be quite unjust and unreasonable, but in this particular case I have no doubt that the rule is applicable.

LORD MURE and LORD SHAND concurred.

The Court refused the appeal.

Counsel for Pursuers (Appellants)—J. P. B. Robertson—M'Lennan. Agent—James Skinner, Solicitor.

Counsel for Defender (Respondent) — A. J. Young. Agents—Martin & M'Glashan, S.S.C.

Tuesday, November 27.

FIRST DIVISION.

SPECIAL CASE—FRASER AND OTHERS.

Succession—Fee or Liferent—Vesting subject to Defeasance.

Terms of a deed from which *held* that a fee had vested in the daughter of the testator subject to defeasance in the event of her having issue or being survived by any of her brothers or sisters.

Charles Fraser, Esq. of Williamston, in the county of Aberdeen, died on 19th June 1823, survived by his wife Mrs Helen Forbes, who died in 1840. The issue of the marriage were three sons and two daughters, viz., Charles Fraser junior, William Fraser, James John Fraser, Jane Fraser, and Elizabeth Fullerton Fraser.

By his disposition and deed of settlement, dated 19th February, and recorded in the Books of Council and Session June 24, 1823, Charles Fraser senior gave, granted, and disponed to and in favour of Charles Fraser junior, his eldest son, and the heirs whomsoever of his body, whom failing to his, the granter's, other children, successively, and the heirs whomsoever of their respective bodies, whom failing his own nearest heirs and assignees whomsoever, All and whole the lands and barony of Newton of Wrangham and others lying in the county of Aberdeen, called the estate of Williamston, under burden of the real liens, burdens, provisions, faculty, and others therein expressed, and, *inter alia*, as follows—"*Fourthly*, under the burden of payment to each of my daughters, the said Jane Fraser and Elizabeth Fullerton Fraser, of the sum of £3000 sterling, payable to them respectively in manner after mentioned, viz., the interest only of £2000 sterling to be payable to each of them during their said mother's lifetime, and to commence from and after the day of my death, and the interest of the said sums of £3000 sterling each to commence from and after the death or entering into a second marriage of my said spouse, and which said sums of interest shall in all time coming continue payable by the said Charles Fraser junior at the rate of 5 per cent., at two terms in the year, Whitsunday and Martinmas, but declaring that it shall not be in the power of the said Jane Fraser or Elizabeth Fullerton Fraser to call upon my said son Charles, or the disponees before mentioned, for payment of the said provisions of £3000 sterling to each during their natural lives, except the sums of £1000 sterling to each, which shall be at their absolute disposal, but which said sums of £1000 sterling to each shall not be exigible till six years from and after my death, nor shall it be in the power of the said Charles Fraser or the foresaid disponees to pay up said provisions to my said daughters under the foresaid exception of £1000 sterling to each, but the same shall remain a real lien and burden on the lands of Newton of Wrangham and others lying in the county of Aberdeen first above disponed, and at their death shall go along with the foresaid conditional provisions to the lawful children of their bodies respectively, in such proportions as the said Jane or Elizabeth Fullerton Fraser shall think fit, and in the event of their making no distribution, to the lawful children of their bodies respectively, share and share alike, and in the event of their having no lawful issue of their own bodies, then it is hereby expressly declared that the said provisions of £3000 sterling to each—under the foresaid exception of £1000 sterling to each—and the other conditional provisions, shall revert and return to my said sons Charles, William, and James John, and to the survivor of the said Jane and Elizabeth Fullerton Fraser, in such proportions as the said Jane or Elizabeth Fullerton Fraser shall think proper, and in the event of both or either of them making no distribution, then those only of my said children who shall be alive at the time shall succeed, share and share alike; and hereby farther expressly declaring that it shall not be in the power of the said Jane Fraser and Elizabeth Fullerton Fraser to dispone, alienate, assign or convey, or in any manner of way pledge, directly or indirectly, the foresaid provisions of £3000 sterling each—under the foresaid exception of £1000 sterling to each—or the foresaid conditional provisions, or contract any debt thereon during the whole course of their natural lives, otherwise than the foresaid conditional provision of £4000 sterling in favour of the said Elizabeth Fullerton Fraser in the event of the said Jane Fraser succeeding to the said lands of Newton of Wrangham as aforesaid; declaring hereby all such dispositions, assignations, contracts, and obligations null and void, and upon such contravention it is hereby specially declared that the right of the contravener shall cease and determine as to the fee of the foresaid provision of £3000 sterling—under the foresaid exception of £1000 sterling to each—and conditional provisions, excepting the said conditional provisions of £4000 sterling in favour of the said Elizabeth Fullerton Fraser, and the same shall, *ipso facto*, devolve in manner after mentioned, viz., upon the lawful heirs of the body of such contravener, share and share alike, whom failing the same shall revert and return to the said Charles, William, and James John Fraser, and the survivor of the said Jane and Elizabeth Fullerton Fraser not so contravening, share and share alike: But declaring always that although the contravener shall entirely lose the fee of the foresaid provision—under the foresaid exception—and conditional provision, and the disposal thereof, still the same shall remain a real lien and burden on the said lands of Newton of Wrangham and others in the county of Aberdeen until the death of the said contravener, to answer the legal interest thereof, which notwithstanding the above contravention such contravener shall have

