case of *Cowan*, but I do not see any reason for these doubts. In *Wilson* v. *Spankie* the landlord's hypothec was held to be good over furniture belonging to the tenant, and which his creditors, though he had become bankrupt, allowed to remain in the house. But this was the case of the whole furnishings of a house. If these had been removed the tenant would not have been permitted by the landlord to continue in possession without refurnishing the house, and the creditors in allowing the furniture to remain were held to have given the landlord so far a security for his rent. These cases justify me in holding that this piano was not within the landlord's right of hypothec. It would be a very inconvenient thing if a child not forisfamiliated while living with his or her father, the tenant of urban subjects, could not possess any moveable article which could by any possibility be classed as furniture, without its falling under the landlord's hypothec. The use of the piano would have been entirely lost to this young lady if she had put it elsewhere, and her deposit of it in her father's house could not be viewed to any extend as a permanency. It might have been of short duration. If she had been married—and she was of marriageable age—it would undoubtedly have flitted with her to her husband's house. Upon these various grounds I think this piano was not embraced within the landlord's sequestration.

Lord Mure—I agree in the opinion expressed by your Lordship. The point is a new one, and has not as far as I have been able to discover been made matter of decision, but the rule of law is undoubtedly that laid down in the case of *Cowan* v. *Perry*, to which your Lordship referred, and that being so I think that the landlord's hypothec does not cover the piano in question. In the case of *Jaffray* v. *Carrick* Lord Moncreiff says—"There can be no question that abstractedly and on general principles the rule of law is that a man cannot pledge property which is not his own—*Res aliena pignori dari non potest.* All the cases in which express pledge or tacit hypothec is admitted are exceptions from that rule, and proceed upon a presumption of the consent of the real owner by the possession voluntarily given, and the title of such possession as implying such consent." In dealing with the facts of that case the Court held that the hypothec did not apply, and in the case of *Cowan* it was decided that while furniture hired was subject to the landlord's hypothec, furniture lent was not.

I can see no principle upon which this piano, the undoubted property of the daughter, can be taken possession of in order to pay a debt of her father.

Lord Shand—I am entirely of the same opinion. It is clear that in his present contention the landlord is asking us to go a step further than we have yet gone in the law of hypothec. Looking to the circumstances of the case I think it is clear that this article cannot be held to have been deposited by its owner in her father's house in any way as security for his rent, and as a subject of his landlord's hypothec. Suppose a person takes rooms for a time as a lodger, and to make himself more comfortable adds a few extra articles of furniture of his own, could it be said that in doing so he renders them liable to the landlord's hypothec? I think the case of *Cowan* v. *Perry* has settled that articles of furniture in such a position would not be liable. The only case attended with any difficulty was that of *Pearson* v. *Robertson*. As here, it was in that case a musical instrument, presumably a piano. That, however, was a case of hire, in which, as has been pointed out, the rule is different, but it is not one which I for my part should like to see extended. I confess I do not find the reason given for holding hired furniture liable altogether a satisfactory one, namely, that the broker, in respect of the hire paid to him, takes the risk of the furniture being sequestrated; but so it has been decided, and the rule at least draws a clear distinction between hired furniture and that which is merely lent or deposited gratuitously.

Lord Adam concurred.

The Court pronounced the following interlocutor.—

> "The Lords having heard counsel for the parties in the appeal against the interlocutors of the Sheriff-Substitute and Sheriff, dated 8th December 1884 and 2d January 1885 respectively, Alter the said interlocutors in so far as they find that the pianoforte belonging to the compearer Miss Jessie W. S. Andrews was rightly included in the sequestration, and disallow her claim: Find that the said piano was not liable to the pursuer's right of hypothec, and was wrongfully included in the sequestration: Appoint the same to be struck out of the summons, and ordain the pursuer to return the same to the compearer the said Jessie W. S. Andrews: *Quoad ultra* refuse the appeal, and decern: Find the defender James Andrews liable in expenses to the pursuer in both Courts: Find the pursuer liable in expenses to the said Jessie W. S. Andrews and her administrator-in-law in both Courts: Allow accounts of said expenses to be given in, and remit the same when lodged to the Auditor to tax and report," &c.

