partly in the same envelope and partly obtruding out of it; and (4) both were the only writings of a testamentary character found in Miss Speirs' repositories after her death. These are circumstances going far to connect the two writings, and to show that they were intended by Miss Speirs to be taken and read as together forming her will or testament. They are stronger tokens of the connection, I think, than if the two writings were found attached the one to the other by a pin, which appears to have been held sufficient in the case of *The Goods of Braddock* (1 Prob. and Div. 533); and if that be so, I think there is no reasonable ground to doubt that the initials of Miss Speirs to the lesser writing is sufficient, especially keeping in view that it is admitted that she frequently signed letters by adhibiting to them her initials, to show that they constitute, and were intended by her to constitute, her completed and finished will or testament, and are not mere memoranda intended to be afterwards altered and rewritten or extended in the form of a more regular instrument.

In the case of *Gillespie* v. *Donaldson's Trs.* (Dec. 22, 1831, 10 S. 174) it was held that two holograph writings bequeathing legacies, one consisting of a single sheet, the first page of which was dated but not signed, and the second page bore another date, but was signed, and the other of which was dated but not subscribed, were nevertheless valid and effectual. It is true that these writings were of the nature of codicils to a principal deed of settlement, in which the testator declared that all legacies should be effectual by separate writings or memoranda, although the same should not be formally executed, "provided the same express my will and intention, and are written, dated, and signed by me;" and it was thought that the name of the testator being found in the codicils in her own handwriting, just as in the present case, satisfied the requirement that they needed to be signed by her.

Upon the whole, I am disposed to answer the query submitted to the Court in the affirmative, the more especially as I cannot doubt from what is stated in the Special Case that Miss Speirs herself intended that the two writings referred to in the question should be held and dealt with as her last will or testament.

Lord Gifford—By taking the course which I understand it is your Lordships' intention to adopt, I believe that we are doing what the testatrix Miss Speirs herself intended to do, and are carrying out her real meaning.

The objections to this interpretation of the will are no doubt somewhat formidable, but still there is enough to enable us to take a view in favour of sustaining it as a whole. I shall endeavour briefly to point out the facts in the case which have largely weighed with me in coming o this conclusion—(1) Both these writings are holograph of Miss Speirs. (2) They were found in conjunction, both of them locked in a drawer of a desk to which Miss Speirs alone had access. (3) They were also truly found in one envelope, though one writing was no doubt only partly inserted in it. (4) When these two documents are read, they are continuous both in sense and form—indeed they read together; of course they are not written on the same kind of paper, but I do not place any great stress upon that fact. (5) The two writings thus read as one sufficiently elucidate the intention of the testatrix. As to the form of her signature, it is in the one superscription by her full name, in the other subscription by initials, and this, it has been admitted on all hands, was a usual mode of signature with the lady. (6) The observations Miss Speirs is admitted to have made as to her final will were to the same effect as the provisions in the papers in question.

It seems to me that to refuse effect to all these considerations would be to give to technicalities and forms a force and power beyond what is desirable or just. I am therefore for giving effect to what manifestly was the intention of the testatrix.

Lord Justice-Clerk—I have come to the same conclusion. These documents purport to be Miss Speirs' completed will. They were found in her confidential repositories together and in the same envelope, though one of them partly projected. The second document begins with the word "also," and that can only mean a reference to something preceding, which something can be nothing else than the first document. Then, lastly, there is the holograph name of the testatrix heading the first writing, while her initials are appended to the second. It does not appear to me that we require anything more, and I think the question put to us must be answered in the affirmative.

The Court therefore answered the question in the affirmative.

Counsel for First Parties — M'Laren — Keir. Agents—Frasers, Stodart, & Mackenzie, W.S.

Counsel for Second Parties—Kinnear — Mackintosh. Agents—Hope, Mann, & Kirk, W.S.

Saturday, July 19.

SECOND DIVISION.

[Lord Craighill, Ordinary.

MUIR *v.* MUIR.

