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 multiplepoinding 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-

action, and that on the facts proved that *onus* had not been discharged.

This was an action of multiplepoinding raised in name of the North British Railway Company by Robert White, a creditor of a person named Charles Seton, for the purpose of having the right to a quantity of furniture, arrested by him and by others of Seton's creditors in the hands of the railway company, determined.

David R. Roberts, as previously reported, though not called in the multiplepoinding, appeared, and objected to the competency of the action on the ground that the furniture was his, and could not competently be arrested for a debt of Seton's, but the Second Division on 4th November 1881 (*ante*, vol. xix. p. 59) in an appeal at his instance sustained the competency of the process and remitted to the Sheriff to proceed with the cause. Roberts now claimed the whole furniture forming the fund *in medio*, averring that on the 19th of March 1881 he had bought the whole of it at Dublin from Seton, who was his brother-in-law, at the price of £135, 10s., and that Seton had granted him a receipt for £135 as the price of the whole of it, which receipt declared that it was sold to him with full power to remove it when it suited him.

Claims were also lodged by Robert White, the real raiser, David W. Wilson, William Massie, and other creditors of Seton. These claimants had used arrestments on the said furniture in the hands of the nominal raisers. They alleged that he was the real owner of the furniture. They denied that any *bona fide* transaction was entered into between Seton, the common debtor, and Roberts. They averred that, on the contrary, Seton was at the date of the alleged sale insolvent and notour bankrupt, and was fleeing from the diligence of his creditors; that Roberts was his brother-in-law, and a conjunct and confident person with him; and that the pretended sale was a collusive device resorted to for the purpose of defeating their diligence.

The Sheriff-Substitute (Hamilton) allowed the claimants other than Roberts a proof of their respective averments, and to Roberts a conjunct probation.

Thereafter on 4th August 1882 he found "that the defender David R. Roberts has failed to instruct a sufficient legal title to the furniture in question: Therefore repels his claim, and ranks and prefers the other claimants *pari passu* upon the fund *in medio*, in terms of their claims; remits to the Sheriff-Clerk-Depute to make out a scheme of division: Finds Roberts liable to the other claimants in expenses, including those of the appeal to the Court of Session" [for which the interlocutor of the Second Division had given him power to decern].

He added this note (from which and from the opinion of the Lord Justice-Clerk the import of the proof clearly appears):—"Roberts claims the furniture as his property in virtue of an alleged sale to him by the common debtor, the terms of which he says are contained in the receipt. At the date when this receipt bears to have been granted (19th March 1881), the common debtor, who is Roberts' brother-in-law, was being pressed on all sides by his creditors, and was notoriously insolvent. The transaction, therefore, is one struck at by the Statute 1621, c. 18, and it was incumbent on Roberts to prove, by clear and independent evidence, that the price said to have been given for the furniture was 'really paid.' This he has failed to do, his own oath and the production of his bank pass book (which really proves nothing) being quite insufficient for the purpose.

"Upon this ground alone—the failure to satisfy the requirements of the Statute of 1621—Roberts' claim must be repelled. But there are other circumstances, either admitted or proved, which tend to throw suspicion upon the transaction between him and the common debtor:—(1) The receipt alone referred to is vitiated as regards the date upon the stamp. (2) Though the furniture is said to have been sold to Roberts on 19th March 1881, it remained in the possession of the common debtor, or at least of his wife and family, until the 2d of May following, and there is no proof of delivery to Roberts even then. No doubt the packages delivered to the railway company on 2d May bore the address 'Roberts, Dublin,' but, in the first place, this does not prove that the furniture really belonged to him, and, in the second place, the common debtor also was in Dublin at that time, and there is evidence that address labels bearing his name were originally put upon the furniture, but were changed for others when it was seen that the removal was being watched. (3) How can it be said that this was a *bona fide* sale when it is admitted that the furniture had previously been assigned to other parties?

"Roberts' claim being out of the way, the fund *in medio* falls to be divided among the other claimants. At the date of the arrestments used by them the common debtor was notour bankrupt."

Roberts appealed to the Court of Session, and argued—This was a case where the claimant's oath, fortifying the acknowledgment of the seller, was sufficient to rebut any presumption arising against the transaction under the Statute 1621, c. 18; Bells' Com. (M'Laren's ed.), ii. 179, footnote.

At advising—

Lord Justice-Clerk — The Sheriff-Substitute has found that Roberts has failed to show that the alleged sale was a *bona fide* transaction. The *onus* was placed on him of doing this, and I think very rightly, because he is a "conjunct and confident" person in the sense of the statute, and Seton was at the time insolvent. I am of opinion that the Sheriff has taken a right view of the case. Undoubtedly there are suspicious circumstances surrounding the transaction, and they are referred to by the Sheriff-Substitute in his note—first, the relationship of the parties; second, the manifest insolvency of Seton, and the necessary knowledge of this which Roberts had; third, there is no proof of delivery to Roberts even on the 2d May. The packages delivered to the railway company may no doubt have borne this address, but this does not prove that they really belonged to him, and there is evidence that address labels bearing Seton's name were originally put on the furniture, but were changed for others when it was seen that the removal was being watched. On the whole matter, I am not disposed to distrust the Sheriff-Substitute's judgment.

