pursuer that he has been unable to adduce the bankrupt, but it is not to be presumed that he would have contradicted the defender even if his evidence had been available.

"The pursuer also argued, that as the defender admits he stipulated for the pasture of 300 sheep, he must pay rent for 300. But this is plainly untenable. In speaking of flocks and herds, a definite is often put for an indefinite, and besides, the complaint is now too late. He should have challenged the defender for the deficiency when the sheep were put into the field, or might have got other sheep to eat up the grass.

"The expenses to which the defender has been found entitled, must suffer some modification. He claimed the value of one sheep, which he says was abstracted from his flock, and a diseased one left in its place. But he has been unable to prove that this was done with the privity of the bankrupt, or was in any way attributable to his fault."

The Sheriff (MAITLAND HERIOT) altered and pronounced the following interlocutor and note:—

"The Sheriff having considered the appeal for the pursuer, against the interlocutor of 16th January last, along with the relative reclaiming petition and answers, and having also considered the record, proof, and whole process: Sustains the said appeal; recalls the interlocutor appealed against: Finds, that, from the 18th day of May till the 16th day of June 1865, 259 sheep were pastured in a field at Panmure possessed by the bankrupt George Galbraith: Finds that it is not proved that the same were so pastured at the rate of either 2d. or 3d. per head per week, as alleged by the defender: Finds that, in the circumstances, the defender must pay the fair value of the pasturage, according to the rule *quantum valeat:* Finds that, in the circumstances, 5d. per head per week is a fair and reasonable sum for the defender to pay for the same: Finds that the sum due to the pursuer, as trustee on the sequestrated estate of the said bankrupt, for the period of four weeks and one day, is £22, 7s. 1d. sterling: Finds that the defender, having consigned with the clerk of court the sum of £10, 19s. sterling on the 18th April 1866, there remains a balance due to the pursuer, as trustee aforesaid, of £11, 8s. 1d. sterling, for which decerns, with interest at the rate of five per cent. from the 16th day of June 1865: Ordains the clerk of court to pay over the consigned money to the pursuer, as trustee aforesaid: Finds the pursuer entitled to expenses; allows on account thereof to be given in, and remits the same to the auditors of court, or either of them, to tax and report, and decerns.

"FRED. L. MAITLAND HERIOT."

"*Note.*—It is proved and admitted that 259 sheep were pastured. The defender alleges that the agreement between him and the bankrupt was that payment was to be made at the rate of not more than 3d. a-head per week. This may be so, but unfortunately for the defender it is not legally proved, and the only way of fixing the value, in such circumstances, is *quantum valeat.* Looking to the evidence of this point, the Sheriff considers 5d. a-head per week a reasonable sum.

"The pursuer wished to be allowed to charge for 300 sheep, on the ground that the bankrupt had agreed to pasture 300 sheep, although only 259 were sent; but how does he propose to prove the bargain as to 300? By the evidence of the defender himself, whose evidence he discards as to the rate? If his evidence be insufficient as to the *rate,* it is equally insufficient as to the *number.* Accordingly, the Sheriff has allowed the pursuer to charge only for the sheep actually pastured.

"The defender claims deduction for one sheep not delivered. This, in the circumstances, cannot be allowed. He did not take over delivery in a regular way from the park keeper, but he broke open the gate, and took delivery at his own hands. He has himself to blame if a sheep was amissing or lost by him."

The defender advocated.

SOLICITOR-GENERAL (MILLAR) and THOMSON for him.

WATSON and BIRNIE in answer.

The Court, Lord NEAVES delivering judgment, adhered to the interlocutor of the Sheriff, and on the same grounds.

Agent for advocator—D. Milne, S.S.C.

Agent for respondent—G. & J. Binny, W.S.

Friday, February 7.

FIRST DIVISION.

JOHNSTONE BEATTIE *v.* JOHNSTONE'S TRUSTEES AND OTHERS.

(See 5 Macph., p. 340.)

Husband and Wife—Donatio propter nuptias—*Tocher—Divorce—Forfeiture—Assignation—Cautioner—Mutual Contract.* In an antenuptial marriage-contract the father of the bride assigned to the marriage-contract trustees all the estate and effects which should belong to him at his death, within six months after which date the trustees were to pay out of said estate and effects, when realised, a sum of £5000 to the husband or his assignees. Shortly after the marriage, the husband borrowed money, assigning this provision to the creditors in security, the fathers of the wife and of the husband being cautioners in one of the deeds of assignation. Thereafter the husband was divorced for adultery. *Held* (1) that the husband's right to the provision was forfeited by the decree of divorce, and (2) that that forfeiture destroyed the right of the assignees. *Observed,* that the provision was of the nature of *donatio propter nuptias,* and that it was assignable, whether vested in the husband or not, although assignees had not been mentioned.

These were conjoined actions of declarator, of extinction of trust, &c., raised at the instance of Mrs Margaret Elizabeth Grierson, or Hope Johnstone, residing in Dumfries, now known by the name of Mrs Johnstone Beattie, against the Honourable Arthur Dalzell and others, trustees under the marriage-contract between the pursuer and David Baird Hope Johnstone and others. The circumstances out of which the action arose, and the question at issue, appear from the following narrative, taken from the note of the Lord Ordinary.

"The pursuer was married in January 1860 to Mr David Baird Hope Johnstone, a younger son of Mr Hope Johnstone of Annandale, and then ensign in her Majesty's 92d regiment. An antenuptial contract, bearing date 23d and 24th January 1860, was executed, to which, besides the contracting spouses, Mr Hope Johnstone, father of the bridegroom, and Lieut.-Colonel William Grierson of Bardannoch, father of the bride, became parties.

