

apart from the statute of 1843 (of which I shall presently speak), was that it had right to support. I rest this on the principle of the *London and North-Western Railway Company v. Evans*, 1893, 1 Ch. 16.

While it is true that the enterprise of supplying this city with water was committed to a private company entitled to make profit within certain defined limits, the purpose was public. I am unable, however, to accept the suggested test as in any way conclusive of the question whether support or right to support exists. The true question is whether the grant made to this company under the compulsory powers of the statute of the right to lay pipes carried with it by implication the right to support. I find it impossible to hold that it did not. The question is the same as would have arisen in actual practice supposing that at the time when the pipe was laid this mineral field had been open. Would the owners have been compensated on the footing that they might next day bring down the pipe or that they might not? Yet the right of the undertakers is just the same, whether the existence of the minerals was known or unknown, and whether the right of support was in fact paid for or not.

The appellants' separate argument on the Act of 1843 (if the views now stated are sound) is somewhat daring, for it involves this, that while from 1823 to 1843 the pipe in question had right to support (by virtue of the doctrine of *Evans*), it was deprived of that right in 1843. I am content to say that the reasoning of the learned Judges in the Court of Session furnishes an adequate defence of the statute against this imputation.

I have only to add that, like the learned Judges, I reject the respondents' alternative theory of common law servitude. Their rights are derived from the Act of 1819 alone.

Appeal dismissed with costs.

Counsel for the Pursuers and Respondents—Dean of Faculty (Asher, K.C.)—F. T. Cooper. Agents—A. & W. Beveridge, Westminster—Millar, Robson, & McLean, W.S., Edinburgh.

Counsel for the Defenders, Reclaimers, and Appellants—Lord Advocate (Dickson, K.C.)—Clyde, K.C.—T. B. Morison. Agents—John Kennedy, W.S., Westminster—J. Gordon Mason, S.S.C., Edinburgh.

## COURT OF SESSION.

Tuesday, December 8.

### SECOND DIVISION.

FISHER v. FISHER'S TRUSTEES.

*Fee and Liferent—Casualties and Duplicands of Feu-Duty Exigible but not Demanded, or Demanded but not Paid—Free Annual Proceeds and Revenue of Heritable Estate.*

Under a marriage contract the surviving spouse (the husband) was entitled during his life to "the whole free annual proceeds and revenue" of the trust estate. The trust estate consisted, *inter alia*, of lands feued out to feuars. Certain casualties and duplicands payable for taxed entries had become exigible during the husband's life, and had been demanded by the marriage-contract trustees but had not been paid before his death; others had become exigible during his life but had not been demanded before his death. The casualties and duplicands which had been collected during A's life had always been paid over to him as revenue. In a question between the executrix under his will and the marriage-contract trustees, *held* that those casualties and duplicands which had been demanded during A's life but not paid formed part of the free annual proceeds and revenue of the trust funds to which he was entitled at the date of his death, and were payable when collected to his executrix under his will, but that those which had become exigible but had not been demanded during A's life fell to be disposed of as capital of the trust estate under the marriage contract.

*Observations per* Lord Trayner on the question whether casualties and duplicands were properly "free annual proceeds and revenue."

*Opinion per* Lord Trayner that if the duplicands had been payable at definite recurring periods, and not for taxed entries, they would, if exigible before A's death, have been payable to his executrix whether demanded during his lifetime or not.

This was a special case for the opinion and judgment of the Court presented by (1) Mrs Helen Fraser or Fisher, 18 Princes Square, London, W., widow of Captain Charles Basil Fisher, whose second wife she had been, as executor under his will; and (2) the trustees acting under a marriage contract entered into between Captain Fisher and his first wife.

The following, *inter alia*, were the facts stated in the case:—Captain Fisher, by marriage-contract entered into between him and his first wife Mrs Anne Hogarth or Fisher, in July 1860 conveyed to the trustees thereunder certain heritable subjects. The marriage contract provided as

follows:—"In the event of the dissolution of the said marriage by the death of either of the said parties . . . then and in that case the said trustees shall account for and pay over to the survivor of the said Charles Basil Fisher and Anne Hogarth during the life of the survivor . . . the whole free annual proceeds and revenue of the said whole trust funds and estate."

Mrs Anne Hogarth or Fisher died on 19th March 1873.

