HOUSE OF LORDS.

Friday, December 1.

(Before the Lord Chancellor (Loreburn), Lord Atkinson, Lord Kinnear, and Lord Gorell.)

WALKER TRUSTEES *v.* LORD ADVOCATE AND OTHERS.

(In the Court of Session, July 7, 1910, 47 S.L.R. 734, and 1910 S.C. 1037.)

Statute — Interpretation — Contemporanea Expositio — Heritable Office — Usher of White Rod — Treaty of Union, Ratified by Scots Acts 1707, *cap.* 7, *and by* 6 *Anne, cap.* 11, *Article* 20.

The Treaty of Union, article 20, enacts "That all heritable offices, superiorities, heritable jurisdictions, offices for life, and jurisdictions for life, be reserved to the owners thereof as rights of property, in the same manner as they are now enjoyed by the laws of Scotland notwithstanding this Treaty."

The Usher of the White Rod at the time of the Union was entitled to receive certain fees from the recipients of honours conferred by the King as Sovereign of Scotland, and could recover these fees from a Scotsman in whatever part of the King's dominions he, the grantee, might be in, and from an Englishman if he, the grantee, received the honour while in Scotland. From 1766 to 1904 the holders of the office claimed and received fees from the grantees of titles and dignities of the United Kingdom.

Held (*rev.* judgment of the Second Division) that although the effect might be to deprive the Usher of valuable emoluments, the terms of article 20 of the Treaty of Union were too unambiguous to be open to interpretation by any custom or practice which had grown up since, that by it the rights effeiring to the office of Usher were as before the Union, and consequently fees were only payable by a grantee of a Scottish honour or dignity, not by the grantees of honours or dignities of the United Kingdom.

The case is reported *ante ut supra.*

The Lord Advocate and others appealed to the House of Lords.

At delivering judgment—

EARL OF HALSBURY — I have had the opportunity of reading my noble and learned friend Lord Atkinson's judgment. I agree with every word of it, and I do not think I can add anything to his reasons.

LORD ATKINSON — This is an appeal against a judgment of the Second Division of the Court of Session whereby it was declared that the respondents, a body of trustees incorporated by a private Act styled the Walker Trust Act 1877, and admittedly the proprietors and holders of the heritable office of His Majesty's sole and principal Usher within the Kingdom of Scotland, are, as such, entitled to recover certain fees and dues, claimed to appertain to this office, from the recipients from the Crown of the following honours, titles, and dignities of the United Kingdom, namely, upon the creation of a duke, £21, 13s. 4d.; of a marquis, £18, 6s. 8d.; of an earl, £15; of a viscount, £10; of a baron, £6, 13s. 4d.; of a knight baronet, £5; and of a knight, £3, 6s. 8d.

The action out of which the appeal has arisen was instituted by the Walker Trustees to try their right to recover these fees on the creation by the Crown of honours, titles, and dignities of this character. The defendants, other than the Lord Advocate, who represents the Crown and the Lords Commissioners of His Majesty's Treasury, are all persons resident in Scotland whose titles are titles of the United Kingdom of Great Britain and Ireland. Two of them — Sir Charles Cayzer, Bart., and Sir Arthur Bignold — are Englishmen, and three — Lord Leith of Fyvie, Sir John Wilson, Bart., and Sir Henry Cook — are Scotsmen. The last-named appellant and Sir Arthur Bignold were created knights by Acolade at Buckingham Palace in the year 1904. The titles of all the others were conferred in or about the same year by letters-patent under the Great Seal of the United Kingdom. The right of the respondent to recover these fees is the sole question for decision.

This office of Usher or White Rod, as he is styled, is a very ancient one. It existed for centuries before the Union of the Crowns of England and Scotland on the accession of James VI of Scotland to the English Throne as James I of England in the year 1603. It admittedly was and has never ceased to be a Scottish office. Its duties, such as they were, were performed in Scotland, and did not and could not, before the year 1707, affect or concern the holders of English or Irish peerages, dignities, or honours as such, who were not members of either of the Houses of the Scottish Parliament, did not attend either General Councils or Feasts at the Scottish Court, and were not resident in that kingdom.

The earliest document referred to in evidence dealing with the office is a grant of 1393, confirmed by a statute of the Parliament of Scotland, of the Barony of Langton to Alexander Cockburn of Langton, in consideration of certain services to be rendered by him, including those of Usher of Parliaments, General Councils, and Feasts. It is stated in the appellants' case, and apparently not disputed, that charters were granted by the Scottish Sovereign in the years 1510, 1542, and 1595 respectively, consolidating this barony of Langton and annexing to it, as a dependency, the office of Usher or White Rod with all its rights and privileges. It is further stated, and not apparently disputed, that the taking of fees by the

holder of this office is first mentioned in a charter, dated in the year 1642, which, however, is not printed in the record. About five years later, on the 5th of January 1647, Charles I, describing himself as the King of Great Britain, France, and Ireland, by charter under the Great Seal of Scotland, granted to Sir William Cockburn and Robert Cunningham, therein described, this office, with the privileges and advantages belonging to it, to hold during their lives, and after their decease to the heirs-male and assignees of the said Sir William.

