

locality, he does so at his own hand because he thinks it better not to surrender, and that therefore there is no encroaching on stock by the law. It is true that surrender has been regarded as an alternative and optional way of implementing the decree of locality, but I think the difficulty must still be faced that the heritor's election not to surrender, which he has a right to make, may involve him, as part of the legal obligation then incumbent on him under the decree of locality, in an encroachment on stock *de facto* for the benefit of a stipend localised on his teinds. I prefer to put the matter as I have stated it above, much fortified by the judgment of Lord Sands. As he says, "The teind was a share in the produce of the soil, the value of which fluctuated annually. There were two elements of uncertainty, the crop for the year and the prices for the year. A valuation in victual eliminated the former; a valuation in money eliminated both." I think that the disadvantage attendant on this elimination is inevitable. It sacrifices the severance of teind and stock then and there for the year and for the year only, and substitutes a notional, or at least an economic, severance for the physical one, by resorting to valuations which are neither made *ad hoc* on the value of the *ipsa corpora* as they lie, nor are based on current values which do not go beyond the economic situation for the time being.

I think the appeal should be dismissed.

LORD WRENBURY—I concur.

Their Lordships ordered that the interlocutors appealed from be affirmed and the appeal dismissed with costs.

Counsel for Appellant—Dean of Faculty (Constable, K.C.)—Macphail, K.C.—J. S. C. Reid. Agents—Tods, Murray, & Jamieson, W.S., Edinburgh—John Kennedy & Company, Westminster.

Counsel for Respondents—Mackay, K.C.—Macdonochie—Pitman. Agents—Menzies & Thomson, W.S., Edinburgh—Archibald Hope & Spens, Westminster.

Monday, December 12.

(Before Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Sumner, and Lord Wrenbury.)

STEWART MACKENZIE v. FRASER-MACKENZIE.

(In the Court of Session, July 17, 1920, S.C. 764, 58 S.L.R. 7.)

*Heraldry—Arms—Differencing—Quartering—Supporters—Title to Sue.*

In a petition for reduction of an interlocutor of the Lord Lyon giving the respondent the right to use and bear the arms of Mackenzie quartered with the arms of Fraser and Falconer, and certain supporters, *held (aff. the judgment of the Second Division)* that the arms of the respondent were sufficiently differenced from the Mackenzie arms by the quartering with them of the arms

of Fraser and Falconer as to exclude any right on the part of the petitioner to challenge the respondent's use thereof; that whether they were correctly differenced or not, the decree of 1817 which granted the arms from which those of the respondent were deduced was protected by prescription and must stand; and that as the petitioner had himself no right to these arms, which had been granted by the Lord Lyon in his ministerial capacity, he had no title to sue. *Held further*, that there being no exclusive right of property in particular supporters the respondent had not infringed any right of the petitioner in regard thereto, and appeal *dismissed*.

The case is reported *ante ut supra*.

The petitioner appealed to the House of Lords.

At delivering judgment—

LORD DUNEDIN—The present appeal is against an interlocutor of the Second Division affirming an interlocutor of the Lord Lyon of 21st October 1918 whereby he dismissed a petition at the instance of the appellant craving that a grant of ensigns armorial in favour of the respondent, dated 7th February 1908, should be reduced or set aside, or at least should be altered by a disallowance of the supporters authorised thereby. It may be a matter for regret that the opinion of this House should be asked on such a question. There seems however no doubt as to the competency of the appeal. The Court of the Lyon is an inferior court, and from inferior courts there lies an appeal to the Court of Session, and final interlocutors of the Court of Session in civil matters are appealable to your Lordships' House.

It will be convenient to set forth as briefly as may be the facts which give rise to the controversy.

The ancient family of Mackenzie of Kintail was advanced to an earldom in the person of Colin, who was created Earl of Seaforth in 1623 with remainder to his heirs-male. The arms of the Seaforths were admittedly described as follows:—"Azure a deer's head cabossed or; crest, a mountain in flames proper; supporters two savages wreathed about the head and middle with laurel, with clubs erect in their hands and fire issuing out of the top of them, all proper; and for motto *Luceo non uro*." The fifth Earl was attainted in 1715 and the attainder was never removed. In 1797 Francis who but for the attainder would have been the ninth Earl was created Baron Seaforth with the remainder to heirs-male of his body. His sons all died *sine prole* in his lifetime and on his death the barony became extinct. He left an eldest daughter Mary, on whom he entailed his estates. She was twice married, first to Admiral Hood, by whom she had no issue, and second to James Alexander Stewart. The petitioner is the grandson of James Alexander Stewart, who has, as did his father, assumed the name of Mackenzie. Francis, Lord Seaforth, in the entail above mentioned, inserted a clause

