

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 communication with her; and in 1873, when his son appears to have written to him, his answer blamed the pursuer for the