negligence or of the position of the children on the street at the time in question. I do not think that anyone would agree that you are entitled to be negligent because a man is a trespasser, or because he is somewhere where he ought not to be. I am not entitled, because a man is a trespasser, through want of the exercise of due care to run him down and injure him in driving a motor car. At the outside it may be said that because the man is a trespasser the driver had no reason to think he was likely to be in a position of danger. That is a different matter altogether and it does not arise in the present case. I agree with what the noble Viscount opposite said, that as regards children there is reason for special care, and that as regards children playing in the street, if they are in fact playing there—which is quite sufficient apart from any right to be there—it is the duty of the driver of a car or the man in charge to exercise due care and diligence in avoiding damage to any of those children. In my opinion ordinary care and diligence in avoiding damage were not exercised in the present case, and the defenders, the respondents, are liable in damages. I agree that the appeal should be allowed.

Their Lordships sustained the appeal, with expenses, and restored the judgment of the Lord Ordinary.

Counsel for the Appellant — Haydon. Agents—T. M. Pole, Solicitor, Leith—John Cuthbert, London.

Counsel for the Respondents—Sandeman, K.C.—A. M. Mackay. Agents—Manson & Turner Macfarlane, W.S., Edinburgh — Grant M'Lean, London.

COURT OF SESSION.

Thursday, March 28.

WHOLE COURT.

MASON AND ANOTHER *v.* RITCHIE'S TRUSTEES.

Superior and Vassal — Casualties — Composition—Lands Subfeued for Less than their Annual Value—Feudal Casualties (Scotland) Act 1914 (4 *and* 5 *Geo. V, cap.* 48).

Lands were subfeued in 1847 for a subfeu-duty of £1 per annum. The rental of the lands at that date and at the date when the vassal took entry was very greatly in excess of £1 per annum, and continued so to be. In an action for redemption of the casualties of the feu under the Feudal Casualties Act 1914, *held* by the Whole Court (*dis.* Lord Johnston, Lord Dundas, Lord Salvesen, Lord Skerrington, Lord Cullen, and Lord Sands) that the composition exigible by the over-superior from the mid-superior was limited to the subfeu-duty of £1 payable to the mid-superior. *Opinion* (*per* Lord Johnston, Lord Dundas, Lord Salvesen, and Lord Sands) that the amount of composition was the annual value of the lands in 1847, when they were subfeued. *Opinion* (*per* Lord Skerrington and Lord Cullen) that the amount of the composition was the annual value of the land at the time of the entry in respect of which the casualties were claimed.

Authorities examined.

John Mason and another, immediate superiors of the lands of Kirktonhall, West Kilbride, *pursuers*, brought an action against Robert Gibb and others, the testamentary trustees of the late Dr Francis Caldwell Ritchie of Kirktonhall, vassals of the pursuers in the lands of Kirktonhall, *defenders*, concluding for decree of declarator that the defenders were bound as at 19th July 1915 to redeem the casualties incident to the pursuers' estate of superiority, exigible in respect of the defenders' estate held off the pursuers, and that the amount of compensation payable as redemption of the casualties was £1299, 14s. 1d., with executive conclusions.

The *holograph settlement*, dated 26th November 1833, of Francis Caldwell Ritchie (a predecessor in title of the defenders) directed his eldest son Francis Ritchie to implement various conditions as to the disposal of his property, which conditions included, *inter alia* — "To my son John Ritchie I hereby make over in tack or lease for nine hundred and ninety-nine years, from and after the first term of Whitsunday or Martinmas after my decease, and my successor is hereby bound to give legal and valid tack-right to that portion of the lands of Kirktonhall—[*then followed a description of the lands of Seamill*]. The said John Ritchie or his heirs on their part to pay to the foresaid Francis Ritchie or his heirs the sum of twenty shillings sterling at the term of Martinmas yearly in name of rent or tack-duty, and to go to the mill of Kilbride with all his grindable grain, and to pay the multures payable by the lands of Kirktonhall, double rent payable at the entry of heirs."

A *feu-right*, dated 5th October 1847, was thereafter granted by Francis Ritchie in implement of the foregoing condition, which feu-right provided — "I, Francis Ritchie of Kirktonhall, physician in West Kilbride, eldest son and heir of the deceased Francis Caldwell Ritchie of Kirktonhall, in obedience to the directions of my said father contained in the holograph settlement executed by him on the twenty-sixth day of November Eighteen hundred and thirty-three, do hereby sell, alienate, and dispone to John Ritchie, my brother, presently in London, and his heirs and assignees whomsoever, heritably and irredeemably, all and whole — [*then followed a description of the lands and other clauses*]—to be holden of and under me and my heirs and successors in feu-farm, fee, and heritage for ever for payment to us of the sum of twenty shillings in name of feu-duty, and that at the term of Martinmas yearly, beginning the first payment thereof at the term of Martinmas Eighteen hundred and forty-eight for the

year immediately preceding, and so furth yearly thereafter at the term of Martinmas in all time coming, and doubling the said feu-duty at the entry of each heir or singular successor to the said lands as use is of feu-farm."

A *precept of clare constat*, dated 18th December 1847, granted by Mrs Elizabeth Douglas Trotter Dick or M'Gregor (a predecessor in title of the pursuers) in favour of Francis Ritchie, provided—"... because ... it clearly appears and is made known to us that Francis Caldwell Ritchie of Kirktonhall, father of our lovite Francis Ritchie, physician in West Kilbride, now of Kirktonhall, died last vest and seised as of fee ... in all and whole—[*then followed a description of the whole lands of Kirktonhall, which included the lands of Seamill*]—and that the said lands and others are holden of and under me, the said Mrs Elizabeth Douglas Trotter Dick or M'Gregor, and my heirs and successors, immediate lawful superiors thereof, in feu-farm, fee, and heritage for the yearly payment to me and my foresaids by the said Francis Ritchie and his successors for the said lands and others above written, of the sum of twenty shillings Scots money allenarly, in name of feu-farm, at two terms in the year, Whitsunday and Martinmas, by equal portions, and the heirs of the said Francis Ritchie, only doubling the said feu-duty the first year of their entry to the foresaid lands for all other burden, exaction, question, demand, or secular service which can be anyways justly exacted or required furth of the foresaid lands and others before written, with their pertinents, by whatsoever person or persons, any manner of way whatsoever: Herefore it is our will ... to give to the said Francis Ritchie as heir of line and provision foresaid sasine of the lands and others above described, to be holden as aforesaid. ..."

The pursuers *pleaded, inter alia*—"4. The Seamill estate having been feued out by the defenders' author for an illusory feu-duty, said feu-duty is not the year's maill thereof, and the pursuers are entitled to have the composition payable therefor fixed on the basis of the real rent subject to the usual deductions."

The defenders, *pleaded, inter alia*—"3. The defenders being only mid-superiors of the lands of Seamill are in any event liable in name of composition only for the amount of the feu-duty payable to them as such mid-superiors."

On 13th July 1917 the Lord Ordinary (ORMIDALE) found that the defenders, being mid-superiors only of the lands of Seamill, were liable in name of composition only for £1, the amount of the feu-duty payable to them as such mid-superiors, and continued the cause.

To his interlocutor was appended the following opinion, from which the *facts* of the case appear:—"The pursuers sue the present action as the immediate superiors of the defenders in the lands of Kirktonhall.

"The defenders are the trustees acting under the trust-disposition of Dr Ritchie, late of Kirktonhall. They explain that they are infeft in the *dominium utile* of the lands of Kirktonhall other than the lands of Seamill, but in the mid-superiority only of the lands of Seamill.

"The property in these subjects was in 1847 feued by their predecessor Dr Francis Caldwell Ritchie, the then vassal of Kirktonhall, in favour of his brother John Ritchie, conform to feu-right under which the reddendo is the sum of £1 yearly. The feu-disposition proceeds on the narrative that it is granted in obedience to the directions of the granter's father, contained in his holograph settlement dated 26th November 1833. The provision made for John Ritchie in that settlement is for a tack or lease of Seamill for 999 years from the testator's death, the rent or tack-duty to be twenty shillings yearly. At the date of the feu-right, according to the averment of the defenders, the full adequate value of Seamill did not exceed the sum of £102, 0s. 11d. I take it therefore to be admitted that the feu-duty of £1 did not represent its full adequate value.

"On 17th July 1896 the defenders paid the sum of £447, the amount agreed to be accepted in full settlement of the composition payable on their entry with the then superiors of the subjects in respect of the death of Dr Ritchie, the last-entered vassal who paid a casualty.

"The next casualty being a casualty of composition would but for the operation of the Feudal Casualties (Scotland) Act 1914 fall due on 17th July 1921. On 19th July 1915 the pursuers, in terms of section 11 of the Feudal Casualties (Scotland) Act 1914, served upon the defenders as their vassals in the said lands a notice requiring the defenders to redeem all the casualties on the said lands belonging to them exigible in respect of the pursuers' estate of superiority in said lands, all in terms of the said Feudal Casualties (Scotland) Act 1914. This action has been raised to determine the amount of compensation payable on the redemption of the casualties.

"The amount of compensation claimed by the pursuers amounts to £1299, 14s. 1d. The figures instructing this sum are brought out in condescendence 9, to which and its relative answer I refer.

"While the averment of the defenders is that the titles produced by the pursuers are incomplete, and their first plea-in-law is 'No title to sue,' the argument addressed to me at this stage was confined to two points.

[*His Lordship dealt with a matter which is not reported*].

"*Second.* Whether as regards Seamill the superiors are bound to accept the feu-duty of £1 payable to the mid-superior as in full of his claim for a composition *quoad* these subjects, or whether he is entitled to a year's rent of the lands as at (*a*) the date of the bringing of the action, or (*b*) the date of the granting of the feu-right.

[*His Lordship dealt with a matter which is not reported*].

"*Second.* As to the sum to be paid as composition I do not propose to examine in detail the authorities cited by the parties

at the debate. They are all dealt with in the elaborate opinion of the Lord President in *Heriot's Trust* v. *Paton's Trustees*, 1912 S.C. 1123, 49 S.L.R. 852.

"I note that it was decided in *Cockburn Ross* v. *Heriot's Hospital*, 2 Ross, L.C. 193, F.C. June 6, 1815, 6 Pat. App. 640, that where a vassal subfeus his lands for their fair adequate value at the date of the subfeu a year's subfeu-duty and not a year's rent is due to the superior in name of composition.

"It was decided in *Campbell* v. *Westenra*, 1832, 10 S. 734, 2 Ross, L.C. 1206, that where a vassal has feued out his lands for a nominal feu-duty and a grassum, which together represent the fair value of the subjects at the time, the superior is on the entry of a singular successor not entitled to a year's rent of the lands, but is bound to accept a year's subfeu-duty and a year's interest on the grassum.

"In *Heriot's Trust* v. *Paton's Trustees* it was decided that where a vassal had subfeued his lands for a feu-duty of £20, which was their fair value at the time, and the feu-duty was afterwards redeemed, in accordance with a right to do so conferred by the feu-disposition, to the extent of £19, 15s., making the existing feu-duty 5s., the superior was not on the entry of a singular successor entitled to a composition of a year's rent but was bound to accept a payment of £20 tendered by the singular successor.

"In all these cases, which are, along with *Monktoun*, 1634, M. 15025, and *Cowan*, 1636, M. 15055, the leading decisions on this topic, there was no dispute that what the singular successor was willing to pay represented the equivalent of what was the full adequate value of the subjects at the date of the subfeu.

"In the present case there is no dispute that the subfeu-duty of £1 did not at the date of the subfeu represent the full adequate value of the subjects. That is estimated by the defenders to have been £102, 0s. 11d.

"On the other hand it is not suggested that the vassal who granted the feu-right received any grassum or other consideration in addition to the stipulated feu-duty of £1.

"Accordingly the defenders maintain that the feu-duty being the whole return available to them for the mid-superiority they are liable to pay their superior no more than £1.

"They found on the provision of the Act 1469, c. 36—'The overlord shall receive the creditor or any other person tennent till him payand to the overlord a yeir's mail as the land is set for the time.' They say, as was said in *Monktoun's* case, the principal vassal let the feu to the subvassal at that time when he might do it by the laws of the realm, and at which time the superior's consent was not in law requisite thereto.

"The pursuers on the other hand maintain that the feu-duty being only a nominal feu-duty is in effect, though not in name, a blench duty, and so covered by the passage which was cited from Stair, iii, i, 27—a passage which, judging from its context, is not, I think, meant to apply only to ward holdings.

"Now the admission made by the defenders that the feu-duty did not come anywhere near the full adequate value of the subjects in 1847 may be said to be an admission that the feu-duty is illusory. In such a case Lord Mackenzie (Ordinary) thought that the subfeu must be disregarded and the lands estimated at their true value.

"But whatever force there may be in the view presented by the pursuers, I have come to the conclusion that while the point is not expressly decided by the judgment in *Heriot's Trust* v. *Paton's Trustees*, it is, so far as I am concerned sitting in the Outer House, foreclosed in favour of the defenders by what was said not only by Lord Robertson and Lord Davey in the case of *Home* v. *Belhaven*, 1903, 5 F. (H.L.) 13, 40 S.L.R. 607, but by the dicta also of the Judges in *Heriot's Trust* v. *Paton's Trustees*. While recognising that the case of *Campbell* v. *Westenra* is still a binding authority, I note that the Lord President thus refers to it at p. 1136:—'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.'

"His Lordship further says—'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. This is what is meant by the term "a year's maill," as the lands are set, for, be it remembered, this is not a proper casualty or prestation. . . . Composition . . . 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?' His Lordship then deals with the case where a grassum had been given, pointing out that the true yearly value to the mid-superior was the feu-duty plus the interest on the grassum.

"As already said, the true yearly value to the mid-superior in the present case is, and has been from the first, the feu-duty of £1.

"Lord Dundas recognises that there is much in the opinions of Lord Robertson and Lord Davey to justify the conclusion that the amount of feu-duty actually exigible during the year in question forms the measure of the superior's claim, while Lord Mackenzie considers that if it were not open to found on *Westenra* the superior was entitled to get, not a year's rent, but only the feu-duty which was actually being received by the mid-superior.

"I shall therefore make findings to the effect . . . that the defenders, being mid-superiors only of the lands of Seamill, are liable in name of composition only for £1,

the amount of the feu-duty payable to them as such mid-superiors, and continue the cause."

The pursuers reclaimed.

On 18th October 1917 the First Division, in respect of the difficulty and importance of the question of law involved in the case, appointed the cause to be considered by the Whole Judges of the Court on minutes of debate.

Argued for the pursuers in their minute of debate—The subfeu was granted for an elusory feu-duty. The proposition of the defenders that the pursuers as over-superiors were bound to accept that subfeu-duty as the measure of the year's rent for the calculation of composition led to startling results, and was unsupported by decision or by statement of institutional writer or conveyancer. A result was that an over-superior could be deprived of a valuable estate by a transaction, viz., the sub-feu, to which he was not invited to consent, and if he was invited and refused his refusal could be ignored. Prior to 1874 by the device of alternative manner of holding a disponee of a vassal could postpone the payment of composition until the death of the vassal. Even after his death the disponee could still put forward the vassal's heir who would be entered for relief. It was ultimately decided that that device ceased to be competent after the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94)—*Rankin's Trustees* v. *Lamont*, 1880, 7 R. (H.L.) 10, 17 S.L.R. 416—though there had been much division of opinion on that point—*Ferrier's Trustees* v. *Bayley*, 1877, 4 R. 738, 14 S.L.R. 480; *Rossmore's Trustees* v. *Brownlee*, 1877, 5 R. 201, 15 S.L.R. 129; *Rankin's Trustees* v. *Lamont*, 1879, 6 R. 739, 16 S.L.R. 387. That device caused considerable inconvenience by creating defeasible mid-superiorities — *Rankin's* case, *per* Lord Blackburn at p. 17. Yet if the defenders were right such devices with their inconvenient results were unnecessary, as it would always have been possible to evade the superior's claim for a composition by creating a subordinate estate held for an elusory return. Such a device had never been used, but if it had been competent it could not be supposed that conveyancers would not have availed themselves of it extensively. The measure of the superior's right to a composition was admittedly unaffected by the Act of 1874, sections 4 and 5. Prior thereto the sanction of the superior's right was a declarator of non-entry, which resulted in a decree enabling the superior to resume possession of the lands unaffected by subfeus or leases granted by his vassal—Act 1449, cap. 18; Ersk. Inst., ii, 6, 26; *Coltart* v. *Tait*, 1782, M. 9313. Prior to 1874 the superior's right to composition could not be defeated or affected by any act of the vassal which was not a *bona fide* let or feudal grant for fair consideration. It might be that the estate had been diminished by a grant on payment of a grassum or the transfer of an estate or the compromise of contested rights, or for support for the public or political career of the lessor or granter of a feu, or by a grant intended gratuitously to enrich the lessee or sub-vassal. Such subfeu-duties or tack duties were elusory, and could be ignored by the superior as *in fraudem* of his rights. Prior to *Lord Home* v. *Lord Belhaven and Stenton*, 1903, 5 F. (H.L.) 13, 40 S.L.R. 607, such a state of the law had been assumed by the best text writers—Duff's Feudal Conveyancing, p. 217; Menzies' Lectures (2nd ed.), p. 508, revised edition of 1900, p. 487; Bell's Conveyancing (1st ed.), p. 1057, 3rd ed., p. 1148; Wood's Lectures, p. 145. The history of the matter had been dealt with—*Heriot's Trust* v. *Paton's Trustees*, 1912 S.C. 1123, 49 S.L.R. 852. The right of Crown and other vassals to subfeu had been gradually allowed subject to safeguards. Thus the Crown was prepared to ratify subfeus by its vassals if the subfeu was for a competent avail without prejudice to the King—Act 1457, cap. 71. Subfeuing or leasing was allowed on condition that there was no diminution of the rental—Act 1503, cap. 91. Grants in feu of land held in ward in prejudice of the over-lord were declared null—Act 1606, cap. 12, ratified and extended to Crown vassals by Act 1633, cap. 16. The superior's right to refuse to receive a singular successor of the vassal was first modified in favour of apprisers, who could compel an entry on condition of paying to the superior a year's maill as the land was set for the time—Act 1469, cap. 36. At that date subfeuing was very rare, and the superior's interest was substantial apart from the feu-duty, and that Act must have deprived the superior of a valuable right. It could not be presumed that the compensation given by the Legislature was not substantial. The method of taking entry was largely used—Ross's Lectures, ii, p. 302. The Act itself spoke of rent, and by a beneficent construction, a feu being regarded as a perpetual lease, a feu-duty when adequate at the date of its creation was regarded as rent. But an elusory feu-duty could not be regarded as rent. Further, that Act did not enact that the appriser should pay only such sum as was annually receivable by himself. He had to pay the whole rent though it might be totally or in part spent in meeting interest on bonds, &c. The same should apply where a mid-superiority was adjudged, for the subfeu was simply a burden like a bond and disposition in security on the lands. There was no hardship, for the appriser was not bound to take the lands. Where adjudging had taken the place of apprising the adjudger gained the right to force an entry, and again payment of the year's rent was the condition—Act 1669, cap. 18. At the date of both of those Acts subfeuing for less than the full present value of the lands was unknown in practice, and the feu-contract was rarely used—*Heriot's Trust* v. *Paton's Trustees*, *per* Lord President Dunedin at p. 1136. When Stair wrote it had been held that the subfeu-duty was the year's maill within the meaning of the Act of 1469—*Laird of Monktoun* v. *Lord Yester*, 1634, M. 15,020; *Cowan* v. *Elphinston*, 1636, M. 15,055. Yet Stair held there were two exceptions to the rule laid down in those cases, viz., where the subfeu was not warranted by law, and where

the reddendo was a blench duty, the reason for the distinction being that a feu for full value was a "heritable location for melioration of the ground," and consequently the feu-duty was taken to be the rent at the time, and that gave rise to a presumption to that effect which could not be rebutted—Inst., iii, 2, 27. That was still the law, with the qualification that the presumption had disappeared—*Campbell* v. *Westenra*, 1832, 10 S. 734, 2 Ross, L.C. 206. A modern subfeu for an elusory feu-duty fell to be treated as a case of blench reddendo. The same principles were repeated by Stair—Inst., ii, 11, 13, and 14. Where singular successors were given the right to force an entry directly without recourse to a fictitious adjudication, that right was subjected to payment of the casualties which the superior could have exacted under the prior law—Act of 1747 (20 Geo. II, cap. 50), sections 12 and 13—so that the measure of the composition remained the same. At that date it appeared that the *presumptio juris* referred to by Stair had become a presumption of fact capable of being redargued, but if it was proved that the subfeu was with material diminution of the rental, the subfeu was not conclusive against the over-superior's claim to possess on his vassal's default — Bankton, ii, 3, 50 and 51. Further, by that Act all ward-holdings of subject-superiors were converted into feus at a valuation of the existing services and casualties of ward. If the defenders were right a large number of subfeus for less than full value would as the result of that Act have become good against the over-superior's previously valuable right to casualties. Bankton, though dealing with the measure of composition, did not mention subfeu-duties as entering into the question of the year's rent — Inst., ii, 4, 31, 33, 34, and 35. The actual full rent of the lands was regarded as the measure of composition by Erskine—Inst., ii, 5, 29, and 42. When the lands fell into non-entry the superior could resume possession disregarding leases granted by the vassal—ii, 6, 26—and subfeus—Ivory's Notes, note 74—but where the over-superior confirmed a base infeftment he could not thereafter resume possession disregarding the subfeu confirmed, but could only exact the subfeu-duty—Inst. ii, 5, 44. When the superior had obtained decree of declarator of non-entry he was entitled to enter into full possession; the tender of subfeu-duties was not enough, subfeus being assimilated to leases—*Colturt's* case. The absence of any decision as to whether a subfeu-duty fell to be treated as the year's maill until 1634 seemed to show that subfeuing was uncommon. In 1634 and 1636 the subfeu-duty was held to be the measure of the composition—*Monktoun's* case and *Cowan's* case — but there was no reason to believe that in these cases the subfeu-duties were not full. In *Cockburn Ross* v. *Heriot's Hospital*, June 6, 1815, F.C., 2 Bligh 707, 6 Paton 640, and 2 Ross, L.C. 193, it was held that where the subfeu was for the full adequate value the subfeu-duty was to be taken as the year's maill. Lord Justice-Clerk Boyle at p. 410 in F.C. report, and Lord Meadowbank at p. 394, expressly proceeded on the adequate nature of the subfeu-duty. Lord Bannatyne dissented, holding that the subfeu could not affect the over-superior's rights. Lord Glenlee, at p. 404, to some extent proceeded upon MSS. notes to Stair by Lord Elchies, who considered that it had been decided in *Countess of Forfar* v. *Creditors of Ormiston*, *circa* 1725 (unreported), that the superior was bound to receive the vassal on payment of a year's feu-duty—see Arniston Papers, vol. viii, No. 12. There was again nothing to show that the subfeu-duty was elusory, and if that had been the case the Judges in *Cockburn Ross's* case would have referred to such a decision and would not have founded so strongly on the adequacy of the subfeu-duty. Further, Lord Glenlee agreed with Lord Meadowbank and did not differ from Lord Justice-Clerk Boyle, and in *Campbell's* case, at p. 736, Lord Glenlee proceeded upon the fairness of the transaction at the time. Accordingly *Cockburn Ross's* case had no bearing when the subfeu-duty was elusory. *Campbell* v. *Westenra* decided that when small parcels of land had been subfeued, the consideration being a grassum in each case and a small feu-duty, in arriving at the year's maill interest on the grassums fell to be included in addition to the subfeu-duty. The decision proceeded on an admission of the over-superior that the feu-duties, plus the grassum, were full value—the question of elusory feu-duty was not argued—but the Judges proceeded on the assumption that an elusory feu-duty was not enough. *Cockburn Ross's* case and *Campbell's* case ruled the practice till 1903—*Heriot's Trust* v. *Paton's Trustees per* Lord President Dunedin at p. 1132. In the House of Lords it was held that the mineral rents and royalties actually received for the year fell to be included in the year's maill—*Earl of Home* v. *Lord Belhaven and Stenton*—reversing a decision of the Court of Session to the effect that a sum adjusted on equitable principles so as to represent the constant annual value fell to be taken—2 F. 1218, 37 S.L.R. 990. *Campbell* v. *Westenra* was cited as justifying recourse to equitable principles, and as an authority to that effect was doubted *per* Lord Davey at p. 18 and Lord Robertson at p. 22. As a result, in the *City of Aberdeen Land Association, Limited* v. *Magistrates of Aberdeen*, 1904, 6 F. 1067, 41 S.L.R. 647, when a subfeu had been granted for a grassum and a blench duty, the Second Division refused to follow *Campbell's* case and held that the measure of the composition was the actual rent of the lands. *Campbell's* case was disregarded only in so far as it was considered an authority for allowing in equitable modifications, and it was decided that an elusory subfeu-duty could not be taken as the year's rent—*per* Lord Trayner at p. 1084 and *per* Lord Moncreiff at p. 1089. Since then in a Court of Seven Judges it had been decided that where lands had been subfeued for an adequate feu-duty at the time of subfeuing the over-superior was only entitled in name of composition to such feu-duty—*Governors*

of George Heriot's Trust v. *Paton.* The *Aberdeen* case, as deciding that in all cases the superior was entitled to the actual rent was overruled and *Campbell's* case approved. The dicta in *Home's* case were not read as laying down the proposition that in all cases the over-superior would only get what was actually receivable by his vassal. Throughout his opinion Lord President Dunedin took the view that when the subfeu-duty was full and not elusory it regulated the measure of the composition, and that where the competent avail consisted of subfeu-duty and grassum *Campbell's* case was still authoritative though it was not an authority for a power of equitable modification. In that opinion Lord Kinnear, Lord Salvesen, and Lord Guthrie concurred. Lord Dundas throughout his opinion took the view that the subfeu-duty if for full value regulated the amount of composition, so did Lord Johnston. Lord Mackenzie apparently considered that the determining factor was the amount actually receivable by the vassal. In the present case the elusory feu-duty could not be supplemented as in *Campbell's* case, for there was no grassum. The alternative argument of the defenders was unsound, for the amount of the composition could not be affected by the question whether the vassals were or were not personally liable therefor. The pursuers as superiors had a proprietary right in the lands burdened with the feus they had given off, and if the land had fallen into non-entry they would not have entered into a mere mid-superiority, but would have actually entered into the lands themselves burdened with such rights as they could not dispute. They were entitled to have the actual rents of the lands taken as the basis for the calculation of their casualties, and the Lord Ordinary was wrong.

