second interlocutor reclaimed against (and adhered to), because in the interlocutor it was found that the pursuer (Stuart's successor) was entitled to demand payment from the defender (Lady Mary Montgomery) of all such portions of the teinds as had been evicted in consequence of augmentations of stipend, "and that whether the vassals to whom the said lands and teinds have been since feued out by the pursuer or her predecessors have by the terms of their titles any claim to relief against the said pursuer for the teinds so evicted."

I have stated the case thus fully in order that it may be made clear that the question raised was essentially different in fact and in principle from the present case. There was no question in *Montgomery* v. *Hamilton* of the liability of an oversuperior for burdens attaching to the right of a sub-feuar. The lands of Dales of Glassford never were sub-feued. Stuart's successors certainly feued out the lands which he acquired from Lord Sempill, but Stuart did not acquire these lands in the character of a feuar, but as a singular successor or disponee of Lord Sempill. If Lord Sempill had undertaken a personal obligation to relieve Stuart of future augmentations (which *ex facie* of the report he did not), then according to the judgment in *Maitland* v. *Horne* that obligation would only have bound the granter and his heirs. But apparently Lord Sempill's obligation was not considered sufficient, because the disponee stipulated for and obtained a conveyance of lands in real warrandice. The effect of the conveyance in real warrandice was that in case of the value of the estate of teinds being diminished by augmentations of stipend, recourse might be had against the property and rents of the warrandice lands by way of indemnity. Then when Stuart or his successors feued out the lands with the teinds in parcels, the feuars having paid a full price for their teinds, naturally stipulated for an indemnity against augmentations. The minister's stipend was augmented. Stuart's successors had to submit to an abatement of feu-duty in terms of their obligation of indemnity, and to that extent the value of their titularity was diminished, and their right to recourse against the warrandice lands emerged. It was no doubt held that they had a claim against the warrandice lands irrespective of the question whether their feuars had or had not a claim of relief against them. But the ground of judgment was that part of the estate of teind had been evicted, and it might very well be that where the Stuart family had sold lands and teinds without relief they were content to accept a lesser feu-duty, taking their chance of recovering something out of the warrandice lands in the event of augmentations being granted. Whether the decision on that incidental point in a somewhat complicated case commends itself to our judgment or not, it seems to me to be impossible to apply a judgment in what was really a competition of heritable rights between the owner of warrandice lands and the holder of a security over those lands in case of eviction of real estate to a question like the present which lies entirely in the region of obligation. Even if the analogy had been more direct than I take it to be, I should not consider that a decision upon a question extremely technical, and I may say unique as to its circumstances, ought to preclude the Court from considering the present question on its merits. My view on the subject of the claim in the present case has already been fully stated, and as I am not satisfied that it is in conflict with the decision in *Hamilton* v. *Montgomerie*, my conclusion is that, except as to the extent of the sum of £9, 9s. 6d. for which the pursuers have been assessed, the interlocutor of the Lord Ordinary should be recalled, and that the defenders should be assoilzied from the action.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary, decerned against the defenders for payment to the pursuers of the sum of £9, 9s. 6d., and *quoad ultra* assoilzied the defenders from the conclusions of the action.

Counsel for the Pursuers and Respondents—H. Johnston, K.C.—Chree. Agents—Alexander Morison & Co., W.S.

Counsel for the Defenders and Reclaimers—Sol.-Gen. Dickson, K.C.—Hunter. Agents—Gordon, Falconer, & Fairweather, W.S.

Saturday, March 14.

FIRST DIVISION.

JOHNSTON *v.* JOHNSTON.

Process—Amendment of Record—Res Noviter—Husband and Wife—Divorce for Adultery—Alleged Act of Adultery not Known to Pursuer when Record Made up—Conduct of Co-Defender with Women other than Defender.

In an action of divorce on the ground of adultery at the instance of a husband against his wife and a co-defender, proof was led in the Outer House, and judgment was pronounced assoilzieing the defender and co-defender. The pursuer reclaimed, and lodged a minute of amendment proposing to add to the record as *res noviter* averments as to certain facts, of which he alleged he had no knowledge and no means of knowledge when the record was made up and the proof led. The first proposed averment had reference to an act of adultery between the defender and co-defender, alleged to have occurred in a different part of the country, and unconnected with the incidents as to which proof had been led in the Outer House. The second proposed averment had

reference to alleged misconduct on the part of the co-defender with another woman nine years before the date of the action.

