

That might have been natural, but it did not necessarily follow; it could have been easily said; it is not said in section 20, nor elsewhere in the Act, and I do not think there is sufficient reason for inferring it, when there is another intelligible view of the meaning of the section.

The LORD JUSTICE-CLERK concurred.

LORD SALVESEN was not present.

The Court recalled the interlocutor of the Lord Ordinary, found that the petitioner was not entitled to disentail the estate of Murie without the consents of the wards, and remitted the petition to the Lord Ordinary to proceed therein.

Counsel for Petitioner (Respondent)—Sandeman, K.C.—Smith Clark. Agents—M. J. Brown, Son, & Co., S.S.C.

Counsel for Respondent (Reclaimer)—Macmillan, K.C.—A. R. Brown. Agents—Cockburn & Meikle, W.S.

Saturday, June 29.

#### FIRST DIVISION.

(Before Seven Judges.)

[Lord Skerrington, Ordinary.]

#### GOVERNORS OF GEORGE HERIOT'S TRUST v. PATON'S TRUSTEES.

*Superior and Vassal—Composition—Sub-Feu—Partial Redemption of Sub-Feu-Duty—Measure of Composition—Act 1469, cap. 36.*

A vassal sub-feued his land for a feu-duty of £20, which was a fair and adequate return at the date of the feu-disposition. The feu-duty was subsequently redeemed to the extent of £19, 15s.

Held that the superior was not entitled on the entry of a singular successor to a year's rent of the lands, but was bound to accept the sum of £20 tendered by the vassal.

*City of Aberdeen Land Association, Limited v. Magistrates of Aberdeen (re Brown Lands), July 2, 1904, 6 F. 1067, 41 S.L.R. 647, overruled.*

*Campbell v. Westenra, June 28, 1832, 10 S. 734, approved.*

*Earl of Home v. Lord Belhaven and Stenton, May 25, 1903, 5 F.(H.L.) 13, 40 S.L.R. 607, distinguished.*

On 7th December 1910 the Governors of George Heriot's Trust, incorporated under the Educational Endowments (Scotland) Act 1882, superiors of certain subjects at the corner of Queensferry Street and Shandwick Place, Edinburgh, pursuers, brought an action against Mrs F. E. Ingram or Paton, widow of James Paton of Avonhill, and others, Mr Paton's trustees, defenders, in which they sought declarator that in consequence of the death of the said James Paton, the vassal last vest and seised in the said subjects, a casualty of

£936 odd, being one year's rent of the said subjects, became due to the pursuers as superiors foresaid on 4th July 1908, the date of the defenders' infestment. A petitory conclusion followed.

The following narrative is taken from the opinion (*infra*) of the Lord President—“This is an action for payment of a composition by Heriot's Hospital, the superiors of ground now forming part of the houses and streets of Edinburgh, directed against the trustees of the late James Paton, the mid-superiors of the same, and being liable in a composition as singular successors of the last-entered vassal, the said James Paton.

“The lands consist at present of various houses, all held under feu contracts and charters of subinfeudation. No question arises except as respects one part of the lands; as regards the rest the pursuers are content to demand a payment of a sum equal to a year's feu-duty receivable by the defenders. But as regards one portion of the lands now known as 1 Shandwick Place, being those originally sub-feued to one Andrew Ferris, the parties are at issue.

“The history of these lands is as follows—By feu-disposition, of date 14th and 16th August 1816 and 1st October 1817, Mr Russell, commissioner and factor for Cockburn Ross, the then proprietor of the *dominium utile* of the said subjects, sub-feued to A. Ferris, the stance No. 1 for the feu-duty of £20. The deed contained a clause allowing the feuar to redeem the feu-duty at any time up to the extent of £19, 15s., at the rate of twenty years' purchase. This power was, at certain dates ending in 1841, taken advantage of, and the feu-duty at present stands at 5s.

“The pursuers contend that as the existing feu-duty is only 5s., which sum does not represent the yearly value of the lands at the time they were feued, they are entitled to demand a sum equal to a year's rent of the lands as they would let at the present time, a sum which may be taken as fixed by the valuation roll. In other words, they demand as a condition of entry to an estate which can only bring in to the vassal 5s. a-year a payment of the capital sum of £936.

“The vassal tenders the sum of £20, being content to admit that to the 5s. he yearly receives he must add £19, 15s.—which may be looked upon either as making up the original feu-duty of £20, or as representing 5 per cent. on the redemption price paid.”

The pursuers pleaded, *inter alia*—“(3) The composition payable by the defenders being (1st) the sub-feu-duties payable to them for subjects feued out without payment of grassum, and of which no part has been redeemed, and (2nd) the year's rent where the sub-feu-duties now payable to the defenders do not form the whole consideration for which the sub-feu-rights were granted, the pursuers are entitled to decree as concluded for.”

The defenders pleaded, *inter alia*—“(3) The sum payable by the defenders, as

trustees aforesaid, to the pursuers in respect of the defenders' implied entry in the subjects referred to in the summons being (a) the amount of the sub-feu-duties actually received and payable to the defenders as trustees foresaid, in respect of said subjects under deduction of the said over-feu-duty and sums in commutation of casualties, or *separatim* (b) the amount of the original sub-feu-duties, or alternatively the amount of the sub-feu-duties actually payable to the defenders as trustees foresaid, together with a sum equal to a year's interest at 5 per centum per annum on the sum received by the defenders' predecessor in redemption of the sub-feu-duty on Ferris's feu to the extent foresaid under deduction as aforesaid, and the defenders having previously tendered, and having now consigned, the amount thereof, the pursuers are only entitled to decree for the sum consigned, and the defenders are entitled to expenses."

On 25th May 1911 the Lord Ordinary (SKERRINGTON) found that the composition was to be measured by the actual rent, subject to the usual deductions. *Quoad ultra* his Lordship continued the cause and granted leave to reclaim.

*Opinion.*—" . . . [After narrating the nature of the action] . . . The pursuers' counsel maintained that in measuring the composition due to his clients the sub-feu fell to be disregarded, and that upon two grounds. He maintained, in the first place, that it appeared from the narrative of the feu-disposition in favour of Ferris that Ferris had paid his superior a grassum of £105. If such was the real nature of the transaction the feu-duty cannot be accepted as the measure of the casualty. Though a feu-duty of £20 is not illusory, it seems to follow from the ratio of the decision as to the 'Brown Lands' in the case of *City of Aberdeen Land Association, Limited, v. Magistrates of Aberdeen*, 1904, 6 F. 1067, that £20 cannot be regarded as the true rent or annual value of the subjects if in point of fact a capital sum was paid by the feuar to the mid-superior in return for obtaining the feu right. What actually took place, as set forth in the narrative of the feu-disposition was as follows:—The original personal agreement for the feu had been made in 1807 by one Munro, a builder, who became bankrupt after building a number of cellars on the ground. A new agreement was then made between Mr Russell, as commissioner for Mr Cockburn Ross, and John Campbell, the trustee in Munro's sequestration, whereby the former agreed to reduce the feu-duty from £33 to £20 upon condition that Campbell should pay him £100, and, in case the price to be received by Campbell for the said area and cellarage should exceed £100, then ten per cent. upon such additional sum 'in full of arrears of feu-duty due for the said stance to Whitsunday 1815, and in consideration of my having consented to the said reduction of feu-duty.' The area and cellarage having been exposed to public roup were thereafter bought by Ferris for £150. The disposition in favour of Ferris

