Wednesday, November 24.

SECOND DIVISION.

CAMPBELL (MILLIGAN'S FACTOR) *v.* MILLIGAN AND OTHERS.

Succession — Trust — Will — Revocation—Conditio si testator sine liberis decesserit—Survivance of Testator for Ten Years after Birth of Child.

M, who was married in November 1889, executed on 12th December 1896, at which time no children of the marriage had been born, a trust-disposition and settlement by which he conveyed his whole estate to trustees and directed them to convey to his wife his whole moveable estate, to pay to her the rents of two specified heritable properties (which in point of fact formed his whole heritable estate), and on her death to convey the two properties to his brother and his sister respectively. The settlement on its execution was placed in the hands of his law agent, and remained in his hands till the testator's death. M died on 14th October 1908 survived by his wife and by the only child of the marriage, who had been born on 24th November 1898.

Held that there were no circumstances in the case sufficient to elide the presumption that the will was revoked by the subsequent birth of the child.

On March 19, 1909, a Special Case was presented to the Court by (1) David Campbell, judicial factor on the estate of the deceased Joseph Milligan, innkeeper, Star Inn, Newton-Stewart, *first party;* (2) Bessie Milligan, the deceased's only child, *second party;* (3) Mrs Eliza M'Myn or Milligan, his widow, Joseph Milligan, Rutherglen, the heir-at-law of his deceased brother William Milligan, and Mrs Janet Milligan or Candlish, his sister, being the whole beneficiaries under a trust-disposition or settlement executed by the deceased on 12th December 1896, *third parties.*

Joseph Milligan married, on 14th November 1889, Eliza M'Myn, and died on 14th October 1908 leaving the said trust-disposition, which directed that after payment of the testator's debts his whole moveable estate, including his business as innkeeper and the goodwill thereof, and his whole stock-in-trade, fittings, furniture, and others in the Star Inn, should be paid over to his wife, the said Mrs Eliza M'Myn or Milligan, and that the rents of his heritable properties in Lauriston should be paid to her during her life. On her death the property in Lauriston sometime occupied by the testator was to be conveyed to his brother, the said William Milligan, and his heirs, and his other property in Lauriston to his sister, the said Janet Milligan or Candlish. The only child of the marriage, Bessie, was born on 24th November 1898, about two years after the execution of the said trust-disposition and settlement, and about ten years before her father's death. The properties in Lauriston were as matter of fact the deceased's whole heritage both at the time of the execution of the trust-disposition and at his death.

The case set forth, *inter alia*—"(2) . . . Up to the date of his death the said Joseph Milligan was in full possession of his faculties and of sound disposing mind. (3) The said trust-disposition and settlement was placed by the said Joseph Milligan in the hands of his law agent, Mr W. M. Kelly, solicitor, Newton-Stewart, for custody, and remained in his hands till the death of the truster. . . . (5) Looking to the fact that the said trust-disposition and settlement was made prior to the birth of the said Bessie Milligan, the first party is in doubt whether to administer the estate in terms of the said trust-disposition and settlement or as an intestate estate. It is in the interests of the second party, and she accordingly *contends*, that the trust-disposition and settlement has been revoked by her subsequent birth and survival of her father, and that the estate falls to be administered as an intestate estate. It is in the interests of third parties, who are the whole beneficiaries under the said trust-disposition and settlement, and they accordingly contend that the estate should be administered under and in conformity with the purposes of the said trust-disposition and settlement."

The *questions of law* were—"(1) In the circumstances above set forth, is the trust-disposition and settlement of the deceased Joseph Milligan valid, and is it the duty of the first party to administer the estate in terms and in accordance with the purposes thereof? Or (2) is the first party bound to divide the estate as an intestate estate."

Argued for the second party—There was a presumption that a will was revoked by the subsequent birth of a child to the testator—*Knox's Trustees* v. *Knox*, 1907 S.C. 1123, 44 S.L.R. 838; *Rankin* v. *Rankin's Tutor*, July 9, 1902, 4 F. 979, 39 S.L.R. 753; *Elder's Trustees* v. *Elder*, March 16, 1894, 21 R. 704, 31 S.L.R. 594. The presumption could doubtless be rebutted, but there was nothing in the present case which could be founded on as sufficient to rebut the presumption. The only thing that could be founded on here was the time that had elapsed between the birth of the child and the death of the testator, and mere lapse of time was not sufficient to elide the presumption—*M'Kie's Tutor* v. *M'Kie*, February 16, 1897, 24 R. 526, 34 S.L.R. 399 (*per* Lord M'Laren at p. 528, p. 400); *Dobie's Trustee* v. *Pritchard*, October 19, 1887, 15 R. 2, 25 S.L.R. 6 (*per* Lord Rutherfurd Clark at p. 4, p. 7). Counsel also referred to *Munro's Executors* v. *Munro*, November 18, 1890, 18 R. 122, 28 S.L.R. 104.

