

respondent's average weekly earnings during the whole twelve months minus six days previous to the accident was £1, 17s. 6d., while his earnings on the day of the accident was 1s. 10½d., and that the question of law for decision was which of these sums was to be taken as in truth his average weekly earnings on a sound construction of Schedule 1 of the statute—the contention of the appellants is, that while it would certainly have been the former (the larger) but for the six days' (or it might be six hours') break, the statute, having regard to the break, compels the arbitrator to take the latter. I cannot concur in this. The result would be ridiculous.

I am therefore for not answering any of the questions, but would express the opinion on the general merits of the case as stated by the Sheriff-Substitute that the average weekly earnings of the workman during the time he was in the employment of the appellants ought to be taken into account, and that the arbitrator ought to divide what he earned by the number of weeks during which he earned it, the result giving his average weekly earnings in the sense of the statute.

My opinion clearly is that on a sensible and reasonable construction of the Act you must take his average weekly earnings during the time he was fully able to work, and give him compensation on that footing, as in fact the Sheriff-Substitute has done.

LORD TRAYNER—I concur in the decision pronounced by the First Division in the case of *Grewar v. Caledonian Railway Company*, and think that decision rules the present case. I am therefore of opinion that the first question in the case before us should be answered to the effect that the period there referred to during which the respondent was off work constituted a break in his employment with the appellants, and that any compensation to be now awarded must be ascertained as if the respondent's employment with the appellants commenced as at 15th October 1901.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor—

“Sustain the appeal and recal the award of the arbitrator: Find in answer to the first question that the period of eight and a-half weeks prior to the 15th October 1901, during which the respondent was off work, constituted a break in his employment with the appellants, and remit to the arbitrator to determine the compensation due to the respondent on the footing that his employment with the appellants, in the course of which he received the injury complained of, commenced on said 15th October 1901: Find it unnecessary to answer the other questions: Find and declare accordingly, and decern.”

Counsel for the Claimant and Respondent—Watt, K.C.—A. Moncreiff. Agents—Simpson & Marwick, W.S.

Counsel for the Appellants—Salvesen, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Wednesday, July 9.

SECOND DIVISION.

RANKIN v. RANKIN.

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

A, a day or two before his marriage, executed a will, whereby he left the residue of his estate to his wife. Two years afterwards he assigned to his wife certain policies of insurance on his life, on the narrative that he had “not yet made any marriage provision for” his wife, “and with the view of making such provision.” Three years after the marriage a child was born; and five years after the child's birth A died after five weeks' illness, during which he was unable to attend to his affairs. A left no other testamentary writing. The widow ultimately did not maintain that the will in question was effectual to dispose of the deceased's heritable estate. *Held* that the *conditio si testator sine liberis decesserit* applied, and that the will was revoked.

M'Kie's Tutor v. M'Kie, 24 R. 526, 34 S.L.R. 399, followed.

This was a special case involving the question whether the *conditio si testator sine liberis decesserit* applied to operate revocation of the will of the deceased John Rankin, coalmaster, Glasgow, who died on 19th October 1901, leaving a widow, who was the first party to the case, and an only child, a son in pupilarity, whose factor *loco tutoris* was the second party.

The following facts, *inter alia*, were stated in the case:—The deceased John Rankin was married in 1893, and a day or two before his marriage he executed a holograph will in the following terms:—“I, John Rankin Jr., coalmaster, 28 St Enoch Square, Glasgow, being about to marry, and being desirous of providing for my wife in the event of my death, hereby appoint my brother Gavin Hamilton Rankin to be my sole executor, whom failing Alexander Bell Ferguson, writer, Hope Street, Glasgow, empowering him to realize my whole estate, and that for the following purposes:—viz. (1) To pay all my just and lawful debts, deathbed, and funeral expenses, (2) to pay, transfer, and hand over to my intended wife, Margaret M'Connell, residing at 25 Percy Gardens, Tynemouth, should the marriage be solemnized, the residue and remainder of my estate, and should she desire it, to transfer any shares in Limited Companies, without realising same, to her: In respect whereof I have subscribed these presents, written on this page by myself, on the twenty-eighth day of August Eighteen hundred and ninety-three. (Signed) JOHN RANKIN Jr.”

On executing this will the testator handed it to his brother Gavin Hamilton Rankin, the second party, to be kept by him and opened on the testator's death.

The testator was married on 30th August 1893 to Miss M'Connell, and on 21st October 1896 the only child of the marriage was born.

