—G. Watt, K.C. — Ingram. Agent — C Strachan Petrie, Solicitor.

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Friday, December 19.

FIRST DIVISION.

LISTER'S JUDICIAL FACTOR *v.* SYME AND OTHERS.

Succession—Foreign—Marriage Contract —"Next-of-Kin"—Construction—Lex domicilii—Lex loci actus—Wills Act 1861 (24 *and* 25 *Vict. c.* 114), *sec.* 3.

By antenuptial contract of marriage between an Englishman, then resident in Scotland, and a domiciled Scotswoman, it was, *inter alia*, provided that the funds settled by the wife should, in the event, which happened, of there being no issue of the marriage, belong to her "next-of-kin, excluding her husband." The contract, which was prepared by a firm of law-agents in Edinburgh, and which was executed both in England and Scotland, contained a clause by which the wife accepted the provisions made in her favour in full of terce of lands, half or third of moveables, *jus relictæ*, and dower, and it also declared that the provisions in favour of the issue of the marriage were to be in full of all they could claim as legitim or bairns' part, or otherwise by and through the death of their father, or as executors or next-of-kin, or otherwise by and through the death of their mother. There was also a clause of consent to registration in the Books of Council and Session for preservation and execution. The wife died domiciled in England.

Held (*diss.* Lord Johnston) that her next-of-kin by the law of Scotland, and not by the law of England, were entitled to her estate.

On 3rd December 1912, A. H. Lister, Queen's Road, Aberdeen, judicial factor on the trust estate under the antenuptial contract of marriage between Joseph Lister (afterwards Lord Lister) F.R.C.S., 3 Rutland Street, Edinburgh, and Miss Agnes Syme (afterwards Lady Lister) eldest daughter of James Syme, Esquire, Professor of Clinical Surgery in the University of Edinburgh, and others, *first party;* Miss Lucy M. A. Syme, Brighton, Sussex, *second party;* Major-General J. M. Burn, Alderley, *third party;* and Captain J. W. Jeffreys, the Durham Light Infantry, Colchester, *fourth party*, presented a Special Case in which they craved the Court to determine whether the destination to Lady Lister's next-of-kin contained in the said contract fell to be construed in the sense attached to that expression by the law of Scotland or in that attached to it by the law of England.

The Case stated—"1. By antenuptial contract of marriage entered into between Joseph Lister (afterwards Sir Joseph Lister, Baronet, first Baron Lister), therein designed as of No 3 Rutland Street, Edinburgh, Esquire, Fellow of the Royal College of Surgeons, on the first part; Miss Agnes Syme (afterwards Lady Lister), eldest daughter of James Syme, Esquire, of Millbank House, Edinburgh, Professor of Clinical Surgery in the University of Edinburgh, on the second part; Joseph Jackson Lister, Esquire, of Upton House, Stratford, Essex, father of the said Joseph Lister (Lord Lister), on the third part; and the said Professor James Syme, on the fourth part, dated said contract of marriage 18th and 19th April 1856, the said parties, in contemplation of the marriage of the said Joseph Lister (Lord Lister) with the said Miss Agnes Syme (Lady Lister), and for the administration and management of the trusts and trust funds under said contract of marriage, nominated and appointed Arthur Lister, of Bradford, in Yorkshire, woolstapler; Rickman Godlee, Esquire, of No 3 New Square, Lincoln's Inn, London, barrister-at-law; the said James Syme; and David Syme, Esquire, Advocate, Sheriff-Substitute of the County of Kinross, and the acceptors and acceptor and survivors and survivor of them, to be trustees and trustee under the said contract of marriage.

"2. By the said *contract of marriage* the said Professor James Syme, father of the said Miss Agnes Syme (Lady Lister), bound himself, his heirs, executors, and successors, to make payment to the said trustees of the sum of £2000 sterling at the first term of Whitsunday or Martinmas occurring six months after his death, with interest thereon at 5 per centum per annum from the date of the solemnising of the said marriage until payment. The trustees were directed to pay to his said daughter Agnes Syme (Lady Lister) all the interest, dividends, and profits of the said £2000 and investments thereof during her lifetime, and after her death to the said Joseph Lister (Lord Lister) during his lifetime, should he survive her. After the decease of the survivor of the spouses the trustees were directed to divide the said capital sum, or investments thereof, among the children of the marriage as set forth in the contract of marriage, but subject to the provision and declaration that if no child of the marriage should become absolutely entitled to the said funds in terms of the contract, then the said funds should belong absolutely to the said Agnes Syme (Lady Lister) and be subject to her appointment and disposal, 'but that only by *mortis causa* deed or will to take effect after her decease, and in default of such appointment or disposal shall belong to her next-of-kin, excluding her husband.' [The contract further provided—"And in consideration of the obligation hereby undertaken by the said James Syme, the fourth party hereto, the said Agnes Syme, with the advice and consent of the said Joseph Lister, her promised husband, hereby renounces and discharges the said James Syme and his executors of all claim competent to her