Argued for the third parties—It was well settled, since the opinion of Lord Watson in *Hughes* v. *Edwardes*, July 25, 1892, 19 R. (H.L.) 33, 29 S.L.R. 911, at p. 35, p. 912, *followed* in *Millar's Trustee* v. *Millar*, July 20, 1893, 20 R. 1040, 30 S.L.R. 865 (*per* Lord Adam at p. 1042, p. 867), and *applied* in *Knox's Trustees* v. *Knox* (*cit.*) and *Elder's Trustees* v. *Elder* (*cit.*), that the question

whether a will was revoked by the subsequent birth of a child was a question of circumstances, starting of course with a presumption in favour of revocation. All the circumstances here pointed to an intention that the will was to stand. There was (1) the lapse of time, (2) the fact that the will was not universal in form, because it dealt only with certain specified heritage, although it happened to be all that the testator had, (3) the fact that the settlement was carefully preserved, and (4) the fact that the moveable estate was given to the mother, who might be expected to discharge her natural obligations to the child. With regard to the lapse of time, the decision in *Dobie's Trustee* v. *Pritchard* (*cit. sup.*) was in opposition to the view expressed by Lord Pitmilly in *Colquhoun* v. *Campbell*, June 5, 1829, 7 S. 709, at p. 712. The latter view, it was submitted, was to be preferred, because the former was associated with a view of the law now discredited, namely, that the birth of the child operated *ipso facto* the revocation of the will (*per* Lord Adam in *M'Kie's Tutor* v. *M'Kie*, *cit.*). The view that the length of the interval between the birth of the child and the death of the testator was material derived support from M'Laren, Wills and Succession (3rd ed.), vol. i, 403. The presumption was therefore one of very varying strength, and depended to some extent on the length of the testator's survivance of the birth of the child. The English doctrine in regard to this matter was the same as the Scots prior to the Wills Act 1837 (1 Vict. cap. 26), and according to that doctrine the birth of a child subsequent to the date of the will was not of itself sufficient to effect revocation of the will—*Johnston* v. *Johnston*, 1817, 1 Phil. 447, at p. 467. Here there were no other circumstances. Further, if the equity was to be considered, it would appear that there was more to be said for the equity of maintaining the will in Scotland than in England where the child had no claim to legitim.

LORD LOW—The question in this case is whether the trust-disposition and settlement left by the deceased Joseph Milligan was revoked by the birth of a child which took place subsequent to the execution of the settlement.

The facts are simple. Joseph Milligan was married in November 1889. The will was made in December 1896. Up to that date no children had been born, so that the inference arises that the will was probably made on the assumption that there would be no children of the marriage. But a child was born in November 1898 and the father survived till October 1908. The will contained no provisions whatever in favour of children, and if it is to stand the second party will take nothing by the testamentary disposition of her father, although she will be entitled to claim legitim.

In such circumstances the presumption is that the will is revoked by the subsequent birth of a child, and the question is, whether there are special circumstances here sufficient to rebut that presumption?

There were three circumstances which were founded on as sufficient for that purpose. The first was the terms of the settlement. Mr Mackay pointed out that in form it was not a universal settlement, because, although the testator conveys his whole estate to trustees, the trust purposes are to pay the whole moveable estate to his wife, to give her the liferent of his heritable properties in Lauriston, and on her death to convey one of those properties to his brother and the other to his sister. Therefore the possible event of the truster acquiring further heritable estate was not provided for, and there was no clause disposing of residue. Mr Mackay's point accordingly is that if the testator had acquired other heritable property subsequent to the date of the will, it would be undisposed of, and would fall to any child who survived the testator as heir-at-law. Now although in form the will was not a universal settlement, in reality it was. There is no doubt the testator intended it to be a universal settlement, because he conveyed his whole estate to the trustees, and the properties in Lauriston were the only heritage belonging to him either at the date of the will or at the time of his death. The will was therefore really a will disposing of his whole estate, and it contained no provision for children, so I do not think that the terms of the will are a circumstance which goes to rebut the presumption that it was revoked by the subsequent birth of a child.

The second point founded on by Mr Mackay was that the settlement was carefully preserved. With regard to that it is stated in the case that "the said trust-disposition and settlement was placed by the said Joseph Milligan in the hands of his law agent . . . for custody and remained in his hands till the death of the truster." I do not see how any presumption can be gathered from that fact. His law agent's office is the place where a man usually keeps his will. In leaving his will in the custody of his agent therefore the testator was not taking any unusual precaution to preserve it. I may add that I read the statement in the case as meaning that the will was left in the custody of the law agent when it was executed. If it had been at first retained by the testator, and given by him to his law agent for preservation after the birth of his daughter, the circumstance might have been significant.

