

Thursday, November 16.

SECOND DIVISION.

[Lord Adam, Ordinary.

YOUNG v. YOUNG.

*Husband and Wife—Divorce for Desertion—Wilful and Malicious Desertion—Act 1573, c. 55—Imprisonment—Relevancy.*

The wilful non-adherence necessary to confer a right on the deserted spouse to sue for a divorce must be continued during the whole period of four years. A wife's action of divorce for desertion dismissed as irrelevant in respect that it appeared from the pursuer's averments that within four years from the time of deserting his wife the defender had been sentenced to a term of penal servitude, which at the date of the action he was still undergoing.

In May 1882 Mrs Catherine M'Kenzie or Young, Inverness, raised this action against her husband William Young to have it declared "that he had wilfully and maliciously, and without just and reasonable cause, deserted and abandoned her, her society, fellowship, and company, for upwards of four years," and to have him divorced accordingly. She averred that she was married to the defender on 29th January 1864, and that they lived together as man and wife until 18th December 1877, when he left her with the intention of wilfully and maliciously deserting her, and she was compelled in consequence to seek relief from the parochial board for herself and children. She further averred that she had recently found out that he had been convicted, under the name of "James Phillips," of larceny at the Liverpool Sessions on 10th August 1880, and sentenced to five years' penal servitude, which sentence he was still undergoing when the action was raised.

She pleaded that the defender having wilfully and maliciously deserted her, and persisted in his desertion for a period of more than four years, she was entitled to decree of divorce.

The Lord Ordinary (ADAM) found the libel irrelevant, and dismissed the same. He added this note:—"In this case it is averred that the pursuer and defender were married on the 29th January 1864; that they lived together as husband and wife until the 18th December 1877; that the defender then wilfully and maliciously deserted the pursuer; that she has never seen or heard from him since his desertion; and that he has contributed nothing towards the support of her or their children. It is maintained in law that the defender having wilfully and maliciously deserted the pursuer, and persisted in his desertion for a period of more than four years, as set forth in the pursuer's condescendence, she is entitled to decree of divorce.

"It is averred in the pursuer's condescendence that the defender was convicted of larceny at Liverpool on the 10th of August 1880, and sentenced to five years' penal servitude, and that he is still undergoing this sentence in Parkhurst Prison.

"The period of four years from the date of the original desertion of the pursuer by the defender did not expire till 18th December 1881. From

the 10th of August 1880, however, the defender's absence was compulsory, and the question is, Whether he can be held to have been in wilful and malicious non-adherence during the whole period of four years required by law?

"I do not doubt that if the defender had been convicted while still living with his wife his compulsory absence under sentence of imprisonment, although the consequence of his own fault, could not have been founded on by his wife as constituting wilful non-adherence so as to entitle her to divorce.

"In this case, however, it must be assumed that the defender had wilfully and maliciously deserted his wife, and was in a course of wilful non-adherence when his conviction took place. The wilful non-adherence, however, must be continued during the whole period of four years, and if during a part of that period the absence has been compulsory, it cannot, in my opinion, be affirmed to have been wilful. It seems to be a hard case for the pursuer, as it is probable enough the defender if a free man would not have resumed cohabitation. But, on the other hand, it cannot be affirmed that if he had been a free agent he would not have repented of his desertion and returned to the society of his wife, as indeed he seems to have done more than once before. I am therefore of opinion that the action is irrelevant, and ought to be dismissed."

The pursuer reclaimed, and argued—The defender had had at least the power, though in penal servitude, to communicate with his wife. He had not done so, and thus he showed his intention of continuing the desertion that he had already begun on 18th December 1877.

Authorities—Fraser on Husband and Wife, ii. 1213, and cases there cited; *Muir v. Muir*, July 19, 1879, 6 R. 1353.

No appearance was made for the defender.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuer—Baxter. Agent—David Roberts, S.S.C.

Thursday, November 16.

SECOND DIVISION.

[Sheriff-Substitute of the Lothians.

NORTH BRITISH RAILWAY COMPANY v.

WHITE AND OTHERS.

(*Ante*, Nov. 4th 1881, vol. xix. p. 59.)

*Bankruptcy—Stat. 1621, c. 18—"Conjunct and Confident"—Presumption—Sale—Onus.*

Creditors of S. having arrested certain moveable property belonging to him in the hands of a carrier, and raised a process of multiplepounding to determine the right to it, the property was claimed by his brother-in-law, on the ground that he had purchased and paid for it and taken delivery of it, and that the carrier held it for him. At the time of the alleged sale S. was insolvent. Held that the *onus* lay on the brother-in-law, as being conjunct and confident with S. to show that the alleged sale was a *bona fide* trans-