I assume that his pension was regularly granted, so I assume that he was regularly struck off the list of pensioners. It is not for us to inquire whether he was regularly struck off or not. But I may notice that his pension might be withdrawn at any time. That is clear from the statute founded upon by the pursuer and is not matter of dispute, and I assume that in this case the Commissioners regularly exercised the powers committed to them. I assume that when the proper Government Department do anything which is within the powers committed to them they do it regularly and properly. This pension could not have been forfeited without the decision of the Chelsea Commissioners, for the power of forfeiture is committed to them. If they were satisfied that the pursuer had been guilty of gross misconduct they were entitled to forfeit his pension, and that an action should be brought in this Court, and a proof or a jury trial allowed for the purpose of determining the question whether the Commissioners were satisfied and whether they decided that this pension should be forfeited, appears to me ridiculous.

I have no reason to think that the pursuer here has been ill-used. With every inclination to sympathise with a man in his position who has suffered injustice from his superiors—and I have the strongest sympathy for such a case—I do not see any ground for thinking that he has suffered any injustice.

Apart from that however we could do no more for him than he could do for himself. He can institute inquiries as to whether the Chelsea Commissioners have decided in his case just as well as we can.

I may observe further that in this case we have been informed by the Solicitor-General, speaking in his official capacity, that he has been provided with copies of minutes of the Chelsea Commissioners showing that they have dealt with this case and have decided that this pension should be forfeited. I am of opinion that in such circumstances no inquiry as to whether the Chelsea Commissioners have decided the case or not can be required, and if they have decided it, their judgment upon it is not subject to review by us.

LORD TRAYNER—I agree with the Lord Ordinary.

LORD MONCREIFF was absent.

The Court recalled the interlocutor reclaimed against and dismissed the action.

Counsel for the Pursuer — M'Lennan — Munro. Agent—Robert Broatch, L.A.

Counsel for the Defender — Sol.-Gen. Dickson, Q.C.—A. J. Young. Agent—James Campbell Irons, S.S.C.

Friday, March 11.

FIRST DIVISION.

BEATTIE AND OTHERS (BEATTIE'S TRUSTEES) *v.* MEFFAN AND ANOTHER.

Succession—Vesting—Destination to Named Children of Liferentrix, and any Other Children that may be Procreated of Her Body—Presumption as to Childbearing.

A testator directed his trustees to hold a certain fund in trust during the lifetime of the longest liver of his two daughters, and to pay to them the interest thereof, and upon the death of the longest liver of his said daughters to divide and pay the fund as follows—one-half to the children *nominatim* of each daughter "and any other child or children that may be lawfully procreated of her body."

In a question arising when one of the daughters was 56 and the other 57 years of age, between the trustees on the one hand, and the assignees of the whole right both of liferent and fee in the fund on the other, *held* that the fund had not vested in the children of the liferentrices, there being no legal presumption that either liferentrix was past childbearing.—*Anderson* v. *Ainslie*, January 24, 1890, 17 R. 337, *approved* and *followed*. *Lowson's Trustees* v. *Dicksons*, June 19, 1886, 13 R. 1003, and *Urquhart's Trustees* v. *Urquhart*, November 23, 1886, 14 R. 112, *overruled*.

By trust-disposition and settlement, James Beattie, who died in 1873, conveyed his whole means and estate, heritable and moveable, to trustees for certain purposes.

Part of his heritable estate consisted of the Railway Hotel, Arbroath, with regard to which the testator, after directing his trustees to hold it for behoof of his widow for her liferent use only, provided that after the death of his said widow the trustees should hold it in trust during the lifetime of the longest liver of his daughters, Mrs Munro and Mrs Meffan, paying the rents of the said premises to them. Upon the death of the longest liver of Mrs Munro and Mrs Meffan, he directed his trustees to sell the Railway Hotel, and to divide and pay the free proceeds thereof, as follows, viz.—"One-half . . . to and among James Munro, George Munro, Jean Munro, and Robert Munro, children of the said Elizabeth Beattie or Munro, and any other child or children that may be lawfully procreated of her body, in equal proportions, share and share alike, and the same is hereby left and bequeathed by me to them and to their heirs, and the other half . . . to and among James Meffan, Susan Meffan, John Meffan, and Alexandrina Meffan, children of the said Margaret Beattie or Meffan, and any other child or children that may be lawfully procreated of her body, in equal proportions, share

and share alike, and the same is hereby left and bequeathed by me to them and to their heirs."

