and the facts so adduced are now sought to be made available as evidence of a plea of either sole fault or contributory fault on the part of the pursuer.

The defenders are undoubtedly to blame for the manner in which the case was laid before the jury, and it is entirely their fault for not pleading a defence upon which at the trial they came ultimately to rely. Upon these grounds I do not see how we can deny the pursuer the benefit of a new trial.

LORD MURE concurred.

LORD SHAND—I am entirely of the same opinion. I think that it is quite sufficient to warrant us in granting a new trial that the averments which the defender made as to the way in which the accident occurred were misleading, and that at the trial an entirely new case was made out from the defence stated upon record.

As no notice was given to the pursuer of the points upon which it is now alleged that the jury ultimately decided for the defenders, I do not see how we can refuse the pursuer the remedy which he seeks.

LORD LEE concurred.

The Court made the rule absolute for a new trial.

Counsel for Pursuer—M'Kechnie—Shennan. Agent—John Gill, S.S.C.

Counsel for Defenders—D.-F. Macdonald, Q.C. —Readman. Agents—Maconochie & Hare, W.S.

Thursday, October 30.

FIRST DIVISION.

BLAIR (OFFICIAL LIQUIDATOR OF THE GREENOCK PROPERTY INVESTMENT COMPANY) *v.* M'CLURE AND CAIRD.

Public Company — Liquidation — List of Contributories—Fraud—Reduction.

In the liquidation of a building society under the Companies Acts, A objected to a motion by the liquidator craving that his name be settled on the list of contributories, on the ground that he had been induced to accept a transfer of his shares by false and fraudulent representations upon the part of the officials, to the effect that no liability attached to them, whereas it now appeared that they were borrowing shares, and that his name was to be entered on the list of contributories in respect of them. *Held* that before A could successfully resist the motion of the liquidator, the deed of transfer must be set aside by an action of reduction.

Counsel for Liquidator — R. V. Campbell. Agent—W. B. Glen, S.S.C.

Counsel for M'Clure and Caird — Graham Murray. Agents—Smith & Mason, S.S.C.

Friday, October 31.

FIRST DIVISION.

[Lord Lee, Ordinary.

AULD *v.* AULD.

Husband and Wife—Divorce—Divorce for Desertion—Adultery of Pursuer—Adherence—Conjugal Rights (Scotland) Amendment Act 1861 (24 *and* 25 *Vict. c.* 86), *sec.* 11—*Statute* 1573, *c.* 55.

In an undefended action of divorce for desertion at the instance of a wife against her husband, which action was raised in 1884, it was proved that the defender deserted the pursuer in 1864. During the proof the pursuer admitted that she had a bastard child in 1871. *Held* that the wife's adultery was a sufficient cause for the non-adherence of the husband, and therefore that the action should be dismissed.

The Conjugal Rights (Scotland) Amendment Act 1861, sec. 11, has not changed the law as to divorce for desertion, but has only effected an alteration in the forms of procedure.

Observations on *Muir* v. *Muir*, 19th July 1879, 6 R. 1253, and *Winchcombe* v. *Winchcombe*, 26th May 1881, 8 R. 726.

This was an action of divorce for desertion at the instance of Mrs Janet Young or Auld against her husband R. C. Auld. The action was undefended.

It was proved that the parties were married in 1856, and that they lived together until March 1864, when the defender, who was in difficulties, went to America. After his departure the defender corresponded weekly with his wife for about five months, and enclosed her small sums of money, but subsequent to 1864 the pursuer had no communication from the defender.

During the course of the proof the pursuer admitted that she had had a bastard child in 1871. It appeared from a letter by the defender to his son, which was produced, that the defender knew that the pursuer had this child.

The Lord Ordinary (LEE) on 19th June 1884 pronounced this interlocutor:—"The Lord Ordinary having heard counsel, and considered the proof adduced and whole cause, in respect of the pursuer's confession that she had an illegitimate child seven years after her husband left her, under the circumstances stated in evidence, Finds her not entitled to insist for divorce on the ground of non-adherence: Therefore dismisses the action and decerns.

