

Wednesday, December 21.

SECOND DIVISION.

[Lord Wellwood, Ordinary.]

MACKENZIE v. MACKENZIE.

(*Ante*, vol. xviii. 379, and 8 R. 374; and *ante*, vol. xxv. 183.)

Husband and Wife—Divorce for Desertion—Defence to Action of Divorce for Desertion Compared with Defence to Action of Adherence.

Circumstances in which held (*diss.* Lord Rutherford Clark) that a husband was not entitled to a decree of divorce for desertion against his wife.

Opinion per Lord Young, concurred in by Lord Justice-Clerk and Lord Trayner, that it was no criterion of the validity of a defence to an action of divorce for desertion to inquire whether or not it would have been a good defence to an action of adherence, because an action of adherence on the one hand was an action at common law and only invited with judicial authority a trial of reunion and renewed cohabitation, while an action of divorce for desertion, on the other hand, was only competent by Act of Parliament inflicting a statutory penalty, and was final in the strictest sense, and because each of these actions might involve reasons and considerations which had no place in the other;—*diss.* Lord Rutherford Clark, who held that to pronounce a decree of adherence against a wife was to negative the existence of any reasonable cause for her “diverting” herself from the company of her husband, and that a husband was entitled to decree of divorce from his wife who had lived separate from him for four years, if he had been willing during that period to resume cohabitation, and if his wife had no just cause for withdrawing herself from his society, *i.e.*, if she had no good defence to an action of adherence.

By the statute of James VI. 1573, c. 55, it is enacted “that quhatsumeuer persoun or persounis joynit in lauchfull matrimonie, husband or wife, diuertis fra vtheris companie without ane ressonabill caus alledgeit or deducit befor ane judge, and remanis in thair malicious obstinacie be the space of four yearis, and in the meantime refusis all preuie admonitiounis, the husband of the wife, or the wife of the husband, for dew adherence, that than the husband or the wife sall call and persew the obstinate persoun offender befor the Judge Ordinar for adherence; and in case na sufficient causis be alledgeit quhairfoir na adherence suld be bot that the sentence procedis aganis the offender, refusand to obey the samin, the husband or the wife sall mene thameselfis to the superiour magistrate, *videlicet*, the Lordis of Sessioun, and sall obtene letteris in the four formes conform to the sentence of adherence; quhilk charge

being cotempnit and therefore being denunciit rebell and put to the horne. Than the husband or the wife to sute the spiritual jurisdiction and power, and require the lauchfull archibischop, bischop, or superintendent of the countrie quhair the offender remanis, to direct preuie admonitiounis to the said offender, admonishing him or hir as befor for adherence; quhilkis admonitiounis gif he or she contemteuslie disobeyis, that archibischop, bischop, or superintendent to direct charges to the minister of that parochin quhair the offender remanis, or in case thair be nane, or that the minister will not execute, to the minister of the next adiacent kirk thairto, quha sall proced aganis the said offender with publict admonitiounis, and gif thay be contempnit to the sentence of excommunication; quhilk anis being pronouncit the malicious and obstinat defectioun of the partie offender to be ane sufficient caus of diurse, and the said partie offender to tyne and lois thair tocher et donationes propter nuptias.”

Osgood Hanbury Mackenzie of Inverewe raised an action against his wife Mrs Minnie Edwards Moss or Mackenzie, in which he asked that it should be found and declared “that the defender had been guilty of wilful and malicious non-adherence to and desertion of the pursuer for the space of four years; and therefore the defender ought and should . . . be divorced and separated from the pursuer in all time coming: And it ought and should be found and declared that the pursuer is loosed, acquitted, and freed of the marriage contracted betwixt the defender and him, and that it is lawful for him to marry any other free person whom he pleases, sicklike and in the same manner as if he had never been married, or as if the defender were naturally dead; and also that the defender has forfeited all the rights and privileges of a lawful wife, and lost and amitted the dos and tocher, and all goods, gear, and others whatsoever which the pursuer received with or on account of the defender, or which were anyways contracted or agreed to be paid to the defender *causa matrimonii nomine dotis* and *propter nuptias*, or whatever she had right to claim *jure relicte* or otherwise as the pursuer’s wife.”

In his condescendence the pursuer averred —“Cond. 4. On 4th August 1880 the defender, without any reasonable cause, and without previously informing the pursuer of her intention, left his home at Tournai, and wilfully and maliciously deserted the pursuer. Cond. 6. The pursuer has all along been willing and ready to adhere to the defender, and he has made repeated attempts, both personally and by letter, to induce her to return and adhere to him as his wife. The defender, however, has repelled all these advances, and refused to adhere to the pursuer. She has continued in wilful and malicious desertion from him since said 4th August 1880, or at least for four years prior to the present date.”

The defender lodged defences, in which she “admitted that she left Tournai on 4th August 1880, and explained that she

was justified in doing so owing to the pursuer's conduct towards her." The statements in Cond. 6 she denied.

The pursuer pleaded—"The defender having been guilty of wilful and malicious non-adherence to and desertion of the pursuer for the space of four years, the pursuer is entitled to decree of divorce as concluded for."

The defender pleaded—"(1) The defender not having been guilty of wilful and malicious non-adherence to and desertion of the pursuer, is entitled to be assolizied, with expenses."

On 17th May 1892 a proof was led before the Lord Ordinary (WELLWOOD), from which and the letters produced the following narrative is taken:—

The pursuer and defender were married on 26th June 1877.

The pursuer was born in 1842. He was a younger son of Sir Francis Mackenzie of Gairloch by his second wife. His father died when the pursuer was a year old, and thereafter the pursuer lived with his mother, hereafter called the Dowager Lady Mackenzie, down to the date of his marriage. The mother and son were devotedly attached to one another. In 1863 the Dowager purchased for her son the estate of Inverewe, taking the title in his name, and thereon she built the mansion-house in which they afterwards resided.

The Dowager had a jointure of £900 a year. When her son married the defender, the Dowager in their marriage-settlement made over £600 of this £900 to her son. Besides this £600 the pursuer's income consisted of the rents from his estate and fishings. These rents, including the rent of the house and shootings, were stated by him in 1876 as amounting to £1400. The pursuer, however, explained in evidence that at that period the income from the farm was abnormally large. In the marriage-contract Sir Thomas Moss, the defender's father, settled £20,000 on his daughter, £10,000 to be paid to the marriage trustees for her behoof at once, and the other £10,000 after the death of Sir Thomas and Lady Moss.

Before Sir Thomas Moss gave his consent to the marriage, there was a distinct understanding between him and the pursuer that the latter's mother was not to live at Inverewe along with the pursuer and the defender after the marriage. In a letter given to her son before the marriage the Dowager wrote—"I would live with you or entirely away, or during the dull time of the year, just any plan that might seem best or please others; if I saw you thoroughly happy I never could be really unhappy." On this point the Dowager was cross-examined as follows—" (Q) Did your son not make you aware that Sir Thomas Moss and his daughter would only agree to the marriage if they should have a home in which you were not to share?—(A) I never heard a word of it except those two or three words 'Mother dear, where will you go?' That implied I was to go somewhere else. (Q) Did you understand the marriage was only allowed and went on upon the

footing that you were to go and live somewhere else?—(A) I did not think anything; I was in a very bad way—very wretched at the prospect of losing my son. (Q) But from the point of view of people who had the happiness of a daughter in view, and who might regard it as essential that the daughter should get the affection of her husband, don't you think it was very natural in the peculiar circumstances that that should be made clear to the lady's friends?—(A) I don't know—I have known some daughters-in-law to live with their parents for a while; I think John Moss and his wife lived with their parents the first year of their marriage. (Q) Was that your idea of what should be done?—(A) I thought I might be a guest if I was very much welcome, but I was not in a hurry. I did not give my son a letter to show to Sir Thomas Moss upon this matter. Some time before he was engaged I wrote on a piece of paper three things—that I would always live with him, or live with him nine months, leaving at the shooting season, or go away entirely. (Q) Listen to this passage in which you say, 'So to be inexpensive I would live with you or entirely away, or during the dull time of the year, just any plan that may seem best and please others.' You see one of the alternatives there to which you were ready to agree was to live entirely away?—(A) I acted upon that. (Q) Did you not give that to your son that he might show it to Sir Thomas Moss as what you were willing to do in this matter?—(A) No, at that time I was not thinking of Sir Thomas Moss. (Q) Do you say that it had reference to what would happen with respect to some unknown marriage, but not with respect to the negotiations with Sir Thomas Moss?—(A) Yes, there was no engagement when I signed the paper. It was to be shown to any prospective father-in-law. (Q) Including Sir Thomas?—(A) Of course, anyone. I have no doubt my son did show that letter to Sir Thomas as his authority for stipulating that I should live away from them."

On the same subject the defender deponed—"I remember Lady Mackenzie in the autumn of 1877 broaching the question of her continuing to live at Inverewe. She did so one day in the drawing-room there. I reminded her of her promise and her engagement, and she admitted she had made it, but said it was not intended to be carried out. The promise or engagement I refer to was that she should cease to live at Inverewe after her son married. She admitted that she had made the promise, but said that she never expected to be taken at her word. I am giving the words so far as I remember them, but I am perfectly clear as to the sense. She seemed very nervous and shaky, and I was sorry for her, and I suggested that if my husband would take a small place elsewhere she might live at Inverewe and we would live elsewhere during her lifetime, but she said it was not so much Inverewe she wanted as her son—that she was miserable without him, and he was miserable without her. I

asked why she had given that promise to my father if she had no intention of keeping it, and she said—'Your father would not have agreed to the marriage without a promise, but I never intended to be kept to my word.' I think that was all; I was very much disgusted and left the room."

Lady Mackenzie, the wife of Sir Kenneth Mackenzie of Gairloch, half brother of the pursuer, deponed—"(Q) Had you conversations with the Dowager Lady Mackenzie more than once in regard to the condition that she should not live in family with the young couple?—(A) We spoke about it in October 1879 at Conan. We were sitting in the drawing-room and she was talking about her daughter-in-law and about the marriage, and she said that though she had promised to leave Inverewe she never expected to be taken at her word. My husband and I were both together there that time. She made that observation in a complaining tone. I never heard her speak with affection of her daughter-in-law."

After the marriage the pursuer and defender spent three or four days at Otterspool near Liverpool, the residence of Sir Thomas Moss, and then went on a short trip to Ireland. They then returned to Otterspool and spent about a fortnight there. The defender deponed that in the course of the honeymoon the pursuer stated that by the law of Scotland a man could get a divorce from his wife unless she obeyed him like a slave, that he would not have married her without money, and that he had made a bad bargain by marrying her. The whole of these statements the pursuer in his evidence denied. The only evidence supporting in any way the defender's statement about the pursuer having married her for money, was that of Sir Kenneth Mackenzie, who deponed—"My brother spoke to me in regard to the money he was getting by his wife. I cannot recollect when he first did so. He spoke as if he had not got the money he expected to have got. He rather gave me to understand that he had rather been a sort of victim of deception. I made some notes in August 1880, and in those notes I have marked with quotation marks that he said he had been drawn into an alliance by the Mosses, but where I took that from I cannot now recollect. *By the Court.*—My notes do not show me when that conversation took place, and I cannot say when it was. *Examination continued.*—I think pursuer recurred more than once to this question of money with regard to the settlements. He rather seemed to think that he had been to some extent victimised—that he had not sufficient control over the money—that he had not got the money he had expected, and had not got control over the money, but I cannot speak more in detail as to that."

In July 1877 the pursuer and defender went north on their way home to Inverewe. A few days before they arrived there the Dowager left Inverewe and went to reside with her stepson Francis at Kerrysdale, nine or ten miles from Inverewe. At Loch

Maree the Dowager and Francis Mackenzie met the young couple on their way home and stayed half an hour with them. The defender deponed that the Dowager's manner toward her at this interview was very cold; the pursuer on the other hand deponed that his mother was "very poorly and shaky and nervous," but that she did her best to be cordial to his wife.

On 29th July the pursuer and defender from Inverewe, the Dowager and Francis Mackenzie from Kerrysdale, Sir Kenneth and Lady Mackenzie from Gairloch, and Cottingham Moss, the defender's younger brother, attended the English service at Gairloch. On this occasion, the defender deponed, the pursuer took no notice of her, but attached himself wholly to his mother. Young Lady Mackenzie deponed that the Dowager was very cold in her manner and barely civil to her daughter-in-law, and that the pursuer took no notice of his wife. Sir Kenneth Mackenzie deponed that the Dowager was barely courteous to the defender, and seemed to take possession of the pursuer. Mr Cottingham Moss deponed that the pursuer paid more attention to his mother than to his wife. On the other hand the pursuer deponed that he had no intention or remembrance of slighting his wife, and Francis Mackenzie deponed he had noticed no slight on the part of the pursuer towards his wife.

The week after the young couple arrived at Inverewe the Dowager was invited over from Kerrysdale to see the marriage presents. She came and stayed at Inverewe for a few days. As to this period the defender deponed—"After we had been a few days at Inverewe he asked me to write a very nice letter to his mother inviting her to Inverewe. I did not say anything; I wrote. (Q) Did you quite like it?—(A) No, perhaps I did not. . . . The Dowager accepted the invitation and arrived. I think we had been about a week or ten days in the house when she arrived. I thought when she came she was rather forbidding in her manner—she seemed to take so little notice of me in any way. I did not think that what notice she did take of me was pleasant. She ignored me a great deal. . . . After the Dowager came I think my husband was always with her. He very rarely devoted any time to me after she came. He took very little notice of me indeed from this time onward."

About this time Mr Dixon, shooting tenant of Inveran, a lodge about 2½ miles from Inverewe, lunched at Inverewe. He deponed—"The party consisted of pursuer, defender, the Dowager Lady Mackenzie, and myself. I was rendered exceedingly uncomfortable by the position of affairs. The ladies scarcely spoke at all, and any conversation was carried on mostly by the pursuer. It struck me at the time that this was a very bad beginning. It appeared to me to be a case of just two to one. It struck me that the mother-in-law was, to use a rather slang expression, sitting upon the wife, and that the husband was not taking the wife's part; but there was nothing said. That was merely an im-

pression on my mind. I may have been mistaken, but it struck me strongly at the time."

Early in August 1877 Sir Thomas Moss and some of his family came to Inverewe on a visit. About 20th September the pursuer and defender went along with the Moss family to the Northern Meeting at Inverness. On the day they left Inverewe the Dowager arrived there. As to this the pursuer deponed—"My mother came the day we left, to stay at Inverewe during our absence. My wife had asked that she should come and take care of things when we were away. My mother had been in the habit of taking a very active interest in my farming affairs. She was in a position to give assistance and orders about matters during my absence, and she could do nearly as well as I could." The defender deponed—"My husband and I had accepted from my father an invitation to go to Inverness for the Northern Meeting in the end of September 1877. A few days before we went my husband told me that his mother was returning to Inverewe for an indefinite time. He did not ask me whether I would like it. He had not consulted me as to whether she should be asked back at all. He told me she had better occupy the bedroom she had had before, and that the room called the boudoir could be prepared for her as a sitting-room in order that we might have separate rooms. (Q) With a view to what, did he add?—(A) That we could all live together. There was no time mentioned. From what he said on this occasion I understood she was coming to live with us. I had never been consulted about it. I reminded him of what I always considered was a condition of the marriage—that his mother should have a separate home from us; and he said that now the marriage was over it need not be enforced. I think he said 'could not be enforced,' but I should not really like to say whether it was the one word or the other. I was very much surprised at such an idea. He said his mother wanted to live with him. (Q) From the conversation at that time, did he speak as if he was referring to any limited time, or did he mention any limit?—(A) No, there was no time whatever mentioned. When he conveyed this information to me he got into a very bad temper about it. He said that if I went on like that he would drive me to separate from him, or something of that kind, but that he would not separate from his mother."

Arrangements had in the meantime been made for building a house for the Dowager, and in September or October 1877 she chose a site at Tournais, on the Inverewe property, about a mile and a half from Inverewe House. Sir Thomas Moss lent the money (£1500 at 4 per cent.) to the pursuer to build Tournais. In her evidence the defender deponed—"I knew it was built for the purpose of enabling her (the Dowager) to live apart from my husband and me. It was built with my entire assent and approval."

After the Northern Meeting the pursuer and defender paid a number of visits, and

then returned to Inverewe in the end of October. As to their journey home, the defender deponed—"We were visiting at Sir John Fowler's at Braemore. It was arranged that we should return by road. The day on which we left Sir John's was a very wild day indeed, and it really was not a suitable day for travelling. The people of the house said it was not fit for us to attempt the journey, and tried to keep us till the storm should go down. (Q) Was it regarded as a dangerous enterprise?—(A) It was thought very imprudent. (Q) Did your husband yield to the request that you should stay?—(A) No, he insisted on going. (Q) Did he give any reason?—(A) That his mother expected him back by a certain day. It was very strongly urged by the people there that it was a very imprudent thing for us to go. Sir John sent his carriage with us as far as Dundonald, where the Vaughan Lee family lived. We only stopped there for about an hour. It was a fearful storm then. They were much surprised that we should arrive on such a day, and Mrs Vaughan Lee thought it most risky for us to go on. They offered to put us up, but my husband would not agree to stop there, for the same reason that he had given before—that his mother was expecting him. From Dundonald we proceeded in a hired dogcart with one horse. The weather was most frightful. It got worse and worse. I was very wet and cold and numb. We went in that dogcart to Gruinard. We found that the road over the burn close to the house had been washed away. We had great difficulty in getting across. We had to go over by means of boards put across. The stream was swollen and pretty deep. We had no intention of staying the night at Gruinard, but we could not go on because the river Gruinard was so swollen that it was impossible to get across. We stayed that night at Mr Murray's. Next day the storm had abated considerably. There was a difficulty in inducing the ferryman to cross the river. Mr Murray told me he said it was unsafe to cross. The Murrays endeavoured to get us to stop another day, but my husband said he must go on if he could get over the river, repeating the same reason—that his mother was expecting him. We got across. I was very much frightened. After we were across there was only a cart track—an old road which had fallen into disuse. The only vehicle we had was a crofter's cart. I think it was just a manure cart. My husband proposed to put the luggage in and I could sit on the top. I did try it, but I could not stand it, and had to get out and walk. The road we had to walk over was very very rough, and I found great difficulty in battling against the wind and sleet. This was not the kind of thing that I was accustomed to or equal to. I felt the cold greatly. The road was so rough that some of the luggage was jolted out several times. We at last found shelter in a bothy by the roadside, where I changed some of my things, as I was very wet. On account of the hardship and ex-

posure on this occasion I suffered very much from rheumatism for some time afterwards. We drove home to Inverewe, where we found Lady Mackenzie." Mr Murray, the proprietor of Gruinard, deponed—"It was fearfully bad weather. There was a storm of wind and rain—in fact it was a terrific storm on the day Mr and Mrs Mackenzie arrived at Gruinard. When I was looking out I saw a dogcart coming in the direction of Gruinard. It seemed strange to me that a dogcart and anybody in it should be out on such a day, and I took my stalking-glass and I saw it was the pursuer and a lady with him. Part of the road near Gruinard had been washed away by the burn that morning a few hours before their arrival. I went out to meet them, and helped Mrs Mackenzie over the burn. I accommodated them for the night. The weather was such that it was impossible for them to proceed that day. It was most certainly not a suitable day for a lady such as Mrs Mackenzie being out at all. (Q) Did anything strike you at that time about Mr Mackenzie bringing his wife out on such a day? No, I cannot say it did; I thought it was a most extraordinary day for any person being out. During the course of the evening Mr Mackenzie seemed to me to utterly ignore his wife. He never spoke to her. He did not indicate any anxiety to know how she had been affected by exposure to the storm. His demeanour to his wife was the subject of conversation amongst my friends in the smoking-room that evening after he had retired. The weather next morning was still very bad. I did not think it a suitable day for a lady proceeding on the journey they would have to undertake. I said so to Mr Mackenzie, but so far as I remember he said he had made arrangements to go on, and go on he would. I said I would be very happy to put them up for longer. I also said that if they waited till the weather moderated I would send them over the bay in a boat, which would save them going round by the road. . . . The way by which they would have to go if they went by land was not a road at all; it was a hill track with water-courses in some parts, and desperately bad. . . . It was a track unsuitable for wheeled traffic at all. . . . They had to cross the river, which was in tremendous flood. It appeared to me and others that the crossing would be attended with danger. . . . It was a day on which I would not have allowed any of my people to cross. . . . I had asked Mr Mackenzie how he proposed to do the remainder of his journey, and he said there was a cart on the other side of the river. It was a common farm cart. I suppose his wife was to go on the cart along with the luggage. That was very far from being a comfortable mode of transit. It was most certainly not suitable for a lady. It did not appear to me that Mr Mackenzie's conduct on those two days displayed any ordinary regard for the health or safety of his wife."

From the end of October till early in December 1877 the pursuer and defender remained at Inverewe, the Dowager residing

with them. As to this period the pursuer deponed—"After our return home I observed that my wife got dull and took very little interest in country things. That change began as soon as her people had gone. It was rather more noticeable after we had paid a number of visits—in the end of October or beginning of November. I was very much engaged and interested in country pursuits. She took very little interest in my pursuits or the mode in which I spent my life. When I came home after I had been out on my day's duties I was struck with the way in which she received me. She did not give me the welcome I should have expected from a young wife. She was taking charge of the house and managing it. That state of dulness and lack of interest got gradually worse. I was not aware of anything that had taken place between us at any time which accounted for it. I was very anxious indeed to do anything I could to please her. I was very much attached to her and loved her. I did my very best to make her comfortable. It was much more after the round of visits I have referred to that I noticed that dulness coming on. Her health was quite good so far as I could see." The defender deponed—"Ultimately after a round of visits we came to Inverewe and found Lady Mackenzie still there. On this occasion she did not take any notice of me while she was in the house. I did not see much of her. She was out for a great part of the day. When she was in the house she was chiefly in her bedroom or in the study with Mr Mackenzie. I saw very little of her in the drawing-room. Neither of them gave me much of their society; I was left very much alone. She appeared to me to go a great deal to the kitchen—a great deal more than ladies usually do. She went a great deal at night. I had occasion to be sometimes in a serving-room near the kitchen, where I used to arrange flowers, and one door and window of which opened into a passage close to the kitchen. While I have been there I have often heard the Dowager talking in the kitchen. This was during the daytime, probably the morning. She had a pretty audible voice. These conversations often lasted a long time. They were conducted in Gaelic. I used to hear my name mentioned. *By the Court*—It was not pronounced as we pronounce it, but in Gaelic, Mrs Mackunach. *Examination continued*

They often laughed a good deal after my name was mentioned. All these, combined with other things, made me most unhappy and miserable." On this subject of her speaking with the servants the Dowager deponed—"I never at any time interfered between her (Mrs Mackenzie) and her servants. I never went into the kitchen and spoke to the servants there in Gaelic about Mrs Mackenzie. I went to the kitchen every evening for about five minutes to feed my dog. That had been my practice for eleven years, and it will be till I die. I had never any object in going to the kitchen except to continue my practice of feeding my dog. On these occasions I did not

speak to the servants in Gaelic about Mrs Mackenzie. I avoided that. I might say a civil word or two to the old housekeeper when she was there. *Cross*—I was not in the habit of going to the kitchen more than I have mentioned. I never sat in the kitchen for an hour or more. I talked to the cook in Gaelic. I never when talking to a servant, or in the kitchen, mentioned my daughter-in-law's name. I may have said 'Mrs Mackenzie' but never beyond. My conversations with the servants were of a somewhat easy nature, because I had very old and good servants. I do not say that we did not have a good laugh sometimes. I think I can swear that my daughter-in-law's name was never mentioned on any occasion in the kitchen when there was laughter going." Jane Macgregor, the parlour-maid, in her evidence corroborated—"Lady Mackenzie was in the habit of going to see her dog fed in the kitchen at night. That had been her practice all along. (Q) Did you at any time see or hear of Lady Mackenzie going to the kitchen and talking to the servants about Mrs Mackenzie?—(A) No, I never heard of such a thing. *Cross*—(Q) Did not Lady Mackenzie go down into the kitchen in the evening and talk in Gaelic for a longer or shorter time to the servants?—(A) I should think her ladyship would talk to the cook in Gaelic. I don't think she talked to any of the others." Besides Jane Macgregor two other servants, Margaret Packman and Jessie Macpherson, in service at Inverewe in 1877, were examined. All three gave evidence that the pursuer treated the defender with kindness, and that the defender treated the pursuer with coldness, and took no interest in the affairs of her house. They also deponed that the defender was treated as mistress of the house, and that the Dowager while at Inverewe never interfered with the domestic arrangements.

Early in December 1877 the pursuer and defender went to Otterspool, and remained there and at Sir Thomas Moss' residence in London till July 1878. The defender deponed that during this time the pursuer complained about trifles and her extravagance, reminding her that she had brought him very little money, while the pursuer deponed that his wife treated him coldly, and showed no sympathy when he lost a case in the House of Lords, and had to pay £1000 as expenses.

The pursuer and defender returned to Inverewe in July 1878. The Dowager, who had been taking care of Inverewe during their absence, moved into Tournai in June. About 12th August Sir Thomas Moss, who had taken the shootings at Inverewe, arrived with his family. They stayed at Inverewe till September, when they returned to Otterspool. In October the pursuer and defender, who was then expecting her confinement, went to Otterspool to stay with Sir Thomas Moss during the winter. The Dowager again went over from Tournai to Inverewe to take care of the latter house during the absence of her son and daughter-in-law.

On 31st January 1879 the pursuer went north on business connected with his farming. He left the following letter at Otterspool for his wife—"Dearest Minna,—I had thought of saying a few words to you before leaving, but finding on former occasions that too much was apt to be said on both sides, I thought, under your present circumstances, I would rather put these words on paper. Need I tell you that I am very unhappy, and how can I be otherwise? It is six weeks since I came back here from Scotland, and I think you have only addressed me half-a-dozen times during those six weeks, and then only to ask some trifling question, such as whether the venetian blinds had been forwarded, or to inquire how your fowls could be sent to Waterford. When I come into the drawing-room you never ask where I have been, or what I have been doing, and hardly raise your eyes off your book or your work, and I don't think the word 'dear' has passed your lips in speaking to me for a year. When you come down to breakfast, though you see me then for the first time, you never give me a nod or sign of recognition. I was away in Lincolnshire for nearly a week; on the morning after my return you never (though awake) asked how I had got on at Doddington, or how I found my nurse at Scarborough. You never gave me a kiss, or even touched me with the tip of your finger; you only asked whether I had got a gardener for your mother. You know it was the same all the summer or autumn. You did not and do not take half as much notice of me as you would of any stranger who came as a visitor; in fact, if you were to behave to any guest as you behaved to me, he would not stay twenty-four hours in the house. Though I try my very best not to show in public what I feel, I can assure you that except when much interested by conversation or reading, I never get rid of my unhappy thoughts. I am almost afraid to walk alone, so miserable do I feel. I sometimes wake up so happy for a moment, and then at once comes a feeling of misery which I cannot describe. But I can truly say, though I pity myself, I pity you, dearest Min, a great deal more, because by your conduct you are doing all you can to make your future life unbearable. Even under the present wretched state of things, I might at home rub on, because I should have my outdoor occupations, and be in my own country and among people I know; but with you, dearest, it would be quite otherwise—away from your own people, what is there up there to make you happy, without it be your husband's love to you and your love for him; no amount of money or luxury can compensate for the want of love. I do not know what better means you could use to divest yourself of that love which I gave you at our marriage than the course you are now pursuing. For your own sake, for my sake, for the sake of the one unborn, do pray to God that He may give you a more tender and loving heart, and if you will but be a loving wife to me, you may rest assured that I will forget and forgive all that is past, and as for warmth

of heart and real strong affection, I am sure you ever have seen enough of me to know that a very little kindness on your part would bring it at once to the surface. Do not, my dear Min, trouble to answer this except in half-a-dozen warm and affective words, with perhaps a tear-drop on the paper, to show that the words come from the heart. That God may bless you is the daily prayer of your affective husband, OSGOOD H. MACKENZIE."

