not, in my opinion, become unlawful because the officer before apprehending took means to test by his own view the correctness of his information, or because finding that the offender was a law-abiding person he abstained from apprehending and reported the matter with a view to citation and trial.

"I am therefore of opinion that upon the admitted facts the note of supension and interdict should be refused."

The complainer reclaimed, and argued—He was entitled to the interdict asked. Even if the respondent Proudfoot was a Midlothian justice of the peace constable in Haddington, he was outside the bounds of his jurisdiction. Then as regards the police constable, he had no reasonable information which entitled him to make an examination of the pursuer's horses. There had been no specific charge which would have entitled him to act as he did. There had been a tentative search and nothing more. A general allegation was not sufficient to entitle a constable to go upon a farm and examine all the horses against the wish of the tenant.

Counsel for the respondents were not called upon.

LORD JUSTICE-CLERK — In the circumstances of this case I see no ground for altering the judgment of the Lord Ordinary. In consequence of a report that a breach of the Prevention of Cruelty to Animals Act was being committed on this farm, the police constable went there and found a horse being worked while suffering from a sore. As the result of this a servant of the complainer was charged under the Act and convicted. Now, because the police constable was accompanied by an official of the Society, we are asked to interdict the directors of the Society and its officers from going to the farm again. I do not think that any such interdict should be granted. Whether the Society's inspector took the police constable, or the police constable took the inspector, does not appear to be material. The police constable was entitled to go there if he thought that a breach of the Act was being committed, and the presence with him of an official of the Society does not appear to me in the circumstances to be illegal. If not illegal, it cannot be the basis of an interdict.

LORD TRAYNER—I agree. I think the complainer has not presented a relevant case. Interdict is asked against the chairman, the directors, and the secretary of this Society. They have never trespassed, and do not appear to have any desire to trespass on the complainer's farms. What is said to constitute the trespass is a visit paid to these farms by a police constable accompanied by an official of the Society. I think with your Lordship that it does not in the least matter whether the policeman took the official or the official took the policeman. The policeman and the official were on the farm, not for the purpose of trespassing, but they went there on information received that there was an offence against the statute being committed. That was not illegal. It was not trespass, for the statute authorises it. It turned out that they were well informed because a conviction followed. But even if no conviction had followed, the policeman and his companion were quite entitled to go together into that field if they had reasonable ground for believing that the statute against cruelty to animals was being violated.

LORD MONCREIFF—I am of the same opinion. I think that the judgment of the Lord Ordinary is right. The case cannot be considered apart from the special facts. The entering on the farm was confined to the one occasion. On that occasion an official of the Society had reason to believe that a horse was being cruelly used. Accompanied by a police constable he entered on the farm for the purpose of investigation, and their examination proved that the cruel treatment was a fact, and a conviction followed. That is the sole ground for this action for interdict, and I do not think it is a good one. I am of opinion that the action complained of was authorised by the statute. I shall only add that I do not think that in deciding as we do we will be giving any encouragement to inquisitorial action on the part of the Society or its officials, or any invasion of private rights.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Complainer—R. V. Campbell—Fleming. Agents—J. & J. Milligan, W.S.

Counsel for the Respondents—Solicitor-General (Dickson, Q.C.)—Cook. Agents—Traquair, Dickson, & M'Laren, W.S.

Thursday, January 18.

SECOND DIVISION.

[Lord Low, Ordinary.

CATHCART *v.* CATHCART.

(*Ante*, March 15, 1899, vol. xxxvi., p. 597, and 1 F. 781.)

Husband and Wife—Divorce—Desertion—Act 1573, *cap.* 55.

Evidence upon which *held* (1) that a husband had used all reasonable means to induce his wife to return to him; (2) that certain forcible measures taken by him in the *bona fide* belief reasonably entertained that his wife was insane did not justify her in continuing her desertion after she had been declared sane by the verdict of a jury; and that consequently (3) the wife having continued in desertion for more than four years after the date of that verdict, the husband was entitled to decree of divorce.

This was an action of divorce for desertion at the instance of James Taylor Cathcart younger of Pitcairlie against his wife Mary Unwin or Cathcart of Wootton Park, Staffordshire.

The defender admitted that she had left the pursuer in September 1887, shortly after the marriage, and had not since that date resided with him. But in defence to this action she pleaded—"(1) The defender not having been guilty of wilful and malicious non-adherence to and desertion of the pursuer, ought to be assoilzied with expenses. (2) The defender being justified in living apart from the pursuer in respect of his cruelty as alleged, ought to be assoilzied with expenses."

