nothing to do with the matter. In the ordinary case, where a liferent is given to a daughter (or a son), it is clear there is nothing but a liferent given; but the nicety in *Cumstie's* case was the destination to sons *nominatim* in liferent for their liferent use allenarly, and their heirs whomsoever equally betwixt them in fee heritably and irredeemably. It was from these words relating to the heirs that the whole difference of opinion arose. It was held by the majority of your Lordships that the result would be that no fee was given to anyone—that it could not go to the heirs, and so there was no fee at all. I thought that might be so, and yet that there was a conclusive indication that the share was meant to be given out and out, and never to come back—in fact that "heirs whomsoever" was equivalent to "himself." And I should decide again in the same way now, but that has nothing to do with the present question.

With that explanation, I do not differ from your Lordship's conclusion, though I should not have been sorry to do so, as our judgment seems to proceed rather against the wish of the testator.

Lord Mure—On the terms of the two deeds taken together it is quite clear from the authorities that Mrs Faulder's right to her share was a mere liferent. The direction in the codicil is distinct, and sufficient to obviate the difficulty which has been suggested, as to whether the words "as also" in the trust-deed are to be read back to the words "appoint and direct," or express merely a power to the trustees. That being so, I think it is settled that Mrs Faulder took nothing but a liferent, and could take no fee unless it were merely a fiduciary one for her children who might be born.

With reference to Lord Deas' remarks, I do not think it necessary to give a decided opinion as to whether a different rule would have applied had the power or direction been so worded as to allow the trustees to deal with the bequest as if it had been directed that it should be invested upon ordinary moveable security to Mrs Faulder in liferent and her children in fee. It is clear on the facts as they are that Mrs Faulder had merely a liferent, and I think that even in the other case she would have had no more. In the case of *Gordon* v. *M'Intosh*, in the House of Lords (April 17, 1845, 3 Ross' Leading Cases, 617), the opinions of Lord Campbell and Lord Brougham indicate that by the law of Scotland the same rule would apply had the money been invested in moveable property, for there the bond contained no express direction to invest in heritable security, and Lord Campbell says distinctly (p. 624)—"I am not at liberty to inquire into the reasonableness of it, or how far strict feudal principles, by which the disposition of real property has been regulated, ought to have been applied to the settlement of a sum of money as a provision for a family on marriage. The decisions of the Scotch Courts make no distinction between land and money in this respect, and with regard to money, treat such a disposition to the parent for life, remainder to the children *nascituri*, without the word 'allenarly,' as in effect a simple destination which may be defeated by the parent, who is considered the fiar. If the word 'allenarly' is added, this is tantamount to fencing clauses in a deed of entail, and prevents alienation, though still the parent would be the fiar." "Allenarly" did not occur in that deed, and both Courts accordingly held that the fee was in the mother because "allenarly" was not there. In regard to that point, I should reserve my own opinion, but I am not prepared to hold that under the direction here given the same rule would not equally apply.

As to the second point, I concur in thinking that Mrs Faulder's share having lapsed owing to her having no issue, became intestacy, and so goes to the testator's next-of-kin.

Lord Shand—I concur in the judgment proposed by your Lordship. It appears to me that the previously decided cases settle both points now raised for judgment. As this lady's share of her father's estate was given her for liferent use allenarly, she had no fee, and in the absence of any proper residuary clause in the settlement I think her share goes back to intestacy.

The decision of the case seems to me to suggest two observations worthy of the attention of the profession. The first of these is, that as the effect of giving a liferent use allenarly to a child is to exclude all right of fee, if it should be desired, as might often be the case, failing issue of the liferenter, to give the liferenter or her heirs a power of disposal of the fund *mortis causa*, or to give a fee to the heirs of the liferenter, this should be done expressly by a clause declaring that the liferenter shall have a power of disposal of the fee *mortis causa*, and failing the exercise of such power that the fee shall vest in the liferenter's heirs.

The second point, the importance of which is illustrated by previous cases, is, that in order to save partial intestacy, such as here occurs, obviously against the wish of the testator, the deed should contain a clause expressly dealing with residue, which will take effect as to lapsed provisions of the testator's estate, and carry these provisions to the persons whom the testator desires to favour.

