and although some arguments were stated against that view in the debate, I cannot say that they at all impressed me. On the second branch of the first question the Lord Ordinary has held that there was no infringement — that the weighted valve used by the respondent is not a mechanical equivalent of the water valve of the complainer, except in the sense that it accomplishes the same object. I cannot concur in that opinion. I think that if it be granted the complainer has a good patent for his combination, the use by the respondent of a valve in a similar combination, effecting exactly the same object as is effected by the water valve of the complainer, is an infringement. It is to my mind clear that it is simply a mechanical equivalent and nothing else.

There remains, however, the second question, is the claim for the milk receptacle valid? That vessel I have already described. Its only features seem to be that the lid is held on by the exhaustion, that the lid being of glass admits of inspection of the interior, and that a separate tube is brought from each teat to the receptacle. I have very anxiously considered whether there is any ground for holding that this receptacle can be held patentable as a new invention, and have come with some regret to the conclusion with the Lord Ordinary, that it cannot be so held. I do not see in what the invention consisted. Can it be called a novel invention that the lid of a vessel which is to be exhausted is allowed to be held on by the air pressure on the creation of a vacuum? I do not think so. There is nothing novel about it, no invention. Can it be said that the use of a piece of glass to enable the interior of the vessel to be inspected is a novel invention. I cannot say so. But in any case, such a use of glass is plainly anticipated in Gedge's patent, in which there is a glass panel in the side of the receptacle. Lastly, is there any invention in using a separate pipe for each teat, instead of combining the pipes from each teat in one pipe, and carrying that pipe to the vessel, which was a mode shown in previous specifications. I do not find in the specification any suggestion that the use of four pipes is in any way a feature of the invention which the patentee puts forward as of importance. No invention is described, and I can see none.

I have therefore come to the conclusion that the fifth claim cannot be sustained. I cannot but regret that the complainer, who I think had a good and patentable invention, should have made a claim which is bad on an unimportant detail of his apparatus. Unfortunately the law is as stated by the Lord Ordinary, that this claim being bad the whole patent must fall. The result, therefore, must be the same as that arrived at by the Lord Ordinary, although in my opinion only upon the invalidity of the fifth claim.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK—I think that the fifth claim is bad. I proceed on the reasons which have been stated by the Lord Ordinary. That is enough for the decision of the case.

I do not, however, wish it to be understood that I am in other respects adverse to the case of the pursuer.

LORD TRAYNER—I agree with your Lordships in holding that the patent in question is invalid in respect of the reasons which your Lordships have stated. The inclination of my opinion is rather in favour of the Lord Ordinary's view, that even had the patent been a good one, the infringement alleged has not been made out, but that is not material in the view which has been taken of the patent itself.

The Court adhered.

Counsel for the Reclaimer — Graham Murray, Q.C.—Daniell. Agents—Davidson & Syme, W.S.

Counsel for the Respondents—C. S. Dickson—Ure. Agents—Gill & Pringle, W.S.

Thursday, July 20.

FIRST DIVISION.

[Lord Low, Ordinary.

BROWN (MILLAR'S TRUSTEE) AND OTHERS.

Succession—General Disposition and Settlement—Conditio si sine liberis—Implied Revocation by Subsequent Birth of a Child.

A testator who by antenuptial contract of marriage had settled £9000 upon his wife and children, three and a-half years after the marriage, and before any child had been born, executed a general settlement which referred to the marriage-contract, and really dealt with only about £700. Eleven months later a child was born, whose birth he survived for three years, when he died leaving the general settlement unaltered.

Held (1)—(following the opinion of Lord Watson in *Hughes* v. *Edwards*, L.R., App. Cas. p. 591)—that whether revocation of a parent's testament by the subsequent birth of a child is to be implied or not, is entirely a question of circumstances; and (2) that looking to the circumstances of this case the settlement had not been so revoked.

The late James Millar, Tarbet, Loch Lomond, executed an antenuptial contract of marriage upon 11th September 1883 by which he conveyed to trustees the sum of £9000, and which contained the following provisions:—"Declaring, as it is hereby declared, that the trustees shall hold and apply the said principal sum of £9000 for behoof of the said James Millar in liferent, during all the days of his life, so long as there shall be no issue of the

said intended marriage; but in the event of such issue being born, the income of the said sum of £9000 shall be paid and applied by the trustees in such manner as they may consider most suitable for the maintenance and education of the issue of the said intended marriage, with power to the trustees to pay such income to the said James Millar, or to his intended spouse, for behoof of such issue; . . . and in the event of the death of the said James Millar, the said sum of £9000 shall be held and applied by the trustees thereafter for behoof of his said intended spouse in the event of her surviving him, in liferent, during all the days of her life, so long as she shall remain his widow, and upon her decease or second marriage, for behoof of the issue of the said intended marriage, and in manner hereafter provided in fee." These provisions in favour of children were declared to be in full satisfaction of their legal claims.

