Thursday, November 23.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

BARRIE *v.* BARRIE.

Husband and Wife—Divorce for Desertion—"Malicious Obstinacy" in Desertion—Act 1573, c. 55.

Where in an action for divorce for desertion the defender (the wife) had been more than four years absent from her husband's house, but from the whole circumstances it appeared that the parties had been really on friendly terms, that their separation partook rather of the nature of an agreement to live apart than of wilful desertion by the defender, and that the pursuer had never seriously pressed his wife to return to his house —*held* that no such malicious and obstinate desertion had been proved as to entitle the husband to decree of divorce.

This was an action of divorce on the ground of desertion at the instance of James Barrie, millwright, West Port, Dundee, against Mrs Isabella White or Barrie, his wife. The action was defended, and the alleged desertion was denied. It appeared from the proof that the parties were married on the 28th September 1874 in the house of the pursuer at West Port, Dundee, where the defender had been residing for a month or two prior to the marriage. The only other occupant of the house was the pursuer's mother, who was an old woman, blind and infirm, and the defender prior to the marriage had attended upon her and assisted in keeping the house. On the 10th May 1875 the defender suddenly left the pursuer's house and went back to live with her father, alleging that her husband treated her unkindly, that his habits were not good, and that the house in which he wished her to reside was unsuitable. After some correspondence the defender on 24th May returned to her husband's house, only, however, to leave it again finally on the 23d of July following. The defender alleged that she left her husband's house with his consent, that he knew where she was going, and that as he grudged the cost of supporting her he was quite willing that she should go. The only child of the marriage was born on 10th December 1875, but none of the expenses connected with its birth were met by the pursuer. Previous to the birth of the child the defender had written to her husband in very affectionate terms. After leaving her husband's house the defender went to live with her father, first in the neighbourhood of Montrose, and subsequently in Dundee. Although living separate the parties appeared to be upon somewhat friendly terms, the defender writing to the pursuer a variety of affectionate letters, after as well as before the birth of the child. These letters are referred to, and the more important of them are quoted in the opinion of Lord Mure. To these letters the pursuer only occasionally sent replies. In addition to the correspondence the parties were in the habit of meeting each other frequently by appointment, and upon all these occasions appeared to those who happened to have opportunity of observing to be on friendly terms. On one occasion the defender called at her husband's house accompanied by a neighbour, and at that meeting also the parties were most friendly to each other. The only letter produced in process in which the pursuer ever asked his wife explicitly to return to his house was that of the 6th February 1882 (shortly before the raising of the present action). It was in these terms—"My dear Wife,—I again ask if you would kindly come to my house. It is now two months since you promised to come, and I have been in waiting ever since. I sincerely hope you will come down this week, God wiling.—I remain yours," &c.

The pursuer deponed that at the various interviews with his wife he repeatedly urged upon her to return to his house, but this was denied by the defender, and no evidence was produced in corroboration of the statement.

On 9th June 1882 the Lord Ordinary gave decree of divorce.

"*Opinion.*—This is a somewhat peculiar case—I do not remember any exactly like it,—and I am very glad that I have no occasion to consider the moral question as to who is to blame for this unfortunate domestic difference. It is often said that if a wife leaves her husband's house voluntarily, it is either because he has been unkind to her or because he is not able to understand her or retain her affection, and possibly it may have been so in this case. At all events, she appears to have been disenchanted very soon after her marriage; and apparently there was no very great affection on her husband's side either. But it is quite clear that on the first of the two occasions when Mrs Barrie left her husband's house she did so not only without his consent, but without his knowledge, and he seems to have been very much distressed on finding that things had gone so far, and he exerted himself to induce her to return—probably from a sense of duty, and perhaps also from a wish to avoid scandal. Well, this reconciliation was of very short duration, and Mrs Barrie left a second time, also without notice to her husband. On neither occasion, so far as I can judge from the statements he made to her father, had she any reason for leaving which would in law have entitled her to a separation, or justified such an extreme step. She thought her husband was near in money matters, she did not like the house, and she thought she was put upon by her mother-in-law. I daresay she thought she was very badly used; but these were not reasons that could justify her for a moment in leaving her husband's house. It rather appears that after the first shock was over on both sides the parties had come to be satisfied that it was the best thing for both. When they met and corresponded they manifested an amount of consideration and courtesy to one another that would have been creditable to persons in a superior state of society. There was no ill-temper, no unpleasant language used, but at the same time there is no manifestation of a strong desire for a reconciliation. Whenever an attempt is made by the one spouse towards approximation, the repulsive force always asserts itself on the other side, and nothing comes of these efforts. My impression is that during the period of separation there was no great affection on either side, though a certain amount of mutual respect and good-will, which I hope still continues. But in these circumstances I have to consider who is to blame.