Argued for the defenders in their minute of debate—The question arose under the Feudal Casualties (Scotland) Act 1914 (4 and 5 Geo. V, cap. 48), and related to the amount to be paid for redemption of the casualties of Seamill. That depended on the amount of the highest casualty payable when the next casualty became due—section 5 (1) (*a*). The casualties of Seamill were taxed in the disposition thereof by the defenders' author, the feu-duty of £1 being doubled at the entry of each heir or singular successor. The subfeu-duty admittedly did not represent the fair annual value of Seamill when the subfeu was given off—no grassum or other consideration was given and the subvassals had a prescriptive title. The defenders in fact represented the granter of the subfeu, but they might quite well have been singular successors who would have known nothing of the original transaction. The elusory subfeu-duty of £1, as being the only feu-duty received by the defenders, was the measure of the over-superior's casualty of composition. That was consistent with principle and was established by decision. Unlike lands held in ward, lands held in feu-farm could always be subfeued. There was nothing against that in the common law or the statutes, and subinfeudation prior to 1874 could only be prohibited by an express clause. The pursuer's argument attempted to apply to feu-farm considerations which applied to other tenures, such as ward where subinfeudation was prohibited, and was irrelevant. Subfeuing was allowed even in wardholding, but it entailed forfeiture by way of recognition if more than half the lands were subfeued—Menzies, Conveyancing (1st ed.), p. 583; Bell, Conveyancing (3rd ed.), 681-684; Stair, Inst. ii, 11, 10, 13, 14, and 15; Ersk., ii, 5, 10. Stair, ii, 11, 13, and 14, quoted by the defender, applied to wardholding. Further, the Acts 1457, cap. 71, and 1503, cap. 91, were intended to provide a relaxation of the liability to recognition — Stair, Inst. ii, 3, 32, and ii, 11, 15. Recognition applied only to wardholdings—Stair, Inst. ii, 11, 16, and so did the Acts 1606, cap. 12, and 1633, cap. 16; Stair, Inst. ii, 4, 36, and ii, 11, 15. Those were the only Scottish statutes against subinfeudation. Further, even in wardholdings recognition was only incurred if more than half was alienated and was not incurred for a subfeu at a feu-duty equal to half the true rent—Stair, Inst. ii, 11, 14 and 15. The superior's right to composition depended on the Act 1469, cap. 36, which gave appraisers a right to force an entry on payment of a year's maill "as the land is set for the time." Those words were unambiguous and were to be taken in their natural sense—*Earl of Home's* case. That right was extended to adjudgers—Act 1672, cap. 19—and purchasers of bankrupt estates—Act 1681, cap. 17—and lastly to all purchasers—Act of 1747 (20 Geo. II, cap. 50), sections 12 and 13; all of those Acts applied to all land by whatever tenure held, including mid-superiorities of no pecuniary value. If the lands were in the actual possession of the vassal the letting rent was the amount of the casualty — *Aitchison* v. *Hopkirk*, 1775, M. 15,060. Where they were feued the feu-duty was that amount — *Monktoun's* case and *Cowan's* case, in which no question of the adequacy of the feu-duty was raised, and it was decided that the mid-superior was only bound to pay what he received. Those cases had been commented on by Elchies in Note to Stair Inst. ii, 4, 32 [quoted *per* Lord Glenlee in *Cockburn Ross's* case, 2 Ross, L.C., at p. 205, and referred to *per* Lord President Dunedin in *George Heriot's Trust* v. *Paton's Trustees* (at p. 1132)], where Lord Elchies considered that the rule that the subfeu-duty fixed conclusively the amount of the casualty had been decided in the *Countess of Forfar's* case. That decision applied even if the subfeu-duty was elusory — Arniston Papers. Even if, as the pursuers argued, the subfeu-duty in the present case was a blench duty, Elchies' Note showed that he did not understand Stair, Inst. iii, 2, 27, in the same sense as the pursuers, but as stating that a blench duty being of no avail would involve recognition in wardholding. But there was no blench duty here if that was confined to a proper blench holding—Stair, Inst. ii, 3, 33; Ersk. Inst. ii, 4, 7—so that when Stair wrote that the feu-duty was presumed to be the rent he

was referring to all feu-duties, adequate or inadequate, and was not regarding inadequate feu-duties as blench duties. *Coltart's* case was not in point; it related to the measure of relief. The decision in the *Countess of Forfar's* case was not questioned till the case of *Cockburn Ross*, in which the main question was whether there was any general prohibition against subinfeudation or whether the prohibition was confined to wardholdings under the Act 1606, cap. 12. The latter view was upheld to the effect that in feufarm subfeus were binding on the superior. Composition was not regarded as a casualty, and therefore could be affected by a vassal without the superior's consent —*per* Lord Meadowbank, F.C. report at p. 395. Subfeu-duties were regarded as elusory only when they were granted for a grassum and a small feu-duty, because in that way the true amount of the consideration was concealed from the superior; elusory did not mean less than the fair market value— *per* Lord Justice-Clerk Boyle, F.C. report at p. 411. It was argued that the subfeu-duty and the average value of the whole profits were the measure of the casualty— F.C. Report, p. 413—but that argument was rejected and the subfeu-duty was held to be the amount of the composition, *i.e.*, of the year's maill—Bell, Conveyance of Land, p. 294, commenting on that case, approved *per* Lord President Dunedin in *Heriot Trust* v. *Paton's Trustees* (at p. 1131). As regards the 19th century text writers quoted by the pursuers the earlier of them merely gave the decision in *Cockburn Ross's* case. Menzies, Conveyancing, 1st ed., p. 505, stated that the subfeu-duty and not the actual rent was the measure of composition though the sub-vassals had erected houses on the sub-feus. In *Campbell's* case it was unsuccessfully argued (at p. 735) that when the subfeu-duty was not full the superior was entitled to a year's actual rent, subject to the grassum being treated as capitalised feu-duty; the decision was that the tender of a feu-duty less than the annual value was sufficient to exclude a demand for the actual rent. Lord Curriehill commenting on these two cases in *Lord Blantyre* v. *Dunn*, 1858, 20 D. 1188, at p. 1199, held that the over-superior had no right to the actual rent but only to the feu-duties, and treated those cases as deciding that the vassal was not bound to pay more than he received. The authority of *Campbell's* case was correctly stated *per* Lord President Dunedin in *Heriot's Trust* v. *Paton's Trustees*, at p. 1136, which case was an authority for the proposition that the superior could get no more than the vassal actually received, *e.g.*, the subfeu-duty—*per* Lord President Dunedin at p. 1128, 1130, 1135, and p. 1136, concurred in *per* Lord Kinnear at p. 1137, Lord Mackenzie at p. 1142. The same principle had been recognised by the Legislature—Act of 1874, section 19—and it applied whether the lands were let or subfeued for a feu-duty merely or a feu-duty and a grassum. The pursuers were only entitled to a sum equal to the subfeu-duty. Alternatively a feu was a mere burden on the superior's right to the lands. When the feu ceased to be full the superior was deprived of his perpetual right to have a vassal in the feu, and accordingly the feu as a burden flew off and the superior became entitled to the unburdened land until the feu again became full by the entry of a vassal and payment of a casualty. In conformity with that theory the superior's remedy prior to 1874 was not a personal action but a declarator of non-entry, and when he obtained decree he resumed possession of the lands and drew the rents. If so, and if he could have ignored the subfeu of Seamill, he could only have drawn the rents from the persons actually in possession but could not compel the mid-superiors to collect the rents and pay them to him. Since 1874 the nature of the action was altered to meet the change caused by the Act of 1874, whereby lands could not fall into non-entry, but the new remedy proceeded on the same theory as the old—section 4 (4)—and the superior's remedy was still to draw the rents. If so, that raised a question between the pursuers and the actual proprietors of Seamill, and as the feu to them contained warrandice only from fact and deed, the proprietors had not ultimate redress against the defenders. If, then, the pursuers could not make good their claim for the rents against the defenders they could not claim a composition against them, for the only sanction for that claim was by proceeding against the rents. And if so the defenders could not be bound to redeem such a composition. The Lord Ordinary was right.

The Consulted Judges returned the following opinions:—

LORD JUSTICE-CLERK—In this case the person in right of the property of Seamill granted a subfeu of the same to his brother, conform to feu-right dated 5th October 1847, under which the property was sold, alienated, and disponed heritably and irredeemably to the disponee, to be holden of and under the disponer in feu-farm, fee, and heritage for ever for payment of the sum of twenty shillings in name of feu-duty yearly. The said feu-right bears to have been granted in obedience to the directions of the granter's father contained in his holograph settlement.

The property was thus given as a present by the deceased vassal to his second son— for I do not attach any importance, so far as this controversy is concerned, to the difference between a tack-right for 999 years at a rent or tack-duty of twenty shillings, and the said feu-right.

In my opinion a vassal is quite entitled to dispose by way of gift of subjects held by him in feu without the consent of his superior. Duff in his Treatise on Deeds says, "The power of alienation is now inherent in a feudal right," p. 69, and he refers to the Statute 20 Geo. II, c. 50. Later on he refers to "the statutory abolition of the power to prohibit alienation without consent."

The statute itself (section 12) gives power "to any person who shall purchase or acquire lands or heritages from the former

proprietor or vassal" to apply for a warrant to charge the superior to enter him, and the Court are authorised to grant such warrant to enter "such heir, purchaser, or disponee respectively."

I know of no principle or authority which prevents a vassal from making a gift of his lands to any person he pleases, or which prevents him from doing so by subfeuing the same for any amount of subfeu-duty, large or small, which he and the donee agree upon. To concede such a right to the superior would be in my opinion contrary both to law and practice, and would infer a very serious limitation of the right of property—the *dominium*—with which every feuar is vested in the feus belonging to him.

The statute, however, provides (section 13) that no superior shall be bound to obey such a charge, unless the charger pays or tenders such fees or casualties as the superior is by law entitled to receive for an entry.

The question remitted for debate before the Whole Court is stated by the pursuers in their minute of debate to be whether all that the defenders are bound to pay for an entry is £1, or such sum as shall be held to be the rental of said estate in 1915. Neither of the parties supports by argument any intermediate sum, and I think that they are right in assuming that the only choice is between these two sums. At any rate these are the only alternatives supported in the arguments submitted to us.

So far as I read such authorities as there are on the point, there is neither principle nor decision which would warrant decree for such an intermediate sum as the actual rent in 1847. On the other hand, I think there is both principle and authority for saying that the superior in the present case can only claim £1, and I am therefore for affirming the Lord Ordinary's interlocutor.

What is spoken of as a casualty in this case is, as Lord Meadowbank put it in his note in *Cockburn Ross*, F.C., June 6, 1815, at p. 395, 2 Bligh 707, 6 Paton 640, 2 Ross, L.C. 193, "not a feudal casualty, but a statutory payment for completing an alienation, and must be interpreted accordingly." The interpretation of the Statute of 1469 has on several occasions been the subject of judicial consideration and decision, and it must now be taken as settled that in such cases subfeu-duty is equivalent to rent. But it is said that this rule only applies when the subfeu-duty was equal to the rent at the time the subfeu was granted. I do not think there is any sufficient warrant for this qualification.

In 1634, in the case of the *Laird of Monktoun* v. *Lord Yester*, M. 15,020, the vassal had subfeued, and his representative charged the pursuer to infeft him, and the charger maintained "that he could give no more for his entry than one year's feu-duty, which was payable by the sub-vassal to the Lord Yester's immediate vassal, seeing by his adjudication he would get no more in time to come but only that feu-duty, and he ought to give no more than he would obtain himself; this allegeance was found relevant, and the Lords ordained the superior to enter this party in place of his vassal, he paying the feu-duty which he would obtain from the sub-vassal, and found he ought to pay no more for his entry"; and the plea that the subfeu was granted without the superior's knowledge and "to his prejudice" was repelled, because the vassal could by law subfeu without the superior's consent. It does not appear what the subfeu-duty was, and how it compared with the actual rent, but the principle on which the judgment proceeded is quite generally expressed. Two years later, in 1636, a similar decision was given in *Cowan* v. *Elphinston*, M. 15,055, where it was found that "the charger could pay no more to the superior but a year's duty of that which he was to get himself when he was entered, which was only so much feu-duty paid to him by his sub-vassals, and not a year's duty of the lands which pertained not to him but to his sub-vassals." Here again the amount of the feu-duty does not appear, but the principle is stated without any qualification.

Bankton, iii, 2, 53, states the same principle without any qualification thus—"If the lands adjudged belong only in superiority to the debtor, his superior is entitled to no more than a year's rent of the feu-duty to which only the adjudger is to have right when entered."

The case of the *Countess of Forfar* v. *Creditors of Ormiston*, about 16th July 1725, decided that the adjudger was only liable for the feu-duty. There is in the Arniston papers (vol. xviii) a reclaiming petition, signed Ro. Dundas, who was then Dean of Faculty. From this it appears that the general question was raised and determined in the case. In said petition it is said—"Your Lordships have determined the point in general without any distinction whether the subfeus are set for a reasonable avail, or if they be set for such a trifle as in effect is but an acknowledgment or blench duty under the name of a feu-duty." This seems to me to be the view of the decision which is put forward by Lord Elchies in the notes quoted by Lord Glenlee. Lord Glenlee was himself I think acquainted with the case, for he concludes his opinion by saying—"I have only to add that I go along with the last decision mentioned in these notes (*Countess of Forfar* against *Creditors of Ormiston*), and that I am for adhering to Lord Meadowbank's interlocutor."

And the Lord Justice-Clerk, referring to the *Countess of Forfar's* case, says—"The decision quoted by Lord Glenlee appears however sufficiently to confirm" the opinion of Bankton, Erskine, and Stair, to which he had referred.

There is no decision which in my opinion can be regarded as overruling any of these cases, or the reasoning on which they proceed to the effect of saying that where a feu-disposition has been granted for a feu-duty, however small, but being the only pecuniary return exigible by or received by the mid-superior as a consideration for granting it, the over-superior can exact anything but the mid feu-duty in respect of

an entry. To my mind it is plain that neither of the cases *Westenra*, 1832, 10 S. 734, 2 Ross, L.C. 1206, nor *Paton*, 1912 S.C. 1123, 49 S.L.R. 852, as a matter of decision covers the present case, nor can the opinions in these cases in my judgment be regarded as trenching on the authority of *Lady Forfar's* case and the two prior cases above referred to. The import of the *Cockburn Ross* decision was well summarised by Lord Justice-Clerk Moncreiff in *Allan's* case, 1878, 5 R. 510, 15 S.L.R. 279, when he said—"That decision only proves more clearly that his (the superior's) right is to be measured by the beneficial enjoyment of the vassal himself"; and Lord Ormidale in the same case said—"The superior must in reference to his casualty or composition for an entry be put in the same position, not better or worse, as the vassal himself."

I think the case of *Campbell* v. *Westenra* has sometimes been misunderstood. The subfeus had been granted in "consideration of certain grassums and annual feu-duties," and the vassal had paid a year's subfeu-duties and interest at 5 per cent. on the prices or grassums originally paid for the feus, and in respect of this payment obtained an entry upon an understanding that she should be liable for any further composition which her superior might be found entitled to "in the event that the House of Peers reverse the decision of the Court of Session in the case of *Cockburn Ross*," which they did not do. The superior thereafter raised a process of declarator to have it found and declared that he was entitled to a year's rent as at the time of entry.

The vassal there admitted that the grassums were to be treated as yielding an annual sum additional to the feu-duty, and that the interest thereof, equally with the feu-duty, was to be treated as part of the yearly return, and the Court accepting this view assoilzied the defender. A point was raised as to whether an average of what should be received in name of casualties should not also be allowed, but it was decided—and so far as the Judges' opinions go this seems to have been all that was made matter of judicial consideration—that the superior was not to receive more than had already been paid to him, that being the only point in controversy—the vassal was only to pay what was held to have been received by the vassal in the year of entry. I do not think *Campbell* v. *Westenra* has much bearing on the question we are now considering. In *Lord Home's* case, in the Court of Session, it was incidentally cited in the argument for the respondent, but it was not referred to at all by any of the Judges in their opinions.

In the House of Lords, in the case of *Lord Belhaven*, 1903, 5 F. (H.L.) 13, 40 S.L.R. 607, Lord Davey, in expressing his concurrence with the view of the minority in the Inner House, said (at p. 18) "that the composition must include the mineral rents received by the respondent in the year of entry subject to proper deductions, as to which there was no dispute before us." He added—"I think that this follows from the principle which I have deduced from the words of the statute as interpreted by the Scottish Courts, namely, that 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 subfeu, and he is entitled to the benefit of the principle when it is in his favour. If this be the principle the question arises, What is the year's rent in the hands of the vassal?" And then, later on, he says —"If, then, the superior's right is to stand in the place of the vassal for the year in question he is entitled to whatever the vassal might have received and retained under the name of rent. I have thought it right to state the reasoning which has led me to this opinion on account of the importance of the case and the division of opinion in the Inner House."

In the same way, in the most recent case of *Paton*, 1912 S.C. 1123, 49 S.L.R. 852, Lord Dunedin, referring to the case of *Belhaven*, said (at p. 1133)—"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." And later, with reference to the same judgment, he says (at p. 1134)—"... The decision merely affirmed what the Court had held more than two hundred years ago in *Monktoun*, 1634, M. 15020, and *Cowan*, 1636, M. 15055, 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."

Further on he said (at p. 1135)—"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 maill' 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 poinding 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 subfeued, 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 subfeuing lands in feu-farm, and that was part of the gradual march of the law which I described at the outset." No doubt, his Lordship was dealing in that case with a subfeu which when granted many years before 1817 had been granted for a feu-duty

which was an adequate return on the value of the lands as at that date, and he concludes, after expressing his view to the effect which I have before indicated, by saying at p. 1136—"That being the true view, the question was solved as regards lands feued for a competent avail." But in my opinion the fact that the lands were feued for less than a competent avail does not affect the application of the principle, though I agree that the opinion of Lord Dunedin which I have quoted cannot fairly be said to have been expressly and in terms applied to such a case as that which we are now considering, and we are therefore driven to see whether the principle which has been applied where the lands are feued for a competent avail is inapplicable in the case of a feu-right where the feu-duty is less than the value of the lands at the time when this feudal relation was constituted. In my opinion it is not. Lord Dunedin in the very careful opinion which he pronounced in *Paton's* case referred to Bell's Treatise on the Conveyance of Land to a Purchaser, and in that work it is set out at page 315 of the third edition—"But 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. For where a feu-duty has been stipulated not ten times more than the agricultural value, but even below the actual agricultural rent of the property, the Court have in repeated instances found that the entry-money of an adjudger was no more than a year's rent of the estate which the adjudger was to receive." Now that occurs in a work the author of which was a member of the bar who had been appointed lecturer on conveyancing by the Society of Writers to His Majesty's Signet. The first edition was published in 1815, and a third edition was published in 1827, and since I began the study of law it has always been accepted as an accurate exposition of a subject which in his preface the author describes as belonging "to the daily practice of the conveyancer."

Dealing with the case of *Cockburn Ross* Lord Dunedin also refers to the quotation by Lord Glenlee from Lord Elchies' Notes on Stair dealing with this subject, and it appears to me that these notes expressly deal with the very question we are now considering. Lord Elchies' Notes bear as follows:—"In this subject of compositions due by comprysers or adjudgers there is a question not noticed by our author, and which, I think, is not very clear, viz.—Where the immediate vassal has subfeued his lands for perhaps a small feu-duty, and the superiority is afterwards comprysed, whether the compryser must pay a year's real rent of the lands or only a year's feu-duty, there being no more payable to his debtors out of them;" and then he proceeds to argue the question, referring, *inter alia*, to *Lord Monktoun's* case, and in the course of the argument he says—"But if the superior should get no more for an entry but a year's feu or blench duty, such as was paid by the sub-vassal, that would put it in the vassal's power for ever to extinguish all hopes the superior could have of a year's rent from a singular successor, and that by subfeuing the lands for a small feu-duty." And then, dealing with the case where the superior's rights might be prejudiced or destroyed *per ambages* as he puts it, he sums up thus—"Upon the other hand, it may be alleged that the compryser should only pay a year's rent, as the lands can yield to him, which in the case of a subfeu is only the feu-duty," and in the end closes the argument by saying—"Yet where subfeus are not null no more will be due but the subfeu-duty"; and then in a parenthesis Lord Elchies writes—"Since writing these, the point is decided, about 16th July 1725, *Countess of Forfar* v. *Creditors of Ormiston*, and the adjudger found only liable for the feu-duty. There was nothing new in the reasoning on either side." It appears to me that this reasoning of Lord Elchies is sound, and entirely consistent with and warranted by the authorities to which I have referred, and in my opinion it follows that where the subfeu is not null, whatever the amount of the feu-duty be, the superior is only entitled to get what the mid-vassal would himself have got in the year of entry—that is to say, the mid feu-duty.

I do not think either the decision or the opinions in *Paton's* case apart from the statements as to the general principle to which I have already referred, affects the questions raised in this case. All that the Lord President said as to the special questions in *Paton's* case is contained in the last paragraph of his opinion (p. 1136):—"As regards the present case, I am further of opinion that it is not necessary actually to apply the case of *Campbell* v. *Westenra*"; and then, as I understand it, he went on to decide the case on its own special facts and without any reference to *Westenra's* case. While Lord Dundas, after referring to what had been said about *Westenra's* case in the House of Lords, added at p. 1141—"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."

Lord Johnston proceeded entirely on the case of *Cockburn Ross*, and so far as *Westenra's* case is concerned he seems rather to have assented to what he thought was *obiter* than to have given any judgment of his own.

Lord Mackenzie, however, founded on *Westenra's* case as justifying £20 instead of 5s. For myself I do not understand how *Westenra's* decision could be taken as an authority for the result reached in *Paton's* case, which seems to me to have proceeded

as much on the defender's tender as on any legal principle which can be derived from *Westenra's* case.

As to the phrase "illusory feu-duty," it appears to me that on the authorities this phrase is applied only when the real consideration for granting the feu is not a feu-duty but a capital payment. For example, Bell, in his Principles, says (section 721)—"The effect of a subfeu for a large price, with illusory feu-duty, is to give the superior the right to the feu-duty with the interest of the grassum." In the same way, in his Commentaries, vol. i, p. 24, he says—"Property subfeued as building ground in a city opened a question of unusual importance in consequence of the extension of Edinburgh over lands held in feu and subfeued to builders. The point had been raised and discussed by the anonymous commentator on Stair (who is understood to have been Lord Elchies), p. 175, and was judicially determined in the case cited below, where it was decided by Lord Meadowbank, after great consideration, and his judgment affirmed by the Court and by the House of Lords, that nothing more is demandable than the subfeu-duty. It remains to be determined what shall be the effect of a subfeu for an elusory feu-duty, or one under the true value, in consideration of a price which may be called 'grassum.' This point was questioned in the case cited above, *Anderson* v. *Marshall*, but it was compromised. It has again been raised, and may be determined in time to be noticed in the end of the book." So, too, the Lord Justice-Clerk, in *Cockburn Ross's* case, at p. 411, says—"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 called upon here to decide." Where there is a conjunction of a price or grassum and an illusory feu-duty other considerations may apply, but we have no such case here. On the contrary, I find no warrant for the suggestion that where the sole consideration, so far as money is concerned, is the feu-duty, anything else but the feu-duty should be taken, or that account should be had of what Lord Fraser in a valuation case spoke of as "sentimental considerations," and I know of neither principle nor authority for taking such considerations into account. I am therefore of opinion that the Lord Ordinary's judgment was sound.

Neither of the parties have, as I said, argued for the middle point of view, namely, that the annual value of the land at the time when the feu-disposition was granted, should be taken, and I know of neither principle nor authority which would give sufficient support to that contention. In my opinion, if the actual feu-duty of £1 is not to be taken, the rent of the lands at the date of entry would be the logical and legal result.

LORD DUNDAS—The question remitted for consideration by the Whole Court is, as stated by the Lord Ordinary—"Whether as regards Seamill the superiors are bound to accept the feu-duty payable to the mid-superior as in full of his claim for a composition *quoad* these subjects, or whether he is entitled to a year's rent of the lands as at (*a*) the date of the bringing of the action, or (*b*) the date of the granting of the feu-right?" There are thus three alternative conclusions open to us. I am of opinion that the superior's right is measured by the third of these, viz., a year's rent or value of the lands as at the date when the feu-right was granted. I shall deal with the three aspects of the case in their order *seriatim*.

