

Therefore the respondents cannot successfully maintain that the complainer has not sufficiently connected himself with the burgh, nor dispute that the complainer is in possession of the lands so described in virtue of a prior grant by the burgh.

This of itself is not conclusive. The writs to which I have referred being writs by progress could not add to or diminish the conditions of the original grant. The respondents therefore might, if they could, have shown that the original grant was of a more limited character.

Again, if the respondents could have shown that they have had exclusive possession of the fore-shore in question for the years of prescription upon a *habile* title they would have prevailed, notwithstanding their grant to the complainer's authors.

Lastly, it was open to the respondents, and is still open to them, to maintain that on a sound construction of the complainer's title he has no right to the fore-shore in question.

In regard to the first point, the respondents do not plead and have not maintained or proved that the boundaries in the original grant were different from those in the instrument of cognition and sasine and in the disposition in favour of the complainer. Secondly, they have not proved exclusive possession of the ground in question. It is true that in 1871 a lifeboat slip was built across part of the fore-shore *ex adverso* of the complainer's feu. But there is evidence that this was done with consent of the defender's predecessor Mr A. Carlaw Lockhart, and the complainer does not now disturb that erection. Again, it is proved that a fence of sleepers was put up above high-water mark at the end of the complainer's feu. But I think it is proved that this also was done with the consent of Mr Lockhart, and as much for his own protection as for the convenience of the town and the public.

There is also evidence to the effect that when sand was taken from the piece of the fore-shore in dispute Mr Lockhart's permission was asked, or at least that no dues were charged by the town or their tacksman when sand was taken from that part of the shore by members of the public.

The only question which remains is whether the true construction of the complainer's title is that for which he contends. On this point, in my opinion, the complainer is right. According to the best authorities a boundary "by the sea-shore" and a boundary "by the sea" mean one and the same thing, and gives to the vassal property in and down to the sea-ebb mark at ordinary tides, subject to the rights of the public. This is very well explained in Lord Kinloch's opinion in *Hunter v. Lord Advocate*, 7 Macph. 912. He examines the whole of the authorities, and says—"I consider the words 'sea,' 'sea-flood,' and 'sea-shore,' to express all of them in this respect one and the same thing. It has been contended with some plausibility that the term 'sea-shore' cannot indicate a grant of the shore, because that by which a subject is bounded cannot be viewed as within the

subject. But this argument ignores what I think is the true object in using this and all the other phrases, which was not to draw a boundary line in the strict sense of the expression, but simply to make it clear and indisputable that the property was dealt with as a property on the shore of the sea, implying thereby that the shore was given by the conveyance to the fullest extent to which the flood of the sea-shore runs out."

It is sufficient for the present case that the complainer is entitled to go down to the existing high-water mark.

I am therefore of opinion that the complainer is entitled to succeed. The form of our judgment may require consideration, and it may be better to hear parties as to whether arrangements cannot be made by which the addition to the slip may be allowed to remain.

The Court recalled the interlocutor reclaimed against, and found the complainer entitled to interdict.

Counsel for the Complainer—Solicitor-General (Dickson, K.C.)—Hunter. Agents—Hutton & Jack, Solicitors.

Counsel for the Respondents—Jameson, K.C.—M'Lennan. Agent—T. S. Paterson, W.S.

Saturday, November 22.

FIRST DIVISION.

ROSS'S TRUSTEES.

Liferent and Fee—Rights of Liferenters and Fians—Free Income—Casualty—Duplications of Feu-Duty.

In his daughter's antenuptial marriage-contract a father conveyed certain subjects to the marriage-contract trustees, with directions to pay the "free income" to his daughter during her life, and to hold the trust estate for behoof of the children of the marriage.

The subjects conveyed consisted of the *dominium directum* of certain property which was feued, and from which duplicands of feu-duty payable at regular intervals were exigible.

In a special case presented by (1) the trustees, (2) the daughter, and (3) her children, held that these duplicands of feu-duty fell to be considered as income and not as capital.

Montgomerie-Fleming's Trustees v. Montgomerie-Fleming, February 28, 1901, 3 F. 591, 38 S.L.R. 417, approved and followed.

By antenuptial contract of marriage, dated 23rd March 1874, between William Ross, C.A., Edinburgh, and Ellen Percival Gibson, Miss Gibson's father William Walker Gibson disposed, assigned, and conveyed to the trustees therein mentioned, and for the uses and purposes hereinafter mentioned, certain lands, subjects, and others therein described, but that only as

respects the *dominium directum* or right of superiority held by the said William Walker Gibson therein under the several feu-contracts narrated in the said ante-nuptial contract, together with the several feu-duties and casualties payable to the said William Walker Gibson under the same.