This charter contains a grant, the meaning of which was so much discussed, in the words following—"Una cum omnibus feodis casualitatibus aliisque devoriis subscriptis solvendis per comites vice comites Barones Majores Equites baronettos aliosqui Equites quovis tempore affuturo creandos aut honores titulos et dignitates recepturos per nos nostrosve commissionarios per literas patentes aut quovis alio modo ab omnibus Scotes solvendis infra nostra dominia et similiter ab omnibus Anglis qui honores et dignitates infra dictum hoc regnum nostrum Scotiæ a nobis recipiant, viz." Then follows a list of the fees.

The next charter necessary to consider is that dated the 5th of June 1674. It grants this office to Sir Archibald Cockburn, son of Sir William, the former grantee, the said Cunningham having renounced. It contains a clause differing in no respect from that above quoted from the previous patent, save that after the word "recepturos," the words "per quondam clarissimum nostrum patrem," have been introduced and the word "nos" omitted after the preposition "per."

Now the first question one has to ask one's self is, What were the honours and dignities with which King Charles I and King Charles II respectively were dealing in these patents? At that period of time each of these monarchs could, as the Sovereign of England, confer English honours and dignities by patent under the Great Seal of England, as Sovereign of Ireland confer Irish honours and dignities under the Great Seal of Ireland, and as Sovereign of Scotland confer Scotch honours and dignities under the Great Seal of Scotland.

If either of these kings sought, in respect of their grants of English or Irish honours or dignities, to exact fees from the grantees, the exaction should be authorised by an Act of the Legislature binding upon the subject who received the grant, *i.e.*, either a native of the particular country or a person living or sojourning in it, and therefore under the protection of and subject to its laws. (See Coke, 2 Institutes, p. 533; Comyn's Digest, Title Prerogatives, vol. 7, p. 65.)

Whether the law is the same in Scotland as in England on this point it is unnecessary to discuss, inasmuch as an Act of the Scottish Parliament of the 6th of September 1681 ratified and confirmed the charter of the 5th of June 1674 granted to Sir Archibald Cockburn. This statute recites at length the charter of 2nd January 1647 to Sir William Cockburn and Robert Cunningham, and translates into English the clause in that patent, the meaning of which is in controversy, in the following passage:—"All and sundry the fines, duties, casualties, and profits belonging to the said office within the kingdom of Scotland according to the custom thereof, viz., all and sundry casualties, fines, and composition accressing and belonging to the said office of Principal Usher to His Majesty, and those who exercise the same within the said kingdom of Scotland, and which were in use to be paid to the said Usher for infringements of lands passing the Great Seal within the said kingdom either by resignations, confirmations, or new gifts, with all fees, casualties, and other duties underwritten, payable by earls, viscounts, lords, knights baronets, and other knights to be made in all time coming, or who should receive honours, titles, or dignities from His Majesty's said father or His Majesty's Commissioners by patents or any other way. To be paid by all Scotsmen within His Majesty's dominions, and also by Englishmen who shall receive any honours or dignities from His Majesty within the said kingdom of Scotland."

I have modernised the spelling of the passage. It then sets out that in "*corroboration*" of all rights and securities granted to Sir Archibald Cockburn and his predecessors, His Majesty granted and confirmed to him, his heirs and assigns, amongst other things, "all fees, casualties above payable by dukes, marquesses, earls, viscounts, lords, knights baronets, and other knights, made or to be made, and who shall receive honours, titles, and dignities by patent or any other way, and payable by all Scotsmen who shall receive dignities within any of His Majesty's dominions, and by all Englishmen who have already obtained and who hereafter shall obtain honours or dignities from His Majesty and his successors within the said Kingdome of Scotland." By this patent a salary of £250 sterling per annum was granted to Sir Archibald Cockburn and his assigns, holders of this office, to be paid out of the "first and rediest of the rents duties payable to His Majesty within the said Kingdome of Scotland." This is, if I may so call it, the first stage in the documentary office of "White Rod." No mention is made of the Great Seals of England or Ireland, nor is any English or Irish statute referred to dealing with any of those charters or the fees granted by them. And it would certainly appear to me to be impossible to read over these documents without coming to the conclusion that the honours, titles, and dignities dealt with by them are Scottish honours, titles, and dignities; that is, honours, titles, and dignities each of the several monarchs as he as sovereign of the kingdom of Scotland had power to grant; and to those honours, titles, and dignities alone. It was, as I understood, contended by Mr Clyde, in his ingenious arguments, that owing to the presence of the words "payable by all Scotsmen within our Dominions," the

patent applies to honours, titles, and dignities granted to Scotsmen by the King as Sovereign of England under the Great Seal of England, or as Sovereign of Ireland under the Great Seal of Ireland; and further, that there would be nothing illegal or unconstitutional in the Scottish Parliament passing an Act requiring a Scotsman, in whatever part of the three kingdoms he might receive one of these honours, titles, or dignities, or be domiciled, to pay to this Scotch official a fee upon receiving it, inasmuch as he, being a Scottish subject, wherever he might be, owed allegiance to his Scottish Sovereign and submission to the Scottish Parliament.

