

the issues for the trial of the cause: Of consent, appoint the cause to be tried at the ensuing sittings of this Division of the Court; and remit to the Auditor to tax the account of the foresaid expenses incurred by the pursuer, and to report."

Counsel for Pursuer (Respondent)—Nevay.
Agent—W. R. Garson, S.S.C.

Counsel for Defenders (Appellants)—Asher—
Lang. Agents—Campbell & Smith, S.S.C.

Friday, June 29.

FIRST DIVISION.

[Lord Young, Ordinary.

BEATTIE OR MASON v. MASON.

Husband and Wife—Divorce—Desertion.

Circumstances in which *Held* (rev. Lord Young—*diss.* Lord Deas) that a wife whose husband had gone abroad was entitled to decree of divorce.

This was an action of divorce for desertion at the instance of Mrs Beattie or Mason against James Mason, her husband. The pursuer and defender were married in 1857, and afterwards lived together in Perth, where the defender carried on business as a shoemaker. Thereafter they went to Australia, from which, after selling their effects there, they returned into Scotland and took up house in Arbroath. The defender, who kept a hotel there, fell into dissipated habits, and in July 1869 left his home and went to Australia. He did not ask his wife to accompany him. Several of his five children were at the time seriously ill. Since that time he had left his wife and family to be supported by her friends.

The defender did not appear, but a certificate that the summons had been personally served upon him at Warrnambool, Australia, was produced. It was communicated from Australia that he did "not intend to take any action in the matter."

Two letters were produced written by the defender to the pursuer at some length, and peculiar in language and in composition. The following are extracts from them:—

"Warrnambool, Oct. 6th 1873.

"My Dear Wife and Family,—You will think it strange of me in not writing you sooner, But I knew air I closed my last letter to you that there was something wrong, for it is now emphatically confirmed upon my mind, for thy language now is cruel cruel to me, for you say you have pledged your word no more to dwell with me, and you say your word you will not brake. . . . You tell me now I have no home for you, and if you come to me you loss your home. But where the heart is, there is always a home. So when ovr hearts and souls are thus divided, what pleasure is there now for me to live, or wheather shall I flee to rest my weary troubled mind," &c.

"Warrnambool, Aug. 10th, 7/74.

"My Dear Wife,—I received your letter dated Decem., and I cannot consent to any think you say in it, for though hath compleatly cut asunder thyself from me. I am going to say But little,

for least said is soonest mended, so therefore you need not expect me to lift my pen again to the, for I say those that bound the to a teather may the support, for no leaving flesh would always this endure. to think each day no brighter hopes would bring when cast adrift from all I Loved, and yet you would expect me to maintain. But that I ever shall refuse to do, since this I have no home for the. its you can send my children here to me, or they will have to stay till I send for them, for I see no youce in writing longer, for it can only sorrow bring. . . . A few more observations I will make. did you not no (know) air I left the that I should not return. why then take a solom promise that you should no more cross the sea, unless it were that you did not wish to live with me, and that it was planned from first to last. . . . you talk of me coming home, But I would not if you had ten times as much, for thy home shall never shelter me. Though I were at the door I should not enter, but that you need not fear. I should sooner death then crouch to any, or enter a place that was not meant for me. As this is the last letter my hand shall ever pen to the, so I say for ever fare the well, for I may be far from here eire this your eyes behold, so adue for ever more."

In addition to proving the circumstances stated above, the pursuer further deponed at her examination—"I remonstrated with defender about his leaving. He said he was going to Australia, and would send for me in a few years. I was willing to go with him if I could have taken the children. He did not offer to take us with him. He has not sent me the means of going to him in Australia. I have been quite willing to go if he had sent me the means, and I have communicated that to him many times. My father supported me and my family till his death in 1873. I have supported myself and them since by keeping lodgers. . . . He has sent me small sums of money, but not sufficient to support myself and family. Since July 1869 he has sent me only £8 or £9 altogether. I have not heard from him nor received anything from him for my support for about four years. *By the Court.*—I am thirty-nine years old. The last money defender sent me was £2 in February or March 1873. I don't think I have the letter sending it. It just said that he sent the money, and made no promise of sending me more. . . . Defender is forty-six years old. I have received no letter from him since 1873. I wrote him immediately after receiving that letter. I have not written to him since. (Q) Why? (A) Because he told me not to inquire after him. He said so in that letter, but I have not looked at it for a long time. He did not say what he was working at. As far as I recollect, the letter said I need not inquire after him, as he never intended to come home, and might be far enough away ere the letter reached me; and that he was in better health than he had been for years. [Shewn letter dated in August 1874]—I see that I last heard from him in 1874, not in 1873. I had no quarrel with him. We were on good terms down to his leaving this country. (Q) In that letter he acknowledges receipt of a letter from you in December, and says, 'I cannot consent to anything you say in it;' what was that? (A) I asked him to come home as he had said he could not send for me. He said he had not the means to bring us to Austra-

