Thursday, July 19.

FIRST DIVISION.

BORLAND'S TRUSTEES *v.* BORLAND'S EXECUTRIX AND OTHERS.

Succession—Trust—Heritable and Moveable—Jus relictæ—Heritable Securities Held by a Trust under which Deceased Husband was Residuary Legatee—Titles to Land Consolidation (Scotland) Act 1868 (32 *and* 33 *Vict. cap.* 101), *sec.* 117.

A testator conveyed his estate to trustees and directed them to pay a legacy of £8000 to his daughter, including therein a bond and disposition in security for £3200, the balance to be made up by conveying to the daughter other portions of the testator's estate at a valuation or by realising other estate and paying over to the daughter so much of the proceeds as was necessary to meet the balance. The testator left moveable estate, heritable property, and bonds and dispositions in security, which passed under a general residuary clause to his son and vested *a morte testatoris*. The son survived the testator and died intestate survived by his widow. The father's moveable estate was insufficient to meet the balance of the legacy to the daughter, and after the father's death his trustees received payment of part of the principal sums due under the bonds and dispositions in security and this they invested in other bonds and dispositions in security. *Held* that in calculating the amount of the *jus relictæ* of the son's widow the sums invested in bonds and dispositions in security fell to be taken into account.

Gilligan v. *Gilligan*, 1891, 18 R. 387, 28 S.L.R. 172, *followed.*

Mrs Margaret Mary Gratia Borland or Lees and others, trustees and executors of John Borland senior, *first parties;* Mrs Isabella Thom or Borland, widow of John Borland junior, only son of John Borland senior, as executrix-dative of her husband, *second party;* Mrs Borland as an individual, *third party;* Mrs Lees, who was the daughter of John Borland senior, as an individual, *fourth party;* Mrs Marion Wilson Hood Borland or Currie, and Mrs Agnes Margaret Elizabeth Borland or Aiton, the daughters of John Borland junior, with consents, *fifth parties;* and John Borland, only son of John Borland junior, *sixth party*, brought a Special Case for the determination of questions as to which of the subjects forming part of John Borland senior's trust estate were liable to the third party's *jus relictæ.*

John Borland senior died on 10th July 1900 leaving a *trust-disposition and settlement* dated 19th October 1896, which after conveying his whole means and estate to trustees, directing the payment at his death of a legacy of £500 to the fourth party, making bequests of furniture to various persons, and giving his wife the liferent of the residue of his estate, provided—"*In the eighth place,* upon the death of the survivor of me and my said spouse I direct my trustees to transfer and convey over the house in London Road, Kilmarnock, belonging to me, and known as Navarra, to my daughter the said Mrs Margaret Mary Gratia Borland or Lees, and in addition thereto to transfer and convey over to her such portions of my estate not otherwise disposed of as they shall consider proper, amounting in value to the sum of six thousand pounds sterling (over and above the specific and pecuniary legacies hereinbefore bequeathed to her) according to values to be put thereon by my said trustees or by any competent valuator to be named by them, including in said sum the principal sum of three thousand two hundred pounds contained in and due by a bond and disposition in security held by me for that amount over property in Glasgow belonging to her husband the said Dr Robert Cowan Lees, dated fourteenth and recorded in Division of the Register of Sasines applicable to the County and Regality of Glasgow sixteenth May Eighteen hundred and ninety-four, or otherwise to realise and convert into cash such portion of my means and estate as will, along with the principal sum contained in the said bond, make up the foresaid sum of Six thousand pounds sterling, which sum so to be realised my said trustees shall accordingly pay over to her. *In the ninth place,* on the death of the survivor of me and my said spouse I further direct my trustees to dispone and convey to my said son John Borland junior the dwelling-house, offices, garden, and pertinents called Etruria, presently occupied by me in Portland Terrace, Kilmarnock, and also the whole heritable subjects belonging to me in King Street and Sandbed Street, Kilmarnock, or between these said streets, with the whole fittings, fixtures, and pertinents thereto belonging, and likewise the whole free residue and remainder of my said means and estate. . . . And I empower my trustees in the execution of the offices of trust and executry hereby committed to them to make up and complete titles in their persons in due and competent form to the means and estate hereby conveyed to them; to sell either publicly or privately the trust subjects or portions thereof; to invest, call up, and re-invest the trust funds in such way and manner and upon such securities as they may approve of. . . ."

In a *codicil* dated 15th January 1900 he further provided—"As I do not consider the amount of money which I have bequeathed to my daughter, now Mrs Cowan Lees, sufficient, I hereby bequeath to her an additional sum of two thousand pounds to be paid to her out of my estate on the decease of me and my wife."

