paid under error. In the present case that is not so, for it is according to both law and equity that the defenders should obtain from the pursuers under their contract of affreightment payment both of freight for the goods actually carried and of dead freight for goods which under the contract of affreightment ought to have been loaded by the pursuers on board the defenders' ship. I am accordingly of opinion that no relevant grounds for a *condictio indebiti* have been proved by the pursuers.

This consideration absolves the Court from going into any nice questions as to the amount of dead freight or its illiquid nature, even were it otherwise necessary to do so, and I have no hesitation in holding that the defenders' fifth plea-in-law should be sustained, and that they should be assoilzied from the whole conclusions of the summons.

The LORD JUSTICE-CLERK and LORD DUNDAS concurred.

The Court found that the defenders were not liable to the pursuers in the value of the shortage of cargo in terms of the first alternative conclusion of the summons, and that the defenders were entitled to set off against the claim for freight on the shortage of cargo the claim for dead freight, and assoilzied the defenders.

Counsel for Pursuers (Respondents)—Murray—Carmont. Agent—Thomas Crow, Solicitor.

Counsel for Defenders (Appellants)—Aitken, K.C.—C. H. Brown. Agent—F. J. Martin, W.S.

Wednesday, January 27.

SECOND DIVISION.

EWING'S TRUSTEES *v.* EWING.

Succession—Faculties and Powers—Power of Appointment—Exercise of Power—Fund Destined to Children in such Proportions and subject to such Conditions and Restrictions as Donee of Power might Appoint—Gift of Liferent with Power of Disposal of Fee by Inter vivos or Mortis causa Deed—Validity—Right to Demand Immediate Payment.

By her antenuptial contract of marriage A conveyed her whole estate to trustees and directed them to hold the fee or capital thereof "for the use and behoof of the child or children of the . . . marriage . . . in such proportions and subject to such conditions, limitations, and restrictions, and with such terms of payment of vesting as" she should "appoint by any deed under her hand." A died predeceased by her husband and survived by a son and a daughter. She left a deed of appointment whereby she directed the trustees to set aside and retain "three fourth shares of the trust estate for behoof of my daughter in liferent for her liferent alimentary use only, and to pay to her or apply for her behoof . . . the free annual income thereof during her lifetime . . .; and on the death of my daughter to dispose of or apply the capital of the shares so liferented by her . . . in such manner as my said daughter may direct by any writing under her hand, whether *inter vivos* or *mortis causa*, and failing such appointment to pay and convey the same to her heirs *in mobilibus*."

Held (1) that the deed of appointment was a valid exercise of the powers conferred by the marriage contract; and (2), following *Mackenzie's Trustees* v. *Kilmarnock's Trustees*, December 4, 1908, 46 S.L.R., p. 217, that the deed of appointment did not confer on the daughter a right of fee to the effect of enabling her to demand immediate payment of the capital.

Trust—Administration—Marriage Contract—Power of Appointment—Exercise of Power—Direction that Share of Marriage-Contract Funds Dealt with in Deed of Appointment should be Held and Administered by Testamentary Trustees—Duty to Transfer.

By her antenuptial contract of marriage A conveyed her estate to trustees and directed them to hold the fee of the estate for behoof of the children of the marriage in such proportions and subject to such conditions, limitations, restrictions, and with such terms of payment and vesting, as she might appoint. By deed of appointment she directed the trustees to hold a certain share of the estate for her daughter in liferent alimentary, and on the death of the daughter to apply the capital as she (the daughter) might direct. A left a trust-disposition and settlement conveying to trustees estate which did not fall under the marriage contract, and also a holograph writing in which she directed that the provisions in the deed of appointment in favour of her daughter should be paid over to her (A's) testamentary trustees to be administered by them in terms of the deed of appointment.

Held that the marriage-contract trustees were bound to hand over the capital of the provisions in favour of the daughter to the testamentary trustees to be administered by them in terms of the deed of appointment.

By antenuptial marriage contract between William Ewing and Miss Harriett Janet Jones, dated 26th January 1866, Miss Jones (who afterwards became Mrs Ewing) conveyed her whole estate to trustees for purposes herein mentioned.

The fourth purpose was as follows:—"The said trustees shall hold the fee or capital of said means and estate for the use and behoof of the child or children of the said intended marriage . . . in such proportions, and subject to such conditions, limitations, and restrictions, and with such terms of payment and vesting, as the said Harriett

Janet Jones shall appoint by any deed under her hand, and failing any such appointment, then the said trustees shall hold, pay over, and divide the said means and estate equally to and for behoof of the said children and the survivors and survivor of them."

Mr Ewing died in 1897, survived by Mrs Ewing and two children of the marriage, viz., Mary Jessie Ramsay Ewing and Arthur Ramsay Ewing, born respectively on 4th September 1869 and 20th August 1870.

