Bank of Victoria has been successfully repudiated, and the funds have in effect been replaced by the defenders, it seems to me that no claim can lie against them for the £80. The case is not one of trustees making a profit by the execution of their trust, but of trustees making a profit upon a transaction which in legal estimation and effect was their own, because it was not within their trust powers. Under these circumstances I think that there is no ground for the claim for the bonus of £80.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Sustain said reclaiming-note so far as relating to the trust funds laid out in the purchase of shares of the British Canadian Lumbering and Timber Company, Limited: Recal said interlocutor so far as relating thereto: Find, declare, and decern against the defenders as trustees and as individuals, conjunctly and severally, in terms of the declaratory conclusions of the summons *quoad* the investments made in the said British Canadian Lumbering and Timber Company, Limited: Decern and ordain the defenders William John Menzies and John Henry Robertson as individuals, conjunctly and severally, to make payment to themselves as trustees libelled, and to produce receipts therefor in process, of (1) the sum of £555, 12s. 6d., with interest thereon at the rate of three pounds per centum per annum from 11th March 1881 till payment; and (2) the sum of £485, 0s. 6d., with interest thereon at the said rate from 18th July 1881 till payment: Under deduction (1) of such sums of dividend as may have been paid to the defenders by the said company and been invested by them on behalf of the pursuer, the said Alexander Henderson, or paid over to him; and (2) of such sums as may have been paid by the defenders or either of them voluntarily, as in place of such dividends to the said pursuer or his family: Adhere to said interlocutor so far as regards the three other investments complained of by the pursuer, but which have now been replaced or repaid, and decern: Recal said interlocutor so far as it deals with the question of expenses: Find the defenders as individuals jointly and severally liable to the pursuers in expenses other than those already disposed of by the interlocutor of 19th January 1899."

Counsel for the Pursuers—Lees—Berry. Agents—Hagart & Burn-Murdoch, W.S.

Counsel for the Defenders—Ure, Q.C.—Macphail. Agents — Menzies, Black, & Menzies, W.S.

Thursday, July 19.

FIRST DIVISION.

(With Three Consulted Judges.)

[Lord Pearson, Ordinary.

EARL OF HOME *v.* LORD BELHAVEN.

Superior and Vassal—Composition—Minerals—Method of Ascertaining Amount of Composition from Minerals.

Held (1) (*following Allan's Trustees* v. *Duke of Hamilton*, Jan. 12, 1878, 5 R. 510) that the returns derived from minerals in the course of being worked are to be taken into account in fixing the amount of a composition due to a superior; and (2) (*aff.* judgment of Lord Pearson, Ordinary, the Lord President, Lord Adam, and Lord Moncreiff *dissenting*) that the amount due to the superior in respect of such minerals was not the sum received by the vassal for the year in which the composition became exigible, but was a sum to be arrived at by taking a fair percentage on the capital value of the lordships receivable by the vassal from the minerals which still remained unwrought at that date.

Superior and Vassal—Composition—Minerals—Wayleave—Shaft in Land Held by Vassal of Another Superior.

A superior claimed a composition from an estate in which minerals were being worked, and were brought to the surface through a shaft situated in another part of the estate which belonged to the same vassal, but was held by him of a different superior. *Held* that in estimating the amount of the composition due in respect of the minerals, the vassal was entitled to make a reasonable deduction in respect of the wayleave which the superior would have had to pay had he worked the minerals himself.

Alexander Charles Hamilton, Lord Belhaven and Stenton, was infeft by extract-decree of special service recorded in the Division of the General Register of Sasines applicable to the county of Lanark on 27th July 1894 in certain lands on which the Earl of Home was the superior. These lands included parts of the coalfields known as Knownoble and Glenclelland.

On 1st February 1897 the Earl of Home, the immediate lawful superior in the said lands, brought an action of declarator and for payment of a casualty against Lord Belhaven, in which he claimed one year's rent of the lands in question as a composition. In support of this claim he made the following averment:—"(Cond. 8) The defender is a singular successor in the whole lands described in the summons, and the casualty of a year's rent thereof became due to the pursuer as superior on the 27th day of July 1894, being the date of the infeftment of the defender in the whole of the said lands described in the summons, at which date the said defender became impliedly entered with the pursuer as superior under and in virtue of

the Conveyancing (Scotland) Act 1874. The said casualty is still unpaid and unsatisfied, and the pursuer has repeatedly requested the defender to make payment of a year's rent of the said whole subjects, which is believed to amount to one or other of the following sums or thereby, viz.—(1) £1966, 18s. 4d., (2) £1666, 18s. 4d., or (3) £966, 18s. 4d."

In answer to this averment Lord Belhaven admitted that a casualty of composition was due, but averred that the amount claimed was grossly excessive.

The pursuer pleaded—"(1) A casualty of one year's rent of the whole lands described in the summons having become due to the pursuer as superior thereof by the defender, the pursuer is entitled to decree as concluded for. (2) The pursuer being superior of the lands described in the summons, and not having received any casualty in respect of the infeftment and consequent implied entry of the defender, is entitled to decree as concluded for."

On 20th March 1897 the Lord Ordinary (Pearson) pronounced an interlocutor, by which he appointed the pursuer to lodge a statement of composition by the first box-day, and the defender to answer said statement.

From the statement and answers it appeared that the parties were agreed that a sum of £166, 18s. 4d. was due as composition for the surface rents of the lands in question, but differed as to the amount due in respect of the minerals. The parties were agreed for the purposes of this case as to the amount of coal still remaining unworked in the lands as at 1894. Upon the basis of the number of tons so fixed by agreement of parties the total amount which the defender would receive in lordships or otherwise therefrom was £5540, 8s.

The Earl of Home made the following alternative claims:—"1. As regards the Glenclelland minerals held of him—(1) A sum equal to the average annual lordships received over a period of seven or ten years, which the pursuer believes is moderately stated at £1320, but in no event to be less than the proportion of the fixed rent applicable to these, viz., £500. (2) A sum equal to the actual lordships received for the year from Whitsunday 1893 to Whitsunday 1894, which the pursuer believes is moderately stated at £800, but in no event to be less than the proportion of the said fixed rent, viz., £500. 2. As regards Knownoble—(1) A sum equal to the average annual lordships received over the period from Whitsunday 1890 to Whitsunday 1894, which the pursuer believes is moderately stated at £539, but in no event to be less than the proportion of the fixed rent applicable thereto, viz., £250. (2) A sum equal to the actual lordships for the year from Whitsunday 1893 to Whitsunday 1894, which the pursuer believes is moderately stated at £700, but in no event to be less than the proportion of the fixed rent applicable thereto, viz., £250."

Lord Belhaven did not admit that the sums above alleged to have been received were correctly stated, but in the view taken by the Court the exact figures are not material. He denied that the Earl of Home was entitled to either of the alternative claims made by him, and maintained that the fair annual value of the minerals at the date of his entry must be ascertained by capitalising the value as at that date of the lordships receivable by the vassal from the minerals still remaining unworked as at that date, subject to a discount of four per cent. He averred that the result would be a capital sum of £3652, 7s., and that the annual value of the minerals should be arrived at by taking 4 per cent. on that capital sum, and that the composition due amounted therefore to £146, 1s. 10d. From this sum he claimed to be entitled to deduct the landlord's proportion of public and parish burdens for the year to Whitsunday 1895.

In arriving at the capital sum of £3652, 7s., Lord Belhaven deducted wayleave at the rate of 1d. per ton from the lordship to be derived from the Glenclelland colliery, in view of the fact (which was not disputed) that these minerals were raised to the surface by a pit and shafting which were situated in ground held by him of a different superior.

On 20th July 1898 the Lord Ordinary pronounced the following interlocutor—"Finds it is admitted that the sum of £166, 18s. 4d. is due by the defender in name of composition in respect of the surface of the lands libelled: Finds that as regards the minerals the defender is due to the pursuer in name of composition 4 per cent. of the total amount received and to be received by the defender in lordships or otherwise for the coal which remained unexhausted at 27th July 1894, so far as held of the pursuer as superior, the said amount being calculated (1) after deducting the estimated public and parish burdens effeiring to the assumed annual payments on which the calculation is based, and (2) after discounting interest at 4 per cent. per annum from said 27th July 1894 upon the net annual payments, but without any deduction in respect of wayleave for the Glenclelland minerals: Appoints the cause to be enrolled for the application of these findings and for further procedure: Reserves the question of expenses, and grants leave to reclaim."

Opinion.—"The pursuer is superior of the five subjects set forth in the summons; and he sues for a composition of one year's rent of the lands as at 27th July 1894, being the date of the defender's infeftment.

"The parties are agreed as to the sum due in name of composition in respect of the surface rents. But the lands contain minerals in course of being worked, and important questions are raised as to the basis on which composition on the mineral returns is to be calculated.

"It was decided in the case of *Allan's Trustees* v. *Duke of Hamilton* (1878, 5 R. 510) that mineral returns are to be taken into computation in such a question. The decree bears that in estimating the year's rent due to the superior 'the annual value of the minerals in the course of being worked must be included.' This decision was arrived at after a report by Mr Edmund

Baxter, W.S., as to the practice in such cases. He reported that there had not been any practice of such a nature as to assist materially in the solution of the question. The Lord Justice-Clerk, in giving judgment, states the question to be whether the superior's right to one year's rent of the lands 'includes the rents stipulated in a lease of minerals.' He adds—'The record is exceedingly imperfect in its statement in regard to the actual lease in question; but I assume that the amount claimed by the superior represents either fixed rent or sums calculated on output by way of royalty payable under a current lease of minerals in process of being worked. It is not said that there is any danger of the minerals being exhausted, and I shall assume that there is none.'

"The Court did not find it necessary in that case to settle the principle of calculation. It is, however, discussed by two of the Judges, who indicate that regard should be had (1) to the uncertainty and risk which attend mineral workings, and (2) to the question whether the minerals are nearly exhausted. They indicate that the first thing is to ascertain the number of years' purchase which the minerals are fairly worth, and that 4 per cent. or other fair percentage on the capital value so ascertained may be regarded as the constant annual value.

"In that case the minerals had been leased by the proprietors. In *Sivwright* v. *Straiton Estate Company* (1879, 6 R. 1209) the proprietors had recently bought the estate for the purpose of working the minerals themselves, and had so worked them for about two years. A remit was made to an accountant to make up a statement of the annual rent and whole mineral and other profits and returns derivable by the defenders from the subjects. The accountant made up a statement on the basis of the rates adopted by the assessor in making up the valuation roll. Having thus obtained an average return he capitalised it at ten years' purchase, and stated interest on the capital sum at 4 per cent. as the yearly value payable for composition. There being various kinds of mineral in the estate, a remit was then made to a mining engineer to report the number of years' purchase which the respective minerals were fairly worth. He reported that as to some of the minerals fifteen years' purchase should be taken, as to others ten years, and as to others five years. The Court first took an average of three years' returns, and they found ten years' purchase of that to be the sum which 'in the present case it is equitable to adopt as the basis for calculating the casualty.' and that 4 per cent. on the sum so obtained represented the annual value. The superior, while accepting the principle of taking an average of years, objected to his claim being cut down to a percentage on a capitalised sum. But the Court (as the report bears) did not even call for a reply on this part of the case.

"In the case of *Sturrock* v. *Carruthers' Trustees* (1880, 7 R. 799) the minerals were under a lease for five years at a fixed rent of £600 at the time the casualty fell due. They had never been worked at all except to a small extent; but it was not alleged that there was any prospect of their being soon exhausted. The defenders contended that there should be an inquiry into the actual amount of minerals wrought, and that the rule pointed at in the case of *Allan's Trustees* should be applied, notwithstanding the existence and the payment of the fixed rent. It was held that, as the minerals were not being wrought except to a trifling extent, and were not alleged to be exhausted, and as the fixed rent seemed to be a fair average rent, it should be taken as showing the annual value. Lord Ormidale, however, expressed a doubt whether there should not have been a remit to a mining engineer to report the number of years' purchase which the minerals were fairly worth, as in the case of *Allan's Trustees*.

"In the present case the facts are substantially admitted. The minerals are under lease, which stipulates for fixed rent or lordships in the landlord's option. The fixed rent was £1000 a-year from Whitsunday 1892 to Whitsunday 1894, and £750 yearly thereafter until certain specified minerals are exhausted, after which the fixed rent is to be £500 for the remainder of the lease, which is stated to be for twenty-one years from Whitsunday 1892, with breaks in the tenant's favour at Whitsunday 1894 and every three years thereafter. The peculiarity of the present case is, that in the year when the casualty became due (which I take to be the year ending Whitsunday 1895) the minerals were rapidly approaching exhaustion; and the parties are agreed (subject to certain reserved questions which I will deal with presently) that the total amount which the defender will receive from the subjects in lordships or otherwise for unexhausted coal as at 1894 is £5540, 8s.

"The defender's contention is that, subject to certain deductions, that sum is to be taken as the basis of the calculation, and that four per cent. upon it must be taken as the annual value for composition. This would amount, on the defender's figures, to £146, 1s. 10d., subject to deduction for public burdens.

"The pursuer, on the other hand, claims a much larger sum. He claims alternatively on the basis (1) of averaging the lordships, (2) of the actual lordships received for the year of entry, or (3) of the fixed rents. The first of these yields a sum of £1859 for the minerals, the second £1500, and the third £750.

