

funds to pay all the preferential debts in full, no competition can arise between the preferential creditors of different orders. That is precisely the case we have to consider, and I therefore think the collector's contention is untenable.

I agree with your Lordship that, although the Lord Ordinary has given his opinion on the question of the order of the preferential payments, that part of his Lordship's interlocutor is not necessary for the disposal of the matter of the action and should be recalled. If it were to stand, the judgment might be cited as an authority on the point, and I do not think that a decision should be allowed to go out as an authority when the point it purports to decide does not really arise on the facts of the case.

LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

“Recal the said interlocutor [of 3rd March 1905]: Find that in respect that the liquidators have admitted the claim for poor rates to a preferential ranking and tendered payment thereof in full, there is no proper question presented to the Court for adjudication on the answers, and remit to the Lord Ordinary to proceed: Find the reclaimer liable in expenses of the reclaiming-note and also the expenses incurred by the liquidators in the Outer House in connection with the answers and the replies.”

Counsel for the Reclaimer—Lees, K.C.—Addison Smith. Agents—R. Addison Smith & Co., W.S.

Counsel for the Respondents—Graham Stewart—W. J. Robertson. Agents—Davidson & Syme, W.S.

HOUSE OF LORDS.

Tuesday, April 11.

(Before Lord Macnaghten in the Chair, Lord Davey, Lord Robertson, and Lord Lindley.)

DUNBAR'S TRUSTEES v. DUNBAR.
(*Ante*, December 3, 1902, 40 S.L.R. 146,
5 F. 191.)

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

By an antenuptial marriage-contract executed in 1848 the wife bound herself to convey to the trustees the whole funds and estate, real and personal, which she then had or might thereafter “conquest and acquire by purchase, succession, or otherwise.” The trustees were directed to pay the annual income of the trust estate to the wife during her life for her separate use, exclusive of the *jus mariti*. Held that the clause of conquest did not extend to estate

which consisted of, or was purchased with, savings made by the wife from her separate income during the subsistence of the marriage.

The case is reported *ante ut supra*.

William Allardes and others (Mrs Dunbar's testamentary trustees) and the Reverend John Archibald Dunbar Dunbar appealed.

At delivering judgment—

LORD MACNAGHTEN—The questions involved in this appeal depend upon the terms of an antenuptial contract, dated the 13th of October 1848, made in contemplation of a marriage then intended, and shortly afterwards solemnised, between Captain Edward Dunbar and Miss Phoebe Dunbar of Seapark. Miss Phoebe Dunbar was heiress in possession of the entailed estate of Seapark, and a lady of considerable means besides. The settlement effected by the contract was a settlement of property which belonged to her at the time, but it also contained a clause of conquest and *acquirenda*. Mrs Dunbar, who survived her husband, is now dead. In addition to the fortune which was hers at the date of the marriage she became entitled to a life interest in a large sum of money under the will of a brother who died in 1862. At her death she was possessed of personal estate of the value of more than £100,000, made up of savings or accumulations of income derived from her life interest under her brother's will, and the interests of the funds specifically comprised in her marriage settlement. By her will she left the moneys which she had thus accumulated away from the appellant, the Rev. John Archibald Dunbar, who was the only surviving child of the marriage, but apparently in her opinion amply provided for otherwise.

It was contended on behalf of Mr John Archibald Dunbar that these accumulations of income, as and when laid out on investments of a permanent character, or at any rate as from Mrs Dunbar's death, became by virtue of the clause of conquest and *acquirenda* subject to the trusts of the settlement of 1848, and that consequently it was not competent for Mrs Dunbar to deal with them by will. That was the principal claim advanced on behalf of the appellant. There was also a claim to a property called the Glen of Rothes, and there was a claim to legitim under the Married Women's Property (Scotland) Act 1881. On these three questions, and on some minor points which were not raised at your Lordships' Bar, the learned Judges in Scotland unanimously rejected the appellant's claim. Agreeing as I do in the result at which they have arrived, I will not trouble your Lordships by dealing with the case at any length.

