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.

The pursuer appealed to the Court of Session for jury trial, and lodged an issue for the trial of the cause.

The defenders objected to the relevancy of the action, and argued — Nothing of any importance was alleged here except (1) that the horse was "spirited," and (2) that in some unexplained manner, while it was being yoked in a private yard, it escaped on to the street. This was not sufficient. It was not alleged that the horse was given to bolting or had ever bolted before. The defenders were not bound to have a man at the horse's head when it was being yoked, and this seemed to be the duty which the pursuer considered to have been neglected by the defenders. Authorities referred to — *Shaws* v. *Croall & Sons*, July 1, 1885, 12 R. 1186; and *Hayman* v. *Hewitt* (1798) 2 Peake 170, *per* Lord Kenyon, C.-J.

Argued for the pursuer — In *Shaws* v. *Croall & Sons*, *cit.*, the ground of decision was that it was not proved that the cab which injured the pursuers was the cab whose driver was said to have been in fault as alleged. Moreover, there it was proved that the horse was quiet. The averment that the horse in this case was "spirited" was sufficient—*Brown* v. *Fulton*, October 26, 1881, 9 R. 36. It was not averred or contended that there ought to have been a man at the horse's head while another man yoked it. The fault alleged was, that whereas in the circumstances of this case, the yard being near a busy thoroughfare, and the horse being spirited, some precaution should have been taken against its bolting on to the public street to the danger of foot-passengers, no such precaution had been taken, with the result that the pursuer's husband was injured. That was a relevant averment of fault against the defenders, and an issue should be allowed.

LORD JUSTICE-CLERK—In this case three things are said: (1) that the horse was a spirited horse; (2) that it was in the act of being yoked into a vehicle inside the defenders' yard; and (3) that it bolted. These being the only averments of fact, the pursuer proceeds to make his averment of the fault said to have been committed, and it is in these words—"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." There is no specification at all. The averment describes nothing unusual in the yoking of the horse. The general averment of carelessness is supported by no statement of anything done or left undone by the person in charge, and the pursuer states the act of carelessness to have consisted in this, that the animal was left entirely uncontrolled and with no one at its head in charge of it. Now, if that means that the animal was "not properly attended to" because the man in charge of it was not at its head when yoking it, that is a statement of fault, because the man did not do what is impossible, as a man cannot yoke a horse at all if he is at its head. On the other hand, if it means that another person should have been placed at its head while it was being yoked, that would mean that it was culpable to employ one person only in yoking a horse into a vehicle, which is out of the question as an averment of fault. I can quite understand that such an averment might be relevant to infer fault, if it were alleged further that a horse was known to be dangerous from its having been known to bolt or attempt to bolt when being yoked, and that, therefore, certain special precautions should have been taken in such unusual and exceptional circumstances. But there is here no averment of anything special within the knowledge of the defenders, which made it culpable to yoke this horse in the ordinary way. This summons must, in my opinion, be dismissed as irrelevant.

LORD YOUNG—It did not occur to the man of business who attended to the interests of the defenders in the Sheriff Court that this case was irrelevant. No doubt there is the usual plea to the relevancy, but no objection was taken, and no argument upon the relevancy was submitted to the Sheriff. None occurred to the defender's adviser, and accordingly proof was allowed. Now, I confess I should have had no doubt that this was right had it not been for the difference of opinion between myself and your Lordships.

I do not think this is an action on the ground that the horse was spirited, or that two men were not employed to yoke it, or that the pursuer suggests that a man who is standing at a horse's head can yoke it to a cart. No peculiarity is suggested here. A man was walking along the streets of Glasgow—and it is not suggested that he was doing so improperly—when he was knocked down and killed by a horse which had no one attending to it. This is an action by the widow against the owner of the horse. She knows that her husband was killed when coming home from his work by a horse, which horse was unattended, and that is all she can know about it. Now, I should have thought that when a horse, which is unattended on the public street, causes the death of a man who is walking along the street, the owner of the horse is *prima facie* in fault, because in ordinary circumstances, with the exercise of ordinary care on the part of the owner of the horse or those for whom he is responsible, his horse will not be loose upon the public street and unattended, and if nothing more were averred by the pursuer but that the horse, when unattended on the public street, knocked down her husband and killed him, I should have thought her case was unanswerably relevant. The owner of the horse might aver and prove that the horse came to be where

