

effect, such as payment of taxes or the like, on record, and I am of opinion that there is no relevant averment of the kind here.

The Court recalled all the interlocutors pronounced in the Sheriff Court, and of new assolized the defender.

Counsel for Pursuer (Appellant)—Mackintosh—Lorimer. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Defender (Respondent)—Hon. H. J. Moncreiff. Agents—Murray, Beith, & Murray, W.S.

Friday, November 3.

SECOND DIVISION.

[Lord Adam, Ordinary.]

KINNEAR v. KINNEAR, *et e contra*.

Husband and Wife—Divorce for Desertion—Separation and Aliment—Wilful and Malicious Desertion—Reasonable Cause for Absence of Spouse said to be Guilty of Desertion.

In an action of divorce raised by a husband on the ground of his wife's wilful and malicious desertion, the Court, on a consideration of the proof, (*dub.* Lord Young) *repelled* a plea to the effect that the wife had reasonable excuse arising out of her husband's cruelty for remaining apart from him, and pronounced decree of divorce; and in a counter action of separation and aliment at the instance of the wife, grounded on averments similar to those which constituted her defence in the action for divorce, *dismissed* the action on the ground that the alleged cruelty had not been established.

The first of these two actions was an action of divorce raised by Thomas Kinnear, sanitary inspector for the burgh of Dundee, against his wife Helen Leslie or Kinnear, on the ground that she had been guilty of wilful and malicious non-adherence to and desertion of him without a reasonable cause for four years. The defender admitted that she had been absent for more than four years from her husband, but averred that her absence was caused by terror occasioned by the gross cruelty of her husband, which had rendered her afraid to live with him. She condescended on various alleged threats and acts of cruelty on his part towards her.

She pleaded, *inter alia*—"The pursuer having treated the defender with gross cruelty, and she having left him on that account, the action is groundless and untenable."

Mrs Kinnear raised a counter action of separation and aliment against her husband, in which she made the same allegations of cruel threatening conduct on the part of her husband which constituted her defence in the action of divorce.

A proof was led in the action of separation and aliment, which by agreement of parties was held as also applicable to the action of divorce. The following facts were elicited by the evidence:—The parties were married in 1865. The husband was at that time a policeman in Dundee, and the parties lived together there, with the exception

of certain short absences of the wife in consequence of quarrels between them, till October 1877, when they finally separated as after mentioned. Five children were born during that period. The husband's position in Dundee improved during the subsistence of the marriage, and at the time of these actions he was sanitary inspector of the burgh of Dundee, and had an annual income of about £170. The wife, on the other hand, after the marriage contracted drunken habits, spending the housekeeping money on drink. She also became untidy and lazy, and her husband had frequent occasion to complain of her habit of smoking and use of bad language before her children. The married life of the parties in consequence became unhappy very soon after the marriage, the husband upbraiding the wife, and quarrelling with her on account of her bad habits, and the wife neglecting her husband and her five children. In September 1866, on the occasion of a quarrel about the husband's dinner, she left him, but he induced her shortly after to return to her home. She again left him in 1873 on the occasion of a quarrel about her habits of drinking, but was taken home again the next day. In September 1874 she again left her husband in consequence of a dispute occasioned by her drinking habits, and on this occasion she took away with her the four children then existing of the marriage. She removed with them to Forfar. On this occasion legal proceedings were threatened against her husband for aliment for her and the children. He at once wrote expressing his anxiety to receive home his children, and stating that his wife was also welcome to return. Three of the children were then sent home to him, and after a time Kinnear came to Forfar and took away the youngest also. Thereafter, in consequence of a message from her husband relating to the health of one of her children, Mrs Kinnear returned to her husband's house in Dundee, promising to mend her ways. For a short time matters went well, but afterwards she again fell into bad company, and returned to her drunken habits. In 1877, after a quarrel relating to the pawning of articles by her, and particularly as to some sheets which were amissing, she left him for the last time. He made this note in his diary—"Tuesday, 2d Oct. 1877.—This day my wife deserted me of her own accord." Two months after he went to Forfar and offered to take her back, but she refused to come. He denied in his evidence that he had ever kicked her or struck her, or had charged her with infidelity, and deposed that he had been always prepared to take her back if she had been willing to come. On this point, however, he deposed in cross-examination as follows:—"I went to Forfar to bring her back two months after she left. She did not give me time to tell her that, because she ran out of the house. When I saw her two months afterwards she was perhaps 8 or 10 yards from me. Since then I have driven through Forfar perhaps three times a-year to see my brother, who lives some distance beyond the town. On these occasions I never called to see my wife. From the reports which I got latterly about her conduct I did not think I would be justified in going to see her. The second time I was at Smith's house I got information concerning a drinking bout which she had had with the foreman-tenter on a Saturday night. I wrote to a friend asking him to make inquiry, and he wrote

