also cited and endorsed the statement of the law by James, L.J., in the case of *in re Henley*—"Whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown's right prevails."

Such being the rule of the common law of England, the question remains whether that rule does not prevail in Scotland. It has always been allowed, and it is common ground in the present case, that the statute of Queen Anne extends to Scotland the provisions of the statute of Henry VIII. The contention of the appellant is that it does more, and extends to Scotland all the prerogative rights of the Crown in regard to the recovery of its revenue. The statute of Queen Anne provides for the institution of a Court of Exchequer in Scotland in pursuance of the Act of Union. The section of the statute chiefly in question is section 7. This section is expressed with reference to the new Court of Exchequer established in Scotland by the statute. Section 6 of the statute enacted that all matters touching the Crown revenue and the remedies and means for recovering the same should be within the jurisdiction and authority of the Court of Exchequer in Scotland, and they were thereby annexed to the said Court. By the common law of England the sovereign had the right of removing into the Court of Exchequer any suit or proceeding relating to the Crown revenue (Chitty on Prerogatives of the Crown, p. 244).

On a consideration of the Act of Queen Anne I am unable to adopt the view that the extension to Scotland of the Royal prerogative thereby made is limited in its scope to the statute of Henry VIII. The first part of the section enacts that all obligations, &c., taken for Crown debts shall have the full force and effect of obligations, &c., taken or acknowledged in the Court of Exchequer in England, according to the purport, true intent, and meaning of the statute in that behalf made in England in the three and thirtieth year of the reign of King Henry the Eighth, or any other law or statute, or any practice, custom, or usage in the Court of Exchequer in England, or by virtue of the royal prerogative. The section proceeds to enact that all suits or prosecutions for debts to the Crown within Scotland shall be in the Court of Exchequer in Scotland, and that the Crown shall be preferred and have preference in all such suits and proceedings in that Court according to the said statute of Henry VIII and according to the uses, course and practice of the Court of Exchequer in England, "and shall have and enjoy such and the same prerogatives as well in and about pleadings and in all other matters and things as by any the laws in England or course of Exchequer in England have been, are, or ought to be allowed"; and it concludes by enacting that the bodies and property of debtors to the Crown shall be "subject and liable by extent, inquisition, and seizures, or by any other process, ways, or means, to the payment of such debts, duties, or revenue to the Crown, and in such and the same manner and form to all intents and purposes as hath been or is used in the Court of Exchequer in England in like cases."

It is, as I have said, common ground that the statute by this section extends to Scotland the prerogative of first execution in proceedings for the recovery of Crown debts defined by the statute of King Henry VIII. The amplitude of the terms used in the section appears to me to reach beyond this, and to be such as to have the effect of extending to Scotland the royal prerogatives generally according to the law of England in relation to all proceedings for the recovery of Crown revenue. If this is so, there prevails in Scotland the wide prerogative right which gives "a preference in favour of the Crown in all cases and touching all rights of what kind soever where the Crown's and the subject's rights concur and so come into competition" (*Rex* v. *Wells*, 16 East. 278, and *New South Wales Taxation Commissioners* v. *Palmer* [1907] A.C. 179, at pp. 185-6).

The debtor here has been divested of her estate, and it stands transferred to the trustee in her sequestration. The trustee, however, holds for the creditors according to their just rights and preferences. There is nothing in the Bankruptcy Acts to make this transference to the trustee operate to cut down the Crown's right of preference, and it follows that in making the rankings he is bound to give effect to it.

I am accordingly of opinion that the appeal falls to be sustained.

The Court sustained the appeal.

Counsel for the Appellant—Sol.-Gen. Dewar, K.C.—Pitman. Agent—John S. Pitman, W.S., Solicitor to the Post Office.

Counsel for the Respondent—Sandeman, K.C.—Black. Agents—Patrick & James, S.S.C.

HOUSE OF LORDS.

Thursday, April 7.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lord Atkinson, Lord Collins, and Lord Shaw.)

EARL OF LAUDERDALE
v. SCRYMGEOUR-WEDDERBURN.

(*Ante*, July 18, 1908, 45 S.L.R. 949, and 1908 S.C. 1237.)

Heritable Office—Hereditary Standard Bearer of Scotland—Nature of Office—Transferability—Prescription—Adjudication.

The office of Hereditary Standard Bearer of Scotland is held *jure sanguinis*, and cannot therefore be bought, sold, or adjudged. If the blood fails the grant is spent and the office becomes extinct.

