succession to any property then belonging to them or which they might acquire or succeed to, or which they or their children might have in the event of a dissolution of the marriage by the death of one or both of them. Therefore, in order to regulate the interests which they, the said Henry E. Somerville and Eleanor Dixon are to have in the property presently belonging to them, or that they may acquire or succeed to during the marriage, they proceed to make the provisions to which I have already adverted.

The object of the parties, it will be observed, is not stated to be to make any provision for the children, whom they probably knew they could not bind, or having any reference to their interests, but only to regulate the rights of the spouses themselves in their present and future property, acquired during the marriage, or that they might afterwards come to have right to. Now, this object was fully carried into effect on the part of Major Somerville by securing to his wife, if she should survive him, a liferent in all the property of which he should die possessed, and giving to the children of the marriage, at her death, what she should have enjoyed for her life. There is nothing to be collected from the recital showing an intention on the part of Colonel Somerville to make provision for the children in case his wife should die in his lifetime, and so he should never be called on to make provision for her. The deed, construed according to the literal meaning of the words, carries into full effect the recited intention, and I see no reason for endeavouring to extend its operation beyond what the language, literally construed, imparts. On these grounds, I have come to the conclusion that the decision of the Court of Session was right.

I will only add, that the doctrine of the English courts, to which we were referred by Sir R. Palmer, in such cases as *Key* v. *Key*, 4 De Gex., M. and G., 70; and *Howgrave* v. *Carter*, 3 V. and B., 79, even if the rules of construction there acted on, and which had been established with great hesitation by Lord Thurloe and Lord Eldon, are to be acted on in Scotland, do not apply to the present case. In all these cases the Court of Chancery felt itself warranted in holding that the object of the will or settlement must have been to make an absolute provision for all the children attaining twenty-one, though the language seemed to indicate the surviving of their parents as a condition precedent. No such doctrine can, in my opinion, be attributed to the deed now under consideration.

Lord Westbury—My Lords, I regret that I cannot concur in the opinion of my noble and learned friends; but as this is a question not involving any general principle or point of law, but turning entirely upon the construction of a private instrument, I abstain from stating my reasons at length. It would be useless with regard to the decision itself, and if there be any validity or force in the reasons, it would only have the effect of weakening the confidence of the parties in the judgment to which they must submit.

Sir Roundell Palmer—I do not know whether your Lordship will allow me to say a single word on the subject of costs. Your Lordship will recollect that this is a family case arising under the provisions of a will. The property in substance goes to the parties for their own life, though with remainders to the children, and even in case there should be no children. I do not know whether your Lordships will think that should be considered with reference to the question of costs.

Mr Anderson—There is no question upon the consideration of the will. It is upon the marriage-settlement.

Lord Chancellor—I do not know what my noble and learned friend thinks on the subject of costs; of course I intended to put the question to the House. "That the appeal be dismissed with costs." I do not know whether my noble and learned friend is of that opinion.

Lord Cranworth—My Lords, I am sorry to say that that is my opinion. I have always an inclination in family suits to make the costs of the parties come out of the estate; but this is not an ambiguity created by the testator.

Interlocutors appealed from affirmed, and appeal dismissed, with costs.

Agent for Appellants—J. T. Mowbray, W.S., and Loch & Maclaurin, Westminster,

Agents for Respondents—J. Shand, W.S., and Simson & Wakeford, Westminster.

Monday, May 20.

DIGGENS *v.* GORDON.

(The Court of Session, 6 Macph. 609.)

Husband and Wife—Antenuptial Contract—Conquest—Succession. Held (aff. C. S.) that a conveyance by a wife in an antenuptial contract of whatever she might "conquest or acquire" during the marriage, was not to be construed technically, but comprehended estate to which she succeeded under her parents' marriage-contract, and as heir *ab intestato* of her father.

