there is nothing to prevent the pursuer from using the field in any way he thinks fit, and if any use so made should in the future bring the ground within the protected subjects specified in this section, then I see nothing in this order which will entitle the District Committee of the day from encroaching on such ground.

I am for adhering.

LORD ADAM—I am of the same opinion. With reference to the condition imposed by the Sheriff upon the Committee, that in case of their operations being carried into the field beyond a distance of 50 yards, they should build a service bridge, it may be that he had no power to insert any such condition since the pursuer's land would be required for building such a bridge. But the only result of that is that if the quarry does reach that point the Committee may have either to stop working or to go back to the Sheriff. There are accordingly, in my opinion, no grounds for interfering with the Sheriff's order.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for Pursuer—Sol.-Gen. Dickson, Q.C.—Clyde. Agents—Skene, Edwards, & Garson, W.S.

Counsel for Defender—Balfour, Q.C.—Guthrie—Craigie. Agent—James Russell, S.S.C.

Tuesday, February 16.

FIRST DIVISION.

M'KIE'S TRUSTEES *v.* M'KIE.

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

A testator sixteen months after his marriage executed a testament by which he bequeathed his whole estate to his wife. Five years subsequently a child was born, whose birth her father survived for fourteen and a half months. The child would have been entitled to £3680 out of her father's estate by way of legitim, the total estate amounting to £14,046

Held that these circumstances were not sufficient to rebut the presumption that the testament was revoked by the birth of the child.

Mr Peter Lawrie M'Kie died on 8th July 1896, leaving a disposition and settlement dated 5th February 1890. He was married on 26th September 1888 to Miss Anne Kennedy, who survived him; there was no marriage-contract between them. There was one child of the marriage Angela M'Kie, who was born on 24th April 1895. By his disposition and settlement Mr M'Kie bequeathed his whole estate, heritable and moveable, to his wife, whom he appointed as his sole executrix and administratrix. The nett value of his personal estate was about £14,000, of which sum £3000 was contained in a bond and disposition in security, so that the legitim fund was about £3680, and the *jus relictæ* a similar amount. There was no other heritable estate.

Mrs M'Kie as guardian of her child presented a petition for the appointment of a factor *loco tutoris* to her, and Mr William Crawford, Duns, was appointed.

A Special Case was presented to the Court by (1st) Mr Crawford, and (2nd) Mrs M'Kie, for the purpose of determining what share of her father's estate Angela M'Kie was entitled to.

The first party contended that the birth of a child subsequent to the date of the disposition revoked it, and that consequently Mr M'Kie died intestate, while the second party contended that it had not that effect, and that consequently she was entitled to the whole estate less her child's claim for legitim.

The first question submitted to the Court was, "Did the birth of the child subsequent to the execution of the said settlement by the said Peter Lawrie M'Kie have the effect of revoking the said settlement or rendering it invalid?"

Argued for first party—There were no circumstances here to overcome the presumption that the subsequent birth of a child revoked a will, the only circumstance at all in point being the lapse of time between the birth of the child and the death of the truster. But the mere lapse of time was not in itself enough to reinstate a will thus revoked—*Dobie's Trustees* v. *Pritchard*, October 19, 1887, 15 R. 2; *Munro's Executors* v. *Munro*, November 18, 1890, 18 R. 122; *Millar's Trustees* v. *Millar*, July 20, 1893, 20 R. 1040. The fact that the will was made sixteen months after the marriage showed that it was improbable that the truster when making it contemplated the birth of children of the marriage. There was accordingly nothing to show that he intended to disinherit children, and accordingly the will must be held to be revoked—*Colquhoun* v. *Campbell*, June 5, 1829, 7 S. 709.

Argued for the second party—There were special circumstances here sufficient to displace the presumption for revocation. These were the facts—that the will was made sixteen months after marraige with a family in prospect; that the child would receive a large share of the estate by way of legitim; that the testator survived the birth of the child by fourteen and a half months without indicating a wish to revoke the will; and that the estate was left to the testator's widow. The lapse of time, coupled with the other circumstances, was enough, though it might not be so alone—Ersk. iii. 8, 46. Erskine's doctrine may have been modified, but the *obiter dictum* of Lord Rutherfurd Clark in *Dobie's Trustees* went much too far. There was no case quite like the present one, where the point was so fine, and as this would be the most equitable division of the estate, the Court should exercise an equitable discretion in

holding the will had not been revoked—*Elder's Trustees* v. *Elder*, March 16, 1894, 21 R. 704; *Elder's Trustees* v. *Elder*, March 16, 1895, 22 R. 505, at 511.

