to purchase goods, or to do something for them. But these representations are not directly connected with the rug, which may have been a perfectly good one. Now there can be no crime in such a sale as is here alleged unless the fraudulent misrepresentations relate directly to the articles to be sold. I am therefore of opinion that all the allegations of misrepresentation made in this complaint are irrelevant, and that the conviction must be set aside.

LORD SALVESEN—I am very far from commending the conduct of this accused, but I agree that there is no relevant charge. The complaint should at least have contained a statement that the complainer not merely purchased but paid for the rug to the accused. If there was only a purchase without payment it could never be said that this accused got any advantage, or that the purchaser suffered any injury by her false pretences.

The Court suspended the conviction and sentence.

Counsel for the Complainer — Spens. Agent—James G. Bryson, Solicitor.

Counsel for the Respondent—M'Robert, Agent—F. J. Martin, W.S.

COURT OF SESSION.

Saturday, November 12.

FIRST DIVISION.

[Lord Cullen, Ordinary.

WALKER *v.* WALKER AND OTHERS.

Husband and Wife—Divorce—Adultery—Reduction of Decree—Fraud upon the Court—Collusion—Agreement not to Defend.

A decree of divorce on the ground of adultery was granted in an undefended action at the instance of the husband. After his death his divorced wife brought an action of reduction of the decree on the ground, *inter alia*, that there had been collusion, in that she had agreed not to defend and to give the necessary particulars to enable her husband to prove his case, in consideration of her husband arranging that the name of the paramour should not be mentioned in court and doing his best to enable her to marry the paramour after the divorce.

Held that this did not amount to collusion.

Per the Lord President—"I think collusion, according to our authorities, is permitting a false case to be substantiated, or keeping back a just defence."

Husband and Wife—Divorce—Adultery—Reduction of Decree—Fraud upon the Court—Condonation—Concealment of Condonation—Proof.

Circumstances in which *held* that a divorced wife, who brought an action of reduction of the decree on the ground that it had been obtained by her husband fraudulently concealing the fact of condonation, while she not having separate advice had not defended through ignorance that condonation was a defence, had failed to prove condonation.

Per the Lord President—"I have no doubt whatever that, apart from all question of collusion, yet it would be a good ground of reduction of a decree of divorce if it could be shown that the party getting the decree had intentionally kept back from the Court the fact that there had been condonation, and had also so arranged matters by keeping away from the witness-box by persuasion the only person who was likely to say much about it, namely, the other spouse, as to make it unlikely that anything that would excite the suspicions of the judge would appear."

Mrs Helen Geraldine Blackwood or Walker raised an action against (1) Graham Weir Walker, the heir-at-law and executor-dative of the deceased Nathan or Nathaniel Walker of Pitcurran, Abernethy, Perthshire, and against certain others who with the said Graham Weir Walker were the whole heirs *in mobilibus* of the deceased Nathan Walker, and (2) the marriage-contract trustees of the pursuer and her deceased husband Nathan Walker. The action was defended by the defenders first called. The pursuer sought to reduce a decree of divorce pronounced by Lord Salvesen (Ordinary), dated 7th July 1906, obtained at the instance of Nathan Walker, deceased, the husband of the pursuer, against the pursuer.

The *facts* of the case appear from the opinions of the Lord Ordinary (Cullen) and of the Lord President.

The pursuer pleaded—"(1) The pursuer's husband having condoned the adultery founded upon in the said action of divorce, and being thereby disentitled to decree therein, the pursuer is entitled to decree of reduction as craved. (2) The said decree of divorce having been obtained by means of fraud on the part of the pursuer in said action, decree of reduction should be pronounced. (3) The decree pronounced in said action of divorce should be reduced in respect that the pursuer therein wrongfully and illegally (1st) withheld material facts from the Court; (2nd) procured that no defences should be lodged thereto; and (3rd) employed the defender therein to assist in obtaining the evidence against herself. (4) In respect that the said decree of divorce is null and void, the defender, the said Graham Weir Walker, is bound to restore the trust estate, so far as extant, to the marriage-contract trustees, and, if necessary, a judicial factor should be appointed to administer said estate in terms of the said marriage contract. (5) The defenders as representing separately the late Mr Walker, are barred from maintaining the defences, and the pursuer having relied on the late Mr Walker's statements that she

had no defence to the action of divorce, and being innocent of any fraud in the matter, is not barred from maintaining the present action."

