vassal who concealed, that interest on a *grassum* should be included in the composition, this being done to parry a demand for a year's rent. As regards the two teind cases, it is obvious that the question then decided on practice was one unprovided for in the statute, and although it might have been decided apart from practice, yet the practice was no doubt instructive. But in these cases, as in the others cited, and particularly in *Aitchison* (1775, M. 15,060), I fail to find any ascription to custom alone, as opposed to the Act 1469, of the authority to settle the composition of the superior—the question was never raised. They are treated, rightly or wrongly in each instance, as cases where, to use the Lord President's phrase, practice would "clear a point on which the statute was silent." The remaining cases may be briefly noticed. If *Paterson* v. *Murray* (1637, M. 1055) be rightly reported, no principle maintained even by the respondent can support it; for, in a case of land pure and simple, the Lords modified the composition to 300 marks, "albeit the lands were worth 800 marks at least;" and this was the case of a compriser, and therefore directly within the terms of the Act 1469. The case, however, has its own lesson, for it, and the very much more recent case of *Wardlaw* (1875, 2 R. 368), show that in some instances the Court of Session have, even when administering unambiguous statutes, adopted modifications of the statutory rule, which cannot be reconciled with the authority of statute law. It may be permissible to add that in Scottish jurisprudence there was in former days less attention paid than now to the terms of the statute being administered, and more to opinion, whether expressed in books or in practice.

The decision of *Cockburn Ross* (June 6, 1815, F.C.), which was affirmed by your Lordships' House (6 Paton 640, 2 Bligh 707), seems to me in no way to help the respondent's case, for the superior there was given all that the vassal drew, viz., the feu-duty.

On these grounds I am unable to adopt the conclusion of the majority of the Seven Judges. I think that coals are within the Act of 1747, and are to be taken into account in fixing the composition, that they must therefore follow the rule of the Act of 1469, and that the royalties paid in the year of entry are accordingly due. They are, just as much as fixed rent, the sum fixed on as the landlord's share of profits, and therefore rent. I consider the mode of calculation adopted in the Court of Session to be contrary to the statute, and unsupported either by reason or authority.

Interlocutors appealed from reversed with costs, and cross appeal dismissed with costs.

Counsel for the Earl of Home—Solicitor-General for Scotland (Dickson, K.C.)—Younger. Agents — Strathern & Blair, W.S., Edinburgh — John Kennedy, W.S., Westminster.

Counsel for Lord Belhaven—Lord Advocate (Graham Murray, K.C.)—Dundas, K.C. Agents—Dundas & Wilson, C.S., Edinburgh —Grahames, Currey, & Spens, Westminster.

COURT OF SESSION.

Saturday, May 16.

FIRST DIVISION.

[Lord Pearson, Ordinary.

THOMSON & COMPANY *v.* MEIK.

Process—Printing—Bill Chamber—Note of Suspension Passed in Bill Chamber and Transmitted to Court of Session—Failure to Print within Eight Days—Court of Session Act 1868 (31 *and* 32 *Vict. c.* 100), *secs.* 26 *and* 90.

The respondents in a note of suspension, which had been passed in the Bill Chamber and transmitted to the Court of Session, moved that the note should be dismissed in respect that prints were not lodged within eight days after the transmission of the process from the Bill Chamber.

Held that the provision of section 90 of the Court of Session Act 1868 that in a Bill Chamber proceeding, as soon as the interlocutor passing the note has become final, "the cause shall become for all purposes an action depending in the Court of Session," did not render the rules as to the making up and printing of the record in an action depending in the Court of Session, enacted in section 26 of the Court of Session Act 1868, applicable to a note of suspension transmitted from the Bill Chamber, and motion *refused*.

The Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 90, enacts—"In all proceedings in the Bill Chamber, as soon as an interlocutor passing the note has become final, . . . the cause shall become for all purposes an action depending in the Court of Session, and may be immediately enrolled by either party in the motion roll of the Lord Ordinary to whom it is marked. . . . Section 26— . . . The pursuer shall cause the pleadings which are to form the record to be printed, and shall within eight days from the lodging of the defences or revised pleadings, as the case may be, deliver two printer's proofs thereof to the agent or to each of the agents of the other parties, and also to the Clerk to the process, who shall transmit the same to the Lord Ordinary: . . . Provided that, if the pursuer shall fail to deliver the printer's proofs as aforesaid, the defender may enrol the cause, and move for decree of absolvitor by default, which decree the Lord Ordinary shall grant, unless the pursuer shall show good cause to the contrary."

