necessary as a cause of granting would now be assumed to have been present as a consideration. The case of *Adamson* v. *Inglis*, November 16, 1832, 11 Sh. 40, establishes this principle, and is a most instructive authority, and apart from that I should be disposed to hold, whatever was the consideration, the ratification was a deed within the meaning of the Act.

The next proposition for determination is whether the heir who ratified can be held to have been three years in possession as required by the Act of 1695? He lived much longer than the three years in apparency, but was he in possession within the meaning of the Act? He never was in the natural possession of the subjects, but it was not necessary that he should be so. If he granted a right to others, he through them would be held to be in possession. This so far is not matter of controversy. Had he granted tacks, or had he drawn rents, his possession could not and would not have been disputed. Nay, more, had he disponed the property on his predecessor's death, he would have been held to have possession through the party predeceasing, on the title which he had granted. This is shown by the decisions in the cases of the *Heir of Kinminity* v. *The Creditors*, July 16, 1756, 5 Brown's Sup. p. 853, and *Yule* v. *Ritchie*, February 10, 1758, M. 5299. In the former case "The Lords unanimously determined that if an heir-apparent for three years possessed lands in the right of his apparency, or *if another possessed them by a right derived from him*, those lands were liable to his debts. The latter case was this—Margaret Miller while she was apparent heir, and before she had been three years in possession, disponed a tenement of land to Ritchie, who entered into possession. Yule, the heir of Margaret Miller, brought a reduction of this disposition as granted by an apparent heir not three years in possession." The defence was that Ritchie's possession must be deemed to be the possession of Margaret Miller, the disponer, so as to make her in the eye of the law to have been three years in possession. And this defence was sustained, the Lords having assoilzied from the reduction. There is no contrary decision, nor have doubts of the soundness of these judgments been expressed by any of our institutional writers. On the contrary, these have been taken as the expression of the law upon the subject, and almost the words of the decision in *Yule* v. *Ritchie* are used by Mr Sandford in his treatise on Heritable Succession, vol. ii. p. 72, in giving his statement of the law upon this subject. It is said, however, that the heir of John Scales granted, not a disposition, but only a ratification of the disposition of his predecessor. That seems to me to be immaterial, if, as I think ~~over~~ the case, the ratification was within the title upon which the widow possessed. This is a reasonable interpretation, and is consonant with the purpose to be accomplished by the statute. It may, therefore, properly be adopted on the present occasion, and that being so, the interlocutor of the Lord Ordinary decerning in favour of the pursuer ought, I think, to be recalled, and the defenders to be assoilzied.

The Lords therefore recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for Reclaimers—D.-F. Kinnear, Q.C. —Rhind. Agent—William Officer, S.S.C.

Counsel for Respondent—Mackay—Napier. Agents—H. B. & F. J. Dewar, W.S.

Thursday, December 15.

SECOND DIVISION.

[Lord Adam, Ordinary.

GRAHAM *v.* GRAHAM.

Husband and Wife—Divorce—Reduction of Decree of Divorce in Absence—Collusion.

A husband having obtained decree of divorce against his wife in absence on the ground of adultery, the latter raised an action of reduction on the ground (1) that her husband had collusively agreed to allow her an annuity of £100 and the part guardianship of their children on condition that she would not defend the action; (2) that the decree was not warranted by the evidence adduced in support of it. The Court, on consideration of the proof, *repelled* the action, on the ground (1) that there was no such agreement proved in point of fact; and (2) that the husband had proved his averments of adultery in the original action.

Divorce—Collusion.

Opinion (*per* Lord Young) that in a case where a husband raising an action of divorce for adultery on grounds which he believed to be true, prevailed on his wife to abstain from maintaining a false defence to this action by offering her a suitable provision, he was not guilty of collusion so as to found an action for reducing the decree.

Competency—Action of Reduction on the Ground of Collusion.

Opinion (*per* Lord Young) to the effect that it was *incompetent* for a wife to found on her own fraud to the effect of raising an action of reduction of a decree of divorce which she and her husband had collusively allowed to be pronounced.

This was a reduction of a decree of divorce pronounced in absence on 31st January 1880. The summons of divorce was raised at the instance of Henry Graham, manufacturer, Langholm, against his wife on the ground of adultery with one Edmund Gordon Johnstone, a manufacturer in Langholm. The action was undefended, and the Lord Ordinary (ADAM) upon considering the proof pronounced decree of divorce as craved.