right to all the days of her life: And I hereby expressly exclude the *jus mariti* of the husband or husbands of either or both of my said daughters, both as to the said provisions of £3000 sterling to each, and conditional provisions themselves, and also as to the annual rents thereof, which I hereby declare shall be purely alimentary, and not attachable for the debts or deeds of such husbands or any of them for the time."

Charles Fraser junior, the eldest son of the testator, succeeded to the whole estates of his father, and died on 29th November 1870 without leaving heirs of his body. William Fraser, the testator's second son, died on 4th September 1851, leaving four sons and four daughters. James John Fraser, the testator's third son, died in 1843 without issue. Elizabeth Fullerton Fraser, the younger daughter of the testator, died unmarried on 18th May 1832, and Jane Fraser, the testator's elder daughter, died on 9th June 1882 also unmarried.

By disposition and deed of settlement executed by the said Charles Fraser junior, dated 28th September 1865, and registered in the Books of Council and Session December 19, 1870, he conveyed to his nephew Edward Fraser, son of the said William Fraser, all and whole the said lands and barony of Newton of Wrangham and others called the estate of Williamston, to which Edward Fraser made up a title by notarial instrument.

Jane Fraser by her holograph will, dated 20th April, and recorded in the Books of Council and Session June 14, 1882, appointed George Thomson of No. 1 Claremont Place, Edinburgh, as her trustee, to whom she conveyed her whole heritable and moveable estate for the purposes therein specified.

This was a Special Case presented by Edward Fraser of Williamston of the first part, and George Thomson, as trustee and executor of Jane Fraser, of the second part, in which the first party maintained "that Jane Fraser having survived her sister and brothers, and having died without issue, the sum or provision of £2000 provided to her as aforesaid, which was declared a real lien and burden on the said lands and estate of Williamston, lapsed through failure of all the purposes relating to it, and that thereupon the first party held the said lands free of the said burden."

The second party claimed "right to the foresaid sum of £2000 on the ground that the fee of said sum vested in the said Jane Fraser in terms of the foresaid disposition and deed of settlement, under burden merely of the limitation as to its destination imposed by the said Charles Fraser senior, her father, for the purpose of protecting the succession to said sum, but which limitation had been removed by the failure of the appointed succession; further, in respect of the failure of the appointed succession, the testator, the said Jane Fraser became entitled to dispose of the said fund as she might think proper, which disposal she had validly effected by her holograph will."

Argued for the first party—The words of gift here were not nearly so strong as they were in *Dawson's* case, and would be satisfied by payment of capital *quoad* £1000, and interest *quoad* £2000—*Dawson* v. *Dawson's Trustees*, February 24, 1877, 4 R. 597; December 20, 1877, 5 R. 374. It is always a question of intention whether a fee is given or not—*Gibson's Trs.* v. *Ross*, July 12, 1877 4 R. 1838; *Studd* v. *Cook*, May 8, 1883, 20 Scot. Law Rep. 566. The clauses of restriction were introduced only to fortify the limitation to right to income.