The defenders pleaded, *inter alia*, that the pursuer's averments were irrelevant, and also, so far as material, unfounded in fact. They further pleaded that the pursuer was barred *personali exceptione* from insisting in the action.

On 17th February 1909 the Lord Ordinary (SALVESEN) repelled the first plea-in-law for the defenders — which was founded on bringing the action after lapse of a year and a day, and after the death of the husband, on which the case is not reported—and before answer allowed to the parties a proof of their averments.

On a reclaiming note the First Division recalled the interlocutor of Lord Salvesen, and remitted to the Lord Ordinary before answer to allow the parties a proof of their averments.

On 7th December 1909 the Lord Ordinary (CULLEN), after a proof, pronounced this interlocutor—"Assoilzies the compearing defenders from the conclusions of the summons, and decerns. . . ."

Opinion.—"The pursuer was married to to the late Nathaniel Walker on 22nd December 1898. In September or October 1905, and again in December 1905, she committed adultery with a Dr Liddell. In respect of these acts of adultery her husband, on 25th May 1906, raised an action of divorce against her. The action was undefended, and, after proof, decree of divorce was pronounced on 7th July 1906. Mr Walker died on 22nd October 1907.

"In the present action, which was raised on 8th October 1908, the pursuer concludes for reduction of the said decree in absence, and she maintains right to have it set aside on two alleged grounds, viz.—(1) that the adultery was condoned by her husband, so that she had a good defence to the divorce action although she did not propone it, and was, she alleges, ignorant of its being in law available to her, and (2) that the divorce proceedings were tainted with collusion between her husband and her, vitiating the decree. The summons contains a further conclusion directed to the restoration of the pursuer to the rights conceived in her favour in an antenuptial marriage contract. The defenders are (1) the persons who are interested in the succession of the husband and who compear, and (2) the trustees under the marriage contract, who denuded after the decree of divorce, and who did not compear. [*His Lordship then dealt with and repelled certain preliminary pleas for the defence, on which the case is not reported.*]

"I now therefore pass to consider the pursuer's grounds of reduction on their merits. The first is that the acts of adultery, on which the decree of divorce proceeded, were condoned by her husband. In the fifth article of the condescendence the pursuer sets forth that on returning home to Pitcurran in January 1906, after being absent on a visit, her husband taxed her with having been guilty of adultery with Dr Liddell; that she admitted her guilt and was forgiven; and that thereafter she and her husband cohabited as man and wife till the end of May 1906.

"It is common ground that at some period prior to the raising of the divorce action on 25th May 1906 the pursuer fully avowed her guilt, and also that the spouses continued to reside together at Pitcurran until the date of the pursuer's departure consequent on the service of the summons, which date was, I think, 26th May 1906, the day after service was made. A sharp controversy arises, however, as to the time when the pursuer first made confession. The pursuer, as already mentioned, places it in January 1906, while the defenders place it in April thereafter, when the pursuer admittedly made a detailed confession. I am of opinion that the pursuer has not proved her averments as to confession and forgiveness in January. Her story is that when she returned to Pitcurran on or about 12th January, after an absence from home of about three weeks, during which one of the acts of adultery took place, she was taken to task by her husband, confessed, and was straightway forgiven. Her account of the occurrence—so momentous a one in her married life—is unnaturally meagre and devoid of circumstance. She says, moreover, that she made the admission of her guilt and was forgiven in presence of her mother Mrs Blackwood, who does not corroborate her. Mr Walker's evidence is, of course, not available apart from his deposition in the divorce action, where he places his wife's confession in April. It is important to observe, however, that from December 1905 onwards he was consulting his solicitor Mr M'Cann, S.S.C., having had his suspicions originally aroused through finding some of Dr Liddell's letters to his wife (not on the face of them incriminating) during her absence from home, and that Mr M'Cann depones that he never heard from his client of any confession having been made prior to April 1906. It is true that before April Mr M'Cann was, on Mr Walker's instructions, endeavouring to lay the train for an action of divorce, but it has to be noticed that Mr Walker's original suspicions had been fortified by the terms of certain intercepted letters. I think the truth of the January incident probably is that on the pursuer's return to Pitcurran along with her mother, there was some decided unpleasantness arising from Mr Walker's suspicions, and involving Mrs Blackwood, in whose house Dr Liddell had met the pursuer during her absence; that Mr Walker ultimately was or professed to be conciliated, and that the pursuer has magnified the incident into a confession of adultery with a remission of guilt by her husband. In any case I am of opinion that the pursuer has not proved the alleged confession and forgiveness in January.

