upon the opinion of the master. The master's opinion is of course of great value as a piece of evidence, but should it turn out that that opinion was wrong, it may be corrected by other evidence in any particular case. If the contention of the charterers were given effect to, it appears to me that it would put matters in a very uncertain and undesirable position as regards the application of a clause of this kind in a charter-party, because according to that contention, not the time when a vessel has to go to a port for repairs is to be taken as the time of the breakdown, but the time when the defect in her machinery—which, when fully developed, ultimately led to her having to discontinue her voyage—can be ascertained or conjectured to have first come into being. It would be most undesirable that the liability or non-liability for hire of a vessel should be made to depend upon the result of investigations of the kind—investigation, for instance, as to whether a hairy crack in some piece of the machinery were old or new? and if old, how old? and so on.

Therefore in the present case I have no hesitation in holding that the breakdown did not occur on the 14th of November, when the original damage probably was done to the machinery, or when the ship left Jaffa, but on the 28th of November, when, after having progressed so far upon her voyage perfectly satisfactorily as regarded speed and safety, it was discovered that the propeller was loose on the shaft, and that it was necessary to go to port for repairs.

The second question to be considered is, whether during the periods when payment of hire ceased in terms of article 12 of the charter-party, the coals consumed on board the "Bauta" are to be paid for by the shipowners or the charterers. It was contended for the charterers that it was inequitable that they should be charged for the coal which was needed to enable the vessel after the breakdowns which occurred on the three voyages to proceed to port for repairs, and that it was a necessary corollary from the cessation of payment of hire that payment for coals should also cease over the same periods. I agree with the Lord Ordinary that this question must be determined on the terms of the charter-party and the nature of the contract.

Now in a contract constituted by time-charter, in the absence of special exemption, the charterers have to suffer the consequences of all mischances that may happen to the ship. In the present case there is a stipulation that in certain circumstances the hire shall cease, but there is no stipulation that the other expenses for which the charterers are liable shall also cease to run, and accordingly, there being nothing in the charter-party to exempt the charterers from payment of the charges for coal and other expenses mentioned in article 2 of the charter-party during the cessation of hire provided for by article 12, it follows that the general obligations contained in article 2 still rested upon the charterers notwithstanding the breakdown of the machinery. An opinion to this effect was, as noted by the Lord Ordinary, delivered by Mr Justice Phillimore in the case of *Vogemann*, 6 C.C. 253, and this opinion was approved of by the Court of Appeal in 7 C.C. 254, and although it was *obiter* as regarded the case then under discussion, yet it is entitled to great weight considering the eminence of the judges who delivered it.

On the whole matter I entirely agree with the interlocutors of the Lord Ordinary and the reasoning by which he has supported them. I accordingly am of opinion that we should refuse the reclaiming note, and adhere to the whole interlocutors of the Lord Ordinary.

The LORD JUSTICE-CLERK, LORD STORMONTH DARLING, and LORD LOW concurred.

The Court adhered.

Counsel for Reclaimers (Charterers)—Dickson, K.C.—C. H. Brown. Agents—A. Morison & Company, W.S.

Counsel for Respondents (Owners)—Horne—W. T. Watson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Friday, July 17.

FIRST DIVISION.

[Lord Dundas, Ordinary.

M'EWAN *v.* M'EWAN.

Husband and Wife—Divorce—Desertion—Statutory Period—Interruption—"Reasonable Cause"—Action of Separation and Aliment at Defender's Instance—Relations of Friendship between the Parties—Arrangements Made in View of Living Apart.

In an action of divorce for desertion at the instance of the husband, *held* that the running of the statutory period of desertion had not been interrupted, in the circumstances of the case, by the defender's raising and carrying on, but unsuccessfully, an action of separation and aliment.

Circumstances in which *held* that the statutory period was not prevented from running, either by the subsistence of friendly relations between the parties, or by temporary arrangements being made as to the custody of the child of the marriage.

Husband and Wife—Divorce—Desertion—"Reasonable Cause"—Act 1573, *c.* 55.

The case of *Mackenzie* v. *Mackenzie*, May 16, 1895, 22 R. (H.L.) 32, 32 S.L.R. 455, decided that nothing less will afford "reasonable cause" for desertion in the sense of the Act of 1573, c. 55, than that which would be sufficient as a defence to an action of adherence; but it did not decide whether in an action of adherence a wife can successfully defend herself upon any other

grounds than would support an action at her instance for separation and aliment.

Circumstances held not to amount to "reasonable cause."

On 18th July 1906 Thomas M'Ewan, electrical engineer, Edinburgh, raised an action against Mrs Jessie Prentice Jones or M'Ewan, his wife, in which he sued for divorce on the ground of desertion. (A counter action of divorce for desertion at the instance of the wife—with which this report is not concerned—was raised on 13th October 1906, and was disposed of at the same time, the defender being assoilzied.)

The *circumstances* in which the action was raised and the nature of the *evidence* appear from the opinion *infra* of the Lord Ordinary (DUNDAS), who on 19th October 1907 granted decree as craved.

Opinion.—"This is an action by a husband against his wife for divorce upon the ground of desertion. The parties were married on 19th December 1900; the defender left her husband's house on 28th September 1901; and they have never since lived together. The action was raised on 18th July 1906. It is thus an admitted fact that the parties have lived apart for more than four years prior to the action. The main question is whether or not the defender had reasonable cause for remaining away from her husband during that period. The case is one of the utmost importance to the parties. I have heard a long and exhaustive proof, and able arguments by counsel; some—though not, I think, all—of the points of fact and law involved present considerable difficulty. I have therefore studied the case with great care and anxiety. I have come to the conclusion that the pursuer is entitled to the decree which he seeks.

"When the case was in the procedure roll a question of law was raised, as to which, on 20th March 1907, I reserved my opinion for reasons then expressed. On 13th December 1902 Mrs M'Ewan brought an action of separation and aliment against her husband, in which the Lord Ordinary (Low), on 8th December 1903, assoilzied the latter. A reclaiming note was presented, but the case went no further, in consequence of an agreement between the parties to which I shall have to refer later. The question as to which I reserved my opinion was, whether or not a valid defence to this statutory action for divorce for desertion may be based upon grounds insufficient to afford the defender success in her action for separation and aliment. In the view which I hold of the present case it is not necessary for me to decide that question, because I am of opinion, for reasons which I shall explain, that even if it be answered in the affirmative, the defender has not made out any sufficient case of 'reasonable cause' for absenting herself from her husband. But as the question is interesting and important, and as this case may go further, it is right that I should state my opinion upon the legal point. No defence, in my judgment, will be good as an answer to a statutory action for divorce, like the present, or to an action of adherence at common law, which falls short of what would be sufficient to support an action of judical separation by the absenting spouse against the other. This question was fully canvassed, though not decided, in the well-known case of *Mackenzie*, 1893, 20 R. 636, *aff.* 1895, 22 R. (H.L.) 32. In the Court of Session a majority of the Judges seemed to have thought that what is 'reasonable cause' within the meaning of the Act 1573, c. 55, is a jury question for the judge or judges in each case as it arises; and that such 'reasonable cause' may consist in something less than would be sufficient as a defence to an action of adherence. The latter view was, as I gather, distinctly negatived in the House of Lords, at all events by Lord Watson (22 R. at pp. 40, 41). But his Lordship seems (at p. 42) to have treated as an open question for future decision whether or not in an action of adherence a wife can successfully defend herself upon any other grounds than would be required in order to sustain an action at her instance for separation and aliment. I am content to express my entire concurrence in the opinion of Lord Rutherfurd Clark in *Mackenzie's* case, the reasoning of which appears to me to be irresistibly sound. That, like the present case, was an action by a husband against his wife for divorce for desertion under the Act 1573, c. 55. Lord Rutherfurd Clark said, *inter alia*—'The defender has, I think, only one possible justification. She must show that she was not bound to adhere, or, in other words, that she had a good defence to an action of adherence. The Court must give decree of adherence unless a good defence is stated, and when a wife disobeys the decree she must be in wilful and malicious desertion, for she is refusing to perform what the Court has determined to be her obligation as a wife. A decree of adherence is no longer necessary as a formality in order to a divorce. But there is no change in the law. . . . I know of no defence to an action of adherence save adultery and cruelty, though I think that the latter may be moral as well as physical.' There is not much authority upon the point. Lord Rutherfurd Clark refers to the weighty dictum of Lord President Inglis in *Chalmers*, 1868, 6 Macph. 547, and to the direct decision in *A B* v. *C D*, 1853, 16 D. 111—(the word 'resist' in Lord Rutherfurd Clark's quotation from the interlocutor in *A B* v. *C D* is a misprint for 'insist on.') To these one might add Fraser on the Personal and Domestic Relations (1846), p. 448 and p. 684. On the other hand it must be noted that Lord Fraser in his later book (Husband and Wife, vol. ii, p. 873) seems to have altered his opinion, and that Lord Watson (22 R. (H.L.) p. 42) was 'unable . . . to regard the case of *A B* v. *C D* as an authority of weight.'

