Thursday, July 7.

SECOND DIVISION.

[Lord Johnston, Ordinary.

THE WALKER TRUSTEES *v.* LORD ADVOCATE AND OTHERS.

Statute — Interpretation — Prescription — Contemporanea Expositio — Heritable Office—Usher of the White Rod—Treaty of Union 1707 (6 *Anne*, c. 11)—*Reservation to Owners of Heritable Offices "in Same Manner as now Enjoyed by the Laws of Scotland"—Fees after* 1707—*Usage—Payment of Fees from* 1766 *to* 1904.

By the Treaty of Union 1707, Article XX, it was enacted that "all heritable offices . . . be reserved to the owners thereof as rights of property in the same manner as they are now enjoyed by the laws of Scotland notwithstanding this Treaty." At that date the holder of the hereditary office of principal usher in Scotland (or Usher of the White Rod) was entitled, in virtue of a Crown charter of resignation confirmed by Act of Parliament in 1686, to certain specified fees "payable be dukes marqueses earles viscounts lords knights barronets and other knights created or to be created and receiveing honours tytles and dignities from His Majesty and his successors within the said Kingdom of Scotland."

In an action in 1909 at the instance of the holder of the office of principal usher, concluding for declarator that he was entitled to the specified fees on the creation of similar dignities of the United Kingdom, it was proved that from 1766 onwards fees were claimed by and paid to the usher on the creation of such dignities of the United Kingdom.

Held (1) that the usage from 1766 onwards might be founded on as *contemporanea expositio* in construing the Treaty of Union, and (2) that the pursuer was entitled to exact the specified fees on the creation of the said dignities of the United Kingdom.

The Walker Trustees, incorporated by Act of Parliament, raised an action against (1) the Lord Advocate as representing the Treasury, (2) Lord Armitstead and others, and (3) Lord Leith of Fyvie and others, concluding for (*a*) declarator (*first*) that the pursuers as holders of the heritable office of principal usher in Scotland were entitled to certain specified fees in respect of all creations of dukes, marquesses, earls, viscounts, lords, or barons, knights baronet, and knights of the United Kingdom; and (*second*) that said fees fell to be collected by the Treasury or the Lord Chamberlain and remitted to the pursuers, or alternatively that the pursuers were entitled to collect the fees themselves; and (*b*) payment to the pursuers by the defenders called in the second and third places of certain specified sums. The defenders called in the *second* place were Englishmen who had received titles or dignities of the United Kingdom since 31st March 1904. The defenders called in the *third* place were Scotsmen who had received such titles or dignities since said date.

The pursuers averred that the hereditary office of principal usher in Scotland, or Usher of the White Rod, had been in existence from time immemorial, and in virtue of various Crown charters and Acts of the Scots Parliament in favour of the pursuers' authors carried with it the right to certain fees on the creation by the Crown of certain dignities. In particular, by charter of resignation under the Great Seal, dated 21st January 1686, in favour of Archibald Cockburn, younger of Langton, the said office was granted of new with all the privileges and emoluments, and in particular certain specified fees payable by Scotsmen receiving dignities within any part of His Majesty's dominions, and by Englishmen receiving such dignities in Scotland. This charter was ratified by Act of Parliament 15th June 1686, c. 63, conferring on the said Archibald Campbell, *inter alia*, right to "all casualties fies and other rents under writen payable be dukes marqueses earles viscounts lords knights barronets and other knights created or to be created and receiveing honours tytles and dignities from His Majesty and his successors within the said Kingdom of Scotland." A specification of the amount of the fees followed.

The pursuers pleaded, *inter alia*—"(1) In respect of their titles to the office of usher condescended on, the pursuers are entitled to decree of declarator as concluded for. (2) In respect of their titles and of the possession had thereon for more than the prescriptive period, the pursuers are entitled to decree of declarator as concluded for."

The defenders pleaded, *inter alia*—"(2) The pursuers being a corporation are not entitled to decree of declarator and for payment as concluded for. (3) In respect of the Act of Union, the fees claimed are no longer exigible, and the defender ought to be assoilzied. . . . (5) In any event, the pursuers are only entitled, under the charter of 1686 founded on, to fees from the recipients of purely Scottish honours, or from Scotchmen who receive the honour of knight-bachelor, or Englishmen who receive that honour in Scotland."

By minute of admissions (No. 199 of process) the parties made the following admissions:—"1. That from a date prior to 1st January 1800 until the year 1904 the fees paid on the creation of peers, baronets, and knights by patent have been collected from the recipients of such dignities by the Home Office, and paid over by that Department, between 1800 and 1871, to the Crown Office in Chancery, and between 1871 and 1904 to the Treasury. Among the fees so collected were the fees claimed by the holder of the office of Heritable Usher for Scotland, and these fees were, under deduction of a commission of 2½ per cent., paid over to an officer of

the Lord Chamberlain's department, for transmission to the holder of the office of Heritable Usher. 2. That in three cases of dignities conferred on princes of blood royal, viz., one in 1766 and two in 1892, and in several cases during the period mentioned in Article I. of dignities conferred on account of services to the State, the said fees have been paid by the Treasury out of public funds."

The *facts* and the *statutes* and *charters* so far as necessary are given in the *opinion* of the Lord Ordinary (JOHNSTON), who on 11th March 1909, after a proof before answer, pronounced the following interlocutor:—"Finds, decerns, and declares in terms of the first conclusion of the summons for declarator, and in terms of the second alternative conclusion of the second conclusion of the summons for declarator; dismisses the first alternative conclusion of the said second conclusion of the summons for declarator, and decerns; decerns and ordains against the defenders second and third mentioned in the summons, with the exception of the defender The Right Honourable George, Lord Armitstead, conform to the petitory conclusion of the summons."

Opinion.—"The object of this action is to determine the question whether the Walker Trustees, as now heritably vested in the office of Principal Usher, or Usher of the White Rod, to the Crown in Scotland, are still entitled to exact what have from time immemorial been styled Fees of Honours, from the recipients of patents of nobility, baronetcies, and knighthoods of the United Kingdom, other than those on knighthoods conferred upon Scotsmen, or conferred upon Englishmen in Scotland.

"The circumstances under which the question arises are these:—For a very long time back, and at any rate since the days of the Stewart Kings, it has been customary to exact, both in Scotland and England, on behalf of certain officials, from the recipients of honours, fees which were of the nature of perquisites, and formed the main or a substantial part of the emoluments of the officials in question. Amongst these officials was the Heritable Usher of Scotland. It so resulted that the conferring of an honour by the Crown became a somewhat costly matter to the subject, so much so that it was by no means uncommon for such honours to be declined by reason of the expense involved. An instance is found in the case of Viscount Melbourne, on whom, after his long and valued service during the early years of her reign, Her late Majesty Queen Victoria desired to confer the Order of the Garter. Finding himself obliged to decline Her Majesty's proferred honour, Lord Melbourne wrote as follows:—

'Brocket Hall, 30th September 1847.

. . . . . .

'This is the true reason why Lord Melbourne has always avoided the honour of the Garter when pressed upon him by His late Majesty and also by your Majesty. Lord Melbourne knows that the expense of accepting the blue ribbon amounts to £1000, and there has been of late years no period at which it would not have been seriously inconvenient to Lord Melbourne to lay down such a sum.'—*Letters of Queen Victoria*, i. 165.

"I may add this other very pertinent quotation from Her Majesty's Letters. After referring to the declinature of the Garter by a member of the Ministry, on whom Her late Majesty had proposed to confer it, Lord Palmerston writes to the Queen:—

'Downing Street, 11th December 1855.

'Viscount Palmerston cannot refrain from saying, on this occasion, that he is not without a misgiving that the high amount of fees, which he understands is paid by persons who are made Knights of the Garter, may have some effect in rendering those whose incomes are not very large less anxious than they would otherwise be to receive this distinction, and he cannot but think that it is unseemly in general that persons upon whom your Majesty may be disposed to confer dignities and honours, either as a mark of your Majesty's favour or as a reward for their public services, should on that account be subject to a heavy pecuniary fine; and he intends to collect information with a view to consider whether all such fees might not be abolished, the officers to whom they are now paid receiving compensation in the shape of adequate fixed salaries. . . .' *Queen Victoria's Letters*, iii. 199.

"I can have little doubt that Her late Majesty must have felt the weight of Lord Palmerston's suggestion, and the incongruity of saddling an honour conferred by grace of the Sovereign with a substantial tax on the recipient for the benefit of official personages. But it was not until the accession of His present Majesty that any active step was taken to put an end to this state of matters. By Treasury Minute on 3rd November 1902 a Departmental Committee was appointed to inquire 'into the origin, nature, and amount of all charges whatsoever incident upon the bestowal by the Sovereign of hereditary or other honours, and to report whether any changes are advisable in connection with administration or otherwise.' The committee reported upon 23rd July 1903 generally in favour of the abolition of all fees of honour, compensation being made to the holders of the offices to which they were attached. In the majority of the cases this was a simple matter, in respect that the offices were held only for life; and further, that in some cases, as in that of the Lyon King of Arms, the holder of the office had on the last appointment received a fixed salary, the fees going to the Exchequer. But in the case of the Usher of the White Rod, when it was found that the office was a heritable office according to the law of Scotland, with substantial fees attached, the Treasury, who opened their correspondence in June 1904 with an expression of desire to commute the fees payable to the Heritable Usher for a lump sum

payment, on second thoughts drew back their hand, and after more than two years' intermittent correspondence determined to challenge the right of the Heritable Usher of Scotland to demand the fees which had been in use to be paid.

"The Treasury did not challenge the trustees' right to the heritable office itself, and to the fixed salary from the Crown attached to it. For by agreement they had already commuted that salary at 26·945 years' purchase. What they challenged was merely the trustees' right to continued exaction of the fees of honour. The position of the Treasury was definitely taken in their letter of 26th November 1906, wherein they stated that they were 'now in possession of the advice which they felt it their duty to seek from the law officers of the Crown, both for Scotland and for England.

"'My Lords understand that up to 31st March 1904 the Walker Trustees obtained fees of honour on creation from (1) Peers of the United Kingdom; from (2) Baronets of the United Kingdom; and from (3) Knights Bachelor, whether created by patent or by the accolade.

"'The conclusion at which my Lords have arrived is, that at the present time there exists no legal authority for demanding these fees either from peers or from baronets.

"'Further, my Lords are satisfied that, so far as the Walker Trustees possess any right to claim fees of honour from newly created knights bachelor, that right is confined to the case of knighthoods conferred upon Scotsmen, or upon Englishmen in Scotland.'