The facts upon which the defender chiefly relied in support of these pleas were (1) that the pursuer had never sincerely desired her to return, and had not used all reasonable means to induce her to do so; (2) that in 1888 he came in the middle of the night to Ashbourne in Derbyshire, roused her out of bed, and compelled her by force to accompany him to Wootton, a distance of seven miles, where she was locked in a room and detained against her will with a hospital nurse; and (3) that in 1891 he caused her to be apprehended at the entrance of the Royal Courts of Justice in the Strand, London, under an urgency lunacy order, and forcibly taken against her will to a private lunatic asylum, where she was kept for five months until she was pronounced to be sane by the verdict of a jury.

The facts sufficiently appear from the opinion of the Lord Ordinary (Low), who by interlocutor dated 15th July 1899 found that the defender had been guilty of wilful and malicious non-adherence and desertion of the pursuer for the space of four years, and pronounced decree of divorce accordingly.

Opinion.—"The pursuer and the defender were married in July 1887. Immediately after the marriage they went for a yachting tour on the west coast of Scotland, and then paid a visit to the pursuer's father at Pitcairlie, in Fifeshire. While they were residing there the defender, on 23rd September, without any warning, left the pursuer, and she has never since resided with him. In the present action, accordingly, the pursuer seeks divorce on the ground of desertion.

"The defender alleges in her defences that one of her reasons for leaving the pursuer was his heartless treatment of her and his indifference and neglect. Apart from certain charges which the defender made at the time against the pursuer, and to which I shall presently refer, it is plain that no conduct on the pursuer's part has been proved which could justify the defender in leaving him. On the contrary, I see no reason to believe that the pursuer's treatment of his wife was otherwise than unexceptionable.

"The true reason why the defender left the pursuer was that she believed that he had been unfaithful to her. There was, in fact, no foundation whatever for that belief, and therefore it could not justify the defender in refusing to adhere. It seems to me, however, to be more than doubtful whether the defender can be regarded as having been responsible for either her beliefs or her actions at the time when she left Pitcairlie.

"In proceedings in lunacy which the pursuer instituted in London, a special jury found, upon 21st July 1891, that the defender was of sound mind at that date. I am unable, however, upon the evidence, to come to any other conclusion than that for a period prior to that date, and after she left Pitcairlie, the defender was of unsound mind, and that being so, it seems to me, for reasons which I shall presently state, to be difficult to resist the inference that at the time when she left Pitcairlie mental derangement had begun to show itself.

"Before leaving Pitcairlie the defender had charged the pursuer with having committed adultery, first at Tobermory, which they visited on their yachting tour, and again at Pitcairlie.

"It appears that the yacht having put in at Tobermory the pursuer went to the public reading-room there, and the defender seems to have conceived the idea that the reading-room in that primitive town was a house of ill-fame, to which the pursuer went for immoral purposes.

"The second charge was that the pursuer had committed adultery with a housemaid at Pitcairlie, when, being unwell, he was occupying a bed in a dressing-room communicating with the bedroom which the defender occupied.

"If that was all it would not be sufficient to justify the inference that the defender was labouring under an insane delusion, because it is not an uncommon thing for a jealous wife to believe evil of her husband upon very slender grounds, although I do not think that I have ever had experience of a case in which the belief was so absolutely without any reasonable basis.

"There is, however, another incident which I cannot explain upon any other supposition than that the defender was not in her right mind. At the time when the defender left him the pursuer was suffering from a chill, and by the advice of his doctor he was sleeping in the dressing-room. The pursuer in his evidence said, most unwillingly, and only because his counsel pressed him to do so, that his wife suggested that her maid should sleep with him. The defender also made the same suggestion to Dr Niven, who was attending the pursuer. Dr Niven's evidence is as follows:—'In the course of my visits I remember Mrs Cathcart taking me into a bedroom one day to ask me about certain matters. On that occasion she suggested to me that seeing that she and her husband were to sleep separately she thought it would be better that her husband should sleep with her maid. I expressed myself as shocked at the suggestion. She said she thought there was nothing very strange in that at all, but the conversation was cut short by the maid coming into the room,

and I was very well pleased. (Q) Did she say anything as to the maid being a nice, clean, tidy woman? (A) Her own maid was that, and that was the reason why she would be very willing that he should sleep with her. I said this was something dreadful, and she said there was nothing very astonishing about it.'