The truster was survived by his wife, who enjoyed the liferent provisions down to her death in 1883, and by Mrs Munro, born 14th November 1840, and Mrs Meffan, born 9th February 1842. Mrs Munro's family at the time of her father's death consisted of three sons and one daughter, Mrs Meffan's of two sons and three daughters.

In course of time, owing to financial difficulties, Mrs Munro assigned her interest in her father's estate to Mr Alexander David Anderson, to whom her children also assigned their rights in the fee of the property. Mrs Meffan's children likewise assigned to their mother their whole right and interest under Mr Beattie's settlement.

Mr Beattie's trustees having, with consent of Mrs Meffan and Mr Anderson, sold the hotel for £985, the present special case was presented to determine a question arising as to the disposal of the proceeds.

The trustees, first parties, maintained—"That on a sound construction of the said trust-disposition and settlement, the fee of the said property will not vest in the children of the truster's daughters until the deaths of their respective mothers; or alternatively, that the fee has only vested in the said children as a class, and subject to partial divestiture, in the event of future children being born to the said daughters of the truster respectively; and that the second parties are not at present entitled to demand payment of the proceeds of the said property."

Mrs Meffan and Mr Anderson, second parties, maintained that "under the terms of the provisions of the settlement with reference to the said Railway Hotel property, the rights of liferent and fee vested in the truster's daughters and their children respectively, and that all these rights now belong to the second parties."

The following questions of law were submitted for the opinion and judgment of the Court—"(1) Has the right of fee vested in the children of the truster's daughters? (2) Are the second parties now entitled to payment of the balance of the price of the said property remaining in the hands of the first parties upon tendering valid and effectual discharges therefor?"

In support of their contention the second parties referred to *Scheniman* v. *Wilson*, June 25, 1828, 6 S. 1019; *Shaw* v. *Shaw*, *ib.*, 1149; *Lowson's Trustees* v. *Dicksons*, June 19, 1886, 13 R. 1003; *Urquhart's Trustees* v. *Urquhart*, November 23, 1886, 14 R. 112; *Barron* v. *Barron's Trustees*, July 7, 1887, 24 S.L.R. 735, *per* Lord M'Laren, at p. 737, and Stair, iii. 5, 50.

Argued for the first parties—It could not be determined until the death of Mrs Munro and Mrs Beattie, among whom the fund fell to be divided, and therefore the trustees were not entitled to pay—*Steel's Trustees* v. *Steel*, December 12, 1888, 16 R. 204, *per* L. P. Inglis, at p. 208. There was no legal presumption that a woman was past childbearing at any particular age—*Anderson* v. *Ainslie*, January 24, 1890, 17 R. 337; *Fleming* v. *M'Lagan*, January 28, 1879, 6 R. 588, *per* Lord Young, at p. 599. A liferenter was not entitled by renouncing his liferent to accelerate the period of vesting in the fiars—*Muirhead* v. *Muirhead*, May 12, 1890, 17 R. (H.L.) 45; *Menzies* v. *Murray*, March 5, 1875, 2 R. 507.

At advising—

LORD ADAM—Mr Beattie died in January 1873, leaving a trust-disposition and settlement dated 14th March 1872. He was survived by his wife and two daughters, Mrs Munro and Mrs Meffan. His widow is now dead. His daughters are still alive.

Part of the property belonging to him consisted of the Railway Hotel in Arbroath. With reference to this property it is stated in the case that he directed his trustees to hold it in trust for behoof of his widow in liferent for her liferent use only, and to make payment to her of the rents thereof during her lifetime.

By the fifth purpose of his settlement he directed his trustees, upon the death or remarriage of his widow, or upon his own death in case he should survive her, to hold the hotel in trust during the lifetime of the longest liver of his daughters Mrs Munro and Mrs Meffan, and to make payment of the rents equally between them during their joint lives; to make payment to the survivor of one-half the rents during her life, and to pay or apply the other half thereof for the use and behoof of the children of the predecessor and their heirs equally *per stirpes*, until the death of the survivor. Upon that event taking place he directed his trustees to sell the hotel and to divide the free proceeds in the following terms—"One-half whereof to and among James Munro, George Munro, Jean Munro, and Robert Munro, children of the said Elizabeth Beattie or Munro, and any other child or children that may be lawfully procreated of her body, in equal proportions, share and share alike, and the same is hereby left and bequeathed by me to them and to their heirs." The other half of the proceeds of the sale he bequeathed to the children of Mrs Meffan in exactly similar terms.

Notwithstanding the direction by the truster that the hotel should be held by the trustees until the death of his daughters and then sold, it has been already sold by the trustees, but that fact can make no difference on the construction of the settlement.

