forthwith to deliver up the said children, viz., Charles Hamilton Reilly, William Sheridan Tottingham Reilly, and Amelia Reilly to the petitioner or any other party having his authority and decree: Find the respondent William Quarrier liable to the petitioner in expenses to 13th May 1895, the date of his intimating his withdrawal from the action: Find the minuter William Sheridan Tottingham Barry liable to the petitioner in the expenses of the discussion on the 1st and 4th June: Find the said respondent and the minuter liable conjunctly and severally to the petitioner in the expenses of the discussion upon expenses," &c.

Counsel for the Petitioner — Comrie Thomson—W. Campbell. Agent—William B. Glen, S.S.C.

Counsel for the Respondent—Ure—Clyde. Agents—Dove & Lockhart, S.S.C.

Counsel for the Minuter—A. Jamieson—Lee. Agents—Dove & Lockhart, S.S.C.

Thursday, July 11.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

GIBSON *v.* CADDALL'S TRUSTEES.

Trust—Litigation by Trustees—Expenses—Liability of Trustees.

Trustees who were fiars of a heritable estate, the fences of which the liferenter was bound to keep up, finding said fences in disrepair, entered upon the lands without his consent and cut them down. The liferenter thereupon raised an action against them in the Sheriff Court for £100 as damages. The Sheriff found that, although the trustees had acted illegally, they had done so in *bona fide* and in the interests of the estate, assessed the damages at £5, and found the trustees liable in one-half of the expenses. *Held* that the trustees were not personally liable for these expenses, but were entitled to recoup themselves out of the trust funds.

Trust—Fee and Liferent—"Annual Income"—Whether Duplicand of Feu-Duty to be Regarded as Annual Income.

Trustees were bound under an agreement to pay to the liferenter of the trust-estate "the whole free annual income." *Held* (*rev.* judgment of Lord Wellwood) that this did not include a duplicand of feu-duty, which was payable only once in nineteen years.

Case of *Lamont-Campbell* v. *Carter-Campbell*, January 19, 1895, 22 R. 260, *distinguished.*

Butter's Church, Glenapp, Ayrshire, with manse and offices, was erected in 1850 upon lands disponed to trustees by the late Mrs Isabella Butter or Caddall, who also left funds in their hands, for, *inter alia*, the building of said church and manse, the income of the balance to be paid annually as stipend to the incumbent for the time being. In 1857 the Rev. Henry Gibson was appointed incumbent, and in 1858 Mrs Caddall's trustees conveyed to him for his incumbency the lands belonging to them, reserving the growing timber and the plantations on said lands, and bound themselves and their successors in office to pay him as stipend the interest of £2700 yearly. In 1869 a sinking fund, which had been instituted in 1850 to meet the expense of keeping in repair, amounted to £500, and the trustees, thinking that sum sufficient for the purposes of the fund, entered into an agreement with Mr Gibson to give him, in addition to the income from the said £2700, the balance of the free income of the estate, he undertaking to keep up the manse, offices, and fencing.

In 1877 certain questions arose between Mr Gibson and the trustees as to the proper repair of the glebe fences, and the trustees, being of opinion that they had not been properly cut, without Mr Gibson's consent sent a hedger on to the lands, who cut them down. Thereupon Mr Gibson raised an action in the Sheriff Court at Ayr against the trustees, to have them interdicted from cutting the hedges, and ordained to pay him £100 damages for their unwarranted interference. The Sheriff-Substitute, after a proof, granted interdict, gave decree for £5 in name of damages, and found the trustees jointly and severally liable in expenses, subject to modification. This interlocutor was affirmed by the Sheriff, who modified the expenses due to the pursuer to one-half, and in his note added that, from the evidence before him, he had no doubt whatever that the defenders had acted throughout in perfect good faith for the benefit of the property, the fee of which they held in trust, but that they were wrong in law in proceeding to do that which, although right and proper in itself, should not have been done without consent or order of law. The trustees paid the damages and expenses in which they were found liable out of the sinking fund.

In 1885 Caddall's trustees entered into a new arrangement with Mr Gibson, by which it was agreed (1) that the arrangement of 1869 should be cancelled; (2) that certain sums should be expended upon the church, manse, offices, fences, &c., out of the sinking fund; (3) that in future the upkeep of these should be under the exclusive control and management of the trustees; (4) that the sinking fund should by degrees be brought up again to the sum at which it then stood; and (5) that as soon as that was done the incumbent should "as hitherto enjoy the whole free annual income from said trust-estate, including said sinking fund."

