Robertson v. *Park, Dobson, & Company*, October 20, 1896, 24 R. 30, 34 S.L.R. 3, *followed*.

William Milne, ice merchant, 103 King Street, Glasgow, presented this petition for recal of inhibition used by Messrs E. & J. Birrell, builders, Kinnear Road, Glasgow, and praying the Court "to find the said Messrs E. & J. Birrell liable in the expenses of this application, and of such other expenses as it may be necessary to incur in order to get the incumbrance created by the said inhibition completely removed."

On 18th March 1902 Messrs Birrell had presented a petition in the Sheriff Court at Glasgow for recovery of a debt due to them by Milne. On 21st March they took out and recorded letters of inhibition against him.

Milne had thereafter paid the debt sued for, and the expenses of the petition, which was accordingly abandoned.

On 1st April 1902 Milne, through his agents, requested Messrs Birrell to discharge the inhibition which they had taken out over his property. Messrs Birrell replied through their agents that they thought his proper course was to present a petition to the Court for recal, but stating that they did not object to discharging the inhibition if Milne paid the expenses.

Milne intimated that he was willing to pay the expenses of the discharge, but Messrs Birrell required that he should also pay the expense incurred in taking out and recording the letters of inhibition.

Milne accordingly presented this petition.

Messrs Birrell lodged answers in which they stated that they had no objection to the prayer of the petition being granted, except in so far as it sought to have them found liable in expenses.

Argued for the petitioner—A creditor, having used inhibition in security of his debt, and having received payment of his debt, was not entitled to demand from his debtor the expense not only of discharging but also of laying on the inhibition as a condition of granting the discharge. The petitioner having been compelled to make the present application by the unreasonable attitude adopted by the respondents, they should be found liable in the whole expenses incurred by the petitioner in freeing himself from the inhibition—*Robertson* v. *Park, Dobson & Company*, October 20, 1896, 24 R. 30, 34 S.L.R. 3.

Argued for the respondents—The position of the respondents with regard to the whole expenses in connection with the inhibition was that of successful litigants. They had obtained payment of their debt, and they were not bound to pay the expenses of their unsuccessful debtor in connection with the steps which they had been obliged to take owing to his non-payment—*Laing* v. *Muirhead*, January 28, 1868, 6 Macph. 282, 5 S.L.R. 199; *Roy* v. *Turner*, March 18, 1891, 18 R. 717, 28 S.L.R. 509.

LORD JUSTICE-CLERK—I think we should follow the case of *Robertson*, which, so far as the question before us is concerned, appears to be on all fours with the present case. If there is any practice under which a creditor who has used inhibition in security of a debt which the debtor has thereafter paid, is entitled to refuse to discharge the inhibition when the debtor is willing to pay the expense of so doing, it is a most unreasonable practice.

LORD YOUNG and LORD TRAYNER concurred.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor:—

"Recal the inhibition taken out by E. & J. Birrell on 21st March 1902 against the petitioner William Milne: Grant warrant for marking the same as discharged in the Register of Inhibitions, and that upon production of a certified copy of this interlocutor: Find Messrs E. & J. Birrell liable in the expenses of the petition and of any expenses necessarily incurred in having the said inhibition completely removed," &c.

Counsel for the Petitioner — Horne. Agents—Fletcher & Morton, W.S.

Counsel for the Respondents — C. D. Murray. Agents—W. & J. L. Officer, W.S.

Friday, June 13.

SECOND DIVISION.

M'PHERSON'S TRUSTEES *v.* HILL.

Trust—Succession—Anticipation of Period of Payment — Discharge of Liferent — Fund Vested subject to Partial Defeasance—Presumption as to Child-Bearing —Security Provided for Event of Future Children.

A fund was held by a body of testamentary trustees for a widow in liferent allenarly and for her children on their attaining majority in fee. The liferent was not declared alimentary. The presently existing children of the liferentrix had all attained majority. The liferentrix was now fifty-seven years of age, and her husband had died in 1898, nineteen years after the birth of the youngest child. The liferentrix having offered to renounce and discharge her liferent, the children called upon the trustees to make over the fund to them. The children offered to purchase an annuity for the liferentrix, and the widow and the children offered to discharge the trustees and to obtain and deliver to the trustees a paid-up policy of insurance for the amount of the fund to be held by them for the protection of the interests of any child or children who might be born and attain majority. It was ultimately not disputed that the fund had vested in the presently existing

children subject to partial defeasance in the event of their mother having any other child who should attain majority. *Held* that on the completion of the proposed arrangements the trustees might pay over the fund to the children.