"*Opinion.*—In this undefended action of divorce on the grounds of adultery, and alternatively of non-adherence, no evidence was offered in support of the first ground of action, and the evidence adduced in support of the second ground disclosed the fact that while there had been non-adherence on the part of the husband for upwards of four years, the pursuer (the wife) had been guilty of adultery.

"The parties were married in 1856. There were children of the marriage. In 1864 the husband left Scotland for America. For five or six months he corresponded with his wife, and occasionally sent her money. But after that he ceased to have any commnuication with her; and in 1873, when his son appears to have written to him, his answer blamed the pursuer for the

separation, and plainly accused her of having had a bastard child.

"I thought it right, when this appeared, to recall the pursuer and ask her the question whether it was true. She admitted that she had had an illegitimate child seven years after her husband left, and about twelve or thirteen years before the action was raised.

"The question is, whether this fact disentitles the pursuer to ask decree of divorce on the ground of non-adherence, and whether it is *pars judicis* to take notice of the fact?

"A few years ago I think that it would have been the universal opinion among Scottish lawyers that in such a position of matters the divorce must be refused. Whether the original offender or not, the spouse who has assumed such freedom from the matrimonial obligations without legal warrant is not in a good case for coming to Court to ask divorce on the ground of non-adherence. Having asserted her independence of legal status, and the obligations which accompany it, she is not entitled to demand that judicial sanction be given to her assumed position.

"But it was contended before me, and with much ingenuity, that recent opinions have recognised a sort of vested right to freedom the instant the four years of non-adherence have come to an end. This contention was rested specially upon the cases of *Muir* v. *Muir* (6 R. 1353) and *Winchcombe* v. *Winchcombe* (8 R. 726).

"An opinion no doubt has been expressed, that if desertion has been maliciously and wilfully persisted in for a period of four years, the pursuer is entitled to her remedy. But I am not satisfied that this opinion was intended to imply that the defender was excluded from stating, as a defence known to the law, the plea that the pursuer had been guilty of adultery. Such a plea in practice was a well-known defence to an action of divorce on the ground of desertion. The case of *Campbell* v. *Campbell* (23 D. 99) was a case in which it was not only stated but sustained; and in my experience it never was doubted that it was a good plea.

"The argument for the pursuer, however, if good, would go to this, that as soon as the four years of non-adherence are concluded the spouse who has right to sue for divorce on the ground of non-adherence has freedom at law to commit adultery. I know no authority for this. My opinion is, that so long as the matrimonial bond is allowed to continue, both spouses are under an obligation to observe it. The husband's desertion will not bar his obtaining divorce on the ground of his wife's adultery (*Donald* v. *Donald*, 1 Macph. 741). Indeed, the words of the statute of 1573 imply that if the alleged deserting spouse can prove a 'reasonable cause' for non-adherence, there can be no divorce; and I cannot see that there is any occasion for proving such reasonable cause until the action of divorce for non-adherence is raised. In short, I think that the action of divorce for non-adherence is founded upon the obligation to adhere, and if that cannot be enforced the action must fail.

"As to the question whether it is *pars judicis* to notice the point, I think that the theory and practice of the administration of the law in questions affecting status impose a duty upon the Judges to take care that status be not changed by their decrees except upon good cause shown."

The pursuer reclaimed, and argued—It was not *pars judicis* to intervene in a question of this kind—*Ralston* v. *Ralston*, January 13, 1881, 8 R. 371. The right to obtain decree of divorce on the ground of desertion vested in the pursuer on the expiry of four years in virtue of the provisions of the Conjugal Rights (Scotland) Amendment Act 1861, sec. 11—*Muir* v. *Muir*, July 19, 1879, 6 R. 1353; *Winchcombe* v. *Winchcombe*, May 26, 1881, 8 R. 726; *Barrie* v. *Barrie*, November 23, 1882, 10 R. 208; *A* v. *B*, May 30, 1868, 40 Jur. 497.

