FEBRUARY 22, 1872.

WILLIAM HARVEY, *Appellant*, *v.* ARTHUR FARQUHAR, W.S., and Others, *Respondents.*

Divorce for adultery—Forfeiture by party of *donatio propter nuptias*—Act 1573, c. 53.

HELD (affirming judgment), *That on divorce for adultery the offending spouse forfeits to the other all benefit from the funds included in the marriage contract, including that part of the fund contributed by such offending party.*[1]

This was an appeal against a judgment of the Second Division of the Court of Session, as to the forfeiture by a husband of his rights under a marriage settlement by reason of adultery. In 1842 the appellant married Miss Rachel Hunter, the eldest daughter of William Chambers Hunter of Tillery and Auchiries, Esq., and her father was a party to a marriage contract executed before marriage. By this contract the appellant bound himself to pay to his marriage trustees, of whom the respondent is the surviving trustee, and assigned to the trustees, in security thereof, all his right under his father's trust disposition. On the other hand, Miss Hunter, with her father's consent, assigned a bond of provision, executed by her father over his entailed estates, and the interest she had in a mortgage for £4000, conditioned to be executed by her father over his unentailed estate in favour of his children. The object of these assignations was, that the sums of money falling under the trust were to be held by the trustees exclusive of the husband's *jus mariti* and right of administration, and were not to be liable for his debts or deeds, or the legal diligence of his creditors. The funds were to be invested on security during the joint lives of husband and wife. The trustees, after deducting necessary expenses, were to pay the annual proceeds to the husband for the maintenance and support of himself and his spouse and family. It was also provided, that on the dissolution of the marriage by the death of either of the contracting parties, in the event of there being issue of the marriage alive at the time, the annual proceeds were to be paid to the survivor, and on his or her death the principal sum was to be divided equally among the children at majority. There was in the marriage contract no discharge on the part of Miss Hunter of the provisions settled upon her by the marriage contract of her parents. The trustees of the marriage contract had all died or resigned except the respondent.

In 1844, by way of implementing his obligation, the husband granted to his marriage trustees a heritable bond for £4000 over his estate of Monecht in Aberdeenshire.

The husband (the appellant) alleged, that he never could get from the trustees any satisfactory account of what sums of money they had received under the assignations of the wife's property. There were three children of the marriage, of whom one only survived, namely, a daughter, now married.

In January 1848 the appellant's wife raised an action of divorce for adultery, and obtained a decree in absence against him, as he was then in Canada, with a view to settle there. The want of pecuniary means prevented the appellant instituting an action of reduction till May 1850, but the action was then dismissed, on the ground, that a year and day had elapsed since the date of the decree, and the same want of funds prevented his appealing to the House of Lords. Down to the year 1847 the appellant received from the trustees the annual proceeds of the trust funds, but they had refused to make any payment to him since. In 1850 the appellant, as administrator for his infant children, raised an action of count and reckoning against the marriage trustees, but for part of the expense the trustees, in the course of the action, obtained warrant to incarcerate him, and he was compelled to execute a disposition *omnium bonorum* in favour of John Ligertwood, advocate in Aberdeen, as trustee for his creditors, whereby his interest under his marriage settlement purported to be conveyed. As, however, Mr. Ligertwood would not appear in the action, it was, in the absence of the appellant, dismissed. The appellant having thus been for twenty three years deprived of any benefit from the marriage contract even as to his own property, and the trustees having contended, that he had forfeited all benefit by his divorce, he raised the present action against his trustee for a count and reckoning, concluding for payment of the funds to which he was entitled, namely, £3500 and interest.

The respondent, in his defence, said, that after the divorce in 1847 the wife's trustees took the opinion of counsel, and were advised that the decree of divorce had the same effect on the wife's

[1] See previous report 8 Macph. 971; 42 Sc. Jur. 554. S. C. L. R. 2 Sc. Ap. 192; 10 Macph. H. L. 26; 44 Sc. Jur. 203.

rights as his natural death would have had. Accordingly, the trustees had ever since paid the interest of the sums of £4000 and £1750 to the wife, who had since married Mr. Jopp, wine merchant in Aberdeen.

In his pleas in law the appellant contended, that the decree of divorce had not the effect of depriving him of his own share of the property settled by the marriage contract, while the respondent contended the contrary. The Second Division ultimately, after ordering the appellant to find security for costs, assoilzied the defender, the now respondent. The husband now appealed from that decision.