taking the institute and heirs of entail bound to bear the arms of Mackenzie of Seaforth. In obedience to this behest Lady Hood matriculated her arms on 14th August 1815 as follows:—"Bears two shields accolées, that on the dexter azure a fret argent on a chief or three crescents sable, over all the badge of a baronet of the United Kingdom of Great Britain and Ireland, in surtout the arms of Mackenzie of Seaforth, his lady being an heiress, the whole within the ribbon of the Most Honourable Military Order of the Bath, being the arms of the late Sir Samuel Hood, baronet, and that on the sinister azure a deer's head cabossed or, for Mackenzie of Seaforth; crest a mount in flames proper, motto above the crest, '*Data fata secutus.*' On a compartment on which is this motto '*Fide parla fide aucta*' are placed for supporters on the dexter side a greyhound proper collured gules and pendant therefrom a badge or, charged with a caberfedz, and on the sinister a savage wreathed about the head and middle with laurel holding in exterior hand a batton erect on his shoulder burning at the end and his hair also inflamed all proper."

On the 21st January 1890 the petitioner matriculated his arms as follows:—"Quarterly first and fourth azure a deer's head cabossed or for Mackenzie of Seaforth and Kintail; second and third or a Fess chequy azure and argent surmounted with a bend engrailed gules all within a double tressure flory counterflory of the last for Stewart Earl of Galloway. Above the shield is placed a helmet befitting his degree with a mantling gules doubled argent and on wreaths of the proper liveries are set the two following crests, on the dexter a mountain in flames proper and in an escrol above the same this motto '*Luceo non uro*' for Mackenzie; and on the sinister a pelican in her nest feeding her young proper, and in an escrol above the same this motto '*Virescit vulnere virtus*' for Stewart, and on a compartment below the shield are placed for supporters on the dexter a savage wreathed about the head and middle with laurel holding in his exterior hand a batton erect on his shoulder burning at the end and his hair also inflamed all proper, and on the sinister a gray hound proper."

On the death of Francis, Lord Seaforth, the male representation of the Seaforths devolved on George Falconer Mackenzie of Allangrange, who but for the attainder would have been tenth Earl of Seaforth. The Allangrange family was a junior branch of the Kintail family, of which branch the famous Sir George Mackenzie of Rosehaugh was a member. The father of George Falconer Mackenzie was John, third of Allangrange, and he had executed in 1812 an entail of the Allangrange estates on his son and other substitutes, binding them to bear the name and arms of Mackenzie of Allangrange. George Falconer Mackenzie on his succession applied to Lyon for a grant of arms which were granted or matriculated (for as to this there is controversy) as follows:—"To all and sundry, who these presents do or may concern, we,

Thomas Robert, Earl of Kinnoull, Lord Lyon King at Arms, do hereby certify and declare that the ensigns armorial pertaining and belonging to George Falconer Mackenzie of Allangrange, Esquire, male representative of Francis, last Lord Seaforth, and only son of John Mackenzie of Allangrange, Esquire, by Catherine, daughter of the Honourable Jane Falconer, and grandchild of the Right Honourable Lord Halkerton; which George Falconer Mackenzie is great-great-great-grandson of Sir Kenneth Mackenzie, first Lord Kintail, and great-great-great-grand-nephew of Colin, Lord Kintail, afterwards first Earl of Seaforth, and of George, second Earl of Seaforth, sons of the said Sir Kenneth Mackenzie, first Lord Kintail; are matriculated in the public registers of the Lyon office and are blazoned as on the margin thus: viz., quarterly, first and fourth azure, a buck's head cabossed or, for Mackenzie; second and third azure, a falcon displayed argent, charged on the breast with a man's heart gules between three mullets of the second, for Falconer. Above the shield is placed a helmet befitting his degree, with a mantling gules, the doubling argent, and on a wreath of his liveries is set for a crest a mountain in flames proper, and in an escroll this motto '*Luceo non uro.*' On a compartment below the shield, whereon is this motto '*Vive ut vivas,*' are placed for supporters two savages wreathed about the head and middle with laurel, and each holding in his exterior hand a batton erect, with fire issuing out of the top of it, their hair also inflamed, all proper. Which armorial ensigns and supporters above blazoned we do hereby certify and confirm to the said George Falconer Mackenzie of Allangrange, Esquire, and the heirs-male of his body, as their proper arms and bearing in all time coming."

The male line of the Allangrange family became extinct in 1907 by the death of James Fowler Mackenzie. He entailed his estates on the respondent, who was a cousin and had married a Fraser of Bunchrew. The entail contained a name and arms clause binding the heirs of entail to assume the name and bear the arms of Mackenzie of Allangrange. In respect of this injunction the respondent applied to Lyon for a grant of arms. This Lyon granted on 7th February 1908 as follows:—"Edinburgh, 7th February 1908.—The Lord Lyon King of Arms having considered the foregoing petition, recognises the assumption of the name of Mackenzie by the petitioners in addition to and after their surname of Fraser, and grants warrant to the Lyon Clerk to prepare letters-patent granting licence and authority unto the petitioners and to the descendants of their marriage with such congruent differences as may hereafter may be matriculated for them to bear and use the following ensigns armorial, viz.—Quarterly, first and fourth azure, a buck's head cabossed or for Mackenzie; second azure, an escallop between three cinquefoils argent for Fraser of Bunchrew; third azure, a falcon displayed argent, charged on the breast with a man's heart gules,