through his death, either for legitim or bairns' part of gear, or for executry or as one of the next-of-kin of her late mother, or under the contract of marriage of her said parents, or otherwise, the goodwill of her said father alone excepted; and the said Agnes Syme hereby accepts the provisions hereby made in her favour in full of terce of lands, half or third of moveables, *jus relictæ*, and dower, and all which she could ask or claim through the decease of the said Joseph Lister, or which her executors or next-of-kin could claim by and through her predecease".]

"3. The said Professor James Syme (Lady Lister's father), who settled £2000 as above mentioned on his daughter under the said contract of marriage, was the son of Scottish parents and was born at Edinburgh on 7th November 1799. He died at Edinburgh, domiciled in Scotland, on 26th June 1870.

"4. The said Joseph Lister (Lord Lister) was the son of English parents. He was born at Upton, Essex, on 5th April 1827, and he was educated in England. He came to Scotland in pursuance of his profession about the year 1852, and at the date of his marriage (1856) he resided in Edinburgh, and till 1877 he resided and carried on his profession first in Glasgow and afterwards in Edinburgh. In 1877 Lord Lister returned to England, and he resided in London till his death in 1912. Lord Lister was at his death a domiciled Englishman.

"5. The said Miss Agnes Syme (Lady Lister) was born in Scotland and was the daughter of a domiciled Scotsman, but she acquired an English domicile on her husband taking up his residence in England. She died at Rapallo, Italy, on 12th April 1893, intestate and domiciled in England.

"6. There was no issue of the marriage between Lord and Lady Lister, and Lady Lister did not exercise her power of appointment. The said trust funds therefore fall under the said contract of marriage to 'her next-of-kin.'

"7. Lady Lister was survived by her husband Lord Lister (who died 10th February 1912) and by her full sister, the second party, by her half sister Mrs Jemima Syme or Burn, wife of the third party, and by her half brother Mr James Syme of Millbank.

"8. The said contract of marriage, which is in the Scottish form, was prepared by a Scottish solicitor, and contains a clause of consent by all the parties to its registration in the Books of Council and Session or others competent for preservation as well as for execution. . . .

"12. The funds settled under the marriage contract by Professor James Syme (father of Lady Lister) were liferented by Lady Lister and after her death by Lord Lister till his death. These latter funds now consist of £1860 Great Western Railway Consolidated Guaranteed Stock and are the whole trust funds under the marriage contract.

"13. The said Mrs Jemima Syme or Burn, born in 1844, was the half-sister or sister consanguinean of Lady Lister, and as above mentioned survived Lady Lister. Mrs Burn died on 21st March 1904 without issue, leaving a will dated 23rd March 1886, by which she bequeathed her whole estate, heritable and moveable, to her husband the said Major-General Burn, the third party, whom she appointed to be her sole executor and universal legatory.

"14. The said Mr James Syme, born in 1850, was the half-brother or brother consanguinean of Lady Lister, and as above mentioned survived Lady Lister. He died on 15th July 1893 without issue, leaving a will dated 8th July 1891, and registered in the Books of Council and Session 31st July 1893, by which he conveyed his whole estate, heritable and moveable, to his wife Mrs Jessie Anne Atherton or Syme, whom he appointed to be his sole executrix and universal legatee. Mrs Syme died on 16th September 1903, and by her will, dated 18th April, and registered in the Books of Council and Session 25th September 1903, she bequeathed the residue of her whole estate to her nephew, the said Captain John William Jeffreys, the fourth party hereto.

