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.

which was, that he should execute a disposition *omnium bonorum*, which he did to Mr. John Ligertwood, advocate in Aberdeen. This was in general terms ; but the appellant contended, that, inasmuch as a certain provision of an alimentary fund out of his own property was involved in the disposition, it was incompetent for him to alienate such provision. The disposition was executed in 1851, and the marriage trustees had, after the appellant was divorced for adultery, treated him as naturally dead, and paid over to the wife the interest of the fund provided in the marriage contract. He raised an action to dispute the correctness of that course, and the Court of Session having decided against him, the previous appeal was brought, in order to reverse the judgment ; *ante*, *p.* 1992. In the present case the defender, the now respondent, contended, that the disposition *omnium bonorum* was valid and regular and competent, and that there was nothing in the marriage contract to prevent the alienation. The Lord Ordinary found that the action was irrelevant, and dismissed it. The Second Division adhered to the interlocutor. The present appeal was then brought.

Anderson Q.C., and *J. T. Anderson*, for the appellant.—The appellant was entitled to maintain this action of reduction to set aside the disposition *omnium bonorum*, which was obtained by oppressive proceedings—Stair, i. 9, 8 ; iv. 40, 25 ; Ersk. iii. 1, 16 ; iv. 1, 25 ; Bell's Pr. § 12. The Court ought to have allowed a proof of the appellant's averments. The fund being alimentary, the appellant could not competently convey it away—Ersk. iii. 5, 2 ; iii. 6, 7 ; *Dick* v. *Dick*, M. 10,387 ; *Urquhart* v. *Douglas*, M. 10,403 ; *Lewis* v. *Anstruther*, 15 D. 260 ; *Bell* v. *Innes*, 17 D. 778 : *Macalister* v. *Macalister*, 26 Sc. Jur. 597.

The respondent was not represented by counsel.

LORD CHANCELLOR HATHERLEY.—My Lords, in this second appeal Mr. Harvey, the husband, who was the appellant also in the former case, seeks to set aside an interlocutor, pronounced by the Lord Ordinary and affirmed by the Court of Session, by which they refused, in an action which he brought for a reduction of certain deeds, to give him that relief. He appears to have been imprisoned for debt at the instance of the trustees under his marriage contract ; and after having been imprisoned for fourteen months he was desirous of availing himself of the provision made in Scotland, a provision which is also made in this country, for enabling persons who are utterly insolvent to be released from prison upon their taking upon themselves to execute deeds by which they make over the whole of their property for the benefit of their creditors. A *dispositio omnium bonorum* was made accordingly by Mr. Harvey, and in return for that disposition he obtained his liberty. He now says that he is entitled to set his disposition aside, because by it he has made a disposition of certain rights, which, being in the nature of an alimentary provision for the benefit of himself and his descendants under his marriage contract, were incapable of alienation, and that, therefore, there ought to be a declarator on the part of the Court, which if it did not set aside the deed *in toto* would nevertheless operate to declare, that that portion of the deed was void, by which he purported to assign and make over any property which is of an inalienable character. He says, that he is entitled to have that declaration made, not being obliged by the law of Scotland, as he would be by our law, to wait until his interest actually emerged by the death of those who have a previous interest in the fund in question, and that, having done that which is contrary to the true effect of the marriage contract, he is now entitled to have so much of his *dispositio omnium bonorum* set aside as would subject him to the consequence of having hereafter, unless he now succeeds in setting aside the disposition, to litigate the question whether the property was actually assignable.

The only arguable point (which was extremely ably put for the appellant by Mr. Anderson) was reduced to a very narrow one indeed, by a previous decision which had occurred in Scotland, before the Lord Ordinary pronounced his interlocutor in this action for the reduction of the deed, which previous decision has now received your Lordships' affirmation. The present case came to be determined after it had been held, that Mr. Harvey had forfeited all his interest provided by the marriage contract in consequence of his adultery, as if he were dead, and his interest stands thus : He takes in the first instance under that marriage contract a certain provision for the benefit of himself and his children, which has been commented upon and disposed of by the previous decision. After that, in the event of there being children, (and there is a child of the marriage now existing,) there is a provision for the benefit of the survivor of the spouses. After that, in case of there being children, the trust property goes over to the children, but if there be no children it comes back to Mr. Harvey, from whom it originally proceeded. As to that last interest the Lord Ordinary says, that it is an interest which is clearly disposable and alienable, and of which Mr. Harvey had a clear right of disposition by a *dispositio omnium bonorum*. Therefore he cannot complain of or reduce the deed, on the ground of any question arising upon that portion of his property ; it was in fact a restitution to him of his original rights in the property, and it was clearly and distinctly alienable.