Helen Jean Meik, 30 Chalmers Street, Edinburgh, presented a note of suspension and interdict against Thomson & Company and another. The note was passed in the Bill Chamber, and on February 26th the process was transmitted to the Outer House. No order was taken to print. A record was made up and prints lodged on March 13th.

On March 14th the respondents moved the Lord Ordinary to dismiss the note in respect that prints had not been lodged within eight days after transmission of the process from the Bill Chamber.

The Lord Ordinary (PEARSON) on March 14th pronounced an interlocutor refusing the motion, and appointing the cause to be put to the adjustment roll.

Opinion.—"The respondent moved that I should dismiss the note at this stage on the ground that by section 90 of the Court of Session Act, as soon as the interlocutor passing the note had become final, the cause became 'for all purposes an action depending in the Court of Session,' and that the complainer had failed to observe the provisions of section 26 of the Act by delivering printers' proofs within the period there specified. In an ordinary action this must be done 'within eight days from the lodging of the defences or revised pleadings, as the case may be,' and the failure to do so gives the defender a right to have 'decree of absolvitor by default,' 'unless the pursuer shall show good cause to the contrary.'

"It is said that in the application of this provision to a passed note the eight days run from the transmission of the note, and it is admitted that the prints were not lodged within that period.

"I have ascertained that the practice since 1868, and so far as I can find the invariable practice, has been to refuse to apply the provisions of section 26 to this particular case. I presume the reason is that in a process originating in the Bill Chamber other remedies are open to the respondent for proceeding with the case than are open to a defender in an ordinary action, and that the provisions of section 26 are not in terms applicable. Under section 90 the cause 'may be immediately enrolled' after transmission, and the respondent can obtain an order on the complainer to print, which in practice fixes the date from which the eight days begin to run."

On March 17th the Lord Ordinary granted the respondents leave to reclaim.

The respondents reclaimed, and argued—As soon as the interlocutor passing the note became final, the cause, as provided by section 90 of the Court of Session Act 1868, became "for all purposes an action depending in the Court of Session." The statutory rules in the Court of Session Act 1868 regulating the making up of the record in Court of Session actions accordingly applied to notes of suspension which had passed from the Bill Chamber into the Court of Session as from the date of the transmission of the note—Mackay's Manual, p. 444. The penalty for failure to deliver printers' proofs as required by the Act was imperative, it being provided that the Lord Ordinary "shall grant decree of absolvitor" if moved for by the defender, "unless the pursuer shall show good cause to the contrary." Though these provisions were not in terms applicable to notes of suspension passed in the Bill Chamber, yet, reading sections 26 and 90 of the Act of 1868 together, the reclaimers were entitled to a decree dismissing the note.

Counsel for the complainer and respondent was not called on.

LORD PRESIDENT—It is in my judgment clear that we cannot comply with the application here made, and that the judgment of the Lord Ordinary is right.

The argument for the reclaimers was based entirely on section 26 of the Court of Session Act 1868, which provides—[*His Lordship read the section*]. None of the provisions in this section are in terms applicable to the kind of proceeding which we have here—a note of suspension passed in the Bill Chamber. Accordingly, Mr Munro was driven to argue that a penalty should be provided by judicial decision for the case, a note of suspension, equivalent to the penalty provided by section 26 for failure to observe the statutory rules for making up a record in an ordinary action in the Court of Session. As the statutory rules in section 26 are not applicable to a note of suspension, we are asked to create by decision an equivalent for the provisions of that section in a case to which it does not apply. If we gave effect to the argument we should be legislating, not applying any existing law. I think the interlocutor of the Lord Ordinary is correct and that we should adhere to it.

LORD ADAM—I concur.

LORD M'LAREN—There is great difficulty in attempting to alter a rule of practice which has been in existence for thirty-five years. That difficulty becomes insuperable where the effect of altering the practice would be to cause the defender to lose his suit. Such a course would amount to a denial of justice.

But I think the Lord Ordinary's judgment does not need the aid of practice. It is sound on its merits. The old form of a bill of suspension was an application for permission to bring an action into Court. After the bill or note had been passed the case had to be dealt with in the same manner as an uncalled summons in an ordinary Court of Session action. The effect of the 1868 Act, sec. 90, in providing that "the cause shall become for all purposes an action depending in the Court of Session," was simply to do away with the calling of the action and other formalities. It does not follow that the provisions of section 26 of the 1868 Act as to the making up of the record in an ordinary action are to be applied to notes of suspension. The provisions of the 1868 Act as to ordinary actions are applicable to notes of suspension only in so far as these are commensurable with ordinary actions. I therefore agree with your Lordship.