Butter's Church had been erected into a parish church *quoad sacra* in 1873, and a sum of £2500 had been paid by the then Caddall trustees to the Endowment Committee of the Church of Scotland to secure an annual stipend to the minister. A deed

of appointment and declaration of trust had also been granted by the said Endowment Committee, dated 25th and 30th April, and registered in the Register of Sasines of the barony and regality of Glasgow, 2nd May 1874, in which it was declared that a portion of all and whole certain parts of the lands on the estate of Kelvinside, from which subjects feu-duties amounting to £894,4s. 5d. were payable to the said Committee, were held by the said Committee to the extent of £100, 14s., together with the casualties of superiority, in trust (1) for payment out of said feu-duties of £100, 14s. of the annual sum of £100 to the minister for the time being of Butter's Church, in the parish of Glenapp, at two terms in the year, Whitsunday and Martinmas; and (2) for payment to Caddall's trustees of the sum of £100 sterling every 19th year, commencing at Whitsunday 1893, in full of all casualties of superiority. The said duplication of feu-duty was paid to Caddall's trustees on 6th June 1893, by which date the sinking fund had been restored to the amount at which it stood in 1885.

In June 1894 the Rev. Henry Gibson raised an action against (1) the Rev. Fergus John Williamson, the only surviving one of Mrs Caddall's trustees acting in 1877, and (2) the existing trustees, for the purpose, first, of having Mr Williamson ordained to repay the amount, being the loss of income sustained by the pursuer taken from the sinking fund in 1877 to meet the damages and expenses found due in the Sheriff Court by the then trustees; and secondly, to have the trustees ordained to make payment of the sum of £100, being payment of the duplicand of feu-duty received by them on 6th June 1893.

The pursuer pleaded—"(1) The first defender being individually liable in payment of the said damages and expenses found due by him and others to the pursuer, and incurred in the said action in the Sheriff Court, and having illegally paid the same out of trust funds, to the prejudice of the pursuer, decree should be granted in terms of the petitory conclusion against the first defender. (5) The duplication of feu-duty of £100, being income of the trust, and being payable to the pursuer under the agreement of 1885, the pursuer is entitled to decree therefor as craved."

The defenders pleaded—"(2) The pursuer's claims in respect of said expenses are barred by *mora, et separatim* by the agreement made between him and the trustees in 1885. (3) The trustees, in litigating said action, having acted in *bona fide*, and for the protection of the trust-estate, they were entitled to make payment of said expenses out of the trust funds. (6) The £100 of duplicand not being annual income in the sense of the deed of agreement, the pursuer is not entitled to demand same from the defenders."

Upon 13th February 1895 the Lord Ordinary (WELLWOOD) found the pursuer entitled to the sum of £100, being a duplication of the feu-duty received from the Treasurer of the Church of Scotland's Endowment Committee on 6th June 1893, with bank interest thereon from the said date until payment, and decerned against the defenders called in the second place accordingly, assoilzied the whole defenders from the remaining conclusions of the action, and decerned.

"*Note.*—I heard parties in this case in the Procedure Roll on 7th November last, but I delayed giving judgment, although I was prepared to do so, because I was told that efforts were being made to settle the case, and I have no doubt that counsel on both sides have done their best to do so. They have failed, however, and I must now dispose of the case, but as much time has elapsed, I do not propose to give a detailed opinion.

"As to the first sum sued for, I am of opinion that, apart from other objections, the pursuer is barred by delay, it being clear that distinct substantial prejudice to the defender Mr Williamson has been caused by the delay. The last sum claimed is £100, being a duplication of feu-duty paid to the defenders second called in the summons on 6th June 1893. With some hesitation, I am of opinion that the pursuer is entitled to this sum, and accordingly I give him decree for it."

The pursuer reclaimed, and argued—(1) The trustees were found personally liable, and had no right to recoup themselves out of the trust funds. They might have been acting in *bona fide*, but that did not justify them committing a legal wrong or not paying for the consequences of having done so. They were only entitled to use trust funds for ordinary trust administration purposes. They had improperly opposed a valid claim made against them, and were personally liable in damages and expenses—*Kay* v. *Wilson's Trustees*, May 6, 1850, 12 D. 845. (2) He was not barred by *mora*. There was no proof of *mora;* indeed, the minutes of the trust would show he had all these years been trying to get redress without litigation. (3) The Lord Ordinary was right as to the duplicand. It was to be treated as part of the income for the year, looking to the recent case of *Lamont-Campbell* v. *Carter-Campbell*, January 19, 1895, 22 R. 260.

