Thursday, December 22.

SECOND DIVISION.

MACKENZIE *v.* MACKENZIE.

Parent and Child—Custody—Rights of Mother—Guardianship of Infants Act 1886 (49 *and* 50 *Vict. c.* 27), *sec.* 5.

A petition was presented by a wife, who had been living separate from her husband for seven years, for access to the only child of the marriage, a girl eight years of age. The husband offered to receive his wife in his mother's house, where he and the child were living, but to this the wife did not assent. The Court, under the powers conferred by the Guardianship of Infants Act 1886, made two interim orders, the one giving the wife the custody of the child for the months of August and September, the other giving her the custody for three weeks at Christmas.

This petition was presented by Mrs Minna Amy Edwards Moss or Mackenzie, wife of Osgood Hanbury Mackenzie of Inverewe and Kernseray, who was living separate from her husband, for access to her daughter eight years old, who was living with the father.

In January 1881 a previous application had been presented by Mrs Mackenzie for the same purpose, to which answers were lodged for the husband on 15th February 1881. In these answers he judicially offered to receive the petitioner as his wife at Tournaig House, and to resume conjugal relations without reference to the past, the petitioner being mistress of the establishment as after marriage. Alternatively, he offered to give the petitioner access to her child at Tournaig at all times when she might choose to come, and when it might be reasonably convenient in view of meals, hours of rest, &c., that the child should be visited. He also offered to arrange that during one or two hours on certain days in each week the child should always be kept either in or immediately about the house, so that the petitioner might depend upon finding her, and the only condition he attached was that the petitioner should come unaccompanied, and that the child should not be taken out of the house unless accompanied by its nurse. On 5th March 1881 the Court refused the petition, on the ground that the petitioner had left her husband without any good and sufficient reason in law. The case is reported in 8 R. p. 574, 18 S.L.R. 379.

The present petition was presented by Mrs Mackenzie in 1887 for access to her child, in which it was stated that the petitioner was the daughter of Sir Thomas Edwards Moss, Bart., of Otterspool, near Liverpool, and was married on 26th June 1877 to Osgood Hanbury Mackenzie. There was one child of the marriage, a daughter named Mary Thyra, who was born on 1st March 1879.

The petition set forth that the marriage was from the first a very unhappy one, and that on 4th August 1880 the petitioner, for reasons which it was not necessary to detail, but which appeared to her amply to justify the course she took, left her husband, who was then residing with his mother, the Dowager Lady Mackenzie, at Tournaig House. Since that time the spouses had lived separate from each other. For some time subsequent to the decision of the Court in 1881 the petitioner, when at Poole House, two and a-half miles from Tournaig, which had been taken for her by her father, was permitted to see her daughter at Tournaig on three days each week between the hours of 10 a.m. and 12 noon.

On 14th August 1882 Mr Mackenzie wrote to his wife stating that he had been requested by his mother to let her know that it did not suit her arrangements for the petitioner to remain with her daughter after 11 o'clock on the days she visited her. The petitioner stated that she "at the time reluctantly agreed to this restriction in order to avoid unpleasantness, but soon found that the journeys from Poole House to Tournaig at so early an hour in the morning were extremely trying, and in winter injurious to her health. She accordingly wrote to her husband on 1st September 1883 asking him to allow her to revert to the hours (10 to 12) originally fixed by him for her visits to the child." He, however, declined to do so, on the ground that it did not suit the Dowager Lady Mackenzie's arrangements that the petitioner should remain at Tournaig after 11 o'clock.

