that an employer may, in a question whether an offence under the statute has been committed, be responsible for the unauthorised actions of his servant, but while accepting that doctrine I agree with your Lordship in the chair that it must be applied with great care. In this case I think that the facts justified the Sheriff-Substitute in holding that the respondents acted innocently.

LORD ARDWALL — Undoubtedly it is a very important matter that adulteration of Scotch tweeds or any other textile fabrics should be prevented, and it is quite right that the authorities should take steps to bring to justice persons who make a traffic in adulterated goods; but I agree with my brother Lord Low that in taking the necessary steps everything should be done in a straightforward manner—there should be a straightforward demand for a specific description of goods about which there could be no ambiguity whatever. Of course traps must be laid in cases of this sort, but I quite concur with what has been said about this and the other case decided in the Justiciary Court this morning, that in each case the correspondence was an attempt to force the accused into giving a wrong description of the goods sold, and to make him admit by his own writing, after the sale had taken place, that he was guilty of an offence. Very properly the accused refused to commit himself to a description of an article which he had not supplied. I agree therefore for the reasons stated by Lord Low that neither the first nor second question can be answered in the affirmative.

In regard to the third question I agree that the Sheriff was right in holding that the accused acted innocently within the meaning of section 2, sub-section 2 (*c*). The precautions taken by them seem to have been most reasonable, and, so far as I can see, sufficient. I am accordingly of opinion on this ground also that the Sheriff-Substitute was right in holding that an offence under section 2, sub-section 2, has not been committed by the accused.

The Court answered the third question in the affirmative.

Counsel for the Appellant — Solicitor-General (Ure, K.C.)—W. Thomson—Lyon Mackenzie. Agent—W. S. Haldane, W.S., Crown Agent.

Counsel for the Respondents — Hunter, K.C. — Horne. Agents — Macpherson & Mackay, S.S.C.

Friday, July 17.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

MACKENZIE'S M.-C. TRUSTEES *v.* BEVERIDGE'S TRUSTEES AND OTHERS.

Marriage Contract—Husband and Wife—Succession — Acquirenda — Legitim — Right of Marriage-Contract Trustees to Claim Legitim — Right of Trustees to Elect between Legitim and Testamentary Provisions.

In an antenuptial contract of marriage a wife conveyed to the trustees therein the whole means, estate, and effects, heritable and moveable, real and personal, belonging to her or to which she had right, or to which she might succeed or acquire right during the subsistence of the marriage, and undertook to complete titles to such means, estate, and effects, and to execute such further deeds in favour of the trustees as might be necessary for carrying out the purposes of the trust.

Held, on the death of the wife's father, that the marriage-contract trustees were not entitled to insist upon his testamentary trustees paying over to them the amount which she might claim as legitim, but that the right to elect to take the testamentary provisions in her favour, in preference to her legitim, still remained with her alone.

On 6th March 1907 the Right Hon. Baron Overtoun of Overtoun, and another, a majority of the trustees acting under the antenuptial contract of marriage dated 30th May and 2nd June 1873, entered into between Robert Mackenzie, writer, Glasgow, and Mrs Elizabeth Hill Beveridge or Mackenzie, brought an action against David M'Lean, 5 Kensington Court, London, and others, the testamentary trustees of the late William Beveridge of Bonnyton, Dunfermline (Mrs Mackenzie's father), acting under his trust-disposition and settlement, dated 22nd March 1902, and others. In it the pursuers sought declarator that they were entitled as trustees foresaid, and as assignees of Mrs Mackenzie under the said antenuptial contract of marriage, to payment of one ninth of the personal or moveable estate of her father, the said late William Beveridge, as her share of legitim. Conclusions for accounting and payment followed.

In the said antenuptial contract of marriage the provision by Mrs Mackenzie (Miss Elizabeth Hill Beveridge) was—"For which causes, and on the other part, the said Elizabeth Hill Beveridge hereby assigns, conveys, disposes, and makes over to . . . all and sundry the whole means, estate, and effects, heritable and moveable, real and personal, now belonging to her, the said Elizabeth Hill Beveridge, or to which she has right, or to which she may succeed or

acquire right during the subsistence of the marriage hereby contracted, with the whole rights, titles, and vouchers of the means, estate, and effects above conveyed by her, and the said Elizabeth Hill Beveridge binds and obliges herself to complete titles in her person to said means, estate, and effects, and to execute and deliver all such farther deeds in favour of the said trustees as may be necessary for carrying out the purposes of this trust. . . . ."

