face of it is binding on the heir of entail in possession. Accordingly, a substitute heir of entail cannot restrain the heir of entail in possession or oblige him to do anything in connection with the entailed estate unless what he desires to prevent would constitute a contravention of the deed of entail.

I now come to consider whether what the pursuer proposes to do, viz., to appropriate the sum paid by the mineral tenants in lieu of restoring the ground, does or does not constitute a contravention of the entail, or put otherwise, whether the substitute heirs of entail could by any known process compel the pursuer to apply that money in restoring the ground? In my opinion they could not do so.

If the pursuer, instead of leasing the minerals, had preferred to work them herself, I do not know of any process by which the substitute heirs of entail could have compelled her to restore the ground. Again, if the minerals being leased, she had for what seemed to be a good reason freed the tenants from their obligation at the end of their lease, I have equal difficulty in seeing what legal claim the substitute heirs could have maintained against her. She need not have taken the mineral tenants bound to restore. In the earlier case—*Muirhead* v. *Young*, 17 D. 875—it was held not to be a good objection to a lease of minerals that the tenants were not taken bound to restore the surface. In that case the lease was current when the question arose, and it may be that the stipulated return was held to have been greater, because the tenant was not taken bound to restore the ground. If in the present case the lease had been still current, it might have been contended that in respect of the obligation to restore the surface the tenant paid a smaller rent or royalty, and that by appropriating the sum paid in lieu of restoration (supposing that payment to be exigible during the lease) the pursuer would really be receiving a grassum, while the substitute heirs would (if the succession opened during the lease) be left saddled with an inadequate return. But as I have already said, the lease is at an end, and therefore the only prejudice which the substitute heirs (who are not concerned with the adequacy or inadequacy of the return received by the pursuer) can allege, is that the pursuer has allowed the mineral tenants to make a use of the surface of the ground, which in the meantime has rendered it unfit for agricultural purposes, and has not applied the compensation paid for the good of the estate. For the reasons stated I cannot hold that this amounts to a contravention of the conditions of the entail, and therefore, although I think the question is one of difficulty, I am prepared to give decree in favour of the pursuer.

In what I have said I have assumed that the money is in the hands of the pursuer, because in my opinion while the marriage-contract trustees were quite justified in taking the opinion of the Court on the question, they were not entitled to withhold payment of this sum, which is really part of the produce of the entailed estate, from the pursuer.

As regards the rents, produce, and profits of the estate of Bredisholm, the marriage-contract trust is simply a trust for management for the benefit of the pursuer alone.

The sum of £78 is, I understand, now admitted to be produce of the estate, and therefore payable to the pursuer.

LORD YOUNG was absent.

The Court recalled the interlocutor of the Lord Ordinary, and found and declared in terms of the first declaratory conclusion of the summons, and ordained the defender to pay the sums of £905, 2s. and £78 to the pursuer, with all interest received thereon.

Counsel for the Pursuer—Campbell, Q.C. —Graham. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Pupil Children (Defenders)—Macfarlane. Counsel for the Trustees (Defenders)—Moncrieff. Agents for Defenders—Fraser, Stodart, & Ballingall, W.S.

Tuesday, November 21.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

FARQUHARSON *v.* CALEDONIAN RAILWAY COMPANY.

Superior and Vassal—Casualty—Composition—Clause of Relief—Implied Entry—Conveyancing Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4.

A vassal duly entered with the superior conveyed the subjects to A and died in 1839. In 1871 A, who had taken infeftment, but had not entered with the superior, disponed the subjects to B, who recorded his disposition. In the beginning of 1874 B disponed the subjects to C, who recorded his disposition, and thus at the passing of the Conveyancing Act 1874 was impliedly entered with the superior. In 1876 C disponed the subjects to D, who also recorded his disposition. Each of the above dispositions contained a clause of relief of all casualties. C died in 1892.

