses of the partie, suitand upon their awin peril. And likewise, divers alienations of landes, halden immediatelie of our Soveraine Lord, being maid be ane person to divers persones, double confirmationes ar granted be our Soveraine Lord thereto, quhair as ane of the saidis confirmations aucht and can only take effect in all clauses above specified. And notwithstanding it is the occasion of great debait amangis the lieges, to their great expenses, alsweill in payment of their compositiones, as that the samin breadis the occasion of great pley.'

"The remedy enacted was that the first confirmation of an infeftment valid in itself should prevail.

"The importance of this Act in the present connection lies in the reference made in its preamble to the ordinances of the Privy Council whereby it had been found that the Sovereign and his compositors 'aucht not to deny his confirmation upon the reasonabil expenses of the partie suitand at his own peril.' The object of the reference is to explain how it came about that several infeftments relating to the same lands were equally confirmed by the Sovereign, thus leading to a wasteful competition of rights which the statute set about to remedy.

"It is common ground in the present case that it is not practicable to ascertain the dates of the ordinances of the Privy Council referred to in the Act of 1578. They may or may not have been earlier than the Act of 1469. This, however, is clear, as I think, that the Act of 1578 does not make any legislative enactment fixing an obligation on the Sovereign to grant a confirmation or entry to anyone who asked it, and does not go further than to record the fact that the King had been advised by his Privy Council that he ought to grant confirmations freely 'upon the reasonabil expenses of the partie suitand at his own peril.'

"These ordinances of the Privy Council, whatever their dates, would appear to be the origin of the Crown practice, which has prevailed, from some time prior to the Act of 1578, down to the present time, of granting entries in Crown holdings, in the case of singular successors, on easier terms than those insisted on by subject-superiors.

"I may now advert to what is said by institutional writers on the subject. There is no great body of authority, nor does it seem to me to be of decisive import.

"Lord Stair (Inst. ii. 3, 43), dealing with the topic of entails being broken or changed with the consent of the superior, says—'But infeftments holden of the King have this privilege that they are not refused, either upon resignation or confirmation, as the fiar purchaser pleaseth: Yea, it is declared by several ordinances of the Privy Council that the King or his Commissioners ought not to deny his confirmation upon the reasonable expenses of the party; which ordinances are repeated in an Act of Parliament (1578, c. 66), and although the design thereof gave not occasion to ratify the same, yet they are contained in the narrative, as motives of that statute, and therefore are not derogate from but rather approved. And though several kings have revoked infeftments granted by them, from heirs of line to heirs-male and of tailzie, yet the effect of such revocations hath never been tried by suit or decision.' This is the passage in Stair on which the defender, I think, mainly founds as indicating Stair's view of the effect of Privy Council ordinances mentioned in the Act of 1578. I am unable to extract from it that Lord Stair meant to say that these ordinances were obligatory on the Crown. He stops short of that with the remark that while they received no legislative ratification by the Act of 1578, they were 'rather approved,' and the further remark, that while kings did not always follow the ordinances, the question of the legality of their actions in that respect had never been raised for decision. In another connection Lord Stair incidentally remarks that confirmations by the King 'pass of course' (Inst. ii. 4, 36).

"Erskine (Inst. ii. 7, 6), speaking of the right of a superior to refuse entry to singular successors, refers to the case of apprisers under the Act of 1469, and that of adjudgers under the Act of 1669, and to that of purchasers of bankrupt estates at judicial sales under the Acts 1681, c. 17, and 1690, c. 20. He observes—'Notwithstanding these particular statutory restrictions on the superior's right, which were enacted merely for the behoof of creditors, the general right of refusal competent to superiors in the case of voluntary transmissions by the vassal long continued from the most early times of our feudal plan, unimpeached by statute, except one in the reign of Robert I, soon to be taken notice of. But from the period that commerce began to be attended to as a point essential to the public interest, vassals were considered in a more favourable light, not as simple beneficiaries, but as proprietors, who ought to have full power over the feudal subject contained in their charters. Hence our Sovereigns did, by several Acts of Privy Council mentioned in 1578, c. 66, give up this right for the public utility; so that purchasers of lands holden of the Crown were from that period secure of being received as vassals by the King, upon their reasonable expense, *i.e.*, on a composition to be paid by them to the Treasury, which is fixed by practice to a sixth part of the valued rent of the lands.'

"Erskine here speaks of the original right of the Crown to grant or refuse entries to singular successors in Crown holdings having been 'given up' for reasons of public utility, and of the security of entry which purchasers of Crown holdings thereby obtained. This may mean either of two things, (1) that the Crown, *ex sua sponte*, initiated and adhered to a practice of freely entering singular successors in Crown holdings on payment of 'their reasonable expence,' or

(2) that the Crown became legally divested of its original right to refuse such entries and became bound by law to grant them in all cases to applicants on such payment. I prefer the former view, because I do not clearly see how ordinances of the Privy Council advising the King how he 'aucht to' act could, without the stamp of legislative enactment following on them—and as Lord Stair points out the Act of 1578 did not amount to that—legally divest him of his inherent rights as superior of Crown holdings; and if so, how Crown practice following voluntarily on these ordinances could in itself create such a divestiture. In another passage Erskine, referring to the entry of apprisers under the Act of 1469, explains that on the refusal of the subject-superior or superiors in order, the ultimate resort of the appriser was to the Sovereign, 'who never refuses to receive any vassal upon payment of the composition established in Exchequer.'

"Sir Thomas Craig, writing of the practice whereby voluntary disponees were wont under the Acts of 1469 and 1669 to force an entry in the guise of apprisers or adjudgers by what he considered a fraud on that Act, explains that the ultimate resort of the claimant for entry, if the immediate superior and intervening over-superiors refused his demand, was to apply for an entry to the King, '*qui nunquam solet recusare*' (*Jus Feudale*, iii, 2, 20, top of page 458 of *Editio Tertia*). I was not referred to any other passage in Craig bearing on the matter in question, nor have I been able to find any. On the passage referred to, it is to be observed that Craig does not represent the King as being bound to grant an entry to anyone who asked it. He only says that it was the custom of the King never to refuse an entry. I place some stress on the way in which the matter is thus put by Craig, who was a writer saturated with knowledge of feudal law.

"I have already quoted passages from Bankton bearing on the topic.

"From a more modern point of view I may refer to what is said by Prof. Menzies in his Lectures on Conveyancing. Writing on the subject of transmission of feus (Lectures, 3rd ed., p. 610) he says—'More than a century before these last-mentioned statutes [1672, c. 19 as to adjudgers, and the Acts of 1681 and 1690 as to purchasers at judicial sales of bankrupt estates] the Crown, under a sense of the unsuitableness of the feudal fetters to the exigencies of advancing freedom and commerce, had adopted a liberal course towards its vassals, having laid down the rule, as appears from 1578, c. 66, to grant confirmation upon payment of expenses by the party.'

"By way of explaining the matter further I may now refer more fully to what the practice of the Crown has been in granting entries to singular successors. From the references in the Act of 1578 to the Privy Council ordinances it would appear that prior to these ordinances, whatever their date, the Crown had in practice exercised a power of granting or refusing confirmations at discretion. The ordinances were to the effect that the King 'aucht not to deny his confirmation upon the reasonabil expenses of the partie suitand at his own peril.' This left the amount of the 'reasonabil expenses' in the hands of the Crown acting through the authorities in Exchequer. So far as the citations given to me go, no statute has ever laid down any rule defining the amount of the payment so to be made by the applicant for entry in a Crown holding. The more modern statutes as to procedure in obtaining Crown charters provide, *inter alia*, machinery for settlement of disputes about the amount, but they do not legislate on the subject of the amount, and appear to leave the matter to depend on a due application of current practice in Exchequer.

"It is impossible to find out how, in the early periods of the application of the rule of the Privy Council ordinances, the amount of the 'reasonabil expenses of the partie' were regulated. In later days, and prior to the Royal Warrant of Queen Anne in 1709 mentioned on record, it would appear that no regular rule was observed in practice; that the Lords or Barons of Exchequer acted in a variable and arbitrary way; and that a good deal depended on the amount of influence which the applicant for entry was able to bring to bear on those in power for the time being.

"This absence of uniformity in the exactions of the Exchequer led to the issuing of the aforesaid Royal Warrant by Queen Anne in 1709, the terms of which are fully quoted on record. It referred to the fact that no certain rule had been observed by Exchequer in fixing compositions due to the Crown at the passing of signatures in favour of purchasers commonly called singular successors, and it announced the royal will and pleasure to be that the amount of composition to be taken in future should be one-sixth of the valued rent. The word 'composition' occurring in the warrant is used in a wide sense. Payments made in Exchequer for charters or writs by progress were formerly compounded for or settled at the sight of officials called 'compositours.'

"It is obvious that according to the conception of this Royal Warrant the fixing of the 'compositions' payable by purchasers or singular successors at one-sixth of the valued rent, 'as a moderate' sum, was regarded as entirely a matter of the royal will and pleasure. And no statute so far as I am aware has ever fixed that or any other amount as the amount to be paid by purchasers or singular successors in Exchequer.

"It appears that Royal Warrants corresponding in effect to that of Queen Anne were issued successively by the Sovereigns who followed, down to and including Queen Victoria, but that none was issued by King Edward VII, and that none has so far been issued by his present Majesty, King George V.

"Since the date of the Warrant of Queen Anne the practice in Exchequer conforming to it has been to exact from purchasers or singular successors under voluntary trans-

missions one-sixth of the valued rent in respect of an entry. This does not, however, apply without variation to the case of adjudgers who have been wont to be entered on different terms, the payment made by them in Exchequer having been primarily based on the amount adjudged for, with the option of paying one-sixth of the valued rent. So far as I am aware, this special rule for adjudgers rests on Exchequer practice, and not on express Royal Warrant.

"On a consideration of the sources of authority above referred to, I am of opinion that the Crown never became legally divested of the original right which, in common with subject-superiors, it had of refusing entry at discretion to singular successors under voluntary transmissions, and that the freedom of entry in Crown holdings at moderate charges which has prevailed for so long has not represented more than what Professor Menzies calls 'a liberal course' on the part of the Crown towards its vassals. I think that Craig states the position accurately when he says the King '*nunquam solet recusare.*' It is certain that the actual amount exacted in respect of entry in Crown holdings has always been regulated directly or indirectly by the royal will and pleasure, and that no statute has ever fixed it.

"On the assumption of the view which I have just stated, the defender advances a second line of argument. He argues that the question involved here is not to be solved by holding merely that the Crown prior to the Conveyancing Act of 1874 was entitled in law to refuse entry to singular successors under voluntary transmissions. There remains the question of the *year's rent* which the Crown now seeks to make the measure of the redemption money under the Act of 1914. The Crown's view, as I have already stated, is that on an application of the Act of 1914 to such a Crown holding as the present, *i.e.*, where casualties are under the tenure payable on death and untaxed, the highest casualty is to be taken as a year's rent. The defender concedes that a year's rent would be the measure if the feu were one held of a subject-superior, because (1) under the Acts already referred to the subject-superior had prior to 1874 been given the right to a year's rent as the condition of receiving a singular successor; and (2) the Act of 1874 had carried on this right with a variation of remedy adapted to the implied entry introduced by that Act. But, he says, the course of legislation from which the subject-superior derived his right to the year's rent, as that right stood at the passing of the Act of 1874, did not apply to Crown holdings. At the date of the passing of the 1874 Act, the Crown may or may not have been entitled to refuse entry to singular successors, but the Crown, he says, stood outside the whole course of legislation under which at that period a year's rent had become 'exigible by' subject-superiors in respect of the entry of singular successors.

"This aspect of the argument carries one back in the first place to the Act of 1469. It is from that Act, as I have already mentioned, that the right of the subject-superior to a composition of a year's rent in respect of the entry of a singular successor is historically derived. It dealt with apprisings. The 'overlord' was put under obligation to enter the appriser. But he was given right to exact payment from the appriser of 'a zeires maill as the land is set for the time,' which measure of payment has been carried forward and still rules—*Earl of Home* v. *Lord Belhaven and Stenton* (*cit.*).

"Now on the terms of this Act it is quite clear that it includes the case of apprisings of Crown holdings. The defender agrees as to this, subject to a material qualification. That qualification is that on his view the latter part of the Act which obliges the 'overlord' to receive the appriser and gives him right to a year's maill from the appriser does not, unlike the earlier part of the Act, apply to the Crown. The 'overlord' contemplated in it was, he says, only a subject-superior. This seems to me to be a very arbitrary way of dealing with the terms of the Act, and on a construction of them I can see no adequate foundation for it. The defender suggests that the word 'overlord' as used in old Scottish statutes had an application limited to subject-superiors, and that by way of contrast 'Our Soveraine Lord' was the style used for referring to the King. The word 'overlord' as used in the institutional writers is a synonym for superior. Further, it is not difficult to find old Scottish statutes in which the word 'overlord' is used in this general sense and as including the Sovereign as superior, as, for example, the Act 1400, cap. 19, which prescribed the just and lawful causes for recognition of feudal holdings.

"The defender, in the matter of this Act of 1469, points out that it did not specifically provide the appriser seeking entry with an effectual remedy, *ad factum præstandum*, against the superior of the lands apprised, and that where an immediate subject-superior, or other superiors above him and below the Crown, refused an entry, even on tender of the year's rent, the ultimate resort of the appriser, as explained by Craig in the passage I have referred to and by other institutional writers, was to the Sovereign, '*qui nunquam solet recusare*,' as Craig says. From this the defender argues that the Crown had, at the date of the Act of 1469, become legally obliged to enter all singular successors, whether by way of voluntary transmission or of real diligence. This appears to me to be a *non sequitur*. The sanction of a legal right is sometimes imperfect. The appriser under the Act of 1469 might have been given a direct remedy *ad factum præstandum* against the subject-superior of a holding which he had apprised. As it was he was not given such a right, and had to seek the best remedy he could, which in the last resort he found in the liberal course adopted towards his vassals by the King '*qui nunquam solet recusare*.' And the customary willingness of the King to grant entries does not imply that the appriser obtaining entry in accordance therewith was legally absolved from paying for it with a year's rent, although the King,

subsequent to the Privy Council ordinances mentioned in the Act of 1578, was in custom to accept as the price of entry the 'reasonabil expenses' of the party, modified according to the royal will and pleasure.

"There followed the Act of 1669, cap. 18, which was directed to the improved process of adjudication, and whereby it was enacted that the 'superiors of lands' should not be bound to enter adjudgers save on payment of the year's rent which had previously applied to the case of apprisers. There is nothing in the terms of this Act to exclude the application of it to the Crown as a 'superior' within its meaning entitled *vi statuti* to payment of a year's rent in the same way as subject-superiors as the price of an entry to be granted to an adjudger.

"I have already indicated how, following on the Acts of 1469 and 1669, which did not apply to singular successors under voluntary transmissions, such singular successors in practice obtained entry by circuity of procedure. This circuity of procedure was of no advantage to the superior, and thus it came about that superiors commonly accepted for entry singular successors under voluntary transmissions without requiring them to go through it.

"The Clans Act of 1747 (20 Geo. II, cap. 50), as I have already said, made an essential change as regards entry of singular successors in lands held of subject-superiors. Section 12 thereof gave, *inter alia*, a direct right to singular successors by way of voluntary transmission to obtain entry from a subject-superior. Section 13 enacted that the singular successor must pay to the superior, as the price of the entry demanded by him, such fees or casualties as the superior is by law entitled to receive. And the enactment has as I have said been construed as meaning that a singular successor demanding entry under it must pay, as the price of such entry, the amount of a 'year's maill' within the meaning of the Act of 1469—*Earl of Home* v. *Lord Belhaven and Stenton* (*cit.*). As at the date of the Clans Act the subject-superior was only 'by law entitled to receive' a year's rent for entering a singular successor by voluntary transmission in this sense that he could refuse to receive such a singular successor as such, and was only bound to receive the singular successor if he went through the procedure necessary to enable him to present himself for entry in the guise of an appriser or adjudger tendering a year's rent under the earlier statutes.

"If I should be right in the views which I have so far expressed, the Crown, prior to the Act of 1747, stood in the same position as did subject-superiors *quoad* the entry of singular successors. That is to say, neither the Crown nor the subject-superior was under direct legal obligation to enter singular successors under voluntary transmission, but both were under statutory obligation to enter apprisers or adjudgers in exchange for payment of a year's rent as the price of entry. But while the Act of 1747 made the radical change I have mentioned *quoad* the entry of singular successors under voluntary transmissions in the case of feus held of subject-superiors its enactments did not apply to holdings of the Crown. They are expressly limited to holdings of subject-superiors. From this fact the defender derives an argument to the effect that the said limitation of the enactments of the Act of 1747 goes to show that there was a pre-existing legal obligation on the Crown to receive singular successors under voluntary transmissions which made it superfluous and inappropriate to include Crown holdings within the scope of said enactments. This is a conjectural view as to the policy of the Act of 1747. I prefer the conjecture for the Crown, which is that the reason for the exclusion of Crown holdings from the said enactments of the Act of 1747 probably was that the main object aimed at by the Act was to break up the military power of subject-superiors which had proved to be so inimical to the Crown and the peace of the realm.

"Passing from the Act of 1747 the argument moves on to the Conveyancing Act of 1874. That Act, as I have said, made in various respects a great inroad on previous feudal law and practice, and it did so in particular in the matter of entry with the superior. Charters or writs by progress were swept away as unnecessary to entry thereafter. There was introduced implied entry, which is *vi statuti* an effective entry although obtained without the intervention of the superior under a writ by progress granted by him. Infeftment, without deed of sasine and by way of due registration of a disposition or other equivalent title in the appropriate register of sasines, had been introduced by intervening statutes. Section 4 (2) of the Act of 1874 enacted as follows—'Every proprietor who is at the commencement of this Act or thereafter shall be duly infeft in the lands, shall be deemed and held to be, as at the date of the registration of such infeftment in the appropriate register of sasines, duly entered with the nearest superior whose estate of superiority in such lands would, according to the law existing prior to the commencement of this Act, have been not defeasible at the will of the proprietor so infeft, to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice, &c.'

"If the Act had stopped at this provision the value of estates of superiority would have been materially depreciated, inasmuch as the effect would have been to deprive them of the ingredient in their value consisting in the pre-existing right of superiors to levy payments in respect of entries asked from them and theretofore obtainable only under their writ. The Act of 1874, however, while aimed at economy in procedure in the matter of entry, is careful to preserve the value of superiority rights. Sub-sections 3 and 4 of section 4 I have already quoted.