On 4th January 1860 an antenuptial-contract of marriage was entered into between Francis John Diggens and Mary Nisbet, daughter of Mr Ralph Nisbet of Mainhouse. Mr Diggens conveyed to trustees a policy of insurance on his life for £200, to be held for his wife and the children of the marriage. Miss Nisbet, on the other hand, conveyed to the trustees, to be held for herself and the children of the marriage, 100 shares of the stock of the North of Scotland Banking Company; and farther, "all sums of money, goods, gear, and effects, and heritable and moveable estates of every description, wheresoever situated, which she may conquest or acquire during the subsistence of the said intended marriage." On 5th January the marriage took place. In November 1863 Mr Nisbet died. By deed, dated in 1855, he directed his marriage-contract trustees to pay over to his daughter a sum of £1500, being one-half of a sum of £3000 which had been settled on his children by his marriage-contract. Mr Nisbet died intestate as to the rest of his estate, heritable and moveable, which was of considerable value. He left two daughters, of whom Mrs Diggens was the elder.

Mrs Diggens, with concurrence of her husband, brought an action against the surviving trustee under their marriage-contract, to have it found that the property to which she had succeeded from her father's estate belonged absolutely to her and her husband, and was not carried to the trustees under her marriage-contract by the clause of conveyance in that deed. The plea upon which she rested her claim was, that the conveyance of "conquest" in her marriage-contract was to be construed in the strict sense of the term—that is, did not comprehend sums to which she succeeded.

The defender, on the other hand, contended that the words "conquest" and "acquire" were not to be read in any strict or technical sense, but in the simple and natural meaning of everything which the wife might become possessed of, or get right to during the subsistence of the marriage.

The LORD ORDINARY (ORMIDALE) sustained the claim of the pursuers. The Second Division of the Court reversed, holding that the clause of conquest was not to be construed technically, but that, viewing the matter as a question of the intention of parties, the claim of the trustee was well founded.

The pursuers appealed.

The ATTORNEY-GENERAL (ROLT), SIR ROUNDELL PALMER, Q.C., and ANDERSON, Q.C., for Appellants.

GIFFORD, Q.C., and YOUNG, for Respondent.

The LORD CHANCELLOR—My Lords, the question to be determined upon this appeal is the proper construction of a clause in an antenuptial contract of the appellants, dated 4th January 1860, whereby the wife assigned, disponed, conveyed, and made over to trustees, of whom the respondent is the sole acting trustee, "all sums of money, goods, gear and effects, and heritable and moveable estates of every description, wheresoever situated, which she may conquest or acquire during the subsistence of the intended marriage."

Under the marriage-contract of Mrs Diggens' father and mother, the father, after binding himself and his heirs and executors to pay to his wife, in case she survived him, an annuity of £150, for securing such annuity bound and obliged himself to settle and invest an heritable bond for £3000 in trustees, the interest to be paid to himself during his life, and after his death to be applied in payment of the widow's annuity, and the principal sum, after the death of both the parties, left to the child or children of the marriage, but in such proportions and at such times as the father might direct, by a writing under his hand, and failing of such writing, to be divided equally amongst the children of the marriage.

There were two daughters of the marriage. The father having survived his wife, by a deed of direction, dated 11th July 1855, appointed one-half of the £3000 above mentioned to the appellant by her then name, Mary Wilhelmina Nisbet, reserving his own liferent, and the deed contained these words:—"I dispense with the delivery hereof, and declare these presents to be good, valid, and effectual, although found lying by me, or in the custody of any other person to whom I may intrust the same, undelivered at my death."

The father died intestate on the 2d November 1863, leaving heritable and moveable estates of considerable value, to which the appellant and her sister became entitled in equal moieties.

The questions upon the appeal are, whether the sum of £1500, appointed to the appellant by the deed of direction of the 11th July 1855, and the moiety of her father's heritable and moveable estate belong to the respondent, as trustee under the marriage-contract of the appellants, as having been "conquested or acquired during the subsistence of the marriage."

In the construction of every instrument, whether will or deed, word or mark, *prima facie* be assumed to have been intended to be used in their ordinary sense, and if they have technical meaning, that meaning must likewise prevail, unless it is apparent from the context or from the whole purview of the instrument that they require a different interpretation.

The word "conquest" is a word of technical signification, and, according to Mr Bell, in section 1974 of his Principles of the Law of Scotland, "when used substantively in marriage-contracts, comprehends whatever is acquired, whether heritable or moveable, during the marriage, by industry, economy, purchase, or duration, but not what comes by succession or legacy or accession to a subject already acquired."

