SUMMER SESSION, 1904.

COURT OF SESSION.

Thursday, May 12.*

FIRST DIVISION.

RANKINE'S TRUSTEES *v.* RANKINE.

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

A testator executed a trust-disposition and settlement leaving his whole estate, heritable and moveable, to his younger brother. Four years afterwards he married and executed an antenuptial marriage-contract, in which, besides settling certain heritable estate on the heir of the marriage, and making provisions for the other children of the marriage, he disponed a house to himself and his wife "in conjunct fee and liferent for her liferent use allenarly, and to his heirs and assignees whomsoever in fee." Three years later a son was born of the marriage, and two years afterwards the testator died.

Held (1) that the *conditio si testator sine liberis decesserit* applied, and that the will became inoperative on the birth of the child, and, accordingly, (2) that the fee of the house disponed in the marriage-contract belonged to the son of the testator as heir-at-law of his father.

William Macbean Rankine died on 28th October 1879 leaving a trust-disposition and settlement dated 31st January 1870 in favour of John Campbell of Kilberry, and others, as trustees, by which he conveyed his whole means and estate, heritable and moveable, including his lands and estate of Dudhope, in trust for certain purposes.

By the sixth purpose he directed his trustees, at the second term of Whitsunday or Martinmas after his decease, to convey and make over the several lands and heritable subjects generally and particularly conveyed, in so far as not sold, and the whole rest and residue of his heritable and moveable estate, to and in favour of his younger brother Archibald Alleyn Knockbuie Campbell, and the heirs whatsoever of his body, whom failing to his eldest brother John Campbell and his heirs.

In July 1874 William Macbean Rankine was married to Rosa Elizabeth Maclaine, having previously on 4th July 1874 executed an antenuptial contract of marriage, registered in the Books of Council and Session August 13, 1874, in which he settled the estate of Dudhope on the heir of the marriage and made certain provisions for the other children of the marriage, and conveyed a dwelling-house, No. 9 Rosebery Crescent, Edinburgh, belonging to him, to and in favour of himself and the said Rosa Elizabeth Maclaine, "in conjunct fee and liferent for her liferent use allenarly, and to his heirs and assignees whomsoever in fee, heritably and irredeemably."

William Macbean Rankine was survived by his brother the said Archibald Alleyn Knockbuie Campbell, and by his widow and three children, viz., a son, Walter Lorne Campbell Rankine, born 4th July 1877, and two daughters.

The trustees nominated in the trust-disposition were duly confirmed executors and realised the personal estate, applying the same towards payment of the testator's debts, which exceeded the moveable estate left by him.

The only heritable property left by the testator consisted of the estate of Dudhope, which was specially conveyed to the heir of the marriage by the said marriage-contract, and the house No. 9 Rosebery Crescent.

A question having arisen whether the house No. 9 Rosebery Crescent fell to the said Walter Lorne Campbell Rankine, as only son and heir-at-law of his father, or to the trustees by virtue of the destination to them in the trust-disposition, a special

*Decided, Friday, March 11.

case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the said Walter Lorne Campbell Rankine, and (2) the trustees of the deceased William Macbean Rankine.

The first party maintained that the *conditio si testator sine liberis decesserit* applied, and that the trust-disposition and settlement was revoked by the subsequent marriage and birth of a child to the testator, and that he was entitled to the fee of the house 9 Rosebery Crescent as heir-at-law of his father.

The second parties maintained that the birth of the said child, more than two years prior to the testator's death, did not revoke or invalidate the trust-disposition and settlement, and that in virtue of said deed the fee of said house belonged to them.

The question of law for the opinion of the Court was—"Whether the fee of the said house belongs to the first party as heir-at-law of his father? or to the second parties under the destination to them in said trust-disposition and settlement?"