On 8th May 1884 Mrs Mackenzie wrote offering to return and live with her husband as his wife. Mr Mackenzie agreed to receive her back, but requested a written assurance that she would not leave his house and go elsewhere without his consent, or by the advice of the family physician; and secondly, that she would not have anything further to do with Poole House (the residence of the petitioner's father), and that she would not associate (in the parish of Gairloch) with those with whom he could not at present be on friendly terms. Mrs Mackenzie declined to accede to these conditions, but renewed her offer to live with him as his wife, and requested to know when he would be prepared to receive her and her maid. Mr Mackenzie again wrote to his wife naming a day for her return, but reiterating the necessity of her complying with his conditions, and refusing to take in her maid, on the ground that the accommodation at Tournaig was not sufficient to receive her. Mrs Mackenzie wrote declining these conditions. During the course of this correspondence the petitioner continued to have access to her daughter on three days in the week, between 9 and 11 a.m.

On 27th October 1885 Mr Mackenzie wrote stating that for certain reasons given in his letter he must restrict the hours of her visit to the child to two hours one day in the week, from 9 a.m. to 11 A.M., and the access was accordingly limited to that period.

The petitioner averred that her husband had thus departed entirely from the judicial offers he had made in the previous petition; that the petitioner considered that the access which she had to her child was quite insufficient, and hampered with improper conditions, and that therefore she made application to the Court to make regulations for securing to the petitioner adequate access to, and means for enjoying, the society of her only child. The application was made under the provisions of the

Guardianship of Infants Act 1886, sec. 5, which provides—"The Court may, upon the application of the mother of any infant (who may apply without next friend) make such order as it may think fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same, or otherwise as to costs as it may think just."

The prayer of the petition was—"To find that the petitioner is entitled to free access to her child, the said Mary Thyra Mackenzie, at all reasonable times, and to make such order as to your Lordship may seem fit regarding the custody of the said Mary Thyra Mackenzie, and the petitioner's right of access to her."

Mr Mackenzie lodged answers, in which he stated that he had always been and still was willing to receive the petitioner back to his home unconditionally. He could not, however, arrange for her being accompanied by her maid, and he thought it right to intimate that he might find it necessary to exercise his authority, as head of the house, to forbid the petitioner leaving his house to reside elsewhere, either temporarily or permanently, and also to forbid her visiting her relations at Poole House, or elsewhere in the parish of Gairloch, in the present circumstances and in the meantime.

The petitioner argued — Under the circumstances the wife here, although living apart from her husband, was entitled to have access to her child. She had previously applied for access, and the Court had formerly refused to grant it, on the ground that the child, living with the father, might come to be a bond of union between the spouses. Now circumstances had changed; the presence of the child in her father's house had not been a bond of union between them, and the amount of access formerly promised by the husband had been very much curtailed — *Mackenzie* v. *Mackenzie*, March 5, 1881, 18 S.L.R. 379, and 8 R. 574. There were several cases where a wife who had absented herself from her husband's house had been allowed access to the children of the marriage—*Lilley* v. *Lilley*, January 31, 1877, 4 R. 397; *Bloe* v. *Bloe*, June 6, 1882, 9 R. 894. It was therefore plain that the settled law and practice of the Scottish Courts was that the parents, even if guilty of marital misconduct, and much more if they were of blameless character, as here, were to have the right of access to their children. The form of order had been settled in many cases—*Beattie* v. *Beattie*, November 10, 1883, 11 R. 85; *Symington* v. *Symington*, March 18, 1875, 2 R (H. of L.) 41, and July 16, 1875, 2 R. 974; *Stewart* v. *Stewart*, June 3, 1870, 8 Macph. 821; *Allan* v. *Allan's Trustees*, July 20, 1869, 41 Jur. 617. Under the Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27) the Court was free to deal as they might think best for the interests of the child. Under the Act the mother was to be as much considered as the father in the matter of custody and access. As a matter of fact the husband had no house of his own to ask his wife to come to, as he was living in his mother's house, and apparently had no other.