Counsel for Pursuers (Respondents)—W. C. Smith. Agent—James Junner, S.S.C.

Counsel for Defender (Appellant)—A. J. Young—Russell Bell. Agent—Party.

Counsel for Claimant J. W. S. Andrews—A. J. Young—Russell Bell. Agents—Whigham & Cowan, S.S.C.

Friday, May 22.

FIRST DIVISION.

YOUNG'S TRUSTEES *v.* HALLY AND OTHERS.

Succession—Trust—Mutual Settlement—Right of Property in Survivor—Destination.

A mutual trust-disposition and settlement executed by three sisters contained the provision that on the death of the first deceaser whatever residue remained of her estates after payment of legacies was to be divided and made over equally between the survivors, and on the death of the second deceaser whatever

residue remained of her heritable and moveable estate was, after payment of legacies, "to belong to the last survivor." It also reserved a power to alter and revoke, "but so far only as regards our respective estates." *Held* that the right of the last survivor in the residue of the joint estates was a right of property, and that she was entitled to alter the destination of the whole funds contained in the mutual deed.

Marriage Contract—Claim of Conquest.

When an antenuptial contract of marriage contained a general clause of conveyance to trustees of *acquirenda, held* (following the authority of *Boyd's Trustees* v. *Boyd*, July 13, 1877, 4 R. 1082) that a life interest in a sum which during the marriage was bequeathed to her in liferent only, and after her death to her children, did not fall under this general conveyance.

The Misses Margaret, Elizabeth, and Magdalene Young, daughters of the deceased James Young, writer in Edinburgh, executed a mutual trust-disposition and settlement dated 3rd March 1852, in which they conveyed to themselves, and the survivor and survivors of them as trustees, with power to the survivor or survivors to assume new trustees, "the whole heritable estate belonging to us, or which shall belong to us respectively at the time of our respective deaths," and the whole moveable estate "belonging or resting-owing to us respectively at the time of our respective deaths." After providing for payment "out of our respective estates" of the debts, &c., "of us respectively," and of certain legacies which "we respectively leave and bequeath," the deed by its fourth purpose directed that on the death of the first deceaser of them, whatever residue remained of her estate, heritable and moveable, should be divided and made over equally betwixt the survivors of them, and that on the death of the second deceaser of them the residue of her estate should "belong to the last survivor." In the fifth place, they appointed that on the death of the last survivor of them whatever should remain of their respective means and estates should be paid or made over to their brother, the Reverend Robert Young, whom failing by death, to his lawful issue equally among them, share and share alike. The deed also nominated and appointed the granters, survivors and survivor of them, to be sole executors to the deceaser and deceasers of them respectively, and lastly reserved power to them respectively to alter, innovate, and revoke the same in whole or in part, "but so far only as regards our respective estates."

The funds of the three sisters were invested on heritable bonds and in public companies, and the securities were nearly all taken in their joint names and the survivors and survivor of them; but some were taken to them jointly without any clause of survivorship.

Margaret Young died unmarried in November 1860, and Magdalene Young died also unmarried in March 1861. Elizabeth Young was thus left sole survivor, and as executrix nominate she gave up inventories of the estates of both her sisters, and expede confirmation thereto before the Commissary of Perthshire in June 1861.

After her sisters' deaths Elizabeth Young dealt with their estates as her own property, drew the dividends, and transferred the most of the investments into her own name. On the 18th November 1872 she executed a deed of assumption, by which under the powers conferred upon her by the mutual trust-disposition she assumed certain trustees to act along with her for the purposes specified in the mutual deed, and conveyed to herself and them as trustees all the heritable estate belonging to the trust-estate at her own death, and in which her deceased sisters and herself had any interest, together with her whole moveable estate at her death, for the purposes mentioned in the mutual deed. Further, under the reserved power of revocation therein contained, she directed her trustees "to invest in good security the share of the residue of the means and estate belonging to me, or to which I may have right," falling to her niece Mrs Euphemia Young or Hally under the mutual settlement, and to pay the annual proceeds to her, and the capital to her children after her death, in equal shares. Mrs Hally's share was declared to be alimentary only.

