

dies inceptus pro completo habetur is applicable. But I think the brocard is pushed far beyond its proper application when it is applied—as it is applied by the judgment in *Brown v. Robertson*—both at the beginning and at the end of the period. If that case were right it really would amount to a certainty that there had never elapsed a period which existed for three years *de momento in momentum*. It never could happen at all unless the person really arrived at midnight punctually, or one second after the midnight the day before the first day, and stayed up to midnight on the last day.

Accordingly I am of opinion that your Lordships should refuse the appeal, and adhere to the judgment of the learned Sheriff.

LORD M'LAREN—I am satisfied that the Sheriff has given a sound decision, and has put it on the right ground. The thing to be determined is an interval of time, and when that is expressed in terms of a division of the calendar, the interval is to be reckoned from the day when the interval begins to the corresponding day in the next division of the calendar. Where the interval to be determined is one year from the 29th of May, it will not be completed until the 29th of May in the following year, and similarly for a period of two, three, or any greater number of years.

This is the first and the important rule, and there is a second and subsidiary rule, which is, that when an interval of time is specified in a statute, a day is held to be *punctum temporis*, and it is therefore held to be unnecessary and improper to reckon by hours. I should hesitate to say that this second rule is universally applicable, because in private contracts it may sometimes be inferred from the nature of the contract or its subject-matter that the time is to be reckoned *de momento in momentum*. But we are only concerned with a period prescribed by statute, and in the absence of express provision to the contrary I should hold that it was unnecessary to reckon by hours and minutes. I may here observe that according to the rule which the Sheriff has applied to a period of residence of three years, the actual residence may fall short of three complete years, but never by so much as one whole day.

But if we were to define the period in the way suggested by the Sheriff-Substitute, it would follow that a residence might be begun on the last moment of the 1st of January and ended on the first moment of the 31st of December, and that this would be treated in law as a residence for the period of a year, although in arithmetic it is only 363 days and a fraction.

When the cases are examined in which intervals of time have been defined by the Court, I think it will be found that the same rule or mode of reckoning has been applied in all cases, although different forms of expression may be used to define the rule. Thus, when it is said that the first day of the period is excluded, and the

last day is taken subject to the maxim *dies inceptus pro completo habetur*, that is just another way of stating that the interval is to be reckoned from a given day to the corresponding day of the next consecutive period.

In the present case the person whose settlement is in question began his period of residence on the 29th of May, and as he did not remain in the parish until the 29th of May three years later, but left on the 28th, it follows that he did not acquire a residential settlement.

LORD KINNEAR—I also agree with the learned Sheriff.

LORD PEARSON was absent.

The Court pronounced this interlocutor—

“ . . . Find in law that the said Parish Council of Urr is bound to repay the pursuers, the Parish Council of Cavers, the amount advanced for the maintenance of the said Isabella Brydeson or Patterson, with interest, all as concluded for: Therefore decern against the defenders, the Parish Council of Urr, for payment to the pursuers of the sum of £16, 18s. 10d., with interest, all as concluded for: Find the respondents, the Parish Council of Urr, liable to the respondents, the Parish Council of Smalholm, in the expenses of the appeal: And remit,” &c.

Counsel for the Parish Council of Cavers (Pursuers and Appellants)—W. Thomson. Agents—Steel & Johnstone, W.S.

Counsel for the Parish Council of Smalholm (Defenders and Respondents)—T. B. Morison, K.C.—Jameson. Agents—P. Morison & Son, S.S.C.

Counsel for the Parish Council of Urr (Defenders and Respondents)—Chree—Macmillan. Agents—Ronald & Ritchie, S.S.C.

Friday, November 27.

SECOND DIVISION.

MACDOUGALL'S FACTOR *v.*
ANDERSON AND OTHERS.

Liferent and Fee—Bequest of Free Income—Casualties—Duplications of Feu-Duties and Ground-Annuals—Purchase by Judicial Factor of Feu-Duties and Ground-Annuals having Duplicands.

A testator, whose estate amounted to £20,000, made a bequest of the liferent of the free income of his estate, but made no provision as to the capital, which accordingly fell into intestacy. His estate at the time of his death included superiorities yielding feu-duties which amounted to £64 per annum. Subsequently part of the moveable estate was invested by a judicial factor in further superiorities yielding £117 per annum. Duplications

were payable from both sets of superiorities at varying intervals of time, and some upon transfer or conveyance of the feus. *Held* that the duplications from both groups of superiorities, irrespective of the periods at which they were payable, were income of the estate falling to be paid over to the liferentrix.

Curle's Trustees, December 18, 1903, 46 S.L.R. 7, *followed*.