The ordinary provision of conquest inserted in marriage-contracts applies only to the husband's acquisitions during the marriage. Lord Cowan, in his judgment in this case says—"A provision made by a wife of her conquest during the marriage is unprecedented; and so far as any known style of contract of marriage can be relied on, or any reported decision on questions of this kind discloses, there is no instance on record of a wife providing in general terms or specifically 'conquest' in its limited sense to the husband and children."

A wife (as was observed in argument) may acquire considerable sums during the marriage by the exercise of her musical or literary talent, or by carrying on business, but, as the Lord Justice-Clerk remarks, "She cannot in any legitimate sense conquest or acquire anything, because whatever she acquires of moveable property passes to the husband; and if any heritable estate comes to her by succession, that would not be conquest; and if by donation, that would be the very opposite of conquest of the marriage."

Of course provision might be made respecting a a wife's acquisitions during the marriage under the term "conquest" in a marriage-contract, if it was clear that the word was meant to be used in the same technical sense as when applied to a husband's acquisitions. But the absence of any precedent of a deed in which a wife has made provision for her conquest in the same sense in which a husband's conquest is provided for, raises a presumption that when the technical word is found in a clause in a marriage-contract dealing with the wife's property, it is not intended to be used in its strict and technical sense.

The word in the present case is not used substantively, but as a verb, as to which Mr Bell, in section 1975, says: "The word conquest is also sometimes used as a verb, 'what we shall conquest or acquire;' or its meaning is qualified by descriptive words, and the extent varies with the expression." By this I understand that the word conquest, when used as a verb, is more flexible then when used as a substantive.

Being then at liberty to depart from the technical sense of the word, if there is a manifest intention that it was not to be technically applied, the question arises, Whether in the deed itself sufficient grounds are not to be found for the adoption of a different construction?

In an ordinary provision of conquest the husband is the absolute proprietor during his life of everything which comes under that denomination, and may dispose of it during his lifetime for onerous causes, but not gratuitously. Every acquisition made by the wife during the marriage belongs to him, unless his *jus mariti* is excluded. There is nothing in the smallest degree analogous to this in the marriage-contract of the appellants. The whole of the wife's heritable and moveable estates of every description which she may "conquest or acquire" are assigned to trustees, and they are empowered, with the consent of the wife alone, to sell any of the heritable estates, and convert them into

money, both the parties binding themselves to execute all deeds necessary for vesting the heritable estates in the trustees. The husband is deprived of the power of touching the smallest portion of the property; and instead of the wife being the absolute proprietrix of it, as in the case of a husband with respect to his conquest, she is restricted to a command over a sum of £2000 for herself, or as a loan to her husband, on security; and in case her husband survives, the trustees, with his consent, may advance to a child or to children any sum not exceeding £2000.

Such a trust as this is utterly at variance with a provision of conquest. From the nature of the deed in its constitution of the trust, and from the character of its provisions, I am satisfied that the words "conquest" and "acquire" were not used in a strict and technical sense, but were meant to comprehend everything which might fall to the possession of the wife during the marriage. This will include the £1500 acquired under the deed of direction of the 11th July 1855, as well as the moiety of the father's heritable and moveable estate. I therefore differ with the Lord Ordinary, and agree with the opinion of the Judges of the Second Division, and think their interlocutor ought to be affirmed.

Lord Cranworth—My Lords, by the antenuptial marriage-contract of the appellants, Mary Wilhelmina Nisbet and Francis John Diggens, dated in 1860, the appellant, Mary Wilhelmina Nisbet assigned to trustees, *inter alia*, "all sums of money, goods, gear, and effects, and heritable and moveable estates, wheresoever situated, which she may conquest or acquire during the subsistence of the said intended marriage," on certain trusts afterwards declared.

By the marriage-contract of her parents, Ralph Compton Nisbet and Mary Cameron, a sum of £3000 had been settled on the children of that marriage, to go to them in such proportions as the father should direct.

The said Ralph Compton Nisbet survived his wife, and died in 1863, leaving issue only two daughters, of whom the appellant, Mary Wilhelmina Nisbet was one.

By a deed of direction, dated in 1855, Ralph Compton Nisbet directed that the trustees who held the £3000 should, after his decease, pay over one-half thereof to his daughter, now Mrs Diggens. This deed was not delivered as a deed, but was kept by him in his repositories. It contained, however, a clause declaring that it should have full force at his death, notwithstanding the want of delivery.

