not think that the case as presented to us is one to warrant us in granting divorce. It is admitted that there is no precedent for a divorce granted under such circumstances, and that there is no *dictum* to that effect in our law—which law has subsisted for a period of about three centuries. The principles which Mr Fraser endeavoured to press into his service were deduced very much from the views taken in England and America in reference to the rights of a wife that is deserted, and the interpretation there given to the word "deserted." In reference to English law, the remark of the Judge whose opinion was quoted to us—and I rather think a similar remark was made by his predecessor, though no decision was come to on the point—was to the effect that "desert" is a new word in their nomenclature, and it was the present Judge of the Consistorial Court that was first called to put an interpretation on the word as appearing in our statutes. It is a word of yesterday to them. Their jurisdiction to grant divorce at all is a jurisdiction of yesterday. And they don't grant divorce on account of desertion at all. They can grant divorce on account of adultery, and they can divorce on account of desertion coupled with adultery; and therefore they are called on to interpret the word *desert*. We are not called on to do that at all. Our statute granting divorce does so for non-adherence. And though recently the forms have been altered, yet the principles on which the statutory jurisdiction is given are the principles on which the statute of 1573 was passed, and that statute clearly lays down that it is in respect of non-adherence that divorce is given, and that the party seeking divorce was primarily to demand adherence from the other party. The forms had no doubt been since modified, but the principle remained the same. In regard to American law, we have in many departments of our law received important suggestions from writers on law in America, and from the judgments in their courts. And upon other points also I have read with great interest some of their speculations on the general principles of jurisprudence; but whatever interpretation they give to the word *desertion* in their law, which compared to our own, is a mystery, I am not disposed to be guided by them in the interpretation of our Act of 1573. Their law may or may not be based on the same principles as our Act, but it is not from their law that we are to interpret that statute. If we find that for three centuries we have been granting divorce on the ground of that statute, and that there is no instance of divorce under circumstances such as the present, it is a pretty strong proof that that Act does not apply to this case. The law is not without a remedy in cases of ill-treatment of the wife by the husband. It does give a remedy in cases of *saevitia*. The wife is entitled to aliment, and she may have separation; and that the law of England gives too. But I am here speaking of divorce *a vinculo matrimonii*. If, in circumstances such as the present, the husband raised an action of divorce against his wife on the ground of non-adherence, and it was shown that his former conduct had been such as to render it dangerous that she should return to him, I am not disposed to say whether there would or would not be ground for a divorce. But I go no further. The fact of the husband here being in another country does not matter at all. What would happen if an attempt was made to find him, and then divorce was claimed on account of non-adherence, is not the question before us. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord CURRIEHILL concurred.

Lord DEAS said—In this case as it stands we cannot be called upon to grant a divorce. There are two general questions which have been alluded to in the argument which I don't think it necessary to decide. I don't think it necessary to say that a woman who is driven away from her husband by cruelty and danger to life can never obtain the remedy of divorce on account of non-adherence. The other general question which I do not think it necessary to decide is that when at the time of desertion by the husband the wife happens to be living apart from him on account of some act or acts of cruelty, he may continue to desert her after that without her getting the remedy of a divorce on account of non-adherence. What I mean under the second head as distinguished from the first will appear from a case such as this. I suppose that a woman, from attacks made upon her by her husband when in *delirium tremens*, for instance, leaves home and gets a decree of aliment against him—which is always a temporary thing, and may be recalled at any moment—and then that he deserts her, goes away to some other country, not for the purpose of pushing his fortune, but just to get out of her way; that for six, seven, eight, or ten years he contributes nothing to her support, nor gives her the means or the opportunity of joining him, nor proposes to join her. I don't wish to decide that the woman would not have the remedy of a divorce on the ground of non-adherence, simply because it happens that at the week or month at which he chose to desert her she chanced to be in another house as a temporary residence. In this case I don't differ from your Lordship, in the conclusion you have come to. The proof here is exceedingly scanty—not so substantial or full as we would require to enable us to decide either of these general questions. I don't think it proved that the husband is out of the country. I don't see any proof as to the wife being prepared to return to him; on the contrary, so far as there is evidence, it goes the other way; and we have very little proof even about the circumstances under which she left him, whether it was on account of temporary violence, or of a long course of cruelty.

