that effect the witness refused to answer the question. A similar question with regard to their respective boats was put by the appellant with the same result to the following witnesses also called for prosecution, viz. — William Martin a member of the crew of the boat 'Joan'; and Hugh M'Crindle and George M'Crindle, members of the crew of the boat 'Teresa.'"

The *question* submitted for the opinion of the Court was—"On the foregoing facts was I entitled to hold that the witnesses Edward M'Crindle, William Martin, Hugh M'Crindle, and George M'Crindle could not be compelled to answer the question above mentioned put to each of them by the appellant with regard to their respective boats?"

No appearance was made for the respondents.

Argued for the appellant — In certain charges the only way of proving a crime was by examining a *particeps criminis*, *e.g.*, incest. It was the duty of the judge to inform the witness that he must answer, because by appearing as a witness for the prosecutor he would be free from criminal consequences. *Socii criminis* were bound to speak out but were relieved from punishment — Macdonald, Criminal Law, p. 462; Hume on Crimes, ii, 367; Burnet, Criminal Law, p. 461; Tait on Evidence (Urquhart's edition) at p. 428; *H. M. Advocate* v. *Weatherly*, 1904, 4 Adam 353.

LORD DUNDAS—There seems to have been here a series of misapprehensions. In the first place the objection seems to have been prematurely taken, because it is difficult to see how there could possibly have been anything incriminating in any answer to the question actually put, namely, "Did the 'Joan' leave Girvan harbour on the morning of Monday 19th May 1919?" But apart from the objection being taken too soon, no doubt through over-anxiety and apprehension on the part of the defending agent, the matter goes deeper. It appears from the case that the witness was assured by the Procurator-Fiscal that no charge would be brought against him under section 5 of the Act. I see it is laid down by the late Lord Justice-Clerk in his well-known book on Criminal Law, p. 462, that "Where a witness is under promise of exemption from prosecution he cannot decline to answer any pertinent question." But further it is perfectly plain, I think, that the Crown having adduced this man as a witness, could not thereafter prosecute him; for as Hume says, ii. 367—"By the very act of calling him as a witness the prosecutor discharges all title to molest him for the future with relation to the matter libelled. Thus the witness, when this has been explained to him, is absolutely free to tell what story he has a mind." I think in such circumstances as are present in this case the witness is actually discharged by operation of law, as Lord M'Laren put it in the recent case of *Weatherly* (1904, 4 Adam, 353) cited to us. Clearly, therefore, the witness was bound to answer the question; the learned Sheriff-Substitute was wrong; and therefore I move your Lordships to answer the question put to us in the negative.

LORD SALVESEN—I am entirely of the same opinion. The matter is of importance, because the fact that these witnesses were told that they might refuse to answer the question put on the ground stated and took advantage of the Court's direction to that effect has very possibly led to a miscarriage of justice. If all the witnesses adduced by the prosecutor were entitled to be mute on the subject of the offence charged against the accused the prosecutor would necessarily fail in obtaining a conviction. I have not the slightest doubt that the Sheriff has entirely misapprehended the law of Scotland, which I think is accurately stated in the passage in Lord M'Laren's judgment read by Mr Wark. My understanding of the law has always been—and I have acted upon it on many occasions, especially in connection with incest cases and the like—that a *particeps criminis* is discharged by the operation of law from all possibility of prosecution by being adduced as a witness by the competent authority. That being so the ground of the Sheriff's ruling entirely disappears, and the question submitted to us must clearly, I think, be answered in the negative.

LORD GUTHRIE—I agree. I hope what your Lordship said will be noted, so that in the next edition of the late Lord Justice-Clerk's most useful book the statement will be broadened and made not to depend on a promise made by the public prosecutor but on the direct operation of the common law.

The Court answered the question put in the negative.

Counsel for the Appellant—Lord Advocate (Clyde, K.C.)—Wark. Agent—John Prosser, W.S.

HOUSE OF LORDS.

Tuesday, November 11.

(Before the Lord Chancellor (Birkenhead), Viscount Haldane, Viscount Cave, Lord Dunedin, and Lord Shaw.)

LORD ADVOCATE *v.* MARQUESS OF ZETLAND.

(In the Court of Session, March 28, 1918, 55 S.L.R. 559, and 1918 S.C. 544.)

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

The Crown is not entitled to assess casualties of composition payable to its estate of superiority at one year's real free rent of the subjects, and consequently such one year's real free rent does not fall to be considered in calculating the compensation to be paid for the redemption of the casualties under the Feudal Casualties (Scotland) Act 1914.

This Case is reported *ante ut supra.*

At delivering judgment—

LORD CHANCELLOR—This is an appeal from an interlocutor of the First Division of the Court of Session dated 28th March 1918, reversing an interlocutor of the Lord Ordinary, Lord Cullen, dated 4th April 1917, in favour of the pursuer, the present appellant.

The matters raised in the debate are extremely difficult, and involve many points peculiar to the mediæval land law of Scotland, upon which an English lawyer can only express his views with diffidence. I have, however, formed a clear view that the appeal fails, and it is necessary in a matter of such far-reaching importance to explain fully the reasons which have led me to this conclusion.

The Lord Advocate appears as appellant on behalf of the Crown. The respondent is Crown vassal who owns some land and is mid-superior of other lands in the county of Fife. His lands are partly blench and partly held at a feu-duty. By the Feudal Casualties (Scotland) Act 1914 feudal casualties are to be redeemed on notice given either by the superior or by the vassal within fifteen years from the 1st January 1915. If such notice is given the compensation is to be paid in accordance with the rules set out in the Act, and by section 9 this compensation may at the option of the vassal take the form of a perpetual feu-duty. In the present case there is no dispute that notice has been duly given and that the amount of compensation is to be ascertained in accordance with section 5 (1) (*a*) of the Act, which provides that the sum shall be fixed—"(*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 4 per cent. per annum, produce one and 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"—as is the case in this appeal—"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."

The issue between the parties rests on the words "highest casualty." The points which arise are—first, what, on the assumption that the highest casualty is the composition payable by a singular successor entering in respect of voluntary transmission, is the proper basis in law in the case of a Crown holding on which the amount to be paid is to be calculated, whether on the actual rental value (or feu-duty if subfeued) or on one-sixth of the valued rent; and secondly, whether in the term "highest casualty" the casualty payable when the lands are taken in execution by an adjudger is included; and if so, whether that casualty is a year's rent.

These questions cannot be resolved without a careful examination of the history of the law relating to feudal casualties. The system of land holding in Scotland was in its origin feudal. The King was early recognised as the paramount owner, and his subjects held of him, either immediately or mediately through a mid-superior, by one or other of several forms of tenure, of which only ward-holding requires detailed examination. Those who held of the King as immediate superior were known as Crown vassals, but as a rule they in turn were superiors of other vassals who held of them by the same tenure. At first the vassal held the feu as a pure *beneficium*, and therefore his interest ceased when he died. By degrees he acquired a proprietary interest in the feu, and one of the earliest steps was the acquisition by his heir of the right to have investiture renewed on payment to the superior of a sum of money known as relief. It is not certain when the practice arose, or when it hardened into a custom having the force of law. The vassal did not so easily acquire a right to alienate the feu, and down to the sixteenth century an attempt to alienate lands held immediately of the Crown inferred the casualty of recognition, which entailed the forfeiture of lands—see Discours Particulier d'Ecosse, 11th par.; Act James VI, 1587, cap. 113—and there are cases down to the end of the seventeenth century which maintain the same rule—*Maitland* v. *Leslie*, (1669) M. 13,382; *Cockburn* v. *Cockburn*, (1676) M. 13,389; *Cleland* v. *Dempster*, (1685) M. 15,032, *cf.* Lord Hardcarse's Decisions, ii, Brown's Suppt., p. 71—until recognition was finally abolished in 1747. If therefore any vassal wished to dispose of his feu he could only do so by consent and with the assistance of his superior—see Discours Particulier d'Ecosse; Hope's Minor Practicks (1734 ed.), v, 16; Dalrymple's Essay, p. 50.

I do not find it necessary to discuss the extremely difficult problems which arise on the earliest statutes. They may or may not be authentic; they may or may not have been in desuetude. It may, however, be noted that a Scottish court can always pronounce that an Act has become invalid by reason of desuetude. "A posterior custom may repeal or derogate from a prior statute"—Ersk. Inst., i, 1, 45, and see Lord Dunedin's judgment in *Heriot's Hospital*, (1912) S.C. at p. 1134, 49 S.L.R. at p. 858.

The earliest Act which is of importance is the Act 1469, cap. 36. Lord Kames (Hist. Law Tracts, p. 362) has produced evidence that apprising existed before the Act, but it is immaterial for the present purpose whether that system was based on an earlier statute or on a practice which had grown up independently of statute. In 1469 the vassals of a subject-superior suffered from the grievance that under the brieve of distress their moveables were liable to be seized by creditors of the superior. The Act was

passed primarily to remove that grievance, and also to enable creditors te obtain diligence against the land itself. Whatever may have been the law as to apprisings when this Act was passed, it is to its terms that we must look for the law from that date. The words of the Act are as follows: —"Till eschewe the great heirschip and destruction of the Kingis commons, maillers, and inhabitants of Lordis lands, throw the force of the brief of distress, that quhair ony summes are obteined be vertue of the saide briefe upon the Lord, awner of the grounde, that the gudes and cattel of the puir men inhabitants of the ground are taken and distrenzied for the Lordes debtes, quhair the mailles extendis not to the availe of the debt: It is advised and ordained in this present Parliament that fra hynefurth the puir tenants sall not be distrenzied for the Lords debtes further then his termes mailles extendis to. And gif the sum obteined be the brief of distresse exceedis the termes maill, the officer sall, at the instance of the partie that obteinis the debt, gang to ony uther proper gudes of the debtour, and pay the remanant of his debt, if he hes so meikil within the schire. And gif he hes not sa meikil lands or gudes within the schire, the creditour sall cum to the King and bring certification of the said schireffe howe meikil he wantes of the summe recovered be the brief of distresse, and may not get his proper gudes within the schire. And then the King sall gif his letters to ony other schireffes quhair the debtour hes ony other gudes or mailles within the realme, and gar them be prised, and pay the said creditour within fifteene dayes after the forme of law. And quhair the debtour hes na moveabil gudes but his landes, the schireffe, before quhom the said summe is recovered be the brief of distresse sall gar sell the land to the availe of the debt and pay the creditour — swa that the inhabitantes of the saides landes be not hurt or grieved for their lordis debtes. Nevertheless it sall be leifful to the person that aucht the lande, first to redeeme and quite out the samin againe within seven zeires payand to the byer the money that it was sauld for, and the expenses maid on the overlorde for charter, saising and infeftment. And the saide redemption and lowsing to be maid within seven zeires, as said is, or not. And gif the creditour takis the termes maill be vertue of the brief of distresse, it sall not be leifful to the Lord to tak it againe. And gif there cannot be foundin a byer to the saids lands, the schireff of that schire or ony uther, quhair he hes land, sall cheese of the best and worthiest of the schire, and least suspect to ony of the parties, to the number of thretteene persons, and apprise the said landes, and assigne to his creditour to the avail of the said summe within sex moneths after the said sum be recovered before the schireff. And als the overlord shall 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."

It might have been a question of some difficulty, even on the principles of construction which the Scottish Courts use to apply to statutes passed before the Act of Union (see the judgment of Lord Robertson in *Earl of Home* v. *Lord Belhaven and Stenton*, 1903 A.C. at p. 347, 5 F. (H.L.) at p. 23, 40 S.L.R. at p. 611; *cf. Heriot's Hospital*, 1912 S.C. at p. 1134, 49 S.L.R. at p. 858), whether the Crown was intended to be included in the term "overlord"; but since the hearing in the Courts below further research has revealed that in the years 1483 and 1484 the Crown granted charters of apprising which refer to the Act, and form conclusive evidence of *contemporanea expositio* in favour of the appellant's contention that the Crown was included. This evidence has rendered almost useless the learned arguments and judgments in the Courts below on this part of the case. I must add that it is not creditable to those who were charged with these researches on behalf of the Crown that the discovery of authorities at once so relevant and so accessible should have come at this late stage in the history of the litigation.

In the course of years the system of apprising was superseded by adjudication. The Act 1621, cap. 7, which deals with adjudications *contra hæreditatem jacentem*, shows that this new system was then in being by the side of apprisings. It was a matter of controversy — as adjudications were not of statutory origin—whether a superior entering an adjudger was entitled to the year's maill mentioned in the Act 1469, cap. 36 (Spotiswoode's Practicks (1706 ed.), p. 9), but it was settled in *Grier* v. *Closeburn*, 1637, M. 15,042 that he had no such right, although the Lords agreed that there was a like reason of equity for the adjudication as for comprisings, but there was no Act to warrant it. This decision does not seem to have been accepted without criticism (see Hope's Minor Practick (1734 ed.) xi, 22) and the point seems to have been decided again in 1663 (Mackenzie's Observations (1686 ed.) p. 74). Eventually the Act 1669, cap. 18, was passed to put adjudications "in the like condition with comprisings as to superiors." It is at least arguable that inasmuch as the Act 1469, cap. 36, applied to the Crown, this Act did so too. Apprisings by this date were falling into desuetude, and eventually the Act 1672, cap. 19, abolished them for the future. The words of the Act that "neither the superior nor the adjudger shall be prejudged by this Act, but . . . shall be in the same case . . . as if apprising were led of the lands at that time and a charge given to the superior," and the similar words used in the Act 1681, cap. 17, as to the sale of bankrupts' lands, seems to suggest that Parliament had in mind only lands held of subject-superiors; for the procedure mentioned does not apply to the case where the Crown is superior. The terms of these Acts tend to confirm the construction placed on the Act 1578, cap. 66, to which I refer later. Apprising and adjudication were methods of obtaining execution against the lands of debtors, and must be considered in relation to the questions raised in this

appeal; but the importance of these Acts lies, on the one hand, in the fact that a superior could be compelled to enter a creditor, and therefore an exception was made to the rule that feus were inalienable, and, on the other, in the fact that in course of time these methods of involuntary alienation were adapted so as to enable a vassal to transfer his land to a purchaser (see the judgment of Lord Balgray in *Hill* v. *Merchant Company*, [1815] 2 Ross, L.C. 320, at p. 323). In the beginning the purchaser was as a rule compelled to assume the guise of a creditor, and then, by taking advantage of the statutory rights of a creditor, he became liable to pay to the superior the year's maill payable as a casualty of composition. The superior was of course never under an obligation to compel this procedure, but as an unwilling superior could by appropriate procedure be forced to enter a purchaser it became the practice for every purchaser to pay this casualty on entry.

It is important to observe that this right of the superior, in the case of a purchaser who was not forced to follow the statutory procedure, did not rest upon statute but upon the practice of the realm, though it is clear that in the case of subject-superiors, at all events, it became part of the law of Scotland that a vassal was entitled as of right to alienate his feu, and that the superior was equally entitled to require, as a condition of entering the purchaser, payment of the casualty of composition. The existence of these rights was recognised by an Act of 1747, one of a series of statutes amending the law of Scotland passed after 1745, 20 Geo. II, cap. 50, which abolished the tenure of wardholding for ever (sections 1 and 9), in the case of lands held of the Crown turned wardholding into blanch holding (section 2), and in the case of lands held of a subject-superior turned that tenure into feu holding (sections 4 and 5). The effect of these provisions was that the Crown received no compensation but that subject-superiors did. A group of sections beginning with section 12 amended the practice of procuring entry by heirs or purchasers of lands held of subject-superiors, one of which (section 13) enabled the superior to refuse entry unless he was paid or tendered such fees or casualties as he was by law entitled to receive. The statute therefore either established or assumed that there was a rule of law that a purchaser was entitled to be entered on condition that he paid the superior a sum of money, which by practice was limited to one year's actual rent. The sections of the Act did not purport to create any new right, but merely to shorten the existing tedious and expensive methods of procuring entries by singular successors in lands held of subject-superiors (Ross' Lectures, ii. p. 300). This rule, as I have pointed out, cannot be supported by the words of the Acts of 1469 and 1669; the rule of law had arisen by reason of the practice of entering voluntary purchasers without having recourse to adjudging, which practice had by 1747 become a matter of course. The expression "such fees or casualties as he is by law entitled to receive," used in section 13, was considered by this House in the case of the *Earl of Home* v. *Lord Belhaven and Stenton*, [1903] A.C. 327, 5 F. (H.L.) 16, 40 S.L.R. 607, and it was then held that the superior was entitled to the casualty prescribed by the Act of 1469. The provisions of the Act, which were intended to simplify and shorten the system of conveyancing theretofore existing, did not apply to the Crown. The procedure applicable to the transfer of a feu held of a subject-superior who was unwilling to enter a purchaser, could not be used against the Crown, and in order to determine whether the undoubted rule that a subject-superior was entitled to a year's maill enured also to the benefit of the Crown, it is necessary to turn to the history of the alienation of feus held immediately of the Crown by wardholding.