"It is very apparent, and was not disputed at the discussion before the Lord Ordinary, that neither of the spouses had any means except what

came from their respective fathers, or other relatives. In the view of what was necessary for their support, Mr Hope Johnstone become bound to contribute an annuity of £200 during his lifetime; and Colonel Grierson settled on his daughter, exclusive of the *jus mariti*, an annuity of £100, to be increased to £150 after his death.

"By the same contract Mr David Baird Hope Johnstone assigned to certain trustees his rights under certain family bonds of provision; and Colonel Grierson assigned to the same trustees all the estate and effects which should belong to him at the time of his death; as did also the pursuer generally her whole means and estate, and especially what should arise to her from the death of her father.

"With regard to the assignment by Mr David Baird Hope Johnstone of his rights under the family bonds of provision, it is declared,—'On receiving payment of the foresaid provisions and sums of money payable to the said David Baird Hope Johnstone under the contract of marriage and bonds of provision above recited, and hereinbefore assigned to said trustees, they shall pay £2000 of said sums to the said David Baird Hope Johnstone, or his assignees, and invest the remainder, and pay the interest or annual produce thereof, in manner after specified.'

"With regard to the estate conveyed by the pursuer and her father, it is declared,—'Upon the death of the said William Grierson, the said trustees shall without any undue delay, realise and convert into money such of the property and estates hereby conveyed by him and by the said Margaret Elizabeth Grierson as shall not consist of heritage,—at the least, of the lands after mentioned; and shall, within six months after the death of the said William Grierson, pay therefrom, or from the heritable estate if the moveable estate shall be insufficient, to the said David Baird Hope Johnstone, *or his assignees*, the sum of £5000, and shall invest the remainder, together with the balances of the provisions and sums of money payable under the contract of marriage and bonds of provision above recited, and conveyed to the said trustees, if not already invested on heritable security, or in the government funds, or on such security as they may deem good and sufficient, railway debentures included, in their own names as trustees, for the purposes of this contract.'

"The purpose of this investment of the surplus funds is afterwards declared to be payment to Mr David Baird Hope Johnstone, during the subsistence of the marriage, and to the survivor on its dissolution, of 'the rents, dividends, interest, and annual produce of the whole property, means and estates hereby conveyed or made payable to them, *excepting the foresaid sums of* £2000 *and* £5000 *hereby directed to be paid to the said David Baird Hope Johnstone, or his assignees, as aforesaid.*' The fee of the subjects was to be retained for the children of the marriage, and failing children, was, so far as derived from Mr David Baird Hope Johnstone's assignment of the family provisions, to go to his 'nearest heirs whomsoever, or assignees,' and *quoad ultra*, 'to the nearest heirs whomsoever of the said Margaret Elizabeth Grierson, or her assignees.'

"It was declared 'that the provisions hereby conceived in favour of the said Margaret Elizabeth Grierson, and of the children of the said intended marriage, are and shall be in full satisfaction to her of all terce of heritage, half or third of moveables, or other claims whatsoever competent to her by and through the decease of the said David Baird Hope Johnstone, in case she shall survive him, or that her executors or nearest of kin could claim by and through her decease, in case she shall predecease her said husband; and also in full satisfaction to the said children of all claims of legitim or executory competent to them by and through the decease of their said father and mother.'

"This marriage was dissolved on 17th March 1865, by a decree of divorce obtained by the pursuer against David Baird Hope Johnstone on account of adultery. There were no children of the marriage.

"In the meanwhile, Mr David Baird Hope Johnstone had borrowed considerable sums of money, on the security, *inter alia*, of his right to the sum of £5000 to be paid to him within six months of Colonel Grierson's death. The defender Mr James Heron, and three other defenders, hold assignations in security to this sum, of various dates in the years 1860, 1863, and 1864. These assignations were intimated to the marriage-contract trustees.

"At the date of the divorce on 17th March 1865, Colonel Grierson was still alive, and the time of payment of this sum of £5000 had not arrived. Subsequently to the divorce, Colonel Grierson and his daughter, the pursuer, executed a revocation of the marriage-contract, so far as any obligation or conveyance on their part was contained in it. Colonel Grierson died on 30th November 1865. He left a trust-disposition and settlement, under which the pursuer, his daughter, is said to be the sole residuary legatee.

"The question has now been raised whether the assignees of Mr David Baird Hope Johnstone are entitled to claim payment from Colonel Grierson's estate of the sum of £5000 stipulated to be paid to that gentleman within six months of Colonel Grierson's death, and assigned to them in security. It is maintained by the pursuer that Mr David Baird Hope Johnstone's own right in this sum had not vested prior to Colonel Grierson's death, and had before that time become forfeited by the divorce. And they maintain that his assignees cannot claim what Mr David Baird Hope Johnstone could not now claim himself.

"For the purpose mainly of raising this question, the present action had been raised; and, at the suggestion of the Lord Ordinary, an amendment of the summons was admitted of consent, in order more clearly to bring out the true question at issue. There are other points comprehended in the action, but these are little else than formal. The substantial question is that which has now been stated."