The *Solicitor General* (Jessell), *Anderson* Q.C., and *J. T. Anderson*, for the appellant.—1. The Court below was wrong in dismissing the action without allowing a proof or inquiry, or directing the defender to produce the accounts. The appellant had a clear interest to sue, for in the event of his surviving his wife, his rights would revive—*Macalister* v. *Macalister*, 26 Sc. Jur. 597. 2. The Court was wrong in holding, that a husband divorced for adultery forfeits all his own property settled by the marriage contract. This doctrine was founded on error, and arose from a wrong construction of the Statute 1573, c. 55, as to desertion. Before the Reformation there was no divorce *a vinculo* at all. The Statute 1551, c. 20, punished notour adultery with escheat of moveables, and simple adultery with arbitrary punishment; but there was no forfeiture of rights by the offending party to the other married party. There was no subsequent Statute which imposed additional penalties upon divorce for adultery, for notour adultery was a capital offence. The Statute 1573, c. 55, deals solely with desertion and its effects. Nevertheless, Stair (i. 4, 20), without any reason stated by him, assumed, that that Statute extended to divorce for adultery. The words in Stair are probably a printer's error. But Bankton (i. 5, 134) followed Stair. Erskine says Stair and Bankton proceeded upon analogy; but that was no reason for straining the words of a Statute. Erskine states elsewhere (Pr. i. 6, 25) that the case of *Justice* v. *Murray*, M. 334, shewed, that the husband who had been guilty of adultery did not forfeit the tocher. There were later cases of *Thom* v. *Thom*, 14 D. 861; *Macalister* v. *Macalister*, 26 Sc. Jur. 597; *Johnston Beattie* v. *Johnstone*, 5 Macph. 340; 6 Macph. 333. But as to these cases, even if they contain doctrine adverse to the appellant, that doctrine has never yet been reviewed or approved by this House, and they ought to be overruled, because no series of decisions can extend an Act of Parliament beyond its plain meaning. Even if the consequence of divorce for adultery was forfeiture of the husband's contribution to the marriage settlement, still the terms of that contract here excluded that consequence. 3. The Court also was wrong in calling on the appellant to find security for costs, because the *dispositio omnium bonorum* which he had executed left him without resources, and his trustee would not proceed in his name, and the order of the Court was oppressive.

The *Lord Advocate* (Young), and *Sir R. Palmer* Q.C., for the respondents.—The doctrine of the Court below was correct as regards forfeiture, by reason of adultery, of property settled on the marriage. All the institutional writers so lay down the law; and Stair, Bankton, Erskine, Kaimes, and Bell, agree on the subject. There was no foundation for the notion, that the doctrine arose from any misprint in Stair, for the MS. in nine editions has been examined and shews no misprint. The doctrine was founded on the common law antecedent to the Statute referred to, for though a divorce *a vinculo* was unknown, a divorce *a mensâ et thoro* could always be obtained, and the effect of that divorce was forfeiture of marriage portions. The cases referred to by the appellant have proceeded on this being established law. In one case, *Greenhill* v. *Aitkin*, 2 Sh. Ap. 435, this House recognized the doctrine. It was thus too late to overrule a doctrine so long acted on, even if it originated in mistake.

Anderson replied.—There was no common law on the subject before the Reformation, and no authority to shew, that before that time there was any forfeiture of the party's property by reason of adultery. If there was ambiguity in the Statute 1573, usage might be admissible to give a meaning to it; but if the Statute is clear it is not admissible to give a different construction.

Cur. adv. vult.

LORD CHANCELLOR HATHERLEY.—My Lords, in this case the appellant, Mr. Harvey, seeks at your Lordships' hands the reversal of certain interlocutors which have been pronounced by the Lord Ordinary and the Court of Session in Scotland, with reference to his right to certain funds which were settled by a contract which he made upon his marriage with his wife, a lady of the name of Hunter.

The marriage appears to have been an unhappy one, inasmuch as not very long after it had been contracted it was dissolved by a sentence of divorce pronounced in the proper Court on account of Mr. Harvey's adultery. It is said, that the sentence was pronounced in his absence, but whatever may have been the form in which the proceedings were taken, no steps have ever been taken to set aside that sentence; and for nearly twenty years this divorce has continued in full effect.