Now, it is quite plain that though Mrs Barrie at the time when she wrote the letter that has been commented upon [quoted *infra* in the opinion of Lord Mure] may perhaps have been willing to return to her husband, that willingness did not long continue, because she did not go back, and she made no serious effort to follow it up. With that single exception, it appears to me that she never was willing to return to her husband's house, and she says, no doubt quite honestly and candidly, that she does not think he really wanted her back. She did not believe in a return of affection on his part, and therefore she did not go. But these are not considerations into which a court of law can enter. Of course it is in every way desirable that when a difference of this kind is made up, it should be with the hope that the parties will end in mutual affection; but all I can look to is, whether there was willingness on the part of the one spouse or the other to adhere? I think that the husband, though he may not have had much affection for his wife, was willing that she should live in his house. He was willing to do his duty. Though he may not have had much regard for her, he was willing to do what the law imposed upon him as his conjugal duty—to maintain his wife and child in his own house. She was not willing to go to live with him unless she should have some guarantee that their future intercourse should be affectionate. In these circumstances I think that the fault which the wife committed in leaving the house was never repaired, and that the pursuer has throughout been willing to do his duty, though perhaps he may not have been able to satisfy the defender's expectations. Therefore the defender must be held to have continued in a wilful condition of separation or diversion from her husband's society, and he is entitled to the remedy which he desires. I allow the defender her expenses. I think this is a case in which it was right she should appear; no imputation can be made upon the wife's conduct except failure to fulfil her legal duty of adherence."

The defender reclaimed. Argued for her—There was no desertion here in the statutory sense of the word, as the defender left her husband's house with his consent, and had all along been willing to return and adhere. This was shown by the correspondence. The pursuer, on the other hand, never desired that his wife should return to his house,—at least he never asked her by letter until shortly before the action was raised. No evidence of any solemn demand on pursuer's part that his wife should return was produced, and in the absence of this there could not be obstinate desertion. There must be some procedure under the present system equivalent to the formal demands to adhere required by the old law.

Authorities—*Chalmers*, Mar. 4, 1868, 6 Macph. 547; *Bowman*, Feb. 7, 1866, 4 Macph. 384; *Winchcombe*, May 26, 1881, 8 R. 726; Fraser (Husb. and Wife), ii. 1210; *A* v. *B*, 40 Jurist 497.

Argued for pursuer—The defender had deserted her husband for more than four years, and he was entitled to his statutory remedy. It was too late now for her to say that she was willing to adhere, no action of adherence being now necessary. All the formal preliminaries required by the old law must be held to have been performed at the calling of the summons. All that is now required to be shown is malicious desertion persisted in for four years. After that period is over the deserted spouse has a vested right. The wife in the present case had done all that is required by law to give the husband a right to his statutory remedy.

Authorities—*Murray* v. *M'Lauchlan*, Dec. 21 1838, 1 D. 294; *Muir* v. *Muir*, July 19, 1879, 6 R, 1353.