Husband and Wife—Divorce for Desertion—Bona fide *Offer to Adhere.*

Circumstances in which *held* that desertion had been established against a husband who had gone to Australia, a letter to his wife sent indirectly, and asking her in vague terms to go out to him not being regarded as *bona fide.*

Husband and Wife—Divorce for Desertion—Conjuga Rights Act 1861—*Timeous Offer to Adhere.*

Held that in an action raised for divorce on the ground of desertion it is too late to offer to adhere after the summons has been served.

This was an action for divorce on the ground of desertion, raised by Mrs Elizabeth Guthrie Watson or Muir against David Muir her husband, now abroad, and his next-of-kin for their interest. There was no defence.

The pursuer was married on 26th November 1869 to the defender, who was at that time a

clerk in the employment of Messrs Maclay & Spens, writers, Glasgow. The marriage was celebrated at Glasgow, where the pursuer and defender thereafter resided. No children were born of the marriage. On 5th November 1871 Mr Muir, shortly after his usual return in the evening, left the house, and in shutting the door said to his wife—"Goodbye, I may never see you more," and she never saw him afterwards, but she had received three letters through Joseph Muir, his brother, purporting to be written by him. The second of these was received by her in May 1872. In this letter, which stated that the defender was staying in Sydney, New South Wales, and that he had been up the country, the defender asked the pursuer to come out to him. But the letter bore no address or postmark, and contained no funds to defray travelling and other necessary expenses, although Muir was aware that she was without any funds for this purpose. She averred that the letter was not made in *bona fide*. The third letter was handed to the pursuer by Joseph Muir in 1872, since which date she had received no communication from the defender, nor intelligence of his whereabouts. The pursuer had endeavoured, by application to the defender's relatives, to ascertain his address, but unsuccessfully. Since 5th November 1871 Muir had contributed nothing to the pursuer's maintenance.

After the summons was served the defender wrote to the pursuer offering to adhere, and saying that he would come home and take her out with him. It was not until the action had been raised that his address had been obtained very reluctantly from his brother. None of the earlier letters were extant, but as to their nature and import the pursuer and her agent Mr Maclay (formerly the defender's employer) both spoke in the proof which was led in the cause.

Thereafter the Lord Ordinary (CRAIGHILL) pronounced this interlocutor:—"The Lord Ordinary . . . . Finds as matters of fact—(1) That the pursuer and the defender were married in November 1869, and after their marriage lived together as married persons until November 1871, when, to avoid the consequences of short accountings for cash which had come into his hands as clerk in the employment of the witness David Thomson Maclay, he left this country; (2) That on leaving, the defender told the pursuer that he was going away, and within a week of the time of his departure he sent a letter to the pursuer repeating this announcement, but giving no explanation of his reasons for this conduct; (3) That the defender on leaving this country went first to New Zealand and subsequently to New South Wales; and having found employment in the latter colony, he, sometime in 1872, sent, through one of his brothers living in Scotland, a second letter to the pursuer, which she received; (4) That in this letter the pursuer was made aware of the defender's address in New South Wales, and was asked to join him there; but not only did she not comply with this request, though possessed of means of her own by which the costs of the voyage might have been defrayed, but she did not even answer the defender's letter, or directly or indirectly communicate or attempt to communicate with him; (5) That in 1873 or 1874 the defender sent a third letter to the pursuer, which she also received; but this letter, like the former, she left unanswered, and made no inquiries regarding the defender till the institution of the present action was resolved on, when the defender's address was sought for by the agents of the pursuer from his relatives in this country for the purposes of the suit; (6) That the defender did not leave this country to separate himself from the society of the pursuer; and there is nothing to show that when, as aforesaid, he asked the pursuer to join him abroad, he was not serious, or not acting in good faith in making this request; and (7) That the true reason for which that request was disregarded by the pursuer, and for which, as aforesaid, she refrained from communicating directly or indirectly with the defender, was that she desired he should not return, having made up her mind that even were he to come back she would not live with him again, and that cohabitation between them should not be resumed: In the second place, Finds as matter of law that in the facts as above set forth there is nothing to warrant the conclusion that the defender's absence was or is obstinate and malicious, non-adherence or desertion, and consequently that the ground of action on which divorce is sued for has not been established: Therefore assoilzies the defender from the conclusions of the libel, and decerns."

