the "Graciana," the "R. Nicholson" had never been employed on salvage work. She was engaged towing in the harbour and towing on the coast. While the pursuers were expected, and perhaps bound, to do salvage work if called upon, it cannot be said to be established that they were specially engaged to do that class of work.

I agree with the defenders that the provisions of section 156 of the Merchant Shipping Act, as regards agreements of seamen, do not apply to the case of the master as under section 742 of the Act the expression "seaman" does not include master. No point on this distinction has been made on record, and I have not thought it necessary to treat the different pursuers' cases separately, as it does not appear to me that an agreement with any of the pursuers excluding a salvage claim has been established.

The defenders said that the result of a decision adverse to their contention would or might lead to a number of claims being advanced by the employees on salvage ships who had hitherto been content with their contract wages. The remedy is in their own hands. They can enter into agreements such as Dr Lushington indicated were contemplated by the statutes, and if these are not inequitable, effect will be given to them. If, however, they neglect to take this course they cannot complain that the provisions of the statute are founded on against them.

As regards the actual apportionment of the salvage award, that must be made in the light of all the facts and circumstances bearing upon the question. I understand both parties were agreed that if we were in principle in favour of the pursuers' claim the most convenient course would be to remit to Mr Bateson to make the appropriate apportionment. If this is so, I think that we might recal the Lord Ordinary's interlocutor, find that the pursuers are not barred from participating in the salvage award to the defenders, and of consent remit to Mr Bateson to deal with the question of apportionment.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Repel the first, second, third, and fourth pleas-in-law for the defender: Of consent remit to Alexander Dingwall Bateson, Esq., King's Counsel, London, to adjust and apportion the amounts of salvage to be awarded to the pursuers," &c.

Counsel for the Reclaimers (Pursuers) — Mitchell, K.C. — Macgregor Mitchell. Agents—Miller, Mathieson, & Miller, S.S.C.

Counsel for the Respondents (Defenders) —Dean of Faculty (Sandeman, K.C.) — Cooper. Agents — Mackenzie & Fortune, S.S.C.

Friday, February 9.

SECOND DIVISION.

[Lord Constable, Ordinary.

MULHERRON *v.* MULHERRON.

Husband and Wife—Divorce—Desertion—Absence of Remonstrance — Willingness of Pursuer to Resume Cohabitation with Defender.

A husband deserted his wife in 1915 after treating her with cruelty and remained in desertion thereafter, his wife continuing to reside in the family home. She made no attempt at remonstrance, her only opportunities for doing so occurring once during each of the first three years of the period of desertion, when she received letters from him disclosing his address, to which, however, she made no reply. The letters were couched in such terms as to repel rather than to encourage any remonstrance or entreaty on her part. In 1922 she brought an action against her husband of divorce for desertion, which was undefended. At the proof certain questions were put to her by the Court, her answers to which indicated that she was unwilling to live with him because of his cruelty. *Held* (*rev.* judgment of Lord Constable, *diss.* Lord Hunter) that the pursuer had not acquiesced in her husband's desertion, and that she was entitled to decree of divorce.

Authorities examined.

Mrs Grace Lumsden Leitch or Mulherron, Cupar, Fife, *pursuer*, brought an action of divorce for desertion against her husband Michael John Mulherron, *defender*. The case was undefended.

The *facts* appear from the opinion of the Lord Ordinary (CONSTABLE), who on 21st August 1922 after a proof found that the pursuer had failed to prove that the defender had been guilty of wilful and malicious non-adherence to and desertion of the pursuer and dismissed the action.

Note.—"I have carefully reconsidered this case and re-read the notes of evidence, but the result has been to confirm the impression which I formed at the hearing that I cannot consistently with well-settled rules of law grant the pursuer decree of divorce in respect of her husband's desertion.

