the defender said he would keep open the house for her, but in the later he said he would have no more to do with her, and would go abroad and never see her again. He never afterwards contributed to her maintenance or the child's, and in point of fact he did sell off all he had and left Macbiehill. He was not discovered till the pursuer's agent succeeded in finding him in order to effect service of this action. He was then—whether or not he had ever gone abroad—living at Millerhill in Midlothian.

The Lord Ordinary reported the case to the Second Division, with this note.

"*Note.* — I have reported this undefended action because it raises a point which is likely to occur in other cases, and which is proper for the consideration of the Court. The wife, who is the pursuer of the action, left her husband's house more than four years ago and went to live with her father. The husband a few weeks later sold his furniture and left the place where he resided. Up to the time of instituting the action he had not communicated with or made his address known to his wife. She alleges, and I considered it to be proved, that she left her home in consequence of her husband's intemperate habits and his cruel behaviour to herself,—behaviour which, in my opinion, would have entitled her to resist a demand for adherence if such had been made by him. The question arises, is this constructive desertion by the husband? The inclination of my opinion is in the affirmative, because I see no real distinction between the cases of the man who drives his wife out of doors with blows, and the man who, with greater cunning, and possibly with the view of depriving her of her legal remedies, makes life intolerable to his spouse, and thus compels her to leave him. In the present case I think it is the husband who must be considered to have, in the words of the Scottish statute, 'diverted' from his wife. If the husband is the party originally to blame, there can be little doubt but that he is responsible for the continuance of the 'diversion' or estrangement during the four years that have elapsed, because during all that time he kept out of the way, and thus made it impossible that overtures of reconciliation should be addressed to him.

"I ought to add, that in another case, which is very similar in its circumstances, I have reserved judgment, with the intention of being guided by the opinion of the Court in the present case."

The pursuer argued that she was justified by the ill-usage proved in going to her father's, and that the defender's conduct while she was so living was malicious desertion, for he broke up the house and left the district, and had never inquired after her or sought to see her or offered to maintain her—*Muir* v. *Muir*, July 19, 1879, 6 R. 1353; *Winchcombe* v. *Winchcombe*, May 26, 1881, 8 R. 726.

At advising—

Lord Justice-Clerk—This question arises upon a case reported to us by the Lord Ordinary for our decision. I do not think that the evidence as given in the proof discloses anything that could be a bar to the pursuer bringing this action of divorce. By going to her father's house in the circumstances disclosed here, I do not think that she deserted her husband, but I think that he unquestionably deserted her by subsequently breaking up his house.

Lord Young—I am of the same opinion. The Lord Ordinary has reported the case to us on what seemed to him to be a point of law, and I think that it is a point of law, but the point is so simple as this—Whether the fact that a wife justifiably took refuge in her father's house is a legal impediment to her afterwards suing him for divorce on the ground of desertion? and I have no doubt whatever that it is no legal impediment. Of course whether he really did or did not desert her is a question of fact. The evidence in this case seems to show that the defender did wilfully desert his wife and maliciously continue in desertion, and in my opinion there is no legal impediment to decree of divorce being pronounced in her favour.

Lord Craighill and Lord Rutherfurd Clark concurred.

The Court remitted to the Lord Ordinary to give decree of divorce.

Counsel for Pursuer — Comrie Thomson — Baxter. Agent—T. Swinton Paterson, S.S.C.

Saturday, January 29.

FIRST DIVISION.

ROSS T. SMYTH & COMPANY, PETITIONERS.

Company—Winding-up — Companies Act 1862, *sec.* 91—*Right of Creditors to a Winding-up Order* ex debito justitiæ.

A creditor of a company which was insolvent craved a winding-up order. It appeared that the other creditors in Great Britain, who were all connected with the management of the firm, objected to the order on the ground that the company had no assets in Britain, and ought to be wound up by a receiver in America. The Court *granted* the petition, and appointed a liquidator.

The Salem (Oregon) Capitol Flour-Mills Company (Limited) was registered under the Companies Acts 1862 to 1883 on 1st May 1884, and the head office was in Edinburgh. The capital of the company was £100,000, divided into 20,000 shares of £5 each, and it was stated in the memorandum of association that "the first or present issue" was "to consist of £60,000 in 12,000 shares of £5 each, the remaining issue or issues to be made at such future period or periods, and upon such terms, as the directors shall determine." Only 2562 shares were taken up, upon which was paid up £5 per share, making in all £12,810, subject to a deduction of £120, being the amount of calls unpaid.

The company was quite unsuccessful, and in a report, dated 15th December 1886, issued by the directors, it was stated in reference to the depreciation of the property and the business losses that these "will involve not only the share capital, but the creditors of the company will all suffer more or less according as the properties realise a higher or lower price." The shareholders were accordingly asked in said report to authorise the directors to proceed with the realisation and winding-up "as if the company were in liquidation."

