COURT OF SESSION.

Thursday, May 26.

SECOND DIVISION.

WINCHCOMBE *v.* WINCHCOMBE.

Husband and Wife—Divorce for Desertion—Cruelty—Deserted Spouse not Willing to Adhere.

A wife who had been for ten years deserted by her husband, *found* (*rev.* Lord Adam) entitled to decree of divorce, though she stated in evidence that in consequence of the usage she had received from her husband during their cohabitation she was unwilling to adhere to him both at the date of the desertion and at the date of the action.

This was an action of divorce on the ground of desertion at the instance of Mrs E. J. Barr or Winchcombe against her husband H. H. Winchcombe. The pursuer averred that she had been deserted by the defender in the year 1870, and that she had not since seen him nor been asked by him to return to cohabitation. The defender appeared at the diet of proof fixed by the Lord Ordinary, and tendered defences at the bar, in which he stated that the cause of his separation from his wife was the interference of her relatives, who had persuaded her to leave his house and take up her abode with an aunt; that he was now resident in France, whence—and also from Cardiff, at which place he had resided for a short time about 1873—he had addressed to her several letters asking her to return to him. He further averred that in the year 1880, before this action was raised, he had written two letters to his wife's agents making offers of reconciliation. These two letters were produced in process. He did not appear to depone at an adjourned diet of proof, nor was any evidence led for him. The pursuer deponed that he had deserted her in Greenock in 1870 after selling all the household furniture, and that since then she had resided with her relatives, and supported herself and the child of the marriage by her own exertions. She also deponed that she had had no communication from him since that time. In answer to questions by the defender's counsel as to whether she had been willing in 1870 to adhere to him, she deponed that she was not, because he had treated her with such violence that she was afraid of him, but that had she felt herself safe from violent treatment by him she would have been willing to go back to him. Further, she deponed—"I am not now willing to adhere to him if he is willing to take me back."

The Lord Ordinary (ADAM) assoilzied the defender, adding this note to his interlocutor:—"The Lord Ordinary does not doubt that the defender deserted the pursuer in May 1870, and has remained away from her ever since, without contributing to her support or to that of their son. *Prima facie* that state of matters would appear to entitle her to divorce, but it also appears that she is not, and never has been, willing that the cohabitation between them should be resumed, the reason being that while they lived together he had behaved to her with great cruelty. In other words, she acquiesced in the separation. It may seem to be a hard state of the law that she would have been entitled to divorce had he not behaved cruelly to her, but having behaved so cruelly to her that she is glad to get rid of him, she is not entitled to divorce.

"The law, however, afforded her another remedy, that of separation.

"It appears to the Lord Ordinary that prior to the change of procedure introduced by the 11th section of the Conjugal Rights Act, the pursuer could not have been in a position to institute an action of divorce.

"She was not willing to adhere, and in her frame of mind could not have taken active steps by raising an action of adherence against her husband, and adopting the other procedure required by the Act of 1873 to compel him to adhere, which were necessary preliminaries to an action of divorce, and without which the deserting spouse was not in a state of wilful and malicious non-adherence. It is clear that there was required not only desertion on the part of one of the spouses, but also a willingness to adhere, or rather a desire for adherence, on the part of the other.

"The Lord Ordinary thinks that the first of these elements is present in this case, but not the latter. He does not think that any change of the law in this respect was intended to be made, or has been made by the Conjugal Rights Act. —*Bowman* v. *Bowman*, Feb. 7, 1866, 4 Macph. 384; *Muir* v. *Muir*, July 19, 1879, 6 R. 1353."

The pursuer reclaimed, and argued—That the case was not ruled by that of *Bowman*, quoted by the Lord Ordinary. The very circumstances of the present case were there foreshadowed, in the opinion of Lord Deas, who did not hold that case to decide that a wife whose husband had gone away and not contributed anything for years to her support was barred from a divorce for desertion merely because at the time he went away she had been obliged to leave him for an interval owing to his cruelty.

Argued for defender—The Conjugal Rights Act of 1861 (24 and 25 Vict. cap. 86), abolished the old forms of procedure, but did not alter the legal position of the parties. These proceedings under the old law necessarily implied willingness to adhere, and that was just what the pursuer had not.

At advising—

LORD YOUNG—If there was wilful and malicious desertion to begin with, and it was persisted in for four years, the pursuer is entitled to the remedy she seeks. In my opinion the facts do enable us to affirm that of the defender. He wilfully and maliciously deserted her more than ten years ago, having previously used her ill, turned her out of his house and threatened her with violence, and indeed having given her a taste of that violence which he threatened. That was done quite deliberately, for he told her friends that it was his purpose to live apart from her. He broke up his establishment, sold his furniture, and went away, leaving her to provide for herself and her child, either by her own exertions or by means of the charity of her friends, and no provocation of all this on her part is proved. He never invited her to return for ten years, and then she seems to have brought an action of divorce on the ground of his adultery, being induced to do

