

disregarded, and direct the said Justices in Quarter Sessions accordingly."

Counsel for Appellant—Rutherford. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for Respondents—Mackintosh—M'Kechnie. Agent—W. G. Roy, S.S.C.

Thursday, June 23.

SECOND DIVISION.

[Lord Adam, Ordinary.

STEVENS v. STEVENS.

Husband and Wife—Divorce for Desertion—Wilful and Malicious Desertion—Reasonable Excuse for Absence of Deserting Spouse—Bodily Fear such an Excuse.

Held (rev. Lord Adam) that a wife having left her husband's house and remained absent for more than four years with reasonable excuse, through fear caused by the threats and violent treatment of her husband, was therefore not in that wilful and malicious desertion which warrants decree of divorce.

Opinion (per Lord Young) that conduct on the part of a husband not sufficient to ground an action of separation and aliment at his wife's instance, may be sufficient excuse for his wife's absence to constitute a defence to an action for divorce on the ground of desertion.

William Stevens, West Calder, brought this action of divorce on the ground of desertion against his wife Catherine Duncan or Stevens. Mrs Stevens defended the action, admitting that she had been absent from her husband's house for eight years, and making no offer of return to him, but alleging that she had left her husband's house in consequence of violence and threats on his part which put her in bodily fear.

She pleaded—"The defender having never deserted the pursuer, but having been driven out of the conjugal residence under threats and in danger of her life, was entitled to absent herself from the pursuer's society and fellowship."

At the proof the pursuer adduced his own evidence and that of two servants who had been in his employment before his wife left him, and also that of two neighbours, to prove that the defender had not been treated with the cruelty which she alleged as an excuse to justify her absence from him. The pursuer also suggested that the real reason for the defender's departure was that she had so mismanaged a grocery business belonging to him of which she had sole charge that very heavy liabilities were becoming due, and that she was unwilling to await the inquiry into the reasons for which these obligations had been incurred.

The defender, besides her own evidence, adduced in support of her averments the evidence of her daughter and son-in-law, the nature of whose evidence will be found summarised in the opinion of the Lord Justice-Clerk. There was a conflict of evidence as to an occasion in March 1873 (two months before defender left her husband) when she was proved to have spent at least part of a night in the storehouse belonging to the shop, the question being whether or

not she had been obliged to take refuge there because her husband had assaulted her and put her out of the house.

The Lord Ordinary on 19th May 1881 found that the defender "wilfully deserted the pursuer, his society and fellowship, on 15th May 1873, and has continued in wilful desertion of the pursuer since that date, being upwards of four years," and pronounced decree of divorce.

The defender reclaimed.

Authority—Winchcombe, May 26, 1881, *supra*, p. 517.

At advising—

LORD JUSTICE-CLERK—It is very truly said by the counsel for the pursuer and respondent that in a question of this kind it is well to lean to the view of the Lord Ordinary who saw the witnesses. But at the same time the pursuer here is suing an action of divorce and asking us to cancel the matrimonial bond which has subsisted for so many years, and he must satisfy us on the facts proved that his wife has maliciously deserted him. In a question of that kind it is relevant to inquire whether the husband so behaved as to found a reasonable excuse for the absence of his wife. I am far from saying that mere hard words, or cold looks, or annoyance, or even threats not deliberate, would suffice to form such an excuse; but the allegation here is that the wife was in fear of her life owing to her husband's conduct, and such, I think, must be taken to be the issue really before the Lord Ordinary. I think it is clear on the evidence that the wife had a hard life of it with this man, that he left her the hard work of the business, and took out of it what he wanted and used it in horse-racing, intemperance, and intemperate living, while she had only sufficient for her own subsistence and clothing, and was subjected to constant threats and violent language. If a man in that position comes here to say that he has done his duty by his wife, and has not treated her with violence, he has something to prove. I say nothing of the evidence of the defender herself, though her testimony seems credible, but the son-in-law Kay, and also his wife, the pursuer's daughter, if they are to be believed, prove the defender's case, for both of them came to the conclusion that the defender was in reasonable fear of her life. Kay, who lived fifteen months in the pursuer's house and had good opportunities of knowing the relations between the parties, says—"They were always contending about something. He was always blackguarding her about something in connection with the business. I heard him say several times he would blow up the house about her ears. . . . He was very violent in his language and conduct towards her. She seemed frightened for him. From what I saw I think she was at times afraid of her life from his violence. He appeared always to be getting more violent until she went away." That is corroborated by Mrs Kay, who says—"My mother seemed to be afraid of him. He never threatened me, but I have been afraid that he would do something during the night. I have heard him say he would shoot the whole lot of us. I have several times heard him say that if he knew where she was he would go and rip her up. I have heard him say so when he had a knife in his

