and those of their families resident in this country who were major, were unanimously and strongly in favour of the first parties retaining Springvale as an investment, and that, after careful consideration, the trustees did not see any reason why their discretionary powers of selling Springvale should be exercised at present.

Argued for the first parties — The first parties were prepared to concede that a *pro indiviso* share in the residue had vested in the second party. But the period of payment had not yet arrived, as both of the truster's daughters were still alive, and the trust purposes had not yet been fulfilled. Before the death of the last surviving daughter the estate might shrink, and the second party was not entitled to be paid out a third share of the amount at which the estate was valued at present—*Haldane's Trustees* v. *Haldane*, December 13, 1895, 23 R. 276. That case ruled the present. The amount payable to the beneficiaries was to be determined by sale of the whole residue after the death of all the testator's children. The trustees were not bound to sell until that period arrived, and they were not entitled to pay out the share of any beneficiary upon the basis of a valuation except by consent of all parties interested. In particular, the Court had no power to compel the trustees to realise the real property in England, or to convey a one-third *pro indiviso* share of it to the second party. Such a *pro indiviso* conveyance would have the same effect as a sale, because the second party as a *pro indiviso* owner could compel a sale. Even if he did not, the result would be that the remaining two-thirds would be unsaleable. The case of *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, and the other cases following upon it did not apply here. This case fell under the exception recognised by Lord President Inglis in that case at p. 305, and given effect to in the case of *Graham's Trustees* v. *Graham*, November 30, 1899, 37 S.L.R. 163, for there were here trust purposes which could not be secured without the retention of the vested estate or interest of the beneficiary in the hands of the trustees. In *Miller* the estate vested in the beneficiary was finally ascertained, whereas here the amount due to each set of beneficiaries could not be ascertained until the death of the last survivor of the daughters.

Argued for the second party—It was admitted here that the second party's share had vested. That being the case he was entitled to immediate payment unless there was some good reason to the contrary. No such good reason could be stated by the trustees. This case was ruled by the cases of *Miller's Trustees* v. *Miller*, *cit.*; *Wilkie's Trustees* v. *Wright's Trustees*, November 30, 1893, 21 R. 199; *Stewart's Trustees* v. *Stewart*, December 14, 1897, 25 R. 302; and *Ballantyne's Trustees* v. *Kidd*, February 18, 1898, 25 R. 621. In the last-mentioned of these cases the period of division had not arrived, but notwithstanding it was held that as the shares had vested those of the children who had attained majority were entitled to payment. All the cases in the books were in favour of the second party's contention except *Haldane's Trustees* v. *Haldane*, *cit.* That case was special, and turned upon the form of the question of law stated for the opinion of the Court.

LORD JUSTICE-CLERK—I must say that upon consideration of the case of *Haldane* I can see no distinction between that case and the present. Perhaps it is a hardship that the second party cannot get the share which is vested in him paid to him now; but the testator has provided that on the death of all his children his estate is to be turned into money and the proceeds divided among the children of his sons and daughters *per stirpes*. That period has not yet arrived, for two of his daughters are still living. If the second party got payment now, there would be a risk of the other beneficiaries' interests being seriously affected. It is true that they might get more, but on the other hand they might get less, and if that were the case there would be no way in which the trustees could make up the deficiency. I am afraid therefore that in accordance with the case of *Haldane* both questions must be answered in the negative.

LORD YOUNG—I agree in thinking that both questions must be answered in the negative.

LORD TRAYNER — I agree with your Lordships in the chair.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor —

"The Lords having heard counsel for the parties in the special case, Answer the two questions therein stated in the negative: Find and declare accordingly, and decern: Find the whole parties to the special case entitled to their expenses as the same may be taxed out of the trust estate of the deceased James M'Culloch of Trees."

Counsel for the First Parties—W. Campbell, Q.C.—C. K. Mackenzie. Agents—Bell, & Bannerman, W.S.

Counsel for the Second Party—Dundas, Q.C.—Craigie. Agents—Strathern & Blair, W.S.

Thursday, March 15.

SECOND DIVISION.

