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

and preferred upon the fund *in medio*, to to the effect of receiving (1) payment or conveyance of the whole free residue of the trust estate."

She pleaded—"(1) The residuary bequest in said trust-disposition and settlement and codicil being void from uncertainty, the claimant is entitled to be ranked and preferred in terms of the first head of her claim."

On 1st December 1899 the Lord Ordinary (Low) pronounced an interlocutor finding "(3) that the directions in the said trust-disposition and settlement for the disposal of the residue of the estate of Miss Mary Playfair are not void from uncertainty, but that upon a sound construction thereof the trustees, acting under the said trust-disposition and settlement, are empowered to divide the said residue among such of the relations of the said Miss Mary Playfair and the legatees named in the said trust-disposition and settlement, and in such proportions as the said trustees may think fit: Therefore . . . ranks and prefers the claimants William Japp and James Thomas Japp, the surviving and accepting trustees of Miss Mary Playfair acting under the said trust-disposition and settlement, to the whole remainder of the trust estate now hereinbefore disposed of, to be applied by them in terms of the said trust-disposition and settlement: Repels the claims for all the claimants except in so far as the same have been sustained by the foregoing decrees of ranking, and decerns," &c.

Opinion.— . . . "The only other question is in regard to the bequest of residue in the settlement, which it is contended is void from uncertainty. That question depends upon the meaning to be ascribed to the words 'other persons' in the clause, and it is not disputed that if these words mean any persons to whom the trustees might choose to give a share of the residue the bequest is void, while if the words mean other persons of a defined class the bequest is good.

"The clause is extremely badly framed, but I am of opinion that the fair reading of it is that the trustees are given power to allocate the residue among the relatives of the testatrix and her legatees, and no-one else. I come to that conclusion because the 'other persons' are described as those 'who in the option of my trustees may be entitled to participate therein,' and the only persons except relatives who are given any title to participate in the residue are the legatees.

"I am therefore of opinion that the residuary clause is not void from uncertainty." . . .

The claimant Miss Anne Playfair reclaimed, and argued—On a sound construction of the deed the trustees would not be in breach of trust if they gave the residue to anyone they pleased. They had an absolute discretion to select anyone they choosed. The bequest was therefore void from uncertainty—*Sutherland's Trustees* v. *Sutherland's Trustee*, July 6, 1893, 20 R. 925; *Anderson* v. *Smoke*, January 27, 1898, 25 R. 493. Bequests to charities were always regarded favourably, and such bequests implied the selection of a well-defined object by the testator—*Robbie's Judicial Factor* v. *Macrae*, February 4, 1893, 20 R. 358, opinion of Lord M'Laren 361; *Cobb* v. *Cobb's Trustees*, March 9, 1894, 21 R. 638. All the cases referred to on the other side had reference to charitable bequests. But here the bequest was not to charities; it was absolutely general and indefinite. The Lord Ordinary's reading of the clause was in conflict with the words used, and he argued in a vicious circle.

Argued for claimants, Miss Mary Playfair's trustees—The testator had indicated the class of objects he meant to favour, and even if the clause were read in its widest sense, the discretion given to the trustees was not wider than that given in other wills, which had been held to be good—M'Laren on Wills, ii. 772; *Kelland* v. *Douglas*, November, 28, 1863, 2 Macph. 150, opinion of Lord Cowan, 164; *Crichton* v. *Grierson*, July 25, 1828, 3 W. & S. 329. It was a question of construction, and the Lord Ordinary's reading was a reasonable and possible one, and the bequest should get the benefit of the doubt. It was the duty of the Court to follow, if possible, a construction that would give effect to the wishes of the testator. It being assumed that a bequest to "other people" was too wide, the bequest was qualified sufficiently to show that "other people" meant "legatees." Even if the deed was held vague, there was a recommendation in the codicil which was a direction to the trustees, and which they were bound to follow—*Miller* v. *Black's Trustees*, July 14, 1837, 2 S. & M. 866. Even if it were assumed that this bequest as a whole was too wide, the whole bequest should not be set aside. That would be against the law interpreting wills as distinguished from contracts. The directions as regards the wider class, "other people," might not receive effect, but the choice by the trustees of persons within the class named and favoured would still be good.