"If the question had been entirely open, I should have thought that once it was settled that mineral returns were not to be left out of the computation, the pursuer's first alternative furnished the true measure of the 'year's maill as the land is set for the time,' in all cases where the minerals are under lease, and that in any view the fixed rent would furnish the minimum claim. But the tendency of judicial opinion has been distinctly the other way. In the

case of *Sturrock*, where the fixed rent was taken as the basis, the decision proceeded on the ground that the minerals were not being wrought except to a trifling extent, and that the minerals were not alleged to be approaching exhaustion. I presume that the words of the Lord Justice-Clerk (that 'under a lease it is only reasonable to take the rent as showing what the value is') must be taken in connection with those facts in the case. In declining to adopt the alternative of fixing a number of years' purchase so as to ascertain the value of the minerals, Lord Gifford expressly says—'No doubt, when mineral rent is paid by lordships, and when the minerals are approaching exhaustion, this may require to be done.' And in the case of *Allan's Trustees* it was plainly indicated that, where minerals were nearly exhausted it was specially inequitable to take the return for the year, or for an average of years, as the composition, and that the subject must be capitalised and a percentage taken.

"But indeed the present case appears to me to be ruled by the case of *Sivwright*, unless its application is excluded by the speciality that there the minerals were not under lease but were worked by the vassal. If this distinction were to receive effect it would come to this, that where there is no lease the process suggested in *Allan's Trustees* and adopted in *Sivwright* would be followed; but where the minerals are let, the actual return, possibly averaged over a few years, would be stated as the composition. I think it would be found in practice that this would result in a much higher scale of composition where the minerals are let than where they are worked by the vassal. The fact is that the purpose in both cases is to ascertain how much of the actual or assumed return is truly annual rent or value; and where the minerals are approaching exhaustion it becomes especially clear that the annual return, whether actual or assumed, includes more than can be regarded as a constant value. The decree in *Sivwright* proceeded, it is true, upon equitable considerations; but if the result there was equitable, I think the same process should yield a similar result here. The difference is, that as the minerals are near exhaustion, and the parties are agreed on their value, the usual inquiry is superseded,

"I therefore think that the defender's contention is substantially correct, and in conformity with the principles which have been laid down in the previous cases. I now revert to certain deductions which the defender claims.

"First, he maintains that the Glenclelland lordships, which have been taken into account in fixing the total value of £5540, 8s., should have been abated by one penny per ton in name of way-leave. That mineral field is only partly within the pursuer's superiority; and it happens that the shaft by which the minerals are got is situated outside the superiority lands. The defender says that if the ownership had been divided as the superiority is, the owner of the minerals where the shaft is situated would have been in a position to exact a payment for way-leave from the other mineral owner. When stated generally, this is undeniable; but I do not think it would be safe to isolate that circumstance and use it to lessen the pursuer's claim. If the facts as to the two fields were fully known, it may well be that there are counterbalancing advantages in working or letting the two as one, which would compensate for any such suggested claim in respect of way-leave.

"The defender further maintains that the money value should be fixed as in 1894-5; and that the assumed yearly output which results in the admitted figure should be subject to rebate of interest, otherwise the 4 per cent. will be calculated on a larger sum than the vassal will really draw. In this I think the defender is right. I assume that the figures have not been so discounted already, and that the words 'as at 1894' in statement 9 refer to the quantity of minerals and not to the money calculation.

"Then the defender claims deduction of the landlord's proportion of public and parish burdens for the year to Whitsunday 1895, corresponding to the sum brought out as 4 per cent. of the capital value. I should have thought the proper course of calculation was to deduct the estimated public burdens from the estimated mineral returns for each year of assumed working before bringing out the net value. There does not seem to be a sufficiently close relation between the 4 per cent. and the returns on which the assessments will be paid to render the mode of deduction proposed by the defender a safe or equitable one. I therefore think that the calculation should be re-stated accordingly."

The pursuer reclaimed.

After counsel had been partly heard on the reclaiming-note the Court appointed the case to be heard before seven judges.

Argued for the reclaimer—It was really settled law that minerals in the course of being worked were to be taken into account in fixing a composition. That was definitely decided in *Allan's Trustees* v. *Duke of Hamilton*, Jan. 12, 1878, 5 R. 510, and although that case might be open to review by a Court of Seven Judges, it should not be disturbed, because it proceeded on a very careful examination of the authorities and a report on the practice, and had been regarded by the profession as settling the point. Assuming *Allan's Trustees* to be good law, the question remained how the casualty was to be fixed. The proper criterion was either the amount received from the minerals in the actual year of entry, or an average of the amounts received during the years in which they had been worked. In strict law the former principle was the correct one. Historically the superior was not bound prior to the Act 1469, c. 36, and subsequent statutes, to grant an entry to singular successors at all. He would therefore have then been entitled to the whole produce of the lands, and the measure of his rights at the present day was his original rights minus the restrictions thereon made by statute. The first

restriction was by the Act 1469 cap. 36. It was there provided—"And also the over-lord shall receive the creditour or ony uther byer, tennent till him, payand to the over-lord a zeires maill, as the land is set for the time. And failzieing thereof, that he take the said land till himselfe and undergang the debtes." No doubt that statute contemplated a particular case, which was not the ordinary case of a composition, but the measure established by that statute "a year's maill, as the land is set for the time," had in all the subsequent decisions been regarded as the proper limitation of the superior's rights. In the earliest case—*Magistrates of Inverness* v. *Duff*, Jan. 23, 1771, M. 9300, an average of years was taken, but the point was not considered. The rule of a year's maill was adopted, after a report on the practice, in *Aitchison* v. *Hopkirk*, Feb. 14, 1775, M. 15,060, 2 Ross' Lead. Cas. 183. The following cases were authorities to the same effect:—*Ross* v. *Governors of Heriot's Hospital*, June 6, 1815, F.C., opinion of Lord Bannatyne, p. 407: *Campbell* v. *Westenra*, June 28, 1832, 10 S. 734; *Lord Blantyre* v. *Dunn*, July 1, 1858, 20 D. 1188, *per* Lord Curriehill, at p. 1198; *Stewart* v. *Bulloch*, Jan. 14, 1881, 8 R. 381, where the Lord President Inglis said, p. 383—"It is not disputed that the superior's right to a composition depends entirely on the old statute 1469, c. 36, and what he is entitled to require in the name of composition is "a year's maill as the land is set for the time;" *School Board of Neilston* v. *Graham*, Nov. 16, 1887, 15 R. 44. Later statutes compelling the superior to receive adjudgers (Act 1672, c. 19), and singular successors (20 Geo. II. c. 50, sec. 13) did not expressly provide any measure by which the superior's rights were to be estimated. By the last cited statute he is to receive "such fees or casualties as he is by law entitled to receive"—that is, it is contended, the year's maill provided by the Act 1469, c. 36. The year to be taken was the year of the vassal's entry—*Houstoun* v. *Buchanan*, March 1, 1892, 19 R. 524; Bell's Prin., sec. 790. If, then, the right of the superior depended on the Act 1469, c. 36, it was irrelevant to argue that the result might sometimes appear inequitable. Even if the whole minerals were worked out in the year of entry, the superior was entitled to the whole sum received. Arguments on the supposed injustice of this were really arguments against the inclusion of minerals in estimating composition at all. The principle given effect to by the Lord Ordinary should logically lead to the inclusion of minerals, even if entirely unworked, which had been held not to be law in *M'Laren* v. *Burns*, Feb. 18, 1886, 13 R. 580, opinion of Lord Rutherfurd Clark, p. 585. The question as to how minerals were to be estimated in fixing provisions under the Aberdeen Act had been settled in favour of taking the year of the granter's death—*Wellwood* v. *Wellwood*, July 12, 1848, 10 D. 1480; *Lord Belhaven* v. *Lady Belhaven*, Jan. 23, 1896, 23 R. 423. There the words of the Aberdeen Act, on which the question depended, were "the free yearly rent of the lands, . . . all as the same may happen to be at the death of the grantor." These words were practically identical with those used in the Act 1469, c. 36, "a year's maill as the land is set for the time." Therefore the decision in the case above cited, that the Aberdeen Act provision was to be computed on the actual revenue derived from the minerals in a particular year, was a very strong authority in favour of adopting the same principle in the computation of a composition. The case of *Sivwright* v. *Straiton Estate Co.*, July 8, 1879, 6 R. 1208, on which the Lord Ordinary mainly relied, was wrongly decided. The opposite decision was arrived at in *Sturrock* v. *Carruther's Trustees*, May 21, 1880, 7 R. 799. Any opinions in that case to the effect that if there were not a fixed rent the year's receipts could not be taken, were, together with the decision in *Sivwright*, vitiated by the fact that they overlooked that the question was not what was equitable, but what was the meaning of the words of the Act 1469, c. 36.

Argued for respondent—(1) Minerals should not be taken into account in estimating a casualty. *Allan's Trustees* v. *Duke of Hamilton* (*cit. supra*) could be reviewed by this Court, and was wrongly decided. If the question depended on the Act 1469, cap. 36, it could not be contended that minerals were ever thought of at that date as constituting part of a "year's maill." The Court in *Allan's Trustees* were misled by the false analogy of the cases under the Aberdeen Act, which had no application. In entail questions mineral income must be treated as rent, otherwise the heir would incur a contravention of the entail in working them. That principle was developed in *Wellwood* v. *Wellwood* (*cit. supra*), but it had no application to the question of a composition, in fixing which mineral rent was not really rent at all, but an alienation of part of the estate. (2) Assuming minerals must be taken into account, the Lord Ordinary had arrived at a proper and equitable result. It was not correct to say that the superior's right to a composition rested on the Act 1469, cap. 36. The words of that Act made it clear that its framers had no intention of fixing a composition. The right to a composition rested on practice. In the report of *Aitchison* v. *Hopkirk* in 5 Brown's Supplement, 613, it was stated, "what seemed chiefly to weigh with the Court was the practice." What the superior was entitled to was the fair annual value of the lands. That could only be arrived at, in the case of minerals, on a fair and reasonable consideration of the circumstances, and the Lord Ordinary had taken a reasonable view. That was the course taken in *Sivwright* v. *Straiton Estate Co.*, July 8, 1879, 6 R. 1208, which was a direct authority in the respondent's favour, and in *Hill* v. *Caledonian Railway Company*, Dec. 21, 1877, 5 R. 386, and was the rule recommended by Professor Montgomerie Bell, Lectures on Conveyancing (3rd ed.) p. 1147. It was followed in the analogous case of the conditions on which coal in a glebe

could be worked by a parish minister—*Minister of Newton* v. *The Heritors*, M. App. *voce* Glebe, No. 6. The opinions in *Sturrock* v. *Carruthers' Trustees*, May 21, 1880, 7 R. 799, showed that the Court thought that in the ordinary case they were not tied down to the receipts of the particular year. To the same effect was the opinion of Lord Ormidale in *Allan's Trustees* v. *Duke of Hamilton* (cited *supra*) at p. 519. There was no authority for the proposition that the superior's right to a composition was derived from an original right, modified by statute, to take possession of the lands himself if the vassal parted with them—Ersk. ii. 5, 29, and ii. 12, 24. The cases under the Aberdeen Act, cited by the other side, had no application. They were decisions on the meaning of words occurring in a modern statute, which left no room for equitable considerations. The right to a composition, as was contended, did not depend upon statute at all; even if it did, it depended on a statute so old and so vaguely expressed as to be open to equitable construction.

At advising—

LORD PRESIDENT—The pursuer is superior of the lands described in the summons, and the defender is proprietor of the *dominium utile* of these lands, having taken infeftment, and thus become the entered vassal therein, on 27th July 1894. The present action is directed to recover a composition in respect of the defender's entry to these lands, and the parties are agreed as to the composition for the surface, but they differ as to (1) whether any, and (2) if any, what, composition is payable in respect of the minerals in the lands.

The minerals were at the date of the defender's entry, and they still are, let to a tenant, along with certain other minerals, under lease for twenty-one years from Whitsunday 1892, with breaks in favour of the tenant at Whitsunday 1894 and every three years thereafter. The lease stipulates for payment of a fixed rent of £1000 for each of the two years from Whitsunday 1892 to Whitsunday 1894, of £750 yearly thereafter until certain parts of the minerals are exhausted, and subsequently of £500 yearly for the remainder of its currency. It is also provided by the lease that the lessor shall be entitled to claim in each case certain specified lordships in lieu of the fixed rent.

The pursuer claims in name of composition either (1) the lordships received by the defender for the minerals in the year of his entry, or (2) an average of the lordships received during the previous ten years as regards one portion of the minerals, and an average of the lordships received during the previous four years as regards the other portion, or (3) the fixed rent applicable to the year of the defender's entry. The defender, on the other hand, contends (1) that composition is not claimable at all in respect of the mineral rents or lordships, or (2) that if it is claimable, the proper mode of estimating it is not to take either the fixed rent or the lordships actually received by him, either for the year of entry or for any other period, but to ascertain the capital value as at the date of his entry of his whole interest in the minerals which then remained to be worked, and to allow 4 per cent. upon that capital value as composition. The Lord Ordinary has in effect adopted the latter view.

We have thus to consider two questions—(1) Whether composition is payable at all in respect of mineral rents or lordships, and (2) if it is payable, upon what basis should it be calculated or ascertained.

