the evidence. He says—"Accordingly, since 1821, the public have abandoned all use of the latter road for any purpose except that of a public footpath. But they have continued to use it as a footpath, although for that purpose only, down to the present time. There is no real conflict of evidence as to this point—those of the pursuer's witnesses who had the best opportunities for observation being quite as emphatic in asserting the public use of a footpath as the witnesses for the defenders. If the only question, therefore, were whether the public had established a right-of-way for foot-passengers by continuous use for forty years and upwards, there can be no doubt that the defenders would be entitled to a verdict upon that issue." Therefore I assume as a matter of fact from which the argument starts, that for that period, far exceeding the prescriptive period, the public have used that right-of-way. They did not use it by tolerance, at least I find no indication that such was the fact. And it would have been very singular if it had been, for the very simple reason that before the new Glasgow and Carlisle Road was made there was a considerable district of country that had no direct communication with the old Glasgow and Carlisle Road excepting by means of the road in question. For carts and carriages it was useful as well as for a footpath. When the new Glasgow and Carlisle Road was made, and communication made more direct with the places to the south, the use of this road for wheeled vehicles and horses was of course to a large extent lessened, although its use for foot-passengers continued. There were many places of importance in that neighbourhood. There was the mill, for instance, for access to which they used the road in question.

Now, the next question, and indeed the only question, is, whether the Road Trustees had a right to shut up the footpath? I say nothing about the road for carriages and horses. I should not think it necessary to dispute that they might have a right to shut up the carriage-way. But, as I have said, the question really is, whether the undisturbed and undisputed right which the public had exercised for eighty years was rightly or wrongly interfered with in 1868 by the shutting up of the road? And that is a question of some difficulty even if the Road Trustees had professed to shut up the road or footpath. In the ordinary case Statute Labour Trustees have no jurisdiction to do anything of that kind. A public footpath is not a statute labour road. Nor is it supported in any way whatever by these trustees. And it is not the least impossible that a right-of-way may exist for foot-passengers although the *solum* over which the footpath goes was once a public road for wheeled vehicles. There is a singular illustration of that in a case reported in 16 D. 521, the case, namely, of *The Glasgow and Carlisle Road Trustees* v. *Tennant*. The case is only important in this view. There was a road with a footpath there, and the road must have been in the immediate vicinity of that which is here in question. The Road Trustees shut up the public road, but left the footpath, and accordingly the footpath was used from that time to the time when the case I have mentioned arose. Now, there is nothing inconsistent in the fact that there may be a right of footpath where a road also happens to be. I rather suspect that a great many statute labour roads were originally nothing but footways, coming gradually from their convenience to be used by cattle and horses, and ultimately coming to be adopted by the Statute Labour Road Trustees. Be that as it may, I imagine that, after eighty years' use of this as a public footpath, it is out of the question to say, there being nothing else to shut up, that the trustees can interpose and deprive the public of that footpath.

These are the views I entertain. I think the Lord Ordinary has dealt with the case very satisfactorily and I certainly should have been better pleased to have adhered to his judgment.

Your Lordships recal the interlocutor, and decern in terms of the summons.

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

Counsel for Pursuers—D.-F. Mackintosh, Q.C, --Dickson—Horn. Agents—Melville & Lindesay, W.S.

Counsel for Defenders — Jameson — Craigie. Agent—R. D. Ker, W.S.

Saturday, January 29.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

GOW *v.* GOW.

Husband and Wife—Divorce—Desertion.

A wife having justifiably left her husband's house during bad health caused by his ill-usage of her, and gone to her father's house, he broke up his home, sold his furniture, and went away from the district in which they lived, and never afterwards had any communication with her. *Held*, in an action raised more than four years after his disappearance, that he was in malicious desertion, and decree of divorce pronounced.

This was an action of divorce for desertion. It was undefended. Personal service of the summons was made, and the diet of proof intimated to the defender.

The pursuer Isabella Peden or Gow was married to the defender John Gow in 1875. They lived together till the spring of 1877 at Macbiehill, near Peebles. At the date of this action there was one surviving child of the marriage. The evidence was to the effect that the defender treated the pursuer so cruelly during their cohabitation that her health suffered. During a period of illness from which the pursuer suffered, and which was, at least to some extent, the result of the defender's ill-treatment, the defender at her request allowed her to go to her father's in Peebles for a week or two until she should be stronger. A few days after he demanded her return by letter, but she was then ill and in bed, and replied that she could not do so. She afterwards went to their house, saw him, and got away a few clothes. She only got away a few articles for immediate use, as she intended to return. Several letters passed, which, however, had been destroyed, in the earlier of which, according to the evidence of the pursuer's sister,

the defender said he would keep open the house for her, but in the later he said he would have no more to do with her, and would go abroad and never see her again. He never afterwards contributed to her maintenance or the child's, and in point of fact he did sell off all he had and left Macbiehill. He was not discovered till the pursuer's agent succeeded in finding him in order to effect service of this action. He was then—whether or not he had ever gone abroad—living at Millerhill in Midlothian.