The Lord Ordinary (KINLOCH) pronounced this interlocutor:—

"The Lord Ordinary, having heard parties' procurators, and made avizandum, and considered the proceedings, Finds, that according to the sound construction of the antenuptial contract between the pursuer and David Baird Hope Johnstone, bearing date 23d and 24th January 1860, there was a power of assignment, anterior to the death of the pursuer's father Colonel Grierson, vested in the said David Baird Hope Johnstone, of the sum of £5000, stipulated by the said contract to be paid to the said David Baird Hope Johnstone, or his assignees, within six months after Colonel Grierson's death: Finds that the said sum was validly assigned in security by the said David Baird Hope Johnstone in favour of the defenders, James Heron, Alexander Borthwick, John Francis

Partridge, and Robert Mackay, by the deeds of assignation respectively held by them: Finds that the validity of the said deeds of assignation was not affected by the decree of divorce obtained by the pursuer against the said David Baird Hope Johnstone on 17th March 1865; and that the said assignees, are entitled, by virtue of the said deeds of assignation, to claim payment out of the estate of the deceased Colonel Grierson, of the sums due to them respectively under the said deeds: Finds that, except in so far as concerns the interest of the said assignees, the said antenuptial contract is, in respect of the said decree of divorce, ineffectual to vest any right in the said David Baird Hope Johnstone, or any one deriving right from him, in the estate or effects of the said Colonel Grierson, or of the pursuer, or to which the pursuer has succeeded, or in any of the provisions made for the said David Baird Hope Johnstone and the pursuers, or either of them, in the said antenuptial contract, by the pursuer or her said father, and decerns."

His Lordship added this note (after the narrative quoted above):—

"The Lord Ordinary is of opinion that in this controversy the defenders, the assignees of Mr David Baird Hope Johnstone, are entitled to prevail.

"The consideration which is first in order is what is the true intent and meaning of the antenuptial contract in that part of it which provides for the payment, within six months after Colonel Grierson's death, of the sum of £5000 'to the said David Baird Hope Johnstone, *or to his assignees.*' It appears to the Lord Ordinary that the meaning, and the only reasonable meaning, which can be put on this provision is, that the power was thereby conferred on Mr David Baird Hope Johnstone of effectually assigning the right during the lifetime of Colonel Grierson. It seems to the Lord Ordinary that this is the only rational view which can be taken of the intention of the parties. Plainly the intended spouses were by no means superabundant of cash; and if Colonel Grierson lived inconveniently long it might come to be very necessary for them to raise money in order simply to get along. The Lord Ordinary cannot resist the impression that the very object of the provision being so worded was just to enable Mr David Baird Hope Johnstone to raise money if necessary on the security of the expected sum. The sum is accordingly to be paid 'to the said David Baird Hope Johnstone, or to his assignees;' and the Lord Ordinary reads this clause as implying that assignees were, equally with Mr David Baird Hope Johnstone himself, to be in right of the sum at the period of its becoming due. He cannot agree with the pursuer in considering the reference to assignees as mere surplusage, or in holding the words to mean assignees after vesting, which is just to reduce them to surplusage; because, after vesting, a right passes to assignees without the necessity of any special declaration. The clause is a very peculiar one. It is not the common devolution on A B, his heirs and assignees, as to which the remark of the pursuer would at least have more plausibility. The disponee and his assignees are not treated conjunctively. The payment is 'to the said David Baird Hope Johnstone *or* to his assignees,' implying, not that the assignees merely come in the room of David Baird Hope Johnstone, but that either he or they would have an equal right of claim at the time of the sum becoming payable. Giving fair effect to the meaning of all the words employed, the Lord Ordinary can reach no other conclusion than that a power of assignment, during Colonel Grierson's lifetime, was purposely and intentionally conferred on David Baird Hope Johnstone, and that the assignations executed by him are valid and operative rights.

"The question was mainly pleaded to the Lord Ordinary as a proper question of vesting, and as if the only alternative to be considered was, not whether a power of assignation was or was not conferred, but whether the right did or did not vest in Mr David Baird Hope Johnstone *to all intents and purposes.* It was asked whether it was to be held that, if Mr David Baird Hope Johnstone died before Colonel Grierson, the right to the sum of £5000 had passed to his legal heirs. It appears to the Lord Ordinary to be not absolutely necessary to determine this precise question. So far as it is necessary to form an opinion on the subject, the Lord Ordinary leans to the opinion that the right *did* vest in David Baird Hope Johnstone, so as to pass to his heirs. Heirs, or gratuitous disponees, could, of course, only have the right as it stood in David's own person; and, if forfeited in his person, could not be claimable in theirs. If, on the other hand, David Baird Hope Johnstone died without incurring any forfeiture, the Lord Ordinary sees no reason why the right should not have passed to his heirs. It is a right absolutely given, though the period of payment is postponed. The death of Colonel Grierson was not *dies incertus* in a legal sense. It was an event certain to arrive, though the period of arrival was indefinite. The right is therefore one which, apart from the question of forfeiture by his misconduct, appears to the Lord Ordinary to have legally vested in David Baird Hope Johnstone. But the only question indispensable to be at present decided is, whether the right had vested *to the effect of being onerously assigned.* The question on that head is simply what, in fair construction, must be held to have been the provision of the marriage-contract. Every question of vesting arising out of a marriage-contract is in truth just a question of intention. If the intention is clear, the legal formula may be easily made to quadrate. There is no incompetency in a right being vested to a limited and qualified effect. If the parties chose, they might effectually contract that the right should not descend to David Baird Hope Johnstone's heirs, but should be capable of being assigned by him for onerous causes. If the deed had expressly borne, 'with full power to the said David Baird Hope Johnstone, during the lifetime of the said William Grierson, effectually to assign the right to the said sum to assignees for onerous considerations,' there could have arisen no doubt as to the validity of the assignations now in question. The Lord Ordinary reads the deed as if it had contained these words.