"It will be observed, under the provisions of sub-section (4) of section 4, that while no lands after the commencement of the Act can fall into non-entry, a superior of lands which but for the Act would have fallen into non-entry is given a substituted remedy in the form of 'an action of declarator and

for payment of *any casualty exigible* at the date of such action.' Also that no implied entry by virtue of the Act is to be pleadable in defence to such action. The effect of a decree obtained in such an action is practically equivalent to the effect of a decree obtainable by a superior prior to the Act under a declarator of non-entry.

"I draw attention to the words 'any casualty exigible' used in sub-section (4), which are of importance in the present argument. In their application to the particular case of a singular successor a casualty as the price of entry was never 'exigible' by the superior in the sense of his being in a position to sue for it by direct action. The superior was entitled to have a vassal. When the fee fell vacant, then if no person either as heir or singular successor offered himself for entry to fill the fee, and tendered the amount fixed by law as the price of such entry, the superior's remedy was to resort to the indirect compulsitor of a declarator of non-entry. If the feu was a valuable one, that is to say, worth more than the burden of the superiority rights, the declarator of non-entry was an effectual compulsitor. The point here is that while the Act of 1874 speaks of a casualty 'exigible' by the superior, no superior could prior to the Act exact a casualty by a direct petitory action, but solely by the indirect method mentioned.

"Now if I am right in the views which I have expressed regarding the position of the Crown *quoad* the entry of singular successors, as it stood prior to the Act of 1874, the position was (1) that the Crown was not under legal obligation to give entry to a singular successor under a voluntary transmission, but (2) that under the Acts of 1469 and 1669 the Crown was under legal obligation to give entry to an appriser or adjudger who tendered a year's rent as the price of entry, and (3) that a singular successor by voluntary transmission in the case of a Crown holding was enabled, like a singular successor in the case of a feu held of a subject-superior prior to the Act of 1747, to force an entry in the guise of an appriser or adjudger, tendering a year's rent as the price of entry, although the Crown had in practice taken a more 'liberal course' towards its vassals by granting entry on easier terms.

"On this hypothesis I am of opinion that the words 'casualty exigible' used in sub-section (4) of section 4 of the Act of 1874, cover the case of a casualty of a year's rent 'exigible' by the Crown in respect of the entry of a singular successor under voluntary transmission, although the remedy of the Crown in order to exact such 'exigible' casualty was an indirect one. As regards the use of language in the statutes referred to, I may recall that the Act of 1747, dealing with the case of feus held of a subject-superior, speaks in section 13 of the casualties which the subject-superior was, prior to the date of that statute, 'entitled by law to receive,' while there is no doubt that the subject-superior was prior to the date of that Act 'entitled to receive' a casualty in respect of the entry of a singular successor under voluntary transmission only in this sense, that failing payment of it he could obtain a decree of declarator of non-entry. He could not directly sue for such a casualty. The words 'casualty exigible' in the Act of 1874 appear to me to be susceptible of a similar construction.

"I may sum up my views so far as being as follows—(1) That prior to the Act of 1874 the Crown had not come under legal obligation to grant entry to singular successors under voluntary transmission in Crown holdings; (2) that the Crown had prior to said Act been laid under legal obligation by the Acts of 1469 and 1669 to grant entry to apprisers or adjudgers, but that only on receiving from them the amount of the 'year's maill' prescribed by the Act of 1469; (3) that while the Crown was not by law entitled to 'exact' by direct process a casualty of a year's rent in the case of a singular successor under voluntary transmission, the Crown was entitled to exact it, if it chose to do so, by refusing entry to such a singular successor unless he tendered himself for entry in the guise of an appriser or adjudger, and so presenting himself offered to pay for his entry the amount of the 'year's maill' prescribed by the Act of 1469; and (4) that the casualty of a year's rent so indirectly exigible in respect of an entry of such a singular successor was a 'casualty exigible' by the Crown within the meaning of those words as used in the Act of 1874.

"The only actual decision referred to at the hearing which seems to bear with any directness on the rights of singular successors under voluntary transmission on the one hand, and of apprisers or adjudgers on the other hand, to obtain entry from the Crown is that of *Clelland* v. *Dempster*, 1685, M. 15,032. The report of the case is very brief, and is somewhat obscure as to the nature of the action, which involved a competition between a decree obtained by Dempster of Pitlever before the Sheriff of Fife and a decree obtained by Clelland before the Court of Session. Pitlever's decree was the prior in date. The earlier citation, however, was in Clelland's action, and he was preferred. One of Pitlever's pleas, which is the subject of the report, was that he had before the date of Clelland's citation presented a signature in Exchequer. The Lords repelled this plea 'in respect the signature was on a voluntary right and not in a course of diligence by apprising or adjudication, and that in voluntary rights it is arbitrary to His Majesty, as it is to other superiors, to receive or not receive a vassal; yea, he may compone and take money, and might retard the other's signature.'

"It does not appear from the brief report of the case whether the position of the Crown as enunciated in the judgment was a matter of controversy in the case. If it was the judgment would be all the more important. But in any case the judgment of the Court contains an unambiguous although brief enunciation of the legal position of the Crown towards singular successors under voluntary transmission applying for entry, as the matter was understood by the Court of Session in 1685. The 'liberal course' of the Crown towards its vassals had then been in exercise for more than a cen-

tury at least. The position of the Crown as so enunciated involved a distinction between applicants for entry in Crown holdings deriving right under voluntary transmissions and applicants for entry proceeding by way of diligence as aprisers or adjudgers, and it was laid down that in the former case it was 'arbitrary to His Majesty' to receive or not receive a vassal.

"If the contentions for the defender in the present case are sound it follows that the judges who decided *Clelland* v. *Dempster* in 1685 entirely misunderstood and wrongly enunciated the legal position of the Crown towards applicants for entry in Crown holdings under voluntary transmissions, inasmuch as the defender maintains that it was not 'arbitrary to His Majesty' to grant such entries, but that, on the contrary, the Crown had come under legal obligation to grant them when asked.

"Apart from the case of *Clelland* v. *Dempster* the argument for the Crown in the present case drew attention to several cases where the position of the Crown towards the entry of singular successors has been touched on by judicial dicta.

"There is, in the first place, the well-known case of *Stirling* v. *Ewart*, 1842, 4 D. 684. It related to the entry of an heir-substitute under a deed of entail of lands held of a subject-superior, the question being whether he was bound to pay a composition of a year's rent as a singular successor or to pay only relief duty as an heir. It was held by a majority of the Whole Court that in the circumstances of the case relief duty only was payable. The decision is not here in point. The case is, however, interesting in respect of some observations made from the Bench bearing on the superiority rights of the Crown. The Lord Justice-Clerk (Hope) said in his judgment—'Neither has notice been taken of the important practice of the prime superior of the whole land in the country, and attention has not been paid to the alarming claims which could open to the Crown against the subjects. On the argument of the superior the Crown would have a claim for a year's rent in every case in which the heir asking for an entry had no other right than that of heir of provision whether in fee-simple or tailzied destination.' The learned Judge went on at some length to refer to the practice of the Crown, the point of which reference is to show that 'one composition, and one composition only, has hitherto enabled the Crown vassals, on obtaining right to their lands, to name any heirs of provision or tailzie they chose.' It will be observed that Lord Justice-Clerk Hope speaks of the superior's argument in the case as calculated to open up a claim by the Crown 'for a year's rent' in corresponding cases relating to entry of heirs of tailzie in Crown holdings. In the same case Lord Medwyn, after referring to the Act of 1469 and the practice following on it, said—'Superiors, it may be presumed, were generally satisfied with obtaining a year's rent for the transference, and this came to be fixed as the price for foregoing their right to refuse an entry which might thus have been forced on them circuitously, more especially after the example set by the Sovereign, for the Act 1578, cap. 66, mentions that by several Acts of the Privy Council purchasers were secure of being received as vassals by the Crown upon their reasonable expenses, *i.e.*, on a composition to be paid to the Treasury, which practice fixed at a reasonable rate, one-sixth of the valued rent. The favourable manner in which the Sovereign has always treated vassals as to their entry makes the circumstance that the Crown makes no such claim as the superior here does, which your Lordship says is the case, of less weight than it might otherwise have. A subject-superior is entitled to and exacts a year's rent from a purchaser although the Crown only claims a small portion of the valued rent. That, however, will not affect an ordinary superior's right.'

"In the case of *The Advocate-General* v. *Swinton*, 1854, 17 D. 21, the question was whether the Crown as superior was entitled to composition from an institute of entail. According to the report the composition which the Crown claimed was a year's rent, and it was held not due in respect of a composition of a year's rent having been paid by the entailer's heir, who had entered as a singular successor. The merits of the decision are not here in question. I was informed by counsel for the defender that the report of the case is wrong in speaking of a year's rent having been claimed by the Crown, and that the claim, at least as ultimately insisted in, was for a composition of one-sixth of the valued rent, and I understood counsel for the Crown to acquiesce in this correction. The Session papers in the case are not available. It is noticeable, however, that the judges who decided the case, in referring to the Crown's claim, speak of a year's rent as if it formed the legal measure of composition in the case of the Crown as in the case of subject-superiors. Lord Deas, as was pointed out by the defender's counsel, speaks of 'a composition of a year's rent (or whatever sum the Crown is in the practice of exacting in name of a year's rent),' thus showing that he had the Crown's practice present to his mind. But the words quoted rather point to his conception of the matter being that it was only a voluntary course on the part of the Crown to accept a modified composition in lieu of a year's rent.

"In the case of *Lord Advocate* v. *Moray*, 1894, 21 R. 553, 31 S.L.R. 432, the question was whether an heir of entail was liable in composition or only in relief, the latter alternative being held the right one in the circumstances. Lord Kinnear, who delivered the judgment of the Court, speaks, on page 559 of the report, of the Crown as 'claiming a year's rent as composition.' On page 561, referring to the fact that although the institute under the entail had been legally liable for composition, relief only had been accepted from him in respect of his entry (an implied entry under the 1874 Act), Lord Kinnear, after observing that if there had been a charter of confirmation in favour of the institute in accordance with former feudal practice there was

nothing to suggest that it would have contained any exceptional condition or reservation except the fact that the payment demanded for entry was less than the superior was entitled to demand, added—'But that might be accounted for in various ways. He knew that the extreme rights of the Crown were not always enforced on the completion of Crown titles, and a vassal might be admitted for relief who was liable for composition either because the Crown chose to waive its right or because the Crown officers were mistaken as to the extent of their claim.' The summons in the case concluded for £5000 in name of 'a casualty of composition on the untaxed entry of a singular successor,' but I was given to understand by counsel that the claim of the Crown, as it came to be ultimately insisted in, was for only one-sixth of the valued rent in name of composition, in accordance with the Crown practice. I do not think that fact, however, displaces the point sought here to be made by counsel for the Crown on Lord Kinnear's observations so far as they go, which is that they recognise that the Crown practice in granting entries has not always involved an enforcement of the Crown's extreme legal rights, and that Lord Kinnear must be presumed to have been speaking with particular reference to entries granted by the Crown to singular successors, seeing that, as is here admitted, the practice of the Crown on the entry of heirs has uniformly been to exact the full amount of the relief duty.

"In the case of *Duke of Argyll* v. *Riddell*, 1912 S.C. 964, 49 S.L.R. 342, the question again was whether the appropriate casualty for the entry of an heir of entail was composition or relief, the former alternative being held the right one. The superior was a subject-superior. The question of the measure of the Crown's right to composition on the entry of a singular successor in a Crown holding was not involved. Lord Dunedin, however, in the course of his opinion observed—'It is quite within one's knowledge that superiors do not always insist on their extreme rights. The Crown, for instance, gives entries for less than could be demanded. The Crown in the case of Drummond Moray, mentioned by Lord Johnston, gave entry for less, and I know that subject-superiors have acted in the same way.'

"None of these four cases the dicta in which I have referred to involved the question raised here. I found the opinion which I have already expressed independently of the dicta which they contain. At the same time I think that counsel for the Crown were justified in saying that these dicta are more in consonance with the view which they here maintain than with that maintained by the defender. These dicta, on the part of very distinguished judges highly skilled in feudal law, seem to recognise that the Crown practice in the matter of entries to singular successors has been to exact less than the Crown's legal right; and further, several of these judges have spoken of the year's rent on the footing of it representing the Crown's legal right in the case of entry of singular successors.

"A further alternative question, however, is raised by the argument in this case. I have held that the Crown at the date of passing of the 1874 Act was, *quoad* the entry of singular successors under voluntary transmission, in a position similar to that in which a subject-superior was prior to the Act of 1747—that is to say, was not bound to enter a singular successor under a voluntary transmission presenting himself for entry as such. It may be, however, that I am wrong in so holding, and that the Crown, by its practice originating in the Privy Council ordinances referred to in the Act of 1578, had lost its original privilege, and that, contrary to the judicial view expressed in *Clelland* v. *Dempster*, the entry of a singular successor under voluntary transmission in a Crown holding had ceased to be 'arbitrary' on the part of the Crown, and had become a matter of legal right on the part of such singular successor. On the other hand it may be that I am right in holding, in accordance with the views which I have expressed, that the Acts of 1469 and 1669 applied to Crown holdings as well as to holdings of subject-superiors both as obliging the Crown to give entry to apprisers or adjudgers and as entitling the Crown, like subject-superiors, to payment of a year's rent as the price of such entry. Assuming this position of matters, the question is how it is to be applied in measuring the redemption money under the Act of 1914.

"The present case is, as I have said, one falling under section 5 (1) (a) of the Act of 1914—that is to say, a case 'where casualties are exigible on the death of the vassal.' In such a case the measure of the redemption money under the Act depends on the 'highest casualty' possibly exigible on the next occasion. The Crown maintains that on the next occasion the person from whom the price of an entry becomes 'exigible' may be an adjudger, entered under an implied entry, and that, on the hypothesis stated, the year's rent exigible from such an adjudger would be the highest casualty in the sense of the Act of 1914. This contention appears to me, on the hypothesis stated, to be sound. It does not seem to me to be an adequate answer to it to point out, as the defender does, that an adjudger, for his security, was by statute made entitled to an immediate entry, although the fee was still filled by his debtor, the last-entered vassal. An adjudger might demand immediate entry or not as he chose. Ordinarily he demanded entry for his security. It still remains, however, that in a case such as this the person liable (indirectly) for the price of entry on the next occasion might be an adjudger bound to pay, on the hypothesis stated, a year's rent.

"Following the views which I have expressed, I shall make findings in accordance therewith and continue the cause."

The defender reclaimed, and argued—The superior's right to refuse entry, originally absolute at least in theory, was modified as traffic in land increased. In the case of the

Crown the modification was conditioned by the Crown's unique position as ultimate feudal superior who, failing all other, could give entry, and if the Crown had refused an intolerable deadlock would have arisen. The King was not superior by right of conquest, but a constitutional monarch whose title depended on agreement and to whom the lands were resigned. Originally he could refuse entry—Bell's Lectures, 3rd ed., p. 683—but to obviate the deadlock referred to which would necessarily have arisen when subject-superiors could not be compelled to give entry, the King as ultimate superior had to surrender the right to refuse. His duty as constitutional head of the feudal system came to concur with his subjects' interests. His sole personal interest was to see that he received reimbursement for the reasonable expenses of the entry which he gave. His surrender of the right to refuse was not voluntary but compulsory. The Act 1457, c. 71, was either declaratory of the practice of the Crown or was passed because a particular monarch had been recalcitrant. Alienations in feu-farm were allowed by the Acts 1503, c. 90 and c. 91; in the case of an alienation under the latter the King could have refused entry only if there was reasonable cause, *e.g.*, if the lands were in recognition, when the King's charter would have excluded his claim for recognition, but he could not act capriciously or force the vassal to pay any sum he asked—Dallas, Styles, pp. 83-84. The King's duty not to refuse entry was impressed upon him by ordinances of the Privy Council and expressly enacted as a duty, the only charge being the reasonable expenses—Act 1578, c. 66. The later part of that Act showed that that duty was not confined to kirk lands but applied to all lands; further, it applied to both manners of holding, for confirmation applied to both and was so used in the Act—Stair, Inst. ii, 3, 28; Ersk. Inst. ii, 7, 9 and 14. According to Stair the King received vassals as matter of course—Inst. iv, 26, 8; charters of confirmation or resignation were granted *periculo petentium*—Inst. iv, 35, 13; and when the King acquired the *dominium utile*, *e.g.*, as *ultimus hæres*, as he could not hold of a superior, he had to present a donatar—Dirleton's Doubts, 3rd ed., p. 141—who entered without payment of a casualty—*The Laird of Blair* v. *Lord Montgomery*, 1680, M. 15,045; *Duke of Gordon* v. *Commissioners for Managing the Forfeited Estates Annexed to the Crown*, 1771, M. 15,050, at p. 15,052; the King acted from duty, not benignantly, in refusing no one—a settled practice declared by the ordinances of the Privy Council, which were approved by the Act of 1578, which applied generally—Inst. ii, 3, 43. The Crown surrendered the right to refuse entry for reasons of public utility and received vassals on payment of reasonable expenses—Ersk. Inst. ii, 7, 6. Willing acceptance of vassals was regarded as being a settled practice obligatory on the Crown—Craig, Jus Feudale, iii, 2, 20, p. 458; Mackenzie, Observations, p. 188, Inst., 8th ed., ii, 12, 3-5, pp. 155 and 157. The King acted from duty and not as an act of grace—Bankton, Inst. ii, 4, 32, and iii, 2, 53, where the reason given was that all the lieges were the King's subjects which could not apply to other than the King; the fee paid was the reasonable expenses—ii, 3, 48. Bankton's reason was repeated in *Hay* v. *Baillies of Aberdeen*, 1634, M. 15,031, and by Dirleton, who took the same view—Doubts, p. 22. Modern writers regarded the king's obligation to accept a vassal as a commonplace requiring no comment—Menzies, 1900 ed., p. 584; Duff, Feudal Conveyancing, p. 254; Bell's Lectures, 3rd ed., p. 758; Ross's Lectures, ii, p. 300; Begg's Conveyancing Code, p. 153. Accordingly it was clear that in 1578 the settled feudal custom was that the King should not refuse an entry but must enter vassals upon payment of the reasonable expenses of the entry. But the feudal custom was the law; further, it had been embodied in the written law by the Act of 1578. The reasonable expenses necessarily varied and were ultimately fixed at a proportion of the valued rent; practice varied as to the proportion to be taken—Royal Warrant of 18th August 1709. The hereditary revenues were later surrendered in exchange for the Civil List—Anson on the Constitution, part ii, p. 165. When the Court of Exchequer was established in Scotland the Crown's rights were carefully investigated—*Stirling* v. *Ewart*, 1842, 4 D. 684, *per* Lord Justice-Clerk Hope at p. 723—and the Royal Warrant of 18th August 1709 was issued fixing the proportion at one-sixth. Similar Royal Warrants were issued by the succeeding sovereigns except Edward VII and George V. They were not evidence of the Crown's willingness to accept less than its legal due, but were meant to fix for the life of the issuing monarch the amount which would be accepted as reasonable expenses. Till the abolition of the Court of Exchequer and the transference of the administration of Crown lands to the Woods and Forests Department by the Hereditary Land Revenue Act 1832 (2 and 3 Will. IV, cap. 112), entry with the Crown was obtained by presenting a signature in Exchequer. Compositors then compounded with the presenter for the price, which was one-sixth of the valued rent—Clark and Scrope, Historical View of the Forms and Powers of the Court of Exchequer in Scotland, p. 187; Bell on the Forms of Deeds, 3rd ed., vol. i, p. 235; 6th Report of Commissioners on Courts of Justice in Scotland, 1819, p. 43. When signatures were abolished—Crown Charters (Scotland) Act 1847 (10 and 11 Vict. cap. 51), section 1—evidence of the valued rent had still to be produced to fix the charge for entry (sections 2, 6, 11, and 12), and the singular successor of a Crown vassal "prayed" for an entry (section 2, Schedule I), whereas entry was demandable from a subject-superior. Those provisions were repeated in the Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), section 64. The office of Presenter of Signatures was abolished and his functions were transferred to and were now exercised by the Sheriff of Chancery—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94). The one-sixth of the valued

