circumstances which have now happened, as to whether he would sooner have his estate divided under the rules of intestacy or whether he would sooner have his old, and in his own view imperfect, will carried into effect, he would have preferred the latter alternative, because it would have given a certain preference to his son, which, so far as all his attempts at testing were concerned, seems to have been *enixa voluntas*. It would have given that preference to his son which a distribution under intestacy would have denied. If the question is put in that way, 'Which under the circumstances that have arisen he would sooner have done?' I agree with the learned counsel, but then that is not really the question. The question is, what was his state of mind at the time? Now, I think it is quite in accordance with human experience that a man, if asked after the event, if such a thing could be possible, "Would you prefer to die testate or intestate"? would always say "I would prefer to die testate"; yet he may have died in a state of conscious intestacy, with the view of probably making a will. In other words, I think that probably the state of mind of every man, who commences operations for a new will by tearing up his old one, is that he does not at all mean to die intestate when he is sitting down to write his new will. But he puts it off and death surprises him,—and he may put it off, according to the nature of his dilatoriness, for a very long time. I think that was the case here. I think this man undoubtedly meant to make his new will, and he was surprised by death. That, I think, is quite consistent with the idea that he knew for the moment that he was in a state of intestacy, although I agree that if you could ask him now he would probably prefer that he should have died testate, even with the old will, than intestate. While I make these observations I base my decision upon this, that the case is really ruled by the case of *Elder's Trustees* (21 R. 704) and there are no special circumstances to overcome the presumption. I am therefore for answering the first portion of the question in the case in that sense. As to the other question that was mooted, I have no doubt that the revocation is a complete one.

LORD KINNEAR—I am of the same opinion. If the question were open I should think it one of some difficulty, but I am of opinion with your Lordship that the case is ruled by authority, and we must follow it.

LORD DUNDAS—I agree with your Lordships and have nothing to add.

The Court answered the first alternative of the question in the case in the affirmative.

Counsel for the First and Second Parties—Johnston, K.C.—Cochran Patrick. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Third and Fourth Parties—Cullen, K.C.—Constable. Agents—Graham, Johnston, & Fleming, W.S.

Thursday, July 11.

SECOND DIVISION.

[Lord Dundas, Ordinary.

TURNBULL *v.* TURNBULL'S TRUSTEE.

Trust — Succession—Denuding—Presumption as to Childbearing—Anticipation of Period of Payment on Finding Caution for the Event of a Child being Born.

A testator directed his trustees to pay the income of his estate to his daughter, and on her death to pay the capital to her children, on the youngest child attaining majority. In the event of the daughter leaving no issue, or of none of her children living to attain majority when the estate came to be accounted for, the testator provided for payment of certain legacies. The daughter brought an action against the sole surviving trustee for payment of the trust estate. She averred that the whole legatees called on the failure of her issue were dead and their legacies lapsed, that she was fifty-eight years and past the age of childbearing, that she was the heir-at-law and sole next-of-kin of the testator, and the only person who had any beneficial interest in the trust estate. She offered to find caution to repeat the sum paid to her in the event of children being born to her. The trustee pleaded that he was bound to hold the estate for behoof of the children *nascituri* of the pursuer.

Held that, on the pursuer finding caution, the trustee was not bound to hold the trust estate for behoof of children *nascituri*, and a proof *allowed*.

On 17th May 1906 Miss E. M. Turnbull, Wallace Street, Stirling, brought an action against J. S. Fleming, solicitor, Stirling, the sole surviving trustee acting under the trust-disposition and settlement of the pursuer's father, the late David Turnbull, in which she sought declarator that the residue of the trust estate fell to be treated as intestate succession, that the pursuer was the testator's heir-at-law and sole next-of-kin, and as such entitled to the said residue.