[Lord Pearson, Ordinary.

HUNTER *v.* HUNTER.

Husband and Wife—Divorce—Desertion—Second Marriage by Wife in bona fide Belief that Husband Dead — Reasonable Cause for Non-Adherence.

In an undefended action of divorce for desertion raised in 1899 by a wife against her husband, the pursuer averred that she was married to the defender in 1883, that the defender went to Canada

in 1886, that thereafter he concealed his whereabouts from the pursuer, that in 1894 she heard rumours of his death, which the defender's relatives believed to be true, that she advertised for him in one newspaper without any result, and that thereafter in the same year, in the *bona fide* belief that the defender was dead, she married another, and continued to cohabit with him till 1898, when she learned that her husband was alive.

The Court (*aff.* judgment of Lord Pearson, *diss.* Lord Young) *dismissed* the action as irrelevant on the ground that the pursuer's averments disclosed (1) that she had no reasonable grounds for believing her husband to be dead when she contracted her second marriage; and (2) that consequently her second marriage was a sufficient cause for her husband's non-adherence and a bar to her action of divorce.

On 22nd June 1899 Mrs Isabella Campbell or Hunter, presently residing at No. 97 Albert Street, Edinburgh, wife of William Hunter, presently residing at No. 3 Lindsay's Land, Clydebank, near Glasgow, raised an action of divorce for desertion against her husband.

The pursuer averred—"1. The pursuer was married to the defender at St James' Episcopal Church, Leith, by the Reverend Canon Jackson, on 3rd April 1883. One child was born of the marriage, viz., Isabella, born 20th day of March 1884. A certificate of the marriage is herewith produced. 2. The parties took up house first at Leith, afterwards at Renfrew, and thereafter at Yoker, near Glasgow. During the time parties lived together the defender wrought very seldom, with the result that a sum of money which the pursuer had saved prior to her marriage was expended in keeping up the household. When that sum of money was spent the pursuer had herself to work in Singers' Machine Factory to earn a livelihood for herself, husband, and daughter. 3. In or about the month of May 1886 the defender procured a situation in Winnipeg, Canada, to which country he accordingly then proceeded, the expenses of his journey being defrayed by his friends. For about two years after he left Scotland the defender corresponded with the pursuer and sent her small sums of money from time to time, amounting in all to £20. On the lapse of these two years, however, the defender ceased writing altogether. The last remittance defender sent pursuer was for a small sum, and was sent in the month of June 1888. As prior to said remittance the pursuer had not heard from the defender for some time, and as said remittance was sent pursuer by a third party (Mr M'Dougal) on the defender's instructions, and the defender sent no letter with it at all, the pursuer wrote Mr M'Dougal acknowledging receipt of the money, and at the same time asked for defender's address. In reply Mr M'Dougal said that the defender had left his district, but stated that he believed he was then working to the Globe Iron Works Company, Cleveland, Ohio. The pursuer accordingly wrote to the defender at said works, but got no reply, and her letter was not returned. Since said last-mentioned date (viz., June 1888) the defender has neither corresponded with the pursuer nor let her know of his whereabouts, nor paid her any money for her support. Nor since said date has the pursuer seen the defender. The defender has all along since said date concealed his whereabouts from the pursuer. 4. Since said month of June 1888 the pursuer made every possible inquiry to ascertain her husband's address, but without any success. 5. In or about the summer of 1894 the pursuer was informed by one Archibald Campbell, a rivetter or boilermaker, presently residing, the pursuer believes, in Barrow-in-Furness, but who belongs to Clydebank, and who had just then returned from America, that it was generally reported and believed that the defender had been frozen to death on a roadside in the vicinity of Duluth, and that he was convinced that it was so. The said belief was shared in by defender's relatives in this country. The pursuer thereupon wrote to the said Mr M'Dougal, asking if he knew anything of the defender, or his whereabouts, but he replied that he did not. Pursuer also caused a notice to be inserted in the 'missing relatives' column of the *Glasgow Weekly Mail*, a paper which defender was in the habit of reading, but got no reply thereto. The pursuer was thereafter convinced that said report of defender's death was true, and she accordingly believed it to be true. 6. Thereafter, in or about the end of 1894, the pursuer received an offer of marriage from one Walter Campbell, her cousin—an offer that was made and received in the *bona fide* belief of the truth of the report of the defender's death. On said offer of marriage being made, the pursuer consulted the defender's relatives in Scotland, who advised her to get married, as they too were convinced that the defender was dead. 7. Accordingly, on the 23rd day of December 1894 the pursuer was married to the said Walter Campbell, by the Rev. Mr Gibson of the Wesleyan Methodist Church, Leith. She went through the form of marriage with the said Walter Campbell in the *bona fide* belief and conviction that the defender was dead. Thereafter the pursuer and the said Walter Campbell cohabited together until the month of September 1898, as after mentioned. 8. In or about the month of September 1898 the pursuer's said daughter Isabella went on a visit to relatives at Clydebank. In the course of her visit there she was introduced to a man who was stated to be the defender. On her return home she at once informed the pursuer thereof, who immediately, on hearing the news, ceased to cohabit with the said Walter Campbell. Inquiries were afterwards made, with the result that it was ascertained that the man to whom the pursuer's daughter was introduced was none other than the defender, and that he had just returned from America six months previously. 9. The pursuer thereafter, in order to keep matters right, informed the police of her marriage with Walter Campbell. The police reported the matter to the Crown authorities, who finally intimated that no proceedings were to be taken, as