"The conclusion at which the Lord Ordinary has arrived from considering the terms of the marriage-contract, has been maintained by the defenders to be fully established by the conduct of the parties. The first loan contracted by Mr David Baird Hope Johnstone on the security of this sum of £5000 is that for £2000, contracted with the defender Mr James Heron. In the bond granted for this loan (which is dated January and July 1860), both Mr Hope Johnstone and Colonel Grierson are cautioners for repayment of the money—*and the same deed contains an assignation to the sum of £5000 in question.* This, it is said, shews the understanding of all concerned, and emphatically of Colonel Grierson, that the sum was assignable

during Colonel Grierson's life. The Lord Ordinary has preferred resting his judgment exclusively on the terms of the marriage-contract. But the fact now referred to is confirmatory of the conclusion otherwise arrived at. It would be difficult, in the face of the fact, for either Colonel Grierson, or any one representing him, to deny the power of assignment.

"If, according to the terms of the marriage-contract, David Baird Hope Johnstone had the power of assigning this sum during Colonel Grierson's lifetime, the question which remains is, whether the assignation, thus in itself competent, was vitiated by the after decree of divorce obtained against David Baird Hope Johnstone by the pursuer? This question appears to the Lord Ordinary of easy solution; indeed, to be solved by the very circumstance that the assignation was in itself competent and effectual. At the time of granting the assignation, David Baird Hope Johnstone was under no disqualification or forfeiture. He, *ex hypothesi*, validly divested himself at this time of his right in favour of his creditor. The right lay in his person unforfeited and undiminished, and it was assigned as such. If this be so, it is impossible, as the Lord Ordinary thinks, to maintain successfully that the creditor could be affected by any after conduct on the part of David Baird Hope Johnstone. It would be ludicrous to say that David Baird Hope Johnstone could grant an assignation, and straightway render it ineffectual by going and committing adultery. The assignee cannot injure the right of the cedent by anything done by him posterior to the assignation. From the nature of the case, any after forfeiture of the right of David Baird Hope Johnstone must be strictly personal to that gentleman. If once it be found that a valid power of assignment resided in David Baird Hope Johnstone during Colonel Grierson's lifetime, the incapacity of the creditor to be affected by the after divorce obtained against David Baird Hope Johnstone appears to the Lord Ordinary to be necessarily involved in the finding.

"A somewhat wider question than that to which the Lord Ordinary has now addressed himself was elaborately discussed before him. It was maintained by the defenders that a distinction exists in the law of Scotland between the consequences of divorce for wilful desertion and those of divorce for adultery; the distinction being, that whereas in the former case the statutory result is, 'that the party offender tyne and lose their tocher, and *donationes propter nuptias*,' the common law result in the other case excludes the loss of tocher, which the offending husband is permitted to retain. This, it was said, was fixed by the well known case of *Justice* v. *Murray*, 13th January 1761, Mor. 334, of which the rubric is the following:—'A wife obtaining a divorce for husband's adultery has right to her jointure as if he were dead, but she cannot demand back her portion.' The provision of £5000, payable to David Baird Hope Johnstone six months after Colonel Grierson's death, the defenders contended, was to be regarded as proper tocher, and to be considered as not forfeited by the decree of divorce. The somewhat startling result is, that supposing no assignment to have been granted at all, David Baird Hope Johnstone, the adulterous and divorced husband, would be now entitled to claim for his personal benefit the whole sum of £5000 from the estate of his wife's father.

"The Lord Ordinary participates in the doubts expressed by a very weighty authority (Mr Ivory, in his notes to Erskine, 1, 6, 48) as to whether the alleged distinction can be held authoritatively settled by this case of *Justice* v. *Murray*, in which the Court pronounced successive judgments directly in the teeth of each other. It would be difficult, as the Lord Ordinary thinks, to discover satisfactory reasons for holding the legal penalty imposed on wilful desertion to be more severe than that imposed on adultery, which is desertion and a great deal more. On the other hand, a decision of the Supreme Court which has stood without any opposite judgment for more than a century is not to be lightly set aside. But it appears to the Lord Ordinary that all difficulty is removed in the present case by the consideration that the sum of £5000 now in question does not possess the legal character in the *dos* or tocher to which the judgment of the case of *Justice* v. *Murray* was made applicable. What was considered in that case to be *dos* or tocher was a sum of money *paid down to the husband in cash at the date of the marriage*. The action in that case was an action at the wife's instance for restitution of a sum of money which had been so paid. The whole argument proceeded on the supposed difficulty or hardship of forcing back from the husband money which had been actually paid, and was constructively spent by him in marriage charges. There is no question in the present case as to repetition of any sum of cash paid to David Baird Hope Johnstone at the date of the marriage. The question on this branch of the case is, whether David Baird Hope Johnstone is entitled, after being divorced for adultery, to claim from the estate of his wife's father a sum of £5000, not payable till six months after the father-in-law's death—an event which might not occur till twenty or thirty years after the marriage—or as many after the adultery. This is an entirely different question from that raised or adjudicated in the case of *Justice* v. *Murray*.

