rock on the terms therein mentioned; (2) that the said cargo or part thereof was shipped on board the s.s. 'Cyprus,' and that a bill of lading was granted by the master of said steamer therefor, and that the same was held by the said Charles Page & Company; (3) that on 1st April 1892 Charles Page & Company applied for an advance of £5000 from the North-Western Bank, Limited, on the security by way of pledge of, *inter alia*, the cargo *per* the 'Cyprus,' and that on 4th April the said bank agreed to give, and did give, the advance asked for in the terms contained in the letter; (4) that the said Charles Page & Company delivered said bill of lading to the North-Western Bank, Limited, blank endorsed, and thereby pledged the said cargo to the said bank; (5) that on 12th April 1892 the said bank re-delivered the said bill of lading to Charles Page & Company without any endorsation by the bank by the letter No. 13/5 of process, and that on same date Charles Page & Company forwarded said bill of lading to the claimants John Poynter Son, & Macdonalds for delivery to the buyers Alexander Cross & Sons on arrival of the 'Cyprus'; (6) that the said Alexander Cross & Son duly received said bill of lading and took delivery of said cargo, and made payments to account thereof, and that the balance of the price due by them amounted, as at 3rd May 1892, to £1039, 7s. 5d., being the fund *in medio;* (7) that on 3rd May 1892 the said sum of £1039, 7s. 5d. was validly arrested in the hands of the said Alexander Cross & Sons by the claimants John Poynter, Son, & Macdonalds, who were lawful creditors of the said Charles Page & Company to the amount of £2011, 10s., with interest and expenses conform to decree in their favour; and (8) that at the date of said arrestment John Poynter, Son, & Macdonalds were ignorant of the transaction between Page & Company and the bank above mentioned: Find in law that at the date of said arrestment the said sum of £1039, 7s. 5d was a debt due by Alexander Cross & Son to the said Charles Page & Company, and was therefore liable to the diligence of the lawful creditors of the latter, and that the claimants, the North-Western Bank, Limited, by delivery of said bill of lading on said 12th April 1892, lost their rights as pledgees of said cargo, and had no preferable right of property therein entitling them to payment of said sum as in competition with the arresting creditors the said John Poynter, Son, & Macdonalds: Therefore dismiss the appeal and affirm the interlocutor appealed against," &c.

Counsel for the Appellants—C. S. Dickson — Ure. Agents — Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents—H. Johnston—Salvesen. Agent—Campbell Faill, S.S.C.

Thursday, February 1.

SECOND DIVISION.

(With Three Consulted Judges of the First Division).

[Lord Wellwood, Ordinary.

GIBSON *v.* GIBSON.

Husband and Wife—Divorce—Desertion—Cruelty without Object no Ground for Divorce for Desertion—Act 1573, *cap.* 55—*Conjugal Rights Act* 1861 (24 *and* 25 *Vict. cap.* 86).

In an action of divorce for desertion, brought by a wife against her husband, evidence on which *held* (Lord Young expressing no opinion, and *diss.* Lord Trayner) that the parties had been living apart with consent of the pursuer, and that therefore she was not entitled to decree.

Opinion per (Lord Rutherfurd Clark, concurred in by Lord President and Lord Kinnear) that cruelty or threats of cruelty by a husband to a wife, which rendered the husband's house intolerable to the wife and led to a separation between the parties, but which were the outcome of the husband's intemperate habits, and were not used by him with the intention of producing and maintaining a separation, were not equivalent to a desertion of the wife by the husband, even although the wife was willing to return if the husband promised to amend his mode of life.

Opinion (*per* Lord Trayner) that a deserted spouse is not bound to do anything to bring the desertion to an end in order to entitle her to decree of divorce for desertion.

Mrs Grace Gibson raised an action of divorce for desertion against her husband George Gibson.

The pursuer averred—"In or about the month of June 1882 defender put pursuer and her child out of doors, threatened to kill her if she returned, locked and secured the premises, and then proceeded to his father's house at New Cumnock and remained there for some time. Immediately before this occasion the defender announced to the pursuer his intention of commencing business as a butcher at New Cumnock. The first intimation of any intention on the part of the defender to commence business as a flesher, and to remove to New Cumnock, was made to the pursuer on the morning of the day on which the landlord of his new premises came to Craigbank to conclude a lease. These premises were taken without any regard to the wishes of the pursuer, and she made no objection to their being taken out of terror of the defender, who only a day or two before had put her and her child out of his house and threatened to kill her if she returned. The defender insisted that the pursuer would have to keep the butcher's shop at New Cumnock. The

pursuer, in consequence of weakness induced by a long course of cruelty and abuse, was physically unable to do so, and said so to the defender, who thereupon got into one of his customary fits of passion. On or about the day before the defender removed to New Cumnock he came into his house drunk and objected to pursuer's sister taking back to her own house a sideboard which belonged to her. He threatened to smash the sideboard and the pursuer, and became so outrageous and violent in his conduct that the pursuer had to seek refuge from his violence. Furthermore, on or about the day when the defender removed to New Cumnock, the pursuer returned to his house to get some clothing, and with the desire to go with him if he were calm, kind, and reasonable. The defender on seeing her became ungovernable in his passion, swore at her, and threw her into the same state of terror in which he had repeatedly and systematically placed her. She had to call for assistance, and upon hearing the voice of a neighbour the defender desisted from the attack upon her which he threatened. The pursuer escaped from the house, and again took refuge with her sisters. The same day the defender locked the house and left Craigbank without leaving any message for the pursuer. The pursuer could not get admission to it when she returned. The furniture was removed, and the house of the parties was broken up by the defender. The defender thus deserted the pursuer, and has continued in malicious desertion of her ever since."