In the present action, which was raised on the 25th May 1880, Mrs Graham sought to have the above decree reduced, on the ground (1st) of fraud and collusion on the part of her husband, the defender in the action; and (2d) that it was not warranted by the evidence adduced in support of it,

She averred that on the 4th December the defender promised her an annuity of £100 a-year, and at the end of two years, if she conducted herself properly, part guardianship of their children, on condition that she would not defend the action of divorce; and she further averred that this offer was renewed on the 24th December at a meeting which took place between them (her brother being also present) at the Edinburgh Hotel,

Edinburgh. In Cond. 4 she averred — "She handed the defender the said summons, and asked him to read it and to say whether he believed the statements therein contained. The defender read the summons, and replied that he did not believe all the statements. He further stated that he had 'tried to get' a legal separation, but that he was advised it was incompetent. The pursuer thereupon stated that she would defend the action of divorce, but the defender managed to dissuade her from this course by again repeating his promise to give her £100 a-year for life, and to allow her a share in the guardianship of the children. He also held out as an inducement that an undefended divorce could be got without any publicity. He promised that if the pursuer would not defend the action he would not marry again, and that he should continue to correspond with and advise the pursuer through life as if no divorce had been applied for and obtained. The defender had been throughout his married life with the pursuer a man of a hard, jealous, and suspicious nature. He never showed much love or affection for the pursuer, and in consequence the pursuer was not quite opposed to living separately from him. He, however, fraudulently intended, and succeeded by the promises and conduct condescended on, to procure decree of divorce, and he did not intend to keep his promise to the pursuer. The pursuer, relying upon those promises, agreed not to defend, and the defender was thus enabled to obtain the decree of divorce." In Cond. 8 she averred as follows:— "The defender having succeeded in inducing the pursuer not to defend the said action of divorce, a proof was led therein on or about the 31st January 1880. At the proof the defender was represented by senior and junior counsel, with the result that they managed to bring out of the witnesses certain facts of a suspicious nature which, in the absence of cross-examination, counter evidence, and explanation, enabled the defender to convince the Lord Ordinary that the statements in the summons were proved. The pursuer believes and avers that the said statements are not sufficiently proved, and that the evidence led does not warrant the decree that has followed upon it. Besides, the pursuer is prepared to show that the said evidence, so far as it tends to inculpate her, is to a great extent false, and that it is largely exaggerated and susceptible of explanation. The pursuer would have defended the said action of divorce, and would have done so successfully, had she not been prevented by the faaudulent conduct of the defender. The defender, in order to procure the said decree, fraudulently pretended, while he well knew the contrary, that a separation between them was illegal, that he would never marry while the pursuer lived, but would after the said decree was granted correspond with, meet, and advise her as if she was still his wife, well knowing that he did not intend to do so; that he would pay her an annuity of £100 a-year for life, which he well knew that when he got the said decree he never meant to pay the said annuity; and promised her part guardianship of her children — a promise which he never intended to fulfil. Induced by these fraudulent promises and pretensions, and knowing the hard, cold, callous, and jealous nature of the defender, the pursuer agreed not to defend the action. She now finds that these promises and pretensions were made to throw her off her guard so as to deprive her of the status of the defender's wife, and they have done so." On the merits of the case she denied the allegations in fact on which the action of divorce depended.

She pleaded—"(1) The pursuer is entitled to decree as concluded for, in respect the decree sought to be reduced was procured through fraud and collusion on the part of the defender. (2) The decree sought to be reduced having been procured in the absence of the pursuer, she is entitled to have the same set aside, so that the questions between her and the defender may be tried. (3) The statements in the said summons of divorce being irrelevant and unfounded in fact, and the evidence upon which the decree sought to be reduced was procured being unsufficient and untrustworthy, the said decree ought to be reduced, with expenses. (4) Generally, in the circumstances, the pursuer is entitled to decree as concluded for, with expenses."

The defender, on the other hand, averred that at the meeting on 4th December he told his wife that he would never see the mother of his children want, and he promised if she continued to live a temperate and pure life for two years, that he would then give her a document binding his trustees to that effect; that he had mentioned the sum of £100, and that it was understood that that was to be the amount of the annuity. He denied, however, that anything was said about the guardianship of the children, or said or understood about the annuity being conditional on the pursuer's defending or not defending the action.