"15. The question has arisen between the parties to this case as to who are Lady Lister's 'next-of-kin,' and, in default of issue and of any appointment or disposal by Lady Lister, entitled as such to the said trust funds settled by Lady Lister's father under the said contract of marriage. This renders it necessary to ascertain authoritatively whether the said contract of marriage is to be construed according to the law of Scotland or according to the law of England. The parties to the Special Case are agreed that by the law of England (if the said contract falls to be construed according to the law of England) Lady Lister's next-of-kin at the date of her death were her full sister, the second party, her half-brother Mr James Syme, and her half-sister Mrs Burn, and that these parties or their representatives are entitled to share the trust funds equally *per stirpes*. If, on the other hand, the said contract falls to be construed according to the law of Scotland, the parties to the case are agreed that the second party is entitled to the whole trust funds as Lady Lister's sister-german, and as such sole next-of-kin at the date of her death, to the exclusion of the other parties as representing her sister consanguinean and her brother consanguinean.

"16. The first party submits no *contention* on the question at issue between the second, third, and fourth parties. The second party contends that in respect (1) that Lord and Lady Lister were both resident in Scotland at the date of the marriage; (2) that the contract of marriage is in the Scottish form and was prepared by a Scottish solicitor; and (3) that Lady Lister's father was a domiciled Scotsman, and the marriage-trust funds now in dispute were settled by him, the said marriage contract, and in particular the destination of the said funds, must be construed according to Scots law; and that consequently the term 'her next-of-kin' in the said contract of marriage means Lady Lister's next-of-kin at the date of her death according to the law of Scotland. The third and fourth parties contend

that the bequest to Lady Lister's 'next-of-kin' is a testamentary provision and not one of the essential portions of the contract between the spouses; that as there is no contrary intention expressed in the marriage contract the 'next-of-kin' should be ascertained according to the law of England as the law of the country of Lady Lister's domicile at the date of her death."

The *question of law* as amended at the hearing was as follows—"Does the destination to the next-of-kin of Miss Agnes Syme contained in the aforesaid contract of marriage fall to be construed in the sense attached to that expression by the law of Scotland to the exclusion of the half blood, or in the sense attached to that expression by the law of England to the inclusion of the half blood?"

Argued for the second party—(1) Assuming the destination in the marriage contract to be contractual and not testamentary, it fell to be construed by the law of the place of execution of the contract, *i.e.*, by the law of Scotland — Bar's Private International Law (2nd ed.), 423; Dicey's Conflict of Laws (2nd ed.), 637-9; Story's Conflict of Laws (8th ed.), 372; *Jacobs* v. *Credit-Lyonnais*, (1884) L.R., 12 Q.B.D. 589, *per* Bowen, L.J., at p. 600; *Chamberlain* v. *Napier*, (1880) L.R., 15 C.D. 614, *per* Hall, V.C., at p. 630; *in re Fitzgerald*, [1904] 1 Ch. 573, *per* Cozens-Hardy, L.J., at p. 587 *et seq.*; *Corbet* v. *Waddell*, November 13, 1879, 7 R. 200, 17 S.L.R. 106. That was also the intention of the parties, for the terms of the contract pointed to that construction, *e.g.*, the use of such expressions as legitim, bairns' part of gear, terce, *jus relictæ*, &c. The destination to the wife's next-of-kin was a special destination, and was not the same as a bequest to heirs *in mobilibus* — *Gregory's Trustees* v. *Alison*, April 8, 1889, 16 R. (H.L.) 10, 26 S.L.R. 787; *Hannay's Trustees* v. *Graham*, 1913 S.C. 476, 50 S.L.R. 310. The words "excluding her husband" did not militate against that construction, for he was not one of her next-of-kin by the law of England any more than by that of Scotland—Jarman on Wills (6th ed.), vol. ii, 1604-6 and 1633; *Bailey* v. *Wright*, (1811) 18 Vesey 49; *Milne* v. *Gilbart*, (1852) 2 De G. M. & G. 715, and (1854) 5 De G. M. & G. 510. (2) Assuming, however, the destination to be testamentary, the result was the same—it fell to be construed by the law of the testatrix's domicile at the date of the will, *i.e.*, by the law of Scotland—M'Laren on Wills (3rd ed.), 30 *et seq.*; Westlake's Private International Law, sec. 122, pp. 156-8; Dicey (*op. cit.*), 679-81; *Thomson's Trustees* v. *Alexander*, December 18, 1851, 14 D. 217; *Mitchell & Baxter* v. *Davies*, December 3, 1875, 3 R. 208, 13 S.L.R. 130; *Brown's Trustees* v. *Brown*, July 18, 1890, 17 R. 1174, 27 S.L.R. 995; *Griffith's Judicial Factor* v. *Griffith's Executors*, January 31, 1905, 7 F. 470, 42 S.L.R. 361. *Esto* that the testatrix had subsequently changed her domicile, that did not affect the construction of her will — Wills Act 1861 (24 and 25 Vict. cap. 114), sec. 3; *in re Groos*, [1904] P. 269.

