It appears to me that the explanation of the nature of the cause which we have received shows that it is well adapted to trial before a judge, and we are also informed that a cognate case is now depending before one of the Judges of the Outer House. I therefore think that we should remit this case to the same Judge.

LORD ADAM concurred.

LORD M'LAREN—If this question were being argued for the first time, I should have doubted whether it was consistent with the policy of the statutes dealing with procedure to send a case back to the Sheriff after it has been removed here for trial, because it has always seemed to me that the policy of the Judicature Act and the Court of Session Act is to provide for a better distribution of business between this Court and the Courts below. Thus it is left open to any party to begin an action in the Sheriff Court irrespective of its value, but the other party is given power, if the value of the cause is over a certain amount, to remove it to this Court. I think the case of *Cochrane* v. *Ewing* recognises that the motive of the provision in the Judicature Act is to enable a party to remove a cause to this Court for trial here when its value is over a certain amount. But of course I do not say that it is incompetent to send a case back to the Sheriff, because that course has been followed by the Court in cases of small value. I think, however, that it is only exceptional cases which should be so treated, because to make a rule of doing so would be to give no effect to the right of appeal given by the statute.

LORD KINNEAR concurred.

The Court remitted the case to Lord Low for proof.

Counsel for the Pursuers—Ure. Agents—J. & J. Ross, W.S.

Counsel for the Defenders—C. S. Dickson. Agent—F. J. Martin, W.S.

Tuesday, November 1.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

YOUNG'S MARRIAGE-CONTRACT TRUSTEES *v.* YOUNG'S TESTAMENTARY TRUSTEES.

Proof—Presumption—Marriage-Contract—Conveyance of Acquirenda—Savings from Life Interest of Wife.

A husband bound himself by an antenuptial contract to invest £1000 in heritable estate in his own and his wife's name, as trustees for behoof of his wife in liferent, and the children of the marriage in fee. On her part the wife conveyed her whole *acquirenda* to her husband and herself, as trustees for the same purposes. During the subsistence of the marriage the wife acquired certain heritable properties in her own name. She died, leaving a settlement disposing of her whole estate.

After the wife's death the heritable properties acquired by her *stante matrimonio* were claimed by trustees appointed under the marriage-contract, and also by her testamentary trustees, the latter alleging that the properties had been acquired by the wife out of savings from the liferent secured to her by the marriage-contract.

Held that there was a presumption that the properties, having been acquired *stante matrimonio*, fell under the conveyance of *acquirenda* in the marriage-contract, and that the wife's testamentary trustees had failed to adduce sufficient evidence to rebut this presumption, and therefore that the claim of the marriage-contract trustees must prevail.

Opinions by Lord Adam and Lord Stormonth Darling, that savings by the wife from the life interest which was secured to her as separate estate would not have fallen under her conveyance of *acquirenda* in the antenuptial contract.

On 30th November 1838 David Young, messenger-at-arms, and Margaret Lindsay entered into a contract of marriage, whereby David Young bound himself to invest £1000 in heritable estate, and to take the titles thereof to himself and Margaret Lindsay, and the survivor, in trust for behoof of Margaret Lindsay in liferent allenarly, and for the children of the marriage in fee. On her part Margaret Lindsay disponed to the said David Young and herself, and the survivor, as trustees for the purposes foresaid, the whole property which she then possessed or which should pertain to her during the subsistence of the marriage. The provisions in favour of the wife were declared to be exclusive of her intended husband's *jus mariti* and right of administration.

David Young and Margaret Lindsay were thereafter married, and the marriage subsisted until 1871, when Mr Young died. Mrs Young died in 1890, survived by several children, and leaving a trust-disposition and settlement disposing of her whole estate.

After Mrs Young's death her children were appointed trustees under their parents' marriage-contract, by decree of the Lords of Council and Session, and they thereafter raised an action against their mother's testamentary trustees, concluding, in the second place, for declarator that certain heritable properties acquired by Mrs Young during the subsistence of the marriage fell under the conveyance by her in the foresaid contract of marriage, and were held by her as trustee under that contract.

The defenders pleaded that they should be assoilzied, in respect that the whole of the properties in question had been ac-

quired by Mrs Young out of the liferent which formed her separate estate.

Proof was allowed. The evidence was almost entirely documentary. It appeared from titles produced that during the subsistence of the marriage between Mr and Mrs Young three properties, viz., a house and ground in Arrochar, and houses in Union Street and Paisley Road, Glasgow, had been acquired by the spouses as trustees under the marriage-contract, and that three other properties, viz., houses in Monteith Row, Bothwell Place, and West Regent Street, Glasgow, had been acquired by Mrs Young, the titles being taken to herself, exclusive of the *jus mariti* and right of administration of her husband.