At advising—

Lord Mure—This is a case of divorce on the ground of desertion for the statutory period of four years, and the Lord Ordinary has held that the pursuer is entitled to the decree which he asks. We have now to determine whether the evidence which has been adduced is sufficient to satisfy us that the defender deserted her husband and remained "in malicious obstinacy by the space of four years." The action is laid upon malicious and wilful non-adherence, and that being a ground of divorce by Act of Parliament, the desertion must be distinctly and clearly proved. The words of the Act of 1573, cap. 55, are, that if either husband or wife "diverts from the other's company without a reasonable cause alleged or reduced before a judge, and remains in their malicious obstinacy by the space of four years," then various proceedings are to take place, and if adherence does not follow thereon then divorce may be granted. Now, it is clear that in dealing with this statute and in applying it distinct evidence must at the outset be looked for of an intention to desert, and that at once brings us to the evidence in the present case. It appears that the parties were married in September 1874, and that about the month of May 1875 the defender left the pursuer's house and went to reside with her father. She remained away upon that occasion for several weeks, and the reason she gives for leaving is, that some difference had arisen between her husband and herself about the way in which she treated his mother; she declaring that she would not live in any house along with his mother, whom she was expected, she alleged, to wait upon like a servant. While the parties were thus separated various letters passed between them, expressed in very affectionate terms, and the result of it all was that upon the 24th of May she returned to her husband's house. Now, this period does not materially affect the present case, except in so far as it shows that whenever pressure was put upon the defender to return she yielded. The second period, and the one we have more immediately to do with, dates from the 23d July 1875, and extends to about the middle of the year 1878. It seems that this second leaving of her husband's house was occasioned by circumstances very similar to those which caused the first. Various accounts are given by the parties, but the substance of what the defender says is that it was a matter of arrangement between her husband and herself, and that she left the house quite with his consent, and in this particular she is substantially corroborated by the pursuer. After leaving him she seems to have returned, with her husband's knowledge, to her father's house, where she has resided ever since. This, then, is the desertion complained of, which in my opinion does not amount to desertion at all, but partakes much more of the nature of a family arrangement. Shortly after leaving her

husband for the second time a correspondence commences, in one of the first letters of which she informs him that she expects soon to be confined, and follows up the communication by three or four other letters in which she asks her husband to send her some clothes which she had left, but to none of these did the pursuer return any answer. It is somewhat curious that although the pursuer maintains that he frequently urged his wife to return he never seems to have put that request in writing. The defender's letters are most affectionately expressed, and are not at all like those of a wife who was maliciously deserting her husband. On the 18th of January 1876 the pursuer writes to defender:—"My dear Wife—It is with the greatest reluctance that I send you the following, to inform you that I discovered some of your things which belongs to you, which you can have at any time. I would like to see you on Wednesday first, in the little room, or at the top of Annfield Road, at eight p.m., or at any time or place you may propose. I sincerely hope that James is keeping better. I would like to say more in this, but I feel to do so. My object in wishing to see you—I am intending to leave Dundee for a time. I have got the offer of another piece of work. Good night.—I remain, yours truly," &c. In this letter he talks of leaving Dundee to go to America, but there is not one word of a proposal that his wife should return to him. Shortly after this, when she required some of her clothes, she goes to pursuer's house accompanied by a friend, gets what she wants, and returns, no attempt having been made by the pursuer to persuade her to remain. There is then a break in the correspondence until July 1878, when the defender writes as follows:—"My dear Husband,—I sincerely trust you won't be offended with me for sending this, but not knowing when I was to see you again, or when I was to hear from you, I cannot set my mind at rest. For the last three years I have had but one hope, but now my hope goes against hope. Dear husband, I have made up my mind that where you go I will go, with your permission. It will either be for joy or sorrow; I hope it will be for the former. Dear husband, send me a few lines as soon as convenient, and state the time when I will see you, and we will make a final arrangement. I hope your headache is better. Our son is in good health. Now, dear husband, try and send me a few lines this week. Good night, dear husband.—I remain, your loving wife," &c. This seems to me to be a fair offer on the defender's part to return if the pursuer would take her back. On the 1st August 1878 the pursuer writes:—"My dear Wife,—I, your loving husband, with heart-sorrow pen you the following to inform you that it may be out of my power to meet you, but I will be extremely glad to meet you at the bottom of Brown Street, our usual place of meeting, or rather at 11 West Port house, which I consider would be the best, at 8·30, if it is convenient for you to do so. I will be most happy to see you at either. If you are not at 11 West Port by 8·30, I will leave the house at that time precise, and meet you at the former place mentioned. My arrangements have come upon me unexpected, therefore I hope you may excuse me for not being able to meet you and Jamie according to promise. I sincerely hope you will come, and we may make arrangements to our future meetings," &c.