At advising—

Lord President—This is an action for divorce on the ground of adultery brought by a wife against her husband, and is undefended. The Lord Ordinary, by the interlocutor which is now under review, "in respect of the pursuer's confession that she had an illegitimate child seven years after her husband had left her, under the circumstances stated in evidence, finds her not entitled to insist for divorce on the ground of non-adherence."

The parties were married in 1856, and in 1864 the husband went to America. For some short time—about six months I think—he continued to correspond with his wife, and sent her money, but after that there was a complete silence and absence of communication until the raising of this action in 1883. The pursuer in the meantime had given birth to a bastard child in 1873.

Now, before the passing of the Conjugal Rights Act the case would have been quite clear, for no woman who had confessed that she had been guilty of adultery during the period of separation could have obtained a decree of adherence, which was then a necessary preliminary to raising an action for non-adherence, because her adultery would have formed a conclusive defence to the husband. But it seems to be thought that section 11 of that Act makes some alteration on this state of the law. Its terms are these—"It shall not be necessary, prior to any action for divorce, to institute against the defender any action of adherence, nor to charge the defender to adhere to the pursuer, nor to denounce the defender, nor to apply to the presbytery of the bounds, or any other judicature, to admonish the defender to adhere."

The question which has been raised in this action is stated by Lord Fraser in the last edition of his work on Husband and Wife, and is also answered there. His Lordship says—"But the Conjugal Rights Act has abolished the preliminary action of adherence, and as a consequence of this, does it follow that the cruelty of the pursuer towards the defender, or his adultery, cannot be pleaded as a defence to an action of divorce on account of the latter's desertion? It is thought that these defences could still be pleaded, because the Statute 1573 does not give an absolute right to divorce merely because the defender deserts or divests; it is only given when the non-adherence is 'without a reasonable cause,' which the pursuer's adultery or cruelty surely is." I think that the soundness of this view of Lord Fraser is very clearly seen from a consideration of the terms of the Act of 1573, which provides that "quhatsumever persoun or persounis joynit in lauchfull matrimonie, husband or wife, divertis fra otheris companie without ane ressonabill caus alledgeit or deducit before ane judge, and remanis in thair malicious obstinacie be the space of four

yeiris," and then the statute goes on to provide that an action of adherence may be brought, and all other proceedings taken, "and in case na sufficient causis be alledgeit quhairfoir na adherence suld be bot" that decree should be pronounced. It is plain therefore that a reasonable cause may be alleged as a good defence, however long after the commencement of the desertion the act founded on occurred. Therefore, if an action of adherence had been raised in the present circumstances, the fact that the desertion began in 1864 would not preclude the defender from stating that in 1871 the pursuer committed adultery, and that this was a reason why he should not adhere.

I am of opinion that the Conjugal Rights Act did not alter the law, but merely the forms of procedure, by abolishing what in the opinion of the Legislature was an unnecessary preliminary. I think the Act does nothing more, and to hold that the effect of the Act was to facilitate the obtaining of a divorce, as far as the grounds of the action are concerned, would, I think, be to put an interpretation on this statute which we are not entitled to do. I said, I think in the case of *Barrie*, that "the remedy of divorce for desertion is one which is peculiar to Scotland. At least it is unknown in other parts of the United Kingdom, and in the Queen's dominions generally, and care must therefore be taken that it is not stretched so as to be extended to cases to which it is not strictly applicable, the more so because its authority depends upon statute." I feel that very strongly, and I think that if we were to listen to the argument of the pursuer we would be extending the remedy, because it must be observed that what the pursuer's contention amounts to is this, that the mere lapse of four years gives at once a vested right to obtain decree of divorce which cannot be defeated by anything that follows; so that no repentance and no offer to adhere can be listened to, and no misconduct after the four years can be pleaded as a defence. But what would be the consequence of such a doctrine? Not merely that the Conjugal Rights Act gives a vested right to the pursuer whenever she pleases, sooner or later, to raise her action of divorce, but that it gives her also a statutory licence to commit adultery so long as she chooses to delay raising her action. That is a consequence which is extremely startling, and the Court cannot lend its aid to a construction which would lead to such a result. The contention of the pursuer was sought to be fortified by a reference to the opinion of the Lord Justice-Clerk in the two cases of *Muir* v. *Muir* and *Winchcombe* v. *Winchcombe*, to the effect that an offer to adhere after the service of the summons, however serious and sincere, came too late. I do not think that that opinion, even if it were sound, would support the argument of the pursuer. But I take leave to suggest that before that can be received as a true corollary of the alteration of the forms of process by the Conjugal Rights Act the question would require to be very seriously considered. For it would come to this, that the law established by the statute of 1573 has been altered, not as regards the form merely, but also as regards the substance and principle. I refrain from giving any opinion on that point, but this Division had occasion to hear a full and able argument on the question in the case of *Lilley* v. *Lilley*, which was settled; that precluded us from giving any judgment, so that our minds are quite open whenever the question shall arise. Therefore, with all deference, I think that the *obiter dicta* of the Lord Justice-Clerk, though entitled to great respect, do not settle the law.