The pursuer in an action of declarator

of right to the office of Hereditary Standard Bearer of Scotland founded upon (1) a charter in his predecessor's favour granted by Charles II as *ultimus hæres* of John Scrymgeour Earl of Dundee, in whom the office had been vested, and (2) a decree of the Court of Session in 1671 in an action in which the defender's predecessor had been cited, declaring, *inter alia*, that the office belonged to his (the pursuer's) ancestor—the grantee of the charter referred to.

Held that, as the office in question was in its nature inalienable, the pursuer had acquired no title thereto.

The case is reported *ante ut supra.*

The defender Scrymgeour-Wedderburn appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—I am sure your Lordships are indebted to the learned counsel on both sides for assisting us through the maze of this litigation.

It seems to me that the pursuer was ill-advised in renewing the controversy which had been settled by the Court of Claims, for although the decision of the Court of Claims cannot be treated as *res judicata* so as to bar further litigation, it proceeded from a very high authority, which it is not safe to call in question unless there is a very clear case.

We have had as the result of this renewed litigation a mass of confused, lengthy, and in many respects irrelevant archæological matter, and I think this mass of matter has been seasoned by a not inconsiderable quantity of bad law.

The pursuer brings an action for the purpose of establishing the proposition that he is the proprietor of the ancient—I might almost call it the venerable—right of the Standard Bearer of Scotland, which seems to have originated as early as the thirteenth century. It is necessary for the pursuer to prove his case. It is of no avail that he should pick holes in the case of the defender whom he has himself selected to be defender, if there are holes to be picked in the defender's case, of which I am more than doubtful.

His claim is for an ancient office and dignity, and we have first to see what is the nature of that office and dignity. It was contended on behalf of the pursuer that it was a thing adjudgable which might be sold, or bought, or put up for auction, or acquired by anybody—a stranger, a foreigner, or possibly even a limited liability company—as an ordinary pecuniary asset.

I think that it was a right held *jure sanguinis*, and that it was not a thing *in commercio* at all. I am aware that there are decisions, at which I will only glance. It has been decided that the office of Usher or White Rod was adjudgable, but great regret was expressed by the learned Judges, who thought they were driven by authority into a decision the principle of which they expressly disapproved. We are not bound to say that the decision in the case of the office of Usher carries with it the necessity of deciding the same thing in regard to the Standard Bearer of Scotland. Indeed, I would observe the same attempt was made to treat the office of Earl Marischal in Scotland as though it also were adjudgable and liable to be put up to auction, and, I suppose, to pass to trustees or anybody who pleases to purchase it. Good sense prevailed, and it was held that the office of Earl Marischal was not a chattel of that description. I am quite satisfied for myself that we are not bound by any authority to hold that the office of Standard Bearer of Scotland can be treated as a matter of commerce—of buying and selling. And I think that the Scottish law of prescription referred to in the argument does not apply to this case.

I believe your Lordships are satisfied that this is an office which cannot be bought and which cannot be sold; that it is an office attached to the blood; and that if the blood fails the grant is spent and the office is extinct. Of course if the grant is spent, the King might in the absence of statutory prohibition grant it again to someone else, because the Sovereign is the fountain of dignity. But it so happens that in the year 1455 an Act of Parliament in Scotland was passed prohibiting the Crown from doing so; that is fatal to the pursuer's alleged title.

This ancient dignity belonged to the family of Scrymgeour, and it had belonged to them since, apparently, the thirteenth century. The limitations under which it was held are dealt with in two Scotch Acts of Parliament, one of the year 1594, under which the present appellant is unquestionably and undisputedly heir of entail unless some nearer title is made good. Some difficulty may be said to arise in regard to that Act of 1594, and therefore I prefer not to found my own decision upon that Act, although I am far from saying that I should reject the contention of the appellant if it rested only upon the Act of 1594. But there is another Act, the Act of 1600, by which this office and dignity goes to the heirs-male of the Scrymgeour blood, and I will assume in favour of the respondent that was the only limitation which we have to consider. Lord Lauderdale claims a title which had its origin according to his own statement in the seventeenth century. I cannot see how it is possible for any title to be obtained in the seventeenth century having regard to the Act of 1455, unless either the pursuer can show that he was heir-male of the Scrymgeour blood (which is not attempted) or that he obtained it by an Act of Parliament which authorised the giving of this hereditary office notwithstanding the preceding Act of 1455.

