to the method of firing the furnace. But it was further found not proved that the fireman had "carefully attended to and managed the furnace so as to prevent as far as possible smoke from issuing therefrom." I do not doubt that the attention and management which the statute requires to be proved as a condition of avoiding the penalty may be performed on the owner's behalf by a duly appointed servant such as the fireman in the present case. But if the owner does not himself properly perform these duties—and he did not offer to prove that he did—then it must be proved that the employee did. The Judge was therefore entitled to find the appellant guilty, and the second question should be answered in the affirmative.

LORD CULLEN—Under section 31 of the Act of 1892 anyone who uses, or causes or permits to be used, a furnace or fire (except a household fire) so that smoke issues therefrom is liable to a penalty unless he proves (1) that he has used the best practicable means for preventing smoke, and (2) that he has carefully attended to and managed the furnace or fire so as to prevent as far as possible smoke issuing therefrom.

Under the present complaint the appellant was charged with using or causing to be used a certain furnace "so that smoke of unnecessary density issued therefrom." This includes the statutory charge turning on the bare fact of smoke having issued from the furnace, but superadds that the smoke was of "unnecessary density." If the superadded charge had been merely that the smoke was dense, I do not think that would have gone to irrelevancy. It would have been of the nature of an aggravation. There is, however, a difficulty arising from the use of the word "unnecessary," because that is a relative term and involves reference to some standard which is not stated. From this point of view I think that the charge was not relevantly stated. While this may be so, it does not appear that the appellant was in any way misled or prejudiced. And it is not difficult to see, as no doubt the appellant did, that the charge as to unnecessary density was of the nature of an anticipatory negation on the part of the prosecutor of a possible defence such as the statute permits. I accordingly agree that the first question should be dealt with as your Lordship proposes.

As regards the second question, I agree that it should be answered in the affirmative. While the appellant proved that he had used the best practicable means for preventing smoke, he did not prove—what a successful defence required—that he had either personally or vicariously carefully attended to and managed the furnace so as to prevent smoke issuing therefrom.

LORD SANDS—I think I understand how the words "of unnecessary density" crept into the complaint. The mind of the framer rebelled against the crude simplicity of the statutory charge. Smoke from a furnace presumably issues through some orifice of limited dimensions. If more than is unavoidable is issuing, the smoke must be too dense at the point of emission. Accordingly the framer of the complaint thought that "of unnecessary density" properly described the condition. It may be, however, for all I know, that the minimum of smoke may be issued through such an aperture or may be of such a chemical constitution that it is more concentrated than is necessary. Accordingly, as it seems to me, the form of this charge is open to objection. I am satisfied, however, that the accused was not misled. I accordingly concur in the judgment proposed.

The Court answered the first question in the negative and the second question in the affirmative.

Counsel for the Appellant—Duffes. Agent—Thomas Ferguson, Solicitor.

Counsel for the Respondent—Macmillan, K.C. — Crawford. Agents — Campbell & Smith, S.S.C.

COURT OF SESSION.

Thursday, December 7.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

G. *v.* G.

Husband and Wife — Nullity of Marriage —Impotency—Inference of Incapacity on Part of Wife.

A wife as a condition of her marriage stipulated that for a certain period after the marriage there should be no sexual intercourse, and the husband consented to the condition. After the expiry of the time the wife still refused to consummate the marriage, though the husband made repeated though not very determined efforts to do so. When the marriage had subsisted for upwards of eight years, during which, however, owing to the husband's absence in India, there were only three comparatively short periods of five months, six months, and one week during which the spouses lived together and connection was possible, the husband raised an action of nullity of marriage against the wife on the ground that she was incapable of consummating the marriage. There was no structural incapacity on the part of the wife, and it was not disputed that the husband was *vir potens*. *Held* (*diss.* Lord Anderson) that in respect that the non-consummation of the marriage was due to unwillingness on the wife's part and not to incapacity, the inference of which failed on the facts, the pursuer was not entitled to decree.

Husband and Wife —Divorce—Desertion—Refusal by Wife to Permit Sexual Intercourse—Act 1573, cap. 55.

Opinions per the Lord Justice-Clerk, Lord Hunter, and Lord Anderson that where spouses have lived at bed and board together, mere refusal on the part

of one of them to permit sexual intercourse was no ground for granting decree of divorce to the other even when the refusal was persisted in over the statutory period of four years.

G., *pursuer*, brought an action against his wife G., *defender*, for nullity of marriage on the ground of impotence, or alternatively, for divorce on the ground of desertion.

The defender pleaded—"1. The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. 2. The pursuer's averments so far as material being unfounded in fact, the defender should be assoilzied. 3. The defender not being incapable of intercourse with the pursuer, decree as concluded for in the first and second conclusions of the summons should be refused. 4. The defender not having been guilty of non-adherence to and desertion of the pursuer, the defender should be assoilzied from the alternative conclusions of the summons."

The Lord Ordinary (BLACKBURN) allowed a proof.

The *facts* of the case and the import of the evidence appear from the opinion of the Lord Ordinary, who on 30th March 1922 dismissed the action.

Opinion.—"The pursuer here asks for decree of nullity on the ground that his wife is incapable of consummating the marriage, and alternatively for decree of divorce on the ground that her unwillingness to consummate the marriage amounts to desertion in terms of the statute. Cases of nullity when they are strenuously defended present questions of difficulty, and in the present case I have found the questions raised by the evidence peculiarly perplexing.

"In 1911 the parties met in India, where the pursuer held an appointment as Economic Botanist at Nagpur. They appear to have come to some sort of understanding before the defender returned home at the end of that year. The pursuer did not come back to Scotland till September 1913, and in October of that year he became engaged to the defender, he being twenty-nine years of age and she thirty-four. As the pursuer was obliged to return to India before the end of November the marriage was arranged to take place on the 5th of that month. I think there is no doubt that the defender objected to the shortness of the engagement, and that she consented to this arrangement with reluctance. She professes to have entertained at that time—and I have no doubt did—somewhat peculiar ideas on the subject of matrimony. On the one hand she held the view that corporeal union was only justified where there already existed complete spiritual union between the parties to the act, while on the other hand she apparently considered that there was no obstacle to her marrying a man with whom she was not in complete spiritual union provided he was willing to forego, temporarily at any rate, all idea of corporeal union. Holding these opinions, and owing to the shortness of the engagement, feeling uncertain of her spiritual affinity to the pursuer, she explained to him two or three days before the marriage that either he must renounce the idea of consummating the marriage for some time or the wedding must be postponed. The pursuer reluctantly and most foolishly agreed to be married on these conditions, and the marriage was accordingly celebrated on the date fixed.

"Before the proof was taken the defender submitted herself to examination by Dr Haig Ferguson, who gave evidence on behalf of the pursuer, the only medical evidence in the case. His report shows that there exists no physical reason to have prevented the defender from consummating the marriage, and that while she has a highly strung nervous temperament, she did not display at the examination any evidence of unusual nervousness or manifestations of hysteria or undue excitement. Dr Haig Ferguson's evidence goes no further than his report, though he stated that there may be cases of a woman otherwise perfectly capable finding it impossible to have connection with some particular man. The defender's appearance in the box corroborated the latter part of the doctor's report. She was cool and collected and showed no signs of nervousness, but displayed some resentment of the manner in which the pursuer had behaved towards her in the last eighteen months. I formed the opinion that she was a woman of considerable intellectual ability, with a will sufficiently strong to control physical desires which she might consider to be due to weakness or any other unworthy cause.

"Now I have no doubt that a compact such as was entered into between the parties before marriage was *contra bonos mores* and could not be enforced, but in this case it cannot be overlooked, as besides throwing some light on the characters of the parties it has a most material bearing on the events which followed. There is a difference of opinion between the parties as to the exact terms of the compact, which of itself led subsequently to mutual misunderstanding. The pursuer understood that it was to last for only one year, while the defender says that the words she used were 'a year or two,' and that she understood the pursuer had agreed to refrain from bodily intercourse until she was satisfied that spiritual union was sufficiently complete to justify the act. Considering the delicacy of the discussion and the circumstances under which it took place it is not surprising that this difference of opinion should exist, and I have no doubt each party honestly believed their own version.

"Ten days after the marriage they left for India, where they lived together till the beginning of April 1914, when the defender with the pursuer's full consent returned to this country to attend the sitting of the United Free Church General Assembly. Thus the first of the four periods into which their married life divides, each of which requires separate consideration, lasted for five months. During this period the pursuer observed his part of the compact to the letter and refrained from making any attempt to have connection with the defender. But he made what seems to me to have been a serious blunder in view of subsequent

events and shared his wife's bed. Up to the time when they sailed for India they occupied one bed together, on the voyage they shared a cabin with two berths, and in India they occupied separate beds in the same room as is the custom in hot climates, but the pursuer on occasions entered the defender's bed and spent part of the night with her. Although the pursuer says that 'at this time I did not make any overtures towards having connection with her,' it is difficult to ascribe any other purpose to his conduct in sharing her bed. While I do not doubt that he made no active attempt to have connection with his wife, I think it is impossible to avoid the conclusion that short of that he conducted himself in the manner he thought would be best calculated to stimulate her desires and to induce her voluntary surrender to his wishes. Neither party was examined in any detail as to their behaviour towards each other while sharing the same bed during this period.

