prehensive terms. The theory of the appellants involves that the statute describes as "free rents" rents from which there have not yet been deducted even public burdens, which come first of all. This I think out the question.

LORD LINDLEY—I am of the same opinion, and have nothing to add.

Appeal dismissed with costs.

Counsel for the Petitioner, Reclaimer, and Appellant—Solicitor-General for Scotland (Dundas, K.C.) — Blackburn. Agents — Grahames, Currey, & Spens, Westminster—Russell & Dunlop, W.S., Edinburgh.

Counsel for the Respondent—Lord Advocate (Dickson, K.C.) — Cullen. Agents — Nicholson, Patterson, & Freeland, London—Strathern & Blair, W.S., Edinburgh.

COURT OF SESSION.

Wednesday, November 25.

FIRST DIVISION.

TAIT'S TRUSTEES *v.* NEILL.

Trust—Marriage-Contract—Fee and Liferent—Liferent with Power of Testamentary Disposal—Power to "Devise"—Obligation of Trustees to Denude.

In an antenuptial marriage-contract the wife's father conveyed a sum of money to trustees for the liferent use of the spouses and the survivor, with the declaration that in the event (which happened) of the wife's surviving without issue the trust funds should be paid "to the nearest of kin" of the wife "according to the law of Scotland, or to whomsoever she may have devised the same by a deed or writing under her hand."

In a special case presented by the wife and the marriage-contract trustees, *held* (1) that the wife had only a liferent and not a fee in the trust funds, and (2) that the trustees were not bound to denude of the trust and make over the trust estate to her upon her executing a renunciation of her liferent interest and an appointment of the capital of the estate in her own favour.

This was a special case presented by John Sprot Tait, sometime Captain in the 12th Lancers, and others, trustees under the antenuptial contract of marriage between the late Captain James Alexander Tait and Miss Mary Anne Smith Cuninghame, first parties; and the said Miss Mary Ann Smith Cuninghame or Tait (now by a second marriage Neill), widow of Major Neill, second party, raising the question of the interpretation of the aforesaid marriage-contract.

The case set forth that certain sums were conveyed to the marriage-contract trustees by the parents of the contracting parties, and, *inter alia*, by William Cathcart Smith Cuninghame, the truster's father. The disposition of the trust funds in the event (which happened) of there being no children of the marriage was as follows:—"(*First*) the trustees shall make payment of the annual rent or interest of the trust funds to the said James Alexander Tait and Mary Anne Smith Cuninghame during their joint lives, and on the death of one of them to the survivor during his or her lifetime;" and *second*, in the event of there being no issue of the marriage, and of the second party being the survivor of the spouses, then on her death, in the event of a certain provision of £10,500 undertaken by or for behoof of the said James Alexander Tait having been previously received by the trustees, for payment thereof to such person or persons as the said James Alexander Tait might have devised the same by a deed or writing under his hand, and failing such destination thereof to make payment of the same to his nearest in kin according to the law of Scotland, and "for payment of the remainder of the trust funds to the nearest in kin of the said Mary Anne Smith Cuninghame according to the law of Scotland, or to whomsoever she may have devised the same by a deed or writing under her hand."

After the death of the said James Alexander Tait (there being no children of the marriage), the second party called upon the trustees to pay over the trust funds to her, and offered them a composite deed consisting of a renunciation and a discharge of her liferent of the trust fund, and a deed of direction and appointment directing and appointing the first parties to make payment of the funds to herself, and a full and complete discharge of the first parties as trustees and of said trust, and of all claims against them thereanent in any manner of way, or, if preferred by them, to grant separately the said several deeds before specified, the deed or deeds to be granted being always in common form. The trustees declined to comply with her demand.

The trust funds consisted of £17,100 2½ per cent. preference stock of the Midland Railway Company and £5000 preferred ordinary stock and £5000 deferred ordinary stock of the Glasgow and South-Western Railway Company. These stocks represented the funds which by said marriage-contract the said William Cathcart Smith Cuninghame obliged himself to assign and transfer to the trustees thereunder, and formed the "remainder of the trust funds" above mentioned.

The following were the questions of law:—1. Are the first parties bound instantly to denude of the trust and make over the trust estate to the second party upon her executing a valid renunciation of her whole liferent interest therein and an appointment of the capital of the estate in her own favour, and granting to the first parties a valid discharge therefor? 2. Are the first parties bound to keep up the trust until the decease of the second party?"