He pleaded — "(1) The pursuer's statements are not relevant or sufficient to support the conclusions of the summons. (2) The decree of divorce having been pronounced after the libel duly served on the pursuer was found relevant, and proof was led of her adultery, the present action of reduction cannot be maintained. (3) The pursuer having been found of adultery with the said Edmund Gordon Johnstone, is not entitled to decree as concluded for. (4) The whole material averments of the pursuer being unfounded in fact, the defender ought to be assoilzied."

In the proof which was led the following facts appeared as to the pursuer's ground of reduction based on fraud and collusion:—At the meeting of the 4th of December no one was present but the pursuer and defender, and the import of their evidence as regards what was said on the occasion is identical with the pursuer's above averments in her condescendence, and the defender's counter-averments. At the meeting of the 24th December no one was present but themselves and George Bowman, the pursuer's brother. As to what was said on the occasion the pursuer deponed that the defender offered to give her £100 a-year if she did not defend the action, and if she so lived as to be able to prove to him that she had lived entirely a proper life at the end of two years from her leaving home he would give her part guardianship of the children. She further deponed that the defender refused to give her at that time documents binding him to the £100 a-year bargained for as the condition of her non-defence, as he alleged that in that case the decree of divorce would be so much waste paper·

but immediately the decree was signed he would send them. This evidence was corroborated by her brother. The defender denied that anything was said about the guardianship of the children, or understood about the annuity being conditional on the pursuer's defending or not defending the action. The offer to provide for his wife as the mother of his children was only prompted by considerations of pity for her unhappy condition.

The Lord Ordinary (ADAM) having considered the proof, assoilzied the defender from the conclusions of the action.

In a note, in which his Lordship reviewed the evidence at length, he concluded by expressing his opinion that it had been sufficiently proved that the adultery had been committed. Further, he was of opinion that the evidence adduced did not go to prove that any such collusive agreement as was alleged had been made. He said—"If the pursuer had known herself to be an innocent woman, it is difficult to believe that she would have allowed herself to be divorced as an adulteress for an annuity of £100 a-year and the part guardianship of her children. Neither can the Lord Ordinary see that it could benefit her children that their mother should be stamped with that character. Neither had she lived an unhappy life with her husband so that she should desire to live apart from him. Any unhappiness she may have latterly experienced in her married life was the consequence of her own evil habits. The truth of the case appears to the Lord Ordinary to be, that after the pursuer had got amongst her own friends, they had induced her to believe that whatever the truth of the matter might be her husband would be unable to prove it; that subsequently she had acted rashly in leaving her home and abandoning her defence to the action—and hence the present proceedings. On the whole matter, the Lord Ordinary is of opinion that the pursuer has failed to prove that the decree of divorce was obtained by fraud or collusion."

The pursuer reclaimed, and argued—The decree of divorce fell to be reduced (1st) on the ground of fraud and collusion; and (2d) on the ground that the allegations on which the action depended were unfounded in fact. (1) *As to collusion*—The law of Scotland furnished no examples of cases like the present, inasmuch as the oath of calumny required of the parties in a suit of divorce raised in Scotland negatived *sua natura* that there had been any collusive arrangement between the parties to obtain such divorce. It was necessary, then, to look to the law of England for examples. In the case of *Barnes* v. *Barnes*, November 22, 1867, 1 L.R. Prob. Div. 505, it was held that the fact that the husband before and after the institution of the suit had had frequent interviews with his wife, and had then given her money and urged her not to oppose the suit, established collusion. The true test of a collusive arrangement, however, appeared in the case of *Hunt* v. *Hunt*, June 30, 1877, 47 L.R. Prob. Div. and Adm. Div. 22, and was to this effect:—If by an agreement between the parties to a divorce suit, pertinent and material facts which might be adduced in evidence in support of a counter-charge against the petitioner by the respondent or co-respondent be withheld from the Court, such agreement will amount to collusion, even though the suppressed facts might not have been sufficient to establish the counter-charge—Browne's Law and Practice of Divorce and Matrimonial Causes, 4th ed. p. 112. Now, in the present case it had been conclusively proved that the nature of the agreement between the parties was a bargain that the wife should not defend herself in the action on condition of receiving an annual money payment and part custody of her children. Had it not been for the agreement she could have adduced pertinent and material facts (as evidenced by the proof of her innocence contained in the present action of reduction) which would have altered the complexion of the case against her, and therefore there was the collusion requisite in the English sense to reduce the decree in absence—*Gethin* v. *Gethin*, December 21, 1861, 31 L.J. Prob. Matr. and Adm. 43; Lord Chelmsford's observations in *Shaw* v. *Gould*, March 27, 1868, 3 (H. of L.) L.R., E. and I. App. 77.

