of the £4000 to his wife. The only evidence is the fact that he never paid the income to his wife. I doubt whether in any view the necessary inference from that fact is that he intended to revoke the donation; and I further doubt whether the mere non-payment of the income by the truster, whatever his intention might be, was a habile method of revoking a gift of income to his wife constituted by a formal trust deed, and by the handing over of the capital sum to the trustees under that deed. But however that may be, I think that the idea that the truster revoked the gift is negatived by the letter of 25th May 1889, quoted in the case, and the circumstances in which it is admitted that the letter was written.

The letter is addressed to the trustees under the deed of trust of 1878, and is signed by Mrs Boyd, and in it she acknowledges that she has received payment of the interest of the trust fund half-yearly up to Whitsunday 1889.

In regard to that letter the statements in the special case are these—"This document is in the handwriting of a former clerk of Mr Boyd's. It was handed to Mrs Boyd by her husband as a document requiring her signature and she signed it. She received no explanation as to the meaning of the document or the purpose for which it was required, and she did not ask any explanation."

The statement in the letter that the income of the trust fund had been paid to Mrs Boyd was not true, and I suppose that it was made to satisfy the trustees under the deed of trust. But however that may be, the statement was truly the truster's statement, although put in the form of a letter from his wife, and in face of that statement by him I do not see how it can be maintained that up to the date of the letter he had revoked the donation of the income to his wife. The statement is that so far from having revoked the donation he had regularly paid the income to her. But if he had not revoked the donation prior to 1889, he never did so afterwards, because there was nothing done by him after 1889, from which revocation could be inferred, which had not equally been done prior to that date. I am therefore of opinion that the claim of the third parties cannot be rejected on the ground that the truster had revoked the gift of the income of the trust fund to his wife.

In my judgment, however, they can only claim the arrears of income from and after Whitsunday 1889, the date up to which payment was acknowledged in the letter. Mrs Boyd is not a party to this case, and she is not seeking to have the letter set aside. It is true that it is neither holograph nor tested, but it is upon the face of it an acknowledgment by Mrs Boyd that she had received payment of the income up to date, and it was sent to the trustees obviously to exonerate them in regard to past income. Standing the letter, therefore, I do not see how Mrs Boyd could claim payment of the income falling due prior to Whitsunday 1889, and I do not think that the third parties can, as regards that matter, be in any better position.

I therefore think that branch (*b*) of question 2 should be answered in the affirmative, with the deletion of the words "or any part thereof," and branches (*a*) and (*c*) in the negative.

LORDS STORMONTH DARLING and ARDWALL concurred.

The LORD JUSTICE-CLERK was absent.

The Court answered the first branch of the first question in the affirmative, deleting the words "indefinitely at their pleasure," and the second branch in the negative; answered branch (*b*) of question 2 in the affirmative, with the deletion of the words "or any part thereof," and branches (*a*) and (*c*) in the negative.

Counsel for the First Parties—The Dean of Faculty (Campbell, K.C.)—Jameson. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Second Party—Lees, K.C.—Burn Murdoch. Agents—Hagart & Burn Murdoch, W.S.

Counsel for the Third Parties—Hunter, K.C.—Boyd. Agents—J. & J. Ross, W.S.

Saturday, July 11.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

SCOTT *v.* SCOTT.

Husband and Wife—Divorce—Desertion—Adherence—Jus Quæsitum—Vested Right—Defender Becoming Insane after Lapse of the Four Years, and Remaining so at Date of Action—Act of 1573, *cap.* 55—*Conjugal Rights (Scotland) Amendment Act* 1861 (24 *and* 25 *Vict. cap.* 86), *sec.* 11.

Where there has been "malicious and obstinat defectioun of the partie offender" for the full statutory period of four years, the injured spouse being all the time willing to adhere, and not being disentitled by any conjugal misconduct of his or her own from seeking the remedy of divorce, that is by itself a sufficient ground for divorce, whether it be called a vested right or a *jus quæsitum* to apply for the remedy.