rent had became insufficient, and the Act of 1847 authorised the charging of further fees (section 7), which were to be fixed by Act of Sederunt (section 28). That was the only reference to any payment other than one-sixth of the valued rent. Consequently from the earliest times the Crown had never received or exacted a year's rent, and both by feudal custom and statute and in the opinion of institutional writers its action was to be attributed to the legal surrender of the right to refuse entry not to benignity. Prior to 1578 modification of the subject-superior's right to refuse entry had begun. It arose out of the hardship to creditors who being singular successors could not attach the debtor's land and get entry. Justice demanded that the subject-superior's right to say who was to be his vassal should give way to creditors' claims. The whole series of Acts to that effect were an excrescence on the common law—*Stirling* v. *Ewart* (*cit.*), *per* Lord Fullerton at p. 706. Those Acts were unnecessary in the case of the Crown, and the composition of a year's rent came into existence solely in connection with those Acts; it was a statutory payment, not a common law true casualty, *i.e.*, incident of feudal tenure like relief. Further, as the King never refused when the debtor was a Crown vassal the procedure and payments differed in his case from the procedure and payments when the debtor held of a subject successor. That was so in the earliest statute, the Act of Alexander II, c. 24—Craigie, Conveyancing Statutes, p. 1; Scots Acts (Record ed.), vol. i, 735 (red ink); Regiam Majestatem (5th ed.), p. 337—which compelled subject-superiors to enter creditors and that without any payment. The authenticity of that statute was sufficiently vouched. Stair did not refer to it, but Brodie's and More's notes to Stair, Inst. iii, 2, 14, did. Erskine considered it the origin of apprisings, and stated that it was acted on—Inst. ii, 12, 2 and 3—which was confirmed in Kames' Historical Law Tracts (2nd ed.), 319, and App. No. 8, and the Register of the Great Seal, vol. ii, No. 375, p. 86. Bankton regarded it as a compulsitor on the subject-superior, the Crown giving entry as matter of course—Inst. iii, 2, 25. Its authenticity was further vouched by Dalrymple, Essay on Feudal Property, 1757, p. 121, and Bell's Lectures (3rd ed.), pp. 824-5. Prior to 1469, therefore, the Crown gave entry to creditors freely and without payment, while the baron was under a compulsitor to give entry without payment. The Act of 1469, c. 36, re-enacted the compulsitor to enter apprisers but gave the subject-superior the right to exact a year's rent as the payment therefor. Failing reception of the singular successor the overlord had to take the land himself and undergang the debts. That provision did not apply to the Crown. The old Scots Acts differing from modern Acts—*Somerville* v. *The Lord Advocate*, 1893, 20 R. 1050, *per* Lord Kyllachy at p. 1064, 30 S.L.R. 868—did not require to mention the King expressly to bind him, but in them the King was generally referred to expressly. An apprising might perhaps be directed against Crown lands, and the word "overlord" might include the Crown, but the King was generally distinguished from other superiors—Acts 1457, c. 71; 1474, c. 57; 1503, c. 90; 1503, c. 91. The Lord Ordinary was wrong in thinking that in the Act 1400, c. 19, "overlord" included the King; that Act applied to subject-superiors only, for it used overlord as equivalent to lord, and the word "lord" was never found used in any Act so as to include the King. The word "overlord" was indecisive. The Act of 1469 referred expressly to the King. But the concluding clauses (which referred to the "overlord" and were in question) could not apply to the King, for he could not take the lands to himself as he could not hold of a subject-superior, neither could he undergang the debt. Further, if the appriser was refused by superior after superior and ultimately came to the Crown, either the King would have been bound to take the lands and undergo the debt, which was impossible, or the appriser found his remedy in the practice of the Crown not to refuse an entry. The practice being as stated, the remedy enacted was not required in the case of the Crown, and the Act was never intended to apply to it. Further, the *onus* was upon the pursuer to show that the Act applied to the King, for all the writers were unanimous that the King never refused entry, and the Act of 1578 expressly laid him under obligation to give entry. If the Act of 1469 had applied to the Crown the Act of 1578 would have referred to it and not to the ordinances of the Privy Council. It was immaterial that the King upon that argument had to receive a vassal blindfold, because if the Act of 1469 applied to the Crown the King equally had to receive a vassal of whom he knew nothing. The object of the Act was not to provide compensation for the loss of the casualty by recognition when lands held in ward were apprised, for, if so, the loss to the Crown was infinitesimal compared with the compensation given. Recognition was of little value to the Crown, for it was only enforced where the vassal neglected to get his right confirmed—*Lord Halton* v. *Earl of Wemyss*, 1673, M. 6461; *Maitland* v. *Leslie*, 1669, M. 13,382 (Stair's report); *Cockburn* v. *Cockburn*, 1676, M. 13,389; Stair, Inst. ii, 11, 23. If the right was confirmed (and the Crown always received vassals) no recognition was incurred. Recognition to the Crown could only be incurred in rare cases, for there was no alienation unless the creditor was infeft and in possession—*Donatar of Ward* v. *Creditors of Bonhard*, 1739, M. 16,453—so that recognition could only arise where the vassal had possessed for forty years without confirmation. Consequently the Crown would have lost little by being compelled to receive apprisers in ward holdings. Further, the procedure in apprisings showed a marked difference between the King and the subject-superior, and while the compulsitor under the Act of 1469 was complete against the subject-superior there was no compulsitor on the Crown except by reason of the practice not to refuse an entry and its recognition under the Act of 1578. Apprisings were known before the Act of

1469, they originated in the Act of Alexander II, and the charter given by Kames showed their nature. The appriser used letters of four forms charging the superior to enter him; if the superior refused he went to the next higher superior, and if he refused to the next, and so on, using letters in each case until he came to the Crown, which never refused an entry. Letters of four forms were not only improper but unnecessary as against the Crown—Ersk. Inst. iii, 8, 79; Bell's Lectures (3rd ed.), p. 788; Craig, Jus Feudale, iii, 2, 20. Where the apprising was against a debtor holding of the King, the Crown never demanded the year's rent, and when the lands were held of a subject-superior the year's rent had to be tendered; the title to proceed was regarded as based on the Act of 1469, and the procedure was different from that followed when the lands were held off the Crown—Dallas, Styles, pp. 33, 40, 41; *cf.* also, in treating of adjudication, pp. 83, 214, 225; Hope's Minor Practicks (1st ed.), pp. 60-67, 108-9 (3rd ed.), xi, 12, 13, 14, 15, p. 347; *King* v. *Hunter*, 1742, M. 5743—as to the nature of the allowance in the case of subject-superiors—Stair, Inst. iii, 2, 28. In the case of the Crown the composition depended not on the year's rent but on the amount of the debt—Ersk., Inst. ii, 12, 24. The observations of these writers and the records of practice therefore showed that the Crown was outwith the Act of 1469 altogether in so far as being compelled thereby to enter apprisers on payment of a year's rent. Had the Act of 1469 applied to the Crown, it could not have exacted the year's rent, for the appriser would have been entitled to claim a gratuitous entry with the Crown in fulfilment of its common law duty recognised in the Act of 1578. That *contemporaria expositio* was of the very highest importance—*Seafield* v. *MacBrayne*, 1906, 8 F. 947, 43 S.L.R. 705—more especially where, as here, the Crown could not point to any instance in which a year's rent had been exacted. Apprisings were superseded by adjudications. Adjudications originated in custom and in the courts, and were later regulated and extended by statute. They were originally only in implement and *contra hæreditatem jacentem*; adjudications for debt were introduced by statute—Graham Stewart, Diligence, pp. 626-627. Adjudication in implement was originally a form of apprising—Craig, iii, 2, 23. The creditor sued for damages, and having obtained decree brought an apprising—Brodie, Note to Stair, p. 460. The earliest example of an adjudication in implement was in 1611—Stair, iii, 2, 53; *Stirling* v. *Ewart*, 1842, 4 D. 684, *per* Lord Cunninghame at p. 690. Up to 1621 adjudications for debt were unnecessary; comprisings were still in use and were regulated by the Act 1621, cap. 6. Adjudications against a deceased debtor were regulated by the Act 1621, c. 7, which Act was silent as to the year's rent. The Act of 1469 was extended by custom to adjudications in implement, and *contra hæreditatem jacentem* except as to the year's rent, which the courts refused to allow, as there was no statutory warrant for it, although the occasion for giving it was in substance the same as under the Act of 1469—*Grier* v. *Closburn*, 1637, M. 15,042, 1 B. Supp. 365; Stair, Inst. ii, 4, 32, iii, 2, 45, and 49. Both Stair and Bankton, iii, 3, 52, considered the year's rent on adjudications as a pure creation of statute to remedy the subject-superior's grievance caused by the decision in *Closburn's* case. The Act of 1669, c. 19, provided the remedy. It applied the "constant practick" of the realm in comprisings to adjudications, viz., in the case of a subject-superior to make payment of a year's rent the condition of every entry. There was no such practick in the case of the Crown, and consequently the Act of 1669 gave the Crown no warrant to demand a year's rent, the constant practick of the Crown was to charge the reasonable expenses. The Act of 1669 was the only statute dealing with adjudications in implement against a living debtor. Erskine, Inst. ii, 12, 50-52, was generally to the same effect as Stair, but he added that all kinds of adjudications were placed on the same footing and were assimilated to comprisings, and an adjudger taking entry was bound to pay the year's rent upon entry, not on the vassal's death as was suggested by the pursuer—section 52. The Act of 1672, c. 19, introduced adjudications for debt and superseded comprisings in all their forms; it did not apply to the Crown because it could not be charged. Erskine regarded that form of adjudication as almost identical with apprisings—ii, 12, 41. The Act 1681, c. 17, introducing judicial sales of bankrupts' lands again distinguished between the Crown and the subject-superior; in the former case a signature passed in Exchequer, and a year's rent was not exacted; in the latter the buyer had to pay a year's rent—Bell's Lectures (3rd ed.), vol. ii, p, 825. Judicial sales were further regulated by the Act 1690, c. 20. The difference between the Crown and the subject-superior was also exemplified in the matter of ranking. Ranking was first regulated by the Act 1661, c. 62, and was made to depend on the obtaining of the first real right or the first "exact diligence" for obtaining the same. Exact diligence was complete in the case of the Crown by presenting a signature in Exchequer; in the case of a subject-superior by a charge—Ersk. Inst. ii, 12, 31—and a year's rent was paid upon the charge but not upon presenting the signature. This matter of exact diligence was found in the Act 1747 (20 Geo. II, c. 50), section 12; in the Act of 1814 (54 Geo. III, c. 137), section 11; the Conveyancing Act 1847 (10 and 11 Vict., cap. 48), section 6; Judicial Procedure, &c. (Scotland) Act (19 and 20 Vict., cap. 91), section 6; and the Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict., cap. 101), section 97. In effect all that was required was the presentation of the signature or the executed charge, and that was regarded as giving a a real right in a question with co-creditors—Stair, Inst. iii, 2, 24. Purchasers next used the Acts designed for the benefit of creditors to enable them to force an entry by means of a fictitious debt followed by a comprising or adjudication. That was at

first regarded as a fraud — Craig, Jus Feudale, iii, 1, 13—but the device became generally recognised in the case of subject-superiors, who frequently, recognising that their hands could be forced, received purchasers without compelling them to go through the fiction, but the device was never required in the case of the Crown, for it never refused entry—Hope, Minor Practicks, p. 68 (1st ed.); Ross, Lectures, ii, pp. 267, 300; Bell's Lectures (3rd ed.), vol. i, p. 571; Erskine, ii, 7, 6. In those circumstances the Act of 1747 was passed, which by sections 12 and 13 compelled the subject-superior to enter a purchaser directly on payment of a year's rent, entry being by resignation. That Act certainly did not apply to the Crown, yet if it was necessary to enact that a purchaser must pay a year's rent on entering with a subject-superior, and if the Crown and the subject-superior were on exactly the same footing, it would have been equally necessary to enact that a purchaser entering with the Crown should be bound to pay a year's rent if the pursuer was right. The pursuer's argument that the Crown at that date had fully recognised that a purchaser could force an entry upon payment of a year's rent, and that consequently there was no need to apply the Act to the Crown, was unsound, for the whole process of fictional debts had by that time so developed that the subject-superior equally was aware that the purchaser could force an entry—Ross, Lectures, vol. ii, p. 300. Stair, Inst. ii, 4, 6, regarded the right of the subject-superior to refuse to receive a purchaser as dead at his time. Erskine's Inst. ii, 7, 6, regarded the Act as abolishing the need to proceed indirectly. That Act did not refer to the year's rent but merely to the fees or casualties which the superior might be entitled by law to receive. The object of that phraseology was probably to cover the normal case where the year's rent was payable, and rarer cases where the casualties were taxed —Bell's Lectures, 3rd ed., vol. i, p. 623. Further, the position of the purchaser under the Act of 1747 had been held to be exactly the same as the position of adjudgers under the earlier Acts—*Duke of Argyll* v. *Riddell*, 1912 S.C. 694, *per* Lord Kinnear at p. 721, 49 S.L.R. 342; *Shirley* v. *Ewart*, 1842, 4 D. 684, *per* Lord Fullerton at p. 708; *Hill* v. *The Merchant Company*, January 17, 1815, F.C., *per* Lord Balgray at p. 143, 2 Ross, L.C. 320. If so, as the Act of 1747 did not apply as between the purchaser and the Crown the Acts from 1469 to 1747 did not apply as between creditors and the Crown, and those Acts alone authorised the exaction of a year's rent. The Act of 1747 merely carried on the right to the year's rent formerly existing in favour of an appriser or adjudger and applied it subject to the limits of its former application to the purchaser—*Earl of Home* v. *Lord Belhaven and Stenton*, 1900, 2 F. 1218, 37 S.L.R. 990, 1903, 5 F. (H.L.) 10, *per* Lord Robertson at p. 19, 40 S.L.R. 607. The singular successor next became entitled to demand entry by confirmation upon payment of a year's rent—Transference of Lands (Scotland) Act 1847 (10 and 11 Vict. cap. 48), sections 6 and 13—which Act applied only to subject-superiors. That was repeated in the Titles to Land (Consolidation) Act 1868, section 97. Finally by the Conveyancing Act 1874 writs of progress were abolished and implied entry was introduced subject to the proviso that the superior's rights were not to be thereby prejudiced. The pursuer's claim was under the Feudal Casualties (Scotland) Act 1914 (4 and 5 Geo. V, cap. 48). That Act applied to Crown holdings, for it was to be construed with the Act of 1874—section 3—and in that Act superior included the Crown — section 3. The Act of 1914 only applied to casualties in existence when it was passed, and entitled the Crown to claim redemption money on the basis of the highest casualty exigible according to the pre-existing law. These casualties were those regulated by the Act of 1874, which again merely preserved the right to casualties which existed prior to its date. But in 1874 the Crown could not claim any casualty of one year's rent at common law, for it was certain that the year's rent rested on statute alone. Further, the Crown could not claim under the Act of 1469 and the other Acts regulating apprisings for apprisings had long been extinct before 1874. Further, the Crown could not claim as for a singular successor entering by confirmation or resignation or implied entry, for the statutory provisions relative thereto did not apply to the Crown. Consequently the Crown's claim must be as for the casualty paid by adjudgers under the Acts of 1669 and 1672. But those Acts did not apply to the Crown, or if they did then the Act of 1914 did not apply to those casualties. For an adjudger's casualty differed from a singular successor's casualty; an adjudger had to pay a year's rent immediately on entry as above explained; he could not take advantage of the alternative manner of holding and postpone payment of the casualty until the vassal's death; he paid upon infeftment, and if the debtor-vassal died he would have to pay again—Graham Stewart on Diligence, p. 626; Transference of Lands Act 1847, section 19; Titles to Land Act 1868, section 62, repealed, and re-enacted in the Conveyancing Act 1874, section 62. Hence while the adjudger was assimilated to a disponee, unlike the disponee he was bound to pay a casualty though the lands were not in non-entry. Consequently the adjudger's casualty was not one payable on the vassal's death. But the Act of 1914 provided for redemption of casualties upon certain "terms," which failing agreement were set out in that Act, section 4 and section 5. None of the cases figured under section 5 applied to adjudger's casualties. Section 5 (1) (*a*) founded upon by the Crown was not applicable, for it only applied to casualties exigible on the vassal's death. Further, casualties under section 5 (1) (*a*) were to be calculated upon expectancy of life—section 6—and that could not apply to adjudgers. Section 5 (1) (*e*) dealt with cases where by agreement the casualties were payable on each sale or transfer of the lands, and none of the other cases in section 5 (1) applied. In fact the Act of 1914 did