"It appears clear that the original separation of the spouses in 1915 was due to the defender's misconduct. He gave way to drink. He was twice convicted for assaulting the pursuer. On his release from prison he returned to the house in a state of intoxication, smashed the windows, and suffered another term of imprisonment, after which he did not seek to return to the family home. In 1916 he joined the army under the Derby Scheme and remained in it until the end of March 1918, when he was demobilised. During that period the pursuer received the usual separation allowances from the Army Pay Department, but this of course ceased when her husband was demobilised, and since then though continuing to reside in

the same place she has never heard from him and does not know where he is.

"During the time when the defender was in the army the pursuer received three letters from him. The first, dated 4th December 1916, was couched in affectionate terms, and plainly indicated a desire to make a fresh start in life and to be reconciled to the pursuer. It asked for an immediate reply, but the pursuer never did reply to it. The next letter, dated August 1917, which was very different in character, requested the pursuer to send the defender some of his belongings, but to this also she did not reply, and the defender went to Cupar and got them from the person with whom they were stored without seeing the pursuer. The belongings in question had been sent home by the pursuer when he joined the army, and it is significant of the pursuer's attitude that she had refused to take them into the house. The third and last communication was a post-card written on 30th March 1918 on the eve of the defender's demobilisation, which requested certain things to be sent to him at the Waverley Station, Edinburgh. The post-card bore no address, but it gave the pursuer another chance to communicate with the defender of which she did not avail herself.

"The result is that from the date of separation in 1915 until the defender's demobilisation in March 1918 the pursuer deliberately refrained from communicating with her husband, notwithstanding at least one apparently *bona fide* effort on his part to seek a reconciliation. The pursuer's explanation of her attitude was not that she distrusted the good faith of her husband's letter, but that she and the children could not live with him unless he reformed, and she was persuaded that he could not reform—'He would be right only for a week or two and then he would be as bad as ever.' In this view she may have been quite right. But it is clear that if any part of that time had been necessary to make up the statutory period of four years' desertion the pursuer could not have succeeded in obtaining divorce. A wife who receives the treatment which the pursuer did is entitled to refuse to live with her husband and notwithstanding his promise of amendment to obtain decree of judicial separation from him, but if she is unwilling to resume cohabitation she cannot, however justifiable her refusal may be, divorce him.

"But then Mr Wallace urged for the pursuer that the four years' desertion upon which he founds in the present case only begins with the defender's demobilisation in 1918, and that since that date the defender has given the pursuer no opportunity of resuming cohabitation or of offering to do so. It is well settled that the admonition or remonstrance of which evidence is usually required from the injured spouse will be dispensed with where the disappearance of the defaulting spouse has made it impossible. But notwithstanding such disappearance the spouse seeking the remedy of divorce must still satisfy the Court that he or she was desirous of resuming cohabitation. Even if the pursuer had so deponed in the present case it would have been very difficult to accept her statement in view of her attitude to her husband between 1915 and 1918. In this respect the case differs materially from *Whalley* v. *Whalley* (1921, 2 S.L.T. 136), in which the husband disappeared the moment a decree of separation was pronounced against him at the instance of his wife. But the pursuer does not in fact make any such pretence. Her counsel having put no questions to her as to her state of mind I thought it necessary to do so, and her answers showed that her disposition towards her husband now remains exactly the same as it was before he disappeared—she could not live with him because she is persuaded that he could not reform. In these circumstances, while I sympathise with the pursuer, I think it is clear that the remedy of divorce is not available to her."

