dents, in which they undertook to use all reasonable means to sell the business, and the petition was continued to give them an opportunity of so doing.

The business was sold, but on 8th March 1905 the case was again enrolled on the motion of the petitioner, who moved for the removal of the trustees on the remaining grounds stated in the petition. The respondents opposed the motion, but subsequently lodged a minute, by which they undertook to repay to the trust estate the amount paid to Mrs Stewart for her services as manager, and the profit made by Mr Paterson by the sale of liquors to the business, and further agreed to apply for an order placing the administration of the trust under the superintendence of the Accountant of Court in terms of section 18 of the Factors Act 1889.

In respect of this minute the Court ordered the administration of the trust to be placed under the superintendence of the Accountant of Court, and dismissed the petition.

The Court further found the petitioner entitled to his expenses out of the trust funds as between agent and client. The respondents moved for their expenses out of the trust funds, and the petitioner opposed the motion. The Court refused the motion.

LORD JUSTICE-CLERK—I do not think the respondents are entitled to any expenses out of the trust funds.

LORD KYLLACHY—I agree. I think the petitioner is entitled to expenses as between agent and client out of the trust estate. As to the respondents, I do not doubt that they acted in perfect good faith, and in accordance with advice from their then law-agent upon which they were perhaps entitled to rely, but I do not think they are entitled to their expenses out of the trust estate.

LORD KINCAIRNEY concurred.

LORD YOUNG was absent.

Counsel for Petitioner—Solicitor-General (Salvesen, K.C.) — Constable. Agents — Oliphant & Murray, W.S.

Counsel for Respondents—Wilson, K.C.—Findlay. Agents—Gill & Pringle, W.S.

Tuesday, March 14.

SECOND DIVISION.

BOYD'S TRUSTEES *v.* BOYD.

Marriage Contract—Construction—Assignation of Acquirenda—Estate Acquired by Wife after Dissolution of Marriage.

By antenuptial contract of marriage a wife conveyed to trustees "her whole means and estate which she might acquire or succeed to." *Held* that estate succeeded to by her after the dissolution of the marriage did not fall under the clause of assignation of *acquirenda*.

Wardlaw v. *Wardlaw's Trustees*, July 7, 1880, 7 R. 1066, 17 S.L.R. 725, *followed*.

Succession—Marriage-Contract—Vesting.

By antenuptial contract of marriage a husband conveyed to trustees £5000 as an alimentary fund for behoof of the family establishment of the spouses, with power to the trustees to pay over the free income to either of the spouses, and to continue such payments until the death or re-marriage of the survivor; declaring that on the death or re-marriage of the survivor the principal sum should belong and be made over in equal sums to and among the children of the marriage, which provisions in favour of children were declared to be in full satisfaction of all their legal rights on the death of their father. It was further provided that the shares of any children who might be minors at the time should be held by the trustees for their behoof until their majority, and that, in the event of the predecease of any of them before majority, their shares should belong to their lawful issue, and, failing issue, should accresce to their surviving brothers and sisters. *Held* that a proportionate share of the estate vested in a son who survived the dissolution of the marriage and attained majority but predeceased the survivor of the spouses.

By antenuptial contract of marriage dated 30th May 1860, entered into between Adam Boyd Boyd and Elizabeth Curry Hogue, Mr Boyd bound himself to pay to trustees £5000 for the following purposes—"(*First*) That the said trustees shall receive, hold, and administer the said sum of Five thousand pounds in their own names, and pay or apply the full annual income or proceeds thereof as an alimentary fund to or for behoof of the family establishment to be created by the said spouses, excluding always the *jus mariti* or right of administration of the said Adam Boyd Boyd in or over both the said principal sum and the annual income or proceeds thereof, which rights or claims he hereby specially renounces, and also excluding the claims of any creditors of the said spouses, or either of them, and declaring that the said principal and interest thereof shall not be assignable by them or either of them to the prejudice of this trust: And further, the said trustees and their foresaids shall have power, and are hereby empowered, either themselves to expend or apply, or else to pay over, the said free income or proceeds thereof to either of the spouses they may from time to time prefer, whose sole and separate receipt shall be their sufficient discharge. . . . (*Second*) That the said trustees and their foresaids shall continue to make such annual payments to or for the said spouses during the subsistence of the marriage, and to or for the survivor so long as he or she remains unmarried, but not longer: And upon the death or remarriage of the said survivor, the said principal

