

now holding the superiority and entitled to the casualties. The lists appended to the case will enable the parties to apply this opinion to the facts and determine the amount due respectively to each.

LORD MONCREIFF—I entertain no doubt that the casualties and duplicands which fell in and were recovered during the lifetime of Captain Fisher formed part of the free annual proceeds and revenue of the trust estate, and were properly paid to him. The question in such cases is one of intention, to be gathered partly from the terms of the deed and partly from the character of the estate. In the present case it is plain that a great part of the estate conveyed to the marriage-contract trustees consisted of feu-duties and casualties, and therefore in my opinion they were properly so dealt with by the trustees during the lifetime of Captain Fisher. The recent cases of *Dunlop's Trustees v. Dunlop*, 41 S.L.R. 8; and *Montgomerie Fleming's Trustees*, 3 F. 591; and *Ross's Trustees v. Nicol*, 5 F. 146, are authorities in point.

Indeed, I am not sure that Mr Mackenzie Stuart contested that point. His argument was properly directed to excluding those casualties and duplicands, which although exigible during Captain Fisher's lifetime were outstanding at his death. That raises a more difficult question. In my opinion the first party, as executrix of Captain Fisher, cannot claim to be in a better position than if Captain Fisher had been the proprietor of the superiorities in question. Now, it is certain that if Captain Fisher had been proprietor and had died without demanding payment of casualties or duplicands which were in one sense due and exigible, such casualties and duplicands would not have fallen to his executrix, but would have belonged, if claimed, to the owner of the superiorities for the time. In short, he would have died with no debt in the ordinary sense due to him by the vassal, and *in bonis* of him when he died. But it appears from the statement in the case that the trustees formally demanded payment of those casualties and duplicands which are marked (a) in the fourth head of the appendix to the case. I think that such a demand was a sufficient assertion of the superior's right, and that therefore the first party is entitled to payment of those casualties and duplicands.

On the other hand I am of opinion that she is not entitled to these casualties and duplicands, payment of which was not demanded during the lifetime of Captain Fisher. It seems strange that many of these casualties and duplicands should not have been demanded sooner, but the parties to the case do not ask us to express any opinion on that subject.

The result therefore will be that the first party will be found entitled to the extent to which I have mentioned, and *quoad ultra* not entitled.

LORD YOUNG was absent at the hearing.

The Court pronounced an interlocutor in the following terms:—

“Answer the first question . . . in the affirmative, in so far as it applies to the casualties and duplicands of feu-duties which were demanded during Captain Fisher's lifetime: *Quoad ultra* answer the question in the negative: Find it unnecessary to answer the alternative question.”

Counsel for the First Parties—Salvesen, K.C. — Hon. P. Balfour. Agents — Alex. Morison & Co., W.S.

Counsel for the Second Parties—Wilson, K.C. — A. Mackenzie Stuart. Agents — Duncan & Hartley, W.S.

Saturday, December 12.

SECOND DIVISION.

[Sheriff Court of Forfar,
at Dundee.

GORDON v. M'HARDY.

Reparation—Negligence—Duty to Public—Liability of Retailer for Poisonous Condition of Contents of Defective Tin—Tinned Salmon.

In an action of damages for the death of his son the pursuer alleged that his son had died of ptomaine poisoning caused by eating tinned salmon supplied by the defender, a retail grocer; that his son's death was due to the fault of the defender; that the salmon was unfit for human food; that the tin containing it had no label on it, and was dented in; that the defender had “failed in his duty . . . in having in his possession and in selling the said tinned salmon; that it was the duty of the defender to examine all tins containing foods which he was selling to the public, in order to satisfy himself that these were air-tight and in order,” and that he had failed to do so. Held that the action was irrelevant.

This was an action at the instance of Adam Gordon, joiner, 22 Nelson Street, Dundee, against Edward M'Hardy, grocer and spirit merchant, 70 Ann Street, Dundee, in which the pursuer sought to recover damages for the death of his son, who, he alleged, had been poisoned through the fault of the defender.

