tion relates arose before or after the passing of this Act, be determined, notwithstanding any agreement under the lease or otherwise providing for a different method of arbitration, by a single arbiter in accordance with the provisions set out in the Second Schedule to this Act."

Now in the present case the landlord had taken the incoming tenant bound that he should relieve him of the claim for compensation. That agreement had been made known to the outgoing tenant and the position accepted by him. There was, therefore, no case of failure on the part of the landlord and his tenant to agree. They were content that the incoming tenant should pay, and that as to the amount the incoming and outgoing tenant should arrange between themselves that that amount should be fixed by arbitration. In effect the landlord had said I will agree to give, and the outgoing tenant had said I will agree to take, what the outgoing and incoming tenants would settle as between themselves as the proper sum to be paid. It would have been imperative on the landlord and the outgoing tenant if they had wished to go to arbitration to keep within the express provisions of the Act, but there was nothing illegal in the outgoing and the incoming tenant, who is not brought on the field by the provisions of the Act but only by the agreement of all parties concerned, to agree that the sum as between them should be fixed by a common law arbitration. The first point therefore fails.

As to the second point, it is quite true that the claim for compensation which the incoming tenant has to pay must be a claim which the outgoing tenant could have made directly against the lendlord under the Act, and I have no doubt, therefore, that the claim in order to be valid must have been made timeously, and therefore must be judged by section 6 (2) of the Act, which is as follows—"A claim by the tenant of a holding for compensation under this Act in respect of any improvement comprised in the First Schedule to this Act shall not be be made after the determination of the tenancy."

But in the circumstances which we have here I think it is impossible for the incoming tenant to maintain that the claim was not timeously made. That it was to be insisted on as against the landlord was clearly expressed in a letter written to the landlord's agent before the arrangement with the outgoing tenant was concluded. That after the arrangement the incoming tenant knew it is necessarily shown by the fact that the determination of such claim is one of the heads of the submission. All these things had been done before the expiry of the tenancy. The appellants are therefore driven to argue that a claim must give particulars, and they laid stress on the fact that in the English Act the expression is "Notice of Claim," while the expression in the Scotch Act is only "Claim." This is a double-edged argument. It is extremely improbable when hitherto the two countries had been dealt with in one Act and it was deemed expedient to provide for the new legislation in separate Acts, that the Legislature should wish to make a difference between the two countries in such a matter. It is much more likely to suppose that the expressions were regarded as synonymous. I am of the opinion that fair notice is all that is needed to be given. The same argument as to the necessity of giving particulars when the same word "claim" alone is used was put forward and rejected in the Workmen's Compensation Act. When the matter comes to arbitration of course particulars must be given, but that is a mere matter of procedure.

I am therefore of opinion that the appeal should be dismissed with costs, and I move accordingly.

LORD WRENBURY—I also concur in the judgment that has just been delivered.

VISCOUNT HALDANE—I have been asked to say that my noble and learned friend VISCOUNT FINLAY concurs in the judgment that has just been delivered.

Their Lordships ordered that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

Counsel for Appellants—Macphail, K.C.—Guild. Agents—Guild & Guild, W.S., Edinburgh—Thomas Priest, Solicitor, London.

Counsel for Respondent—D. P. Fleming, K.C.—James Macdonald. Agents—M'Leod & Rose, S.S.C., Edinburgh—Charles G. Bradshaw & Waterson, Solicitors, London.

COURT OF SESSION.

Thursday, March 2.

FIRST DIVISION.

[Lord Hunter, Ordinary.

SMITH-SHAND'S TRUSTEES *v.* FORBES.

(*Reported ante*, July 2, 1921, 58 S.L.R 554.)

Superior and Vassal—Casualties—Redemption—Composition—Separate Feus Subfeued in Combination by Single Feu-Disposition in Favour of a Sub-feuar—Measure of Composition—Interest of Grassum—Mature Growing Timber—Feudal Casualties (Scotland) Act 1914 (4 *and* 5 *Geo. V, cap.* 48).

A vassal holding adjacent lands of two immediate superiors sub-feued the lands to a sub-feuar as one feu for payment of a grassum and a nominal feu-duty. One of the superiors sued the vassal for redemption of casualties, the redemption money claimed being based on a composition of five per cent. on an apportionment of the grassum agreed on by both superiors. The composition thus assessed was greater than the annual value of the lands of which the pursuers were superiors. It was averred by the vassal that the grassum in question was greater than could have been

obtained had the lands been sub-feued separately. It was admitted that at the date of the sub-feu there was growing timber of considerable value on the lands. *Held* (1) that the composition fell to be ascertained by apportioning the grassum between the two feus; (2) that in the absence of averment that the amount of the grassum had been arrived at by adding the value of the timber, the value of the timber did not fall to be deducted from the grassum for the purpose of arriving at the amount of the composition; and (3) that there being no specific averment of an alternative method of ascertaining the year's maill, it fell to be calculated at five per cent. on the portion of the grassum effeiring to the lands of which the pursuers were superiors.