hand in the butcher's shop." And the woman herself also says that she believed his threats to be serious. Against that indeed we have the evidence of the pursuer himself and the two servants, who say that nothing of that kind took place, and that if there had been any such conduct on the part of the husband they must have seen it. If so, the statements of Kay and his wife must be false. Now, I think that on this matter the question concerning the pursuer's being obliged to take refuge in the storeroom is a test of the credit to be given to these conflicting statements. We have the evidence regarding it of the defender, of Kay, and of the servant Noble. Now, Noble says there was never any quarrelling, and that the defender was never put out of the house by the pursuer, and never was in the storeroom; she specially denies that she went to tell Kay her mistress was in the storeroom. And yet it turns out that, according to the pursuer, what happened was that in March 1873 he himself went to get Kay to come to the house, that Kay was trying to get her to tell what the debts were, and that rather than tell she went out of the house and was afterwards found in the storeroom outside. Now, Kay depones—"I remember Noble coming up one night and telling me her mistress was in the storeroom. I went and found her there. Pursuer was in the house at the time. No one but myself took her out of the storehouse. I took her into the house. Defender on that occasion told me to look at her throat and I would see the mark of his hands upon it. I did not look. This was shortly before she left her husband." It is impossible to reconcile that with the statement of Noble, and I see no reason to doubt Kay. This, I think, indicates that Noble, and not Kay, is untrustworthy. Taking it as the test, it inclines me to give more weight to the defender's evidence than the pursuer's, and on the question of whether or not the defender was reasonably in fear of serious bodily injury owing to the conduct of her husband, to decide in her favour. I do not say anything on the question whether a wife requires a defence to an action of divorce—the very same grounds which she requires to enable her to raise an action of separation and aliment, but in this case I am of opinion that the pursuer has not made out a case of malicious desertion by the defender.

LORD YOUNG—[After concurring with the Lord Justice-Clerk on the import of the facts.]—There is no occasion to decide here whether, had the wife being suing an action of separation and aliment, instead of defending an action of divorce, she would have succeeded or failed. My impression is that she would have succeeded, but even the expression of that impression is superfluous, and there is not occasion to express an opinion on the point, for it is well settled that a woman may defend herself against a suit of divorce for wilful and malicious desertion on grounds and by means of evidence not sufficient to support an action at her instance for separation and aliment. The Court will not pronounce decree of separation and aliment except on the ground of personal cruelty, and I think something short of that will entitle a woman to defend herself against divorce for wilful and malicious deser-

tion. The law is well stated, I think, in Fraser on Husband and Wife, p. 1211. By the old law, before the Conjugal Rights Act of 1861, a divorce for desertion could not be obtained without being preceded by an action of adherence. To that action all defences were competent which would justify judicial separation, or even less then would be required for the latter action. If, therefore, the pursuer was guilty of cruelty or adultery, or (in the case of the wife) of antenuptial incontinence, he or she could not demand adherence, and therefore divorce on account of the defender's non-adherence or desertion never could be obtained. There may, I think, be reasonable cause for a wife's absence short of what would warrant this Court in granting a judicial separation.

LORD CRAIGHILL concurred.

The Court recalled the interlocutor of the Lord Ordinary and assolized the defender.

Counsel for Pursuer and Respondent—J. A. Reid. Agent—Henry Buchan, S.S.C.

Counsel for Defender and Reclaimer—J. Campbell Smith. Agent—A. Nivison, S.S.C.

Thursday, June 23.

SECOND DIVISION.

[Sheriff of Fife.

ANDERSON v. EARL OF ELGIN.

Landlord and Tenant—Repairs Bargained for under Lease.

The appellant, tenant of certain brewery buildings, the property of the Earl of Elgin, at Brucehaven, Dunfermline, brought this action in January 1881 to have the Earl ordained to repair the subject of the lease, or failing his doing so, for authority to do so at the Earl's expense. The lease, which was dated in January 1880, between the parties provided that the landlord should make certain specified repairs on the malt barns, the tenant agreeing thereafter to accept the whole subjects as in "sufficient habitable and tenantable condition and repair." The appellant alleged that the stipulated repairs had never been made, and this the defender denied. The Sheriff-Substitute (GILLESPIE) assolized the defender. The Sheriff (CRICHTON) adhered; and the Court affirmed the decisions of the Sheriffs.

Counsel for Appellant—Rhind—Shaw. Agents—Begg & Murray, Solicitors.

Counsel for Respondent (Defender)—Trayner—Jameson. Agents—Thomson, Dickson, & Shaw, W.S.