"I shall now discuss the evidence, and as a case of this sort requires narrow and minute scrutiny I fear that I must do so in somewhat wearisome detail. Much must of course turn upon the degree of credibility

to be attached to the evidence of the more important witnesses. I ought, therefore, at the outset to record my impressions upon that matter. It appears to me that very little, if any, weight can be given to the evidence of the defender herself, unless where it receives reliable confirmation. She is at the present date in a deplorably bad state as regards her physical and nervous conditions, and her faculty of memory has also to a large extent admittedly failed. The prognostication of her own witness, Dr Clouston, upon this head was more than fulfilled. I assented willingly to a request that the defender's examination should be conducted in private, and this was done. But even under the best conditions, and with her physician seated beside her, it was obvious that Mrs M'Ewan, who I believe was honestly doing her best to answer the questions put to her, was unable from the condition of her health, nerves, and memory, to give evidence of much value. The defender's condition commands deep sympathy. But one must point out that her weakening of memory is not her only, or perhaps her most important, defect as a witness. It is, I think, clearly proved that she was, during the brief period of her residence with her husband, in the habit of taking morphia to an extent distinctly deleterious to her system. The habit began under doctor's orders owing to grievous pains to which the defender was subject at specific periods. It is not suggested that she was ever a morphino-maniac, and I believe that she has entirely given up the use of morphia for some years past. But it is, I think, not doubtful that during the very period to which most of her evidence relates her mental balance, and her physical and nervous conditions, were injuriously affected by the taking of the drug. Indeed, some of her conduct—for instance, certain occurrences in the house of Mrs M'Ewan senior—can hardly be accounted for on any other footing. It is, in my judgment, clear that her normal power of regarding matters fairly had become gravely distorted, and her frame of mind rendered that of a hysterical, 'notional,' highly irritable, and unreasonable woman. Further, it is in evidence that, probably during the whole period of her residence with the pursuer, she suffered (as she now suffers, I regret to say, in an aggravated degree) from exophthalmic goitre (Graves' disease), the nature and effect of which are fully explained by the medical witnesses. Looking to all this, it is, I think, clear that the defender's own evidence must be regarded in the light which I have stated. Then as regards the testimony of those members of her family who appeared in the witness-box, viz., her father, her sister, and her brother, I am bound to say that, in my opinion, it can only be accepted with great caution and reservation. I should be slow to impute intentional untruthfulness to any of them, but they impressed me, one and all, as persons of nervous, high-strung temperament, and I think there is no doubt that they have all cordially disliked the pursuer from first to last. They seem to have viewed with suspicion, if not condemnation, whatever he said or did with reference to his wife, and to have adopted a somewhat vindictive attitude. I cannot but regard a great deal of their evidence, especially that of Miss Jones and her father, as biassed and greatly exaggerated. Mr Jones junior, it appears, employed a detective to watch the pursuer's movements in the hope that he might discover some impropriety between him and the nurse, or any other woman. There is no suggestion that any such impropriety ever existed, but the incident illustrates young Mr Jones' attitude towards his brother-in-law. The demeanour of the pursuer, on the other hand, did not impress me at all unfavourably in the witness-box, but I think some parts of his evidence are not wholly candid.

"The evidence may conveniently be considered as divided into two periods, viz., before and after the actual parting of the spouses on 28th September 1901. During the earlier of these various instances are alleged of cruelty or misbehaviour on the part of the pursuer. I shall deal with these in chronological order.

"1. It appears that before the marriage the defender's father had pressed the pursuer to make some antenuptial provision for his bride. A week or ten days before the marriage day the pursuer definitely declined to do so upon the advice of his law agent, and looking to his financial position at the time, which he disclosed to Mr Jones. The latter gentleman, in his own house at Dalmeny, on the evening before the marriage, handed to the pursuer a legal document and requested him to sign it. The pursuer says that he thought it was some kind of marriage contract affecting his own means; he declined to sign it, and some heated words ensued between the two men. I think (though the pursuer is doubtful on the point) that the document must have been that which is now in process, and if so, it has nothing at all to do with the pursuer's means. It is a deed by which the defender, then Miss Jones, conveyed to trustees, of whom her father was one, certain property (worth about £50 a-year) which Mr Jones had some time previously made over to her. Shortly after the parties returned from their honeymoon, there seems to have been some talk between them about this property; and they agree in stating that, on a Saturday evening in January 1901, the defender went to her father's house at Dalmeny for the purpose of getting him to destroy the trust deed. The pursuer accompanied her, but did not enter the house, and returned home alone. At this point the evidence of the parties diverges. The pursuer says that his wife had proposed to contribute her own £50 toward the household expenses. 'She told me before we left town that she was going for the purpose of getting the document destroyed. She said, "My father is a very determined man. He will be sure to ask you to sign that document again