The respondent argued—There were still the same grounds for refusing this petition that there were in 1881, when the Court refused the previous one. The ground on which access was refused then was that the lady was wilfully living separate from her husband. She could have gone back and lived with him and her child when she liked, and had no right to ask for any access whatever. The husband had made an unconditional offer to take his wife back, which she refused. What she regarded as conditions were merely regulations to enable the husband to regulate his house properly. The regulations were quite legal—Fraser on Husband and Wife, ii. 896, and cases there cited; Stair, i. 4, 9. The wife was *de jure* living with her husband, and the Court would therefore not interfere. In all the cases quoted on the other side there were definite allegations of cruelty by one spouse against the other, and they dealt merely with the question of access while some cause was pending for divorce or separation. When the spouses were separate, and access was denied, then the Court would give access to the children of the marriage even where one of the spouses had erred, but here the wife had the power to go to her child if she wished, and no good reason had been shown why she should not go back. The statute of 1886 was merely declaratory of the common law, and did not really change the position of the husband and wife as to custody of the children. To give the wife access here would be an abuse of the discretion of the Court.

After the case had been heard, but before judgment was given, the defender put in process two letters to his wife, the first dated Edinburgh, 13th June 1887, in which he said—"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. It is true that I cannot for the present receive you elsewhere than at Tournaig, but my restricted means make this unavoidable. . . my whole present income does not on an average much exceed £100. . . Should you in 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 day 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." The second was dated 20th June, and in it the respondent said that if the petitioner felt any difficulty in returning to Tournaig on account of his mother being there, she was quite willing to give up her cottage in the meantime to the petitioner and her husband, for a month or a couple of months. The respondent said that he was 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. . . Of course you know that if my mother leaves us, she takes her income along with her."

At advising on 7th July—

LORD YOUNG—This case is one of an unusual and somewhat painful character, and one to which we have all given great consideration. The husband and wife were married in 1877, and their only child—a girl—was born in 1879. She is consequently now a little over eight years of age. It was stated—and, unfortunately, truly stated—that the marriage has been an unhappy one, the parties having been separated, and having lived apart for nearly seven years, since 1880. During all that time the wife has lived in a house taken for her by her father, called Poole House, about two and a-half miles from Tournaig, where her husband lives with his mother. The wife's purpose in living at Poole House was unfortunately not to be near her husband, but to be near her child, who lived with him, so that she might have opportunities of seeing her. Some time ago an application was made to this Court for an order to allow her access to the child, but we did not—for reasons explained at the time—see fit then to interfere. That application has now been renewed, and we have had the facts regarding the opportunities of access actually afforded to the mother, and a long correspondence between the parties, before us. Now, we have to consider whether we should use that power which we have, both at common law and under the recent statute, to make such an order. In my opinion, under the circumstances which have been disclosed to us, and which circumstances I wish neither to detail nor to comment upon, it is fitting that we should make such an order. I am not of opinion that the wife has been altogether well used, but I wish to make no observation beyond that. The wife has not been induced to return to her husband, who is living with his mother, and with whom she lived unhappily. There is no imputation upon her conduct, and her character is unimpeached and unimpeachable. The opportunities of access which have been given have not been kindly given. I do not wish to use stronger language than is necessary, but there was no kindliness shown in the opportunities which were given. During all these years the mother has been living in the neighbourhood of Tournaig for the purpose of seeing her child, but the opportunities afforded have been rare. I think it very fitting that a young girl, as this is, should be a good deal with her mother, and the question is presented, whether she is to be wholly with her grandmother, or spend some part of the time with her own mother? I have, without detailing or commenting upon the facts, to suggest that the best way we can do our duty, both with regard to the parents and to the child, whose interest must always be our prime care, is by making an interim order regarding the custody of the child in the present circumstances. It appears a fitting and reasonable thing that this young child should be with her mother during the present autumn. I therefore propose to your Lordships to pronounce an order, unless the parties should be able to agree to carry out the arrangement—in which case no order will be needed—that the mother should have the custody of her child at Poole House during the months of August and September. We would reserve to ourselves power to make any further order when the Court meets in October on the motion of either party.

