

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,

LL.D., Town-Clerk of Glasgow, craving directions from the Court.

The following statement of the circumstances under which the petition was presented is in substance taken from the opinion of the Lord President:—

The city of Glasgow is divided into twenty-five wards, each of which is represented by three town councillors. The seventy-five councillors thus elected, with the Dean of Guild and the Deacon Convener of the city, constitute the Town Council of the city.

Mr Andrew Scott Gibson was in November 1900 elected for three years as a member of the Town Council of Glasgow for the 6th Ward. The annual statutory election of one-third of the Council took place on 4th November 1902. Amongst the nominations received by the Town-Clerk on 28th October 1902 for the vacant offices were a nomination of Mr Samuel Chisholm, and a nomination of Mr Gibson, as candidates for the 17th Ward. It is provided by section 47 of the Town Councils (Scotland) Act 1900 that "in the event of any disqualified person being nominated the town-clerk shall, if the names of such person and his proposers and assenters appear in the municipal register, receive the nomination paper and deal with it in the same manner as the nomination papers of qualified candidates, but if the names of such persons or any of them do not appear in the municipal register he shall reject the nomination paper, and the same shall be null and void." As Mr Gibson's nomination paper satisfied the requirements of this section, the Town-Clerk accepted the nomination. At the election for the 17th Ward on 4th November 1902 Mr Gibson was found by the returning officer to have received a larger number of votes than Mr Chisholm, and the returning officer consequently on 5th November declared Mr Gibson to have been elected for that Ward. The Town-Clerk having on 5th November sent to Mr Gibson the statutory notice of his election, and required his attendance on the following day to declare whether he accepted the office to which he had been elected, Mr Gibson appeared and intimated his acceptance of the office of councillor for the 17th Ward, and made the requisite declaration, but he did not then make any intimation as to his position relative to the 6th Ward, to which he was, as already stated, elected in November 1901. Mr Gibson, however, on 14th November 1902 wrote and sent to the Town-Clerk a letter by which he tendered his resignation of the office of representative of the 6th Ward. Section 12 of the Town Councils (Scotland) Act 1900 declares that "any male elector in the burgh who is not subject to any of the disqualifications aftermentioned, shall be eligible as a councillor." These disqualifications are specified in section 13 of the Act under five heads, and the circumstance of a candidate being already the representative of another ward is not stated to be a disqualification.

The election of the Town Council of Glasgow, as of the town councils of the

burghs of Scotland, is regulated by the Town Councils (Scotland) Act 1900, and by the Ballot Act 1872, subject to a special provision as to interim vacancies contained in section 25 of the Glasgow (Tramways and General) Order Confirmation Act 1901.

Section 36 of the Town Councils (Scotland) Act 1900 is as follows:—"In case of any of the following events occurring between the issue of the notice mentioned in section 42 and the first day of October in the following year, viz.—(a) The death of any councillor; (b) the resignation of office of any councillor; (c) any councillor vacating office in consequence of coming under any of the disqualifications specified in section 13 hereof; (d) a disqualified person being elected as councillor; (e) the full number of councillors not being elected at any election, the full number failing to accept office, or any councillor being elected by more than one ward; (f) any election being abortive in consequence of any error or irregularity in the proceedings; (g) a vacancy occurring from any cause other than those above stated, and other than retirement in ordinary rotation; the vacancy so occurring shall be filled up *ad interim* by the town council at a meeting of which the notices stating that the matter is to be then dealt with shall be sent out by the town-clerk within three weeks of the occurrence of such event, and which shall be held not sooner than five days, and not later than ten days from the date of such notice. In the event of the town-clerk failing to call the said meeting, or in the event of the said meeting failing so to elect, it shall be in the power of the provost, or of any councillors forming among them one-third of the whole town council, at any time thereafter to call a meeting for the same purpose and upon the same notice: Provided that any vacancy so occurring under heading (e) or under heading (f) aforesaid may, if the town council so resolve, be filled up *ad interim* as soon as may be by a special election by the electors, and such election shall be held as nearly as may be under the provisions of this Act, and the returning officer at such election shall, subject to the approval of the town council, fix the date of the election, and shall fix the dates for the issue of all necessary notices, and for lodging and withdrawing nomination papers, so that the intervals between such respective dates shall be the same as in the case of ordinary elections under this Act."