The defenders pleaded, *inter alia*—"(3) The pursuers not being entitled to claim Mrs Mackenzie's legitim without her consent and against her wishes, the defenders are entitled to absolvitor."

The *facts* are given in the opinion of the Lord Ordinary (MACKENZIE), who on 22nd June 1907 assoilzied the defenders.

Opinion.—"The object of this action is to have it declared that the pursuers the marriage-contract trustees of Mr and Mrs Mackenzie are entitled, under the conveyance in the marriage-contract of the wife's *acquirenda*, to payment of the legitim to which she is entitled from her father's estate. By the marriage-contract dated in 1873 the husband made the provisions for his wife which are set out. The wife's father was not a party to the marriage contract. On her part she conveyed, assigned, and disponed to the trustees her whole means, estate, and effects then belonging to her or to which she had right, or to which she might succeed or acquire right during the subsistence of the marriage, and bound and obliged herself to complete titles in her person to said means, estate, and effects, and to execute and deliver all such further deeds in favour of the trustees as might be necessary for carrying out the purposes of the trust.

"The trust purposes were (2) for payment of the income to her; (3) on her death for payment of the income to her husband should he survive her; (4) on her death, but subject to her husband's liferent, for the children of the marriage in such proportion as the spouses should direct, or failing appointment equally. There were two children, Robert Duncanson Mackenzie and William Beveridge Mackenzie. The wife at the date of the action had contributed nothing but a legacy of £50 to the marriage trust.

"The wife's father died on 23rd January 1905, leaving a trust-disposition and settlement by which he conveyed his estate to the defenders in this case.

"By the seventh purpose of his settlement, he left Mrs Mackenzie £2000, under the provision and declaration thereinafter mentioned. A legacy of £2000 was left to the testator's grandson William Beveridge Mackenzie. One-fifth of the residue was left to Mrs Mackenzie. The testator's grandson Robert Duncanson Mackenzie was expressly excluded from any interest in his estate. The trustees were given absolute power and discretion with regard both to the £2000 legacy and the share of residue left to Mrs Mackenzie, to pay or postpone payment, or to retain the same vested in their persons, or to vest the same in other trustees, so that the interest might be paid or applied for her alimentary use during her life, or for such time as the trustees might fix, and so that the capital should be settled on the testator's grandson William Beveridge Mackenzie, as the trustees might deem expedient.

"The purposes of the marriage contract and of Mr Beveridge's settlement were thus at variance as regards (1) the husband's contingent liferent, (2) any interest of R. D. Mackenzie, and (3) the discretionary power to the testamentary trustees over Mrs Mackenzie's capital.

"The marriage-contract trustees (with one exception) resolved to claim payment of Mrs Mackenzie's legitim to which she became entitled on her father's death. Mrs Mackenzie was called on by the pursuers to concur in this claim, but declined, and is a defender in this case.

"The figures were not disputed. The legitim will not exceed £13,000. The testamentary provision is at least £14,500. It was pointed out that as payment of this is postponed till the widow's death the legitim may prove to be as valuable. In the event of either of Mrs Mackenzie's brothers predeceasing her mother, without issue, the testamentary provisions will be at least £27,000, and may amount to over £43,000.

"It was argued on behalf of the pursuers that on the death of Mrs Mackenzie's father on 23rd January 1905 a right to legitim vested in her; that she had by her marriage contract conveyed her whole *acquirenda* to the trustees; that the right to legitim which had vested in her passed under this conveyance to them; and that she could do nothing to defeat the right they had so acquired. This argument was stated by counsel for the pursuers to be independent of any question of the amounts of the legal and conventional provisions respectively. It was maintained that where the trusts upon which conventional provisions are to be held are inconsistent with the trusts of the marriage contract, it is then not merely the right, but the duty, of the trustees under a marriage contract which contains a conveyance of *acquirenda* such as the present to demand payment of legitim. According to this argument a wife by becoming a party to a marriage contract such as the present destroys her right to elect. It may be that the legitim would only give the wife £5000, and that a heritable estate worth £5000 a-year has been settled on her by her father. The wife, however, could only take what would fall under the marriage contract. She would not be entitled to elect at all, because by her conveyance of *acquirenda* she had already given the £5000 to her marriage-contract trustees.