Argued for third and fourth parties—The destination was clearly testamentary, not contractual. That being so, it fell to be construed by the law of the testatrix's domicile at the date of her death, viz., the law of England — M'Laren (*op. cit.*) 30; *Smith* v. *Smiths*, June 6, 1891, 18 R. 1036, 28 S.L.R. 956. [LORD MACKENZIE referred to *Purvis' Trustees* v. *Purvis' Executors*, March 23, 1861, 23 D. 812, at p. 830, and also to *Steel* v. *Steel*, July 13, 1888, 15 R. 896, 25 S.L.R. 675.] *Esto* that the contract contained certain expressions pointing to its being governed by the law of Scotland, it contained others which indicated equally strongly that it fell to be ruled by the law of England, *e.g.*, "dower," "executors and administrators," &c. In these circumstances the presumption was in favour of the law of the testatrix's domicile at the date of her death—*Brown's Trustees* (*cit. sup.*). The case of the *Earl of Stair* v. *Head*, February 29, 1844, 6 D. 904, was distinguishable, for there the contract expressly provided that it was to be governed by the law of Scotland.

At advising—

LORD PRESIDENT—Lord Lister died in February 1912 a domiciled Englishman. At the date of his death he was in the enjoyment of the income of the capital sum of £2000 which had been settled on Lady Lister by her father in the antenuptial marriage contract of the parties, dated as far back as April 1856. The income of the same sum had been enjoyed by Lady Lister until the date of her death in April 1893. And the question that now arises relates to the disposal of the capital sum of £2000, which depends upon the construction of a certain clause in the marriage contract. That deed was prepared by a Scotch conveyancer, is in Scotch form, and was executed in Scotland by Lady Lister at the time when she was a domiciled Scotswoman. It directs that, subject to the right of the spouses in the income and in the event of no child of the marriage succeeding to the capital, the £2000 should belong absolutely to the said Agnes Syme and subject to her appointment and disposal, "but that only by *mortis causa* deed or will to take effect after her decease, and in default of such appointment or disposal shall belong to her next-of-kin, excluding her husband." Lady Lister died, without having executed any deed of appointment, a domiciled Englishwoman, and there were no children of the marriage. Now it is agreed between the parties that the capital sum in question passes to the next-of-kin of Lady Lister ascertained at her death, but the question is, who are they. Are they to be ascertained according to the law of Scotland, or are they to be ascertained according to the law of England? I am of opinion that the sum in question belongs to the next-of-kin of Lady Lister at her death, ascertained according to the law of Scotland.

I read the clause in the marriage contract as testamentary and not contractual, but I may say in passing that I should have reached exactly the same conclusion had I regarded the clause as contractual. Indeed, we were invited by counsel for the third and fourth parties in this case to consider

it as one in which a domiciled Scotswoman executed a will in Scotland, in Scotch form, in favour of her next-of-kin and died a domiciled Englishwoman. I am willing so to regard it, and on that assumption the question at once arises—what was the intention of the testator as evinced by the words used in her settlement. I entertain no doubt that at the date when she executed her deed Lady Lister contemplated that her next-of-kin by the law of Scotland should have the bequest. In the absence of any indication to the contrary we are not entitled to assume that she intended as the objects of her bounty persons to be chosen and selected according to the law of a foreign state with which, presumably, she was not familiar. Equally clearly I think we are not entitled to assume that when she changed her domicile she intended to change the objects of her bequest, unless she expressed a clear intention to that effect. Now down to the time of her death it was within her power by such a deed as is mentioned in the marriage contract to direct the destination of this £2000 whithersoever she desired. But she did not avail herself of the power so conferred, and that leads I think irresistibly to the conclusion that she was perfectly satisfied with the will that she had already made, and in that frame of mind she remained until the day of her death.