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

The case as originally presented is reported *ante ut supra*. The action having been allowed to proceed at the instance of one of the pursuers, and the necessary amendments having been made, now bore to be raised by Miss Janet Smith-Shand and others, the trustees of the late Mrs Anna Stuart or Smith-Shand, owners of the immediate superiority of a portion of the estate of Candacraig, *pursuers*, against Sir Charles Stewart Forbes of Newe and Edinglassie, Baronet, the vassal of the pursuers in the said portion of the estate of Candacraig, and also against William Macintosh, factor and commissioner for the trustees of the late Most Noble Alexander William George, Duke of Fife, *defenders*. The summons as amended concluded for declarator that the defender Sir Charles Stewart Forbes as vassal of the pursuers was bound to redeem all the casualties incident to the pursuers' portion of the superiority of the said estate, and for payment by this defender to the pursuers of the sum of £1105, 3s. 9d. for and on account of the said casualties. There were also alternative conclusions for payment of additional feu-duties in the event of Sir Charles deciding to commute the redemption price into annual payments.

From the averments of the parties it appeared that Sir Charles Stewart Forbes was prior to Martinmas 1900 proprietor in fee of the *dominium utile* of certain lands known as the Estate of Candacraig, one portion of which he held as immediate vassal of Mrs Smith-Shand and the remaining portion as immediate vassal of the Duke of Fife's trustees. On 9th November 1900 Sir Charles Stewart Forbes created a subordinate holding of the estate by granting a feu-disposition, under which in consideration of the sum of £54,000 paid to him as the price of the lands and of a feu-duty of one shilling yearly he disponed to Alexander Falconer Wallace, Esquire, both portions of the estate. Notice of redemption of casualties under the Feudal Casualties (Scotland) Act 1914 was given to Sir Charles Stewart Forbes by Mrs Smith-Shand and by the Duke of Fife's trustees on 1st February 1917 and 11th June 1915 respectively. The state of the Sir Charles Stewart Forbes' title was such that the next casualty payable by him might be relief. The highest casualty was a composition, and the pursuers maintained that it fell to be calculated on the basis of one year's interest at five per cent. on the proportion of the grassum of £54,000 effeiring to the portion of the estate of which the pursuers were superiors. For the purposes of the action and of the determination of their respective rights in the redemption money or additional feu-duties payable under the Feudal Casualties (Scotland) Act 1914 the pursuers and the Duke of Fife's trustees had adjusted between them the boundaries of the two portions of the estate, which were not always easily ascertainable, and agreed that the proportion of the grassum of £54,000 to be held to effeir to the portion of the estate of which the pursuers were superiors was £29,831, 14s. 8d. The pursuers accordingly calculated the redemption money payable to them by Sir Charles on the basis of a composition, ascertained as above, of £1105, 3s. 9d. The rental of the lands held of the pursuers at the date of the feu-disposition was according to their averments £1129, 17s. 7d., and according to the averments of Sir Charles £685, 8s. 5d., both of these sums being less than a composition based on a year's interest at 5 per cent. on the said portion of the grassum.

Sir Charles Stewart Forbes further averred —(*Ans.* 4)—"Explained further that in the year 1900 there were large quantities of mature growing timber upon the said estate of Candacraig, and that a large proportion of the sum of £54,000 condescended on represented the value of the said timber. This defender reasonably estimates the value of the said timber, as entering into the total sum of £54,000, at £10,300, and he further reasonably estimates that the value of the mature timber standing uncut in the year 1900 on the lands held of the pursuers was £4000. Explained further that the said lands and estate of Candacraig had residential and sporting attractions, which largely enhanced its value to the disponee beyond its value in the market on a commercial basis. The capital value of such estates, and the capital value of the lands and estate of Candacraig, sold as it was to a willing buyer, was very high relatively to annual value, being about thirty-five years' purchase thereof. The rental or annual value accordingly represented much less than 5 per cent. on the capital value. Moreover, the said sum of £54,000 was received by this defender in respect of the lands and estate of Candacraig regarded as a single estate. No sale was made by him of the estate held by him of the pursuers as an estate by itself, and no grassum was received by him therefor; nor could any such sale have been effected at a price comparable to the proportion of the sum of £54,000 founded on by the pursuers. The estate held by this defender of the pursuers has upon it a large mansion-house which has from time to time been extended; but the shootings on the estate are of comparatively little value, and the mansion-house is disproportionate in a marked degree to the available shootings. On the other hand the shootings on neigh-

