we should allow the parties their expenses out of the fund.

The LORD PRESIDENT was absent.

The Court adhered, and allowed all parties their expenses out of the fund *in medio*.

Counsel for Reclaimers—J. Reid—A. O. Deas. Agents — Macpherson & Mackay, S.S.C.

Counsel for Respondents Gibson's Trustees—G. Watt—Macmillan. Agent—John Macmillan, S.S.C.

Counsel for Respondent Macdougall — M'Lennan — A. J. Robertson. Agents — Dalgleish & Dobbie, S.S.C.

Tuesday, June 27.

FIRST DIVISION.

STUART-GORDON'S TRUSTEES *v.* STUART-GORDON.

Succession—Will—Revocation—Conditio si testator sine liberis decesserit.

The presumption of law that the birth of a child operates the revocation of a settlement previously executed by the parent, which makes no provision for children *nascituri*, may be rebutted by evidence of the testator's intention that the will should subsist.

A lady who had been married three years without having any children executed a trust-disposition and settlement, whereby she bequeathed certain specific legacies, including various personal jewels and ornaments, and left the residue of her estate to her husband, no provision being made for children *nascituri*. The amount thus disponed by her was £8000. Previous to the execution of this will there had been settled on the lady in liferent and the children of the marriage in fee sums amounting to £14,000. Nearly two years after she had made the will the lady became aware that she was pregnant. During her pregnacy she on several occasions expressed anxiety as to the result to herself of her confinement. Within two months of the birth of her child she appended to her settlement a docquet containing a list of the jewels bequeathed by her, but made no other change in or addition to her settlement. She died two days after the birth of her child.

Held that the will was not revoked by the subsequent birth of a child, the operation of the presumption in favour of revocation being excluded by the facts that the child was amply provided for in the knowledge of her mother, and that the mother, in the expectation of the birth of a child, and in knowledge of the existence of her will, had allowed it to stand unaltered.

Mr and Mrs Stuart-Gordon were married on 22nd June 1892.

By the will of Mrs Stuart-Gordon's aunt, dated 6th June 1888, a sum of £10,000 was set apart for payment of the income thereof to Mrs Stuart-Gordon during her lifetime, and on her death for payment of the capital to her children as she might appoint, and failing such appointment, to her children equally. It was declared that the children's provisions should not vest in them till the period of payment, which, in the case of sons was to be on their attaining majority, and of daughters at majority or marriage. Till those dates, the trustees — after Mrs Stuart-Gordon's death — were empowered to apply the income of each child's share for its maintenance.

Mrs Stuart-Gordon was entitled under the will of her father to a sum of £4000, which sum, by deed of trust dated 10th June 1892, she settled in liferent to herself and her husband and in fee to her children in such proportions as she might appoint. It was declared that no vesting should take place in the child or children till majority. No provision was made for the case of a child dying before attaining majority.

On 9th November 1895 Mrs Stuart-Gordon executed a trust-disposition and settlement by which she conveyed her whole estate—which amounted to £8000 — to trustees. She bequeathed various pecuniary legacies, amounting to £1013, and certain legacies of personal jewels and ornaments. The whole of the residue of her estate she bequeathed to her husband.

There were no children of the marriage at this date, and there was no reference made in the settlement to the contingency of the birth of a child. In May 1897 Mrs Stuart-Gordon became aware that she was pregnant, and she wrote to a friend, Mrs Ferrier, the following letter announcing this fact:—"How much I wish you were near me, so much we might talk over. I am feeling better, but pretty seedy now and then, and suffering pain. I cannot make out what it can be, but shall likely know on Wednesday when the doctor comes back. It is either change of life or a baby, I think now, but I shall let you know. If it is that, I may as well make all my plans sure, and make my will. I should not survive it I am sure."

Thereafter she wrote several letters to Mrs Ferrier on the subject, in which she expressed her anxiety as to the result to herself of her confinement.

On 2nd September 1897 Mrs Stuart-Gordon wrote to Mr M'Kinnon, her law-agent, that she wished him to call upon her "on some matters of business." Her object in doing so was to make a list of the jewels bequeathed in her settlement. This was done, and on 14th September a docquet was signed by Mrs Stuart-Gordon containing a list of these jewels, and was sent by her to Mr M'Kinnon.

On 15th November Mrs Stuart-Gordon was confined prematurely, giving birth to a daughter, and on 17th November she died.

A Special Case was presented by (1) the trustees under Mrs Stuart-Gordon's settlement; (2) Mr Stuart-Gordon; (3) and (4) the legatees under her settlement; and (5) Mrs Stuart-Gordon's infant daughter, and Mr Stuart-Gordon as her tutor and administrator-in-law.