But it is said with regard to this possible life interest, in case he should survive his spouse, that that is inalienable by the provisions of the marriage contract, and that if the wife died, and he survived, he then would find himself in the possession of this life interest, which he cannot alien, because it is an alimentary provision made for him under the marriage contract. *Macalister's*

case was cited in aid of that proposition, and the Lord Ordinary says, (and it appears to be the true view of the case,) that in that case it is not very clear what was the precise point that was actually determined. It seems rather to have been as to whether the wife, who was the person in regard to whom the claims arose, had forfeited not only her interest, but also her right and power of appropriating and disposing amongst the children the funds there in question. There are other cases in which this has been decided, viz. that when the wife dies and the husband has been the guilty party, the provision which has been made for the wife by means of the husband's property arises at once. But he does not forfeit that which is not included in the contract in any way. Of course he is not actually dead, although the law presumes him to be dead as between himself and his spouse. He being still *in esse*, his rights revive as soon as the marriage contract is dissolved, and as soon as the wife has exhausted all the interest secured to her, the innocent party, under the contract. Therefore the interest which would go over in case of children failing, would come back to Mr. Harvey, and was disposable by the deed.

The question here is really, whether this possible life interest of the appellant, which may survive the interest which the wife takes under the marriage contract, is or is not an alimentary provision which the husband could not dispose of. Now I can see no authority to shew, that this provision, made partly out of the £1700 of the wife's and partly out of the £4000 provided by the husband, was an alimentary provision which the husband could not dispose of, because the case appears to stand in this dilemma. If it is a provision which he takes under and by virtue of the marriage contract, then, according to the law of Scotland, the forfeiture accrues. If it is not a provision that he takes by virtue of the marriage contract, if it is some remainder of his own interest or property subject to the emerging of the interest of the children (if they attain the character which the deed specifies) upon his death, but which interest of the children, possibly by their dying before him, may all be exhausted before his own death, then that fragment of interest so remaining in him would, of course, not be an alimentary interest, but an interest which he could dispose of as being his own and undisposed of. As regards that which was provided for him by his wife, of course that would be forfeited as between himself and his wife by his adultery. As regards the remainder of his own interest, subject to its being possibly burdened by the interest of his children if they should acquire an interest, and which, if they did not acquire it, would come to him absolutely as soon as the children were out of the way, that species of interest is vested in him in such a manner as to be disposable by him, and, as the Lord Ordinary has very properly held, is included in the *dispositio omnium bonorum*. It was said that he could not possibly alien this interest, and it was necessary shortly to examine that point; but I think, when it is examined, there is really no substance in the claim so made, and accordingly I am of opinion, that the Lord Ordinary came to the right conclusion in this case. It seems to me, therefore, that with the approbation of your Lordships, this appeal must follow the fate of the last appeal, and that the interlocutor must be affirmed, and the appeal dismissed with costs.

Mr. Anderson.—May I mention to your Lordships that the case was heard *ex parte*, so that there are no costs.

LORD CHANCELLOR.—That is quite true.

LORD CHELMSFORD.—This case appears to me to be abundantly clear, and to require very few observations in deciding it. The appellant seeks to reduce a disposition *omnium bonorum* made by him in favour of his creditors, upon a process of *cessio bonorum* under the provision of the 6th and 7th William IV. cap. 56, in so far as it bears to alienate the whole or any part of his claims, rights, and interest under his marriage contract.

By the 6th and 7th of William IV. it is provided, that in the process of *cessio bonorum* it shall be optional with the creditors to require the debtor to execute a disposition *omnium bonorum*, and in the disposition made by the appellant it is recited, that he had been required by his creditors to execute such a disposition. He thereby (*inter alia*) alienated and disponed his whole claims, rights, and interests, present as well as future and contingent, under and by virtue of the contract of marriage, "and specially his claims, rights, and interest, present as well as future and contingent, whether of liferent or of fee, in the sum of £4000, granted by him to the trustees under the marriage contract." By that contract the sum of £4000, as well as certain moneys given by the father of the intended wife, were settled as stated in the former case. In the first place, interest was to be paid by the trustees, during the joint lives of the parties, to the appellant, for the maintenance and support of himself 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. And then followed a clause, that, in the event of the children of the marriage predeceasing the appellant, then the trustees were to pay to him this principal sum of £4000.