between three mullets of the second, for Falconer; to be borne by the petitioner Mrs Beatrice Anna Mackenzie or Fraser-Mackenzie on a lozenge, below which a compartment are set for supporters two savages wreathed about the head and middle with laurel and carrying on their exterior shoulders a baton erect with fire issuing out of the top of it, their hair also inflamed, all proper; and by the petitioner Robert Scarlett Fraser-Mackenzie on a shield above which is to be placed a helmet befitting his degree with a mantling azure doubled or, and on a wreath of his liveries is to be set for crest a burning mountain, proper, and on an escrol over the same this motto *Luceo non uro*, and below the shield this motto *Vive ut vivas*."

The petitioner began these somewhat tardy proceedings in 1918, ten years after the respondent had obtained the grant. He has been found to fail by the Lord Lyon and by the unanimous judgment of the Second Division of the Court of Session, and I confess in such a matter it would have had to be brought very clearly home to me that the judgment was wrong before I could have advised your Lordships to reverse. As it is I think the appeal fails, not only on the grounds which have been considered sufficient in the Court below, but also in the matter of title. It is, I think, conclusively settled by the case of *Macdonald* (4 S. 371) that the Court of Session will never interfere by way of reduction (and it follows that real, which is tantamount to reduction, must share the same fate) with a coat of arms granted by the Lyon in his ministerial capacity unless the complainant can aver and show that he is entitled to the coat of which he complains. It is true that in his petition the petitioner sets forth not that he is entitled to the coat of the respondent—which would indeed be absurd as the petitioner has no connection with either Falconer or Fraser—but that he is entitled to the Seaforth arms borne by Francis Lord Seaforth, and that the coat of the respondent contains the undifferenced arms of the Seaforths. Now how does he support that statement? Merely by saying he is heir of line of the first Lord Seaforth. Now the whole brunt of the attack rests upon the hypothesis that the arms granted to George Falconer Mackenzie of Allangrange in 1817 were not Allangrange arms but undifferenced Seaforth arms, for if the coat of 1817 was either Allangrange or differenced Seaforth then *cadit questio*. Now if it was undifferenced as the head of the clan that means that, in a question with Lady Hood, George Falconer was preferred. The controversy has been mooted, but never actually decided by legal decision, whether on a competition the heir of line or the heir-male should be preferred. (See the remarks of the judges in *Cunningham*, 11 D. 1139.) The very idea of a competition excludes the idea of both being preferred. Of course the one that failed would still be entitled to the family arms with a difference, and at that rate Lady Hood's coat might be read as properly differenced because of the quartering, for she, even on

the reading which the petitioner wishes to give to Nisbet's parenthetical comment on Sir G. Mackenzie as to differencing by means of quartering, was no stranger to the family. But if George Falconer Mackenzie succeeded to the undifferenced family arms which were in turn succeeded to by James Fowler Mackenzie, then on the death of the said James Fowler Mackenzie *sine prole*, who was the heir of line, failing heirs-male, who is entitled? Following the analogy of heritage it is his—James Fowler's—heir of line, and that assuredly the petitioner is not. Conceivably you might revert to the founder of the family, but the petitioner is equally not heir of line of the first Earl Seaforth. Why should it be the heir of line of one Francis, who was after all only an intermediate holder? I am therefore of opinion that the petitioner, upon the assumption that the coat of 1817 was the undifferenced coat of the Seaforths, fails for want of title.

I think, however, that he also fails on quite a separate ground, namely, that I think the coat of 1817 was an Allangrange coat. It was applied for as an Allangrange coat to satisfy the condition of an entail involving forfeiture upon disregard. It was given as such. No doubt it contained, as an ingredient so to speak, the Seaforth coat. Lyon says that the coat was properly differenced by the Falconer quartering, and I do not see that he is wrong, but suppose it was bad heraldry, it must stand, for it is protected by prescription. The decree of 1817 is a decree conferring a coat as a whole as the arms of Allangrange. Now it is settled law that, quite apart from the question of title in the defender, a pursuer cannot attack if in order to attack successfully he must cut down a decree which is more than forty years old—*Dundonald v. Dykes*, 14 S. 737; *Cubbison v. Hyslop*, 16 S. 112. The decree must therefore stand, giving the arms as the arms of Allangrange. If they are Allangrange arms, then what Lyon did in 1908 to satisfy the entail was clearly within his ministerial powers and will not be interfered with by the Court of Session.

The question of supporters cannot be treated as a separate question. No peculiar and exclusive right to supporters of a certain class can be asserted, and whether Lyon was right or wrong in granting the supporters, the appellant is not *in titulo* to raise such a question.