"The Lord Ordinary is very clearly of opinion that, in any question with David Baird Hope Johnstone personally, there would be no legal ground for maintaining that a claim for this sum of £5000 lay at his instance. The Lord Ordinary is of opinion that David Baird Hope Johnstone forfeited by the divorce all legal right to claim this sum, and generally all the provisions made in his favour by the pursuer or her father, saving always the right of his assignees. That gentleman has not appeared personally in the present process to maintain any individual claim; and in regard to him, any judgment is properly in absence. With regard to his assignees in the right to the sum of £5000, who have appeared and litigated, the Lord Ordinary has found other sufficient grounds on which to consider their right to be protected against the forfeiture incurred by the divorce. If the Lord Ordinary be right in his conclusion on this point, the assignees have no interest to press the consideration of the other and larger question."

The pursuer reclaimed.

Fraser and M'Kie for relaimer.

Young and Gifford for respondents.

Lord President—The interlocutor of the Lord Ordinary in this case disposes of two questions, both of great importance, and both attended with considerable difficulty. The first of these questions is, whether a decree of divorce pronounced on 17th March 1865, had the effect of forfeiting certain provisions in the marriage-contract of the spouses, conceived in favour of the husband, Mr David Baird Hope John-

stone? and the second question is, whether, assuming the first question to be answered in the affirmative, that forfeiture affects his assignees?

When David Baird Hope Johnstone and Miss Elizabeth Grierson were married on 25th January 1860, they had not any means vested in them which were presently disposable, but both had expectations. Mr Hope Johnstone was entitled to a share of certain provisions which had been settled in the marriage-contract of his father and mother, and also by certain provisions executed by his father. On the other hand, Miss Grierson was the only surviving child of her father, and, as such, was naturally the heir and successor to him in all his property. In these circumstances, the contract of marriage was prepared, and naturally Mr Hope Johnstone's father, on the one hand, and Colonel Grierson, on the other, became parties to the contract. David Baird Hope Johnstone and his father threw into the common stock in the hands of the marriage-contract trustees all his share in these family provisions I have mentioned, and Colonel Grierson in effect undertook to settle his whole fortune on the spouses and their issue. The provision on the one side, to Mr David Baird Hope Johnstone, it was contemplated, might become payable to the trustees as soon as Mr Hope Johnstone of Annandale died, and as soon as that took place, the trustees, on getting payment "of the foresaid provisions and sums of money payable to the said David Baird Hope Johnstone under the contract of marriage and bonds of provision above recited, and hereinbefore assigned to said trustees, shall pay £2000 of said sums to the said David Baird Hope Johnstone, or to his assignees, and invest the remainder, and pay the interest as annual produce thereof, in manner after specified." That is the way in which the contract on the husband's side was disposed of. And on the other side, Colonel Grierson undertook that on his death his whole estate should be put into the hands of the trustees, and £5000 should be paid out of the same to Mr David Baird Hope Johnstone. The marriage-contract was dated two days before the marriage, and it would appear that the marriage subsisted for about five years, until 17th March 1865, when decree of divorce was pronounced in an action at the instance of the wife against the husband on the ground of adultery.

In consequence of this decree of divorce, Colonel Grierson and his daughter executed a deed of revocation on 26th April 1865, by which they revoked all the provisions conceived in favour of David Baird Hope Johnstone in the marriage-contract, and that revocation was duly intimated to the trustees under the marriage-contract. In November of the same year Colonel Grierson died. The assignations which are founded on by the defender all bear date in the interval between the date of the marriage and its dissolution by divorce in March 1865—all made therefore during the subsistence of the marriage, and during the life of Colonel Grierson.

These appear to me to be all the facts necessary to keep in view in determining the effect of the decree of divorce on that particular provision of the marriage-contract with which we have to deal, I mean the provision of £5000 to David Baird Hope Johnstone, to be paid out of the means and estate of Colonel Grierson.

It is very important to notice, in the first place, that this is a provision which, during the life of Colonel Grierson, stands entirely in the form of an obligation to be fulfilled after his death. It is therefore not only not an obligation of present payment, but not an obligation which can receive effect till the death of Colonel Grierson. And, as will be seen hereafter, it is in some degree contingent even beyond that, because the performance of the obligation at all is dependent on Colonel Grierson leaving sufficient means to discharge it. The first question therefore is, whether this is a provision of a kind that is forfeited by the husband when he is divorced for adultery? I am of opinion that it is. It is certainly not of the nature of tocher, in the proper sense of the term, of a sum of money paid down within a certain definite time in consideration of the marriage, and therefore it does not depend on the law of the case of *Justice* v. *Murray*. It is a *donatio propter nuptias*, one of those gifts by settlement very frequent in marriage-contracts, and which, not being properly tocher, are held to be forfeited by the guilty parties when the marriage is dissolved by divorce for adultery. So far, therefore, I agree with the Lord Ordinary.

But there remains the second and more difficult question, whether the husband's assignees are affected by this forfeiture.

It seems that almost immediately after the marriage, David Baird Hope Johnstone borrowed money, and it is said he borrowed it very much on the credit of this provision. That is, perhaps, not quite accurate, for, if I understand the matter rightly, these assignations assigned the £2000 out of his own expectancy as well as the £5000. In one case, at least, there was superadded a cautionary obligation by Colonel Grierson and Mr Hope Johnstone of Annandale. That circumstance of Colonel Grierson being a party to one of these assignations was founded on to show that this £5000 was necessarily meant as a present fund of credit to Mr David Baird Hope Johnstone, and it was thought to go a long way to interpret the marriage-contract, in showing the intention of parties in making this provision as being a clearly vested estate in David Baird Hope Johnstone, assignable for onerous causes; and therefore these assignations ought not to be defeated by any subsequent act on the part of Mr Hope Johnstone. I attach no importance to the circumstance that Colonel Grierson was a party to the assignation. He was a party because his obligation as cautioner was required by the creditor, and no one doubts that the provision of £5000 vested in the husband an assignable interest; and therefore that Colonel Grierson should be a party to what was assignable in law, goes little way to settle the question.