The method pursued by the spouses was to purchase a property under burden of bonds and gradually disburden it. Thus, to take first the properties acquired by the spouses in trust, it appeared from the titles that the Arrochar property was purchased in 1840 for £375, £100 being paid by Mr Young in cash, and the remainder of the price being secured by bond over the property granted by the spouses as trustees under the marriage-contract. This bond was paid off to the extent of £75 in 1851, and the balance in 1854, and in May 1861 the property was sold for £850, but £600 of the price was left on bond over the property until May 1866.

It was admitted that Mr Young had in 1841 built an additional house on this property at the cost of about £150. There was no direct evidence to show what was done with the price received for the property.

In regard to the Union Street property, the titles showed that it was bought in 1860 for £500, £385 being paid by David Young in cash, and a bond for £115 being granted by the spouses as trustees. The bond was paid off in November 1861, and the property was sold in May 1874 for £1500.

From the title of the Paisley Road property it appeared that it was purchased in 1867 for £1800, of which £400 was paid in cash, and the balance was secured by bond granted by the spouses as trustees.

With regard to the properties acquired by Mrs Young in her own name, the following facts appeared from the titles:—*Monteith Row Property*—Mrs Young lent sums of £300 and £70 over this property in 1856 and 1857. In 1860 she purchased it for £1530 under burden of a bond for £1000, in corroboration of which a personal bond was granted by herself and her husband. The bond was paid off in May 1866. *Bothwell Place Property*—In 1869 Mrs Young purchased this property for £1500 under burden of bonds to the amount of £3950. She paid the balance of £1150 in cash. Of the bonds £100 was paid off in 1871, and between November 1874 and May 1885 further sums of £2450 were paid off. In 1890 the property was sold for £8500, leaving a balance of £7100 after the remaining bond for £1400 was paid off. *West Regent Street Property*—The property was purchased by Mrs Young in 1870 for £800 under burden of a bond amounting to £550, which was paid off in 1875.

It also appeared that in 1869 Mrs Young borrowed a sum of £1000 over the Monteith Row property, and in 1870 a sum of £200 over the property in West Regent Street. On each occasion Mr Young bound himself personally to repay the sums borrowed, while Mrs Young, as heritable proprietor of the subjects, disponed them in security of the loan.

It was shown from entries in the books of a firm of writers, who acted as agents in regard to the properties from 1869 onwards, that the £1000 borrowed over the Monteith Row property in 1870 was applied in part payment of the price of the property in Bothwell Place.

A document was produced which had been found in Mrs Young's repositories after her death. It was headed "Statement showing the intromissions of Mrs Young as trustee under her marriage-contract," and evidence was led showing that the existence and contents had been known to Mrs Young. It contained entries extending from May 1851 to the date of Mrs Young's death, and credited Mrs Young with all the payments made between these dates in purchasing or disburdening any of the properties held by the spouses, whether held on a trust title or in Mrs Young's individual name. On the other side were entered the price received for the Arrochar property, and sums borrowed on the security of the properties, and also sums of £300 and £100 received from Mr R. L. Young, a son of Mrs Young, in 1870 and 1871. At the foot of the account was written—"From this account it appears—1. That up to the 15th of May 1860 £645 had been invested, and the only apparent source from which it could come were the savings from the Arrochar rents and profits made by Mrs Young. 2. That from the 15th of May 1860 to the 15th of May 1866 £810 additional had been invested, after taking into account the price of the Arrochar property. And 3. That between 15th May 1866 and the year 1872 another sum of £600 had been invested."

No evidence was led to show that Mrs Young had possessed any money at the date of her marriage, or had succeeded to any during its subsistence, and her bank account threw no light upon the source from which the payments made in purchasing or disburdening the properties held by her as an individual had been derived. Several witnesses deponed that she was a woman of excellent business capacity and thrifty habits.

As to Mr Young's means, it was admitted that his estates had been sequestrated in 1849, and again after his death. The latter sequestration was said to be due not to ill success in his business but to unfortunate speculation.

On 29th March 1892 the Lord Ordinary (STORMONTH DARLING) assoilzied the defenders from the second conclusion of the summons.

