

kirk sessions of the several churches. The sessions of the several churches, without condition or qualification, must, in my opinion, mean the kirk sessions of the Established Church. Then the result is, that it is a gift to be administered by the kirk sessions according to the discretion of the kirk sessions, amongst Christians of all denominations, except Roman Catholics, within the bounds of the Presbytery. All this appears to be sufficiently clear, and therefore I submit to your Lordships, that the interlocutors appealed from ought to be affirmed. And as it has been agreed on the other side, the costs are to come out of the estate.

LORD CRANWORTH.—My Lords, I have not a single word to add to what my noble and learned friend has said, because I entirely concur in his conclusion, and in the reasoning by which he has arrived at that conclusion. I will only add, that a point on which I have some doubt in this case is, whether this House has not been a little too lax in ordering costs to come out of the estate in cases of this sort, because it rather encourages appeals which I think the persons making those appeals must often, and certainly in the present case, must have felt to be absolutely desperate.

LORD WESTBURY.—My Lords, I entirely agree with my noble and learned friends with regard to the objects of this gift. The description must be taken conjunctively, and if it be so taken, there is no uncertainty about the objects of it. They are the poor of the presbytery, the poor Christians resident in the presbytery. Neither is there any want of a fiduciary power to distribute the subject of the gift, for that fiduciary power of distribution and selection of the objects or recipients is given to the kirk session. There is therefore with respect to the gift everything that is necessary to give it certainty, both with regard to the construction of the gift, and also as to its administration.

I entirely concur in the last observation which has been made by my noble and learned friend, that when Sir Roundell Palmer with his usual generosity has not in terms consented, but has manifested no disinclination, that the costs should be given out of the estate, the appellants must consider themselves indebted to the bounty of their opponents for that which certainly they would not have obtained from the strict rules of justice in this House.

LORD COLONSAY.—My Lords, I have nothing to add except to mention, that in disposing of this case in the way that has been suggested, we are not confining the kirk sessions of the Presbytery to give the benefit of this fund to the relief of the poor in the legal construction of that expression. The discretion is wider here. We are not dealing with that question at all. That point is not involved here. It may come before your Lordships hereafter for decision upon the definite article "the" as relating to the legal poor. But we are not dealing with that question in the present case.

LORD CRANWORTH.—There are no legal poor in the Presbytery.

Interlocutors affirmed; the costs of the appeal to be paid out of the estate.

Appellants' Agents, Tods, Murray, and Jamieson, W.S.; Bircham, Dalrymple, Drake and Bircham, Westminster.—Respondents' Agents, Cheyne and Stuart, W.S.; Grahames and Wardlaw, Westminster.

APRIL 2, 1867.

MRS. BARBARA MARY MACINTOSH or DUNLOP (Pauper), v. WILLIAM JOHNSTON, Accountant (Trustee).

Husband and Wife—Postnuptial Contract—Bankruptcy—Provision for Aliment of Wife—*Husband married wife, who had no property, there being no antenuptial contract; but by postnuptial contract, he, being then solvent, provided and paid over £5000 to trustees for her and her children as an alimentary fund, and she renounced her legal rights in lieu thereof. His estates were sequestered two years afterwards.*

HELD (affirming judgment), *That the provision of interest to the wife during the marriage was revocable as being a donatio inter virum et uxorem, and that the trustee in the sequestration was entitled to reduction of the deed to that extent.*¹

¹ See previous report 3 Macph. 758; 37 Sc. Jur. 390.
Macph. H. L. 22; 39 Sc. Jur. 382.

S. C. L. R. 1 Sc. Ap. 109: 5

This was an appeal against the interlocutors by which it was found, that the provision by the postnuptial contract and supplementary contract, sought to be reduced, of the interest or income of £5000 in favour of the defender, Mrs. Barbara Mary Macintosh or Dunlop, in so far as the same was directed to be paid to her during the subsistence of the marriage, constituted a donation *inter virum et uxorem*, and was revocable by the defender, George Moore Dunlop, and was revoked by his sequestration.

