Alexander Thoms died on 15th August 1864. The complainer pleaded compensation in respect of this sum of £500, due to her under these documents, with interest from 15th August 1866, two years after Alexander's death.

The respondent denied that these documents were binding upon him; and explained, that on the 24th August 1866 the complainer raised, in the Sheriff-court at Cupar-Fife, an action against the respondent for payment of the said sum of £500, with interest; that, on 26th December 1866, the respondent put in defences to the said action; and that the complainer has taken no further steps in the said action, except to obtain every three months a renewal order to prevent the case from being dismissed under the Sheriff-Court Scotland Act. It is further explained, that the complainer stated no plea of compensation or retention in the action at the respondent's instance against her above mentioned.

He pleaded—"(3) The alleged claims at the complainer's instance against the respondent not having been pleaded in the action at the respondent's instance against her, or against the petition for interim execution, cannot now be competently insisted in.

"(4) The alleged counter claims at the complainer's instance being illiquid, unconstituted, and denied, compensation or retention in respect thereof is incompetent."

The Lord Ordinary (Ormidale) refused the note of suspension with expenses.

The complainer reclaimed.

Shand for reclaimer.

Solicitor-General (Millar) and Adam, for respondent, were not called on.

At advising—

Lord President—I do not know what your Lordships' view of this case may be, but it appears to me very clear that this is not a liquid document of debt. This document, which is signed by the respondent, the charger, is as follows (*reads*). It is clear that this is not a liquid document of debt, for there is no creditor, and then when you find a creditor set up by this assignation indorsed in the document, that raises a number of considerations which leave me in no surprise that it should be the subject of an action. It might raise some very delicate questions. It has been made the subject of an action in the Sheriff-court of Fife, and that action has been in dependence for two years. It is impossible to assent to the contention of this complainer that this is a liquid document of debt on which compensation may be pleaded either before or after sentence. And this matter is complicated by it being a plea after sentence. My simple ground of judgment is, that this is not a liquid document.

Lord Curriehill concurred in holding that this was not a liquid document of debt, as it neither contained the name of a creditor nor an averment of date.

Lord Deas—I have some difficulty in saying absolutely that this is not a liquid document of debt. It is quite true that the document itself is not, but we must take the probative assignation too, which makes it payable to the lady. Taking these two together, there is nothing to prevent this from being a liquid document, provided it is admitted to be holograph, but the vagueness as to the term of payment. I don't know that this in itself is sufficient to support your Lordships' views. But supposing that matter got over, every liquid document of debt cannot be pleaded in this way against a charge on a bill under decree. Questions may have arisen as to that liquid document, which may prevent it from being used in that summary way. It is impossible to look at the facts without seeing that very important questions have arisen as to whether this document can be enforced; and if we did not know enough to see that, it would be clear that there has been an action to enforce it. And when we see that there has been a litigation for two years, is it possible to say that it is within the category of liquid documents as to which there is no dispute? There may be other serious questions raised. There has been great delay in enforcing this document, and though we were told that the reason for the delay did not appear, I think if we look at the facts we may easily see how it might be expedient not to push on the matter. My only difficulty is as to which, out of so many grounds, our judgment should rest.

Lord Ardmillan thought that this could not be called a liquid document of debt, and therefore concurred with their Lordships. If this had been a proper bill of exchange, he thought there would be some difficulty in holding that it was too late for the complainer to state the plea.

Agents for Complainer—Hill, Reid, & Drummond, W.S.

Agent for Respondent—A. J. Napier, W.S.

Saturday, May 30.

A. *v.* B.

Husband and Wife—Divorce—Desertion—1573, c. 55. Action of divorce by a wife against her husband on the ground of desertion, *dismissed*, on the ground that the pursuer had failed to prove desertion in the sense of the Statute 1573, c. 55.

A wife brought an action of divorce against her husband on the ground of desertion. It appeared that the parties were married in 1857, and lived together till October or November 1862. At the latter date they were abroad. The wife and children then returned to Scotland, the husband promising to join them in the following spring. The husband did not return, but went to the United States of America, and his friends were unable for a long time to discover where he was. The pursuer alleged that the defender had undutifully and unnaturally, as well as wilfully and maliciously, deserted the pursuer, his spouse, her society, fellowship, and company, and had, from and since the said month of November 1862, withdrawn, absconded, and withheld himself from her. He had contributed nothing towards the maintenance and support of her or her children during all that time, and pleaded that she was entitled to decree of divorce.

The action was undefended. A proof was allowed. Two letters were produced, written by the defender in March 1867, the one to his sister the other to his wife. In these letters the defender lamented his continued absence from his relations, and expressed a hope of being able to do something for them when he had bettered his position. The Lord Ordinary (Jerviswoode) found that the pursuer had failed to prove as matter of fact that the defender had deserted the pursuer in the sense of the Statute 1573, cap. 55, and therefore dismissed the action.

The pursuer reclaimed.

BALFOUR for reclaimer.