not apply to adjudgers or creditors' casualties at all but to the ordinary true vassal's casualties. It applied to the casualties contemplated in the Act of 1874, section 4 (3). In burgage holding, which was always off the Crown, there were no casualties. The attempt to claim a year's rent there failed — *Hay* v. *Bailies of Aberdeen* (*cit.*) There was no decision in point; the matter was touched upon only in judicial dicta. *Cleland* v. *Dempster*, 1685, M. 15,032, 2 Brown's Sup. 71, merely decided that the presentation of a signature in Exchequer upon a voluntary right as opposed to a judicial transference had no effect as a diligence. It did not decide that the Crown was entitled to refuse a vassal, nor did it raise any question of the terms for entry. The argument negatived probably was that a signature upon a voluntary right should be assimilated to a signature upon an adjudication. *Dundas* v. *Officers of State*, 1779, M. 15,103, was very strong evidence of the custom as to the Crown, for Crown counsel repudiated the proposition that the Crown was entitled to a year's rent as composition. *Stirling* v. *Ewart* (*cit.*), 3 Bell's Ap. 128, was not in point. The question was the enfranchisement of a deed of entail, and there was no question of a Crown holding. Lord Ivory (concurred in by Lord Cockburn and Lord Murray), at p. 697, dealt only with the general feudal law, so did Lord Fullerton at p. 706, and Lord Medwyn at pp. 725 and 731. Lord Justice-Clerk Hope at p. 723 showed that the Crown's rights were carefully scrutinised in 1707; his reference to a year's rent was simply a reference to the casualty whatever it might be, and did not involve that the casualty was a year's rent. In the House of Lords, *per* Lord Cottenham at p. 250, the general law was also examined. The *Advocate-General* v. *Swinton*, 1854, 17 D. 21, was badly reported or argued and did not decide the present question. The report bore that a composition of a year's rent was paid to the Crown. The judgment at p. 25 showed that the sum consigned and paid could not have been the year's rent of the estate in question. The memorial in the case showed that the sum consigned was one-sixth of the valued rent. If so the decision was in favour of the reclaimers. *Lord Advocate* v. *Moray*, 1894, 21 R. 553, *per* Lord Kinnear at p. 559, 31 S.L.R. 432, merely decided whether composition or relief was to be paid, no question as to the amount of the composition was raised, and the dicta of Lord Kinnear were not to the effect that the Crown was entitled to one year's rent. In any event they were *obiter*, and read in the sense maintained by the respondent were inconsistent with Lord Kinnear's opinion in *Earl of Home* v. *Lord Belhaven and Stenton* (*cit.*). *Duke of Argyll* v. *Riddell*, 1912 S.C. 694, *per* Lord President Dunedin at p. 744, 49 S.L.R. 342, was not a decision upon the amount of the composition payable to the Crown, and there was no citation of the practice as to the Crown. *Earl of Home* v. *Lord Belhaven and Stenton* (*cit.*) did not raise the present question, and the whole opinion of Lord Robertson at p. 19 proceeded upon a reference to the Act of 1747, which did not apply to the Crown. *George Heriot's Trust* v. *Paton's Trustees*, 1912 S.C. 1123, 49 S.L.R. 852, was not in point. The Crown from earliest times as in execution of its duty gave entry for reasonable expenses, which were afterwards fixed at one-sixth of the valued rent, which sum the defender was willing to pay. But whether that was or was not the case, the Crown was not bound by any of the Acts enabling creditors or singular successors to demand an entry on payment of a year's rent. That was established by the *contemporaria expositio*, backed by the opinions of writers, which when the present claim was being made for the first time laid a heavy *onus* on the pursuer which had not been discharged. In any event the highest casualty in the present case falling under the Act of 1914 was relief. The Lord Ordinary's interlocutor should be recalled and the defenders assoilzied. The following were also referred to:—Stair, Inst. ii, 4, 5, and 36, iv, 26, 8, and iv, 35, 13; *Duke of Athole* v. *H. M. Advocate*, 1760, M. 4766; *Countess of Sutherland* v. *Creditors of Skelbo*, 1771, M. Sup. and Vas., Appx. No. 1; Kames, Historical Law Tracts (2nd ed.), Appx. No. ix, p. 461; *Farquharson* v. *Farquharson*, 1748, Elchies' Sup. and Vas., No. 10, and Elchies' Notes, p. 438.

Argued for the pursuer (respondent)—The Lord Ordinary was right. Prior to 1469 creditors of vassals could not attach their debtors' lands. No argument could be founded upon the Act of Alexander II, cap. 24. Its authenticity was doubtful. It appeared only in Regiam Majestatem (5th ed.), p. 337, and in the Record edition of the Scots Acts was inserted in an appendix of doubtful Acts—Scots Acts (Record ed.), vol. i, pp 34 and 735, red ink. Regiam Majestatem was a doubtful authority—Stair, Inst. i, 1, 16 (More's ed., at p. 13). Ersk. Inst. ii, 12, 2, regarded it more favourably, but the charter in Kames' Historical Law Tracts (2nd ed.), p. 443, Appx. No. 6, quoted by Erskine, did not show that that Act had been acted upon, for that document was of the nature of an adjudication in security and was redeemable, whereas the Act of Alexander II dealt with irredeemable infeftments. Further, the sasine in Kames' Historical Law Tracts (2nd ed.), p. 427, Appx. No. 1, was inconsistent with the existence of that Act and of any practice upon it. Judicial opinion attributed the first step towards forcing an entry only to the Act of 1469—*Hill* v. *Merchant Company*, January 17, 1815, F.C., *per* Lord Balgray at p. 142; *Heriot's Trust* v. *Paton's Trustees* (*cit.*), *per* Lord Dunedin at pp. 1129 and 1135 of 1912 S.C. Further, the Act itself did not appear to belong to the period to which it was assigned. Further, if it was genuine the Act of 1469 would have been a retrogression, for the earlier Act did not authorise the taking of a year's rent. Also, it must have been long in desuetude, for if not the Act of 1469 would have been unnecessary. Stair, Inst. iii, 2, 13, and 14, considered that prior to 1469 there never existed anything of the nature of apprisings or adjudications, and that creditors were first allowed to attach

their debtor's lands by the Act of 1469. In 1469 that inability of the creditor was a great grievance, and that Act was passed to afford relief. At that date wardholding was the predominant tenure. All the land except church land and land in burghs was held in ward, and *in dubio* ward was assumed to be the nature of the tenure—Stair, Inst. ii, 3, 31. Further, prior to 1469 there was very little land held of the Crown which was not held in ward. The origin of feu-farm was not clear. Feus appeared to have been original grants to encourage agriculture of the nature of leases and not permanent—Stair, Inst. ii, 3, 34. The earliest feus were of small portions of land for cultivation. After its first introduction feu-farm disappeared, and was again revived by the Act 1457, cap. 71—Ersk. Inst., ii, 4, 5—which statute revealed a cautious reintroduction of feu-farm limited to Crown vassals and only for a competent avail. The King ratified the grant to prevent the lands falling into ward, which gave security of tenure to the sub-vassal. Hence feu-farm was not common, and that view was taken in *Heriot's Trust* v. *Paton's Trustees, per* Lord President Dunedin. Apart from that exception the only other lands held in feu-farm at that time were kirk lands—Stair, Inst. ii, 3, 37, and 39. Wardholding was essentially a military tenure. It predominated, for it was for long necessary for the safety of the realm. Hence sprang its two main features—the casualties of recognition and ward. Recognition, whereby the feu returned to the superior, occurred in wardholdings where the vassal alienated redeemably or irredeemably the greater part of the fee. Ward occurred where the vassal was incapable of military service, *e.g.*, where he was in minority, and the feu then remained in the hands of the superior or his donatar. Recognition was incurred though the infeftment following the alienation was an *a me* holding, for the vassal had done all he could to alienate the land—Stair, Inst. ii, 11, 10; *Carnegy* v. *Cranburn*, 1663, M. 10,375 and 13,380. Recognition was also incurred by granting security rights if these covered more than half the lands. The result was that the lands went back to the superior. Both the vassal and the creditor lost them. Recognition was fundamental in wardholding, for by the alienation the vassal rendered himself less able to give the military service. It was of great value to the superior, and was enforced by the Crown through the donatar long after 1469—*Carnegy's* case—and it was very burdensome to creditors. Where the land fell into ward the superior got the rents of the lands during the vassal's minority subject to an obligation to support the vassal if he was not otherwise supported. In the case of the Crown these rents were given to a donatar—Ersk., ii, 5, 5-9; *Donatar of Ward* v. *Creditors of Bonhard* (*cit.*). Large revenues were obtained by the Crown from those sources long after the Act of 1469. Apprisings of land held ward may have been granted by the Courts prior to 1469 without legal authority, but the instances must have been very few, for recognition was incurred and the vassal and the creditor both lost the lands. Further, the granting of securities over land was subject to the fact that the moment the securities exceeded one-half of the land recognition was incurred. The result was securities could not be safely granted, and security of tenure was impossible. The Act 1469, cap. 36, was passed to provide a remedy. It expressly so stated. Further, the hardship was not limited to lands held of subject-superiors, but it applied also to Crown holdings. The result of the Act was to give the apprising creditor a right to the lands. That was a large inroad on the superior's right to ward and recognition, for in the case of an adjudication the ward was burdened with the sum for which the lands were adjudged—Ersk. Inst. ii, 5, 7. The year's rent was the compensation given therefor. In such circumstances that was the natural presumption, and all the more so when legislation was in the hands of the very classes from which the superiors affected were drawn. No good reason could be stated for confining that compensation to the subject-superior and not extending it to the Crown which regularly exacted its casualties in wardholdings. Further, those casualties were required to provide revenue for public purposes. Further, if the Act did not apply to Crown holdings, the remedy provided would have been very useless for the bulk of the land was held by vassals of the Crown. The word "overlord" must have included the King throughout the whole Act, for if not there was nothing to prevent the lands, when a creditor was infeft, falling into recognition at the instance of the King. That could only be avoided by having the King's consent to the alienation. The Act of 1469 must have entitled the creditor to the King's consent, otherwise the remedy would have been useless. The same idea of the King's consent was found in the Act 1457, c. 71. The defender's argument that the King was bound to receive vassals apart from the Act of 1469 was not well founded, for as wardholding existed for the safety of the realm it could not be said that the King was bound to receive a vassal of whom he knew nothing. There was nothing absurd in the King taking the lands himself; that was most natural seeing that the tenure was military, and much more easily understood than that the King should accept anyone. Nor was there any anomaly in underganging the debts. The Crown did so to this day in successions as *ultimus hæres*. In practice the King would simply pass on the lands to the vassal he approved of, who would undergang the debts. The remedy was perfectly complete. Letters of four forms were used against the subject-superior. They may not have been competent against the King, but in any event the King as a constitutional monarch would do what the law of the land stated was his duty. Certainly Crown lands could be apprised—extracts were given from the Register of the Great Seal which applied to Crown lands—Act 1621, c. 8. The word overlord certainly was used in the Act 1400, c. 19, to include the King. "Sovereign lord" was used in the Act 1457, c. 71, to make clear what was meant. In the Act

of 1474, c. 57, "overlord" did not apply to the King, because he could not hold of anyone, and the King was expressly mentioned to show that he was included under the Act though not under the opening clause. The Act 1503, c. 90, was personal to the King and for his life only. The Act 1503, c. 91, made similar provisions as to subject-superiors, but those provisions might just as well have been in two clauses in one Act. The Act 1547, c. 5, used overlord to include the Crown. If any deduction could be drawn from the phraseology it was that overlord included all superiors, and the King was only mentioned when overlord had already been used in the Act in a narrower sense. The King did not in these old Acts require to be expressly mentioned to be bound—*Somerville* v. *Lord Advocate* (*cit.*); *Magistrates of Edinburgh* v. *Lord Advocate*, 1912 S.C. 1085, 49 S.L.R. 873; *Advocate-General* v. *Magistrates of Inverness*, 1856, 18 D. 366. Stair, Inst. ii, 4, 32, regarded the composition under the Act of 1469 as coming in place of relief. Relief applied to all holdings, Crown and others. If Stair had thought the composition only applied to subject-superior's lands he would have noted that difference between it and relief, and relief was in its origin also based on the year's rent—Stair, Inst. ii, 4, 26. The view that the Act of 1469 applied generally and provided a comprehensive remedy was supported by *Clelland* v. *Dempster* (*cit.*). Further, about that time Parliament was undoubtedly asserting complete control over all Crown property—Act 1489, c. 7 (Record ed., vol. ii, p. 219); Act 1493, c. 21 (Record ed., vol. ii, p. 235); Act 1528 (Record ed., vol. ii, p. 328a); Act 1592, c. 34 (Record ed., vol. iii, p. 560); Act 1633, c. 9 (Record ed., vol. v, p. 23); and Act 1640, c. 28 (Record ed., vol. v, p. 285); Act 1585, c. 16, and 1578, c. 14 (Record ed., vol. iii, pp. 380 and 439). The mismanagement by the King of his revenues was so great that in 1595 a commission was set up to manage the King's revenues, and in setting up the commission it was declared that the letters of instructions which the King was in the habit of giving to the Exchequer with regard to casualties should be null, and that practice was to be discontinued—Sir William Purvis, Revenue of the Scottish Crown, pp. 7 and 11. The Crown, in the sixteenth and probably also in the fifteenth century, held two different kinds of estates—one which could not be alienated without the consent of Parliament, the other which could be alienated with the advice or consent of the three estates, such as lands falling to the Crown by escheat or recognition—Discours Particulier d'Ecosse by Makgill and Ballenden (published by the Bannatyne Club, No. 5) p. 5—Stair, Inst. ii, 3, 35. The Crown and Parliament were therefore in conflict as to the revenues of the Crown derived from the Crown lands. Parliament was assuming control and finally achieved complete control of those revenues. The Act of 1469 was one of the series of Acts dealing with Parliamentary control of the Crown lands. Further, the King appeared to have contested in the Courts the question as to whether he was bound by those Acts, and the Courts decided that he was bound—Tytler, History of Scotland, 3rd ed., vol. vii, p. 376. The King sued, and probably was sued in his own name, but later the Officers of State sued—*King's Advocate* v. *Lord Dunglas*, 1836, 15 S. 314, *per* Lord Medwyn, at p. 325. Adjudications against the heir for the ancestor's debts were introduced by the Act 1540, c. 106—Stair, Inst. iii, 2, 45; Ersk. Inst. ii, 12, 11. Adjudications in implement grew up on the analogy of apprisings—Stair, Inst. iii, 2, 53; Ersk. ii, 12, 50 and 51. The Courts refused to allow the year's rent in such adjudications, founding on the Act 1621, c. 6, and 1621, c. 7, the former of which dealt with apprisings and mentioned the composition, while the latter referred back to the Act of 1540 and did not mention composition—*Grier's* case (*cit*). The Act 1621, c. 8, made extracts from the Great Seal Register evidence, which showed that Crown lands could be apprised. The Act 1661, c. 62, extended the legal and set up a *pari passu* ranking in adjudications within year and day. The Act 1669, c. 18, assimilated adjudications to comprisings and gave the superior the year's rent he had in apprisings; payment of the year's rent was the "constant practick" in apprisings and this was applied to adjudications. While the right to take a year's rent was given there was no constant practick to exact it—Stair, ii, 4, 32; Ersk. Inst. ii, 12, 24. That custom of leniency still survived—*Duke of Argyll* v. *Riddell* (*cit.*), *per* Lord President Dunedin at p. 744 of 1912 S.C. It did not follow therefore that because there was no constant practick of the Crown to exact a year's rent that the Crown was not bound by the Act of 1669. The Act of 1469 applied to the Crown, and the Act of 1669 merely applied the provision of the Act of 1469 to adjudications. The Act 1672, c. 19, abolishing apprisings, also applied to the Crown and gave the right to the year's maill. The Acts of 1681, c. 17 (amended by the Act 1690, c. 20) applying to decreets of sale, provided for the passing of a signature in Exchequer upon payment of a year's maill; that certainly applied to Crown holdings. The Act 1685, c. 22, placed the King and subject-superiors in the same position with regard to tailzied lands. The defender's argument that the King could not refuse an entry was mainly based on the Act 1578, c. 66, and the ordinances of the Privy Council therein referred to. Both of those dealt with Church lands which were falling to the Crown at the Reformation and did not apply generally. There was a series of statutes dealing with such lands—Acts of 1563, c. 77, 1564, c. 88, 1584, c. 7, 1690, c. 32, 1698, c. 11. Those lands were specially dealt with—Stair, ii, 3, 37—and the ordinances were not applicable generally—though Stair, Inst. ii, 3, 43, and Erskine, Inst. ii, 7, 6, seem to have thought otherwise. The practice referred to by Erskine could not have gone further back than the institution of the valued rent in 1670—Erksine, Inst. ii, 5, 35—which was nearly a century after the Act of 1578. Further, the ordinances of the Privy Council had no legislative effect and did not stereotype the practice of the country. Craig, Duff, and

Menzies merely were authorities to the effect that it was not the King's habit to refuse entry. The King had the right to refuse, but *ex benignitate* did not exercise it. Hope, Minor Practicks (1st ed.), pp. 67-68, 86-87, 108; Spotiswood's ed., v, 16, p. 235; viii, 11, p. 290; xi, 13, p. 348; and xi, 22, p. 355, showed that the King was entitled to a composition the amount of which was fixed with his treasurer. The result was that the Crown was *ex clementia* prepared to accept less than the year's rent though entitled to exact that, but there was no settled practice as to what the Crown would accept. The royal warrants from Queen Anne onwards were simply information for the guidance of the barons as to what sum the Crown would accept in place of the full year's rent; they were merely personal to each sovereign issuing them, and they could not bind his successors. The reasonable expenses of the charters had nothing whatever to do with the casualties. The expense of the charters had been dealt with by Parliament from very early times—Act 1621, c. 19 (Record ed., vol. iv, p. 616 and p. 619); Act 1672, c. 40 (Record ed., vol. viii, p. 88 b); Act 1690, c. 61 (Record ed., vol. ix, 200); Act of Sederunt, 3rd July 1846; Act of Sederunt, 14th July 1847; Act of Sederunt, 27th January 1869; Crown Charters Act, 1847, sections 6, 7, 28. The practice as to passing signatures was set out in Hope, Minor Practicks (Spotiswood's ed.), v, 16, viii, pp. 235, 284 *et seq.*; (1st ed.), pp. 67, 84 *et seq.* The Act of 1747 did not apply to the Crown, for having the right to refuse an entry the Crown never exercised it and gave entry on lenient terms, but the subject-superior might well try to exact more than the year's rent when the feu was small and the circuitous process of a fictitious apprising costly. Hence that Act introduced a conveyancing expedient to shorten and cheapen the method of forcing entry—section 12—and *quoad ultra* it left all superior's rights quite unaltered. The Act of 1847, sections 6 and 19, made similar provisions for entry by confirmation. The Act of 1874 applied to the Crown—section 3; it did away with the necessity of recourse to the superior to get a title, but the superior's whole rights to casualties were retained with all their incidents—section 4 (1) (3) and (4)—and in place of the old declarator of non-entry an action for payment of a casualty was substituted. That action was only competent when the old declarator was competent, *i.e.*, when the last-entered vassal had died. A temporary incumbent like an adjudger had not to pay a casualty upon recording his decree but only on the death of the last-entered vassal, and even if the provisions of section 62 seemed to lead to the opposite result they had been repealed by the Statute Law (Revision) No. 2 Act 1893 (56 Vict., cap. 51), section 1 and schedule, and were no longer the law—*Morison* v. *Stubbs*, 1897, 24 R. (J.) 61, 34 S.L.R. 672. In 1914 therefore there was no statute entitling a superior to get a casualty when an adjudger took infeftment if the last-entered vassal was still alive. No case of redemption under the Act of 1874 had come into Court. The Act of 1914 gave the superior and vassal equal rights to force redemption and made redemption compulsory within fifteen years. Section 5 (*a*) applied to the present case; it was intended to apply to all cases where, as was the general rule, casualties were payable on the death of the last-entered vassal. Section 5 (*b*) applied when there was something special in the titles. In the present case there was no specialty. In *Cleland* v. *Dempster* (*cit.*) it was implied that the Crown was subject to the enactments with regard to apprisings. In the *Advocate-General* v. *Swinton* (*cit.*) the rubric was not absolutely accurate; if it had been, the present point would have been decided, but the dicta of Lord Rutherfurd, Lord Curriehill, and Lord Deas, at p. 22, were in favour of the pursuer, and were emitted in an Exchequer cause by judges familiar with Exchequer practice. In *Stirling* v. *Ewart* (*cit.*) the dicta of Lord Justice-Clerk Boyle at p. 723, and Lord Medwyn at 725 were in favour of the pursuer; so were the dicta of Lord Kinnear in the *Lord Advocate* v. *Moray* (*cit.*) at pp. 559 and 561. The *Duke of Argyll* v. *Riddell* (*cit.*), *per* Lord President Dunedin at p. 744, was referred to. Upon principle and upon the statutes and decisions the Lord Ordinary was right, and should be adhered to. *Dundas'* case and *Hill's* case were referred to.

