see how it would ever be safe to grant interdict in terms of the prayer of the petition, which asks the Court "to decern for the removal or remedy or discontinuance of the nuisance hereinafter condescended on, and to grant interdict against the recurrence of it, all in terms of the Public Health (Scotland) Act 1867, and particularly sections, 16, 18, 19, and 105 thereof." I never knew of an interdict being granted in terms so wide as that. Originally the Sheriff pronounced interdict in terms of the prayer, and on looking at the prayer I find that it is necessary to read the different sections of the statute. I think the terms of that interdict were so wide that it would have been impossible to comply with them.

I think that the observations of the Lord Ordinary on this point are important, and with them I entirely concur.

Lord Shand—I am of the same opinion. The statute provides that the word nuisance shall include "any fire-place or furnace which does not, as far as practicable, consume" its own smoke. I agree in thinking that this means, "which does not in point of fact," and that whether the fault arises from the bad construction of the furnace, or from a bad system of working, the result being that the furnace does not consume its smoke. And in the case of a bad system of working, I do not think that it would be necessary for the complainer to show that it had been going on for any lengthened period of time. If it was proved that at intervals for two or three days at a time the furnace was so worked that quantities of smoke issued, I should hold that sufficient to create a nuisance.

It appears, however, that what occurred here might have happened from accidental causes, and not from a mode of working, or a system which can be condemned. And I therefore think we should adhere. In such cases it is very desirable that the local authority should be at more pains, before coming into Court, directly to investigate into the operations which are going on. They had power under the statute to enter these premises for that purpose, and it rather appears that if that course had been here adopted they might have saved this litigation. They might then have been able to point out to the respondent in what respect his system was defective, or, at all events, the Local Authority would have been in a much better position for proving their case, and showing at any rate that the discharge of smoke did not arise from accidental causes.

Lord Deas was absent.

The Court adhered.

Counsel for Local Authority—Mackintosh—A. J. Young. Agents—Whigham & Cowan, S.S.C.

Counsel for Murphy—J. P. B. Robertson—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Friday, March 14.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

IRVINE *v.* IRVINE.

Husband and Wife—Divorce—Desertion.

A husband who had failed in business went abroad, arranging with his wife to send for her when he could earn enough to support her and their family. He corresponded with her for a year, and sent her a little money, after which she heard no more from him, though there was reason to believe that her letters reached him, and it was reported that he was doing well. More than five years after the date of the last letter she received from him, she raised against him an action for divorce for desertion. The Court, holding it not proved either that the defender had wilfully deserted his wife on going abroad or that he was in wilful desertion at the date of the action, *dismissed* the action.

Agnes Goudie or Irvine, residing in Edinburgh, raised an action for divorce against her husband, Erasmus Irvine, on the ground of desertion. The following facts were established at the proof:—The parties were married in Lerwick in 1863. Defender had shortly before returned from the Australian Gold Fields, and pursuer had known him only for a few months before their marriage. After their marriage they stayed a few months in Shetland with pursuer's mother, and then sailed for Melbourne. Defender was not successful in business there and became addicted to drink, and they returned to Lerwick in 1869. They afterwards lived in London, and then in Edinburgh, where defender opened a grocer's shop, but ultimately he became insolvent and sailed for New Zealand in August 1875, leaving pursuer in Edinburgh, and she never saw him again. There were seven children born of the marriage. Defender wrote to pursuer regularly for the first twelve months. It had been arranged that he was to send for her when he got employment. He told her he was unsuccessful, and was generally employed as a gold digger. He sent her £5 or £6 after he left. She supported herself and the children by keeping lodgings. The last letter she received from him was about the end of 1876 or beginning of 1877. He told her to address her letters to him to the Post Office, Dunedin. In his last letter he said he was going 300 or 400 miles further west. She wrote several letters to the last address he gave her without getting a reply. She afterwards got another address from a friend of her husband's in Edinburgh, and wrote several times to it also without getting a reply. None of her letters were returned. The last she wrote was in the end of 1878 or beginning of 1879. An intimate friend of the parties had received one letter from defender shortly after he went out to New Zealand. Defender was working in Dunedin at that time, but things were then looking very dull. Defender did not allude to his wife or family in that letter. Another friend of the parties knew a person who lived near where the defender was working about the year 1878, and who gave him defender's address at different places on the west coast of New Zea-

land. Pursuer got defender's address from him more than once. This friend wrote that he was surprised defender's wife did not hear from him, as he was doing well, and afterwards wrote that defender had ceased to correspond with him because he had spoken about his wife.

The Lord Ordinary (KINNEAR) dismissed the action.

