to that second position, but he contended, that it was not applicable to the third, because it goes on, "or the chains were negligently or unskilfully attached to the gland." Now it must be observed, that that clause is quite ungrammatical, and I think the only fair way of construing it is, that, having first applied the allegation of want of due skill or attention, on the part of the defender, to the gland or bolts to which the first two positions in the summons relate, it then takes the third, viz., "the chains;" and I think you must read that in the same way as the others, "or the chains from want of due care or attention on the part of the defender, were negligently and unskilfully attached to the gland." It is ungrammatical, no doubt, but it seems to me, that this is the fair and reasonable construction.

LORD WENSLEYDALE.—My Lords, I agree with my noble and learned friends who have preceded me. I felt considerable doubt at one time with respect to the construction of the summons, as to whether the last alternative put in the summons was properly alleged, but I certainly think, that the part of the interlocutor depending upon that last alternative must be understood, according to its true construction, as resting entirely upon the preceding allegation of the defender not having taken due precaution to secure the safety of the workmen employed by him in connexion with the cylinder. The interlocutor is not very grammatically expressed, but I take the meaning to be, that the accident arose in consequence of the defender not having taken due precaution to secure the safety of the workmen employed. And if that is proved, he is responsible, according to the cases decided in your Lordships' House, particularly the last case, which was decided some years ago, the case of the *Bartonshill Coal Company*, *ante*, p. 785; where the matter was fully considered, and an elaborate and very proper judgment was pronounced by my noble and learned friend, LORD CRANWORTH. Now, reading that final interlocutor according to the reasonable construction, and looking at what the intention of the Lord Ordinary was, I take it to be clear, that he meant only to make the defender responsible for what he was responsible in point of law, namely, the defect on his part in not providing good and sufficient apparatus, and and in not seeing to its being properly used. I think, that it is to be considered as pervading the whole of the finding of facts in the interlocutor, and that it does not mean to rest upon anything done or omitted to be done by the workmen themselves. I take it to be perfectly clear, that, in these cases, there is no warranty. All that the master is bound to do is to provide machinery fit and proper for the work, and to take care to have it superintended by himself or his workmen, in a fit and proper manner. I think it is clear, that this judgment was pronounced solely upon the ground of negligence on the part of the defender. Therefore, upon that point, I think the judgment is right.

With respect to the rest of the case, I take it to be clear, that there is a remedy in this case by the mother for the death of her son, who was bound to support her if he could, and who it is clear had the means of doing so. Therefore, I agree with my noble and learned friends in thinking, that the interlocutor ought to be affirmed.

LORD KINGSDOWN.—My Lords, I entirely agree. I cannot say, that I have myself entertained any doubt upon any part of the case from the beginning to the end of it.

Interlocutors appealed against affirmed with costs.

For Appellant, J. F. Elmslie, Solicitor, London; James Bayne, S.S.C., Edinburgh.—*For Respondents*, Deans and Rogers, London; A. J. Dickson, Edinburgh.

JULY 17, 1861.

Mrs. AGNES FARMER or GALLOWAY, *Appellant*, *v.* ROBERT CRAIG, *Respondent*, in M.P., at instance of THOMAS THOMSON, *Raiser*.

Husband and Wife—Donatio inter virum et uxorem—Bankrupt—Policy of Insurance to Wife—*A. insured his life, and paid the premiums, the policy being taken in the name of his wife, her heirs, executors, or assigns. He afterwards became bankrupt. There was no antenuptial contract, and the wife had no separate estate.*

HELD (reversing judgment), *That the life policy was in the nature of a provision for the wife, and being reasonable in amount, if it was made when A. was solvent, it belonged to the wife and not to the trustee for A.'s creditors.*[1]

---

[1] See previous report 22 D. 1211; 33 Sc. Jur. 553. S. C. 4 Macq. Ap. 267: 33 Sc. Jur. 649.

This action of multiplepoinding was raised by Thomas Thompson the manager for the Standard Life Assurance Company ; the fund *in medio* being the sum due on a policy on the life of the deceased James Galloway. The claimants were Galloway's widow and the trustee on his sequestrated estate.