At advising—

LORD SKERRINGTON—The learned Solicitor-General opened his case by stating quite accurately that the controversy between the parties was whether the Acts 1469, cap. 36, and 1669, cap. 18, did or did not confer upon the Crown a right to exact a year's rent as the price for infefting an appriser or adjudger. He did not dispute that apart from these two statutes the third and leading conclusion of this action could not be supported. It seems to me, therefore, that the pursuer's success depends upon his being able to establish that the right of the Crown as feudal superior to exact a "composition in Exchequer" upon the entry of every creditor owed its origin to the earlier, and finds its present legal justification in the later, of these statutes. It is matter of common knowledge that the right of the subject-superior to claim a year's rent upon every change of investiture was purely statutory. Is the composition which the Sovereign has been in use to exact on the same occasions satisfactorily explained and accounted for upon the theory which Crown counsel asked us to accept, viz., that the Sovereign, having received from Parliament in the year 1469, and again in the year 1669, a right in common with all other superiors to exact a year's rent as the price for accepting an appriser or adjudger as his vassal, has uniformly exercised that right by restricting his claim *ex gratia* to a charge very much less than and in no way resembling the statutory year's rent?

Stair is largely responsible for the common opinion that apprisings and judicial sales of a debtor's heritage were unknown prior to the Act of 1469 (ii, 4, 32, iii, 2, 13, 14), but as both Kames (Hist. Law Tracts, 2nd ed., pp.

321, 322) and Erskine (ii, 12, 2) pointed out, apprisings were in use before the Act of James III, and this statute merely introduced changes which with Erskine we may regard as "improvements" or with Kames as "unhappy." In addition to a charter of apprising under the Great Seal dated in 1450 Kames prints an instrument of sasine of the same year in favour of the assignee of an appriser of burgage property (pp. 443, 427). One asks—How and upon what terms did a judicial purchaser or an appriser obtain infeftment from the superior prior to the year 1469? There is no direct evidence except a statute of Alexander II, cap. 24, which if authentic and not in desuetude entitled the purchaser to receive infeftment from the sheriff on behalf of the King or from the "baron" as the case might be, and that (in Erskine's phrase) "without any gratification" to the superior. If, however, this statute is thought not to be genuine or to have fallen into desuetude, one must rely upon inferences based upon the attitude which the King on the one hand and subject-superiors on the other have consistently maintained as regards their rights and duties when requested to sanction a change of investiture.

From the earliest date at which we have definite knowledge as to the matter down to the year 1874, when charters by progress were abolished, the King facilitated both the voluntary and also the judicial transfer of the property of which he was the immediate superior. On the other hand the general policy of the subject-superior during the same period was to make a pecuniary profit out of every change of investiture, and if necessary for that purpose to refuse to receive a new vassal unless the applicant presented himself in the character of an appriser or adjudger and tendered the statutory year's rent as the price of his entry. When one reads the Crown charter of apprising of 1450 already referred to, or the excerpts from similar charters of 1508 and 1547 also printed by Kames (pp. 459 and 461), it is difficult to believe that the Sovereign as feudal-superior accepted either before or after the year 1469 a douceur as a reward for making effectual the decrees of his own judges. A subject-superior naturally proceeded upon different and more selfish lines. Possibly the year's rent of the Act 1469, cap. 36, was the result of a compromise between the feudal and the commercial spirits. Possibly, however, it was a pure victory for the feudal aristocracy, who in this view secured for themselves payment for what previously they had required to do gratuitously. The award of a year's rent to a superior in return for his obedience to an order of the King's Court might well have been refused by the Parliament of 1469 upon a principle of general jurisprudence which even Craig regarded as applicable to the feudal law, and which is admirably stated by him at the beginning of his chapter on apprising and adjudication (iii, 2, 1). He there describes the judicial transfer of a feudal right to a creditor as one of several necessary exceptions to the general rule that there can be no change of investiture except by the mutual consent of the superior and of the vassal. Private contracts and rights, he explains, must give way to public utility, and an investiture is just an example of what the civilians called *privatorum pacta*. Whether it was or was not so enacted by a statute of Alexander II, Erskine, ii, 12, 2, may have been right in supposing that prior to 1469 a superior could not have demanded a "gratification" for not obstructing the process of the King's Courts. A claim for his reasonable expenses in connection with the reception of a new vassal would raise a different question, but a claim of the former kind would in the absence of express statutory warrant look like an imposition on the part of a subject and an absurdity in the mouth of the Sovereign. This opinion derives support from a judgment pronounced nearly two hundred years after the passing of the Act 1469, cap. 36, with reference to the comparatively modern process of adjudication. The Court found the adjudger's charge against the superior to be "orderly proceeded"—in other words, it affirmed the superior's legal duty to make the decree of adjudication effectual, but it denied his right to a year's rent in return for his obedience — there being at that time no statutory authority for such a demand— *Grier* v. *Closeburn*, 1637, M. 15,042, 1 Br. Sup. 365. Some thirty years afterwards the feudal superiors of the period were able to induce the Scots Parliament to reverse this decision by passing the Act 1669, cap. 18, which awarded to superiors a year's rent as the price for entering an adjudger. Possibly the very same process had been gone through two hundred years before. The defender's counsel are not concerned to maintain any particular theory as to the rights of superiors before the year 1469, or as to how it came to be thought that Parliamentary compensation ought to be paid to superiors in respect of the entry of an appriser. They have, however, adduced weighty reasons in favour of the opinion that the Sovereign did not claim any such compensation for himself and his royal successors.

Although there lies upon the pursuer's counsel the heavy burden of justifying at every stage of his argument a claim which so far as can be traced has never before been asserted by the Crown, the defence would, in my judgment, at once collapse if the defender's counsel were unable to suggest some intelligible legal basis other than the Acts of 1469 and 1669 for the Crown's practice of exacting a composition as a condition of the issue of a charter by progress in favour of a judicial transferee. In infefting a creditor the Sovereign was performing a legal duty, and would not have been entitled to exact any sum which he chose to demand as the price of its fulfilment, whereas in theory at least he was so entitled in my opinion when he granted a charter of resignation or confirmation. If the defender's counsel can suggest such an explanation of the tax upon creditors as I have desiderated it will be for the Solicitor-General to demonstrate that the practice cannot reasonably

be explained in the manner so suggested, and that it can be attributed to no other cause except the exercise in a very modified form of a right to exact a year's rent in terms of these statutes. The suggestion made by the defender's counsel is that the Exchequer composition which was payable by creditors was a charge for services, and essentially of the same nature as the other charges which according to custom were exigible on the issue of Crown charters by progress. "Fees" and "drink-money" had to be paid in return for the services at the Signet and Seals of the officials who attended to the expeding, sealing, and registering of Crown charters. Why should not a reasonable contribution to the expenses of the Lords of Exchequer constitute a valid and legal charge against an appriser if and when he required to avail himself of their services by asking to have a signature revised and passed as the warrant for a charter under the Great Seal? This qualification is necessary, because (as will be seen in the sequel) there are good reasons for believing that signatures of infeftment were not used in the case of apprisers until long after the Act of 1469. No example was cited where composition was paid by an appriser to the Crown except in Exchequer and in return for a signature up to the time when signatures were abolished by the Crown Charters Act 1847 (10 and 11 Vict. cap. 51), section 1, so far as preliminary to the granting of royal charters. Thereafter applicants for such charters lodged a draft of the charter with a note and the title-deeds in the office of the Presenter of Signatures until the abolition of charters by progress in 1874.

Signatures were gifts or grants of various kinds under the hand of the Sovereign, or since 1603 under a seal or cachet imitating his writing, and they were the warrant of the formal gift or other writing appropriate to the transaction. The Act 1567, cap. 1, enumerated a variety of occasions when a signature was used. Some signatures authorised the issue of a charter, and thus were warrants for infeftment. It may be assumed that the composition paid for a signature was originally the modified or compounded price paid for a privilege or for a grant of property, but in the case of grants which the Sovereign was supposed to be under a moral duty to make the composition might easily lose its original character and become a payment for the services of the officials charged with the duty of inquiring into the propriety of making the grant in the particular circumstances. Signatures of infeftment were referred to in the Act 1489, cap. 12, in which James IV promised not to pass any gifts or other writing which might touch his casualties or property without the consent of his Privy Council. The Act 1542, cap. 1, mentioned signatures of new infeftment by resignation, alienation, or confirmation, and also remissions and the compositions made therefor. When James VI left Scotland for England in 1603 he gave a commission to the Privy Council to give infeftments on resignations made by Crown vassals, and it appears that confirmations of infeftments were also granted under his cachet during his absence (1609, cap. 14). Signatures are referred to in the 19th Article of the Treaty of Union and in the 19th clause of the Act constituting the Court of Exchequer (6 Anne, cap. 26). What is meant by revising a signature is explained by Clerk and Scrope (p. 169) as follows:—"By revising of signatures or gifts is understood the examining into all the particulars contained in them, that nothing be inserted to the prejudice either of the Crown or subjects. The Crown is at no rate to suffer; and as to the subjects, every clause in a gift will be struck out if it seems to carry any fraudulent or insnaring meaning. It is true that in matters of property or private rights where the Crown has no concern the Lords of Session are the sole judges; yet the Barons of Exchequer are to take care that no clauses be inserted in signatures or gifts except such as are sufficiently warranted; that so, if possible, all unnecessary actions and prosecutions in any courts of judicature may be prevented. By the custom of the Court of Exchequer any one of the Barons may revise signatures, that is, compare them with grants of the like kind, or with former rights or grants to which they relate; and commonly it is the province of the Senior Baron if he pleases to take this trouble upon him; but if any difficulties occur, he must state them to his brethren before they can receive a determination." The question whether a signature of infeftment by way of confirmation or resignation should be allowed to pass might be one of delicacy and difficulty. The passing of "double confirmations" was expressly forbidden by the Act 1578, cap. 66, and for very just and obvious reasons. While Erskine went too far when he described this prohibition as "improper" (ii, 7, 14), it must be confessed that it was too absolute, and that it imposed upon the Exchequer a hard-and-fast rule which in certain cases could not be observed without injustice and which was in such cases disregarded. The difficulty which was felt in Mackenzie's time (Obs. on Acts of Parliament, p. 189) was the same as that with which the Barons had to contend after the Union—Clerk and Scrope, p. 190. It will be said, however, that apprisings and adjudications for debt stood in a different position from voluntary conveyances and adjudications in implement, seeing that the King could not refuse infeftment to a creditor merely because other creditors were already infeft in the same property or because the debtor's title was doubtful. The justice of this observation is proved by the fact that until a comparatively late period signatures were not considered necessary in the case of creditors. On the other hand there was no law which compelled the King to scatter grants of salmon-fishings, foreshore, and gold mines in favour of creditors who were enterprising enough to attribute such rights to their debtors, or which required him to grant charters of apprising in respect of lands which had reverted to himself as superior, or which he had acquired *jure communi*. Whatever may have been the decisions in regard to subject-superiors

(and they were not consistent), I have not found one in which the King, while claiming a preferable right to the property, was ordered by the Court to infeft an appriser *periculo petentis* and *salvo jure*. Accordingly there is no reason to doubt that the Exchequer acted prudently when it made signatures compulsory in the case, first of apprisers and afterwards of adjudgers, and that creditors were thenceforth legally and properly charged a moderate *ad valorem* fee in return for the services of the Lords of Exchequer in revising and passing the appropriate signatures of infeftment—in other words, in establishing their right to receive a title from the Crown. Although the services of the Exchequer in revising a signature of apprising or of adjudication were less meritorious than if the signature was one of confirmation or resignation, the reward was proportionally smaller.

Important pronouncements by the Privy Council with regard to the composition which ought to be charged on confirmations were made by certain ordinances which unfortunately have not been preserved though their purport and effect may be gathered from the preamble of the Act 1578, cap. 66 (already referred to), and from the commentaries upon that statute. The reference in the preamble is as follows—"Like as it is founden be sundry ordinances of the privie Councel that our Soveraine Lord and his hiennesse Compositours aucht not to deny his confirmation upon the reasonabil expenses of the partie suitand upon their awin peril." The Compositors are stated to be the same as the Lords of the Checker (Clerk and Scrope, p. 102). The preamble then went on to refer to alienations by Crown vassals and to the litigation and expense, including payment of compositions, which were caused by the practice of double confirmations. From the context of the passage above quoted, and from the mention of what were presumably the same ordinances by the Act 1584, cap. 7, it is probable that they referred primarily to the duty of the King towards such of his subjects as held feus of Church property granted by churchmen shortly before and after the Reformation. Such feus had to be confirmed by the King, both as coming in place of the Pope and also because he had become the feudal superior in lieu of the church. Interesting information about such feus and long leases is contained in the Acts 1564, cap. 88, 1584, cap. 7, and 1593, cap. 190. The Act of 1584 stated the rates of composition charged for a signature of confirmation, viz., four times the "maill," which Stair, ii, 3, 37, interprets as "silver rent," and in the case of a farmer twice the "ferme." It may be assumed that these "maills" and "fermes" were only a fraction of the rental when the grants were made, the balance being represented by grassums and services. At first sight one might think that there was not much similarity between the confirmation of a church feu and the confirmation of an alienation by a Crown vassal, but as regards the present question they were much alike. In each case the royal confirmation, if timeously applied for, could be had for the asking, in return for a moderate charge, but in each case the omission of this precaution might entail serious consequences—the annulling of the feu in the one case and the forfeiture of the property by recognition in the other case if the tenure was ward. When more than a century had passed after the Reformation the titles of the church feus ceased to be a question of practical interest, but the ordinances continued to command attention as valuable statements of general principle in regard to the duty and policy of the Crown in granting confirmations. Presumably the Privy Council in dealing with a new and troublesome matter had appealed to and applied what was already a settled rule in the case of charters by progress, though possibly one which had never before been expressed in an authoritative writing. On no other theory can one account for the fact that Stair (ii, 3, 43) and Erskine (ii, 7, 6), in the passages quoted by the Lord Ordinary (p. 9), and also Mackenzie (Obs. on Acts, p. 188), treat the preamble of the Act 1578, cap. 66, and the ordinances as of general application, and make no reference whatever to the church feus. It is impossible to believe that Stair and Mackenzie at any rate were ignorant of the contents of the ordinances. Erskine's theory (ii, 7, 6) that the ordinances operated as a renunciation by the Sovereign in favour of his subjects whose right to purchase lands holden of the Crown became from that period secure, is one which presents serious difficulties, both legal and historical. Kames, on the other hand, considered that the maxim "The King receives every purchaser," was older by two hundred years, and was founded upon a statute, 2 Robert I, cap. 25 (1325)—the Scots version of *Quia Emptores*. One may or may not agree with him in accepting this statute as genuine, but there is no answer to his statement that "it is not the genius of our law to bestow upon subject-superiors a privilege which the King has not" (Statute Law, 2nd ed., p. 447). The difficulty disappears if one ceases to search for a legal basis for Kames' maxim, and is content with the simpler and more natural view that the King, owing to his double position of paramount superior and Sovereign, was from very early times supposed to owe a moral duty to his vassals of an exceptional character which forbade him to hamper them in the disposal of their property for the purpose of gaining a pecuniary advantage to himself. If the Lords of the Privy Council in the time of Queen Mary and James VI had thought that the Sovereign possessed, by grant from Parliament, a good right to levy a year's rent on the entry of every appriser—the most favoured of all singular successors (Ersk., ii, 7, 8)—they would not have announced that disponees were entitled to an entry upon payment of reasonable expenses. Moreover, this rule must have been ancient, as the Privy Council would not have made a new departure for no apparent purpose except to dilapidate the royal revenues, of which their predecessors in the year 1489 had been so careful. In con-

trast to the policy of the Privy Council in regard to compositions on confirmations, one may refer to the statutory prohibition against accepting a composition for the relief due by heirs and to the strict account which the Exchequer exacted from Sheriffs in regard to the King's casualties (1587, cap. 74, cap. 75; Ersk., ii, v. 50). The view which I have ventured to present in regard to the antiquity of Kames' maxim does not seem to me to conflict with the statement in the tract by Makgill and Bellenden, written in 1559, to the effect that the King is not obliged to receive resignations or other dispositions of lands sold or resigned by his subjects except at his good pleasure and in so far as his treasurer has received composition.