The pursuer reclaimed, and argued—Remonstrance was not necessary, especially when as in the present case the circumstances showed that it would have been useless—*Watson* v. *Watson*, 1890, 17 R. 736, 27 S.L.R. 598; *Gibson* v. *Gibson*, 1894, 21 R. 470, *per* Lord Rutherfurd Clark at p. 478, 31 S.L.R. 409; *Muir* v. *Muir*, 1879, 6 R. 1353, 16 S.L.R. 785; *Winchcombe* v. *Winchcombe*, 1881, 8 R. 736, 18 S.L.R. 517; *Gow* v. *Gow*, 1887, 14 R. 443, 24 S.L.R. 311; *Murray* v. *Murray*, 1894, 21 R. 723, 31 S.L.R. 576. The case of *Farrow* v. *Farrow*, 1920 S.C. 707, 57 S.L.R. 656, was not really *contra*. *Horsley* v. *Horsley*, 1914, 1 S.L.T. 92, and *Whalley* v. *Whalley*, 1921, 2 S.L.T. 135, were also referred to.

At advising—

LORD ANDERSON—The pursuer was married to the defender on 7th August 1903 at Cupar. He deserted her in 1915, and has ever since remained in desertion. Since the defender's desertion the pursuer has continued to reside at Union Place, Cupar, where the parties had their matrimonial home. The defender during the period when the spouses lived together treated the pursuer with cruelty, and she was on one occasion compelled by his violent conduct to leave him for a time. She, however, resumed cohabitation, and despite renewed ill-treatment on his part continued to live with him till he deserted her. The pursuer now desires to have the marriage dissolved because of the defender's desertion, but the Lord Ordinary has refused decree, holding, as I understand his judgment, that the evidence discloses that the parties were living apart of mutual consent. Against that judgment the present reclaiming note has been taken. The case is a very narrow one, but I have reached the conclusion that the pursuer is entitled to decree.

A pursuer in an action of divorce on the ground of desertion is entitled to decree on proof of those facts—(1) that there had been desertion on the part of the other spouse, and (2) that this desertion had been persisted in for the statutory period of four years—(See *Gow*, 14 R. 443, Lord Young, at p. 444). It is implied in this that during the *quadriennium* the spouse who has been deserted has never acquiesced in the separation. If such

acquiescence takes place, then the separation loses its character of desertion and the situation becomes that of severance by mutual consent. The Act of 1573 supplies a test which may be applied for the purpose of gauging the character of the separation. The deserted spouse may privily admonish or remonstrate with the deserting spouse with the object of endeavouring to bring about a resumption of cohabitation. The point raised and decided in the case of *Watson* (17 R. 736) was whether or not it was an essential part of a pursuer's case to prove that remonstrance had been made, and the decision was that such proof was not essential. There may be circumstances in which remonstrance is impossible, as when the deserting spouse has completely disappeared, and remonstrance need never be made where it would manifestly be ineffective—(Lord Shand in *Watson*, 17 R. 743). In the present case it might be thought that the pursuer had an opportunity of remonstrance when she received the defender's letter of 5th December 1916. He was then an invalid in Norwich Hospital and incapable of resuming cohabitation. The suggested occasion for remonstrance would thus seem to have been inopportune, and remonstrance then would, apparently, have been ineffective. The letter, moreover, was insulting in its terms. The defender asked the pursuer to do certain things, under certification that if she failed he would commit adultery with one or other, or with both, of two women named in the letter. I am of opinion that no self-respecting woman would have answered such a letter, and I am not prepared to hold that the pursuer has debarred herself from obtaining decree because she did not answer that letter. The subsequent letter was even more offensive in its terms, and no other opportunity of remonstrance was available to the pursuer, as the defender therafter disappeared.

There remains her evidence in response to certain questions put by the Court. One of these, to wit, "What is your frame of mind towards him?" was plainly incompetent. It is too late in the course of an action for the dissolution of the marriage to ask either pursuer or defender such a question. The pursuer's attitude as to the matter of renewed cohabitation must therefore be judged by the other evidence, and especially by her conduct during the period of separation. A more satisfactory conclusion may be reached from a consideration of her conduct than from her answers to questions put to her in the witness-box as to an hypothetical state of facts never seriously contemplated. As I have pointed out, it is proved that the pursuer returned to cohabitation after she had been compelled to leave her husband on account of his cruelty. This leads me to conclude that if the defender had made an offer to resume cohabitation she would have again risked ill-treatment in order to discharge her matrimonial duties. Again, it is proved that she made inquiries with the object of ascertaining the defender's address. It does not appear from the proof for what purpose she wished to discover his whereabouts, but it is not an unreasonable inference that she did so in order to endeavour to bring about a resumption of cohabitation.

