privilege, that the statement was false and malicious. There must be a circumstantial statement of the grounds of that averment, which will be different according to the nature of the case and the degree of the privilege. I can understand that in a case, for example, like *Williamson* v. *Umphray*, where a person appearing in a Licensing Court represented that the applicant was a drunkard, that in such a case it might be sufficient to say that the party made that statement knowing it to be false. It would be a little difficult to see how the ground of malice could be otherwise stated. But where the question relates to the solvency of a person who at the time when a security was granted had not been adjudged bankrupt, and to the good faith of the person making the representation that he was known to be insolvent, these are not matters of definite fact which must be either true or false, and I agree with the Lord Ordinary that it is not enough in such a case to say that the trustee has made a false statement on the record knowing it to be false. I see nothing in the statement that has been read to us that would take the trustee out of his privilege—out of the ordinary privilege which a litigant has to state all facts which are pertinent to the issue which he desires to raise.

LORD KINNEAR—I agree. I do not think it necessary to consider whether the pursuer would be entitled to an issue, or what we should have done had there been relevant averments of facts and circumstances that would show malice, because I do not think the question arises, and I agree with the Lord Ordinary on the grounds he has stated, that in the first place, this being an action of judicial slander it is necessary not only to aver malice in general terms, but to aver facts and circumstances by which such malice has been "evinced and evidenced," as the Lord Ordinary puts it, and certainly I think there is no such averment of facts and circumstances to be found in this record.

The Court adhered.

Counsel for the Pursuer and Reclaimer—W. Campbell, K.C. — Graham Stewart. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defender and Respondent—Clyde, K.C.—R. S. Horne. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, January 23.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ANDERSON *v.* ANDERSON.

Husband and Wife—Donatio inter virum et uxorem—Provision or Donation—Conveyance of Shares to Wife Taking Effect stante matrimonio—Revocation.

A husband in 1898, nineteen years after the date of his marriage, by transfer bearing to take effect as at its date, and not bearing to proceed upon any obligation, transferred to his wife 564 shares in a limited company. The deed of transfer was in the ordinary form. Thereafter the wife at her husband's request transferred 164 of said shares to third parties. The husband having executed and intimated a formal deed of revocation of the remaining 400 shares, brought an action against his wife, in which he sought to have it declared that the transfer having been executed gratuitously and without consideration, was a *donatio inter virum et uxorem*, and had been competently revoked, and craved a decree ordaining her to retransfer the balance of 400 shares, and failing her doing so that the shares should be adjudged to him. The wife averred that the transfer had been made to her in lieu of an antenuptial provision which, owing to facts concealed from her and her father at the time of the marriage by the pursuer, was of no value, and which with the consent of her husband she had renounced in 1885 as being of no value. She pleaded that the transfer having been granted in implement of a legal or natural obligation, and forming a reasonable provision in her favour was irrevocable. *Held* that the defences were irrelevant, and decree *granted* in terms of the conclusions of the summons.

This was an action at the instance of Eric Sutherland Anderson, planter, Oakbank, Elgin, against his wife Mrs Margaret Mackenzie Hay or Anderson.

The summons concluded for declarator—(*First*) that a transfer of five hundred and sixty-four ordinary shares of the Yatiyantota Ceylon Tea Company, Limited, made by the pursuer in favour of the defender, conform to deed of transfer executed upon 30th March 1898, and thereafter duly registered in the register of the said company, was a conveyance made by the pursuer gratuitously *stante matrimonio* to the defender and constituted a *donatio inter virum et uxorem*, and that the same was therefore revocable at the instance of the pursuer; and (*Second*) that said donation and conveyance or transfer was competently and validly revoked by the pursuer as regards four hundred of said shares, conform to deed of revocation duly executed

by the pursuer upon 9th August 1899, and that the pursuer accordingly was now entitled as proprietor of said shares to have the same formally retransferred to him by the defender, and to have himself registered as the owner thereof in the register of said company, and for decree ordaining the defender to deliver to the pursuer a duly executed transfer of said shares, and, failing her doing so, that the said shares should be adjudged from the defender, and declared to belong to the pursuer.

The pursuer was married to the defender Mrs Margaret Mackenzie Hay or Anderson on 23rd December 1879. There were no children of the marriage. At the date of the present action the parties were living apart, and had been doing so for some years.