Apart altogether, therefore, from the authority of decided cases I come to the conclusion that we must have regard entirely to the intention of the testator as disclosed in the deed which she made. But in coming to this conclusion I think I am following the authority of the cases on this point which were cited to us in the very able and elaborate argument with which we were favoured. I refer especially to the reasoning of Lord Ivory in the case of *Lord Stair* v. *Head*, 6 D. 904, of Lord President Inglis in the case of *Mitchell & Baxter* v. *Davies*, 3 R. 208, and of Lord Fraser, concurred in by Lord Adam and I think by Lord M'Laren, in *Brown's Trustees* v. *Brown*, 17 R. 1164, and adopting the words of Lord Fraser in that last-mentioned case, with a variation appropriate to the circumstances, I am inclined to say that at the time when the marriage contract was executed by Agnes Syme she knew nothing about the law of England and was thinking only about the law of her own land.

Apart altogether from the authority of the decided cases, I should have reached exactly the same conclusion as the result of express statutory enactment, for the third section of the Wills Act 1861 (24 and 25 Vict. cap. 114) provides as follows—"No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same"; on which clause Professor Dicey's apt and as I think accurate comment is—"It is also clear that all questions of interpretation must be dealt with exactly as they would have been dealt with had the testator not changed his domicile."

I therefore interpret this clause of the marriage contract exactly as if Lady Lister had died a domiciled Scotswoman, and, in accordance with that opinion, I think we ought to answer the question put to us in the form in which I understand it is to be altered, to the effect that the next-of-kin of Lady Lister are to be ascertained according to the law of Scotland and that the second parties to this case are entitled to have the capital sum of the £2000 in question.

LORD JOHNSTON—I regret I cannot come to the same conclusion that your Lordship has reached, but I desire to say that my difficulty arises not on the law, as to which I think we are entirely agreed, but in the application of that law to the particular document.

By a clause in Lord and Lady Lister's marriage contract her fortune, in the circumstances which have occurred, passes to "her next-of-kin." Are the individuals so designated to be ascertained according to the law of Scotland or of England? The former excludes, and the latter includes, the half blood. Lady Lister left a sister by the full blood, and a brother and sister by the half blood. Hence the question. There may be other distinctions between the two systems of law, but the above is stated as the only distinction affecting the question raised in the present case.

I take, first, the facts as regards domicile. Lady Lister was the daughter of Professor Syme, and her domicile at the date of the execution of her marriage contract, 1856, was Scotland. Whatever the domicile of the marriage from 1856 to 1877—and I think it was Scottish—it was from 1877 to Lady Lister's death in 1893 English.

Lord Lister, then Mr Lister, was born in Essex, in England, of English parents, in 1827. In 1852, at the age of twenty-five, he came to Scotland in pursuance of his profession, and at the date of his marriage, 1856, he was living at 3 Rutland Street, Edinburgh. Between 1856 and 1877 he practised in Glasgow and in Edinburgh. He returned to England in 1877, and resided in London till Lady Lister's death in 1893, and in fact till his own in 1912.

I have mentioned these facts in detail because many of them have a bearing upon the construction of Lord and Lady Lister's marriage contract.

Under that deed Professor Syme, who was a party to it, settled £2000 upon his daughter. I do not need to refer to the special terms, the settlement being a mutual settlement and the respective fathers of the spouses making provision for them, further than to say that failing issue of the marriage, which event happened, it was declared that the provision made for Lady Lister by her father should "belong absolutely to the said Agnes Syme, and subject to her appointment and disposal, but that only by *mortis causa* deed or will to take effect after her decease, and in default of such appointment or disposal shall belong to her next-of-kin excluding her husband."

Lady Lister left no deed appointing or

disposing. But as, in consideration of the above-mentioned provision, Lady Lister discharged her father of her legitim, the consequent settlement on her next-of-kin must be deemed and taken to be her settlement, and while her settlement of the fund *quoad ultra* is contractual, this part I conceive to be testamentary.

One more fact—the trustees were two English and two Scottish, so that nothing can be deduced from the selection of trustees bearing on the domicile of the trust.

In these circumstances the next-of-kin "take expressly in the character of grantees under the deed, and by force of the specific provisions on their behalf therein contained —*per* Lord Ivory in *Stair* v. *Head*, 6 D. 921. They are, in fact, conditionally instituted to the issue of the marriage. But it is necessary to construe the deed in order to ascertain the meaning of next-of-kin, which, though a common expression, is in law a term of art, because the law assigns a particular meaning to it, and a meaning which differs in different countries. Writing as a domiciled Scotswoman, the *prima facie* presumption is that Lady Lister used the term in the sense attributed to it by the law of her own country. And if there was nothing special in the deed to counteract this presumption, I should agree that it must prevail. But as Lord President Inglis pointed out in *Mitchell & Baxter's* case, 3 R. 211, "the real question, as in every testamentary deed, is, what was the intention of the testator" or grantee? The fact of domicile is not "absolutely conclusive." "It might be his intention that his settlement should be construed by the law of a different country, and that intention might be expressed in his will. If so, the law of that country would regulate the construction . . . of his settlement"—see also *Brown's Trustees*, 17 R. 1174. Not only do I think that the intention may be expressed, but that it may equally be implied.