The Court recalled the Lord Ordinary's interlocutor, and sustained the claim for Alexander Fulton and others, the testator's next-of-kin.

Counsel for Mr Fulton's Trustees—Maconochie. Agent—J. Gillon Fergusson, W.S.

Counsel for Mrs Faulder's Next-of-kin—Ure. Agents—Maconochie & Hare, W.S.

Counsel for Mr Fulton's Next-of-kin—Murray. Agents—Maconochie & Hare, W.S.

Saturday, February 7.

SECOND DIVISION.

SPECIAL CASE—FORDYCE AND OTHERS (FORDYCE'S TRUSTEES) *v.* WYNDHAM KENNION AND OTHERS.

Power of Appointment—Where given under a Scotch Deed, and Executed by a Deed valid under Scotch Law but not by the Lex domicilii.

A Scotsman by a Scotch deed gave a power of appointment to certain of the beneficiaries. One of the donees of the power became a domiciled Englishwoman, and exe-

cuted it by a deed valid according to Scotch law but not by the *lex domicilii*. *Held* that the power having been granted by a Scotch deed, was appropriately executed in Scotch form, and appointment sustained.

Opinion—per Lord Justice-Clerk (Moncreiff)—that it would also have been sufficient if valid according to the *lex domicilii*.

By deed of trust dated 30th January and 17th February 1841, and registered 15th March 1860, Lieutenant-Colonel John Fordyce, late of Ayton, placed the sum of £28,000 in the hands of certain trustees for behoof of his seven sisters. By the first purpose of the trust one-fourth of the free revenue of the foresaid sum was directed to be paid to such of them as should remain unmarried, for household expenses. By the second purpose the remaining three-fourths was directed to be paid to his whole sisters married and unmarried in life for the time being, equally among them during their respective lifetimes; and it was declared "that in estimating or applying the said three-fourths of the free revenue, allowance shall always be made for such part or parts of the said capital sum of £28,000 as may revert to me or my representatives in any of the events hereinafter mentioned." The third purpose was—"Such of my sisters as shall marry shall each of them individually have power, at any time during her or their lifetimes, to bequeath to or settle upon her or their child or children surviving the granter or granters of such bequest, or any of them, in such manner as she or they may think fit, the sum of £4000 sterling (part of the above capital sum of £28,000)." . . . The fourth purpose of the trust provided—"Upon the decease of any one or more of my sisters above named, whether unmarried at the time or being married without leaving a child or children, or in case the child or children in whose favour such bequest or settlement shall have been made as aforesaid shall die before attaining majority, then and in every such event the principal sum of £4000, part of the said capital sum of £28,000, shall revert and be payable by the said trustees to me or my executors or assignees on my or their giving security to their satisfaction for the regular payment to them, the said trustees, of one-fourth part of the interest thereof for the benefit of my surviving unmarried sister or sisters." . . The trustees appointed under this deed were all resident in Scotland, and in a subsequent part of the deed they were empowered and directed "to lay out or invest the foresaid sum of £28,000 sterling, either in whole or in such portions as they may think proper, on the security of lands or heritages in Scotland, or in the purchase of Government stock, or to place any part of the capital sum which they may not think it expedient thus to invest in one of the chartered banks of Scotland."

Only one of the sisters was married, viz., Catherine Elfrida, who was married on 21st June 1843 to Dr George Kennion of Harrogate, a domiciled Englishman. She died on 8th July 1878 a domiciled Englishwoman, and predeceased by her husband. She left three children, two sons and one daughter, wife of the Rev. E. A. Dury of Wigan. The daughter died before the presenting of this case, but her marriage-contract trustees and her husband, together with Mrs Kennion's two sons, were the second parties to it.

Lieutenant-Colonel John Fordyce, the granter of the deed of trust above mentioned, died in 1851, survived by all his sisters, and leaving a settlement by which he conveyed his whole estate, heritable and moveable, to his brother George William Fordyce Buchan, who died in 1871, leaving his whole estate to trustees, who were the third parties to the case. Colonel Fordyce's trustees were the first parties.

