Wednesday, December 3.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

DUNBAR'S TRUSTEES *v.* DUNBAR.

Marriage-Contract — Conquest — Conveyance of Estate which Wife might Conquest and Acquire—Estate Falling under Trust — Accumulations of Income — Exchange.

A wife bound herself by an antenuptial marriage-contract to convey to trustees for the purposes of the marriage trust all estate, sums of money, &c., which she at any time thereafter might "conquest and acquire by purchase, succession, or otherwise," with a certain specified exception. By the provisions of the contract the wife was entitled to receive the whole income of the property conveyed by her to the trustees for her separate use, exclusive of her husband's *jus mariti* and right of administration.

Held that accumulations of income made by the wife previous to the dissolution of the marriage, and property purchased by her out of such accumulations, did not fall under the clause of conquest, but, as her own unfettered property, fell to be dealt with under her testamentary settlement.

Held also that where property was purchased with funds provided in nearly equal amounts by the husband out of his own funds, and the wife out of savings of income, and the title was taken to the husband and wife in conjunct fee and liferent, and to the survivor and issue of the survivor in fee, this property did not fall under the clause of conquest, in respect that it was not "acquired" by the wife until after the dissolution of the marriage by the predecease of the husband.

An estate purchased during the marriage with money which had been held under trust, created prior to the marriage, for the purchase of lands to be entailed, and which was not conveyed to the marriage-contract trustees, having been acquired by the wife in fee-simple during the marriage, pursuant to an agreement for disentail between the wife as heir of entail in possession and her son as heir-apparent, under which the wife conveyed certain other formerly entailed lands to the son in the event of his surviving her, *held* that the estate thus acquired by the wife in fee-simple did not fall under the clause of conquest, in respect that it had been acquired by her by way of exchange in accordance with a bargain presumably fair.

Marriage-Contract—Reserved Power of Disposal—General Testamentary Settlement—No Reference to Power—Succession—Trust.

By antenuptial marriage-contract a wife conveyed to the trustees a certain fund to be held by them "under trust, to be paid to such person or persons, and at such time or times, as I . . . by any writing or writings under my hand, or by my last will and testament shall direct." The wife died, leaving a general trust-disposition and settlement, which purported to deal with her whole estate but made no special mention of the fund in question. *Held* that the fund in question was effectually disposed of by the testamentary settlement.

Succession — Legitim — Right in Mother's Estate—Exclusion, Discharge, and Satisfaction—Married Women's Property Act 1881 (44 and 45 Vict. c. 21), secs. 7 and 8.

Section 7 of the Married Women's Property Act of 1881 enacts that the children of a wife "shall have the same right of legitim in regard to her moveable estate which they have according to the law and practice of Scotland in regard to the moveable estate of their deceased father, subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, and satisfaction thereof as the case may be."

By an antenuptial marriage-contract executed in 1848 it was provided that certain provisions therein made for the child or children of the marriage were to be "in full satisfaction . . . of all bairn's part of gear, executry, and everything else which they could respectively claim or demand by and through the decease of . . . their mother on any ground whatever."

The mother having died in 1899, *held* that a son of the marriage was not entitled to claim legitim from her estate.

By antenuptial marriage-contract dated 13th October 1848, entered into between Captain Dunbar and Mrs Phœbe Dunbar Dunbar, Mrs Dunbar conveyed to trustees, for the purposes therein specified, "All and sundry lands and estate, heritable bonds, adjudications, and all other heritable subjects of whatever kind or denomination, or wherever situated, presently pertaining to and belonging to me, or which I may acquire or succeed to during the subsistence of the said intended marriage, but excepting and reserving herefrom the foresaid estate of Seapark, already settled under strict entail as aforesaid." Without prejudice to the general conveyance she proceeded to convey to the trustees certain specified subjects and effects, including all the household furniture belonging to her in virtue of a bequest in her favour by her brother, the then deceased John Dunbar of Seapark, or which had been otherwise acquired by her since his death; and "*in the second place*, not only the rents, maills, and duties of the said entailed lands and estate of Seapark, in so far as is competent to me the said Miss Phœbe Dunbar to assign and convey the same under the said deed of entail, but not otherwise, and that from and after the date of these presents, but also the free interests, dividends, and profits of the said sum of £20,000 sterling, payable to and exigible by me as heir in possession of the

said entailed estate of Seapark in so far as not already paid or accounted for to me, and hereafter until the said principal sum shall be invested in lands and heritages as aforeaid: *Item*, the rents, maills, and duties of such lands and heritages to be so acquired and settled to become due to or exigible by me from and after the date of my entry to such lands and heritages under or in virtue of the deed or deeds of entail to be granted by the said trustees of the said John Dunbar, Esquire, in terms of the directions to that effect in his said trust-disposition and deed of settlement partly above narrated, but always subject to the terms of such deed or deeds of entail: *In the third place*, the residue of the personal estate of the said John Dunbar, Esquire, bequeathed to me as aforesaid, to the extent of the sum of £2000 sterling, and of eleven shares of the stock of the Aberdeen Railway Company, and ten shares of the Great North of Scotland Railway Company, and also ten shares of the stock of the Deeside Railway Company, still under the management of the said trustees and executors, with the whole interest, profits, and dividends due or to become due on the said sum and stocks forming part of the said residue: *And in the fourth place*, the sum of £12,800 sterling or thereby belonging to me the said Miss Phœbe Dunbar, or to which I am entitled from or out of the estate of the said Duncan Dunbar, Esquire, deceased, my father, under his last will and testament above referred to, and as one of his next-of-kin as aforesaid, and which sum is invested in the purchase of the sum of £7456, 14s. 10d. bank 3 per cent. annuities, and £5924, 4s. 9d. 3¼ per cent. reduced annuities, standing in the names of the said John Masson, Richard Roy, and Duncan Dunbar as executors and trustees of the said estate, who have sanctioned and approved of this present settlement; and also the share or portion to which I am or may be by the said last will and testament or otherwise entitled of the principal sum of £6241 bank 3 per cent. consolidated annuities thereby set apart for the purpose of providing an annuity to Mrs Phœbe Bailey, otherwise Dunbar, my mother; together also with all further sums or interests to which I am at present or may through any event or contingency or in any way hereafter become entitled to from or in the estate, real and personal, of the said Duncan Dunbar, Esquire, my father, as one of the legatees or devisees under his said last will and testament, or as one of his children and nearest of kin as aforesaid, excluding always the *jus mariti* and all power of administration, courtesy of Scotland, and all other right of the said Edward Dunbar, Esquire, my promised husband, or of any future husband of me the said Miss Phœbe Dunbar, as regards the several subjects, rents, sums, funds, and others generally and specially above conveyed, except as herein provided to him in the events after mentioned." It was further provided—"And further, I, the said Miss Phœbe Dunbar, with consent of my said promised husband, and I, the said Edward Dunbar, Esquire, for myself, and we both with one consent, hereby bind and oblige ourselves to dispone, assign, convey, transfer, and make and set over, to and in favour of the said trustees and foresaids, All and sundry lands, heritages, and sums of money, funds, goods, and other estate, real and personal, which I, the said Miss Phœbe Dunbar, now have or at any time hereafter may conquest and acquire by purchase, succession, or otherwise, other than the heritages to be acquired and settled by the trustees and executors of the said John Dunbar, Esquire, as aforesaid upon trust, in the terms and for the general purposes (that is, apart from the particular settlements of the furniture and others in the mansion-house of Seapark, and of the fund forming part of the residue of the estate of the said John Dunbar, Esquire) of the said intended marriage, and of this settlement as after written."

With reference to the purposes of the trust it was provided that the trustees were to "pay to me the said Miss Phœbe Dunbar, or to permit and empower me to receive the whole of the foresaid rents, interest, profits, and dividends, and whole annual income of the said estates, properties, monies, or stocks, funds, and securities wherever secured or invested during all the days of my life for my own separate benefit and use, exclusive of the *jus mariti* and administration of my said promised husband or of any future husband as aforesaid."

A special provision with regard to the property specially conveyed in the third place is quoted in the Lord Ordinary's opinion.

Certain provisions were made for the child or children of the marriage, and it was declared that the provisions contained in the marriage-contract in favour of the child or children of the said intended marriage, "shall be in full satisfaction to him, her, and them of all bairn's part of gear, executry, and everything else which they could respectively claim or demand by and through the decease of me the said Miss Phœbe Dunbar, their mother, on any ground whatever, and not otherwise, goodwill excepted only."

In 1874 Mrs Dunbar Dunbar, as heir of entail in possession of certain lands held by her as heir of entail in possession under entails, entered into an agreement with her son John Archibald Dunbar Dunbar as apparent heir of entail under said entails, whereby in consideration of certain benefits John Archibald Dunbar Dunbar consented to the disentail of said entailed estates. In terms of this agreement Mrs Dunbar Dunbar conveyed the lands of Seapark and others to John Archibald Dunbar Dunbar in the event of his surviving her, and she conveyed the lands of Over Glen of Rothes and others to herself and her husband Edward Dunbar Dunbar "in conjunct fee, and to the survivor of them, and the heirs and assignees whomsoever of the survivor."

Captain Dunbar Dunbar died on 10th January 1898, and Mrs Dunbar Dunbar on 9th May 1899. She left a trust-disposition and settlement, and codicil thereto, dated

respectively 6th January and 29th April 1899, whereby she conveyed to trustees "All and sundry lands and heritages, and in general the whole estate and effects, heritable and moveable, real and personal . . . at present belonging or which shall pertain and belong or be owing to me at the time of my death."

An action of multiplepoinding was raised by Mrs Dunbar Dunbar's testamentary trustees, the fund *in medio* consisting of the estate to which they had confirmed and made up titles. Claims were lodged (1) by the judicial factor, who had been appointed in 1900 on the estate falling under the marriage-contract; (2) by Mrs Dunbar Dunbar's testamentary trustees; (3) by the Rev. John Archibald Dunbar Dunbar, the only surviving child of the marriage, and by certain others to whom it is unnecessary to refer.

The judicial factor claimed and, except the property specially conveyed in the third place, was admittedly entitled to all the funds expressly conveyed by the marriage-contract, so far as still extant and included in the fund *in medio*. He also claimed as falling under the marriage-contract the additions made to Mrs Dunbar Dunbar's estate which accrued during the marriage.

His claim as originally stated was "to the extent of the whole" of the fund *in medio*, "or otherwise to that part thereof which formed the estate of Mrs Dunbar Dunbar at the dissolution of her marriage on 10th January 1898."

He, however, abandoned the first alternative of his claim.

He pleaded—"On a sound construction of Mrs Dunbar Dunbar's marriage-contract, her whole estate, real and personal, belonging to her at her marriage, or subsequently acquired by her, or (*separatim*) subsequently acquired by her during the subsistence of her marriage, having been assigned to the trustees therein named, the present claimant, being now in right of the said trustees, should be ranked and preferred in terms of his claim."