bouring lands held by this defender of the Duke of Fife's trustees are of much value, but there is no mansion-house on any of the three lots in which this defender holds the said lands of the Duke of Fife's trustees. The price of £54,000 was obtained by this defender only because he was personally in a position to combine the estate held by him of the pursuers with the three estates held by him of the Duke of Fife's trustees, and so to set up a single estate possessed of a valuable mansion-house appropriate to the valuable shootings thus attached to it. It is not possible to say what price or grassum would have been received by this defender in respect of the estate held by him of the pursuers (assuming that it could have been sold as a separate estate) if he had sold the said estate by itself, or had received (as in fact he has not received) any grassum therefor. It is, however, certain that if the estates which were combined by this defender and disposed of as a single estate, had been disposed of by him (assuming that purchasers could have been found) as separate estates, each at their own individual value, the cumulo price or grassum received would have been very much less than £54,000. The difficulty of finding purchasers would have been so great that the proper view to take is that the separate estates, and in particular the estate held by this defender of the pursuers could not have been disposed of at all on any practicable terms. Even if purchasers could have been found, this defender estimates that the cumulo price of the estates could not have been expected to exceed £40,000 (including the value of mature timber), and that the price or grassum for the lands held of the pursuers (including the value of mature timber) could not have been expected to exceed £18,000." To these averments the pursuers answered—(Cond. 4)—"Admitted that there is growing timber on said estate, and that it has residential and sporting attractions. Not known to what extent said residential and sporting attractions affected said price of £54,000. In any event these formed ordinary elements in the value of the estate as a heritable subject. Denied that the value of the timber, if it entered into the sum of £54,000, is reasonably estimated at £10,300. Explained that in 1900 the value of the timber on the pursuers' portion of said estate did not exceed £2400. Denied that the said mansion-house is disproportionate to the estate held by the defender Sir Charles Stewart Forbes, of the pursuers. Denied further that the said defender has received no grassum for the estate held by him of the pursuers, or that the four estates composing the estate of Candacraig could not have been disposed of separately on practicable terms. Explained that the defender Sir Charles Stewart Forbes could in 1900 have granted separate feu-dispositions of the four parts of the said estate to the said Alexander Falconer Wallace for separate grassums, in which case the cumulo grassum received by him would have been the said sum of £54,000."

The compensation payable to the Duke of Fife's trustees, calculated on the same basis as that adopted by pursuers, was £901, 4s., and the Duke of Fife's trustees were willing, on receipt of that sum, to grant a discharge in favour of Sir Charles Stewart Forbes of all casualties incident to the estate of superiority of the portion of the estate of Candacraig of which they were superiors or, if Sir Charles desired, to give a joint discharge with the pursuers of all casualties incident to the superiorities of the estate of Candacraig.

The pursuers *pleaded*—"1. The pursuers, the trustees of the said Mrs Anna Stuart or Smith-Shand, being the immediate lawful superiors of the defender Sir Charles Stewart Forbes in the lands libelled, and due notice of redemption in terms of the Feudal Casualties (Scotland) Act 1914 having been given, the casualties incident to the feu fall to be redeemed by the defender Sir Charles Stewart Forbes in terms of said Act. 2. The defender Sir Charles Stewart Forbes having sub-fued the lands libelled along with other lands in consideration of an elusory feu-duty and a grassum, the composition payable in respect of the lands libelled falls to be calculated on the basis of the proportion effeiring to the lands libelled of a year's sub-feu-duty, together with a year's interest at 5 per cent. on the proportion effeiring to the lands libelled of the said grassum, under deduction of a year's feu-duty payable to the pursuers. 3. The principal sum sued for being the just and true redemption price of the casualties incident to said feu, decree should be pronounced in terms of the petitory conclusions of the summons. 4. The defender Sir Charles Stewart Forbes having no title or interest to dispute the apportionment of the sum of £54,000 made in condescendence 5, the explanations in answer 5 for said defender ought not to be remitted to probation. 5. The defences for the defender Sir Charles Stewart Forbes being irrelevant should be repelled."

The defender, Sir Charles Stewart Forbes pleaded, *inter alia*—"1. The pursuer's averments being irrelevant, the action should be dismissed. 2. The pursuers are not entitled for the purposes of the present action to found upon the feu disposition granted by the defender in 1900 and grassum paid thereunder in respect (*a*) that the said feu transaction does not constitute a set of the lands in respect of which the present claim arises, and (*b*) that the year's mail of the said lands cannot be deduced therefrom. 3. *Separatim*, the sum of £29,831, 14s. 8d. not having been obtained by this defender as a grassum in respect of the lands held by him of the pursuer, cannot be founded on by the pursuers for the purpose of calculating the composition payable to them. 4. In any case the pursuers are not entitled to found upon the grassum paid under the said feu transaction in so far as it represents the price of mature timber. 5. In any event the pursuers are not entitled to calculate the redemption price of the casualties by computing interest at 5 per cent. on the said grassum. . . . 7. The principal sum sued for not being the just and true redemption price of the casualties incident to said lands, this defender should be assoilzied."