Very shortly after the Act of 1469 a divergence in practice can be traced, and the development of the procedure adopted on the transfer of his feu by a Crown vassal followed a very different course to the practice with regard to lands held off subject-superiors. The position of the Crown must be considered from several distinct standpoints—(*a*) As paramount superior recourse could be had to him in cases where the mid-superior refused to fulfil his obligations. For example, if a subject-superior refused to enter an adjudger who had complied with all the forms, the latter could proceed from superior to superior, and if he failed to obtain redress he ultimately came to the King. In such a case the King never refused. This is the case mentioned in several authorities which have sometimes been cited in support of the proposition that the King never refused to enter any singular successor. The context clearly shows that the writers did not intend to lay down that such an extended rule was the law at an early period, although some do go on to state that the Crown did as a matter of fact admit all voluntary successors. The two cases are however distinct; and it is the former case which is mentioned by Craig (Jus Feudale (Runciman's ed.) iii, 2, 20). He first of all mentions land held off the Crown as immediate superior, and continues: "Si prædium de alio quam de Rege teneatur et dominus superior ter requisitus recuset, tunc ad ejus superiorem recurritur . . . et sic de superiore in superiorem donec ad Regem perveniatur *qui nunquam solet recusare*" and the same observation is required by the similar statements in Bankton (Inst. iii, 2, 52) and Erskine (Inst. ii, 12, 25). In such a case there was no question of a casualty being due to the King, for the immediate superior was entitled to it (*Starke* v. *L. Airth*, [1630] M. 6900). Except as illustrating the policy of the Crown with regard to the alienation of feus the action of the Crown in that class of case is not of assistance in determining this appeal. (*b*) With regard to apprising and adjudication, at first the King, as is shown by the charters of apprising already referred to, exacted the same casualty as a subject-superior. The extracts from the Treasurer's Accounts and the statement in Balfour's Practicks of the Law of Scotland at p. 402, "Ilk marke land of zeirlie profit should be

comprisit to the creditor to twentie merkis, viz., five merkis of zeirlie profit for ilk hundredth merkis of debt (Pen. Jan. 1559, Alane Dickisone contra Johnne Carkettill, Pen. Mart. 1536, 1 t.c. 932)" show that in the sixteenth century the Crown was wont to require payment from comprisers on the basis of 5 per cent. or twenty years' purchase. Apprising was abolished in 1672, and there is no indication whatever that the Crown ever exacted a year's maill from an adjudger; the casualty demanded in the seventeenth century where a creditor was proceeding by way of diligence was calculated on a small percentage of the debt without any reference to the rent or rental values. Dallas' Styles (1697 ed.), p. 35. (*c*) In the case of voluntary alienation the policy of the Crown was to encourage it, as it tended to diminish the power of the Lords (who in Scotland had much greater power than in England) by causing the dispersal of estates. The Lords were naturally less favourable, for their interest was to retain as their vassals persons closely bound to them. It is therefore not surprising to find that the Crown early adopted a very indulgent attitude to purchasers, and was not disposed to throw any obstacles in the way without real cause, whether the purchasers appealed to him as the immediate superior, or as the ultimate feudal lord in the case of a mid-superior refusing to enter a purchaser. There is no instance of a purchaser being compelled by the Crown to resort to apprising or adjudging, and there is consequently no rule or practice based on apprising or adjudging with regard to the purchase of lands held of the Crown as superior. The case of a subject-superior who could be compelled to enter a purchaser, cannot apply to the King, who could not be charged, and it is therefore impossible to argue from the one case to another and different case. The Crown practice in 1578 is authoritatively stated in the preamble to the Act 1578, cap. 66, "Anent dowbil confirmation of fewes of kirk lands, and landes halden immediatelie of our Soveraine Lord." The passage occurs in the part of the preamble which deals with kirk lands, and reads— "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." The words are obscure, and taken by themselves might be read as applying only to kirk lands, and nothing more is known of the Acts of Council referred to. The preamble, however, is conclusive proof that they did exist, whatever their date may have been, and were to the effect stated, and the interpretation placed upon them by the institutional writers shows that it has always been considered that the passage applies to all alienations of lands held immediately of the Crown. Although indeed the Act contains no reference to the subject-matter in the enacting part, for the reason that the statement is inserted only as an illustration and by way of analogy, yet the assertion by Parliament of the existing rule of law cannot lightly be put on one side, especially having regard to the weight of authority of the greatest of the Scottish writers who have referred to it.

Lord Stair (ii, 3, 43) thus states his view— "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, cap. 66, and though 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." Erskine (Inst. ii, 7, 6) says— "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, cap. 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"—and see Bankton, Inst. ii, 3, 48 and 53. In *Miln* v. *Laird of Powfouls*, (1678) 2 Stair's Decisions 653, M. 3028, it was, it is true, argued, but apparently not decided, that "though the King as superior by the common law must receive apprisers or adjudgers, yet as to infeftments upon resignation or confirmation the King as all other superiors may refuse all or confirm whom he pleases. And by the Act of Parliament founded on, viz., Act 66, par. 5, 1578, the first confirmation is declared the best right. And albeit that Act mention an Act of Council yet the King or his Compositors ought not to deny confirmation upon the reasonable expenses of any party, yet that is not repeated in the statutory part but only in the narrative; and an Act of Council can derogate from no man's right much less the King's." The argument that an Act of Council cannot derogate from any man's right would seem to be based on a misconception. The general notion in feudal times, which survived to much later days, was that the King "should live of his own," and the services and moneys due to him as supreme feudal lord were the means by which he carried out his duties as such lord. As is pointed out in the introduction to the 1st vol. of the Exchequer Rolls of Scotland, p. 34—"The ordinary sources of the royal revenue may be described generally as consisting of the rents of the Crown lands, with the payments due from the thanages, the casualties . . . exigible from time to time from the Crown vassals, the fines imposed by the Justiciary and sheriffs, the escheats of

attainted persons, the ferms or maills of the royal burghs, and the customs on merchandise with occasional compositions . . . and the castle wards . . . Taxation was an extraordinary source of income to which the King was not expected to have recourse except on the occurrence of great national emergencies." The interest of the subjects of the realm was to force the King to meet his current expenses out of his own resources. This policy was never more than an ideal, for kings rarely sought to keep their expenditure within the limits of their resources, and moreover, as the feudal system never established a clear distinction between the King as ruler of the country and as a landowner, he was as absolute owner entitled to alienate his lands. To a certain extent this was a recognised duty of a king, for it was then the only substantial way of rewarding service to the State. The State was therefore always in danger that the resources of the monarch would be so diminished by improvident grants as to cast an increasing and intolerable burden upon his lieges. The history of Scotland shows that it was part of the constitutional functions of the Privy Council to manage and dispose of "the domains of the Crown including the lapsing and redisposal of landed estates and feudal rights belonging to subjects and the items of large or small value ever pouring into the Exchequer in the shape of feudal casualties" — Register of the Privy Council of Scotland, vol. i, introd. p. 6. Thus an Act, 1489, cap. 12 (Acts of the Parliament of Scotland, ii, p. 220) requires the consent of the Privy Council to all grants relating to the King's property and revenue, and the Register of the Privy Council contains numerous examples of the royal will being signified through the Privy Council (*e.g.*, 23rd August 1565, 21st July 1566, and the earlier Act of Council, 7th August 1527, cited by Sir James Balfour; Practicks of the Law of Scotland, p. 133). The Privy Council therefore had a definite constitutional duty, and it afforded the natural channel for declaring the decision of the Crown upon a matter of policy, such as the limitation to a reasonable sum of a casualty due to him, for such a determination would tend to diminish the ordinary revenue.

Whether this be the correct view or not, the rule or practice was duly established that the King would enter singular successors upon payment of a reasonable composition. What was reasonable was a question open to discussion in each case, and it appears from the royal warrant that some persons received more favourable treatment than others, although the highest rate does not seem to have exceeded one-fourth of the valued rent. Upon the establishment of the new Court of Exchequer the barons took steps to remedy this state of affairs and obtained a warrant issued by Queen Anne under the Privy Seal which fixed a definite uniform scale—Clerk and Scrope, p. 187. This warrant, which is dated the 18th August 1709, recites that there is no certain rule in settling compositions due at passing signatures in favour of purchasers, and that sometimes one-fourth, sometimes one-fifth part of the valued rent, and at other times a lesser proportion had been taken, and ordains that for the future the composition should be one-sixth part only of the valued rent. The "valued rent" refers to the cess valuation made about 1666 —Clerk and Scrope, p. 189. Composition on adjudications by way of diligence were, as already stated, assessed at a percentage (*ib*, p. 188). From that date compositions payable to the Crown have always been assessed at one-sixth of the valued rent (see Juridical Styles, i, p. 458), and naturally all purchases of Crown lands have been negotiated on the assumption that no larger sum would or could be exacted. Nor has there ever been any suggestion that any other sum was due.

In the year 1779 it seems clear that the Courts regarded the composition established by the warrant of Queen Anne as fixing the legal rights of Crown and vassal. In *Dundas* v. *Officers of State*, (1779), M. 15,103, the dispute arose on Acts of Parliament which enabled the Crown to confer on a subject the Earldom of Orkney and Zetland, and which had been followed by a grant in exercise of that power. It was contended that the grantee became entitled to enter the Crown vassals and to receive the casualties on the entry of heirs and singular successors—in other words that the effect of the grant was to turn the Crown vassals into the vassals of a subject-superior. The argument for the vassals was that the compositions payable under the Warrant of 1709 were established by law, and that no grant could derogate from the rights so acquired. The argument for the Crown was in effect that the grant to the subject of the right to enter vassals and to receive the casualties was not warranted by the Acts authorising the grant of the earldom. The Court held that the rights of the King's vassals were saved by the statutes, and assoilzied the defenders from the conclusions of the pursuer's declarator. The Warrant of 1709 was re-issued by succeeding monarchs down to and including Queen Victoria. It has not been re-issued by either King Edward VII or King George V, but the practice has not been altered in any way.

If the practice at the beginning of the nineteenth century is considered several hypotheses may be explored with regard to the casualty exacted by the Crown from a singular successor. First, it may be contended that the Crown had an absolute right to refuse to enter a purchaser. If that were so, then no fixed casualty could be due, for if the King could enter a purchaser or not as he pleased, he could enter him on any terms which he thought fit to impose in the particular case. The sum fixed by each negotiation would not be an incident of tenure, but the consideration for a particular waiver of the prerogative. No argument to support a claim to a year's maill could be founded on this contention, which indeed proves too much, and it has not been put forward in this case. Even if it were put in the form that the King was bound to enter a purchaser but could exact any sum

he pleased, that would perhaps only entitle him to demand a reasonable sum, as is the case in England, where the lord of the manor is entitled to levy an arbitrary fine—*Willowe's Case*, 13 Coke 1. Secondly, it may be contended that the Crown was bound to admit and was entitled to demand a reasonable sum as casualty. This in effect was the system instituted or at least recognised by the Acts of Council referred to in the Act 1578, cap. 66. If this be right, then the appellant's contention that a year's maill is due cannot be accepted, for nothing would seem more evident than that a sum far in excess of the highest amount exacted for hundreds of years cannot be pronounced reasonable. Thirdly, it may be contended that the Crown had the same right as a subject-superior. I am not able to accept this view. The subject-superior could be compelled to accept a purchaser, and if he were so compelled he became entitled to a year's maill, but there is no proof that the Crown ever was or ever could be so constrained. A usage suggested by the practical consequences of the refusal to enter a purchaser cannot have any bearing on the case of a superior who has never been liable to those consequences. Fourthly, in default of all other hypotheses I find it necessary to found the law upon the admitted practice. Where for hundreds of years both superior and vassal have acted in accordance with a particular rule as if it were a binding rule of law, where that rule has been accepted as law both by the courts and by writers of the greatest authority, and where the only evidence of the rule is the actual practice, I cannot resist the conclusion that if there is a rule of law it cannot be inconsistent with the practice, but it must, on the contrary, explain and enforce that practice. It is obvious that no support to the appellant's contentions can be derived from these considerations.

Turning now to the statutes of the nineteenth century, which have transformed the law of property without altering the principles upon which it is based, the Acts to be examined are—The Act 54 Geo. III, cap. 137, section 11, which, however (like the earlier Act 33 Geo. III, cap. 74, section 11) is only important as showing that adjudication was available in respect to lands held by Crown vassals. The repealed Act 10 and 11 Vict. cap. 48, section 6, provided that a superior might be compelled to enter an heir or disponee by charter of confirmation as well as by resignation, but the charger was declared bound to pay or tender to such superior such duties or casualties as he was "by law entitled to receive." An expression which repeats the wording of the Act of 1747 must bear the same interpretation. Section 19 gave the superior a right to recover the casualty, which hitherto had not been recoverable by a substantive action. The Crown is not mentioned in the Act except in such a way as to show (see sections 9 and 10) that the superiors referred to were subject-superiors. The Crown Charters Act 1847 (10 and 11 Vict. cap. 51) amended the practice with regard to Crown charters. Section 2 required the applicant to give evidence of the "valued rent" where necessary, but made no reference to the actual rent, and section 6 provided for the fixing of the amount of the casualty. This was a permanent Act passed during a period when there was in existence a royal warrant stating the amount of the casualty, which was obviously accepted by Parliament as the rule to be followed. The repealed 21 and 22 Vict. cap. 76 made provision for simplfying the forms of conveyance, and section 6 provided for the case of lands held off the Crown. The "duties and casualties payable in Exchequer" must, it would appear, refer to the casualty stated in the Warrant, otherwise if the words refer to the casualty which (according to the appellant's contention) is due in law the officials who accepted a lesser payment were guilty of a dereliction of duty. The reference to the "casualties payable" in the Act can only, it seems obvious, mean such casualties as were in fact paid, even if the appellant's contention be correct. The same observation applies to the similar words used in section 8, which are in sharp contrast with the words used in the case of a subject-superior, where the expression is "such duties or casualties as he shall be entitled to demand" (see sections 7 and 9). The Titles to Land Consolidation (Scotland) Act 1868, as amended in 1869, lays down (sections 63 *et seq.*) the procedure to be adopted in obtaining Crown writs. Section 64 repeats the obligation placed on the applicant by the Crown Charters Act 1847 to give particulars of the valued rent where necessary, and is equally silent as to the actual rent or value. Section 69 provides for the fixing of the amount, and section 78 provides for payment. By section 69 the amount to be ascertained is the amount of the "composition or other duties due and payable to the Crown." Does this mean a year's maill? It is common ground that the practice under the Act was to fix the compositions in accordance with the Royal Warrant of 1709, but the section gives no right or power to the officials concerned to fix less than the amount to which the Crown was entitled. It is obvious that no one at that period had any idea that the Crown could possibly be entitled to more than was exacted in practice, and the terms of the Act are inconsistent with the view that any alteration of the law or the practice was intended, for the words follow the words of the Acts which it consolidated. The last Act before the Act of 1914 to which it is necessary to refer is the Conveyancing (Scotland) Act 1874. This Act applies to the Crown. Section 4 abolished the need for renewal of investiture, and provided that infeftment was to imply entry with the superior. Sub-section 3 provided that "such implied entry shall not prejudice or affect the right or title of any superior to any casualties .... 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 . . . for recovering . . . such casualties . . . 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 . . . have required the vassal to enter or to pay such casualty irrespective of his entering." And by subsection 4 the superior is given a right of action "for payment of any casualty exigible at the date of such action." Section 15 provides a means for the voluntary redemption of casualties. In cases where casualties are exigible only on the death of the vassals the redemption is effected by payment of the highest casualty, estimated as at the date of redemption, with an addition of 50 per cent., and thereupon the superior is to discharge the casualty in manner provided by section 16. Section 62 provides that decrees of adjudication shall be equivalent to and have the effect of a conveyance, and although it is unlikely at the present day that a creditor would have recourse to adjudication, nevertheless this remedy is still available. All these Acts and the practice under them so far as they are material show that during the nineteenth century no such view of the law was held as is now put forward by the appellant. The terms of these Acts are consistent with and in some respects the same as those of the Act of 1914, which does not indicate any intention on the part of Parliament to alter the law as to the amount of a casualty.

This is a convenient point at which to consider the question whether the money paid by an adjudger to the superior can rightly be considered as an incident of the feu. In my view it cannot be so considered, because even the adjudger's entry does not make him the vassal. If the debt is repaid within the legal then his rights cease to exist, and even if it is not repaid further proceedings are necessary in order to constitute him the vassal. Until then the adjudger is merely a person holding a security. Moreover, under the section which I have cited the casualty payable by the adjudger is recoverable as a debt immediately on the adjudger taking infeftment, and it is therefore impossible to contend that such a casualty becomes exigible on the death of the vassal. The appellant therefore cannot rely on the casualty so payable. Even if he could do so, I am unable to agree with the appellant's contention that the Crown would be entitled to a year's maill. As I have already pointed out, there are only three instances of the Crown having exacted such a casualty from an appriser, and no precedent whatever of such an exaction from an adjudger. The same considerations that have led me to reject the argument as to voluntary successors lead me to the same conclusion on this part of the case. The Act of 1914 is intended to complete by compulsory methods the redemption of feudal casualties which was commenced by the Act of 1874. The term "the highest casualty" is used in both Acts to designate the basis of the datum line. It is employed merely for the purpose of calculating the compensation, for it is not the highest but all the casualties that are the subject of redemption. The term cannot be interpreted in a different sense in the two statutes. It is possible, no doubt, to construe those words as meaning the highest casualty which could as a matter of legal right be exacted whether actually demanded or not, or again, as the highest casualty which as a matter of practice is ever exacted in connection with the feu. It is in the highest degree improbable, even assuming (contrary to my view) that the appellant is right, that a series of payments always uniformly made in accordance with a known scale which has always been taken into consideration in any calculations or dealings with the land, should be redeemed on a different and much higher basis never in practice demanded and never considered by anyone who contemplated any dealing with the land. If such was the intention of Parliament, then such an alteration would surely have been enacted in plain and unmistakable words. The term "exigible" used in the section does not assist the interpretation of the two words, for the expression is not the "highest casualty exigible," but the "highest casualty on the arrival of the time at which the next casualty might be expected to become exigible," and therefore is only used to fix the date at which the calculation was made. The Act of 1874 dealt with the payment of casualties and their redemption. There is no indication in the Act that any difference is to be made in the calculation of the highest casualty when it falls to be paid, and in the calculation of the same amount when all casualties are to be redeemed. It would follow therefore that even if the appellant were right in his contention as to the Crown's right he is not necessarily entitled to succeed on this appeal. I prefer, however, to base my judgment not so much on the construction of these two words as on the principle that the casualty of composition payable to the King on the entry of a purchaser is by law fixed at one-sixth of the valued rent.