sum, or the investments on which it stands, shall belong and be made over in equal sums to and among the children equally of the marriage between the said Adam Boyd Boyd and Elizabeth Curry Hogue: Declaring that the shares of any that may be pupils or minors at the time shall continue to be held and administered by the said trustees and their foresaids for their behoof until their majority, with power to the said trustees to make previous advances to them or for their behoof to the extent of one-third of their estimated shares, and in the event of the predecease of any of them before majority their share shall descend and belong to their lawful issue, if any, equally, and failing issue shall then accresce and belong to their surviving brothers and sisters equally, the issue of any such having predeceased in like manner taking their parents' share, . . . and which other provision above written, conceived in favour of the child or children who may be born of the said intended marriage, it is hereby declared shall be in full satisfaction to them of all bairns' part of gear, legitim, portion natural, executory, and everything else that they could claim or demand by and through the decease of the said Adam Boyd Boyd, excepting what he may think fit to bestow of his own goodwill."

By the said marriage-contract the following provisions were made regarding Miss Hogue's estate—"For which causes and on the other part the said Elizabeth Curry Hogue, with the consent of the said Robert Hogue her father, hereby dispones, assigns, and makes over to the said trustees and their foresaids her whole means and estate, heritable or moveable, which she may acquire or succeed to by the death of her father, or by or from any other person or persons, to be held by them in trust (*First*) For behoof of herself and her said intended husband and the survivor of them in liferent, for their liferent use allenarly, and (*Second*) For behoof of the child or children of the marriage in fee, to be equally divided among them if more than one."

The said £5000 was duly paid to the trustees by Mr Boyd, and Mrs Boyd brought no estate into the trust at the date of the marriage.

Mr Boyd died in 1870, survived by his widow, who was still alive and unmarried at the date of this case, and by two children, Robert Hogue Boyd and Ada Boyd.

Ada Boyd married in 1893 Thomas Arthur Randal Hutchinson, and by antenuptial contract of marriage disponed to trustees her whole means or estate then belonging to her or to which she might succeed or acquire right in any way during the subsistence of the marriage.

Robert Hogue Boyd died unmarried in 1902, leaving a will conveying the residue of his estate to the children of Mr and Mrs Hutchinson.

In 1882 Mrs Boyd succeeded to £230 from her aunt Miss Wilson, and in 1889 to a further sum of £1711 from her uncle Mr Thomas Wilson.

In these circumstances, questions having arisen both as to the estate inherited by Mrs Boyd from her aunt and uncle and as to the estate brought into the marriage-contract by Mr Boyd, a special case was presented for the opinion and judgment of the Court.

The parties to the case were—(1) Mr and Mrs Boyd's marriage-contract trustees, (2) Mrs Boyd, (3) Robert Boyd's executor, (4) Mr and Mrs Hutchinson's marriage-contract trustees.

The questions of law for the judgment of the Court were as follows—"(1) Was the estate inherited by Mrs Elizabeth Curry Hogue or Boyd Boyd from her aunt and uncle as aforesaid carried to the first parties under the clause of assignation of *acquirenda* in her marriage-contract? or, Does it fall to be paid to the second party free of the marriage-contract? (2) In the event of the first alternative of the immediately preceding question being answered in the affirmative, did one-half of the estate inherited by Mrs Elizabeth Curry Hogue or Boyd Boyd, and carried to the first parties as aforesaid, vest in her son, the deceased Robert Hogue Boyd Boyd, prior to his death? (3) In the event of the immediately preceding question being answered in the affirmative, are the first parties entitled to make payment of the share of the said estate vested in Mr Robert Hogue Boyd Boyd, upon a receipt and discharge by the second party, and by the third party as executor aforesaid and as tutor-in-law of his daughters? or, Are they bound to retain and administer the same in order to protect the second party's liferent? (4) Did one-half of the fee of the estate brought into the marriage-contract settlement by Adam Boyd Boyd vest in his son the deceased Robert Hogue Boyd Boyd on his survival of the dissolution of the marriage between his parents?"

With regard to the estate inherited by Mrs Boyd, it was maintained and argued by the second party that, as it did not come to her until after the dissolution of her marriage by the death of her husband, it did not fall under the clause of assignation of *acquirenda* in the marriage-contract at all, but fell to be paid to her as her absolute property — *Wardlaw* v. *Wardlaw's Trustees, supra; Russell's Trustee*, June 30, 1887, 14 R. 849, 24 S.L.R. 610.

The first parties maintained and argued that the said estate did fall within the clause of assignation, and that they were bound to administer it as part of the marriage-contract funds, and in this contention the third and fourth parties concurred.