A similar provision was made regarding the share which was to fall to Jane Wylie Young, also a niece, while the share of Robert Young, a nephew, was directed to be held for him till he reached the age of 25, and the interest only and such part of the capital as might be considered necessary to be applied for him till he gained that age.

Miss Elizabeth Young died upon 20th March 1879. She was predeceased by her brother the Rev. Robert Young, who left three children, Mrs Hally, Jane Wylie Young, and Robert Young.

At Miss Elizabeth Young's death questions arose as to whether she had power to revoke the destination of the estates of her sisters Margaret and Magdalene, and as to the portion of the joint estate affected by the deed of assumption and settlement. The present Special Case was accordingly presented, the first parties to which were the trustees acting under the deed of assumption and settlement of Elizabeth Young.

The second parties were Mr and Mrs Hally's marriage contract trustees.

The third parties were Jane Wylie Young and Robert Young, while the fourth party was Mrs Hally.

The first and second parties contended that Elizabeth Young had power to alter the destination in the mutual deed of settlement *quoad* the whole fund, and that she effectually exercised that power by her deed of assumption and settlement.

The third and fourth parties contended that Elizabeth Young could not alter the destination of the estates of her sisters Margaret and Magdalene, and that the deed of assumption and settlement which she executed only affected her own proper share of the estate.

On this point the following question was submitted to the Court:—"Had Miss Elizabeth Young power under the mutual trust-disposition and settlement to alter and revoke the destination of the funds which originally belonged to Misses Margaret and Magdalene Young, and if so, does her deed of assumption and settlement operate such alteration and revocation?"

The second and third questions in the case

arose out of the provisions of Mr and Mrs Hally's antenuptial contract. By it Mrs Hally conveyed to the trustees of her marriage-contract (the second parties) "All and whole whatever property, means, estate, and effects, heritable and moveable, real and personal, may belong to her, or which she may acquire in any way during the subsistence of the said intended marriage, from the estates of her father, the said Reverend Robert Young, and her aunts, Elizabeth Young, Margaret Young, and Magdalene Young; and the said John Hally hereby renounces his *jus mariti* and right of administration in relation to all such property, means, estate, and effects." Her husband renounced his right of administration.

The trustees were directed to invest the funds and pay the annual proceeds to Mrs Hally, exclusive of her husband's *jus mariti* and right of administration, and his debts and deeds, her receipt being sufficient discharge therefor, while the capital was to go to the children of the marriage.

Mrs Hally contended that the income derived from her share of Elizabeth Young's estate ought to be paid directly to her as it fell due, or even if paid to her marriage-contract trustees that they ought to pay it over to her as received, and could not accumulate it.

They, on the other hand, maintained that she had by the marriage-contract assigned it to them, and that they must accumulate it as capital, and only pay to her the annual income derived from the fund so capitalised.

The following questions were stated on this point:—Does Mrs Hally's share of the income to be derived from the funds to be administered under the said deed of assumption and settlement come within the assignation by her to the marriage trustees, or is her share of income payable direct to Mrs Hally? If the said income falls to be paid to the marriage trustees, is it their duty to accumulate it as capital, or to hand it over as received to Mrs Hally?

Argued for the first and second parties—The answer to the first question depended upon the fourth purpose of the mutual settlement. It was the intention of the trustees that the surviving sister should deal with the whole estate, just as each had dealt with her share. The right in the survivor was one of property, there were no words of limitation, the survivor took the whole residue subject to debts and legacies. After the death of the first sister the estate vested and remained in the hands of the trustees—*Douglas' Trs.*, Dec. 2, 1879, 7 R. 295.

Argued for third parties—The first question ought to be answered in the negative, for the surviving sister had exceeded her powers in dealing with her sisters' shares of the joint estate. There were here three wills in one. Elizabeth Young could only alter the destination *quoad* her own share. The provisions in the deed and fact of a trust showed the intention of the parties—*Græme* v. *Græme's Trustee*, July 16, 1869, 7 Macph. 14 and 1062; *Milne* v. *Milne*, Jan. 19, 1876, 13 Scot. Law Rep. 223.

