

AGNES GALLOWAY, WIDOW APPELLANT.
 ROBERT CRAIG RESPONDENT.

Gift by a Husband to his Wife.—Per Lord Brougham : By the law of Scotland a gift by a husband to his wife is to be taken as a *donation*, or as a *provision*, according to the circumstances.

1861.
 May 17th, 28th,
 and July 17th.

Donation by Husband to Wife—Subsequent Bankruptcy—Rights of Creditors.—By the law of Scotland a donation made by a husband to his wife, *stante matrimonio*, is revocable, and his bankruptcy operates as a revocation.

Provision by Husband for Widow—Subsequent Bankruptcy—Rights of Creditors.—A provision made for a wife is not revocable if it be reasonable ; and if it be excessive it may be cut down for the excess, and remain valid for the remainder.

Circumstances under which it was held that a policy of insurance was a *provision* and not a *donation*.

ON the marriage of the Appellant with James Galloway, a mason and builder in Glasgow, now deceased, no settlement was made or contract executed.

In May 1852 the husband effected an insurance of 499*l.* 19*s.* on his own life with the Standard Life Assurance Company in Edinburgh. The policy was taken payable to Mrs. Galloway, “her heirs, executors, or assignees.” The husband duly paid the premiums.

On the 12th May 1857 the husband executed a trust disposition and settlement, *mortis causa*, whereby he assigned and disposed to certain trustees his whole heritable and moveable property, making a provision for his wife, but saying nothing as to the policy.

On the 10th June 1858 the husband was sequestrated under the Scotch Bankruptcy Act, and the Respondent, Mr. Craig, was appointed trustee of his estate. It was alleged by him, but denied by the Appellant that the husband was insolvent when the

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policy was effected. There was a deficiency of assets to satisfy creditors.

The husband died on the 4th July 1858.

The question was whether the trustee or the widow was entitled to the sum insured.

For the purpose of determining this question the Assurance Company instituted a multiplepinding (a) suit, calling upon Mrs. Galloway and Mr. Craig to put in their claims respectively to the sum insured.

A record was made up, including condescendence by Mrs. Galloway and answers by the trustee; and both parties put in their claims respectively. Mr. Craig, by his plea in law, insisted that the policy in question was part of the estate of the deceased husband, the bankrupt, and he, therefore, as the official trustee under the sequestration, claimed the amount.

Mrs. Galloway on the other hand by her pleas in law maintained the following propositions:—

I. The policy in question having been all along in the possession of the claimant, and being *ex facie* and truly the property of herself, “her heirs, executors, and assignees,” she is entitled to be preferred in terms of her claim.

II. Even had the policy been opened by Mr. Galloway, and the premiums been paid from his funds,—1. The sum insured would have been only a moderate and rational provision made for his widow when he was perfectly solvent, and in discharge of the legal obligation incumbent upon him; 2. Said policy was a delivered evident in favour of the claimant—was truly an alimentary provision for her behoof—and is not attachable for the debts of her late husband.

III. Even had the policy remained in the custody of her late husband, this would not affect the claimant’s right and title to the same, as the husband is the legal custodier of the wife’s writings.

IV. The sum in the policy never having been *in bonis* of the deceased, his creditors have no right or title to claim the same.

The *Lord Ordinary* (b), on the 29th June 1859, pronounced the following Interlocutor:—

Finds that the policy of insurance for 499*l.* 19*s.* on the life of the late James Galloway, bears to have been effected by the

(a) Interpleader.

(b) Lord Ardmillan.