On 3rd February 1879 the defender replied in the following terms—"Dearest Osgood,—I was not a little surprised at finding a letter from you (soon after you left here) on my table, and as it was one to which I did not think it advisable to answer in a hurry, and being so far from well at the time, I have not attempted a reply till now. From the tone of your letter, I gather that you do not quite realise the fact that affection, or the display of affection, which in me would be synonymous, and respect, can only be gained and cannot be forced; if they could they would be scarcely worth having. What have you done to gain or retain the affection of your wife since we married? That you have been greatly tried I most fully allow; but it is only under those circumstances that one is able to judge of what a man is made, and to respect him or not accordingly. Though our form of religion is widely different, we have the same Bible. Can you honestly say that you have 'left father and mother and cleaved to your wife.' Do you trust and confide in yr. wife as you do in your mother? Are her wishes looked upon almost as a command by you, as are those of your mother? You have, to please your mother, built her a house at our expense, and have very rightly consulted her whims and fancies on the subject, and spared yourself no trouble to add to her comfort, irrespective of very great expense which I should be loath to put you to, as times are I believe bad; have you taken the smallest trouble, or done anything, but at most given a most unwilling consent to any alteration which might have added to the comfort of your wife's home? I think I am not wrong when I say that for every pleasure or comfort, beyond the barest necessities of one's existence, I have enjoyed since I married I am entirely indebted to the generosity and thoughtfulness of my own family; for what I call necessities in the house, for a pony carriage, for newspapers and something to read, for the very clothes I wear, I am obliged to thank others. Even when too ill to do it myself, you never troubled to see after my pony, and until remonstrated with persisted that I must either clean the pony and carriage myself, or pay a boy myself to do it for me, nor did you give yourself any trouble to see that proper food was given to it. I know you have lived all your life with one whose tastes, occupations, and interests were similar to your own. Now you must attempt to realise that you have to spend your life with one whose tastes, occupations, and interests are diametrically opposite to your own, and though so long as

you can afford it, I sd. be the last to wish in any way to interfere with you and your amusements, I do expect of you to look as leniently on mine, and not to think that because so far you have not seen the necessity for it, that anything I suggest is an extravagance and foolish. Now, to give you an instance, I have hinted and even spoken seriously to you about my dislike to dogs, more especially small ones, and still you persisted in having three in the drawing-room, until having been flown at I positively refuse to sit in the same room with one, and even then no steps were taken to keep it entirely out of the house. Now, what would you think of my brothers or Kenneth if they persisted in smoking their pipes in the drawing-room and all over the house before your mother, regardless I believe of her dislike to tobacco? I think it would be ungentlemanly in the extreme. Now, with her it would be only a dislike, with me it is besides dislike a peculiar nervousness with regard to small dogs which I have always had more or less, and since what happened at Inverewe I much question ever being able to get over. Still I should be sorry to stand in the way of your having one in the house if you wished it; but I hope for my sake that you will choose one which does not bite, and that you will have it kept properly washed and cleaned; if too, as last year, six dogs and several puppies are allowed the run of the kitchen and back premises, I shall have to give up the housekeeping to the cook, and confine myself to merely seeing her in the dining-room for a few moments, just to order dinner. I do think that with your palatial kennels that you might continue to keep your dogs down there. What would you think if I wished to appropriate part of your kennels to my poultry? I am sorry if I offended you by not taking sufficient interest in your old nurse, but, with my English ideas, the fact of a man of your age going off to spend the evening and night with your old nurse struck me as so utterly ludicrous, that I purposely avoided mentioning her. If I had done so in private it would have been humbug on my part, and if before anybody else it would only have caused a smile, knowing that I was quizzing you. As to not taking an interest in what concerns you, there are two sides to every question. I should like to know what interest you take in me. I do not remember your ever having asked whether I found that my maid suited me, or whether when I have been ill, she was attentive and nice, nor have you ever interested yourself sufficiently to inquire whether for the coming event I had been able to engage a good doctor that I like or a good nurse. To have fixed upon this month to go so far away by English people is thought queer, to say the least of it, and though I would not for one moment think of saying a single word that would interfere with your plans, especially as so far as I am concerned personally it would matter little whether you happened to be in the house or not at the time, still I should have

imagined for your own sake, setting aside any feeling of affection or regard for propriety's sake, you would not have liked to run the smallest risk of being absent. Now, I don't attempt, nor do I wish, to try and make myself out perfect, and you entirely in the wrong, but I do think that I have had much to try me, and I quite confess that my affection for you has not been sufficient to stand the trial—in short, I have been disappointed in you. If you behave to me as a man should to his wife, you will do much towards regaining my affection, and might possibly arrive some day at hearing yourself called 'dear' by me, but if you and your mother continue one, and expect me to join you as a sort of inactive partner and form a trio, you will find yourself very much in the wrong. Now, it would be my advice to you, if your mother's health is sufficiently restored to bear it, to speak with her seriously on this point, or if you have not the courage to do that, leave a letter for her when you come south, and make her clearly to understand that, of course, wishing her every happiness in her new house, she must, at the same time, remember that you had ties at Inverewe which must not be ignored for her sake, and that she must endeavour to interest herself in Tournaig, and try and forget Inverewe altogether; that any interference, either directly, or indirectly, with me and what concerns me will only be highly disapproved of by you. In whatever you wish me to take any interest whatever, let me advise you to make such arrangements that your mother and I do not come in contact and clash, as you must be fully aware there is no love lost between us, but I don't think I am asking too much when I say that I hope you will make it clear to her that I expect to be treated by her as one lady expects to be treated by another, and that any attempt at 'ignoring me altogether,' and instead of calling upon me, going round to the kitchen, &c., will only end in, as far as I am concerned, all communication ceasing between Inverewe and Tournaig. If you don't support your wife as a man should, your mother will have to answer for still further misery than what she has already caused, and I, for my part, would not hesitate to make her fully aware of that fact. I was glad to learn from your telegram that you had arrived safely, and that you found your sheep pretty well. We have had a fall of snow which has ended in a thaw.—Yr. affect. wife, MINNA AMY MACKENZIE." In her evidence the defender admitted that this reply was very injudicious.

On 26th July 1879 the pursuer returned to Otterspool. On 1st March the baby was born. Mr Mackenzie advertised for a Gaelic-speaking nurse in the *Inverness Courier*, and engaged a Mrs Bain, who entered his service on 26th March. At the end of March the pursuer again went north to Inverewe. The defender made a slow recovery, and by the doctor's advice went to Buxton for a fortnight with her mother. About the end of June the pursuer rejoined

his wife at Buxton. They returned home to Inverewe by short stages, the Dowager going over to Tournaig before they arrived.

In his evidence the pursuer deponed that while in the north between March and June he had written to his wife every post, but that he got no reply until near the end of that period. The defender in her evidence complained that the pursuer had made a great row about the amount of the bill for the baby's clothes, and had treated her very rudely on his arrival at Buxton. The only third person's evidence bearing on this period was that of Travers, the butler, at Otterspool, who deponed that in his opinion the pursuer treated his wife in a "very cool and contemptible manner" during the winter of 1878-79.

On their way home to Inverewe the party consisting of the pursuer and defender, the baby, Mrs Bain the nurse, and Anne Harris, the defender's maid, crossed Loch Maree to Inveran (5½ miles) in a boat. The morning of the day in question was fine, but rain came on early in the forenoon and continued all day. On arriving at Inveran the defender fainted and was carried into the house. There the pursuer and defender remained overnight, and next morning drove to Inverewe. As to the conduct of the spouses on that occasion, Anne Harris, the lady's-maid, in a letter dated 15th July 1879, shortly after the occurrence, wrote—"I daresay that you have heard that Mrs M. was taken very poorly when we got to Inveran, at Mr Dixon's; we came up Loch Maree, and it rained the whole of the time. He never asked her once how she was, or if she was wet after all her illness. She was shaking from head to foot. I wrapped her up well too before we started; it played so on her mind as well that he was so cool. She was all right until she got out of the boat. Mr Dixon was so kind, she was carried up to the house part of the way. However, when she was a little better she fell asleep for two hours; when she awoke she had a good dinner and went to bed. I slept with her that night. She slept well all night. She was as bright as a lark in the morning; she did not have the slightest cold. I gave her such a lot of hot brandy and water I think it did her good, however, she has been ever since, she gets about well." In her evidence, taken by commission at New York in May 1892, Anne Harris deponed—" (Q) Do you remember the defender becoming unwell in the boat and spending the night at Inveran? —(A) I do. She did faint, but we thought it was put on. She was carried out of the boat, and we slept at Mr Dixon's all night. We includes Mr and Mrs Mackenzie, Mrs Bain, the nurse, baby and I, who stayed at Mr Dixon's. We, who thought it put on, includes Mrs Bain and myself alone. . . . The thirteenth cross-interrogatory being put to the witness, namely—Did the pursuer, after she was taken ill, show any sympathy for her? Is it correct to say that he never asked her once how she was, or if she was wet after her illness—if not, how do you explain the passage to that effect in

the aforesaid letter of 3rd July? She depones—When she was carried out of the boat he did not know what to do he was so anxious. He showed sympathy for her. . . . Being shown the passage in said letter of 3rd July referred to, she depones—‘It might have been true at the time.’ I cannot explain it otherwise than that I was very angry with him (meaning the pursuer) at the time.” Mrs Bain deponed—“When we got to Loch Maree hotel we proceeded to cross the loch by boat. I did not see anything to indicate that Mrs Mackenzie had any objection to going by boat. It was a very fine bright morning when we started. . . . After we had gone a little way it began to rain. (Q) In going along in the boat did Mr Mackenzie seem to be taking care of his wife, and attending to her?—(A) He was asking her if she was keeping tolerably dry when the rain came on. I had the baby the whole way. Mrs Mackenzie had plenty of rugs and umbrellas. It was not a cold day. . . . In going along in the boat I did not hear Mrs Mackenzie make any complaint about being unwell. I was the last that came out of the boat. I did not hear till we arrived at Inveran House that she was feeling ill. The baby and I were not at all the worse of the sail. We all remained over night at Mr Dixon’s. Mr Mackenzie appeared to be very anxious about his wife after we got to Mr Dixon’s. She was in a bedroom. As I was coming down for a bath for the baby I saw Mr Mackenzie go to the door of the room on his tiptoes. I think she was asleep, and he was going to the door so as not to disturb her. On the following day we went to Inverewe.” Mr Dixon, the tenant of Inveran, deponed—“She (the defender) was taken into my house, and remained in that condition till half-past six. She was then better and went to bed. Prior to that she was in a sitting-room downstairs. My sister was not there at that time. The pursuer dined with me, and they both stayed the night in my house. In the course of the afternoon I was surprised to see that the pursuer never went near his wife, either while she was in the swoon or afterwards. During the three and a half hours before she went to bed he never, so far as I remember, went near her. I was struck with that at the time. I think he made some inquiries about her from the servants who were attending; I certainly did, and I have no doubt he joined in them. I thought that if he had been an affectionate husband he would probably have been taking a closer interest in her. My housekeeper attended to her. The pursuer and his wife left next morning.” Joanna Mackenzie, housekeeper to Mr Dixon, deponed—“I remember one day Mrs Mackenzie coming to the house with her baby and nurse and staying all night. When I first saw her that day she was lying on the dining-room sofa. She was just in a fainting state. I have seen people in a faint many a time. (Q) She was in a faint when you saw her?—(A) Yes. Her maid Harris was with her. I saw Mr Mackenzie there.

He seemed to be feeling concerned about his wife. He was standing beside her and kissing her, but I don’t think she was aware of that. He seemed very much concerned about her.”

After the spouses had arrived at Inverewe the pursuer made arrangements for the baptism of the baby. It was christened Mary Thyra at the Free Church of Poolewe by the minister Mr Dingwall. The defender had wished it to be baptised at Inverness by an Episcopalian clergyman, and she refused to attend the christening. She deponed that she had conscientious scruples against doing so. Mrs Bain, the nurse, deponed—“I knew shortly after we went to Inverewe that the baby was going to be baptised. On the Saturday before the christening Mrs Mackenzie told me that she was not going to be present at the baptism. She did not give any reason for not going. She and I were on quite friendly terms. I begged her to go, but she did not go. I carried the baby to the church. After I came back I said I was very sorry that she did not go. I said that the minister prayed so earnestly for her, and she said he might save himself the trouble, she could do it for herself. (Q) Did she say anything before you went as to the baby being quiet or the reverse?—(A) She hoped it would cry all the time. There was a nice nursery fitted up in the house for the baby and me. We remained at Inverewe for about a month—until the Duke of St Albans party came to the shooting. During that time I saw a good deal of Mrs Mackenzie. She was always quite pleasant to me. (Q) Was she pleasant to all the people in the house except one?—(A) I think so. (Q) Did it appear to you that her manner to her husband was different from her manner to all the other people in the house?—(A) Yes, it did. He was in the habit of going out a good deal on his daily duties. She did not seem to take any interest in his movements that I saw. I have several times seen him come in and tell her what he was going to do. Sometimes she would reply, and sometimes she would not. He came to the nursery occasionally to see the baby. Mrs Mackenzie was a good deal in the nursery. When he came in she mostly walked out. I have frequently heard him asking her after he had been out how she was and how she was keeping.”

As to this period Mrs Lisette Kindermann, a cousin of the pursuer, deponed—“My husband and I paid a visit to Inverewe in the summer of 1879. I don’t think Mr and Mrs Mackenzie had been long there before we went to stay with them. Our visit extended to two or three days. Mrs Mackenzie received us very kindly, and appeared to make us quite welcome. She was kind and attentive to us during our visit. I noticed that she did not speak to her husband. When he addressed her she did not answer him. I thought his manner to her was very kind. I have seen him doing little acts of kindness to her. There was nothing about his manner or demeanour to her which would

justify unkindness or want of attention." Mr Cottingham Moss deponed—"I went to Inverewe on 23rd July, and stayed there till 5th August. On that occasion I thought pursuer and my sister were not getting on well together. I thought he treated her very badly, and seemed to disregard all she wished. I spoke to him three times about it." Sir Kenneth Mackenzie deponed—"After the pursuer and his wife came back to Inverewe in 1879, my wife and I called several times and saw them together. That was in the month of July. My wife and I were very much struck by his roughness and rudeness and bearishness to his wife, especially after entering into the room. I think I was there only twice, and that struck me on both occasions. It was the subject of conversation between my wife and myself as we drove away from the house."

The shooting at Inverewe for the autumn of 1879 was let to the Duke of St Albans, and the house was let with it. The pursuer and defender therefore went over to Tournai in the beginning of August, the Dowager, a few days before their arrival there, going to England to pay a number of visits. When the Duke and his party left Inverewe in October, the pursuer and defender returned there, and the Dowager, after her visits were over, came back to Tournai. After their return to Inverewe, the relations of the spouses, which had improved somewhat at Tournai, grew much worse. They hardly had any verbal conversation together. On 18th November 1879 the pursuer wrote the following letter to his wife, then residing in the same house as himself:—"My dear Minna—As you positively refused to give the orders I asked you to give (about the servants moving into the main house and leaving the outside buildings for the winter), I have just been speaking to Christie about my orders being carried out on Thursday when Macgregor, the carpenter, leaves. As I require now to be out as soon as possible after daylight, I am going for the future to read prayers at 8 o'clock, and our breakfast to be immediately afterwards, and the servants to breakfast at half-past seven. There are several things which you do to which I very strongly object, and I think it best to mention them now. First, breakfasting in bed when not actually ill, instead of being up and looking after your household; secondly, shaking out your napkin and looking about you when I say grace at dinner; thirdly, kneeling on the seat of your chair at prayers; fourthly, coming into prayers in the morning and sitting in the drawing-room in your dressing-gown." On the subject of this letter the defender deponed—"With reference to the faults enumerated in that letter, I did not breakfast in bed except when I was ill. The hour of prayers was a little early—eight o'clock. As to the shaking out my napkin and looking about me when he said grace at dinner, I was not aware I had done it. With regard to kneeling on the seat of my chair at prayers, I was not at all strong, and kneeling on the floor

often made me very faint in the morning. It is very common for ladies to kneel on the seat of their chair. With regard to coming into prayers in the morning and sitting in the drawing-room in my dressing-gown, what is called a dressing-gown there is a tea gown. I don't think I ever put on my tea gown in the morning unless I was ill. As I suffered from rheumatism owing to the damp at Tournai I sometimes sat in my tea gown, which was padded and warm."

From about this time the spouses ceased to occupy the same bedroom. As to the cause of this the pursuer deponed—"Up to the autumn of 1879 we had been in the habit of occupying the same bedroom, but at that time I began to sleep in my dressing-room. The nurse told me one morning that my wife had had a very bad night, and that my moving about in bed disturbed her, and she would like it better if I removed. I spoke to her, and she said she would rather I did so, and I had a bed made up in the dressing-room. That was my sole reason. I was very much surprised at her wish, because I had been rather useful to her a night or two before when she was ill." The defender deponed—"He (the pursuer) spoke to me one evening about having a separate bed made up for himself. I don't know what excuse he gave. I said I was very nervous and ill at night. I did not think anything was decided one way or another, and I expected him that night as usual, but he did not come. He did not give any reason for proposing that. When I said I felt nervous at night I gave that as a reason for his staying. I don't think he said anything. I never heard anything more about the matter, except that he went to his dressing-room. He has never occupied the same bedroom with me since." Jessie Macpherson, the parlour-maid, deponed—"I remember Mr Mackenzie instructing me to make up a bed in his dressing-room. The reason he gave was that Mrs Mackenzie was unwell. It was a spring bed they slept in, and if Mr Mackenzie moved it wakened her, and for her comfort he wished to have a separate bed. I prepared the bed in the dressing-room, which just opened off the bedroom." Mrs Bain, the nurse, deponed—"I remember one morning I was going out with the baby, and on the landing Mr Mackenzie met me and asked how Mrs Mackenzie was. I said she had not had a good night, and that she said he disturbed her in going to bed. 'Oh!' he said, 'I think I should make up the dressing-room bed, and not be disturbing her.' The dressing-room bed was made up in consequence. He said that the door could be open between, and he could hear if she wanted anything. I told Mrs Mackenzie that I had told her husband that he disturbed her, and she laughed."

About the close of the autumn of 1879 the defender, who was in a very weak state of health, desired to go to Otterspool to spend the winter with her father and family, and she wished the child to accompany her. The pursuer

was quite willing that his wife should go south, but he refused to let the baby go with her. To Sir Thomas Moss, who wrote urging him to grant the defender's request to let her take the child with her, the pursuer replied in December 1879—"I would accompany Minna to Otterspool, and then return and take care of baby. Nothing will induce me to take the child south in midwinter. I know how little a thing upsets a child—even the change of milk from one cow to another. How much more, then, is there risk of its catching cold and getting upset in a double journey of about 1000 miles, and the change from the purest of air at the seaside to the smoky atmosphere of a large city. Then there is always the risk of whooping-cough, which, as the child is teething, would be most dangerous, if not fatal." And on 5th January 1880—"The season of the year, the long journey and teething, and not having been weaned, are the reasons I give to the world for not letting the child go south at present. But though I consider these quite sufficient reasons in themselves, I have other reasons for not letting baby go, and of which I think it right to let you and Lady Moss know. As long as Minna continues to act towards me unlike a wife (I may say unlike a Christian), I cannot, and will not, trust the child with her and away from myself. A wife who cannot behave properly to her husband is not fit to be trusted by him with his child, and unless Minna turns over an entirely new leaf, expresses sorrow for the past, and promises amendment for the future, the child must remain here." He deponed—"The reason I gave for not allowing the child to go to Otterspool was that I did not wish it to be taken away from its nursery and pure air to a smoky town. I had another reason—that I had been recommended by several friends to try and get my wife to have a liking for her home." On the same subject Mrs Bain, the nurse, deponed—"I asked Mr Mackenzie that he should let the baby go, and he said he did not think to do so; that his reason was that he wished Mrs Mackenzie to have something at home to attract her to come back willingly." Lady Mackenzie of Gairloch deponed—"I came to know that a question had arisen whether Mrs Mackenzie should go south with or without her baby. I first learned that such a question had arisen two or three weeks before the 3rd of December. It came to my knowledge first in letters from the pursuer himself. Those letters were marked private, and were therefore burned. The tenor of them was that pursuer said his wife did not show sufficient deference and obedience to him, and that he must punish her to bring her to a proper frame of mind. She was not willing to go south without taking the child with her, and he was urging her to go alone, and he said that if she would not agree to go alone, he would not . . . take her from her home during either that or the following year. There was no sign of affection for his wife in those letters. I thought, on the contrary, that his trying to send her away showed how little he

wished to keep her with him. From those letters I certainly formed the opinion that he wished to get her away, and to go back and leave the child with the Dowager Lady Mackenzie. . . . The correspondence which took place about that time was opened by the pursuer. He spoke about his wife's illness, and he implied that she had brought it upon herself by taking drugs and alcohol in order to make herself ill, and that she did not take enough exercise. The letters were also full of her want of obedience. That was a constant complaint. I never observed any disobedience on her part. In the beginning of December I remember urging him to allow the child to go south with its mother. He would not, and indeed he said that whether she went south or not, he was determined to send the child to his mother at Tournaig, for he did not see why she should not have some of the pleasure of it. He said that to me quite distinctly. I urged him again to agree to his wife's request, that if she went the child should go too. His feelings towards his wife at this time appeared to me to be feelings of intense dislike. He did not seem at all anxious about her." In his evidence Sir Kenneth Mackenzie deponed that he and his wife received letters from the pursuer complaining of his wife's disobedience and want of deference.

Towards the close of the year 1879 the defender's illness grew worse. The pursuer appears to have believed that it was caused in great part by unwholesome dietary and the use of drugs. On 5th January 1880 he wrote Sir Thomas Moss—"Minna asked me yesterday to get further advice, and I telegraphed for Dr Bruce, who is thought to be the best doctor in this county, and he is to arrive to-morrow night. I myself have far more faith in Dr Robertson than in Bruce, but I don't think either can do her much good. If she would try and take milk and rice, cream and porridge, or any simple nourishing food of this sort, and, above all, try and cultivate a thankful and contented spirit instead of making herself and everyone around her miserable by the frame of mind in which she is at present, it would do her more real good than all the doctors, and all the wine, brandy, opium, tea, and so-called tonics which she takes at present." After Dr Bruce's visit on 6th January the pursuer sent the following telegram to Lady Moss—"Doctor says nothing serious matter with Minna, only effects of low spirits; forbids wine, brandy, opiates, tea; recommends change, but certainly not for baby." And he wrote her as follows—"The doctor arrived, and has been a long time with Minna. He tells me he does not think there is anything serious the matter with her, only that she is nervous, and down from want of society and want of taking interest in anything. He is, I am glad to say, to put a stop to what I have felt all along has been the ruin of her health, viz., laudanum, opium, wine, brandy, clear beef-tea with nothing in it, and if possible, tea also is to be stopped. How often have I longed to smash the bottles that contained all these horrors, but I did

not like to take the law in my own hands, and as to giving advice, I might as well throw it to the winds. He recommends (like the rest) a change for her, and that immediately; but neither he nor Dr Robertson expect good to arrive from going from a pure air to an impure one. What they expect to do her good is the society of her relations, and if they will not come up to her here, they must try and persuade her to let me take her south to them. Dr Bruce agrees with me that it would be the greatest folly to take the child south." The only evidence as to defender's using drugs was the evidence of Mrs Bain, who deponed that she saw a bottle with laudanum in the defender's bedroom, the evidence of Isabella M'Lean, the housemaid, who deponed to having seen a bottle labelled "Opium," with a dark-brown liquid in it, on the washbasin-stand in her mistress's room at Inverewe, and the evidence of John Mathieson, game-keeper at Inverewe, who deponed that at the request of Anne Harris, the defender's maid, he had drawn a glass-stopper from a bottle labelled "Opium" or "Opiate," with a brown liquid in it. The defender admitted in her examination that she took some opium pills and morphia which Dr Robertson, the local doctor, had ordered. She also admitted taking Tamar Indien lozenges. Dr Bruce was examined for the defence, and deponed—"He (the pursuer) spoke about his wife wanting to go away to her father's with the child. He was very much against taking the child from home, and I was at one with him about that. He went on to say that the change of diet, and so on, would be against it, and I quite agreed with him. He said quite distinctly that his wife did not take an interest in the child. He said that in the course of the conversation as to whether the child should go with her. He made various petty complaints about his wife. Even supposing they had been true, they were not at all serious. (Q) Did you pay much attention to them?—(A) Well, certain things stuck in my mind. I certainly did not think that he had any particularly bad feelings towards his wife—that it was just a question of some little domestic jar that would get right if they went away. I have seen the telegram by pursuer of 6th January 1880. I am bound to say that that is very seriously different from what I said. I did not forbid wine, and I allowed Mrs Mackenzie to have brandy by the written dietary which I laid down. I prescribed tea. With regard to opiates, I should like to explain that I think opiates are not a good cure for diarrhoea, and I am not in the way of prescribing them; but I think opiates are occasionally necessary in diarrhoea. I thought in this case it was more a matter of digestion, and so on, and I was against opiates, but not entirely against opiates. The telegram therefore is incorrect as regards brandy, opiates, and tea. I cannot say whether wine was mentioned. In anything I said about the baby, what pursuer had stated as to his wife not caring for the baby was undoubtedly an

element in my mind; but it is an ordinary rule amongst many doctors that as long as a baby is thriving on milk, and so on, it should not be disturbed. If I had known that the defender was eagerly attached to the baby, and greatly felt separation from it, that certainly would have altered my opinion, and I would not have forbidden the child to go; in fact, I wrote to Lady Moss afterwards saying that the child might go. If I had known that the separation was preying on the mind of the defender, and would be acutely felt by her, I would clearly have advised that the child should go with the mother. It was a healthy thriving child. Travelling with every comfort, there would have been no particular risk to the child. (Q) Speaking generally, what do you say as to the propriety of a child of that age being with its mother?—(A) Of course I should say that if the mother insisted on having it, it should go with the mother, though probably I would also say at the same time that I thought it better at home. All things considered, I am afraid I would have said 'go.' (Q) Look at pursuer's letter to Lady Moss. Did you know whether Mrs Mackenzie was taking an interest in things or not?—(A) She only answered my questions, and made no statement of any kind. I do not know whether she was taking an interest in things or not. The catalogue of things mentioned in that letter as forbidden by me is a very unfair version. With reference to the expression, Dr Bruce agrees 'with me that it would be the greatest folly to take the child south,' anything I said was upon the representation that Mrs Mackenzie did not care for the child. (Q) Did you say anything about its being the greatest folly to take the child south?—(A) I would have gone this length, that my advice in this case would have been not to take the child away, but I did not say anything about folly. *Cross*— . . . I directed that opiates were not to be given as matter of course, but only when urgently needed. . . . I did not prescribe Tamar Indiens. I learned from somebody that she was taking them. I substituted another purgative. . . . Mr Mackenzie had told me that he and his wife were not getting on. I told pursuer that I thought the child would be better at home—I meant in its own nursery at Inverewe. I was speaking in a general way as against taking it from its own immediate surroundings. For instance, a point on which the thing turned was milk. The milk at Inverewe agreed with the child, and everybody knows that the milk you may get at other places is different from the milk you may get at home, and that is a very serious question. I have no doubt the pursuer referred to that matter. I did not know that Mrs Mackenzie wished to have the child at all until I heard from Lady Moss. I wrote to Lady Moss on 12th January in the following terms—"I understand you wish to have some particulars as to the state of health of your daughter Mrs Osgood Mackenzie of Inverewe, and my opinion as to her

treatment. Mrs Mackenzie is in a very weak condition, and I believe that the first and essential requisite is change of air. The change ought to be as thorough as possible, and I recommend her going to Nairn, and by and by to the Continent. Then her digestion is bad. For this I prescribed suitable medicines and a regular dietary. She suffers too a great deal from irregular diarrhœa, dependent upon dyspepsia and nervous derangement. Quite rightly, amongst other things, opium has been prescribed. I do not approve of going on with the opium, unless in an emergency, as it seemed to have little effect, and there was a danger of the drug growing upon the patient. I also disapprove of tea and much stimulants, as interfering with the natural appetite for proper food. With regard to the child's travelling, I decidedly think it would be better that it should stay where it is. It is thriving very well. At the same time, there is very little chance of its coming to harm by its being taken south, provided due attention be paid, among other things, to supplying it with pure wholesome milk."