The pursuer averred that on 30th March 1898 he executed in the defender's favour without consideration a deed of transfer of 564 ordinary shares of £10 each, fully paid, belonging to him in the Yatiyantota Ceylon Tea Company, Limited; that at his request the defender had transferred to third parties 164 of said shares; and that the balance of 400 shares still stood upon the register in her name.

The defender admitted that the shares had been transferred to her, and that 400 of them still stood in her name on the register, but denied that the transfer had been made without consideration, and explained—"The pursuer had by antenuptial contract of marriage dated 16th December 1879, and recorded 30th January 1880, assigned to the defender in liferent, and to the children of the marriage in fee, subject to the liferent of the pursuer's mother Mrs Agnes Wilson or Anderson, the tenant's part of and right and interest in a lease of certain subjects situated in the parish of Spynie and county of Elgin, entered into between the Earl of Seafield and the late Eric Anderson, and dated 10th and 13th, and recorded 17th February 1862, which lease was assigned to the pursuer by assignation dated 21st, 24th, and 25th January, and recorded 1st December 1870. At the date of the marriage the said subjects were burdened with (1) a bond and assignation in security by the factor and commissioner for the pursuer for the sum of £450, dated 1st and recorded 5th December 1870, with relative bond of corroboration by the pursuer dated 15th March and recorded 28th April 1871; and (2) a bond and assignation in security by the pursuer and another for the sum of £50 dated 3rd June and 31st July, and recorded 15th November 1878; and (3) and (4) bonds for the sums of £100 and £50, making in all £650, which was the full value of the subjects. The pursuer was aware of said bonds, but concealed their existence from the defender and her father. The defender first became aware of them several years after her marriage. The said bonds were paid off in 1885, and a new bond and assignation in security over the said subjects were granted on 22nd May 1885 by the said Mrs Agnes Wilson or Anderson and the pursuer for £450 to James Wilson Dunlop, banker, Elgin. The defender, on or about said 22nd May 1885, at the earnest entreaty of her husband, and with his consent and concurrence, granted a deed of renunciation whereby she renounced and discharged her right of liferent over the said subjects, the said right being then of no value. Thus the only provision made for the defender by the pursuer in the said antenuptial contract was found to be of an illusory character and worthless, and the pursuer, on 30th March 1898, being under a legal or at least a natural obligation to make provision for his wife in lieu of said antenuptial provision, executed in favour of the defender the deed of transfer of said 564 shares condescended on. This deed was executed by the pursuer in implement or on account of said obligation."

It was admitted that the defender having refused to retransfer the shares in question to the pursuer, he executed and intimated to the defender a formal deed of revocation.

The pursuer pleaded — "(1) The said shares being the property of the pursuer, he is entitled to decree as concluded for. (2) The transfer of said shares having been made by the pursuer *stante matrimonio* and gratuitously, he was entitled to revoke the same, and having done so is entitled to decree as concluded for. (3) The defences are irrelevant."

The defender pleaded, *inter alia*—"(1) The transfer of said shares by the pursuer having been granted in implement or on account of a legal or natural obligation, is irrevocable. (2) The transfer of said shares being onerous and forming a reasonable provision for the defender, is irrevocable."

The Lord Ordinary (STORMONTH DARLING) on 8th July 1902 pronounced the following interlocutor:—"Repels the defences: Finds, decerns, and declares in terms of the declaratory conclusions of the summons: Ordains the defender within twenty-one days after the date of this interlocutor to deliver to the pursuer a duly executed deed of transfer of the shares mentioned in the summons, under exception therein mentioned, that the same may be forwarded to the company named in the summons for registration, and also to deliver to the pursuer, or concur with the pursuer in obtaining delivery, of the certificates for said shares, and decerns, under certification that in the event of the defender failing to do so decree will be pronounced in terms of the conclusions of the summons for adjudication: Finds no expenses due to or by either party."

Opinion.—"The question at the present stage is whether I am to allow a proof, as asked by the defender, or to hold the defences irrelevant and grant decree. I have come to the conclusion that the latter is the course which must be followed.

