

of aliment to be paid to a wife judicially separated from her husband on proof of cruelty.

A wife brought an action of separation and aliment against her husband on the ground of ill-treatment and cruelty. A proof having been led, the Lord Ordinary (JERVISWOODE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel and made avizandum and considered the proof with the record, productions and whole process: Finds, in point of fact, that the defender has been guilty of grossly abusing and maltreating the pursuer, his wife: Therefore finds that the pursuer has full liberty and freedom to live separate from the defender, her husband; and decerns and ordains the defender to separate himself from the pursuer, *a mensa et thoro*, in all time coming: Decerns against the defender for payment to the pursuer of the sum of £40 sterling per annum in name of aliment, payable half-yearly and in advance, at the terms, and in the portions concluded for, with the legal interest of each term's payment from the time the same falls due till payment thereof, but under deduction always of such sums as have already been paid to account of said aliment: Finds that the pursuer is entitled to the custody of Archibald Wotherspoon, a pupil, the only child of the marriage between the pursuer and defender, during the years of his pupilarity, and decerns against the defender for payment to the pursuer of the sum of £10 sterling per annum for the aliment of the said Archibald Wotherspoon, as long as he shall remain in the custody of the pursuer, payable half-yearly and in advance, at the terms and in the portions concluded for in the summons, with the legal interest of each term's payment from the time the same falls due until payment thereof, but under deduction of any sums which have been already paid to account of said aliment: Finds the defender liable to the pursuer in the expenses of process so far as not already paid: Allows an account of such expenses to be lodged, and remits the same to the auditor, to tax and to report."

The sum allowed by the Lord Ordinary as aliment was the same amount as the parties had stipulated for under a voluntary contract of separation.

The wife reclaimed.

PATERSON for her.

J. M. DUNCAN in answer.

At advising—

LORD-JUSTICE CLERK—This is a reclaiming note in an action of separation and aliment by a wife against her husband, and is confined to the question of the amount of aliment awarded to the wife by the Lord Ordinary. The action is founded on the husband's cruelty, which is not now disputed. The amount of aliment has been fixed by the Lord Ordinary at £40, which was the amount provided by a voluntary contract of separation entered into by the parties in 1865.

The husband's income, arising from heritable property, is admitted to amount to £268, besides the interest on the balance of the price of a house, which balance amounts to £250. The total income may therefore be assumed at £278 annually. Taxes and repairs reduce this by £35; leaving the free income £243.

It is said that the husband pays to an unmarried daughter £100 per annum, and £20 to a sister in reduced circumstances. It has been farther explained to us that the wife has an annuity of £30 secured to her from her first husband's estate, and she has also an allowance of £30 a-year from her

husband's trustees for the aliment of her son by her first marriage. This last allowance, however, is precarious in itself, and as her son is now sixteen years of age, must shortly terminate.

No inflexible rule can be laid down in such cases. In the last reported case before this Division of the Court—that of *Lang v. Lang*—it was stated that a fourth of the husband's free income had been usually awarded, and was as near a general measure of liability as the decisions appeared to establish. Every case of the kind, however, must depend on its special circumstances; the husband must not be left unreasonably impoverished, while the wife who has been compelled to separation owing to the ill-treatment of the husband must be fairly and favourably considered.

The allowance given by the husband to the daughter cannot be taken into account as a deduction from his income, although the expense of maintaining her in family must be deducted in the estimate of his available means. The £20 a-year paid to his sister can hardly come into competition with the wife's claim; but the sum in this case does not materially affect the result.

On the other hand, the £30 awarded to the wife by the trustees of her late husband must be thrown out of view, as precarious in itself and temporary in its nature. The annuity derived from her husband's estate is, on the other hand, permanent, and must enter into our calculations.

On the whole, I am of opinion that the sum awarded by the Lord Ordinary is not sufficient, and that an addition of £15 a-year ought to be allowed. The Court award £55 per annum.

The other Judges concurred.

Agents for Pursuer—J. & A. Peddie, W.S.

Agents for Defender—J. & R. Macandrew, W.S.

Saturday, October 30.

OLIVER v. ROBERTSON.

Bankrupt—Caution—Expenses—Personal Exception.

The pursuer of an action became bankrupt and was ordained to find caution for expenses. The cautioner provided ultimately withdrew, whereupon the motion for new caution was renewed by the defender. *Held* (upon evidence that the defender had been instrumental in causing the withdrawal of the first cautioner) that he was barred from maintaining his equitable right to demand caution from the bankrupt.

This case, which was an action at the instance of Andrew Oliver, draper, Kilmarnock, against William Robertson, flesher there, was brought for the purpose of setting aside certain judgments in a cause in the Sheriff Court of Ayrshire. The pursuer some time ago became bankrupt, and was ordained to find caution for expenses. He found caution in the person of a cousin of his own, but the cautioner subsequently intimated his withdrawal. The defender thereupon moved for new caution. This the pursuer opposed, on the ground that the defender had induced the former cautioner to withdraw by approaching him with exaggerated statements of the risk he ran, and had thus barred himself *personali exceptione* from insisting for new caution. A minute having been put in by the pursuer stating the facts, and a letter having been produced from the former cautioner, written at the time of the withdrawal, and giving an account of

his conversation with the defender, the Court, in respect of said letters and the statements made at the bar, held that there was enough to show that the defender had induced the original cautioner to withdraw, and that was an illegitimate proceeding, which must have the effect of depriving the defender of his equitable right to demand caution from the bankrupt.

