answer. The respondents said it was vested in the Corporation of the city. He was not prepared to say whether it was vested in them or in the Crown; but he thought it was in one or other of them. The history of the church was very curious, they all knew; and the result of that was that he would have great doubt—if it was a question of any practical interest—whether the Crown or the town was the fendal proprietor of this church; but at all events it was not the property of the Ecclesiastical Commissioners, and still less of the petitioners, and so a difficulty arose whether, these parties neither having built nor acquired this church, it was competent for the Court to entertain the petition. The second difficulty which occurred was, whether they had power under the 8th section of the statute to take the old parish, which by a recent statute had been disestablished and disendowed, and make it into a district to be erected as a parish *quoad sacra?* That was not in the letter of the Act; whether it was in the spirit was another question. But the matter did not end there. If there were doubts as to the competency of the Court proceeding on these two grounds, there were other grounds, and very serious ones, as to the expediency; and the question that arose under a petition like this was always a question of expediency. They were not bound to erect this into a new parish merely because there was a church and district proposed to be attached, and a competent stipend provided for a minister; there was always a question whether it was for the benefit of the church and the public that this erection should be made. Now, there was one proviso in that section of the Act of 1870 which presented a good deal of difficulty to his Lordship's mind. It was provided that it should be competent to the Ecclesiastical Commissioners to annex for parochial purposes such portions of such parishes as they might think fit, to any other parish or parishes in the city. Whether that was to be done once for all, or from time to time, was not very clear. The petition, as it had originally stood, had reserved this power to the Commissioners, but that portion of the prayer had been struck out, and the Commissioners no longer insisted upon that reservation; but the gentlemen who at present filled the office of Commissioners could not bind their successors in giving up a statutory power, and therefore the Court was bound to contemplate the possibility that this power might be exercised after, and notwithstanding a decree of the Court of erection. And what would be the effect of that? It would be just this—to destroy the creation of the Court. Again, under the former statute of 1860 there was a clause—section 23—which provided that from and after the 11th November 1860 the Commissioners should have and might exercise the whole rights and powers heretofore and then belonging to and exercised by the Corporation of the city, so far as respected the parochial arrangements connected with the city and its churches and parishes, and might, with the consent and concurrence of the Presbytery of Edinburgh, from time to time unite, disjoin, or change the boundary of any of the parishes. Now, this power had not been taken away by the later statute of 1870; and here, again, the erection *quoad sacra* of this district, which had been mentioned or suggested as the proper parish to be attached, might be completely destroyed and done away with by the Commissioners under this power, at any time, with the concurrence of the Presbytery. Now, these considerations derived an immense amount of weight when he considered that the church and the district to be attached to it were not physically connected; that the parish was at some distance from the church; and that the church, therefore, was inconveniently placed for the district of which it was to be parish church. And yet, in the face of these difficulties and incongruities, the Court was asked now to take this district, which lay eastward of the South Bridge streets, and to join or attach it to a church which lay, as they knew, at a considerable distance away, with the risk and possibility, and perhaps not the improbability, of the whole of this being made nugatory by the action of the Ecclesiastical Commissioners, alone or with the concurrence of the Presbytery. The conclusion, therefore, to which his Lordship came was this. He saw very considerable doubts and difficulties as to the competency—but he did not desire to pronounce any opinion upon this point. He took them into consideration, however, and gave them very great weight in the question of expediency; and considering these difficulties, and also what he had lately mentioned as to the expediency of attaching this church and district together, and the great probability of what they were then asked to do being undone by others thereafter, he thought the course they ought to follow, in the exercise of their undoubted discretion, was to refuse the prayer of the petition.

LORDS DEAS, NEAVES, ARDMILLAN, JERVISWOODE and MACKENZIE concurred.

Counsel for the Petitioners—The Lord Advocate (Young) and Lee. Agent—H. W. Cornillon, S.S.C.

Counsel for the Respondent—The Solicitor-General (Clark) and M'Laren. Agents—Millar, Allardice, & Robson, W.S.

COURT OF SESSION.

OUTER HOUSE

[Lord Gifford.

A.'S EXECUTORS *v.* B. AND OTHERS.

Will—Revocation by subsequent birth of Children—Si sine liberis.

A will executed by a testator, who though married had no children, whereby he gave his wife half of his moveable estate, and authorised his executors to divide the residue as they "might think right to do with it,"—*Held* (by Lord Gifford and and acquiesced in) to have been superseded *in toto* by the subsequent birth of two children whose births the testator survived for upwards of two years and for upwards of four months respectively.

Will—Holograph—Lithograph Form.

Opinion (*per* Lord Gifford) that a will of which the formal clauses were lithographed, but the names of the testator and trustees, and the effective words disposing of the estate were in the testator's handwriting, was holograph of the testator.

This was an action of multiplepoinding and exoneration at the instance of the executors of A against B, the widow, and C and D, the sole surviving children of A.