Thereafter, the superior having demanded a composition of a year's rent from D, D paid it and got relief from C's trustees. C's trustees in turn got relief from B, but upon B asking relief from A, the latter refused to pay, on the ground (1) that prior to the passing of the Act of 1874 composition was not a casualty payable or prestable to the superior, and was not therefore included in the clause of relief in his disposition to B in 1871; and (2) that the composition demanded by the superior from D was in respect of D's entry, and had become due at C's death in 1872, and was not therefore the composition due and payable at the date of the disposition to B, to which alone the clause of relief applied.

Held (*aff.* judgment of Lord Kyllachy) that A was bound to relieve B of the composition paid by him.

By feu-charter, dated 5th December 1822, the President and Governors of Robert Gordon's Hospital in Aberdeen (now known as Gordon's College) disponed in feu to William Willox, wright in Aberdeen, a piece of ground in Woolmanhill and Blackfriars Street, Aberdeen, subject to a feu-duty of £20, 3s. Under the feu-charter the casualties due to the superiors payable by heirs and singular successors were untaxed. William Willox took infeftment by means of instrument of sasine, dated 9th and recorded 26th, both days of December 1822.

By disposition, dated 13th September 1828, Willox disponed the said subjects to himself and his wife in conjunct fee and liferent, and to the longest liver of them in fee. Willox died in 1839, survived by his wife, by whom the disposition was recorded on 21st December 1864.

By disposition, dated 20th December 1864 and recorded 24th February 1865, Mrs Willox disponed a portion of the said subjects to the Scottish North-Eastern Railway Company.

By disposition, dated 12th May and recorded 10th July 1871, the Caledonian Railway Company, who had then come in place of the Scottish North-Eastern Railway Company, in virtue of The Caledonian and Scottish North-Eastern Railways Amalgamation Act 1866, sold a portion of the subjects acquired by the Scottish North-Eastern Railway Company from Mrs Willox to Peter Farquharson. This disposition contained a clause of relief of casualties in the following terms:—"And the company binds itself to free and relieve the said disponee and his foresaids of all feu-duties, casualties, and public burdens." At the date of the disposition William Willox and his wife were dead, and the subjects were in non-entry.

By disposition, recorded on 10th January 1873, Peter Farquharson sold the subjects disponed to him to John Pirie. By disposition, recorded on 24th April 1874, John Pirie sold the subjects to John Florence. By disposition, recorded on 3rd June 1876, John Florence sold a portion of the subjects acquired by him to John Dunn, and by disposition, recorded 22nd May 1884, he sold the remaining portion of his holding to William Harvey. By disposition, recorded 21st March 1893, William Harvey sold the portion acquired by him to John Dunn, so that the latter acquired the whole of the subjects successively held by Farquharson, Pirie, and Florence. All these dispositions contained a clause of relief of casualties, &c., in statutory form.

The superiors, the President and the Governors of Gordon's College, having demanded a casualty of a year's rent from John Dunn in respect of the subjects, vested in him as aforesaid, amounting to £60, 8s. 5d., and Dunn having paid the casualty to the superiors, he demanded relief thereof from the trustees of John Florence, in respect of the clause of relief contained in the conveyance in his (Dunn's) favour. Florence's trustees made payment to John Dunn in terms of this demand, and obtained a discharge, dated 17th February 1898. They in turn, with consent of John Pirie's executor, applied to Peter Farquharson for relief in respect of the obligation contained in the disposition by Farquharson in favour of Pirie, Florence's author. Immediately on receiving a demand for relief from payment of said casualty, Farquharson communicated with the Caledonian Railway Company, informing them of the whole circumstances in which relief was claimed from him, and at same time sending them the whole title-deeds for examination. The Railway Company, however, repudiated liability.