"But at an earlier point the Treasury had suddenly disclaimed any further responsibility in connection with the collection of fees for the Heritable Usher of Scotland, which, from a date prior at least to 1790, had been made by them or other Government office, along with those of other similar officials in England. This was certainly within the right of the Treasury, but was undoubtedly calculated to prejudice the value of what they had contemplated, and still, I understand, contemplate, commuting or acquiring in the public interest. And there was a good deal of comment in argument on the Treasury's action. I cannot, however, for a moment assume that the superior officials of the Treasury were actuated by hostile motive, but merely that, as they were supplied, as will be subsequently seen, with very imperfect information regarding the past history of the right at issue, they gave no particular consideration to the future consequences of the course they authorised to be taken. And I have no doubt that if the present question is finally decided in favour of the Walker Trustees, negotiations will be resumed as they were originally opened in 1904.

"I do not think that it would serve any good purpose to refer further to the initiation of the question. It is sufficient to say that the Walker Trustees were required by the Treasury to establish in a court of law a right which it is now proved had been recognised for over one hundred and fifty years, during more than one hundred of which the Treasury and other Government offices in London had acted as agents of the Heritable Usher of Scotland in collecting his fees, and had received a commission on doing so in the same way as they had acted in *pari casu* for various English officials; that it is perfectly evident from the difficulties put in the way of the Walker Trustees in recovering the necessary proof of past usage, and obtaining admission of facts which should have been within cognisance of the Treasury, that the Treasury resolution to challenge the right of the trustees was taken on insufficient inquiry; and that it is, at first sight, not apparent on what reasoning the Act of Union, which is the basis of the challenge, should be assumed to give no countenance to the right of pre-Union Scottish officials to receive fees of honours of the United Kingdom, and yet to be an adequate midcouple on which to sustain the rights of similar pre-Union English officials to receive such fees, inasmuch as England is no more the United Kingdom than is Scotland. But it is always within the discretion of the Treasury to compel anyone to establish a right the concession of which would involve a payment out of public money. For though the Walker Trustees have no direct claim against the Treasury, when once the case reached the length of a debate on the merits the learned Solicitor-General very frankly conceded that the Treasury merely desired that the question should be tested in the interests of the Revenue, at the expense of the Crown, and not at the expense of private recipients of honours; and that if the right was established, it was the intention of the Government to commute the fees by compensating the Walker Trustees.

"Accordingly, though at first sight the Treasury are not interested, and are not, strictly speaking, proper defenders, the action has been conveniently raised by the Walker Trustees against (*first*) the Treasury; (*second*) certain Englishmen, recipients of honours of the United Kingdom, but who, having residences in Scotland, are subject to the jurisdiction; and (*third*) certain Scotsmen, recipients of similar honours. But the true and only contradictors are the Treasury. The conclusions of the summons are for declarator that the pursuers, as proprietors and holders of the heritable office of Principal Usher of the Kingdom of Scotland, are entitled to the whole fees and dues after mentioned in respect of all creations of dukes, marquesses, earls, viscounts, lords or barons, knights-baronet, and knights of the United Kingdom of Great Britain and Ireland. And then the respective fees, which differ in each rank, are enumerated. There are further operative and petitory conclusions which it is unnecessary at this stage to enumerate.

"The pursuers plead (*first*) that in respect of their titles to the office of Usher, and (*second*) in respect of their titles and

of the possession had thereon for more than the prescriptive period, they are entitled to the decree of declarator for which they conclude.

"The Treasury plead in defence (1) that the pursuers, being a corporation, are not entitled to decree of declarator and for payment as concluded for; and (2) that in respect of the Act of Union the fees claimed are no longer exigible, and accordingly that the Treasury ought to be assoilzied.

"The real question which goes to the root of the case is, What is the effect of the Act of Union of the Kingdoms? And this must be considered, first, as a question arising on the Act itself; and second, as a question arising on the Act when coupled with interpretative prescription. I venture to think that the law officers of the Crown, in the opinion upon which the Treasury have acted, have proceeded on a consideration of the Act only, and have not considered it, nor had the opportunity of considering it, in the light of the usage which has followed on it, as it is pretty clear that the usage was not fully known to the Treasury officials charged with the matter before it was proved to them in the present case. But in order that the question may be properly determined, the evidence, so laboriously gathered by the Walker Trustees, must, I think, be carefully and fully examined. If it is too fully dealt with in this judgment I must plead the historical interest of the question.

"Instead of referring to the titles produced by the Walker Trustees I find it more convenient to take the history of the office from Thomson's Acts of the Scots Parliaments, which contain repeated ratifications of these titles and much other information.

"In 1393 there is found (Thomson, i, 580) a grant to Sir Alexander Cockburn, who was at the time Keeper of the Great Seal of Scotland, of the Baronies of Boltone, Carredyne, and Langtoune, coupled with the obligation that he and his heirs and assignees give attendance on the progress of the Circuit of Justiciary held at Berwick, of the Circuit of Justiciary held at Edinburgh, and at the Parliament held at Scone; and there is added this further grant, '*et quod dictus Alexander vel heredes sint principales Hostiarii nostri ad nostra Parliamenta Generalia Concilia et Festa*,' Sir Alexander and his heirs to have an allowance at said times for two squires in armour, with two archers and their sword bearers and horses. But no fees of office are mentioned. This is, though probably not the first, the earliest extant grant of the heritable office which the Walker Trustees now hold. That there were other inferior ushers and ushers-depute is seen from the various statutes of the sixteenth century, and that fees had come to be received by ushers, including presumably the Principal Usher, is, *inter alia*, shown by an Act—1592, chap. 88 (Thomson, iii, 586)—by which there was remitted to the Privy Council for consideration an article 'anent the fees of Ushers.' I think between the grant of 1393 and the beginning of the seventeenth century, there were one or more renewals of the grant in favour of the family, which had come to be known as that of Cockburn of Langton. But in the beginning of the seventeenth century it would appear that the pressure of royal favourites had disturbed the sole and exclusive right of the family to the office, and that concurrent rights had been granted to others, viz., to a certain James Maxwell, to the Earl of Wigtown, and to the Earl of Glencairn, or to his brother Colonel Robert Cunnynghame. And during that century there is ample evidence of a protracted struggle on the part of Cockburn of Langton to recover the sole right which was his by his title. Thus we have in the beginning of August 1641 (Thomson, v. 332) an ordinance anent the Laird of Langton's incarceration, which shows that he was sent to the Castle by warrant of his Majesty Charles I 'for taking upon him, without warrant or knowledge of his Majesty, to go before the King as an usher with a rod in his hand.' Yet, it being the day of the King's first appearance in Parliament, Langton is, out of the royal clemency, only commanded to keep his chamber till the morning, that the matter might be heard and settled anent his claim to the office of Usher. This was followed in the course of the same month (Thomson, v. 643) by a petition by James Maxwell that the claim betwixt the Earl of Wigtown, Langton, and himself be remitted to the Judge Ordinary. Again, in September following (Thomson, v. 351), a protestation was lodged with Parliament anent the place of Usher by the Laird of Langton, who had been forcibly debarred from possession of his office, whereon he took instruments.

"After this, by whatever means or influence, Cockburn of Langton appears gradually to have recovered his right of sole Usher, and to have been ultimately reinvested in it towards the end of the seventeenth century. There is first a charter of Charles I, dated 2nd January 1647, which, the temporary right of James Maxwell having been vacated by his decease, and the Earl of Wigtown bought off by a promise of £1000 from the King (see 1647, chap. 290, Thomson, vi (1), 744), the office of Usher is granted to Sir William Cockburn and Colonel Cunnynghame for their life, and to the heirs-male and assignees of Sir William Cockburn after their deaths. This charter, which was ratified 1647, chap. 289 (Thomson, vi (1), 744), is the first charter in which I find a particular statement of the dues receivable by the Principal Usher, and by whom payable. They are, however, more conveniently quoted from a later document. But over and above the fees a salary of £200 sterling money, which had been enjoyed by the Maxwells, was transferred to Colonel Robert Cunnynghame. The Act further expressly ordains and appoints Langton and Cunnynghame 'to enter to the present possession in exercising of the said office in this present Parliament, as

freely and in the same manner as any other Principal Usher has done in former Parliaments.' Accordingly, Sir William Cockburn and Colonel Robert Cunnynghame compeared personally in Parliament and took the oath *de fideli* (Thomson, vi (1), 768).

"The next Cockburn of Langton, Sir Archibald, obtained a charter, dated 10th May 1662, of the lands and barony of Langton, with the office of Principal Usher to his Majesty, with all privileges and dues belonging thereto, with reservation to Colonel Robert Cunnynghame during his lifetime allenarly of his conjunct right to the said office. From the ratification by Charles II, 1663, chap. 104 (Thomson. vii, 521), it would appear that some change had been made in the partition of the emoluments, Cunnynghame receiving the whole fees, and, I think, a salary of £50 sterling, and Cockburn the salary of £200 sterling during Cunnynghame's life, without prejudice to Cockburn's right to the full fees on Cunnynghame's death.

"I may next refer to the Act 1681, chap. 8 (Thomson, viii, 245), by which the charter of Robert II is ordered to be registered in the records of Parliament, by reason of the age and frailty of the original document. This Act throws light on the nature of the office, because the petition on which it proceeds states that the charter is one wherein the office of Principal Usher to the Parliament is heritably bestowed on the Langton family, and craves registration of the charter, 'since it is an office which concerns the Parliament.'