claimant, Mrs. Galloway, with concurrence of her husband; that the obligation to pay the premiums is therein undertaken by her; that the sum in the policy is declared to be payable six months after Mr. Galloway's death, to her, or to her heirs, executors, or assignees, and that the receipts for the premiums paid on the policy are all in her name, and, with one exception, have been produced by her: Finds it admitted that there was no marriage contract between Mr. and Mrs. Galloway, and that it is not alleged that any other provision for Mrs. Galloway, than that under the policy, was made by her husband: Finds that the sum in the said policy was not due by the insurance company till after the death of James Galloway, when it became due to the claimant, Mrs. Galloway, as the holder and creditor according to the terms of the policy: Finds that the late James Galloway was sequestrated on the 10th June 1858, and died on the 4th July 1858: Therefore, finds that the sum payable under the said policy was not, at the date of sequestration, part of the estate of the said James Galloway, and that the claimant, Mr. Craig, as trustee on his sequestrated estate, is not entitled to claim it in this multiplepointing on the footing of its being part of the sequestrated estate: Finds, that in order to ascertain whether the claimant, Mr. Craig, as trustee foresaid, is entitled to be preferred to the fund *in medio* to any extent or effect, it is necessary to inquire whether Mr. Galloway was solvent or insolvent when the policy was effected and the premiums thereon were respectively paid: Therefore, remits to Mr. Walter Mackenzie, accountant in Glasgow, to examine the books, papers, and accounts, and generally the affairs of the late James Galloway; and to report,— 1st, whether he was solvent or insolvent at the date of the policy, viz., 5th May 1852, and if he was solvent at that date, then, 2ndly, at what date the said James Galloway became insolvent: Grants diligence, at the instance of both or either of the parties, against havers for recovery of the said books, papers, and accounts, and commission to the said Walter Mackenzie to take the oaths and depositions of the havers, and to receive their exhibits, the same to be reported *quam primum*; and reserves the question of expenses.

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To this Interlocutor the *Lord Ordinary* added the following Note:—

The mode of ascertaining the solvency or insolvency of Mr. Galloway by a remit to an accountant, which has been here adopted, was agreed on as the most convenient and least expensive.

The trustee on the sequestrated estate of the late Mr. Galloway has demanded the whole sum in the policy as part of his estate; and, in support of that plea, he maintains that it is unnecessary to inquire whether Mr. Galloway was solvent or insolvent at the

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date of opening the policy, or at the date of the annual payment of the premiums.

The Lord Ordinary is not prepared to give effect to this plea. The right to receive payment of the sum in the policy, when it should become due, was in the wife,—so the policy bears; and it is not disputed that the policy was effected with the knowledge and consent of the husband. She was, from the first, the creditor, and she is specially mentioned by name as the creditor under that policy. The right to the amount set forth as insured on Mr. Galloway's life was on the face of the policy in her; and on her also the obligation of paying the premiums was imposed by the terms of the policy; and the receipts are accordingly in her name.

The sum insured was not due till after the husband's death. It was not *stante matrimonio*, but *post finem matrimonii*, that this sum became payable by, or exigible from, the Insurance Company. It never was or could be due to the husband himself, for it was only payable on his own death; and it was not payable to the wife during her husband's life.

It is quite true that the holder of a policy of insurance may use it as a security or fund of credit, or may in some cases obtain a certain sum by surrendering it at a stipulated value. But this does not affect the question here involved, which relates not to any sum borrowed on the contingency, nor to any bonus or premature fruit dropping during the currency of the policy, in earnest of future possession, or to any surrender value on adjusted conditions of anticipated settlement, but to the sum in the policy, due in terms thereof, on the event there fixed as the condition of payment, and exigible by the wife only after the death of the husband.

It is also true, that as the wife had no separate estate, the annual premium paid in her name must have been paid out of the husband's funds, and it is said that he thus carved an estate out of his own estate. But irrespective of the question of solvency or insolvency, the power of the husband to create in this form a provision for his wife after his death, by payments in her name and for her benefit, can scarcely be disputed. The right of the wife to the sum in the policy was both *sua natura*, and, according to the words of the policy, exigible only after the dissolution of the marriage, and it could not form part of the husband's estate during the subsistence of the marriage. The decision in the case of *Wight v. Brown*, 27th January 1849 (11 D. 459), appears to the Lord Ordinary to be an authority in support of the views now expressed. This point must be considered apart from the plea that the policy was a donation, and therefore revocable, and apart from the plea that the husband was insolvent, and that the alienation was to the prejudice of his creditors; and so viewing it, the Lord Ordinary is of opinion that, irrespective of alleged revoca-

tion and of alleged insolvency, the sum in the policy in name of Mrs. Galloway was not part of the husband's estate falling within the sequestration.