She pleaded—"(1) The defender having deserted pursuer, and having wilfully and maliciously continued in said desertion for four years, the pursuer is entitled to decree of divorce as craved."

The defender lodged defences, and pleaded —"(1) The statements of the pursuer are irrelevant and insufficient to support the conclusions of the summons. (2) The pursuer having deserted the defender, is not entitled to maintain this action. (3) The parties having in any event separated from each other by mutual consent, the action is not maintainable. (4) The defender not having been guilty of the wilful and malicious desertion libelled, is entitled to absolvitor."

A proof was led before LORD WELLWOOD (Ordinary).

The facts of the case were as follows. In March 1880 the pursuer was married to the defender who carried on a grocery business in Craigbank. One child was born of the marriage. The defender was a man of intemperate habits, and often returned home late at night the worse of drink. When in that state he was loud and abusive in his language and manner toward the pursuer, treated her cruelly, and threatened her with violence. The pursuer also deponed that the defender frequently struck her, and that she in consequence of his violence had on different occasions to leave his house at night and take refuge with her sister who lived a few doors off, or pass the night in a shed in the neighbourhood. The defender appeared to have acted not with any intention of causing the pursuer to separate from him, but from sheer brutality aggravated by drunkenness.

In April 1882 the defender, with the pursuer's knowledge, but she averred against her wish, took a house in New Cumnock, about two miles distant from Craigbank, intending to carry on business there after Whitsunday. When about to quit his house at Craigbank in June 1882 and flit to New Cumnock, the following events happened which the pursuer founded on as constituting desertion of her by the defender.

The pursuer deponed—"The night before he went to New Cumnock he was drunk and violent, and ordered both me and my child out. I did not go at first, and he shoved me out. He did not give any reason, except that he was not satisfied with me; he often said he wished I would die and be out of the way altogether. When he had got me and the child out the night before he left, he locked the door and shut up the house. I went to my sister and asked if I would be allowed to stay for a little. I hoped defender would change his mind, and that I would get back. He left the village that night, and I did not get back. I stayed in my sister's all night—my sister, who is now Mrs Hyslop. . . . On the morning after defender turned me out, I went round to the house and tried the door, and found it locked. I went back later in the forenoon, and the door was open. I went in. Defender was not there. I saw that he was determined to remove. Some of the things were away. I took a dress and some underclothing, and was going to take them to my sister's. On my way out I met defender coming in. He came forward in a threatening manner, and asked what the hell I was doing there. I shouted to Mr Ross, who was in the shop next door, and Mr Ross replied, but I do not recollect what he said. My husband got me by the shoulders and pushed me out at the door, and said if ever I came back he would kill me. I had gone out the previous night with just the clothes I had on, and I went back in the morning to get some things. After defender put me out I rapped at the door to try and get in again, but the door was locked. I was not back after that. Defender took the dress that I was taking away from me, and I had to go without it. Finding that I could not get in again, I left and went to my sister's. When defender stopped me as I was going out, I rapped on Mr Ross for assistance as well as shouted to him. Though I was afraid to go back to my husband in consequence of his threat to kill me, if he had come for me I would have gone with him at once. Defender took the furniture to New Cumnock. It would be nearly a week before everything was away. He had a carter removing some of it, and he took some of it himself with a cart. My sister's house was quite near where we had stayed in Craigbank, but defender never looked near me during the week he was removing

the furniture. He never sent for me nor addressed me in any way. He was still drinking during that week. From that time till now he has never looked near me. I don't recollect his ever seeing the child after that. He has never sent me anything for my support nor for the child's. He has never suggested that if I went back he would amend his conduct. If he had promised to live a decent life I would have gone back. . . . *Cross.*—I would have gone back to him after June 1882 if he had asked me, even though I was afraid. I should have been in danger of my life; but all the same, I would have risked it. . . . I was intending to go to New Cumnock with him. (Q) What altered your mind?—(A) His treatment in putting me out the night before he began to take the furniture away. His conduct was getting worse and my health was failing, but I would have accompanied him all the same if he had not put me out and threatened that if I went back he would kill me. He never asked me to go back after that. He never looked near me. I never sent word to him that I would go back if he would amend his ways . . . *Re-examined.*—The last thing my husband said to me was that if ever I came back he would kill me. He has never spoken to me from that day until now, and has never signified directly or indirectly that he wanted me back, or that he would treat me as a man should treat his wife. I would have incurred the risk of going back to him if he had asked me."