back that the circumstances were very suspicious. I did not pursue the matter further. I was somewhat doubtful about it, but latterly I have been convinced that there was not only a drunken bout, but that there was a little more." Two witnesses, Mr and Mrs Smith, who resided in Dundee, but had visited the Kinnears in Dundee, and whose evidence is referred to in the note of the Lord Ordinary, *infra*, deponed on one occasion on which they had seen the husband strike his wife, and one of these witnesses also deponed that during Mrs Kinnear's last absence from Forfar Kinnear said to him with reference to his wife that he hoped "the b—— would be dead before the witness returned to Forfar, and if she were dead he would get a wife with a great deal of money." The evidence of the husband as to the wife's bad habits being the reason of the quarrels between the spouses, and as to his not having treated the wife with harshness or cruelty, was corroborated by that of the two eldest children of the marriage, and that of certain neighbours, and of a woman named Dollon, referred to in the opinion of Lord Craighill.

On the other hand, Mrs Kinnear deponed that she was compelled to leave her husband on account of his violent and cruel treatment of her by striking and kicking her, and the insufficiency of the money given her for housekeeping. Her evidence was to the effect that she had left her husband's house in 1877 on the occasion of the quarrel about the missing sheets above referred to, because from his violent conduct she was in terror of her life. She also deponed that her husband had never asked her to return, and that she felt deeply the separation from her children. A number of witnesses deponed to having heard her complain of her husband's cruelty, but the only evidence of such violence consisted in that of the two witnesses above referred to. It was proved that Mrs Kinnear had never seen her children since her departure from her husband's house in 1877, although she was during the period of her absence engaged in a factory in Forfar, while the children were all the time residing with their father in Dundee.

The Lord Ordinary (ADAM) in the action of divorce at the husband's instance gave decree of divorce. He dismissed the action of separation and aliment.

He added this note to his interlocutor in the action of divorce:—"At the conclusion of the proof the Lord Ordinary was of the opinion that the defender had failed to prove that she had reasonable cause for leaving her husband in October 1877, or for her continued non-adherence since, and further consideration has only strengthened that opinion. The only witnesses who speak to having seen any personal violence used by the pursuer to his wife are James Smith and his wife, who speak to something of that kind having taken place in Park Terrace about the New Year of 1875. From the manner in which Smith showed in the witness-box what the pursuer did to his wife on that occasion it was quite clear that the pursuer did not intend to hurt, and did not do so. It would be an abuse of language to say that he acted cruelly or violently towards her.

"The rest of her case consists of evidence of complaints of her husband's cruelty, alleged to have been made by her to some of her friends and

neighbours, and now repeated by them. The Lord Ordinary has only to say that he places no reliance on the statements of the defender, whether now made by herself or reported by her witnesses.

"The pursuer appeared to the Lord Ordinary to be quite a respectable and trustworthy man, and the Lord Ordinary believes that he has given a substantially true account of their married life. The truth of the case appears to be that it is more in consonance with the defender's tastes and habits to live independently as a factory worker than under, it may be, the somewhat strict control of her husband. That she had no particular affection for her children, which might have kept her in her husband's house, is plain enough, because although living at no great distance from them she has never seen them, or apparently desired to see them, since she left them in October 1877."