I therefore move your Lordships that the appeal be dismissed, with costs.

I am authorised to state that my noble and learned friend Lord Atkinson concurs in the judgment which I have delivered.

LORD SHAW—The appellant was within his rights in bringing this appeal. It is competent; beyond that I see very little that can be said for it. In my opinion it is a misguided and hopeless appeal. To use the language of Lord Fullerton in *Cunninghame v. Cunningham*—"It is one involving no patrimonial interest and merely relating to heraldic honours. As these are presumed to be the creations of the Crown, I should have thought that any competition

regarding them might have been left to the determination of an official specially appointed for that purpose rather than made the subject of discussion before a court of law." Just as, however, it was in the time of Lord Fullerton so it remains till now. Courts of law in their due order as appellate courts from an undoubted Court of law—that of the Lyon King at Arms in Scotland—are not relieved of the task of determining cases of this character in those instances in which a heraldic right vested in one subject of the Crown has been seized or invaded by another subject of the Crown,

I agree entirely with the opinion of Lord Dunedin. But I desire to make it specially clear that I do not think that the appellant had or has any title to sue. There is a passage in the case for the respondent which I do not find after a full study of the documents to be faulty, or to fail to express clearly the conclusions which I have myself reached. "The appellant has no title to impugn" the arms of the respondents. "He is a Stewart, not a Mackenzie. He is not the chief of the Clan Mackenzie, nor does he claim to be. He is not the heir-male of the Earls of Seaforth, nor does he claim to be. He is not the heir-of-line of the Earls of Seaforth; the heir-of-line of the first Earl of Seaforth is the Earl of Crawford, and the heir-of-line of the last Earl of Seaforth is, if anyone, the Earl of Effingham. He is not the representative of any Earl of Seaforth. He is not the owner of the estates of Seaforth or Kintail. He is not the representative of the Mackenzies of Allangrange, whose arms and supporters the respondents bear. He is not entitled to bear these arms, nor does he claim to be. All he is entitled to is to bear the arms matriculated by him in 1890, namely, his quartered coat, consisting of the Mackenzie and Stewart arms and the particular supporters thereto attached. As the appellant has no right to the arms borne by the respondents, he has no title to pursue the present action." I agree with this statement.

In the ordinary case the determination of such a plea saves judges from entering upon merits and saves parties from the expense of inquiry. It has not done so in this case, and it has to be borne in mind that it might have created difficulties to confine the inquiry as to the descent, title, and rights of the appellant without being even in that inquiry entangled in an investigation as to the whole lines of descent, say, from the old Lord Kintail, whose title dated from 1609, and who was attained in 1715. In short, I think it may be for the best that the inquiry was conducted as it was, and I think its results are compended in the passage which I have just cited.

I am, however, of opinion that the law with regard to any interference with the administration of the Lord Lyon, or with the exercise by him of his ministerial powers in regard to the grant of arms, remains in the same position as that set forth by Lord Robertson in the case of *M'Donnell v. M'Donald* (4 Shaw 376), a decision pronounced in the year 1826. In my view no appeal to the ordinary courts of law against

such a grant is competent unless upon the ground which I have stated, namely, an invasion of a right vested in the appellant. In Lord Robertson's words—"The power of granting ensigns armorial is part of the royal prerogative; but everything belonging to that power has been given by sundry statutes to the Lord Lyon's grant. His power to grant new armorial bearings is merely discretionary and ministerial, and with that this Court cannot interfere. But if the Lord Lyon should grant to one person arms which another is entitled to bear, and should refuse to give redress, there could be no doubt of the jurisdiction of this Court to entertain an action at the instance of the party to have his right declared, as this would involve a question of property, which a right to bear particular ensigns armorial undoubtedly is. But a question remains behind whether the summons in the present case is so conceived that it could be entertained by any court. . . . There is no conclusion in favour of his right to these arms, so that were he to obtain decree in terms of his libel he could take nothing under it. Popular actions are unknown in our law, and no one can bring an action to take from another what he himself has no right to." The good sense and sound law of this latter proposition are beyond question; and therefore it is a startling fact to find that the appellant asks courts of law to deprive the respondent from using the Fraser of Bunchrew coat of 1908, and from using indirectly the Mackenzie of Allangrange coat of 1817, when in point of fact he makes no claim to be the owner or the person entitled to wear either the one of these coats or the other. It stands accordingly beyond question that this challenge of the ministerial action of the Lord Lyon is at the instance of a person whose rights to wear the coat which has been granted have not been invaded or taken away. If in such a position room were left for challenges at law the whole field of heraldry might become a field of battle, and every member of every clan in Scotland would be vested with the right to fight in courts of law about matters in which he personally had no heraldic or patrimonial interest at stake.