"The second period opens on 16th December 1914, when the defender arrived back in India and was met by the pursuer at Bombay. Her return had been somewhat postponed owing to the activities of the German warship 'Emden' in the Red Sea. It continued till September 1915—a period of nine months—when the defender again returned home with the pursuer's consent, which this time was reluctantly given, in order to undergo an operation for appendicitis. During this period the pursuer says that he made repeated attempts to have connection with the defender up to the 18th June, when the appendicitis attacks became worse, and 'of course these attempts entirely stopped.' Thus so far as active operations were concerned the period was restricted to six months. It is at this stage that the difference between the parties as to the terms of their compact assumes importance, as the pursuer thought it had come to an end, while the defender was under the belief that it still continued in force. With regard to the advances made by the pursuer which he describes as attempts to have connection, the defender admits that his evidence generally speaking is true. With reference to the first night at Bombay she was asked—'Did you not understand that the pursuer was endeavouring to persuade you to relax the condition?—(A) Well, I should not have thought of it in any case; I should not have been dreaming about it in any case. I knew he was glad to have me back, and I never thought of anything further the very first night I arrived. I did not understand that he was making an attempt which I was resisting, and in any case the time of the stipulation which I had made was not nearly completed even if I had intended to give in before then.' There is no doubt, however, from the defender's cross-examination that before the conclusion of this period she did realise that the pursuer was making attempts to have connection with her and that she resisted these attempts. She says, however, that the attempts were only made occasionally and not repeatedly. This discrepancy between the evidence of the spouses may, in my opinion, be ascribed to the fact that there does not appear to have been any clearly marked distinction between the pursuer's behaviour during this second period when he says he was attempting to have connection with the defender, and what I think must be assumed to have been his behaviour during the first period when he refrained from pushing his advances quite so far. His own evidence is sufficient to show that under the circumstances it might be easy for the defender to have failed to realise that there was any marked distinction in his purpose. The pursuer's description of his attempts which were rejected were as follows:—'Generally I simply got into bed beside the defender, and it was always more by action and suggestion than actual words that I tried to get her to agree. Very often I made very little progress; occasionally I seemed to be getting further. Generally it was a question of taking her in my arms. She did not seem to like my getting on the top of her. That very rarely occurred. So instead I used to try to draw her on to the top of myself. (Q) Did you ever succeed in drawing her on the top of yourself?—(A) I did. That was easier than getting on the top of her, but I never succeeded in consummating the marriage. The defender either turned away if we were in each other's arms or slipped off if she happened to be on the top of me, and she never would open her legs in order to permit intercourse. This all passed in silence. (Q) Apart from any attempt to have connection with her, did the defender seem to like or to dislike endearments, embraces, and the like?—(A) It struck me that she did not dislike the embraces provided they did not go beyond a certain length. I never tried to use physical force, because I was afraid that if I used physical force it would create a scene, and my idea all through was to try to awaken the sexual instinct in the defender, and I was afraid that if I used force it might undo any progress that had been made. . . . Attempts such as I describe were frequent between . . . December 1914 and March 1915. During that period my attempts were confined, as I have described, to these attempts in bed when I did not say anything about it. In March 1915 I did have a talk with the defender about it.' In another passage he says — 'It was dreadfully hard for me, because frequently the closeness affected me so that nature found its own relief in my case.' In cross-examination he admits that on no occasion did the defender display any symptoms of losing her mental control.

"Now it does not appear to me that this evidence necessarily implies that the defender was incapable, or indeed leads to any such inference. It seems to indicate either an absence of sexual desire or a mental control over her passions which might be described as abnormal, but the evidence in my opinion points to an unwillingness on her part to consummate the marriage rather than to any incapacity to do so caused either by structural or mental abnormality. The pursuer's conduct towards his wife on this matter was so chivalrous that it appears to me to fall short of any determined attempt

at consummation. On his own showing he seems to have confined himself to attempts to excite her into a voluntary surrender of her person in which he failed. That no idea of her incapacity had entered his mind during this period is evidenced by the nature of their discussion in March 1915, and by his letters written to her immediately after her second return to Scotland. During the discussion in March the pursuer attempted to convince the defender that she was not legally married until consummation had taken place and that it was the duty of every married woman to submit to sexual intercourse. This seems a somewhat tactless line of argument to have adopted considering the defender's views. On the 16th of September 1916 he wrote to her referring to this duty and says, 'So long as we refuse we cannot hope for true happiness as we are wronging ourselves and our Maker.' It is to be observed that even after this period had come to an end he attributes the failure to consummate the marriage to the terms of the compact and not to the incapacity of the defender. It is not very surprising that his appeal to the defender on the ground of her duty had a bad effect on her. Asked, 'Did he emphasise the aspect of duty in this matter?' she answers 'Yes, very much so. That emphasis affected me rather badly, because it was not at all my idea at the start; it may be a duty, and I admit it is a duty, but it was not from that point of view that I intended to enter into that closest of relations. I would have been very much more easily affected by an appeal to my affections than by a suggestion of duty.'"

"Two other incidents occurred in this period to which reference should be made. It is admitted that on one night in the course of the summer the defender of her own accord left her bed and joined the pursuer in his. She says that this was due to sexual instinct, and that if the pursuer had availed himself of the opportunity it is quite possible that she would have yielded. He was, however, half asleep and contented himself with putting his arm round her. She remained in his bed till morning. The pursuer explained this incident first by saying that there had been some slight difference between them before they retired that night, and that he thought she had come to show that she wished to make it up. Later on he said it must have been after her appendicitis had developed, when he did not consider that the risk of the defender becoming pregnant should be hazarded. These two reasons are not very consistent, but it is fair to state that there is no reference to this incident on record, and that the pursuer on being reminded of it in the box might at this distance of time be uncertain of the reason why he treated an obvious advance of this sort so coldly. Some importance was attached to this incident by defender's counsel, but I do not think that much can be made of it.

"The other incident was that in the month of March the pursuer refused to show the defender a letter which he had received from his mother. His explanation was that his mother had used expressions of endearment about himself which he was afraid the defender might make fun of. Judging from the way in which his mother referred to him in the witness-box his explanation is probably justified. The defender, however, was apparently already suspicious of her mother-in-law, whom she thought—and I think with some reason—took first place in the pursuer's affections. This incident was the first of several which created in the defender's mind such a feeling of jealousy towards the pursuer's parents as to create thereafter a very serious breach between them. It is unnecessary to consider whether this jealousy was justified or not, but that it existed is without doubt, and it had a considerable bearing on subsequent events.

"The third period opens with the defender's return to Scotland for her operation in September 1915 and continues until September 1920—a period of five years. During the whole of this period the parties were never together. The defender took a return ticket when leaving India, and at that time it was thought possible that the pursuer would get leave in 1916 and that she would be able to return with him. By June 1916 all hope of leave had disappeared, but the defender delayed her return in order to be present at a function in November when her father's jubilee as a minister was to be celebrated. When the autumn arrived there was plague in India, travelling was far from safe, and there was a possibility of the pursuer being called to the colours, and under these circumstances her relations urged her to remain at home. This she decided to do, and it was perhaps fortunate that she did so, as the pursuer was called up in 1917 and sent to Mesopotamia, where he remained till 1920. The pursuer complains that if the defender had really wanted to come out to India she could have made the journey safely, which is possibly true. But I am quite unable to accept the suggestion that her election to remain with her own people under the circumstances amounted to desertion of her husband in the sense of the statute. A voluminous correspondence passed between the parties during this period, which does not suggest that the pursuer ever entertained this view.

"The earlier letters of this correspondence are not produced, but on the defender's side they appear to have been directed to ascertain whether the first place in the pursuer's affections was occupied by herself or his mother. Having apparently convinced herself that she only came second, she wrote a letter on 17th February 1916, in which she said that she thought their original compact should be made permanent. Apparently she fortified this proposal by reference to the expense of educating a family and the difficulties which had to be faced by parents resident in India in so doing. She also suggested as an alternative that the pursuer might divorce her, or that she herself might commit suicide. She says that this letter was written at a time when she was in a very depressed state of mind and that its main object was to extract from the pursuer some indications of affec-

tion. The two very lengthy letters written by her on 23rd February and 5th March suggest that the letter of 17th February cannot have been so seriously intended as the pursuer seems to have thought. Anyhow the letter of 17th February failed in its alleged purpose, and the reply from the pursuer contains a most matter of fact discussion on the points raised in her letter and the wickedness of suicide. The pursuer says that this letter of 17th February 1916 came as a great shock to him, and that from then on his feelings towards the defender altered, his affection for her diminishing. There is a corresponding change in his subsequent letters, and expressions of endearment, which were never very prominent in his letters, disappear altogether. The rest of this correspondence is mainly noteworthy as showing the rapid development of the defender's jealousy of the pursuer's parents. Her father died in the spring of 1920, and on the break-up of her home she took a small house in Glasgow where her mother resided with her temporarily. The defender states that she took this house in anticipation of her husband's return, and that she had by this time fully realised the mistake of their antenuptial compact and had made up her mind to perform all the duties of a wife to him.