There are here *indicia* from which a different intention may be, I think must be, implied. It cannot but be observed, on a careful perusal of the marriage contract, that the parties or their advisers foresaw that the future matrimonial domicile was a matter of doubt. I do not speak merely as wise after the fact, but because the doubt was in the circumstances reasonable, and is betrayed by the terms of the contract itself. It bears on the face of it to have been prepared by those who had in their mind's-eye the law both of Scotland and England, for at three different places at least English words of style are introduced, separately or as alternatives for Scottish equivalent, viz., "hotchpot," "executors and administrators," "will," and "dower." And more pregnant still, it contains two provisions intended, I think, to meet the possibility of the domicile of the marriage at the dissolution being English. These are, I think, of importance to consider.

The first is the ulterior destination to Lady Lister's "next-of-kin, *excluding her husband.*" Why should he be excluded in these general terms? If the law of Scotland alone was looked to, her husband's *jus mariti* would have been renounced or excluded. But by the law of England a surviving husband has possible rights of a different character, much more nearly rights of succession, though it may be not technically such—*Milne* v. *Gilbert*, 3 D. M. & G. 715, and 5 D. M. & G. 510, 95 R. R. 300. It is true that any such claim was avoided by the destination to the next-of-kin, who thus took as conditional institutes and not merely *ab intestato* — *Brown's Trustees.* But that case had not arisen at the date of the marriage contract, and it was not unreasonable that it should be regarded as better *ob majorem cautelam* expressly to exclude it. Hence was used the expression "excluding her husband," an expression apt to apply with effect whether the domicile at the dissolution of the marriage was Scottish or English.

The second is the acceptance of her provisions from her husband by Lady Lister as in satisfaction not only of terce and *jus relictæ* but of dower — again providing against the possibility of the domicile being English at the date of the dissolution of the marriage.

From these considerations I think that I am bound to draw the conclusion that Lady Lister's intention was that her next-of-kin should succeed, in the event which happened, according as these might be pointed out by the law of the domicile ultimately adopted by the spouses, whether Scottish or English. That she did not look further and contemplate that the domicile might be neither Scottish nor English, does not affect the construction of the settlement in the circumstances which she did contemplate.

I am therefore of opinion that the next-of-kin according to the law of England should prevail.

LORD MACKENZIE—Lord and Lady Lister's antenuptial contract of marriage is dated in 1856. It was prepared by a firm of law agents in Edinburgh, and was executed there by the spouses and by Lady Lister's father, Professor Syme of the University of Edinburgh. It was executed in London by Lord Lister's father. There is no statement in the case as to the domicile of Lord Lister at the date of the marriage. He was born in London, of English parents; resided in Scotland in pursuance of his profession from 1852 to 1877, when he returned to England; and died in London a domiciled Englishman in 1912. Lady Lister was born in Scotland, the daughter of a domiciled Scotsman, and was a domiciled Scotswoman at the date of the execution of the marriage contract. She acquired an English domicile when her husband returned to England. She died in 1893, domiciled in England.

Upon the death of Lord Lister the fund settled by his wife under the marriage contract devolved on her next-of-kin. The question in the case is whether this means those who at the date of her death were her next-of-kin according to the law of Scotland, or whether they were her next-of-kin according to the law of England. The fund in question consists of a sum of £2000, which, in terms of the marriage contract, Professor

