shares of it had vested in fee in various beneficiaries, and the trustees' duty after the death of the liferentrix was to pay them their shares from time to time as realised, irrespective of any division into capital and income, for which there was no provision in Dr Playfair's will. All the payments, both interim and final, just represented the one-seventh share of that item of the trust-estate. But when these payments reach the hands of the marriage-trustees I think I must take account of the fact that their trust-purposes make it material to inquire whether it is all capital, or whether and how much of it is truly income. Perhaps they could not have treated the payments to account otherwise than they did, subject always to rectification of the account after the final payment is made. But at all events it would not have been safe to treat them all as income.

"On the other hand, neither are they all capital. They are the proceeds of one of Dr Playfair's investments which his trustees might, if so advised, have realised at once after his death for what it would fetch. Had they done so and invested the price it would have been an income-producing subject. It does not necessarily cease to be so because in the course of judicious realisation they hold it for years. The aggregate of the sums received by the marriage-contract trustees, that is to say, the total product of the investment so far as regards their one-seventh share, must be apportioned on some fair principle between capital and income.

"I am not aware that this question has been presented for judicial decision in Scotland. But I was referred to some English cases which furnish a rule reasonable in itself, and not inconsistent with any of our authorities—*Earl of Chesterfield's Trusts*, 1883, 24 Ch. Div. 643; in *re Foster*, 1890, 45 Ch. Div. 629; in *re Hubbuck*, 1896, 1 Ch. 754. The total amount received in the realisation is treated as if it had been the product of a sum invested as at the testator's death at a reasonable rate of interest accumulated to the date or respective dates of receipt. That sum—the sum required to produce the amount in hand under those conditions—is credited to capital and the remainder to income. It may be that this rule would operate harshly in certain cases and would require to be modified; but for the average case no fairer rule occurs to me or was suggested in argument.

"It is not however applicable here in terms, for Mrs Playfair survived her husband for sixteen years and (it is supposed) received the rents from the Playfair trustees as income. The parties here do not desire to go back into that period, and unless that is done it would be obviously unfair to take the date of Dr Playfair's death as the date from which the theoretical accumulation is to run. As between the present parties, it seems fair to take the death of the liferentrix as the terminus.

"It follows from what I have said that the circumstances of this case exclude the application of the case of *Boyd's Trustees* v. *Boyd*, July 13, 1877, 4 R. 1082, and the decisions which have followed upon it."

Counsel for the Petitioners—W. L. Mackenzie. Agents—W. & F. Haldane, W.S.

Counsel for the Minuter — Grainger Stewart. Agents—Sibbald & Mackenzie, W.S.

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*Saturday, March* 19.

## OUTER HOUSE.

[Lord Stormonth Darling.

## HUNTER *v.* HUNTER.

*Husband and Wife—Divorce—Desertion—Period of Desertion—Deduction of Term of Imprisonment.*

In an action of divorce for desertion raised more than six and a half years after the commencement of the desertion, it appeared that for ten months of that time the deserting spouse had been undergoing a term of imprisonment. Neither the period prior nor that subsequent to his incarceration amounted to four years, but the two together exceeded that term.

Decree of divorce *granted.*

On 18th January 1898 Mrs Ann Bennet or Hunter raised an action of divorce against her husband on the ground of desertion.

The pursuer averred on record, and it was established at the proof, that she was married to her husband in 1886, that about March 1891 he had left her and gone to live with another woman, and that, with the exception of one occasion when she went to ask him for money, which he refused to give her, she had never seen him since. The only information she had received about him was that on 20th September 1894 he was released from Durham jail after undergoing a period of ten months' imprisonment with hard labour for embezzlement. The identity of the defender and the prisoner so released was instructed by a letter from the governor of the jail.

The Lord Ordinary having suggested a doubt whether desertion for the statutory period of four years had been proved, the pursuer argued:—It must be admitted that the period of imprisonment fell to be deducted from the time during which the husband had been in desertion, for there could be no intention to desert on the part of a spouse in confinement—Fraser's H. & W. 1213; *Young* v. *Young*, November 16, 1882, 10 R. 184. But *Young's* case was distinguishable from the present, for there in order to make up the four years the term of imprisonment had to be counted in. Here, though four years had not elapsed between the beginning of the desertion and the beginning of the imprisonment, nor yet between the defender's discharge from prison and the raising of the action, these two intervals of time added together made up a total of more than four years. The

Act 1573, cap. 55, said nothing about the four years being continuous. If the pursuer's contention were unsound, imprisonment even for a day would interrupt the running of the four years. A new period would have to begin to run with the spouse's release, only perhaps to be broken in turn by a similar term of imprisonment for some trifling offence. There could surely be no greater proof of the *animus* to desert than the fact that the prisoner on being released did not return to his wife. Even in the case of the long prescription, where possession for forty years "continually and together" was required, it was never proposed to deal with the term of a party's compulsory absence, and consequent inability to act, through banishment or foreign service except by way of deduction—*Duke of Lauderdale* v. *Earl of Tweeddale*, M. 11,193; *Whitefoord* v. *Earl of Kilmarnock*, M. 11,196; *Graham* v. *Watt*, July 15, 1843, 5 D. 1368.