"Then in cross-examination Dr Niven was asked—'What were the exact words about sleeping?' and he answered—'So far as I remember she said quite plainly that she thought the best thing would be for her husband to sleep with her maid, that she was a nice, clean, tidy woman, and that she (Mrs Cathcart) would have no objection.'

"The defender denied that anything of the kind occurred, and from the way in which she received the question, I am satisfied that she had no recollection of making the suggestion, and that the idea that she should have done so is now inconceivable to her.

"I have no doubt, however, that the incident did occur. Nothing can be suggested against Dr Niven's credibility, and I do not think that there is any reason to doubt the accuracy of his recollection, because the matter was of a kind which must have made a deep impression upon his memory.

"Now, I cannot imagine a sane woman in the defender's position in life making such a proposal to Dr Niven. It was suggested that she was anxious to get something against her husband, and that what she proposed was a scheme to entrap him. But no woman in her sound mind would have thought of attempting to get a respectable professional man like Dr Niven to aid her in such a scheme.

"It might be possible to construe what the defender said to Dr Niven as meaning that the maid should sleep, not with the pursuer, but in the same room, so as to be at hand to attend to him if required. In ordinary circumstances such a proposal would have been sufficiently startling, but when made by a wife who believed that her husband was at the time engaged in an illicit connection with another maid-servant in the same house, it is incredible except upon the supposition that she was not responsible for what she said.

"The case therefore stands thus. The defender made against the pursuer and believed charges of infidelity of the most improbable description and without any foundation whatever; she made the extraordinary proposal to which I have referred to the pursuer and to Dr Niven, and she subsequently became, I think, evidently of unsound mind. The inference that the defender was already of unsound mind when she left the pursuer seems to me to be so strong that I do not think it would be possible to affirm that she was then responsible for her actions and capable of malicious desertion.

"I do not think, however, that that is conclusive of the case, because many years have elapsed since the defender must be regarded as having fully regained her reason, and during all that period she has persistently refused to hold any communication with the pursuer.

"In 1891 the defender's conduct became so peculiar that the pursuer had her confined in a lunatic asylum, and she had been there for some five months under skilled medical treatment prior to the inquiry, in which the jury pronounced her to be of sound mind. Now, no one challenges the verdict of the jury, and there is no suggestion that since the verdict the defender has had a relapse, or that she is not now of sound mind. But the verdict was pronounced upon 21st July 1891, and since that date the defender, although of sound mind, has lived separate from the pursuer, and has refused to see him or to hold any communication with him. In these circumstances I am of opinion that, so far as desertion on the defender's part is concerned, there is sufficient to justify decree, but the questions remain—(1) whether the pursuer used all reasonable means to induce the defender to adhere? and (2) whether the pursuer's conduct was such as to justify the defender in refusing to return to him?

"It was contended for the defender that the pursuer had never shown any *bona fide* desire to be reconciled to her or to receive her back, and reference was made to certain letters which the pursuer wrote to the defender after she had left him in 1887 and in 1888.

"The pursuer was asked in cross-examination about letters which he had written to the defender in October 1887, and which were unfavourably commented on by the

---

NOTE:—The letters specially referred to by the Lord Ordinary were as follows:—

"*Pitcairlie, 23rd December* 1887.

"Dear Mary—I never requested you to return to your father-in-law's house. *It is my house at Lambennie which is open to you as my wife*, where I am willing to receive you, and to which it is your duty to come. As in one of your letters you allude *again to your disgraceful stories against me, and take credit to yourself for your willingness to 'forgive,'* it is as well that there should be no ambiguity or misunderstanding between us on that point, as I have already told you there is nothing in my past life of which I have any reason to be ashamed, or which requires condonation or forgiveness from you, and you cannot therefore wonder that I do not at all appreciate or accept forgiveness for offences which were never committed, and your allusion to which I cannot but regard as a continued insult to all right feeling. As to the business with your uncle to which you refer, I do not understand what you mean in the least. I am much surprised at your talking of inviting people to Wootton under present circumstances, and I trust that at any rate you will not make use of my name in any way in the matter. It seems to me that you do not fully realise the very serious import of what you have done, and the immeasurable distance which separates a matter such as this from the ordinary details and affairs of life.—Yours, J. T. CATHCART."

Lord Chancellor in proceedings in the High Court of Justice in London (L.R., Ch. Div., 1893, vol. i. p. 473). These letters have not been produced, and no explanation was given why they have not been produced. It may be that they could not be recovered, but I do not know that that was the case. If, however, the defender desired to found upon these letters, the same means of recovering them were open to her as to the pursuer.