The first, second, and fifth purposes of the said trust were as follows:—"In the first place, During the subsistence of the marriage hereby contracted they shall pay the free income of the trust estate (after deduction of any expenses of management applicable to or connected with the receipt or recovery of such income, and of any charges properly payable out of the income) to the said Ellen Percival Gibson, upon her own receipts, and excluding the *ius mariti* and right of administration of the said William Ross, and any claim to or control over the same on his part, or on the part of creditors or others in his right: In the second place, In the event of the dissolution of the marriage by the death of the said William Ross, and of there being a child or children of the marriage, or the issue of such surviving, the trustees shall pay the free income of the trust estate to the said Ellen Percival Gibson during her life: In the fifth place, In the event of their being children of the marriage, or the issue of such surviving at the period of the dissolution of the present marriage, the trustees shall hold the said whole trust estate (subject to the before-written directions for the application of the income thereof) for behoof of and as a further provision for the child or children of the present intended marriage, and the child or children of any subsequent marriage into which the said Ellen Percival Gibson may enter, if she shall be the survivor, and the same shall be payable to them at the same periods, and shall be subject to the whole of the powers, provisions, and declarations" which were therein specified and set forth in regard to the sum settled by the said William Ross upon the children of the then marriage, with certain exceptions and changes thereon.

The income of the trust estate consisted chiefly of feu-duties exigible from the said subjects conveyed by Mr Walker. There were also certain duplicands of feu-duty payable by the feuars of said subjects, which fell due every 20th, 22nd, or 25th year, according to the terms of the particular feu-contracts.

Questions having arisen as to whether these duplicands were to be treated as income or capital of the trust, the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the trustees under the marriage-contract, (2) Mrs Ellen Percival Gibson or Ross, now Nicoll, and (3) the children of the marriage between Mr and Mrs Ross, and also the children of Mrs Ross by a second marriage with Dr Augustus Nicoll.

Besides setting forth the provisions of the marriage-contract (quoted *supra*), it was stated in the case that Mrs Ross

divorced her husband in 1890, and in the same year married the said Dr Augustus Nicoll. Four children of her first and two of her second marriage survived, and formed the third parties to the case.

The amount received from duplicands of feu-duty during the subsistence of the trust amounted to £585, 11s. 5d. This sum had been treated by the trustees as part of the capital of the trust.

The questions of law were as follows:—

"(1) Do the duplicands or any of them, or any part of them, fall to be considered as income or revenue of the estate conveyed to the first parties under the said contract of marriage? (2) Do the duplicands or any of them, or any part of them, fall to be considered as capital of the said trust estate?"

Argued for the second party—The duplicands should be reckoned as income. The point was settled by *Montgomerie-Fleming's Trustees v. Montgomerie-Fleming*, February 28, 1901, 3 F. 591, 38 S.L.R. 417. That case was undistinguishable from the present.

Argued for the first and third parties—The duplicands should be treated as capital. They were to be treated as casualties, and were not part of the regular income—*Magistrates of Dundee v. Duncan*, November 20, 1883, 11 R. 145, 21 S.L.R. 107; *Ewing v. Ewing*, March 20, 1872, 10 Macph. 678; *Gibson v. Caddall's Trustees*, July 11, 1895, 22 R. 889, 32 S.L.R. 668. The case of *Montgomerie-Fleming (cit. supra)* was distinguishable. It was decided purely on consideration of the probable intention of the testator in a will dealing with a property of which such duplicands formed an exceptionally large part.

LORD PRESIDENT—This case raises a very short point, on which we have had an excellent argument. By this marriage-contract the trustees are directed to pay to the second party the "free income of the trust estate." There is nothing said about the "annual income," and there are no restrictive words of any kind. The question asked is whether these duplicands of feu-duty form part of the income of the trust estate, and I am of opinion that they do. They do not come out of capital, and they leave the capital of the estate untouched. Accordingly, they are, *prima facie*, payable to the person who has right to the enjoyment of the income of the estate. The word "free" creates no difficulty, because it is not suggested that these payments are restricted in any way. Accordingly, I think that this case falls within the principle of the case of *Montgomerie-Fleming's Trustees* (1901, 3 F. 591), and, applying that principle, that we should answer the question to the effect that these duplicands of feu-duty form part of the income or revenue of the estate.

LORD ADAM concurred.