and it will be better for me to go and ask him to destroy it." I had no reason to doubt her word. She was not crying when she left me. She was in quite ordinary spirits so far as I saw. That was the last occasion on which the document was spoken of between us, so far as I remember.' The defender depones—'That Saturday night my husband got angry about it, and he was so angry that I went out to Dalmeny to try and get my father to destroy the deed. My husband went with me, but he did not go into the house. He went away. I went and saw my father. I told him what the trouble was. He said he would burn it. . . . When he' (the pursuer) 'was speaking about the trust deed at home before I went out to my father, he was very angry. I think he said he would make my life a hell on earth if he could not get the money.' In her cross-examination this passage occurs—'(Q) Is it the case that you said to Mr M'Ewan that your father would be sure to try again to get him to sign the trust deed? (A) I don't remember. (Q.) May that have happened? (A) I really don't remember. It is the case that I went out to Dalmeny that Saturday afternoon to get the trust deed destroyed. (Q) Was that because you thought your father would be troublesome in pressing your husband to sign it? (A) I thought my life would be made a hell on earth if I did not get it destroyed. (Q) But didn't you go out to Dalmeny to get it destroyed because you were afraid that your father would press your husband again to sign? (A) I don't understand you.' Mr Jones says that the defender on her arrival presented a very excited appearance and seemed to be very much distressed. 'She said that she wanted me to destroy that trust deed because she was having no peace from Mr M'Ewan about it. She said that he was taunting her about it continually, and that the deed was causing dispeace between them. She explained that the cause of dispeace between herself and her husband was because she had the disposal of the revenue, or that the capital as well as the revenue from it would be at her disposal, and she desired that the capital should be at the disposal of Mr M'Ewan and herself. She said that the result of the capital not being put at the disposal of her husband was that her life was such that she could not live it, or words to that effect. I said that for her sake I would certainly do that if it were going to make it more pleasant for her, but that I could not just make up my mind that evening to do so, and that I would take the thing into my consideration. She pressed the destruction of the deed upon me, and appeared very anxious.' Mr Jones junior merely states—'She came out to endeavour to get my father to burn the trust deed. I heard her ask him. He said he would if it would give her peace of mind, but he would consider the matter.' Miss Jones gives a much more elaborate account of what passed. She depones, *inter alia*, that the defender said—'"I have come out because I want my money. I want the power of my money given to Tom, so that he can do what he likes with it." . . . (Q) Did she say why she wanted to give it to Tom? (A) She said he was making her life intolerable about it; he had been disappointed when my father settled the money on her.' It is difficult to make much of all this. The proposal that Mr Jones should destroy the trust deed was, I apprehend, a somewhat ridiculous one, though it did not appear so to the parties concerned. The pursuer's story is an odd one, but it may be true. It does, I think, derive some degree of confirmation from the condition of the draft of the trust deed, which bears evidence of an intention first to include Mr M'Ewan as a consenter to the deed as it was originally framed, and second, to append his consent at some time after the marriage had taken place. Mr Jones can give no explanation as to what appears in this draft; but it seems to harmonise with the view that he was a determined man, who might insist upon the pursuer sooner or later signing the document. It is, I think, not improbable that there was some kind of tiff or dispute between the spouses about the question of this money; but the whole episode, taken by itself, seems to me to have very little importance, although it bulked largely in the proof and the arguments of counsel. I cannot hold it proved that the pursuer threatened to make his wife's life 'a hell on earth,' or used any language of that sort. He positively denies having done so.

"2. On a Thursday in February 1901 the spouses were invited to dine at Mr Jones' house at Dalmeny. Some friction arose as to whether or not the defender should pay for the cab in which she was to drive there. In the result the pursuer stayed at home, and the defender went alone to her father's house. She slept there that night and stayed till the following Tuesday. On the Saturday the pursuer came out to see the defender, having heard from her that she had a cold. Some sort of scene took place in her bedroom, in which the pursuer, Mr Jones, and his son took part. The following day the pursuer sent out his servant Prudence Lindsay (now Kelly) with a message to his wife. On Tuesday he came out to fetch her home, and they returned together. Surrounding these apparently simple events there is conflicting evidence, but I do not think anything is proved which is of much importance, or at all approaches the region of legal cruelty. The pursuer says the original friction arose because he reminded his wife—who was to drive out, he following later—that it had been arranged between them that she should pay her own cab fares when he was not with her. He says—'She got into a great pet, and I said, "If you are going on like this I simply cannot go to Dalmeny." She kept going on, and the consequence was that I did not go.' The defender's account is not in substance different, but she adds—'That was the first time we had been asked out to dine after our marriage. It put me a great deal about.' Both parties seem to me to have behaved in rather a pettish manner. As to what occurred on

the Saturday the defender's mind is a blank. She says—'He came in the afternoon. I was still in bed. He came up to see me in the bedroom. (Q) What happened? (A)—I cannot remember. (Q) Was there any disturbance in the bedroom?—(A) Yes, but I cannot remember.' It seems clear enough that some heated words passed between the pursuer on the one side and Mr Jones and his son on the other, arising apparently from the topic of the pursuer's alleged parsimony in his household expenditure. The accounts given by the Joneses of what happened strikes me as palpably exaggerated. It was most improper that an unseemly brawl should take place in such circumstances, but it appears to me that any undue vehemence on the pursuer's part resulted from the gratuitous intervention of the Joneses, and not from any anger on his part towards the defender, or any desire or intention to cause her distress. The Sunday episode depends for its importance (or the reverse) upon what was the real substance of the message which the pursuer sent to his wife by the servant. A very slight alteration in the words would make all the difference. The witnesses differ materially as to what the words were, as is not unnatural after such a lapse of time. The servant herself (a witness for the defender) says—'Mr M'Ewan told me to tell her that if she did not come back on Monday she could send for her things.' I think very likely that was the substance of the message, and I find no proof that it was to the effect that if the defender did not return on Monday she need not come back at all. It is in my judgment almost incredible that a message like that could have been sent looking to what we know of the relations between the parties at that time, and to the fact that on the Tuesday Mr M'Ewan came to fetch his wife home, and she returned with him apparently quite willingly.

"3. I do not think any further specific charge of cruelty or misbehaviour is made against the pursuer until June, unless one should notice a vague history about a 'deed of separation,' which is placed about the month of March. It occupies a prominent position in Mrs M'Ewan's record, along with a similar allegation in support of which no evidence at all was offered. But the defender's recollection of the matter is too dim to be intelligible, and I see no reason to doubt that the pursuer's account of it is substantially correct. In June 1901 the pursuer and defender stayed for about a fortnight in Mr Jones' house, in the absence, as I understand, of that gentleman and his wife. Miss Jones alleges that the pursuer upon singularly insufficient provocation called her a 'depraved woman,' and that she lost her temper and was 'furious.' She says—'I left the room and went upstairs, and though I should not have done it I told my sister what he had called me. She and I were occupying the same room at that time, because she required so much attendance during the night. Mr M'Ewan came into the bedroom after I had gone up. He started on my sister. He used the word 'damn' very often, and he said, 'What a nuisance all this is, and so on.' I still was angry, and I said that after what he had called me downstairs the subject was not to be mentioned in my presence. When my sister got to know that there had been such a quarrel between us downstairs she lost all control of herself. I went to my brother's room and asked him to go for Doctor Dickson, because I knew I could not quieten her.' This is a strange story. The pursuer's account of the matter sounds much more reasonable and probable. It is not I think proved that he called Miss Jones 'a depraved woman,' but it seems probable that something he said to Miss Jones, or that she thought he said, caused that lady to lose her temper. However this may be, the episode does not appear to indicate any animus or ill-will on the part of the pursuer towards his wife. The scene, which was doubtless a distressing one for the defender, resulted directly from Miss Jones' loss of temper and her ill-advised conduct in rushing off in an angry state to the defender's room.

"4. On 18th July 1901 the defender went out for a visit to Dalmeny. About this time the doctor definitely told her that she was pregnant, and the not unreasonable alarm which this occasioned her added to the general delicacy of her health. The pursuer, who was on holiday at Boat of Garten, was summoned by telegram. It is said that on 30th July he came into his sick wife's bedroom and deliberately threw a towel, with which he had been washing his hands, at her head, or at least in her direction; that it struck the bed; and that the defender was much frightened and upset by the incident. If I thought this was a true or a substantially accurate account of what happened I should think it a very serious matter indeed. But the story is not in my opinion proved, and I confess that I do not believe it. The pursuer's account of the matter is quite natural and probable. The defender's memory has for the most part failed her in regard to it. But this passage occurs in her evidence—'(Q) For all you remember, was that all your husband did on that occasion — to come into the room and shy a towel at your head?—(A) Yes, and I was very ill, and I don't wonder I cannot remember. I cannot remember whether my sister was present at the time.' Miss Jones' evidence is as follows:—'We had not been expecting him when he walked in. He had been evidently washing his hands in the bathroom, because he came in drying his hands with a towel. I could see by his face that he was in a very bad temper. He did not speak when he entered the room, but he looked at my sister, and he was walking up and down the room drying his hands, when all of a sudden he rolled the towel up and flung it, striking the wall above my sister's bed. She screamed. He then began, "You are a nice sort of wife for a man to have, lying there," and he said to me that the maid would not stay when the mistress was not at home. I was very anxious to get him soothed, and to get him out of the

bedroom, and I said as an excuse, "Will you not go downstairs and get a glass of milk?" He said he would not. I left the room and sat with the nurse downstairs till I saw him go away. I then went up to my sister and found her lying in a state of collapse. She clung on to me and cried.' An absolutely unprovoked attack of this sort upon a sick and defenceless wife would require, I think, clear proof in order to obtain credence; and I reject the story all the more readily because it appears to me to be quite inconsistent with the previous and the almost immediately succeeding relations between the parties, to which I shall refer in a moment.

