adopted the pursuer's suggestion of disposing of the claim on the assumption that he could competently entertain it, and leave the defenders to take such action by way of interdict or otherwise as they thought proper. The pursuer coupled his request that this course should be followed with an offer to relieve the oversman of all expenses connected with such a litigation, but the latter allowed himself to be persuaded to the contrary by the defenders. The defenders therefore are in my judgment wholly to blame for the present litigation and ought to bear the expenses of the oversman as well as of the pursuer. If they had consented, as they well might, to the oversman disposing of the claim in the first instance they could have raised the legal points embraced in their 4th and 5th pleas just as readily in an action of interdict in which they would have been the complainers, and the matter could then have been determined without the necessity of having it remitted back to the oversman. I notice from the correspondence that the oversman's agents pressed the defenders to keep their client scatheless, in which case he was quite willing to do nothing but wait the decision of the Court and in due course act thereon. The defenders, however, refused to give any such undertaking, and the oversman accordingly thought it proper that he should enter appearance and explain his position. I do not blame him for doing so, nor on the other hand do I blame the pursuer for asking a decree for expenses against the oversman, who was the only person against whom he could direct his action. Had he made no such claim for expenses he might conceivably have obtained a decree in absence against all parties convened, in which case he would have had to bear the cost of raising the action—an expense to which he had been put entirely because the oversman chose to act on an unfounded plea proponed by the defenders.

LORD ORMIDALE did not hear the case.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Decern against the defender William Hutcheson in terms of the conclusions of the summons: Find the compearing defenders Thomas Greenshields and Thomas Steel Greenshields liable in expenses in the cause incurred by both the pursuer and the defender the said William Hutcheson, and remit," &c.

Counsel for the Reclaimer (Pursuer)—D. P. Fleming—J. Macdonald. Agents—M'Leod & Rose, S.S.C.

Counsel for the Respondent (Defender)—William Hutcheson—Chree, K.C.—Scott. Agents—Connell & Campbell, S.S.C.

Counsel for the Respondents (Defenders)—Thomas Greenshields and Thomas Steel Greenshields—Macphail, K.C.—Guild. Agents—Guild & Guild, W.S.

Saturday, July 2.

FIRST DIVISION.

[Lord Hunter, Ordinary.

SMITH-SHAND'S TRUSTEES AND ANOTHER *v.* FORBES.

Process—Summons—Competency—Several Pursuers—Community of Interest—Action by Different Superiors of Adjoining Lands Held by the Same Vassal for Redemption of Casualties—Amendment.

A vassal holding adjacent lands under two different immediate superiors subfeued the lands as one feu for payment of a grassum and a nominal feu-duty, neither of which was allocated or apportioned. The superiors sued the vassal in one action for redemption of the casualties belonging to them respectively and for payment to them on their joint-receipt of an undivided capital sum or to each of them of separate sums. They averred that the boundaries of their estates were "in certain portions not easily ascertainable," and that "for the purposes of this action and of the determination of their respective rights in the redemption money or additional feu-duties payable under the Feudal Casualties (Scotland) Act 1914, the pursuers have adjusted the matters of boundary arising between them." *Held* (1) that the pursuers had no common interest and that the action was incompetent, but (2) that the action could be amended so as to proceed at the instance of one or other of the pursuers.

Miss Mary Jane Smith-Shand and others, the testamentary trustees of the late Mrs Anna Stuart or Smith-Shand, and William MacIntosh, factor and commissioner for the trustees of the late The Most Noble Alexander William George, Duke of Fife, owners and factor and commissioner for the owners respectively of the immediate superiority of the two portions of land which made together the whole of the estate of Candacraig, Aberdeenshire, *pursuers*, brought an action against Sir Charles Stewart Forbes of Newe and Edinglassie, the vassal of the trustees of the late Mrs Smith-Shand and the trustees of the late Duke of Fife in the said estate, *defender*, for declarator that the defender was bound to redeem all casualties incident to the superiority of the estate belonging to the trustees of the late Mrs Smith-Shand and all casualties incident to the portion of the superiority of the estate belonging to the trustees of the late Duke of Fife, and for payment "to the pursuers upon their joint-receipt" of the sum of £2006, 7s. 9d. for and on account of the casualties of superiority of the said lands," or alternatively to them respectively of the sums of £1105, 3s. 9d. and £901, 4s. The summons also contained alternative conclusions for the payment of additional feu-duties in the event of the defender deciding to commute the redemption prices into annual payments.