The pursuer reclaimed, and argued—Muir left and never even gave his wife an opportunity of going with him. There was not any collusion clearly in this case. [LORD JUSTICE-CLERK—That is evident, for he asks her to join him]. But all he says is, "Come out." The earlier letter rests on Mr Maclay's testimony; the latter one was too late, for four years of desertion had expired. The family of the husband had his address, and manifestly withheld it from the wife. Probably, indeed presumably, that was done by his directions, and if so, where was the *bona fides?*—*Harris—Chalmers—Mason.* [LORD JUSTICE-CLERK—Is an offer to adhere made in the defences sufficient, for truly that is what the last letter amounts to?] No, it is then too late—*Murray*—Conjugal Rights Act 1861—*M'Callum.* He may be at present ready to return, but during the four years there was no such offer or indication of disposition.

Authorities — *Townsend* v. *Townsend*, Aug. 5, 1873, L.R., 3 Prob. and Div. 129; *Bowman* v. *Bowman*, Feb. 7, 1866, 4 Macph. 384; *Turnbull* v. *Turnbull*, Jan. 1864, 2 Macph. 402; *Chalmers* v. *Chalmers*, March 4, 1868, 6 Macph. 547 (in these two latter cases the application was for a protection order); *Harris* v. *Harris*, Nov. 15, 1866, 15 L.T., N.S. 448; *Mason* v. *Mason*, June 29, 1877, 14 Scot. Law Rep. 592; *Murray* v. *Maclachlan*, Dec. 21, 1838, 1 D. 294; Conjugal Rights Act 1861 (24 and 25 Vict. c. 86, sec. 11); *M'Callum*, 3 Macph. 550; *Cargill* v. *Cargill*, July 24, 1858, 3 Swab. and Tris. 235; Fraser, ii. 1214; *Basing* v. *Basing*, 3 Swab. and Tris. 516.

At advising—

LORD JUSTICE-CLERK—In this action the Lord Ordinary has decided against the pursuer, but upon the evidence I have come to an opposite conclusion, and that moreover without much difficulty. [*After stating the facts of the case, his Lordship proceeded*]—Now, it must especially be observed here that the wife has never during all these years since 1871 heard directly from her

husband. All the information she has received has been in the shape of three letters sent to her by the medium of his brothers, and these brothers were under most strict directions charged not to divulge to her his whereabouts. Those three letters have all been destroyed, or at least Mr Maclay, who had them at one time, cannot lay his hands upon them. One of them, however, it has been proved, came in 1871, the second in 1872, and the last in 1874. It is said that in one of these letters (and in one only) the defender asked his wife to come out to him in Australia; but in answer to that your Lordships will have noticed that he did not tell her what his occupation was out there, what means he had such as might enable him to support her properly, or even where exactly she was to go to if she set out. With reference to this last matter, I may remark that after the letter was written in 1874 Muir left Sydney and went 500 miles away to a remote part of the colony, so that had his wife actually gone she might have found herself in serious straits. All these circumstances, to my mind, bear upon the question of the good faith of the defender, and it is also to be remembered that he has never contributed a shilling towards the pursuer's support since he deserted her, nor offered in any way at any time to pay her expenses, or to send her funds to enable her to join him.