The defender William Macintosh pleaded, *inter alia*—"3 The pursuers and the said trustees being the sole interested parties, and having adjusted their respective rights in the casualties due by the defender Sir Charles Stewart Forbes, and the said defender being liable to the pursuers and to this defender in the whole redemption money applicable to the whole estate, and having no title or interest to quarrel said adjustment, the pursuers are entitled to decree upon the basis of the said apportionment. 4. The defences for Sir Charles Stewart Forbes being irrelevant, should be repelled."

In the action as originally laid, the Lord Ordinary (HUNTER) on 29th July 1920, after repelling the defender's preliminary pleas, found that the composition payable by the defender (Sir Charles Stewart Forbes) in respect of the estate of Candacraig fell to be calculated on the basis of a year's sub-feu-duty, together with a year's interest at 5 per centum on the grassum paid.

Opinion.—[*After the narrative appearing in the previous report*]—"According to the pursuers' averments, which are admitted by the defender, the feu-duty of one shilling yearly was elusory and did not represent the true avail of the lands at the time nor bear any relation thereto.

"The next casualties payable by the defender are in terms of the Feudal Casualties Act to be taken as payable at the expiry of twenty-five years from 1st February 1917 and 11th June 1915. The highest casualty is a composition. The question on the merits of this case is as to the basis on which this casualty falls to be calculated. The pursuers contend that the calculation should be made by adding to the elusory feu-duty one year's interest on the grassum of £54,000 at 5 per cent. The defender maintains that the proper basis is annual rental, and he explains that he has all along offered and still offers to redeem (or commute) future casualties on this basis but his offer has been declined. In his answer to the fourth article of the condescendence he states that the rental of the lands at the date of the sale did not exceed £1240, 14s. 6d. yearly, that in the year 1900 there were large quantities of mature growing timber upon the estate, and that a large portion of the price of £54,000 represented the value of the said timber. He also alleges that the said estate had residential and sporting attractions which largely enhanced its value to the disponee beyond its value in the market on a commercial basis. The capital value of such estates, and the capital value of the estate of Candacraig, sold as it was to a willing buyer, was very high relatively to annual value, being about thirty-five years' purchase thereof. The rental or annual value accordingly represented much less than 5 per cent on the capital value. . .

"As regards the basis on which composition falls to be calculated I think that the decision in the case of *Campbell* v. *Westenra* ((1832) 10 S. 734) is adverse to the defender's contention. In that case a vassal had granted a sub-feu for an elusory feu-duty and the payment of a grassum. The superior claimed that the sub-feu had to be disregarded in fixing the amount of composition and that a year's rent of the lands was due. The vassal tendered payment of the elusory feu-duty and 5 per cent. on the grassum, and contended that he was not liable for any further payment. The Court gave effect to this contention. That case has been taken by text writers as determining that where a sub-feu has been granted for a price as well as a feu-duty the superior will draw a year's sub-feu-duty, and also the interest on the price as amounting to a 'year's maill as the land is set for the time' in terms of the Act 1469, cap. 36, which regulates the amount of composition payable to a superior for entering a vassal—Bell's Principles, 721; Bell's Lectures, 1148; Menzies, 1900 Ed. 487; Wood's Lectures, 145; Duff on Feudal Conveyancing, 218. Lord Dunedin in his opinion in *Heriot's Trustees* v. *Paton*, 1912 S.C. 1123, goes fully into the effect of the decision in *Campbell* and the extent to which it has regulated practice since it was pronounced.

"The defender, however, maintained that this case was distinguishable from *Campbell's* case as he was offering a year's rent of the lands, which was what the superior claimed in that case. This circumstance does not appear to me to make any difference on the principle applicable. Centuries ago it was determined that where property had been lawfully and *bona fide* sub-feued the superior could only claim the feu-duty actually payable to his vassal—*Monktoun*, M. 15,020; *Cowan* v. *Elphinstoun*, M. 202 and 15,055; *Cockburn Ross*, 6th June 1815, F.C., 6 Pat. Ap. 640. As Lord Davey said in the case of the *Earl of Home* v. *Lord Belhaven* (5 F. (H.L.) 13)—'The importance of these cases is, first, that they affirm that a feu is within the expression "as the lands are set," and, secondly, they affirm that what the superior is to get for this composition are only the fruits for the year which the vassal himself would be entitled to, notwithstanding that the lands may have been covered with buildings producing a vastly higher rent to the sub-feuar; or, in other words, that the superior stands in the place of the vassal as regards the maills or rent for the year, for better or for worse.' When an estate is given out in feu with the possibility of development, with the prospect of getting minerals, or with large forests of mature timber, the feu-duty may be much greater than the agricultural rents payable for the lands at the date of the feu. But the actual feu-duty is as much 'the year's maill of the lands as they are set' in the first years after the feu is granted as after the estate has become fully developed. It is equivalent, as Lord Dunedin said in *Paton's* case, to an 'escheat of the vassal's property for a year,' paid as 'an acknowledgment to the superior for his trouble in granting an entry to a vassal who is a stranger to the standing investiture.'

