Saturday, January 24.

FIRST DIVISION.

[Sheriff Court at Glasgow.

YOUNG *v.* YOUNG.

Husband and Wife—Reparation—Slander—Action of Damages for Slander by Husband against Wife.

An action of damages for slander at the instance of a husband against his wife is incompetent.

Alexander Gillon Young sued his wife Mrs Helen Baxter Munro or Young in the Sheriff Court of Lanarkshire at Glasgow claiming damages for slander. At the date of the action the pursuer was living apart from his wife, but the marriage had not been dissolved. The ground of action was a statement alleged to have been made by the defender to the effect that the pursuer had made her take arsenic. The slander was said to have been uttered on 7th May 1900, and the action was not brought till 7th November 1901. The defender denied that she had made any such statement and pleaded, *inter alia*, (1) The action is irrelevant, and (2) *mora*.

The Sheriff-Substitute (STRACHAN) dismissed the action as incompetent and irrelevant and found the pursuer liable in expenses.

On appeal the Sheriff (BERRY) adhered to this interlocutor.

The pursuer appealed to the First Division of the Court of Session.

Counsel for the defender referred to Odgers on Slander, 3rd ed., p. 417; *Philipps* v. *Barnet* [1876], 1 Q.B.D. 436.

LORD PRESIDENT—This is certainly a somewhat singular action. It was raised in the Sheriff Court of Lanarkshire at Glasgow by the pursuer against his wife, and he sues for damages on the ground that she had said that he induced her to take arsenic. The Sheriff-Substitute and the Sheriff have carefully considered the case and have arrived at the conclusion that the action must fail on the grounds (first) that it is not maintainable in law, and (second) that it was not raised until eighteen months after the alleged slander was uttered, the delay suggesting the conclusion that the alleged slander could not have been regarded as serious at the time when it is alleged to have been uttered. It is admitted that so far as known no such action has hitherto been sustained in Scotland, and that goes some way, though perhaps not very far, towards sustaining the conclusion that it is incompetent. But Mr Orr has referred us to authority which makes it clear that in England such an action is not allowed. The case of *Philipps* v. *Barnet*, February 1, 1876, 1 Q.B.D. 437, was decided by four eminent Judges on the very intelligible ground that so long as the marriage is undissolved the husband and wife are one person in law. No doubt certain separate rights as regards property are conferred upon the wife by statute, and these are protected by law, but none of the statutes provide or suggest that while the marriage remains undissolved an action will lie at the instance of either spouse against the other in respect of something slanderous having been said by one in regard to the other. One can see that if such an action were allowed it would not contribute to domestic peace but open the door to claims which had much better be left to sleep. If every domestic squabble were followed by an action of defamation there would be a large addition to the business of the Court, and it would be highly inexpedient in the interest of both husband and wife. I think that the view which has received effect in England is both sound and expedient, and that we should give effect to it here. On that ground I think that the judgments of the Sheriff-Substitute and the Sheriff are right.

The Sheriff-Substitute has also given weight to the fact that the action was not brought till eighteen months after the alleged slander had been uttered, and no doubt considerations as to time are of importance. No reasonable excuse has been stated by the appellant for the long delay in raising his action, and if no tacit prescription of words spoken in anger or in heat were allowed actions would lie for every angry or hasty word spoken within forty years in the privacy of the home. While this consideration is entitled to weight, it seems to me sufficient to base the judgment upon the first ground stated.

LORD M'LAREN—It is clear that under our older law no action of damages could have been brought between spouses, and for this reason, that if the action had been at the husband's instance against the wife he could have recovered nothing, because all her personal property passed to him on marriage; and again, if the action was at the instance of the wife against the husband, any sum she might have recovered from him would have immediately vested in him under his *jus mariti*. In these circumstances the law would not give a right of action which could have no useful result. But then in the course of time separate interests in property were conferred upon the wife, first by antenuptial contracts and later by statute. It is one thing for the law to recognise these separate interests and to protect the wife in their enjoyment, but it is quite another thing to reverse the principles of the older law and to sustain a personal action by a wife against a husband, or by a husband against a wife, having no relation to the wife's separate property.

