

leave next morning. She had received her wages up to that date, and she had been informed by the defender that she refused to give her a character and would write to Miss Mitchell.

I think it impossible to sustain the argument—for it is argument—that the letter was volunteered, or was “wholly gratuitous.” The statement to that effect is inconsistent with the admitted relation in which Miss Mitchell stood to the parties. That relation, in my opinion, gave to the defender an undoubted right, if it did not impose a duty, to let Miss Mitchell know the fact that the pursuer had left her place, and the cause and manner of her leaving as well as the fact that a character would not be given.

I therefore think that the pursuer’s allegations disclose a case of privileged communications; and I further think that the terms of the letter do not by themselves show excess on the part of the defender. It contains undoubtedly defamatory matter of and concerning the pursuer, but, if written in good faith and not maliciously, it was in my opinion clearly privileged.

This brings me to the second question, whether there is any relevant allegation of malice. The usual presumption of malice which attaches to a calumnious statement is displaced. The pursuer must aver in a sufficient and intelligible manner that the statement was made maliciously, that is, not in good faith, but to gratify ill feeling. Now, the pursuer has alleged in a general way that the statement was made “maliciously without probable cause, and with the intention of injuring the pursuer in her character and prospects.” But has she presented a case in which a general allegation of malice can be accepted as sufficient? It has been said that there are two classes of cases, in one of which a general allegation may be enough. Perhaps this may be so. But I am not aware that the class in which a general averment will be sustained as sufficient can be extended beyond those cases in which it appears that the calumnious statement, if false, must have been known to him who made it to be false, and therefore necessarily to have been made in bad faith. What the law requires is an allegation of malice that is sufficient and relevant with reference to the circumstances of the case as presented by the pursuer on record. Now here there is nothing in the circumstances as set forth suggesting that the defamatory statement contained in the letter was known to the defender to be false. The circumstances rather suggest that what was said may have been said in perfect good faith, for the communication only informs Miss Mitchell of what had actually happened. The defender admittedly had dismissed the pursuer as having been incapable and unfit to take orders from drinking. That was the footing on which the pursuer left, and although she now alleges that the charge was groundless, she does not allege that the defender did not believe it, or that there was anything in the circumstances of the dismissal to put the defender in bad

faith. There is nothing alleged which suggests any private grudge or any cause of displeasure other than the conduct of the pursuer for which she was dismissed, and which is referred to in the letter.

In this state of the record I am of opinion that the case falls within the principle of the case of *Innes v. Adamson*, which is, that where a defamatory statement is made in the discharge of a public duty, to one who had a legitimate interest to receive it, the statement will not be actionable unless circumstances can be alleged inferring actual malice. That was a very strong case, for there the statement was alleged to have been made not only maliciously and without probable cause, but to have been made “without any previous investigation.” It was urged that the rule applied in the case of *Innes* extends only to persons holding a public office. But what principle is there for drawing a line there? It appears to me that there is none, and no line was drawn in fact by the decision. The only principle I can find is that if there is privilege disclosed by the record, there must be on record an allegation sufficient to put the communication beyond the privilege. The privilege arises from duty, and I am unable to see that it makes any difference in the matter of alleging malice whether the duty be to one’s office or to one’s neighbour, provided it be the public interest that it should be discharged, and that the writer or utterer of the defamatory statement appears to have occupied a position in relation to the receiver involving such duty.

I therefore think that the pursuer’s action is irrelevant, and that the Sheriff’s interlocutor ought to be recalled and the action dismissed with expenses.

LORD RUTHERFURD CLARK concurred.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court recalled the Sheriff-Substitute’s interlocutor and dismissed the action as irrelevant.

Counsel for the Appellant—Watt. Agent Abm. Nivison, L.A.

Counsel for the Respondent—Macfarlane. Agents—Henderson & Clark, W.S.

Wednesday, March 19.

SECOND DIVISION.