Lord ARDMILLAN thought that in this case nothing could be clearer than that the pursuer has a remedy, and that that remedy was not divorce but separation.

J. AND F. BATEY *v.* DYKES.

Reparation — Wrongous Arrestment — Repetition — Issue. Action of damages for wrongous arrestment and of repetition of money paid in order to get arrestment loosed, in which issues adjusted.

Counsel for Pursuers—Mr Trayner. Agent—Mr P. S. Beveridge, S.S.C.

Counsel for Defender—Mr Mackenzie and Mr H. J. Moncreiff. Agent—Mr A. D. Murphy, S.S.C.

In this action the pursuers sue the defender for damages in respect of the arrestment and dismantling of their ship the Montrose, first on 14th July 1865 *ad fundandam jurisdictionem*, and again on the following day, on the dependence of an action raised by the defender against them. They also sued for repetition of a sum of £40, 18s. 8d. which they had paid to the defender under protest in order to get the arrestments loosed, and which they alleged they had been concussed to pay, in order that the vessel might resume her regular trips betwixt Leith and Aberdour. The pursuers proposed the following issues:—

"1. Whether, on or about the 14th and 15th days of July 1865, the defender wrongously, maliciously, and without probable cause, and for a debt not due by the pursuers, arrested the steamship or vessel called the Montrose, and sometime called the Lord Aberdour, of Newcastle-on-Tyne, the property of the pursuers, while lying in the harbour of Leith, and caused her to be dismantled, and detained in the said harbour of Leith—to the loss, injury, and damage of the pursuers?"

Damages laid at £300.

"2. Whether, on or about the 18th day of July 1865, the defender wrongously exacted and received from the pursuers the sums of money specified in the schedule hereto annexed, in order to have the said arrestments loosed and discharged; and whether the defender is rest-

ing owing to the pursuers the said sums, or any part thereof, with interest at the rate of 5 per centum per annum from said 18th July 1865 till paid?"

The defender objected to the relevancy of the action. He urged that the first issue should not be allowed because malice, which was an essential element of the ground of action, had only been averred on revisal, the only averment in the original condescendence being that the pursuers "believed" that the arrestment was maliciously used. Farther, in regard to the first arrestment there was not even on the closed record an allegation of malice. He also objected to the second issue on the ground that the payment of the debt which the pursuers now said was not due by them but by the charterers of their vessel was a voluntary act on their part, and that they could not now claim repetition.

The Court allowed the issues, except in regard to the first arrestment, which the pursuers consented to leave out of the first issue. They thought that the averment of a belief that malice existed was sufficient, but that the ambiguity had been cleared up by the insertion on revisal of the words "and averred." In regard to the other objection it assumed the very question of fact which was to be tried.

As the relevancy of the action was objected to the Court, following the rule laid down in the recent case of Mackenzie *v.* Goldie (*ante*, p. 101), found the defender liable in expenses since the date of closing the record.

GUTHRIE *v.* ANDERSON.

Employment — Recompense. A party found liable for a tradesman's account, although he was not directly the employer, on the ground that he had reaped the benefit of the work.

Counsel for Pursuer—Mr Shand and Mr J. G. Smith. Agent—Mr William Saunders, S.S.C.

Counsel for Defender—Mr D. B. Hope. Agent—Mr Robert Hill, W.S.

James Guthrie, wright and joiner in Stirling, sued Samuel Anderson, coppersmith, Leith, in the Sheriff Court of Edinburgh, for payment of £74, 9s. 3½d. for "wright or joiner work done, and furnishings made, betwixt 19th May 1862 and 6th February 1863, on certain old houses in Stirling, on the employment of the defender's mother, who was then in the management of the property, and latterly on the employment of the defender himself, after he had examined the work done on the employment of his mother, of which whole work and furnishings the defender is now reaping the advantage, and which the defender promised to pay."