In professed exercise of her powers of appointment, Mrs Ewing, who died in April 1901 survived by both the two children, executed on 3rd August 1898 a deed of appointment, whereby she directed the marriage contract trustees, in the event of her being survived by her daughter and son, *first*, "to set aside one-fourth share of the trust estate, and to pay or make over the same to my son absolutely"; and "*second*, to set aside and retain the other three-fourth shares of the trust estate for behoof of my daughter in liferent, for her liferent alimentary use only, and to pay to her or apply for her behoof, as the said trustees may in their absolute discretion think most expedient, the free annual income thereof during her lifetime, with power to the said trustees to advance to, or apply for behoof of, my daughter for her more comfortable maintenance, such part as they may think proper of the capital hereby appointed to be liferented by her, and on the death of my daughter, to dispose of or apply the capital of the shares so liferented by her, or so much thereof as may not have been, in terms of the power hereinbefore conferred, advanced to her or applied for her behoof, in such manner as my said daughter may direct by any writing under her hand, whether *inter vivos* or *mortis causa*, and failing such appointment, to pay and convey the same to her heirs *in mobilibus*."

Mrs Ewing left a trust-disposition and settlement dated 11th January 1901, by which she conveyed to trustees therein mentioned all her estate not conveyed in her marriage contract or dealt with in the deed of appointment, and provided, *inter alia*, as follows:—"*Second*, my trustees shall hold the residue of the trust estate, and shall apply the same and the income arising therefrom for behoof of my daughter Miss Jessie Ramsay Ewing, and shall in their absolute discretion deliver and make over the same to her wholly or partially, or apply the same for her more comfortable maintenance; and I desire that my daughter shall in all matters take the advice of and be guided by my trustees, in whom I have confidence that they will take a friendly interest in my daughter's welfare, and make such arrangements for her after my death as they may consider desirable and expedient, and as the pecuniary means from all sources available for the purpose will admit. . . ."

Mrs Ewing also left a holograph writing, dated 9th February 1901, in these terms—"I hereby alter the deed of appointment by me, dated 3rd August 1898, to this extent, that the provisions it contains in favour of my daughter Mary Jessie Ramsay Ewing are to be paid over to the trustees named in the will I signed last month, to be administered by them (or the survivor of them) as directed in the said deed of appointment. In all other respects they are to have exactly the same powers as are set forth in my will."

In 1908 questions having arisen with regard to the disposal of the share of the marriage-contract estate destined under the deed of appointment to Miss Ewing in liferent, a Special Case was presented for the opinion and judgment of the Court. The first parties were the trustees under the marriage contract; the second parties were the trustees under Mrs Ewing's trust-disposition and settlement; and the third and fourth parties were respectively Miss Ewing and Arthur Ramsay Ewing, the children of the marriage.

The contentions of the parties as set forth in the Special Case were—"The first parties maintain that the said holograph letter is invalid and ineffectual to alter the terms of the deed of appointment, and that they are accordingly not bound to hand over to the second parties any portion of the funds committed to their charge under the said marriage contract and deed of appointment. They also contend that in any event they are not bound to hand over to the second parties the capital of the provisions made in said deed of appointment in favour of the third party.

"The second parties maintain—(1) That the said deed of appointment and holograph writing are valid and effectual in their whole clauses and provisions; (2) that they are entitled to have conveyed and made over to them not only the income but also the fee or capital of the said three-fourth parts or shares of the marriage contract funds directed to be held and applied for behoof of the third party; and (3) that they are entitled to hold and administer the said three-fourth parts or shares in terms of the said deed of appointment.

"The third party contends that the said deed of appointment is invalid in so far as it limits her rights to an alimentary liferent with power of disposal merely, and that the qualifications fall to be read *pro non scriptis*, in respect that a share of the trust funds is vested in her under the marriage contract, and has become payable to her; alternatively, that upon a sound construction of the said deed of appointment, and on the assumption that the said deed is wholly valid, she takes under its terms an absolute fee of three-fourth parts or shares of the marriage-contract trust estate, and is entitled to payment thereof; alternatively, that the whole appointment of her share is invalid, and that she and the fourth party are entitled equally between them to immediate payment of the fee or capital of said share in terms of the marriage contract; alternatively, she concurs in the first two contentions of the second parties, but maintains that the second parties are bound to deal with the said three-fourth parts or shares as falling under said trust-disposition and settlement.

"The fourth party maintains that the said deed of appointment is invalid *quoad* the share of the marriage contract trust estate directed to be held and applied for behoof of the third party, and that said share falls to be paid immediately to the third and fourth parties equally."