At advising—

Lord Justice-Clerk—I cannot agree with the conclusion at which the Lord Ordinary has arrived with regard to this clause. He arrives at it by practically excluding from the clause the words "or other persons." I do not think that that is the way in which this disposition can be dealt with. The Lord Ordinary says in his note that he is of opinion that the fair meaning of the clause is "that the trustees are given power to allocate the residue among the relatives of the testatrix and her legatees, and no-one else." With rgard to the special mention of legatees in this part of the will, I think that the meaning of that is that the trustees are not to hold themselves excluded from giving to legatees a share of the residue, because these latter had already received special legacies. The question is, whether this bequest of the proceeds of the residue of his estate "to such of my relations or other persons who in the opinion of my trustees may be entitled to participate therein" is not a

legacy which we must hold to be void on account of its being so vague as not to constitute a specific gift. If the words "other persons" are left out, the legacy is not vague, but if they are kept in it becomes extremely vague. A legacy to "relatives or other persons" is not a legacy to persons within a particular class, but a legacy to persons without any distinction whatever.

The bequest is simply a direction to the trustees to give the proceeds of the residue to any-one they chose. I think that such a bequest is much too vague to receive effect, and none of the cases cited have gone so far as to hold a legacy in similar terms to be valid.

LORD YOUNG—I arrive at the same conclusion. I think that the Lord Ordinary's view as to the meaning of the clause is erroneous. I think it contains no distinct or intelligible direction restricting the trustees to any use of the money. I cannot read the clause otherwise than as leaving the disposal of the residue entirely in the discretion of the trustees. I am therefore of opinion that the judgment of the Lord Ordinary is wrong, and ought to be reversed.

LORD TRAYNER—I am of the same opinion. There are two distinct classes of legacies, both very general in their terms, one of which the Court will hold valid and the other not. If a testator leave money to a definite class indicated by himself he may validly leave to trustees the selection of the individuals of that class; but if he leave the selection of the class to trustees the bequest is void from uncertainty. I cannot read this clause otherwise than as putting the money at the absolute disposal of the trustees. No definite class is pointed out. It is a bequest to any person to whom the trustees think fit to give it. "Legatees" are mentioned, not for the purpose of indicating that the trustees are to select persons from that class, but to indicate to the trustees that in making their selection such persons are not to be excluded simply because they are legatees.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor:—

"Recal the said interlocutor (1) as regards the third finding thereof; (2) in so far as it ranks and prefers the claimants William Japp and James Thomas Japp, the surviving and accepting trustees of Miss Mary Playfair acting under her trust-disposition and settlement dated 21st July 1894, and codicil dated 5th June 1896, to the whole remainder of the trust-estate not therein before disposed of; and (3) in so far as it repels the first branch of the claim for the said Miss Anne Playfair: Find that the directions in the said trust-disposition and settlement and relative codicil thereto by the said Miss Mary Playfair for the disposal of the residue of her estate are void from uncertainty, and accordingly sustain the first plea-in-law for the said Miss Anne Playfair, as also the first branch of her claim, and rank and prefer her accordingly. *Quoad ultra* adhere to the said interlocutor reclaimed against, and decern."

Counsel for Claimants Miss Mary Playfair's Trustees — W. Campbell, Q.C. — Grainger Stewart. Agents—Ferguson & Japp, W.S.

Counsel for Claimant Miss Anne Playfair — Guthrie, Q.C. — Cook. Agents — Kinmont & Maxwell, W.S.

Wednesday, March 14.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

WILSON'S TRUSTEES *v.* JAMES WATSON & COMPANY.

Bankruptcy — Trust-Deed for Creditors — Appropriation of Payments by Trustees — Principal or Interest — Payment — Appropriation of Payments—Interest.

Under a trust-deed for creditors the trustees paid in all six dividends, of which the first four were made as being payments to account of the amount of the creditors' respective debts as at the date of the deed, the fifth as in payment of the balance of this amount and to account of interest thereon, and the sixth as in payment of the balance of interest thereon from the date of the deed. After paying these dividends it appeared that there was still a surplus. One of the creditors, a firm who had assented to the trust-deed, and who had acquiesced in the method of payment adopted by the trustees in the case of all the dividends except the last, claimed payment out of the surplus of a balance of interest still due to them, which they brought out by attributing the dividends as an extinction *primo loco* of the interest due at the respective dates of payment. *Held* that their claim must be sustained, in respect that the dividends having been paid by the trustees and accepted by the creditors in the course of a realisation under a trust-deed, there had been no such appropriation of the payments as could effectually bar the creditors from claiming full payment of their interest-bearing debts.

By *ex facie* absolute disposition and assignation dated 9th and 11th August 1886 three gentlemen of the name of Wilson disponed and assigned to the disponees and assignees therein named their respective shares of the estate left by their deceased father. By a relative declaration of trust dated 17th, 18th, and 19th August 1886 it was acknowledged and declared by the disponees and assignees that the disposition and assignation was in trust for the following trust purposes, viz.—(1) payment of