thing about Lord Salvesen's decision, because I think each of these cases must be decided on its own merits. But that this case comes within the words of the Act of Sederunt, 15th July 1876, I have not any doubt. Here there was an order for proof pronounced, and I am quite willing to give the defenders the benefit of the doubt and to treat the tender as synchronous with the order for proof being pronounced. By an order for proof it is shown that the case demanded proof if the facts were not admitted, and I think the meaning of the Act of Sederunt is quite clear that by an order for proof being pronounced it is shown that there was a case requiring investigation. That being so, when expenses are found due to the pursuer the intention is that that should carry the expenses of investigations so far as necessary, even although those investigations were made prior to the order for proof being pronounced, and although, owing to the further conduct of the parties, the defender having made a tender, the proof itself never in fact came to be led. I think the defender here had himself to blame, because he could have put in his tender at such a time as to have put the pursuer in bad faith when he applied for an order for proof. If the tender had been put in and had been brought to the knowledge of the pursuer I do not think he could then, without considering the tender, have rushed in to get an order for proof.

I rather agree with what has fallen from my brother Lord Mackenzie, that the Act of Sederunt, if it errs at all, errs on the side of undue severity to the pursuer.

I therefore think that what the Auditor did was right, and that Lord Dewar's interlocutor upon that matter must be recalled and the finding of the Auditor restored.

LORD KINNEAR—I am entirely of the same opinion.

LORD JOHNSTON—I also agree, and think that the matter is very largely disposed of by the case referred to (*The Mica Insulator Company* v. *Bruce Peebles & Company*, 1907 S.C. 1293).

LORD MACKENZIE—I am of the same opinion.

The Court recalled the Lord Ordinary's interlocutor, repelled the defenders' objections to the Auditor's reports on the pursuer's accounts of expenses, approved of the Auditor's reports thereon, and decerned against the defenders for payment to the pursuers of the taxed amount of their respective accounts.

Counsel for Pursuers (Reclaimers)—A. R. Brown—Burn Murdoch. Agents—Alex. Morison & Company, W.S.—Mackenzie & Kermack, W.S.

Counsel for Defenders (Respondents)—Horne, K.C.—Lippe. Agents—Boyd, Jameson, & Young, W.S.

Thursday, October 31.

EXTRA DIVISION.

[Lord Dewar, Ordinary.

A B *v.* C B AND G H.

Husband and Wife—Process—Divorce—Adultery—Act of Sederunt, 17th July 1908 *—Minuting Defender Found Entitled to Final Judgment.*

A B brought an action of divorce against his wife, in which he asked the Court to find facts "proven relevant to infer guilt of adultery of the defender C B with G H." The case having been intimated in terms of the A.S. of 17th July 1908 to G H, he lodged a minute craving to be sisted as a party to the cause. After proof the Lord Ordinary decerned against the wife in terms of the conclusion of the summons, but, in respect that there was no conclusion against G H, found it unnecessary to consider how far the evidence was good against him. G H reclaimed, and in the Inner House counsel for the pursuer admitted that he could not maintain that adultery was proved against G H. Parties differed as to whether in the circumstances the action should be dismissed as against G H., or decree of absolvitor pronounced in his favour.

Held that there was a declaratory conclusion against G H; that he was therefore entitled to have a judgment on the question of whether adultery was proved against him or not; that the Court could not decide that question without hearing the evidence, and were entitled to the opinion of the Judge of first instance upon it; that therefore the case must go back to the Lord Ordinary in order that he might decide whether adultery was proved against G H, and if not, whether decree of dismissal or absolvitor should be pronounced.

The Act of Sederunt of 17th July 1908 enacts—"In every action of divorce on the ground of adultery in which appearance has not been entered, and in which the person with whom the defender is said to have committed adultery, has not been cited as a co-defender, the Lord Ordinary before whom the action depends shall, before fixing a diet of proof, unless cause be shown to the contrary, appoint intimation to be made to such person, . . . and such person, if he or she desires to dispute the truth of the averments made against him or her, shall be entitled to lodge a minute craving to be sisted as a party to the cause, . . . and on such person being sisted, he or she shall become a party to the cause and be subject to the same procedure as if he or she had originally been cited as a co-defender, and with the same rights and liabilities as to the expenses occasioned by such intervention."