Argued for the fourth party (Mrs Hally) on second and third questions. The point was decided by the case of *Boyd's Trs.* v. *Boyd*, July 13, 1877, 4 R. 1082.

At advising—

Lord President—The first question in this Special Case arises on the construction of a mutual trust-disposition and settlement executed by three sisters; the question is in these terms—"Had Miss Elizabeth Young power under the mutual trust-disposition and settlement to alter and revoke the destination of the funds which originally belonged to the Misses Margaret and Magdalene Young?" or, in other words, had the last survivor of the three sisters power to alter the destination of their funds by *mortis causa* deed?

The answer to this question depends upon the construction of the deed of settlement, which is somewhat awkwardly expressed, though perhaps not more so than deeds of this kind usually are. By its terms the three sisters conveyed all that they possessed to themselves as trustees, and to such other persons as they might assume into the trust for the purposes mentioned in the deed. It was no doubt specially provided that the whole estates of the three sisters were to be concentrated in the person of the last survivor, but the question comes to be, What is the true position of the last survivor? Has she an absolute right of property in the accumulated estates, or is she restricted, especially in the matter of testing, to her own share of the common fund. To answer this question it is necessary to look somewhat carefully at the various clauses of the settlement, and first of all at the clause of conveyance. The words there used are—"We, the said Margaret Young, Elizabeth Young, and Magdalene Young, do hereby give, grant, &c. . . heritably and irredeemably, all and sundry lands and heritages of every description, or wheresoever situated, belonging to us, or which shall belong to us respectively at the time of our respective deaths." Now, I pause here to observe that there is no ambiguity in these words; each of the sisters is conveying to the trustees whatever she happens to have belonging to her at the time of her death. At the death of the first deceaser her separate estate passes to the survivors as her trustees, and the same thing happens at the death of the second sister.

But what is the estate possessed by the second and third deceaser at the time of their respective deaths? By the terms of the deed, certain legacies are provided, payment of which is then to be made. As these legacies are bequeathed out of the respective estates, each of the legatees is to receive a triple legacy, and this I understand is not disputed. After mention of these legacies the deed by its fourth purpose goes on to provide that "on the death of the first deceaser of us whatever residue remains of the first deceaser's estate, heritable and moveable, after payment as aforesaid, is to be divided and made over equally betwixt the survivors of us." Now, what is the effect of these words "to be divided and made over equally betwixt the survivors of us?" The words are very general and wide, and it is difficult to attach any other meaning to them than that the survivors are to get absolutely the free residue of their sisters' share of the estate. This construction is, if possible, made more clear by what the deed declares is to take place at the death of the second sister; for this fourth purpose goes on to provide that "on the death of the second deceaser of us whatever residue shall remain of the second deceaser's heritable and moveable estate after payment of said legacies shall belong to the last survivor of us." Now, the way that I read

these words is that at the death of the first deceaser the free residue of her estate is to pass to the survivors in equal portions. Each of the survivors will then possess her own original share *plus* one-half of the share of the predeceasing sister, and as there are no qualifying words the right which each takes in the share of her predeceasing sister is one of property. If either of these two sisters had thought fit to dispose of their shares of this estate, either *mortis causa* or *inter vivos*, they could undoubtedly have done so. But then the deed provides that the whole estate of the two predeceasing sisters is to be concentrated in the last survivor. The words are, that on the death of the second deceaser "whatever residue shall remain of the second deceased's heritable and moveable estate after payment of said legacies shall belong to the last survivor of us." Now, what is the residue of the second deceasing sister's estate composed of? Of her own original share *plus* the half of the first deceaser's share. The deed then provides that the whole of this is to belong to the last survivor. The words are quite unqualified—the survivor is to take all, subject to debts and legacies. Looking, then, to the circumstance that the last survivor of these three sisters is to have a right of property in the combined estates, what is the effect of these words in the fifth purpose of the mutual deed, "On the death of the last survivor of us we appoint that whatever shall remain of our respective means and estates . . . shall be paid or made over to the said Robert Young, our brother, whom failing," &c. Is that provision to be binding as a matter of contract upon the last survivor? I do not think it is. The right of the surviving sister in the concentrated estates being a right of property is a notion entirely opposed to her being bound by anything of the nature of a contract.

