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 Morrison 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 allenarly, 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 allenarly; 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 feuar was entitled to enforce the stipulations

of the feus against the others: (2) any reservation by the superior of power to have the street made only when, and as far as, he thought proper, was inseparable from the right of superiority: and (3) such reservation could not be enforced by him after the last feu had been given out.

On 18th January the Glasgow Jute Company presented a petition in the Dean of Guild Court for warrant and decree of lining. To this petition Mr Carrick, Master of Works in Glasgow, offered no opposition; and on 21st January they got the decree prayed for. On 2d February Mr Ure, a conterminous feuar, lodged a petition, asserting his interest, craving to be sisted in the process and praying for recall of the interlocutor of 21st January. In his petition he questioned the statement made by the Company of their boundaries. They had asked leave to erect for temporary purposes a one-storey brick building on ground which, they alleged, belonged to them, and was surrounded on all sides by their buildings. Mr Ure, however, challenged production of their titles, alleging that he and they were feuars of the same superior; that the ground they proposed to occupy was part of a street which it was stipulated in the feu-contract of every feuar was to be formed there; and that the street had in reality been left open—though not causewayed and paved—lined with gas-lamps, and used for two years. He also said that their predecessors, Messrs W. & J. Fleming, who obtained the feu in 1863, had that same year made the same claim as the company now made, and been refused.

Mr Ure was sisted as a respondent in the process along with Mr Carrick. The Company replied, that the building had been erected; that it occupied the site which previously had been occupied by a large reservoir: that Mr Ure was not a conterminous proprietor; and that though the common superior, Mr Hozier, had stipulated for the formation of a street to be called Graham Street, which was to stretch between the feus along to Baltic Street, he had agreed in the feu-contract of the Flemings not to carry Graham Street nearly the whole length at first stipulated.

On 31st March the Dean of Guild recalled the interlocutor complained of and refused the petition for lining. The Company appealed; and on 26th October the papers were boxed to the First Division.

SOLICITOR-GENERAL and MACLEAN, for the appellants, argued—The respondent has no interest to go along the street further than the access to his own property. Graham Street never was a thoroughfare, and never could be, till Baltic Street was formed; and Baltic street was only formed in 1863. Mr Hozier is the only one entitled to insist on the opening of this street; and even he can't enforce it. Causewaying and paving is the test of the real formation of the street. Authorities—*Carson, &c.* v. *Miller*, 13th March 1863; *Trustees of Free St Marks* v. *Taylor's Trustees*, 26th January 1869.

CRICHTON (who was not called on) and DEAS for the respondent, replied—Each of the feuars has a *jus quæsitum* to enforce the conditions of the feus against the others. The stipulation is in the titles of both parties. The superior, having given each feuar this right, was not entitled to withdraw it without the consent of them all. The question is not merely one of servitude, but one of common interest. Authority—*Mackenzie* v. *Carrick*, 26th January 1869.

At advising—

LORD PRESIDENT—I think the Dean of Guild has done rightly in refusing this authority to build. The ground in question is one that formerly belonged to a Mr Hozier, and has been gradually feued out to various feuars. His intention was to have a street called Baltic Street and one called Graham Street, running at right angles to it from the Dalmarnock road; and most of the feus had been occupied before the appellants acquired their feu. The question is, whether there is in the titles of the feuars a sufficient obligation to compel the making of this street? I think there is. The first title we have of the appellants describes their feu as bounded by the middle of Graham Street on one side, and by Mr Ure's feu on another; and it conveys the feu under the reservations, conditions, &c., contained in the several feu-contracts of the ground in the neighbourhood.

Now, I cannot entertain the slightest doubt that when such obligations are inserted in the titles of the feuars each feuar is entitled to enforce what is in his neighbour's titles, and that they are thenceforth to have a common interest. It is the way in which such obligations amongst feuars are most commonly formed. This is well illustrated in the recent case of *Mackenzie* against *Carrick*, also a Glasgow case.

In that case it was held an encroachment on the common interest of the feuars for one of them to build a bridge across the street to his buildings on the other side. But there is in the feu-contract of Mr Ure a declaration in these terms:—"Declaring that the said Robert Ure and his foresaids shall be obliged to leave open and free of building or other obstruction sufficient space for the completion of the foresaid streets, and he and his foresaids and the ground hereby feued shall be liable for and burdened with the expense of causewaying and paving the one-half of the foresaid streets, so far as bounding the piece of ground hereby feued, and of maintaining the same in sufficient repair in all time coming, and which streets shall be so causewayed, paved, and formed whenever required by the said James Hozier, or his heirs and successors, and shall be mean and common to them and their feuars and tenants, and to the said Robert Ure and his foresaids, but which streets shall not be laid open till, nor carried farther through the said James Hozier's lands than, he thinks proper."

But I think this a reservation personal to the superior, and that cannot be transmitted by him. Also the formation of these streets depends upon the extent of the feuing. If ground remain in use for agricultural purposes, it is the superior's interest not to open up the street further than the feuars need. But when it is feued, it is his interest to have the street formed as early as possible. But none of the feuars can found upon this reserved power of the superior.