1. The defenders' contention, which the Lord Ordinary has sustained, that the superior must be content with the actual feu-duty of £1 in full of his claim is, in my judgment, unsound. It is well-settled law that where a vassal subfeus his lands for their full adequate value at the time a year's subfeu-duty and not a year's rent is due to the superior in name of composition. In the old cases of *Monktoun* v. *Yester*, 1634, M. 15,020, and *Cowan* v. *Master of Elphinston*, 1636, M. 15,055, it seems to have been decided, though as regards the latter case the reports by Spottiswood, M. 15,055, and by Durie, M. 202, are diametrically opposed to one another, that the superior was entitled to no more than the feu-duty for which the lands were actually set. There is nothing in either of the cases as reported to suggest that this feu-duty was other than a fair and adequate return for the lands at the time when the feu was granted, or that a superior is bound to accept an inadequate or illusory feu-duty as the year's maill of lands. On the contrary, the historical probability is that at the time when these cases were decided the feu-duty represented the fair yearly avail of the lands. I think this must have been so in the case of *Monktoun*, for I find a passage in the reclaiming petition in the *Countess of Forfar's* case (1725) preserved in the Arniston collection of Session Papers (vol. viii, No. 12), and referred to in the minutes of debate, which is worth quoting here. The writer, Robert Dundas—afterwards, I apprehend, Lord President—observes that in *Monktoun's* case "the question was anent the feu of a ward holding, constitute during the period that such feus were allowed, but then allowed under the quality of being without diminution of the rental, so that the feu-duty was the true avail and rent of the land at the time, and the law, by not allowing feus of ward lands to be set except for a competent avail, secured the interest of the superior as to his casualties." I think that *Monktoun* v. *Yester* and *Cowan* v. *Elphinston* were the lineal precursors of *Cockburn Ross*, where the proposition I have stated above was definitely and in terms enunciated by the decision of this Court, affirmed by the House of Lords 2 Ross, L.C. 193, June 6, 1815, F.C., 6 Pat. App. 640. I think it is clear from a study of the opinions of the Lord Justice-Clerk and other Judges in that case, to which I referred at sufficient length in giving my opinion in *Heriot's Trust*, 1912 S.C. 1123, at pp. 1138-39, 49 S.L.R.

852, that the fact that the subfeu-duty represented the "full, adequate value at the time" was not a mere incident but an integral part of the judgment. This is, I think, demonstrated by the decision in the succeeding case, *Campbell* v. *Westenra*, 1832, 10 S. 734, 5 F.C. 8vo., 2 Ross L.C. 206—the logical sequel of *Cockburn Ross*—for the Court there held that the superior was not bound to accept as the year's maill the small feu-duty for which the lands were actually set, but was entitled, in order to bring the amount up to their full adequate value, to the addition of a year's interest on the grassums. It seems to me therefore that *Westenra's* case affords expressly, and that of *Cockburn Ross* by clear implication, authority adverse to the view of the Lord Ordinary. His Lordship in reaching his conclusion appears to me to have proceeded upon a too narrow and therefore erroneous reading of Lord President Dunedin's opinion in *Heriot's Trust*, from which he cites excerpts. *Heriot's Trust* is an important decision. A Court of Seven Judges overruled the *Aberdeen* case, 1904, 6 F. 1067, 41 S.L.R. 647, and reinstated *Campbell* v. *Westenra* as an authority of repute, and the decision of the House of Lords in *Home* v. *Belhaven*, 1903, 5 F. (H.L.) 12, 40 S.L.R. 607, was also canvassed, and its true scope and effect explained by the judges, especially by the Lord President. I think that the *Belhaven* case decided only (1) that in computing a year's maill within the meaning of the Act 1469, cap. 36, the annual value of minerals in course of being worked cannot be excluded, and (2) that the actual amount of rents or royalties due to the vassal during the particular year must be taken without having regard to approaching exhaustion of the minerals or to "equitable" methods of calculating the amount of compensation, *e.g.*, upon an average of years. Lord Dunedin's opinion in *Heriot's Trust* seems to me to be adverse, and not favourable, to the Lord Ordinary's conclusion. It must of course be read as a whole, and the various dicta must, like all judicial dicta, be construed with reference to, and not divorced from, their context. I am confident that his Lordship did not intend to give colour to the view that the right of a superior must be measured by and restricted to the subfeu-duty, however inadequate its amount may be. In the first place Lord Dunedin expressly approved of *Campbell* v. *Westenra*. Its authority had suffered temporary eclipse from the dicta of Lord Davey and Lord Robertson in *Home* v. *Belhaven* and the subsequent decision of the Second Division in the *Aberdeen* case. But *Heriot's Trust* overruled *Aberdeen* and revindicated *Westenra*. The Lord President stated his views at length as to the high authority and the historical importance of the last-named case, and concluded by saying, at p. 1136, 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." Now (as already said) I do not see how the Lord Ordinary's view can stand along with *Westenra*. If his Lordship's conclusion is well founded I think the superior in *Westenra* would have had to be content with the actual subfeu-duty and to go without the interest on the grassums. In the second place the result arrived at by the Lord President in *Heriot's Trust* seems to me absolutely to negative the Lord Ordinary's interpretation of his opinion, for he held that the mid-superior's obligation was to pay the superior not 5s., which was all that was payable in name of subfeu-duty at the date of the action, and indeed at the date (1893) when Mr Paton (whose trustees were the defenders) purchased the mid-superiority, but £20, the amount of subfeu-duty originally stipulated for, and which admittedly represented the full annual value of the subjects at the date of the subfeu, although the sum had been, to the extent of £19, 15s., redeemed by the vassal, prior to Mr Paton's purchase, in terms of a power to that effect contained in the feu-right. It is true that in *Heriot's Trust* the defenders tendered on record payment of £20 in full of the pursuer's claim, but the question of the superiors' rights as between that sum and the 5s. was fully and keenly argued before the Court as affecting the legal principles involved, and is dealt with by those of the Judges who delivered opinions in the case.

The defenders in their minutes of debate refer to an old case, *Countess of Forfar* v. *Creditors of Ormiston*, as supporting their contention. The case is nowhere reported. We have only a reference to it in Lord Elchies Notes on Stair, 2 Ross L.C. 205-6. Lord Elchies, after an admirable statement of arguments on both sides, ends by noting that "Since writing these the point is decided, about 16th July 1725, *Countess of Forfar* v. *Creditors of Ormiston*, and the adjudger found liable for the feu-duty." But the circumstances of the case, the amount of the feu-duty, and the actual nature of the decision are left in obscurity, nor do the session papers, which are referred to in the minutes of debate, appear to me to cast any reliable light on the matter. In these circumstances I am unable to attach weight to the *Countess of Forfar's* case. If its decision was what the defenders contend that it was—a view which seems to me to find no warrant in the reclaiming petition—then I think it is inconsistent with later authorities.

The weight therefore of principle and authority seems to me to be against the Lord Ordinary's finding. A further consideration which weighs strongly with me is that if his Lordship's view be well founded it would always have been easy for a vassal to defeat his superior's claim for a year's maill by the creation of a mid-superiority with reddendo of merely nominal amount. This topic is mentioned by the pursuers in their minute of debate. But the simplest example seems to me to be just such a case as we have here. If the defenders' contention is sound, a man might dispone his lands to his son, or other successor desig-

nate, on a *de me* holding for a reddendo of 1d. Scots, doubling the same on the entry of heirs or singular successors. The result would be that the son and his successors, singular or otherwise, would hold the lands for all time for payment of these duties only, and all claim by the over-superior for composition would be excluded except to that nominal extent. I find it impossible to suppose that generations of conveyancers should either have overlooked such expedients—especially if the *Countess of Forfar's* case had really decided the point, as the defenders maintain it did—or have delibe ately refrained from putting them into general operation if they were legal. I do not believe our conveyancers would have displayed either such ignorance or such vicarious magnanimity.

2. There is I think much more to be said in point of principle for the superiors' demand for a full year's rent of Seamill, as at the date of the action, than for the defenders' contention, with which I have just dealt. But it must also in my judgment be discarded. It would lead to startling results, and it is I think unsupported by (if not actually inconsistent with) authority. The subfeu-duty of £1 is admittedly very much less than the annual value of the land, either now or as it stood in 1847. But it does not in my judgment follow that where a subfeu-duty is so small as to be illusory the matter is cast loose, and the superior is entitled to demand a year's rent of the subjects. I know of no authority in support of such a conclusion. An argument precisely upon these lines was submitted to and sustained by the learned judges of the Second Division in the *Aberdeen* case with regard to the "brown lands." The Court there proceeded upon the view, based upon certain *obiter dicta* by noble and learned Lords in *Home* v. *Belhaven* that the case of *Campbell* v. *Westenra* was bad law. Lord Trayner expressed the opinion (at p. 1085) that "if . . . the subfeu is illusory, then the superior is entitled to a year's rent"; and Lord Moncreiff, the only other judge who delivered a judgment, said (at p. 1089)—"... When the feu-duty is illusory it cannot be permitted that the superior's right should be thus evaded, and such feu-duty can never be held a year's rent in the sense of the statute. Then if so the superior must be entitled to a year's actual rent of the lands." But by the unanimous judgment of a Court of Seven Judges in *Heriot's Trust* the decision in the *Aberdeen* case as regards the "brown lands" was definitely overruled, and the authority of *Westenra's* case revindicated. Both in *Westenra* and in *Heriot's Trust*, although the subfeu-duty exigible at the date of action was inadequate and illusory, the superior's claim for a year's rent was rejected by the Court, and a middle course resorted to. The unsuccessful argument for the superior in *Westenra's* case was just on the lines of that put forward by the superiors here. Lord Dunedin pointed out in *Heriot's Trust* (at p. 1133), that in *Campbell* v. *Westenra* "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."

3. There remains for consideration the middle one of the three possible views indicated by the Lord Ordinary, viz., that the superiors are neither bound to accept the feu-duty of £1 in full of their claim, nor entitled to demand a year's rent of the lands of Seamill as at the date of the action, but that the measure of their right is a sum equal to the annual value of the lands as in 1847 when the feu-right was created. Neither of the parties has thought fit to put forward this view specifically in their pleadings, or to refer to it in their minutes of debate, each fearing I suppose that by so doing he might appear to weaken the force of the extreme contention to which his insistance is directed. In my judgment, however, a just interpretation of the Act 1469, c. 36, leads to this conclusion as the true solution of the problem. It cannot be maintained, at least since the decision of the House of Lords in *Home* v. *Belhaven*, that a general power of modification resides in the Court to enable it to override the exact words of the old Scots Act, but, on the other hand, it has always been the recognised function and practice of the Court to interpret the spirit of such Acts in relation to practice and to the circumstances of particular cases that arise (see per Lord Dunedin in *Heriot's Trust* and *Johnstone* v. *Stotts*, 4 Pat. App. 274, there referred to). The Act 1469, c. 36, has repeatedly been so interpreted. It was only by a wide interpretation of this sort that its original and expressed scope was extended so as to include lands set not on lease but in feu-farm. In *Aitchison* v. *Hopkirk*, 1775, M. 15060, 2 Ross L.C. 183, its language was further extended to the case where lands had not been actually "set" or subfeued at all. "The point was determined after a hearing in presence, and upon considering reports relative to the practice, which last chiefly weighed with the Court," 2 Ross, L.C. 183. Much more recently, in *Stewart* v. *Bullock*, 1881, 8 R. 381, 18 S.L.R. 240, the words of the Act were interpreted as including the value of unlet shootings. In *Campbell* v. *Westenra* the year's maill was found by the Court upon a just interpretation of the Act to be the amount of subfeu-duty plus a year's interest on the grassums and not either the inadequate subfeu-duty actually stipulated or a year's rent of the subjects as at the date of the action. In *Heriot's Trust* a similar result was reached, the Court ignoring the fact that the original (and admittedly adequate) feu-duty of £20 had been reduced by powers of redemption to 5s., and reverting to its full amount as the fair and equitable measure of the superior's compensation. In both *Westenra* and *Heriot's Trust* the mid-superior had under the decision of the Court to pay a larger sum than that which at the date of his own purchase of or succession to

the mid-superiority he was able to demand from the vassal. It seems plain, therefore, that the Court is entitled, and is in use, where circumstances render such a course expedient and just, to find the year's maill in something different from actual year's rent on the one hand or actual subfeu-duty on the other—in other words, to arrive at the proper (not the nominal) consideration as at the date of the subfeu. In the present case it seems to me that the words of the Act lead upon a just and equitable interpretation—and one much less drastic than has at former stages of its history been put upon them—to the superior's demand being fixed at such sum as may be admitted or ascertained to be the fair annual value of Seamill in 1847. It appears from the record that the parties are not far from one another in their views as to the amount of that sum.

I am therefore for recalling the (second) finding in the Lord Ordinary's interlocutor, and in place thereof finding that the defenders are liable to the pursuers on the basis of such sum as may be admitted or ascertained in the course of the proceedings to be one year's annual value of the lands of Seamill as at the date of the feu-right.

If I am wrong in thinking that the Court is entitled to interpret the spirit of the Act 1469, c. 36, in the manner indicated, then I should be compelled to hold that the superiors here are entitled to demand a year's rent of the lands of Seamill as at the date of the action.

In conclusion I must say that I have approached the consideration of this case with reluctance, because I observe that the defenders state on record several preliminary pleas, and in particular "No title to sue." If this plea should turn out to be well founded the labours of the Whole Court would, I suppose, be rendered futile or at all events purely academic. I think that preliminary pleas ought to be as far as possible disposed of in the Outer House before decision upon the merits is reached, or simultaneously with such decision.

LORD SALVESEN—The question in this case is whether a nominal subfeu-duty of £1, or a year's rent of the land as at the time the subfeu was created, or a year's rent of the land as at the date when the action was brought, is the true measure of the composition payable to the superior on the entry of a singular successor by his vassals who are the owners of the land. In my opinion the case of *Heriot's Trust*, 1912 S.C. 1123, 49 S.L.R. 852, decides the point in favour of the second alternative, and rejects the first and third; and the dicta of Lord Dunedin, on which the Lord Ordinary has placed so much reliance, must be taken to refer to the case, which is not before us, of the subfeu-duty having been a full and adequate consideration as at the date when the subfeu was granted. On no other view can I understand why a decree was pronounced in favour of *Heriot's Trust* for £20 instead of for 5s., which was the existing subfeu-duty at the date when that action was raised. I was a party to that decision, and concurring as I did with Lord President Dunedin, it never occurred to me that his full and learned exposition of the law was capable of any other interpretation. He rejected, on the one hand, as the measure of the composition payable the rent of the lands as at the date when the action was brought. On the other hand, I think he rejected equally the view to which the Lord Ordinary has given effect, of taking the actual subfeu-duty payable at that time, and which was all the mid-superior was entitled to exact, as being the measure of the vassal's obligation. If we had agreed with the Lord Ordinary I cannot see any ground upon which we could have awarded the superior £20, for the argument on which the vassal mainly relied was that the subfeu-duty of 5s. was all that the vassal drew, and was all that the superior was entitled to. The alternative argument presented for the vassal was that as £20 was an adequate return for the lands at the time that they were subfeued this constituted the proper return calculated on the basis approved in the case of *Campbell* v. *Westenra*, 1832, 10 S. 734. Now if there is one thing clear in Lord Dunedin's opinion it is that he thought that case well decided, and not overruled by the dicta of Lord Davey and Lord Robertson in the case of *Belhaven*, 1903, 5 F. (H.L.) 13, 40 S.L.R. 607. The operative part of that judgment was that on the entry of a singular successor the superior was entitled to a year's subfeu-duty, plus a year's interest of the grassum (the feu-duty and the grassum together being treated as an adequate consideration for the grant of the subfeu), and not either to the actual feu-duty alone or to a year's rent of the land as at the date when the action was raised. The only distinction between the facts of that case and the present is that the subfeu in this case was granted for a nominal consideration in respect of a direction by the owner that the lands subfeued were to be gifted to the person who received the subfeu, but the principle to be applied appears to me to be exactly the same. What was the value of the gift at the time it was made? Its annual value we know to have been something between £85 and £102, just as the annual value of the consideration paid for the subfeu in *Campbell's* case was held to be the subfeu-duty plus a year's interest of the grassum paid; that accordingly appears to me to be the measure of the superior's claim in the present case.

The matter is, I think, made still more clear on considering the decision in the case of the *City of Aberdeen Land Association*, 1904, 6 F. 1067, 41 S.L.R. 647. The Lord Ordinary (Low) had decided in the case of a piece of land which in reality had been sold for a fair price, but where, in order to keep the recognition of the superiority, the transaction took the form of a subfeu with a nominal duty that the composition payable fell to be measured by five per cent. interest on the sale price. That judgment was reversed by the Second Division, which decided that as the decision in *Campbell's* case had been overruled by the House of Lords, the superior was entitled to a com-

position equivalent to a year's rent of the lands. The case of *Heriot's Trust* was remitted to a bench of Seven Judges for the purpose of reviewing that decision, and they unanimously decided that it could not be supported. The two rules, however, which Lord Trayner regarded as conclusively settled (p. 1085), were, I think, affirmed, and for my own part I have no fault to find with his statement of them. It seems to me to be in accordance with the opinions of all writers of authority on conveyancing that where lands are subfeued for a nominal or illusory feu-duty the over-superior is not restricted to it when demanding a composition on the entry of a singular successor to the lands; but where the reddendo reasonably represents the value of the lands at the time they are subfeued he is bound to accept the feu-duty as thus fixed. The only fault found with the judgment was the conclusion that in the case of an illusory subfeu-duty the measure of the over-superior's right was the actual rent of the lands at the date of the action, and not their rent or annual value as at the date when the subfeu-duty was fixed.

I confess therefore I am unable to understand how any of the Judges who took part in the decision in *Heriot's Trust* can arrive at a conclusion in favour of either of the extreme propositions contended for. Of course it is open to the Whole Court to review the decision in *Heriot's Trust*, and to hold that it and all the other cases on which it was founded were erroneously decided. For my own part I think it was well decided. There is no recorded case where an illusory sub-feu has been treated as the measure of the composition payable to the superior on the entry of a singular successor, and as this department of law was one with which our predecessors were much better acquainted than we can profess to be I should be slow to introduce any further limitation of the rights of the superior by a new interpretation of an ancient Scots Act which has been the subject of repeated consideration by the Court during several centuries, and which has been uniformly interpreted by the Court and the profession in a different sense.

LORD GUTHRIE — In my view the only question before us is whether the pursuers are entitled to payment of the nett real rent of the subjects in question as at the date of bringing the action, in accordance with the pursuer's contention, or only to the feu-duty of £1 as maintained by the defenders. The record raises no other question, and no other view is argued in the minutes of debate.

It seems to me therefore that we must take it as the law of the present case that the pursuers are either entitled to payment of the nett real rent of the subjects as at the date of bringing the action or only to payment of the feu-duty of £1.

There is another view, namely, that the pursuers are entitled to a year's nett rent of the subjects as at the date of granting the feu-right. Had that view been competently before us it would have involved an appropriate conclusion and plea and a statement of the amount of the nett rent in 1847, the date of the feu-right, all of which are absent from the record.

As between the two views presented to us I agree with the Lord Ordinary. But if my view as to the matter for decision is held too narrow I add that had the third alternative view above indicated been properly raised by the parties I should have agreed with the result reached by Lord Dundas.

LORD CULLEN—The measure of the composition applicable to the entry of singular successors in a feu is contained in the Act of 1469, cap. 36. It is a "year's maill as the land is set for the time." The composition is not a proper feudal casualty, but represents compensation to the superior for the abridgment of his original feudal rights made by the Act. The Act applied only to apprisers. It is unnecessary to trace the course of legislation whereby the same measure for a composition has become applicable to singular successors in general.

At the period of the said Act subfeuing was very little if at all known. The Act in stating the amount of the composition provided by it figures the land feued as being let by the vassal to tenants, and makes the measure of the composition the rental thereby yielded for the year in question. The land, however, might not be let to tenants but be in the natural possession of the vassal himself. In regard to such a case it was decided by the Court that the words of the Act meant the lettable value of the land—*Aitchison* v. *Hopkirk*, 1775, 2 Ross, L.C. 183, M. 15,060. Where the land is under lease the superior's resort to the lettable value at the period of the entry is not excluded by a lease which stipulates for an elusory or merely nominal and *pro forma* rent, having been granted for extrinsic considerations.

As time passed on subfeuing where not prohibited became common. A mid-superiority was created by the subfeu. The original vassal's estate in the lands after the granting of the subfeu was limited to the mid-superiority. There was, however, no privity between the over-superior and the sub-vassal. The sub-vassal had no right to demand an entry with the over-superior. He held of the mid-superior. I am speaking, of course, of the case of proper subfeus and indefeasible mid-superiorities. The continued efficacy of the sub-vassal's right in the *dominium utile* as created in his favour by the subfeu was dependent on the non-occurrence of a tinsel of the principal feu held by his author. Against the occurrence of such a tinsel, as also against the effects of a decree of declarator of non-entry obtained by the over-superior (by way of poinding of the ground, &c.), the sub-vassal had the relief afforded by the warrandice under the subfeu right.

In presence of the growing practice of subfeuing the question arose as to how the case of a subfeu limiting the principal vassal's estate to the mid-superiority thereby created fell to be regarded as affecting the composition when occasion arose for a

singular successor of the principal vassal seeking an entry with the over-superior. The singular successor seeking entry was like his author debarred by the subfeu right from letting the land to tenants and drawing the rents or from enjoying the natural occupation of the land. There were two alternative views. One was to ignore the subfeu right altogether, and to take the rental value of the land as let or lettable in the year of entry. The other was to fit the subfeu into the words of the Act of 1469 by regarding it as a "set" of the land within the meaning of these words. The latter was adopted.

In the cases of *Monktoun* in 1634, M. 15,020, and *Cowan* in 1636, M. 15,055, it was held that the composition on entry of a singular successor of the principal vassal who had subfeued was the amount of the annual reddendo in the subfeu right. The reports do not disclose whether the reddendo was or was not the equivalent of the rent value of the land at the date of the subfeu right.

But while a particular subfeu right may fall to be regarded as such a set of the land as will rule the composition, it does not follow that every subfeu right should so rule. If in the case of a lease by the principal vassal where there is no subfeu there is room for discrimination between a lease with a fair rent and one with a *pro forma* or elusory rent, may there not be room for an analogous discrimination in the case of subfeus?

There is this difference between the ordinary lease and the subfeu right, that the latter is a right granted *in perpetuum*, with an annual return which does not vary "for the time" but is fixed and unrevisable. In the course of long years, even centuries, the reddendo may with increase of land values become inconsiderable compared with the current value of the land, while there is no possibility of revising it. Thus there may perhaps be room for a presumption to the effect that the reddendo in a subfeu right represents the annual value of the land at its date. Lord Stair treats the matter from this point of view (iii, 2, 27). He speaks of the feu or subfeu as a location, and says that its reddendo is presumed to represent the rent at its date, which presumption he says "will not admit of a contrary probation." He differentiates, however, the case of subfeus in blench as not admitting of the presumption. The reason is not far to seek, being found in the character of the blench-feu as one granted for considerations extrinsic to its reddendo, and in which the reddendo is *pro forma* or elusory. It seems clear enough that Stair was treating the matter from the point of view of regarding a subfeu as a "set" within the meaning of the Act of 1469, and not as some different species of feudal transaction which by its peculiar virtue barred the over-superior from any resort to the "year's maill" of the land itself under all circumstances no matter what its reddendo might be, and confined him to a "year's maill" of the interjected estate of mid-superiority as being, *fictione juris*, the land. Otherwise I do not see why he should have thought it relevant to introduce the topic of the presumed adequacy of the subfeu-duty as at the date of the subfeu-right, or to differentiate blench subfeus.

Stair's presumption as to the adequacy of the subfeu-duty is stated by him to be one which does not admit of a contrary probation. I have not been able to find any express adoption of it. Bankton (ii, 3, 51) also offers a presumption in favour of the adequacy of the subfeu-duty, but offers it as a presumption of fact, saying "such subfeu is presumed to have been granted without diminution of the rental, if the contrary is not proved." I have not been able to find that Bankton's presumption of fact, any more than Stair's absolute presumption, has been expressly adopted. It seems clear, however, that Bankton, like Stair, regarded the subfeu right as having been admitted to a place within the Act of 1469 in the character of a "set" of the land, thus making it necessary in his view to establish the fair amount of its reddendo, and for that end to call in aid a presumption.

So far I cannot see sufficient grounds for holding that, when Stair and Bankton wrote it had been established that every subfeu-right, no matter what its reddendo, substantial or elusory, barred the over-superior from a resort to the "year's maill" of the land itself when a singular successor sought an entry in the principal feu.

As regards Stair's differentiation of blench subfeus as not admitting of his absolute presumption, it is true that a proper blench holding is one designated as such by appropriate words in the tenendas or the reddendo clauses of the charter. I can hardly think, however, that Stair's ratio turns on such technicality. His differentiation of the blench subfeu is by way of contrast with the ordinary subfeu which, admittedly or presumptively, has been granted for a reddendo amounting to the yearly value of the land at the time. The blench subfeu is one which discloses itself as not proceeding by way of transaction on the annual value at its date, but on extrinsic considerations, and as having a *pro forma* or elusory reddendo. And there may be other cases where a subfeu-right, though not technically blench, equally discloses itself as one not truly granted in consideration of its reddendo but in respect of extrinsic considerations, and with a reddendo which is *pro forma* or elusory. And in such a case the ratio of Stair's differentiation would seem to be equally applicable. Turning to the subfeu right here in question, one finds that it was not founded on any transaction related to the value of the land at its date. The sub-feuar's father Francis C. Ritchie died leaving a settlement whereby he purported to make over to his son John in tack or lease during 999 years the land in question for a yearly return of £1 per annum, payable to his heir Francis and his heirs. Francis, the heir, having made up his title by precept of *clare constat* proceeded, as in obedience to his father's directions in his said settlement, to effectuate them by grant-

ing in 1847 the subfeu right in question to his brother John for the annual reddendo of £1 per annum. According to the present defenders' averments, the gross annual value of the lands subfeued was then at least £102 or thereby, subject to deduction of (1) public burdens, (2) one-fifth for teind, and (3) repairs, the net annual value being about say £80.

It is thus disclosed that the subfeu of 1847 represented in substance a gift enjoined by the testator, and effectuated by the act of his heir as in obedience to his injunction, in favour of his son John; and that the reddendo of £1 per annum was in no real sense the consideration for it, but was a nominal one, not based on transaction or calculated as the actual annual value of the lands.

On this footing I am unable to see why the case of this feu-right should be treated differently from that of a proper blench holding. The material point applicable to both is that the subfeu-right is disclosed as one in which the reddendo is nominal, and the true consideration for the grant lies not in it but elsewhere. In either case, as the true consideration is not one susceptible of pecuniary ascertainment like a money grassum, there is no room in my opinion for any presumption of the grant having been made for an adequate return based on the rental value at the time.