The question that is brought before your Lordships for consideration is as to the effect of that divorce upon the interest which Mr. Harvey would, except for the divorce, be entitled to under

and by virtue of the marriage contract. The marriage contract provided funds derived from two sources, partly derived from Mr. Harvey, the intended husband, and partly derived from his intended wife's property. It is not very material what the proportion of their several contributions was; they appear to have been about £4000 on the part of the husband, and £1700 or thereabouts on the part of the wife, besides certain other provisions made by a bond. Now these particular funds in question in this case before your Lordships were vested in trustees, and the trustees were directed to invest them, from time to time, in the manner described in the contract of marriage, and after they had been so invested they were directed to be dealt with in the following manner:—"*First*, that the sums of money and others falling under this trust shall be held by the said trustees exclusive of the *jus mariti* or right of administration of the said William Harvey, which he thereby for ever renounces, and shall not be subject or liable to his debts or deeds, or the legal diligence of his creditors." *Secondly*, the direction was a trust to invest; and *thirdly*, the direction was that the income was to be paid to the husband for the maintenance of himself and his wife, and any children of the marriage. The *fourth* direction was, that the income was to be paid, in case there were any children, to the survivor of the husband and wife, and if there were no children, there was a further disposition, which it is not necessary for me to mention, because in the events which have happened there is a child existing at this present moment, and the limitations over would make no difference with regard to the matter which we are now called upon to decide.

What has been decided in the Court below is this, that in consequence of this divorce of Mr. Harvey for adultery, he being the offending spouse, all his interest in the property disposed of by this contract of marriage at once ceases, just as if he were actually dead, and that the wife's rights are immediately brought into operation in the same manner as if the offending spouse had predeceased her.

That principle appears to have been one which has been settled by authority in Scotland for between two and three hundred years. But it is said, that the point has never been brought before the consideration of your Lordships' House, and that therefore, whatever may be the opinion of the Judges in Scotland, bound as of course they would be by so long a series of decisions as has undoubtedly taken place, it is competent for your Lordships to review those decisions, and to see if they rest upon a sound and sure basis, and particularly to examine whether they have not arisen from an error which commenced at a very considerable distance of time back (however long it may be,) which, being demonstrated, as the appellant undertook to demonstrate it, to be an error, ought now to be corrected and set right by a contrary course of decision, in which the Judges in future would be guided by the opinion which your Lordships should come to in this particular case.

Now the case seems to stand thus: As long ago as 1573, that is nearly 300 years from this time, a Statute was passed in Scotland with reference to desertion by a husband of his wife. That Statute was framed in a somewhat singular manner. Proceedings were to be taken to establish the fact of wilful desertion, desertion after remonstrance, the party being summoned in the proper way before a Court sufficiently constituted for that purpose, and it was to be ascertained whether he persisted obstinately in the act of desertion; if so, a course was taken for his excommunication, and a course was then taken for his divorce; and a forfeiture was declared by the Statute undoubtedly of all the goods and provisions made in respect and in consideration of the marriage, whether made from the property of the wife or of the husband. There was some little contest and discussion at your Lordships' bar as to the latter, but I think the Statute plainly intimates, that all the provisions made in respect of and in regard to the marriage, including the provisions made by the husband, were to be forfeited as if the husband were dead, as the Judges have decided in the case with regard to the present divorce of Mr. Harvey.

It is then said, that by an error originated by one who bears a very great name, Lord Stair, the Judges by degrees began to assume that, by analogy to this Statute, they would be entitled to say, that in cases of divorce which would be analogous to desertion on the part of the husband on the supposed ground, that the husband could no longer consort with his wife, and that she could no longer be required to consort with him, the same description of forfeiture ought to take place, and that his interest under the marriage contract would on similar grounds of reasoning be lost to him by way of forfeiture just as if he had predeceased his spouse.