During January 1880 the relations between husband and wife grew worse and worse. On 16th January the pursuer wrote to the defender—"My dear Minna—Fearing that the hope of being allowed to take the child south, by-and-bye, is the cause which prevents you from going to Otterspool now, and makes you dissuade your relations from coming to see you here, I think it right to let you know what I told your father some time ago, viz., that as long as you continue to act as you are doing at present, the child shall not leave its home. You must be perfectly aware of the misery you are inflicting on yourself, on me, and on the whole household by your conduct. I do not believe that in this large parish there is another instance of a wife behaving to her husband in the way you behave to me, or of a wife who shows such utter indifference towards her husband, and treats his advice and his wishes with the scorn with which you treat mine. Is it possible that you can imagine that such conduct can answer even in a worldly point of view? No, Minna, the discontented, stubborn, rebellious spirit which you have nursed for a long time is a spirit which must be displeasing not only to man but to God. Is this the way you show your gratitude to Him for all the blessings He has showered down on you? for the darling child He has given you, for the way in which He has spared to you your parents, and your brothers, and sister, and for the thousand other comforts and luxuries which He has given you above any other of the inhabitants of this district. And what do you give Him in return for all this? not so much as a bright smile, or a happy look to testify of the heartfelt gratitude within! Our child is very young at present, but not long hence, if God spares her, she will be of an age to be readily affected by the example of those around her, and more especially

by the example of her mother. I could hardly imagine a worse example to a child than yours is at present. If you do not amend your ways (sad though it would be) I may see it my duty to arrange that my child be not brought up under such bad influence and example.—That God may avert this by giving you a new heart and a new nature is the earnest prayer of your sorrowful husband." On the same day a scene occurred in the house which is thus described in a letter from the pursuer to Sir Thomas Moss, dated 17th January—"I have had many days of sorrow with her (the defender), but never experienced anything like what I had to endure yesterday and to-day. Minna attacked me suddenly in the drawing-room without the slightest provocation on my part. I can only say that no tramp could have said worse things to a drunken husband than she said to me. 'You brute' was one of the many things she said. What I should have done was to have put her under lock and key; and certainly if she ever attempts the like again I shall do so. She followed me from the drawing-room into my business room and commenced anew there, and in a manner in which no one with any pretensions to being a lady or a Christian could have behaved unless bereft of their reason. All night she was in a fearful state of frenzy, and the nurse had to sit up with her till five in the morning. I believe that she declared herself to be going mad, and said such horrible things about herself and the child that she terrified the nurse, who had to remove all opiates out of the room. Though I heard the noise in the room, and expected to be called for every moment, I did not leave my dressing-room, in which I have my bed, knowing that my presence would only irritate her and aggravate her state. She seems to have a morbid horror of me now, and wont look me in the face." As to this occurrence the defender deponed—"When Lady Mackenzie asked me to go on a visit to Conan my husband seemed much displeased about it. He was in a very bad temper, which he showed by nagging at me about this, and my disobedience, and my conduct generally. I was then in the extremely low state of health which I have described. Under these circumstances I am afraid I used an expression that I afterwards regretted. I said, 'How can you be such a brute to treat me like this?' I had been feeling his conduct a good deal. I felt immediately that that was an expression I should not have used. He left the room, and I at once went to his business room and said I was very sorry that I had used that word. He said, 'Did you mean it?' I said, 'I am very sorry I used it.' He did not reply; he was writing at the time. I said, 'I have now withdrawn that word; you cannot use it again against me.' He said, 'We will see about that,' and he told me to leave the room. That was on 16th January 1880. I had that morning received a letter from him written under the same roof. It produced a very painful feeling upon me. I had done nothing that

I was aware of to warrant such a letter. It was under those circumstances that I used the word which I at once retracted. The whole scene upset me very much, and I had a very bad relapse that night. *By the Court.*—I found that letter on my toilet table. When my husband wrote letters to me in the same house, he either left them on the table or gave them to the maid to give to me. *Examination continued.*—The suggestion that he might arrange to have his child not brought up under my influence made a great impression upon me. I was miserable about it. I had really no comfort in my life at that time except my child.”

On 20th January 1880 the pursuer and defender, with the baby, went to Conan to pay a visit to Sir Kenneth and Lady Mackenzie. As to the pursuer's attitude towards his wife while at Conan, Lady Mackenzie gave evidence—“Mrs Mackenzie, when she arrived at Conan, was not at all well—perhaps a little better than when I had left her at Inverewe, because I had left her in bed, but still she was far from well. The manner of the pursuer to her on the occasion of that visit was certainly very bad—very rude and disagreeable—so much so that we sometimes had difficulty in keeping up appearances before the servants. I did not see Mrs Mackenzie do anything to warrant such treatment. (Q) In speaking of his manner being rough and rude, can you give us any more particular description?—(A) The tone of voice and the manner—not looking at her when he spoke to her—speaking in contemptuous tones. He was the reverse of affectionate. I think that treatment would make any lady in her state of mind very unhappy. It was manifest that defender was unhappy.” Sir Kenneth deponed—“When Mrs Mackenzie came to Conan on 20th January 1880 she was in a weak and depressed state altogether. She got a little better while she was staying with us. Pursuer's demeanour towards her was still worse than it had been in the summer; it was more bearish. He never spoke to her or looked at her. (Q) Did he appear to be kind to her or the reverse?—(A) Quite the reverse.”

On 29th January 1880 the pursuer wrote to his mother, the Dowager, the following letter—“Dearest Mother,—I have no particular news to tell you, except that, though I had written to take the lodgings in Inverness, the landlady wrote back that she could not take us on Monday, not till Tuesday. So, as this opened a way of escape, I had a talk with Eila to-night, and told her I thought it was most silly for us to go to Inverness, and that we had better return (if Minna is determined to return) at once from here, *i.e.*, next week. Eila seemed to agree with me, and is going to speak to Minna about it to-morrow. So I hope we may not go there. After an immense deal of consideration, I do not think I will use the threat just now of sending baby to Tournaig, but it shall pay you a visit by-and-bye. I really and truly believe that the reason Minna won't leave the baby

is that she fears you will get hold of it in her absence. I am nearly sure that if you were not in the country she would be willing to leave the baby. . . . Snog is more and more devoted to me, and cries every time I leave her, and generally cries every time she goes to her mother. She has an extraordinary craze for music.” In explanation of this he deponed—“I never threatened to send the child to my mother, but I thought at Conan I would threaten to send it to my mother, hoping my wife would come back with me. (Q) Do you mean as a kind of loadstone to draw her back?—(A) Just so. I said, ‘I am not going to lead a bachelor's life with the child at Inverewe, and if you don't come back I will perhaps send the child to live with my mother till you come back.’ (Q) Did you put that to her?—(A) No, I don't think I ever put it to her. I only thought about it.”

On 10th February 1880, while the spouses were still at Conan, the pursuer was thrown into a state of great alarm by the discovery of what he thought was a plot on the part of his wife to run away from him with the child. In his evidence he deponed—“While we were at Conan the nurse, Mrs Bain, said to me late one night in Gaelic, ‘Take care they don't run off with the child from you.’ It had never passed through my mind that anything of the kind would be done. I was very much startled, and did not believe it. Mrs Bain was going away the following day to Inverness to see Walter Carruthers of the *Courier*, in whose family she had been a servant for 13 years. She did go to Inverness the following day. Harris, my wife's maid, was taking charge of the baby that day. I went out with her to carry baby for a bit along the road, and she said that she had something on her mind which she must tell me at once. She told me about a plan for carrying off the child. . . . Mrs Bain returned from Inverness on the Tuesday night. . . . It was on the Wednesday that she told me her story. She resumed her care of the child. I was out walking with the child on Wednesday morning, and she then made a communication to me which caused me alarm lest the child should be carried off.” The alleged plot is thus described by him in a letter he afterwards wrote to his cousin Osgood Hanbury—“The plot was this: My brother-in-law (Cottingham Moss) was to be at the Muir of Ord Station at a fixed time, with a special train, with a new nurse, and everything that could be wanted for the journey. My wife was to drive out alone, and my child with her nurse (being by arrangement) on the road, the child was to be lifted into the carriage by her mother, and the Muir of Ord being reached, the special train was to set off, and catch the mail train at Perth, and thus they were to get the child beyond the jurisdiction of Scotch law. It was hoped the English Courts would give a separation (somehow or another) on the ground of cruelty, and give the mother possession of the child for the first seven years, and if there appeared any danger of not succeeding in this, the child was to be taken and hidden abroad.” Mrs

Bain, the nurse, deponed—"After we had been about three weeks at Conan I remember her coming to the nursery one night just before dinner. She said to me, would I help her if things came to the worst? (Q) Did she tell you how you could help her?—(A) She said, if I would help her, that she was going to take off the baby. She said she was going to Otterspool with it. I said, 'Oh! you are frightening me,' and I was quite frightened when I heard her say it. 'Oh!' she said, 'there would be nothing done to you, because Sir Thomas consulted a lawyer about it, and he said that if I could get the baby to England the law was not half so hard there upon ladies as it was in Scotland.' I said I would have nothing to do with it; and I asked, did Sir Kenneth and Lady Mackenzie know about it. She laughed and nodded to me, and said she would get the carriage. She said she would have the baby for the first seven years—perhaps longer if she went abroad. She said that Mr Cottingham could get a special train, and an old servant of theirs could come to meet her, and if I went on the road she would pick up the baby on the road from me. When she made that proposal I did not agree to it. I had said one day on a former occasion, when she was very discontented, that if I knew where to go off with the baby I would go off with it before they would be scrambling about it. On the occasion at Conan I said I would not agree to help her to take the baby to England. She said, 'Do you think Harris would help me?' meaning her maid. She said that Mrs Wilson, an old servant, would come to Inverness to meet her, and she said I could follow with the luggage next day. She told me that no harm would come to me. (Q) Did she say anything about there being arrangements for taking care of the baby and feeding it on the road?—(A) Yes, she said she could get a bottle of milk and a spirit-lamp. I told her I could not agree to help her. I was going to pay a visit at Inverness next day. I mentioned to Harris that night what Mrs Mackenzie had told me. Harris was to take care of baby when I was away. I said to Harris, 'Perhaps you will all be away before I return,' and Harris said 'What?' and I told her, and she said she would tell every word to Mr Mackenzie. I said that Mrs Mackenzie had said that perhaps Harris would help her, and Harris said 'No, I will not help her; I will tell Mr Mackenzie.' Mrs Mackenzie came to me that night after dinner, and told me not to say anything about the matter, but I had told Harris before dinner. I went to Inverness next day, and returned in the evening. The following morning I was out with the baby. Mr Mackenzie came to me and asked me what story did Harris tell him, and I told him so far as I could every word that Mrs Mackenzie had said to me." The defender deponed—"With regard to the incident which has been described as an attempt on my part to remove the child, one day—I think early in December 1879—when I was sitting on the rocks by the sea at Inverewe, Mrs Bain, the nurse, said—

'What a pity it is that Sir Thomas has not got a yacht that he could come in and take us away south.' That was the first suggestion that was made on the subject. It originated entirely from the nurse. I don't think I said anything. The next conversation that took place was three or four weeks later in the nursery at Inverewe, when I was very ill; Mrs Bain then said that if we were only down in the country we could easily get a special train and go straight off to Otterspool. I was surprised that she knew anything about special trains, and that they were so easy to get as she said; but she seems to have known of some case where one had been used. I don't think anything more was said at the time. *By the Court*—This was at a time when I was desirous of taking the child south, and there was a good deal of talk going on about it. *Examination continued*—I am sure the subject was not mentioned again until a fortnight after our arrival at Conan, when the nurse began to ask what our plans were. I put her off from day to day, saying that I hoped perhaps something would turn up, perhaps Mr Mackenzie might change in his views. On the 31st of January Sir Kenneth and Lady Mackenzie received a telegram which summoned them at once to London. It was something of great importance, and contrary to their usual practice they left on the Sunday morning. I was left alone at Conan, and Mr Mackenzie was away staying some miles off. The nurse that night said—'What a chance this is for getting away.' I said—'Don't tempt me; it is too tempting. What would Mr Mackenzie say when he came home and found the nursery empty?' I think her words were—'I should like to see him.' I answered—'I should not.' That was all that happened at that time. I had promised the nurse a day at Inverness. I put off fixing a day, as I was not strong enough to look after the child myself without her assistance. Sir Kenneth and Lady Mackenzie returned on Monday 9th February. . . . I went to meet Sir Kenneth and Lady Mackenzie at Inverness in the afternoon, and when I came back I went into the nursery and the nurse again asked me when she could have her day's holiday at Inverness. I told her she might go the following day. She asked if anything had been decided as to what we should do when we left Conan. I said no, I was very much disturbed about it, I did not know what to do. She asked me if I had any idea of going away without Mr Mackenzie's consent, and I am afraid I did say at the time—'If it came to the worst would you go with me?' She seemed to hesitate a good deal, and I think said something about the maid Harris, but nothing more was said on the subject. I had formed no plan whatever of taking away the child. Except the question I put in response to what she said, I never said anything to indicate to her that I had any such idea. I had not done anything or made any preparations for such a step, and I never did. That night I went up to the nursery as usual to kiss

the child before I went to bed, and I then told the nurse that I had talked over with Lady Mackenzie my position and my future, and I had made up my mind that it was better to go away, and to go south without the child, and that I was going to telegraph to my brother, meaning my second brother Cottie. Next morning before going to Inverness she came to my room about eight o'clock with the baby. She looked rather disturbed, and I said to her—'You look as though you were afraid I was going to carry the baby away to-day.' She said she had had a bad night thinking about it. I said—'You need not be afraid; any idea I may have had on the subject I have entirely abandoned. I have telegraphed to my brother, and I hope he will come at once.' My reason for telegraphing to my brother was that I wished to have him with me, and to decide what was best to be done. Mr Mackenzie had previously written to ask that my brother should be sent to escort me south. No communication whatever had passed between me and my brother in regard to the removal of the child. There had been no arrangement whatever that he should get a special train, or any other arrangement."

On 11th February the pursuer accused the defender in presence of her brother Cottingham Moss of plotting to remove the child. The pursuer deponed—"I asked my wife whether she was ready to confess as to the plot. I don't recollect the exact words she used, but her brother said—'Don't commit yourself, Minna;' and then when she finished he said—'I would not have committed myself if I had been you Minna.' I cannot recollect the exact words she used, but it was to the effect that she had intended to take the child if I did not sign some letter. I understood quite distinctly that she admitted the plot." The defender deponed—"I went to my room and my brother accompanied me. Shortly afterwards Mr Mackenzie came in. We were all three standing by the door. He said—'Is it true, the plot I hear, that you were going to take away the child?' I said—'I don't know what your treatment of me might have driven me to do.' My brother advised me not to argue with him, as he seemed to be in a very bad temper. . . . I had not confessed to any plot or plan to remove the child." Mr Cottingham Moss deponed—"I was in my sister's room when Mr Mackenzie came in and said he had been told of a plot for taking away the child. He was very excited and angry. My sister said there was no plot. He insisted there was, and that he had been told all about it. The only thing in the nature of an admission that she made was that if he drove her to it, there was no knowing what she might do. She denied in my presence that there had been such a plot. (Q) Did you warn your sister against committing herself?—(A) I advised her not to argue with him—he was not in a fit state to argue. (Q) Did you use such an expression as 'not to commit herself'?—(A) I don't think so; I cannot remember the words I used. It is certainly not correct to say

that at that interview my sister had confessed to a plot."

On 12th February 1880 the pursuer took the nurse and child to Inverewe, and shortly thereafter, the defender not returning, he went over to Tournai with the baby and resided with his mother the Dowager. The defender went back to Otterspool with her brother. The pursuer continued to believe that there had been a plot to deprive him of his child, and he promulgated this belief among his relatives. The defender's family and Sir Kenneth and Lady Mackenzie on the other hand believed that the plot was a figment of the pursuer's imagination.

Inverewe was let to strangers. Two or three of the pursuer's servants were retained in it till the term of Whitsunday 1880.

The defender was attended at Otterspool by Dr Fitzpatrick, who deponed—"When I saw her in February 1880 she was in a somewhat nervous condition, which I attributed to what had occurred with regard to parting with her infant. That was the first time she made any complaint to me whatever as regards the cause of her mental distress. She told me that a good deal of her distress was owing to that, and asked me if I did not consider it very cruel to keep the infant away from her. . . . I attributed it entirely to the child not being allowed to come south with her. She suffered very great sleeplessness and loss of appetite, caused, I considered, by the mental suffering she was undergoing." In March she went to London and was attended by Drs Andrew Fyfe and Matthews Duncan. Dr Fyfe deponed—"My attendance continued at intervals from 24th March to 29th April that year. I saw her at first every day, then every second day, and latterly every two or three days. When I was first called in I found she had typhoid fever, a dilated condition of the lower bowel, with great pain over it, and a uterine affection, together with mental depression. Dr Matthews Duncan (who is now dead) saw her along with me on one occasion. He and I entirely agreed in our diagnosis. Speaking medically, the condition I have described was very serious. It was not dangerous, but it might rapidly have become a dangerous case. It might have ended in inflammation, with a fatal issue; ulceration might have ensued. The typhoid affection had probably existed for about a month; the pain over the lower bowel was of longer standing; and the uterine affection would be longer still—most probably from about the birth of her child. The conditions I have described affected the spirits of the sufferer, and the power and disposition to go about. I found she answered the questions I put to her very well and very frankly, but she was plainly in a depressed state of mind. I did not see or find anything to lead me to suppose that her condition or any part of her condition had been brought about by the improper use of any drug. I am quite satisfied of that. I know Tamar Indien lozenges. It is a quack medicine—composed, I believe, of ground senna leaves, tamarind, and a small quantity of gelatine:

(Q) Do you think some of these would bring about this condition?—(A) Certainly not, it had nothing to do with it. Supposing it had been the fact that Mrs Mackenzie had taken opiates to any extent, that could have had nothing to do with the condition I found. It looked to me as if she had something on her mind."

About two months after the defender went to Otterspool, the marriage trustees called up the sum of £6000 which had been lent to the pursuer at the time of the marriage, and arranged to pay the income of her funds to the defender herself and not to her husband.

On 1st June 1880 the pursuer sent the defender's pony and pony-chaise from Inverewe to Otterspool, the only intimation given being a telegram from one of the farm servants to the stationmaster at Otterspool that the pony, &c., had been despatched. With reference to this, the pursuer during his cross-examination deposed—"After my wife went south I sent her pony and pony-chaise from Inverewe to Otterspool. I sent a telegram on 1st June saying that they had left Achnasheen station and that the harness was sent also. I had not given my wife any previous notice that these were to be sent, but I was afraid that something might happen to the pony, and that I should be blamed for it. I was not afraid of the carriage, but the pony would have been of no use without the carriage. (Q) Was it not a very broad hint to your wife that neither she nor her pony nor her carriage might come back?—(A) I don't think it was. I daresay it would have been better to write. It was not a hint that she and her belongings should not come back, it was entirely for fear about getting into a row about the pony, which was a great pet of my wife's, and I had been accused of ill-treating it before. (Q) Your wife left early in February; why did you wake up on the 1st June to the idea that you had better pack off her pony and carriage to Otterspool?—(A) Because I heard no word of her coming back."

On 5th June 1880 the defender wrote to the pursuer from London,—“Dear Osgood—As you have never written to me, even to say how baby was, since you left me at Conan, you will perhaps be surprised at receiving a letter from me. Thanks to Dr M. Duncan's treatment I am now much stronger, and hope to be quite fit to return home this month. The trustees under our marriage-settlement have, as you know, been called upon by my father to pay over the income of the money settled on me to my sole use, as provided by the settlement, in the belief that this would avert in the future such differences as had arisen between us in the past, so far, at all events, as regards money. In these circumstances it may probably be satisfactory to you that some arrangement should be arrived at as regards household expenses, &c., and if you are willing that I should undertake all the details of housekeeping, with the authority that other wives possess as mistresses of their households, I shall be very glad to contribute my share of our joint expenses

at Inverewe. I am quite sure you will see how painful you have rendered my return by the letters about me you have seen fit to send for circulation among some of your relations, but my love for my child impels me, now that I am permitted by the doctor to go north, to return to Inverewe, where you have promised I shall find her.—Yr. wife, MINNA AMY MACKENZIE.” To this the pursuer replied in a letter dated 28th June 1880,—“Dear Minna—Having waited nearly four months for some sign from you of sorrow and repentance for your past conduct, I have been the more grieved at reading your letter of the 5th of June, which holds out no hope nor guarantee against a repetition of that line of conduct which has made my married life so miserable, and especially as regards what occurred at Conan. First and foremost, I am determined to take every possible precaution towards guarding my child; and secondly, not being considered by you as fit to be entrusted with your money (though assured by your father I was to be so), I decline allowing any of it to be spent in my house, or on anything over which I have control. I retained the servants, &c., at Inverewe till the letter from Messrs Whitley & Maddock arrived, and knowing from it that for the future I could only live by joining my means with those of my mother, and by living in the strictest economy, I gave some of my servants warning, and have made entire fresh arrangements, and do not intend returning to Inverewe at any rate till the winter after the shooting tenant has left, and perhaps I may make this permanently my home. Can you have forgotten that any promise I made about baby was given at Conan prior to my discovery of your desire to deprive me of her? That discovery forces me to act very differently for the future from what I ever imagined I should have to act towards my wife. Should you like to come here, and write to say so, a room will be prepared for you. Baby is quite well—Your husband, OSGOOD H. MACKENZIE.”

On 19th June the defender wrote saying that she would arrive on 1st July at Tournai. On 21st June the pursuer wrote that he could not have servants other than his own at Tournai and suggesting that his wife might stay at Loch Maree Hotel if she objected to be the guest of the Dowager. On 26th June the defender telegraphed—“Cannot accept your suggestion of Tulladale, as I return to live with my child. If maid cannot be received she can go to the inn.”

Mr Dixon of Inveran gave evidence bearing upon the pursuer's state of mind at this time. After stating that he had called on the Dowager at Tournai on 22nd January 1880, when she had used strong epithets showing her aversion to her daughter-in-law and that 23rd March 1880 was the first date on which the pursuer had spoken to him about the defender's conduct, Mr Dixon deposed—“I remember him calling upon me on or about 28th June 1880. He came to my house and produced a letter

from his wife stating that she was to arrive at Achnasheen on the following Thursday on her way to Tournai, and he burst into an agony of tears. He wept bitterly. (Q) What kind of tears were they—were they tears of joy?—(A) Evidently of regret and sorrow. I was very much surprised. In finishing the statement of his grief he put the question—‘What shall I do? What shall I do?’ I replied—‘Go and meet her at Achnasheen and try and smooth matters over,’ or words to that effect. He replied that he certainly should not do so—that it was impossible for him to do so—that he could not sit by her all that way during the drive from Achnasheen. We had a long talk over it. I entreated him to be conciliatory and kindly. Even adopting his own view that his wife had treated him unkindly, I entreated him to be conciliatory and kindly so that he might make matters smooth yet. He said no—that he would not even go and meet his wife at any intermediate stage of the drive, but that he would just send his dog-cart for her to Gairloch. My recollection of all that is very distinct and clear. From what he said and his demeanour on that occasion, it was quite plain that to have his wife back was the last thing he wished.”