From this point of view it seems to me that the subfeu right of 1847 cannot be regarded as such a "set" of the lands as makes the elusory reddendo in it the "year's maill" in the sense of the Act of 1469.

This conclusion, which seems to me conform to principle, is I think consistent with the decisions. So far as I am aware, no decision has ever laid it down that a subfeu right, which is either one technically blench or one which has a nominal reddendo, and has been granted not truly in exchange for its reddendo but in respect of other considerations not susceptible of a pecuniary estimation, falls to be accepted as ruling the composition by its reddendo.

Long subsequent to the cases of *Monktoun* and *Cowan*, and subsequent to the time when Stair and Bankton wrote to the effect above-mentioned, there came before the Court, in 1815, the case of *Cockburn Ross* v. *Heriot's Hospital*, 2 Ross, L.C. 193, which is of much importance. It was very fully argued, and the question raised in it was the subject of considered opinions on the part of eminent judges. There was a subfeu. Notwithstanding the existence of the subfeu the over-superior claimed as composition on the entry of a singular successor to the mid-superiority a year's maill of the land itself, ignoring the subfeu right. The facts as to the subfeu-duty were—(1) that it was admitted to have been the fair annual value of the land at the date of the subfeu right; and (2) that owing to the erection of buildings it had come to be much less than the annual value of the land at the period of the entry in question. The decision was that the subfeu-duty ruled the composition. Mr Ross's rubric to the case is as follows:—"Where a vassal subfeus lands for their full adequate value at the time, a year's subfeu-duty, and not a year's rent, is due to the superior in name of composition." The rubric to the case as reported in the Faculty Collection (6 June 1815) is as follows:—"When a vassal subfeus his possession for its full adequate value at the time, it is only a year's subfeu-duty, not a year's rent, which he is bound to pay his superior as a composition for an entry to a singular successor."

The train of the reasoning for the successful vassal is worthy of attention. It led forth thus—"In the case of agricultural tenements a fair lease has always been held to be conclusive of the value in questions with superiors. In the same way a fair subfeu-duty ought to be also." It then went on to set forth reasons in support of the latter contention.

While the opinions of some of the Judges who took part in the case have a wide range, the decision did not go beyond the proposition deduced in the two rubrics above quoted. In the subsequent case of *Campbell* v. *Westenra*, 1832, 10 S. 734, Lord Cringletie, who gave the leading opinion, said, at p. 735—"The principle which must rule the present case appears to me to have been decided in that of *Cockburn Ross*. The facts are not the same, but the principle is settled in the words of the rubric of the report in the Faculty Collection, that 'when a vassal subfeus his possession for its full adequate value at the time, it is only a mere subfeu-duty, not a year's rent, which he is bound to pay the superior as a composition for an entry as a singular successor.'"

In view of the fact of the case of *Cockburn Ross* having been brought before the Court in 1815, and of the judicial attention which it received, it is difficult to suppose that the older cases of *Monktoun* and *Cowan* had been understood as deciding that a subfeu right with any kind of reddendo barred the over-superior from a resort to the year's maill of the land itself as the measure of his composition. It is apparent that *Cockburn Ross* did not lay down that wide proposition. So far as I am aware no writer of authority has extracted that wide proposition from the case. In this connection reference may be made to an observation by Lord Watson in the case of *Sandeman* v. *Scottish Property Investment Company*, 1885, 12 R. (H.L.) 67, 22 S.L.R. 850. The decision in that case, which related to the effect of an irritancy of a principal feu upon subfeus, is not in point. But dealing with the case of *Cockburn Ross*, which had been cited in argument, Lord Watson treated that case thus at p. 75—"In my opinion the principle upon which a reddendo, fairly representing the value of a subfeu at the time when it was given off, was held in *Cockburn Ross* v. *Heriot's Hospital*, 6th June 1815, F.C., aff. 2 Bligh 709, to be the rent at which the land has been set for the purpose of estimating the year's maill payable to the superior in terms of 1469, chapter 12, has no bearing whatever upon the question now before the House." Lord Watson here, it will be observed, conceives the subfeu as a set, and the subfeu-duty as a rent

under a set, within the meaning of the Act of 1469.

There followed on *Cockburn Ross* in 1832 the case of *Campbell* v. *Westenra*, 10 S. 734. The subfeus there in question had each been granted partly for a grassum and partly for a small yearly feu-duty. It was admitted that the grassum and the feu-duty taken together represented the fair value of the land at the date of each subfeu right. The over-superior was held entitled to a composition including (1) the amount of the annual feu-duty, and (2) interest on the grassum. The decision purported to follow the case of *Cockburn Ross*. The difficulty arising from the fact of the feu-duty, unlike that in *Cockburn Ross*, being in itself inadequate as at the date of the subfeu right, was got over apparently by regarding the grassum as of the nature of capitalised feu-duty. The argument for the successful vassal was as follows—"The principle of the case of *Cockburn Ross* rules the present against the defender. It was there decided that when a vassal in a *bona fide* exercise of his powers feus out his property for a fair consideration as at the time the superior cannot demand more than the yearly return so bargained for by his vassal. In the case of *Ross* the whole consideration was the feu duty. Here it was partly feu-duty partly grassum, but this is merely a difference in the shape of the return and does not make the transaction less fair or in any way a fraud on the superior although he may be entitled to have the actual consideration reduced to a yearly return so that he may not be deprived of his just claims. This, however, is done by the interest on the grassum already paid and he is clearly entitled to nothing more." This argument reflects the ratio of the decision. There was a considerable amount of discussion in the case as to whether the right to casualties enuring to the mid-superior should be taken into account as an ingredient of value in estimating the composition. No casualty had fallen in during the actual year of entry, but the superior maintained that the composition should include the average yearly value of the uncertainly recurring casualties. The opinions of the Judges are mostly occupied with this topic. The superior's claim was negatived, but the case of a casualty falling in during the year of entry was left open. As regards the question decided, the case followed the principle of *Cockburn Ross*. There does not seem to have been any dispute as to what the latter case had decided apart from the special topic of the mid-superiority casualties. Lord Cringletie, who gave the leading opinion, said—"The principle which must rule the present case appears to me to have been decided in that of *Cockburn Ross*," and referred to the rubric of that case in the Faculty Collection, already mentioned. He then pointed out that the grassum and the feu-duty taken together admittedly represented the fair value of the land at the time of subfeuing, thus going to equiparate the case with *Cockburn Ross*, and thereafter passed to deal with the topic of the mid-superiority casualties. The opinions of Lord Meadowbank and Lord Justice-Clerk Boyle dealt with that topic. Lord Glenlee began by saying, at p. 736—"I certainly understood that this was an open question notwithstanding the decision in the case of *Ross*"—obviously referring to the same topic, and went on—"but, on the other hand, that while the mid-superior would not be allowed to defraud the overlord yet if what he does is *bona fide* a fair transaction at the time, the rule is that we are not to take into view matters of entries because, though these being untaxed diminished the price given, yet they were incidental profits, and nothing fraudulent is alleged."

It seems clear that *Campbell* v. *Westenra* lends no support to the view that the principle of *Cockburn Ross* reaches either to the case of a blench subfeu or to the case of a subfeu with a merely elusory reddendo, where the reddendo is not only nominal in amount but is disclosed to be not the true consideration for the grant. On the contrary it treats *Cockburn Ross* as a case where the subfeu was, to use the words of Lord Glenlee, "*bona fide* a fair transaction at the time."

The decision in *Campbell* v. *Westenra* forms only a special rule applied to the case of a subfeu which was "*bona fide* a fair transaction at the time," but where the fair consideration was partly paid in the form of a grassum or lump sum by way of price. The process adopted was not one of making an independent resort to the rental at the time of the subfeu, but a process whereby the subfeu right was accepted, as in *Cockburn Ross*, to rule the composition, as being a legitimate "set" of the lands.

In *Blantyre* v. *Dunn*, 1858, 20 D. 1188, the lands had been partly let under two long leases, dated in 1770 and 1776, for 300 years and 360 years respectively, and partly subfeued in 1774 for 1d. Scots, if asked only. The vassal's successor had purchased the leases, and as to them it was held that the rents therein did not rule the composition, inasmuch as if there had not been an absolute confusio there were no rents due and exigible from tenants in the year of the entry, 1852, and that the composition must be measured by the annual value in 1852. As regards the land subfeued, there was no decision so far as the case is reported. The vassal's contention was that he was liable only in the 1d. Scots. Lord Mackenzie in his opinion as Lord Ordinary referred to the cases of *Cockburn Ross* and *Campbell* v. *Westenra*, and observed, at p. 1194—"As to the subfeu in 1774, neither the original charter nor any copy has been produced to show its terms, and the case has been ordered to the roll for explanations. If it can be shown that there was a full price paid at the time for the subaltern right in addition to the annual payment of a penny Scots, the principle sanctioned by the Court in *Campbell*, 10 S. 734, may perhaps be held to apply. But if there was nothing but a merely elusory payment of a penny Scots, it is thought the subfeu must be disregarded and the lands estimated at their proper value."

The argument for the vassal in the present case appeals to the recent case of *Heriot's Trust* v. *Paton's Trustees*, 1912 S.C. 1123, 49 S.L.R. 852, and to the dicta of Lord Davey in *Earl of Home* v. *Lord Belhaven and Stenton*, 1903, 5 F. (H.L.) 13, 40 S.L.R. 607.

In the former of these cases the consideration for the subfeu right—a feu-duty of £20 per annum—was admittedly an adequate return as at the date of the grant. The feu-duty was subsequently redeemed to the extent of £19, 15s. by a lump payment. The composition was estimated as including both the remaining 5s. of annual feu-duty and interest at 5 per cent. on the redemption price of the £19, 15s. of feu-duty. Lord Dunedin, in his exposition of the principles of the law and the authorities touching the matter of compositions, expresses himself in a way highly favourable to the sub-feu right as ruling a composition. He puts it that the composition is simply payment for what the entering vassal gets, and if the estate to which entry is given is a mid-superiority, why, he asks, should the vassal pay more than the value of that superiority? He likens the case of a composition to that of a liferent escheat—an analogy drawn by Lord Glenlee in his opinion in *Cockburn Ross*—speaks of the over-superior as only entitled in his quest for composition to occupy his vassal's shoes, and points out 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."

Wide in their apparent scope as these observations of Lord Dunedin are, I doubt whether they were intended to apply to the case of a proper blench subfeu or a subfeu for an elusory reddendo. My reason for the doubt is that while Lord Dunedin was engaged in giving an exposition of the law established by decision, and not purporting to add a new chapter to it, the case of a subfeu in blench or one for merely an elusory reddendo, such as we have here, has never so far as I am aware been decided by the Court. It is not covered by the decision in *Cockburn Ross*, which on its terms, and on the view of its ratio stated in *Campbell* v. *Westenra*, had no relation to such subfeus. I incline to think that Lord Dunedin in his said observations was dealing with what may be called the ordinary case of a subfeu, which, admittedly or presumptively, is to be regarded as "*bona fide* a fair transaction at the time," to use again Lord Glenlee's words in *Campbell* v. *Westenra*. Such was the nature of the subfeu in the case of *Heriot's Trust* v. *Paton's Trustees*.

The case of *Earl of Home* v. *Lord Belhaven* did not involve the question here. Lord Davey's observations on the law of Scotland relating to compositions due on entry to a mid-superiority are wide in their reach, and are to the effect that the composition is to be strictly limited to the annual value of the mid-superiority, whatever it may happen to be. Lord Davey's observations, however, were not necessary to the decision of the question before him, but were *obiter*. I venture to doubt whether they were intended to apply to the case of the blench subfeu, or the case of the subfeu where the reddendo is elusory in the sense I have above stated. If they were so intended, I respectfully think that they are not verified by the authorities.

The argument for the vassal in the present case seems to me to treat the problem too much as if it were one as to a year's maill of the interjected estate of mid-superiority, instead of one as to a year's maill of the land yieldable either under what may be legitimately regarded as a ruling set thereof or in the absence of such a set.

Assuming that the subfeu right here in question, granted by way of gift, with a reddendo of nominal amount not representing the true consideration for the grant, does not rule the composition, the question which remains is how the composition is to be measured. I think it must be measured by the yearly value of the land during the year to which the claim for composition in respect of the entry in question relates. The alternative view proposed on the above assumption is that the measure of the composition should be the yearly value of the land during the year in which the subfeu right was granted. This view is, as I understand, regarded as established by the cases of *Campbell* v. *Westenra* and *Heriot's Trust* v. *Paton's Trustees*. I am unable to see that this is so.

Campbell v. *Westenra* followed the principle of *Cockburn Ross*, which was that a subfeu right in which the reddendo was the fair equivalent of the yearly value at the time when it was granted should rule the composition as being "*bona fide* a fair transaction at the time." It expressly purported to apply that principle. The difficulty in it was that while the subfeu rights had been fair transactions at the time the fair consideration was partly by way of grassum, so that the other part, the annual reddendo, was in itself inadequate. This difficulty was got over, as Lord Dunedin explains in *Heriot's Trust* v. *Paton's Trustees*, by treating the grassum as capitalised feu-duty. Lord Dunedin, after dealing with the earlier decisions, says (at p. 1136) that thereby "the question was solved as regards lands feued for a competent avail." He then goes on to deal with the ratio of *Campbell* v. *Westenra* thus—"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." This statement occurs in the course of a train of reasoning directed to show the ruling quality of a subfeu right according to authority. There seems to be no savour about it of the view that, *esto* a particular subfeu right, because one in blench or one with an elusory reddendo, falls to be passed by as not ruling the composition, the resort, after passing it by, is not to be to the yearly value at the period of the entry in question but to the

yearly value at the bygone period when the subfeu right was granted. The process in *Campbell* v. *Westenra* was not one of passing by the subfeu right, and of making an independent resort to the yearly value at its date, but, on the contrary, was a process of equiparating the case with that of *Cockburn Ross* by treating the grassum as of the nature of "a capitalisation of the feu-duty." The decision in *Heriot's Trust* v. *Paton's Trustees* does not seem to me to carry the matter further. The original reddendo of £20 was admittedly adequate as at the date of the subfeu right, and it was taken as measuring the composition. The process was not, any more than was the process in *Campbell* v. *Westenra*, one of passing by the subfeu right, and of making an independent resort to the yearly value of the lands at its date.

If I should be wrong in thinking that the subfeu right here in question falls to be passed by as not ruling the composition, and that the measure of the composition is to be found by resorting to the yearly value of the land at the period of the entry, the proper alternative in my opinion would be to regard the subfeu right as ruling the composition by its reddendo of £1.

LORD ORMIDALE—I remain of the view expressed in my interlocutor of 13th July 1917. I have had an opportunity of reading the opinion of the Lord Justice-Clerk, and I concur in it.

LORD HUNTER—Composition is not a proper feudal casualty, but is, as Lord Dunedin explained in *Governors of George Heriot's Trust* v. *Paton's Trustees*, 1912 S.C. 1123, at 1135, 49 S.L.R. 852, "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."

In the present case the defenders are mid-superiors. They are entitled to payment of £1 a-year feu-duty, and they can never receive anything more from the estate of mid-superiority except when the feu-duty is doubled upon the entry of an heir or singular successor.

The defenders' estate of mid-superiority was created in 1847 by a subfeu granted by their author Dr Ritchie in favour of a younger brother in execution of the provisions of their father's settlement. Admittedly the feu-duty did not represent the adequate yearly value of the land at the time. On the other hand the granter of the feu received no other consideration for the grant than the inadequate feu-duty.

There appears to be only one decision—*The City of Aberdeen Land Association* v. *Magistrates of Aberdeen*, 1904, 6 F. 1067, 41 S.L.R. 647—in which it has been held in connection with feu-holding that a mid-superior entering with his superior has to pay not merely the feu-duty to which he is entitled, but the present rents of the lands which are not enjoyed by him and to which he has no right or claim.

That case was overruled by a Court of Seven Judges in *Governors of George Heriot's Trust* v. *Paton's Trustees*.

The subfeu in the latter case was originally granted for what was admitted to have been at the time of the grant an adequate return for the lands. As the feu-duty in the present case was admittedly inadequate I do not think that *Paton's* case can be taken as necessarily an authority for the respondents' contention that they cannot be called upon to pay more than the actual feu-duty received by them. On the other hand I am unable to satisfy myself that the authoritative review of the law as to composition contained in Lord Dunedin's opinion supports the view that where the feu-duty at the time of the grant was admittedly inadequate the superior's claim to a composition for an entry from the proprietor of the mid-superiority must be measured, not by what he receives from his lands, but by the amount of a hypothetical rent at the date of the grant or by the present rent. Holding the view that the present point was not decided in *Paton's* case I propose to state briefly the grounds for my reaching the conclusion, which I do with considerable hesitation, that the Lord Ordinary's decision ought to be affirmed.

The measure of a superior's right is to be found in the Act 1469, cap. 36, which fixes the composition payable for entry by a creditor-appriser at "a year's maill, as the land is set for the time." Later legislation gave all singular successors a right to claim an entry from their superiors on payment of a similar duty.

In the cases of *Monktoun* v. *Yester*, 1634, M. 15,020, and *Cowan* v. *Elphinston*, 1636, M. 15,055, it was decided that where lands were feued the superior was entitled to receive from the mid-superior only the amount of the feu-duty.

The question as to the extent of a superior's rights where the lands had been subfeued was fully considered in *Ross* v. *Heriot's Hospital*, 1820, 2 Ross, L.C. (Land Rights) 193. According to the rubric of that case, "where a vassal subfeus his lands for their full adequate value at the time, a year's subfeu-duty and not a year's rent is due to the superior." A perusal of the report does not lead me to the conclusion that it results from the decision that where the feu-duty is inadequate the superior is entitled to claim the actual rent of the land from a mid-superior who has no claim to these rents.

The action was for declarator that the purchasers or singular successors of the pursuer were entitled to demand an entry from the defenders upon payment to them of the feu-duty in full of the composition. According to the argument of the pursuer a fair subfeu ought to be conclusive of the value in a question with superiors. It was also maintained that if vassals had been entitled to subfeu or dispone in every case, there never could have been any doubt as to the point, and that the difficulty upon the question had arisen from confounding together those cases where they are with those cases where they are not so entitled.

On the other hand it was maintained for the defenders that their right as superiors could not be affected or at all impaired by subfeu rights which had been executed with-

out their knowledge, and had never received their concurrence or confirmation.

Lord Glenlee in the course of his opinion says, at p. 404—"As far as I can see, and laying together the dicta which I have met with, the claim of the superior for a year's rent, on giving an entry to an appriser or singular successor, since it ceased to be matter of choice with him whether he would do it or not, has been considered as approaching more near to the nature of the liferent escheat than to the nature of the other casualties which I have mentioned, which arise out of the feudal contract itself. And it appears to me that, previously to the passing of the Act 1606, it was understood by our lawyers of these days, or, I should rather say, that *after* the passing of the Act 1606 it was understood that before that Act was passed the claim of the subject-superior for non-entry, by whatever tenure his vassal held, whether by ward, feu, or blench, was burdened by the base rights which had been granted by the vassal, whether consented to by the superior or not. On the other hand, again, it would appear that after that Act, in consequence of the clause in it which declares the base rights granted by the ward vassals of subject-superiors to be void and null, by way of exception, in all questions with the superior, it came to be settled in the particular case of ward vassals, to whom the statute was limited, that the superior's right to the entry-money was not burdened by base rights to which he had not consented. But as to subject-superiors, where the holding was feu or blench, as the Act did not refer to them, matters stood as if it had never existed; and consequently in that sort of tenure the superior's claim for entry-money was burdened with every base right which the vassal had granted, whether consented to by the superior or not."

This distinction as to the validity of base rights held feu and those held ward has to be kept in view in considering the decisions and the exposition of law in text-books. In 1469, and for many years after, ward was still the regular holding.

After the passage which I have quoted above, Lord Glenlee proceeded to point out that the decisions were in some degree ambiguous, and then quoted a passage from the old annotated edition of Stair, the notes to which are understood to have been written by Lord Elchies. The arguments on both sides are there set out, and the point is said to have been decided in the vassal's favour, about 16th July 1775—*Countess of Forfar* v. *Creditors of Ormiston*. From the Arniston Collection of Session Papers, to which the respondent refers, it appears from the reclaiming petition to have been stated that the Court there decided that if the subfeu was not null the superior could get no more than the feu-duty in name of composition, even though that duty were such a trifle as in effect was but an acknowledgment or blench duty under the name of a feu-duty.

The question arose in a somewhat different form in the case of *Campbell* v. *Westenra*, 1832, 10 S. 734, where the vassal had feued out the lands for a nominal feu-duty and payment of a grassum. The superior claimed that as the feu-duty was illusory inasmuch as it did not represent the real consideration received by the vassal, a year's rent of the lands was payable by the mid-superior. This view was rejected, and the pursuer awarded the actual feu-duty and interest on the grassum at 5 per cent. The soundness of this decision was doubted in certain dicta of Lord Robertson and Lord Davey in the House of Lords in the case of the *Earl of Home* v. *Lord Belhaven*, 1903, 5 F. (H.L.) 13, 40 S.L.R. 607, and in the case of the *City of Aberdeen Land Association Company* these dicta were held as overruling the case of *Campbell*. The authority of the latter case was, however, restored by the case of *Paton*, to which I have referred.

What was done in the case of *Campbell* was to give the superior the feu-duty and interest on the grassum, these being taken as equivalent to an escheat of the vassal's property for a year. No doubt it was assumed that the two sums represented an adequate return from the land in the year when the feu was granted. I do not, however, think that from this it follows that if a subfeu has been lawfully created even for an inadequate feu-duty, it entitles the superior in granting an entry to a mid-superior to disregard the feu and claim a year's rent. If that were a correct view, it would or might impose upon a singular successor in a mid-superiority an obligation to pay without right of recourse against anyone a sum far exceeding not merely the yearly avail of his estate but the whole capital value of his estate. I think this view is inconsistent with the principle of the thing, as explained by Lord Dunedin in his opinion in *Paton's* case, and with the grounds of judgment of the House of Lords in the *Earl of Home's* case.

If I am wrong in the view that the actual feu-duty, being the yearly value of the estate of mid-superiority, is all that the defenders can be called upon to pay by way of composition to their superiors, I should agree with Lord Dundas's opinion that the matter is not cast loose by the circumstance that the feu-duty was inadequate at the date of the grant, and that, for the reasons stated by his Lordship, the superior ought to receive by way of composition not the present rent of the lands but their rent as at the date of the feu.

LORD ANDERSON—It is suggested that it is open to the Court to fix upon one of three sums as representing what is payable to the pursuers by way of composition—(1) the sum of £1, which is offered by the defenders; (2) the sum of £192, 7s., which is claimed by the pursuers; (3) a sum of not less than £85 and not more than £102, which is said to represent the annual value of the lands in the year 1847.

I am of opinion that the Court is debarred from considering the last-named sum on the four following grounds:—

1. This suggestion is directly in the teeth of the enactment of the Act 1469, c. 36, which is regulative of the whole matter. This

Act compels a superior to give entry to a vassal on being paid a year's "maill as the land is set *for the time*." What time is referred to? Plainly the time when the superior's claim to a payment emerges, that is, in the ordinary case, when the vassal demands an entry—in the present case, when it became necessary to determine the amount of compensation payable to the superior for redemption of casualties under the provisions of the Feudal Casualties (Scotland) Act 1914. In other words, as the claim for compensation was made by the superior by notice dated 19th July 1915, it is the maill for that year which must be ascertained. Lord Davey makes this quite clear when in the *Belhaven* case he says, 5 F. (H.L.) 13, at p. 18, 40 S.L.R. 607—"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 statute does not enact, directly or by implication, that what the superior is to receive is the maill of a year, fifty, one hundred, or it may be two hundred years prior to the year of entry.

2. I am unable to understand why in the present case the year 1847 should be chosen in preference to any other year prior or subsequent thereto. The theory on which this suggestion of a *via media* is based is that the existent feu-contract creating a mid-superiority cannot be looked at in connection with the matter under consideration because the feu-duty payable under it is illusory. The feu-contract for this reason is inept and nugatory and must be entirely disregarded. But if this is so, what concern has the Court with the year 1847, when this nugatory transaction had its inception?

3. The proposal is not practicable in this sense, that the Court cannot now determine with reasonable exactitude what was the annual value of land fifty or a hundred years ago. The present case, in which it is suggested that the Court should hold an inquiry as to what was the value of a small portion of Ayrshire in 1847, seems to me to be in a specially favourable position in respect that the parties find themselves able to propone certain figures. But even in this case there is substantial difference between the rival figures suggested. The reclaimers say in their minute of debate—"At the date when this feu-right was granted it is common ground that the annual value of Seamill was from £85 to £102." How is the Court to determine now what figure between these extremes represents the yearly value of the subjects as in 1847? It is to be noted that even on the figures suggested for the year 1847 a transaction is contemplated which I cannot help regarding as extravagant, to wit, that a sum of somewhere near £100 must be paid to secure enfranchisement in an annual payment of £1 under sanction of forfeiture of the latter right.

4. There is no authority for the proposal now made.

It is conceded that there is no direct authority. No case has been decided to the effect that the maill of some year prior to the year of entry represents the value of the superior's composition. But it is claimed that indirect authority for the proposal now made is to be found in the cases of *Campbell* v. *Westenra*, 1832, 10 Sh. 734, and *Heriot's Trust*, 1912 S.C. 1123, 49 S.L.R. 852.

It is maintained that in these cases the Court gave the superior something beyond what was annually paid by the sub-vassal to the mid-superior. I am of opinion that this is not so, but that in these cases the Court gave the superior nothing more than what the mid-superior took annually from the sub-vassal. In *Campbell* the sub-vassal paid annually a feu-duty plus what could be earned by a grassum or capitalisation of a part of the feu-duty, and the Court gave the superior as composition what the mid-superior took in the year of entry in respect of these two payments. Similarly in *Heriot's Trust* the mid-superior received annually the sum of £20 by a payment of 5s. every year and to the extent of £19, 15s. by the annual return from the capital payment made by the vassal in partial redemption of the feu-duty. In awarding the superior £20 as composition the Court gave the superior nothing more than the mid-superior received in the year of entry.