Argued for the defenders—(1) Even if the pursuer's averments were relevant, it was too late after eighteen years to institute a proof. (2) Although trustees were found liable in expenses, it did not necessarily follow they were not entitled to recoup themselves out of the trust funds if such existed. It might be their duty to litigate in the interests of the trust. Here they had successfully resisted a claim for £100 to the extent of saving £95. Their *bona fides* had been fully recognised by the Sheriff. It could not therefore be said that they had acted recklessly or without any justification—*Andrews* v. *Ewart's Trustees*, May 27, 1885, 12 R. 1001. (3) The duplicand did not fall into the category of "annual income," and therefore the pursuer had no claim to it under the agreement of 1885—*Ewing* v. *Ewing*, March 20, 1872, 10 Macph. 678. *The Lamont-Campbell* case was not in

point, because there were duplicands falling due every year, and on that ground alone they were held to form part of the annual income of the estate.

At advising—

LORD PRESIDENT—As the pursuer's record does not contain any admission of the facts upon which the Lord Ordinary considers him barred by delay, I do not deem this a safe ground of judgment. That record, however, does disclose an inherent defect in the ground of action. The action seeks to make the defenders personally liable for the costs incurred by Caddall's trustees in an action in which those trustees were called by the present pursuer, the decree sought being for payment of £100, and the decree obtained being for £5. Now, it is not said by the pursuer that the present defenders acted unreasonably or recklessly or otherwise than in accordance with their duty when they defended this action. Unless then, it were the law that, as in a question with beneficiaries, trustees are personally liable in the costs of every action relating to the trust estate which they defend unsuccessfully, or rather with only partial success, the pursuer's case must fail.

On the second question in the action I have come to be of opinion that the pursuer has no legal right to the duplication of feu-duty. In the first place, it is clear that the declaration of trust executed by the Endowment Trustees of the Church of Scotland in 1874 does not directly give to the pursuer any such right. It remains to be seen whether the trustees who, under the deed which I have mentioned, are to receive those casualties, are bound to pay them over to the pursuer; and this depends upon the agreement of 1885, which defines the rights of the pursuer as between him and Caddall's trustees. Now, under that agreement, what the pursuer is to get from the trustees is the whole free annual income from the trust-estate. Unless this duplication of feu-duty is, in the sense of the agreement, "free annual income," his case fails. Well, it is of course true that this money did come in in one particular year; but then the same may be said of every sum whatever that is paid, whether once for all or recurrently. And when regard is had to the fact that this £100 falls in only once in nineteen years, I do not think that it can be regarded as annual income. I think the moneys included in that phrase are those payments which, or the like of which, come in each year. I say "or the like of which," because, if this trust were fortunate enough to have so large a number of superiorities that each year a duplication of £100 fell in, then I do not doubt that the pursuer would be entitled to what he asks; and this was very much one of the points that arose in *Mrs Carter-Campbell's* case. Unfortunately, there is no such affluence in the Caddall trust, and on the question before us I am unable to affirm that this £100 is part of the free annual income from that trust-estate.

I am therefore for recalling the Lord Ordinary's interlocutor, and assoilzieing the defenders from the whole conclusions of the action.

LORD M'LAREN—I am of the same opinion. Upon the first point it is always understood that where trustees, acting in the discharge of their duty, litigate in the name of the trust-estate and for the protection of the interests of the trust, they are entitled to charge the trust with their account for expenses, upon the principle that representative persons are entitled to the costs necessarily incurred in the interests of their constituents. It would, I think, be unfair that their right should depend upon the circumstances of their being successful in the litigation; and if such a rule were established, I imagine that it would be difficult to find persons willing to become trustees.

Of course there are cases where trustees may be acting really in their own interests, and may be litigating without having any good grounds for doing so. But such cases are exceptional, and there is no allegation here that the trustees did more than defend the trust against a claim for £100, which proved extravagant, because the pursuer was only awarded £5.

On the second point, if we were here in a question as to the adjustment of the agreement, there might be much to be said in favour of Mr Gibson's contention, that the whole proceeds of the investment, including casualties, belongs to the incumbent under the destination in the original trust. But then it is made matter of arrangement that a certain sum should be invested in feuduties under a deed of trust, under which Mr Gibson is only entitled to the yearly income of the trust-estate. It may well be that the parties saw that there would always be expense in connection with the mortification, and that it was desirable to have a sum like a casualty coming in once in twenty years available to meet the demands of the trust. There was, however, no special provision to this effect, and we must determine the point according to the fair meaning of the agreement contained in the deed. I agree with your Lordship that a casualty is not annual income. It may be income in a certain sense. In some cases it may be difficult to determine what is income under a gift or bequest of income. Here, where the right of Mr Gibson is to annual income, I cannot see how he can claim a sum only coming in at intervals of twenty years.