Held that the first proposed averment was *res noviter* in the proper sense, in respect that though the averment related to facts alleged to have occurred before the record was made up, it did not appear that these facts were or ought to have been known to the pursuer, and proposed amendment *allowed*; but that the second proposed averment was irrelevant, and proposed amendment so far *disallowed*.

John Johnston, engine-fitter, 310 Cathcart Road, Glasgow, on 31st May 1902 brought an action of divorce on the ground of adultery against his wife Maggie Wilson or Johnston, and against the Rev. Emmanuel Morgan, minister of the parish of Riccarton.

The circumstances and dates as set forth on record were as follows:—The marriage took place on 1st January 1900. For six years before the marriage the defender had been the co-defender's housekeeper. The spouses at first took up house in Glasgow, where the pursuer was employed as an engine-fitter. At the Whitsunday term, 1900, they entered into occupation of a cottage near the manse of the co-defender, and belonging to the co-defender. The pursuer's tenancy of this cottage lasted for a year, *i.e.*, till Whitsunday 1901, but the pursuer himself ceased to live there (except at week-ends) in October 1900, when he gave up a situation which he had obtained in Kilmarnock and returned to the service of his former employers in Glasgow. The defender on 28th May 1901 joined him at a new house which he had taken in Glasgow, and to which he had removed the cottage furniture. But she only remained one night there. Next day she left the pursuer and never lived with him afterwards. It was not alleged that the defender and the co-defender ever met after May 1901. The case for the pursuer was, that from the date of the marriage down to May 1901 the defender and co-defender were carrying on a continuous course of illicit intercourse, and that this was a continuation of illicit relations which had existed for a considerable time prior to the marriage. The pursuer also averred four specific occasions on which adultery was said to have taken place in the manse between July 1900 and January 1901.

The record was closed on 15th July 1902.

Proof was led in the Outer House on 30th October 1902 and following days. The Lord Ordinary (STORMONTH DARLING), by interlocutor dated 26th November 1902, assoilzied the defender and co-defender from the conclusions of the summons.

The pursuer reclaimed, and lodged a minute of amendment stating that, since the date of the Lord Ordinary's interlocutor the pursuer had received information which led him to believe that after the defender left her house in Glasgow she committed adultery with the co-defender, and he therefore craved leave to amend the record by adding the following articles to the condescendence for the pursuer in reference thereto, and in reference to another discovery, also made since the date of the Lord Ordinary's interlocutor in reference to the co-defender's relations with another of his servants:—"(10) Since the defender left the pursuer's house she has kept up communication with the co-defender. Shortly before August 1901 the co-defender gave the defender a certificate of character for the purpose of enabling her to obtain a situation as a domestic servant. The defender used this certificate in applying for a situation to the tenant of Glenbrittle House, in the Island of Skye. The said tenant engaged the defender as a housemaid under the name of Maggie Wilson, and she arrived at Glenbrittle on or about the 7th of August 1901. (11) On or about the 21st of that month the co-defender left Riccarton to visit the defender, and arrived at Carbost on or about said date. He stayed at Carbost Inn, which is nine miles from Glenbrittle, and thereafter visited the defender at Glenbrittle on the following day. He called at the kitchen door of the house, where he was received by the defender early in the afternoon, and went a walk with her. During the course of said walk, which was on an extremely unfrequented road, the defender and co-defender diverged from the road at a point about two miles from Glenbrittle in order to reach a secluded spot on the side of a stream named A-corre-Ghreadaidle, where they committed adultery on said date. The defender and co-defender were alone in each other's company for a period of about four hours. The defender was seen with the co-defender by her master, and when she returned to Glenbrittle about 7·30 in the evening she was dismissed from his service, and left his house the following day. The co-defender during said visit was not dressed in clerical costume, and he did not disclose his name either to the landlady of the inn or to any person whom he met. The pursuer obtained a clue to the above information after the Lord Ordinary had made avizandum with the cause, as he only then received a letter from the landlady of the Carbost Inn. (12) Further, a servant whom the co-defender had in his employment prior to the engagement of the defender, and for some time thereafter, and who is now in domestic service in Edinburgh, was seduced by the co-defender and became pregnant. She was in the co-defender's service during all or part of 1893 and in the beginning of 1894, and during this time the co-defender had immoral relations with her. When he discovered that she had become pregnant he made secret arrangements for the said servant's removal to Edinburgh, where on 14th March 1894 she gave birth to an illegitimate female child of which the co-defender is the father. An extract of the birth is herewith produced and is referred to for the name of the said servant. This child still survives and the co-defender regularly makes payments for its aliment. The pursuer could not have discovered the said information earlier owing to the

secrecy adopted by the co-defender in making the said arrangements."

