might be revoked. I am not suggesting that that would happen in this case, but still there is a possibility. Meantime the estate is perfectly safe, and is being managed with due regard to economy. I think with your Lordship that it is better to leave the estate under its existing administration.

LORD KINNEAR—I also agree with the Lord Ordinary. The petition, as I understand, is maintained on the ground that a father has a legal right to put an end to the judicial administration of the estate of his minor son and to secure his position as administrator-in-law, and therefore that the Court has no concern with any conditions which he may propose to adject to his own administration, but must at once proceed to recal the curatory. I do not think that is the legal position of the petitioner at all. This is not an application to supersede the father in the office of administrator-in-law by the appointment of a judicial factor on the son's estate. Even if it had been, I should not assent to the proposition that the Court has no power to make such an appointment. The case of *Wardrop*, 7 Macph. 532, to which the Lord Ordinary refers, only decided that very strong grounds must be shown for such an application, and that it was not enough merely to say that the father was in embarrassed circumstances. But it assumes that on such on application it is the duty of the Court to consider, when the matter is brought before them by a person who has a title to do so, whether, looking to the interests of the minor, such an appointment should or should not be made. But, as I have said, the father here is not in the position of a father objecting to the appointment of a curator. The question here is, whether an appointment made at his own instance should be recalled. The argument was pressed by Mr Pitman that conclusions should not be drawn too strongly from statements made in the petition which he was not bound to make, but which were inserted in a spirit of candour, and in order that the Court might be put in possession of the whole facts. I quite assent to that, but as the statement has been made we must read it to ascertain its bearing upon the application before us. It amounts to this, that the petitioner or his advisers do not think that he is in a position to undertake the uncontrolled guidance of his son's affairs as his administrator-in-law, and that in view of certain circumstances he thinks he ought not to administer the capital of the estate, and therefore proposes that a trustee should be appointed in whom that capital should be vested. But then he says that although he is not prepared to administer the capital he ought to have the control of the income. I am not prepared to enter into such a distinction. A father ought either to have the uncontrolled management of his son's estate, or else, if it is admitted that he is not in a position to claim the uncontrolled administration, it is better for the interests of the son that the administration both of capital and income should remain in the hands of an officer of the Court. I am therefore disposed to refuse the prayer of the petition on the grounds on which the Lord Ordinary has proceeded, without any consideration of the terms of the trust-deed which it is proposed to grant. It is enough that we are assured that the father does not feel entitled to claim the uncontrolled administration of the son's estate, but desires to be restrained by a trust, because I think that if the father is not to be the absolute and uncontrolled guardian the present method of administration is better and simpler than a new trust. But when we look at the trust-deed, I agree with your Lordships that its provisions are such as we ought not to sanction, and form an additional ground for thinking that the prayer of the petition ought to be refused.

The Court adhered.

Counsel for the Petitioners — Jameson, K.C. — Pitman. Agents — Clark & Macdonald, S.S.C.

Counsel for the Respondent — W. L. Mackenzie. Agents — Dundas & Wilson, C.S.

Friday, January 30.

FIRST DIVISION.

CAMPBELL'S TRUSTEES.

Marriage-Contract—Succession—Power of Appointment—Prescribed Formalities—Power Exercised without Formalities Prescribed—Contract.

Where a marriage-contract confers a power of appointment to be exercised by the survivor of the spouses by any writing executed with certain prescribed formalities, the power cannot be validly exercised by any writing which is not executed with the formalities specified.

Question (*per* Lord M'Laren) whether, apart from the law of wills, it was competent for parties to a contract to stipulate that any writing, however informal, should be binding upon them in reference to that contract.

Process—Special Case—Facts Admitted in Case — Question of English Law — Construction of English Statute.

Opinions (*per* Lord Adam and Lord Kinnear) that the Court will not consider, in a special case, an argument founded on the construction of an English statute, unless the meaning of that statute is set forth as one of the admitted facts in the case.

This was a special case raising the question of the validity of the exercise of a power of appointment conferred in the marriage-contract between John Archibald Campbell and Miss Emma Legh or Campbell. The *first parties* to the case were the trustees acting under the marriage-contract; the *second parties* were the trustees under the trust-disposition and settlement of the Rev. John Archibald Legh Campbell, son of the

parties to the marriage-contract; and the *third party* was Miss Carolina Emma Campbell, their only surviving child.