The contentions of the parties as set out in the case were:—"The fifth parties contend that by the birth of the said Margaret Anne Stuart-Gordon the said settlement and codicil of Mrs Stuart-Gordon were revoked, and that her estate falls to be divided as in intestacy. The second, third, and fourth parties contend that the said settlement and codicil were not so revoked, and that the said estate falls to be administered in accordance with the terms of the said settlement and codicil."

The question submitted for the judgment of the Court was — "Whether the said trust-disposition and deed of settlement and codicil are effectual, and fall to be carried out by the first parties, or whether they were revoked by the birth of the said Margaret Anne Stuart-Gordon?"

Argued for fifth parties — Where a testator died leaving a will which made no provision for children, there was a strong presumption that the subsequent birth of a child revoked the will. It was true that might be rebutted by circumstances — *Hughes* v. *Edwardes*, July 25, 1892, 19 R. (H. of L.) 33, but there must be strong evidence of intention to disinherit the child in order to rebut the presumption. The fact that the lady died within three days of the birth of a child, and had thus no opportunity of changing her will, was a strong element in this case. The fact that the child was otherwise provided for could not legitimately be taken into account. The tendency of all the later cases had been to uphold the presumption—*Elder's Trustees* v. *Elder*, March 16, 1894, 21 R. 704; *M'Kie's Tutor* v. *M'Kie*, February 16, 1897, 24 R. 526; *Colquhoun* v. *Campbell*, June 5, 1829, 7 S. 709, at p. 711; M'Laren on Wills, i. p. 403.

Argued for second, third, and fourth parties—There were three elements in this case in favour of rebutting the presumption—(1) The settlement did not operate a complete or substantial disinheritance of the child, since Mrs Stuart-Gordon's other instruments amply provided for her daughter—*Adamson's Trustees* v. *Adamson's Executor*, July 14, 1891, 18 R. 1133. (2) It was clear that she knew of the existence of a child, and the existence of her settlement was also clearly brought before her notice — *Millar's Trustees* v. *Millar*, July 20, 1893, 20 R. 1040; *Adamson's Trustees*, *supra*. It was competent to adduce all the facts stated in the case as evidence on these points, including the letters written by Mrs Stuart-Gordon — Taylor on Evidence, section 1227. (3) The person chiefly favoured in her will was not a stranger but her husband, the natural guardian of her children.

At advising—

Lord Adam—I do not think that the law applicable to the case is doubtful. It is, I think, that when a child is born there arises a presumption that a settlement previously executed by the parent is thereby revoked.

But that this is a presumption of law, and may be rebutted by facts, admitted or proved, showing that the testator understood or intended nevertheless that the settlement should receive effect. It appears to me therefore that the question we have to consider in this case is, whether the facts disclosed are sufficient to rebut the presumption. Now, these facts may occur either before or after the birth of the child. In this case, seeing that the mother died three days after the birth, the facts founded on are all antecedent.

Now, it appears from the case that Mrs Stuart-Gordon was entitled under her father's will to a sum of £4000, and that the fee of this sum was settled by a deed of trust on the children of the marriage between her and Mr Stuart-Gordon, subject to their respective liferents.

It further appears that, under the will of an aunt, Mrs Smith, Mrs Stuart-Gordon was entitled to the income of a sum of £10,000, the fee of which was in like manner settled on her children.

It further appears that the sum which Mrs Stuart-Gordon had to dispose of, and which was affected by the settlement, amounted to £8016, 10s. What she had done by her settlement was this—she had bequeathed certain pecuniary legacies to relations and friends, and to the vestry of St Andrew's Church, Aberdeen, amounting in the aggregate to £1013.

She had directed her trustees to deliver to the daughters of Mrs Hay or Foster certain jewels valued at £7, 11s. 6d., which she had received from her deceased aunt Lady Hay, who was their grandmother, and finally she had bequeathed the whole residue and remainder of her estate to her husband.

This was the position of matters which Mrs Stuart-Gordon had to consider when she found herself in the family way.

Now, it is clear, I think, that at an early period of her pregnancy she had her mind directed to her succession in the event of a child being born.

Then, with reference to an illness from which she seems to have been suffering, she wrote on 10th May 1897 to a friend Mrs Ferrier, "I cannot make out what it can be but shall likely know on Wednesday when the doctor comes back. It is either change of life or a baby, I think now, but I shall let you know. If it is that, I may as well make all my plans sure, and make my will. I should not survive it, I am sure."

