Friday, July 19.

FIRST DIVISION.

ROGERS' TRUSTEES *v.* ROGERS AND OTHERS.

Trust—Liferent—Fee—Stocked Farm. A testator left to his widow the liferent of a stocked farm. Held, that the obligations of the liferentrix were to keep up the working stock on the farm, supplying the place of what became extinguished, and to leave about the same amount of crop at the end of the liferent as she took at the beginning, but that her executors would be entitled to the benefit of any material increase in the amount or value of the farm plenishing.

This was an action of multipleponding and exoneration raised by the trustees of the late John Rogers of Northfield, in the county of Fife. Mr Rogers died in January 1844, leaving a widow and three children. He directed his trustees to make over to his widow the whole household plenishing, and to allow her, as long as she remained his widow, the liferent of the whole free residue of his estate, heritable and moveable, declaring that she should be entitled to actual possession, if she wished it, of the subjects and effects to be liferented by her, so long as the same were not required to be otherwise disposed of in fulfilment of the purposes of the trust. The trustees were to have power to sub-feu or lease the heritable property with the written consent of the testator's widow; and in the event of a lease, the trustees were to sell by public roup or private bargain the whole crop, farm-stocking, and implements of husbandry belonging to the trust-estate. After the death of the testator's widow, the residue of the trust-estate was to go equally to the children then alive. Mr Rogers himself farmed the estate of Northfield, and the property left by him mainly consisted of that estate, and the crops and stocking on the farm. After Mr Rogers' death, his widow entered into possession and management of the farm, and continued to possess and manage it until her death in January 1862. At her death she left a settlement, conveying her whole property to her daughter, Mrs Scott.

In this action, raised for the purpose of distributing the residue of Mr Rogers' estate, the claimants were his two sons and his daughter, Mrs Scott, and her husband. The principal question between the parties related to the effect of the liferent provision given by the testator to his widow. The construction contended for by Mrs Scott, who, besides being entitled to one-third of the free residue of her father's estate, was also entitled to the whole property left by her mother, was, that a liferent of stock, farm implements, and other subjects which naturally wear out by use, does not impose any obligation on the liferenter to replace the articles as they become worn out or useless; that the whole stock, implements, &c., on the farm of Northfield, including the horses and cows, having been worn out or extinguished by the proper use thereof during the liferent of Mrs Rogers, she was not bound to replace the same for behoof of the fiars; and that the whole crops, stock, and utensils on the farm of Northfield, at the death of Mrs Rogers, having been her own exclusive property, and no part thereof having ever belonged to her deceased husband, the same became vested in the claimant, her daughter, in virtue of her settlement. The other claimants did not admit this construction of the liferent right of Mrs Rogers, and contended that in no view could Mrs Scott claim any part of the crop or stocking on Northfield at the time of her mother's death, without accounting for the value of the crop and stocking on the farm at the death of the truster.

The Lord Ordinary (JERVISWOODE) found that the value of the crop on the lands when Mr Rogers died—of turnips and autumn sown wheat, and of certain acres of grass and quantities of manure—ought to have been accounted for by Mrs Rogers to the trustees, as forming a portion of the capital of the trust-estate, of which she had the liferent only, and that the value of horses, cows, cattle, and stocking on the trust-property ought also to have been so accounted for to the trustees by the liferentrix; but that she was not liable so to account for the value, or for the tear and wear of implements of husbandry which were taken possession of and used by her, or for the articles themselves, excepting in so far as these were at the period of her death still extant and available for use.

Mrs Scott reclaimed; and, she having died, the reclaiming note was insisted in by Mr Anderson, the trustee under her marriage-contract, and Mr White, her testamentary trustee and executor.

CLARK and GIFFORD for Anderson.

GEBBIE for White.

WATSON and FRASER for other claimants.

LORD PRESIDENT—We are now to dispose of the Lord Ordinary's interlocutor of 6th February 1866. It is necessary to attend to the facts of the case, and the provisions of the trust-deed of the late Mr John Rogers.

That gentleman died on 17th February 1844, leaving a widow and three children, and his widow survived him for eighteen years, and died on 27th January 1862. She liferented the entire estate of the testator, or what is called the free residue, and on her death the fee fell to be divided. The widow, during her enjoyment of the liferent, became possessed of some money, and Jane Scott, her daughter,—the other two children being sons,—is entitled to the entire succession of her mother, whatever that may be.

In the adjustment of the fund *in medio*, certain questions arose as to the effect of Mrs Rogers' possession of the estate during her viduity. These questions, I think, depend entirely on the construction of the trust-deed, which is undoubtedly somewhat peculiar. The estate of Mr Rogers consisted chiefly of the heritable property of Northfield, in the county of Fife, which he had himself been in the habit of farming, and where he resided with his wife and family; and his settlement provided that his trustees should, in the first instance, pay his debts, &c., in common form; secondly, he appointed his whole household furniture to be at the absolute disposal of his widow; and then follows the third provision, which is the most material one:—"Thirdly, I appoint my trustees to allow the said Elizabeth Dykes, so long as she remains my widow, the liferent of the whole free residue of my estate, heritable and moveable." It is with reference to this form of expression it is so important to keep in view the nature of the estate. If it had been an estate which was to be at once converted into money, and then the liferent given to the widow and the fee to the children, there would have been no difficulty; but the estate consisted mainly of heritable property, which he had himself farmed down to his death, and of course that farm was a stocked farm. He had debts, and in some of