At advising—

LORD PRESIDENT—I see no ground for differing from the Lord Ordinary. A change has been introduced, with regard to the law of desertion, by the Conjugal Rights Act. A different kind of remedy has been provided from that contemplated by the old Statute. By the first section a wife is to be entitled to an order of protection, but that is not the case before us. The kind of desertion here in question is not described in the Conjugal Rights Act at all. We must go back for a description of this species of desertion to the Act 1573, c. 55, and there the language is very explicit, for it declares that if either the husband or wife "diverts frae other's companie without ane reasonable cause alledged or reduced before a judge, and remains in their malicious obstinacy be the space of foure zeires, and in the mean time refusis all privie admonitions—the husband of the wife, or the wife of the husband—from due adherence; that then the husband or the wife shall call and persew the obstinate person before the judge ordinar for adherence." All that takes place after this is altered by the recent Statute; many of the preliminaries are dispensed with, but what I have read is still in force, and contains the species of desertion. There must be desertion without reasonable cause for four years, and during that time the husband must remain in malicious obstinacy. The question is, is this the case here? It seems to me that we have merely the element of desertion. There is no doubt of the bad habits of the husband; but his continued absence does not seem to be the result of malicious obstinacy, for he would probably be glad to come back if he had the necessary means. And where are the invitations to come here, and the complaints by the wife to the husband that he is absent from her society? There are none of these elements in this case. There is nothing but the single element of absence. I am for adhering.

LORD CURRIEHILL concurred.

LORD DEAS—Whether it would be reasonable that the wife should get divorce in such circumstances, or not, it is certainly not the law. Mere absence will not do. There may be long-continued absence without any explanation, which may give rise to the presumption that it is malicious and wilful. But this is not a case of that kind. The absence of the husband in this case is explained in a way that is not creditable to the character of the man, but it shows that his purpose is not to get quit of his wife. His habits are unsteady, and he goes and enlists in a foreign army. He knows his own weakness, and laments it. But that is not malicious desertion in the sense of the Statute. It is quite true that, as we lately held in the case of *Chalmers* (*ante*, p. 357), it will not do for a man to turn round and say,—I am willing to live with you. That is not enough. But the question is whether there is any *mala fides* here? I think not. It is evident, from his letter, that the man is not pretending, but is expressing his real feelings when he laments that he must live away from his wife.

LORD ARDMILLAN concurred.

Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, June 2.

OUTER HOUSE.

(Before Lord Kinloch.)

RANDALL *v.* JOHNSTON.

(*Ante*, vol. iii, 322.)

Lawburrows—Suspension—Malice—Relevancy. Held (by LORD KINLOCH, and acquiesced in,) that malice and want of probable cause are a relevant ground of suspension of lawburrows. After a proof, reasons of suspension *repelled.*

This was a suspension presented by the Reverend Edward Randall, of St Ninian's Chapel, Castle-Douglas, of a charge given him to find caution of lawburrows that the respondent, General Thomas Henry Johnston, of Carnsalloch, "shall be kept harmless and scatheless in his body, possessions, goods and gear, and in noways molested or troubled therein by the complainer." In March 1867 the Court, recalling an interlocutor of the Lord Ordinary, remitted to his Lordship to pass the note on caution. The Lord Ordinary accordingly passed the note on caution of lawburrows, binding the complainer to keep the peace towards the respondent in common form, under a penalty of £50 sterling *ad interim*, and until the note of suspension was disposed of. A record was made up in the suspension, and thereafter, on 28th June 1867, the Lord Ordinary (KINLOCH) found that the suspender had averred competent and relevant grounds of suspension, and allowed a proof, appending to his interlocutor the following note:—

"The process of lawburrows is one of the most ancient known to our law. It had its origin in times of barbarism and violence, when life was continually in peril. It may be fairly said to be unsuitable to the condition of modern society, in which a well regulated police affords amply sufficient protection. But it holds its place in the law, and must be dealt with according to its own legal rules.

"It is not matter of dispute that to obtain letters of lawburrows, or the equivalent warrant from an inferior judge, nothing more is requisite in the general case than the oath of the applicant that he dreads bodily harm at the instance of the party against whom the application is made; and that no further proof is requisite,—as in the present case a lieutenant-general in the army may, on such an oath, at once obtain a warrant of lawburrows against a minister of the gospel. At the time of origin of the proceeding, it was probably felt that to require a proof as to the threatened injury before the lawburrows was granted, would frustrate the object in view. It is undoubtedly no defence against the issuing of the warrant, on the due oath being emitted, to say that there is no good ground for the application. It probably follows as a necessary consequence, that to allege that no good ground existed for the application is unavailing to obtain suspension of its effect from a higher tribunal; for there seems no good reason why this objection should be more admissible in the court of review than in the primary jurisdiction.

"But the ground of suspension now presented goes a good deal further. The suspender offers to prove that the application was made maliciously and without probable cause. He does not merely say that it was groundless; but that it had not even