was granted in consideration of the sum of £105 and of the yearly feu-duty. If the feu-duty had been fixed at £20 by direct contract between the feuar Ferris and his superior Mr Cockburn Ross, it would have been difficult to maintain that the £105 was not a grassum. But the rate of feu-duty had been fixed by antecedent contract between Mr Cockburn Ross's commissioner and the trustee in bankruptcy, and I do not think that it necessarily follows from anything stated in the narrative of the feu-disposition that the sum of money stipulated for by the former was of the nature of capitalised feu-duty, or that the rate of feu-duty agreed upon by them was less than the true annual value of the subjects. It is true that they contemplated that Campbell might be able to obtain £100 or more from a purchaser of the feu, but that was merely a speculation on the part of Campbell and might have come to nothing. The parties no doubt recognised that the original feu-duty of £33 was excessive and that if the subjects were exposed for sale burdened with that feu-duty and also with the arrears of feu-duty they would be unmarketable. The superior was under no obligation to come to the assistance of the trustee in bankruptcy, but if he chose to stipulate that a payment should be made to account of arrears of feu-duty as a condition of his intervention that payment does not necessarily constitute a grassum.

"Assuming, however, that £20 is to be regarded as the full annual value of the subjects at the date of the feu-disposition, the pursuer's counsel further argued that the presently existing rate of feu-duty was only 5s., which could not be so regarded, and that accordingly the actual present rental of the subjects must be resorted to in fixing the composition. The point would be decided in terms by the judgment of the Second Division in the *Aberdeen* case with reference to certain of the Brown Lands were it not for the fact that in the present case the redemption of the greater part of the feu-duty took place under a reserved power contained in the original feu disposition, whereas in the *Aberdeen* case the redemption involved a new contract between the mid-superior and the vassal. I confess that I am unable to appreciate the importance of this distinction. The material fact is that the feu-duty now actually exigible from the subjects is an illusory one, and cannot possibly be regarded as representing the just annual value. It seems to me irrelevant to inquire how that state of matters has been brought about. The defender's counsel argued that the feu-duty of £20 must be regarded as still continuing, and that what had taken place was really of the nature of an anticipatory payment of that feu-duty. This suggestion seems to me to be erroneous in fact and in law. There is all the difference in the world between a payment in advance of rent or feu-duty which has not yet accrued due and an alteration in the amount of rent or feu-duty exigible under a lease or feu-charter. In the present case what the

feuar had right to do and purported to do was to redeem the feu-duty of £20 to the extent of £19, 15s, and unless on the footing that the transaction was invalidly carried out I do not see how it can be successfully maintained that there was merely a payment of feu-duty in advance. I am accordingly of opinion that the present case is ruled by the decision in the *Aberdeen* case, and I shall pronounce a finding to the effect that as regards the subjects included in the feu-disposition to Ferris the composition is to be measured by the actual rent subject to the usual deductions.

"Two other alternative views are stated by the defenders in their third plea-in-law, but counsel for the defenders admitted that the *Aberdeen* case directly ruled these two points, and that accordingly he felt unable to argue them before me."

On 19th December 1911 the Court appointed the case to be heard before the First Division with three Judges of the Second Division, and it was so heard on 9th February following.

Argued for reclaimers—The case depended on the proper construction of the Act 1469, c. 36. What the pursuers were entitled to under that Act was a flar's mail as the land was set for the time, *i.e.*, the sub-feu-duty. The pursuers' argument that the contract in question was equivalent to a blench feu, inasmuch as the feu-duty was elusory, was not well founded, for blench holding was quite distinct from feu, and was really an improper form of ward holding—*Stair*, ii, 3, 33; *Ersk.* ii, 4, 7; *Bank.*, ii, 3, 43. The intention of the Act 1469, c. 36, was to secure the vassal in his goods, just as the Act 1449, c. 18, aimed at securing him in his lands, and it arose from the brief of distress. Redress was given against the debtor's land, the superior being compelled to receive the appriser as his vassal on payment of the mail for which the land was set for the time. He was given that sum by way of compensation for receiving the creditor, for the fee was still full, the debtor being still alive. The scope of the Act had been widely extended by construction, as had been done in the case of many other Scots Acts—*Johnstone v. Stotts*, 1802, 4 Pat. App. 274, pp. 283 and 285. Thus it had been extended to cases where the statute was silent on the point, as where the vassal was himself in occupation of the land, or where a grassum had been paid, or where the feu-duties had been redeemed. There was no need for such construction here, for (1) the Act was clear in its terms, and (2) there was a sub-feu-duty. That being so, what the pursuers were entitled to was the sub-feu-duty and nothing more—*Monkton v. Yester*, (1634) M. 15,020; *Cowan v. Elphinston*, (1636) M. 15,055; *Aitchison v. Hopkirk*, 1775, 2 Ross's L.C. (Land Rights) 183; *Cockburn Ross v. Heriot's Hospital*, June 6, 1815, F.C., *aff.* July 24, 1820, 6 Pat. App. 640 [2 Ross's L.C., 193]; *Lord Blantyre v. Dunn*, July 1, 1853, 20 D. 1188; *Earl of Home v. Lord Belhaven and Stenton*, July 19, 1900, 2 F. 1218, 37 S.L.R. 990, *rev.* May 25,

1903, 5 F. (H.L.) 13, 40 S.L.R. 607. Alternatively the defenders were entitled to tender as they did either the original feu-duty of £20 or the present feu-duty of 5s., plus 5 per cent. on the redemption price—*Campbell v. Westerra*, June 28, 1832, 10 S. 734. The case of the *City of Aberdeen Land Association v. Magistrates of Aberdeen*, July 2, 1904, 6 F. 1067, 41 S.L.R. 647, on which the pursuers relied, was wrongly decided *quoad* the Brown Lands, and should be reconsidered.

Argued for respondents—Originally a feu was a kind of location, the feu-duty being the mail—Act 1457, c. 71; *Stair*, ii, 3, 34; ii, 4, 21; ii, 11, 13-15; iii, 2, 27. Where, however, the feu-duty was elusory as in blench-holding, the transaction was not so much a location as an alienation with consequent penalties, *e.g.*, recognition—*Duff's Feudal Conveyancing*, p. 34. *Esto* that where there was a fair yearly feu-duty, the sum payable was the feu-duty, that rule was inapplicable where, as here, the land was in substance set for a grassum and a small elusory payment. In such cases what was payable was the rent of the lands—*Earl of Home v. Lord Belhaven* (*cit. sup.*). That case overruled the practice which had followed on *Campbell v. Westerra* (*cit.*), and incidentally that decision. The case of *Cockburn Ross* (*cit.*), on which the defenders mainly relied, was distinguishable, for there the feu-duty was a fair and adequate one, whereas here there was a great difference between the value of the lands and the existing feu-duty. That being so, what was to be taken was not the feu-duty but the rent of the lands—*City of Aberdeen Land Association, Limited v. Magistrates of Aberdeen* (*cit.*).

