

present case does not come within that category at all.

The Court pronounced this order:—

“The Lords having resumed consideration of the petition, and having heard counsel for the parties on the note for the petitioner, Do order and direct that the petitioner Mrs Minna Amy Edwards Moss or Mackenzie shall have the custody of her child Mary Thyra Mackenzie in the petition referred to, from the morning of the 24th day of December current to the 14th day of January 1888 inclusive; and ordain the respondent Osgood Hanbury Mackenzie to give effect to this order, and decern accordingly; and allow interim extract: *Quoad ultra* continue the case, with liberty to either party to move therein.”

Counsel for the Petitioner—Sol.-Gen. Robertson—Balfour, Q.C.—Salvesen. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondent—D.F. Mackintosh—Graham Murray. Agents—J. & A. F. Adam, W.S.

Thursday, December 22.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

GOULD v. GOULD.

Husband and Wife—Divorce—Desertion.

Circumstances in which held (*rev.* Lord M'Laren), in an action for divorce on the ground of desertion at the instance of a husband against his wife, that the pursuer was entitled to decree.

This was an action of divorce on the ground of desertion at the instance of Isaac Gould, a master baker in Markinch, against his wife Ann Scott or Gould.

The parties were married in 1860, and lived together until 1875.

The action was undefended.

At the proof the pursuer, who had two daughters by a former marriage, deponed—“The defender left me finally in March or April 1875. The cause of her leaving me was my bringing my daughter home to attend the shop; my wife did not remain with me for more than a fortnight or three weeks after that. My wife removed everything in the house belonging to her when she went away.”

The defender deponed—“I left him for his ill-usage of me—coming home at untimely hours, and his falsehoods. . . I wrote to his agent that I wished I had never seen his face, and did not care if I never saw it again. The letter now shown me is my letter. I have never offered to go back. (Q) Are you now willing to go back and stay with him?—(A) It just depends on how he would treat me. I have passed him in Markinch since I left him. He said it was a fine day. I don't think I made any answer. I never tried to avoid him. . . It is not true that I left

because he had deprived me of the charge of the shop; it was on account of his ill-usage. He said that I robbed the till, and was ill to his children, and was remonstrated with for taking the blankets from his bed, and that when I left the house there was hardly anything in it. There is no foundation for these charges.”

James Drummond, a commission-agent in Cupar, deponed—“I know pursuer and defender. I remember defender leaving pursuer in 1875. He was very anxious that she should come back to his house again, and a few months after she left I went at his request and saw her, and told her that he wished her to return to stay with him. She said No.”

A letter was produced with the postmark of 24th June 1887, addressed by the defender to the pursuer's agent, in these terms—“I have nothing to say about Gould's case except all he says about me is false, unless that I married him and left him, and was far too glad to get away from him than I was to marry him. I am sorry I ever saw his face, and will not be sorry though I never see it again. I never intended to go back and live with him after leaving.”

The Lord Ordinary (M'LAREN) on 9th July 1887 pronounced this interlocutor—“Finds that the pursuer has failed to prove facts and circumstances relevant to infer that the defender had wilfully and maliciously deserted the pursuer for four years and upwards previous to the raising of the present action; therefore dismisses the action, and decerns.”

“*Opinion.*—If it were possible to deal with consistorial cases in the way that all other cases are dealt with by giving effect to what both parties desire I should have very little difficulty in dealing with this case, but that is not the mode in which the law prescribes that actions of divorce shall be considered. It is nothing to the purpose that both parties may be willing to be divorced. I must consider whether there were grounds for divorce commencing at the time when separation *de facto* took place, and continued during the statutory period of four years. Now, according to the pursuer's own statement he had allowed his wife to take charge of the shop that he kept as a baker during the whole period of their married cohabitation, and I can hardly think that there can be any real foundation for his complaint against her of pilfering money without his knowledge, because that could not have gone on for fifteen years without being found out, or some action being taken by him upon it. But after fifteen years' service as manager of his shop he, whether upon communication with her or without communication—she says without communication to her—of his reasons, sent for his daughter and deposed his wife from her position as manager of the shop, and put his daughter in her place. She not unnaturally resented this conduct, and left his house. She would not consent to remain there in a subordinate position to her step-daughter. She now says that she knew nothing of this charge of pilfering until afterwards, which is very likely quite true, but she knew that her step-daughter was coming there, and she now says—and this raises the only conflict of evidence in the case—that she was quite willing his daughter should come to take her place, because she was no longer

