

SUMMER SESSION, 1884.

COURT OF SESSION.

Wednesday, May 14.

FIRST DIVISION.

SHAW, PETITIONER.

Process — Bankruptcy — Appointment of New Trustee—Nobile officium.

A petition for the appointment of a new trustee on a sequestrated estate was presented during vacation. The Lord Ordinary on the Bills ordered intimation, service on the bankrupt, and advertisement, which were duly made. On the petition appearing in the Single Bills, the First Division ordered intimation and service of new.—*Stewart v. Chalmers*, June 14, 1864, 2 Macph. 1216; *Abel v. Watt*, November 21, 1883, 11 R. 149.

The estates of John Mackay Anderson were sequestrated, in terms of the Bankruptcy (Scotland) Act 1856, in 1870, and a trustee appointed thereon. The estates of the bankrupt were realised, the proceeds divided, and the trustee having transmitted to the Accountant in Bankruptcy the sederunt-book in the sequestration, was discharged in 1872. The bankrupt was not discharged, and he thereafter succeeded to certain heritable property on the death of his father.

This was a petition presented by Andrew Shaw, a creditor, for the appointment of a new trustee on the sequestrated estate.

On 7th April 1884 the Lord Ordinary on the Bills pronounced this interlocutor:—"Appoints the petition to be intimated on the walls and in the minute-book for eight days, to be served on John Mackay Anderson, the bankrupt, and intimated by advertisement in the *Edinburgh Gazette*; and grants warrant to and authorises the Deputy-Clerk Register to transmit the sederunt-book in the sequestration to the office of the clerk to this process for inspection there by the parties, and subject to future orders of the Court."

Intimation, advertisement, and service, as ordered, was made, and the sederunt-book transmitted to the clerk of the process. The Lord Ordinary on the Bills (KINNEAR) subsequently refused to pronounce any order in the case.

On 14th May, when the petition appeared in the Single Bills, the First Division, without delivering opinions, pronounced this interlocutor:—

"The Lords of new appoint the petition to be intimated on the walls and in the minute-book for eight days, to be served on John Mackay Anderson, the bankrupt, and to be intimated by advertisement in the *Edinburgh Gazette*."

Counsel for the Petitioner—Dickson. Agents—Dove & Lockhart, S.S.C.

Saturday, May 17.

SECOND DIVISION.

[Lord Kinnear, Ordinary.]

WILLEY v. WILLEY.

Husband and Wife—Divorce for Desertion.

Circumstances in which decree of divorce for desertion granted in favour of a husband, although no remonstrance or demand for adherence was made by him at the date of desertion or during the period of its endurance.

Charles Joseph Willey, residing at 7 Roseneath Terrace, Edinburgh, raised an action of divorce against his wife on the ground of desertion. No defence was lodged, but the case was watched by an agent on behalf of the defender. The facts of the case as elicited in proof were the following:—The parties were married in 1863, the pursuer being then a grocer in Leicester, and a widower with two children. They cohabited in Leicester till 1868, when defender left pursuer's house and did not return. Three children had been born of the marriage. The pursuer deponed that he

had lived happily with his wife till he discovered her kissing another married man about three months after the birth of their first child, who was born on 5th June 1864, after which they did not live happily.

On 23d April 1868 defender went on a visit to a married sister in London, saying she was to be absent for three weeks. She did not take the children with her. Three days after she left pursuer received from his brother-in-law, Mr Nicholson, in whose house she was then staying, the following letter:—"My dear Sir,—Sarah and her sister arrived here on Thursday evening in due course, and I regret that it has become my painful duty to make known to you that it is not her intention to return to Leicester again. It is not necessary, nor is it my intention, to enter into any details as to the reason why she has determined not to live with you again; those reasons are well known to you, and I can only say that they appear to me more than sufficient to justify her in such a resolution; indeed, I am surprised that she has not done so before, that for three years she should have been able to endure the sufferings your conduct imposed upon her; however, it is needless to dwell on such a subject—it is past, the die is cast—irrevocably cast—and it now only remains that I should ask you, as a reasonable and Christian man, to make a fair and adequate allowance for the support of your wife and her three children. I ask you in all sympathy and consideration for you as well as her to consider the matter carefully, and to award such an annuity as will support her in the like comfort and respectability she had when you married her, and also for the maintenance and education of her children.—Waiting your reply, I am," &c. On the 7th of May following the defender returned to Leicester and remained several days in pursuer's house. During that time they occupied separate rooms, and pursuer had no conversation with defender as to the reason of her going away. He deposed that he did not think it worth while; he thought it was an insult to himself. Defender again left and never returned. He allowed his wife £150 a-year for about a year and a half after she left him, which he then reduced to £100, because she had succeeded to a large sum of money and was better off than he was. He ceased paying anything after about two years. When she left him he had not the slightest idea that she was going away permanently; she never said a word to lead him to believe that she was. He denied that there was any truth in what was said in Mr Nicholson's letter as to his conduct being the cause of his wife's going away. He could not accuse himself of having ill-treated her in any way. He continued to live in Leicester till 1875, when he came to Edinburgh, where he had bought a house and had since permanently resided and intended to continue residing. In answer to the Court the pursuer deposed that when he ceased paying his wife the allowance he did not call upon her to return to him, and had never urged her to come back and stay with him; that he thought it beneath him to ask her to come back, as he considered himself the injured party.