"The fourth period opens with the pursuer's arrival in this country on 13th September, and his conduct towards the defender was not only inexcusable but is very difficult to understand or explain. Knowing as he did the strained relations between his wife and his parents, he wrote to the defender and told her that he was going straight home to Perth and requested her to join him there. He got a letter at Marseilles from her asking him to come to Glasgow, and he cabled that he was going to Perth. On arrival he went straight to Perth without breaking the journey at Glasgow as he might easily have done. The defender wrote him several letters explaining that it was impossible for her to come there until they had 'met by ourselves first of all,' and begging him to stay with her just for a few nights in Glasgow. In the beginning of October she with her mother went to meet him at Perth Station. The interview was ineffectual as nothing would please the pursuer except that she should come to his parents' house. The pursuer's explanation of his conduct is that his parents were old, and that he thought it was the right thing to do. On her return to Glasgow from Perth Station the defender wrote, 'I do not know how much or how little you are wanting me, but I do know that I am wanting you very badly,' but this very pointed request left him untouched. On the 5th November, which was the anniversary of their wedding day, the pursuer went to a meeting in Manchester, and allowed the anniversary to pass without any communication to the defender. From there he went on to Wales to visit some relations, which somewhat discredits his excuse for not having gone to Glasgow. As two months of the pursuer's leave had now passed, the defender realised that she must humour the pursuer's obstinacy, which I think he mistook for strength of will, and with some difficulty persuaded him to pick her up at Glasgow on his way back to Perth and to take her with him. They arrived at his parents' house on Saturday, 13th November, and the defender to her surprise found that it had been arranged that they should occupy separate bedrooms for the first time since their marriage when sleeping under the same roof. When she asked the reason she was told, 'We won't discuss it to-night.' It was not till Monday morning that the discussion took place, and the pursuer then produced the letter which the defender had written to him on 17th February 1916 and founded on it as providing sufficient reason for the way in which he was behaving towards her. The defender says she had forgotten all about this letter, that she expressed regret for having written it, and told him that she was now willing to do as he wished and to consummate the marriage. The pursuer accepted her explanation, the letter was solemnly burnt, and apparently the reconciliation was complete. Both parties are agreed so far as to what took place at the discussion, but they are not agreed as to what followed. The defender says that the pursuer in answer to a question stated that he was quite satisfied now that she had given into his will, and that he would not insist on connection as he did not think it would be safe for her at her age—she was then forty—to run the risks of childbirth. She says that when the discussion was ended she understood that the pursuer had accepted her offer in full, but that in the interest of her safety he did not desire that any connection should take place. She says this conversation took place after the letter had been burnt. The pursuer's version is somewhat different, and he says this part of the conversation took place before the burning of the letter. He says in chief that she asked, 'What would my position be if childbirth did not follow having connection, and I told her then that the question was not of childbirth, which did not rest with us at all, but it was the willingness to undertake the responsibility, and after that everything seemed to be all right.' He also states in chief that she said she thought having a child would possibly kill her or would be a grave risk. In cross-examination he admits that he knew that she was frightened as to the consequences that childbirth might have upon her life, and when it was put to him whether he had not said that in these circumstances he did not wish to have connection with her and was satisfied with her having given way on the question of will, his answer is the strange one, 'I don't remember saying that.' It was only on being pressed to answer the question 'Yes' or 'No' that he answered it in the negative. They shared the same bed for the rest of the week. The pursuer says that on Monday night 'She was quite affectionate to me in bed. I tried that night to have connection in the same way as in former times, not by asking but simply by trying to draw her towards me. That was no more successful; it was exactly the

same as it was in India.' On Tuesday he made no attempt as he had reduced the defender to tears before bedtime by insisting on remaining at Perth for the rest of his leave and refusing to go to Glasgow with her. On each of the next three nights he says he tried again without success, and on the Saturday the defender went to Glasgow to attend some meetings, proposing to return to Perth in the following week. The defender's version of what happened on the Monday night is as follows:—'On the first night the pursuer and I were on terms of perfect friendship. (Q) Did you sleep in his arms or did he take you in his arms?—(A) I lay in his arms for part of the night, but I slept eventually by myself. (Q) Did you resist any advances that he made?—(A) No. (Q) In view of the way you understood his attitude after your explanation, did you expect him to make any physical advances?—(A) I did not. (Q) And so far as you were made aware did he make no such advances?—(A) No. (Q) And in particular did you offer no resistance to anything he wished to do?—(A) I did not. I don't understand what is meant properly by 'advances.' I was aware of no special advances beyond the fact that he cuddled me in his arms for a considerable time, and I was quite glad to be in his arms; that is all I am aware of. (Q) Did he endeavour to get you to open your legs, and did you refuse to let him?—(A) No. (Q) Was there any trace of hysteria or excitement that night?—(A) No, certainly not. (Q) And did you pass the night, so far as you know, in complete good feeling between one another?—(A) Yes, on my side at least—on both sides I think.' Her evidence with regard to the other three nights when the pursuer says he attempted to have connection with her is the same, namely, that she did not understand that that was his object or purpose.

"The events of this week are in my judgment the most important in the whole history of this case, and if there was no other evidence than what I have narrated above, I should have felt bound to treat the defender's story as incredible, although in the witness-box she gave every appearance of speaking the truth. But there is other evidence. On the evening of the 20th November, the very day the defender left Perth, the pursuer writes her a letter beginning—'My own wee Girlie,' and ending—'It is such a waste of time your leaving me alone. The house is very quiet without you, and I have been missing you. Perhaps there will be a letter on Monday from you. I hope there will be. You didn't even leave anything behind for me to take care of. It is silly having to say good-night with a pen when we don't need to. Good-night, wee girlie, sleep sound.—Your loving Robin.' This letter is not only very different in tone from any of the other letters from the pursuer to the defender which have been produced, but it is emphatically not a letter which a man would write to a woman who had deceived him and disappointed him as the pursuer maintains that the defender did throughout her visit. If she had refused for four nights out of the preceding five to behave towards him as he says he expected her to behave, he could never have expressed regret that she was not with him to share his bed again. The effect of this letter on my mind, coupled with the pursuer's halting denial that on the Monday of the Perth visit he had volunteered to refrain from having connection with the defender, is such that I cannot hold it proved that the defender's account of what passed at the discussion on that morning is untrue, incredible as it may appear.

"Two more letters from the pursuer, dated 30th November and 6th December, are produced, which are in ordinary terms and contain no complaints of the defender's conduct. The next letter produced is dated 1st February 1921, in which he curtly announces his intention to have the marriage annulled 'in view of the impossible situation created by your refusal to live with me as a wife.' Subsequent to the Perth visit the pursuer was much occupied in travelling about in the endeavour, which was successful, to obtain an appointment in this country. When not so engaged he returned to Perth. He never invited the defender to join him there, and in a letter (not produced), dated 20th December, he intimated that he had no intention of coming to Glasgow to spend Christmas with her.

"I find the pursuer's conduct difficult to understand or explain, and the only conclusion I am able to come to about him is that like his wife he is not quite normal. That the parties are unsuited to one another I have no doubt, and probably it would be better for both of them that the marriage tie should be severed. But it is quite another matter whether the pursuer is entitled to put an end to it by a decree which must involve a serious slur upon the defender. His right to a decree of nullity depends upon whether the failure of the defender to consummate the marriage is to be attributed to incapacity or to unwillingness. 'Refusal of marital intercourse cannot be relied upon as a ground of decree of nullity except so far as it may under certain circumstances be regarded as evidence of some abnormal physical condition' (*per* M.R. Cozens-Hardy in *Napier* v. *Napier*, 1915 P. at p. 186), but the Court may after a reasonable time draw the inference that refusal of intercourse arises from incapacity (*S.* v. *A.*, 1877, 3 P.D. 287—Sir James Hannen). In the case of *A B* v. *C B* (8 F. 603), where it was held on the facts that incapacity must be assumed from the wife's refusal, Lord Dunedin points out (p. 609) that 'this is a question of fact and each case must be judged on its own circumstances,' and he quotes a passage from the opinion of Lord Penzance in the case of *G.* v. *G.* (2 P. & D. 287) to the effect that 'the basis of the interference of the Court is not the structural defect but the impracticability of consummation.'

"There is no structural defect in this case and no evidence whatever of any nervous or hysterical affection which, had

it existed, might have made connection impracticable and so have been held as equivalent to a physical obstruction. During the first period of the marriage it is admitted that the pursuer of his own free will abstained from any attempt at consummation. During the second period the defender thought that the pursuer was not adhering to the terms of his compact, and it seems to me that her refusal must be attributed to unwillingness. At all events I do not think that it would be fair to infer from her refusal during this period of six months that it arose from incapacity. During the third period the parties were never together, and it is only during the one week of the fourth period that they were together under circumstances which might reasonably infer incapacity rather than unwillingness. This is why I regard the evidence of what passed at the discussion between the parties on the Monday of that week as of the greatest importance in the case. As already stated, I am of opinion on the evidence that the pursuer must have made some such suggestion as the defender says he did, and accordingly I cannot draw the inference which I should otherwise have done, that her subsequent failure was due to incapacity. I may add that from the pursuer's own description his attempts to have connection with the defender on this as on former occasions do not appear to have been very determined, and so far as I can judge would be quite capable of being misunderstood by the defender if she in truth believed that he had no intention of completing the connection.

"In my opinion this is not a case in which the facts justify a decree of nullity.

"The conclusion for divorce on the ground of desertion may be dealt with very shortly. *Esto* that refusal to consummate may amount to desertion, on which I express no opinion, it cannot in this case be said that the defender has been maliciously and obstinately in desertion for four years. There were in fact only six months in one period and six days in another in which she could have been capable of desertion in this sense. In my opinion there are no relevant grounds on which the alternative conclusion of the summons can be supported.

"Under the whole circumstances I think the proper course to adopt is to dismiss the action, and I shall accordingly do so."

The pursuer reclaimed, and argued—There was in the present case sufficient evidence to entitle the Court to infer incapacity on the part of the defender—*A B* v. *C B*, 1906, 8 F. 603, and *per* L.P. Dunedin at p. 609, 43 S.L.R. 411; *A B* v. *C D*, 1900, 38 S.L.R. 559; *M.* v. *G.*, 1902, 10 S.L.T. 264; *G.* v. *G.*, 1871, L.R., 2 P. & D. 287, F. & P. 1897, 7 L.T. 193; *Vickery* v. *Vickery*, 1921, 37 T.L.R. 332, *C.* v. *C.*, [1921] P. 399. On the evidence the pursuer's case could not be treated as one of pure unwillingness on the part of the defender. Alternatively the pursuer was entitled to divorce on the ground of desertion. Refusal of intercourse was equivalent to diverting from the other's company in the sense of the old statute. Company as there used meant matrimonial company in the full sense and not merely society. If the pursuer was right here, the break in time did not matter, because the attitude of the defender throughout was an attitude of persistent refusal—Fraser, Husband and Wife, vol. ii, pp. 1209 and 1210.