With reference to both of these questions, it is essential to keep in view the origin and ground of the claim of composition in respect of the entry of a singular successor as vassal. Prior to 1469, only the heir of the investiture under a feu grant was entitled to demand an entry against the will of the superior, but by a series of statutory enactments, apprisers, adjudgers, purchasers at judicial sales, and ultimately all singular successors, became entitled to an entry upon payment of a year's rent of the lands. This payment is now known as composition, and it differs from the proper casualties of superiority in being founded exclusively upon statute. As the language of the statutes is of vital importance, both with reference to the question whether composition is due at all in respect of mineral rents or lordships, and to the question what is the proper measure of it, if it is due, I shall briefly refer to them.

The Act of 1469, c. 36, in favour of apprisers, provided that "the overlord sall receive the creditour or ony uther byer. tennent till him, payand to the overlord a zeires maill, as the land is set for the time." The Act of 1672, c. 19, which substituted adjudications for apprisings, declared that the rights of superiors should remain the same, and the Act of 1681, c. 17, which instituted judicial sale of bankrupts' lands, authorised the issuing of a warrant "for charging the superior to enter the purchaser upon payment of a year's rent." Ordinary purchasers and singular successors obtained power to compel an entry under the Act of 20 Geo. II., c. 50, but by section 13 of that Act it was declared that no superior should be bound to obey a charge to enter "unless the charger at the same time shall pay or tender to him such fees or casualties as he is by law entitled to receive upon the entry of such heir or purchaser." Erskine (Institutes, ii. 7, 7) says that by this "must be meant a year's rent of the lands, for that was the proportion which apprisers were to pay for their entry by the Act of 1469, and which was, from the analogy of that Act, demanded from voluntary purchasers by such superiors as were willing to enter them. The British statute appears to have been enacted merely for the more expeditious completing the titles of purchasers, without the least intention of impairing any of the just rights of superiority." So when by the Transference of Lands Act 1847 (10 and 11 Vict. c. 48), it was enacted that the superior might be compelled to grant an

entry by confirmation, it was, by sec. 6, "provided always that the charger shall at the same time pay or tender to such superior such duties or casualties as he is by law entitled to receive upon the entry of the charger"; and a similar provision again occurs in sec. 97 of the Titles to Land Consolidation (Scotland) Act 1868. Under the whole series of statutes, therefore, a year's maill or rent is the measure of the composition.

The view that the superior's claim to composition rests upon statute alone, has not, so far as I am aware, been seriously questioned, but as it lies at the foundation of the whole question, I may refer to some of the decisions in which it has been judicially recognised. It was so in the case of the *Magistrates of Inverness* v. *Duff and Others*, 1769, M. 15,059, and in the case of *Cockburn Ross* v. *Heriot's Hospital*, June 6, 1815, F.C., in which Lord Bannatyne said, "As to the claim now in question, there is ground to believe that as a fixed composition it was not known till 1469;" and the Lord Justice-Clerk said, "As to the general question, it appears to me to turn upon the interpretation which, according to the feudal and statutory law, your Lordships may think yourselves bound to give to the Act 1469. It is now quite unnecessary to enter into any disquisition as to the point whether the non-entry duty payable upon a singular succession is a proper feudal casualty or not, as it is clearly a right regulated by statute; and it is on a fair interpretation of the Act 1469 that the case ought to be decided by the Court." In *Blantyre* v. *Dunn*, 20 D. 1188, Lord Mackenzie (p. 1192) said, "The right to this exaction" (composition) "is founded on the Acts 1469, c. 37, 1669, c. 18, and 1681, c. 17, by which superiors are bound to enter apprisers, adjudgers, and purchasers at judicial sales on payment of a year's rent." Lord Curriehill (p. 1198) spoke to the same effect, and on p. 1200, Lord Deas said, "The rule of payment as now applicable to a singular succession, where the entry is untaxed, was originally fixed by the statute 1469, c. 36, at a year's rent, 'as the land is set for the time.' If the defender offers a rent which is below the actual value of the lands, the onus lies on him to show that the lands are actually and truly let for rent which he offers to pay." In the case of *Stewart* v. *Bulloch*, 8 R. 381, in which it was decided that the value of unlet shootings must be taken into account in computing a casualty, the Lord President (Inglis) said — "Now it is not disputed that the superior's right to a composition depends entirely on the old statute 1469, chap. 36, and what he is entitled to require in name of composition, is, in the words of the statute, 'a year's maill as the land is set for the time,'" and in the case of the *School Board of Neilston* v. *Graham*, 15 R. 44, where pasture land had been conveyed for building not yet erected, the Court held that the yearly maill of the subjects at the date, as defined by the Act 1469, cap. 36, was their agricultural value.

This being so, the first question is, whether rents or lordships paid under a lease of minerals are "maills" or "rents" of the lands in the sense of the statutes just mentioned, and I am of opinion that they are. It is true that the rents or lordships stipulated to be paid under mineral leases are not in strictness for the use or enjoyment of land or its fruits, but for the right to work and remove a part of the soil. Mineral rents or lordships have, however, long been treated in Scotland as rents for nearly every practical purpose. They are received and dealt with by the owners of land like their other rents; they pass as such under grants of liferents or family provisions where the minerals are being worked at the time of the granter's death, or sometimes, even if they are not then actually worked, if they have been worked shortly before; they are entered in the valuation roll as rents or income from land, and are rated as such to local rates, and they are in like manner so charged with Income Tax—Craig ii, 8, 17—*Wellwood* v. *Wellwood or Clarke*, 10 D. 1480; *Waddell* v. *Waddell*, June 21, 1812, F.C.; *Douglas* v. *Scott and Yorke*, 8 Macph. 360; *Guild's Trustees* v. *Learmonth and Others*, 10 Macph. 911; *Wardlaw* v. *Wardlaw's Trustees*, 2 R. 268; *Baillie's Trustees*, 19 R. 220; *Strain*, 20 R. 1025; and in the recent case of *Greville Nugent* v. *Greville Nugent's Trustees*, November 20, 1899, it was decided in the House of Lords that rents and royalties paid under a mineral lease in respect of mines open at the date of the settlement fell to the liferenter as income, and were not to be accumulated as capital for the benefit of the fiars. It has been held that a tercer was not by virtue of her right of terce entitled to mineral rents, but in the case of *Wellwood* (p. 1489) Lord Fullarton said—"In the case of terce it has been decided that it '(revenue from coal)' is to be excluded, but I have great doubts whether if that question had been raised for the first time in the present day the decision would have been the same;" and Lord Jeffrey indicated similar views, saying —"Terce is an antiquated and in some respects an unreasonable provision; for instance, no terce is payable from burgage lands." Another test very apposite in the present question is, whether the superior would have been entitled to mineral rents or lordships if he had entered into possession of the feu under a declarator of non-entry, or the equivalent proceeding introduced by the Conveyancing Act 1874; and it does not seem to be doubtful that he would have been entitled to the rents or lordships of minerals in so far as actually let, as well as to continue for his own profit, any mineral workings then actually being carried on by the vassal. I therefore think that the decision of the Second Division of the Court in *Allan's Trustees* v. *The Duke of Hamilton*, 5 R. 510, that mineral rents or lordships should be taken into account in ascertaining composition was right.

Assuming, however, that mineral rents or lordships are to be taken into account

in ascertaining the composition due to a superior, the question remains—upon what basis they are to be dealt with for the purposes of that question. If they are "maills" or rents of the lands within the meaning of the statutes already referred to, it appears to me to follow that the actual return in the year, whether lordship or fixed rent, which it is most for the interest of the lessor to claim, and which he does claim and receive from his tenant, should also be the measure of the payment to be made by him (the lessor) to his superior in name of composition. The intention of the legislature in passing the statutes already mentioned seems to have been to require that the stranger vassal should, as the consideration for his entry, make over to the superior the rent or return which he receives from the lands in the year of his entry, and it appears to follow that whatever he receives as and for rent he should pay under the like denomination to his superior as composition, subject to the question of his right to a deduction in respect of landlords' repairs and landlords' taxes to be afterwards considered.

But what the Lord Ordinary has done (apparently contrary to his own opinion as indicated in his Note, and in deference to the decision in *Sivwright* v. *Straiton Estate Co.*, 1879, 6 R. 1209, and to certain dicta in other cases) is something altogether different from ascertaining a maill or rent, either gross or net. He finds that in respect of the minerals the defender is due to the pursuer in name of composition 4 per cent. of the total amount received and to be received by the defender in lordships or otherwise for the coal which remained unexhausted at 27th July 1894, so far as held of the pursuer as superior, the amount being calculated (1) after deducting the estimated public and parish burdens effeiring to the assumed annual payments on which the calculation is based, and (2) after discounting interest at 4 per cent. per annum from 27th July 1894 upon the net annual payments. This is a highly artificial operation, which brings out a sum which was not, and never under any circumstances could have been, paid by the mineral tenant to the defender as the lessor, and which was not, and never could have been, received or enjoyed as a rent by the lessor or by any other person. The theory of the calculation is that the whole future interest of the lessor in the minerals should be capitalised, subject to a rebate of interest, so as to determine the value of the capitalised amount of that interest as at the date of the entry, and that 4 per cent. should be paid as income upon the amount so ascertained. This would have been an intelligible proceeding if the proprietor receiving mineral rents or lordships was bound to treat, or did treat, them as capital, saving and capitalising them, so that instead of having the minerals in specie, he would have the value of them in money, merely spending or enjoying the income accruing from the capitalised sum, but this is a thing which not even an heir of entail is bound to do, or would ever in fact do. If it was only admissible to work minerals under the obligation to capitalise the rents or lordships, so that the value of the minerals to the proprietor should remain settled in perpetuity, it would follow that an heir of entail who worked minerals by himself or by a tenant would, if he did not so settle the rents or lordships, be guilty of a contravention resulting in an irritancy of his right, but heirs of entail, as well as fee-simple proprietors, in fact treat and spend mineral rents or lordships as income. As there is no obligation upon a vassal who owns minerals so to save and capitalise the mineral rents or lordships, it follows that, as the working proceeds, the superior would receive, upon the occasion of each successive entry of a new vassal the 4 per cent. upon a smaller capital sum, and that when the minerals were exhausted he would receive nothing. The result would be that he would never at any time receive anything which would represent a year's maill or rent of the minerals. I understand that in the present case there is every probability that the whole minerals will be exhausted before the entry of another vassal, so that on the occasion of that entry the superior will receive no composition in respect of the minerals — in other words, he will receive, once and no more, a payment of 4 per cent. upon the capitalised value as at the date of his entry of the future mineral rents or lordships, the whole of which as they accrue the vassal will receive and treat as income. If the case depended upon equity, instead of depending, as I think it does, upon statutory enactment, this would, in my judgment, be a highly inequitable result, in so far as the superior is concerned. What, however, appears to me to be a fatal objection to the course proposed by the Lord Ordinary is that such a percentage as would be given to the superior under it would not be in any sense a maill or rent of the lands (including the minerals) for any year, or even for any average of years. The pursuer's counsel referred to the case of the *Minister of Newton* v. *The Heritors*, M., App. *voce* Glebe No. 6, as an authority for capitalising rents and giving only the income to persons having merely a life interest. It was there found that a parish minister might work coal in his glebe on condition that the value and proceeds of the coal should remain under the control and management of the heritors and presbytery for behoof of the minister and his successor, and if this analogy was followed in the present case the defender would have less reason to complain, but, as I have already pointed out, there is here no proposal to capitalise the rents or lordships and retain them, giving only the interest to the successive proprietors, which would result in the payment of composition to the superiors periodically in perpetuity. I may add that if the principle of ascertaining the value of the lessor's interest in minerals still remaining to be worked in an opened field was once admitted, it is difficult to see why the same principle should not be applied to an unopened field.

The Lord Ordinary, however, refers to three cases as supporting the view to which he has given effect, the first being that of *Allan's Trustees* v. *Duke of Hamilton*, 5 R. 510. It is true that in that case two of the Judges indicated opinions that in ascertaining composition regard might be had to the number of years' purchase which the minerals were fairly worth, and that 4 per cent. or other percentage might be taken upon the capital value for the purpose of ascertaining the composition, but there was no decision to this effect In *Sivwright* v. *Straiton Estate Co.*, 6 R. 1209, the Court found that "in the present case it is equitable to adopt as the basis for calculating the casualty a sum equal to ten years' purchase of the average mineral rents payable for three years, and to calculate interest at 4 per cent. on the sum obtained." This, however, is something different from what the Lord Ordinary has done in the present case. The Court there proceeded upon past experience of working—taking the average for three past years, multiplying this by ten and allowing 4 per cent. upon the sum so arrived at. The multiple of ten seems to have represented the number of years for which the minerals would remain workable, and to this extent cognisance was taken of the future. In other words, the Court looked to the past as well as to the future for a standard by which to ascertain the composition, while the Lord Ordinary proceeds upon an estimate of future working alone. In the third case referred to by the Lord Ordinary—*Sturrock* v. *Carruthers' Trustees*, 7 R. 799—the fixed rent was taken, so that it is not an authority for what the Lord Ordinary has done, but for one of the alternative views maintained by the pursuer. The fact that this decision was pronounced by the same Division of the Court within less than a year after *Sivwright* v. *The Straiton Estate Co.* was decided shows that the latter was not understood as having been intended to lay down a general rule applicable to all such cases.