lia. He gave no other reason for not sending for us. (Q) What does he refer to when he says, 'Thou hath completely cut asunder thyself from me?' (A) Because I could not go out to him; that is what I took him to mean. (Q) Do you mean that he asked you to come out, and you refused to go. (A) No; I never refused. I cannot say what his meaning was, unless he thought that I could have come to him after my father's death, and was disappointed I did not come. (Q) Then he must have asked you to come out to him? (A) At first he asked me. (Q) When? (A) The first year or two after he went out; but he never spoke of sending me money to take me out. (Q) Did he press you very much to come at that time? (A) No. (Q) But you thought he was ill-pleased that you did not go? (A) No; he was disappointed. I repeatedly asked him for money; he said he had not got it. My father died in January 1873. (Q) He goes on in this letter to say, 'Those that bound thee to a tether may thee support;' who are these? (A) I asked him to come home, as I had a house in which we could live; and he meant that having a house in Scotland bound me. The house was left to me by my father—that is, I had the life-rent of it. Defender did not ask me to sell it. I told him how it was left to me. . . . (Q) 'I told thee in my last letter that if you did not give me a satisfactory reply I should not again say whether I was well or not;' what was it he wanted a satisfactory reply to? (A) About the property—telling him that it was in the hands of trustees, and that I had only a life-rent of it. He thought I could sell it, or raise money on it, and come out to him. He wanted me to do that, and I explained to him that I could not. The letters of October 1873 and August 1874 are the last letters I received from him. (Q) In the letter of October 1873 he says, 'Thy language now is cruel to me, for you say you have pledged your word no more to dwell with me, and you say your word you will not break;' what does that allude to? (A) It is nothing but his own way of speaking when I told him that I could not sell the property and come to him. He meant I had pledged my word when I said to my father that I would live in the house he left me. (Q) You told him in reply to his request that you should come out to him, that you had promised to your father to live in the house? (A) Yes. (Q) 'You tell me now I have no home for you, and if you come to me you lose your home; but where the heart is there is always a home.' You had refused quite distinctly to go out to him? (A) I told him I had nothing to go to him with. (Q) And that you had promised your father to live in the house he had left you? (A) Yes; and I asked him to come to it. (Q) In point of fact, you did refuse to go? (A) No; I told him I was quite willing if he sent the means. (Q) When did you tell him that? (A) In almost every letter since he went away. He told me he had no home where he was, and I wrote asking him to come to the home that I had."

Several other witnesses deponed that the defender had told them when he left for Australia that he would leave his wife and children to the care of her father, and other testimony corroborative of the pursuer was adduced.

The Lord Ordinary found that the pursuer had

failed to prove her averments of desertion, and dismissed the action.

The pursuer reclaimed.

At advising—

LORD MURE—After a careful examination of the whole evidence in this case I am unable to come to the same conclusion as the Lord Ordinary. I cannot find anything in the evidence to lead me to hold that the account given by the pursuer is not substantially correct, or to doubt her credibility. She was deserted by the defender when he left her in 1869; he never made any real proposal that she should join him, or sent her any money for that purpose. From the letters he wrote it is clear he never intended her to follow him. In these circumstances, there is sufficient to instruct desertion by the defender. The pursuer is distinct that when her husband left for Australia he did not offer to take any of his family with him. She says she was willing to go afterwards if he had sent her the means.

There is, further, the evidence of the witness Smith, to the effect that when the defender left the country his intention was to go and live by himself in Australia. This summons has been personally served upon the defender, and he is therefore aware that it has been brought, but he has taken no steps to defend himself. I think the pursuer has proved her case, and that she is entitled to decree of divorce.

LORD SHAND—I am of the same opinion. After the best consideration I have been able to give to the evidence I have come to the conclusion that wilful desertion has been clearly proved, and that the pursuer is entitled to decree of divorce.

There is no doubt that the pursuer's husband has absented himself from his wife for the requisite period of time. It appears that when he went abroad in July 1869, about eight years ago, he left his wife and five children behind him to find their own living as best they could. He had fallen into dissipated habits, and in very coarse terms he announced his intention to one of the witnesses of leaving his wife and children to be looked after by his wife's father. He was urged to remain, but declined; and from that day to this he has done nothing to support his family, for the miserable pittance of £3 or £9 which he has sent home during that time cannot be regarded as any real assistance. If nothing is shown to take off the effect of these facts, I think the inference must be that desertion is proved. If it appeared that there was any connivance on the part of the pursuer, or that there had been any arrangement with her that the defender should remain abroad, that would lead to a different result, but I find nothing to discredit the pursuer's testimony upon the point. In the pursuer's examination by the Lord Ordinary she says—"You had refused quite distinctly to go out to him? (A) I told him I had nothing to go to him with. (Q) And that you had promised your father to live in the house he had left you? (A) Yes; and I asked him to come to it. (Q) In point of fact, you did refuse to go? (A) No; I told him I was quite willing if he sent the means." He has not sent the means, and the only other question open is whether his absence can be regarded as temporary, or whether it ap-