Now, whatever may be said as to some expressions which are found undoubtedly on the part of the learned Judges to the effect of an analogy having been followed with regard to that Statute even down as late as the case of *Beattie* v. *Johnstone*, where, in the opinion of Lord Curriehill, something is said which appears to have a little bearing that way, I think your Lordships will be of opinion, that the appellant cannot succeed by resting his case upon that supposed error having prevailed as a ground of decision; because, when the matter comes to be sifted, the argument comes to this: Anterior to the Reformation there was no possibility of divorce. That is true as to divorce *a vinculo*. And that being so, it was argued by the Solicitor General, that there cannot have been any common law which authorized this forfeiture, and that the Statute law which was directed against one particular offence, namely, desertion, cannot be extended to

another independent offence which it was not intended to strike at. And then he said, that there was another and different Statute, by which a forfeiture was effected of the property or at least the moveable property of the husband to the Crown, and that it would be inconsistent with such a Statute as that to say, that any analogy could now be set up by which it could be said, that the property of the offending spouse was not to be forfeited to the Crown, but was to cease for the benefit of the unoffending spouse.

But in pursuing that line of argument it is forgotten, that although there was no divorce *a vinculo*, yet at all times, both when the Roman Catholic Church prevailed in Scotland and also down to the present time, there has been a divorce *a mensâ et thoro* independently and irrespectively of the divorce *a vinculo matrimonii*. It appears by some ancient authorities, one of them being as old as 1540, anterior to the Statute of 1573, that with regard to a part of the property, the property I think that was provided by the wife in that particular case, a forfeiture did take place as if the husband were dead, upon the simple ground of the divorce *a mensâ et thoro*, as we should call it, having taken place upon his default, that is to say, through his adultery. That appears to have rested in great measure upon doctrines in Scotland of a far severer character with reference to the crime of adultery than any which exist in this country, because there appears to have been a Statute in Scotland at one time which is probably obsolete at present by desuetude, though it has not been distinctly repealed, by which the offending husband in the case of his adultery was to be punished by death. Therefore one can see many reasons operating upon the minds of those who had to decide cases of this description in Scotland which would scarcely be held to be a legitimate foundation for similar decisions in our English Courts, and one can understand how it came to pass, that at the time I mentioned anterior to the Statute, viz. in 1540, a doctrine should be held, that forfeiture in respect of the husband's adultery took place exactly in the same manner as if he were actually dead, and removed therefore from any rights under the nuptial contract.

Now, that being so, there is a series of decisions from that time downwards which were said indeed in argument to have originated in this mistake of the distinguished jurist Lord Stair, but which, if it was a mistake, appears to have been participated in by all the learned Judges who succeeded him down to the very recent case of *Beattie* v. *Johnstone*, where the principle certainly appears to have been tried to the utmost. It is not necessary for us on the present occasion to pronounce any opinion upon the particular circumstances of that case. I only mention it for this reason, that Lord Curriehill, who differed from the rest of the learned Judges in that case, for particular reasons, himself said, that the law was undoubted, it having been settled by a long course of decisions, that the husband forfeited as if he were dead all his rights under the nuptial contract in consequence of his adultery.

In that case of *Beattie* v. *Johnstone*, the father had agreed to pay for his son during his (the son's) lifetime, and after his death to pay for his intended wife, an annuity of £200 a year. The husband having committed adultery, it was held, in pursuance of this long course of decisions, that he was out of the way just as if he were actually dead, and that the annuity to the wife, which was duly covenanted with the father to be paid to her upon the decease of her husband, not upon his divorce, became immediately payable. The case is a remarkable one certainly as carrying the doctrine with regard to adultery to a very great extent. Lord Curriehill objected to its being carried to that great extent; and opposing his view to the view of the rest of the Court in that respect, he nevertheless intimated, that the matter was quite settled with reference to the provisions made as between the intended spouses *inter se* in the marriage contract.

Having stated this, I think that I have stated all that is necessary to be stated in this case to shew, that we should not take upon ourselves to alter a course of settled decision which seems to extend backward for a period of nearly if not quite 300 years, because in the arguments in some cases which have taken place, and in some text writers, and possibly in some *dicta* of Judges, we may find a reason assigned for that course of decision which possibly it may be difficult to support, viz. the reason of analogy with the Statute which has been relied upon in some of the writers as the cause of this law having now become the established law of Scotland. Now an application of one penal Statute to another case by analogy of course would be a very serious thing, and not one that your Lordships would be inclined in any way to sanction by your authority. But, on the other hand, we have great reason to suppose, looking at what happened before the passing of the Statute, and looking at what was the law of Scotland with regard to adultery, that the Statute with respect to desertion followed the analogy of the law, that existed with reference to divorce *a mensâ et thoro* in consequence of the husband's adultery, because it is remarkable, that in that Statute proceedings were directed to be taken to bring the matter to a case of divorce before the penalty was actually inflicted. You begin with desertion; then proceedings are taken to render that desertion plain and manifest as an act of obstinate and wilful desertion on the part of the husband; then you proceed to divorce, and then you proceed to the penalty in question. I do not see in any of the authorities which have been cited that I can find any distinction between the forfeiture of the provisions brought in by the wife and the forfeiture of any provision

made by the husband; it is simply a forfeiture of all his rights under the marriage contract which takes place just as if he were actually dead.

