Friday, December 18, 1903.

FIRST DIVISION.

CURLE'S TRUSTEES.

Liferent and Fee — Trust Disposition — Casualties—Duplications of Feu-Duty or Ground-Annual—Purchase by Trustees of Feu-Duties and Ground-Annuals having Duplicands—Duplicand on Entry of Heir and Singular Successor.

A testator, whose estate amounted to £160,000, directed his trustees to hold the residue for behoof of his son and his two daughters equally, and to hold and invest such shares in their, the trustees', own names "for the respective liferent uses allenarly" of the said son and daughters, and for behoof of their lawful issue respectively in fee. The trustees retained a ground-annual of £62, 10s. per annum, which had been in the possession of the testator. They also purchased feu-duties and ground-annuals. The feu-duties and ground-annuals held by them came to about £1300 per annum. Duplications, however, were payable at varying periods, some every nineteen years, some every twenty-five years, and one, amounting to £42, on the entries of heirs and singular successors. *Held* that the duplications, both of the ground-annual formerly in the testator's possession and of the feu-duties and ground-annuals purchased by the trustees, irrespective of the periods at which they were payable, were income of the estate falling to be paid over to the liferenters.

Montgomerie-Fleming's Trustees, February 28, 1901, 3 F. 591, 38 S.L.R. 417; *Ross's Trustees*, November 22, 1902, 5 F. 146, 40 S.L.R. 112; *Dunlop's Trustees*, October 23, 1903, 6 F. 12, 41 S.L.R. 8, *followed*.

Henry James Watson and others, the testamentary trustees of the late Robert Curle, shipbuilder in Glasgow, acting under his trust-disposition and settlement, dated 13th December 1878 and registered 23rd June 1879, *first parties;* Mrs Isabella Curle or Millar and others, *second parties;* and Ethel Mary Millar and others, *third parties*, brought a special case to decide in what way the duplicands of feu-duties and ground-annuals belonging to the trust-estate were to be dealt with.

The second parties were the testator's son and daughters, to whom had been left a liferent of the residue of the estate. The third parties were the children of the second parties, and were entitled to the fee of the residue of the estate.

The truster died on 8th June 1879. His trust-disposition and settlement, *inter alia*, directed—"And further, I direct my trustees to hold and retain the residue and remainder of my means and estate for behoof of my three children, the said Robert Barclay Curle, Mrs Isabella Curle or Millar, and Mrs Jane Curle or Lamont, equally amongst them, share and share alike, the said shares being to be retained and invested as hereinafter mentioned, that is to say, I direct my trustees to hold and retain and invest the said shares in their own names as trustees foresaid for the respective liferent uses allenarly of my said son and two daughters, and for behoof of their lawful issue respectively in fee, in such proportions among such issue respectively, if more than one child, and whether there be one or more children, subject to such restrictions and conditions as such son or daughters may respectively direct by any deed or writing under their hands or signed by them respectively, to take effect at their decease respectively, and, failing such appointment, equally among such issue, if more than one child, share and share alike, but with power to my son and daughters who are or may be married to confer upon their wife and husbands respectively, if surviving, a liferent of not more than one-third of the whole of their respective shares should they respectively think proper, notwithstanding of their leaving a child or children: And in the event of my son or daughters, or any of them, dying without leaving lawful issue, or of such issue all dying before majority or marriage, I direct my trustees to hold and retain the fee or capital of the said shares for behoof of the survivors of my said son and daughters, equally among them, share and share alike if more than one, and in the event of only one surviving, for his or her behoof in the same way as is hereinbefore provided with regard to the shares originally taken by the said survivors or survivor in their own right: . . . And further, I authorise and empower my trustees, notwithstanding any conditions and limitations which my said son and daughters may appoint in regard to the capital of the shares falling to their issue respectively, to pay to or for behoof of such of the issue of my said son and daughters as may be in minority at the decease of their parent the annual proceeds of their shares respectively, or so much of such annual proceeds as my trustees shall think necessary for their maintenance and education, accumulating the remainder, if any, for their behoof respectively, and adding the same to the capital of their shares until they shall respectively attain majority, if sons, or attain majority or be married, whichever of these events shall first happen, if daughters."

