could have been resisted in the Admiralty Court in 1823, since which time the practice has been of the nature I have just indicated.

The Lords recalled the Lord Ordinary's interlocutor, repelled the defences, and decerned against the defender for £44.

Counsel for Pursuer (Reclaimer)—Trayner—Jameson—Kennedy. Agents—Pringle & Dallas, W.S.
Counsel for Defender (Respondent)—Gloag—Millie. Agents—Watt & Anderson, S.S.C.

Saturday, May 21.

FIRST DIVISION.

[Lord Adam, Ordinary.

CLARK *v.* CLARK.

Husband and Wife—Provision to Wife—Conjugal Rights Amendment Act 1861 (24 *and* 25 *Vict. cap.* 84), *sec.* 16.

A married woman for whom no provision had been made by marriage-contract, but who subsequently became entitled to a life-rent of £40 per annum (which was however to go to her husband *stante matrimonio*), received from her father during his lifetime the sum of £440. This sum was invested on deposit-receipt in the wife's name. During several years she periodically uplifted and re-deposited the money, the discharges being granted by her alone. In 1867 the money, which had been slightly increased in amount, was used to purchase heritable property of the value of £450. The disposition was in favour of the wife, the husband receiving the rents. In 1880, the spouses having separated, and the husband having raised an action of declarator and adjudication of the property as being a donation—*held*, under the 16th section of the Conjugal Rights Acts 1861, that the husband had never obtained complete and lawful possession of the subjects, and that they did not exceed and were otherwise a reasonable provision for the wife.

The pursuer in this case, James Clark, farmer, Kirklandhill, near Dunbar, was married to the defender in July 1864. David Denholm, Mrs Clark's father, lived with the pursuer and defender, and some time before his death gave his daughter a sum of £440. This money was lodged upon deposit-receipt in the Dunbar branch of the Commercial Bank in the name of the defender. The first deposit-receipt, which was dated 5th July 1865, was uplifted in November following, and a new deposit-receipt taken for a somewhat larger amount; similarly each half-year, down to March 1867, new deposit-receipts were taken and the old ones discharged, the discharges being in all cases by, and the new receipts in favour of, Mrs Clark only. The money thus deposited was finally uplifted on 28th November 1867. By disposition of the same date certain subjects in Dunbar were purchased from George Denholm of Ninewar, who "in consideration of the sum of four hundred and fifty pounds sterling instantly paid to me by Mrs Agnes Denholm or Clark, wife of James Clark, tenant of Springfield, as the price thereof," thereby sold and disponed "to the said Agnes Denholm or Clark, and her heirs and assignees whomsoever, heritably and irredeemably, All and Haill" the said subjects. The purchase-money was the sum uplifted from the deposit-receipt, the total sum then on deposit being £460. The discharge was granted, as on previous occasions, by Mrs Clark, but the money was actually uplifted and paid to Mr Denholm by her husband.

The parties ceased to live together in March 1880, and the object of this action was to have it found and declared that the conveyance to the defender above referred to was a donation by the pursuer to the defender, and so revocable; and for decree revoking the same and adjudging the subjects to the pursuer.

The pursuer pleaded—"(1) The funds with which the said subjects were purchased having belonged to the pursuer, and the purchase and conveyance to the defender of the subjects having been a donation by him to her *stante matrimonio*, he is entitled to revoke the same, and to have the said subjects vested in his own person, and decree ought to be pronounced in terms of the conclusions of the summons. (2) The said sums not having come to the defender as succession, by donation, bequest, or otherwise than by her own industry, and the same never having been beyond the possession and control of the pursuer, decree ought to be pronounced as concluded for. (3) Provision having been otherwise made for the defender by her father, which is in the circumstances sufficient for her, her claim to the property in question ought to be repelled. *Et separatim*, the defender is not entitled to insist for a provision while the pursuer is solvent and the marriage is subsisting."

The defender pleaded—"(3) The defender having obtained, by donation or bequest, the fund out of which she paid the price of the heritable subjects in question, the same did not fall under the pursuer's *jus mariti* or right of administration, in respect that he did not claim or obtain possession of it as set forth in the Conjugal Rights (Scotland) Amendment Act 1861. (4) The pursuer having been aware and approved of the defender retaining the said money and depositing it in her own name, and investing it in the purchase of the subjects in question, as set forth in the defender's statement, he thereby waived and abandoned all claim which under the statute or otherwise he might have had. (5) The subjects in question being no more than a reasonable provision for the defender's support and maintenance, the present action is, in respect of the provisions of the statute cited, untenable in law. (6) *Esto* that there was a donation, it is irrevocable, in respect that it was a provision made for the defender, and was and is not more than reasonable."

The Lord Ordinary (ADAM) allowed a proof, from which the foregoing facts appeared, and also that there was no marriage-contract between the parties, and that defender's only separate estate was a property of about £40 yearly value, the income of which was enjoyed by her husband *stante matrimonio*. The rental of the defender's farm was £733. The pursuer offered to pay the defender £40 per annum, or alternatively to take her back if she preferred.