LORD KINNEAR—I agree with your Lordship.

The Court adhered.

Counsel for the Complainer and Respondent—Wilton. Agent—Robert H. Wood, S.S.C.

Counsel for the Respondents and Re claimers—Munro. Agents—Macdonald & Stewart, S.S.C.

Friday, May 22.

FIRST DIVISION.

[Lord Stormonth-Darling, Ordinary.

MASON'S TRUSTEES *v.* CHIENE.

Company—Railway Company—Expenditure not Authorised by Act—Railway Expert—Deposit-Fund—Claim on Deposit-Fund—Ultra vires.

The private Act incorporating a railway company authorised the expenditure of the company's funds in the construction of the line and in payment of "all costs, charges, and expenses of and incident to the preparing for, obtaining, and passing of this Act, or otherwise in relation thereto." By agreement the company undertook to pay the sum of £5000 to A, who had formerly been manager of a railway, and then carried on business as a professional expert in railway matters, for professional services and assistance given by him in the promotion, preparation for, obtaining, and passing of the Act. A was to act as general manager and adviser to the promoters, giving them the aid of his technical and general knowledge, and to aid them in carrying the bill and negotiating with other railway companies. *Held* that this agreement was *ultra vires* of the company, in respect that it was not competent, under the section authorising payment of the expenses of obtaining the Act, to agree to pay, to a person not belonging to any of the recognised professions, such a lump sum, which could not be taxed or checked in any of the usual ways, and which was to be paid partly at least for the use of influence and not for services; and that consequently A was not entitled to payment of the sum agreed upon out of the parliamentary deposit fund consigned by the promoters of the company.

Process—Petition to Uplift Deposit-Fund—Validity of Decree — Challenge of Decree without Action of Reduction—Company—Deposit-Fund.

A obtained a decree in absence against a railway company incorporated under a private Act of Parliament, and charged upon the decree. *Held* that the validity of the decree could be considered in a process, raised some years afterwards, and initiated by a petition to uplift deposit funds consigned by the promoters of the company, in accordance with the provisions of the Standing Orders of both Houses of Parliament.

The Dundee Suburban Railway Company was incorporated by the Dundee Suburban Railway Act, which received the Royal Assent on 28th July 1884.

The Act contained, *inter alia*, the following clause:—"All costs, charges, and expenses of and incident to the preparing for, obtaining, and passing of this Act, or otherwise in relation thereto, shall be paid by the company." With the exception of this section there was no authority in the Act for the expenditure of the company's funds except in the construction of the railway.

In January and May 1884 James Thomas Harris and Charles Stuart Blair, two of the promoters of the company, had lodged with the Court of Exchequer deposits amounting to £7799 and £1646, in accordance with the provisions of the Standing Orders of both Houses of Parliament and 9 and 10 Vict. cap. 20. The ultimate destination of these deposits was provided for, in a private Act obtained by the company in 1892, in the following terms:—"If the company do not, previously to the expiration of the period limited for the completion of the railway, complete the same and open it for the public conveyance of passengers, then, and in every such case, the deposit fund mentioned in section 50 of the Act of 1884 . . . shall, if a judicial factor has been appointed, or the company is insolvent, or the undertaking has been abandoned, be paid or transferred to such judicial factor or be applied in the discretion of the Court as part of the assets of the company, for the benefit of the creditors thereof, and, subject to such application, shall be repaid or re-transferred to the depositors."

Prior to the incorporation of the company, negotiations had been entered into between D. W. Paterson, S.S.C., solicitor to the promoters, and Mr S. L. Mason, formerly manager of the North British Railway Company. As a result of these negotiations Mr Mason wrote to Mr Paterson the following letter, dated 21st February 1884:—"Dear Sir—The following are the terms upon which I have, at your request, been acting and am in future to act in professionally advising and aiding in the promotion of the above railway.

"As a retaining fee and as a contribution towards my travelling and personal and other expenses, I am to be paid on the 28th February 1884 the sum of fifty guineas. If the Bill be thrown out of Parliament I am to receive no further remuneration. If it pass, my fee is to be two per cent. upon the capital authorised by the Act.

"I am to be general manager and adviser to the promoters, giving them the benefit of any technical and general knowledge I possess; aiding them in carrying the Bill, and in negotiating with the neighbouring Railway Companies.

"You are to procure the adoption of this arrangement by the promoters, the intention being to bind the Company when incorporated and not the promoters as individuals. But the promoters, or some of them to be now named, are to be bound to deliver to me within four weeks after the Act receives the Royal Assent an agree-