LORD M'LAREN—I am of opinion, in common with your Lordships, that this case is ruled by *Montgomerie-Fleming's Trustees* (1901, 3 F. 591), which I hold to

be a sound decision on this identical point. So far as there are any slight differences between the two cases they are rather in favour of the argument for the beneficiary. There may in certain cases be a difference of construction in the cases of a gift to one person in *lifereit* and another in fee and that of a gift of income, for in the case of a gift of *lifereit* and fee the argument might be stated that an uncertain thing like a casualty, which would in all probability occur only once during the course of the *lifereiter's* interest, was not part of that regular return which is characteristic of a *lifereit*, whereas when the gift is of the income of the estate, that argument would not be applicable. In general, I should be disposed to hold that every payment to be made from a trust estate which does not involve a diminution of capital ought to be regarded as a payment out of income, whether that payment is made yearly or half-yearly, or periodically at longer intervals. All such payments when made to the trust estate are to be regarded as part of the profit as distinguished from the *corpus* of the estate, and therefore fall to be made over from the estate to the person who is beneficially entitled to the income.

It is another element in this case, though not perhaps of great weight, that this estate was mainly provided by the lady's father in her marriage-contract, and I think that when a father settles estate upon his daughter on her marriage he may fairly be supposed to favour her interests as much as those of the unborn children, and to intend that she should have the benefit of everything that can reasonably be considered to be income.

LORD KINNEAR—I agree, and have nothing to add, except that I think Mr Pearson was right in saying that in cases like this we must attend to the terms of the particular conveyance, the effect of which is in question. But when we return to the marriage-contract we find that it contains a conveyance of the *dominium directum*, or superiority of certain lands belonging to Mr Gibson, "together with the several feu-duties and casualties payable" to him. He conveys the lands and the feu-duties and casualties just as he would have conveyed the lands and assigned the rents if he had been disposing of the *dominium utile*. In either case there is a conveyance of land with its fruits, and the fruits are the income to be derived from the estate. When we apply these terms to the facts of the case we find that the casualties referred to are duplicands of the feu-duty, payable at certain regular intervals. I cannot doubt in reading the marriage-contract that the periodical returns from the estate, including both the feu-duties and the casualties, are the income of the estate, and I do not think it material whether the latter kind of payments are called casualties or duplicand feu-duties.

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

Counsel for the First and Third Parties—Jameson, K.C.—R. B. Pearson. Agents—J. & J. Ross, W.S.

Counsel for the Second Party—Campbell, K.C.—Ralston. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Friday, November 28.

FIRST DIVISION.
TOWN-CLERK OF GLASGOW,
PETITIONER.

Burgh—Election of Town Councillors—Councillor Representing One Ward Elected for Another Ward—Acceptance of New Office and Resignation as Representative of Original Ward—Mode of Filling up Vacancy—Town Councils (Scotland) Act 1900 (63 and 64 Vict. c. 49), secs. 12, 13, 36, and 47—Glasgow Corporation (Tramways and General) Order Confirmation Act 1901 (1 Edw. VII. c. lxxiv.), sec. 25.

In a city and royal burgh divided into wards a person who was already a member of the council as a representative of the 6th Ward, and whose term of office had not expired, was nominated as a candidate and was elected as a councillor for the 17th Ward. He accepted office without either having previously or at the same time resigned office as councillor representing the 6th Ward, but he resigned office as a representative of the 6th Ward a few days later. *Held* (1) that he was now entitled to sit as a member of council for the 17th Ward; (2) that there was now a vacancy in the 6th Ward, but not in the 17th Ward; and (3) that the vacancy in the 6th Ward should be filled up by an election held under the provisions of section 25 of the Glasgow Corporation (Tramways and General) Order Confirmation Act 1901, being the provisions of a local Act as to filling up vacancies "occurring in the Corporation in the course of the year by the death, disability, or resignation of any member," and not in accordance with the provisions of the Town Councils (Scotland) Act 1900, sec. 36.

Expenses—Petition by Town-Clerk for Directions—Town Councils (Scotland) Act 1900 (63 and 64 Vict. c. 49), sec. 113—Town-Clerk—Burgh—Common Good.

Where a town councillor representing one ward had been elected for another, and doubts had arisen as to the validity of such an election and the procedure to follow, expenses of a petition by the Town-Clerk under section 113 of the Town Councils (Scotland) Act 1900 allowed to be charged against the common good.

This was a petition under the 113th section of the Town Councils (Scotland) Act 1900, presented by Sir James D. Marwick,