[Lord Trayner, Ordinary.

HALKETT AND OTHERS v. PENNEY.
Husband and Wife—Marriage-Contract Provision—Trust—Claim by Wife to have her Estate Reconveyed to her during the Subsistence of the Marriage.

A lady by her antenuptial contract conveyed all her property to trustees for, *inter alia*, payment to her of the annual proceeds during the subsistence

of the marriage; (3) for certain payments from the capital to her if required, saving and reserving the sum of £12,000, which was to remain invested during the subsistence of the marriage except in the event of advances to the issue of the marriage. These advances were limited to £1500 to any one child, and to £5000 in all. A *jus quæsitum* to the extent of £5000 was given to the children of the marriage, but their provisions were not to vest in them until majority or marriage. If she survived her husband without issue the trustees were to reconvey the whole trust funds to her or to her nominees, and if with issue the balance beyond £5000 if required. If the husband survived without issue he was to receive an annuity of £400, and, subject to said annuity, the trustees were to dispose of the trust funds as she might direct, if with issue he was to be paid the liferent of the whole trust funds subject to a power in the trustees to apply half thereof for behoof of said issue.

A power of apportionment among the issue of the marriage was conferred upon the spouses jointly, and failing such joint apportionment upon the survivor.

Upon the failure of the trustees a judicial factor was appointed to hold the said trust-estate, which then amounted to £9000. There were five children of the marriage, a son who had attained majority, two daughters who had also attained majority, and to whom the advances to the extent of £1500 each had been made, and two sons in minority.

The wife, with the concurrence of her husband, and with the consent of the three eldest children, brought an action against the judicial factor and the two youngest children to have the judicial factor ordained to pay over to her the whole trust-estate less £2000, or to pay over so much of it as the Court should think right.

The Court held that the trust-estate must be retained in the hands of the judicial factor during the subsistence of the marriage, and dismissed the action.

Colonel Frederick John Colin Halkett, 25 Charleville Road, West Kensington, London, and his wife Mrs Helen Margaret Fisher or Halkett were married to each other in 1857. There were five children of the marriage—a son now aged 28, two daughters, now aged 26 and 23 respectively, and two sons, aged 17 and 12 respectively.

By antenuptial contract of marriage to which her mother, Mrs Fisher, Bridgend, Perth, was a party, Mrs Halkett on her part disposed to trustees (1) all her estate heritable and moveable then belonging to her or which she might conquest; (2) all and whole her right and interest in the estate of the deceased James Fisher, her father; (3) all her rights and interest in the estates of John Fisher, Dunkeld, her grandfather, and Mrs Helen Fisher, her grandmother, and she bound herself to execute all necessary deeds for vesting the same in the trustees.