The case stated—"7. Upon the death of the said Robert Curle his trustees completed their title to his heritable and moveable estate (which amounted in value to about £160,000), and proceeded to realise the same; and after fulfilling the first four purposes of the trust settlement they proceeded to invest, and still hold, the residue of the estate for behoof of the second parties in liferent and the third parties in fee. 8. At the time of his death the said Robert Curle was proprietor of a ground-annual of £62, 10s., payable from a property in Stirling Road, Glasgow, which was then valued at £1240. Under the title to the ground annual a duplication was payable every

nineteenth year, and one duplication of £62, 10s. fell due and was paid at Whitsunday 1886. This ground-annual was redeemed by the owners of the property in 1899 at the price of £1250, being twenty-five years' purchase, in terms of a clause to that effect in the contract of ground-annual. 9. Among other investments made by them the trustees purchased at various dates between 1880 and 1890 certain feu-duties and ground-annuals at a total cost of £31,404, 6s. 11d., and these are still held by them. Of these the titles to the following feu-duties and ground-annuals provide for duplications being payable every nineteenth year from the date of entry, namely, Crosshill feu-duties, Watson Street feu-duty, Ingram Street ground-annual, and Garscube Road ground-annual. In the case of the Dundee and Arbroath Railway Company feu-duty a duplication is only payable every twenty-fifth year, and in the case of the South York Street feu-duty a duplication is payable on the entries of heirs and singular successors. In the case of feu-contracts executed before the Conveyancing and Land Transfer Act 1874, the deeds provided that the duplication was 'in full of all composition or relief that may be exacted or required from the vassal, his heirs, and singular successors;' while in feu-contracts executed after that Act came into operation reference to casualties is omitted. In the deeds relating to the ground-annuals the duplications are only referred to as duplications or double payments of the ground-annual."

The ground-annuals and feu-duties (including that redeemed) amounted to about £1300 a-year.

The case gave the following statement as to duplications:—

Statement showing total amount of duplications collected and to be collected from 1886 (date when first duplication received) to 1915.

Year.	Situation.	Amount.
1886	Stirling Road	£ 62 10 0
1890	Dundee and Arbroath Railway Company	176 19 8
1891	- - - - - -	—
1892	Ingram Street	198 10 0
1893	Crosshill	18 0 10
1894	Watson Street	137 10 0
1895	Crosshill	28 3 4
1895	Garscube Road	111 10 0
1896	Crosshill	37 16 0
1897	- - - - - -	—
1898	Crosshill	53 15 0
1899	Do.	247 11 10
1900	Do.	34 1 4
1901	- - - - - -	—
1902	Crosshill	15 13 10
1903	South York Street	10 10 0
1903	Do.	14 14 0
1903	Do.	16 16 0
1904	Crosshill	32 0 0
1905	Do.	69 6 5
1906	Do.	51 7 5
1907	- - - - - -	—
1908	- - - - - -	—
1909	- - - - - -	—
1910	- - - - - -	—
1911	Ingram Street	198 10 0
1912	Crosshill	£ 18 0 10
1913	Watson Street	137 10 0
1914	Crosshill	28 3 4
1914	Garscube Road	111 10 0
1915	Dundee and Arbroath Railway Company	176 19 8

The second parties *maintained* that the duplications formed part of the revenue or income of the estate and so fell to be paid to them as liferenters. The third parties maintained that the duplications fell to be considered as capital and did not fall to be paid to the liferenters.

The following questions were, *inter alia*, submitted:—"(1) Does the duplication of £62, 10s. of the ground-annual over the Stirling Road property, held by the deceased prior to his death, and paid to the trustees in 1886, fall to be considered as income or revenue of the estate? (2) Do the duplications already received, and those which will afterwards become due, in respect of the ground-annuals purchased by the first parties as trust investments, fall to be considered as income or revenue of the trust? (3) Do the duplications of feu-duties already received and to be received in respect of the Crosshill, Watson Street, and Dundee and Arbroath Railway Company feu-duties fall to be considered as income or revenue of the estate? (4) Do the duplications already received and to be received in respect of the South York Street feu-duty fall to be considered as income or revenue of the estate?"

After the argument (opinions unrevised)—

LORD PRESIDENT (LORD KINROSS)—The point raised in this case is a very short one. By the testamentary settlement of the late Mr Curle he directed his trustees to "hold and retain and invest the said shares"—that is, the shares of his estate provided to members of his family—"in their own names as trustees foresaid for the respective liferent uses allenarly of my said son and two daughters, and for behoof of their lawful issue respectively in fee, in such proportions among such issue respectively, if more than one child, and whether there be one or more children," and so on. Now it appears that Mr Curle at the time of his death was proprietor of a ground-annual of £62, 10s. payable from a property in Stirling Road, Glasgow, which was then valued at £1240, and under the title to the ground-annual a duplication was payable every nineteenth year, and one duplication of £62, 10s. had fallen due and was paid at Whitsunday 1886. In the exercise of the powers of investment conferred upon the trustees they had at one time or another acquired feu-duties and ground-annuals to the total cost of £31,404, 6s. 11d., so that at the time the question arises the ground-annuals which had belonged to Mr Curle in his lifetime and had been acquired by his trustees after his death were simply trust investments for beneficiaries. That was the sole purpose they were for. They might have had them in railway stock or other things, but in point of fact these