The pursuers averred, *inter alia*—"(Cond. 1) The defender was prior to the term of Martinmas 1900, when he by virtue of disposition dated 9th November 1900 created the subordinate holding after mentioned, proprietor in fee of the *dominium utile* of certain lands and estate known generally as the estate of Candacraig in Aberdeenshire. He holds these lands as the immediate vassal of the pursuers, the trustees of the said Mrs Anna Stuart or Smith-Shand, in respect of that portion thereof described in the first conclusion of the summons, and of the Duke of Fife's trustees, the constituents of the pursuer William MacIntosh, in respect of the remaining portion described in the second conclusion of the summons. The said two portions make up together the whole estate or lands whereof the casualties are presently in question, and they adjoin one another, having mutual boundaries which are in certain portions not easily ascertainable. For the purposes of this action and of the determination of their respective rights in the redemption money or additional feu-duties payable under the Feudal Casualties (Scotland) Act 1914 the pursuers have adjusted the matters of boundary arising between them. (Cond. 4) By feu-disposition dated 9th November 1900 and recorded in the Division of the General Register of Sasines applicable to Aberdeenshire on 12th November 1900, the defender, in consideration of the sum of £54,000 sterling paid to him as the price of the lands, sold and disponed for an elusory feu-duty to Alexander Falconer Wallace, Esquire, of 8 Austin Friars, London, the estate of Candacraig, consisting of the two portions held by him of the first-mentioned pursuers and of the constituents of the second-mentioned pursuer respectively, as above set forth, and described in the first and second conclusions of the summons. The tenendas clause and reddendum for the said feu to the said sub-vassal were as follows:—'To be holden the lands and others hereinbefore disponed of and under me and my heirs and successors as immediate lawful superiors thereof in feu-farm, fee, and heritage for ever for payment to me and my foresaids by the said Alexander Falconer Wallace and his foresaids of the sum of one shilling sterling at the term of Martinmas yearly.'"

The defender *pleaded, inter alia*—"1. In respect that the pursuers sue upon two separate and independent grounds of claim, the action is incompetent and should be dismissed."

On 28th July 1920 the Lord Ordinary (HUNTER) repelled the first plea-in-law for the defender.

Opinion.—"The pursuers in this action are (first) the trustees of the late Mrs Smith-Shand, and (second) Mr MacIntosh, the factor and commissioner for the trustees of the late Duke of Fife. They each own a portion of the immediate superiority of the estate of Candacraig in Aberdeenshire, which is held of them by the defender as their vassal. The action has two declaratory conclusions—(First) that the defender is bound as at 1st February 1917 to redeem all the casualties incident to the first-mentioned pursuers' portion of the superiority of said estate of Candacraig, and (second) that he is bound as at 11th June 1915 to redeem all the casualties incident to the second-mentioned pursuers' portion of said superiority. The main petitory conclusion is that the defender should be decerned and ordained, but always after such reasonable space and opportunity being afforded to him to decide whether he will elect, in terms of the Feudal Casualties (Scotland) Act 1914, to commute the redemption prices or either of them into annual payments, to make payment to the pursuers upon their joint-receipt of the sum of £2006, 7s. 9d. sterling, or such sum as shall be ascertained to be the just and true redemption price in terms of the said Act for and on account of the casualties of superiority of the said lands, or otherwise to make payment to the pursuers respectively of the said sum in the shares and proportions following, *videlicet*—To the pursuers the trustees of the said Mrs Smith-Shand the sum of £1105, 3s. 9d. sterling, and to the pursuer William MacIntosh the sum of £901, 4s. sterling, together with interest at the rate of 4 per centum per annum upon such capital sum or sums as shall be found and ascertained to be payable as aforesaid from the said 1st day of February 1917 as regards the sum payable to the pursuers the trustees of the said Mrs Smith-Shand, and from the said 11th day of June 1915 as regards the sum payable to the pursuer William MacIntosh, both until payment. There is an alternative conclusion in the event of the defender electing to make annual payments in lieu of the capital sums ascertained to be payable in redemption of the casualties of superiority.

