COURT OF SESSION.

Tuesday, November 23.

OUTER HOUSE.

[Lord Stormonth-Darling,

SMITH'S TRUSTEES *v.* GRANT.

Succession—Will—Revocation—Conditio si testator sine liberis decesserit—Evidence of Intention.

The right to challenge a will on the ground that a child has been born to the testator subsequent to the date of the will is personal to the child so born, and if the child dies without making a claim, no right to make it passes to his personal representatives.

Watt v. *Jervie*, July 30, 1760, M. 6401, *followed.*

Held that proof of declarations of intention made by the testator is not competent either to rebut or to fortify the presumption which arises from the birth of a child subsequent to the date of his father's will.

Mr John Smith, wine and spirit merchant in Glasgow, died on 6th April 1876 leaving a trust-disposition and settlement dated 5th August 1873, by which he made certain provisions for his wife, and directed his trustees to hold the residue of his estate "for behoof of" his "two daughters equally in liferent, for their liferent use only, and to and for behoof of their respective issue *per stirpes* in fee."

At the date when the trust-disposition was signed, these two daughters, namely, Mrs Mary Smith or Grant and Miss Margaret Smith, were the only children Mr Smith had. Mrs Grant was the only surviving child of his first marriage, and Miss Margaret Smith was at that time the only child of his second marriage. But on 13th March 1876, a few weeks before his death, another daughter was born to him named Alice. She survived him, but died on 16th January 1878. She received payment of legitim, but no claim was made by her or on her behalf to the effect that Mr Smith's will had been revoked by her birth subsequent to its date, and that she was entitled to a share of his estate as if he had died intestate.

The trustees nominated in the will continued to administer Mr Smith's estate in accordance with his testamentary provisions until 1896, when they were advised, that owing to the decision of the Court in the case of *Elder's Trustees* v. *Elder*, March 16, 1894, 21 R. 704, they ought to take the opinion of the Court on the question of the effect of the birth of the child Alice upon Mr Smith's trust-disposition and settlement. They accordingly brought the present action of multiplepoinding and exoneration for the purpose of having that question determined. With the exception of £18, 10s., being the residue of the moveable estate, all the deceased's property under the control of the trustees was heritable.

Claims were lodged (1) for the trustees, who claimed to be ranked and preferred to the whole estate for the purpose of being administered in terms of Mr Smith's settlement; (2) for Miss Margaret Smith, who claimed to be ranked and preferred (first) to one-third *pro indiviso* of the whole heritable property of the deceased John Smith as one of his three heirs-portioners, and (second) to another third as heir-at-law of the deceased Alice Smith, another of his three heirs-portioners; and (3) for Mrs Grant, who claimed that the trustees should be ranked and preferred to the whole fund *in medio*, to be held and applied by them as trustees for the purposes of the settlement, or *alternatively*, her share *ab intestato* of her father's property, heritable and moveable.

Mrs Grant, *inter alia*, averred as follows:—"(Cond. 3) Although his daughter Alice was born only twenty-four days before the death of her father, Mr Smith had for some time prior to her birth been aware of the prospect of their being further issue of his marriage. After her birth he continued down to the day of his death in full possession of his faculties, and he deliberately and of set purpose forbore to alter or revoke the trust-disposition and settlement made by him on 15th August 1873. Shortly before Alice's birth Mrs Smith had, owing to some slight disagreement with the claimant, left her husband and had gone to live with her sister, with whom she was staying at the time of the child's birth. Mr Smith was duly apprised of the birth. About four weeks after Mrs Smith had gone to live with her sister, Mr Smith's state of health began to cause himself and his friends some anxiety, and on being made aware of his condition by her doctor, Mrs Smith returned home about a week before her husband's death. After her return she on more than one occasion urged her husband to make some testamentary provision for Alice, but he refused, on the ground that he had sufficiently provided for his wife to enable her to provide for the child. This he did deliberately in full possession of his faculties, and with clear apprehension of the effect of the trust-disposition and settlement which he had made. The claimant believes and avers that Mr Smith desired and intended that the said trust-disposition and settlement should continue to regulate the succession to his means and estate notwithstanding the birth of his daughter Alice."

Mrs Grant, in addition to a plea to the effect that the settlement was still valid and subsisting, and ought to have effect, also pleaded, *inter alia*—(2) "Any right of challenge of the said trust-disposition and settlement on the grounds advanced for the claimant Margaret Smith being personal to and having lapsed upon the death of the said Alice Smith, neither the said claimant nor any of the other parties to the present process has any title to maintain the revocation of the said trust-disposition and settlement in respect thereof."

Miss Margaret Smith pleaded, *inter alia*, that the averments of the claimant Mrs Grant were irrelevant.