Syme, Lady Lister's father, bound himself to pay to the marriage-contract trustees. Two of the trustees resided in England and two in Scotland. In consideration of this obligation undertaken by her father, Lady Lister, with the advice and consent of her husband, renounced and discharged her father and his executors of "all claim competent to her through his death, either for legitim or bairns' part of gear, or for executry, or as one of next-of-kin of her late mother, or under the contract of marriage of her said parents or otherwise, the goodwill of her said father alone excepted." A sum of £2000 was also settled by the husband. As regards this, the direction was to pay him the interest during his lifetime, and after his death to pay the income to his wife during her lifetime. As regards the £2000 settled by the wife, the trustees were directed to pay the interest to her during her lifetime for her sole and separate use, and independent of her husband, and after her death to pay the interest to her husband during his lifetime. There were no children of the marriage, and accordingly it is unnecessary to consider the provisions of the marriage contract in regard to them. In the event of there being no child of the marriage, the marriage contract declared that the £2000 settled by Lord Lister should belong absolutely to him and his executors and administrators. As regards the £2000 settled by the wife, it was declared that if no child of the marriage should become absolutely entitled thereto, then the fund should in such case "belong absolutely to the said Agnes Syme, and subject to her appointment and disposal, but that only by *mortis causa* deed or will to take effect after her decease, and in default of such appointment or disposal shall belong to her next-of-kin, excluding her husband." The marriage contract contained a clause by which the wife accepted "the provisions hereby made in her favour in full of terce of lands, half or third of moveables, *jus relictæ* and dower, and all which she could ask or claim through the decease of" her husband, "or which her executors or next-of-kin could claim by and through her predecease," and it also declared that the provisions in the marriage contract in favour of issue of the marriage were to be in full of all they could claim "as legitim or bairns' part, or otherwise by and through the death of their father, or as executors or next-of-kin, or otherwise by and through the death of their mother." There is also a clause of consent by the parties to registration of the marriage contract in the Books of Council and Session or others competent for preservation as well as for execution in common form.

It is evident that the clause under consideration is not one under which the husband takes any interest. He is expressly excluded. The destination to next-of-kin only takes place in default of any other appointment of the fund by Lady Lister. None of the parties to the marriage contract except Lady Lister has any interest in the clause in question. It is of the nature of a testamentary bequest. The intention of the person making the bequest has therefore to be ascertained. Did Lady Lister mean that on her death the law of Scotland was to be applied in fixing who her next-of-kin were, or did she mean that they were to be ascertained by the law of the country in which she happened to be domiciled at her death? I come to the conclusion that the reasoning contained in the opinion of Lord Ivory in the case of the *Earl of Stair* v. *Head*, 6 D. at p. 921, is applicable. No doubt in that case there was an express declaration that the import and effect of the deed "shall be construed and regulated by the law of Scotland." In the present case this is to be implied from the language of the deed and the position of the parties as above set forth. There do occur in the contract certain expressions more appropriate to the law of England than to the law of Scotland, viz., the reference to hotchpot, the destination of the husband's fund to his executors and administrators, and the reference to dower. The latter phrase is, however, used in conjunction with terce and *jus relictæ*. The destination to the next-of-kin is a special destination. Next-of-kin is not equivalent to heirs *in mobilibus*. The words "excluding her husband" were founded on as indicating an intention to exclude the paramount right which a husband has under the law of England, but they serve a purpose in this deed under the law of Scotland, because although the *jus mariti* is excluded from the liferent of the wife, there is no exclusion, express or implied, of the *jus mariti* after Lady Lister's death. As is pointed out by the Lord President in the case of *Mitchell & Baxter* v. *Davies*, 3 R. at p. 212, this is not a question of the law of succession, but a question of the construction of a deed. The real question, as in every testamentary deed, is what was the intention of the testatrix. I may also refer to the reasoning of the Lord Ordinary (Lord Fraser) in *Brown's Trustees*, 17 R. 1174. I am of opinion that in this case next-of-kin means next-of-kin at the date of death as fixed by the law of Scotland, and that accordingly the second party is entitled to the whole trust funds.

The construction of the settlement is not altered by any subsequent change of domicile. The provisions of Lord Kingsdown's Act (24 and 25 Vict. cap. 114), sec. 3, are declaratory of the law.

LORD SKERRINGTON—Although the destination of the sum of £2000 to the next-of-kin of the future Lady Lister was defeasible and gratuitous, it formed a term of the contract between her and her father whereby she induced him to come under an obligation to pay £2000 to the trustees of the marriage contract. It was also a term of the contract between her and her father on the one hand, and her future husband on the other, whereby he renounced his rights as a husband as regards this fund. The present case resembles that of *Gregory's Trustees* v. *Alison*, (1889) 16 R. (H.L.) 10, in which Lord Watson attached importance to the fact that the deed which he had to construe was a contract and not a will, which might be held to speak as from the

