got no answer to his letters. Well, then, no communication having been made to him when he came to leave, as he was entitled and bound to do, the landlord says to him, No, you must pay for another year. I cannot assent to that view, which would be a very harsh one even if the law were more favourable to it than I think it is. The landlord knew that the defender was not to remain at the old terms. I think we should find in fact that sufficient notice was given of his intention to leave.

LORD RUTHERFURD CLARK—I am of the same opinion. I proceed entirely on the facts, and I take no notice of the condition in the lease with respect to the obligation of the tenant to flit at the termination of the lease without any warning or process of removing.

LORD LEE—I also concur, and place my decision entirely upon the facts.

The Court pronounced the following interlocutor:—

"Find in fact (1) that on 21st January 1889 the defender intimated to the pursuer, through his factor or agent Mr Patterson, that his lease of the premises in question would expire in May following, and that he would then quit them, unless he received intimation that a reduced rent would be accepted; (2) that he received no communication; (3) that under his lease he was bound to quit without any notice from the pursuer; (4) that he did quit them accordingly on the 28th day of May 1889, and meanwhile on 3rd April preceding had taken other premises: Find in law that the notice given as aforesaid was timeous and sufficient: Therefore sustain the appeal; recal the judgment of the Sheriff-Substitute appealed against: assoilzie the defender from the conclusions of the petition: Find him entitled to expenses, &c.

Counsel for the Appellant—Dickson—G. W. Burnet. Agent—George M. Wood, S.S.C.

Counsel for the Respondent—Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, January 24.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

ANDERSON *v.* AINSLIE AND OTHERS.

Trust — Succession — Vesting — Entail — Entail Amendment Act 1848 (11 *and* 12 *Vict. c.* 36), *sec.* 27.

Trustees were directed (1) to make up titles to a testator's landed estate, and hold it for the liferent use of his widow and unmarried daughter Margaret and the survivor; (2) upon the death of the survivor to execute a strict entail of the lands 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 to his other daughters and the heirs of their bodies, whom failing to certain remoter relations and their heirs, and *inter alios* in favour of Archibald Ainslie and the heirs of his body; (3) to hold the whole residue of the estate for the liferent use of his married daughters in certain proportions; (4) notwithstanding these liferent rights to apply the residue of the estate "as opportunity offered," and "at such time or times and from time to time as they should consider proper," in the purchase of lands as nearly as might be contiguous to the testator's landed estate, it being declared that notwithstanding any such purchase or purchases the proportionate share or shares payable to any beneficiaries in the trust-estate should not be diminished; (5) the testator directed as follows—"On the residue of my trust-estate being realised and applied in the purchase of lands and other heritages as aforesaid, my trustees may, and I direct and appoint them to convey and make over the whole lands and other heritages then vested in them by a valid and effectual entail to and in favour of the institute or heir of entail then in possession, or who would then have been entitled in virtue of the deed of entail to be executed by my trustees to the possession of the lands and estate of Elvingston."

When the testator's daughter Margaret was aged fifty-eight and unmarried, Mrs Anderson presented this petition under the Entail Amendment Act 1848, sec. 27, to acquire Elvingston and the residue in fee-simple, and averred (1) that her sister Margaret could not now have issue; (2) that the petitioner was therefore the person who, if the direction contained in the testator's trust-disposition had been carried into effect, would be the institute of entail in possession of the said estates subject to the liferents of her mother and sister, and might by paying for the consents of next heirs in terms of the Entail Acts acquire the said estates and residue in fee-simple by executing and recording an instrument of disentail. She produced a minute of consent to the petition by her mother and sister Margaret, who bound themselves to grant discharges of their liferents of Elvingston on compensation, and she claimed that in respect of these consents her right to have the entail executed had vested. Further, the residue might at once be entailed.

Archibald Ainslie lodged answers maintaining that Mrs Anderson had not and might never have any vested interest as institute.

Held (1) that the time for executing the entail had not arrived; (2) that there was no presumption that there would be no heir of the body of the

testator's daughter Margaret; (3) that Mrs Anderson had no vested right as institute, and therefore had no title to demand a conveyance under the Entail Acts, which only enabled those entitled to a conveyance to acquire an estate in fee-simple instead of under an entail.

Presumption—Presumption as to Childbearing.

There is no particular age at which the law will presume that a woman is past childbearing.

The late Robert Ainslie of Elvingston, Haddingtonshire, died on 3rd May 1888. At the time of his death he was in possession of the landed estates of Elvingston, Redcoll, Huntingdon, Morham Mains, and others, in Haddingtonshire, having a rental of about £3700 per annum. He also left a free moveable estate amounting to upwards of £123,000. He left a trust-disposition and settlement dated 8th October 1885, and a codicil dated 13th April 1888. Mr Ainslie was survived by his wife Mrs Mary Ainslie, and by five daughters—Mrs Martha Ainslie sometime Burt now Campbell, eldest daughter, Mrs Mary Reid Ainslie or Anderson (the petitioner), Mrs Jessie Ainslie or Wright, Miss Margaret Scott Ainslie, and Mrs Elizabeth Ann Ainslie or Sewell. His only son Colonel Ainslie predeceased him.

By his settlement he disponed his whole estate, heritable and moveable, to trustees, and directed them (2) to deliver to his widow, as her absolute property, the whole household furniture and articles belonging to the establishment at Elvingston, declaring that if she did not test on them they should be delivered to his daughter Margaret Scott Ainslie for her lifetime, and upon the death of the survivor of them that they should be delivered to the "institute or substitute heir who may then be in possession or entitled to have possession of my lands and estate of Elvingston and others in virtue of the deed of entail thereof directed to be made by my trustees as after mentioned." The testator provided as follows:—"*Fourth*, That my trustees may make up and complete *omni habili modo* in their persons as trustees foresaid proper feudal titles to my said lands and estate of Elvingston, and also to the whole other lands and heritages presently belonging to me, or which may belong to me at the period of my death, and shall hold such of the lands and heritages presently belonging to me as may also belong to me at the period of my death in trust for behoof of the said Mary Ainslie, my wife, and the said Margaret Scott Ainslie, my daughter, and the survivor of them, in liferent for their and her liferent use allenarly, and shall permit and allow my said wife and daughter, and the survivor of them, to occupy and possess the mansion-house of Elvingston, together with the offices, garden, lodges, avenues, and such other portions of my lands and estate of Elvingston, or other lands and heritages presently belonging to me, and as may also belong to me at the period of my death, as my said wife and daughter and the survivor of them may wish to retain in their natural possession, provided always that in the event of the marriage of the said Margaret Scott Ainslie before the death of my said wife, the said Margaret Scott Ainslie shall, during the lifetime of my said wife, amit, forfeit, and lose all right to occupy and possess jointly with my said wife the said mansion-house of Elvingston, with the offices, gardens, lodges, avenues, and such portion of my lands and estate of Elvingston, or other lands and heritages, as were previously in the possession of my said wife and herself, and shall receive no allowance of any kind in respect thereof; and my trustees shall make payment to my said wife and daughter, and the survivor of them, of the whole free rents, profits, and yearly proceeds of or arising from the whole remaining lands and estate of Elvingston, and such of the other lands and heritages presently belonging to me, as may also belong to me at the period of my death, and not in their or her natural possession, but subject to the burden of the annuities mentioned in the eighth clause or purpose hereof, providing hereby that upon the death of my said wife, or upon my own death should I survive her, the said Margaret Scott Ainslie and her husband, if she be then married, or immediately upon his marriage to her, shall be obliged to retain or to assume, as the case may require, and constantly thereafter during the lifetime of the said Margaret Scott Ainslie to use and bear the surname and designation of 'Ainslie of Elvingston.' . . . And in regard to any lands and heritages which I may acquire by purchase or otherwise after the date of these presents, I hereby provide that the free rents, profits, or yearly proceeds of or arising from such lands and heritages which I may hereafter acquire, shall be paid to the same parties, and shall be dealt with in the same manner in every respect as the free balance of the annual income arising from the free residue and remainder of my moveable or personal estate and effects hereinafter mentioned in the ninth clause or purpose hereof. *Fifth*, That upon the death of the last survivor of the said Mary Ainslie, my wife, and Margaret Scott Ainslie, my daughter, or as soon thereafter as may be convenient, my trustees may divest themselves of the lands and estate of Elvingston, and also of the whole other lands and heritages presently belonging to me, or which may belong to me at the period of my death, by making, granting, and subscribing a deed of strict entail, agreeably to the laws of Scotland, of the whole of the said lands and heritages to and in favour of the heirs of the body of the said Margaret Scott Ainslie, whom failing, to and in favour of Mary Reid Ainslie or Anderson, my second daughter, wife of the said John Richard Anderson, and the heirs of her body; whom failing, to and in favour of Jessie Ainslie or Wright, my third daughter, wife of the said George Wright, and the heirs of her body; whom failing, to and in favour of Elizabeth Ann Ainslie or Sewell, my youngest daughter, wife of Arthur James Sewell, late of the Indian Service, and the heirs of her body; whom failing, to and in favour of Martha Ainslie, sometime

Burt, now Campbell, my eldest daughter, sometime wife, thereafter widow, of the deceased Benjamin Burt, Esquire, Doctor of Medicine, formerly residing in Edinburgh, now wife of Major Colin Campbell, residing in Edinburgh, and the heirs of her body; whom failing, to and in favour of the said David Ainslie, my brother, and the heirs of his body; whom failing, to and in favour of the said William Bernard Ainslie, my cousin, and the heirs of his body; whom failing, to and in favour of the said Alexander Carnegie, my cousin, and the heirs of his body; whom failing, to and in favour of Archibald Ainslie, tenant in Dodridge, and the heirs of his body; whom all failing, to my own nearest heirs and assignees whomsoever, the eldest heir-female and the descendants of her body excluding heirs-portioners and succeeding without division throughout the whole course of succession above prescribed. . . . . *Ninth*, That my trustees may hold and stand possessed of the whole free residue and remainder of my whole moveable or personal estate and effects, and may, out of the annual income arising therefrom, make payment of a free yearly annuity of £500 sterling to" Mrs Campbell and Mrs Sewell, and the balance of the income to Mrs Anderson and Mrs Wright equally during life, with power to bequeath their liferents to their husbands and sisters.