The LORD JUSTICE-CLERK, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the petition, and answers thereto for Osgood Hanbury Mackenzie, and considered the letters produced, Do order and direct that the petitioner Mrs Minna Amy Edwards Moss or Mackenzie shall have the custody of her child Mary Thyra Mackenzie, in the petition referred to, during the ensuing months of August and September, in her own home at Poole House, in the county of Ross, or elsewhere in Scotland; and ordain the said Osgood Hanbury Mackenzie to give effect to this order, and decern accordingly, and allow interim extract: *Quoad ultra* continue the case, with liberty to either party to move therein."

In obedience to the above interlocutor the child Mary Thyra Mackenzie was sent to reside with her mother at Poole House during the months of August and September, where her father visited her. She returned to her father on 1st October.

On 13th December the petitioner presented a note to the Lord Justice-Clerk, in which she stated "that the respondent has declined to give the petitioner the custody of their child for any period, and only offers access on three days every week for one hour a day, at ten o'clock in the forenoon, or as an alternative, that she should, while resident at Poole House, have the child with her there on Saturdays, from twelve to three o'clock. The petitioner considers that the access so offered is entirely inadequate, and she is thus obliged to make this application that the matter may be regulated by the Court. Her health is suffering from the strain and anxiety to which she has been subjected in consequence of the uncertainty of her rights with reference to her child, and in all the circumstances it is very desirable that some definite and permanent arrangement should now be arrived at."

The prayer was that his Lordship should move the Court to make such order as should seem fit regarding the custody of the child and the petitioner's right of access to her.

In a correspondence which had passed between the parties subsequent to the date of the last order Mr Mackenzie again offered to receive his wife at Inverewe House, and, when that was let during the shooting season, at Tournaig, Lady Mackenzie's house. On 13th October Mrs Mackenzie wrote thus from Liverpool—"Dear Osgood,—My father having returned, I have now come south to talk over your letter of Sept. 16th with him. We have carefully discussed the proposals contained therein, together with the many letters I have received from you during the past five years, and the general treatment I have experienced at your hands. When I saw you on Saturday, Sept. 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 practic-

ability of the offer which circumstances have apparently induced you to make."

On 24th November Messrs Tods, Murray, & Jamieson, the agents for Mrs Mackenzie, wrote to Messrs J. & A. F. Adam, the agents for Mr Mackenzie, in the following terms regarding the access to the child asked by her:—"On her part she would ask Mr Mackenzie to allow her to have her child with her every Saturday during her residence at Poole House, and that she should have her child during six weeks in August and September in each year, and also during a fortnight at Christmas, and that during that fortnight, with the object of enabling her child to have some intercourse with her own relations in England, she should be allowed to take the child with her to England, undertaking, along with her brother as her guarantee, that at the end of that period the child shall be returned to Mr Mackenzie."

In answer to this letter the respondent's agents wrote—"On behalf of Mr Mackenzie, we have to state that as he cannot in any way countenance or acquiesce in his wife's determination to live apart from him, he is not prepared to make arrangements on the footing of a permanent separation from her." They stated that while that was so, the respondent was willing that the petitioner should see her child at Tournaig at 10 a.m. on three days of the week for one hour, or have the child with her at Poole House on Saturdays from 12 to 3, excepting when the child might be from home. This offer was refused, and the note was accordingly presented.

The petitioner argued—It was in the power of the Court, under the Guardianship of Infants Act 1886, sec. 5, to make whatever order they thought best. If the parties had been separated by a judicial decree, the Court would certainly have granted the petitioner access. There was nothing against the petitioner's conduct, and the history of the case showed that she had reasons for not residing with her husband which fully justified the course she had taken. The statute treated the question as one and the same whether the wife was separated from her husband by judicial decree or not. That view was taken in the interest of the infant children, that they ought not to be wholly removed from the companionship of either parent. If the view of the respondent was to be taken, then the child was in a most unfortunate legal position, as the Court could take no cognisance of the state of affairs, and could not act as they considered best in the exercise of their discretion for the interests of the child.