A died suddenly on 31st March 1873, aged 44

years, leaving a will executed by him on 30th January 1869 dealing only with his personal or moveable estate. His heritable estate was of trifling value. This was partly written and partly lithographed, but was holograph of A in so far as written. Under the will the pursuers were nominated executors, and they were directed to pay "one-half of all my money, and all my furniture and personal property, to my wife (B), and the residue to be divided as the friends named above may think right to do with it." The whole moveable means and estate amounted to about £23,000, which formed the fund *in medio*. The pursuers raised this action in order to have judicial authority interponed in their administration and distribution of the fund. A and B were married in 1863. Prior to the date of the will two children had been born, but had both died. C was born on 24th January 1871, and D on 8th November 1872. The deceased for about six or eight weeks prior to his death suffered from an affection of the chest, but was able to attend to business till the day of his death. About three months before death he expressed to his wife an intention to make a new will, but no such deed was executed. The will was found in a drawer in a wardrobe, along with other documents of value, including the titles of certain heritable subjects of small value recently purchased.

The only persons interested in the succession were—(1) B, the widow, and (2) C and D, the infant children, born subsequently to the date of the will, and the *curator ad litem* appointed to them.

The claim of the widow was as follows:—"(1) To be ranked and preferred preferably on the fund *in medio* to the whole furniture and personal property, other than money, left by the deceased; and (2) to be ranked and preferred preferably to one-half of the whole money or other moveable estate, other than that above claimed, pertaining or resting-owing to the said A at the date of his death."

There was no marriage-contract between A and his wife, and the children claimed as follows:—"(1) One-third of the whole moveable or personal estate of the deceased A, equally between them, in name of *legitim* due to them as the only surviving children of their father; and (2) one-third of the said estate, equally between them, as the amount of the executry estate falling to them as sole next of kin: Or alternatively, In the event of its being found that the before-mentioned settlement contains a valid and effectual bequest in favour of B, the said bequest does not include more than one-half of the deceased's moveable or personal estate, after deducting debts and expenses of administration; and the claimants, as the only children and sole next of kin of their father, claim to be preferred equally between them to the whole residue of his said estate." And in pursuance of their claims they pleaded—"(1) The document dated 30th January 1869 is invalid and ineffectual as a settlement of the deceased A's moveable or personal estate, in respect—1. It is not holograph of the granter; 2. It was not, prior to the granter's death, duly tested, and is vitiated in its date; and 3. the granter's wife, being largely interested in the same as legatee, was disqualified from acting as an instrumentary witness. (2) Assuming the said document to have been at the date it bears a valid settlement, the same has been revoked or superseded *in toto* by or in consequence of the birth of the claimants after its date, and the other circumstances set forth in the condescendence. (3) The claimants, as the only children of the deceased A, are entitled to *legitim*, and the deceased having died intestate, they, as sole next of kin, are entitled to the executry estate, all as claimed. (4) In any event, the direction in regard to residue contained in the said settlement is void for uncertainty, and the residue belongs, whether as *legitim* or executry, to the claimants, the deceased's only children and sole next of kin. (5) On a sound construction of the said settlement, the bequest in favour of the said Mrs B does not include more than one-half of the moveable or personal estate of the deceased, after deducting debts and the expenses of administration."

Authorities quoted; as to the will being holograph—*Maitland's Executors*, 10 Macph. 79; as to the will being superseded—*Colquhoun* v. *Campbell*, 5 June 1829, 7 S. 709; M'Laren, vol. i. 257, *et seq.*

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 22*d January* 1874.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, joint minute for the claimants, and whole process—Finds that the last will or testament executed by the deceased A, dated 30th January 1869, was revoked by the subsequent birth of the claimants C and D, both children of the said A, at least in so far as the said will or testament disposes of or provides for the distribution of the personal means and estates of the said A: Finds that there is no sufficient evidence that the said deceased A intended the said last will or testament to take effect notwithstanding the birth and survivance of his said children: Finds that the said A must be held to have died intestate so far as regards the beneficial distribution of his said personal means and estate. Therefore, and in accordance with the above findings, ranks and prefers the claimant Mrs B, the widow of the said deceased A, to one third of the free moveable means and estate of the said A, and ranks and prefers the claimants C and D, the children of the said A, to the remaining two thirds of his free moveable means and estate, and decerns: Finds the pursuers and real raisers entitled to retain out of the fund *in medio* the whole expenses incurred by them, as the same shall be taxed by the Auditor of Court, and *quoad ultra* finds no expenses due to or by any of the claimants, and decerns.

"*Note.*—With the admissions contained in the closed record, and with the further admissions contained in the joint minute, No. 12 of Process, all parties have renounced further probation, and accordingly the Lord Ordinary deals with the competition as with a concluded cause.

"The question is whether the deed, partly written and partly lithographed, bearing to be the will or testament of the late Mr A, is to receive effect, and is to regulate the distribution of his personal means and estate, which amounts to upwards of £23,000. The competition is between the widow of the deceased and the two children surviving of the marriage. If the will receives effect the widow will take one-half of the free estate, and the other half will be *in arbitrio* of the trustees or executors, the children being altogether excluded, or left to betake themselves to their legal claim of legitim.