Mr. and Mrs. Dunlop were married on 30th October 1860, there being no antenuptial contract, and the wife having no property, but the husband having £10,000. In March 1861 a postnuptial contract was executed, by which the husband bound himself to pay, on 1st January 1863, to trustees £5000, to be invested, and the interest paid to the wife during the subsistence of the marriage, for aliment of herself and children, declaring the same alimentary. The deed also contained these provisions:—"Third, in the event of the said marriage being dissolved by the death of me, the said George Moore Dunlop, survived by the said Barbara Mary Macintosh, I hereby provide and direct, that the said trustees shall make payment to her of the interest or income of the said sum of £5000 during all the days and years of her life while she remains my widow; but restrictable, in the event of her entering into a second marriage, as the same is hereby restricted, to a free liferent annuity of £100, payable the said income or restricted annuity, as the case may be, at the terms of Martinmas and Whitsunday, by equal portions, or quarterly, as the said trustees may find suitable. . . . Fifth, in the event of the death of the said Barbara Mary Macintosh survived by me, the said George Moore Dunlop, and of there being children of the marriage, the said trustees shall hold the sum of £2500 of the said sum of £5000, for behoof of such children, the fee to be divisible among them on majority. . . . Sixth, the remaining half of the said sum of 2500, the said trustees shall be bound to pay over to me, the said George Moore Dunlop, or divest themselves of and reconvey the securities or stocks in which the same may have been invested to me: Which provision I, the said Barbara Mary Macintosh, hereby accept in full of all that I, or my next of kin or others in my right, could claim in name of terce, *jus relictæ*, half or third of moveables, or other claims legal or conventional, by or through the death of the said George Moore Dunlop, all such claims being hereby renounced and discharged."

A supplementary contract of marriage was executed on 25th December 1862, shortly after the husband attained majority. The money was partly paid to the trustees, and securities given for the rest. On 6th August 1863 the husband's estates were sequestered, and the trustee sought to reduce the postnuptial contract, in so far as the said contract directed £5000 to be paid to the wife's trustees for the benefit of the wife during the marriage. The Lord Ordinary and Second Division reduced the contract to that extent. The wife now appealed.

The appellant in her *printed appeal case* gave the following reasons for reversing the interlocutors:—"1. Because the marriage contract provision under reduction cannot be revoked, as a *donatio inter virum et uxorem*, by the bankrupt or by the respondent in his right as trustee for his creditors, in respect that, under the deeds by which it was constituted, and the possession had thereon, the bankrupt stood, at the date of his sequestration, absolutely divested of the assets therein contained, and that onerously, being in security and implement of his natural and legal obligation to aliment and provide for his wife and children during the marriage as well as after its dissolution. 2. Because the provision, in favour of the appellant, in security and implement of which the bankrupt was divested as above mentioned, was further onerous, in respect, that it was granted by the bankrupt and accepted by the appellant as in lieu and satisfaction to her of her common law rights and claims against her husband (the bankrupt's) estate thereby discharged on the faith of it. 3. Because the provision in question, in security and implement of which the bankrupt was divested as aforesaid, was granted for the aliment, support, and education of the children of the marriage, as well as for the aliment of the appellant herself.

Horn, for the appellant.—The interlocutors were wrong. This provision to the wife was effectual, because the husband was completely divested of all control over it, and the consideration was a natural duty and legal obligation to support the wife, and the husband was solvent at the time—Bell's Prin. sects. 1591-6; Stair, i. 4, 10; 1 Fraser, Dom. Rel. 437; 1 Bell's Com. 534. Gratuitous deeds of divestiture to children are irrevocable—*Smitton v. Tod*, 2 D. 225; *Turnbulls v. Turnbulls' Trustees*, 1 W. S. 80. The doctrine, that donations from a husband to a wife *stante matrimonio* are revocable, is founded on the theory, that the donation is obtained by blandishment, and this consideration may be rebutted—Stair, i. 4, 18; Ersk. i. 6, 29; Bankt. i. 5, 91; i. 5, 95; 1 Fraser, Dom. Rel. 492; 1 Bell's Com. 634, 642; *per* Lord Campbell, *Rennie v. Ritchie*, 4 Bell's App. 242; *per* Lord Curriehill, *Macdonald v. Macdonald's Trustees*, 1 Macph. 1065; *Campbell*, M. 988. There is no authority which expressly says, it is incompetent to make such a settlement on the wife as was done in this case, and the following cases are not inconsistent, viz. *Inglis v. Lowry*, M. 6131; *Short v. Murray*, M. 6124; *Macpherson v. Graham*, M. 6113; *Macgregor v. Macgregor*, 22d January 1820, F. C.; *Jeffrey v. Campbell*, 4 S. 32; *Kemp v. Napier*, 4 D. 558. The last case is, when rightly understood, in favour of the appellant. And so are *Morrice v. Sprot*, 8 D. 918; *Wright v. Harley*, 9 D. 1151; *Galloway v. Craig*, 4 Macq.