There are certain Acts of Parliament—three Acts of Parliament—upon which Lord Lauderdale relies. As to the first, I will reserve my observations at the moment, but as to the second and third of them, those Acts are, as well indeed as the first, *salvo jure cujus libet*, that is to say, they are not to interfere with the right of

anyone else. Now that being the case, it becomes incumbent upon Lord Lauderdale to prove, if he can, that the family of Scrymgeour capable of inheriting this dignity is in the male line extinct, and it is obvious that he can avail himself of neither of the latter two Acts unless he can show that the line was extinct, for otherwise no effect would be given to the clause *salvo jure cujus libet.*

Now has he proved that? What the pursuer's counsel have done has been to subject the pedigree which the appellant puts forward to a variety of most ingenious and subtle criticisms, but they have fallen wholly short of proving that the male line was extinct even if the appellant's argument and proof be received with the greatest caution. It seems to me, I must say, that the title of the defender, his ability to be heir-male unless someone else with a preferable title is brought forward, is only open to one possible doubt, that is to say, the doubt as regards the position in the pedigree of one David of Sonahard.

I will not go through the various documents by which the position of David of Sonahard has been called into question, and on which reliance has been placed on both sides, but I think, though the exact place of David of Sonahard has not been established, there is strong ground for saying that his fourth or fifth in descent was an heir-male of the Scrymgeour blood, and he being the fourth or fifth predecessor to that person was also an heir-male of the Scrymgeour blood. I will not enter in detail upon the deeds or documents, but it seems to me that any old documents like these in which a branch line is brought in in family settlements, as we should call them nowadays, or entails, as though they were *hæredes*, are very strong and very cogent evidence that they were *hæredes.* And you are not likely to assume that they were heirs on the mother's side and not heirs on the father's side when the father happened himself to bear the name of Scrymgeour. That seems to me to be hyper-criticism and not really to be worthy of attention. Whether, however, the appellant has proved his title or not it is quite clear to me that Lord Lauderdale has failed in proving the extinction of this line.

Now there is only one other point to which I need allude, on which reliance was placed, and I approach it and treat it with great respect, because that was the ground upon which the Court of Session arrived at the conclusion from which I am unfortunately obliged to dissent. The Court of Session relied upon a certain decree in the year 1671 as establishing that the Lauderdale ancestor of that time, and therefore his descendants of to-day, obtained and owned this ancient office and dignity; and it was also relied upon as showing that there were in fact at that date no heirs-male of the Scrymgeours alive.

I may be wrong, but I think it is pretty plain from the opinion of the Lord President that although he thought himself bound by this document, the decree of 1671, he did not in the least believe that it represented the truth, and when I remember the historical condition of the country at that time I am not inclined to stretch any decree in favour of one of the then Senators of the College of Justice given by the other Senators of the College of Justice, when the successful litigant was very likely backed by the hand of power. I say I am not disposed to extend any such decision further than I am obliged. That decree deals with lands—and those are proper subject-matters for a decree of the Court of Session; but the decree also deals with and confirms to the Lord Hatton of that day this ancient office and dignity upon the ground that it had come back to the Crown as *ultimus hæres* and had then been granted by the Crown to Lord Hatton.

Now it is perfectly absurd in law to say that a dignity which is spent by the extinction of the line comes back to the Crown as *ultimus hæres*, and the Court of Session of 1671 had no authority to say so. Still less authority had they, unless they were justified by some statute, to say that the grant made by King Charles II in favour of Lord Hatton of an hereditary office and dignity was a good grant. It was flying straight in the face of the Act of Parliament of 1455 to say anything of the kind, and they had no more authority to say that than they would to-day have authority to say that, for example, a particular peerage had been put up for auction at Charing Cross and a good title acquired by the purchaser. It is entirely outside their jurisdiction and bad on the face of it. I therefore pretermit any further criticism of that decree of 1671, which appears to me on many grounds open to very grave suspicion. But I content myself with saying, in respect of the office or dignity now in question, it is wholly outside the jurisdiction of the Court of Session of that day, or of any day, and to that extent is a nullity.

But it is said—and this is the point which I understand Sir Robert Finlay most naturally and properly desired to be mentioned, and it was dwelt upon by his learned junior with much force and ability—that there had been a preceding Act of Parliament in 1670 which authorised the Court of Session to ratify the grant of this office and dignity to Lord Hatton. Now, apart from the point of *salvo jure*, that would give a foundation of jurisdiction to the Court of Session if, and only if, we thought that the Act of 1670 was sufficient to overrule the general Act of 1455. I am satisfied it is not. It is not sufficient to overrule that Act. The Act of 1670 does not even mention the honour and dignity; and before a decree of that sort, which is directly contrary to an Act of Parliament, is to be allowed validity on the plea that it has been authorised by another Act, that authorisation must be clear, explicit, and unmistakable. In my opinion it is not so. Accordingly I am satisfied that the pursuer has no title at all to the office and dignity which he claims under the decree of 1671.