As regards clauses in marriage contracts providing for the settlement of after-acquired property, I quite agree that effect must be given to the intention of the parties apparent on the face of the contract construed fairly, although the result may seem to be whimsical or even unreasonable. But still there are some considerations which it is as well to bear in

mind as aids to the construction of such clauses. These considerations may, of course, be excluded either designedly or accidentally by the language used, but unless they are so excluded, they are, I think, of general, if not universal, application. One is that change of investment—mere alteration in the outward form of property—is not “acquisition” within the meaning of a provision of this sort. Another is that property which has reached its destination through the medium of the trust, or property which, in accordance with the declarations of the parties to the contract, comes to be at the absolute disposal of one of those parties, does not again fall under the operation of the trust unless there is a clear direction to that effect. In the present case I cannot find in the marriage contract of 1848 any indication that money, which under or in accordance with the trust would come to the hands of Mrs Dunbar—money which was to be hers to hoard or spend, to waste or save, just as she pleased—was under any circumstances, or in any event, to be brought back under the operation of the trust and pass through the mill again. Such a result seems inconsistent with provisions carefully made to safeguard her separate use and enjoyment of the income which was originally her own. It is, I think, opposed to the whole scope of the instrument.

The clause in question is called a clause of conquest, and the word “conquest” occurs in it. But the word is used as a verb and not as a substantive. So used it has not apparently the strict technical meaning to be ascribed to it when used as a substantive. A clause of conquest, though perhaps a somewhat rude and rough form of provision for the issue of the marriage, is intelligible enough when the husband is the settlor, but according to the view expressed in this House in the case of *Diggens v. Gordon*, 1 H.L. Sc. Ap. 136, it is not, or at any rate was not, at the date of the contract now in question, properly speaking, applicable where the settlement is by the lady. In the case of a settlement on the part of the wife the word “conquest” adds little or nothing to the force of the word “acquire” when used in conjunction with it. Here I think the word “acquire” is the governing word. The expression “conquest” is, as it seems to me, merely redundant and tautological.

An argument was founded on the expression “acquire by purchase.” But there again I think that the words “by purchase, succession, or otherwise” add nothing to the force of the word “acquire,” and that whatever the meaning of the draftsman may have been there must have been an “acquisition” properly so called in order to bring any subject within the operation of the clause. There must be something got from an external source.

As regards the lands of the Glen of Rothes and the question of legitim, I have nothing to add to the observations of the learned Judges in the Courts below.

It only remains for me to move that the appeal be dismissed with costs.

LORD DAVEY—The first and principal question on this appeal is whether certain investments of the savings made by the late Mrs Dunbar Dunbar from her separate income are bound by a clause of *acquirenda* in her marriage-contract. She was entitled to the income partly under the marriage-contract itself and partly under the will of her brother, who died during the subsistence of the marriage.

The marriage-contract is dated the 13th October 1848, and after a conveyance by the lady of certain specified subjects it contains a clause whereby Mrs Dunbar Dunbar, with the consent of her intended husband and Captain Dunbar Dunbar for himself, and they both obliged themselves to dispoise, assign, convey, &c., to the trustees all real and personal estate which the lady then had or at any time thereafter might “conquest and acquire by purchase, succession, or otherwise.” The first trust of the settled property other than the furniture, plate, and so forth in the mansion-house of Seapark was to pay the annual income to the lady for her life for her separate use exclusive of the *jus mariti* of her intended husband or any future husband.

Capain Dunbar Dunbar died on the 10th January 1898, and Mrs Dunbar Dunbar died on the 9th May 1899, leaving a son, the Rev. Archibald Dunbar Dunbar, the only issue of the marriage surviving.

It has been decided in Scotland that a life interest in income is *prima facie* not comprised in a clause of *acquirenda*—*Boyd's Trustees v. Boyd*, 4 R. 1082. And the same has been held in England—*Briggs v. White*, 22 B. 176n—or if it is expressly included it follows the destination of the trust income—*Scholfield v. Spooner*, 26 Ch. D. 94.

I was, I confess, rather surprised to hear it argued that, apart from any technical meaning to be attached to the word “conquest,” the savings from a wife's separate income, became subject to an ordinary *acquirenda* clause or covenant for settlement of after-acquired property. This proposition was said to be supported by Lord Eldon's opinion in *Lewis v. Maddocks* (8 Ves. 149, 17 Ves. 48), and the recent case of *in re Bendy*, 1895, 1 Ch. 109. When *Lewis v. Maddocks* is examined I do not think it can be cited as an authority for that purpose. There was a covenant by a husband to convey by deed or will all his personal estate to the use of himself and his intended wife and the survivor, subject to the payment of a sum of money on the death of the survivor to the children of the marriage. Lord Eldon said during the argument that he could not adopt the construction that annual produce was property acquired in the sense of the bond, but he added, except only to the extent “in which the husband himself might think proper to lay up that produce as capital,” and in the course of his judgment he said that certain sums must be considered as “personal estate,” “capital, even if composed of savings.”