Ap. 267 ; *ante*, p. 1047 ; *Rust v. Smith*, 3 Macph. 378. This provision was not only in discharge of a legal obligation, but was onerous, inasmuch as the wife renounced her legal rights in lieu of it—*Hepburn v. Brown*, 2 Dow, 342 ; *Hunter v. Dickson*, 5 W. S. 455 ; *Macdonald v. Macdonald*, 1 Macph. 1065 ; and it was given for her aliment—*Turnbull v. Turnbull*, 1 W. S. 80 ; *Smitton v. Tod*, 2 D. 225.

Anderson Q.C., *Scott*, and *Colt*, for the respondents, were not called upon.

LORD CHANCELLOR CHELMSFORD.—My Lords, that portion of the provision to the wife, which is to exist during the subsistence of the marriage, is the only part of this postnuptial contract which is impeached ; and that is really the only question raised in this case.

The decision appealed from is objected to by the appellant on the ground, that the postnuptial settlement in question is executed in implement of his natural and legal obligation to aliment and provide for his wife and children during the marriage. But what is the natural and legal obligation ? It is to support and aliment his wife and children during the marriage, according to his ability. There is no natural obligation recognized by Scotch law to divest himself of a portion of his property, and put it out of his control, to provide for his wife and children. On the contrary, it would rather appear to be his natural duty to preserve his right as head of the family, to dispense his means according to a just view of his obligations, and not to deprive himself of the exercise of that discretion, by making an absolute and irrevocable disposition of any portion of it to his wife.

The appellant, in the next place, insists, that the provision in the contract is onerous, because it was granted by the husband and accepted by the appellant, in lieu and satisfaction of her common law rights and claims against her husband's estate. But these legal claims of the wife only come into operation after the death of the husband. Her legal claim, during the subsistence of the marriage, is to proper aliment and support, which is rather to be regarded in the light of an obligation on the husband than of a right in the wife, which she can relinquish, so as to render a deed onerous which is founded on such a relinquishment.

The third and last ground upon which the appellant insists is, that the provision in question is onerous and irrevocable, because it is granted for the aliment, support, and education of the children of the marriage, as well as for the aliment of the appellant herself. Now a donation by a father to his children is not revocable, like a donation by a husband to his wife. But I agree with the Lord Ordinary, that this cannot be held to be a provision in favour of the children. The postnuptial contract sets forth, as its inductive cause, the propriety of making a "suitable provision" for the wife ; it does not constitute a *jus crediti* or direct prestable right in the children.

Upon the whole, my Lords, it seems to me clear, that the interlocutors appealed from are well founded in principle and upon authority ; and I submit to your Lordships, that they ought to be affirmed.

LORD ROMILLY.—My Lords, I entirely assent to the views that have been expressed by the LORD CHANCELLOR. I understand the principle of the Scottish law to be, that all donations between husband and wife are revocable, subject, however, to certain exceptions—1st, where the husband is performing a natural obligation ; and 2d, where there is a consideration for the donation which makes the contract onerous.

It is important, therefore, to consider what is meant by "natural obligation." Now, I apprehend, that though there is in one sense a natural obligation on a husband and father to support his wife and children during his life, that is not the meaning of the words "natural obligation," as used to support a donation from a husband to a wife, because the law enforces that already. Accordingly, by a contract to support his wife and children, a husband binds himself to do nothing more than he is compelled to do without entering into such a contract. But the support of his wife and children after he has ceased to exist, is not an obligation which can be enforced by law ; and this is a "natural obligation" which will not be performed unless he himself performs it. That is "a natural obligation" within the meaning of the exception which makes such a contract onerous ; and consequently, if the husband makes a deed or contract for the support of his wife and children after his death, after the marriage is over, that, I apprehend, is the performance of a "natural obligation" which will support a contract of this description.