"On the other hand, it is certain that the pursuer did make a full confession to her husband in April 1906, when she gave him details as to when and where the acts of adultery took place; and I do not think that an earlier avowal of her

guilt is proved. From the period of this confession until 26th May following, the spouses continued to reside together at Pitcurran, and the pursuer depones that sexual intercourse took place. She claims the benefit of a presumption in her favour, arising from the continuity of her residence with her husband. The proof, however, discloses a fact which, I think, turns the edge of the presumption, to wit, that in the end of August or the beginning of September previous Mr Walker had changed the sleeping arrangements, and had thereafter occupied a separate bedroom. The pursuer seeks to account for this by saying that Mr Walker was in use to smoke and read in bed; but this does not satisfactorily explain why he should have made a new departure at the period mentioned. On the other hand, the change corresponds with the time when Mr Walker learned that the pursuer had made an excursion to Dalmeny to meet Dr Liddell, and in his evidence in the divorce action, which disclosed the continued residence at Pitcurran, he deponed that he made the change because he then became suspicious.

"There is another element in the case which has to be kept in view in estimating the significance of the continued residence of the spouses together. The pursuer was on markedly bad terms with her father, and had no means of her own. Her husband's financial position was extremely straightened, his income being £60 or £70 a-year. The defender's explanation of the pursuer's continued residence at Pitcurran is that her husband, although intending, as she was quite well aware, to sue for divorce, allowed her to stay there out of consideration for her, and in view of the difficulty there was in her finding or being provided with a home elsewhere. This view receives aid, I think, from the fact that Mr Walker's feelings do not seem to have ever become in any marked degree embittered towards the pursuer, and that even after the divorce he continued to maintain more or less friendly relations with her.

"The pursuer depones that although her husband had a separate bedroom he resorted to her room and continued to have sexual relations with her. If this is true it involves either that Mr Walker's use of a separate room was not brought about by his suspicions of his wife, as he deponed it was in the divorce action, or that it was a mere device on his part to create, for use in divorce proceedings, the appearance of a withdrawal from cohabitation which did not in fact take place. Now even if I took a more favourable view of the quality of the pursuer's evidence than I do, I should feel unable to hold that it sufficed to make out her case, looking to the disadvantage the defenders are at in being put to meet a challenge of the decree of divorce after Mr Walker's death, and without the benefit of his testimony. I feel, however, bound to say that I think the pursuer's evidence on this and the other controverted questions of fact in the case falls to be taken with considerable reserve. The defenders made a forcible challenge of her credibility on various grounds, and her manner of giving her evidence was not reassuring.

"The pursuer adduces in corroboration of her testimony as to her husband's practice of resorting to her room a Mrs Blyth, who was the house servant at Pitcurran, and who was a witness in the divorce proceedings, and then deponed that she saw that relations were strained between the pursuer and her husband, because they occupied separate bedrooms during the whole time that she was at Pitcurran. Mrs Blyth was a very unsatisfactory witness, and I regard her testimony as entirely unreliable. The pursuer's counsel, indeed, placed little or no stress upon it.