"*Opinion.*—[*After referring to the various properties acquired by Mr and Mrs Young*]—Now, apart from the rise in market value, the only source which can be suggested for

all this gradual acquisition of property is the lady's thrift in saving from the income which formed her separate estate. Were these savings *acquirenda* in the sense of the marriage-contract? I think not. A legacy to which she succeeded would undoubtedly have fallen under that category. But this was money which by the terms of the contract itself was made exclusively her own. She was free to spend it as she chose, untrammelled either by her husband or the marriage-contract trustees, and it seems to me that any possible construction of a contract is to be preferred to one which says to the wife 'You may spend your income, but if you save it, you shall have no right to dispose of it after your death.' That was, I think, at the bottom of the judgment in *Morris* v. *Anderson*, 9 R. 952 (see especially the concluding portion of the late Lord President's opinion at p. 956), and it has been decided in two cases—*Boyd's Trustees*, 4 R. 1082, and *Young's Trustees*, 12 R. 968—that a clause of *acquirenda* does not cover the life interest to which a wife succeeds during the subsistence of the marriage, but extends only to principal sums. If this be so as to life interests coming to the wife from sources outside the marriage-contract, I think the rule applies still more forcibly to savings from the income of the marriage-contract funds. Had the case, then, been a pure one of property bought with savings alone, and the title taken in the wife's name, I confess I should not have had much doubt. My chief difficulty has arisen from the difficulty of tracing the proceeds of the Arrochar property, which was undoubtedly trust property, even although in that case also the wife's savings may have helped to pay off some of the bonds. If it can be shown that the price obtained for that property was invested to any extent in subjects the title to which was taken in the wife's name, undoubtedly the trust-estate would be entitled not merely to the sum so invested, but to any increment of value proportionate thereto. If there had been any case of breach of trust, perhaps the trust-estate would be entitled to the whole property. But no such case is alleged, and in the absence of any positive proof as to what came of the proceeds of Arrochar, I have come to think that the conduct of the spouses in taking certain titles in their own names as trustees, and certain other titles in the wife's individual name, affords the best guide to the destination of the money.

"Assuredly their conduct excludes any notion that the wife dedicated her separate estate to trust-property. In 1860 and 1861 a sum of £500 was invested in the Union Street property on a trust title, and the defenders are willing to account for the nett price realised for that property in 1874, viz., £1490, 12s. 5d. Again, in 1867 a sum of £400 was put into the Paisley Road property also on trust title, and that property is still, I understand, in the pursuers' hands, so that whether these were the actual proceeds of Arrochar or not, a sum more than double the price obtained for Arrochar is now available to the trust-estate.

"I am therefore of opinion that on making payment of the admitted proceeds of the Union Street property, the defenders are entitled to absolvitor, but inasmuch as the great part of the difficulty has been caused by the spouses not keeping the trust-estate sufficiently distinct, I think the pursuers were justified in trying the question, and I shall therefore not find them liable in expenses."

The pursuers reclaimed, and argued—The properties having been acquired by Mrs Young *stante matrimonio*, were *prima facie acquirenda*, and fell under the conveyance in the marriage-contract. The fact that the titles were taken in Mrs Young's own name was not enough to displace the presumption arising from the fact of acquisition during marriage. It was for the defenders to prove that the monies with which they were purchased were derived from the separate estate of the wife, but they had failed to do so, as the evidence on the whole favoured the view that these monies were derived either from the sale of the Arrochar estate, or from further advances made by the husband in fulfilment of his obligation under the marriage-contract, or from gifts by the children.

The defenders argued—The Lord Ordinary's view was right, that the conduct of the spouses in taking the titles of the properties partly to themselves as trustees under the marriage-contract, and partly to the wife in her own name, formed the best guide as to the sources from which the monies for their acquisition had been derived. The fact that the husband was insolvent in 1849 and in 1871, and the evidence as to the wife's business capacity and thrifty habits, favoured the defenders' contention.

At advising—

LORD PRESIDENT — By the marriage-contract of Mr and Mrs Young the lady conveyed to her husband and herself as trustees, for herself in liferent and the children of the marriage in fee, the whole property, heritable and moveable, then belonging to her or that should pertain and belong to her during the subsistence of the marriage.

Now, on the showing of the defenders, there came to pertain and belong to Mrs Young during the marriage the several heritable properties the titles to which stood in her name, and which, or the proceeds of which, are now in dispute. *Prima facie*, therefore, these properties fall within the conveyance which I have recited and now belong to her children in fee.