There was in the feu-contract of 1863 with the Flemings a declaration on Mr Hozier's part of his willingness to abandon his right to have this street formed. The extract says—"Declaring that the said James Hozier hereby consents, in so far as he is concerned as superior, that the street of 40 feet wide, called Graham Street, which was intended to be continued to Baltic Street, shall be abandoned and given up to the extent of that part of it which is bounded on both sides thereof by the properties presently belonging to the said W. & J. Fleming & Company, being from the north-western corner of the ground some time ago feued by the said James Hozier to Angus Buchanan, metal-refiner in Bridgeton, and now belonging to the

said second parties, and to the effect that, as in right of the said first party, in so far as the keeping closed or opening up of the said street is concerned, the said second parties may either keep the same closed or opened up to the extent foresaid at their own convenience; but it is hereby provided that the said James Hozier, by thus giving his consent to discontinue and abandon the said street to the extent and effect above mentioned, shall not be involved in any dispute or incur any responsibility by his doing so, and of all questions relating to which the said second parties hereby agree to relieve the said James Hozier and his foresaids."

The latter part is an attempt to transfer to one of the feuars a right reserved to the superior. It may be incorrect to call that right personal to the superior or intransmissible; but I think it was one that accompanied the right of superiority, and could not be separated from it. All this agreement is valid for is, that the other parties to the contract could enforce it against Mr Hozier.

This is not even as if it had occurred at the beginning of the feuing, or at the giving out of the last of the feus when he might have attempted to give the power of building up the street to the feuars. I don't say he could do it. But had he given it to the appellants it would have been a transference of the *dominium utile* of that part of the street to them. And the *dominium utile* had gone from him in the deed of 1863. I therefore think this appeal must be refused.

LORD DEAS—I entirely agree with your Lordship. It must be first carefully noted that this is not a case of servitude. It is one in which the feuars have either a right of common property in the street to be formed, or at least a common interest; and this last would be sufficient. It is just like the interest of parties in a common stair. I think here it comes up to a right of common property. The opening of this street was to be inserted in the infeftment of every feuar. It was, therefore, a condition of his right. The terms of right as to this street in the feus are the same as those in regard to the common drain and common sewer. And I think the superior has just as much right to shut up the one as the other.

LORD ARDMILLAN—I concur with your Lordships. The superior could not by a deed, granted after all the lots were feued, subvert the relative rights of the feuars.

LORD KINLOCH—I have arrived at the same result. This abandonment of Graham Street in the deed of 1863 was quite invalid. Every feuar had a right to maintain and keep open Graham Street. As soon as Mr Hozier had no unfeued grounds in that street his power over the street's formation was gone.

Agents for the Appellants—Maconochie & Hare, W.S.

Agents for the Respondents—Duncan, Dewar & Black, W.S.

Saturday, November 6.

SMITH, PAYNE & SMITHS AND OTHERS *v.* RISCHMANN.

Bankruptcy Acts 1856 *and* 1860—*Expediency—False name—Majority—Recal—Sequestration.* Under the Bankruptcy Act of 1856 a sequestration cannot be recalled on a petition within forty days, unless it was obtained by the bankrupt under a false name and without the knowledge of his creditors. And under the Act of 1860 it cannot be recalled on a petition within three months, unless an absolute majority of the creditors reside in England or Ireland, and the Court is satisfied of the expediency of the estate being administered under the bankruptcy laws of England or Ireland.

Rischmann carried on business in London as a hop-merchant from about 1854 to 1869 under the name of Louis Rischmann. On 8th January 1869 he left London and came to Glasgow, and remained there, as he alleged, seven weeks. Having thus acquired a domicile sufficient for jurisdiction, he presented a petition for sequestration in this Court under the name of Philip Ludwig Rischmann, with concurrence of his mother-in-law, Mrs Susan Wheeler, No. 7 Albion Road, Milton, next Gravesend, County Kent, a creditor to the requisite amount. In the notice of his sequestration in the Edinburgh and London Gazettes the name inserted was Philip Ludwig Rischmann. This he said was his true name. But the creditors asserted that it was not known to them, and that he used it solely to conceal his identity from them. They further alleged that he had described himself as factor and general agent, and that none of the creditors were resident in Scotland, and most of them out of Great Britain and Ireland.

By sections 31 and 32 of the Bankruptcy Act of 1856 it is provided that a petition for recal of a sequestration may be presented at any time within forty days after the date of the sequestration or the advertisement for payment of the first dividend; or at any time, if by nine-tenths in number and value of the creditors. And by the 2d section of the Bankruptcy Act of 1860 it is provided that in any case where sequestration has been awarded in Scotland, the deliverance may be recalled upon a summary petition, presented within three months after the date of the sequestration, if it be shown that a majority of the creditors in number and value reside in England or Ireland, and that from the situation of the bankrupt's property or other causes, his estate ought to be administered under the bankrupt laws of England or Ireland.

Under these circumstances Messrs Smith, Payne, & Smiths, bankers, London, and Louis Desiré de Marneffe, merchant, Alost, Belgium, presented a petition for recal of the sequestration.

The Lord Ordinary on the Bills (MANOR) refused the petition.

The petitioners reclaimed.

SOLICITOR-GENERAL and SHAND, for the reclaimers, argued—The proceedings not having been regular, this petition is competent. Even though the name used by the respondent in the sequestration was his own name, it was not the name under which he carried on business: it was therefore a misdescription. He cannot plead the 31st section, as he did not comply with the directions of the statute in obtaining the sequestration. De Marneffe got no notice by letter. The sequestration is a nullity. It is competent for the Court to recal it. The Act means, by "majority," the majority of the creditors in the United Kingdom. There are no creditors in Scotland. The first question is—Is it a Scotch sequestration? Authority—*Moses* v. *Gifford*, 4 Macph. 1056.

DEAN OF FACULTY and PATTISON, for respondent, replied—The petitioners Smith, Payne & Smiths get notice by letter on 29th March. The matter