Now, it is not at all necessary to inquire too curiously whether there was an absolute vesting as of a right of fee in David Baird Hope Johnstone as regards this £5000. There are some considerations very obvious on the face of the marriage-contract that would lead to the opinion that there was no present right of fee in David Baird Hope Johnstone, but I do not desire to be understood as resting my opinion on that consideration. It does not much matter whether a right of fee had vested in David Baird Hope Johnstone or not. It is necessary to attend to the nature of the provision, and the way in which alone it could become payable to the party in whose favour it was conceived. Colonel Grierson came under this obligation; under reservation of his own liferent, and under burden of his debts and legacies to a small amount, he "assigns, dispones, conveys, and makes over from him, his heirs and successors, to and in favour of the trustees, for the ends, uses, and purposes hereinafter-mentioned, all and sundry lands and heritages, goods

and gear, and in general the whole property, means, and estate, heritable and moveable, of every description, and wherever situated, presently belonging or that shall pertain or belong to him at the time of his death;" in short, the whole estate of which he shall die possessed. And then, in disposing of this, the trustees are thus directed — "Upon the death of the said William Grierson, the said trustees shall, without any undue delay, realise and convert into money such of the property and estates hereby conveyed by him and by the said Margaret Elizabeth Grierson as shall not consist of heritage—at least of the lands after mentioned—and shall, within six months after the death of the said William Grierson, pay therefrom, or from the heritable estate, if the moveable estate shall be insufficient, to the said David Baird Hope Johnstone, or to his assignees, the sum of £5000, and shall invest the remainder," &c.

The provision then is, that out of the estate to be left by Colonel Grierson, and to be taken by the trustees, they shall pay £5000 to the said David Baird Hope Johnstone, or his assignees. It occurs for observation, in the first place, that if the words *or his assignees* had not been there, the right and interest of David Baird Hope Johnstone would nevertheless have been assignable. Of that there can be no doubt, and that without regard to whether there was a present right of fee in David Baird Hope Johnstone, or only an expectancy. Any interest, however contingent, is assignable, but of course the right of the assignee depends on what is the right of the cedent, and the assignees will be exposed to all the contingencies to which the cedent would have been exposed, if he had not sold or conveyed his rights.

But great stress was laid on the introduction of these words *or his assignees*, as importing something more than would have been imported in this deed if the words had been absolute. It is said that they show the intention of all the parties that this right should be presently assignable. The Lord Ordinary thinks that whatever be the nature of the right of the husband immediately on the marriage being celebrated, at all events he had a faculty or power of assigning; by which I understand him to mean that he had conferred upon him a right to give to his assignee something of a fuller or more available right than he had himself. In short, that he stands in the position of a party having a right given to him in the event of his surviving a certain term, or in some other contingency, but with an absolute power of disposal in the meantime. I know no example of words such as here, having that meaning. It rather appears to me, that when a right is conceived in favour of a party and his assignees, or a party *or* his assignees, which, without mention of assignees, would still have been assignable, the expression of that does not alter the nature of the right. That appears to me to be a general clear rule of law applicable to such questions of construction, and it remains to be seen whether there is anything here to give it a different effect? I confess I think not. I think the introduction of the words very natural in the circumstances. There is no doubt that this right was assignable whether vested or not vested, whether presently available or only a hope of succession. And therefore to give it to David Baird Hope Johnstone or his assignees, appears to me to be very natural and obvious language of conveyancing, and it is an unnaturally forced construction to say that the words *or to his assignees* make the right anything better or worse than without them.

But then, abstracting this specialty, there is the general question—whether, if a provision be conceived to a husband in a marriage-contract, and that provision be of an assignable nature, and be assigned *stante matrimonio*, the subsequent forfeiture of that provision by the husband being divorced for adultery destroys the right of his assignee, who has acquired the right during the subsistence of the marriage?

This cannot be said to be decided by any express authorities, but it appears to me that according to all legal principle applicable to cases of this kind, the forfeiture by the husband must affect the assignee. A provision of this kind is in certain cases defeasible, and one of these cases is that the husband shall be divorced for adultery. That is a rule of law. It does not require to be expressed in a contract, but is as fully operative as if it were expressed; and therefore any creditor lending his money on the faith of a marriage-contract provision, must be held to kuow that that marriage-contract provision is liable to be defeated by adultery committed by the party in whose favour it is conceived, followed by decree of divorce. I cannot think it would be in accordance with legal principle that this forfeiture could be avoided, by any party who was conscious of the guilt of adultery, before decree of divorce assigning away a right which he knows he has forfeited. That would tend to defeat the rule of law which forfeits such a provision, and there is nothing in our law applicable to this species of forfeiture, or to the law of assignation, requiring this result. The rule that an assignee has no higher right than his cedent is applicable to this case. I therefore differ from the Lord Ordinary, and think that this provision was forfeited by the decree of divorce affecting the assignees as completely and effectually as it affected the husband himself.

Lord Curriehill—This is a very important question. I have come to the same conclusion as your Lordship, and as the grounds on which I have come to that opinion are the same as those which have been stated by your Lordship, I need not repeat them. The case, in my opinion, may be summed up in three propositions:—1. This was a *donatio propter nuptias*. 2. It is by law itself an implied condition of that *donatio* that the right of the creditor may be resolved in the event of the party being divorced for adultery. 3. The contingency has occurred in which that implied resolution takes place.