The defender deponed:—"It is not true that I put the pursuer out about June 1882, along with her child, and threatened to kill her if she returned. I locked up the house at Craigbank in June 1882. I had part of the furniture away by that time. On my return from New Cumnock four or five hours afterwards, I found my wife and her sister, now Mrs Hyslop, in the house. They must have got in through the grocer's shop. Previous to this time my wife had agreed about removing to Bridge-end, New Cumnock. She was quite aware I had taken a house there. She instructed Mrs Dempster to clean the house. I believe I paid Mrs Dempster for that after the furniture had been removed. The first intimation that I got that my wife was not going with me to New Cumnock was on the morning of the removal of the furniture, after I came back from having been at New Cumnock with the first cart of furniture. On my return I went upstairs, when I met her and her sister, now Mrs Hyslop, and she turned round about and told me she was not going with me to New Cumnock. I said if she was not going I and the furniture were going, because my lease had expired and I had to go. I asked her to go with me. I did not say to her at that time that I wished she would die; I never said such a thing at any time. The pursuer and her sister had some of the silver plate away before I met them in the house, and when I met them they were carrying out more effects from the house. I told them they would be better to go back and leave them as the things did not belong to them. I said that they had broken up the door after I had secured it. The pursuer did not indicate in any way that she was willing to go back with me to Bridge-end. The impression I formed from her conduct that day was that she had been advised by her friends not to go with me . . . *Cross.*—Do you say she went away that night solely because she was obstinate in argument?—(A) Yes. I saw her taking away silver plate the following day. She took away a cruet-stand, a butter-cooler, and a lot of other things. Her sister, now Mrs Hyslop, was with her. She may have taken a dress as well as these other things. I do not remember what all she took. I told them to go back and leave the things where they had got them, but they took them away in spite of me. I met them on the stair a second time after that. It is not the case that I took the dress from her, or anything else. My wife may have rapped through the partition to Mr Ross, but not in my presence. I do not know what she would rap for. The last thing I said to her before she left was to put back the things she was taking away. (Q) Is it not the case that you shouted out to your wife, 'Damn you, what are you doing here,' or 'What the hell are you doing here'?—(A) These were not the last words. These were the words I believe I used when I met them on the stair. That was after I had locked the door and gone to New Cumnock, and on returning found her and her sister carrying off the effects. It is not the case that the last words I said to her were that I would kill her if she came back. I did not tell her that I would do for her if she came back, nor anything like it. If anybody says they heard me say that, it is untrue. I locked the door of the house that day to prevent my wife and her sister carrying off more effects."

From June 1882 to May 1893 the pursuer and her child lived with her relatives at Craigbank, and the defender at his premises at New Cumnock. Neither made any attempt to bring about a reconciliation.

On the 23rd May 1883 the defender wrote to the pursuer the following letter:—"Grace,—If there is any of the furniture you want, let me know by return, as I am leaving New Cumnock and going to dispose of everything. Let me know by Friday morning, and I will send them up to you; hoping little Andrew is keeping well. GEO. GIBSON." On the same date the pursuer replied as follows:—"George,—In answer to yours of this morning, I will be very glad if you will send up the sideboard and drawers, also the small tin case, and any books you are not wanting for your own use. You might send my work-boxes and the rocking-chair, and any of my clothes you see. I am glad to say Andrew is keeping strong and a good speaker, and believe me, George, I sincerely hope you will get on well wherever you go, and will always be pleased to hear of your well-being. I would have liked to have saved the crumbcloth too, but you know best what you require. They will all be kept for little Andrew. Trusting you are well,

—I am, yours, GRACE." On 25th May the defender wrote the pursuer—"As regards the sideboard, it's a thing that I can't give you, except either you or any of them that wants it likes to buy it. I will give it to any of them for seven pounds, and as regards the rest you have spoken about, I will send them upon either Tuesday or Wednesday. If any of them wants the sideboard you can let me know as soon as you can. I can sell it for more money, but if there is any of them wanting it they can have it for what I said. GEO. GIBSON." On 29th May the pursuer wrote to the defender—"Keep the sideboard until you hear from me again. I will let you know as soon as possible. Send up the other things.—GRACE;" and again on 31st May —"The money for the sideboard will be forthcoming, but as the trustees had to be consulted, I can hardly tell what day I will get it yet. Will send it down, so you can send the sideboard up.—GRACE GIBSON."

Thereafter the defender disposed of his business in New Cumnock and went to Glasgow without leaving his address with the pursuer. The pursuer and the child of the marriage continued to live with her relatives at Craigbank. No further communications passed between them. Since June 1882 the defender did nothing towards the sustenance of his wife and child.

On 22nd December 1892 the Lord Ordinary (WELLWOOD) assoilzied the pursuer.

"*Opinion.*—I am of opinion that the pursuer is not entitled to the remedy she seeks. I have arrived at this conclusion with some reluctance, because I think that during the cohabitation the defender treated the pursuer very badly, and further, I do not see any reasonable hope of the parties coming together again.