The case of *Justice* v. *Murray*, which was referred to as simply a case depending entirely on its own peculiar circumstances, and the reasons given for it are perfectly consistent with the general doctrine. In that case the lady having recovered other rights, viz. a jointure to which she was entitled by virtue of this doctrine, took upon herself afterwards to seek to recover a tocher which had been paid to the husband, and which had become mixed up with his property, and which (as was said in that case) was on that account not recoverable by her, for that was the reason given for the decision (whether good or bad). It is not necessary to inquire whether the decision was a correct decision or not; that is immaterial to the present question altogether. But that decision is put upon that ground, that the tocher has become mixed with his property, and that all her right was only to be exactly in the position in which she would be if he were dead, and that if he were dead she would not recover the tocher. If that be so, that case would have no application to the present, but it was ingeniously attempted to make an application of it by saying, that the payment by these trustees into the wife's hands of the interest from the funds since the separation was in fact a payment made to the husband himself. Of course it could be no such thing. The limitations and declarations of trust affecting the fund are declared in the marriage contract; those limitations for the benefit of the husband are limitations which according to the law he is unable to retain, because he is taken to be dead, and to have predeceased his wife, and the wife therefore was correctly held in the Court below to be entitled to the benefit of those provisions which in fact she had enjoyed for the last twenty years.

That is all that appears to be necessary to be said upon this particular case. In my judgment the decision of the Court of Session ought to be affirmed, and the appeal dismissed with costs.

LORD CHELMSFORD.—My Lords, the appellant claims by his action the right to have an account and payment of moneys received by the trustee under a marriage contract entered into prior to his marriage with Rachael Hunter. The provisions in this contract were, on the one hand, a sum of £4000, which the appellant bound himself to pay to the trustees, and, on the other, certain sums which the father of Rachael Hunter agreed to provide on the part of his daughter.

The whole of these funds were to be held by the trustees in trust during the joint lives of the two parties, for the maintenance and support of the appellant and his spouse and family, and upon the death of either of the spouses the interest was to be paid to the survivor, and upon the death of the survivor the principal sum was to be divided equally amongst the children of the marriage.

The marriage took place on the 1st of February 1842. In January 1847, Mrs. Harvey obtained a decree of divorce from her husband on the ground of his adultery, and afterwards married Mr. Keith Jopp. There is one child of the marriage living, a daughter, who is married and has children. Since the divorce the trustee has paid the interest of the £4000 to Mrs. Jopp, and it is now after the lapse of more than twenty years insisted by the appellant, that these payments were wrongful.

The ground upon which the payments were made to Mrs. Jopp is, that by the divorce for adultery the appellant lost all benefit under the marriage contract, and that his wife became entitled to its provisions as if the marriage had been dissolved by his death.

It is unnecessary to dwell upon the argument which was first addressed to us on the part of the appellant, that there was no law in Scotland, that a husband divorced for adultery forfeits anything, but (as was said) that, after the passing of the Act of 1573, which provided for a divorce for non-adherence, and the consequences of such a divorce to the offending party, the Judges acted by analogy to this Act, and made the same law applicable to a divorce for adultery.

I think there is ample proof, that before the Act of 1573 the law of divorce for adultery existed by the common law. It is true, that before the Reformation there could be no divorce *a vinculo*, but there were divorces for adultery *a mensâ et thoro*, and the same consequence followed from these divorces, and attached upon the guilty party, as from divorce *a vinculo*.

It is admitted, that there are several authorities in support of the position, that upon a divorce for adultery the offending party loses all the benefit which he is entitled to under the marriage contract. But these decisions have never been appealed from, and the appellant questions their propriety. It is, however, a strong presumption in their favour, that they have been acquiesced in for many years, and that such institutional writers as Lord Stair, Bankton, Erskine, and Bell, have treated the law upon the subject as settled.

