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-

position the ground was conveyed, "together with the whole buildings, . . . parts, privileges, and pertinents thereof, rights, and servitudes effeiring thereto." The proportion of Robertson & Company's statutory supply of 260,000 gallons per day applicable to the property purchased by Bird & Company was 124,084 gallons, and in 1895, in an action brought by the sellers against the purchasers in the Sheriff Court of Lanarkshire, the Sheriff, affirming the judgment of the Sheriff-Substitute, held that the purchasers, as successors of the sellers in the greater part of the John Street Mills, were entitled to the water rights therewith connected under the statutes.

On 21st October 1892 Robertson & Company relinquished 130,000 gallons of their daily supply.

Down to 16th February 1894 Bird & Company drew their supply of water from Robertson & Company's meter and through their pipes. Immediately prior to that date the Water Commissioners undertook to give Bird & Company a direct supply of 100,000 gallons per day, for which the latter undertook to pay whether they used it or not.

In February 1896 Robertson & Company raised an action in the Sheriff Court of Lanarkshire at Glasgow against Bird & Company for payment of £203, being the price with interest thereon of the defender's proportion of the water supply paid by the pursuers at different times to the Water Commissioners.

The defenders in their answers to the pursuers' condescendence explained—"(Ans. 3) The subjects sold by the pursuers had right to a proportion of the water supply in question, which right passed with the sale of the subjects to the defenders." And further explained—"(Ans. 5) Under the agreement between the parties and the conveyance following thereon, the water rights attaching to the John Street Mill under the said statutes and under the titles passed as parts and pertinents with the said mill to the defenders." They also admitted liability to the pursuers (1) for water supply from 15th February to 21st October 1892; (2) for water actually consumed by them from 27th October 1892 to 15th February 1894; (3) for proportion of water-meter rent; and (4) for interest at 4 per cent. The total thus brought out was £190. They, claimed however, to deduct therefrom the sum of £150 with interest "being sums disbursed and damages sustained by them through the pursuers' breach of contract in refusing to share the water supply and in relinquishing part of same."

In support of this claim the defenders stated that the pursuers, in consequence of relinquishing 130,000 gallons per day, were unable after providing for certain other mills, to supply them with their proper proportion of 124,084 gallons, and that the pursuers further harassed the defenders by denying a right to a water supply and by attempting to cut it off. They further averred—"(Stat. 4) The defenders were unable to carry on their work without a daily water supply, and they were compelled to apply to the corporation for a supply. A long negotiation followed. The corporation insisted upon payment of £100 by the defenders as a condition of their giving to the defenders a direct supply. A minute of agreement was executed on 15th February 1894 embodying the agreement arrived at, which is produced. The defenders were also obliged to pay the legal expenses of the corporation and of their own agents connected with the negotiation and minute of agreement. They estimate their outlay and damages in consequence of the pursuers' said breach of contract (including the said sum of £100) as £150, with corresponding interest, which they claim to set off against the pursuers' claim in this action."

The pursuers pleaded—"(1) The defenders being justly indebted and resting-owing to the pursuers in the sums sued for, decree ought to be granted as craved. (6) There can be no compensation in this action."

The defenders pleaded—"(2) The defenders having suffered outlay and damage through the breach of contract of the pursuers as condescended on, are entitled to set off the said outlay and damage in this action against the pursuers' claim."

On 27th March 1896 the Sheriff-Substitute (SPENS) decerned against the defenders *ad interim* for £190, 11s. with interest.

Note. . . —"The £190, 11s. represents money which the pursuers have paid for water used by defenders, and which defenders are admittedly liable to recoup them for. That is a liquid claim, and against it defenders are attempting to set up a claim of damages for alleged breach of contract. That claim of damages is based on the allegations set forth in the defenders' separate statement of facts. It practically comes to this, that defenders claim that they are entitled to set against the price of the water, which the pursuers have admittedly paid for them, £100 which the defenders paid to the Glasgow Corporation Water Commissioners as the consideration for the latter entering into the agreement with them. To that agreement the pursuers were no parties. It was entirely an ultroneous proceeding on defenders' part. It was open to defenders to have raised a declaratory action as against pursuers if they were wilfully withholding water from them which they were bound to supply. They did not take this course, but as a matter of convenience for themselves they entered into this agreement with the Water Commissioners containing ten different clauses. I am of opinion that they are not entitled to put that claim of £100 as against the price of the water. Sheriff Berry and I held in a previous case that the water right passed with the disposition. I have no doubt, however, that this was not the pursuers' intention, but while I say this I am not prepared to absolve the defenders wholly from blame in not making it perfectly plain what their position was with regard to this statutory water right, and to claim the £100 they paid the Glasgow Corporation Water Commissioners as the price of an indepen-