"I now pass to the charter of 5th June 1674, whereby the sole and undivided office is again vested in Sir Archibald Cockburn, and the rights pertaining to the office fully defined. It proceeds on a narrative of all and sundry the prior gifts, charters, infeftments, and other rights and securities from the fourteenth century onwards, and specially of the charter of 2nd January 1647 by Charles I, and of the charter of 10th May 1662 by Charles II, and explains that the said Sir Archibald Cockburn had acquired to himself a renunciation of Colonel Cunnynghame's rights in the said office, and of the fees, dues, and casualties of the same, dated 15th February 1674, and accordingly proceeds of new perpetually to confirm to Sir Archibald Cockburn of Langton, and his heirs-male and assignees whatsomever, heritably in all time coming, the lands and barony of Langton, with all its pertinents, 'togither likewise with the said office of sole and principall Usher to his Majesty and his successors in the said Kingdome of Scotland with all honours, dignities, priviledges, fies, casualties and dewties pertaining and belonging thereto, And speciallie but prejudice of the said generalitie all and sundrie fies casualties and rents belonging to the said office and used and wont to be paid to the said Collonell Robert Cunynghame or any uther his Maties or his most royall fathers Principall Ushers within the said Kingdome, for expeding of infeftments of lands under his Majesty's Great Seale either by resignation confirmation or new gifts, togither with all fies casualties and uther dewties above written, payable be Dukes Marquesses Earls Viscounts Lords Knight Baronets and uther Knights made or to be made, And who shall receive any honors titles dignities from His Majestie or his successors or Commissionars by patent or any uther way and payable by all Scotismen who shall receave dignities within any of his Majesties dominions And by all Englishmen who already have obtained and who hereafter shall obtain honors or dignities from his Matie and his successors within the said Kingdome of Scotland To witt for every Duke The soume of Two hundreth and sextie pounds ffor every Marques the soume of Two hundreth and twentie pounds ffor every Earle One hundreth and ffourscore pounds ffor every Viscount One hundreth and tuentie pounds ffor every Lord ffourscore pounds ffor every Knight Baronet Thrie score pounds And for every Uther Knight ffortie pounds Scots money And siclike his Majestie by the foresaid Chartor (for certane onerous causes and good Considerations therein mentioned) Gives Grants and Dispons To the said Sir Archibald Cokburn and his airs male and assigneyes whatsomever Ane yearlie fie of Two hundreth and ffiftie pounds sterling money of England To be payed to the said Sir Archibald Cokburn and his foresaids in all time comeing at two termes in the year whitsonday and Mertimas by equall portions Out of the first and readiest of the rents dueties and casualities payable to his Majestie within the said Kingdome of Scotland ordaining the Commissioners of Thesaurie his Maties Thesaurer principall Thesaurer Deput his Maties Cashkeeper and Receavers having place and power for the time and their successors in office To readily answer Obey and Thankfullie pay the said fie of Two hundreth and ffiftie pounds sterling to the said Sir Archibald and his foresaids at the termes above written.' To the fees there was thus added a salary of £250 sterling money of England, made up of the former salary of £200 sterling enjoyed by Langton and of the former salary of £50 enjoyed by Colonel Cunnynghame. Further, the barony of Langton, with its pertinents, together with the said office of Principal Usher, and the fees, dues, and casualties belonging thereto, were of new united and erected into one free barony, to be called the Barony of Langton.

"Either expressly or by reference, the same description or definition of the office of Usher, and the rights, salary, and fees pertaining thereto, is continued in the titles to the present day.

"The salary of £250 a-year and the fees, converted into English money, enumerated in this charter of 1674, remained the emoluments of the office at the date of the Union, and continued unaltered down to the date when the present question arose.

"There was only one further charter

prior to the Union, dated 21st January 1686, and ratified 1686, chap. 63 (Thomson, viii, 632). But it is complicated by proceeding upon the marriage-contract of Archibald Cockburn, younger of Langton, and makes no change in the definition of the office of Principal Usher, its fees and emoluments. It was, however, the subsisting title at the date of the Union.

"I think it is a fair inference, from references in Thomson's *Acts*, that up to the date of the Union the ceremonial duties of Usher were performed by the holders of the office, and that these duties were largely connected with the sitting of the Scots Parliament, though doubtless they included also attendance on royalty when Court was held in Scotland. One of the last references is found in 1693 (Thomson, ix, 247), where, in defining and limiting the admission of persons, not members, to the Parliament, the ushers are enumerated as among those having the right of entry.

"I turn now to the Treaty of Union, 1707, (Thomson, xi, 406). The important sections of the Treaty are—

'I. That the two Kingdoms of Scotland and England shall, upon the first day of May next ensuing the date hereof, and forever after, be united into one Kingdom by the name of Great Britain . . .

'III. That the United Kingdom of Great Britain be represented by one and the same Parliament, to be stiled the Parliament of Great Britain.

'IV. That all subjects of the United Kingdom shall from and after the Union have full freedom and intercourse of trade, and navigation. . . . And that there be a communication of all other rights, privileges, and advantages which do or may belong to the subjects of either Kingdom, except where it is otherways expressly agreed in these articles.

'XX. That all heritable offices, superiorities, heritable jurisdictions, offices for life, and jurisdictions for life, be reserved to the owners thereof, as rights of property, in the same manner as they are now enjoyed by the laws of Scotland, notwithstanding of this Treaty.

'XXII. That by virtue of this Treaty, of the Peers of Scotland at the time of the Union sixteen shall be the number to sit and vote in the House of Lords, and forty-five the number of the representatives of Scotland in the House of Commons of the Parliament of Great Britain.' (There follows the order for summoning the sixteen Scots Peers and the representatives of the Scots Commons to the Parliament of Great Britain.)

'XXIII. That the foresaid sixteen Peers of Scotland, mentioned in the last preceding article, to sit in the House of Lords of the Parliament of Great Britain, shall have all privileges of Parliament which the Peers of England now have, and which they or any Peers of Great Britain shall have after the Union, and particularly the right of sitting upon the tryals of Peers; . . . , and that all Peers of Scotland, and their successors to their honours and dignities, shall from and after the Union be Peers of Great Britain, and have rank and precedency next and immediately after the Peers of the like orders and degrees in England at the time of the Union, and before all Peers of Great Britain of the like orders and degrees who may be created after the Union, and shall be tryed as Peers of Great Britain, and shall enjoy all privileges of Peers, as fully as the Peers of England do now, or as they or any other Peers of Great Britain may hereafter enjoy the same, except the right and priviledge of sitting in the House of Lords, and the priviledges depending thereon, and particularly the right of sitting upon the tryals of Peers.'

"The true and sole question to be determined in the present case is, as I have already indicated,—what, on a sound construction, is the effect of the Treaty of Union on Langton's title? After the Union there could no longer be any honours purely of the Kingdom of Scotland granted by the Crown. While, therefore, referring to the terms of Langton's title, there might after the Union be Scotsmen who should receive dignities within His Majesty's dominions, then extended beyond Scotland, there could be no Englishmen who should receive honours or dignities from His Majesty purely confined to the Kingdom of Scotland, if the term honours or dignities 'within the Kingdom of Scotland' means, as I think it does, honours or dignities of the Kingdom of Scotland, and not merely *de facto* conferred within the Kingdom of Scotland. Prior to the accession of the Stuart Kings to the English Crown the King of Scotland could confer no honours which could have any recognition, except by courtesy, beyond the limits of the Kingdom of Scotland. When on the Accession of James VI to the throne of England the Crowns became united, while the Kingdoms remained separate, there was this change: the Crown might confer on a Scotsman an English Peerage or a Baronetcy of Nova Scotia, and he might further confer upon an Englishman a Peerage of the Kingdom of Scotland, but could not confer any Peerage which would, except by courtesy, pass current in both Kingdoms. It was consistent with the reason of the thing that in this state of matters, if the Scots Principal Usher was to receive fees of honours, they should, as Langton's title of 1674 provides, be confined to fees of honours of any part of His Majesty's dominions conferred upon Scotsmen, and of Scottish honours conferred upon Englishmen. Nor, I think, is it possible to give any other intelligible meaning to 'within the Kingdom of Scotland.' For where, as matter of place, is an honour conferred? If a subject is dubbed Knight, it is true the honour is conferred wherever the King and his subject for the moment are. But other honours are conferred by patent. Where such is the case, it can hardly be said that the subject receives an honour within the Kingdom of Scotland because he happens to be in Scot-

land when the patent is delivered to him or reaches his hands. I think, therefore, that there can be no doubt that the meaning of the terms in the charter to which I have referred gave the Usher at the date of the grant a right to fees from Scotsmen receiving honours or dignities from the Crown pertaining to any part of its dominions, and from Englishmen receiving from the Crown purely Scottish honours or dignities, and that it could at its date confer no other or greater right. The law officers of the Crown have, however, apparently taken a different view, and advised the Treasury that, in respect of the Act of Union, the Walker Trustees have not only no legal authority at all for demanding fees from Peers or Baronets, but only from Knights who are Scotsmen, or upon whom Knighthood is conferred in Scotland. See the Treasury letter of 26th November 1906 above quoted.

"This is, however, not the contention now presented by the Treasury. It is now maintained that there are no longer any Scottish honours to be received, and therefore that, whatever may be the case with regard to Scotsmen, there are no longer any fees of honours exigible from Englishmen. But neither, it may be said, *pari ratione* are there any English honours now to be conferred, and therefore no fees of honours to be received by the English officials. Yet they have gone on exacting and receiving the same from the days of the Union onwards upon honours and dignities of the United Kingdom, and that from Scotsmen as well as from Englishmen, and their right has never been called in question by the Treasury or by anyone else.

"It is apparent from its terms, however, that the Act of Union made a serious change in the situation. Had the question been raised immediately after the Union it would have been, I think, on a consideration of the terms of the Act of Union, a contention open to the officials of both countries, that an honour of the United Kingdom was an honour both of the Kingdom of England and of the Kingdom of Scotland; that the new peer, baronet, or knight received the recognition of his rank, be he an Englishman, within the country of Scotland, as matter of right, and no longer merely of courtesy, and be he a Scotsman, received the same recognition, for the same reason, in the country of England; that when the Scotsman on whom was conferred a British Peerage appeared at court in England, he was received as a peer in that country of right, and not by courtesy, and equally, when an Englishman on whom was conferred a Peerage of the United Kingdom appeared at court in Scotland, his reception was that of a peer of right, and not by courtesy in that country, in each case with his precedence defined by the Act of Union, and with 'communication of all rights, privileges, and advantages which do or may belong' to a peer in the country where he was so received. I think that the contention on behalf of the officials of either country, that, on a construction of documents merely, they were both equally entitled to their fees on grants of honours having such currency, would have been unanswerable. But I do not find it necessary thus to base my judgment upon the mere interpretation of the Langton title, taken in conjunction with the Treaty of Union, because a persistent usage has supplied me with an interpretation in a manner which, while it coincides with the interpretation which I should myself have put upon the documents taken by themselves, precludes the necessity of my resting upon my own construction, for it enables me to sustain the Walker Trustees' appeal to explicative prescription. I shall deal immediately with the details of that prescription. But I must first consider the contention of the learned Solicitor-General, that no such prescriptive usage can be referred to or have any effect on this question, because even though it may be a usage of continuous exaction and payment of fees as before the Union, it would not be prescription on the title, but would be prescription against the title or without title. I cannot sustain this argument. It is based upon a literal regard to the terms of the Langton pre-Union title, and a careful refusal to look beyond it to the Treaty of Union. It is founded on a literal interpretation of the Langton pre-Union title, and not of that pre-Union title and the Treaty of Union read in conjunction. Not only do I think that they must be read in conjunction, but the usage which has followed the Union has, in my judgment, both interpreted them when so read, and has by *contemporanea expositio* confirmed the view that they ought to be so read.