Argued for the first party—The birth of a child revoked the destination in the trust-disposition and settlement—*M'Kie's Tutor* v. *M'Kie*, February 16, 1897, 24 R. 526, 34 S.L.R. 399. *Munro's Executors* v. *Munro*, November 18, 1890, 18 R. 122, 28 S.L.R. 104, was a precise precedent in respect of the sequence of events, the testator's marriage and the execution of the marriage-contract being subsequent to the date of the will. There were no circumstances here to counterbalance the legal presumption, for the marriage-contract did not in any way set up the will, and if the will was revoked it must be held to be revoked *in toto*—*Crow* v. *Cathro*, June 18, 1903, 5 F. 950, 40 S.L.R. 687. In *Millar's Trustees* v. *Millar*, July 20, 1893, 20 R. 1040, 30 S.L.R. 865, and *Stuart-Gordon* v. *Stuart-Gordon*, June 27, 1899, 1 F. 1005, 36 S.L.R. 779, relied on by the second parties, the circumstances were altogether special.

Argued for the second parties—The question whether the testament of a parent was revoked by the subsequent birth of a child is one wholly dependent upon the circumstances of the case—*per* Lord Watson in *Hughes* v. *Edwards*, July 25, 1892, 19 R. (H.L.) 33, at p. 35, 29 S.L.R. at p. 912; *per* Lord Kinnear in *Elder's Trustees* v. *Elder*, March 16, 1894, 21 R. 704 at p. 709, 31 S.L.R. 594. The circumstance that the testator had executed a subsequent deed in the marriage-contract was in itself an important element going to set up the will—*per* Lord Rutherfurd Clark in *Dobie's Trustee* v. *Pritchard*, October 19, 1887, 15 R. 2, at p. 4, 25 S.L.R. 6. In disposing of the house No. 9 Rosebery Crescent in the marriage-contract the truster had in effect referred to the subsisting destination in his trust-disposition as indicating the person who was to have the fee of the house. The will and the marriage-contract accordingly must be read together. The provisions made for the wife and children of the marriage in this subsequent marriage-contract, and the fact that the parent survived the birth of the child for two years, leaving the trust-settlement unrevoked, were sufficient to rebut the *presumptio juris* in favour of the birth of the child revoking the trust-settlement. The case fell under the principle of *Stuart-Gordon* v. *Stuart-Gordon*, *supra*, and *Millar's Trustees* v. *Millar*, *supra*.

LORD M'LAREN—It is always difficult to deal satisfactorily with cases where it is sought to invalidate a will by the operation of the *conditio si sine liberis decesserit*. It would, perhaps, be more convenient if the rule were absolute that the birth of a child would have the effect of a revocation of a pre-existing will. But I am not satisfied that such a rule would always give effect to the true intentions of the party whose estate was under distribution. It would be very difficult to apply it to cases where the will makes provision for children *nascituri*; and it is not to be overlooked that an unmarried man who is making a will which he wishes as far as possible to be final, may provide that in the event of his marriage and children being born to him the given destination would apply, but in the case of his dying unmarried then his property should go to his brothers and sisters, or to whoever he considered to have the strongest claim upon him. On the whole, we are more likely to arrive at the true intentions of the party whose estate is under distribution, under the principle of law which I think has been in the later cases carefully considered and deliberately adopted, which leaves it open to the Court to consider in each case whether the presumption of revocation has taken effect. I do not think there has ever been any difference of opinion on the question that the presumption is in favour of revocation in such cases. Coming to the case before us, Mr Rankine before his marriage executed a will, in which apparently the event of his own subsequent marriage had not entered into his calculations, and in it he left his property to his brother. When he came to enter into marriage, Mr Rankine made a settlement of the usual character, in which he settled his heritable estate of Dudhope upon the heir of the marriage, and made at the same time a suitable provision for his younger children. With regard to the house in Edinburgh, which is the subject in question in this case, he disposed of it by a somewhat ambiguous provision, leaving a liferent to his widow and the fee of it to his "heirs and assignees." We do not know what he intended by that expression. He may have meant to his heir-at-law, whoever he might be; but it is conceded, and the argument is taken on the assumption, that according to the true construction of these words we are to look to the heir in the subsisting destination as satisfying the definition that is sought. He is either the heir, or if he is not the heir, he is at all events the assignee, and as such is to be taken to be the person

appointed by the marriage settlement. But then that consideration does not really advance the decision of the point, because a party who is making a contract of marriage usually only refers to his estate so far as he means to bind himself irrevocably as to its disposal. The fact that he has omitted to deal with other portions of the estate, or to deal completely with those portions that he mentions in his settlement, does not create any presumption that he had overlooked them. The position of the case now is, that this house stands destined, under Mr Rankine's first will, to his brother, but that destination was under a deed which did not contemplate marriage; and in the absence of anything leading to a contrary conclusion there is a presumption in regard to this property, or any other property carried by the will, that the destination was revoked by the birth of a child.