"*Note.*—To support the action it must be proved that the desertion was originally wilful and malicious, and that it has been obstinately persisted in, notwithstanding remonstrance (*Bowman* v. *Bowman*, 4 Macph. 484; *Chalmers*, 6 Macph. 549; *Barrie* v. *Barrie*, Nov. 23, 1882, 10 R. 208). Neither of these points appears to me to be made out. It does not appear that the pursuer stated any objection to her husband leaving her in this country when he sailed to New Zealand, and she says that it was arranged that he should send for her; but there is no evidence that he has ever been in a position to do so. The continued separation of the spouses may therefore be owing to causes beyond the control of either; and if it should hereafter become practicable for the husband to return, or for his wife to join him in New Zealand, it cannot be assumed that the husband would refuse to adhere."

The pursuer reclaimed.

At advising—

LORD JUSTICE-CLERK.—I think the grounds stated by the Lord Ordinary in his note are quite sufficient in existing circumstances for dismissing this action. We know nothing about this man, except that he did not return and did not write to his wife.

LORDS YOUNG and RUTHERFURD CLARK concurred.

LORD CRAIGHILL was absent, being engaged in taking a proof.

The Court adhered.

Counsel for Pursuer — R. K. Galloway. Agents—Miller & Murray, S.S.C.

Tuesday, March 18.

FIRST DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

COMMISSIONERS OF POLICE OF OLD ABERDEEN *v.* LESLIE.

Police—Police and Improvement Act 1850 (13 *and* 14 *Vict. cap.* 33), *sec.* 212—*General Police Act* 1862 (25 *and* 26 *Vict. cap.* 101), *sec.* 149.

Police Commissioners served notice, under the 149th section of the Police and Improvement Act of 1862, upon the proprietors of houses within a burgh which had adopted that Act, requiring them to adjust and properly lay the footway in front of their property. Certain of the proprietors having paid no attention to the notice, the Commissioners repaired the footway and raised an action in the Sheriff Court against them for recovery of the expense. The defenders averred that the Commissioners in adopting the Police and Improvement Act of 1850, took over the footway as sufficiently constructed; and further, that the works contemplated in the specification amounted to reconstruction of the footway. *Held* that the items of the account libelled showed that the operations were of the nature of repairs; that sec. 149 of the Act of 1862, besides incorporating sec. 212 of the Act of 1850, imposed upon owners the burden of maintaining the footways opposite their lands; and that the defenders had made no relevant averment that the Commissioners had ever undertaken to relieve the defenders of this latter obligation.

The Police and Improvement Act 1850 (13 and 14 Vict. cap. 33), sec. 212, provides:—"That the owners of all houses . . . which are adjoining or fronting any street . . . within any burgh, shall at their own expense, when required by the commissioners, cause footways before their property respectively on the sides of the said streets . . . to be made, and to be well and sufficiently paved with flat, hewn, or other stones, or to be constructed in such other manner and form and of such breadth as the commissioners shall direct; and in case such owners shall refuse or neglect or delay so to do, any magistrate before whom such complaint may be brought, may fine . . . such owners . . . and on recovery shall thereout defray the expenses incurred in making such footway."

The Police and Improvement Act 1862 (25 and 26 Vict. cap. 101), sec. 14, provides:—"The owners of all lands or premises fronting or abutting on any street shall at their own expense, when required by the commissioners, cause footways before their property respectively on the side of such streets to be made, and to be well and sufficiently paved with flat, hewn, or other stones, or to be constructed in such other manner and form and of such breadth as the commissioners shall direct, and shall thereafter from time to time, as occasion may require, repair and uphold said footways." . . . .

This was an action at the instance of the Police Commissioners of Old Aberdeen, and George Stables, their clerk, as representing them, against the Misses Leslie of Powis, Old Aberdeen, to recover a sum of £26, 19s. 7½d. which the pursuers had expended in paving operations, and for which they sought to make the defenders responsible.

On 7th August 1882 the following notice was served upon the defenders by the pursuers:—"I am instructed by the Commissioners of Police to request you to have, within 14 days from this date, the foot-pavement fronting or abutting your lands or premises at Powis Lodge, College Bounds, adjusted and properly laid in conformity with specifications which are in my hands for your inspection, and to be made to the satisfaction of their Inspector of Works, who will give the necessary levels for laying the same, failing which the Commissioners will themselves execute the work and charge you with the expense, in accordance with the 149th clause of the General Police and Improvement (Scotland) Act 1862.—Yours truly, GEORGE STABLES jun., Clerk to the Commissioners."

The defenders took no step to execute the work