Section 25 of the said Glasgow Corporation (Tramways and General) Order Confirmation Act 1901, is as follows:—"From and after the second Tuesday of November one thousand nine hundred and one any vacancy occurring in the Corporation in the course of the year by the death, disability, or resignation of any member shall be filled up by the electors of the ward in respect of which such vacancy has occurred, and the following provisions shall have effect:—(1) The nomination and election shall, subject to the provisions in this section contained, be

made and conducted, and the costs and charges thereof defrayed as nearly as may be in the same manner as in the case of the annual election of town councillors on the first Tuesday in November; (2) the Town-Clerk shall, as soon as conveniently may be after the occurrence of the vacancy, give notice of the vacancy in any newspaper published in Glasgow. The nominations of candidates shall be lodged with the Town-Clerk within seven days from such notice. The provisions as to the withdrawal of nominations at the ordinary annual election shall apply to nominations under this section; (3) if more than one candidate is nominated for the vacancy, the election shall take place on a day to be fixed by the Town-Clerk in a notice to be published by him in any newspaper published in Glasgow, but shall not take place sooner than seven days from the publication of such notice; (4) the person elected in pursuance of the provisions of this section shall hold the office of town councillor during the period for which the person vacating such office might lawfully have held it: Provided that if such vacancy occur within three months of the next succeeding annual election in November, the Corporation may resolve that such vacancy shall not be filled until such annual election."

The petitioner prayed the Court "to pronounce an order giving directions to the petitioner as to the steps which he ought to take in the circumstances set forth in the petition, and, in particular, directing him as to—(1) Whether Mr Andrew Scott Gibson, having been returned as elected for the said 17th Ward, and having declared his acceptance of office for that Ward without resigning his seat for the 6th Ward, is now entitled to sit as a member of council for 17th Ward or 6th Ward; (2) Whether there is a vacancy in either or both 6th Ward and 17th Ward, and, if so, how do such vacancy or vacancies fall to be filled up, should the election to supply such vacancy or vacancies be according to the provisions of section 36 of the Town Councils (Scotland) Act 1900, or of section 25 of the Glasgow Corporation (Tramways and General) Order Confirmation Act 1901;" and "To order the expenses of this petition, and the proceedings following thereon, to be charged against the assessment levied in Glasgow under the Registration Acts, or against the Common Good."

Answers were lodged for Mr Andrew Scott Gibson.

Argued for the petitioner—A town councillor representing one ward was disqualified as a candidate for another ward; for, although this was not stated amongst the disqualifications set forth in section 13 of the Town Councils (Scotland) Act 1900, that list could not be exhaustive, *e.g.* minority and insanity were not mentioned, and a different decision would result in great inconvenience, *e.g.*, the number of Councillors would never be complete. Parliamentary practice supported this view—*Erskine May's Parliamentary Practice*, 10th

ed., p. 28, Belfast Election, 1886. And it had been decided that the holding of one office which could not be held along with another disqualified a candidate for the second office—*The Queen v. The Mayor, &c., of Bangor* [1886], 18 Q.B.D. 349; *The Queen v. Douglas* [1898], 1 Q.B. 560.

Argued for the respondent—There was no disqualification as this was not mentioned in the statute among the disqualifications, and that being so, the result of election to and acceptance of the new office was merely that *eo ipso* the former and incompatible office was vacated—*The Queen v. Mayor, &c., of Bangor, cit. sup.* It could not be said that this was a double election to the same office, for both the electors and tenure were different, and the Parliamentary practice had no bearing, for it did not govern the case, and it was not invariable—*Roe on Elections*, ii. p. 110.

At advising—

LORD PRESIDENT—[*After stating the facts ut supra*]—Under these circumstances questions of difficulty and dubiety arose, and the Town-Clerk presented the present petition craving directions as to (1) Whether Mr Gibson, having been returned as elected for the 17th Ward, and having declared his acceptance of office for that ward, without having resigned and without then resigning his seat for the 6th Ward, is now entitled to sit as a member of Council for the 17th Ward or the 6th Ward, and (2) Whether there is a vacancy in either or both of the 6th Ward and the 17th Ward, and if so, how do such vacancy or vacancies fall to be filled up—should the election to supply such vacancy or vacancies be according to the provisions of section 36 of the Town Councils (Scotland) Act 1900, or the provisions of section 25 of the Glasgow Corporation (Tramways and General) Order Confirmation Act 1901.

I am of opinion that the answer to the first question put in the petition should be that Mr Gibson is now entitled to sit as a member of Council for the 17th Ward, but not as a member for the 6th Ward, and that the answer to the second question should be that there is a vacancy in the 6th Ward, but not in the 17th Ward, and also 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.