At advising—

LORD PRESIDENT—[*After narrative given supra*].—The demand as made is a startling demand, and is a complete departure from the demand made by the pursuers on the last entry, namely, that of the deceased Mr Paton in 1904, when the pursuers were content to accept the sum now tendered. It is admitted that no instance of such a demand being made can be found in any known practice, nor is there any authority to support it until the case of *The City of Aberdeen Land Association v. The Magistrates of Aberdeen* (6 F. 1067), decided by the Second Division, which reversed the judgment of the Lord Ordinary. The Lord Ordinary has held the present case to be ruled by the decision as to the parcel of what were called the Brown Lands in that case, and he is clearly right in so doing. It is to reconsider the soundness of that decision that this case has been sent to a Court of Seven Judges.

I wish to explain again what I mean in saying that the demand is supported by neither authority nor practice. I mean that there is no instance in practice or authority in the books for a person who seeks an entry from his superior being called on to pay in composition more than he gets or could get in yearly value from

the estate to which he seeks an entry. Only two of the learned Judges of the Second Division delivered opinions in the *Aberdeen* case. The decision admittedly was counter to and therefore overruled a decision of the same Division more than seventy years previously—a decision which had regulated the practice of the profession ever since, and was quoted in every textbook on conveyancing—the case of *Campbell v. Westenra* (10 S. 734). Lord Trayner did so on the ground, first, that *Campbell* was a case which had no authority to warrant it in either the decisions or the text-writers, and, secondly, that it had been disapproved in the House of Lords in the recent case of *Belhaven* (5 F. (H. L.) 13). Lord Moncreiff based his judgment on the latter point alone. I shall examine each of these grounds, but before I do so it will perhaps be better first to set forth historically the enactments and decisions on which the determination of the question turns. Much of this is trite law, and to be found in many decisions with greater fullness. I shall therefore do no more than recapitulate what may be found at length elsewhere, and notably in the opinions of the majority of the Judges in the well-known case of *Cockburn Ross* (6th June 1815, F.C.; *affd.* 1820, 6 Pat. 640), decided in 1815, and affirmed in the House of Lords.

It is notorious that in very early times a feu was a mere personal right, and that the first encroachment upon that position was to consider a feu as descending of right to heirs, but with no power in the vassal to transfer his feu to a singular successor. It is equally certain that the original and proper feudal tenure was that of ward, and that feu-farm was, so to speak, an innovation. It is also certain that the rigour of the proper feudal casualties, and in particular of recognition, and the severity of the laws as to the recovery of feudal debts, brought as a concomitant extreme hardship upon the persons who actually cultivated the land. The trend of progress was to affirm the full right of property in the vassal and to protect the cultivator. That progress may be traced in the Acts of the Scots Parliament. The first of the series is the oft-quoted Act of 1449, cap. 18, in favour of "the puir people that labouris the ground," which made tacks enure against the purchaser. The next is the Act of 1469, cap. 36, which is headed, "That the puir tennentes sall pay na farther then their termes maill for their lordis debt be the Briefe of Distresse," and is mainly concerned with that topic. As a compensation to the creditor whose right was thus being curtailed, it went on to provide for an appraising, and then, only as a concomitant to that, concludes with the words, "And also the over-lord sall receive the creditour or any uther byer, tennent till him, payand to the over-lord a zeires maill as the land is set for the time. And failzieing thereof that he take the said land till himselfe and undergang the debtes." Of this statute Lord Stair says (ii, 4, 32) that before it no superior could be compelled to receive any other vassal than the heir of the first

vassal provided by the investiture. He goes on to relate how by custom this compulsitor upon the superior to receive the new proprietor as his vassal came to be extended to the newer form of action—adjudication—which was introduced, and gradually superseded apprising. Yet at first it seems that the custom introduced the compulsitor without the concomitant solatium in the form of the payment of the year's rent. Probably the practice as to this varied, and though the Lords of Session (after the Session was established), who, as Stair says, had always taken a latitude in the modification of the year's rent, thought that the equity of the matter demanded equal treatment of the superior whether the entry was forced upon him by means of adjudication or apprising, yet, when put to solemn decision, they decided that upon adjudication no composition was due (*Grier v. Laird of Closeburn*, 1636, M. 15,042). For remeid whereof the Act of 1669, cap. 18, was passed, which fixes the payment in adjudications at one year's rent in the same manner as in apprisings. So matters remained for one hundred years, practice (that is, practice as to payment on obtaining a voluntary entry), as Duff puts it, following the analogy of the statutes, till the matter was finally regulated by 20 Geo. II, c. 50, which forced the superior to give an entry, on production to him of a disposition flowing from the former proprietor and containing a procuratory of resignation, provided that he was paid or tendered "such fees or casualties as he is by law intitled to receive upon the entry of such . . . purchaser." This therefore legally relegated the measure of composition to the fees commonly exacted over a practice of two hundred years which had based the determination of the composition on the sum which had been fixed by the old Act of 1469. Now land, so far as the vassal of the over-lord is concerned, might be in three positions—(1) it might be set in tack to the poor bodies that labour the ground (that is the position directly dealt with by the Act of 1469); or (2) it might be in personal possession; or (3) it might be subfeued. As regards both of these latter positions the matter came to controversy and decision. As regards personal possession, the Court, holding that they were entitled equitably to interpret the statute, held that set was equivalent to might be set, and that consequently whatever enhanced value the land bore, the superior got his year's rent as they could be let by the superior or proprietor at the time. This was finally settled by the case of *Aitchison* (14th February 1775, F.C., M. 15,060), and has never been doubted since. Now it is noticeable in that case that in the Faculty Reports it is added that it was reports on the practice which chiefly weighed with the Court.

As regards lands which had been feued, the matter was decided as early as 1634 in the case of *Monkton v. Yester* (M. 15,020), and the judgment was repeated two years later in *Cowan v. The Master of Elphin-*

stone (M. 15,055). In both cases the judgment was put on the same ground, namely, that the superior could not ask for more than the yearly value of the estate to which alone an entry was sought.

Accordingly, it is treated by Stair (iii, 2, 27) as settled, though he goes on to give his view that if lands were feued blench, the result might be different. It is probable that in the early cases the difference of value between the value of the ground at a yearly rent and the feu-duty was not great. The regular building feu was at that time practically unknown, but when towns began to grow, and the professional builder came on the field, the practical interest in the question altered, and it is therefore not to be wondered at that, in spite of the authority of these older cases, and of Stair, another attempt was made by the superior (the same superior as in this case, and in respect of the very same ground) in the case of *Heriot's Hospital v. Cockburn Ross* (*cit.*). I need not take up your Lordships' time describing that case. It is dealt with in great fulness by Mr Ross in his Leading Cases. The majority of the Court included Lord Justice-Clerk Boyle and the first Lord Meadowbank, both eminent feudalists who had been brought up in the practice of the feudal system of conveyancing, as yet untouched by modern reforms. It was affirmed in the House of Lords, and settled the question, so far authoritatively. The actual fact, however, was that the feu-duty in that case represented an admittedly competent rent as at the time it was fixed, and the entry of the sub-vassal was taxed. Now that the decision in *Cockburn Ross* was in accordance with the understanding of the profession is certain. It is instructive to see the view of the profession at the time as to what the decision really amounted to. The conveyancing book of the period—indeed the only one of authority that had been published since Walter Ross's lectures—was Bell's treatise on the Sale of Land to a Purchaser, which was published just at the time *Cockburn Ross* was decided, viz., 1815. Mr Bell was the first lecturer on conveyancing appointed by the Writers to the Signet when the lectureship—which afterwards became the professorship—was founded in 1793, and he is well known as the compiler of the Law Dictionary, and as the author of various treatises, and what he says (at p. 294) is—"It is further to be considered that the person who has feued out the ground for building, and who has the mid-superiority, has no other estate than the feu-duty arising from that mid-superiority; and therefore when he sells that feu-duty, all that the purchaser acquires is the feu-duty; and when he offers its amount as entry-money, he gives a year's rent of the estate, to which he demands a title from the superior. This is all that the statute requires, and all that the decisions of the Court have authorised, though under circumstances very different from the present." So far the text. He adds in a note—"On these grounds, I many years ago gave an opinion relative to the