"There is no doubt that legitim vests *ipso jure* by mere survivance. It was pointed out in *M'Murray* v. *M'Murray's Trustees*, 1852, 14 D. 1048, that this had been settled since 1843 by *Fisher* v. *Dixon*, 2 Bell's App. 63. Although, however, it is true that the right to legitim vests, it is equally true that

another right completely vests, and that is the right to the testamentary provisions. This is emphasised by Lord Moncreiff and Lord Gillies in their opinion in *Stevenson* v. *Hamilton*, 1 D. 181, at 197, where they say —'That right (to the testamentary provision) is perfect and effectual to herself (the wife) unless the claim to legitim can be put forward in her right. A choice is to be made between these rights, and the material question is, who shall be entitled to make this election?' The question in *Stevenson's* case was whether the creditors of the husband were entitled to maintain that all the personal rights. of the wife became vested in him *jure mariti*, and that the right to the legitim having passed to him by the legal assignation of the marriage, he had an absolute right to claim it. The minority there held that the interest of the husband in the wife's legitim was one which she could not surrender, and the grounds upon which this view was put support the pursuers' argument in the present case. The Court, however, negatived this view upon the ground that the husband's *jus mariti*, though it has many of the effects of a right of property, is in its proper nature a right of administration only. It was held that the right to elect was primarily in the wife, and that if the husband forced his wife to her injury to reject the testamentary provision which excluded the *jus mariti* the Court would interfere.

"The interlocutor bears that as the mutual claims of the husband and his creditors and of the wife did not admit of adjustment and division of the fund between them being made by the Court, the wife's claim was sustained. *Stevenson's* case was referred to in the *Duchess of Buckingham* v. *Winterbottom*, 13 D. 1129, and was followed in *Lowson* v. *Young*, 16 D. 1098. See also *Macdougal* v. *Wilson*, 20 D. 658. In the case of *Aikman*, 30 S.L.R. 804, it was held (by the Lord Ordinary, Lord Low) that an undischarged bankrupt was not entitled to reject his legitim and take instead testamentary provisions from which his creditors were purposely excluded. This was upon the ground that a right to legitim which vested in the bankrupt after the date of the sequestration, and while he was undischarged, was clearly 'estate' as defined in section 103 of the Bankruptcy Act, and that therefore the trustee was entitled to the vesting order asked. It was pointed out that the decisions of *Stevenson* and *Lowson* were not applicable to such a case.

"It was argued in the present case that as a claim to legitim cannot be given up to the prejudice of ordinary creditors, neither can it to the prejudice of marriage-contract trustees, who are in the position of creditors also.

"No doubt in regard to what the marriage contract includes, it is onerous in the highest degree. The right of election, however, is personal and not transmissible, and until it is exercised by the only person who is entitled to do so, it cannot, in my opinion, be said that, within the meaning of the conveyance in the marriage contract, the wife has succeeded to the legitim more than to her testamentary provisions. It appears to me that the right to elect remains notwithstanding the terms of the conveyance. The wife may be barred from exercising that right, *e.g.*, if she has granted a specific conveyance of her legal rights. Or, again, if she has become bankrupt, in like manner she would forfeit her right to elect. I think, however, that unless there is something in the contract to bar her election, her right to elect remains. I am not able to hold that the terms of the marriage contract under consideration are sufficient to operate as a bar.

"Nor do I think that there are circumstances in the case which necessitate the interference of the Court.

"I am accordingly of opinion that the defenders are entitled to be assoilzied, with expenses."