"There are, however, produced one letter from the pursuer to the defender dated in December 1887, and four letters dated respectively in March, May and June 1888, from which I think it may be sufficiently gathered what was the attitude which at that time the pursuer was taking towards the defender.

"In regard to the pursuer's letter of 23rd December 1887, I do not think that much fault can be found with it, because although it does not display any affection on the pursuer's part for the defender, it must be remembered that it was written under the sense of a very great wrong which he suffered at her hands. She had groundlessly accused him of being unfaithful under circumstances which, if true, involved uncommon moral depravity on his part, and she had also apparently accused him to others of having venereal disease. She had not only made these accusations, but adhered to them, and the position which she seems to have taken up was, that although (judging from her letters) she was not by any means unwilling to be reconciled to the pursuer, she insisted that he should admit that the accusations were true, or at all events that they were not delusions on her part. I think that great allowance is to be made for letters written under such circumstances. I may add that until March 1888 I do not think that the pursuer considered the defender to be of unsound mind, although he was unable to account for her apparent belief in the charges which she made against him.

"The only other letters which I think it necessary to refer to in detail are those of 8th June and 13th August 1888.

"The former letter seems to me by far the most unfavourable to the pursuer of any of his letters. I have been unable to discover the precise circumstances under which it was written, but it was undoubtedly an extremely unkind and harsh letter, and what made it in my opinion more inexcusable was that at that time the pursuer must have been at all events very doubtful of the defender's sanity.

"I do not, however, think that the letter can be regarded as an act of cruelty on the pursuer's part which would have justified the defender in refusing ever again to live with him. Its importance is as bearing

"*Pitcairlie, Auchtermuchty, N.B.,*
"*8th June* 1888.

"Mary,—I do not understand your last letter. It was certainly at no suggestion of mine that anything happened to you at Scarboro' of any kind, for until I had your telegram I did not even know that you were there, nor have I had any communication with Miss Preston or anyone else leading to such conduct as you suggest.

"I cannot understand why you are continually imputing to me that which I have given you no ground whatever to suppose likely. Pray understand that neither directly nor indirectly have I taken any step of the kind which you indicate, and if you will only look back at what has happened since you left me, you will see how far I have been from doing anything of the sort. With regard to money, I cannot imagine what you mean. I left the drawing up of your settlements entirely to yourself, your own family and advisers, and interfered in no way, and I have never attempted to interfere with your property at Wootton or elsewhere. In fact, no husband could have left his wife or her money more entirely to herself than I have done, or made less attempt to secure advantages for himself from his marriage with a woman whom he has now to suffer for having regarded as worthy of trust and affection. All these suggestions on your part can only give me the more thorough and sincere contempt for conduct so shameful and so systematically false from beginning to end as yours has been—J. T. C."

"*13th August* 1888.

"Mary,—The news of your conduct at Skipton the other day, and letters from some of your relations on the subject, have brought me up from Scotland. If you still have any idea that *I* wish to see you shut up in a lunatic asylum, I hope you will put this idea away once for all. It is the very last thing I should wish for, or take any steps to bring about. What you have been doing lately, however, has made much talk, and if you do not take more care of yourself I cannot tell what the consequences may be, quite apart from any actions of mine. To show you how anxious I am to do all I can in your interests, I shall go down to Wootton to-morrow and stay there in the hope that you will come there to me as soon as you get this letter, and remain there with me quietly. You cannot, I should think, have any doubt that you would be quite safe with me at Wootton, and that I would treat you in the future as I did in the past, before you left me, with all kindness. To prevent you misunderstanding me, and to put it to you quite clearly, I give you my word that if you will do as I now ask and return to my protection, I will do nothing myself to lead to your being placed in an asylum, nor will I countenance in any way anyone else doing so. If you will think this over, I am sure you cannot hesitate what to do. As your husband it is my place to protect you, and while you are with me I can do so. It is difficult, however, if you persist in keeping away and running into risks and difficulties from which it is my sincere desire to save you—J. T. C."

upon the question whether the pursuer used all reasonable means to effect a reconciliation with the defender, and, regarded from that point of view, the letter is unfavourable to the pursuer.