Some question was raised, indeed, as to the authenticity of the passage cited from Lord Stair, (i. 4, 20,) where he speaks of marriages dissolved by divorce, either upon wilful non-adherence, or adultery, giving to the party injured the same benefit as by the other's natural death, in so far as the words "or adultery" are contained in it. But we cannot entertain any doubt of the

accuracy of the printed edition of Stair, when we are informed, that in no fewer than nine MSS. of this work in the Advocates' Library, the words "or adultery" are to be found.

It is however argued, that the forfeiture which is incurred by the husband's adultery and consequent divorce must be confined to the benefit which he derives from his wife's fortune. But there is no ground for such an argument, if the bond for £4000 provided by the appellant in the marriage contract is a *donatio propter nuptias*, which it may be observed is something different from a tocher, as the Act of 1573 makes a distinction between them in providing, that the party offender shall tyne and lose the tocher and *donationes propter nuptias*. The tocher I understand to be the marriage portion or *dos* which the wife brings to her husband. If that be paid over to the husband at the time of the marriage, it may be, that, upon a divorce on account of his adultery, he may not be bound to restore it. But if the effect of such a divorce be, that the provisions of the marriage contract are to be dealt with as if the offending party were naturally dead, there is no reason to be given why upon such an event the interest of the offender in a *donatio propter nuptias* should not cease, and the right of the innocent party immediately commence and take effect.

A rather extraordinary argument was addressed to us on the part of the appellant, to prove, that there was no forfeiture of his rights by the divorce. It is provided by the marriage contract, that the sums of money falling under the trust shall not be subject or liable to his debts or deeds, or the legal diligence of his creditors. It was said, that "deeds" here means "acts," and that the divorce was the act of the appellant, because his adultery was the cause of it. Now, although the word "deeds" may mean every act of the appellant, by which the trust moneys may be transferred from him, I am at a loss to see how the divorce can be an act of this character attributable to him since it is not his act at all, but only a consequence of his act; and the loss of his interest in the trust funds is the legal consequence, not of his adultery, but of the decree of divorce.

It is also said, that the provisions in the marriage contract being of an alimentary nature, the clause as to the trust moneys not being subject or liable to the appellant's debts or deeds prevented his conveying or forfeiting his interest under it. That he had no power to convey his interest while the marriage subsisted is unquestionable. I consider the clause in question to be intended to protect the wife and family against the acts of the husband, by which they might be deprived of the maintenance and support provided for them by the marriage contract. But the loss of the husband's interest in the fund as a consequence of the divorce does not deprive it of its alimentary character. And as the effect of the divorce is to treat the interest of the appellant as if he were naturally dead, I do not see how a clause which relates to his acts and deeds can after the divorce have any operation.

On the whole, the grounds upon which the interlocutors of the Court of Session proceeded having been so long regarded as the law in Scotland, and there being no decision, that I am aware of, opposed to it, if I entertained a doubt upon the subject, (which I certainly do not,) I should hardly feel myself at liberty to give effect to it. But being satisfied, that the interlocutor appealed from is correct, I am of opinion that it ought to be affirmed.

LORD WESTBURY.—My Lords, I have very little to add to what your Lordships have already said. In the marriage contract between these parties, the husband and wife, there was contained a provision, that the interest of the consolidated fund should, during the joint lives of the husband and wife, be paid to the said William Harvey, the husband, for the maintenance and support of himself, and his spouse and family. After the divorce, the trustees paid the interest of the fund to the wife, and this is an action by the husband, Mr. Harvey, proceeding on the ground, that that interest was not properly paid.

We have been asked here to reverse by our decision, not only a great number of cases, but also a rule or principle which appears to have been long incorporated into the law of Scotland, and to have become an established rule of construction in the marriage law in that country. The rule is one which I am by no means surprised to find, having regard to the extreme severity which that country once manifested upon the subject of adultery. The rule, I think, is this, that the interest provided by a marriage contract for the benefit of either of the spouses is, by the adultery of the delinquent, lost for the benefit of the other spouse. But when we use the word "lost" or "forfeited," we must remember, that the interest ceases only for the benefit of the other spouse, and to the extent of the provision, as if the delinquent spouse were naturally dead. What I mean to observe is this, that,—supposing a marriage contract which gave to the husband a liferent in very considerable property, and provided for the wife to the extent of an annual sum, not perhaps being one half of the interest which she would take after the death of the husband —if the husband commits adultery, the provision made for the wife's benefit emerges and comes into actual possession in like manner, *quoad* that provision, as if the husband were naturally dead. And the husband would remain entitled to the surplus of the fund, *ultra* the provision that arises for the benefit of the wife.