Upon 13th June 1887 James Millar executed a general disposition and settlement of all his estate, heritable and moveable, in favour of his wife, declaring that he did so "in exercise of all powers of disposal or otherwise competent to me under or by virtue of the antenuptial contract of marriage."

Upon 6th May 1888 a daughter, the only child of the marriage, was born, and upon 19th June 1891 James Millar died, survived by his wife and child, the former of whom died on 12th January 1892 leaving a settlement.

A multiplepoinding was raised by Mr Marcus J. Brown, S.S.C., her trustee and executor, as nominal raiser, the claimants being Mr Brown, as her executor, and also as tutor-nominate of her daughter; James Millar's brother, in right of certain creditors, as real raiser, and certain other creditors.

The first question was as to the effect of the birth of the child upon the general settlement, the child's tutor pleading that "the said general disposition and settlement of 13th June 1887 having been executed while the testator had no issue, and without making provision for the contingency of his leaving issue, was revoked, to the extent of the estate not dealt with by the marriage-contract, by the subsequent birth of his child Mary Millar, and the said James Millar having left no other disposition of his means over and above the £9000 conveyed by his marriage-contract, the same vested in the said Mary Millar as his heir *in mobilibus*."

Upon 16th February 1893 the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds that the trust-disposition and settlement of the deceased James Millar, dated 13th June 1887, was not revoked at the date of his death, and must receive effect as a valid settlement of his affairs: With this finding appoints the cause to be enrolled for further procedure: Reserves all questions of expenses, and grants leave to reclaim.

"*Opinion.*—It was maintained for the tutor-nominate of Mary Millar that her father's settlement was revoked by her subsequent birth, and can receive no effect.

"The authority chiefly relied upon by the tutor was the case of *Dobie's Trustees*, 15 R. 2, in which Lord Rutherfurd Clark expressed the opinion that mere survivance of the parent, however long, would not have the effect of setting up a general settlement made prior to the birth of the child, and at a time when the contingency of a child being born was not in contemplation. None of the other Judges in that case differed from the view taken by Lord Rutherfurd Clark, and if there was nothing here to be said in favour of holding the settlement to be operative except that the father survived the birth of his child for three years, I should hold it to be settled that that was not enough.

"Survivance, however, for a period apparently long enough to allow the parent an ample opportunity of reconsidering his settlement and altering it, if he thinks fit, to suit the altered circumstances, has always been recognised as one of the elements to be taken into account in cases of this description.

"In the case of *Hughes* v. *Edwards*, L.R., App. Cas. 1892, p. 591, Lord Watson says—'According to the law of Scotland the question whether the testament of a parent is revoked by the subsequent birth of a child is one wholly dependent upon the circumstances of the case.'

"It is therefore necessary to consider the whole circumstances of the case, and those which appear to me to be material are as follows:—"(1) By the testator's antenuptial contract of marriage the sum of £9000 was secured to his children; (2) the value of the estate which the testator had at his disposal at his death was small, amounting apparently, after payment of debts, only to some £700; and (3) the testator survived the birth of his child for such a length of time that he had full opportunity of making a new settlement if that which he had previously made did not continue to express his intention as to the disposal of his estate.

"In such circumstances I am of opinion that the settlement cannot be held to be revoked, and of no effect. Although the settlement is in form a universal settlement, it in fact dealt with only a small part of the testator's estate. The great bulk of the estate fell under the marriage-contract, by which an ample provision, having regard to the amount of the father's fortune, was secured to the child.

"The present case appears to me to be more nearly allied to that of *Yule* v. *Yule*, M. 6400, than to that of *Dobie's Trustees*, or of *Colquhoun* v. *Campbell*, 7 S. 709, which was also relied upon by the tutor-nominate."

The tutor reclaimed, and argued—That the case was ruled by the cases of *Dobie's Trustees* v. *Pritchard*, October 19, 1887, 15 R. 2 (espec. Lord Rutherfurd Clark's opinion), and *Munro's Executors* v. *Munro*, November 18, 1890, 18 R. 122. It was not clear that the truster meant the contract of marriage and his settlement to be read

together. If he had had the marriage-contract in contemplation he must have known that there was no provision for the maintenance of children during the widow's lifetime. The presumption that the settlement was revoked by the child's birth should be applied.