The Lord Ordinary granted decree of divorce.

Counsel for the Pursuer—J. H. Millar. Agent—F. M. H. Young, S.S.C.

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*Saturday, March* 19.

## OUTER HOUSE.

[Lord Pearson.

## MOLLESON (PRINGLE PATTISON'S CURATOR).

*Judicial Factor—Competition—Sequestration of Land Estate.*

The *curator bonis* of a deceased lunatic presented a petition for the sequestration of the ward's estate, and the appointment of a judicial factor to receive the rents. Competing claims to the estate were presented by (*a*) the disponee under a *mortis causa* disposition executed some years before the ward became insane, and (*b*) the ward's next-of-kin. The petition was opposed by the disponee, who had recorded the disposition in the register of sasines. Petition granted, on the ground that neither party was in possession, and that there was a competition for the estate which presented elements of reasonable doubt as to the rightful claimant.

This was a note presented by T. A. Molleson, C.A., *curator bonis* to the late Mrs Pringle Pattison, praying for the sequestration of the deceased's estate, and the appointment of a judicial factor to receive the rents. The circumstances of the case are fully stated in the opinion of the Lord Ordinary.

An *interim* appointment having been made, the Lord Ordinary on 19th March 1898 sequestrated the estates and appointed Mr Molleson as judicial factor.

*Opinion.*—"Mrs Pringle Pattison of The Haining died there on the 3rd of this month, leaving heritable and moveable property of considerable value. She was predeceased by her husband, who died on 12th June 1888. Upon his death a petition was presented for the appointment of a *curator bonis* to her, founded upon two medical certificates which bore that she was of unsound mind and incapable of managing her affairs, or of giving directions for their management, and that she had been in a like state of mind for several years. One of the certificates described her as being in a state of semi-fatuity. The petitioners were Jane and Euphemia Bowers, in the character of first cousins of Mrs Pringle Pattison, and her only or nearest relatives resident in Scotland, and the petition was served upon certain persons who were described as her other nearest relatives. Mr Molleson, C.A., was appointed curator, and remained in the possession and management of the estates until the ward's death.

"Immediately upon her death, competing claims were made to the estates. Professor Seth (who is a relative, not of Mrs Pringle Pattison but of her husband) claimed as sole executor and universal disponee under a disposition and settlement by the deceased, dated in January 1875, more than thirteen years before the curator was appointed. The Misses Bowers claimed as two of the next-of-kin and heirs-portioners; and one of them proceeded with her lawyer to the mansion-house, and claimed to take possession of it, and of all the effects therein.

"In these circumstances Mr Molleson, who was lawfully in possession, but whose active title had fallen by the death of the ward, sealed up the repositories, and made application to the Court for the sequestration of the estates and appointment of a judicial factor, suggesting that an interim factor should be appointed until the note should be advised. The application set forth that Professor Seth (now Pringle Pattison) concurred in it, and that he approved of Mr Molleson being appointed to the office. But it is now explained at the bar that his concurrence was for the limited purpose of maintaining Mr Molleson in possession until the repositories were opened after the funeral, and that this purpose having been served, his concurrence must be deemed to be withdrawn.

"He now asks me to recal the interim appointment and to refuse the note. The next-of-kin and heirs-portioners desire to have the estate sequestrated, and the appointment continued, in view of the competing claims.

"The cases discussed before me were the following:—*M'Donald*, 11 D. 1028; *Elliot*, 5 D. 1075; *Speirs*, 5 R. 75; *Fraser*, 18 D. 264; *Lady Hawarden*, 23 D. 923; *Campbell*, 1 Macph. 991, *aff.* 2 Macph. (H.L), 41; *Munro*, 11 D. 1202; *Calton*, 8 Macph. 713; *Aikman*, 21 D. 1374.

"The position of parties as to title is this. Two of the next-of-kin have petitioned the Sheriff of Selkirk to be decerned executor-dative, but no petition has been presented for service as heir. The disponee under