defender, the loss in consequence of the second account being disallowed to be borne rateably by both defenders.

The circumstances of this case have been already reported (July 20, 1878, 15 Scot. Law Rep. 734). This discussion arose on the motion for approval of the Auditor's report, when both defenders claimed payment of their accounts.

Argued for pursuer—In this case there was only one defence (Sheriff's note), and on appeal only one statement was made, and one appearance was quite sufficient—*Burrel* v. *Simpson & Company*, July 19, 1877, 4 R. 1133; *Consolidated Copper Company*, January 17, 1878, 15 Scot. Law Rep. 274.

The defenders argued that in the circumstances of the case the double appearance was absolutely necessary.

At advising—

LORD JUSTICE-CLERK—I think it is the duty of agents to conduct cases of this description if possible without a double defence, and the expense of double agency and double appearance of counsel, and there is, as a rule, no difficulty in doing so. The present case depended on Crombie's liability, and it was only if we had found him liable that the question of Fender's liability could arise, but we found him not liable. It seems to me that the best course to follow here is to take the two accounts as one, and to modify it. What we propose is to add £21, as watching expenses for the second defender, to the larger account, and to disallow the rest, the part disallowed to be borne rateably by both defenders.

LORDS ORMIDALE and GIFFORD concurred.

Counsel for Pursuer (Respondent)—Trayner. Agent—H. B. Dewar, S.S.C.

Counsel for Crombie (Defender and Appellant)—Mair. Agent—W. Steele, S.S.C.

Counsel for Fender (Defender and Appellant)—Mackintosh. Agents—Frasers, Stodart, & Mackenzie, W.S.

Thursday, October 17.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

BEATTIE OR MASON *v.* BEATTIE'S TRUSTEES.

Husband and Wife—Effect of Decree of Divorce for Desertion pronounced in Absence—Where Subjects settled on Wife after Marriage, the Fee to be conveyed on Death of Husband—Statute 1573, *cap.* 55.

A wife who had obtained decree of divorce against her husband for desertion claimed from her father's trustees a conveyance of subjects settled on her and her children by her father's trust-deed, executed after the husband had been three years absent. The trust-deed bore that "during the subsistence of the marriage between her and the said J. M., or otherwise during their joint lives," the trustees were to pay her the income of the subjects "until the dissolution of her marriage with the said J. M. shall take place by the death of one of them." It was further provided that in case she "shall survive me and the said J. M." the subjects should be conveyed to her in fee.

Held that the deed not being a marriage-contract, nor granted *intuitu matrimonii*, the presumption of law that divorce was equivalent to death under the Act of 1573 did not arise, and that from the words of the deed the term which the testator had in his mind must be presumed to be the natural death of the husband, and that therefore the subjects could not be conveyed to the wife till that term.

James Beattie died on 18th January 1873 leaving a trust-disposition and settlement dated 14th March 1872, under which the defenders in this case were the acting trustees. The sixth purpose of this deed contained a provision in favour of Alexandrina Beattie, the deceased's daughter, the pursuer, in the following terms:—"*Sixthly*, In case Alexandrina Beattie or Mason, my daughter, spouse of James Mason, shoemaker, formerly in Arbroath, now in Australia, and her said husband, shall be both alive at the time of my death, I direct and appoint my said trustees to hold the subjects and others belonging to me . . . in trust for behoof of the said Alexandrina Beattie or Mason, and that during the subsistence of the marriage between her and the said James Mason, or otherwise during their joint lives, and to make payment to my said daughter of the rents and duties of the same from the period of my death until the dissolution of her marriage with the said James Mason shall take place by the death of one or other of them . . . and further, in case Alexandrina Beattie or Mason shall survive me and the said James Mason, her husband, then I direct and appoint my said trustees to convey and make over the said subjects and others in Colville Place to the said Alexandrina Beattie or Mason, my daughter, and her heirs and assignees whomsoever, in absolute right, and with right to the rents and duties thereof from and after the dissolution of her marriage as aforesaid, or from and after the period of my death, as the case may be, and in all time coming: But it is expressly provided and declared that in case the said Alexandrina Beattie or Mason shall predecease the said James Mason or die before me, then in either of these cases I direct and appoint my said trustees to hold the said subjects and others in Colville Place for behoof of the children of the said Alexandrina Beattie or Mason and their heirs as aftermentioned." Then followed a power of sale in favour of the trustees upon the succession opening to the children, the proceeds to be divided among the latter. The deed further contained a bequest of residue to the pursuer, and a declaration that the whole provisions therein in favour of the truster's daughter were exclusive of the *jus mariti* and right of administration of their husbands, and not affectable for their debts.

The pursuer was married in 1857 to James Mason, then living in Arbroath, at the time of this action in Australia. Her husband having deserted her and gone to Australia, she raised an action of divorce against him. The Lord Ordinary (YOUNG) found that the pursuer had failed to prove desertion, and dismissed the action, but on a reclaiming note the First Division recalled this judgment (*ante*, June 29, 1877, 14 Scot. Law

Rep. 592), and on 29th June 1877 granted decree annulling the marriage in the usual terms. Her husband had not entered appearance to defend the action, but evidence was produced of the personal intimation of the proceedings to him.