The testamentary trustees maintained—"(2) The estate which forms the fund *in medio* in the present process is not estate comprehended in the conveyance to the trustees under the said contract of marriage, or if so conveyed, does not fall under the destination to heirs of the marriage, but is held by the said trustees subject to the late Mrs Dunbar Dunbar's power of disposal. Considered with reference to the argument for these claimants, the said estate may be classed as consisting of the four items enumerated in the following article. (3) These items are—*Item* 1. The estate of Glen of Rothes, held in fee-simple by the testatrix at the time of her death, and acquired by her for onerous consideration under agreement with her son as heir apparent of entail. *Item* 2. Estate specified in the contract of marriage, *videlicet:*—under the third article of the particular conveyance to the trustees, as to which estate a power of *mortis causa* disposal is specially reserved in the said contract. This estate was, shortly after the date of the marriage, and at the request of Mrs Dunbar Dunbar and her husband, made over to her by the trustees, and was immixed with her other funds. *Item* 3. Estate to the value either of £10,000, or of such other sum, less or more, as may be proved to represent the income which accrued to the testatrix during the sixteen months which elapsed between the dissolution of the marriage by the death on 10th January 1898 of her late husband Captain Edward Dunbar Dunbar and her own decease on 9th May 1899. *Item* 4. The whole balance of the fund *in medio*, whether heritable or moveable, so far as not comprehended under all or any of the items foresaid, all of which balance of the fund represents accumulations of and savings from the income which was enjoyed by the testatrix during the subsistence of the marriage."

They accordingly claimed the whole of the fund *in medio*.

The Rev. Archibald Dunbar maintained that in so far as the judicial factor was not preferred to the estate, and it was moveable, he was entitled to one-half thereof by virtue of his right of legitim, and claimed accordingly.

He pleaded—"In respect of his right of legitim the claimant is entitled to be preferred in terms of his claim."

The Lord Ordinary (KINCAIRNEY) allowed a proof on certain points, to which it is unnecessary to refer.

There was also a joint-minute of admissions by the parties, the import of which, so far as was necessary for the decision of the case, sufficiently appears in the opinion of his Lordship *infra*.

The Lord Ordinary on 19th November 1901 pronounced the following interlocutor:—"Finds (1) that the provision of conquest does not extend to the funds and estate vested in the testamentary trustees of the late Mrs Dunbar Dunbar, which consisted of or were derived from the accumulation of income to which Mrs Dunbar Dunbar was entitled; (2) that said provision of conquest does not extend to accumulations after the dissolution of the marriage, or to estate acquired after the dissolution of the marriage; (3) that in particular it does not extend to the estate of Barluach; (4) that the sum of £2000 and the stock of the Aberdeen Railway Company, or the stock which has been substituted therefor, has been effectually conveyed and disposed of by the settlement of Mrs Dunbar Dunbar; and (5) that the lands of Glen of Rothes do not fall under the said provision of conquest: Repels the plea-in-law for the judicial factor, and for the Reverend John Archibald Dunbar Dunbar: Appoints the cause to be enrolled for application of these findings."

Opinion.—"This multiplepoinding brings into Court the estate conveyed by Mrs Dunbar Dunbar, of Sea Park, in the county of Elgin, to her trustees by her trust-disposition and settlement, dated 10th January 1898. The estate is large, and the questions raised are important and complicated. Claims have been lodged (1) by the judicial factor on the trust estate constituted by the antenuptial marriage-con-

tract executed by Captain Dunbar Dunbar and her on 13th October 1848; (2) by the trustees under her trust-disposition and settlement, the nominal raisers; (3) by the Reverend John Archibald Dunbar Dunbar, only child of the marriage, the real raiser; and also by certain other parties whose claims are comprehended in the claim of the testamentary trustees, and for whom no separate argument was offered.

"As matters have happened, the Reverend John Archibald Dunbar Dunbar is the only person who is beneficially interested in the marriage-contract, and therefore the claim by the judicial factor is in effect a claim for him. He has, however, a separate claim for legitim on his mother's free moveable estate, in which he is not represented by the judicial factor, and which has necessitated a separate claim for him. It raises a question perfectly distinct from the question between the judicial factor and the testamentary trustees. No question is raised in this case about the trust-disposition and settlement of Mrs Dunbar Dunbar, by which the bulk of her estate is carried past the Reverend Mr Dunbar Dunbar because she considered him sufficiently provided for otherwise.

"There is no claim for the representatives of Captain Dunbar Dunbar, Mrs Dunbar Dunbar's husband, and therefore the litigation is wholly between the judicial factor and the testamentary trustees, except one separate but important question raised by Mr Dunbar Dunbar.

"Captain and Mrs Dunbar Dunbar were married on 17th October 1848, having executed an antenuptial marriage-contract on 13th October 1848. The marriage was dissolved by the death of Captain Dunbar Dunbar on 10th January 1898, and Mrs Dunbar Dunbar died on 9th May 1899.

"By the marriage-contract, which cannot, in my opinion, be regarded as a universal settlement, Mrs Dunbar Dunbar conveys to trustees, now represented by the judicial factor, all the heritable estate then belonging to her, or which she might acquire or succeed to during the subsistence of the marriage, excepting the entailed estate of Sea Park. She proceeds, without prejudice to the general conveyance, to convey certain specified subjects and effects, which are to a large extent extant in the form in which they were then conveyed. Some of the investments have, however, been altered, but have been identified, and part of these funds were in the possession of Mrs Dunbar Dunbar at her death, were conveyed by her testament, and are included in the fund *in medio*. The estate possessed by her at her death and conveyed to her testamentary trustees greatly exceeded the funds and estate expressly conveyed by her marriage-contract, and the main question in this case relates to such excess.

"I heard a debate on the case in the Procedure Roll, but I found myself unable to dispose of the questions raised without ascertainment of several facts, and I allowed a proof, indicating in a note the facts which it seemed necessary to ascertain.

"The parties have since adjusted an extremely elaborate minute of admissions, and have led a short supplementary proof, and the case now falls to be decided on the minute and the proof.

"It is not, however, in a very satisfactory position yet, because, while it is a multiplepoinding in which a condescendence of the fund *in medio* has been put in, claims have been lodged, and proof applicable to these claims has been led, there has been no interlocutor ascertaining or approving of the fund *in medio*, and therefore it is impossible to do more at present than pronounce findings determining the respective rights of the claimants. But they were agreed if that were done there would not be much difficulty in adjusting the fund and in applying the findings to the fund adjusted.

"The judicial factor is admittedly entitled to all the funds expressly conveyed by the marriage-contract, and still extant or capable of being identified with the estate so conveyed, with, I think, one exception (the subjects conveyed in the third place), to be afterwards noticed, and he claims all such estate so far as included in the fund *in medio*; but he claims besides, as falling under the marriage-contract, the additions to Mrs Dunbar Dunbar's estate which accrued during the marriage, and which form the bulk of the fund *in medio*. His claim on record is for the whole fund *in medio*, or for that part thereof which formed her estate at the dissolution of the marriage. At the debate his claim was restricted to this alternative, and all claim was abandoned to any funds by which Mrs Dunbar Dunbar's estate had been increased between the dissolution of her marriage on 10th January 1898 and her death on 7th May 1899. He admitted that all such estate was carried by Mrs Dunbar Dunbar's testament.

"No amendment of the record was made on account of this admission, and I have doubted whether I ought not to have required such an amendment. But the case is intricate, and the precise extent of the concession not perhaps obvious at first, and I think it better to take the case on the footing that such was the condition of the argument.

"The judicial factor's claim is of course based on special clauses in the marriage-contract, which I will immediately consider.

"The testamentary trustees also claim the whole fund *in medio* in virtue of the conveyance in Mrs Dunbar Dunbar's testament of all the estate belonging to her at its date, or which might belong to her at her death; but I understood their counsel to concede that they could not claim estate expressly conveyed by the marriage-contract or investments which could be identified with the funds so conveyed, with the exception already referred to.

"The dispute between the judicial factor and the testamentary trustees is thus in regard to the funds and estate by which Mrs Dunbar Dunbar's estate had been increased during the marriage, and that is the principal and primary question raised.

"I have said that in this question the judicial factor represents the Reverend Mr Dunbar Dunbar. The separate claim for him being for legitim is for 'one-half of the residue of the fund *in medio*, so far as the same is moveable, after satisfying the claims of the judicial factor.'

"It will be convenient, however, to take that last point separately, and to confine attention in the first place to the question between the judicial factor (in the interest of the Reverend Mr Dunbar Dunbar) and his mother's testamentary trustees.

"The claim of the judicial factor is founded on the following clause of conquest, which in the marriage-contract follows the conveyance of special funds and estate, and is as follows:—'And further, I the said Phœbe Dunbar, with consent of my said promised husband, and I the said Edward Dunbar, Esquire, for myself, and we both with one consent, hereby bind and oblige ourselves to dispone, assign, convey, transfer, and make and set over to and in favour of the said trustees and foresaids, all and sundry lands, heritages, and sums of money, funds, goods, and other estate, real and personal, which I the said Phœbe Dunbar now have, or at any time hereafter may conquest and acquire by purchase, succession, or otherwise, other than the heritages to be acquired and settled by the trustees and executors of the said John Dunbar, Esquire, as aforesaid, upon trust, in the terms and for the general purposes (that is, apart from the particular settlements of the furniture and others in the mansion-house of Sea Park, and of the fund forming part of the residue of the estate of the said John Dunbar, Esquire) of the said intended marriage and of this settlement, as after written: Surrogating hereby and substituting the said' . . . trustees . . . 'in the full right and place of the haill premises; with power to them and their foresaids to uplift and receive, and if necessary to call for and pursue for the rents, interests, profits, and dividends, principal sums, and others foresaid, and to grant receipts, discharges, assignations, or other conveyances of the whole premises as fully in all respects as I the said Miss Phœbe Dunbar could have done myself before granting these presents, or previous to contracting or solemnising the said marriage, or as we the said contracting parties might have done thereafter, and to settle or reinvest the same from time to time as may be necessary or expedient, any reinvestments of the sums now in the British funds on other and different securities during the lifetime of me the said Miss Phœbe Dunbar being made only with my consent in writing; and all the settlements and reinvestments being always for the trusts and purposes before mentioned and hereinafter specially set forth.' I have thought it convenient to quote the clause at length, but the words of special importance are the words by which Miss Dunbar conveys to the trustees all the estate which she 'at any time hereafter may conquest and acquire by purchase, succession, or otherwise.'

"Special reference was also made to the following important clause with reference to the purposes of the trust by which the property conveyed was declared to be conveyed to the trustee 'upon trust to pay to me the said Miss Phœbe Dunbar, or to permit and empower me to receive the whole of the foresaid rents, interests, profits, and dividends, and whole annual income of the said estates, properties, monies, or stocks, funds, and securities, wherever secured or invested, during all the days of my life, for my own separate benefit and use, exclusive of the *jus mariti* and right of administration of my said promised husband, or of any future husband as aforesaid.'

"I think this a very difficult question not satisfactorily decided by authority, but confining attention to the clanse of conquest I think the preponderance of authority favours the view that such savings did not fall under the conveyance of conquest.