Under these circumstances, with great respect to the Court of Session, I think this order must be reversed, and I will only say this much further, that it does not appear to me that the Court of Session had before them the point of view which I at least take of this case, and indeed the whole matter had been so mixed up by a variety of references to feudal law and with endless disputations in regard to almost every document in the voluminous volume which has been placed before your Lordships, that it is not surprising if in such a multitude of points the cogent and conclusive point should have been somewhat lost sight of—at all events I think it has been lost sight of. In my opinion it is clear that the pursuer has no title, and I think I ought to say that although the Lord President had only a moral conviction that the appellant is in the male line of this ancient family, I am completely satisfied that he is so, and if it was necessary and relevant to give effect to it I should be prepared to advise your Lordships to do so by a decree.

EARL OF HALSBURY—This case is of great archæological as well as of legal interest, but one is so much tempted by the nature of it to go into a great number of matters which are not essential that I shall withhold any observations of my own and content myself with what the Lord Chancellor has said.

LORD ATKINSON—I concur with the judgment which has been delivered by my noble and learned friend on the Woolsack.

LORD COLLINS—I concur.

LORD SHAW—I have considered carefully the proceedings in the litigation of 1671, and with great interest indeed I have read the decree which is the foundation of the judgment of the First Division in the present case. It is a decree obtained in a lawsuit founded upon a charter purporting to have been issued by the Sovereign as *ultimus hæres*.

The whole transactions as narrated in the decree are of a remarkable character. Certain of the Scrymgeour family were there represented, one of their counsel being no less renowned a person than Sir George Mackezie of notable memory. Sir George Mackenzie appeared and one of his clients appears to have been Alexander Scrymgeour. Alexander Scrymgeour's title as an heir-male holding under previous Acts of Parliament would appear to have been undisputed but for a sophism which crept into the proceedings, to the effect that as Alexander Scrymgeour appeared only to be an heir-male in the ninth degree any propositions put forward by him or claims urged by him were of no avail and indeed irrelevant. Shortly after that pronouncement, which impliedly agreed that Alexander Scrymgeour was in fact an heir-male, and therefore presumably entitled to succeed in upsetting the proposition upon which alone the King could in my view have succeeded as *ultimus hæres*, viz., that the Scrymgeour heirs-male were extinct, Sir George Mackenzie and his colleagues adopted this procedure—they "passed from their compearance and craved to be marked absent, which the said Lords admitted of and decerned in absence." The whole proceeding is rather curious, and prompts certain historical reflections.

In those circumstances, I cannot agree that that decree is such as to enable us in this Court to pronounce that it was *res judicata* to all intents and purposes upon the question whether the Scrymgeours were dispossessed of this office in consequence of the heir-maleship (to use that term) being extinct. On the face of this decree that was not so. It is, I think, an error into which the Court below has fallen to treat the present issue between the parties as determined by the result of that suit. For I will go further with regard to it and say, in the first place, that it was not in the power of Sir George Mackenzie to sacrifice the rights of the whole line of heirs-male favoured by the Act of 1600 not merely by disappearance from the suit or even by express consent therein, whatever were his powers as counsel with regard to his particular clients or the particular litigants he represented. Secondly, it was not in the power of Sir John Nesbit, who was called as Lord Advocate, by any consent in the litigation to prejudice the rights of the Scrymgeour family as heirs-male. Finally, I think that that decree is thus vitally assailed altogether apart from the further question as to whether the office of Standard Bearer to the King in time of war was a piece of heritable estate capable of reversion to the King himself as *ultimus hæres*. The idea that the King might recreate the office if the holders thereof were extinct may be reasonable enough, and even then the difficulties under the Act of 1455 to which the Lord Chancellor has referred would emerge; but the idea that the King could become the last heir to the office of being his own Standard Bearer is a repugnancy which I cannot see my way to clothe with legality. And differing from a certain portion of the judgment of the Court below, I would add that even though the term heritable may be applied to such an office it by no means follows that it is alienable.