The defenders, however, seek to except these properties from the operation of the clause by maintaining that they were acquired with monies accumulated or supplied from an income which was by the marriage-contract her separate estate. The marriage-contract took the husband bound to lay out and secure £1000 on heritable bonds or heritable property, and to take the rights and securities to himself and his wife in liferent for her liferent use

allenarly and to the children in fee. Certain heritable properties were bought as in implement of this clause, and the title taken in accordance with the obligation. It is said by the defenders that from the income of those properties the wife saved up monies and bought the properties now in question. It appears to me that the success of the defenders depends on whether they have proved affirmatively that the properties in dispute were acquired with those monies of Mrs Young; and in my opinion they have not done so. The materials before the Court are of the most meagre and scanty description; and to affirm the proposition of the defenders would be to proceed upon conjecture, and conjecture not of the most probable kind. There is no direct evidence on the subject at all; and all that the defenders have to found on is the several states and accounts which are in the appendix. I consider those documents to be inconclusive. No money can be traced from the investments which yielded the wife's separate income into her bank account, or from her bank account to the sellers of the properties in question; and there is, neither in the aggregate of the sums received and invested, nor in the several items of the receipts and payments, any correspondence, coincidence, or relation between what the lady had wherewith to buy and the prices paid.

It is true that it would be at least equally difficult to affirm either of the theories of the sources of the money which are mooted by the pursuers. But then, in my view, the pursuers' case is primarily rested on the admitted fact that these properties belonged to Mrs Young during the subsistence of the marriage; and the burden of proof is on the defenders to establish those facts as to the source of the acquisition which are necessary to elide the legal inference.

The Lord Ordinary takes a similar though not so strong a view as I do of the deficiency of the evidence as to the source of the money, but his standpoint on this subject is materially different. His Lordship finds in the titles themselves the solution of a question otherwise undetermined. He comments on the difficulty of tracing the source of the price, and then says—"I have come to think that the conduct of the spouses in taking certain titles in their own names as trustees and certain other titles in the wife's individual name affords the best guide to the destination of the money." I am unable to agree in this reasoning. Assuming, what I think is barely made out, that the husband was a party to the titles of the properties in the wife's name, there was nothing in the titles being so taken in itself adverse to the view that it fell under the *acquirenda* clause. On the contrary, so far as those titles themselves went, their legal effect *prima facie* was to bring them within that clause. The husband might well assent to such a title. Again, the fact that the other properties were acquired in name of the trustees does not seem to me to infuse into the titles in name of the wife an effect which otherwise would not belong to them. The probable explanation of the titles in name of the trustees would seem to be, that those properties were intended to afford compliance with the other clause of the marriage-contract, viz., that relating to the £1000; but, be this as it may, I cannot find in the fact that the husband let the other properties be taken in the wife's name any evidence that the facts regarding their acquisition were such as to exclude them from the legal effect of titles so taken. In short, we are in search of proof of separate estate of the wife having been the source of the acquisition; I do not discover such proof in the titles, and I have not found it outside them.

What I have said relates to the properties which stood in name of the wife at any time during the subsistence of the marriage; for the right of the pursuers to the proceeds of the properties which stood in name of the trustees is not disputed, and has been given effect to by the Lord Ordinary. In substance, I think that the pursuers are entitled to the decree sought under the conclusion of the summons which is introduced by the words "in the second place;" but as its terms were not canvassed, the form of our judgment may if necessary be made matter of adjustment.

Lord Adam—At the date of Mrs Young's death certain properties stood in her name as an individual, and others in her name as trustee under her marriage-contract. By that contract she conveyed the whole estate which she then possessed, or which she might acquire during the subsistence of the marriage, to her husband and herself as trustees for the purposes therein specified. Now, the presumption is that all properties acquired by her during the subsistence of the marriage fall under that conveyance in the marriage-contract, but this is only a presumption, and may be displaced by proof to the contrary effect, and the defenders plead that they should be assoilzied, because the properties in question were acquired by Mrs Young out of money saved from her separate estate. The only separate estate which Mrs Young had was the income of the provision of £1000 which her husband was bound to invest for her behoof exclusive of his *jus mariti*. I agree with the the view expressed by the Lord Ordinary as to the law, that if it were made out in fact that the properties had been purchased out of the income which formed the wife's separate estate, then the properties would have been the separate estate of the wife also, but I agree with your Lordship that that is a matter to be proved by the wife's testamentary trustees, and that they have not proved it.

We know almost nothing of the affairs of the spouses from 1849 down to the dissolution of the marriage—I say from 1849, because there is evidence to show that up to that date they had no money, but I think it is extremely improbable that Mrs Young could have accumulated money sufficient to acquire these properties out of her life-

rent since then. I agree, accordingly, with your Lordship that the presumption is that these properties fell within the wife's conveyance of *acquirenda* in the marriage-contract, and that that presumption is not overcome by the fact that the titles of the properties were taken in the wife's name as an individual.