"The pursuer has brought a large body of witnesses to prove that the defender was a drunkard; that when he was drunk he was abusive and violent; that he treated the pursuer cruelly, threatened her frequently, and occasionally struck her, although of this there is not so much evidence. On the other hand, whether owing to the want of means or lapse of time, or because such evidence is not to be obtained, no one is brought to say a good word for defender except himself.

"I therefore hold it to be sufficiently established that prior to the separation of the spouses in 1882 the defender treated the pursuer with such cruelty as to entitle her to leave him, and to justify a judicial separation, but unless divorce on the ground of desertion is to be allowed in every case in which the injured party would be entitled to judicial separation, I do not think that the pursuer can get the decree she asks. It does not follow that because one party to a suit is not to be believed in regard to certain points of the case, the other party's evidence is to be accepted on all points. Now, in the present case, as I have said, I believe the pursuer's evidence in the main as to the defender's ill-usage of her, but there are certain points of her evidence material to the case which I cannot accept implicitly. I am not satisfied—I do not believe that after she left her husband and refused to accompany him to New Cumnock she had any real desire to join him again. It is practically admitted that she made no effort at reconciliation. She says that she would have been willing to go and live with him if he had asked her. I must say that I do not believe this, because the whole of her actings are inconsistent with it. I think the truth is that she was glad, possibly with reason, to be quit of him, and so were her relations with whom she lived, and probably nothing would have been heard of this case if the defender had not recently re-appeared in the neighbourhood, his re-appearance coinciding with right to certain money opening to the pursuer.

"If the facts of the case are examined I think they show that though they afford ample grounds for judicial separation they do not afford sufficient material for divorce. The defender's alleged desertion is thus described on record. Speaking of the day on which the defender left Craigbank the pursuer says—'The same day the defender locked the house and left Craigbank without leaving any message for the pursuer. The pursuer could not get admission to it when she returned. The furniture was removed, and the house of the parties was broken up by the defender. The defender thus deserted the pursuer, and has continued in malicious desertion of her ever since.' If that is the desertion on which the pursuer relies, it is certainly not substantiated. In June 1882 the defender did not desert the pursuer. He had previously carried on business at Craigbank, but at Whitsunday 1882 he, with the full consent of the pursuer, took a house or premises at New Cumnock, which is about two miles distant from Craigbank. There is no ground for saying that he deserted his wife in leaving Craigbank and going to New Cumnock. He had to go there because he had given up his premises at Craigbank. The fact is the pursuer refused to go with him, I assume justifiably.

"During the following year the defender was living within two miles of the pursuer. She knew well where he was, and she must have seen him occasionally at Craigbank, but she made no effort whatever at reconciliation, and neither did he. And so things went on until May 1883, when a very important incident occurred. The defender, finding that business was not prospering at New Cumnock, owing, as he says, to his wife not coming to assist him, resolved to go elsewhere, and accordingly he wrote the letter to the pursuer—[*His Lordship quoted the letter*].

"The defender says he wrote this letter to give his wife an opportunity of proposing to come to him. I do not believe that; I think the letter was written in order to get a bid for the furniture. At the same time the occasion was critical and gave the pursuer an opportunity of showing what her real wishes were. Instead of remonstrating with the defender for going away, or proposing to come to him, she replied as follows—[*His Lordship quoted the letter*].

"She afterwards wrote the letters in regard to the sideboard.

"Thus the spouses parted as it seems to me by mutual consent, and the defender went off with the good wishes of the pursuer, however coldly expressed. He seems to have led a very wretched life, partly, no doubt, due to his bad habits, while the pursuer has, fortunately for her, been living with kind and attentive relatives. This has gone on for ten years and I do not think it is proved either that the defender has intentionally kept out of the pursuer's way, or that she has made any serious attempt to find him with a view to reconciliation. He has neglected his duties as a husband and a father, but so far as I can see the pursuer's one feeling was relief at his absence.

"The question to be decided is whether these facts justify me in holding that the defender has deserted the pursuer. I think not. Not merely is the balance of authority against the pursuer's contention, but I do not think that any case has been quoted on her behalf which when examined will support her demand.

"The cases mainly relied on for the pursuer were—*Muir*, 6 R. 1353; *Winchcombe*, 8 R. 726; *Gow*, 14 R. 443; and *Gould*, 15 R. 222. These cases have been very much discussed recently, especially in the case of *Watson* before the whole Court, 17 R. 736. I do not think that the judgment which I will pronounce will really conflict with any of them. The ground of decision, especially in the cases of *Winchcombe* and *Gow*, was that it is not a bar to a wife obtaining divorce on the ground of her husband's desertion, that before the desertion began she had left him on account of his cruelty. For instance in *Gow's* case the pursuer, the wife, left her husband on account of his cruelty, and went to live with her father. The husband a few weeks later sold his furniture, left the place where he resided, and up to the time of the wife instituting the action, had not communicated with or made his address known to his wife. Thus, as Lord M'Laren said, he 'made it impossible that overtures of reconciliation should be addressed to him.'

"*Winchcombe's* case was not precisely the same. The husband treated his wife with cruelty deliberately for the purpose of obtaining a separation from her. He then broke up his home, went abroad, and disappeared. Therefore there was here actual desertion by the husband.