The pursuers reclaimed, and argued—The conveyance in the marriage contract was universal in its terms, and therefore included the right to legitim. Whatever came to the lady during marriage fell within the conveyance — *Douglas's Trustees* v. *Kay's Trustees*, December 2, 1879, 7 R. 295, 17 S.L.R. 180; *Campbell's Trustees* v. *Whyte*, July 11, 1884, 11 R. 1078, 21 S.L.R. 732; *Simson's Trustees* v. *Brown*, March 11, 1890, 17 R. 581, 27 S.L.R. 472. That being so, it was the duty of the marriage-contract trustees to claim the legitim, for they had to look after the interests of the children of the marriage as well as those of the spouses. The right to legitim was vested in the lady at the time of her marriage, though the amount could not be ascertained till her father's death—*Stevenson* v. *Hamilton*, December 7, 1838, 1 D. 181, Lord Fullerton's opinion; *M'Murray* v. *M'Murray's Trustees*, July 17, 1852, 14 D. 1048; *Fisher* v. *Dixon*, April 6, 1843, 2 Bell's App. 63. The right vested *ipso jure*, without any claim being made, and passed under the assignation to the marriage-contract trustees. The lady could not now elect, for the right of election had passed to the marriage-contract trustees. They were onerous assignees. Their position was analogous to that of a trustee in bankruptcy who was entitled to claim legitim—*Aikman, Petitioner*, March 2, 1893, 30 S.L.R. 804; *Wishart* v. *Morison*, June 4, 1895, 3 S.L.T. 29. The case of *Stevenson* (*cit. sup.*) relied on by the respondents was a narrow and peculiar one, and was decided, not on the ground that the legal assignation implied in marriage was insufficient to carry the right to legitim, but on a very different ratio, viz., that a husband would not be allowed to exercise his curatorial power to his wife's prejudice. In short, the Court in *Stevenson's* case looked upon the *jus mariti* as a "curatorial right of administration." That was clear from the case of the *Duchess of Buckingham* v. *Winterbottom*, June 13, 1851, 13 D. 1129. The view of the minority in *Stevenson* was the sound view, and was in the reclaimer's favour. [As to the different meanings of the *jus mariti*, reference was made to Ersk. Inst. i. 6, 13; Stair's Inst. i. 4, 9 and 17; Bell's

Com. i., 59; and Bell's Prin. 1561.] *Esto*, however, that the right to claim legitim was not conveyed, there was no doubt that the legitim itself, when vested as it now was, was carried by the assignation, for on her father's death it ceased to be *inter acquirenda* and became *inter acquisita*. The lady was barred from exercising her option except in one way, for she could not derogate from her own grant—*Douglas's Trustees* (*cit. supra*); *Macdougal* v. *Wilson*, February 20, 1858, 20 D. 658, at 665; *Miller* v. *Galbraith's Trustees*, March 16, 1886, 13 R. 764, 23 S.L.R. 533; *Obers* v. *Paton's Trustees*, March 17, 1897, 24 R. 719, 34 S.L.R. 538. The case of *Reid* v. *Morison*, March 10, 1893, 20 R. 510, 30 S.L.R. 477, relied on by the respondents, was distinguishable, for it dealt with a *spes successionis*, not with a vested right.

Argued for respondents—The Lord Ordinary was right. The assignation in the marriage contract was an assignation of "property," and the right to claim legitim was not "property." Before such a right became property it was essential (1) that the succession should have opened, and (2) that the legitim should have been accepted. "Property" did not include a *spes successionis—Reid* v. *Morison* (*cit. sup.*) Neither did it include the right to choose between legitim and testamentary provisions. The lady's obligation in the marriage contract was not to acquire for the marriage-contract trustees, but to hand over to them what she herself had acquired, and the assignation could not therefore carry anything until it had been so acquired—*Stevenson* v. *Hamilton*, *cit. sup.*; *Duchess of Buckingham* v. *Winterbottom*, *cit. sup.*; *Lowson* v. *Young*, July 15, 1854, 16 D. 1098; *Millar* v. *Birrell*, November 8, 1876, 4 R. 87, 14 S.L.R. 58. Legitim was a right of succession, and did not vest in any higher sense than the provisions of a will—*M'Murray*, *cit. supra* (opinions of Lords Rutherfurd and Ivory); *Morison's Curator Bonis* v. *Morison's Trustees*, December 3, 1880, 8 R. 205, 18 S.L.R. 160; *M'Call's Trustee* v. *M'Call's Curator Bonis*, July 16, 1901, 3 F. 1065, 38 S.L.R. 778. The cases of *Aikman*, *cit. sup.*, and *Wishart*, *cit. sup.*, were inapplicable, for they were decisions on the scope and extent of the vesting clause (sec. 103) of the Bankruptcy Act 1856. The term "estate," as used in that section, included "all powers, rights, and interests capable of legal alienation" (sec. 4), and its scope therefore was very much wider than that of the clause of assignation in this marriage contract. The ratio of the case of *Miller* v. *Galbraith's Trustees*, *cit. sup.*, was the same as that of the more recent case of *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236—viz., repugnancy—but that principle did not apply here, for there was no absolute conveyance to the marriage-contract trustees. What was conveyed to them was not "estate," but "estate to which I shall acquire right." The two things were very different. In any event, the present application was premature so long as this lady's mother was in life.