The defender pleaded—"(1) The averments of the pursuer are irrelevant. (2) On a sound construction of said trust-disposition and settlement, the defender is bound to hold the trust estate for behoof of the children *nascituri* of the pursuer. (3) The residue of said trust estate having vested in the beneficiaries called in the last purpose of the said trust-disposition and settlement, and being disposed of, the pursuer is not entitled to decree as concluded for."

The *facts* are given in the following excerpt from the opinion of the Lord Ordinary (DUNDAS)—"The pursuer avers that she is the only child of the late David Turnbull, who died in 1876 leaving a trust-disposition and settlement, dated 1875, under which the defender is admittedly the sole surviving trustee. By the said settlement

the truster directed his trustees to realise his whole estate, to invest the proceeds, and to pay the whole annual income thereof to the pursuer during her life. He further directed 'Fourthly, with reference to the disposal of the capital of my estate forming the trust funds, I hereby authorise, direct, and appoint my said trustees to retain the same in their own hands for behoof of the lawful child or children of my said daughter Elizabeth Murdoch Turnbull, and on the decease of their mother, and on the youngest child attaining twenty-one years of age, to account for and pay over to and divide equally between and among such children, or pay solely to such child if there be only one, the whole of said capital sum forming the trust funds and all accumulations thereof, and take their or his discharge therefor. . . .' The trustees, in virtue of a power conferred upon them by the settlement, have paid over to the pursuer a sum representing one-half of the residue of the trust estate. The truster further provided, 'Lastly, should my said daughter leave no lawful issue of her body, then upon the decease of the longest liver of her and me, or should she have a lawful child or children but no child live to attain twenty-one years of age, when the said trust funds are appointed to be accounted for and paid over to such child or children as aforesaid, then upon the decease of the last of such children or child,' the trustees were directed to deal with the said residue in the manner set forth in the said settlement. The pursuer avers and offers to prove that the whole of the persons who would have been entitled under the said 'last' purpose to have succeeded to the residue of the trust estate, failing her issue, are now dead. She states that she is fifty-eight years of age and unmarried; that she is the heir-at-law and sole next-of-kin of her father; and that 'she is now past the age at which it is possible that she should have issue, and she therefore maintains that the residue of the said trust estate is undisposed of and falls to her as representing her father, and that she is entitled to immediate payment thereof.' The summons concludes for declarator and payment accordingly. The defender declines to make payment without the authority of the Court, and he pleads, *inter alia*, '2. . . . [*second plea, supra*] . . .'

The pursuer in condescendence 7 made the following statement:—"She" (*i.e.*, the pursuer), "is prepared to grant a valid discharge of her liferent interest under the said trust-disposition and settlement upon receiving payment of the capital sum. She has applied to the defender for payment thereof, but though he is personally desirous of winding up the trust he refuses to make such payment without the authority of the Court. The defender is now the sole surviving trustee under the said trust-disposition and settlement, and if the trust is to be maintained it will be necessary for him to assume new trustees which will cause expense to the trust estate. No trust purpose now remains except to pay the income of the estate to the pursuer. Further, the pursuer is prepared, if necessary, to find caution for repetition of the sum paid to her in the improbable event of child or children being born by her."

On 8th November 1906 the Lord Ordinary sustained the second plea-in-law for the defender and assoilzied him from the conclusions of the summons.