entry-money in some very valuable urban property of this description in this city. And I am happy in finding that while these sheets are going through the press judgment has been pronounced by the Court of Session holding the feu-duty to form the only rent which the superior is entitled to demand." This is *Cockburn Ross's* case, and he goes on to quote from Lord Meadowbank's judgment. This was written in 1815, and repeated in the second edition in 1828. In 1832 the question of what was to be done when a grassum had been paid arose in the case of *Campbell v. Westenra* (*cit.*). The mid-superior offered the feu-duty plus 5 per cent. on the grassum. The superior contended that he should have the yearly value of the subjects, not as they were to the mid-superior, but to the owner of the *dominium utile*, and the Court decided in favour of the mid-superior. Two of the Judges who formed the Court were survivors of the same Court as decided *Cockburn Ross*—Lord Justice-Clerk Boyle and Lord Glenlee. It is very important to see that they and the two others, Lord Cringletie and the second Lord Meadowbank, all treated the case as the logical result of the judgment in *Cockburn Ross*. I shall deal hereafter with the question upon principle; at present I am only speaking of authority. Lord Glenlee was the Judge who in *Cockburn Ross's* case read the passage from the old annotated edition of Stair, the notes to which have always been understood to be written by Lord Elchies. It is quoted in Ross's Leading Cases, and will be found to be an admirable statement of the argument on both sides, ending with a determination in favour of the vassal mid-superior. That the case was at once accepted by the profession is certain. It was, as I have already shown, in accordance with the opinion of the teaching authority of the day in conveyancing. It was repeated in his second edition, and it was stated as undoubted law in the next book—a book of high authority, which has been quoted again and again by generations of judges, and was indeed the foundation of all the regular conveyancing treatises—I mean Duff's Feudal Conveyancing. Duff's work in time was followed by that of Menzies, and that again by the work of Montgomery Bell. In all of these the point is treated as indubitably settled, and *Campbell v. Westenra* (*cit.*) recognised as undoubted authority; and this is the case which Lord Trayner says is devoid of authority. Not only did it rule the teaching of the profession and the practice for seventy years without a question, but, apart from that, and from the question whether it is not the necessary sequel to the opinions of Stair and Erskine and the older cases and the case of *Cockburn Ross*, there is the authority of the Court itself which decided it. Lord Justice-Clerk Boyle and Lord Glenlee, not to speak of Lord Cringletie and the second Lord Meadowbank, were men who had been brought up under the untouched and unmodified feudal system at a time when the bulk of the work in Court consisted of

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cases of that description. We are a generation who cannot pretend to such experience, and if *testimonia ponderanda sunt*, I cannot help saying that upon a question which is nothing but correct feudal practice the opinion of the Second Division in 1832 far outweighs the dictum of the most eminent of commercial lawyers in 1904.

It is said, however, that the case of *Campbell* is overruled by the decision of the House of Lords in the case of *Belhaven* (*cit.*), decided in 1902. Now, whatever might be one's view of the soundness of a House of Lords decision, if it really decided the point we should be bound in this Court loyally to follow it in other cases. It is equally true, however, that we are not bound by the dicta of noble Lords however eminent, and a recent example is given of this position by the decision of the House of Lords in the case of *Thompson v. Gould & Co.* ([1910] A.C. 409), where they reversed the judgment of the Court of Appeal in England, and incidentally of both Divisions of this Court, although in the case of *Powell v. Main Colliery Company* ([1900] A.C. 366) Lord Halsbury in the House of Lords had expressly approved of the case of *Bennett v. Wordie & Company* (1899, 1 F. 855), the case in the Second Division which was overruled.

Now it is perfectly clear that the decision in the *Belhaven* case did not touch the question. The question in that case was as to the amount of the composition to be paid in respect of the minerals. There was no sub-feu. The vassal was himself in possession of some of the lands let, but the minerals were set to a tenant, who paid a large sum, as is often the case in mineral lets, by way of royalties. The superior contended that he was entitled to the actual return or royalty which the vassal got in the year of entry. The vassal contended for an average of years, and, further, offering to prove that the minerals in the field were on the point of exhaustion, said that that fact should be taken into account. The majority of the Court gave effect to the vassal's contention, and this judgment was reversed by the House of Lords. Now all that was decided in that case was that the superior in the year of entry is entitled to get what the vassal gets. So far, therefore, as it is a decision, it seems to me against, and not in favour of, the superior's contention in the present case. It was natural that the case of *Campbell v. Westerra* should be attempted to be used by the vassal in *Belhaven's* case in argument as an illustration of the power which he contended resided in the Court, of equitable modification, and it was in consequence of this that the case was commented on by Lord Davey and Lord Robertson. It was not necessary to attack the case in order to justify the decision of the House in the *Belhaven* case. The ground of that judgment is plain enough. The words of the statute were applicable directly to the case. The estate of the vassal was set at the time, and the vassal actually received the sum sued for in the

year of entry. There had been no long-continued interpretation in the matter of mineral rents, which, as Lord Davey said, would have made him follow that interpretation whatever he had thought of it if he was approaching it *de novo*. The earliest case was only in 1878, and a report obtained in it disclosed that there was really no practice to guide the Court—*Allan's Trustees*, 5 R. 510. In these circumstances the House of Lords held that the Court was bound to follow the words of the statute. Lord Robertson dismisses the case of *Campbell v. Westerra* with the remark that the Court of Session had omitted to notice that the payment of the interest on the grassum was a concession on the part of the vassal. But, with deference, the case cannot be thus dismissed, for the superior contended that he was not bound to accept the feu-duty plus interest on the grassum, but that since it was shown that the feu-duty did not represent the whole value, then the lands were not set for the feu-duty, but must be held to be set for the yearly value as that value existed, not to the vassal who craved an entry, but to his sub-vassals who held the *dominium utile*. That was decided against the superior, as I have already set out. Lord Davey simply says he cannot reconcile the case with the statute. Now if you are to take the statute and keep close to the words used, the result would not be, when the feu-duty is inadequate, to throw the whole thing loose and allow the superior to inquire as to what is the actual value to the sub-vassal, but would be to take the feu-duty, however inadequate it might be, and this really seems Lord Davey's view, for he says—“The importance of these cases is, first, that they affirm that a feu is within the expression ‘as the lands are set;’ and secondly, that they affirm that what the superior is to get for this composition are only the fruits for the year which the vassal himself would be entitled to, notwithstanding that the lands may have been covered with buildings providing a vastly higher rent to the sub-feuar, or in other words, that the superior stands in the place of the vassal as regards the mails or rent for the year, for better or for worse.” And again—“The superior is entitled to the year's fruits which the vassal himself receives, or is entitled to receive, in the year of entry. The superior is confined to this when it is to his disadvantage, as in the case of a sub-feu, and he is entitled to the benefit of the principle when it is in his favour.” And indeed the superior in his argument here seems to me to blow hot and cold. He says *Campbell v. Westerra* is wrong because the Court exercised a power of equitable modification which, he says, they have not got. But when then asked to take the exact sum at which the lands are set, namely, 5s., he says that is not equitable, because “set” must mean “set for an adequate rent,” and accordingly he really asks the Court to modify equitably the sum due in his favour.