There is therefore, as it appears to me, an important distinction to be drawn with respect to that part of the argument which was pressed upon us with so much ability by Mr. Horn when he tried to put the natural obligation of supporting a wife *stante matrimonio* on exactly the same footing as the support of the wife after the marriage is over. It is upon this ground, my Lords, and considering the sole question we have to consider here to be one which relates to a provision for the support of the wife during the marriage, and not at all after the marriage, that it does not appear to me, that this case comes within the exception which would prevent the application of the rule of the Scotch law, by which all donations between husband and wife are held to be revocable.

So also, I think, there is no consideration of an onerous character in any other respect, because the abandonment by the wife of the *jus relictæ* only applies to what she gives up after the

marriage is over, and can hardly apply to that which exists during the time that the marriage is subsisting. It is confessedly not before us to consider, whether the contract be or be not a good one after the marriage has been concluded.

I also concur in the observation which has been made by the LORD CHANCELLOR with respect to this question, that the children of the marriage are not the objects of the deed, but that the wife is the object of the contract, and that this is a contract made expressly and directly for her benefit.

When Mr. Horn suggested, that, if there had been no bankruptcy, and if the husband had neglected his wife and children, the Scottish Courts would not, under this contract, have sequestrated this fund and made some provision for the wife and children, it occurred to me as probable, that even without the contract, such a proceeding might have taken place under the Scottish law, and that the Courts might have sequestrated this fund and appointed some person to have control over it, and to apply it to the support of the wife and children—there being, I apprehend, according to the Scottish law, though not according to English law, an obligation on the part of the mother to support her own children.

For these reasons, my Lords, I am of opinion, that the decision of the Courts below was correct, and that this appeal ought to be dismissed.

LORD COLONSAY.—My Lords, I concur in the conclusion at which your Lordships have arrived. All the arguments that could be advanced in support of the appeal have been urged by the counsel for the appellant. He has stated every point and cited every case that could be brought at all to bear on the matter, and with that ability and research with which those who have been accustomed to hear him speak are well acquainted; but, my Lords, I think all that learning and all that ability have failed to establish a good case on the part of the appellant.

There is a clear distinction in the law of Scotland between rights that exist under an antenuptial and under a postnuptial contract. And there is a clear distinction between rights granted by a husband in favour of a wife, which are to take effect after the marriage is terminated, and those which are attempted to be granted by the husband in favour of a wife, to take effect during the subsistence of the marriage. But the broad argument, that was maintained on the part of the appellant, would go far to obliterate these distinctions. And indeed it would come to this, that without any special circumstances, in every case the gift of a sum of money made nominally by way of provision by the husband to his wife, *stante matrimonio*, is effectual, and cannot be revoked. That seems to be the substance of the argument. Now, I cannot admit, that such is the doctrine of the law.

The doctrine of the law is, that grants by a husband in favour of his wife *stante matrimonio* are revocable; and special circumstances must be established in order to make out an exceptional case. Now I do not find in this deed or in any of the circumstances stated with reference to the condition of the husband or the wife, anything that can constitute a special and exceptional case. The wife brought no fund into the common stock. The husband was not in circumstances, that required him to make any provision of this kind. There are no special circumstances, that I see asserted—there are none urged—there is nothing that could account for what he did, except, that he chose to make a grant to his wife when he was under no obligation whatever to make it, or, in other words, by way of donation. If the doctrine of natural obligation to provide for a wife and children were to be carried to the extent, that has been contended for here, then, in every case, and without any special circumstances whatever, the provision could be maintained. But there is no legal obligation on the husband, as your Lordships have observed, to set apart a portion of his own estate; there is not even any natural obligation upon him to do so, for I concur in the remark of one of your Lordships, that the natural mode of providing for a wife and children *stante matrimonio*, is by the husband's prudent and judicious management of his means. The cases which have been referred to, in which any countenance has been given to the doctrine, that has been pressed upon us, were all cases of special circumstances. Even if we go back to the case of *Short and Birnie v. Murray*, M. 6124, that was a case in which the husband had reserved his own liferent, and it was by an ingenious argument suggested, that it was a present provision for the wife, because, although the husband had reserved his liferent, the wife could go into the market and dispose of the fee. But in that case the provision was one that was not to take effect during the husband's life, but he was not to have the benefit during his life of the income arising out of that fund. So also in other cases that have been referred to. The case of *M'Pherson v. Graham*, M. 6113, was a very special case indeed. That was the case of a renunciation of the husband's *jus mariti*; and in that case there had been an actual possession of the fund by trustees, and a payment of it to the children of the wife after her death. The marriage had been dissolved by death, and the husband came forward to claim those sums which the trustees had paid to the children in fulfilment of his own deed. That again was a special case. So also in the recent case that has been referred to, *Rust v. Smith*, 3 Macph. 378. That was a case of a very peculiar kind in which the wife was carrying on a separate business for the maintenance of the family—a special circumstance to be taken into consideration. In short, in all the cases referred to, there were special circumstances which warranted the supporting of the provision.