dent arrangement with them, and to which pursuers were no parties, seems to me inconsistent with the ordinary principles of law. The other £50, making up the £150 claimed, is ancillary to this £100 claimed, viz., legal expenses of the corporation and their own agents connected with the negotiations of the agreement, &c. I think they must fall with the larger claim, but perhaps it is sufficient for the determination of this case to say that I regard pursuers' claim as liquid, and the claim of damages for alleged breach of contract as illiquid, and that in my opinion a separate action would be necessary, and that here it cannot be pleaded as a set off."

On 15th December 1896 the Sheriff (BERRY) adhered.

Note.—"I think the pursuers are entitled to interim decree, as the Sheriff-Substitute has found, for the amount admitted to be due by the defenders. The claim in the action is for a liquid sum paid by the pursuers for the defenders for water supplied by the Water Commissioners. The counter claim of the defenders, on the other hand, is based on a transaction to which the pursuers were not parties. That there was a breach of contract on the part of the pursuers which gave occasion to that transaction is not admitted, and the question raised in regard to it is one which in my opinion can only be raised in a separate action." . . .

The defenders appealed, and argued—There was no such admission of indebtedness as justified the Sheriff in granting interim decree. The admission was made subject to the qualification that the defenders claimed to set off against the debt due to the pursuers the sums which they had been obliged to pay owing to the pursuers' conduct. If that qualification were relevant, there was no admission of a liquid debt due to the pursuers. A proof would be necessary, and the defenders would be entitled to prove their counter claim — *Taylor* v. *Forbes*, December 2, 1830, 9 S. 113; *Scottish North-Eastern Railway Company* v. *Napier*, March 10, 1859, 21 D. 700; *Johnston* v. *Robertson*, March 1, 1861, 23 D. 646; *Sawers* v. *M'Connell*, January 22, 1874, 1 R. 392; *Macbride* v. *Hamilton & Son*, June 11, 1875, 2 R. 775; *Gibson* v. *Stewart and Brown & Company*, January 13, 1876, 3 R. 328, referred to.

Argued for the pursuers—There was an admission of liability of a liquid debt on the part of the defenders, and the alleged qualification was irrelevant. The Sheriff's judgment in the former action had decided that a right to a water supply on special terms was conveyed to the defenders with the mill. If that were so, it was hopeless for them to succeed in a counter claim, which proceeded upon the assumption that they depended upon the pursuers for their water supply. *Esto*, that they had paid the corporation £100 for a privilege which they enjoyed already; that was their own business. and the pursuers could not be held liable because of such a payment.

At advising—

LORD PRESIDENT — The Sheriffs have rejected the counter-claim of the defenders as being illiquid. It seems to me that a more satisfactory ground for the decision is that the claim is irrelevant.

The statements of the defenders do not seem to me to set forth any breach of contract on the part of the pursuers, or any loss caused by them. On the showing of the defenders it would appear that they were entitled to demand from the Corporation, without any payment, the supply which they have now obtained. Their right to that supply seems to depend on the fact of their proprietorship of the subjects occupied by them. From their statements it seems that the Corporation had no right to the £100, and on that footing it seems impossible to say that the defenders' payment of that sum can found any claim against the pursuers.

We were informed that the question about £13 no longer requires decision. That being so, I think that we ought to replace the Sheriff's interim decree for £190, 10s., with a final decree for the same sum.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I think the Sheriff's judgment is substantially right, but I am not prepared to assent without qualification to all the reasons he has given for it. The Sheriff holds that the pursuers' claim is liquid, and that the counter claim of the defenders for damages for an alleged breach of contract, not being liquid, cannot be pleaded as a set off but must be established in a separate action. I think it clear that the pursuers' claim is not liquid unless it can be held to be liquidated by the admissions of the defenders, and it cannot be so held if the defenders' averments in support of their counter case are relevant. To render a claim liquid it is necessary that it should be constituted, and that its exact amount should be fixed either by an obligatory writing or by the judgment of a competent court.