In my opinion the appeal fails, and I move your Lordships accordingly.

Lord Shaw—The summons in this case concludes for the declarator that Lord Zetland is bound to redeem all the casualties incident to the Crown's estate of superiority in certain lands in Scotland belonging to Lord Zetland and described in the condescendence. The Marquess does not dispute such a declarator. The sole question between the parties is as to the amount of compensation which is payable on the redemption of these casualties. By the third conclusion of the summons, however, a declarator is asked that the Crown is entitled to assess the casualties at one year's real free rent of the lands. Lord Zetland denies that the Crown is entitled to any casualty of composition on this basis. In the course of argument the Marquess's contention was that the composition payable by him according to the law and practice of Scotland—a composition which he was willing to pay—would not in any circumstance be reckoned at more than one-sixth of the valued rent of the lands. The importance of the question may be judged by the difference between these two things. Should the view presented by Lord

Zetland, which his Lordship maintains is founded on the law and practice of Scotland which has been known for centuries, be correct, then the amount payable would be £73, 9s. 3d., or computed upon the scale set up by the statute, an addition to the feu-duty of £2, 18s. 4d.; whereas if the view presented by the Crown be correct these sums would be increased more than a hundredfold. There would be due as compensation the sum of £8745, or, computed according to scale, an addition to the feu-duty of £339 per annum. The case, which is a test one, involves the introduction of this new mode of calculation in regard to all the lands held of the Crown in Scotland, and it is not easy to figure the total of the final consequences of the change sought to be introduced. These things, as well as the extremely careful and thorough advocacy of the case on both sides, compel a close study of all the legal questions involved.

The statute falling to be construed is the Feudal Casualties Scotland Act 1914, which by its third section provides that it shall be construed as one Act with the Conveyancing Scotland Act 1874 "(hereinafter called the principal Act), and so far as is consistent with the tenor of this Act and the principal Act respectively." The Act provides by its fourth section that the casualties "incident to any feu created prior to the commencement of this Act" shall be redeemable within fifteen years, and that according to terms agreed upon or failing agreement upon payment of compensation or conversion thereof into an annual sum. The expression "casualties incident to any feu" is, in my opinion, and as I shall afterwards explain, one of vital importance in the construction of the Act, and that importance is very apt to be overlooked. The provisions of sections 5 and 6 have been much canvassed. Section 5 (1) is 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. . . ." Section 6 (1) provided as follows—"For the purposes of paragraphs (*a*) and (*b*) of sub-section (1) of section 5 of this Act the time at which the next casualty might be expected to become exigible shall be determined according to the expectancy of life, at the date as at which compensation is to be fixed, of the person on whose death the incidence of the next casualty depends . . ." Then there appears in Schedule A of the statute a table of the expectancy of life of the person on whose death the incidence of the next casualty depends. The term "exigible" used in the expression "in cases where casualties are exigible on the death of the vassal" points to the period of the vassal's death as that at which it is the right of the superior to exact and ingather the sum due to him in the name of casualty, and at which it is the obligation of the vassal to pay. Unless the composition claimed is exigible in this sense, section 5 (1) (*a*) of the statute, which is the only foundation of the pursuer's claim, cannot be invoked, and the action fails.

Quite apart from the demand of the Crown to revert as ultimate superior of lands in Scotland, to alleged rights under the ancient Scotch Acts—a demand which I shall presently investigate—there stands the initial difficulty of reconciling the language of the section 5 of the Act of 1914 with the claim now made, and that I think in two particulars, namely, first whether the casualty claimed to be due is an incident of the feu, and secondly whether it was a casualty exigible on the death of the vassal. Unless both of these things can be established the claim fails for the simple reason that the statute does not apply. In my opinion neither of them can. The novel demand shapes itself thus. The claim of a casualty of one year's rent has no common law ground; it is solely the creation of statute. It was the fine on payment of which superiors could be compelled to enter apprisers under the Act of 1469, and adjudgers under the Act of 1669. The Crown, so it is said, had that right; that is the matter which will be hereafter explored. But the present questions are whether such a casualty or fine was an incident of the feu exigible on the vassal's death.

As to its being an incident of the feu, I desire to observe that the Statute of 1914 in my opinion is not assisted in its construction by a reference to adjudgers' rights. I say this apart from what is acknowledged and is perfectly clear, viz., that at no period in the history of Scotland has the Crown ever had, or pretended to, a right to charge one year's rent from an adjudger. To put my view in a word, the pecuniary demand by a superior against an adjudger could in no proper sense of the term be considered an incident of the feu. The relation of the debtor as vassal to the superior is not destroyed by the passing of an adjudication, and even an adjudger's entry with his superior does not create him the vassal in the feu. The debt may be repaid within the legal, and if this is done, the whole of the adjudger's rights fly off, and indeed he cannot get into a direct relation with his superior and be subject to the ordinary incidents of the feu except by a transfer operated by a decree in a legal process of declarator of expiry of the legal. Until a decree in that declarator is given an adjudger remains an outsider, in the situation of a creditor, and merely a security holder. So long ago as the *Bonhard* case (1739, M. 16,453) "the Lords were unanimous that ward does not fall by the death of an adjudger though infeft within the legal, nor even after the legal, unless he was in possession, for till then, even after the legal, the adjudger is not deemed the proprietor, which one must be before ward can fall by his death; he is but a creditor who may relinquish his adjudication, and by diligence affect the person or other effect of his debtor." And this old and settled law was confirmed by the clear judgment of Lord Justice-Clerk Inglis in *M'Dougall & Blackie*, 1 Macph. 504. The learned Judge

deals with the "fallacy that an adjudication is of the nature of a sale or conveyance," and he speaks firmly and weightily on that fallacy as follows — "That is unsound as law; and it was very emphatically condemned by Lord Moncreiff in the case of *Cochrane* against *Boyle*. The question there occurred whether an adjudication was equivalent to a sale, and this is the way in which Lord Moncreiff deals with it— 'Whatever the old apprizing may have been in theory, I am clear that a decree of general adjudication, in modern law, is no more than *pignus prætorium*, a step of diligence which only creates a security for debt. It is not the act of the debtor but a security taken by the act of the law. The debt remains unpaid. The security may be abandoned and other remedies taken. The debtor is still the vassal.' And this opinion of Lord Moncreiff was the foundation of the judgment delivered in the House of Lords by Lord Brougham. . . . An adjudication is nothing but a security."

So much as to the allegation that an adjudger's casualty is an incident of the feu. But even were it so the second question would arise, namely, whether such a casualty is exigible "on the death of the vassal"—that is to say, that the casualty falls due then, can be demanded then, and must be paid then. What is the present law of Scotland with regard to that subject? By section 19 of the Land Transference Act 1847 (10 and 11 Vict. cap. 48) it is declared that "the adjudger or purchaser . . . by passing infeftment on the decree of adjudication or of sale in manner above mentioned shall become indebted in such composition to the superior, and shall be bound to pay the same upon the superior's tendering a charter of confirmation, whether such charter shall be accepted or not, and the superior shall be entitled to recover payment of such composition as accords of law." This section was superseded by section 2 of the Titles to Land Act of 1868, and that again is superseded by section 62 of the Conveyancing Act of 1874. It appears to me to be without any question, upon these sections, and I do not think this is seriously disputed in argument, that this adjudger's casualties do not become exigible on the death of the vassal but are recoverable as debts, and are exigible in the sense of the statute under construction immediately upon the adjudger taking infeftment. This is a state of matters totally irrespective of the death of the vassal who is debtor. The exigibility of an adjudger's composition is not at that period at all, but at the date of infeftment, and the whole scheme of the statute actually providing per the schedule for the expectancy of life of the vassal is out of place in regard to an adjudger's entry. But there is more than that. The rights of the adjudger do not, as I have explained, come into the position of being incidents of the feu until after the expiry of the legal and until he has obtained a suitable decree of declarator to that effect. He may be infeft, he may therefore impliedly be entered under the statute, but the debtor, who still remains the vassal, may arrange his affairs and pay the adjudger's debt, and the whole adjudging transaction simply disappears and the relation between the superior and vassal continues as before and as if no adjudication had ever taken place. It is therefore out of place to suggest that the reference in the Statute of 1914 to these casualties which fall to be exacted on the death of the vassal can be construed to include casualties which are not so exigible, but are exigible at quite a different period of time, namely, the moment when a decree of adjudication is recorded. The attempt to stretch the Statute of 1914 or its schedule of life expectancy so as to include a case which is not covered either by its letter or its spirit accordingly completely fails.

The above conclusions appear to be quite enough for the disposal of the case. But the arguments and the valuable judgments of the Courts below—not as I humbly think taking adequate stock of the fundamental objections on the Act of 1914 with which I have dealt — naturally comprehended the actual relation of the Crown as superior of the lands of Scotland with the subjects of the realm to whom the charters were granted. This topic touches nearly the foundations of the feudal system of landed rights, and has constitutional and administrative aspects which are of interest. It is impossible within the limits of a judicial address in this House to make a full presentation. The authorities are far more than here cited, but I think all the authorities are in the same direction and support the conclusion at which I have arrived. As I view the matter it stands thus. The argument for the Crown is that it has the right in consequence of the language employed in the Act of 1914 now to compel commutation of what it maintains is its highest casualty, and that that casualty is one year's rent of the vassal's lands.

The demand of the appellant must be justified by the law and practice of Scotland. I use the phrase advisedly. It is of the utmost importance that subjects of the realm should have their rights determined in a manner beyond the limits of the caprice of the Crown, its advisors, or the Government of the day. In the innumerable transfers of property during the last 400 years in Scotland it has been assumed, and the assumption acted upon, that the casualty of composition due to the Crown consists of the expenses of the transaction—in the case of apprizers or adjudgers a small percentage of the debt, but never more than one-sixth of what is known as the valued rent, and in all other cases of singular successor this same sixth. For a time, as shall be shown, there was some uncertainty as to what the exact proportion of the valued rent should be. There seems little reason to doubt that influence in high quarters may have modified, just as lack of influence and perhaps more sinister considerations may have increased, the Crown's demand. But centuries ago the public injury attaching to a system financially haphazard produced its remedy in practice, and the composition of the

Crown, in nominally limiting the claim for its "expenses," became limited and fixed as described. And it may be broadly stated that for well over 400 years an exaction by the Crown of one year's rent of the lands in name of composition, either in the normal case of a singular successor, that is, a purchaser, or the abnormal case of apprisers or adjudgers, is absolutely unknown. On the other hand, what was charged by the Crown in respect of composition was perfectly well known. It became, as I have said, part of the law and practice in Scotland. It is the interest of the Crown at this date to point to the text of the Act of the year 1469, but it is of course admitted that the claim made is inconsistent with centuries of practice.

I do not think that the ancient customs of our country can be uprooted in this fashion. No one knew better than Stair what troublous times were and what the necessity was of paying heed to the ancient customs of his country in the legal sphere, these being at the basis of all settled order. His views, which have hitherto been treated with deference and respect, are stated with much force, even with regard to the views of Craig in his De Feudis, and would apply with even greater cogency to that period of Scotch history anterior to the year 1600 (Stair, ii, 3, 3). "Our learned countryman, Craig of Rickerton," says he, "hath largely and learnedly handled the feudal rights *and customs* of this and other nations in his book De Feudis, and therefore we shall only follow closely what since his time by statute or custom hath been cleared or altered in our feudal rights, which is very much"; and in another passage he adds ". . . And though these decisions have been intermitted, since that time, till King Charles II's return, the loss is not great, these times being troublesome, and great alterations of the Lords; but the decisions of the Lords have been constantly observed since that King's return, by which most of the feudal questions are determined . . . neither does he (Craig) observe any decisions particularly further than his own time, in which our feudal customs could be but little determined, seeing the Lords of Sessions were mutable and ambulatory, till the year 1540, in which King James V did perfect the establishment of the Session in a College of Justice, who at first could not be so knowing and fixed in their forms and customs; and therefore it cannot be thought strange if the feudal customs as they are now settled do much differ from what Craig doth observe." In Scotland the desuetude of statutes is perfectly well known, as is also the rise of customs which by long continuance become the interpreters of our laws. This is familiar to every Scotch lawyer. "The most essential articles of our customary law," says Erskine (i, 1, 44) "are so interwoven with our constitution that they are notorious and so require no evidence to prove them; as the laws of primogeniture and deathbed, the order of legal succession, the legitim of children, the husband's courtesy, and the widow's terce; but where any later usage which has been gradually gathering strength is pleaded upon as law, the antiquity and universality of that usage must be proved to the judge as any other matter of fact; for all customary law is founded on long usage, which is fact." And as to the effect of custom in the interpretation and even the repeal as well as the desuetude of statutes, that also is perfectly well recognised. "Custom," says he, "as it is equally founded in the will of the lawgiver with written law, hath the same effects. Hence as one statute may be explained by another, it may be also explained by the uniform practice of the community; for which reason custom is said (L. 37 de legibus) to be the surest interpreter of law. Hence also, as a posterior statute may repeal or derogate from a prior, so a posterior custom may repeal or derogate from a prior statute, even though that statute should contain a clause forbidding all usages that might tend to weaken it."

In the light of these fundamental principles let us examine the case upon statute which the appellant makes. The statute in question is the Act of 1469, cap. 36, passed at a period of Scottish history when the well-being of those that were engaged in agriculture was the subject of the deep attention of the legislation of Scotland's Parliament. The Act of 1449, cap. 18, gave stability to the tenure of land in lease "for the safetie and favour of the puir people that labouris the ground." The Act in question, of 1469, was—"Till eschewe the great heirschip and destruction of the Kingis commons, maillers and inhabitantes of Lordis lands." The vassals who held lands and who had become embarrassed in circumstances or contracted debt were unable to dispose of their property so as to raise a fund for payment. The creditors on the other hand had no means of touching that fund, the obstacle in each case being that the subject-superior was not obliged to enter the purchaser. He might refuse altogether, or the terms which he imposed might be extortionate. The system of apprising of land for debt was accordingly introduced with this compulsitor—"And als the overlord sall receive the creditor 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 himself and undergang the debtes,"

It does not appear to me that this compulsitor with its condition of payment of a year's mail ever applied to the Crown of Scotland. It applied and applied alone to recalcitrant superiors. The King was not one of these, he is not mentioned in the Act, and it requires little imagination to see how inapplicable such a compulsitor would be to the condition of the Sovereign. The superior under this statute was to take the land, failing a payment of a year's rent, "Till himself and undergang the debtes." This borders on the ridiculous as applied to the King, and there is no example to be found of it in the Scottish history. As to the overlord receiving the creditor, the language of the statute was that the overlord "sall" receive him. How did the creditor make operative this provision? If the overlord or superior declined to receive him, the

creditor used diligence against him executing a charge against him, and failing obedience putting him to the horn. This whole idea of it being possible to put to the horn the Sovereign of Scotland is fantastic. A process of horning is an ancient process under which, say at the Market Cross of Edinburgh, after three blasts of a horn the recalcitrant subject was put "under pain of rebellion"—was, in short, denounced as a rebel and declared among other things to be an outlaw. And the idea of a legal process having been authorised by an Act of the Parliament of Scotland whereby the King of Scotland should be made a rebel against himself and be outlawed from his own kingdom is in the region not of law but of comedy. Yet the reasoning under which it is possible to apply the Act of 1469 to the Sovereign of the country leads to that grotesque situation. It is true that at the last, rising in the scale from vassal to superior, and from superior to superior, you reach at last the Sovereign as the ultimate superior of the land of Scotland. But his station in that capacity is far more constitutional and far less absurd than the argument of the appellant involves. He is no recalcitrant. The appeal to him to enter a new vassal is never made in vain. The payment which he demands is a payment for centuries fixed as equivalent to those incidents that accompany a transaction involving the granting of conveyances and the setting up of new relations of superior and vassal, and finally by the alterations of the Treasury records bearing upon these transactions. It is impossible to read the institutional writers and the well-known authorities which have for centuries and generations been followed by all practitioners of the law without seeing how universal this truth is. "For," says Stair, iii, 2, 28, "if the superior be contumacious, and will not enter the appriser upon diligence, Craig (lib. 3, deig. 2, s. 20) prescribes that the superior may be thrice required, and if he refuse, letters may be obtained from the lords to charge his superior to receive the appriser, supplying his place, and so from superior to superior till he come to the King, who refuseth none." Erskine goes so far, and I think he is right, as to say that the undoubted right of all superiors including the Crown to refuse to enter a new vassal was, in the case of the Crown, given up in the public interest. I do not think it doubtful that this was done by various Acts of the Privy Council of Scotland. The learned counsel for the appellant were able to say with truth that those Privy Council Acts could not be found. There is nothing to wonder at in that. The 15th and 16th centuries were years of storm and trouble, and many valuable records disappeared, some of which, owing to the recent labours of learned men, are again fortunately seeing the light. But that there were such Acts of the Privy Council is not open to doubt. In particular, the Scottish Parliament itself recognised them. By the Act of 1578 chapter 66, provision was made on the subject of what was called a double confirmation of feus of church lands, and also, which is important, of lands "halden immediately of our Soveraine Lord." This statute proceeds—Craigie, p. 20—"Likeas it is founden be sundry ordinances of the Privie Council 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." This "aught not" thus ratified by Parliament became the acknowledged law, and this so far as I can see, without any exception whatsoever, in all the succeeding centuries of practice of the Kingdom. There is not a doubt that the greatest legal authorities of our country take this view. Thus Stair (ii, 3, 43, vol. i)—"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, cap. 66), and though 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 derogated from but rather approved." And Erskine (ii, 7, 6) states broadly and with assurance—"Our Sovereigns did by several Acts of Privy Council mentioned in 1578, cap. 66, give up this right (the right of refusal to enter a vassal) for the public utility." I have in this case been quite unable to understand how it is that so much stock was taken in the appellant's argument of the Act of 1469, while the effect and significance of the Act of 1578 were practically ignored.