Held, accordingly, that the fact of the defender to an action of divorce for desertion having become insane at a period subsequent to the four years, and being insane at the date of the action, did not affect the pursuer's right to obtain divorce. *Murray* v. *M'Lauchlan*, December 21, 1838, 1 D. 294; *M'Callum* v. *M'Callum*, February 15, 1865, 3 Macph. 550; *Muir* v *Muir*, July 19, 1879, 6 R. 1353, 16 S.L.R. 785; *Winchcombe* v. *Winchcombe*, May 26, 1881, 8 R. 726, 18 S.L.R. 517; *Auld* v. *Auld*, October 31, 1884, 12 R. 36, 22 S.L.R. 26;

Watson v. *Watson*, March 20, 1890, 17 R. 736, 27 S.L.R. 598—*discussed*.

The Conjugal Rights (Scotland) Amendment Act 1861 (24 and 25 Vict. cap. 86) enacts, section 11—"It shall not be necessary, prior to any action for divorce, to institute against the defender any action of adherence, nor to charge the defender to adhere to the pursuer, nor to denounce the defender, nor to apply to the presbytery of the bounds, or any other judicature, to admonish the defender to adhere."

Mrs Kate Thomson or Scott, Hawick, brought an action against her husband Andrew Scott, an inmate of the Buckinghamshire County Lunatic Asylum, Stone, near Aylesbury, in which she sought for divorce on the ground of desertion.

The Lord Ordinary (MACKENZIE) appointed a curator *ad litem* to the defender, who stated the following pleas—"(1) The action is incompetent and ought to be dismissed, in respect that the defender is now insane. (2) The action is irrelevant and ought to be dismissed, in respect that the defender has not been in wilful and malicious desertion since he became insane as condescended on."

The Lord Ordinary reported the case to the Inner House.

The circumstances are stated in the first two paragraphs of his report, *infra*.

LORD MACKENZIE—"This is an action of divorce on the ground of desertion brought by a wife against her husband.

"According to the pursuer's averments the material dates are as follows—The parties were married in 1894, and the defender left the pursuer in November of that year. In January 1895 he stayed two days in pursuer's parents' house when she was there. On 15th March 1899 he was admitted to Hampstead Workhouse suffering from influenza, with fever and delirium tending to become maniacal. On 10th April 1899 he was sent to Hanwell Asylum, and was transferred to the Buckinghamshire County Asylum on 9th December 1904, where he was at the date of the raising of the action. The pursuer avers that it is not expected he will ever recover.

"A curator *ad litem* has been appointed to the defender. It was contended by him that in the circumstances above set forth the action is incompetent or irrelevant in respect the defender has not been in wilful and malicious desertion since he became insane. The pursuer's contention is, that as the defender was, according to her averments, in wilful and malicious desertion for four years before he became insane, the supervening insanity is no bar to her obtaining decree of divorce.

"The difficulty arises from the fact that it has never been settled since the Conjugal Rights Amendment Act 1861 at what date the right to make a *bona fide* offer to adhere expires. Under the old law an offer of adherence, when made timeously and *bona fide*, was sufficient to bar divorce—Fraser on Husband and Wife, p. 1214. At p. 115 of Lothian's Consistorial Law the view is expressed that the last opportunity for offering to adhere is the interval between the charge on the decree of adherence or admonition by the Church Court, where such is given, and the raising of the action of divorce. In *M'Lauchlan* v. *M'Lauchlan*, 1 D. 294, it was held that the pursuer could not be barred from obtaining decree of divorce by the defender offering to adhere after the four years had expired and all the preliminary proceedings required by the Act of 1573 had been taken. If proceedings had been instituted under the old law, as it existed prior to the Conjugal Rights Amendment Act 1861, the first step would have been to bring an action of adherence. If this had not been brought before the defender had become insane, it is difficult to see how the pursuer could have obtained a decree ordaining a person of unsound mind to adhere. Accordingly, in the present case, unless a decree of adherence had been obtained by April 1899, it could not have been obtained at all, and the subsequent action of divorce could not have been proceeded with.