So far as regards the judgment. Then there comes the other point, the plea proponed by the respondents in this case, namely, that they have adjudged this right; and indeed, upon examination, it is largely because the Lauderdale family appear to propone this right by adjudication that they have a title to contest an issue on this topic at all.

Now, I wish to say very plainly that in my view an office of this character is not in itself an adjudgable thing by the law of Scotland. I think the only foundation for that plea is the much questioned case in reference to the heritable usher. In that case a judgment was pronounced from which one of the most enlightened men of his time dissented, namely Lord President Forbes of Culloden, but all the judges

agreed that the practice which they were constrained to confirm was an "irrational practice." In those circumstances I do not think any court of law should extend a practice which has been thus judicially condemned on account of its irrationality. This office or right is one of those things which in my opinion is not by its nature adjudgable. The idea that it could be swept up in bankruptcy and say that a purchaser should be able to buy at the market cross of Edinburgh the office of being Standard Bearer to the Sovereign in time of war need not be further remarked upon. In the circumstances mentioned the title of Lord Lauderdale entirely fails. I add, that for myself I have the greatest doubt as to certain procedure in this litigation. I refer to that which began with an interlocutor of Lord Kyllachy which has resulted in great expense to both parties, and which gave Lord Lauderdale, though he had no right whatever unless he could prove that he held a thing which was in its essence adjudgable, a position which entitled him to call upon the Scrymgeours to prove every item of their succession from their ancestor in 1600.

If Lord Lauderdale's title fails, I think the demand which was made that the Scrymgeours should enter into this expensive litigation was a demand which is not really justifiable; but with regard to what they have done in consequence may I tender my respectful assent to the views of my noble and learned friend on the Woolsack. We are not deciding the question, but so far as the facts and pedigrees have been elucidated before this House it appears to me there is a sufficiency of legal evidence even in the sense that has been so ably argued by Mr Wedderburn, viz., that his client has proved his descent as heir-male under the Act of 1600.

Their Lordships reversed the order appealed against and found the appellant entitled to expenses both in the House of Lords and in the Court below.

Counsel for Appellant — Wedderburn, K.C. — J. H. Stevenson. Agents — D. M. Gibb & Sons, S.S.C., Edinburgh—A. & W. Beveridge, London.

Counsel for Respondent—Sir R. Finlay, K.C., M.P. — Macphail. Agents — Tods, Murray, & Jamieson, W.S., Edinburgh—John Kennedy, W.S., London.

Friday, April 29.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lord Atkinson, and Lord Mersey.)

STEWART *v.* WILLIAMSON.

(*Ante*, July 13, 1909, 46 S.L.R. 918, and 1909 S.C. 1254.)

Lease—Outgoing—Arbitration—Valuation of Sheep Stock—Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, c. 61), sec. 11 (1) — *Abrogation of Reference in Lease and Substitution of Reference in Statute.*

The Agricultural Holdings (Scotland) Act 1908, section 11 (1), enacts—"All questions which under this Act or under the lease are referred to arbitration shall . . . be determined, notwithstanding any agreement under the lease or otherwise providing for a different method of arbitration, by a single arbiter in accordance with the provisions set out in the second schedule to this Act."

A lease of a sheep farm for five years expiring at Whitsunday 1909. provided that at the expiry of the lease "the tenant shall leave the sheep stock on the farm to the proprietors or incoming tenant according to the valuation of men mutually chosen, with power to name an oversman."

Held that the Act applied, and that a single arbiter fell to be appointed.

This case is reported *ante ut supra*.

The pursuer Stewart appealed to the House of Lords.

At delivering judgment –

LORD CHANCELLOR—Your Lordships are asked to decide whether a clause in a lease dated 1884 has been superseded by the provisions of the Agricultural Holdings Act 1908. The clause runs as follows:—"John Stewart hereby binds and obliges himself at the expiry of this lease to leave the sheep stock on the farm to the proprietors or incoming tenant according to the valuation of men mutually chosen, with power to name an oversman."

Is this superseded by the words of the 11th section, which I cite so far as material—"All questions which under this Act or under the lease are referred to arbitration shall . . . be determined, notwithstanding any agreement under the lease or otherwise providing for a different method of arbitration, by a single arbiter, in accordance with the provisions set out in the second schedule to this Act."

If this were an English case the authorities decided on the Common Law Procedure Act 1854 draw a marked distinction between arbitration and valuation. It is one thing to refer a dispute to the decision of an arbitrator who has to hear parties and witnesses as in a court of law. It is another thing to say that a third person shall value the subject of sale, as when an incoming tenant agrees to buy fixtures at