lent of the old casualties of superiority, the question being, are they to be treated as capital or as income. Independently of authority, I should have no difficulty in holding such payments to be income, because they are produce of the estate, and because they may be appropriated to income without diminishing the capital value of the estate. The recurring payments satisfy the definition of a usufruct, because they may be expended without consuming or destroying the estate. While it may be that a casualty of large amount, payable only once or twice in a lifetime might be treated as capital, yet I observe that in the Ayr case (*Gibson* v. *Caddall's Trustees*, 22 R. 889) the Lord President pointed out that if the payments there had been so large in number as to bring in a regular income every year they would have been ascribed to income. In point of fact the casualties on an estate consisting of a number of feus are part of the income of the estate according to the ordinary meaning of words, and I have no doubt would be treated as income by an unrestricted proprietor. The only case which requires consideration is that of *Ewing* v. *Ewing* (10 Macph. 678), in which Lord Benholme held that sums paid in lieu of casualties on a feu-holding were to be given to the fiar. I observe that in that case the trustees were directed to execute a conveyance to Mrs Ewing in liferent and to the trustee's heir in fee, and the question was who was entitled to receive these recurring payments. The argument was irresistible that the fiar, who alone could give an entry, was entitled to sums paid in lieu of a composition on non-entry, because he was the person entitled to give the right for which the payment was made. Then his Lordship expresses great doubt as to whether this principle was applicable in the case of *grassums* paid every twenty-five years on burgage subjects. That is very like the present case, and on this point I cannot think that the decision is an entirely satisfactory one, because Lord Benholme recognises that the ground of judgment in the case of proper casualties is inapplicable, and yet no new ground of judgment is suggested.

The case is assimilated to that of bonus dividend, but we know that according to the most recent English cases the question whether a bonus paid by a company is to be treated as paid out of income or capital is entirely a question of fact. We lately had occasion to apply that principle in a question with a liferenter. The circumstances of the present case are distinguishable from *Ewing's* case, because this is a case of income paid through trustees, and in my opinion such recurring payments as the present should form part of the widow's liferent.

LORD KINNEAR—I agree with your Lordships. I think it is not of the slightest consequence whether these duplications of feu-duty are called casualties or not. In modern law language that may be a correct terminology, because it has the sanction of Parliament, although it would no doubt have offended the susceptibilities of the older feudalists. But whether they are properly called casualties or not, they are not casualties in the sense of the law under which casualties were given to the fiar, as distinguished from the liferenter, because such casualties were not constantly recurring payments, but payments dependent on uncertain events, such as the death of the vassal or the transmission of his estate. The reason why the particular casualties to which these duplications have been assimilated were paid to the fiar was because a liferenter by constitution could not enter vassals, and therefore was not entitled to exact a payment in return for an entry. But even in the case of proper casualties I doubt whether that consideration would be sufficient to solve a question arising, not out of any feudal incident, or from the conditions of a title to land, but on the construction of a settlement. In that case the question always is what the maker of the settlement intended; and on the construction of this particular settlement I have no difficulty in holding that the truster intended his widow to have the income arising from these duplications. Such payments cannot be assimilated to casualties of feu in the older sense, because they are constantly recurring payments, payable at fixed intervals under contract between the superior and the feuars. I have no doubt that a proprietor in the position of the truster would in general treat such periodical payments as income, and I think he intended his widow to have the income arising from them after his death.

The Court answered the first question in the affirmative, and the second in the negative.

Counsel for the Second Party—W. Campbell, K.C. — Horne. Agents — Mylne & Campbell, W.S.

Counsel for the Third Parties—Dundas, K.C.—Spens. Agents—H. B. & F. J. Dewar, W.S.

Friday, March 1.

SECOND DIVISION.

[Sheriff Court at Dunfermline.

HUNTER *v.* RUSSELL.

Expenses—Reparation—Slander—Apology.

In an action of damages for slander, the defender lodged a minute in which it was stated "that if any expressions used by the defender concerning the pursuer could be construed as reflecting in any way upon the pursuer, his character or conduct, he unreservedly withdraws the same, there being no ground therefor, and expresses his regret for the occurrence." The pursuer lodged a minute of acceptance thereof. On a motion for expenses, *held* (*dub.* Lord Young) that the terms

of the apology being equivalent to the verdict of a jury in favour of the pursuer, the pursuer was entitled to expenses to the date of acceptance of the tender.