Lord Young—I am exactly of the same opinion.

There is a statutory presumption to begin with against a conjunct and confident person receiving property after the notour insolvency of the person who transfers it. It is of course only a presumption, and may be overcome. Now, the Sheriff-Substitute allowed the creditors of the insolvent to prove their averments which raised this statutory presumption, and further allowed the appellant a conjunct probation. This was very proper I think, for it gave the latter an opportunity of removing, if he could, the presumption against him. Now, I am of opinion with the Sheriff that he has not satisfactorily removed it. He has failed satisfactorily to show that the sale was a *bona fide* transaction. We have nothing from him but his own statement.

Lord Craighill—I am of the same opinion. The burden of proof lay with Roberts. Once it was established that he was a conjunct and confident person, then the statutory presumption became applicable. The question decided by the Sheriff-Substitute was, whether Roberts had shown there was any reality in the sale. Now, all that is adduced for this purpose is his own oath, and while I recognise the authority of Prof. Bell when he says that there may be cases where the alleged purchaser's oath is sufficient, I am of opinion that this is a case outside that *dictum*, because (1) there are suspicious circumstances surrounding the transaction, and (2) I think that there was other evidence available to the appellant for corroboration of his own statement. This has not been adduced, and of course we must bear this in mind when we consider whether he has discharged the *onus*.

Lord Rutherfurd Clark—I am of the same opinion. It is very clear that the transaction has been brought within the statute, and the appellant has failed to discharge the *onus* thereby thrown on him of overcoming the presumption against him.

The Court dismissed the appeal and affirmed the judgment of the Sheriff-Substitute.

Counsel for Appellant—Nevay. Agent—Robert Broatch, L.A.
Counsel for Respondents—Shaw. Agent—Peter Morison, S.S.C.

Friday, November 17.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

STEWART AND OTHERS *v.* BROWN AND OTHERS.

Property—Heritable Creditor—Sale under Bond and Disposition in Security—Relative Rights of Prior Creditor and Postponed Creditor—Disposition ex facie *Absolute—Title to Sue*—Mora *and Acquiescence—Heritable Securities Act* 1847 (10 *and* 11 *Vict. c.* 50), *sec.* 3.

The representatives of the holder of an *ex facie* absolute disposition of certain subjects which was qualified by a back-bond, and formed in reality a postponed security, brought in 1875 a reduction of two dispositions of these subjects which had followed on a sale in 1866 at the instance of two prior bondholders, on the ground that the provisions of the Heritable Securities Act 1847 had not been complied with, in respect there had not been proper intimation and advertisement of the sale, and that an adjournment of the sale "to the day of " which had been made was invalid. *Held* that the pursuers, who were not proprietors of the subjects, had no title to sue, and *separatim*, that in any event they would have been barred by delay in bringing the action, the facts on which it was founded having been all along within their knowledge.

Heritable Creditor—Intimation and Requisition for Payment—Premonition—Adjournment of Sale.

Observations on (1) the duties in relation to postponed creditors of a heritable creditor selling under powers in his bond; (2) the effect of an intimation and requisition for payment; and (3) the meaning of the term "adjourned sale."

Opinions that where after premonition property has been exposed for sale, and in consequence of no sale being effected the sale is adjourned for such a time that a subsequent exposure is rather a new sale than an adjourned sale, fresh premonition to the debtor might be necessary.

On 15th May 1854 Thomas Pearson, clothier in Glasgow, granted two bonds and dispositions in security over certain subjects in Glasgow belonging to him, and known as the Arcade property, for £5000 each, in favour of A. J. Brown of Balloch, and the trustees of the deceased Mrs Meiklam respectively. The grantees were infeft on the precepts of sasine in the bonds. The said bonds and dispositions in security contained all usual and necessary clauses, including a power of sale, and were declared to be *pari passu* securities; at the date of granting them the said Thomas Pearson was infeft in the subjects conveyed. By disposition dated 21st December 1852 Pearson disponed the said subjects to John Stewart, but excepted from the warrandice the foresaid bonds. The said John Stewart was infeft in said lands conform to instrument of sasine dated 21st January 1856. The disposition to him, however, though *ex facie* absolute, was really in security, being qualified by a back-letter dated 21st December 1855, signed by Stewart and Pearson, and which bore that the said disposition was to be held by John Stewart in security, and for payment and relief of such sums of money as he had advanced or might thereafter advance to Pearson, and of all obligations undertaken, or that might thereafter be undertaken, by him for Pearson. This back-letter was never recorded. By disposition dated 24th April 1856 John Stewart disponed the Arcade property to the Western Bank, who were infeft on 4th June 1856, but this conveyance, though *ex facie* absolute, was also in security only for debts due by John Stewart. John Stewart thereafter became bankrupt, and was sequestrated on 16th January 1861; in October 1863 he was discharged without a composition, but was retrocessed in his whole heritable and moveable estate in July 1866 and December 1872. The Western Bank, by disposition and assignation