Opinion.—" . . . (*After narrative given supra*) . . . There are numerous decisions of recent date upon this branch of the law, and it is not, perhaps, easy to reconcile some of them with the general principles laid down in others. I shall refer briefly to such of the cases as appear to me to bear most nearly upon the point here raised for decision. In *Ainslie* v. *Anderson*, 1890, 17 R. 337, a petition was presented under section 27 of the Rutherfurd Act to have certain trustees ordained to convey a heritable estate to the petitioner in fee-simple. One of the subsumptions of the petition was that a spinster lady of fifty-eight could have no heirs of her body. The Lord Ordinary (Kyllachy) granted the prayer of the petition. In the course of his opinion (at page 346) his Lordship observed *obiter* that he was 'with the petitioner in her contention that Miss Margaret Ainslie may now be taken as past the age of childbearing.' In support of this view he referred to the opinions of Lord Curriehill in *Gibson* v. *Home*, 1881 (not reported), and of Lord M'Laren in *Barron* v. *Dewar*, 1887, 24 S.L.R. 735, to the case of *Urquhart's Trustees*, 1886, 14 R. 112, decided by the Second Division, and to English decisions in *re Widow's Trust*, 11 Eq. 408, and *Croxton*, 9 Ch. Div. 388. The Second Division recalled the Lord Ordinary's interlocutor and refused the prayer of the petition. The rubric bears, *inter alia*, that 'there is no presumption of law that a woman is past childbearing at any particular age.' The decision was an unanimous one, and the opinions delivered are full and instructive. In *Beattie's Trustees*, 1898, 25 R. 765, the First Division unanimously and expressly approved and followed *Ainslie's* case, and disapproved of two earlier decisions by the Second Division—*Urquhart's Trustees*, already referred to, and *Bouson's Trustees*, 1886, 13 R. 1003. Then in *Gollan's Trustees*, 1901, 3 F. 1035, the First Division held, in construing a destination in a trust-disposition and settlement to 'the heirs of the body of' a lady named and surviving, that vesting was postponed until her death. Lord Adam, who gave the leading opinion, pointed out that 'it is perfectly clear and well recognised that you cannot tell who the heirs of a person are until that person dies. It is perfectly obvious that until a person dies nobody can tell whether he is to be survived by heirs of the body or not.' The lady in question was fifty-one years of age, she had three children, and the special case bore that she 'is beyond the age of child-bearing.' Lord Adam went on to observe that 'it is said that that is quite enough to entitle the Court to order the money to be paid over now in the same manner as if she were