"The parties have endeavoured by their elaborate minute to ascertain and determine the character and origin of the accessions to Mrs Dunbar Dunbar's estate during marriage to which this case relates. The most important article is the 23rd, which is as follows:— 'That the whole estate left by Mrs Dunbar Dunbar at the time of her death, with exception of the Caledonian Railway Stocks mentioned in article 7 hereof, and the lands of Glen of Rothes as originally entailed, is to be held to have been made from the accumulation of income to which Mrs Dunbar Dunbar was entitled, except so far as it represents the £2000 mentioned in article 6 hereof, and except further, so far as Captain Dunbar Dunbar may be held to have contributed thereto, by the remittance from Messrs Holt & Company of £4900 mentioned in article 17 hereof. It is admitted, however, that the Seapark furniture did not form part of the estate left by Mrs Dunbar Dunbar.' It is to be regretted that this important article was not more simply expressed, but the purport of it is that the parties are agreed that with certain exceptions (to be afterwards considered) the whole fund *in medio* consists of savings from Mrs Dunbar Dunbar's income, and the question is, whether such savings as at the dissolution of the marriage fall under the clause of conquest above quoted, and now fall to be paid to the judicial factor for behoof (as already noticed) of the Reverend Mr Dunbar Dunbar, or whether they formed unsettled separate estate belonging to Mrs Dunbar Dunbar and at her disposal.

"The judicial factor did not contend that the marriage-contract trustees could lay hold of the rents or interests of the estate while accruing, much less that it was their right and duty to capitalise them, and to pay only the interest of them to Mrs Dunbar Dunbar. On the contrary, it was I think conceded—and at anyrate I think it clear—that Mrs Dunbar Dunbar was entitled to receive and enjoy and expend, if she chose, the whole income. I think that settled by ample authority, which, as the position was

not disputed by the judicial factor, it is not necessary to quote. Nor was it maintained for the judicial factor that there was any particular time on the lapse of which the trustees could insist on the savings being paid to them. It appears to me that not only was it within the right of Mrs Dunbar Dunbar to spend her annual income as it accrued, but that she might, if she so chose, expend the balance of the income of one year in meeting the expenditure of the next. At the debate in the Procedure Roll it was contended, or at least suggested, that the savings, although not the property of the trustees while they were in the form of money in the possession of Mrs Dunbar Dunbar, or were lodged in bank on current account, yet became so when they were placed on permanent investments as stocks or property, and certain English authorities were referred to in support of that position, in particular, *Bendy*, 1895, 1 Ch. 109. But that does not seem to be in accordance with other English cases (see *Finlay*, 1897, 1 Ch. 721), and was little insisted on in the last argument in which very little was said about the English cases, and I think that view cannot be maintained. The argument very properly turned mainly on Scotch law and on the special terms of the deed, and it was maintained for the judicial factor that although a provision of conquest during the marriage might not deprive the granter of his or her control during the marriage over the funds acquired during the marriage, yet at the dissolution of the marriage the position of matters was altered, and the title of the trustees then attached to the accessions to the estate.

"I am not sure what the view of the judicial factor was as to the powers of Mrs Dunbar Dunbar after her husband's death over the funds which had then accumulated. But I think he required to maintain that she then lost her power, and that the savings then accresced to the estate specially conveyed by the marriage-contract, and that her right in these funds was reduced to the interest on them, her right to subsequent payments being wholly uncontrolled by the marriage-contract.

"It was contended for the judicial factor that conquest, when provided in a marriage-contract, comprehended whatever was 'acquired, whether heritable or moveable, during the marriage by industry, economy, purchase, or donation'—Bell's Prin. sec. 1974—a definition which included savings from income, and which was said to be supported by *Diggens* v. *Gordon*, March 7, 1865, 3 Macph. 609, *aff.* May 20, 1867 (H.L.), 5 Macph. 75; and I cannot help thinking that this contention has great force.

"The judicial factor maintained that the point was ruled in his favour by *Arthur & Seymour* v. *Lamb*, June 30, 1870, 8 Macph. 928, 7 S.L.R. 592. That was a case about the antenuptial contract of Sir Charles Lamb, which was remitted by the Court of Chancery for the opinion of the Court of Session. By his marriage-contract Sir Charles Lamb conveyed to trustees the one-half of the estate already belonging to him, or which 'he shall conquest or acquire or succeed to in fee-simple during the subsistence of the said intended marriage.' The action was raised during Sir Charles' life, but after the death of his wife. The Court answered, *inter alia*, that Sir Charles thereby 'provided to himself in liferent and the children of the marriage in fee one-half of his whole estate, including not only what then belonged to him, but all that he might acquire during the subsistence of the marriage by his own industry and economy, by succession, or otherwise.' This, it was said, amounted to an express declaration by the Court that a provision of conquest included acquisitions by economy, which was the present case. The Court proceeded to say that Sir Charles remained during his life the absolute owner of his whole estate, subject only to an obligation to leave one half of it to the children of the marriage—a deliverance which seems consistent with the judicial factor's argument.

"This opinion appears at first sight to be in favour of the judicial factor, subject to this distinction that in that case there was no trust-deed or conveyance to trustees, but only an obligation on the husband to make a provision. In the present case the provision of conquest is by the wife in favour of trustees. But it is more material to remark that the case is reported without opinions. I have examined the Session papers, which are very voluminous, and I find besides a careful examination of the case by Lord Watson in *Macdonald* v. *Fraser*, July 24, 1893, L.R., App. Cas. p. 642. I am unable to see either from the report or the Session papers or Lord Watson's judgment that the question whether savings from income fell under a clause of conquest was raised or discussed in that case. The question between the parties was altogether different, and appears to have related to the vesting of the estate in a child of the marriage.

"On the other hand, the testamentary trustees founded on *Boyd's Trustees* v. *Boyd*, July 13, 1877, 4 R. 1082, 14 S.L.R. 637; *Young's Trustees* v. *Young*, May 22, 1885, 12 R. 968, 22 S.L.R. 643; and *Young's Trustees* v. *Young*, November 1, 1892, 20 R. 22, 30 S.L.R. 65.

"In *Boyd's Trustees* the intending wife by antenuptial contract conveyed to trustees a sum of £2000 and all estate which she 'may conquest and acquire during the subsistence of the said marriage by purchase, succession, bequest, or otherwise.' During the marriage she acquired, *inter alia*, the annual proceeds of the residue of her father's estate. In a special case between the trustees and herself and her husband they submitted to the Court the questions whether the trustees were entitled to demand that the annual proceeds of the residue should be paid to them for the purposes of the trust, and if so, whether they were bound to pay these proceeds to Mrs Boyd as income or to capitalise them. The Court answered the former question in

the negative, and found it unnecessary to answer the latter. The rubric sufficiently expresses the judgment to the effect that life interests and annuities did not fall under the general conveyance of *acquirenda*, such a clause being read only as referring to principal sums. That case differed in important particulars from the present. The clauses of conquest are, it is true, substantially the same, but in the case of *Boyd* the question was raised and the judgment given while the marriage subsisted, not, as here, after it was dissolved; and a judgment as to the effect of a clause of conquest during the marriage does not by any means determine the effect of such a clause after the dissolution of the marriage.

"Further, the case did not relate to accumulations of income or savings from income, but to liferent rights, although it might be argued that if a liferent right was not embraced in a provision of conquest the accumulations derived from it could not be so either.

"The differences between this case and the case of *Boyd* seem to me material, and I have certainly a difficulty in applying the judgment in *Boyd* as an authority.

"The earlier case of *Young*, 12 R. 968, was to much the same effect. There by an antenuptial contract the intending wife conveyed to trustees all which she might acquire during the subsistence of the marriage from certain sources specified. She acquired from one of these sources a liferent interest in a residuary estate. It was held that the conveyance was of capital only, and that the income was payable to the wife. The report bears that the Court adopted the reasoning of the Lord Justice-Clerk in the case of *Boyd*. The same point was thus ruled in both Divisions.

"The later case of *Young's Trustee* v. *Young*, November 1, 1892, 20 R. 22, is more in point, although there was no decision on the question. The case was about the antenuptial contract of David Young. By that contract his intending wife disponed to him and herself and the survivor as trustees all the estate belonging to her 'or that shall pertain or belong to her during the subsistence of the said marriage.' The marriage was dissolved by the death of the husband, and afterwards the widow also died leaving a trust-disposition and settlement; and the question arose between the marriage-contract trustees and the testamentary trustees of the same nature as in this case. The plea of the testamentary trustees, who were the defenders, was, 'The properties in question having been acquired by Mrs Young and paid for by her money, saved by her from her separate estate, the defenders should be assoilzied'—that is to say, that the estate so acquired did not pass to the marriage-contract trustees—substantially the same plea as is pleaded in this case by the testamentary trustees. The Lord Ordinary (Lord Stormonth Darling) in effect sustained that defence. From his opinion it appears that his Lordship held it proved that the part of Mrs Young's estate in question had been acquired by her thrift in saving from the means which formed her separate estate, and he held that these savings were not '*acquirenda* in terms of the marriage-contract.' Various passages in his opinion are directly applicable to the present case. He observes that 'any possible construction of a contract is to be preferred to one which says to the wife—"You may spend your income, but if you save it you shall have no right to dispose of it after your death." He then refers to the case of *Morris* v. *Anderson*, June 16, 1882, 9 R. 952, 19 S.L.R. 716, and to *Boyd* and *Young*, in which he says that it had been decided that a clause of *acquirenda* does not cover the life interest to which a wife succeeds during the subsistence of the marriage. 'If this be so,' he proceeds, 'as to life interests coming to the wife from sources outside the marriage-contract, I think the rule applies far more forcibly to savings from the income of the marriage-contract funds.' These opinions bear so closely on this case that if his judgment had been a judgment of the Inner House I would have had no choice but to follow it as a decision absolutely in point. But the judgment was recalled, so that it cannot be founded on by the testamentary trustees as a judgment in their favour. But the Judges in the Inner House differed from the Lord Ordinary only on the facts but not on the law. They held that it was not proved that the funds in question were derived from Mrs Young's savings from her estate, and that the contrary was to be presumed.

"The Lord President said—'The success of the defenders depends on whether they have proved affirmatively that the properties in dispute were acquired with these monies of Mrs Young'—implying, of course, that if that had been proved or admitted they would not have fallen under the marriage-contract. Lord Adam agrees with the Lord Ordinary as to the law, and Lord M'Laren, without expressing any opinion on that point, concurs in the judgment. Lord Kinnear was absent. The case therefore, although not a judgment in favour of the testamentary trustees in this case, is a very weighty authority in that direction, differing little in point of authority from an actual judgment.

"It will be observed that Lord Stormonth Darling regards the cases of *Boyd* and *Young* (as to savings during the marriage) as applicable to the case of savings after the dissolution of the marriage, and no dissent from that view was indicated in the Inner House.

"I am free to confess that I have very great doubt on that point. I do not see clearly why the savings from a wife's liferent estate should not fall under the ordinary definition of conquest as expressed in the passage from Bell's Prin. above quoted; and but for this last case of *Young* I would have been inclined to hold that the case of *Boyd* and the earlier case of *Young* did not apply. But the opinions in the later case of *Young* are so closely applicable to this case that I think I am entitled, and perhaps bound, to waive my doubts and to follow them.

"In a case of this magnitude and complexity my judgment is sure to be taken to the Inner House, where this matter will be considered.

"So far I have dealt only with the principal clause of conquest in the marriage-contract. But there are other clauses which should be noticed. There is a clause of conquest relating to heritage only which does not, so far as I see, affect the construction of the clause under consideration, and to which no separate effect can be given.

"I have already quoted a clause which directs the trustees to pay the interests of the properties mentioned in the marriage-contract to Mrs Dunbar Dunbar for her own separate benefit and use. The testamentary trustees founded on that clause, and I think they were entitled to do so, and that it favours the view that the interests after they were paid to Mrs Dunbar Dunbar remained her separate personal estate exclusive of her husband's *jus mariti*.