I only add a word upon these three points. In the first place I hold that the Lord Lyon and the Second Division of the Court of Session were clearly right in their view with regard to differencing. I refer to a short and simple proposition of Sir George Mackenzie in his very remarkable work "The Science of Heraldry treated as a part of the civil law and law of nations, wherein reasons are given for its principles and etymologies for its harder terms." Says the famous Lord Advocate—"These cadets who have their arms quartered with other arms need no difference, for the quartering or empaling is a sufficient difference as is clear in the example of," &c. And he further remarks—"It is observable that though a cadet be descended of a cadet, yet I think he need not express the difference of that family out of which he has immediately come, for else the Court should be filled with difference, and the use of difference is only to distin-

guish from the chief's family." From this it appears clear to me that quartering is in the learned author's opinion a sufficient difference. I find that the other writers on heraldry, and all the authorities as I read them from that date till now, take the same view. It follows from this that the Allangrange coat was well differenced by quartering, and that it could never fail to be distinguished from, never could be read as setting up a claim to, the chief of the Mackenzie's coat, which is—Arms—Azure, a deer's head cabossed *or*. Crest—A mount in flames proper. Motto—*Luceo non uro*. Supporters—Two savages wreathed about the head and middle, holding in their hand a baton erect on their shoulder burning at the end and their hair likewise inflamed, all proper. Neither of the parties to this case claims that coat. It is a remarkable fact that the arms themselves, namely, "azure, a deer's head cabossed *or*," have been differenced over and over again, and that the appellant is himself, under a matriculation obtained in 1890, the owner of a differenced coat containing these arms, and also the crest and motto "for Mackenzie." In short, it has been recognised by everybody, including, one is glad to see, even the appellant, that "quartering is a sufficient difference." A challenge could accordingly not be made by the chief of the Mackenzies against either the coats of the appellant or the respondent, and no such challenge has ever been made. It appears to me to be out of the question to permit a challenge by the appellant himself against the respondent. He could only enter the field of the respondent's arms by claiming them, and that he does not do, whereas for aught yet seen the respondent's arms, granted as for Bunchrew and deduced through Allangrange, seem to have been quite properly granted and deduced.

In the second place, I am clearly of opinion that the Allangrange coat is good against everybody, being fortified by prescription and having been granted by the Lyon King at Arms of the day in the year 1817.

In the third place, in my opinion the objection to the supporters granted by the Lyon King entirely fails. I think the state of the law was accurately expressed by Nisbet, who says (vol. ii, part iv, chap. 7, 1816 edition, p. 33)—"It is allowed by the practice of heraldry for many different families to carry the same supporters without any ground of offence, or concluding them to be of one descent and kin, which practice is frequent with us, especially in using savages for supporters." One need not inquire whether that particular practice is still greatly in vogue, but the law applicable to the grant and selection of supporters remains to the present day as it was stated by Nisbet. Fortunately the knowledge of the Lord Lyon can be relied upon to avert any likely sources of confusion in practice, but the matter is in my opinion entirely within the ambit of his ministerial power. He selects for a supporter among objects supposed to be from the animal world something real, historical, symbolical, or merely grotesque—anything, say, from a unicorn to a savage

with flaming hair. All these things may be found in the field of heraldry, but it is the Lyon King who goes about in that field seeking what he may select.

LORD SUMNER—In September 1812 John Mackenzie of Allangrange executed a deed of entail of the estates of Allangrange, which are some thousands of acres in extent, designating his estate to his son George Falconer Mackenzie and the heirs male and female of his body, with gifts over not now material, under the proviso in common form that his said son "and the heirs-substitute and successors before named who shall happen to succeed to the said lands and barony, and the husbands of the heirs-female, shall be holden and obliged to assume and constantly retain, use, and bear the surname, arms, and designation of Mackenzie of Allangrange . . . in all time coming." It is singular, but it appears to be the case, that there were not then in existence, either by grant or in use, any arms of Mackenzie of Allangrange as such. The entailer, John, died shortly afterwards, but the precise date of his death is not given.

In 1815, by the death without issue of Francis Lord Seaforth, George Falconer Mackenzie became chief of the Seaforth Mackenzies, and as such was entitled to the Seaforth achievement, but the Seaforth estates did not pass to him. The records of the Lyon Court in 1817 certify what are the ensigns armorial pertaining to George Falconer Mackenzie of Allangrange, male representative of Francis last Lord Seaforth, and only son of John Mackenzie of Allangrange by his wife a grandchild of Lord Halkerton. These ensigns armorial are, in brief, quarterly a buck's head cabossed *or* for Mackenzie, and a falcon displayed argent for Falconer, with supporters as hereinafter mentioned, and they are confirmed to him and the heirs-male of his body.