"There remains finally for notice on this part of the case a point sought to be made on the correspondence, where Mr Walker is to be found speaking of having forgiven the pursuer. I think, however, it is clear enough, when the whole context of the circumstances is kept in view, that the use of this expression cannot be taken as signifying that there was any *remissio injuriæ* by the husband. The letter of 1st June 1906, chiefly founded on by the pursuer, contains the following passage—'There is no need of my mentioning anything about the case. You know I don't altogether blame you, and I told you I forgave you, but as long as you have a couple of hypocrites as your father and mother have made themselves out, hanging round about you and egging you on to do wrong, nothing will come of it. I know that your love has come back for the first man who gained it, and you care for him best; may he make you very happy, that's all I can wish.' This letter was written a week after the service of the summons of divorce. In the pursuer's letter, which is undated, but apparently followed immediately on her departure from Pitcurran on 26th May, she had written—'I am sorry, very sorry dear; try and forgive your wife, and may God forgive me.' I do not think that the expressions in Mr Walker's letter of 1st June above mentioned can be taken as meaning that he had condoned the pursuer's matrimonial offence, and had passed from his legal right to reparation therefor by means of divorce.

"On the considerations above stated I am of opinion that the pursuer, on whom the *onus* lies, has failed to prove the condonation of her adultery which she alleges as one of her grounds of reduction.

"The second ground on which the pursuer maintains her right to reduction is that the divorce proceedings were collusive. While admitting that she was guilty of adultery, and that her husband apart from the alleged condonation had a good ground of action against her in respect thereof, she founds on certain circumstances attending the mode of conducting the proceedings for divorce, which she says were improper in the eye of the law, and have the effect of vitiating the decree and making it voidable at her instance. She points to the following facts—That having

been told by her husband that she had no defence to the action which he proposed to bring, she believing this (which apart from the alleged condonation was true) not only abstained from taking any steps with a view to defending the action, but made full confession of her adultery to her husband with details as to times and places, thereby facilitating the preparation of the evidence in the case; and that her husband, on the other hand, made an arrangement with her to the effect that in the divorce proof Dr Liddell's name would not if possible be mentioned in Court, and that he would endeavour to prevent the case being reported in the newspapers, the object of this being to avoid injury to the professional prospects of Dr Liddell, who had come under promise to marry the pursuer when the divorce was obtained.

"I am unable to see that these facts afford the pursuer a good ground for reducing a decree of divorce which passed against her on account of her admitted adultery. She has in this action had full opportunity to establish the alleged condonation, which she says was not put forward formerly by way of defence in consequence of the representations made by her husband, and she has in my opinion failed to do so. As regards the facilities which the pursuer's confession gave to her husband in obtaining evidence for his action and the arrangements for the avoidance of publicity, these introduced no falsity into the divorce proceedings, and I do not see how it can be in the mouth of the pursuer to complain of them as vitiating the decree. I was referred to English cases in which, at the instance of the King's Proctor acting in the public interest, decrees *nisi* were set aside on the ground of arrangements of one kind or another between the spouses with a view to divorce, although the facts alleged and proved in the divorce proceedings were true in themselves, and although it was not shown that material facts had been left undisclosed. I do not think that these cases apply. It is one thing to stay the hand of the Court in the public interest so as to secure that the marriage tie shall not be dissolved in proceedings conducted under conditions which tend to prevent a full disclosure of the truth. It is, I think, a different case where, as here, one of the spouses seeks to set aside a decree of divorce. Apart from the effect by way of bar of her own participation in the arrangements which she now complains of, the pursuer is necessarily in knowledge of the whole truth, and if there were any material facts which were screened from the view of the Court in the divorce proceedings, she is in a position to state them when she now seeks to open up the decree. But apart from the alleged condonation she has not shown that the divorce proceedings were affected by any falsity either by way of misrepresentation or concealment of material facts, so as to infer that the decree pronounced against her involved any miscarriage of justice.

"I am accordingly of opinion that the defenders fall to be assoilzied from the conclusions of the action."