It has been suggested that the right of the surviving sister was one whereby she might spend the united property during her lifetime, but that she was bound to let the residue pass at her death according to this destination. But this suggestion points at an alleged right of a very anomalous nature, and cannot be entertained, and looking to the construction which I think ought to be put upon clauses 4 and 5 of this mutual deed, I consider, so far as we have yet gone in reading the deed, that the last surviving sister had the right to dispose of the joint-estate in any way she chose.

This brings us to the consideration of the clause of revocation, which is in these terms:—"We hereby reserve power to us respectively to alter, innovate, and revoke these presents, in whole or in part, by any writing under our respective hands, as we may think proper, but so far only as regards our respective estates," and so on. Now, the construction of this clause contended for by the first party to this case is, that this power of revocation is confined strictly to the original estate of each sister. That however is not the meaning which I am disposed to attach to these words. The power of revocation is no doubt confined to "our respective estates;" but what is the true meaning of this expression? That is to be found by looking back to the clause of conveyance, to which I have already referred. The words undoubtedly mean the estate which belonged to each of the sisters at the time of her respective death. While all the three were alive this clause of revocation must necessarily bear a limited interpretation, because in the event of one of the sisters desiring to revoke while the other two were alive, it is clear that the exercise of this power could only be over her own share of the joint estate. But the clause ceases to have this limited interpretation after the death of one of the sisters, and much more so when it is applied to the case of the last survivor.

I therefore think that Miss Elizabeth Young had power to alter and revoke the destination of the funds which originally belonged to her sisters who predeceased her.

But we are further asked in the second half of the first question whether Miss Elizabeth Young's deed of assumption has operated such alteration and revocation.

Now, that depends upon the provisions of the second deed to which we were referred, namely, the deed of assumption and settlement by Miss Elizabeth Young, in which the following passage occurs:—"And further, in exercise of the reserved power to alter, innovate, and revoke contained in the said trust-disposition and settlement, I do hereby direct and appoint my said trustees to invest on good security the share of the residue of the means and estate belonging to me, or to which I may have right, falling to Euphemia Elizabeth Hunter Young, my niece, eldest daughter of the deceased Reverend Robert Young, minister of the parish of Auchterarder, under the said trust-disposition and settlement, and to pay to her the annual interest or proceeds thereof during all the days of her life, and after her death to pay over the capital sum in equal shares to her children upon their respectively attaining majority." That is to say, in other words, Euphemia Young's interest is to be a purely alimentary one. The construction which the first party puts upon the words "estate belonging to me" is, that it is a direction to the trustees to invest the estate belonging to Miss Elizabeth Young at the time of her death for behoof of her niece Euphemia Young, and this I think to be the true construction. The other contention which was offered—that it meant Elizabeth Young's share at the time of the mutual deed—would, I think, involve a misconstruction of the deed. All the more when, looking to the words used, there cannot I think be any doubt about this lady's intention.

The second question raises a point of a totally different kind, and one which falls to be determined by an examination of Mrs Hally's marriage-contract, a deed which was executed subsequent to the deed of assumption. The question is whether Mrs Hally's share of the income to be derived from her aunt's estate is to be paid to her marriage-contract trustees, or whether it is to be paid directly to herself? I am very clearly of opinion that it is not to be paid to her trustees, and that for the reasons stated by their Lordships of the Second Division in the case of *Boyd's Trustees* [*sup. cit.*], and especially on the grounds stated in the opinion of Lord Moncreiff.

LORD MURE concurred.

LORD SHAND—The only question of general interest in this case is that raised by the second

query. I am clearly of the opinion expressed by your Lordship that the income derived by Mrs Hally from Miss Elizabeth Young's estate does not fall under the assignation by her to her marriage-contract trustees. It was a conveyance by her of capital only, and not of income; I also agree with your Lordship that the case of *Boyd's Trustees* determines this point.

Upon the first question I am not so clear. The true result of this trust-deed in my opinion is (and had I been trying the question alone I should have so decided it) that the last survivor of the three sisters could test only upon her own share of the joint estates, and as regards the power of revocation, I should be inclined to hold that it applied only to the individual shares of each of the sisters.