LORD M'LAREN—I concur in the judgment proposed and in the views expressed by your Lordship. It appears from the dates of the title-deeds that the properties in question were in fact acquired by the wife during the subsistence of the marriage. Their character is therefore properly described by the general name of *acquirenda*, and it lies with the persons maintaining the contrary to displace the presumption that they fall under the conveyance in the marriage-contract. I agree that there is no evidence to displace this presumption, and accordingly that their disposal must be governed by the terms of the marriage-contract.

LORD KINNEAR was absent.

The Court found and declared in terms of the second conclusion of the summons.

Counsel for the Pursuers — Wilson — Grey. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders—C. S. Dickson. —Guy. Agents—Ronald & Ritchie, S.S.C.

Thursday, November 3.

SECOND DIVISION.

[Sheriff of the Lothians, &c.

PAGE *v.* STRAINS.

Landlord and Tenant—Lease—Agreement —Construction — Whether Agreement between Landlord and Tenant Binding on Singular Successor—Act 1449, *cap.* 17.

A landlord of premises let on a lease at the yearly rent of £50, granted to the tenant in May 1891 this document—"This is to certify that Mr Strains gets five pounds reduction per annum after this date from his rent during expiry of lease." The tenant paid at least one half-year's rent at the reduced rate. In Martinmas 1891 the property was sold. In an action by the buyer against the tenant for rent at the rate in the original lease, the Court *assoilzied* the defender, holding that at the date of the sale he possessed under the original lease modified by the agreement, and that this was the limit of the pursuer's right.

By disposition dated 12th November 1891 William Slater sold the subjects at 15 Crown Street, Leith, to David Page, wine and spirit merchant there, with entry at Martinmas 1891. The premises were occupied by Alfred Charles Strains, as tenant under a lease from Slater dated 13th September 1888, for the space of six years from and after the term of Whitsunday 1889, at a rent of £50.

At Whitsunday 1892 Page called on Strains for a half-year's rent of £25, which Strains refused to pay, but tendered £22, 10s. as the proper rent.

Page brought an action in the Sheriff Court to sequestrate and secure the furniture and effects in the house for payment of the sum of £25, being the rent due at Whitsunday 1892, and in security of the succeeding two terms at the same rate, averring that his right of hypothec was in danger of being defeated.

It was proved that the rent originally was £50 per annum; Strains complained of it as being too high, and in January 1891 Slater agreed to reduce it by £5 and go to live in the house as a lodger, paying £15 a year for the room he occupied.

Upon 15th May 1891 Slater gave Strains this document—"This is to certify that Mr Strains gets five pounds reduction per annum after this date from his rent during expiry of lease;" and that at Martinmas 1891 the receipt given to Strains for his rent bore to be for £22, 10s. The entry of the yearly value in the valuation roll was £45 per annum. The document reducing Strain's rent was not shown to Page until after he had bought the property.

Upon 25th July 1892 the Sheriff-Substitute (HAMILTON) pronounced this interlocutor—"Finds it not proved in fact that William Slater, the defender's former landlord, agreed to reduce the rent payable under the lease by £5 a-year from Whitsunday 1891: Further, and *separatim*, finds in law that the certificate, in so far as it imports an agreement to the effect above mentioned, is not binding upon the pursuer: Repels the defences: Grants warrant to the Sheriff-Clerk to pay to the pursuer the sum of £25 sterling, consigned in his hands, being the half-year's rent due at Whitsunday 1892, and decerns."

The defender appealed—At the beginning of the debate the pursuer's counsel intimated that he admitted the Sheriff-Substitute's finding in fact to be wrong.

Argued for the appellant—He held under a lease with a rent of £45, because the certificate of 1891 must be read into the original lease. There had been possession under it, and the possession was shown by a receipt for the rent of £22, 10s. That was all that was required to make the Act of 1449 applicable to the case, and the modified lease was good against singular successors—*Neilson* v. *Menzies*, June 21, 1671, M. 15,231; Rankine on Leases, 134. The defender was not affected by the contract between the pursuer and Slater.

The respondent argued—The bargain as to the reduction of rent was a personal matter between Slater and the pursuer; it was not pleadable against the singular successor. The original rent was an essential part of the lease, which was shown to the pursuer when he bought the property, and he was entitled to get the rent stipulated in it. In analogous cases, where a reduction had been given to enable a ten-