Argued for the defender—On the evidence there was no ground for inferring incapacity on the part of the defender. Looking especially to the peculiar conditions under which this married life was entered on, the utmost that could be inferred was unwillingness. Non-consummation was only an item of evidence in inferring incapacity. *Consensus non concubitus facit matrimonium*, and there was no warranty as to the quality of the capacity—*Lang* v. *Lang*, 1921 S.C. 44, 58 S.L.R. 38. The real question was whether parties at the time of interchange of consent were capable of intercourse. There were several classes of cases—(1) Structural incapacity, (2) functional incapacity, (3) incapacity derived from repulsion towards a particular individual where the ground was much more doubtful and the medical evidence only inferential, (4) incapacity inferred from non-intercourse merely from efflux of time and without explanation. This last ground was based on the case of *A B* v. *C B*, 1906, 8 F. 603, 43 S.L.R. 411, but the ground of judgment in that case could not be applied to the present case. The other cases cited by the pursuer were not in point. This case differed from all these in the inversion of the married life. The whole evidence in the case pointed to wilful refusal and not incapacity, and wilful refusal was not a ground for decree of nullity—*Napier* v. *Napier*, [1915] P. 184; *Finegan* v. *Finegan*, 1917, 33 T.L.R. 173. If the pursuer was not entitled to decree of nullity, neither was he entitled to succeed under his alternative conclusion of divorce for desertion. There was no warrant for the construction of the old statute which the pursuer put on it. The passage in Fraser, Husband and Wife, *cit. sup.*, gave no support to it, and it had been expressly negatived in two Outer House Cases—*X* v. *Y*, 1914, 1 S.L.T. 366, and *C* v. *D*, 1921, 2 S.L.T. 82. Even if the pursuer's construction was correct, the break in the period would bar the remedy. Desertion could only count from the burning of the letter at Perth.

At advising—

LORD JUSTICE-CLERK—If this were a court of morals charged with the duty of apportioning praise and blame, or armed with the power of releasing an ill-assorted pair from a tie which was irksome to one if not to both of them, its task would not be one of great difficulty. But I apprehend that the problem with which the Court is confronted cannot be solved upon such simple lines as these. We have to decide whether the pursuer has proved that at the date of the marriage the defender was incapable of consummating her marriage with him, in which case decree of nullity would be pronounced, or alternatively whether it has been proved that the defender has been in malicious desertion of the pursuer for

four years, in which case he would be entitled to decree of divorce.

The facts of the case, though unusual, are not complicated, and with regard to many material matters there is complete agreement between the parties. The pursuer was at the date of his marriage in the Indian Agricultural Service. The defender is the daughter of a well-known minister of the United Free Church of Scotland. They met in India, which was the pursuer's residence, and where his duties lay, in 1911 during a visit which the defender paid to that country. They appear to have been attracted to one another, and on the pursuer's return to Scotland on leave two years later they became engaged to be married in October 1913. The marriage ceremony took place on 5th November 1913, the pursuer being then twenty-nine years old and the defender thirty-four. Before the date of the ceremony, however, an event of great significance occurred—an event which permeated the whole married life of the parties, if indeed it did not poison it. The defender was unwilling that the marriage should take place so soon as it did, but the date was propelled because of the expiry of the pursuer's leave. The choice appears to have been between marriage on or about the date when it was in point of fact celebrated and indefinite postponement. The former course was decided upon, but the defender as a condition of marriage stipulated at a meeting which the pursuer and she had on 1st November 1913 that there should for a time after the marriage be no sexual intercourse between them. The reason she gave was that it was necessary that they should first know one another better than they did. But there seems to be no doubt, though she did not express it, that at the back of her mind lay a more or less fanciful idea that spiritual union should precede physical union. The pursuer reluctantly and unwisely agreed to the condition imposed upon him by the defender. The bargain, be it observed, was not that by contraceptive methods pregnancy should be avoided, but that there should be complete abstinence from intercourse. The duration of the bargain is a matter of dispute between the parties, the pursuer alleging that the pact was for a year only, the defender avowing that she thought she had made it clear to the pursuer, as it certainly was clear to her mind, that it should be continued for a "year or two." Be it short or long, it was a stupid bargain, as the defender in evidence ultimately admits. For good or ill, however, the marriage took place upon that footing.

The married life of the pursuer and the defender falls naturally, as the Lord Ordinary points out, into four parts. The first period extended from the date of the marriage, viz., 5th November 1913 to April 1914. This period does not detain us long. It was covered by the pact, and both parties are agreed that the pursuer in loyal observance of his bargain made no attempt during that period to seek intercourse with the defender. Shortly after the marriage ceremony the parties returned to India and remained there till April 1914, when the defender returned to this country to attend the United Free Church General Assembly, of which her father was to be Moderator. She remained in Britain till December 1914. During the first period the pursuer and the defender when residing together sometimes occupied separate beds and sometimes the same bed. But no inference relevant to the present case can be drawn from anything which occurred during that period. Indeed for the purposes of this action it may be wiped out. The pact stood, and it was scrupulously observed.

The second period—and it is of considerable importance—runs from December 1914 to September 1915. During that time the defender was in India and resided with the pursuer. It was not, however, an uninterrupted period, as we shall see. There appears to have been no discussion of the sexual situation as it existed between the parties until March 1915. The pursuer, however, states that on the night the defender landed at Bombay from England he made an unsuccessful attempt to have intercourse with her. This, according to him, was the first occasion during their married life that he made the attempt. The defender states that she did not understand his purpose. The pursuer adds that after their return to Nagpur he renewed the endeavour but without success. The defender does not deny this statement. She contents herself by saying she supposes it must be correct. The evidence stands thus—the pursuer says the attempt was made by him on numerous occasions. The defender admits that it *sometimes* happened, and she further admits that she resisted the attempt when made. It is agreed that what occurred occurred in silence, that the defender on no occasion exhibited any loss of control, and that no force was at any time used by the pursuer. I may say incidentally that the idea that the law should compel a husband to resort to that expedient in order to assert his rights seems to me a revolting one. It puts a penalty upon chivalry and a premium upon brutality. The defender's senior counsel indeed expressly disclaimed approval of any such theory. So far there is no vital conflict of evidence between the parties. It is agreed that the pursuer made an attempt at intercourse on various occasions. It is agreed that nothing was said by either party on the subject. It is agreed that the defender frustrated the pursuer in the execution of his purpose.

On 15th March 1915, however, the parties at last discussed the situation, and at some length. The pursuer then apparently upbraided the defender for not doing her duty—a point of view which she somewhat resented. It was probably bad strategy on the part of the pursuer to approach the subject from that standpoint. However that may be, the defender made it clear to him that she desired their relations to continue as they had been during their first year of marriage. She maintained that they were sufficient for one another, and avowed that she did not desire intercourse. In spite of this the pursuer says that after that date his attempts were more frequent than they

were before that date. This the defender denies. It is probably not of much consequence which of them is correct. In June 1915 the defender had an attack of appendicitis which had been developing for some time previously, and which from the pursuer's point of view seems to have affected their relationship. A curious incident occurred in July or August 1915. One night about that date the defender crept into the pursuer's bed, stirred, so she says, by sexual impulse. It is common ground, however, that the pursuer on that occasion made no attempt to seize the unique opportunity afforded to him. The defender says he was "dead sleepy"; he says he thought she had come to make up a quarrel which they had had, and that in any event her illness precluded any idea of intercourse. I do not think that much can be made of this incident by either party. In September 1915 the defender returned to England. The second period closed and the third period was ushered in.

It extended over an unexpectedly long time. In point of fact, for reasons which it is needless to examine closely, the pursuer and the defender were separated by the seas from September 1915 to September 1920. Considerable correspondence passed between them during the period of their separation from one another. The pursuer's letters are somewhat operose, argumentative, and dull. The defender's letters on the other hand are clever and even arresting in their character. They reveal her as on occasion peevish and petulant, hypersensitive and jealous, but they at the same time reveal a vigorous if somewhat imperious personality. Several of these letters bear on the question at issue in this case. For example, on 17th February 1916 the defender wrote the pursuer a letter, which was destroyed in circumstances to be afterwards referred to, in which she expressed the desire that the pact between them should become permanent. This letter was written at a time when it seemed probable that the pursuer might return home on leave. A letter in March and another in April revealed the same mental attitude on the part of the defender. The letter of 6th April is worth quoting. In it the defender says—"If it is your opinion that children can be the only true link between the husband and wife, then you had no right to marry for that purely carnal and material aim. I despise that sort of attitude, and as all your recent letters become less and less affectionate (you never use endearing terms nowadays) its not very likely I'm going to feel more drawn to you and consequently more inclined to accord with your desire to bring children into the world. No. There must be some change before that day ever dawns for me, and it certainly *won't* dawn as long as you continue to write to your mother and receive from her letters which you are unable to share with your wife. If there's to be the final link—I mean in the matter of children—there will certainly have to be dispelled before that everything secret and tending to disloyalty." And again towards the end of the letter she writes—"It is my disinclination to enter into such a state with you—*at anyrate as things are at present.*" It thus appears that the defender was still of the same mind as in 1913, but no one suggested—and indeed no one seems to have thought—at that time that her attitude was dictated by incapacity. It was attributed, and I think rightly attributed, to disinclination. Her letters, I think, afford strong confirmation of that theory.