The purposes for which the trustees were to hold said trust funds were, *inter alia*—
 “*Second*, For payment of the free annual interest or produce of the trust funds and estate to the said Helen Margaret Fisher during the subsistence of the marriage, such payment being exclusive of the *jus mariti* and right of administration of the said Frederick John Colin Halkett, and her own receipt being a sufficient discharge to the said trustees. *Third*, For payment assignation on conveyance at any time or times during the subsistence of the marriage, of such sums or such parts of the principal or capital of the trust funds and estate hereby conveyed in trust by her as aforesaid, to the said Helen Margaret Fisher, or to such person or persons as she shall by any writing or writings under her hand direct, saving and reserving the sum of £12,000 sterling, which sum is to remain vested in the said trustees under these presents, and for the purposes hereinafter set forth, and is not to be encroached on in any way during the subsistence of the marriage, except in the event of advances to the issue of the marriage out of said sum as after mentioned. *Fourth*, In the event of the said Helen Margaret Fisher predeceasing the said Frederick John Colin Halkett, and of there being no issue of the intended marriage then surviving, or in the event of there being such issue but such issue predeceasing him before attaining to majority or being married, the said trustees are hereby directed to pay the said Frederick John Colin Halkett, during the then remainder of his life, an annuity of £400, . . . and subject to the said annuity of £400, the said trustees are hereby directed to dispose or make over the residue of the trust funds and estate to such party or parties as the said Helen Margaret Fisher may direct by any writing under her hand, whether testamentary or otherwise, and failing such to her heirs, executors, or administrators, to be distributed by them according to the law of Scotland. *Fifth*, In the event of the said Helen Margaret Fisher predeceasing the said Frederick John Colin Halkett, and there being surviving issue of the intended marriage, the trustees shall pay over to the said Frederick John Colin Halkett during his life the free annual interest or produce of the trust funds and estate hereinbefore conveyed by the said Helen Margaret Fisher as aforesaid, or of so much thereof as shall for the time being remain vested in the said trustees: But it is hereby expressly provided that it shall be in the power of the said trustees, if they deem it advisable, to apply the said free annual interest or produce to any extent not exceeding one-half thereof, for behoof of the said issue, without paying the same over to the said Frederick John Colin Halkett. . . . *Sixth*, Notwithstanding the provisions of the free annual interest or produce of the trust-estate hereinbefore written in favour of the said Helen Margaret Fisher and Frederick John Colin Halkett, it shall be in the power of the said trustees at any time to advance to or for behoof of the child or children of the intended marriage,

for their outfit or advancement in life, a sum not exceeding in whole £5000, and such advances to or for the benefit of any one child not to exceed £1500, while three or more children survive. *Seventh*, In the event of the said Helen Margaret Fisher surviving both the said Frederick John Colin Halkett and the issue of the said intended marriage, the trustees shall dispend and make over to her or to such person or persons as she may direct by any writing the whole property or funds remaining vested in them in trust. *Eighth*, In the event of the said Helen Margaret Fisher surviving the said Frederick John Colin Halkett, and there be surviving issue of the marriage, the said trustees shall continue to pay to her the free annual interest or produce of the trust funds and estate, and she shall at any time be entitled to call on the trustees to set aside the sum of £5000 sterling out of the trust funds, to be retained for behoof of such issue, and also to call on the said trustees to pay or make over the balance of the said trust funds to her, or to such party or parties as she may appoint by any writing under her hand, and the said sum of £5000 shall be held by the said trustees for behoof of such issue, under the provisions herein contained, applicable to the issue of the said intended marriage; and should advances have been made to them under the sixth purpose of the trust, such advance shall be held to have been made out of or in satisfaction *pro tanto* of said sum of £5000, declaring that should the said Helen Margaret Fisher not call on the trustees to pay or make over the balance of the trust funds as above provided, or avail herself of this power only to a limited extent, the said trustees shall hold such balance, or any part of the trust funds and estate exceeding the said sum of £5000, for behoof of the issue of the said intended marriage, under the provisions herein contained applicable to such issue. *Ninth*, In the event of there being issue of the said intended marriage, and if such issue shall survive both parents, the trustees shall continue to hold any remaining trust funds and estate for behoof of such issue, and apply the same as they think proper for their support and education, declaring that it shall not be necessary that the sums so applied (if there be more children than one) be equal in amount, and on such children respectively attaining majority or being married, the said trustees shall pay over or denude of the said trust funds and estate in favour of such children in such proportions as the said Frederick John Colin Halkett and Helen Margaret Fisher may direct or appoint by any joint writing or writings under their hands, and failing such joint writing as the survivor of them by any writing or writings, testamentary or otherwise, may direct, and failing such direction or appointment, or so far as such direction or appointment shall not extend, the said trustees shall divide and make over the said trust funds and estate equally among said children.”

None of the provisions in favour of

children were to become vested in them until they respectively attained majority or were married.

The two eldest daughters each received out of the trust funds supplied by their mother the sum of £1500. No advance was made to any other child of the marriage.