William Hodge, who was a brother-in-law of the defender, and who had paid a visit of several days to the parties after their marriage, said they

seemed to be living happily together. He was not surprised at defender's leaving pursuer, for he learned from her letters to his (witness') wife that pursuer was insanely jealous, though he had never seen him exhibit such a disposition. Another witness, who was a brother of pursuer's first wife, lived in Leicester and was intimate with the parties, also spoke as to their appearing to live on affectionate terms. He was surprised at the defender's leaving, as he never saw anything in pursuer's conduct which in his opinion could justify her in doing so.

The Lord Ordinary assolized the defender.

"Note.—The pursuer has, in my opinion, failed to establish sufficient grounds for divorce.

"A decree of divorce for desertion cannot be given merely because the spouses prefer to live separately, or because they have in fact lived separate for many years. It is necessary to prove that the desertion of the pursuer by the defender was wilful and malicious in the beginning, and that it has been wilfully and maliciously persisted in, and, as the Lord President says in the case of *Chalmers*, 6 Macph. 549, 'notwithstanding remonstrance.' See also *Bowman v. Bowman*, 4 Macph. 384; *Barrie v. Barrie*, 10 R. 216.

"The evidence does not enable me to determine that the defender's withdrawal from her husband's society in 1863 was wilful and malicious desertion. In the letter founded on it is justified as the natural consequence of her husband's conduct towards her. The Court has no means of knowing whether there is any foundation for that statement or no; and the pursuer says he knows of none. But it is remarkable that, when he was thus informed that because of his conduct towards her his wife had determined not to return to his society, he appears to have accepted that determination without remonstrance; and when she returned for a time to his house to make arrangements for her removal, and to take away her children, he says that he did not think it worth while to have any conversation with her as to why she had gone away. For two years he made her an allowance for her separate maintenance, and when he ceased to do so, it was not because of any refusal on her part to return, but because she had succeeded to property, and he thought she was sufficiently provided for. From that time to this he has never called upon her to return, or indicated any desire that she should do so. But there can be no such thing as an obstinate persistence in wilful and malicious desertion unless the deserted spouse is desirous to adhere, and takes some intelligible method of expressing that desire to the defender. In the present case the import of the evidence appears to be that the pursuer was content that his wife should remain away; and, at all events, he has never expressed any desire that she should return."

The pursuer reclaimed, and argued—The Lord Ordinary had founded his judgment on the ground that the deserted husband was bound to call on his wife to adhere. Calling to adhere was never more than a part of procedure which was swept away by the Conjugal Rights Act.—*Muir v. Muir*, July 19, 1879, 6 R. 1353; *Fraser on Husband and Wife*, p. 1210. In *Barrie v. Barrie*, Nov. 23, 1882, 10 R. 208, relied on by the Lord Ordinary, the wife offered to adhere. Here it was the reverse—she sends an agent to watch the case, but herself refuses to come. The theory

of divorce for desertion was that the deserted spouse all the time desired the deserter to return; but it could not depend on his saying it, for then a deserted husband might say "Come back, though, honestly speaking, I am happier without you;" and so parties might get divorce on this ground by mutual consent by agreeing to live apart for four years if the deserted one had said to the other "Come back."