"The Conjugal Rights Amendment Act of 1861 has, however, made a change in the Act of 1573, for it provides that it 'shall not be necessary prior to any action of divorce to institute against the defender any action of adherence nor to charge the defender to adhere to the pursuer, nor to denounce the defender, nor to apply to the presbytery of the bounds, or any other judicature, to admonish the defender to adhere.' The effect of this is explained by the Lord President in *Watson* v. *Watson*, 17 R. 736. The abolition of the forms required by the Act 1573 as necessary preliminaries to the action of divorce did not in any way alter the substantial conditions on which alone divorce could be obtained. The argument for the curator *ad litem* was that there was no vested right to divorce on the expiry of the four years during which malicious and obstinate desertion had continued. He founded on the case of *Auld* v. *Auld*, 12 R. 36, in which the Lord President and Lord Shand, referring to the cases of *Winchcombe*, 8 R. 726, and *Muir*, 6 R. 1353, criticised the view that as a result of the 11th section of the Conjugal Rights Amendment Act the whole procedure formerly necessary is to be held to have taken place the moment the action is raised, and that therefore an offer to adhere after the summons has been served comes too late. The case of *Hunter* v. *Hunter*, 2 F. 771, was also founded on. In *M'Callum*, 3 Macph. 550, Lord Deas expressed the opinion that the meaning of section 11 of the Act of 1861 is that if there shall have been non-adherence for the statutory period, decree of divorce may be obtained by simply instituting and following out the action of divorce itself. In the case of *Mackenzie*, 22 R. (H.L.) 22, Lord Watson says—'The only remedy provided by Scotch law where the offending spouse persists in avoiding cohabitation after decree, is to be found in the Act of 1573. Decree of divorce under that Act, is, in my opinion, nothing else than a penalty for obstinate non-adherence.' And in dealing with the Conjugal Rights Act it

is pointed out that the object of that enactment was to simplify procedure by allowing the pursuer to prove non-adherence in his suit for divorce.

"If insanity, just as imprisonment, be a reasonable cause for non-adherence, the question is whether it cannot be pleaded as an answer to an action of divorce for desertion.

"If it can be so pleaded, it may entail great hardship upon a pursuer. There may have been malicious and obstinate desertion for the statutory period. Under the old law an action of adherence might have been raised after a year. Under the existing law the action of divorce, in which non-adherence must be proved, can only be raised after the four years. If insanity supervenes shortly after the expiry of four years, the pursuer, according to the defender's argument, might under the existing law be in a worse position than before 1861, and might lose her remedy altogether.

"I think it is possible to hold that, on the facts as averred, the present action is competent and relevant, and I am accordingly of opinion that a proof should be allowed. So long as the substantial conditions, to use the expression of the Lord President in *Watson's* case, are observed, the injured spouse is entitled to the statutory remedy. The substantial conditions could not be fulfilled in *Auld* or in *Hunter*, because the adultery of the pursuer was a reasonable cause for non-adherence on the part of the defender, at the date of the action. So if insanity had here supervened before the four years of desertion had expired, the action could not have been maintained. Where, however, as here, there had been four years' desertion prior to insanity, it appears to me that the defender had incurred the statutory penalty. It is not necessary to express an opinion on the question whether it is too late, after the action has been brought, for the defender to offer to adhere. There can be here no offer to adhere on the part of the defender. As, however, it may be considered that the case touches the general question of when an offer to adhere may be made, upon which different views have been expressed in the cases of *Muir* and *Winchcombe*, and the case of *Auld*, I think it proper to report the point."