On 1st July defender arrived at Tournai. Thereafter the relations of husband and wife continued as strained as ever. The defender had brought with her Plumridge, her mother’s maid, and kept her at Poolewe Inn. She also kept a special trap at the inn. The pursuer objected to both maid and trap, and letters passed between the spouses on the subject. As to the conduct of the spouses about this time, Duncan Davidson of Tulloch deposed—“I went to visit at Tournai in the summer of 1880. I was there for seven weeks about the month of July. When I arrived, the Dowager Lady Mackenzie and Mr Mackenzie were staying in the house. Mrs Mackenzie arrived while I was there. She was there for several weeks during my visit, and I left her there. I was out shooting and fishing during the day, but I had an opportunity of seeing Mrs Mackenzie at dinner every night. So far as I remember, I had not heard before going there that there was anything unusual about the relations between Mr and Mrs Mackenzie. After I had been there for a little time I was struck by her demeanour towards her husband. I saw there was very considerable coldness on her part. She showed it by never answering her husband when he spoke to her, unless it was at the dinner-table, when he might ask her to take some of a particular dish. I never heard her say more than ‘Yes’ or ‘No’ to him so far as I remember. His manner towards his wife was always very courteous. I never heard him say a cross word to her. He appeared to feel her treatment of him very much indeed. (Q) Have you any means of knowing whether he was anxious for reconciliation?—(A) I should say he was very anxious indeed. He often said to me that if she held out her little finger to him he would go on his knees at her feet. So far as I was

concerned, Mrs Mackenzie was always quite polite to me. She talked very little to him at table. So far as I saw, there was not the slightest want of courtesy on the part of Lady Mackenzie towards Mrs Mackenzie. I sometimes found my position at table uncommonly uncomfortable in consequence of the relations between the parties. (Q) Why?—(A) Mrs Mackenzie would not answer either Mr Mackenzie or her mother-in-law.” Jessie Macpherson, the defender’s attendant, deposed—“During the time Mrs Mackenzie was at Tournai, so far as I could see, people were anxious to make her comfortable. I saw no unkindness on the part of Mr Mackenzie towards her. Lady Mackenzie never spoke to me against Mrs Mackenzie, and, so far as I know, nothing of that kind took place between Lady Mackenzie and the other servants.” Lady Mackenzie of Gairloch deposed—“I went over to Tournai accordingly after she had arrived. She met me on the high road a short distance from Tournai House. I went with her to the house. We saw Lady Mackenzie going in with the nurse and the baby, and I said I thought I had better go and see Lady Mackenzie. Mrs Mackenzie opened the house door, and I followed her into the sitting room, where we found Lady Mackenzie alone. After a little conversation Lady Mackenzie offered to send for the baby, and rang the bell for the servant to fetch it. Mrs Mackenzie said: ‘I will fetch baby,’ and went out of the room to get it. Lady Mackenzie then began to speak very hardly of her daughter-in-law, and to find great fault with her and with us for our behaviour. She said it was all our fault that her son was blamed, and that we should support him in everything he had done, and in his treatment of his wife. I said that that was impossible. Mrs Mackenzie had returned while this conversation was going on, but only went away again, asking me to join her in her bedroom, which I did as soon as possible. On this occasion the Dowager was very excited, very indignant, and very abusive. She was complaining of everything about her daughter-in-law. She seemed the reverse of kindly disposed to her. I thought Mrs Mackenzie would have very hard times of it with the Dowager. The Dowager I think is a very masterful person. The reason why Mrs Mackenzie and I left the room and went to Mrs Mackenzie’s room was that it was naturally very unpleasant to hear herself abused, and it was unpleasant for me to listen to it. The Dowager did not stop the kind of language I have referred to when Mrs Mackenzie came in. She proceeded, speaking her mind freely. It was not possible, looking to the way the Dowager was going on, that I could have had an opportunity of speaking to Mrs Mackenzie unless we had gone to her bedroom. (Q) Did Mrs Mackenzie seem to feel the way her mother-in-law was treating her?—(A) I think she expected it. (Q) Did she look as if she was used to it?—(A) Rather. I don’t think Mrs Mackenzie uttered one word the whole time. She and I stayed together perhaps half an hour in her room. I saw the Dowager again

when I came down after being upstairs. I think tea was in the drawing-room then, but she began again on the same subject, and at last I got up and kissed her, and said good-bye, and hoped there would be no occasion for us to quarrel. She said 'Oh, it's no good your kissing me and being good to me if you are not the same to Osgood.' I had not been in any way unkind to Osgood that I am aware of. The Dowager was still in an excited state when I came away. I was not very long there. It was still the same faultfindings. (Q) What appeared to be her feelings towards her daughter-in-law when you left the two together?—(A) She ignored her presence, and of course after this abuse her feelings could not be very warm. Mr Dixon deponed—"I remember my sister and myself calling at Tournai on 2nd July 1880. We wished to show politeness towards Mrs Mackenzie, who had just arrived. When we were leaving I mentioned to pursuer that I was expecting Mr and Mrs Murray of Gruinard the following week to stay with me, and hoped he would bring his wife to dine with me while they were there. The pursuer and his wife were both on friendly terms with the Murrays. He declined the invitation, and then drawing me aside he said to me, 'I could not possibly go out to dinner with my wife,' adding something to the effect that she could come up and have a cup of tea with my sister, or that he would send her up. In point of fact the invitation was not accepted."

On 4th August 1880 the defender left Tournai. As the proceedings of this day were relied on by the defender as showing physical cruelty towards her on the part of her husband, the evidence may be given at length. The pursuer deponed—"I was as usual going about my daily work, which took me out the greater part of the day. I was very often not home at lunch. I was in the habit of seeing my child regularly every morning at breakfast, when she came and sat in a little chair by my side. When I came back late to dinner she would be away to bed. My wife never came down to prayers or breakfast. Breakfast was at eight o'clock. I remember an incident that happened on the morning of the 4th August. I always went up to fetch the child from the nursery directly after prayers, and I found that the child was in bed with her mother that morning which I had never found before. I asked the nurse, Mrs Bain, to go and fetch the child. I stood upon the landing, and I heard my wife say to the nurse—"He shall not have the child unless he takes her by force." I went in and reasoned, I think quite gently and quietly with her. I explained it was the only time of the day I had the chance of seeing the child. That only had the effect of making her very angry. She had her breakfast on a tray on the bed at the time, and the child was on her left side. My wife got very excited. The child was crying. I went up to the bedside and reasoned with my wife, and she said—"If you come near me I will strike you," and she hit at me more than once. I put my

hand upon her arm to hold her down on the bed. I then went out to see if she would cool down, and I asked the nurse to go in and reason with her. The child began to scream most violently, and I rushed back to the room. In the meantime my mother, who had heard the screaming, came up. What struck me when I was out on the landing was that either the child had got scalded, or that some pin in my wife's dressing-gown had run into her. I went round to the same side where I had been before, and my mother came to the other side, and I heard my wife call out that she would strike my mother if she came near her. Between us the child scrambled out of her arms, my mother taking one hand and I the other, and we took her away. The child was kicking all among the tea and hot plates on the bed, and screaming violently. (Q) What did you do at that time—where did you put your hand?—(A) Upon her right arm on the bedclothes. *By the Court.*—(Q) Was your object to take the child from her?—(A) It was to pacify her at the moment when she was striking at me. (Q) Did you intend to remove the child when you went into the room?—(A) No; if the child had not been screaming so violently probably I should not, because I went into the passage. I went out to see if my wife would cool down, and to see if the nurse would talk her round. (Q) Do you mean whether the nurse would talk her round to let the child go?—(A) Yes. *Examination continued.*—When I returned to the room I was apprehensive that the child would be injured. I have already mentioned the two things that struck me. The child was not at all given to crying, and never cried violently. The screaming was such as to suggest some very violent pain. My wife left Tournai that day about half-an-hour afterwards. The defender deponed—"On the 4th August, about a quarter to eight in the morning, I knocked at the partition between my room and the nursery. It was not answered for some time. At last the nurse came in, and I said I wanted the baby that morning. The nurse said the child had not finished her breakfast. I said, 'Bring the child in and her breakfast,' which was porridge, and I would give it to her myself. The nurse seemed very much put out, but she did go, and she brought the child. She then left the room to bring the breakfast. After she had gone I heard Mr Mackenzie coming upstairs, and he went, as I judged from the sound of his footsteps, to the nursery. I did not hear any voices. Presently he came to the door and he said 'Give up baby; I want her at once.' He said it very roughly. He spoke from the open door. I did not see him. About that moment the nurse came in, and she said, 'Oh! baby has not finished her breakfast; won't you leave her?' I said, 'If you leave her here a few minutes she will have done, and she can go.' He said, 'I will have her; it is nonsense. I will have her at once; give her up.' He then came round to the other side of the bed. He held my right hand

down, and said that if I would not give up the baby he would have me held down by force. I was very much frightened, and I said, 'I will strike anybody who comes to use force.' He let go my arm, but put his arm across me as it were to keep me down in bed, and tried to get hold of the baby, and then she began to cry. The baby at this time was in my left arm. There was a space between the right side of the bed and the wall sufficient for a person to go up into, and it was there that my husband came up. (Q) Did the baby cry at all until he first seized you by the arm or took your arm and afterwards put his arm across you?—(A) She began to cry then. She had not been crying before. He did not take the baby away then, but he went off saying 'I will have you held down by force.' When he got to the door Lady Mackenzie seems to have been there, and she came in. He turned back, and she followed him, calling out, 'Hold her down, hold her down; the father has every right; she must obey,' or words to that effect. He again came round to the right side of the bed and Lady Mackenzie remained on the left. She took my left hand and he gripped my right arm with considerable force, and in that way the nurse took the child away. I continued to hold the child in my left arm till it was taken from me in that way. They were holding me simultaneously on the two sides. I had been stung on the inside of my right hand before this, and it had a poultice on it, and was all bound up. When my husband threatened to have me held down by force I said 'It will not be much to your credit to hold a woman down in bed, especially as I have a wounded hand, and I hope you will not use force.' While this incident was proceeding my husband was perfectly white with rage, and his mother was very excited. (Q) Did they seize your arms gently or otherwise?—(A) Mr Mackenzie used considerable force. His mother did not use so much force. I had never before seen her in my bedroom. Until my husband and his mother came in the child was not in the slightest danger in my bed. There is no foundation whatever for the suggestion that there was anything about my dressing-gown that would scratch the child. There was no danger from hot tea or anything else that was on the bed. It is absolutely without foundation to say that the child was taken away to relieve her from some sort of danger. The nurse left the room first with the child, and then Mr Mackenzie, and Lady Mackenzie was the last to leave. Before she left she said, 'You are in my house now, and obey me you must.' I said, 'Yes, Lady Mackenzie, it is your house, but the child is mine.' She said 'The child may be yours, but it is practically mine now.' I think that is all that passed. After the manner in which I was treated on this occasion I felt it was quite impossible to remain any longer in the house—indeed, I was frightened to do it." The Dowager deponed—"My son was in the habit of being out all day attending to his farming interests. We always break-

fasted at eight o'clock, and the child was brought down at breakfast time every morning, a small chair being placed beside the table. That was the time of the day when my son had chiefly an opportunity of seeing her, because when he returned at night the child was generally asleep. I remember on the morning of 4th August hearing baby screaming as if much hurt. I was at the breakfast table in the dining-room when I heard the screams. They were coming from Mrs Mackenzie's bedroom upstairs. I ran upstairs as fast as I could. I was frightened, because the child was a good-tempered healthy child and hardly ever cried. These were screams. When I went upstairs I spoke to my son who was waiting in the passage. He said he had failed to get the baby, that he hoped the nurse would succeed, and that he had left the room to see whether the nurse would get the baby. As I was getting near the door Mrs Mackenzie called out that she would strike me if I came near her. I saw her strike her husband several times with her right hand. After that I think I just put my hand on her arm. She was holding the child in her left arm. My son was on the other side of the bed. She was striking him with her right hand and pinching the baby with her left arm. All the breakfast was on the bed—a tray with tea and hot things. She made no attempt to strike me. I was on her left side and my son was upon her right. I think I said to the nurse, 'Oh, you must take the baby. *By the Court*—(Q) Did you say that to the nurse or to your son?—I think I spoke to the nurse; I am not clear about that; I just said it generally—'Oh, we must take the baby.' *Examination continued*—I said that because I was so frightened when the baby screaming and struggling. The baby was calling out for the nurse and striving to get away, and she got away to the nurse somehow. The nurse cuddled it up and petted it. (Q) Did you use any violence towards Mrs Mackenzie?—(A) Oh dear no—I never put my hand on her in that way—I am not very strong anyway. I put my hand upon her left arm to try and help the nurse to get the child. *By the Court*—(Q) Did you put your hand upon her left arm to enable the child to get away?—(A) I think so. *Examination continued*—(Q) How did the child get away?—(A) It sort of crept out on the bed. The nurse was at the foot of the bed ready to catch it. She seemed to be very anxious about the baby. I was on the left side of the bed when I went in, and the head of the bed was close to me. The head of the bed was up against the wall. On the right hand side there was room for my son to be there. The bed was very much nearer to the one side of the room than the other. On the right side there was very little room, and on the left side there was the whole space of the room. On the right side there was just room for a person to squeeze in. In doing what I did I had no motive in the world except to save the child. I would not have been in the room at all but for the child's screams. It was the only time

I was there during the whole five weeks. The door was open when I went up. The bed was in such a position that the moment I went in at the door I was close beside Mrs Mackenzie, and before I got in she said, 'If you come near me I will strike you.' *Cross.*—With regard to the incident of 4th August, I am aware that when her husband sent for the child there was a message brought back that the child was with its mother having breakfast. It was on receiving that message that he went up. I remained in the dining-room. . . . When I went up I saw my son standing waiting in the passage. I asked him something, and he said, 'I have failed to get the baby; I have left the room, but I hope nurse will manage it.' I understood from what he said that he had been in the room trying to get the baby. The door was open, and when Mrs Mackenzie heard my steps she called out that she would strike me if I came near her. That was just as I was going into the room. I think the door was wide open. It opened to the bed-head. I said very little—not half of what has been told—a great deal has been made up. Mrs Mackenzie said to me, 'I will send for Kenneth.' I said—'You may, but it is my house.' I said something to the nurse about taking away the baby. . . . He went round to the right side of the bed, into the space between the wall and the bed, and I saw her strike him several times. (Q) Was anything said which led you to know what he went for?—(A) The screams of the child was the reason. He was on the right side of the bed and I on the left of it. . . . He did not take the child; it sort of crept out. (Q) Did you think it unreasonable that a mother should wish, having her child in her room and its breakfast brought there, that it should remain till finished?—(A) I think she was wrong to disturb the hours of her husband; she might have had the child any time of the day when my son was absent at his farm. The child was screaming long before I went up. (Q) Did you think it reasonable or unreasonable that the child should be allowed to finish its breakfast?—(A) Very unreasonable to have it at a wrong time. (Q) Do you think that justified violence?—(A) Quite, I was frightened to death. After she struck him several times, my son put his hand on her right arm to keep her quiet. . . . (Q) Did you hold her down on the other side?—(A) I should not be very well able, but I put my hand on her left arm. (Q) For what purpose?—(A) That we might get the child slipped out. When I went in my daughter-in-law was holding the child in her left arm. (Q) Was it your seizing that arm that released the child from that arm?—(A) No; I think the child was getting out—crawling to the nurse—but I think I may have assisted. (Q) Was it not your laying hands upon Mrs Mackenzie's arm and holding it back that let the child out of her arm?—(A) It might have helped a little. (Q) Do you think, looking particularly to the relations which subsisted between you, that you were warranted in such an act?—(A) I think I was perfectly warranted. (Q) And your son

was of the same opinion so far as you can judge?—(A) Of course, to rescue his child and my grandchild. (Q) If she had continued a resident at Tournaig, and had she to give the child its breakfast in her bed, would you and your son have just done the same thing over again?—(A) I should not have gone up if the child had not been screaming. (Q) Suppose the child was not screaming, and was with the mother, and was sent for by Mr Mackenzie, would you have done the same thing again?—(A) I would not interfere; it was only fright that made me interfere. (Q) But your view is that what you and he did that morning was quite right?—(A) Perfectly." Mrs Bain, the nurse, deponed—"I remember on the morning of 4th August Jessie Macpherson coming to the nursery with a message that Mrs Mackenzie wanted the baby. I said the baby had not got its breakfast yet. I went to Mrs Mackenzie's room to explain that to her. She said she would give the baby its breakfast. I took the baby to her room. This was just after prayers, which were always at eight o'clock. After I took the baby to the mother's room I came out of the room, and the baby began to cry violently. Jessie Macpherson came upstairs to me, I think, and said that Mr Mackenzie wanted the baby downstairs. I said that the baby was in its mother's room, and I went in again to ask for the baby. Mr Mackenzie then came upstairs, knocked at the door, and said, 'Please, Minna, may I have the baby, and you can have her afterwards.' The child was still crying. I opened the door and went in. The tray with the breakfast was on the bed. I was frightened that the child would be burnt, and the child was still screaming and crying, and she sort of scrambled away, and I caught her and walked out of the room. When Mr Mackenzie said to his wife, 'Please, Minna, may I have the baby?' I think she said, 'If you will come near me I will strike you,' or something like that. I was inside the room at the time; I had gone in for the baby. Mrs Mackenzie appeared to be very excited. Before I got the baby, and after Mrs Mackenzie said what I have mentioned, the baby was still crying loud and screaming. (Q) Did Mr Mackenzie come into the room at that time?—(A) Yes, he was in at that time. (Q) After he came in, did Lady Mackenzie come in?—(A) Lady Mackenzie just came in at the door. I think it was the screaming that had brought her. She asked, 'What's this?' I was standing near the foot of the bed. The baby was putting out its arms to come to me. I said to Mrs Mackenzie, 'Please let her go this time.' After that the baby came down to the foot of the bed, and I was a sort of excited and got frightened, hearing the scolding going on, and I just walked away directly. I did not think of anything but the child, and when she was crying I was afraid she had been burned from the tea tray. I took the child away to the nursery. (Q) Did you see Mr Mackenzie take hold of his wife's arm?—(A) No, I did not. (Q) Were you at the foot of the bed when you got the child?

—(A) Yes, just down at the side of the bed. The breakfast things were upon the bed. The baby was rather upset for the day; it took some time to soothe her. *Cross.*—I did not see Mr Mackenzie lay hands upon his wife at all. I did not see him catch her arm. (Q) Do you say that nothing of that kind happened when you were in the room? —(A) No, I did not see that done. (Q) If it had happened when you were in the room, must you have seen it?—(A) Well, I did not see it. I was at the door when Lady Mackenzie came in. I did not hear her say anything. She and Mrs Mackenzie spoke, but I cannot tell what was said. (Q) Did you hear her say, 'Hold her down, hold her down, and take the child; she must obey'? —(A) No. I did not see Lady Mackenzie holding Mrs Mackenzie's left arm. I was leaving the room when I met her just inside the door. (Q) Did you leave Mr Mackenzie and his mother in the room with Mrs Mackenzie when you went out?—(A) No, they were all on the landing coming out. I cannot remember whether I left them in the room or not. I think I went out first, and they were coming along just after; we all just seemed to come in a body. (Q) Were there any parting words with Mrs Mackenzie?—(A) Not that I heard. (Q) Do you say that at no time while you were in the room did either Mr Mackenzie or his mother lay hands on Mrs Mackenzie?—(A) Not that I noticed. I did not see any marks on her arms afterwards. I heard through the country that there were such marks. (Q) Did not the child only scramble out when Mr Mackenzie was pinning down one arm and his mother pinning down another arm of Mrs Mackenzie?—(A) No, they were not holding her arms or touching her arms. (Q) Then how do you account for the baby's scrambling out?—(A) Well, the tray was on the bed, and the child was screaming, and she came down the farthest side and I caught her. When I first went into the room Mrs Mackenzie was holding the baby in one arm, but I cannot tell what arm it was. Mr Mackenzie wanted her to let loose the baby, and the baby scrambled down to the side of the bed and I caught her. (Q) You saw Mrs Mackenzie holding the baby with one arm or another; did you see her release the baby from that arm?—(A) No, I did not notice how she did. It was quite evident that she was not wanting to give up the child. I saw her holding it, and then I saw it at the foot of the bed. I really cannot say how the child scrambled to the foot of the bed. (Q) Can you account for it in any other way except that Mrs Mackenzie's arm had been taken away from the child?—(A) I really did not see that happen, and I cannot say. I really don't recollect anything whatever about it. (Q) Do you think Mrs Mackenzie quitted the baby willingly?—(A) I cannot say."

After leaving Inverewe the defender walked through the rain to the inn at Poolewe (a distance of two miles), where her maid Plumridge received her. The next day she went back to Tournais with Plumridge and saw the baby, which the pursuer held in his arms during the interview.

Thereafter she went with Sir Kenneth and Lady Mackenzie to Flowerdale, the residence of Sir Kenneth. Sir Kenneth and Lady Mackenzie, John Moss the defender's elder brother, and Plumridge, all deponed that they had seen blue marks on the defender's arm as if it had been violently gripped.

The matter was placed in the hands of the lawyers, and on 27th August 1880 the defender's agent wrote to pursuer's agents. —"On many petty humiliations inflicted on her there, as on very many unhappy episodes in her (the defender's) married life, I think it needless to enlarge here. It suffices to say that on 4th August, while she was in bed and giving her child her breakfast, her husband came into her room and demanded the infant from her. She delayed to give her to him till she had finished her breakfast, and thereupon he and Lady Mackenzie held her down in bed with such force as to bruise her arms, while the nurse, by their orders, took her infant from her. This violence and insult, to say nothing of the added humiliation of its being done in presence of a servant, made it impossible for Mrs Mackenzie to remain longer under Lady Mackenzie's roof. She left it. It makes it equally impossible for her to return there. She has therefore arranged with Sir Kenneth Mackenzie for Pool House, near Inverewe, where she intends to reside for the meantime, and I have on her part to request through you Mr Osgood Mackenzie to make reasonable, adequate, and proper arrangements for her seeing and having access to her child. I will be obliged by your giving me by an early day an articulate statement of the arrangements Mr Mackenzie has to propose. I have only to add that when Mr Mackenzie is in a position to offer his wife a home of her own, where she may take her legitimate place as head of the house, wife and mother, and when she receives a reasonable assurance that she will not again be exposed to acts of violence and insult such as that of which she recently had cause to complain, she is ready, and offers to come to him." On 7th October the pursuer's agent replied—"Mr Mackenzie has authorised me to make the following proposals to his wife. Instead of going to reside at Pool House, near Poolewe, two and a-half miles from Tournais (as you state that Mrs Mackenzie intends to do), should she on further consideration like to return to Tournais as her home, she has only now to express to Mr Mackenzie (or through you) her wish to do so, and his mother (the Dowager Lady Mackenzie) being anxious to please, would in that case be willing in the meantime to leave Tournais, and make some other arrangement for her own residence in the neighbourhood. Should Mrs Mackenzie, however, still determine to go and reside at Pool House, my client on his part will try to accommodate her as to the hours and the days of the week on which she might come to see her child at Tournais, and if she would prefer it, without the presence of Lady Mackenzie in the nursery.

The defender's agent wrote in answer on 10th November—"As to the proposal which

you make on Mr Mackenzie's behalf that Mrs Mackenzie should return to Tournaig, while we regret that it is not accompanied by any assurance on his behalf that she will not again be exposed to acts of violence such as occurred on 4th August, we at the same time observe that it is proposed by him that Lady Mackenzie shall no longer continue to reside with him. You are aware that her presence in the house has been in a great measure the cause of the present unfortunate state of matters, and were Mrs Mackenzie assured that Lady Mackenzie is absolutely to withdraw not only from the house but also from the neighbourhood, she would be disposed to return to her husband. But on this point your letter is somewhat vague, and we have to request that you will kindly say where it is proposed that Lady Mackenzie shall reside; and assuming her residence to be sufficiently distant to prevent her interfering with her son and his wife, whether that residence is to be permanent or not." To this letter the pursuer's agent replied that such an assurance could not be given, and informing the defender's agents that if the defender took up residence at Pool House the pursuer was willing to let her see the child in presence of the nurse three times a-week, from 10 to 12 o'clock a.m.

Thereafter the pursuer and the baby continued to reside with the Dowager at Tournaig, while the defender spent a part of each year with her father and his family at Pool House, and drove over three times a-week to Tournaig, and saw the child at the hours arranged.

In 1881 the defender presented a petition to the Court for access to her child. The petition was refused. The proceedings are reported *ante*, vol. xviii. p. 379, and 8 R. 374.

On 14th August 1882 the pursuer wrote the defender changing the hours at which she was to see the child from between 10 and 12 a.m. to between 9 and 11 a.m.

About 8th September 1882 Sir James Spaight, a shooting tenant of Inverewe, attempted to bring about a reconciliation between husband and wife, but nothing resulted. Upon this matter Sir James wrote John Edwards Moss, the defender's brother—"Osgood Mackenzie's manner and language on the first occasion that I spoke of his wife's willingness to come back and live with him, was so quiet and moderate in tone that I felt quite sanguine as to the happy result of the proposed negotiation about future arrangements, but after he had been home to Tournaig, and, of course, talked it over with Lady Mackenzie, I observed at once a total change in his manner and temper. He recounted various stories of his wife's habits and conduct to which he strongly objected, all of a trivial nature, but magnified into serious faults. I tried to show him the folly of noticing such trifles, or allowing them to cause any serious difference between man and wife, pointing out the vast improvement he would effect in his position and happiness if he had his wife back at Inverewe, and saw his friends and relatives there with

one so fitted in every way as your sister to take her position as head of his house. To this he replied that she never could take that position, as none of the county families would know or visit a woman who had been two years on the loose! I was so shocked at the remark that I could have knocked him down, and abruptly finished our interview, saying I would not again speak to him on the subject."

On 8th May 1884 the defender wrote to the pursuer as follows,—“Dear Osgood—I had hoped about two years ago that arrangements might have been made by a then mutual friend for my return to you at Inverewe: I trust that time may now have softened the feelings which then prevented a reconciliation between us. As I am still wishing to return to you and to my child, I write to express a hope that when I go north you may be disposed to receive me back to live with you as your wife. I can only trust that when considering this offer of mine you may be guided by an earnest wish for our welfare, and that of our child, and forgetting the past, act so as best to promote and maintain peace and harmony; thus by mutual forbearance on both sides may a happier feeling in time exist between us.—Your wife, MINNA A. MACKENZIE.” To this letter the pursuer replied on 10th May—“I am to-night in receipt of your letter of the 8th inst., and need hardly tell you, Minna, that I am very willing to receive any proposal coming from you which would express contrition, and a hearty desire and determination (with God's help) to endeavour to become henceforward a dutiful wife. But true forgiveness requires deep and heartfelt repentance, and I promise that such repentance on your part shall always be met by kindness and forgiveness from me. But considering that you have insisted on absenting yourself from your home and from your husband ever since February 1880 (except during the month of July in that year), and that though you have at times visited your child here, you have at other times not seen her, nor inquired after her, for long intervals of many months, and also that you have never asked to see me, nor given expression to any feelings of regret for your past conduct and desertion—therefore, before returning here I feel I must require you now to give me a solemn written assurance—First, That your offer to return is quite genuine, and dictated by a real earnest desire to fulfil your marriage vows, and from no other motive, and that you will henceforth live with me, and that you will not again leave my place of abode at all (even temporarily) and go elsewhere, without my consent, or by the advice of our family docter, Dr Robertson. And secondly, I shall also require a written promise from you, that you will not, for the future, have anything further to do with Pool House, nor even again enter its doors, or its grounds, and that when you wish to drive out, you will do so only in my carriage, using only my pony or ponies, and my servant; and farther, that you

will give me your written assurance that you will not associate (in this parish of Gairloch) with those with whom I cannot at present be on friendly terms; and, until those persons shall have changed their conduct towards me, and until I give you permission to visit or associate with them, I shall expect you to cleave to your husband instead of to them.—I remain your sorrowing but faithful husband, OSGOOD H. MACKENZIE. P.S.—Mary is, I am glad to say, very well." A correspondence then ensued between the spouses, the pursuer insisting on the written conditions being given, and the defender refusing to give them, because as she states in her letter of 25th June 1884—"I have already given you those assurances you ask of me which I can give with sincerity and in good faith. I could only give the other assurances you require at the sacrifice of all self-respect, for, apparently, among other things they would infer the complete severance of all intercourse and connection with my father and other members of the family." In a letter dated Tournai, 8th November, the pursuer modified his demands as follows—"Your plea for refusal was that you imagined I might not allow you to see your father. When I promised to be 'kind and considerate,' I fully meant if your father were seriously unwell at any time at his home, either at Otterspool or in London (or if you had not seen him for some length of time), to let you go to England to visit him. But as you have hitherto never kept verbal vows or promises, and moreover considering you have deserted me for upwards of four years, I thought it both wise and right to ask you for your written assurance that you would not leave here again without my consent. Now, if you went to England to visit your father, you might see all your relations and friends at the same time. You will remember in my letter of May the 10th I only wished to restrict you (as to not associating with persons with whom I was not in terms of friendship) to 'this parish of Gairloch.' I said nothing as to persons in the south, my great anxiety being to keep Mary free from the possibility of hearing any disputes or discussions, as it would be so grievous to contaminate her young mind. Again referring to your father and to your letter of June the 25th, when I wrote to you last, I naturally supposed that if you gave up your establishment at Pool House, your father would cease coming to this part of the country, as he could not visit you as he previously did in your house at Poolewe. But (notwithstanding his conduct throughout towards me) should he come again to Poolewe, I would be quite willing to arrange for him and your sister to see you here in this house. After these explanations regarding your father, I must refer you to the last part of my letter of June the 12th, where I state my reasons for asking these assurances from you; for, bearing in mind your conduct during your short stay here in July of 1880, my firm conviction arising from past experience was, that your agreeing to these conditions previous to your return would hold out in my opinion

the only prospect of peace after your return, but should you prefer to come back to me here, without giving me these assurances in writing, I shall be ready to receive you, and will try to act, as I have already said I would, and will hope for God's help and blessing on my endeavours to do my duty, but I must most emphatically warn you that, as your husband and head of the family, I feel I shall be obliged to enforce the terms of the assurances I asked for, and I shall require you never again to enter Pool House or its grounds, never to associate with persons in this parish of Gairloch who are not on friendly terms with me without my especial permission, nor leave me for short or long intervals without my consent, or by the advice of my medical man. Requesting you to send me a reply before November the 21st, and asking you to let your answer to this be final.—I remain, your faithful husband, OSGOOD H. MACKENZIE." To this the defender replied on 20th November—"I cannot add any assurances to those I have already made in my letters of last summer. I am still willing to return to you, and remain permanently with you in your home as your wife, and as the mother of our child, and to discharge all my duties as such, but I do not think it is reasonable to ask me, and I could not agree, never again to enter Pool House and its grounds, or visit my father and my relations and friends there. Please let me know if and when you are prepared, on this footing, to receive me back to your house with my maid, and I will at once arrange to return." The correspondence continued, the pursuer on 9th December further writing the defender that if she returned to live with him, her lady's maid could not be received, and on 18th December—"Regarding your maid, I am surprised that you should have asked me to receive her along with you here. Surely you cannot have forgotten the 5th of Aug. 1880, when, in my presence, and in the presence of the nurse, you commanded your maid to bear witness against me, your husband, and the master of the house. It would be very unwise in me to run the risk of such a grave occurrence ever happening again, it being a circumstance which cannot fail to remain impressed upon my memory for the rest of my life." The correspondence ended on 11th May 1885 by the defender writing as follows:—"As you still apparently purpose the imposition of these heartless conditions, I am once more obliged reluctantly to decline this conditional offer to receive me; but I add again, as I have so often done before, that on your telling me that you will refrain from preventing me from visiting my relatives and friends, I am ready to return, accompanied by my maid, to live with you as your wife and the mother of our child, and on the footing I stated in my letter of Nov. 20th. But unless you can consent to receive me in that way, there seems no further use to continue this painful correspondence, as I must decline to return on any other footing.—Yr. wife, MINNA AMY MACKENZIE."

