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

not think that the case as presented to us is one to warrant us in granting divorce. It is admitted that there is no precedent for a divorce granted under such circumstances, and that there is no *dictum* to that effect in our law—which law has subsisted for a period of about three centuries. The principles which Mr Fraser endeavoured to press into his service were deduced very much from the views taken in England and America in reference to the rights of a wife that is deserted, and the interpretation there given to the word "deserted." In reference to English law, the remark of the Judge whose opinion was quoted to us—and I rather think a similar remark was made by his predecessor, though no decision was come to on the point—was to the effect that "desert" is a new word in their nomenclature, and it was the present Judge of the Consistorial Court that was first called to put an interpretation on the word as appearing in our statutes. It is a word of yesterday to them. Their jurisdiction to grant divorce at all is a jurisdiction of yesterday. And they don't grant divorce on account of desertion at all. They can grant divorce on account of adultery, and they can divorce on account of desertion coupled with adultery; and therefore they are called on to interpret the word *desert*. We are not called on to do that at all. Our statute granting divorce does so for non-adherence. And though recently the forms have been altered, yet the principles on which the statutory jurisdiction is given are the principles on which the statute of 1573 was passed, and that statute clearly lays down that it is in respect of non-adherence that divorce is given, and that the party seeking divorce was primarily to demand adherence from the other party. The forms had no doubt been since modified, but the principle remained the same. In regard to American law, we have in many departments of our law received important suggestions from writers on law in America, and from the judgments in their courts. And upon other points also I have read with great interest some of their speculations on the general principles of jurisprudence; but whatever interpretation they give to the word *desertion* in their law, which compared to our own, is a mystery, I am not disposed to be guided by them in the interpretation of our Act of 1573. Their law may or may not be based on the same principles as our Act, but it is not from their law that we are to interpret that statute. If we find that for three centuries we have been granting divorce on the ground of that statute, and that there is no instance of divorce under circumstances such as the present, it is a pretty strong proof that that Act does not apply to this case. The law is not without a remedy in cases of ill-treatment of the wife by the husband. It does give a remedy in cases of *saevitia*. The wife is entitled to aliment, and she may have separation; and that the law of England gives too. But I am here speaking of divorce *a vinculo matrimonii*. If, in circumstances such as the present, the husband raised an action of divorce against his wife on the ground of non-adherence, and it was shown that his former conduct had been such as to render it dangerous that she should return to him, I am not disposed to say whether there would or would not be ground for a divorce. But I go no further. The fact of the husband here being in another country does not matter at all. What would happen if an attempt was made to find him, and then divorce was claimed on account of non-adherence, is not the question before us. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord CURRIEHILL concurred.

Lord DEAS said—In this case as it stands we cannot be called upon to grant a divorce. There are two general questions which have been alluded to in the argument which I don't think it necessary to decide. I don't think it necessary to say that a woman who is driven away from her husband by cruelty and danger to life can never obtain the remedy of divorce on account of non-adherence. The other general question which I do not think it necessary to decide is that when at the time of desertion by the husband the wife happens to be living apart from him on account of some act or acts of cruelty, he may continue to desert her after that without her getting the remedy of a divorce on account of non-adherence. What I mean under the second head as distinguished from the first will appear from a case such as this. I suppose that a woman, from attacks made upon her by her husband when in *delirium tremens*, for instance, leaves home and gets a decree of aliment against him—which is always a temporary thing, and may be recalled at any moment—and then that he deserts her, goes away to some other country, not for the purpose of pushing his fortune, but just to get out of her way; that for six, seven, eight, or ten years he contributes nothing to her support, nor gives her the means or the opportunity of joining him, nor proposes to join her. I don't wish to decide that the woman would not have the remedy of a divorce on the ground of non-adherence, simply because it happens that at the week or month at which he chose to desert her she chanced to be in another house as a temporary residence. In this case I don't differ from your Lordship, in the conclusion you have come to. The proof here is exceedingly scanty—not so substantial or full as we would require to enable us to decide either of these general questions. I don't think it proved that the husband is out of the country. I don't see any proof as to the wife being prepared to return to him; on the contrary, so far as there is evidence, it goes the other way; and we have very little proof even about the circumstances under which she left him, whether it was on account of temporary violence, or of a long course of cruelty.

Lord ARDMILLAN thought that in this case nothing could be clearer than that the pursuer has a remedy, and that that remedy was not divorce but separation.

J. AND F. BATEY *v.* DYKES.

Reparation — Wrongous Arrestment — Repetition — Issue. Action of damages for wrongous arrestment and of repetition of money paid in order to get arrestment loosed, in which issues adjusted.

Counsel for Pursuers—Mr Trayner. Agent—Mr P. S. Beveridge, S.S.C.

Counsel for Defender—Mr Mackenzie and Mr H. J. Moncreiff. Agent—Mr A. D. Murphy, S.S.C.

In this action the pursuers sue the defender for damages in respect of the arrestment and dismantling of their ship the Montrose, first on 14th July 1865 *ad fundandam jurisdictionem*, and again on the following day, on the dependence of an action raised by the defender against them. They also sued for repetition of a sum of £40, 18s. 8d. which they had paid to the defender under protest in order to get the arrestments loosed, and which they alleged they had been concussed to pay, in order that the vessel might resume her regular trips betwixt Leith and Aberdour. The pursuers proposed the following issues:—

"1. Whether, on or about the 14th and 15th days of July 1865, the defender wrongously, maliciously, and without probable cause, and for a debt not due by the pursuers, arrested the steamship or vessel called the Montrose, and sometime called the Lord Aberdour, of Newcastle-on-Tyne, the property of the pursuers, while lying in the harbour of Leith, and caused her to be dismantled, and detained in the said harbour of Leith—to the loss, injury, and damage of the pursuers?"

Damages laid at £300.

"2. Whether, on or about the 18th day of July 1865, the defender wrongously exacted and received from the pursuers the sums of money specified in the schedule hereto annexed, in order to have the said arrestments loosed and discharged; and whether the defender is rest-