Ordinary in the exercise of his discretion having decided that it should go to proof before himself, and it being competent for him to do so, I do not think that we should interfere with what he has done.

The Court adhered and found the reclaimers liable in the expenses of the reclaiming-note.

Counsel for the Pursuers—Sol.-Gen. Dickson, Q.C.—Sym. Agents — Reid & Guild, W.S.

Counsel for the Defender — Balfour Q.C., —Dundas, Q.C.—Donald. Agents—Macrae, Flett, & Rennie, W.S.

Wednesday, March 15.

SECOND DIVISION.

[Lord Low, Ordinary.

CATHCART *v.* CATHCART.

Process—Divorce—Defences Allowed after Reclaiming-Note Presented.

Held that it is in the discretion of the Court to permit defences in a consistorial action to be received and further proof taken after the Lord Ordinary has pronounced decree of divorce and his interlocutor has been reclaimed against.

On 3rd October 1898 James Taylor Cathcart, younger of Pitcairlie, raised an action of divorce for desertion against Mary Unwin or Cathcart of Wootton Park, Staffordshire, wife of the pursuer, and residing in London or elsewhere furth of Scotland.

The pursuer averred that he and the defender were married to each other on 20th July 1887; that on or about 7th September 1887, while they were residing in Pitcairlie, the defender had deserted the pursuer, and that since that date she had been guilty of malicious and wilful desertion of and non-adherence to the pursuer notwithstanding his repeated efforts to get her to return and live with him.

No defences were lodged for the defender. Proof was led before the Lord Ordinary (Low) on 17th December 1898.

At the proof the defender was represented by counsel, who cross-examined the witnesses for the pursuer but led no counter proof.

On the same date the Lord Ordinary pronounced the following interlocutor:—"Finds it established that the pursuer and defender are lawfully married persons, and that the defender wilfully deserted the pursuer, his society, and fellowship, in or about September 1887, and has continued in wilful desertion of the pursuer since that date, being upwards of four years: Therefore divorces and separates the defender Mary Unwin or Cathcart from the pursuer, his society, fellowship, and company, in all time coming: Finds and declares that the pursuer is loosed, acquitted, and freed of the marriage contracted betwixt the defender and him, and that it is lawful for him to marry any other free person whom he pleases in the same manner as if he had never been married to the said defender, or as if she were naturally dead: Finds and declares that the said defender has forfeited all the rights and privileges of a lawful wife, and decerns."

Against this interlocutor the defender reclaimed. When the case came on for hearing the defender asked to be allowed to put in defences, and the case was adjourned in order to allow the pursuer to see the defences and make statements in answer.

In her defences the defender stated that the pursuer never had any real affection for her, and soon after the marriage commenced to treat her with indifference and neglect; that she had left him in consequence of his having committed adultery with a chambermaid named Nellie Watson, residing at Pitcairlie, and that he had been guilty of the following acts of cruelty towards the defender:—(1) On 21st August 1888 at Ashbourne, in the county of Derby, he had assaulted her, gagged her, and dragged her into a carriage, and driven her to Wootton Park, a distance of seven miles, in the early morning, where he forcibly detained her till she was relieved by the chief-constable of the county; (2) in the beginning of 1891 she had been seized, within the precincts of the Royal Courts of Justice, London, by a man named Gaspard, acting in the employment of the defender, and taken to a lunatic asylum called the Priory Asylum, Roehampton Lane, London, where she had been forcibly detained for five months; (3) actuated by vindictive and mercenary motives the pursuer had harassed the defender with lunacy and other proceedings, his sole object being to acquire control of the defender's means and estate.

On consideration of the case being resumed, the pursuer argued — 1. It was incompetent to receive the defences and allow new proof to be led. The defence should have been put in in the Outer House. There was no case in which a defence was allowed for the first time in the Inner House, and it was for the defender to make out that this was competent. A consistorial cause did not differ from an ordinary action, except in this, that if no defence were lodged in the consistorial action, nevertheless the pursuer required to prove his averments before he could get decree. 2. Even if it were competent to receive the defences and allow proof at this stage, the Court in their discretion should refuse to receive them on account of the unsatisfactory nature of the defence—*Longworth* v. *Yelverton*, March 10, 1865, 3 Macph. 645. Appearance for the defender had been made in the Outer House, and everything stated in the defences had been known to her then. The defender's statements were made up of (*a*) a charge of adultery in 1887. In 1889 the defender had raised in England an action for divorce on the ground of adultery and cruelty. She had abandoned the charge of adultery, which was the same as in the present case—*In re Cathcart* [1892], 1 Ch. 552. She was therefore precluded from pleading in this action any acts of adultery

which she might have proved in the former action, but had not. On the charge of adultery she had not a scrap of evidence beyond what she had in 1887. (*b*) As regards the charges of cruelty, her allegations had been fully gone into by the English Judges, and had been disposed of by them in certain lunacy proceedings raised by the pursuer—*In re Cathcart* [1892], 1 Ch. 549; [1893], 1 Ch. 466. All her allegations having been the subject of judicial decision in England, the Court should refuse to allow her to go into them a second time.