On 29th June 1911 A B, *pursuer*, brought an action of divorce against his wife C B, *defender*, in which the conclusion of the

summons as amended was as follows—"Therefore the Lords of our Council and Session ought and should find facts, circumstances, and qualifications proven relevant to infer guilt of adultery of the defender C B with G H, and therefore find her guilty of adultery with him accordingly: And our said Lords ought and should divorce and separate the defender from the pursuer and from his society, fellowship, and company." The action was, under the Act of Sederunt of 17th July 1908, intimated to G H, who put in a minute denying his guilt, and on 12th January was sisted as a party to the cause.

On 13th April 1912 the Lord Ordinary (DEWAR) pronounced this interlocutor—"Finds facts, circumstances, and qualifications proved relevant to infer the defender's guilt of adultery: Finds her guilty of adultery accordingly, and therefore divorces and separates the defender from the pursuer, his society, fellowship, and company in all time coming: Finds and declares in terms of the conclusion of the summons, and decerns."

Opinion.—"This is an action at the instance of A B against his wife for divorce on the ground of adultery with G H. Mrs B does not defend the action. She has admitted the adultery both by extrajudicial confession and on oath. But G H has appeared in the case, and has lodged a minute of amendment denying the adultery and averring that the action is collusive, and that the pursuer and defender are acting in concert together for the purpose of extorting money from him.

"But for this minute the case would have been simple, because there is such strong presumption that a person will not admit adultery unless it is true, that very little corroborative evidence is necessary to enable an injured spouse to obtain the remedy of divorce. Mrs B's confession and certain letters she wrote, to which I shall presently refer, although not evidence against G H, are, I think, conclusive against her. But the averments contained in the minute are of such a grave character that it is necessary to examine them with great care in the light of the evidence. If they are true, divorce is of course out of the question; but if they are untrue the pursuer is entitled to a clear and unequivocal judgment to that effect. As there is no conclusion against G H in the summons, I do not require to consider how far the evidence is good against him. The only question I have to decide is whether it is proved that this action is really a collusive conspiracy between the pursuer and defender brought for the purpose of extorting money from G H. I am very clearly of opinion that it is not."

G H reclaimed, and argued—The declaratory conclusion of the summons was directed as much against G H as against C B, and therefore the Lord Ordinary was wrong in refusing to decide whether adultery was proved against him. The pursuer now admitted that adultery was not proved against him, and the Court should make a finding to that effect and assoilzie him. It was quite competent in law to find the defender guilty with the co-defender, but the co-defender not guilty—*Leitch*, January 31, 1906, 13 S.L.T. 742; November 6, 1906, 14 S.L.T. 396. The pursuer urged that the Conjugal Rights (Scotland) Act 1861 (24 and 25 Vict. cap. 86), sec. 7, only gave power to dismiss the action, but that Act had nothing to do with the case. Under the Act of Sederunt 1908 the minuting defender had become as much a party to the cause as if he had been cited as a defender in the beginning.

Argued for pursuer and respondent—G H came into the case voluntarily, and could not take advantage of a case not brought against him to escape liability to another action for damages brought directly against him. Therefore the correct course would be to dismiss the action. Counsel referred to the case of *Miller* v. *Simpson*, December 9, 1863, 2 Macph. 225.

LORD KINNEAR—I think this case is in a somewhat unfortunate position, but I cannot say I have any doubt as to the proper way of dealing with it.

The action is one of divorce, and the Lord Ordinary has pronounced the decree of divorce which is brought before us on a reclaiming note by a certain G H, who is not called in form as a co-defender, but whose name is set out in the first conclusion of the summons as being the person with whom the pursuer alleges his wife committed adultery. The first conclusion is that the Court should find "facts, circumstances, and qualifications proven relevant to infer guilt of adultery of the defender C B with G H. The action was intimated to G H. He put in a minute denying his guilt, and at the same time making certain other averments material to the cause which I need not further consider now.

The Lord Ordinary has pronounced an interlocutor, in the first place finding that the defender's adultery is proved and therefore divorcing her, and then finding and declaring in terms of the conclusion of the summons. The first part of that interlocutor is not reclaimed against, but the second part is, on the ground that the declarator in terms of the conclusion of the summons means that it is proved that the defender had committed adultery with G H. G H reclaims against that finding, and, as I understand, the counsel for the pursuer and respondent does not maintain that he could hold it except under certain qualifications which at present I do not think it necessary to consider.