The testator died of enteric fever, and was ill for fully five weeks before his death, but during this time he was unable to attend to his affairs. No other testamentary writing than the will above quoted was known to be left by the testator.

The testator left both heritable and moveable estate. The heritable estate, all of which the testator acquired and succeeded to subsequently to the date of his will quoted above, included a villa, of which, in terms of the destination, the first party was liferentrix, and the child of the marriage as heir of her father was the fiar.

The value of the deceased's heritable estate exclusive of the villa was about £1400, and the value of his moveable estate was about £13,400, of which £2700 was invested in heritable bonds.

In addition to the narrative of the above facts in the case, a minute was lodged by the parties and adopted as part of the case, which stated that in 1894 the testator assigned to his wife certain policies of insurance on his life, on the following narrative, viz.—“Seeing that I have not yet made any marriage provision for my wife, and with the view of making such provision.”

The first party maintained that the will was valid notwithstanding the subsequent birth of the pupil child, and that the will effectually disposed of the whole estate of the deceased, both heritable and moveable.

The second party maintained that the maxim *si testator sine liberis decesserit* applied, and that the will was revoked by the birth of the child.

At the hearing the first party departed from the contention that the testator's heritable estate was carried by his will.

The only question of law which it is necessary to notice for the purposes of this report was as follows:—“Was the said will of the late John Rankin revoked by the birth of his son?”

Argued for the first party—It was a question of circumstances whether a will was revoked by the birth of a child. In the present case the circumstances were such as to make it clear that the testator intended that his will should receive effect; it had been given to the second party for that purpose, and had been left with him during the five years which elapsed between the birth of the child and the death of the testator without alteration—*Millar's Trustee v. Millar*, July 20, 1893, 20 R. 1040, 30 S.L.R. 865; Ersk iii. 8, 46; *Watt v. Jervie*, 1760, M. 6401. The most recent decision was in the case of *M'Kie's Tutor v. M'Kie*, February 16, 1897, 24 R. 526, 34 S.L.R. 399. That case, however, was distinguished from the present by the fact that the will there

under consideration was a universal settlement, and in the present case the will which the first party sought to support carried only the moveable estate of the testator, and the presumption in favour of revocation did not hold in the case of a partial settlement—*Yule v. Yule*, 1758, M. 6400. *M'Kie's* case was further distinguished by the difference in the time which elapsed in that case and in the present between the birth of the child and the death of the testator. All the considerations which had been held to overcome the *conditio* were in favour of the first party—*Colquhoun v. Campbell*, June 5, 1829, 7 S. 709, Lord Pitmilley, at p. 12. The terms of the assignation in 1894 did not affect the presumption; the language there employed only meant that no provision had been made which was protected.

Argued for the second party—Mere lapse of time between the birth of a child and the death of the testator did not affect the presumption—*Dobie's Trustee v. Pritchard*, October 19, 1887, 15 R. 2, 25 S.L.R. 6; *As Executor v. B.*, January 22, 1874, 11 S.L.R. 259. The terms of the assignation of 1894 showed that at that date the testator understood that he had made no provision for his wife, therefore no inference could be drawn from the circumstance that between the birth of his child in 1896 and his death he was silent as to a will which in 1894 he must have forgotten all about, or regarded as having no effect. The case of *M'Kie, cit sup.*, governed the present case.

At advising—

LORD JUSTICE-CLERK—The practical question in this case is whether a will executed when a man has no children is nullified by the birth of a child, and whether mere lapse of time, without any other circumstances, can have the effect of setting the will up again. In my opinion the sound view is, that the birth of a child operates as a revocation of the will previously made. That seems to be the understood law. Upon the other question there is no doubt that the authorities are not so consistent. It appears to have been held in some cases that if the testator did nothing for a considerable time, leaving the will in existence, it might be held that he wished his will to take effect. Other authorities express clearly the view that no presumption can arise to validate a will held to be revoked by the birth of children, from mere lapse of time, and this view is very sharply and clearly stated by Lord Rutherford Clark in the case of *Dobie*. The view he there expresses commends itself to me as the sound view in the matter, and I am therefore in favour of answering the first question in the affirmative. There is the less difficulty in holding so in this case, as the husband made provisions after marriage without any reference to any existing settlement. At the debate the contention under which the second question would require to be answered was abandoned, and therefore no answer requires to be given.