The *questions of law* were — "(1) Does the said deed of appointment, in so far as regards the provisions in favour of the third party, constitute to any extent a valid exercise of the powers conferred upon Mrs Ewing under her said contract of marriage? (2) In the event of the first question being answered in the negative, does the three-fourth share fall to be divided equally between the third and fourth parties? (3) In the event of the first question being answered in the affirmative, is the third party entitled to claim the fee of the said three-fourth share free of the limitations set forth in the said deed of appointment? (4) In the event of the first question being answered in the affirmative, and the third question in the negative, is the said holograph writing effectual to qualify the terms of said deed of appointment? (5) In the event of the fourth question being answered in the affirmative, are the first parties bound to hand over to the second parties (1st) the capital of the provisions in the said deed of appointment in favour of the third party, or (2nd) only the income thereof? (6) In the event of the first part of the fifth question being answered in the affirmative, will the second parties be entitled to treat the said sum as capital of the trust estate, and administer it in terms of the provisions of the trust-disposition and settlement, or will it fall to be administered in terms of the deed of appointment?"

Argued for the second parties—(1) The deed of appointment was a valid exercise of the powers conferred by the marriage contract. The gift to the object of such a power, of a liferent plus a power of disposal, had been recognised as a valid exercise of the power—*Lennock's Trustees* v. *Lennock*, October 16, 1880, 8 R. 14; *Wallace's Trustees* v. *Wallace*, June 12, 1891, 18 R. 921, 28 S.L.R. 709; *Wright's Trustees* v. *Wright*, February 20, 1894, 21 R. 568, 31 S.L.R. 450. The principle of these cases was not in any way impugned by the cases of *Warrand's Trustees* v. *Warrand*, January 22, 1901, 3 F. 369, 38 S.L.R. 273; *Matthews Duncan's Trustees* v. *Matthews Duncan*, February 20, 1901, 3 F. 533, 38 S.L.R. 401; *Neill's Trustees* v. *Neill*, March 7, 1902, 4 F. 636, 39 S.L.R. 426; *Middleton's Trustees* v. *Middleton*, July 7, 1906, 8 F. 1037, 43 S.L.R. 718; *Dick's Trustees* v. *Cameron*, 1907, S.C. 1018, 44 S.L.R. 753; for in these cases the exercise of the power of appointment was held invalid because either there was given only a liferent and no power of disposal, or the fee was appointed to parties who were not objects of the power—see *per* Lord M'Laren in *Neill's Trustees* v. *Neill*, *cit.*, at p. 640, p. 431. These cases were therefore perfectly consistent with the validity of the exercise of the power here, since it conferred on the object of the power a liferent *plus* an unlimited power of disposal. The principle contended for by the second parties had also been given effect to in *Dalziel's Trustees* v. *Dalziel*, March 9, 1905, 7 F. 545, 42 S.L.R. 404. Further, if the deed of appointment were not a valid exercise of the powers, it was difficult to see how any effect could be given to the words "subject to such conditions, limitations, and restrictions" contained in the clause of the marriage contract conferring the powers. (2) The third party's interest in the provisions for her behoof under the deed of appointment did not amount to a fee to the effect of entitling her to demand immediate payment of the capital. Whatever the effect of a gift of an unlimited liferent and an absolute power of disposal might be, an alimentary liferent *plus* a power of disposal could not be regarded as equivalent to a full right of fee —*Alves* v. *Alves, &c.*, March 8, 1861, 23 D. 712, *per* L.J.-C. Inglis, at p. 717; *Douglas' Trustees* v. *Cochrane*, November 6, 1902, 5 F. 69, 40 S.L.R. 103. The third party could therefore not appeal to the rule in *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236; and *Yuill's Trustees* v. *Thomson*, May 29, 1902, 4 F. 815, 39 S.L.R. 668. In any event, the third party could not demand payment of the capital so long as a trust was directed to be kept up for a particular purpose, as here, for payment of an alimentary liferent—*Hughes* v. *Edwards*, July 25, 1892, 19 R. (H.L.) 33, 29 S.L.R. 911. (3) The provisions in the deed of appointment in favour of Miss Ewing fell to be administered, in virtue of the holograph document by Mrs Ewing, by the second parties. It was not incompetent for a party entitled to exercise a power of appointment of marriage-contract funds to provide that the funds appointed by her should be administered by her testamentary trustees —*Dalziel's Trustees* v. *Dalziel*, *cit.*; *Mackie* v. *Mackie's Trustees*, July 4, 1885, 12 R. 1230, 22 S.L.R. 814. The first parties were therefore bound to transfer the capital of the three-fourths share of the marriage-contract funds liferented by Miss Ewing to the second parties, to be administered by them in terms of the deed of appointment.