The respondent argued—The prayer of the note ought not to be granted. The last order which the Court had made was essentially a temporary one, and as showed by the Judges' opinions, was made in the hope that the parents might be brought together again, but that hope no longer existed, and the state of circumstances had been materially altered. The state of affairs was now this—The respondent, as shown by the correspondence, made a perfectly unqualified offer to take his wife back to his own house, not merely to his mother's, but the petitioner had definitely refused to return. So that a wife who refused to live with her husband, and could give no reason for that refusal except that she did not desire to do so, was asking for access to her child, when by resuming her proper position she could be with the child at all hours. The Court could not, in accordance with the law and previous decisions, make any such order—*Bloe* v. *Bloe*, June 6, 1882, 9 R. 894. If the mother did not show that she had legal grounds for living apart from her husband, the custody of the child was undoubtedly in the father. It was out of the question to say that the child would not be under proper care if left with her father, as his moral character was as unimpeached as that of the mother. Under the Act of 1886 the application ought not to be granted. The words "under such circumstances as would justify the wife being absent from her husband" must be read into the Act. It was never intended that a wife who chose to live apart from her husband to suit her own wishes was entitled to come to the Court to ask for access.

At advising—

Lord Young—This case came before us last July, and we then, on the application of the present petitioner, the mother of the child, ordered that she should have the custody of the child during the months of August and September. We thought when we pronounced that order that there was a chance of the parties being able to make arrangements about the future custody of the child without again appealing to the Court. But it has turned out that they are unable to do so, and that the spouses are now as good as separated for ever—that the wife has made up her mind that she will not return to her husband, and that they have been unable to agree as to the custody of the child, or as to the amount of access to which the parents are entitled respectively. Accordingly the mother has presented a note—incident to the original petition—by which she requests us to resume consideration of the petition, and prays us to make such order as we may see fitting regarding the custody of this child, and of her right of access to it. Upon that note we have had a full statement of the facts, and a full argument upon the law of the case.

There is in the note no special suggestion as to the amount of access we should allow, but in one of the letters which passed between the parties or their agents, I find this suggestion in a letter of Messrs Tods, Murray, & Jamieson, the petitioner's agents, to the agents for the respondent—"On her part she would ask Mr Mackenzie to allow her to have her child with her every Saturday during her residence at Poole House, and that she should have her child during six weeks in August and September in each year, and also during a fortnight at Christmas, and that during that fortnight, with the object of enabling her child to have some intercourse with her own relations in England, she should be allowed to take the child with her to England, undertaking along with her brother as her guarantee, that at the end of that period the child shall be returned to Mr Mackenzie." We as good as intimated that we would meantime only deal with the question, which of the parties the child should spend her Christmas holidays with, and only thereafter, if necessary, deal with the larger question of future custody. I remarked that the future would be a very short time, for the girl will be

nine years of age in the beginning of March, and three years thereafter she will be in a position to have a say in the matter herself, and we can make no order that will extend beyond that time. But in the meantime we must consider and dispose of the application now before us as to the custody of the child during the Christmas holidays.

We have had a distinct statement of the law on the part of the respondent, that in a case of a child like this the custody of the father ought not to be interfered with, and that it was contrary to the law of Scotland and to the practice of our Courts to interfere with the custody of the father unless by his conduct he should have shown himself to be such a bad custodier of his children that we could not trust them with him. I am not of that opinion. The law is now statute law, and section 5 of the Guardianship of Infants Act 1886 enacts—"The Court may upon the application of the mother of any infant (who may apply without next friend) make such order as it may think fit regarding the custody of such infant, and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same, or otherwise as to costs as it may think just." Now, it is impossible to read that section of the Act without seeing that it foresees and provides for the case of the two parents, both living and living separate from each other, for if they are living in harmony together the idea of an application to the Court for access to see their children is out of the question. Therefore the case is that of two parents living—but living apart—and by the statute the Court is directed to deal with such an application according to its discretion, having regard primarily to the welfare of the infant, but also to the wishes of both parents so far as these are reasonable. One pleasant feature in this case—and it is the only pleasant feature in it—is that there is no imputation upon the character of either of the parties, and I am entitled to assume, and have every assurance that it is according to the truth, that each of the parents is of irreproachable character. But the spouses are living apart, and we see with regret that the wife has now been absent from her husband for seven years, and she says that her feelings have changed, and that she cannot live with her husband again. It would need an inquiry, which we are not in a position to make, to judge of her conduct in this matter.