The Special Case set forth—"(1) John Borland senior . . . left estates, heritable and moveable, of the approximate value of £21,000. Part thereof consisted of lands in the province of Manitoba, Canada, as after mentioned, which were held by the truster in fee simple, and on 23rd February 1901 probate of the said trust-disposition and settlement and administration of all and

singular the estate and effects, rights and credits of the deceased in any way concerning the same was granted by the Surrogate Court of the Eastern Judicial District of the Province of Manitoba to the deceased's executors. The grant of probate was registered in the Land Titles Office for Morden, Manitoba, on 14th March 1901. . . . (3) The said John Borland senior was survived by his widow Mrs Agnes Hood Borland, who died on 25th July 1915, a daughter Mrs Margaret Mary Gratia Borland or Lees, the fourth party (who is also the executrix and general disponee under the will of the said Mrs Agnes Hood Borland), and a son, the said John Borland junior. The said John Borland junior died intestate on 29th September 1904 (thus surviving his father the testator, and predeceasing his mother the liferentrix). He left estate of considerable value apart from his interest in the succession to his father under the said ninth trust purpose. He was survived by a widow Mrs Isabella Thom or Borland, the third party, and three children, viz., the said Mrs Marion Wilson Hood Borland or Currie, and the said Mrs Agnes Margaret Elizabeth Borland or Aiton, the fifth parties, and the said John Borland, who was born on 12th October 1901. (4) The items of the estate of the said John Borland senior as at the date of his death on 10th July 1900 (including therein the sum of £8000 bequeathed to the fourth party and the specific bequests of furniture), which remained in the hands of his trustees, after deduction of charges against capital, and after satisfying the legacies directed to be transferred and paid at the death, were as follows:—

1. 99 ordinary and 80 preference shares, each £10 fully paid of Glenfield & Kennedy, Limited (of which 28 preference shares, valued at £280, being part of a second issue, were taken up by the trustees) . .	£1,814	0	0
2. Principal sums in Scottish bonds and dispositions in security . . .	7,380	0	0
3. Value of Manitoban lands as ascertained on realisation	2,464	11	6
4. Value of heritable properties in Scotland at present valuations . .	8,625	0	0
5. Furniture, valued at .	272	1	0
	£20,555	12	6

As at the date of the death of the said John Borland junior, on 29th September 1904, the items of the estate (excluding furniture) in the hands of the trustees of the said John Borland senior were as follows:—

1. 99 ordinary and 80 preference shares of Glenfield & Kennedy, Limited	£1,814	0	0
2. Principal sums in Scottish bonds and dispositions in security as above .	7,380	0	0
3. Additional investments in Scottish bond and disposition in security made out of proceeds of Manitoban lands sold . .	1,100	0	0
Carry forward,	£10,294	0	0
Brought forward,	£10,294	0	0
4. Value of Manitoban lands unsold	938	8	0
5. Manitoban mortgage taken as after-mentioned in respect of lands sold .	198	14	10
6. Value of heritable properties in Scotland . .	8,625	0	0
7. Cash, including sum on deposit receipt . .	288	6	0
	£20,344	8	10

(5) The said John Borland senior died infeft in the bonds and dispositions in security or assignations thereof, and heritable properties in Scotland which formed part of his estate at his death. There were no special destinations affecting the same. The said bonds and dispositions in security or assignations thereof were in favour of the said John Borland senior, and his executors or assignees whomsoever, and the titles of the said heritable properties in Scotland were in favour of himself and his heirs and assignees whomsoever. Shortly after his death, his testamentary trustees completed their title to the said securities and heritable properties by notarial instruments in ordinary form duly recorded in the appropriate Register of Sasines, and they continued to be infeft and seised therein (with the exception of heritable securities to the extent of £1200 which were realised immediately after the death of John Borland senior) at the date of the death of the said John Borland junior."

By a *minute of amendment* it was conceded—"(1) That the provisions made in favour of the deceased John Borland junior by the ninth purpose of said trust-disposition and settlement vested in John Borland junior as at the death of John Borland senior."

The following *question of law* was submitted:—"(1) In calculating the amount of the third party's claim for *jus relictæ*, do there fall to be taken into account (*a*) the sums invested in bonds and dispositions in security which belonged to the testator at his death; (*b*) the sums representing the amount of bonds and dispositions in security realised by the first parties and reinvested by them in bonds and dispositions in security?"

