Saturday, July 17.

FIRST DIVISION.

NEILSON'S TRUSTEES *v.* HENDERSON AND OTHERS.

Marriage-Contract—Conveyance of Whole Means and Estate—Life Interest.

By antenuptial marriage-contract, A, who was entitled under her father's settlement to a liferent of one-third of the residue of his estate, conveyed to trustees "all and sundry the whole means and estate, heritable and moveable, real and personal, wherever situated, now belonging to her, or to which she may succeed or acquire right during the subsistence of the said intended marriage," excepting therefrom a sum to which she was entitled under her parents' marriage-contract, all legacies not exceeding £500 thereafter acquired by her, and all jewels, ornaments and household effects.

The purposes of the trust included the payment to A of the free yearly income or revenue of the said means and estate, and the payment to her husband, in the event of his surviving her, of the said free yearly income or revenue.

In a question between her and her marriage-contract trustees, *held* (following *Boyd's Trustees* v. *Boyd*, July 13, 1877, 4 R. 1082, and *Young's Trustees, &c.*, May 22, 1885, 12 R. 968) that the liferent to which she was entitled under her father's settlement did not fall under the conveyance by her of her whole means and estate to her marriage-contract trustees, such a clause including only principal sums.

By trust-disposition and settlement Walter Montgomerie Neilson, who died in 1889, directed his trustees to convey the residue of his estate, to the extent of two-thirds, to his son, and to the extent of one-third, to hold and pay and apply the same for behoof of his daughter in liferent and any children to be born of her in fee.

The trust-disposition and settlement contained a declaration that "all liferents hereby conferred shall be purely alimentary, and shall not be assignable by the liferenter."

By antenuptial marriage-contract, executed in 1896, Marion Neilson, the daughter of the said Walter Moutgomerie Neilson, assigned, disponed, and conveyed to certain trustees, for certain purposes, all and sundry the whole means and estate, heritable and moveable, real and personal, wherever situated, now belonging to her, or to which she may succeed or acquire right during the subsistence of the said intended marriage, but excepting from this conveyance, first, the sum of £1000 of her share of the estate held by the trustees under the contract of marriage between her parents after mentioned; and secondly, all legacies, bequests, and acquisitions of the specific articles, or sums of money or securities, not exceeding in value on any one occasion £500, that may hereafter be left or given to or acquired by her, and all jewels, personal ornaments, and effects, furniture, pictures, and household effects, all which shall belong to her separately, exclusive of her husband.

The purposes of the trust-deed were, *inter alia*—(First) payment of the expenses of the trust; (second) payment to the said Marion Neilson during her lifetime, for her inalienable alimentary use only, of the free yearly income or revenue of the said means and estate; (thirdly) payment to the husband, Wilfred Henderson, in the event of his surviving the said Marion Neilson, for his inalienable alimentary use only, of the said free yearly income or revenue.

The trustees were empowered to adjust accounts, and to receive and discharge "any balance of past income or accumulations of income to which" Marion Neilson "is entitled" under her father's trust-disposition and settlement.

Mrs Henderson's share of accumulations of income of her father's residue amounted to £15,000.

Certain questions having arisen as to Mrs Henderson's rights under her father's settlement and under her marriage-contract, this special case was presented by Mr Neilson's trustees, first parties, Mrs Henderson and her husband, second parties, and Mr and Mrs Henderson's marriage-contract trustees, third parties.

The opinion of the Court was desired upon the following questions, *inter alia*—"2. If the said liferent has vested in Mrs Henderson, is the said liferent payable to her or to her marriage-contract trustees? 3. If the said liferent is payable to Mrs Henderson's marriage-contract trustees, is it the duty of such trustees under the said marriage-contract to accumulate the sums received by them in respect of the said liferent, paying to Mrs Henderson during her lifetime only the income of such accumulations along with the income of the rest of the estate under their charge, and holding said accumulations in all respects as part of the capital of said estate, or should the said liferent be handed on, as the same is received, to Mrs Henderson?"