It is true that many judicial dicta make reference to an "illusory" feu-duty, but it seems to me that the judicial significance of this term is correctly explained by the Lord Justice-Clerk in *Cockburn Ross*, June 6, 1815, F.C., at p. 411, where he says—"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."

I am therefore of opinion that the Court is restricted, in determining what is the amount of composition due, to a consideration of the figures proponed by the parties respectively.

As between these alternative figures of £1 and £192, 7s. I am of opinion that the question is concluded by authority in favour of the figure of £1 suggested by the defenders.

The legal proposition which in my opinion has been established by decision is that the superior is entitled where the lands are all set when the claim emerges to a payment in respect of composition of the value of the return which the sub-vassal makes to the mid-superior.

I hold that this legal proposition has been established by the following series of decisions:—(1) *Monktoun*, 1634, M. 15,020; (2) *Cowan*, 1636, M. 15,055; (3) *Countess of Forfar*, July 16, 1725, referred to in Lord Elchies' note upon Stair's Institute, ii, 4, 32; (4) *Cockburn Ross*; (5) *Campbell* v. *Westenra*; (6) *Heriot's Trust*.

These decisions extending over a period of nearly 300 years, and deciding in terms, as I read them, the legal proposition which I have formulated, afford in my opinion complete legal justification for the contention maintained by the defenders. The matter is put in a nutshell by Lord President Dunedin in *Heriot's Trust* (*cit.*) at p. 1135 when he asks the question "What would the superior take by an escheat of the

vassal's property for a year"? He would not take the sum of £192, 7s. suggested by the pursuer nor the sum of £100 or thereby suggested by those who favour a *via media.* He would take £1 and nothing more, because as Lord Dunedin points out that sum and no other is a year's value of the mid-superiority.

It appears to me that the views I have ventured to express find support in the judgments of Lord Davey and Lord Robertson in the *Belhaven* case.

The rule thus established is a plain and workable rule. It is, moreover, quite equitable. A composition is a windfall. A superior can never rely upon the occurrence of an occasion entitling him to claim a composition. I surmise therefore that the purchase price of a right of superiority is not calculated so as to include something in respect of this right. The superior is indeed no party to the transaction whereby his right to a composition may be modified, but he knows that subinfeudation is legal, and that it may take place without his concurrence and against his wishes.

The matter of adequacy or inadequacy of the feu-duty, which I gather has been determinative of the opinions of some of my brethren, does not seem to me to be a relevant consideration. The language of the Statute of 1469 makes no reference to this topic. No decision determines that the feu-duty must be adequate before it can be taken as the measure of the composition. It is true that there are dicta suggesting that this is a material consideration, but as the statute lends no support to this suggestion I do not regard these dicta as being sound in law.

I am therefore of opinion that the value of the composition is £1.

LORD SANDS—In order to determine the measure of the superior's right it is necessary to advert to the Act 1469, c. 36, where that is defined as "a year's maill as the land is set for the time." I observe that the word "maill" is here used in the singular, though in the same statute it is used several times in the plural when dealing with a body of tenants. I also take into account the fact that at the date of the statute a resident proprietor had generally a part of his property in his own occupation. I also take note that under the statute it has been held that payment falls to be made in respect of unlet lands. In view of these considerations I am of opinion that the words "a year's maill" are the governing words, and that "as the land is set for the time" are explanatory, but only partially explanatory, of what is to be taken as a year's maill. In other words, I hold that what the superior is to get is not the rents of the respective lands forming the feu holding for the current year, but the rent or annual value of the whole holding, to be measured in the case of the portions actually let by the rents payable by the tenants.

This provision, which whilst giving a great concession to vassals was intended to reserve a valuable right to superiors, was no doubt intended to be, and must still I think be, construed reasonably and not jesuitically. Now at the outset I leave out of account the question of subfeuing. I postulate a case of a vassal, part of whose property consists of a farm worth £500 per annum. Out of love, favour, and affection he gives a nineteen years' lease to one of his sons at a nominal rent of £1 per annum. During the subsistence of this lease a casualty of composition becomes due. Is the amount of that casualty limited to the £1 payable under the lease on a reasonable construction of the terms of the Act 1469? In my opinion it is not. I hold that £1 is not "a year's maill as the land is set for the time." The land is not and never was let for £1 per annum. There may be a formal deed to that purport and effect, regular in every respect, making no reference to any other consideration, and binding between the parties. But this lease does not represent the real nature of the transaction, which was a donation of the use of the lands for nineteen years, not a location, or, to use the statutory word, a "setting" of the lands for a term of years in return for the payment of rent.

I turn now to the case of a subfeu. At the date of the Act of 1469 subfeuing was rare, and was probably not in the contemplation of the framer of the Act. Even, however, if it had been in contemplation, it would not have suggested the discrepancies in value which arise under modern conditions. There was no feuing of burgage subjects, and in the case of rural land the feu-duty was just the agricultural value. It was a common thing before the Reformation for a tenant to get a lease, and then some years afterwards to have his right raised to a feu at the same rent. It was not until a century and a half after the Act that the question seems to have arisen as to how a subfeu-duty was to be treated. I think that upon the statute the question whether a subfeu-duty which had ceased to represent the annual value of the land was to be treated as "a year's maill as the land is set for the time" was one of some difficulty, and it might have been decided either way. It was, however, decided in favour of the vassal—*Monktoun* v. *Yester*, 1634, M. 15,025, and *Cowan* v. *Master of Elphinston*, 1636, M. 15,055. Nearly two centuries later the rule was affirmed by the House of Lords in the case of *Cockburn Ross*, 2 Ross, L.C. 193, June 6, 1815, F.C., 6 Pat. App. 640. That case proceeded upon the footing that the feu-duty represented the fair value of the lands when the feu-right was constituted. The import of the judgment is thus summarily stated by Lord Watson in *Sandeman* v. *The Scottish Property Investment Company*, 1885, 12 R. (H.L.) 67, at p. 75, 22 S.L.R. 850—"A reddendo fairly representing the value of the subfeu at the time when it was given off was held . . . to be the rent at which the lands has been set for the purpose of estimating the year's maill payable to the superior in terms of the 1469, cap. 12." Much has been written or spoken by eminent judges and jurists upon the question during the century which

followed. But this condition has invariably been mentioned as part of the rule. I should have great difficulty in holding that these eminent lawyers mentioned the qualification merely *ob majorem cautelam*, and did not regard it as an integral part of the rule. Supposing that for a hundred years consistorial jurists had laid it down that a paramour is liable in damages if he knew that the woman was married, I think it would be somewhat extravagant to suggest that this left entirely open the question so far as the opinion of these jurists was entitled to weight whether there was any liability where the paramour was ignorant of the marriage. If the qualification was regarded as a condition of the rule, that appears to me to go a considerable way to settling the question, for even though no express decision may support a rule the accepted opinion of eminent jurists extending over a century comes very nearly to making law in a conveyancing question. That it was so regarded is, I think, confirmed by the practice of conveyancers. My respect for the old school of feudal conveyances is too great to allow me readily to entertain the idea that their elaborate machinery was mere futility, and that millions of reams of paper and countless tomes of print have been wasted because they did not know the law, and were ignorant that a casualty could be evaded by an illusory feu-duty.

But even if the view be accepted that the point is merely reserved by all the authorities I have referred to, it is not, I think, putting it too high to affirm that the matter is not foreclosed against the superior by the cases in which it was held that he must be content with an adequate feu-duty. These cases, and the opinions of jurists based upon them, are no authority for the proposition that he must be satisfied with an illusory feu-duty. At the most they leave that matter open. If it be so regarded, and if I am right in my view as to what would be the rule applicable to an illusory rent, then I think the same rule falls to be applied in the case of an illusory feu-duty on a just and reasonable construction of the statute.

I should have come to this conclusion apart from direct authority, but I think it is involved by necessary implication that an illusory feu-duty will not do in the cases of *Campbell* v. *Westenra*, 1722, 10 S. 734, as rehabilitated in *Heriot's Trust*, 1912 S.C. 1123, 49 S.L.R. 852, and the *Heriot's Trust* case itself. The former case appears to me to make it clear that what is to be regarded is not the form but the substance of the transaction. Lord Glenlee makes it quite plain that in his view an illusory feu-duty will not do. The *Aberdeen* case, 1904, 6 F. 1067, 41 S.L.R. 647, is to the same effect. It is true that this case was overruled because the Court had, as I think was not altogether surprising, regarded *Westenra* as virtually overruled by the House of Lords in the *Belhaven* case. But though this was found to be an erroneous assumption the fact still remains that the learned Judges all regarded the illusory rent theory as quite untenable. In so far as it was decided in that case that an illusory feu-duty is not to be regarded the case was not in my view overruled by *Heriot's* case.

In the present case it is necessary for the defender if he is to escape for £1 to show that the lands are set for that rate within the meaning of the Statute of 1469. If they are so set they must have been so set at some past date. If *Heriot's Trust* case makes nothing else clear, it at all events makes it clear that it is not enough to point to the annual sum actually payable for the time being. One must go back to the original transaction. At the date of that transaction the author of the now superior was, from the point of view of feudal law, absolute proprietor, and could dispose of the lands feudally as he thought proper. But he was under personal obligation, imposed by his father's will, to give his brother a lease of the farm for 999 years at a rent of £1. In these circumstances he granted him a feu-charter with a feu-duty of £1. The question is whether within the meaning of the Statute of 1469 this was a setting of the lands for that rent or return. In my view it was not. That may have been the form of the transaction but it was not the substance. The lands were donated by the father to the younger brother on a long lease, and whether the action of the elder brother be regarded as a carrying out of that donation or as the grant of a feu in consideration for the surrender of the right to the lease, it was not in substance, in any reasonable sense, a contract of setting of the lands for a maill of £1. The case of *Westenra* establishes that the whole consideration must be taken into account. It appears to me to be unreasonable to suggest that in this case the consideration in respect of which the feu was granted was £1 per annum. The father, instead of imposing an obligation upon the elder brother to grant a lease at an illusory rent, might have imposed an obligation to grant a bond for £5000. If in satisfaction of this obligation the feu had been granted it would plainly have been extravagant to suggest that the consideration was £1 per annum. I see no difference in principle between the two cases.

For the foregoing reasons I am of opinion that the superior's claim is not satisfied by a tender of an illusory feu-duty. Upon the question, what in these circumstances he is entitled to, I agree with the opinion of Lord Dundas. There may be a good deal to be said for the view that if the illusory feu-duty falls to be disregarded the superior is entitled to fall back upon the actual present annual value of the lands. But I think there is sufficient authority to support the proposition that when the vassal has alienated the lands by subfeuing them for an inadequate feu-duty, the measure of the casualty is the amount at which the lands might have been feued at the date of the original creation of the subfeu.

In my view feudal casualties, although in certain aspects they are an irksome anachronism, and are fortunately now being got rid of, are proprietary rights, which are entitled to the same protection from the courts of law as any other legal rights. I

also apprehend that it is a general principle of our law that in the protection of rights regard is to be had, in so far as possible, to the substance rather than to the form. The case of the putting forward as vassal of an heir who had no relation to the property as vassal in order to defeat a claim to a casualty is sometimes cited as affording argument in favour of devices to defeat the superior's claims. I do not see the relevancy of the argument unless it be cited in support of the general proposition that a superior's proprietary rights are to be treated differently from other rights and are not entitled to protection on the same lines and principles as other proprietary rights. Indeed the argument seems to me to be on par with an argument in favour of, wherever possible, holding certain words of style to be indispensable because the Courts held that the use of the word "dispone" was indispensable.

At advising—

LORD PRESIDENT—The sole question submitted for our decision is whether this superior is entitled to claim from this vassal in name of composition £1 sterling or the actual rent of the lands.

I am of opinion that the judgment of the Lord Ordinary is sound, and that the superior is entitled to have in name of composition £1 sterling. My reason is that this is one year's feu-duty, and consequently it is in accordance with decision and practice "a year's maill as the land is set for the time." It is all that the vassal himself can draw. It is a year's rent of the estate to which alone the vassal would be entitled to demand an entry; and it is certain that it is only a year's rent as drawn by the vassal which is exigible. If the vassal can in the year when the casualty becomes due legally obtain from the sub-vassal only £1, then according to feudal law and practice the superior can demand as composition only £1, for that is the "year's maill as the land is set for the time." If this be the law, then it is obviously irrelevant to inquire what the true yearly value of the land was at the date of the subfeu. It is equally irrelevant to inquire what are the rents which the sub-vassal draws, for this vassal is entitled to receive neither the one nor the other, and it is the vassal's right to rent which is the precise measure of the superior's right to composition. As Lord Adam said in the *Earl of Home* v. *Lord Belhaven*, 1903, 5 F. (H.L.) 13, 40 S.L.R. 607, 2 F. 1218, at p. 1236, 37 S.L.R. 990—"The measure of the superior's right is to receive whatever the vassal would have himself received as annual fruits."

It is common ground that the superior's claim in this case rests exclusively on the old Act 1469, cap. 36, as interpreted by decision and practice. He is entitled to have "a year's maill as the land is set for the time." These are plain and simple words, and by them the superior's right in this case must be judged. It is now conclusively determined that although the statute is ancient its antiquity does not affect its construction. In the year when the composition falls to be paid it must be ascertained what the lands yield by way of return to the vassal, and whatever they yield to the vassal, be it great or small, is the measure of the superior's claim. Unless the lands be in the vassal's own possession there is no room for inquiry about their possible or probable yield. This appears to me to be the plain meaning of the statute—a meaning sanctioned by practice and decisions extending over centuries. There is in the feudal law of Scotland "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"—*per* Lord President Dunedin in *Heriot's Trust* v. *Paton's Trustees*, 1912 S.C. 1123, at p. 1130, 49 S.L.R. 852. Indeed, the question in controversy in the present case is in my opinion completely covered by authority. Among the earliest cases we find the *Laird of Monktoun* v. *Lord Yester*, M. 15,020, in 1634. There certain lands were feued by Lord Yester to Hay of Monktoun. Monktoun subfeued. Monktoun's adjudger charged Lord Yester to enter him in Monktoun's place. The charger alleged that he could give no more for his entry but one year's subfeu-duty, which was payable to Monktoun by the sub-vassal, "seeing by his adjudication he would get no more in time to come but only that feu-duty, and he ought to give no more than he would obtain himself." This allegation was found relevant. The Lords found he ought to pay no more for his entry than he himself would obtain from the sub-vassal. That was held to be the precise measure of the superior's claim. Two years later, in 1636, a similar decision was given in *Cowan* v. *The Master of Elphinston*, M. 15,055. There too the Lords found the charger "could pay no more to the superior but a year's duty of that which he was to get himself when he was entered, which was only so much feu-duty paid to him by his sub-vassals, and not a year's duty of the lands which pertained not to him but to his sub-vassal." As Lord President Dunedin pointed out in the case of *Heriot's Trust* (*cit.*), at p. 1130—"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;" and Lord Davey in the *Earl of Home* v. *Lord Belhaven* (*cit.*), at p. 16, observed—"The importance of these cases is . . . 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." These decisions appear to me to be directly in point and to be decisive of the present controversy. They are in complete harmony with the simple words of the old Act. They have often been referred to and have never been called in question. They appear to me to negative decisively any inquiry into the adequacy or inadequacy of the feu-duty payable to the vassal by his sub-vassal. Their effect is, I think, accurately stated by Lord President Dunedin in *Heriot's Trust* v. *Paton's Trustees* thus —"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." It is true that the amount of the feu-duty is not stated in either case. That is not surprising, looking to the ground of judgment, which obviously renders any inquiry as to the amount of the feu-duty idle. Whether the feu-duty was greater or less than the market rate was a wholly irrelevant topic of inquiry if the superior was to have just what the vassal was entitled to draw from the lands, neither more nor less. In the present case the vassal gets and can get no more than £1 sterling.

The principle laid down in these old cases has been accepted and consistently applied in modern times by the highest authorities. Thus in *Allan's Trustees* v. *The Duke of Hamilton*, 1878, 5 R. 510, at p. 517, 15 S.L.R. 279, Lord Justice-Clerk Moncreiff observed —the superior's "right is to be measured by the beneficial enjoyment of the vassal himself." In the same case (at p. 518) Lord Ormidale remarked that as a general principle "the superior is not, in reference to the composition due to him for an entry, in a better or worse position than the vassal." And Lord Gifford in the same case (at p. 521) laid down the rule applicable thus — "What the superior is to get then as composition is the equivalent of one year's enjoyment of the feu, just as if he had entered into possession." The same view was taken, and was upheld in the House of Lords, by the minority of the Judges in the case of the *Earl of Home* v. *Lord Belhaven* (*cit.*) I refer particularly to the opinion of Lord Adam, whose point of view was adopted and developed at considerable length by Lord Davey in the House of Lords. The principle he deduces from the words of the statute as interpreted by the Scottish Courts is thus stated (at p. 18)—"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 subfeu, and he is entitled to the benefit of the principle when it is in his favour." To Lord Davey's review of the decisions which establish the principle I have nothing to add.

The decision in the *Belhaven* case rests on two separate and distinct grounds, "either of which," as Lord President Dunedin pointed out in the *Heriot's Trust* case would be sufficient." With the first we are not concerned here. With the second we are. It is stated thus by Lord Dunedin at p. 1134—"Second, the decision merely affirmed what the Court had held more than two hundred years ago in *Monktoun* and *Cowan*, 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." In short, all that the *Belhaven* case decided was that "the superior in the year of entry is entitled to get what the vassal gets."

It remains only to consider the latest case on the subject, *Heriot's Trustees* v. *Paton's Trustees*. It contains a full, and if I may respectfully say so, an admirably clear statement by Lord President Dunedin of the whole law on the topic now in hand. It sets up the authority of the familiar case of *Campbell* v. *Westenra*, 1832, 10 S. 734, 2 Ross, L.C. 1206. And I for my part have no fault to find with Lord President Dunedin's analysis of the criticism which had been directed against it. I think it laid down a rule of correct "feudal practice," to use Lord Dunedin's words. Or I might adopt the words of Lord Dundas (at p. 1141) and say—"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 value of lands at the time when the subfeu was granted." Although on the whole I am disposed to adopt Lord Mackenzie's view of that decision when he says (at p. 1143), it is "a decision on an old Scottish statute which laid down a rule of practice," I am content to point out that in the present case there was no redemption money or grassum paid by the sub-vassal. The sum of £1 sterling represents the whole return which the vassal receives from the land. And if we apply the principle which rules such cases as the present as enunciated by Lord President Dunedin in *Heriot's Trust* v. *Paton's Trustees* (*cit.*, at p. 1135), then it is evident that £1 is the measure of the superior's right. For what he says is this —"Composition . . . 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?" Why, indeed? Agreeing as I do entirely with this statement of the principle applicable, I am for affirming the interlocutor of the Lord Ordinary.

If I am wrong in my statement of the principle applicable to the present case, then it seems to me to be obvious that the subfeu must be disregarded and the sub-vassal must be required by the superior to pay the actual rent of the lands, for it is certain that according to feudal law and practice no vassal can ever be compelled to pay more by way of composition than he actually receives. If it be said that this principle comes into play only where the feu-duty is adequate, then I ask—Who is to say what is an adequate feu-duty, and by how much must it fall short of the market rate at the date when the subfeu was granted to warrant a court of law in finding it to be inadequate? In short, once the mooring to sound and well-fixed feudal practice is severed we may drift anywhere. The subfeu stands or it does not stand. If it stands, then the superior is bound to acknowledge it, and if he does he must be content to have his right to composition measured by the vassal's rights under the grant of subfeu.

LORD JOHNSTON—The law on this subject has been settled by a long series of well-considered cases just to the point on which this case depends. That question is whether

a vassal by subfeuing his holding for an illusory subfeu-duty can effectually disappoint his own superior of the composition to which he is entitled on entering a singular successor. In my opinion each case has followed in logical sequence on its predecessor, and I think that this case completes the series. As exception has in some quarters been taken to the use of the term illusory, I would say that by illusory I mean not necessarily a blench or peppercorn duty in the strict sense, but any feu-duty which does not represent and is not intended to represent the true and entire consideration for the subfeu.

It is immaterial whether or not the Act of 1469, cap. 36, first introduced the real diligence of apprising. Personally I do not think that it did, and that it did not introduce it but only regulated some of its incidents, and particularly the mode of making it effectual to the completion of the feudal title of the appriser.

The Statute of 1469 enacted that "the over-lord shall receive the creditour or any other buyer, tennent to him paying to the over-lord *a year's maill as the land is set for the time.*" But this statute applied only to the case of apprisers, and in *Grier* v. *Closeburn*, 1637, M. 15,042, was held restricted to their case and not to cover adjudgers. The question with which we are concerned is not that of the condition of entry of an appriser but the general one of the condition of the entry of singular successors without discrimination. It is inaccurate to reason as though this general question depended solely on the interpretation and application of the Statute of 1469, and there is much that is misleading in the language of judges in the various decided cases if read without keeping this fact fully in view. Failure to do so accounts I think for a good deal in the opinions of the majority of the Consulted Judges. The question at issue truly depends on the construction and application of the Act of 1747 (20 Geo. II, cap. 50).

I would here refer to the opinion of Lord Kinnear in *Home* v. *Belhaven*, 2 F., at p. 1241, where he says that "the measure of a voluntary disponee's liability for composition is determined by usage and not by the express terms of any statute." This appears very clearly from the language of the statutes, and also from the history of the law, which is perfectly well known. Shortly what his Lordship points to is this—the entry of singular successors was made statutorily compulsory by stages (1) in the case of apprisers "payand to the over-lord a zeires maill, as the land is set for the time" —1469, cap. 36; (2) in the case of adjudgers on payment "of the year's rent of the lands and others adjudged, in the same manner as in apprisings"—1669, cap. 18; (3) in the case of purchasers at judicial sale of a bankrupt estate "upon payment of a year's rent"—1681, cap. 17; and (4) in the case of singular successors generally who may purchase or acquire lands held of subject-superiors and who shall obtain a conveyance containing a procuratory of resignation *in favorem*—1747, 20 Geo. III, cap. 50, sec. 12. But on what condition? Not on any specific statutory payment. But between 1469 and 1747 it is historically known that purchasers of lands who were neither apprisers, adjudgers, nor purchasers at judicial sale, had found circuitous methods by the use of conveyancing expedients, of compelling an entry, and that prior to 1747 superiors had come to see the futility of opposing such entries, and consequently that a more or less uniform and extensive practice of giving voluntary entries had forestalled the Act of 1747. Accordingly the statute of that year makes the condition of the compulsory entry of a singular successor not specifically the payment of a year's rent but the payment or tender to the superior "of such fees or casualties as he is by law entitled to receive," without further defining them as the former statutes had done. Lord Kinnear expresses the opinion (p. 1242) that the only law to which that provision could refer "was that which rested on established usage, because the earlier statutes do not apply to the case." It may seem, his Lordship adds, of little consequence whether the payment is fixed by statute or by usage. But then if there be a question what the "year's rent" means there may be a very material difference between a liability which depends upon a literal construction of the very words of a statute and that which depends upon usage. I desire to emphasise this, in which I respectfully agree, because the facts to which Lord Kinnear adverts cannot be ignored in appreciating the bearing of the case law on the present question.

"Composition" is the term now applied to the consideration to be given to the superior for an entry in the case of all singular successors, legal and voluntary. We are here concerned with the entry of a singular successor of the latter class whose charter is the Act of 1747. It is not sufficient therefore merely to found on the Act of 1469 anent aprisings. It is true that that Act is the prime origin of the law on this subject. But it is also true that the gradual extension of that law to cases to which it does not directly apply, and in changing circumstances, does not depend upon mere construction of the words of that statute. The stages of that extension are marked by a series of decisions of the Court. All that can be accepted is that these decisions have proceeded on an equitable interpretation and application of this old statute, but under the influence of practice and of change of circumstances.

I would further premise that Lord Dunedin in *Heriot's Trust* v. *Paton's Trustees*, 1912 S.C. 1123, at p. 1135, 49 S.L.R. 852, is, in my opinion, hardly justified in saying that composition 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. I think that it has nothing to do with the trouble entailed in giving an entry, but that it is truly a payment, formerly indefinite in amount, exacted when an entry was voluntarily conceded to a singular successor, and first reduced to a fixed statutory scale in 1469, conditioned in the interest of apprisers ex-

clusively as the consideration for their recognition by the superior, which it was previously in his power to refuse, except on his own terms. I believe that the provision of the Statute of 1469 represents the commencement of a compromise of the contest which had been going on for some generations between the strict views of the feudal system maintained in their own interest by the superiors, and the elasticity demanded by the growing commerce in land. "Composition," defined in measure or amount by statute and practice, thus made a condition of the change of investiture, was from the beginning not a composition for trouble taken or services rendered, but a consideration for the compulsory surrender of the superior's feudal claim to be master of any change of investiture. That this statutory composition was also intended as a substantial consideration is sufficiently apparent from the fact that a year's rent of the lands was its measure.

1. The Legislature then in the Acts of 1469, 1669, and 1681 took the legal position as it found it and, while modifying the law to a certain extent in favour of freedom of commerce in land, left the superior with a defined right which was a valuable incident in his property. This explains the expression in some of the earlier leading cases to the effect that he was not to be disappointed of his right by anything not a *bona fide* transaction.

2. But the question still remains, What is the interpretation to be put on the term "a year's maill as the land is set for the time," the expression used in the Act of 1469, and practically repeated in those of 1669 and 1681? Occurring as the expression does in a statute of the Scots Parliament so far back as 1469, that question cannot be answered without regarding the principle upon which statutes are to be construed. If the old Scots Act is to be construed literally you may come to one conclusion. If on the other hand it may be construed liberally, so as to apply its spirit and intention as circumstances change and new circumstances arise, then you may come to another conclusion.

