Tuesday, November 18.

SECOND DIVISION.

MUNRO AND OTHERS (MUNRO'S EXECUTORS) *v.* MUNRO AND OTHERS.

Succession—Testate Succession—Revocation by Marriage and Birth of Child to Testator—Conditio si testator sine liberis decesserit—Pencil Alterations.

A testator executed a holograph will, by which he left his whole estate to his parents, failing whom to a nephew. He afterwards married and had issue. He died survived by his wife and two children, and also by his parents. In his repositories was found the will with the word "parents" stroked out and the word "wife" substituted, and the word "nephew" stroked out and the word "daughter" substituted, both alterations being in pencil. *Held* that the will was destroyed by the testator's subsequent marriage and birth of children, and that his free estate fell into intestacy.

By a holograph settlement or will dated 5th February 1884, William Munro, banker, Dunoon, who was then unmarried, made over his whole means and estate, heritable and moveable, to his parents should they survive him, and failing them to his nephew, but under burden of certain legacies.

Upon 17th June 1885 Mr Munro married Janet Dawson. They previously executed a marriage-contract dated 16th June 1885. By this contract Munro, *inter alia*, made over the sum of £2000 to trustees to be held by them for the alimentary liferent use of the spouses and the survivor of them, and upon the death of the survivor for the issue of the marriage *per stirpes* in such shares and proportions as either of the spouses should appoint by any writing under their hands, and failing any such direction, then it was to be held and applied for the children of the marriage in equal shares, and their respective issue *per stirpes*. On her part Mrs Munro contributed £3000, which was to be held by the same trustees and treated in the same way as Mr Munro's funds. Mr Munro died upon 27th September 1889 survived by his wife and two daughters. A posthumous son was born on 3rd March 1890. He was also survived by his parents and his nephew. The holograph settlement was found in Mr Munro's repositories after his death, put up together with certain jottings or memoranda holograph of Mr Munro, and showing the state of his affairs as at 31st December in each of the years 1883, 1884, 1885, 1886, and 1887. Each of these memoranda was headed—"State of William Munro's affairs" as at its date, and contained a list of his various investments at that date. No similar state of affairs for the year 1888 was found. The holograph settlement, which was written in ink, had the following pencil alterations made thereon — "The word "parents" was deleted, and the word "wife" was written below it; the word "they" was deleted, and the word "she" was written in between it and the next word in the line ("survive"), and the word "nephew" was deleted, and the word "daughter" was written below it. These alterations were in Mr Munro's handwriting. They were made in pencil only; they were not initialed or signed, and no date was attached to them. Mr Munro left considerable means beyond the sum settled by the marriage-contract.

The parents, with consent of the nephew, by a trust-disposition dated 7th November 1889, assigned to trustees for behoof of Mrs Munro and her children any interest they had under the said holograph testament under burden of payment of an annuity of £40 sterling formerly paid by Mr Munro to them.

In these circumstances a special case was presented to the Court.

The first parties were the executors of Mr Munro. The second parties were the trustees under the deed executed by his parents. The third party was the widow, the fourth party the legatees, and the fifth party were the tutors and curators of the children.

The second parties maintained that the holograph settlement was effectual as a will in favour of Mr Munro's parents under burden of payment of the debts and legacies therein mentioned. The third party maintained that the holograph settlement was, in respect of the pencil alterations thereon, effectual as a will in her favour under burden of payment of the debts and legacies therein mentioned. The fourth parties maintained that the holograph settlement effectually bequeathed to them the respective legacies. The fifth parties maintained that the holograph settlement must be held as revoked by the subsequent birth of children by the operation of the *conditio si testator sine liberis decesserit*.

The questions for the Court were—"(1) Is the said holograph settlement effectual as a will in favour of Mr Munro's parents under burden of payment of the debts and legacies therein mentioned? (2) Is the said holograph settlement, in respect of the pencil alterations made thereon by Mr Munro, effectual as a will in favour of the third party under burden of the payment of the debts and legacies therein mentioned? (3) [The third question related to the legacies]. (4) Was the said holograph settlement revoked by the subsequent birth of children to Mr Munro by the operation of the *conditio si testator sine liberis decesserit*, and does the whole of his means and estate, subject to the obligations undertaken by him in the said antenuptial contract of marriage belong exclusively to his three children as heirs *ab intestato?*"

