

hand in the butcher's shop." And the woman herself also says that she believed his threats to be serious. Against that indeed we have the evidence of the pursuer himself and the two servants, who say that nothing of that kind took place, and that if there had been any such conduct on the part of the husband they must have seen it. If so, the statements of Kay and his wife must be false. Now, I think that on this matter the question concerning the pursuer's being obliged to take refuge in the storeroom is a test of the credit to be given to these conflicting statements. We have the evidence regarding it of the defender, of Kay, and of the servant Noble. Now, Noble says there was never any quarrelling, and that the defender was never put out of the house by the pursuer, and never was in the storeroom; she specially denies that she went to tell Kay her mistress was in the storeroom. And yet it turns out that, according to the pursuer, what happened was that in March 1873 he himself went to get Kay to come to the house, that Kay was trying to get her to tell what the debts were, and that rather than tell she went out of the house and was afterwards found in the storeroom outside. Now, Kay depones—"I remember Noble coming up one night and telling me her mistress was in the storeroom. I went and found her there. Pursuer was in the house at the time. No one but myself took her out of the storehouse. I took her into the house. Defender on that occasion told me to look at her throat and I would see the mark of his hands upon it. I did not look. This was shortly before she left her husband." It is impossible to reconcile that with the statement of Noble, and I see no reason to doubt Kay. This, I think, indicates that Noble, and not Kay, is untrustworthy. Taking it as the test, it inclines me to give more weight to the defender's evidence than the pursuer's, and on the question of whether or not the defender was reasonably in fear of serious bodily injury owing to the conduct of her husband, to decide in her favour. I do not say anything on the question whether a wife requires a defence to an action of divorce—the very same grounds which she requires to enable her to raise an action of separation and aliment, but in this case I am of opinion that the pursuer has not made out a case of malicious desertion by the defender.

LORD YOUNG—[After concurring with the Lord Justice-Clerk on the import of the facts.]—There is no occasion to decide here whether, had the wife being suing an action of separation and aliment, instead of defending an action of divorce, she would have succeeded or failed. My impression is that she would have succeeded, but even the expression of that impression is superfluous, and there is not occasion to express an opinion on the point, for it is well settled that a woman may defend herself against a suit of divorce for wilful and malicious desertion on grounds and by means of evidence not sufficient to support an action at her instance for separation and aliment. The Court will not pronounce decree of separation and aliment except on the ground of personal cruelty, and I think something short of that will entitle a woman to defend herself against divorce for wilful and malicious deser-

tion. The law is well stated, I think, in Fraser on Husband and Wife, p. 1211. By the old law, before the Conjugal Rights Act of 1861, a divorce for desertion could not be obtained without being preceded by an action of adherence. To that action all defences were competent which would justify judicial separation, or even less then would be required for the latter action. If, therefore, the pursuer was guilty of cruelty or adultery, or (in the case of the wife) of antenuptial incontinence, he or she could not demand adherence, and therefore divorce on account of the defender's non-adherence or desertion never could be obtained. There may, I think, be reasonable cause for a wife's absence short of what would warrant this Court in granting a judicial separation.

LORD CRAIGHILL concurred.

The Court recalled the interlocutor of the Lord Ordinary and assolized the defender.

Counsel for Pursuer and Respondent—J. A. Reid. Agent—Henry Buchan, S.S.C.

Counsel for Defender and Reclaimer—J. Campbell Smith. Agent—A. Nivison, S.S.C.

Thursday, June 23.

## SECOND DIVISION.

[Sheriff of Fife.

ANDERSON v. EARL OF ELGIN.

*Landlord and Tenant—Repairs Bargained for under Lease.*

The appellant, tenant of certain brewery buildings, the property of the Earl of Elgin, at Brucehaven, Dunfermline, brought this action in January 1881 to have the Earl ordained to repair the subject of the lease, or failing his doing so, for authority to do so at the Earl's expense. The lease, which was dated in January 1880, between the parties provided that the landlord should make certain specified repairs on the malt barns, the tenant agreeing thereafter to accept the whole subjects as in "sufficient habitable and tenantable condition and repair." The appellant alleged that the stipulated repairs had never been made, and this the defender denied. The Sheriff-Substitute (GILLESPIE) assolized the defender. The Sheriff (CRICHTON) adhered; and the Court affirmed the decisions of the Sheriffs.

Counsel for Appellant—Rhind—Shaw. Agents—Begg & Murray, Solicitors.

Counsel for Respondent (Defender)—Trayner—Jameson. Agents—Thomson, Dickson, & Shaw, W.S.