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

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

The Court pronounced this interlocutor—

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

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

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

Thursday, May 16.

FIRST DIVISION.

[Lord Sands, Ordinary.

SELLAR *v.* HIGHLAND RAILWAY COMPANY.

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

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

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

Defences were lodged by the Highland Railway Company.

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

knowledge the pursuer's agents at once, on 28th September 1917, communicated with the Railway Company, the arbiters and oversman, and the clerk to the reference, and intimated that they would not be bound by the oversman's award. The pursuer's said representations were lodged on said 28th September 1917, and they were lodged without prejudice to the pursuer's right to object to the award on the ground of Mr Hogg's disqualification. The pursuer's claim was greatly prejudiced by the influence which Mr Hogg exercised over the mind of the oversman. The arbiters and oversman visited the locus together, and sat together during the whole proceedings, both evidence and speeches, which extended altogether over five days. The matters of fact in dispute between the parties to the said reference were entirely matters of practical engineering and practical salmon-fishing, and the pursuer believes and avers that the oversman in coming to his decision was largely influenced by the views of Mr Hogg, who is a member of the engineering profession. The oversman would not otherwise have entirely disregarded the strong and independent engineering evidence adduced for the pursuer. The said decreet-arbitral is invalid and is not binding on the pursuer, in respect that one of the members of the tribunal was disqualified from acting as an arbiter in the said reference. With reference to the averments in answer the pursuer has no knowledge and makes no admission as to the circumstances attending the appointment and acceptance of office by Mr Hogg or as to the price or value of his shares of the defending company. *Quoad ultra* the averments in answer are denied. (*Ans.* 8) Admitted that during the said arbitration the said Charles Pullar Hogg was a holder of ordinary stock of the Highland Railway Company. Not known when the pursuer became aware of this fact. *Quoad ultra* denied. Explained that the amount so held by him was £3700, that the price paid by him for the said stock was £1529, 5s., that the value thereof at the time of the arbitration was about £1100, and that his whole personal interest in the results of the arbitration was of the most trifling description. Explained further that the said Charles Pullar Hogg was appointed by these defenders entirely on account of his professional standing and reputation and without having in view the fact that he was a shareholder, and that at the time of his acceptance of office as arbiter and during the said proceedings it had escaped the recollection of the said Charles Pullar Hogg that he was a shareholder, and that he applied himself honestly and without prejudice or bias to the duties of the said office. *Quoad ultra* denied."

The pursuer pleaded, *inter alia*—"1. The defender Charles Pullar Hogg being disqualified by personal interest from acting as arbiter in the said reference, the said decreet-arbitral is invalid and falls to be reduced. 3. The defenders, the Highland Railway Company, being bound to appoint under the said submission a duly qualified arbiter in the said reference, and having failed to do so, are liable to make good to the pursuer the loss which he has sustained through their said failure."

The compearing defenders pleaded, *inter alia*—"1. The pursuer's averments being (*a*) irrelevant and (*b*) insufficient in specification the action should be dismissed. 2. The said decreet-arbitral not having been pronounced by the said Charles Pullar Hogg the pursuer's first plea-in-law should be repelled. 3. These defenders being incorporated by Act of Parliament, the said Charles Pullar Hogg was not disqualified from acting as their arbiter on account of his being a holder of their stock, and the pursuer's first plea-in-law should accordingly be repelled. 4. *Separatim*—In any event the pursuer having lodged representations against the proposed findings of the oversman in full knowledge of Mr Hogg's holding of stock is barred from now objecting to the award on that ground."

On 11th February 1918 the Lord Ordinary (SANDS) repelled the first plea-in-law for the defenders under reservation of the question of relevancy of the pursuer's pecuniary conclusions, and the second, third, and fourth pleas-in-law for the defenders, and continued the cause and granted leave to reclaim.

Opinion, from which the *facts* of the case appear:—"In this case pursuer seeks reduction of a decreet-arbitral on the ground that one of the arbiters was disqualified. The objection is in the circumstances of the case technical, but the pursuer is entitled to take advantage of a technical invalidity to get rid of an award which he conceives to be unjust.