The Lord Ordinary found "that the disposition of date 28th November 1867, taken by the pursuer in favour of the defender, his wife, was in the circumstances a reasonable and onerous provision made by him for her as his wife, and is not revocable by the pursuer: Therefore sustains the 6th plea-in-law for the defender, and assoilzies her from the conclusions of the action, and decerns: Finds the pursuer liable in expenses, but subject to modification," &c.

He added this note—"At the conclusion of the proof the Lord Ordinary stated the grounds on which he was of opinion that the money paid for the subjects contained in the disposition above mentioned was in law the property of the pursuer, and that therefore no question arose under the 16th section of the Conjugal Rights Act. But he took time to consider the question raised by the defender's sixth plea-in-law—whether the disposition was to be regarded as a pure donation by the pursuer to his wife, or whether it ought not to be regarded as a reasonable provision by him to her, and therefore not revocable? There was no marriage-contract between the parties. The pursuer is under a natural obligation to provide for his wife if not otherwise sufficiently provided for. She appears to be only provided in a sum of £40 per annum, being one-half of the rents of a small property called Howburn, the liferent of which was left to her by her father, the pursuer during his life being entitled to the rents. The pursuer is also entitled to the rents of the subjects now in question during his life. The information furnished as to his means is not very satisfactory, but he is the tenant of a considerable farm, and appears to be in comfortable circumstances. A few years ago he came into possession of a sum of £500 left to the defender by her uncle, and besides household furniture of some value, he succeeded in right of his wife to a sum of about £100. In these circumstances a provision of £450, which was the price paid for the subjects in question, does not appear to be more than a reasonable provision for his wife.—*Rust* v. *Smith*, January 14, 1865, 3 Macph. 378; *Galloway* v. *Craig*, 4 Macq. 267; *Kinnear* v. *Ferguson*, November 7, 1871, 10 Macph. 54."

The pursuer reclaimed, and argued—It must be conceded that the money with which the subjects had been purchased was in law the pursuer's, and that apart from the Conjugal Rights Act the wife could not touch it. Did that Act alter the case? It did not. The husband here had possession. There was no evidence that he intended to make a donation of it to his wife; her possession therefore was his. As to whether apart from the Act it was to be regarded as a reasonable provision, it was submitted that as the defender already had £40 per annum of her own, she was not entitled to obtain anything more.

Replied—The pursuer never had possession of the money or of the subjects, which were purchased with the money. They might be his in law, but the Act contemplated something more than a good title—*Somner* v. *Anderson*. The defender was therefore entitled to a reasonable provision out of them; and their total value was not more than a reasonable provision.

Authorities—*Craig* v. *Galloway*, June 22, 1860, 22 D. 1211, and July 17, 1861, 4 Macq. 267; *Rust* v. *Smith*, Jan. 14, 1865, 3 Macph. 378; *Dunlop* v. *Johnston*, March 24, 1865, 3 Macph. 758, and April 2, 1867, L.R., 1 Scot. App. 109; *Somner* v. *Anderson*, March 2, 1871, 9 Macph. 595; *Kinnear* v. *Ferguson*, Nov. 7, 1871, 10 Macph. 54; *Oxenfoord*, Feb. 13, 1664, M. 6136; *Wright's Executors* v. *City of Glasgow Bank*, Jan. 24, 1880, 7 R. 527; Fraser, Husband and Wife, ii. 948.

At advising—

Lord President—In this case the pursuer seeks to set aside a disposition taken in name of his wife on the 28th November 1867 of certain subjects in Dunbar. The disposition bears to be granted in consideration of a sum of money advanced by her, but the allegation of the pursuer is that the money was really his own, and that consequently this was a pure case of donation *inter virum et uxorem*. On the other hand, the defender contends that the subjects were purchased with money to which she had succeeded, or rather which her father had given her during his lifetime, and which she has kept in bank in her own name until the purchase of this property.

The allegations of the defender appear to me to be well founded in point of fact. It is clear that she did receive money from her father in 1865 to the amount of £440, and upon receipt it was lodged in her name in the Commercial Bank of Scotland at Dunbar on the 5th of July. It appears that this sum was increased to £495 by the month of November, and that a fresh deposit was taken, also in the name of the defender. On 25th May 1866 the sum had risen to £500, and was again deposited in the defender's name, and this system continued till November 1867, when the sum lodged in bank was £460. Now, the conveyance is dated 28th November 1867, and there seems to be no doubt that the money which was then paid to the seller is the same money as that lodged in Mrs Clark's name in the Commercial Bank.