"The letter of 13th August was written after the defender had been conducting herself in such a way as to make it plain to the pursuer that if not actually insane she was on the verge of insanity. The object of the letter was to try to induce the defender to join the pursuer at Wootton Park, and live quietly with him there, the pursuer's hope being that with quietness and care she might be restored to mental health. That object was entirely laudable, but the tone of the letter was not calculated to bring about the desired result. I can understand and make allowance for the pursuer's feelings of indignation and resentment at the way in which the defender had treated him, but when he knew that the defender's mind was unhinged I think that he might have, and ought to have, written more kindly to her.

"I see no reason, however, to suppose that the letter was not written in good faith. If, as was suggested, the pursuer's true object was to get control of the defender with the view of putting her into an asylum, I think that he would have written a letter more calculated to induce her to meet him at Wootton, and put herself under his protection.

"The letter of 13th August 1888 terminated the pursuer's correspondence with the defender at that time. There followed immediately after the letter an attempt on the pursuer's part to get the defender to live at Wootton—a matter upon which I shall have something to say presently. In January 1888 the defender brought an action of divorce against the pursuer on the ground of adultery and cruelty. The charge of adultery was not pressed, but the defender asked separation on the ground of cruelty, and after some procedure the action was dismissed in June 1889. The pursuer afterwards had the defender apprehended upon an urgency warrant and confined in a lunatic asylum, and that was followed by the inquiry in lunacy in which the defender was found to be of sound mind. There was subsequently prolonged litigation in the High Court of Justice in regard to the costs of the proceedings in lunacy, in which final judgment was given in the end of 1892. I shall afterwards consider how far the pursuer's conduct in these proceedings was such as to justify the defender's subsequent refusal to adhere. In the meantime I would only remark that during the currency of the proceedings I do not think that it would be reasonable to blame the pursuer for not making advances to the defender.

"Before considering the communications which the pursuer made to the defender after 1892, I have a general observation to make on the correspondence of 1887 and 1888. I do not blame the pursuer for not having asked the defender at that time to return to him unconditionally. So long as she persisted in her charges against him, to do so would have been to invite an impossible situation. But a husband who seeks the remedy of divorce for desertion must show that he has used all reasonable means to induce his wife to adhere, and in the circumstances in which the pursuer was placed I think that his proper course would have been to try to bring the defender to see that the charges which she made against him were unfounded, and that there was no reason why she should not live with him. I am willing to believe that that was the course which the pursuer intended to follow, but judging from the letters which have been produced it seems to me that he adopted a method which was more calculated to estrange the defender still more than to pave the way to a reconciliation. The pursuer's letters are not, in my judgment, those of a husband who sincerely desired his wife to return to him, and whose only object was to persuade her that she had left him in error, and that there was no good ground for their remaining separate.

"The fact, however, that for a time after an unwarranted desertion by his wife the husband has not made such advances to her as can be regarded as a reasonable attempt to bring about a reconciliation, will not justify her in refusing to adhere if he subsequently approaches her in a proper spirit. But that appears to me to be what happened in this case.

"On 12th January 1893 the pursuer wrote to the defender the letter printed in the Appendix. [This letter was as follows:—"My dear Mary—Although you are so obstinate in refusing to encourage any kindly feeling between us, you will not, I am sure, object to my writing to wish you a 'Good New-Year,' and send you my best wishes for 1893. I haven't heard from you for a long time, and as I thought you didn't want to see me I have not tried to meet you, although I still hope that some day things may be better between us. I may perhaps be in London sometime in the spring; if I am, would you like to see me? You might at least, I think, give me a cup of tea some afternoon. If you take any interest in what I am doing, you may like to hear about the black cattle which you used to be fond of. There are some very good ones now. One bull got 1st prize at the great All England Show at Doncaster the year before last, and I hope to do the same at Chester this year with another if he goes on well. The herd is getting quite famous, but perhaps you have forgotten all about them now for other things—although I hope not.—J. T. CATHCART."] That was very soon after the final settlement of the litigations which had been going on between the parties. The criticism which was made upon that letter was, that even then the pursuer did not ask the defender to return to him. If he had done so I should have regarded the letter with some suspicion. The breach between the parties had been so wide that the pursuer could only hope to bridge it over by gradually establishing better relations with the defender. In such circum-

stances I think that the letter was a very proper one, and I have no reason whatever to doubt its good faith. The letter was returned by the defender to the pursuer. In 1894 the pursuer discovered where the defender was residing, and he tried to obtain an interview with her, and wrote to her several times, but the defender refused to see him and returned his letters. In 1896 and 1898 the pursuer again wrote to the defender in terms to which no exception can be taken, but the letters were not answered.