An action of relief was thereafter brought in the Sheriff Court at Aberdeen by Florence's trustees against Farquharson. He again communicated with the railway, but they again repudiated any claim of relief. Farquharson being advised that he had no alternative but to defend the action, did so, but decree was pronounced against him by the Sheriff-Substitute. Being advised that the judgment was sound in law, he paid to Florence's trustees (1) the casualty of £60, 8s. 5d.; (2) interest thereon £2, 5s. 8d.; and (3) taxed expenses in the action, £17, 17s. 3d., amounting in all to £80, 11s. 4d. The expense incurred by Farquharson's agent in defending this action was £32, 0s. 4d.

On 25th November 1898 he raised an action against the Caledonian Railway Company to have it found and declared that the defenders were bound to relieve him of the above sums, and to have the defenders ordained to pay him the total of £112, 11s. 8d.

The defenders averred that the casualty became and was due in consequence of the death of John Florence, who died on 21st August 1892, at which date John Dunn was impliedly entered with the superiors in the whole subjects in which Florence had become impliedly entered as at 1st October 1874, and that the defenders were under no obligation towards the pursuer for relief in respect of the payment.

They pleaded — "(2) The said casualty not being a burden of which the pursuer is entitled to be relieved by the defenders under their disposition, the defenders should be assoilzied, with expenses. (3) On a sound construction of the disposition and of the Conveyancing (Scotland) Act 1874, the defenders are not in the circumstances bound to relieve the pursuer of the sums sued for, or any part thereof."

On 4th March 1899 the Lord Ordinary (KYLLACHY) found, declared, and decerned in terms of the conclusions of the summons.

Opinion.—"The pursuer in this case sues the Caledonian Railway Company for relief of a composition which he has had to pay to the superior of certain subjects in Aberdeen. These subjects were disponed to the superior so far back as the year 1871, by the Scottish North-Eastern Railway Company, whom the Caledonian Company now represent; and the claim of relief is founded on a clause in the pursuer's disposition whereby the Railway Company

bind themselves 'to free and relieve the said disponee and his foresaids of all feu-duties, casualties, and public burdens'—that is to say (expanding the clause in terms of the interpretation clause of the Titles Act), 'to relieve of all feu-duties or other duties and services or casualties payable or prestable to the superior prior to the date of entry.'

"The composition in question was due to the superior at the date of the disposition—that is to say, the subjects were in non-entry when the Railway Company disponed to the pursuer. But it was only the other day that the superior made his demand; and by that time the subjects had undergone various transmissions, the pursuer having disponed to a third party with a clause of relief expressed as in his own disposition, and that third party having again disponed with a similar clause of relief—and so on. The result was that the superior's claim was made against the present owner; and he having sought relief against his immediate author, the pursuer had ultimately to pay. He did so after an action had been brought against him, which he intimated to the Railway Company, and which the latter refused to defend. Consequently the present action includes a demand both for the composition itself, and for the expenses of the unsuccessful defence.

"The pursuer maintains that the case is ruled by the well-known case of the *Straiton Estate Company* v. *Stephens*, 8 R. 299; and undoubtedly in that case the clause of relief was similar, and was enforced after at least one transmission, and was held to cover both the casualty paid to the superior and the expenses of an unsuccessful defence.

"The defenders, however, take two points, which have been ably argued by Mr King.

"In the first place, they say that the composition here was truly payable, not in respect of the pursuer's entry, but in respect of the entry of Mr Dunn, the present proprietor, and was not therefore the composition which was due and payable at the date of the pursuer's disposition. As to this argument, I think I need only observe that, in my opinion, it was fully considered and expressly negatived in the case of the *Straiton Estate Company*. Nor am I able to see that the subsequent case of *Mounsey*, 12 R. 236, at all affects the authority of that decision. The principle, I take it (and it is a principle recognised in both cases), is just this—that a composition, once it becomes due and payable, remains so until it is demanded and paid; and when demanded and paid is the same composition which has been due all along.