"From the pursuers' averments it appears that they own the superiority of the whole estate or lands whereof the casualties are in question, and that their estates have mutual boundaries, which are in certain portions not easily ascertainable. For the purposes of this action, and of the determination of their respective rights in the redemption money or additional feu-duties payable under the Feudal Casualties (Scotland) Act 1914, they have adjusted the matter of boundary between them.

"Under the above Act the casualties incident to the said estates of superiority fall to be redeemed on the demand of either party into a capital sum or sums, or at the option of the vassal into an additional feu-duty corresponding to such capital sum or sums. The late Mrs Anna Stuart or Smith-Shand duly gave the defender notice of redemption on 1st February 1917, and the constituents of the second-mentioned pursuer gave similar notice on 11th June 1915. These dates are the statutory dates at which the redemption moneys fall to be ascertained.

By feu-disposition dated 9th November 1900, and recorded in the Division of the General Register of Sasines applicable to Aberdeenshire on 12th November 1900, the defender, who was then proprietor in fee of the *dominium utile* of the estate of Candacraig, in consideration of the sum of £54,000

sterling paid to him as the price of the lands, sold and disponed the said estate for an elusory feu-duty to a Mr Wallace, London. The tenendas clause and reddendum for the said feu to the said sub-vassal were as follows:—'To be holden the lands and others hereinbefore disponed, of and under me and my heirs and successors as immediate lawful superiors thereof in feu farm, fee, and heritage for ever for payment to me and my foresaids by the said Alexander Falconer Wallace and his foresaids of the sum of one shilling sterling at the term of Martinmas yearly.' The disponee undertook an obligation to relieve the defender of the over feu-duties and of the casualties payable to his superiors. . . .

"The first plea taken by the defender is—'In respect that the pursuers sue upon two separate and independent grounds of claim, the action is incompetent and should be dismissed.' He relies upon the three cases of *Killin* v. *Weir*, 7 F. 526; *Brims & Mackay*, 1907 S.C. 1106; and *Paxton* v. *Brown*, 1908 S.C. 406.

"These cases all illustrate the rule laid down in *Feuars of Orkney*, M. 11,980, that 'different parties could not accumulate their actions in one libel unless they had connection with one another in the matter pursued for or had been aggrieved by the same Act.'

"As was pointed out by Lord President Dunedin in the case of *Paxton*, mere convenience does not justify different pursuers maintaining the same action unless the case is brought within one or other of the exceptions mentioned. In the same case Lord M'Laren said that he understood by the first exception 'some title or interest in common.' It appears to me that the present case comes within the exception as thus defined. Each of the two pursuers has no doubt a distinct and separate interest in his own estate of superiority. But if either had raised an action against the defender and a question had arisen as to the extent of his estate, the question could hardly have been satisfactorily decided in the absence of the other pursuer. The defender in creating an estate of mid-superiority dealt with the whole estate of Candacraig as an entity, receiving a price for both portions held of the two pursuers without separation of the price into two parts. As long as he receives a valid discharge for the whole amount payable by him he is not prejudiced by the conjunction of the two superiors. I propose therefore to repel the first plea for the defender. . . ."