George Garioch Dalgarno, solicitor, Arbroath, judicial factor on the estate of the late Rev. James Ewen Macdougall of Springfield, Arbroath—*first party*; Mrs Margaret Campbell Macdougall or Watson and others, the next-of-kin of the late Rev. J. E. Macdougall—*second parties*; and Miss Margaret Anderson, to whom the late Mr Macdougall had bequeathed the free income of his estate—*third party*, presented a Special Case dealing with the administration of the late Mr Macdougall's estate.

By his will the Rev. James Ewen Macdougall, who died at Springfield House, Arbroath, on 23rd December 1901, provided, *inter alia*, as follows—"It is my wish that should my housekeeper Margaret Anderson survive me, she shall be entitled to and enjoy the whole free income and revenue arising from the whole residue of my means and estate during her lifetime so long as she survives me." . . . *Quoad* the fee of his estate, which consisted of both heritable and moveable property, Mr Macdougall died intestate.

The case stated—"6. The heritable property which belonged to the said Reverend James Ewen Macdougall at the time of his death, and now forming part of the estate under the management of the first party, consists of the lands of Springfield . . . comprising . . . the superiority or *dominium directum* of eight feus given off from the lands by former proprietors of the estate. The feu-duties and ground-annuals yielded by these feus amount to £64, 3s. 2d. per annum. In the case of two of the feus a duplication of the feu-duty is payable on the expiry of every twenty-fifth year from the date of entry under the charter. In the case of four of the feus a duplication of the feu-duty is payable 'at and upon every transfer or conveyance' of the feu. In another case a duplication of a ground-annual is payable on every transfer of the subjects. In the remaining case the entry of heirs and singular successors is untaxed. . . . 7. During his period of office as judicial factor the said George Miln—Mr Dalgarno's predecessor—invested £751 of the moveable estate of the said deceased Reverend James Ewen Macdougall in the purchase of the *dominium directum* of subjects at Rosebrae, in the burgh of Arbroath, and of certain ground-annuals payable furth of subjects there. This superiority and the ground-annuals continue to form part of the deceased's estate. The feu-duties yielded by this superiority and the said ground-annuals together amount to £25, 8s. 6d. per annum. For these feus a duplication is payable in one

case on the expiry of every fifteenth year from the term of Whitsunday 1877, in another case on the expiry of every twentieth year from Whitsunday 1898, and in the third case on the expiry of every twentieth year from Martinmas 1899. As regards the ground-annuals, a duplication is in each case payable upon 'every transfer or conveyance . . . whereby the same may come or belong to a new proprietor.' . . . 8. The first party, as judicial factor foresaid, invested £2767, 10s. of the moveable estate under his control in the purchase, at Whitsunday 1903, of the superiority of subjects in Dalhousie Terrace and Comiston Drive, Edinburgh, yielding fifteen feu-duties, amounting in all to £92, 5s. per annum. As regards fourteen of the holdings, a double of the feu-duty is in each case payable at the end of every nineteenth year from the term of Martinmas 1886. As regards the remaining holding, a double of the feu-duty is payable at Whitsunday 1921, and at the end of every twentieth year thereafter." . . .

The first and second parties maintained that the duplications and casualties, uplifted and to be uplifted, were to be considered as capital, and did not fall to be paid to the liferentrix.

The third party maintained that the said duplications and casualties were to be reckoned as income, and fell to be paid to her as liferentrix.

The questions of law were—"1. Do the duplications or casualties, . . . or any of them, or any part of them, fall to be considered as income or revenue of the estate, payable by the first party to the third party? 2. Do the duplications or casualties, . . . or any of them, or any part of them, fall to be considered as capital."

Argued for first and second parties—In the absence of contrary intention, duplicands and casualties fell to be treated as capital—*Ewing v. Ewing*, March 20, 1872, 10 Macph. 678, 9 S.L.R. 416; *Gibson v. Cad-dall's Trustees*, July 11, 1895, 22 R. 889, 32 S.L.R. 668. The cases of *Montgomerie-Fleming's Trustees v. Montgomerie-Fleming*, February 28, 1901, 3 F. 591, 38 S.L.R. 417; *Ross' Trustees v. Nicoll*, November 22, 1902, 5 F. 146, 40 S.L.R. 112; and *Dunlop's Trustees v. Dunlop*, October 23, 1903, 6 F. 12, 41 S.L.R. 8, were inapplicable, for there the Court proceeded on evidence of the testator's intention. There was no such evidence here. The duplicands received by this testator were small and at rare intervals, and could not, therefore, have been in contemplation. *Quoad* the duplicands of feu-duties bought by the judicial factor, intention had no place, and the rule in *Ewing v. Ewing (cit.)* applied. That rule was still law—*Dunlop's Trustees (cit.)*, per the Lord President, 6 F. at p. 14. Even if the duplicands were legally income, those falling due within a year or two of the purchase of the superiorities ought to be apportioned between the fiars and the liferentrix—Apportionment Act 1870 (33 and 34 Vict. cap. 35), sec. 2. The method of striking an average adopted in *Lamont Campbell v.*

Carter Campbell, January 19, 1895, 22 R. 260, 32 S.L.R. 203, was an instance of this principle. These duplicands represented part of the purchase price, and ought therefore to be treated as capital. Any other rule would enable trustees to favour liferenters at the expense of fiars. If the contention of the liferentrix were sound, it would be possible to depreciate the trust-estate by buying and selling superiorities before and after duplication payments.