After the full and careful exposition of the matter by Lord Dunedin in the case of *Heriot's Hospital* v. *Paton's Trustees* I shall not presume to say anything further. But I may be pardoned the following quotation, which I adopt as expressing my own view:—"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 which 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." It will be found that from case to case and stage to stage the old Scots statutes in question here have not been modified, but have been interpreted in the spirit, not in the letter, and have been so applied as circumstances required.

3. What was in the mind of the Parliament which passed the Act of 1469 is of course best seen from an examination of the Act itself. And I think that it discloses its meaning with exceptional clearness for a statute of such early date, owing to the adventitious circumstance that the enacting words, with which alone we are concerned, are only incidental to its main purpose and provision. This main purpose was the protection of "the King's commons maillers and inhabitants of lords lands" from the effect of the brief of distress, when executed for debt against their landlords, under which the goods and cattle of "the puir men, inhabitants of the ground," were, as the law then stood, liable to be distrained for their landlord's debts "where the maills extends not to the avail of the debt." The statute was a sequel and a complement of the Act 1449, cap. 18, whereby current leases were made binding upon singular successors. It was only as an incident of the remedy provided by the Act of 1469 that the process of apprising which had already, I am satisfied, been established at common law (see Kames' Historical Law Tracts, 4th ed., p. 347, and the Crown Charter of Apprising contained in the Appendix No. 7, dated in 1450, that is, nineteen years before the Act was passed), was regulated, and the completion of the feudal title of the appriser provided for. When therefore in that relation the statute declares that the over-lord "shall receive the creditour or other buyer tennent to him paying to the over-lord a year's mail as the land is set for the time," there can I think be no doubt that Parliament in the term "year's mail" referred to nothing but the year's rent of the maillers or tenants, cultivators of the ground. Not only is this the deduction which must necessarily be made from the general purview of the statute, but its terminology is entirely consistent therewith. The terms "maillers" and "year's maill" are naturally applicable to the tenant in the ordinary sense, and to his rent, and the term "set" to his contract of location, though it may be quite true that it soon came to be applied also to the contract of subinfeudation. Little indeed is known of the introduction of the practice of subfeuing, but it can be confidently said that by 1469 it had made very little progress in Scotland, and *had certainly never been used as a mere conveyancing expedient.* It may also not inappositely be noticed here that in a number of statutes both shortly before and shortly after 1469, where an attempt was made to facilitate subfeuing of land held in ward, the Legislature were alive to the need of providing that the feu-farm should be the "competent avail of the land," see 1457, cap. 71, 1503, cap. 90 and cap. 91, and other Acts.

I cannot therefore avoid the inference that in passing the Act of 1469, cap. 36, when speaking of a year's maill, the Legislature intended a similar limitation, and assumed that the lands would be set for "a competent avail." Accordingly in *Alison* v. *Ritchie*, M. 15,196, a tack for an illusory feu-duty and an extravagant duration was found not good against singular successors,

and *pari ratione* would not have been good against a superior when required to enter a singular successor.

4. Like many of the old Scots Acts that of 1469 has been extended in its application, according to its spirit rather than its letter, by judicial decision, in circumstances from time to time emerging which were not in the contemplation of its authors.

The first question which arose was how composition was to be measured when the vassal had subfeued in place of letting his lands? But it is to be noted that no such recorded question arose till nearly two hundred years after the passing of the Act of 1469, from which it may be inferred that the practice of subfeuing was slow in making headway. Three cases have to be considered —*Monktoun*, 1634, M. 15020, *Cowan* v. *Elphinstone*, 1636, M. 202 and 15055, and *Countess of Forfar*, 1725, N.R. I desire to draw particular attention to these cases, for they seem to be the foundation of the defence, and because deductions are sought to be drawn from them for which I think that there is no warrant. They are all cases of apprisers or adjudgers, where the statutes 1469 and 1649 could be appealed to directly, and they were all cases in which the vassal had subfeued his lands. The contention is that these three cases decide and establish as matter of principle that the superior's right is limited to demanding what his vassal himself is entitled to receive, which, where he has subfeued, is merely the subfeu-duties for the year, with sub-casualties if any falling in during the year; that the principle of the decisions is that the estate of mid-superiority is all to which the superior can give the singular successor entry, and therefore that its return for the year of entry is all that the superior is entitled to receive; that this was decided without limitation; and that it fixed an absolute rule regardless of any question of the adequacy or inadequacy of the subfeu-duty to represent the year's rent of the land at the time of creating the subfeus.

The first criticism—but I think it is somewhat weighty—is that it is remarkable that judges of eminence and accepted authorities in feudal conveyancing in the beginning of the last century did not discover the merit and alleged effect of these decisions, but put themselves to great pains to find other grounds of judgment from which the present defenders cannot draw the extreme proposition necessary for their defence, and yet that latter-day judges are asked in this century to accept these cases as authorities conclusively ruling the present question. I understand that some of my learned brethren are prepared so to accept them.

I think that all that can be deduced from these authorities is that the Court in 1634-36, and again in 1725, giving a liberal construction to the Acts of 1469 and 1669, held their provisions reasonably satisfied where the lands were set in subfeu as well as where set in lease. It was an undoubted stretch of the express terms of the statute for (1) the natural meaning of "mail" is rent not feu-duty, (2) the term "set for the time" necessarily implies "and from time to time," importing a temporary location, and (3) the concluding passage of the Act which provides, failing the superior giving an entry, "that he take the said land till himself and undergang the debtes," imports unmistakably that the superior is to resume the land himself unclogged by subaltern rights. But there was much to say for this equitable intervention of the Court—legislative rather than judicial—in the interest of the free development of commerce in land, provided only that, following the analogy of the Acts 1457, cap. 71, and others to which I have already referred, the subfeu-duty was the full or adequate value of the lands at the date of the transaction of subfeu. For thus the superior would practically get a year's value, as at the date of the subfeu of the lands which he had given out, though deprived of the prospect of unearned increment either natural or artificial. But the letter of the statutes themselves did not warrant, and their spirit, that is, the reason of the thing, did not demand the indiscriminate extensive application to cases where the subfeu-duty did not even pretend to be a year's value of the land, but was only an illusory payment to enable advantage to be taken of a conveyancing expedient.

Before I could hold that these cases had this effect, or that the Court which pronounced them had the subject in its present phase in view, I should like to know a little more about their circumstances than the reports bear. In *Monktoun's* case I am able to say positively that the subfeu-duty was an adequate avail, for the report M. 15,020 ends with the statement, as one of the Court's grounds of judgment, "likeas the principal vassal set the feu to the subvassal at the time when he might do it by the laws of the realm," and we know that no such subfeus could, under the conditions then prevailing, be legally granted except for a competent avail. This is confirmed by a passage in Robert Dundas's minute of debate in the *Countess of Forfar's* case. We have therefore the Court, indirectly at least, recording that they were in part moved to their decision by the fact of the adequacy of the subfeu-duty. In *Cowan* v. *Elphinstone* there are two reports giving diametrically different results, that of Durie, M. 202, saying that the Court held the compriser bound to pay "a year's avail of the land as the same is commonly worth," and rejecting a year's subfeu-duty as not enough, and that of Spottiswood, M. 15,055, saying that the Court found that the appriser ought to pay for his entry no more than his subfeu-duty. The latter report is, of course, that relied on by the defenders. Whether it was a case of the Court reversing itself on a reclaiming petition, as often occurred in those days, and which was the ultimate judgment, or whether the discrepancy can be explained by what the Lord Justice Clerk Boyle says in *Cockburn Ross*, F.C., 6th June 1815, at p. 417, the case cannot be said in these circumstances to be a satisfactory precedent. But we do know that the subfeu-duty was at least substantial, for Durie tells us that it consisted of 14 bolls of victual, which, being a payment in kind, was more

than likely the agricultural value of the land at the date of subinfeudation.

The importance of these two cases to the defenders is the reporter's (Spottiswood's) statement in *Cowan* v. *Elphinstone* that "the Lords found the charger could pay no more to the superior but a year's duty of that which he was to get himself when he was entered," and from this they seek to deduce the conclusion that the decision was an abstract finding entirely independent of any consideration of the adequacy of the feu-duty. Seeing the circumstances I cannot so read it. But even could it be assumed that the defenders were right, one is, I think, entitled to ask how was such a decision reached, and in respect that the authority has until now been ignored to examine these grounds. It was certainly not reached on the letter of the statute. And how in its spirit neither the defenders nor the majority of the Consulted Judges pretend to explain. This matter is crucial to the defence. If the words quoted from the report by Spottiswood in *Cowan's* case were intended to lay down a principle I dispute the soundness of the decision in law though it may be defensible on the facts on other grounds. It could not have been accepted by the profession during the 150 years which followed its date or we should not have had the case of *Cockburn Ross*, 2 Bligh 707, 6 Paton 640, 2 Ross, L.C. 193. Judges of the seventeenth century might give an equitable extension to a statute of the fifteenth century, but they could not evolve out of their own inner consciousness a legal principle as underlying the work of the Legislature two hundred years before, of which there is no trace in that work, and attribute it to that body so as to affect the scope and effect of that work.

That the Court itself did not regard that they had settled anything in point of principle in *Monktoun's* and *Cowan's* cases is clear, for three years later, in *Paterson* v. *Murray*, 1637, M. 15,055, they took neither the feu-duty nor the full rent as the composition, but modified it at 300 merks out of a rent of 800. The same occurred two years later still in *Almond* v. *Hope of Carse*, 1639, M. 15,056.

But the matter, it is contended, was clinched by the case of the *Countess of Forfar* in 1725. If it had been settled in 1634 and 1636, why did it require to be again considered in 1725? Now the *Countess of Forfar's* case is not exactly a mythical one though there is no trace of it in the records, no interlocutor can be found, and no papers are extant except a reclaiming petition bearing the signature of Robert Dundas, then either Lord Advocate or ex-Lord Advocate. So it is essayed out of this *ex parte* document to reconstruct the case and make it a conclusive authority. I have carefully examined this pleading, which is of no great length, and I think that its contents have been misapprehended by those who found on it. The pursuer the Countess was superior and the defenders were adjudgers, so again the case was directly under the statutes. It is clear from the crave at the end of the minute that the Countess claimed a year's rent, that her claim was rejected, and that it was pressed on reclaiming petition. But that is all that we know. There is no trace of a final decision in the reclaiming petition. From the initial sentences of Dundas's minute it is, I think, to be inferred that the judgment reclaimed against found in general terms that the pursuer was entitled to no more than the subfeu-duties, because the learned counsel begins by asking special consideration "of a case of general concern . . ., for if this interlocutor be the rule there is an end of that casualty of superiority, namely, the entry from singular successors, which nowadays is the greatest advantage arisen from the superiority." From the course of the argument, I think rather hastily, it is assumed that the subfeu-duty was illusory. I think it clear, however, that the reference to illusory feu-duty was not to the circumstances of the actual case, but to a hypothetical case introduced merely to point the moral of the interlocutors objected to, thus—"It deserves to be reconsidered, more especially since your Lordships have determined the point *in general* without any distinction whether the subfeus are set for a reasonable avail, and for such a feu-duty as may in a moderate way of thinking be looked upon as a rent, . . . or if they be set for such a trifle as in effect is but an acknowledgment or blench feu-duty under the name of a feu-duty." And the learned counsel proceeds to demonstrate that the decree has no authority from the statute, and then passing to the reasonableness of the thing shows how the wide extension which a general finding gives to the statutory provisions places it absolutely in the power of the vassal to destroy altogether the superior's casualty. In illustration he does not, as he naturally would have done had it fitted the generality of his argument, make reference to the facts of his case. He does not suggest that the subfeu-duty actually was illusory, but, stating an entirely hypothetical case, develops an easy conveyancing mode of disappointing the superior, and concludes that "it is impossible to avoid this if your Lordships' interlocutor be the rule." This, I think, makes it quite clear that the Court did not have the case of an illusory feu-duty before them, and that Dundas was only concerned to get round a judgment which in general terms had given the superior merely the actual subfeu-duty to the adequacy of which no objection could be taken, *i.e.*, it was but an astute piece of pleading—an attack on a general finding on the terms of its generality and avoiding particular application. Now we do not know how Dundas's argument was taken or how the Court disposed of the case, except so far as a cryptic reference to it by Elchies, to be subsequently referred to, goes. I think it would be eminently unsafe to allow such an unreported case of which we have such meagre details to be taken as an authority, and more particularly as an authority from which a determining principle is to be deduced.

These three precedents leave the matter here, that in cases which fall under the

Statutes of 1469 and 1669—and it must be recollected that they were or ought to have been proceeding on the statutes alone—the Court in the seventeenth and eighteenth centuries gave to these statutes such an interpretation "not in the letter but in the spirit," as extended the expression "a year's maill as the land is set for the time" to a subfeu-duty as well as a rent, but did not thereby determine that this equitable extension was admissible, not in the letter *and against* the spirit, where the subfeu-duty was illusory.

Before leaving this point, and as bearing on the position of the singular successor generally, I would draw attention to the fact that Dundas in his minute of debate anticipates Lord Kinnear in drawing a distinction between the statutory position of an appriser or adjudger and "what was law and customary before as to a buyer." This incidental reference explains the use of the expression "such feus or casualties as he is by law entitled to receive" in the statute 20 Geo. II, cap. 50, passed twenty years after Dundas wrote. His statement indicates that the practice, no doubt following on the analogy of the statutes, had crystallised before the statute was passed.

5. Chronologically the next point raised was how the statute was to be applied where the subjects were not subfeued but were still held and occupied by the immediate vassals, and where therefore there could be no year's maill as the lands were not set for the time. This occurred in a case of a voluntary singular successor—*Aitchison* v. *Hopkirk*. The Court held that the superior was entitled "to a year's rent of the subject whether lands or houses as the same are set or *may be set* for the time." The introduction of the words "or may be set" is thus explained by this note on Sir Ilay Campbell's papers—"*N.B.*—'May be set' was added on a suggestion that many of the feus were in the natural possession of the proprietors." This case occurred after the passing of the Act of 1747 (20 Geo. II, cap. 50), and the question therefore was what feus or casualties the superior was "by law entitled to receive." Accordingly the report of the case bears—"The point was determined after a hearing in presence, and upon considering *reports relative to the practice*, which last chiefly weighed with the Court." It is I think to be assumed that, starting with the old statutes anent apprisings and adjudications, the Court considered how the criterion of the year's rent had been interpreted and applied in practice to the wider class of singular successors generally. This is however the only case in which I have found that express reference to practice which was to be expected. It has certainly ruled practice since its date.

6. The question of the application of the statutes in the case of subfeuing was brought sharply to a point in the case of *Cockburn Ross* v. *Heriot's Hospital*, upon the true bearing of which in relation to the present case much would seem to turn. Ross's author had feued land from the Hospital in 1733. Ross acquired in 1804 and entered as a singular successor for a composition based on the then rental of the subjects. But he shortly subfeued for building purposes for payment of subfeu-duties admitted to be the full value at the time of the ground. In order to clear the position of a possible singular successor in the property Ross raised a declarator against the Hospital to have it determined whether the composition to be paid for an entry by a *purchaser or adjudger* from him was to be a year's full rent of the houses or a year's subfeu-duties. The case therefore involved the older statutory provisions and also those of 1747. No discrimination is however made by the parties or the Court, and I imagine for this reason, viz., that by this time the liberal interpretation given to the older statutes and the practice, which had been engrafted on them and been given effect to in the Act of 1747, had so coalesced that there had come to be no practical distinction. But the Court certainly treated the whole question of the bearing of subfeuing on the superior's claim for composition as entirely open, though the cases of *Monktoun* and *Cowan* were brought under their notice. How far they were actuated by the fact that they were now dealing with the case of the singular successor generally, not merely with the appriser or adjudger, does not appear, but it is more than probable that this element was not ignored but assumed.

I disclaim the contention that the case of *Cockburn Ross* decides that where lands are subfeued for an illusory subfeu-duty the illusory subfeu-duty is not to be regarded as the measure of composition. Neither, however, does it decide as a general proposition that such feu-duty whether adequate or illusory is to be taken as the measure of composition. On the contrary it reserves that question, though I think with an unmistakable indication of opinion. It may be open to your Lordships now to decide that an *illusory* subfeu-duty is to be taken as the measure of composition where such is the subaltern reddendo. But you cannot do so on the authority of *Cockburn Ross's* case, and further, without (1) quarrelling its limited *ratio decidendi*, and (2) holding that it has misled the Court in subsequent cases, and so led to miscarriage which now falls to be corrected. What *was* decided in *Cockburn Ross* was that where subfeuing was allowed, as since 1874 it is universally, a subfeu-duty of *adequate* amount at the date of the subfeu is to be accepted as the measure of composition under the Acts. This and nothing else was before the Court and nothing else was decided. But the subsumption of the whole judgment was the *adequacy* of the subfeu-duty. The rubric in the Faculty Collection is justified by the terms of the interlocutor of the Lord Ordinary (the first Lord Meadowbank), which is based on an initial finding in fact "that by the pursuer's titles from the defenders he was under no restraint from subfeuing, and that the subfeus he granted, it is not controverted by the defenders, were made for a full and adequate avail of the subjects," and accordingly finds in law "that

a purchaser or adjudger from the pursuer will be entitled to obtain an entry from the defenders on paying the free income of the estate acquired by him during the first year of his access to the possession thereof." This interlocutor was adhered to, Lord Bannatyne dissenting, without exception taken to its terms by those of the Court who sustained it. The Lord Justice-Clerk (Boyle) indeed said expressly—"I have always looked at the case under the special circumstances in which it presents itself, in which I find nothing but the utmost *bona fides* on the part of the pursuer, a full and adequate duty having been stipulated and offered by him to his over-lords. . . . 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-duty elusory a very different question might have arisen, but one which we are not here called upon to decide. . . . I have no difficulty in saying that after a careful attention to the language of that Act, and of all the other relative statutes for a course of two centuries, it appears to me that the words 'pay the year's maill as the land is set for the time' may, and necessarily do, include the case of lands *set for a fair feu-duty*."

I retain to deal subsequently with Lord Glenlee's opinion, which is by no means easy to follow, and which introduced another and wholly different consideration in regard to this matter. It suffices here to say that he concurred in sustaining Lord Meadowbank's interlocutor, and that in subsequently disposing of the case of *Campbell* v. *Westenra*, 1832, 10 S. 734, 2 Ross, L.C. 1206, he so expressed himself as to show that he understood the decision in *Cockburn Ross's* case as I have represented it, viz., as doing more than merely reserving the question of the subfeu for an illusory subfeu-duty. His actual words are (p. 736), referring to the decision to which he had been a party in *Cockburn Ross's* case—"I certainly understood . . . that while the mid-superior would not be allowed to defraud the over-lord, yet if what he does is *bona fide* a fair transaction at the time, the rule is that we are not to take into view matters of entries," &c.

7. The question of how an *adequate* subfeu-duty was to be regarded having been authoritatively determined in the case of *Cockburn Ross* by the House of Lords in 1820, 6 Pat. 640, though the Court of Appeal in affirming did not throw any further light on the matter of principle, the further question how a subfeu-duty of an illusory amount stipulated for title sake, coupled with a price down or grassum as the real consideration for the transaction, was to be regarded, next came up for decision.

In *Campbell* v. *Westenra* a property had been long held in feu by the Dukes of Hamilton of a subject-superior. In 1755 the then Duke of Hamilton disposed of it in parcels for prices down in each case and subfeu-duties. The cumulo prices or grassums amounted to £1870 sterling, and the cumulo subfeu-duties to £22, 10s. Scots and 22 bolls of victual, this subfeu-duty just relieving him of the feu-duty which he himself paid to his immediate superior. The over-superiority by the beginning of the nineteenth century had come to be vested in Campbell of Succoth, the Hamilton mid-superiority in Mrs Westenra, and the *dominium utile* in a number of sub-vassals who had built on the ground, their cumulo rental being about £1700 a-year. Mrs Westenra had acquired by a gratuitous but singular title, and her only interest in the mid-superiority was in the prospective sub-casualties, the entry of singular successors in the subfeus being untaxed. Mrs Westenra was desirous of completing her title at once, but Succoth and she did not agree on the amount of composition due, and the case of *Cockburn Ross* was before the Court. Succoth maintained that the subfeu-duties were shown on the face of the title to be nominal and not the real consideration for the grants, that therefore they did not satisfy the requirements of the statutes and were to be disregarded, and he claimed the free rents of the subjects in their existing state as they were or might be set on lease. Mrs Westenra on the other hand maintained that she was entitled to an entry on payment of a sum equal to the cumulo amount of the subfeu-duties. A friendly suit was thereafter raised by Succoth to determine the question between them. I must apologise to your Lordships for dealing with this case at some length. The nature of the report in 10 S. renders it necessary to do so, as it is contended that it decides nothing but an incidental question and on the main issue proceeds on admission. Difficulty as to what was actually at issue and decided is occasioned by three things.

1st. Succoth in his pleadings on record at once gave the unqualified admission that the subfeus of 1755 were given out for full value at the time if both the subfeu-duties and the grassums were taken into consideration.

2nd. Succoth agreed to give the entry at once, and Mrs Westenra to make a payment to account of what she admitted to be due, the true sum due to be determined by the Court.

3rd. The case was reported to the Second Division by Lord Fullarton on informations according to the practice of the time, and was therefore decided on the written pleadings without a hearing in presence.

As the determination of the question between her and Succoth was to await the final decision in *Cockburn Ross's* case Mrs Westenra came under an undertaking—"(1) to pay a sum equal to what she draws from her sub-vassals, thereby giving to her superior all that she has right to draw for that year; (2) to give an obligation to pay such further sum to her superior for the entry as he shall be entitled by law to demand in the event that the House of Lords reversed the decision of the Court of Session in the case of *Cockburn Ross*, then under appeal. But the judgment in *Cockburn Ross's* case was affirmed, and this apparently altered Mrs Westenra's conception of the position, for after the House of Lords' judgment she communicated to

Succoth a minute in these terms, viz.—Seeing that the question might arise whether in respect of the grassum "it was not within the *bona fide* meaning of the said agreement as modelled on the principle of the decision of this Court in the case of *Cockburn Ross* that in order to make up the full adequate value of the subjects at the date of subinfeudation an additional allowance should be made in consideration of said grassums, the defender, without departing from the original agreement as above recited on 23rd September 1826, further agreed to pay a year's interest of the price or consideration received by the Duke of Hamilton at granting the subfeus." This, I think, must be regarded rather in the light of a tender than an admission, for the defender's original and higher contention was maintained to the end, and it was not accepted by the pursuer.

An examination of the informations lodged for the parties and reported to the Court shows that Succoth by his counsel (Mr Tait) maintained solely his extreme case for the full rents as at the date of his entry on these grounds—1st, that distinguishing from *Cockburn Ross* the subinfeudation was truly a sale for a price and not an onerous subfeu—a sale and not a location, the form only of the contract of feu being adopted but its substance being absent; 2nd, that he was free to reject Mrs Westenra's concession of interest on the grassums as it rested on no principle. Certainly if lands were to be taken as set for the time, meaning thereby the time of the entry being asked, the price paid sixty years before could give no measure of this.

Mrs Westenra's information was prepared by Mr Ivory (afterwards Lord Ivory), who evidently found himself in a dilemma between two alternative arguments, in one of which he evidently had little or no confidence. He therefore maintained his first alternative as if it was his real case, and beginning by tying Succoth to his admission that at the date of subinfeudation the lands now held of him by Mrs Westenra passed from the Duke of Hamilton to his subvassals upon the footing of a valuable consideration having been received by her author, he maintained that the feu-duties, and the grassums, if reduced or converted into a feu-duty, amounted to the adequate value of the subjects when set on the contract of subinfeudation on which they were still held, and which therefore answered to "the year's maill as the land is set for the time." This therefore gave the measure of the composition due. Though he backs and fills somewhat in his argument he finally concludes thus—"In a word, the rule is that a vassal in acting on his power of subinfeudation shall do nothing really to prejudge or evade the natural rights of his own superior. He shall not by any contrivance so bargain with the sub-vassals as to destroy and take away what the superior would have been entitled to if the contract with the sub-vassal had been fairly and honestly gone into." He then compares an adequate feu-duty with a price down and a feu-duty, making together an adequate return, and is concerned in contending that he is not to be tied to the letter of the statute or by the mere mode of giving off the subfeu, provided the substance is there. As his alternative contention he presented an argument elaborating the plea that as subinfeudation was the legal right of the vassal the claim to composition of the over-superior was limited by the subfeus which burdened the mid-superiority. This, I suppose, was intended to lead to the conclusion that the claim of the over-superior was limited to the subfeu-duties irrespective of any consideration of the grassums paid, but it is difficult to say that the point is in any way pressed home; and I do not wonder at the reporter stating (10 S., at p. 735) the argument for Mrs Westenra as though confined to the first alternative presented.

There is a further difficulty introduced by the terms of the opinions of the Court, which do not proceed to deal directly with the main question, but are practically confined to an incidental matter which must have been raised verbally before the Court after consideration of the mutual minutes of debate and after the main question had been disposed of. This was whether in addition to the subfeu-duties there should not be added in ascertaining the amount of composition an average of the sub-casualties received by the mid-superior. The judgments actually reported were almost entirely concerned with this incidental point. But they necessarily imply that the Court had rejected the extreme contentions of both the superior and his vassal, and had held that the proper measure of the composition due by the latter was the amount of the subfeu-duties and interest on the grassums. The incidental claim was negatived, as it had been in *Cockburn Ross's* case, but at the request of the superior's counsel the Court reserved the question whether a superior *in pari casu* is not also entitled to the amount of any casualties actually received during the year of the entry. It does not seem to have been observed that this had already been so decided in *Cockburn Ross*—see Lord Meadowbank's judgment.