they were thoroughly satisfied that she had acted throughout in good faith. The pursuer has since received a message from the defender that he will not return to her again. 10. The defender has thus been since at least the month of June 1888 guilty of wilful and malicious non-adherence to and desertion of the pursuer, since which date the defender has never corresponded with her or informed her of his whereabouts or address, or sent her any money for her support. The present action of divorce has therefore been rendered necessary."

The pursuer pleaded—"(1) The defender having been guilty of wilful and malicious non-adherence to and desertion of the pursuer, his wife, for the space of four years, the pursuer is entitled to decree of divorce. (2) The pursuer having gone through the marriage ceremony with the said Walter Campbell in the *bona fide* belief and conviction that the defender was dead, and she having ceased to cohabit with him on hearing the defender was in life, said marriage ceremony is no bar to the present action."

No appearance was entered for defender.

On 18th July 1899 the Lord Ordinary (PEARSON) dismissed the action.

Opinion.—"This is an undefended action of divorce at the instance of a wife, on the ground of her husband's desertion.

"The parties were married sixteen years ago, in April 1883, and one child was born of the marriage in May 1884. They lived together, first at Leith, and afterwards in the neighbourhood of Glasgow.

"The pursuer avers that her husband was seldom at work, and that she herself supported the family; that in May 1886 her husband obtained a situation in Canada, and for about two years thereafter he corresponded with her and sent her small sums of money amounting in all to £20, the last remittance being sent through a third party (Mr M'Dougal) in June 1888. She thereupon wrote to Mr M'Dougal, asking for her husband's address, and was furnished with an address in the United States where he was believed to be working. The pursuer wrote to him at this address, but the letter was neither answered nor returned, and the pursuer has since made further inquiries which have been fruitless. She further avers—'The defender has all along since said date concealed his whereabouts from the pursuer.' It now turns out that the defender returned from America a little more than a year ago, and is living at Clydebank, where the summons has been personally served upon him; and the pursuer avers that she has received a message from him that he will not return to her again.

"So far, therefore, the pursuer presents a case of wilful and malicious non-adherence on the part of her husband, which would have entitled her to divorce on that ground at any time after the lapse of four years from June 1888, that is, after June 1892, assuming that the husband had not expressed his willingness to adhere.

"The pursuer, however, with creditable frankness, states that she went through the form of marriage in December 1894 with her cousin, and they have since cohabited until September 1898, when she ceased cohabitation immediately on learning that her husband was alive. The pursuer avers that this second connection, which began in the form of a regular marriage, was entered upon by both parties in the *bona fide* belief that her husband was dead, and after consulting with his relatives, who advised her to get married. She avers circumstances which, if proved, will (I assume) instruct her good faith in the matter; and having laid the facts before the Crown authorities, she has been informed that they adopt that view, and that no proceedings will be taken against her.