The pursuer in the present action called upon the trustees under her father's settlement to convey to her absolutely in terms of his trust-deed quoted above, contending that the decree of divorce had the same effect as her husband's death, but this the trustees refused to do without judicial authority.

The pursuer pleaded, *inter alia*—"(2) The marriage of the pursuer with the said James Mason having been dissolved, she is now entitled to obtain, and the defenders as trustees foresaid are bound to grant, a conveyance of the said subjects in favour of the pursuer under the sixth purpose of the settlement."

The defenders' second plea was—"(2) Having regard to the terms of the trust-disposition and settlement under which the defenders act, and to the fact that the decree of divorce founded on by the pursuer was obtained in absence, and on evidence the effect of which was doubtful, the defenders were not and are not entitled to comply with the demand of the pursuer without being judicially authorised to do so."

The Lord Ordinary (RUTHERFURD CLARK) on 20th March last assoilzied the defenders, finding the pursuer liable in expenses. He added the following note:—

"*Note.*—The question in this case is, Whether by reason of the dissolution of her marriage with James Mason by decree of divorce the pursuer is entitled to obtain from her father's trustees a conveyance of the subjects settled by him on her and her children? According to the language of her father's trust-deed she is only entitled to such a conveyance 'if she survive James Mason.' But she contends that the decree of divorce has the same effect as his death.

"It is to be observed that the question does not arise in a marriage-contract, but with reference to the last will of the pursuer's father. When that deed was made the pursuer had been deserted by her husband, and was living with her father. The divorce was granted on the head of desertion.

"The direction to the trustees is, that 'during the subsistence of the marriage between her and James Mason, or otherwise during their joint lives,' they shall pay to the pursuer the income of the subjects 'until the dissolution of her marriage with the said James Mason shall take place by the death of one or other of them.' It is then provided that in case the pursuer 'shall survive me and the said James Mason' the trustees shall convey the subjects to her; but in case the pursuer 'shall predecease the said James Mason, or die before me,' the trustees are directed to hold them for the pursuer's children and their heirs.

"James Mason is still alive.

"In these circumstances, the Lord Ordinary is unable to hold that the pursuer is entitled to the conveyance which she demands. The deed contemplates two conditions, during which the income only is to be paid to the pursuer, viz., the subsistence of the marriage 'or during their joint lives.' It is only on the death of James Mason that the trustees are directed to convey the fee to her, and if she predecease him the fee is to go to her children. The divorce cannot, it is thought, be held in the construction of the deed as equivalent to Mason's death, for other interests than those of the pursuer are involved. Indeed, from the alternative which has been already referred to, it would seem that the testator intended the pursuer should not have the fee during Mason's life, even though the marriage did not subsist. He may have feared that though the marriage was dissolved they might marry again. But whatever conjectures may be made in regard to his intention, the words seem to be too express to admit of the pursuer's claim being sustained."

The pursuer reclaimed.

Argued for her—It had always been held that divorce was equivalent to death in relation to provisions to a husband or wife. This must be taken to be settled law, and the only difficulty in the present case was the phraseology of the deed.

Authorities—Stair, i. 4, 20; Bankton, i. 5, 134; *Thom* v. *Thom*, June 11, 1852, 14 D. 861; *Johnstone-Beattie* v. *Johnston*, February 5, 1867, 5 Macph. 340; *Harvey* v. *Farquhar*, February 22, 1872, H. of L. 10 Macph. 26.

Argued for respondent—Divorce could only be read as death in relation to provisions in a marriage-contract or a deed granted *intuitu matrimonii*—*Countess of Argyll*, M. 6184. In the circumstances of the case if the husband chose to open up the case (which he would be entitled to do, being furth the kingdom—*Ferryman* v. *Lockyer*, June 28, 1876, 3 R. 882), he would have a fair chance of success, and it was maintained the clauses referred to were introduced in view of a possible divorce and to prevent the husband even having any interest in the property.

Authority—Fraser on Husband and Wife, 2d ed. ii. 1220.

At advising—

LORD JUSTICE-CLERK—This is a very peculiar case. The deed in question has not been very clearly expressed, and I rather think this has been intentional. It was executed by the pursuer's father in 1872, and in it he made a provision for his daughter, who had then been three years deserted by her husband. Whether the husband intended to come back or not, or whether a divorce would be obtained if he did not, the father did not know, and so he made his settlement, so far as the pursuer is concerned, in the terms in which he did, which are very special, and quite different from those used in the provisions to his other daughters. The provision in favour of Mrs Mason was that the trustees were to hold the liferent of a certain subject for her behoof "during the subsistence of the marriage between her and the said J. M., or otherwise during their joint lives," and payment of the rents and duties was to be made "from the period of my death until the dissolution of her marriage with the said J. M. shall take place by the death of one or other of them." "After the dissolution of the marriage as aforesaid, or from and after the period of my death" the pursuer was to have the fee conveyed to her, "with right to the rents and duties thereof."