Argued for third party—Casualties and duplicands were income, not capital—*Montgomerie Fleming's Trustees v. Montgomerie Fleming* (cit. sup.); *Ross's Trustees v. Nicoll* (cit. sup.) The present bequest of liferent was in very full terms, nor could favour to heirs on intestacy as fiars be presumed—*Blyth's Trustees v. Milne*, June 23, 1905, 7 F. 799, 42 S.L.R. 676. It was immaterial whether the duplications were payable at regular or irregular intervals—*Dunlop's Trustees v. Dunlop* (cit. sup.)—and whether they were owned by the testator or bought by the factor—*Curle's Trustees*, December 18, 1903, 46 S.L.R. 7. Since the Conveyancing Act 1874 the ratio of *Ewing v. Ewing* (cit. sup.) no longer applied—*Montgomerie Fleming's Trustees* (cit. sup.), per the Lord President, 3 F. 594. The case of *Gibson v. Caddall's Trustees* (cit. sup.) was distinguishable.

LORD ARDWALL—The question raised in this special case is whether certain duplications or casualties fall to the liferentrix under the will of the late Reverend James Ewen Macdougall, or fall to be treated as part of the capital of the estate, the fee of which belongs to the second parties as the testator's next-of-kin.

The clause granting the liferent is in these terms—[His Lordship read the clause, quoted supra].

This question, in my opinion, is now well settled by authority to the effect that duplications of feu-duties and casualties (whether they are properly so termed or not) form part of the income of the estate of which the superiority forms a part.

The first of these cases is *Montgomerie Fleming's Trustees v. Montgomerie Fleming*, 3 F. 591. That case was to a certain extent decided on the presumed intention of the testator as inferred from the circumstances of the case, which were, that almost the whole estate consisted of land feued for building, and the casualties or duplications yielded a constant annual return, and it was thought that the testator intended that his widow should have the whole income of the estate as he enjoyed it, and that as one-third of the income was derived from duplications of feu-duties payable at fixed intervals, it must be presumed that the intention of the testator was that these should be treated as income, and that accordingly they belonged to the liferentrix. In that case it was observed that the ratio of the judgment in *Ewing v. Ewing*, March 20, 1872, 10 Macph. 678, as to such duplications was made inapplicable by the provisions of the Conveyancing Act 1874. The ratio of the decision in *Ewing's* case was that under

the law as it then existed the casualty arose as a consideration to the superior for the fulfilment by him of the duty imposed on him of giving an entry to his vassal's heir, but as now infeftment implies entry the superior has no duty in the matter.

This case was followed by the case of *Ross's Trustees v. Nicoll*, 5 F. 143, where marriage-contract trustees were directed to pay "the free income of the trust estate" to the wife during her life. It was there observed that such duplicands did not come out of capital, but left the capital of the estate untouched. "Accordingly," the Lord President said, "they are *prima facie* payable to the person who has a right to the enjoyment of the income of the estate;" and Lord M'Laren made observations to a similar effect.

The next case was *Dunlop's Trustees*, 6 F. 12. In that case the trustees were directed to pay the testator's widow "the free yearly proceeds of the trust estate." The special question raised there was whether the word "yearly" had not the effect of limiting the proceeds of the estate to the feu-duties coming in annually, and of excluding duplicands, which were only payable from time to time, but this question was answered in the negative, and it was held that duplicands as well as feu-duties constituted part of the produce of the estate for the years in which they fell due.

In conformity with these decisions I am of opinion that it is quite clear that the duplicands or casualties arising from superiorities and ground-annuals which belonged to the deceased at the time of his death fall to be paid to the third party as liferentrix.

