

be said to be in wilful and malicious desertion in the sense of the Statute 1573, cap. 55.

The pursuer Catherine Young was married to the defender William Young on 29th January 1864, and they lived together until December 1877, when he left her. He remained away, and held no further communication with his wife, who made frequent inquiries after him, and in the course of these inquiries found that on the 10th August 1880 he had been convicted at Liverpool and sentenced to undergo a term of five years' penal servitude. The pursuer brought the present action for divorce on the ground of desertion, a period of four years from the date of the original desertion having elapsed.

Argued for the pursuer—It was true that the defender had been in prison since August 1880, but the desertion had wilfully and maliciously been begun before that time, and continues still to be of that character, as although he knew the address of his wife he had had no communication with her, which he would have been able to do even if in prison.

Pursuer's authorities—Fraser on Husband and Wife, 1213; *Muir v. Muir*, July 19, 1879, 6 R. 1353.

The Lord Ordinary issued the following interlocutor and opinion:—"Finds the libel irrelevant, therefore dismisses the same, and decerns.

"*Opinion.*—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 of 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 until 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."

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

Wednesday, July 5.

SECOND DIVISION.

(Before Lord Justice-Clerk Moncreiff, Lords
Craighill and Rutherford Clark).

[Sheriff of the Lothians.

MURRAY v. LEE.

Cautioner—Promissory-Note—Payment by Instalments—Breach of Contract on Part of Creditor Discharging Cautioner.

A granted to B, his creditor, a promissory-note payable at one month. C granted to B a letter of guarantee undertaking to see the sum for which the note had been granted paid at the rate of so much a-month. A failed to pay the first monthly instalment, whereupon B protested the note for the full amount, and poinded the goods of A, who in consequence became bankrupt. B then called on C to pay the amount in the promissory-note as cautioner. *Held* that B's proceedings against A constituted sufficient breach of the contract between B and C to discharge the latter's cautionary obligation.

In July 1881 Thomas Murray, farmer, Braidwood, the pursuer, obtained decree in the Sheriff Court of Edinburgh against Joseph Sharp, horse-dealer in Gilmerton, for £37, 4s. 10d. as the price of certain cattle supplied to him by the pursuer, and 18s. 3d. as the expenses of process, and on the following day the pursuer proceeded to charge Sharp to make payment within ten days. At the expiry of the charge, and when the pursuer was about to poind the effects of his debtor, the latter called at the office of the pursuer's agent, and proposed to pay a sum of £10 to account of the sums decerned for and the expenses of diligence; to pay a like sum of £10 monthly thereafter till the whole debt should be paid off; and to grant a bill along with the defender J. B. W. Lee, S.S.C., for payment of the full balance due to him. A promissory-note was thereafter granted to the pursuer by Sharp for £29, 4s. 1d. as the adjusted balance then due by him.

The promissory-note was not subscribed by the defender, who in lieu thereof wrote on August 13th the following letter to the pursuer's agent:—"Dear Sir,—Mr Joseph Sharp, Gilmerton, is due Mr Thomas Murray, farmer, Braidwood, Penicuik, some £29 or thereby, and proposes to pay it at the rate of £10 a-month by bill or otherwise. He has asked me to say that I will see the £29 paid

at the rate of £10 a-month from this date, and I undertake that it will be so paid by him.”

The note as actually drawn was at one month, but the defender maintained on record and in evidence that it was signed blank by Sharp on the understanding that it was to be drawn at three months. Sharp having failed to make payment of the first monthly instalment due by him, the pursuer, on 29th September, protested the promissory-note for the full amount, and charged upon it, and finally pointed Sharp's effects on 6th October. No intimation of the non-payment of the first instalment was made to the defender. Sharp thereupon took out sequestration.

The present action was raised by Murray in the Sheriff Court against the defender for payment of the amount in the promissory-note as cautioner of Sharp under the above letter of guarantee.

The defender pleaded, *inter alia*—“(4) In a single transaction, if the surety has engaged on the footing of a credit of a certain extent in point of time, the creditor can in no sense abridge the time without the surety's consent. (5) The pursuer's proceedings being in breach of the arrangement to take £10 a-month, the defender ought to be assoilzied.”