"It is plain that from 1892 onwards the defender has been fixed in her resolution to have no further communications with the pursuer, and during that period I do not think that he could reasonably have been expected to do more than he did with the view of effecting a reconciliation.

"The question remains whether the pursuer's treatment of the defender at Ashbourne in August 1888, and again when he had her taken by force to a lunatic asylum in February 1891 was such as to justify her in refusing to live with him.

"What occurred at Ashbourne seems to me to raise a question of difficulty. The pursuer was at that time impressed with the necessity of having the defender placed under some control. She had been conducting herself in a very eccentric way, and the pursuer believed that, if not insane, she was upon the verge of insanity. He had been advised that quiet, the absence of cause of excitement, and careful nursing might result in the defender's restoration to mental health. He accordingly wrote to the defender the letter to which I have already referred, proposing that she should meet him at Wootton Park. The pursuer himself went to Wootton, and with the view of having his wife properly attended to engaged as servants two trained nurses and a manservant, who also appears to have had some experience in a lunatic asylum.

"So far I do not think that, apart from the terms of the letter of 13th August, upon which I have already commented, any blame attaches to the pursuer. On the contrary, I think that it was obviously better to try what could be done for the defender by rest and care in her own house than to rush at once into lunacy proceedings.

"On the evening of the 20th or 21st of August the defender drove up to the door of Wootton House, but when she heard that the pursuer was there she drove away again. The pursuer learned that she had gone to a small inn at the village of Ashbourne, about seven miles distant. He accordingly went there the same night with one of the nurses and the manservant and, at an hour which was certainly considerably after midnight, roused the defender from her bed and compelled her against her will to dress and accompany him to Wootton. Considering that the defender was at the time, to the pursuer's knowledge, in a very critical state, and that any unusual excitement was likely to do her harm, I think that it is difficult altogether to justify the pursuer's action.

"I am satisfied, however, that the pursuer acted in good faith, and that any error which he committed was an error in judgment only.

"The pursuer was placed in a very difficult position, in which it was not easy to determine what was the proper course to follow. He was satisfied—and he was acting under advice both medical and legal—that it was essential that the defender should for a time lead a life of rest and careful attention to her physical condition, and he found her upon the night in question within easy reach of Wootton, but prepared to leave the following morning, presumably again to resume the aimless wandering life which was rapidly leading her into madness. He accordingly resolved to take her to Wootton at once.

"Of course it may be said that he should at all events have waited until the morning. But the pursuer gives a quite intelligible if not altogether satisfactory reason for not having done so. He says that he was very anxious that the defender should not be talked of as a lunatic, and he feared that if he waited until the morning when people were about there might be a scene, and as the defender was well known in Ashbourne and the neighbourhood he wished to avoid a scandal.

"It is said, however, that the pursuer used a degree of force to compel the defender to go with him to Wootton which when used to a woman in her condition amounted to cruelty.

"The pursuer says that although the defender was unwilling to accompany him she suffered him to lead her by the hand from her room to the carriage, and that no greater force was used.

"Now, I do not suggest that the pursuer was not an honest witness—on the contrary, my impression was entirely the other way—but I think that this is a matter in which it is probable that he, without any intention to speak anything but the truth, somewhat minimised the amount of force which he used. On the other hand, I have no doubt that the defender considerably exaggerated it.

"There is no evidence upon the point except that of the pursuer and the defender, although there were apparently three other persons who must have seen what happened—namely, the landlady of the inn, the nurse, and the manservant.

"I do not, however, think that the defender can take benefit from the fact that none of these persons was called as a witness, because upon the question whether she is justified in refusing to adhere she is, I take it, pursuer in the issue.

"The conclusion which I come to on the evidence is, that although the defender was unwilling to go to Wootton, and protested against being taken there, she did not offer actual physical resistance, and that although some force was used to lead her from the room to the carriage, there was nothing in the nature of a struggle.

"That being so, and it being established, in my opinion, that the pursuer was actuated by no other motive than to do what

was best in the defender's interest, I do not think that what occurred at Ashbourne amounted to *sævitia* upon his part, or (assuming that something less than *sævitia* will constitute a good defence to an action of divorce for desertion) to conduct which would constitute a 'reasonable cause' for refusal on the defender's part ever again to live with her husband.

"In regard to the execution of the urgency order, it was, no doubt, a strong step, but in the circumstances I am of opinion that it was justified. The defender's condition at that time was such that, in my opinion, it was the pursuer's duty to take measures for her protection. The defender would not submit to be examined by medical men, and in resorting to an urgency order the pursuer acted under the best advice which he could obtain. No doubt the defender was taken to the asylum by force, and the scene must have been a very painful one, but it was the result of her own unhappy condition, and not of anything for which the pursuer can be blamed.