"Now, where a married person sues for divorce on the ground of desertion, it is a good answer that the pursuer has committed adultery, the reason being that adultery furnishes a good ground for non-adherence, and so cuts away the basis of the statutory action. See *Auld* (1884, 12 R. 36), where the rule was applied, although there was a period of six years' desertion before the adultery was committed.

"The question is thus raised whether the pursuer's second connection, although begun and ended in good faith, is to be regarded for the purposes of this case as being an adulterous connection.

"That it is to be so regarded as giving the husband a right to sue for divorce is laid down in distinct terms by Erskine (Instit. i. 6, 44)—'If a woman,' he says, 'shall contract with a second husband, on false intelligence that the first husband had died abroad, that first hath it in his power, upon his return, either to take his wife home to his family, or to sue for a divorce against her on the head of adultery, for bigamy ought, as to this question, to be counted adultery; but the woman, if she had probable grounds to believe her husband dead, is not subjected to any criminal trial upon an accusation either of bigamy or of adultery.'

"If this be the law, then the circumstances of this case would warrant an action of divorce on the part of the husband. If so, I see no escape from the conclusion that they furnish a good answer to the wife's action for divorce for desertion.

"The doctrine laid down by Erskine has indeed been challenged by the high authority of Lord Fraser. In the first edition of his work (1 Pers. & Dom. Relations, 657) he stated explicitly that the doctrine must be held as overruled by decisions, and he referred to the cases *Thomson* v. *Bullock* (1836, 12 Octavo Faculty 216), and *Macdonald* (1842, 1 Broun Just. 238). In his later edition, however, his Lordship modifies this opinion, referring to *Macdonald's* case as supporting Erskine so far as it goes (namely, as to the criminal charges), and quoting the case of *Thomson* as one in which Lord Moncreiff adopted the rule of the canon law which ordered the husband to take back his wife. But *Thomson's* case when examined does not really run counter to the doctrine laid down by Erskine. It was an action of divorce by the returning

husband, grounded on the second marriage of the deserted wife. But it plainly appears from the reports, and specially from the fuller report in the 'Jurist' (9 Scot. Jur. 131), that the wife's defence (which with some hesitation the Court sustained as relevant, and remitted to probation) was not founded merely upon *bona fides*, but upon the averment that 'the pursuer had led her, by circulation of reports, to believe he was dead; and so having entrapped her into the commission of the adultery, he could not found upon it as a ground of divorce.' This plainly amounted to a plea in bar of the husband's action—a plea which is not raised by the mere averment that the wife contracted the second union in *bona fide*. In the present case there is no averment that the husband was the author of, or was in any way responsible for the rumours of his death upon which the wife relied. All that is said is, that 'the defender has all along concealed his whereabouts from the pursuer,' which in the absence of specification I take to mean no more than this—that he has refrained from communicating his address. At the highest this would only entitle the wife to say that she did not know whether he was alive or not. Her belief in his death rested upon rumours which are not said to be traceable to the husband.

"Accordingly, I hold that the case of *Thomson* does not run counter to the doctrine laid down by Erskine; and I am not prepared to hold that that doctrine does not accurately express the law of Scotland on the matter. I find nothing to the contrary in the case of *Donald* (1863, 1 Macph. 741), in which this question was much canvassed, and to which Erskine's opinion was referred to without dissent.

"In my opinion, therefore, the pursuer's own statement discloses a good answer to her claim, and the action must be dismissed. I would add that the hardship is not so great as it appears at first sight to be. Her second marriage was contracted in December 1894. For two years and a-half before that she had, on her own statement been in a position to obtain a divorce from her husband on the ground of desertion. It would have been no answer to such an action to suggest that he was dead, for the circumstances averred by the pursuer on that head, though they may have been sufficient to put her in good faith, were plainly inadequate to displace the legal presumption that her husband was still living. She was therefore entitled to avail herself of the remedy which our law allows if she desired to be free to marry again. Yet her status as a married woman remained unaltered, although she had it in her power to bring it to an end. Whatever sympathy one may feel in the individual case, I think it would be of the worst example to give any encouragement to such laxity. By pretermitting the step which would at once have legalised her position, she must be held to have taken her chance of her husband turning up; and the chance has gone against her."