I now come to the fourth period, extending as it does from the date of the pursuer's return to this country in September 1920, when the pursuer and defender finally parted. That the pursuer grievously mishandled the situation on his return to England I have no doubt at all. That if he had handled it with skill and sympathy and understanding the result might have been entirely different I have equally little doubt. What was the situation? The parties had been separated for five years. The pursuer's attitude to the defender had in the interval somewhat altered. The nagging character of many of her letters had, the pursuer admits, diminished his affection for her. There is no indication that she cared for him less. The evidence, indeed, points the other way. Instead of going straight to the defender when he returned to this country, instead of meeting her alone, instead of treating her with thoughtfulness and kindliness, the pursuer despite her appeals insisted on going direct to his father's house in Perth, insisted on her joining him there though she disliked the atmosphere, and in point of fact allowed two months of his short leave to elapse ere he spent a night under the same roof with the defender. All this he admits, stating half-a-dozen times or more that it was "his plan." If so, I cannot help thinking that it was a singularly bad plan. It was a most infelicitous preface to a new chapter in their lives. The defender asked the pursuer to go to Glasgow and stay with her alone there—a significant request. On another occasion she begged him to come to her in Crianlarich. She told him that she wanted him badly. But he appears to have been blind to the realities of the situation and he was deaf to her appeals. He wanted, so he says, to be with his parents as much as possible—a laudable wish, no doubt. But it failed to take account of the fact that he had a wife as well as parents, and that she too had a claim, if not a first claim, upon his time. The question resolved itself ultimately into a conflict of wills. The pursuer desired the defender to meet him at his father's house; the defender desired to meet him elsewhere. In the end the pursuer triumphed, but with what result to the defender's feelings towards him it is not hard to guess. She met him by arrangement in early October at Perth Station. I mention this incident only to dismiss it, for nothing of any materiality was then discussed between them. Thereafter the pursuer had business in Manchester. He had visits to pay to friends in England, and amid these engrossing occupations the anniversary of his wedding passed unnoticed by him though not by the defender.

Eventually, in obedience to the pursuer's

wishes, the defender on Saturday, 13th November, went to the house of the pursuer's father in Perth, and then began a period which is vital to the decision in this case. On her arrival at Perth the defender was surprised to find that for the first time during their married life she was allotted a a separate bedroom from the pursuer. The excuse which he tenders for this arrangement is, I think, trivial and unconvincing. Be that as it may, the arrangement continued till Monday, 15th November. On that date the parties had a serious conversation. Its purport is matter of dispute between them. They agree that the letter of 17th February 1916, to which I have already referred, was made the subject of discussion. They agree that it was solemnly burnt. They agree that the defender expressed her regret for writing it, and that she consented now to do as the pursuer wished. They agree that a reconciliation was thus effected. But the defender adds that the pursuer was content with the victory which his will had won, and that having in view her age and the consequent danger involved in childbearing — which were the subject of discussion between them —he stated that he did not now desire to have connection with her. This was a startling and unexpected statement which if made by him it is inconceivable that the pursuer could have forgotten. And yet when the statement is put to him on four separate occasions he contents himself in evidence with a *non memini*. It is true that eventually under the pressure of cross-examination he denied that he made the statement. But I cannot imagine the pursuer giving the evidence which I have quoted unless something of the kind alleged by the defender had taken place. If the statement had been the defender's invention he would have instantly and indignantly denied it. It is not unimportant to note that the Lord Ordinary believes the defender in this matter. The pursuer, on the other hand, maintains that on Monday, 15th November, Wednesday, 17th November, Thursday, 18th November, and Friday, 19th November, in virtue of the recent bargain between the parties he sought for the connection which she had promised and was repulsed. On Tuesday, 16th November, it is matter of agreement that owing to an hysterical attack which the defender had, but which was wholly unconnected with the question of intercourse between the parties, no attempt at connection was made by the pursuer on that night. On Saturday, 20th November, the defender went to Glasgow and the parties did not meet again. I find it difficult, if not impossible, to believe that a man who had been tricked by his wife in the manner described by him could have written the endearing letter to her which is dated 20th November 1920. I do not think its terms can be reconciled with his evidence. But it is quite in harmony with the defender's account of what took place at Perth. On 1st February the pursuer sent a letter to the defender which came to her as a bolt from the blue, announcing his intention of taking action against her, and despite her appeals for another interview in order to discuss matters the request was refused.

What then is the inference to be drawn from this unhappy story of married life? Is it that the defender is incapable of consummating her marriage with the pursuer? I think not. It is true that the marriage had subsisted for nine years. It is also true that no intercourse had taken place during that time. And it is also true that from time to time the pursuer, whose potency is not disputed, sought it. But it must be remembered that the opportunities afforded were limited to three periods of time. The first of these runs from 5th November 1913 to April 1914. That period is covered by the pact, and in the circumstances I have narrated may be entirely disregarded. It yields no inference of consequence. The second period is from December 1914 to September 1915 in India. That period was interrupted and contracted by the defender's approaching and actual attack of appendicitis. As regards *words* during that time the defender at the interview in March 1915—the only occasion when the matter was discussed—maintained the same attitude as was embodied in the pact. As regards *deeds* she refused her assent to intercourse when it was sought. She honestly believed, I think, that the period of the pact had not yet expired. If this action had been raised at the end of this period, I cannot think that it would have succeeded. All the circumstances point, in my opinion, to disinclination rather than disability on the part of the defender. In the correspondence whilst the husband and wife were parted the defender maintains the same position. She proposes that the pact should be permanent. She describes with scorn the carnal side of marriage, and she tells the pursuer that he must take a different course from that which he has adopted if he is to achieve his wish. But she clearly indicates to him the manner in which this can be done. The correspondence, in short, whilst demonstrating the defender's unwillingness postulates her capacity, which up to this time does not appear to have been questioned by anyone. The third period is at Perth and it is vital. If the defender's statement of what then occurred is correct, and the Lord Ordinary accepts it, *cadit quæstio*. If the pursuer's account is correct, then I consider the period is much too short to admit of a safe inference of incapacity. The circumstances from the defender's point of view were not favourable. She was in an environment which she disliked, and the effect of the bickerings of Tuesday may well with a nature like hers have continued during the following days. The attempts made by the pursuer appear to have been lacking in virility. It is not even suggested that on any occasion the defender's night attire was disarranged. His dumbness all through seems well-nigh inexplicable. To sum up, I find on the defender's part a misguided and stubborn refusal to do her duty as a wife, but I cannot find a scintilla of evidence to warrant the view that she was incapable of doing that duty. She may have been aggravating. She may

have been abnormal. She may have been glacial. But the evidence, in my judgment, is consistent with mere stubbornness on her part, and indeed I am of opinion that the probabilities point clearly in that direction rather than in the direction of incapacity.

The view I take is, I think, quite consistent with the authorities upon this subject. In *A B* v. *C D* (8 F. 603) Lord Dunedin adopts the opinion of Lord Penzance in *G.* v. *G.* (L.R., 2 P. & D. 287), to the effect that the ground of a decree of nullity is not structural defect on the part of a woman but the impracticability of consummation. "Impracticability" is an ambiguous word, and would cover the case of stubborn refusal. I do not, however, apprehend that these learned Judges intended to lay down the doctrine that stubborn refusal of intercourse affords good ground for a decree of nullity, but rather that in given circumstances impracticability of intercourse may yield an inference of incapacity. Lord Dunedin's judgment proceeded on the view that no reason was suggested for the wilful refusal on the part of the wife, and that the whole probabilities of the case pointed to the opposite conclusion. In other words, the theory of contumacity was excluded. That being so, it is reasonable, if no other explanation is tendered, to hold that refusal *per se* may in time warrant the inference of incapacity. In this case, in my judgment, the converse of the position in *A B* v. *C D* is to be found. The wilful refusal of the wife is accounted for by her attitude to the sexual act, as instanced by the pact, by her attitude at the interview of 15th March 1915, and by her letters. The probabilities in the circumstances as I have narrated them point, in my judgment, to disinclination rather than to incapacity. In other words, there is in this case a theory which conflicts with the theory of incapacity. There is here another and a sufficient explanation of failure to consummate the marriage. To release this man from this woman in these circumstances would, in my opinion, be to confer a charter of freedom on any person who steadily declined to do his or her duty to the other spouse. That I think would be a perilous doctrine, and it is wholly repugnant to the law of Scotland as I understand it. In truth the idea of incapacity on the part of the defender in this case seems to me to be a mere afterthought on the part of the pursuer. It never occurred to him during the pre-Perth period or for some considerable time after. By whom or how it came to be suggested to him I know not. But I am satisfied on the evidence that the theory is ill founded, and that therefore the first conclusion of the summons fails.

The second conclusion in which the pursuer seeks for decree on the ground of desertion may be shortly disposed of. It is I think quite unmaintainable. To say that a person who lives at bed and board with her spouse has "divertit" from his company is manifestly extravagant. The unbroken usage of three hundred years raises a strong presumption against the contention. Two Outer House judgments have definitely negatived it. Moreover, it clearly appears from the evidence that the five years' absence of the defender in this country was with the express consent of the pursuer. How then can she be said to have then been in malicious desertion of him? Even if she had been, the reconciliation at Perth in November 1920 when the letter of 17th February was burnt is clear evidence of condonation on the part of the pursuer.

On the whole matter I am accordingly of opinion that the Lord Ordinary's judgment is right and should be affirmed.

LORD ORMIDALE—The present action is raised by the pursuer against his wife for declarator of nullity of marriage on the ground that the defender was at the time of the marriage and still is impotent and unable to consummate the marriage, and, alternatively, for divorce on the ground of desertion.

