cated upon. The rubric of the case is as follows:—"In a question as to the paternity of a child born before the marriage of the alleged father with the mother, there is no presumption that he is the father; but the paternity must be proved." Therefore, I think that the presumption of legitimacy is considerably shaken by the fact that the child was born illegitimate.

The next question is one of status, as founded on reputation. But, on considering the evidence, I do not think there is undivided evidence of reputation; at the very least the reputation is divided. No doubt the child lived with Wilkie, but that does not go very far, and the neighbours around did not hold the child to be legitimate, so that, upon the whole, there is not much to be rested on legal presumption, and the question therefore is, what is the import of the proof.

I have no hesitation in saying that the evidence is conclusive. In the first place, it is clear that this child was born in 1821, illegitimate, before the marriage of its mother, and that is a fact proved by extrinsic evidence and not by mere hearsay. And then there is, in addition, the most important evidence that Mrs Wilkie stated to several witnesses, not only that the child was illegitimate, but was not the child of her husband. Judging of this as a matter of evidence, and looking to the reasons stated for the disclosures made to friends, I see no room to doubt her testimony. I hold the import of the proof therefore to be, both that the child was born before the marriage, and that the husband was not the father. There is unquestionably a matter beyond that, which it is not necessary to deal with as a ground of judgment, but it corroborates the result of the evidence. I think it is reasonably proved that at the date in question Wilkie was a married man, and therefore there is a presumption of law that he was not the father. The Lord Ordinary says that certificate was not sufficient. I don't say that if the question had related to the validity of the first marriage it would have been enough. But it is enough for the purposes of this case.

There might have been important questions arising out of the fact of the first and alleged second marriage of Wilkie. But whatever the law might have been if it were proved that Wilkie was the father of the child, he being married, and afterwards married again and acknowledge the child, it is unnecessary to determine, because by the evidence it is proved that Wilkie was not the father of the child. I would therefore be prepared to propose to your Lordships that the interlocutor of the Lord Ordinary should be altered, and that we should find that the deceased Mrs Jane Smith or Wilkie was illegitimate.

LORD COWAN—I am of the same opinion on the first ground stated by your Lordship. The *onus* of proving illegitimacy lay with the party alleging it, and I think he has discharged it. With reference to the proposal of additional proof upon *res noviter*, I beg to reserve my opinion on the question, not only against but for receiving it.

LORD NEAVES concurred.

Agent for Pursuer—John Keegan, S.S.C.
Agent for Defender—M. Lawson, S.S.C.

Thursday, October 21.

FIRST DIVISION.

ALLAN *v.* KERR AND ANOTHER.

Caution—Postnuptial Deed—Revocation—Trustees.

By postnuptial deed a lady and her husband assigned to trustees her right to a bequest in her favour by her grandfather, directing the trustees to pay the interest of the money to the spouses, and the survivor of them, and the principal to the children of the marriage. Thereafter the spouses, with the concurrence of the only child of the marriage, executed a revocation, which the trustees declined to recognise, and, at the bar, offered caution for repayment in the event of other children being born. Caution refused, and action dismissed.

By last will and testament, dated 5th February 1818, George Simmers, residing in Aberdeen, bequeathed the residue of his whole estate and effects to his daughter, Mary Simmers or Adamson, in liferent, and her children in fee. Her only child, Mary Adamson, married Hugh Allan, cabinetmaker in Aberdeen; and on the 1st February 1853, Mr and Mrs Allan assigned to trustees Mrs Allan's whole interest in her grandfather's bequest. The trustees were directed to pay the interest of the money to Mrs Allan during her lifetime, and thereafter to her husband, if he survived her, with power also to advance not more than half the principal sum to Mrs Allan, or Mr Allan if he survived her. But it was expressly declared that this was to be done for the sake of the better maintenance of the spouses and the children of the marriage, and that Mr Allan's interest therein was not to be assignable nor affectable by his debts and deeds. The fee was to belong to the survivor of the spouses, if there were no children of the marriage; but if there was any child, or the issue of any child, then the fee was to go to such child or children on the death of the survivor of the spouses, majority being the time of payment. On 8th July 1868, Mr and Mrs Allan, with the consent and concurrence of their daughter Mary Simmers Allan, executed a revocation of this trust-deed and assignation; but as the trustees refused to denude themselves of the trust, Mr and Mrs Allan, with their daughter's concurrence, brought an action of declarator of the validity of the revocation.

They contended that, as Mrs Allan was forty-nine years, and therefore unlikely to have more children, and as the daughter was of full age, and gave her consent, that the only persons having a *jus crediti* in the trust-estate were themselves, and that the deed was therefore revocable by them.

The trustees replied that it was not certain that the purposes of the trust had been fulfilled. The pursuers might have more children, or, even if they had no more, if their daughter left children, and died before her parents, the succession would open to the children, and not to their mother, who had given the consent to this revocation. The trustees further contended, that the trust-deed and assignation was a delivered deed, and was not *suâ naturâ* revocable.

The Lord Ordinary (MURE) assoilzied the defenders, holding that though there was a *jus crediti* in the fee of the trust-estate in the child of the pursuers' marriage, and her issue, yet that no right to any share of it vested during the lifetime of

her parents, and therefore that the assignation could not be revoked by the pursuers, even with their daughter's consent.