On 27th October 1885 the pursuer wrote the defender restricting the time during which she could visit her child to two hours (9 to 11 a.m.) of one day every week. The reason given was that the visits interrupted the child's hours of study.

In 1886 the Guardianship of Infants Act (49 and 50 Vict. cap. 27) was passed.

On 18th March 1887 the defender wrote the pursuer asking to be allowed to see the child more frequently and at more convenient hours. She stated—"I am very anxious to see her more frequently than I am at present allowed. For more than a year now I have only seen her when we have both been in the country for two hours weekly, and though she is now eight years old I have never for one moment seen her alone since she could speak, there being always one, sometimes two, and even three servants present in the room whilst my daughter and I are together. This must obviously take away from much of the pleasure and freedom of intercourse which we would otherwise have. The hours also for my visiting her are inconvenient, and in winter, in such a climate as this, most trying, nor can I have any communication with her when I am absent." On 21st March the pursuer replied refusing to agree to the alterations desired.

On 12th May 1887 the defender anew presented a petition to the Court for access to her child. To this petition the pursuer lodged answers, in which he adhered to all he had expressed in his letters of 1884. The case was heard, and while at *avizandum* the pursuer on 13th June wrote the following letter to his wife:—"My dear Minna,—I write to ask you once more whether you will not still return to live with me as my wife, If my former letters have seemed to you harsh I sincerely regret it, and can only say they were not meant to be so. I am quite ready to receive you back whenever you choose to come, without further reference to the matters which you have considered difficulties in the way of your return. I am now willing to leave all of these to your own discretion and good feeling. Whatever the differences between us have been, I for my part shall try to forget them, and shall strive by every means in my power to make your life in the future a happy one. It is true that I cannot for the present receive you elsewhere than at Tournai, but my restricted means make this unavoidable. My farms are unfortunately at present a source of considerable annual loss, absorbing the greater part of the profit which my shooting rent, itself uncertain, yields; and after paying interest of debt and estate expenses out of the allowance which I have from my mother, my whole present income does not on an average much exceed £100. You must therefore see it to be impossible for me in the meantime to return to Inverewe; but if it should in time come to be possible to do so, consistently with our means, you may be assured that I shall be glad to join with you in considering any arrangement

that can be made with that object. As the accommodation for servants at Tournai is very limited, there being but one room, there may be difficulty in providing comfortably for your maid; but if she is willing to put up with what accommodation there is, I have no objection to your bringing her with you. Should you in the meantime be unable to see your way to agree to my proposal, I shall keep it open for your acceptance; and in that event I am willing that you should come to see Mary as formerly—viz., three days in the week, from ten to twelve o'clock, and that you should have her to yourself during your visits, without the presence of anyone. Perhaps you may see your way to occupy part of the time in helping the child with her studies, as you are so well able to do, but as to this you must yourself judge. I shall be at all times willing to see you when you come, if you will allow me. If you should be at any time unwell, and unable to come to Tournai, I promise myself to bring Mary to see you at Pool House, and to leave her there with you for the usual time. Anxiously awaiting your reply, which kindly address to me, to the Cockburn Hotel, Edinburgh.—I remain, ever your faithful husband, OSGOOD H. MACKENZIE."

On 14th June a copy of the letter was boxed to the Court, with a note craving delay. On 20th June the pursuer further wrote to the defender,—"My dear Minna—I received a letter on Saturday from my mother, in which she says that should you feel any difficulty in returning to Tournai on account of her being there, she is quite willing to give up her cottage in the meantime to us; so that we may have it to ourselves for at least a month or a couple of months. I feel very unwilling to accept this proposal, which to my mother at her age means so much, but if you desire it she will readily make the sacrifice. Whether after the shooting season is over we may be able to go back to Inverewe for the winter depends (as I mentioned in my last) upon the possibility of doing so with prudence, and that again depends upon how times go, and upon the arrangements which it may be possible to make. Of course you know that if my mother leaves us she takes her income along with her.—I remain, ever your faithful husband, OSGOOD H. MACKENZIE." In reference to this offer of the pursuer, Mr Dixon gave evidence in cross-examination—"In connection with that I think I spoke to him (the pursuer) on the subject of his wife returning to live with him as an alternative to his child going away. He said that unless he were to give an unconditional invitation to her to return, he might lose the child altogether. He seemed to be afraid of that. (Q) But did he indicate any view as to the alternative of his wife returning to him or his losing the child?—(A) He never contemplated the possibility of his wife returning at that time. He never made any remark to me which seemed to contemplate that. I do not think he ever spoke of his wife's return obviating the necessity of the child being

taken away. He never put it that way, so far as I remember.”

On 7th July the Court pronounced an interlocutor giving the defender the custody of the child for the months of August and September, and for three weeks at Christmas. The proceedings are reported *ante*, vol. 25, p. 183.

On 23rd July the pursuer wrote to the defender—“My dear Minna,—I sit down now to write to you about dear little Mary’s leaving here and going to you on Monday week. I cannot tell you what a bitterly hard trial it is for me to part with her, even though she is only going two miles away from me; and I can but pray God that it may never again be necessary for either parent to be deprived of her, for the sake of the other, but that she may be the means of bringing us together, so that we may all three very soon be found living under the same roof at Inverewe. When I went to meet you at the door on Friday of last week I thought perhaps you might have expressed a wish to have a talk with me. Should you care to see me here any day next week, and will let me know, I will be sure to be at home to receive you, or I shall be glad to see you any day you may like when I am visiting Mary at Pool House.”

On 16th September 1887 the pursuer wrote the following letter to the defender—“My dear Minna,—When I wrote in June last, and assured you of my readiness to receive you back unconditionally to live with me once more as my wife, the only home I then had to offer you was this cottage. I now write to say that my shooting tenant will be leaving Inverewe next month, and that I am prepared to arrange for our return there if you are willing to do so. You know my circumstances, and that it is indispensable that Inverewe should, if possible, be let during the shooting season, but, except at that time, the house is vacant, and I am willing at least to try whether with our joint resources we cannot again live there. If you come, I shall (as I have said before) be anxious to let bygones be bygones, and begin our married life anew. When I wrote to you in June I was fearful of not being able to let Inverewe, and in that case I could not have proposed our going to reside there this year—now circumstances are in a measure different, and I write to say so. I had hoped to have had some reply from you to my former letters of June 13th and 20th, and beg you to let me have an answer to this letter as soon as possible, so that if you are willing to come back I may make the necessary arrangements for our occupying the house the end of next month.—Awaiting your answer, I remain, your faithful husband, OSGOOD H. MACKENZIE.” Various letters passed thereafter between the spouses as to the abode of the Dowager, the management of the servants, and the education of the child in the event of their again residing together, and an interview between husband and wife took place on 24th September, but all without result. On 13th October the defender

wrote to the pursuer—“Dear Osgood,—My father having returned, I have now come south to talk over your letter of September 16th with him. We have carefully discussed the proposals contained therein, together with the many letters received from you during the past five years, and the general treatment I have experienced at your hands. When I saw you on Saturday September 24th, I realised most fully what my feelings were and are towards you, and your letters up to June 13th, let alone your conduct, speak for themselves as to what your feelings must be towards me. I therefore cannot see that it is possible our again attempting to live together, and write to tell you my views, without going into details of the practicability of the offer which circumstances have apparently induced you to make. You said in one of your later letters that you hoped our child would be the means of bringing us together, but our ideas as to her training are so widely different that I fear if we were together she would probably be the first cause of disagreement. Under these circumstances I shall be glad to hear from you what permanent arrangement you are prepared to make in order that I may have reasonable enjoyment of Thyra’s society.—Yr wife, MINNA A. MACKENZIE.” And on 24th November 1887 the defender’s agents wrote the pursuer’s agents—“We were aware of the correspondence to which you refer which has passed between Mr and Mrs Mackenzie since this case was last before the Court, and we are also aware, of course, of the letter from Mrs Mackenzie dated 13th October, which closed that correspondence, and which intimated, for the reasons referred to in it, her final resolution that it was impossible that she should again attempt to live with Mr Mackenzie. We think it right to say that this resolution was arrived at by Mrs Mackenzie after very mature consideration, and that it represents, she desires us to say, her final resolution on the subject for the reasons referred to in her letter.”

Thereafter the custody of the child continued to be regulated by the Court till March 1891, when the child attained puberty, and elected to reside with her father.

The action of divorce was raised in November 1891.

Concerning the pursuer’s desire for a divorce, Mr Dixon gave evidence—“I never saw any sign of a change of feeling on his part towards his wife—always aversion. On many occasions he talked to me of divorce with reference to his wife. I think that began not long after she went to live at Pool House. He told me that he thought he would be in a position in time to apply for a divorce. (Q) Did he look forward to that with satisfaction apparently?—(A) Certainly. He repeated conversations of that tenor from time to time onwards. He never indicated any desire for a reconciliation with his wife, or any desire to have her back to live with him. (Q) From all the opportunities you had of seeing him and the conversations that took place, did you form any opinion whether he wished

her to stay away or to come back?—(A) I am sure I cannot have been mistaken, from what he said to me himself, in believing continuously that he never had the slightest desire to have her back, but the contrary. In so saying I come down to the latest conversations on the subject. In December last he told me that he was about to apply for a divorce, and I said in reply, 'Well, I am very sorry to hear it.' He said—'Well, you see it is this way: if I don't get a divorce and my wife were to survive me, she would have Inverewe.' That is the last time he said a word to me on the subject. . . . He never indicated that any of his letters were written with the object of inducing her to come back, and it was upon reading his statement to the effect that he was sincere in making the offer to take his wife back that I was led to offer to give evidence to-day, and I have therefore volunteered to say what I have said this morning. I have come forward entirely of my own accord. I am satisfied, from all he said to me during that course of years, that whatever he may think now he was not sincere in asking her to come back, and I think the circumstances I have mentioned sufficiently indicate it. I have never heard a word or seen an act that would indicate the slightest change of feeling. I should say that the feeling of aversion which I have described was apparently insuperable. I never saw any alteration upon it."

Sir Thomas and Lady Moss both died before November 1891.

On 23d June 1892 the Lord Ordinary assozied the defender from the conclusions of the summons.

"*Opinion.*—In this case the pursuer Mr Mackenzie seeks to divorce his wife on the ground of wilful and malicious desertion. He also asks that the defender should be held to have forfeited all the rights and privileges of a lawful wife, 'and lost and amitted the dos and tocher, and all goods, gear, and others whatsoever which the pursuer received with or on account of the defender, or which were any ways contracted or agreed to be paid to the defender *causa matrimonii nomine dotis et propter nuptias*, or whatever right she had to claim *jure relictae* or otherwise as the pursuer's wife.' The last-mentioned conclusion of the summons is no idle form, because at present the defender under her marriage-contract is in receipt of the income of £20,000 settled money. The pursuer now proposes to deprive her of that income as if she were naturally dead, and if he succeeds in obtaining decree of divorce he will strip her of nearly the whole of her present income. It is not surprising that an action which involves social and pecuniary consequences so serious to the defender should be vigorously defended.

"In such cases it is always a matter of primary importance to ascertain which of the spouses was to blame for the original separation. The pursuer's averments on the point are specific enough. They are these:—[*His Lordship quoted from Record*].

"I. The first thing to be ascertained is whether the defender had or had not

'reasonable cause' for leaving the pursuer on 4th August 1880, and for thereafter remaining away from him. If she had reasonable cause, there can be no divorce. But even if it is not proved that the cause of leaving was reasonable and adequate, it does not necessarily follow that the pursuer is entitled to decree. As a condition of succeeding, he must satisfy the Court not only that he was himself willing to adhere, but that he used all reasonable means to induce the defender to return to cohabitation.

"The existing law of divorce for desertion depends upon the old statute 1573, c. 55, as amended by the Conjugal Rights Act, 1861, sec. 11. Divorce on the ground of desertion alone, which in the United Kingdom is peculiar to Scotland, is a valuable remedy when applied within proper limits, and has relieved many a case in which to refuse the remedy of divorce would have inflicted cruel hardships on the injured spouse. But divorce on the ground of desertion requires to be jealously guarded, because it is exceptionally liable to abuse. In no class of cases is there greater risk of collusion or greater difficulty in detecting it. Even if the case is honestly defended, there is the risk, quite as serious, which the Court is bound to guard against, of divorce, with all its penal consequences, being granted at the request of one of the spouses, who may have been as much, if not more, to blame than the defender for the disruption of the home, and who, far from desiring the defender to return, has, while professing to be anxious for renewal of cohabitation, taken no honest steps to win the other back. The remedy is not for such a case as that, and care should be taken not to extend the statute so as include it. The late Lord President Inglis more than once expressed himself strongly to that effect. He did so in the case of *Barrie v. Barrie* (10 R. 208), and again in the whole Court case of *Watson v. Watson* (17 R. 736), in which he said (p. 741):—'I consider this a question of so great importance, not only to the law of Scotland, but also to the morality and social wellbeing of the community, that I cannot conclude without repeating what I said in *Barrie v. Barrie*, that while wilful and malicious desertion of one spouse by the other is a flagrant violation of conjugal duty of such a kind that every system of jurisprudence provides a remedy, the remedy of divorce *a vinculo* for desertion is peculiar to Scotland, is unknown in other parts of the United Kingdom and in the Queen's dominions generally, and that the greatest care must be taken that it shall not be extended to cases to which by law it is not strictly applicable.' In that opinion the present Lord Justice-Clerk agreed (p. 743).

"I shall have occasion afterwards to consider more fully the law applicable to the case, but I have said so much in order that, while examining the evidence to see whether the defender had reasonable cause for leaving the pursuer in 1880, it may also be seen what was the pursuer's state of mind and conduct subsequent to that event.

"It is useless to attempt to disguise the fact that the origin of the misunderstandings and disputes which unhappily arose between the pursuer and defender is to be found in their disagreement as to the pursuer's mother, the Dowager Lady Mackenzie.

"The relations between the pursuer and his mother, the strong attachment which existed between them, her control and influence over him, and her connection with the estate of Inverewe, were altogether exceptional, and must be grasped in order to a proper understanding of this case. The Dowager was the second wife of the pursuer's father Sir Francis Mackenzie, and the pursuer was her only child. The pursuer's father died in 1843, when the pursuer was only a year old, and from that time until 1877 the pursuer resided almost uninterruptedly with his mother. In 1863 she bought for him the estate of Inverewe, taking the title in his name; but if he was master, she was virtually mistress of it, and continued to assist him to manage it. She says in her letter of 13th November 1880, speaking of Inverewe—'But no circumstance will ever induce me to give up residing on this property, which I purchased in 1863 as a permanent residence for my son and a home for myself.

"The attachment between mother and son, the genuineness of which no one questions, by itself calls for nothing but approval. But when the pursuer began to talk of marrying, it became apparent to all who knew the circumstances that it was absolutely necessary that the Dowager Lady Mackenzie should not reside with the married pair. Accordingly, when the pursuer proposed to Miss Moss, her father most properly made it a condition of giving his consent that the Dowager should not live at Inverewe. The necessity for some such arrangement must have been represented to the Dowager, for she had given her son a letter, to be shown and acted on, in which she says—'I would live with you, or entirely away, or during the dull time of the year, just any plan that might seem best to please others. If I saw you thoroughly happy I never could be really unhappy.'

"Notwithstanding this assurance it is only too plain that immediately after the marriage both the Dowager and the pursuer were desirous of breaking or evading the condition. The defender says—[*His Lordship read evidence quoted in narrative*]. This is corroborated by young Lady Mackenzie—[*His Lordship read evidence quoted in narrative*]. . . .

"This intention on the part of the Dowager to live at Inverewe was objected to by the defender and her relations, and finally the pursuer and his mother agreed to give it up, it being arranged that the Dowager should reside at Tournai, a distance of about two miles from Inverewe. But the result, as I think the evidence shows, was that the defender's refusal to agree to her remaining was bitterly resented by the Dowager, and also was resented by the pursuer himself, who made it a ground of complaint against his

wife. To that cause, I think, many of the unpleasant scenes and events which subsequently took place may be traced. . . .

"I do not propose to examine in detail the married life of the parties during the first eighteen months after their marriage. There are some matters, however, which must be noted, as they have a bearing on subsequent events, and permanently affected the attitude of the spouses to each other. The pursuer complains that the defender's manner almost from the first was cold and indifferent, and gradually got worse. I asked the pursuer's counsel how he accounted for this. The only explanation which he could give was that the defender was disappointed and dissatisfied with her position. I do not think that this explanation is satisfactory. Two reasons are assigned by the defender for feeling unhappy. One is that her husband's manner to herself was inconsiderate and indifferent. I think there is a certain amount of exaggeration on both sides as to the manner of the pursuer and defender respectively; but I am unable to accept the view that the fault of manner lay originally with the defender. In addition to the evidence of the defender and her relations as to the pursuer's brusque manner to and inconsiderate treatment of her, we have the evidence of Sir Kenneth and Lady Mackenzie, Dr Mackenzie, and two neutral witnesses—Mr Murray of Gruinard, and Mr Dixon, the tenant of Inveran. The most serious bit of evidence on this point is that of Mr Murray, who 'graphically describes the occurrence to which he speaks. His evidence, which corroborates in every particular that of the defender, shows that at this very early date—the autumn of 1877—the pursuer, in order to return to his mother, was willing to risk his wife's health and safety by exposing her to a journey in weather and under circumstances in which she should not have been exposed at all.

"The most serious trouble, however, was the growing dread which the defender entertained of the influence of the Dowager over the pursuer. It is true that, owing to the efforts of friends, the Dowager was not much with the married pair between the end of 1879 and the autumn of 1879. But between September and December 1877 she stayed four or five weeks at Inverewe; and it was during that time that the conversation took place between her and the defender as to her continuing to live at Inverewe. What the defender says made her most unhappy was that when the Dowager was in the same house with her son she monopolised him entirely. . . .

"It is urged that during their earlier married life the pursuer wrote as if he was really attached to his wife, and as if he could not understand her change of manner towards him. If the letters were sincere, I can only account for this on the supposition that the pursuer from first to last was blind to the effect of his own conduct to the defender, and the effect upon the defender of the relations between himself and his mother. One of the most remarkable fea-

tures of the case is that the pursuer withdraws nothing and regrets nothing. He says, 'Nobody is perfect, but I think I had nothing particular to regret;' and that has been his attitude throughout.

"The defender may perhaps have attached too much importance to some incidents; but I think, judging from subsequent events, that in the main her instinct was correct. The Dowager did, both at Inverewe and Tournai, monopolise her son; her influence over him was great, and it was not exercised favourably to the defender.

"Towards the close of 1878 the pursuer and the defender went to Otterspool for the defender's expected confinement.

"On 31st January 1879 the pursuer returned to Scotland. Before leaving he left for his wife at Otterspool a letter in which he complained of her coldness and neglect. The defender answered this letter on 3rd February. The defender admits that that was an injudicious letter, and she has had reason to regret it, because it was carefully preserved by her husband, and forms one of the principal grounds of attack against her now. At the same time, it is fair to say that it was written when she was very ill, and under a strong sense of irritation. The letter does not strike me as being that of a person who does not care; on the contrary, it is the letter of a woman who is angry and jealous. The keynote of it is jealousy of the Dowager, whether well or ill founded. For instance, she says, 'Can you honestly say that you have left father and mother and cleaved to your wife?' And again, 'But if you and your mother continue one, and expect me to join you as a sort of inactive partner and form a trio, you will find yourself very much in the wrong.' I think the worst that can be said of the letter is that it contains a number of petty and undignified complaints, but the motive is what I have said. The pursuer did not answer this letter, but subsequently said to his wife, 'You will hear of that letter again some day.'

"The child was born on 1st March 1879. A few days after the birth a dispute seems to have taken place between the pursuer and his mother-in-law Lady Moss, which led to a correspondence, hot and angry upon his side, which continued for several months.

"It is to be regretted that this action should have been delayed until both Sir Thomas and Lady Moss were dead. I do not suggest that that was the motive for the delay—there was another amply sufficient reason—but one result of the action not being sooner raised is that their evidence, and that of other material witnesses, has been lost. The cause of the dispute was that Lady Moss complained that the Dowager at Inverewe had been in the habit of abusing, or at least discussing, the defender in Gaelic with the domestics. Lady Moss being dead, it is impossible to ascertain with certainty what passed between her and the pursuer; and the cook being also dead, it cannot be satisfactorily ascertained what passed between her and the

Dowager. The Dowager was certainly in the habit of going to the kitchen and talking familiarly with the cook in Gaelic. The defender says that she heard her own name mentioned, the mention of it being accompanied with laughter, and the Dowager admits that she may have mentioned the defender's name. She says—"I may have said 'Mrs Mackenzie,' but never beyond. My conversations with the servants were of a somewhat easy nature, because I had very old and good servants. I do not say that we did not have a good laugh sometimes. I think I can swear that my daughter-in-law's name was never mentioned on any occasion in the kitchen when there was laughter going." Well, it may be that nothing disrespectful was said about the defender, but it is easy to see how continued conduct like this on the part of the Dowager would tell upon a sensitive and reserved nature like that of the defender; and the incident just shows the great difficulty of the Dowager, who had been mistress, accepting the position of a mere guest in her son's house. Whether Lady Moss was judicious or not in what she said, I think that her letters and those of Sir Thomas show a sincere desire to make it up with the pursuer; but nothing would content him but an unconditional apology upon his own terms, without any admission or fault on his own part. I only advert to this matter because I think that from that time the pursuer harboured a bitter feeling against the defender's family, or at least against Sir Thomas and Lady Moss.

"I shall not dwell in detail upon the six months which followed immediately after the birth. The pursuer returned north towards the end of March, leaving his wife at Otterspool. She made a bad recovery, and was reduced to a condition of great weakness and delicacy. One of the most unsatisfactory features of the case is that the pursuer never seems to have appreciated how delicate his wife was after her confinement. She then was taken to Buxton, and thence the pursuer took her by Edinburgh and Inverness to Tournai. The only incident during that journey which I have time to notice is the journey up Loch Maree to Inveran in an open boat. The defender was badly wet, and being in a delicate state, fainted on getting out of the boat. She was carried up to the house of Mr Dixon, the sporting tenant of Inveran, and gradually recovered. There is a considerable conflict of evidence as to the pursuer's conduct upon this occasion. The defender says that he was cold and inattentive, and Mr Dixon says that he observed at the time that the pursuer never went near his wife. Mr Dixon's housekeeper, Johanna Mackenzie, says—"When I first saw her that day she was lying on the dining-room sofa. I saw Mr Mackenzie there. He seemed to be feeling concerned about his wife. He was standing beside her and kissing her, but I don't think she was aware of that. He seemed to be feeling concerned about his wife." I think that both accounts are true in the

main. I think that when the defender first fainted the pursuer was alarmed and concerned; but I think that both before and after the faint he neither felt nor showed much concern for his wife's comfort. In connection with this incident I must draw attention to what I consider a very discreditable feature in the evidence of the lady's-maid Harris, a witness for the pursuer, which was taken on commission. She was asked, 'Do you remember the defender becoming unwell in the boat, and spending the night at Inveran?' To this she makes the following extraordinary answer—'I do; she did faint; but we thought it was put on. . . . We who thought it put on includes Mrs Bain and myself alone.' This answer is of great significance, when it is remembered that one of the pursuer's most persistent charges against the defender was that she shammed illness, or produced it by taking drugs in excess. The queries which immediately follow show the drift of the examination, and what the witness was expected to answer, especially the 19th and 20th interrogatories; and the charge suggested is repeated on record in the pursuer's answer to the defender's fourth statement.

"Very fortunately for the defender and the interests of justice a letter written by Harris at the time was preserved, dated 15th July 1879—[His Lordship read the letter].

"Harris's evidence is worse than useless to the pursuer; and the letter which I have just quoted corroborates in a marked way the evidence of the defender and Mr Dixon.