Argued for the pursuer—It was competent after the Lord Ordinary had given his decision on the closed proof, but before final judgment was given on a reclaiming-note, for the pursuer to state new relevant facts which had come to his knowledge since the proof was closed. It was for the Court, having regard to the whole circumstances of the case, to determine whether the new facts so discovered were such that it was necessary for justice being done in the case that an inquiry as to these facts should be made. The facts averred in the articles proposed to be added to the condescendence were relevant, and were *res noviter* in the proper sense of the term. The facts averred in the proposed articles (10) and (11) were entirely distinct as to time and locality from the circumstances as to which proof had been led. In regard to the averments in proposed article (12), the misconduct of the co-defender with another woman was competent corroborative evidence of adultery with the defender—*Whyte* v. *Whyte*, November 15, 1884, 11 R. 710, *per* Lord Mure, 21 S.L.R. 470; *King* v. *King*, February 2, 1842, 4 D. 590, at p. 597; *Forster* v. *Forster*, 1 Haggard, C.R. 144, *per* Lord Stowell. The misconduct of the co-defender alleged was with a woman who, as servant in his house, occupied the same relation to him as the defender did for six years before her marriage. This special circumstance in any view made the proposed averment relevant. There had been no failure of diligence by the pursuer in not discovering and averring these new facts at an earlier period, as they were all, as regards time and place, outside the circumstances and region of inquiry to which the proof before the Lord Ordinary had been directed.

Argued for the defender and co-defender—The averments proposed were not *res noviter* in the proper sense. Allegations of *res noviter* must be looked at strictly, and it was not sufficient to entitle the pursuer to a proof of these new averments that he should state that he did not know the facts before the case went to trial and the decision of the Lord Ordinary was given—*Stewart* v. *Gelot*, July 19, 1871, 9 Macph. 1057, *per* the Lord Justice-Clerk at p. 1060; *Hansen* v. *Craig*, July 16, 1858, 20 D. 1306. The effect of allowing a proof of the amendmends proposed in articles 10 and 11 would be to allow the pursuer to put forward and prove a new case. The averments in the proposed article 12 were irrelevant. The conduct of the co-defender in relation to another woman nine years before the events on which the action was based was not competent corroborative evidence of his having been guilty of adultery. In the cases referred to by the pursuer the evidence admitted was as to the conduct of one of the spouses, and such evidence had never been admitted as to the conduct of a co-defender.

LORD PRESIDENT—This is an action of divorce on the ground of adultery at the instance of a husband against his wife, and also against a co-defender, the Reverend Emmanuel Morgan, minister of the parish of Riccarton. Proof was led upon the averments contained in the record as it then stood, and judgment was pronounced in the Outer House upon that evidence, finding that there was not sufficient proof to warrant a decree of divorce. It is now proposed to add three new articles, which, if admitted, would be numbered 10, 11, and 12 of the condescendence. Article 12 contains an averment of immoral relations between the co-defender and a servant in his employment in the year 1893. That is a proposal to enter upon an inquiry with regard to the co-defender's conduct with another woman about nine years before the things in respect of which divorce is sought are alleged to have occurred. Such an inquiry appears to me to be inadmissible. It is remote in time and in subject-matter. Even if the allegations were established this would not prove the substantive case alleged in the record. It is true that inquiry has been allowed in actions of divorce at the instance of a wife in England, and I think also in this Court, with regard to her husband's relations with other women, but this is a different case, and the admission of such evidence should not in my judgment be extended. I therefore think that this article should be disallowed,

Articles 10 and 11 are of a different character. In them it is alleged that the co-defender gave the defender a certificate of character which enabled her to obtain a situation as a domestic servant in Skye; that while she was there the co-defender visited her, not in clerical dress, but in the attire of a layman; that he went out for a walk with her and committed adultery with her. These averments relate to the conduct of the defender and co-defender, and they are well alleged as *res noviter*, and they would be very vital to the case. The pursuer alleges and offers to prove that he had no knowledge of this occurrence, and no means of knowledge, when the record was made up and the proof led. I think that we should allow articles 10 and 11 to be added to the record.

LORD M'LAREN—This is an application to allow the addition of certain averments to the record on the ground of new matter emerging in the course of the action.

The incident which is averred in articles 10 and 11 is a new act of adultery in a different part of the country and unconnected with the incidents as to which proof was led before the Lord Ordinary. This is not a case in which the failure to bring forward evidence was the result of negligence on the part of the pursuer or his agent, and I think it a proper case of *res noviter*.