The point, however, does not appear to have been necessary for the actual decision, and the weight of the case as an authority

is considerably diminished by Lord Eldon's remark when the case first came before him in 8 Ves. at p. 156, that if the Court finds a solid subject of personal property they would attach it rather than render the covenant perfectly nugatory, though they did not know what to do with the argument showing the absurdity of it. I entirely agree with the very clear and convincing judgment of Lord Justice Romer in *Finlay v. Darling*, 1897, 1 Ch. 719, and hold with him that savings from income not originally included in a covenant for settlement of after-acquired property do not fall within the covenant, and the wife retains the control and power of disposing of such income. Lord Justice Romer's opinion is supported by that of Buckley, J., in the recent case of *Clutterbuck's Settlement* (1905, 1 Ch. 200). The same point arose in Scotland in *Young's Trustees v. Young*, 20 R. 22, but it was held to be not proved that the investments in question were made out of savings of the wife's income. There was therefore no decision. But it seems to have been assumed by some of the learned Judges that if it had been proved the investments would have been outside the clause of *acquirenda*.

The point therefore is narrowed to the question whether the word "conquest" in the deed is used in a technical sense, and what is the effect if that be so. On this question the decision in the case of *Diggens v. Gordon* (3 Macph. 609), which was confirmed in this House, L.R., 1 Sc. App. 136, appears to me important. "The word conquest used substantively," says Professor Bell, "comprehends whatever is acquired, whether heritable or moveable, during the marriage by industry, economy, purchase, or donation," and it may be assumed to bear an analogous but perhaps more elastic meaning when used as a verb. Properly speaking, conquest is applicable only to the husband, and cannot in any legitimate sense be applied to the wife as explained by the Lord Justice-Clerk in *Diggens v. Gordon*. This does not carry you very far, because it may yet be a technical word improperly applied as distinguished from a word used in a non-technical sense. What is more important is that in a proper provision of conquest the title of the husband is not affected during the subsistence of the marriage or during his own life after its dissolution. He remains the unlimited far of his property, except that he cannot defeat the provision by a gratuitous disposition in fraud of his contract. In the marriage-contract now under consideration, on the contrary, the property is to be at once on the accrual of the wife's title conveyed to the trustees of the settlement, and to be placed in their management for the purposes of the settlement. In the judgments of the Lord Justice-Clerk and Lord Cowan in the Court of Session and of Lord Cranworth and Lord Colonsay in this House in *Diggens v. Gordon* this circumstance was treated as conclusive that the word was not used in any technical sense. I see no valid

reason for not adopting those opinions in the present case.

In *Diggens v. Gordon* the question was whether property which the wife took by succession during her coverture was bound by the clause. The words were "conquest or acquire," which certainly lent themselves to a distributive construction more easily than the words before your Lordships. It might have been said that the lady "acquired the property if she did not conquest it." That may be true. But it appears to me from a perusal of the judgments in the Court of Session and in this House that the decision was in fact based on the ground that the word conquest was not used in any technical sense, and it is a decision to that effect.

The appellants also placed reliance on the use of the word "purchase" in the clause under consideration, which they contended was meaningless if it was not intended to include property purchased by Mrs Dunbar out of her income. Your Lordships were told that this word is found in the common form provision of conquest from which this clause was adapted by the draftsman. But what I wish to point out is that the word "purchase" is equally destitute of any real meaning in a proper provision of conquest. If the moneys laid out in the purchase were not already subject to the clause the purchased property will not become so, and inversely the investment of moneys which are not the subject of conquest will not make them so. If a man has an estate before marriage and sells it during the coverture and buys another, or if he invests money coming to him from a succession in consols, the new estate or the consols will not (I presume) become "conquest," and, on the other hand, if he accumulates his savings in a money-box or a bank, or in any of the traditional modes, the fund is (I presume) equally "conquest," though he has not laid it out in an investment. I am content to say with the Lord Ordinary that it is difficult to find any satisfactory meaning for this word, but I am unable to hold that it adds anything to the argument that savings from income were included in the provision under consideration.