The *eleventh* purpose directed—"That my trustees may purchase, as opportunity offers, such lands and other heritages as nearly contiguous to my lands and heritages in the parishes of Gladsmuir and Haddington as my trustees shall consider eligible as an addition or additions thereto, and for that purpose my trustees may realise and convert into money the whole or any portion of the free residue and remainder of my moveable or personal estate and effects."

The *twelfth* purpose was in these words—"On the residue of my trust-estate being realised and applied in the purchase of lands and other heritages as aforesaid, that my trustees may, and I hereby direct and appoint them to convey and make over the whole lands and other heritages then vested in them by a valid and effectual deed of strict entail to and in favour of the institute or heir of entail then in possession, or who would then have been entitled in virtue of the deed of entail to be executed by my trustees under the fifth clause or purpose hereof to the possession of the lands and estate of Elvingston, and the whole other lands and heritages presently belonging to me, or which may belong to me at the period of my death, whom failing, the substitute heirs of entail called or entitled to succeed to him or her therein, and with and under the whole conditions, prohibitions, and other clauses contained in the entail of my said lands and estate of Elvingston and other heritages hereinbefore directed to be executed, subject to such alterations and omissions as my trustees may in the then existing circumstances deem necessary or expedient, and which subject as aforesaid, and in so far as the same may be subsisting for the time, shall be verbatim inserted in the deed of entail to be executed by my trustees, conveying and making over the lands and other heritages in terms of this clause or purpose."

By codicil dated 13th April 1888 the testator provided that in place of the deed of strict entail being made to and in favour of, *inter alios*, Elizabeth Ann Ainslie or Sewell, and the heirs of her body, the same should be made to and in favour of, *inter alios*, the said Mrs Sewell, and the heirs of her body that might be born after the date of the execution of this codicil, the heir of her body born before the date of the execution of this codicil being hereby expressly excluded either as the institute or as a substitute heir of entail; and further, in the event of the present child of Mrs Sewell surviving her mother the testator made certain provision for her.

At the testator's death none of his daughters—Mrs Anderson, Mrs Campbell, and Mrs Wright—had issue.

Upon 9th January 1889 Mrs Anderson, with consent of her husband Major-General Anderson, C.B., presented a petition under the Entail Acts praying for authority to the trustees to convey to her in fee-simple, and for her absolute use, the lands of Elvingston and others, and to pay her in fee-simple the whole residue.

The trustees had not purchased lands as permitted by the eleventh purpose of the deed.

She averred, *inter alia*—"The said Miss Margaret Scott Ainslie was born on 14th May 1832, and is unmarried. There can thus never be heirs of the body of the said Miss Margaret Scott Ainslie, and the petitioner is therefore the person who, if the direction contained in the said trust-disposition and deed of settlement had been carried into effect, would be the institute of entail in possession of the said estates of Elvingston, Huntingdon, Redcoll, Morham Mains, and others, subject to the respective liferents of her mother, the said Mrs Mary Ainslie, and her sister, the said Mrs Margaret Scott Ainslie, and might, by virtue of the Entail Acts or some of them, after providing for the legacies and annuities bequeathed as aforesaid, acquire to herself said landed estates, and the residue of the personal estate of the said Robert Ainslie, in fee-simple by executing and recording an instrument of disentail in terms of the foresaid Act. That the petitioner was born on the 19th day of January 1827, is married to the said Major-General John Richard Anderson, but has no children, and that the heirs whose consents must be given or be dispensed with to the present application" were Mrs Wright, Mrs Sewell, and Mrs Campbell, "being the three nearest heirs who at the date of presenting this petition are for the time entitled to succeed to the said entailed estate in their order successively, as above mentioned, immediately after the petitioner, being the persons who, if the said direction to entail contained in the fifth purpose of the said trust-disposition and deed of settlement had been carried out, and the lands directed to be purchased and entailed in terms of the last purpose thereof had been so purchased

and entailed, would be at the date of presenting this petition for the time entitled to succeed to such entailed estate in their order successively, as above mentioned, immediately after the petitioner. That the said Mrs Wright, Mrs Sewell, and Mrs Campbell are all of fullage, and not subject to any legal incapacity other than that arising from their respective marriages. . . . That the said Mrs Mary Ainslie and Miss Margaret Scott Ainslie, who liferent the landed estates of Elvingston and others as aforesaid, acquiesce in the present application, and are prepared to renounce their respective liferents and give their formal consents to the present application on being satisfied that compensation for their respective interests in said landed estate has been sufficiently provided for by the petitioner."

The Entail Amendment Act 1848 (11 and 12 Vict. c. 36), sec. 27, enacted—"That where any money or other property, real or personal, has been or shall be invested in trust for the purpose of purchasing land to be entailed, or where any land is or shall be directed to be entailed, but the direction has not been carried into effect, it shall be lawful for the party who, if the land had been entailed in terms of the trust, would be the heir in possession of the entailed land, and who in that case might by virtue of this Act have acquired to himself such land in fee-simple by executing and recording an instrument of disentail as aforesaid, to make summary application to the Court, as hereinafter provided, for warrant and authority for the payment to him of such money, or for the conveyance to him of such land in fee-simple, and the Court shall, upon such application, and with such consents, if any, as would have been required to the acquisition of such land in fee-simple, have power to grant such warrant and authority." And by section 28—"That for the purposes of this Act the date at which the Act of Parliament, deed, or writing placing such money or other property under trust, or directing such land to be entailed, first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail."

The Entail Amendment Act 1875 (38 and 39 Vict. c. 61), enacted, sec. 3—"That the term 'entailed estate' shall include all heritages which by the law of Scotland may be made the subject of entail, and also all lands or other heritages held in trust for the purpose of being entailed, and all money or other property, real or personal, invested in trust for the purpose of purchasing land to be entailed, and also all money consigned in respect of the taking of any land forming part of any entailed estate."

The Entail (Scotland) Act 1882 (45 and 46 Vict. c. 53), enacted, sec. 3—"It shall be lawful for an heir of entail in possession of an entailed estate held under an entail dated on or after the 1st day of August 1848 to disentail the estate and acquire it in fee-simple by applying to the Court in the manner provided by the Entail Acts if he shall be the only heir of entail in existence, or if he shall obtain the like consents as are required by the 3rd section of the Entail Amendment Act 1848 in the case of entails dated prior to the said date."

The petitioner founded on these provisions.

Service was made upon the trustees, and on Mrs Wright, Mrs Sewell, and Mrs Campbell, and the *inducicæ* expired without answers.

The Lord Ordinary on the Bills (WELLWOOD) remitted the case to the Hon. J. W. Moncreiff, W.S., to report whether the proceedings were regular and in conformity with the statute and relative Acts of Sederunt, and whether the prayer should be granted.

The reporter in an interim report raised questions (1) as to the petitioner's title to the claim made, and (2) as to the applicability of the statutes cited.

Upon 23rd March 1889 the Lord Ordinary pronounced this interlocutor:—"Appoints the petition to be served on David Ainslie of Costerton, residing at Costerton House, Blackshiels, Midlothian; Alexander Carnegie of Redhall, in the county of Kincardine, residing at Forebank House, Brechin; Archibald Ainslie, farmer, Temple Hall, East Lothian, eldest son of the late Archibald Ainslie, tenant in Dodridge, East Lothian; and also on Jane Ainslie, Archibald White Ainslie, and Florence Muriel Ainslie, children of the said Archibald Ainslie, farmer, Temple Hall, and the said Archibald Ainslie as their curator, and ordains them to lodge answers thereto, if so advised, by the second box-day in the present vacation—24th April 1889: Meantime supersedes consideration of the petition.

"*Note.*—This petition raises questions of difficulty and importance, and the property involved is of considerable value. Although the petition bears to be presented in virtue of the Entail Statutes, the first question to be decided is, whether the time has arrived at which, under the trust-disposition and settlement of the late Robert Ainslie of Elvingston, his trustees are bound or entitled either to execute the deed of entail therein directed to be made, or to convey and make over the lands directed to be entailed to the person entitled to acquire them in fee-simple. There is thus involved the question whether the petitioner is *in titulo* to demand an immediate conveyance of the estate.