At advising—

LORD M'LAREN—This is an action by marriage trustees, concluding that they should be found entitled to the legitim which they say vested in the wife on her father's death, with further conclusions for accounting and payment.

Defences were put in by Mrs Mackenzie and her father's trustees setting forth that Mr Beveridge (Mrs Mackenzie's father) by his will had made certain provisions in favour of his daughter which she considers more advantageous to her than the share of the father's estate which she might claim as legitim. The question then is whether Mrs Mackenzie has a personal right of election between legitim and the testamentary provisions in her favour, or whether the right of election lies with her marriage trustees in virtue of a general conveyance of her estate acquired and to be acquired contained in the contract of marriage.

The Lord Ordinary's opinion contains a full statement of the facts of the case to which I refer, and I shall proceed at once to consider the case in its legal bearings. By the contract of marriage, executed in 1873, Mr Mackenzie assigned to the trustees two policies of insurance (£3000), and undertook to provide a further sum of £2000 for the purpose (*inter alia*) of securing an annuity of £300 to his wife.

Miss Beveridge conveyed to the same trustees "the whole means, estate, and effects, heritable and moveable, real and personal, now belonging to her, or to which she has right, or to which she may succeed or acquire right during the subsistence of the marriage hereby contracted," for the purposes of the marriage trust. These purposes include payment of the life interest or income of the estate to Mr Mackenzie in case of his survivance of his wife. Mr Mackenzie was called as a defender, but has not appeared to maintain his individual interests in his wife's estate, but I think it may be taken that the action of the marriage trustees sufficiently raises for consideration all the beneficiary interests that arise under the marriage-contract trust.

As regards Mr Beveridge's settlement (1902), we are only concerned with it in so far as it makes provision for his daughter and her family. Under the settlement Mrs Mackenzie is entitled to a legacy of £2000 and one fifth share of the residue, and as to both provisions Mr Beveridge's trustees are empowered either to make immediate or postponed payment of the capital, or to vest the money in trust for her liferent alimentary use, and so that the capital may be settled on her son William Beveridge Mackenzie. This son also receives £2000 in his own right. Nothing is given to the other son of Mr and Mrs Mackenzie.

Mr Beveridge's settlement makes no reference to his daughter's marriage contract, and we do not know how far he was acquainted with its provisions. But under his own settlement his trustees are empowered to pay the capital of his daughter's provisions to herself, and if

they choose to exercise the power this capital sum, *i.e.*, the £2000, and one-fifth share of residue would apparently fall as *acquirenda* to the marriage trustees, subject, it may be, to a question whether Mrs Mackenzie's son Robert would be entitled to participate. This follows from the decisions in *Simson's Trustees* v. *Brown*, 17 R. 581, and *Douglas's Trustees* v. *Kay's Trustees*, 7 R. 295. Mr Beveridge's trustees do not say, and are probably not bound to say, how they propose to exercise the powers conferred on them, and I only refer to the power of paying the capital to Mrs Mackenzie because I think it may be inferred that Mr Beveridge's directions were meant for the benefit of his daughter and were not conceived in any hostile spirit towards her husband, of which indeed the will bears no evidence.

In considering the legal question, I think we must approach it from the point of view that in general the right of election between legal and conventional provisions is personal to the child.