Before 1860 portions of the heritable subjects conveyed by Captain Fisher's marriage contract had been feued out by him, and subsequently other feus were given off by the marriage-contract trustees. The feu-duties from these subjects, and sundry duplicands of feu-duty exigible for taxed entries, and casualties of composition and relief duty which fell due from time to time and were ingathered by the trustees, were paid over by them during the subsistence of the marriage to the spouses, and after Mrs Anne Hogarth or Fisher's death to Captain Fisher as part of the free annual proceeds and revenue of the trust estate. The duplicands referred to were not payable at definite recurring periods, but were all constituted thus—"Doubling the feu-duty the first year of the entry of every heir and singular successor."

Captain Fisher died on 2nd April 1902, survived by his second wife, the first party to this case, leaving the will under which she acted and whereby he disposed of his whole estate and effects not otherwise disposed of and not subject to any of his marriage settlements.

Certain casualties and duplicands had become exigible from the heritable subjects above referred to during Captain Fisher's life, and had been demanded from the vassals by the marriage-contract trustees, but had not been paid before his death; others had become exigible during his life but had not been demanded before his death. It was with regard to the rights of the first and second parties to the sums exigible in respect of these casualties and duplicands that the question involved in this special case arose.

The first party maintained that the casualties of composition and relief duty, and the duplicands of feu-duties which were outstanding and exigible previous to Charles Basil Fisher's death, were a portion of the free annual proceeds and revenue of the said trust funds to which he was entitled at the date of his death under the contract of marriage with his first wife, and that the same formed part of his personal estate, and now fell to be paid over to the first party as the executrix under his will.

The second parties maintained that the casualties and duplicands were not a portion of the free annual proceeds and revenue of the said trust funds to which Charles Basil Fisher was entitled under the contract of marriage, and that they did not fall to be paid, as part of Charles Basil Fisher's personal estate, to the first party as his executrix, but that they were estate accruing to the trust after the date of his death, and that they fell to be retained by

the second parties for division amongst the beneficiaries entitled to the capital of the estate under the contract of marriage.

The following were the questions of law for the opinion and judgment of the Court:—" (1) Do the casualties and duplicands of feu-duties which were exigible but outstanding at the date of death of the said Charles Basil Fisher, or any of them, form part of the free annual proceeds and revenue of the trust estate to which he was entitled during his life, and are the second parties bound to pay and transfer the same when collected to the first party as executrix of the said Charles Basil Fisher? or (2) Do the said outstanding casualties and duplicands of feu-duties or any of them form part of the estate to be divided by the second parties amongst the beneficiaries entitled to the capital of the estate under the said antenuptial contract of marriage?"

Argued for the first party—Even though not demanded and paid prior to Captain Fisher's death, the casualties and duplicands in question formed part of the annual proceeds and revenue of the trust estate to which he had become entitled—*Dunlop's Trustees v. Dunlop*, October 15, 1903, 41 S.L.R. 8; *Montgomerie-Fleming's Trustees v. Montgomerie-Fleming*, February 28, 1901, 3 F. 591, 38 S.L.R. 417. At the date of Captain Fisher's death the casualties and duplicands formed part of his moveable estate, being accumulations of income—*Straiton Estate Company v. Stephens*, December 16, 1880, 8 R. 299, 18 S.L.R. 187; *Stewart v. Murdoch*, June 6, 1882, 19 S.L.R. 649. It could not be said that these prestations had been left outstanding in ordinary course of trust administration, and what the trustees had done or left undone could not affect the rights of fee or liferent therein.

Argued for the second parties — The casualties which were not demanded prior to Captain Fisher's death were never *in bonis* of the deceased, as they were not due until demanded—*Motherwell v. Maxwell*, March 6, 1903, 5 F. 619, 40 S.L.R. 429. The duplicands and casualties which were unpaid at the date of Captain Fisher's death formed no part of his moveable estate, as he was entitled only to the free annual proceeds and revenue of the trust estate.

At advising—

LORD JUSTICE-CLERK—The late Captain Basil Fisher was under his marriage contract entitled on surviving his wife to receive from the trustees "the whole free proceeds and revenue" of the whole trust funds and estate, under certain obligations to provide for the upbringing and education of the children of the marriage. Part of the estate held by the trustees consists of certain heritable subjects conveyed in trust by him for the purposes of the marriage contract. The question in this case relates to certain casualties of composition, relief duties, and duplicands of feu-duties, the right to claim which emerged during Captain Fisher's lifetime, but which had not been realised and handed over to him before his death. These fall into three categories—

(1) Where a claim had actually been made by demand; (2) where negotiation had been opened by the trustees to ascertain the amounts, but where they had not been ascertained or a demand for payment made; (3) where no action had been taken in regard to them.