"If a vassal has sub-feued for an elusory feu-duty and the payment of a grassum you cannot arrive at a year's value of the mid-superiority created unless you add a year's interest of the price paid to the elusory feu. In most cases where lands have been feued

by vassals the method of calculation will be much more favourable to them than valuing compositions on the basis of rents which the vassals do not receive, and which in many cases exceed the capital value of the estates of mid-superiority to which entries are being granted by the superiors. Lord Davey in *Belhaven's* case said—'The superior is entitled to the year's fruits which the vassal himself receives or is entitled to receive in the year of entry. The superior is confined to this when it is to his disadvantage, as in the case of a sub-feu, and he is entitled to the benefit of the principle when it is in his favour.' This statement is equally applicable if the words 'as in the case of a sub-feu' are omitted.

"I propose to pronounce an interlocutor repelling the first three pleas-in-law for the defender, finding that the composition payable by the defender in respect of the estate of Candacraig falls to be calculated on the basis of a year's sub-feu-duty together with a year's interest at five per cent. on the grassum paid in terms of the second plea-in-law for the pursuers, and grant leave to reclaim, reserving meantime the question of expenses."

On 1st March 1922 the case as amended was heard in the First Division.

Argued for the defender and reclaimer Sir Charles Stewart Forbes—(1) The grassum in this case could not be the basis for calculating the composition. The sub-feu was not of a single estate as in *Campbell* v. *Westenra*, 1832, 10 S. 734, nor was it a set of the pursuers' holding within the meaning of the Act 1469, cap. 36. The decision in *Campbell* v. *Westenra* which was followed by the Lord Ordinary did not therefore apply. Further, the rule of that decision was only to be applied where the result would be equitable. Here it would not. The superior was not entitled to take advantage of the exceptional situation in which this vassal was placed of being able to combine the estate with another and thus obtain, as he had done here, a grassum which was greater than what could have been got by sub-feuing the estates separately. The equitable way was to take the actual rent as the basis—*Aitcheson* v. *Hopkirk*, 1775, M. 15,060. It was contrary to the principle of the Acts that the superior should get more than the annual value, as he would do if the apportioned grassum was taken as the basis of calculating the composition — *Heriot's Trust* v. *Paton's Trustees*, 1912 S.C. 1123, *per* Lord Dunedin at pp. 1130 and 1134, and Lord Dundas at p. 1141, 49 S.L.R. 852. (2) If the composition was to be estimated on the basis of the grassum, then the value of the timber fell to be deducted in fixing the amount effeiring to the pursuers' holding. This was necessary to an equitable application of the rule of *Campbell* v. *Westenra*. At common law the timber was not part of the annual rent. It did not belong to a liferenter. Further, (3) the rate of interest should be determined with regard to the circumstances of the transaction and the nature of the subjects. The rate of five per cent. allowed in *Campbell* v. *Westenra* was too high. Here the high price compared with the rental and the nature of the estate established a clear case for modification without inquiry—*Hill* v. *Caledonian Railway Company*, 1877, 5 R. 386; *Heritable Securities Investment Association* v. *Miller's Trustees*, 1893, 20 R. 675, 30 S.L.R. 354; *Greenock Harbour Trustees* v. *Glasgow and South-Western Railway Company*, 1909 S.C. (H.L.) 49, 46 S.L.R. 1014; *Schulze* v. *Dun*, 1912 S.C. 50, 49 S.L.R. 50; *Sivright* v. *Straiton Estate Company*, 1879, 6 R. 1208, 26 S.L.R. 718; *Heriot's Trust* v. *Paton's Trustees, supra.*

Argued for the pursuers and respondents —The superior was entitled to take a year's feu-duty as the year's maill. In this case the amount which the vassal was receiving as feu-duty was a percentage of the grassum. A sub-feu of different feus in combination was just as much a set within the meaning of the Act of 1469 as a lease would be. The composition must therefore be taken as a percentage of the grassum as apportioned. The rule in *Campbell* v. *Westenra*, approved in *Heriot's Trust* v. *Paton's Trustees*, was a general rule—*Mason* v. *Ritchie's Trustees*, 1918 S.C. 466, 55 S.L.R. 454. The contention that there were other considerations included in the grassum was irrelevant—*Pollockshaws Co-operative Society* v. *Stirling Maxwell*, 1906, 8 F. 638, 43 S.L.R. 375; *City of Aberdeen Land Association* v. *Magistrates of Aberdeen*, 1904, 6 F. 1067, *per* Lord Low, p. 1078, 41 S.L.R. 647. (2) The averments as to the value of the timber were irrelevant. The estate was sold with the timber which happened to be on it. There was no separate sale of the timber. (3) The proper interest on the grassum was five per cent. That was the legal interest — *Campbell* v. *Westenra*, *supra*—to which the superior was entitled, where as here there was a grassum—Duff, Feudal Conveyancing, pp. 217, 218; Menzies, Lectures on Conveyancing, p. 487.