The third point that was founded on was that the testator lived ten years after the birth of the child. It was argued that he had thus ample time to consider the new situation created by the birth of his daughter, and that if he intended to make any alteration on his will he had full opportunity to do so. Now if the necessary inference, or even the most natural inference, was that the testator was satisfied with his will and had made up his mind not to alter it, that might be enough to rebut the presumption of revocation. But

I do not think that that can be said to be the case, because the fact that the testator did not alter his will during all these years is as likely to have been the result of procrastination as of deliberate intention to abide by the will. No doubt the lapse of time may be a very important circumstance. If the time between the birth of the child and the death of the testator is very short, so that the testator had not a reasonable time to consider what testamentary arrangements he should make in view of the birth of a child, it would obviously require very clear indications otherwise of his intention that the will should stand in order to rebut the presumption. On the other hand, if, as here, the testator lives many years after the birth of the child, less pregnant circumstances would suffice. But in this case there is nothing but the long lapse of time. If the question had now arisen for the first time it would have necessitated very careful consideration whether the lapse of time alone would be sufficient to rebut the presumption in favour of revocation. Upon principle, however, and apart from authority altogether, I should answer that question in the negative, for the reason which I have already indicated, namely, that the mere fact that the testator has allowed years to elapse without altering his will is not a sufficiently sure indication of a matured intention not to alter it. But there is ample authority for that view. There is first the opinion of Lord Rutherfurd Clark in *Dobie's Trustee* v. *Pritchard* (1887, 15 R. 2). Then there are the opinions of Lord Adam and Lord M'Laren in *M'Kie's Tutor* v. *M'Kie* (1897, 24 R. 526), and the opinion of the present Lord Justice-Clerk in *Rankin* v. *Rankin's Tutor* (1902, 4 F. 979). Lastly, there is the opinion of the present Lord President in *Knox's Trustees* v. *Knox* (1907 S.C. 1123), and that is the most important of all in view of the circumstances of the case in which it was expressed. The Lord President said—"I do not think it is possible to use Lord Watson's dictum" (that the question was always one of circumstances) "in the case of *Hughes* (1892, 19 R. (H.L.) 33) as subversive of the idea that there is a legal presumption. I do not find that there are circumstances in this case to rebut the presumption, because truly I think there is no circumstance tending in that direction except the mere efflux of time." Now in that case the will was executed in 1896, a child was born in 1897, and the testator did not die until 1905. The seven or eight years which elapsed in that case afforded the testator just as adequate an opportunity of making a new will as the ten years we have to deal with here. I am therefore of opinion that the first question should be answered in the negative and the second in the affirmative.

LORD DUNDAS—I quite agree. I think Mr Mackay was justified in submitting that the Court in deciding each case of this nature may have regard to all relevant facts and circumstances attending it; but, none the less, at the back of all there remains the presumption of revocation which arises from the fact of the birth of a child after the date of a settlement. Considering the facts here, which I need not repeat, I cannot find any such combination of circumstances as has in former cases been held sufficient to rebut the presumption. Mr Mackay relied almost entirely upon the bare fact that this testator survived the birth of the child by ten years and allowed the settlement to stand during that period. I think the cases establish that that consideration is not enough to rebut the presumption. We should therefore, in my opinion, answer the questions in that sense; and I do not think it necessary to discuss the more general topics which were mooted during the argument.

LORD CULLEN—I concur. I am unable to see sufficient grounds for holding that the presumption of revocation on which the second party relies is rebutted by the circumstance that during the interval which elapsed between the birth of his child and his own death the deceased did no positive act significant of his intentions concerning the regulation of his succession, but merely remained inactive in regard thereto, for reasons which we do not know.

The LORD JUSTICE-CLERK was presiding at a trial in the Court of Justiciary.

LORD ARDWALL was presiding at a jury trial.

The Court answered the first question in the negative and the second in the affirmative.

Counsel for the First and Second Parties—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Third Parties — A. M. Mackay. Agents — Guild & Guild, W.S.

Tuesday, November 9.

OUTER HOUSE.

[Lord Skerrington.

ROBERTSON-DURHAM AND ANOTHER (LIQUIDATORS OF BRUCE PEEBLES & COMPANY, LIMITED) *v.* STERN AND WATT.

Process — Mandatary — Liquidation — Foreign Claimants — Liquidator's Deliverances Contested.

Persons resident abroad lodged claims in a liquidation, and their claims having been rejected by the liquidator they lodged answers in support of their claims. *Held* (*per* Lord Skerrington, Ordinary) that as there were no reasons which would make it inequitable to require the claimants to sist mandataries, they must do so.

Robertson-Durham, C.A., and another, liquidators of Bruce Peebles & Company,