With the exception of two cases in bankruptcy (to which I shall refer) the decisions are uniform to this effect. In the earliest case—*Stevenson* v. *Hamilton*, 1 D. 181—the decision was that of a majority, but in the later case of *Lowson* v. *Young*, where the point was raised under different circumstances, the decision was unanimous. This is a strong authority in favour of the wife's personal right of election; because the lady had at first proposed to claim legitim, but afterwards, and shortly before her husband's supervening bankruptcy, she changed her mind and accepted her father's testamentary provision (which excluded her husband's rights), and it was held that her election must be sustained.

In the argument for the pursuers much reliance was placed on the principle that the right of legitim vests by the death of the father; but this argument does not influence me, because it is equally true that the right to a testamentary provision vests. All that is meant is that no proceeding of the nature of '*adiation*' is necessary to fortify the right in either case. The truth is that each right vests conditionally on the other right not being claimed. The fact that there is an election proves that neither the legal nor the conventional provision attracts the estate in a higher degree than the other.

The distinction was also taken that in the case of *Stevenson* v. *Hamilton* the competitors were the husband or his creditors, while in the present case the competing parties are the wife's disponees.

But I am not prepared to admit that under this contract of marriage the right of election between legal and testamentary provisions was conveyed to trustees. The general rule is that a universal conveyance of estate does not carry an unexercised power, and this principle is very well illustrated by the decisions as to the effect of a general disposition in a testamentary deed. In such cases it has been inferred from the terms of the will, especially if the testator knew that he had the power, that the will was equivalent to an exercise of the power. But in the absence of indications of intention, the bare fact that the testator has a power of disposal is not sufficient to bring the subjects over which he has the power under the operation of his will.

Now it may be that if Mrs Mackenzie had in plain terms conveyed her power of election to the marriage trustees, or, which is the same thing, had expressly authorised them to exercise her right of election, this action would be well founded. But I am unable to infer from the general conveyance of estate which she might acquire that she intended to make over to marriage trustees the personal privilege of determining whether her legal or her conventional provision was in all the circumstances the more advantageus in her own interest and that of her family.

It is pointed out by the Lord Ordinary that in certain events the legitim claim may be the more valuable, and that in other events the testamentary provision would be the more valuable of the two. This seems to be a fair case for personal election by the person who is to receive the benefit, and there is no question here as to unfairness in the exercise of the power.

If it is assumed, either absolutely or for the purposes of the argument, that in this case the marriage trustees are in the position of assignees of the legitim, I do not think that their right is any stronger than that of the husband in the cases of *Hamilton* and *Lowson*.

The *jus mariti* is now only a shadow, but at the time when these questions were raised it was a right very strongly founded in the law. It was considered to be founded on the "assignation of marriage," and that is exactly the nature of the assignation on which the case of the pursuers is founded. I can see no substantial distinction as regards the derivation or the onerosity of the right in the two cases, and I think that the decisions in question govern the present case.

The last point in the case is the argument founded on the two cases in bankruptcy—*Aikman*, 30 S.L.R. 804, and *Wishart*, 3 S.L.T., 29, where a trustee in bankruptcy was held entitled to claim legitim against the wishes of the bankrupt, who naturally preferred that his rights should be left to the operation of his father's will. These are decisions in the Outer House by Judges whose opinions are deserving of the greatest respect. In *Wishart's* case there is no considered opinion; the report only says, "held, following *Aikman*," and states the decision.

Now in effect these are decisions as to the extent and effect of the vesting clause of the Bankruptcy Act 1856. I do not doubt that under that clause a power may be adjudged by the trustee, because a power is in its nature adjudgable, and the trustee without going through the form of an adjudication has all the rights of an adjudger. If we compare these cases with *Lowson* v. *Young* we see that in the one case the right of a bankrupt husband's trustee was not allowed to prevail against the right of the