Counsel for William Macintosh did not offer any argument on the merits.

LORD PRESIDENT—The question which remains in this action is how to assess the composition for the lands of Candacraig in order to calculate the redemption money for the extinction of all casualties on that estate under the Feudal Casualties Act of 1914.

Ever since the Act 1469, cap. 36, the only measure of composition has been that of a year's maill for the lands as set for the time. A payment so measured was originally the key by which a creditor got access to his debtor's land for the satisfaction of his debt, and as the law developed it became the regular means by which ordinary purchasers of land were enabled to make up their titles to it, and it is curious that the problems which arise in the application of so rough a measure have received comparatively little illustration in decided cases. It was applied in *Cockburn Ross* v. *Heriot's Hospital* (F.C., 6th June 1815, 6 Pat. App. 640) to the effect of making the sub-feu-duty (in the case of a sub-feu) the equivalent of the maill. And in *Campbell* v. *Westenra* ((1832) 10 S. 734) it was decided that, where

the vassal had sub-feued stipulating for a substantial grassum, one way of ascertaining the year's maill was to add to the sub-feu-duty a year's interest on the grassum. The interest was calculated at 5 per cent. In the present case the sub-feu-duty is so small as to be negligible, while the grassum was very substantial and really constituted the whole consideration for the sub-feu. A novelty in the case is that Candacraig was sub-feued in combination with another estate for a single consideration which was larger than would have been obtainable from the disposal of the two estates separately. Accordingly the problem of deriving the year's maill from the sub-feu-duty (of one shilling) and the grassum (of £54,000) has added to it the complexity that those considerations were obtained neither from the two estates separately, nor from Candacraig alone, but by uniting both of them in one transaction.

The effect of the readjustment of the pleadings which has been made since the case was last heard has been to make the action one at the instance of the superiors of Candacraig alone, and they now claim to assess the composition by calculating 5 per cent. on an apportioned share of the slump grassum paid for the sub-feu of both estates. The defender contests this on the ground that the superior is not entitled to more—as the equivalent of a year's maill of Candacraig—than that estate could produce by itself. The first question thus comes to be whether the circumstance that the grassum was enhanced as the result of combining the two estates into one makes it illegitimate to resort to a process of apportionment of the grassum. The alternative suggested by the defender in argument was that we should go back to the actual rents obtainable for Candacraig at the date when the property was sub-feued, but there is neither principle nor authority for going back to those rents in a case in which the consideration for the sub-feu provides material for assessing the annual value at its date. The minority in *Mason* v. *Ritchie's Trustees* (1918 S.C. 466) who favoured such a course were confronted by a case in which the consideration provided no such material. I see no objection to a resort to apportionment arising out of the circumstance that the two estates were combined. If there had been no sub-feuing at all, and the estates had been disposed of by a combined lease for a slump rent, a better return might have been got for the two together than could have been got for them if let separately. But I cannot think that there would be any objection in that case to apportionment, although the result would be to enable the superior to share through the medium of composition in the advantage obtained by the vassal from the combined let. The case would not be really different from one in which the land comprehended in the superior's grant turned out to be of more than ordinary mercantile value to a neighbouring proprietor who took it on sub-feu, at a ransom price it may be, for the purpose of uniting it with another piece of land which that neighbour had. As to the mode of apportionment all difficulty has disappeared, because the defender no longer persists in challenging the principles on which the apportionment agreed between the superior of Candacraig and the superior of the other estate proceeds. The proportion of the slump grassum effeiring to Candacraig is thus fixed at £29,831, 14s. 8d.

The next point upon which objection was taken was this. In 1900, when Candacraig was sub-feued, it contained a certain area covered with timber which was mature and had a value which one side puts at £10,300 and the other side at £2400. The defender's argument was that a part of the grassum must have represented the value of this matured timber, and that if the grassum is to be used as a basis from which to derive the amount of the year's maill it will be necessary to deduct from it the value of this timber. If it had been averred that the grassum, though appearing in the disposition as a slump price for the whole subjects sub-feued, had been in truth and in fact arrived at by adding the amount of a valuation of the timber (as ready for cutting) to an accepted offer for the land, there might have been room for argument in favour of excluding the value of the timber from the grassum before using it as a basis for deriving the year's maill. All that is said upon record is that the timber was there, and that if sold for cutting its value was according to the defender £10,300. But timber, even though mature, may enhance the value of an estate apart altogether from its value for cutting. Moreover, when people buy or feu land they habitually buy or feu it with wood growing on it; the value may be more or less according to circumstances, but the wood is just a part of the land like the buildings on it. Therefore it seems to me that this second objection fails.