"Now, the proper contradictors in such a question would have been the trustees under the trust-disposition and settlement, but they have not thought fit to oppose the prayer of the petition. It is true that the three next heirs entitled to succeed under the destination in the trust-deed after the petitioner are called as respondents, and if this had simply been a petition presented under the Entail Statutes, it would not have been necessary to have called remoter substitutes. But as an important question of vesting is involved, in which remote substitutes are interested, and as their interests are not otherwise represented, I think it is essential that they should have an opportunity of appearing and being heard if they

think fit. With this view I obtained from the petitioner's agents a list of the surviving substitutes named in the deed other than those already called as respondents, and of the heirs of the body of Archibald Ainslie, tenant in Dodridge, who died leaving issue. I have ordered the petition to be served upon the two surviving substitutes not called as respondents, viz., David Ainslie and Alexander Carnegie, and on the eldest son of Archibald Ainslie and his three children. William Barnard Ainslie, the remaining substitute, predeceased the testator, without issue."

Mr David Ainslie lodged no answers.

Archibald Ainslie and his children lodged answers. They admitted the statements of fact in the petition. But they further stated—"Mrs Mary Ainslie (the testator's widow) and Margaret Scott Ainslie are both still in life. It is not admitted that there can never be heirs of the body of Margaret Scott Ainslie. The arrangement made by the petitioner with the said Mary Ainslie and Margaret Scott Ainslie as to renunciation by them of their respective rights of liferent of the truster's lands of Elvingston and others are not known to the respondents. The respondents submit that, whether such arrangement be made or not, the petitioner is not in the position of heir in possession, and is not and will not be entitled to make the present application unless she survive both these persons. By the said trust-disposition and settlement no right is expressed in favour of the petitioner except a direction to the trustees, in the event of there being no heirs of the body of Margaret Scott Ainslie, to divest themselves of the said lands on the occurrence of the decease of the longest liver of said two liferentrices by a deed of entail in favour of her and the heirs of her body, and failing her of the other persons named in said fifth purpose. The trustees are directed to hold the said lands and estate, and they are not bound or entitled to divest themselves thereof until that event. On the occurrence of that event, the entail may fall to be made upon one of the other persons called in the fifth purpose of the trust. The petitioner's three sisters, who are called in the petition as the three heirs next entitled to succeed, may also predecease the occurrence of said event. The said liferentrices cannot by renouncing their liferents injuriously affect the interest of the persons called under said destination subsequently to the daughters of the truster, and thereby defeat the intention of the truster. The respondents submit that the petitioner is not entitled to make the present application; *separatim*, that it is premature; and that, in any event, the petitioner is not entitled to have the prayer of the petition granted without satisfying and securing the interests of the respondents."

Mr Carnegie of Redhall also lodged answers to the petition, and objected to the prayer being granted on the same grounds.

Mrs Ainslie and Margaret Ainslie lodged a minute of consent to the petition, and agreed when called on to grant formal renunciation of their liferent rights on receiving from the petitioner compensation or security for compensation of their interests.

Upon 20th July 1889 the Lord Ordinary (KYLLACHY) pronounced this interlocutor:—"Finds that the petitioner is entitled, upon production of the requisite consents and renunciations of the liferentrices, in terms of the minute, to have the landed estates of Elvingston and others, and also the whole residue of the personal estate of the late Robert Ainslie of Elvingston (but subject to and under burden of all debts and annuities secured upon or for which the said estates, heritable and moveable, may be liable) conveyed to her in fee-simple as craved in the petition; and of new remits to the Hon. James W. Moncreiff, W.S., to inquire into the circumstances set forth in the petition, whether the proceedings have been regular and proper, and in conformity with the provisions of the statutes and relative Acts of Sederunt, and to report.

"*Opinion.*—This is a petition by Mrs Major-General Anderson and her husband for authority to disentail (1) the lands of Elvingston, which belonged to Mrs Anderson's father the late Mr Ainslie, and are now held by his trustees for the purpose of being ultimately entailed; and (2) the residue of Mr Ainslie, which is also held by his trustees for the purpose of being invested in land to be entailed with the lands of Elvingston on the same series of heirs.

"It is not disputed that if upon the just construction of Mr Ainslie's trust-disposition and settlement his trustees are now bound or entitled to execute the entail of the lands of Elvingston and to buy other lands with the residue, the petitioner Mrs Anderson is the institute of entail in whose favour the entail falls to be executed. Neither (on the same assumption) is it disputed that as such institute she is entitled to present the present petition to have the estate disentailed with the consents which she is in a position to procure.

"The question, however, is, whether the direction to entail—in the events which have happened — has become operative either as regards the lands or as regards the residue, so as to entitle the petitioner to invoke the provisions of the 27th and 28th sections of the Rutherfurd Act, and the relative provisions of the subsequent Entail Statutes.

"The negative is maintained by the respondents, who are certain of the substitute heirs of entail, and to whom intimation of the petition was made by order of my predecessor (Lord Wellwood) on considering the report by the man of business to whom the petition was in the usual course remitted. The respondents maintain that the time has not yet come for the execution of either entail, and that therefore the disentailing provisions of the Entail Acts are inapplicable.

"The question at issue is thus really a question not of entail, but of trust law, arising and depending upon the construction of Mr Ainslie's trust-settlement. That settlement is somewhat obscure, and contains provisions which are difficult if

not impossible to reconcile, but its general scheme may be taken to be as follows:—

"Mr Ainslie died on 3rd May 1888, and his settlement and relative codicil were executed on 8th October 1885 and 13th April 1888. He possessed at the time of his death the lands of Elvingston, in the county of Haddington, yielding a rental of about £3700 per annum. He also left free moveable estate of the value of about £123,000. He left a widow and one unmarried daughter, Miss Margaret Scott Ainslie, who is now in her fifty-eighth year, and also four married daughters, of whom the petitioner Mrs Anderson is one. In that state of his family (1) he directed his trustees to make up titles to his landed estate of Elvingston, and also to any lands which he might purchase prior to his death (he in point of fact purchased none), and to hold the lands of Elvingston for the liferent use of his widow and unmarried daughter and the survivor of them, the income from any other lands purchased by him prior to his death to be applied in the same manner as the income of the residue of his estate.

"(2) He next directed that on the death of the last survivor of his wife and unmarried daughter his trustees should execute a strict entail of the lands of Elvingston, and also of any other lands to be purchased prior to his death, in favour of the heirs of the body of the said Margaret Scott Ainslie (the unmarried daughter), whom failing to and in favour of Mrs Anderson, the petitioner, and the heirs of her body, whom failing to his other daughters and the heirs of their bodies, whom failing to certain remoter relations, and, *inter alios*, the present respondents.

"(3) He next directed his trustees to hold the residue of his estate substantially for the liferent use of his married daughters, but in certain different proportions, and with certain provisions in favour of their husbands, unnecessary to specify.

"(4) He further directed that notwithstanding the above liferent rights, the residue of his estate should be applied 'as opportunity offered,' and 'at such time or times, and from time to time, as my trustees shall consider proper,' in the purchase of lands as nearly as may be contiguous to the estate of Elvingston, 'it being declared that notwithstanding any such purchase or purchases the proportionate share or shares payable to any beneficiaries in my trust-estate shall not be diminished.'

"(5) And lastly, by the last or twelfth purpose he directed as follows:—'On the residue of my trust-estate being realised and applied in the purchase of lands and other heritages as aforesaid, that my trustees may, and I hereby direct and appoint them to convey and make over the whole lands and other heritages then vested in them by a valid and effectual entail to and in favour of the institute or heir of entail then in possession, or who would then have been entitled, in virtue of the deed of entail to be executed by my trustees under the fifth purpose hereof, to the possession of the lands and estate of Elvingston, and the whole other lands and heritages presently belonging or which may belong to me at the time of my death, whom failing to the substitute heirs therein called to succeed,' &c.

"The deed contains various minor provisions, but the above are those which most directly bear on the present question.

"In these circumstances the petitioner maintains (1) that so soon as the residue is applied in the purchase of lands, the trustees fall to entail the whole lands vested in them, including the estate of Elvingston, and that notwithstanding the previous direction that the said lands of Elvingston (along with any other lands to be purchased by the truster during his life) should be entailed on the death of the last survivor of Mrs Ainslie and Miss Margaret Scott Ainslie; (2) that in any view the residue may be at once applied in the purchase of lands to be at once entailed; (3) that assuming that the lands of Elvingston are entailable only on the death of the liferentrices, the postponement of the entail thereof was merely for the protection of the liferents, and that as the liferentrices have agreed to renounce these liferents, and to consent to the immediate execution of the entail, their liferents are to be held as having expired to the same effect as if they had both died; (4) that any difficulty which might have arisen from the fact that the first institutes of entail are the heirs of the body of Miss Margaret Ainslie is obviated by the fact that Miss Margaret is now over fifty-seven years of age, and that the possibility of her having children is practically excluded. These are the four points the petitioner maintains.