Lord Adam—This deed by its fourth purpose directs that the residue of the first deceasing sister's share is to be divided and made over equally between the survivors. Now, it appears to me that these words "divide and make over" do not suggest any distinction between the original and the acquired shares; and then the deed goes on to say that on the death of the second sister the residue of her estate is to "belong" to the survivor. No words could, I think, be stronger to give an absolute right of property in the residue to the survivor. It is to my mind just as if the deed had said that the residue of the second deceasing sister's share was to be "part of the estate of the survivor." In this view of the matter it would be anomalous in the extreme if the surviving sister was not to be able to spend or use in any way she liked what was her absolute property. Nor do I think that this right of property in the surviving sister is in any way controlled by the clause of revocation, for I cannot see how it can control or contradict the clear language of the fourth purpose.

Upon the other point referred to by your Lordships I am equally clear, and I consider it settled by the case of *Boyd's Trustees*.

The Court answered the first question in the affirmative, and the second in the negative.

Counsel for First and Second Parties—A. J. Young. Agents—Mylne & Campbell, W.S.

Counsel for the Third Parties—Law. Agents—Mylne & Campbell, W.S.

Counsel for the Fourth Party—Shaw. Agents—Drummond & Reid, W.S.

Friday, May 22.

OUTER HOUSE.

[Lord Fraser.

GRIEVE *v.* GRIEVE

Proof—Husband and Wife—Divorce—Photograph—Identification.

A photograph being merely secondary evidence cannot be used as a means of identifying a person who can be compelled to attend the trial. Where, therefore, the defender in an action of divorce has disobeyed a warrant to appear for identification, the pursuer cannot proceed to use a photograph, but must move for a warrant to apprehend the defender and bring him up for identification.

This was an action for divorce on the ground of adultery. The pursuer was John Grieve, a flesher in Glasgow, and the defender was his wife Catherine Semple or Grieve. The parties were married in 1880, and lived together as husband and wife till 1883, when they separated. The woman afterwards gave birth to a child, of which her husband could not have been the father, and which she registered as illegitimate. This action was accordingly brought. No defences were lodged. On 14th May the Lord Ordinary found the libel relevant, and fixed a diet of proof, and granted an order ordaining the defender to appear at the proof for identification. This order was served, and the execution of the citation was put into process, but the defender did not appear at the proof. The registrar of births at Glasgow was called as a witness, and exhibited his register, wherein there was recorded an entry of the birth of a child marked "*illegitimate*," and which was said to be the child of the defender. The witness was asked by whom the direction to enter the child as illegitimate was given, and he stated it was by a woman. Whereupon the counsel for the pursuer proposed to prove by the exhibition of a photograph of the defender that she was the person who gave the information; and he referred to the execution of the order on the defender to make appearance for identification, which had not been obeyed.

Lord Fraser—I cannot admit this evidence. There seems to be very loose notions afloat as to how far photographs can be used, and this is a good illustration of them. A photograph is secondary evidence, and secondary evidence of the most unreliable character. Two photographs of the same person very often are very different from each other and even the most skilful individual may mistake the photograph of one person for another. It is only as a last resource, and where justice would otherwise be defeated, that the Courts admit this secondary evidence. Indeed, no secondary evidence is ever received if primary evidence can be obtained at reasonable cost and with available means. Wherever a defender or any other person can be compelled to come to Court for identification, the Court will not receive a photograph in place of the original. If a defender, as in this case, refuses to obey the order of the Court to appear for identification, then the course is to apply for a warrant to apprehend the person so failing to appear, and bring him or her to Court. I long ago printed the form of warrant in use in the Consistorial Courts of Scotland upon the matter (Husband and Wife, p. 1166), and such a warrant ought to have been applied for in the present case, and would at once have been granted by me. In cases where the person sought to be identified is outwith the jurisdiction of the Court, and where its warrants of apprehension cannot reach him, a photograph may then as a matter of necessity be used, and I have, when counsel, been allowed by Judges in such circumstances—but only in such circumstances of necessity—to use a photograph. The wife in the present case is in Glasgow,