"It will be observed that in these cases there was actual and intentional desertion on the part of the husband, although no doubt preceded by the wife leaving him on account of his cruel treatment, and in these and the other cases the husband when sued was abroad at the time. I may refer to Lord Shand's observations on these cases in *Barrie*, 10 R. 208-215.

"The great distinction between these cases and the present, and cases like *Barrie* and *Watson*, is that in the latter the spouse who is said to have deserted has been accessible, living within the same town or within easy reach, without any effort being made on the part of the spouse who complains of being deserted to effect a reconciliation. In regard to this distinction, I may refer to the opinion of Lord Shand in *Watson's* case, 17 R. 743, 744, in which I concurred at the time, and which I think expresses tersely and forcibly the conditions which are requisite as a foundation for an action of divorce on the ground of desertion.

"In the present case there is in addition what practically amounts to a deliberate agreement to live separate, which it seems to me places an insuperable impediment in the way of the pursuer founding upon the subsequent absence of the defender as constituting desertion.

"I have already stated my reasons for regretting that I am driven to this conclusion. It is satisfactory to know that the pursuer's money is settled on herself."

Against this judgment the pursuer reclaimed. The case came before the Second Division of the Court, who on 17th November 1893, after hearing counsel, appointed the cause to be argued before themselves and Three Judges of the First Division.

Argued for pursuer—She was entitled to decree because (1) she had been deserted by her husband in 1882, he had turned her out of the house; and (2) the husband had since then remained in malicious desertion, never having shown the slightest willingness to take her back. Our law did not recognise any such thing as divorce for desertion brought about by mutual consent or incompatibility of temper, but where the husband had, as here, deserted the wife by turning her out of his house, and threatening to kill her if she returned, it was his duty to make overtures to her to show that he had altered his mind, and not her duty to humbly approach him and ask if he had changed his mind and solicit him to take her back. Remonstrance was not now a necessary element in every case before divorce for desertion could be sought; it depended upon the circumstances of the case whether it was required or not—*Watson* v. *Watson*, March 20, 1890, 17 R. 736—it was of less importance where the wife was the pursuer of the action than where the husband was in that position. The Court would not uphold the need of remonstrance in circumstances which showed that it was impossible to make it, or that where made it would be clearly unavailing. The husband having deserted the wife had committed the initial wrong, and it was his duty, in order to end the desertion and put himself in the right, to make overtures to his wife to return. If he had done so, the pursuer was willing to return, and not having done so, the defender must be held to have been in malicious desertion during the period of his absence—*Mure* v. *Mure*, July 19, 1879, 6 R. 1353; *Winchcombe* v. *Winchcombe*, May 26, 1881, 8 R. 726; *Willey* v. *Willey*, May 17, 1884, 11 R. 815; *Gow* v. *Gow*, January 29, 1887, 14 R. 443; *Gould* v. *Gould*, December 22, 1887, 15 R. 229. The case of *Barrie* v. *Barrie*, November 23, 1882, 10 R. 208, might

be quoted as a contrast to the present, there being in that case only some petty disputes between the parties to furnish a cause for their living apart.

Argued for defender—The judgment of the Lord Ordinary was sound. The statement made by the pursuer in condescendence 5 was absolutely contradicted by her evidence. The attempt of the pursuer to justify her conduct in not going back to her husband by saying that she was afraid to do so because he had threatened to kill her, must therefore be regarded with suspicion. *As to the law of the case*—(1) There must be unconditional willingness on the part of the injured spouse to return if asked to do so, and that condition of mind must continue during the whole four years in order to entitle her to decree of divorce for desertion. Here it was clear that the pursuer had no wish to return to the defender—*Bowman* v. *Bowman*, February 7, 1868, 4 Macph. 384. (2) The pursuer was bound to remove from the defender's mind the impression that she refused to go with him to New Cumnock in June. It might have been a misunderstanding on his part, but it was the duty of the pursuer to make intimation to him that she was willing to reside with him there if she intended to found upon his departure to New Cumnock as proof of desertion. Remonstrance must still be made unless it is impossible to make it by reason of the address of the person not being known, or at all events unless it is plain that remonstrance would be of no effect—*Barrie* v. *Barrie*, November 30, 1882, 10 R. 208; *Watson* v. *Watson*, March 20, 1890, 17 R. 736.