The defender replied—(1) In point of fact there was no collusive agreement between the parties such as is pleaded by the pursuer. The agreement was made in no sense conditional on divorce being obtained or not. It was prompted by the husband's commiseration for his wife and by his unwillingness to allow her, as the mother of his children, to starve. The only condition attached to it was one that she should live respectably for two years. But (2), assuming that the agreement was of the nature contended for by the pursuer, in point of law collusion will not be inferred merely because the defender does not appear, nor will it be inferred because the husband or wife gave facilities for precognition—Fraser's Husband and Wife, vol. ii. p. 1194; *Harris* v. *Harris*, June 11, 1862, 31 L.J. Matr. Cases, 160. Neither will mere facilities given by the defender for the trial, purchased by a price, amount to collusion, if there be no connivance in the acts of alleged impropriety, and if there be an honest case established in point of fact and believed in by the pursuer—*Shaw* v. *Gould*, *supra*. In evidence taken before a Select Committee of the House of Lords in 1844, Dr Lushington defined collusion to be permitting a false case to be substantiated, or keeping back a just defence (*vide* Law of Divorce and Matrimonial Causes by Swabey, 1858, p. 18), and this may be taken as the true test of a collusive bargain in England. Viewing the present agreement in the light of this definition, there was nothing of the nature of collusion.

The Lords after hearing counsel made avizandum with the case.

At advising—

LORD JUSTICE-CLERK — Your Lordships have now heard this case, and are prepared to deliver judgment. The case arises out of very unhappy circumstances, and I shall express my opinion upon it very shortly.

The action is an action of reduction, by the wife of the defender, of a decree of divorce obtained by her husband in her absence. The grounds she urges for setting aside that decree are, in the first place, that it was obtained by collusion, and, in the second place, that it is not well founded. In short, she founds her action on a denial of the facts on which the Lord Ordinary proceeded.

In this action of reduction a full proof of the facts was taken. Under the former procedure in absence no doubt the proof was much more limited. But the two questions we have to decide are, first, whether this decree is null in respect it was collusively obtained on a corrupt agreement between the husband and his wife that she should not defend herself, and that in that way decree should be obtained against her which would not, or might not, be obtained had she defended the action. Her second ground of action, as I have already said, is that there is no foundation for the allegation in point of fact.

Now, in regard to the first ground of action, I should be sorry if we were obliged to decide upon the general question whether an agreement between husband and wife pending a process of divorce—an agreement that the wife should not defend—is or is not necessarily a collusive arrangement. I do not know what the result there might be. I can well understand that there might be grounds on which the husband, although perfectly well convinced of the truth of the allegations which he maintained, yet might not unwillingly try to avoid the public exposure of this family disgrace, and the effect upon his children implied in a contested suit, but I cannot shut my eyes to this, that the oath of calumny negatives such a state of fact. The husband swears that he has made no arrangement with the opposite party, and while I am far from saying that if perfectly satisfied with the honesty of the motives on both sides, the Court would necessarily set aside a decree under such circumstances on the ground of collusion, yet I do not wish to express any definite opinion upon that matter. A great deal must necessarily depend upon the state of the facts.

But I have come to a very clear opinion upon this case—the opinion that there is no ground whatever for the allegations which the wife makes in point of fact. I have come to that conclusion notwithstanding the contrary evidence. Upon that contrary evidence I do not put any credit. I think all the surrounding circumstances corroborate, not what the wife says, but what the husband says, and I think that the only remark that can be made upon the conduct of the husband is that for a pursuer of such an action, and for a man in such an unhappy position, he was only too much moved by commiseration for his unhappy wife. That is my opinion, therefore—that there is no collusive agreement proved, and I should be prepared to go further and say that not only was it not proved, but that the contrary was proved—that is, it was proved that there was no collusion.

