on which the two superiors were directly claiming for apportionment of it between them. It is only that accidentally the *cumulo* feu-duty or rental, as the case may be, happens to form a standard with reference to which the quantum of each of the separate and unconnected claims of the two superiors falls to be assessed. This may make a point of convenience in favour of assessing the two claims simultaneously. But mere convenience is not enough to avoid the said process rule. If either of the two superiors had sued alone for redemption of casualties, a plea by the defender of all parties not called would not, I think, have been tenable.

I concur in the judgment which your Lordships propose.

LORD SKERRINGTON did not hear the case.

The Court recalled the interlocutor reclaimed against, sustained the first plea-in-law for the defender, and continued the cause to enable the pursuers to submit an amendment.

Counsel for the Pursuers (Respondents)—Macmillan, K.C. — Maitland. Agents — Murray, Beith, & Murray, W.S.

Counsel for the Defenders (Reclaimers)—Dean of Faculty (Constable, K.C.)—Graham Robertson — Macintosh. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Wednesday, July 6.

SECOND DIVISION.

[Lord Anderson, Ordinary.

MACGREGOR *v.* LORD ADVOCATE AND ANOTHER.

Crown—War Department—Jurisdiction of Civil Courts—Liability of War Department for Negligence of Motor Transport Driver.

An action of damages for negligence will not lie against the Crown, the Crown not being liable for the wrongous acts of its servants.

Held that an action of damages by a member of the public against the Lord Advocate as representing the War Department for personal injuries sustained by the pursuer through being knocked down and injured by a motor car driven by a sergeant of the Motor Transport Company, Royal Army Service Corps, was *incompetent.*

Duncan Gregor Macgregor, medical student, Joppa, *pursuer,* brought an action against the Lord Advocate as representing the War Department and Sergeant Robert Macfarlane, Motor Transport Company, Royal Army Service Corps, Leith Fort, Leith, *defenders,* in which he claimed payment of £1200 in name of damages for personal injuries sustained through being knocked down and run over by a motor car belonging to the War Department and driven by the defender Robert Macfarlane.

The defender, the Lord Advocate, pleaded —"1. The War Department not being liable in damages for the wrongful or negligent act of the defender, the said Sergeant Robert Macfarlane, the action, in so far as laid against the defender as representing the said Department, is incompetent and should be dismissed."

On 27th May 1921 the Lord Ordinary (ANDERSON) sustained the first plea-in-law for the defender the Lord Advocate as representing the War Department, and dismissed the action in so far as laid against him.

Opinion.—"In this case the pursuer sues the defenders, conjunctly and severally, for damages in respect of personal injuries. The pursuer was knocked down and severely injured by a motor car driven by the defender Sergeant Robert Macfarlane, who is a driver in the Royal Army Service Corps. The said defender was at the time driving said motor car in the course of his duty as a British soldier.

"The Lord Advocate, as representing the War Department, pleads that the action in so far as laid against him should be dismissed as incompetent.

"This plea was based on the constitutional principle that a department of State cannot be sued in an action claiming damages for a wrong. Each department of State, it was said, is a branch of the Government, the Government constitutionally is the Sovereign, and the Sovereign can do no wrong, personally or by any of his ministers, cognisable in a court of law.

"It was conceded by the pursuer's counsel that this constitutional principle is recognised in England—*Feather,* 6 B. & S. 257; *Tobin,* 16 C.B., N.S. 310; *Canterbury,* 1 Philip 321; Addison on Torts (8th ed.), 140; Bevan on Negligence, i, 217, 220. Redress in England may be had by a subject against the Crown only where the claim is for implement of a contract, or for damages in respect of breach of contract — *Thomas,* L.R., 1874, 10 Q.B. 31; *Windsor and Annapolis Railway Company,* L.R., 1886, 11 A.C. 607—and then the subject must proceed, not by ordinary action, but by petition of right.

"It was maintained, however, by the pursuer's counsel that in Scotland this constitutional principle does not apply, but that the Crown may be sued in the Scottish Courts in respect of a wrong.

"As the constitution of Scotland has been the same as that of England since 1707 there is a presumption that the same constitutional principles apply in both countries. The pursuer's counsel was unable to refer me to any case in Scotland where the Crown or any department of State had been sued in respect of a wrong. He founded, however, on these three considerations — (1) That in England no action lies against the Crown even on contract, whereas in Scotland an action on this ground has always been competent. I was not impressed by this consideration, as I regard the English practice of proceeding by a petition of right to be a mere matter of judicial machinery.

"The petition presupposes a 'right' in the subject which according to English pro-

cedure falls to be vindicated in that way.