On the present question I am very clearly of opinion that the pursuer is not entitled to decree.

Lord Mure—The question here turns on the construction of the Act of 1573, which was very carefully considered in the case of *Barrie* v. *Barrie*. The evidence—to entitle to a decree of divorce—must show clearly that the party alleged to have deserted went away without reasonable cause. And in this case I think there is sufficient to show that there was desertion, although the evidence is not strong, and that the desertion was without reasonable cause. The husband here went away in 1864 to get rid of pressing difficulties, and remained away without making and attempt to send his wife money.

On the other branch of the case, whether at the time the action was raised the defender was in malicious obstinacy, there I think the case completely fails. There cannot be a doubt that the pursuer's adultery would have been a good defence under the old law, provided the adultery was committed before the date of the action; and the only question therefore is whether that defence has been put an end to by the passing of the Conjugal Rights Act. I see no reason why this defence should not be pleaded, because it is only the forms of procedure that were superseded by that Act, and on that ground I am not able to read the statute as enacting that a husband should not be entitled to plead that his wife has committed adultery, and therefore that he is not bound to adhere.

I therefore agree that the view which the Lord Ordinary has taken is sound.

Lord Shand — I entirely agree with the opinions which have been now delivered by your Lordships.

Before the passing of the Conjugal Rights Act, the adultery of the spouse seeking divorce on the ground of desertion would have been a complete answer to the action, and I cannot see that any change has been made by that statute.

The argument of the pursuer was mainly rested on the *dicta* of the Lord Justice-Clerk in the two cases which have been referred to. With regard to that I can only say that the question there dealt with was one which did not necessarily arise in the determination of the case, and I think it is one which would require to be very seriously considered. Under the former law, when an action of adherence was brought the defender was judicially called on to adhere, and an opportunity was given, even after the lapse of the four years. If the defender agreed to adhere then the remedy of divorce could not be obtained. It is true that now the action of adherence is abolished, but it is not clear that the substantial rights of the parties are altered by the statute. I think it is a very grave question whether when the action of divorce is brought the privilege does not remain with the defender of saying "I do offer to adhere." We had a full argument on that point in the case of *Lilley*, and the Court then considered it to be a grave one. I am not at present

prepared to say that it is clear that the mere lapse of four years destroyed the defender's right to offer to adhere, and it is not necessary to come to any conclusion on that matter here.

I think it right, however, to say that I concur in the observations which your Lordship has made on the two cases which contain the *dicta* of the Lord Justice-Clerk.

The Court adhered.

Counsel for Pursuer — Ferguson. Agent—Thomas S. Esson, W.S.

Friday, October 31.

FIRST DIVISION.

SPECIAL CASE—THE GOVERNORS OF GEORGE HERIOT'S HOSPITAL AND OTHERS.

Superior and Vassal—Relief—Heir of Investiture—Duly Entered.