Lord Young—This is an action of reduction of a decree of divorce for adultery which, so far as appears *ex facie* of the proceedings, was regularly pronounced, although in absence of the defender. According to our practice, and indeed statute law, such decree even when unopposed is not pronounced as of course, but only on evidence establishing the ground of action to the satisfaction of the Judge. Accordingly the decree in question proceeded on evidence, although *ex parte*, and I am not of opinion that the defender against whom it stands is at liberty to impeach it to the effect of retrying the case on a mere allegation that she has changed her mind and now wishes to defend. The grounds upon which she may be permitted to do so are various, but we have to consider only that on which the pursuer here relies, viz., that she is innocent of the adultery imputed to her, and that her husband induced her to abstain from defending herself by a certain promise which he has not fulfilled. I extract the averment of innocence from Cond. 7, which beyond this consists of mere loose writing, and that of a promise from Cond. 4, which, although rambling and confused, does aver that the wife was induced by her husband to abstain from defending herself on a promise to give her "£100 a-year for life, and to allow her a share in the guardianship of the children," which promise he has not kept. There is really nothing else in the record which is at all material.

This was represented to us as a case of collusion between the spouses to deceive the Court into affirming by judgment a false charge of adultery, and pronouncing an unjust decree of divorce. It is not averred that the husband knew the charge to be false, and the pursuer's counsel repudiated any intention of imputing such knowledge to him. With regard to the wife, however, it is certain that if she was innocent she certainly knew it, and that her ground of action is, therefore, that she abstained from defending herself against a charge which she knew to be false, and allowed a decree of divorce which she knew to be unjust, in consideration of a settlement of £100 a-year promised by her husband, who, for aught she says to the contrary, honestly believed that she was an adulteress. I am unable, as at present advised, to say that I think this is a good ground of action. It is a general, if not a universal rule, that a party will in vain appeal to a Court of Justice for redress on the medium of his own fraud, even when his adversary was a party to it. I acknowledge that the relation of husband and wife makes a speciality, although this is reduced to a minimum in the case of a wife who has been turned out of her husband's house, and against whom an action of divorce has been commenced. I also acknowledge that divorce, although largely, is not exclusively the private affair of the parties to deal with as they please. The law, indeed, takes cognisance of this by allowing the intervention of the Lord Advocate in Scotland and of the Queen's Proctor in England wherever the public interest seeems to be concerned, as distinguished from that of the parties. Provision is thus made for frustrating collusion by setting aside decrees thereby obtained, without violating the wholesome rule that the Court will not aid a party who invokes its interference on the medium of his own fraud. It is not fitting that the protection of the Court against imposition, and of the interest of the public in the pure administration of justice in the Divorce Court, should be committed to the parties who practised the imposition, and I see grave objections to allowing any party for his own end to found on his own deceit on the suggestion that the ends of public justice are involved. I have pointed out that it is no part of the pursuer's case here that her husband knew, as she (according to her statement) certainly did, that a deception was being practised on the Court, although I am not prepared to say that had it been so I should have thought differently of the point I am now speaking of. That would, indeed, have been a gross case of collusion be-

tween two spouses to obtain a divorce on grounds which both knew to be false. But in such a case would it be right to commit or leave the vindication of the outraged law to one of the parties to the outrage who complained that she had been disappointed of her promised reward for committing it? I greatly doubt it, and even venture to say that as at present advised I should not be prepared to entertain a private action founded on such a medium, which is, in truth, an offence of a very grave character indeed. Nor in such a case could I distinguish between the pursuer and the defender in the divorce action—for, according to the assumption, they wilfully colluded together to deceive the Court into pronouncing an unjust decree on false grounds, and although they played different parts, they played in concert and to the same end. Nor let me put the case that the pursuer of the divorce sought a reduction of the decree he had obtained on the medium that it was false, and the result of collusion between himself and his wife. I venture to ask how the Court would deal with that action. Whether they would, *ex proprio motu*, invite the attention of the Lord Advocate to the matter I cannot say, but I hardly think that they would recognise the pursuer as a fitting guardian of the ends of public justice, or allow him for his own private ends to found on his own fraud.

Without pursuing the subject, which in a concluded cause is unnecessary, I desire only to express my own individual doubt as to whether this record presents any case for interfering with the decree of divorce at the instance and for the private ends of the pursuer of the action.