Now parties are chiefly in dispute as to whether the finding—whatever it be—which affects G H should be followed up by a dismissal of the action or by an absolvitor of G H from the conclusions of the action. I think there is a preliminary question which must be decided before the Court can possibly determine whether the form of judgment should be absolvitor or dismissal, and that is whether it is or is not proved that G H committed adultery with the defender. Now upon the form of the interlocutor I should have thought

the Lord Ordinary had held it proved, and I think the interlocutor says so in plain words; but then his Lordship explains in his note that he had not in fact applied his mind to that question at all. He says—"As there is no conclusion against G H in the summons, I do not require to consider how far the evidence is good against him. The only question I have to decide is whether it is proved that this action was really a collusive conspiracy between the pursuer and the defender for the purpose of extorting money from G H.

Now I cannot agree with the Lord Ordinary in thinking that there is no conclusion of the summons directed against G H. I think there is a declaratory conclusion which necessarily and directly tables the question for judicial determination whether he is or is not guilty of adultery with the defender in this action. The Lord Ordinary, when the procedure reached the proper stage, taking that view, directed that the action should be intimated to G H to give him an opportunity of appearing and attending the proof. G H accordingly put in a minute to the effect I have already mentioned, and I think that the effect of that was that he and the pursuer joined issue upon a question of fact which is of vital importance to G H, namely, whether he is or is not guilty of adultery with the pursuer's wife. I am of opinion that he is entitled to have a judgment upon that question, and that it is not reasonable or fair treatment of G H to say that it is not a question arising for decision, because there is no operative conclusion in the shape of a money claim made against him. There is the declaratory conclusion, which very clearly affects him.

Now we are asked to supply the deficiency in the Lord Ordinary's judgment and to pronounce a finding, without having considered the evidence, that will relieve the minuter G H of the judgment in fact that has already been pronounced against him. We are asked, in some form or other, to find that the case is not proved against him. I think it quite impossible for this Court to do anything of the kind. We could pronounce no finding upon that question of fact without having the evidence properly brought before us and fully argued. But even if that had been done, I think we ought to pronounce no such finding without knowing the Lord Ordinary's mind upon it. It is a question to which, in the opinion before us, his Lordship has not applied his mind. The first thing to be done is that he should be asked to apply his mind to it, and to say whether, in his judgment, the case is proved against G H or whether it is not. I think it quite necessary to have that question distinctly decided before we consider whether the proper course is to dismiss or assoilzie. The latter is quite a minor question, but still it is one of material importance; but the first step towards it is to find what is really proved or not proved against him.

Therefore what I should move your Lordships to do is to adhere to the first part of the interlocutor, but to recal it in so far as it finds and declares in terms of the conclusions of the summons, and to remit to the Lord Ordinary to consider and decide the question whether the case is or is not proved as against the minuter G H, and to proceed as shall be just. I do not mean that the Lord Ordinary is to do nothing beyond finding the effect of the proof as regards G H's guilt or innocence. Having determined that question he should then proceed as shall appear to him to be just, and decide whether the final disposal of the action should be by way of dismissal or by way of absolvitor, provided always he thinks the case is not proved against G H.

LORD DUNDAS—I am of the same opinion. The dependence of this action was intimated to G H in terms of the recent Act of Sederunt—a very wholesome and useful Act of Sederunt as I humbly think. G H was allowed to lodge a minute, if so advised, and did lodge a minute, and in terms of the crave of that minute he was sisted on 12th January 1912 as a party to the cause. The only position as a party which he could possibly occupy was, of course, that of co-defender, and accordingly in terms of the Act of Sederunt, on being sisted, he became a party to the cause and subject to the same procedure as if he had been originally cited as co-defender.

In that state of matters, G H being thus a co-defender, I think the Lord Ordinary ought to have decided the question and expressed an opinion as to whether the allegations made concerning him were or were not proved in fact. It was pressed upon us by the learned Dean that, although that had not been done in the Outer House, it might now be done here. I agree with your Lordship that that is impossible. The suggestion that we should proceed, without hearing any evidence, to make such a finding as is desired seems to me to be quite extravagant. And the alternative view—that we might have heard the Dean or his junior open the case, and then dispose of the matter—does not meet the situation either, because this is obviously a question where the Court is entitled to have the benefit of the views of the Judge of first instance. I therefore agree that the case should go back as your Lordship has indicated. If the Lord Ordinary should hold that the allegations made by the pursuer so far as concerning G H are not proved by competent and sufficient evidence, he will, of course, proceed to consider and decide whether the proper course would be to assoilzie G H, or to dismiss the action so far as laid against him.

LORD MACKENZIE—I am entirely of the same opinion. I think that the course that the case has taken shows quite distinctly that one of the parties to the case is G H. He was sisted as a party to the case by the interlocutor of 12th January 1912, after having been allowed to lodge a minute by interlocutor of 15th July 1911. In that minute he denied the truth of the averments made with reference to him, and

those averments are contained in the third, fourth, and sixth articles of the condescendence.