It appears that Mrs Munro and all her children now in life have assigned to Mr Anderson all their rights and interests under the settlement, and in like manner that the whole children of Mrs Meffan have assigned to her all their rights and interests under the settlement. Mrs Meffan and Mr Anderson, who are the parties to the case of the second part, demand that the proceeds of the property shall now be paid over to them, on the ground that they are the only parties having any right or interest in the fund.

It appears to me that the right of Mrs

Meffan and Mr Anderson to make this demand depends upon whether a right to the fee of the proceeds of the sale of the hotel was at the date of the several assignations in their favour, or is now, vested in the children of Mrs Munro and Mrs Meffan.

Now, it will be observed that the right of the children to the proceeds in question depends solely on the direction to the trustees to pay and divide the same contained in the fifth purpose of the settlement. There is nothing in the terms of the settlement, so far as it has been made a part of this case, or in the case itself, to indicate that the truster intended that the period of vesting should be other than the period of division. But the period of division directed by the deed, which is the death of the longest liver of the truster's daughters, has not yet arrived—Mrs Munro and Mrs Meffan being still in life. It may be that, if it could be shewn that the only purpose of the truster in postponing the period of division was to secure his daughters' liferent; and if it could be shewn that the fee had vested in the children who granted the assignations, so that the second parties to the case were the only persons who had or could have any interest in the fund—then it may be that the period of division directed by the settlement might be accelerated. But I think that the period of division is postponed not only to secure the liferent of the property to the daughters, but also to secure that all their children should share equally in the gift. The direction is to pay to certain children of the daughter, who are named, "and any other child or children that may be lawfully procreated of her body." Now, I suppose it could not be contended that, if the daughter was still a young woman having children, but still admittedly capable of having more, the fee would vest in the existing children, on her discharge or renunciation of her liferent, or that she and they together could demand immediate payment of the fund. It is said, however, that the daughters, being respectively 56 and 57 years of age, it is impossible that they can have any more children, that therefore it is certain that the children now in existence are the only persons who can have right to the fee of the fund in question, that therefore they and the liferenters together represent every right and interest in the fund, and are entitled to have the period of division prescribed by the settlement anticipated, and to have immediate payment of the same. That, therefore, raises the question whether ladies 56 and 57 years of age can be assumed to be incapable of having children.

The most recent cases on the subject are *Lowson's Trustees*, *Urquhart's Trustees*, and *Anderson* v. *Ainslie*. In *Lowson's Trustees*, 13 R. 1003, Mr Lowson, by a settlement dated in 1844, directed his trustees to invest the residue of his estate for behoof of his daughters equally in liferent and their children in fee, exclusive of their husbands' *jus mariti*. He died in 1858, leaving two daughters, Mrs Macdougall and Mrs Dickson. In 1886 Mr and Mrs Dickson, she being then upwards of 60 years of age, with their five surviving children, who were all in majority, claimed that they, as being the whole parties interested in the one-half of the residue of the estate, were entitled to have it forthwith paid over to them. This claim was opposed by the trustees, on the ground that it was possible that Mrs Dickson might still have other children. The Court held that Mrs Dickson and her children were entitled to immediate payment.

This case was followed in *Urquhart's Trustees*, 14 R. 112, in which the age of the lady was 61 years and she had been married for 39 years without having any child.

In these cases the ages of the ladies were 60 and 61 respectively—in the present case the ages of the ladies are 56 and 57 respectively. It seems to me to be extremely difficult to draw a line between the ages of 56 and 57 on the one hand, and the ages of 60 and 61 on the other, on the ground of the impossibility of there being children in the one case and not in the other. I think therefore that the cases of *Lowson's Trustees* and *Urquhart's Trustees*, if they are to be followed, rule the present case.

But the question again occurred in the important case of *Anderson*, 17 R. 337. The facts of the case, so far as they bear on the present question, were these. Mr Ainslie directed his trustees to make up titles to his estate of Elvingston, and to hold it for the liferent use allenarly of his widow and an unmarried daughter Margaret, and the survivor of them, and upon the death of the survivor to execute a strict entail thereof in favour of the heirs of the body of Margaret, whom failing, in favour of Mrs Anderson, a married daughter, and the heirs of her body, whom failing, in favour of certain other persons. While the widow and Margaret were still alive Mrs Anderson presented a petition to the Court under the 27th section of the Rutherfurd Act praying the Court to ordain the trustees to convey the estate to her in fee-simple, on the ground that the liferenters had consented to discharge their liferents, and that as her sister Margaret was fifty-eight years of age there could be no heirs of her body, that therefore she was in the position of institute under the entail which was directed to be executed, and was entitled to avail herself of the provisions of the Entail Acts and have the estate made over to her in fee-simple.