"There is no doubt that a conveyance of property without consideration by a husband to a wife *stante matrimonio* is revocable by the husband as a donation. In this case the husband, on 30th March 1898, transferred to his wife certain shares in a limited company, admitted to be worth about £2000, and the wife was duly registered

as proprietor of the shares. On 9th April 1899 the husband executed a formal deed of revocation, and he is entitled to make the revocation effectual by compelling a reconveyance of the shares, unless it can be shewn that the transaction was not in reality a donation at all. The wife endeavours to make out a case of that kind by alleging that the only provision made for her in her antenuptial marriage-contract was a liferent of certain leasehold subjects, the burdens on which made the liferent of little or no value, and that in May 1885, at the request of her husband, she executed a deed renouncing her liferent, such as it was. She avers that the existence of the burdens was concealed from her before the marriage, but she admits that she was aware of their existence before she granted the deed of renunciation, and she does not say that the deed was granted in consideration of any substituted provision. Her deduction is that the pursuer, when he executed the transfer of shares in 1898, did so because he was 'under a legal, or at least a natural, obligation to make provision for his wife in lieu of said antenuptial provision.'

"It is of course undoubted that there is an obligation, both natural and legal, on a man to provide for his wife according to his ability in the event of her becoming his widow. If he does so to a reasonable extent when he is solvent, either because there has been no antenuptial contract between them, or because the provision therein has failed or become insufficient, the benefit which he thus confers on his wife is not truly a donation at all, and cannot be revoked either by himself or his creditors. But all this refers exclusively to provisions in the proper sense, *i.e.*, to conveyances of property which are to take effect after the husband's death, and it affords no protection to a conveyance which is to take effect during his life. This distinction, and the reason of it, appears very clearly from the opinions both here and in the House of Lords in the case of *Dunlop* v. *Johnston*, 3 Macph. 758, affirmed 5 Macph. (H.L.) 22, which is the most authoritative exposition of the law on the point, and was so treated in the recent case of *Robertson's Trustee* v. *Robertson*, 3 F. 359. In *Dunlop's* case the trust conveyance for behoof of the wife during the subsistence of the marriage was quite separable from the provision made for the event of her survivance, and the deed was reduced only as regards the first of these. But here, from its very nature, the transfer is one and indivisible, and must stand or fall as a whole. If the wife should happen to survive, and the shares should still remain her property, they would no doubt form a provision for her widowhood. But there being no trust, and the transfer having been taken directly to herself, there is no security that the shares will be extant when she becomes a widow, because she may sell them all during the subsistence of the marriage. This of itself seems to me exclusive of the notion of the transfer having been a provision either in intention or in effect. In other words, an immediate divestiture by a husband of part of his estate is necessarily a donation, for it is not a mode of fulfilling any legal obligation towards his wife which the law can recognise.

"I do not know that the wife could improve her controversial position even by offering to transfer the shares to trustees with directions to pay the dividends to the husband during his life, and thereafter to reconvey them to herself. But I do not require to consider that question, because she makes no such offer. On the contrary, she asserts her right to draw the dividends as a means of enabling her to live apart from her husband; otherwise she says she will be left 'dependent on her relations for her maintenance and support.' But there is not a word in her defences to justify her for living apart from her husband. If, therefore, the transfer is to be regarded as a provision for enabling the wife to do so, it is revocable on that account alone. (See *Macdonald* v. *Macdonald's Trs.*, 1 Macph. 1065.) Accordingly I find nothing in the defender's averments which, even if proved, would help her case."

The defender reclaimed, and argued—The defence was relevant and a proof should be allowed (1) because the provision in the antenuptial marriage contract had failed, and (2) because the pursuer was under a natural obligation to make provision for his wife—Fraser, Husband and Wife, pp. 940-945; *Galloway* v. *Craig*, 4 Macq. 267. Such a provision could take effect *stante matrimonio*—Bell's Prin., 10th ed., 1986; *Galloway*, *supra*, Lord Brougham at p. 276, Lord Wensleydale at p. 278; *Rust* v. *Smith*, January 14, 1865, 3 Macph. 378: *Sharp* v. *Christie*, January 19, 1839, 1 D. 396; *Macdonald* v. *Ross and Others*, July 10, 1863, 1 Macph. 1065; *Gregg* v. *Holland*, [1902], 2 Ch. 360. If the defender was not entitled to the income of the provision it could be reduced *quoad* the income — *Dunlop's Trustees* v. *Dunlop*, March 24, 1865, 3 Macph. 758, 5 Macph. (H.L.) 22. In *Honeyman & Wilson* v. *Robertson*, December 7, 1886, 14 R. 163, 24 S.L.R. 152, the husband had reserved the right to revoke, otherwise the provision would have remained good—Lord Mure at p. 166. In *Robertson's Trustee* v. *Robertson*, January 22, 1901, 3 F. 359, 38 S.L.R. 279, the facts were very suspicious against the husband making a provision. Further, the defender was entitled to prove that the provision was reasonable and what was the intention of parties in making it. No doubt there was a presumption that a conveyance by a husband to a wife was a donation, but that presumption could be rebutted. In any case the defender was entitled to her expenses as being a necessary and a debt of the husband—*Symington* v. *Symington*, December 3, 1879, 3 R. 205, 13 S.L.R. 124.