Argued for defender—1. It was quite competent to receive the defence and to allow further proof. An amendment might be allowed at any time to try the real issue in a cause—*Guinness, Mahon & Company* v. *Coats Iron and Steel Company*, January 20, 1891, 18 R. 441. In a consistorial action for divorce every facility was granted to the defender to prove that decree should be refused, and appearance for a defender in such an action was permitted at any stage of the case, even after a reclaiming-note had been presented—*Whyte* v. *Whyte*, January 31, 1891, 18 R. 469; *Ross* v. *Ross*, July 3, 1897, 24 R. 1029. 2. It being competent for the Court to receive the defences and appoint further proof to be heard, they ought in the exercise of their discretion to do so in the present case. (*a*) In regard to the charge of adultery no evidence as to that had been led either in the proceedings in England or in the Outer House, and it was possible that the defender had information now which she had not in 1889. (*b*) The acts of cruelty averred had all occurred since 1889, and had not been the subject of inquiry in any consistorial action. They had come up incidentally in certain lunacy proceedings, and even in these proceedings the comments of some of the Judges showed that in their opinion the attitude of the husband had been such as to excuse the defender leaving him, and that therefore there had been no malicious desertion on her part—*In re Cathcart* [1892], 1 Ch., opinions of L.J. Bowen, p. 567, and of L.J. Kay, p. 569; and [1893], 1 Ch., opinion of Lord Halsbury, p. 474. The grounds for allowing inquiry were on that account very strong.

At advising—

Lord Justice-Clerk—The defender in a former action in the English Courts has already stated her case about the alleged infidelity of the pursuer, and in that action she abandoned the charge of adultery. It is plain from her present defences that she can bring no other accusation of infidelity against the pursuer than that already abandoned, and I am therefore of opinion that we in the exercise of our discretion ought not to allow the defences with regard to that to be received. With reference to the charges of cruelty, I think they should be allowed, and that the case should be remitted back to the Lord Ordinary to proceed, on condition that the defender pay the whole expenses incurred since the date of the Lord Ordinary's interlocutor.

Lord Young—I agree. I think that the case will be most satisfactorily decided when proof has been taken with reference to the defender's averments in regard to cruel treatment. I concur with your Lordship in thinking that we should not allow the statement of alleged adultery to be received. With that struck out I am of opinion that the defences should be received, the interlocutor reclaimed against recalled *in hoc statu*, and the case remitted to the Lord Ordinary to proceed.

Lord Trayner—I am of opinion that it is not incompetent for us to allow the defences to be received at this stage, but that it is for us in the exercise of our discretion to determine whether these defences should be received or not. I agree in thinking the defences on the ground of adultery should not be allowed. I have doubts as to consenting to a remit to take any proof but refrain from dissenting.

Lord Moncreiff—I have had some difficulty on the questions argued, but have come to be of opinion that the defender's defence on the charge of cruelty should be admitted to proof.

The Court recalled *in hoc statu* the interlocutor reclaimed against, allowed the defences to be amended by deleting the averment of infidelity, and the amendment having been made, allowed the defences and the answers thereto to be received, found the pursuer entitled to expenses since the date of the interlocutor reclaimed against, and remitted the cause to the Lord Ordinary to proceed.

Counsel for Pursuer—W. Campbell, Q.C. — Craigie. Agent — William Duncan, S.S.C.

Counsel for Defender—Jameson, Q.C — Hunter. Agent—A. W. Gordon, Solicitor.

VALUATION APPEAL COURT.

Wednesday, February 15.

(Before Lord Kyllachy and Lord Stormonth Darling.)

YOUNG & SONS *v.* ASSESSOR FOR PEEBLES.

Valuation Cases—Buildings Erected by Squatter—Valuation of Lands (Scotland) Act 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 42.

Contractors for the erection of certain waterworks were permitted by the tenants of farms adjoining their works to erect certain stores and huts. There was no sub-lease or other arrangement, and no rent was paid for the permission. The contractors let the stores and huts and received rent for them. *Held* that there was no ground for entering them in the valuation roll either under the Valuation Act 1854 or the Amending Act of 1895.