"Certain objections, chiefly of a technical kind, have been stated to the validity of the will; but the Lord Ordinary does not find it necessary to pronounce any judgment upon these technical objections, because he thinks that the implied revocation of the will by the subsequent birth of the testator's two children is sufficient for the disposal of the whole cause.

"The Lord Ordinary may say, however, that his impression is that the technical objections would not *per se* be fatal to the will. He thinks that although all the formal clauses of the deed are lithographed it is in substance and in law the holograph deed of the late Mr A. The essentials of the deed are in his handwriting, and in accordance with various decisions the fact that the holograph of the maker is filled into a printed form does not destroy the holograph character of the deed. The name of the granter, the names of the trustees, and the effective words disposing of the whole estate, are all in the handwriting of the testator himself.

"If this view be correct, the objections to the testing of the deed are obviated, and as a holograph deed does not require instrumentary witnesses, the objection that Mrs B herself is one of the instrumentary witnesses seems to be sufficiently met.

"The vitiation in the date is also immaterial, for a date is not essential to a will, and the date of actual signing is admitted by the parties.

"In the Lord Ordinary's view the true question in the case is whether the will was revoked by the subsequent birth of the testator's two children, C and D. The Lord Ordinary thinks it was.

"When the will was made the testator had no children. There had been two children of the marriage, but they had died in infancy, and it seems impossible to read the deed without feeling that it is the will of a person who did not expect to leave children, or rather that it is a will made for the case of the testator dying without leaving children. But this is just the condition *si sine liberis* which is sometimes expressed, but which the law holds to be always implied in testamentary writings like the present, and the Lord Ordinary reads the will just as if it had contained the words, 'in the event of my dying without leaving lawful issue.'

"C, the testator's eldest daughter, was born on 24th January 1871, being two years after the date of the will, and his second daughter, D, was born on 8th November 1872, and the Lord Ordinary does not doubt that the birth of these children, if the testator had not died immediately or soon thereafter, would operate, in the absence of contrary evidence, as an implied revocation of the will. The cases will be found cited in Mr M'Laren's book on Wills, vol. I., p. 257 and subsequent pages. The leading case is that of *Colquhoun* v. *Campbell*, 5 June 1829, 7 S. 709, but the principle has been recognised in many other cases.

"The real difficulty in the present case arises from the fact that the testator survived the birth of his children a considerable time, and did not take any steps to alter his testament, for it seems to be the law that the presumption of revocation may be overcome by facts and circumstances showing that the testator, notwithstanding the existence of children, still intended the testament to take effect.

"The Lord Ordinary thinks, however, that nothing but the very clearest evidence will overcome the presumption of revocation. To use the words of Lord Glenlee, it must be made "as plain as a pikestaff that the testator did not intend the succession to go to the child." This has not been shown and cannot be shown in the present case. The testator was a comparatively young man, only 44 years of age when he died. He was in vigorous health, and although complaining for a week or two before his death, he was able to attend to business, and was actually out at two public meetings the very day upon which he died. Persons like the testator, and indeed other persons also, are very apt to delay adjusting their *mortis causa* settlements thinking that there is no hurry. The mere lapse of time *per se* goes for very little unless it is coupled with circumstances indicating an intention that the old settlement should stand. But the interval of survivance in the present case is comparatively short. Mr A only survived the birth of his daughter D about four months, and, so far from there being any indication of his intending the settlement of 1869 to stand, it is admitted that three months before his death he expressed his intention of making another settlement. His sudden death, apparently with only a few hours' warning, prevented this intention from being carried out, but the Lord Ordinary thinks it clear that there is no evidence whatever, but the reverse, that he intended to disinherit both his children.

"The raisers are of course entitled to expenses, but in the circumstances the Lord Ordinary thinks that the claimants should each bear their own expenses. The present judgment was necessary for the exoneration of all concerned."

This interlocutor has since become final.

Counsel for Pursuers and for the Widow—Trayner. Agent—P. S. Beveridge, S.S.C.

Counsel for Children—J. C. Lorimer. Agents—Gibson & Ferguson, W.S.

Friday, January 23.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

PADWICK *v* STEWART.

Entail—Res judicata—*Record of Entails.*

An heir of entail in possession of an entailed estate entered into a personal contract of sale of the estate with a purchaser, subject to the following conditions—that the price should not be payable or entry given until the seller's death, and then only "at the first term of Whitsunday or Martinmas six months after the validity of the will hereby made shall be finally and irreversibly ascertained and determined." The price was not to be held payable until the purchaser had obtained a valid title by adjudication or otherwise, and power was reserved to the seller to put an end to the whole transaction in certain circumstances. In an action of adjudication in implement by the purchaser against the succeeding heir of entail, *Held* (1) that a judgment in the Outer House (which had not been reclaimed against) affirming the validity of the entail,