do it, but if the same issue will try both causes there will be conjunction. These appear to me to be the considerations that ought to influence the Court, and now let us see what the contingency between these processes is, and what is the issue which they raise. The object of the first action, as its conclusions clearly show, is to have it found and declared that the pursuers as riparian proprietors are entitled to the use of the water in a pure state fit for the consumption of man and beast, and that the defenders are not entitled to convert it from a pure state into a polluted one. The second conclusion of the action prays for a prohibition against their doing so. That is all the action, because it is not necessary to try the subsidiary questions by a separate issue before the jury. The conclusions of the two new actions are exactly the same, and therefore the main question, and the only question is, whether the defenders have caused the pollution of the stream to the nuisance of the pursuers? It appears to me that all considerations of expediency are in favour of the conjunction of these processes, that one jury may dispose of the question in presence of all the parties.

The other Judges concurred.

The motion for conjunction was accordingly granted, and the pursuers were appointed to lodge issues.

POTTER *v.* POTTER.

Proof—Payment of Money. An allegation that a legacy of £100 had been paid can only be proved by writ or oath.

Counsel for the Pursuer—The Lord Advocate and Mr H. J. Moncreiff. Agent—Mr A. D. Murphy, S.S.C.

Counsel for the Defender—Mr A. R. Clark and Mr Deas. Agents—Messrs Duncan & Dewar, W.S.

This is an action for payment of a legacy of £100 claimed as having been left by the late John Potter, shipmaster in Limekilns, to the pursuer, who is his grandson. The action is founded on John Potter's disposition and settlement, dated the 14th January 1843, and is directed against the defenders as executors confirmed to James Potter, nephew of the the testator, or at least as having viciously intromitted with and taken possession of his whole means and estate. In answer to the claim the defenders state that on 15th May 1853 the pursuer being desirous of setting up in business, a sum of £100 to enable him to do so was paid by his uncle, James Potter, as the legacy due to him under his grandfather's settlement. James Potter was sole executor under John Potter's settlement, intromitted with his estate, and is now dead.

On 23d November 1864 the Lord Ordinary (Kinloch) found that the defender had not proved or offered relevant and sufficient evidence to prove payment of the legacy sued for, and repelled the defences, reserving to the defender all competent reference to the oath of the pursuer. The Lord Ordinary held it was incompetent for the defenders to prove by parole evidence the alleged fact of the amount of the legacy having been paid to the pursuer. On advising a reclaiming-note for the defender, the Second Division, on 19th January 1865, opened up the record, and remitted to the Lord Ordinary to appoint parties to revise and adjust their statements respectively, and thereafter to close the record, and to proceed with the cause. On reconsidering the case the Lord Ordinary again found that the defender had not proved payment of the legacy sued for by the writ of the pursuer, and is not entitled to obtain an allowance of parole evidence in proof of the allegations made by him towards instructing payment; and of new repelled the defences. To-day the Court unanimously adhered, but received a minute tendered by the defender, referring the alleged payment of the legacy to the oath of the pursuer.

DONALDSON'S TRUSTEES *v.* MACDOUGALL.

Trust Deed—Construction. Terms of a trust deed under which held (alt. Lord Kinloch), (1) That a liferent had lapsed; and (2) That the fee should be distributed *per capita* and not *per stirpes*.

Counsel for Mr J. Lawford Young—Mr Patton and Mr Cook. Agents—Messrs Thomson & Dickson, W.S.

Counsel for Lieut. Macdougall and Others—Mr Gordon and Mr Duncan. Agents—Messrs Adam, Kirk, & Robertson, W.S.

This case has been on several occasions before the Court. The questions now in controversy regard the meaning of a clause in the third codicil to the late Mr Donaldson's settlement. By the previous parts of that settlement, as construed by the judgment of the House of Lords, the residue of Mr Donaldson's estate was given to certain grand-nephews and grand-nieces, subject to the condition that if any of these died without issue before the testator's widow, by whom the whole estate was liferented, the share of such deceaser "shall belong to and be divided equally, or share and share alike, among the survivors of my said grand-nephews and grand-nieces equally." By the third codicil Mr Donaldson, to some extent, altered this provision as regarded grand-nieces, and appointed his trustees "to pay the share or shares bequeathed to my said grand-nieces in or by the foresaid deed of settlement to them and their respective husbands only in liferent, for their, her, or his liferent use allenarly, and the fee of such shares to the lawful issue of my said grand-nieces equally; whom failing, to the survivors of them, and my grand-nephews, also named in the foregoing settlement or codicils, equally in liferent, and their issue, also equally in fee, after the death of the longest liver of me and my wife."