The parties had not seen very much of each other prior to their marriage. They became acquainted in 1911 in India, where the pursuer was in the Indian Agricultural Service. The defender was on a visit to a brother. She returned to this country in December 1911. The pursuer, whose home was at Perth, came to Scotland on leave in September 1913, and in October became engaged to the defender. On 5th November the parties were married. At the date of the marriage the pursuer was twenty-nine and his wife five years older. A few days before the date fixed for the celebration of the marriage the defender insisted that it should be a condition of the marriage that the pursuer should agree that to begin with there should be no intercourse between the parties. The period of this unwise and unnatural abstention was to be one year according to the pursuer; a year or two according to the defender, that is, of indefinite duration, although she says she thought in her own mind that she would agree to connection taking place within two years. To this proposal the pursuer, faced with the alternative of no marriage, reluctantly and very foolishly agreed. Obviously the existence of this understanding or pact, vitally affecting in my judgment the whole course of the married life of the parties, is of outstanding importance. It was distinct notice to the pursuer of a peculiar and fantastic attitude on the part of his wife in regard to sexual relations, and afforded an indication of the possibility at least of a continuing unwillingness on her part to submit to intercourse even after the period of the pact had expired. The defender explains her mind on the subject thus—"I wanted this condition arranged because my idea of marriage had been for a good many years something which was rather different to the sort of what is called physical union. I had a feeling that it ought to be a spiritual union first of all, and I intended that that sort of thing should grow in the time of our acquaintanceship in our living together before the physical side was developed. I did not say all these things to the pursuer. He did not

ask me, and I suppose it is true that what I said was that first we would be sufficient for each other, but that is what I implied." The pursuer says that there was no reason of health or anything else that he knew of for the proposed abstention. The reason stated to him was that they might be alone together for the first year to know each other better.

In point of fact the marriage has never been consummated. It is not disputed that the pursuer is *vir potens*. The defender according to the medical evidence suffers from no structural defect or malformation preventing or tending to prevent sexual intercourse. The pursuer, however, maintains that if he has proved that no intercourse has taken place although there has been ample opportunity, and that the defender has always resisted his attempts to consummate the marriage, then the Court is entitled and ought to draw the inference that the refusal on her part arises from incapacity. That incapacity is not confined to cases where there is structural incapacity was decided in *A B* v. *C D* (8 F. 603), where the Court in the case of a woman suffering from no structural defect or malformation drew the inference from the evidence adduced that there was a practical incapacity on her part.

Although the marriage in the present instance has endured for upwards of eight years, there were only three comparatively short periods of five months, six months, and one week during which the spouses lived together and connection was possible. They proceeded to India after the marriage and lived together till the beginning of April 1914, when the defender returned to this country. In December 1914 she rejoined her husband and remained with him till September 1915, but after June that year she began to suffer from appendicitis. She returned to this country to undergo an operation. It was not until November 1920 that she again saw her husband and spent a week with him in Perth. During the first period, November 1913 to April 1914, the parties occupied the same bedroom and occasionally the same bed, but the pursuer, in terms of the pact, made no overtures for connection. During the second period, however, from December 1914 to June 1915, the period of abstention having in his opinion come to an end, he made very frequent attempts to consummate the marriage but without success. I have considered very carefully the evidence of how he endeavoured to accomplish his object. I come to the conclusion that he has failed to show that his efforts were those of a man resolutely determined to enforce his marital rights and to bring home to his wife that such was his intention. His endeavour was, as he himself explains, to arouse in her the sexual instinct, and on his failure to do so he appears to me too easily and too quickly to have acquiesced in her refusal to allow connection. At no time did he call in aid verbal request or remonstrance. His overtures were always conducted in silence. On 15th March, however, the parties had in the course of the day a prolonged discussion on the matter. The defender wanted their relations to remain the same as during the first period. The pursuer is asked—"(Q) After your discussion, when you had talked the matter out, had not the defender made it clear to you that her preference had not changed and that she still wished to live without connection?—(A) Yes, that is so, and the conversation stopped then, but in addition I made my point of view perfectly clear that I did not agree. (Q) Was it therefore in full knowledge that the defender's reluctance to connection remained the same that you made the subsequent advances of which you have spoken?—(A) I did not really think about it afterwards; I went on in the same way as I had gone on all through, hoping to develop the sexual instinct which seemed to be lacking." The defender depones that while she cannot remember that she used the expression "The time is not up yet," that was always in her mind. Her views on the subject of physical union had not yet altered. She admits that both before and after March, when the pursuer renewed his efforts, she resisted all his advances.

I agree entirely with the view that the pursuer was not bound to use force to oblige his wife to submit to connection—*G.* v. *G.*, 1871, 2 P. & D. 287; *H.* v. *P.* 1873, 3 P. & D. 126. I cannot think that in seeking to gain his object he was entitled to inflict on his wife pain *plus quam tolerabile*. But here we have no evidence of pain or distress, no hysteria, no fainting, no screams, no struggling, nothing to show invincible repugnance. The pursuer indeed admits that he used no force at all. He is asked—"(Q) Apart from any attempt to have connection with her, did the defender seem to like or dislike endearments, embraces, and the like?—(A) It struck me that she did not dislike the embraces, provided they did not go beyond a certain length. I never tried to use physical force, because I was afraid that if I used physical force it would create a scene, and my idea all through was to try to awaken the sexual instinct in the defender, and I was afraid that if I used force it might undo any progress that had been made." Elsewhere in the evidence this passage occurs—"(Q) Is it the case that though on all these occasions the defender refused the advances she never showed any symptoms of loss of nervous or mental control?—(A) The advances were never pushed to the extent of causing her to lose her mental control. (Q) That may be the explanation, but is it not the case that for that reason or for another she never in fact did show any symptoms of loss of such control?—(A) She never did."

I come to the conclusion that during this period it is impossible to infer from the facts established that there was practical incapacity on the part of his wife—that consummation was practically impossible. The reasonable inference to my mind is that the fact that there was failure to have connection was due to nothing but the perverse and wilful refusal of the wife to permit it. That alone is not enough to found an action of nullity. As Sir James Hannen said in *S.* v. *A.*, 1878, 3 P.D. 72, at p. 73—"However much we may revolt from the idea of a man

using force to compel his wife to have intercourse with him—and such a feeling is one which probably is much stronger at the present day than in past times—no case has gone the length of saying because a man naturally abstains from using force, that therefore the refusal, if it be a merely wilful refusal on the part of the wife, will justify him in coming to the Court and asking that it shall be declared that the marriage is void." See also *Napier* v. *Napier*, [1915] P. 184, overruling *Dickinson* v. *Dickinson*, [1913] P. 198. This is quite in accord with what the Lord President said in *A B* v. *C D* (*supra cit.*), for here I think it cannot be affirmed, as it was in that case, that the whole probabilities of the case point in a direction other than that of wilful refusal. In the present case there is disclosed a reason or motive for the defender's wilful refusal—the reason, such as it is, that was declared by the wife immediately before the marriage and accepted by the pursuer as sufficient, to the extent at least of causing him to agree to abstain from connection during the first year of the marriage. Further, in my opinion, that there was nothing but wilful refusal on the defender's part was the view taken by the pursuer himself. It is not suggested from the beginning to the end of his evidence, or in his letters, that the defender, if willing, could not have consummated the marriage.

After the return of the wife to this country in September 1915 she did not go back to India, and the pursuer was unable from causes arising from the war to get home until 1920. In 1917 he went to Mesopotamia on war service and was not demobilised till 1920. He reached this country in September of that year. A number of letters meanwhile passed between the parties. At first the correspondence was conducted in friendly and affectionate terms, but absence did not apparently make the heart grow fonder, and as early as February 1916, at a time when there was still a prospect of the pursuer getting leave from India, the defender was writing in terms that were far from pleasant. Special reference is made to a letter of 17th February 1916 and to other letters in the spring of that year. The defender took a jaundiced view, it appears to me, of various matters of comparative triviality. *Inter alia* she was vexed with what she thought was her husband's disloyalty to her in that she was made, as she thought, to take second place to his parents in his affection and esteem. She made it plain that at the moment of writing she had no intention of departing from her refusal to have sexual intercourse with him. She writes of divorce or possible suicide as the only alternative. Disinclination generally and fear of the sexual act she could overcome, she says, but not her disinclination to enter into the state with her husband, "at any rate as things are at present." These statements were taken seriously by her husband—it may be too seriously—and he concluded that it was her desire and intention that the antenuptial pact should be permanent. While he remonstrated in terms that were at once earnest and affectionate, there can be no doubt that relations became strained and the regard of the pursuer for his wife tended to diminish. This may account to some extent for his declining when he got back to this country in 1920 to visit the defender at a house she had taken in Glasgow and insisting on her coming to him at his parents' house in Perth. His letters on the topic though obstinate are not unkind in expression. It would have been wiser, perhaps, if he had made some concession. But whichever of the parties was to blame for the clash of wills the defender ultimately gave way, and in November 1920 the spouses came together once more in the house of the pursuer's parents.