The case set forth, *inter alia*—"By contract of marriage in the English form, dated 18th October 1822, between John Archibald Campbell, Clerk to the Signet, and Mrs Emma Legh or Campbell, his wife, it is, *inter alia*, stipulated that after the decease of the spouses the trust funds shall be held by the trustees 'in trust for all and every or any one or more of the child or children, grandchild or grandchildren, or other issue of the said intended marriage, at such age or ages, time or times, and in such sort, manner, and form as the said John Archibald Campbell and Emma Legh, his intended wife, at any time during their joint lives, in and by any deed or deeds, or writing or writings, with or without power of revocation, to be by them sealed and delivered in the presence of and attested by two credible witnesses, shall direct or appoint; and in default of such joint direction or appointment, then as the survivor of them the said John Archibald Campbell and Emma Legh, and as to the said Emma Legh, whether she shall be then covert or sole, shall by any deed or deeds, writing or writings, with or without power of revocation, to be by him or her signed, sealed, and delivered in the presence of and attested by two credible witnesses, or by his or her last will and testament in writing, or any codicil or codicils thereto, to be by him or her signed and published in the presence of and attested by three credible witnesses, shall direct or appoint; and in default of any such direction or appointment, or as to such part of the said trust funds and premises concerning which no such appointment shall be made, or to which no such direction or appointment shall extend, upon trust to pay, assign, and transfer the said sums of money, funds, and securities, and the interest and proceeds thereof, to such child or children, if more than one, equally, to be divided between them share and share alike as tenants in common, and their respective executors, administrators, or assigns, the issue of any deceased child taking his, her, or their parent's share."

Mrs Campbell died on 14th June 1855, and Mr Campbell died on 7th September 1866. There were three children of the marriage, all of whom survived their parents, viz.—(1) The Reverend John Archibald Legh Campbell, sometime Vicar of Helpston, who was never married, and who died on 5th May 1901; (2) Miss Carolina Emma Campbell, who still survived; and (3) Miss Charlotte Amelia Campbell, who died in 1875 unmarried and intestate.

Mr and Mrs Campbell did not execute any deed of appointment of the trust funds during their joint lives. Mr Campbell left a trust-disposition and settlement dated 5th July 1865, and four separate papers of directions (referred to in and confirmed by the trust-disposition), all dated 20th December 1855, with two additions thereto, the one dated 1st September 1859 and the other 18th July 1863. These papers of directions were all holograph of Mr Campbell, and were neither sealed nor witnessed. The trust-disposition was executed in the ordinary form, and signed before two witnesses. No. 4 of these papers of directions was the only one bearing on the questions raised in this case. It was addressed to the trustees under the marriage-contract, and in it Mr Campbell professed to exercise the power of appointment.

The trust-disposition and settlement proceeded on the narrative that the testator had executed certain holograph directions (viz., the papers of directions above-mentioned), which he was now desirous of confirming, and the second trust purpose was "for payment of the sums of money and fulfilment of the purposes contained in the said directions."

The case did not contain any statement as to what the law of England as to the attestation of documents was, either at the date of the marriage-contract or subsequently.

The first and second parties maintained—"(1) That the paper of directions No. 4 contains a valid exercise of the power of appointment to the marriage-contract funds; (2) that at all events the confirmation in Mr Campbell's trust-disposition is a valid appointment."

The third party maintained that the paper of directions was invalid as an appointment, in respect that it was not executed with the formalities prescribed by the marriage-contract, and that the confirmation in Mr Campbell's trust-disposition was invalid as an appointment for the same reason.

The question of law was—"(1) Was the power of appointment to the marriage-contract fund validly exercised by Mr Campbell, either (1) by the paper of directions No. 4, or (2) by his trust-disposition confirming the same?"

There were also subsidiary questions which in the view taken by the Court it was found unnecessary to consider.

Argued for the first and second parties—The exercise of the power was valid. The formalities required by the marriage-contract were those required by the law of England at the time. The law was altered by the Wills Act, 1 Vict. cap. 26, which provided (section 10) that a power of appointment executed by a writing complying with the requisites of the Act should be valid even although it did not comply with the formalities required by the deed by which it was conferred. If the present question had arisen in England, the paper of directions, confirmed by the trust-disposition, would have been a valid exercise of the power—*Taylor* v. *Meads*, 1865, 4 De G. J. & S. 597. The Court would not readily refuse effect to a deed executed in accordance with the forms prescribed in Scotland, and showing plainly the intention of the granter—*Kennion* v. *Buchan's Trustees*, February 7, 1880, 7 R. 570, 17 S.L.R. 380.