But it is not necessary for us to do that. A large correspondence has passed between the parties, and looking to that I am not greatly surprised at the state of feelings displayed by her, deplorable though it is, and I would not take upon myself to censure her. Her feelings may change again, and she may be able to live with her husband—we may hope that they will change, though that hope certainly is not bright in my opinion—but meanwhile they are living apart. The husband is not a wealthy man; he is in rather impecunious circumstances; we are told that his whole personal income is £100 per annum. The wife has an allowance from her father, who is a man of some rank and wealth, and who, we are told, is generous in his dealings with her, so that she is no source of expense to her husband. Now his condition is such that he must live upon the bounty of somebody, and at present he is living upon the bounty of his mother, and the only home he can offer to his wife is his mother's house, and it was in that house that she had found life to be intolerable before.

Now, is it reasonable and in the interest of the child, or is it not, that the desire of the mother to have her child with her at Christmas should be gratified? It is really a question whether she should be under the care of her own mother or of her grandmother at that time. I think it is reasonable both in the interest of the child, and in compliance with a very natural and becoming desire on the part of the mother, that she should have the child for the Christmas holidays. I myself have no apprehension about the child being returned at the close of the period for which we may determine that she should have the custody of it. There is security offered—pecuniary security, I daresay, if it is exacted—but I am under no apprehension that people of a station such as the petitioner and her family are represented as being, would act improperly in such a matter. I would suggest that we should give the mother the custody of her child, for such a period us would be reasonable for the Christmas visit that the child is going to pay to England during the festive season. The period of a fortnight has been suggested, but I think that a longer period would be more suitable. I would have suggested a considerably longer period, but in deference to what I understand is the feeling of your Lordships, I think that we should pronounce an order for the child to be with her mother for a period of three weeks, and that the child should be restored to her father at the end of that time.

With reference to the future we decide nothing, but I would suggest to the parties whether these visits by the mother to the mother-in-law's house—the father's house—to see her child is a convenient mode of promoting that intercourse between the mother and the daughter which is desirable, and whether the custody of the child should not be divided between them in a different way. For my own part I should think it better that the child should be in the custody of its mother altogether.

Lord Craighill—I am of the same opinion. I think it reasonable that the mother should have the custody of her child during these three weeks as proposed, but I desire to say nothing as regards the decision of any other matter.

Lord Rutherfurd Clark—I concur.

Lord Justice-Clerk—I concur in the proposal that this little girl should be sent to be in the custody of her mother for the Christmas holdays. I would only wish to state my opinion upon one point. The case was argued as if the Act of 1886 dealt with cases of wilful and causeless desertion. I am not prepared to say that such a case would be within the spirit of the enactment, but the

present case does not come within that category at all.

The Court pronounced this order:—

"The Lords having resumed consideration of the petition, and having heard counsel for the parties on the note for the petitioner, Do order and direct that the petitioner Mrs Minna Amy Edwards Moss or Mackenzie shall have the custody of her child Mary Thyra Mackenzie in the petition referred to, from the morning of the 24th day of December current to the 14th day of January 1888 inclusive; and ordain the respondent Osgood Hanbury Mackenzie to give effect to this order, and decern accordingly; and allow interim extract: *Quoad ultra* continue the case, with liberty to either party to move therein."