The pursuer reclaimed, and argued—She had a good ground for divorce against her husband unless it was held that she was barred by her marriage with Campbell from insisting on it. The question therefore depended upon whether or not her cohabitation with Campbell was adultery. Guilty intention was required in order to constitute an adulterous connection, and there was no such intention here. The pursuer when she went through the ceremony of marriage with Campbell was under the *bona fide* impression that her first husband was dead, and this impression had been created by the action of the husband. Her marriage with Campbell was therefore no bar to her present action—Fraser on Husband and Wife, 2nd ed., ii. 1143; *Thomson* v. *Bullock*, December 9, 1836, 12 Oct. Fac. 216. In the cases of *Donald* v. *Donald*, March 30, 1863, 1 Macph. 741, and *Auld* v. *Auld*, October 31, 1884, 12 R. 36, there had been no second marriage in *bona fide*, but immoral cohabitation with another man. These cases were therefore not adverse to the pursuer's contention, but supported it by contrast.

At advising—

LORD JUSTICE-CLERK—The Lord Ordinary has stated so fully and clearly in his opinion the facts of this case, as disclosed in the pursuer's pleading, that it is unnecessary to go into them in detail. The question stated shortly is, whether a wife can sue for a divorce on the ground of desertion, she having married and cohabited with another man at a time when she had no sufficient ground for believing her husband to be dead, but relying only on a rumour to that effect, there being nothing which could displace the legal presumption that the husband was still alive. For it is, I think, plain that in this case she could not have successfully taken any other legal proceedings regarding rights claimed by her in respect of her being a widow. Had she taken any legal proceedings on the footing that her husband was dead she could neither have proved the fact nor got the benefit of any presumption tending in that direction. Can she then sue for divorce on the ground of desertion when by her own act she has placed herself in the position that any claim she had to call upon her husband to adhere is gone? I am unable to hold that she can. The law on this matter as laid down by Erskine commends itself to me as just. By entering into a new marriage the pursuer has taken the risk of acting on imperfect information, from which she inferred she was free to marry when in fact she was not. Without taking any legal steps to have her previous marriage relation put an end to she entered into the new relation. I assume, of course, the truth of all she says against her husband, but all she does aver consists of facts that would have entitled her to the benefit of the law of desertion; it could not of itself sever the marriage tie and give her the right to marry and cohabit with another. Legally, I hold that her cohabitation with another man must be held adulterous; and if that view be sound, then it is, I think, plain that

the basis of a demand for divorce on the ground of desertion must fail. The case of *Auld* settles that if a spouse has incurred the imputation of adultery, a divorce at that spouse's instance on the ground of desertion is not maintainable.

Such cases as the present are necessarily rare, and there are, therefore, few reported cases which can form direct authorities, The case of *Donald* differs from this case in this particular, that the wife there did not marry again, but fell into illicit intercourse with another man. The case, therefore, was more unfavourable to the woman than the present one. But the case is an authority on the question whether such a plea of belief of the other spouse's death can be received where it did not rest on reasonable and probable grounds. In the words of the Lord President, the question is whether the wife did, "before holding herself free from the bonds of matrimony, make such inquiries or receive such information as she was entitled to rely on?" I feel quite unable to hold that what the pursuer here states as the grounds of her belief fulfil the requirement thus stated by the Lord President. It comes to no more than this, that some-one who had been in America told her that he had heard that her husband was dead, and that he believed it, and that no reply was given to a notice in the *Weekly Daily Mail*. I adopt the words of the Lord President in that case, which I think apply to this case, that such inquiry was not made as "to put her in possession of warrantable grounds for belief that her husband was dead," and that is sufficient for the determination of the present case.