I am therefore of opinion that the appeal fails on the first and principal point. The only other points argued by the appellants at your Lordships' Bar were (1) as to the lands of Glen of Rothes and (2) as to the Rev. Archibald Dunbar Dunbar's claim to legitim out of his late mother's estate. On the former I agree with the Lord President that there was sufficient consideration to support the agreement made between Mrs Dunbar Dunbar and her son as a family arrangement. In such cases the Court does not weigh the amount of consideration in golden scales, and there being no claim for reduction of the agreement the Court is bound to give effect to it. I also agree with the Lord President that the claim for legitim is excluded by clause 7 of the marriage-contract, notwithstanding that the claim can only be made under the Act of

1881. The words of the clause are perfectly general, and are, I think, intended to exclude every claim which the children of the marriage might otherwise make through the death of their mother at the time when that event happened.

I am of opinion that the appeal fails altogether, and should be dismissed with costs.

LORD ROBERTSON—I have grave doubts of the judgment under review, and of the soundness of the reasoning on which your Lordships affirm it. But the Court below was a very strong one, each of the learned Judges being singularly well equipped in this region of the law of Scotland. Accordingly I do not dissent from the motion that the appeal be dismissed.

LORD LINDLEY—(Read by LORD DAVEY)—In 1848, upon the marriage of Captain Dunbar and Miss Phoebe Dunbar, property of hers and land which she might afterwards acquire was vested in trustees upon certain trusts, which included a trust for her sole and separate use for her life; and by the settlement it was provided that all the property, real or personal, which she then had or should at any time thereafter “conquest and acquire by purchase, succession, or otherwise” (with a specified exception) should be conveyed or assigned to the trustees of the settlement, to be held by them on the trusts therein declared. The husband died in January 1898, and his wife died in the following year. The main question before your Lordships is whether property purchased by the wife with income paid to her during her marriage, and to which she was entitled for her separate use, became on her death subject to the dispositions of her will, or whether it became vested in the trustees of the settlement for the benefit of a child of the marriage. The Court of Session has decided this question in favour of the persons claiming under her will, and against the trustees of the settlement.

Any other decision appears to me entirely inconsistent with the trust for the separate use of the wife during her life. By virtue of this trust the income which became payable to her became her own property absolutely, and the trustees had no claim to it as against her. She was at perfect liberty to spend that income, if she chose, or to save it and invest it in Government or other stocks or securities, or in the purchase of land. As long as she retained it, or any investment or property bought with it, she could dispose of it, or what was bought with it, as she thought proper, by act *inter vivos* or by will.

The conveyance of after-acquired land did not comprise land bought by her with the income to which she was entitled for life for her separate use under that settlement. The subsequent provision for settling after-acquired property must in my opinion be construed in like manner so as to preserve her rights under the trust for her separate use, and not so as to destroy those rights or any of them. Wide as the provision is, it cannot possibly include the

income which it is the duty of the trustees to pay over to her; and why, if that is so, they should be able to follow the income and claim what she may have purchased with it, passes my comprehension. As a matter of principle I concur entirely with the view taken by L. J. Romer in *Findlay v. Darling*, 1897, 1 Ch. 719, in which a similar point arose on an English settlement.

But the law of Scotland may of course be different; and it was strenuously contended by counsel for the appellants that the use of the word conquest (which has a technical meaning in Scottish law) showed that property bought by the lady out of her savings, and held by her at her death, could not be disposed of by her by her will, but became subject to the trusts of the settlement, and counsel cited a number of Scotch decisions in support of that contention.

The word conquest in this settlement has to be applied to the property of the wife and to property which under the settlement belonged to her for her separate use. Moreover, the word conquest does not occur alone; the phrase is “conquest and acquire by purchase, succession, or otherwise.” The whole phrase includes every mode of acquisition, and points to some future acquisition by which her property was increased before it became subject to the trusts of the settlement; in other words, the phrase points to some property in addition to that to which the lady was entitled at the date of the settlement, and in addition to any property to which she was entitled under the settlement itself. Any other construction deprives her of the right to dispose of her own property under the trust for her separate use. If any confirmation of this view is required, it is, I think, to be found in the clause in the settlement by which Captain Dunbar renounced all claims to property which his wife might acquire during the subsistence of the marriage, whether or not such acquisitions were settled on the trusts of the settlement. This points to the possibility of her acquiring property which was not to be brought into settlement, and would include such as she might purchase with her own separate income. But I do not myself attach importance to this clause.

As regards the Scotch decisions, I can discover no case in which it has been held that property purchased by a wife with money belonging to her for her separate use under her marriage settlement falls within a clause in it binding her to bring her after-acquired property into the same settlement. The nearest authority on the point is *Young's Trustees v. Young* (20 Rettie 22), and that somewhat supports the opposite view, but it cannot be regarded as a decision in favour of the respondents. In the absence of any authority settling the question in favour of the appellants, and thinking that their contention is wrong on principle, I have come to the conclusion that their appeal on the main point ought to be dismissed.