Counsel for Pursuer—G. H. Pattison. Agent—James Somerville, S.S.C.

Counsel for Defender—Orr Paterson. Agents—J. & A. Peddie, W.S.

Tuesday, November 2.

FIRST DIVISION.

SPECIAL CASE—LACY *v.* MORRISON.

Alimentary—Consent—Divorce—Donatio propter nuptias—Liferent—Marriage-Contract—Provision—Revisal. In her antenuptial contract of marriage a lady conveyed to her intended husband the estate real and moveable belonging to her, or that might be acquired by her during the subsistence of the marriage. She was of age, but the contract bore to be with her father's special advice and consent, and was revised by him in draft. Held, that on the dissolution of the marriage by her adultery, the husband was not entitled to a provision made by her father for her aliment and liferent use in his trust settlement previous to the date of the contract, such not being a *donatio propter nuptias*.

By antenuptial contract of marriage between Henry Beatson Lacy, Writer in Glasgow, and Annie Campbell Morrison, daughter of Alexander Morrison of Ballinakill, Writer in Glasgow, dated 10th October 1857, mutual conveyances and provisions were made and obligations entered into. In return for the provisions made by Mr Lacy, Miss Morrison, who was of age, with the special advice and consent of her father, conveyed to herself in liferent,—“seclusive of the *jus mariti* or right of administration of her said intended husband, and not affectable by her own acts or deeds, or the right and diligence of her creditors, or the creditors of her said intended husband,” and on her decease to Mr Lacy in liferent, and under the like conditions, and to the children of the marriage or any subsequent marriage she might make, in the proportions and under the conditions she might specify, the fee of—“all and sundry, the whole lands, means and estate, heritable and moveable, real and personal, now belonging to her, and which she may acquire and succeed to during the subsistence of the said intended marriage, with the rents, interest and profits” other than the provisions made by Mr Lacy in her favour; and reserving to herself power to apportion and restrict to a liferent the interest of her children in these provisions. The draft of this contract was revised by Mr Morrison.

The marriage took place on the 13th of the same month, and was, on 26th January 1869, dissolved by decree of divorce, at the husband's instance, on account of his wife's adultery. Three children were born of the marriage, all of whom survive and reside with Mr Lacy. Hence the question arose, whether Mr Lacy was entitled to a liferent of the interest bequeathed by Mr Mor-

risson to his daughter by a trust-deed and settlement executed in 1849.

By its sixth purpose, the trustees were directed to pay equally amongst his children during their lifetimes, and for their liferent use allanarly, the rent, interest, profit and income of his estate, heritable and moveable, “excluding the *jus mariti* and right of administration of the husbands of such of my daughters as are or shall be married, and declaring that the sums to be payable to my sons and daughters under this provision shall be purely alimentary, and shall not be assignable by them or by the husbands of my daughters, nor attachable for the debts of them, or any of them, and that receipts to be granted by my daughters for the sums payable to them respectively shall be sufficient without the consent of their husbands.” By its seventh purpose, the trustees were directed, on the death of any of the children leaving lawful issue, to pay that child's portion equally amongst the issue at majority or marriage; and until such event to apply the interest, or as much as was necessary, in their maintenance and education.

These provisions Mr Morrison declared were to be in full satisfaction of legitim or any other claims, legal or conventional, to which his children might be entitled. He died on 18th April 1860.

FRASER and WATSON, for Mr Lacy, argued—The daughter being *sui juris*, her father's consent was not necessary to validate her obligations. His revisal of the draft of the contract was equivalent to a draft by himself. As he was a consenting party to the contract, it is evident that the parties had his trust-settlement in view. The provisions of the contract therefore control the provisions of the settlement. By the contract Mr Lacy takes liferent of his wife's provisions if he survive her. Divorce is equivalent to dissolution of the marriage by death of the guilty party. Authorities—*Buchan*, M. 6528; *Beattie v. Johnstone's Trustees*, 7th Feb. 1868.

SOLICITOR-GENERAL and M'LEAN, for Mrs Morrison, and MACDONALD, for the trustees, were not called on.

The Court unanimously held that Mr Lacy had no right to what came to Mrs Morrison under her father's trust-settlement. The provision in it was purely alimentary and personal, and for her liferent use allanarly; and it was not in her power, therefore, to substitute another person for herself. It was not a *donatio propter nuptias*, but made by a testamentary disposition that could be revoked at any time; and, not being a provision in consideration of marriage, it did not come under the rule that such is forfeited by the divorced party. At her death the fee was to go to her children, and there was no liferent of it to her husband.

Agents for Mr Lacy—Murray, Beith, & Murray, W.S.

Agents for Mrs Morrison—J. & R. D. Ross, W.S.
Agents for Trustees—Campbell & Smith, S.S.C.

Friday, November 5.

GLASGOW JUTE CO. *v.* CARRICK.

Appeal—Dean of Guild Court—Feu Contract—Reservation—Stipulation—Superior. In the feu-contract of each of several feuars, it was stipulated that a street should be formed in a certain direction and position. Held (1) each feuair was entitled to enforce the stipulations