Counsel for the pursuer were not called upon.

LORD PRESIDENT—The question in this case is whether a conveyance of 564 shares in a Ceylon Tea Company by the pursuer

to the defender is a donation *inter virum et uxorem*, and therefore revocable, or is a proper matrimonial provision, and therefore irrevocable. It is to be observed that the transfer was made nineteen years after the marriage of the parties, and it contains no recital that it was made in fulfilment of any promise or obligation to make a provision for the defender. Further, it does not bear to be a provision to take effect after the death of the pursuer, and no means are used, by trust or otherwise, to preserve the funds until the dissolution of the marriage. There is nothing to prevent the defender from making a gift of the shares, or selling them at any time and spending the proceeds during the subsistence of the marriage—all the essential elements of a proper matrimonial provision are absent. It is simply a transfer of shares, and *prima facie* is a donation *inter virum et uxorem*. There is no allegation of price or antecedent obligation, or any consideration whatever, and therefore it appears to me that the shares must be retransferred, unless something is alleged which, if proved, would form an answer to the husband's claim. Nothing of that kind is alleged. The defender endeavours to make out that a provision made for her in an antenuptial contract of marriage had failed as regards value, and that she had renounced it such as it was in 1895, as she alleges, at her husband's request. That provision therefore came to an end and was out of the way long before the transfer in question was made. We are therefore left with the fact that the husband made the transfer as a donation to his wife, and nothing is alleged which would make it valid. I think there is nothing here to remit to probation, and that the judgment of the Lord Ordinary is well founded.

LORD ADAM—I agree. It appears from the condescendence that the pursuer transferred to his wife while they were living together, between November 1897 and May 1898, some 564 shares in a Ceylon Tea Company. There appears to have been no writing of any sort beyond the execution of the ordinary form of transfer. The husband has got back some of the shares, and now seeks to recover the remainder, the gift of which he has revoked. *Prima facie* the transfer was a donation *inter virum et uxorem stante matrimonio*, and is revocable unless the wife can make out some good reason why that presumption should not have effect. By way of answer the defender says that the transfer was a postnuptial provision which was made for her, and if so it would be a good answer to the husband's claim. No one doubts that where no antenuptial provision has been made, or where such a provision has failed, a husband, being solvent, may make a reasonable postnuptial provision for his wife. The question is whether that is the nature of this transaction. Now, I think that to make a proper postnuptial provision the object and intention of the provision must be that it should come into effect after the dissolution of the marriage for the maintenance of the wife. The case of *Galloway* v. *Craig* (July 17, 1861, 4 Macq. 267) was decided in the wife's favour for this reason, that the sum due under the policy was not due till after the death of the husband, and nothing was due during the husband's life. Here the case is the exact opposite. There is nothing to prevent the wife from selling these shares to-morrow, and therefore the transfer could never constitute a provision for her maintenance to take effect after the dissolution of the marriage. That seems to me to be sufficient for the disposal of this case. I quite recognise that such a postnuptial provision need not necessarily be in the form of an annuity; it may well be a sum of money which does not come into the wife's hands during the subsistence of the marriage but after its dissolution. No doubt the wife could in that case defeat the provision by selling her expectancy, but she could do the same thing in the case of an annuity. I have no doubt that this transfer must be treated as a donation *stante matrimonio*, and I agree with the Lord Ordinary.

LORD M'LAREN—I agree with the Lord Ordinary in his judgment, and also in the reasoning by which he supports it. It will be generally agreed that there are certain conditions necessary to the validity of a postnuptial contract. The first of these is that there should be no antenuptial contract, or that if there is an antenuptial contract, it is not a contract which makes reasonable provisions suitable to the position and means of the husband. The second is that the husband must be solvent, and the third is that it must appear that the disposition or transfer was intended as a provision for the wife to take effect after the husband's death. These are the conditions stated by Lord Mure in the case of *Honeyman*, and assented to by the other Judges.