It is, however, to be kept in view that these cases were prior to the very important decision in *Lord Belhaven and Stenton* v. *Dowager Lady Belhaven and Others*, 23 R. 427, in which it was held by a majority of seven Judges that in estimating the provisions which an heir of entail is entitled under sections 1 and 4 of the Aberdeen Act to make for his widow and children, the royalties payable under mineral leases during the year current at the date of the granter's death fell to be taken as part of the "free yearly rent" of the entailed estate irrespective of the fact that the minerals were nearly exhausted. Although the language of the Aberdeen Act is not identical with that of the Act 1469, c. 36, and the other statutes already referred to, it is the same in substance, and the reasoning of the majority of the Judges appears to me to apply to the present case. The words of the Aberdeen Act—"all as the same may happen to be at the death of the grantor"—express more precisely the direction that the rent for the particular year, and not an average, is to be taken, but this seems to be sufficiently done by the words of the Act 1469, c. 36, "a year's maill as the land is set for the time." The decision in *Lord Belhaven's* case, of course, displaces the dicta of some of the Judges in the case of *Wellwood* (which also related to an Aberdeen Act provision) that it might possibly be proper in some cases to take a sum arrived at upon an average of years. As showing that decisions under the Aberdeen Act are authorities in cases like the present arising under the Act of 1469, c. 36, I may refer to the judgment of the Lord President Inglis in the case of *Stewart* v. *Bulloch* already referred to, where he said—"But do the words of the Act 1469 differ in any essential particular from the words of the statute on which these cases were decided? Just let us see what are the words of the Aberdeen Act which were in question in those cases? What the wife of an heir of entail is entitled to have as provision is a liferent out of a certain proportion of the lands and estate, which is described as not to exceed one-third part of the free yearly rent of the said lands and estate where the same shall be let, or of the free yearly value thereof where the same shall not be let. Now, it seems to me that in meaning and effect these words exactly correspond to the words of the Statute 1469 as construed by Lord Curriehill in *Blantyre* v. *Dunn*, and consequently that the decisions on that section of the Aberdeen Act are authorities in the present question."

In support of the view adopted by the Lord Ordinary, reference was made to the practice of giving large deductions in respect of repairs, &c., in ascertaining the composition payable from lands upon which there are houses or other buildings. This practice is no doubt founded upon the decision in the case of *Aitchison* v. *Hopkirk and Others*, 1775, M. 15,060, which related to a question between the proprietors of houses and yards in the town of Airdrie and Mr Aitchison the superior. They were willing to enter with him on payment of the original feu-duty or a double thereof, but this he refused, insisting for a whole year's rent both of the lands and houses, and brought an action of declarator of non-entry against them in this Court. The Court after a hearing in presence, "and upon considering reports relative to the practice, which last chiefly weighed with the Court," found "that the respondent, as superior, is entitled for the entry of singular successors in all cases where such entries are not taxed, to a year's rent of the subject, whether lands or houses, as the same are let, or may be let, at the time, deducting the feu-duty and all public burdens, and likewise all annual burdens imposed on the lands with consent of the superior, with all reasonable annual repairs to houses and other perishable subjects." It is quite reasonable that annual burdens which would form a charge upon the vassal's interest as proprietor, *e.g.*, landlord's taxes and rates, should be

deducted, so as only to give the superior the net income from the lands which the vassal would have had to spend. So it is quite reasonable that in ascertaining the composition the cost of repairs which would naturally be made by a landlord upon houses or other perishable subjects should be deducted, as these repairs are necessary to keep the subjects in a condition to yield the rent; and if the superior entered into possession under a declarator of non-entry, or the equivalent proceeding introduced by the Conveyancing Act 1874, he would in like manner require to incur the same expense in order to maintain the same subjects in a rent earning condition; but there is nothing corresponding to this deduction in the case of minerals let to and worked by a tenant. Where minerals are so let, the cost of sinking, fitting, and maintaining the pits, buildings, and machinery, has to be met by the lessee, and he takes account of all these expenses in fixing the rent or lordship which he can afford to pay to the lessor, after retaining a tenant's profit for himself. The rent paid to the lessor of minerals is thus a clear or net rent, out of which he does not require to pay anything corresponding to the cost of landlord's repairs necessary to keep houses or other perishable subjects in a lettable condition. When a mine is exhausted the tenant takes away his machinery and fittings, and the lessor does not then, any more than during the currency of the lease, incur any expenses corresponding to landlord's repairs on wasting subjects. It, therefore, appears to me, that the view adopted by the Lord Ordinary does not derive any support from the deductions in respect of landlord's rates or landlords repairs, made from gross rental of houses, or other perishable structures, necessary to maintain them in a lettable condition. Nor is there, so far as I can see, any other analogy which would sustain that view.

It was further maintained in support of the Lord Ordinary's judgment that the practice which, it is suggested, must have followed upon the decision in *Sivwright's* case, precludes a recurrence to the actual rent or lordship for the year of entry as the measure of the composition, but there is no evidence of any practice of fixing compositions in accordance with that decision, and it is unlikely that there can have been such practice, seeing that, as I have already pointed out, in the next case which came before the same Division of the Court (*Sturrock* v. *Carruthers' Trustees*) the fixed rent for the year was taken. But even if there had been such a practice, I do not think that it could have been so uniform or long continued as to make a rule which the Court would be bound or entitled to enforce. It is not said that any bargains or arrangements have been made in reliance upon it. It may well be that such cases have been settled by compromises of various kinds, but this would not establish a rule which could have the force of law. Further, as such a question could only arise where a mineral field is approaching exhaustion, I greatly doubt whether it can have often arisen in the past, whatever may be the case in the future. I may add that a usage. the effect of which would not be to interpret a statute, but to substitute a specifically different kind of payment for that provided by it, would be entirely different from the practice upon which the decision in *Aitchison* v. *Hopkirk* was largely founded, as the practice there in question was consistent with the statute, only clearing a point on which the statute was silent, viz., whether the gross or only the net rent should be paid in name of composition.

For these reasons, I think that the Lord Ordinary's judgment should be recalled, and that the pursuer should be found entitled in name of composition to the lordships received by the defender for the year of his entry, and if these lordships exceed the amount of the fixed rent or in his (the pursuer's) option the fixed rent for that year, subject to deduction in either case of any rates or taxes payable by a landlord in respect of the rent which he receives from a tenant.

LORD ADAM—When, as Lord Ordinary, I decided the case of *Allan's Trustees* I was of opinion that mineral rents ought not to be taken *in computo* in fixing the amount of composition payable by a vassal on obtaining entry. The Court, however, were of a different opinion, and it is now decided that they are to be so taken.

It is material, however, to notice the grounds on which it was so decided, and they are very clearly stated by the Lord Justice-Clerk "The question for our decision," he says, "is whether these minerals represent income or capital; whether they are paid for *partes soli* or constitute annual fruits?" and he answers the question by expressing the opinion, that "the rent of a going colliery is not part of the corpus or capital of the estate, but constitutes fruits or beneficial enjoyment." Lords Ormidale and Gifford concur with him, but suggest that in certain circumstances it might not be equitable to give the whole of the rents to the superior.

The next case which occurred was that of *Sivwright* v. *The Straiton Estate Company*. The Court in that case found that "it is equitable to adopt as the basis of calculating the casualty a sum equal to ten years' purchase of the average mineral rents payable for three years, and to calculate interest at 4 per cent. on the sum so obtained," the three years being, as I understand, the three years preceding the year for which the casualty was due, which was the year 1874.

The next case which occurred was that of *Sturrock* v. *Carruthers' Trustees*, in which the minerals were let for a term of years at a fixed rent, and were only being worked to a small extent. The Court held that the actual rent was to be taken as the basis of the composition due to the superior, and that the vassal was not entitled to have the value of the mineral rents capitalised, and a percentage on that capital value taken. The Lord Justice-Clerk and Lord Gifford,

however, indicated an opinion that the case might have been different if the minerals had been let for a lordship or not at all.

These appear to be all the cases which have been decided as regards the amount of composition due to the superior in respect of mineral rents.

It will be observed that the case of *Sivwright* is the only case in which effect has been given to the principle of capitalisation, although, as the Lord Ordinary remarks, opinions in support of that principle have been expressed in other cases.

The case of *Sivwright* does not appear to me to be a satisfactory one. No opinions were delivered by the Judges, at least none are reported, and we do not know the grounds on which they proceeded. The Lord Ordinary thinks it was a case in which the minerals were being worked by the vassals themselves. I do not think that is clear. No doubt they were working the minerals at the date of the action; but the year for which a casualty was due was 1874, and the defenders only purchased the estate in 1876. It does not appear whether the minerals were let at and prior to 1874, or whether "the average mineral rents payable for three years" were actual rents or estimated rents. But however that may be, it is clear that this Court adopted and acted on the principle of capitalisation in that case.

It will be observed, however, that the basis of the capitalisation adopted in this case is quite different from that in *Sivwright's* case. There the basis of capitalisation was the average of three previous years' rents—here the basis is the estimated amount of minerals remaining in the lands. That appears to me to be a novel proceeding. But if this case is to be decided on equitable considerations, and if the object is to ascertain the average annual value of the minerals over a series of years, that would not appear to be material. One mode of capitalisation may be appropriate in one set of circumstances, and another mode in another set of circumstances.

In this case we have to deal with a case in which the minerals are let on lease, either for a fixed rent or lordship in the defender's option, and in which the vassal has in fact received £1500 as lordship for the minerals let during the year in question. It is not a case in which the vassal is working the minerals himself. In that case it would be necessary to ascertain the annual value of the minerals for the year in question, but not, in my opinion, the average annual value for a series of years.

In my view it is a case in which the lands in non-entry—for the minerals are part of the lands—are set or let for certain maills and duties payable to the vassal. No doubt the rent is payable by way of royalties—but that makes no difference. I entirely agree with what the Lord President said in the Belhaven case—"that the word 'rent' covers royalties has been decided, and the decision seems clearly sound, as the system of royalties is merely the way of calculating the rent to be paid."

It is a case, then, in which the lands are let for certain rents payable to the vassal.

By the Act 1469, c. 36, which still regulates this matter, superiors were ordained to receive apprisers upon payment of "a year's maills as the land is set for the time"—the time referred to being, as I have always understood, the year when the casualty became due; and the maills or rents which he was to be paid, the rents or maills which would have been paid to the vassal himself. It would, I think, have been quite irrelevant to inquire whether such rents represented the constant annual value of the lands or the average annual value of a series of years. If the rent in question were payable for a purely agricultural subject I do not suppose that that proposition would be disputed. I do not suppose that the Court would listen to a claim by the superior for a larger sum, because it appeared from the lease that in the next and succeeding years a much enhanced rent was to be paid for the farm, and therefore that the rent in question did not represent the true annual value of the subjects.

The Lord Justice-Clerk in *Allan's* case said—'A year's maills of the lands in the Act 1469, c. 36, means precisely the same thing as a year's free rent of the lands and estate under the Aberdeen Act, as the minerals are part of the lands, and the superior must deduct from his claim all burdens attaching to the income or produce of the lands;" and commenting on the case of *Cockburn* v. *Ross* he further says "That decision only proves more clearly that his right is to be measured by the beneficial enjoyment."

Lord Ormidale in the same case expresses the same opinion, and, as he sets forth very clearly the principle of the matter, I may be permitted to quote at some length what he says. "The superior must," he says, "in reference to his casualty or composition for an entry, be put in the same position, no better or worse, as the vassal himself;" and he goes on to say "that where there is a refusal or unreasonable delay on the part of the vassal to enter, the superior is entitled to the remedy of obtaining possession himself. The conclusions of a summons of declarator of non-entry are accordingly to the effect that the tenants are to pay their rents to the superior; and such would be the terms of the summons in the present instance were a declarator of non-entry resorted to. And it is important to keep in view that the principle on which this takes place is, as explained by Ersk. ii., 5, 42, that the right of the superior to the full rents which become due after citation does not accrue to him in the character of creditor, but as *interim dominus* or proprietor of the rents, and consequently the action for making them effectual must be the same as a proprietor is entitled to for recovering the rent of his estate, which can be directed against tenants and other possessors."

That appears to me to be a clear exposition of the rights and remedies of the superior as they stood before the passing

of the Conveyancing Act of 1874. But although that Act altered the superior's mode of recovery of his casualty, and he can no longer enter into possession of the lands by declarator of non-entry, it in no way altered the nature or extent of his rights. It appears from the form of the summons substituted for the declarator of non-entry given in the Schedule to that Act, that he is entitled to declarator "that the full rents, maills, and duties of the said lands of X after the date of citation herein do belong to the superior until the said casualty be paid."

Lord Gifford's opinion is, that "what the superior is to get then as composition is the equivalent to one year's possession of the feu, just as if he had entered into possession, and I think that is the true principle to be followed out in fixing such composition." "In short, he would just take the place of his vassal and receive the mineral rents which the vassal would have received if the lands had not fallen into non-entry."

It is not difficult to see to what result these principles, if they are to be followed to their logical conclusion, lead in this case.

It is settled law that mineral rents, whatever they may be in fact, are to be considered in law annual fruits of the lands.

The measure of the superior's right is to receive whatever the vassal would have himself received as annual fruits.

The vassal has in fact received a sum of £1500 as mineral rents; by the interlocutor under review, however, it is proposed to give the superior only a sum of £146, 1s. 10d.