In any view, and with great respect to the Lords Davey and Robertson, they had

no need to attack *Campbell v. Westerra*, and I think they do not do justice to either the authority or the ratio of the case. I do not myself quarrel with the decision of *Belhaven*, though that is immaterial, because it would be binding upon me whatever my own opinion might be. But it seems to me to be clearly based upon sound principle and to have two reasons for it, either of which would be sufficient—first, that it was a case to which the words of the old statute directly applied, and required no construction at all. The lands which formed the estate to which the entry was sought were set, and set at an adequate rent. The moment that you settle that mineral royalty is truly rent for the lands, the result follows. Second, the decision merely affirmed what the Court had held more than 200 years ago in *Monkton (cit.)* and *Cowan (cit.)*, namely, that the superior should get just such a composition as he would get out of the lands if for the year of entry he was in the vassal's shoes.

But there are cases to which the words of the old statute do not directly apply. Lord Davey himself admits this when he deals with the case of land in the vassal's own possession. If you had to take the literal words used they would not apply. It would be a *casus improvisus* and the superior would get nothing. In point of fact you would pronounce a judgment analogous to that of *Grier (cit.)*, where, an adjudication not being an apprising, the superior was left without a composition. But the Court did not do this. Practice, as it was said, cleared the point, and *Aitchison's* case was decided with the approval of all and of Lord Davey. I think the Court behaved in exactly the same way in *Campbell v. Westerra*. In truth, what lies behind it all is the question of the interpretation of a very old statute of the Scots Parliament. Such statutes were passed under a totally different state of affairs, with language that does not always fit modern life. The function of the Court in interpreting them is not that of modification. It is truly interpretation, but necessarily, in such a case, of the spirit and not of the letter. The books are full of instances of this. Look at the decisions on the triennial prescription and the interpretation of "men's ordinaries." That this is legitimate has been again and again recognised not only by the Court but by the House of Lords, e.g., Lord Eldon in the case of *Johnstone v. Stotts*, 4 Pat. 274.

It is necessarily the case when any court deals with a very old statute. The English decisions on the Statute of Frauds form a good example, and the Scottish Courts had to deal with a body of statute law which was passed by a Parliament whose powers were never constitutionally defined and whose political power and influence varied by much at different epochs. In view of this undoubted fact it is difficult to understand Lord Robertson's allusion to the case of *Wardlaw*, 9 R. 725, 10 R. (H.L.) 65, which he says brings its own lesson against the Court meddling with

the terms of a statute. In the first place the Court of Session did not give effect to the argument of the losing counsel on the clause in the Trusts Act, and their judgment was affirmed (not reversed) by the House of Lords. But apart from that, it is, I think, impossible to treat the interpretation of the Trusts Act 1867 by a court in 1882 as *in pari materia* with the interpretation of a Scots Act of 1469.

Let me now come, last of all, to the principle of the thing. The whole secret, I think, lies in the idea that the superior should get what is equivalent to an escheat of the vassal's property for a year. That is what is meant by the term "a year's mail" as the lands are set; for be it remembered this is not a proper casualty or prestation. The superior's rights in proper casualties or prestations cannot be affected by anything the vassal can do. In so far as his rights are represented by money (which they always are in the tenure of feu-farm) he has his pointing of the ground and his irritancy *ob non solutum canonem*, and they are untouched by anything the vassal can do. Composition, on the other hand, is a mere acknowledgment to the superior for his trouble in granting an entry to a vassal who is a stranger to the standing investiture. It is a payment for what the vassal gets. Now all the vassal can get is an entry to the estate to which he enters, and if this estate is a mid-superiority, why should he pay more than a year's value of that mid-superiority? It is true that if value was rising the superior would have got more if the lands had not been sub-feued; so would the mid-superior, if I may so express it, if he had never turned himself into a mid-superior. But the reason of all this is the power of sub-feuing lands in feu-farm, and that was part of the gradual march of the law which I described at the outset. The early history of subinfeudation as given in Walter Ross need scarcely be taken into account—first, because he is then dealing with a period when ward was the regular holding; and secondly, because he wrote before the days of Thomas Thomson, and it now seems doubtful whether the statute of Robert I, equivalent to *quia emptores*, ever existed. Lord Stair (ii, 11, 13 *et seq.*) gives a history of subinfeudation, from which it appears that the practice was sometimes allowed and sometimes attacked by the Legislature. But all this legislation had only to do with ward-holdings. As regards feu-holdings, no prohibition of subinfeudation was ever made by statute. It is probably safe to say that the precise position which we have here was never in the minds of those who framed the Statute of 1469. We are dealing with a very early period, nearly 150 years before the institution of the Register of Sasines, and I cannot say I am able to state with certainty how matters stood. How far subinfeudation was common at that date I hesitate to say. It is certain, however, that the tenure of feu-farm was at that period not very common. Ward was still the regular holding, and it is only when you have the



conjunction of feu-farm with subinfeudation that this question can arise.

I would not like to say that in 1469 such a conjunction necessarily existed at all; that it was not common may be inferred from the fact that the case of *Yester* did not occur till 1635, that is 165 years after the statute. It does not, however, become necessary to find out these matters, because once the case of *Yester* settled, as it did, that the words of the statute "as set" by their own force included the position of a subinfeudation of a feu-farm tenure, the inquiry becomes immaterial. In so settling, *Yester* was put upon the right principle as expressed in the judgment, namely, that the superior could not ask for more than the yearly value of the estate to which alone an entry was sought. That being the true view, the question was solved as regards lands feued for a competent avail.

But what of the case where a grassum was given? I think the Court of Session took the view that the grassum must be looked on as a capitalisation of the feu-duty, and that therefore the true yearly value to the mid-superior was the feu-duty plus the interest on the grassum. In so holding, in my humble opinion, they were not modifying the Statute of 1469, but interpreting it to fit the state of changed circumstances, being no more than they had done in the case of *Aitchison (cit.)*. I therefore think that *Campbell v. Westenra* is good law, and that it was not overruled by the House of Lords judgment in *Belhaven*, though it cannot now be cited as an authority for a general power of modification being supposed to reside in the Court, to enable the Court to override the exact words of the Statute of 1469.

As regards the present case, I am further of opinion that it is not necessary actually to apply the case of *Campbell v. Westenra*. When the mid-superior feued out the lands for £20, it seems to me that he fixed the true yearly value of the estate of mid-superiority which by his act he created, and that the power of redemption which he gave to the sub-vassal did not alter the value of the estate, though it did give the sub-vassal a power of getting rid by a capital payment of all further liability on his part. In either view it follows, in my opinion, that the claim of the superior as made is bad, that the case of the Brown Lands in the *Aberdeen* case was wrongly decided, and that £20 being tendered by the mid-superior vassal he should be assoilzied from the conclusions of the summons.