I sympathise with the pursuer, who seems to have been straightforward in what she did on discovering the mistake; but I am unable to come to any other conclusion than that which was arrived at by the Lord Ordinary. The case may be a hard one, but to give weight to that consideration in favour of the pursuer would be likely, in my opinion, to be harmful. The matrimonial relation requires to be guarded by firm rules, and the application of these rules, however hardly they may bear in particular cases, is a necessary safeguard of the important social relation which is constituted by marriage.

I must therefore hold that the judgment of the Lord Ordinary cannot on legal grounds be impugned.

Lord Young—The Lord Ordinary is of opinion that the pursuer's averments present a relevant case against her husband of wilful and malicious non-adherence entitling her to divorce, and in this I concur. He is, however, also of opinion that the statement which she makes "with creditable frankness" respecting the marriage ceremony which she went through with her cousin in December 1894, and the subsequent cohabitation thereon, is a confession by her of adultery which disentitles her to the divorce which the Court must otherwise have awarded on proof of her (relevant as he thinks) averments of wilful and malicious non-adherence. "The question" his Lordship says "is thus raised whether the pursuer's second connection, although begun and ended in good faith, is to be regarded for the purposes of this case as being an adulterous connection." His opinion is that the question must *de plano*, and without admitting evidence, be answered in the affirmative. I am, on the contrary, of opinion that a proof ought to be allowed and taken before we pronounce any judgment. Lord Moncreiff in his opinion, which has been communicated to us, says—"Personally I should have preferred to reserve consideration of the objection until the facts were ascertained." I understand this to mean that in his Lordship's judgment it would be safer, and avoid some, and that very conceivable, risk of a miscarriage of justice, to postpone the consideration and disposal of this objection until the facts are ascertained. This is my opinion also, and leads me, I think unavoidably, to the conclusion that the Lord Ordinary ought not to have disposed of the objection until the facts were ascertained. When they are ascertained there may not even be room for the objection or need to consider it, for the pursuer may fail to prove "wilful and malicious non-adherence" although ever so relevantly averred.

But while I agree with Lord Moncreiff that it is preferable, as being safer against risk of miscarriage of justice, to reserve consideration of the objection until the facts are ascertained, and think this sufficient reason for ordering proof now, I think it my duty to say that in my opinion the pursuer is, as matter of legal right, entitled to be allowed a proof, and that the judgment dismissing her action without evidence on the ground that she is a self-confessed adulteress is wrong, and ought to be recalled.

With respect to the marriage ceremony between the pursuer and her cousin, and their subsequent cohabitation, the Lord Ordinary observes that "She avers circumstances which if proved will (I assume) instruct her good faith in the matter." I agree, as I think anyone reading the averments will, in this observation. What the Lord Ordinary has I think failed to attach sufficient importance to is that by these averments the *bona fide* though erroneous belief of the pursuer and her cousin, and indeed of all the defender's relatives, is attributed to the wilful and malicious misconduct of the defender, prolonged over a period of six years and upwards.

I cannot assent to the Lord Ordinary's remark that for two and a half years before her marriage with her cousin the pursuer "had on her own statement been in a position to obtain a divorce from her husband on the ground of desertion," and might then have availed herself of the remedy which the law allows if she desired to be free to marry again. I have no ground for forming and acting judicially on an opinion that in 1892, on the expiry of the statutory period of four years, the pursuer was in a position to bring, and

possessed of evidence to support, an action of divorce. She was, if her averments are true, left deserted and destitute except in so far as she could support herself by the labour of her hands. In the end of 1894, when her cousin came to her rescue, and he and all the defender's relations had become honestly convinced of his death, it may have been, and probably was, considered whether an action of divorce for non-adherence was needful or desirable, and whether there was evidence to support it. Had such action been then brought, the pursuer stating "with creditable frankness" that the defender was, as she and all his relations honestly believed, dead, and that the object of the action was to obtain a decree of divorce which would enable her to marry her cousin, how would it have been dealt with? I think it not improbable that Lord Pearson would have dismissed it in respect of the creditably frank statement that the pursuer believed that the person called as defender was dead. But suppose he allowed evidence, and that circumstances were proved which produced in his judicial mind the same *bona fide* belief which the pursuer acknowledged they had produced in her mind, would he have given decree of divorce? I am not surprised that she was not advised to bring the action when honestly believing that the only possible defender was dead.