"I shall pass over without comment the earlier part of the autumn of 1879. The pursuer and defender resided at Tournai, the Dowager being away, and for a time they seem to have got on pretty well together. But after the shooting tenant left Inverewe the pursuer and defender returned to Inverewe, and the Dowager to Tournai. From that time forward the relations of the pursuer and defender became worse. I do not think that the fact that the Dowager was residing at Tournai made the defender's position any better. Tournai was only two miles from Inverewe, and the pursuer was constantly there and in constant communication with his mother; and things were just as bad as if she had been living at Inverewe. The defender was in delicate health, and felt the necessity for a change of air. She was anxious to go to Otterspool, and to take her child with her. The pursuer professed to believe that her illness was of her own causing, and was due to an excessive use of alcohol and drugs taken contrary to medical orders and advice. This charge he has persisted in and circulated from that time to this; and on record he repeats the charge, and during the proof he attempted but without success to prove it. The pursuer was determined that the child should not accompany its mother, much as she desired it. He gave as his main reason at first that he feared for the child's health; but it appears under his own hand, in a letter

written to Sir Thomas Moss on 5th January 1880, that he had another reason, and that was that he desired to punish his wife for what he considered her improper and disobedient conduct to himself. He says—'A wife who cannot behave properly to her husband is not fit to be trusted by him with his child; and unless Minna turns over an entirely new leaf, expresses sorrow for the past, and promises amendment for the future, the child must remain here.' It is right to point out the kind of orders which the pursuer expected the defender to obey. In the Appendix there is one of the letters written by the pursuer to his wife while living in the same house, and while she was in a very delicate state of health. He writes thus—[His Lordship read from letter of 18th November 1879].

"It was on account of supposed disregard of such uncalled-for and trifling complaints as these that the pursuer addressed his wife in cruel language such as that used by him in his letter of 16th January 1880, which led to the scene during which she called him a 'brute.'

"Sir Thomas Moss and others continued urgently to press the pursuer to allow the child to accompany the defender, but the pursuer remained obdurate. At this point there occurs a matter to which I attach a good deal of importance as throwing light upon the pursuer's conduct and tactics. On 6th January 1880 he despatched through the local post-office to Lady Moss the telegram, 'Doctor says nothing serious matter with Minna, only effects of low spirits; forbids wine, brandy, opiates, tea; recommends change, but certainly not for baby.' This telegram contains a distinct insinuation that the defender had been taking stimulants and opiates in excess. It also insinuates that Dr Bruce was of that opinion, and states that he had forbidden them. It also states that the doctor considered there was nothing serious the matter with the defender. Now all these insinuations and statements were untrue or grossly exaggerated. Dr Bruce was examined as a witness for the defender, and he contradicts the pursuer in every particular. He is shown the telegram, and he says in regard to it, 'I am bound to say that it is very seriously different from what I said;' and he proceeds to say that he did not forbid wine and that he allowed Mrs Mackenzie a certain quantity of brandy, that he prescribed tea, and that in regard to opiates he thought they were occasionally necessary in diarrhoea, although he preferred that they should not be used. In regard to the baby he says that while he was of opinion that the baby was better in the air of its own nursery, anything that he said in regard to a change not being advisable for it was induced by the pursuer's statement to him (which was false) that the defender did not take an interest in the child. He says—'He said quite distinctly that his wife did not take an interest in the child. He said that in the course of the conversation as to whether the child should go with her. He made various petty complaints about his

wife.' And he says—'If I had known that the separation was preying on the mind of the defender and would be acutely felt by her, I would clearly have advised that the child should go with the mother. It was a healthy, thriving child. Travelling with every comfort, there would have been no particular risk to the child.'

"The statements, therefore, in the telegram were false and misleading. But, in addition, it was an outrage on the part of the pursuer to send a telegram in such terms about his wife through the local post-office. It is difficult to understand how the pursuer can protest as he does against the telegram subsequently sent to him by Sir Thomas Moss—a most improper telegram—and at the same time not perceive and acknowledge his own culpability in despatching the telegram of 6th January 1880.

"On the same day that the telegram was despatched, the pursuer wrote a letter to Lady Moss, and in this letter he is as disingenuous as in the telegram. In regard to that Dr Bruce says—'The catalogue of things mentioned in that letter as forbidden by me is a very unfair version.' He also says that he never said anything about the air of Liverpool being bad, and that anything he said about the child was upon the representation that the defender did not care for the child.

"As I have already said, the pursuer was in the habit when living in the same house with his wife, of writing her letters containing commands and reproofs. On 16th January 1880 he wrote—'As long as you continue to act as you are doing at present, the child shall not leave its home.' He added that her stubborn, rebellious spirit must be quelled, and concluded by saying—'If you do not amend your ways (sad though it would be) I may see it my duty to arrange that my child be not brought up under such bad influence and example.' On 17th January 1880 he writes to Sir Thomas Moss after a quarrel which he had had with the defender, during which he complained that she called him a brute—'What I should have done was to have put her under lock and key; and certainly, if she ever attempts the like again I shall do so.'

"On 23rd January Sir Thomas Moss wrote to the pursuer entreating him to allow the child to accompany the defender south. The answer was that he would not let the child go.

"I now come to another serious piece of evidence which shows the understanding at this time between the pursuer and his mother in regard to the defender. That is a letter written by the pursuer to his mother from Conan on 29th January 1880. As the letter is of importance I shall quote part of it—[*His Lordship quoted letter*]. This letter shows that the pursuer and the Dowager were in close consultation with a view to breaking the defender's spirit. It shows the pursuer's knowledge of his wife's dread of the Dowager in connection with her child, and that notwithstanding this he was prepared to concuss her by threatening to send the child to the Dowager; and in the postscript he tells his mother with indecent

exultation that the child, who is referred to by the nickname 'Snog,' preferred him to her mother, crying every time that she left him, and generally crying every time that she went to the defender. This letter, be it observed, was written before the events at Conan, of which the pursuer complains so much; and it shows that the defender was not without grounds in thinking that her husband and his mother were in league against her. In connection with this I may refer to Lady Mackenzie's evidence—[*His Lordship quoted the evidence*].

"I now come to what is called the plot on the part of the defender to carry off the child without the pursuer's consent from Conan. I think that too much importance has been attached to it, but as it bulks largely in the pursuer's case I must express the view which I take of it. I think it is proved that the defender, goaded by the pursuer's refusal to allow the child to accompany her, was foolish enough to talk to the nurse Bain as to the possibility of the child being removed to England. The defender says that Bain began the subject while they were at Inverewe, and, on the whole, I am inclined to believe this to be true; but I think it is proved, and indeed admitted by the defender, that at Conan she asked Bain whether she would help her if things came to the worst. Bain did not agree to this, and finding that Bain would not help her the defender gave up the idea. One proof of this is that she did not apply to the maid Harris to help her, and the same evening told Bain not to say anything about what she had said. Now I think that the defender was very wrong in harbouring such an idea, although it must be admitted that she acted under a sense of great provocation, caused by the pursuer's cruel refusal to allow the child to go with her. The next day Harris, who had been told of this conversation by Bain, warned the pursuer to look out for the safety of his child, and afterwards he had a conversation with Bain. It is not clearly proved what Bain told the pursuer, but we do know what the pursuer professed to believe about this plot, because he describes it in a letter dated 5th May 1880, to Mr Osgood Hanbury in these terms—[*His Lordship quoted the letter*].

"The plot therefore which the pursuer professed to believe, and with which he charged his wife, was not that the defender had thought of taking the child away, but that she and her relatives had made every arrangement for that being done. He thus placed himself in a false position. A great deal has been said about the untruthfulness of the defender and her relatives in denying the existence of the plot; but in judging whether that denial was untruthful or not, it must be remembered that what they were persistently and obstinately charged with was a plot the details of which had been finally arranged. They were entitled to deny that, because no such arrangements had been made; and the worst that can be said against them is

that they did not volunteer the admission that the defender had asked Bain to help her.

“The pursuer says that at an interview on 11th February, at which Mr Cottingham Moss was present, the defender confessed to the plot; but he cannot give the words she used, which is somewhat remarkable, as he was in the habit of writing down any conversation which he considered important. The defender said that she merely said to him that if he drove her to it there was no knowing what she might do; but she says she did not admit that there was any plot. Mr Cottingham Moss corroborates her in this, and I believe him and the defender.

“The result of this incident was that the pursuer took up the position which he has ever since maintained, and founded on at every turn, that he was in constant danger of having his child taken away from him against his will. He returned to Inverewe with the child, and lost no time in carrying out his threat of sending the child to Tournais. Of this he apprised the defender by telegram of 15th February 1880.

“On 11th February Sir Thomas Moss sent the pursuer what was certainly an improper telegram—‘Not well enough to travel. Do you wish me to countenance my daughter being taken to her grave by your decree against the doctor’s advice. Remember the Penge case;’—and some angry letters followed in regard to the plan or plot. In regard to the telegram, it appears from subsequent letters of Sir Thomas Moss that it was despatched when he was labouring under great anxiety about his daughter’s condition, and he had at least the manliness and propriety to express regret for having used such words.

“After the defender’s return to Otterspool the relations between the parties were very strained, and the step was taken, which I think was to be regretted, of calling up a loan which had been given to the pursuer of part of the marriage-contract funds, to the interest of which the defender had exclusive right. That was an act of retaliation, and no doubt was bitterly resented by the pursuer. Soon after her arrival at Otterspool the defender became very unwell. Dr Fitzpatrick, who attended her, speaks to her condition at that time. He also says that she was very depressed, and he attributed her depression to the child not being allowed to come south with her. Shortly afterwards she went to London, and there she had a very serious illness. Dr Andrew Fyfe attended her, along with Dr Matthews Duncan, who unfortunately is dead, and he says—‘He and I entirely agreed in our diagnosis. Speaking medically, the condition I have described was very serious. It was not dangerous, but it might rapidly have become a dangerous case.’ She was then suffering from three distinct causes—typhoid fever, pain over the lower bowel of long standing, and uterine affection, which had probably existed since the birth of the child. The doctor says that he did not see anything

to lead him to suppose that any part of her condition had been brought about by the improper use of any drug; and as to the Tamar Indien lozenges, he said that these, which were a mild aperient, had certainly nothing to do with the defender’s condition.

“During the interval between February and June 1880 the pursuer did not write to the defender. About the end of May 1880 the pursuer took a step which is not without significance. Without further notice than a telegram from one of the farm-servants at Inverewe, the defender’s pony, pony-chaise, and harness were despatched from Inverewe to Otterspool. This does not look as if the pursuer desired the defender to return to him. The only other matter to be noted is that the pursuer widely circulated his own version both as to the plot and as to his charge against the defender of taking drugs and stimulants to excess.

“The defender gradually recovered, and as soon as she felt strong enough to travel was desirous of returning to her husband and child. She accordingly wrote to the defender a letter dated 5th June 1880. In that letter she offered to contribute her share of the joint expenses at Inverewe, and concluded by saying—‘I am quite sure you will see how painful you have rendered my return by the letters about me you have seen fit to send for circulation among some of your relations, but my love for my child impels me, now that I am permitted by the doctor to go north, to return to Inverewe, where you have promised I shall find her.’

“That letter produced the greatest consternation at Tournais. In the course of the proof, a Mr Dixon, who has been already mentioned, voluntarily came forward in consequence of having read that the pursuer declared that he was desirous throughout to get his wife back. This witness had no conceivable interest to do anything except tell the truth and discharge a very unpleasant duty. The pursuer did not go into the box to contradict him, and judging from the manner in which it was given, I think that his evidence was thoroughly trustworthy, and must be believed. Now, this gentleman says that as early as the 22nd of January 1880 he called upon the Dowager at Tournais, and that on that occasion she used the strongest epithets as to the defender’s general conduct and character, and abused her to him. In the month of March the pursuer began to talk to him about his wife, and gave his own version of the disputes between them.

“Before referring to what Mr Dixon says about the defender’s proposal to return, I should mention that on receipt of the letter of 5th June 1880 the pursuer wrote to his wife a letter, which, as I read it, was calculated and intended to deter her from returning. It is a most unkind letter, and shows pretty plainly that he did not desire her presence. The defender, however, would not accept this rebuff, and wrote on the 19th of June saying that she

would arrive upon the 1st of July. The pursuer made another effort to put her off by suggesting that she might go to the Loch Maree Hotel for two or three days, but she did not agree to this, and proposed to come to Tournai. Mr Dixon thus describes what occurred on the 28th of June [*His Lordship quoted Mr Dixon's evidence*].

"This extraordinary statement is not contradicted, and I hold it proved. It shows that, far from wishing his wife to return to him, the pursuer was in despair at her insisting on coming; and it shows also that by that time he entertained a feeling of positive aversion to her.

"The defender arrived upon the 1st of July, and she resided at Tournai till the 4th of August. The pursuer received her coldly, and occupied another bedroom during her stay. We find a chronicle of the pursuer's attitude towards her in a series of little notes that he was in the habit of writing to her, and leaving on her table, containing for the most part reproofs and instructions as to her conduct. He would not permit her maid Plumridge, whom she had brought with her, to live in or even enter the house; and thus the defender was in the end completely isolated.

"The pursuer led some evidence, including that of Mr Davidson of Tulloch, to prove that while the defender resided at Tournai she behaved very coldly to the pursuer. No objection can be taken as to the manner in which Mr Davidson gave his evidence, but he was only a boy of fourteen at the time, and was plainly not aware of what was going on behind the scenes, and what was the cause of the defender's manner. On the other hand, young Lady Mackenzie speaks as to the Dowager's feelings towards the defender at that time. As early as 1879 the Dowager, in speaking to Lady Mackenzie, used language about her daughter-in-law which I shall not repeat, but it will be found in the proof. On Lady Mackenzie calling for the defender at Tournai in June 1880, she saw the Dowager, who at once began violently to abuse her daughter-in-law. While referring to Lady Mackenzie's evidence, I may quote, by anticipation, one more passage at this place. In speaking of the defender's departure from Tournai, and the condition she was in at that time, Lady Mackenzie says—'After such treatment she could not go back to Tournai. I did not think she could safely have gone back. That is my opinion still. (Q) From all you saw of pursuer's conduct to his wife, and what he said to you, did you think he wished she should stay with him or not?—(A) I think everything he did has been done with a view to drive her away. He has never, in any communication to me, from that day to this indicated a desire to have her back.' That is the evidence of the pursuer's sister-in-law, who gave it with great clearness and precision.

"Then came the scene of 4th August 1880. That was an event of great importance, because it led to the defender leaving the pursuer, but I should not otherwise have thought it necessary to dwell upon the evidence in regard to it, because I hold it

to be proved beyond doubt that a great outrage and indignity was inflicted upon the defender on that day. It is proved—and indeed the pursuer and his mother had to admit—that simply because the pursuer wished to have the child beside him during breakfast, the child was taken from the defender by force—the defender being held down in bed, the pursuer holding one arm and his mother the other, while the nurse carried off the child. It is said that this violence was necessary for the safety of the child. I cannot accept that suggestion, for, in the first place, I think the child was in no danger, and in the next place, it is plain that there would have been no scene and no crying on the part of the child if the pursuer had had the ordinary self-restraint and manliness to leave the child with its mother for a few minutes. I think the real reason why the child was taken forcibly from the defender was that the pursuer was determined that his arbitrary commands should be obeyed, and that if necessary he was prepared, and would be prepared again, to use violence to the defender. I think I should have arrived at this result even on the evidence for the pursuer, but I may say that I believe every word of the defender's evidence in regard to this matter. I shall only quote one passage to show the tone in which the Dowager and the pursuer spoke of the child. Mrs Mackenzie says of the Dowager—'Before she left she said—'You are in my house now, and obey me you must.' 'I said, "Yes, Lady Mackenzie, it is your house, but the child is mine." She said, "The child may be yours, but it is practically mine now." I think that is all that passed.' Compare with this the Dowager's language—'(Q) Do you think, looking particularly to the relations which subsisted between you, that you were warranted in such an act?—I think I was perfectly warranted. (Q) And your son was of the same opinion, so far as you can judge?—(A) Of course, to rescue his child and my grandchild.'

"The evidence of the nurse Bain was most unsatisfactory, because, although she was standing facing Mrs Mackenzie, and must have seen all that took place, she obstinately refused to admit that she saw either the pursuer or his mother put a hand upon the defender. The impression left upon my mind was, not only that she was speaking untruthfully in regard to that incident, but that her evidence in regard to any other matter likely to tell against the pursuer must be received with considerable reserve.

"On this occasion, then, actual and considerable violence was unwarrantably used. The marks of the pursuer's grasp upon the defender's right arm remained for many days, and were seen by Plumridge, by Sir Kenneth and Lady Mackenzie, and by Sir John Moss. Of that there is no doubt. In addition, the violence was used under circumstances of peculiar indignity, at a time when the defender, who was in poor health, was without any person in the house upon whom she could rely for assistance, and in the presence of the nurse. Worst of all, there was this element, that

the baby was removed with the forcible assistance of the Dowager, of whom, in connection with the child, according to the pursuer himself, the defender had a 'perfect horror.' All these elements, I think, made it absolutely necessary that the defender should, at least for the time, leave the house. This she did on foot, and in the rain. She returned next day to bid good-bye to the child; but far from making any apology for what had happened the previous day, the pursuer would not allow the defender to take the child in her arms, and told her that she did not even deserve to be allowed to kiss it. From that day to this the pursuer has never in any way admitted that he was in fault in what he did, and justifies the whole of his conduct on that occasion.

"The first question which I have to decide is, Whether what occurred on 4th August was, in the sense of the statute, 'reasonable cause' for the defender leaving the pursuer? This, I think, is a jury question, to be determined according to the circumstances of the case, regard being had to the reciprocal obligations of the parties as married persons. The statute does not define what is 'reasonable cause.' It does not say that such cause must be confined to adultery or cruelty, and there is no decision which binds me so to limit and apply the words. I have no doubt that the Court in applying the Act should keep in view as a guide the grounds upon which judicial separation may be granted, or a defence to an action of adherence may be rested, although, as I think, they are not constrained to apply the same standard rigidly in judging of a defence to an action of divorce for desertion. No cause for diverting should, in my opinion, be recognised as reasonable in the sense of the statute which, taking into consideration the position in life of the parties, the history of their previous married life, and the whole circumstances of the case, is not shown in a reasonable sense to have rendered the position of the spouse who diverts intolerable, and to have made the fulfilment of matrimonial duties impossible. But if there is proof of substantial ill-treatment by the pursuer of an action of divorce, which, in the opinion of the Court led to the defender diverting, and which is neither justified nor repented of, but there is a doubt whether such treatment as proved quite amounts to cruelty such as would support an action for judicial separation, or a defence to an action of adherence, the Court is, I think, entitled and bound to construe the statute liberally in favour of the defender, and avert the penal consequence of divorce.

"In my opinion the defender had 'reasonable cause,' in the sense of the statute, for leaving Tournai on the 4th of August 1880. I think she could not with self-respect or safety to health have remained in the house. She would not have been bound to remain, or return had she been asked to do so, which she was not; and I think she would have had a good defence to an action of adherence had one been raised. It is

true that the pursuer had not previously struck his wife, or used bad language to her, and that the violence used upon the 4th of August was not in itself dangerous. It may be also that the matters of which the defender complains in the pursuer's previous treatment of her do not, taken separately, amount to cruelty which can be recognised by the law as an excuse for non-adherence. Physical violence is not in all cases essential; but when it occurs, it completes what might otherwise be an insufficient proof of cruelty. When a husband who has habitually treated his wife in such a way as to make her life miserable, and impair her health, uses physical violence to her, his previous conduct may at once be appealed to to strengthen and complete the charge of cruelty. Now in this case I do not regard the violence used by the pursuer on the 4th of August 1880 as an accidental outburst. I think it was the outcome and evidence of a settled determination that he would compel his wife to obey him, however trifling and unreasonable his commands might be, and that if necessary he would use force. We see traces of this in his previous conduct and letters. He had, as I have said, represented that his wife took stimulants and opiates to excess, with the result of making her violent and outrageous, and hinted that the opiates were having some effect upon her mind. In one of his letters he says that if the conduct he complains of is repeated, he should have to lock her up. 'What I should have done was to put her under lock and key; and certainly if she ever attempts the like again I shall do so.' I therefore regard the incident of 4th August 1880 as part of a systematic course of treatment which the defender had to expect and submit to if she remained at Tournai.

"None of the cases relied on by the pursuer are of close application. In the first place, no case has been cited which relates to an action for divorce for desertion under the statute, and consequently I have not been referred to any authoritative judicial opinions as to what amount of ill-usage or cruelty will constitute 'reasonable cause' in the sense of the statute. The cases quoted are either suits for judicial separation or to compel adherence. The leading case relied on by the pursuer is *Paterson v. Russell*, as reversed in the House of Lords (7 Bell's App. 337). That case, which was an action for judicial separation at the instance of a wife, was decided in the Court of Session in 1849, and reversed by the House of Lords in 1850, who refused separation. There is no doubt that in that case the husband treated his wife abominably, but he stopped short of actual violence, and confined himself to harsh and repellent conduct, which must have produced great humiliation and mental suffering but not injury to health. It is plain from Lord Brougham's opinion, that the decision was arrived at with great reluctance, and in deference to the previous authorities. But he does not affirm the proposition that in all cases physical

violence must be used; and further, he makes what I regard as a prediction as to the maturing of the law in such cases—‘If the husband, without any violence, or threat of violence to the wife, without any maltreatment endangering life or health, or leading to an apprehension of danger to life or health, were to exercise mere tyranny, constant insult, vituperation, scornful language, charges of gross offences utterly groundless; charges of this kind made before her family, her children, her relations, her friends, her servants; insulting her in the face of the world and of her own domestics, calling upon them (which is one of the cases put below) to join in those insults, and to treat her with contumely and with scorn—if such a case were to be made out, or even short of such a case—any injurious treatment which would make the marriage state impossible to be endured, rendering life itself almost unbearable—then I think the probability is very high that the Consistory Courts of this country would so far relax the rigour of their negative rule, at present somewhat vague, as to extend the remedy of a divorce *a mensa et thoro* to a case such as I have put.’ Forty years have elapsed since that decision, and I venture to think that the standard of what constitutes cruelty has been somewhat modified during that period.

‘The case of *A B v. C D*, 16 D. 111, was also strongly relied on. That was an action of adherence. The defence was that the husband had treated the defender cruelly, and that she was not bound to adhere. The proof disclosed rude and very harsh treatment on the part of the husband, but stopping short of positive violence, except that the pursuer gave his wife a violent push when she tried to get her child from him. Two of the Judges, Lord Murray and Lord Wood, concurred with great difficulty in repelling the defence, and I am not surprised, looking to the facts stated. I venture to doubt whether that judgment would be repeated now. But it is not easy to argue from one case to another, because each case depends so much upon its own circumstances. I think that the elements which go to make up cruelty in the present case, though like those in *A B v. C D* in some respects, are different in kind, and when taken in combination are much stronger.

‘On the part of the defender the following authorities were cited and call for notice. In the case of *Kelly v. Kelly* in 1869, L.R., 2 P. & D. 31, the Judge Ordinary—Lord Penzance—thus stated his view of the law as applied to the case before him, one of judicial separation, almost every word of which, I think, applies in a great degree to the present case—‘The peculiar and distinguishing feature of this case is the adoption by the respondent of a deliberate system of conduct towards his wife with the view of bending her to his authority. A man who sets about to achieve this end by purposely rendering a woman’s life unhappy is in danger of overstepping his rights, as he is pretty sure to fall short of his duties. The respondent in

this case has, in my judgment, done both. Without disparaging the just and paramount authority of a husband, it may be safely asserted that a wife is not a domestic slave, to be driven at all cost, short of personal violence, into compliance with her husband’s demands. And if force, whether physical or moral, is systematically exerted for this purpose, in such a manner, to such a degree, and during such length of time as to break down her health and render serious malady imminent, the interference of the law cannot be justly withheld by any Court which affects to have charge of the wife’s personal safety. In cases of this kind everything depends on degree. Many acts which are venial in themselves become reprehensible when they take their places as parts of a system. Others, justifiable on occasions, lose their justification when continuously and purposely repeated. In considering a charge of cruelty, therefore, the conduct of the party inculpated can only be justified, or the reverse, as a whole. And if, upon a general review, the Matrimonial Court is of deliberate opinion that cohabitation could not be resumed with safety to the wife, it is bound by the dictates of common-sense, as well as upon principles repeatedly avowed and acted upon in a long series of decisions, to step in and forbid its resumption. No doubt in cases such as the present, where the personal violence used is of a trifling character, it behoves the Court to be sedulous in inquiry and slow in conviction. It should be entirely satisfied that the conclusion of the wife’s danger is clearly reached, and on reliable evidence. Moreover, the decisions of my predecessors have imported this further proposition as a condition of the Court’s interference, that the troubles of the wife are not owing to her own misconduct.’

‘The facts of the case, which I shall not detail, curiously resemble in many particulars, though undoubtedly in exaggeration, those of the present. The case was appealed, and the judgment of the Judge Ordinary, granting judicial separation to the wife, was affirmed by a full bench, consisting of the Judge Ordinary, Baron Channel, and Justice Hannen. The appeal is reported 2 P. & D. 59. The Judge Ordinary’s statement of the law, which I have quoted, was adopted with approval by the Court of Appeal.

‘Reference was also made to the case of *Mytton v. Mytton*, July 24, 1886, L.R., 11 Prob. Div. 1141, in which Mr Justice Butt, without a jury, held that a persistent course of harsh, irritating conduct, unaccompanied by any actual violence, but carried to such a point as to endanger the wife’s health, constituted legal cruelty; and to the Scotch case of *Stewart v. Stewart*, June 3, 1870, 8 Macph. 821, in which a wife was held entitled to judicial separation and alimony on proof of a single act of personal violence followed on frequent and long-continued threats.

‘On the whole matter I am of opinion that I am not precluded by any authority from finding, on the facts proved, that the

pursuer was guilty of such cruelty or ill-usage towards the defender, as to constitute reasonable cause in the sense of the statute.

"II. If I am correct in the view which I take of the incident of 4th August 1880, the pursuer, in order to succeed, must show that the defender became in desertion at some subsequent date. The separation having occurred through his fault, the burden—and it is heavy—is on him to show how and when his wife, the injured party, became the deserter. This I think he has failed to do. As I have said, he never apologised for his conduct upon the 4th of August. And accordingly, in the communications which passed between him and his agents and those of his wife after that date, I think the defender was entitled to refuse to return until she had such assurances as would secure her against a recurrence of such treatment. The negotiations came to nothing. The defender applied to the Court for access to the child, and at first the decision of the Court was adverse to her. Some efforts were made by mutual friends to effect a reconciliation, and especially by Sir James Spaight in 1882, but the pursuer repelled this approach, using offensive language about the defender.

"The next matter of importance is that on 8th May 1884 the defender made an unconditional offer to return to the pursuer. This letter, which is not said to have been prompted or written with the assistance of legal advisers, is expressed in very creditable terms, and I think, judging from the subsequent letters which the defender wrote, that the letter expressed a genuine desire for reconciliation. The pursuer replied to that letter very much in the same manner in which he replied to the defender's letter of 5th June 1880, and in his answer he does his best, as it appears to me, to repel her and prevent her return, by imposing conditions which he must have known she could not agree to. He tells her that she must express contrition, and deep and heartfelt repentance for her past conduct and desertion, and before returning—that is, before he would allow her to return—he required her to give him a solemn written assurance on three heads, which he proceeds to mention. The conditions practically amounted to this, that she was to make in writing an unqualified confession of fault, and to undertake not to see her own relations and friends if they were residing near Inverewe. His own conduct to the defender was entirely ignored, and no expression of regret made for it. I asked him '(Q) Did you think when you wrote that letter that there was any chance of your wife agreeing to its terms?—(A) I cannot say really; I thought very likely she would not, but I thought she might.' The defender, in answering this letter, says very naturally that she does not think that one-sided written assurances would be at all likely to conduce to future happiness, and that the wisest course was for both parties to forgive and, if possible, forget. On 23rd May he insists on the written assurances asked.