**LORD KINNEAR**—I have had the advantage of reading the opinion which has just been delivered, and also of repeated conferences with the Lord President upon the question which we have got to decide, and I content myself therefore with saying that I agree entirely with what the Lord President has said.

**LORD DUNDAS**—I am of the same opinion. Your Lordship has probably expressed all that need be said upon the matter, but, as

I had prepared a separate opinion of my own, I shall deliver it.

It is admitted that a composition is due and payable by the defenders Paton's Trustees to the pursuers the Governors of Heriot's Hospital. But the parties differ widely as to the basis on which the composition is to be ascertained, and consequently as to the amount to be paid. The defenders' position is that of mid-superiors, between their over-superiors the pursuers on the one hand, and their own sub-vassals on the other hand. The pursuers' demand is for a year's rent of the subjects, which, as these are situated in a busy part of the city of Edinburgh, amounts to a large sum—over £900. The defenders take up alternative lines of defence. They say that in strict law the amount of the composition due is 5s., which was, when Mr Paton acquired the mid-superiority in 1893, and still is, the sub-feu-duty exigible in each year by the mid-superior from the actual proprietors. But they have offered on record to pay £20, being the amount of the feu-duty stipulated in the original feudisposition in 1816-17 by the defenders' predecessor in title, Mr Cockburn Ross, of the subjects now in question, which contained a power (since exercised) to redeem the feu-duty to the extent of £19, 15s. at twenty years' purchase. The defenders alternatively state their willingness to pay the actual sub-feu-duty of 5s., together with a sum representing interest at 5 per cent. on the capital value of the redemption price of the redeemed portion of the original feu-duty, which sums would together work out at £20.

The Lord Ordinary decided that "the composition is to be measured by the actual rent, subject to the usual deductions." He considered, and rightly, that he was bound so to hold in accordance with the decision of the Second Division in the *Aberdeen* case, 1904, 6 F. 1067; and that case in its turn bore to proceed upon the decision of the House of Lords in *Home v. Belhaven*, 1903, 5 F. (H.L.) 13. We are in a position to review the *Aberdeen* case, but the judgment of the House of Lords is, of course, binding upon us. One must therefore consider what it was that the House of Lords decided in the important case of *Home v. Belhaven*. Upon a *prima facie* view of it, there would certainly seem to be some ground for holding that in *Home v. Belhaven* much that had for a very long time previously been considered to be law was decided by the House of Lords to be not law; and that the manner in which this Court had been in use to consider and deal with Scots Acts such as 1469, cap. 36, as well as some of the methods by which compositions had been in use to be ascertained or adjusted, were erroneous. But though there are passages in the opinions of some of the noble and learned Lords which seem to support such a view, I have come to think that the actual decision of the House in *Home v. Belhaven* was not of so far-reaching a character. It seems to me that all that was decided (apart from what may have been expressed by way of opinion or



illustration) was, that in arriving at "a zier's mail as the land is set for the time," there must be included money rents or royalties from minerals actually due to the vassal for the year in question, without regard to the state of exhaustion of the minerals. I shall revert later on to this matter.

In the *Aberdeen* case Lord Trayner, who gave the leading opinion, deduced from the authorities down to and including *Home v. Belhaven*, two rules which formed the basis of his judgment so far as here relevant. These rules were stated at length by his Lordship (6 F. at p. 1085), and I need not here quote them. But I am, with all respect, unable to accept them as correctly embodying the result of the decisions. Lord Trayner does not analyse these; and one cannot therefore pursue the matter in detail. But I know of no warrant for the view that, if the sub-feu-duty is illusory, the superior is *eo ipso* entitled to a year's actual rent in name of composition. I humbly think that the decision in the *Aberdeen* case, so far as it affects the present question, was wrong. It seems to me that the learned Judges fell into error because they attributed too wide and sweeping a result to the decision of the House of Lords in the *Belhaven* case.

The most important case, prior to *Home v. Belhaven*, upon this matter, is probably that of *Cockburn Ross v. Heriot's Hospital* (June 6, 1815, F.C.; 2 Ross's L.C. 193; *affd.* 6 Paton 640, 2 Bligh 707). It may be said, by the way, to warrant the main portion (though not, I think, the last sentence) of Lord Trayner's second "rule." The rubric, which seems to me to give correctly the gist of what was decided in the Court of Session, bears that "when a vassal sub-feus his possession for its full adequate value at the time, it is only a year's sub-feu-duty, not a year's rent, which he is bound to pay his superior as a composition for an entry to a singular successor." It is unfortunate that we have no adequate record of the grounds upon which the House of Lords affirmed the judgment, beyond a bare statement by the Lord Chancellor (Eldon) that he could not find reason to advise the House to disturb it. But it is, I think, clear that the fact that the sub-feu-duty represented the "full adequate value at the time" was not a mere incident in the case, but entered materially into its decision. The interlocutor of the Lord Ordinary (Meadowbank) bears on its forefront that it was not controverted that the sub-feus were "made for a full and adequate avail of the subject." In the Second Division the Lord Justice-Clerk (Boyle) expressly said—"I have always looked at the case under the special circumstances in which it presents itself, in which I find nothing but the utmost *bond fides* on the part of the pursuer, a full and adequate duty having been stipulated and offered by him to his over-lords . . . Everything has been fair on his part; no elusory feu-duties are stipulated, but a full and valuable consideration is secured for the advantage of the superior. I certainly

wish it to be understood, as my opinion, that if there had been any attempt to diminish the interest of the superior by taking grassums or a price and making the feu-duties elusory a very different question might have arisen, but one which we are not here called upon to decide." Seventeen years later the decision of *Campbell v. Westenvra* (June 28, 1832, reported in 8vo F.C. and also 10 S. 734) was pronounced, in which two of the learned Judges who had decided *Cockburn Ross* took part—viz., Lord Justice-Clerk Boyle and Lord Glenlee—and which formed indeed the logical sequel of the earlier judgment. Lord Meadowbank *secundus* said (p. 563 of F.C. report)—"The pursuer admits in the record that the reserved feu-duty and grassum together were the full value of the lands at the time when the sub-feus were granted. I therefore cannot see that he is entitled to demand more than the defender has already offered, under the principle of the decision in the case of *Cockburn Ross*." The Lord Justice-Clerk also, alluding to that case, said it was "decided that no more was exigible than the annual feu-duty" (10 S. at p. 736). I think, therefore, that *Cockburn Ross* is a binding authority for the proposition that the superior cannot exact more in name of composition than the sub-feu-duty where it is admitted or proved (and in the present case the admission was expressly made at the bar) that it represents the full adequate value of the subjects at the time of the sub-feu.

If, then, the feu-duty of £20 had still been exigible, a tender of its amount would, I apprehend, have been a complete answer to the pursuers' demand for a composition. But the fact that it has been redeemed, except to the extent of 5s., gives room, on the one hand, for the pursuers' suggestion that the subsisting feu-duty being plainly inadequate and illusory, they are entitled (as Lord Trayner held) to a full year's rent; and, on the other hand, to the defenders' contention that the 5s., being in fact the subsisting yearly mail or avail received by them, must—equitable considerations having been ruled out of account by the recent decision in the House of Lords—be accepted by the pursuers in full of their composition.