I do not think that the fact of Mr Gibson having been elected to and accepted the office of representative of the 6th Ward prevented him from being nominated as a candidate for the 17th Ward, although he could not continue to hold both offices. It may be a question whether his acceptance of the office of representative of the 17th Ward did not *eo ipso* vacate his office as representative of the 6th Ward, and I am disposed to think that it did, but this question is not of practical importance in the present case, as Mr Gibson on 14th November resigned his position as representative of the 6th Ward.

A question, however, was raised as to the applicability of the rule of practice which is understood to obtain in parliamentary elections, viz., that a member elected and sitting for one constituency cannot so long as he so sits stand as a candidate or be elected for another constituency—Sir Erskine May's Parliamentary Practice, 10th ed. p. 287—but I do not think that we would be warranted, without statutory authority, in introducing this rule or practice into municipal elections, which are regulated not by historical usage or custom but by statute. I may add that I think it would be a misfortune if the rule were introduced into municipal elections in Scotland, as it might in some cases seriously hamper the choice of a councillor by the electoral body.

In this connection I may refer to the case of *The Queen v. The Mayor and Corporation of the Borough of Bangor*, 1886, 18 Q.B.D. 349, and 13 App. Cas. 241 (1888), in which it was held by the Court of Appeal in England that a person was not by reason of his being an alderman disqualified for election to the office of councillor, but that by accepting the latter office he vacated the former, as the offices cannot be held together. This seems to me to be a convenient rule of practice. In the view which the House of Lords took of the case it was not necessary for them to express an opinion upon this question. It appears to me, however, that the view taken by the Court of Appeal was reasonable, and that it affords material support to the opinion which I have already expressed.

LORD ADAM—I concur.

LORD M'LAREN—I am of the same opinion. It is clear that there are only two possible solutions for a double election of this kind. The first is that a person who is already a member of the Town Council is ineligible as a candidate. The second is that if a member of a Town Council is elected as a representative of another ward, then by accepting the second election he ceases to represent the ward for which he previously sat. The first solution, which represents the usage of the House of Commons, is not founded on statute but upon considerations of good sense and expediency. The second solution derives certain support from the case of the alderman who was afterwards elected a common councillor, I mean the case of *The Queen v. The Mayor and Corporation of Bangor*, L.R. 18 Q.B.D. 349. The case is not strictly in point, and perhaps not more so than the practice of the House of Commons, because the constitution of English municipal bodies differs materially from that of burghs in Scotland, and especially in the rule that in England a man cannot be an alderman and a councillor at the same time. In a question where the considerations are so nearly balanced I think the determining consideration ought to be that, while certain statutory restrictions are placed upon the choice of a candidate (chiefly in relation to business connection with the Corporation), there is no statutory restriction

debaring a ward from choosing as its representative one who is already in the Council. In the absence of any decision or precedent I think that our judgment should be in favour of freedom of choice, which I understand is also one of the reasons given in your Lordship's opinion.

LORD KINNEAR—I concur on the ground that I think Mr Scott Gibson vacated his office as Councillor for the 6th Ward by his acceptance of the office of Councillor for the 17th Ward and thereupon making the requisite declaration. I consider that his acceptance of the election for the 17th Ward was incompatible with his continuing to hold his seat for the 6th Ward. For these reasons I concur with your Lordships' decision.

The Court pronounced this interlocutor—

“Find in answer to the first question in the petition that Mr Gibson is now entitled to sit as member of Council for the 17th Ward of the city of Glasgow: And in answer to the second question in the petition, that there is a vacancy in the 6th Ward but not in the 17th Ward, also 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 of 1901 (1 Edw. VII. cap. lxxiv), and Decern: Find the petitioner entitled to the expenses of the petition and following thereon as shall be taxed by the auditor out of the common good of said city, and *quoad ultra* Find no expenses due, and Remit the account of said expenses to the auditor to tax and to report.”

Counsel for the Petitioner—Solicitor-General (Dickson, K.C.)—Deas. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—Campbell, K.C.—Munro. Agents—Sibbald & Mackenzie, W.S.

Tuesday, December 2.

SECOND DIVISION.

[Lord Low, Ordinary.]

HART v. COUNTY COUNCIL OF THE COUNTY OF LANARK.

Local Government—County—County Council—Administration of Criminal Law—Remuneration of Procurator-Fiscal—Administration of Justice—Procurator-Fiscal—County General Assessment Act 1868 (31 and 32 Vict. cap. 82), sec. 3 (2) and (3)—“Rogue Money” Act 1724 (11 Geo. I. cap. 26), sec. 12.

Held (diss. Lord Young) (1) that the County Council of the county of Lanark were bound out of the county general assessment levied by them under the County General Assessment Act