Argued for the fifth parties—John Borland junior took the whole residue of his father's estate burdened with an obligation to pay the legacy of £8000 to his sister, the fourth party. John Borland senior had provided for the method of payment of that legacy; part was to be paid out of the bond specified. The balance might be paid by transferring specifically sufficient securities at a valuation or by realising so much of the testator's estate as was sufficient to meet the balance. The balance was primarily payable out of moveables, and only in so far as the moveables were insufficient was it necessary to have recourse to the latter alternative. But only in so far as the latter alternative was necessary was the estate converted—*Buchanan* v. *Angus*, 1862, 4 Macq. 374, *per* Westbury, Lord Chancellor, at p. 379; Theobald, Wills (7th edn.),

p. 256. *Quoad ultra* John Borland junior was entitled to have the bonds conveyed to him *in forma specifica*, and therefore his right to the bonds was of the same character as the bonds themselves, and was not subject to *jus relictæ*—Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), section 117. *Gilligan* v. *Gilligan*, 1891, 18 R. 387, 28 S.L.R. 172, was distinguished from the present case. Here one individual took the whole residue of the trust estate. Further, Lord Rutherfurd Clark's opinion at p. 389 was *obiter*, and section 3 defining "creditor" in the sense of the Act of 1868 was not quoted. Question 1 (*a*) should be answered in the negative. Question 1 (*b*) should also be answered in the negative; the reinvestment was a pure act of trust management and could not affect John Borland junior's succession.

Counsel for the other parties were not called upon.

LORD PRESIDENT—I am unable to see that the claim for the fifth party to this Special Case has any substantiality. As it has been stated and argued by counsel today, it appears to me to be totally destitute of any foundation in law.

John Borland junior had apparently nothing more than a *jus crediti* in a moveable succession. He was not creditor in one of these bonds and dispositions in security, nor was he the successor of a creditor. It appears to me therefore that the words of Lord Rutherfurd Clark in the case of *Gilligan* v. *Gilligan*, 1891, 18 R. 387, p. 389, 28 S.L.R. 172, are applicable to this case. "I think," he says, "that the estate of the truster was by the operation of the recent statute wholly moveable, and that the son as a beneficiary under the trust had merely a moveable *jus crediti*. He was not entitled to any share of the heritable bond. His right was to a certain share of a moveable estate. His claim being a moveable *jus crediti*, his widow is entitled to one-third as her *jus relictæ*." That opinion applies to the case before us in terms. I think it is sound.

I therefore propose to your Lordships that we should answer the first question in the affirmative, and if so the second question does not arise.

LORD JOHNSTON, LORD MACKENZIE, and LORD SKERRINGTON concurred.

The Court answered the first question in the affirmative.

Counsel for the First, Second, and Third Parties — Blackburn, K.C. — Leadbetter. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Fourth Party—Christie, K.C. — Dunbar. Agents — Clark & Macdonald, S.S.C.

Counsel for the Fifth Parties—Moncreiff, K.C. — Hamilton. Agents — Cameron & Orr, S.S.C.

Counsel for the Sixth Party — Wilson, K.C. — Scott. Agents — Wallace & Begg, W.S.

Thursday, July 19.

SECOND DIVISION.

[Lord Anderson, Ordinary.

WATSON *v.* GLASGOW CORPORATION.

Reparation — Negligence — Contributory Negligence — Tramway — Foot-Passenger in Crossing Street Failing to Observe Approaching Car — Second Verdict Set Aside.

A foot-passenger in crossing a street had to cross two sets of tram rails. Having looked and seen a car coming he let it pass, then proceeded to cross, and after crossing the second line of the first set of rails looked again to see if any car was coming, and observed one standing at the points some 40 yards away. He then went on in a slanting course with his back towards the stationary car without looking again in that direction, and just as he was stepping on to the first rail of the second set the bonnet of a car brushed against him and knocked him down. In an action of damages a jury gave him a verdict, and in a second trial he again obtained a verdict. *Held* that he had been guilty of contributory negligence, and the verdict in his favour set aside and judgment *entered for the defenders.*

Alexander Watson, 531 Duke Street, Dennistoun, Glasgow, *pursuer*, brought an action against the Corporation of Glasgow, *defenders*, for damages in respect of personal injuries sustained by him in consequence of having been knocked down by a tramway car belonging to the defenders.

The defenders *pleaded, inter alia*—"2. The accident not having been caused by any fault or negligence on the part of the defenders or those for whom they are responsible, decree of absolvitor should be pronounced. 3. The accident having been caused, or at all events materially contributed to, by the fault and negligence of the pursuer himself, the defenders should be assoilzied from the conclusions of the summons."

An issue having been allowed the action was tried before Lord Anderson and a jury, and a verdict for £50 damages was returned in favour of the pursuer. The Court set aside this verdict, and ordered a new trial to take place before Lord Salvesen and a jury. A verdict was again returned in favour of the pursuer, the damages being this time assessed at £200. The defenders obtained a rule on the pursuer to show cause why the verdict should not be set aside as being contrary to the evidence.

The *facts* established at the trial were thus narrated by Lord Salvesen—"The facts of the case as disclosed in the pursuer's evidence are that he was crossing from the Olympia Theatre in the direction of the Union Bank, which is on the south-west side of Bridgeton Cross. In doing so he had to cross two sets of car rails, and he says that before crossing the first line of the first set of rails he looked to see if any cars were