"There is a clause which provides for the event of the death of both spouses without children, and which bears to exclude the representatives of Captain Dunbar from any share of the trust funds, 'or of such other sums, funds, and personal estate' acquired by Miss Phœbe Dunbar during the marriage, 'though not included in the said trust,' . . . 'and which may be in communion betwixt me and the said Edward Dunbar, Esquire, at the time of the dissolution of the marriage by his predecease.' The purpose and effect of this clause is not very clear, but it seems to imply that the parties to the contract recognised that there might be estate acquired by Mrs Dunbar Dunbar which did not fall within the clause of conquest or the marriage-contract trust, which appears inconsistent with the judicial factor's case.

"I understood the judicial factor to contend that he derived some advantage in this part of the argument from the use of the word 'purchase' in the provision of conquest. It was argued that it was intended to include in the conquest estate purchased by Mrs Dunbar Dunbar with savings from her income, because she had no other estate wherewith to purchase, all the estate which she possessed at the date of her marriage having, it was said, been conveyed to her marriage-contract trustees (a very doubtful assumption). But I am unable to give that effect to this word. It is a word of style, which at one time was used in clauses of provision of conquest. It was in the clause of provision considered in the case of *Boyd;* and I think that it cannot fairly be read as referring to purchases made with Mrs Dunbar Dunbar's estate. These could not be said to be acquisitions by her. Acquisition by purchase seems to refer to some transaction by which her estate was increased, and something became her property which was not so before. I am hardly prepared to put any satisfactory meaning on this word, but I am unable to hold that it adds anything to the arguments that savings from income were included in the provision of conquest under consideration.

"The result is that, deferring to what I consider the preponderance of judicial authority, I decide that the fund *in medio*, so far as it admittedly consists of savings from Mrs Dunbar Dunbar's income, does not fall under the clause of conquest, but must be held to have belonged to the testamentary trustees.

"There are three items of the estate which are treated as exceptional in the argument. These are—(1) the estate of Barluach; (2) a sum of £2000 and certain railway shares, which are dealt with together in an exceptional manner in the marriage-contract; and (3) the lands of Glen of Rothes.

"1. The estate of Barluach was purchased in May 1877 for about £10,000 (article 19). It was paid for by Mrs Dunbar Dunbar's cheque, dated 11th May 1877, on her current account with the British Linen Company Bank at Forres, with which bank Mrs Dunbar Dunbar was accustomed to deal, and into which account she was accustomed to pay the dividends and interests due to her (article 21). But on 2nd May 1877 a sum of £4900 was paid into this account by (as I understand article 17) Captain Dunbar Dunbar. This sum represented the price of Captain Dunbar Dunbar's commission, which he had sold in 1853. It has not been said that any part of the fund *in medio* belongs to the representatives of Captain Dunbar Dunbar. But it was contended for the judicial factor, and I think reasonably, that it should be held that the one-half of the price of Barluach was contributed by Captain Dunbar Dunbar, and that the other half was paid out of Mrs Dunbar Dunbar's savings; and that his conclusion was that, even if it should be held that the latter half was not included in conquest, the former half ought to be included as being (assuming it to form part of Mrs Dunbar Dunbar's estate, which is a necessary assumption) an acquisition derived from Captain Dunbar Dunbar. The answer of the testamentary trustees was that this property, at least the part of it paid for by Captain Dunbar Dunbar, was not acquired by Mrs Dunbar Dunbar until the death of Captain Dunbar Dunbar, and that therefore the acquisition of it by her was not during the marriage, but after the dissolution of it, and if so, did not, as was conceded, fall within the clause of conquest; and it seems to me that the answer is well founded. The title was taken to Captain Dunbar Dunbar and Mrs Dunbar Dunbar in conjunct fee and liferent, and to the survivor and heirs of the survivor in fee. If the whole price had been paid by Mrs Dunbar Dunbar such a title might have carried the fee to her; but I do not think that could be so when the price was contributed by both spouses in nearly equal parts. I think that, assuming that to be so, the property belonged to the spouses in conjunct fee during the marriage, or at all events did not belong to the wife, but that the full fee vested in the survivor on the dissolution of the marriage. Perhaps no precise authority was quoted; but that conclusion seems consistent with the law

as laid down in Erskine, iii. 8, 36; *Mackellar* v. *Marquis*, December 4, 1840, 3 D. 172; *Myles* v. *Calman*, February 12, 1857, 19 D. 408; *Brough* v. *Adamson*, July 2, 1887, 14 R. 858, 24 S.L.R. 616. The cases are carefully and usefully collected in Craigie's Law of Conveyancing, Heritable Rights, p. 568.

"I think, therefore, that the estate of Barluach should not be withdrawn from the fund *in medio*, but should be held to have passed to the testamentary trustees.

"2. The question as to the sum of £2000 and the railway shares is very peculiar. They formed portions of the residue of the estate of Mrs Dunbar Dunbar's brother, and are conveyed in the third place to the marriage-contract trustees. The £2000 no doubt now appears as Mrs Dunbar Dunbar's personal estate, and the railway shares are now represented by Caledonian Railway stock, and are entered in the state of the fund *in medio* in two items of the value of £781 and £22.

"The £2000 and the railway stocks were certainly conveyed to the marriage-contract trustees, and are not *acquisita* of any kind. The question about them is totally different. Although conveyed to the marriage-contract trustees, they were not conveyed for the purposes of the trust-deed or under the destinations of the trust; because a subsequent clause of the marriage-contract provides that the trustees should hold them (the £2000 and the shares) 'under trust, to be paid to such person or persons and at such time or times as I the said Miss Phœbe Dunbar, by any writing or writings under my hand or by my last will and testament shall direct.' The question is, whether these effects fall under Mrs Dunbar Dunbar's testament, which purports to convey all her estate, but which makes no mention of either the £2000 or the shares. I am of opinion that they do. The case is very peculiar. It does not raise a question about the exercise of a power or about the alteration of any previous destination, because there was no destination. The money and shares were conveyed to the trustees, who are told to pay them according to the order of the truster. They were not told to apply them for the purposes of the trust if they got no other directions. They were left with no instructions if the truster did not choose to give them. I think they were conveyed by the testamentary deed, and indeed must have been, unless it could be maintained that they formed intestate estate, which has not been pleaded or maintained.

"3. The third special question, that as to the lands of Glen of Rothes, is very complicated and novel. The facts are stated in articles 2, 3, and 4 of the minute of admissions, and seem to be as follows:—There was a sum of £20,000 which John Dunbar, brother of Mrs Dunbar Dunbar, by a deed, dated and recorded before her marriage with Captain Dunbar Dunbar, directed to be employed in the purchase of lands to be entailed on the same heirs as were called by the entail of Sea Park. In 1869 the lands of Glen of Rothes were purchased at the price of £13,640, 12s. £11,755, 7s. 6d. of that price was paid out of the foresaid £20,000, and the balance was provided by a cheque on Mrs Dunbar Dunbar's account with the British Linen Company's Bank at Forres. A portion of the whole lands of Glen of Rothes corresponding to the sum of £11,755, 7s. 6d. was entailed as directed, and these lands were possessed under that title until 1874. Had they stood on that title at Mrs Dunbar Dunbar's death, of course these lands would not have formed any part of her estate, but would then have passed to the Reverend Mr Dunbar Dunbar as next heir of entail. But on 8th October 1874 an agreement was entered into between Mr and Mrs Dunbar Dunbar on the one part, and the Reverend Mr Dunbar Dunbar on the other, by which it was agreed that Mrs Dunbar Dunbar's estates should, so far as entailed, be disentailed, and that she should dispone to him the lands of Sea Park and Kinloss, and that she should with his consent dispone to herself in fee-simple the lands of Glen of Rothes, and that he should also cancel a bond of annuity in his favour. This agreement was carried into effect, and, in implement of it, Glen of Rothes, so far as held by Mrs Dunbar Dunbar under entail, was conveyed by her to herself and her husband in conjunct fee, and to the survivor of them, and the heirs and assignees whomsoever of the survivor, and they were held by that title at the dissolution of the marriage, and also at the death of Mrs Dunbar Dunbar.

"The first question is—Did the lands of Glen of Rothes, to the extent to which they were paid for out of the fund provided by John Dunbar, brother of Mrs Dunbar Dunbar, form estate which the judicial factor is entitled to claim? They are, on the other hand, claimed by the testamentary trustees as part of Mrs Dunbar Dunbar's estate not falling under the marriage-contract.

"The judicial factor makes no special reference to the lands of Glen of Rothes in his pleadings. The testamentary trustees have pleaded that the Reverend Mr Dunbar Dunbar 'is barred *personali exceptione* from claiming the estate of Glen of Rothes, and any such claim on behalf of the heirs of the marriage is accordingly excluded.'

"The deed of John Dunbar by which the £20,000 was provided has not been produced, which is perhaps to be regretted, but no doubt the account of it in the marriage-contract may be taken as correct.

"The £20,000 is not part of the estate conveyed by the marriage-contract. Only the interest of it is conveyed. Perhaps this statement may be questioned, but my view is that it was treated as part of Sea Park. Any further interest which Mrs Dunbar Dunbar had in it as heiress of entail belonged to her before her marriage, and was not conveyed to her marriage-contract trustees.

"Hence I apprehend that the judicial factor cannot claim the estate of Glen of Rothes as representing the £20,000 under the express conveyance in the marriage-contract, but only, if at all, under the provision of conquest.

"I think that if the estate of Glen of Rothes had not been disentailed no claim could have been made in respect of it by the judicial factor. That would seem to follow from the case of *Boyd*, the earlier case of *Young*, and from the opinions in the later case of *Young*.

"I think further, that in the title to that estate it was, at the dissolution of the marriage, the property of Mrs Dunbar Dunbar, having in view the fact that no part of the price was supplied by Captain Dunbar Dunbar, but that all of it may be said to have come from her, at least from money in which no one had an interest except herself and her heirs.

"Was it conquest? I have come to think it was not. The lands were conveyed to Mrs Dunbar Dunbar in fee-simple, as the result of a bargain between herself and her son. She gave up to him her present interest in Sea Park and Kinloss, and he gave up to her all his right as next heir of entail to the Glen of Rothes estate. Presumably the exchange was an equal one—nothing to the contrary being suggested. Can it be said that her estate was increased by the bargain? Suppose that a man who had granted a marriage-contract with a clause of conquest should exchange one property which was not conveyed by the marriage-contract for another of equal value, could it be held that that other property would fall under the clause of conquest, although it in no respect increased his estate? I am unable to think so. I think such a property would not be conquest, but would come in the place of the property for which it was exchanged. I take this view certainly with diffidence, because no authority bearing on it one way or the other was quoted, and because I did not understand that any argument to that effect was stated for the testamentary trustees. They, I think, confined their argument to the plea of personal bar, which I am not able to sustain as stated. In truth, it is not a plea against the judicial factor at all, but would arise after he had been preferred. But it seems to me that if this estate of Glen of Rothes could be properly regarded as property acquired after the marriage-contract, and as otherwise falling under the provision of conquest, there was nothing in the agreement of 1874 which could prevent the application of that provision. I should not have been able to hold that the claim of the judicial factor, supposing it to be in the same position as a claim from the Reverend Dunbar Dunbar, was against the good faith of that contract, or that the contract interposed any personal bar to the claim.