As regards the first of these views, I think that in accordance with the "principle" of *Cockburn Ross*, as explained by Lord Meadowbank, £20 must represent the maximum of the pursuers' claim, being the "full adequate value" of the subjects when sub-feued. The case of *Cockburn Ross* and (its logical sequel) that of *Westenvra*, to which I shall once more advert in a moment, afford to my mind a sufficient answer to the pursuers' demand for a full year's rental; and I think the *Aberdeen* case, which the Lord Ordinary followed, must be overruled in so far as it forms a precedent for such a demand.

But the question remains whether, looking to the most recent decision, *Home v. Belhaven*, in the Court of last resort, the pursuers can in this case legally claim

even £20, or whether they must not, apart from tender, be content with 5s. I was at first disposed to think that the latter alternative was the correct one. In *Cockburn Ross* it was held that a feu was a "set" of the lands, and that if the sub-feu-duty represented their full value at the time the superior could thereafter claim no higher amount in name of composition. I thought at first that in *Home v. Belhaven* the House of Lords had carried the matter a long step further and decided that the amount of the sub-feu-duty actually exigible during the year in question—whether adequate or illusory, permanent or temporary—forms the measure of the superior's claim, such being the rule prescribed by statute, and considerations of supposed equity *hinc inde* being out of place and inadmissible. There are passages in the opinions of Lord Davey and Lord Robertson which appear to justify the conclusion indicated. But having studied the case of *Home v. Belhaven* as carefully as I can, with the endeavour to discriminate between actual decision on the one hand and matters of opinion merely on the other, I have come to think (as earlier stated) that the actual decision involved no more than the propositions (1) that, as the Court of Session had laid down in *Allan's Trustees v. Duke of Hamilton* (1878, 5 R. 510), the annual value of minerals in course of being worked is not to be excluded in the computation of "a zier's maill," within the meaning of the Act 1469, cap. 36; and (2) that the actual amount of the rents or royalties due to the vassal for the particular year must be taken, without having regard to approaching exhaustion of the minerals or recourse to "equitable" methods of estimating, by a calculation based on averages or otherwise what might be a fair and reasonable payment in the whole circumstances of the case. If this view is correct, *Home v. Belhaven* seems really to have no bearing whatever as a direct decision upon the case now before the Court, and, in particular, to afford no support to the defenders' argument that they are liable in no higher payment than the 5s. sub-feu-duty.

It would, I apprehend, be open to us to apply here, if it were necessary to do so, a method corresponding to that adopted by the Court in *Campbell v. Westenra*, as the defenders, according to one of their alternative pleas, invite us to do, viz. to fix the composition payable at £20, on the basis of the actual sub-feu-duty of 5s. together with interest at 5 per cent. on the capital value of the redeemed portion of the redemption price of the original feu-duty of £20. It is true that in *Home v. Belhaven*, *Westenra's* case was commented on with some measure of disapproval. Lord Davey said that he did not pretend to explain or reconcile it with the terms of the statute. Lord Robertson observed that "it was not the Court that decided, but the vassal who conceded, that interest on a grassum should be included in the composition, this being done to parry a demand for a year's rent." His Lordship's view would appar-

ently result in this, that the superior was not legally entitled to receive as composition more than the sub-feu-duty, whatever it was, apart from the "conceded" interest. But I think these observations must be read *secundum subjectam materiam*, and their Lordships' condemnation of *Westenra's* case limited to it being founded on as in justification of an estimate or calculation by which the supposed yearly value of a wasting subject was sought to be substituted, in computing the amount of a composition, for the actual return from that subject in the year of assessment. In this sense, and to this extent and effect, it seems that *Westenra* was disapproved by the judgment as well as by the opinions in *Home v. Belhaven*, but I cannot hold it to have been utterly and to all effects written out of our books. On the contrary, I regard it as being (subject to the observation just made) a subsisting decision of very high authority, looking not only to the eminence of the learned Judges who decided it, but also to its place (which your Lordship in the chair has fully explained) in the history of our law and the practice of the legal profession in Scotland. I think *Westenra's* case still stands as illustrating what might under given circumstances be a legitimate and proper method of arriving at the full and adequate annual value of lands at the time when the sub-feu was granted, which, according to the principle of *Cockburn Ross's* case, is the maximum that the superior is entitled, when the lands have been so set, to receive as composition. Here, however, there is no need to rely on such cases as *Westenra*, for we know, and it is admitted, that £20 not only was the actual amount of feu-duty stipulated for the subjects in question, but represented their full and adequate annual value at the time. For the reasons stated, I think the pursuers are entitled to a composition of £20, but no more.

LORD JOHNSTON—The question in the present case is, what effect is to be attributed to a partial redemption of a sub-feu-duty in estimating the composition to be paid on the entry of a singular successor in the mid-superiority?

The predecessor of the mid-superior granted in 1817 a feu-disposition in favour of a sub-vassal in consideration of a feu-duty of £20, which *ex hypothesi* was an adequate value of the lands at the time. But the grant contained the proviso that the vassal might at any time redeem this feu-duty to the extent of £19, 15s. at twenty years' purchase.

In the case of *Cockburn Ross* (1820, 2 Ross's L.C. 193), on a combined consideration of the right, on the one hand, of a vassal to sub-feu, introduced by the Act of 1457, cap. 71, and extended by the common law, and of the right, on the other hand, of a singular successor to require an entry on payment of "a year's maill as the land is set for the time," established by a series of Acts commencing with 1469, cap. 121, it was decided that where lands are subfeued for their adequate value at the time all that

the superior can demand in name of a "year's mail" is the sub-feu-duty which the mid-superior receives. It is obvious that were such construction not to be put on the superior's right to exact a composition for an entry, the vassal's right to sub-feu would, if not rendered nugatory, at least in the case of building land, be seriously prejudiced. The rule of *Cockburn Ross's* case (affirmed 6 Pat. App. 640), which has regulated conveyancing practice since that date, was a simple application of the statutory provision regarding the consideration to be paid for an entry to the case where the vassal has granted a sub-feu.

I do not think that in the present case it is necessary to go beyond this authority. The original feu-duty here was admittedly adequate at the time the sub-feu was granted. It is no concern of the superior that his vassal has debarred himself by agreement with his sub-vassal from exacting it in full. He undertook that he would debar himself on demand by the terms of the feu-disposition. He might have done so at any time by a subsequent voluntary agreement. He might have done so even for a limited term of years. He has done so in perpetuity. But the full feu-duty of £20 still stands disclosed on the face of the title, and is the law of the title. The deed of restriction is not a link in the title. It is only a discharge *ab ante* and in perpetuity of the recurring feu-duty so far as the £19, 15s. redeemed is concerned, which on its entering the register of sasines is notice to anyone dealing with the mid-superior.

I have confined myself to the consideration of the case of *Cockburn Ross*, because I think that its authority is all that is necessary for the judgment in the present case. But the object of consulting the present Court was that the decision in the case of *Westenra*, 10 S. 734, might be reconsidered. I have experienced much difficulty, though in view of your Lordship's exhaustive exposition of the law, concurred in as it is by my learned brother on your Lordship's right, I hesitate to express that difficulty, in satisfying myself that the judgment in the case of *Westenra* was, having regard to the terms of the statutes 1469, cap. 12, etc., a justifiable extension of the decision in *Cockburn Ross's* case in a different set of circumstances. But I am sensible of the difference, to which your Lordship has adverted, between the manner in which the Scots Courts have regarded the statutes of the Scots Parliament, and particularly the earlier ones, and that in which we are bound to regard the fruits of modern legislation. The decision in the case of *Westenra* leads to an equitable result; it has ruled practice for seventy years, and it ought not, I think, to be lightly disturbed, particularly where the question is not one of principle but of the application of accepted principle to particular circumstances.