It is contended, that this disposition, so far as it extends to the appellant's rights under the marriage contract, is void, the appellant having no power to convey these rights, they being declared to be alimentary, and not to be subject to his debts or deeds.

By the decree of divorce obtained against the appellant, he forfeited all his interest in the

trust funds under the marriage contract, except that which was contingent upon the death of his intended wife.

The alimentary provision is expressly confined to the joint lives of the husband and wife. On the dissolution of the marriage by the death of either of the parties, (and divorce for adultery is equivalent to death,) the trustees are to pay the interest and proceeds to the survivor during his or her life. The appellant has no right in any part of the fund while it is payable to Mrs. Jopp. If the fund continued to be alimentary after it became payable to Mrs. Jopp, it has long ceased to be so, as the only living child of the marriage is forisfamiliated, having become a married woman. Upon the death of Mrs. Jopp the principal sums become payable to the children of the marriage, and in this provision the appellant had no interest. The only claim which he had upon the fund is upon the contingent possibility of his former wife dying without issue, in which event the trustees are to pay over to him the £4000 which he brought into settlement. Now this interest, remote and shadowy as it is, he had clearly a right to dispose of, and if so, how can a disposition of his claims, rights, and interest under the marriage contract be reducible. If any creditor of the appellant were to bring an action against the trustees to make the disposition *omnium bonorum* available beyond the contingent interest of the appellant, he would necessarily fail, as the trustee would be able to shew, that since the divorce he had nothing else left, over which he had the power of disposition.

With respect to the clause as to the monies under the marriage contract not being liable to the debts and demands of the appellant, which it is now contended rendered them inalienable, whatever be the effect of this clause, it clearly cannot apply to the contingent interest of the appellant in the £4000, which in the event would belong to him absolutely, which he would have a clear right to dispose of, and which he could not legally protect against the diligence of his creditors.

The case is almost too clear for argument, and it must not be supposed, that we adjourned it on account of any doubt which we entertained, but merely that it might be taken into consideration at the same time with the other appeal which we have just disposed of.

It is painful to think of the waste of money and of time which has been occasioned by the vexatious proceedings of the appellant. I am of opinion that the interlocutors appealed from must be affirmed, and I am sorry that we cannot affirm them with costs.

LORD WESTBURY.—My Lords, this is an action of reduction. It seeks to set aside, to annul, and to reduce the whole of the *dispositio omnium bonorum* executed by the appellant.

The first ground put forward for the reduction is rather an amusing one, if one can be amused by anything of this kind. It is put thus, I think, according to Scotch phraseology, by the appellant, that the whole deed is reducible, because it was executed *in squalore et caligine carceris*, in a dark and dirty dungeon. But unfortunately the law provides for that very case; because this is a deed executed by the appellant by reason of his insolvency, and which must be executed by him as a condition of his release from prison. The law contemplates that it will be a prisoner's deed. I dare say that prisons in Scotland, as in England, where this deed was executed, were very bad abodes; but that is the law, and it affords no ground whatever for reduction.

Unfortunately the other ground of reduction trenches rather on the province of interpretation. Now, you cannot reduce a deed upon any ground that can be set right by the construction of the deed. If the deed professes, in terms, to convey that which the granter or maker of the deed has no right to convey, you may have a remedy by reduction, or you may have a remedy by declarator; but whatever may be corrected by the proper interpretation or construction of the deed forms no ground of reduction. The argument was put thus under the first trust, namely, that contained in the third provision of the marriage settlement; there is a direction to apply the money substantially for the maintenance of the husband, the wife, and the children. The divorce operates as a cesser for the benefit of the wife of the husband's interest in that trust.