The policy, which was in favour of Galloway's wife, between whom and her husband there was no marriage contract, was in the following terms :—"Whereas Agnes Farmer or Galloway, wife of James Galloway, builder, No. 101, St. George's Road, Glasgow, being desirous to effect an insurance on the life of the said James Galloway for the remainder thereof, to the extent of £499 19*s.* sterling, with the Standard Life Assurance Company, and having subscribed, or caused to be subscribed, and deposited at the office of the said company in Edinburgh, a declaration, bearing date the 26th day of February 1852, which is also signed by the directors subscribing as relative hereto, and which is hereby declared to be the basis of this assurance, and having paid to the directors the sum of £18 13*s.* 9*d.*, as the premium for such assurance for one year from the 12th day of April 1852. Now be it known by these presents, That if the said James Galloway shall die at any time within the term of one year as above set forth, the capital stock and funds of the said company shall be subject and liable to pay, and are hereby charged with the payment, to the said Agnes Farmer or Galloway, or to her heirs, executors, or assignees, of the said sum of £499 19*s.* sterling, at the end of six months after the death of the said James Galloway, the said sum of £499 19*s.* sterling, to be paid at the office of the said company in Edinburgh, from which this policy has been issued, provided always, that the said sum shall not be payable until the expiration of at least three calendar months after the decease of the said James Galloway shall have been certified and proved to the directors of the said company: and it is hereby further agreed, that this policy may be continued in force from year to year, during the life of the said James Galloway, provided the said Agnes Farmer of Galloway, or her aforesaids, shall pay, or cause to be paid, to the directors at their said office, on or before the 12th day of April next ensuing, the sum of £18 13*s.* 9*d.*, and the like sum annually, on or before the day aforesaid, which annual payments shall be accepted at every such period as a full consideration for such assurance."

Galloway's estate was sequestrated on 10th June 1858, and he died on 4th July following, when the sum on the policy became payable.

The trustee on the sequestrated estate, who claimed the whole sum in the policy, averred that Galloway was insolvent when it was effected, or, at least, for several years before sequestration.

The widow, who also claimed the whole sum, averred that—"COND. 3. The policy was delivered to the claimant, and remained in her separate and individual possession, and under her control, and the premiums were regularly paid as they fell due by the claimant, or others acting for her ; and the whole receipts (which are herewith produced) run in her name, and were all along in her separate and individual possession, and were put up by her in the inside of the policy."

The widow admitted, that the premiums had been paid by James Galloway.

The Court of Session held, that the policy was in effect a *donatio inter virum et uxorem*, and being revocable it was actually revoked by the sequestration, and so, that the trustee was entitled to the proceeds.

Mrs. Galloway maintained, in an appeal to the House of Lords, that the interlocutors of the Second Division of the Court of Session ought to be reversed, for the following reasons :—1. The late Mr. Galloway was not only entitled, but bound by a natural obligation to make a suitable provision for the appellant, in case she should survive him. Having done so by means of the policy in question, and by payment of the annual premiums thereon, the policy became the appellant's absolute property. It was not revocable by Mr. Galloway as a donation *inter virum et uxorem*, and was not attachable by Mr. Galloway's creditors. Authorities:—Erskine's Institutes, i. 6, 30 ; iv. 1, 33 ; Stair, i. 4, 9, 15, 18 ; Bankton, i. 5, 98 ; Bell's Commentaries, ii. 15, 14 ; *Dalgleish*, M. 6124 ; *Cossar*, M. 5710 ; *Macgill*, M. 6109 and 5696 ; *Chalmers*, M. 6110 ; *Short*, M. 6124 ; *Lady Lindores*, M. 6126 ; *Hepburn* v. *Brown*, 2 Dow, 342 ; *Sharp* v. *Christie*, 1 D. 396 ; *Mackenzie*, M. 958. 2. The judgments appealed against, which award the sum in the policy to the creditors of the deceased James Galloway, should be altered and reversed, because the sum in question was never *in bonis* of the said James Galloway, and never formed part of the estate carried by his sequestration, and never vested in his trustee for behoof of his creditors. 3. The appellant ought to be preferred to the proceeds of the policy in question, because that policy, and all rights arising or accruing in virtue thereof, were from the first, remained throughout, and still continue, the exclusive property of the appellant alone.

Craig, the *respondent*, supported the judgments (in his *printed case*) on the following grounds :—1. The grant of the policy was a donation, no consideration having been given for it, and the husband having been under no obligation to confer it. 2. The policy was not of the nature of a provision by Galloway to his wife, in the event of her survivance, in place of her legal provisions, and therefore there is no authority for holding it onerous or irrevocable in any view. 3. It was

of the nature of a donation, and not of a provision, inasmuch as it was not a liferent provision in favour of the wife during her viduity, and was not a survivorship policy, and was made payable to her heirs, executors, or assignees, in the same way as to herself, and was payable whether she ever became her husband's widow or not. 4. It was not of the nature of an onerous provision, because the husband was in no respect bound to keep it up. 5. It was of the nature of a donation, and not of a provision, because it was during the husband's life a valuable right, which, without onerous consideration, had been separated from his estate, and made part of the estate of his wife, which might have been converted, during his life, into a source of support for his wife and himself, and which his wife had it in her power to alienate entirely during her husband's life, so as to deprive herself of any benefit from it during her viduity. *Jardine* v. *Currie*, 8 S. 937; *Shearer* v. *Christie*, 5 D. 130; *Kemp* v. *Napier*, 4 D. 558; *Strachan* v. *M'Dougle*, 13 S. 954.