I confess I do not follow the reasoning which holds that mineral rents are to be taken *in computo* in fixing the superior's composition because they are to be considered as yearly fruits, yet in fixing the amount of the composition recognises them as in part only yearly fruits, and in part as being paid for *partes soli.*

I think they must be taken one way or another. If they are to be taken as the purchase price of *partes soli*, they ought not to be included at all in fixing the composition. If they are to be taken as annual fruits, then I think they should be treated as any other rents—for example, purely agricultural rents—are treated, in which case I do not doubt that the full sum of the rents would be taken *in computo.*

As I have said, the judges in *Sivwright's* case have not given us the reasons why they adopted the principle of capitalisation, but no doubt, as the Lord Ordinary says, they did so "upon equitable considerations," and the equitable considerations would appear to be those suggested by Lord Gifford in *Allan's* case—"It would not be equitable," he says, "in many cases to give the pursuer the full mineral rent or proceeds which happen to be made good the year of non-entry. That might possibly be to give him a large proportion of the whole value of the minerals, for minerals are sometimes wrought out in a very few years, and some equitable rule must be adopted for ascertaining what is the true and permanent and constant value, as distinguished from the mere accidental output in any one year."

But it is just in the introduction of equitable considerations into a case in which they have no application that I think *Sivwright's* case was wrongly decided, and that I think that the Lord Ordinary, proceeding chiefly on its authority, has decided this case wrongly. It is, I think, just the same error as was fallen into in the *Wellwood* case with reference to the Aberdeen Act, and which was corrected in the recent *Belhaven* case.

It is all a matter of chance in what year a composition may become due. It may happen just the year after the whole minerals are worked out, in which case the whole minerals in the land will have disappeared without the superior having received a penny of the proceeds, or, on the other hand, the minerals may be begun to be worked the year after, and all have been wrought out before a recurring casualty becomes due—in which case also he would get nothing. But if he is fortunate, and the non-entry duty becomes payable while there happen to be some minerals still to work out in the lands, then he will get a share of them. It is said that when the minerals are nearly exhausted, to give the superior the full mineral rent might be to give him a large proportion of the value of the minerals remaining. That, no doubt, is so; but it seems to be forgotten that the reason is that the vassal has already received the proceeds of the mineral field, and has them or may have them in his pockets, so that it will not give him a large proportion of the minerals which were originally in the lands.

I do not make these observations with the view of suggesting that, if the object is to find out the average or constant annual value of the minerals the mode of capitalisation adopted in this case may not be as fair as any other, but of suggesting whether, looking to the peculiar character and incidence of the claim, there may not be some grounds in equity for holding that the superior should be entitled to the full rents of the minerals as they may happen to be during the year when the casualty falls due. In my view, however, all these speculations are irrelevant. I think the rule of the statute is that the superior is to have the rents at which the lands are let at the time—that is the year for which the composition is paid. I think, just as it was held in the analogous case of *Belhaven*, under the Aberdeen Act, the Court have no power, for equitable or other reasons, to depart from that rule, and that therefore the superior is entitled to have taken *in computo* the amount of the lordships received by his vassal during that year.

I therefore think the interlocutor should be recalled, and decree given for £1500.

LORD M'LAREN—I concur with Lord Kinnear, and only desire to make one observation in regard to my opinion in the case of *Lord Belhaven* v. *Lady Belhaven.* In that case I stood alone in favour of

taking the mean rental of mineral subjects as the basis for calculating the widow's provisions under the Aberdeen Act. The majority of the Judges were of a different opinion, and had the questions now raised been the same as in that case, I should have held myself bound by the decision. But the questions in the two cases are not the same. In *Lord Belhaven's* case, the majority of the Judges gave great weight to the words of the statute as excluding all other modes of arriving at the annual value other than the free yearly rental at the death of the grantor. Here we are not confined to a single year. Whether we look at the statutes or at practice the superior's right is to receive a composition equal to a year's maill, but we are not limited to one particular year. I cannot consider that the amount of the royalties received in any particular year is the equivalent of a year's maill. The question we have to determine is not what is the rent attaching to a particular year, but what is the annual value of the subjects, and I think we are entitled to ascertain what is the actual annual return to the owner of the minerals by any method that is best fitted to give a true approximate result.

LORD KINNEAR — The pursuer, as the superior of certain lands belonging in property to the defender, claims from the latter, as the composition payable on the completion of his title, the sum of £1666, of which £166 is said to represent a year's rent of the surface, and £1500 a year's rent of the minerals.

There is only one feudal estate; and the distinction between surface and minerals is taken merely for the purpose of calculating the composition. There is no dispute as to the amount of composition in respect of the surface rents. The parties are agreed that the actual rental applicable to the surface, as it appears in the valuation roll, is £248, 5s., and that for an estate of that annual value, £166 is a fair and reasonable composition. But they are at variance as to the amount which should be allowed for the annual value of the minerals. These minerals are rapidly approaching exhaustion, and the parties are substantially agreed that the total amount received or to be received by the defender for coal unexhausted in 1894, when the composition is said to have become due, may be stated at £5540. The demand of £1500 as the composition of a year's rent for entry to an estate of which the fee simple is valued at £5540, is, as far as I know, without precedent; and I do not think it can be supported by any practice or principle of the law of Scotland. It was made clear enough in the pursuer's argument that it would never have been advanced but for the supposed authority of a recent decision, which I venture to think has no bearing on the question, and which certainly belongs to a totally different chapter of law.

It is not disputed that the superior's right, expressed in general terms, is the ordinary return which is or may be obtained for the use of the lands for a year. But the question is whether in estimating that return, the owner of the *dominium utile* is entitled by law or usage to take into consideration the probable duration of the mineral field, if the estate includes minerals, or whether the superior is entitled by the express terms of an Act of Parliament to the actual rent or actual lordships of a particular year, irrespective of any other consideration, and especially of the probability that no similar amount, or if so be, no rent or lordship whatever, may be obtainable in any future year. For the solution of this question I think it is material to keep in view the true object and origin of the rule of law by which a composition is payable on the entry of a singular successor; and for this purpose I am afraid I may be induced to dwell somewhat unduly on matters that are elementary and familiar. But if I do so it is because a good deal of confusion has been introduced into the discussion in consequence of their having been for the moment forgotten. There are two points which I am induced by the pursuer's argument to observe in the outset—first, that the rule has nothing to do with the rights of the superior on non-entry, or the failure of the vassal's heir to take up his ancestor's estate; and secondly, that the composition payable by a disponee on a voluntary contract of purchase and sale is not fixed in terms by any statute whatever, and is not even recognised by any statute before the Heritable Jurisdictions Act of 1747.

As to the first point, it is no doubt true that the action is founded on the death of the last-entered vassal, and sets forth that event as the ground on which a composition is payable. But that is the form introduced by the Act of 1874; and it is only a method for working out new provisions as to the entry of vassals, which in no way affect the theory of the law, or the measure of the composition. For these we must still go back to the law as it was before the passing of the Act. At that time it is elementary that land could only be transmitted by the forms of feudal tenure. The proprietor who desired to sell might dispone to a purchaser, but the purchaser could not have a real right without infeftment, and he could not obtain infeftment without the intervention of the superior. But the superior could not be compelled to infeft him except on payment of a composition; and therefore the primary purpose of the composition was to satisfy the superior for entering the creditors or disponees of a living vassal. Nobody, I presume, supposes that apprising or adjudging creditors had to wait until the death of their debtor vacated the fee before enforcing entry with the superior; and just as little was the voluntary disponee obliged to wait till the death of the disponer. But then although the vassal could not himself infeft his disponee so as to put him in his own place in the fee, he could create a subaltern right, and infeft his disponee by a base holding under himself; and he could at the same time grant a warrant to

infeft him as on a holding immediately of the superior, and this infeftment the superior, under the older law, might ratify if he chose, and since the Lands Transference Act of 1847, might be compelled to ratify on receiving the composition due on alienation. While the law so stood, it was frequently, although by no means invariably, convenient for a disponee to remain content with the subaltern infeftment; and so long as he chose to leave his title in this position, while his disponer was still in life, the superior had no power to compel him to demand confirmation, and had no right of action whatever for payment of the composition. He must wait until the disponee chose to ask for confirmation, and then he might demand composition as the fee for granting it. On the other hand, if the disponer died, and so vacated the fee held immediately of the superior, the disponee must either have induced the disponer's heir to enter and take the place of the immediate vassal, or if he and the heir could not agree upon that course, he must have come forward himself and demanded confirmation so as to prevent the fee falling into non-entry, and then he had to pay composition. But then the composition he had to pay in this case was determined by exactly the same conditions and measured by the same rule, as if he had come forward at once on obtaining his disposition and demanded an entry while his disponer was still in life. It was still the fine payable on alienation which he had to pay, and not a feudal casualty payable in consequence of non-entry, which indeed was absolutely excluded by his demand for the completion of his title. Now, when the Act of 1874 put an end to all this procedure by dispensing with the intervention of the superior, implying an entry on the registration of a conveyance, and abolishing non-entry, it became necessary to give the superior for the first time a right of action for payment of his composition, unless he was to be deprived of it altogether, and to determine the conditions on which such action should be raised. Accordingly, the Act prescribes that the superior shall not be entitled to demand any casualty sooner than he could by the prior law or the conditions of the feu right have required the vassal to enter or to pay a casualty irrespective of his entry. But in the case of a sale by an entered vassal, the superior could not by the old law require the purchaser to enter, or, unless it were so stipulated in the feu right, to pay a casualty, so long as the seller was in life; and it follows, that in general the new action for payment of a composition can only be brought on the death of the last-entered vassal, which under the old law would have enabled the superior, if necessary, to bring an action of non-entry. I have recapitulated these details, however familiar to your Lordships, because I cannot help thinking that it is the mere form of the action and nothing else which has suggested the notion of the superior's claim to payment being measured by his rights in case of non-entry. But then although the Act of 1874 provides this new method for recovering payment of the composition, it does not create the liability for payment or alter it in the slightest degree. It is still a fine for alienation and nothing else; and the position of a disponee who has been entered by implication, when such an action as this is brought against him is precisely the same, in so far as the measure of his liability is concerned, as that of a disponee who under the old law had abstained from entering with the superior during his disponer's life and came forward to demand an entry upon the fee being vacated by the disponer's death, and that again was precisely the same as if he had demanded an entry immediately upon the disposition being delivered. I must therefore take the liberty of saying that I dissent from certain propositions which I find laid down by a high authority in the *Duke of Hamilton* v. *Allan's Trustees*, as to the position of the superior with reference to the series of statutes which first compelled him to receive singular sucessors. It is said "the lands are in non-entry, and before the statutes in question he was not bound to receive a singular successor at all;" and again, "the land being in non-entry the superior is presumed to be in possession, and what the singular successor must render for his entry is the value of the beneficial enjoyment." I venture to say, with all respect, that there is no foundation for this doctrine to be found in the statutes, or in the history of the law. The Acts compelling the superior to receive his vassal's creditors who have executed diligence against the lands certainly do not presume that the lands are in non-entry, or that the superior himself is in possession. The normal case which they contemplate is that of a living debtor, whose creditors seize his lands for payment of his debts. And if he had died before the diligence was executed, still it cannot be assumed that the superior had come into possession, because the procedure in that case was to charge the debtor's heir to obtain himself entered and infeft. The fee falls into non-entry by the death of the vassal, but not by his granting a conveyance to a purchaser, or by the execution of diligence against him at the instance of his creditors. And therefore, when under the former law a purchaser or adjudging creditor came forward to demand an entry it would have been quite idle to suggest that the superior was in beneficial possession, or that the amount of his claim for composition was to be estimated by the value of his beneficial possession. An attempt to obtain possession by a declarator of non-entry would have been just as futile, because the action would have been met by the conclusive answer that the fee was full. The position of the superior *ex hypothesi* is that he has given out his land, and presumably for value, to a vassal, that he has no beneficial right or interest in the *dominium utile* whatever, and that he cannot resume possession except on the forfeiture or contumacy of his vassal. The suggestion,

therefore, that the composition must be the value of the beneficial possession to which the superior would otherwise be entitled, seems to me to be altogether baseless.