"The respondents dispute each of these contentions. They maintain that the direction to entail Elvingston on the death of the last survivor of the liferentrices must be held to override the general direction in the eleventh purpose with respect to all lands and other heritages vested in the trustees, and they point out that on the contrary construction the deed contains no provision for the subsistence of the trust to the effect even of protecting the liferents of Mrs Ainslie and Miss Margaret. They further maintain that the renunciation of the liferents does not here operate as equivalent to the death of the liferentrices, inasmuch as the postponement of the entail to the death of the last surviving liferentrix must be held to have been, partly at least, for the protection of the various conditional institutes under the entail. They further—if I rightly understand their argument—maintain that even as regards the residue the direction to entail is so expressed as to apply only in the event of the time having arrived for the entail of Elvingston—that is to say, only in the event of Mrs Ainslie and Miss Margaret having predeceased the complete investment of the residue.

"I have found the questions thus raised attended with difficulty, but after repeated consideration I have come to be of opinion that the petitioner is right. I am unable to get over the express words of the last or twelfth purpose, by which the trustees are directed so soon as their purchases are com-

plete to entail the whole lands then vested in them. That is what is expressed, and it plainly, as it seems to me, directs an entail of everything, Elvingston included. Nor is such an entail inconsistent with the subsistence of the liferents over Elvingston any more than with the liferents constituted over the residue. No doubt in the latter case there is an express reservation of the liferents, while in the former there is no express reservation, and that no doubt creates a difficulty. But the difficulty is after all not greater than that which in any case arises as between the certainly inconsistent language of the fifth and last purposes. I am moreover, I confess, moved to give literal effect to the words of the last purpose by this consideration, that the truster plainly intended that his whole lands purchased and to be purchased should be united in one estate, and conveyed, if not to the same institute, at least to the same series of heirs, whereas if the lands purchased by the residue were entailed at once, and the lands of Elvingston were not entailed until the death of the last survivor of the liferentrices, there would be no certainty that the two estates should not be separated and pass (*e.g.*, if Miss Margaret had children born after the entail of the residue) to a different series of heirs. It is, moreover, to be noticed that the truster could have had no reason for postponing the entail of any lands to be purchased by himself beyond the entail of lands to be purchased by his trustees. These former lands were not to be liferented by the liferentrices of Elvingston, but were to be treated in all respects as part of the residue, and yet on the respondent's construction they could not have been entailed any more than the lands of Elvingston until a date—it might be years—after the whole residue had been invested in lands, and these lands had been entailed as provided in the last purpose.

"I therefore read the fifth purpose in connection with the last, and as if it (the fifth purpose) had been in effect thus—'I direct the lands of Elvingston to be entailed on the death of the survivor of the liferentrices thereof, but subject always to the direction contained in the last purpose with respect to the entail of my whole estate, so soon as my whole residue is invested in land.' This is perhaps a strong implication, but it appears to me to be a necessary one, at least if the two parts of the deed are to be reconciled.

"If the above be sound, it is unnecessary to consider the other grounds on which the petitioner relies. I may say, however, that I am with the petitioner in her contention that Miss Margaret Ainslie may now be taken as past the age of child-bearing. I agree on this point with the opinions (cited at the debate) of the late Lord Curriehill in *Gibson* v. *Home*, March 18, 1881 (not reported), and of Lord M'Laren in *Barron* v. *Dewar*, 24 S.L.R. 735. I may also refer to the judgment of the Second Division of the Court in the case of *Urquhart* v. *Urquhart's Trustees*, November 22, 1886, 14 R. 112, and to the English case *in re Weddon's Trust*, 11 Eq. 408, and *Croxton*, 9 Ch. Div. 388.

"I am also—though with hesitation—with the petitioner on her remaining point, viz., that assuming that the entail of Elvingston is directed to be made only on the death of the last surviving liferentrix, the renunciation of the two liferents is equivalent to the death of the two ladies. I am on the whole unable to distinguish this case from the case of *Annandale* v. *M'Niven*, 9 D. 1201, at all events as interpreted in the opinions of the Second Division of the Court in the recent case of *Latta* v. *Muirhead*, 15 R. 254, and I do not feel at liberty to consider whether or not the reasoning in these cases is in accordance with principle.

"I therefore give judgment generally in favour of the petitioner, and shall pronounce an interlocutor finding that the procedure has been regular and proper, and that the petitioner is entitled upon production of the requisite consents and renunciations of the liferentrices in terms of the minute to have the estate of Elvingston and also the whole residue conveyed to her in fee-simple, and remitting to the reporter to see the necessary deeds executed, and to report."

Archibald Ainslie and others reclaimed, and argued—The first question was whether the petitioner was *in titulo* to present the petition. If the trust-deed gave her no title she could not found on sec. 27 of the Rutherfurd Act (*supra*), which only gave a title to the person who would be the heir in possession "if the lands had been entailed in terms of the trust," while sec. 28 only fixed an artificial date in order to give effect to the disentailing clauses of the Rutherfurd Act where these applied—*Black* v. *Auld*, November 5, 1873, 1 R. 203, But the Act left untouched the question of title, and was inapplicable where there was none—*Picken's Trustees*, February 24, 1886, 13 R. 603. On this first question the petitioner had no direct conveyance or gift under the deed. The lands were conveyed to trustees, who were directed to make up titles to and hold them till the death of the survivor mentioned, and then to execute an entail, under which the petitioner (if she survived, and failing nearer heirs) would be institute. But till these conditions were purified the petitioner had no vested right—*Bayne's Trustees* v. *Clark*, November 26, 1880, 8 R. 142. To avoid this difficulty the Lord Ordinary had read the provisions of the twelfth purpose as to residue as controlling the fifth. Further, his Lordship had regarded the last clause as implying a direction "so soon as their purchases are complete to entail the whole lands then vested in them." Such interpretations would exclude the liferenters from the deed. The fifth purpose should receive its natural meaning. To discover the heir "in possession of Elvingston, or who would have been entitled under the fifth purpose to Elvingston," the words "would then have been entitled," must be read "if the right had vested, but there had been delay in making the entail." The cases like *Preston Bruce* founded on by the petitioner did not apply, for in them the petitioner had a vested right—*cf. Forbes* v. *Burness*, June 29, 1888, 15 R. 797. The trust involved subsistence over a long period, and

a final entail in favour of the person ultimately entitled. The mere element of age supplied no presumption that a child could not be born of the testator's daughter—*Menzies* v. *Murray*, March 5, 1875, 2 R. 507; *Barron* v. *Dewar*, July 7, 1887, 24 S.L.R. 735; *Fleming* v. *M'Lagan*, January 28, 1879, 6 R. 588; *Urquhart's Trustees* v. *Urquhart*, November 23, 1886, 14 R. 112; *Lowson's Trustees* v. *Dicksons*, June 19, 1886, 13 R. 1000; Wharton's Law Lexicon (7th ed.). 1883; Taylor's Jurisprudence (3rd ed.), ii. 299; Tidy's Medical Jurisprudence, part 2, p. 30, 31, 51 *et seq.* Vesting was not accelerated by the consents of the liferentrices. Vesting was accelerated where a wife took her legal rights, and repudiated provisions which postponed vesting of claims in others—*Annandale* v. *M'Niven*, June 9, 1847, 9 D. 1201, 19 Scot. Jur. 529; *Alexander's Trustees* v. *Waters*, January 15, 1870, 8 Macph. 414; *Latta* v. *Muirhead*, December 23, 1887, 15 R. 255. But for that result it must be clear that the postponement was for one purpose, *e.g.*, the wife's sake. Here the postponement might be for other reasons—*Alexander's Trustees* (*supra*), *per* Lord Justice-Clerk, p. 417.

The respondent argued—This was a question of trust, and not of entail law. By trust law the petitioner could now insist on the conclusion of the trust, and sec. 27 of the Statute of 1848 applied. The testator desired to form one large estate to descend to the same series of heirs, with protection to the liferentrices. This purpose would be defeated if the respondents prevailed. Assuming that Margaret could have no issue, sec. 27 of the statute applied to the residue. The trustees were not directed to accumulate, there was no postponement or rights to be protected. They could employ the residue in buying land whenever they liked, but the land must be entailed whenever bought. With regard to the entail of Elvingston, if the last purpose were held to apply to the lands, no violence would be done to the testator's desire by granting the petition. The entail was postponed to protect the liferents, but these were protected. It was argued that the object was the protection of Margaret's issue and the later substitutes. But Margaret was past the age of childbearing, and the argument on the other side came to this—that the testator wished to protect the interests of distant relatives at the expense of his nearer relatives. The respondents construed the deed naturally—*Alexander's Trustees* v. *Waters*, *supra*. The death of the last survivor had legally happened in view of the liferentrices' consents. The cases of *Latta*, *Annandale*, and *Alexander*, *supra*, and *Lucas*, 8 R. 502, applied, and did not differ in principle from the present. A woman of fifty-eight years could not have issue—*Urquhart*, *supra*; *Croxton*, 1878, L.R., 9 C.D. 388; *Widdow's Trustee*, 1871, L.R., 11 Eq. 408. Even if issue might be born the entail need not be postponed where the institute, whose right would be defeated, was still unborn—*Mountstewart*, 1707, M. 14,903, and 14,912; *Preston Bruce*, March 6, 1874, 1 R. 740; *Forbes* v. *Burness*, June 29, 1888, 15 R. 779.