it was unavoidably, and that therefore he was not liable. But all owners of horses are bound to take precautions against their horses getting on the streets unattended to the danger of the lieges. It is not averred that the deceased was in fault in any way or could by the exercise of care upon his part have avoided being knocked down by the defender's horse. The defender might have averred circumstances which would have excused him for allowing his horse to be on the street unattended, but there is no such averment. The defenders make no averments at all. They do not admit that the horse was theirs. They only admit that they are contractors, and that they decline to pay damages. They deny that the pursuer's husband was knocked down and killed by their horse. Now, I think we may take it for granted that a man who has a yard adjacent to the public street can make arrangements which will prevent his horses getting on to the street unattended, to the danger of the lieges. The statement that he cannot do so will not be accepted. It is open to him to aver circumstances which will explain and excuse the fact of a horse belonging to him getting on to the street upon a particular occasion, but an action against him on the ground that someone has been knocked down and killed by his horse when unattended on the public street is, in my opinion, perfectly relevant, although there is no averment except that the person in question was so knocked down and killed by his horse when so unattended. We have such an averment here, and we have no averment of circumstances showing that what occurred was unavoidable by the exercise of ordinary care, and I think the pursuer's averments are quite sufficient.

I think this is one of the cases in which fault is to be presumed in the first instance from the occurrence of a fact. It is the same when some one is driven or ridden down in the street. Fault is to be presumed from such a thing having happened. The driver or rider may show that by no care and attention which was incumbent upon him could the occurrence have been avoided, but *prima facie* he is to blame, for it is to be presumed that ordinary care upon his part will prevent such a thing from taking place, and we must take it for granted, unless the contrary is proved, that it took place because he was not exercising the ordinary care which he is bound to take for the safety of the public who are using the streets. Suppose a lorry or van with a horse going along the street runs down and kills a man, is it necessary to aver anything more than that such was the case? Is it necessary to go into details as to what was wrong with the driving of the horse, either that it was too fast or too slow? I think not. I hold it incontestably clear that it is only necessary to aver that the man was run down and killed when walking along the street. And if such a thing happens through a horse being altogether unattended and so getting on to the street, nothing more is necessary than that happened and that the owner did not take the ordinary care which would have prevented it from happening.

I attach no importance to the particular averments as to how the horse got on to the street upon this particular occasion, although I think they are quite proper. My opinion is based upon the averment that the deceased was knocked down and killed by a horse belonging to the defenders which was unattended upon the public street. Is it to be understood that ordinary care will not prevent a horse from bolting on to the street and killing people who are walking there? It is open to the defenders to show that they were not to blame, but that is for them to prove. The unfortunate widow ought not to be expected to state more than that her husband was killed in the way she says he was.

I am therefore of opinion, and very clearly of opinion, that this case is relevant, as the defenders' advisers in the Sheriff Court thought it was, and that an issue should be allowed.

LORD TRAYNER—The substance of the pursuer's averments is that her husband was knocked down and killed on the public street by a horse belonging to the defenders which bolted from their yard while being yoked. She maintains the defenders' liability on the ground that the horse bolted through the carelessness of the defenders, and the carelessness is said to consist in this, that there was no one at the horse's head "in charge of same." The relevancy of the action must of course be determined with reference to the averments made, and I deal with the case on that footing, disregarding any other consideration not there presented or necessarily implied, and certainly not taking into account the defenders' pleading. I cannot regard the pursuer's averment as setting forth a relevant ground of action. The defenders will only be liable if they failed to act with ordinary care and prudence in the management of the horse. But they cannot be held to have failed in that respect, if all that can be said against them is that there was nobody at the head of the horse while it was being yoked. It is matter of everyday experience that such a course is never taken. I think therefore that fault cannot be attributed to the defenders because they did not follow this unusual course on the occasion libelled.

LORD MONCREIFF was absent.

The Court sustained the first plea-in-law for the defenders, and dismissed the action with expenses in both Courts.

Counsel for Pursuer—J. Purves Smith. Agent—T. C. Smith, S.S.C.

Counsel for Defenders — W. Thomson. Agent—John Veitch, Solicitor.