Argued for the defender—The action was incompetent and irrelevant, and fell to be dismissed. Four years' desertion did not confer on the innocent spouse a vested right to obtain divorce, divorce being only granted where there was four years' desertion combined with a refusal to adhere at the date of the action. Accordingly where, as here, the defender was incapable of stating whether he was willing, or refused, to adhere, the remedy was barred. That this was the true view of the law as to divorce for desertion was clear, *firstly*, from the language used in the Act 1573, cap. 55, where an action of adherence, decree for adherence, letters of horning, admonitions by the bishop, were all necessary preliminaries to a final decree of divorce. *Secondly*, the Act of 1573, cap. 55, was not an enactment of new law but a codification or declaration of the consistorial law of the Reformation, in which the citation of the party to adhere, which necessarily postulated his ability to appear and answer, was an essential preliminary—The Booke of the Universall Kirk of Scotland, part i, p. 262, Bannatyne Club edition; Works of Sir George Mackenzie, vol. i, 277; Harpprecht Opera Omnia, 1627, vol. i, p. 417. This too was the Roman-Dutch law—Voet Commentarius ad Pandectas, lib. 24, tit. 2-9—and is now the modern law of South Africa—Nathan's Common Law of South Africa, vol. i, p. 280. *Thirdly*, modern decisions supported the view contended for, making it clear that the changes introduced by the 11th section of the Conjugal Rights Act 1861 were changes in the form of procedure only, and were in no way meant to alter the law as to, or facilitate the obtaining of, divorce—*Auld* v. *Auld*, October 31, 1884, 12 R. 36, see L.P. at p. 38, 22 S.L.R. 26; *Watson* v. *Watson*, March 20, 1890, 17 R. 736, L.P. Inglis at 738 and foll., 27 S.L.R. 598; *Hunter* v. *Hunter*, March 15, 1900, 2 F. 771, 37 S.L.R. 537; *Mackenzie* v. *Mackenzie*, May 16, 1895, 22 R. (H.L.) 32, Lord Watson at pp. 40 and 41, 32 S.L.R. 455. Accordingly, as the pursuer was not in a position in which she could obtain a decree of adherence against her husband, she could not obtain a decree of divorce.

Argued for the pursuer—Seeing that the Act of 1573 either enacted new law or declared the law existing at the time, it was unnecessary to go back to any earlier date. Under the Act of 1573, *i.e.*, prior to the Conjugal Rights Act 1861, the defender's insanity would not necessarily have prevented the pursuer obtaining divorce. She might have raised her action of adherence and obtained her decree to adhere after the lapse of one year, and while the defender was still *compos mentis*, and then proceeded with her divorce at the end of four. It was therefore quite inconceivable that she could be in a worse position since the Act of 1861 than she was before it, the object of the Act having been merely to simplify procedure, and not in any way to limit the rights as to divorce. After the completion of four years' desertion the deserted spouse got a right of action which could not be defeated by a subsequent offer to adhere; she had in fact what was termed by Lord Mackenzie and Lord Corehouse *a jus quæsitum* to insist on divorce—*Murray* v. *M'Lauchlan*, December 21, 1838, 1 D. 294; *M'Callum* v. *M'Callum*, February 15, 1865, 3 Macph. 550; *Muir* v. *Muir*, July 19, 1879, 6 R. 1353, L.J.-C. Moncreiff at 1357, 16 S.L.R. 785; *Winchcombe* v. *Winchcombe*, May 26, 1881, 8 R. 726, 18 S.L.R. 517. The only limit to this right was that the pursuer must come into Court with clean hands, and must not have barred her right of action by any conjugal misconduct of her own—*Mackenzie* v. *Mackenzie*, *cit. sup.* Further, the defender's case was really based upon the fallacy that supervening insanity was equivalent to an offer to adhere. It was

not and could not be so, there being no ground whatever for assuming that had the defender remained sane he would have altered the attitude he had adopted during so many years. It was out of the question to allow the guilty party to claim any benefit from his supervening incapacity at the expense of the innocent, and the fact that he had not *de facto* come forward and offered to adhere must be held equivalent to a definite refusal—*Mordaunt* v. *Moncreiffe*, 1874, 2 Scotch and Divorce Appeals, 374.

At advising—

LORD STORMONTH DARLING—This action of divorce for desertion has been reported to this Division by Lord Mackenzie on the question whether an offer to adhere can competently be made by or on behalf of a husband after the lapse of the four years which are necessary to lay the foundation for such an action, the question not being one of willingness to adhere if he could, but of impossibility of adherence owing to his supervening insanity. It is admitted that the marriage took place on 28th March 1894, and it is averred by the wife, who is pursuer, that in November 1894 the defender left the house where he and she had resided with her parents, without giving any reason, and that he has never, with the exception of two days in January 1895, lived with the pursuer since that time, or contributed anything towards the support of her or the child of the marriage, who was born in July 1894. The curator *ad litem* appointed to the defender in the process states that, owing to the insanity of the defender, he is not in a position to ascertain the facts as to these averments; but he admits that the defender became an inmate of Hampstead Workhouse, suffering from influenza with fever and delirium tending to become maniacal, on March 15, 1899, and that he was transferred to Hanwell asylum on 10th April in that year, since which time he has been continuously in an asylum, and is not expected to recover. In these circumstances it is averred by the curator that since March 15, 1899, it has been impossible for the defender to adhere to his wife.