"I think that it is plain enough that the reason of the defender's refusal in recent years to hold any communication with the pursuer was what happened at Ashbourne and in the lunacy proceedings. The impression which I gathered from her evidence was that she believed that she never was insane, and that the action of her husband at Ashbourne and under the urgency order amounted to an outrage for which there was no justification.

"If, however, the pursuer's conduct at Ashbourne, however unwise, was taken in good faith, and with the sole object of doing what was best for the defender, as I think it was, and if the proceedings under the urgency order, however painful, were justified by the defender's condition, as I think they were, the defender's belief, however honest, that the reverse was the case, cannot in law be held to be a justification of her obstinate refusal to adhere.

"Upon the whole matter, I have, although not without difficulty, come to the conclusion that the pursuer is entitled to decree."

The defender reclaimed, and argued—The defender was now bound to concede for the purposes of this case that the pursuer did not commit adultery. But it was proved that the defender left the pursuer in the *bona fide* belief that he had. Her desertion therefore was not originally malicious. Indeed, it was not now maintained that it was. But it was contended that the defender had continued in wilful and malicious desertion since 1893. The pursuer was not now entitled to take any *terminus a quo* from which to date the desertion, unless at such date he would have been entitled to a decree of adherence. In this case the wife's non-adherence was justified by the husband's conduct generally, and more particularly by his conduct in relation to (1) the Ashbourne incident, and (2) the lunacy proceedings. Even if it were conceded, as it was not, that he was acting in *bona fide*, and that he was justified in the circumstances in taking steps to secure the confinement of his wife, the methods which he adopted were unnecessarily violent and inconsiderate, and were such as to show that he had taken up and maintained an attitude of strong hostility to the defender, and that his actions were inspired at least as much by anger against her as by regard for her true interests. He might have attained all that in any view he was justified in desiring without resorting to such extreme measures as he in fact chose to adopt, and apart from that he ought at least to have tried other ways of having her compelled to submit to medical examination before he took such violent means as carrying her off forcibly in the middle of the night, and having her publicly seized under an urgency order. His conduct in this respect had been severely commented on by the Judges in England, who had all the facts before them—*in re Cathcart* [1892], 1 Ch. 549, *per* Bowen, L.J., at p. 567, and Kay, L.J., at p. 569, affirmed [1893], 1 Ch. 466. With such proofs as the wife had here of her husband's hostility towards her, and of his utter disregard for her feelings, she was not bound to adhere. It did not follow that even if she had no sufficient defence to an action of adherence, she had no defence to an action of divorce for desertion —*Mackenzie* v. *Mackenzie*, March 18, 1893, 20 R. 636, *per* Lord Young at p. 665. Still less was it necessary that the wife should prove such conduct on the part of the husband as would entitle her to a decree of judicial separation—*Mackenzie* v. *Mackenzie*, *cit.*, and 22 R. (H.L.) 32, where the view of the majority in the Court of Session was not dissented from. All that the wife was bound to prove was that her non-adherence was not malicious and obstinate—*Mackenzie* v. *Mackenzie*, *cit.* No doubt a decree of judicial separation could only be pronounced upon proof of adultery, or physical cruelty actual or apprehended—*Russell* v. *Russell* [1895], p. 315, and [1897] A.C. 395. But here the parties were in a different position. [LORD M'LAREN—The law relating to judicial separation is the canon law so far as adopted by the common law of Scotland. But the law relating to divorce for desertion is purely statutory, and the question is, whether the desertion has been malicious, obstinate, and without reasonable cause.] That was so. All that had to be proved was that the wife's non-adherence was justified by the husband's conduct. That had been amply demonstrated here. It was to be noted that the result of the *Russell* case, *cit.*, was that although the husband was refused decree of judicial separation, the wife was refused decree for restitution of conjugal rights. The pursuer's attitude of hostility towards the defender was illustrated, and her attitude towards him was justified, by the tone of his letters, which were cold and hard, whereas her letters to him were affectionate and impulsive. Since 1891 there had been no communication between the parties. [LORD TRAYNER — Was her refusal to open and receive his letters after that date not grossly contemptuous, and improper

conduct in a wife towards her husband?] She was justified in her attitude by his previous conduct towards her. The defender also founded upon the letters as showing that the pursuer had no *bona fide* desire for his wife's return, and had made no adequate efforts to secure it, and argued that this was, apart from any other reason, sufficient ground for refusing him decree of divorce for desertion—*Watson* v. *Watson*, March 20, 1890, 17 R. 736.