Mr Clyde may possibly be right upon this point, though legislation of such a kind as he suggests would be somewhat unjust and altogether anomalous. I cannot, however, adopt the construction for which he contends. I think the words "to be paid by all Scotsmen within His Majesty's dominions" were introduced in order to make those fees recoverable from the Scottish grantee by reason of his nationality in whichever of the three kingdoms he might be resident or might receive the honour, whereas the English recipient of Scottish honours and dignities could only be reached by a Scottish statute or by a judgment of the Scottish Court if he came within that kingdom. These provisions touching the payment of these fees do not in my view alter the conclusion to which I have come as to the nature of the honours, titles, and dignities dealt with. That this was the view of the Crown and of the Scottish Legislature some few years before the Union is, I think, suggested by the wording of the charter of resignation in favour of Alexander Cockburn junior of Langton, dated the 21st January 1686, and in the Scottish statute confirming it passed on the 15th of June in the same year. The words in the charter dealing with those fees run thus—"Una cum omnibus feodis casualitatibus aliisque censibus subscriptis solvendis per Duces, Marchiones, Comites, Vicecomites, dominos, milites, Baronettos aliosque, equites, creatos et creandos ac honores titulos dignitates a nobis vel successoribus nostris aut commissionariis nostris per literas aut quovis alio modo recepturas ac solvendis per omnes Scoticas (*sic*) dignitates intra quaecunque nostrorum dominiorum recipientes, ac per omnes Anglos qui hactenus assequuti sunt vel in posterum honores et dignitates a nobis vel successoribus nostris in dicto Regno nostro assequentur." And the confirming statute, though it contains near the end of it a general clause of ratification of the patent, recites the charter intended to be ratified as granting "all new gifts with all casualties, fees, other rents underwritten payable by dukes, marquesses, viscounts, lords, knights, baronets, and other knights created or to be created, and receiving honours, titles, and dignities from His Majesty and his successor within the said kingdom of Scotland."

It certainly appears to me, therefore, that the rights of the Usher of the White Rod were at the time of the Union simply these—(1) He was entitled to receive the stipulated fees from the recipients of honours conferred by the King as Sovereign of Scotland; and (2) he could recover those fees from a Scotsman in whatever part of the King's dominions he, the grantee, might be when he received the honour, dignity, or title; and (3) he could recover like fees from all Englishmen whenever they received those honours in Scotland, and could therefore be reached by the tribunals of that country.

The next question is, Did the Treaty and Act of Union alter the White Rod's position, enlarge or curtail his rights? In my view sections 20 and 23 of the Treaty left his rights precisely as they were, though no doubt they made less lucrative the enjoyment of them. The 20th article runs as follows—"XX. . . . [*quotes, v. sup. in rubric*] . . ."

It left to this officer all the rights of property he then enjoyed by the law of Scotland by virtue of his office. The operation of this and the 23rd section may, so far as he is concerned, be harsh and oppressive in this, that as peers of Scotland could not thenceforth be created, he loses the fees which but for the Treaty he would have received. This is undoubtedly so, but while such a consideration might possibly give the trustees a strong claim upon the bounty of the Crown, it cannot affect the question of the proper construction of the Treaty and the ancient documents of earlier date. That is a pure question of law, and is, moreover, the only question for the decision of your Lordships. In this case neither the Lord Ordinary nor the Judges in the Second Division, nor indeed counsel in argument, have succeeded in pointing out what is the alleged ambiguity in this article of the Treaty, or indeed in the earlier documents which the usage or practice obtaining from 1766 downwards, the payment through the Treasury of these fees by all recipients of honours, titles, and dignities of the United Kingdom, was admitted in evidence to explain or remove, or how it was legitimately to aid in determining the subject-matter to which these documents apply or to fix the limits of the rights they confer.