The Lord Ordinary expresses the opinion that, on the facts as averred, the present action is competent and relevant, and that a proof should be allowed, because here there had been four years' desertion prior to insanity and the defender had incurred the statutory penalty for that conjugal misconduct. His Lordship thinks it unnecessary to express an opinion on the question whether it is too late, after the action has been brought, for the defender to offer to adhere, because there can be here no offer to adhere on the part of the defender; but he reports the case, as it may be considered that it touches the general question of when an offer to adhere may be made—a question upon which different judicial views have been expressed in the cases of *Muir*, 6R. 1353, and *Winchcombe* 8 R. 726, on the one hand, and *Auld*, 12 R. 36, on the other.

I doubt whether there was any such real difference of judicial view as the Lord Ordinary indicates. In *Muir's* case the husband's offer to adhere, after the action of divorce had been personally intimated to him, was held to come too late, chiefly on the strength of section 11 of the Conjugal Rights Act of 1861, and the wife, who was pursuer, and had established desertion for upwards of four years, got her divorce. *Winchcombe's* case was one where a wife also got her divorce simply on the ground that the husband had deserted her for more than four years, and that there was no proof of his having made, after the expiry of the period, such an offer of adherence as she was bound to accept. Now, it is quite true that in *Auld's* case Lord President Inglis declined to accept what he characterised as the Lord Justice-Clerk's *obiter dictum* about the effect of section 11 of the Act of 1861 as finally settling the law. In particular, his Lordship combatted the view for which the pursuer in *Auld's* case was attempting to use Lord Moncreiff's dictum viz., that the lapse of four years gave a vested right to a deserted spouse to obtain divorce which could not be defeated by anything which happened after that period—and what had happened in *Auld's* case after the lapse of the four years was that, by her own admission, the wife who complained of having been deserted had borne an illegitimate child. I greatly doubt whether Lord Moncreiff ever intended his dictum to be stretched so far as that, but at all events the pursuer's counsel here did not carry it to that extent, or anything like it. He fully admitted, with Lord President Inglis, that the changes introduced by section 11 of the Conjugal Rights Act were changes in the form of procedure merely, and could not affect what the same learned Judge called "the substance of the enactments previously in force relating to this branch of the law of divorce," and one of these substantial conditions was of course that the deserted spouse should not by her own conduct have disentitled herself from obtaining the remedy she sought.

But if the judgment that we are now to pronounce is to have any useful effect such as the Lord Ordinary obviously intended by making the action at this stage the subject of a report, it will not do to restrict it to a mere criticism of the cases of *Muir*, *Winchcombe*, and *Auld*. Three other cases at least must be dealt with — those of *M'Lauchlan* in 1838, 1 D. 294; *M'Callum* in 1865, 3 Macph. 550; and *Watson* in 1890, 17 R. 736.

M'Lauchlan's case depended in the Outer House before Lord Fullerton, and began with the wife obtaining decree of adherence upon which she gave a charge to the defender, her husband, which was disobeyed. He was denounced, and the denunciation was recorded. She then presented a petition to the presbytery to proceed to the admonition and excommunication of her husband. Finally she raised an action of divorce, in which the defender stated that he was ready and willing to adhere, and the pursuer met that with the plea that it