At advising—

LORD JUSTICE-CLERK — The late Mr Robert Ainslie of Elvingston died in 1888 leaving large heritable and moveable estate. By his trust-deed executed in 1885 he directed his trustees to make up titles to his landed estate. The trustees were directed to hold that estate for the liferent use of his widow and Miss Margaret Ainslie, his daughter, and the survivor. He then directed that on the death of the survivor of these two they were to entail Elvingston and any other lands purchased by him in favour of the heirs of the body of Margaret, whom failing in favour of a married daughter, the petitioner Mrs Anderson, and the heirs of her body, whom failing to his other daughters and the heirs of their bodies, whom failing to certain remoter relations. The residue of the estate was directed to be held mainly for the liferent use of his married daughters in certain specified proportions, but he also directed that the trustees should purchase lands in the neighbourhood of Elvingston, as they should consider proper, with the residue. The last purpose of the trust was —"On the residue of my trust-estate being realised and applied in the purchase of lands and other heritages as aforesaid, that my trustees may, and I hereby direct and appoint them to convey and make over the whole lands and other heritages then vested in them by a valid and effectual deed of strict entail to and in favour of the institute or heir of entail then in possession, or who would then have been entitled in virtue of the deed of entail to be executed by my trustees under the fifth clause or purpose hereof to the possession of the lands and estate of Elvingston, and the whole other lands and heritages presently belonging to me, or which may belong to me at the period of my death, whom failing the substitute heirs of entail called or entitled to succeed to him or her therein, and with and under the whole conditions, prohibitions, and other clauses contained in the entail of my said lands and estate of Elvingston, and other heritages hereinbefore directed to be executed, subject to such alterations and omissions as my trustees may in the then existing circumstances deem necessary or expedient, and which subject as aforesaid, and in so far as the same may be subsisting for the time, shall be verbatim inserted in the deed of entail to be executed by my trustees conveying and making over the lands and other heritages in terms of this clause or purpose; and the entail to be so executed by my trustees shall be so framed as to bind the institute as well as the heirs of entail; and my trustees shall cause the same to be recorded in the register of entails and be feudalised by registration thereof in the appropriate Division of the Register of Sasines or otherwise, and also to be registered in the Books of Council and Session, all at the expense of my trust-estate, and the institute in the deed of entail to be executed by my trustees conveying and making over the lands and heritages in terms of this clause or purpose shall be bound to grant and deliver to my

trustees a full discharge and ratification of all their actings, intromissions, and management in the execution of the trust hereby constituted, which discharge and ratification shall bind and be good against all the succeeding heirs of entail."

The present state of the facts is this. The widow and the daughter Margaret are still alive, the latter still unmarried, and being about 58 years of age. These ladies are willing to renounce their liferents on their liferent interests being compensated. No part of the residue has been applied to the purchase of land.

In these circumstances Mrs Anderson desires to have the trustees ordained to convey the landed estate and the residue to her. The ground of her application is that it is now impossible that her sister Margaret can have issue, and that therefore she is the person who if an entail were executed would be entitled to possession as heir of entail, and that therefore she is entitled to have in fee-simple the landed estate left by Mr Ainslie, and also to have the residue of his personal estate handed over to her under the 27th section of the Entail Amendment Act (11 and 12 Vict. c. 36), she having obtained the consents which would be necessary to her disentailing and acquiring in fee-simple if the whole estate were now invested in land and entailed and she were the actual heir in possession.

I do not think that it is necessary to decide whether a mere undertaking by the liferentrices and others interested to give up their rights on being sufficiently compensated would be held sufficient to remove any bar that the existence of these rights might interpose between the petitioner and that which she seeks to attain. It might be very difficult so to hold. But I shall assume that the position of the petitioner is the same as if such renunciation had been unconditionally granted, and that the sole duty of the trustees still remaining to be executed by them were that of converting the part of the estate which is still in a moveable form into land, and entailing such land along with the landed estate left by the truster on the series of heirs nominated in the deed.

Some importance has been attached by the Lord Ordinary to the question how the twelfth clause relating to the entailing of the whole lands after lands have been purchased with the residue, and the fifth clause directing the entail of Elvingston to be made only on the death of the last survivor of the widow and Margaret, are to be read as bearing upon one another. The Lord Ordinary holds that the twelfth clause overrides the fifth, and that although the fifth clause expressly declares that it is upon the death of the last survivor of the widow and Margaret that the lands of Elvingston are to be entailed, nevertheless in respect of the twelfth clause the trustees when they have converted the whole residue into land are bound then to proceed to entail not only these purchased lands, but also the lands of Elvingston, although the widow or the daughter or either of them may be still alive. It appears to me to be very difficult so to hold. The more reasonable interpretation of the two clauses seems to be that which does not require any part of either of them to be directly ignored and set aside. The twelfth purpose itself speaks of the deed of entail of Elvingston as "to be executed under the fifth clause or purpose," and it seems to me that as the fifth clause directs such entail to be executed on the death of the last survivor of the widow or Margaret it would be subverting that clause to read the twelfth as meaning that the trustees were to execute the entail of Elvingston whenever the residue had been invested in land, although to do so at that time would be in express contradiction of the fifth purpose itself. But it is unnecessary to decide this point. For neither the event contemplated by the fifth clause nor the event contemplated by the twelfth clause has occurred. The widow and the daughter Margaret are both alive, therefore the fifth clause is not yet operative; the residue has not been expended in the purchase of land, and therefore the twelfth clause is not yet operative. The question whether the arrival of the period contemplated by the one clause tends to affect in any way the procedure under the other does not arise. The case must be taken upon the footing that both as regards Elvingston and as regards the residue the time has not arrived when according to the terms of the deed the trustees are bound to proceed to execute any entail.

If the time has not arrived when under the will the trustees are to proceed to execute an entail, it seems equally clear that according to the expression of the destination to which the trustees must conform in executing an entail, the petitioner is not the person who would be the institute under such entail. It is the heir of the body of her sister Margaret who is such institute. This is not disputed, but the petitioner maintains that her sister Margaret, having been born in 1832, cannot now have issue. And she further maintains as a consequence of this that she is therefore entitled on getting rid of the postponement of time caused by the testator's directions to entail only on the lapse of the liferent by obtaining discharges from the liferentrices to be dealt with as if she could now call upon the trustees to execute an entail in which she would be the first nominated heir. In short, she desires that it shall be held to be her legal position that she is fiar of the estate subject only to the limitations which the entail would impose. If she can succeed in this, she then proposes to take the further step of calling upon the trustees to stay their hand from executing an entail, and to hand over the whole estate as it is, heritable and moveable, in fee-simple to her in respect she has the consents of those who would be the subsequent heirs of entail, and is therefore entitled to make this demand under the Entail Amendment Act.

Our answer to the question whether the petitioner can enforce this demand depends upon an assumption as to the impossibility of Miss Margaret having issue of her body. Such an assumption must be either a pre-

sumption of law based upon ascertained fact in the particular case, or a presumption in law pure and simple. Now, I hold it to be clear that we could not make the allegation of the petitioner matter of inquiry as to fact. It is certainly not a case for legal decision on ascertained fact. On the other hand, there is no authority for saying that the law has in any way fixed a limit of age beyond which childbearing is impossible. But if we have no power to declare as matter of fact or legal presumption that Miss Margaret cannot have issue, then as the direction to the trustees is to make her issue institute in the entail, it seems to me to be logically impossible for us to declare that the petitioner is now in the position under Mr Ainslie's trust-deed which would give her the place of institute of entail if an entail were now made.

In these circumstances it appears to me to be impossible to hold that the petitioner has now that standing under Mr Ainslie's settlement which alone under the 27th section of the Entail Amendment Act could entitle her to make such a demand as she now makes upon the trustees. Her contention as regards Elvingston is that the liferents being out of the way the time has come for entailing, and that there being no other existing heir nearer than herself the trustees are bound to entail upon her and her heirs. But her proposal is to defeat the right of a prior heir. I can find no authority which entitles her to do this. If her sister were a young woman her claim would be unstateable, and the only difference made by the actual state of the facts is that she can appeal to alleged impossibility of there being an heir of the body of her sister. But as I have already said, neither on ascertainment of fact nor presumption of law can we affirm such impossibility.

As regards the residue, it is certain that the time at which the truster directed an entail to be made has not arrived, and the case is therefore stronger against her demand. The demand is under the 27th section, and I see no ground and know no authority for holding that the petitioner can avail herself of that section to defeat the right of a prior heir. In the view I take of that section its operation does not extend beyond the institute in the destination ordered by the truster, or the person who by failure of prior heirs has come to be first heir. The section confers upon the person in whose favour the entail would be made, provided the time has arrived at which it should be made, the right to take in fee-simple instead of being compelled to take an entailed estate. But I see no ground for holding that it confers any further right on such person to defeat the trust-deed. It is by reference to the trust-deed alone, when the time comes for creating the entail, that it can be determined who is the person who is to be first named in the entail, and therefore entitled to the benefit of section 27. That being so, I hold in the present position of this trust the petitioner cannot demand a conveyance from the trustees under that section to the exclusion of prior heirs. The petitioner is not the institute, and it cannot be held in law that the institute has failed. And I do not think that the case in this particular is affected by the renunciation of the liferents by the widow and Margaret. That does not relieve the trustees from their duties, or make the petitioner the institute of entail.

I am therefore forced to the conclusion that we should recal the interlocutor of the Lord Ordinary and refuse the prayer of the petition.