The pursuer reclaimed, and argued—The agreement between the husband and wife that she should not defend the action, and should furnish the particulars as to time and place of the adultery, while he in return was to do his best to prevent the name of her paramour appearing, and to bring about her marriage with him, amounted to collusion—*Midgley* v. *Wood*, 1859, 30 L.J. (P.M. & A.) 57; *Lloyd* v. *Lloyd and Chichester*, 1859, 30 L.J. (P.M. & A.) 97; *Churchward* v. *Churchward*, [1895] P. 7; *Butler* v. *Butler*, L.R., 15 P. D. 66; *Chisim's* case and *Edwards'* case at pp. 582 and 583 respectively of Macqueen's Appellate Jurisdiction; *Barnes* v. *Barnes*, 1867, L.R., 1 P. & D. 505. (2) There was collusion, or if that term were confined to the action of both parties, a fraud upon the Court in that there had been condonation in the sense of connection after the confession. Apart from the pursuer's own evidence, this was established by the fact that even if the confession took place, not in January as they maintained, but as late as April, the spouses had continued till the 24th of May to occupy the same house. By taking the oath of calumny the husband committed a fraud upon the Court. But in any case connection was not necessary to establish condonation; the offence might be blotted out by forgiveness apart from connection — *Edgar* v. *Edgar*, March 6, 1902, 4 F. 632, 39 S.L.R. 424; *Ralston* v *Ralston and Lord Advocate*, January 13, 1881, 8 R. 371, Lord Craighill at 380, 18 S.L.R. 233; *Keats* v. *Keats and Montezuma*, 1859, 28 L.J. (P.M. & A.) 57, at p. 63—and the letters showed that there had been forgiveness. Even if there had been no condonation the fact of the concealment from the Court of a material ground of defence, coupled with the fact that the wife had no separate legal advice, was sufficient for reduction. (3) The pursuer was not barred from pleading collusion and condonation; she, unlike her husband, did not know that a fraud was being committed on the Court. Moreover, it was *pars judicis* to take notice of condonation — *Paul* v. *Paul*, 1896, 4 S.L.T. 124 and 171; *Stewart* v. *Stewart*, February 27, 1863, 1 Macph. 449.

Argued for the defenders (respondents)—(1) There was no evidence of condonation apart from that of the pursuer and Mrs Blyth, and they were not credible witnesses, the evidence of Mrs Blyth being contradictory of her former evidence. Consequently no fraud had been committed on the Court. (2) The English cases cited on collusion had no application in Scotland, where a different system of law prevailed. There was, they maintained, no collusion in the agreement made. But assuming it amounted to collusion, the pursuer was barred from taking advantage of her own collusion or fraud—*Graham* v. *Graham*, December 15, 1881, 9 R. 327, Lord Young at p. 333-4, 19 S.L.R. 207.

At advising—

LORD PRESIDENT—This is an action of reduction of a decree of divorce. It is brought by the divorced wife after the husband's death, and the grounds upon which the divorce is sought to be reduced are collusion and fraud. In the argument before us collusion was rested upon two separate branches or grounds. The action of divorce was undefended, and the divorce was granted for adultery. It is said by the pursuer now, although she admits that the adultery was in fact committed, that the adultery had been condoned by her husband, and that the fact of condonation was concealed from the Court. She also says that the fact of the divorce being undefended was due to her husband's persuasion that she should not defend the action, and that the consideration for her not doing so and also for giving such particulars as enabled the husband to prove his case before the Lord Ordinary, was that the husband arranged that the name of the paramour should not be mentioned in the Court—and as a matter of fact the name of her paramour was not inserted in the decree—and that the husband did his best to enable her to marry the paramour after she was divorced. The paramour, however, did not marry her, and after waiting for about a year after the husband's death she raised the present action.