The third point is one which has given me more anxiety than the other two. The superior appeals to the rule of *Campbell* v. *Westenra* (10 S. 714), and says the simple way is to derive the year's maill by calculating interest at 5 per cent. on the apportioned sum of £29,831, 14s. 8d. That rate of interest he maintains provides a guide for arriving at the equivalent of what would be a year's maill. I am not prepared to affirm that the percentage adopted in *Campbell* v. *Westenra* is a rule of universal application. But it has been regarded as generally authoritative, except during a short period of suspended animation between the cases of *Home* v. *Belhaven* ((1903) 5 F. (H.L.) 13) and *Heriot's Trust* v. *Paton's Trustees* (1912 S.C. 1123). I think in these circumstances I should only be doing what is right were I to refuse to depart from it except in favour of some definite alternative, the adoption of which was clearly required by the specialties of a particular case. Now what is said in this case amounts shortly to this—If you apply the rule of *Campbell* v. *Westenra*, by calculating interest at 5 per cent. on the £29,831, 14s. 8d., you get an equivalent for the year's maill which is materially larger than was the total rental of the estate (tak-

ing the highest figure given to us by either side) at the date of the sub-feu. That is certainly a striking result. But then what is the alternative presented to us? On the one hand, as I pointed out, it was suggested in argument that we should go back to the rents which were actually being got for the lands of Candacraig when the sub-feu was entered into. But for the reasons already indicated I do not see my way to adopt this suggested alternative. Suggestions were also made in the course of the debate that we should alter the rate of percentage so as to bring the figure down, but why, and to what rate of interest? The argument left that in the air, and the defender's averments provide no materials for any inquiry which would result in elucidating it. Five per cent. is not an inappropriate rate as interest or for capitalisation purposes under present conditions. To order proof on the question of the sale prices of feu-duties or the current rate of interest in 1900, or whatever might be the disputed matters of fact involved in the defender's argument, without specific averments about these topics, connecting them with some definite alternative method of assessment of the year's maill, is out of the question. The argument presented to us upon this matter really comes to this, that the amount arrived at by applying the rule of *Campbell* v. *Westenra* is startingly large. So it is; but in itself, and apart from an alternative, that does not seem to be a reason for departing from the rule. The transaction in this case was for a fancy price; hence the heavy maill. Nobody suggests that this was an ordinary commercial transaction in land. The estate had very attractive residential and sporting features, and a purchaser was found to pay a fancy price for it. It may be that the purchaser would not have agreed to buy if the whole consideration had taken the form of an annual sub-feu-duty, inasmuch as the saleability of the estate in his hands would have been prejudicially affected. But the defender got the price all the same. Why should not that price provide the basis for fixing the year's maill, when in point of fact it was the actual price of the sub-feu? I see no alternative to the method adopted in *Campbell* v. *Westenra*, and I therefore think the conclusion to which the Lord Ordinary came is the sound one.

LORD MACKENZIE—I am of the same opinion. I think that the view taken by the Lord Ordinary in the earlier stage of this case was correct, and that we ought to follow the rule of practice laid down in *Westenra*, 10 S. 734.

In applying that rule, of course certain factors have to be taken into consideration, and the first is what is the amount of the grassum? That is ascertained in the present case—£54,000, and I have been unable to see any good reason for discarding that figure as the starting point. The fact that the value of the feus taken in combination is greater than their joint value taken separately does not seem to me to be adverse to the pursuer's contention.

Part of the £54,000 must be taken as the value of the timber, because this is not a case in which there was any separation of the value of the property and the value of the wood, and therefore I do not think that there is any record for allowing inquiry into the value of the timber. It must just be taken as entering into the value of the lands for which the £54,000 was paid.

The next step which has to be taken is to apportion the £54,000 between the respective superiors, and that has been done, and the defender now offers no opposition to the proportion which is allocated to each of the superiors.

But there remains the question of the rate of interest which ought to be applied to the amount of the grassum—that is to say, how is the grassum to be decapitalised and converted into a feu-duty? The rule laid down in *Campbell* v. *Westenra* is, as Lord Dunedin held in *Governors of George Heriot's Trust* v. *Paton's Trustees* (1912 S.C. 1123), the rule of correct feudal practice, and is a working rule of practice not to be departed from unless there are specific averments which will warrant the Court in laying down that the rate of interest to be applied should be something different from 5 per cent. For my own part, if the defender in this case had come forward with a definite alternative to 5 per cent., and had supported that by averments of facts and circumstances relevant to infer the application of a rate lower than 5 per cent., I should not have thought that the hands of the Court were tied and that they were bound to allow as much as was allowed in *Campbell* v. *Westenra*. It is because I have been unable to find either on record or in the argument submitted to us definite material for an alternative that I feel compelled to follow what was done in *Campbell* v. *Westenra* and apply it without modification in the present case.

LORD SKERRINGTON—Counsel for the defender argued that for various reasons interest upon the price or grassum of £54,000 ought not to be taken into account in fixing the amount of the yearly rent as was done in the case of *Campbell* v. *Westenra*, 10 S. 734. This argument seemed to me to be more plausible than sound, and I see no reason why the grassum in the present case should not be apportioned as between the two superiors. That having been decided, the defender's counsel stated that their client had no interest to criticise the amount of the apportionment as agreed upon between the two superiors.