Before I leave the period of the 16th century I may observe that these things seem fairly plain. Long before its close the law and practice of Scotland had distinguished clearly the rights of the Sovereign as superior from those of the subject-superior. The latter might be recalcitrant, and in consequence the Statute of 1469 had to be passed, to avoid the peril that the land of Scotland might prove neither a fund of credit nor a subject of transfer. Accordingly a compulsitor of an apprising was introduced to meet this recalcitrant class and the price of their consent was assessed at a year's rent. But the King was not recalcitrant. He refused none. No statute exists to compel him to grant an entry. He did so as part of his royal duties, otherwise the feudal system would break to pieces. And this duty of the Crown has been recognised as the basis of the feudal law of Scotland. Changes were made, no doubt, on the occasion of new charters issuing from the Crown investing or confirming the rights of new vassals, and the expenses of these transactions, as before stated, were a composition which the new vassal had to pay, and became by usage fixed at settled sums, viz., in the case of adjudications or other redeemable rights 1 per cent. of the debt, but limited always to one-sixth of the valued rent, and in the case of other singular successors, *e.g.*, pur-

chasers, to the one-sixth of the valued rent. This figure, in short, was the maximum measure of the Crown's composition exigible against any Crown vassal. The true lines of law and practice thus became plain; they have been uniformly acted upon. In regard to the subject-superior the first inroad upon the assessed right of refusal to enter a vassal was the compulsitor of an action of apprising for debt. This was quickly adapted to the case of simple sale by the device against which Craig fulminates and which Walter Ross calls a legal fiction. A debt as from the vassal to the purchaser was created, giving the purchaser a title to bring an apprising and so to enter upon the land sold. Thus the ordinary case of singular successors was provided for in the case of subject-superiors, and the composition was one year's rent. But with regard to the King the other line was followed. There is no case which can be cited and no charter which can be quoted of which it can be affirmed that it referred to any fictional transaction of the sort. In three cases within a few months of each other the Crown has been able to establish that a Crown charter of apprising was granted. There is nothing to suggest that they were not genuine cases of apprising, but the composition charged for the Crown was as high as that which the subject-superior was able to charge. These charters, the last of which that can be found being so far back as 1483, were followed by many other Crown charters of apprising in which the assessment laid upon the vassal was a relatively small sum of the expenses of the Treasury, and in all the cases reference was equally made to "our Act of Parliament." That is to say, the Act of Parliament is referred to in the same breath with—in three instances—the taking of a year's rent, and in all the others which follow, the taking of the expenses of the Crown. And this latter habit went on for generations, and the uncertainty of the impost was gradually removed. This was the law and the practice of Scotland even long prior to 1578.

I pause to observe that when the Act of 1669, chapter 18, anent adjudications was passed, the reference to the several Acts of Parliament and "the constant practick of the Kingdom" and to the superior of the lands "before he be holden to enter and infeft the compriser," must ex necessitate be to those superiors alone against whom a process culminating in the execution of horning could be issued by which they should be holden to this duty. And it is further true that when by the Act of 1672, chapter 19, it was enacted that comprisings should cease, the substantive declaration of the statute similarly referred to subject-superiors alone. "And it is hereby declared that neither the superior nor adjudger shall be prejudged by this Act, but that they shall be in the same case after citation in this process of adjudication as if apprising were led of the lands of that time and a charge given to the superior thereupon." It is here again plain that it is those superiors who can be compelled by a charge that were alone referred to and against whom execution to the point of outlawry could be issued. It should further be added that there is no instance of a charter of adjudication on the Crown having ever once been issued in which a composition of a year's rent was ever charged. What then was the measure of this Crown composition? In other words how were the "reasonable expenses of this party," referred to over and over again in the text and style writers, ascertained? Upon this matter the law and the practice of Scotland with regard to Crown rights had taken a definite form. In Dirleton's Doubts Resolved and Answered by Sir James Steuart the very point of this present case is put and is answered thus by Steuart (p. 42)—"If by the First Act of Parliament" (*i.e.*, 1469) "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 past upon comprisings, but comprisings lay at the Signet, and were the warrant of charters under the Great Seal." That this was the acknowledged and accepted state of the law of Scotland on the subject is confirmed by Dallas, who, in an interesting note to a style of the summons of adjudication, speaks (1697 ed., p. 225) of having along with Mr Thomas Hay Clark gone "to my Lord Stairs President" and consulted him about these matters of practice, including horning against subject-superiors, and the difference between them and the sovereign superior, and so he says "the law prescribed remedies against both, viz., to call the superior in the one, and to appoint the other to be allowed, and horning to pass thereon to compel the superior; but against the King no such diligence, for being *communis pater* he ever takes a moderate composition and enters the appriser or adjudger when the signator is presented in the Exchequer."

I ask again, what then was "the reasonable expenses of the party"? They are thus set forth by Dirleton—"When the Exchequer do pass signatures upon comprisings, they may take the known composition, which is 10 marks 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 rule of Exchequer." That this 1 per cent. was the "known composition" was quite clear to the profession long before Dirleton and Steuart's time, and long before the Royal Warrants beginning with that of Anne. Dallas was a very high authority, whose writings appeared in 1666 to 1688. He gives the further details of the Crown composition in his System of Stiles and his note to Style of Signature of Apprising (p. 35)—"It is compound for ten merks for each 1000 merks of the first 10,000 merks, and 5 merks for each 1000 merks more."

I think the rule to have been substantially settled before the close of the sixteenth century, but I am certain that it was so long

before the close of the seventeenth. We are in search of law and practice, and there are instructive passages on that topic in the historical view of the Court of Exchequer in Scotland by Baron Sir John Clark and Baron Scrope (1708, 1724). That law and practice could nowhere be more authoritatively settled, and it passes in their work under the name of a rule—"The last rule in revising signatures for infeftments is to adjust and appoint the compositions which are payable to the Crown upon renewal of infeftment," and in another passage the rule is thus referred to—"It being then a fixed rule that all who are not *alioque successuri* are to pay in name of composition a fixed part of their valued rent." This was the ordinary case of singular successors, say purchasers, and that was fixed at one-sixth of that rent, and to it the fixed rule, not depending in any way upon the Act of 1469, and entirely and increasingly different from a year's actual rent of the land—that fixed rule to that ordinary case applied and applies.

It is, however, not the ordinary case on which the appellant founds, but the extraordinary case provided for in regard to apprisings and adjudications, and on that he founds a statutory claim. But the case of apprisings and adjudications is the very one which is expressly and over and over again dealt with, and in which the measure of the Crown's demands has nothing to do with a year's actual rent, but has relation to the value of the debt. "Compositions," say these learned authors, "compositions or signatures of adjudications, infeftments of annual rent, and other redeemable rights are stated thus—Every thousand merks to ten thousand merks pays ten merks, and every thousand merks above ten thousand merks pay five merks. But when the annual rent, or the sum on which an adjudication is granted or an heritable bond given, exceeds the valued rent of the land, the composition must be settled by the valued rent, and not according to the sum contained in the adjudication; and the same rule is to be observed in confirmation of such redeemable rights." In short, the percentage upon the debt might be an exaction far beyond any reasonable charge for the "reasonable expenses of the parties," and so the Crown vassal had the option of paying the maximum charge, namely, that paid by ordinary purchasers, one-sixth of the valued rent.

I do not detain your Lordships further upon this topic. The law and practice of Scotland has been so settled for centuries. Many authors might be quoted; they all concur. Professor Menzies, whose word on any matter of practice is law, puts the whole matter in a nutshell (Conveyancing, 1900 ed., p. 584). He does not hesitate to use the word "rule" when speaking of the action of the Crown, and after remarking on the entry of adjudgers under the Act of 1672, and purchasers at judicial sales under the Acts of 1681 and 1690, he observes—"More than a century before these last-mentioned Acts 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, cap. 66, to grant confirmation upon payment of the expenses of the party." Here, in short, is everything that is sought for, namely, a rule of practice universal and with a duration of centuries, but also even more than that—a rule approved and ratified by a statute of the realm. In my opinion the attempt to alter it now completely fails, and that quite apart from those other obstacles to success with which I have dealt in the earlier portion of my address. On the later statutes I would observe briefly as follows:—While it is admitted that the provisions of the Act of 1747, sections 12 and 13, applied only to subject-superiors, it must also be admitted that the Conveyancing Statute of 1847 gives no countenance to the idea that the law and practice of Scotland in regard to the composition due to the Crown as above described had been departed from. Some light may be derived from the Act of the latter year to amend the practice with regard to Crown charters. By section 2 of that statute (10 and 11 Vict. cap. 51) it is provided that when a Crown charter is desired the applicant is to lodge with the presenter of signatures certain things, including the title-deeds, "together with evidence of the valued rent when necessary." No possible reason can be given for this except that if the parties differed as to the figures the valued rent should be "evidenced" as a datum, and one-sixth of it struck as the composition due by law. A similar reference to the valued rent occurs in section 64 of the Titles Consolidation Act of 1868 (31 and 32 Vict. cap. 101).

I will now deal with the situation of matters under the Statute of 1874. It is of importance to do so because the title of the defender, the Marquis of Zetland, to the property in question in this case was completed by a Crown writ of clare constat dated under 14th and recorded 17th February 1874. The Conveyancing (Scotland) Act of that year did not come into operation until the following 1st October. That statute, following those of 1847 and 1868, provided that at the date of the registration there should be implied entry with the superior to the lands, and by section 4, sub-section 3, "such implied entry shall not prejudice or affect the right or title of any superior to any casualties . . . 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 the superior under the existing law and practice . . . for recovering . . . such casualties . . . shall continue to be available to such superior in time coming." The result of that was clear. The principle of optional redemption of casualties was introduced by the statute—a principle which after 40 years was to be made compulsory. But under the Act of 1874 the financial basis of redemption was perfectly plain. The law and practice of Scotland had placed one-sixth of the valued rent as the composition due to the Crown, in all ordinary cases such as purchase, and in the unusual cases of adjudgers this was also the maximum due. And this statute, passed in the midst of the Victorian reign and

therefore during the currency even of the Victorian Royal Warrant, made the determination of that composition exigible by the Crown unquestionably clear. It conformed, in short, to the law and practice of centuries. It appears to me to be a singularly strained construction of the Act of 1914 that it will enable the Crown not only to put out of view the law and practice of the country, but even in the case of the very vassal now being sued, to declare that the very same language as that of 1874, used in the statute of 1914 (and to be construed along with it), means that Parliament has unwittingly (because until this litigation no one dreamed of it) increased a Crown exaction upon a vassal one-hundred-and-ten-fold. I find no warrant for embodying such a meaning in the words of the later Act.

I regret that I must add a further word in regard to an argument upon the subject of the issue of successive Royal Warrants. The law and practice of Scotland long anterior to the close of the 17th century was fixed in all the particulars which I have detailed. It was no doubt expedient that after the union of the Parliament some assurance should be given that the time of variability of composition by possible intrigue and interest at headquarters so as to procure either favour or punishment should be definitely brought to an end in all time coming, and it was in the interest both of the Crown and its subjects to let parties know how they stood. I do not look upon the Royal Warrants as exercises of clemency but as recognitions for the security of all concerned —an assurance that the Crown compositions were in fact for all time coming definitely standardised. To hold otherwise would be attributing to the advisors of his present and his late Majesty some intent to reintroduce into the laws of landed rights those troubles and uncertainties and that dependence upon intrigue or favour from which the country had completely shaken itself free. The whole of these notions appear to me to proceed from a fundamental mistake, for the truth was, that Scotland was ruled by right. It was governed, not by chaos and caprice, but by law and practice. Dangers to the State cannot otherwise be avoided. Accordingly it is not wonderful that when in the year 1708, one year after the union of Parliaments, the Court of Exchequer was set up, it should have discovered one of its troubles to be that, accepting the valued rent as the basis of its calculations, reckoning what proportion would be a reasonable composition for the Crown to take, was an irksome duty to it and produced uncertainty to the lieges. Accordingly in the following year, 1709, the Royal Warrant of Queen Anne was issued, and in my opinion it was issued to settle this matter for ever. It proceeds upon the facts that the Crown was informed by the Court of Exchequer "that there are compositions due to us at passing signatures in favour of purchasers commonly called singular successors. But yet in settling the said compositions you find no certain rule has been observed, that sometimes one-fourth, sometimes one-fifth part of the valued rent, and at other times a lesser proportion, hath been taken for the said composition and have therefore prayed that we would be pleased to settle a standing rule for you to observe in all such cases hereafter, and you having also proposed one-sixth part of the valued rent as a moderate sum to be taken for such composition." Accordingly the Warrant issued— "We have resolved that in all times coming there shall be taken and paid for all composition due to us at passing signatures in favour of purchasers called singular successors one-sixth part only of the valued rent, and accordingly Our will and pleasure is, and we do hereby direct, authorize and command, that you Our said Barons do observe as a standing rule in all cases where compositions are due to us for the causes aforesaid that one-sixth part of the valued rent be taken from all sorts of people without any manner of distinction or alteration whatsoever, and that you cause the same to be duly answered and paid to us for our use accordingly."

Had this been the introduction in this reign of a new principle or practice into the working of the feudal law of Scotland, I should still have been of opinion that the rule introduced did not issue except exactly as it said, namely, to be a "standing rule," and "to operate in all times coming as a standing rule . . ." These Royal Warrants were repeated by Sovereign after Sovereign and by Her late Majesty Queen Victoria. By that time the whole law of Scotland upon the subject had settled down into such a position that no law book can be found and no law teaching can be quoted under which this fundamental practice was treated as otherwise than fixed. During the Victorian Reign great statutory changes were made in the laws and practice of Scotland as to the tenure and transfer of land, and when the 1874 Act was passed providing for the voluntary redemption of casualties, it is, as I have shown, plain to demonstration that the extreme of casualty to which the claim of the Crown could extend was one-sixth of the valued rent. To go on repeating after that reign the issue of Royal Warrants which had long ago achieved their object in settling this part of the law of landed rights would have been surplusage.

I am of opinion that the appeal should be disallowed with costs.

VISCOUNT HALDANE — I have had the advantage of reading the opinions of some of your Lordships who sat to hear this appeal. I have decided not to express a dissenting judgment, for the reason that at least two of your Lordships are much more familiar than I am with the jurisprudence of Scotland. But the case is one of importance and the question raised has caused me some anxiety. Therefore I do not think it right to let the occasion pass without indicating the reasons which have led me to feel some difficulty in concurring with the conclusion which I understand the majority in this House to have reached.

The question is a purely legal one. Has the Crown a theoretical right in law to

exact a composition of a year's rent, on a compulsory redemption under the Act of 1914, from a Crown vassal with a title such as that of the respondent? I lay emphasis on the expressions "legal" and "theoretical." For I think that it is clearly shown that it has not been the practice for the Crown to make such claims. But the question which remains is whether its abstention from doing so is due to absence of legal and theoretical right or to mere usage. Such usage may indeed have become in the course of time so definite as to give the subject a constitutional right to object to the insistence by the Crown on the exercise of the full title which it may by law possess. But if so his objection is one which is not cognisable by a court of law. It belongs to the domain in which the advice given to the Crown by its ministers is controlled by public opinion, expressed by Parliament or outside Parliament.

I therefore turn to the only point before us. It arises under the Feudal Casualties (Scotland) Act 1914. The respondent is a Crown vassal, and he is sued under the Act for redemption of the casualties incident to the Crown's estate of seperiority. The statute enables the superior to claim a sum of money as compensation for loss of all title in the future to casualties. The controversy relates to the basis on which the Crown can claim such compensation. That compensation might in the case of a vassal who held of a subject-superior be based normally on the standard of a year's rent, as being the highest casualty possibly exigible. It is in dispute whether the Crown could ever have claimed a composition of this amount.

Section 5 (1) (*a*) of the statute is the important one, and it applies without doubt to the case of the Crown. It provides that "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." I may observe that the expression "the highest casualty" appears to have been adopted from sec. 15 of the Conveyancing (Scotland) Act 1874.