As against a plain statutory law no usage can prevail—see Lord Brougham, *Dunbar* v. *Duchess of Roxburghe*, 3 Clark and Finnelly, 335, at 354; Lord Campbell, *Gorham* v. *The Bishop of Exeter*, A & E. 15 Q.B 52, at p. 73. In *Herbert* v. *Purchas*, L.R., 3 P.C. 605, at 650, Lord Hatherley is reported to have said—"It is quite true that neither contrary practice nor disuse can repeal the positive enactment of a statute, but contemporaneous and continuous usage is of the greatest efficacy in law for determining the true construction of obscurely framed documents." In the *Trustees of Clyde Navigation* v. *Laird*, 8 A.C. 658, at p. 673, Lord Watson says—"When there are ambiguous expressions in an Act passed one or two centuries ago it may be legitimate to refer to the construction put upon these expres-

sions throughout a long course of years by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the Legislature at that remote period." And in a recent case in your Lordships' House — *Winstanly* v. *North Manchester*, A.C. 1910 — it was held that the rector of a parish was rateable, under the 43 Eliz. c. 2, in respect of the burial fees he received as occupier of the parish burial ground, notwithstanding the fact that for over three centuries the practice had been not to rate him.

It may be doubted in the present case, however, whether the persons who paid these fees knew anything whatever of the right by virtue of which they were demanded, or whether the payment could be described as having been made with the consent, to use the language of Lord Watson, of all parties interested; but however that may be, the payment of the fees for even 150 years from the year 1766, though undoubted, is, I think, irrelevant, and cannot affect the meaning of the documents your Lordships have to construe, inasmuch as their language is plain and unambiguous. So that the question for decision, in my view, narrows itself down to this — Is an honour or other title or dignity of the United Kingdom, created and conferred since 1707, a Scottish title, dignity, or honour within the meaning of the foregoing charters and patents of the Scottish King and statutes of the Scottish Parliament?

I concur with Lord Low, and, as I understand, with the other learned Judges in the Second Division, in thinking that a post Union title or dignity or honour is a wholly different thing from the Royal title, dignity, or honour conferred before the Union by the King of Scotland by virtue of his prerogative as Sovereign of that kingdom.

Where I differ from him and them is in their conclusion that the 20th section of the Treaty of Union is ambiguous in its language, and that because of that the usage of the last 150 years can be relied upon to secure to this officer fees in respect of the honours, titles, and dignities created since its date which are not Scottish honours, titles, or dignities in the sense I have indicated. In my view, the Treaty of Union left the office as it was, with the rights which, under the law of Scotland, the holder of it theretofore enjoyed in respect to the creation of Scottish honours, titles, and dignities properly so called and nothing more.

The order of knighthood is not in any sense a local title. It is an order of chivalry recognisable in every part of the King's dominions, and differs in that respect altogether from an earldom conferred by the King as Sovereign of the kingdom of Scotland. (See *Sir John Douglas's* case, 4th vol., Coke's Reports, vol. R., p. 16.)

In my opinion, therefore, the interlocutors appealed from are erroneous, and should be reversed, and this appeal be allowed with costs.

LORD KINNEAR — I agree entirely with all that has been said by my noble and learned friend opposite, and I therefore think it unnecessary to detain your Lordships by stating my own reasons, which are entirely in accordance with his.

LORD GORELL—I have had the opportunity of reading and considering the judgment of my noble and learned friend Lord Atkinson, and I fully concur with it.

Their Lordships reversed, with expenses, the judgment appealed against.

Counsel for the Pursuers (Respondents) —Clyde, K.C. — Macphail, K.C. — C. H. Brown. Agents—George J. Wood, W.S., Edinburgh—John Kennedy, W.S., Westminster.

Counsel for the Defenders (Appellants) —The Lord Advocate (Ure, K.C.)—The Solicitor-General (Sir John Simon, K.C.)—J. C. Pitman. Agents — Thomas Carmichael, S.S.C., Edinburgh—Solicitor to the Treasury, London.

COURT OF SESSION.

Friday, November 17.

FIRST DIVISION.

(SINGLE BILLS.)

A B *v.* C D.

Process—Double Reclaiming Notes—Competency—Expenses—Court of Session Act 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 52.

While a party who means to reclaim is not in safety to rely on the opposite party's intimation that he intends to present a reclaiming note, he is not entitled, after the latter's note has been not only intimated but printed and boxed, and the case sent to the roll, early in the reclaiming days to prepare another reclaiming note with a view to getting the expense thereof. Accordingly where double reclaiming notes have been presented it will be for the Auditor to say whether there was any proper reason for lodging the second note, and if there was not, he will disallow the expense of it even though the party lodging it may have been successful in the cause.

The Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 52, enacts—"*Effect of a reclaiming note against a final judgment.*—Every reclaiming note, whether presented before or after the whole cause has been decided in the Outer House, shall have the effect of submitting to the review of the Inner House the whole of the prior interlocutors of the Lord Ordinary of whatever date, not only at the instance of the party reclaiming, but also at the instance of all or any of the other parties who have appeared in the cause, to the effect of enabling the Court to do complete justice,