"When I say *contemporanea expositio*, I must guard myself by adding that the exposition was in this particular case, owing to a circumstance to be immediately mentioned, only relatively contemporaneous. There was a lapse of fifty to sixty years before it began. But it did begin in or about 1766, and continued unbroken down to 1904, or a period of one hundred and fifty years, and was only broken then by the abortive negotiations which have been going on between the Treasury and the Walker Trustees. But even 1766 is, compared with the present day, relatively contemporaneous with 1707. The facts of the Union and the effect of the Treaty of Union were much more fully in men's minds then than they are in ours, and presumably men were then in a better position to judge of them and draw the proper conclusions.

"The hiatus to which I have referred occurred in this way. Towards the end of the seventeenth century the Langton family found themselves in financial straits, and the Archibald Cockburn the younger of 1686 disponed the office of Usher to Sir James Cockburn of that ilk 'for relief of certain engagements he stood bound in, and, other creditors having adjudged, a competition ensued in which Sir James was preferred, since which time he and Sir William, his son, has possessed the fees, the duty of the office being in the

meantime performed by the heirs of the family.

"'Sir Alexander Cockburn, heir of the family, insisted in a declarator, concluding that it was not a patrimonial estate alienable by his predecessors, but that it must descend to the heirs of the family, and that his taking this office could not subject him to the debts of his predecessors.' (*Cockburn* v. *Cockburn*, 1747, M. 157.) But it is evident from another report of the case (M. 150) that the creditors of Langton, who had adjudged the office as well as the land estate, had brought a ranking and sale, and in these proceedings it was found by the Court of Session that the office in question was adjudgable. The case went to the House of Lords, who in 1755 affirmed the judgment appealed against (1 Pat. 603). The duration of these early bankruptcy proceedings seems, from other sources of information, to have been very lengthy, probably to have extended over nearly fifty years; and though the statement in *Morrison* would lead one to infer that the duties of the office were performed and the fees exacted in the interim, the statements in a great number of documents which have been produced would lead to the conclusion that during the competition among Langton's creditors the office and its fees fell into abeyance. In any case, there is no evidence forthcoming of the exaction of fees between the Union of the Kingdoms and the sale of the office under the abovementioned ranking and sale in 1758. It was then purchased by Alexander Coutts, Esquire, merchant in London, in favour of whom a charter of adjudication and sale was granted in that year. This charter bore to grant to Alexander Coutts 'et heredibus suis et assignatis quibuscunque hereditarie et irredimabiliter totum et integrum hereditarium officium solius et principalis ostiarii Nobis nostrisque successoribus in Scotia cum omnibus honoribus dignitatibus privilegiis feodis casualitatibus divoriis et censibus ad dictum officium pertinentibus, et usitatis et consuetis principalibus Ostariis in Scotia solvi,' together with the salary of £250 sterling. The charter contained a clause separating the heritable office, with its fees and dues, from the barony of Langton, and it was feudalised as a separate tenement, sasine to be taken at the Palace of Holyrood House.

"From this time onwards there is no evidence of any duties having been performed by the Usher of the White Rod any more than by the other similar officials, English and Scottish, who, notwithstanding, continued to receive fees of honours. But the holder of the office has been from time to time recognised by the Crown; for instance, shortly after his acquisition of the office Alexander Coutts was, by Order of Council, 11th September 1761, permitted to walk at their Majesties' Coronation as Gentleman Usher of the White Rod next to the Gentleman Usher of the Black Rod (that is, the English Usher). At subsequent coronations this privilege was sometimes conceded to the holder of the office, and sometimes refused. But it is clear that since its acquisition by Alexander Coutts the office, like many others concerned with archaic court functions, became an honorific sinecure, no duties being either asked or performed.

"But the matter of fees was different. Like many other old sinecure offices the emoluments attached to it, and not merely the salary but the fees, were and continued to the end to be valuable. And it having been determined, as shown above, that the office was heritable and adjudgable, or in other words marketable, it has, on the faith of that judgment, and except in the case of the first sale to Mr Coutts, on the faith also of the regular payment of the salary and collection of the dues, more than once changed hands for large prices. It is not improbable that Mr Coutts, whose name savours of banking relations, bought in the office in 1758 in the interest of the Cockburn family. In any case, he did not hold it long, but about 1765 or 1766 appears to have transferred it, though for what consideration I do not know, to Sir James Cockburn, no longer of Langton. By him it was held till 1790, when, following in the steps of his forefathers, he also became bankrupt, and a ranking and sale of his estate also was instituted. In that process, some of the proceedings in which, to be afterwards more particularly referred to, I regard as the most important evidence in the whole case on the point of prescription, it was judicially sold to Campbell of Inverneil for the very large sum of £7000. By him it was again sold to Sir Patrick Walker in 1806, and it has remained in the Walker family and Trustees ever since. On Sir Patrick's death in 1837 it passed to his two sisters the Misses Walker of Drumsheugh jointly, and on the death of the last survivor of the sisters in 1870 it passed to their Trustees, by whom it is now held for behoof of the Episcopal Church in Scotland.

"But before I refer to the proceedings in the judicial sale to Inverneil in 1790 it is necessary to examine the evidence of prescriptive custom which preceded that event.

"The first circumstance to note is the course adopted by the Lyon King of Arms in 1732. The emoluments of that official were also dependent, *inter alia*, upon certain Fees of Honours. But his position differed from that of the Principal Usher in the fact that his office was not hereditary. The grant of the office was for life only, and the fees were dependent on the grant. No doubt, whatever logically he was entitled to, the Lyon King found it difficult after the Union to enforce his demands in England in respect of Peerages and others of the United Kingdom conferred upon domiciled Englishmen. Accordingly in 1732 Mr Alexander Brodie, the then holder of the office, applied to George II for a new grant of fees, and a patent was issued in favour of him and his successors in office dated 19th July 1732. This patent is an important recognition by the Crown in matter of principle. It

proceeds on the narrative that the Lyon King of Arms of Scotland was by several royal grants entitled to divers fees upon grants of honours within Scotland in the same manner as the Officers of Arms in England are entitled to fees upon grants of the like nature in England; that by virtue of the Treaty of Union no person can be created a peer of Scotland or of England only, but that a Peerage of Great Britain confers that dignity both in England and Scotland as fully as a grant in each respectively would have done before the Union; that upon all grants of honours in Great Britain since the Union the Officers of Arms in England have received their fees as if the creation had been for England, but though such Peerages reached over Scotland as well as England no fees had been paid to the Lyon King. So far the statement is that of the Lyon King, though accepted without contradiction. What follows is the statement of the Crown, viz.—'Whereas, in pursuance of the twenty-fourth Article of the Treaty of Union between England and Scotland, we did soon after our accession to the Throne settle and declare the rank and precedency of the Lyon King of Arms of Scotland, it is just that Lyon King of Arms of Scotland and the heralds and pursevants of Arms of Scotland for the time being should since the Union continue to receive reasonable fees upon creations and grants of honours and dignities which extend throughout our said United Kingdom, for their better support in their respective offices and stations.' And accordingly there is granted to Alexander Brodie, Lyon King of Arms of Scotland, and his successors, fees upon a new scale on the grants of honours of the United Kingdom, to be recoverable in any Court of Record in England by the like remedies and methods of law as the Officers of Arms of England do and lawfully may proceed for the recovery of the fees granted to them by any of His Majesty's royal predecessors, or in any Court in Scotland by the like methods and remedies in law as the Lyon King of Arms in Scotland for the time being did or might have proceeded for the recovery of the fees anciently due to him upon creations and grants of honours in Scotland before the Union. And a new table of fees is settled.

"Now this grant by patent does not assist the Usher of the White Rod as a direct precedent, but it is, I think, important as a contemporaneous exposition by the Crown itself of the effect of the Act of Union in this relation.

"After he had obtained his title Mr Alexander Coutts as Usher of the White Rod followed suit, and appealed to the Crown to place him by a new grant in the same position as the Lyon King. Had he proceeded on his existing Scottish grant, doubtless he would have found it very uphill work and very costly to enforce his demands in England, and there is no saying what the result at that date of an appeal to the Courts of England, which would have been necessary, might have been. It is therefore not unnatural that he should have appealed to the Crown to declare his right and to grant him similar executorials, but he did so in terms which, it must be admitted, rather petitioned for an act of grace than a declaration of existing right, and probably he could not practically have proceeded in any other way. But he failed, and if he had sat down discomfited the course thus taken by him might have been fairly founded upon, as it was in fact by the learned Solicitor-General, as a demission or abandonment of any claim of right. But fortunately for the Walker Trustees things took a somewhat different course in the hands of Sir James Cockburn, his successor. The situation is explained by a number of documents contained in a portfolio produced by Mr Grant of the Lyon Office. Mr Grant's evidence I entirely discard. The only justification of his presence in the box was as an historical expert to assist the Court to the contents of the documents within his keeping. But he adopted too much the role of the partisan witness. His documents, however, speak for themselves. They are, however, not indeed originals. They are copies made by Sir Patrick Walker in the early part of the last century, and as a collection of writings of antiquarian interest they were long ago handed by Sir Patrick's nephew Colonel Ainslie, C.B., one of the Walker Trustees, to the keeping of the Lyon King, who is the recipient of many such collections. Though not originals it is difficult to doubt their authenticity as copies. They could not indeed be founded on as documents of title, but a perusal of them elucidates, I think correctly, the history of Mr Coutts' endeavour to obtain a like patent grant to that conferred upon the Lyon King, his failure, and the course taken by his successor Sir James Cockburn, which had a more successful issue. That course resulted, without the intervention of any new grant, in Sir James' right to the old fees to which his only title was the old Scottish grant, coming to be recognised throughout the United Kingdom, and the fees exacted and paid during a long and continuous period commencing with 1766, and lasting without intromission till the present question, after the Treasury negotiations initiated in 1904, was raised.