The first question is whether this is a matriculation of the Seaforth arms, undifferenced but quartered with the arms of Falconer, and suitable to the new chieftain, who desired to record his connection with his mother's house, or is a grant of new of an achievement for Allangrange, the introduction of the Falconer coat being used as a difference sufficient to warrant the grant of a new Allangrange coat that could not be confounded with the old Seaforth coat. The appellant contends that the latter would be bad heraldry, but this is not now quite the question. As the Lyon must always be presumed to be a good herald till the contrary is shown, the vice of this particular grant, so construed, if it is vicious, may be an argument for regarding it, *mitiori sensu*, as not a new grant at all, in which case it would be admittedly good, but the question still is whether it is or is not a new grant, albeit somewhat heterodox. Even if we were constrained to read the dead language of heraldry as strictly as we should construe the living language of a deed, it would be right to take account of the position of the parties and the object which they had in view, but I do not think we are so bound. Neither the

vocabulary nor the grammar of heraldry possesses the precision without which the strict rules of construction of written instruments cannot be required.

It is admitted that the Lyon has the right, and in practice exercises and long has exercised it, to regard with favour the wishes and interests of those who apply for arms in order to satisfy a name and arms clause, and that in doing so he grants arms showing the connection of the applicant with other families, subject to suitable differences where required. George Falconer Mackenzie had strong and obvious reasons for desiring arms of Allangrange, but arms so blazoned as to show that as a Mackenzie he was the chief of the Seaforth Mackenzies, though he succeeded his father as Mackenzie of Allangrange, while through his mother he was honourably connected with the family of Falconer. The respondents' case is that both his wishes were gratified. As the chieftain he could have matriculated the ancient Seaforth arms, including the supporters, without any differencing, for he took them as heir-male and was not a mere cadet, but then what of the arms of Allangrange which he was bound to obtain and bear under the entail? This consideration answers any presumption in favour of augmentation as against abatement, for here we have the explanation—and a convincing one it is—to show why he should seek arms different from those of Seaforth, and not merely the Seaforth arms quartered by way of augmentation with those of Falconer. It may seem that this heraldry itself is ambiguous and capable of either interpretation, until the fact is pointed out that the arms of Falconer, Lord Halkerton, were not such as he could quarter as of right as having been his mother's, for she in her turn was not entitled to them as of right. George Falconer Mackenzie's only way of obtaining a right to this quartering was by grant from the Lyon, and the true interpretation of the matter, as one would expect, is that the Lyon granted of new arms of Allangrange, composed of the arms of Seaforth not differenced otherwise than by quartering with the arms of Falconer. I do not overlook the language in which in 1829, when claiming to be served heir-male in general to Kenneth, first Lord Kintail, George Falconer Mackenzie recited that he obtained the arms of 1817 from the Lyon under the same degree of relationship to the said Kenneth as he there set out, but this is a mere recital and does not exclude the case of his having obtained it also for the purpose of the entail of Allangrange, and as a grant of new. Nor do I forget that the grant of 1817 is to George Falconer Mackenzie and to the heirs-male of his body, thus limiting it to those of his heirs who would also succeed him in the chieftaincy, but I fail to appreciate how this proves that the grant was not a new grant of Allangrange arms. The fact may be very consistent with a matriculation of the Seaforth arms merely quartered with those of Falconer, but it is no answer at all to the point that exclusive devotion to the bare dignity of Seaforth would substantially

imperil the inheritance of Allangrange. It seems to me that unless we are to make a complete jettison of all consideration of the real interests engaged and of the probable intentions alike of the Lyon and of the grantee, these arms must have been given in 1817 as a new Allangrange coat, which the quartering duly differenced alike from the ancient Seaforth arms and from those of Falconer. Such is the Lyon's view, and with it the Second Division has agreed. I see no reason to differ from it. If we were to take the contrary view, we must assume that George Falconer Mackenzie was deliberately risking his estate. What measure of practical risk he ran if he did not assume the Allangrange arms I do not know, and in any case he ran it for a year or two, but why should he run any risk at all? To say nothing of filial piety and family pride, why should he jeopardise the lands of Allangrange "just for a brisure to stick in his coat?" The appellant's case is, that in order to bear the Seaforth coat undifferenced, and only quartered for pride or phantasy with the arms of Falconer, he sought and got no brisure, though without a sufficient brisure he sought and got no Allangrange arms at all. I take him to have been a man of sense. After all, he got two small buck's heads cabossed or instead of one large one, and he kept the acres of Allangrange. He was chief of the Seaforth Mackenzies, which no one could gainsay whatever arms he bore, but the position of chief came to him as one of a junior branch, and nothing could alter the fact.