The present process regards the one-sixth share bequeathed to the testator's grand-niece, Eliza Young or Cuthbertson, wife of Allan Cuthbertson. Mrs Cuthbertson predeceased the testator's widow without leaving issue, but survived by her husband, Mr Allan Cuthbertson. By judgment of the Inner House, of 15th January 1864, it was found "that Mrs Eliza Cuthbertson having predeceased the testator's widow, leaving no issue, but survived by her husband, the claimant, Allan Cuthbertson, the said Allan Cuthbertson is entitled to a liferent use and enjoyment of the fund *in medio*." The judgment further found that the fee of the said fund belongs to the issue of the testator's grand-nephews and grand-nieces existing at the date of the widow's death, whether their parents survived that term or not." Mr Allan Cuthbertson survived this interlocutor only four days, having died on 19th Jan. 1864. By this event the liferent of the fund terminated; and two questions thereon arise (1)—Whether the fee opened to the parties in right of it unburdened with any further liferent? and (2) whether the right of fee, found by the Inner House to belong to the issue of the whole grand-nephews and grand-nieces, was divisible *per stirpes* or *per capita*. In regard to the first question, the Lord Ordinary (Kinloch) was of opinion that on the death of Mr Cuthbertson a liferent of the fund in question emerged to the three surviving grand-nieces and grand-nephews equally among them; but in the case of the grand-nieces, he did not think the liferent passed to their husbands on their deaths, the provision to that effect applicable to an original being omitted in regard to a devolved share. In regard to the second question, the Lord Ordinary held that the fee was divisible *per stirpes*.

To-day the Court altered this interlocutor, and held that the liferent had lapsed, and that the division of the fee should be *per capita*.

The LORD JUSTICE-CLERK said—In disposing of the two questions which are raised by these reclaiming notes, we must have regard specially to the judgment which has been already pronounced in this process, and also in the previous process, regard-