The casualties, &c., in this case not being in the position of ordinary debts, the present question has arisen as between those in right of any estate left by Captain Fisher and those in right to the estate settled by the marriage contract. It had been the practice of the trust where such moneys were recovered to hand them over to Captain Fisher. But as regards those not paid before his death, those entitled to his estate maintain that the moneys obtained since Captain Fisher's death, but which were exigible during his life, fall to be paid to them. The executrix of Captain Fisher maintains that they were *in bonis* of the deceased at the time of his death, and therefore that they fall to be accounted for to her. It appears to me that there is a distinction to be drawn between the different classes. Captain Fisher would undoubtedly have been entitled to the money represented by these casualties and duplicands had they been demanded, and payment made by the feuars, during his life. On the other hand, one in right of such payments, if he does not choose to proceed to demand them, does not obtain the position of a creditor, so that his representatives can claim them after his death as having been part of his estate. If he declines to proceed to exact them, or omits to do so, the claim passes with the heritable right, and when exacted what is recovered goes, not to those who are creditors of the last holder, but to the fiar who demands them from the feuars.

My view therefore is that in those cases in which a demand was made for payment during Captain Fisher's lifetime the proceeds fall to his executrix as being funds which form part of his personal estate. But as regards those claims which were not ascertained and made matter of demand at the time of his death, I hold that they do not form part of his estate, but are estate accruing to the marriage-contract trust, to be disposed of in the division of the trust estate among the beneficiaries.

**LORD TRAYNER**—By marriage-contract between Mr Fisher and Miss Hogarth the trustees there named (who are the second parties to this case) were directed, in the event of the dissolution of the marriage by the death of either of the spouses with issue of the marriage then surviving, to pay over to the surviving spouse during his or her life "the whole free annual proceeds and revenue" of the trust-estate. Mrs Fisher (*née* Hogarth) predeceased her husband, leaving two children of the marriage surviving. Mr Fisher married again, and died on 2nd April 1902. The first party is his widow and executrix. The trust-estate consisted, *inter alia*, of lands held by feuars under Mr Fisher, from which in the course of the trust considerable sums were de-

rived from time to time in name of feu-duty, duplicands of feu-duty, and casualties of superiority. Some of these duplicands and casualties fell due during Mr Fisher's life, and the question we are asked to determine is whether these duplicands and casualties fall to be paid to his executrix or whether they go to the beneficiaries under the trust. It occurred to me that it might be questioned whether these duplicands and casualties could be brought within the description of that to which Mr Fisher was entitled in the event of his survivorship, viz., "the free annual proceeds and revenue" of the trust estate, for duplicands of feu-duty and casualties of superiority are not "annual proceeds" nor "annual revenue." The answer to that difficulty, however, is perhaps to be found in the fact that during the lifetime of the spouses duplicands and casualties were paid over to them, and to Mr Fisher as the survivor, and there is thus an interpretation put upon the terms of the marriage-contract by the parties who made it. These payments could only have been made by the truster to and received by the spouses and Mr Fisher on the view that they were part of the revenue of the trust estate, as otherwise the trustees would have been bound to hold the payments of duplicands and casualties for behoof of the fiars. It appears that some of the casualties and duplicands now in question became due and were demanded in the course of Mr Fisher's life while others became due during that time but were not demanded until after Mr Fisher's death, and the question is whether the whole or what part of them, if any, falls to the first party as moveable estate of her deceased husband. Had the duplicands in question here been made payable at definite recurring periods and had fallen due during the lifetime of Mr Fisher I would have held that they fell now to his executrix as part of the moveable estate of her husband. Such duplicands are just additional feu-duty for the special year in which they become exigible, and require no demand to vest the right to them in the superior any more than the year's feu-duty itself. But here the so-called duplicands were not of that character, they were the amount at which the entry of heirs and singular successors was taxed, and must therefore be dealt with as casualties. With regard to the casualties, my opinion is that only those which were demanded during the lifetime of Mr Fisher fell to his executrix. As was pointed out in the case of *Motherwell* the casualty due on an entry is not of the character of a debt. It is something which the vassal has to pay for the completion of his title, but only if the superior chooses to exact it, which he may do or not do as he pleases. No demand having been made by Mr Fisher it does not appear that he intended to exact the casualty which on demand he would have been entitled to. The casualties therefore due but not demanded at the time of Mr Fisher's death appear to me to belong to the fiars who (or the trustees in their interest) are the parties

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<sup>d</sup>., 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