"5. Another episode occurred upon, I think, 1st August. The pursuer came out to Dalmeny to see his wife. She came in from the garden, and they went together to her bedroom. The pursuer says that Miss Jones intervened, and called him a coward, a bully, and a liar; that she sent for her father; that on his arrival an excited talk ensued, apparently about the medical expenses which had been incurred, in the course of which Mr Jones called him a cowardly brute, and a lying cad, and threatened to throw him downstairs, and forbade him to cross his threshold again. Mr Jones admits that there was a discussion about the expenses, which the pursuer complained were being run up without his knowledge or authority; that he called the pursuer a cowardly brute, and told him to go down the stairs and never to cross the threshold again. '(Q) What had he done to justify you in calling him a cowardly brute?—(A) In behaving to his wife in a cowardly manner and attacking her when she was lying in bed. He had been saying everything, I suppose, to her, and miscalling her. (Q) What did you know he had said to his wife?—(A) I know what he did after I went in; he bullied her after I went in. I cannot remember what he said to her; it was just a general bullying.' This is certainly very loose and unsatisfactory evidence. Miss Jones depones that the pursuer 'was standing near my sister, and I got between them, and he was simply furious and shook his fist in front of my eyes, saying, "You are a low-bred pair of women." . . . . . I cannot tell you exactly what happened before or after. (Q) When he called you a pair of low-bred women, had that any relation to anything that was being discussed at the time? (A) No, but he did not always use his words in relation to other words.' Miss Jones admits that she called the pursuer a coward and a bully. The defender's evidence adds nothing to the story. It is plain enough that a distressing and discreditable scene took place, which was calculated to upset the defender. But I cannot say the pursuer was solely, or indeed mainly, to blame. It is clear that Miss Jones and her father were both extremely angry, as indeed they seem to have been whenever they encountered the pursuer; the whole disturbance arose from their intervention, which they must have known would probably bring about some such result; and there is nothing to show that the pursuer was or intended to be deliberately unkind to his wife. It is not, in my judgment, proved that he called her and her sister a 'pair of low-bred women'; and I think it highly improbable that he did so. It is important to observe what followed upon this and the preceding episode, because the subsequent events seem to me to demonstrate that the pursuer's conduct cannot have been on either occasion of the aggravated character represented by the defender's witnesses. About the end of August the defender paid a visit to her aunt, the now deceased Mrs Harvey, at Boat of Garten. The pursuer joined her there before the end of her visit, and brought her home. That their relations to one another were of an excellent character cannot be doubted, looking to the letters which the defender wrote to her husband, and to the evidence of Mrs Harvey, Mrs Hadnett, and Mr Dudgeon. It is also useful to contrast the language of a letter written by the pursuer to Miss Jones about the middle of September with the injurious epithets which, according to that lady, were used by him towards her only a few weeks previously.

I think that I have now dealt with all of the specific charges which the defender makes as to her husband's behaviour, except that she complains that 'he said some dreadful things' about Mr Jones 'before his people' one night. I think the defender must have imagined something which never occurred. The pursuer denies the allegation, and he is supported by the various members of his family who were examined as witnesses, and whose evidence I see no reason at all to doubt. There are, however, allegations of a general kind against him to the effect that he frequently spoke in a rough and loud manner to and in the presence of the defender when she was ill; that he frequently broke out about money matters of a trifling nature; that he used unkind and abusive language to his wife, calling her, for example, 'a death's head'; and also spoke about her father in insulting terms. The chief evidence upon these matters is that of Nurse Blacklock, an emphatic witness for the defender. I think there is some foundation in fact for these charges, though I suspect they are exaggerated. I am convinced that the pursuer was throughout sincerely attached to his wife, and at times treated her with great kindness and consideration. On the other hand, I think that he sometimes failed in these respects, and fell short of the forbearance and the tenderness which her ill-health and delicate condition ought to have commanded. The pursuer struck me as a man full of health, strength and vitality, and probably not possessed of naturally fine susceptibilities. He would, I think, find it difficult to realise the difference between his own constitution and that of so extremely delicate a creature as the defender, or the importance of maintaining in her presence, especially in times of sickness and pain, a quiet and gentle demeanour. Nurse Blacklock says she failed to impress the pursuer with the

gravity of the situation in this respect. If my impression is correct, I think it throws a good deal of light upon the topic I am now dealing with. The pursuer's anxiety about household expenditure and the like was natural enough, but I think he spoke more often and more roughly about such matters than was either necessary or kind. It is probable that he sometimes spoke disrespectfully and rudely about Mr Jones, whom he did not like, and who cordially disliked and (as has been seen) frequently abused him. It must also, I think, be taken that he spoke unkindly to the defender about the falling off in her personal appearance. If I am right in all this, such behaviour on the pursuer's part was very regrettable and cannot be justified. But there is, in my opinion, no evidence of anything like a systematic course of harsh or cruel conduct on his part. I do not doubt that he had a good deal to provoke and irritate him, which cannot have been lessened by the methods of his wife's family towards him, or by her constant habit of 'going to Dalmeny' upon the smallest occasions.

"I now pass to the events which culminated in the defender's departure from her husband's house on 28th September 1901. Miss Jones came on the 19th to stay with them, in response to the pursuer's invitation. The pursuer and she never appear to have got on well together, and it was not long before, to use Miss Jones' phrase, 'unpleasantness began.' She says—'I could not understand Mr M'Ewan. I blamed him for going over to his people, because he was very susceptible to outside influence. He did not speak at all kindly to his wife; she might have been an enemy. There seemed to be absolutely no sympathy or kindliness about him. He would not speak to me in the house at all. (Q) What was the effect of this on your sister's condition? (A) It was hopeless—I could make nothing of him. On Friday, the 27th, I felt that things had come to a pitch.' This is all rather vague; but Miss Jones then and there wired for her father, and they proceeded to consult their solicitor Mr Drummond. Mr Jones arranged to return on the following morning. Early on the 28th it appears that the pursuer and the servant (who was the only one in the house) had a dispute about a trifling sum of money, and the latter threw up her place or was dismissed by him. As to what followed, there is a sharp conflict of evidence. Miss Jones says that the pursuer came and told the defender that he had dismissed the servant; and then '"Well, Jessie," he said, "I cannot afford to keep this up; you will need to go home to Dalmeny." She said, "I don't want to go home; people will talk." He said, "You must go; I cannot afford to keep it up." (Q) Did he seem angry with your sister? (A) He was always angry. When he insisted that she should go, she said "I will just need to go; there is nowhere else." Nothing was said about her going home till her confinement was over, or about what was to be done with the house. (Q) Was there anything said about her going home till another servant was got? (A) There was no suggestion of another servant at all—merely that she was to go home, and he would shut up the house. He then went away to business.' Miss Jones and her father met and arranged, after again consulting Mr Drummond, to take the defender to Dalmeny, which was done that afternoon. Miss Jones admits that all this was arranged without any communication with the pursuer and without the defender's consent; and adds that the latter 'wanted rest and peace, but she did not want to stay out of her husband's house.' Mr Jones says that Miss Jones informed him 'they had got notice to quit'; that 'Mr Drummond said that that ended the whole matter'; and that he there and then instructed that gentleman 'to arrange about a separation.' The pursuer's account of what happened after the servant was dismissed is quite different, and it is very distinct. It is too long to quote, but the gist of it is that he proposed to his wife that she should go to her father's house till another servant was got, to which his wife agreed, and he went out to business; that on his return he was surprised to find her and her sister with their things packed, on the point of departure; that his wife bade him a fond but tearful good-bye, and departed at her sister's call; that the servant insisted on leaving that very day, and that he accordingly went to his mother's house. The pursuer's story is to some extent confirmed by his mother (an excellent witness) and other members of his family, who say that he came to their house on that day, stating that the servant was going, and that his wife was to stay at Dalmeny till the place should be refilled. I must say that of the two stories thus told, that of the pursuer commends itself to me as by far the more probable. It is hard to see why the dismissal of the servant for a piece of impertinence should have been immediately followed by a sudden break up of the household, and a permanent ejection of the wife. But the matter is not left in much doubt when one turns to the real evidence which is available. There is a series of letters, ten in number, written by the pursuer to the defender between 30th September and 3rd November, the language of which is palpably inconsistent with that of a man who had on 28th September ejected his wife from his house, and quite consistent with the pursuer's account of what happened. To none of these letters, the sincerity of which I do not doubt, did the pursuer receive any answer. I observe in passing (1) that the partridges mentioned in the letter of 6th October were returned to his office without comment; (2) that the allusion in the letter of 3rd November to 'what I am driving at' probably refers to the fact that on 24th October he had received a wire 'Don't come as you cannot see Mrs M'Ewan—Jones'; and (3) that the defender seems to have forgotten these letters, but says 'I don't think I would