The first point to be considered is the meaning of the words quoted from the Act of 1914. What is meant by "highest casualty"? In order to interpret those words it is necessary to go back to the Act of 1874. By its definition section that Act interprets the superior as including the Crown, and "casualty" as including, not only the relief duty payable on the entry or succession of an heir, but the composition or other duty payable on the entry of a singular successor, whether by law or under the conditions of the feu, together with all payments exigible in lieu of such duties and compositions. Section 15 provides that casualties may be redeemed by the proprietor of the feu, "in cases where casualties are exigible *only* on the death of the vassal," on payment of "the amount of the highest casualty," estimated as at the date of redemption, with an addition of fifty per cent., and in cases where casualties are exigible, on the occasion of each sale or transfer of his property, as well as on the death of the vassal, on somewhat different terms. This section is repealed by the Act of 1914, but it is important as showing the state of the law which the later Act was passed to alter. It will be observed that the first set of the alternative terms for redemption was made applicable in cases where the casualties are exigible "*only*" on the death of the vassal—a word which is omitted in sec. 5 (1) (*a*) of the Act of 1914, and that sec. 5 (1) (*a*) accordingly covers, in the absence of a restricting context, cases where, in addition to casualties exigible on death, a casualty is exigible, not by the terms of the disposition on the occasion of each sale or transfer, for such cases are provided for by sub-sec. 5 (1) (*b*), but in instances where, in addition to those on death, an occasional casualty may possibly be exigible on a transfer.

If this be so, I think that the Crown can claim against the respondent compensation based on the amount of such occasional casualty if it is the highest and also possibly exigible, for the initial words of the sub-section seem merely to describe the kind of title dealt with, and the language of the substantive part of the sub-section does not in terms confine the highest casualty to which it refers to one exigible on death. The language of the next sub-section, which refers to a different class of titles under which casualties are in terms exigible on the occasion of every sale or transfer as well as on death, seems to bear this out.

The next point relates to the date with reference to which the compensation is to be estimated. As it is common ground that the state of the present respondent's title is such that the next casualty may be relief, and that the amount of the relief is less than the amount which would be payable as composition, the proviso to section 5 (1) (*a*) applies to the case. It is to the effect 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 is to be fixed on the assumption that the next casualty will be payable on the expiration 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.

Now as the state of the respondent's title is such that the next casualty may be relief, and as the Act of 1914 is to be read as one with the Act of 1874, and, *inter alia*, the expressions "casualties" and "composition" are to have the meanings they have in the Act of 1874, and in addition to include such meanings as the Act of 1914 assigns to them, there is no ambiguity in the language used in section 5 (1) (*a*). The highest casualty

will, as I have already observed, include any composition which may be payable only on an occasion if it be the highest in amount of the casualties that are possible, and the language does not require that it should be a casualty exigible on death. As already said, I think that this is borne out by the omission in section 5 (1) (*a*) of the word "only," which, as I have pointed out, occurs in section 15 of the Act of 1874. If a year's rent is a composition exigible in law on a possible occasion by the Crown it will be greater than relief and the proviso will apply. It therefore appears to me that the first question must be answered to the effect that if at any time there can come to the Crown a legal right to exact a composition of a year's rent the whole sub-section applies, and prescribes unambiguously the date by reference to which the compensation is to be estimated.

The question which follows on this one is therefore whether there is vested in the Crown a right at any time to exact the amount of a year's rent claimed as being the footing on which the calculation is to be based. In the First Division the decision of the majority was that the Crown had failed to establish that it could ever be entitled in law to the year's rent so claimed. It was said, to begin with, that the Crown is not in use to demand this amount, which it is the right at most of a subject-superior to demand in respect of an entry on transfer from his vassal, and it was shown conclusively that it has not been the practice of the Crown to ask for anything approaching this sum.

I think it will be convenient to consider, first, the purely theoretical position of the Crown under the words used in the various statutes in relation to the power to claim casualties against singular successors. The right may seem to have been established by the old Scots statutes prior to the Union, and yet may afterwards have been modified by desuetude, or by the interpretation placed on these statutes by the Scottish Courts under the extraordinary freedom of construction which by custom they have exercised — a freedom in restricting the usual meaning of words which no court could properly claim when construing statutes passed after the Union of the Parliaments, and the recognition which followed of the language of the Imperial Parliament as what is alone to be looked to by judges.

It is doubtless true that by the original principles of the feudal system no vassal had the power of transferring the right to his feu to a disponee without the superior's consent. It follows that the composition or payment exacted was originally arbitrary in amount, and was not a casualty in the strict sense of being something arising out of the conditions of the feu. But then no more was the relief payable on his succession by the heir; and yet it is clear that all superiors became treated as bound by the law to enter the heir as a new vassal on payment of a relief which amounted to no more than a single payment of the feu-duty. Custom appears to have given rise to this obligation as one the courts would enforce apart from any statute in the cases of Crown superiors and subject-superiors alike. But although, as will presently appear, the amount of composition payable to a subject-superior by a singular successor was settled as being limited to a year's rent, it was in the first place so settled as the indirect result of a statute of the Scots Parliament, and not, like relief, by mere custom. In the case of the Crown superior, on the other hand, whatever the legal right may have been, it became at last the practice to exact as composition no more than what was latterly a sixth of the valued rent, a comparatively small fraction of the actual full annual value, and in the time of Queen Anne, and during the reigns of several later sovereigns, this fraction was fixed by royal warrant as the composition to be exacted. Still it may well have been that the Crown, while possessing a legal right to exact as much as the full year's rent, did not think it fitting, having regard to the position of the Sovereign as the head of the feudal hierarchy, to do so, and that in the end there was established a practice which was constitutional rather than legal, according with what seemed most consonant with fair dealing. But this is a very different proposition from that suggested in some of the judgments in the First Division that the Sovereign, at least when infefting a creditor, was performing a legal duty for which the Crown would not have been legally entitled to exact any sum as the price of its fulfilment. It may well be that what the Crown did was settled simply by a constitutional practice which its advisers had established—a practice which had no technical foundation. If so the purely legal position was that either the Crown could have made an unlimited demand, or that if not the limit to the demand must have been a creature of statute. As it was essential for the Lord Advocate's argument to show that there was a casualty exigible of definite amount, he sought to find this limit in a particular statute. That statute, or rather the first of the series of statutes on which he relied, was the Act of the Scots Parliament for the relief of tenants, passed in 1469. The majority in the First Division have held, as the foundation of their judgments, that this statute did not bind the Crown. But I think that, both from its language and from what was done under it, the true view is that, so far as its words go, it did bind the Crown, and established a statutory limit to its claim in the cases to which the statute applied. As the result of the further material which the Lord Advocate was able to produce before your Lordships—material relevant as a contemporaneous exposition of this Act, but which was not before the learned Judges in the Court below — it seems to me that the foundation of the judgments of Lord Skerrington and Lord Johnston is impaired, and indeed the argument for the respondents has mainly proceeded on another footing.

The Scots Act of 1469 was passed to protect tenants from distress for their Lord's debts beyond the amount of maill or rent due from them. The land in case

of deficiency was to be sold subject to the rights of the tenants, with power to the debtor, being the landlord, to redeem within seven years on payment of the price for which the land had been sold, and also of the expenses of the creditor in obtaining infeftment with the overlord or superior. The overlord was compelled to receive the creditor or other buyer on payment to him, the overlord, of a year's maill. If he failed to do so he had to take the land himself and become liable for the debt.

In terms this Act appears to have applied to the Sovereign when the Sovereign happened to be the overlord, and I know neither of any principle of construction nor of anything in the language of the Act which suggests that it should not so apply. But even were the words of the Act open to doubt I think that the doubt is dispelled by the interpretation put on the Act at the time as shown by certain charters of apprising granted by the Crown in the years 1483 and 1484. These refer to the Act itself and show that, in accordance with what were regarded as its terms, a year's rent was exacted by the Crown for entering the appriser. I refer to the charters, discovered by research subsequent to the hearing in the Courts below, under which William Lord Borthwick, Janet Napier, and the Countess of Ross were entered as apprisers with the Crown. It may be that very soon, later on, in subsequent transactions with the Crown, less than the amount prescribed by the statute was accepted. It is not easy to be quite sure how this stood. But the point is that, at all events in the charters to which I have referred, the Crown asserted the right to claim as overlord in terms of the Act of 1469. This appears to me to be sufficient as a contemporaneous exposition of the meaning put on it.

The next Act of the Scots Parliament that is of importance is the Act of 1669 anent adjudications. By this statute adjudications were placed on the same footing with apprisings, and the superior was not to be holden to grant any charter for infefting the adjudger until he was paid one year's rent of the land adjudged. In the case of this Act no evidence has been produced of contemporaneous exposition, but I see no ground in the words employed for thinking that the Crown was meant to be placed in a worse position than other superiors. There is no sufficient evidence to discriminate the "constant practick of the kingdom" referred to in the Act from what was laid down in general terms applicable to all superiors by the "severall Acts" also referred to. Nor can I assume that the "year's rent" which was to be exigible, as in the case of a comprising under the earlier Act of 1469, was regarded by the statute as no longer exigible by the Crown, which, in theory at least, had a right to it under that earlier Act.

In 1672 the Scots Parliament in the next place passed an Act abolishing comprisings altogether and substituting for them adjudications of a proper proportion of the debtor's land in favour of the creditor. The superior was not to be prejudiced by the Act, but was to be in the same case as if an apprising had been led and a "charge given to the superior thereupon." I do not think that the last words are enough, occurring in their context, to exclude the Crown from the benefits conferred and of freedom from being "prejudged" under the general provisions of the Act. It is, of course, clear that the Crown could not be charged as a subject-superior could, but this does not seem to me sufficient to make the Act in its general scope inapplicable in cases of Crown superiorities.

It was suggested that the right of the singular successor to compel an entry by making use of these old statutes rested on a mere legal fiction which could form no sufficient basis for the present claim, but I do not think that it is accurate to describe the procedure as resting on a legal fiction. Singular successors had a full right to make special contracts with the seller for the purpose of bringing the case within the provisions of the statutes. It was a roundabout mode of compelling the superior, but it was by no legal fiction properly so-called that this was brought about. An actual contract could be made wherever it was insisted on and there was a legal right to make it and to reap the fruits of so doing. Such a procedure is quite different from one resting on legal fiction rightly so-called where no contract really exists, or can be believed to exist in fact, and the person proceeded against is simply precluded by the Court from being allowed to say so.

I next come to the legislation subsequent to the Union of the Parliaments. The first material statute is that of 20 Geo. II, cap. 50, the main purpose of which was to abolish the tenure of ward holding in Scotland. Among other things which the Act did in addition to this was to make provision by section 12 for enabling the purchaser of land who had obtained from the vendor a procuratory of resignation to apply to the Court for letters of horning to charge the superior to grant an entry. Section 13 provides that the superior is to be bound to grant the entry only if such fees or casualties are tendered as he is by law entitled to receive. It is obvious from their terms that these sections do not apply to the Crown. But it is equally plain from section 13 that subject-superiors were recognised as entitled to certain casualties. We know that the casualty payable on the entry of a singular successor was indirectly limited by the operation of the Scots Acts as to comprisers and adjudgers, to which reference has already been made, to one year's rent. The reason was that by the process dealt with in these Acts alone could the new vassal compel an entry, and the practice had arisen of the superior accepting the fact that the new vassal thus had power to compel an entry by indirect process. If I am right in what I have said about these three earlier Scots Acts, the Crown was as much limited in the extent to which it could claim and also was in as good a position as any other superior.

It is said that the Crown has not for

centuries past been in use to exact nearly so much as a year's rent. I think that this is clearly shown to have been the case. The Royal Warrants of Queen Anne and subsequent Sovereigns, to which reference was made during the argument at the Bar, prove it. But it does not follow that the Crown had not the legal power in the case of the entry of an adjudger, and so of a purchaser who could proceed indirectly by way originally of apprising and later by adjudication, to demand the full amount. Apparently in the fifteenth century it actually did so with aprisers, and that it did not do so later on cannot affect its legal right unless something legally binding it can be proved. For reasons which I will indicate later on I am unable to regard the evidence as establishing more than a practice followed *ex gratia*, as distinguished from a custom establishing a law. The Royal Warrants appear to me to render the origin of the practice as depending on custom improbable. The evidence of definiteness and uniformity, without any other source than usage to refer it to, as well as of freedom from ambiguity, which I should look for before coming to the conclusion that something binding was to be presumed from the practice, appears to me to be lacking. No doubt the Sovereign, as head of the feudal system, regarded himself as morally bound to set an example of fair dealing. That is one thing. It is quite another to say that it is proved that he was bound by law to ask for no more than what from time to time he did ask. And I do not see how the circumstances that the sections I have referred to in the Act of 1747 did not apply to the Crown affected legal rights which it may have already possessed. It is not surprising that these rights should not have been dealt with in 1747, for the Act then passed was one of several which were passed substantially at the same time, largely on the advice, as we know from history, of Lord Chancellor Hardwicke, for the main purpose of restricting the powers of certain of the great subject-superiors in Scotland.

The next statute to which reference has to be made was passed a century later, the Transfer of Land Act of 1847 (10 and 11 Vict. cap. 48), which related to land not held in burgage tenure. This Act dealt with a number of conveyancing questions, and the only provisions that are important for the purposes of this appeal are those contained in section 19, which related to adjudications. That section provided that where the Court granted a decree of adjudication the decree might be accompanied by a warrant for infefting the adjudger or purchaser on alternative manners of holding, either *a me* or *de me*. The person obtaining the decree might claim entry, completing his title by means of a charter of confirmation from the superior. But the right of the latter to the composition payable by an adjudger or purchaser under the existing law was reserved entire, and the adjudger or purchaser was, by passing infeftment on the decree, to become indebted in the composition to the superior, and to become bound to pay the amount on the superior tendering a charter of confirmation, whether the charter was accepted or not. It is clear both from the definition section and from other sections, such as 7 and 9, that for these purposes the Act extended to the Crown, and while doubtless the alternative remedy given by section 19 of charging where confirmation was refused did not so apply, that did not prevent the other provisions of the section from extending to titles where the Crown was the superior, and it is at all events abundantly clear that the section took away no right the Crown already possessed. But in view of later legislation the question is no longer an important one. In the same year the Crown Charters Act was passed for the purpose of simplifying the mode of obtaining such charters. The applicant was to lodge a draft with the presenter of signatures along with his title-deeds, and together with evidence of the valued rent where necessary. In case of dispute the Court could decide on any objection as to title, and could remit to the presenter of signatures to proceed or not in accordance with its judgment. Before the charter, when sealed, was delivered to the applicant he was to pay to the proper officer of the Crown the amount of duties and compositions payable. So far as this Act is concerned it appears to me to have left the question that we are considering where it found it. No doubt the Crown was in the habit of accepting much less than the year's rent by way of composition. The question is not whether it did do so, but whether it was bound to do so, and if there was a right to exact the full year's rent—this right does not seem to me to have been taken away by any of the legislation which I have considered hitherto.

The next important Act is the Titles to Land Consolidation Act 1868. Between its date and that of the earlier statutes I have referred to several Acts had been passed to amend the law of conveyancing in Scotland. But their material provisions are re-enacted in this Act of 1868, and for the rest they are so far as relevant repealed. The Titles Act of 1868 contained a code of provisions as to completion of title, which for the most part extended to the Crown in common with subject-superiors. Section 62, as amended by an Act passed in the following year, is now repealed and re-enacted in another form by a later statute, to which I will come presently. But it dealt with adjudications for debt or on sale, and it is interesting to see what it provided. Infeftment could be taken by the adjudger on his decree as if he had got a conveyance. If that were all he would hold base of the person whose land was adjudged until confirmation should be granted by the superior. Upon this being done the adjudger was to hold off the superior, but the right of the superior to composition was retained entire, and the adjudger on obtaining infeftment was to become indebted to the superior for the amount of the composition payable, and the superior on mere tender of the proper charter was to be entitled to recover the amount. Section 97 confers, but as against a subject-superior only, the right to charge. This particular section neither creates any new right against

the Crown nor detracts from any right possessed by the Crown, which remained able to enforce the old right against adjudgers.

The next important Act is the well-known Conveyancing (Scotland) Act of 1874, which abolished the necessity of renewal of investiture. On registration of his infeftment a proprietor is to be deemed under section 4 (2) duly entered with the immediate superior, but without prejudice (under sub-section 3) to the title of the superior to any casualties (which include all compositions on entry), provided that the implied entry is not to entitle the superior to demand any casualty sooner than he could demand it under the law prior to the Act. Section 62 deals with the case of adjudications for debt or in implement. It enacts provisions which take the place of section 62 of the Titles to Land Acts of 1868 and 1869, but repeats their substance. In particular, it enacts that the right of the superior to a composition is reserved entire, and that the adjudger shall become indebted to the superior on the mere tender by the latter of a proper charter for the amount of the composition. This section so far as the relevant words are concerned is repealed by the Statute Law Revision Act, No. 2, of 1893 as being no longer operative, but that Act provides in terms that the repeal is not to affect the right to any of the hereditary revenues of the Crown, or to prevent any enactment purporting to be repealed from being put into force for the collection thereof. Finally section 65 of the Act of 1874 prescribes the mode in which adjudgers may complete their titles by recording their decrees.

I have now reviewed the legislation which appears to me to be relevant to the question whether the Crown has a legal right to demand an amount limited to a year's rent on the entry of an adjudger.