the subsequent parts of his settlement he contemplates that it may become necessary to sell if his affairs turn out unfavourable. But his main contemplation evidently was, that the heritable estate will be retained by the trustees and be liferented by his widow, and descend to his children. After giving her a liferent, which is really a liferent of that heritable property, he adds this important declaration:—"Declaring that she shall be entitled to actual possession, if she so wish it, of the subjects and effects to be liferented by her, so long as the same are not required to be otherwise disposed of in fulfilment of the purposes of this trust." It is then provided, farther, that it should be in the power of the trustees to sub-feu or to let the property in whole or in part; but no sub-feu or lease shall be granted during her lifetime without her written consent. Farther, in the event of the property being let, the trustees are to sell by public roup or private bargain the whole crop, farm stocking, and implements of husbandry belonging to the trust estate. Taking these different provisions together, the intention of the testator comes out. He meant that his widow, if she wished it, should have personal occupation of that estate just as he left it. In short, that she should have a liferent of that stock and plenishing of the farm. And, accordingly, she did elect to take this farm just as it stood; and, being accustomed probably during her husband's lifetime to such pursuits, she continued, apparently with success, to manage this farm. The question comes to be, in these circumstances, On what footing she is to account, or her representatives are to account, at the time of her death, for the farm-stocking which she got when she took personal occupation of the farm?

It is clear that we cannot deal with this case as if the widow had been entitled to a liferent of this farm without the stocking. Nor can we so construe her right as if she had been a liferenter of moveables. If she had been so as to horses and cows there are principles of law which, I think, are not applicable to this case. For what she was to have, and what she had, was a stocked farm, *i.e.*, a heritable subject with these accessory moveables. The question is, What is the fair obligation on a party having a mixed subject of that kind, and what are her rights?

Now I am clear that a liferent of such a subject does not entitle the liferenter to leave it displenished of moveables. On the contrary, it is her fair obligation that she is to keep up the farm during her term of occupation, and to leave it at her death, as she received it, as a properly stocked farm. I think, therefore, that when the horses and cows died they did not perish entirely to the fiars, but that, on the contrary, it was her business to supply their place. And so as to the farm implements. In short, it was a condition of the liferent occupation that she should keep up the working stock on the farm.

That disposes of all the points raised in the Lord Ordinary's interlocutor as to particular subjects. And when we come to the crop, the principles applicable are all of the same kind as those which apply to the live stock. In managing such a farm there will always be a certain part of the farm occupied by a particular crop, and at the commencement and termination of the lease there will, if the rules of good husbandry be followed, be pretty nearly the same proportions of crop on the different parts of the farm. And, therefore, if the liferenter received part of the land in winter wheat in January 1844 and left part in winter wheat in January 1862, and in like manner received part in young grass and left a part in young grass, I should not be disposed to inquire very strictly whether one was larger than the other, but to take that as a fair equivalent. It is somewhat different as regards the crop in the stack-yard, or barn, or granary, though even there there must be a distinction. In so far as it may be on its way to the market, it is not part of the stocking, but in so far as it is only a moderate stock, for the maintenance of the cattle on the farm, it is part of the stock of the farm. The general result is, that we are not to weigh in minute scales the differences of the stocking, but, unless there is some material difference, the one is to be set against the other. But if there be a material increase in amount or improvement in quality, so as to make it a much better stocked farm, then I am not prepared to say that she is not to have the benefit of it. Her executors will fairly be entitled to the value.

That allows us to come to a conclusion which should enable the parties to settle without much inquiry; and I propose to substitute for the findings of the Lord Ordinary something like what I have suggested.

There remains only one other thing to be noticed, and that is the first finding in law of the Lord Ordinary. The Lord Ordinary finds, "that although the nominal raisers of the present process, as trustees of the deceased John Rogers, did not enter into actual possession and management of the trust estate of the deceased on the death of the truster, but left the same in the hands of the liferentrix, they must be held in law, in a question with the objectors, to have had such possession and management since the death of the truster." Now that involves considerations of some importance. My objection to it is, that it is unnecessary. If these trustees had undertaken the management of the estate, and had left the liferenter in possession without any control, and she had dissipated the estate, and died insolvent, when the fiars were minors under the charge of the trustees, a question of personal liability might have arisen against the trustees. But that is not the case here, for the widow was not the kind of person to die insolvent; she was a careful manager, and seems to have improved the subject. And, therefore, it seems that there is no interest on the part of any one to maintain the personal liability against the trustees seeming to be involved in this finding. If it does not involve that meaning, it is unnecessary, and should be recalled.

The other Judges concurred.

Agents for Anderson—D. Crawford & J. Y. Guthrie, S.S.C.

Agents for White and other Claimants—Macgregor & Barclay, S.S.C.

Friday, July 19.

GREIG *v.* SIMPSON AND MILES.

Poor—Settlement—Residence. Held by a majority of the whole Court (diss., Lord President and Lord Benholme) that a sailor who was tenant of a house in parish of B for five years, and whose wife resided there during the whole period, but who himself did not reside there for half of the time and never for more than ten months at a time, being during the rest of the five years ab-