

say that the next heirs should have appeared and insisted on the three months' delay. Parties in these cases are entitled to rely on the Court seeing that all the statutory requisites are carried out, and it has never been our practice that they should be bound to appear. On these grounds I think there is no alternative but to recal all the interlocutors after that of 14th March 1899, and as the three months have now expired to remit to the Lord Ordinary to proceed with intimation to the next heir.

**LORD M'LAREN**—In this case we are in a different position from the Lord Ordinary, because the Lord Ordinary had no power to recal interlocutors already pronounced even if he had come to think the orders were incompetent or premature. I am of the same opinion as your Lordships. The fallacy of the Lord Ordinary's opinion appears to be in attributing too much importance to the use of the word "forthwith" in section 18 of the Act of 1882. If in one clause of a statute the judge is directed to do something, and in another clause to do something else "forthwith," the duty of the judge in the two cases as regards the despatch of the business in hand would be the same. In either case his duty is to carry out the procedure described with as little delay as possible. If in this view it be necessary to find a reason for the use of the word "forthwith," such a reason appears from the consideration that in the case of a single creditor he is not authorised to apply to the Court until six months after a charge has expired, while a trustee in a sequestration may present his application immediately on his appointment. At the same time it is not in my view necessary to sist a petition under section 18 for the three months for all purposes. Many things might be done in this interval. Curators might be appointed, the claims of creditors claiming a preference dealt with, and other cognate incidental matters followed out; but nothing must be done within the time limit which could affect the rights of expectant heirs. Here there has been a remit to a lawyer and a remit to an actuary before the elapse of three months, and therefore before the expectant heir was in a position to come forward and state objections. I am therefore of opinion that all interlocutors already pronounced, except such as are merely incidental, ought to be recalled *hoc statu*, and the case remitted to the Lord Ordinary to take the proper steps of procedure afresh.

**LORD KINNEAR**—I agree with your Lordship in the chair and Lord Adam. It appears to me that no procedure can be validly taken under the 18th section until the heir whose consent is to be dispensed with has received the special intimation provided by that section, and that that special intimation cannot be given until after the lapse of three months from the date of the application. It follows that the procedure in this case is ineffectual, and therefore that the interlocutors men-

tioned by your Lordships must be recalled and the procedure carried out anew. It is clear enough that the special intimation in question does not dispense with the usual notice to all persons interested by intimation or service when the application is brought into Court, and the usual interlocutors may therefore be perfectly good for their own purpose.

The Court pronounced this interlocutor:—

"The Lords having considered the reclaiming-note for The Honourable Francis Edward Basil Napier and The Honourable Frederick William Scott Napier against the interlocutor of Lord Pearson dated 7th February 1901, and heard counsel for the parties, Recal said interlocutor and the other interlocutors in the case subsequent to 14th March 1899, and remit to the Lord Ordinary to order intimation of the proceedings to be made in terms of section 18 of the Entail (Scotland) Act 1882, in the same manner as in a petition by a creditor under that section; and decern: Find the reclaimers entitled to expenses," &c.

Counsel for the Petitioner—Dundas, K.C. — Cullen. Agents—J. A. Campbell & Lamond, C.S.

Counsel for the Respondents—A. O. M. Mackenzie. Agents—E. A. & F. Hunter & Company, W.S.

Thursday, February 28.

FIRST DIVISION.

MONTGOMERIE-FLEMING'S TRUSTEES.

*Succession—Liferent and Fee—Annual Income—Duplications of Feu-Duties.*

A trustor directed his trustees to hold and apply the whole residue and reversion of his estate and effects, heritable and moveable, real and personal, *inter alia*, for behoof of his widow in liferent. Practically the whole of the estate consisted of land in or near Glasgow, on which a large number of building feus had been given out at different dates since 1830. From the lands there fell due duplications of feu-duty payable by the feuars every nineteenth year from the date of their respective entries. From these duplications the estate derived an annual revenue of varying amount. In a special case presented by the trustor's widow and children, held (distinguishing *Ewing v. Ewing*, March 20, 1872, 10 Macph. 678) that the widow was entitled to such of these duplications as might fall due each year, as part of her liferent.

This was a special case presented by (1) Robert Jameson and others, trustees under the trust-disposition of the late James Brown Montgomerie-Fleming of Kelvin-

side, Glasgow, first parties; (2) Mrs Jane Robertson Prichard or Montgomerie-Fleming, widow of the late J. B. Montgomerie-Fleming, second party; and (3) Miss Elizabeth Tennent Montgomerie-Fleming and the other children of the said James Brown Montgomerie-Fleming, third parties.