Anderson Q.C., and *Neish*, for the appellant.—This was not a donation but a provision. The rule is well settled, that if the gift is in the nature of a provision, it is irrevocable during the marriage—Ersk. i. 6, 30; iv. 1, 33; Stair, i. 4, 18; Bank. i. 5, 98; 2 Bell's Com. 2, 15, 14. Here the wife had no provision previously made for her. And it was the natural duty of the husband to give her a provision. When this policy was effected, everything tended to shew, that the husband's intention was to make it a provision. The only objection against so treating it is said to be, that the policy was made payable to her and her executors whether she survived or not. Does that circumstance make it the less a provision? It was substantially a provision nevertheless. There is no dispute as to its being suitable to the circumstances and position in life of the parties; and the only effect of its being in excess would be to cut down the excess to the proper standard—*Short* v. *Murray*, M. 6124; and nice scales will not be used in order to reduce it. *Per* Lord Eldon in *Hepburn* v. *Brown*, 2 Dow, 342. It is said, that this was not in the usual form of an alimentary provision, viz., by way of annuity, but it was a lump sum. But a lump sum was easily convertible into the other form, and there was no absolute necessity for such form, as the other might often be more convenient and valuable, and there were several instances of such provisions in M. 6126, *et seq.* It was said also, that the wife might have sold this policy during the marriage. It is true it did not form part of the husband's goods—*Wight* v. *Brown*, 11 D. 459; and he could not have alienated it without her consent. At all events it was not alienated, and there is no reason for allowing this circumstance to take this provision, otherwise good, out of the protection of the general rule.

Lord Advocate (Moncreiff), and *Rolt* Q.C., for the respondent.—The objections urged in the Court below were sufficient to shew, that this policy was in effect a revocable donation, and was revoked.

Cur. adv. vult.

LORD BROUGHAM.—My Lords, in this case, I will read to your Lordships the judgment of my lamented *late* noble and learned friend, LORD CHANCELLOR CAMPBELL. He says:—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 gift, and if the gift was intended between the parties when made to be such 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.

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 important obligation on the husband to make a provision for the wife when she becomes a widow, wisely recognised by the law of Scotland, subsisted in full force to prevent this being considered a mere voluntary gift without consideration. It is naturally to be expected, that it 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 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 19*s.* was effected by him in the name of his wife on his own life, payable three 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 the £499 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 that, 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 that 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; 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 an implied condition, that she survived him. 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 imposuit.* 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 that, 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 interlocutor appealed against, which has driven the widow to prosecute this appeal *in formâ pauperis*.

LORD BROUGHAM.—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 a wife is to be taken either 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 sequestration, 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 a case of *Short* v. *Burney*, 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.

LORD WENSLEYDALE.—My Lords, 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 sequestrated in June 1858, it was revocable by the respondent, the trustee in the sequestration, and he was entitled to the fund *in medio*. It 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 the contract by the assurance company to pay £499 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 by the respondent, the trustee.

I certainly have felt very great doubt upon this point; but, after much consideration, I agree with my 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'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* (M. 6176), a gift of the security for 10,000 marks, due from a third person to the husband, subject to his mother's liferent, was held to be a good provision for a wife (subject to a further inquiry, whether, in 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.—My Lords, I cannot say, that I have entertained any great doubt upon this case, or any doubt more than one always entertains where there is a difference of opinion between the Court below and the Court which is about to reverse the judgment.

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. On the other hand, a provision made for a wife by her 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 *primâ 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; 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, 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 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 time, 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 at a time therefore when it ceased to bear the character of a provision. 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 that Court 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 Session, and the Court of Session will do what they think just, upon the reversal of the judgment.

LORD KINGSDOWN.—Is a pauper ever found entitled to 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.—Ought we not to give a complete judgment?

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 not the 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 pauperized 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, and cause remitted with directions as to the costs below.

For Appellant, Dodds and Greig, Solicitors, London; Adam Morrison, S.S.C., Edinburgh.—*For Respondent*, Loch and Maclaurin, London; Robert Finlay, S.S.C., Edinburgh.