It is also clear that she remained in the apprehensive and anxious frame of mind which she there expressed during the whole period of her pregnancy.

Such being her frame of mind, on 2nd September she wrote to her agent Mr M'Kinnon that she was anxious to see him on a matter of business. The matter of business on which she desired to see him

related to her settlement. It appears that when making the settlement she had arranged with her agent to make out a list of the jewels she had got from Lady Hay, and had bequeathed by the third purpose of the settlement to Mrs Foster's daughters, and to docquet it as relating to the settlement.

This she had omitted to do, and she now desired to repair the omission.

She accordingly saw her agent, and gave him a list of the jewels, to which he appended a docquet in these terms—"The foregoing is a list of Lady Hay's jewels referred to in my deed of settlement of date 9th October 1895." She signed this docquet and returned it to Mr M'Kinnon about the 15th September, not much more than two months before the child was born.

This appears to me to be a very significant proceeding. It is clear that she had had under consideration the terms of the settlement she had made, and if in view of the conditions and the expected birth of a child she had desired to make any change in its terms, surely this was her opportunity. She, however, not only expresses no such desire, but, so far as I can see, she could have had no other object in view in making out and docqueting the list of jewels than to facilitate the duty of her trustees in carrying out the third purpose of the settlement, by which she had bequeathed them to Mrs Foster's daughters, so that they might be able to distinguish them from the other jewels in her possession, and which were otherwise bequeathed. If this be so, then I think Mrs Stuart-Gordon must have understood and intended that the settlement was to have effect after her death.

If at this time Mrs Stuart-Gordon, in the full knowledge that the birth of a child was more or less imminent, had executed a new settlement, I do not think that such a settlement would be revoked by the subsequent birth of the child, because I think she must necessarily be considered to have had that contingency in view when she made the settlement. It appears to me that what occurred in this case amounts to very much the same thing. I think that Mrs Stuart-Gordon, in the full knowledge of her condition, recognised and adopted her existing settlement as the settlement which was to regulate her succession. Nor does it appear to me that there was anything in the circumstances of the case that should make it improbable that she should do so. She knew that any child that might be born was largely provided for otherwise, and the great bulk of the money which she had to dispose of was bequeathed to her husband, the father of the child, in whom, no doubt, she had confidence that he would do what was right with it in the future.

On the whole matter, I am of opinion that the facts disclosed are sufficient to rebut the presumption of law that the settlement was revoked by the birth of the child, and that accordingly the will and codicil are effectual and fall to be carried out by the trustees, and that the question should be answered accordingly.

Lord M'Laren—One cannot but feel that the state of the law in regard to the doctrine of implied revocation of a will executed before the birth of children is not satisfactory, as it leaves to the arbitrament of the Court a question which ought to be in the domain of positive law. The rule as it has been judicially interpreted leaves the conditions for determining its application in a very undefined and unsettled condition. At the same time it is probably better—I mean as representing the probable intention of parties—that the rule should exist with its limitations than that there should be no rule at all, which would have the effect, in the case of a will made by a man before his marriage was contemplated, of disinheriting his subsequent issue in favour of collateral legatees. Now, in order to be sure that one is on safe ground in a question of this kind, it is desirable to look shortly at the different categories into which the cases fall and their conditions, because the strength of the presumption varies very much according to the known conditions in each case. Perhaps the strongest case for the unqualified application of the doctrine of implied revocation is a will made before marriage; because even supposing the maker knew that his issue were otherwise provided for, it is, in the absence of any reference to children in the will, most unlikely that he would intend his settlement to subsist after his marriage. But again, in the case of a will made after marriage but before the birth of children, there may be cases where the marriage had subsisted for years without expectation of issue, and if a child should afterwards be born and no opportunity had occurred for revising the will, I should think that would be regarded as a case very nearly in the same position as that of a will made before marriage. But in the case of a will made by a man soon after his marriage, and while there is nothing to make it unlikely that he should be looking forward to issue, he must be a very absent-minded man who would make a will under such circumstances and not provide for the possibility of issue being born of the marriage. That would be a case where it might be supposed that the testator was satisfied with the existing provisions in favour of his children and did not intend to leave them more. It must always be remembered that the foundation of the rule is a supposed inadvertence on the part of the testator, and that if a man gives the smallest sum to his children born or to be born that will absolutely exclude the doctrine of implied revocation. There was a case in this Court where a parent had daughters but no son, and where it was held that a son subsequently born was entitled to claim the estate. Whether the Court will go so far as to say that a will providing for all a man's existing children but omitting to deal with children to be born will be revoked by the birth of another child, I am unable to say, but probably in such a case it would be safe

to adopt the formula of the Roman law and say "Whatever child may be born to me hereafter I disinherit him."