Counsel were heard in the Procedure Roll when the following authorities were referred to:—*Morison's Curator Bonis* v. *Morison's Trustees*, December 3, 1880, 8 R. 205; *Elder's Trustees* v. *Elder*, March 16, 1894, 21 R. 704; *M'Kie's Tutor* v. *M'Kie*, February 16, 1897, 24 R. 526; *Watt* v. *Jervie*, July 30, 1760, M. 6401, and January 7, 1762, M. 8170; *Blair's Executors* v. *Taylor*, January 18, 1876, 3 R. 362 at page 370; *Dobie's Trustee* v. *Pritchard*, October 19, 1887, 15 R. 2; *Colquhoun* v. *Campbell*, June 5, 1829, 7 S. 709; *Hughes* v. *Edwards*, July 25, 1892, 19 R. (H.L.) 33; *Millar's Trustees* v. *Millar*, July 20, 1893, 20 R. 1040; *Johnston* v. *Johnston* (1817), 1 Phillimore 447; *Hall* v. *Hill* (1841), 1 Dr. and War. 94; Erskine's Inst. 3, 8, 46; M'Laren's Wills and Succession, vol. i. 403.

The Lord Ordinary pronounced the following interlocutor:—"Sustains the second plea-in-law for the claimant Mrs Mary Smith or Grant, and in respect thereof repels the claim for the claimant Miss Margaret Smith: Sustains the first alternative claim of the said claimant Mrs Mary Smith or Grant, and the claim for the pursuers and real raisers, and ranks and prefers the pursuers and real raisers in the whole fund *in medio* accordingly, and decerns," &c.

Opinion.—[*After stating the facts*]—"This multiplepoinding has been brought by Mr Smith's trustees in consequence of the decision in *Elder's Trustees*, 21 R. 704, which was the first case in Scotland establishing the proposition that the *conditio si testator sine liberis decesserit* operates in favour of a child born after the date of the settlement, even when the competition is, not with strangers, but with other children of the testator alive at its date.

"What really gives rise to the competition in this case is that Mrs Grant was the child of a first marriage, while Margaret Smith and the deceased Alice were children of a second. Thus, if the settlement is inoperative, Margaret will take, in her own rights and as her sister's heir, two-thirds of the estate *ab intestato*, instead of one-half under the will.

"Mrs Grant states a plea against her sister's title which I will consider in a moment. But, alternatively to that, she makes certain averments of which she asks a proof. The substance of these averments is that the testator, in full view of Alice's birth, deliberately and of set purpose forbore to alter his will, and declared his intention not to do so. It seems to me, however, that the case of *Elder's Trustees*, and the comments of Lord M'Laren upon it in the case of *M'Kie*, 24 R. 526, are conclusive against the competency of any proof of declarations of intention either as setting up the will or as fortifying the presumption against its subsistence. The other circumstances relied on by Mrs Grant require no proof, for the testator's survivance of Alice is admitted, the knowledge of his wife's pregnancy must be presumed, and his mental capacity is not denied.

"The case must therefore be decided on the record; and if Alice had survived and had been the claimant, the decision in *Elder's Trustees* would have been directly applicable. For there the claim was made by the tutor of the child born after the date of the will.

"But here it is made by the heir of the child, and Mrs Grant's preliminary plea is that the right of challenge is personal to the child, and that no representative has any right to maintain it. This plea is founded mainly on the case of *Watt* v. *Jervie* (1760), M. 6401, referred to with approbation by Lord Newton and Lord Pitmilly in *Colquhoun* v. *Campbell*, 7 S. 709, and cited by Lord M'Laren (Wills and Succession, p. 404) as an authority for the proposition that the right of challenge is personal.

"I am not aware that the case of *Watt* has ever been overruled, and I am of opinion that it is conclusive in favour of Mrs Grant's plea.

"Mr Campbell, for the claimant Miss Margaret Smith, relied on the analogy of the claims of legitim and *jus relictæ*, which are undoubtedly transmissible to representatives. But the Court which decided *Watt* v. *Jervie* had this analogy fully in view, for at a subsequent stage of the case (reported in M. 8170) they decided that the next-of-kin of the posthumous child, although not entitled to plead the *conditio si testator sine liberis decesserit*, were entitled to claim legitim. In the present case legitim has been paid.