Argued for the second party—The terms of the settlement, especially looking to the expression "under burden of payment," and the exclusion of the *jus mariti*, showed there was a fee in Jane Fraser.

At advising—

Lord President—This is a Special Case presented for the determination of two questions which have arisen upon the construction of the settlement of the late Mr Charles Fraser of Williamston, the first of which is, Whether the sum of £2000 declared to be a real lien and burden on the estate of Williamston is to be paid to the executor of a daughter of the testator? or whether, secondly, by reason of the failure of the purposes relating to this sum, the proprietor now holds the estate disburdened of it?

Mr Charles Fraser, whose settlement was executed so far back as the year 1823, left a family of three sons and two daughters. He made certain provisions in favour of the sons, and provisions of a different character in favour of the daughters; it is not necessary to consider the provisions in favour of the sons. By the fourth purpose of the deed it is provided that the estate of Williamston is to descend to his eldest son "under the burden of payment to each of my daughters, the said Jane Fraser and Elizabeth Fullerton Fraser, of the sum of £3000 sterling, payable to them respectively in manner after mentioned, viz., the interest only of £2000 sterling to be payable to each of them during their said mother's lifetime, and to commence from and after the day of my death, and the interest of the said sums of £3000 sterling each to commence from and after the death or entering into a second marriage of my said spouse, and which said sums of interest shall in all time coming continue payable by the said Charles Fraser junr., at the rate of 5 per cent., at two terms in the year, Whitsunday and Martinmas, but declaring that it shall not be in the power of the said Jane Fraser or Elizabeth Fraser to call upon my said son Charles, or the disponees before mentioned, for payment of the said provisions of £3000 sterling to each during their natural lives, except the sums of £1000 sterling to each, which shall be at their absolute disposal, but which said sums of £1000 sterling to each shall not be exigible till six years from and after my death."

So far the language of the clause indicates an intention that in some way or other the sum of £3000 was to be paid to the daughters. No doubt a qualification is contained in the words "in manner after mentioned," and it therefore depends upon a construction of the later clauses of the deed what the restriction is upon the burden of payment of the two sums. It is not to be in the power of either of the daughters to call upon the eldest son for payment of these provisions during their natural lives, but an exception to that is made in the case of each daughter in regard to £1000 out of the £3000, for £1000 is to be paid by the son, and received by the daughter on the lapse of six years from the death of the testator. No provision is made for the payment