The proposed article 12 is in a different position. In it the pursuer avers and seeks to prove misconduct by the co-defender with another woman. There is authority for allowing evidence of improprieties by a defender with other women, or (where the

defender is a woman) with other men, to displace the presumption of his or her good conduct in the married relation. This practice is intelligible when it is confined to the conduct of the spouses. But I am not disposed to extend it. I see no reason for permitting an investigation of the previous life and conduct of a co-defender. The circumstance that a man may have had illicit intercourse with an unmarried woman is not corroborative evidence of his having been guilty of adultery.

LORD KINNEAR—I am of the same opinion. As regards article 12 of the proposed addition to the condescendence I have no doubt that it must be rejected. I think it would have been irrelevant even if it had been included from the beginning. It is an attempt to prove the case against the defender by proving that on one occasion eight or nine years ago the co-defender had been guilty of misconduct with another woman. I know of no legal ground upon which the whole previous life of the co-defender could be inquired into for the purpose of establishing the particular case of misconduct which gives rise to the present action.

As regards the other two proposed additions I have more difficulty. It is not maintained, however, that it would be incompetent to allow them. It is common ground that the pursuer is not precluded by the decision of the Lord Ordinary on a closed proof, before final judgment, from bringing forward such new allegations of fact.

In general I should be extremely slow, assuming the matter to be in the discretion of the Court, to allow a pursuer to bring forward a new case in such circumstances. A pursuer must in general consider whether the case with which he is prepared is sufficient to go to trial, and when he does so the matter must in general be decided on the case as it stands. I think there is great difficulty in allowing a pursuer the privilege of amending his record by adding new statements, after the Lord Ordinary has given his decision, if the result on the case as it originally stood is unfavourable to him. At all events it is not, I think, disputed that a proof of such new facts should not be allowed unless it is clearly necessary for the ends of justice that newly discovered facts should be inquired into.

I do not differ from the view that your Lordships have expressed that in the circumstances of this case it is just and reasonable that a proof should be allowed of the new facts brought forward by the pursuer in the 10th and 11th articles. It appears from the authorities that a new inquiry should be allowed unless the pursuer knew or ought to have known at an earlier stage the facts which he proposes to make the subject of a new inquiry. In the present case I agree that it cannot be said that there was any negligence or failure of due diligence on the part of the pursuer in failing to ascertain the facts which he now seeks to prove.

I am therefore prepared on these grounds to agree in the course which your Lordships propose.

LORD ADAM was absent.

The Court pronounced this interlocutor:—

"The Lords having considered the proposed minute of amendment for the pursuer and reclaimer, No. 24 of process, and heard counsel for the parties, open up the record, allow the pursuer to amend the same by adding articles 10 and 11 of said minute to the condescendence for him, and appoint the defender and the co-defender to answer said articles by the first box-day in the ensuing vacation; disallow article 12 of the said minute," &c.

Counsel for the Pursuer and Reclaimer—Hunter—Morison. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender and Respondent—Dundas, K.C.—J. R. Christie. Agents—R. & R. Denholm & Kerr, S.S.C.

Counsel for the Co-Defender and Respondent — M'Clure. Agents — Simpson & Marwick, W.S.

Tuesday, March 17.

FIRST DIVISION.

SMITH *v.* TRUSTEES OF PORT OF LERWICK.

Property — Sea — Foreshore — Udal Tenure in Shetland—Crown—Rights of Crown under Udal Law—Rights of Udaller.

A proprietor of land in Lerwick, Shetland, brought an action to have it declared that he was the proprietor of the foreshore *ex adverso* of his property to the lowest low-water mark. He and his authors had held the subjects in question upon titles—among which there was no Crown writ—going back to a disposition granted in 1819, which conveyed *per expressum* the foreshore in question, and sasine thereon published in the Register of Sasines. Defences were lodged by persons who held a disposition from the Crown, dated 1878, of "all and whole the right, title, and interest" of the Crown in, *inter alia*, the piece of foreshore in question. *Held*, in respect the land law applicable was admitted to be udal and not feudal, (1) that, the right of the Crown in the foreshore in question being a right of sovereignty and not of property, the disposition by the Crown was ineffectual to convey any right of property therein, and (2) that, in the absence of any effectual competing right, the pursuer had a valid and effectual right and title to the foreshore in dispute, he and his authors having held it for eighty years upon a title which expressly conveyed it, and which had been made public by registration.