This was a special case presented by (1) the trustees under the trust-disposition and settlement of the deceased John M'Pherson; (2) Mrs Jessie M'Pherson or Hill, the liferentrix of a certain fund held by the first parties as trustees; (3) the children of Mrs Hill, in whom it was ultimately not disputed that the fee of that fund had vested, subject to partial defeasance in the event of Mrs Hill having other children; (4) certain of the residuary legatees of the deceased John M'Pherson. The question in the case was whether the trustees were bound or entitled at the request of the second and third parties to make over the fund so held by them to the third parties.

By the fourth purpose of a codicil to his trust-disposition and settlement the testator John M'Pherson directed his trustees to pay to each of certain nephews and nieces, of whom Mrs Hill was one, a legacy of £1000. By the fifth purpose of the codicil the testator directed his trustees on the death of the survivor of himself and a sister, who survived him and died in 1900, "to pay or divide the whole residue and remainder of my estate, heritable and moveable, equally to and among my nieces after mentioned, or such of them as may then be alive, and subject to the provisions after expressed: (first) Mrs Jessie M'Pherson or Hill"—then followed the names of five other nieces.

The fifth purpose further provided as follows:—"I direct that the foresaid legacy of One thousand pounds and the share of residue above provided to each of my nieces Mrs Jessie M'Pherson or Hill and Mrs Jane M'Pherson or Young [one of the other nieces named] shall belong to them in liferent allenarly, and to their children respectively in fee; and I direct my trustees to administer such shares during the lives of the said Mrs Jessie M'Pherson or Hill and Mrs Jane M'Pherson or Young, and on their deaths respectively to divide the same among their respective children: And I declare the provisions of my said trust-disposition and settlement as to a share or part of a share of my estate devolving on a child or on children of any of my nieces shall apply to the said legacies and shares of residue last above mentioned."

The provisions of the deceased's trust-disposition and settlement referred to in the fifth purpose of the codicil were as follows:—"I declare that all the provisions herein contained in favour of any of my nieces are and shall be exclusive of the *jus mariti* and right of administration of their husbands, present and future, and in the event of any share or part of a share of my estate devolving on a child or on children of any of my nieces, the same shall not vest in such child or children until and as they respectively attain majority, except in so far as such share or part of it may be actually paid to or expended for such child; and I authorise my trustees to make payments to or for such child or children who may be in pupillarity or minority of the share or part of the share or income thereof to which they may prospectively be entitled, according to their discretion, and the same shall be deemed to vest in such child or children on such payment being made, but to the extent of such payment only."

The children of Mrs Hill were all major at the date of the present case, the youngest child was born in 1879, and Mrs Hill's husband died in 1898, so that during the last nineteen years of her married life she had no child. At the date of this case she was fifty-seven years of age, and had not entered into a second marriage. The amount of the fund destined to Mrs Hill in liferent, the fee of which, as was ultimately not disputed, had vested in her children subject to partial defeasance in the event of her having another child or children, was estimated to be about £3000.

In addition to the facts set forth above the case stated as follows:— "The third parties have, with the consent and concurrence of the second party, requested the trustees to make payment to them of the said share of residue and legacy of £1000, on the ground that the said share of residue and legacy have vested in the third parties subject only to the liferent in favour of the second party, and to partial defeasance in the event of a child or children being hereafter born to the second party and reaching majority. Mrs Hill offers to renounce and discharge her liferent, and the third parties have arranged to purchase for her a policy for an annuity of £100 (which would be approximately equal to the income expected from her liferent) from a first-class insurance company, to be approved of by the first parties, or from the Post Office Savings Bank, containing a clause prohibiting the anticipation of the annuity or the alienation thereof by Mrs Hill, and excluding the *jus mariti* and right of administration of any future husband she may marry. The first parties believe that such a policy would effectually secure the interests of Mrs Hill contemplated by the testator. Further, Mrs Hill and her children offer *simul ac semel* with the latter receiving payment of the said share of residue and legacy, to grant to the trustees a discharge (with joint and several warrandice thereof), and to obtain and deliver to the trustees a paid-up policy by an insurance company approved of by the trustees providing for the payment of £3000, or such other sum as may be necessary, in the event of any child or children being born to Mrs Hill in the future, to be held by the trustees for the protection of the interests of any child or children who may be born to Mrs Hill."