"(2) The Crown Suits Act of 1857, sec. 1, was founded on. Reference is there made to actions to be instituted in Scotland on the behalf or against Her Majesty or on the behalf or against any public department, and it was argued that this enactment thereby recognised that *any* action might be raised against the Crown or a department of State. That contention does not appear to me to be sound. The enacting words must in my opinion be controlled and modified by the constitutional principle I have alluded to, and the statutory provision is thus confined to those actions which may competently be raised.

"(3) It was urged that the ordinary rule of the common law fell to be applied whereby a master is made vicariously responsible for the act of an employee performed in the course of his employment. I am not prepared to hold that a soldier serving the State is an employee in the sense of this common law rule, nor am I prepared to affirm that if he is, the War Department is his 'master' in the sense of the rule.

"There is no reference to this question in any of the institutional treatises on the law of Scotland, nor is there any Scottish case which expressly decides the point maintained by the Lord Advocate. There are, however, judicial dicta which support the view contended for on behalf of the War Department. In the case of *Smith*, 25 R. 112, a bombardier raised an action against the Lord Advocate as representing the War Department, in which he concluded, *inter alia*, for damages in respect of wrongful acts of a court-martial by which he had been tried. The action failed and the Lord Ordinary (Kincairney) in dealing with the claim for damages said at p. 121—'There remains the conclusion for £750 as damages for the wrongs which the pursuer has suffered through the illegal convictions of which he complains. Now on this point the question does not arise whether this Court could set aside the decrees of the court-martial complained of as *ultra vires* or incompetent. I am disposed to think that it could not. But I am not asked to interfere in that manner, for these illegal proceedings have already been set aside by competent military authorities. The pursuer does not challenge the proceedings of the military authorities, but rather founds on them, and maintains or may maintain that they prove conclusively that he has suffered a legal wrong. But the question is whether he can make any claim against the War Department for that wrong. He might probably have sued those members of the court-martial who did the wrong, if it could be shown that their proceedings were incompetent or *ultra vires*. But I am unable to see on what principle the War Department can be made liable. There is no authority for the proposition that when a Court falls into error or acts incompetently or exceeds its jurisdiction any department of the State can be made answerable. There is no reason why there should be such liability for the errors of courts-martial more than for the errors of other civil or criminal courts. It is said that the War Department is liable for the faults of the officers who formed the courts-martial as being the servants of the War Department; the answer is that they were not the servants of the War Department but the servants of the Crown; and if it be said that this action, although nominally against the War Department, is really against the Crown the conclusive answer appears to be that the Crown cannot be sued for wrong done by itself or its servants. It is settled, indeed, that an action will lie against the Crown on a contract entered into by the servants of the Crown or for breach of contract by the servants of the Crown — *Thomas* v. *The Queen*, 10 L.R., Q.B. 43; *Windsor Railway Company* v. *The Queen*, 11 L.R., A.C. 614. In these cases it was, I think, clearly recognised that the Crown could not be made liable in damages for wrong or delict or quasi-delict. Nor, it is thought, can it be liable where the damage has arisen from the negligence of the servants of the Crown — *Viscount Canterbury* v. *Attorney-General*, 1842, 1 Philip Ch. Cas. 306; *Lord Advocate* v. *Hamilton*, 29 S.L.R. 213. Questions of delicacy may arise in applying this principle, but I am unable to think that there is any doubt that neither the Crown nor any public department can be liable for the blunders of a court or of the officers supposing themselves to form a court, or of the Commander-in-Chief of the Forces in India. On the whole I am satisfied that the present case cannot be supported in any of its parts and that the defender is entitled to absolvitor.' The Second Division adhered and Lord Young at p. 123 made these observations as to the conclusion for damages—'I omitted to refer to the conclusion for damages. What I have to say upon that is, that while any servant in the public service may have an action for damages against any individual who has done him a wrong, even in connection with military service, I know of no authority for a claim of damages against Her Majesty's Government or any public department of Her Majesty's Government. Any individual in the public service may so treat another as to subject himself personally in damages, and the damages may be recovered in a court of law, but there is no authority for an action against the Government or a public department of the Government, which is the same thing, for all the departments in the Government just constitute the Government as representing Her Majesty.' In the case of *Wilson*, 7 F. 168, in which a regiment of volunteers and its commanding officer were sued for damages in respect of the death of a child, killed by an ammunition waggon, the Lord Ordinary (Kyllachy) said at p. 170—'In this case I have come to the conclusion that the action cannot be sustained as against Colonel Mackay as representing the volunteer regiment, and as holder and administrator of its funds. These funds belong to the Government—that is to say, the Crown—and it is, I think, an accepted doctrine that the Crown cannot be liabled or sued for damages in respect of

the "torts"—the wrongful acts of its officers. I therefore propose to dismiss the action so far as directed against Colonel Mackay as representing the regiment.' This part of the Lord Ordinary's decision was reversed, but the general proposition laid down by the Lord Ordinary was not challenged.