Mrs Kinnear reclaimed.

At advising—

LORD CRAIGHILL.—There are two actions which on the present occasion await decision. The one is an action of divorce at the instance of Mr Kinnear, the husband, against the wife; the other is an action of separation and aliment at her instance against him. The Lord Ordinary has decided both in favour of the husband, and hence the reclaiming-notes upon which these causes are now before the Court. The action of divorce is grounded upon Mrs Kinnear's alleged desertion, and what is to be determined in it is not merely whether she was absent from her husband's house for over four years, but also whether she has been guilty of malicious obstinacy in remaining away. The burden of proof in this, as in all actions, rests in the first instance on the pursuer; but as regards the second question particularly, this in ordinary circumstances is particularly light, because unless there shall be a justification of the alleged desertion, malicious obstinacy will, as a necessary inference, be held to be established. Accordingly Mrs Kinnear here attempts to justify her conduct, and the justification set forth in the second of her pleas is to the effect that the pursuer, her husband, having treated her with gross cruelty, and she having left him on that account, the action is groundless and untenable. If the facts are as assumed in her pleas, she was entitled to remain away, and cannot be divorced on account of her absence; but, on the other hand, if justification has not been proved, it is plain that that defence cannot be sustained. Matters therefore stand in this position:—The claimer left her husband's house and remained away over four years. Has she justified her absence in such a way as to elude the qualification of malicious obstinacy? If she has not, the pursuer, her husband, is entitled to judgment. No doubt in many cases there may be suspicions and surmises that the pursuer of such an action connives at the withdrawal of the defender, and where this is proved there will be afforded ground for a sufficient defence. But nothing of that kind has here been alleged, and if it had been, the facts that have been proved would have been an ample refutation. On a consideration of the proof the conclusion to which I have come is that the judgment of the Lord Ordinary ought to be affirmed. The married life of the claimer and her husband has not been happy. This has been abundantly estab-

lished. It may be that on occasions—and these some of the occasions specified by the claimer on record—he was harsh and severe, not to say violent; but there were faults on both sides, and if he at those times was the more conspicuous offender, any excess on his part was condoned, because the claimer, though she left his house afterwards, returned and renewed cohabitation. The ultimate cause of separation might have been held to have been influenced by what had previously occurred if there had been in the proof what supported the statement of the claimer on the subject; but the fair result of the evidence, as I think, is that when she left her husband's house in October 1877 she withdrew not from terror or apprehension of anticipated violence. She no doubt deposes that she was so influenced; but I am humbly of opinion, upon a consideration of all the evidence, that she left her husband's house not because of any violence the defender was guilty of, nor because of any violence that was apprehended, for we have not merely the evidence given by the husband, but also by her daughter, that there was no violence, and that there was at the time no reason to apprehend that violence would be used. What occurs to me to have been the cause of the departure of the claimer in October 1877 was that dispute with reference to the missing sheets, the defender's story regarding which is contradicted by Mrs Dollon. Looking at all that we have heard in the case, and taking everything into account, it appears to me that the justification set forth has not been established, and that the defender—that is to say, the claimer—having been absent for more than four years from her husband's house, has been guilty of malicious obstinacy without justification, and that therefore the Lord Ordinary has rightly pronounced decree of divorce. This being so, I am of opinion that in the action of divorce the Lord Ordinary's judgment ought to be sustained, and that his judgment in the action of separation and aliment should also be affirmed.