wife to choose the provision which protected her own money against her husband's creditors, while in the other case, where the question was between the husband and his creditors, no other person being interested, the right of the trustee was sustained. The cases are not inconsistent because the questions were different. and as at present advised I should agree with Lords Kyllachy and Low in regard to the trustee's claim. In this connection Lord Kinnear has called my attention to the rule that a bankrupt is not entitled to renounce a succession where the renunciation will be productive of injury to his creditors without benefit to himself. But then I think the present case, if it is governed by authority at all, must be held to fall within the principle of *Lowson* rather than that of *Aikman*, because the principle is that where the interests of the wife, real or supposed, conflict with those of the husband or children, or trustees representing their interests, the election lies with the wife herself. It is only necessary to read the judicial opinions to see that the grounds of decision in *Lowson's* case and the earlier case of *Hamilton* are absolutely different from anything that could be put forward in a question between a bankrupt and his trustee. I am therefore for adhering to the Lord Ordinary's decision.

LORD KINNEAR — I agree with Lord M'Laren, I am, however, disposed to rest my opinion rather upon the construction of this particular marriage contract than upon general rules of law. Taking this view, I am not disturbed by the difficulties which were experienced by the learned Judges who decided the cases of *Hamilton* v. *Stevenson* and *Lowson* v. *Young* with reference to the operation of the *jus mariti*, and the consequent right of the husband or his creditors to interfere with the wife's election between legitim and testamentary provisions.

These cases seem to me to be different from the present in two very material respects. In the first place, the assignation of moveable property implied in marriage was universal, and in the next place, over and above the right of property which was carried *jure mariti* to the husband, there was in him a right of administration which enabled him to control the wife's management of property belonging to herself; and accordingly the real point of difficulty in the cases of *Stevenson* v. *Hamilton*, 1 D. 181, and *Lowson*, 16 D. 1098, seems to have been whether the husband and his creditors could be allowed to interfere to the disadvantage of the wife and for their own advantage in the exercise of her right of election. The Court held that while they had an equitable power to control the right of election if it were used wrongly and to the disadvantage of persons having an interest in the subject-matter, in the cases in question there was no reason for interfering or allowing the husband to interfere with his wife's choice. It does not appear to me that a question of that kind arises at all in the present case, because on the construction of this marriage-contract I am of opinion that neither the legitim itself nor the right of choosing between legitim and testamentary provisions is conveyed to the trustees.

What is conveyed to the trustees is the whole means, estate, and effects belonging to the wife, or to which she had right at the date of the marriage contract, or to which she might succeed or acquire right during the subsistence of the marriage. That assignation, of course, took effect immediately as regards the rights already acquired by the wife, but in order that it should take effect upon the other rights which she had not yet acquired, it was necessary in the first place that she should acquire them, and until she acquires right to it by succession or otherwise during the subsistence of the marriage no estate falls within the terms of the conveyance. I do not think that she can be held to have acquired right to legitim before she has considered whether she will take legitim or something else which is offered by her father's testamentary settlement. It appears to me that before that right can be included among *acquisita* as distinguished from *acquirenda*, it must be acquired by her determining that she shall take it. I cannot read the conveyance in the marriage contract as equivalent to an assignation to the trustees of a right of election so as to commit to them the right of choice which belongs to the wife herself. I cannot go quite so far as I think the Lord Ordinary does when he says that it is a right which is personal and not transmissible, because I am unable to see any sound reason in law why a child may not assign to trustees if he or she thinks fit the power to make a choice between two alternative rights. But I think it is necessary that she should do so in perfectly plain terms if it is to be maintained against her that she has conveyed her right from herself to anybody else, and there is nothing in the contract of marriage which to my mind can bear that meaning. What is conveyed is property. There is no special function committed to the trustees which could involve a right to exercise a discretion of this kind. Their duty is to ingather the estate when it became estate, and to administer it in a certain way, but to that their duty is confined.

When the question arises whether the child shall take legitim or take the testamentary provisions, there may be conflicting interests which the trustees can have no power to determine. I do not say that there are in this case, but for the purpose of construing this contract we must keep in mind that the marriage trustees are not to determine between the spouses and the children whether the interest of the one is to be sacrificed to the interest of the other in making an election. It may very well be that the interests of the spouses conflict, and that the interests of the children conflict with both. There is nothing in this deed that I can see giving power to the trustees to determine any such conflict according to their discretion.