Any doubt which might otherwise have been felt in regard to the nature of the Exchequer composition on charters by progress, at any rate from the time when creditors were first required to pay it, is in my judgment completely removed by the failure of the Solicitor-General to suggest any different explanation from that which commended itself to Stair and Erskine. Be it that the King had a legal right to demand a year's rent, but preferred not to do so, it is still necessary to account for the charges which he in fact elected to make. These were, in the case of apprisings and redeemable rights, 1 per cent. on the debt up to 10,000 marks (£555 sterling) and ½ per cent. on the excess, and in the case of irredeemable rights one-fourth to one-sixth of the rental. It is impossible to regard these figures as the result of a rough and ready attempt to fix an equivalent for a year's rent with the necessary deductions. The only feasible explanation, and the only one in the field, is that persons asking for a renewal of an infeftment in property held off the Crown were required to contribute what was regarded as a reasonable sum towards the expenses of an establishment which assisted the King to perform his duty as paramount feudal superior. If this was the character of the charge, it was, as its name implied, a "composition." Nor would one be surprised to find that its amount varied to some extent, though never (so far as we know) in the case of creditors; that, as Hope expressed it, the "compositions are made less or more according to the Lords' (of Exchequer) pleasure" (Minor Practicks, tit. viii, section 11); that something depended on the applicant's influence with the Treasury and Exchequer (Clerk and Scrope, p. 187); and that after the Union it became the practice for each Sovereign to follow the example of Queen Anne and to give precise instructions always in identical terms as to the amount which ought to be exacted.

Both Dallas (Part i, p. 35, Part iii, p. 225) and Erskine (ii, 12, 24) state the amount of the composition which was payable to the Exchequer by an appriser or adjudger at the percentage which I have already mentioned of the sum in the apprising or adjudication. This percentage may be contrasted with what was known as "the Lords' modification" in the case of the year's rent payable to a subject-superior. According to Stair, "the Lords of Session have always taken a latitude in the modification of the year's rent, especially if the sum apprised or adjudged for be small and the lands be great"—(ii, 4, 32, iii, 2, 27). According to Erskine (1695-1768) it would seem that the power of modification was "frequently" made use of in his time—(ii, 12, 24). Judicial opinion on the subject had changed by the year 1775, as appears from Hailes' report of the case of *Aitchison* v. *Hopkirk* (1775, 2 Hailes, p. 612), where Lord Coalston said that the Court in favourable circumstances had "used liberties with the statute." In the only reported case on the subject the debt was 2300 merks, the year's rent 800 merks, and the composition was modified to 300 merks—which was more than 10 per cent. on the debt—(*Paterson* v. *Murray*, 1637, M. 15,055). Dallas (Part i, p. 85) states that if the rent was great and the debt small the usual modification was a year's annual rent of the money—which of course was much more than the 1 per cent. or the ½ per cent. levied by the Exchequer. Though it is not so stated in any of the earlier authorities which I have consulted, there can be no doubt that it was an indulgence on the part of the Exchequer to assess the composition upon the debt instead of the rental, and that the appriser or adjudger had the option of having his composition settled according to the rental—(Juridical Styles, 3rd ed., i, 458). On the other hand, where the interest of the debt exceeded the valued rent, the Exchequer was entitled to have the composition settled according to the valued rent and not according to the debt—(Clerk and Scrope, p. 190). Redeemable rights were compounded for in Exchequer in the same way as adjudications (*ibid.*).

Referring to the amount of the Exchequer composition in respect of irredeemable rights, Clerk and Scrope (p. 187) state that the composition payable to the Crown upon renewal of infeftments "were of old, and still are, of two kinds—one was in some measure proportionable to the value of the feu, and the other flowed from the King's bounty, and was called a gratis composition because it never exceeded 10 merks. The first kind was often irregular, and exacted at the pleasure of the Lord High Treasurer and Commissioners of the Treasury of Scotland, so that more or less was paid according as parties had interest with the Treasury and Exchequer; but when the Barons, on establishing the Court, observed what inconveniences this created both to themselves and others, they applied to Her Majesty Queen Anne in 1709 and procured a warrant under the Privy Seal to be a standing rule in all time coming; which appoints—That all compositions on signatures for infeftments should be rated at the sixth part of the valued rent, unless they in whose favours these signatures are to be past be heirs *alioqui successuri*; that all gratis compositions should be rated at 10 merks Scots; that no signature of what kind soever should be passed in Exchequer without paying this duty; and that the composition for tacks of teinds should be three years' rent

of the free teinds." The margin of variation stated in the Privy Seal Warrant of 1709 was not very great, viz., "sometimes one-fourth, sometimes one-fifth part of the valued rent, and at other times a lesser proportion." Presumably, therefore, the highest rate of composition which was known by the first Barons to have been exacted by the Crown from singular successors was one-fourth of a valuation which at one time was supposed to represent the real rent.

The earliest table that I know of stating the fees payable at the Signet and Seals is one of 3rd and 4th June 1597, afterwards mentioned. A later table approved by the Privy Council on 4th February 1606 was ratified by the Act 1621, cap. 19. This specified also the Chamber-Fees payable to the King's Ushers for resignations of lands held off His Majesty. The Act 1672, cap. 16, under its final head "Concerning the Exchequer" stated the fees payable for the registration of signatures and in respect of signatures which had to pass the various seals. A table on similar lines prepared by the Society of Writers to the Signet, partly in 1731 and partly in 1822, is printed in the early editions of the Juridical Styles (see 3rd ed., i, 536). The same distinction between the fees and the composition appears in the Crown Charters Act 1847 (10 and 11 Vict., cap. 51, sections 6, 7, and 28). From this time the fees were regulated by Statutory Rules of Court made by the Court of Exchequer, and later by the Court of Session (31 and 32 Vict. cap. 101, section 91; rule of Court of 27th January 1869). It cannot be doubted that these charges originally found their justification in the same principle as the rule in the old tables of fees applicable to charters by progress granted by subject-superiors, viz., "The superior's agent draws the deed. The vassal pays for it."

The principle underlying the maxim that "the King receives every purchaser" is explained by Stair in a passage where he describes the title necessary in order to remove a tenant—"Any infeftment of property or liferent, or the superior's infeftment during the ward, or after declarator of non-entry, or liferent escheat, are valid titles of removing; but infeftments upon the pursuer's own resignation are not sufficient titles for removing, unless the pursuer have been in possession by maills and duties; because infeftments pass of course in Exchequer upon any person's own resignation (except it to be the King's property), seeing the King receives all his subjects in any other rights of property whereof the casualties only belong to the King; though for knowing the progress of rights by infeftment the King be the supreme superior" (iv, 26, 8). In another passage he refers to the King as "the supreme superior and first author of all infeftments," and adds, "the King claims not the property of any land, but of the annexed property, and of the property of lands falling to him by forfeiture, recognition, or as last heir (whereof bastardy is a species), or by acquisition, wherein the King *utitur jure communi:* hence it is that the King gives charters of confirmation, or upon resignation, without exact instruction of a full progress from the King, the same being always given *periculo petentium*" (iv, 35, 13). Bankton gives substantially the same reasons as Stair in two passages which refer primarily to adjudgers, though he extends the same principle to voluntary rights (iii, 2, 53, ii, 3, 48). They are quoted in the Lord Ordinary's opinion (pp. 6, 7). The former passage, as I read it, negatives in so many words any right on the part of the Crown to exact a year's rent in return for a charter of adjudication. Bankton lays stress upon the fact that all the lieges are the King's subjects, and that he can suffer no prejudice by a change of his vassals. In short, both Stair and Bankton considered that the King had no legitimate interest to refuse to infeft a stranger to the investiture either redeemably or irredeemably. They would, doubtless, have admitted that at some remote period of the history of Scotland the king had a legitimate interest to have a fighting man for his vassal. On the other hand I think that they would have denied that it was legitimate for him to use his position as the head of the feudal system and the superior (immediate or mediate) of every landholder in Scotland in order to exact from his subjects a tax which was not one of the recognised feudal casualties reserved by him or his royal predecessors from their original grants. It is true that Craig made the somewhat sordid suggestion that the King had an interest to refuse to grant a charter of resignation in favour of heirs-male because an heiress's casualty of marriage was more lucrative than that of an heir (ii, 16, 20). It is also true that from time to time his ministers induced the sovereign to include such charters (if granted during minority) in the royal revocations upon the pretext that his conscience was troubled by the injustice done to the heirs whatsoever—Craig, ii, 16, 12, 1587, cap. 31. The effect of these revocations was never legally tested—Stair, ii, 3, 43. For the purposes of the present action it is enough to point out that until a statute was passed in the year 1914 abolishing all casualties not redeemed within a period of fifteen years, it does not appear to have occurred to any feudal lawyer or to any minister of State that charters by progress might legitimately be converted into a valuable source of revenue by directing the Exchequer to raise the customary tariff for a charter until it reached the extreme limit permitted by the Act of 1469.

The suggestion is not a novel one that the Act 1469, cap. 36, did not apply to the Crown as regards its final clause, by which it was enacted that "the overlord sall receive the creditour or ony uther byer, tennent till him, payand to the overlord a zeires maill, as the land is set for the time. And failzieing thereof, that he take the said land till himselfe, and undergang the debtes." The following question was put by Dirleton (Doubts, pp. 22, 23)—"If by the first Act of Parliament anent comprisings a composition was due to the King?—*Answer.* It is thought not: There being a difference betwixt the King and other superiors, in

respect the King is *pater patriæ*, and all the lieges being his subjects, it cannot be said that he has any prejudice by the change of his vassal; and long after the said Act of Parliament signatures were not passed upon comprysings, but comprysings lay at the Signet, and were the warrand of charters under the Great Seal."

"To try when that custom was changed, and what warrand was for changing the same." To this question Stewart replied as follows (Answers, p. 42)—"When the Exchequer do pass signatures upon comprisings, they may take the known composition, which is ten merks of the thousand, whatever the former custom was: Nor doth it indeed appear when or how it was changed; but 'tis like it hath been done by a rule of Exchequer." It is noticeable that Stewart does not throw any doubt upon Dirleton's statement as to the late introduction of signatures in the case of apprisers, and as to charters under the Great Seal passing in such cases without a signature. This statement, the accuracy of which there is no reason to doubt, removed what appeared to be a difficulty in the phraseology of the Act. On the one hand it seemed tolerably certain that if it had been intended to confer upon the Crown a new and important source of revenue the statute would not have stopped short with an abstract declaration of the right in the words quoted above, but that it would have referred in a practical way to the officials by whom and the mode in which the year's rent was to be collected. In short, the Act would probably have said something about the "Lordes and auditoures of the Checker" (1456, cap. 58), or "thesaurers" or "composition" or "signatours" or some such technicality. On the other hand if prior to 1469 it had been customary for an appriser to pay money into the Exchequer upon his entry it would have been natural for the Act to mention the practice. Originally both apprisers and adjudgers, if they chose to dispense with a charter under the Great Seal, could obtain infeftment by means of a mere precept, probably under the Quarter Seal which passed without any signature. This simple procedure was not abolished in the case of apprisers until about the end of the sixteenth, and in the case of adjudgers until after the middle of the seventeenth, centuries. The later procedure, when a charter of apprising or of adjudication under the Great Seal was the only means of obtaining infeftment, was complicated and cumbrous in the extreme. It is described by Hope (Minor Practicks, 1734 ed., tit. 8, section 12), and by Dallas (Part i, p. 36). Instead of expeding merely a precept of infeftment the creditor required to have a signature revised and passed in Exchequer, in addition to which two precepts were necessary, one under the Privy Seal and one under the Signet, authorising the issue of a charter under the Great Seal. Then came the charter itself with its originally separate precept of infeftment under the Quarter Seal. However unnecessary and even absurd this multiplication of services and of payments may appear to us, there can be no doubt that the various services, including the revising of the signature, were each and all regarded by our ancestors as legitimate and necessary in the interests both of the King and of his subjects.

Craig gives the earliest description that I have found of the procedure by which an appriser obtained infeftment from the superior (iii, 2, 20). After the appraisement had been completed the process was extracted and laid before the Supreme Court with a supplication. If the procedure had been regular the Court, in the case of lands held of the King, ordained the Director of Chancery to direct a Royal precept to the principal Sheriff of the district for infefting the creditor. On the other hand, if the land was held of a subject, the latter was charged three times to give infeftment. If he disobeyed, the next superior was charged and so on from superior to superior "*donec ad Regem perveniatur qui nunquam solet recusare.*" In this particular case "*solet*" was equivalent to "*debet.*" The King's intervention either as the immediate or the mediate superior for the purpose of entering an appriser was *ex debito justitiæ*. The device of going upwards from superior to superior was probably suggested by the Act 1474, cap. 57. I have not found any mention by Craig either of the year's rent or of any other composition payable to the superior by the appriser, though he refers to the "Sheriff's fee" for carrying through the apprising (iii, 2, 19, 22). The Jus Feudale was published in the year 1603, and it is probable that the ancient procedure by which apprisers could obtain infeftment without a signature and without a charter was falling into abeyance about that time. At any rate, in a table of fees given by Skene (De Verb. Sig. p. 54), and approved by the Lords of Privy Council and Exchequer on 3rd and 4th June 1597 in pursuance of a special power and commission to them from the King and his Estates, the item—"For ane comprising quhilke exceedes nocht ane thousand merkes vi shillings viii pennies" (and so on up to 50 shillings) appears under the heading "Prices set downe to the Signet for signatoures passing the privie and great seales." The order of Court mentioned by Craig was known as the "allowance," and was, of course, essential in his time, as the Director of Chancery would not issue a precept without authority. It had to be obtained from the Supreme Court, seeing that diligence against superiors could not proceed upon the decree of an inferior judge, much less upon that of a messenger—*King* v. *Hunter*, 1742, M. 5743. Under the later procedure the allowance ceased to be essential because the appriser might "immediately after the comprising draw up his signature and crave the same to be past in Exchequer" (Minor Practicks, tit. xi, section 14). In Dallas's time the allowance had again become necessary in apprisings though for a new purpose, viz., as one of the statutory conditions of preference in a competition between apprisers (1661, cap. 31).

Referring to the more modern process of adjudication *contra hæreditatem jacentem* Craig stated (iii, 2, 23) that the decree was

the warrant for precepts from Chancery addressed to the superior and requiring him to infeft the creditor. In this sentence the word "superior" is either an error for "Sheriff of the County" or the reference may be to an obsolete form of diligence against a subject-superior (Stair, ii, 3, 29). The action being in the Supreme Court an allowance was unnecessary, but the order upon the Director of Chancery was no doubt obtained by means of a bill. Dallas gives the form of a bill craving the Court to ordain the Director to issue precepts under the Quarter Seal for infefting the adjudger in lands to be held by him of the Crown (Part i, p. 84), and he explains that the summons of adjudication of which he promises to give a style has a conclusion against the Officers of State and the Director for infeftment in this form (p. 83). The Styles were begun in 1666 and ended in 1688. Part i was written before 1669, as appears from the statement (p. 85) that there was no statute which required an adjudger to pay a year's rent. When he comes (Part iii, p. 214) to give the form of the summons of adjudication he makes it conclude that the pursuer should be ordained to be infeft "by way of signature and composition in our Exchequer to be expede the Great Seal in due and competent form." In a note he explains that this summons never had a bill "till within these few years", the Keeper of the Signet insisted upon a bill because adjudications under the Act 1672, cap. 19, required a bill. In Part iv (p. 508), he gives the style of a signature of adjudication *contra hæreditatem jacentem*. In a note he explains that formerly no signature passed at all, but that the Court on a bill ordained the Director of Chancery to direct a precept under the Quarter Seal to the Sheriff, &c., of the place where the lands were situated for infefting the adjudger. He adds—"But within thir twenty years the Lords of the Thesaury would have it passed by way of signature, and the writters ceded, not willing to give offence, albeit there was no positive statute for it, and yet some to this day (and to be sure) do it the old way, if not both ways." From the internal evidence one may infer that this change was made within a few years after the passing of the Act 1669, cap. 18, and one may conjecture that the Treasury saw no reason why adjudgers should not go through the same procedure and pay the same composition to the King as did apprisers, seeing that Parliament had placed adjudgers in the same position as apprisers in regard to the year's rent. Evidently, however, neither the Treasury nor the writers (including Dallas himself) considered that the Act of Parliament applied to the case and could be appealed to as a direct authority for the change. But the most important point is that the Crown's claim to levy a composition from adjudgers was made for the first time the better part of a century after adjudications had come into use. This fact corroborates Craig's evidence as to the entry of apprisers in his day. The inference from the testimony of Craig, Dallas, and Dirleton is that the Exchequer composition which came at a comparatively late period to be exacted from creditors, was historically and legally a development from the composition which the King's Compositors (1578, cap. 66) and the Treasurer (1584, cap. 7) were in use to charge as the price of a signature of confirmation or resignation in favour of the feuar or voluntary disponee of land held of the Crown, though out of favour to creditors the composition in their case was made proportionate to the debt and not to the rental. The precise converse was the fact in regard to the year's rent exigible under the Acts of 1469 and 1669. Creditors and no others were liable for it. In course of time, however, and by recourse to a legal fiction, purchasers took the benefit of the Act of 1469 (and of the Act of 1669 when it became law), in order to obtain a title from the superior, and of course they could only do so by fulfilling the statutory condition and paying their way as creditors. Hence it is that the year's rent became the general measure of the entry-money payable to a subject-superior. Historically and legally the customary year's rent payable by a voluntary disponee was a development from the statutory year's rent payable by a creditor. It will, I think, be found that the use of the term "composition" to denote "the year's rent or the Lords' modification" or the "year's duty" which was payable to subject-superiors was later in date than and derived from the primary use of the word, which referred to payments due to the King. I have not noted any example earlier than the seventeenth century of the entry-money payable to a subject-superior being described as a "composition."

Either of the rival theories which were presented by the counsel on each side with reference to the origin and legal basis of the Crown's right to a composition on the entry of every vassal not *alioqui successurus* accounts for the law as it existed immediately prior to 1874 in regard to the right of an adjudger to demand an entry from the Crown, and also in regard to the Crown's right to withhold such entry until payment was tendered of whatever sum might be due in name of composition. If the Solicitor-General's theory is well-founded two important consequences follow. In the first place the statutory right of the Crown to a year's rent would become operative upon the occasion of every entry given in obedience to the statute, and consequently could never be lost by non-user or contrary usage, nor could the enactment itself fall into desuetude. In the second place the obligation of the Crown to give an entry upon the statutory condition must (in theory at least) have undergone the same process of extension from creditors to voluntary disponees as took place in the case of subject-superiors prior to and altogether independently of the Act 20 Geo. II, cap. 50, sections 12 and 13 of which merely provided a new way of enforcing a pre-existing right. On the other hand, if the defender's theory is accepted the Crown would be outside the purview not merely of the Act 1469, cap. 36 (in its final clause), but also of the Act 1669, cap. 18. None the less the Sovereign would

be bound, for the reasons already explained, to assist the process of his own Courts by infefting an adjudger, and his obligation would be the same even although the adjudger was a purchaser who held either a decree of adjudication in implement giving him an irredeemable title to the lands, or a decree of adjudication proceeding upon a fictitious debt and giving him only a redeemable title. Accordingly the defender's theory does not involve the consequence that until the year 1874 a Crown vassal had no power to alienate his property except by the grace of the Sovereign. At the same time it must be kept in view that the Crown never made it necessary for a disponee to disguise himself as an appriser or adjudger.