These being the circumstances, the Lord Ordinary assoilzied the defender, so far as I can discern, upon two grounds. The first of these is that Mrs Muir never answered her husband's letters. That is perfectly true, and I confess that I am not surprised at it, considering the mode he adopted for the transmission of his correspondence, and the character of the epistles themselves, as spoken to not only by Mrs Muir but by Mr Maclay also. The want of confidence in her exhibited by her husband was, it seems to me, enough to render it natural for the pursuer to wait and see what it was that he really meant. The second ground on which the Lord Ordinary decided the case was that in her examination Mrs Muir said that she thought she would not have gone had she been asked to go. I quote from the proof the questions put by the Court, and the answers on this point—"(Q) Supposing he had asked you to go out, and had sent you a remittance, how would you have acted?—(A) I ought to have had some more word from him before going out. (Q) Would you not have written to him?—(A) Well, I do not think it, from what I had heard. (Q) In short, you do not wish now that your husband should come back and live with you?—(A) From what I have heard I do not think it would be judicious on my part. (Q) In short, do you not wish it?—(A) From the way he treated me I would be afraid to go to him in a strange country. If he had been here it might have been different. (Q) If he had sent you money, and asked you to go, what you say now is that you would not have gone?—(A) I do not think, from what my friends say, that it would be advisable. (Q) Would you or would you not go back to your husband?—(A) I do not think so."

But I rather think that this is beyond the reasonable line of examination. No reply of the pursuer's is worth having on such suppositious grounds; it is only when the offer is made and the chance occurs that the acceptance or refusal becomes of practical import. Therefore these two grounds on which the Lord Ordinary proceeded do not appear to me to affect the true question. What, then, is the law applicable to this case? In order to determine this it must be borne in mind that this absence of the defender was not in any sense an enforced one. There was no imprisonment or cause of that kind to detain him. No doubt he fled from this country to avoid the consequences of acts of embezzlement committed upon the funds of his employer—that very Mr Maclay who acted as his wife's man of business—and this kept him away, but that is not in any sense a compulsory absence. Again, I am not prepared to say that a wife is bound under all circumstances to follow her husband when he goes off thus under a cloud. I think he must show a real and genuine desire that she should rejoin him. Here there was no sign of this—indeed the reverse. The wife was kept in total darkness as to her husband's movements, doings, and whereabouts, in order that Maclay, her agent, might not come to know—might not have the opportunity of prosecuting if he wished to do so. If Muir really did wish his wife to come out to him, why did he not communicate with her, and send his real address. He did not do so, and in the whole circumstances I cannot think he meant to deal with her in *bona fide*.

But there is another point raised in this case, and one that is of considerable importance under the Conjugal Rights Act 1861. Muir, the defender, after the summons of divorce was served upon him, makes an offer to adhere, and to come home and take out the pursuer with him again. Supposing that offer to be quite genuine, the question arises whether it is too late. I think that it is so. Under the form of procedure which of old ruled in these cases, the recalcitrant and deserting party was in the first place called upon to adhere by a form of process in the Ecclesiastical Court, and then, when decree of non-adherence had been pronounced, the action of divorce was raised. Of course now all this is swept away; but under the 11th section of the Conjugal Rights Act 1861 I think that now the action of divorce starts in exactly the same position as if it had been raised under the old form after a decree of non-adherence had been pronounced, and accordingly I am of opinion that once the summons in an action for divorce on the ground of desertion has been served, it is too late for the defender to say he is ready to adhere.

No doubt here the case in its whole aspect is a narrow one, but the conduct of the defender has, in my opinion, well entitled the pursuer to the remedy she seeks.

Lord Ormidale—This case is very peculiar in its circumstances—so much so, indeed, as to render it very unlikely that the judgment to be pronounced in it, whether in favour of the pursuer or adverse to her, can form a precedent for others.

The pursuer and her husband have been living apart since the 5th of November 1871, a period of nearly eight years; and it was certainly not owing to anything in the conduct of the pursuer—the wife—that this has taken place. On the contrary, it clearly appears that the separation was caused by the conduct of her husband; and

not only so, but it is also clearly proved that the defender on 5th November 1871 left his wife for New Zealand, and from thence went to New South Wales, without informing her of his intention, or giving her, directly or indirectly, any explanation as to where she could find him or write to him. Had the matter remained in this state, there could be no doubt, I think, that the pursuer would now be entitled to decree of divorce, on the ground that the defender—her husband—had deserted her without reasonable cause, and remained in malicious separation from her for more than four years.