At advising—

LORD JUSTICE-CLERK—I am of opinion that the pursuer is not entitled to decree of divorce. The evidence satisfies me that the parties have been living apart with the consent of the pursuer, and that she has not been willing to adhere during the period which has elapsed since cohabitation ceased. It is not a case in which the pursuer had not opportunity for using means to endeavour to re-establish the family life. The defender and pursuer were living near one another for a long time after the separation; they were in communication by writing after they ceased to meet, and there has never been a suggestion on the part of the pursuer of a desire to resume cohabitation. On the contrary, it is her own case that she could not live with the defender, that he had been unkind and brutal to her, so that she was justified in separating herself from his society. This may be so, but if that was her position, and if it was in a state of mind which resulted from it that she tacitly consented to the breaking up of the conjugal home, as on the evidence I am satisfied she did, I can see no ground in that for holding that she is entitled to decree upon the plea that she has been wilfully and maliciously deserted by her husband. If she could not live with her husband because of his cruelty, and desired to be supported by him, her remedy was an action for separation and aliment. I cannot hold that where spouses live apart it is a sufficient cause for granting a decree of divorce for desertion, that the ground on which the wife who is suing did nothing to re-establish the family life, was that she could not live with the defender because of his cruelty. Wilful and malicious desertion can only be held proved at the instance of a spouse who was willing to cohabit. If there is unwillingness to cohabit because of the other spouse's cruelty, the law provides the remedy of separation and aliment, on the ground that the pursuer is justified in refusal to cohabit. It does not provide any remedy by divorce because of cruelty. If the separation is caused by cruelty, it is a separation which the injured spouse justifies on right to leave the other spouse's society. But such a separation is from the very nature of it a separation consented to by the injured spouse, and no duration of such a separation by itself can, in my opinion, be ground for a decree of divorce for desertion. In this case there is nothing else. I am therefore in favour of adhering to the interlocutor of the Lord Ordinary.

LORD YOUNG—I understand from what passed at consultation that all your Lordships are of opinion that no desertion has been proved to begin with, and if there was none, there could be no malicious persistence in desertion for four years, The Lord Justice-Clerk says he is of opinion—and the Lord Ordinary seems to be of the same opinion—that the spouses separated of consent. If that is the result of the evidence, there is no room for any question of law. From that opinion I am not prepared to dissent. If the desertion is not proved, and if there was no malicious persistence in the desertion, there is no room for legal opinion, and I express none.

LORD RUTHERFURD CLARK—In this case the pursuer separated herself from the society of the defender on account of his cruelty. She did so for good cause, and I am not surprised that she did not return. She had a very reasonable fear that his violence would be repeated. She has lived apart since 1882, and except for two letters which passed in 1883, there has been no communication between them. For most of the time the defender was resident in Glasgow, and it is certain that he contributed nothing to the maintenance of his wife or child.

The question is, whether the defender was in desertion, or whether the spouses were living separately of mutual consent? I answer it according to the latter alternative. I think that the pursuer was glad to be rid of her husband, and that in order to secure that end, she was willing to take the burden of maintaining herself and her child.

The remarkable fact is that she made no effort to resume cohabitation. She says that she was willing to live with her husband provided that she saw any prospect of his amendment. I doubt whether any such idea was ever seriously entertained,

and I cannot take her statement as proof of the fact. Her conduct is, to my mind, conclusive to the contrary. In a case like the present it is, I think, idle to speak of being willing to resume cohabitation when there was no effort to resume it. Nor is there, in my judgment, a surer proof that the pursuer released her husband from all his marital duties and desired to live alone, than the fact that she never asked him to contribute to her support and to the support of his child. She tries to give another colour to her conduct by saying that she did not know her husband's address. There was no difficulty in obtaining it. She knew his mother, who was living in her neighbourhood, and she could easily have procured the address of her son. It is not said that he was absconding.

I am aware that neither remonstrance nor entreaty is required as a solemnity in order to divorce for desertion. But the presence or absence of remonstrance and entreaty are very material in determining whether there was desertion, or whether the separation existed of mutual consent, especially when the spouse who complains of being deserted was the first to separate. In such a case, and in the absence of evidence to the contrary, the continued separation is to be referred to the cause which originally produced it, or, in other words, to the choice of the pursuer to live apart because of the cruelty of her husband.

It is said that the defender put the pursuer out of the house, and that this act was the beginning of his desertion. We cannot judge by the act alone irrespective of the intention. Cruelty and threats of cruelty which lead to a separation cannot be equivalent to desertion unless they are used for producing and maintaining a separation. No such case is before us. The defender may have turned his wife out of doors, but it was the act of a drunken man. It cannot be regarded as having been done in order that he might separate himself from the society of his wife. The pursuer says that in their last interview he threatened that if "I ever came back he would kill me." I cannot hold it to be proved that he made this statement. There is no evidence for it other than the evidence of the pursuer. Still less can I hold such language to be proof of a settled purpose on the part of the defender to separate himself from his wife. It seems to have been uttered in drunkenness, and when I consider that for many years the pursuer lived separately from her husband without complaint or effort after reconciliation, I should require very strong proof before I could hold that the separation was due to the defender's refusal to receive her. We have no such proof. She says—"If he had promised to live a decent life I would have gone back." This can only mean that she would not go back if she thought she was to be exposed to the same cruelty as before. She so acted, and with complete justification. But in that case is she deserted? I think not, because she was not willing to adhere. The condition which she attached to her return seems to be conclusive against her. It shows that she preferred to live apart from a fear of her husband's violence. She used the remedies which belong to a wife who is treated cruelly. She cannot at the same time claim the remedies which are given for desertion.