able to work in the shop. But I think I must take the pursuer's own statement, as if not necessarily the more reliable one, at least the one by which she is bound, and it is that he had superseded his wife in the charge of the shop, and that in consequence of that she left him. Well, it may be that she was not entitled to leave him on that ground, but certainly it is a ground that one must have a very considerable sympathy with, and I can hardly look upon her leaving in such circumstances as a deliberate act of desertion. Well, then, according to the law of divorce the desertion must be continued notwithstanding the remonstrances of the other spouse, and in opposition to his or her wishes, but I have no sufficient evidence that Mrs Gould's absence from her husband's house was continued in opposition to his wishes. One witness says that he had taken a message from the husband to the wife asking her to return. She denies the statement, and gives a different version of that matter. But there were other ways that might have been tried. The pursuer might have seen his wife or written to her, and expressed regret for anything he had done that had contributed to the separation, and offered a reconciliation. Letters of that kind have often been put in evidence in cases of divorce for desertion, and where they appear to be written in good faith great weight is always allowed to them. In the present case the result of my consideration of the evidence is, that in the first place Mrs Gould left her husband, not from any purpose of wilful desertion, but from natural feelings of resentment caused by his conduct towards her, and that the pursuer has not since then done what was incumbent upon him to induce her to repent and to resume conjugal cohabitation.

“With regard to the other cases which have been cited, while of course it is always very useful to know the views that are taken by the Court of Appeal upon any legal question, I cannot look upon a decision in one case of fact as a precedent or authority for the decision of another question of fact, and in the view I take there is no question of law here, and I must give my opinion upon the facts as I find them. I shall therefore dismiss the action.”

The pursuer reclaimed, and argued—That if the husband was not satisfied with his wife's conduct as manager of the shop he was entitled to get another assistant, and that did not entitle the defender to leave him. She had never offered to go back to him—*Willey v. Willey*, May 17, 1884, 11 R. 815.

No appearance was made for the defender.

The Court ordered additional proof as to whether the pursuer had ever asked the defender to return to him as his wife.

At the proof before Lord Rutherford Clark the pursuer deponed—“I remember sending a message to my wife shortly after she left me in 1875, by Mr James Drummond, who was in the habit of coming about my house. I told him to go to my wife and tell her I was anxious for her to return. He went to see my wife with the view of inducing her to return to me. I thought he could do that better than if I went myself. He reported the result to me, saying that she said she would never return, and that when she left me she did not mean to come back.”

James Drummond deponed—“I remember the pursuer asking me to convey a message to his wife. He said I was to make sure and try to get her back to him if possible. I called on the defender accordingly. My interview with her lasted about half-an-hour. I asked her on her husband's behalf to return to him, but she said she would not return. I told her her husband was anxious she should come, but she said she would not come.”

At advising—

LORD CRAIGHILL—[*After narrating the facts*]—The only matters to which I should advert are, First, the cause of the defender leaving her husband's home. The pursuer thinks that the cause was that she was superseded in the management of the baker's shop belonging to him. The Lord Ordinary gives that also as his view in his note, and states that he thinks when she left it was not wilful desertion. I have no sympathy with that view. The husband was master in his own house, and if it seemed good to him to appoint another than his wife to conduct his business he was quite entitled to do so, and it was no excuse for the wife leaving her husband's house that he did so appoint someone to conduct the business.

Then with regard to the other matters in regard to which the additional proof was allowed, I do not know that I would have thought it necessary to have ordered additional proof, because I could not have held that the pursuer's right of divorce had been ousted because he did not send after his wife when she left the house, but the Lord Ordinary thought that that raised a difficulty. The Court therefore thought that additional evidence might clear up the point, and it was accordingly ordered. The pursuer appeared and stated that he had sent James Drummond to his wife to induce her to return, and James Drummond also appeared, and repeated the evidence he had given before, to the effect that he had by the husband's desire requested her to return. This being the position of affairs, it appears to me that the Lord Ordinary's grounds of judgment have been displaced, and we are left free to come to our own judgment. On the whole matter I think that there was no excuse for the wife leaving her home, and that the pursuer is entitled to decree.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court recalled the Lord Ordinary's interlocutor and granted decree as craved.

Counsel for the Pursuer—Forsyth. Agents—Watt & Anderson, S.S.C.

Thursday, December 22.

FIRST DIVISION.

SUTHERLAND v. TAYLOR.

Parent and Child—Custody of Illegitimate Child.

The mother of an illegitimate child entered into an agreement, with the approval of its father, to hand over the child,