Lord Deas—This case involves two questions—(1) whether this provision of £5000 was forfeited by the husband; and (2) if so, whether it can be exacted by the husband's assignees? I am clearly of opinion, with your Lordship, that the provision was forfeited by the husband. In the case that was formerly before us on 5th February 1867, I had occasion to narrate what appeared to me to be the import of that contract of marriage, and likewise to state the grounds on which I thought the provision then in dispute was to be dealt with as a *donatio propter nuptias*, although it flowed not from one of the spouses to the other, but from the parent of one of them, and I need not repeat what I then said. On that point, also, the Lord Ordinary agrees. He holds, as your Lordships do, that this was a *donatio propter nuptias*. I do not rest my opinion, on that point, any more than your Lordship does, on any

peculiarity in the phraseology of this provision raising a question of vesting or not vesting. The estate of the father of the bride was vested in a certain sense in the trustees for the purposes of the marriage-contract, but subject to the conditions of that contract—these conditions implying, among other things, that that estate was to consist of what the father of the bride left. But I do not rest on that, but take it on the footing of *donatio propter nuptias*, the right to which had vested contingently in the trustees, with a *jus crediti* in the husband. But I think it was forfeited by the husband.

But the second question is an important one, Whether it can in the circumstances be exacted by these assignees? There was a great deal bearing on that question in the previous case, and I had there occasion to state the grounds on which I held that the provision there in question could not be exacted by assignees any more than by the husband himself. Much of what I said then applies in this case, and I need not repeat it. It appears to me, as it does to your Lordship, that if this provision could be exacted by assignees, the object of the law would be virtually defeated. The provision is exigible, if exigible at all, under a mutual contract. By that mutual contract the husband was bound to implement the obligations incumbent on him as much as the father of the bride was bound to implement his; and if the husband broke the marriage-contract, and did not fulfil his obligations—if, in place of living with his wife in the married state, as the service of the church says, "till death us do part," he committed an offence which is by the law of Scotland a capital crime—although the penalty has not of late years been enforced, whether from the number of the parties who would come under it, or from some other ground of expediency—then he broke the mutual contract into which he had entered. It was part of that contract that he should not commit adultery; and when he did commit adultery, and that led to a decree of divorce putting an end to the marriage, he had broken in the most complete manner the marriage-contract into which he had entered. And the result was that, as he had not fulfilled his part of the contract, he could not demand payment of the £5000. Well, then, if, the day after the marriage was entered into, or at any time during the subsistence of the marriage, the husband wished to defeat his obligation, all he had to do, if the assignation was good, was to assign his right to some third party, to keep the money for his behoof, he not fulfilling his part of the contract, but yet getting the benefit of the contract from the other party. The result of holding that there is a right in the assignee to exact a sum which the cedent could not exact, is inconsistent with the whole law applicable to mutual contracts. In the former case which was before us, we had occasion to consider whether the assignees there were bound to know that it was a condition of the contract, that, if the husband failed by dissolution of the marriage, that was a failure which would affect the assignee as well as the cedent. The only difference between that case and this is, that there it was held that the assignee was bound to read these words in the way in which the law would read them, equally as the husband. It might be said that that appeared on the face of the contract, and therefore the assignee was bound to know it, while here it does not appear on the face of the contract, but is an implication of law. But it would come to be a very narrow distinction whether an assignee was bound to construe the words *whom failing* appearing on the face of the contract, and not to give effect to the implication of law. I think he was as much bound to know the one as the other. He was as much bound to know that the husband would by adultery forfeit his right in these provisions, as he was bound to construe the words *whom failing* as we construe them. I do not think the Lord Ordinary differs from all that. He goes altogether on what he thinks are the specialties of this case, and the great specialty is, that the provision is by the words of the contract payable to him or his assignees. Another specialty is, that the fathers of the bride and bridegroom became parties to one of these assignations, and the Lord Ordinary thinks the provision was to be a fund of immediate credit to the husband. I do not think there is anything in either of these specialties. A thing payable to a man is payable to his assignees, whether mentioned or not. The mention of heir or assignee makes no difference in the right, more than if they are not mentioned at all. Besides, this provision was assignable. There is no doubt of that. The contingent right was assignable, but it was assignable subject to all those conditions which might destroy it; subject to this, that the father of the bride might die leaving nothing, and subject also to the condition of forfeiture by the husband in the event of his failure to perform his part of the contract. As to their becoming parties to the assignation, I find that what took place is this—the fathers of the parties became in the first part of the deed cautioners for the debt. The first part is simply a personal bond for the debt, and might have stood alone, without any assignation at all. Accordingly, when the deed goes on to convey this provision in security, there is nothing about the fathers of the parties in that part of the deed. They are cautioners in the personal obligation, and then the husband assigns his right in farther security. There is no doubt that he was entitled to do that, but that does not touch the question. If this form of the assignation had any effect, it would be all the other way, for the fact of the two cautioners shows rather that the creditor did not rely on the husband for his debt, but chose to take cautioners, and very wisely, for as far as we see he will get payment, while the other creditors will not get any.

The only other observation I have to make is that it is not necessary for me to consider what becomes of this £5000, whether it was forfeited to the father of the bride, or whether it would have fallen into the fund to go to the children of the marriage. The question would have arisen if there had been children of the marriage, but there are none. It is sufficient for this case (1) that this provision was forfeited by the husband, and (2) that that forfeiture attaches equally to his assignees.