Now we had brought to our notice a considerable amount of English authorities as to what constitutes collusion. But before I state what I consider collusion to be, let me say that there is one thing quite obvious about it, namely, that collusion means the action of two people and not of one. That is almost too self-evident to be stated. But if authority for that is required, it will be found that collusion is so treated by all the authorities in this matter, and, in particular, by the late Lord Fraser in his book on Husband and Wife. If that is so, it enables us to get rid of part of the case as pleaded, because in regard to collusion it rules out the matter of condonation, for the pursuer's story is that the real reason that this defence of condonation was kept back on her part was that she did not know the law as to condonation. The adultery had been committed at various times, but notably about Christmas time. The pursuer says that she made a confession immediately after Christmas, when she and her husband returned to their house in January. The contention of the opposing parties, who are the representatives of the deceased husband, is that the confession was not made until the following April, and that is the view of the Lord Ordinary who tried the case. But it is undoubted that, whether the confession was made in January or April, the spouses continued to live in the same house up till the 26th of May, and although they did not occupy the same bedroom, there was still, of course, in a small house, with only one servant, most ample opportunities for sexual connection. That sexual connection, the pursuer says, did take place with ordinary regularity. But she says that she did not know that sexual connection following on a confession of adultery inferred in law the condonation of the offence. Well, now, the moment that the pursuer says this, collusion is put out of the case as regards the condonation, because if the fact was kept back from the Court, this was due, not to the action of the two parties, but to that of the husband alone, because it is quite obvious that you cannot keep back that which you yourself do not know. Accordingly the collusion here cannot have anything to do with the condonation.

But then it was argued that there was sufficient to show collusion in the arrangement between the two parties that the lady should not defend, and it was on this point that we had the citation of English authority. Now I wish to say most distinctly that I do not think that English authority upon such a matter is at all a safe guide for us. The whole history of divorce in England is perfectly different from what it is here. Divorce in England is purely statutory; and the whole position as regards the interposition of the King's Proctor and the defences which may be pleaded are quite different from the law and procedure in divorce in Scotland. I need scarcely remind your Lordships that recrimination, which is an absolute bar to divorce in England, has no such force in this country. Therefore I think that the decisions of English judges, however eminent, upon a question of this sort are really no guide for us. I have not myself any doubt as to what collusion according to the law of Scotland is. I shall take the words of an English judge of the past, not of the present. I think collusion, according to our authorities, is the "permitting a false case to be substantiated, or keeping back a just defence. I notice that that definition was adopted by Lord President Colonsay, no doubt before he was Lord President, but at a time when he was Lord Advocate, and when he was giving evidence before a Commission upon the divorce laws, and I think it is not too much to say that his utterances upon that occasion are entitled to much the same weight as they would have had if they had been uttered on the Bench. At any rate, the definition is, I think, amply supported by the cases which have occurred in this country. That being so, I do not myself see how it can ever be said that there is collusion when persons simply arrange that there shall be no defence in a case—because one must take each case by itself—where there is no question as to the fact of adultery having been committed. But that is not allowing a false case to be substantiated; it is not keeping back just evidence. I cannot say more on the matter, because I have really nothing to add, except that I agree in general with the observations of Lord Young in the case of *Graham*, 9 R. 337, which were quoted to us, and which I need not repeat here. I think that, this being a divorce case in which there was no defence, the same remarks apply to the fact of the lady having by arrangement given particulars as to the time and *locus* of the offence, so as to allow of the case being

proved. I cannot help thinking that there again there is nothing collusive in a husband being put in possession of these particulars which should be laid before the Court.