The Rev. George Hunter, minister of the parish of Kelty, Blairadam, brought an action in the Sheriff Court of Fife at Dunfermline against James Russell, grocer, Kelty, in which he claimed £500 as damages for slander. The pursuer averred that the defender had used certain words of and concerning him, meaning thereby that the pursuer had dishonestly appropriated money belonging to the defender. The pursuer also averred that he was willing to forego any claim of damages that he had if a suitable retraction and apology were granted, but that the defender declined to withdraw and apologise. The defender denied having used the words complained of. The Sheriff-Substitute (GILLESPIE) having allowed a proof, the pursuer appealed to the Court of Session for jury trial, and lodged issues for the trial of the cause. During the debate in the Inner House, counsel for the defender stated that while his client did not admit that he had used the words complained of, he was willing to lodge a minute withdrawing and expressing his regret for any expressions he might have used reflecting on the pursuer's character. The case was accordingly continued that this might be done. On 19th February 1901 the defender lodged a minute, which bore—"that if any expressions used by the defender concerning the pursuer could be construed as reflecting in any way upon the pursuer, his character or conduct, the defender unreservedly withdraws the same, there being no ground therefor, and expresses his regret for the occurrence." The pursuer, on 21st February 1901, lodged a minute of acceptance of the defender's apology, and the case was enrolled for the disposal of the question of expenses. The pursuer moved for expenses, and argued that the apology now offered was equivalent to the verdict of a jury in his favour. He cited *Faulks* v. *Park*, December 22, 1854, 17 D. 247, and *Mitchells* v. *Nicoll*, May 24, 1890, 17 R. 795. The defender maintained that the Court should find no expenses due, on the ground that the apology contained no admission that he had used the words complained of, and that it was therefore merely a settlement of the action, and not equivalent to the verdict of a jury in his favour.

LORD JUSTICE-CLERK—In this case the pursuer has succeeded in getting rid of a serious imputation upon his character; and I am of opinion that he is entitled to expenses down to the date of his acceptance of the retraction made by the defender.

LORD YOUNG—I have some difficulty in this case, but in the circumstances I am not sorry to think—from what I know to be your Lordships' views—that it is not to be acted upon. My difficulty is this, that the pursuer does not by this minute establish the case which he must have established to the satisfaction of a jury before he could get a verdict, viz., that the words complained of were used calumniously and falsely by the defender, meaning thereby to represent that the pursuer had dishonestly appropriated £4. If the jury had found that the defender used the words complained of, but that these words did not mean that the pursuer had dishonestly appropriated £4, that would have meant a verdict for the defender, and there is nothing in this minute which *negatives* that possible finding by the jury and so establishes the case which the pursuer must have established in order to get a verdict. But it is not necessary to do more than indicate my difficulty, I should have been disposed to give expenses to neither party.

LORD TRAYNER—I cannot say that I participate in the doubts which Lord Young has just expressed. I do not know that I have ever seen or heard of a tender which really amounted to an admission of the slander on which the action was laid. In my own experience actions of damages for slander have been settled very much on the lines on which the action here has been settled. The broad question raised in this case was this—The pursuer avers that the defender had slandered him, and he came into Court in order to clear his character of that slander—a matter of importance to anybody, but especially of importance to the pursuer looking to the nature of the slander and to the position and office which he occupies. Now, what is the result? The result has been to vindicate the pursuer entirely from the charge made against him. What the defender says comes to this—"I do not know that I used the language attributed to me, but if I did, and if it is capable of the meaning put upon it, then I express my regret for using such language of the pursuer." That is an ample vindication of the pursuer's character.

LORD MONCREIFF—I am of the same opinion, and also on the ground that the pursuer has obtained everything for which he brought the action, viz., the vindication of his character. As to the apology, I think that it is all that can be expected. The effect of such an apology is precisely the same as if the pursuer had obtained a verdict. If a pursuer goes on with his action after receiving an apology in such terms, he is, according to the case cited—*Mitchells* v. *Nicoll*, 17 R. 795—liable in expenses.

The Court, in respect of the minute of tender and acceptance thereof, dismissed the action, and found the pursuer entitled to expenses in both Courts to the date of acceptance of the tender.

Counsel for the Pursuer and Appellant—Watt, K. C. — Wilton. Agent — P. R. M'Laren, Solicitor.

Counsel for the Defender and Respondent — Constable. Agents — Wallace & Begg, W.S.