of the £2000 to each, for the payment of the £1000 is an exception to the provision with regard to the sum of £3000. The deed then goes on to say that it shall not be in the power of the eldest son to pay up the provisions to the daughters "under the foresaid exception of £1000 sterling to each, but the same shall remain a real lien and burden on the lands of Newton of Wrangham and others . . . and at their death shall go to the lawful children of their bodies respectively." Then comes a provision that in the event of their having no children these provisions of £3000, under the foresaid exception of £1000 sterling to each, "shall revert and return to my said sons, and to the survivor of the said Jane and Elizabeth Fullerton Fraser," in such proportions as the daughters may determine, and in the event of them, or either of them, making no distribution, "then those only of my said children who shall be alive at the time shall succeed, share and share alike." Now, the destination of these sums concludes with the words I have just read, and the question is, whether in the event of the failure not only of issue of the daughter, but of her being predeceased by her brothers and sister, which occurred in Jane Fraser's case, the estate is to be disburdened of the whole £2000? If the deed stopped there the question would have been one of considerable difficulty, but it is not necessary to determine a hypothetical question here, for there are clauses following which demonstrate quite plainly the intention of the testator that there should be vested in each daughter the fee of the £2000 in addition to the fee of £1000. Certainly the £2000 is in such a case in a different position to the £1000, for that is at the daughter's absolute disposal, while the £2000 is tied up and settled in the way I have described. But the question is, what becomes of it on the failure of the daughter, the issue of her body, and her brothers and sister? The testator goes on, after the provisions I have mentioned, to insert in his settlement certain prohibitions, and fences them with irritant and resolutive clauses just as if he were making an entail. All this is absurd enough no doubt, but still these clauses show clearly enough what was in his mind, and what he intended should take place in the event which occurred. He first declares that it shall not be in power of the daughters or either of them "to dispone, alienate, assign, or convey, or in any manner pledge," the foresaid provisions of £3000 each, or contract debt thereon. Now these words clearly apply to deeds of conveyance to take effect in the lifetime of the party, and not to testamentary dispositions of either daughter. That is an important observation. Then the testator goes on to say that all such dispositions shall be null and void, "and upon such contravention, that the right of the contravener shall cease and determine as to the fee of the foresaid provision of £3000 sterling . . . and the same" (that is, the fee) "shall *ipso facto* devolve in manner after mentioned, viz., upon the lawful heirs of the body of such contravener, share and share alike, whom failing, &c. . . . But declaring always that although the contravener shall entirely lose the fee of the foresaid provision . . . still the same shall remain a real lien and burden on the said lands of Newton of Wrangham until the death of the contravener to answer the legal interest thereof, which, notwithstanding the above contravention, such contravener shall have right to all the days of her life." Now, there is one thing quite clear on the face of these clauses, viz., that the testator thought that he was giving each of his daughters a fee in £2000 as well as in £1000, for he says that though under certain circumstances the fee shall determine, yet the interest from the fee shall remain with the contravener. If only a liferent belonged to the daughter, it is very difficult to see what the effect of a contravention would be, as the testator evidently intended that she should lose something called a fee and retain a liferent. It is in these circumstances very difficult to draw any conclusion but one from the deed, namely, that the fee of £2000 was in each daughter, but tied up and made a burden on the estate for the purpose of securing the succession to the daughter's children if she had any, and failing them to the surviving brothers and sister. To all other intents the fee was in the daughter subject to defeasance in the event of her having children or being survived by her brothers or sister. There was one other clause relied on by the counsel for the first party, namely, the clause which excludes the *jus mariti* of the daughters' husbands as to the provisions of £3000, "and also as to the annual rent thereof, which I hereby declare shall be purely alimentary." It was argued that if the fee of the £2000 was in the daughter it would be impossible to make the income alimentary, for the fee might be carried off by her creditors. That would be quite a sound argument in ordinary cases. Then it was argued further that on the very words of the clause it was impossible that there should be anything but a liferent in the daughter, because the words "liferent alimentary" were equivalent in law to nothing but "liferent allenarly." But all this proves too much, for the provisions of the clause apply to the whole sum of £3000, whereas as regards £1000 in the case of each daughter we have seen that a fee is distinctly given. The argument therefore, if well founded, would go to this, that the testator intended that the interest of the £1000 also should be alimentary. That is inconsistent with the whole purpose of the deed.

On the whole matter I think that the first question must be answered in the affirmative, and the second in the negative.

Lord Deas and Lord Mure concurred.

Lord Shand—It appears to me that the question here is whether a lapse of this provision has taken place in favour of the proprietor of Newton of Wrangham. In the deed the testator declares that these shall be provisions primarily in favour of his daughters and their children, and that on their failure they were to revert to the surviving brothers and sister. In such a case I think the Court should lean to the construction of the deed which would give effect to that intention, and not to the construction which would cause a lapse. The contention of the proprietor of this estate would lead to the anomaly that although either sister could succeed to the provision which belonged to the other, yet that neither could in any event deal *mortis causa* with her own provision.

Having these two points in view, the question remains, With whom is the fee of the £2000? There is no trustee, and the debtor certainly cannot be the

fiar, for the estate of Williamston was conveyed to him under burden of payment of the amount. It appears, therefore, from the structure of the deed that the fiar really was the lady enjoying the liferent. I do not think it is necessary to go over the clauses in detail, for it appears to me that the fee was in her, subject always to defeasance in the event of her having issue, in which event she would be fiduciary fiar for them. There would be the same result if she was survived by her brothers or sister.

The Court pronounced the following interlocutor:—

"Find and declare that the second party, as trustee and executor of the late Jane Fraser, is entitled to receive and can validly discharge the sum of £2000 declared to be a real lien and burden on the estate of Williamston, and that the first party does not hold the said estate of Williamston free from the said burden: Of consent, appoints the expenses as taxed to be paid out of the funds found to belong to the second party," &c.