"He avers—and this is not disputed—that one of the arbiters was a shareholder in the defenders' company who were parties to the reference, and he pleads that the arbiter was therefore disqualified and that the decreet-arbitral is invalid and falls to be reduced. It was not disputed that an arbiter is disqualified if he is a party to a reference or member of a company or partnership which is one of the parties. A point was made, however, of the fact that the defenders are an incorporated company, and it was contended that in these circumstances it is the corporation through its directors, and not the shareholders, who are the parties. The only authority indicated in support of the distinction was an inconclusive remark by Lord President Inglis in the case of *Smith v. Liverpool, London, and Globe Insurance Company*, 14 R. 931, 24 S.L.R. 672. In my view there is no ground for discriminating. There is a technical difference from a process point of view when the company is incorporated. But the rule which affirms the disqualification of a judge or an arbiter in respect of interest does not rest upon any technical considerations in relation to the forms of process but upon broad grounds of general principle. It has been repeatedly affirmed that the smallness of the interest or the extravagance of the suggestion of bias in the particular case makes no difference. Even the inadvertent failure of a Lord Chancellor so irreproachable as Lord Cottenham to advert to the fact that he

was a shareholder in a company litigant was held to be fatal to a judgment—*Dimes*, 3 Clark (H.L.) 759. An arbiter is in the same position as a judge, and the tender of declinature by judges who are shareholders in incorporated companies is a matter of constant experience. I am of opinion, therefore, that there is no ground for this distinction.

"It was further contended that the pursuer waived any objection, because he, under protest, lodged a representation against the proposed award after he had discovered the arbiter's disqualification. I am unable to sustain this contention. Defenders having submitted arguments in support of this award are not in a position to contend that the invalidity of the proceedings was so manifest that pursuer was bound to let judgment go by default if he meant to challenge them. A party litigant in this Court who is refused leave to reclaim against an interlocutor repelling a preliminary plea is not put to his election either to submit to judgment upon the merits or to waive his objection to the interlocutor. I accordingly repel this contention.

"The remaining argument of the defenders upon this branch of the case is that the award sought to be reduced was that of the oversman, who was unaffected by the disqualification of the arbiter. It appears to me, however, that if one of the arbiters was a person throughout disqualified from acting, the logical result is that there was no oversman and no devolution by two arbiters who were unable to agree. Reduction of the decreet-arbitral on this ground, *i.e.*, that the whole proceedings were null, seems to me to be within the pursuer's pleadings, though these pleadings are not very artistically framed to present this view of the matter. Stress is laid rather upon the influence of the arbiter upon the oversman. I am not so confident about this ground of judgment. The oversman is not in any way obnoxious to the rule that a party cannot be a judge in his own cause. If the award is to be set aside on account of influence upon his mind it must be in virtue of other considerations than that inexorable rule of law which takes no account of the extent of the interest or the reality of the bias. It does not appear to me to be clear that in a case like the present, where counsel for the pursuer at the bar disclaim any suggestion of other than a technical objection to the arbiter, an award must be set aside on the ground that the oversman may have been influenced by that arbiter. In this aspect the case is distinguishable from *Blanshard* v. *Sun Fire Office*, 6 Times L.R. 365, where the arbiter was corrupt in fact as well as in theory. If therefore the prior proceedings in the reference could be ignored and the decreet-arbitral were challenged solely upon the ground that the oversman may have been unduly influenced by Mr Hogg, I should regard the case as not free from difficulty. I think that there might perhaps be room for the contention that in such circumstances one must look at the substance and not at the mere form of the objection to the arbiter, who is supposed to have unduly influenced the oversman. I prefer to rest my judgment upon the more general ground, which I think is covered by pursuer's first plea-in-law, that Mr Hogg, having been disqualified from acting as an arbiter, a decreet-arbitral following upon a reference in which he so acted falls to be set aside.

"I accordingly sustain the first plea-in-law for the pursuer: Repel the first plea-in-law for the defenders, under reservation of the question of relevancy of pursuer's pecuniary conclusions: Find it unnecessary to dispose of pursuer's second and defenders' fifth plea: Continue the cause and grant leave to reclaim."