I agree that cap. 66 of the Scots Statutes of 1578 relating to double confirmation of kirk lands and of lands holden immediately off the Sovereign does recognise in its preamble the practice of the Crown as laid down in the ordinances of the Scots Privy Council to grant confirmation on payment of reasonable expenses. But this intervention, not of the Scots Parliament but of the Scots Privy Council, appears to me to point to what I have called a constitutional obligation only, and the Act in question does not profess to make a new law on the matter. So far as statute law is concerned it appears to me that the legal right in controversy came into existence under the Scots Acts referred to and has remained intact. The title of an adjudger who became bound to pay to the superior a composition on his right being made a feudal one was not the right to the full fee. That remained in the debtor whose land was adjudged. But a real burden may be thus created, and the limiting price that can be lawfully exacted by the superior for granting a valid title to this burden is the payment of a composition of a year's rent. The fee of the debtor vassal is not evacuated. No casualty may arise on the succession to it until it becomes evacuated by that vassal's death. It remains full. But it is burdened *de præsenti* on the confirmation of the creditor's title. This appears to me to be true so far as mere statutory title is concerned in the case of the Crown as much as in that of any other superior. It was thus that a casualty of a year's rent could become exigible in the case before us, and it would become exigible in principle if the event of the entry of an adjudger took place in the respondent's lifetime—an event which at all events in contemplation of law is possible.

The question which remains is, whether if the Crown originally had by the terms of the Scots Statutes the theoretical right to claim on the footing I have discussed, that right still remains. Such a right might, as it seems to me, have become modified in two ways only. The Scottish judges, in the exercise of the very large discretion which they appear to have exercised in the past in putting limiting constructions on the natural meaning of words, may have by judicial decision displaced the *prima facie* construction, and may even have excluded the application to the Crown of the words of these statutes or some of them, with an authority which we ought to recognise. Or there may have been a practice so uniform that a lost Scots statute, modifying the language of the Scots Act in question, ought to be presumed.

As regards the first of these questions I do not think that the decisions of the Judges are either uniform or are sufficiently specific where they might be invoked for the respondents. So far as they go they seem to point the other way.

The case of *Cleland* v. *Dempster* (M. 15,032) was decided in 1685, after the date of the last of the Scots Acts under consideration. The report of the decision at least suggests that if a signature is on a voluntary right, and not on a course of diligence by apprising or adjudication, it was arbitrary to His Majesty, as it was to other superiors, to receive or not receive a vassal, but *secus* if the signature had been in a course of diligence, when the right was not arbitrary. Then the dicta—for they amount to no more—of the eminent Judges who decided the modern cases of *Stirling* v. *Ewart* (1842, 4 D. 684), *Lord Advocate* v. *Swinton* (17 D. 21), *Lord Advocate* v. *Moray* (21 R. 553), and *Duke of Argyll* v. *Riddell* (1912 S.C. 694), indicate that these Judges at least had no knowledge of such restrictions on the theoretical and legal right of the Crown as is contended for, and no decision in a different sense was brought before us.

Turning to the alternative way in which the right of the Crown might conceivably have been cut down by a Scots Statute that has become lost, it is enough to say that such a point was not made in the exhaustive arguments that were placed before us. It is possible that an Act of the old Scottish Parliament might more easily have been lost than would have been the case on this side of the border. But some evidence that there has been such a lost Act must be produced. We certainly cannot presume it from mere evidence of a benevolent practice. It may be going too far in such a case to say as did Sir George Jessel in *Chilton* v. *Corporation of London* (7 Ch. D. 735) that the judges being in principle bound to

know whether or not there has been any such Act, even though it cannot be produced, nothing that they do not know of as an Act of Parliament can be presumed to have existed. But it is highly relevant to observe that the evidence of usage which has been produced to us, both from actual documents and from the books of eminent text writers, does not give countenance to the notion that it was by the interposition of the Scots Parliament that the legal title of the Crown if it existed was modified. What these documents and statements show is rather that a practice arose, as early at least as the sixteenth century, under which the Crown did not refuse to receive any vassal on being paid the composition from time to time established in the Exchequer. At one period this composition was fixed for certain cases at ten merks in the thousand. It seems to have varied "according to the Lords' pleasure" down to the institution of the post Union Court of Exchequer in 1708. After that time it was fixed by warrant of Queen Anne in 1709 at a sixth part of the valued rent, and this warrant was re-issued by subsequent Sovereigns down to the time of King Edward VII, when it ceased to be renewed. No doubt this was the practice of the Crown Authorities. But it is one thing to say that it was their practice, and quite another to say that the legal right was extinguished. The observations of Stair and Erskine, and the other writers whose statements were cited at the Bar, are for the most part in terms that are appropriate to usage of constitutional validity at least as much as to legal right. These observations seem to me to prove no more than that there had been laid down and publicly adopted by the Crown Authorities a practice which varied as time went on, and which ultimately assumed the form set forth in the royal warrants. It was quite right that Stair and Erskine and the other writers who were describing practice as well as principle should treat the practice as the recognised one and of high importance. But however definite a form the practice which guided the Crown officials in their relation to the public may have assumed, it does not follow that it ever detracted from the legal right, and the legal right is the only thing with which we are concerned on this appeal. However uniform the habitual action of the Crown, and however much the subject could regard past experience of it as a reliable guide to the future, the duty of the Crown Authorities appears to me to have been at the utmost of constitutional as distinguished from legal obligation. And even if it amounts to so much—a question about which I say nothing inasmuch as I have no title in a judicial capacity to say anything—the question is whether there is a legal right beyond it, for it is to such legal right alone that I feel myself entitled to look.

If I had had to decide this appeal without the great advantage of knowing what has weighed with the majority of your Lordships, I should, for the reasons I have indicated, have hesitated in agreeing with those learned Judges in the First Division who differed from the Lord President and Lord Cullen. But the learned Judges who formed the majority, and some of your Lordships sitting here, speak with the experience of a lifetime in the interpretation of the conveyancing law of Scotland, and bring to the task of interpreting it great knowledge which I do not possess. I am aware of the latitude, striking to an English lawyer, which obtains north of the Tweed in the interpretation by the Courts and the great institutional writers of the Scots Statutes prior to the Union. This latitude may well affect the point whether the restriction on the right of the Crown is not more than constitutional. The question before us is one on which the conclusion reached ought to take full account of judicial tradition and the atmosphere in which it has arisen, as well as of the views current among those versed in Scottish legal practice, just as the interpretation of such a principle as the rule in *Shelley's* case in England would require a mind familiar from long experience with the learning of English conveyancers. It is for this reason that I do not feel myself entitled to dissent from the conclusion reached on a pure question of conveyancing by the majority of Judges of such great eminence and experience as those who have heard the arguments in the present case. I therefore bow before their views as to the interpretation which the Scottish Courts ought to-day to put on the old Scots Statutes that are before us for construction.

VISCOUNT CAVE—[*Read by Lord Dunedin*]—The question for determination on this appeal is what is the proper basis of the compensation which under the Feudal Casualties (Scotland) Act 1914 is payable by a Crown vassal on the redemption of the casualties incident to the Crown's estate of superiority.

Under the Conveyancing (Scotland) Act 1874 feudal casualties were redeemable at the option of the proprietor of the feu on terms prescribed by section 15 of that Act. By the Act of 1914 they are made redeemable at the instance either of the superior or of the proprietor of the feu within a period of 15 years from the 1st January 1915, and if not redeemed within that period they are to be extinguished, subject only to a saving for pending proceedings. The compensation payable on redemption is fixed by section 5 of the Act, which prescribes different terms of redemption according to the nature of the casualties, and section 9 gives an option to the proprietor of the feu to convert the compensation so ascertained into a perpetual annual feu-duty.

The respondent, the Marquess of Zetland, is the proprietor of certain lands comprised in a charter of resignation and confirmation granted by King George III, and mid-superior of other lands held under the same title, such lands being partly blench and partly held at a feu-duty. Notice has been duly given on behalf of the Crown requiring the respondent to redeem the casualties on

these lands, and the terms of such redemption now fall to be determined in accordance with the provisions of the statute.

It is common ground that the case falls within paragraph (*a*) of section 5, sub-section 1 of the Act, which regulates the composition payable in cases where casualties are exigible on the death of the vassal, and under that paragraph the composition payable in such cases is "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." The contention of the appellant is that the compensation payable under this provision falls to be adjusted on the basis that the Crown is entitled on the entry of a singular successor, whether taking by legal diligence or by voluntary transfer, to a composition of "one year's real free rent" of the land, or if the land has been feued by the vassal, one year's feu-duty, this being (as he alleges) the highest casualty which the Crown is in any event entitled to exact. The respondent, while admitting that a composition of that amount is receivable by a subject-superior on the occasions referred to, denies that when the Crown is the superior any such composition is payable. The question therefore is whether the Crown can on either of the occasions referred to require payment of a composition of that amount.

It is convenient to deal first with the case of a singular successor taking by the exercise of legal diligence, sometimes referred to as an adjudger, and with regard to this case a preliminary question is raised by the respondent on the construction of section 5 (1) (*a*) of the Act of 1914. It is contended that on the true construction of that paragraph the "highest casualty" which is to be taken as the basis of the compensation, must be a casualty exigible on death, and that the composition payable on the admission of an adjudger is payable not on death but on the recording of the decree of adjudication. I am disposed to think that the construction of the section so contended for is the right one. The paragraph is introduced and governed by the words "in cases where casualties are exigible on the death of the vassal"; and it is plain by reference both to paragraph (*a*) of section 5 (1) and to section 6 (1) of the Act that the "next casualty" there mentioned is a casualty payable on death. This being so I think that it is a true inference that the "highest casualty" referred to in the paragraph must also be a casualty exigible on death. But assuming this to be so, I am by no means satisfied that the casualty now under consideration, namely, the composition payable by an adjudger, does not fall within that category. It is true that a creditor obtaining a decree of adjudication is entitled to procure his decree to be recorded forthwith and thereupon becomes bound to pay to the superior the amount of the composition, but the creditor is under no obligation to take that course, and if he prefers not to do so the composition can only be exacted by the superior if and when death occurs. I may add that a singular successor taking by voluntary transfer is entitled (if he desires it) to immediate infeftment and thereupon becomes liable to pay a composition, and yet it is not contended that the composition payable by such a successor is not a casualty exigible on death. The point is not free from doubt, but upon the whole I think that the composition payable on the entry of a singular successor taking under an adjudication may fall within the description of the "highest casualty" in section 5 (1) of the Act.

I proceed to consider the question whether the composition exigible by the Crown on such occasion is one year's rent of the land including in that expression a year's feu-duty where the land is sub-feued. It appears to be clear that before the year 1469 neither the Crown nor a subject-superior could be compelled to receive a new vassal other than the heir of the vassal provided by the investiture (Stair, ii, 4, 32), although vassals taking by transfer were, no doubt, often entered with the superior's consent. A Statute of 1469 (cap. 36) contained provisions under which the land of a debtor might be sold for payment of his judgment debt, or if no buyer could be found land to the value of the debt could be "apprised" under the direction of the Sheriff and assigned to the creditor, power being reserved to the debtor to redeem the land so apprised within seven years; and the statute concluded —"And als 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." I am of opinion that this statute, which was passed for the relief of creditors, applied as well to lands held of the Crown as to lands held of a subject-superior; and that this view was taken immediately after the passing of the statute is shown by a series of Crown charters of apprising dated in the years 1483-4, which though not produced in the Courts below were brought to the notice of this House. But although in these early instances a year's rent appears to have been exacted by the Crown it is plain that before many years had passed it became the practice of the Crown not to require payment of the year's rent but to be satisfied with a smaller composition taking the form of a percentage on the debt. In the Lord High Treasurer's accounts for 1500-6 the amounts received on apprisings appear to be equal to 5 per cent. of the debt, which might well be about the equivalent of a year's rent of the land apprised. But in some Crown charters dated 1643-5 the compositions paid amount to about 2 per cent. on the debts recovered; and shortly after the latter date the amount appears to have been fixed at 1 per cent. on the first 10,000 merks of the debt and one-half per cent. on any further sum. In Dallas' System of Styles (1666-88) it is laid down (edition of 1697, pages 33-35) that on a decree of apprising being allowed in respect of lands held of the King (not being burgage lands) there must infeftment

pass the whole Seals by way of signature and composition in Exchequer, and that on this signature being presented "It is componed for 10 merks for each 1000 merks of the first 10,000 merks, and 5 merks for each 1000 merks more contained in the apprising (being a first comprising), and being a second, third, and so forth for the half, namely 5 merks for each 1000." In the same book (page 225) Dallas quotes a saying by Lord Stair which confirms this view. In Clark and Scrope's Historical View of the Court of Exchequer in Scotland (1708-24), written after adjudication had taken the place of apprising, the practice is laid down as follows (edition of 1820, page 190):—"Compositions on signatures of adjudications, infeftments of annual rent and other redeemable rights are stated thus, every thousand merks to ten thousand merks pays ten merks, and every thousand merks above ten thousand merks pay five merks; but when the annual rent of the sum for which an adjudication is granted or an heritable bond given exceeds the valued rent of the land the composition must be settled by the valued rent, and not according to the sum contained in the adjudication; and the same rule is to be observed in confirmations of such redeemable rights." In Lord Bankton's Institutes of the Law of Scotland (1751) it is said (iii, 2, 53)—"In adjudications of lands holden immediately of the Crown no year's rent is exigible by the Barons of the 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 Dirleton's Doubts resolved and answered by Sir James Steuart (edition 1715, page 42) the following questions and answers occur:—"N.—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 past upon comprisings, but comprisings lay at the Signet, and were the Warrant of charters under the Great Seal. To try when that custom was changed and what Warrant was for changing the same. When the Exchequer do pass signatures upon comprisings they may take the known composition, which is 10 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 rule of Exchequer." Whether the answer here given as to the construction of the Statute of 1469 is correct or not, it is strong evidence as to the practice prevailing at the time.

Similar statements appear in Erskine, who states (ii, 12, 24) that in the case of adjudgers of Crown lands the composition is regulated "not according to the rent of the lands but in proportion to the principal sum apprised or adjudged for," in Parker on Adjudication (section 181 in the Juridical Styles, 3rd ed., p. 458) and in a number of other authorities. No instance has been produced later than the year 1484 of the exaction from an appriser or adjudger of Crown lands of the composition of a year's rent; and the rule against requiring such a composition may be said to have the sanction of a practice of some centuries. The reason for the adoption by the Crown of this practice must now be a matter of speculation only. It may have been considered, as stated in the earlier writers, that the lieges being "all alike the King's subjects" there was no reason for preferring one vassal to another, and in any case it is not unnatural that the execution of decrees made by the King's Courts should have been permitted without the exaction by the Crown of a heavy fine.

What then is the legal inference to be drawn from this long-established practice? Even if there had been nothing more than the acceptance by the Crown for some centuries of a composition less than the amount allowed by statute, it might still be difficult after so great a lapse of time to treat the practice as a mere indulgence to the subject capable at any time of being abandoned. In the history of feudal holdings many rights of the subject (including the right of an heir to admission on payment of a relief) have no other basis than long usage, and it might well be argued that a practice so long maintained has become a right enforceable by law. Such an argument would have especial weight in Scotland, where the force of long custom even when contrary to a statutory rule has been repeatedly acknowledged. But in the present case it is unnecessary to resort to that argument. Since the passing of the Act of 1469 the process of apprising set up by that Act has been abolished and adjudication has been substituted for it, and the appellant must show, in order to establish his claim, that the right to a year's rent given by the Act of 1469 in the case of apprisings has been extended by some later statute to adjudication. It is therefore necessary to consider the effect of the later statutes, and in so doing to bear in mind the practice established at the time when they became law.

In the case of *Grier of Bararge* v. *The Laird of Closeburn* (1637, M. 15,042) it was held that the Act of 1469 applied to comprisings only and not to adjudications, and accordingly that a subject-superior was not entitled to take a year's rent before entering an adjudger; for (it was said) "the Lords could not enlarge the Act without a warrant, albeit they found there was a like reason of equity for the adjudication as for comprisings and that the superior was alike prejudged in the one as in the other by the change of his vassal against his will, which the superior alleged that by no law or reason he ought to do against his own will without satisfaction therefor; which the Lords could not regard, for the reason foresaid, viz., that there was no act to warrant the same." Accordingly a statute was passed in 1669 (cap. 18) which, after reciting that "by several Acts of Parliament and constant Practick of the Kingdom, there is one

year's rent of all lands, annual rents, or others apprised due and payable to the superior of the saids lands and others before he be holden to enter and infeft the compriser, and that there is the same reason in cases of adjudications as apprisings," declares that "the superiours of lands, annual rents, and others 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, and declares that in all cases adjudications shall be in the like condition with comprisings as to superiours." The recital in this statute as to the "constant Practick of the Kingdom" applied only to subject-superiors, for at the date of its passing it was the established practice of the King never to exact one year's rent, and the expressions "the year's rent" and "in the like condition" point to the conclusion that the Act was intended only to apply to adjudications the then existing practice as to comprisings. Having regard to these considerations I think that there is good ground for saying that this statute had no application to lands held off the Crown. If so it follows that under the decision in *Grier* v. *Closeburn*, and apart from any argument founded on long practice, the Crown has no right to a year's rent by way of composition in cases of adjudication and that the claim of the appellant under this head falls to the ground.

By an Act of 1672 (cap. 19) provision is made for adjudging lands of a debtor to his creditor, comprisings being abolished; and it is declared that "neither the superior nor the adjudger shall be prejudged by this Act but that they shall be in the same case after citation in this process of adjudication as if apprising were led of the lands at that time and a charge given to the superior thereupon." It appears by Erskine (ii, 12, 31) that the words "a charge given to the superior" are appropriate to a subject-superior but not to the Crown, as in the case of lands held off the Crown the practice was not to give a charge but to present a signature in Exchequer. This provision therefore is also inapplicable to a Crown holding.

