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

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

Their Lordships dismissed the appeal with expenses.

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

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

COURT OF SESSION.

Wednesday, October 15.

FIRST DIVISION.

SCOTTISH INDIA-RUBBER COMPANY, LIMITED, PETITIONERS.

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

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

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

any class of shares shall be interfered with, except by a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class, and confirmed at a meeting of shareholders of that class, in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all shareholders of the class. (2) Where an order is made under this section an office copy thereof shall be filed with the Registrar of Companies within seven days after the making of the order, or within such further time as the court may allow, and the resolution shall not take effect until such a copy has been so filed."

The Scottish India-Rubber Company, Limited, *petitioners*, presented a petition of which the *prayer* was in the following terms:—"To confirm the alteration of the provisions of the company's memorandum of association with respect to its objects set forth in the said special resolution of the company and of the deferred shareholders of the company passed on 9th November 1917 and confirmed on the 26th November 1917, or to do further or otherwise in the premises as to your Lordships may seem proper."

The petitioners *averred, inter alia,* "that the . . . special resolution [in question] was submitted to and approved of by a separate meeting of the deferred shareholders of the company, . . . and that approval was confirmed at a subsequent meeting of the deferred shareholders called for the purpose of considering such confirmation."

No answers were lodged, and on 24th December 1917 the Lord Ordinary officiating on the Bills (HUNTER) remitted to George H. Boyd, solicitor, to inquire into and report upon the facts and circumstances set forth in the petition, as to the reasons for the proposed alteration of the company's memorandum of association, and as to the regularity of the present proceedings.

The reporter *reported* as follows:—"The petition is stated to be one for 'confirmation of alteration in the memorandum of association,' and prays that your Lordships shall 'confirm the alteration of the provisions of the company's memorandum of association with respect to its objects set forth in' a special resolution of the company passed on 9th November 1917 and confirmed on 26th November 1917. In point of fact the special resolution set forth in the petition makes no alteration on the provisions of the company's memorandum with respect to its objects, and the statements in the petition show that what is aimed at is an alteration or reorganisation of the share capital. The Scottish India-Rubber Company, Limited, was incorporated under the Companies (Consolidation) Act 1908 on 10th May 1910. The share capital was £5000 divided into 4000 ordinary shares of £1 each and 1000 deferred shares of £1 each. It is stated that of the above share capital there have been issued 3500 ordinary shares of £1 each fully paid, and 1000 deferred shares of £1 each fully paid. Messrs Hourston & Macfarlane, C.A., Glasgow, the auditors of the company, certify as to this statement being correct at the date of presenting the petition, and that since the petition was presented further 50 ordinary shares have been issued. As already mentioned by the reporter, it appears that while the petition prays your Lordships to confirm an alteration of the company's memorandum with respect of its objects, the statements in the petition show that what is contemplated is an alteration or reorganisation of capital. The company was incorporated with two classes of shares, viz., ordinary shares and deferred shares, and apparently now desires to have only one class of shares, and proposes to achieve this end by the surrender of the deferred shares to the company and a consolidation of the surrendered shares with the existing ordinary shares. Apparently the company do not propose to issue new shares in exchange for the surrendered shares, nor to reduce the capital by the amount of the surrendered shares. The company apparently intends to hold the shares so converted 'available for subscription and allotment as ordinary shares.' The company endeavours to attain its object by passing a special resolution deleting clause 5 of its memorandum and resolving that in lieu thereof there shall be substituted a new clause. Clause 5 of the memorandum is in the following terms:—'The share capital of the company is five thousand pounds, divided into four thousand ordinary shares of one pound each and one thousand deferred shares of one pound each, with power from time to time to increase the same and also with power to divide the shares in the present or future capital of the company into several classes, and to attach thereto, respectively, any preferential, deferred, qualified, or special rights, privileges, or conditions. The ordinary shares shall confer the right to a dividend of five per cent. per annum on the capital paid up thereon before any dividend is paid on the deferred shares, and any surplus profits thereafter shall be divisible rateably among both classes of shares. The ordinary shares shall rank in the case of winding up in priority to the deferred shares.' The special resolution of the company making the alteration is in the following terms:—'That clause 5 of the memorandum of association shall be deleted and that in lieu thereof there shall be substituted the following clause:—"The share capital of the company is £5000, divided into 5000 ordinary of £1 each, with power from time to time to increase or reduce the same, and also with power to divide the shares in the present or future capital of the company into several classes and to attach thereto respectively any preferential, deferred, qualified or special rights, privileges, or conditions."' The reporter is respectfully of opinion that where a company reorganises its capital under the powers given by section 45 of the Act the Court should not be asked to confirm an alteration in the memorandum, but to confirm the special resolution of the company modifying the conditions contained in the memorandum and to direct an office copy of the order of the Court to be filed with the registrar. The reporter understands that it is the practice of your Lordships also to direct that notice of the