By his trust-disposition and settlement the said J. B. Montgomerie-Fleming conveyed his whole estate, heritable and moveable, to trustees for, *inter alia*, the following purpose:—"In the third place, to hold and apply the whole residue, remainder, and reversion of my said estate and effects, heritable and moveable, real and personal, including therein the whole household furniture and plenishing, bed and table linen, books, pictures, gold and silver plate, cutlery, and china belonging to me at the time of my death, to and in favour and for behoof of my wife Jane Robertson Prichard or Fleming, so long as she shall remain my widow, in liferent, for her liferent alimentary use allenarly."

Then followed provisions with regard to the fee of the estate.

In the special case the following facts were set forth:—"The chief asset of the said James Brown Montgomerie-Fleming's estate and effects was at the time of his death, and still is, the lands and estate of Kelvinside, which were valued by Messrs T. D. Smellie & Fraser, property valuers and surveyors in Glasgow, on the 16th day of February in the year 1895, at the sum of £224,459, 16s. 6d., but which were at the time of his death burdened with bonds and dispositions in security to the cumulo amount of £180,000, and are still burdened with said bonds and dispositions in security to the cumulo amount of £178,370, £1630 having since his death been paid to account of the said £180,000. The free annual income of the lands and estate of Kelvinside, after deducting the interest on these bonds and dispositions in security, is about £1000, while the free annual income from the rest of the estate and effects left by the said James Brown Montgomerie-Fleming, and falling under the said trust-disposition and settlement, apart from Beaconsfield House and the household furniture, &c., therein, but deducting the interest on the bond and disposition in security for £4750 over that house, is about £135. From the lands and estate of Kelvinside, however, there fall due duplications of feu-duties, and it is in regard to these duplications that the question here presented for the decision of the Court arises. A statement showing what these duplications are, and also when they fall due, is printed in Appendix I., which is held as part of this case. It should here be stated that the said James Brown Montgomerie-Fleming during his life spent these duplications as they came in, just as if they were feu-duties. It should also be stated that the first parties are and will be giving off feus, with duplications of feu-duties every nineteenth year."

Appendix I., annexed to the special case, contained a list of the feus given off from

the estate, showing in separate columns the situation of the feus, the feu-duties, the dates of entry, and the terms at which the first duplications would be payable after the death of Mr J. B. Montgomerie-Fleming. From the heading of the last-mentioned column, it appeared that the duplications were payable every nineteenth year from the date of entry. From this list it also appeared that feus had been given off more or less continuously since Whitsunday 1830, which was the earliest date of entry mentioned.

From a statement contained in Appendix 2, annexed to the special case, it appeared that the amount to be derived from the duplication of feu-duties would be as follows:—

"Year to Whitsunday 1900	£862	5	1
Do. do. 1901	418	3	5
Do. do. 1902	320	15	0
Do. do. 1903	190	10	0
Do. do. 1904	47	15	0
Do. do. 1905	58	15	0
Do. do. 1906	264	16	4
Do. do. 1907	57	0	4
Do. do. 1908	608	1	8½
Do. do. 1909	148	7	11
Do. do. 1910	842	19	10
Do. do. 1911	819	14	11
Do. do. 1912	767	11	2½
Do. do. 1913	362	14	9½
Do. do. 1914	247	1	11
Do. do. 1915	566	10	0
Do. do. 1916	396	13	9½
Do. do. 1917	225	3	2½
Do. do. 1918	153	1	5"

The second party maintained that the duplications falling due, as they did, some every year, were to be reckoned as income, and therefore fell to be paid by the first parties to her as liferentrix under the bequest conveyed to her in the third place in the said trust-disposition and settlement.

The third parties maintained "that the duplications were to be considered as capital of the estate of the deceased, and did not fall to be paid to the second party as liferentrix."

The following were the questions of law:—"(1) Do the duplications, or any of them, or any part of them, or any average of them, as well those applicable to feus given off prior to deceased's death as those applicable to feus that are being and that may be given off by his trustees, fall to be considered as income or revenue of the estate and effects of the deceased, and to be paid to the second party as liferentrix under the bequest to her made in the third place in the said trust-disposition and settlement? (2) Do the duplications, or any of them, or any part of them, fall to be considered as capital of the estate and effects of the deceased, so as not to be payable to the second party as liferentrix?"