Argued for the second parties—The liferent provided to Mrs Henderson under her father's settlement was payable to herself and not to her marriage-contract trustees. It had not been conveyed by her marriage-contract. Apart from the declaration in Mr Neilson's settlement that none of the liferents conferred by him should be assignable, there was a legal presumption that the conveyance to trustees in a marriage-contract carried only capital—*Boyd's Trustees* v. *Boyd*, July 13, 1877, 4 R. 1082; *Young's Trustees, &c.*, May 22, 1885, 12 R. 968, and 22 S.L.R. 647, where the opinions are given *ad longum;* Bell's Lectures, ii. 910. It was contended that *Boyd's Trustees* was founded upon the decision in *Mainwaring's Settlement*, 1866, L.R., 2 Eq. 487, and that *Mainwaring* was no longer regarded as authoritative by the English courts. But an examination of the cases relied upon by the third parties showed that though

Mainwaring might be assailable in so far as it was decided on the ground of the testator's intention, it was absolutely untouched as regards the test it proposed, viz., whether the property in question will or will not "fit the trusts of the settlement." That test if applied here was conclusive. The second and third purposes of the marriage-contract trust were unintelligible and unworkable as regards Mrs Henderson's liferent under her father's settlement —*Young's Trustees, supra.*

Argued for the third parties—The marriage-contract trustees were entitled to payment of the liferent for the purposes of the contract. *Boyd's Trustees, ut supra,* and *Young's Trustees, ut supra,* only laid down a principle with regard to *acquirenda.* When this marriage-contract was entered into Mrs Henderson had already a vested right in the liferent. One of the grounds of the decision in *Boyd* was the authority of *Mainwaring,* which, if not overruled, had been seriously questioned in *re Allnut* (1882), 22 Ch. D. 275, and in *Scholfield* v. *Spooner* (1884), 26 Ch. D. 94. Another ground of the decision in *Boyd* was the intention of the testator. But that had been repudiated not only in *Scholfield* but also in *Simson's Trustees* v. *Brown,* March 11, 1890, 17 R. 581, a case which, following *Douglas's Trustees* v. *Kay's Trustees,* December 2, 1879, 7 R. 295, *per* L.P. Inglis, at p. 300, ruled the present case. In *Newlands* v. *Miller,* July 14, 1882, 9 R. 1104, the only purpose of the marriage-contract trust was the payment of the liferent of the wife's estate to the husband.

At advising—

LORD M'LAREN—The deceased Walter Montgomerie Neilson left his fortune, consisting of heritable estate and moveable investments, amounting as at the date of the case to £430,000, to trustees for distribution. He was survived by a son and a married daughter, Mrs Henderson. One-third of the residue was left to Mrs Henderson and her children in trust, the leading direction being that the trustees should hold and apply this share of residue for behoof of the testator's daughter in liferent, and any children to be born of her, equally among them and their issue *per stirpes,* in fee.

Mrs Henderson by her antenuptial contract of marriage assigned to trustees "the whole means and estate heritable and moveable, real and personal, wherever situated, now belonging to her or to which she may succeed or acquire right during the subsistence of the said intended marriage." The second question in the case is, whether Mrs Henderson's "liferent" (which I take to mean the income accruing to her term by term) is payable to her or to her marriage trustees." Now, the purposes of the marriage-trust are in the first place the payment of the "income" of the estate conveyed to her for life, and to her husband in the event of his survivance, and then the distribution of the "fee or capital" of the estate among the children of the marriage. If Mrs Henderson's income accruing under her father's trust is payable to her marriage-trustees, it would be their duty to capitalise it and to pay her only the income of the accumulated fund. This seems perfectly clear in the terms of the marriage trust, though it is extremely improbable that anything of the kind was intended.

The case of *Boyd's Trustees,* 4 R. 1082, is a direct authority on the question raised. It was there held by the Second Division of the Court that a general conveyance of wife's estate will not (unless the context necessitates such a construction) include the income of settled estate payable to her by trustees. This decision was approved by the First Division of the Court in the case of *Young's Trustees,* 12 R. 968, and I am of opinion that we should follow it, the question in the present case being identical. In a certain sense, no doubt, an annuity payable by trustees is estate, but in another and very familiar use of the word "estate" it means an estate in fee, either land or invested money capable of being immediately transferred, and the question is in which sense is the word here used. The expression is, "estate heritable and moveable, real and personal," words which certainly apply to a capital fund, but do not necessarily or invariably include income derived from a trust. The rule established in *Boyd's* case recommends itself as expressing in the great majority of cases the probable intention of the parties, while the opposite construction is not only improbable but would be altogether unsuited to the usual purposes of a marriage-trust. The rule, of course, is not to be taken in an absolute sense; if the parties make it clear that income is to be paid to trustees for the purpose of being accumulated, their intention will receive effect. Or again, if a marriage-contract sets forth that income falling under the trust is to be paid over to the spouses, I should take this to be an indication that the general conveyance was meant to include life-interests. There is also the case where a wife has a proper liferent-estate in land, a liferent-estate in her own name. As to this I give no opinion; it is not directly ruled by the case of *Boyd's Trustees,* on which my opinion is founded. I think we ought to affirm the first alternative of the first question, and the first alternative of the second question. The third question does not arise for decision. If your Lordship agrees with me the judgment might be—In answer to the first question, find and declare that the said liferent vested in Mrs Henderson as at the date of Mr Neilson's death; In answer to second question, find and declare that the said liferent is not payable to Mrs Henderson's marriage trustees; and find that it is unnecessary to answer the third and fourth questions.