I hold it proved that the defender deserted the pursuer in 1915, and that he has been in wilful desertion since then. He knew, or ought to have known, that the pursuer continued to live in the matrimonial home, and he could have found her there at any time. He was in Cupar in 1918 and made no effort to see her or his children. I hold further that it is not proved that the pursuer acquiesced in the separation and that she was unwilling to resume cohabitation.

The present case in its circumstances is entirely different from the cases of *Gibson* (21 R. 470) and *Farrow* (1920 S.C. 707), in which decree was refused. In these cases the proof clearly disclosed that the spouses had been living apart of mutual consent. This case, moreover, is *a fortiori* of the cases of *Muir* (6 R. 1353), *Winchcombe* (8 R. 726), *Gow* (14 R. 443), and *Murray* (21 R. 723), in which decree was pronounced. I am therefore for recalling the Lord Ordinary's interlocutor and granting decree of divorce.

LORD ORMIDALE—As I read the proof in this case it is clear that when the spouses separated in 1915 it was the husband who left the wife and not the wife who left the husband, and further, that there is no reason to suppose that the husband's desertion was occasioned by anything that the wife either said or did. The incident of his attempted entry into the house when drunk, feet foremost, and the smashing of the windows was followed by his being sent to jail for a breach of the peace. If he had returned after his imprisonment to the home of the marriage in Union Street I do not doubt that cohabitation would have been resumed just as before. He did not return then or at any later date, and he never afterwards, except when constrained to do so during his service with the army which terminated in 1918, contributed a penny to the support of his wife and children. Accordingly there was desertion by the defender, and he has persisted in his desertion for upwards of seven years.

The pursuer is therefore entitled to divorce unless the Court is satisfied that she condoned and acquiesced in the defender's desertion. If she did, then the spouses have been living apart by mutual consent. Now it is, no doubt, true that the pursuer at no time made any remonstrance, and if she had a reasonable opportunity of doing so the absence of such remonstrance tends to show that she was unwilling to resume cohabitation. In *Watson* v. *Watson* (17 R. 736) Lord Shand, at p. 744, says—"Remonstrance for absence or repeated requests that the deserting spouse should resume cohabitation—made seriously and in *bona fide* but rejected and so unavailing—must be the best evidence in support of the points (1) that the pursuer has desired adherence or renewal of cohabitation, and (2) that the desertion has been wilful and obstinately

persisted in." The same Judge, however, observes at p. 743—"I think cases may not unfrequently occur in which the conduct of the deserting spouse unequivocally demonstrates that admonition and remonstrance would be unavailing." If so, then proof of remonstrance is not an essential requisite of the pursuer's obtaining decree. The present case belongs in my opinion to the category of cases figured by Lord Shand. The pursuer made no remonstrance. The only opportunities she had for doing so occurred once during each of the first three years of the desertion, so far as the being made aware by the receipt of letters disclosing the defender's address can be said to afford an opportunity, but keeping in view the tone and temper of the letters it is certain in my judgment that no remonstrance would have been of any avail. The general tenor of the letter of 4th December 1916 as I read it is offensive and repellent, and although there can be found in it terms which appear to be kindly enough I cannot myself, having regard to the context, believe that the writer was sincere or serious when he used them. The whole of the letters repel rather than encourage an attempt at remonstrance or entreaty on the part of the pursuer. The conduct of the defender on his demobilisation illustrates the determined and malicious nature of his diversion from his wife's society, for although he actually visited Cupar in 1918 he did not disclose his visit to the pursuer and made no endeavour to see her. Thereafter he disappeared, and during the succeeding four years it was impossible for the pursuer to make any approach to him by letter or otherwise. The failure to make remonstrance therefore goes no length at all towards proving that the pursuer, who was the deserted spouse, was not willing to resume cohabitation.