The fourth parties, the residuary legatees of the deceased other than the second and third parties, contended that the legacy and share of residue in question had not vested in the third parties, but this contention was not insisted in.

The first parties contended—"(1) That they are bound to continue the trust

administration until the death of Mrs Hill, as directed by the said trust-disposition and settlement and codicil; and (2) that even assuming the said share of residue and legacy have vested in the third parties, this is subject to partial defeasance in the event of a child or children being hereafter born to Mrs Hill and reaching majority, and that they are therefore bound to maintain the trust in order to secure the interests of such future children."

The questions of law for the opinion and judgment of the Court were, *inter alia* —"1. Have the legacy and share of residue provided to the third parties in this case by the said trust-disposition and settlement and codicil vested in them subject to a partial defeasance in favour of any child or children that may be born to the second party and may reach majority? 2. Are the first parties bound to pay over and divide among the third parties the said legacy and share of residue in whole or in part on receiving the discharge and insurance policy and on exhibition of the policy of annuity above referred to? 3. Are the first parties bound to retain and administer the said legacy and share of residue until the death of the second party?"

Argued for the second and third parties—On the completion of the arrangements proposed by these parties the third parties were entitled to have the fund in question handed over to them—*Pretty* v. *Newbigging*, March 2, 1854, 16 D. 667; *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236; *Shaw* v. *Shaw*, 6 S. 1149; *Scheniman* v. *Wilson*, June 25, 1828, 6 S. 1019, Lord Justice-Clerk at p. 1022; *Urquhart's Trustees* v. *Urquhart*, November 23, 1886, 14 R. 112, 24 S.L.R. 98; *Louson's Trustees* v. *Dicksons*, June 19, 1886, 13 R. 1003, 23 S.L.R. 722; *De la Chaumette's Trustees* v. *De la Chaumette*, March 20, 1902, 39 S.L.R. 524. The right of the third parties was indefeasible; it might be encroached on but it could not be extinguished; and therefore it satisfied the principle laid down by Lord Watson in the case of *Muirhead* v. *Muirhead*, *cit. infra*, relied on by the first and fourth parties. By the proposed arrangements the very remote contingency of other children being born of the second party, if she married again, would be provided for, and the trustees would be discharged and secured against all risks.

Argued for the first and fourth parties—The trustees were directed to administer the fund in question during the life of the second party, and the third parties were not entitled to payment until her death. The case was not affected by the fact that it was improbable that the second party would have more children; it proceeded on the assumption that she might—*Beattie's Trustees* v. *Meffan*, March 11, 1898, 25 R. 765, 35 S.L.R. 580. The cases of *Scheniman* and *Shaw*, *cit. sup.*, did not apply, and were to be compared with *Buchanan's Trustees* v. *Buchanan*, May 26, 1877, 4 R. 754, 14 S.L.R. 503. While the third parties' right was subject even to partial defeasance the Court would not order payment of their shares—*Muirhead* v. *Muirhead*, May 12, 1890, 17 R. (H.L.) 45, Lord Watson at p. 48, 27 S.L.R. 917. The trustees were bound to retain the fund—*Hughes* v. *Edwardes*, July 25, 1892, 19 R. (H.L.) 33, 29 S.L.R. 911. The case was the same as if the uncertainty attached to the fund instead of to the number of shares into which it was to be divided—*Haldane's Trustees* v. *Haldane*, December 12, 1895, 23 R. 276, 33 S.L.R. 206.

At advising—

LORD JUSTICE-CLERK—There are in this case only two grounds on which it can be alleged that the third parties are not now entitled to demand payment of the legacy and share of residue provided to them by the testator. The first is that there is a liferent interest given to Mrs Hill, and that the trustees must hold till her death. The second is, that if vesting in the third parties is assumed, it is subject to partial defeasance in the event of other children being born and attaining majority. As regards the first point, I am satisfied that it is not tenable. Mrs Hill's liferent is not declared to be alimentary or in any way protected, or her powers over it limited. She had therefore power to discharge it, and is prepared to do so.

As regards the second point, the facts are that Mrs Hill is now fifty-seven years of age, and has not had a child since the year 1879. Now, although there may be no presumption in law that a woman may not have a child in such circumstances, there is a strong *prima facie* presumption in fact against it, and in similar cases the Court has felt justified in allowing a fund to be handed over to existing beneficiaries on security being provided for a possible but scarcely possible contingency. I do not see any sound ground on which it can be maintained that these precedents may not be followed in this case, in which undoubtedly there has been vesting. Indeed, it would be difficult to conceive a case more appropriate for applying them than the present. It might be a strong thing to say that the trustees are bound to pay over, although I do not think I should hesitate to do so if it were necessary. But I presume it would meet all that is necessary in this case if the second question were put rather as to lawfulness than obligation. And I would say without any hesitation that the trustees may lawfully pay.