The only question remaining would be whether there are circumstances which might displace that presumption. I sympathise very strongly with the observations made by Lord Rutherfurd Clark in the case of *Dobie* (15 R. 2), that such circumstances, in order that they may have decisive weight, must be evidenced in writing, but not necessarily by a formal deed, because there might be memoranda or letters under the hand of the testator, showing clearly that he had considered that the will made before marriage was operative, or that he had not considered it operative. In the present case we have no such evidence in writing; and parole evidence has been held in previous cases to be insufficient to displace the presumption of revocation. There is nothing, then, but the lapse of two years in this case. Whether the elapse of any period of time is sufficient to displace the presumption I am not prepared to say, but I should certainly say that the fact of the testator having survived the birth of his child two years would not be sufficient to set up a will executed by him before marriage under the altered circumstances which have arisen. I therefore come to the conclusion that the fee of the house belongs to the first party—that is, to the son as heir-at-law of his father—and that the first alternative question ought to be answered in the affirmative.

LORD KINNEAR—I am of the same opinion. I agree with Lord M'Laren that it is impossible to be certain that the *conditio si sine liberis decesserit* will always give effect to the intentions of a deceased parent, if that means that it will operate in the same way as he would have directed if he had expressed his clear intention. But then I think that is an observation which is not peculiar to this particular rule of law, but is common to all rules of law which regulate intestate succession, and perhaps also to the rules of construction which regulate the interpretation of wills. We can only give effect to intention, or take it into account, when the testator has expressed it, either directly in words or else by some disposition from which it can be inferred what the man's intention was. If he has given no indication of an intention, the supposed intention with which it is conjectured that the rules of law may be at variance can be nothing more than a conjecture that he might have desired to do this or that under circumstances which might have been present to his mind, but that appears to me to be a speculation which is altogether beyond the range of judicial decision. Upon the rule of law itself I do not think it is necessary to examine the controversy which has undoubtedly arisen through a considerable course of decisions, as to the true principle upon which it is founded. It is enough that it is quite settled in our law that the birth of a child operates to revoke all previously executed wills, unless something is done by the parent to set up the will. And therefore the question in all cases of the kind must be whether there is anything to show that the testator intended his will to receive effect notwithstanding the birth of the child, and after the birth of the child had become known to him. Now, I agree with Lord M'Laren that there is nothing of that kind in the present case. There is an apparent difficulty, but I think it is only apparent, which arises from a consideration of the previous will and the marriage-contract taken together. But on a little consideration of these two documents, it seems to me that their effect in law is plain enough whether we assume that the will is allowed to stand or that it is revoked. By the will the deceased had no doubt disposed of his estate, and in particular of the two estates which are specified in the special case, the estate of Dudhope and the house in Rosebery Crescent. Then he entered into a marriage-contract, by which he settled Dudhope in terms that were binding upon himself, and which he could not afterwards alter. The contract purports to settle also the house in Rosebery Crescent, but under conditions which left him the free control and disposal of that property subject only to the liferent in favour of his wife. The liferent is of course indefeasible; but when the liferent should have expired, the house in Rosebery Crescent is to go to him and his heirs and assignees in fee. I think that left the fee of the house in him, and subject to his disposal, and so left it in exactly the same position as an unsettled estate, which is not specified in the marriage-contract at all. The only difference—if there be a difference—would be, that if the will had disposed of the Rosebery Crescent house, such disposal would not necessarily be revoked by the marriage-contract, and therefore might be read along with the marriage-contract, if nothing else were done to revoke it, when the succession opened on his death. But then the house was disposed of by a deed which was ambulatory and revocable until his death, and therefore the deceased was free to dispose of the Rosebery Crescent house during his lifetime as he thought fit. That seems to me to leave the question of how the Rosebery Crescent house was to be disposed of in exactly the same position