"On these points, therefore, my judgment is for the trustees. I am of opinion—(1) That the lands of Barluach are rightly comprehended in the fund *in medio*, and were carried to the testamentary trustees; (2) That the sum of £2000 mentioned in the third place in the marriage-contract was comprehended in the conveyance in Mrs Dunbar Dunbar's testament, and does not fall to be deducted from the fund *in medio*, and that the Caledonian Railway stock, being the second and third items of the 'estate unrealised' in the statement of the fund *in medio*, represents the stock of the Aberdeen Railway Company, and were comprehended in the conveyance in the settlement, and do not fall to be withdrawn from the fund *in medio;* (3) That the lands of Glen of Rothes, so far as being or representing the entailed lands, do not fall to be conveyed to the marriage-contract trustees, but form part of Mrs Dunbar Dunbar's personal estate carried by her settlement.

"It follows that the whole estate left by Mrs Dunbar Dunbar mentioned in article 23, except the Seapark furniture, consists of savings from Mrs Dunbar Dunbar's income not carried by the marriage-contract, and is all carried by Mrs Dunbar Dunbar's settlement.

"That estate now consists of heritable property which is estimated in the statement of the fund *in medio* as of the value of £25,000. It is said to consist of Glen of Rothes and Barluach, with which I have already dealt, and of Forres House, property at Forres and Whiteinch, and village of Kinloss, which I presume fall under the general admission in article 23, and consist of property in the purchase of which Mrs Dunbar Dunbar invested the accumulations of her income. The estate consisted further of sums invested in consols and stocks, and in sums lodged in bank on deposit-receipts, and in corporeal moveables. I may state the value of these very roughly as something under £100,000, the precise amount remaining for subsequent adjustment and ascertainment.

"The opinion which I have expressed amounts to this, that all this fund *in medio*, so far as it is admitted to consist of savings from Mrs Dunbar Dunbar's income, or of the estate of Barluach or of Glen of Rothes, was the property of Mrs Dunbar Dunbar, and was not carried by the marriage-contract but was carried by her settlement, and that no deduction falls to be made in respect of the £2000 and shares mentioned in article 3 of the marriage-contract.

"Had I been able to hold that the savings from Mrs Dunbar Dunbar's estate fall under the clause of conquest I should have required to consider how far that conclusion would be modified by the destinations in the deposit-receipt, the certificates of stock, and the heritable estates about which there was argument. But in the view which I have thought myself bound to take, I do not think it necessary in this very lengthy opinion to follow that argument, because in truth all the titles and destinations seem in favour of the conclusion that the properties belonged to Mrs Dunbar Dunbar.

"The only question remaining is that about the claim of the Reverend Mr Dunbar Dunbar for legitim.

"The testamentary trustees have pleaded that this claim is barred because of Mr Dunbar Dunbar's election to take under his mother's settlement. But at the debate their plea (4) to that effect was withdrawn, and I shall therefore repel it of consent. There is therefore nothing to prevent Mr Dunbar

Dunbar from founding on the marriage-contract. Of course if he were to claim under his mother's settlement he could not claim legitim, because that deed, dated in 1899, declares its provisions to be in full of legitim. But of course that testamentary deed could not bar his claim for legitim, but only put him to his election, and therefore the only question under this claim relates to the marriage-contract.

"The claim is made in virtue of section 7 of the Married Women's Property Act 1881, which provides that the children of a wife 'shall have the same right of legitim in regard to her moveable estate which they have according to the law and practice of Scotland in regard to the moveable estate of their deceased father, subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, or satisfaction thereof as the case may be.'

"The claim for legitim, if well founded, is for one-half of the estate to which it relates. It is only for legitim after the claims of the judicial factor are satisfied—that is, for one-half of Mrs Dunbar Dunbar's moveable estate, so far as not falling under the marriage-contract and clause of conquest—that is to say, for one-half of the unsettled moveable estate. It does not affect the estate settled by the marriage-contract. Supposing it had been held or should yet be held that Mrs Dunbar Dunbar's savings constituted conquest, then the claim for legitim would be for one-half of the accumulations after the dissolution of the marriage, with the addition, it may be, of the money and stock mentioned in article 3 of the marriage-contract.

"The clause in the contract on which the testamentary trustees found as excluding legitim has been quoted. The words to be be interpreted are 'bairn's part of gear,' executry, and everything else which they could respectively claim through the death of their mother.

"The testamentary trustees maintain that the clause excludes the claim for legitim. It is first necessary to interpret the words.

"There is no doubt that the clause applies to Mr Dunbar Dunbar. It does so expressly. Further, there is no doubt that it refers to the death of his mother and not to the death of his father. The words certainly exclude him from all bairn's part of gear which he could claim through the death of his mother. So far there is no difficulty. But what is the meaning of bairn's part of gear? The phrase is generally used as synonymous with legitim, although not, I think, necessarily so. The judicial factor maintains that in this clause bairns' part of gear cannot mean legitim, because at the date of the deed no legitim was due on the death of a mother, and I rather think that view must be accepted, unless it could be held that the clause is merely a conveyancer's blunder, a view which I cannot take if I can avoid it, and which I am hardly inclined to take in this case, because the deed, although very verbose, clumsy, and cumbrous, is very careful, and I am inclined to think that the conveyancer omitted the word legitim of purpose as inapplicable to the succession to a mother, and intended by the phrase 'bairn's part of gear' such rights as children had at that date (being before the Act of 1855, 18 Vict. cap. 23) on their mother's death. What these precisely were I need not consider. I therefore do not read this clause as an express exclusion of legitim. It excludes, however, all claim of any kind which at its date could be made by a child in respect of his mother's death. But there is no express satisfaction or exclusion of legitim.

"I think, however, that had this deed been a settlement of a husband's estate and not of a wife's, there would not be the least doubt that legitim would have been excluded—M'Laren on Wills, p. 136; *Maitland* v. *Maitland*, 1843, 6 D. 244.

"The question is whether, that being so, a right to legitim has been conferred on Mr Dunbar Dunbar by the 7th section of the Married Women's Property Act 1881. There have been several decisions of the Court in regard to the effect of the Act. The last of these is a case which went to the whole Court—*Murray's Trustees* v. *Murray*, May 31, 1901, 38 S.L.R. 598, and in all of them considerable difficulty has been experienced. They have been chiefly under the 6th section relating to *jus relicti*, but the same considerations apply to the 7th section relating to legitim. The question in this case is in many respects more difficult than in any of these cases, but the conclusion which I have ultimately come to is that Mr Dunbar Dunbar has no claim for legitim. I think so chiefly because of the provision in the section that the right of children to legitim under that Act is to be subject to the same rules in regard to the exclusion of it as the claim for legitim on the moveable estate of a father. I think also that the 8th section leads to the same conclusion. It says that the Act shall not affect any contract between married persons. Now it is quite true that in this case the claim for legitim would not affect the estate settled by the marriage-contract. But then I think the agreement under the marriage-contract was that the heir of the marriage should get what the contract provided, and should get nothing more, and I think that if the claim for legitim were allowed the contract to that effect would be greatly affected.

"Reference was made in the argument to the cases in which it was held that an obligation to relieve from public burdens did not relieve from burdens imposed by supervening legislation, on which point the leading authority is, I think, the case of *Scott* v. *Edmund*, June 25, 1850, 12 D. 1077, but I have not been able to see the application of these cases, and need not examine them."

The Rev. Archibald Dunbar Dunbar reclaimed, and argued—(1) The clause of *acquirenda* in the marriage-contract covered accumulations of income by Mrs Dunbar Dunbar. It could not be said that money was acquired by her saving it as

long as she was alive, because at any time during her life she could have spent it. But whatever was left by her of her savings at her death represented acquisitions by her. The only difficulty was to say when this money was "acquired." The answer to that was—when it passed out of her power to spend it, *i.e.*, at the dissolution of the marriage by her husband's death. It was not maintained by the reclaimer that the marriage-contract trustees could have laid hold of the rents or interests of the estates while accruing. Mrs Dunbar Dunbar was entitled to spend her whole income, but since she chose not to spend it but to invest and accumulate it, it fell under the clause of *acquirenda*. The argument applied equally whether it was held that the term "conquest" was used in its strictly technical sense or if it was used merely as synonymous with "acquire." On the first alternative the authorities supported the view that "conquest" covered accumulations of income such as these—Bell's Prin. 1974; Ersk. iii. 8-43; *Diggens* v. *Gordon*, March 7, 1865, 3 Macph. 609, May 20, 1867, 5 Macph. (H.L.) 75; *Arthur & Seymour* v. *Lamb*, June 30, 1870, 8 Macph. 928, 7 S.L.R. 592. This last case exactly covered the present, and showed that "conquest" in a marriage-contract would cover all that was acquired "by industry, economy, purchase, or donation," during the subsistence of the marriage. The respondents' view would give no meaning to the words "acquire by purchase." How could she acquire by purchase if not out of savings from her income? There was no other source by which, as suggested by the Lord Ordinary, she could increase her estate. The Lord Ordinary would have apparently decided this point in the reclaimer's favour but for the decision in *Young's Trustees* v. *Young*, November 1, 1892, 20 R. 22, 30 S.L.R. 65. It was true that there was a decision by Lord Stormonth Darling in that case contrary to the reclaimer's argument, but it was not dealt with in the Inner House, and not being necessary for the decision of the case was *obiter*. The earlier cases on which the respondents founded were, as even the Lord Ordinary admitted, clearly distinguishable from the present one, and accordingly did not justify their reasoning. (2) *The Estate of Barluach.*—Part of the sum paid for this property was contributed by Captain Dunbar Dunbar, and accordingly, even if the amount paid by Mrs Dunbar Dunbar was not to be treated in accordance with the reclaimer's contentions as stated above, the sum of £4900 paid by Captain Dunbar Dunbar must be treated as conquest, since it was an acquisition derived by her from him. No claim had been made by his representatives to any interest in the property. It was clearly Mrs Dunbar Dunbar's, and to the extent of £4900 at any rate must be treated as conquest. (3) *The Lands of Glen of Rothes.*—The agreement in question was all in favour of Mrs Dunbar Dunbar. It was not a mere excambion—an exchange of a property which she had prior to her marriage for another, but an agreement under which she acquired in fee simple property which she had only in liferent. Her estate was increased by the bargain, and accordingly to that extent must be treated as conquest. (4) *The sum of £2000 and Railway Shares.*—These were not comprehended in the conveyance in Mrs Dunbar Dunbar's testament, which made no mention of them. (5) Assuming the reclaimer to be wrong in the first contention, then the Rev. John Archibald Dunbar Dunbar was entitled to legitim from his mother's moveable estate. The clause in the marriage-contract on which the respondents founded did not amount to exclusion of his right. Probably the conveyancer may have intended to exclude the rights of the children in any goods in communion; but under the marriage-contract, excluding the husband's *jus mariti*, and putting all the *acquisita* into the marriage-trust, there were no goods in communion. The reclaimer did not dispute that had the settlement in the marriage-contract been of the estate of a husband and not of a wife legitim would have been excluded. But Mr Dunbar Dunbar's right to legitim was founded upon the 7th section of the Married Women's Property Act of 1881. The exclusion of children's rights in the marriage-contract did not apply to a new right such as this. It could not be intended expressly to apply to a right which did not exist at the date of the contract. Parents in contracting as to the rights of a child could only give up rights which they knew as existing for a consideration which they knew. In the case of *Keith's Trustees* v. *Keith*, July 17, 1857, 19 D. 1040, the words of exclusion were just as wide as those here, but were held not to apply to a right which did not exist at the time, nor had any of the authorities gone to the length that a clause of exclusion dealing wholly with property outside the marriage-contract should affect a claim for legitim, and thus affect the marriage-contract—*Murray's Trustees* v. *Murray*, May 31, 1901, 3 F. 820, 38 S.L.R. 598; *Poë* v. *Paterson*, December 13, 1882, 10 R. 356, 20 S.L.R. 252, July 16, 1883, 10 R. (H.L.) 73, 21 S.L.R. 48; *Fotheringham's Trustees* v. *Fotheringham*, June 27, 1889, 16 R. 873, 26 S.L.R. 609; *Simons' Trustees* v. *Neilson*, November 20, 1890, 18 R. 135, 28 S.L.R. 119; *Buntine* v. *Buntine's Trustees*, March 16, 1894, 21 R. 714, 31 S.L.R. 581. The Lord Ordinary, in his views as to the effects of sections 7 and 8 of the Act, had gone wrong by not adding to his interpretation of them the saving words *mutatis mutandis*.