naturally dead, for she is naturally dead in the sense that she cannot have more children. But I think the more recent authorities hold that a woman cannot be presumed to be past childbearing at any particular age.' Therefore I think that we cannot give effect to that contention. In face of this series of authoritative decisions it would in my judgment be impossible to give effect to the pursuer's argument in the present case. Her counsel, however, referred to two decisions, both of which were pronounced by the Second Division at dates subsequent to any of the cases to which I have alluded. The first of these is *De la Chaumette's Trustees*, 1902, 4 F. 745. Marriage-contract trustees there held the wife's funds in trust for behoof of the spouses and the survivor of them in alimentary liferent and of the children of the marriage in fee. When the marriage had subsisted for twenty-five years without any child having been born, and the wife had nearly reached the age of seventy, the spouses called upon the trustees to pay over the capital. The special case set forth that there was 'now no likelihood of there being any children of the marriage.' Lord Young was of opinion that the capital ought to be so paid over; and his Lordship referred to the two cases of *Louson's Trustees* and *Urquhart's Trustees*, which, however, as I have mentioned, were expressly disapproved by the First Division in *Beattie's Trustees* as being inconsistent with the decision of the Second Division in *Ainslie* v. *Anderson*. None of the other Judges agreed with the opinion expressed by Lord Young. The majority of the Court held that in the circumstances the trustees were entitled at the request of the spouses to apply the funds in the purchase, in the names of the trustees, of annuities on the joint lives of the spouses and the survivor, to be held and applied by the trustees as unassignable income for the alimentary use of the spouses. Lord Moncrieff dissented, and expressed his 'fear that this decision will hamper us in subsequent cases in which the age of the lady is not so advanced.' Referring to the cases of *Ainslie* v. *Anderson* and *Beattie's Trustees*, and to 'decisions which proceed upon a different view, which will be found referred to in Lord Kyllachy's opinion in *Anderson's* case,' Lord Trayner said—'Accepting, however, for the moment the view adopted in these two recent cases, all that is settled is that there is no presumption of law that at any particular age a woman is past childbearing. But neither is there any presumption of law that a woman is or will have children after a certain age. There is, however, a very strong presumption, *hominis et facti*, that a woman who is seventy years of age is past child bearing. . . . I am prepared in this case, without laying down any general rule, to hold that the lady here is past child-bearing, and that it is consistent with the right and duty of the first parties to purchase the annuity as proposed in the third question.' I do not think that the pursuer can take any material benefit from the case of *De la Chaumette's Trustees*. It is not an authority for the payment over of funds to a woman alleged to be past the age of child-bearing; the lady in that case was about seventy years of age, and had lived a quarter of a century of childless married life, and the decision was obviously a very special one, and pronounced, as Lord Trayner expressly said, 'without laying down any general rule.' The other case to which the pursuer's counsel referred was *M'Pherson's Trustees*, 1902, 4 F. 921. There testamentary trustees held a fund in trust for a lady in liferent, not alimentary, and for her children as they respectively attained majority in fee. In 1902, when the special case was presented, this lady was a widow aged fifty-seven, and her children had all attained majority, the youngest of them having been born in 1879. She and her children concurred in calling upon the trustees to pay over the capital of the fund to the children. It was admitted that the fee had vested in the latter subject to partial defeasance in the event of other children being born and attaining majority. The children offered to purchase an annuity for their mother, and she and they offered to discharge the trustees, and to obtain and deliver to them a paid-up policy of insurance providing for the payment of such sum as might be necessary in the event of other children being born. The Second Division (Lord Moncreiff absent) held that the trustees were entitled, on the completion of the proposed arrangements, to pay over the funds to the children. It is, I think, clear that the pursuer cannot found upon this case as an authority for the payment to herself of the subsisting residue of her father's estate as upon the ground that she is incapable of child bearing. In *M'Pherson's Trustees* the Court did no more than sanction a family arrangement between the trustees and the liferentrix and the existing fiars—all in majority—subject to the carrying out of a proposal, detailed in the special case, by which provision, which the Court considered adequate, was made for the protection of the interests of any issue which might be born. The report of the case indicates that a full citation was made by counsel of authorities, including those to which I have referred. The opinions delivered by the Court are not lengthy. Lord Trayner expressed himself as 'prepared to hold, for the reasons assigned by me in the case of *De la Chaumette*, that the trustees may now lawfully deal with the fund in question on the view that the second party will not have any more children.' But his Lordship proceeded to observe that the children are willing to find caution to restore the fund they now claim, or so much thereof as may be necessary to meet the claim of any future child or children should any such be born and reach majority. I think it reasonable that such security should be given to the trustees. This is in accordance with the course adopted by the Court in the cases of *Scheniman* (1828, 6 S. 1019) and *Shaw* (1810, 6 S. 1149) cited to us in the course of the

argument.' With regard to these latter observations, the pursuer's counsel referred to passages upon her record in which it is stated that 'she is prepared to grant a valid discharge of her liferent interest under the said trust-disposition and settlement upon receiving payment of the capital sum'; and, 'further, the pursuer is prepared, if necessary, to find caution for repetition of the sum paid to her in the improbable event of child or children been born by her.' For the reasons already explained, I am against the pursuer upon the bare contention expressed in the summons, viz., that her father's residue must, in the circumstances, be treated as intestate succession, and be paid over to her. It remains to consider whether the averments which I have just quoted might entitle the pursuer to payment upon sufficient caution being found by her for repetition in the event of her having issue. It is true that in the cases of *Scheniman* and *Shaw*, to which I have referred, the Court allowed payment to children upon securing their mother's liferent and finding caution for the contingency of another child being born; and that a similar course, under somewhat similar circumstances, was sanctioned by the Second Division, after a long interval of years, in the case of *M'Pherson's Trustees*. The circumstances of the present case are not identical with those in which that course has been adopted. I do not say that, as a matter of practical expediency and convenience, some such solution might not reasonably be resorted to. But the question involved is not, as I think, one of law for the Court to decide, but rather one of fact, probably not capable of actual demonstration as a fact at all. If the Court is entitled, as apparently it is, to resort in its discretion to an equitable remedy in circumstances in which no question of law is really submitted for its decision, that course is in my opinion only open to one or other of the Divisions, and not to a single Judge in the Outer House. So far as I am aware there is no precedent for the exercise of such an equitable jurisdiction by a Lord Ordinary, and I am not prepared to inaugurate it. If the views which I have expressed are well founded, they are conclusive of the matter, and there is no need that I should deal with the argument which was submitted in reference to the third plea-in-law stated for the defender. Upon the whole matter I shall sustain the second plea-in-law stated for the defender, and assoilzie him from the conclusions of the action."