The defender had no written title to the property until 22d January 1863, and he was willing to pay the pursuer's account so far as incurred after that date. But it appeared that the property had been left to him by his uncle who died in 1857, by will, which was afterwards declared to be invalid for the conveyance of heritage; and that on 22d January 1863 his mother, who had previously conveyed the fee of the subjects to another, reserving her liferent, conveyed the liferent to the defender by a deed which gave him right to the rents from and after Whitsunday 1862.

The Sheriff-Substitute (Arkley) decided in favour of the defender. He found that the claim could only be established by proof of the defender's promise to pay it, and that the promise could only be proved by his writ or oath. The Sheriff (Gordon) adhered.

The pursuer advocated, and pleaded that the defender's mother in employing him acted as trustee for the defender, and that the defender having rereived the rents, and so reaped the benefit of his labour, he was liable on the principle of recompense.

The Court advocated the cause, and recalled the Sheriff's judgment, holding that as the defender had a right to the rents from Whitsunday 1862, he was bound to pay the account sued for if it was really due, and a remit was made to a man of skill to report upon a defence stated that the work had not been done in a tradesmanlike manner.

Thursday, Feb. 8.

FIRST DIVISION.

UNIVERSITY OF ABERDEEN *v.* IRVINE OF DRUM (*ante*, p. 55).

Trust — Charitable Purposes — Testament — Decree — Construction — Annual-Rent. Terms of three writings which held (alt. Lord Kinloch) not to constitute a right to the fee of an heritable estate.

Counsel for Pursuers—Mr Patton, Mr Clark, and Mr John Hunter. Agent—Messrs Patrick, M'Ewen, & Carment, W.S.

Counsel for Defender—Mr Gordon and Mr Gifford. Agent—Mr Arthur Forbes Gordon, W.S.

This case was advised to-day. The result of the judgment is to assoilzie Mr Irvine of Drum from the conclusions of the action with expenses.

Lord CURRIEHILL said—The present action was instituted for the purpose of having it declared that the lands of Kinmuck belong to ten bursars and scholars of the University and Grammar School of Aberdeen. The defender, though not admitting that these bursars have any right to the subjects, has expressed his willingness to create an heritable and irredeemable right of annual-rent or ground annual of £1000 Scots in their favour over his estate. The question in dispute is the right to the absolute fee of the lands. The demand of the pursuers is founded upon three documents—1st, A provision in the testament of Sir Alexander Irving of Drum, dated in 1629; 2d, A decree of the Court of Session dated in 1633; and 3d, A bond by Sir Alexander Irving, the son of the granter of the provision, dated in 1656. The provision in the testament is in these terms:—"For the maintenance of letters, by thir presents, I leave, mortify, and destinate ten thousand pounds Scots money, which is now in possession and keeping of Marion Douglass, my spouse, all in gold and weight, appointed for the use underwritten, of her own knowledge and most willing consent, to be presently delivered to the Provost, Baillies, and Council of Aberdeen, and to be bestowed and employed by them upon land and annual rent in all time hereafter to the effect after following—to wit, £320 of the annual-rent thereof to be yearly employed hereafter on four scholars at the Grammar School of Aberdeen for the space of four years, ilk ane of them fourscore pounds; and £400 to be paid yearly to other four scholars at the College of New Aberdeen, and students of Philosophy thereat, ilk ane of them ane hundred pounds during likewise the space of four years; and also I ordain to be given to other twa scholars who have passed their course of Philosophy, being made Masters, and are become students of Divinity in the said New College, 400 merks Scots money—viz., to each one of them 200 merks of the said annual-rent during the space of four years also; and the odd 20 merks which, with the dedications above specified, complete the said haill annual-rents of £10,000, I ordain to be given to any man the Town of Aberdeen shall appoint for ingathering and furthgiving of the said annual-rent to the said scholars, as is above designed; which scholars, of the kinds above written I will and ordain yearly in all time hereafter be presented by my said executor, as my heir, and his heirs and successors, Lairds of Drum, to the town of Aberdeen, Provost and Baillies thereof, and their successors, who shall be holden to receive them yearly upon their presentation, and shall stand obliged and comtable for the said annual-rent to be employed as is above appointed in all time coming." The nature of the right thus constituted in favour of the