The defender reclaimed, and argued, on the question of competency—The pursuers had no community of interest. They were suing for totally separate sums which they claimed under different feudal titles. The Lord Ordinary had decided on the ground of convenience and the absence of prejudice, but that was not sufficient to overcome the objection. The uncertainty of the boundaries and the difficulty of splitting up the grassum were irrelevant. If the combined action was held to be competent the defender might be prejudiced on the question of whether there was a set for maills, in the meaning of the Statute of 1469, by which the composition was to be measured. The action was therefore incompetent—*Orkney Feuars* v. *Stewart of Burray*, 1741, M. 11,986; *Killin* v. *Weir*, 7 F. 526, 42 S.L.R. 393; *Paxton* v. *Brown*, 1908 S.C. 406, 45 S.L.R. 323. It was doubtful if the action could be amended so as to allow one of the pursuers to abandon—*Hay* v. *Mortan*, 1862, 24 D. 1054; *Wilson* v. *Magistrates of Musselburgh*, 1868, 6 Macph. 483, 5 S.L.R. 312; *Stewart* v. *Greenock Harbour Trustees*, 1868, 6 Macph. 954, 5 S.L.R. 615. The Court of Session Act 1825 (6 Geo. IV, cap. 120), section 10, and Act of Sederunt, 11th July 1828, section 115, gave no authority of such an amendment.

Argued for the pursuers (respondents)—The action was both competent and convenient. There was sufficient community of interest. There was a joint interest in the matter libelled — *Paxton* v. *Brown*, *supra*. A joint interest in the legal sense was not necessary. The principle of the objection was that people should not be made parties to a process who would be merely spectators of part of the proceedings. Here it was necessary in order to decide the questions at issue that both superiors and the vassal should be present. The case was at least on the border line where convenience became a consideration—*Cowan* v. *Duke of Buccleuch*, 1876, 4 R. (H.L.) 14, *per* Lord Cairns, L.C., at p. 17, 44 S.L.R. 189—and the position was due to the defender having sub-feued the lands as one estate. If necessary the action could be amended by striking out one of the pursuers—*Paxton* v. *Brown*, *supra*.

At advising—

LORD PRESIDENT—The defender is entered vassal in the lands of A, which he holds of the first pursuers as superiors. He is also entered vassal in the lands of B, which he holds of the second pursuer as superior. In 1900 he subfeued the lands of A and the lands of B by a single feu-disposition in favour of a sub-feuar in consideration of a price of £54,000, the sum of one shilling sterling payable yearly at Martinmas being stipulated for in the tenendas clause as a feudal reddendum. Neither the price nor the nominal feu-duty was allocated or apportioned as between the two estates of A and B. The present action is brought by the first and second pursuers together for the redemption (1) of the casualties belonging to the first pursuers as superiors of A, and (2) of the casualties belonging to the second pursuer as superior of B, under and in terms of the Feudal Casualties Act 1914. By the third conclusion, in the event of the defender electing to redeem by capital payment, decree is sought for an undivided sum of money payable on the joint-receipt of the first and second pursuers, or alternatively for two separate sums payable to the first and second pursuers respectively. By the fourth conclusion, in the event of the defender electing to commute the redemption money due to either the first or the second pursuer into annual payments, decree is sought for such annual payments, beginning in the case of each of the two pur-

suers from the date (1st February 1917 in the case of the first pursuer, and 11th June 1915 in the case of the second pursuer) on which notice to redeem was given by them respectively.

It is clear that the action as it stands is just an accumulation of two actions in one by different superiors interested in the casualties of two separate estates. It therefore falls within the rule of the *Feuars of Orkney* v. *Stewart* (M. 13,986) unless the two pursuers can be shown to have an interest in common in the matter of the suit. In the ordinary case it seems clear that no common interest can exist between two superiors of two different estates enforcing the rights of their respective superiorities. The Lord Ordinary, however, thought that an interest in common in the matter of this particular action could be found in the fact that, as appears from the averments of the two pursuers, the boundaries of their estates, which adjoin each other, "are in certain portions not easily ascertainable," and that "for the purposes of this action and of the determination of their respective rights in the redemption money or additional feu-duties payable under the Feudal Casualties (Scotland) Act 1914 the pursuers have adjusted the matters of boundary arising between them." But the common convenience of the two superiors, which is undoubtedly served by adopting this course, does not constitute a common interest in the redemption of each other's casualties. If it did, the rejection by the Lord Ordinary of the defender's first plea-in-law would be justified. But, as was tersely remarked by Lord Dunedin in *Paxton* v. *Brown* (1908 S.C. 406), where the rule of the *Feuars of Orkney* was recognised as in green observance — "Convenience is convenience, but a rule remains a rule." Besides, a superior who seeks to enforce against his vassal the rights of his superiority cannot be heard to say that he does not know the meiths and marches of the lands comprised in the superiority in virtue of which he brings his action.