On 3rd June she repeats her sincere desire to return, and remain with the pursuer as his wife, and discharge all her duties as such, and that she would give up the establishment at Pool House. I need not pursue the letters further, although they require to be read in order properly to understand the case; but in the end, on the 8th of November, the pursuer so far makes this apparent concession, that he dispenses with assurances in writing, but at the same time clearly intimates that he will enforce the conditions which he had previously mentioned. This he does at greater length in a letter of 9th December 1884, in which he again reverts to the matter of the plot, which, he says, 'is as fresh in my mind now as when the nurse told me of it on the evening of February 10, 1880, and when I accused you of it the next day, though you at once confessed it to me yourself, you denied it to me and others shortly afterwards.' He positively refused to allow her to bring a maid with her; and the result of the whole matter was that the defender's attempt to return to the pursuer being thus discouraged and frustrated, parties continued as they were before.

"My impression on reading these letters is that the pursuer did not wish the defender to return to him, and that he would have been much better pleased if she had not proposed to do so, because I think he would then have endeavoured to obtain a divorce for desertion. That view is confirmed in a remarkable way by Mr Dixon's evidence, because he says distinctly that during the whole of this period the pursuer was speaking to him about his desire for a divorce. Mr Dixon says that from 1880 onwards the impression upon his mind, from the conversations which he had with the pursuer, was that the pursuer had an aversion to his wife, and had not the slightest desire to have her back. He says—[*His Lordship quoted the evidence*]. Mr Dixon also says that during the period which I have just been examining, the pursuer told him of the conditions which he was imposing, and said 'that unless the defender would submit and show proper compliance with his conditions he could not do with her—he could not have her back. That was always the tenor of what he said.'

"Down to this time then—the end of 1884—there is no evidence that the defender was in desertion. On the contrary, it is proved that, when ignoring the past she was willing to return, she was repulsed by the pursuer, who did not I believe sincerely desire her to come back at all. Then came an interval of two or three years, which were not unimportant as affecting the defender's state of mind at their close. What followed must be viewed in the light of the rebuff which the defender received and the pursuer's attitude down to 1887. He made no attempt at reconciliation.

"In 1886 the Guardianship of Infants Act was passed. Taking advantage of this, the defender presented a petition for access to her child. The proceedings are reported in 25 S.L.R., at p. 183, to which I refer with-

out further comment. They throw some light on the pursuer's sudden change of mind or tactics.

"In his answers, dated 21st May 1887, the pursuer adheres to his letters written in 1884. In consequence of observations from the bench, the letter of 13th June was written by the pursuer to the defender. It is an excellent letter, but it is scarcely the letter of the pursuer. It was revised by his legal advisers, and is absolutely different in tone from any of his letters in 1884-85, which he adhered to in his answers a month before. It is an unconditional invitation to his wife to return, even the maid being conceded, and it is expressed in very conciliatory language.

"The defender, who was in the north, being informed by telegram that such a letter had been written, prepared to come south to consult as to what should be done; but she was stopped by a telegram, to the effect that the pursuer's letter, which she had not had time to receive in course of post, had been already boxed to the Court. She says—and I think she may be excused for thinking—that the offer was not written in good faith, but was intended as a move in the litigation to influence the Court, or to lay the foundation for an action of divorce; and the marked contrast in its tone when she read it confirmed this view.

"She accordingly did not at that time reply, and ultimately she did not accept the offer. The question is, Whether her failure to do so placed her in desertion? I think not. I think she had reason to distrust the pursuer. So long as he was master of the position he had harshly repelled her advances. She might well ask what was the reason of this sudden change? and what guarantee she had for its continuance? The pursuer's feelings toward herself were then unchanged; of that I am satisfied. The pursuer's counsel boldly maintained that this was wholly immaterial, provided the pursuer were willing to take her back. I think it is most material in this inquiry, though it may not be conclusive. The pursuer's motive in writing that letter can only be surmised; but so much can be seen. He was still wishing for a divorce. The letter if, as apparently the pursuer expected, it was not accepted, would serve two purposes; it would help him with the Court in the petition, and it would also facilitate divorce. If, again, it was accepted, the petition which he dreaded would be withdrawn, and he would at least get the uncontrolled custody of the child, which he so keenly desired.

"Mr Dixon speaks thus of what the pursuer told him at that time: He says that the pursuer told him that he had made an unconditional offer to the defender; that he led him to understand that the unconditional offer, although made in the course of the proceedings for the custody of the child, was made with reference to a divorce; and that the pursuer told him what were the prospects of a divorce, and about the law of divorce in Scotland, and the necessity for his being willing to receive his wife back unconditionally if he were to hope to get a divorce.

"In reference to the pursuer's apprehension that his child would be taken from him at this time, Mr Dixon says—[*His Lordship quoted the evidence*].

"Mr Dixon was closely cross-examined, but I think that his evidence on cross-examination was even stronger and more pointed than that which he gave when examined in chief.

"The pursuer did not give evidence to contradict this. His counsel contented himself with maintaining that Dixon's evidence was unreliable, because it was utterly inconsistent with the pursuer's conduct and his letters to the defender at the time. But this is begging the question that the letters were written in good faith. The pursuer was bound to contradict Dixon's evidence on oath if he desired that I should disbelieve it. I think the explanation of the evidence is that Mr Dixon spoke merely of what the pursuer told him at the time, which presumably was the matter which he had most at heart; and that was divorce. The question of custody, though important, was a minor matter.

"I do not propose to say much about the communications which later in the year passed between the pursuer and the defender. If I had been ignorant of the previous history of the case, I should have been inclined to believe from the letters that the pursuer was in earnest, but it is plain that the defender did not trust him, and required assurances which she did not succeed in getting, and I think she was justified in doing so. There were two matters as to which assurances were required—the future place of abode of the Dowager, and the management of the child; because if the Dowager were to be in a position to interfere again, or if the pursuer were not to permit the defender to take a mother's proper place in the management and education of the child, there would be little prospect of the defender being properly treated or able to live with the pursuer. I think that, reading the letters closely, it will be seen that the pursuer was either not able or not willing to give satisfactory assurances upon the first point, and that he was not willing to commit himself upon the latter, and it was this, I think, which brought the interview of 24th September 1887 to an abrupt conclusion.

"On the assumption that the defender was justified in leaving the pursuer originally, I do not think that her refusal to accept the offer made to her in 1887 can possibly be regarded as desertion on her part.

"III. Even if it were held that she had not an adequate reason in the sense of the statute for leaving the pursuer in 1880, I do not think that the pursuer is entitled to divorce, because he is barred by his own conduct in neither desiring that his wife should return or taking reasonable steps to bring about that result. He made no effort to prevent her leaving his house, from which his unkindness drove her. When she wished to return to him in 1884 he repelled her, and while in 1887 he professed

to ask her to return unconditionally, he neither expected nor wished that she should return and take her place as his wife and as the mother of their child.

“I think that this view is justified by the terms of the Act 1573 as amended.

“By the Conjugal Rights Act of 1861 it was provided that before raising an action of divorce on the ground of malicious desertion, it should no longer be necessary to take certain proceedings—viz., to institute an action of adherence, to denounce the defender, or to apply for ecclesiastical admonition. But I think that the spirit of the Act may still be appealed to in its integrity, because we gather from the provisions which remain in force, as well as from those proceedings which are no longer necessary as solemnities, what is the attitude of the two spouses respectively towards each other, which must be proved to exist before divorce on that ground can be obtained. The defender must be shown to have diverted without reasonable cause, and continued his or her non-adherence in malicious obstinacy for the space of four years. On the other hand, the pursuer must show that he or she has all along been anxious and willing to adhere, and also has used every reasonable means to induce the deserting spouse to return and adhere. There may be cases in which remonstrance is impossible, as where the residence of the defender is unknown, and there may be cases, though they must be rare, in which it can be proved to demonstration that remonstrance would have been absolutely unavailing. But where the spouse who is said to have deserted is accessible, the pursuer of such an action must in the general case show that he or she has *bona fide* taken all reasonable steps to induce the other to return. This I take to be the gist of the opinions of the majority of the Judges in the case of *Watson v. Watson*. Lord Shand in that case says (17 R. 743)—‘The desertion must be wilful; it must be obstinately persisted in; it must be without lawful excuse; and it must clearly appear that the pursuer of the action, throughout the period of four years of alleged desertion, was desirous of cohabitation, and ready to renew it. It is not possible to state in distinct propositions, or with any degree of precision, what facts will or will not amount to proof of the essential points now stated—for the proof, and the particular measure of proof, must vary according to the infinite variety of circumstances under which the desertion may have originated and been persisted in. I should say that the first matter to be made quite clear is that to which I have last adverted—I mean the mind of the pursuer, and his or her willingness and desire, during the four years of alleged desertion, to have cohabitation resumed. I should think the evidence of the pursuer is indispensable in such cases; and it is probably with reference to that evidence in its bearing, in the first instance, on the question of the pursuer’s state of mind in regard to his or her willingness and desire for adherence, that proof of admonition or

remonstrance with the alleged deserting spouse may be required, and many circumstances will be found essential. Remonstrance for absence, or repeated requests that the deserting spouse should resume cohabitation—made seriously and in *bona fide*, but rejected and as 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 following remarks of the Lord Justice-Clerk bear specially upon the hardening effect upon the defender of the pursuer’s attitude and conduct between August 1880 and 1887. His remarks as applied to this case go to show that even if the pursuer was in earnest in 1887, his offer came too late, because by his own conduct he had produced that very obstinacy or determination not to return on the part of the defender of which he complains, which therefore cannot be said to be malicious obstinacy—‘The state of mind which leads to an act of desertion from conjugal society, and which might yield to admonition, if admonition were given, may harden into obstinacy just because the other spouse shows absolute indifference, and does nothing to bring about a resumption of the duties of married life. Such an unfortunate result can, and undoubtedly often does, follow in cases of this kind. But in those cases both spouses are blameable, and not one only. I hold that a spouse who is left by the other spouse has a duty to endeavour to cure the evil, and is not entitled to allow it to grow without any honest effort whatever to check and uproot it, and then, when possibly it can no longer be uprooted, to found upon it as entitling him to a divorce. It is only on the ground that it has rooted itself notwithstanding his efforts that he can found upon it at all.’

“On both grounds, then, my judgment is for the defender. I am far from saying that she was wholly free from blame. But the separation was due to the pursuer’s own conduct, and he is not entitled to the divorce he seeks.”

The pursuer reclaimed, and argued—The judgment of the Lord Ordinary proceeded on two grounds—(1) That the pursuer was guilty of such cruelty towards the defender that she was justified in leaving him; and (2) that the present state of mind of the pursuer was such as to disentitle him to the judgment craved. Both of these grounds of judgment were erroneous. (1) In order to make out a good defence to this action of divorce, the wife must show, in the first place, that she had reasonable cause, in terms of the Statute 1573, c. 55, for leaving her husband; that the husband’s conduct was such as would entitle her to absent herself from him; such as would amount to a good defence to an action of adherence on his part; such as would entitle her to get a decree of judicial separation in an action at her instance. It was contended for the wife, and decided by the Lord Ordinary, that in order to make out a good defence to an action of divorce,

the reasonable cause which had to be shown was something less than what would constitute a good defence to an action of adherence at the instance of the husband, or would entitle the wife to a decree of separation in an action at her instance. In other words, the Lord Ordinary had decided that a smaller standard of cruelty was required to found a good defence in an action of divorce than that required to found a good defence in an action of adherence, or to form a good ground for an action of separation and aliment at the instance of the wife. Their contention, on the other hand, was that the measure of cruelty which formed a good defence in an action of divorce was the same as that which would form a good defence in an action of adherence, and the same as that which entitled a wife to a decree of separation and aliment. [LORD YOUNG—Is there not some distinction? Here you are not pursuing a common law action for separation and aliment, but a statutory action of divorce, a penal action forfeiting the wife's goods and gear. The wife is therefore defending herself against an imputed crime. In a judicial separation the marriage remains; in an action for divorce the marriage is killed, and one of the parties is punished as a criminal. SOLICITOR-GENERAL—If it is the duty of the wife to adhere, and if her non-adherence is visited with certain consequences, these consequences cannot affect the question of adherence. If a woman is not entitled to a decree of the Court granting her separation, she has no reasonable cause of absence from her husband's house.] The only good grounds for non-adherence were adultery and cruelty. The standard of cruelty was the same in an action of divorce, adherence, or separation. The cruelty must be intolerable. They did not contend that gross physical violence must be proved in order to justify a wife living apart from her husband; there must be legal cruelty caused by such conduct on the husband's part as treating his wife practically as a slave, and deposing her from her position as mistress of the house. But in order to justify a wife leaving her husband, there must be danger caused to her health by the misconduct of the husband. Nothing of the kind was proved here. All the evidence proved that the defender was treated courteously by the pursuer, and was mistress in her husband's house. Even if the defender's evidence alone was looked at, it only proved that the pursuer had lost his temper on one occasion, and on that occasion the assault was of the most trifling description. That was not enough to entitle a wife to desert—*Waring v. Waring*, July 16, 1813, 2 Haggard, 153. In this case the question of provocation must also be taken into account, for there was no doubt that the wife had adopted a course of conduct which tended to alienate the affections of her husband—*Best v. Best*, February 21, 1823, 1 Adam, opinion of Dr Swabey, p. 423. The evidence showed that the wife's affection for the husband was dead before the birth of the child; she was disappointed at the

social position and the circumstances of her husband, and having a morbid disposition, she fretted herself and sent him to coventry. No such cruelty was proved as would justify her desertion. The cases founded on particularly as showing the standard of cruelty necessary in such cases were *A v. B*, December 3, 1853, 16 D. 111, and *Paterson v. Russell*, August 9, 1850, 7 Bell's App. 337. Other authorities founded on—*Lang v. Lang*, June 13, 1851, 13 D. 1108; *Chalmers v. Chalmers*, March 4, 1868, 6 Macph. 547, Lord President Inglis's opinion, 550; *Mackenzie v. Mackenzie*, November 13, 1883, 11 R. 105; *Burroughs v. Burroughs*, May 15, 1861, 30 L.J. Prob. 186; *Yeatman v. Yeatman*, May 5, 1868, L.R. 1 Prob., opinion of Lord Penzance, 491. (2) The pursuer had been willing all along from the date of desertion that his wife should return to him, and on various occasions had asked her to do so. The wife had remained away in malicious obstinacy for more than four years. The husband did not require to prove that he longed intensely for the return of his wife. If he was willing that she should return, that was enough. Under the old Act certain formalities had to be gone through on the part of the husband, namely, a charge of adherence, and privy admonition, which proceedings were not very conciliatory. Although the necessity of going through these formalities had been done away by the Conjugal Rights Act of 1861, they still served to show that if the husband was *bona fide* willing that his wife should come back, you were not entitled to inquire into his reasons for being willing. If the offer to take back the wife was not repulsive on the face of it, the husband did not need to prove that the offer was *bona fide*. In this case, even although it was unnecessary to demonstrate a good motive for the husband's desire that his wife should return to live with him, there had been shown at least one good motive besides his affection for herself, viz., his desire for the sake of the child that the scandal of separation should cease. The husband was therefore entitled to divorce, because (1) there had been no cruelty to the wife justifying her desertion; and (2) the overtures of her husband to her had placed her in the position of a wife remaining away in malicious obstinacy.

Argued for defender—(1) The wife had a reasonable cause for leaving the husband. The facts which would form a good defence in an action of divorce were not the same as those which would afford a good defence in an action of adherence, or entitle a wife successfully to sue an action of separation and aliment. An action for adherence and an action for separation and aliment were both common law actions, but an action for divorce was founded on a statute, and that a penal statute. Such a statute must be construed strictly. It was no violation of the marriage-contract that the wife absented herself from her husband if the conduct of the latter rendered such absence justifiable—*Chalmers v. Chalmers*, March 4, 1868, 6 R., opinion of Lord Deas, 552. The Court had complete discretion to judge of

the circumstances of each case, and decide whether the wife had reasonable cause or not for leaving her husband. It was admitted by the pursuer that the cruelty need not be physical; it might be moral cruelty. In this case all through the married life of the parties the pursuer had treated the defender in the most unfeeling manner until at last his ill-treatment culminated in the personal assault on 4th August 1880. The standard of cruelty varied according to the *status* of the parties. The state of society had also to be considered; woman was not now treated so much as an inferior as at the beginning or middle of the century. Even if the decisions in *A v. B* and *Paterson v. Russell* had any bearing on this case (which was denied) it was doubtful whether these decisions would be pronounced if these cases were tried over again at the present time. In short, the cruelty which justified a wife leaving her husband was entirely a question of circumstances. If the life of a wife was rendered intolerable by the conduct of her husband she had a good ground for leaving him. The letters of the husband and his conduct towards his wife culminating in the assault proved conclusively that he first attempted to break her spirit and put her in the position of his slave, and when he found that that was impossible he did all he could to drive her from his house. (2) The pursuer had failed to show that he had ever any true desire that his wife should return to him. Therefore, even assuming that the wife deserted him, it could not be said that she remained away in malicious obstinacy if her husband did not really want her to come back. The husband in such circumstances was debarred from getting divorce—*Barrie v. Barrie*, November 23, 1882, 10 R. 208; *Watson v. Watson*, March 20, 1889, 17 R. 736. The pursuer's wish to have his wife back, expressed in his letters written in 1887, was not sincere. If a wife leaving and living apart from her husband knew that in doing so she was carrying out his wishes known or tacitly expressed, she could not be said to be remaining away from him in malicious obstinacy. The Lord Ordinary's opinion was sound in his view both of facts and law, and his judgment ought to be affirmed.

At advising—

LORD JUSTICE-CLERK—In this case, which has been one to which the Court have given very anxious consideration, I have myself come to the conclusion—agreeing as I do in the finding of the Lord Ordinary upon the facts and on the grounds he has stated for that finding—that it would not be advisable that I should enter into any detail of those facts. It is extremely undesirable that the very painful and unfortunate circumstances disclosed in this case should be more discussed than is absolutely necessary. One would hope that even yet the wound which has been kept open so long might be healed up, and I think it is unadvisable to say anything to bring prominently forward again the facts of this case, and I confine myself to

stating my distinct concurrence with what the Lord Ordinary has stated in his note as the proper view to be taken of the facts of the case. As regards the law of the case, I have had an opportunity of perusing an opinion which has been prepared by Lord Young, and concurring as I do in that opinion in its entirety, I feel that I could add nothing to it with any advantage, and that it is better that I should simply express my concurrence in that opinion, which I now do.

LORD YOUNG—By the common law of Scotland it is the duty of married persons to adhere, as it is termed, to one another—that is, to live together as husband and wife, and when either of them violates this duty the other may by our common law pursue an action of adherence, which is a common law action. To the success of such action it is not essential that the defender shall have “deserted” the pursuer in any sense of that term, or “diverted fra his company without ane reasonable cause, and remained in malicious obstinacie be the space of four yeires,” or for any space. It is sufficient that there is at the date of the action a subsisting separation of however short duration which the pursuer desires to terminate, and which the Court appealed to thinks ought to be terminated, although it may be only experimentally, with a view to a reasonable trial of re-union and renewed cohabitation. It is, of course, open to the defender to show that the origin of the separation was such, and the treatment of him or her by the pursuer while they lived together such, that it would be cruel, or even unreasonable, to order them in that action at that time, and under the existing circumstances to renew their cohabitation. I have so expressed myself because I know of no authority or reason for holding that the failure of one action of adherence is a bar to raising another under altered circumstances; or, on the other hand, that the history of a re-union in obedience to a decree of adherence might not so justify a second separation by showing reasonable cause for it, that the Court would recognise its reasonableness and decline to terminate it as they had the first, although the spouses had behaved to each other exactly as they had done before.

These observations on the common law are, I think, well and instructively confirmed and illustrated by a case cited, and much relied on by the pursuer in this action—the case of *A B v. C D*, December 3, 1853, 16 Dunlop, 111. That was an action of adherence at the common law by a husband against his wife. She did not “desert” him or “divert fra his company.” On the contrary, he treated her harshly, inexcusably turned her out of his house, refused to live with her or to allow her within his house. The matter of aliment was eventually arranged by a voluntary contract of separation. After many years the husband repented or said he did, cancelled the contract of separation, and invited a re-union. The Lord Justice-Clerk said—“There is no doubt that the fault at the first was on the hus-

band's side. There was no departure on the part of the wife from her conjugal vows, and the separation in 1842 was wholly his doing, and wholly his fault. And I must say that the tone of his statements and proof do not remove the unfavourable impression which I entertain of his conduct, or reconcile one to the notion of decerning his wife to return to his society." Again, "Therefore he practically withholds conjugal rights from her. That is the greatest fault on the part of the husband. There can be no such serious ground of complaint as non-cohabitation, especially when he boarded his wife out of the house. She was thus compelled to sleep separately from her husband." Here, therefore, the defender in the adherence action (the wife) never deserted, or diverted from the company of the pursuer, excusably or not. On the contrary, he inexcusably diverted from her company. He nevertheless obtained a decree of adherence against her. And why? I can find no other reason than that suggested by Lord Cockburn, when he says—"Conjugal adherence is the right and duty of both parties, and the expression of a wish for re-union by either of them is a movement towards what is natural and proper, and is entitled to the favourable consideration of the Court." What does this mean? He who "expressed a wish for re-union" was the spouse whose misconduct had caused the disunion, and "the favourable consideration" could only mean the acceptance of the expression of his wish as importing true repentance of the past, and determination to behave differently in the future. But this is, in all sense and reason, inconsistent with the notion of the order for adherence being enforced or repeated in a second action if on the order for re-union being obeyed he showed no repentance, but behaved just as he had done before—that is, in the manner characterised by the Lord Justice-Clerk in the language which I have cited from his judgment.

What I have said implies, of course, that an order for adherence ought to be obeyed, and that disobedience which would be contumacy might involve serious consequence. I only mean that such an order implies no condemnation of the defender's past conduct or approval of the pursuer's, and is quite consistent with the Court being of opinion that the separation in its origin and continuance was "wholly his (the husband's) doing, and wholly his fault," and that "there was no departure on the part of the wife (the defender resisting the order) "from her conjugal vows." Now, what is due and reasonable obedience to such an order (decree of adherence)? The Court by making it has signified that it has given a "favourable consideration" to the pursuer's "expression of a wish for re-union," and that it is the defender's duty to submit to making trial of re-union and renewed cohabitation accordingly. Does the order signify more than this? If the trial is made in pursuance of the order, and the result is satisfactory, all is well. But if it proves unsatisfactory, what then? I do not, of course, consider the case of the

spouse who obtained the order (say the husband) behaving otherwise and worse than he had ever done before, of his being guilty of cruelty or immorality such as the Court had not, in making the order, occasion to consider. The case which I put, and think it useful to consider, is, that the husband's conduct after the renewed cohabitation is just what it was before, and results in a second separation, which must be pronounced to be (as the first was) "wholly his doing and wholly his fault." He again desires conjugal adherence, expresses a wish for re-union, and his wife not responding to it, again raises an action of adherence—for I suppose the first would be exhausted. Would the Court again give favourable consideration to his expression of wish for re-union "as a movement towards what is natural and proper," and again give him decree? I could not countenance the proposition, that when the Court in an action of adherence repel the defence of misconduct on the part of the pursuer, although condemning his conduct as harsh and indefensible, and saying that "very little more would have made it a sufficient" defence, and so granting decree, do thereby establish anything of the nature of a standard of misconduct up to which he may continue to act in the future without affording a defence to his wife against the repetition of a similar decree.

The purpose of these observations is to establish and illustrate the proposition which I venture to affirm as sound, that it is no criterion of the validity of a defence to an action of divorce for desertion on the Act 1573, c. 55, to inquire whether or not it would have been a good defence to an action of adherence at the common law. Without saying that these actions have no features in common, I think they are different in character, and that each may involve reasons and considerations which have no place in the other. An action of adherence is at the common law, and involves (or may) such reasons and considerations as I have been commenting on, including such favourable consideration as the Court may in the circumstances think is due to the expression by a gravely peccant spouse of a wish for re-union. Then a decree of adherence is not final in the sense of subsisting while the marriage subsists, or for any definite period, but only invites, with judicial authority, a trial of re-union and renewed cohabitation, which may, quite consistently with the decree, be of very brief duration. An action of divorce for desertion, on the contrary, is not at the common law, which does not allow divorce except for adultery, but is founded on the Act 1573, c. 55, by the provisions of which alone it is competent. Further, the decree of divorce is final in the strictest sense. It affirms the statutory offence and inflicts the statutory penalty.

In the case before us, therefore, we have no occasion to determine whether or not the pursuer's expression of a wish for re-union (assuming that he made such) is entitled to the favourable consideration of the Court, leading to a decree of adherence

at common law, but whether or not he has proved that the defender is guilty of the statutory offence for which the penalty of divorce and forfeiture of her property is enacted.

Now, the statutory offence is desertion without reasonable cause, and remaining in malicious obstinacy for four years, and in the meantime refusing all privy admonitions for adherence. The words of the Act are—[*His Lordship read the Act*]. The Act requires that the action of divorce for this offence shall be preceded by certain specified proceedings, including an action of adherence, which have been characterised as “formalities.” I do not cite these, because they were dispensed with by sec. 11 of the Act 24 and 25 Vict. c. 86, only observing that their design was obviously to emphasise the “malicious and obstinate defection of the partie offender,” which, however remains essential to the statutory offence, although it is no longer “necessary” to emphasise it by these proceedings. When a wife deserts from the society of her husband, and persists in her desertion, the wilful and malicious obstinacy of her conduct will certainly be emphasised by adding to it her contumacious disobedience of a decree of adherence pronounced by a Court of law on due consideration of the facts. But I venture to think that this addition may be more than emphasis and be of itself some, and not slight, evidence of her state of mind and the quality and character of her conduct. It may show, or go far to show, a determined and obstinate resolution on her part never to return. The Act of 1861 assumes that such resolution on her part may possibly be proved to the satisfaction of the Court without it, and so dispenses with the action and decree of adherence as a “necessary” preliminary to an action of divorce. But it does no more. It is still competent to institute it, and take decree of adherence if the facts warrant it, and I incline to concur with Lord Fraser in thinking that there may be cases in which “the proper course to adopt is an action of adherence,” although no longer a statutory necessity—See Fraser on Husband and Wife, 1210. There may no doubt be cases (generally undefended cases), the facts of which show that an action of adherence would have been an idle formality. I cannot say that I think this is a case of that sort. I am convinced that the defender now before us would have defended an action of adherence, and, if unsuccessful in her defence, would have given due obedience to an order of the Court to adhere. Of the result of such obedience after a longer or shorter trial we can of course say nothing. But the statutory offence warranting divorce may, as I have said, be proved against the defender without the “necessity” of applying this test although it might have been applied.