Argued for the third party—(1) If the power of appointment were valid, it conferred a full right of fee on the third party —*Rattray's Trustees* v. *Rattray*, February 1, 1899, 1 F. 510, 36 S.L.R. 388; *Wilkie's Trustees* v. *Wight's Trustees*, November 30, 1893, 21 R. 199, 31 S.L.R. 135. It made no difference that the liferent was declared to be a limentary — *Wilkie's Trustees* v. *Wight's Trustees*, *cit.*, *per* Lord Rutherfurd Clark at p. 203, 207. The third party was therefore entitled to a fee and could demand immediate payment of the capital of the provisions in her favour in the deed of appointment—*Miller's Trustees* v. *Miller*; *Yuill's Trustees* v. *Thomson*, *cit.*; *Macculloch* v. *M'Culloch's Trustees*, November 24, 1903, 6 F. (H.L.) 3, 41 S.L.R. 88, *per* Lord Davey, at p. 6, p. 90. The case of *Hughes* v. *Edwards*, *cit.*, was distinguishable, and the case of *Duthie's Trustees* v. *Kinloch*, June 5, 1878, 5 R. 858, 15 S.L.R. 586, had no application, because there the fee and the annuity were conveyed in different instru-

ments. (2) Alternatively, the deed of appointment was not a valid exercise of the powers conferred by the marriage contract. The marriage contract gave the third party a right of fee, and the deed of appointment reallocated that right to a liferent plus a power of disposal, which was not equivalent to a fee—*Alves* v. *Alves, cit., Fulton's Trustees* v. *Fulton*, February 6, 1880, 7 R. 566, 17 S.L.R. 377; *Reid* v. *Reid's Trustees*, June 13, 1899, 1 F. 969, 36 S.L.R. 722; *Douglas' Trustees* v. *Cochrane, cit.; Peden's Trustee* v. *Peden*, June 27, 1903, 5 F. 1014, 40 S.L.R. 741; *Forrest's Trustees* v. *Reid*, November 25, 1904, 7 F. 142, 42 S.L.R. 133; *Mackenzie's Trustees* v. *Kilmarnock's Trustees*, December 4, 1908, 46 S.L.R. p. 217. The deed of appointment in thus conferring on the third party rights which did not amount to a full fee, was not a valid exercise of the powers—*Warrand's Trustees* v. *Warrand*, *Matthews Duncan's Trustees* v. *Matthews Duncan*, *Neill's Trustees* v. *Neill*, *Middleton's Trustees* v. *Middleton*, *Dick's Trustees* v. *Cameron, cit.* The cases of *Lennock's Trustees* v. *Lennock*, *Wallace's Trustees* v. *Wallace*, and *Wright's Trustees* v. *Wright*, were inconsistent with these, and the second parties could not found on them. Further, the powers conferred by the marriage contract no doubt included power to fix the term of payment and vesting, but they did not include a power to postpone payment indefinitely, or beyond the date of vesting. The three-fourth shares of the marriage-contract funds therefore fell to be paid over to the third and the fourth parties equally between them.

The fourth party adopted the third party's argument that the deed of appointment was invalid, and further argued that in any event the direction to pay and convey to the heirs *in mobilibus* of the third party was invalid as they were not objects of the power—*Warrand's Trustees* v. *Warrand, cit. supra.*

Argued for the first parties—The holograph writing was not effectual to divest the marriage-contract trustees. It was matter of contract that the marriage-contract funds should be administered by these parties, and that provision could not be defeated by one of the parties to the contract, at her own hand. In *Dalziel's Trustees* v. *Dalziel, cit.*, there was no contract, and *Mackie* v. *Mackie's Trustees* did not apply. In any event the second parties were not entitled to conveyance of the capital of any portion of the marriage-contract funds.

At advising—

LORD LOW—The first question in this case is whether a deed of appointment of certain marriage-contract funds which was executed by Mrs Ewing is or is not valid. The power of appointment was contained in the antenuptial marriage contract which was entered into between Mrs Ewing and her late husband in 1866. By that contract Mrs Ewing conveyed her whole estates to trustees. The first purpose of the trust, of course, was the payment of expenses; the second was that the trustees should pay the annual interest of the trust fund to Mrs Ewing during her life; and the third purpose was that in the event of her husband surviving her, they should pay the annual income to him during his life. Then by the fourth purpose, after the death of the surviving spouse the trustees were directed to hold "the fee or capital of the said means and estate for the use and behoof of the child or children of the said intended marriage . . . . in such proportions and subject to such conditions, limitations, and restrictions, and with such terms of payment and vesting, as the said Harriett Janet Jones—(that is, Mrs Ewing)—shall appoint by any deed under her hand. . . ."