LORD YOUNG—I am not very willing to assent to the general proposition that a will is revoked by the birth of a child. Of course that supposed rule of law is applicable only to cases in which the testator was a bachelor when he made his will, or at least was childless. I am not prepared to say that in every case the birth of a child revokes a will made prior to its birth.

I think the circumstances of the particular case must always be attended to, and what the Court has to consider is whether in the circumstances they are satisfied that the testator could not have intended his will to operate in the event of his having a child. I think the circumstances disclosed here, as stated in the case, certainly entitle us to declare judicially that the testator did not intend this will to operate.

In the first place the will is a mere provision to the testator's wife; it takes notice of nothing else but that. I should say that at the time when it was executed, immediately before his marriage, the testator only intended to provide for his wife in case any calamity should carry him off before he knew the state of his affairs and his family.

In the second place, by the terms of the destination of certain heritable property to which Mr Rankin succeeded, his wife was given the life rent of a residence—a very proper provision for a wife. And in the manner stated in the minute which was put in, which we were asked to consider as part of the case, Mr Rankin made provision for his wife in terms which show that he had then no intention that the will he had made before his marriage should have effect, for thereby he had given all his personal estate to his wife. In assigning the policies of assurance referred to in the minute he expressly says, "Seeing that I have not yet made any marriage provision for my wife, and with the view of making such provision." I think in these circumstances we may reasonably conclude that he had not the existence of his will in his mind at all, especially in view of the fact, which is also stated, that he was very ill for a considerable period before his death, and that he died at an age when most men do not feel called upon to make a settlement of their estate. Therefore in the circumstances I am disposed to apply the rule as to the birth of a child by answering the first question in the affirmative, but I would rather not answer it as put, but by finding that the will was not intended in the circumstances to receive effect.

LORD TRAYNER—I concur in the opinion delivered by Lord M'Laren in the case of *M'Kie*, and the decision in that case, I think, rules the decision of the question before us, and I am therefore prepared to answer the first question in the special case in the affirmative.

LORD MONCREIFF was absent.

The Court answered the first question in the affirmative.

Counsel for the First Party—Guthrie, K.C.—Hunter. Agent—W. B. Rankin, W.S.

Counsel for the Second Party—Dundas, K.C.—Horne. Agents—Dalgleish & Dobbie, W.S.

Wednesday, July 9.

SECOND DIVISION.

[Sheriff-Substitute at Paisley.]

DUNN v. CUNINGHAME.

Process—Appeal for Jury Trial—Remit to Sheriff—Questions of Property and Right-of-Way.

In an action of damages for the death of a son, the pursuer averred that the deceased, a boy aged eleven years, was playing on a public roadway which ran close to a mill-lade, the property of the defender, when owing to the lade being unfenced the boy fell into the water and was drowned. She further averred that the said road was at the place in question also the property of the defender, and that the mill-lade being on a public road was frequented by the public and by numbers of children. The defender admitted that "the lade and private path in question" were situate on his property. The Sheriff allowed a proof. The pursuer appealed for jury trial. The Court, in respect that the case involved questions of property, and as to the existence of a right-of-way, refused the appeal and remitted the case to the Sheriff for proof.

M'Intosh v. Commissioners of Lochgelly, November 31, 1897, 25 R. 32, 35 S.L.R. 50, doubted, per Lord Trayner.

This was an action raised in the Sheriff Court at Paisley by Mrs Elizabeth Mullen or Dunn, widow, residing at Crosslee, near Houston, against John Charles Cuninghame, Craighends House, Johnstone, in which she craved decree for payment of £250 as reparation for the death of her son.

The pursuer averred, *inter alia*, as follows:—“(Cond. 2) On or about the 13th day of August 1901, between three and four o'clock afternoon, the pursuer's only child James Shearer Dunn, aged eleven years or thereby, was playing on the roadway which runs from the village of Crosslee to Bridge of Weir at a point opposite Crosslee Mill in said road close to a mill-lade known as Crosslee Mill Lade, the property of the defender, when owing to the said lade being unfenced, unguarded, and unprotected, the said child slipped into the water in said lade and was drowned. The said road from Crosslee to Bridge of Weir aforesaid is at the place in question also the property of the defender. (Cond. 3) The said accident was due to the fault and negligence of the defender, or of those for whom he is responsible, in failing to have said mill-lade, so far as it abuts and forms part of the said roadway, particularly at the place in question, fenced, guarded, or