Tuesday—Thursday, April 2—4.

SECOND DIVISION.

(Before the Lord Justice-Clerk.)

MILNE *v.* BAUCHOPE.

Reparation—Slander. Verdict for pursuer.

In this case Eliza Milne, teacher, was pursuer, and John Bauchope, teacher, was defender. The following issue was submitted for the pursuer :—

"It being admitted that the pursuer is a certificated teacher, and was infant schoolmistress of St Mary's Sessional School, Edinburgh, from October 1861 to July 1865, and that the defender was, during said period, and still is, a master in said school :

"Whether, on or about the 10th day of January 1865, the defender did write and transmit, or cause to be written and transmitted, to the Rev. Dr Grant, minister of the parish of St Mary's, Edinburgh, a letter in the terms contained in the schedule. And whether, in said letter, the defender did falsely and calumniously say of and concerning the pursuer that she had told falsehoods—to her loss, injury, and damage ?

"Damages, £500."

The letter in question charged the pursuer with misrepresentations of fact regarding some of the pupil teachers, of conduct in many respects subversive of discipline, and concluded by saying :—

"She questions some of the scholars about me in a way she ought not to do. She has spoken insolently and falsely to me, and about me, in presence of the pupil teachers and others. In many instances she has shown little or no interest in school, and she seems to be actuated by a spirit of petty annoyance. She has sometimes told direct falsehoods, occasionally to the knowledge of the pupil teachers. Her conduct in ignoring my position, and the daily system of petty annoyance which she pursues, makes me desirous of having this state of matters remedied as soon as possible."

The following counter-issue was submitted for the defender :—

"Whether the statements in the said letter, to the effect that the pursuer had told falsehoods, are true ?"

The jury, by a majority of 9 to 3 found that although by the letters and documents before the Court the defender is regarded as head master, there is no evidence to show that he was appointed to such an office, and the jury do not recognise him as such ; also by the same majority they found for the pursuer, and assessed the damages at £10.

Counsel for Pursuer—Mr Fraser, Mr W. A. Brown, and Mr Kerr. Agent—James Bruce, W.S.

Counsel for Defender—Mr Watson and Mr Gloag. Agent—Andrew Scott, W.S.

HOUSE OF LORDS.

Monday—Tuesday, April 1—2.

DUNLOP *v.* JOHNSTON.

(In Court of Session, 3 Macp. 758.)

Husband and Wife—Post-nuptial Settlement—Bankruptcy of Husband. Held (aff. C. of S.) that a post-nuptial provision by a husband in favour of his wife and children, to take effect during the subsistence of the marriage, was ineffectual in a question with creditors under his sequestration.

This was an appeal from the Second Division of the Court of Session. An action of declarator and reduction had been raised by the respondent, as trusteee on the sequestrated estate of George Moore Dunlop, against the bankrupt and his wife, the present appellant, and the trustees under her marriage-contract. The condescendence set forth that the appellant, at the age of nineteen, was married to George Moore Dunlop in 1860. No ante-nuptial marriage-contract was executed. In 1861, her husband commenced business in Glasgow as an oil merchant and drysalter, in partnership with James Anderson Mackintosh, under the firm of Mackintosh, Dunlop, & Co. In 1862, the firm was dissolved by mutual consent, being then indebted to the amount of about £4000. In November 1862, Dunlop commenced business on his own account, and so continued till his estate was sequestrated on 6th August 1863, and Mr Johnston was elected trustee. On 29th March 1861, Dunlop and his wife executed a post-nuptial contract, whereby the husband bound himself to pay, for behoof of his wife, £5000 to certain marriage trustees, directing the trustees to pay the income to the wife during her life for her aliment and that of her family, such income being declared alimentary, and not affectable by her deeds or debts, or by creditors of the husband. In the event of her death, the trustees were to hold half of the capital —namely, £2500—for the benefit of the children, and to pay the other half to the husband. When the husband executed this deed, he was a minor. On 25th December 1862, Dunlop and his wife executed a supplementary contract, conveying to trustees certain securities in implement of the obligation in the marriage-contract, and varying the destination of the £5000. The trustees obtained payment from Dunlop of the sum of £5000, and became vested in the securities. It was alleged that the post-nuptial contract was a *donatio inter virum et uxorem*, and was revocable and revoked by the sequestration of the husband, and that the said provisions were not a reasonable and moderate provision for the wife, considering the circumstances of the husband.

The defenders, in their answers, set forth that at the time of the marriage Mr Dunlop's fortune amounted to £10,000, the wife having no fortune ; that the post-nuptial contract was executed to secure the wife against the risks of the husband's business, and was fair and reasonable ; that the wife, in consequence, renounced her legal rights ; that the trustees were duly vested in the fund by registration and intimation ; that the provisions were not now revocable, and that they were granted for onerous cause.

The Lord Ordinary (Barcaple) found that the provision of the post-nuptial contract, in so far as it directed payment of the income to the wife during the marriage, was a donation *inter virum et uxorem*, and was revocable, and was revoked by the sequestration. On reclaiming-note, the Lords of the Second Division adhered.

Mrs Dunlop appealed.