LORD YOUNG—I have had very great difficulty in this case, but looking at the judgment of the Lord Ordinary, in which I understand all your Lordships are disposed to concur, I think I am warranted in deferring my doubts to so large a preponderance of opinion; but my doubts are grave, and I cannot say that they have been altogether removed. Had I been left to myself to judge of the case alone originally in the first instance, I rather think I should have arrived at another conclusion. This is not a case in which there is malicious and obstinate desertion of a husband who was anxious during the whole period referred to, or willing, to receive his wife back. I think there is evidence—serious evidence—at least of rigorous and severe treatment of this woman by her husband at home, though I am far from saying that I should differ from your Lordships to such an extent as this, that her treatment was such as to justify her withdrawal. But I have no great difficulty in accounting for her withdrawing, being left with something like £1 a week, without any assistance to manage the house and a family of five children which she had borne to the pursuer. Her habits do not seem to have been good. She smoked, and she took a little more drink, it is

said, on some occasions—though the evidence of that is not great—than she ought to have done. There is evidence which troubles my mind of the worse than hardness of the position in which she was placed by her husband even after his income grew to be such as not to render that justifiable. She went away more than once, and returned again and found the state of things so hard and him so severe in his conduct towards her that she went away again. When she went away the last time he looked calmly on her departure; and at the end of four years he brings this action, and he is at some pains to tell us in his evidence that he suspected her of infidelity, and latterly became convinced of her infidelity, though he did not accuse her of it. He says that he had heard such reports, and believed such reports, of her immoral conduct that he did not think he would be justified in calling on her. I think he says so. He says—“From the reports which I got latterly of her conduct I did not think I would be justified in going to see her.” He also says—“I was somewhat doubtful about it”—about her conduct and habits—“but latterly I have been convinced that there was not only a drunken bout with him, but that there was a little more;” and he says to a friend who came to see him during her absence, from Forfar, where she was working as a mill-worker, that he hoped “the b—— would be dead before I return to Forfar,” and if she was dead he would get a wife with a great deal of money. I do not think that is the language of a man who is ready to receive his wife during all that time. He says he was willing she should return, but that is inconsistent with the state of his mind. It would be doing any honest man great injustice to say that he was ready to receive a wife back to manage his children of whom he entertained the opinion which he said he did, that she was a drunken woman, and engaged in drunken bouts and something more with a foreman tenter. There is no evidence of misconduct on her part, and therefore that must be laid aside as erroneous. But though I have been greatly troubled by these considerations to which I have adverted, I agree in the main that there is no legal justification of her withdrawal, and that it was in point of fact continued for four years. Notwithstanding these doubts which I entertain—grave doubts—of the husband's willingness to receive her back—who thought that she was unfaithful to him, and wished she was dead that he might have another wife—I am not prepared to set that opinion against the opinion of the Lord Ordinary, in which your Lordships concur, that he was in point of fact willing to receive her back all the time.

LORD RUTHERFURD CLARK—I also have entertained doubts on this case, but at the same time I concur in the opinion of Lord Craighill.

LORD JUSTICE-CLERK—I concur in the result at which Lord Craighill and the majority of your Lordships have arrived. It is impossible to have heard the discussion and read the evidence in this case without having a considerable amount of sympathy for both sides. They were an ill-matched couple, and the husband rose in the world, and I think he had not appreciated and did not understand exactly the feelings of the wife whom he had married in humbler circum-

stances, and accordingly the household latterly came not to be a happy one. But I am not of opinion to any degree that there was harshness or ill-usage, in the proper sense of the word, on the part of the husband; on the contrary, the impression on my mind was that his wife had been treated with great forbearance. She was rather Bohemian in her habits, which her husband was not. He was anxious to rise in the social scale; she had no such desire, and was regardless of such things, and therefore from month to month, and year to year, they went on getting further apart as to their tastes and temperament. I think the husband was forbearing to the last degree; as I have said, he showed very great forbearance on the whole. No doubt there were things—must be in such households—of which the wife might have had reason to complain, and which she might have found hard to bear, but I think she treated him much worse than he did her. I think that her desertion was obstinate, and heartless besides, and was a malicious leaving of her family. Under such circumstances as those described, I have to concur with your Lordships in the result of adhering to the Lord Ordinary's interlocutor, though I would have gladly seen the case disappear by the parties going together again.