Whether quartering is in certain circumstances a sufficient brisure is a question which I will take later. The Allangrange coat of 1817, regarded as a coat differenced from the Seaforth coat, is at any rate not one that the appellant could now ask to reduce. He may decry it as false heraldry but it stands, and unfortunately for him stands by no means alone, as a precedent against him and in favour of that which he does impugn, namely, the grant to the respondent in 1908. The Allangranges duly bore these arms for about ninety years and then the present respondent became entitled to the lands as institute under an entail on the death of the entailer James Fowler Mackenzie in 1907. She was his cousin on his mother's side, a Mackenzie of Ord by birth and married to Captain Fraser of Bunchrew. The entail contained a name and arms clause as before. Accordingly in 1908 the respondent as heiress of tailzie prayed of the Lyon such a grant as would suitably record her marriage and yet entitle her to the Allangrange achievement. She was granted the Seaforth buck's head, cabossed or, quartered this time not only with a falcon displayed argent, charged on the breast with a man's heart gules between three mullets of the second, for Falconer, but also with an escallop between three cinquefoils argent for Fraser of Bunchrew. The question then is whether in the case of an heir of entail who is not of the same blood the Allangrange arms were validly and sufficiently differenced by quartering the escallop and cinquefoils of Fraser along

with the quartering of the Falconer falcon. If it was, no question arises of the extent to which the buck's head cabossed or was used, for that is covered by the new grant of 1817, and the respondent has satisfied her name and arms clause, for she took not the Seaforth coat merely augmented by George Falconer Mackenzie's addition of a quartering of the arms of his mother's family, but the true arms of Allangrange, as granted to him of new with such difference as her own case required. If so, it becomes immaterial to consider whether on the appellant's side Lady Hood became entitled on her father's death to bear the family arms undifferenced, for the arms granted in 1908 cause no confusion with or infringement upon her right if any; and further, the question whether the respondent herself is of the pure Mackenzie blood or not does not arise, nor does the nice point of the incidence of the burden of proof between the appellant, as bound to show that she is not of that blood, and the respondent as bound to show that she is. The Lyon affirmed by the Second Division is of opinion that the difference here is valid and sufficient, and I think so too.

I could well understand that quartering should never be admitted as a valid mode of differencing, for quartering consists in combining coats which exist already, and differencing is a process of bringing into existence a coat which hitherto has not existed at all. It may well be that the arms in question would speak more clearly if something were superimposed in the same quarter on the buck's head, cabossed or, so as to make it a differenced, that is a different, buck's head, instead of merely associating the old buck's head in two quarters with other heraldic ensigns in the other quarters of the shield. I can understand again that as a matter of uncorrupted doctrine the same heraldic combination should not be admitted to express two separate propositions—first, that in addition to his family arms the bearer has acquired broad lands and on his mother's side is of high degree, and second that, being only a cadet of an armigerous family, the bearer advertises his cadency and avows his subordination. The settled law of heraldry, however, permits this risk of confusion. The appellant does not question it; he only seeks to impose a limitation. However proper it admittedly is to difference by quartering, where the grantee of the new arms is the younger son or the younger brother of the bearer of the arms upon which the brisure is imposed, it becomes improper when the brisure is used to difference the new armiger from someone more remote than a father is from a son, say as is the respondent's case, a cousin on the mother's side, whose propinquity to the old armiger is simply that of an institute in an entail. A cadet can validly difference by simply quartering his mother's coat, but not by quartering a cousin's. Such is the distinction made. It appears to be rather a matter of degree and therefore of discretion than of doctrine. No clear authority to support it can be found. The broad pro-

position is asserted by many institutional writers, by Mackenzie, Nesbit, and Seton. Dugdale too favours it but he is English. Mr Fox Davies recognises the practice though with disapproval and some doubt (Complete Guide to Heraldry, p. 483). The appellant really only finds on his reading of Nesbit's parenthetic comment (Part 3, vol. ii., pp. 21, 22), on Mackenzie's unqualified propositions (p. 75, s. 4), a reading for which I can discern no adequate warrant, and on the fact that these writers do not expressly say that this right can be extended to strangers in blood when they are illustrating its application to the cases of sons and brothers. I think the omission of such a statement under such circumstances is really accidental.

We must remember that the language of heraldry is the invention of a chivalrous but illiterate age, and that it has never been an exactly inflected language. In its day it served its turn, but since reading and writing have become common accomplishments, its correct idiom has always been in dispute among heralds and antiquaries. I am unable to see that in granting the arms of the respondent in 1908 the Lyon erred in any matter of law. He has given his own reasons for supporting that grant, and by those reasons the Second Division was convinced. I am the less disposed to differ from these authorities because I know myself to be so ill qualified to criticise in a matter which is not only one of Scots law but of the law of arms, and has so little to do with the serious realities of life. Little as it can be worth, my opinion agrees with the interlocutor appealed against, viz., "find in law the said arms of 1908 are sufficiently differenced from any arms to which the petitioner has right, and that the petitioner is not entitled to challenge the respondent's right to said arms."

I think this disposes of the case. The supporters—naked wild men with heads inflamed and wreathed about the middle with laurels all proper—were as I understood a collateral rather than a substantive matter. The respondent's achievement if otherwise supportable does not become bad because of the supporters. Their significance throughout has been due to the fact that they might seem to give colour to the construction of the whole achievement, as being the full Seaforth arms merely quartered with those of another family, but if that quartering is meant to be and is valid as a difference, and the achievements are really the Allangrange achievement as granted to George Falconer Mackenzie and to the respondent respectively, there is nothing in the point. It arises simply from the penury of heraldry in beasts and men suitable for the honourable office of supporters to a coat.