"These judicial dicta support the presumption to which I have alluded. As I find myself in entire agreement with the views expressed by these learned judges I shall sustain the first plea stated for the Lord Advocate and dismiss the action in so far as it is laid against him.

"As counsel for the other defender conceded that the pursuer's averments were relevant I shall appoint an issue to be lodged for the trial of the cause."

The pursuer appealed, and argued—The action was competent. There was no reason why the maxim *qui facit per alium facit per se* should not apply to a department of State as well as to a private person. The defenders' plea rested on a theory of mediæval English jurists which never had any application in Scotland. This theory meant that the King was not subject to the jurisdiction of his own courts either in contract or in tort. In England the peculiar procedure of suing by petition of right had been introduced to remedy this. In Scotland, however, the Court of Session had always had jurisdiction over the King personally—Balfour's Practicks, p. 267, *A* v. *B* 1534, M. 7321; Tyler's History of Scotland, ix, p. 289. Subsequent cases had always assumed this principle and had only dealt with the proper procedure—*Hay* v. *Officers of State*, 1832, 11 S. 196; *King's Advocate* v. *Lord Dunglass*, 1836, 15 S. 314; Crown Suits Act, 1857 (20 and 21 Vict. cap. 44); *Somerville* v. *Lord Advocate*, 1893, 20 R. 1050, *per* Lord Kyllachy at p. 1067; Lord Kincairney at p. 1072, and Lord M'Laren, 30 S.L.R. at p. 1075; Judicial Review, v, p. 368; Dicey's Law of the Constitution, 8th ed. pp. 7, 8. In England in actions of tort the action was only competent against the individual, but the practice of the Crown was to pay the amount in which the defender was found liable—Dicey, Law of the Constitution, 8th ed. p. 557. The only authorities *contra* were—*Smith* v. *Lord Advocate*, 1897, 25 R. 112, 35 S.L.R. 117, and *Wilson* v. *1st Edinburgh City Royal Garrison Artillery Volunteers*, 1904, 7 F. 168, 42 S.L.R. 138. *Tobin* v. *The Queen*, 1864, 16 C.B. (N.S.) 310, 33 L.J. (C.P.) 199, showed the distinction between suing an officer for whom the Crown would not be liable because of his wide discretion, and a servant who would have no such discretion. In *The Queen* v. *Williams*, 1884, 9 A.C. 418, the Executive Government of New Zealand had been held liable for negligence.

Counsel for the respondent were not called on.

LORD JUSTICE-CLERK—I cannot see any ground whatever for disturbing the Lord Ordinary's judgment.

I have always understood, both from my reading and experience of Scots cases, that an action of damages for negligence such as the present—an action for reparation as it is properly called in Scotland—will not lie against the Crown, for the reason that the Crown is not liable for the wrongous acts of its servants. There is not much authority on the subject—I think there are only the two cases to which Mr King Murray referred—*Smith* v. *Lord Advocate*, 25 R. 112, and *Wilson*, 7 F. 168; there, however, this precise point was raised, and in both of them it was completely negatived.

In *Smith* the action related to various things, but there was a conclusion for damages which was supported by this averment—"The pursuer claims compensation for the injury and indignity he suffered in consequence of the wrongful imprisonment aforesaid." In negativing that conclusion the Lord Ordinary, Lord Kincairney, said—"There remains the conclusion for £750 as damages for the wrongs which the pursuer has suffered through the illegal conviction of which he complains." Having dealt with that matter from various points of view his Lordship concludes by saying—"If it be said that this action, although nominally against the War Department, is really against the Crown, the conclusive answer appears to be that the Crown cannot be sued for wrong done by itself or its servants." In the Inner House that point was not explicitly dealt with by all their Lordships; but the Lord Justice-Clerk says this—"On the whole matter I agree with the Lord Ordinary and think that his interlocutor should be affirmed." "There is," Lord Young remarks, "nothing in the common or statute law of Scotland entitling us to give any of the remedies which we are asked to give, and on that ground I think the defences must be sustained." Lord Trayner said—"I agree that it is impossible to give the pursuer decree under any of the conclusions of the summons." Lord Moncreiff said the same thing; and then Lord Young added—"I omitted to refer to the conclusion for damages. What I have to say upon that is, that while any servant in the public service may have an action of damages against any individual who has done him a wrong, even in connection with military service, I know of no authority for a claim of damages against Her Majesty's Government, or any public department of Her Majesty's Government. Any individual in the public service may so treat another as to subject himself personally in damages, and the damages may be recovered in a court of law, but there is no authority for an action against the Government or a public department of the Government, which is the same thing, for all the departments in the Government just constitute the Government as representing Her Majesty." Accordingly the Court adhered to the judgment of the Lord Ordinary. In the case of *Wilson*, Lord Kyllachy, the Lord Ordinary who decided the case, distinctly laid down the law to the same effect. His judgment was affirmed by the Inner House, but the part of his opinion which relates to the matter here in question was not brought under review. In our text books, including "Glegg on Repara-

tion," which is the most recent publication on the subject, the law is distinctly stated to the same effect.