was incompetent and irrelevant to make such an offer at that stage. Lord Fullerton repelled this plea of the pursuer, and appointed her to state in a minute, signed by herself, whether she accepted or declined the offer made by the defender. Lord Fullerton's interlocutor was, however, recalled by the First Division, consisting of the first Lord Mackenzie, Lord Corehouse, and Lord Gillies, very much on the strength of a passage in Baron Hume's Lectures. Lord Mackenzie said that it did not appear to him to admit of doubt that, when desertion had been obstinately continued so long as it had been in that case (upwards of four years before the wife obtained her decree of adherence) there was a *jus quæsitum* in the party deserted to insist for a divorce, which was not liable to be thereafter defeated at the option of the deserter. Lord Corehouse said that the statute gave the remedy after four years' "malicious and obstinat defectioun," which remedy was meant to be effectual. He also pointed out, like Lord Mackenzie, that unless the deserted spouse acquired a right to obtain a divorce after the lapse of four years such as could not be defeated by a subsequent tender of adherence, the remedy of the statute would be quite inoperative. And Lord Gillies agreed, on the assumption (which all the Judges made), that the pursuer's proceedings, ecclesiastical and civil, had been regular.

M'Callum's case was an action of divorce on the ground of desertion, and the judgment in it was pronounced soon after the passing of the Conjugal Rights Act, which by section 11 rendered it unnecessary, prior to any action for divorce, to institute against the defender any action of adherence, or to charge the defender to adhere to the pursuer, or to denounce the defender, or to apply to the presbytery of the bounds, or any other judicature, to admonish the defender to adhere. Excommunication not being expressly abolished by section 11 the case was reported by the Lord Ordinary (Lord Ormidale) on the question whether wilful desertion for four years together was a sufficient ground for divorce. The First Division unanimously held that, when admonition was dispensed with, excommunication as a necessary consequence was dispensed with also, and, accordingly, it was remitted to the Lord Ordinary to proceed with the cause.

Watson's case followed in 1890 and was sent to the Whole Court. It was proved that in 1874 the wife left her husband and had persisted in her desertion ever since. Her husband deponed that he was willing to take her back, but she was not called as a witness, and it did not appear that any remonstrance had been made to her, although she was living in Scotland and her address was known to the pursuer. The Whole Court, by a majority, holding that the facts proved were not sufficient to warrant decree of divorce, remitted the case to the Lord Ordinary to take further proof, particularly with regard to the state of mind of the pursuer towards his wife during the period of desertion, and as to her willingness to return to him during that period. This case, therefore, seems to show that in the opinion of the majority the necessity of admonition or remonstrance on the part of the spouse complaining of desertion was a question of circumstances, depending upon the merits of the particular case, and that no absolute rule could be laid down. Perhaps the case is chiefly important for a vigorous protest by Lord President Inglis against the notion of introducing, or even seeming to countenance, divorce *a vinculo* by consent of parties.

It seems, therefore, to be the result of all the cases that when, as here, there has been "malicious and obstinat defectioun of the partie offender" for the full statutory period of four years, the injured spouse being all that time willing to adhere, and not being disentitled by any conjugal misconduct of her own from seeking the remedy of divorce, that is by itself a sufficient cause of divorce, whether it be called a vested right or a *jus quæsitum* to apply for the remedy. I am, accordingly, of opinion with the Lord Ordinary that the proof which he proposes should be allowed.

LORDS LOW and ARDWALL concurred.

The LORD JUSTICE-CLERK was absent.

The Court remitted the case to the Lord Ordinary, instructing him to find the libel relevant and fix a diet for proof.

Counsel for the Pursuer—Inglis. Agent—Geo. A. Grant, S.S.C.

Counsel for the Defender—Dykes. Agent—Robert Millar, S.S.C.

Saturday, July 11.

SECOND DIVISION.

[Sheriff Court at Glasgow.

THE SALVATION ARMY LIFE ASSURANCE SOCIETY, LIMITED *v.* THE BRITISH LEGAL LIFE ASSURANCE COMPANY, LIMITED.

Insurance — Life — Industrial Assurance Transfer to Another Company — Notice of Transfer—Person Sought to be Transferred — Collecting Societies and Industrial Assurance Companies Act 1896 (59 *and* 60 *Vict. c.* 26), *sec.* 4, *sub-secs.* 1 *and* 2, *sec.* 14, *sub-sec.* 1.

The Collecting Societies and Industrial Assurance Companies Act 1896 enacts—sec. 4 — "(1) A member of or person insured with a collecting society or industrial assurance company shall not" (with certain exceptions not here material) "become or be made a member of or be insured with any other such society or company without his written consent, or in the case of an infant without the consent of his father or other guardian. (2) The society or