The pursuers produce no such writing, and if their claim were denied it would be necessary for them to prove the facts out of which it arises, and the precise amount of the sums which they allege to be due. The question, therefore, is whether they are dispensed from that necessity by the defenders' admissions. Now, the defenders admit their liability for the sum of £190, 11s. for which the Sheriff has given decree against them, but the admission is made under the qualification that they are entitled to deduct from the amount decerned for a sum of £150, as the amount disbursed by them, and damages which they have sustained through the pursuers' breach of contract.

Now, it is well settled that where an admission is made under a qualification the party founding upon it must take it as it stands, and that he cannot adduce the part of his opponents' statements which is favourable to him and exclude the remainder. If, therefore, the allegations of fact, upon which the defenders' counter-

claim is based were relevant, there would be no admission upon the record as it stands which could dispense the pursuer from proving his case. But, on the other hand, it would be open to him to disprove the qualification, and when that had been done, to found upon the admission as conclusive. This has been frequently decided, and I have no doubt that on the same principle the qualification may be displaced by showing that, assuming the facts to be as stated, they afford no good answer to the claim. The question, therefore, appears to me to be, not whether the defenders can set off a claim of damages against a liquid claim, but whether the averments by which their admission is qualified are relevant to support a claim against the pursuers. I am of opinion that they are not relevant.

Their case is that they have suffered damage by the pursuers' breach of contract in relinquishing a part of the water supply which had originally belonged to the entire property of the pursuers before the defenders had acquired a portion of it. But, according to their own case as set forth in their averments, their right to a portion of this water supply did not depend upon any personal contract by which the pursuers were bound to communicate, and which it was possible for the pursuers to perform or to violate, but was a right attached to the property which the defenders had acquired, so that after their title to the property was completed it was no longer in the power of the pursuers to give or withhold the water supply.

Their averment in answer to the third article of the condescendence is "that the subjects sold by the pursuers to the defenders had right to a proportion of the water supply in question, which right passed with the sale of the subjects to the defenders." Again, in answer to the fifth article, they say—"Under the agreement between the parties, and the conveyance following thereon, the water rights attaching to the John Street Mill under the said statutes and under the titles passed as parts and pertinents with the said mill to the defenders." And they go on to say that this had been held in an action in the Sheriff Court to which the pursuers and defenders were parties. Their case, therefore, is that a certain water right had passed to them with the disposition of their property. They go on to say that the pursuers, having relinquished to the Corporation 130,000 gallons per day of the water supply appropriated to their original property, were not able to give to the defenders the 124,084 gallons, which was the proportion appropriated to the subjects which they had purchased; that, accordingly, the defenders were compelled to apply to the Corporation for a direct supply, and the Corporation insisted upon a payment of £100 as a condition for giving it. This is the most material item of damages which they allege that they have suffered in consequence of the pursuers' breach of contract. But it appears to me to be plain upon their own showing that the demand of the corporation, whether it was well founded or not, did not arise out of any breach of contract on the part of the pursuers, and that the latter are in no way answerable for the demand or its consequences.

The defenders' case is that they had acquired right to this water supply as a part and pertinent of their property, and that this right was carried along with the property by the disposition in their favour. If that be so, the pursuers had done all that they could be required to do, and all that it was possible for them to do in order to communicate the right, by granting the disposition. I do not think it necessary to inquire whether the Corporation had any right or title to insist upon a payment of £100. If the defender had a complete right to the water already, which is their own averment, it is obvious that the Corporation could have no such claim, and in that case the payment was unnecessary, and the defenders who chose to make it without any obligation to do so can have no claim to recover it from their authors.

On the other hand, if it was a quality of the right which they acquired, that before it could be made effectual they should pay a fine to the Corporation, the pursuers had given them all to which they were entitled when they conveyed the property, and along with it the right so qualified. There is no averment of any contract with the pursuers to relieve their purchasers of any claim at the instance of the Corporation. I am therefore of opinion that the defenders have stated no relevant case to found their claim of damages against the pursuers, and that their admission of liability for the sums sued for is thus freed from the qualification which they attached to it as effectually as if a relevant claim had been disproved.

The consequence is that the pursuers are not tied down to the qualification, but may reject it as affording no good answer to their claim, and found upon the admission as if it had been from the first unqualified.

The Court decerned in favour of the pursuers for the sum of £190, 10s.

Counsel for the Pursuers — Guthrie — Craigie, Agents—Macandrew Wright & Murray, W.S.

Counsel for the Defenders—C. K. Mackenzie—Cook. Agents—A. P. Purves & Aitken, W.S.