LORD YOUNG—The petition is based on the petitioner's right under the trust-deed of the late Mr Ainslie of Elvingston, her father. She has no other. What that right is is not admitted by parties interested, and certainly *in titulo* to dispute it. On the contrary, it is contested on what I regard as serious grounds by other beneficiaries under the same deed. Whether the dispute is such as we can properly or competently decide as incidental to such a petition as the present is I think very doubtful, and I incline to the opinion that it is not.

The petition is a "summary application" for "warrant and authority" of a ministerial character, and assumes an undisputed radical right. Accordingly the disputants of the petitioner's right were not called as respondents, and are before us now only because the Lord Ordinary on the Bills saw fit of his own motion to order that the petition should be served on them that they might attend to their interests. I have difficulty in regarding this as a fitting or even competent way of bringing before the Court for judgment a serious question of conflicting rights under a trust-settlement. For just suppose that the possible dispute had not occurred to the Lord Ordinary on the Bills, and that he had not ordered intimation to the possible disputants, could any "warrant and authority" granted on the petition have been regarded as a decision adverse to them, or hindered them from maintaining in a proper action that the petitioner had not the right on which that "warrant and authority" had been granted? As confirmatory of these views I refer to the note appended to Lord Wellwood's interlocutor ordering intimation to the beneficiaries under Mr Ainslie's trust-settlement whose interests conflict with those of the petitioners, and also to the observation by Lord Kyllachy in his note—that "the question at issue is then really a question not of entail but of trust law arising and depending upon the construction of Mr Ainslie's trust-settlement."

I have for obvious reasons thought it my duty to state this difficulty which I feel, for I should not wish it to be thought that any question of right and title might as matter of course be incidentally decided in a ministerial petition under the Entail Acts. At the same time, being adverse to any avoidable protraction of litigation, I am willing to express the opinion which I have formed on the questions which were fully argued to us without any objection being stated to the competency of deciding them under this petition.

I have already stated that the questions regard the petitioner's right under her father's trust-deed, she having no other. The petition is on the footing that she has right now to demand—first, the execution by her father's trustees of an entail of Elvingston, and other lands of which he died possessed, in her favour as institute of entail; and second, that these trustees shall with the trust-money in their hands now purchase land and entail it on her as institute of entail. If these assumptions are well-founded, and if we can in this petition (contrary to my opinion) competently decide that they are, the petition may be granted, and otherwise not. I am of opinion that they are not well founded.

First, with respect to Elvingston, I am of opinion that the time for executing the entail thereof has not arrived, and will not till the death of the last survivor of the truster's widow and daughter Margaret. I entirely dissent from the view of the Lord Ordinary that the clear direction to that effect in the 5th head of the trust-deed is modified or any way affected by the direction in the 12th head with respect to lands purchased by the trustees with residue. Who will when that time comes be the person having right to be regarded as institute of entail under the directions of the trust-deed we of course cannot know. Should Margaret be survived by any heir of her body, such heir will of course be the institute, and if not, then it will be the next of the favoured persons in the order specified in the deed who may then be alive. This may possibly be the petitioner Mrs Anderson, but the *prima facie* likelihood is against it. Margaret being her junior by several years. She (Margaret) is the fourth of a family of daughters, and although all of them except herself are married they are all childless. I notice this only to observe that when the time comes it is not merely possible but even probable that the institute of entail according to the trust will be one of the respondents or the heir of his body.

That we can take no account of the possibility of Margaret leaving an heir of her body is a proposition which, agreeing with your Lordship and differing from the Lord Ordinary, I think unsound. I would only add to what your Lordship has said that Margaret's age was known to her father, and that she is hardly appreciably older now than she was at his death in 1888, or when he executed the trust in 1885, or the relative codicil in 1888. Yet his directions to his trustees is that they shall abide the event, and execute no entail before her death. I think the trustees are not at liberty to violate or disregard his direction on any such view as that on which the Lord Ordinary here proceeded, and I should have thought so although the lady named had been a hundred at the date of the deed, and any age you please when the question arose. I think a truster may lawfully direct his trustees to await the death of a maiden lady of any age, however advanced, and thereupon to convey his succession to her child should she have one, and if not then to some other.

Then with respect to the life interests in Elvingston which the trustees are directed to satisfy, the direction is that the trustees shall hold the lands of Elvingston for the liferent use of the truster's widow and daughter Margaret, and the survivor. At this present time the trust subsists, the lands are vested in the trustees, and the truster's widow and daughter Margaret are alive. Has anything occurred to relieve the trustees of the duty of obeying the directions of the truster? Absolutely nothing. How then are the trustees in a position to execute an entail of the lands free of these life interests? It is not suggested that the trustees could, according to their trust, execute an entail subject to these life interests. These beneficiaries, the liferenters of Elvingston, have done nothing whatever to relieve the trustees of the duty of executing the presently subsisting trust in their favour. How then can it be said that the trustees can now be called on to execute an entail of the lands free of their claims, or on the footing that they have been extinguished?

The petitioner's argument here is, I think, as delusive and fallacious as possible. The proposition to be established is that the lands of Elvingston as now vested in Mr Ainslie's trustees have been relieved of the trust with respect to the life of the truster's widow and daughter, so that the trustees may now be required to execute an entail of them on that footing. The proposition actually established, or assumed to be so, is that the petitioners have ascertained that these liferenters are willing to renounce their liferents on such terms as may be satisfactory to themselves, which is, I suppose, the frame of mind of all liferenters. The very language of the petition is that the liferenters "are prepared to renounce their respective liferents, and give their formal consents to the present application on being satisfied that compensation for their respective interests in said landed estate have been sufficiently provided for by the petitioner." What compensation is contemplated has not been mentioned. The most obvious, and so the most probable, is that the liferents shall be continued, with only this difference (immaterial to the liferenters), that the fee shall be transferred from the testamentary trustees to Mrs Anderson, or some other, the only purpose in view being to terminate the trust (as being completely executed), in order that Mrs Anderson may have a *locus standi* as institute of entail. I cannot assent to the view that the intentions of the truster may be defeated and his lawful directions violated to the possible and even probable detriment of trust rights by any such provisional arrangement. I have not to consider or at least decide the case of an actual and unconditional discharge of the liferents. I may say, however, that I more than doubt whether the rights of the respondents would be prejudicially affected by such discharge. Taking their rights exactly as they exist under the trust-deed, they may prove to be of great or little or no value according to circumstances; but I think, as at

present advised, that they are not exposed to extinction at the will of the liferenters, exercised for the purpose of extinguishing them either spontaneously and gratuitously, or for consideration given by another (the petitioner) who is interested to extinguish them.

Second, with respect to the residue of the trust property, consisting, I believe, of a large sum of money (£123,000), I am of opinion that there is no ground for the contention that nothing remains to be done by the trustees except only to purchase land and entail it on the petitioner as institute. What I have said regarding Elvingston applies also to the residue, and I shall not repeat it. There can, in my opinion, be no entail till the death of the survivor of Mrs Ainslie and Margaret.

But the truster's directions regarding the residue are significant as declaring in a manner quite unmistakeable his will and intention, which it is, I think, the bounden duty of his trustees to execute, and to defend against all outside efforts made with the view to frustrate it. They are the proper executors and guardians of his will.

Having ordered that the entail which he appointed should not be executed until after the death of his youngest daughter, he necessarily contemplated the possibility, and indeed probability, of his trust subsisting for many years, and having the desire that his large money fortune should be used to enlarge the estate of Elvingston, which he intended to remain in his family, he directed that the residue (really the money) should be applied by his trustees, as opportunity offered, and "at such time or times and from time to time as my trustees shall consider proper, in the purchase of land as nearly as may be contiguous to the estate of Elvingston," and to be eventually entailed as he had directed Elvingston to be.

Now, I am clearly of opinion that it was and is the duty of the testamentary trustees to execute these quite explicit directions according to their plain intent and meaning; that they are not at liberty to combine with or aid any of the beneficiaries, liferenters, or others to frustrate or defeat them to the possible and more or less probable detriment of other beneficiaries; that they are not at liberty to connive at any such attempt by others, but are bound actively to do their best to defeat it, and to insist on the execution of the trust according to the truster's clearly expressed will.

I think that in executing the truster's directions to purchase land contiguous to Elvingston as opportunity may offer from time to time the trustees are bound to take account, as the truster no doubt did, of the possibility, and even likelihood, that those who may eventually take his property by his bounty will respect his intentions if they can, even although it might be impossible to compel them. It is true that we have the assurance of one of his daughters and her husband that they have no respect for his intentions, and will, if they have the opportunity, disregard them. But it is not to be assumed that others will be like-minded, and it is not even certain that the rule of the Entail Act of 1848 will be in force when this Ainslie property comes actually in the due execution of the trust to be in the hands of some one whose wish or necessities would induce him to avail himself of it. I think it is the right of any of the beneficiaries who may possibly become an institute or heir of entail according to the trust directions to insist on the execution by the trustees of the direction with respect to the purchase of land with residue.