"Mr King's other point, which is more open, is this. He pointed out, what is quite true, that the disposition here, differing from that in the *Straiton* case, was dated in 1871—that is to say, before the Act of 1874—and must accordingly be construed by reference to the old law—the law before the Act of 1874. And his argument was, that under the old law composition was not properly a casualty at all—at all events was not a casualty payable or prestable to the superior, who under the old law had no right to sue for composition, but could only enforce its payment indirectly, viz., by entering into possession of the lands. In short, the defenders adopt certain views as to the old law expressed by Lord Curriehill as Lord Ordinary in the case of *Straiton*, and I do not know that their argument can be better stated than we find it stated in Lord Curriehill's note in that case.

"Now, having given my best consideration to this matter, I am of opinion that, although the point in question was not in terms decided in the *Straiton* case, yet having regard to the opinions in that case and the general tenor of the authorities, the casualty here was as much due and payable to the superior at the date of the pursuer's disposition as it would have been if the disposition had been dated subsequent to the Act of 1874. I do not wish to revive an old and forgotten controversy—a controversy which must now, except in the rarest cases, be quite academical. But I must say, with all the respect due to any opinion of Lord Curriehill, especially on questions of this kind, I am unable to agree with the very strict and technical reading which he attaches to the clause of relief contained in this and similar dispositions. I prefer the view indicated by Lord Shand, and expressed and explained at length by Lord Young. I do not think I need do more than refer to Lord Young's opinion, in which I entirely concur. The *Straiton Company's* case did not, as I have said, decide the point; but, taking the case as open, I am of opinion that the pursuer here has right under his clause of relief to be put in the same position as if the Railway Company had (as they might have been obliged to do at the time) completed their disponee's title by paying to the superior the casualty then due.

"The result is that the pursuer gets decree in terms of his summons."

The defenders reclaimed, and argued—The Lord Ordinary had decided against them because he held that the decision in *Straiton Estate Company* v. *Stephens*, December 16, 1880, 8 R. 297, ruled the present case. They submitted it did not, because in *Straiton's* case the disposition containing the clause of relief was dated after 1874, while in the present case the disposition was dated prior to 1874. Before 1874 a composition was not a casualty payable or prestable until the claim was enforced by the superior in an action of non-entry. The Act of 1874 had changed all that, and had given the superior a right to bring a petitory action for payment of the composition when there was an implied entry under the statute — *Campbell* v. *Stuart*, Dec. 11, 1884, 22 S.L.R., opinion of Lord Fraser, 294. Lord Curriehill's opinion in *Straiton*, 8 R. 302, was to the same effect, and although his judgment as regards the law on the matter subsequent to 1874 had been reversed by the Inner House, no objection had been taken to his opinion with respect to the law prior to 1874.

Indeed, his opinion on this point received support from Lord Deas (8 R. 308), who said that it was the statutory entry provided for by the Act of 1874, which made the casualty a debt due by the vassal. The pursuer's disposition being dated in 1871, and he never having entered with the superior, and having disponed the subjects to Pirie in 1873, composition was not a casualty payable or prestable by him as vassal under the disposition from defenders. It therefore did not fall under the clause of relief in his disposition. In any event the composition now sued for was not paid in respect of the pursuer's entry. It was paid in respect of Dunn's entry, and was thus not the composition due and payable at the date of the pursuer's disposition—*Mounsey* v. *Palmer*, December 6, 1884, 12 R. 236. The superior had pretermitted the casualties due by the owners of the property prior to Dunn, and the casualty paid by Dunn was in respect of his own entry. It did not therefore fall under the clause of relief in the pursuer's disposition.

Argued for pursuer—Composition was a casualty of which the defenders were bound to relieve him in terms of the clause of relief in his disposition. The Act of 1874 had made no change in the nature of composition as a casualty, it had only substituted an action of declarator and payment for an action of declarator of non-entry, and decree in the former action operated in the same mode as a decree of non-entry did before 1874, and could not be enforced by personal diligence against the defender —Mowbray's Analysis of the Conveyancing (Scotland) Act 1874, p. 12. The superior was therefore, after 1874, with respect to his claim for composition, in exactly the same position as before. The case of *Straiton Estate Company*, *supra*, ruled the present, and the decision of the Lord Ordinary was sound.