But it would appear that the defender has written to the pursuer since he left her in November 1871 some letters, which are referred to in the Lord Ordinary's interlocutor under review. It was, however, satisfactorily explained by the pursuer's counsel that the letter referred to by the Lord Ordinary as having been sent to her by the defender in 1872 did not contain his address, and that the first communication she received from him with an address was not till some time in 1874. But this letter came to her like the former, through one of the defender's brothers, and considering the way she was treated by the defender's brothers in Glasgow, as well as by the defender himself, I cannot say she was much, if anything at all, to blame for following the advice of her agent, whom she consulted on the subject, by not taking any notice of it. Nor do I think that it was owing to any fault of hers that the letter which she left with her agent has fallen aside and cannot now be found.

It is very important, however, to observe that neither in the letter of 1874 nor in any other did the defender offer to provide his wife with funds to enable her to join him in New South Wales, till he did so in a letter dated so recently as the 22d of September last, after proceedings had been taken against him. And it is also important to observe that the address in the letter of 22d September last is simply "Cowra, Lachlan River, New South Wales," and that the defender does not even then send the necessary funds to enable her to join him there. He merely says—"I will on your sending me word send money home to you to pay your passage out in a first-class passenger ship, or if you do not choose to come alone, I will on hearing from you come home for you." I cannot think that such a letter as this, written so long as seven years after the defender's desertion, is sufficient to bar the pursuer from obtaining the remedy she now seeks. Nor can I say I am surprised that the pursuer should in the circumstances have doubted the *bona fides* of the desire the defender at last expressed that she should join him in New South Wales.

It may be true that the real cause of the defender deserting his wife in November 1871 was not so much a desire to separate himself from her as to avoid a criminal prosecution; but that cannot be any excuse to him for leaving his wife in the manner he did without a word of explanation, and still less can it excuse his subsequent silence and neglect of her.

It appears to me that in the special circumstances of this case, as now referred to, the defender must be held to have deserted the pursuer without any reasonable cause in November 1871, and that his absence from her ever since must be held in law to be malicious. If he could have come to this country for her, as he says he could in his letter of 22d September last, it must, I think, be held that he could have done so long previously, or indeed have offered to take her with him when he left this country in November 1871.

I am therefore of opinion that the interlocutor of the Lord Ordinary reclaimed against ought to be recalled, and decree pronounced in favour of the pursuer, as concluded for by her.

Lord Gifford—I am of the same opinion, but the case is a narrow one, and I quite sympathise with some of the difficulties felt by the Lord Ordinary. Although it is most improbable that any other case will arise in which the circumstances may be on all-fours with the present, yet it seems to me that we have enough here to warrant us in pronouncing decree of divorce.

Practically Muir's excuse comes to this—that having committed embezzlement he could not remain in this country. That may be perfectly true, but there is, to say the least of it, an awkwardness in commencing the defence at the outset by admitting that he is a felon.

Again, the defender never directly communicated with his wife, he sent her no money to aid her to go out, he indicated no particular place to which she was to go, never during all those long years did he aid her in any way, and yet he would have us believe this was an honest offer. I cannot think that it was. I must say it was very necessary for her to be perfectly sure where she was going to, and that his proposal was a genuine one, considering that he was, as it appears, 500 miles back into the country from the port at which she must have landed. She was entitled to have reasonable grounds for expecting to find a home. Now, so little was this the case that it actually required a proof to extort the information in the witness-box of what really was his address. Then the period of his absence has now amounted to more than seven years, so that upon the whole, while admitting the narrowness of the case, I think that we have here a deserted wife who is entitled to her decree of divorce.

The Court recalled the interlocutor of the Lord Ordinary and granted decree in terms of the conclusions of the summons.

Counsel for Pursuer—Guthrie. Agent—R. R. Simpson, W.S.

Saturday, July 19.

SECOND DIVISION.

[Sheriff of Forfar.

HILL *v.* MACLAREN.

Property—Specific Right of Access—Positive Servitude—Right of Owner of Dominant Tenement to Substitute New Access.

Certain property was feued out for building purposes by feu-contract, which conferred a right of access by a passage specially marked on a relative plan. The owner of