In the second place, the policy was not in this case an absolutely gratuitous provision so as to be revocable by the husband as a donation *inter virum et uxorem*. The wife was not in any other way provided for. The amount does not appear to be, and is not alleged to be, otherwise than moderate and reasonable, and, except on the footing of the husband's insolvency at the date of the policy (a fact not yet ascertained, and if so found, leading to a different rule of law), the sum in the policy must be dealt with as an onerous provision for the wife, in fulfilment of a natural obligation, in so far as it is reasonable and not excessive, and as gratuitous and revocable only *quoad excessum* (1 Bell's Com. 642).

It does not seem to be necessary, in this view of the policy as a provision, to enter on the question, whether the sequestration of the husband's estate would operate *ipso facto* as a revocation of a donation, or whether the sequestration only transferred to the trustee for the creditors the right to revoke as it stood in the person of the husband. There is some authority in support of the trustee's argument, that not merely was the right to revoke transferred, but that revocation was effected at once by the sequestration; and this seems most in accordance with the true principles of the law of bankruptcy (*Kemp v. Napier*, 1st February 1842, 4 D. 558). But unless this was a proper donation, so as to have been revocable by the husband, this point does not arise.

In the last place, the effect of the alleged insolvency of Mr. Galloway remains to be considered; but, on this point, it will be more satisfactory to reserve the expression of opinion till the facts in regard to the insolvency shall have been ascertained.

Upon a reclaiming petition presented by Mr. Craig, the cause was fully argued before the Lords of the Second Division; and a minute having been lodged by Mrs. Galloway, whereby she admitted that the premiums of insurance on the policy had been paid by her husband, or from his funds, their Lordships on the 22nd June 1860 pronounced the following judgment (a):—

Alter the Interlocutor of Lord Ardmillan: Find that the policy opened in May 1852 by the deceased James Galloway, in name of his wife, and the payment of the annual premiums

(a) Lord Benholme dissenting. See Sec. Ser. vol. 22, p. 1219.

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thereafter out of his funds, constituted in truth and substance a donation by the husband to the wife, and was therefore revocable, and was *ipso facto* revoked by the sequestration of the husband's estate: Therefore, rank and prefer the claimant Robert Craig in terms of his claim and decern.

Against this judgment of the Second Division Mrs. Galloway appealed to the House.

Mr. *Anderson* and Mr. *Neish* for the Appellant.

The *Lord Advocate* and Mr. *Rolt* for the Respondent.

The following opinions, delivered by the Law Peers, exhaust the case.

LORD BROUGHAM:

My Lords, I will read to your Lordships the judgment of my late lamented noble and learned friend Lord Chancellor *Campbell* (a). He says:—

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I approve of the view taken of this case by Lord *Ardmillan* (the Lord Ordinary), and by Lord *Benholme*, the dissenting Judge of the Second Division of the Inner House.

Having carefully referred to the decisions, and the authorities from institutional writers, quoted at the bar, I come to this conclusion, that, according to the law of Scotland,—in determining whether a gift by a husband to the wife is to be considered a pure revocable *donation*, or a *provision* for the wife after the death of the husband, which cannot be revoked by the act of the husband or by his sequestration,—if there was no antenuptial contract between the spouses, and the wife was entirely unprovided for at the time of the

(a) Lord Campbell had written his judgment, as was his wont, shortly after the argument, which in this case had taken place in the month of May 1861. The manuscript was found after his death (see *suprà*, p. 236), and communicated to Lord Brougham, who delivered it as above.

gift, and if the gift was intended between the parties when made to be such a provision for her,—and it may operate as such a provision,—it shall be treated as such a provision, so that, the wife surviving the husband, it shall go to the wife and not to the executors of the husband, and, the husband being sequestrated, living the wife, it shall go to the wife, and not to the creditors of the husband.

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The policy in question, a gift by the husband to the wife, seems to me, according to all these conditions, to be a provision for the wife and to belong to her.