Dirleton's opinion that the Act 1469, cap. 36, did not entitle the King to claim a composition, though given only tentatively is valuable, because he lived much nearer to the critical period than we do and had information not available to us. Moreover, he had gone out of his way to apply his mind to a question which was purely academic and which until recently had no prospect of ever possessing any practical interest. His opinion therefore differs *toto cœlo* in value from the observations of legal writers and the *obiter dicta* of judges however eminent, who, for all that appears, may never have specially considered the question and may simply have assumed, as was very natural, that the moderate composition exacted by the Crown from its immediate vassals was just an example of the Sovereign's usual liberality towards his subjects. In some cases it is obvious that the expression "a year's rent" has been used by force of habit—the amount of the composition being immaterial and the only question being whether the Crown was entitled to anything. The reports of the cases of *Advocate-General* v. *Swinton*, 1854, 17 D. 21, and *Lord Advocate* v. *Moray*, 1894, 21 R. 553, 31 S.L.R. 432, are instructive. Anyone reading them would suppose that the bench and the bar were agreed that if the Crown's claim was successful the amount due would be a year's rent. The real state of matters was the opposite. In *Moray's* case Crown counsel had carefully framed his summons so as to avoid claiming a year's rent.

Lands held of the King in free burgage constitute a formidable exception to the supposed universality of the Act 1469, cap. 36. Why in this case did an appriser not pay a year's rent as the price of his reception by the baillies on behalf of the King? Dallas (Part i, p. 40) referred to the special services for which such lands were liable, but much the same might have been said of ward holdings, and in any case liability to perform a feudal service is no ground for exemption from a non-feudal tax. Again, it has been said that burgage lands do not fall into non-entry, but an appriser who wished to be infeft had to pay a year's rent to a subject-superior even though the fee was full. Lastly, in the case of *Hay* v. *Bailies of Aberdeen*, 1634, M. 15,031, the bailies' claim for a year's rent was negatived on the ground that they were not the superiors and that their services were merely ministerial, but it was not explained why a year's rent should not be paid in such a case and accounted for to the Exchequer. I do not know upon what theory consistent with his case the pursuer would account for the fact that the King was under a legal obligation to infeft the appriser of burgage lands but was not entitled to the statutory reward of a year's rent.

The primary purpose of the Act 1469, cap. 36, was to protect the cultivators of the ground against an oppressive use of the brieve of distress by which they might be compelled to pay a larger sum to their landlord's creditor than they owed in name of rent, and by which apparently they might even be required to pay their rent both to the landlord and to his creditor. Obviously the tenants of a "lord" who was a Crown vassal were entitled to the protection of this statute, but it is not so clear that the King himself was a "lord" within the meaning of the Act, though the question is of no importance. The King's creditors were not likely to distrain his personal effects and those of his "poor tenants" in order to recover what he owed them. Was the King an "overlord" within the meaning of that part of the Act which in modern parlance may be said to have amended and codified the law and practice in regard to diligence against the heritable estate? From 1469 onwards every apprising was an apprising "conform to the Act of Parliament" and could not be anything else. It may also be conceded that a person reading the Act with no knowledge of the law and practice which preceded and followed it would say that the statute had been badly bungled if it left the appriser of land held immediately of the King without any means of making his security effective by compelling the latter to infeft him. He would be apt, however, to take a different view of the matter on learning that a creditor had an undoubted right to an entry, and that the only question was whether it was really intended by the Act of Parliament that he must for the future pay a year's rent for that privilege. In one aspect, no doubt, it seems unfair that a tax which in the end falls upon the landowner should be imposed in such a way that Crown vassals escape while they tax their own vassals. *Prima facie* the statute ought to have placed all superiors in a position of equality as regards the year's rent, and *prima facie* it actually did so, because "overlord" is just an old-fashioned name for a superior, and it primarily denotes every superior, including the Sovereign, unless the context or the subject-matter forbid. Erskine thrice uses "overlord" in this its most general sense (ii, 3, 12, ii, 3, 4, ii, 5, 10). Moreover, in defining the conditions on which a debtor may within seven years redeem his land this very statute required him to pay "the expenses maid on the overlord for charter saising and infeftment." These words naturally include the cost of completing a title from the Crown. When all this has been said, however, everything has been said that can be urged in favour of the pursuer. On the other hand, it is not a universal rule

that the same word must bear exactly the same meaning where it occurs in different clauses of a statute dealing with very different matters. The conditions upon which a debtor may be allowed to redeem his property without injustice to his creditor have little in common with the conditions upon which an appriser should be allowed to obtain infeftment. Further, the word "overlord" may be used with perfect accuracy as meaning a subject-superior only, as appears from the Acts 1474, cap. 57, and 1540, cap. 105. All that is necessary in any particular case is to show that it was in fact used in this limited sense. Accordingly it is for the defender to suggest some valid reason for supposing that James III did not procure from his Parliament on behalf of himself and his royal successors a grant of a year's rent payable in perpetuity on every occasion when an appriser should require to apply to the Crown for infeftment. Need the defender do more than point to the fact that so far as can be ascertained after the most thorough investigation into the practice of centuries the Sovereign has never on any single occasion claimed a year's rent for infefting an appriser, and that he could not have made such a claim consistently with the theory upon which he performed his duties as the head of the feudal system? If there had been any connection in the sequence of time or of cause and effect between the Act of 1469 and the practice of the Crown to charge a composition in Exchequer either against disponees or against creditors some trace of the connection would almost certainly have been found in the public records, and in particular in the Treasurer's accounts. Moreover, so far as appears the King has never attempted to exercise the alternative right—the *retractus feudalis* which the Act 1469, cap. 36, conferred upon superiors. Bankton states that "this option is never used by the Crown" (ii, 3, 48). Though I have stated the result of the investigation in a negative form, the inference which ought to be drawn from that result is positive, viz., that the Parliament of 1469 conferred the right now in question upon subject-superiors and upon them only.

So far I have dealt with the question between the parties as if it depended exclusively upon the meaning and effect of the Act 1469, cap. 36. In reality the Crown's right to the year's rent, if it has such a right, depends upon the combined effect of the Act 1669, cap. 18, anent adjudications, and of section 4 of the Conveyancing (Scotland) Act 1874. The latter enactment, while it abolished charters by progress, tried not to alter the rights and liabilities of superiors and vassals in regard to composition, and does not seem to have any bearing upon the amount which a Crown vassal must pay in name of composition. The Act of 1669 stands in a different position. Its intention and effect are not doubtful, viz., to confer upon superiors in a question with adjudgers the same right to a year's rent as they enjoyed in a question with apprisers under the earlier Act. Accordingly if it could be demonstrated beyond all doubt that the King had a legal right in the year 1668 to demand a year's rent for infefting an appriser, it would follow that the Act of 1669 gave him the same right in a question with adjudgers. Nor would it be material that this result was not foreseen and intended. On the other hand, if it were doubtful whether the earlier Act did or did not entitle the King to claim a year's rent from an appriser, the preamble of the later Act would be evidence that the Parliament of that year did not consider that he had any such right in a question with apprisers, and that it did not intend to give him any such right in a question with adjudgers. The preamble refers for the law on the subject not only to several Acts of Parliament, but also to the "constant practick of the kingdom." Now it is certain that according to the constant practice prior to 1669 a year's rent was not "due and payable" to the King "before he be holden to enter and infeft the compriser."

For reasons which have been sufficiently indicated in the course of this opinion, I hold that the Crown's alleged right to a year's rent has been disproved. If I had thought the question doubtful the result would have been the same, as the pursuer must prove his case. Every argument that can be adduced in favour of the theory that the Crown had waived its right to a year's rent is equally consistent with the view that it never possessed that right. In my judgment therefore the defender is entitled to be assoilzied from the third declaratory and the relative accounting and petitory conclusions of the summons. It remains to be seen whether it is possible for the pursuer to make any use of the remaining conclusions. *Prima facie* the "highest casualty" exigible by the Crown on the death of the vassal would appear to be one-sixth of the valued rent, being the price which a person holding a decree of adjudication in implement would have required to pay for his signature of adjudication before the year 1847 or for his charter of adjudication before 1874. The defender's counsel suggested that one effect of the Act of 1874, which abolished charters by progress, was to abolish the Crown's right to a composition in Exchequer, but this point was not fully argued, and I express no opinion in regard to it.

I shall now refer to a contention upon the part of the defender's counsel which I regard as an unnecessary excrescence upon their argument. I do so merely out of respect for the ability and learning with which it was supported. They maintained that until the abolition of charters by progress in the year 1874 the King was under a general legal obligation to grant a charter of resignation or of confirmation at the request of a disponee of a Crown vassal. Counsel were not content with what seems to me to be the sounder and safer opinion, viz,, that every such disponee had a legal right to demand an entry in the character of an appriser or an adjudger, but in the ordinary case only a moral right (which the Crown invariably respected) to an entry in his own proper character. The question is an idle one, because there is little practical

difference between a legal obligation and a moral obligation which the obligant invariably recognises and fulfils. Dirleton placed the distinction between a subject-superior and the King on its proper basis when he wrote (Doubts, p. 164)—"Ista sunt intelligenda de prædiis quæ de Subditis tenentur—Rex enim & Quæstores Regii, quique alii ei a Rationibus sunt id quod justum est haud gravate facere præsumuntur." There were undoubtedly special cases in which the Crown's obligation to grant a charter of confirmation or of resignation amounted to a legal duty. The three statutes of the sixteenth century already cited with reference to church feus imply that if the person in right of such a feu did his duty and asked for a confirmation he was entitled to have it. The same may be said of two statutes of the seventeenth century relative to "the Small Vassals of Kirklands who now hold of their Majesties" (1690, cap. 32; 1698, cap. 11). These persons were until 1874 entitled to have their signatures and charters expede either gratis or on modified terms according to the amount of their valuation. In a somewhat obscure case relating to Kirklands, which did not fall within any of the statutes, the Director of Chancery was ordained to issue a precept for infefting a purchaser—*Stark* v. *Airth*, 1630, M. 6900. In *Hay* v. *Bailies of Aberdeen*, already cited, a case which related to burgage subjects, the bailies were held bound to infeft a person who charged them upon a procuratory of resignation in his favour, though they pleaded that no superiors could be compelled to accept a resignation. The competency of this procedure at the instance of a singular successor as distinguished from an heir or adjudger was afterwards doubted—*Braco* v. *Magistrates of Banff*, 1740, M. 6919. Again, there were cases where the King or other superior came under an obligation by letter of regress to receive back his former vassal after the latter should have redeemed a wadset, in pursuance of which the wadsetter had been infeft by the superior. Hope tells us that upon sight of the regress the Lords would give command to the Director of Chancery to give forth precepts to infeft the reverser—Minor Practicks, tit. vi, section 1. This last exception, however, goes far to prove the rule. With these exceptions, whether real or apparent, I know of no instance in which the Court gave the aid of its process in order to compel either the King or (until 1747) a subject-superior to grant a charter of resignation or confirmation. On the other hand, there were ample precedents and machinery at the service of an heir or of a creditor. This absence of precedent is the first difficulty in the way of accepting the theory of the defender's counsel. The second difficulty is the impossibility of finding any satisfactory legal ground for such an obligation on the part of the Sovereign. As Kames pointed out, the King must originally have had the same right of refusal as every subject-superior had until 1747. Accordingly one asks by what legal process and at what date he divested himself of this right. Both Kames (Statute Law, 2nd ed., p. 447) and Erskine (ii, 7, 6; ii, 7, 14), in passages already commented on, appeared to consider that the duty of the King to receive every purchaser in his own proper character was a legal duty, but neither gave a satisfactory reason for his opinion. Neither a statute which is in desuetude nor an ordinance of the Privy Council is a sufficient basis for a legal duty. All that can be said is that, if it be legally possible for a superior to alter the conditions of a feudal tenure by non-user or by contrary usage, the defender has proved his contention up to the hilt. Lastly, the only decision directly in point is an authority for the proposition that "it is arbitrary to His Majesty as it is to other superiors to receive or not to receive a vassal" by confirmation—*Cleland* v. *Dempster*, 1685, M. 15,032, 2 B.S. 71. The case was a competition between two disponees both infeft *a me vel de me* but neither confirmed by the King, who was the immediate superior. One of them, however, had presented a signature in Exchequer, and he claimed a preference on that ground. The reports are not intelligible unless one remembers that the decision was pronounced a few years before the Act 1693, cap. 13, which made sasines preferable according to the dates of their registrations, and irrespective of whether they were public or base or were clad with possession. It is also useful to supplement the reports by reference to an earlier case in which the same question was raised but not decided. The arguments, however, are fully reported in regard to the effect of the Act 1578, cap. 66, and of the ordinances, and were much the same as those to which we listened in the present case—(*Miln* v. *Powfouls*, 1678, M. 3028). It is, I think, certain that the Court in *Cleland's* case intended to negative the contention that the King was under a general legal duty to grant a charter of confirmation either in respect of the Act of 1578 or of the ordinances or upon any other ground. The authority of this judgment is not lessened because it might have been put upon a different ground. Even if it were conceded for the sake of argument that the Sovereign was bound to grant a charter of confirmation or resignation in every case just as if he had granted an express obligation to that effect, it would still, I think, be good law that in a competition between two disponees the preference (apart from fraud) would depend upon actual infeftment and not upon the existence of a right to obtain infeftment. In competitions between apprisers or adjudgers the Court introduced a rule, afterwards made statutory, that a charge against a subject-superior, or the presentation of a signature in Exchequer, should be treated as equivalent to infeftment—(Minor Practicks, tit. xi, section 16; Ersk. ii, 12, 23). Disponees not unnaturally followed the example of apprisers, and made notarial protests if the expeding of their signature or charter was unduly delayed—(Mackenzie, Obs., p. 188). I do not think that such protests could serve any useful purpose unless one of the competitors had created the delay to the prejudice of his rival and by collusion with an official of the Exchequer, the Signet, or the

Seals. For these reasons I consider that the defender's counsel have failed to establish a general legal duty upon the part of the King to grant charters of confirmation or resignation.

Seeing that Dallas's Styles are not in every library and that more than forty years have elapsed since it became incompetent for an adjudger to obtain infeftment by charter from the Crown, I have thought it as well to preserve certain notes and extracts from the Styles with regard to apprisings and adjudications, which were made for my own use. Besides helping to make intelligible steps of procedure which are now obsolete, they illustrate the marked difference from a practical and pecuniary point of view between the appriser's or adjudger's entry to lands held of the Crown by the tenures of ward, blench, or feu, for which he paid composition in Exchequer; his entry to lands held of the King in free burgage for which no composition was paid; and lastly, his entry to lands held of a subject-superior for which he paid "a year's rent or the Lords' modification." They also bring out clearly the legal duty of the Sovereign to infeft a creditor and the legal process directed to that end, in sharp contrast to the absence of any such process for infefting the voluntary disponee of a Crown vassal. It is not necessary to do more than mention the Styles relating to the inquest and culminating in the verdict of apprising. This was followed by a lengthy "Decreet of Apprising" pronounced by the presiding judge, who was generally a messenger or Sheriff in that part"—(Part i, p. 29). It ordained the appriser to be infeft in the subjects to be holden of the King or other superior, and contained the judge's receipt for the Sheriff-fee referred to by Craig. The author then explains that after the decreet has been "allowed" within sixty days conform to the Act of Parliament (1661, cap. 31) it must be considered first "whether the lands apprysed hold of the King or of a subject. 2. If of the King, then whether Burgadge (as Tenements within Burgh, or the like) or if otherways as Ward Blench or Feu. And so concluding the lands to hold of the King, and yet not burgadge, there must infeftment pass the whole Seals, by way of Signator and Composition in Exchequer"—(p. 33). The signature runs in name of the King with the special advice and consent of the "Lord High Thesaurer, Comptroller, and Collector-General of His Majesties' Rents, and new Augmentations" and the remanent Lords of Exchequer, and ordains a charter and infeftment to be made and passed under the Great Seal. It refers to the allowance by the Lords of Council and Session finding the Decreet of Apprising "orderly proceeded in manner written on the back thereof" and "ordaining . . . . infeftment to be passed and exped thereupon by way of Signatour and Composition in Exchequer." In a note it is stated (p. 35) —"This Signator being presented by the person appointed for that office (marked on the back with the writer's superscription) to the Exchequer, it is componed for ten merks for each 1000 merks of the first 10,000 merks, and five merks for each 1000 merks more contained in the apprysing (being a first comprysing), and being a second, third, and so forth for the half, viz.—Five merks for each thousand, after which composition, the presenter gives it out to the writer, and marks it presented on the back by himself to the Exchequer, and subscrives, and thereafter the writer goes to the person Keeper of the Thesaurers Register, who receives and registrats the same." A clause was sometimes inserted in the signature requiring the appriser to pass a new infeftment if he should acquire an irredeemable right by the expiry of the legal or by transaction with the debtor (Part iv, p. 502). After describing the rest of the procedure necessary for passing the seals and expeding a charter under the Great Seal (Part i, p. 36), the author gives the style of a horning against subject-superiors and also against the magistrates of burghs as to lands either held of them or of the King in free burgage. He explains (Part i, p. 40) that the magistrates usually give obedience and grant infeftment without suspending, because there is "no composition due to them, as to other subjects, for lands within Burghs are lyable to Scotting, Lotting, Watching, Warding, and all other emergents incident to Incorporations, which for the most part other lands outwith Burrows are not lyable to." He adds that other superiors sometime "suspend and sometime give obedience, as they and the appearand vassal agree or disagree anent the Composition, and that there be no other just ground why the Superior cannot enter or receive him." The suspension (p. 40) states various objections, and among others that "The Charger being an Appryser, he ought *ante omnia* to pay a year's Duty of the Lands for his Entry, according to the Act of Parliament, with the bygone feu-duties, which he has never offered to do." In a note (p. 42) he refers to the practice of the Court to modify the composition. On page 83 he explains the procedure in what is now called adjudication *contra hæreditatem jacentem*. In this case there was no allowance, and accordingly it was necessary in the summons to call the superiors for their interest. Where the lands are held of the King "ye must call the Chancellor, Thesaurer, Principal and Deput, Privy-Seal, Advocat, Register, and other Ministers, and Director of the Chancellary, for the King's interest, because the Summonds concludes that the lands being adjudged from the appearand heirs, as they who were charged and renounced, that the Director be ordained to issue furth Precepts for Infeftment; And the reason is, the King may have a reasonable cause to alledge why he cannot infeft, as that the lands are fallen in recognition, the right is reduced for not-payment of the feu-duty, and the like which if he have they may be proponed in the adjudication; and, on the other part, if the lands hold of a subject, he must be conveened for his interest, for the Summonds concludes against him, that he be not only decerned to infeft, but also that Letters pass for that effect on twenty-one