On the evidence I agree with the Lord Ordinary that the ground of action, such as it is, is not true in fact. I think the defender did express to the pursuer and his relatives his intention to make a settlement on her for her maintenance after the divorce, which he left no doubt of his intention to prosecute. I think, however, that he did so on no other condition than her repentance for the past, to be manifested by her good conduct in the future, and that he made no bargain with her to abstain from defending the divorce if so minded. According to our practice a wife may generally—practically always—defend herself at her husband's expense against a divorce, however clear from the first, and successful in the end, the action against her may be. The notion of an innocent wife consenting to an unjust divorce on a promise of a small annuity is therefore, *prima facie*, improbable in a high degree, while there is no improbability at all in a really injured husband promising a really guilty wife and her relatives that he will not allow her to be destitute. But apart from mere probability, I am of opinion that the husband here made no bargain. Indeed, I think that when he expressed his intention, quite becoming in itself, his wife was not in fact,—certainly not as he understood,—alleging innocence, but, on the contrary, giving him to understand that she acknowledged her infidelity. On any other footing her conduct, as she now alleges it—an innocent wife consenting to be unjustly divorced as an adulteress for £100 a-year,—is contrary to all one knows of human nature.

But although this is my opinion on the evidence, I do not shrink from saying that I think that the question of collusion turns on no narrower issue than the integrity and good faith of the husband. If to obtain or facilitate a divorce to which he knows or believes he is not entitled, he bribes his wife to abstain from defending herself, I should think him guilty of collusion. If, on the other hand, while he is seeking divorce, honestly and in good faith, on grounds which he believes to be true, his wife, or her friends for her, confessing her infidelity, entreat his compassion to protect her from destitution, I should not be disposed to impute collusion to him because he promised a suitable provision on the condition of penitence, of which the first fruits should be the abstaining from maintaining a false defence to his action for the reparation which the law allowed him for her wrong. We know from experience how long and stubbornly a false defence may be maintained by an adulterous wife (and according to our practice at the husband's expense) to a true action, and I hesitate to say that a husband who does no more than honestly guard against this is guilty of collusion. I suppose any lawyer of experience would think it more politic to stipulate for a defence and reasonable conduct of it. Would this be collusion assuming good faith? But the statement of a defence is no safeguard against collusion. A communication by the husband, or for him, to the wife or her friends, that while willing to make a settlement on her, he will view with disfavour the statement and maintaining of a false defence, and consider it inconsistent with the repentance and amendment which he exacts as the condition of his bounty, is, in my humble opinion, not collusion. The point is probably of little practical interest, for this is, so far as I know, the only case in which a woman divorced for adultery in an undefended cause has subsequently come forward and said that although innocent, and so with a good defence, she deliberately consented to the disgrace and the divorce in consideration of a small annuity promised to her.

I do not think that the evidence on which the decree was originally pronounced was more than sufficient, but I think it was sufficient, and that it is not weakened but confirmed and strengthened by the additional evidence led in this action.

Lord Craighill—I am also of opinion that the interlocutor should be affirmed and the reclaiming note refused.

The action on which we are giving judgment is one by which the pursuer seeks to set aside a decree of divorce pronounced against her upon evidence adduced before the Lord Ordinary. She did not appear in that action, and it is now said that she refrained from appearing in consequence of the corrupt and collusive arrangements that were entered into between her and her husband prior to the trial of the cause. This is the first of the grounds upon which she seeks to have her case established; the second is, that looking at the proof itself the charge of adultery upon which decree was pronounced has not been made out; and that, as we must deal with the case as it would have been dealt with supposing no judgment had been pronounced at all, the only result that can be reached is to give the pursuer absolvitor from the conclusions of action for divorce.

That is what the pursuer says. It appears to me that these are the only questions raised upon the record; and it certainly is the

case that they are the only questions upon which argument was addressed to the Court from the bar. The competency of challenging by a reduction a decree pronounced in a case of divorce is not a question which the parties have taken up, and is not a question, as I have said, upon which we have derived any assistance. Therefore I am not only not called upon, but I think I am not entitled in the circumstances of the case, to commit myself further upon that question than I do in saying that the course which was followed in this action is the same course as was followed in the case of *Stewart*, February 27, 1863, 1 Macph. 449. In this last-mentioned case the Court took everything into consideration, and came to a decision with reference to the merits of the decree pronounced in absence, not merely upon the evidence in the original action, and the judgment of the Lord Ordinary upon that, but also on the proof which was led in the action of reduction. Therefore there seems to be authority for the procedure adopted here. Certainly that case of *Stewart* having been decided as it was, it appears to me that the counsel for the defender in this action of reduction were justified in not bringing forward for decision any question with reference to the mere competency of the action.