In this view of the case, and in these circumstances, I do not think we can derive any benefit from the presumption of law arising out of the

Act 1573, cap. 55. The question seems to me to depend upon the intention of the testator.

Now, without going into any detailed analysis of the words of the deed, I am quite satisfied that the words were chosen with a view to a possible divorce. What is the meaning of the words in the provision for payment of the annual proceeds which I have just quoted if read according to their natural meaning. Mr Scott says that the meaning is that if the marriage were dissolved by divorce the wife was to have the fee during the life of both, the marriage being terminated; if the marriage was not terminated by divorce, then the wife was not to get the fee till the death of her husband. The Dean of Faculty says the meaning is, that the father had in view the possibility of a divorce, and that the meaning of his words is that even in the event of a divorce the wife was not to become entitled to the fee of the property until the natural death of James Mason.

In regard to the latter part of the clause, relating to the period at which the rents were to be paid, it seems to me expressly to dissociate that term from the dissolution of the marriage by divorce, and to fix it specially at the date of the husband's actual death. The clause relating to the fee is also ambiguous, but I am inclined to arrive at the same view of its meaning, that what the testator had in his mind was the natural death of James Mason. Though it is impossible to say that this meaning is clearly expressed, I am of opinion—distinctly so—that the Lord Ordinary is right, and that the testator, to guard against the possibility of the husband having at any time any interest whatever in the fee, and having in his mind the possible contingency of divorce, used the words he did for the express purpose of meeting this contingency.

At first I did not see how this could have affected the testator's mind, but I have since come to see that the divorce being in absence, the friendly letters passing between his daughter and her husband, and the other circumstances of the case (*cf.* 14 S.L.R. 592) might have weighed with him in keeping the husband out altogether, and in making the term of payment the date of the husband's natural death.

In conclusion, I may say that I do not think the children have any *jus quæsitum* whatever.

Lord Ormidale—I have come to the same conclusion as your Lordship. In construing this deed it is of great importance to keep in view that it is not a marriage-contract, or granted in any way *intuitu matrimonii*. If it had been, then a rule of construction would have been introduced which has nothing to do with the matter as it comes before us. The deed was executed fifteen years after the pursuer's marriage, and its object seems to me to be to counteract the effect the marriage had in so far as it gave the husband an interest in his wife's succession. The law regulating marriage-contracts and all such deeds is therefore out of the question, and we come to the construction of this deed independently of that element.

Now, it is not unimportant that whereas we have language in the deed expressly pointing out the actual death of one or other of the parties, we have had no case quoted in which the natural meaning of the ordinary word has been construed to mean anything different, except in the three cases relating to the marriage-contracts.

As to the consideration of what was the testator's intention, I am not much affected by it. I do not think we have anything to do with that consideration if the language of the deed is otherwise clear. A testator may be fantastical or absurd if he pleases, but that does not entitle us to interfere if his language is otherwise clear. But I think it is not unnatural that the testator here might have had it in view that there was a possibility of a divorce, and even that the husband might return afterwards and be desirous of uniting himself with the pursuer again. There being nothing therefore in this deed to enable us to construe it differently from what its own language imports, I think it clear that the natural death of the husband is what was intended, and that therefore we should adhere to the Lord Ordinary's interlocutor. I must add that I think that the children's interest might be materially affected if we decided differently.

Lord Gifford—I do not differ from your Lordships, but perhaps I have felt more difficulty in coming to a decision. I agree that this is not a case relating to husband and wife in consistorial law; it is merely a question of construction of a deed. But this does not exclude the idea that the testator may have looked to divorce as being equal to natural death so far as the marriage was concerned, and so meant his deed to be construed. But where I am compelled to agree with your Lordships is, that the words used have reference to the actual death of the husband even after the possible contingency of divorce. But I may say that I should not have been at all embarrassed even though "death" were the only term used in holding divorce equivalent to it if the other facts of the case were consistent with this interpretation.

I think it very difficult to say that I could not reach the intention of a testator in any other way than through his actual words. I can conceive a case of an annuity to a wife payable on the death of her husband being paid on divorce; but it is unnecessary for me to go on multiplying examples, as in the present case, as I have stated, I am constrained, for the reasons I have, given to concur with your Lordships.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Scott—J. A. Reid. Agents—Renton & Gray, S.S.C.

Counsel for Defenders (Respondents)—Dean of Faculty (Fraser)—Rhind. Agent—Wm. Officer, S.S.C.

Friday, October 18.

SECOND DIVISION.

[Sheriff of Argyllshire.

M'ARTHUR *v.* JONES.

Statute 1686, *c.* 11 (*Act for Winter Herding*)—*Trespass—Where held that Cattle Trespassing were not Lawfully taken Possession of.*

The Act 1686, cap. 11, imposes a penalty of half a merk on the owners "for ilk beast they shall have going on their neighbours' ground," and enacts that "it shall be lawful to the