Nor can I attach the same weight as the Lord Ordinary does to the answers given by the pursuer to the questions put by his Lordship. The questions do not appear to me sufficiently to test or ascertain the real attitude of the pursuer's mind on the question of her willingness to adhere during the period of desertion. The idea had, I should say, never been the subject of serious consideration by her. There was no particular reason why it should. I am not prepared, because of anything said by her in the witness-box, to infer that if, for example, the defender had had the decency on the occasion of his visit to Cupar in 1918 to present himself at the old home in Union Street, which the pursuer had never abandoned, she would not have resumed cohabitation with him. That, or something analogous, is the sort of concrete incident which would have furnished a true and sufficient test of her willingness to adhere. It must be kept in mind that although earlier in her married life she had been actually compelled by the cruelty of the defender to leave him, she nevertheless resumed her married life with him. Further, it appears that she made such inquiries as she could to ascertain his whereabouts after 1918. She was not asked the purpose of these inquiries, but there is nothing in the evidence to suggest, and I see no reason for assuming, that they were made for any but a worthy motive. Some of the questions put by the Lord Ordinary appear to me to be directed to ascertaining her state of mind at the date of the trial. Such questions in my opinion are of little utility and doubtful competence. Just as a defender is not entitled to meet an action of divorce by an offer to adhere after the summons had been served on him, so I think it is not legitimate to ask a pursuer what is her state of mind at the moment she is giving her evidence.

This case is materially different from a case where the spouse alleging desertion has been the first to separate. In *Gibson* v. *Gibson* (21 R. 470), where the wife separated herself from the society of her husband because of his cruelty and made no effort to resume it, Lord Rutherfurd Clark at p. 478, after pointing out how material the presence or absence of remonstrance is in determining whether the separation existed of mutual consent, adds these words, which appear to me of great significance—"Especially when the spouse who complains of being deserted was the first to separate." In *Murray* v. *Murray* (21 R. 723)—a case which was held over until the result of *Gibson* v. *Gibson*, which was heard before Seven Judges, was known—the Court, of which Lord Rutherfurd Clark was a member, gave the pursuer decree of divorce, and yet, so far as I can judge, the evidence of willingness on the part of the pursuer was certainly no stronger than in the present case.

On the whole matter, although I have found the case a perplexing and narrow one, the pursuer is in my opinion entitled to decree.

LORD HUNTER—I agree with the Lord Ordinary. The original separation of the spouses may have been due to the defender's ill-treatment of the pursuer when he was under the influence of drink. I think, however, that the pursuer was a consenting party to the separation. This appears to me to be established by the pursuer's conduct and by the answers which she gave to questions put by the Lord Ordinary to her when she was in the witness-box. To three communications made to her by the defender she made no reply. The first of these contains, as the Lord Ordinary indicates, internal evidence of a desire on the defender's part to be reconciled with the pursuer. The second, although couched in very unfriendly terms, starts with a declaration which the pursuer never contradicted that each of the spouses had given the other freedom. In answering the Lord Ordinary the pursuer says—"I never asked him to come back. I could not ask him to come back, I lived in such terror when I did live with him." And again she says—"I just felt that I could not live with him at all." It was contended that the pursuer's answers must be taken as though she had expressly said that she was willing to adhere to the defender if he reformed, and that such an

answer was sufficient to indicate that separation arose from malicious desertion. In this I do not agree. The answer to such a question as I have indicated is of no value. If it indicates anything it is readiness on the pursuer's part to live with a husband of a different character from her own, but does not prove willingness to adhere to her actual husband. If a wife is unable to live with her husband because of his cruelty, her remedy is judicial separation and not divorce.