But while I say that, that does not, of course, end the case, because I have no doubt whatever that, apart from all question of collusion, yet it would be a good ground of reduction of a decree of divorce if it could be shown that the party getting the decree had intentionally kept back from the Court the fact that there had been condonation, and had also so arranged matters, by keeping away from the witness-box by persuasion the only person who was likely to say much about it, namely, the other spouse, as to make it unlikely that anything that would excite the suspicions of the judge would appear. And undoubtedly here there is a passage in the correspondence which shows that at one time the wife wished to consult another independent agent, and that it was owing to the advice of the husband that she did not do so. Accordingly I think that what is here averred is in that sense relevant enough. On this part of the case I do not conceal from your Lordships that I have had a good deal of doubt and hesitation. I think there is only one thing to be ascertained, and that is, of course, the difficulty, and that one thing is, was there or was there not condonation? In other words, did these parties have the intercourse of spouses after the fact of adultery was known by the husband, or did they not? If I thought that that was satisfactorily proved, then I think that the rest would be easy, because I think if that is once satisfactorily proved, very little will do in the way of preventing the wife being separately represented, to lead one to hold that the whole matter was a machination. But the question remains, Is it proved that there was condonation? . . . [*After reviewing the evidence his Lordship proceeded*]— . . . My feelings upon what may be called the verisimilitudes of the matter are so strong that if I were sitting here as a Lord Ordinary trying the divorce case I rather think I would have come to the conclusion that there had been condonation. If I were sitting and trying the case of divorce as Lord Ordinary, with the husband swearing that there was no condonation and the wife swearing that there was, I think I would have decided that there had been in view of the circumstances. But that is a perfectly different thing from asking us to set aside a judgment given by the Court—a judgment of the Court in which it is perfectly evident that the question of condonation was not entirely absent from the Lord Ordinary's mind, and that he had applied himself to that matter. When we are asked to set aside that judgment I think it is absolutely necessary that there should be conclusive proof of the fact that something was concealed from the Court, and that conclusive proof I fail to find in the state of the evidence for the reasons I have stated.

Therefore upon the whole matter I have come to the conclusion that the Lord Ordinary, who has evidently given great attention to the case, is right, and that his judgment ought to stand.

LORD KINNEAR—I agree with your Lordship both as to the law and as to the facts of the case. I may add that the real difficulty of the case appears to me to lie in the question of fact only—whether the acts ascribed to the two spouses can be correctly described as collusion or not. Even if collusion is not established, I have no doubt it would be a good ground for setting aside a judgment in the husband's favour if it were proved that in order to obtain that judgment he committed a fraud on the Court by deliberately withholding the fact that would have proved condonation, and keeping his wife out of the witness-box in order that that fact might not be disclosed. But then I think it is clear in law that if a judgment pronounced after evidence is to be set aside upon the ground of fraud on the Court, it must be clearly proved in the first place that such fraud was in fact committed. The burden of proof lies entirely upon the pursuer, and I think that the weight of that burden is increased, although I do not say more, when she brings her action after the death of her husband instead of during his lifetime. I quite agree with the Lord Ordinary that it is a material point that the action is raised at a time when her husband's testimony cannot be obtained. To establish the fact of fraud it seems to me to be quite clearly necessary, in the first place, to prove the fact which she alleges of condonation. If there was in fact no condonation, there was no fraud on the Court, and that question of fact is to my mind, as it is to your Lordship's mind, the real difficulty in the case. If one were to consider the case only with reference to the probabilities, having regard to the undoubted facts which are proved, to determine whether it was likely or not likely that condonation had taken place, I should come, I must say, to the same conclusion as your Lordship. But that is not the duty of the Court in a question of this kind. We are not to reduce a judgment given after evidence upon the ground that facts contrary to that judgment may or may not be probable, but it must be proved that such facts really occurred. Now the conclusive point to my mind is that the only evidence which is to be set against the husband's oath—I mean the only testimony to be set against the husband's oath—is the testimony of the wife, who according to the Lord Ordinary, and, apart from the Lord Ordinary's judgment, for the reasons your Lordship has stated, is not a credible witness. I can attach no weight to the pursuer's evidence, and therefore I think she has failed to prove her case.

LORD JOHNSTON—I entirely agree with the Lord Ordinary and with your Lordships. Still I feel bound to say that in common, I think, with your Lordships I have experienced great difficulty and great

doubt in the case. I have consequently given very great attention to the evidence, and particularly to the correspondence.

I should like to reserve my opinion as to how far English authority may be referred to in the matter of collusion. I quite understand that the law of divorce in England and in Scotland has been and is quite different. But I have felt in reading the English decisions that, however different that law may be from ours, there is much that is valuable to be found in the explanations and expressions of the English judges when dealing with this subject.