The second point to which I adverted at the outset has probably a more direct bearing on the question we have to decide, and that is 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. The first Act is the Act of 1469, by which superiors were ordained to receive apprisers upon payment of "a year's maill as the land is set for the time." It must be admitted that in some cases language has been used by judges of high authority which seems to imply that this Act has been extended by construction to cases which its provisions do not comprise so that the right of all classes of singular successors to an entry may be brought within its scope. But this appears to me to be very inconsistent both with the language of the Act itself and of subsequent Acts, and also with the earlier decisions. It is an Act to regulate the diligence of apprising. It begins with a series of provisions for obviating the hardship to which "tenants and inhabitants of lords' lands" were exposed in the execution of the brieve of distress for the lord's debts, and it is only as the sequel to regulations for enabling the debtor to seize his debtor's land without prejudice to other interests, and for the apprising of the land by the Sheriff, that it goes on to provide that "the overlord shall receive the creditor or ony uther buyer tennent till him payand to the overlord a zeires maill as the land is set for the time, and failzieing thereof that he take the said lands till himselfe and undergang the debtes." I observe in passing that this process has as little resemblance as possible to a declarator of non-entry. But the present point is that it is a provision for one specific case, and for that case only. The purpose was to enable a creditor to take his debtor's land for payment of the debt. But he could not do so to any real effect unless he could hold the land of and under the superior, and therefore it is enacted that the superior must admit him or pay the debt. But nobody could put in force this last provision who had not first carried out the prescribed process for seizing and valuing the land. And accordingly the next statute in the series makes it perfectly clear that when the cumbrous and antiquated process of apprising was superseded by the simpler diligence of adjudication, it was found that the superior could take no benefit from the Act of 1469. The form of judicial transference by adjudication appears to have been at first made effectual against the superior without payment of a year's rent, because Stair tells us that "custom allowed not a year's rent to superiors for receiving adjudgers till the year's rent was also extended to adjudications by the Act of Parliament. The Act 1669, c. 18, therefore, was necessary to put adjudications on the same footing as apprisings, and this was done by enacting that the superior should "not be holden to grant any charter for infefting the adjudger until such time as he be paid and satisfied of the year's rent of the lands or others adjudged in the same manner as in comprisings." Again in 1681 a new Act was required to extend the same rule to judicial sales of bankrupt estates, and it was only by that Act that the purchasers at such sales attained right to an entry on payment of a year's rent. Every one of these Acts was confined in its operation to the particular case with which it was concerned, and none of them gave any right to voluntary disponees, or fixed the terms on which such disponees should be received by the overlord. But then we are told by the institutional writers that such disponees found an incidental advantage in the statutes in two different ways. In the first place, a practice was introduced by which with the collusion of their disponers they were enabled to lead fictitious adjudications, and force an entry in the apparent character of adjudging creditors. Craig, who was a rigid feudalist, condemns this practice with much severity as a fraud upon superiors; and, on the other hand, feudal conveyancers of a later date, such as Walter Ross, defend it as a perfectly reasonable and beneficial device. Whatever may be thought of the controversy, the material point for the present purpose is that its existence, and that of the device which gave rise to it, make it evident that the statutes, at the time when they were in daily observance, could not be made available for voluntary disponees presenting themselves to the superior as such. We must therefore look elsewhere for the source of their right; and Erskine's account of it shows that it really arose from a usage which grew up gradually and naturally as soon as ideas of feudal tenure began to be displaced by ideas of contract, and superiors began to discover that they had no real interest to reject purchasers or impede commerce in land. The statement is that purchasers, who could not force an entry, bargained for an entry with the superior, and practice followed the analogy of the statutes which gave him right to a year's maill as a composition for admitting a creditor, appriser, or adjudger. Following upon this practice the Act of George II., which enabled ordinary disponees to compel an entry by resignation, provides that the superior shall not be obliged to give obedience to a charge to receive an heir purchaser or disponee unless the charger shall tender to him such fees or casualties as he is by law entitled to receive upon the entry of such heir or purchaser. Now the only law which entitled him to a fee on the entry of a voluntary disponee was that which rested on established usage, because the earlier statutes do not apply to the case. It may seem that if the fee to which the superior is entitled is a year's rent, it

may be of very little consequence whether that is fixed by Act of Parliament or by constant usage. But then, if there be a question whether the year's rent means the fair yearly return for the land or the actual payment made by a lessee in a particular year, irrespective of its relation to the true yearly value, 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. And the pursuer's argument recognises that distinction. For his case was rested mainly on the decision in the case of Lord Belhaven on the Aberdeen Act, and on the assumption that the words a year's maill in the Act of 1469 must mean the same thing as a year's rent in the Aberdeen Act. Now I think the decisions show that in our earlier practice, when a question arose as to the measure of the liability, or as to the elements to be taken into account in fixing it, the Court proceeded, as Mr Duff points out, upon a careful inquiry into the usage, and not upon the literal construction of statutory words. A good instance of the rule that the actual payment for a particular year was not conclusive is to be found in the case of the *Magistrates of Inverness*, M. 9300, where it was held that salmon fishings and grass lands must be estimated at the medium rent for a period of years. But perhaps a better illustration of the importance ascribed to usage is the case of *Aitchison*, M. 15,060, where the return from houses and lands was determined upon an investigation into the practice. Again, in *Reid* v. *Fullarton*, 4 S. 227, note, and in *Thomson* v. *Simson*, 4 S. 226 (224), the point was directly decided that in determining the year's rent usage must prevail. The question was whether the vassal was entitled to deduct a fifth of the rent as teind, although the teind was valued. In *Reid* v. *Fullarton* Lord Alloway, to whose judgment the Court adhered, found that the deduction must be allowed; and he gives this as his reason :—"With regard to the teinds, I have been regulated by what I understand to have been the uniform practice, and Lord Stair most properly mentions that this casualty has always been most kindly transacted between superior and vassal, so that we must rest on the common custom used betwixt the superior and vassal as to the nature of this casualty." In *Thomson* v. *Simson* Lord Mackenzie as Lord Ordinary took a different view, and after assigning very cogent reasons against the deduction, he observed "Practice seems rather to favour the defender's argument, but it is a case where practice is of inferior weight, because superiors often use their rights with less than their full legal rigour." But this judgment was unanimously reversed in the Inner House, where it was observed that the case of *Reid* was in point, that that decision was founded upon practice, and that in this question it was more important to follow precedent than principle. We have thus a formal decision of each Division of the Court that the measure of the right depends upon practice, and upon practice arising out of a persistent course of "kindly transaction" between superior and vassal. Evidence to the same effect is to be found in the rule so well known to those of your Lordships who are familiar with the practice in this class of cases in the Outer House, by which large deductions are uniformly allowed for depreciation by way of ascertaining as fairly as possible the constant rent of the subjects. I quite appreciate the Lord President's observation as to the distinction between deductions made for the purpose of ascertaining the net rental and the kind of process the Lord Ordinary has adopted for estimating the probable yearly value of an estate. But the deductions in question go far beyond what is necessary for fixing the net rental of the year of entry; and their purpose, as I understand it, is just what the defender asks for, the ascertainment so far as possible of the constant rental of a perpetual estate, as distinguished from the accidental value of the return in a single year.

For these reasons I think that when the question of minerals was brought before the Court for the first time in the *Duke of Hamilton* v. *Allan*, the Lord Ordinary took the right course when he remitted to an experienced conveyancer to inquire and report as to the practice, and I am disposed to think also that on consideration of the report I should have come to the same conclusion as the Lord Ordinary. The superior was entitled by long-established usage to the value for one year of the yearly fruits of the estate. Minerals are not in fact yearly fruits; and the Lord Ordinary found that practice did not support a claim to have the proceeds of a year's sale of minerals taken into account. Why, then, should they be included? I must confess, with great respect, that the reasons given in the Second Division for the reversal of His Lordship's judgment are not to my mind convincing. I have already adverted to the fallacy of supposing that the superior has some right to the beneficial enjoyment of the *dominium utile* which he has given out in its entirety, and presumably for value, to the vassal. But another main ground of judgment seems to me to be equally open to question. It is laid down that the notion of minerals being *partes soli* is too metaphysical to be applied to the transactions of ordinary life; and it is argued that therefore the superior is entitled to treat as fruits or annual produce whatever sum may be paid for them to the landowner by a lessee during the year of entry. This is not easily to be reconciled with the law laid down by Earl Cairns in the case of *Christie* v. *Gowans*, 11 Macph., H.L. 1, and by Lord Watson in *Campbell* v. *Campbell's Trustees* (10 R., H.L. 65). Lord Watson says that minerals, "as long as they are embedded in the soil, are, to all intents and purposes, *partes soli*, and even when they are removed from the strata in which they repose, and are brought to the surface for the purpose of being sold, they are not, in

fact nor in law fruits." It is true that in the construction of settlements the rents or royalties paid for open mines will generally be held to fall within a gift of liferent. But the rule of law, as it is stated by Erskine, is still that a simple liferenter as such has no right to work or appropriate the proceeds of a mine, or to let minerals, because the minerals are a part of the fee. The cases in which mineral rents or royalties have been held to go to the liferenter are not inconsistent with Mr Erskine's doctrine, because they depend upon the intention expressed or implied of the maker of the settlement. The theory is that the absolute owner of the fee has given to another, or, as in the case of *Greville Nugent*, reserved to himself, a right which, when the settlement is construed with reference to the condition of the estate, must be interpreted to include the proceeds of mineral workings, although he has used language which, more strictly construed, would import only a usufruct. But that does not alter the distinction between usufruct and fee. It cannot be disputed that these decisions make law, or that they are based on very cogent reasons But they are decisions on the construction of settlements; and they seem to me to throw no light on the superior's right to a fine on a change in the ownership of the *dominium utile*, whether that right depends upon usage or upon the construction of an Act of the Scots Parliament passed in the fifteenth century. At the same time I appreciate the view which I understand to be held by your Lordships, and I do not dissent from it, that it is too late for us to disturb the practice which has followed on the decision in the Duke of Hamilton's case. But then, if we are to follow that decision, we ought to follow it in all points; and I take it to be clear that the learned judges who decided it held, that while mineral rents or royalties ought to be taken into account, it would be unjust and unreasonable to give the superior the entire royalties of a particular year if it could be shewn that by reason of the approaching exhaustion of the minerals these did not represent the fair annual return from the estate. The view taken by the judges is expressed very clearly by Lord Gifford, who says that the proper course is to ascertain, in the first place, the number of years' purchase which the minerals are worth, taking into view the character of the workings and the risks and expenses of the same, and then, having ascertained the capital value of the mineral workings, to take a fair percentage on the capital value, which may be regarded as the constant annual value. Lord Ormidale was of the same opinion, and although Lord Moncreiff does not say so in terms, it may be inferred from his judgment that he agreed with his colleagues, because he bases his decision mainly on the cases of *Wellwood*, 10 D. 1480, and *Douglas*, 8 Macph. 360, on the construction of the Aberdeen Act, in which the same view was adopted, and the reasons for it expounded with great force and cogency. I do not think it necessary to examine the subsequent cases of *Sivwright* and *Sturrock*, because I agree with what the Lord Ordinary has said about them. The result of the cases, so far as they go, appears to me to be that if mineral rents are to be taken into account at all this must be done without infringement of the rule of law—that what the superior is entitled to is one year's payment of the constant annual return from the estate and no more, and therefore that the actual royalties of a particular year cannot be taken as conclusive if they are not admitted to represent the fair annual value. The best method for carrying out this principle in particular cases may be a difficult question. But we have heard no specific objection to the Lord Ordinary's method on the assumption that the superior is not entitled to the actual return for the year in question irrespective of the annual value. I think that if minerals are to be taken into account at all the judgment is substantially right. I am confirmed in this view because it is in accordance with the opinion of the late Professor Montgomerie Bell. According to his statement, which is in conformity with that of the reporter in the *Duke of Hamilton* v. *Allan*, there was when he wrote no established practice to justify the inclusion of minerals in making up the amount of a composition. But if it should be found that they ought to be included, he is of opinion that their annual value should be estimated by taking a percentage on the capital value. His opinion on such a subject is entitled to weight, not only because of his learning and great experience, but because it was by his instructions as Professor of Conveyancing that the generation of conveyancers was trained in whose hands any practice which may have existed since the Duke of Hamilton's case must have grown up. It is enough for the judgment, however, that all the direct authority is in favour of the doctrine that the superior's right is to be measured by the constant annual value. The pursuer's contention is that his claim is to be in no way affected by any consideration of annual or future value whatever. According to the argument the superior is entitled, as a fine on a change of ownership, to whatever sum may be received for exhausted minerals, even though it exceed the value of the fee-simple of the remaining property, provided it be received in the year of the death of his last-entered vassal. I think this claim irreconcileable both with principle and with authority.

There are, however, two authorities which are said to support the superior's doctrine, and which certainly deserve consideration. The first is *Stewart* v. *Bulloch*, 3 R. 381, in which the late Lord President seems to say that the question depends exclusively on the construction of the Act of 1469. I must confess that this has created a considerable difficulty in my mind because of the very high authority of an opinion to which we have all been accustomed to defer. But the answer remains that the Act does not in fact apply to the case in

hand, and contains no language which can be stretched so far as to cover it. It is important also to observe, that the question in *Stewart* v. *Bulloch* was not whether the liability for a composition of a voluntary disponee depended upon the Act of 1469 or upon practice. If it had been so, the Lord President would not have quoted as in point the opinion of Lord Curriehill in *Lord Blantyre* v. *Dunn*, 20 D. 1188, because that was not a case of the entry of a purchaser on a voluntary contract, but of a purchaser at a judicial sale, and that is regulated by the express terms of the Act of 1681, admitting such purchasers on payment of a year's rent. But the purpose for which Lord Curriehill was cited by the Lord President was to show that by usage the return for unlet land must be taken into account as well as the rents for land under lease. The question was whether the value of unlet shootings must be taken into account in fixing the composition. The unsuccessful argument for the vassal was that the statute entitled the superior to nothing but "maills," or rents actually received from tenants; and the answer in effect was, that in practice the vassal had been held liable for rents obtained for land under lease, or that might have been obtained for land not under lease. So far as it goes, therefore, the decision is in favour of the doctrine that practice must prevail, although it must be admitted that in the opinions the settlement of certain points is referred to construction, which might I think have been more correctly referred to usage.