Argued for the first parties—The second party had not the fee, but only a liferent

with a qualified power of disposal. The word "devise" was used in its ordinary meaning, and not as a technical term of English law, and implied a disposal by *mortis causa* deed. Therefore the destination amounted to a liferent with a fee to her next of kin, subject to defeasance in the event of her disposing of the funds by testament. That did not amount to a fee in the second party, especially as the funds were not provided by her, and were to go to her nearest of kin, who might not be her heirs *in mobilibus*—*Reid* v. *Reid's Trustees*, June 21, 1899, 1 F. 969, 36 S.L.R. 722; *Douglas' Trustees*, November 6, 1902, 5 F. 69, 40 S.L.R. 103.

Argued for the second party—She had a liferent with an unqualified power of disposal, which amounted to a fee—*Rattray's Trustees* v. *Rattray*, February 1, 1899, 1 F. 510, 36 S.L.R. 388. The trustees were therefore bound to denude, on the principles recognised in *Muirhead* v. *Muirhead*, May 10, 1890, 17 R. (H.L.) 45, 27 S.L.R. 917.

At advising—

LORD PRESIDENT—The question in this case is whether the second party is entitled to demand and receive from the first parties certain funds which were placed in settlement by her father at the time of her first marriage.

On the occasion of that marriage Mr Tait, the first husband of the second party, and she entered into an antenuptial contract of marriage, dated 14th and 15th May 1873. Mr Tait died on 19th September 1879, and the second party was thereafter married to Major Neill, who died on 14th March 1887. The second party had no issue by either marriage.

By the marriage-contract above mentioned certain provisions were made by or on behalf of Mr Tait, and the father of the second party bound himself to assign and transfer to the trustees under the contract —(1) £5000 consolidated stock of the Glasgow and South Western Railway Company, and (2) £10,000 sterling, either in cash or in such railway mortgage bonds as he might think proper.

It was provided, *inter alia*, by the marriage-contract, that in the event, which happened, of there being no issue of the marriage, and of the second party being the survivor of the spouses, then on her death, in the event of a certain provision of £10,500 undertaken by or on behalf of Mr Tait having been previously received by the trustees, for payment thereof to such person or persons as Mr Tait might have devised it to by a deed or writing under his hand, and failing such devise, to make payment of it to his nearest of kin according to the law of Scotland, and for payment of the remainder of the trust-funds to the nearest in kin of the second party according to the law of Scotland, "or to whomsoever she may have devised the same by a deed or writing under her hand."

The remainder of the trust-funds above mentioned form the whole funds held in trust by the first parties. They at present consist of £17,100 2½ per cent. preference stock of the Midland Railway Company, and £5000 preferred ordinary, and £5000 deferred ordinary stock of the Glasgow and South Western Railway Company, these stocks representing the funds which the father of the second party, by the marriage-contract above mentioned, bound himself to assign and transfer to the trustees under it.

A question has now arisen as to whether, under the circumstances which have occurred, the second party is entitled to demand and receive payment of the capital of these trust-funds, and she has applied to the first parties for such payment, and has offered to them a composite deed consisting of a renunciation and discharge of her liferent of the trust funds and of a deed of direction and appointment, directing and appointing the first parties to make payment of the funds to herself, and a full and complete discharge of the first parties as trustees, and of the trust just mentioned, and of all claims against them thereanent, or, if preferred by them, to grant separately the several deeds above specified, the deed or deeds to be so granted being always in common form. The first parties, however, have declined to comply with this demand.

The second party maintains that under the terms of the marriage-contract the trust funds belong to her in fee, or otherwise that, upon a renunciation by her of her liferent right, as there are (as she alleges) no contingent interests to be protected the trust funds will fall to be paid over to any person to whom she may have appointed them, and that accordingly upon executing and delivering to the trustees the deed or deeds above mentioned she is entitled to demand and receive the trust funds from them.

The first parties, on the other hand, maintain that it is their duty under the marriage-contract, in the events which have occurred, to hold the trust funds in question for payment to the second party of the free income during her lifetime, and on her death for payment of the capital to her nearest of kin according to the law of Scotland, or to whomsoever she may have devised it by deed or writing under her hand, and that at all events they are not in safety to comply with her request without judicial authority.