have answered the letters, because I think it was his place to come out and apologise to me for turning me out of the house.' Again, the pursuer's evidence is confirmed by Messrs Drummond & Reid's letter to him, dated 4th November 1901. It sets out a formidable indictment, detailing the grounds upon which a separation is demanded; but it contains not a word about the ejection or 'notice to quit,' of which, according to the Joneses' story, Mr Drummond was informed on 28th September. On the contrary, the letter states that 'it was arranged at your request that Mrs M'Ewan should go to her father's house at Dalmeny, and remain there until the period of her confinement was over.' I find it impossible to accept Mr Jones' assertion that this was an unauthorised statement on the part of Mr Drummond (who was not adduced as a witness); and I think it is clear that the Joneses' version of the instructions given to Mr Drummond on 28th September is incorrect. This view is further supported by a letter from Dr Carmichael to Mrs Jones, dated 3rd October 1901, in which he says—'I had a long chat with Mr M'Ewan this evening, and he seems quite agreeable to his wife remaining at Dalmeny till after her confinement.' The defender's counsel pointed to a statement by the pursuer in his evidence that 'it is not true that I had arranged that she should go to Dalmeny till the period of her confinement was over'; but I think the passage, fairly read in the light of the letters, must mean that the pursuer did not on 28th September make such an arrangement with his wife. If, as appears from Dr Carmichael's letter of 3rd October, an arrangement or understanding had by that date been come to, to the effect mentioned, it sufficiently explains the fact (upon which the defender's counsel founded) that the pursuer did not engage or seek to engage a new servant, or allude to the topic in his letters. Lastly, I consider that Mrs M'Ewan's tearful farewell to her husband on 28th September may be easily accounted for if she had been led by her sister to believe that the pursuer was turning her permanently out of his house. For these reasons I have little hesitation in accepting the pursuer's version of what happened on this very important date—28th September 1901—and rejecting that of the defender's witnesses.

"If my views upon the evidence are, up to this point, correct, it follows, in my judgment, that the defender had not, when she left her husband's house, reasonable cause for permanently absenting herself from him contrary to his desire. The evidence, in my opinion, falls far short of anything which has been hitherto held in our law to amount to legal cruelty or *sævitia*. This conclusion is, I am aware, the same as that arrived at by Lord Low in the separation action in 1903. The long and careful opinion which his Lordship then delivered was referred to by counsel on both sides during the procedure roll discussion. I may say, however, that I have endeavoured to form my own views as to the evidence I heard, and as to the witnesses who were examined before me, apart from any consideration of what may have occurred at the former trial. If again (contrary to my opinion) something short of *sævitia* may do as a defence to an action like the present, it appears to me that what is here proved ought not to be held sufficient. In considering such questions it is right and proper to have regard to the condition and the health of the wife; but I think it would be a new and dangerous doctrine to affirm that a wife has reasonable cause for remaining apart from her husband against his expressed desire because of conduct on his part which at times annoys or pains her, or may even have a prejudicial effect on her health, where there is no violence, and where the conduct is neither habitual nor deliberate, and is not the sole or even the main cause of her ill-health or weakness.

"I now come to consider the events which have happened since 28th September 1901, and I do so in the light of what, according to my view, had occurred previously. On 4th November 1901 Messrs Drummond & Reid wrote to the pursuer the letter to which I have already referred, alleging 'a long and systematic course of cruelty carried on' by him towards his wife, and asking him to agree to a voluntary separation. The pursuer handed this letter to his agent, who replied to it on the 8th, stating that he was making inquiries into the matter. Mr Robson's inquiry was careful and methodical, and occupied a considerable time. On 4th March 1902 he replied to Drummond & Reid denying absolutely the charges of cruelty, or that any ground for separation existed, and stating that the pursuer desired that, as soon as the defender was sufficiently recovered from her recent confinement, she should return to her home along with the child. On 7th March Messrs Drummond & Reid wrote that 'Mrs M'Ewan remains of the same mind as when she instructed us to write the letter of 4th November last to Mr M'Ewan, and . . . cannot agree to the proposal you make that she should return to live with Mr M'Ewan.' This is a very clear declinature to adhere, and the pursuer dates the commencement of his wife's desertion of him from this time, though he pleads alternatively a day in July 1902. I do not think that the effect of the letter in this aspect is materially diminished by the fact that Mrs M'Ewan was admittedly too weak and ill on 7th March to have been able to rejoin her husband. That was not the 'proposal' which had been made—in which her return was made expressly conditional upon her being sufficiently recovered to allow of her being removed with safety; and Messrs Drummond & Reid's rejection of the 'proposal' is absolute, and not based upon the state of her health at the time. The child, it appears, was born at Dalmeny on 27th February 1902. The first intimation of this event was made to the pursuer verbally through the law agents upon the day after its occurrence—coupled with the strange request (repeated