Lord Ardmillan—I am very clear that this provision in the marriage-contract was a *donatio propter nuptias*. It is not tocher, and I carefully abstain from giving any opinion as to what would be the law if it were proper tocher. This provision being a *donatio propter nuptias*, I have no doubt that it was forfeited by the decree of divorce for adultery, as regards the party against whom the decree was pronounced. But another and more nice question arises as to the effect of this on the assignee. I do not think that the expression *or his assignees* is of much moment. I assume the provision to be assignable independently of these words. But it was assignable only subject to all its essential qualifica-

tions and conditions. The general rule of law, *assignatus utitur jure auctoris*, is followed by the corollary *resoluto jure dantis resolvitur jus accipientis.* The one follows the other, unless there is some special reason why that should not be the case. I am clear with all your Lordships that the conditions and qualifications imposed by public law are to be held as impressed on every contract. No man can be heard to say that a provision in a marriage-contract is not qualified by a condition imposed by public law; and this assignation is as much subject to the condition as if that condition had been expressed in terms in the contract. On the whole case I agree with your Lordships, that this provision was forfeited by the husband, and that by that forfeiture the right of his assignees was destroyed.

Agents for Pursuer—Jardine, Stodart, & Frasers, W.S.

Agents for Defender—Hope & Mackay, W.S., and John Galletly, S.S.C.

Friday, February 7.

FIRST DIVISION.

M'ALLISTER *v.* MANN.

Summary Diligence—Promissory-note—Consideration—Charge—Suspension—Sale. Circumstances in which *held*, that summary diligence on a promissory-note in which the complainer was co-obligant was incompetent, the note not being granted for a debt due, but in consideration of a sale and conveyance of certain subjects, and it being clear that the counterpart of the obligation could not now be carried through.

James M'Allister, jeweller in Glasgow, presented this note of suspension against John Mann, C.A., Glasgow, factor for the trustees of the Glenarm Whiting Company, craving suspension of a threatened charge on a promissory-note granted by the complainer and Hugh Donaghy. The following issues were proposed:—

"1. Whether the promissory-note, No. 31 of process was granted by the pursuer, and received by the defender as factor for the trustees of Hugh Donaghy, Glenarm, Ireland, in part payment of the price of the Glenarm Whiting Works, sold by the defender as factor foresaid to the said Hugh Donaghy, and upon the condition that the said works should be conveyed to the said Hugh Donaghy so as to enable him to give a security to the pursuer over the same: Whether the defender as factor foresaid, or the said trustees, failed to implement said condition: And whether the defender has wrongfully threatened to charge the pursuer to make payment of said promissory-note.

"2. Whether the said promissory-note was granted by the pursuer, and received by the defender as factor foresaid, in part payment of the price of the said works, sold by the trustees, or the defender as factor foresaid to the said Hugh Donaghy: Whether the said trustees, or the defender as factor foresaid, retained possession of the said works, and refused to convey the same to Donaghy: And whether the defender has wrongfully threatened to charge the pursuer to make payment of said promissory-note.

"3. Whether the said promissory-note was granted by the pursuer, and received by the defender as factor foresaid, in part payment of the price of the said works, sold by the said trustees or the defender as factor foresaid to the said Hugh Donaghy: Whether during the currency of the said promissory-note, the said trustees sold the said works to Robert Robertson, and allowed him to take possession thereof: And whether the defender has wrongfully threatened to charge the pursuer to make payment of said promissory-note."

The Lord Ordinary (BARCAPLE) reported the case on the issues, with this note:—

"The respondent maintains that the complainer must put expressly in issue the sale of the works by the defender to Donaghy. But the complainer is not seeking to set up the sale. He only maintains that his promissory-note was granted in part payment of the price of the works as sold by the defender to Donaghy. If there never was a completed or binding contract of sale, there is only the more reason why the charge on the note should be suspended, if it was true that it was granted as in part payment of the price of the works. The respondent further maintains, that there must be put in issue a direct undertaking by him to the complainer himself, to convey the works to Donaghy. The Lord Ordinary thinks it is sufficient for the purpose of this suspension, that the issues set forth that the note was granted by the complainer and received by the respondent on the footing set forth in the several issues. The Lord Ordinary thinks that the complainer is entitled to the issues proposed by him, except in so far as the second issue bears that the trustees, or the defender as their factor, retained possession of the works. There does not appear to be any statement to warrant that part of the issue. The complainer originally proposed the case should not be sent to trial, but that he should be allowed a proof. The respondent objected to this course; and, looking to the nature of the case, the Lord Ordinary thought it proper to order issues. The opinion of the Court will now be obtained on this point."

CLARK and W. M. THOMSON for complainer.

PATTISON for respondent.

LORD PRESIDENT—This case was reported to us on issues by the Lord Ordinary, and of course that naturally led us to consider the statements made by the suspender almost exclusively. And, so long as we did that, the case appeared to be a very complicated one. But we have now the written agreement out of which this has arisen; and on reading that, and the statements of the respondent, it turns out one of the clearest cases I ever saw. I think the respondent cannot be allowed summary diligence, but I should not have found that out from the statements of the suspender. The facts may be shortly stated. Donaghy, who was originally tenant of Glenarm Mill, county Antrim, got into difficulties, and executed a trust in favour of the persons represented by Mann, having induced them to take the works on the representation that with a little advance of money the concern could be made profitable. But this turns out not to be the case, and matters became gradually worse, and in March 1865 the trustees found themselves in advance for actual outlay to the amount of £600. In these circumstances, negotiations were opened between Donaghy and the trustees with a view to his recovering the reversion of the lease of the mill—for