The Sheriff-Substitute (HAMILTON) found that the letter of guarantee founded on applied to the debt sued for, and that the defender had not established any sufficient grounds for refusing to pay said debt; and adding the following note:—“The Sheriff-Substitute does not care to inquire whether when Sharp signed the promissory-note in Mr Forsyth's office it was blank as regards the term of payment, because he is satisfied that the note as actually drawn was in accordance with the arrangement between the parties. The pursuer was entitled to demand the fullest security for his debt. A three months' bill would have been of no use to him. What he wanted was a document upon which he could operate at once if the first monthly instalment were not paid when due, and such a document Sharp was not in a position to decline to give.

“If the Sheriff-Substitute is right in this view there is an end of the case. When Sharp failed to meet the first monthly instalment the pursuer was entitled to do diligence upon the promissory-note.

“There is nothing in the objection that the defender did not get timeous notice of the non-payment of the instalment, or of the dishonour of the promissory-note. The pursuer was not bound to give him any special notice.”

The defender appealed to the Court of Session.

Authorities—Bell's Comm. i. p. 392; *Bacon v. Chesney*, 1 Starkie, 192.

At advising—

LORD CRAIGHILL read the opinion of the Court, in which the LORD JUSTICE-CLERK and LORD RUTHERFURD CLARK concurred, as follows:—In the action which has been brought before us by this appeal the defender, as cautioner for a principal debtor of the name of Sharp, has been sued for the sum of £29 odd, £10 whereof is said to have become payable on 10th September 1881, other £10 on 10th October following, and the balance on the 13th November last. The defender admits the granting of his obligation, but defends himself from liability on the ground that the conditions of his cautionary have not been

fulfilled. The Sheriff-Substitute decreed against the defender, and hence the present appeal. The case is one of nicety and difficulty, and my opinion upon it has vacillated, but in the end I have come to the conclusion that the pursuer has broken his contract with the defender, and consequently is not entitled to recover the sum sued for.

The result depends (1) on the contract between the pursuer and the defender, and (2) on the proceedings taken against Sharp by the pursuer. We have nothing to do with the incident of a similar contract between the pursuer and Sharp, the principal debtor. Was there a contract between the pursuer and the defender as to the way in which the pursuer's debt was to be recovered from Sharp? If there was, what was that contract? These are the cardinal points, and once they are fixed the case is as good as determined.

The contract is set forth in the letter of 13th August 1881. My reading of this letter brings out an obligation on the part of the pursuer to exact payment from Sharp only by monthly instalments, and even if there should be a failure on the part of Sharp to pay as the instalments became due the pursuer was not to be entitled to turn upon Sharp for immediate payment of the full debt, just as if an arrangement for payment by instalments had not been concluded. This, no doubt, was a limitation of the rights which, apart from contract with the defender, the pursuer might have exercised; but then the pursuer obtained as the consideration for this surrender an obligation from the defender to see paid as they became exigible the instalments by which payment of the debt had been promised.

This being, as I think, the contract, the question next to be considered is, Whether that contract was observed? I am of opinion that it was not. Upon the noting of the bill I make no observation; but on the 29th of September the protest for non-payment of the full contents was recorded, and on the 5th October the goods of the principal debtor were pointed; other creditors took alarm, and the consequence was the sequestration of Sharp's estates. This result probably was injurious to the defender. Had things been allowed to proceed in the way anticipated and contracted he might have been able to recover from Sharp such instalments of the debt as he had paid, whereas by sequestration the most that could be hoped for would be the dividend which the estate might afford. But breach of contract is enough for the defence, and this, I think, was committed when the pursuer proceeded against the principal debtor for the whole debt instead of demanding payment from the defender of the first instalment which Sharp had failed to pay.

For these reasons I think the appeal should be sustained, the interlocutor decreeing recalled, and the defender assoilzied.

LORD YOUNG was absent.

The Lords sustained the appeal, recalled the Sheriff-Substitute's interlocutor, and assoilzied the defender.

Counsel for Pursuer (Respondent)—Rhind. Agent—Party.

Counsel for Defender (Appellant)—Nevay. Agent—David Forsyth, S.S.C.