What I have now said seems to me to confirm the view which I expressed at the outset that the questions which are here presented are truly questions of trust law, and regard the due execution of a testamentary trust. It is unfortunate, I think, that the trustees should not have appeared to defend the trust, and insist on their right and duty to execute it according to the truster's clearly expressed intention. I have endeavoured to consider the case as if they had done what I think was their duty in this respect, and so were resisting the petitioner's demand that they should now convey the whole trust property to her. It is as likely as not, perhaps more likely than not, that the institute of entail under the trust directions is yet unborn, and the substitutes to him may all be as yet unborn. I am clearly of opinion that the trust must continue to subsist, and be administered in all respects according to the directions of the trust-deed, and with a single view on the part of the trustees to accomplish the truster's cherished desire that his whole available personal fortune shall be applied to the purchase of land contiguous to Elvingston, so that those of his family and blood whom he has designated shall take by entail a landed estate as considerable as it was in his power to make it. This desire may possibly be eventually disappointed by circumstances beyond the power and control of the trustees, but it is their duty to do their best to attain its accomplishment and to frustrate all attempts to disappoint it.

LORD RUTHERFURD CLARK—The petitioner applies to the Court under the 27th section of the Entail Amendment Act of 1848 in order to acquire in fee-simple (1st) the lands of Elvingston and others, and (2nd) the residue of her father's trust-estate.

By Mr Ainslie's trust-deed the trustees are directed to hold the lands of Elvingston and the whole other lands which belonged to him at his death for the successive liferent of his widow and his daughter Margaret, and "upon the death of the last survivor" of these two persons to settle these lands by deed of strict entail on the heirs of the body of his daughter Margaret, whom failing on his daughter Mrs Anderson and the heirs of her body, whom failing on certain other heirs.

I pass over as immaterial the clauses relating to the income arising from residue. The capital is to be employed in the purchase of land, and the last clause of the deed makes the following provisions:—

"On the residue of my trust-estate being realised and applied in the purchase of lands and other heritages as aforesaid, that my trustees may, and I hereby direct and appoint them to convey and make over the whole lands and other heritages then vested in them by a valid and effectual deed of strict entail to and in favour of the institute or heir of entail then in possession, or who would then have been entitled in virtue of the deed of entail to be executed by my trustees under the fifth clause or purpose hereof to the possession of the lands and estate of Elvingston, and the whole other lands and heritages presently belonging to me or which may belong to me at the period of my death, whom failing the substitute heirs of entail called or entitled to succeed to him or her therein."

A question has arisen as to the meaning and effect of this clause. According to its expression it applies to the whole lands vested in the trustees at the time when their purchases are completed, and thus includes both the lands which were conveyed to them by the truster, and those which they have bought. Hence it is argued that the terms of the fifth purpose, by which the entail of Elvingston is directed to be made on the death of Mrs Ainslie and Miss Margaret Ainslie, are so qualified and altered that the entail of these lands as well as of the lands purchased is to be made as soon as the residue has been applied in the purchase of lands, even if that event shall happen during the lifetime of Mrs Ainslie and Miss Ainslie, or either of them. The Lord Ordinary adopts this view. I do not think that it is necessary to notice the point further. For whether his Lordship be right or wrong it is plain that the last clause can have no effect in qualifying the fifth until the lands are actually purchased So far therefore it is clear enough that the time at which the truster directed the entail to be made has not arrived. For Mrs Ainslie and Miss Margaret Ainslie are both alive, and the residue has not been yet invested in the purchase of lands.

That she may the more readily avail herself of the provisions of the 27th section of the Act of 1848, the petitioner has entered into agreements whereby Mrs Ainslie and Miss Margaret Ainslie are prepared to renounce their respective liferents of Elvingston, and whereby her sisters are also prepared to renounce all interest which they have in the income of residue. The discharges have not yet been executed, and indeed will not be executed unless the petitioner is successful under the present petition. But I am willing to consider the case as if they had been executed, or, in other words, as if by reason of these discharges nothing remained for the trustees to do but to fulfil the directions of the truster with respect to entailing.

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.

If this be so, we have next to inquire whether the 27th section of the Act of 1848 is applicable to the case. The benefit of that section is conferred on "the party who, if the land had been entailed in terms of the trust, would be the heir in possession of the entailed land." In order that she may avail herself of it the petitioner must show that she possesses this character.

According to the expression of the trust-deed she does not. For the entail is directed to be made, not on her as institute, but on the heir of the body of her sister. As matters now stand she contends that she does possess the statutory character both with regard to Elvingston and with regard to the residue. With regard to the former, she urges that by the discharge of the respective liferent of Mrs Ainslie and Miss Ainslie, or by the agreement to discharge them, the time has now arrived at which the trustees are directed to entail Elvingston, and that as there is no other existing heir the entail must be made on her. With respect to the residue, she maintains that the object of the statute was to prevent the money being applied in the purchase of land, that for the purpose of determining the person who can apply under it, the land is to be assumed to be purchased, and that if it were purchased she is the heir in whose favour the entail would be made. It is to be observed that there is a difference between the two cases. It may be that by the discharge of the liferents the time at which the truster directed the lands of Elvingston to be entailed has arrived. It is clear that this is not so with regard to the residue.

In either case the petitioner proposes to use the 27th section of the statute to the effect of defeating the right of a prior heir. No authority was produced that it has ever been or that it can be so used. The petitioner founded on the case of *Preston Bruce*. It is quite different. Mr Preston Bruce was heir of entail in possession, but a nearer heir might be born, who according to entail law would be entitled to displace him. It is true that there were some unentailed lands and some money, but these were regarded as part and parcel of the entailed estate, and as being under the same rule. The question was whether Mr

Bruce could disentail. He was allowed to do so, because the statute gives that right without qualification to every heir in possession. By disentailing and altering the investiture he defeated the right of the unborn prior heir. But in doing so he was only exercising the rights which the statute gave him as heir in possession. The case determines what the petitioner could do if she had taken possession under an entail. But it does not aid us in the construction of the 27th section, or prove that by means of that section the right of a prior heir may be defeated.

I am of opinion that according to the just construction of that section the benefit of it is limited to the institute of entail, or to such person as by process of time has come to be the first heir. The statute is dealing with the case in which the entail is not made, and in which there can be no heir of entail in possession. It supposes an entail to be made in terms of the trust, and it gives to the person in whose favour the entail would be made the same rights as are conferred on the heir in possession under an existing entail. It defeats the trust so far as to enable the heir to take a fee-simple instead of an entailed estate, but no further. To every other effect the trust-deed is conclusive. The trust-deed alone determines who the person is in whose favour the entail is to be made, and therefore determines who the person is who can avail himself of the statutory powers. I am therefore of opinion that the statute cannot be used to the effect of defeating the rights of prior heirs, for I cannot hold that in any event which has as yet occurred the trust-deed directs an entail to be made on the petitioner to the exclusion of the issue of Miss Ainslie.

With regard to the lands of Elvingston, no entail is to be made till the death of the survivor of Mrs Ainslie and Miss Ainslie, unless indeed the 5th clause is so qualified by the last as to make the time for the execution of the entail to depend on the investment of the residue in the purchase of lands. In neither view has the time arrived, and the petitioner is not the institute, nor has the institute failed. Nor do I think that Mrs Ainslie and Miss Ainslie can by a discharge of their liferents enable or oblige the trustees to accelerate the date at which the entail is to be made to the effect of defeating the right of the institute. One purpose in the postponement of the entail was to secure the succession of the heir of Miss Ainslie's body. The truster's intention cannot be defeated because Mrs Ainslie and Miss Ainslie choose to renounce their liferents. Such a renunciation does not make the petitioner the institute of entail, nor does it diminish the obligation of the trustees to fulfil the directions of the truster. So that unless the petitioner can show that the 27th section enables her to defeat the rights of a prior heir the petitioner must fail. I have already said that the section in my opinion has no such power.

The same considerations apply to the residue. The time appointed by the truster for making the entail has not arrived. It cannot be anticipated to the effect of defeating the right of a prior heir.

LORD LEE—I desire to say at the outset that I concur in the doubt expressed by Lord Young whether the questions of trust law which are at the foundation of this case are here competently raised.

The first question raised by this reclaiming-note is whether the directions of the late Mr Ainslie as to the application of the residue of his trust-estates are such as enable the petitioner to claim that the money be dealt with as entailed land of which she is "heir in possession" within the meaning of the 27th clause of the Act 11 and 12 Vict. cap. 36. For the opinion of the Lord Ordinary is rested on this, that the directions as to an entail of the lands of Elvingston and others are explained by the directions as to the residue which he thinks are clearly intended to be carried out at once on the death of the truster. I do not think that that intention is by any means clear.

The question appears to me to depend on the terms of the trust. For it is only if the petitioner is the party who would be heir in possession "if the land had been entailed in terms of the trust," that she can claim the benefit of the 27th clause. The question therefore depends on the rights of succession created by the will of the late Mr Ainslie. Unless it can be shown that his will as to the succession may be carried out consistently with what is proposed (save in the matter of purchasing and entailing land), I apprehend that the proposal must be disallowed. I do not mean of course that the statute in no case contemplates alteration in the order of succession. Where it applies it enables the party entitled to the benefit of its provisions, to put an end to the appointed order of succession altogether. But in order to decide whether the petitioner is entitled to make the application contemplated by section 27, I think it plainly necessary that she should be able to show that she has a present right to be regarded as fiar of the estate, or money appointed to be entailed, subject only to the limitations which would be created if an entail were executed. It cannot be maintained and was not contended that the statute has the effect of giving anyone the position of heir in possession who is not such *de jure* and according to the will of the person under whose directions he claims.