The question related to the disposal by Mrs Kennion of the £4000 which she had power under Colonel Fordyce's trust-deed to settle on her children. By deed of appointment, executed 28th July 1865, in contemplation of the marriage of her daughter, Mrs Kennion, in virtue of the power conferred on her by her brother's deed of trust, appointed that if her daughter should survive her, a sum of £1000, part of the sum of £3000, being three-fourth parts of the share of the £28,000, should belong to her daughter absolutely, and should be paid to her after her own death. This sum of £1000 Mrs Dury assigned to her marriage-contract trustees. In the deed of appointment the deed of trust of Lieutenant-Colonel Fordyce was erroneously referred to as dated 18th January 1841, whereas it was executed on 30th January and 17th February 1841, and registered in the Books of Council and Session on 15th March 1860. Further, Mrs Kennion left a holograph will dated "St Paul's Vicarage, Hull, 1876," which so far as material was in these terms—"I wish to prevent any uncertainty of how the money which was left to me, as stated in my brother John's will, is to be disposed of. I write the following few lines to guide those who may take the management of my affairs after my death, having the disposal of the sum of £4000 for the benefit of my children as I may see fit to do. Of this £4000 I leave £1000 to Wyndham—George Wyndham Kennion *one thousand;* to Thomas Robert Kennion £3000, three thousand." The "Wyndham" and George Wyndham Kennion here referred to were the same person. The reference made to Colonel Fordyce's "will" was erroneous, as no power was given to Mrs Kennion under that instrument, nor was anything left to her under it.

It was assumed by all the parties that this will was invalid by the law of England, Mrs Kennion's domicile. The family of Mrs Kennion maintained that by the deed of appointment in contemplation of her daughter's marriage, and by the will of Mrs Kennion, which was sufficient according to the law of Scotland, the place where the power was given by the deed of Colonel Fordyce, Mrs Kennion had validly appointed the sum of £4000 among her children. Further, they maintained that even if the will of Mrs Kennion were to be disregarded, the £3000 left unappropriated by the deed of 1865, executed in contemplation of Mrs Dury's marriage, fell to be divided equally among the children of Mrs Kennion.

The trustees of G. W. F. Buchan contended that neither the deed of appointment of 1865, which proceeded on a mis-recital, nor the will of Mrs Kennion, which was not valid by the law of England, was a valid appointment, and that, the power of appointment not having been exercised, the £4000 reverted to the estate of Colonel Fordyce, of which they were now in right.

The following questions were submitted to the

Court—"(1) Is the deed of appointment by Mrs Kennion of 1865 a valid exercise of the power conferred on Mrs Kennion by the said deed of trust, notwithstanding the erroneous recital in it of the date of the said deed of trust? (2) Is the holograph document by Mrs Kennion, and endorsed by her 'My last will—C. E. Kennion,' a valid exercise of the power conferred on her by the said deed of trust by Lieutenant-Colonel John Fordyce? (3) In the event of either or both of the foregoing questions being answered in the negative, are the trustees of the late George William Fordyce Buchan entitled to the reversion of the sum of £4000 provided to Mrs Kennion by the said deed, or to the reversion of the unappointed part thereof? Or does the said sum, so far as unappointed, fall to the parties of the second part as the children of Mrs Kennion?"

Argued for First and Third Parties—In the special circumstances of the case the *falsa demonstratio* in the deed of 1865 rendered it null. The holograph document left by Mrs Kennion was invalid as a will by the Law of England, which was the law both of the domicile and of the place. Whether as will or as appointment, the deed was null. It was not a gift to children with power of appointment in their parent. It was an express condition of their taking at all that the parent should "bequeath or settle" the sum in their favour. The words "bequeath or settle" referred to valid *mortis causa* deeds.

Argued for Second Parties—The law of the domicile could not apply, because this was not part of the personal estate of Mrs Kennion. The authorities showed that the form of the deed exercising the power was to be regulated by the deed confirming the power, because the property was conveyed by virtue not of the appointment but by the act of the donor of the power. The power to appoint was given for the benefit of the children, and if there was no appointment the fund fell to be divided equally.