The Court adhered to the interlocutors of the Lord Ordinary in both actions.

Counsel for Reclaimer (Mrs Kinnear)—Campbell Smith—Rhind. Agent—W. Officer, S.S.C.

Counsel for Respondent—J. P. B. Robertson—Watt. Agents—Fyfe, Miller, Fyfe, & Ireland, S.S.C.

Friday, November 3.

SECOND DIVISION.

[Sheriff of Fife.

MACDONALD & FRASER v. HENDERSON.

Sale—Horse—Sale by Auction—Special Warranty in Sale Catalogue—General and Special Conditions of Sale—Obligation of Buyer to Pay Price to Auctioneer.

A person bought a horse at a sale by auction. The sale catalogue disclosed the seller, and contained a special warranty of soundness. On the face of the catalogue was the heading, "Special conditions of sale (in addition to those under which these sales are held)." Printed bills were posted up in conspicuous places on the walls of the saleroom containing the general conditions referred to in this heading, one of which was that in the event of the auctioneer giving delivery of any lot without payment of the price he should be entitled to recover payment by action at law without consent of the seller or consigner, and that no defence should be competent against such action on the ground of any alleged defect or disconformity to warranty of the lot sold, the buyer having no claim in respect of such against the auctioneer, but only against the owner

or consigner. The auctioneer took the buyer's cheque in payment of the price, and gave delivery of the horse on the day of the sale. Next day the buyer returned it as unsound, and stopped payment of the cheque. The horse died the same evening. *Held* that the general conditions in the printed bills formed part of the contract between purchaser and auctioneer, and that the former having obtained delivery on the footing of these conditions was bound to the latter individually to fulfil his part of the bargain, and was not entitled to stop payment of the cheque on any question of warranty, whatever might be his recourse against the seller.

Observations (per Lord Justice-Clerk) on the case of Henderson v. Steenson, June 1, 1875, 2 R. (H. of L.) 71.

Macdonald & Fraser, the pursuers of this action, were auctioneers in Perth, and conducted weekly sales of cattle, horses, &c., there. During all sales, and on the day of the sale after mentioned, they exhibited in their sale-hall their general conditions of sale. One of these conditions was to the following effect:—"It is declared that no warranty is given by the auctioneers personally, and that with every desire on their part to describe accurately each lot, such description or particulars as given at the time of sale is solely for the guidance of buyers, who shall be held to have satisfied themselves as to the state, quality, and sufficiency of the lot offered for, and shall not be entitled to object thereto or withhold the price on any ground whatever; also, that this shall not be held as depriving the buyer of any legal claim competent against the consigner, whose name will in every instance be disclosed, but in no case shall the auctioneers be liable; further, that all purchases must be paid for in cash to the auctioneers when called down if demanded, and removed at the conclusion of the sale, and that the lots will be at the sole risk of the respective buyers on being knocked down; further, in the event of the auctioneers giving delivery of any lot without payment of the price, they shall be entitled to recover full payment from the buyer by action at law at their own instance without consent of the owner or consigner of the lot, and no defence against such action will be competent on the ground of any defect, actual or alleged, of the lot sold, or of the same being disconform to description or warranty or otherwise, the buyer having no claim against the auctioneers, but only against the owner or consigner of the lot." The said conditions of sale further contained the stipulation that the foregoing were the terms on which the pursuers did business, and that both consigners and purchasers were to be held as agreeing to, and should be bound to abide by, these conditions. These conditions were printed on bills, four or five of which were posted up in conspicuous places—the lower ends of the bills being about four and a-half feet from the ground—on the walls of the hall, one being near the entrance, and one on each side of the auctioneer's chair, and they were clean and legible.

A sale of horses took place at the pursuers' mart on 4th July 1881, and among those exposed for sale on that occasion was a horse described in the sale catalogue as follows:—"No. 44. Mr