The other case to which I desire to advert is *Lady Belhaven* v. *Lord Belhaven*, and I confess I am unable to see that that decision has any bearing on the question in hand. A decision on the construction of an Act of Parliament or of any written instrument cannot govern the construction of another instrument which may happen to contain similar words, but of which the whole scope and object are entirely different; and, therefore, even if the present question depended upon the Act of 1469, I should not have expected to derive much assistance in the interpretation of that Act from a judgment on the construction of an entail Amendment Act passed in the reign of George IV. There may be some superficial analogy between the question whether the royalties of a year are to be taken as representing rent or annual value for the purpose of fixing a widow's annuity under the Aberdeen Act, and the question whether they represent annual value for the purpose of fixing a superior's composition, but the answer in each case must depend upon the legal basis of the claim; and the ground of judgment in *Lady Belhaven's* case, was that the express terms of the statute left no room for discussion of the question whether a year's royalties represented annual value or not, or whether it was or was not reasonable that an annuity which might burden the estate for many years should be calculated on a rental on the eve of disappearance. The Aberdeen Act enables an heir of entail in possession to provide his wife in a liferent provision out of the entailed estate, provided such annuity shall not exceed one-third part of the free yearly rent "after deducting burdens affecting the estate or its proceeds, and diminishing the clear yearly rent or value to such heir of entail in possession, all as the same may happen to be at the death of the granter." The statute, therefore, fixes the particular year—the year of the granter's death—of which the rental and its deductions are to be taken as the basis for calculating the annuity; and when it is suggested that this may be unfair to subsequent heirs, the answer, as Lord President Robertson puts it, "lies in the terms of the statute," which by the words "all as the same may happen to be at the death of the granter," seems to make a frank confession that the rule prescribed is more or less rough and ready, but that it is to be followed through all vicissitudes. The point which was taken upon the apparent hardship to subsequent heirs is to some extent displaced by a consideration of the 13th section, which prescribes a limit beyond which their income may not be reduced. But the judgment was that stated by the Lord President, that the express terms of the statute are conclusive, and that they "warrant no departure from the condition of things as they happen to be at the death of the granter." I conceive, therefore, that this decision throws no light whatever on either of the questions which we have to consider, viz.,—whether the year's rent to be paid to the superior is a constant or reasonably constant rent, or the exceptional return for a single year which accident may have made the year of payment, and if so, whether the sum demanded by the pursuer is the fair annual value of the estate. I think the Lord Ordinary's answer to both questions is substantially right, and that we ought to adhere to his judgment.

LORD MONCREIFF—In this case a composition of a year's rent of the lands described in the summons became due from the defender, a singular successor, to the pursuer as superior, on the 27th of July 1894. The only question upon which, as I understand, our opinion is asked at this stage relates to the mode in which, for the purpose of calculating the amount of the composition to be paid by the defender, the annual value of minerals in the said lands, which were being worked under a current lease, is to be calculated. The Lord Ordinary, disregarding the rent or return for the year of entry and the average returns under the lease for preceding years, has ascertained their annual value by simply taking 4 per cent. upon the capital sum of £5540, 8s., the estimated value of the unexhausted coal as at 1894, subject to certain deductions. He has thus fixed the annual value of the minerals (as at 1894) with reference not to the present or the past but to the prospective value of the mineral field. What we have to decide is whether that is a mode of valua-

tion which is authorised by the statute or sanctioned by custom.

It appears from the Lord Ordinary's note that he has thus decided contrary to his own opinion in deference to previous decisions and judicial opinions expressed in previous cases, in particular in three cases—*Allan's Trustees* v. *Duke of Hamilton*, 5 R. 510; *Sivwright* v. *Straiton Estate Company*, 6 R. 1209; and *Sturrock* v. *Carruthers' Trustees*, 7 R. 799. I think that, sitting alone, his Lordship was bound to decide as he has done; but it is open to us, sitting as a Court of Seven Judges, to reconsider the question; and having done so, I agree with your Lordship in the chair and Lord Adam that the mode of computation adopted by the Lord Ordinary and sanctioned by some at least of those decisions and *dicta*, is erroneous. The superior's claim is rested on the old Scots Act 1469, c. 36, by which superiors were ordained to receive apprisers upon payment of "a year's maill as the land is sett for the time."

By the Act 1672, c. 19, superiors were ordained to receive adjudgers on the same terms as in the Act 1469, c. 36.

Then by 20 Geo. III. c. 50, section 13, it was provided that the superior should be obliged to enter disponees by resignation provided that the charger "shall pay or tender to him such fees or casualties as he is by law entitled to receive on the entry of such heir or purchaser;" and section 6 of 10 and 11 Vict. c. 48, provided that the superior should enter vassals by confirmation on the same terms. Although (as will be observed) in the later statutes the words of the Act 1469, c. 36 are not repeated, I never heard it questioned till now that the payments there referred to, to which the superior was "by law entitled," were just the payments provided by the older statute, viz., "a year's maill as the land is sett for the time," although until the Act 20 Geo. III. c. 50 disponees had no statutory right to compel an entry on these terms. Previously superiors were in use to receive disponees on the same terms as apprisers and adjudgers. They were not compelled by statute to do so, and in this sense the superior's claim to a composition on the entry of a disponee depended at that time not on the statute but on agreement. But the measure of the claim was that specified in the Act 1469, c. 36, and the effect of the Acts 20 Geo. III. c. 50, and 10 and 11 Vict. c. 48, was to apply the old statute to such cases. In short, the meaning and effect of the later statutes is, that as a condition of giving an entry to a purchaser the superior should receive the same fine or composition as he was already "by law entitled" to receive from those persons who were entitled to demand an entry, that is, a year's rent.—See the opinion of Lord President Inglis in *Stewart* v. *Bulloch*, 8 R. 381-383. The Act 1469, c. 36, is thus the true foundation and measure of the superior's right.

It was decided in *Allan's Trustees* that the annual value of the minerals must be taken *in computo* in fixing the amount of the composition. I did not understand that this was seriously disputed, but if it was, I think the decision was right. If this is done I see no reason why in ascertaining their annual value any distinction should be made between the rents or return for the use of the surface and the rents or return from minerals. It is said that mineral rents are not *in pari casu* with agricultural rents, because, apart from the annual output being often unequal, minerals are *partes soli*, and may in the end be exhausted by working. This was an excellent argument against the contention that the annual value of minerals should be taken *in computo*; but once it is decided that minerals are to be treated as rent-producing subjects, and rents or lordships derived from them as part of the annual income of the lands, I do not see how, without doing violence to the words of the statute, we can apply a different rule.

When the composition became due the condition of matters was this. The minerals were yielding and had yielded for many years an annual return of say £1500-£2000. They were not exhausted, although nearly so. The question therefore arises sharply whether a superior's claim for composition must be judged of as matters stand when it is made, without reference to future years, or whether it is subject to diminution if there is a prospect of the subjects of lease being exhausted in the course of a few years.

I do not propose to re-examine in detail the reasons urged against including the annual value of minerals, though several of them were made to do duty in support of the Lord Ordinary's mode of calculation; but there is one point upon which I should like to make an observation. A great deal has been said as to the hardship to the vassal of having to pay a composition on the basis of a large output during the year of entry when the minerals are on the point of being exhausted and may not yield any return in the course of a few years. But there is another side to the question. The extent to which the minerals should be worked is entirely in the discretion of the vassal and his tenants, and the more they are worked the less becomes the prospect of the superior getting a large or any composition from minerals in future years. It is also to be observed that the more extensively a mineral field is developed the more the surface is sacrificed and the letting value of the surface necessarily becomes smaller; and that again goes to diminish the amount of the composition which the superior may expect to receive in the future. It may fairly be held that these considerations balance or help to balance the supposed hardships to which I have referred.

I do not doubt that an enactment of this kind admits of being interpreted or modified by definite custom or practice: and if any uniform custom or practice (not inconsistent with the statute) had been shown to exist we should have been entitled to give effect to it. It is said that although the annual value of minerals must be taken *in computo* this should be done only *sub modo*,

regard being had to the fluctuating nature of the annual return from them, and the probability of exhaustion. But there is no evidence of any such practice before us. Professor Bell, whose views are otherwise favourable to the defender, says—"I am not aware of anything like a rule of practice as applicable to a composition in such cases."—II. Lectures, 2nd ed., p. 1137. This coming from a writer whose practical experience was great may be taken as conclusive on that point, apart from Mr Baxter's report on remit in *Allan's Trustees*.

There may and probably have been cases in which superiors in settling with their vassals have, by way of compromise, taken into consideration the fluctuating nature of the return, and even (although I doubt if such cases have been numerous) the probability of the speedy exhaustion of the minerals. It is also true that in the decisions there are to be found not a few *dicta* which countenance the view that in fixing the annual value of the minerals, at least where the permanency of the returns is doubtful, there should be an inquiry into the condition of the mineral field and the whole circumstances of the case. But there is no settled practice, and there is no decision which expressly establishes the competency of the mode of valuation which the Lord Ordinary has adopted.

If the decisions under the Entail Statutes apply by analogy, as I think they do, the recent decision of a Court of Seven Judges in the case of *Lord Belhaven*, 23 R. 423, discountenances the adoption of any other basis of calculation when the minerals are let than the rent or return for the year.

The convenience and simplicity of this construction of the statute indicate its soundness, and recommend its adoption. As long as the return or rent payable for the year is taken no difficulty arises. It may tell in favour of the superior at one time, but it may tell against him the next. But if the rent or return for the year is not to be necessarily accepted, then in each case where the permanency of the rent is called in question it may be necessary to have an inquiry not only into the working and returns of previous years, but into the whole condition of the mineral field and the prospect of the minerals being soon exhausted.

It must be remembered that the same Statute regulates the composition to be paid in respect of an agricultural lease; but I do not understand that it is contended that it is competent to disregard the rent under an agricultural lease for the year of entry, although hardships just as great may arise where the current rent does not truly represent the prospective value of the lands. The lands may be let for a high rent, and yet it may be certain that on the expiry of the lease, perhaps in the next year, the lands could only be let at a greatly reduced rent, if at all; or to take the converse case, the lands may be let for too low a rent, and it may be certain that a much higher rent will soon be obtained.

As I have already said, I think that the decisions under the Entail Statutes are directly in point. In the case of *Christie* v. *Christie*, 6 R. 301, in a petition under sec. 7 of the Aberdeen Act to have a bond of annuity provided to a widow of a predeceaser fixed, it was held that the rent payable under a lease of minerals current at the date of the granter's death was to be taken as part of the rental, and that an inquiry into the value of the minerals could not be allowed. I do not say that that decision is conclusive, because the Court may be said to have proceeded mainly on the ground that a uniform rent had been paid for two years at the death of the granter and for five years thereafter, and that therefore there was a sufficient degree of permanency in the rent to warrant its being taken.

But the judgment in the case of *Lord Belhaven* to which I have referred went much further, and being a decision by a Court of Seven Judges is binding on us if it applies. That case was subsequent to the cases of *Allan's Trustees* and *Sivwright*, and all the authorities on the subject were fully considered. That was a decision under the Aberdeen Act, 5 Geo. IV. c. 87, sec. 1. The words to be construed were—"full yearly rent of the said lands and estate where the same shall be let," and "the clear yearly rent or value thereof to such heir of entail in possession, all as the same may happen to be at the death of the grantor." The majority of the Court held that in estimating the provisions which an heir of entail was entitled to make for his widow and children under sections 1 and 4 of the Aberdeen Act, the royalties payable under the mineral leases during the year current at the date of the granter's death fell to be taken as part of the free yearly rent of the entailed estate, irrespective of the fact that the minerals were nearly exhausted

I confess that I cannot distinguish between the terms of the Aberdeen Act and those of the Statute 1469, c. 36. If the Act 1469, c. 36, applies, its antiquity surely does not affect the meaning to be put upon the extremely simple words to be construed. The arguments in favour of admitting equitable considerations are just as strong in the one case as in the other. It is true that under the Entail Statutes certain deductions are allowed, and the heir can in some cases restrict his liability by surrendering a portion of the rents. But, on the other hand, he may be burdened for many years on the basis of a high mineral rent current at the death of the granter, while in the case of a composition the vassal is only liable in one year's rent.

As showing the identity of the question, I may point out that Lord M'Laren's dissent (23 R. pp. 433-434) may be adopted as a powerful argument for the present defender. His Lordship says—"I hold that the mode of valuation which I propose is a true valuation as at the death of the granter, because my proposition is that the coal remaining unwrought at the death of the granter is to be valued, that is, its capital value is to be ascertained as at the granter's death, and the annual return which that

capital sum is capable of producing is to be taken as the annual value of the subject." His Lordship continues—"The result of my consideration of the cases is that the Court has recognised a distinction between wasting subjects and subjects which produce a return in perpetuity, and as I think that this is a well founded distinction, my view is that it should be recognised and if necessary extended." This is a forcible statement of the defences in the present ease, and covers the whole of it, but the majority of the Judges decided otherwise, for reasons which are thus stated by the Lord President (p. 431)—"I fully appreciate the hardships of particular cases, but all the arguments *ab inconvenienti*, all the instances of the last year of the lease where the coal is all but worked out, all the cases of no reasonable permanence (so far as these are peculiar to mineral rents, and do not apply to all rents) are really arguments against coal being ever treated as part of the annual proceeds of the entailed estate. They furnish no warrant for the establishment of a separate rule for ascertaining the yearly proceeds of a colliery when the statute has prescribed but one rule for all subjects falling within its scope." And Lord Adam states it shortly in words which in a sentence contain the true answer to the defence in this case. Assuming that the annual value of mines and minerals is to be taken *in computo*, he says—"The rule which must be followed is that prescribed by the statute with reference to entailed lands and estate generally of which they form a part. There is no authority for estimating the rent or value of one part of the entailed lands and estate in one way and another part in another way." These passages from the opinions of two of the majority of the Judges, in which the others concurred, state concisely the arguments for the pursuer in the present case. I therefore regard the case as a direct and binding authority, and in doing so I have the high authority of Lord President Inglis in *Stewart* v. *Bulloch*, 8 R. 834, *ad finem*.