The compearing defenders reclaimed, and argued—The Lord Ordinary was wrong. As regards judges the general rule was that no man could be judge in his own cause—*Wildridge* v. *Anderson*, 1897, 25 R. (J.) 27, *per* Lord Moncreiff at p. 34, 35 S.L.R. 125—but exceptions to that general rule were early recognised—*Douglas, Heron, & Company*, 1774, Tait's Acts of Sederunt, p. 644, 1 Hailes' Dec. 563; *Heritors of Canongate*, 1789, Tait's Acts of Sederunt, p. 644. In these two cases if the declinature had been sustained, no quorum would have been left to try the cause, but that reason was absent in *Bank of Scotland* v. *Ramsay*, 1738, 5 B. Sup. 206. Where the judge had an interest in a company litigating, the nature of the company must be considered, and if it was incorporated by patent or Act of Parliament, by which a public benefit was intended, the mere holding of shares by a judge did not disqualify him—Ersk. Inst. i, 2, 25. That distinction had been expressly recognised and was declared to be the law as to the chartered banks—A. S. 1st February 1820. It had been held applicable to the case of a chartered canal company—*Spiers* v. *Ardrossan Canal Company*, 1823, 2 S. 252 (N.E. 221)—and where a judge was a stockholder in a bank—*Anderson* v. *Bank of Scotland*, 1840, 15 F.C. 547. Where a judge's interest was as policy-holder in a mutual insurance society a declinature had been sustained—*Aberdeen Town and County Bank* v. *Scottish Equitable Assurance Company*, 1859, 22 D. 162; *Borthwick* v. *Scottish Widows Fund*, 1864, 2 Macph. 595, *per* Lord Justice-Clerk Inglis at p. 613—which ground of declinature was removed by the Court of Session Act 1868 (31 and 32 Vict. cap. 100), section 103. But the true test of whether an individual was judge in his own cause was whether he had a direct personal interest in the suit. A shareholder in an unincorporated company had such an interest, but when an incorporated company litigated it was the *persona* which was litigating and had the direct interest, the incorporators had merely an indirect interest. That principle recognised by Erskine (*cit.*) had been acted on—*Smith* v. *Liverpool, London, and Globe Insurance Company*, 1887, 14 R. 931, *per* Lord President Inglis at p. 938, 24 S.L.R. 672—and it showed that when the judge was not directly a party the quality and extent of his interest were relevant considerations. Railway companies were in an even stronger

position than banks and insurance companies, for they obtained compulsory powers as they were organisations for public utility. *Dimes* v. *Proprietors of the Grand Junction Canal*, 1852, 3 Clark H.L. Cas. 759, turned upon whether under the former law the judge would have been disqualified if he had been acting as a witness. Further, it had been doubted and the principle of the decision did not apply universally—*London and North-Western Railway Company* v. *Lindsay*, 1858, 3 Macq. 99, *per* Lord Cranworth, L.C., at p. 114. *Wauchope* v. *North British Railway Company*, 1863, 2 Macph. 326, at p. 333, was referred to. The same principles applied to voluntarily chosen judges as to those appointed by the State. Here the arbiter had a microscopical interest in a company incorporated for purposes of public utility, and that was not sufficient to disqualify him. Further, if his interest was sufficient to disqualify him the pursuer could not raise the question for he was barred by having proceeded in the arbitration after he was aware of the disqualification. The pursuer should have taken steps at once to prevent the oversman from issuing his award, whereas he lodged representations against the proposed findings—Bell on Arbitration, par. 238; *In re Elliot*, 1848, 2 De G. & Sm. 17. He could not keep up his objection to the arbiter until the decision in the reference had gone against him and then seek to reduce the award.