Argued for the respondents—(1) There had never been a marriage-contract where the Court had interpreted a clause such as this as one of conquest in the technical sense. Nor could it be interpreted as meaning that the accumulations of income fell generally under the *acquirenda*. Under the terms of the contract the trustees were bound to pay over the income to Mrs Dunbar Dunbar as it accrued, and it then became absolutely her property and passed out of the marriage trust. To support the

reclaimer's contention they would have to show that at some time it passed back to it. At what time was this? She could do precisely what she pleased with the income, and how could the mere fact that she did not spend it bring it back to the trust. To fall under conquest it was necessary that the trustees should have had power to call upon her to hand over these savings, either year by year, a power which was negatived in *Boyd's Trustees* v. *Boyd*, 4 R. 1082, or at the dissolution of the marriage, and they had no such power. The case of *Arthur and Seymour* v. *Lamb*, *supra*, was concerned with an entirely different kind of contract, and was accordingly not in point. If Mrs Dunbar Dunbar had the *jus utendi*, how could it be said that she had not the *jus disponendi?* If the money came to her, as it did, through the trust, and in execution thereof, how could it be said to form part of the trust? Bell's definition of conquest applied only to the case of a father's estate, as did that of Erskine. There was no case of conquest out of a wife's estate—*Diggens* v. *Gordon*, 5 Macph. (H.L.) 75, *per* Lord Cranworth. The reasoning of Lord Stormonth Darling in *Young's Trustees* v. *Young*, *supra*, 20 R. 22, was absolutely sound, and was by implication accepted in the Inner House, though it was unnecessary to decide the point there. The argument as to the meaning of "purchase" was not valid. In a sense the properties were acquired by purchase, but the mere fact of Mrs Dunbar Dunbar having used the money paid over to her by the trustees to buy an estate could not bring that money back into the trust. It was nothing more than a word of style, the meaning being "any estate however I get it"—*Russell's Trustees* v. *Russell*, June 30, 1887, 14 R. 849, at p. 855, 24 S.L.R. 610. (2) The title to Barluach was granted to Captain and Mrs Dunbar Dunbar in conjunct liferent and fee, and to the survivor in fee. Accordingly, that part of the property paid for by Captain Dunbar Dunbar was only "acquired" by his wife in fee after his death, and was accordingly not conquest during the marriage. (3) With regard to the £2000, &c., there was a power by reservation in Mrs Dunbar Dunbar to dispose of it. There was accordingly a strong presumption that she intended to exercise that power. It was exercised by the general dispositive clause in her will. (4) The lands of the Glen of Rothes were conveyed to Mrs Dunbar Dunbar as the result of an agreement between herself and her son, under which she surrendered certain rights and conferred benefits upon her son. The consideration on both sides was presumably adequate since there had been no attempt to reduce the agreement, and it was not now relevant to found upon its inadequacy. It could not therefore be argued that a property obtained in exchange for another of presumably equal value should be treated as conquest—*Farie* v. *Watson*, 1770, 2 Pat. 213, Fraser, H. & W. 1339. (5) There was an effectual exclusion of legitim both from the father's and from the mother's estate, even if it were not anticipated by the parties that the latter right would ever exist. The expression "bairn's part of gear" was used by the institutional writers as synonymous with legitim—Bell's Prin. 1582; Stair iii. 8, 45. The case of *Keith's Trustees* v. *Keith*, *supra*, confirmed the respondents' contention, because what was decided there was that to exclude any particular right it was necessary to name the actual right. Here the actual right, or rather the synonymous expression for it, was so named. Moreover, under section 7 of the Married Women's Property Act it was expressly provided that the same rule in law was to be applied with regard to exclusion from the new right as applied to a claim for legitim from a father's estate. That view was supported by the 8th section of the Act. A provision had already been made for the heir of the marriage under the marriage-contract, and if the claim for legitim were allowed, the contract would be affected to that extent.

At advising—

LORD PRESIDENT—The main question raised in this case is whether a provision of conquest contained in the antenuptial contract of marriage executed by Captain Dunbar Dunbar and Mrs Dunbar Dunbar of Seapark, in the county of Elgin, on 13th October 1848 (their marriage took place four days afterwards), extends to and includes accumulations made by her from the income which she received during the subsistence of the marriage. There are also subordinate questions as to whether that provision of conquest extends to and includes (1) the estate of Barluach; (2) the sum of £2000 and the shares of the Aberdeen Railway Company, or the stock of the Caledonian Railway Company which has been substituted for it; (3) the lands of Glen of Rothes; and (4) whether the Rev. John Archibald Dunbar Dunbar, the only child of the marriage, is entitled to claim legitim from the personal estate left by his mother Mrs Dunbar Dunbar.

It is not disputed that the judicial factor on the trust created by the antenuptial marriage contract has right to all the funds and estates conveyed by that contract at its date, but he further claims as falling under it the additions which were made to Mrs Dunbar Dunbar's means and estate, chiefly by saving from income, during the subsistence of the marriage, and which form the larger part of the fund *in medio*. The funds originally claimed include not only the additions made to the estate by savings of income during the subsistence of the marriage, but also the additions made to it by savings between the dissolution of the marriage by the death of Captain Dunbar Dunbar on 10th January 1898 and the death of Mrs Dunbar Dunbar on 9th May 1899, but it is now admitted by the judicial factor that the additions made by savings between those two dates are effectually carried by her testamentary settlement. On the other hand, the trustees under that testamentary settlement admit that they cannot claim as falling

under it the estate expressly conveyed by the marriage-contract, or investments which can be identified with that estate, subject to one exception. The most important question remaining in dispute between the judicial factor and the testamentary trustees thus relates to the additions made to Mrs Dunbar Dunbar's estate, chiefly by savings, during the subsistence of the marriage.

By the marriage-contract Miss Dunbar, with consent of her then promised husband, Captain Dunbar, and he for himself, and they both with one consent, bound and obliged themselves to dispone, assign, convey, and make over to and in favour of the trustees under that contract, and their successors, "All and sundry lands, heritages, and sums of money, funds, goods, and other estate, real or personal, which I the said Phœbe Dunbar now have, or at any time hereafter may conquest and acquire by purchase, succession or otherwise, other than the heritages to be acquired and settled by the trustees and executors" of John Dunbar previously mentioned, upon trust for the purposes therein specified; and Miss Dunbar also conveyed to the trustees under the marriage-contract all the estate which she "at any time hereafter may conquest and acquire by purchase, succession, or otherwise." It was, however, declared "that the property was conveyed to the trustees upon trust to pay to me the said Phœbe Dunbar, or to permit me to receive the whole of the aforesaid rents, interests, profits and dividends, and whole annual income of the said estates, properties, monies or stocks, funds and securities, wherever secured or invested, during all the days of my life, for my own separate benefit and use, exclusive of the *jus mariti* and administration of my said promised husband, or of any future husband."

It is, in my judgment, clear that Mrs Dunbar was entitled to expend the whole of her annual income, including the income arising from the funds settled under the marriage-contract as it accrued, and I am unable to see any ground for holding that she was bound to do so within any definite time, so that she could not expend in a subsequent year any balance of income from the settled funds which had accrued in a previous year. But I understood the judicial factor to contend that when the savings were placed upon what were termed in the argument "permanent investments" Mrs Dunbar Dunbar's power to spend or otherwise dispose of them ceased, and that they fell under the provision of conquest contained in the marriage-contract. It is further, as I understood the argument, maintained by the judicial factor that savings from income, resulted from "economy," and that consequently upon the authority of a passage in Bell's Principles (sec. 1974) they fell under the definition of conquest. I am, however, unable to assent to the view thus contended for, as it does not appear to me to be in accordance with principle, or to be sustained by the authorities relied on by the judicial factor. He founded strongly upon the case of *Arthur and Seymour* v. *Lamb*, 8 Macph. 928, in which there was no trust-deed or conveyance, but only an obligation upon the husband to settle and secure. The case is reported without judgments or opinions other than those contained in the answers to the questions put in the case remitted by the Court of Chancery in England for the opinion of the Court of Session. By the marriage-contract to which that case related, Sir Charles Lamb provided to himself in liferent and the children of the marriage in fee, one-half of his whole estate, including not only that which then belonged to him but all that he might acquire during the subsistence of the marriage by his own industry and economy, by succession, or otherwise. This language appears to me to be more comprehensive than that which is used in the marriage-contract of Captain and Mrs Dunbar Dunbar. I may add that I do not find any statement in the report that there had been any savings of income during the marriage. On the other hand, the testamentary trustees relied upon the more recent case of *Boyd's Trustees* v. *Boyd*, 4 R. 1082, in which it was held that life interests and annuities to which a married woman became entitled during the subsistence of the marriage did not fall under a general conveyance of *acquirenda* by her to the trustees under her antenuptial marriage-contract, such a clause being held to refer only to principal sums; and a similar decision was pronounced in the case of *Young's Trustees* v. *Young*, 12 R. 968. The judgment in the second case of *Young's Trustees* v. *Young*, 20 R. 22, is not inconsistent with this view, as it proceeded upon the ground that it had not been proved that the property had been purchased out of savings made by the wife from a liferent to which she had right. I am unable to see any principle for holding that the form or kind of investment selected should alter the quality of the beneficial interest in it, or that the person having right to that interest should lose his right unless he spent the income within a short but unspecified time after he received it. The view upon which these decisions proceeded appears to me to be more consistent with the reasonable construction of the term "conquest" than the opposite view contended for by the judicial factor. The word "conquest" seems to me to imply acquisition from some external source, not merely abstinence from spending income to which the recipient has right. This view is confirmed by the fact that the only two modes of acquisition specified in the marriage-contract of Captain and Mrs Dunbar Dunbar are by "purchase" and "succession," and the reasonable construction of the words "or otherwise" which follow seems to me to be by other modes, *ejusdem generis*, with purchase or succession, *i.e.*, coming from some external source, not simply growing up by Mrs Dunbar not spending money to which she had an unfettered right. If, as I understand to be admitted, the income was not "conquest"

when it was paid to Mrs Dunbar Dunbar, the question arises, When did it become "conquest," and what brought about this essential change in its character? It is difficult to see how such an essential change in its character could take place during her life, as she might have spent it whenever she chose; and if this be so, the paradoxical consequence results from the opposite view that money became conquest after her death which never possessed that character during her life. And if the receipt of the income and the abstention from spending it did not make it conquest, I am unable to see any ground for holding that a different consequence would follow from its being simply placed to her credit in account. The direction in the marriage-contract to the trustees to pay the whole annual income to Mrs Dunbar Dunbar for her own separate use and benefit seems to me to support the view that when the income was so paid it remained her property, exclusive of her husband's *jus mariti*, or any right either in him or in any third party. The clause excluding Captain Dunbar Dunbar from the trust funds, or "such other funds and other estate" acquired by Mrs Dunbar Dunbar during her marriage, although not included in the trust, supports the view that the parties contemplated that Mrs Dunbar Dunbar might acquire and retain estate which did not fall within the clause of conquest in the marriage-contract.