Mr Nisbet left considerable property at his death, in 1863, both heritable and moveable, to which his two daughters became entitled in equal moieties, as heirs-portioners and next of kin.

The question for decision is, whether the £1500 so directed to be paid to Mrs Diggens, and her share in the heritable and moveable estate of her father, were duly assigned by her to the trustees appointed by the antenuptial contract entered into on her marriage.

The question turns entirely on the point, whether the property to which she so became entitled passed under the description of heritable and moveable estate *which she might conquest or acquire* during the subsistence of the marriage. The Court below held that it did; but the appellants dispute the correctness of that decision, on the ground that property to which she succeeded as heir-portioner and next of kin of her father, or to which she became entitled under her father's deed of direction, is not *conquest* according to the Scotch law.

It cannot be disputed that when, in a marriage-contract, the intended husband makes in the ordinary form a provision of conquest in favour of his wife or children, the word "conquest" has a well established definite meaning, which I assume would not include any part of that to which Mrs Diggens became entitled on her father's death. A provision of conquest seems to have been an ancient mode of making a settlement for the benefit of wife and children, sufficient probably in early times, but ill-suited to the exigencies of the present day. It was founded, as I collect from the opinion of the Lord Justice-Clerk, on the hypothesis that the spouses were bound together in a sort of partnership, to endure during the marriage, and then, at the death of the husband, the result of their gains during the marriage, whether from industry, frugality, or purchase, was to be ascertained. This was analogous to the profit of a commercial partnership, and the result was treated as the "conquest" on which the contract of the husband in favour of his wife and children attached.

But it is impossible to attach to the word "conquest," as used in this marriage-contract, the same meaning as that which attaches to it in an ordinary provision of conquest by a husband. What is to constitute "conquest," properly so called, cannot be ascertained till the death of the husband; but here the assignment of what the wife shall "conquest or acquire" operates immediately on the accruing of the title to the property assigned. It is all to be held by trustees during the marriage, on trusts irreconcileable with her retaining, or her husband retaining, any power or control over it. The argument, however, of the appellants was, that though the incident of conquest, properly so called, to which I have referred—I mean its leaving everything under the husband's control until his death—might be inapplicable to the assignment contained to the settlement, yet it would be right to interpret the words, "which she may conquest or acquire," as embracing only such things as constitute conquests properly so called.

Now, it is admitted on all hands that a provision of conquest by a husband does not extend to or affect any heritable or moveable estate which come to him during the marriage by succession or legacy; and therefore, reasoning by analogy, the appellants contend that the words used in the antenuptial contract ought not to be taken as extending to the share of her father's heritable and moveable estate, to which she succeeded on his death. I cannot agree to this argument. If no technical meaning is to be attributed to the words "conquest or acquire," no one would hesitate to say that a married daughter, when her father dies and leaves a large property, which descends on her, "acquires" that property during the marriage. She certainly acquires it at some time; and if she does not acquire it during the marriage, when does she acquire it? No authority has been produced to show that any technical meaning has ever been attributed to these words, "conquest or acquire," except in the case of a provision made by the husband when, from the nature of the contract into which he is entering, the word "acquire" cannot have its ordinary meaning.

Even if it were necessary to adduce arguments to show that the word "acquire" ought to have its ordinary meaning attributed to it, there are cogent arguments on the face of the deed leading to that

conclusion. In the first place, the assignment here is by the intended wife, not by the husband; and it is highly improbable that a lady, one of two only daughters of a gentleman of fortune, should in her marriage with an officer in the Navy, think of entering into an engagement to settle what she should earn during the marriage by her own personal talents or exertions. Arguments were ingeniously put to show, that she might, during her marriage, as an authoress or an artist, earn large sums to which she might intend her contract to refer. This seems to me highly improbable, and quite inadequate to justify the Court in giving to the words used a technical instead of their ordinary meaning. Besides which, as was truly said at the bar, all which a married woman might so earn, would from time to time, as it might be realised, become the property of the husband.

But what seems to me to show conclusively that it is not to earnings or acquisitions in the nature of "conquest," technically interpreted, that the deed referred, is the circumstance that the property assigned is to go to trustees, who are to deal with it during the marriage in the mode prescribed by the contract. This is inconsistent with conquest in its technical sense. It was admitted that there is no authority for holding that a provision of conquest had ever been made the subject of an assignment to trustees; and I am persuaded that no such case can or does exist. Such a trust would, in fact, be inconsistent with the nature of conquest. On these grounds, I think that the decision of the Court below was right.