"I do not need to go in detail into the many documents bearing upon the resumption of the payment of fees of honours after the judicial sale to Alexander Coutts; many of them are in Mr Grant's portfolio, others are produced separately. It is sufficient to say that Mr Coutts presented a petition on the lines of the Lyon King's, which on 3rd December 1761 was by the Privy Council referred to the Lord Advocate for his opinion, and that a second petition in the same terms was on 9th July 1763 remitted to the Attorney and Solicitor-General of England for consideration. It was not till 6th April 1763 that the report of the Lord Advocate was obtained on Mr Coutts' first petition. As an opinion of Mr Miller, afterwards Lord Glenlee, this report was much

pressed upon my attention by counsel for the Walker Trustees. But I venture to think that it is not of the weight which is always justly accorded to an opinion in law by Lord Glenlee. It must be read in the light of the petition on which it proceeded, which was not in itself a demand of right, but was a request for equitable consideration. Where Lord Glenlee says that 'upon this state of the facts I am humbly of opinion that . . . the right of the family of Langtoun to this heritable office and to all the fees and emoluments thereof could not be prejudged by the said Treaty, but remain to them as entire as before the Union,' he leaves it still an open question what 'are the fees and emoluments thereof,' and from whom exigible.

"And again, where he says in the other passage on which Mr Macphail placed particular reliance, 'I am also humbly of opinion that the fees granted to this office upon the creation of peerages and other dignities of Scotland are not abolished or extinguished by this Treaty of Union. For peers created since the Union are Peers of Great Britain, which includes both England and Scotland, and consequently the officers of either kingdom are equally well entitled to the fees of their respective offices upon such creation,' he leaves it open to doubt whether he means that they are entitled as a matter of enforceable right, or have merely a just and equitable claim which should lead to his Majesty's 'granting Mr Coutts the fees of his office upon the creation of all peers, &c., in time coming to which the delay' in pressing the application from the date of the Union to 1763 ought to be no bar.

"But the next document in date shows the matter in a very different light. Mr Coutts' second petition had been remitted to the law officers of the Crown in England, and we have a letter addressed to Mr Coutts by his London agent, Mr Gordon, dated from the Temple, 6th July 1764, the first half of which I take leave to quote, as it has an important bearing upon the situation;—'Dear Sir,—After much importunity I at last obtained a meeting this evening with Mr Attorney and Mr Solicitor-General, who, having read over your petition, Lord Advocate's report, Lord Lyon's grant, and all the relative papers, had much reasoning and argument on the subject, and I am sorry to tell you that they have both taken up the case in a light which never yet occurred to any person who has considered it.

"'They think you have a right, by your own and your predecessors' grants from the Crown, to certain fees and emoluments upon every title and honour conferred by His Majesty on any of his subjects. In consequence of their right, you may prosecute for and recover these fees, so far as the action is not barred by prescription as to any bygone fees since the Union. They think, as these fees were specially granted and ascertained by the charter in 1686, and the grant renewed to you in 1758, that His Majesty cannot or ought not to make any other grant. Because he cannot impose new fees on any of his subjects by any grant; and if the fees are already granted and established by former charters, there is no occasion for any new grant. If you have a right by former charters, that right must be made effectual by the ordinary course of law; its import and extent must be determined by the Judges, and not by the King. If, on the other hand, you have no right by your former grants, His Majesty cannot create or impose new fees. They therefore think that His Majesty ought not on this occasion to interpose, but that the matter ought to be left to the course of law.

. . . . . .

"'I said everything in my power and used all the arguments I could to show that the grant now desired was in effect only to explain the extent of the former grants from the Crown, and that this explanation was necessary on account of the new constitution of titles of honour in consequence of the Union of the Kingdoms; I likewise urged the case of Lord Lyon as a precedent in point, but all to no effect. The answer was that the King could not explain or extend the former grants; the law must do it; and that the precedent in the case of Lord Lyon was a bad one, and ought not to be followed. Upon the whole finding, I could obtain no favourable report.'

. . . . . .

"Not satisfied with this rebuff, Mr Coutts returned to the charge in 1764 with a third petition to the Crown, upon which, however, nothing seems to have been done while Mr Coutts retained the office; and it is no wonder, seeing the opinion of the Attorney and Solicitor-General, as communicated by Mr Gordon in the letter above quoted. Betwixt and 1766 Mr Coutts had transferred his right to Sir James Cockburn, who in February of that year laid a memorial before the Attorney and Solicitor-General of the day. I think that this memorial was really in supplement to the pending third petition of Mr Coutts of 1763, which had been remitted to the Law Officers of the Crown, and not yet reported on, for I find, shortly after the date of Sir James Cockburn's memorial, the Attorney and Solicitor-General report (5th April 1766) upon that petition. I am disposed to think that there may have been a change of Government, and that they were not the same law officers whose opinion was referred to in Mr Gordon's letter above quoted. If this was not so, they must have changed their views, or forgotten their former attitude as narrated by Mr Gordon, for their report bears, 'We have considered the said petition . . . . and are humbly of opinion that the office of Heritable Principal Usher of Scotland is a subsisting office, and that it is lawful for His Majesty by letters patent under his Privy Seal of Great Britain to revive by grant to the said officer reasonable and moderate fees upon creation of honours and dignities, in like manner as was done in the year 1732 by His late Majesty to the Lyon King of Arms; but how far the same may be expedient, especially as some of the

fees appear to be excessive, and the same have now been disused ever since the Union of the two Kingdoms, must be submitted to your Lordships.'

"The new grant recommended does not, however, appear to have been issued, and accordingly Sir James Cockburn presented a fourth petition in his own name, in 1766, and in the same year, on 27th October, submitted a case to Sir Fletcher Norton and Mr Wedderburn, whose opinion was at once more favourable, and more serviceable, for to the following query, 'Has not Sir James Cockburn a just and legal right to demand these fees annexed to the office of Heritable Principal Usher given to him and his family by so many successive grants, as they are particularly ascertained by the charter of 1686, upon the different degrees of honours and dignities therein mentioned, *as they are now granted to Peers of Great Britian*, notwithstanding the long disuse?'—they answered that 'Sir James Cockburn has a title by the Act of Union to demand the same fees as were paid to his predecessors upon creations of honours in Scotland, and the disuse of payment arising from the neglect of creditors, who, upon the distressed situation of the family, had attached the office, ought not to prejudice the right.'

"Fortified by this opinion, Sir James Cockburn struck out a new line, and appealed to His Royal Highness the Duke of Cumberland to order payment to him of the fees on His Royal Highness' dukedom. This application must have been passed on to the Treasury, for the next document is the important report of 26th November 1766, by Thomas Nuthall, Solicitor to the Treasury, addressed to the Lords of the Treasury, in which he states—'In obedience to your Lordships' command . . . . by which I am directed to consider the Memorial of Sir James Cockburn, Baronet, hereunto annexed, and to report to your Lordships the state of the Memorialist's case, together with my opinion what may be fit to be done therein, I humbly certify to your Lordships that I have examined into the truth of the allegations contained in the said Memorial, and conceive the Memorialist's case to be therein truly stated. And the Memorialist having laid before me a case stated by him for the opinion of Sir Fletcher Norton and Mr Wedderburn, I have annexed the same hereunto, with their opinion thereon, by which it appears that the claim of the Memorialist is well founded, as I apprehend the same to be.'

"On 28th November 1766 the Lords of the Treasury, the Chancellor of the Exchequer present, having read the report of Mr Nuthall on Sir James Cockburn's memorial, minuted, 'My Lords are pleased to allow the claim of Sir James Cockburn, and direct Mr Nuthall to pay him the sum of £21, 13s. 4d., being the fees of his office, which he demands upon the creation of the Duke of Cumberland.' £21, 13s. 4d. was the sterling equivalent of 260 pounds Scots. And an order for payment was accordingly granted on 1st December 1766.

"The Usher of the White Rod, by the favourable result of this appeal, thus laid the foundation of the practice which has continued from 1766 down to the present date. From documents subsequent in date to those which I have quoted I should say that success was not all at once complete, and that the consistent practice of the nineteenth century was only established by a course of gentle pressure during the last part of the eighteenth century. But the important thing is that it was established, and was established not by grant declaratory or confirmatory from the Crown, but by demand based upon the old pre-Union title emanating from the Scottish Kings, when read in connection with the Treaty of Union.

"I pass now to what I have already stated to be, in my opinion, the most important piece of evidence for the Walker Trustees, viz.—The process of adjudication and sale under which the office of Heritable Usher passed in 1790 from the family of Cockburn to Sir Archibald Campbell of Inverneil, K.C.B. No. 254 of process contains a series of excerpts from the decreet of sale. It is very lengthy, and I shall endeavour therefore to state merely its import and bearing upon the present case. The office of Heritable Usher was Lot 3rd in the state of the sale. Its value was proved in the usual way by two officers of the Court of Exchequer in Scotland, who spoke to the salary and fees payable in Scotland, stating the former at £250 per annum, and the latter at an average of £20, 10s. per annum, which they valued at twenty years' purchase, making £5410 in all. And upon this evidence the Court found the proven value, and letters of publication were issued, and the sale was ordered to proceed. Whereupon it was at once brought to the notice of the Court by Inverneil and Messrs Drummonds, bankers, London, creditors of Cockburn's, that no account had been taken of the fees of honours received by the Usher in England. The sale was stayed, and commission issued to John Spottiswood, solicitor, London, who I have reason to believe was a member of the firm founded by Mr Gordon, Mr Coutts' agent in 1766, and who, therefore, if I am right in my conjecture, must have had every means of knowing the history of the office and its relation to England, to take evidence as to the value of the fees received from English recipients of honours. The result was the examination by Mr Spottiswood of a very large number of witnesses in England, and the disclosure, through their evidence, that prior to 1790 the system had been initiated which lasted down to 1904, by which the fees of the Usher of the White Rod were, along with other fees of honours of like nature, collected by Government officials in London and paid over to the Usher, a commission being deducted. On considering the evidence so collected on commission by Mr Spottiswood, the value of Lot 3rd was reconsidered by the Court and raised to £7196, 9s. And upon this proven value the sale proceeded, and the purchase by

Inverneil was made. It cannot be said that the proceedings in the ranking and sale form *res judicata* on the subject of the right of the Usher of the White Rod to exact his fees in a question with all future recipients of honours. But it comes very near it. And I think that I may at least say that the Court of 1909 would require to find some very strong reasons to conclude that their predecessors of 1790 were ill founded in proceeding to a judicial sale of Sir James Cockburn's estate on the footing that one parcel to which they were giving a judicial title carried with it the valuable right to fees of honours from all peers, baronets, and knights of the United Kingdom, and not merely from those who happen to be Scotsmen by birth.

"Whatever may be thought of it as a judicial act, it certainly is the most important proof that the practice of exaction and payment, which afterwards admittedly continued, had in 1790 been firmly established.