At advising—

LORD JUSTICE-CLERK — The defenders, the Caledonian Railway Company, on absorbing the Scottish North - Eastern Railway into their system took over an obligation entered into by the latter company, in a disposition in favour of the pursuer, to free and relieve the pursuer of, *inter alia*, "all casualties."

There was at that time a composition due to the superior of the lands, which were then in non-entry, but the superior did not then, or for a long time after, make any demand upon his vassal. From time to time the property was disponed by one proprietor to another. Ultimately the superior made his demand, and the present or past proprietors in succession called each on his immediate predecessor for relief on their guarantees, but on the pursuer intimating to the Railway Company they refused to relieve him, and accordingly the pursuer has been compelled to pay after a litigation.

It could hardly be disputed that if the case of *Straiton* is an authority, and if there is no later case by which its authority is affected, that it is practically a distinct negative to the defence here pleaded. The defenders, however, attempted to maintain that the decision in *Straiton* was affected by the case of *Mounsey*. I am unable to see that this is so. That case only decided that where a superior has exacted a composition from the latest disponee who is impliedly entered under the Act of 1874 in respect of the death of a previously-entered vassal, he cannot on the death of an intermediate impliedly-entered vassal, exact another composition from the vassal from whom he had already received a composition payment.

As regards the other point raised for the defenders, viz., that this composition is not a casualty from which the defenders are bound to give relief, I agree with the Lord Ordinary in thinking that to read the clause of relief in accordance with the strictly narrow view that was taken by the late Lord Curriehill would be to strain at technicality, and that the views expressed to a different effect in the case of *Straiton* are more sound.

The Railway Company could have been compelled to make Mr Farquharson's title full and complete at the time. Instead of this they guaranteed him against what he would have to pay for having this done if called on. The superior having now exacted his right, the pursuer has been compelled to pay under the clause of relief granted by him, and I am of opinion that the Lord Ordinary has rightly held that the Railway Company from whom he received his disposition containing a similar clause of relief must be ordained to make payment to him.

LORD TRAYNER—I concur entirely in the views expressed by the Lord Ordinary, and cannot usefully add anything to what his Lordship has said.

LORD MONCREIFF—I am of opinion that the Lord Ordinary's judgment is right upon both of the points mentioned in the note.

The subjects in question became in non-entry on the death of Willox, the last-entered vassal in 1839, and they were still in non-entry in July 1871, when they were disponed to the pursuer Farquharson by the disposition which contains the clause of relief relied on by him. Farquharson disponed to Pirie in 1873, and Pirie to John Florence, whose disposition was recorded in the Register of Sasines on 24th April 1874, both dispositions containing similar clauses of relief. On the passing of the Conveyancing Act of 1874, Florence on infeftment was entered with the superior by force of the Act, and at that time the composition due at the date of the disposition in favour of the pursuer in 1871 was still unpaid.

In 1876 Florence sold a portion of the subjects to John Dunn by disposition, which was duly recorded. Florence died in 1892. In 1893 Dunn acquired the remaining portion of the property. Then the superior for the first time demanded from Dunn a casualty of a year's rent, which

Dunn paid. Dunn having paid the casualty applied to Florence's trustees for relief, which they granted, and they in turn, with Pirie's concurrence, applied to the present pursuer and obtained relief from him. The pursuer having paid Florence's trustees, now in his turn claims relief from the defenders, who represent the pursuer's authors in 1871.