The Lord Ordinary thinks that the 16th section of the Conjugal Rights Act does not apply, because he thinks that the money paid for the subjects was in law the property of the pursuer. I am not able to agree with his Lordship. It seems to me that if the 16th section did not apply to anything which was in law the property of the husband it would be entirely futile in its effect. The section applies only to property which is in law the property of the husband. It provides that where money comes to a wife otherwise than by her own industry the husband or his creditors shall not be entitled to claim the same as falling within the *communio bonorum* or under the *jus mariti* or husband's right of administration, except on condition of making therefrom a reasonable provision for the support and maintenance of the wife, unless she is otherwise provided for. This enactment is subject to an important qualification, which is expressed in these terms—"Provided always that no claim for such provision shall be competent to the wife if before it be made by her the husband or his assignee or disponee shall have obtained complete and lawful possession of the property, or, in the case of a creditor of the husband, where he has before such claim is made by the wife attached the property by decree of adjudication or arrestment, and followed up the said arrestment by obtaining thereon decree of

furthcoming, or has poinded and carried through and reported a sale thereof."

Now, the only question to be considered is, whether there was before the disposition was granted on the part of the husband, or of any assignee or disponee of his, complete and lawful possession of the money which Mrs Clark had in her own name in bank. It is quite clear that complete and lawful possession in the sense of the statute means something more than a good title. It means that that property must be under the control, and in the actual, and not merely in the constructive, possession of the husband. Now, where was the money during the whole time from the date when it was given to Mrs Clark by her father to the time the purchase was made? It was in Mrs Clark's possession. It stood on deposit in her name in the bank, and when the lands were purchased the disposition was taken in her name. I think, therefore, that the idea of complete and lawful possession is excluded by the facts.

Now, is this provision a provision of such a nature as the wife is entitled to insist on having, looking to her and her husband's condition and circumstances? It is a disposition of lands no doubt, but her only other income is the sum of £40 per annum, which is a small sum for persons in the position of the pursuer and his wife. Therefore in regard to the amount of the property in question no objection can be taken, but it is said the disposition is of such a character as to make it objectionable. It is said that it is a provision which takes effect during the lifetime of the husband, and puts the wife in possession of an income *stante matrimonio*, but that is not the nature of the provision. The rents are to fall under the *jus mariti*. The actual beneficial operation takes place only after the dissolution of the marriage. I think, therefore, that the provision is a moderate one and in its character unobjectionable, and I therefore have come to the same conclusion as the Lord Ordinary.

Lord Deas and Lord Mure concurred.

Lord Shand was absent.

The Lords recalled the interlocutor of the Lord Ordinary, and sustained the third and fifth pleas-in-law for the defender, and assoilzied the defender.

Counsel for Pursuer (Reclaimer)—Trayner—Brand. Agent—R. Ainslie Brown, S.S.C.

Counsel for Defender (Respondent)—Campbell Smith—Rhind. Agent—W. Officer, S.S.C.

COURT OF JUSTICIARY.

Tuesday, April 26.

GLASGOW SPRING CIRCUIT.

(Before Lord Moncreiff, Lord Justice-Clerk.)

THE QUEEN'S ADVOCATE *v.* LITTLEJOHN AND GALL.

Insanity—Examination of Witness, a Patient in Lunatic Asylum, as to Assault Committed in Asylum.

A patient in a lunatic asylum at the time of the crime charged examined without objection.

Observation of Lord Justice-Clerk upon the examination of such witnesses.

Littlejohn and Gall, who were night warders in the asylum attached to the Govan Combination Poorhouse, were indicted for murder, as also assault to the fracture of bones, serious injury to the person, and danger of life. The assault was charged to have been committed on two occasions, the night of the 27th December 1880 and the night of 1st January 1881, on Cornelius O'Leary a patient in the asylum, who died on 5th January 1881 in consequence of the injuries sustained, by which several of his ribs were fractured.

One of the principal witnesses for the prosecution, and the only eyewitness to the assaults, was Stephen Harper, who at the time of the assault was a patient under treatment at the asylum, but was discharged from it a few days after the second assault.

It was proved by medical evidence that Harper, who had completely recovered, was in a fit condition to be examined, and could give an intelligible account of what he said he witnessed on the occasions libelled. But Dr Liddell, the doctor of the asylum, gave it as his opinion on examination that complete reliance was not to be placed upon the evidence of anyone under treatment as a lunatic at the time of the facts to prove which he was called.

The counsel for the panels did not object to the examination of Harper, who gave a minute and distinct account of the assaults upon O'Leary, and his evidence was confirmed by the result of the post-mortem examination.

In charging the jury the Lord Justice-Clerk remarked that this was the first time he had seen a witness examined who had been a patient in a lunatic asylum at the date of the occurences which he described, and that the evidence of Harper, while not incompetent, must be received with great caution.

The jury found the panels guilty of assault as libelled.

Note.—In the cases of *Sheriff and Nutshill*, 27th April 1866, Aberdeen, 5 Irv. 226, and of *Thomas M'Kenna*, 21st April 1869, Inverness, 1 Coup. 244, a lunatic was not allowed to be examined who had a supervening fit of insanity after the date of the facts to prove which he was called. But in the present case there has been no supervening insanity.

Counsel for H. M. Advocate—Mackay, A.-D.—H. Johnston.

Counsel for Panels—Guthrie Smith—Baxter.