I have obtained from the Clerk of Court the terms of the actual interlocutor of the Second Division, viz.—"*Edinburgh, 28th June* 1832.—The Lords having advised the cause, in respect that the defenders have already paid not only the whole few duties exigible for the year in question but also the full interest of the grassums paid to them by the subfewars for that year, assoilzie the defenders from the conclusions of the lybel and decern. (Signed) D. BOYLE, *I.P.D.*" When this interlocutor is read in the light of the procedure in the case it is out of the question to suggest that the decision proceeded not *causa cognita* but on the concession of Mrs Westenra. It has ruled practice ever since, subject to this, that in the case of *Home* v. *Belhaven* dissatisfaction with *Campbell* v. *Westenra* was expressed by Lords Davey and Robertson. This was taken by the other Division of the Court as equivalent to an overruling, and therefore in the *City of Aberdeen Land Association, Limited* v. *Magistrates of Aberdeen*, 1904,

6 F. 1067, 41 S.L.R. 647, they disregarded it and sustained the superior's demand for the full rent. This led to the case of *Heriot's Hospital* v. *Paton's Trustees* being sent to a bench of Seven Judges, presided over by Lord Dunedin, when it was held that the decision in *Home* v. *Belhaven* did not touch the case of *Campbell* v. *Westenra*, that the opinion of the noble and learned Lords who expressed disapproval of it was obiter, and did not do justice either to the authority or to the ratio of the decision, and did not justify its disregard in the *Aberdeen Land Association* case, which was therefore disapproved. The case of *Paton's Trustees* could not have been so disposed of had the Court not accepted the precedent of *Westenra's* case as resting not on admission but on judicial determination.

As I was a party to the judgment in the case of *Heriot's Trust* v. *Paton's Trustees*, and expressed a doubt as to the soundness of the decision in *Campbell* v. *Westenra*, I desire to say that further consideration of the whole subject, in the light which has been thrown on it in the present case, has entirely dissipated that doubt, and satisfied me that it was unfounded.

8. With reference to the main question with which I am concerned, the case of *Heriot's Hospital* v. *Paton's Trustees* makes no new departure any more than it made any retrograde step. Ground had been subfeued for a reddendo of £20, with power to the subvassal to redeem £19, 15s. thereof on a five per cent. basis. This he did, and thereafter held of the mid-superior for a subfeu-duty of 5s. only. On a transfer of the mid-superiority to a singular successor a composition of a full year's rent was claimed by the Heriot Trust as over-superiors. It was maintained that the 5s. feu-duty could not be accepted being illusory, that the original feu-duty of £20 had been extinguished and could not be reverted to, and that the mid-superior had no alternative but to pay the full year's rent. It was not disputed that £20 had been, as in *Cockburn Ross*, an adequate feu-duty at the date of the subfeu, and this being tendered by the mid-superior it was decided that the superior's claim to a full year's rent must be repelled This appears to me to be entirely in the spirit of and in line with *Cockburn Ross's* case and *Campbell* v. *Westenra*. So far for the decision.

I shall have to deal with the ostensible ground of the Lord President Dunedin's opinion in what immediately follows. But before doing so I would here emphasise the point that the important cases of *Westenra* and *Paton's Trustees* cannot logically be reconciled with the principle contended for by the defenders, viz., that the estate of mid-superiority is all to which the superior is able to give an entry to a singular successor, and that the composition to which he is entitled must therefore be confined to the return from that estate for the year of entry. In these cases the grassums originally paid and the redemption money respectively were no part of the estate of mid-superiority to which the superior was asked to give or could give entry. They had gone into the pockets of the superior's bygone authors. All that he could give entry to was the estate of mid-superiority as it stood at the date when entry was asked. If the defender's contention is sound the ratio of *Cockburn Ross's* case ought not to have been in any way limited, and the decisions in *Westenra* and *Paton's Trustees* are indefensible. The defenders and those who are prepared to sustain their contention have made no adequate attempt to meet this dilemma, but content themselves with evading it.

9. I return then to the matter of Lord Glenlee's opinion in the case of *Cockburn Ross*, which has, I think, suggested to some members of the Court a ground for reopening the whole question, for they cannot in my opinion reach their conclusion without unsettling more than a century's practice proceeding on authoritative decisions, and on the knowledge of the very skilled conveyancers of the time of what these decisions imported. There is no room for *distinguishing*.

The main argument of the defenders in the present case rests on the proposition that all that there is for the pursuers to give an entry to is the estate of mid-superiority, and, that being so, that the composition claimed can only be a year's subfeu-duty, as that is the whole return to them for the year of entry. Though they contended that it was not properly a blench feu-duty, but the substantial one of £1 sterling, I take the case on the footing that in this relation it is in fact illusory.

The argument is admittedly suggested by the opinion of Lord Glenlee in *Cockburn Ross*. I have perused and reperused that opinion, and I am compelled to say that it is almost as difficult to paraphrase as it is to understand, and while I cannot quote it *in extenso* I feel much diffidence in attempting to analyse it. I think that Lord Glenlee starts with the intention of basing his judgment on the proposition that subfeuing has always been recognised unless prohibited where the tenure is not in ward but in feu; that the superior's estate was as much burdened in law as the vassal's by the latter's subfeus; and that therefore the superior's claim for composition is affected by such subfeus. But he never reaches that conclusion. His first step is to consider the various classes of feudal casualties, and particularly those not arising from the nature of the feudal contract as, *e.g.*, liferent escheat. And casualties of this class he holds are effectual only against the vassal himself and the estate as enjoyed by him after his subfeuing and are therefore subject to all his deeds and inferentially to his subfeus. And he then says, though giving no reason whatever for the statement, that the superior's right to composition is *more* analogous to the liferent escheat than to any other casualty.

His Lordship then passes to the history of subfeuing, and after a general reference to English legislation, states that after 1606 it was understood that as regards subject-superiors, of whom lands were held in blench or feu, their claims for entry-money

were burdened with every base right which the vassal had granted. His Lordship here seems to adopt the fallacious line of reasoning which deprives the opinions of Lord Justice-Clerk Moncreiff and Lord Ormidale in *Allan* v. *Duke of Hamilton*, 1878, 5 R. 510, 15 S.L.R. 279, of all value. The claim of a superior for composition has no relation whatever to his claim for non-entry duties—see Lord Kinnear in *Home* v. *Belhaven*. I venture with all deference to say that his position last stated if intended to be applicable to the claim for composition is mere assertion and void of authority. But the inexplicable thing is that his Lordship draws no conclusion from either of his propositions and makes no application of them towards the disposal of the case before him. On the contrary he caps his whole line of reasoning by adding "I am aware the decisions are ambiguous," and then, without giving us further light upon the decisions to which he must be supposed to be referring, he switches off thus—"But I find in a MS. Book of Notes on Stair's Institute a reference made to a decision in 1725 by which the point is said to have been decided." But what point? This decision of 1725 is the case of the *Countess of Forfar* to which I have already adverted. It is more than strange that a Judge of such undoubted authority should base his judgment on a case of which so little is known, and of which apparently he knows nothing more than that "it is said" in some, to him anonymous, notes on Stair, to have decided a point. But his Lordship before going to his discovered authority interposes a long quotation from the annotations upon Stair ii, 4, 32 (now understood to have been made by Elchies, though whether as law student, counsel, or judge there is no information. Elchies was admitted to the bar in 1712 and raised to the bench in 1732. His collection of Decisions covers the period 1733 to 1754). The burden of this quotation is that there is a point not adverted to by the annotator's author, and certainly there is no hint of it in Stair ii, 4, 32, viz., how would the superior's composition be affected by his vassal having taken a price down or grassums coupled with an illusory subfeu-duty, in fact just the future case of *Campbell* v. *Westenra*. Having stated the point Elchies proceeds to enumerate the considerations pro and con which occur to him *cogitando* in the quiet of his study, but comes to no conclusion. Then follows what seemingly had captured Lord Glenlee, a notandum by Elchies, viz. "(Since writing these the point is decided about 16th July 1725, *Countess of Forfar* v. *Creditors of Ormiston*, and the adjudger found only liable for the feu-duty. There was nothing new in the reasoning on either side.)" What value there may be in Elchies' cogitations is much detracted from by the fact that while his point is not adverted to in Stair ii, 4, 32, if he had read on to iii, 2, 27, he would have found Stair saying, anent the composition of a year's rent, that "a subaltern blench infeftment cannot make a blench-duty sufficient as a feu-duty," and a blench-duty is all that is left if a grassum is taken accompanied by an illusory feu-duty. Moreover, Elchies' question is answered by the case of *Westenra* in a manner which will not square with his assumed deduction from that of the *Countess of Forfar*. I am at a loss therefore to understand the weight which in some quarters has been attributed to Elchies' Notes.

But Lord Glenlee himself proceeds after finishing his quotation—"I have only to add that I go along with the last decision mentioned in these notes, and that I am for adhering to Lord Meadowbank's interlocutor," and we know how that interlocutor is expressed. To its limitation to subfeu-duties adequate in amount Lord Glenlee, for all his quotation from Elchies' Notes, takes no exception. Moreover, his understanding of the judgment to which he had subscribed in *Cockburn Ross's* case is seen from the terms of his reference (which I have already quoted) to it some years later in *Campbell* v. *Westenra*, while still, along with the Lord Justice-Clerk Boyle, on the bench of the Second Division, and to which I would make particular reference. It is entirely inconsistent with his Lordship's having based his judgment on an authority which would have carried him clear of any question of adequacy. I can hardly think that he read Elchies' notandum in the sense in which the defenders would have us do.

I conclude, therefore, that it is difficult for the defenders to draw support either from Lord Glenlee's opinion in *Cockburn Ross* or from his quotation from Elchies' Notes. But undoubtedly they get more assistance if his words be taken literally from the latter part of Lord Dunedin's opinion in *Heriot's Trust* v. *Paton's Trustees*. But this is only by divorcing his Lordship's language from the circumstances with which he was dealing—a course against which no one was so ready to protest as Lord Dunedin himself. If I may venture to say so, I think that Lord Dunedin had given great attention to the first part of his judgment where he was dealing with a most important general question and was combating heterodox doctrine uttered obiter in the House of Lords, but that when he came to deal with the actual case before him it appeared so simple on the precedents that he did not weigh his language with that scrupulous care which he would have used if he had known that it would be pressed into the service of defenders in the position of those before us. As a member of the Court which decided *Paton's* case (*cit.* at p. 1125), I can say that we did not consider *ab ante* what would be the effect as regards composition of a subfeu for an illusory subfeu-duty coupled with a consideration not sounding in money, but confined our attention to the case before us, which was a mere circumstantial variation of *Campbell* v. *Westenra*.

But Lord Dunedin uses language which may be and has been prayed in aid by the defenders—particularly when he says in conclusion that "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 his act created." From this, ignoring the fact surely present to Lord Dunedin's mind that the £20 was an adequate feu-duty, it is sought to be inferred that whenever a superior makes a grant in feu it is in his vassal's power to disappoint entirely his right to composition by subfeuing for an illusory feu-duty, and thereby fixing the yearly value of the estate of mid-superiority which his act creates at an illusory figure, it may be zero. It is therefore said that Lord Dunedin's words carry the defenders the whole way. I feel certain that his Lordship would at once disclaim the assumption that he intended his words to be carried that length. At the same time I must respectfully question the line of reasoning which leads up to the above statement and gives colour to the defenders' gloss upon it. What I take exception to is shortly this, that instead of regarding the growth of the law on this subject historically from the original Statute of 1469, with its restricted application, its gradually widening by a liberal interpretation, its analogical extension in practice to cases not originally provided for, made finally general in 1847, his Lordship seeks to evolve *ex post facto* a principle underlying the original enactment which was never in the minds of those who framed it or those who developed it. I think that he has been captivated by Lord Glenlee's reference to liferent escheat, and that when he coins his own expression "escheat of the vassal's property for a year," he assumes that such is necessarily to have the same incidents. He thus attributes to the Legislature of 1469 a definite conception for which it is impossible to find warrant when the terms of the statute are considered. Liferent escheat was certainly the most artificial outcome of the feudal system and based on a pure fiction. It was gradually toned down by the Courts in the exercise of their equitable jurisdiction, largely through the medium of more fictions, as is very fully shown by Erskine, ii, 5, 53-80. To attribute its incidents as they were gradually evolved and reduced to the superior's right to composition, whether regarded as strictly statutory or in its later developments, is far fetched indeed. Lord Glenlee thought that by doing so he might find a ground for subjecting the superior's right to the subfeus granted by his vassal. I think that the same idea was running through Lord Dunedin's mind when he asks and answers the question, if the estate is a mid-superiority, why should the singular successor pay more for an entry than the value of that superiority? But it was no such recondite reasoning which led the Court to their judgment in *Cockburn Ross*. It was the recognition that, regarding the progress of the commerce in land in the three and a half centuries which had elapsed since 1469, and the practice to which that Act had given the direction, it was in the spirit, if not the letter, of the law to recognise that "a year's mail" was satisfied by a year's subfeu-duty, provided that the subfeu-duty was an adequate return for the land at the date of subinfeudation.

This and not any imaginary actuating principle solved the question as regards lands feued for a competent avail. I think that it equally and naturally solved the question where a grassum had been taken, and also that where a portion of the subfeu-duty had been redeemed. With all deference I do not think that the assumed principle of an escheat of the vassal's property for the year solves either of the two last questions in accordance with their actual decision, but would lead to a wholly contrary result. Once the grassum or price was received it was personal property divorced from the land and no longer in any way related to the mid-superiority. The true yearly value to the mid-superior was the subfeu-duty, not at all enhanced by the hypothetical interest on a grassum, which might be in his pocket, but which might, as in *Westenra's* case, much more likely have become part of the personal estate of his bygone author. Once accept the imaginary actuating principle and *Westenra's* case goes by the board, and *Paton's Trustees* itself follows.

Composition, unlike liferent escheat, was naturally related to the feudal tenure. I have already given my reasons for thinking that it was something more than a mere recompense for the trouble of giving an entry. In regulating its amount the Legislature in 1469 were thinking neither of liferent escheat nor of subinfeudation, but of the estate which the superior had given out to his vassal. It was partially true then, and in course of the centuries became invariably true, that his vassal might reduce that estate, so far as he himself was concerned, to one of mid-superiority by subinfeudation.

What then is the estate of mid-superiority? To regard it as if it was nothing but a rent charge heritably secured, or a right to receive a subfeu-duty of definite amount, is to take a fallacious and misleading view of it. As Menzies says (Lectures, 1st ed., p. 606)—"The *a me* conveyance divests the disponee entirely. The *de me* conveyance divests him only of the *dominium utile*, which passes to the subvassal. There still remains to him an estate, which in relation to the subvassal is that of superiority, but in relation to his own superior retains all the characteristics and is subject to all the liabilities of a *dominium utile*." Menzies lectured long before the case of *Sandeman*, 1885, 12 R. (H.L) 67, 22 S.L.R. 850. But his words find full confirmation from that case, and particularly from what Lord Watson says at p. 68, *et seq.*, where incidentally he foreshadows the defenders' argument here and describes it as amounting "in substance to this, that the character of the superior's reserved right undergoes a radical change whenever the vassal instead of disponing subfeus the land without his superior's consent," and shows how unfounded this contention is. It seems to me that these words are as applicable to composition, whether that is expressly part of the reddendo or only so impliedly, as it is to the feu-duty. It is just as much part of

the superior's "heritable estate or interest in the lands paramount to the estate of the vassal."

How then stands the matter of the alleged protected position of the sub-vassal? I need not occupy time by referring to the practice of obtaining confirmation of subfeus which prevailed not only in 1469 but for two or three centuries after it, or to the reasons for and effect of obtaining it, or to the reason of the practice falling into desuetude. It is sufficient to recal the effects (1) of the irritancy *ob non solutum canonem* of the immediate vassal's feu upon his subfeuar —*Sandeman's* case — and (2) of the sub-vassal's tinsel of his immediate superior's mid-superiority. It is unnecessary to go back to the more ancient form of this remedy. It is enough to take that supplied by the Act of 1847 (10 and 11 Vict. cap. 48), which proceeds upon a correct apprehension of the conveyancing situation. The conclusion therefore that if the vassal has reduced his *dominium utile* to an estate of mid-superiority his singular successor can obtain an entry to that estate by paying no more than a year's value of what his author has retained can only, on the defenders' argument, be reached by regarding merely the legal conception of the sub-vassal's estate and ignoring that of the mid-superior. It certainly cannot be reached by assuming that the subaltern right burdens that of the mid-superior in a question between the latter and the over-superior — a question with which he, the sub-vassal, is not concerned. For it seems to me that to look at the matter from the point of view of the sub-vassal is altogether misleading. The sub-vassal is not interested. There is no claim for composition against him. There is none, indeed, against anybody. The demand is only for fulfilment of a condition of the over-superior's receiving a singular successor to his own immediate vassal. It is no question of non-entry. The fee is full. The singular successor is not a vassal. He is only seeking to become one. If he finds the condition of entry too onerous he need not place himself in the position of having to pay it, or which is the more natural and practical course, he may make the onerosity a factor in adjusting the terms of his acquisition of the mid-superiority. The mid-superior who had parted with his *dominium utile* by subinfeudation, and if he has taken a grassum or price down made his profit thereby without regarding the contingent claim of composition, if he ever comes to part with the estate he retains, is the proper party to suffer, as he does when he finds his mid-superiority affected in value and possibly unsaleable. The over-superior is not responsible, and the sub-vassal is not affected so long as the mid-superiority is not irritated. If it is the position becomes that in *Sandeman's* case.

10. I am concerned with the true ground of reaching a judgment in the catena of cases which have to be referred to on this subject, not because it makes any practical difference in anything which has yet been decided, but because it makes all the difference in what has now to be decided.

The true ground of decision is, I think, simple and applicable with perfect consistency. It does not make the vassal master of the situation. It gives due regard to the over-superior's position, and at the same time interprets and applies the original statute if to it the matter is necessarily to be referred—a proposition to which I except according to the spirit and not the letter merely. But it also consists with the practice which has been superinduced on that statute, and to which in my opinion the matter is more properly to be referred. Equity has played its part in the development of the law and practice, and when equity is pleaded counter-equity may be demanded. It has been recognised that where land has been subfeued for an adequate consideration, and therefore under an onerous and *bona fide* transaction in the commerce in land, it would be inequitable not to recognise the subfeu-duty as giving the measure of the composition. But then counter-equity requires that subinfeudation shall not be used as a cloak to defraud the superior, and that if there be other consideration than the mere feudal return in the shape of subfeu-duty that other consideration must be brought into the account.

The cases which I have dealt with settle, I think, very clearly that where the amount of composition has to be ascertained in a case where subfeuing has occurred, what has to be looked to is the true and whole consideration of the contract of subinfeudation and not the mere feudal return or subfeu-duty. If, then, it has been fixed that the true and whole consideration of the contract of subinfeudation must be taken *in computo*, why is that principle to stop short in its application where there is another consideration, but one which is not reduced to a money value in the deeds which embody the transaction?

We know from the titles here, and could have had it easily proved *aliunde*, that the late Mr Ritchie of Kirktonhall left his estate of Kirktonhall, including Seamill, to his son Dr Ritchie subject to the condition that he should execute a long lease of 999 years of Seamill in favour of his younger son John Ritchie for a nominal rent of 20s. sterling. It was evidently seen by the solicitor who carried out Mr Ritchie's settlement that such a lease would be unavailing in a question with the superior of Kirktonhall, so he astutely turned the long lease into a subfeu for the same illusory reddendo.

The property was worth about £100 a-year, or say £2000 capital value in 1847, when Dr Ritchie in fulfilment of his obligation under his father's settlement transferred Seamill to his brother John. Suppose that he had been free to dispose of it, and had sold it on a base title to his brother for a grassum of £2000 and an illusory subfeu-duty of 20s. sterling, the composition now in question would be 20s. plus 5 per cent. on £2000, or say £100. It is difficult to see how it could have been anything less had Dr Ritchie without obligation made a free gift of Seamill to his brother and carried out the transaction by a blench subfeu. There would still have been a further consideration —

love, favour, and affection on the one side and a grateful sense of obligation on the other, and the measure of the consideration would necessarily have been the value of the property so transferred.

But the present case is much stronger. Dr Ritchie had taken his father's estate under obligation to convey. His brother could have compelled him to convey. It was open to them by agreement to depart from the express directions of the father as to the mode of conveyance. But the conveyance notwithstanding was obligatory. What then were the true and whole considerations *hinc inde* for the conveyance—what but an onerous obligation on the one side, and an onerous discharge of that obligation on the other? John Ritchie undertook to pay an illusory subfeu-duty and gave his discharge, or must be held to have given his discharge, of his brother's obligation as the real consideration for the feu-right granted to him in 1847. And what was the value of that consideration? Surely just the value of the estate transferred—and the composition due is the illusory feu-duty plus the annual value of the estate as at 1847. As I have said the principle of decision hitherto adopted compels us in my opinion to this conclusion, and we should not be loyally following the precedents set by our predecessors, and the practice which has followed on them, if we did not take this further step, now that the case, long since adumbrated, has occurred. Equity has been appealed to in the interpretation and application to new conditions of the old Act, which give the norm in this matter, and the plea has received effect. But equity entails counter equity, and the latter calls for application here as a condition of the former.

It is said that the true value of the estate at the date of subfeuing might be difficult if not impossible of ascertainment, and that the superior must show what that value was, and cannot prevail unless he does so. It is, however, not capital but only annual value as at 1847 that has to be ascertained, and the parties only differ on this point by some £15 or £16. I do not think that it would be beyond the capacity of the Court to settle that question between them. But at the same time I hold that the *onus* is not on the superior, but on the singular successor who seeks to be recognised as vassal. He is notwithstanding the form which the Act of 1914 imposes on this action *in petitorio*. If he cannot prove the data on which he can obtain equitable relief from the strict statutory claim, he must face the year's rent as at the date of entry.

Since preparing this judgment I have had the advantage of perusing the opinion of my brother Lord Cullen. He has presented most cogent reasons for concluding that by their own act or that of their author the defenders have left themselves no alternative but to pay for their entry a full year's rent. I admit the strict logic of the conclusion to which Lord Cullen has come, and acknowledge the ability with which he has maintained it, and if the equitable exception for which I contend does not receive acceptance I should adopt it in preference to that of the majority of the Consulted Judges. But my own opinion is that which I have expressed. I am not deterred by the consideration that neither party to the case has maintained it. My judgment falls within the conclusions of the summons, and because I cannot find ground for giving the pursuer his full demand I am not driven to refusing him that to which I think him entitled, and instead subscribing to a judgment which I do not approve.

LORD MACKENZIE—The question in this case relates to the amount of the casualty to be redeemed in respect of the lands of Seamill. These do not belong in property to the defenders, who are only mid-superiors thereof. The mid-superiority was created by the feu granted on 5th October 1847 by Dr Francis Ritchie in favour of his brother John Ritchie, which bore that the lands in question were "to be holden of and under me and my heirs and successors in feu-farm, fee, and heritage for ever for payment to us of the sum of twenty shillings in name of feu-duty . . . doubling the said feu-duty at the entry of each heir or singular successor to the said lands as use is of feu-farm." There was no grassum.

It so happens that the defenders in this action represent the granter of the subfeu, but the question raised would have been the same if the defenders had been singular successors who, it might have been after a number of transmissions, had bought the mid-superiority worth £1 a-year. The lands might have been covered with buildings, so that the annual value was a thousand times that of the mid-superiority. The mid-superiors having granted the subfeu could not draw any of the rents from tenants occupying the land, nor (standing the subfeu) could they enter into natural occupation of the land. Nor could they in the present case look forward to making a profit from future compositions, for the entry of singular successors is taxed. The pursuers argue, however, that the entry of singular successors being untaxed in the title which their authors, the over-superiors, granted to the defenders' author, the mid-superior, the measure of the composition payable on entry to the mid-superiority was not £1 but a year's rent of the lands. There is no case in the books in which such a demand has been given effect to.

The measure of the composition payable by a mid-superior is in the case of a feu limited to the subfeu-duty, and that because it constitutes the "year's maill as the land is set for the time," as provided by the Act 1469, cap. 36.

There is no question that the right granted in 1847 was one of feu. It was not a blench holding, and it is necessary to keep in view the distinction between infeftments in blench and infeftments in feu which is dealt with in Stair's Institutes, ii, 3, 33 and 34. The distinction depends not on the amount of the reddendo but on the nature of the tenure. Blench rights bear to be "in name of blench-farm" or "if they bear not *si petatur*." An infeftment in feu is accounted

and called an assedation or location in our law. The application of the Act 1469, cap. 36, to feus is dealt with in Stair, iii, 2, 27—"Consideration is also had of feus set by the debtor before the apprising, which while warranted by law, the superior will only get a year's feu-duty for receiving the appriser in the superiority—February 15, 1634, L. Munktoun, Spotis. comprising, Cowan *contra* Mr Elphinstoun—or if there be a subfeu of lands holden feu at any time; but a subaltern blench infeftment cannot make the blench-duty sufficient as a feu-duty, seeing a feu is an heritable location, for melioration of the ground, and is therefore presumed to be the rent at the time of the feu which will not admit a contrary probation." The two cases referred to of *Monktoun* v. *Yester*, 1634, M. 15,020, and *Cowan* v. *The Master of Elphinston*, 1636, M. 15,055, proceed upon the principle that where there is subfeu the over-superior cannot ask for more than the annual value of the estate to which an entry is sought. The mid-superior has no other estate than the feu-duty arising from the mid-superiority.