The destination in a disposition and settlement made by C was "to the heirs-male of my body, whom failing to the heirs-female of my body, whom failing to G, my cousin-german, and the heirs whomsoever of his body, whom failing to my own nearest heirs whomsoever." G succeeded, and made up his title by decree of general service and charter of resignation, which contained the above destination, omitting the words "whom failing to my own nearest heirs whomsoever." On his entry he paid a composition to the superior. In 1881 G died intestate and without issue, and the sisters of C completed a title to the lands by decree of special service as "nearest lawful heirs-portioners of provision in special of G . . . under and by virtue of the foresaid disposition and settlement of C and titles following thereon." A Special Case was presented to decide whether the superior was entitled to a composition or only to relief-duty, in which the superior admitted that the vassals were duly entered. *Held* that as the vassals were admittedly entered as heirs of investiture no composition was due.

By disposition and settlement, dated 5th November 1851, and registered in the Books of Council and Session 23d June 1856, the late Thomas Carnegy, Esquire of Craigo, gave, granted, disponed, and assigned "to the heirs-male of my body, whom failing to the heirs-female of my body, whom failing to Thomas Macpherson Grant, Writer to the Signet, my cousin-german, and the heirs whomsoever of his body, whom failing to my own nearest heirs whomsoever," *inter alia*, "All and Whole the lands and estate of Nicolson Park" and others belonging to him, situated at St Leonards, Edinburgh.

Mr Carnegy died on or about 12th June 1856, without leaving heirs-male or female of his body, and without altering the said destination, and Thomas Macpherson Grant succeeded to the lands of Nicolson Park under the foresaid destination. He made up his title to the portion of the said lands which was held of the Governors of George Heriot's Hospital by decree of general service "as nearest and lawful heir of provision in general of the said late Thomas Carnegy under the foresaid disposition and settlement," recorded in Chancery on 12th November 1856, and by charter of resignation by the said superiors in his favour, dated 4th December 1856. By said charter of resignation the Governors of Heriot's Hospital gave, granted, disponed, and in feu-farm forever confirmed to and in favour of "Thomas Macpherson Grant, Esquire, Writer to the Signet, and the heirs whomsoever of his body," the portion of the said lands of Nicolson Park, of which they were superiors. The charter bore that the said subjects pertained heritably of before to the deceased Thomas Carnegy, and had been resigned into the hands of the said superiors by virtue of the procuratory of resignation contained in the foresaid disposition and settlement, "in favour and for new infeftment of the same, to be made, given, and granted to the heirs-male of the body of the said deceased Thomas Carnegy, whom failing to the heirs-female of his body, whom failing to the said Thomas Macpherson Grant, his cousin-german, and the heirs whomsoever of his body: To which disposition and settlement and procuratory of resignation therein contained the said Thomas Macpherson Grant has right, either by virtue of the death of the said Thomas Carnegy without heirs, male or female, of his body," or of the foresaid decree of general service in his favour. By instrument of sasine following on this charter recorded on 16th December 1856, Mr Macpherson Grant was infeft in the said subjects. The entry of heirs was by the said charter taxed at a duplicand of the feu-duty, which was 5s. 4½d. per annum, and the entry of singular successors was untaxed. Mr Macpherson Grant paid to the superiors on his entry as a singular successor to Mr Carnegy a composition of £277, 9s. 5d., being a year's rental (consisting of sub-feu-duties), under deduction of the year's feu-duty and burdens. Mr Macpherson Grant died on 23d September 1881, intestate and without issue, and the four surviving sisters of Thomas Carnegy succeeded to the said subjects.

This was a Special Case presented by the Governors of Heriot's Hospital of the first part, and the Misses Carnegy of the second part, for the opinion of the Court upon the following question:—"Are the first parties entitled to a casualty of one year's rent, or of relief-duty only, in respect of the implied entry of the second parties and their said sister?"

The Special Case contained this statement—"The second parties [and their sister Miss Bain, who died before the date of this case] being then the only surviving sisters of the said Thomas Carnegy, and the only surviving issue of the late David Carnegy of Craigo, his and their father, succeeded to the said subjects under the destination in the before-mentioned disposition and settlement by the said Thomas Carnegy. They completed their title by decree of special service as 'the nearest lawful heirs-portioners of provision in special of the said deceased Thomas Macpherson Grant, . . . under and by virtue of the foresaid disposition and settlement of the said Thomas Carnegy, and titles following thereon.' The decr[illegible] of special service