Argued for Mrs Millar's executor—Whether or not there had been revocation was a question of circumstances—*Adamson's Trustees*, July 14, 1891, 18 R. 1133, and the opinion of Lord Watson in the recent case of *Hughes* v. *Edwards*, 1892, L.R., App. Cas. 583, quoted by the Lord Ordinary. There was sufficient here to elide the presumption of revocation. Not merely did the truster survive the birth for three years, but in making his settlement he knew that possible children were amply provided for under the marriage-contract to which he referred.

At advising—

LORD ADAM — There is no dispute between the parties as to the law. That is laid down by the Lord Ordinary, who refers to the opinion of Lord Watson in the House of Lords. We have therefore to deal with facts and circumstances, and to say what inference is to be drawn from them as to whether this settlement was revoked by the birth of a child or not.

The facts are these — An antenuptial contract of marriage was entered into between the spouses upon 11th September 1883, and by its provisions £9000 were settled by the husband upon his wife and children in somewhat unusual terms. Upon the birth of a child the income of that sum was, even during the father's life, to be expended by the trustees for the child, and upon the father's death the income was to be expended for behoof of the widow, no reference being made to any obligation as to the children whom it would be incumbent upon her to maintain. Upon her death or second marriage the income is freed for the benefit of the children.

Upon 13th June 1887, three and a-half years after the marriage, the settlement in question was executed. It appears to be *ex facie* a general settlement, but it bears reference to the marriage-contract, and it really only deals with £700, the residue of the truster's means and estate.

There was thus only a short interval between the execution of the marriage-contract and the execution of the settlement, and the truster might still fairly expect to have children. A child was in fact born upon 6th May 1888, eleven months after the settlement. The father survived until 19th June 1891.

Looking to these facts, I agree with the Lord Ordinary. It is material to observe that the father when he made this settlement must have been well aware of the marriage-contract, and must have known that he had already by that contract bestowed by far the greater part of his means and estate upon his wife and children, and that he was *de facto* only dealing with a small part of his property.

It is difficult to conclude otherwise than that when the child was born, he knowing it was amply provided for, did not disturb his settlement, because he thought the marriage-contract and the settlement would be read together, and when so read constituted a fair settlement of his affairs. I am for adhering to the judgment of the Lord Ordinary.

LORD M'LAREN — The question we are now considering arises upon a somewhat arbitrary rule of law intended to prevent injustice to families. That rule is, that a settlement made by the head of the family before a child is born to him is to be taken as qualified by the condition *si sine liberis decesserit*. I agree with the Lord Ordinary and with Lord Adam that such an arbitrary condition imported by law into settlements must be tempered by the circumstances of the case, and that if it were applied universally it might lead to injustice and to well-considered settlements being defeated.

The *conditio si sine liberis* as applied to the case of legatees has been very liberally applied. But in this special branch of the subject we have the authority of the House of Lords for saying that its application is to be decided entirely by the circumstances of the case.

It is doubtless in accordance with sound principles of jurisprudence that we consider the state of knowledge of the testator and all the circumstances before deciding whether his will is to be cut down by the operation of a general rule, and it is most important to note that the disposal of this estate does not depend on the will alone, but upon the combined effect of the will and the marriage-contract. That is a very important circumstance, because when a man having property or large expectations enters into marriage he generally executes a marriage-contract, and he is advised in making such a contract that he must consider his wife and the possible issue of the marriage if the age of the wife is such that issue may reasonably be looked for. Here very ample provision was made for children, although they were not to get their provisions immediately upon their father's death. There is no law requiring that the father should so provide for his children, and it is an ordinary and reasonable provision that the mother should enjoy the liferent of the whole estate, being bound at the same time to aliment her children. So here we have not the case of a man who without expectation of issue, and with no person interested in his estate except his wife, makes her his sole legatee. It is the case of a man who has by an irrevocable deed provided the bulk of his fortune to his wife and children, and who is now only dealing with the small estate which he kept in his own hands.

If therefore, with the House of Lords, we are to hold it is a question of circumstances whether the settlement is revocable or not, I think the circumstances here are all against the idea that Mr Millar overlooked the possibility of a child being born, and in favour of the view that he executed this settlement as he did because he knew any child was already provided for.

LORD KINNEAR – I have considerable difficulty with this case, because I do not think it so clear as it appears to your Lordships, that this truster in making this settlement intended only to deal with the small residue not dealt with by the marriage-contract, and that having in view the possibility of issue being born to him, he preferred to leave this residue to his wife rather than to his children already provided for.