Now, I see here no reference to the wife's proposal to return, nor any acceptance of it. Up to this date therefore the defender cannot be said to be in "malicious obstinacy" in living with her father, for the pursuer refuses to accept her offer to return. The third period of the time embraced in this case is from August 1878 to February 1882. Now, during that period it does not appear in evidence that the pursuer ever asked his wife to return to his house, and such being the state of the facts it does not appear to me that he can make out a case against his wife upon the statute. No doubt the pursuer says that at the private interviews which he had with the defender he asked her to return, but he stands uncorroborated. The defender, who denies that any such request was ever made, is corroborated by the witness Mrs Adam and by four or five others, while the pursuer cannot bring anyone who ever heard him ask his wife to return or heard her refuse to do so. The mere fact that the defender lived in her father's house, where she had so far been placed by the pursuer, and the absence of any request in writing for her to return (until shortly before the present action was raised), is sufficient to satisfy me that the pursuer has failed to make out a case of wilful and malicious desertion as required by the statute.

Lord Shand—I agree with Lord Mure in thinking that the pursuer has failed to make out a case of wilful desertion against his wife. The Lord Ordinary has observed that in many respects this is a peculiar case, and I agree with him in that remark. Now, passing over the temporary separation, of which I do not think that we can take any account, seeing that the parties cohabited thereafter, and coming to the permanent separation which took place on 23d July 1875, it appears that although at first she went to her father's house, which was at some distance from that of her husband, she ultimately returned and lived in Dundee, so that we have the two parties residing at a short distance from each other during the whole period of the five years. It further appears that during this period the parties often met, and indeed were upon the most friendly terms with one another. Taking the case, then, upon this footing, the first question that is to be considered is—Is this really a case in which the wife can be said to have deserted her husband, and to be living apart from him without his consent, and is it not rather one in which both parties believe that they can be more comfortable living separately, and have accordingly made up their minds to do so? Evidently the Lord Ordinary thinks so, for he says in his note that "it appears that after the first shock was over upon both sides, the parties had come to be satisfied that it was the best thing for both." But the evidence makes this, I think, clear beyond a doubt, for we have a long series of letters by the wife to the husband, all couched in most affectionate terms, and expressing her desire and willingness to go with him wherever he wishes her, while in her evidence she says that her husband never asked her to return To this the husband gives a denial, and says that frequently in their private interviews he urged her to return. Her verbal evidence is certainly fully corroborated by her letters, while the husband's testimony stands unsupported. So far, then, as the evidence goes, it

appears that during the most part of the time of the desertion the parties were living separate by agreement, and that being so this does not appear to me to be a case of desertion of the kind contemplated by the statute at all. As to the authorities to which we were referred—the cases of *Muir*, *Winchcombe*, and *Chalmers*—in all of them the action of the defaulting spouses were unequivocal; they had left the country, and in the act of leaving there was clear desertion. I do not think, however, that the judgment in their cases can have any effect in the present circumstances, and I am satisfied that this pursuer is not entitled to the decree which he asks.

Lord President—I am of the same opinion. Wilful and malicious desertion is, there can be no doubt, a flagrant violation of conjugal duty, and such a violation thereof that every form of judicature provides some redress, but the law of Scotland alone provides the remedy of divorce—a remedy which is unknown in the other parts of the United Kingdom of the Queen's dominions, and which must not be stretched beyond its legitimate bounds, seeing that it is a statutory remedy. In order to come up to the requirements of wilful desertion in the name of the statute, it is essential that one of the spouses must withdraw from the other's society without any reasonable cause, and must continue that desertion maliciously. Without attaching too strong a meaning to the words, I may repeat what I had occasion to observe in the case of *Chalmers*, reported in 6 Macph. 547, that nothing but wilful desertion, persisted in notwithstanding remonstrance, is sufficient to found an action of divorce. That being so, I agree with your Lordships in thinking that there is nothing in the present case like wilful desertion in the sense of the statute.