At the hearing in this case it was said that since the decisions in the cases of *Allan's Trustees* and *Sivwright*, practice had been in accordance with those decisions, and it was contended that that practice of at most twenty-five years should not now be disturbed. We have no evidence of the existence of such a practice. But apart from that, at the date of the decision in the case of *Lord Belhaven* the mode of computation sanctioned by the Court in the case of *Wellwood* v. *Clarke*, 10 D. 1480, and 11 D. 248, had, it may be presumed, been followed for fifty years, and yet that decision, with the practice which followed upon it, was (in that respect) overruled and disregarded.

The decisions upon which the defender relies are neither numerous nor, in my opinion, conclusive. In the case of *Allan's Trustees* the Court did not expressly decide anything as to the way in which the amount of composition should be ascertained. But both Lord Ormidale and Lord Gifford made observations as to the fair and reasonable way of ascertaining the annual value of the minerals, favouring the view that in each case an inquiry should be made in order to fix the number of years' purchase which the minerals are fairly worth, and then taking a fair percentage upon the capital value so ascertained.

In the case of *Sivwright*, however, the Court decided, after inquiry, that 4 per cent., on a sum equal to 10 years' purchase of the average mineral rents payable for the three years ending Whitsunday 1874, should be taken as the year's rent payable for the composition. In so doing they took into consideration the value of the remaining minerals, but they also had regard to present and past returns. They did not call on the counsel for the vassal to speak on the question of capitalisation, and no reasoned opinions were delivered. Possibly the opinions expressed in *Allan's Trustees* may have been held virtually to conclude the question in the opinion of the Court, which consisted of the same learned Judges.

In *Sturrock's* case, again, the same Court took the actual rent as the basis of composition, but it may be said that this was on the footing that on inquiry that rent appeared to the majority to have sufficient permanency to warrant the Court in adopting it as representing "a year's maills as the lands are sett for the time."

While great weight necessarily attaches to the opinions which were held and expressed by the three eminent Judges who decided those cases, I am, with all deference, of opinion that the result of the argument and authorities is that the plain words of the statute, "a year's maills as the land is sett for the time," must be accepted in their literal sense, and that in the absence of modification of their meaning by established custom there is no room for equitable considerations.

Here the average lordships for a number of years preceding the year of entry give £1859, the lordships for the year of entry £1500, the fixed rents £750. The Lord Ordinary, disregarding all these, has allowed only £146, 1s. 10d., the percentage on the existing value of the minerals. This is a new departure, because even the judgment in *Sivwright's* case took cognisance of present and past returns.

For the reasons which I have stated I think the Lord Ordinary's judgment is wrong. In my opinion the lordships for the year of entry should be taken subject to the deductions which your Lordship in the chair has specified.

LORD KYLLACHY—I concur in the opinion of Lord Kinnear. I had noted some observations on the same lines, but his Lordship has so completely expressed my views that I do not propose to say more than this. Personally I should have been prepared in the circumstances to reconsider the decision in the case of *Allan*. I quite recognise the difficulty that, following upon that decision, composition upon mineral royalties

has now been paid in practice for twenty-two years. But I must take leave to observe that that consideration appears to me to apply with at least equal force to what is now proposed by the pursuer. For it is not I think disputed that that proposal involves, with respect to the mode of estimating the composition, an entire displacement of the existing practice—a practice sanctioned by the opinions in the case of *Allan*, and also by judgments pronounced in several subsequent cases. The practice may be right or wrong, but it is certainly well established. Nor as applied to minerals since the case of *Allan* did it involve any novelty in point of principle. For in estimating composition the element of depreciation has always been considered and fully allowed for. It has been so in urban, and even in agricultural subjects. Nor does it seem to matter that the allowance is in practice made under the head of repairs. For I think it is familiar to most of us that repairs are held to include not only repairs proper, but repairs and renewals, the heritor receiving always by way of deduction from the year's rent a percentage (often a very large one) sufficient one year with another to maintain the subjects, whatever they are, in their existing state.

LORD LOW—I am of the same opinion as that expressed by Lord Kinnear, and I entirely agree with what he has said. I shall therefore merely state shortly the grounds which have led me to the same conclusion.

If the provisions of the Act of 1469, c. 36, fixing the amount to be paid to a superior in consideration of his receiving an appriser, could be regarded as a statutory enactment which had been made applicable in terms to the entry of an ordinary disponee by subsequent legislation, I should have considered the judgment in the case of *Lord Belhaven* as being directly in point, because I think that there is no substantial distinction between the phraseology of the old Act and of the Aberdeen Act. I have come to be satisfied however that the amount payable to a superior for entering an ordinary disponee rests upon the Act of 1469 only in this sense, that the practice has been regulated to a large extent by the analogy furnished by the provisions of that Act.

The Act originally applied only to the case of apprisers whom superiors were ordained to receive on payment of "a year's maill as the land is set for the time." The same rule was applied to adjudgers by the Act of 1669, c. 18, which, proceeding upon the preamble "that by several Acts of Parliament and constant practick of the Kingdom, there is one year's rent of all lands apprised due and payable to the superior," enacted that the superior of lands adjudged "shall not be holden to grant any charter for infefting the adjudger till sich time as he be payed and satisfied of the year's rent of the lands and others adjudged, in the same manner as in comprisings; and declares that in all cases adjudications shall be in the like condition with comprisings as to superiors."

I have quoted the very words of that statute for the purpose of comparing them with the phraseology of the Acts of 1747 and 1847 (20 Geo. II. c. 50, and 10 and 11 Vict. c. 48), whereby superiors were ordained to enter heirs and disponees. The former Act applied to heirs who had been served and retoured, and to purchasers and others who had obtained a disposition with procuratory of resignation. By the 13th section it was provided that the superior should not be bound to receive such heir or disponee unless he should pay or tender "such fees or casualties as he [the superior] is by law entitled to receive upon the entry of such heir or purchaser." By the Act of 10 and 11 Vict. superiors are ordained to receive vassals by confirmation upon precisely similar terms.

The later Acts therefore did not, like the Act in regard to adjudgers, refer to and incorporate the Act of 1469, and the question is, what is the meaning of the words, "such fees or casualties as he is by law entitled to receive?"

The entry-money payable by singular successors was sometimes taxed by special agreement, and if so the amount so fixed would be the fee or casualty which the superior was by law entitled to receive. If, however, there was no special agreement by which the casualty was taxed, there was no positive law fixing the amount to which the superior was entitled, but as Mr Duff (Feudal Conveyancing, p. 215) puts it, "a purchaser bargained with the superior for an entry." It must, however, be conceded that it came not to be altogether a matter of bargain, because if the superior was not reasonable the form of apprising or adjudging the lands for a price was gone through, and the superior was thereby compelled to receive the disponee upon payment of a year's rent under the old Acts. It therefore came to be the settled practice for superiors to receive purchasers and disponees upon the same terms as apprisers and adjudgers.

That the matter is ruled by practice and not by statute is shown by the leading case of *Aitchison* (M. 15,060, 2 Ross's Leading Cases p. 183) in which the question was whether the rent of houses built upon the lands were to be taken into account in fixing the amount of the composition. The Court held that they were, and the report of the case states that "the point was determined after a hearing in presence, and upon considering reports relative to practice, *which last chiefly weighed with the Court*."

The interlocutor of the Court was to the effect that the "superior is entitled for the entry of singular successors, in all cases where such entries are not taxed, to a year's rent of the subject, whether lands or houses, as the same are set or may be set at the time, deducting the feu-duty and all public burdens, and likewise all annual burdens imposed on the lands by the consent of the superior, with all reasonable annual repairs of houses and other perishable subjects."

It is to be observed that the Court there took into consideration the fact that houses are perishable subjects, and I think that I am right in saying that the cost of "repairs," which it was held that the disponee was entitled to deduct, has in practice been regarded as meaning something more than the cost of mere ordinary repairs such as all buildings require from time to time, and as being analogous to an allowance on account of depreciation. If the pursuer's contention in this case is right, then minerals, which are exhausted in the using would be the only perishable subject in regard to which that fact would not be taken into consideration in fixing the amount of a composition.

The present case therefore seems to me to depend upon custom or practice, and not upon any direct statutory provision, and the question is, What has been the practice in regard to the produce of minerals?

Now the result of the inquiry which was instituted by Lord Adam in the case of *Allan* was to show that up to 1878 there had been no settled practice in the matter. There had not even been any general recognition of the superior's right to claim anything in respect of the produce of minerals. Lord Adam accordingly negatived the claim of the superior in that case that mineral rents and lordships should be brought into computation in fixing the amount of a composition. The Second Division, however, took a different view, but Lords Ormidale and Gifford expressed the deliberate opinion that, looking to the wasting nature of the subject, the superior was not entitled, in the general case, to the full return of the minerals for the year of entry, and they both indicated the opinion that an equitable result would be obtained by capitalising the value of the minerals and taking the interest thereof as the amount of the composition. The Lord Justice-Clerk (who was the only other judge who took part in the judgment) in no way dissented from the views expressed by Lords Ormidale and Gifford, and in a subsequent case (of *Sivwright*) he adopted the same view.

There is only one case (that of *Sturrock*, 7 R. 799) in which the superior has been given the actual rent of minerals, and that was simply because it was a case of a new mineral field in which the minerals had only been worked to a small extent. Even in that case Lord Ormidale would have preferred to fix the amount of the casualty by taking a percentage of the capital value of the minerals, and Lord Gifford regarded the case as one in which the rent was paid "not for the actual working of the minerals but for the mere leave or permission to work."

In the case of *Sivwright* (6 R. 1208) the Court adopted the same method of ascertaining the amount of the casualty as that taken by the Lord Ordinary in this case, and it is to be observed that the learned Judges of the Second Division appear to have regarded the method of capitalising the value of the minerals and taking the interest thereof as the amount of the casualty as being so much a recognised method that they did not call for an answer to the superior's argument that it was incompetent. I have no doubt that the Second Division had it in view that the report which had been obtained in *Allan's* case had shown that the method of taking a percentage upon the capital value of the minerals had been frequently adopted in practice.

I think that the three cases which I have mentioned are all the cases in which the question has been brought before the Court; but it is certain that they represent only a fraction of the cases which have actually arisen between superior and vassal. My understanding is, that since the decision in the case of *Allan* it has been regarded as settled not only that the superior is entitled to claim in respect of returns from minerals, but that he is not, in the general case, entitled to the actual receipts for any particular year, and that the practice has been to adjust the amount of the casualty either by taking an average of rents or lordships, or interest upon the capitalised value of the minerals, the object being to arrive at a sum which will fairly represent rent in the proper sense of the term, namely, the consideration paid for the possession and use of the subjects, as distinguished from the price of the minerals which are removed.

I am therefore of opinion that to give effect to the views urged by the pursuer would be an entirely new departure, and would give superiors an advantage to which no statute directly applicable to the case entitles them, which has not been sanctioned by a single judgment of the Court, for which there is no precedent in practice, and which is contrary to a considerable body of judicial opinion.

In regard to the method by which in such cases the amount of composition is to be ascertained, it may not be expedient, or even possible, to lay down a hard and fast rule, but the fact that so few cases have come before the Court seems to me to show that in practice there has generally not been much difficulty in arranging a sum which both parties regarded as reasonable. In the present case the Lord Ordinary seems to me to have taken a method which might very well have been adopted by a mineral owner who did not wish to spend what was truly capital, but only such part of the returns from his minerals as a prudent man would regard as income. I am therefore of opinion that the interlocutor should be affirmed.

At the conclusion of the advising, counsel for the respondent asked the judgment of the Court on the question of his right to deduct one penny per ton as way-leave in respect of the Glenclelland colliery. Counsel for the respondent submitted that no such deduction should be allowed. The Court, without giving further opinions, pronounced the following interlocutor:—

"The Lords . . . in conformity with the opinion of the majority of the Seven

Judges present, alter the interlocutor reclaimed against by deleting the words 'but without any deduction in respect of wayleave for the Glenclelland minerals,' and substituting therefor the words, 'and (3) subject to such deduction in respect of wayleave for the Glenclelland minerals as may be shown to be just and reasonable,' and to the above extent recal the said interlocutor: *Quoad ultra* adhere to said interlocutor, and remit to the Lord Ordinary to ascertain and decern for the sum payable to the pursuer in terms of the said interlocutor as hereby altered: Find the defender entitled to expenses since the date of the said interlocutor," &c.

Counsel for the Reclaimer — Solicitor-General (Dickson) Q.C.—Blair. Agents—Strathern & Blair, W.S.

Counsel for the Respondent—Dundas, Q.C.—Blackburn. Agents—Dundas & Wilson, C.S.

END OF VOLUME XXXVII.