Making allowance for the difference of phraseology in the laws of England and Scotland, the grounds which I have stated against the competency of this action are substantially the same as those developed by Lord Blackburn in the case of *Philipps* v. *Barnet*. I regard that case as an authority to be recognised by Scottish Courts, as it does not depend on any peculiarity of the law of England in regard to

the parties to the suit. It appears to me to depend on fundamental principles in the law of husband and wife, equally true in Scotland and in England. As regards the second point raised, as to the pursuer's delay in bringing this action, I should not be disposed to view favourably any action of damages for slander brought eighteen months after the alleged slander was uttered, but I do not know enough of the circumstances of the present case to enable me to form a clear opinion upon the validity of the plea of *mora* put forward by the defender. Our decision on the first point as to the competency of the action is sufficient for the disposal of the case.

LORD KINNEAR—I agree with your Lordships. I do not leave out of view that the appellant has told us that he does not desire in this action to recover money from his wife. At the same time in dealing with the competency we are bound to look at the action itself, and we find that the conclusion is for damages and nothing else. I agree that the law laid down by Lord Blackburn in the case cited to us is in accordance with our own law. It would be highly inexpedient and inconsistent with the principles of our law as well as that of England as Lord Blackburn explains it, to sustain this action.

LORD ADAM concurred.

The Court affirmed the judgment of the Sheriff.

Counsel for the Pursuer—Party.

Counsel for the Defender—Orr. Agents Winchester & Nicolson, S.S.C.

Tuesday, January 27.

FIRST DIVISION.

JOHNSTON *v.* JOHNSTON.

Expenses—Husband and Wife—Interim Award—Husband Reclaiming—Motion in Inner House for Award to Cover Expenses in Outer House—Payment a Condition of Proceeding.

In a reclaiming-note at the instance of the pursuer in an action of divorce by a husband against his wife, the wife moved for an interim award of expenses, calculated at a sum which was more than sufficient to enable her to present her case in the Inner House, and was designed to meet a portion of the expenses incurred by her in the Outer House, which had exceeded an interim award made by the Lord Ordinary. She also moved that payment of the sum awarded should be made a condition-precedent to the reclaiming-note being heard. The Court, in making an award of expenses, limited the amount to the sum necessary for the conduct of the case in the Inner House, and refused in the meantime to make payment a condition of proceeding with the reclaiming-note.

In an action of divorce at the instance of John Johnston against his wife Mrs Maggie Wilson or Johnston, and another, the Lord Ordinary (STORMONTH DARLING) awarded Mrs Johnston £15 as interim expenses. After a proof he pronounced an interlocutor by which he assoilzied Mrs Johnston from the conclusions of the action, and found her entitled to expenses. Against this interlocutor Johnston reclaimed.

Mrs Johnston presented a note to the Lord President in which she prayed his Lordship to move the Court to decern against the pursuer, *ad interim*, for payment to her of the sum of £200, or such other sum as the Court might think fit, on account of her expenses in the case, and "to make payment of the sum so to be awarded a condition of the pursuer being allowed to proceed with his reclaiming-note in the cause."

In the note she averred that the proof had lasted for three days, and had entailed expenses amounting to £150, that she had no means of her own, and had received nothing from the pursuer except the £15 awarded by the Lord Ordinary. She argued that a substantial award of expenses should be given.

Counsel for the reclaimer argued that the expenses to be awarded should be only the amount necessary to enable the respondent to present her case in the Inner House. Interim award of expenses in the Outer House was a question for the Lord Ordinary.

LORD PRESIDENT—I think that the question in regard to the expenses already incurred in the Outer House should be dealt with by the Lord Ordinary in the Outer House. A motion for expenses might have been made by the defender then, and whatever the result of that motion might have been I do not think that either practice or expediency would induce us at this stage to make an award of Outer House expenses here. The question remains whether we should now make an award of expenses to enable the defender to present her case in the Inner House. She holds the judgment of the Lord Ordinary, and therefore she will not incur the expense of printing but only the expense of instructing counsel to support the Lord Ordinary's judgment. We think these expenses may be met by an award of £20. We do not propose at present to make the payment of this sum a condition-precedent to allowing the hearing on the reclaiming-note to proceed, but we expect that it will be at once paid, and if it is not paid we may afterwards consider whether payment should not be made a condition-precedent to our hearing the pursuer on his reclaiming-note.

LORD ADAM—I have always understood that the motion for expenses was made for the purpose of enabling the wife—whether she be pursuer or defender—to lay her case before the Court. That proceeded on the principle that the whole property was in the husband, and therefore that the wife had no means. I further