It occurred to me that there might be some difficulty with regard to the superiorities and ground-annuals purchased by the judicial factor after the testator's death in the course of investing the residue of the estate. It appeared to me that there might be a question as regarded several of the duplicands which at the time of the purchase were known to be due at the end of two and a-half years or some such short period. It was argued with great plausibility for the second party that the falling in of these duplicands so shortly after the purchase, must have increased, *pro tanto*, the price paid for the superiorities out of the capital of the estate, and that as matter of correct book-keeping even, it would be only fair that the duplicands or casualties which fell due, say in 1905, should be divided into two portions, and that as these fell due every nineteen years, that two and a-half ninetieths thereof should be paid to the liferentrix, but that the remainder, representing capital, should be held by the factor and invested by him for the ultimate benefit of the fiars, the liferentrix, however, in the meantime getting the interest on the sums so invested. I must say that I was much impressed with this argument, although it was obvious that when it came to making calculations over a number of years as the various casualties or duplicands fell in, it would lead to considerable difficulty and confusion, and possibly expense

in the management of the trust, and then there was the consideration that the investments having been proper trust investments, and duplicands having been decided by the three cases above cited to form part of the annual proceeds of an estate, it was hardly consistent with these decisions to divide them up into income and capital. But the necessity of considering this question for the first time is obviated by the decision which the Court was referred to at the close of the debate, in the case of *Curle's Trustees*, decided December 18, 1903, but reported for the first time in the Scottish Law Reporter of November 11th last (46 S.L.R. p. 7). In that case the trust estate consisted, *inter alia*, of a ground-annual which had been in possession of the testator, and of a large number of feu-duties and ground-annuals purchased after the testator's death. On many of these, duplicands were payable, some of them very soon after the date of purchase. Questions were put in the special case dealing separately with a number of the purchased feu-duties and ground-annuals, and the Court answered all the questions in the affirmative, to the effect that in every case duplicands of feu-duties and ground-annuals whenever payable formed part of the income or produce of the trust estate, and they held that the case was ruled by the decisions in the cases of *Fleming, Ross, and Dunlop's Trustees*. Accordingly, it may now be held to be settled that where part of an estate is invested in superiorities or ground-annuals, duplicands or casualties form part of the income of such estate, and will be held to be so, unless there is something to the contrary in the deeds under which the estate is administered, or, I may add, unless the improbable event has occurred of investments having been fraudulently made for the purpose of favouring liferenters at the expense of fiars.

I accordingly propose that the first question should be answered to the effect that all the duplicands and casualties enumerated in the appendix fall to be considered as income or revenue payable by the first party to the third party, and with regard to the second question I propose that it should be answered in the negative.

The LORD JUSTICE-CLERK and LORD LOW concurred.

LORD DUNDAS was sitting in the Extra Division at the hearing.

The Court answered the first question of law by declaring that all the duplications or casualties fall to be considered as income of the estate payable by the first party to the third party, and answered the second question in the negative.

Counsel for the First and Second Parties—Forbes—Irving. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Third Party—Ingram. Agent—Henry Robertson, S.S.C.

Saturday, November 28.

FIRST DIVISION.

LORD ADAM AND ANOTHER
(CUNNINGHAM'S TRUSTEES) v.
BLACKWELL AND OTHERS.

Succession—Vesting—Division per stirpes or per capita—“Among.”

A testator directed his trustees that on the death of his widow, to whom he had given a liferent, “all of which I am possessed be divided equally among my cousins the Blackwells (leaving out Mrs Buckle), and among the children of my uncle James Hay.”

Held (1) that the fee of the residue vested *a morte testatoris*, (2) that the residue fell to be divided among the Blackwell family and the Hay family *per capita*, (3) that a member of the Hay family born after the testator's death was entitled to a share.

By holograph last will or testament, dated 6th April 1841, and registered in the Books of Council and Session 30th September 1842, Robert James Hay Cunningham, hereinafter referred to as the “testator,” conveyed to the trustees and executors therein mentioned his whole property, real and personal. The said will was in the form of a letter to his agents, and was as follows:—“Trafalgar Hotel, London, April 6th, 1841—To Messrs Tod & Romanes, Great Stuart Street, Edinburgh, who are hereby appointed my trustees and executors.—Gentlemen,—I hereby dispone and convey to you my whole property, real and personal, and the vouchers thereof, with directions to fulfil the obligations in my contract of marriage to my wife, and thereafter to pay and apply the free proceeds as follows:—£100 sterling to James Turner, schoolmaster, West Barns, Dunbar; £200 to my servant John Gibson Campbell; my collection of Latin and Greek Classics to James Turner, schoolmaster, West Barns, Dunbar; my geological and mineralogical collection to the Edinburgh Museum; £100 to my cousin Robert Blackwell; all furniture, pictures, plate, jewels, I bequeath to my wife, with also the liferent of all monies belonging to me after the above-mentioned legacies are paid off; on the event, however, of her either entering into a second marriage or not residing permanently in Scotland, she is not to be entitled to the interest of any money belonging to me; upon her decease, or second marriage, or non-residence in Scotland, I desire that all of which I am possessed be divided equally among my cousins the Blackwells (leaving out Mrs Buckle) and among the children of my uncle James Hay, Esq. of Belton. . . .”

The testator died on the 15th of May 1842, and the trustees nominated by his said last will or testament entered into possession of his whole means and estate. The trustees duly implemented the prior purposes of the trust imposed upon them, and held the residue for the liferent use of the testator's