Counsel for First Party — Solicitor-General (Asher, Q.C.) — Pearson. Agent — Alexander Morison, S.S.C.

Counsel for Second Party—Trayner—Strachan. Agent—William Manuel, S.S.C.

HOUSE OF LORDS.

Tuesday, November 27.

(Before the Lord Chancellor, and Lords Blackburn and Watson.)

CLYDESDALE BANK *v.* M'LEAN.

(*Ante*, March 2, 1883, vol. xx. p. 459, and 10 R. 719.)

Bank—Bank Cheque—Right of Drawer to Countermand—Onerous Indorsee—Bill of Exchange.

M. drew a cheque on the Bank of Scotland in favour of C., for C.'s accommodation, to enable him to reduce an overdraft on his account with the Clydesdale Bank. C. paid the cheque into his account, and it was placed to his credit, and the overdraft *pro tanto* reduced. Two days thereafter M. instructed the Bank of Scotland not to pay the cheque. *Held* (*aff.* judgment of First Division) that the cheque having been given and used for the purpose of reducing C.'s overdraft with the Clydesdale Bank, M. was not entitled, in a question with that bank, to stop payment of it, and was therefore liable to make good its amount to that bank.

Observations on the nature of cheques on bankers.

This case was reported in the Court of Session on March 2, 1883, *ante*, vol. xx. p. 459, and 10 R. 719.

The following was the interlocutor of the First Division of March 2, 1883:—"Find that on Saturday 14th January 1882 the defender granted to the witness W. B. Cotton a crossed cheque drawn in his favour on the Bank of Scotland for the sum of £265, 2s. 6d., said cheque being to the extent of £250 an accommodation to Cotton granted to enable him to reduce the balance at his debit with the pursuers, and the defender agreed that the said cheque should be so used by Cotton and the pursuers: Find that in pursuance of the said agreement between Cotton and the defender, Cotton, on receipt of the defender's cheque, endorsed it to the pursuers, and gave it them as cash, and the contents being put to his credit, the balance at his debit was thereby reduced to £28, 15s. 5d. sterling: Find that on Monday forenoon the pursuers passed the cheque through the clearing-house—that is to say, one of their clerks in conjunction with a clerk of the Bank of Scotland ascertained the difference in the amount between the value of the cheques payable between the two banks, and placed the difference to the credit of the bank having the preponderance in value: Find that on Monday afternoon the defender directed the Bank of Scotland not to honour the cheque, and in consequence the pursuers were not credited by that bank with the amount contained in it: Find that the pursuers have thus suffered loss to the amount of the value of the cheque by the act of the defender in stopping payment of it: Refuse the appeal, and allow the decree pronounced by the Sheriff-Substitute on 14th July 1882 to go out and be extracted in name of the Clydesdale Bank (Limited), incorporated under the Companies Acts 1862 to 1880, and decern: Find the appellant [defender] liable in expenses," &c.

The defender appealed to the House of Lords against this interlocutor.

Counsel for pursuers and respondents were not called on.

At delivering judgment—

Lord Blackburn—My Lords, the Lord Chancellor being unfortunately hoarse has requested me to give the leading opinion in this case.

There is no doubt, I think, that the decision appealed against is perfectly right. The first question (and it would be one of considerable importance if there were any doubt about it) is, whether a cheque drawn as this is a negotiable instrument or not? and upon that point I should have myself thought beforehand that there could not be any possible question raised. The general law merchant for many years has in all countries caused bills of exchange to be negotiable. That is a common ground which belongs to all or almost all countries, and it has been adopted as the law in all civilised countries. There are in some cases differences and peculiarities which by the municipal law of each country are grafted upon it, and which do not affect other countries, but the general rules of the law merchant are the same in all countries, and before the recent Act (the Bills of Exchange Act), which received the royal assent in August 1882, the general law of Scotland and the general law of England were the same. Some peculiarities there were in the municipal law of Scotland as to the mode in which it was to be enforced, and there may have been some things (though we have not been able to discover them) which according to the law of England might be enforced which could not have been enforced in Scotland. We need not, however, decide that matter. Upon the general question of negotiability the law has always been the same in both countries, and we have always been in the habit of treating the authorities of each country as