On Monday the 15th there was effected what was intended to be a complete reconciliation, involving the destruction of the letter of 17th February 1916 and an agreement by the defender to submit to intercourse with her husband. The defender, while admitting that she expressed her willingness to have connection, depones that her husband said, "No, it would not be safe at your time of life to have children," and that accordingly she did not expect him to attempt connection. The defender's evidence in this matter cannot, in my opinion, be accepted. That the possible risk to the defender of having children at her age was referred to I do not doubt, but that the pursuer because of it declared that he would abstain from connection is not only highly improbable but appears to me to be quite inconsistent with the account she gives of what passed at their meeting in her letter of 12th February 1921. Such a declaration would have been an ample justification for what her husband in his letter of 1st February calls her refusal to live with him as his wife, and yet no reference is made to it. The pursuer's case is, that acting on the belief that his wife was willing, he again attempted to have sexual relations on the nights of the 15th, 17th, 18th, and 19th November and was again repulsed. The defender denies that any attempts were made. Accordingly we have oath against oath, and it is for the pursuer to prove his case. It appears to me that after the reconciliation it is hardly credible that the pursuer did not again attempt to consummate the marriage. On the other hand, if his efforts were no more determined than when in India it may be that a failure on defender's part at once to yield and to assist him led him again too readily to desist from his overtures. The proceedings were once more carried through in silence. There was no demand or request for connection, and no remonstrance at any time that the defender was not implementing her promise. Although the pursuer denies that his advances could have passed for mere demonstrations of affection without a serious attempt at consummation, in answer to the question, "Were they advances which could be in any way misconstrued by the defender?" he says, "I don't know. I don't think so." His account of what took place finds some corroboration in the episode of the loosened pyjamas

admitted by the defender. On the other hand, this must be read along with her denial that determined efforts to have connection were made at all, and the happenings when they were in bed together and their effect on the mind of the pursuer must be considered in the light of the letter written by the pursuer on 20th November, the day of the defender's departure from Perth. The expressions of affection and the language of regret in which he refers to her absence are not those of a husband not only baffled and defeated for three nights in succession in his attempt to consummate his marriage, but also finally and firmly convinced that his wife, however willing beforehand to give him what he desired, was incapable of conceding his demand whenever he attempted to put it into force. As I have said, at no time in India did it occur to the pursuer that the defender was suffering in any real sense from an incapacity to consummate the marriage, and I am unable, in the state of the evidence as to the four nights in Perth, to infer from it that his view of the matter was in any way altered, and that he had come to the conclusion that her refusal was not merely wilful and perverse but due to some abnormal physical or constitutional condition.

On the whole matter I cannot but think that if the parties had resumed cohabitation under a roof of their own it was possible and probable that the marriage would have been consummated. On this branch of the case, therefore, I think the Lord Ordinary has come to a right conclusion. In regard to the question of divorce on the ground of desertion, it is, in my opinion, unnecessary to consider the question whether the refusal on the part of a spouse to permit intercourse is relevant to instruct desertion within the meaning of the statute, for I am clear that in no view of the facts has it been proved that the defender was in malicious and obstinate desertion in any sense of the term for the requisite period of four years.

LORD HUNTER—In order to succeed in his action, so far as it concludes for declarator of nullity of his marriage with the defender, the pursuer must establish to the satisfaction of the Court that the defender's failure to consummate the marriage has arisen from incapacity on her part at the date of the marriage to have marital intercourse with him. Wilful, steadfast, and persistent refusal on the part of a wife to have carnal intercourse with her husband has never in Scotland been recognised as a ground for annulling a marriage. It may be noted that in England a different view was taken by the President of the Divorce Court in *Dickinson* v. *Dickinson* ([1913] P. 198), but this decision was overruled by the Court of Appeal in *Napier* v. *Napier* ([1915] P. 184, the head-note in which case is—"The decision in *Dickinson* v. *Dickinson* (otherwise *Phillips*) that wilful and persistent refusal to allow marital intercourse is of itself a sufficient ground for a decree of nullity of marriage is not justified in principle or by the authorities and must be overruled." The circumstance, however, that there has in fact been no intercourse, although there has been ample opportunity over a reasonable length of time, may enable the Court to draw the inference of incapacity of the defender in favour of a pursuer who is admittedly potent. There are a number of cases in which this doctrine has been developed. I do not propose to do more than refer to what Lord Dunedin said in *A B* v. *C D*, 1906, 8 F, 603. At p. 608 occurs this passage in his Lordship's opinion—"The question that arises in the present case, and is I think undecided by this Court, is, whether incapacity in the woman is to be confined to those cases, admittedly rare, where there is what has been termed structural incapacity. I see no reason so to confine it, and I am content to adopt in terms the words of a very great authority on such subjects, the late Lord Penzance, in the case of *G.* v. *G.*, L.R., 2 P. & D. 287. He said—'The invalidity of the marriage, if it cannot be consummated on account of some structural difficulty, is undoubted, but the basis of the interference of the Court is not the structural defect but the impracticability of consummation.' . . . Now I admit this is a question of fact, and each case must be judged on its own circumstances." In conclusion, Lord Dunedin states the propositions of fact which had been proved and which led to his taking a view favourable to the pursuer. Among these propositions are the two following, which I consider important, as they appear to me to have a direct bearing upon the facts of the present case. First, that the husband was able and anxious to consummate, and had more than sufficient opportunities, free from any circumstances of a disturbing nature either mental or physical; second, that no reason whatever is suggested for a wilful refusal on the part of the wife, and that the whole probabilities of the case point to an opposite conclusion.

In the present case the parties have been married since 5th November 1913, but I am not satisfied on a careful study of the evidence that the pursuer is entitled to have findings pronounced on the lines of the two propositions to which I have referred. The evidence is of a perplexing character. I agree with the Lord Ordinary in the careful summary of the salient incidents of the married life of the parties which he has made, and the inferences which he has drawn therefrom.

The evidence as to what occurred in India has to be read in the light of the unfortunate agreement come to between the spouses before marriage that intercourse was not to take place for some time. The pursuer says that a definite period of one year was fixed for the duration of abstinence, but the defender alleges that it was to be for a year or more. She explains—"My idea of marriage had been for a good many years something which was rather different to the sort of what is called physical union; I had a feeling that it ought to be a spiritual union first of all, and I intended that that sort of thing should grow in the time of our acquaintanceship, in our living together before the physical side was developed."

There may have been a misunderstanding between the parties, but I cannot think that during this period any safe inference can be drawn from the defender's refusal to have intercourse, except that it arose from the peculiar views she entertained upon the married state, and points to wilful refusal rather than incapacity. The parties were separated for a period of about five years and then resided for a week together in Perth in the house of the pursuer's parents in November 1920. On four nights of this week the pursuer and defender slept together. By this time the defender had realised that she had been wrong in persuading her husband to come to their pre-marriage agreement as to intercourse. The Lord Ordinary rightly says that the events of this week are the most important in the whole history of the case. I agree with him that the proof does not justify the inference that the pursuer made any real attempt during this period to consummate the marriage. The terms of the pursuer's letter of 20th November appear to me to be inconsistent with the case which he now makes. Even if this conclusion were wrong, the circumstances connected with the spouses' residence in Perth were of such a disturbing nature as to preclude one from drawing an inference of incapacity from the fact that there was no marital intercourse upon the four nights in question. It may be that the result is unsatisfactory, and that severance of a tie that has become a source of irritation and unhappiness might be to the ultimate benefit of both parties, but that circumstance does not entitle me to put an interpretation on facts which I do not consider justified.

As regards the alternative conclusion of the summons for divorce on the ground of desertion, I agree with the Lord Ordinary that it cannot in any view be said that the defender has been maliciously and obstinately in desertion for four years. I may add that I see no reason to alter the view which I expressed in the case of *X* v. *Y* (1914, 1 S.L.T. 366) that divorce on the ground of desertion will not be granted if the spouses have admittedly resided during the whole or part of the statutory period in the same house and occupied the same bed whether there has been intercourse or not.

LORD ANDERSON—The Lord Ordinary has decided this case, as I read his judgment, mainly on the turn of a phrase—on the form of the pursuer's answer to a question the import of which was probably not understood. To my mind this is far too narrow a basis of decision of a case which is of so vital an importance to the parties. It seems to me that the case can only be properly determined by considering all its outstanding features and drawing the appropriate inferences therefrom.

The prominent facts of this case—unique in their character—which the evidence discloses are these—(1) that the marriage has subsisted for nine years; (2) that it has not been consummated—this being "the primary fact" (*per* Lord President Dunedin in *A B* v. *C B*, 8 F. 603) in a case of this nature; (3) that the pursuer down to the month of November 1920 by admission, and in my opinion until February 1921 by proof, was able, willing, and anxious to consummate the marriage; (4) that there was ample time and opportunity for consummation during the foresaid period of nine years; (5) that the efforts made by the pursuer to effect consummation—efforts again and again renewed—were adequate and unmistakeable; and (6) that consummation has not been effected because of the defender's fault or misfortune—her fault if she has been wilfully refusing to have intercourse; her misfortune if she has been and is unable to perform the sexual act. The inference I have drawn from these leading facts, and from a careful consideration of the whole evidence and correspondence, is that the defender is, and has all along been, incapable of the sexual act. She is proved, in my opinion, to be a woman devoid of the sex instinct, who has done her best to effect the act of consummation, but who is temperamentally unfitted and constitutionally unable to do so. I have reached this conclusion without difficulty, having been compelled inevitably and irresistibly to draw this inference from the proved facts. I am quite unable to regard this constitutional state, as the Lord Ordinary does, as involving "a slur" on a woman. It is something which she cannot help, and for which she is no more responsible than for a birth mark.

There was no dispute as to the law which falls to be applied to a case like this. It is conceded that there is no structural defect and no functional disorder, such as hysteria, which affected the defender as the result of attempted intercourse. The medical evidence, however, and that of the pursuer, make it plain that the defender is a woman of abnormally nervous temperament. The law of Scotland in a case like the present is that "if it be satisfactorily proved that the repeated endeavours of a potent husband, who has tried all means short of force, had been uniformly successful, it was for the Court, in the absence of any alleged or probable motive for wilful refusal, to draw the inference that the non-consummation was due to some form of incapacity on the part of the wife." In these words, which represent the view of Sir Francis Jeune in the case of *F.* v. *P.* (75 L.T. 192) Lord President Dunedin explained what was the law of Scotland in the case of *A B* v. *C B*, *supra*. It seems to me that the present case is *a fortiori* of that case, and that the inference of incapacity which was drawn in it should more readily be reached in this action. I find in this case all the elements which justified the inference in that case—to wit, (1) non-consummation, (2) repeated endeavours, (3) a potent husband, (4) trial of all means short of force, and (5) absence of any alleged or probable motive for wilful refusal after the month of November 1914.