investments were very common, very favourite, and, I dare say, very good—ground-annuals and similar rights. Under this deed at clause 4 he directed his trustees to hold and retain for the respective liferent use allenarly of the beneficiaries, and the question comes to be whether these ground-annuals and duplicands and similar payments which are coming in, some of them annually and others at intervals, do or do not fall under the head of income of the estate in this provision which is made for liferent use allenarly—whether these are in the nature of income. Now we are not here, as it appears to me, concerned to discuss much or almost at all what appears to be the feudal character of the rights created and the payments made. It is a rule in considering a testamentary settlement that effect should be given as far as can be to the wishes of the testator, as these are to be collected from his testamentary writings. Now it seems to me, looking at the matter in that light, a proper result would be that payments made from them are what they are—part of the income of the estate—they should be enjoyed in the same way as any other part of it. And it appears to me further that this question having been three times recently considered by us in the cases of *Fleming*, *Ross*, and *Dunlop's Trustees*, though there are no doubt variations and differences between the terms of the deeds and the investments, the principle on which we proceeded there in giving effect to what we gathered and collected to have been the intention of the testator in making provisions for the members of his family should also apply here. But there no doubt have been questions raised as indicated to-day which might tend to an opposite conclusion from the legal and feudal character of these rights. But then this is not a feudal question we are now to decide, but what we have to decide is, what is the meaning of ordinary plain language in making provisions for the members of the testator's family, and any other view would lead to anomalous results. If the trustees were acting within their powers in making these investments, and if the result of our judgment was to withdraw the effect of these provisions in the trust-deed, it might be a most anomalous and undesirable result. Therefore, looking to the cases which have been recently decided and very carefully considered, and taking into consideration the argument that we have had to-day again, I must say it appears to me there is no sufficient reason for refusing to apply to this case the principle we applied in the other cases, and I therefore think the questions should be answered in favour of the liferenters.

Lord Adam—The truster here directed his trustees to hold and retain the residue of his estate for the respective liferent use allenarly of his son and two daughters, and for behoof of their lawful issue respectively in fee. That was the leading direction of the trust-deed. Now I do not see myself that directing trustees to invest residue for liferent use allenarly is anything different from directing the income of his estate to be paid to his son. I think the two things are, if I may say so, synonymous—they amount to the same thing. I cannot see that the presence of that word "allenarly," which was so much founded on by Mr Hunter, makes any difference whatever on the construction of the sentence. Supposing it was held that there was liferent use to the said son, that means no more or less than liferent use allenarly. The subjects to which this case applies are in different positions, and there is a question applicable to each kind of subject. The first is a duplicand of £62, 10s. payable upon a ground-annual which the truster himself bought; the next are duplications of certain ground-annuals purchased by the trustees; and the third duplicands of feu-duties in respect of certain subjects, these duplicands being payable at certain periods of 19 and 25 years respectively, some of them 19 years and some of them 25 years. The fourth is also a duplicand of feu-duties in respect of South York Street feu-duty, the peculiarity in that case being that these duplicands are not payable at certain times, but by heirs and singular successors on the death of the last vassal. For myself I can make no distinction between any of these different classes of duplications, because it humbly appears to me that one and all form part of the income of this estate. I think we have had to deal with duplicands in the same situations in each of these cases which your Lordship has referred to, and we treated them all as part of the income of the estate. I think this case is decided and ruled by the cases of *Fleming*, *Ross*, and *Dunlop's Trustees*, and I propose to answer all the questions in the affirmative.