Argued for the third part—The exercise of the power was invalid. If a marriage-contract conferred a power and provided

that it should be exercised in a certain way, it could not be exercised in any other way. It was familiar law that a testator could direct his trustees to give effect to any writing under his hand, though not holograph or tested. The present was the converse case, and the same reasoning applied. If the point was not directly settled in Scotland it was implied in the decision in *Nasmyth* v. *Hare*, July 27, 1821, 1 Sh. App. 65. It was clearly settled in England—*West* v. *Ray*, 1854, 23 L.J. Ch. 447; Sugden on Powers, 8th ed. p. 207. The English Wills Act had no application to the case. Its effect was not admitted as a fact in the case, and therefore could not be known to or considered by the Court. At all events it was not applicable to Scotland.

LORD PRESIDENT—The question in this case is whether a power of appointment contained in an antenuptial contract of marriage in the English form, dated 10th October 1822, between Mr and Mrs Campbell, was validly executed either (1) by a paper of directions, dated 20th December 1855, holograph of and signed by Mr Campbell, but neither sealed nor witnessed, or by a trust-disposition and settlement, dated 5th July 1865, subscribed by him before two witnesses, with a testing clause in the Scotch form, but not sealed.

By the contract of marriage it was declared that the funds thereby placed in trust should be held by the trustees in trust for the child or children, grandchild or grandchildren, or other issue of the intended marriage between Mr and Mrs Campbell, at such age or ages, time or times, and in such sort, manner, and form as Mr and Mrs Campbell at any time during their joint lives, in and by any deed or deeds or writing or writings, with or without power of revocation, "to be by them sealed and delivered in the presence of and attested by two credible witnesses, shall direct or appoint, and in default of such joint direction or appointment, then as the survivor of them shall by any deed or deeds, writing or writings, with or without power of revocation, to be by him or her signed sealed and delivered in the presence of and attested by two credible witnesses, or by his or her last will and testament in writing, or any codicil or codicils thereto, to be by him or her signed and published in the presence of and attested by three credible witnesses, shall direct or appoint."

Mr Campbell on 20th December 1855 wrote and signed a paper of directions making a division of the trust funds held under the marriage-contract, but that paper was neither sealed nor attested by two credible witnesses, and it does not bear to be witnessed at all.

Mr Campbell's trust-disposition and settlement dated 25th July 1865 was executed in the Scotch form before two witnesses, who signed as such in the ordinary way, but it was not signed and published in the presence of or attested by three credible witnesses.

It thus appears that no writing was left by Mr and Mrs Campbell, or either of them, complying with the requisites as to execution specified in their contract of marriage, and the question is whether in consequence of this Mr Campbell's paper of directions and trust-disposition and settlement, or either of them, are or is ineffectual in law.

It was stated in the course of the argument before us that the solemnities mentioned in the marriage-contract were those which were required and were sufficient in England at its date, at all events as regards deeds (as distinguished from wills), and it was contended that the mention of them in the contract was merely equivalent to saying that the writing should be executed in accordance with the law of England as that law might stand at the time when it might be executed, even although the formalities of execution required and sufficient at that time migh tbe different from those required and sufficient at the time when the contract of marriage was entered into. I am, however, unable to accept the view thus contended for. In the first place, the law of England is matter of fact in Scotland, and there is no statement in this case as to what the law of England on this subject was at the dates of the documents in question or is now. But apart from this, it appears to me that the methods of execution prescribed by the marriage-contract were, like the rest of it, contractual, and that consequently they could not be disregarded unless, possibly, with the expressed consent of both the husband and the wife. It is quite lawful for the parties to a contract, or even to the maker of a will conferring a power, to stipulate or declare that solemnities different from or in addition to those required by law at the time shall be adopted in the execution of any power which they or he may confer. The well-known case of *Nasmyth* v. *Hare*, 1 Shaw's App. 65, is a good illustration of this. It was held by the House of Lords in that case that a testament executed by a Scotsman who had long resided in India, and to which a seal had been attached which had been afterwards cut off, was thereby revoked, although the testator was domiciled in Scotland and the testament was holograph of and subscribed by him, so that it would have been valid even although it had been neither witnessed nor sealed. In that case the testator had voluntarily added the solemnity of sealing, and it was held that he thereby indicated that his testament should be effectual only if he left the seal attached to it, and consequently that when he cut off the seal (it was not suggested that anyone else had done so) he thereby indicated an intention to revoke the testament. Another important authority in the same direction is the case of *West* v. *Ray*, 23 L.J. Ch. 447, in which it was held by Vice-Chancellor Wood that a power of appointment by deed or writing under the hand and seal of the donee was not well executed by a will without a seal, although the will be executed and attested in accordance with the requirements of the English Wills Act, 1 Vict. c. 26.