If that inference can fairly be drawn, then I agree with your Lordships as to the law.

LORD PRESIDENT—I concur with Lord Adam.

The Court adhered.

Counsel for Reclaimer—Salvesen—A. S. D. Thomson. Agent—Marcus J. Brown, S.S.C.

Counsel for Real Raiser—C. K. Mackenzie. Agents—Mitchell & Baxter, W.S.

Counsel for Creditor Claimants—Wm. Thomson. Agents—Tait & Johnston, S.S.C.

Counsel for Mrs Millar's Executor—J. A. Reid—Cullen. Agent—Marcus J. Brown, S.S.C.

Thursday, July 20.

WHOLE COURT.

[Dean of Guild of Edinburgh.

SOMERVILLE *v.* THE LORD ADVOCATE.

Jurisdiction — Dean of Guild — Crown — Property—Building Regulations—Edinburgh Municipal and Police Acts 1879 (42 *and* 43 *Vict. cap.* 132), *secs.* 159 *and* 162.

The Commissioners of Her Majesty's Works and Public Buildings proceeded to erect buildings on ground purchased by them within the burgh of Edinburgh, without applying to the Dean of Guild for a warrant, whereupon the Procurator-Fiscal of the Dean of Guild Court brought an action of interdict against them in that Court.

Held (by a majority of the whole Court, *diss.* Lords Young and Kincairney) that the action was incompetent, in respect that the Crown was only subject to the jurisdiction of the Supreme Court.

Opinions that the ground having been acquired by the Crown by purchase, was affected by the regulations in the Edinburgh Police Acts, and therefore that the Commissioners were bound to apply to the Dean of Guild for a warrant before proceeding with any building operations.

In virtue of powers conferred upon them by the Act 21 and 22 Vict. cap. 40, the Commissioners of Her Majesty's Works and Public Buildings acquired certain ground within the burgh of Edinburgh for the purpose of erecting a General Post Office thereon, and upon the ground so acquired a General Post Office was in due course built. In 1891 the Commissioners, without having applied for a warrant in the Dean of Guild Court, proceeded to erect an addition to the Post Office, funds having been voted by Parliament for that purpose.

George Somerville, the Procurator-Fiscal of the Dean of Guild Court, thereupon presented a petition in that Court against the Lord Advocate, as representing the said Commissioners, craving the Court to interdict the respondent from proceeding further with the operations already mentioned, and to find him liable in a penalty not exceeding £5 for having proceeded with the same without a warrant.

In defence the Lord Advocate stated—"The Lord Dean of Guild of the burgh of Edinburgh and his Court have no jurisdiction over the Crown in respect of its property, either in the royal or in the extended burgh of Edinburgh, whether vested in it as part of its patrimonial rights, or on behalf of the public services, and whether said property is held by the Crown directly or through the medium of Commissioners, as in the case of the General Post Office in Edinburgh."

The petitioner pleaded, *inter alia*—"(2) The warrant of Court is necessary in order to ensure that the said building will not cause an encroachment on the rights of others, or be attended with danger or inconvenience to the public. (3) The proceedings of the respondent being in contravention of the Edinburgh Municipal and Police Acts 1879 and 1882 should be interdicted as prayed for in the petition."

The Lord Advocate pleaded, *inter alia*—"(1) No jurisdiction either at common law or by statute. (2) In respect that to sustain the jurisdiction of the Dean of Guild of the burgh of Edinburgh and his Court, in the circumstances in question, would be a novel extension of said jurisdiction, and contrary to public policy, the petition should be dismissed."

On 28th May 1891 the Lord Dean of Guild repelled the first plea-in-law for the respondent; sustained the jurisdiction of the Dean of Guild Court; found that the Commissioners of Her Majesty's Board of Works and Public Buildings had, without any warrant of Court, and in contravention of the Edinburgh Municipal and Police Acts of 1879 and 1882, begun to erect the building complained of; continued the cause *hoc statu* to allow the respondent to make the necessary application for warrant of Court, and decerned.

"*Note.*—The Commissioners of Her Majesty's Board of Works have recently, without any warrant of this Court, commenced an extension of the General Post Office, which is situated within the burgh of Edinburgh. The Procurator-Fiscal of Court, founding on the Edinburgh Municipal and Police Act 1879, applies for interdict against the Lord Advocate as representing the Commissioners from proceeding further with the operations. There is no doubt that the property, being within the burgh,