From the point of view of the defender also there is a possible convenience in having the redemption money ascertained in a process to which both superiors are parties. For if it should turn out that resort must be had to an apportionment between the two estates of the single feu-duty and grassum —these two elements of consideration being treated on the lines of *Campbell* v. *Westenra* (10 S. 734) — it might be convenient in his interest that the apportionment should be done once and for all, and so as to bind both superiors at once. I therefore suggested to the defender that it might not be worth his while to persist in his objections to the competency of the action as laid, but—as he was perfectly entitled to do — he preferred to maintain that objection, and it is therefore necessary to deal with it. It is true that the disadvantages which may result from making two bites of a cherry in this matter of apportionment (should it become a necessary part of the procedure in the case) may fall on one or other of the superiors according to circumstances and not on the defender.

My opinion accordingly is that the Lord Ordinary's interlocutor must be recalled and the defender's first plea-in-law sustained. But this does not necessarily lead to the dismissal of the action. The forms of process in use in 1741, when the *Feuars of Orkney* was decided, admitted of the practice (followed in that case) of allowing the action to proceed at the instance of whichever of the pursuers their procurators might select. In *Paxton* v. *Brown* this course was followed. I see no reason against following it here, and I therefore propose that the cause should be continued in order to give an opportunity for selection between the pursuers, and for the preparation of the necessary minute or minutes of amendment, deleting from the instance the name of either the first or second pursuer, and adjusting the conclusions, condescendence, and pleas-in-law to the new situation created by such selection.

LORD MACKENZIE—I concur. I think we must come to this conclusion in consequence of what has been decided in a series of cases, of which *Paxton's Trustees* (1909 S.C. 406) is the latest example.

LORD CULLEN—The defender is the vassal in a certain feu held immediately of the pursuers first mentioned in the summons. He is the vassal in certain other feus held immediately of the pursuers second mentioned in the summons. The two superiors are here suing, in virtue of the Act of 1914, for redemption of the casualties incident to the feus held of them respectively. The defender pleads that the combination of their claims in one process is incompetent, invoking the rule laid down in *Feuars of Orkney*, M. 11,980, and recently applied in *Paxton* v. *Brown*, 1908 S.C. 406. I am of opinion that this plea falls to be sustained.

The feu held of the first superior, and those held of the second, stand entirely distinct and unconnected in origin and tenure. In any other case of process, competent at common law or otherwise, for the enforcement of superiority rights connected with the two sets of feus respectively, the rule invoked by the defender's plea would clearly have applied. Thus if before the Act of 1874 the two superiors had been suing declarators of non-entry, or if subsequent to that Act they had been insisting in action for recovery of casualties in the substituted form authorised by that Act, it is admitted that separate actions would have been necessary. And it is, I think, equally clear under the Act of 1914 as applied to the case of the feus here under consideration that if it had not happened that resort requires to be made to a *cumulo* feu-duty on the one hand, or to a *cumulo* rental on the other hand, for measuring the claim of each superior, the process rule in question would have again applied so as to render separate actions necessary. The pursuers, however, contend that it is the need for such resort which avoids the rule and justifies the form of process which they have adopted. I am unable to accede to this view. It is not as if the *cumulo* feu-duty or the *cumulo* rental formed a fund *in medio*

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-