Lord Advocate (Gordon), Robert Horn, and Rupert Potter, for her, argued—The marriage-contract provision could not be revoked by the bankrupt, or by the trustee for his creditors, because the bankrupt, at the date of his sequestration, was absolutely divested of the property in

question. He had divested himself in implement of his natural and legal obligation to provide for his wife and children during the marriage, as well as after its dissolution, or his death. The provision was farther onerous, in respect that it was granted by the bankrupt, and accepted by the appellant, in lieu of her common-law rights. The bankrupt having deserted his wife and infant child, this was the sole fund on which they could come to save them from destitution. They relied on the decision of the House of Lords in Turnbull's case, followed by that of Smitton, and the judgment of the First Division of the Court below in Wright *v.* Harley. The provision for the children of the marriage could not be controverted.

ANDERSON, Q.C., CHARLES SCOTT, and COLT, for the respondent, were not called on.

At advising,

LORD CHANCELLOR (Chelmsford)—The trustee on the sequestrated estate of the appellant's husband brought this action seeking to have it declared that a provision in her favour, contained in a post-nuptial contract of marriage, whereby the trustees named therein were directed to make payment to her of the sum of £5000, had been revoked by the sequestration of the estates of her husband—that such a provision was a donation by Dunlop in favour of his spouse made *stante matrimonio*, and being revocable by the husband, was therefore rovocable by the trustee. It will be observed that this action affects the reduction of the marriage-contract only in so far as it regards the payment of an annuity to the wife during the subsistence of the marriage. That is the only part impeached, and the only part upon which any question arises. The Lord Ordinary and all the learned Judges of the Second Division thought that, although in consideration of the provision that was made for her by the marriage contract, the wife surrendered her right to terce and other claims, her having done so did nevertheless not make this marriage-contract onerous. This unanimous decision of the Court below is objected to by the appellant, in the first place, because, as she maintains, this contract was executed in discharge of a natural obligation. Now, there is an obligation both natural and legal on a husband to provide for his wife and family, but he is only bound to provide for them according to his ability. There is no obligation whatever upon him to divest himself of his property. On the contrary, it is his duty to reserve to himself the power of dispensing his means according to his discretion as a parent. It is next objected by the appellant that this contract is onerous, because the wife thereby relinquished her right to the terce, and those other rights which would accrue to her upon the death of her husband. Such a relinquishment can furnish no consideration for this contract, inasmuch as those rights could not come into operation until the husband's death. The onerosity of the deed was, lastly, maintained upon the ground that it contained a provision for the aliment and education of the granter's children. But I agree with the Lord Ordinary in thinking that the provision in question was not one in favour of the children of the marriage. The post-nuptial contract in question set forth in its inductive clause that there had not been an ante-nuptial one, and that it was therefore proper and incumbent on him (George Dunlop) to supply that omission, and to make a suitable provision for his wife. The question being confined, my Lords, to the validity of this contract, only in so far as it provides for the payment of an annuity to the wife during the subsistence of the marriage, I am of opinion that the counsel for the appellant has failed to support his propositions, and I therefore advise your Lordships to confirm the judgment of the Court of Session.

Lord ROMILLY—I assent to the opinion expressed by my noble and learned friend on the woolsack. The principle of the Scotch law is that all donations between husband and wife are revocable. To that rule there are, however, two exceptions. The first is when a donation is made in pursuance of a natural obligation; and the second, when a consideration is provided. With regard to the first, a covenant by the husband, as in the present case, to support his wife and family during the subsistence of the marriage, cannot be onerous, because the law already enforces that obligation upon him without regard to any contract; but a covenant that his wife shall be paid so much after his death is made in pursuance of a natural and legal obligation, and makes his contract onerous, since after his death the law cannot be enforced against him. Upon the ground, therefore, that this is a provision for the wife to take effect during the subsistence of the marriage, I consider that it does not come within the first exception I have mentioned. As regards the other exception —viz., that there was a consideration for this provision made by the husband—I have only to remark that the rights which the wife surrendered were those which could only accrue by the death of her husband. I also concur that the children of the marriage were not, according to this contract, the object of relief. I don't say that had the obligation of supporting the children of the marriage been thrown upon the wife by her husband's desertion, she might not have claimed to rank as a creditor on his estate, but with that question the contract has nothing to do.

Lord COLONSAY—I concur with your Lordships. All the learning, acumen, and ability of Mr Horn —for which qualities those who have been accustomed to hear him know him to be distinguished —have failed to establish the propositions of the appellant. There is in the law of Scotland a clear distinction between ante-nuptial and post-nuptial contracts of marriage. There is also an equally clear distinction between provisions between husband and wife which are to take effect during life and those which are to take effect after death. The argument of Mr Horn, were it to prevail, would go to entirely obliterate these distinctions. The doctrine of Scotch law is that all donations between husband and wife, *stante matrimonio* are revocable. Circumstances may withdraw a particular case from the government of that principle; but those special circumstances I have failed to find in the present case. In all the cases which have been cited, wherein the rule which I have mentioned was held not to apply, there were those special circumstances. There was no consideration for the contract; and in so far as it referred to the children of the marriage, the rights which would have accrued to them on their father's death were not surrendered.

Appeal dismissed, but not with costs, as the appellant was a pauper.

Agents for Appellant—J. & A. Peddie, W.S., and John Greig, Westminster.

Agents for Respondent—John Walls, S.S.C., and Bannister and Robinson, London.