The defenders' argument is this. They say that the pursuers' authors undertook to relieve him only of casualties exigible at the date of the disposition in 1871; that the only casualty then exigible was a composition due in respect of the death of Willox, the last-entered vassal; that the payment made by Dunn was a payment made in respect of his own entry (*Mounsey*, 12 R. 236); that that casualty became due on the death of Florence in 1892, and that it was not the casualty which was due and exigible in 1871. They plead that on Florence being impliedly entered under the statute in 1874, the superior was entitled to proceed against him for the casualty then due, and that if he did not then do so, he must be held to have departed from the claim which was the only claim to which the clause of relief relied on by the pursuer applied. I think there is some plausibility in this argument, but I think that it proceeds upon a misapprehension of the effect of an implied entry under the Act of 1874. Under the old law when lands were in non-entry, the superior could at any time force payment by declarator of non-entry against the purchaser for the time in possession of the lands. But if he did not choose to do so, and the lands continued in non-entry, and one or more transmissions took place, when the superior came to claim a composition from the purchaser in possession, he could only recover payment of one casualty—Bell's Lectures (3rd ed.), p. 1147.

Now, an implied entry under the Act of 1874 does not enable the superior to demand any casualty sooner than he could by the law prior to the Act (section 4, sub-section 3); and on the other hand, an implied entry is not pleadable in defence against an action of declarator and payment (section 4, sub-section 4). Thus, on the one hand, a superior who delays to claim a casualty from a purchaser who is impliedly entered under the Act, is not precluded by reason of the implied entry from demanding the casualty at any time from the vassal so entered. No inference can be drawn from the fact that an implied entry has taken place without a claim being made to the effect that the superior has waived his right to the casualty. On the other hand, if the superior does not claim the casualty from a vassal who is impliedly entered, and the latter dies after having disponed the land to a purchaser who is infeft, the superior, when he proceeds against the latter, is not entitled to two casualties but only to one. The casualty which in the end is demanded and paid is the casualty which was due at the outset, and no other.

On the second point I agree with the Lord Ordinary. In modern practice, at least dating back to a time anterior to 1871, composition has been recognised as a casualty due and payable to the superior, although prior to 1874 payment could not be enforced directly by a petitory action. I observe that in the interpretation clause of the Act of 1874 composition is described as "the composition or other duty payable on the entry of a singular successor," which confirms the view that before the passing of that Act composition was held among conveyancers to be *in pari casu* with other feudal casualties payable to the superior.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuer—Craigie—W. Æ. Mackintosh. Agent—R. C. Gray, S.S.C.

Counsel for the Defenders—King. Agents—Hope, Todd, & Kirk, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, November 21.

(Before the Lord Justice-Clerk, Lord Adam, and Lord Moncreiff.)

BANKS AND MITCHELL *v.* WELSH.

Justiciary Cases — Expenses—Poaching—Summary Procedure (Scotland) Act 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 22—*Poaching Prevention Act* 1862 (25 *and* 26 *Vict. cap.* 114).

Under sec. 22 of the Summary Procedure (Scotland) Act 1864, expenses in a suit for penalties cannot be given to or against a procurator-fiscal unless such an award is authorised expressly or impliedly by the Act imposing the penalty.

The Poaching Prevention Act 1862 imposes (sec. 2) a penalty on conviction, but does not expressly authorise an award of expenses. It provides (sec. 3) that any penalty under the Act shall be recovered and enforced in Scotland under the Day Trespass Act 1832.

The Day Trespass Act 1832 imposes (sec. 1) a penalty and expenses on conviction, and provides (sec. 8)—"The justice or justices of the peace by whom any person shall be summarily convicted and adjudged to pay any sum of money for any offence against this Act, together with expenses, either immediately or within such period as the said justice or justices shall think fit; and that in default of payment at the time appointed, such person shall be imprisoned," . . . "the imprisonment to cease upon payment of the amount and costs."

Held that sec. 8 of the Day Trespass Act did not authorise but only referred to an award of expenses, and that there was therefore no authority for an award of expenses in a prosecution under the Poaching Prevention Act. Conviction in which such an award had been made