The pursuers reclaimed, and offered caution for return of the funds in case of the birth of any other child of the marriage.

FRASER and M'LAREN, for the reclaimers, cited the following authorities:—*Scheniman* v. *Wilson*, 6 S. 1019; *Majendie* v. *Carruthers*, 16th Dec. 1819, F. C. and 6 Pat. App. 597; *Beattie's Trs.* v. *Cooper's Trs.*, 24 D. 519; *Craigie* v. *Gordon*, 15 S. 1157; *Thornhill* v. *M'Pherson*, 3 D. 394; *Smitton* v. *Tod*, 2 D. 225; *Pretty* v. *Newbigging*.

Lord Advocate (YOUNG, who was not called on) and H. J. MONCREIFF, for respondents.

At advising—

LORD PRESIDENT—Here a disposition was made to trustees by the husband and wife. The trustees entered and administered the trust. They made various payments to the husband and wife from the income of the trust-estate, and various advances from the principal sum.

It is now proposed to revoke the disposition, with the consent of the only child of the marriage. The intention of that disposition was that there should be no division of the fee till the death of the longest liver, and the fee was then to go to the child or children equally, the issue of any child who had predeceased the survivor of the spouses taking the share of its or their parent.

Now, it is said that as Mrs Allan is forty-nine years of age she may not be expected to have more children. That may be unlikely, but it is not impossible, and if she have any more children they have an interest in the trust-estate.

But the pursuers propose to avoid this difficulty by their offer of caution, and they say that the children of the daughter of the marriage have no interest, and cannot be taken into consideration whilst she is alive. Whether this proposition is correct or not, however, cannot be discussed till the question of caution has been settled.

Now, an offer of caution is an appeal to the discretion of the Court. No party is entitled to it as a matter of course, and it can only be acceded to on the conditions prescribed by the Court. It is therefore a matter for our consideration whether we should agree to it. Now, the object of this trust was to prevent the risk that was run in case of Mr Allan's bankruptcy. But the very reason of this revocation is because he is in difficulties. Acceding, then, to the pursuer's offer of caution would make the Court aid them in defeating the very object of the trust-disposition. When the Court accepted caution in the cases of *Scheniman* and *Pretty*, referred to, it was in order to give effect to the testator's views, whereas division of the money here would defeat them.

A question of great importance also is, What are the rights of the possible grandchildren? But there are none, and there may never be any; yet we are asked to decide the question. Now we never decide a question before it arises, and that would be sufficient to prevent our stating our views upon this proposition of the pursuers, even if we got over the difficulty about caution, and, as I have already said, we cannot listen to this offer of caution. I am therefore of opinion that the proper course is to dismiss this action.

LORD DEAS—I concur with what your Lordship has said, and I may add, if the trustees were, as it is said they could, to throw this disposition into the fire, they could be tried at the criminal bar for it. It is a delivered deed to trustees, and is therefore not revocable, much in the same way as if it were an antenuptial contract of marriage.

The question just is, whether the right not having vested in the daughter so as to be transferable to other parties, that yet she should be entitled to set aside the deed by a revocation. In *Routledge's* case the marriage had been dissolved, and it was the only child of the marriage that made the revocation.

LORD KINLOCH—My opinion is not matured on the two propositions, but any opinion I have is against the idea that the parents could revoke, and that the child of the marriage is the only party interested in this trust-assignation. Her issue have a strong interest in it; and this question we are asked to decide prematurely, by anticipation, and on contingency. Now, we never do that.

Recall the interlocutor of the Lord Ordinary, dismiss the action, and sustain the defences, with expenses.

Agents for Reclaimers—Henry & Shiress, S.S.C.

Agents for Respondents—Morton, Whitehead, & Greig, W.S.

Thursday, October 21.

SECOND DIVISION.

INSPECTOR OF UPHALL *v.* INSPECTORS OF SOUTHDEAN AND EDINBURGH CITY PARISH.

Poor—Residential Settlement—Absence from Parish—Constructive Residence—Birth Settlement. Held (1) that residence in the sense of the Poor Law Act is a matter of fact and not of intention. (2) Circumstances in which held that a residential settlement had been lost by absence from the parish, and that liability devolved on the parish of birth.

This was an action brought to determine what parish was liable for the aliment of the wife and children of a hawker of the name of Williamson, who was some time ago sentenced to fifteen years' penal servitude for an assault committed upon his wife. The parish of Uphall was the relieving parish, the parish of Southdean was the parish of birth, and the City Parish of Edinburgh was alleged to have been the parish in which Williamson had at the time of his incarceration a residential settlement. The facts of the case were substantially that Williamson held, prior to 1845, when he left his father's house, a residential settlement in Edinburgh; that since 1845 he had been more in Edinburgh than any other place, and had made it his chief resort, but that he had been constantly a good deal away from it, his habit having been to wander about the country making or selling baskets, especially during the summer months.

The Lord Ordinary (BARCAPLE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the defenders in the conjoined actions, and considered the Closed Record and Proof: Finds that at and prior to the year 1845, or about that time, James Williamson, the husband and father of the paupers, had acquired and then retained a residential settlement in the City Parish of Edinburgh: Finds that at or about that time he ceased to reside continuously in said parish, and has not since then resided there con-