In *Watson* v. *Watson* (17 R. 736) Lord President Inglis, dealing with divorce for desertion under the statute, says (at p. 739)—"It seems clear that to meet its requirements there must be not only an offender against the conjugal obligation and duty of adherence, but also an injured party who does not condone the offence, but on the contrary remains faithful to the marriage vows, and desires and requires the offender to return to conjugal cohabitation, not as a statutory solemnity or matter of form, but as a substantive fact. In all cases therefore where the spouses are by mutual consent living apart, the statute plainly has no application, nor do the motives which induce them both to live apart in any way affect the question. It may even be highly expedient that they should never meet again. Their meeting might presumably be attended by serious consequences, perhaps even fatal to life or health. But such cases are not within the statute, which requires as the condition of its application obstinate non-adherence on the one side and a manifested desire for adherence on the other."

In *Gibson* v. *Gibson* (21 R. 470) it was proved that the husband had treated his wife with cruelty, and when drunk had turned her out of his house, and that for more than four years thereafter the spouses had lived separate. The Court refused decree on the ground that the spouses had been living separately of mutual consent. Lord Rutherfurd Clark said (at p. 478)—"I am aware that neither remonstrance nor entreaty is required as a solemnity in order to divorce for desertion. But the presence or absence of remonstrance and entreaty are very material in determining whether there was desertion, or whether the separation existed of mutual consent, especially when the spouse who complains of being deserted was the first to separate." In a subsequent passage in his opinion he added, "Cruelty and threats of cruelty which lead to a separation cannot be equivalent to desertion unless they are used for producing and maintaining a separation." Towards the end of his opinion he said (at p. 479)—"It may be hard that a woman must remain united to one who used her so ill. But cruelty is not desertion. A wife is bound to submit to such usage as she receives from her husband, or else to withdraw from his society. And if she chooses the latter alternative, she has, to my mind, shown in the most emphatic manner that she is not willing to cohabit with him. She acts in the exercise of a legal right which may be declared by a decree of judicial separation. It is immaterial whether the decree be pronounced or not. Her right depends on the cruel treatment, and is only ascertained by the decree. So long as she acts in the exercise of that right she cannot be deserted, just as I think that no woman could be deserted if she were living apart from her husband under the authority of a decree of separation." Finally he explains that a woman so living separate from her husband, as a condition of the possibility of desertion, must abandon her position and indicate a willingness to "resume cohabitation." In the present case there is no evidence of any such abandonment by the pursuer of her right to live separate from her husband because of his ill-treatment of her. That being so, I do not think that decree could be pronounced in her favour without disregarding the principles laid down by Lord President Inglis in the case of *Watson*, and going contrary to the actual decision in *Gibson's* case.

LORD JUSTICE-CLERK—In this case I agree with the majority of your Lordships that the defender deserted the pursuer, and that he remained in malicious desertion of her for the statutory period of four years. I also agree that the circumstances proved preclude the idea that remonstrance directed by the pursuer to the defender would have been of any avail. My only difficulty arises from the answers given by the pursuer to certain questions put to her by the Lord Ordinary, and the inference which these answers are capable of yielding as to her state of mind during the years of the defender's desertion. *Prima facie* her answers suggest that she was unwilling during the statutory period to resume cohabitation with the defender—an attitude of mind which if it is proved to have existed would, I think, be fatal to her action. But as the majority of your Lordships take the view that these obviously unpremeditated replies should not be unduly stressed against the pursuer, that her conduct throughout the married life of the parties is a more reliable and eloquent test of her state of mind, and that it evinces a sincere desire to perform her marital duty, I, although with some hesitation, assent to the views expressed by the majority of your Lordships and to the judgment by which it is proposed to give effect to them.

The Court recalled the interlocutor of the Lord Ordinary and granted decree of divorce.

Counsel for the Pursuer and Reclaimer — Graham Robertson, K.C. — Wallace. Agents—Wallace, Begg, & Company, W.S.