Authorities—(*Scotch*)—*Taylor* v. *Scott*, July 16, 1847, 9 D. 1504; *Corbet* v. *Waddell*, Nov. 14, 1879, 17 Scot. Law Rep. 106. (*English*) *Crookenden* v. *Fuller*, Nov. 4, 1859, 29 L.J. (Prob.) 1; *Alexander*, Feb. 15, 1860, 29 L.J. (Prob.) 93; *Hallyburton*, Feb. 13, 1866, 1 L.R., P. & D. 90; *Butler* v. *Gray*, Nov. 15, 1869, 5 L.R., Ch. 26; *Tatnall* v. *Hankey*, 2 Moore's P. C. App. 342.

At advising—

Lord Justice-Clerk — The main question which is raised in this Special Case is one of considerable importance and interest. It is substantially whether a holograph will valid by the law of Scotland, but executed in England by a domiciled Englishwoman, can receive effect as a valid exercise of a power of appointment under a Scotch trust-deed and settlement. There is also another but subordinate question, which is the first stated in the case, but which does not appear to me to be attended with much difficulty.

The material facts are these—[*states facts ut supra*].

The fact that the appointment is in excess of the sum remaining to be appointed to will not, I think, render the appointment ineffectual, but the two sums must suffer proportional abatement. The question which remains is, whether this holograph writing, which is valid by our law, but invalid, as I assume, by the law of England, as a will or testament, is effectual as an exercise of the power granted by the deed. It is said that as Mrs Kennion was a domiciled Englishwoman, the will is not in conformity with the law of her domicile, and is therefore ineffectual.

If this question related to the disposal by Mrs Kennion of property belonging to herself by way of will or testament, there can be no doubt of the general law that the formalities of such a testament must be determined by the law of the domicile. Even that rule, however, suffers exception where a will is executed in a country which is not the country of the domicile, but is valid according to the law of the place where it is executed. In such a case the rule of *locus regit actum* will apply, and it thus appears that such an instrument may be valid when not executed according to the law of the domicile, although it would also have been valid if it had been so. In like manner, personal rights to and concerning moveables in general follow the domicile and must be transmitted or regulated by instruments executed according to the law of the domicile. But this rule also suffers equitable exceptions. There are many writings or instruments relative to personal property or personal claims which are so incidental to proceedings in another country in which the moveable property is situated, that it may often be convenient and perfectly effectual to execute relative instruments according to the rules prevalent in the place where they are to receive effect. Though moveable property has no site, yet the administration of it may have a definite locality, and there are not wanting many illustrations which might be given of the efficacy of relative writings executed according to the law, not of the domicile of the granter, but of the place of administration in which the instrument is to receive effect.

The present case, however, probably stands outside even of that category, for this is a power which gives authority to the appointer either to settle or to bequeath at any time during the lifetime of the lady a sum of money held by these trustees in virtue of the powers contained in this Scotch instrument. Even had there been no authority on this subject, while I should not have doubted, that a deed of appointment in the English form would have been sufficiently valid, I should have been of opinion that the execution of such a power, forming part in fact of a Scotch deed of settlement, was fitly and appropriately conceived in the terms sanctioned by Scotch conveyancing, and that we should not be justified in refusing effect to an instrument executed according to our own forms.

It is, however, satisfactory to know that this question is considered among jurists to be practically settled. In the last edition of Storey on the Conflict of Laws, sec. 473, the following passage occurs—"Suppose a power of appointment to be given to a party enabling him to dispose by will of personal estate situate in one country, and he has his domicile in another country, and he executes the power and complies with all the requisites of the power, making a will according to the law of the country where the power was created and the personal estate is situated, but the will is not made according to the requisites prescribed by the law of the place of his domicile, the question would then arise whether the power of