pears that he has either cherished the intention of immediately returning to this country or of having his wife and family with him. The proof shows he has resolved never to return; and his extraordinary letters also state in substance that he has no home for his wife abroad, and that he refuses to maintain her there. The whole tone of the letters is such as to give the pursuer no encouragement to join him, and my belief on the proof is that if the pursuer did scrape together means sufficient to enable her and her children to join him, she would find herself in want and destitution when she reached Australia. It appears that she has been all along in very straitened circumstances, but that she is able to earn a livelihood in this country by keeping lodgers, in a small house of which her father has left her a life-rent only, which, it is explained, might bring a rent of about £12, and where she desires to have her husband to live with her. I see no evidence that she has the means of going abroad, but even if she had, I am satisfied she would only give up a home here to find herself homeless and penniless abroad; and, in the whole circumstances, I think she is entitled to the decree of divorce which she asks, on the ground of the wilful desertion of her husband.

LORD DEAS—A decree of divorce is always a very serious matter, and more particularly when it is for desertion. In that case it is entirely founded on the statute, which gives the remedy only if the desertion is persisted in with malicious obstinacy for four years. The question is, if that is so here?

I cannot say that I am surprised that the Lord Ordinary should not have given the grounds of his judgment in a note, because the case was one which proceeded in the absence of the defender, the pursuer alone appearing, and the proof being entirely in her power. The Lord Ordinary was obviously somewhat suspicious of the grounds of action, and therefore cross-examined the pursuer from time to time in order to find out the true state of matters. I find the grounds of his Lordship's opinion in these questions.

The law on the matter is well stated by Mr Erskine. The late Conjugal Rights Act (24 and 25 Vict. cap. 86 sec. 11) dispenses with the interim procedure which formerly took place through the medium of the Church, and which was exacting. But otherwise the law is still the same as ever. Mr Erskine (Inst. i. 6, 44) says:—“It would seem that the only persons who can be sued on the process for adherence are such as continue within the kingdom; for these alone are capable of receiving admonition from the Church, and of incurring through their wilful obstinacy the censure of excommunication. Action might perhaps be sustained at the suit of the innocent party against the deserter, though not residing in this kingdom, upon evidence adduced that the desertion was wilful, and that the defender left the kingdom and still remains abroad from a deliberate purpose of abandoning the conjugal society, lest such wrong should be left without a remedy. But, on the other hand, it may be safely maintained that without such evidence no action for adherence would receive support, either from equity or the analogy of law, against persons continuing abroad, even beyond the four years, since divorce is

not founded either in the divine law or our own upon the head of desertion, if it does not appear to be wilful.”

In the present case it is clear that the defender did not leave the country for the purpose of deserting his wife. There is no ground for supposing that that is negated by the letters. I cannot doubt that it was a subject of great vexation to him that he had not his wife with him. After the correspondence had been going on for some years, in which he always pressed her to join him, he writes a last letter, laying on her the blame, so far as there was any, of their being apart.

In those circumstances it is necessary for her to prove (1) that her husband was earning a wage which would enable him to send her means to take her to Australia; and (2) that she had not the means herself. That is not proved. In so far as appears upon the proof, the state of the facts is the other way. The burden of proof lay upon her, and unless she shows some sufficient ground for our believing that he had means, I do not think she has satisfied the requirements of the statute. A man is not to be divorced either on the ground of mental defect or of the composition of his letters. I am not surprised that the Lord Ordinary should have come to be of opinion that the pursuer has failed to establish her case, and I am disposed to think that the Lord Ordinary is right.

LORD PRESIDENT—I do not suppose there is any doubt about the law here. The only doubt is about the matter of fact. Notwithstanding what Lord Deas has said, I regret we have no note of the Lord Ordinary's views, because I have great difficulty in understanding what his ground of judgment was. If he had told us that he considered the pursuer unworthy of belief, and that upon that ground she was not entitled to have decree, that would have been very intelligible. But I can hardly suppose that was his reason, because, if so, he would have told us. We could not know it otherwise.

If, on the other hand, the pursuer's account is true, then I have no hesitation in agreeing with the majority of your Lordships. I think the result of the evidence is that the defender went to Australia with the intention of deserting his wife. She was left without support, and their children were ill at the time. He has done nothing for them since 1869; he will not come home; and he has not enabled his wife and family to go to him; she is unable of herself to do so. If these are the facts of the case, I think there can be no doubt about the law.

LORD DEAS—I think it right to say, in justice to the pursuer, that I do not at all disbelieve her.

Decree of divorce was granted.

Counsel for Pursuer—J. A. Reid. Agents—Renton & Gray, S.S.C.