I understood the judicial factor to maintain that even assuming Mrs Dunbar Dunbar to have retained full power of disposing of the savings so long as her husband lived, she lost that power upon his death. I am, however, unable to see any ground for holding that this event should bring about so vital a change in the quality of the right which Mrs Dunbar Dunbar had under the clause of conquest. According to the argument maintained by the judicial factor in the interest of the Rev. John Archibald Dunbar Dunbar, his father's death would in effect operate a transfer to him of rights which had previously belonged to his mother, and I am unable to see how his father's death could have any such effect.

For these reasons I concur with the Lord Ordinary in thinking that the fund *in medio*, in so far as it consists of savings from Mrs Dunbar Dunbar's income, did not fall under the clause of conquest in the marriage-contract, but passed, along with the rest of her disposable property, to her testamentary trustees.

A separate argument was addressed to us in regard to (1) the estate of Barluach, (2) a sum of £2000 and certain railway stocks, and (3) the lands of Glen of Rothes.

It appears that the estate of Barluach was bought in May 1877, and that the price, £10,000, was paid by Mrs Dunbar Dunbar's cheque in 1877, but it is alleged by the judicial factor that part of this sum consisted of money which belonged to Captain Dunbar Dunbar, being £4900, representing the price of his commission, which had been sold so far back as 1853. No claim is made to any part of the sum paid for Barluach, or to any interest in that property by the representatives of Captain Dunbar Dunbar, and even if the proper inference from the facts was that one-half of the price was contributed by him and the other half paid out of Mrs Dunbar Dunbar's savings, the result would not in my judgment be that contended for by the judicial factor. The title was granted to Captain Dunbar Dunbar and Mrs Dunbar Dunbar in conjunct fee and liferent, and to the survivor and the heirs of the survivor in fee, so that in whomsoever the right to the property was vested during the joint lives of the spouses, it on Captain Dunbar Dunbar's death became vested in Mrs Dunbar Dunbar as the survivor in full fee. The property, or at least the part of it *ex hypothesi* paid for with Captain Dunbar Dunbar's money, was not "acquired" by Mrs Dunbar Dunbar until after his death, and it was therefore not conquest during the marriage. The authorities referred to by the Lord Ordinary appear to me to support this view.

The cases of the £2000 and the shares of the Aberdeen Railway Company (now represented by Caledonian Railway Stock) are very special. That money and stock formed part of the residue of the estate which belonged to Mrs Dunbar Dunbar's brother, and they were conveyed to the marriage-contract trustees, not for the purposes of the marriage-contract trust, but "under trust to be paid to such person or persons and at such time or times as I, the said Miss Phœbe Dunbar, by any writing or writings under my hand or by my last will and testament shall direct." These assets were thus, although held by the marriage-contract trustees, not part of the estate of the marriage-contract trust, but were subject to the disposition of Mrs Dunbar Dunbar, and were thus in effect her property. I therefore agree with the Lord Ordinary in thinking that these items are carried by Mrs Dunbar Dunbar's testamentary settlement.

I have felt very considerable difficulty in regard to the questions relative to the lands called Glen of Rothes, but I have come to be of opinion that the result arrived at by the Lord Ordinary in regard to them is correct. The facts are complicated, and the admissions in regard to the matter are contained in articles 2, 3, and 4 of the minute of admissions. The important question, however, appears to me to be whether the agreement entered into between Captain and Mrs Dunbar Dunbar on the one part, and the Rev. John Archibald Dunbar Dunbar on the other part, is to receive effect according to its terms or to be disregarded. By that minute it was agreed that Mrs Dunbar Dunbar's estate, so far as entailed, should be disentailed; that she should convey to him the lands of Seapark and Kinloss, the conveyance to take effect upon her death; and that she should with his consent dispone to herself in fee-simple the lands of Glen of Rothes, and that he should cancel a bond of annuity in his favour. This arrangement was duly carried out, and in fulfilment of it Glen of Rothes was, in so far as held by

Mrs Dunbar Dunbar under entail, disponed by her to herself and her husband in conjunct fee, and to the survivor of them and the heirs and assignees of the survivor. The lands were at the dissolution of the marriage, and also at the death of Mrs Dunbar Dunbar, held under that title. It was argued that the agreement was unequal, the consideration for it being inadequate, but it has not been reduced, and it must, in my judgment, receive effect according to its terms. I may add that even if the consideration given had been inadequate, there are no means of reforming the contract, still less of arriving at a conclusion that any definite amount of excess given so ascertained that it could with any propriety be described as conquest during the subsistence of the marriage. But if and so long as the contract and what followed upon it receives effect, the Glen of Rothes estate was not conquest of the marriage, and therefore would not fall under the conveyance of conquest in the marriage-contract. The lands were conveyed to Mrs Dunbar Dunbar as the result of an agreement between her and her son for a stipulated and presumably adequate consideration.

The result, in my judgment, is that the fund *in medio*, in so far as it consists of savings from Mrs Dunbar Dunbar's income, the estate of Barluach, the £2000, and the stock of the Caledonian Railway Company, and Glen of Rothes, belonged to her in property, and was not bound by the marriage-contract, but was effectually disposed of by her testamentary settlement.

The remaining question relates to the claim of the Rev. John Archibald Dunbar Dunbar for legitim under section 7 of the Married Women's Property (Scotland) Act 1881. The claim, if valid, could, in my judgment, only affect one-half of Mrs Dunbar Dunbar's moveable estate, so far as not bound by the marriage-contract or the clause of conquest. It would not affect the estate governed by the marriage-contract. The testamentary trustees rely on clause 7 of the marriage-contract as excluding the claim, the provisions thereby made being declared to be in full of bairn's part of gear, executry, and everything else which they (the bairns) could claim respectively through the death of their mother. The question therefore comes to be whether the claim of legitim is excluded by this clause, and I concur with the Lord Ordinary in thinking that it is. If the settlement had been of the estate of a husband and father, and not of the estate of a wife and mother, it would, in my judgment, have been clear, upon the authorities mentioned by the Lord Ordinary, that the claim would have been excluded, and the provision in the Married Women's Property (Scotland) Act 1881, conferring upon children a right to legitim from a mother's estate, is declared to be subject to the same rules in regard to the exclusion of it which apply to a claim for legitim from the estate of a father. This view is supported by section 8 of the Act, which declares that it (the Act) shall not affect any contract between married persons. The agreement under the marriage-contract was that the heir of the marriage should be entitled to claim what was thereby provided to him and nothing more, and if his claim to legitim from his mother's estate was sustained, the contract would be very materially affected.

For these reasons I am of opinion that the reclaiming-note should be refused, and that the Lord Ordinary's interlocutor should be adhered to.

Lord M'Laren—I do not propose to enter exhaustively on the merits of all the points raised in the case, but only to offer some observations on the two larger questions—first, whether the conveyance to the marriage trustees carries accumulations from savings out of the wife's income; and secondly, whether Mr Dunbar Dunbar is entitled to legitim out of his mother's estate. The second question is only important if it is held that the accumulated fund in question does not fall under the conveyance in the contract of marriage, but is the estate of Mrs Dunbar Dunbar, subject to her testamentary disposal, and also subject to legitim, under the provisions of the Married Women's Property Act 1881.

It is admitted (by minute, art. 23) that the estate left by Mrs Dunbar Dunbar, with certain exceptions which fall to be separately considered, is to be held to be made "from the accumulations of income to which Mrs Dunbar Dunbar was entitled under the contract of marriage." I add to this that the income secured by the contract of marriage to Mrs Dunbar Dunbar was the income of her own estate, and was payable to her for her separate use, exclusive of the *jus mariti* of Captain Dunbar Dunbar.

It cannot be doubted that the lady was entitled to spend the whole of her income year by year as it accrued, or to make gifts from it to such extent as she might think proper. But the argument against the testamentary trustees is that the income, in so far as not expended or given away, returned to the trust and became capital, and so belongs to the lady's son, as the person entitled after her death to the capital of the marriage trust estate.

I need hardly say that this would be a very exceptional provision in a contract of marriage, that the unexpended part of the wife's income from her individual estate should return to the trust and become capital; but of course, if this be the clear meaning of the conveyance in the contract of marriage, effect must be given to it. But the exceptional character of the suggested interpretation justifies this observation, that if such were the meaning of the parties I should expect to find it embodied in a separate and substantive clause, and not left to depend on inferences drawn from words of a general conveyance.

I now proceed to consider the meaning and effect of the words descriptive of the subjects conveyed to the trustees. The words are—"All and sundry lands, heritages, and sums of money, funds, goods,

and other estate, real and personal, which I, the said Phœbe Dunbar, now have, or at any time hereafter may conquest and acquire by purchase, succession, or otherwise, other than the heritages to be acquired and settled by the trustees and executors of the said John Dunbar, Esq." The estate so described is conveyed in trust "for the purposes of the said intended marriage, and of this settlement as after written." These purposes in the events which have happened are (1) to pay to Mrs Dunbar Dunbar, or to permit and empower her to receive, the whole annual income during all the days of her life for her own separate benefit and use, exclusive of the *jus mariti* and right of administration; and (2) on the death of the surviving spouse to "convey, assign, pay over, or divide" the trust estate for the benefit of the child or children of the marriage, of whom the claimant Mr Dunbar Dunbar is the only survivor.

Now, if we consider (for the sake of clearness) only the estate which belonged to the lady at the date of her marriage, and which passed at that date into the possession of the trustees, it appears to me that, as and when the trustees paid over to Mrs Dunbar Dunbar the annual income of the estate, that trust was completely executed except as to the ultimate disposal of the income-producing subject. Either the trust was completely executed as regards the income when it was paid over to Mrs Dunbar Dunbar on her receipt, or the trustees had a duty to inquire periodically how much of the income was expended, and to demand repayment of the unexpended part in order that it should be brought under their administration and added to the trust estate. Of such a duty I can find no trace in the contract of marriage. Their only duties in relation to the estate vested in them were to keep the capital safe for the benefit of the children of the marriage, and to pay the income to the wife. When so paid the income was taken out of the trust, without, so far as I can discover, any note of intention that it should be brought into the trust at any future time.