Now, the present case appears to me to fall nearest to the case of a will made after marriage and the birth of one child, because although no child had been born of this marriage and some years had elapsed without the expectation of issue, there can be no doubt that the lady was looking forward to the birth of a child. That had been the cause of much anxiety to her in consequence of her delicate state of health. I wish to guard myself against being supposed to proceed upon the view that a child *in utero* is to be considered in the same position as if already born, because we know on high authority that this is a rule which only exists for the purpose of enabling the child to take benefit by the will. But what we are now considering is not whether the child is *in utero* or is born, because there is nothing given to the child. What we are considering is the state of the mind of the lady who made this will which is said to be revoked; and I cannot see any difference between the state of her mind and knowledge of the subject at the time when she came to consider her will and to add an inventory that was to make it complete, and her state of mind after the birth of the child if she had survived. She was dealing with her estate at a time when she was in full knowledge that she would in all probability give birth to a child, and in these circumstances and with the provisions of her will brought under her notice—for she was considering her will at the time — she made what was in itself a very unimportant addition to it, but which becomes very important with reference to its legal effect, because it amounts to a republication of the will as of the date when the addition was made to it.

In short, I think it must be taken as if the testatrix had re-executed her will at the time when on the advice of her lawyer she signed an inventory relative to one of its provisions.

I agree with Lord Adam that this is a case where the operation of the rule is plainly excluded, and upon this ground—the double condition that the child was amply provided for in the knowledge of her mother, and that in the personal knowledge and the expectation of the birth of a child, and having an opportunity of revising her will she allowed it to stand unaltered.

LORD KINNEAR — I agree with Lord Adam.

The LORD PRESIDENT was absent.

The Court affirmed the first alternative of the question.

Counsel for First and Fifth Parties—J. B. Balfour Q.C. — Dove Wilson. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for Second, Third, and Fourth Parties—The Dean of Faculty (Asher, Q.C.) —Rankine, Q.C. — Ferguson. Agents — Auld & Macdonald, W.S.

Wednesday, June 28.

FIRST DIVISION.

[Sheriff of Lanarkshire.

RAE *v.* FRASER.

Process—Stated Case—Amendment—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37)—*A.S. June* 3, 1898, *sec.* 9 (*g*).

The Court will not send back a case to the Sheriff for amendment under the Act of Sederunt, section 9 (*g*), in order to enable either party to raise a new point of law as to which the Sheriff has given no determination, and which, from anything that appears, has not been argued before him.

This was a case stated by the Sheriff-Substitute of Lanarkshire at Glasgow (SPENS) in an arbitration under the Workmen's Compensation Act 1897, in which Janet Rae sought payment from A. Fraser of £300 in respect of the death of her husband through an accident while in Mr Fraser's employment.

The facts established by the proof were thus stated by the Sheriff-Substitute:—"(1) The appellant is the widow of John Rae, who was killed on 10th February 1899, while engaged along with James Golding and Andrew Fraser junior, all in the respondent's employment, in lifting a certain air compresser, then lying on the quay at Glasgow, by means of a hydraulic jack. (2) The air compresser in question had been used in connection with the new bridge across the Clyde at Jamaica Street, but having served its purpose it had been, *inter alia*, sold. (3) The respondent's contract was with the purchaser, and it merely was to lift the air compresser from where it was, lying resting upon two blocks sufficiently high to enable a lorry to be placed underneath, and to place it upon the lorry. (4) Somehow the jack got off the plumb, and the compresser in consequence shifted its position and came down upon the said deceased John Rae, crushing him to death.

"In these circumstances," the Sheriff-Substitute continued, "I found that the accident is not one for which compensation falls to be awarded under the Workmen's Compensation Act. I therefore dismissed the claim as I was of opinion that the contract which the respondent had undertaken, and which was simply to lift the air compresser sufficiently high to put a lorry under it, and to load it on the lorry, did not bring the respondent within the definition of 'undertaker,' nor did his contract fall within the definition of 'engineering work' in section 7 (2) of the Workmen's Compensation Act 1897."

The question of law submitted to the Court was as follows:—"Whether the word 'alteration' in the definition of engineering work,' in section 7 of the said Act, means *structural* alteration only, and does not apply to the raising of an air compresser by means of a hydraulic jack so as to place it on a lorry?"