The Lord Ordinary does not appear to me to have put his decision of the case on statutory grounds, for in his note he says—"When the parties met and corresponded they manifested an amount of consideration and courtesy to each other which would have been creditable to persons in a superior state of society. There is no ill temper, no unpleasant language used, but at the same time there is no manifestation of a strong desire for a reconciliation. Whenever an attempt is made by the one spouse towards approximation, the repulsive force always asserts itself on the other side, and nothing comes of these efforts." Here the blame is divided, but as his Lordship goes on he tries to find out who, from the evidence, is most to blame. "I think that the husband, though he may not have had much affection for his wife, was willing that she should live in his house. He was willing to do his duty. Though he may not have had much regard for her, he was willing to do what the law imposed upon him as his conjugal duty—to maintain his wife and child in his own house." It appears to me that the pursuer in not remonstrating with the defender and urging her to return to his house has failed in his obligations; and in the whole circumstances as disclosed by the evidence, I am of opinion that this is not a case within the meaning of the statute, and am therefore for recalling the interlocutor reclaimed against, and for assoilzieing the defender from the conclusions of the action.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender from the conclusions of the summons.

Counsel for Pursuer—J. P. B. Robertson—Moody Stuart. Agent—P. Douglas, S.S.C.

Counsel for Defender — Mackintosh — Watt. Agent—David Milne, S.S.C.

Thursday, November 23.

FIRST DIVISION.

[Sheriff of Forfarshire.

THE NORTH OF SCOTLAND BANKING COMPANY *v.* FLEMING.

Cautioner—Bond of Caution—Bank Agent—Over-Drafts—Advances to Bank Agent.

Cautioners for a bank agent undertook liability for all overdrafts on current or deposit accounts. The bank allowed the agent for a considerable period to make overdrafts on an account opened in his own name for behoof of a separate business which he conducted. In an action by the bank against one of the cautioners for losses resulting from this system to the bank—*held* that the terms of the bond of caution imported liability only for advances to customers in the course of business, and that the sums sued for being in reality advances made by the bank to their agent, the cautioner was not liable.

Alexander Gilruth Fleming was appointed in January 1874 by the North of Scotland Bank to act as their agent in Dundee. A bond of caution was thereupon entered into, by which he, as principal obligant, and his brother John Fleming, farmer, Alyth, and John Playfair, farmer, Johnshaven, as cautioners and full debtors, bound themselves "conjunctly and severally, our heirs, executors, and successors whomsoever, that during the time that I, the said Alexander Gilruth Fleming, shall continue in the said trust and office of agent for the said North of Scotland Banking Company, I shall carefully and diligently attend to the said business, and honestly and faithfully discharge the duties and trust thereof to the best of my skill, and in particular that I shall follow out and obey such instructions regarding the mode of conducting the business placed under my charge, or generally in regard to my duties as agent foresaid, as may be prescribed to me by the said banking company, or by their manager for the time being, and subscribed by the said manager, or by the secretary acting under him, and that I shall not act contrary to the said instructions in any particular, either by doing what may be thereby forbidden, or omitting to do what may be thereby enjoined; and further, that I shall well, fully, and truly account to the said North of Scotland Banking Company, or to their manager for the time, for all sums of money, whether in specie or bank notes, whether of the said banking company or other banks, or bankers' drafts on London or Edinburgh or otherwise, and for all bills, promissory-notes, or other vouchers, instructions, and documents of debt with which I shall be entrusted from time to time by the said company or their manager, or which shall come into my hands in the execution of the trust committed to me; and that I shall pay in and deliver to the said banking company, or to their mana-