Having joined issue on those questions of fact, I think he was entitled to the judgment of the Court upon them; and that the Lord Ordinary not having disposed of them, the case should go back to his Lordship in order that he may say whether, in his opinion, they are proved or not as in a question with the minuter.

We were asked by the learned Dean of Faculty to make a finding that there was no evidence relevant to infer G H's guilt of adultery with the defender in this case, and it was suggested that the way was open for this Court making that finding by the admission that Mr Blackburn tendered at the bar. Mr Blackburn's admission was to the effect that he was prepared to admit that no evidence had been led which would justify him, as in a question with G H, arguing in this case that he had proved the averments made against him. But it was carefully pointed out that that admission was limited to the purposes of this case, and he made it quite evident he desired to safeguard himself with regard to any future action of damages he might raise.

In my opinion we cannot proceed to make a finding with regard to evidence as to the import of which we are entirely ignorant, and in a case of this kind I should entirely demur, for my own part, to expressing any opinion without knowing what impression that evidence made on the Lord Ordinary, who heard and saw the witnesses. I agree with what your Lordships have said.

The Court pronounced this interlocutor—

"Adhere to said interlocutor [of 13th April 1912] in so far as it finds facts, circumstances, and qualifications proved relevant to infer the defender's guilt of adultery: Finds her guilty of adultery accordingly, and therefore divorce and separate the defender from the pursuer, his society, fellowship, and company, in all time coming: Recal said interlocutor in so far as it finds and declares in terms of the conclusion of the summons, and in place thereof find and declare the defender to have forfeited all the rights and privileges of a lawful wife, and that the pursuer is entitled to live singly or to marry any free woman, as if he had never been married to the defender or as if she were naturally dead: *Quoad ultra* adhere to said interlocutor: Remit to the Lord Ordinary to consider and dispose of the first conclusion of the summons so far as directed against the minuting defender, and to proceed as may be just, and decern."

On 14th November 1912 the Lord Ordinary (DEWAR) pronounced this interlocutor—

"The Lord Ordinary, on the motion of the minuting defender, G H, for absolvitor from the conclusion of the summons so far as directed against him, in respect that the pursuer admitted that no sufficient evidence had been led to infer that the said G H had been guilty of adultery with the defender—the pursuer not opposing said motion—assoilzies the said G H from the said conclusion, and decerns."

Counsel for the Pursuer and Respondent—Blackburn, K.C.—C. H. Brown. Agents—W. & W. Finlay, W.S.

Counsel for Minuting Defender and Reclaimer—The Dean of Faculty (Dickson, K.C.)—The Hon. W. Watson. Agents—Bruce, Kerr, & Burns, W.S.

Tuesday, November 5.

EXTRA DIVISION.

PARK AND OTHERS (GLOVER'S TRUSTEES).

Succession — Testament — Construction — "Liferent Use and Enjoyment" of House —Liferent or Right of Occupancy—Public Burdens—Liability for Feu-Duty, Landlord's Taxes, Repairs, Insurance Premiums, and Interest on Bonds.

A directed his trustees to retain for "the liferent use and enjoyment" of his unmarried daughters certain houses with the furniture and other effects therein and to pay an allowance of £400 per annum out of the income of his estate for the upkeep of the said residences. In paying this allowance the trustees deducted from it the feuduties, landlord's taxes, and repairs effeiring to the houses and the insurance premiums for the furniture therein. They did not, however, deduct the interest of two bonds over one of the houses.

Held that all these items, including the interest on the bonds, formed proper charges against the liferentrix.

Succession — Testament — Construction — "Allowance at the Rate of"—Deficit in a Particular Year.

A testator who had provided a residence for his unmarried daughters directed his trustees "to pay to my said unmarried daughter or daughters, out of the income of my estate, an allowance at the rate of £400 per annum towards the upkeep of said residence."

Held that if in any year there was not sufficient revenue to yield £400, any part thereof unpaid must be paid out of the income of future years.

David Francis Park and others, trustees acting under the trust-disposition and settlement of the late Thomas Craigie Glover of Mount Grange, Edinburgh, *first parties;* Thomas Glover, Eastbourne, and others, the persons entitled to shares of the fee of residue of the trust estate, *second parties;* Mrs Janet Cumming Glover or Park and others, the whole persons entitled to the liferent of shares of residue, *third parties;* and Alexandria Malcolm Glover, the only unmarried daughter of the testator, *fourth party*, presented a Special