The marriage was dissolved by the death of Mr Ewing in 1897. There were then two children of the marriage in life—a son, Arthur Ramsay Ewing, who is the fourth party to the case, and a daughter, Miss Mary Jessie Ramsay Ewing, who is the third party. Mrs Ewing died in 1901, and she was survived by both these children. In 1898 Mrs Ewing executed a deed of appointment, by which she purported to exercise the powers conferred upon her by the fourth purpose of the marriage contract. In that deed she directed the marriage-contract trustees, in the event of her being survived by her daughter and son, which event happened, first, "to set aside one-fourth share of the trust estate and to pay or make over the same to my son absolutely." It is not disputed that that was a perfectly good appointment. But then, in the second place, she directed her trustees "to set aside and retain the other three-fourth shares of the trust estate for behoof of my daughter in liferent, for her liferent alimentary use only, and to pay to her or to apply for her behoof, as the said trustees may in their absolute discretion think most expedient, the free annual income thereof during her lifetime, with power to the said trustees to advance to, or apply for behoof of, my daughter, for her more comfortable maintenance, such part as they may think proper, of the capital hereby appointed to be liferented by her, and on the death of my daughter to dispose of or apply the capital of the shares so liferented by her, or so much thereof as may not have been, in terms of the power hereinbefore conferred, advanced to or applied for her behoof, in such manner as my said daughter may direct by any writing under her hand, whether *inter vivos* or *mortis causa*, and failing such appointment to pay and convey the same to her heirs *in mobilibus*." It is maintained that either that appointment is entirely invalid and should be disregarded altogether, or that it is valid only in so far as it sets aside the three-fourths share of the trust estate for the daughter, and that all restrictions and conditions which are added should be struck out, with the result that the capital of the three-fourths should be handed over to the daughter.

In considering whether the exercise of a power is valid or not, obviously the first thing to do is to compare the exercise of the power with the power itself, and to see how far the one is consistent with the other.

Now, in the fourth purpose of the trust it is provided that the trustees shall hold the fee of the capital for behoof of the child or children of the marriage in such proportions as Mrs Ewing shall appoint. In the deed of appointment Mrs Ewing directs her trustees to set aside a specific portion of the fund, namely, three-fourths, and to hold the same for behoof of her daughter. So far, therefore, I think it is clear that the deed of appointment is on all fours with the power conferred by the marriage contract, and is a proper exercise of that power. Then the marriage contract goes on to say —"subject to such conditions, limitations, and restrictions as Mrs Ewing shall appoint." The question then comes to be, whether the conditions, limitations, and restrictious embodied in the deed of appointment are of the nature contemplated in, and which the mother is empowered to impose by, the fourth purpose of the marriage contract. In considering that question one must go back to the marriage contract and see what was the object which the fourth purpose of the trust was intended to attain, because it is only when we consider what the object in view was that it is possible to say whether the restrictions actually imposed were of the character contemplated. The object of the fourth purpose of the trust was to make provisions for the children of the marriage, and the restrictions which the mother was empowered to impose must therefore, I take it, have been restrictions which were appropriate to and consistent with provisions for children.

Now in certain circumstances the best and indeed the only way in which a child, and especially an unmarried daughter, can be securely provided for may be to prevent that child spending or alienating the capital of the provision during her life, and to restrict her actual enjoyment of the provision during her life to the income. That is a method of dealing with provisions with which one is familiar, and it is a very reasonable and proper method of providing for a child whom the parents have reason to suppose is either thriftless, or is easily imposed upon, and is likely to be left without a provision at all if she has complete control of the capital during her life. Now Mrs Ewing did no more than was necessary to prevent her daughter being left without a provision at all. What she did was to restrict the daughter's actual enjoyment to a liferent, which she prevented her anticipating by declaring it to be alimentary, and she directed the trustees to retain the capital during the lifetime of the daughter for the purpose of securing the income to her, but at the same time she gave the daughter as complete power over the capital as was consistent with that purpose. Accordingly, we find that although the trustees must retain the capital during the daughter's life in order to have an income whereby she may be provided for, the daughter has power to assign the capital during her life, provided the assignation does not take effect until her death; that she has power by testamentary settlement to leave the capital to anyone whom she chooses; and that if she neither assigns nor bequeaths the capital it is to pass to her heirs *in mobilibus* as if it were *in bonis* of her at her death. It seems to me that these were the kind of restrictions which were contemplated in the marriage contract. If it were not so, I have some difficulty in seeing what the very widely expressed powers in regard to restrictions and limitations were intended to cover. So that even apart from authority I should have been of opinion that the restrictions imposed upon the daughter's right to deal with the share appointed to her were restrictions which it was within the power of Mrs Ewing to impose.