Counsel for the Petitioner—Sol.-Gen. Robertson—Balfour, Q.C.—Salvesen. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondent—D.-F. Mackintosh—Graham Murray. Agents—J. & A. F. Adam, W.S.

Thursday, December 22.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

GOULD *v.* GOULD.

Husband and Wife—Divorce—Desertion.

Circumstances in which *held* (*rev.* Lord M'Laren), in an action for divorce on the ground of desertion at the instance of a husband against his wife, that the pursuer was entitled to decree.

This was an action of divorce on the ground of desertion at the instance of Isaac Gould, a master baker in Markinch, against his wife Ann Scott or Gould.

The parties were married in 1860, and lived together until 1875.

The action was undefended.

At the proof the pursuer, who had two daughters by a former marriage, deponed—"The defender left me finally in March or April 1875. The cause of her leaving me was my bringing my daughter home to attend the shop; my wife did not remain with me for more than a fortnight or three weeks after that. My wife removed everything in the house belonging to her when she went away."

The defender deponed—"I left him for his ill-usage of me—coming home at untimeous hours, and his falsehoods. . . I wrote to his agent that I wished I had never seen his face, and did not care if I never saw it again. The letter now shown me is my letter. I have never offered to go back. (Q) Are you now willing to go back and stay with him?—(A) It just depends on how he would treat me. I have passed him in Markinch since I left him. He said it was a fine day. I don't think I made any answer. I never tried to avoid him. . . It is not true that I left because he had deprived me of the charge of the shop; it was on account of his ill-usage. He said that I robbed the till, and was ill to his children, and was remonstrated with for taking the blankets from his bed, and that when I left the house there was hardly anything in it. There is no foundation for these charges."

James Drummond, a commission-agent in Cupar, deponed—"I know pursuer and defender. I remember defender leaving pursuer in 1875. He was very anxious that she should come back to his house again, and a few months after she left I went at his request and saw her, and told her that he wished her to return to stay with him. She said No."

A letter was produced with the postmark of 24th June 1887, addressed by the defender to the pursuer's agent, in these terms—"I have nothing to say about Gould's case except all he says about me is false, unless that I married him and left him, and was far too glad to get away from him than I was to marry him. I am sorry I ever saw his face, and will not be sorry though I never see it again. I never intended to go back and live with him after leaving."

The Lord Ordinary (M'Laren) on 9th July 1887 pronounced this interlocutor—"Finds that the pursuer has failed to prove facts and circumstances relevant to infer that the defender had wilfully and maliciously deserted the pursuer for four years and upwards previous to the raising of the present action; therefore dismisses the action, and decerns."

"*Opinion.*—If it were possible to deal with consistorial cases in the way that all other cases are dealt with by giving effect to what both parties desire I should have very little difficulty in dealing with this case, but that is not the mode in which the law prescribes that actions of divorce shall be considered. It is nothing to the purpose that both parties may be willing to be divorced. I must consider whether there were grounds for divorce commencing at the time when separation *de facto* took place, and continued during the statutory period of four years. Now, according to the pursuer's own statement he had allowed his wife to take charge of the shop that he kept as a baker during the whole period of their married cohabitation, and I can hardly think that there can be any real foundation for his complaint against her of pilfering money without his knowledge, because that could not have gone on for fifteen years without being found out, or some action being taken by him upon it. But after fifteen years' service as manager of his shop he, whether upon communication with her or without communication—she says without communication to her—of his reasons, sent for his daughter and deposed his wife from her position as manager of the shop, and put his daughter in her place. She not unnaturally resented this conduct, and left his house. She would not consent to remain there in a subordinate position to her step-daughter. She now says that she knew nothing of this charge of pilfering until afterwards, which is very likely quite true, but she knew that her step-daughter was coming there, and she now says—and this raises the only conflict of evidence in the case—that she was quite willing his daughter should come to take her place, because she was no longer