purpose of making them fit as premises for such a manufactory are to be taken into account as enhancing the value of the hereditament, although such machinery and plant remains personal property and are not physically attached to the premises.'

"Now, it is quite clear that this is not the law of Scotland. The English Court had to construe the word 'hereditament,' and to find whether or not it was comprehensive enough to include all articles necessary for the trade, and so allowing the decision to turn upon a consideration of the adaptation of the tools or machinery to the premises. These decisions would be more in point here if the question turned merely on the construction to be put on the words 'lands and heritages' without any statutory definition of what these words mean. Under the English statutes relative to rating there is no express enactment in reference to machinery such as occurs in the Valuation Act, where we find the expression 'lands and heritages' to include a large number of various species of property therein described, and amongst others 'all machinery fixed or attached to any lands or heritages.' The enactment is not that all machinery that can be found to be adapted to the particular mill, or gas-work, or shipbuilding yard, shall be deemed heritage to be valued,—it must be machinery fixed or attached—fixed, that is to say, in such a manner that it cannot be detached from the building without destruction to itself or injury and destruction to the building. It is, moreover, clearly an abuse of language to say that an article, because it is very heavy, is to be held to be fixed or attached to the heritage when it rests there without bolt or screw or attachment of any kind. The reason for this special enactment as regards machinery is not far to seek. According to the Scottish mode of assessment for public burdens, the landlord pays a certain proportion and the tenant pays the rest. The assessments are laid on according to the annual value as contained in the valuation roll. "The 6th section of the Valuation Act enacts that where heritages are *bona fide* let under a a lease for twenty-one years or less, the rent shall be taken as the annual value, but if the lease shall be for more than twenty-one years, then the rent shall not necessarily be assessed as the yearly value, but such value shall be ascertained irrespective of the rent. Now, suppose the shipbuilding yard or joiner's premises, or any other premises wherein engineering works are carried on under a lease for more than twenty-one years, and the tenant brings all the plant (the rent received by the landlord being payable merely for the shell of the building), it would be a very hard case in such circumstances to enter in the valuation roll not merely the annual value of the building but also the value of the tenant's plant, and upon such value to lay an assessment upon the landlord who derives no sort of return from the plant which is not his. It would be different if the machinery which is valued, were fixed and annexed to the realty, because such machinery becomes a part of the realty, and will go to the landlord at the termination of the lease. It must have been upon some such ground that the special enactment in reference to machinery was made by the Valuation Act. But whether this be the true ground of such special enactment or not, effect must be given to the words employed according to their plain meaning and import. The word 'attached' may be more elastic than the word 'fixed,' but as to the latter it is thought that it can only have the meaning which I have already expressed, and which it must also possess though the premises be not let to a tenant but be in the occupancy,—as in the present case,—of the owner. This necessarily leads to the conclusion that the assessor here has gone wrong, and that the appeal of the Railway Company must be sustained."

Counsel for the Appellants—Balfour, Q.C.—Dickson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for the Assessor—Party.

Wednesday, October 19.

SECOND DIVISION.

M'EWEN (DOBIE'S TRUSTEES) *v.* PRITCHARD AND OTHERS.

Succession—Conditio si sine liberis—Will—Subsequent Birth of Child—Revocation.

A lady in her antenuptial marriage settlement directed her trustees in the event of there being no child of the marriage to pay the trust-funds to such person or persons as she should appoint by her will. Ten days afterwards she executed a will, and on the narrative that it was made "pursuant to the power reserved by or given to her in and by the said antenuptial settlement, and of all other powers enabling her in that behalf," she bequeathed her estate to two sisters and to her husband. Three years after a child was born of the marriage, whom the testatrix survived one month. *Held* that the *conditio si sine liberis* applied, and that the will was revoked by the subsequent birth of the child.

Per the Lord Justice-Clerk and Lord Craighill—that the antenuptial settlement and the will were only intended to take effect in the event of there being no child of the marriage.

By antenuptial settlement dated 11th August 1882, between Herbert Hallett of Chapel Street, Park Lane, London, of the *first* part, Jane Dobie of 33 Chepstow Place, Bayswater, of the *second* part, and Madalene Dobie and Samuel M'Millan of the third part, it was agreed that Madalene Dobie and Samuel M'Millan should hold certain stocks and funds belonging to the said Jane Dobie in trust as therein mentioned. The settlement contained this declaration—"And it is hereby declared that in case there shall be no child of the said marriage who, being a son, shall attain the age of twenty-one years, or being a daughter shall attain that age or marry, the trustees shall stand possessed of the said trust-funds, or of so much thereof respectively as shall not have been applied under any of the trusts and power herein contained. Upon the trusts following—that is to say, upon trust

to pay the same unto such person or persons as the said Jane Dobie, whether covert or sole, shall by her last will and testament, or any codicil thereto, direct or appoint; and in default of any such direction or appointment, then upon trust to divide and pay the same between and amongst the next-of-kin of the said Jane Dobie in accordance with the Statute of Limitations in force in England."