But it seems to me that the matter is really settled by authority. The leading case upon the subject is, I think, the case of *Carver* v. *Bowles*, 1831, 2 R. & M. 304. That was an English case in which a father was given a power of appointment in regard to the marriage-contract provisions for his daughters, the power being expressed, I think, almost in identical terms with those in the present case, and it was held that it was competent for the father to settle the daughters' shares to their separate use, and to restrain them from anticipation or alienation, which is just what Mrs Ewing has done in this case. I understand that the rule laid down in *Carver* v. *Bowles* has been regarded in England as correctly stating the law upon the point, and it has been repeatedly adopted and followed in Scotland, first in the case of *Lennock's Trustees*, 1880, 8 R. 14, then in the case of *Wallace's Trustees*, 1891, 18 R. 921, and finally in the case of *Wright's Trustees*, 1894, 21 R. 568. In all of these cases the rule laid down in *Carver* v. *Bowles* was recognised as sound law. Now that is a very formidable body of authority. The case of *Lennock's Trustees* was decided in this Division when Lord Moncreiff was Lord Justice-Clerk. The case of *Wallace's Trustees* was decided in the First Division under the presidency of Lord President Inglis, and *Wright's Trustees* was decided in the same Division when Lord Robertson was Lord President. It is said that the judgment of this Division in the case of *Warrand's Trustees*, 1901, 3 F. 369, threw doubt upon the soundness of these cases. Well, what was actually decided in the case of *Warrand's Trustees* was to my mind not in any way inconsistent with the rule of *Carver* v. *Bowles*, because the circumstances in the case of *Warrand* were such that I think there were very good grounds for holding that the rule was not applicable at all. At the same time I confess I have considerable sympathy with the criticisms made in the case of *Warrand's Trustees* by Lord Trayner and Lord Moncreiff upon the cases of *Lennock's Trustees* and *Wright's Trustees*, because in these cases the element was present that not only had the donee of the power restricted the enjoyment of the children to a liferent, but had disposed of the fee to issue of the children who were not objects of the power; and I think that it might very well be said that in these cases the invalid

appointment of issue of children and the conditions and restrictions which were put upon the children's right could not be separated, and that therefore the whole appointment was invalid by reason of parties who were not objects of the power being brought in. But that is a mere criticism upon the circumstances of the particular cases, and does not alter the fact that in all of the cases the rule of *Carver* v. *Bowles* was recognised as the rule of the law of Scotland. We have no difficulty of that sort in this case, because the circumstances in this case precisely meet the rule. There is no one brought in here who is not an object of the power. The appointment is for behoof of the daughter and for behoof of her only, and there is no further restriction put upon her enjoyment beyond what is absolutely necessary to secure that she shall have during the whole of her life a certain provision. Except what is necessary to effect that purpose, she is given the most absolute power possible over the fee of her share.

The result is therefore that I am not prepared to hold that the appointment was to any extent invalid.

But then another question is raised by the daughter (the third party). She says that if that be so, then really there is in fact no restriction upon my right at all. What is given to me is equivalent to a fee, because I am given a right to the income during my life, and an absolute power of ultimate disposal of the fee. That is equivalent to a right of fee, and therefore I demand that the capital shall be handed over to me now. Now here again, apart from authority, I should be of opinion that that contention is not well founded. I have always understood that there was no purpose more appropriate for a trust than to secure to a person an alimentary liferent, and that, whatever might be the power given to the liferenter in regard to the ultimate disposal of the capital sum, the fact that the liferenter was restricted to an alimentary liferent was a sufficient ground for maintaining the trust. But I think that really the question is set at rest by the judgment which was pronounced recently in the case of *Mackenzie's Trustees*, 46 S.L.R. 217. In that case it was held, as put very shortly in the judgment of the Lord President, that the Court will not declare a right to be a right of fee unless there is both an unlimited liferent and an absolute power of disposal. Now here there is an absolute power of ultimate disposal, but the liferent is not unlimited, being strictly alimentary.

I am accordingly of opinion that the third party cannot claim immediate payment of the fee or capital.

The next question which is raised depends upon the construction of a holograph writing which was executed by Mrs Ewing in 1901, whereby she made certain so-called alterations upon the deed of appointment. The marriage contract and the deed of appointment of course contemplated that the fund should be held by the marriage-contract trustees, but Mrs Ewing made a testamentary settlement disposing of certain estate which did not fall under the marriage contract, and in 1901 she made a holograph writing to the following effect—"I hereby alter the deed of appointment by me, dated 3rd August 1898, to this extent, that the provisions it contains in favour of my daughter Mary Jessie Ramsay Ewing are to be paid over to the trustees I named in the will I signed last month, to be administered by them (or the survivor of them) as directed in the said deed of appointment. In all other respects they are to have exactly the same powers as are set forth in my will."

The first question which is raised in regard to that writing is whether it was competent for Mrs Ewing to direct the fund to be administered by any other body of trustees than those acting under the marriage contract. I think that that question is determined by the cases of *Mackie's Trustees*, 1885, 12 R. 1230, and *Dalziel's Trustees*, 1905, 7 F. 545, in both of which it was recognised that if the power was otherwise competently exercised it was within the discretion of the donee of the power to direct that the appointed funds should be administered by the trustees who had been appointed in the donee's testament. I think that in this case there is a special reason why that should be so. I assume, of course, that I am right in holding that Mrs Ewing made a valid exercise of the power in the directions which she gave in regard to the share of her daughter. But these directions involved the exercise of very wide discretion upon the part of the trustees, and if, as I think it was, it was competent to Mrs Ewing to give that discretion, then of course it was really essential that the trustees who were to carry out her directions should be persons in whom she had complete confidence—I do not mean complete confidence as to their integrity—that is to be assumed—but complete confidence in their judgment, and that they would take such an interest in Miss Ewing as would lead them to do what was really in their opinion the very best for her interest.