Argued for the pursuer (respondent)—The Lord Ordinary was right. The same rules applied to arbiters and judges—*Maule* v. *Maule*, 1816, 4 Dow 363, *per* Lord Eldon, L.C., at p. 380; *Murray* v. *North British Railway Company*, 1900, 2 F. 460, *per* Lord Trayner, at p. 465, 37 S.L.R. 370—and a direct pecuniary interest in the cause was sufficient to disqualify either. The interest of a shareholder whether the company was incorporated or not was such a direct interest as would disqualify. *The Bank of Scotland* v. *Ramsay* (*cit.*) might quite well have turned on the difficulty of getting a quorum. The A. S. of 1820 was *ultra vires*, and proceeded on a practice which was unsound—Shand's Practice, vol. i, p. 63—and it also proceeded on the ground of convenience, for all the judges might have invested in bank stock. An infinitesmal interest in an incorporated company was sufficient to disqualify—*Lindsay's* case (*cit.*). The question of incorporation was immaterial—*Dimes'* case (*cit.*). The result of that case had been regarded as applicable to Scotland—*Smith's* case (*cit.*), *per* Lord President Inglis at p. 937. The inference to be drawn from the Court of Session Act was that the general rule applied except in the special cases that Act excepted. The same inference must be drawn from the practice in civil causes of waiving the objection by joint-minute, which expedient seemed of doubtful competency in criminal causes—*Caledonian Railway Company* v. *Ramsay*, 1897, 24 R. (J.) 48, at p. 49, 34 S.L.R. 526. If quantum of interest was material the arbiter here in question had a material interest. *Spiers'* case (*cit.*) was distinguished, for no direct pecuniary interest was involved. One member of the tribunal being disqualified the decision of the whole was bad—*Leeson* v. *General Council of Medical Education and Registration*, 1889, 43 L.R. Ch. D. 366; *The Queen* v. *Meyer*, 1875, L.R., 1 Q.B.D. 173. The pursuer had not waived his objection to the arbiter. The only matter on which waiver was founded was the lodging of representations against the proposed findings, but that had been done under protest and without prejudice, and that did not amount to waiver—*Davies* v. *Price*, 1864, 34 L.J. (N.S.) Q.B. 8; *Ringlands* v. *Lowndes*, 1864, 17 C.B. (N.S.) 514, *per* Bramwell, B., at p. 528; *Haigh* v. *Haigh*, 1861, 3 De G. F. & J. 157, *per* Knight Bruce, L.J., at p. 164, and Turner, L.J., at p. 169. *Elliot's* case (*cit.*) was distinguished, for the arbiter's disqualification was known when he was nominated.

LORD PRESIDENT—It is now well established by the law of Scotland that the holder of shares in a public company is disqualified from acting as arbiter or judge in any action in which the company in which he holds shares is a party. It would be idle at this time of day to review or criticise the authorities which establish that proposition. We are not asked, and could not be asked to reconsider them.

I attach for my own part considerable importance to the statutory enactment in the Court of Session Act of 1868, which by section 103 provides that it shall be no longer a disqualification for any judge, either in this Court or an inferior Court, that he is "a partner in any joint-stock company carrying on as its sole or principal business the business of life and fire or life assurance, where such company is a party to the proceeding in which the judge is called to exercise his jurisdiction." And I rather think that the comment which is made by the first editors (Scott and Brand, p. 111) of the Court of Session Act upon that section is justified when they say—"The remedy applied by this section is of a very limited kind, as it still retains to a judge the right to decline where (1) he is a partner in any joint-stock company which does not carry on as its sole or principal business the business of life and fire or life insurance; (2) where he is possessed in his individual right of any stock or shares in an incorporated company; and (3) where he is a partner in any other company not being a chartered company, however numerous the company may be." If these observations are sound—and I think they are—they apply in terms to the present case.

It was not seriously urged before us that any distinction could be drawn between incorporated and unincorporated companies, and it is out of the question to hold that any distinction can be drawn relative to the amount of the holding of the arbiter or judge in the particular company concerned.

I agree with the conclusion reached by the Lord Ordinary on all the questions raised in the case and with the reasoning by which he has arrived at it, and I propose to your Lordships that we should adhere to his interlocutor and remit to him to proceed with the case.

LORD MACKENZIE — I am of the same opinion. The Lord Ordinary has given effect in this case to a well-established rule, and we cannot take any other course.