The pursuer's *bona fide* belief that the defender was dead was not corrected till towards the end of 1898, when he returned to this country. She raised her action in June 1899, and I have already expressed why I am unable to concur in the Lord Ordinary's censure of her failure to bring it seven years earlier. The defender is now resident in Scotland, and the summons was served on him personally. He has stated no defence, and not hitherto appeared. But should the case be allowed to proceed in the usual way, he may appear at any stage, and state such pleas and lead such evidence as he thinks fit. He has as yet offered no explanation of his desertion of his wife, prolonged over a period of ten years, with such successful concealment of his whereabouts and anything which might suggest his existence as to produce the honest belief in her and all his relations and friends that he was dead. He may at any time give such account as he pleases, good or bad, and the pursuer may call him as a witness, and for aught I or any of us know, prove by his evidence that the honest belief of his wife and relations in his death was induced by his conduct, and intended by himself to be so.

LORD TRAYNER—I agree with the Lord Ordinary in thinking that this action should be dismissed. It is an action by a wife against her husband concluding for divorce on the ground of the desertion or non-adherence of the latter. The Lord Ordinary in his opinion says that the pursuer would have been entitled to divorce on the ground alleged had she brought her action in June 1892. I cannot assume that. The defender might have had a good defence to such an action, had it been brought, by showing that his absence from his wife for more than four years prior to that date was not malicious, or obstinate, or without reasonable cause. But if he has deserted the pursuer for four years prior to the raising of this action, without reasonable cause, then the pursuer may succeed. Now, the pursuer's own averments show that this is not the case. In 1894, on the belief that the defender was dead, she married another and continued to cohabit with him from the time of the marriage, or more correctly, the marriage ceremony, until the year 1898. I regard that as a sufficient and reasonable cause why the defender should refuse now to adhere to his wife. The statutory ground for divorce therefore is wanting at the time when the pursuer claims the right conferred by the statute. It is true the defender does not plead the pursuer's conduct in defence to the action; he has not appeared in the case. But the pursuer's own averments show that she is not entitled to the statutory remedy which she asks us to give her. I give no opinion as to whether the pursuer's conduct has been such as to entitle her husband to divorce her, for that question does not arise here. I proceed, as I have said, upon the ground that the pursuer cannot get divorce against her husband for desertion or non-adherence, when her own averments disclose that the defender has a reasonable cause for non-adherence.

LORD MONCREIFF was absent at the advising, and his opinion was read by the LORD JUSTICE-CLERK, as follows:—This is a very hard case, and it is with reluctance, and not without hesitation, that I agree that the Lord Ordinary's interlocutor should be affirmed.

Personally I should have preferred to reserve consideration of the objection until the facts were ascertained. But I cannot say that the Lord Ordinary was not justified in disposing of the case on relevancy; and as the pursuer's counsel frankly admitted that he was not in a position to strengthen the averments on record, we must assume that the pursuer has stated all the facts which she is able to prove.

The question therefore is, whether the pursuer when she married again had on her own showing reasonable grounds for thinking that the defender was dead. I see no reason to doubt that she *bona fide* believed that he was dead; but that is not enough; it must be shown that her belief rested on reasonable and probable grounds sufficient to justify such a serious step. Now, when the pursuer's averments are sifted they come to this, that the only foundation for her belief was the unsupported statement of Archibald Campbell in 1894 to the effect that it was generally reported and believed that the defender had been frozen to death. He did not state of his own knowledge that the defender was dead, but merely that he had heard the report and believed it. It is to be observed that the pursuer's belief was not induced by the defender's previous

long-continued silence; because, as she says, he had neither corresponded with the pursuer nor let her know of his whereabouts for six years prior to the date of his supposed death, from which she naturally inferred, not that he was dead, but that he had deserted her. Therefore the only ground for the pursuer's belief that the defender was dead when she married again was this report spoken of by Archibald Campbell, and the question is whether she was justified in marrying again on the faith of such a rumour.