Now there can be no doubt that a marriage contract containing a variety of conventional provisions, although there be included in it property contributed by the husband and property

contributed by the wife, is a *donatio propter nuptias* in the sense in which that phrase is used in the Scotch law. And the result, therefore, is, that the husband's loss or forfeiture in the case of a divorce for adultery is not limited to the property of the wife, but extends to the whole of the property, whether brought within the operation of the *donatio propter nuptias* by himself or by his wife.

Now with regard to tocher, tocher, which is a sum paid by the intended wife to the intended husband *intuitu matrimonii*, when it is accompanied by a settlement or *donatio propter nuptias*, must be regarded as a consideration paid by the wife for the provision contained in that *donatio*.

Of course, if the wife claims the benefit of those provisions, she cannot at the same time claim restitution of the tocher, which is the consideration for what remains to her under the marriage contract.

Now, applying this to the third provision of the marriage contract, there is a direction for the payment of the income, for the purpose of maintaining the husband and the wife, and the children of the marriage; and there can be no doubt, by the law of Scotland, in the case of a divorce for adultery, the interest which the husband has in that joint trust or direction becomes extinct for the benefit of the wife, and through the wife of the children of the marriage. I think, therefore, that the decision in this case is most unquestionably in strict conformity with the rule of law in Scotland. And it is by no means the function of this House, (and it would be very unwise and mischievous indeed, if your Lordships arrogated to yourselves any such function,) when sitting here in your appellate capacity, in which you are bound only to correct decisions which are contrary to the established law of the country in the Courts of which the decisions appealed from may have been pronounced, to extend that power and authority to the alteration of rules of law which have long been established, long accepted, and long acted upon, and which have formed the basis of the ownership, the administration, and the dealings with private property in the Courts of that country. I have therefore no hesitation in advising your Lordships to adhere to the established rule in Scotland, which is evidenced not only by decisions, but by a long series of writers, who have taught the law to generations of lawyers, and we should be very rash indeed if we attempted to alter the application of that established rule. I regret very much that this appeal should have been presented after so long a period of time, but what your Lordships are bound to do is, I think, to dismiss it, and to dismiss it with costs.

Interlocutors affirmed, and appeal dismissed with costs.

Appellant's Agents, John Shand, W.S.; Simson and Wakeford, Westminster.—*Respondents' Agents*, Stuart and Cheyne, W.S.; Grahames and Wardlaw, Westminster.

FEBRUARY 22, 1872.

WILLIAM HARVEY, *Appellant*, *v.* JOHN LIGERTWOOD, *Respondent*.

Marriage contract—Disposition *omnium bonorum*—Husband's alimentary provision—Forfeiture—Reduction—*H., on his marriage executed a marriage contract, by which he paid to trustees £4000, and the wife also contributed funds, and the trustees were to hold the funds exclusive of the* jus mariti *and of the husband's debts and deeds, etc., and to pay the interest to H. during the marriage for the maintenance of himself, his spouse, and family, and to the survivor, and after the survivor's death the principal sums to be divided amongst the children equally as they attained majority, and if no children, then the £4000 to be paid to H., etc. H. was divorced for adultery, there being issue alive of the marriage, and he executed a* dispositio omnium bonorum, *but afterwards sought to reduce the disposition on the ground, that the fund was an alimentary provision.*

HELD (affirming judgment), *That he was entitled to dispose of what interest remained to him after the divorce, and that he had effectually disposed of it.*[1]

This was an appeal from a decision of the Second Division of the Court of Session. The case arose out of the circumstances of the previous appeal of *Harvey* v. *Farquhar*. It was an action of reduction to set aside a disposition *omnium bonorum*, in so far as it attempted to convey the appellant's rights under his contract of marriage. In the course of an action of declarator which he had raised against his trustees he incurred certain expenses, for which he had been incarcerated, and the only way in which he could get out of prison was by *cessio bonorum*, the condition of

[1] See previous report 8 Macph. 971; 42 Sc. Jur. 564. S. C. 10 Macph. H. L. 33: 44 Sc. Jur. 207.