There had been no antenuptial contract between the spouses ; at the time of the gift the wife was wholly unprovided for, and the imperfect obligation on the husband to make a provision for the wife when she becomes a widow, wisely recognized by the law of Scotland, subsisted in full force, to prevent this being considered a mere voluntary gift, without consideration. It naturally would operate, and most clearly it was intended to operate,—as a provision for her when she should become a widow. There being two policies of insurance for 300*l.*, each effected by the husband in his own name on his own life, and payable to his own executors, for his own separate benefit,—while he was still solvent,—this policy for 499*l.* 19*s.* was effected by him in the name of his wife on his own life, payable six months after his death to his wife, “her heirs, executors, or assigns.” The premiums due on this policy were paid from the funds of the husband, but the receipts given for them were in the name of the wife.

She actually did survive him, and the sum insured on his life is unquestionably due from the Insurance Office. He had been sequestrated shortly before his death, and the only controversy is between her and his creditors under the sequestration as to the right to

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the 499*l.* 19*s.* The policy, if a provision, is allowed to be reasonable in amount.

Such a provision by a husband for his widow we are told is very common, and certainly is very natural.

The objection that it is not in the shape of an annuity is clearly unsustainable; for although the provision must be for the wife, not *stante matrimonio*, but *post finem matrimonii*, this provision may be by a lump sum which may purchase an annual allowance; and there are various instances in the reports of such a gift being held a valid provision.

But, strange to say, chief reliance is placed upon the policy being payable to the wife, "her heirs, executors, and assigns." Although this might be supposed to be indicative of an intention to make the money insured the separate and absolute property of the wife, it is converted into an objection that the money would have been payable to her representatives if she had predeceased her husband, and in that case it could not have been a provision for her after his death. Further, the fact is relied upon that the moment one premium had been paid the policy was of some value, and that she might have sold it in her lifetime, and so on his death she might have been wholly unprovided for. But I think it is very certain that the spouses did not consider the policy of any productive value till the death of the husband; the notion of selling it during their joint lives never entered their imagination, and in truth the one could not have sold or surrendered it without the consent of the other. To be sure, there was a possibility that she might have predeceased him; but, although this was not an anticipated possibility, if we are to regard subtleties, the gift of the policy as a provision for the wife may be considered to have been only on the implied condition that she survived him; and although, living the husband, the sequestra-

tion took place, which would have operated as a revocation of a mere voluntary donation, it could not, living the wife, operate a revocation of conditional provision. I allow that the transaction must have its character impressed upon it at the time when the policy was effected. Here *initium, non finis, operis nomen imponit*. But, from the beginning, it may be considered a provision for the wife if she survived her husband, but to be his property on her death if she predeceased him. I cannot doubt that a valid deed might have been framed containing these express stipulations. It is admitted that between husband and wife there may be a valid transaction making an irrevocable provision for the wife when she becomes a widow, without any writing; and, by way of provision, there may be a conditional as well as an absolute gift. On this hypothesis, the sequestration of the husband in the lifetime of the wife could not work a revocation, and, as she survived him, the policy became absolutely hers.

There being thus no legal objection to giving full effect to the just intention of the parties, I must confess that I feel satisfaction in being able to advise your Lordships to reverse the Interlocutors appealed against, which has driven the widow to prosecute this appeal in *formâ pauperis*.

Here Lord BROUGHAM resumed :

My Lords, I entirely agree with my late noble and learned friend in all parts of his opinion. It is quite clear that by the law of Scotland, a gift by a husband to his wife is to be taken as a donation or as a provision for her according to the circumstances. If it is clear that it is the husband's intention to make that provision, and if it is a reasonable provision, then in case of a question arising with creditors upon a seques-

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tration there is no doubt that it is sustainable by the law of Scotland.

As to one point referred to in the opinion of my late noble and learned friend, which I have read to your Lordships, in addition to what he has said I may mention that in the case of *Short and Burney v. Murray* (a) a gift to the wife of a security subject to a life interest which might not terminate, living the wife, was held to be a provision for her and that she might dispose of it. Now in this case the wife might have disposed of the policy, and might have sold it for more than she would have done if it had actually contained the condition of her surviving her husband. Therefore I entirely agree with my noble and learned friend that the judgment appealed from should be reversed.