LORD ADAM—I agree with Lord M'Laren. I think that this case is entirely ruled by *Boyd* and *Young.*

LORD KINNEAR and the LORD PRESIDENT concurred.

The Court, in answer to the second question, found and declared that the liferent was not payable to Mrs Henderson's marriage-contract trustees, and found it unnecessary to answer the remaining questions.

Counsel for the First Parties—Jameson—Younger. Agents — Webster, Will, & Ritchie, S.S.C.

Counsel for the Second Parties—H. Johnston—C. K. Mackenzie. Agents—Bell & Bannerman, W.S.

Counsel for the Third Parties—William C. Smith — Ramsay. Agents — Webster, Will, & Ritchie, S.S.C.

Tuesday, July 20.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

CONNOLLY AND OTHERS *v.* THE BENT COLLIERY COMPANY, LIMITED.

Minor and Pupil—Factor loco tutoris—Administration of Sum Awarded to Pupils in Action of Damages—Discharge.

Where a claim is exigible by pupils who have no tutors, their debtor is entitled to have a factor *loco tutoris* appointed to discharge the claim.

In an action of damages which was appealed for jury trial, in which all the pursuers were in pupilarity, and orphans, and which was settled extrajudicially, the pursuers lodged a note craving the Court to ordain the defenders to make payment of the sum agreed to be paid in settlement of their claims to such person in Glasgow as the Court might appoint to receive the same, and to authorise such person to grant a discharge therefor to the defenders.

The defenders objected, on the ground that the course proposed was incompetent, and that the proper course was for the pursuers to obtain the appointment in the Sheriff Court of a factor *loco tutoris*—*Anderson*, 11 R. 870; *Pratt*, 17 D. 1006.

The Court refused the prayer of the note, on the ground that the defenders being entitled to an effectual discharge, a factor *loco tutoris* was the proper party to grant the discharge—*Observed, per* Lord Young, that the appointment craved in the note virtually entailed the creation of a trust.

Counsel for Pursuer—A. S. D. Thomson. Agent—George Inglis Low, S.S.C.

Counsel for Defenders—Salvesen. Agent—W. G. L. Winchester, W.S.

Saturday, July 10.

FIRST DIVISION.

[Sheriff of Lanarkshire.

ROBERTSON & COMPANY *v.* BIRD & COMPANY.

Proof—Admission—Relevancy of Qualification of Admission.

A, who as proprietor of certain subjects had a statutory right to a supply of water from the Glasgow Water Commissioners at a fixed rate, sold part of these subjects to B, together with the right to the proportion of the water supply at the said rate applicable to the part sold. B continued to draw his supply from A for some time, but ultimately made an arrangement directly with the Water Commissioners for a separate supply.

In an action raised by A against B to recover the price of the proportion of the water supply drawn by B from A, who had paid the Commissioners for the whole supply to which he had a statutory right, B admitted liability, but qualified his admission by claiming to deduct from the sum sued for a sum in name of damages for breach of contract, representing a sum paid by him to the Water Commissioners in consideration of the arrangement entered into by them with him. This arrangement he averred had been rendered necessary by A's relinquishing to the Commissioners part of the water supply, and by failing to provide the number of gallons per day appropriated to the subjects disponed to him.

Held that the qualification adjected to B's admission of liability was irrelevant, in respect that he rested his case upon the conveyance to him of the right to the proportion of water supply as part of the subjects conveyed; that the right so constituted could not be affected by A's action; that A's claim had therefore been liquidated by B's admission; and that A was consequently entitled to decree.

Under the Glasgow Corporation Waterworks Amendment Act 1866 (29 and 30 Vict. c. 328), sec. 22, and the Glasgow Corporation Waterworks Amendment Act 1879 (42 Vict. c. 40), sec. 16, John Robertson & Company, Limited, cotton-spinners, Glasgow, were, as proprietors of John Street Mill, entitled to a total supply of water for trade purposes from the Glasgow Corporation at the rate of 260,000 gallons per day at the rate of 5s. 6d. per 100,000, and were bound to pay for that quantity of water, whether used or not, at the said rate for a period of fifteen years, which expired on 1st June 1892.

Robertson & Company sold to Alexander P. Bird & Company a weaving mill forming part of the John Street property, with entry on 15th February 1892. By the dis-