The Lord Ordinary reported the case to the Second Division, with this note.

"*Note.* — I have reported this undefended action because it raises a point which is likely to occur in other cases, and which is proper for the consideration of the Court. The wife, who is the pursuer of the action, left her husband's house more than four years ago and went to live with her father. The husband a few weeks later sold his furniture and left the place where he resided. Up to the time of instituting the action he had not communicated with or made his address known to his wife. She alleges, and I considered it to be proved, that she left her home in consequence of her husband's intemperate habits and his cruel behaviour to herself,—behaviour which, in my opinion, would have entitled her to resist a demand for adherence if such had been made by him. The question arises, is this constructive desertion by the husband? The inclination of my opinion is in the affirmative, because I see no real distinction between the cases of the man who drives his wife out of doors with blows, and the man who, with greater cunning, and possibly with the view of depriving her of her legal remedies, makes life intolerable to his spouse, and thus compels her to leave him. In the present case I think it is the husband who must be considered to have, in the words of the Scottish statute, 'diverted' from his wife. If the husband is the party originally to blame, there can be little doubt but that he is responsible for the continuance of the 'diversion' or estrangement during the four years that have elapsed, because during all that time he kept out of the way, and thus made it impossible that overtures of reconciliation should be addressed to him.

"I ought to add, that in another case, which is very similar in its circumstances, I have reserved judgment, with the intention of being guided by the opinion of the Court in the present case."

The pursuer argued that she was justified by the ill-usage proved in going to her father's, and that the defender's conduct while she was so living was malicious desertion, for he broke up the house and left the district, and had never inquired after her or sought to see her or offered to maintain her—*Muir* v. *Muir*, July 19, 1879, 6 R. 1353; *Winchcombe* v. *Winchcombe*, May 26, 1881, 8 R. 726.

At advising—

Lord Justice-Clerk—This question arises upon a case reported to us by the Lord Ordinary for our decision. I do not think that the evidence as given in the proof discloses anything that could be a bar to the pursuer bringing this action of divorce. By going to her father's house in the circumstances disclosed here, I do not think that she deserted her husband, but I think that he unquestionably deserted her by subsequently breaking up his house.

Lord Young—I am of the same opinion. The Lord Ordinary has reported the case to us on what seemed to him to be a point of law, and I think that it is a point of law, but the point is so simple as this—Whether the fact that a wife justifiably took refuge in her father's house is a legal impediment to her afterwards suing him for divorce on the ground of desertion? and I have no doubt whatever that it is no legal impediment. Of course whether he really did or did not desert her is a question of fact. The evidence in this case seems to show that the defender did wilfully desert his wife and maliciously continue in desertion, and in my opinion there is no legal impediment to decree of divorce being pronounced in her favour.

Lord Craighill and Lord Rutherfurd Clark concurred.

The Court remitted to the Lord Ordinary to give decree of divorce.

Counsel for Pursuer — Comrie Thomson — Baxter. Agent—T. Swinton Paterson, S.S.C.

Saturday, January 29.

FIRST DIVISION.

ROSS T. SMYTH & COMPANY, PETITIONERS.

Company—Winding-up — Companies Act 1862, *sec.* 91—*Right of Creditors to a Winding-up Order* ex debito justitiæ.

A creditor of a company which was insolvent craved a winding-up order. It appeared that the other creditors in Great Britain, who were all connected with the management of the firm, objected to the order on the ground that the company had no assets in Britain, and ought to be wound up by a receiver in America. The Court *granted* the petition, and appointed a liquidator.

The Salem (Oregon) Capitol Flour-Mills Company (Limited) was registered under the Companies Acts 1862 to 1883 on 1st May 1884, and the head office was in Edinburgh. The capital of the company was £100,000, divided into 20,000 shares of £5 each, and it was stated in the memorandum of association that "the first or present issue" was "to consist of £60,000 in 12,000 shares of £5 each, the remaining issue or issues to be made at such future period or periods, and upon such terms, as the directors shall determine." Only 2562 shares were taken up, upon which was paid up £5 per share, making in all £12,810, subject to a deduction of £120, being the amount of calls unpaid.

The company was quite unsuccessful, and in a report, dated 15th December 1886, issued by the directors, it was stated in reference to the depreciation of the property and the business losses that these "will involve not only the share capital, but the creditors of the company will all suffer more or less according as the properties realise a higher or lower price." The shareholders were accordingly asked in said report to authorise the directors to proceed with the realisation and winding-up "as if the company were in liquidation."