The further question was raised, I suppose for the protection of the marriage-contract trustees, whether what was to be handed over to the testamentary trustees was the capital sum or only the annual income. Now, the words of the writing are "the provisions it" (that is, the deed of appointment) "contains in favour of my daughter Mary Jessie Ramsay Ewing." The "provisions" there referred to plainly include the three-fourths of the marriage-contract funds which the trustees were directed to set aside for behoof of Miss Ewing. Accordingly it is the capital sum, and not merely the income, which is directed to be paid over to the testamentary trustees.

Then I think there is another question upon this holograph writing, namely, whether the testamentary trustees are entitled to treat the sum as capital of the trust estate and administer it in terms of the provisions of the trust-disposition and settlement, or whether it falls to be administered in terms of the deed of appointment.

Plainly the fund is to be administered by the testamentary trustees in terms of the deed of appointment. The holograph writing expressly says so, and the only object of the writing was to make a change in the trustees who were to carry out the appointment, not to alter the terms on which the fund was appointed. I suppose that the reason why that question was put was that the writing goes on to say that "in all other respects they are to have exactly the same powers as set forth in my will." Now I take that to refer to general administrative powers given to the trustees by the will, which it would be very useful for them to have in administering the fund under the deed of appointment.

I think, if I remember rightly, these are all the matters which are raised in this case, and the result, in my judgment, is that the questions should be answered as follows. As to the first question, it is unfortunately framed in such a way that it is impossible to give a categorical answer to it, so I propose that your Lordships should answer it by finding that the deed of appointment was, as regards the provision to the third party, a valid exercise of the powers conferred on Mrs Ewing by her marriage contract.

The second question is superseded.

The third question, for the reasons which I have given, should be answered in the negative.

The fourth question is, whether the holograph writing is effectual to qualify the terms of the deed of appointment? In so far as it directs the administration of the appointed fund to be by the testamentary trustees the question should be answered in the affirmative.

The fifth question should be answered by saying that the first parties are bound to hand over "the capital" to the second parties; the sixth question by saying that the second parties must administer it in terms of the deed of appointment.

LORD ARDWALL—I have found this case to be one of considerable difficulty. It was anxiously argued by counsel for the third party that the deceased Mrs Harriett Janet Jones has not by her deed of appointment validly exercised the powers of appointment contained in her contract of marriage, in respect that there is no proper appointment of the fee or capital of the said means and estate to the party of the third part. Now it is quite true that an alimentary liferent coupled with a power of disposal by testamentary deed does not give the party a right to an absolute fee to the effect of enabling a court of law to declare a fee and decern for payment to the beneficiary of the capital sum. But while this is so, I am of opinion that the appointment made in the deed under consideration is a valid exercise of the power conferred by the marriage contract. That power is found in the fourth purpose, and declares that "the said trustees shall hold the fee or capital of the said means and estate for the use and behoof of the child or children of the said marriage . . . in such proportions, and subject to such conditions, limitations, and restrictions, and with such terms of payment and vesting, as the said Harriett Janet Jones shall appoint by any deed under her hand."

Now, by the deed of appointment the trustees are directed to set aside and retain three fourth shares of the trust estate for behoof of Mrs Ewing's daughter in liferent for her liferent alimentary use only, with power to make advances, and on the death of the daughter they are directed to dispose of or apply the capital of the shares so liferented by her in such manner as she may direct by any writing under her hand, whether *inter vivos* or *mortis causa*, and failing such appointment to pay and convey the same to her heirs *in mobilibus*.

Now I have to observe that these provisions give the whole benefit of the appointed share of capital to the daughter, and to no one else. There is no introduction of anyone not a proper object of the power, as happened in the cases of *Warrand*, *Neill's Trustees*, *Middleton*, and *Dick*, which were cited to us. In short, Miss Ewing gets the whole of the three-fourths of the capital of the estate, although subject to conditions, limitations, and restrictions.

I think it must be a question in each case whether the limitations and restrictions are reasonable and appropriate, and in the present case I cannot say that they are not, having regard to the fact that the person whose interest was to be protected was an unmarried woman whose father and mother were both deceased. It will be noticed that she has the full benefit of the income of the estate while she lives, and a perfectly unrestricted power of disposal of it after her death. In short, the only limitations upon her right are such limitations as are necessary to protect her from dilapidating the estate during her life.

For these reasons I am of opinion that in this case the appointment made by Mrs Ewing ought to be sustained.

The other question of importance in the case is, which body of trustees ought to administer the appointed funds which were originally settled under the marriage contract of Mr and Mrs Ewing? This is a question for the Court in each case, and unless there is some special reason to the contrary they will be guided by considerations of convenience (see *Dalziel*, 1905, 7 F. 545). In the present case I think that it would be most convenient that the fund should be administered by Mrs Ewing's testamentary trustees in terms of the deed of appointment, and there is no important reason arising on the terms of the deeds why this should not be done. I am accordingly of opinion that the first branch of question 5 ought to be answered in the affirmative.