As regards the question of the possibility of Margaret having issue, which was thus raised in the case, Lord Rutherfurd Clark said—"Two things may be taken as settled—first, that the time has not yet arrived when the truster directed the entail to be made; and second, that according to the expression of the destination the petitioner is not the institute under the entail. But she claims that position in fact on the ground that her sister Miss Margaret Ainslie was born on 14th May 1832, and that she cannot have issue. The first

question comes to be, whether we can assume it to be a fact that Miss Ainslie can have no issue. We know nothing more on this subject than Miss Ainslie's age. On the one hand, it is plainly a matter on which we could not order inquiry. On the other hand, the law has not assigned any age at which a woman is to be held as past childbearing. But if we can neither ascertain the fact by proof, nor proceed on any legal presumption, I do not think that we can decide the case on the footing that Miss Ainslie can have no issue. We must assume the possibility of such issue, and by consequence we must hold that the petitioner is neither in form nor in fact the institute of entail." The law as so laid down is concurred in by the rest of the Court.

It appears to me that this case is inconsistent with the cases of *Lowson's Trustees* and *Urquhart's Trustees*, in which it was assumed, without legal presuption and without inquiry, that women of sixty and sixty-one were incapable of childbearing.

In my opinion the law as laid down in the case of *Anderson* is right, and ought to be followed in this case. If that be so, we must assume the possibility of Mrs Munro and Mrs Meffan having children, and consequently the period of division prescribed by the settlement not having arrived, that the fee of the fund has not vested in their existing children, and therefore that their assignees, the parties of the second part, are not entitled to payment thereof.

I think that both questions should be answered in the negative.

LORD M'LAREN—I concur. In my view the question in this case is to be solved by the clear and accurate statement of Lord Rutherfurd Clark in the case of *Anderson*. That leaves open for consideration cases in which it may be proved or admitted that the possibility of issue is at an end, but in the absence of such admission or proof I agree with Lord Adam, following upon the case referred to, that the Court cannot order an inquiry into the matter, and at the same time that the Court has no legal presumption to guide it independent of the facts.

The LORD PRESIDENT concurred.

LORD KINNEAR was absent.

The Court answered both questions in the negative.

Counsel for the First Parties—Baxter. Agent—Alex. Morison, S.S.C.

Counsel for the Second Parties—Chisholm. Agent—R. C. Gray, S.S.C.

Friday, March 11.

SECOND DIVISION.

[Sheriff of Lanarkshire.

SMITH *v.* JOHN WALLACE & COMPANY.

Reparation — Negligence — Horse — Horse Escaping into Public Street while being Yoked.

In an action of damages the pursuer averred that her husband, while walking along a street in Glasgow, was knocked down and killed by a horse belonging to the defenders, which bolted from their yard into the street, "through the carelessness of the defenders or their servants, in consequence of the said animal not being properly attended while being yoked to a cart in a place in such close proximity to a busy thoroughfare, in respect that the said animal was left entirely uncontrolled and with no one at its head in charge of same, more especially as the said animal was known to the defenders and their servants to be spirited." *Held* (*diss.* Lord Young) that the action was irrelevant.

This was an action brought in the Sheriff Court at Glasgow by Mrs Flora M'Arthur or Smith against John Wallace & Company, contractors, 165 Stobcross Street, Glasgow, and Richard Dunbar, the only known partner of that firm, as such partner and as an individual, in which the pursuer craved decree for the sum of £1000 as damages for the death of her husband Matthew Smith, who was killed as alleged through the fault of the defenders.

The pursuer averred, *inter alia*—"(Cond. 2) On or about 11th August 1896, while pursuer's said husband Matthew Smith, who was a house painter, was on his way home, and was passing the defenders' yard at 165 Stobcross Street aforesaid, he was knocked down and fatally injured by a horse belonging to the defenders which bolted from their yard into the said street, through the carelessness of the defenders or their servants, in consequence of the said animal not being properly attended while being yoked to a cart in a place in such close proximity to a busy public thoroughfare, in respect that the said animal was left entirely uncontrolled and with no one at its head in charge of same, more especially as the said animal was known to the defenders and their servants to be spirited."

The defenders made no averments by way of explanation of how the horse came to escape on to the street as alleged. They admitted that they were carting contractors and that they had declined to pay compensation to the pursuer, but denied all the pursuer's other averments.

The defenders pleaded, *inter alia*—"(1) The action is irrelevant."

By interlocutor dated 8th December 1897 the Sheriff-Substitute (SPENS) before answer allowed a proof.