"Mr Campbell further argued that there was no principle in law for holding the right of challenge to be purely personal. Some of the grounds of judgment stated in the report of *Watt's* case are certainly open to criticism, if indeed they are truly grounds of judgment and not merely parts of the argument. It is difficult to see how the fact of the child living for only a few months could possibly affect the mind of a testator who died when the child was *in utero*. It is also true that the testator's knowledge of his wife's pregnancy would not now be held by itself to infer an intention not to alter; in *Elder's* case the testator survived the birth of the child for ten months, and in *M'Kie's* case for fourteen. But the leading ground of judgment seems to have been that the *conditio* was an equitable plea, and therefore only to be sustained where equity required it.

The truth is, I rather think, that some confusion has been introduced into this branch of the law by a too rigid adherence to the phraseology of the Roman law, from which the rule has been adopted in a modified form. It may be that by that law the subsequent birth of a child *eo ipso* revoked a father's will, because a child could not be disinherited except by express words. But that is not our law; and to say that a will is revoked by the mere birth of a child is rather a misleading expression. If so, it would be difficult to see how a will once revoked could ever be restored to vitality by

lapse of time or change of circumstances, or anything short of a fresh testamentary act on the part of the maker. This was the difficulty suggested by Lord Rutherfurd Clark in *Dobie's Trustees* v. *Pritchard*, 15 R. 2. But if the child born after the date of the will predeceases the testator, undoubtedly the will holds good; it is only the child's survivance of the father, or its being *in utero* at that date, that raises the plea. The true rule, as expounded in the later cases, seems to be that in either of these events, the law presumes that the testator did not intend his will to remain valid. There is thus no *punctum temporis* at which it is necessary to presume revocation, which of course must take place, if at all, during the life of the testator. If there were, it would be a strange result that the effect of the revocation should be done away with, and the will restored by something happening after the testator's death, in this case by the child dying without making a claim; for surely it must be ascertainable at a man's death whether he has died testate or intestate. But these difficulties are avoided if the will be held, in the absence of clear evidence to the contrary, to be affected from the first by the implied condition that it shall not remain valid if a child be subsequently born and be alive (or *in utero*) at the testator's death. And to that statement of the rule there is nothing illogical or contrary to principle in adding the further qualification that the challenge must be made by or for the child himself. Indeed it is in harmony with the principle underlying the whole rule, viz., that a father is under a natural obligation to make provision for a surviving child. But he is under no such obligation towards the child's representatives."

Counsel for the Pursuers and Real Raisers—Ralston. Agents—Adamson & Gulland, W.S.

Counsel for Claimant Miss Margaret Smith—W. Campbell. Agents—Adamson & Gulland, W.S.

Counsel for Claimant Mrs Grant—Christie. Agents—Simpson & Marwick, W.S.

Thursday, November 25.

FIRST DIVISION.

[Lord Pearson, Ordinary.

MARTIN & COMPANY *v.* HUNTER.

Expenses—Trustee in Sequestration—Watching Fees—Precognitions.

Held that a trustee in a sequestration who is allowed watching fees in a petition for recal of the sequestration, is not entitled to the expenses of taking precognitions on his own account.

A petition was presented on 17th April 1897 by Mr Thomas Hunter, grocer, Lasswade, with the concurrence of Mr Ormiston, a creditor, for sequestration of Mr Hunter's estates. A deliverance was pronounced by the Sheriff granting sequestration in terms of the prayer of the petition, and at a meeting of creditors, held thereafter, Mr Charles Romanes was appointed trustee in the sequestration.

A petition was presented by Messrs Martin & Company, wine merchants, Leith, who were creditors of Mr Hunter, craving the Court to recal the sequestration on the ground that the affidavit of the concurring creditor did not comply with the statutory requisites.

After a proof the Lord Ordinary (PEARSON) on 17th July 1897 refused the prayer of the petition, and found the petitioners liable to the trustee "for the expenses incurred by him in watching the case on behalf of the estate, and of attending the proof."

The petitioners reclaimed, and the Court adhered to the Lord Ordinary's interlocutor.

The reclaimers objected to the Auditor's report on the trustee's account of expenses, *inter alia*, in respect that he failed to tax off the expenses of "framing precognitions" amounting to £3, 6s. They maintained that these were not truly expenses of watching the case.

LORD PRESIDENT—This is a very small matter, but it is perfectly clear that when we allow watching fees we allow what is necessary to enable a trustee to be present at every stage, and to consider whether overt intervention is necessary. Accordingly I think that all the objections barring the first are bad. With regard to the first, I cannot see that the trustee is under the necessity of framing precognitions on his own account. Under the statute he has full opportunity for obtaining information from individuals associated with the affairs of the bankrupt, and has no occasion for precognitions in a case when he has merely to watch.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court sustained the objections so far as they related to the expenses of framing precognitions.

Counsel for the Petitioners—T. B. Morrison. Agent—Marcus J. Brown, S.S.C.

Counsel for the Trustee—Findlay.