On 21st August, ten days thereafter, Mrs Dobie or Hallett executed a last will and testament, in which, on the narrative that it was "made and executed pursuant to the power reserved by or given to me in and by a certain indenture of settlement bearing date the 11th August 1882, executed prior to and in consideration of my then intended marriage with the said Herbert Hallett, and of all other powers enabling me in that behalf," she bequeathed to her sister Mrs M'Millan, wife of Samuel M'Millan, the sum of £250; and as to the rest and residue of her estate whatsoever and wheresoever, she gave the same equally between her sister Madalene Dobie and her husband Herbert Hallett, share and share alike; and thereby she appointed Samuel M'Millan and Madalene Dobie as her executor and executrix.

On 10th March 1885 Alexander Dobie, Mrs Hallett's brother, died without issue, leaving a share of his heritable estate, which was situate in Scotland, to his sister Mrs Hallett.

On 19th August 1885 a daughter, Emily Marian Luxmore, was born of the marriage. Mrs Hallett only survived this daughter a month, and died on 23d September 1885. At the time of her death and also of the execution of the will she was domiciled in England. Mr Hallett died on 24th September 1886, survived by his daughter, to whom as guardian he by his will appointed Alfred John Pritchard, solicitor, London.

A question arose as to whether Mrs Hallett's will was, as regarded her interest in the heritable property forming her brother's trust-estate, evacuated by the subsequent birth of her daughter. The *first* party in the case was William Campbell M'Ewen, W.S., Edinburgh, the trustee under a trust-disposition executed by Alexander Dobie. The *second* party was Alfred Pritchard, the child's guardian, who maintained that the will was evacuated. The *third* and *fourth* parties were the beneficiaries or representatives of beneficiaries under Mrs Hallett's will, and they maintained that the will was not evacuated.

The question submitted for the opinion of the Court was—"Whether the said Mrs Jane Dobie or Hallett's last will and testament, in so far as it disposed of her interest in the trust-estate of the said Alexander Dobie, was revoked by the birth and survivance of her said daughter, the ward of the second party?"

Argued for the third and fourth parties—The *conditio si sine liberis testator decesserit* did not apply here. Mrs Hallett had in view the possibility of there being children of the marriage when she signed the marriage settlement, and she survived the birth of her child without altering the terms of her will. Her will did not deal with her whole estate — Ersk. Inst., iii., 8, 46; *Yule*, December 20, 1758, M. 6400; *Watt*, July 30, 1760, M. 6401; Bell's Princ. sec 1776. The case of *Colquhoun* v. *Campbell*, June 5, 1829, 7 S. 709, did not apply, as it was a settlement dealing with the whole estate.

Counsel for the second party was not called upon.

At advising—

Lord Justice-Clerk—The question in this special case might in other circumstances have presented some difficulty; but as I read the marriage settlement, I see no difficulty whatever. Apart from the precise words, it substantially is to this effect—Mrs Hallett reserves power, should there be no children born of the marriage, to test on any money coming to the settlement, and she requires her trustees to pay it to anyone she should appoint by her last will and testament. Ten days subsequent to this deed she executed her last will, bequeathing her interest in her brother's heritable estate to her two sisters and to her husband. Three years afterwards a daughter was born to her, whom she only survived one month. In these circumstances the question has arisen whether Mrs Hallett's will has been evacuated by the subsequent birth of the daughter. I am of opinion that the will, like the antenuptial settlement, proceeded entirely on the contingency of there being no child born of the marriage. The provisions in the marriage settlement are very express as regards this contingency. No doubt there occur in the will the words "all other powers enabling her in that behalf," but I think these must be read subject to the contingency of her having no children; then and then only was she to have the power of testing. On that simple construction of the settlement, then, I am of opinion, that the testament has been evacuated. At the same time, I do not doubt that according to authority in the law of Scotland, a will made prior to the birth of a child may be evacuated by its subsequent birth, if such an event was not in the contemplation of the testator.

Lord Young—I think the question must be answered as your Lordships propose. I am of opinion that on the doctrine of *si testator sine liberis decesserit* the will made by Mrs Hallett in 1882 was absolutely revoked by the birth of the child in 1885.

Lord Craighill—I also think that the will in 1882 was revoked by the subsequent birth of the child. That is sufficient for the decision of the question presented to us, but if it had been necessary to give a decision (which I think it is not) on the point, I should have adopted the view taken by the Lord Justice-Clerk on the construction of the testament.