so by an erroneous interpretation of a letter which she received concerning him. After that he invited her to come to him—that is, after a wilful and malicious desertion for more than ten years. I am not going to express any absolute opinion whether after ten years of wilful and malicious desertion repentance comes too late, for I think we have no proof at all here of the defender's honest willingness to take back his wife at any time. Such letters as have been produced in process cannot be received as proof of such willingness without more evidence, and especially the evidence of the writer of them. I do not think it is anything to the purpose that the pursuer when examined as a witness said that she was "not willing to return to the house of one who had so used me, unless I had an assurance that I would be received as a wife should be, and that my person would be safe." I do not like the question—"Would you have been willing to return if something happened that never did happen?" I am not sure that I should allow such a question, but at all events a proper answer to it would have been—If I had been invited I would have considered the subject, but as I never received an invitation I cannot answer. I cannot therefore assent to the conclusion of the Lord Ordinary except in so far as he finds desertion proved. I am of opinion that this interlocutor ought to be recalled and decree of divorce pronounced.

Lord Craighill—I concur, and have nothing to add.

Lord Justice-Clerk—I also concur. I quite retain the opinion I expressed in the case of *Muir*, and the more the thing is sifted it seems to me the almost inevitable result, because it would never do for a man to desert his wife, however maliciously, for twenty years, and then when an action of divorce for desertion was raised against him, simply to offer to adhere, the result of which must be that whether the wife accepts or rejects her action for divorce is lost. I do not think that is the law. But it is not necessary to decide that question here.

The Court recalled the interlocutor of the Lord Ordinary and granted decree of divorce as craved.

Counsel for Pursuer—Rhind—Millie. Agents—M'Caskie & Brown, S.S.C.
Counsel for Defender—Salvesen. Agent—R. W. Renton, S.S.C.

Thursday, May 26.

SECOND DIVISION.

GALLOWAY *v.* SIM.

Shipping Law—Liability of Owner for Lighting Wreck Sunk in the Fairway of a Navigable River.

Circumstances in which *held* that a shipowner whose vessel had been injured by a collision, and abandoned after the fixing up of one white light by the crew, was not liable for the damage to another vessel which came into collision with the wreck, the light on which had been from some cause extinguished.

In this action Hugh Henry Galloway, sole registered owner of the steamer "Marmion" of Glasgow, sued William Sim, sole registered owner of the steamer "Loch Etive" of Glasgow, for £316, 16s. 11d., as damages sustained by him in consequence of a collision between the "Marmion" and the "Loch Etive" in the Clyde on 9th February 1880, which was the result, as the pursuer alleged, of the conduct of those for whom the defender was responsible. The circumstances of the collision were thus narrated by the Sheriff-Substitute (Erskine Murray) in his findings in fact:—"Finds (1) that on 9th February 1880 the 'Loch Etive,' a small screw-steamer whose registered tonnage is about 47 tons, was proceeding down the river Clyde after dark, when she was run into opposite Thomson's Shipbuilding yard, between Renfrew and Dalmuir, by the steamship 'Toward' coming up the river: Finds (2) that a large hole was made in her port quarter, and she was slewed round by the collision, making a semicircle in the river till her bows wheeled round facing the N.-W., in the position laid down in the two maps, with her bow about 50 feet nearer the S. side than the middle of the river, where she sunk by the stern first, having, when sunk, her two masts (the after one of which is a mere pole) and a portion of her funnel, which is situated very near her stern, above the water: Finds (3) that at the time of the collision she was carrying the usual steamer lights—a white light in the foremast and a red and green at the two sides: Finds (4) that when the 'Loch Etive' began to fill, her master and some of the crew—two of whom were somewhat hurt or shaken by the collision — scrambled up the bows of the 'Toward,' which was still jammed into the 'Loch Etive': Finds (5) that the 'Toward' drew up for a short time alongside of Thomson's Wharf and gave the 'Loch Etive' men a boat to rescue the remaining men of the 'Loch Etive,' who were clinging to her foremast rigging: Finds (6) that in taking off the men they also took off the red and green light, leaving the white light on the foremast, which was burning brightly, and which, if undisturbed, ought to have burned for the rest of the night: Finds (7) that the master of the 'Loch Etive' asked the master of the 'Toward' for an additional light to be hung on the 'Loch Etive' for the purpose of additional security, but the latter disregarded his request and started at once for Glasgow, carrying with him the crew of the 'Loch Etive,' and reaching Pointhouse pier, where the wreck was reported to the deputy harbour-master Johnston, at 10·40, and the Custom-house Quay, about three miles further up, probably about 11·15 or 11·30, as vessels come slowly up the harbour: Finds (8) that the master of the 'Loch Etive' then went out to the house of Mr W. C. Sim, the defender, owner of the 'Loch Etive,' at Pollokshields, which he must have reached shortly before or about midnight, to report and to ask instructions: Finds (9) that defender told him to get additional lamps in Glasgow as soon as the ship-chandlers' shops were opened in the morning, and to take them to the vessel, which he accordingly did, reaching the neighbourhood of the vessel about 8 A.M.: Finds (10) that in the