I was on reading the Lord Ordinary's judgment struck with what he says—"It is one thing to stay the hand of the Court in the public interest, so as to secure that the marriage tie shall not be dissolved, in proceedings conducted under conditions which tend to prevent a full disclosure of the truth. It is, I think, a different case where, as here, one of the spouses seeks to set aside a decree of divorce." Having regard to this fact I cannot yet make up my mind, although I have studied the evidence on that point, as to whether the real initial motive in the husband's mind in raising this divorce was to obtain freedom from his wife or freedom from his marriage-contract. I cannot help regarding the divorce proceedings from the beginning with suspicion, and I am prepared to say that, had I been sitting as a Judge of first instance in the divorce proceedings themselves, and had I known then what I know now, I think I should have refused divorce. But then it is a different question whether we are to upset a divorce which has already been granted, and I agree with your Lordship in thinking that this lady has by no means substantiated her case for reduction with such evidence as we can accept as satisfactory, far less as sufficient. I think, after more than one perusal of her correspondence, that Mr M'Cann sums her up in two lines of his evidence—"She is a most peculiar person. She is very difficult to dispose of;" and I think no one can read her correspondence without seeing that she has a distorted and constantly fluctuating view of life in all its relations and circumstances. I do not think her evidence is to be regarded as representing truly what happened at any definite time, for to me her mind shifts and shifts like a kaleidoscope at every turn, however slight, and without her evidence she has no case.

I therefore entirely agree with the judgment which your Lordship proposes.

LORD SALVESEN was sitting in the Second Division.

The Court adhered to the interlocutor of Lord Cullen dated 7th December 1909, refused the reclaiming note, and decerned.

Counsel for the Pursuer and Reclaimer—Morison, K.C.—W. T. Watson. Agent—George Scott, S.S.C.

Counsel for the Defenders and Respondents—M'Lennan, K.C.—Lippe. Agents—L. & J. M'Laren, W.S.

Saturday, November 12.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

FRASER (FRASER'S TRUSTEE) AND OTHERS *v.* THE CALEDONIAN RAILWAY COMPANY.

Superior and Vassal—Railway—Statutory Title—Compensation to Superior for Loss of Casualties—Date at which Compensation Falls to be Assessed—Interest—Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 19), *secs* 80, 107–111, *and* 126.

In 1846 a railway company acquired certain lands by compulsory purchase under the Lands Clauses Act 1845. The proprietor having refused to grant a conveyance, the company in 1847 deposited the compensation found due and took possession. On the proprietor's death in 1874 the company obtained from his heir a conveyance in statutory form, which they recorded in 1875. In 1903 the superiors brought an action against the company for compensation for loss of casualties.

Held (1) that the execution of the statutory title in 1875 destroyed the superior's rights of superiority in the lands taken, giving to him as from that date a right to compensation therefor—a right which was not barred by the promoters having in the meantime obtained access to the land—and (2) that the pursuers were entitled to interest on such compensation from 1903, the date when their demand was made.

Dissenting Lord Johnston, who was of opinion that the recording of the statutory title did not affect the obligation on the company to pay the feudal charges, and that these (so far as not prescribed) subsisted till they had been redeemed, and that accordingly the pursuers were entitled to recover (*a*) such charges down to the date of their redemption, and (*b*) compensation for their loss, with interest on such compensation from 1903, the date when the company were called on to redeem.

On 8th December 1908 Major Francis Fraser of Tornaveen, Aberdeenshire, sole surviving trustee under the antenuptial contract of marriage between the late Mr and Mrs Fraser of Tornaveen, and others, brought an action against the Caledonian Railway Company for payment of (1) the sum of £885, with interest thereon at 5 per cent. from 14th December 1875, or otherwise from 25th February 1903, and (2) the sum of £307 odd.

In 1846 the defenders, in virtue of the powers contained in the Act 8 and 9 Vict. c. clxii, entituled "An Act for making a railway from Carlisle to Edinburgh and Glasgow and the North of Scotland, to be called the Caledonian Railway," took compulsorily from N. D. Laurie of Lauriston, then proprietor of the lands of Orchardfield, in the county of Edinburgh, a por-