The Court after hearing counsel granted a commission to take the evidence of the defender, who was at the time residing in Southampton. Her evidence taken on commission was to the following effect—When she left pursuer's house in April 1868 she had formed an intention not to return. She had not, previous to leaving, communicated this intention to her husband. She had authorised her brother-in-law, Mr Nicholson, to write the letter to pursuer quoted above. "(Q) Did you thereby intend to express your final intention not again to live with your husband?—(A) Yes. (Q) Have you since leaving your husband at any time offered to return to live with him?—(A) No. (Q) Have you had at any time since, or have you now, any intention to return to him?—(A) No. (Q) What was the cause of your leaving your husband?—(A) On account of his jealousy, which worried me."

On resuming consideration of the cause, with the report of commission, the Court, without delivering opinions, recalled the Lord Ordinary's judgment, and granted decree of divorce.

Counsel for Pursuer—Lang—Murray. Agents—Paterson, Cameron, & Co., S.S.C.

LANDS VALUATION COURT.

Saturday, May 18.

(Before Lord Lee and Lord Fraser.)

SCOTT AND CAMPBELL (BALLACHULISH
SLATE QUARRIES.)

Valuation—Lease—Arrangement between Proprietor and Tenant—Lordship.

A proprietor and tenant of a slate quarry entered into a lease for fifteen years under which there was a fixed rent to be paid by the tenant, or alternatively the proprietor could claim "a lordship or royalty of one half of the free profits of the tenant after paying all needful expenses," and £400 in addition, provided that such payment of £400 did not bring the profits of the tenant below a fixed sum. The landlord having in one year elected to take the lordship, and having thus received more than the fixed rent—held that the deed must be treated as an ordinary lease, and that the assessor was entitled to fix as the valuation of the subjects the amount obtained by the landlord for that year.

At a Court held by the Valuation Committee of the Commissioners of Supply of the county of Argyle, to hear appeals against the assessor's valuation for the year 1883-4, Ebenezer Erskine Scott,

O.A., Edinburgh, sole trustee under the trust created by the late Sir George de la Poer Beresford of Ballachulish, the proprietor, and Dr Donald Campbell, the lessee, of the slate quarries at Ballachulish, appealed against the valuation of £1870, 1s. 7d. fixed by the assessor as the annual value of the quarries. The contract between the proprietors and Dr Campbell was contained in a lease for fifteen years between the late Sir George Beresford and Dr Campbell dated in 1878. By this lease the quarries, with stables, shed, and certain small fields adjoining, and the use of roads, tramways, &c., were let to Dr Campbell at £1000 of fixed yearly rent, "or in the option of the said first party [the proprietor] a lordship or royalty of one-half of the free or clear profits which the said Donald Campbell may make on his works, manufacture, or trade under this lease," after deducting from the gross proceeds interest at five per cent. on Dr Campbell's capital advanced in carrying on the works, and all loss and expense incurred in quarrying, up-keep, or formation of the roads, tramways, &c., and all expenditure incurred by him in carrying out the lease, "declaring that should the said first party and their foresaids, in any one or more years, resolve to take the said lordship or royalty, instead of the fixed rent as above, then and in that case the said Donald Campbell shall be bound, and he hereby binds and obliges himself and his foresaids, in addition to the said lordship or royalty of one full half, as aforesaid, to pay to the said first party and their foresaids the sum of £400 sterling in each and every such year, and that when and so soon as they shall have elected to take the said lordship or royalty, with penalty and interest, from the time of the said election until payment; but as it is the intention of the parties, in the event of the said first party electing to take the lordship or royalty, in place of the fixed rent, in any one year or more years, the said Donald Campbell shall receive at least £1000 sterling, therefore it is hereby declared that if in any year in which the said first party shall elect to take the lordship or royalty in place of the fixed rent, it shall happen that the nett profits shall not amount to or exceed the sum of £2800 sterling, then the said Donald Campbell shall be bound to pay to the said first party, in place of the £400 sterling, and in addition to their said lordship or royalty of one-half of the said nett profits, the difference between a £1000 sterling and the other half of the said nett profits." The lease stated that Dr Campbell had also paid to the proprietors the sum of £3792, 8s. as one-half of the valuation of the moveable plant necessary for working the quarries, taken over from a former tenant, and that the same should be held to be the joint property of the proprietors and tenant; the proprietor engaged to pay Dr Campbell half the valuation of the stock as left by him at the end of his tenancy. The value of the plant, stock, &c., at the date of this case, amounted to £8035, 15s. 10d.

For the year 1883-84 the proprietor had exercised his option of claiming half the profits of the undertaking, together with £400 extra paid him by the tenant under the conditions of the lease. By this arrangement the proprietor received the sum of £1870, 1s. 7d., while the tenant received £1070.

The trustee and Dr Campbell maintained that