appointment was well executed and the will entitled to probate in the country where the personal property is situate. It has been held that it is." Reference is made by the learned authority to the case of *Tatnall* v. *Hankey*, 2 Moore's Privy Council Reports, 342. The main question which arose in that case in its technical aspect was, whether the Court of Probate had done rightly in refusing to consider whether a will executed at Naples according to the English form was to be admitted to probate as a valid appointment under an English will? The Judge in the Court of Probate held that he had no jurisdiction to consider or decide how far this Neapolitan will was effectual. Lord Brougham, however, held that the appointment was good, because the donee took, not by virtue of the appointment but by virtue of the trust of the deed containing the power, and that the law of the power itself must also be the law of the exercise of that power. The question, indeed, seems considered as set at rest in England by this authority. The question again arose for judgment in the case of *Crookenden* v. *Fuller*, 29 L.J., Prob. & Div. 1; and Sir Cresswell Cresswell, thinking that the case of *Tatnall* v. *Hankey* did not decide any point but the right of the Judge of Probate to consider and decide the validity of the will, disregarded the dicta of Lord Brougham in that case. But he retracted this opinion in the subsequent case of *Alexander*, 29 L.J., Prob. & Div. 93, having discovered that the judgment of the Privy Council in the case of *Tatnall* v. *Hankey* was to the effect that the validity of an appointment under a power did not depend on the domicile of the appointer. This case was followed in the case of *Hallyburton*, 1 L.R., Prob. & Div. 90, which related to the exercise of a power under an English will exercised in Scotland by a domiciled Scotchwoman according to the English form; Lord Penzance unwillingly but decidedly followed the authority of the previous case of *Alexander* and that of *Tatnall* v. *Hankey*, and sustained the appointment.

I have therefore no hesitation in giving effect to this holograph writing. It is not necessary to consider it as a will; it is enough that it is a probative writing in exercise of the power of appointment contained in the trust-deed, and executed during the lifetime of the appointer.

Lord Ormidale and Lord Gifford concurred.

The Court therefore answered the first and second questions in the affirmative, and found it unnecessary to answer the third.

Counsel for First and Third Parties—Lord Advocate (Watson)—Macfarlane. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Second Parties—Kinnear—Mackintosh. Agents—Macandrew & Wright, W.S.

Saturday, February 7.

FIRST DIVISION.

[Lord Adam, Ordinary.

LA COUR & WATSON *v.* HARDING AND ANOTHER (TRUSTEES ON JAMES MORTON & COMPANY'S SEQUESTRATED ESTATE) AND OTHERS.

Bill of Exchange—Non-onerosity—Process—Diligence—Where Writ of Drawers called for to be Used against Holder of a Bill.

The acceptors of certain bills of exchange suspended a charge by the holders, on the ground that the bills were accommodation bills, and that the holders received them from the drawers knowing this, and without giving value. They further averred that the bills were used for the purpose of carrying on a gigantic series of frauds, in which the drawers and holders were equally participant. The holders pleaded that the non-onerosity of the bills could only be instructed by their writ or oath. Before answer as to this plea, diligence *granted* for the recovery (1) of all books, &c., of the holders, and (2) of all books, &c., of the drawers—this latter on the ground that it was impossible to tell, except from a comparison of both sets of books, whether the drawers' books might or might not be writ of the holders.

The complainers in this case were La Cour & Watson, merchants, Leith, and Lauritz La Cour and Anthony Watson, the individual partners of that firm, and the respondents were Robert Palmer Harding, accountant, London, and William Anderson, accountant, Glasgow, the trustees on the sequestrated estate of James Morton & Co., merchants, Glasgow, and Maclay, Murray, & Spens, their law-agents. The complainers suspended a threatened charge upon three bills for £1314, 14s. 7d., £1266, 11s. 10d., and £1441, 3s. 9d., dated respectively 11th, 13th, and 18th September 1878, which were drawn by Matthew & Theilmann, merchants, Leith, and accepted by the complainers, and were payable in London three months after date, and alleged to be blank endorsed by Matthew & Theilmann.

The following were the averments of the complainers:—"(2) In or about 1865 the firm of William Hay, millers, Glasgow, were largely indebted to parties connected with the City of Glasgow Bank. In order to prevent the said firm stopping, and so injuring the credit of the said parties, an arrangement was entered into whereby Mr Theilmann, of Matthew & Theilmann, merchants, Glasgow, became a partner of said firm, and Mr Morton, the sole partner of James Morton & Co., arranged to advance the funds necessary for carrying on said firm. It was further arranged that these advances should be made through Matthew & Theilmann, and accordingly Mr Morton from time to time handed to Mr Matthew of Matthew & Theilmann, his brother-in-law, who resided with him, notes, drafts, and cheques to be by him handed to or disbursed for the said firm. Morton also furnished to the said firm, through Matthew & Theil-