It was argued, however, that different principles may be applicable to the £1500, to which the wife was entitled under her parents' marriage-contract and the deed of direction executed by her father. The argument was, that though the precise amount to which she eventually became entitled was not ascertained till after the death of her father in 1863, yet she had an absolute indefeasible title to some part of the £3000 secured by the marriage settlement of her parents to their children; and so, it was contended, she could not be said in any sense to have acquired that sum during the marriage. But this is a very subtile refinement. She had not any part of the £3000 at the time of the marriage, and it is reasonable to understand her contract as extending to everything not then in her possession, but which should come to her by any means during the marriage. She makes over to the trustees a small sum of bank stock of which she was possessed at the time of the marriage; and the reasonable construction of the language used is, that she meant to deal with all of which she should afterwards become possessed in the same mode in which she dealt with that which she already possessed.

My opinion is, that the interlocutors of the Inner House ought to be affirmed.

Lord Westbury—My Lords, my noble and learned friends who have preceded me, have stated their reasons for affirming this interlocutor so fully, and to my mind so satisfactorily, that it is unnecessary that I should weary your Lordships by a repetition of them. I concur entirely in affirming the interlocutor.

Lord Colonsay—My Lords, I entirely concur in the conclusion at which your Lordships have arrived. The attempt in this case to put on the word "conquest" the particular construction which the appellants contend for is, to my mind, a perfect novelty. The word "conquest" here occurs in a marriage-contract, and it is introduced into that marriage-contract with two accompanying circumstances which prevent me from giving to it the interpretation that the appellants contend for. In the first place, it has reference to what may be acquired by the wife. That in a marriage-contract is a novelty, and it would be very difficult of application—I would say almost impossible of application—if the word "conquest" be taken in the sense in which it is understood in reference to a provision of "conquest" in a marriage-contract. In the second place, it is an immediate conveyance to trustees, to be operative during the subsistence of the marriage. That again is entirely inconsistent with an ordinary provision of conquest in a marriage-contract. These two circumstances seem to me to take the word "conquest" out of the interpretations which the appellants contend for. I am not quite certain whether the appellants contend for the interpretation of "conquest" in this marriage-contract in the same sense in which "conquest" provided by a husband is understood, is in the limited sense in which the word "conquest" is held to be applicable to heritable rights; but it is necessary for their case to put upon the word "conquest" the meaning for which they contend, and they endeavour to make that particular meaning of the word "conquest" communicate itself to the next succeeding word "acquire;" so that the word "conquest" is to have this extraordinary, unusual, and unprecedented application in a marriage-contract, and it is to destroy the ordinary meaning of the word that next follows it. My Lords, I think these considerations are sufficient to show that the word "conquest" here was not used in the sense for which the appellants contend. Indeed, I think the use of the word here was simply a mistake, because in its strict technical sense it would lead to a construction contrary to all precedent; contrary to law; and it might, I think, lead to contending for impossible consequences. But if you get rid of the technical meaning of the word, the meaning of the contract itself and the purpose and object of the parties are perfectly plain; it was intended to carry whatever was acquired by the wife during the subsistence of the marriage. Therefore I think that the judgment of the Court below is perfectly right.

Sir Roundell Palmer—Will your Lordships permit me, as your Lordships have said nothing at present about expenses, to recal to your recollection the fact that the Court below thought this a case in which no expenses should be given, and no expenses were given.

Lord Westbury—My Lords, It has never been your Lordships' habit to give encouragement to appeals; and such encouragement would be given if, where no costs are given in the Court below, your Lordships adopted the course of not giving expenses on appeal. I think you ought not to do so. This is not a case of ambiguity arising on a will. And certainly I do not think that encouragement should be given to appeals, as would be done by the relaxation in such a case as this of the ordinary rule that, except under very exceptional circumstances, the costs follow the judgment.

Lord Cranworth—My Lords, I concur with my noble and learned friend.

Interlocutor affirmed, and appeal dismissed, with costs.

Agents for Appellant—A. & A. Campbell, W.S.

Agents for Respondents—Morton, Whitehead, & Greig, W.S.