death of the testator. The clause in the marriage contract which has to be interpreted begins by conferring upon Lady Lister a power of "appointment and disposal, but that only by *mortis causa* deed or will to take effect after her decease." The distinction between a *mortis causa* deed and a will was, in the year 1856, one of great importance in Scots law and was familiar to Scottish lawyers, but it depended upon technicalities peculiar to our system and which have no place in English law. In default of appointment or disposal the clause declared that Lady Lister's fortune should "belong to her next-of-kin, excluding her husband." Lord M'Laren lays it down (ii, p. 765) that a bequest in such terms operates in favour of the persons who at common law would have been entitled *ab intestato* to the moveable succession of the *propositus*. In other words, relations through the mother would be absolutely excluded, descendants would exclude collaterals and ascendants, collaterals would exclude ascendants, and the full blood would exclude the half blood. These are highly technical and arbitrary rules. The Special Case does not state, and I do not profess to know, how such a bequest would operate according to the law of England; but I cannot assume that the effect would be the same as in Scotland with the single exception that the half blood would rank along with the full blood —which is the only difference mentioned in the Special Case. There is authority for the view that in England the children and the parents of the *propositus* are held to be in an equal degree of kindred, and that they take jointly—*Withy* v. *Mangles*, 10 Cl. & Fin. 215. I can discover nothing in the marriage contract to indicate that the expression "next-of-kin," as used in the clause under construction, was not used in the sense in which it is intelligible to Scottish lawyers. It seems unlikely that the parties, after using technical words of Scots law in the earlier part of the clause, should have used the expression "next-of-kin" in any but the technical sense intelligible to Scottish lawyers. Further, I cannot believe that the parties, and in particular Lady Lister and her father, desired that their contract should take effect according to the rules of some foreign system of jurisprudence (either English or colonial or foreign), of the operation of which they were utterly ignorant.

In my opinion the persons entitled to benefit are those who were Lady Lister's next-of-kin (as defined by the law of Scotland) at the date when the provision vested, *i.e.*, at her death.

The Court answered the question of law as amended in the affirmative of the first alternative and in the negative of the second alternative, and decerned.

Counsel for the First and Second Parties —J. H. Millar. Agents—W. & J. Cook, W.S.

Counsel for the Third and Fourth Parties —Blackburn, K.C.—Lord Kinross. Agents —Russell & Dunlop, W.S.

VALUATION APPEAL COURT.

Saturday, December 20.

(Before Lord Johnston, Lord Salvesen, and Lord Cullen.)

SCOTT *v.* KINCARDINESHIRE ASSESSOR.

Valuation Cases—Mansion-house—"Yearly Rent or Value"—Mansion-house never Let and in Occupation of Owner—Method of Valuation—Deductions—Upkeep of Policies, &c.

A large mansion-house which had cost about £17,000 to build in 1866, and had never been let, had stood in the valuation roll for a number of years at £230. On an appeal, consequent on a rearrangement by the assessor of the valuation, and an alteration as regards the value of the policies, the Valuation Committee fixed the value of the house at £190. The proprietor appealed, and contended that the house should be valued at £115, but the Court *sustained* the determination of the Valuation Committee.

Opinions as to the appropriate method of ascertaining the "yearly rent or value" of an unlet mansion-house, and the deductions allowable from the rent which the subject might be expected to let for if let furnished in conjunction with shootings, and with the policies and gardens kept up by the proprietor.

Opinion (*per* Lord Johnston) that in valuing an unlet mansion-house, where it was difficult or impossible to proceed by comparison with similar houses let from year to year in the neighbourhood, it was competent for an assessor to consider what rent the owner might be reasonably expected to give for a residence suitable and proportionate to the rental and existing conditions of his estate.

At a meeting of the County Valuation Committee of the County of Kincardine, on the 11th day of September 1913, Miss Anna Katharine Scott of Brotherton appealed against the following entries in the valuation roll of the said county of Kincardine for the year 1913-14:—

Description and Situation of Subject.	Proprietor.	Tenant. Occupier.	Yearly Rent or Value.
Estate of Brotherton, mansion house, garden, and offices	Miss Anna Katharine Scott of Brotherton, *per* W. Hope Robertson, W.S., 61 North Castle Street, Edinburgh	Proprietrix	£252
Policies . .		Do.	£40
Electricity works .		Do.	£10

and craved that the valuation of the mansion-house, garden, and offices should be reduced to £137 (representing a reduction from £230 to £115 in the value of the mansion-house, there being no dispute about the balance of £22, which it was agreed was the value of the garden and four lodges and ser-