The second parties argued—The will was effectual in favour of Mr Munro's parents, under burden of payment of the debts and legacies mentioned therein. The pencil additions and alterations made upon this settlement did not change its character, and must be disregarded altogether—*Patti-*

son's Trustees v. *University of Edinburgh*, November 9, 1888, 16 R. 73; *Petticrew's Trustees* v. *Petticrew*, December 6, 1884, 12 R. 249; *Brown* v. *Maxwell's Trustees*, May 21, 1884, 11 R. 821. The pencil additions must be held to be deliberative only—*Lamont* v. *Magistrates of Glasgow*, March 10, 1887, 14 R. 603. The law in England was to the same effect—Williamson on Executors (8th ed.), 211. The *conditio si testator sine liberis decesserit* did not apply here. The general presumption that this *conditio* was to be read into a will giving a stranger an estate, if the testator should afterwards marry and have children, could be rebutted by the facts, viz.—(1) The will did not deal with the whole estate of the deceased but only part of it; (2) it was also plain that the testator had not forgotten the existence of the will, because he had actually made alterations on it which, although they could not affect the validity of the will, showed that he had remembered the existence of his wife and children; (3) the testator had survived the birth of his children for some time, but had not destroyed the will. All these circumstances showed that the *conditio* did not apply—Bankton, i. 227; Ersk. Inst. iii., 8, 46; *Colquhoun* v. *Campbell*, June 5, 1829. 7 S. 709.

The third party argued—The will was valid and effectual as altered for her benefit. The pencil alterations made by the testator were good, as the Court always endeavoured to arrive at the true meaning of a will, and effect had often been given to wills in a much rougher state than this. The will did not fall under the *conditio si sine liberis* for the reasons already given in the second parties' argument.

The tutors of the children argued—The pencil alterations destroyed the deed as a testamentary document, but were ineffectual as a will in the third party's favour. At most they were only deliberative, and the will in the altered circumstances was a mere draft. Apart from the question of the pencil alterations the will was destroyed by the operation of the *conditio si sine liberis*. The course of the decisions in later times had been that the birth of a child absolutely destroyed a will made when there were no children of the testator—*Dobie's Tr.* v. *Pritchard*, Oct. 19, 1887, 15 R. 2. Unless the testator did anything very decided to show that he intended that the birth of a child should make no difference, the *conditio* applied, and here the testator had done nothing. The result was that the estate fell into intestacy—*A's Executors v. B. and Others*, Feb. 1874, 11 S.L.R. 259.

At advising—

LORD JUSTICE-CLERK—The late Mr Munro, banker in Dunoon, wrote a holograph will, dated 5th February 1884. At that time Mr Munro was a bachelor, and by this will he made over his whole means and estate, heritable and moveable, to his parents should they survive him, and failing them to his nephew, under the burden of certain payments and legacies. Mr Munro afterwards married, and he took this will and with a pencil scored out the word "parents" and substituted "wife," and the word "nephew" and substituted "daughter." At the time he did this it is obvious that only one child was born of the marriage. The question is, whether this will is to stand as it now is, or whether it is to stand as it was originally drawn, or whether it falls altogether?

It is quite clear that the will came to an end as it was originally drawn upon Munro marrying and leaving a widow and children. Well, the next question is, whether the old will having come to an end, the changes made in pencil by Munro upon it constituted the document as a new will? and I am of opinion that it did not. I do not think that it is necessary for us to enter into the question whether in every circumstance the insertion of pencil alterations must be held to vitiate the whole deed, but taking the whole circumstances of this case into account, my impression is that Mr Munro took this old will, which he must have known to be valueless, and used it as a draft for a new will to be executed afterwards. Mr Munro was a solicitor and notary-public, and I do not think that he intended to set up this will, which he must have known to be useless, as the real settlement of his affairs. In my opinion, therefore, Mr Munro did not leave any will to govern the division of his property, and therefore it will go according to the rules of the law of the land. The last section of the fourth question for the consideration of the Court will be answered in the affirmative.

LORDS YOUNG, RUTHERFURD CLARK, and TRAYNER concurred.

Counsel for the First, Second, and Fourth Parties—MacWatt. Agents—Cumming & Duff, S.S.C.

Counsel for the Third Party—Sym. Agents—Cumming & Duff, S.S.C.

Counsel for the Fifth Party—Younger. Agents—Cumming & Duff, S.S.C.

Tuesday, November 18.

SECOND DIVISION.

[Lord Trayner, Ordinary.

THE EARL OF WEMYSS AND MARCH AND OTHERS *v.* THE EARL OF ZETLAND AND OTHERS.

Salmon Fishing—Fixed Engine—Net.

A net of about 120 or 300 yards long and from 12 to 15 feet deep was used for taking salmon in the estuary of a river. The net was paid out from a boat rowed across the stream, and was afterwards kept upright by floats on the top and a heavy rope at the bottom. The net was stretched straight across the channel where the fish ran, at slack water, shortly before the tide began to ebb or flow, and was left to float entirely un-