An Act of 1681 (cap. 17) deals with the sale of the lands of bankrupts, and declares that such a sale shall be as effectual as if it were made by the debtor and all the creditors cited "and that a signature shall pass thereupon in Exchequer and a warrant for charging the superior to enter the purchaser upon payment of a year's rent." This enactment is ambiguous, as the words "upon payment of a year's rent" may grammatically apply both to the signature in Exchequer and to the warrant to charge the superior, but having regard to the practice then firmly established, it appears probable that they refer to the latter only. The distinction made between the case of the King and that of the subject-superior is noticeable.

The Act of 1747 (cap. 50) is not directly in point under this head, as it refers to purchasers only, but the fact that the Act is confined to subject-superiors again marks the distinction in law and practice between lands held off the King and lands held off a subject.

The Transference of Lands Act 1847 (cap. 48), section 19, which empowers an adjudger to obtain entry by confirmation, preserves the right of the superior to the composition payable "under the existing law," and the Conveyancing (Scotland) Act 1874 in providing for an implied entry preserves to the superior all rights and remedies obtained by him under the "existing law and practice" for recovering his casualties. The references in these statutes to "the existing law" and the "existing law and practice" must be construed in the light of the rule then fully established as to Crown holdings.

Upon a review of these statutes I have come to the conclusion that they do not give to the Crown upon an adjudication the right to levy a year's rent, but only the composition which had in practice been exacted, namely, a percentage upon the debt. The claim of the appellant, so far as it is founded on the contention that a year's rent or a year's feu-duty is exigible by the Crown from an adjudger, is therefore not established.

The further contention, namely, that the Crown is entitled to a composition of a year's rent (or a year's feu-duty) on the entry of a singular successor taking by purchase appears to me to present less difficulty, as there is in this case no statute which can be pointed to as giving such a right, and the claim must be rested on usage.

In the case of lands held off subject-superiors, such a usage was early established and received statutory sanction. The Act of 1469 had no direct application to purchasers, but in order to secure from a subject-superior an entry for a voluntary purchaser the device was adopted of a fictitious debt followed by an adjudication. In the words of Erskine (ii, 7, 6)—"In lands holden of subject-superiors expedients were fallen upon which received the countenance, or at least the indulgence, of law for evacuating the superior's right and enabling the vassal to sell the lands to a stranger without his consent. One usual way was by a bond granted by the vassal to him who intended to purchase for a sum fully equal in value to the lands; on which bond the creditor deduced an adjudication of these lands against the granter, for it behoved the superior to enter such creditor as his vassal under the character of adjudger." This expedient, although not more open to censure than some other legal fictions which have been sanctioned by the Courts (such as fines and common recoveries in England) was denounced by Sir Thomas Craig (Jus Feudale, 1603) as a *callida machinatio*, and Lord Stair (ii, 4, 6) advised that a law should be made whereby superiors might be compelled by letters of horning to receive singular successors for a year's rent. Accordingly by an Act of 1747 (cap. 50, sections 12 and 13), after reciting that "the methods of procuring entry by heirs or singular successors or purchasers of lands in Scotland that are held off subject-superiors heretofore practiced are

tedious and expensive," it was enacted that it should be lawful for a purchaser of lands on obtaining from his vendor a disposition or conveyance containing a procuratory of resignation in his favour to apply for a warrant for letters of horning to charge the superior to receive or grant new infeftments to such purchaser, and that the Lords of Session should grant letters of horning to charge the superior accordingly; but it was provided 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 procedure so set up for procuring the infeftment of a purchaser has been altered and simplified by later enactments, but the right of a subject-superior to a composition of a year's rent has throughout been preserved and (except that for a time the Courts assumed jurisdiction to moderate the amount) has been enforced. The right was recognised by this House in *Home* v. *Earl of Belhaven*, L.R., 1903 A.C. 327, 40 S.L.R. 607.

The history of lands held off the Crown differs widely in this respect from that of lands held off a subject-superior. There is nothing to show that the legal fiction above referred to was ever resorted to as against the King. Indeed, no such compulsion was required, for the King, as Sir Thomas Craig said in 1603, *nunquam solet recusare*—Jus Feudale, iii, 2, 20. The Act of 1747 had no application to Crown vassals, and it is admitted that in the whole history of the feudal system in Scotland there is no record of a single instance in which the Crown has exacted a casualty of a year's rent from a purchaser of land held by a Crown vassal. It is stated by Stair (ii, 3, 43) that "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 though 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 Erskine (ii, 7, 6) has the following statement to the same effect: —"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." The ordinances of the Privy Council referred to by Stair and Erskine are not now forthcoming, and so far as they are recited in the Act of 1578 to which those authors refer they would seem to apply to kirk lands only, but it cannot be doubted that these institutional writers had the ordinances before them, and great weight attaches to their statements. Whatever may be the origin of the rule that purchasers of Crown holdings should be received upon payment of a reasonable composition for expenses, it is recognised as established, not only by the authors above mentioned, but by Sir Thomas Hope (Minor Practicks 1625-49), Dallas (System of Styles 1676-88), Sir George Mackenzie (Observations on the Acts of Parliament 1679), and a host of other authorities, as well as in the case of *Dundas* v. *Officers of State* (1779, M. 15,103). Although the amount required under the head of expenses may for a time have been subject to the pleasure of the Crown Commissioners it was ultimately fixed by a Royal Warrant issued by Queen Anne in the year 1709 at the amount named by Erskine, namely, one-sixth of the valued rent of the lands. This Warrant was renewed on the succession of each subsequent Sovereign down to and including Queen Victoria, and although it was not renewed by King Edward VII or by his present Majesty its terms have been observed during their reigns and a composition of one-sixth of the valued rent has been uniformly accepted down to the present time.

Notwithstanding these facts, which are not really in dispute, the appellant contends that the Crown is entitled now to forsake the rule so long established on the ground that it was adopted *ex gratia* only, and for the purpose of the statutory compensation to assess the casualties payable on the admission of a purchaser at one year's rent of the land, "subject to the usual deductions of feu-duties, public burdens, the cost of reasonable repairs, and other deductions recognised by law." The Lord Advocate appeared to me to base this contention on the view that the legal fiction above referred to by which a purchaser could assume the guise of a compriser or adjudger and so force an entry upon payment of a year's rent, applied not only to land held off a subject-superior but also to land held off the Crown, and that although the statutory sanction given to this practice by the Act of 1747 had admittedly no application to Crown lands, the Crown could now revert to the ante-1747 practice and exact a composition of a year's rent. To this contention there are two answers, either of which appears to me to be sufficient to dispose of it. In the first place neither the fiction in question nor the rule founded upon it has ever been resorted to in the case of Crown lands, and since the year 1747 it has had no application to any lands whatever. In these circumstances it cannot be expected that the Courts would now allow it to be revived for the sole purpose of enabling the Crown to obtain a large sum by way of compensation. In the second place, even if the legal fiction could be revived, the Crown

authorities would be no better off, for if (as concluded above) the Crown has no right to the payment by an adjudger of a composition of a year's rent, neither can it exact that sum from one putting on the dress of an adjudger. The fact is that the Crown has long since abandoned any claim to refuse a new vassal who is willing to pay a reasonable composition on entry, and the right of the subject so acquired by immemorial use cannot now be abrogated.

If it is asked what then is the composition exigible by the Crown from a purchaser I think that the best answer which can be given is that it is a reasonable composition for expenses and that long practice has shown that one-sixth of the valued rent is a reasonable sum. But however this may be, I am satisfied that the claim of the appellant to base the compensation payable by the respondent on the basis of a year's rent cannot be sustained.

I may add that if during the reign of Queen Victoria the respondent had been minded to redeem his casualties he would have been entitled under section 15 of the Act of 1874 to redeem them on payment to the superior of "the amount of the casualty estimated at the date of redemption with an addition of 50 per cent.," and as the Royal Warrant was then in force the compensation would have fallen to be adjusted on the basis of a casualty of one-sixth of the valued rent. And even if the claim to redeem had been made after the expiration of the Royal Warrant but before the Act of 1914 I do not doubt that compensation on the like basis would have been accepted. Now the compensation which on this basis would have been payable by the respondent is estimated at about £75, while the compensation estimated on the basis now claimed by the Crown would exceed £8000. It is difficult to believe that when in 1914 Parliament made redemption compulsory it intended so largely to increase the compensation payable by Crown vassals.

For the above reasons I am of opinion that the claim of the appellant fails and that this appeal should be dismissed.

LORD DUNEDIN — Before I had put in final shape my opinion in this case I had the advantage of reading the opinions prepared by my noble and learned friends the Lord Chancellor, Viscount Cave, and Lord Shaw. They have so exhaustively handled the materials on which the decision depends that I should ordinarily have been content to express my concurrence with the result at which they have arrived. But the case is so important that I feel I ought not to give a silent vote. I shall therefore endeavour as far as possible not to repeat, in terms less happy, what I respectfully think has been so well said by them.

There can be little doubt as to the intent and object of the Feudal Casualties Act 1914. It was to deprive the superior of his casualties and to give him in return something that should be a fair compensation for what he had lost. Section 5 carefully discriminates between the various classes of charters, but really the main division is between the cases dealt with in sub-section (*a*) and the special cases dealt with in (*b*), (*c*), (*d*), (*e*), (*f*). Now (*a*) is the common case. Under the ordinary charter a casualty becomes due only on the death of the vassal. It may be relief, and relief may be mentioned in the reddendo "duplicando feudifirmam uti mos est in feudifirmis"; it may be composition when the person to be entered is not the heir of the investiture, and this is probably not mentioned in the reddendo. It is the common case that we have to deal with here. Indeed I doubt very much if there would be found an instance of a Crown charter of a date prior to the 19th century which fell under any division but the first. Those dealt with under (*b*) to (*f*) represent comparatively modern devices sprung most of them from the exigencies of the building feu. It is, I think, impossible to read sub-section (*a*) without feeling that what the framer is thinking of is the ordinary casualty that is due either on the entry of an heir or of a singular successor introduced by voluntary transmission. The payment depends for its calculation on "the time at which the next casualty might be expected to become exigible," and such expectancy is dealt with in section 6 and the concomitant Schedule A by estimating the expectancy of life of the person "on whose death the incidence of the next casualty depends"—that is, in other words, the person who at the date of calculation fills the fee. All this phraseology is far away from the idea of the payment made for an entry by an appriser or adjudger. I do not for a moment suppose the idea of an appriser or adjudger ever entered the mind of the framer of the section. I will give reasons for this subsequently. Yet it is always possible that a statute has said more than its framer meant. Possibly there is no better illustration than is to be got from this very branch of law, Section 4 of the 1874 Act certainly never intended to give superiors more valuable rights than they had before. But the course of the decisions which began with *Ferrier's Trustees* (4 R. 738, 14 S.L.R. 480), and greatly hampered the device of tendering the heir, show that such was its effect.

Deferring for the present the further consideration of this topic, it is obvious that the first question in the case is whether the Crown was entitled to exact a year's rent from a singular successor by voluntary transmission, or must have been content with the time-honoured payment of a sixth of the valued rent. For it was not disputed that "highest casualty" means the highest casualty which the superior could exact—supposing a casualty to be due — under the law as it stands at the date of the calculation, *i.e.*, after 1914. It does not mean the highest casualty which could historically be shown to have been paid. I cannot say that I have ever thought this point one of difficulty. The cardinal fact that stares one in the face is that the Act of 20 Geo. II, which gives the right to the voluntary disponee to force an entry on terms of paying a year's rent, is expressly limited to subject-superiors. I shall revert to the reason, but

for the moment the fact is enough. Now it is true that while the right to get a casualty given to the superior by that Act is non-existent so far as the Crown is concerned, the compulsitor on the superior to receive is also non-existent so far as that Act is concerned in a question with the Crown. But that is immaterial, and immaterial for two independent reasons, either of which is sufficient for the present purpose. The first is the historical reason, namely that there is no evidence that the Crown ever refused to grant an entry. Theoretically, as has often been pointed out, the superior could refuse any renewal of the fee either to heir or singular successor. It is certain that by long custom the superior was bound to renew the investiture in the person of the heir; and this by the law of Scotland (which, be it remembered, never adopted *mortuus sasit vivum*) was extended far beyond the natural heir or heir-at-law, for in the case of tailzies it was held to cover the heir of any destination proffered by the taker of the original charter. See the long series of cases, of which *Lockhart* (M. 15,047) may be taken as the first. The right to refuse the singular successor had survived in Scotland, so far as the subject-superior was concerned, till the Act of 1469, which opened the door to one class of singular successor, viz., an appriser. It was finally put an end to by the Act of Geo. II, but so far as the King was concerned there is no trace of his ever having refused to accept a new vassal. On the contrary, the conduct of the King is differentiated by Craig, our oldest writer on this matter, from that of the subject-superior in that the King "nunquam solet recusare." Whether this non-refusal was itself the growth of custom or was an act of the Crown signified through the Privy Council matters but little. That it existed beyond all memory seems certain. As to this the Act of 1578 is exceedingly important. There was a slight attempt in argument to say that the Act referred only to Church lands. Obviously it is not so limited. Its title shows that it dealt not only with Church lands but with all lands "halden immediatelie of the Crown." Doubtless Church lands were the lands where the abuse of double confirmation was most likely to be rife. When the Reformation, the initial date of which for Scotland may be taken as 1558, had taken such hold that the churchmen saw that the game was up, they proceeded to dispose of their lands as quickly as they could, and a double disposition was more likely to occur in such a case than in the case of an ordinary vassal parting with his lands. But the importance of the Act for the present purpose is the statement therein that "it is founden be sundry ordinances of the Privie Councel that our Sovereign Lord and his hienesse Compositours aucht not to deny his confirmation upon the reasonabil expenses of the partie suitand upon their awin peril." On this Erskine founds his statement in ii, 7, 6, that the Sovereign gave up the right of refusal by ordinances of the Privy Council for the public utility. I confess to doubting whether these ordinances of the Privy Council which are lost did more than acknowledge a custom which had become existent. There is a strong family resemblance between this idea of a solemn act of renunciation and the legendary account of the establishment of the feudal system in Scotland which is given in the laws attributed to Malcolm the Second, where it is said that Malcolm distributed the whole lands of Scotland among his nobles, reserving only to himself the Royal Dignity and the Mute Hill of Scone, whereas, as was pointed out long ago by Lord Kames in his essay on the introduction of the feudal law, it is certain that the feudal system was introduced gradually, and took its form from custom and not from a formal creation.

The second reason is to be found in the Act of 1874, which effects an entry *invito superiore*. It is true that it saves the right of the superior to his casualty, so that the subject-superior is saved in the right given him by the Act of Geo. II. But the Crown having no right under that Act is saved in nothing except what apart from that Act it may have right to charge. Now inasmuch as there is no Act which gives the Crown a right to charge anything to a voluntary disponee, it is custom and custom alone which fixes the Crown casualty. Theoretically the position might be put that the Crown being entitled to refuse any entry might as a condition of entry charge, not particularly a year's rent, but anything it pleased. Theoretically the same could be said of an entry to an heir. Yet custom fixed relief as the casualty due on the entry of an heir, as well in the case of the Crown as of the subject-superior. Seeing then that the Crown did not as a matter of fact refuse to enter a voluntary disponee, it was left to custom to regulate the payment that was made, for after all, as Erskine says (ii, 3, 9), "the feudal law is customary which consists in fact, and ought not to be extended further than the particular usage which constitutes it." Now custom has never sanctioned the payment of a year's rent. But it has sanctioned a payment. Originally the payment was uncertain in amount. It was fixed by "His Highness' Compositors," to quote the words of the Act of 1587. In our oldest treatises we find it still unsettled. Thus Hope in his Minor Practicks (p. 68)—he represents the period 1625-1649—"ingressuum is commonly a year's duty to the superior who receives a new vassal, except the King, whose composition is made by the Lords of Exchequer"; and further, treating of signatures (p. 86), "The Treasurer . . . hears parties make offers anent the composition to be paid for the same"; and again, "The same (*i.e.*, the signatures) are past and componed by the Lords of Exchequer . . . and the composition is written at the end of the signature . . . which compositions are made less or more at the Lords' pleasure." Nor is this to be wondered at, for custom does not spring fully grown like Minerva from the head of Jove. In its inception it is always ambulatory and uncertain; it is only by the progress of years that it comes to be settled.

Of the eventual settling of this custom we have a clear account in the treatise by Sir John Clark and Baron Scrope. They represent the inception of the Court of Exchequer after the Union. They relate how the Barons finding the inconvenience of the past practice procured a Royal Warrant "to be a standing rule in all time coming," which fixed the composition at a sixth of the valued rent. That practice has prevailed ever since, and in my view it was the stereotyping of the custom. The mere fact that the warrant came to be renewed by succeeding sovereigns does not in my opinion make the payment the less a customary payment. No other payment has ever since that date been made. No other payment has been alluded to by any writer. Erskine in the passage already cited speaks of the composition as fixed by practice at one-sixth of the valued rent. Walter Ross, Bell, Duff, Menzies, and Montgomery Bell all tell the same story. I come therefore to the conclusion, and I confess without difficulty, that the Crown has no claim on the entry of a person claiming under a voluntary disposition to a year's rent either by statute or at common law, that its claim is to a customary payment, and that the custom has been stereotyped as allowing a sixth of the valued rent.