Lord Rutherfurd Clark—I also am of opinion that the will of Mrs Hallett was revoked by the birth of her child. Whether it could be set up again by mere survivance, I greatly doubt. I am inclined to think that there was an absolute annulling of the deed in consequence of the birth of the child, and that it could only be set up by a formal deed of equal value. By mere survivance, we cannot imply an intention on Mrs Hallett's part to give effect to it. But I am not moved by this consideration, because, assuming we have the right to entertain it in order to further her intention, I think there is nothing in the case by

which she showed her intention that the will should receive effect in its terms.

The Court answered the question in the affirmative.

Counsel for First and Second Parties—W. Campbell. Agents—J. & A. F. Adam, W.S.

Counsel for Third and Fourth Parties—Shaw—Guthrie. Agents—Cair M'Intosh, & Martin, W.S.

Saturday, October 22.

SECOND DIVISION.

[Sheriff of the Lothians and Peebles.

TRAIL AND OTHERS *v.* WILLIAM KELMAN & COMPANY.

Reparation—Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *secs.* 4 *and* 7—*Notice—"Reasonable Excuse" for Want of Notice—Discretion of Court.*

The 4th section of the Employers Liability Act 1880 provides that an action for compensation for injury shall not be maintainable under the Act unless notice that injury has been sustained is given, "provided always that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for the want of such notice."

Held that the question whether there was a "reasonable excuse" might either be determined at the adjustment of issues, or in the discretion of the Court be postponed for the determination of the judge who subsequently tried the case.

Circumstances in which the Court *postponed* the determination of the question for the decision of the judge who tried the case.

On 3d November 1886 John Trail, a mason, while in the employment of the defenders, who were builders in Edinburgh, received personal injuries owing to the fall of a gable, from which he died. His widow and children raised an action of damages against his employers, which was laid both at common law and under the Employers Liability Act 1880. They gave no notice of the action in terms of the Act, and the defenders, relying on this, pleaded—(1) The pursuers having failed to give notice of claim to the defenders in terms of the Employers Liability Act 1880, are not entitled to maintain the action so far as laid under that Act." The pursuers stated that "the defender William Kelman was present when the said accident occurred, and was informed of the injuries the deceased sustained."

The Sheriff-Substitute (RUTHERFURD) pronounced this interlocutor—"Finds that notice as required by the Employers Liability Act 1880 was not given to the defenders of the death of the late John Trail within six weeks thereafter, and that there was no reasonable excuse for the want of such notice: Therefore sustains the defenders' first plea-in-law, and finds that the action is incompetent in so far as laid upon the said Act:" *Quoad ultra* he allowed the parties a proof of their averments.

"*Note.*—The only explanation given by the pursuers on record (Cond., Art. 4 *ad finem*) of their failure to comply with the requirement of the statute of 1880 with regard to notice is that the defender William Kelman was present when the accident occurred, and was informed of the injuries sustained by the deceased John Trail.

"The Sheriff-Substitute is unable to hold that there is in terms of the fourth section of the Act a 'reasonable excuse' for the want of the notice. It is not alleged that the pursuers were unable from any cause to give the statutory notice to the defenders, and the Sheriff-Substitute thinks that the words 'reasonable excuse' apply only to those cases in which the relatives of the deceased party have been prevented giving notice by force of circumstances. The Sheriff-Substitute has therefore sustained the defenders' first plea-in-law."

The pursuers appealed to the Court of Session for jury-trial, and proposed an issue in which damages were laid both at common law and under the statute. They moved for approval of the issue, and that the case should be remitted to the Lord Ordinary for trial. The respondents objected to the issue under the statute in respect that no notice had been given of the claim in terms of the fourth section of the statute, which enacts—"(4) An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or in case of death within twelve months from the time of death; provided always that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice." Here there had been no written notice—*Moyle* v. *Jenkins*, December 6, 1881, L.R., 8 Q.B.D. 116. In fact there had been no notice given at all. This statutory defect could not be cured by the "reasonable excuse" put forward by the appellants, which was merely that one of the defenders had been present when the accident occurred.—*M'Donagh* v. *P. & W. M'Lellan*, June 18, 1886, 13 R. 1000; *M'Govan* v. *Tancred, Arrol, & Co.*, June 26, 1886, 13 R. 1003.

The appellants replied—There was here reasonable excuse for the want of notice within the rational meaning of the statute. The whole purpose of the statute was attained by one of the defenders being present when the accident occurred. But in any case, on a sound construction of the latter part of the 4th section, the question must be determined by the Judge at the trial of the case. The 7th section, too, provided that "a notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading." This section showed that the purpose of the notice was just to give the master an opportunity of investigating the accident and preparing for his defence.