ing the distribution of the testator's estate. By the judgment of the House of Lords in the first case, the general meaning of the settlement was fixed, and, in particular, it was adjudged that according to the true construction of that settlement the term of vesting was the death of the longest liver of the testator and his spouse. Now, the general scheme of the principal deed of settlement was that the residue of the testator's estate should be divided into six shares, and that one of such shares should be given to each of his grand-nephews and grand-nieces in fee, there being three grand-nephews and three grand-nieces; and it was provided also by that principal deed of settlement that in the event of any one of these residuary legatees dying without leaving issue before his or her share vested, then that share was to be divided equally among the survivors of his grand-nephews and grand-nieces. The judgment of the House of Lords fixing the term of vesting, and also fixing that the issue of a predeceasing grand-nephew could not take under the devolution clause as one among the survivors of the grand-nephews and grand-nieces, really determined everything that was raised as a difficulty upon the construction of this principal deed of settlement. But in the present process of multiplepoinding, which brings into Court for distribution Mrs Cuthbertson's share of the estate, questions of a very different kind arose, depending, not upon the construction, or at least not exclusively or principally on the construction, of the deed of settlement itself, but rather upon the construction of the third codicil; and in regard to that share of Mrs Cuthbertson's, the state of the fact was this, that at the death of the widow of the testator Mrs Cuthbertson was no longer alive. She predeceased the widow. But she had left a husband behind her, Mr Cuthbertson, her widower; and we found that he was entitled under the provisions of the third codicil to a liferent of his wife's one-sixth share of the residue of the testator's estate. At the same time, we found also by the same judgment (15th January 1864) that as Mrs Cuthbertson had left no children, the fee of the fund—that is, of her one-sixth part of the residue—belongs to the issue of the testator's grand-nephews and grand-nieces existing at the date of the widow's death, whether their parents survive that term or no; and consequently that the claimant who was before us, Mr Lawford Young, as the sole issue of Thomas Young, one of the testator's grand-nephews, was entitled to a share of the fee of that fund, along with the issue of his other grand-nephews and grand-nieces. Since that judgment was pronounced Mr Cuthbertson is dead; and the question now comes to be, in the first place, whether the death of Mr Cuthbertson puts an end to all right of liferent as affecting Mrs Cuthbertson's one-sixth part of the residue, or whether by reason of Mr Cuthbertson's death after having become liferenter of this fund, there is another liferent in succession opened to other parties under the terms of the third codicil. Now in this, as in every other question under Mr Donaldson's settlement, the main thing to keep in view is, that there is one period of time in the mind of the testator which alone regulates all questions of vesting and distribution, and that is the death of the longest liver of himself and his spouse, or, as the event has turned out, the death of his widow. Upon that occasion everything is to be settled once for all. There is no substitution in the fee of any of these shares; and it seems to me quite out of the question to hold that there is what might be called a substitution in the liferent, or, more properly speaking, a succession of liferents created where there is no substitution in the fee. I think that is a most unnatural construction of this codicil, and entirely inconsistent with the whole scope and purpose of the testator's settlement. It seems to me that when a failure takes place under this third codicil, either in the liferent of the fee—that is to say, where the person who is to take the liferent or the fee predeceases the term of vesting—somebody else takes in place of that person who has failed, and that is the whole meaning and effect of the words "whom failing," and the clause which follows. The share of Mrs Cuthbertson was liferented by her husband according to the terms of our previous judgment, because he survived the widow, though his wife had predeceased him; and in like manner the fee of that share, there being no issue of Mrs Cuthbertson, went under the clause of devolution—the clause beginning "whom failing"—to the issue of the other grand-nieces and grandnephews. All that on matter of construction appears to me to be perfectly clear, and that effect having once taken place at the point of time which settles everything—namely, the death of the widow—there can be no longer any shifting of interests or any succession of interests in these rights, which then vested; and therefore the fee of this share having been subjected to the burden of one liferent, the purpose of the clause is satisfied, and that liferent having lapsed, the fee emerges unburdened, as a fee for the benefit of those in whom it vested at the time of the widow's death. I therefore differ from the interlocutor of the Lord Ordinary in so far as he finds that by reason of the death of Mr Allan Cuthbertson the liferent of this fee devolved upon the surviving grand-nephews and grand-nieces. I think there is no room for such a construction. But then there arises another question, and one certainly of somewhat more delicacy than that which I have just disposed of. The fee of Mrs Cuthbertson's share has been found to vest in the issue of the grand-nephews and grand-nieces who survived the period of vesting, who were alive, that is to say, at the widow's death, whether their parents had survived that term or no. In short, the right of the issue of the other grand-nephews and grand-nieces as conditional institutes to this share of the fee did not depend in any way upon their parents taking a corresponding liferent. There might be no parents alive at all at the time. The whole grand-nephews and grand-nieces might be dead, and there might be nobody therefore to stand between the issue—that is to say, the great-grand-nephews and great-grand-nieces — when the period of vesting arrived. Or this might also happen—there might be two or three grand-nephews or grand-nieces surviving without issue, and there might be issue surviving of the other three grand-nieces and grand-nephews who had predeceased; and a share having lapsed both as regards the liferent and fee, it would then go in liferent to the three childless grand-nephews or grand-nieces, and in fee to the issue of the predeceasing grand-nephews and grand-nieces, which demonstrates that there is no necessary connection as of parent and child to tie together the liferent and the fee either of the whole or of the divided portion of his lapsed share. Now, the question in these circumstances is, whether the fee of this lapsed share is to be divided among the surviving issue of the grand-nieces and grand-nephews *per stirpes* or *per capita*. Where a division is to be made *per stirpes*, it will generally be found that the principle of division is that a certain portion in the distribution is to go to each of several families. In short, that is the real principle of a division *per stirpes*, and we have a very good example of that here in the leading part of the third codicil. The testator's residuary estate being divided into six shares, and his purpose being to restrict his three grand-nieces to a liferent only, he gives the fee to their issue. But the way in which that is expressed is, that the trustees are appointed to pay the share or shares bequeathed "to my said grand-nieces by the deed of settlement for their liferent use allenarly, and the fee of such shares to the lawful issue of my grand-nieces equally." Now, there nobody could have the smallest difficulty in arriving at the conclusion that the division must be *per stirpes*, because the whole object of the codicil was merely to convert the right and interest of the grand-nieces into a right of liferent, but not in any