Argued for the third parties—The duplications of feu-duties were not income but capital. Whether expressed to be so or not, they were in fact in lieu of casualties, and were called casualties in section 23 of the Conveyancing Act 1874. Casualties were capital, not income, in a question be-

tween fiar and liferenter—*Ewing v. Ewing*, March 20, 1872, 10 Macph. 678; *Magistrates of Dundee v. Duncan*, November 20, 1883, 11 R. 145. In *Lamont Campbell v. Carter Campbell*, January 19, 1895, 22 R. 260, where the average annual amount of such payments was held to be included in a bond of provision in favour of his widow by an heir of entail, the question depended on entailed law. That case was distinguished in *Gibson v. Caddall's Trustees*, July 11, 1895, 22 R. 389, where a single payment of exactly the same kind as in the present case was held to belong to the fiar. The observation of the Lord President there (p. 893) that if the trust were fortunate enough to have so large a number of superiorities that each year a duplication of £100 fell in, then they would fall to the liferenter, was not applicable here, because his Lordship was contemplating the case of a regular income from duplications. Here, as shown by the table quoted above, the income from that source varied greatly every year.

Counsel for the second party were not called upon.

**LORD PRESIDENT**—The question which we have to decide in the present case is, whether the periodical payments described as duplications of feu-duties fall to be considered as income or revenue of the estate so as to be payable to the liferentrix, or as capital.

Mr Fleming's estate consisted of land feued off for building, yielding a clear income in feu-duties of £1000 a-year, while from other sources the annual income is about £135. From the estate there is a further return, the duplications of feu-duties payable at recurring periods from the different feus. This is quite a familiar provision in feus of building land, and the periodical payments are not generally, and they are not in this case, described as casualties. In the appendix we have a statement of the amount of these duplications of feu-duties for the years from 1900 to 1918. The amount is £862 for the year ending Whitsunday 1900, for part of which the testator lived, so that at the date of his death he was receiving nearly as much from the duplications of feu-duties as from ordinary feu-duties, and it would seem a startling proposition that the testator meant to exclude nearly half the annual income arising from his feus from the liferent provided to his widow. One would have expected that if he meant to do this he would have directed what was to be done with the income thus excluded. The average amount of the duplications for the period of years above mentioned is £387, and it seems plain that the testator intended that this should be treated as income.

But it is argued that these payments are of such a character that they are not properly income, but are, like casualties, to be treated as capital. It is true that prior to 1874 the payment for an entry, or casualty proper, was a payment due to the fiar who could grant an entry and not to the liferenter. But such a proper casualty was

not a payment recurring at regular intervals. The duplications are not described as casualties in this case, but it is contended that they are in lieu of casualties; but, taking this to be so, it does not follow that they are to be dealt with as proper casualties in a question between the parties who are respectively entitled to capital and income. If the principle contended for was sound, it must apply equally if the duplicated payment was distributed over the whole period of 19 years so as simply to increase the annual feu-duties, and counsel for the third parties appeared to admit that in such a case it would not be possible to regard the payments as other than income.

Certain cases were referred to, among others the case of *Ewing*. In that case the payments were of two kinds, both periodical, the first from subjects held under contracts of ground-annual, the second from subjects under feu-contracts. In the first case the periodical payments were in name of *grassum*, and in the case of the feus in lieu of casualties. The decision was given in 1872, when the feudal system was in full operation, and before new relations between superior and vassal were created by the Act of 1874. By section 23 of that Act casualties, as payments for an entry depending on the occurrence of uncertain events, were abolished, while payments of additional feu-duties at fixed intervals are permitted. In view of these changes the case of *Ewing* is no authority against the view I have expressed.

In the case of the *Magistrates of Dundee* it was decided that when a feu-contract contained a provision for a duplication of feu-duties at stated intervals this was to be regarded as in lieu of casualties, even when there was no express discharge of the superior's right to casualties. That was a decision between superior and vassal as to liability for a casualty arising on the construction of a particular feu-contract, and has no bearing upon the construction of a testamentary settlement as between the person entitled to the liferent and the persons having right to the fee of a trust-estate.

I therefore think the first question should be answered in the affirmative and the second in the negative.