Lord M'Laren—I am of the same opinion. The question is no doubt in a sense a question of testamentary intention, because it must first be ascertained from the terms of the will what was the nature of the limited interest which the testator intended to confer. But when it has once been ascertained to be a usufructuary interest, then it seems to me to be of very little consequence as regards what the testator did under it, whether it be given in the form of a liferent, which perhaps is not a very appropriate expression for a right under a trust, or whether it be given in the more correct language of a direction to employ the income or the produce of the estate for the benefit of certain parties. Now in this case where the word used is "liferent" I see nothing to suggest any construction which would give that word "liferent" or "liferent allenarly" a more limited meaning as regards the subject contained in it than "income" and "produce" which we have had to construe in previous cases coming before this Division. The principle of the decisions, and the principle I think in this case, is that periodical payments, although occurring at intervals of longer than one year—and generally a good deal longer, twenty or twenty-five years—are nevertheless to be treated as income

where there is a sufficient number of them to constitute a recurring payment. I do not know that we have ever gone so far as to hold that a single composition of considerable amount would be treated as income, though of course a good deal might be said in support of the principle of uniformity as applicable to such cases. Then in the present case there is, however, as your Lordships have pointed out, one question which might be held to involve an element not present in the cases referred to by Lord Adam, and that is in regard to the York Street property, the question whether a proper casualty of superiority—a sum payable by heirs or singular successors, and taxed as regards the amount—is to be treated as capital or income. Well, two distinctions were suggested. The one is that such casualties are always given to the fiar, because the fiar alone has the power of entering vassals, and he is therefore entitled to the legal consideration of receiving the entry; the other element that these casualties do not occur at fixed regular intervals of time, but occur at very uncertain periods, and are never payable more than once in a generation. As to the first distinction, I think it is disposed of by the fact that a superior is no longer entitled to demand an entry, and that the sum which he now receives is not a consideration for any trouble he takes in entering the vassal, but merely compensation under the Conveyancing Statutes for the pecuniary rights which he would otherwise have lost. Then the second distinction certainly creates a difficulty, but there being no decision to the contrary, and in view of the great inconvenience, and if I may use the word, I might almost say absurdity, of treating casualties at death in one way, and casualties payable at fixed periods in another way, I agree with your Lordships that it is better to have a uniform rule, and that we ought not to treat the case of casualties occurring at uncertain periods—a case which can never arise in future contracts—as exceptional. I therefore am for answering all the questions as your Lordships have proposed.

LORD KINNEAR—I think the questions are all already decided in the cases to which your Lordships have referred, and I therefore agree in the course your Lordships propose to take.

The Court answered the first four questions in the affirmative.

Counsel for the First and Third Parties—Hunter. Agent — P. Gardiner Gillespie, S.S.C.

Counsel for the Second Parties—Horne. Agents—Mylne & Campbell, W.S.

Thursday, June 4, 1908.

OUTER HOUSE.

[Lord Johnston.

PATERSON (M'INNES' TRUSTEE) *v.* GLASGOW CORPORATION.

Public Authorities Protection—Act Done in Pursuance of Act of Parliament—Limitation of Time for Bringing Action—Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 38), *sec.* 166.

The Public Health (Scotland) Act 1897, section 166, enacts—". . . Every action or prosecution against any person acting under this Act on account of any wrong done in or by any action, proceeding, or operation under this Act, shall be commenced within two months after the cause of action shall have arisen. . . ."

Circumstances in which *held* that a local authority was barred by their actings from maintaining in defence to an action for damages for injury to property, that the action had not been brought within two months after the injury complained of.

On 18th July 1907 Mrs Paterson, sole trustee acting under the trust-disposition and settlement of the late Miss Mary M'Innes, who resided at 48 North Portland Street, Glasgow, brought an action against the Corporation of Glasgow, to recover damages for alleged injury to certain house property belonging to the trust through the wrongful service of a notice under the Public Health (Scotland) Act 1897.

The property in question, which had belonged to Miss M'Innes, who died on 10th February 1906, consisted of seven dwelling-houses situated and entering at 64 Rose Street, Glasgow, but having a frontage to Govan Street, there being below these houses a shop entering from Govan Street. On 28th April 1906 the Corporation served upon Mr Archibald Hamilton, the law agent of the trust, a notice that the dwelling-houses situated at 64 Rose Street, being a back land, of which premises he was therein described as owner, were in a state so dangerous and injurious to health as to be unfit for human habitation. On a representation, however, by Mr Hamilton that he was not owner of the property a second notice in similar terms, dated 4th May 1906, was served upon Miss M'Innes' trustee. It subsequently transpired, as admitted by the defenders on record, that these notices had proceeded on an error as to the identity of the property intended to be condemned, the property aimed at being in reality a back land belonging to Alexander Sim, to which access was gained by the entry at 64 Rose Street, but which was entered in the valuation roll as at No. 60 Rose Street. In spite of remonstrances by the law agent for the trust, pointing out that a mistake had been made, the defenders did not withdraw the notices, and, after endeavours to sell the property, the bondholders entered into possession and ulti-