event to diminish their shares, or to take the share of any one grand-niece out of the family of that grand-niece, if she should have a family; and so nothing but a division *per stirpes* will satisfy either the words or the plain scope and intention of that provision. But the words which follow stand in a very different situation, the provision regarding the distribution of a lapsed share—that is to say, a share of a grand-niece who leaves no issue—because then there is nobody that stands to her in the relation of her own family or descendants; and the provision is that the fee of that share is to go to the issue of the other grand-nieces and grand-nephews; that is to say, to all the persons who at the period of vesting and distribution stand to the testator in the relation of great-grand-nephews and great-grand-nieces. Now, it appears to me that the natural meaning of that is that all the individuals who stand in that position are to take equally—or, in other words, that the distribution is to be *per capita*. I cannot otherwise satisfy the words, "their issue equally in fee after the death of the longest liver of me and my wife." I think that is the plain meaning of these words, and that the whole foundation for a division *per stirpes*, and the whole reason for construing the previous part of the sentence as making a division *per stirpes*, is entirely inapplicable. It was argued no doubt—and it seems to have had a good deal of effect on the mind of the Lord Ordinary also—that there is in the two parts of the codicil a use of the same expression in words, and he seems to think it very unnatural to give the same words occurring in the one part and in the other of this codicil a different or an opposite meaning. But I do not think there is much in that argument, and I doubt whether it does not proceed upon an unwarrantable assumption. I don't think that the construction to which I have referred does give to any word in this codicil opposite meanings in the two different parts of the codicil. The only word that is of very great importance in considering this argument is the word "equally;" but it seems to me that the word "equally" means exactly the same thing throughout; for in the first part of the codicil it is used in this way—the shares of the grand-nieces are to be enjoyed by them and their respective husbands "only in liferent, and the fee of such shares is to go to the lawful issue of my said grand-nieces equally." Is it equally among the family of the grand-nieces, or is it equally among the individuals of each family? I think clearly the latter, because the division *per stirpes* provided in this part of the codicil does not depend on the construction of the word "equally" in the slightest degree. The codicil plainly means that each share is to go to a grand-niece in liferent, and her issue in fee; and that settles the division *per stirpes*. But it is to go to her issue equally—that is to say, the sixth part or share which belongs to the mother in liferent is to be divided equally among the individuals who constitute her issue. And so, when we come to the second part of the clause, it will be found that the word "equally," according to the construction which I have now given to that part of the clause, has the same meaning. The lapsed share is to go to the grand-nephews and grand-nieces who survive equally in liferent—that is to say, the liferent is to be divided equally among these individuals, and the fee is to go to their issue equally—that is, to all the great-grand-nephews and great-grand-nieces equally. But how could that be accomplished unless it was to be an equal distribution among the whole individuals that constitute that class? If it were not so it would be an unequal distribution, and it would not be an equal distribution in the sense of any part of this codicil, for the word "equally" in every part of it signifies an equal distribution among individuals, and not among families. I am therefore of opinion, further that the distribution of the fee of the lapsed shares which is in question must be equally among the individuals who at the period of the widow's death answered the description of the surviving great-grand-nephews and great-grand-nieces of the testator.

The other Judges concurred.

Wednesday, Feb. 7.

FIRST DIVISION.

BOWMAN *v.* BOWMAN.

Husband and Wife — Divorce — Desertion. A wife who left her husband's house on account of his maltreatment of her, held (aff. Lord Ormidale) not entitled to obtain divorce on the ground of his desertion.

Counsel for Pursuer—Mr Fraser and Mr Couper. Agents—Messrs Wotherspoon & Mack, S.S.C.

This was a divorce by a wife against her husband, on the ground of desertion for upwards of four years. It was not defended by the husband. The parties were married in 1856. After living together for about two years, the pursuer in 1858, in consequence of her husband's maltreatment, left his house, fellowship, and society, and returned to live in family with her father, with whom she has continued to live ever since. In 1860 she sued her husband in the Sheriff Court of Glasgow for aliment, and obtained decree against him therefor. No part of the aliment decerned for was ever paid; and after the decree was obtained the husband disappeared from Glasgow, where he had previously resided, and he has not been heard of since.

Upon these facts the Lord Ordinary (Ormidale) assoilzied the defender. He found that it was not alleged or proved that ever subsequently to 1858, when the pursuer left her husband's home, she has been willing to return to his society and fellowship, or to adhere to him as her husband. On the contrary, there was evidence that she was not willing to do so. He therefore found that in law the pursuer was not entitled to divorce.

The pursuer reclaimed, and argued that her leaving her husband in 1858 having been caused by his maltreatment of her, this constituted in law desertion by him. In support of this argument the following authorities were cited, viz.:—Ersk. 1, 6, 19; 1 Fraser, 458; "Bishop on Marriage and Divorce," sections 504-517; 2 Dane's "Abridgment of American Law," p. 208; "Reeve on Husband and Wife," p. 207; Boehmer's Jus. Eccl. Prot., 4, 19, 39; and the case of Graves *v.* Graves, 1864 (3 Swabey & Tristram, 350).

The Court adhered to the Lord Ordinary's interlocutor.

The LORD PRESIDENT said—This is an action of divorce at the instance of Mrs Bowman against her husband, on the ground that he has wilfully and maliciously deserted her and that she is consequently entitled to decree of divorce. The Lord Ordinary allowed a proof of the facts, and we have heard a learned argument from Mr Fraser on the facts of the case, and on the principles applicable to such cases, and on the rules by which questions analogous have been decided in England and America. But I am unable to see that we can consistently with our law grant the decree that is asked. It appears from the evidence that the pursuer left her husband's residence, and went to reside with her parents on account of his maltreatment of her, and that she claimed aliment from him on the ground that the course taken by her was warranted under the circumstances. It then appears that the husband thereafter left his house, sold his furniture, and went to another house; and it is stated that he has since gone abroad, has never paid aliment to his wife, and that she does not know where he is, but believes him to be abroad. There is no evidence that inquiry has been made about him, and that they are unable to find where he is. I do