Counsel for the respondent were not called upon.

LORD JUSTICE-CLERK—We have had a clear statement from Mr Hunter, and everything has been said on behalf of the defender which could have been said. But I have come to the conclusion—and I must say without difficulty—that there are no grounds for interfering with the Lord Ordinary's interlocutor. I entirely concur in his judgment, and in the reasons which he has given for it. I do not think that it would be for edification that I should enter further into the details of the case. There is, however, one observation which I would like to make. I certainly agree with what the Lord Ordinary says as to the Ashbourne incident. If the pursuer erred upon that occasion, I think he committed an error of judgment only. I am not satisfied that he committed even an error of judgment. He was in a difficult position, and apart from the lateness of the hour his conduct does not appear to me to be open to criticism. He had, I hold, a duty to do. It was a duty requiring, if it was undertaken, a certain amount of firmness. If he believed that his wife was affected in her mind, then his position was a difficult and painful one. In dealing with a person in such a state it may be necessary, in view of the disorder of mind, to exercise firmness in a way that might not be right where there was no mental affection. The same law which takes away the personal liberty of a person of diseased mind, necessarily implies that some interference with liberty is permissible by a husband or father or other near relative in order to secure proper care and treatment. And in exercising such firmness it is very difficult to draw strict lines of limit. In this case I think that the pursuer did not exceed the limits of discreet firmness. But I am further satisfied that in any view he acted in good faith. I do not think it is necessary for me to comment otherwise upon the evidence.

LORD M'LAREN—I am also entirely satisfied with the Lord Ordinary's interlocutor, and have nothing to add.

LORD TRAYNER— I concur.

LORD YOUNG and LORD MONCREIFF were absent.

The Court adhered.

Counsel for the Pursuer—W. Campbell, Q.C.—Craigie. Agent—A. W. Gordon.

Counsel for the Defender—W. Hunter. Agent—William Duncan, S.S.C.

Wednesday, January 24.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

JOHNSTON *v.* JOHNSTON, *et e contra.*

Trust — Trustee — Petition for Removal — Absence from United Kingdom—Outer or Inner House — Trusts (Scotland) Amendment Act 1891 (54 *and* 55 *Vict. cap.* 44), *secs.* 2 *and* 8.

Under section 2 of the Trusts Act 1891 it is provided that "'the Court' shall mean any court of competent jurisdiction in which a question relative to the . . . removal of a trustee comes to be tried." Section 8 provides that where a trustee under a *mortis causa* trust becomes incapable of acting by reason of continuous absence from the United Kingdom for a period of six months or upwards, he may be removed from office on application by a co-trustee, to be made "either to the Court of Session or to the Sheriff Court from which the original confirmation of the trustees as executors issued."

Held that "Court of Session" for the purposes of the section is not limited to the Inner House, and that such an application may competently be made in the Outer House.

Section 2 of the Trusts (Scotland) Act 1891 (54 and 55 Vict. cap. 44) provides that "For the purposes of this Act . . . the expression 'the Court' shall mean any court of competent jurisdiction in which a question relative to the actings, liability, or removal of a trustee comes to be tried." Section 8 provides that "In the event of any trustee being or becoming insane or incapable of acting by reason of physical or mental disability, or by continuous absence from the United Kingdom for a period of six calendar months or upwards, such trustee . . . may, on application in manner hereinafter mentioned by any co-trustee or any beneficiary in the trust estate, be removed from office upon such evidence as shall satisfy the Court of the . . . continuous absence of such trustee. Such application, in the case of a *mortis causa* trust, may be made either to the Court of Session or to the Sheriff Court from which the original confirmation of the trustees as executors issued, and in the case of a marriage-contract may be made either to the Court of Session or to the Sheriff Court of the district in which the spouses are, or the survivor of them is domiciled, and in all other cases shall be made to the Court of Session." Section 11 of the Trusts (Scotland) Act of 1867 (30 and 31 Vict. cap. 97) provides for, *inter alia*, the assumption of new trustees with the consent of the Court, in the event of trustees being incapable of acting from continuous absence for six months or upwards. Section 16 provides that applications to the Court under the Act are to be by petition "in the first instance before one of the Lords Ordinary officiating in the Outer House."