in writing, by Mr Robson's desire, on 3rd March) that he should make immediate arrangements for taking over its custody. This, we now know, was entirely Mr Jones' doing. He is explicit about this. '(Q) Did you want to prevent any reconciliation between the husband and wife, and in order to prevent that reconciliation, did you send away the child? (A) That is the idea we had at the time. The sending away of the child was entirely my act.' It is curious, however, to note that this is not consistent with the averments made in a petition presented to the Court in Mrs M'Ewan's name on 7th May for access to her child, the instructions for which Mr Jones says that he gave. On 21st June an important letter was written by the pursuer's agent to Messrs Drummond & Reid, in which he expressed the pursuer's continued desire that his wife should return and live with him, and his willingness, immediately on learning that Mrs M'Ewan agreed to come back, to make a home for her as soon as possible, and meanwhile to arrange for their living together in suitable apartments. Prior to this, on 11th June, the pursuer had written to his wife in affectionate terms, the sincerity of which I do not in the least doubt. The reply he got was from Mr Jones on 16th June, written in the third person, and briefly informing him that his wife had gone to Glasgow to consult a specialist, and would probably be there for some time. This announcement produced a letter from Mr Robson to Mr Jones of 21st June, which speaks for itself. On 8th July Messrs Drummond & Reid wrote to Mr Robson asking for 'a definite reply to the matters referred to in our letters—(1) a voluntary separation; (2) custody of the child; and (3) aliment for Mrs M'Ewan and her child.' This letter was crossed in the post by a letter from Mr Robson to the defender's agents repeating his client's desire that his wife should return, and adding, 'as he had not only offered but has urged this, and is willing thus to maintain and provide for her, he declines to furnish her with separate aliment.' The pursuer, as I understand, takes 8th July 1902 as the date at which at the latest the defender's desertion must be held to have commenced. On 12th August the pursuer and his wife had a personal meeting, and on the 16th he wrote her an affectionate letter. Again on 7th October a meeting took place at the defender's request, at which, as appears from a letter by the pursuer's agents dated on the 8th, 'Mrs M'Ewan stated that she was prepared as soon as she was stronger and sufficiently recovered to return to live with her husband and try to be happy together.' On 3rd November the defender called upon Mr Robson, who gives a distinct account of the interview. On the 6th Mr Robson wrote to the defender informing her that the pursuer had taken a house in Warrender Park Crescent, which she had recently seen with him, and would have it put in order and furnished without delay, so that she might return to and resume living with him, and asking her to meet the pursuer on an early day in order to select papers and colours for the rooms. The letter concludes—'I am also instructed to say that, as you have already been informed, he wishes that neither your sister nor any members of your family should visit at or come to the house.' It was the fact that the pursuer had expressed this wish, which I do not think was in the circumstances unwise or unreasonable, at all events as regarded the immediate future. The defender's reply, written on 7th November, is a very important letter, as bearing upon a legal point argued by her counsel, to be afterwards referred to. She says—'I agree to the taking of the flat in Warrender Park Crescent. With regard to painting, furnishing, &c., will Mr M'Ewan be good enough to please himself, as in the circumstances it is a matter in which I have no interest. I have made up my mind that, however Mr M'Ewan acts, or whatever he says, I will try living with him for the sake of my helpless little boy. I wish another meeting, which Messrs Drummond & Reid will arrange for me.' The meeting desired by the defender was arranged for, and took place on the 19th. But before it took place a most regrettable change of circumstances had arisen. A sharp disagreement had occurred between the defender and her sister, on the one part, and the nurse whose duty it was to bring the baby daily to their lodgings, on the other part. The ladies allege that Nurse Archibald had been intolerably rude to them, and had even slapped Miss Jones' face. The meeting on 19th November, from which the pursuer under his agent's advice absented himself, and at which Mr and Miss Jones were present, was wholly taken up with this dispute. Mr Robson's letter of 21st November describes the situation, and announces that the pursuer declined, 'in the interests of the child,' to comply with the defender's request that Nurse Archibald should be dismissed; and on 24th November Messrs Drummond & Reid wrote that the defender 'cannot go to the house in Warrender Park Crescent if the present nurse is to be retained. She is quite decided as to this.' On the 27th Mr Robson wrote adhering to the position which the pursuer under his advice had taken up. Upon this matter of the nurse the negotiations between the parties for a permanent reconciliation broke down, and in December the wife's action for separation was raised. It cannot, I think, be doubted that this rupture was a most unfortunate occurrence. The circumstances attending it have given me much anxiety. I confess that, in my judgment, the pursuer would have acted with more propriety if he had yielded to his wife's wishes and got a new nurse for the child. It is not to my mind clear upon which side lay the justice of the dispute as to the conduct of Nurse Archibald. The evidence is conflicting. But in any case I think it is matter for regret that the pursuer did not yield upon the point. It is, however, a very different affair to conclude that in not so yielding he was guilty either of cruelty in the legal sense

or of such conduct as could justify his wife in refusing to come back to him. I cannot adopt that conclusion. A number of reliable witnesses speak to the nurse's excellent treatment of the child; it is to my mind doubtful whether she had been guilty of insolence towards the defender and her sister; the matter was *prima facie* one upon which the pursuer was entitled to judge; and I am convinced that his resolution, mistaken as I conceive it to have been, was arrived at conscientiously upon the advice of his agent, who was also his uncle, upon whom he relied implicitly, and not from any intention of wounding his wife or being cruel to her. The judgment of Lord Low was pronounced on 8th December 1903. The agreement which has been referred to was signed on 9th and 11th January 1904. Since that time the parties have neither written nor spoken to one another. This action was raised on 18th July 1906.

"The defender's counsel argued that even if his client must be held to be in 'malicious and obstinate defection' in April or in July 1902, the pursuer's action fails (*a*) because the defender had not been in such 'defection' for a full space of four years prior to 18th July 1906; and (*b*) because the pursuer had not during that period sufficiently complied with the duty incumbent upon him of endeavouring to persuade her to return. The former of these arguments included two quite separate branches. It was argued, in the first place, that the defender cannot be held to be in desertion during the dependence of her action for separation, which, although not successful, was raised and fought out in *bona fide;* and that the period, about a year, over which the litigation extended must be cut out and disregarded, the result being that the necessary space of four years has not elapsed. I know of no authority for this contention, and I think it is unsound. It seems to me to derive no support from the case of *Young*, 1882, 10 R. 184, which was cited, where a wife's action was thrown out as irrelevant because it appeared that during the last two years of the period of alleged desertion her husband had been, and still was, in prison. As Lord Adam justly observed—'If during a part of that period the absence has been compulsory, it cannot, in my opinion, be affirmed to have been wilful.' Nor does the recent English decision in *Craxston*, May 8, 1907, 23 *Times* L.R. 527, appear to me to aid the defender's argument at all. It was urged by the defender's counsel that, if this view is sound, in a case where a separation action had been so prolonged as to extend over four years, a wife might at the end of it be then and there divorced for desertion. I do not think this result could follow. She would always have a *locus penitentiæ* to declare her willingness to adhere. On the other hand, if the defender's contention is sound, the result might, in the case figured, be that the husband would have to wait not four but eight years for his decree. The second branch of the defender's argument as regards the period of four years deserves, I think, more consideration, and raises what appears to me to be a delicate point, and one not covered by authority. Her counsel urged that the running of the statutory period was effectually interrupted, because during October and the beginning of November 1902 the parties were on friendly terms with one another, and on 7th November the defender wrote the letter to Mr Robson which I quoted some time ago at length. It was urged that the parties had thus 'practically come together'; and that at all events on 7th November it could not be said that the wife was 'remaining in malicious obstinacy.' This point has caused me more anxiety than any other in the case, but upon the whole I think that it is not sound. It has, I am aware, been often laid down that the remedy of divorce for desertion is a very peculiar and a purely statutory one; and that care must be taken not to unduly extend its application. But I think one must regard the general mental attitude of the defender during the period as a whole, and not pay undue heed to temporary signs of softening, unfortunately abandoned, and never ripening into actual adherence. I think the defender's expression of willingness to adhere, for the sake of her child, was always under some reservation as to an improvement in her own health and strength; and even the letter of 7th November expressly conditions that a further meeting should be arranged. Most regrettably, as I have explained, the scene had materially altered before that meeting took place, and the overtures of 7th November came to nothing. If I am right in holding that the defender was in wilful non-adherence otherwise during the period in question, I cannot hold that anything that took place during this temporary brightening of the horizon was sufficient to bar the currency of the statutory period.