The question in the case therefore is this—Is it proved that the defender is guilty of this statutory offence, and I am of opinion that it is not. I concur in what I may, for brevity, call the Lord Ordinary’s verdict on the evidence, and generally in the comments which he has made upon it, and in

the opinions which he has expressed as to the conduct of the parties. Doing so, I need not I think enter into the details of the facts, which are excessively wearisome and uninteresting.

The law governing this and similar cases is, however, interesting, and it is, I think, important that it should be stated by us as distinctly as possible. The bulk of what I have said is upon the law of the case, induced by the fallacious, as I think, contention or rather assumption of the pursuer to the effect that if the facts proved would have entitled him to succeed in an action of adherence at the common law, they must of necessity entitle him to prevail in this action of divorce on the Act. The greater part, if not the whole, of the Solicitor-General’s concluding speech for the pursuer was based on this assumption. I say assumption advisedly, for there was no attempt to establish the truth of the proposition assumed. Mr Ure, in his concluding speech for the defender, made the same assumption, and did not maintain that he could resist the divorce on the statute upon facts that would not have afforded a defence to an adherence at the common law. I am, however, bound to state, and if necessary act on, my own opinion of the law. The point may be immaterial in a particular case, and is so in this if the Lord Ordinary’s opinion upon the evidence, in which I concur, is well founded, for I think with him that upon the facts proved the defender would have a good defence in an action of adherence. But other Judges, here or elsewhere, may think otherwise, and it is important and according to our duty to exhaust the case by expressing our opinions upon the law governing it, not only in the view that the evidence would afford a defence in an adherence, but also in the view that it would not or might not. If my opinion on this, I think, very important legal question requires or admits of further explanation and illustration I shall best give it by reverting to the case of *A B v. C D*. That case occurred in 1853, and so before the Act of 1861 (24 and 25 Vict. c. 86) dispensing with the necessity of an action of adherence as a preliminary to an action of divorce on the Act 1573. Had it been subsequent the facts and evidence would or might have been exactly the same, and if so must in an action of adherence have been regarded and dealt with in the same way, the Act of 1861 being no impediment to an action of adherence, and not affecting the law applicable to it. Now, supposing it to have occurred subsequent to that Act—say in 1862—and the facts and evidence to have been exactly as they were, the Court must, with the views they had, have repelled the defences and given decree of adherence. Suppose now that the action had been an action of divorce on the Act 1573, and that the Court had been required to deal with it on the same facts and evidence, is it reasonably conceivable that they would, or, consistently with the conclusions on the evidence which they expressed, could have granted decree of divorce?

Let me now cite the case of *Bowman v. Bowman*, February 7, 1866, 4 Macph. 384, which illustrates the converse of the same proposition. That was an action of divorce on the Act 1573 by a wife against her husband, who had admittedly deserted her, and subsequently absconded after disposing of all his effects in this country. She failed in the divorce, and why? because she had shown no disposition for re-union. Now, suppose that her action had been an action of adherence, and undefended as the divorce was, is it reasonably conceivable that it should have been dismissed as the action of divorce was? I think it sufficient to refer to the case without examining it in detail.

But if the view which I take of these two cases be sound, they show that there may be decree of adherence on facts which would not warrant divorce, and a refusal of divorce on facts that would warrant decree of adherence.

If the facts in a case would afford a good defence to an action of adherence, it follows, I think, clearly that they afford a good defence to an action of divorce. But the converse does not follow logically. It needs demonstration, and may be untrue. This is so with the converse of all propositions, and with the obverse as well. Therefore, although it be true that a wife who has a good defence against adherence has a good defence against divorce, it does not follow and may not be true that a wife who has not a good defence against adherence has not a good defence against divorce, for the second proposition is the obverse of the first. This is according to a certain familiar and elementary rule of logic.

The facts of an individual case may of course be such as to warrant decree either of divorce or adherence, and to afford no good defence against either, so that the injured spouse may sue either for divorce or adherence as he pleases. On the other hand, they may be such as to support the one action and not the other, as the cases which I have cited and commented on show I think conclusively. But indeed the proposition is too obviously true to need the support of authority. It is certainly not necessary that the pursuer of an adherence should aver and prove that the defender diverted from his company without reasonable cause, and remained in malicious obstinacy by the space of four years, and in the meantime refused all privy admonitions, while it is necessary that the pursuer of a divorce on the Act 1573 should aver and prove this. A man who inexcusably turned his wife out of his house and kept her out may, on repentance and expressing a wish for re-union, have a decree of adherence against her from judges who condemn his conduct in strong language, but nevertheless think it fitting to give favourable consideration to his expression of wish for re-union.

I have said that I concur in the opinion of the Lord Ordinary as to the past conduct of the parties, and expressed my desire to avoid examining the evidence in detail. But without entering into details I may,

and perhaps ought to say that I think the evidence shows unmistakably that the pursuer has throughout been under the influence of his mother, and that the two, mother and son, acted in concert together in a manner which made the defender's married life miserable almost from the first. Before the marriage took place it was stipulated, I think very naturally and reasonably, that the young married couple should have a house and establishment of their own, and that the Dowager Lady Mackenzie should not live with them or they with her. This was distinctly agreed to on both sides, the Dowager being a consenting party, and expressing her consent in writing. Such a stipulation could not of course be so made as to be capable of specific enforcement, or otherwise than as a plainly expressed agreement between parties who believed in and relied on each other's integrity and honour. Now, it is with pain that I feel compelled to concur in the Lord Ordinary's opinion that the pursuer and his mother did not behave quite honourably or truthfully in this matter. We must all sympathise with a mother's love for her only son who had never lived apart from her, and with her strong and perhaps passionate desire that they should continue to live together even after his marriage. She had always been the head of the house in which she and her son lived together, and although she had agreed to live apart from him after his marriage, and so allow him to have a house of his own in which his young wife should, as was natural, be the lady head, she seems to have found, on brooding over the thing, that the sacrifice was more than she could bear. The result was that she and her son agreed together to break their pledged word and faith to the defender and her parents. They acted accordingly almost from the first. The Dowager assumed the position of head of the house, and in concert with her son acted with the manifest and indeed not concealed determination of subjecting the young wife to a humiliating state of obedient subjection. The evidence shows that the Dowager was of an imperious temper, and took but little account of the defender's feelings of wife or mother. I think the design was to break the defender's spirit, and subdue her to be a nonentity in the house of which her mother-in-law was the supreme and indeed only head. Now, while I have not language at my command which will define and limit the extent to which such conduct and treatment may be carried without affording reasonable cause to a wife to leave the house (and I doubt the possibility of definition), I am of opinion that it may be such, and persevered in long enough, to justify her in leaving, or at least to excuse her in doing so without any imputation of malice or negation of reasonable cause. It is easy enough in such a case to figure facts upon which the conclusion would be clear the one way or the other, but a definition to comprehend all cases is, I think, from the nature of the subject, impossible. In any individual case before the Court the Judges

must take account of all facts and circumstances having legitimate bearing on reasonable cause, malice, and obstinacy. Nor, although the law is no respecter of persons, do I think that the social position and station of the parties is immaterial. A woman in the position of the defender marrying a man in the pursuer's position is entitled to be treated as a lady ought to be by a gentleman, and has reasonable cause for complaint (I do not by any means say necessarily for a separation) if she is not. That a wife who finds to her sorrow that her husband is by nature habitually unreasonable, disagreeable, even offensive, and hard to get on with, may justifiably leave him, cannot of course be maintained. There must be more than that. If he was disagreeable and offensive, not from natural disposition, but purposely made himself so to his wife to render her life miserable, the case presented might be very different. There may be cruelty, and cruelty affecting health, and tending to shorten life if long enough persisted in, without personal violence. I repeat that I think it impossible to express any practically useful definition or rule, and that all the Court can do is to say on the facts of the case before it whether in their judgment the language of the statute is applicable to the defender's conduct. That language, though general, is significant enough, importing delinquency of a most grave and serious character, and punishable with a tremendous penalty to be immediately and irrevocably inflicted. This I think forcibly suggests the rule by which we are governed in the construction and application of penal laws and statutes. According to it we must, or I think ought to, take any mercifully favourable view of the defender's conduct which is reasonably admissible. With respect to the present defender, I am not myself prepared to censure her conduct. It may, however, occur to others very well able to judge that she might and even perhaps ought to have been more docile and submissive than she was, and to have continued longer to endure the life to which she was subjected, trying hard to overcome the prejudices of her husband and mother-in-law, and win her way to their favour. There may well be more in this view than I individually think there is. But I desire to say that even if I fully assented to it I could not find in it sufficient to justify the application to her conduct of the statutory language. She may not always have behaved in the most judicious, amiable, and gentle manner, and may nevertheless have acted without malicious obstinacy, and not without reasonable cause. She may well be acquitted by us of this statutory charge although her conduct was not throughout and in all respects to be commended. A young wife and mother whose demeanour and conduct under very exceptionally trying circumstances of some duration met with universal unqualified approval would be a marvel.

I have said that in my opinion the proved facts of this case are such as would enable the defender now and in existing circum-

stances to resist decree of adherence in an action at the common law. I have done so, however, only because I think it my duty to exhaust the case so far as my judgment is concerned in every view of it that was argued, including the view that it is essential to the defence that we should hold that an action of adherence must have failed on the facts with which we are dealing. It is nevertheless my deliberate and decided opinion that we do not and indeed cannot in this action decide that the facts proved would afford a good defence to an action not before us, namely, an adherence at the common law. The result of our judgment will, I have reason to believe, be to sustain the defence and assoilzie the defender. But this in my opinion will be and can be, only absolutor from the conclusions for divorce and forfeiture under the Act of 1573. Whether on the same facts we or other Judges would (or, I may say, will) in an action of adherence act as the Court did in the case of *A B v. C D*, and give favourable consideration to the pursuer's expression of wish for re-union, and so order a trial of it (and a decree of adherence can amount to no more), we cannot possibly foretell. But not to dwell on the view that the facts shall continue unchanged, and I venture to suggest that it is reasonably possible that they may not, it is obviously desirable to leave matters between these spouses as open as possible to a change for the better. Our law of divorce for desertion (standing on the Act 1573) is highly penal, and not only exceptional but unique in the Queen's dominions, and it is according to the common law and the practice of the Court in the execution of such a statute to inflict the penalty thereby enacted only in cases strictly falling within its provisions. The cases which have occurred under this law have not been numerous, and in most, and indeed nearly all of them, the defender called has declined to defend, desiring the termination of the marriage relation so soon as the statute permits it, and from the language of the statute I incline to think that it was chiefly and primarily intended to apply when the defender's conduct showed that to be his or her state of mind. On the evidence before us I cannot affirm that such is or ever was the defender's state of mind. On the contrary, I am persuaded that she is and has all along been willing for a re-union, and desirous and hopeful of such a change of circumstances as might make a trial of renewed cohabitation reasonable, as being at least not unlikely to be attended with success. I think it is her honest judgment, and with reasonable cause for it, that such change of circumstances has not hitherto occurred, and consequently that the time for a trial of re-union is not yet. But it may possibly, and even not improbably, come in the not remote future. The causes which we see from the evidence operated during the past life of these spouses together to render it not merely unhappy, but distressing and unbearable, may be greatly modified and even disappear. One of them in particular may become

lenior ac melior accedente senecta, and perhaps cease before the parties, still young people, are very advanced in years. Then a better frame of mind may come to the pursuer himself, in which he will be more regardful of the happiness of his wife, and of his child and hers. In short, I think, judging only from the history which the evidence gives us of the lives of these hitherto unhappy spouses and the causes of their unhappiness, that it is not merely possible, but may reasonably be thought probable, that a sense of duty to each other and to their daughter, and a right judgment of what is best for themselves, may lead to their return to each other's society.

The LORD JUSTICE-CLERK read the following opinion of LORD RUTHERFURD CLARK, who was absent:—The defender has lived separately from the pursuer since 1880. The pursuer is therefore entitled to a divorce if he was willing to resume cohabitation, and if the defender had no just ground for withdrawing herself from his society. If he was not willing, we must hold that the separation was of mutual consent. If the defender had just ground for refusing to live with him, she could not be in malicious desertion. The case turns on the view which we take of these two points, and I shall examine them in their order.

(1) In 1884 the defender made overtures for a reconciliation. She wrote gently and kindly. I do not think that the pursuer behaved well. His letters were cold and imposed very harsh conditions. They impress me with the belief that he did not then desire that she should return.

A litigation ensued regarding the child, in which the pursuer was well advised. The result was that he wrote to the defender on 13th June 1887 asking her to return to him. His proposal was unconditional, and was expressed in very proper terms.

It is said that the pursuer wrote this letter to serve the purposes of the litigation which was then in progress, and that it did not express his true mind. That he wrote it to put himself right in the litigation I do not doubt. He had previously taken up a very false position, in that he had made it very difficult for his wife to return by reason of the very harsh conditions to which he required her consent, and which in default of her consent he said he would enforce. He had been shown his error, and his letter I think was meant to repair it. I am satisfied that he was sincere. Whatever might be his feelings towards his wife, he had strong reasons for putting an end to the separation in the interests of his child and for avoidance of scandal. But any doubt is, I think, removed by what took place in September following. On the 16th of that month he again asked her to come back, and offered to make arrangements for their residence at Inverewe. His proposal was made in a very kindly spirit and was urgently pressed. No condition of any kind was attached. It was refused, and refused in such a manner as to convince me that the defender had made up her mind never to live with the pursuer again.

The defender appeals to the evidence of Mr Dixon, and contends that the pursuer manifested such aversion to her that his offer could not be sincere. The evidence refers chiefly to the earlier part of their married life. It shows that in 1880 the pursuer spoke of his wife in a very bitter way. He would not meet her at the station. He could not accept an invitation to dinner because he could not go out with her. But we must not forget that the sullenness of the defender was the chief if not the sole cause of the bitterness that existed in his mind. I am surprised that the pursuer should have spoken as he did to Mr Dixon or to any man; but I am not surprised that he was deeply offended. The defender had withdrawn from him every token of wifely affection, and had treated him with disdain. So early as 31st January 1879 he wrote to her professing a warm affection, complaining of her coldness, and entreating her love. Considering that his letter was intended for her eye only, and that there was no motive for falsehood, I believe that his professions were honest. His complaints and entreaties were in vain.

It is probable that owing to the feelings which such conduct must necessarily create, the pursuer did not regret that the defender should leave him, and that he was unwilling to receive her, when she proposed to return in 1884, unless he had some assurance that he would not again suffer in the same way. But though the wounds which had been inflicted might never be healed, and the love which once united them might never be renewed, I am satisfied that in June 1887 the pursuer was willing that the defender should return to his society. Nay more, when I keep in view the insistence with which the proposal was pressed, I believe that he wished her to return. In my opinion there is no ground for saying that after June 1887 the separation existed with his consent.

(2) If I am right so far, it follows that the separation has been due to the action of the defender. She has refused to live with her husband, and she must be in desertion within the meaning of the statute unless she has a legal justification.

In my opinion the case does not present any legal difficulty. 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. Such a decree is nothing more than the judicial ascertainment of the pre-existent obligation to adhere. It does not create it or give it any additional force. So long, therefore, as a wife is bound to adhere, she can have no reasonable excuse for "diverting" herself from the company of her hus-

band. To pronounce a decree of adherence is to negative the existence of any such cause. But as the decree must be pronounced when there is an obligation to adhere, the existence of such a cause is necessarily excluded by the existence of the obligation.

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. Accordingly in *Chalmers v. Chalmers* the Lord President said—"Our law has provided that a man may not separate himself from his wife except for adultery and *savitia*." And in *A B v. C D*, where the spouses were living apart under a voluntary act of separation, and when the husband had raised an action of adherence against his wife, the only question was whether he had so maltreated his wife as to give her a good defence. Lord Cockburn put it thus (16 D. 113)—"Has the wife made out a case of cruel or degrading treatment sufficient to release her from what otherwise is her duty." The Court pronounced this interlocutor—"Find that the action can only be resisted on the ground that the pursuer so maltreated her at and prior to the date of the contract (viz., a voluntary contract of separation) that she would at said time have been entitled to resist a judicial separation, and is therefore not bound now to adhere: . . . Find that although the defender has proved that she was subjected to much discomfort when living with the pursuer, and suffered much harsh treatment at his hands, and that he had deserted her bed, and was living separate from her, yet that she has failed to prove such violence or such cruelty and maltreatment as to support a judgment by a court of law finding that she is not now bound to adhere to her husband."

That the spouses do not live happily together is no defence. There are many causes of unhappiness of which a Court of law can take no cognisance, and for which it can give no relief. It must do nothing to destroy or weaken the obligations springing from the contract of marriage, the faithful performance of which may be the means of restoring the happiness which has been lost, and of re-uniting spouses who have been disunited. These moral influences must be sacredly guarded. And it is, in my opinion, from such considerations as these that it is well settled in our law that the obligation to adhere subsists unless there be adultery or *savitia*.

The question then is, whether the defender was so cruelly treated by the pursuer that she was not bound to adhere. For it is not alleged that there has been adultery. In answering it I do not propose to examine the evidence minutely; I shall merely state the results at which, after much consideration of it, I have arrived.

I put aside at once the charge that she was cruelly treated physically. It is founded chiefly, if not entirely, on what took place in August 1881, when her child was taken from her. That the pursuer and Lady Mackenzie should have combined to take the child from the defender by force is much to be deplored, but perhaps not more

than the fact that the defender should have struggled to retain it. I cannot, however, hold that the conduct of the pursuer amounted to cruelty. He had no intention of injuring the defender; his only purpose was to take possession of his child. He was within his legal right. If the defender sustained any hurt she has herself to blame. I should have thought that she would at once have resigned the child. And she would have done so if she had not been under the influence of unworthy feelings. I regret to say that on a full consideration of the evidence I can come to no other opinion than that she had had the child with her in order that she might keep it from the pursuer at the hour at which she knew that he was accustomed to have it, and which was the only hour available for that purpose. She was acting in disregard of her husband's wishes. She was wantonly depriving him of what she must have known to be his chief pleasure. With all this I cannot approve of the action of the pursuer. But at the same time I cannot look at what took place as amounting to cruelty. It occurred once. There is no reason to expect that it would ever occur again. It would never have occurred but for the misconduct of the defender.

Other matters have been referred to in the early history of their married life. It is said the pursuer exposed the defender to hardships and even to danger in certain journeys which he took with her. To my mind there has been great exaggeration here. It is evident that the pursuer is not popular with his class, and that the witnesses do not look at his actions in a favourable light. But I cannot find any evidence of cruelty. There was no complaint by the defender at the time, and I think that we may safely leave out of consideration what she passed over in silence. She was very acute to perceive any transgression against herself.

But she urges that she was so much neglected and degraded that the conduct of the pursuer, though not taking the shape of violence, was cruelty in a moral sense. I cannot so hold. I see that the pursuer and defender were soon unhappy; but I cannot attribute to the pursuer any conduct which I can hold to be cruel. A matter was pressed upon our notice which if it occurred might be held to fall within that category. The defender says that within a few days of their marriage the pursuer told her that he had married her for her money, and for no other reason. I think that she is mistaken. It is hard to conceive that any man could be so brutal. Looking to the conduct of both parties, I decline to believe it. If the pursuer had made any such statement he could not have ventured to write to the defender as he did, and the letters of the defender are more to be trusted than her memory. If she had received such an insult she could not forget it, and could hardly forgive it. She never made it the subject of reproach, or made use of it as a means of exposing the hollowness of the pursuer's professions of attachment.

Two matters were much pressed on our notice—First, the telegram of the pursuer to Lady Moss, dated 6th January 1880, which was represented to convey a charge that the defender was addicted to the excessive use of opiates and stimulants; and second, that she was accused of having formed a plan of removing their child to England without his knowledge. I am far from approving of what the pursuer said or wrote on either of these subjects; but I see no evidence of cruelty.

With regard to the first matter, the telegram was to Lady Moss. It purports to do nothing more than to give the import of the directions of the doctor who was in attendance upon the defender. I see no reason to doubt that the pursuer believed that he was making an honest and true report. I do not wish to suggest that the defender ever took stimulants or opiates to excess. But the pursuer was under the belief—and I think the honest belief—that she did, and that she was thereby injuring her health. It was a subject on which he was painfully anxious, and his anxiety may have led to the doctor's views not being stated with perfect accuracy. But I am satisfied that there is no foundation whatever for saying that the pursuer brought against his wife what he knew or believed to be a dishonest charge, in which aspect alone it would have been of importance in the present inquiry.

The second matter is of small moment, though much has been said and written on it. I need only say that the pursuer had a justification for his belief. The defender herself admits that at one time she entertained such a plan; thereafter she explains that before the pursuer's accusation she had abandoned it. She has I think not much reason to complain even though the plan assumed a distorted shape in the imagination of the pursuer.

As I read her letters she does not complain of cruel treatment. The principal topics are that the pursuer manifests no interest in her concerns, that he denies her comforts to which she conceives herself to be entitled, and that Lady Mackenzie is too much in the house, and made of too much importance. I may say by the way that she might have had more tolerance for her husband's mother, in view of the great pecuniary sacrifice which she had made in order that the marriage might take place, and that she might have considered whether her husband's means were sufficient to provide all that she asked for. But these matters are beside the question. I see nothing more in them than the unhappiness of an ill-mated pair due to the fact that their ideas, tastes, and pursuits were entirely dissimilar, and that they could not or would not show any forbearance or make any concession.

To what cause, then, is the separation to be attributed? I answer—To the fact that from an early date the defender repented of her marriage. She was translated to a new and uncongenial scene. She was, I think, disappointed in the place of her residence, as being different from her former

luxurious home. She was disappointed in her husband. She was distressed with the presence of Lady Mackenzie, and with the influence which she possessed over her son. These and other causes produced a great revulsion of feeling, and led her to treat her husband with a sullen coldness. She says she married for love. I believe her. I see no other inducement. But her love very soon died. She made no effort to keep it alive. She did worse. She so acted as to alienate the affection of her husband.

She left her husband in August 1880. The separation began in anger. But I am satisfied that it continued because she had resolved to live no longer with a husband whom she no longer loved.

She shows best in 1884, when she proposed to return. Her letters are very much to be commended, and I wish that the pursuer had acted with more generosity. But I suppose that he was desirous to be assured that the conduct which had much offended him should not be repeated. He imposed conditions so harsh that the defender could not submit to them. The offer of reconciliation was ineffectual, and in my judgment through the fault of the pursuer. I am not surprised that the defender was offended, and that the separation continued. But, as I have said, the pursuer came to see his error, and wished his wife to return. His proposal in 1887 was honest and in earnest. It was in my opinion refused without any justification.

I do not think that the pursuer had forfeited his rights as a husband, or that the defender had been relieved of her obligations as a wife. We cannot hold that she was justified in separating herself from her husband because she found him less loving than she expected, or because she had more of the society of her mother-in-law than she desired. It is possible that she did not meet with all the attention which a wife might expect to receive. But she seems to have made no effort to draw to herself her husband's love. She was very prompt in taking offence, and her resentment was manifested in a very marked and disagreeable way. With these matters, however, we have really no concern, except in so far as they may explain the conduct of the parties before us, and the reason why the defender chose to live alone.

I do not think it necessary to examine the manner in which the pursuer behaved to the defender when they were living separate, or to notice the difficulties which he interposed to her having access to her child. He might have been more considerate. But his conduct was due to the belief that she had forfeited her rights as a wife and mother by withdrawing herself from his society without just cause. But it had, perhaps, the baneful effect of confirming the defender in her resolution never to live with him again. He was, however, set right, and, as I have said, he endeavoured to repair his error. The defender would not return. She refused—not from fear of any evil consequences to herself, but, as I think, for the sole reason

that she had determined to live with her husband no longer.

I am therefore of opinion that the pursuer is entitled to decree in terms of the conclusions of the summons.

LORD TRAYNER—For reasons clearly indicated by Lord Young in the conclusion of his opinion (in which opinion I concur) I abstain from going into any details regarding the facts of this case. And I shall only say that I concur generally in the view of those facts which has been taken by the Lord Ordinary.

I shall state very briefly the grounds on which I think the defender is entitled to our judgment. First.—The Act of 1573 (which is the sole authority for divorce on the ground of desertion) provides that where one spouse “divertis from uthers companie” and remains away in “malicious obstinacie” for four years, refusing meantime all privy admonition, such spouse may in respect of such absence or desertion be divorced. It is upon this statute that the pursuer now founds. To entitle him to decree of divorce against the defender he must establish at least two things—(1st) that the defender has deserted him or abandoned his society for four years; and (2nd) that such abandonment or desertion was without reasonable cause. The first of these propositions is not in dispute—the defender has been absent from her husband for more than four years. The only question therefore is, Is it shown that her absence is without reasonable cause? or perhaps it would be more correct to put it thus, Has the defender justified her absence—has she shewn that she had reasonable cause for her absence? Now, what is “reasonable cause” in the sense of the statute. The language is in no sense technical. It means exactly what the words in their ordinary sense import, and no more. The spouse justifying his or her absence must satisfy the tribunal before which the question may depend that the cause of his or her separation from or desertion of the other was reasonable and therefore sufficient. If this is established, then no ground for divorce remains—if not, decree of divorce will be granted. It may not be a very satisfactory state of the law that a question so important as divorce, followed by consequences so grave, should depend for its decision upon the opinion which a judge or judges may take of a defender’s conduct in a particular case, guided by no rule except the opinion which the whole circumstances submitted may induce him or them to form. But I think that is the state of the law; and we can only administer not amend it. Reading the Act of 1573 in this way, I am of opinion very clearly that the defender has shewn “reasonable cause” for leaving the pursuer’s society when she did, and remaining away from him ever since. But second—It is maintained for the pursuer that nothing can be regarded as “reasonable cause” in the sense of the Act 1573 except such cause as would afford a sufficient defence to an action of adherence, or afford relevant

ground for an action of separation and aliment. From what I have already said it follows that I do not adopt this view. In the first place, I think it is wrong to assume, as the pursuer’s argument does, that an action by a wife suing for separation and aliment stands on the same footing as an action by her against her husband for adherence. The pecuniary consequences to the husband (the defender) in the former of these actions in the event of decree being pronounced against him are more onerous than in the latter, and I think it has been recognised both here and in England that less will be sufficient as a defence to an action for restitution of conjugal rights, than would be sufficient to ground an action claiming such restitution. There is some authority I know for the pursuer’s contention, but I think the better opinion, and that supported by the greatest weight of authority, is to a contrary effect.

I shall only add, that if it were necessary to hold that the defender’s defence here could not be sustained except upon her shewing that she had such reason for leaving her husband as would have relevantly founded an action for separation at her instance, I am prepared to find that such reason has been established. Having regard to the whole circumstances of the case, including the social position of the parties, I am of opinion that the pursuer’s conduct to the defender, culminating in the act of violence on his part on 4th August 1880 was sufficient to entitle her to a decree of separation, and afforded more than would have been necessary for a sufficient defence to an action of adherence.

LORD JUSTICE-CLERK—I would like, in addition to what I have said, to state that I concur in the latter part of Lord Trayner’s opinion, that if it was necessary to decide upon the question of cruelty, I should be of opinion that the defender had justified her absence from her husband by the fact that he had been guilty of cruel treatment towards her which would have justified a separation.

The Court adhered.

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