It is not disclosed in the reports of the cases of *Monktoun* or *Cowan* what the amount of the feu-duty was. There is, so far as the reports bear, no limitation of the principle contained in these cases, viz., that the over-superior should get a composition measured by what he would get out of the lands if he stood in the mid-superior's shoes during the year of entry. The principle is founded on the nature of the contract of subfeu, not upon the amount of the subfeu-duty. It is said, however, in the present case that the principle laid down in these two cases does not apply when the feu-duty is elusory. The decision in *Cockburn Ross* v. *Heriot's Hospital*, June 6, 1815, F.C., 2 Bligh 707, 6 Paton 640, 2 Ross, L.C. 193, is cited as authority for this. The rubric in that case is this—"When a vassal subfeus his possession for its full adequate value at the time it is only a year's subfeu-duty, not a year's rent, which he is bound to pay his superior as a composition for an entry to a singular successor." The interlocutor of Lord Meadowbank of 12th November 1813 shows that the rubric is correct as to the amount of the feu-duty, but upon the general question of the effect of a subfeu reference may be made to the note issued with his interlocutor. His Lordship says, after pointing out that a composition is not a feudal casualty but a statutory payment for completing an alienation, and must be interpreted accordingly—"In a proper feudal casualty the superior is not affected by what he has not consented to, but can it be believed or argued that in order to obtain an entry to an estate of £400 per annum the statute meant to authorise a payment of £4000 to be exacted by a superior, or can it be believed that ever the country has so understood the statute and submitted to it without ever a question"? When the case came to the Inner House Lord Meadowbank delivered an opinion protesting against the view of Lord Bannatyne, who had just delivered an opinion to the effect that if a person subfeued for building the over-superior was not limited to the subfeu-duty when a composition came to be fixed if he had not given his consent to the subfeu. Lord Meadowbank refers to the laws of other countries, according to which the property of the vassal was alienable, a census only or species of fine, sometimes only of nominal amount, being left to the superior. Lord Glenlee in his opinion read from the manuscript book of Notes on Stair's Institutes, now known to have been written by Lord Elchies, the passage which discusses this question—"In this subject of compositions due by comprisers or adjudgers there is a question not noticed by our author, and which I think is not very clear, viz., where the immediate vassal has subfeued his lands for perhaps a small feu-duty, and the superiority is afterwards comprised, whether the compriser must pay a year's real rent value of the lands or only a year's feu-duty, there being no more payable to his debtor out of them." And considering both sides of the question the annotator adds in parenthesis—"Since writing these the point is decided, about 16th July 1725, *Countess of Forfar* against *Creditors of Ormiston* (N.R.) and the adjudger found only liable for the feu-duty. There was nothing new in the reasoning on either side." The importance of the decision in the *Countess of Forfar* is brought out by studying the Session Papers (Arniston Collection, vol. xviii), where the reclaiming petition, signed Ro. Dundas, is to be found. One thing appears clear, that the case counsel was arguing was not one in which the subfeu-duty was a "competent avail." If it had been the case of *Monktoun*, decided ninety years earlier, would have been tabled, and that would have been an end of it. The argument put forward by counsel for the reclaimer was that the decision in *Monktoun* was not against him and he puts his point thus—"As to the decision that has been taken notice of by the adjudger in this case, viz., that of *Monktoun*, where Lord Yester observed by Drury, 'tis certainly not at all material, because there the question was anent the feu of a wardholding, constitute during the period that such feus were allowed, but then allowed under the quality of being without diminution of the rental, so that the feu-duty was the true avail and rent of the land at the time, and the law, by not allowing feus of wardslands to be set except for a competent avail, secured the interest of the superior as to his casualties." It is legitimate to infer from this that the subfeu in the *Countess of Forfar's* case was for less than a competent avail. If so, it decided the general question that is raised here.

It is clear that the learned counsel who signed the reclaiming petition in 1725 so regarded the question in the case. This appears from the following extracts—"I must beg a review of this interlocutor, and that a case of so general concern may be thoroughly considered, for if this interlocutor be the rule there is an end to that casualty of superiority, viz., the entry from singular successors, which nowadays is the

greatest advantage arising from the superiority." The reclaiming petition then urges that if an adverse view to the argument submitted is taken, then "the vassal may alienate and subfeu an estate of £1000 per annum for a feu-duty of 6d., and then the very person that hath acquired the subfeu may adjudge the superiority of the subfeu from the vassal, and the paramount superior shall be obliged to receive that adjudger for payment of 6d. If this hold, then every man that has a mind to alienate his estate will easily save the year's rent due to the superior; he will first subfeu his land to a trustee of the purchasers, then he will dispone the superiority to the purchaser or grant a bond upon which that purchaser may adjudge it. The superior must receive that adjudger or disponee upon payment of the 6d. feu-duty, and then the subfeuar, who was the trustee, resigns in the purchaser's hands *ad perpetuam remanentiam*. It is impossible to avoid this if your Lordship's interlocutor be the rule, and I might suggest several other methods by which a superior's right might be eluded if this rule take place." In conclusion, the Court was asked "to reconsider the case, which is of so universal concern, and that superiors may not be entirely defrauded of their casualties, to find that an adjudger or singular successor claiming an entry must pay a year's rent of the lands according to such reasonable modification as your Lordships shall think fit to make." Unless the learned counsel was mistaken in 1725 the general question was then raised and decided against the superior.

It is, in the opinion of the Lord Justice-Clerk (Boyle), in *Cockburn Ross* that the passage occurs upon which the pursuers' argument here must be based. It is to the following effect—"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." If this passage is to be read as meaning that unless the feu-duty is equivalent to the full value of the land when the subfeu was granted, then the subfeu has to be disregarded when an entry is sought to the mid-superiority; it is difficult to reconcile this view with what is stated in Stair, iii, 2, 27. If the subfeu-duty is not to rule unless it is full, then every subfeu would be examinable, and the position of the mid-superior would depend upon the view the Court of Session might take of the value of subjects feued out, it might be a hundred years before. This point did not need to be, and was not, argued in *Cockburn Ross*, and any dictum upon it was obiter. If, however, the expression "elusory feu-duty" is confined to the case where the interest of the superior is diminished by taking grassums or a price, then the opinion of the Lord Justice-Clerk is consistent with Stair, and when there is no other consideration for the grant than feu-duty, then it will be "presumed to be the rent at the time of the feu, which will not admit a contrary probation." The underlying idea in the opinion of the Lord Justice-Clerk is that the over-superior shall not be defrauded by the granter of the subfeu taking a grassum, and this consideration bulks very largely in any passage where the matter is dealt with. The protection necessary to be given to the over-superior was considered in *Campbell* v. *Westenra*, 1832, 10 S. 734, 2 Ross, L.C. 1206, where in addition to the feu-duty grassums had been paid. The method adopted was to treat the grassums as capitalised feu-duty and to give the over-superior as composition not only the subfeu-duty but also interest upon the grassums. To this judgment both Lord Justice-Clerk Boyle and Lord Glenlee, who had taken part in *Cockburn Ross*, were parties. The ground upon which this can alone be justified is that the grassums as well as the feu-duty formed part of the consideration for the grant. Where, however, the whole consideration for the subfeu is the subfeu-duty, and there is no further payment, then there is nothing more that the over-superior can get. It may be that the inducing cause of the subfeu is love, favour, and affection, but the over-superior cannot turn this into money. The terms of the settlement of Francis Caldwell Ritchie of 26th November 1833 do not seem to me to affect the question, for it would have been just the same if the testator himself had granted the subfeu.

The true principle is stated in *Heriot's Trust* v. *Paton's Trustees*, 1912 S.C. 1123, 49 S.L.R. 852, by the Lord President Dunedin (at p. 1135)—"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?" The only answer the over-superior can suggest is that if he has to be content with the subfeu-duty he is thereby defrauded. The comment upon that, which in my opinion is effective, is that what has defrauded him, to use his own language, is the power to subfeu without his consent. There is no question that the subfeu is binding on singular successors of the granter, and therefore such a case as *Alison* v. *Ritchie*, 1730 M. 15196, where it was held that a tack for 2400 years at an elusory rent was not binding on singular successors has no application. In the *Heriot Trust* case the Lord President says that the whole secret lies in the idea that the superior should get what is equivalent to an escheat of the vassal's property for a year. This is the view also taken in *Cockburn Ross* by Lord Glenlee. Now, as is stated by Stair, ii, 10, 66—"The vassal's liferent escheat gives the superior no more than the vassal himself had the time of his denunciation. . . . In feus, so far as is allowed by law, the vassal's

liferent will reach no more than the feu-duties of feus set by the vassal before his denunciation."

There remains the case of *Belhaven*, 1903, 5 F. (H.L.) 13, 40 S.L.R. 607, 2 F. 1218, 37 S.L.R. 990, in which there are *obiter dicta* in favour of holding closely to the words of the Act of 1469. In my opinion the present case is one to which the language of the old statute directly applies. It is only if the over-superiors are allowed to add words to the Act, which they have no warrant from any decision for doing, that they could succeed. In my opinion they are not entitled to do so, and consequently fail in the action.

If the foregoing view is not sound the only alternative in my opinion would be to give the over-superior a year's rent. There either is a subfeu or there is not. If there is not, then the whole matter is cast loose and the case would be in the same position as that of *Aitchison* v. *Hobkirk*, 1775, M. 15,060. I cannot regard the cases of *Heriot's Trust* or *Campbell* v. *Westenra* as giving the over-superior anything more than what was regarded as the equivalent of the consideration stipulated in the contract of subfeu. The Court did not disregard the contract, but in each of these cases applied its terms to existing circumstances. In the present case the contention of the pursuers is that as regards the present question the contract should be disregarded altogether. The year 1847 is of no consequence as regards the feudal relation of parties unless it be held that in that year a valid contract of subfeu was entered into. If it was, then it should receive effect. If not, then the fact that the lands had in that year an agricultural value of so much more than the subfeu-duty appears in my judgment to have no relevancy to the question what composition should be paid for the year of entry. If the feu be disregarded then the rule to be applied is that laid down by Lord Curriehill in *Blantyre* v. *Dunn*, 1858, 20 D. 1188, quoted with approval by the Lord President in *Stewart* v. *Bulloch*, 1881, 8 R. 381, at p. 384, 18 S.L.R. 292. "According to the established construction of this enactment, the measure of the composition payable by such an entering vassal is the rent payable to him by his tenant in the lands at the time of the entry, if they be then set in lease to a tenant, or the sum for which they might then be let if they are in the possession of the vassal himself." It may be noted that in *Blantyre* v. *Dunn* the point there raised with reference to a subfeu for an elusory duty was not brought to judgment, though the Lord Ordinary indicated an opinion that it should be disregarded.

For the reasons above stated I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD SKERRINGTON—Most persons at the present day would agree with Lord Kames that it was something of a "fatality" that subject-superiors were ever permitted to suppose that they had a right to prevent the voluntary transfer of heritable property—Stat. Law, 2nd ed., p. 447. One might go a step further and regret that it was thought necessary by the framers of the Act 1469, cap. 36, to compensate such superiors on the footing that they had a right to obstruct the process of the King's Courts by refusing to infeft a creditor-appriser. It was still more regrettable that the authors of the Act 1669, cap. 18, went out of their way to compensate superiors for having to receive adjudgers though it had been decided thirty years before that a subject-superior was under a legal duty to obey a decree of adjudication and must do so gratuitously—*Grier* v. *Closeburn*, 1637, M. 15,042, 1 Br. Sup. 635. The final fatality was the abandonment by the Supreme Court of the "latitude" which according to Stair (ii, 4, 32) it had always taken, and according to Erskine it still "frequently" exercised of modifying the amount of the year's rent "*ex æquitate* far below its true worth according to circumstances" (ii, 12, 24). In those days what the creditor had to pay to the superior for his infeftment was called "a year's rent or the Lords' modification"—Dallas, Part I, p. 85. In a case not unlike the present, though distinguishable upon the ground that the subfeu was invalid, the Court decided in favour of the superior, but told him that the modification would be "very moderate in respect of the compriser's small benefit"—*Almond* v. *Hope*, 1639, M. 15,056. At the time of Erskine's death in 1768 this excellent and straightforward method of restraining "the rapacity of superiors" had fallen into abeyance, and was described as a "using of liberties with the statute"—*Aitchison* v. *Hopkirk*, 1775, 2 Hailes 612, 5 Br. Sup. 613, M. 15,060, 7 F.C. 29, 2 Ross, L.C. 183. From that time the Court has been constantly urged to exercise under the guise of interpretation its discarded power of modification with the object of mitigating if possible the unjust and injurious consequences which the Acts of 1469 and 1669 if applied literally would lead to where land had been developed for building purposes. In *Aitchison's* case this plea was resisted; in *Campbell* v. *Westenra*, 1832, 10 S. 734, 2 Ross, L.C. 1206, it was successful. In the former the judges were obviously startled to learn that an attempt was being made to tax a feuar upon improvements made upon land which was unimproved when given off by the superior. They accordingly ordered an inquiry into the practice, but the result was not favourable to the contention that the word "land" as used in the statutes should be construed so as to exclude buildings erected by the feuar. Judgment accordingly went in favour of the superior. The question was again raised and again decided in the same way in *Anderson* v. *Marshall*, 1824, 3 S. 236. Lord Monboddo's observations in the earlier case have a direct bearing upon the so-called *via media* which has been suggested by some of their Lordships as the true solution of the present controversy, although it does not commend itself to either of the litigants. "It is impossible," he said, "to go back to examine the original value of the subject 100 or 200 years

ago. Were I sitting here as a legislator I might listen to many of the arguments urged by the feuars; *here* I must say what *is* law, not what *ought* to be law." A misunderstanding of a note by Sir Ilay Campbell (2 Bell's L.C. 188) has given rise to the idea that the important case of *Aitchison* decided a point which was not in dispute, and which probably had been settled law from an early period, viz., that a proprietor cannot escape from paying composition by keeping his land in his own hands instead of "setting" it to a tenant or feuar.

Though there is not much to be said in favour of the superior's demand for a year's rent either upon the score of equity or of public policy, it is none the less a statutory claim created by the Acts of 1469 and 1669, and it is our duty to interpret these Acts fairly and reasonably. In my judgment it is an unfair and an unreasonable construction to hold that they conferred upon the landowner a plenary power to fix, according to his own absolute discretion, the amount of a burden which, though falling upon the creditor in the first instance, must obviously, as one of the clauses of the earlier Act indicates, fall ultimately upon the landowner himself. No one doubts that the superior must be content to accept for his composition a year's rent as the landowner himself has chosen to fix that rent according to his own ideas of estate management however foolish or eccentric. The landowner owes no duty to the superior in this matter. On the other hand, if the rent or return from the property as fixed by the landowner was a term of a mixed contract of sale and lease or was a reservation from a deed of gift, it seems to me too clear for argument (apart of course from authority to the contrary) that the statutes cannot have intended the superior to be bound to accept such an assessment of the rental. Though the Act of 1469 is elliptically expressed, it plainly did not intend to make the superior's right conditional upon the landowner having let his property to a tenant. Accordingly the true statutory standard was the rental, though in the application of that standard the leases would in ordinary circumstances be conclusive if the land happened to be under lease. It does not in the least follow that a lease which formed part of a collateral contract or transaction, and which fixed a rent without any regard to the rental must necessarily be binding upon the superior, even though it would be binding both upon the granter and his heirs, and also upon a singular successor in virtue of the Act 1449, cap. 18. It would not generally be difficult to decide whether a particular lease (including a location by way of feu) did or did not constitute a "setting" of the land for a "maill" within the meaning of the Act 1469, cap. 66. The question would usually settle itself, the whole burden of proof being upon the superior, and every presumption being in favour of the document. In a case like the present, or like *Campbell* v. *Westenra*, it is easy for the superior to establish that the stipulated rent was not intended by the lessor to represent the rental according to any theory of estate management however unusual, but in ordinary circumstances it would be very difficult for him to do so. Definitions are dangerous, but one thing is not doubtful, viz., that the inadequacy of the return at the time of the grant and the landowner's motives in making it are not conclusive, or indeed significant, except as items of evidence in a proof for the purpose of showing that the stipulated return was a purely arbitrary and subjective figure. The right which the Acts conferred upon superiors was undoubtedly liable to have its value diminished to some extent by the will of the landowner, but it remains to be decided that the statutory right was not at the same time conditioned by other circumstances of an objective character and beyond his control.

The majority of the Court have come to the conclusion that except in cases similar to *Campbell* v. *Westenra* the superior's right must be measured by the return which the vassal is entitled to receive from the property at the date of his entry irrespective altogether of the nature and object of the transaction by which that return was fixed, and even, as I understand, though it is a merely nominal return such as a peppercorn or a penny Scots. I avoid the terms "elusory" and "illusory," as they have been used in various senses. On the other hand we are unanimous, I understand, in thinking that *Campbell's* case ought to be followed wherever the circumstances are substantially the same. I hold that view not because I consider it a good decision in point of law, nor yet a successful attempt at judicial legislation, but because it has been accepted as law and acted upon for the better part of a century both by lawyers and by the public. In such cases it is less important that the law should be just and wise than that it should be clearly ascertained and absolutely settled. I accordingly respectfully think that it was a mistake to overrule *Campbell's* case, as was done in 1904, by a decision which has been itself overruled. At the same time I regret that the question which we now have to determine was not decided one way or the other in the year 1832. If the opinion of the majority of the present Court is good law it ought to have been laid down eighty years ago. It would have led to the abolition of compositions without compensation to superiors. A judgment to the opposite effect on the other hand would have necessitated immediate legislation upon the lines probably of the Act of 1914. The actual judgment which was delivered in *Campbell's* case, however well intentioned, gave a new lease of life to compositions. The decision in the case of *Heriot's Trust* v. *Paton's Trustees*, 1912 S.C. 1123, 49 S.L.R. 852, was the necessary and legitimate sequel of *Campbell's* case.

Having now stated what appears to me to be the natural interpretation of the statutes (apart from authority and practice) I should in ordinary course have gone on to answer any argument of a similar character which had been adduced in favour of a different construction. I have not, however, been able to discover any such arguments in the

opinions of those of their Lordships who consider that the superior's composition in the present case is limited to £1. It is true that importance is attached to the fact that the transaction by which the annual return was fixed at that figure was lawful and within the power of the landowner, but that is merely another way of stating the very proposition which has to be established, viz., that the statutes intended to make the legal powers of the landowner the measure of the superior's rights.

The opinion of the majority appears to me to rest entirely upon an interpretation of the authorities with which I am unable to concur. The whole question has been so fully and so satisfactorily dealt with by Lord Cullen from this point of view that I do not think it necessary to add more than a few observations in regard to the cases which are thought to decide that the stipulated return is necessarily conclusive against the superior. *Monktoun* v. *Yester*, 1634, M. 15,020, cannot have been properly argued on behalf of the adjudger (also erroneously called an "appriser") or he would have escaped liability altogether, adjudgers not being bound to pay the year's rent before the Act 1669, cap. 18. The decision, however, was one on relevancy, and was otherwise right enough so far as it went. The adjudger's averment as to the existence of the subfeu was properly held relevant, and the superior's reply as to the subfeu "being done without his consent and so to his prejudice" was equally properly not "respected" as it would have been had the circumstances been the same as in *Almond* v. *Hope*. I cannot understand how *Monktoun's* case can be represented as a judgment upon a question which was not raised and not argued, viz., whether it would have been relevant for the superior to allege that the subfeu-duty was either a nominal sum or an arbitrary sum which had been fixed without regard to the rental. The case of *Cowan* v. *Elphinston*, 1636, M. 15,055, 202 (assuming Spottiswood's report to be the correct one), was equally well decided and equally irrelevant to the present controversy. It decided nothing except that the subfeu-duty was the rent, and that the superior must be content with it, as of course he must if he can adduce no good objection to it. Stair's opinion on the legal question, and also upon the import of these two cases, is quite clear. He regarded feus as long leases granted for the purpose of improving the ground (ii, 3, 34, iii, 2, 27). When he said (in the passage last cited) that the feu-duty was "presumed to be the rent at the time of the feu which will not admit a contrary probation," I do not think that he intended to lay down an arbitrary rule of evidence but merely a rule of commonsense and relevancy, viz., that in such cases it would be useless to prove that a larger return could have been obtained if the property had been let on a short lease instead of on a perpetual feu. It would be an insult to attribute to Stair the notion that a penny Scots *si petatur tantum* in a blench-holding was not a rent within the meaning of the Acts, but that the law would be the other way if these three words were omitted and the grant were called a feu. His citation of *Monktoun* and *Cowan* shows by the context that in those cases the subfeu-duty was regarded as the fair annual value of the property at the date of the subfeu in the estimation of the persons best qualified to judge, viz., the granter and grantee of the right. As regards the unreported case of the *Countess of Forfar* v. *Creditors of Ormiston* I do not attach any weight to the reclaiming petition. It is a favourite device of counsel to point out the far-reaching and dangerous nature of the consequences which will result from the judgment under appeal as they choose to represent that judgment. The conclusive answer, however, to the whole line of argument is that it proves too much. If the decisions in question had been generally accepted by judges, by legal writers, and by practising lawyers as meaning what their Lordships believe them to mean, all difficulty and doubt would have been at an end two centuries ago, and the Act of 1669 would have been as harmless to landowners as it was worthless to superiors. The law would have been conclusively settled that the superior must be content with the actual return, and that it is irrelevant to inquire how that return came to be fixed at one figure rather than at any other. It is, however, notorious that a different opinion can be and has been held as to the import and effect of these three decisions, and that they have not been in fact regarded as settling the law in favour of the opinion of the majority. That is conclusively proved by the fact that when the very point arose, first in *Anderson* v. *Marshall* in 1824 and then in *Campbell* v. *Westenra* in 1832, the vassal did not venture to argue that the superior must be content with the subfeu-duties, which though quite inadequate were certainly not merely nominal and equivalent to zero. Granting for the sake of argument that the true significance and effect of these three old cases has now been discovered, I have yet to learn that decisions become authoritative merely because they are ancient and obscure. In the absence of any authoritative precedent or uniform practice clearly determining the present question our duty is to construe the statutes according to their natural meaning.

I have already indicated my opinion of the *via media* which an important minority considers to be the proper way out of the difficulty. It is said to be the legitimate offspring of the decision in *Campbell's* case. Even if the legitimacy were certain it ought I think to be avoided as being in direct conflict with the language of the statutes which it is our duty to interpret.

Subject to the foregoing observations I agree with Lord Cullen both in his reasoning and in the result which he has reached.

The Court adhered.

Counsel for the Pursuers—Chree, K.C.—A. M. Mackay. Agents—M. M'Gregor & Company, W.S.

Counsel for the Defenders — Macphail, K.C.—A. M. Hamilton. Agents—Robson & M'Lean, W.S.

Tuesday, February 19.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

MACBEAN *v.* WEST END CLOTHIERS COMPANY, LIMITED.

Process—Expenses—Caution for Expenses — Restriction of Amount — Defender in Liquidation—Extension of Time—Limitation of Caution.

A receiver and manager was appointed by the English Courts to a limited company registered in London and carrying on business in Scotland. A petitory action having been brought against the company the receiver and manager lodged answers. The pursuer pled that those answers were unauthorised, which plea was sustained by the Lord Ordinary. The defenders reclaimed and amended the record by adding averments to the effect that by the law of England the receiver's action in lodging answers had been validated, which averments rendered necessary a case to ascertain the English law. The Court, on the motion of the pursuer, *ordained* the defenders to find caution for the expenses of the cause by 15th February, and on 19th February, on the motion of the defenders, extended the time for finding caution to 5th March and limited the amount thereof to £300, reserving to the pursuer the right to apply to the Court at any future stage of the process for additional caution.

Duncan Alexander MacBean, *pursuer*, brought an action against the West End Clothiers Company, Limited, having their registered address in London and carrying on business at 3 North Bridge, Edinburgh, *defenders*, concluding for decree for £179, 8s. 4d., £20, 11s. 4d., and £353, 18s. 11d. with interest, which sums the pursuer alleged the defenders owed to Charles Cole Pitcher, formerly chairman and managing director of the defenders, who had assigned his rights against the defenders to the pursuer.

Defences were lodged for the defenders by a receiver and manager appointed by the English Courts, who averred that his powers superseded the powers of the directors.

The pursuer denied the receiver's authority to defend the action. He *pleaded, inter alia*—"2. There being no defences lodged by or on behalf of the company, decree should be granted as concluded for."

On 19th June 1917 the Lord Ordinary (ORMIDALE) sustained the second plea-in-law for the pursuer.

The defenders reclaimed and amended the record by adding averments to the effect that by English law the receiver's action in lodging defences had been validated. Those averments rendered necessary a case for the ascertainment of the English law under the British Law Ascertainment Act 1859 (22 and 23 Vict. cap. 63).

On 5th February 1918 the Court recalled the interlocutor of the Lord Ordinary, and, on the motion of the pursuer, ordained the defenders to find caution for the expenses of the cause by the 15th February.

Thereafter the defenders moved that the time for finding caution should be extended and the amount limited. They referred to *Harvey* v. *Furquhar*, 1870, 8 Macph. 971.

On 19th February 1918 the Court extended the time for finding caution till 5th March 1918, and limited the amount thereof to £300, reserving to the pursuer the right to apply to the Court at any further stage of the process for additional caution, and to the defenders their answers thereto.

Counsel for the Pursuer—Constable, K.C. —Greenhill. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for the Defenders—Blackburn, K.C. — Leadbetter. Agent—Donald Mackenzie, S.S.C.

HOUSE OF LORDS.

Friday, May 3, 1918.

(Before the Lord Chancellor (Finlay), Viscount Haldane, and Lord Shaw.)

GORDON'S EXECUTORS *v.* GORDON.

Contract—Constitution of Contract—Writing.

Where there are communings with a view to an agreement, it is a question of the intention of parties whether a valid and effectual agreement has been made requiring no formal instrument though such formal instrument is being prepared, or whether there is to be no valid and effectual agreement until the formal instrument is completed. *Circumstances* in which *held* a formal completed instrument was required.

Samuel Hunter Gordon, and two others, a majority and quorum of the executors of the late John Gordon, farmer, Cullisse, Nigg, in the county of Ross and Cromarty, *complainers*, brought a note of suspension and interdict against Alexander Paterson Gordon, farmer, Arabella, Nigg, *respondent*.

The *prayer* was—"That the complainers are under the necessity of applying to your Lordships for suspension and interdict against the said respondent, as will appear to your Lordships from the annexed statement of facts and note of plea-in-law. That the complainers consider that in the whole circumstances of the case they are entitled to have this note passed and interdict granted without caution or consignation. May it therefore please your Lordships to suspend the proceedings complained of and to interdict, prohibit, and discharge the said respondent from selling, disposing of, or intromitting with the stock, crop, implements of husbandry and plenishing on the said farm of Cullisse, and the furniture and plenishing in the dwelling-house thereon, and meantime to grant interim interdict or to do otherwise in the premises as to your Lordships shall seem proper."