I do not consider the case where the violence is used, and the threats of violence are made, for the purpose of producing and maintaining a separation, or that where the husband turned his wife out of the house and keeps it closed against her. It does not arise on the evidence, and I reserve my judgment on it. We are dealing with the case of a drunken husband who made his house intolerable to his wife. I do not think that his conduct had any purpose in it. It was the outcome of intemperate habits which destroyed his sense of duty and manhood. It may be hard that a woman must remain united to one who used her so ill. But cruelty is not desertion. A wife is bound to submit to such usage as she receives from her husband, or else to withdraw from his society. And if she chooses the latter alternative, she has, to my mind, shown in the most emphatic manner that she is not willing to cohabit with him. She acts in the exercise of a legal right which may be declared by a decree of judicial separation. It is immaterial whether the decree be pronounced or not. Her right depends on the cruel treatment, and is only ascertained by the decree. So long as she acts in the exercise of that right she cannot be deserted, just as I think that no woman could be deserted if she were living apart from her husband under the authority of a decree of separation. In either case the separation is due to her own act, though justified by her husband's cruelty. I do not mean to say that a woman who has separated herself from her husband by reason of his cruelty may not thereafter be deserted. But it is, I think, a condition of the possibility of desertion that she abandons her position and is willing to resume cohabitation. So long as she maintains it she is excluding her husband from her society.

For these reasons I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD ADAM—The parties in this case were married in March 1880, separated in June 1882, and have never lived together since. The question is, whether the pursuer has proved that this rupture of their conjugal relations was caused by the wilful and malicious desertion of her by the defender.

It appears from the evidence that the defender was a man of dissipated habits, that he sometimes came home at night the worse of drink, that when in that state he was apt to be quarrelsome and violent, and it is alleged that the pursuer had frequently on these occasions to leave the house at night and take refuge with her sisters, who lived a few doors off, or remained in a shed in the neighbourhood. It is not suggested that the defender conducted himself as he did with the intention of inducing or com-

pelling the pursuer to separate from him. In fact she always returned, after a shorter or longer time, to her husband's house, and resumed cohabitation with him. Whether the defender's conduct would have justified the pursuer in separating herself permanently from him, we need not inquire. Separation *a mensa et thoro* is the remedy provided by the law of Scotland to an injured spouse in respect of conduct such as is alleged against the defender, and not divorce *a vinculo matrimonii*, such as is sought here. Whether it is a satisfactory or sufficient remedy it is not for us to say.

It further appears that the defender intended to leave Craigbank, where he had been residing, and had in April preceding, as the pursuer knew, taken a house and shop in the neighbouring village of New Cumnock for the purpose of carrying on business there—a step which the pursuer tells us she did not approve of. It was while the defender was about to leave Craigbank and to remove to New Cumnock that the incidents occurred which led to the separation.

The pursuer's account of the matter is this—[*His Lordship quoted the evidence*].

Now, it is right to point out that the pursuer gives an essentially different account of the matter on record. The account there given is—[*His Lordship quoted the passage from the pursuer's condescendence set forth in the narrative*].

Now, it will be observed that there is nothing said on record about the pursuer and her child being locked out of the house and taking refuge with her sister the night before the defender removed to New Cumnock, or about his threatening at the meeting next day to kill her if she went back, and which she swears altered her mind as to going to New Cumnock with him. The two accounts are quite inconsistent, but in my view it is immaterial to consider which of these two accounts, if either, is to be taken as correct, because neither, in my opinion, leads to the conclusion that the pursuer is entitled to divorce. I may, however, be permitted to remark that I am not disposed to place implicit reliance on the evidence of a party who makes such diverse statements in so material a part of her case.

It appears to me upon the evidence that there is no proof that the defender deserted the pursuer—that is, that he separated from her with the intent of putting an end to the conjugal cohabitation; on the contrary, I think that she deserted him. She may or may not have had good reason for doing so, but that is not the question.

It is no doubt true that the defender removed the furniture from Craigbank, and, as the pursuer phrases it, broke up the house there. But that is of no materiality in this case. The defender had, as the pursuer knew, taken a house and shop in the neighbouring village of New Cumnock for the purpose of carrying on business there, and to which he had removed. This was not done by the defender with the view of breaking up the matrimonial establishment and of withdrawing himself from the pursuer's society. He and his house were just as accessible to pursuer there as if he had continued to reside at Craigbank. The pursuer had often, she tells us, returned to her husband in somewhat similar circumstances before, and it may be permissible to doubt whether her reason for not doing so on this occasion was not that she did not wish to remove from the immediate vicinity of her sister's house, and possibly from the protection which that afforded her.

It is true also that the defender did not open a shop in New Cumnock, and that he broke up his establishment there at the end of a year. He says that his reason for doing so was because he could not carry on a shop without the assistance of his wife, and that at the end of the year he had lost hope that she would rejoin him. I see no reason to doubt the truth of that statement. We have the correspondence which passed between them when he gave up his house in New Cumnock, and I think that the terms of that correspondence, and the fact that he voluntarily returned to her the furniture and other articles which she desired, show that he entertained no feelings of ill-will towards her. In my opinion, if she had ever proposed to return to him he would have been ready and willing to receive her.