In June 1888, upon the petition of the last of the trustees acting under said marriage-contract, who wished to resign, Joseph Campbell Penney, C.A., Edinburgh, was appointed judicial factor upon the said trust-estates. The said Mrs Helen Margaret Fisher or Halkett and her husband, with the consent and concurrence of their three eldest children, thereafter brought an action against the said judicial factor and the two youngest children of the marriage to have the whole trust property vested in the judicial factor under the conveyance by the said Mrs Halkett, over and above the sum of £2000 paid over to her, or such part of said trust funds as the Court should think she had a right to claim.

The trust funds in the factor's hands amounted to about £9000.

The pursuers pleaded—“(1) On a sound construction of the antenuptial contract of marriage executed by the pursuers, the female pursuer, with the consent of her husband, is entitled to take out of the trust her whole funds, under deduction of £2000 sterling. (2) On a sound construction of the said contract, the female pursuer, with consent of her husband and of her children Charles, Alice, and Edith, is entitled to take out of the trust-estate her whole funds, under deduction of such part thereof (to be ascertained in the course of the process to follow hereon) as may be sufficient to meet the rights of her children Hugh and Frederick.”

The defender pleaded—“(3) On a sound construction of the said contract of marriage, the pursuers are not entitled to diminish the trust-estate thereby destined for behoof of the children of the marriage, and the defender is entitled to be assoilzied from the conclusions of the action, with expenses.”

A *curator ad litem* was appointed to the two youngest children.

The Lord Ordinary (TRAYNER) upon 19th July 1889 dismissed the action and found the defenders entitled to expenses.

“*Opinion*.—The second purpose of the marriage-contract trust is for payment to Mrs Halkett of the free annual interest or produce of the trust-estate, during the subsistence of the marriage, exclusive of the *jus mariti* and right of administration of her husband. I regard that clause as not merely a direction for trust management, but a proper contract provision, whereby there was secured to Mrs Halkett so long as the marriage subsisted payment of the free proceeds of her estate—a provision intended to protect her against her own acts as well as the acts of others, and one which she cannot now revoke or renounce. The grounds upon which the learned Judges proceeded in the decision of the case of *Menzies v. Murray*, 2 R. 507, appear to me to have at least equal force and applicability in the present case.

“The third purpose of the trust provides that a sum of £12,000 shall be held by the trustees, and ‘is not to be encroached on in any way during the subsistence of the marriage’ except in the event of advances out of that sum to the children of the marriage as provided for. Advances appear to have been made to the children to the extent of at least £3000. What the pursuers now propose is to take that £12,000, or what remains of it (practically the whole trust-estate), subject to a deduction of £2000, to meet further advances to the children into their own hands. I am of opinion that they are not entitled to do this, first, because it would be against the direct provision of the marriage-contract, and second, because it would defeat the provision in favour of Mrs Halkett under the second purpose of the trust.

“If the pursuers obtained the decree which they seek, they would simply be setting aside their marriage-contract. This I think they are not entitled to do, nor do I think it is for their interest to do so.”

The pursuers reclaimed to the Second Division of the Court, and argued—This case was ruled not by the case of *Menzies v. Murray*, but by those of *Ramsay v. Ramsay's Trustees*, November 24, 1871, 10 Macph. 120, and *Laidlaws v. Newlands*, February 1, 1884, 11 R. 481. In the case of *Menzies* the wife had only a liferent, and no fee even after husband's death. Here, as in the two other cases, she had both the liferent and the fee. The argument that the trust must be kept up to protect the wife against her own acts was rejected in the case of *Laidlaws*. Who then were interested to oppose this proposed reconveyance? The children's *jus quaesitum* was limited to £5000, which, with the advances already made, would be secured by the judicial factor retaining £2000. The law would not keep up the trust to secure the husband's annuity in case he survived. Besides, the husband was one of the pursuers in this action.