But the present case is without special circumstances. It is nothing but a provision made without any onerous consideration, and without any circumstances that could constitute a special occasion for its being made.

It is said, that the wife renounces her legal rights. I do not think in this case, that comes to be a matter of great importance. The question here is not in regard to the wife's rights after the dissolution of the marriage. We have nothing to do with these. It does not appear, that there was any such importance attachable to the renunciation by her of her legal rights as to raise this deed into the condition of an onerous one. The rights of the children were not renounced—they are reserved, and exist even on the dissolution of the marriage. I concur, therefore, with your Lordships in thinking, that the appellant has not succeeded in making out a case.

LORD CHANCELLOR.—The appellant in this case is a pauper, and therefore we say nothing whatever about costs.

Interlocutors appealed from affirmed, and appeal dismissed.

For the Appellant, J. and A. Peddie, W.S.; John Greig, Westminster.—For the Respondent J. Walls, S.S.C.; Bannister and Robinson, London.

APRIL 5, 1867.

WILLIAM JENKINS, *Appellant*, v. ALEXANDER ROBERTSON and Others, *Respondents*.

Highway—*Res Judicata*—Declarator of Public Road—Compromise—Second Action—*Certain pursuers, chiefly magistrates of a burgh, raised an action of declarator of a public right of way, and obtained a verdict in their favour, but on a rule being made absolute for a new trial the parties agreed to certain terms of compromise, and the defenders were assoilzied pro formâ, and the authority of the Court was interponed to the agreement. Afterwards J. and three other individuals, not parties to the former action, raised a similar action of declarator against the same defenders, who pleaded res judicata.*

HELD (reversing judgment), *That the former decree was not res judicata.*

SEMBLE, *a decree in an action of declarator of a public right of way obtained without fraud or collusion, and if decided on the merits, is res judicata, and may be pleaded in bar of a second action as to the same public way, raised by other parties.*¹

The pursuer, William Jenkins, brought an appeal against the interlocutors of the Lord Ordinary, dated 9th December 1863, and of the First Division, dated 9th June 1864, whereby the Court sustained the second plea in law for the defenders, viz. that the decree obtained by the defender in the former action was *res judicata*.

The action was raised in the name of three other pursuers besides the appellant, and the leading conclusion of the action was to have it declared, that a certain public right of way existed (describing it).

A previous action of declarator relative to the same public right of way was raised in 1860 at the instance of the provost and bailies of Elgin, the conclusion of the summons being the same. Issues were adjusted, and, after a five days' trial, a verdict was returned for the pursuers. A rule absolute for a new trial was obtained. The parties then began to negotiate, and ultimately the pursuers agreed to abandon part of their claim, and the decree of the Court was interponed to a minute of agreement dated February 1862, assoilzieing the defenders and discharging the rule for a new trial.

In March 1863, the present action was commenced, when the Lord Ordinary and First Division held, that the former judgment was *res judicata*.

The appellant, in his *printed case*, gave the following reasons for reversing the interlocutors:—
1. Because the subject of the present action had never been adjudicated upon by any competent tribunal, the decree of absolvitor founded on by each of the defenders being the result, not of a trial of the cause, but of an arrangement to which the appellant was not a party, and by which he cannot be affected. 2. Because the two actions having been raised by two different sets of pursuers, who were neither the same individually nor in any way related to each other, the plea of *res judicata* was altogether inapplicable, and ought to have been repelled.

¹ See previous report 2 Macph. 1162; 36 Sc. Jur. 582. S. C. L. R. 1 Sc. Ap. 117; 5 Macph. H. L. 27; 39 Sc. Jur. 384.