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Lord WENSLEYDALE :

This is a case of considerable nicety and difficulty, and I have had great doubt as to the conclusions at which I ought to arrive. I was strongly impressed by the able and perspicuous reasoning of the *Lord-Justice Clerk* and *Lord Cowan* in favour of the Respondent, and much inclined at one time to adopt their opinion. It is conceded on all hands that gifts between spouses are revocable, except so far as the Court can see that they were onerous ; and a reasonable provision made for a wife, being in pursuance of a natural duty, is deemed onerous. It is also clear that the presumption is that an assignment of property by a husband to a wife is *primâ facie* a donation, and therefore revocable, and further, that if it was revocable by the husband when his estate was sequestered in June 1858, it was revocable by the Respondent, the trustee in sequestration, and he was entitled to the fund *in medio*. It

(a) Morr. 6124.

appeared to the majority of the Court of Session, for reasons at first sight apparently very strong, that it could not at the date of the sequestration be predicated properly, that the gift of the policy of assurance was or could be a provision for the wife, and therefore irrevocable, because onerous. That it was a gift by the husband out of the property which he had in his hands is clear. He bought with money, from year to year paid for premiums of insurance for each year, the benefit of a contract by the Assurance Company to pay 499*l.* 19*s.* if he died in the course of that year; and the policy being entered into in the name of the wife, the benefit of the contract was thereby given to her. If the policy had been for the payment of the sum insured on the death of the husband, provided the wife survived, there would have been, I think, no question, but that the gift of it to the wife would have been deemed a provision for her after the husband's death, and therefore irrevocable, if reasonable, and no question, in the present state of the case arises as to the sum to be paid being disproportionate to the husband's means, and therefore unreasonable. But the objection to this policy being considered as a provision is, that it is payable in the event of the husband's death, whether the wife survive or not, and a sum payable to the wife, or her executors or administrators, on the death of the husband, would be hers, though she died in her husband's lifetime; and it may be said that if that event happened, such sum could not in point of law be considered as a provision for her, because she could never actually enjoy it on her husband's death. Then it would seem, if this be correct, that as it was uncertain at the time of the insolvency, which happened before the death of the husband, whether this policy would turn out to be a provision, and therefore valid, or a donation, and therefore invalid, it was revocable by the husband, and therefore

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by the Respondent, the trustee. I certainly have felt very great doubt upon this point; but after much consideration I agree with my other noble and learned friends, who are of opinion that the Appellant is entitled to the full benefit of this policy, because it may be considered, notwithstanding these objections, as a provision. There can be little doubt that it was intended by the husband so to be, because the sum was made payable to his wife after his own death, and most likely it was by mistake that he omitted to introduce the contingency of the wife surviving, and therefore paid too large a premium. But I do not see why, in order to constitute a valid provision, the money must be payable *after* his death, or why the gift of a present sum of money, or of money's worth, to a wife at that time unprovided for, may not be considered in point of law, if so intended to be a provision. In the case of *Short and Burney v. Murray*, a gift of a security for 10,000 marks due from a third person to the husband subject to his mother's life, was held to be a good provision for a wife (subject to a further inquiry whether on reference to his estate, it was excessive, and then it was to be reduced). Now, in that case it was not certain that the wife would survive the husband's mother, and therefore it might be that she would never actually receive any part of it herself; but she might so dispose of it as to make a provision for herself.

The same observation may be made on this policy of assurance. She might dispose of it as soon as she obtained it, and for much more than if it had contained a condition that she should survive her husband, and with the money produced might be able to secure a provision for herself.

Therefore, upon the whole, though after much doubt, I agree that the judgment ought to be reversed.

Lord KINGSDOWN:

By the law of Scotland a donation made by a husband to his wife *stante matrimonio* is revocable, and his bankruptcy operates as a revocation.

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On the other hand, a provision made for a wife by a husband is not revocable, if it be reasonable, and if it be excessive it may be cut down for the excess, and remain valid for the remainder.

These rules appear to be established by the text books and decided cases referred to in the argument, and they are not disputed at the bar.

The question is, What is it that distinguishes a donation from a provision?

A provision is held to be good because it is not the mere voluntary act of the donor, but is the performance of a moral duty imposed upon a husband to provide for his wife in the event of her surviving him, and the first question, therefore, seems to be, Is she already otherwise provided for? If not, it should seem that *prima facie* an intention on the part of the husband would be presumed to make a provision unless there be something in the nature of the transaction to exclude such intention.