Assuming, however, that the pursuer is to be treated as the deserted party, I think the result is the same, whether she was willing or unwilling to return to him. If it be that she was unwilling to return to her husband, then she acquiesced in the separation, and cannot complain—*Volenti non fit injuria*. In that case the parties were living apart by mutual consent.

She professes, however, that she was all along willing to return to him "if he had asked her." I confess that if her statement as to his treatment of her while they lived together is to be taken as literally correct, I doubt, with the Lord Ordinary, whether it is true that she was willing to return to him. But be that as it may, the fact remains that she never approached her husband in any way with a view to putting an end to the state of separation. That being so, I think the case falls within the principle of the case of *Watson*, 17 R. If she desired to resume cohabitation it was her duty to take the initiative, and to have communicated with her husband. There could have been no difficulty in her doing so, but that she never did.

If we are to believe the statements of the parties, both were willing to resume cohabitation, but neither would take the first step in that direction.

On the whole matter, I think the interlocutor of the Lord Ordinary should be adhered to.

LORD KINNEAR—I have come to the same conclusion, for the reasons stated by Lord Rutherfurd Clark, and have nothing to add.

LORD TRAYNER—I hold it proved in this case that the defender in the month of June 1882 turned his wife and child out of

his house, locked the door, and left the house; that on the following day, finding his wife at the house, he again turned her out, and said that if she came back he would kill her; that he immediately thereafter removed the whole furniture from that house to a house in a neighbouring village two miles distant—New Cumnock; that he lived at New Cumnock for about a year, and thereafter left New Cumnock without communicating to the pursuer where he was going; and that from the time he turned the pursuer and her child out of doors in June 1882 he has never asked the pursuer to return to live with him, communicated with her in any way, or done anything towards the support and maintenance of the pursuer and her child. These facts being proved, I am of opinion that they amount in law to wilful and malicious desertion, which having been persisted in for more than four years, entitles the pursuer to decree of divorce in respect of such desertion.

If the pursuer had agreed to live apart from her husband, I need scarcely say that she would not have been entitled to the remedy of divorce, nor would she have been entitled to divorce if all she could allege and establish was ill-usage however gross. For that state of matters the law provides a different remedy. But if desertion is established, as I think it is here, then the fact that the injured wife did not desire to return to her husband at any time or during the whole time of his desertion, does not thereby deprive her of her right to a divorce. If he had *bona fide* invited her to his house, and offered to renew conjugal cohabitation at any time during the four years, then his desertion would have ceased. But if the desertion is maliciously persisted in by one spouse for the period of four years, in my opinion the state of mind of the other spouse during that period is immaterial, provided always that the conduct of that spouse does not establish that the living separate is agreed to. In short, in my view the injured spouse is not bound to do anything to bring the desertion to an end. In the present case (although in the view I have expressed it is not material to this decision) I hold it is proved that the pursuer was willing to return to her husband, the defender, if he had asked her.

I think, differing from the Lord Ordinary, that the pursuer should have decree as concluded for.

LORD PRESIDENT—I agree in the opinion of Lord Rutherfurd Clark.

The Court adhered.

Counsel for the Pursuer—Dundas—Crabb Watt. Agents—Simpson & Marwick, W.S.

Counsel for the Defender — Salvesen — Wilton. Agent—Thomas M'Naught, S.S.C.

Friday, February 2.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WILLS & COMPANY *v.* BURRELL & SON.

Ship—Charter-Party—Freight—Charterers Held not Entitled to Freight of Cargo Stowed on Deck by Master.

By charter-party it was agreed between the owner and the charterers of a ship that the ship was to load a complete cargo at Glasgow and proceed therewith to Trinidad and Demerara, where, on discharging the outward cargo, she was to load a complete cargo to be conveyed and delivered at London. For the round voyage the charterers were to pay a slump freight of £1425. The owners guaranteed that the ship would carry 1400 tons dead weight cargo outwards, and 1550 tons dead weight cargo home. The ship had liberty to call at any port for coals.

The voyage was completed, and the dead weight cargo guaranteed duly carried and delivered. On the homeward voyage the ship put in at St Michaels for coal, and while coaling the master took on board and stowed on deck a quantity of pineapples, the freight for which from St Michaels to London amounted to £76, 18s. 11d.

The charterers of the ship refused to pay the freight stipulated in the charter-party, except under deduction of the sum earned by the carriage of the pineapples, contending that they had hired the entire ship for the round voyage for the slump sum of £1425, and that everything which the ship earned on the voyage belonged to them.

Held that the freight earned for the carriage of the pineapples belonged to the shipowners and not to the charterers, and that the latter must pay the former the slump freight of £1425 stipulated in the charter-party without deduction.

By charter-party dated 1st February 1893 it was "mutually agreed between G. H. Wills & Company of the good steamship called the "Castro," of the measurement of 725 tons nett register or thereabouts, bound Stockton, now Elba, guaranteed 1400 tons d.w. cargo outwards, and 1500 tons d.w. cargo homewards if d.w. cargoes provided, and Burrell & Son of Glasgow, merchants. That the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Glasgow, or so near thereunto as she may safely get, and there load, from the factors of the said merchants, a full and complete cargo of lawful merchandise, which the said merchants bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall there-