As to the appellant's right to bring this petition at all, I only desire to say that without deciding the question, which I think it needless to do, I am very far from being satisfied that he has any *locus standi* in the matter, but as his appeal fails finally we need not also say that it never should have been begun.

LORD WRENBURY—I concur.

Their Lordships ordered that the interlocutors appealed from be affirmed and the appeal dismissed with costs.

Counsel for Appellant—Macphail, K.C.—Mackay, K.C.—W. H. Stevenson. Agents—John C. Brodie & Sons, W.S., Edinburgh—Grahames & Company, Westminster.

Counsel for Respondents—Stevenson, K.C.—Leadbetter, K.C.—Carnegie. Agents—Mackenzie & Black, W.S., Edinburgh—Williams & James, London.

Tuesday, December 13.

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

MOHAD v. ANCHOR LINE  
(HENDERSON BROTHERS), LIMITED.

(In the Court of Session, May 20, 1920,  
58 S.L.R. 465.)

*Workmen's Compensation Act—Seaman—Injury during Voyage—Desertion—Liability of Employer under Merchant Shipping Acts—Emergence of Right to Compensation—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 7 (1) (e)—Merchant Shipping Act 1906 (6 Edw. VII, cap. 48), sec. 34 (1).*

A seaman who was engaged for a round voyage from Bombay to the United Kingdom and back to Bombay met with an accident during the voyage which partially incapacitated him. He was thereafter maintained by his employers in accordance with the provisions of the Merchant Shipping Act 1906, and brought in one of their vessels to Liverpool and thence by train to Glasgow, where he rejoined his ship. Before the expiry of his contract of service he deserted, and thereafter claimed compensation under the Workmen's Compensation Act. *Held (diss. Lord Sumner, aff. the judgment of the Second Division)* that as the liability of the shipowners under the Merchant Shipping Act had been terminated by the seaman's desertion the latter was entitled to claim compensation under the Workmen's Compensation Act, and that the shipowners could not postpone their liability therefor until the termination of the voyage.

The case is reported *ante ut supra*.

The shipowners appealed.

At delivering judgment—

VISCOUNT HALDANE—The point in this appeal is a very short one, and it turns, in the view which I shall venture to submit to your Lordships, on the construction of two sections in the Merchant Shipping Act 1906 and the Workmen's Compensation Act of the same year.

The way in which the question arose was this—It was a question tried under the

Workmen's Compensation Act, the arbitrator being the Sheriff-Substitute of Lanarkshire, and he has made a statement of his findings in the usual form, which is somewhat meagre but which raises the point. The respondent, who was a Mohammedan seaman, was engaged by the appellants, apparently at Bombay, for a round voyage from that city to the United Kingdom and back to Bombay within a year, and in the course of the voyage he met with an accident to his right hand, which appears to have been of a somewhat severe character. After the accident the respondent was treated in hospital at Marseilles, where the steamer appears to have stopped, and then he was brought after treatment by the appellants in one of their steamers to Liverpool and thence by train to Glasgow, where he rejoined the steamer the "Circassia." Just after this, in September 1920, he left the "Circassia" without leave and deserted the service.

Now these are the facts as found, and on these facts the arbitrator raises this question, which went to the Second Division—"On the facts as stated, and in view of the provisions of the Merchant Shipping Act 1906, section 34, and the Workmen's Compensation Act 1906, section 7 (1) (e), was I as arbitrator entitled to refuse an award of compensation?" The view he took was this, that the two statutes must be read together, and that the right given by the Workmen's Compensation Act was a right which could not be put into operation because of a provision as to liability in the other Act, to which I will in a moment call your Lordships' attention. The provision in the Merchant Shipping Act is the one which comes first in the order of date. The two Acts were passed in the same year, but the Merchant Shipping Act was passed, I think, first. It is section 34, sub-section (1)—"If the master of, or a seaman belonging to, a ship receives any hurt or injury in the service of the ship, or suffers from any illness" (with certain exceptions) "the expense of providing the necessary surgical and medical advice and attendance and medicine, and also the expenses of the maintenance of the master or seaman until he is cured or dies, or is returned to a proper return port, and of his conveyance to the port, and in the case of death the expense (if any) of his burial, shall be defrayed by the owner of the ship, without any deduction on that account from his wages." Now that is a right given to the seaman in the present case. The Workmen's Compensation Act, sec. 7, sub-sec. (1) (e), says this—"The weekly payment" (that is, in the case of compensation being recovered under the Workmen's Compensation Act) "shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act 1894, as amended by any subsequent enactment or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice."

Now the real question seems to me on those sections to be whether there was liability under the Merchant Shipping Act to defray the expenses of maintenance. The