LORD KINNEAR—With regard to the first point, I think we must take the judgment of the Sheriffs as conclusive, and therefore must hold that the trustees had no right to enter upon the property for the purpose of executing operations without the consent of the incumbent or a judicial warrant. But then I also think that we must look at the interlocutors and notes of the Sheriff-Substitute in order to see what was the nature of the question raised between the pursuer and the trustees, and I find, on a perusal of these notes, and especially that of the Sheriff—although it does not materially differ from that of the Sheriff-Sub-

stitute—that in the judgment of the Sheriff these trustees still had a title to the property, and a duty with regard to it. He held, and no doubt correctly, that the fee was vested in them in trust, with the duty of keeping the trust property in repair, because a conveyance of the property to the minister during his incumbency could not divest the trustees absolutely, or relieve them of their duty to protect the trust-estate. The Sheriff also held that the facts of the case justified the trustees' appearance, because the property was being neglected, and it was necessary that some operations should be performed. The only point against the trustees was that they were wrong in supposing that their duty to the trust property required or entitled them to enter upon it without the consent of the beneficiary. The Sheriff goes on to say that while the trustees were wrong, they were in his opinion acting in good faith, and for the benefit of the property. Their error therefore was one in law only.

It appears from these circumstances that there was a question between the pursuer and the trustees, which was a fair question for discussion, and they were therefore entitled, and indeed called on, to make some answer to the pursuer's demand for interdict, and for a large sum in name of damages, which it might have fallen upon the trust to pay. The trustees, as representing the trust, were justified in entering appearance, and although they were wrong in their views, I think the expense incurred is a good charge against the trust estate, in whose interest it was incurred.

On the second point, I agree that the casualty payable once in nineteen years is not annual income, and cannot be handed over to the incumbent for the time being, but belongs to the trust-estate in which he and future incumbents have an interest.

LORD ADAM was absent.

The Court recalled the interlocutor reclaimed against, assoilzied the defenders from the whole conclusions of the action, and found them entitled to expenses.

Counsel for the Pursuer—Jameson—F. T. Cooper. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Defenders—Vary Campbell—Salvesen. Agents—Adair & Fenwick, S.S.C.

Thursday, July 11.

FIRST DIVISION.

[Sheriff Court of the Lothians and Peebles.

ROBB *v.* BREARTON.

Process — Summary Ejection — Appeal — Competency—Judicature Act 1825 (6 *Geo. IV. c.* 120), *sec.* 44.

Held that an appeal against a decree of summary ejection by a sheriff was competent.

Process—Summary Ejection—Sub-Tenant in Lawful Possession.

A proprietor of urban premises gave notice to quit to a tenant who held them on a yearly tenancy. Part of the premises were occupied by a sub-tenant under a lease from the principal tenant. Without giving any notice to the sub-tenant the proprietor petitioned the Sheriff to grant warrant for his summary ejection from the premises.

Held that the petition was incompetent, in respect that the sub-tenant was in lawful possession of the subjects, and could not be removed without warning.

In November 1894 James Robb purchased from James Jeffrey certain heritable subjects on the south side of Springfield Street, Leith.

The firm of H. & A. Brown, van builders, Leith, were tenants of the subjects from Jeffrey under a lease from year to year.

In March 1893 Messrs Brown had granted a sub-lease of a portion of the subjects for a period of six years to Patrick Brearton, sawdust merchant, Leith.

On 2nd February 1895 Robb, by registered letter, gave warning to Messrs H. & A. Brown to flit and remove from the premises occupied by them.

No notice was sent to Brearton.

In May 1895 Robb presented a petition against Brearton in the Sheriff Court of the Lothians and Peebles, craving the Court "to grant warrant to officers of Court summarily to eject the defender and his gear, goods, and effects" . . . from the subjects in question, "and to make the same void and redd, and to interdict the defender in all time coming from entering into" the subjects.

A record was made up, and the pursuer pleaded—"(1) The defender having no title to possess the ground libelled on, or any part thereof, and notwithstanding occupying the same or a part thereof, the pursuer, as being the proprietor of said ground, is entitled to have the defender ejected therefrom. (2) The defence is irrelevant."

The defender averred that he was in lawful possession of the subjects under a sub-lease from the tenant for a period of six years; that even if he was regarded only as a yearly tenant, he was not liable to summary ejection, and that he had received no previous warning or notice of removal.

He pleaded—"(2) The defender being in possession under a missive of lease flowing from a party entitled to grant the same, is not liable to summary ejection without previous warning or notice to quit."

On 19th June 1895 the Sheriff-Substitute (HAMILTON) sustained the second plea for the pursuer, and granted warrant of summary ejection.

"*Note.*—The Sheriff-Substitute holds the defence to be irrelevant upon the authority of the following cases—*Robb* v. *Menzies*, January 20, 1859, 21 D. 277, and *Wilson* v. *Campbell*, December 12, 1839, 2 D. 232.

The defender appealed to the Sheriff, who, on 27th June 1895, dismissed the