LORD ADAM—The question in this case is whether Mr M'Kie's settlement, by which he left the whole of his estate to his wife, was revoked by the birth of a child occurring after its date.

Now, having regard to the doctrines laid down in the case of *Elder's Trustees*, I think there is a principle that when a child is born, the presumption of law is that its birth renders a previous setlement invalid—a presumption which can only be rebutted by proof of facts and circumstances showing that the intention of the testator was that the will should stand. I think that this is not a very satisfactory position from the point of view of a judge. I could understand that a good principle to adopt would be that of Roman law, viz., that the birth of a child revokes unconditionally a previous settlement. That would seem to have been the opinion of Lord Rutherfurd Clark as given in the case of *Dobie's Trustees*, but it has not been adopted in the more recent views of the law, and the question accordingly depends on the consideration of facts and circumstances. Now, to draw inferences from facts and circumstances is always a very difficult function to perform. It is like making a new will for a man. The only circumstances referred to here are, in the first place, the lapse of 14 months between the birth of the child and the death of the father, which does not appear to me to be of sufficient importance to rebut the general presumption; and, secondly, the fact that the will was in favour of the mother and not of a stranger, which is certainly of importance, but which is also, in my opinion, not strong enough to rebut the presumption.

Accordingly, in my opinion, we should answer the first question in the affirmative.

LORD M'LAREN—It may be that in the opinion of some lawyers the rule with which we are here concerned is not founded on the best consideration of equity, nor really represents the most probable intention of the testator. But the rule has been recognised in our practice for a long time, and we must apply it with the aid of the known expositions of the law. One thing is manifest, that the presumed revocation of a will by the subsequent birth of a child is not an absolute presumption. There may be exceptions to it. I am sorry to say that it is very difficult to find from the authorised expositions of the law what these exceptions are.

The case of *Elder* is important in this connection, as it settled this point, that the Court will not allow proof of declaration of the deceased as either setting up the will or as fortifying the presumption against the subsistence of the will. For in that case the Lord Ordinary had allowed a proof, but the interlocutor was recalled by the Inner House, and judgment was given upon the known and undisputed facts appearing on the record.

I should hesitate to say that the presumed revocation was a mere question of circumstances. It seems to me impossible to find a solution of the practical questions with which the Courts have to deal under such an indefinite standard. It rather appears to me that the presumption can only be displaced by something that amounts to a tangible and clear expression of the testator's wish that his will should subsist, *e.g.*, by his executing a codicil to it, or by his taking measures of precaution showing that he treated his will as a subsisting document. There is no authority for holding that mere lapse of time is sufficient to overcome the presumption. In the light of principle it is very difficult to see why it should—why, in other words, a document which is dead should be revived by the lapse of time. The effect of lapse of time is to strengthen the counter-presumption which may arise from some indication of the testator's wish, which by itself might be insufficient—for example, if the testator had taken great care to preserve his will, or had made some written reference to it after the lapse of years from the birth of a child. I have been led to consider what kind of evidence is sufficient to overcome the presumption of revocation, because we cannot answer the question raised in the present case without considering the kind of evidence which is admissible to rebut the presumption. There is really nothing in this case which is adverse to the presumption except the survivance of the testator for a relatively short period without making a new will. I agree with Lord Adam that this circumstance is not sufficient of itself.

I have come to this conclusion not without regret, for I cannot help thinking that when the testator made his will his real view was that it should stand until his child, if he should have a child, should reach the years of discretion. I do not think a man in the position of the testator, leaving a wife and a young child surviving him, could make a more reasonable will than was here made, and I cannot help regretting that the presumption must be applied, for I think we are denying effect to a will which really represents the testator's intention.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court answered the question in the affirmative.

Counsel for First Party—Blackburn. Agents—Russell & Dunlop, W.S.

Counsel for Second Party—Dundas—Constable. Agents—J. & J. Turnbull, W.S.