In these circumstances Messrs Ross T. Smyth & Company, corn merchants, Liverpool, who were creditors of the company, presented a petition for a winding-up order, and the appointment of an official liquidator, on the ground that the company was unable to pay its debts, and it was just and equitable that it be wound up.

Answers were lodged for the company and three of the creditors. It appeared that all the creditors, other than Messrs Ross T. Smyth & Company, were connected with the management of the company.

The respondents stated that there were no assets in this country with which a liquidator could deal, that the property in America was hypothecated to the creditors there, and that a receiver should be appointed in America.

Argued for the respondents—The appointment of a liquidator was unnecessary, and would only involve the company in further expense. The American creditors of the company had secured their own interests by hypothecation and otherwise. There were no assets in this country, and the respondents, who were the whole body of creditors of the company other than Messrs Ross T. Smyth & Company, opposed this application. Their desires must be taken into consideration—*in re St Thomas' Dock Company*, February 12, 1876, L.R., 2 Ch. D. 116; *in re Chapel House Colliery Company*, June 28, 1883, L.R., 24 Ch. D. 259; Story's Conflict of Laws, secs. 409, 599; Bar's International Law (Gillespie's translation), sec. 128.

At advising—

Lord President—The state of the case is that this company is in a state of insolvency. It is in a very bad condition indeed. Now, a creditor of the company (and apparently the only independent creditor, for all the others are in some way connected with it) makes an application for a judicial winding-up. The company and the directors do not dispute the grounds on which the petition is presented, and they lay before the Court a report of the directors of date 15th December 1886, which was considered at a meeting of the company on 23d December, and there it was agreed to grant authority to the directors to proceed with the realisation of the properties and the winding-up of the concern "as if the company were in liquidation."

The issue therefore raised here is not whether the company is to be wound up, but whether the winding-up is to be conducted by the directors, or whether a liquidator shall be appointed by the Court. I have no doubt that the proper course for us to take is to make an order for winding-up the company, and to appoint a judicial liquidator.

Lord Mure concurred.

Lord Shand—I am of the same opinion. It is conceded that this company is unable to pay its debts, and this creditor is entitled to the order he craves *ex debito justitiæ*, unless it be shown that the general voice of the creditors is against the application, or that the refusal of the order will not prejudice the petitioner. I am not satisfied on this last point. The company is in a very peculiar position. It has resolved on winding-up, and in these circumstances a creditor is entitled to say, "I desire that the winding-up shall be a judicial one," if for no other reason than that the effect would be to cut down certain preferences.

A number of cases were referred to in argument in which a winding-up was refused, but there is no case in the books in which after a company has resolved to wind up, and one creditor has demanded the appointment of a judicial liquidator, that was refused. It is said that the general voice of the creditors is opposed to the application, but all the creditors other than the petitioner were connected with the company, and very likely the first duty of the liquidator will be to investigate their debts. I have no doubt whatever that we should grant this application, even though it is said that an official receiver may be required in America. In every view I think the petitioner is entitled to have the winding-up put in the hands of an official liquidator.

Lord Adam concurred.

The Court granted the order.

Counsel for Petitioner—Shaw. Agent—Robert Finlay, S.S.C.

Counsel for Respondents—Lorimer. Agents—Auld & Macdonald, W.S.

VALUATION APPEAL COURT.

Wednesday, February 2.

(Before Lord Lee and Lord Fraser).

SHARP *v.* THE ASSESSOR OF THE COUNTY OF CAITHNESS.

Valuation Cases—Lease—Renunciation—Valuation Act 1854 (17 *and* 18 *Vict. c.* 91), *sec.* 6.

A tenant who paid a rent of about £600 renounced his lease under an agreement with his landlord, by which he paid him £100 a-year as part of the difference between that rent and the rent paid by the succeeding tenant. *Held* that this sum could not be taken into consideration in assessing the value of the subjects.

At a meeting of the Valuation Committee for the Wick district of the Commissioners of Supply of the county of Caithness held at Wick upon the 14th day of September 1886, for the purpose of hearing appeals against the valuations made by the assessor of the said district of the said county, for the year ending Whitsunday 1887, Adam Sharp, Esquire of Clyth, appealed against the following entry in the valuation roll, viz:—"No. 1014, farm and house, Mains of Clyth, proprietor, Adam Sharp, Esquire of Clyth; occupier, Adam Sharp, Esquire, aforesaid; yearly rent or value £100.

It appeared from the Case stated for the Valuation Appeal Court that prior to Whitsunday 1886 Thomas Douglas was tenant of the houses, farm, and lands of Clyth Mains under the appellant, Mr Sharp of Clyth, at a rent including interest on expenditure, amounting to £591, on a lease for nineteen years from Whitsunday 1878.