LORD SALVESEN—I agree with your Lordship in the chair.

LORD MACKENZIE—The amount of the

composition demanded by the pursuers from the defender, who is vested in the mid-superiority of the subjects in question, is a year's rent. The year's rent is £936; all that the defender receives is 5s., the amount of the sub-feu-duty. The pursuers' demand is based on the Act 1469, cap. 36. Now if the superior was in a position to say that the sub-feu was not binding upon him he could disregard the reddendo under which the defender now draws 5s., but admittedly he cannot—the sub-feu is binding on him. The true test is what could the superior himself draw if he entered into possession? If the sub-feu was binding on him he could draw no more than the mid-superior was entitled to get, and in no view could he be entitled to the full year's rent of £936. A question arises, however, as to whether he is entitled to 5s., the present amount of the sub-feu-duty, or £20, the amount of the sub-feu-duty when the sub-feu was originally given off—the difference of £19, 15s. has been redeemed under powers in the feu-contract. The argument in favour of the £20 is based on the case of *Campbell v. Westenra*, 10 S. 734, 2 Ross's L.C. 206, where the superior was held entitled to get from the mid-superior a year's feu-duty and a year's interest of the grassums paid. In the present case the year's interest on the grassums would be represented by the year's interest on the redemption money. The argument in favour of the 5s. is based on the judgment of the House of Lords in the *Earl of Home's* case, which proceeded on the view, as expressed by Lord Davey, that the superior was entitled to receive the year's fruits which the vassal himself receives, or is entitled to receive in the year of entry—"The superior is confined to this when it is to his disadvantage, as in the case of a sub-feu, and he is entitled to the benefit of the principle when it is in his favour." Logically, therefore, the superior is only entitled in the present case to 5s. The dicta, however, in *Lord Home's* case, which disapprove of the principle laid down in *Campbell v. Westenra* are *obiter*. The latter is a decision on an old Scottish statute which laid down a rule of practice, and is in a different position from a case upon a modern Act of Parliament. The distinction is pointed out by Lord Eldon in *Johnstone, &c., v. Stotts, &c.*, 4 Pat. App. 274 at pp. 283-4. The case of *Westenra* provided for a situation in regard to which the statute was silent, just as has been done in other classes of cases, e.g., when the lands are unlet or in the natural possession of the vassal. I therefore consider it a precedent for allowing £20 here—the amount tendered. If, on the other hand, it were not open to found on that case, then I should consider the pursuers are entitled to 5s. It follows that, in my opinion, the view taken in the *Aberdeen* case in regard to the Brown Lands is not supported by previous authority. I therefore agree with your Lordship in the chair that the pursuers are only entitled to £20.

LORD GUTHRIE—I agree with your Lordship in the chair.

The Court pronounced this interlocutor—

“The Lords, along with three Judges of the Second Division, having considered the reclaiming note for the defenders against the interlocutor of Lord Skerrington, dated 25th May 1911, and heard counsel for the parties, recal said interlocutor: Find that there is a casualty of composition due to the pursuers by the defenders, the trustees of the late James Paton mentioned in the summons, in respect of his death, and that as regards the subjects included in the feu-disposition by John Cockburn Ross in favour of Andrew Ferris, dated 14th and 16th August 1816 and 1st October 1817, the composition is to be measured by the sum of £20 tendered by the defenders to the pursuers; and with this finding remits the cause to the Lord Ordinary to proceed: Find the defenders entitled to expenses,” &c.

Counsel for Pursuers (Respondents)—  
Constable, K.C.—Chree. Agent—Peter  
Macnaughton, S.S.C.

Counsel for Defenders (Reclaimers)—  
Murray, K.C.—Hon. W. Watson. Agents  
—Macpherson & Mackay, S.S.C.

Wednesday, July 3.

## SECOND DIVISION.

(SINGLE BILLS.)

### ANDERSON, PETITIONER.

*Proof—Evidence—Divorce—Commission to  
Examine Pursuer Returning Abroad.*

The pursuer in a divorce action, who was employed abroad, and who had returned to Scotland to raise her action, presented a petition for a commission to take her evidence to lie *in retentis* on the ground that she was obliged to return to her employment before the case could be called, which owing to the fact that her husband was resident in Australia could not be done within three months. The Court granted the prayer of the petition.

Mrs Isabella Joiner or Anderson, domestic servant, New Haven, Connecticut, U.S.A., then residing at Arbroath, wife of Alexander Matthew Anderson, tanner, formerly residing at Arbroath and then at Botany, Sydney, New South Wales, *petitioner*, presented a petition in which she craved the Court to appoint a commissioner to administer to her the oath *de calumnia*, and to take her evidence to lie *in retentis*, in an action of divorce at her instance against her husband.

The petitioner stated—“That of this date (15th June 1912) the petitioner was found entitled to the benefit of the poor’s roll to raise an action of divorce on the ground of adultery against the said Alexander Matthew Anderson, her husband. The petitioner is employed as a domestic servant at New Haven, Connecticut, and

recently returned to this country in order to raise the said action.

“That after their marriage in 1904 the parties resided together for some time in Arbroath, but the defender is now resident in Australia. The petitioner has discovered an address which may possibly find him, and edictal citation is accordingly inappropriate.

“That of this date (1st July 1912) the summons in said action was signeted, and a service copy of the summons was posted to Australia with a view to service upon the defender. Before the summons can be called it is probable that at least three months must elapse.

“That the petitioner has left her only child in New Haven, Connecticut, and has to pay for her board. Her money is nearly done, and she cannot afford to stay in this country for more than a few weeks. Moreover, her employer in New Haven has informed her that unless she can sail for America by the middle of July her situation must be forfeited.”

On counsel moving in Single Bills that the prayer of the petition be granted, the Court pronounced this interlocutor:—

“Remit the cause to Lord Dewar to take the evidence of the petitioner, said evidence to lie *in retentis* subject to the orders of the Lord Ordinary, or to appoint a commissioner to administer to the petitioner the oath *de calumnia*, and to take her evidence; to dispense with interrogatories and with the reading in the minute book; and to order the deposition of the petitioner, and productions, if any, to be sealed up by the commissioner and transmitted to the Clerk of Court to lie *in retentis* subject to the orders of the Lord Ordinary.”

Counsel for the Petitioner—Dunbar.  
Agent—Robert Gibb, W.S.

Saturday, July 6.

## SECOND DIVISION.

(SINGLE BILLS.)

### WALKER v. SMITH.

*Poor’s Roll—Reporters Equally Divided in  
Opinion—Sheriff Court Appeal.*

A pursuer in a Sheriff Court action appealed from a judgment of the Sheriff, affirming a judgment of the Sheriff-Substitute, to the Court of Session, and applied for the benefit of the poor’s roll. The reporters were equally divided in opinion. The Court refused the application.

Robert Walker, labourer, High Street, Perth, *pursuer*, brought an action in the Sheriff Court of Perth against John James Smith, baker, Pitlochry, *defender*, in which he claimed payment of the sum of £100 as damages for personal injuries sustained by