But then it is said, suppose the wife should die first, leaving the husband surviving, the interest of the husband would revive, and he, emancipated from the forfeiture produced by the divorce, would be entitled to the benefit of the trust for the maintenance of himself and his children; and then it is assumed by those who propound the argument, that this alimentary provision, contingently arising on the husband's surviving the wife, does pass by the deed in terms, whereas it could not pass by the *dispositio omnium bonorum*, seeing that that contingent provision would be subject to the declaration contained in the first provision of the marriage settlement, namely, that the *jus mariti* should be excluded, and the provision contained in the deed should be inalienable. Now, I admit that that disposition, to the extent of the alimentary provision, would be good; but then the argument is this, that it does not pass under the disposition, for all that does pass under the disposition is what the husband is entitled to dispose of. The language of the disposition is this: he professes to pass "my whole claims, rights, and interests, present as well as future and contingent." Now, nothing is better settled in insolvent and bankruptcy law than the proposition, that a deed of assignment for the benefit of creditors, whether it be made

by law or be made by the act of the parties, passes only what the husband is lawfully entitled to part with. And if the husband is not, as I grant he would not be, lawfully entitled to alien the contingent alimentary trust that might possibly arise under the fourth provision in the marriage contract on the death of the wife in the lifetime of the husband, then, certainly, it does not pass under the words in the disposition, which are limited entirely to this, "my whole claims, rights, and interests." That would not be a personal, private, and individual right of the husband. It is not, therefore, a right within the terms of the deed. In that respect, therefore, there is nothing whatever to reduce. The deed is a good deed, and rightly construed, according to the law, it would not touch that which it is said the maker of the deed had no right to dispose of.

There are two other interests given to the husband by the settlement, one of which is a life interest on the death of his spouse leaving him surviving. The counsel for the appellant, Mr. Anderson, who of course knew, as he always does, both the strength of the case and its weakness, felt that his only course, in order to rescue this life interest, was to make out that it was somehow charged with an alimentary character in favour of the children, and accordingly he attempted to establish that. But that is a mere imagination. It is not charged with any such thing. It is very true that the husband might possibly be personally liable to maintain the children even when adult, in case of their falling into a state of indigence and necessity. But there is no charge of that kind fastened upon the life estate, and the life estate cannot be brought within the declaration against alienation, for it is a principle of Scotch law as well as of English law, that you cannot retain an interest to yourself in your own estate and make it inalienable. The same observation must apply also to the contingent fee which is given to the husband in the event of the children failing and of his surviving his wife. That also cannot be made inalienable. And therefore the liferent, if he survives his wife, and the fee, if the children fail and he survives his wife, are two things that fall within the legitimate scope and operation of the *dispositio omnium bonorum*, and do not therefore subject that deed to any impeachment, so as to justify its being reduced or set aside.

This appeal is an instance of great pertinacity in litigation which we must regret very much. Under all the circumstances we must dismiss the appeal, and I am happy to be relieved from the obligation of dismissing it with costs.

Interlocutors affirmed, and appeal dismissed.

Appellant's Agents, John Shand, W.S.; Simson and Wakeford, Westminster.

MAY 2, 1872.

LORD ADVOCATE, *Appellant*, *v.* MAJOR GENERAL CHARLES HAGART, C.B., and Others, *Respondents.*

Succession—Inventory duty—Return of duty in respect of debts—Provision to children by marriage contract—*H. by antenuptial marriage contract bound himself to secure a sum for his children, but not having implemented his obligation, he by his trust disposition directed his trustees to pay one of his sons £10,000 in full of his share, and this was paid accordingly.*

HELD (affirming judgment), *That the £10,000 was a debt due by H., and ought to be deducted from inventory duty, pursuant to 5 and 6 Vict. c. 79, § 23.*

HELD FURTHER, *That the whole of the debts due to deceased, and heritably secured, should be added to the gross amount of the personal estate in order to ascertain the duty payable.*[1]

The executors of the late Thomas Campbell Hagart sought to recover from the Inland Revenue repayment of stamp duty in respect of payment of debts of the deceased.

By antenuptial marriage contract the late T. C. Hagart had bound himself to pay certain provisions to his children, and by his trust disposition he directed his trustees to pay to his second son, James M'Caul Hagart, a sum of £10,000. The trustees paid this sum.

The trustees, in making up the total amount of personal estate and money secured on heritable estate of the late T. C. Hagart, included two sums of £9000 and £7922, which were heritably secured.

The trustees contended, that they were entitled to deduct £150 in respect of the first sum of

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[1] See previous reports 9 Macph. 358 : 43 Sc. Jur. 195. S. C. L. R. 2 Sc. Ap. 217; 10 Macph. H. L. 62; 44 Sc. Jur. 381.