The pursuer reclaimed, and maintained that while she might not be entitled to payment of the residue as matter of right, still on finding caution to repeat in the event of children being born the Court would, following the authorities, authorise payment to her. She cited the following authorities—*Shaw* v. *Shaw*, 6 S. 1149; *Schenimen* v. *Wilson*, June 25, 1828, 6 S. 1019; *Blackwood* v. *Blackwood's Trustees*, June 11, 1833, 11 S. 699; *Macpherson's Trustees* v. *Hill*, June 13, 1902, 4 F. 921, 39 S.L.R. 657; *De la Chaumette's Trustees* v. *De la Chaumette*, March 20, 1902, 4 F. 745, 39 S.L.R. 524; *In re Lowman*, L.R. [1895], 2 Ch. 348, *per* Lindley, L.J., at p. 366; *Anderson* v. *Ainslie*, January 24, 1890, 17 R. 337, 27 S.L.R. 276; *Beattie's Trustees* v. *Meffan*, March 11, 1898, 25 R. 765, 35 S.L.R. 580; *White's Trustees* v. *Whyte*, June 1, 1877, 4 R. 786, *per* L.P. Inglis, at p. 789, 14 S.L.R. 499; *Munro* v. *Macarthur*, November 23, 1878, 16 S.L.R. 126.

The defender supported the judgment of the Lord Ordinary.

LORD JUSTICE-CLERK—There is no doubt that it has long been a fixed doctrine in our law—and the same seems to be the case in England—that there is no age at which a woman is presumed to be incapable of childbearing. Nevertheless the Court have in several cases considered themselves able to allow property which is to all intents tied up when there is practically no possibility of children being born to be divided on security being found to make repetition in the event of a birth taking place. I think we may follow these cases on the present occasion. I therefore propose that we recal the interlocutor of the Lord Ordinary, and allow a proof before answer of the averments for the pursuer contained in articles 6 and 7 of the condescendence.

I should add that while we recal the interlocutor of the Lord Ordinary I do not think his Lordship could have treated the present case otherwise than he has done.

LORD STORMONTH DARLING—I quite agree. It is to be understood that we agree with the Lord Ordinary in his view that he could not in this case have done anything but what he has done. It has been argued that we ought to follow the decisions which have been cited to us, and which lay down a rule which does not constitute a rule of law but a rule of practice. We think this is a suitable case for applying that rule.

LORD LOW—I am of the same opinion.

The Court recalled the interlocutor of the Lord Ordinary, and before further answer allowed a proof.

Counsel for the Pursuer (Reclaimer)—Howden — J. H. Henderson. Agent — William Considine, S.S.C.

Counsel for the Defender (Respondent)—M'Robert—C. A. Macpherson. Agents—M'Leod & Rose, S.S.C.

Friday, July 12.

EXTRA DIVISION.

[Sheriff Court at Kirkwall.

LAWSON'S EXECUTORS *v.* WATSON.

Bills of Exchange—Act of 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 3 (1) *and* (2) *and sec.* 20 *—Absence of Drawer's Signature—Incomplete Instrument as a Proof of Indebtedness.*

L's executors, in an action against W, founded on an incomplete instrument