"The defender's remaining argument was based upon the pursuer's alleged failure to fulfil his duty in the way of persuading his wife to return to him. During the earlier part of the time in question no such charge could, I think, possibly be maintained against Mr M'Ewan. I have alluded to his letters and his conduct. I think he was sincerely anxious to get his wife back, and made it abundantly clear to her that he was so. But after the separation case was over, an agreement, as I have already explained, was entered into, to which Mr and Mrs M'Ewan and Mr Jones were parties. The first article of this document recorded, as matter of declaration and agreement by all parties, Mr M'Ewan's adherence to his former position as regarded his wife, and a repetition of his request and desire that she should return to him. It is true that after the agreement was signed he never again wrote to his wife. It may perhaps be regretted that he did not; and if he had been left to his own impulse I think he probably would have done so. But he was advised by Mr Robson, and the advice was, in my judgment, legally correct, that the clause to which I have referred was a standing offer to his wife to return, and needed no

further repetition. In my opinion, the pursuer was not, in the circumstances which I have detailed, bound to continue requests and entreaties which, it seems clear enough, must, if answered at all, have been answered in the negative. The limits of a deserted husband's duty in this regard were fully canvassed in the Whole Court case of *Watson*, 1890, 17 R. 736, where some difference of opinion arose. I think the question must be held to be largely one of circumstances. I assent to the view of Lord Kinnear in *Willey's* case, 11 R. 815, which was quoted with approval by the Lord President in the case of *Watson*, to the effect that in order to his success it is necessary that 'the deserted spouse is desirous to adhere, and takes some intelligible method of expressing that desire to the offender.' I cannot doubt that the pursuer here was throughout sincerely desirous to adhere, and that the defender thoroughly understood that he was so. There is some evidence as to occasions when the parties are said to have met and passed each other on the streets, but it is very vague and inconclusive, and I attach little importance to it.

"For the reasons which I have now stated, I am of opinion that the pursuer is entitled to decree."

The agreement which followed upon the action of separation and aliment referred to in the Lord Ordinary's opinion contained, *inter alia*, the following article—"Whereas an action of separation and aliment and other proceedings are depending in the Court of Session between the parties, or some of them; and whereas it is the opinion of her medical advisers that Mrs M'Ewan is in a very weak state of health, and that it is of vital importance that she should have the custody and company of the child of the marriage between her and Mr M'Ewan; and whereas Mr M'Ewan is willing, in view of Mrs M'Ewan's state of health, to give the custody of the child to her for the present under the following declarations and conditions, which all the parties hereto are agreed upon: Therefore the said parties agree as follows—*First.* It is declared and agreed that Mr M'Ewan's handing over the child to Mrs M'Ewan, who at present is living apart from him, is not to be held as to any extent implying acquiescence on his part in her continuing to live apart from him. On the contrary, he adheres to his former requests to her to return to live with him, and desires that she should do so."

The defender reclaimed, and argued—The defender had not been guilty of malicious desertion, for (1) she had reasonable cause for staying away; (2) the statutory period had been interrupted by the action of separation brought by her in 1902; and (3) the pursuer had consented to her living apart. (1) The defender's absence from February 1902 till July 1902 was due to her ill-health, and that period accordingly could not be imputed to the alleged desertion—*Lilley* v. *Lilley*, July 6, 1881, 12 R. 145. During October and November 1902 the spouses though living apart were frequently meeting and going about together. They were looking for a house at the time, and had a suitable house been available they would have resumed cohabitation. In the end of November the defender was ready to return provided Nurse Archibald had been dismissed. The pursuer however preferred the society of the nurse to that of his wife, and in these circumstances the defender was justified in living apart. She had a "reasonable cause" in the sense of the Statute 1573, c. 55. Our law was the only system of jurisprudence which allowed divorce for desertion, and the statute accordingly must be strictly construed. Wilful and malicious defection throughout the full statutory period had to be proved, and that had not been proved here. It was not necessary that the defender in order to justify her absence should prove such a degree of cruelty as would support an action of judicial separation. Something less would do—*Mackenzie* v. *Mackenzie*, December 21, 1892, 20 R. 636, at pp. 651, 663, 674, 30 S.L.R. 276. *affd.* May 16, 1895, 22 R. (H.L.) 32 (at pp. 34, 40), 32 S.L.R. 455; *Russell* v. *Russell* [1895] P. 315, *affd.* [1897] A.C. 395, at pp. 410, 455-6; Fraser's H. & W. 873; Bishop on Marriage, &c. (1891 edn.), secs. 1741, 1746, 1757-59. The cases of *Jolly* v. *M'Gregor*, 1828, 3 W. & S. 85; *A B* v. *C D*, December 3, 1853, 16 D. 111; *Chalmers* v. *Chalmers*, March 4, 1868, 6 Macph. 547, 5 S.L.R. 357; *Auld* v. *Auld*, October 31, 1884, 12 R. 36, 22 S.L.R. 26, cited by the respondent (*infra*), were all prior to *Mackenzie* and no longer authoritative. The case of *A B* v. *C D*, in particular, had been disapproved by Lord Watson in *Mackenzie*. (2) The defender was entitled to live apart during the dependence of her action of separation and aliment, for she had in the words of the statute a "reasonable cause alleged or deduced before a judge." Malicious obstinacy was essential to the success of the pursuer's case—*Barrie* v. *Barrie*, November 23, 1882, 10 R. 208 at 212, 20 S.L.R. 147; *Young* v. *Young*, November 16, 1882, 10 R. 184, 20 S.L.R. 129—and that could not be held to exist while the defender was *bona fide* suing for separation —*Craxton* v. *Craxton*, 23 T.L.R. 527. (3) The pursuer had consented to his wife's staying away, for there was an entire absence of remonstrance on his part—*Watson* v. *Watson*, March 20, 1890, 17 R. 736, 27 S.L.R. 598; *Gibson* v. *Gibson*, February 1, 1894, 21 R. 470, 31 S.L.R. 409. Moreover, he had entered into a formal agreement, in which, while calling on her to adhere, he at the same time virtually consented to her living apart. From the date of the agreement all "privy admonitions" on his part had ceased, and he had therefore failed to comply with the provisions of the statute.

Argued for the respondent—(1) The Lord Ordinary was right. The desertion really began on 28th September 1901, when the defender left to go to Dalmeny, for the evidence showed that she had no intention of returning. The defender had no reasonable cause for staying away. The only grounds which would justify a wife in

non-adhering were adultery and *sævitia*—*Russell*, [1895] P., at pp. 329-31, [1897] A.C., at pp. 399, 419; *Mackenzie* (*cit. sup.*), *per* Lord Rutherfurd Clark, at p. 670; *Jolly* v. *M'Griger*, 1828, 3 W. & S. 85, at p. 130; *A B* v. *C D*, *cit. sup.*; *Chalmers* v. *Chalmers*, *cit. sup.*; *Auld* v. *Auld*, *cit. sup.*; *Forster* v. *Forster*, 1 Hag. Consist. 144; More's Lectures, i, 76. Neither adultery nor *sævitia* was present here, and therefore the defender had no reasonable excuse for non-adhering. It would be quite anomalous if a wife who was not entitled to live separate, and who could therefore claim aliment, were not bound to adhere. (2) There was no authority that the raising of an action of separation, which was unsuccessful, interrupted the running of the statutory period. The case of *Young* (*cit. sup.*), relied on by the reclaimer, was rejected by the Lord Ordinary. The maxim *non valens agere* had no application to a case like the present, for it only applied where there was legal incapacity to sue—*Graham* v. *Watt*, July 15, 1843, 5 D. 1368. The fact that the action was unsuccessful showed that the defender had no good ground for staying away, and when it was decided against her she did not adhere. The action therefore went for nothing—Bishop on Marriage, sec. 1758, and *Wagner* v. *Wagner* there cited. (3) The evidence showed that the pursuer had repeatedly urged his wife to return, but his letters were sent back unopened. Further, the agreement founded on by the reclaimer contained an explicit request by the respondent that his wife should adhere, which was a standing offer to her to return needing no further repetition. The defender's averments on record indicated that she had no intention of resuming cohabitation. The pursuer therefore was entitled to decree.