With regard to the estate brought into the marriage-contract by Mrs Boyd, the third party maintained and argued that one-half thereof vested in Robert Boyd on the dissolution of the marriage of his parents by the death of his father. There was nothing to suggest postponement of vesting except that the only destination in the deed was a direction to make over on the death or re-marriage of the surviving spouse—*Forbes* v. *Luckie*, January 26, 1838, 16 S. 374; *Rogerson's Trustees* v. *Rogersons*, March 10, 1865, 3 Macph. 684.

The fourth parties maintained and argued that no right in the said estate could vest in anyone till the death or re-marriage of the survivor of the spouses — *M'Alpine* v. *M'Alpine*, March 20, 1883, 10 R. 837, 20 S.L.R. 551; *Buchanan's Trustees* v. *Buchanan*, May 26, 1877, 4 R. 754, 14 S.L.R. 503; *Richardson's Trustee* v. *Cope*, March 8, 1850, 12 D. 855; *Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142.

LORD KYLLACHY—In this case I see no reason for postponing vesting beyond the dissolution of the marriage and the majority of the respective children. I am of opinion that all the presumptions are in that direction, and that there is no particular difficulty upon the language of the settlement in giving effect to these presumptions.

There are several points in favour of vesting—(1) This is a marriage-contract in which the children's provisions are declared to be in full of legitim; (2) apart from the widow's liferent and the children's fee there is no ulterior destination or trust purpose, or at least no ulterior destination or trust purpose which is not plainly referable to failure of children before the dissolution of the marriage; and (3) even as between and among the children of the marriage there is no destination-over except one expressly described as applicable to failure before majority.

On the other hand, there is absolutely no unfavourable point except this, that the gift of the fee is expressed as a gift to take effect at the death of the widow. And I am unable to hold that that is at all a conclusive circumstance or one which can be allowed to outweigh the other considerations to which I have just adverted.

As to that matter and the case generally, the decision in *Forbes*, 16 S. 374, and *Rogerson*, 3 Macph. 684, are I think sufficient authorities. The latter was no doubt a case in which there was a dissent by Lord Justice-Clerk Inglis, but, on the other hand, it was a case very much more unfavourable than the present to vesting before payment. For there was there not only a gift expressed as here to take effect at the death of both spouses, but there was also what was at least capable of being read as a destination-over to take effect as between the children failing survivance of both spouses.

I think therefore the fourth question in the case may be answered in the affirmative.

With regard to the first three questions, it appears to me that this case is within the principle of the case of *Wardlaw*, 7 R. 1066, and *Campbell* (*Russell's Trustees*), 14 R. 849, and the other cases cited at the discussion, and that the first question falls to be answered in the affirmative in terms of its second alternative, and being so answered the second and third questions are superseded.

The LORD JUSTICE-CLERK and LORD LOW concurred.

LORD YOUNG and LORD KINCAIRNEY were absent.

The Court answered the second alternative of the first question in the affirmative; answered the fourth question in the affirmative; and found it unnecessary to answer the other questions in the case.

Counsel for the First Parties—W. Thomson. Agents—Nisbet, Mathison, & Oliphant, S.S.C.

Counsel for the Second Party—Constable. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Third Party—Macmillan. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Fourth Party—G. Moncreiff. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, March 15.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

D. Y. STEWART & COMPANY *v.* CROOM & ARTHUR.

Sale—Disconformity to Contract—Rejection—Right to Retain Goods and Set up Claim for Damages—Sale of Goods Act 1893 (56 *and* 57 *Vict. c.* 71), *sec.* 11, *sub-sec.* 2, *and secs.* 35 *and* 53.

The purchasers of two mechanical stokers intimated rejection of them to the sellers, but continued to use them for three months thereafter. In an action by the sellers for payment of the price the purchasers put in a counter-claim for damages in respect that the machines were disconform to contract.

Held (following *The Electric Construction Company, Limited*, 24 R. 312, 34 S.L.R. 295) (1) that the purchasers having continued to use the machines for three months after intimating rejection of them, were not entitled to found on their alleged rejection; and (2) that having elected to reject, they were not entitled thereafter to fall back upon the alternative remedy provided by the Sale of Goods Act of retaining the machines and claiming damages.

This was an action raised in the Sheriff Court of Glasgow at the instance of Croom & Arthur, engineers, against D. Y. Stewart & Company, ironfounders. The pursuers sued for the price of two mechanical stokers supplied to the defenders in August 1901. The defenders averred that the stokers were defective in construction and workmanship and disconform to contract, in respect that they did not prevent smoke to the satisfaction of the sanitary inspector, and they put in a counter-claim of damages. The pursuers denied the alleged warranty and averred that any failure was due to the improper use by the defenders or to the imperfect construction of certain parts which the defenders were bound under the contract to supply.

The defenders averred that they intimated rejection of the stokers on 16th September