as if there had been no marriage-contract at all. It is disposed of by will. After the will a child is born. The question is whether the birth revokes the will so far as concerns the house. And it appears to me that where the history and legal effect of the two deeds are understood, marriage-contract does not enter into the question at all. The question is, did the birth of the child revoke his will? and the marriage-contract does not affect that question, because it contains nothing to set up the will as against the revocation created by the child's father. The fact that it confers a liferent of the house in Rosebery Crescent, leaving the fee at the absolute disposal of the husband, is nothing to the purpose, because that is just the condition which would have arisen if there had been no marriage-contract at all, except of course in so far as regards the liferent. But the grant of liferent by contract, although it may burden a fee destined to another by will, neither confirms nor revokes that destination. Therefore it seems to me that there is nothing to exclude the operation of the presumption.

The only other point which was pressed, and which I do not desire to omit from consideration, is whether the son, in a question as to the house in Rosebery Crescent, is not sufficiently provided for already by the marriage-contract. Now, whether the son was amply provided for in the father's opinion or not I do not know, and I decline to speculate, because we have no expression of the father's opinion before us. But it appears to be altogether immaterial to the question. We cannot infer from any other provisions that the father set up this will as against this child. The case of *Stewart Gordon*, in which it was held that other provisions in favour of the child whose birth was said to have revoked the will might be taken into account as a material consideration, was a very different one from this. The true ground of judgment in that case, as I read it, was that the mother, on the eve of the birth of her child, looking forward to that event, recognised by a writing under her hand a previous will which she had executed. That was held to be an action on her part sufficient to set up the will as against the effect of the *conditio*. That seems to me to have been a perfectly reasonable inference, because if the lady, knowing that she had made a will, and looking forward to the birth of a child, nevertheless announced, not in so many words but by clear implication, that she desired it to stand, I do not think that that affects in any way the application of the general rule. I agree that we should answer the question as Lord M'Laren proposes.

LORD PRESIDENT—I am entirely of the same opinion.

LORD ADAM was absent.

The Court answered the first alternative question in the affirmative.

Counsel for the First Party—Pitman—Lee. Agents — Pearson, Robertson, & Finlay, W.S.

Counsel for the Second Parties—Blackburn — Pearson. Agents — Kinmont & Maxwell, W.S.

Friday, March 4.

OUTER HOUSE.

[Lord Low.

THE PROVOST, MAGISTRATES, AND COUNCILLORS OF THE BURGH OF LESLIE *v.* ARCHIBALD AND OTHERS.

Burgh—Burgh of Barony—Transference of Burgh Property to Statutory Municipal Authorities — General Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 101), *secs.* 22, 26, *and* 41—*Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 20, 23, 24, *and* 25—*Town Councils (Scotland) Act* 1900 (63 *and* 64 *Vict. cap.* 49), *secs.* 8 *and* 33.

The town of Leslie was by ancient charters, dating from 1457 to 1627, erected into a Burgh of Barony, with power to elect a council. A council had regularly been elected down to the present time. In 1865 the householders of the burgh adopted the General Police and Improvement (Scotland) Act 1862 and elected Commissioners of Police in the manner provided by sec. 41.

Held (1)—*following Commissioners of Blairgowrie*, 4 F. 72, 39 S.L.R. 67—that the property of the burgh was in 1865 transferred to the Police Commissioners by sec. 22 of the Act of 1862, and was now vested in the present Provost, Magistrates, and Councillors of the burgh, the successors of the commissioners under the provisions of the Burgh Police (Scotland) Act 1892 and the Town Councils (Scotland) Act 1900; (2) that the Barony Council had been superseded by the present Provost, Magistrates, and Councillors of the burgh; (3) but that with regard to certain property, such as the commonty of the Burgh of Barony, in which the feuars of the Burgh of Barony had exclusive rights, the Provost, Magistrates, and Councillors were bound, with certain trifling exceptions, to hold and apply it for behoof solely of the inhabitants of that part of the modern and extended burgh which corresponded with the old Burgh of Barony.

The pursuers in this action were the Provost, Magistrates, and Councillors of the burgh of Leslie, acting under and in terms of the Town Councils (Scotland) Act 1900, and the defenders were the Council of the Burgh of Barony. The pursuers sought declarator "that the whole subjects, lands, and other properties, heritable and moveable, funds, customs, properties, rights,