"The rest is matter of admission; but before I pass to the admissions made by the Treasury, I must state my opinion that the Walker Trustees would not have been justified in perilling their case on these admissions alone. They were extracted with great difficulty, but their acceptance without anything further would, I think, have been a dangerous concession for the pursuers. Whatever trouble and expense they have been put to in unearthing documents from government offices, when once the question was seen to be, not merely the fact of prescriptive usage, but the foundation of that usage, they were bound to carry back and connect the usage with their title. To do so has cost much patient research, but it has been skilfully and effectually done.

"What is admitted by the Treasury is found in No. 199 of process. It is practically to the effect that from 1st January 1800 the Fees of Honours have been collected from the recipients of such dignities by first one and then another Government official, and his share paid over to the holder of the office of Heritable Usher for Scotland, under deduction of a commission, and that in certain instances, and I think more are proved than are admitted, the Fees of Honours conferred on Princes of the Royal Blood, and on certain subjects for conspicuous services to the State, have been paid by the Treasury out of public funds.

"I do not think that it is necessary that I should examine the long series of authorities on explicative prescription to which I was referred. As an occasion for the application of the positive prescription, the present involves an element not, I think, found in any previous case, viz., the change extrinsically effected in the subject of the grant by the supervening Treaty of Union and the Statute which embodied it. That the Statute of 1617, c. 12, which introduced the positive prescription, may be appealed to with success there must be a heritable subject, a title, and possession consistent with or capable of being referred to that title. Though neither lands, a barony, nor an annual rent, the office of Heritable Usher and the fees pertaining to the office is a 'heritage' in the sense of that statute. The pursuers have produced their title, or their series of titles, and they have proved unbroken possession for a period far exceeding the prescriptive period. The only question is whether that possession is consistent with or referable to their titles. That depends upon whether the recipients of honours or dignities of the United Kingdom since the Union 'obtain honours or dignities from His Majesty and his successors within the Kingdom of Scotland.' It is not inconsistent with this grant that after the Union an honour or dignity of the United Kingdom should be regarded as an honour or dignity 'within the Kingdom of Scotland,' which is part of that United Kingdom, and the explication, derived from the uninterrupted usage or possession for the prescriptive period, of which I have traced perhaps at too great length the origin and the history, has, in my opinion, unequivocally established that throughout the whole period of such usage or possession it has been so regarded.

"It remains that I consider two contentions of the Solicitor-General on behalf of the Treasury.

"The first was that at repeated points in this long history the Crown has made grievous mistakes in dealing with the Heritable Usher for Scotland, but that on a well-known principle the Crown could not be bound by the mistakes of its officials. I must say that I fail to appreciate the bearing of this argument or the appositeness of the principle. The Treasury are not properly defenders in this case; they are only at best defenders *de convenance*. No claim is competent to the Walker Trustees against the Treasury. If the Treasury choose to pay the fees on the creation of the next Royal Duke, well and good; but if they do not, the liability is not theirs, and can only be enforced against him, not them; and so with all other subject recipients of honours. The Treasury are only defenders by arrangement, because they have insisted on having tested by judicial decision, at their expense, the right of the Heritable Usher to his fees, in a question with subject recipients of honours. But in thus accepting the position of defenders the Treasury can plead no higher than the subject recipients whom they represent; and whatever mistakes the Crown may have made, though I cannot say that I discover them, these alleged mistakes may form part of, and may even be the origin of, the practice to which the subject recipients of honours have succumbed.

"The second was, that the pursuers, the present holders of the office of Heritable Usher, being a corporation, they are not entitled to the decree of declarator and payment which they demand. This I understand to mean that as a corporation they could not perform the original duties of Usher—they could not as holders of this heritable office exact the fees. I think

that the learned Solicitor-General felt himself very much put to when he submitted this argument, and I am doubtful whether he meant me to take it seriously. But, as I have already pointed out, the Treasury in defending this action can plead no higher than the subject defenders whom they represent, and I do not think that it is in the mouth of the latter to state this plea. The question is personal to the King. Such a thing has been known to history as the performance of the duties of similar offices by deputy. And where the office has become merely honorific, I can hardly imagine His gracious Majesty interfering to deprive, what I may term an ecclesiastical charity, of a lucrative right, the benefit of which goes to the poorer charges of that Church. And I note, in passing, that at the coronation of His present Majesty, upon the claim of the Walker Trustees to exercise the office of Usher of the White Rod in Scotland by Deputy, the Court of Claims adjudged that the claimants' right to be present by deputy (to be approved by His Majesty) be allowed, but that no duties be assigned by this Court.

"But there is another sufficient answer, as it seems to me, to this contention, and that is, that from the death of Sir Patrick Walker in 1837 the office has been held first by his two sisters jointly, then by the survivor of them for a short time, and since 1870 by their trustees, who in 1877 were incorporated by statute; that during all this time the duties of the office could not have been performed by the holder of the office except by deputy, and yet that the fees have continued to be exacted and paid. I think, therefore, that there is no foundation for this last plea of the learned Solicitor-General.

"Accordingly I am satisfied that the Walker Trustees are entitled to the declarator which they seek in the first place, and to the second alternative of the declarator which they seek in the second place. The first alternative of the declarator which they seek in the second place falls to be dismissed. The Treasury or other officials of the Government in London may have acted for more than one hundred years as the agents of the Heritable Usher, but cannot be compelled to continue their agency. And finally, the decree for payment sought in the third place must go out against the subject defenders called, other than Lord Armitstead, who I understand did not desire to lend his name as defender, but at once paid the fees exigible from him on being made aware of the circumstances."

The defenders reclaimed, and argued—As the Crown could not levy taxes without the consent of Parliament, so it could not on the creation of offices attach thereto the right to exact fees from the subjects—Stephen, Commentary on the Laws of England (15th ed., vol. ii, p. 587); Comyn's Digest *v.* Prærogativa, D. 37 (5th ed., vol. vii, p. 65); Coke, Institutes, ii, p. 533; *Institute of Patent Agents* v. *Lockwood*, June 11, 1894, 21 R. (H.L.) 61, 31 S.L.R. 942, January 26, 1893, 20 R. 315, 30 S.L.R. 375. The pursuer's right to collect fees sought to be established in the present action was good only in so far as conferred by Act of Parliament. There was no such Act subsequent to the Treaty of Union. The pursuer's right existed therefore only so far as it was conferred in the Acts of the Scots Parliament, and affected by the Treaty of Union 1707 (6 Anne c. 11). The right conferred by the Scots Acts was of course a right to collect fees on the creation of dignities of Scotland, *i.e.*, Scottish dignities. No right to collect such fees on the creation of dignities of the United Kingdom could be given by these Acts, and the pursuers had therefore no such right unless it could be shown that it was conferred by the Treaty of Union, for there was no later enactment. The Treaty of Union did not confer any right; it simply secured to the pursuers the continuance of their existing right to collect fees on the creation of Scottish dignities. The creation of these dignities in point of fact ceased on the passing of the Treaty of Union, but it did not become incompetent—Riddell, Inquiry into Scottish Peerages, p. 269. That was the plain meaning of Article XX of the Treaty of Union, and it was not open to construction. Nor could the pursuers base their claim on charters subsequent to 1707. These charters did not profess to create new rights, but only to deal with existing ones. Besides, they could not contradict Acts of Parliament—*Earl of Lauderdale* v. *Scrymgeour Wedderburn*, April 7, 1910, 47 S.L.R. 532. Nor could the alleged usage between 1766 and 1904 avail to secure to the pursuers the right they claimed. No doubt *contemporanea expositio* in the sense of the construction which the sages of the law who lived about the time an Act was passed put upon it was both admissible and important in construing an Act of Parliament—Coke 2 Inst., 11, 136, 181, cited in Trayner, Latin Maxims and Phrases, 4th ed., p. 104—but there was nothing of that in the usage founded on by the pursuers. Further, that usage could not be founded on by way of either *contemporanea expositio* or of prescriptive possession of the right claimed, for it would be prescription against the title—*Presbytery of Dundee* v. *Magistrates of Dundee*, March 19, 1858, 20 D. 849, *per* L.J.C. Hope at p. 877; *Baird* v. *Magistrates of Dundee*, February 5, 1862, 24 D. 447, *per* L.P. M'Neill at p. 455; *Officers of State* v. *Earl of Haddington*, June 4, 1830, 8 S. 867, May 26, 1836, 2 W. & S. 468, September 24, 1831, 5 W. & S. 570; *Earl of Moray* v. *Magistrates of Kinghorn*, 1762, M. 1988.

Argued for the pursuers (respondents):—While it was no doubt true that the Crown could not impose taxes without the consent of Parliament, it was not so certain that it could not grant one subject power to levy imposts on another, *e.g.*, grants of petty customs to royal burghs. But that was not the nature of the right claimed here at all. There was no incompetency in a grant by the Crown without the consent of Parliament of a right to the holder of an office to exact fees for the performance of

the duties of that office. The pursuers' titles included not only Acts of Parliament but charters subsequent to the Treaty of Union, and in particular the decree of sale in favour of Sir Archibald Campbell of 25th May 1790. Naturally the pre-Union charters dealt only with Scottish dignities, but the only equivalent of these dignities after the Union were similar dignities of the United Kingdom. In both cases the dignities gave precedence in Scotland. On the passing of the Treaty of Union the creation of Scottish Peers became incompetent—Anson, Law and Custom of the Constitution, vol. i, p. 200. Unless, therefore, the pursuers were thereafter entitled to exact fees on the creation of dignities of the United Kingdom, their right was extinguished by the Treaty of Union. That was in violation of Article XX, which reserved heritable offices to their owners. The obvious and plain meaning of the Treaty of Union was therefore that contended for by the pursuers. In any event, if the pursuers' titles were doubtful they were susceptible of explanation by prescription, and the usage from 1766 to 1904 was possession not inconsistent with their titles. Such possession on their titles was therefore sufficient to constitute their right—Act 1617, c. 12; Ersk. Inst. iii, 7, 6; Millar, Prescription p. 5; *Cooper's Trustees* v. *Stark's Trustees*, July 14, 1898, 25 R. 1160, 35 S.L.R. 897; *Fraser* v. *Lord Lovat*, February 18, 1898, 25 R. 603, 35 S.L.R. 471, *per* L.P. Robertson at p. 616, p. 479; *Macpherson* v. *Mackenzie*, May 21, 1881, 8 R. 706, 18 S.L.R. 503; *Auld* v. *Hay*, March 5, 1880, 7 R. 663, 17 S.L.R. 465, *per* L.J.C. Moncreiff at p. 668, p. 468; *Lord Advocate* v. *Sinclair*, June 7, 1867, 5 Macph. (H.L.) 97, 4 S.L.R. 207, *per* Lord Chelmsford, L.C., p. 100, p. 208, Lord Colonsay at p. 105, p. 211; *Magistrates of Wigton* v. *M'Clymont*, January 15, 1834, 12 S. 289; *Home* v. *Young*, December 18, 1846, 9 D. 286; *Sanderson* v. *Lees*, November 25, 1859, 22 D. 24, *per* Lord Curriehill at p. 30; *Maxwell* v. *Magistrates of Dumfries*, June 1, 1866, 4 Macph. 764, 2 S.L.R. 43; *Sheriff of Galloway* v. *Earl of Cassilis*, 1634, M. 10,888; *Earl of Callender* v. *Town of Stirling*, 1672, M. 10,892; *Cunningham* v. *Earl of Eglinton*, 1709, M. 10,906.