It was maintained in the present case that Mr Campbell's trust-disposition and

settlement was effectual as an execution of the power because it satisfied the requirements of the English Wills Act, 1 Vict. c. 26, but this contention is in my judgment untenable, because it is provided by section 35 of the Act that it shall not extend to Scotland. It was also argued that the absence of attestation in the paper of directions was obviated by its being validated by the trust-disposition and settlement, but this argument, in my judgment, must fail (1) because the trust-disposition and settlement does not purport to confirm the paper of directions, and (2) because it (the trust-disposition and settlement) does not comply with the contractual requirement contained in the contract of marriage that where the power is executed by a will or codicil that will or codicil must be signed and published in the presence of and attested by three credible witnesses.

One of the questions originally put in the case was whether any of the writings in question had been effectually homologated by all the parties interested, but this question was withdrawn, as I think rightly, because there could be no homologation where none of the parties knew that there was any informality or defect in the writings requiring to be homologated.

For these reasons I am of opinion that the answer to the first question should be that the power of appointment of the funds settled under the marriage-contract was not validly exercised by Mr Campbell either by his paper of directions or by his trust-disposition and settlement.

LORD ADAM—Mr and Mrs Campbell executed in 1822 an antenuptial marriage-contract in English form, but as Mr Campbell was a domiciled Scotsman no doubt the presumption was that it was to be executed in Scotland. By that contract the spouses conveyed to trustees the whole trust funds to be held for the children of the marriage and their issue subject to a joint form of appointment to the spouses during their lives, and a like power to the survivors. According to the provisions of the marriage-contract if the appointment was made during the joint lives of the spouses or by the survivor the deed of appointment required to be sealed and delivered before two credible witnesses, but if made by the survivor by will it was required to be signed and published before three credible witnesses. No joint appointment was made. Mr Campbell was the survivor, and he did execute two writings which professed to be an exercise of the power. In 1855 he executed a holograph writing addressed to the trustees, which professed to be an exercise of the power of appointment, but the writing was not executed before witnesses. There can be no doubt that the document contained a valid appointment according to the law of Scotland, but it was not executed according to the provisions of the marriage-contract. Ten years later he referred in his settlement to the paper of directions in the following terms:—"(Second) for payment of the sum of money and fulfilment of the purposes contained in the said directions." Now, I should have thought that if this settlement had been executed according to the provisions of the marriage-contract it would have been a sufficient adoption of the paper of directions, but the will does not conform to the provisions of the marriage-contract because it is only executed before two witnesses, and accordingly the decision of the question is not advanced by this reference in the will to the paper of directions. These are the facts, and the question of law is, whether, when parties have by the terms of a marriage-contract directed certain formalities to be observed in the execution of a deed of appointment, such a deed cannot be treated as valid unless the formalities are complied with. We are familiar enough in Scotland with parties taking the law into their own hands and declaring that any writing found under their hand, whether formal or informal, shall be a sufficient appointment, and I see no reason to think that when parties, instead of dispensing with solemnities, have declared additional solemnities, they should not be entitled to make a law for themselves. There is no reason in principle against the legality of such a proceeding, and the case of *Nasmyth* v. *Hare* (1 Sh. App. 65) is an authority in its favour. If the case rested here there would be no difficulty, but it is said that the solemnities laid down in the marriage-contract were simply those required at the time by the common law of England. I do not know whether that is a true statement of the law of England or not, because there is no statement as to the law of England in the case, and I have therefore the greatest difficulty in giving effect to such an argument. Assuming, however, that this statement of the law of England is correct, it is said that the Wills Act (1 Vict. c. 26), sec. 110, altered the solemnities required for the execution of wills, and if this question had been raised in England the will would have been held to contain a valid reference to the deed of directions. How that may be I do not know, but there is an express declaration in the Act that it shall not apply to Scotland, and if so the matter is left where it was before. I think, though I confess with some regret, looking to Mr Campbell's obvious intentions, that we must hold that the appointment is invalid.