If it had been averred and proved that the rumour was intentionally circulated by the defender, or even if it had been averred and proved that the defender was aware of the rumour and aware that his wife believed it, and yet kept silence, I should have been disposed to hold that the defender would have been barred from stating the objection in defence to the pursuer's action. But in the absence of any such averments I am not prepared to hold that a married woman who contracts a second marriage upon such slender grounds, however honestly she may believe that her husband is dead, can escape the consequences of her error. Her *bona fides* may be a good defence to a prosecution for bigamy, but it will not deprive the husband of his right to refuse to adhere, and if he is not bound to adhere he cannot be divorced for desertion. I therefore think the Lord Ordinary's interlocutor should be affirmed.

The Court adhered.

Counsel for Pursuer—Trotter. Agents—Stirling & Duncan, Solicitors.

Thursday, March 15.

SECOND DIVISION.

[Lord Low, Ordinary.

PLAYFAIR'S TRUSTEES *v* PLAYFAIR.

Succession — Trust — Bequest Void from Uncertainty—Direction to Convey Residue to Relations and Other Persons Entitled in Opinion of Trustees to Participate therein.

There are two distinct classes of legacies, both very general in their terms, one of which is valid and the other not. If a testator leaves money to a definite class indicated by himself, he may validly leave to trustees the election of the individuals of that class; but if he leaves the selection of the class to trustees, the bequest is void from uncertainty.

A testator in her trust-disposition and settlement gave and committed to trustees power to allocate and pay the residue of her estate "to such of my relations or other persons who in the opinion of my trustees may be entitled to participate therein, including in such bequest such legatees as are herein named by myself, and that according to the whole discretion of my trustees, who shall alone be the judges."

Held (*rev.* judgment of Lord Low) that this bequest was void from uncertainty, and that the residue had fallen into intestacy.

Miss Mary Playfair died on 13th December 1897 leaving a trust-disposition and settlement dated 21st July 1894, by which she conveyed her whole means and estate, heritable and moveable, to trustees. The deed provided for payment of debts, &c., and of legacies to the Free Church of Scotland, the poor of Alyth, and certain individuals, and proceeded as follows:—"(*Fourth*) I give and commit to my trustees power to allocate and apply the residue of my whole estate, and pay the free proceeds of the same to such of my relations or other persons who in the opinion of my trustees may be entitled to participate therein, including in this bequest such legatees as are herein named by myself, and that according to the sole discretion of my trustees who shall alone be the judges." The testator also left a codicil dated 5th November 1894, in which she gave certain directions relative to the bequest for the poor of Alyth, and made the following provision as to the residue of her estates:—"(*Third*) It was my sister Janet's wish that in the division of the residue of her estate, cousins, paternal and maternal, alive at her death should be called to participate, and that the children of deceased cousins should represent their parents. I accordingly enjoin on my trustees to keep this in view, and to exercise this direction as much as possible according to the option and discretion of my trustees in the division of my estate, keeping in view the other provisions above written with regard to the residue of my estate."

Difficulties arose in regard to the division of the estate. *Inter alia*, Miss Anne Playfair, the sister and sole next-of-kin of the testatrix, considered that the clause in the settlement dealing with residue, as qualified by the codicil, was void by reason of uncertainty.

In these circumstances Miss Mary Playfair's trustees raised an action of multiplepoinding for the purpose of dividing the estate.

In this action the trustees lodged a claim in which they claimed that they were entitled to "apportion the residue of the whole trust estate in such shares as they in their discretion may appoint among persons to be selected by them from those falling within the classes intended to be benefited by the testatrix, viz. (1) relations of the said Mary Playfair, including her cousins, paternal and maternal, alive at the date of her death, and the children of deceased cousins, and (2) legatees mentioned in her will."

Miss Anne Playfair lodged a claim maintaining that the trust-disposition and settlement and codicil in so far as they dealt with residue were void from uncertainty, and that she, as sole next-of-kin of the testator, was entitled to the residue of the trust estate. She claimed "to be ranked