Argued for the respondent—The third purpose of the trust was clear and distinct. To the extent of £12,000 the trust funds were to be kept in the hands of the trustees, and therefore now in those of the judicial factor during the subsistence of the marriage. This was an antenuptial contract of marriage in the interests of Mrs Halkett with the consent of her mother, and the general law that a wife, even with the consent of her husband, cannot revoke the trust and remove the protection secured by her marriage-contract was saved even in the case of *Ramsay*. The cases in point here were *Torry Anderson v. Buchanan*, June 2, 1837, 15 S. 1073; *Hope*, March 15, 1870, 8 Macph. 699; *Menzies v. Murray*, March 5, 1875, 2 R. 507. Here also there was a right of apportionment among the children reserved to the surviving spouse. That alone showed the trust must be kept up.

Counsel for the *curator ad litem* adopted the argument for the respondent, and contended it was for the interest of the two youngest children that the trust should be kept up.

At advising—

LORD JUSTICE-CLERK—By this antenuptial contract of marriage the trustees under it are directed to hold the trust funds coming from the wife for her behoof during the subsistence of the marriage, and to pay the annual proceeds to her upon her own receipt, exclusive of her husband's *jus mariti* and right of administration.

The Lord Ordinary has held that direction to be binding upon the trustees, so that neither by the wife's own act nor by her act in conjunction with her husband can the protection secured to her by the marriage-contract be removed during the subsistence of the marriage.

I concur with the Lord Ordinary in thinking the trustees are bound to continue to hold the trust funds during the subsistence of the marriage for the wife's protection. There is no clause modifying the provision. To the extent of £12,000 the trust funds provided by her are not to be encroached upon except for the one purpose of making advances to children.

LORD RUTHERFURD CLARK—I am of the same opinion. It is clearly established that the marriage-contract gave protection to the wife during the subsistence of the marriage, so that the trust funds must be preserved for her.

So far I agree with your Lordship and with the Lord Ordinary, but I am not sure that the case of *Menzies* is so directly in point as the Lord Ordinary thinks it is.

LORD LEE—I agree with Lord Rutherford Clark in thinking that the case of *Menzies* is not so clearly applicable as the Lord Ordinary thinks. Indeed, I am not sure that I could have concurred with the Lord Ordinary if it had been necessary to hold that the present case was ruled by that of *Menzies*; but it is not necessary to decide this case upon that view.

The third purpose of this deed upon which we had a very full argument is as follows—[*Reads clause given above*]. Now, no doubt one of the purposes after set forth is the wife's own liferent if she survived her husband. In the case of *Menzies* that was the purpose for which the trust was ordered to be kept up. Here there are other purposes for which the trustees must continue to hold the funds. I think the ninth purpose of the trust is conclusive of the question, for by it the survivor of the spouses has a power of apportioning the funds falling to the children.

I cannot therefore see how the trust can be fulfilled without the trustees holding the whole fund of £12,000, which the husband may allocate if he survives. On that simple ground I think the whole fund must be retained in the hands of the judicial factor, although I think there is no *jus quaesitum* in the children beyond £5000.

LORD YOUNG was absent.

The Court adhered, but allowed the expenses of the action to be paid out of the trust-estate.

Counsel for the Pursuers and Reclaimers
—Comrie Thomson—Rhind. Agent—Wm.
Officer, S.S.C.

Counsel for the Defender and Respondent
—Jameson—Burnet. Agent—R. Stewart,
S.S.C.

Counsel for *Curator ad litem*—Salvesen.
Agents—H. B. & F. J. Dewar, W.S.

Wednesday, March 19.

SECOND DIVISION.

[Lord Kinnear, Ordinary.]

WHYTE v. ROBERTSON.

(*Ante*, vol. xxvi. pp. 67 and 91, and
16 R. pp. 95 and 100.)