The argument maintained for the judicial factor as representing the trust is that savings of income are comprehended in the expression "estate which the wife may conquest and acquire by purchase, succession, or otherwise." "Conquest" used as a verb is an unfamiliar word, but if it takes its meaning from the substantive "conquest," as used in family provisions, it points to estate coming to the party by purchase or singular title in contradistinction to estate coming to him by inheritance. As used in this deed "conquest" seems to have the same meaning as "acquire," because the qualifying words "by purchase, succession, or otherwise" are applied to both. The context does not suggest that the parties had two species of estates in view, conquest and acquisition, but rather that they were using a circumlocution to describe everything that might come to the wife during the subsistence of the marriage other than the estate which she then possessed. I think that (with the exception specially mentioned) Mrs Dunbar Dunbar meant to convey to the trustees her whole estate, *acquired and to be acquired*, neither more nor less, and that the construction is the same as if she had used these words. But then I think this is an exhaustive description, and as the trust estate from which Mrs Dunbar Dunbar's income came included all that she had at the date of the marriage, and all that came to her thereafter by a title independent of the trust, the words of conveyance are satisfied, and there is no other estate upon which they can operate. I have difficulty in representing to my own mind how money which came to the beneficiary through the trust, and in the due execution of the trust, can also be estate which she is bound to bring into the trust. In any case, I do not feel obliged to assent to the proposition, because if we consider the words descriptive of the estate to be acquired during the subsistence of the marriage and to be brought within the trust, and if we give to these words the most extended meaning which the context permits, they cannot apply to the income of the trust estate itself, which is specifically disposed of by the deed of trust.

I may also notice that Mrs Dunbar Dunbar's income under the trust comes from her own estate, and is of the nature of a liferent by reservation. The powers of a liferenter by reservation are understood to be the largest which can be claimed by a limited owner, and would, I conceive, include all unqualified right to dispose of the fruits of the liferented subject as she pleases.

Before I conclude my observations on this part of the case I must refer to what has been decided in cognate cases, and also to Bell's definition of "conquest" as comprehending whatever is acquired during the marriage "by industry, economy, purchase, or donation" (Bell's Prin, sec. 1974). Now, if a husband having at the time of his marriage little or no realised estate, instead of setting up a trust, comes under an obligation to provide the conquest of the marriage to his family, that may very well include investments derived from savings out of income. In such a case I should accept Bell's definition of conquest, and indeed if economies were excluded, it would often be extremely difficult to prove that any conquest existed. But then I should not gather from Bell's definition that he had in view the case of income of estate settled by a contract of marriage, and we have the authority of Lord Cranworth in *Diggens* v. *Gordon*, 5 Macph. (H.L.) 78, that in the case of a trust of wife's estate we are not to give conquest its technical meaning. I do not suggest that Bell's definition stands in need of construction, because to my mind its meaning is quite clear. But I think it raises just the same question of construction that is raised by the Dunbar contract of marriage, and is to be interpreted in the same way. I must make the same observation regarding the judgment in *Arthur and Seymour* v.

Lamb, 8 Macph. 928, which merely echoes Bell's definition; and as the judgment was in the nature of a legal opinion for the guidance of an English Court, it was apparently not considered necessary to express the grounds of judgment. I agree in the Lord Ordinary's observations regarding this case, and also as to the inconclusive character of the decisions cited on the other side, except that I think the case of *Boyd's Trustees*, 4 R. 1082, is in point. In that case the marriage trustees maintained the proposition which is the foundation of the claim of the judicial factor in this case. They contended that estate which the wife might "conquest and acquire" during the subsistence of the marriage included income of trust estate appropriated to the maintenance of the wife. It is true that in *Boyd's* case the trustees pressed the argument to its logical but paradoxical conclusion that the lady was to have no income at all, because every element of income that vested in her was, as they said, brought back to the trust under the name of conquest or *acquirendum*. I have already observed that if the argument for the judicial factor is sound the marriage trustees would have been entitled year by year to demand repayment of Mrs Dunbar Dunbar's unexpended income as being an *acquirendum*. Now, that was just the claim which was put forward in the case of *Boyd*, and which was negatived by the judgment of the Court. The proposition was treated as essentially unsound, and as involving a forced construction of the *acquirendum* clause of the contract. Now, in my view, the validity of the plea does not depend on whether a claim to this income was in fact made by Mrs Dunbar Dunbar's marriage trustees in her lifetime, or is only made for the first time by the judicial factor (their successor in title) after her death. The construction of the clause proposed by the reclaimer is essentially the same as the construction which was rejected in the case of *Boyd*. The ground of judgment, as stated by the Lord Justice-Clerk, is that the trust-conveyance in the marriage-contract never can comprehend estate, the very nature of which implies annual enjoyment. This appears to me to be a sound principle, and it is directly applicable to the present case.

I do not propose to add anything to what has fallen from your Lordship regarding the special subjects except a few words as to the acquisition of the lands of Glen of Rothes.

It was pointed out in the course of the argument that the Lord Ordinary in his very careful and interesting exposition of the case had fallen into a slight error of fact when he stated as the result of this bargain that Mrs Dunbar Dunbar gave up to her son her present interest in Seapark and Kinloss, and that he gave up to her all his right as next heir of entail to the Glen of Rothes estate. Mrs Dunbar Dunbar did not give up her immediate interest in Seapark and Kinloss. She only gave these lands to her son on his survivance. But I agree with the Lord Ordinary in the next observation, that "presumably the exchange was an equal one." We do not know all the circumstances and all the reasons that influenced the parties to this contract of exchange. But there is no reason to suppose that in the treaty for the exchange an unequal bargain was contemplated, and (which is perhaps more relevant to the inquiry) there is no admission and no proof that the exchange was in fact unequal. The claim of the judicial factor is made in the interest of Mr Dunbar Dunbar the son, who must know all the facts, and if he meant to claim the value of Glen of Rothes in whole or in part as conquest, or, in other words, as representing an increase of interest to his mother's estate, it was for him to furnish the judicial factor with evidence in support of his claim. In the absence of evidence to the contrary I can only regard this transaction as being what it purports to be, an exchange on fair terms and for mutual convenience. The contrary would be difficult to establish, because there was no actual exchange of lands but only the surrender by each party of certain interests in the estate of the other; the question of equality or inequality in the transaction would, as one of its elements, involve an actuarial valuation of life interests which we could not determine except upon skilled evidence. I therefore agree with the Lord Ordinary that the alleged acquisition by Mrs Dunbar Dunbar under the transaction is not made out.

I pass to the question of the direct claim by Mr Dunbar Dunbar for legitim out of his mother's estate.

The right to legitim out of a mother's estate is given by the seventh section of the Married Women's Property (Scotland) Act 1881 to "the children of any woman who may die domiciled in Scotland," and therefore unless the legitim is barred, the son is entitled to one half of his mother's unsettled moveable estate. The effect of our decision as to conquest is to leave a very substantial fortune in this condition. There are two answers to the claim—first, that it is expressly excluded in the marriage-contract, and secondly, that it is impliedly excluded or satisfied by limiting words in the seventh section of the statute. In either view, as Mr Dunbar Dunbar has taken a more valuable interest under the contract as the heir of the marriage, it is argued that he would not be entitled to claim legitim contrary to the scope and intent of the contract.

The case for express exclusion is founded on the declaration that the provisions in favour of the child or children of the marriage shall be in full satisfaction to him, her, and them "of all bairn's part of gear, executry, and everything else which they could respectively claim or demand by and through the decease of me, the said Mrs Phœbe Dunbar, their mother."

In the year 1848, when the contract was made, there was no right of legitim out of the mother's estate, but in the case of the father surviving, the children had a right

as the mother's next-of-kin to her share of the goods in communion. The existence of such a right was a sufficient motive for the insertion of this declaratory provision, and I see no reason to doubt that the declaration would have sufficed, in the event supposed, to bar the claim to goods in communion. The claim goes further, because it enumerates "bairn's part of gear," which I take to be synonymous with legitim, as among the claims excluded. There are also words of general exclusion of all claims consequent on the decease of the mother. As to the exclusion of bairn's part of gear, I have difficulty in realising what is meant by the exclusion by name of a non-existing right. On this point I should concur in the observation made by one of your Lordships in the course of argument, to the effect that reasonable people do not exclude rights until they know what they are; and I do not see how there could be an intelligent exclusion of legitim out of the mother's estate when no such claim existed or had been even mooted as a subject of legislation. I can more easily follow the argument that the words of general exclusion of all claims consequent on the mother's decease were intended to include the case of supervenient legislation enlarging the children's rights as against the parental estate, it being the intention of the parties that the children of the marriage should take nothing as of right from the mother if they accepted the provisions secured to them by the contract. But I think the full force of this consideration is best exhibited when taken in conjunction with the statutory legislation which I proceed to consider.

The statutory right of legitim is measured by the corresponding right against the father's estate, and is given "subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, or satisfaction thereof."

Now, if this had been a testamentary instrument disposing of specific estate and leaving a balance of moveable estate undisposed of, I should not, as at present advised, hold that legitim out of the undisposed estate was barred. The two claims would not be inconsistent. The son might say, I make no claim out of the estate which is governed by this instrument except what is given to me by the instrument; but in regard to the estate that is not disposed of, that is left to the operation of law, which in the event that has happened only permits the parent to dispose of one-half of the free estate. But the conditions are not the same when the provision is given by a contract of marriage, because our law supposes that the spouses contract not only with one another, but with and for the issue of the marriage. Also, in settling a contract of marriage the spouses look forward, and generally take care to secure to themselves the unrestricted disposal of so much of their present and future estate as is not settled by the contract itself. Of the intention on the part of Mrs Dunbar to secure to herself the unqualified power of disposal of her unsettled estate there is, I think, unequivocal evidence in the clause which I have quoted. If these words had been used by a father, the son would not even have had an election, because it is settled law that legitim may be excluded by marriage-contract, and that the son must take what he gets under the contract, unless, perhaps, in the case which has never arisen of a purely illusory gift.

But for the purposes of the present case the argument may very well stand on the lower plane of election, because Mr Dunbar Dunbar is not proposing to surrender the benefit which is secured to him by the contract, and yet he makes this claim, contrary, as I think, to the plainly expressed intention of his mother, that all legal claims of whatever nature shall be held to be satisfied ("full satisfaction" is the expression used) out of the provisions made for the children. If the intention to satisfy legal claims is disclosed by the deed, then I think the statute makes that intention effectual, because the right of legitim is in its inception a qualified right, being given subject to the known rules of law in relation to exclusion, satisfaction, or discharge. I am accordingly of opinion that the claim of legitim is not well founded, and on the whole matter that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Reclaimer—H. Johnston, K.C.—Clyde, K.C.—Constable. Agent—Thomas Henderson, W.S.

Counsel for the Respondents—Guthrie, K.C.—Moncrieff. Agents—Stuart & Stuart, W.S.

Wednesday, December 3.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

SNADDON *v.* THE LONDON, EDINBURGH, AND GLASGOW ASSURANCE COMPANY, LIMITED.

Cautioner — Liberation — Negligence of Creditor — Guarantee for Employee — Failure to Intimate Timeously Criminal Conduct.

By bond of guarantee dated 12th May 1897 A became cautioner to an insurance company for B, one of their agents. On 11th August B forged the payee's signature on a cheque sent to him by the insurance company to hand on to one of their clients, and embezzled the money. On 25th September B confessed his crime to the insurance company and was suspended by them. On 8th October B absconded. On 11th October the insurance company gave information of the crime to the police and also to A.