Now, in order to test the position of the petitioner as to the residue, I think it necessary to consider whether if there had been no directions as to an entail, but a simple destination in the terms directed by Mr Ainslie, a fee would have been vested in the petitioner *a morte testatoris*.

The direction to entail the lands to be purchased is only to take effect "on the residue of my trust-estate being realised and applied in the purchase of lands and other heritages as aforesaid," and the entail thus directed to be made is to be in favour of the "institute or heir of entail

then in possession, or who would then have been entitled, in virtue of the deed of entail to be executed by my trustees under the fifth clause or purpose hereof, to the possession of the lands and estate of Elvingston," &c.

Now, on referring to the fifth purpose, it will be seen that the entail of Elvingston is to be executed only "upon the death of the last survivor of the said Mary Ainslie, my wife, and my daughter Margaret Scott Ainslie." It is to be in favour of the petitioner, but only "failing heirs of the body of the said Margaret Scott Ainslie," and only in the event of her being the "heir of entail then in possession," &c., in virtue of the entail of Elvingston, not otherwise. If she shall have predeceased the time for making that entail the bequest of residue is in favour of the next substitute. Further, the eleventh purpose, which contains the provision as to the purchase of lands "as aforesaid," shows that while the income of the residue is disposed of by the ninth purpose in a manner inconsistent with the idea of the residue being entailed before the lands of Elvingston and others, it is distinctly contemplated that these lands may have been entailed before the residue has been applied to the purchase of lands. For it is provided that certain lands in the parish of Morham, "should my trustees then have divested themselves of the said lands and other heritages in the parish of Morham," may be disentailed and sold by arrangement with the heir of entail in possession for the purpose of being used as a part of the residue in the purchase of land to be entailed, the title to which is to be taken by the trustees in their own names.

My opinion is that according to this trust, supposing that the direction as to residue had been for payment or conveyance in terms of the destination, and without any provision for entailing it, it is impossible to hold that any right to the residue is vested in the petitioner as fiar prior to the death of the liferentrices. I think that the case of *Bryson's Trustees* (8 R. 142), and the authorities there referred to, are conclusive on this point.

It was argued that the postponement of the conveyance appointed by the deed is for no other purpose than the protection of the life interests, and that these being renounced, or provisionally renounced, there is nothing to interfere with the petitioner's claim to enter at once into the enjoyment of the residue. But it appears to me that there are other purposes to be served by the postponement, according to the declared intention of the testator. In the first place, the trust is intended to protect the interests of Miss Margaret Ainslie's children in case she should have any; and in the second place, it is intended to protect the interests of all who may come to be conditional institutes under the destination in the event of the failure of such children, and of the petitioner, before the appointed time for conveyance or payment shall have arrived. Before that time I think there could be no vesting under this deed.

But it was also argued that the 27th clause of the Act applies to all cases of money held in trust for the purpose of purchasing land to be entailed, and that the 28th clause requires us to hold the death of the testator, as the date when the trust first came into operation, to be the date of an entail made in execution of the trust. And the cases of *Black* v. *Auld*, 1 R. 133, *Viscount Fincastle*, 3 R. 345, and *Preston Bruce*, 1 R. 740, were referred to. But none of these were cases where a person in whom no right had vested was claiming to take the administration of a trust-fund out of the hands of the trustees. In *Black* v. *Auld* it was admitted that Captain Scott Black could not have applied to the Court until he attained the age of twenty-five, because the right to the money did not vest in him till then, although the trust-deed came into operation twenty years before. But it was decided that after attaining that age he must be regarded as heir in possession. The only question was whether he was heir in possession under an entail dated prior to 1st August 1848 (in which case he could disentail without consent) or under an entail of later date in which case he required consent. In either case he was the heir in possession within the meaning of the statute. So also in the case of *Viscount Fincastle* there was no question as to Lord Dunmore being the heir in possession. He was in actual possession. The only question was whether the entail was subsequent to 1848, so as to make it necessary that he should have had the consent of an heir-apparent of the age of twenty-five, and born subsequent to the date of the entail.

With regard to the case of *Preston Bruce* I shall only say that no such question was there raised or decided as occurs here. The petitioner was actually served heir of tailzie, and was in actual possession of the lands by virtue of the infeftment following on such service. No doubt there was also some trust-money. But the right to it was complete, or at least was held to be complete. I cannot think that the decision in that case would have been the same if all that Mr Preston Bruce could have alleged had been that by arrangement with a liferenter he had accelerated the opening of the succession. In point of fact he was able to allege that as heir in actual possession he had a vested right of fee in the money similar to that which he possessed by virtue of his infeftment in the lands, and I think it appears very clearly from the opinions of the majority of the Judges that the decision turned upon the fact that the petitioner was in actual possession by virtue of the tailzie. But for that fact there is no answer to the reasons given by Lords Deas and Neaves for dissenting from the judgment. The case in my opinion affords no precedent for the present, in which the Court is asked to put an end to a trust at the instance of one who does not possess, and may never possess, a vested right under it.

On these grounds I am of opinion that the petitioner has failed to establish her

title to make the present application under the 27th clause of the statute, and in this view it is unnecessary to consider the sufficiency of the provisional agreement set forth in the petition to warrant the statement that the liferents have been renounced, and that the requisite consents can be produced. But I may say that *prima facie* there seems to be a great difficulty in entertaining the present application without an actual renunciation of the liferents. It is doubtful whether the liferenters under this trust have power, in any view, to accelerate the execution of the trust in favour of the petitioner, and to the prejudice of remoter heirs. But the absence of an actual renunciation makes it exceptionally difficult to affirm that the petitioner has a present right to be regarded as the institute of entail appointed by the trust, and that the consents referred to in the minute will be sufficient. The petition is not yet before the Court in a complete shape, and until "the last date of the consents required to the same," a change of circumstances may have a material effect upon the petitioner's rights notwithstanding the 19th clause of the Act of 1853. The proceedings in the meantime are of an entirely tentative kind, and I should think it doubtful in any case whether it can be determined at present that the consents offered are those which will be required when the liferents have been renounced.

With regard to the lands of Elvingston and others, I do not understand the Lord Ordinary to read the fifth purpose of the trust as being by itself sufficient to support the petitioner's title to the character of heir in possession. But be this as it may, I concur with your Lordships in thinking it impossible at present to hold that there cannot be heirs of the body of Miss Margaret Scott Ainslie. The possibility of such heirs is not a question of law, and for the reasons already stated by your Lordship and Lord Rutherfurd Clark, I am of opinion that the authorities do not warrant any presumption of fact in the circumstances of the present case.

On these grounds I think that the petitioner's claim to put an end to this trust must be disallowed.

The Court recalled the Lord Ordinary's interlocutor of 20th July 1889, and refused the prayer of the petition.

Counsel for the Petitioner—Low—Maconochie. Agents—W. & J. Cook, W.S.

Counsel for the Respondent Archibald Ainslie—Sym. Agents—J. & R. A. Robertson, S.S.C.

Saturday, January 25.

SECOND DIVISION.

[Sheriff of Midlothian.

M'TERNAN *v.* WHITE & BEE.

Reparation—Relevancy—Fellow-Workman—Known Danger.

A workman was struck and injured by a portion of a stone which a fellow-workman was breaking. He brought an action of reparation against his employers, and averred that the accident was due to their fault or to that of their foreman, for whom they were responsible, in continuing to employ a workman while known to them to be in a state of incompetence through intoxication. The pursuer did not aver that he was ignorant of the condition of his fellow-workman, or that he had demurred to working beside him while in that condition.

The Court *held* (the Lord Justice-Clerk *diss.*) that it appeared from the pursuer's averments that he was working in face of a known danger, and *dismissed* the action as irrelevant.

Patrick M'Ternan, labourer, 213 Canongate, Edinburgh, brought an action in the Sheriff Court at Edinburgh against Messrs White & Bee, builders, Edinburgh, for £200 as reparation for injuries sustained by him in the course of taking down an old building while in their employment.

The action was laid both at common law and under the Employers Liability Act 1880.

The pursuer averred—"On or about the 2nd day of September 1889, while the pursuer was engaged, on the defenders' orders and directions, along with others of their servants, loading carts with stones and other material which had formed the old building, he was struck on the head by a large stone which was being broken up in an unskilful and grossly reckless manner by one of the defenders' servants named Thomas Stenhouse, who, on the orders and directions of the defenders or their said superintendent, had been placed at the job. . . . . The accident to the pursuer occurred through the fault of the defenders and of their said foreman in culpably and recklessly ordering, directing, or allowing, as they did, one of their workmen named Thomas Stenhouse to break large stones at the building beside the pursuer while the said workman was in such a state of drunkenness as to be unfit for doing work of the kind with ordinary safety to the pursuer while conforming to the orders of the defenders in doing the work he was engaged at when the accident occurred. The defenders and their foreman were made aware of the intoxicated condition in which the said Thomas Stenhouse was a considerable time before the accident occurred, and they knew of the danger attending a person in that condition working with a large sledge hammer at the place. When the