But the action being brought, what we have to determine is, whether the grounds of reduction have been established? The first of these grounds is the alleged corruption of a party to the suit in making the arrangement which is said to have been entered into. That arrangement is said to have been to the effect that if the pursuer would only refrain from defending the action for divorce, the defender in this action, who was pursuer in the divorce, would give her an annuity for a certain period of £100 a-year, and also allow her to participate in the guardianship of the children. I am of opinion, upon the facts, that the alleged collusion and corruption have not been established. I am as satisfied as I can be that there was no intention whatever in anything that occurred on the part of the defender here to attempt to interfere with the administration of justice in this matter. I think he believed the grounds of his action were well founded, and I am satisfied he had no idea, any more than the pursuer of this action, who was defender in the divorce, had any idea, that adultery having been committed there was to be kept back a plea which nevertheless would disentitle the husband from his remedy. I think that what was done was imprudently done, because agreements with reference to appearing or not appearing to defend an action in such a matter are, to say the least of it, extremely precarious. The pursuer seems to have expressed almost a feeling of diffidence as to the grounds of action; but far more strongly does the defender —the defender in the divorce—by consenting to stand by, by necessary implication confess her guilt of that which was alleged against her. As Lord Young has observed, it seems to me that no woman conscious of her innocence would ever consent, for even such a bribe as that which is said to have been held out, to have guilt and disgrace fixed upon her for the remainder of her life.

I do not think it necessary that I should say more, for I am satisfied that nothing was intended to be done, and that nothing was done, by the defender here to corrupt the administration of justice, or to do anything which would in the least degree affect the decision which in any circumstances would be pronounced in an action of divorce.

On the question whether or not the grounds of action set forth in the summons of divorce have been established, I come to the same conclusion as both your Lordships.

The Lords adhered.

The pursuer's counsel moved the Court for expenses, on the ground that this action was virtually a defence to the original action for divorce. The motion was refused, Lord Craighill remarking as follows:—At the time the action was brought the pursuer was not the wife of the defender. She is now trying to recover her status, but she has failed in the attempt. Costs have been incurred in this, as in other cases, and any party who, even if he or she could challenge a decree of divorce, brings such an action, must do so subject to the ordinary conditions which any other party incurs.

Counsel for Pursuer (Reclaimer)—Macdonald, Q.C.—Scott. Agents—T. & W. A. M'Laren, W.S. Counsel for Defender (Respondent)—Lord Advocate (Balfour, Q.C.)—Trayner—A. J. Young. Agents—Duncan & Black, W.S.

Thursday, December 15.

SECOND DIVISION.

[Lord Lee, Ordinary.

M'PHERSONS *v.* HAGGARTS.

Cautionary Obligation—Writ—Parole Evidence of Qualification of Obligation as between Cautioners.

Where several persons had entered into a cautionary obligation to a bank, to subsist till recalled in writing, for a customer of the bank in a cash-credit—*held* (*rev.* judgment of Lord Lee), in a question between the cautioners, that parole proof that the obligation of two of them had been given and accepted *ad interim* only, and till a supplementary and valid guarantee should be given by another, who was in minority at the date of their signature of their cautionary obligation, was incompetent.

In July 1878 a cash-credit was opened at the Bank of Scotland, Kirriemuir, for Donald M'Pherson, keeper of the Ogilvie Arms Hotel, Glenprosen. M'Pherson was to be allowed to overdraw his account with the bank to the amount of £500 on finding sufficient security. A cautionary obligation to that amount was on the 24th and 26th of that month entered into on his behalf by Charles and James M'Pherson, the pursuers of the present action, and by John Haggart, Donald M'Pherson's brother-in-law. This obligation of guarantee was to subsist till recalled in writing. Application had been also made to James Reid Haggart, John Haggart's son, to join in the cautionary obligation. He was at the time in minority, but on the 24th