Here the gift is of a sum of money which cannot fall into possession until the husband is dead, and until, therefore, the wife may require alimony.

It is not alleged that it is excessive in amount. It is but 500*l.*; and it appears that the husband at the same time that he effected this policy on his life in the name of his wife effected two others, each for like sums of 500*l.* in his own name.

That the sum so secured is a gross sum and not an annuity, is an objection which seems to be excluded not more by the decided cases than by the reason of the thing. If it had been an annuity, it might have been sold, and converted into a gross sum, and being

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a gross sum it may be invested in the purchase of an annuity.

It is said that the policy being made in favour of the wife, her heirs and executors, her representatives would have been entitled on the husband's death, though she had died in his life, and could therefore have had no occasion for a provision.

But it seems to me that there is great force in the observations of Lord *Benholme*, that it by no means follows that because the husband could not revoke the provision during the wife's life, he could not revoke it if she predeceased him; and at a time therefore when it ceased to bear the character of a provision (a). It seems within the principle of the rule, that the provision may be good in part and bad in part; good so far as it is a reasonable provision, and bad for the excess.

Mr. *Anderson*: This case must, I presume, be remitted for inquiry into the insolvency at the date of the policy; but I would submit to your Lordships that the costs in the Court below subsequent to the date of the *Lord Ordinary's* Interlocutor should be given to the Appellant. Your Lordships are now pronouncing the order which the Court of Session ought to have made. If they had refused the reclaiming note, they would have done so with costs.

Lord Advocate: Your Lordships will observe that the Interlocutor of the Court of Session finds no expenses due, and it is not usual to insert in your Lordships' judgment any finding as to costs in the Court below. The case will go back to the Court of

(a) Lord *Benholme's* words were: "What the husband could not have done to the effect of defeating an onerous provision for his widow, he might be able to do when his revocation interfered with no provision of that kind."

Session, and the Court of Session will do what they think just upon the reversal of the judgment.

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Lord KINGSDOWN : Does a pauper have costs ?

Mr. *Anderson* : Yes, my Lord.

Lord *Advocate* : Although we were successful in the Court below, the Court below awarded no costs to us. If upon your Lordships' judgment going back they think the Appellant is entitled to the costs since the date of the *Lord Ordinary's* Interlocutor, they will give costs accordingly.

Lord BROUGHAM : We are to give the same judgment which the Court below ought to have given. We think that they were wrong in their decision, and that they were wrong also in not giving costs.

Lord Advocate : At any rate the only amount of costs that they claim will be, as my learned friend says, costs subsequent to the date of the *Lord Ordinary's* Interlocutor. But what I submit is this, that the Court in considering the case, although they considered the Appellant wrong, gave no costs against the Appellant ; therefore, I think it is a case in which the Court below should be left to consider the question of costs, and to hear the parties upon it.

Lord BROUGHAM : They were wrong in considering the Appellant wrong, and therefore they were wrong in not giving her the costs.

Lord Advocate : The question of costs is a matter very much in the discretion of the Court.

Lord WENSLEYDALE : We ought to do what the Court below ought to have done.

Lord Advocate : This is a question between the trustee of an insolvent's estate and the widow. There may be considerations arising out of the position of the parties, which may regulate the question of costs.

Lord WENSLEYDALE : We ought to give a complete judgment, ought we not ?

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Lord Advocate: Not upon the question of costs. I submit it is the exception rather than the rule in cases of reversal to deal with costs in the Court below. That is generally left to be dealt with by the Court below in the application of the judgment. It is sometimes done, but it is the not usual course in cases of reversal.

Mr. Anderson: Almost universally your Lordships dispose of the question of costs. I ought to mention that we did not appear in *formâ pauperis* in the Court below; we were pauperised by the decision there, we were ordinary litigants in the Court below.

Lord CRANWORTH: We think that the case should be remitted to the Court of Session with a declaration that the costs in the Court below subsequent to the date of the *Lord Ordinary's* Interlocutor should be given to the Appellant.

Interlocutors reversed, cause remitted back with direction as to Costs below.

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