This, however, does not end the matter, and I now come to the part of the case as to which I have had more difficulty. It is first of all necessary to revert to the Act of 1914. The standard of calculation is the highest casualty. Now the Lord Advocate argues that, assuming that composition on a voluntary transmission is a sixth of the valued rent, yet that if the land were adjudged a year's rent would be due under the existing law, and that the possibility of such an event brings in a year's rent as the highest casualty exigible.

Though in the end we are bound to decide according to the letter of the statute, it is always admissible to try to penetrate its spirit in order the better to interpret the letter. Such an inquiry disposes one but little favourably to the Lord Advocate's argument. The intent of the statute was certainly to compensate the superior for the loss of what he would have been likely to get if the statute had not been passed. He might only get relief; but the phrase the "highest casualty" taken along with the definition clauses shows clearly that the chance of composition becoming payable on the entry of a singular successor by voluntary conveyance must be included. What then of the person who seeks an entry in respect of judicial transference? In dealing with involuntary or judicial alienation we must begin with apprising the oldest form of diligence which transferred the land itself in contradistinction to diligences which affect the fruits thereof or the moveables situated on it. We may begin with the Act 1469 apart from the question of whether the diligence of apprising was known before that date. In any view the Act formalised the process. It authorised a transference, but it was not an out-and-out transference; it gave a redeemable not an irredeemable right, though aided by a decree of declarator of expiry of the legal it might become the first step of an irredeemable title. As matters stood at that time it behoved the appriser to get an entry from the superior, for the decree of the Court contained no warrant for infeftment, and if not infeft he might be cut out by a subsequent appriser or a voluntary disponee who succeeded in getting an entry. Accordingly the compulsitory clause on the superior was added to the Act, and for a long period entries were doubtless taken. But a great change was effected by the Act of 1661, which enacted a *pari passu* preference between all apprisings got within year and day of the first effectual, and declared that an apprising should be made effectual either by infeftment obtained or by exact diligence, *i.e.*, by a charge given to the superior even though nothing more was done. This enactment was by decision extended to adjudications, which had by this time taken their place as an alternative form of diligence. So Stair points out (ii, 4, 32) "there is a great alteration by the Act bringing them (apprisings and adjudications) in *pari passu*, for thereby a charge against the superior to enter is declared as effectual as if infeftment had passed, and custom hath required no further diligence than that charge, so that it will be to the detriment both of debtor and creditor to urge actual infeftment during the legal, and no unjust prejudice to the superior seeing till then the adjudication is but *pignus prætorium*, and if it be redeemed or satisfied the vassal is unchanged." Actual entry became therefore no longer a necessity and consequently rarer, and this continued to be the case after adjudications were statutorily substituted for apprisings by the Act 1672, cap. 19. Eventually in 1847 a statutory power was given to the Court to insert a warrant for infeftment in the decree. Feudally speaking this was rank heresy, for it allowed an infeftment to be granted which did not flow from the superior or from someone to whom the superior had given the power to give an infeftment. Even in judicial sales infeftment had to be obtained as in adjudications, *i.e.*, by charging the superior to enter the buyer. See Acts 1681, cap. 17, 1690, cap. 20. But it is interesting as being the forerunner of what was done in 1874. But by this time (1847) the first Bankruptcy Act had been passed, and then came the Act of 1856, which transferred to the trustee the heritable estate of the debtor to the same effect "as if a decree of adjudication had been pronounced subject to no legal reversion."

Let me now sum up the matter to see what is the position in 1914. Apprising is gone, being abolished by the Act of 1672. Adjudication is still possible. But seeking a charter is impossible for charters by progress are abolished by the Act of 1874. There remains only the procedure of 1847, no longer under that Act which stands repealed, but re-enacted under the Act of 1874 after having been re-enacted by the Act of 1868, itself repealed by 1874. That is to say, it was possible in 1914 to get a decree of adjudication containing a warrant for infeftment and then record the decree. That would in

terms of 1874 effect entry, and the composition, whatever it was, would be due as a debt. None the less the adjudication would only be a redeemable right, liable to be swept away if the debt were paid. How little likely it would be that a creditor in 1914 would resort to this troublesome and uncertain method instead of the easy and expeditious proceeding of making his debtor bankrupt and leaving the trustee to realise the property. In other words, the chance of the Crown obtaining this casualty, assuming for the moment that it was a year's rent, was infinitesimal, and that is why I said before that I did not believe the idea of an adjudger ever entered the mind of the framer of the Act. Indeed, the discovery of the present argument by the Lord Advocate is a monument to his ability and research, but only worthy in my opinion of the epithet of the laird of Riccarton—a *callida machinatio* to extort from the lieges of Scotland who hold off the Crown a payment which no one dreamed of as exigible. But the *callida machinatio* denounced by Craig was successful, nay, came to be the subject of praise by a subsequent generation. The praise of this I leave to the future generation when it comes, but I am bound to consider whether, whatever I think of the spirit, the words of the statute do not make it successful. Reverting to the Act of 1914 the first question is whether the expression "highest casualty" can include the payment made on the entry of an adjudger. I am not confident in my opinion on this point because it does not coincide with that of some of your Lordships. But while, as I have said above, the idea of an adjudger's payment is foreign to the spirit of the section, yet I have not been able to convince myself that the words do not cover it. It seems to me that the words "when casualties are exigible on the death of a vassal" are nothing more than a definition of one of the different categories of charters, and that the term "highest casualty" does not necessarily bear any relation to the period which is fixed to enable the arithmetical process to be gone through. Highest is independent of the probabilities of the case, for admittedly composition may be taken although there is no probability of aught but relief—indeed the proviso is made to fit such a case. I therefore come to the conclusion—unwillingly I admit—that "highest casualty" includes any payment provided that it falls within the definition of casualty in section 3. Now section 3 provides that in addition to the definitions there given are to be added the definitions in the principal Act. This sends us back to the Act of 1874, and section 3 of that Act says that casualties shall include "the composition or other duty payable on the entry of a singular successor whether by law or under the condition of the feu." It seems to me that these words cover the case of an adjudger taking infeftment under the provisions of the 62nd section of the 1874 Act, and that, improbable as such an event might be, that payment ranks among the casualties from among which the highest casualty may be selected.

This drives me to consider whether if such an entry had been taken, the Crown could have recovered as a debt a year's rent. It is with this part of the case that I have felt most difficulty, though in the end I am glad to say that I have come to a clear opinion on the subject. The claim of the Crown necessarily begins with the Act of 1469, and in the Court of Session undoubtedly the principal topic of controversy was whether the clause in that Act applied to the Crown. I cannot help remarking that I think that your Lordships, and still more the learned Judges of the First Division, have a good deal to complain of in the way in which this case has been prepared by the advisers of the Crown. Such research as was deemed necessary ought to have been made and finished in a case of this sort before the case was heard by the Lord Ordinary. Lord Skerrington's opinion shows plainly enough how much investigation was left to the Bench. But it was only after the Court of Session had pronounced judgment and the Lord Advocate appeared in the case, quickened doubtless as to the difficulties of meeting Lord Skerrington's opinion by the remembrance of his own successful argument, and obliged—I doubt not *valide sed frustra renitens*—to take up the Crown case, that further investigation was made, with the result that several very important documents have been placed before your Lordships which were not before the Judges of the Court of Session. It is not possible to say that this is incompetent, for they are not produced *in modum probationis*, but it is exceedingly inconvenient that your Lordships should have to judge of their effect while the Judges of the Court of Session have had no opportunity of expressing their opinions upon them. I shall only say that I hope such procedure will not be imitated in future. Now the important productions thus made were the Crown charters of apprising taken from the Register of the Great Seal which of late years have been rescued from the oblivion of manuscript by being printed, of which the publication is not yet complete. We have two charters of 1483 and one of 1484, *i.e.*, fourteen and fifteen years after the Act of 1469, which in the clause dealing with the repayment of the sums due in order that the debtor may be reinstated, say that the sums borrowed must be repaid "unacum expensis que super nos tanquam dominum superiorem dict. terr. facte fuerint pro receptione [sc. of the appriser] in tenentem earundem videlicet firma unius anni de eisdem debita secundum tenorem acti parliamenti nostri." In the face of this it is, I think, impossible to affirm that the clause in the Act had no application to the Crown. And yet I think that Lord Skerrington was in the main right. In the case for the Crown it is attempted to show that the Act of 1469 was a studied bargain in a Conveyancing Act whereby the Crown in return for giving up its right of rejection stipulated for the payment of a year's rent. I do not think it was any such thing. It was primarily not dealing with conveyancing at all. It

was dealing, as Lord Shaw has pointed out, with the protection of the poor and providing for the payment of debt. It was necessary to deal with the superior, because according to the then views it was impossible to give a real right in land which did not flow from him. And I doubt not that the clause about the year's rent was inserted through the influence of the great feudal nobility, who, unlike the Crown, had been in use to refuse entry when they chose. To suppose that the King was in a position to safeguard his interests is to take little stock of the times. In 1469 James III was only seventeen. Three years before he had been kidnapped by the Boyds, and thereafter there was a struggle for the possession of his person between them and the rival faction. In 1469 the Boyds fell, Boyd himself fled abroad, his son Arran, who had married the King's sister, was divorced and she married Lord Hamilton. The King married Margaret of Norway, and then came various vicissitudes of fortune. I do not pursue the subject, but the idea that the Crown was in a position to make a bargain for itself against its nobility is far from the truth. To borrow the words of Dalrymple in his essay on Feudal Property, "In such a country (Scotland) it was needless to restrain the King by statutes, he was sufficiently restrained by his own impotency and the power of his nobility."

At the same time I do not underrate the significance of these charters. They show, I think, that the Crown officials of the time assumed that the Act applied to the Crown and took advantage of the provision to exact in some cases a year's rent. It is, however, a very different question how long they kept to that. Your Lordships will have noticed that the *firma unius anni* does not appear in any charter produced subsequent to 1484. We know also that when we come to the time of Dallas (1666 *et seq.*) we have in his work two instructive passages. In the note to his Style of Signature of an apprising he states the regular composition, 1 per cent. for the first 10,000 merks and ½ per cent. thereafter. It is obvious that his Styles were composed partly before and partly after the Act of 1672. Accordingly when he comes to deal with the summons of adjudication he gives an account of the clauses he has chosen and adds the opinion that the Act of 1672 which gives diligence against the subject-superior, gives none against the King, "for being *communis pater* he ever takes a moderate composition and enters the appriser or adjudger when the signature is presented in Exchequer." After this date there is unanimity in all writers as to the composition on an adjudication being computed on the debt and not being the year's rent of the lands. Clerk and Scrope writing of what happened after the union give the same table as Dallas, Dirleton and Stewart say the same, and I need not cite the later authorities, who are unanimous. In short, the practice has remained unbroken, though for the reason given modern instances must be rare. What it therefore comes to is this, that although from the charters of 1483-84 it would appear that a year's rent had been charged by the Crown on an apprising, yet when we come to the time of adjudications there appears a fixed practice to charge a moderate sum calculated on the amount of the debt and not a year's rent.

It may not be possible to account with certainty for the change, but I think it allowable to venture a surmise on the matter. Lord Shaw has called attention to the true nature of a decree of apprising or adjudication that it is only a *pignus prætorium* and not a sale under reversion. But in 1484 that was not clearly understood. It must be remembered that in 1469 all was tentative. Apprising was a very new expedient and the Court had not had the opportunity to consider its true nature. Nay more, there is, I think, evidence to show that at first a wrong view was taken. In Sir George Mackenzie's observations on the Act 1469, p. 73, will be found a statement that in a question as to the casualty of marriage it was found that a compriser was vassal during the legal even though the debt was subsequently paid within it—a decision obviously wrong according to the considered judgments cited by Lord Shaw. It occurs to me therefore that the reason for the payment of the full year's rent in the charters of 1483-84 might be due to a mistaken idea that an apprising constituted a sale under reversion, but that as soon as the correct doctrine prevailed, and as the Lords of Session, we know from Stair, always modified the year's rent if the debt was small, the practice was initiated of charging a small sum calculated on the amount of the debt. There is another circumstance which points the same way. In one of the charters produced by the Crown, that of Arch. Stewart of date 1634, there is a stipulation that if the right should become irredeemable, *i.e.*, if a declarator of expiry of the legal should be brought, then Stewart was to take a new charter and pay a composition. That is to say, the Crown officials seem to recognise that the payment made for an apprising was not equal to what would be paid for an out-and-out transference. This is mentioned by Dallas as a practice in one of his notes, p. 502, and by Steuart and Dirleton, p. 48.

The somewhat tardy investigations of the Crown ended where the present publication in print of the Register of the Great Seal ends, and that is before 1672. Taking advantage of the interposition of the long vacation since this case was argued, I thought it would be interesting to see how matters stood after 1672. Through the kindness of Mr Maitland Thomson, whose labours for many years in the Register House — for a long period gratuitous — are appreciated by the few but are not sufficiently known to the many, I have the result of a search in the Signatures and the Paper Register during a period of 30 years after 1672, extending to nearly 50 instances. The result is that he has discovered no single instance of a composition having reference to the rent; that though in some instances less was exacted, there is no instance of the

exaction of more than the scale mentioned above; and that the clause stipulating for a second infeftment is fairly common at first and gradually disappears. Accordingly the state of affairs seems to come to this—at the most a few early instances of a payment of a year's rent for an appriser's composition; an early departure from such an exaction; a period of some uncertainty, and lastly some time between two and three hundred years ago a stereotyping of the practice into a charge based upon the debt and never exceeding one-sixth of the valued rent. See Parker on Adjudications, section 181. Under these circumstances I have no hesitation in saying that there is no warrant for charging more than the custom has allowed. Counsel for the Crown argue that they are entitled to revert to the year's rent allowed by the Act of 1469. Directly they cannot do so, for apprisings were abolished in 1672 and have never been led since. As to adjudications the Crown is not in a position to prove that a year's rent was ever paid for an adjudication; whereas Lord Zetland can show the constant practice of the payment of a sum calculated on the debt but never exceeding one-sixth of the valued rent, which sum the Crown is admittedly entitled to charge. No doubt this is less than the Act of 1469 gave on the assumption that it applied to the Crown, and adjudications were by the Act 1672 put in the same situation as apprisings. But there can be no doubt that the provisions of a Scottish Act of Parliament can be abrogated by custom. Lord Shaw has quoted a very pertinent passage from Erskine. I had occasion to speak on the same subject in the case of *Heriot's Hospital*, 1912 S.C. 1134, commenting on some remarks made by Lord Robertson in the *Earl of Home's* case, which with deference I may now say scarcely adverted to the great difference between a statute of the old Parliaments of Scotland and that of the Parliament of England or a post-union statute. I would refer to them and say that I have seen no reason to change my opinion. The judgment of this House in *Lord Home's* case does not require to be supported, on the theory that a Scotch statute could not in ancient times be "modified" by the Lords of Session or sink into desuetude by the prevalence of a contrary custom.

On the whole matter I am of opinion that the right of the Crown to any casualty in 1914 was the right given to it with the other superiors by the 4th section of the Act of 1874, which was the right to recover whatever casualty was exigible, to use the words of the Act, "under the existing law and practice"; that the Crown could not under the existing law and practice recover more than one-sixth of the valued rent as composition for the entry of any singular successor, voluntary or judicial; and that consequently that sum and not a year's rent is the highest casualty which must form the basis of a calculation under the provisions of the Act of 1914. I think the judgment should be affirmed.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellant—The Lord Advocate (Clyde, K.C.)—Chree, K.C.—Pitman. Agents—Thomas Carmichael, S.S.C., Solicitor H.M. Woods, Edinburgh—F. A. Jones, Solicitor H.M. Woods, London.

Counsel for the Respondent—Macmillan, K.C.—Watson, K.C.—Maconochie. Agents—Dundas & Wilson, C.S., Edinburgh—Grahame & Co., Westminster.

COURT OF SESSION.

Wednesday, October 15.

FIRST DIVISION.

SCOTTISH INDIA-RUBBER COMPANY, LIMITED, PETITIONERS.

Company — Procedure — Memorandum of Association — Reorganisation of Share Capital by Way of Alteration of Memorandum—Application to Confirm Special Resolution to Alter Memorandum—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 45.

The memorandum of association of a company provided that its share capital was £5000 divided into 4000 ordinary shares of £1 each and 1000 deferred shares of £1 each, with power to divide the shares in the present or future capital of the company into several classes, and to attach thereto respectively any preferential, deferred, qualified, or special rights, privileges, or conditions. 3500 of the ordinary shares and 1000 of the deferred shares were issued and were fully paid up. By resolution of an extraordinary general meeting, confirmed at a subsequent extraordinary general meeting, the company passed a special resolution deleting the above-quoted provisions of the memorandum of association, and substituting therefor the following—"The share capital of the company is £5000, divided into 5000 ordinary shares of £1 each," with similar power to divide into classes and attach conditions. The company, without passing any resolution to reorganise capital by consolidating existing shares, presented a petition for confirmation of the special resolution, for direction for filing a copy of the order of the Court with the Registrar, and for notification of the registration of the order in the *Edinburgh Gazette*. The Court *granted* the prayer of the petition.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) provides—Section 45—"(1) A company limited by shares may, by special resolution confirmed by an order of the court, modify the conditions contained in its memorandum so as to reorganise its share capital, whether by the consolidation of shares of different classes, or by the division of its shares into shares of different classes: Provided that no preference or special privilege attached to or belonging to