registration of the order shall be given in the *Edinburgh Gazette.* The reporter refrains from expressing any opinion as to whether the prayer of the petition may be amended so as to permit of your Lordships confirming the special resolution above quoted as a resolution of the company within the meaning of section 45, but it seems to the reporter that, preliminary to the resolution deleting clause 5 in its entirety and substituting the clause contained in the special resolution, the company should have resolved to reorganise its existing share capital by consolidating the two different classes of shares into one class and then resolved that in order to permit of this reorganisation receiving effect the conditions contained in the company's memorandum should be modified by deleting clause 5, and in lieu thereof substituting the clause contained in the special resolution as passed. Assuming that your Lordships grant leave to the company to amend the prayer of the petition so as to convert it into a petition praying your Lordships to confirm the special resolution above quoted, the reporter respectfully submits that, on the documents as they at present stand, the company has not put itself in the position to ask your Lordships to confirm the special resolution as a resolution of the company within the meaning of section 45 of the Act. The company has passed no consolidating resolution. Apparently they contemplate passing a resolution to consolidate the two classes of shares after the memorandum has been altered, by the deletion of clause 5 as it at present stands and the substitution of the clause contained in the special resolution. It seems to the reporter that if your Lordships confirmed the resolution in the terms in which it has been passed the position would be that on the company's memorandum as it would then stand the share capital would be stated to be all of one class, while in point of fact it would, until the company passed the necessary consolidating resolution, continue to consist of two classes."

Thereafter the petitioners lodged a minute in which they proposed, if the Court so permitted and required, to amend the prayer of the petition by deleting the part of the prayer quoted *supra* and by substituting therefor the following—"To confirm the said special resolution of the company passed on 9th November 1917 and confirmed on 26th November 1917, modifying the conditions contained in the company's memorandum of association and to direct that a copy of the order of Court be filed with the registrar, and that notice of the registration of the order be given in the *Edinburgh Gazette.*"

Thereafter the reporter, having had the minute laid before him, issued a supplementary report in which he repeated the two paragraphs of his former report, last above quoted.

After hearing counsel the Court, without delivering opinions, granted the prayer of the petition amended as suggested in the minute.

Counsel for the Petitioners — Gentles. Agents—Macrae, Flett, & Rennie, W.S.

Wednesday, October 15.

FIRST DIVISION.

[Sheriff Court at Kirkcudbright.

STIRLING *v.* GRAHAM.

Process—Appeal—Competency—Removing—Appeal against Allowance of Proof in Removing—Court of Session Act 1825 (6 *Geo. IV, cap.* 120), *sec.* 44—*Sheriff Courts (Scotland) Act* 1913 (2 *and* 3 *Geo. V, cap.* 28), *sec.* 2.

Held that an appeal against an interlocutor allowing proof in an action of removing was competent.

The Court of Session Act 1825 (6 Geo. IV, cap. 120) enacts—Section 44—"And be it further enacted by the authority as aforesaid that when any judgment shall be pronounced by an inferior court ordaining a tenant to remove from the possession of lands or houses, the tenant shall not be entitled to apply as above by bill of advocation to be passed at once, but only by means of suspension, as hereinafter regulated."

The Sheriff Courts (Scotland) Act 1913 (2 and 3 Geo. V. cap. 28) enacts—Section 2—"In lieu of section twenty-eight there shall be inserted in the principal Act (7 Edw. VII. cap. 51) the following section:—28 (1) Subject to the provisions of this Act, it shall be competent to appeal to the Court of Session against a judgment either of a sheriff or of a sheriff-substitute if the interlocutor appealed against is a final judgment, or is an interlocutor—(*d*) Against which the sheriff or sheriff-substitute either *ex proprio motu* or on the motion of any party, grants leave to appeal. (2) Nothing in this section nor in section twenty-seven of this Act contained shall affect any right of appeal or exclusion of such right provided by any Act of Parliament in force for the time being."

James Stirling, Laurieston Hall, Kirkcudbright, *pursuer*, brought an action of removing in the Sheriff Court at Kirkcudbright against John Graham and Robert Graham, *defenders.*

The pursuer was the proprietor of the farm of Bargatton in the parish of Balmaghie and stewartry of Kirkcudbright, and the defenders were joint tenants of the farm.

On 7th July 1919 the Sheriff-Substitute (NAPIER) allowed a proof, and on the motion of the defenders allowed them or either of them to appeal to the Court of Session.

The defender John Graham appealed.

In the Single Bills the pursuer objected to the competency of the appeal, and argued—Any exclusion of appeal from the Sheriff Courts to the Court of Session existing as at 1913 was saved by the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), as amended by the Sheriff Courts (Scotland) Act 1913 (2 and 3 Geo. V, cap. 28), section 2. After a final decree in an action of removing the only competent method of review was by way of suspension—Judicature Act 1825 (6 Geo. IV, cap. 120), section 44; *Barbour* v. *Chalmers & Company*, 1891, 18 R. 610, *per*