It was maintained to us in an ingenious

argument that inasmuch as the right to legitim vests, *ipso jure*, on the death of the father, the assignation to the trustees took effect upon the legitim fund by the mere survivance of the daughter, and therefore that when the father's will put it in her power to accept certain testamentary provisions provided she gave up her legitim, it was no longer within her option to make that bargain with the testamentary trustees, because she could not, as it was said, pay the price; the legitim fund had already gone to her own marriage-contract trustees; she could not account for it because it was theirs, and therefore she could make no choice between the two funds. I think that argument is open to the objection that it is an attempt to extend the verbal terms of a proposition in law to conclusions altogether beyond the intention of those who originally laid it down. I quite agree that we must accept the propositions laid down by so exact a lawyer as the first Lord Moncreiff, from whose opinion this phrase was quoted in the course of the argument, and that we must follow them out to their necessary conclusions. But we must, in the first place, see exactly what Lord Moncreiff meant. When he says that the right to legitim vests *ipso jure*, that really means nothing more than this, that on the death of the father it passes to the child without the necessity for completing any formal title. That is the whole force and effect of the words *ipso jure*, and the same thing may be said of the right to a legacy under a will.

The right to legitim passes by operation of law, the right to a bequest passes by operation of the will, but they both pass entirely and absolutely upon the child's survivance of the father; and the one, as Lord M'Laren has pointed out, is as conditional a right as the other, because the child cannot take legitim out of his father's estate except upon the condition of leaving the rest of the estate to go by the will, and he cannot take the testamentary provisions in lieu of legitim except on condition of allowing the will to operate upon the legitim fund. Therefore there is, to my mind, a perfectly clear right of election which must be exercised before the child can take either the one provision or the other. I quite agree also with Lord M'Laren with reference to the case of *Aikman*, 30 S.L.R. 804. I should be very sorry to say anything inconsistent with Lord Low's judgment in that case, which appears to be perfectly sound. But then I think it rests upon a ground in law which stands quite clear of that upon which the present case ought to be decided, which is simply this, that the right to legitim having vested in the bankrupt he could not be allowed to surrender it to the prejudice of his creditors. It was really an equitable power to control the exercise of a right which a man *sui juris* would certainly have been entitled to exercise, but which the bankrupt, whose whole property belongs to other people, cannot be allowed to exercise to their prejudice. The bankrupt's father had left him a provision in his will on condition that if he were not discharged—he had already been sequestrated before the will was made—it should not be paid to him but held for the benefit of his children, and he very naturally maintained that he should prefer this money to go to his children rather than let the legitim go to his creditors. The whole question was whether he could be allowed to sacrifice his creditors' interests in that way, and Lord Low held that he could not. I agree with him; but I do not think that throws any light upon the construction of this contract of marriage.

LORD PRESIDENT — I confess I have myself found this case attended with great difficulty; but I had the opportunity of perusing the opinion which has just been delivered by my brother Lord M'Laren, and I am prepared to concur in that opinion. I do so the more easily because your Lordships both take the same view as the Lord Ordinary.

I think the case in the end comes to depend on a very small though not simple proposition, and that is, Does or does not a conveyance of *acquirenda* in a marriage-contract convey the right of election? I have come to the conclusion that it does not. There is one consideration which to a certain extent affects my mind. It is this. I see great difficulties in working out the idea that the trustees in a marriage-contract should have the right of election, because what is to be their criterion in exercising it? To whom is their duty? The duty of trustees is of course to the whole of the beneficiaries under the settlement, and yet the question whether it was better to take legitim or to take the testamentary benefit that is offered instead may raise perfectly cross interests, if I may use the phrase, among the beneficiaries to whom the trustees have got an equal duty. That class of difficulty never arises in a bankruptcy case, because the trustee in a bankruptcy case has one duty and one duty alone, which is to take what is going to bring ready money for the creditors. He would never have any doubt whatsoever as to what he had better do in taking either legitim or testamentary provisions. With the others it is quite different, and therefore here it is only the natural result to hold that a conveyance of *acquirenda* does not convey the right of election, but only binds the lady to hand over to her marriage trustees whatever she gets after she has got it.

LORD PEARSON was absent.

The Court adhered.

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