I am unable to draw any distinction between the position of Lord Cottenham in the case of *Dimes* v. *Proprietors of the Grand Junction Canal and Others*, 1852, 3 Clark (H.L.) 759, and the position of Mr Hogg in the present case.

With regard to the second question, as to whether the pursuer has waived any objection, I think that looking to the stage of the proceedings at which it came to his knowledge that Mr Hogg was a shareholder in the company the argument of the reclaimers cannot be successfully maintained. If it had come to his knowledge before the proceedings were opened, a different conclusion might have been reached.

LORD SKERRINGTON—I agree with your Lordships in thinking that the judgment of the Lord Ordinary was right upon each of the two points which were submitted to us for review.

LORD JOHNSTON was absent.

The Court adhered.

Counsel for the Pursuer (Respondent)—Constable, K.C.—J. S. Mackay. Agents—J. Miller Thomson & Company, W.S.

Counsel for the Defenders (Reclaimers)—Macphail, K.C.—J. H. Millar. Agents—J. K. & W. P. Lindsay, W.S.

HOUSE OF LORDS.

Friday, June 28.

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

MONTGOMERY *v.* ZARIFI AND OTHERS.

(In the Court of Session, July 6, 1917, 54 S.L.R. 562, and 1917 S.C. 627.)

Husband and Wife—Marriage Contract—Divorce—Invocation by Contract of Law of England.

By a settlement executed prior to the marriage of a domiciled Scotchman to a domiciled Englishwoman it was provided—"It is hereby agreed and declared by all the parties hereto, and particularly by the husband, that these presents shall be construed, and that the rights of all parties claiming hereunder shall be regulated, according to the law of England, in the same manner as if the husband were now domiciled in England and as if the husband and wife were to remain henceforth during their respective lives domiciled in England."

The husband having obtained in the Scotch courts a decree of divorce for adultery against the wife, he sought declarator that a liferent in favour of the wife of certain funds held under the settlement had been lost by her and should be paid to him on the footing of her death, or alternatively that he was entitled to such an equitable modification of the settlement as would have been made by the English courts if the divorce had been there granted.

Held, sus. decision of the First Division, that the trustees under the settlement fell to be assoilzied from the earlier conclusions, and that the alternative conclusion fell to be dismissed.

This case is reported *ante ut supra.*

The pursuer Montgomery appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—The appellant in this case is and always has been domiciled in Scotland. On the 31st October 1912 he was married to the respondent Fanny Zarifi, who prior to her marriage was domiciled in England. The other respondents are the trustees of the settlement, dated 31st October 1912, made in contemplation of the marriage, who were then and are now domiciled in England.

On the 12th October 1914 the appellant in an action raised in the Court of Session in Scotland obtained a decree of divorce against the respondent Fanny Zarifi on the ground of her adultery. There are no children of the marriage.

This action was instituted by the appellant on the 15th June 1915 to have it found and declared that since and by virtue of the said decree of divorce the respondent Fanny Zarifi had lost and amitted any provisions and rights provided to her during the lifetime of the appellant in the said settlement of the 31st October 1912 as if she were naturally dead as at the date of the said decree of divorce; and that she is bound to concur in the payment by the trustees of the said settlement to the appellant of the provisions made in her favour during the lifetime of the respondent by the said settlement; and that it should be declared that the life interest of the respondent Fanny Zarifi in the property vested in the trustees of the said settlement ceased and determined as at the date of the said decree of divorce; and that the income should be paid to the appellant as if she were dead; and, as an alternative, to have it found and declared that under the said settlement the appellant is entitled to such equitable modification of the provisions of the settlement as he would have obtained according to the law of England if the domicile and the decree of divorce had been in England; and that there should be paid over to the appellant such portion of the income under the said settlement as shall be determined to be in accordance with the practice of the English courts, or as shall be found to be just and equitable in the circumstances of the case.

Lord Dewar, before whom as Lord Ordinary the action was tried, dismissed it on the ground that the Court of Session had no jurisdiction to entertain the action.

His decision was reversed by the First Division of the Inner House, where it was held that the Court of Session had jurisdic-