**LORD ADAM** concurred.

**LORD M'LAREN**—I think the judgment proposed by your Lordships is sound in principle, and I venture to say that it is not in conflict with any of the decisions in this branch of the law. It is to be observed, though I do not know that the case depends very much on the distinction, that this is not a case of a direct disposition by a testator to disponees in fee and liferent, as in the case of *Crum Ewing* (10 Macph. 678), but it is the case of disposition to trustees with a direction to hold the estate for the benefit of the truster's widow in liferent allenerly and for other purposes with which we are not concerned. The case relates to recurring payments such as may now lawfully be made a burden on a feu, as the equiva-

lent of the old casualties of superiority, the question being, are they to be treated as capital or as income. Independently of authority, I should have no difficulty in holding such payments to be income, because they are produce of the estate, and because they may be appropriated to income without diminishing the capital value of the estate. The recurring payments satisfy the definition of a usufruct, because they may be expended without consuming or destroying the estate. While it may be that a casualty of large amount, payable only once or twice in a lifetime might be treated as capital, yet I observe that in the Ayr case (*Gibson v. Caddall's Trustees*, 22 R. 889) the Lord President pointed out that if the payments there had been so large in number as to bring in a regular income every year they would have been ascribed to income. In point of fact the casualties on an estate consisting of a number of feus are part of the income of the estate according to the ordinary meaning of words, and I have no doubt would be treated as income by an unrestricted proprietor. The only case which requires consideration is that of *Ewing v. Ewing* (10 Macph. 678), in which Lord Benholme held that sums paid in lieu of casualties on a feu-holding were to be given to the fiar. I observe that in that case the trustees were directed to execute a conveyance to Mrs Ewing in liferent and to the trustee's heir in fee, and the question was who was entitled to receive these recurring payments. The argument was irresistible that the fiar, who alone could give an entry, was entitled to sums paid in lieu of a composition on non-entry, because he was the person entitled to give the right for which the payment was made. Then his Lordship expresses great doubt as to whether this principle was applicable in the case of *grassums* paid every twenty-five years on burgh subjects. That is very like the present case, and on this point I cannot think that the decision is an entirely satisfactory one, because Lord Benholme recognises that the ground of judgment in the case of proper casualties is inapplicable, and yet no new ground of judgment is suggested.

The case is assimilated to that of bonus dividend, but we know that according to the most recent English cases the question whether a bonus paid by a company is to be treated as paid out of income or capital is entirely a question of fact. We lately had occasion to apply that principle in a question with a liferenter. The circumstances of the present case are distinguishable from *Ewing's* case, because this is a case of income paid through trustees, and in my opinion such recurring payments as the present should form part of the widow's liferent.

LORD KINNEAR—I agree with your Lordships. I think it is not of the slightest consequence whether these duplications of feu-duty are called casualties or not. In modern law language that may be a correct terminology, because it has the sanction of

Parliament, although it would no doubt have offended the susceptibilities of the older feudalists. But whether they are properly called casualties or not, they are not casualties in the sense of the law under which casualties were given to the fiar, as distinguished from the liferenter, because such casualties were not constantly recurring payments, but payments dependent on uncertain events, such as the death of the vassal or the transmission of his estate. The reason why the particular casualties to which these duplications have been assimilated were paid to the fiar was because a liferenter by constitution could not enter vassals, and therefore was not entitled to exact a payment in return for an entry. But even in the case of proper casualties I doubt whether that consideration would be sufficient to solve a question arising, not out of any feudal incident, or from the conditions of a title to land, but on the construction of a settlement. In that case the question always is what the maker of the settlement intended; and on the construction of this particular settlement I have no difficulty in holding that the truster intended his widow to have the income arising from these duplications. Such payments cannot be assimilated to casualties of feu in the older sense, because they are constantly recurring payments, payable at fixed intervals under contract between the superior and the feuars. I have no doubt that a proprietor in the position of the truster would in general treat such periodical payments as income, and I think he intended his widow to have the income arising from them after his death.

The Court answered the first question in the affirmative, and the second in the negative.

Counsel for the Second Party—W. Campbell, K.C.—Horne. Agents—Mylne & Campbell, W.S.

Counsel for the Third Parties—Dundas, K.C.—Spens. Agents—H. B. & F. J. Dewar, W.S.

Friday, March 1.

## SECOND DIVISION.

[Sheriff Court at Dunfermline.

HUNTER v. RUSSELL.

*Expenses—Reparation—Slander—Apology.*

In an action of damages for slander, the defender lodged a minute in which it was stated "that if any expressions used by the defender concerning the pursuer could be construed as reflecting in any way upon the pursuer, his character or conduct, he unreservedly withdraws the same, there being no ground therefor, and expresses his regret for the occurrence." The pursuer lodged a minute of acceptance thereof. On a motion for expenses, held (*dub.* Lord Young) that the terms