We have had no argument as to what was the effect of the Union of the two kingdoms in 1707, but it seems to me that the legislation that then took place almost necessarily resulted in this, that the position of the Crown in such matters must be the same on both sides of the Border. Accordingly, although few questions have arisen, the English decisions have been accepted as correctly expressing the law of Scotland. Mr Glegg in his book, in the chapter headed "Liability to be Called as Defender," says—"The general rule that every wrongdoer is liable to answer in an action of damages, requires no explanation, and only apparent exceptions call for notice." "The chief of these," he continues, "is the case of the Crown. The maxim that the King can do no wrong takes away the ground of an action of damages, and leaves the injured party without a remedy in a court of law." Then he goes on to say—"This protection extends to public departments, to officers of public departments when their action has been instructed by the State, and to British subjects carrying out the orders of a foreign sovereign in his territory."

I confess I never had any doubt that the view to which the Lord Ordinary has given effect is sound, and I have no doubt now. Mr King Murray put before us all the cases he has discovered which bear upon the matter, and I am satisfied he has made an exhaustive investigation. Of these the only ones in the Court of Session which appear to touch the question of the liability of the Crown for negligence are the two cases I have referred to, and they are both against the contention.

On these grounds I see no reason for interfering with the Lord Ordinary's interlocutor, and I think we ought to refuse the reclaiming note.

LORD DUNDAS—I am of the same opinion. I think the interlocutor reclaimed against is clearly right. "It is," as Lord Kyllachy observed in the case of *Wilson* (7 F. 168), "an accepted doctrine that the Crown cannot be liable or sued for damages in respect of 'torts'—the wrongful act of its officers." His Lordship, as Lord Ordinary, decided another branch of the case against the Crown, for in *Wilson* the Crown had in fact intervened to conduct the defence for the regiment and its colonel, Colonel Mackay, but while the Crown successfully reclaimed on that point, the pursuer did not even take advantage of the reclaiming note to raise any challenge of the doctrine laid down by the Lord Ordinary upon the important point that concerns us here. I have no doubt the law laid down by Lord Kyllachy there is correct. I think the matter is concluded by authority so far as the Court of Session is concerned, and I am for adhering.

LORD SALVESEN—If this question were open the argument for the reclaimer would be almost irresistible. No reason has been suggested why a department of State should not be answerable like a municipal corporation or any ordinary employer for the proper conduct of its business. The present state of the law as it has been settled, in England does not appear to me to be satisfactory, because it leaves it in the option of a department to accept liability where it pleases, and to repudiate liability where pressure is not brought upon it, possibly from political sources, to accept liability. I do not think it is desirable, from the point of view of public policy, that a department should be in that position, and it may well be that the present state of matters ought to be the subject of legislative amendment.

Treating this as a pure question of the common law of Scotland, however, I think it is settled by authority. The law of England seems to have been settled for a long period, and it is substantially to the effect that while the Crown may after certain procedure be sued for breach of contract, it cannot be sued for the negligence of a servant of the Crown. Authoritative pronouncements in Scotland are extremely meagre, but such as they are they seem to have followed the English rule, that rule being originally derived from a doctrine that is no longer accepted, viz., the doctrine that the King can do no wrong. But as your Lordship in the chair has pointed out, it would be anomalous if the liability of a Crown Department in Scotland differed from the liability of a Crown Department in England, and as the law has been long fixed in England and has been adopted, as I think, by our judges, it seems to me that we must simply follow the decisions which have been pronounced and adhere to the interlocutor of the Lord Ordinary.

LORD ORMIDALE did not hear the case.

The Court adhered.

Counsel for the Pursuer—Morton, K.C.—King Murray. Agent—Allan M'Neill, S.S.C.

Counsel for the Lord Advocate—Solicitor-General (C. D. Murray, K.C.)—J. B. Young. Agent—Campbell Smith, S.S.C.

Counsel for the Defender Robert Macfarlane—Keith. Agent—Herbert Mellor, S.S.C.

Saturday, July 2.

FIRST DIVISION.

ROBERTSON'S TRUSTEES *v.* HORNE AND OTHERS.

Succession—Will—Construction—Division per Stirpes or per Capita.

A testator who had six sisters and one brother directed his trustees to divide his estate into seven shares, and to divide one-seventh equally between B, C, and D (the children of my deceased sister A) and the children of E, the deceased daughter of the said A. *Held*, on the evidence derived from the deed as a whole, that the portion of the estate in question was divisible *per stirpes*