As regards security something was said about risk if it were provided by endowment assurance. It does not occur to me that there is ground for holding that this risk is greater than must be taken and is often taken in making trust investments, particularly since the passing of the recent Act regarding investments of trust funds. Any investment has some risk attached to it, as has also all caution, but certainly a well-selected insurance is as free from risk as many others that a court of law would sanction.

I am of opinion that the first two questions should be answered in the affirmative, the second as I have proposed, and that the third should be answered in the negative.

LORD YOUNG concurred.

LORD TRAYNER—The portion of the trust estate destined under the settlement of the truster to the second and third parties in liferent and fee respectively appears to me to have now vested as regards the fee in the third parties (they all having attained majority), subject to partial defeasance in the event of the second party having another child or children.

The third parties now call upon the trustees (the first parties) to make over to them the fee so vested on provision being made to secure the first parties against loss or risk in the event of partial defeasance taking place, but the trustees answer this demand by saying that they are precluded from complying with it by reason of (1) the existence of the liferent in favour of the second party, and (2) the possibility of the second party giving birth to a child or children in the future, for whose behoof as well as for the third parties the trustees hold and are bound to hold the fund in question. The first difficulty is, I think, easily got over. The second party offers to renounce and discharge her liferent, which, as it is not declared alimentary, I think she is entitled to do. The third parties offer to secure the second party in her liferent, or what is equivalent to it, by purchasing for her an annuity. But the trustees will be protected from all responsibility if the liferent is duly renounced and discharged. They are not concerned as to the terms on which it has been done.

With regard to the second difficulty, I am 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. The important facts which lead me to this conclusion are that the second party is now fifty-seven years of age, that her youngest child was born in 1879, that the second party's husband survived till 1898, and that during the last nineteen years of her married life no child was born. But the third parties 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* and *Shaw*, cited to us in the course of the argument.

LORD MONCREIFF was absent.

The second question was amended by deleting the words "Are the first parties bound to," and substituting the words "May the first parties."

The Court answered the first question, and the second question as amended, in the affirmative, and the third question in the negative.

Counsel for the First and Fourth Parties — Campbell, K.C. — R. C. Henderson. Agents—Drummond & Reid, S.S.C.

Counsel for the Second and Third Parties —Dundas, K.C.—Strain. Agents—Thomas White & Park, S.S.C.

Saturday, June 14.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

COOPER *v.* CALEDONIAN RAILWAY COMPANY.

Reparation — Negligence—Railway — Carriage of Passengers—Nervous Shock Resulting from Fright—Injury to Health Arising from Shock — Door Swinging Open while Train in Motion.

In an action of damages for personal injury at the instance of a widow of fifty-six years of age against a railway company, the pursuer averred that while she was travelling alone in a compartment in one of the defenders' trains, and shortly after the train had started, the door at the opposite end of the compartment to that at which she had entered flew open; that almost at the same time a train passed in the opposite direction at a considerable speed, and the motion of the passing train caused the door to swing backwards and forwards, and that the glass in the window was broken and the woodwork splintered. The pursuer further averred that the occurrence was due to the fault of the defenders, and that she was greatly alarmed, "being in terror momentarily of being struck and cut by the breaking glass and fragments of the woodwork;" that her nervous system received a shock which confined her to bed for three weeks, and resulted in lasting injury; and that her injuries were the direct result of the defenders' fault. *Held* (*rev.* judgment of Lord Stormonth Darling) that the pursuer was entitled to have an opportunity of proving her averments, and issue *approved*.

This was an action of damages for personal injury at the instance of Mrs Margaret Braddon or Cooper, residing at Greenhill Cottage, Rutherglen, against the Caledonian Railway Company.

The pursuer averred that she was a widow of fifty-six years of age, and that she carried on business as a draper in High Street and Nelson Street, Glasgow, and travelled daily to and from Glasgow by the defenders' railway; that on 11th February 1901 she entered one of the defenders' trains at Rutherglen by the south door, and that she was alone in the carriage. "(Cond. 3) Shortly after the train left Rutherglen Station the other or north door of the compartment swung open. Almost at the same moment a train came up in the opposite direction, going at a considerable speed. The motion of the passing train caused the open door to swing back and