*Succession—Vesting—Marriage-Contract—
Power of Apportionment—Fee and Life-
rent—Sequestration—Discharge.*

A lady by her antenuptial contract of marriage conveyed certain bank shares to herself in liferent, and failing her to her husband in liferent and to the children of the marriage equally in fee, but with power to her husband, and failing him to herself, to apportion the provisions thereby made for children, and failing such apportionment the provisions to divide equally, the issue of a child dying before receiving its provisions, having right to the parent's share.

The husband died in 1869, survived by his wife, one son, and three daughters.

By deed of transfer in 1870 the wife transferred the said shares to herself in liferent, and to her four children *nominatim* equally in fee. The children accepted the transfer, the acceptance bearing that it was not to affect the rights and interests of the children *inter se* under the marriage settlement.

In 1882 the son's estates were sequestered. In 1884 he got his discharge. In January 1887 his mother died. In November 1887 the trustee in bankruptcy was discharged. In 1888 the sequestration was revived and the trustee in bankruptcy reappointed.

The son brought an action against the trustee to have it found and declared that his share of the bank shares belonged to him, and had not passed under the sequestration. He maintained that until his mother's death he had only a *spes successionis*, which could have been defeated by her, and that the shares had only vested in him upon her death, three years after he had got his discharge.

Held that the shares had vested in him upon his acceptance of the transfer of 1870, and consequently fell under the sequestration.

The estates of George Whyte & Company, distillers, Invernettie, Peterhead, and of George Whyte, sole partner thereof, were sequestered on 7th June 1882, and James

Alexander Robertson, C.A., Edinburgh, was appointed trustee. On 18th March 1884 the bankrupt was discharged without composition, and on 4th November 1887 the trustee was discharged by the Sheriff.

J. A. Robertson was, after a petition to the First Division to revive the sequestration, reappointed trustee on said sequestered estates upon 8th December 1888. Whyte brought an action against the trustee to have it found and declared that he had an undoubted right in and to a fourth part of certain shares in the Commercial Bank of Scotland, which he averred had vested in him upon his mother's death on 18th January 1887, and therefore since the date of his discharge, and which he had since assigned.

The history of these shares was as follows:—They belonged originally to the pursuer's mother, who by her antenuptial contract of marriage with George Whyte senior conveyed them "to herself in liferent but exclusive of the *jus mariti*, and failing her by death to the said George Whyte in liferent, and in either case to the children of the marriage equally among them if more than one, in fee, subject to the powers of division and other conditions hereinafter mentioned." And it was further declared "that in case there be more than one child of this marriage, the said George Whyte shall have the power, and failing his dying without exercising it, the said Isabella Mess shall have the power, while she remains his widow, at any time of his or her life, or on deathbed, to divide the provisions hereby made for children in such manner as he and, failing him, she may direct by any writing under his or her hand, and failing any such division the said provisions shall divide equally among the children, male and female, the issue of a child dying before receiving its provisions having right to the parent's share." Her husband died in April 1869 without leaving a valid deed of apportionment, survived by herself, one son (the pursuer), and three daughters.

By transfer dated 10th and 11th May 1870, and duly registered in the books of the said Commercial Bank, she made over said shares to and in favour of herself, the said Isabella Mess or Whyte, in liferent for her liferent use allenerly, and to the children of the marriage between her and the said George Whyte, namely—George Whyte (the pursuer), Mary Logan Whyte, Phillis Whyte, and Fanny Whyte equally in fee, and to their assignees and successors whomsoever, declaring "that the acceptance thereof was not to affect the rights and interests of the children of the said deceased George Whyte, *inter se*, under the said marriage settlement." The pursuer and his sisters accepted of said assignation.

The pursuer pleaded—"(1) The pursuer being registered owner of one-fourth part of the said thirteen shares of the stock of the said bank, and his right to and interest in the same having vested subsequent to his discharge from sequestration in March 1884, he is entitled to decree in terms of the declaratory conclusion of the summons."