At advising—

LORD LOW—It was decided in the case of *Sir Alexander Cockburn* v. *Creditors of Langton* (M. 150, *affd.* 1 Paton 603) that the office of Chief Usher was a feudal and patrimonial estate which was alienable in its nature and was therefore adjudgable. Accordingly the right of the pursuers to the office is not disputed, nor their right to the fixed annual salary of £250 attached thereto, which the Treasury have commuted for a single payment of £6540, 18s. The question, however, remains whether the pursuers are also entitled to exact certain fees upon all creations of peers, baronets, and knights of the United Kingdom. The Lord Ordinary has answered that question in the affirmative, and the Lord Advocate, as representing the Treasury, has reclaimed against that judgment.

The argument of the reclaimers was to the following effect: It was beyond the power of the Sovereign, without the consent of Parliament, to confer along with an office the right to exact fees, because that was equivalent to granting right to a subject to impose a tax upon his fellow-subjects. Further, where a right to exact fees had been confirmed by Parliament, that right could not be enlarged without the consent of Parliament being again obtained. Prior to the Union the Chief Usher had been empowered by Act of the Parliament of Scotland to exact fees from persons upon whom Scottish honours were conferred, but that Act gave no right to the Usher after the Union to demand fees from persons upon whom honours of the United Kingdom were conferred. To give such a right an Act of Parliament would have been necessary, and no such Act was obtained.

The question whether prior to the Union the Crown could in Scotland confer upon a subject, such as the holder of an office or a corporation, right to exact fees, or dues, or customs without the consent of Parliament, is one upon which it is unnecessary to enter, because the right of the Chief Usher to exact fees was prior to the Union confirmed by Act of Parliament, and it is not disputed that at the date of the Union he was entitled to exact, and did exact, such fees.

Now by article 20 of the Treaty of Union it was provided "that all heritable offices . . . be reserved to the owners thereof as rights of property, in the same manner as they are now enjoyed by the laws of Scotland." It is plain, and is admitted, that by that article of the Treaty the office of Chief Usher in Scotland was continued, and that the holder of that office retained right to the annual salary of £250. Presumably he also retained right to any other emoluments attached to the office, but it is said that his right to exact fees became at all events inoperative, because the fees authorised by Parliament in 1686 were in respect of Scottish honours—that is to say, honours of Scotland as a separate kingdom—whereas after the Union all titles of honour were of the United Kingdom. The Lord Advocate indeed contended that it was still competent to the Crown to confer a purely Scottish peerage, but I think that is plainly not so in view of the provisions of article 23 of the Treaty of Union.

The pursuers, upon the other hand, deny that prior to the Union the fees which the Usher was entitled to exact were limited to Scottish honours, but they contend that even if that were so they would still be entitled to the fees which they claim, because a peer or baronet or knight of the United Kingdom is necessarily a peer or baronet or knight of Scotland.

The terms in which the right to exact fees was given vary somewhat in the different grants which were made, but I am inclined to think that the right of the

Usher at the date of the Union must be regarded as having been regulated by the title upon which the office was then held. That title was a Crown charter of resignation, dated 21st January 1686, in favour of Archibald Cockburn junior of Langton, and an Act of the Scottish Parliament ratifying the same, of date 15th June 1686. In the charter right is given to exact fees at a given rate from all Scotsmen receiving dignities within any part of His Majesty's dominions, and from all Englishmen receiving honours and dignities in Scotland. In the Act of Parliament, however, the right which is ratified and approved is stated thus: "All casualties, fees, and other rents underwritten payable be dukes marqueses earles viscounts lords knights baronets and other knights created or to be created and receiving honours tytles and dignities from His Majesty and his successors within the said Kingdom of Scotland, To witt," and then there follows a specification of the amount of the fees as in the charter.

Why the description in the Act of the persons from whom fees might be exacted differed from and was more restricted than that given in the charter I do not know, but I rather think (although it is not a matter of importance in the view which I take of the case) that the grantee having obtained a parliamentary ratification of the right must accept the terms in which that ratification was expressed. If so, then he was only entitled to exact fees from peers, baronets, and knights created and receiving honours, titles, and dignities within the kingdom of Scotland.

Of course, when an Act of the Scottish Parliament speaks of peers created within the kingdom of Scotland it refers to purely Scottish peerages, and these were not, and as I think could not be, created after the Union. I should therefore have thought that after the Union the condition of matters—namely, the creation of Scottish peerages—in respect of which fees were exigible did not exist. The argument that the right given by the Act of 1686 included all creations of peers of Great Britain, because all British peers are peers of Scotland, strikes my mind as somewhat strained. A peerage of Scotland created before the Union and a peerage of the United Kingdom created after the Union are, in my estimation, entirely different things. Therefore if the pursuers' claim depended only upon the pre-Union title, I should have thought that it was not well founded, not because the right had been taken away, but because the conditions upon which alone it could be exercised could never again exist.

But there is also the Treaty of Union, which embodies the terms upon which the Commissioners representing England and Scotland respectively agreed to the union of the two countries. As I have already pointed out, one of the terms agreed upon was that heritable offices should "be reserved to the owners thereof as rights of property, in the same manner as they are now enjoyed." These words are exceedingly wide and general, and are plainly capable of construction. Indeed, I think that they are capable of being construed in the sense for which the pursuers contend, because it seems to me to be reasonably clear that the intention of the article was that the owner of a hereditary office should not be in a worse position after the Union than before it.

Now the Treaty of Union was concluded and the Act of Union passed in 1707, and it is therefore important to inquire what has been done in regard to the fees in question in the two centuries which have intervened. For the first fifty or sixty years the persons then in right of the office did not collect any fees at all, but the circumstances were peculiar, and it was not contended, nor do I think it could have been successfully contended, that the Usher had abandoned, or lost by desuetude, any right to exact fees which the Union had left to him. The exaction of fees, however, appears to have been resumed about 1766, and fees upon the conferring of all dignities of the United Kingdom since that date until the present question was raised in 1904, have been claimed by the Usher and paid to him, continuously, without interruption, or, so far as appears, without objection on the part of anyone.

Further, it is admitted in the minute of admissions—"(1) That from a date prior to 1st January 1800 until the year 1904 the fees paid on the creation of peers, baronets, and knights by patent have been collected from the recipients of such dignities by the Home Office, and paid over by that Department between 1800 and 1871 to the Crown Office in Chancery, and between 1871 and 1904 to the Treasury. Among the fees so collected were the fees claimed by the holder of the Office of Heritable Usher for Scotland, and these fees were under deduction of a commission of 2½ per cent. paid over to an officer of the Lord Chamberlain's Department for transmission to the holder of the office of Heritable Usher."

It is also admitted that upon the occasion of dignities conferred upon Princes of the Blood Royal the fees have been paid to the Usher by the Treasury out of public funds.

I do not think that it is possible to get over that continuous exercise of the right claimed for nearly a century and a-half with apparently the unanimous consent of all parties interested. If the usage had commenced at the date of the Union, then, if I am right in thinking that the right of the Usher to claim fees upon the conferring of all dignities of the United Kingdom was, at all events, not inconsistent with the provisions of the Treaty of Union, I think that it would have amounted to *contemporanea expositio* of the most conclusive description. And I do not think that it can make any difference that a long period elapsed after the Union during which fees were not claimed, because admittedly any right which the Usher had was not lost, and when the fees were claimed the right was not disputed, and there has been since that time a continuous usage of payment for more than three times the prescriptive period.

I am therefore of opinion that the conclusion at which the Lord Ordinary arrived was right, and that the interlocutor under review should be affirmed.

LORD ARDWALL—I am of opinion that the judgment of the Lord Ordinary ought to be affirmed. He has gone so thoroughly into the history of the whole matter in his able and exhaustive opinion that it is unnecessary for me to enter upon the ground which has been covered by him.

Concurring as I do generally, though not in all particulars, with the opinion which has just been delivered by my brother Lord Low, I merely wish to make some few remarks upon the argument which was submitted to us on behalf of the Crown, and which apparently to some extent was additional to the argument submitted to the Lord Ordinary. Shortly stated, the argument, as I understood it, was this:—The fees in question are of the nature of a tax, and could not legally be imposed by the Sovereign without an Act of Parliament. The only Acts of Parliament conferring right to these fees were passed prior to the Act of Union. These Acts of Parliament conferred right to collect fees only in respect of Scottish peerages and titles of honour. Since the Act of Union no Scottish peerages or titles of honour have been conferred—and the Lord Advocate added that they might have been conferred, which I think is an erroneous statement, as I shall afterwards point out. At all events, he says none have been conferred, and in particular those in question in the present action are not Scottish titles of honour, but titles of honour of the United Kingdom, and accordingly the fees in respect of them are not authorised in the only way in which such imposts can constitutionally be authorised.

I cannot assent to this argument. In my opinion these fees are not taxes. In their origin they represent payment for services rendered, and though these services may have been or may now have become of very slight importance, yet the fees are not taxes in the proper acceptation of that term. I should suppose that these fees took their origin both in England and Scotland in this way. The kings desired to have a following at court, or it may be called a household, consisting of gentlemen or nobles of more or less distinction. The attendance of such persons at Court, and their travelling from place to place, as it appears from some documents in this case they did, along with the Court or the circuit ayres, necessarily involved expense. Accordingly the kings found it necessary to pay the court officials, such as ushers, heralds, and so on, sums to meet these expenses, and to support themselves and their servants. This was done partly by salaries and partly by conferring on such officials the right to certain fees from persons receiving titles of honour at the hands of the sovereign. Now I think that in order to enable him to keep up a sufficient household the sovereign was entitled to attach it as a condition of the bestowal of honours that the persons on whom such honours were bestowed should make payment of certain fees to the officers of his court who arranged and took part in the ceremonials attending the bestowal of titles of honour. According to the ordinary use of language I do not think this act of the sovereign can be called the imposition of a tax. It was at most the imposition of a condition of certain needful payments upon those whom the king "delighted to honour," and they were under no obligation whatever to accept these honours; indeed, the Lord Ordinary in his opinion has referred to an interesting instance of an honour being refused for reasons of economy during the reign of her late Majesty Queen Victoria. I therefore consider that the passages from institutional writers on constitutional law read to the Court by the Lord Advocate with the view of establishing the trite proposition that the sovereign cannot impose taxes without the consent of Parliament, have no relevancy to the present question. It follows from this that in my opinion the royal grants dated subsequent to the Act of Union were valid and capable of being fortified and explained by prescription, and, in particular, that the charter of sale under the Union seal in favour of Alexander Coutts, Esquire, of the Hereditary Office of Sole and Principal Usher in Scotland, dated 23rd February, and written to the Seal and registered 15th, and sealed 18th March 1758, taken along with the prescriptive usage that has followed on it, forms a valid title to the fees in question in the person of the pursuers, and has been rendered unassailable, and been explained by such prescriptive usage; and that accordingly it is not necessary for the pursuers to go further back for the ground of their present claim.