The pursuer averred that on 17th February 1903 his wife purchased from the defender a one pound tin of salmon for 8^d., and that on the same day, after eating a portion of the salmon, his son Adam Gordon junior, was taken ill, and after a week's illness died of ptomaine poisoning. “(Cond 5) . . . The ptomaine poisoning was the result of deceased having partaken of the said tinned salmon. (Cond. 6) The tinned salmon supplied by defender to pursuer's household was in such a bad condition that it was unfit for human food. The tin containing same had no label on it, and it was dented in as if it had been knocked about, or as if some heavy article

had rested or fallen thereon. . . . (Cond. 7) The defender is responsible for the death of the said deceased, in so far as he failed in his duty to the public, and to the pursuer and his household in particular, in having in his possession and in selling the said tinned salmon, which was not, as before stated, in a fit condition for consumption. It was the duty of the defender to examine all tins containing foods which he was selling to the public in order to satisfy himself that these were air-tight and in order. He should have taken reasonable and proper precautions to prevent such an occurrence as that before condescended on. He did not make any such examination of the foresaid tin, nor did he take any such precautions, and in these respects he failed in his duty, and caused the death of the said Adam Gordon junior."

The defender pleaded—"(1) The action is irrelevant."

On 3rd July 1903 the Sheriff-Substitute (CAMPBELL SMITH) allowed a proof.

The pursuer appealed for jury trial.

Argued for the respondent—The action was irrelevant; it was not averred that the defender knew that the salmon was unwholesome, or that the tin was not air-tight. No action lay against the defender—*Cramb v. Caledonian Railway Co.*, July 19, 1892, 19 R. 1054, 29 S.L.R. 869; *Emmerton v. Matthews* (1862), 31 L.J. Exch. 139; *Smith v. Baker, Son, & Death* (1878), 40 L.T. (N.S.) 261.

Argued for the appellant—The case should be sent to a jury. A tin in the condition of that supplied ought not to have been accepted by the defender from the manufacturers, and if damaged after delivery to the defender ought not to have been sold by him. There being no name on the tin, the defender should be held to be in the position of the manufacturer, and therefore liable as for negligence in preparing the article sold—*George v. Skivington* (1869), L.R., 5 Exch. 1.

LORD JUSTICE-CLERK—In this case I think that there is no relevant case stated. I do not see how the defender could have examined the tin of salmon which he sold without destroying the very condition which the manufacturer had established in order to preserve the contents, the tin not being intended to be opened until immediately before use.

It is plain that a grocer who gets a quantity of tins of preserved food and sells them to the public cannot be liable for the condition of the contents of the tins if he buys from a dealer of repute. It is said that the tin which was sold to the pursuer was dented, but it is not averred that the dent had cut through the metal and allowed the air to get in, or had otherwise caused such an injury to the contents that the defender should have noticed it. Such an averment as that might have afforded ground for an action against a tradesman, but there is no such case here.

LORD YOUNG—This is an important case, but I am of the same opinion as your Lord-

ship. We know that there is a large consumption of tinned salmon, although many people believe it to be dangerous. It is stated by the pursuer that for the price paid in this case—8½d.—it should have been possible to secure 1 lb. of the best salmon steak, but nothing definite is averred against the article supplied, except that the tin in which the salmon was contained was dented. It is not stated that there was any duty incumbent upon the grocer who sold it except of satisfying himself that the tin was air-tight, and it is not said how this was to be done. I am therefore of opinion—without referring to the authorities quoted—that no relevant case has been stated against the defender.

LORD TRAYNER—I agree. I think there is no relevant averment of fault or neglect of duty on the part of the defender sufficient to afford ground for an action of damages.

LORD MONCREIFF—Had there been any averment that the defender was asked to disclose the name of the manufacturer of the tin of salmon and refused, I should have been disposed to consider that the pursuer had stated a case for inquiry. But there is no such averment. I do not think that the defender was bound to do more than he did, and I am therefore of opinion that the action should be dismissed.

The Court dismissed the action.

Counsel for the Pursuer and Appellant—D. Anderson. Agent—William Cowan, W.S.

Counsel for the Defender and Respondent—Salvesen, K.C.—Craigie. Agent—J. Pearson Walker, S.S.C.

Tuesday, December 15.

SECOND DIVISION.

[Lord Low, Ordinary.]

MACLEOD v. WILSON.

Succession—Testament—Conditional Institution—Destination to Daughter "and her heirs and assignees"—Legacy or Bond of Provision—Gift Held not Conditional on Surviving or Leaving Issue.

M. died leaving a disposition and settlement whereby "for the settlement of the succession to my means and estate after my decease" she disposed her whole estate "to my daughter J., and her heirs and assignees whomsoever absolutely," and she nominated J. to be her executrix. The disposition concluded with declarations for the protection of J. in the enjoyment of "the provision hereby made" in her favour, and M. reserved her own "liferent of the premises." M. was predeceased by J., who was her only child, and who left no issue. In an action at the instance of M.'s heirs *ab intestata* against the