In considering the question which has thus arisen it is proper to keep in view that the funds to which it relates did not belong to and were not placed in settlement by the second party, they having been provided and placed in settlement exclusively by her father. The marriage-contract contains no provision by which, nor does it mention any event in which, any right to the fee of the settled funds is conferred upon or could come to her. The ultimate destination of the settled funds is to her nearest in kin according to the law of Scotland, who could of course not be ascertained until her death, constituting a destination-over in their favour, or "to whomsoever she may have devised the same by a deed or writing under her hand." The word

"devise" is a term of English not of Scotch law, but I do not think that it is used in the marriage-contract as a technical term; it seems to me to be used rather in a popular sense to designate a testamentary bequest—a gift or conveyance *mortis causa.* It is, however, maintained by the second party that the right of liferent which was given to her, combined with the power conferred upon her to "devise" the funds by deed or writing, results in her having a right of fee. If she had had by the terms of the marriage-contract a right to dispose of the capital of the funds *inter vivos,* there would, in my judgment, have been much force in her contention, but the case seems to me to be very different when the only power which she has is one of testamentary disposal. By the terms of the power as expressed she cannot give a right to anyone which could take effect during her life, or in other words she has not, at all events by the terms of the deed, any right of *inter vivos* disposal. There is a marked contrast between the provisions applicable to the funds placed in settlement by or on behalf of Mr Tait and those placed in settlement by the father of the second party for her behoof, no doubt because it was intended to give to Mr Tait a right to the funds settled by him or his father, subject to the burdens created by the marriage-contract, while it was not intended to give to the second party a similar right in the funds placed in settlement by her father.

For these reasons I am of opinion that we should answer the first question in the negative and the second in the affirmative.

LORD ADAM—The fund in question here is a sum brought into the settlement by Mrs Neill's father and settled in terms of the antenuptial contract of marriage entered into between Mrs Neill and her first husband. Mrs Neill had a liferent in that sum during her life, and the direction was that the trustees should make payment of the remainder of the trust funds, that is, the sum in question, "to the nearest in kin of the said Miss Cuninghame (Mrs Neill) according to the law of Scotland, or to whomsoever she may devise under her hand." Now, as to the meaning of the word "devise" I have no doubt at all that, not only by the technical law of England but by the common use of language, "devise" means dispone by *mortis causa* deed. That direction therefore conferred on Mrs Neill the power of disposal by settlement of this sum. Well, then, in this case you have the sum brought into the settlement not by the lady but by the lady's father, with a power of disposal by will of that sum, and what is most material in this case, failing her exercise of her power—for that is the meaning of it—then it is to be paid over to the nearest of kin of the lady. Now it humbly appears to me that a direction in regard to a sum of money in these terms conveys to the liferentrix in this case no right in fee at all.

It is a liferent to her with a power of disposal, not *inter vivos* but *mortis causa,* but what is material is the destination-over, not to her heirs *in mobilibus* but to her nearest of kin. Her nearest of kin are not necessarily her heirs *in mobilibus* by the law of Scotland, and their relationship cannot be ascertained till her death. Now, if she had not the fee, and had no power to dispose of it *inter vivos* to anyone, I think the whole case fails. If she has not the fee herself she cannot give a fee to anyone else. Much less can she convey and dispose the fee to herself, as she proposes to do, by a deed that in my opinion can only come into operation after her death. I think that is an impossible proposal, and on the whole I think the question should be answered as your Lordship proposes.

LORD M'LAREN—The object of the second party is to obtain a declaration that the liferent which was given to her together with a power of disposal is equivalent to the fee. I agree with your Lordships that the contention cannot be sustained in the present case. There are two obstacles to the assertion of such a right—first, that the power of disposal is not an unqualified power, and secondly that there is a destination-over in default of appointment. With regard to the effect of the power of disposal I will only add one observation, which is, that whatever meaning we may give to the word "devise," or whatever may have been the settler's meaning in using it, we could not read it as being equivalent to "alienate" or "dispone." It is in its nature a qualification of what might otherwise be an unlimited power of disposal; and if we hold it to be a qualified power of disposal, it is not of much consequence for the purposes of the present question what is the precise shade of meaning that the settler attached to it. I also agree that the destination to next-of-kin is not the same thing as allowing the property to go to personal representatives who would take by devolution of law, because first of all the next-of-kin do not take by devolution of law but under a will, and secondly, they are not identical with the persons who would take by operation of the law, but in certain cases the class may be materially different.

LORD KINNEAR concurred.

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

Counsel for the First Parties—H. Johnston, K.C.—Macphail. Agents—Lindsay, Howe, & Co., W.S.

Counsel for the Second Parties—Campbell, K.C.—Cullen. Agents—Macrae, Flett, & Rennie, W.S.