As regards the Glen of Rothes property, I also have arrived at the conclusion that

the appellants are wrong. This property was acquired by the wife in exchange for part of the Sea Park property, which belonged to her and her son, and was expressly excluded from the settlement. The exchange was the result of a family arrangement to which her son was a party, and in my opinion the terms of this arrangement were such as to exclude any claim by the son to this Glen of Rothes property.

There remains the claim of the son to legitim, *i.e.*, half of his mother's unsettled personal property. His claim is based upon the fact that he acquired this right under a statute passed after the settlement was made, *viz.*, 44 and 45 Vict. c. 21. But the settlement contains a clause to the effect that the provision made by it for the children of the marriage shall be in full satisfaction of all "bairns' 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." These words are so wide as, in my opinion, to exclude the children of the marriage from all claims foreseen and unforeseen to any share of their mother's personalty except under the settlement.

In my opinion the decision appealed from was correct on all points, and the appeal ought to be dismissed with costs.

Their Lordships dismissed the appeal.

Counsel for the Appellants—The Solicitor-General (Salvesen, K.C.) — Constable. Agents—Thomas Henderson, W.S., Edinburgh—Martin & Leslie, Westminster.

Counsel for the Respondents—Haldane, K.C.—Guthrie, K.C.—Moncrieff. Agents—Stuart & Stuart, W.S., Edinburgh—Gellatly & Son, London.

Friday, April 14.

(Before the Lord Chancellor (Halsbury), Lord Davey, and Lord Robertson.)

CHR. SALVESEN & COMPANY
v. REDERI AKTIEBOLAGET
NORDSTJERNAN.

(*Ante*, January 16, 1903, 40 S.L.R. 305.)

Agent and Principal—Agent's Responsibilities to Principal—Misrepresentation by Agent to Principal that Contract Concluded—Damages—Measure of Damages.

A foreign shipowner employed a Leith shipbroker to find freight for a vessel. The shipbroker entered into negotiations with third parties and reported to his principal that he had "fixed" the ship on certain terms. As a matter of fact no bargain was concluded between the shipbroker and the third parties. *Held* (1) that the shipbroker was liable to the shipowner for loss incurred by the latter by reason of his relying on the former's incorrect statement; (2) that in the absence of evidence that the shipowner sustained

any loss of profit by his reliance on the incorrect statement, no damages fell to be awarded him in respect of loss of profit, but that a sum fell to be paid him as compensation and solatium in respect of outlays on telegrams and trouble.

This case is reported *ante ut supra*.

Salvesen & Company appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—The proposition of law laid down by the Exchequer Chamber in *Collin v. Wright* must, I think, notwithstanding the protest made by Chief-Justice Cockburn, be held to be the law. But one must see what that proposition is, and how far it is applicable to the case before your Lordships. The proposition is this—that a person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent is answerable to the person who so contracts for any damage which he may sustain by reason of the assertion of authority being untrue. This is the authority upon which the Court below have given damages, but it really has no application to the facts in proof here.

A firm applies to a shipbroker in Scotland to obtain freights for a vessel of theirs. The shipbroker in consequence opens a negotiation with Messrs Ireland, who state certain terms which they will accept, one of which is what the appellants' principals will not agree to. The appellants, nevertheless, untruly report that the bargain is complete, whereas the bargain in fact went off altogether. Now, I quite agree that if in consequence of their misstatement the respondents changed their position and suffered damage, the appellants would be liable for any actual damage arising from the acting on that erroneous statement, and it is no answer to say that the appellants *bona fide* expected to get over the one outstanding term by which the bargain went off, but it appears to me there is an absolute failure to make out any such damages as are claimed, though I think £30 has been justly suggested as enough to cover all actual damage sustained, and for that the respondents ought to sustain their judgment.

But I think in applying the doctrine of *Collin v. Wright*, and treating the appellants as having held themselves out as the agents of Messrs Ireland, and clothed with their authority to make a contract, they seek to get, and the Court below have given them as damages, the profits they would have made if Messrs Ireland had in fact authorised the appellants to act as their agents, and had in truth made the bargain. But in fact they did nothing of the sort; they were endeavouring to get a bargain from Messrs Ireland, and having failed to overcome Messrs Ireland's objections, they are in the position of not having got the bargain they represented they had.

There is no evidence of any loss sus-