At advising—

LORD PRESIDENT—In this case I am of opinion that we should adhere to the judgment of the Lord Ordinary. His Lordship has examined the case with extreme care and minuteness, and I think your Lordships would in any view have been slow indeed to disturb that judgment so far as it is based upon facts. Probably I need in one sense say no more, but I should like to say this, that although in a case of this sort I always have bowed my own judgment on any dubious point to the judgment of the judge who saw the witnesses, I have no hesitation in saying that, reading the evidence as I have very carefully as a Judge of Appeal, I should be inclined to take even a stronger view than the Lord Ordinary has taken of the conduct of the parties. I think that I might say that the whole of the trouble in this case was from the very bad advice and evil influence that this lady got from her own relations, and I think in particular that the conduct of the brother and sister was such that Mr M'Ewan was well entitled if he wished to refuse that they should ever be in his house again. Now if it only rested upon fact I would say no more, but there are in the case one or two nice and delicate points of law on which I think it is necessary to say a very few words. In the first place, I agree with the Lord Ordinary in the view which he takes in the first part of his note as to the true import of the case of *Mackenzie*, 22 R. (H.L.) 32, in the House of Lords—that is to say, that I agree with him that in the House of Lords the view of the majority of the Judges in the Court of Session as to what was the true meaning of "reasonable cause" in the Act of 1573, c. 53, was overturned, and the House of Lords held that nothing less will afford reasonable cause than that which would be sufficient as a defence to an action of adherence. I agree with him also that their Lordships in the House of Lords in that case treated it as a question not decided, as far as they were concerned, as to whether in an action of adherence a wife can successfully defend herself upon any other grounds than would be required in order to sustain an action at her instance for separation and aliment. The Lord Ordinary goes on to express his opinion upon that question by intimating that he concurs with what Lord Rutherfurd Clark said in *Mackenzie's* case. I do not hold that the House of Lords overturned that, but on the other hand I do think that they certainly spoke in such a way as to show that they did not consider that matter binding on them, but that it was not necessary to decide it in that case. I do not think it is necessary to decide it in this case either, and for this very good reason, that even supposing the criterion was not what I may call the stricter criterion which Lord Rutherfurd Clark said it was—supposing it was the looser criterion—I think the ground here in fact which is set forth for the wife not adhering is utterly and absolutely inadequate. The ground which is put forth as having justified the wife in her eventual refusal to go home is that the husband declined, *ante omnia*, to dismiss the nurse, and the reasons for dismissing the nurse were said to be that the nurse had behaved very rudely to the wife and her sister, and there was a story of an assault upon the sister by the nurse. As far as that story is concerned I think it bears, if not absolute falsity, exaggeration on the face of it. In fact I consider Miss Jones' testimony in these matters as entirely untrustworthy, and it seems to me out of the question to say that a wife is entitled to say she will no longer live with her husband because, forsooth, she having been absent for a long time, and a child of very tender years having been entirely looked after by a nurse almost from the moment it was born, the husband does not choose to dismiss the nurse before the wife comes home. All that sort of thing, if the wife had been allowed to come home, would have settled itself. All would have been well in that household I am sure if it had been given a chance, but to say that an incident of such a sort is to be a ground on which the wife is to resist one of the first duties of matrimony seems to me nothing less than absurd. Accordingly I do not think we need solve that somewhat difficult question of law

which is left open by the judgment of the House of Lords in *Mackenzie*. Now the only other question from which I think comes any real trouble is the question whether in calculating the four years the wife was entitled to a deduction for the period during which an action of separation was running. Under the circumstances here I am of opinion that she was not. There is little or no authority on the matter in the books in this country, but the question does seem to have arisen in America, and although it is no authority that binds one, I think that one is fortified in one's view by the view which seems to have been taken there, and which I find in section 1758 of the last edition of Mr Bishop's book. After dealing with proceedings which are really a fraud on the Court, he goes on—"Or if after a desertion has commenced, there comes a real divorce suit, rendering a renewal of the cohabitation temporarily improper, still it does not intercept the desertion; because, as an intent to continue the cohabitation will in the absence of explanation extend through the temporary separation of the last section (*i.e., while carrying on any form of divorce suit*), so the intent to desert will reach forward and govern the period of the divorce suit here stated." Now taking the facts of this case I think it is perfectly clear that although one would hesitate to say that when the lady originally went away from her husband's house she did it with a mind then actually made up to desert, I think that that state of mind very rapidly supervened under the influence of her own relations. I think it was brought to an absolute point in the beginning of the next year, when after a demand had been made by her for a separation the whole matter had been carefully looked into by the husband's lawyer, and a perfectly clear and proper letter had been written by that gentleman, saying that he, having gone into the whole facts, had found nothing which would justify such a demand, and that it must be distinctly understood that the husband wished his wife to come back again. Well, after that period it seems to me the intention to desert is clear, and I think that if there was to be any action raised, it ought to have been raised then and there, at once. It seems to me impossible that after a long period after this is allowed to elapse, and after at one time the wife seems almost to have been in a state of mind in which she was going to come back, she could then break off on this absurd pretext about the nurse, then, raising an action of separation in which she is entirely unsuccessful, claim to have the period deducted. All these remarks seem to be enormously strengthened when I remember the fact that up to this hour there has never been an offer by this lady to come back. It would be a perfectly different question if what your Lordships were deciding was a case in which a wife was at your Lordships' bar saying, "I am willing to live with my husband to-morrow; don't settle it that the axe has fallen, that the last hour of the four years is run out and that I am divorced"; whereas here you have persistent desertion maintained to this very hour. I am entirely of the opinion of the Lord Ordinary, and think his judgment should be adhered to.

LORD M'LAREN—I concur with his Lordship in the chair, both as to the facts and as to the legal principles raised in the case.

LORD KINNEAR—I am of the same opinion.

LORD PEARSON was absent.

The Court adhered.

Counsel for Pursuer (Respondent)—Cooper, K.C.—Macphail. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for Defender (Reclaimer)—Scott Dickson, K.C.—R. S. Horne. Agents—Drummond & Reid, W.S.

Saturday, July 18.

FIRST DIVISION

[Sheriff Court at Glasgow.

O'BRIEN AND ANOTHER *v.* THE STAR LINE, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident—"Arising Out of and in the Course of the Employment"—Onus—Fireman Found Injured in Part of Ship Accessible only through Door which had been Locked and where no Business to be.*

In order to recover compensation under the Workmen's Compensation Act 1906 a claimant must prove that the accident arose "out of" and "in the course of" the workman's employment; and the *onus* is not discharged if the manner in which the accident happened is left unexplained and the evidence is consistent with its having arisen otherwise than out of and in the course of the employment.

A fireman whose duty it was to remain on board a steamship went ashore without leave and returned late at night intoxicated. Next morning he was found fatally injured in a part of the ship where he had no right to be, and to reach which he had to get beyond an iron door which had been locked. There was no evidence as to how he got there, or as to how the locked door was forced, or as to how the accident happened.

Held that there being no proof that the accident had arisen out of and in the course of the deceased's employment, his dependants were not entitled to compensation.

Mrs Mary Burge or O'Brien, widow of Stephen O'Brien, fireman, and Daisy Burge, his stepdaughter, claimed compensation