LORD M'LAREN—I concur with your Lordship, and I shall not add anything on the merits of the case.

There is one incidental matter on which I desire to reserve my opinion. Reference was made to cases in which the maker of a deed may either retrospectively or by anticipation declare the validity of any writing of his although it is not executed in conformity with the common law or with the statutory requirements relating to the execution of deeds. I can see a perfectly intelligible principle on which a party may give validity to an existing deed which does not conform to the requirements of statutory attestation. On that principle it has come to be a common practice in

writers' offices to execute a contract by a writing which is neither holograph nor tested, and then for the obligant to add in his own hand the words "adopted as holograph." That means nothing more than this—"Here is a deed which is not binding on me as it stands and I agree that it shall be binding on me." But I entertain great doubt as to the possibility of extending that principle to future deeds. In the case of codicils it has been held by this Court, and affirmed by the House of Lords, that the statutory and common law requirements of execution may be dispensed with by a clause in the will. That perhaps is an example of the favour which the law shows to wills. But I doubt very much whether it is competent for a party to say that he will be bound by any future deed although it should be neither holograph nor tested. I only mention this point because I desire to reserve my opinion as to the extension of what is a convenient working rule when confined to wills.

LORD KINNEAR—I agree, and would only add that I think the question raised depends entirely upon whether the trust-disposition and settlement of Mr Campbell is so attested as to comply with the conditions which the marriage-contract requires for the execution of the power of appointment. The trust-disposition directs the trustees to pay certain sums of money, and to fulfil the purposes contained in the paper of directions. That paper of directions is quite a valid document in itself according to the law of Scotland although it is not effectual in terms of the power; and I think that if the trust-disposition and settlement, which expressly adopts it, had been executed according to the formalties required by the marriage-contract there would be no difficulty in holding that the power of appointment had been well exercised, not by the paper of directions, but by the trust-disposition. But then the trust-disposition is not executed with the formalities required by the marriage-contract, because it is not signed before three witnesses. The formalities prescribed are not those prescribed by the law of Scotland, but it is perfecly legal for parties to contract among themselves that a deed should not be well executed unless it is executed with formalities which the law does not demand. Here they have made such a contract in clear terms, and if they have prescribed certain formalities as necessary for the valid execution of the power of appointment I think the power must be exercised *modo et forma* as the contract prescribes.

I do not consider the argument that was addressed to us on the supposed identity of the formalities prescribed with those required at that time for the execution of a valid will by the law of England, because for this court the law of England is not matter of law but matter of fact; and we can take no fact into consideration in the disposal of a special case except those which are embodied in the case itself. I therefore agree with Lord Adam that we cannot regard what has been said with regard to the law of England, because on that law we have no information. But I also agree with your Lordship that even if we were to assume that the law of England is what it was stated to be, the argument founded upon it would not be maintainable.

The Court answered the question in the case in the negative.

Counsel for the First and Second Parties—Chisholm—Grainger Stewart. Agents—J. A. Campbell & Lamond, W.S.

Counsel for the Third Party—Dundas, K.C.—Chree. Agent—Hugh Patten, W.S.

Friday, January 30.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

M'FADZEAN *v.* CORPORATION OF GLASGOW.

Reparation — Public Authority — Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1.

In an action of damages raised in April 1902 against the Corporation of Glasgow the pursuer averred that on 13th March 1901 two persons employed by the defenders as collectors, who were also sheriff-officers, forcibly entered his house for the purpose of executing a summary warrant for recovery of the rates payable in respect of his occupancy, notwithstanding that the rates had been paid two days previously. The defenders pleaded that the action was excluded by section 1 of the Public Authorities Protection Act 1893. *Held* that, assuming the action to be relevant, it was excluded by the Act.

The Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61), enacts, sec. 1, "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:—(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof."

On 22nd April 1902 Neil M'Fadzean, 5 Sawmill Place, Garscube Road, Glasgow, raised an action in the Sheriff Court of Lanarkshire against the Corporation of the City of Glasgow, whereby he sought to recover damages for fault on the part of the defenders.