days under the pain of Horning—and he may also have the same or like reasons to alledge as those mentioned for the King why he cannot infeft" (Part i, p. 83). He then gives the form of the bill against the Director of Chancery. The bill narrates the decree of adjudication ordaining the Director of Chancery to issue precepts under the Quarter Seal, and craves the Court to "grant warrand to and ordain the said Director of Chancery and his deputs to grant, direct, emit, and issue furth precepts under the quarter seal, in my favours, for infefting me as having right, as said is, in the lands and others above specified to be holden of his Majesty and his successors, in manner above expressed, and als to append the said quarter seal thereto, in due and competent form as effeirs, after the form and tenor of the said decreet, in all points, and your Lordships answer." The author then adds—"This bill being given in to the Bill Chamber, with the decreet of adjudication as its instruction, the same is written upon by the clerk of the bills' servant, and thereafter past by the ordinar Lord on the bills, and subscribed by the clerk, which being done, the writer gives in the bill thus expede to the Chancellory, and upon sight thereof there is a precept expede" (Part i, p. 84). In a note to the form of a horning against "a superior," by which he means of course a subject-superior, he states (p. 85)—"That albeit the composition due to superiors of comprysed lands for entry, viz., a year's rent, or the Lords' modification, which if the rent be great, and the sum apprysed for but small, or the lands in haill or part liferented, they usually make but a year's annual rent of the money, yet there is nothing due by adjudgers for entry, notwithstanding there may be als much pretended in reason and equity by the superior, from the adjudger, as by the other, only there is an Act of Parliament appointing the first, but no Act as to the last, which is the rule of both, and the Lords decide accordingly." This must have been written before the Act 1669, cap. 18, became law. In Part iii, p. 214, he gives the style of a summons of adjudication *contra hæreditatem jacentem*, calling the officers of State and Director of Chancery, as also the magistrates and the subject-superiors for their interest, and concluding that the pursuer "should be ordained to be infeft" in the lands holden of the King (otherwise than burgage) "and that by way of Signature and Composition in our Exchequer, to be expede the Great Seal, in due and competent form," and that the magistrates and subject-superiors should be "decerned to infeft" him. Where the adjudication came in place of an apprising conform to the Act 1672, cap. 19, the Act required it to be followed by an allowance, and accordingly it was not necessary to call the superiors in the summons (p. 220). Dallas explains (p. 225) that this form of summons was submitted by him to and approved by Lord President Stair. After referring to the horning against a subject-superior, he adds, "But against the King no such diligence, for being *Communis Pater* he ever takes a moderat Composition, and enters the appryser or adjudger when the Signatur is presented in the Exchequer." In Part iv, p. 508, he gives the style of a "Signature of Adjudication in favours of the Adjudger, proceeding on a *cognitionis causa*, with an account of the ancient form under the Quarter-seal, and how altered." In a note the author explains—"When lands held of the King, in cases of this nature, no signature passed at all, but the adjudger gave in a bill to the Lords in course (as another common bill), showing that upon such a day he obtained the lands adjudged frae such a person, as lawfully charged to enter heir, and who renounced to be heir to his father for payment of such a sum, conform to the decreet pronounced thereanent before the Lords, and whereby he was ordained to be infeft, to be holden of His Majesty and royal successors, as superiors, in the same way and manner as the defunct held the same, or as his son might have holden the same had he entered and not renunced to be heir to him, in manner foresaid, as the said decreet present to show bears, and therefore craving the Lords might ordain the Director of the Chancellary, and his deputs, to emit and direct furth a precept under the quarter seal, in due and ample form of Chancellary, direct to the Sheriff, Baillie of Regality, or Stewartrie where the lands ly, or to as Sheriff, etc., in that part, for giving seasin of the lands adjudged to be holden of his Majesty and successors, *ut supra:* And this bill was passed by the Lord Ordinary on the Bills, and subscribed by the clerk of the bills, and then the Director or his deputs, gave out a precept under the quarter-seal accordingly, and seasin followed, and was registrat within sixty days: But within thir twenty years the Lords of the Thesaury would have it passed by way of signature, and the writters ceded, not willing to give offence, albeit there was no positive statute for it; and yet some to this day (and to be sure) do it the old way, if not both ways."

LORD JOHNSTON—In the case of *Ritchie's Trustees*, 1918, 55 S.L.R. 454, also to be disposed of to-day, I shall state my opinion at length on another phase of the same question as is now before us. Certain points with which I shall have then to deal have a bearing upon the present case, and I therefore, to avoid repetition, make reference here to my opinion in *Ritchie's Trustees*, and shall content myself with giving very generally my grounds of judgment in the present case.

I have had the benefit of perusing and considering the exhaustive opinion just delivered by my brother Lord Skerrington, whose acumen and research have placed before the Court in ordered form a mass of necessary material not easily available to the modern conveyancer. I am perfectly satisfied with his reasoning and agree in the conclusions which he has reached.

From the first opening of the case I felt that there was something so incongruous in the claim now made on behalf of the Crown that its rejection must be an almost

foregone conclusion. A careful consideration of the long and able argument presented by counsel has only served to confirm that impression.

The one flaw in the argument on both sides appears to me to have been the failure to keep sufficiently in view that the Crown's claim for statutory redemption of its casualties of superiority is to be measured by the composition payable for the entry not of an adjudger but of a singular successor in the wider sense of the term. The case of the adjudger who superseded the appriser is only one instance, and that the least frequent in practice, of the singular successor. The common instance is that of the purchaser. As regards the development of the law on the subject of the composition the purchaser is in a very different position from the appriser or adjudger. The adjudger was due for his entry *vi statuti* a year's rent; while the purchaser is due since 1747 a similar payment by the statutory recognition of a practice which I think may be correctly described as in course of growing up but which had not as yet become part of the common law. The Act 1469, cap. 36, provided that the overlord shall receive the apprising creditor "tennent till him payand to the overlord a year's maill as the land is set for the time." The Act 1669, cap. 18, enacted that "superiors of lands . . . adjudged shall not be holden to grant any charter for infefting the adjudger till such time as he be payed and satisfied of the year's rent of the lands and others adjudged in the same manner as in comprisings." The adjudger and appriser were therefore placed *in pari casu* and apprisings became obsolete. But the Act of 1747, 20 Geo. II, cap. 50, on the narrative of the circuity and expense of "the methods of procuring heirs or singular successors or purchasers of lands in Scotland that are held of subject-superiors heretofore practiced," provided a compulsitor on such superiors, on being duly charged by warrand of the Lord Ordinary on the Bills, to "receive or grant new infeftment to such heir or purchaser respectively," but "provided always that no superior shall be obliged to give obedience to such charge unless the charger at the same time shall pay or tender to him such fees or casualties as he is by law entitled to receive upon the entry of such heir or purchaser." The latter statute therefore does not define the payment as a year's rent in the case of the heir or purchaser, but leaves it to interpretation what it means by "such fees or casualties as he is by law entitled to receive." It is well known historically what that means. Confining attention to purchasers who are properly singular successors, and eliminating heirs who are not, purchasers who could not obtain an entry from the superior of the land purchased by them voluntarily had devised conveyancing methods whereby they could apply to the superior in the guise of an adjudger and compel an entry on payment of a year's rent, and prior to 1747 it had become the custom for superiors to waive the circuitous and expensive procedure and give an entry on payment of the year's rent. If they chose to stand out they could obtain no more than their year's rent. If they acceded voluntarily they need take no less. What, then, the Statute of 1747 means is, not that there had arisen a practice having the force of law that a superior was bound to receive directly a singular successor, not being an adjudger, and could, as in the case of an adjudger, be charged to do so on tender of a year's rent, but that such singular successor could in practice attain his end indirectly on payment of the same fees or casualties as he would have tendered and must have paid in terms of law had he been an adjudger. If I may use a modern expression, what the statute really did was to short-circuit the procedure which had come to be commonly resorted to where not waived, but reserving to the superior as for the future his statutory right the same fees or casualties as he could have exacted had the circuitous procedure required to be adopted. I refer to Lord Kinnear's exposition of this point in *Home* v. *Belhaven*, 1900, 2 F. 1218, at p. 1242, 37 S.L.R. 990. This consideration has, I think, a most important bearing upon the decision of the present case.

Why I was so impressed with the incongruity of the present demand of the Crown was that I have always regarded the Crown as the origin and fount of all feudal right. The feudal system may have had a different history in Scotland and in England. It was probably later in reaching maturity in the former than in the latter country. Its relative development was certainly affected by the fact that the Crown in England was too strong for its feudal nobility, and in Scotland its feudal nobility too strong for the Crown. But the system lasted longer in Scotland than in England, and, what is the important point here, stamped its impress on the Scottish system of conveyancing in land in a manner which distinguishes it to this day from that of probably any other country. The consequence is that as the Crown was recognised as the paramount superior and source of all feudal right, the Crown is still the paramount superior and source of all land rights. Consequently it seemed to me impossible to conceive that the Crown should in any statute, much less in one so early in date as 1469, be herded along not only with its own vassals in chief or nobility but also with all in the feudal chain down to the very last or lowest mid-superior, under one generic term "overlord," and that there should be imposed on the Sovereign by his Parliament—that is practically by his assembled feudatories—the duty of entering an apprising creditor, and at the same time have conferred on him the right to receive a year's rent of the lands apprised as a consideration for doing so, in reality for making effectual the order of his own Court.

I am satisfied that the Crown did not require to be brought by statute to a sense of its duty in this respect, and that the statute in question was not directed in this

respect against the Crown. Consistent practice for four hundred and fifty years confirms this.

But then the Crown's claim is not based on the Statute of 1469, for that applies in terms only to the species of singular successor termed an appriser; nor on the Statute of 1669, which extended its operation to adjudgers. To reach the singular successor generally the Crown must find some other foundation for the claim than the Statutes of 1469 and 1669, and the only foundation possible is the Statute of 1747. And here appears to me to come in the importance of appreciating precisely what that statute effected, and what were its limitations. For while that statute recognises a practice which had grown up of superiors dealing with purchasers and other voluntary singular successors on the same footing as with adjudgers, and perpetuates that practice by statutory sanction, Parliament expressly confined its operation to "singular successors or purchasers of lands in Scotland *that are held of subject-superiors*," and so excluded the Crown from its purview. This appears to me to infer that the Crown was as much outside the practice which had grown up on the lines of the Statute of 1469 as I am satisfied it was outside that statute itself. As the right of the subject-superior to composition on the entry of a singular successor is not based on the Statute of 1469, but on a practice superinduced on that statute and sanctioned by the Act of 1747, the Crown takes nothing from that statute or from its recognition of the practice which had grown up and on which it proceeds. This entirely confirms the impression with which I approached the case, and satisfies me that the Crown's present claim is baseless.

In truth the Crown, as Lord Skerrington has shown, has a claim by usage, but it did not originate in the Act of 1469 and was a totally different usage from that on which the Act of 1747 proceeds.

I think therefore that we should recal what is necessary of the Lord Ordinary's interlocutor and assoilzie from the third conclusion of the summons.

LORD PRESIDENT—I agree with the conclusion reached by the Lord Ordinary in this case, and with the close and able reasoning which has led him to that conclusion. So thoroughly has his Lordship explored the whole ground that I can add but little to his full and careful expositions. We had the advantage too of listening to a lengthy and singularly able and learned debate, in the course of which no authority bearing on the topic in controversy was omitted and no argument was left unsifted. But in the end the vital question throughout still remained the decisive issue—Did the old Act of 1469, cap. 36, embrace the Crown or was it confined to subject-superiors? It was frankly conceded that it did extend to Crown lands, that "overlord" was a habile term by which to describe the Crown, and that there was nothing in the Act to indicate the exclusion of the Crown. But it was argued that inasmuch as there was no recorded instance prior or subsequent to the date of the Act of the Crown refusing an entry, therefore the Crown was not entitled to demand the year's rent which every other superior might by force of statute claim. I cannot think that this is convincing. The questions which throughout the argument were uppermost in my mind, and to which I have been unable to find any satisfactory answers, were—Why should the Crown, in this ordinary step of feudal practice, be placed in a different position from other superiors? Why should subject-superiors be entitled to claim a year's maill as the lands are set for the time, and why should the Crown be bound to grant an entry on payment merely of the reasonable expenses of the charter? Why should no one have discovered this strange anomaly in feudal practice until now? Why should judges, acknowledged masters of feudal law and practice, have spoken as if it were matter of course that the Crown like all other superiors was entitled to a year's maill although it invariably asked and took less? I do not think that any successful answer to these simple inquiries has been made. At the outset of the debate we were told that the issue lay between a year's maill on the one hand and one-sixth of the valued rent on the other hand. It soon became evident that this was a hopeless contention, that the rule of the one-sixth of the valued rent dated no further back than the reign of Queen Anne, that prior to that date no certain rule had been observed, that each sovereign since then has fixed the composition at what he pleased, that some of them fixed nothing at all—in other words, failed to renew the warrant—and that composition at various rates as well as "reasonable expenses" had been charged to the Crown vassal. Driven from the one-sixth of the valued rent, counsel for the respondents urged that it was the duty of the Crown to take nothing more for an entry than "reasonable expenses," which may be true, but lacks point unless you go further and demonstrate that the right of the Crown is limited to "reasonable expenses," and that it can under no circumstances demand more. But nothing approaching this was so much as attempted. No textwriter was referred to, no statute was cited, no decision was quoted, no dictum was mentioned which afforded the smallest support to the proposition that the Crown had no right to demand a year's rent as composition. It is a very striking fact that in the case of the *Advocate-General* v. *Swinton*, 17 D. 21, decided as far back as 1854, the very eminent feudal lawyers who took part in the decision were under the belief, as is clearly apparent from their opinions, that they were called upon to decide whether or not the Crown was entitled to demand a year's rent, neither more nor less, just like other superiors. And if it had been there held that composition was due at all, then in conformity with these opinions decree for a year's rent would have been given without hesitation. And it is equally clear that every member of the Court was under the belief that the Crown had actually been paid a year's rent as composition, and hence was

not entitled to make a second demand for a similar amount. Many other judges, masters of feudal law, have taken for granted the Crown's right to a year's rent although well aware that it had never been exacted. And so we were in the end left with a plea on behalf of the vassal so simple as this—The Crown has been accustomed to refuse no man an entry; the Crown has never asked a full year's rent. The Crown has always been liberal, and has always asked something less than a year's rent. *Ergo* something less than a year's rent is all that the Crown can now claim. How much less nobody knows. Obviously, as I think, this will not do. If the year's rent is not to be exigible, then the alternative figure must be fixed somehow, and confessedly it is to be found nowhere. The judgment we are now asked to pronounce sheds no light at all on the only question which this action was raised to determine. I am completely in the dark as to what your Lordships consider is the amount of the highest casualty which the Crown can claim. Once it was admitted—and the admission really could not have been withheld—that the Act 1469, cap. 36, applied to Crown lands, and that the expression "overlord" as used in the Act was habile to embrace the Crown, it became plain to my mind that the conclusion come to by the Lord Ordinary was the only possible conclusion. For the argument that because the Crown did not require compulsion to give an entry, therefore the Act 1469, cap. 36, could not apply to the Crown, is palpably untenable. In the absence of authority or contrary feudal practice I hold that the Crown could not since 1469 refuse an entry if a year's rent of the lands as set at the time was duly tendered, was bound to grant an entry if a year's rent was tendered, and was entitled to have a year's rent as a condition of granting the entry. In short, the Crown like a subject-superior may *ex gratia* for centuries ask and receive less than it is entitled to exact, but that benevolent practice will not deprive the Crown of its right to refuse an entry wherever there be not offered by way of composition "a year's maill as the lands are set for the time."

LORD MACKENZIE, who heard part of the case, delivered no opinion.

The Court pronounced this interlocutor—

"Recal the interlocutor [of the Lord Ordinary]: Find it unnecessary to deal with the first and second declaratory conclusions of the summons: Therefore dismiss the same: *Quoad ultra* assoilzie the defender from the remaining conclusions of the summons, and decern."

Counsel for the Pursuer (Respondent)—Solicitor-General (Morison, K.C.)—Chree, K.C. — Pitman. Agent — Thomas Carmichael, S.S.C.

Counsel for the Defender (Reclaimer)—Blackburn, K.C.—Macmillan, K.C.—Maconochie. Agents—Dundas & Wilson, C.S.

Thursday, May 16.

FIRST DIVISION.

[Lord Sands, Ordinary.

SELLAR *v.* HIGHLAND RAILWAY COMPANY.

Arbitration — Arbiter — Disqualification —Holding Stock in Incorporated Company, One of the Parties — Timeous Insistence on Objection—Lodging Representations against Proposed Findings of Oversman under Protest.

Arbiters having disagreed devolved the reference upon the oversman, who issued proposed findings. It was then discovered that one of the arbiters held £3700 ordinary stock in a railway company which was one of the parties to the reference. The other party becoming aware of that fact, intimated that he considered that arbiter was disqualified from acting and that he would not hold himself bound by the award. He thereafter lodged representations against the proposed findings without prejudice to his right to challenge the award on the ground of the arbiter's disqualification. In an action of reduction of the decreet-arbitral, *held* (1) that the arbiter in question was disqualified, and (2) that in the circumstances waiver of the objection to the arbiter could not be inferred from the lodging of the representations.

Colin Reid Sellar, *pursuer*, brought an action against the Highland Railway Company, incorporated by Act of Parliament; Charles Pullar Hogg, civil engineer, Glasgow; George Davidson of Wellwood, lessee of salmon fishings in Aberdeen; and John Wilson, K.C., Edinburgh, *defenders*, concluding for reduction of a pretended decreet-arbitral, dated 6th and recorded in the Books of Council and Session 8th, both days of October 1917, issued by the defender John Wilson as oversman in a reference between the pursuer and the Highland Railway Company, and for decree for £628, 14s. 11d. against the Highland Railway Company.

Defences were lodged by the Highland Railway Company.

The parties averred, *inter alia*—"(Cond. 8) After the oversman had issued his proposed findings, but before the pursuer's representations against them had been lodged, the pursuer for the first time discovered that the said Charles Pullar Hogg during the arbitration proceedings was the holder of £3700 ordinary stock of the said company, and was thus disqualified from acting as arbiter in the said reference in respect that he had a direct pecuniary interest in the result. This circumstance was not previously known to the pursuer, and it was not disclosed to the other members of the arbitration tribunal. Had the pursuer been aware of this circumstance he would not have proceeded with an arbitration in which the said Charles Pullar Hogg occupied the position of arbiter. On Mr Hogg's disqualification coming to the pursuer's