I regard the compact which the defender forced the pursuer to enter into as supporting the conclusion I have reached as to the defender's temperament. She married late in life for a woman, and the compact which

she proposed is suggestive. It indicates to my mind that she recognised that she was sexually defective and that she doubted her ability to perform the act of intercourse. Measures are not infrequently taken by spouses to prevent conception, but an arrangement such as the parties made is so unusual that it plainly points to abnormality in the spouse proposing it. The compact was to hold for a year. That was the pursuer's understanding, and there is nothing in the defender's letters or in her conduct after the year expired to indicate that she took a different view. The pursuer loyally observed the compact and did not attempt to have intercourse until after the year had expired. Thereafter he made persistent and unmistakeable efforts, which are described in his evidence, to accomplish the act. The defender permitted these attempts and did not maintain that they were in breach of the terms of the compact. The efforts of the pursuer were persisted in with greater or less assiduity during nine months or thereby of the year 1915. It is said that intercourse did not take place because the defender was unwilling to join in the act. I cannot accept this view. I am unable to hold that a woman who was capable of the act but unwilling to perform it would have allowed the pursuer to make the attempts which are spoken to, and I cannot conceive that a woman of normal feelings being so approached would have been able to refrain from intercourse. A woman who did not wish intercourse to take place would have slept apart from her husband, as was done in the case of *Hudston* (1922, 39 T.L.R. 108) just decided by Horridge, J. If she did occupy the same bed she would have done so, figuratively, as the princess did in the Arabian tale, between whom and the prince a naked sword was laid. The view I take of the defender's conduct is that she was willing but unable to perform the act. I am quite unable to hold that a woman to whom the pursuer acted in bed as he says he did could have refrained from the act if she possessed the sex instinct at all. She was again and again placed under her husband and a-top of him, *nuda cum nudo*, and all without avail. I am compelled to conclude that it was thereby demonstrated that she is entirely deficient in natural sensibility and incapable of the sexual act. It is true that nothing to this effect was ever said by her, but the last thing that a woman would confess is that she is unable to perform the sexual act. Instead she explains her conduct by all sorts of excuse—lack of spiritual union, fear of heredity, terror of childbirth, and so forth, all which I regard as pure camouflage, designed to cloak her incapacity.

In March 1915 the pursuer tried by verbal persuasion to get the defender to perform her matrimonial duty. The Lord Ordinary considers that the pursuer thereby recognised that he was dealing with a woman who was unwilling to do what he wished. This does not seem to me to follow, and the pursuer depones that he hoped the defender's conduct was due to "inability and not wilful sin." If the defender's refusal of intercourse was at the outset due to unwillingness, the incident which took place in the summer of 1915 when she sought the pursuer's bed would seem to terminate the period of stubbornness. The defender suggests that she was then moved by sexual desire. I have no doubt that she was then and had been all along anxious to effect consummation, but once again there was a failure to have intercourse, due in my opinion to the same cause—her inability to do the act.

There were two letters written by the defender on 17th and 23rd February 1916 which afford strong corroboration of the views I have expressed as to her constitutional incapacity. The letter of 17th February was destroyed at Perth, but its purport is not in dispute. At a time when she was anticipating a renewal of her association with the pursuer, and was conscious that she could not do what he wished, she wrote the letter whose tenor the pursuer summarises—"Refrain for always or divorce me." Her abnormal temperament is made manifest in the letter of 23rd February in which she threatens to commit suicide. If at this time the pursuer had sought the remedy which he now demands I am of opinion that he would have been entitled to decree. All the tests which are suggested by the Lord President in *A B* v. *C B* had then been satisfied; the pursuer had made ample endeavour, persisted in over an adequate period of time, to effect consummation, and no probable motive for wilful refusal on the part of the defender subsequent to November 1914 had been disclosed. The inference would therefore have been necessitated that non-consummation was due to the incapacity of the defender, and that is the inference which I should have drawn as at that point of time.

Things were allowed to drift, however, until the autumn of 1920, and it is plain that the pursuer was bound before taking any legal proceedings to give the defender another opportunity of doing her matrimonial duty. It may be that the pursuer was too autocratic with reference to the place of meeting, and that he ought to have visited his wife in Glasgow. She did, however, ultimately agree to go to Perth, and travelled there from Glasgow with her husband on Saturday 13th November 1920. On Monday the 15th the parties had a conversation, as the result of which the letter of 17th February 1916 was burnt, the defender expressed her willingness to consummate the marriage, and the parties occupied the same bed on that night. The Lord Ordinary has held it proved that the situation had changed so completely at Perth that the defender was then willing to have intercourse while the pursuer had ceased to desire it. This conclusion in my opinion is not only inconsistent with all the probabilities but is against the direct evidence. The pursuer depones that he tried by unmistakeable approaches to effect intercourse on the nights of the 15th, 17th, 18th, and 19th November. The defender in cross-examination admits that on the Monday night there had been a "sort of carrying on" for about two hours and that the pursuer's pyjamas

were loosened. The probabilities of the case are all against the conclusion reached by the Lord Ordinary. If the pursuer had made up his mind not to have intercourse why did he not say so in his letters to the defender in the autumn of 1920? If this was his attitude why was he so anxious to get the defender to Perth? Why at Perth was the letter of 17th February discussed and ultimately burnt? Why did the defender case to sleep alone and go into the pursuer's bed? Why did the pursuer hold her in his arms and loosen his pyjamas if he did not desire her? Again, when she had received the pursuer's ultimatum of 1st February 1921 why did she fail to state in any of her subsequent letters that she had been willing to consummate the marriage at Perth, but that the pursuer had not desired to do so? The Lord Ordinary considers that the tone of the pursuer's letter of 20th November is inconsistent with his oral evidence. I venture to disagree. The tone of a letter depends on the mood of the writer. The Lord Ordinary thinks that the pursuer ought to have been in a resentful mood when he wrote that letter. I do not think so. If the pursuer thought, as I am of opinion he did, that the defender although willing had been unable to yield herself to him, why should he have been resentful? He hoped that she would return shortly to Perth and that she might yet overcome her incapacity. In this mood the tone of his letter is just what would have been expected.

If those views are sound, the situation at Perth was this—the pursuer was anxious, as he had always been, to effect consummation; the defender was willing to have intercourse; efforts were made on four nights to accomplish the act, but in the end it remained unaccomplished. Following on what had happened in India, the events at Perth would seem to afford further and conclusive proof of what had already been demonstrated, to wit, that the defender was devoid of sex instinct and incapable of performing the sexual act. The only ground on which a contrary conclusion can be affirmed is this, that the Perth test was inadequate. It is suggested that this test was insufficient (*a*) because there were "disturbing elements" and (*b*) because the period was too short. It is difficult to see what disturbing elements affected the parties on the night of the 15th. There had been a complete reconciliation and the parties went to bed on the best of terms and apparently in a suitable mood for the accomplishment of what both then desired. The defender and her mother-in-law had a sort of quarrel on the Tuesday, but nothing was attempted by the pursuer on that night, and the effect of that quarrel had surely passed away on the 17th, 18th, and 19th. I am unable to hold that there were any disturbing elements which adversely affected the test to which the defender was subjected at Perth. Was the period of test at Perth of sufficient duration? If this period had been the only test it would manifestly have been insufficient. But if I am right in holding that her incapacity had been proved by what occurred in India, I think that the test to which she was subjected at Perth was quite adequate to show that her incapacity still endured.

My opinion, accordingly, is that the pursuer has proved that the defender has all along been unable to perform the sexual act.

If the marriage is not to be annulled I am of opinion that it cannot be desolved on the plea of the defender's desertion. My reasons for holding this view are fully stated in my opinion in the case of *C* v. *D*, 1921, 2 S.L.T. 182. The pursuer's future as the result of the judgment which is proposed is a singularly hopeless one. If the true view be that non-consummation of the marriage is due to the defender's stubbornness (and this seems to be the ground of judgment proposed, although it is against the defender's own evidence as to what occurred at Perth) she may persist in this attitude indefinitely, and it would seem as if the law of Scotland afforded the pursuer no remedy. I am unable to accept the view that our law is powerless to put an end to a state of affairs so hopeless and so impossible. The law will not hesitate to regard what is styled stubbornness when persisted in over a long period of time and when it has been subjected to an adequate attack as inability in fact and impotence in law.

The Court adhered.

Counsel for the Pursuer and Reclaimer—C. H. Brown, K.C.—Scott. Agents—Bonar, Hunter, & Johnstone, W.S.

Counsel for the Defender and Respondent—Moncrieff, K.C.—Keith. Agents—Simpson & Marwick, W.S.

Wednesday, December 6.

FIRST DIVISION.

[Sheriff Court at Ayr.

WILSON *v.* WILLIAM BAIRD & COMPANY, LIMITED.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap*, 58), *First Schedule* (16)—*Review of Weekly Payment—Payment in Abeyance During Ten Years' Employment—No Recorded Agreement—Competency of Application to Review.*

A boy fifteen years of age was injured on November 29th, 1911, and having claimed compensation under the Workmen's Compensation Act 1906 received a weekly payment from his employers until April 24th, 1912, when his employers, having taken him into their employment again though he was still partially incapacitated, stopped the weekly payment without his consent. He remained in their employment until 20th January 1922, when he was dismissed. Being still partially incapacitated he brought proceedings under the Act for review of the weekly payment formerly made. There was no recorded agreement. *Held* that the arbitrator