As to the decisions, I cannot say I think they are altogether in a satisfactory state, but in the view I take of the case I do not require to rely on them.

LORD DUNDAS—I am of the same opinion. It might not, I think, be an easy task to

bring all the decisions upon this branch of the law into absolute line with one another; but having listened to the careful and exhaustive citation of the reported cases by counsel at the Bar, I am not aware of anything previously decided that should prevent us from determining this case in the manner which your Lordships propose. The marriage contract, as has been pointed out, directed the trustees to hold the fee or capital of the estate for behoof of the child or children, subject to apportionment by Mrs Ewing, who was authorised to adject or impose conditions, limitations, and restrictions. Now when one turns to the exercise of the power by Mrs Ewing, so far as concerns her appointment to Miss Ewing, the daughter of the marriage, it seems to me to be within the terms and scope of the power. The trustees are directed to set aside and retain a specific part of the capital of the estate for behoof of Miss Ewing, and then follow words of restriction and limitation, for the trustees are directed not to pay over the daughter's share to her, but only to pay her the income for her alimentary liferent use, and on her death to apply the capital, so far as not already advanced for her more comfortable maintenance, to anyone whom the daughter might nominate by writing to take effect after her death. It was urged that the effect of this appointment was to cut down a fee to a bare liferent. I do not think that this is really the effect of Mrs Ewing's appointment. It is to be observed that the whole capital of the daughter's share is directed to be set aside and retained for her behoof, and, as your Lordships have pointed out, no part of it is given by Mrs Ewing to strangers to the power, for, of course, the daughter's nominees will take the fee from her, and from her only. It is true that Mrs Ewing has limited her daughter's right in her appointed share because she apparently considered that her daughter's "behoof" would best be served by giving her a liferent only, and a *mortis causa* power of disposing of the capital. But none the less, as it seems to me, the capital of Miss Ewing's share has been appointed for behoof of her and of her only, and therefore I can see nothing illegal in this exercise of the mother's power of appointment. The only other matter on which I shall say a word is the question whether Miss Ewing's appointment to her share confers on her a right of fee such as to entitle her to demand payment of the capital from the trustees. This question must, I think, be answered in the negative, because that seems to follow from the authoritative statement of Lord Dunedin in the most recent case on the subject (*Mackenzie's Trustees*, 46 S.L.R. 217), where he says that "as the law stands at present upon authority, it is . . . . that the Court will not declare a fee unless there is both an unlimited liferent and an absolute power of disposal as opposed to a mere testamentary power of disposal." As regards the other points in the case, I have merely to say that I concur in what has been already said.

The LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor:—

"Answer the first question of law . . . by declaring that the deed of appointment by Mrs Harriett Janet Jones or Ewing, dated 3rd August 1898, . . . was a valid exercise of the powers conferred upon her under her contract of marriage, dated 26th January . . . 1866: Find it unnecessary to answer the second question: . . . Answer the third question in the negative: Answer the fourth question . . . by declaring that the holograph testamentary writing, dated 9th February 1901, is effectual in so far as it directs that the capital of the provisions in favour of the third party are to be paid over to the second parties, to be administered by them: Answer the fifth question . . . by declaring that the first parties are bound to hand over the capital of the provisions in favour of the third party under the deed of appointment to the second parties: Answer the sixth question . . . by declaring that the second parties are bound to administer the capital of the said provisions in favour of the third party in terms of the said deed of appointment: Find and declare accordingly, and decern."

Counsel for the First Parties—Dean of Faculty (Scott Dickson, K.C.) — Horne. Agents—Alex. Campbell & Son, S.S.C.

Counsel for the Second Parties—Bartholomew. Agents—Gill & Pringle, W.S.

Counsel for the Third Party—M'Lennan, K.C.—Jameson. Agents—Gill & Pringle, W.S.

Counsel for the Fourth Party—M. P. Fraser. Agents—Gill & Pringle, W.S.

Friday, January 15.

SECOND DIVISION.

[Sheriff Court at Glasgow.

M'GUIRE *v.* THE UNION COLD STORAGE COMPANY, LIMITED.

Expenses — Appeal from Sheriff Court — Abandonment—Application under Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, c.* 51), *First Schedule, Rule* 96, *for Leave to Abandon Appeal—A. S. 5th January* 1909, *sec.* 4 (4)—*A. S. 10th March* 1870, *sec.* 3 (5).

Held that the expenses which the Court may award against an appellant who has applied for leave to abandon his appeal under rule 96 of the First Schedule of the Sheriff Courts (Scotland) Act 1907 are not limited by section 4 (4) of the A. S. of 5th January 1909 and section 3 (5) of the A. S. of 10th March 1870 to three guineas, but are matter for the discretion of the Court, who may either remit the account to