On the first point it may be observed that it is not indispensable that there should have been no antenuptial contract, if the provision made by the antenuptial contract is either very small in relation to the circumstances of the husband when the additional provisions are made, or if the antenuptial provision has failed altogether. While desiring to keep the question open when it arises as to the effect of these conditions, it is unnecessary in the present case to determine it, because there is no evidence before us in this case of any intention on the part of the husband to make a provision for his wife. It is not the law that where a husband makes a gift to his wife and desires to revoke it he must make a settlement out of the gift upon his wife. That would be a complete misstatement of the law as to the revocable character of such gifts. The wife must be able to show that the transfer, if it is to be held irrevocable, was in its inception intended to take effect as a provision. Counsel for the defender, in the excellent argument which he addressed to us, was unable to show any rule or practice that questions of intention of this kind could be referred to

proof. No case was cited to us in which a proof at large was allowed for the purpose of establishing that a transfer of funds to a wife not *ex facie* bearing to be a provision was intended as a provision. I desire to keep open the question whether in the case of a latent ambiguity as to intention, supplementary evidence might be allowed under the restrictions and conditions which are imposed in cognate cases under a well-known rule of evidence. In the absence of any declaration in writing I am unable to see how we could allow a proof of intention, and it is difficult to see any benefit which the wife could get from such a proof. I may add, although not necessary to the decision of the case, that the wife seems to have recognised that the transfer was revocable, because on two occasions she retransferred some of the shares at her husband's request.

It follows, in my opinion, that this transfer cannot be treated as a provision at all. If it could be treated as a provision, the case of *Dunlop* is an authority that it might have been sustained in so far as designed to take effect after the husband's death, but where there is an unqualified gift there is no room for such separation. The result is that I concur with the Lord Ordinary in the conclusion to which he has come.

Lord Kinnear—I am of the same opinion. The only question is whether this transfer was a gift by the husband to the wife during the subsistence of the marriage, and so revocable, or was a provision for her maintenance to take effect after her husband's death. Upon that question it appears to me to be clear that if the shares are put by the husband into the actual possession of the wife during the lifetime of both, that constitutes a gift and not a provision.

The difficulty which occurred to me during the argument arose from Mr Smith Clark's citation of a passage from Lord Wensleydale's opinion in the case of *Galloway* v. *Craig*, in which his Lordship is represented as saying—"But I do not see why, in order to constitute a valid provision, the money must be payable after his death, or why a gift of the 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." It rather appears to me that what his Lordship had in view was a present gift of money intended by both parties to be applied in securing a provision to take effect on the husband's death. But as authority for this statement Lord Wensleydale cites the case of *Short & Burney* v. *Murray*, M. 6124, in which he states that the provision in favour of the wife was made subject to the liferent of the husband's mother, and he adds—"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."

Now, I find on turning to the case of *Short & Burney* that it is entirely in accordance with the views which all your Lordship have expressed as to the conditions necessary for the validity of provisions in contradistinction to donations, because, in the first place, the provision dealt with in that case bore in express terms that it was made in implement of a promise made by the husband at the time of his marriage. In other words, it was a conveyance in implement of a moral obligation, and secondly, Lord Wensleydale seems not to have observed that the conveyance to the wife was subject not only to the husband's mother's liferent but also to his own. There was therefore a provision in performance of a promise, and to fall into possession on the death of the husband, and not sooner. In these circumstances I am disposed to think that no real difficulty is created by the observations to which we have been referred. The decision itself in the case of *Galloway* is entirely in accordance with the judgment proposed by your Lordship. In that case the husband made a provision for his wife by taking out a policy in her name upon his own life with a destination to his wife's heirs in the event of her predeceasing him. It was said that money that might go to the wife's heirs or assignees was not a provision for her maintenance in any proper sense. The answer to this difficulty by Lord Benholme in the Court of Session, and by Lord Campbell and Lord Kingsdown in the House of Lords, was that it did not follow because the husband could not revoke the provision during the wife's life that he could not revoke it if she predeceased him, and at a time therefore when it ceased to bear the character of a provision. Lord Campbell says—"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." Accordingly the decision is entirely consistent with the law as stated by your Lordships, that to be effectual as a provision the transfer must take effect after the husband's death. I therefore concur with the Lord Ordinary.

The Court adhered, and found no expenses due to or by either party.

Counsel for the Pursuer and Respondent—Wilson, K.C.—G. Moncreiff. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Defender and Reclaimer—Salvesen, K.C.—Smith Clark. Agents—Elder & Aikman, W.S.