It was next argued that some deduction should be made from the sum of £54,000 because there was mature timber upon the estate, but the defender's averments are not such as would entitle us to treat the timber as a separable subject.

As regards the rate of interest, the defender has stated no reasons sufficient to justify us in departing from the customary rate of 5 per cent.

LORD CULLEN—The cumulo grassum of £54,000 was paid for the heritable subjects embraced in the two feus and for nothing else, and I can see no reason why it should

not be apportionable between these two feus whatever the due proportions may be. If it be the case that the two feus had they been sub-feued separately would have produced less than was got by sub-feuing them together, it remains none the less true that the better result which was obtained by taking the latter course represents what was potential value in the lands, and comes from no other source whatever. The case appears to me to be the same in principle as that which would have arisen had the lands of the two feus been combined in one agricultural lease at a cumulo rent larger than the sum of the separate rents obtainable from the subjects if leased separately.

As regards the timber, the grassum according to the feu-disposition was paid indiscriminately for all that was contained in the two feus. The timber simply formed one of the elements of heritable value in the feus, and it seems to me quite irrelevant to consider what the vassal did or could do with the timber after he acquired the sub-feu. If the rule of *Campbell* v. *Westenra*, 10 S. 734, is otherwise applicable, I see no reason why the timber should be eliminated from the calculation any more than any of the other elements of heritable value for which, all taken together, the grassum was paid.

As regards the remaining question, I do not think that the rule of *Campbell* v. *Westenra* necessitates the taking of 5 per cent. interest on all grassums which are paid for sub-feus irrespective of circumstances. The 5 per cent. rate, so far as the report shows, was not a matter of controversy or argument in the case at all. If, however, as was said by Lord Dunedin in the case of *Governors of George Heriot's Trust* v. *Paton's Trustees*, 1912 S.C. 1122, the grassum was treated as being of the nature of a capitalisation of the feu-duty, it would seem to follow as the logical view that the rate of interest to be taken in any particular case should be such a rate as will correspond with the market value on sale of feu-duties of the particular class at the period of the transaction, seeing that the principal vassal is figured as buying up or redeeming beforehand by a capital payment the sub-feu-duty which otherwise would have formed the consideration for the grant. That view, however, has not been advanced by the defender, as it would not, it appears, be favourable to his interest, and no other definite alternative is advanced by him. In these circumstances it seems to me that we have no grounds for departing from the formula of *Campbell* v. *Westenra*, and I therefore think we should apply the rate of 5 per cent.

The Court pronounced this interlocutor—

"... Repel the whole pleas-in-law in said amended closed record for the defender Sir Charles Stewart Forbes: Find and declare in terms of the first conclusion of the summons: Find that the composition payable by the defender Sir Charles Stewart Forbes in respect of the pursuer's Mrs Ann Stuart or Smith-Shand's trustees' portion of the superiority of the estate of Candacraig falls to be calculated on the basis of a year's sub-feu-duty together with a year's interest at five per cent. on that portion of the grassum paid for the whole estate of Candacraig effeiring to the portion of the said estate of which the said pursuers are superiors: Find in respect of the agreement of parties that for the purposes of this case said portion of the grassum is the sum of £29,381, 14s. 8d."

Counsel for Defender and Reclaimer Sir Charles Stewart Forbes—Dean of Faculty (Constable, K.C.)—C. Mackintosh. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Defender William Mackintosh—Mackay, K.C.—W. H. Stevenson. Agents—John C. Brodie & Sons, W.S.

Counsel for Pursuers and Respondents—Chree, K.C.—Maitland. Agents—Murray, Beith, & Murray, W.S.

Saturday, March 18.

FIRST DIVISION.

GLASGOW CORPORATION *v.* BARCLAY, CURLE, & COMPANY, LIMITED.

Road—Public Street—Abnormal Traffic Causing Damage to Public Street—Liability of Traffic Owner at Common Law—Whether Abuse of Street or only Wear and Tear—Rights of Public Authority against Persons Responsible for Extraordinary Traffic.

A firm of boilermakers transported along the streets of a city a number of boilers which along with the bogies on which they were mounted weighed from 65 to 82 tons each, with the result that many of the granite setts with which the streets were causewayed were "crushed and ground." The streets, however, were not made dangerous or inconvenient for public use, although the date when operations of repair would be required was materially hastened, and part of the permanent material of the causeway was so damaged as to necessitate when the time for relaying the streets arrived complete renewal. The local authority within whose jurisdiction the streets in question lay brought an action of damages at common law against the firm (there being no statutory enactments dealing with excessive weight or extraordinary traffic applicable to the streets in question), in which it claimed to recover the cost of replacing the setts which had been destroyed, thereby seeking to vindicate its right to charge against any user of the streets whose traffic caused extraordinary damage the extra expense incurred. *Held* that as the user com-