But apart from this, I consider the latter part of the Lord Advocate's argument to be unsound, for, in my opinion, the Treaty of Union had not the effect of impairing or destroying the rights of the pursuers or their predecessors as conferred by the Acts of the Scottish Parliament preceding the Act of Union, but in fact had the effect of greatly extending them, and that for the reason that all titles of the United Kingdom conferred after the Union, whether on Englishmen or Scotsmen, were titles which had effect not in one country only but in both.

Some difficulties may be raised about the wording of the original grant, but I cannot doubt that the effect of the Treaty of Union, properly interpreted, is as I have described. The passages in the Treaty of Union that are of importance are the 20th section, which is in the following terms:—"That all heritable offices, heritable jurisdictions, offices for life, and jurisdictions for life, be reserved to the owners thereof as rights of property in the same manner as they are now enjoyed by the laws of Scotland notwithstanding this treaty."

And then there follow sections 22 and 23, from which I think it is apparent, as pointed out by Sir William Anson in his

work on the Law and Custom of the Constitution, 4th edition, vol. i, p. 201, that after the passing of the Act of Union the sovereign could not create a peer of Scotland, as seems to have been assumed by the Lord Advocate in the course of his argument. The importance of this fact is, I think, very great in construing section 20 of the Treaty of Union, because if all that was reserved to the owners of the heritable office of White Rod by that section was the power of exacting fees in respect of purely Scottish titles of honour, the reservation in section 20 would be entirely valueless and derisory, which it ought not to be assumed to be. This being so, I think it follows that the interpretation I have above set forth is the true interpretation of the Treaty of Union with regard to this matter.

Further, I think the Treaty of Union and the Act of Union which followed thereon are open to construction by usage following thereon, although the Lord Advocate maintained the contrary on the ground that an Act of Parliament must be interpreted by its terms alone, and that no subsequent usage can affect its construction. I should demur assenting to this proposition in its entirety with regard to any Act of Parliament, but, with regard to the Treaty of Union and the Act which gave effect to it, I think matters stand in a very peculiar position. That Treaty was in itself of the nature of a contract between two independent nations, and I think that the rules of law applicable to all contracts must be held to apply, and that where a contract is ambiguous or capable of two constructions it is of the utmost importance to ascertain how the parties to the contract interpreted it themselves at and subsequent to its date, and I may add that any court of law would be very slow in interpreting any ancient statute to construe it contrary to the sense in which it had been consistently construed either by usage or by legal decision since its date.

With regard to the question in hand, it is true that immediately subsequent to the Union fees were not exacted by the holders of the office of White Rod until the year 1766, but this hiatus is satisfactorily explained by the Lord Ordinary in his history of the office. But it was otherwise with the corresponding English office of Usher of the Black Rod and other similar offices, for it is apparent from documents in process that the English Court officials who were *in pari casu* with the Usher of the White Rod in Scotland exacted the fees which they had exacted before the Act of Union in relation to English titles of honour from all recipients of titles of honour of the United Kingdom subsequent to the Treaty of Union.

I accordingly reach the conclusion that both in Scotland and in England the interpretation put upon the Treaty of Union at and ever since its date was to the effect that titles of honour of the United Kingdom should, as regards the fees payable to Court officials in respect thereof, be regarded as titles both of the kingdom of Scotland and of the kingdom of England, and should carry with them the obligation to pay the fees which were exigible in both countries at and before the date of the Act of Union.

I may say that there appears to be nothing extravagant in this, because titles of the United Kingdom were titles giving precedence and rights both in England and in Scotland. I have not thought it necessary in the view I take of the case to deal with the distinction that was drawn in the arguments of parties between knighthood and other titles of honour in relation to the question presently before the Court.

On these grounds, I think the argument submitted for the Crown on the points I have dealt with, as well as on the other points dealt with by the Lord Ordinary, fails, and I therefore concur in the judgment proposed.

LORD DUNDAS—I am of the same opinion, and as I also agree in substance and result with the able and elaborate opinion of the Lord Ordinary, I shall not add very many words. It seems to me that the pre-Union status of the heritable office in question,—its rights, its salary, and its fees,—were clearly enough defined, though some cloud of doubt may rest as to its duties. I agree with the Lord Ordinary in thinking that the real question in this case is as to the effect upon the office of the Treaty (and subsequent Act) of Union in 1707. I cannot accept the view presented on behalf of the Treasury that the words of article 20 of the Treaty are absolutely clear and unambiguous to the effect that, while the office itself was reserved to its owner as a right of property, and its salary was therefore saved, the fees appertaining to it were by clear implication effectually abolished unless in so far as purely Scots peerages or other honours should thereafter be created. My first observation is that after the Union the Crown could not, as I think, create a peer of Scotland, though it might create peers of Ireland under the circumstances defined in the Act of Union with Ireland. This is expressly stated by Sir William Anson in The Law and Custom of the Constitution (4th ed., vol. i, p. 201). But, apart from this point, the Lord Advocate's argument is in my judgment unsound, because I consider that the language of article 20 of the Treaty of Union is not unambiguous, but is plainly open to construction. The Treaty was, I apprehend, something in the nature of a bargain between the two countries. Neither of them was thereby absorbed into, or annexed to, the other. The scheme was one of union, and of the "communication" of rights, privileges, and advantages belonging to the subjects of each kingdom, as between the two kingdoms. I think the Treaty contained general heads of agreement between the two countries, leaving,—as is common and usual in ordinary contracts of minor importance and dignity,—a good deal to be settled as matters of detail by subse-

quent express adjustment or otherwise. Now if this view is correct I consider that the post-Union actings of the parties concerned in this particular matter are of the utmost importance. It may be that if the language of article 20 of the Treaty of Union were held to be clear and unambiguous so far as relating to the office in question, no evidence of usage following upon it could be admitted to contradict its plain terms. But if, as I hold, the terms of article 20 of the Treaty are open to construction, evidence of such usage,—by which I mean actings during a long subsequent period by the parties concerned in this matter,—seems to me to be of the highest relevancy in the interpretation of the article. I think this view is in accordance with the principles of construction and interpretation of any ancient document laid down alike by our text writers and our decisions. Now it is amply explained by the evidence in the case why the fees of this office were not exacted for a considerable period after the Union; and it was quite properly conceded in argument that the right, if such existed, to demand them was not lost to the Usher by lack of such demand. But the fact that the fees were, after this gap of about sixty years, exacted by and paid to him continuously and without interruption for much more than a hundred years, down to the time when the present dispute began to arise, is to my mind quite sufficient to explain (so far as explanation or interpretation is necessary) the true meaning of the Treaty of Union as relating to the matters in question and the terms upon which the right to the fees of this hereditary office ought now to be determined. I am for adhering to the Lord Ordinary's interlocutor.

LORD JUSTICE-CLERK — The opinion of Lord Low, which I have read, so accurately and fully expresses the opinion I have formed in this case, that having also heard the opinions of your Lordships, in which I also concur, I feel that I cannot add usefully any words of my own which could but be of the nature of repetition. The Lord Ordinary has also expressed his opinion in the same sense so fully and clearly that I content myself with saying that I agree with all your Lordships that his judgment should be affirmed.

The Court adhered.

Counsel for the Pursuers (Respondents) — Clyde, K.C. — Macphail, K.C. — C. H. Brown. Agent—George J. Wood, W.S.

Counsel fer the Defenders (Reclaimers) Lord Advocate Ure, K.C. — Solicitor-General Hunter, K.C.—Pitman. Agent—Thomas Carmichael, S.S.C.

Wednesday, May 25.

FIRST DIVISION.

[Sheriff Court at Airdrie.

UNITED COLLIERIES, LIMITED *v.* M'GHIE.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58)—*Appeal —Transmission of Process from Sheriff Court—A.S., 26th June* 1907, *sec.* 17 (*f*).

Circumstances in which the Court in a Stated Case under the Workmen's Compensation Act 1906 *granted* upon conditions an order to transmit the process from the Sheriff Court.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *First Schedule, sec.* 15—*A.S., 26th June* 1907, *secs.* 9 *and* 15 (2)—*Minute Constituting Process—Review of Compensation—Application, Form of.*

A workman asked to continue to receive compensation from his employers under the Workmen's Compensation Act 1906. The parties agreed to refer the question of the pursuer's fitness for work to a medical referee in terms of section 15 of the First Schedule to the Act. A joint minute to that effect was accordingly lodged with the sheriff-clerk, who remitted the matter to one of the medical referees. The referee having reported that the pursuer had recovered, the employers lodged a minute craving the Court to interpone authority to the medical referee's certificate and to end the compensation. There was no memorandum of agreement. The Sheriff-Substitute holding that there was no process before him, and that accordingly he could not act until a separate application to end the compensation was made by the employers, dismissed the minute.

Held on appeal that the application "to end the compensation" was properly before the Sheriff-Substitute as arbitrator, and that accordingly he ought to have entertained it and disposed of the case on its merits.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule, sec. (15), as applied to Scotland, enacts, *inter alia*, that the sheriff-clerk, "on application being made to the Court by both parties, may . . . refer the matter" (*i.e.*, the workman's condition) "to a medical referee."

The A.S., 26th June 1907, enacts—sec. ix —"Applications under paragraphs . . . 15 . . . of the first schedule to the Act . . . shall be made by a minute, which shall be lodged in the original process, if any, and if there be no process, a copy of the recorded memorandum certified by the sheriff-clerk shall be lodged along with the minute, and shall be held to be the process. Such minute shall be intimated to the other party or parties interested, and thereafter be disposed of summarily, as if it were