to adopt the formula of the Roman law and say "Whatever child may be born to me hereafter I disinherit him."

Now, the present case appears to me to fall nearest to the case of a will made after marriage and the birth of one child, because although no child had been born of this marriage and some years had elapsed without the expectation of issue, there can be no doubt that the lady was looking forward to the birth of a child. That had been the cause of much anxiety to her in consequence of her delicate state of health. I wish to guard myself against being supposed to proceed upon the view that a child *in utero* is to be considered in the same position as if already born, because we know on high authority that this is a rule which only exists for the purpose of enabling the child to take benefit by the will. But what we are now considering is not whether the child is *in utero* or is born, because there is nothing given to the child. What we are considering is the state of the mind of the lady who made this will which is said to be revoked; and I cannot see any difference between the state of her mind and knowledge of the subject at the time when she came to consider her will and to add an inventory that was to make it complete, and her state of mind after the birth of the child if she had survived. She was dealing with her estate at a time when she was in full knowledge that she would in all probability give birth to a child, and in these circumstances and with the provisions of her will brought under her notice—for she was considering her will at the time — she made what was in itself a very unimportant addition to it, but which becomes very important with reference to its legal effect, because it amounts to a republication of the will as of the date when the addition was made to it.

In short, I think it must be taken as if the testatrix had re-executed her will at the time when on the advice of her lawyer she signed an inventory relative to one of its provisions.

I agree with Lord Adam that this is a case where the operation of the rule is plainly excluded, and upon this ground—the double condition that the child was amply provided for in the knowledge of her mother, and that in the personal knowledge and the expectation of the birth of a child, and having an opportunity of revising her will she allowed it to stand unaltered.

LORD KINNEAR — I agree with Lord Adam.

The LORD PRESIDENT was absent.

The Court affirmed the first alternative of the question.

Counsel for First and Fifth Parties—J. B. Balfour Q.C. — Dove Wilson. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for Second, Third, and Fourth Parties—The Dean of Faculty (Asher, Q.C.) —Rankine, Q.C. — Ferguson. Agents — Auld & Macdonald, W.S.

Wednesday, June 28.

FIRST DIVISION.

[Sheriff of Lanarkshire.

RAE *v.* FRASER.

Process—Stated Case—Amendment—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37)—*A.S. June* 3, 1898, *sec.* 9 (*g*).

The Court will not send back a case to the Sheriff for amendment under the Act of Sederunt, section 9 (*g*), in order to enable either party to raise a new point of law as to which the Sheriff has given no determination, and which, from anything that appears, has not been argued before him.

This was a case stated by the Sheriff-Substitute of Lanarkshire at Glasgow (SPENS) in an arbitration under the Workmen's Compensation Act 1897, in which Janet Rae sought payment from A. Fraser of £300 in respect of the death of her husband through an accident while in Mr Fraser's employment.

The facts established by the proof were thus stated by the Sheriff-Substitute:—"(1) The appellant is the widow of John Rae, who was killed on 10th February 1899, while engaged along with James Golding and Andrew Fraser junior, all in the respondent's employment, in lifting a certain air compresser, then lying on the quay at Glasgow, by means of a hydraulic jack. (2) The air compresser in question had been used in connection with the new bridge across the Clyde at Jamaica Street, but having served its purpose it had been, *inter alia*, sold. (3) The respondent's contract was with the purchaser, and it merely was to lift the air compresser from where it was, lying resting upon two blocks sufficiently high to enable a lorry to be placed underneath, and to place it upon the lorry. (4) Somehow the jack got off the plumb, and the compresser in consequence shifted its position and came down upon the said deceased John Rae, crushing him to death.

"In these circumstances," the Sheriff-Substitute continued, "I found that the accident is not one for which compensation falls to be awarded under the Workmen's Compensation Act. I therefore dismissed the claim as I was of opinion that the contract which the respondent had undertaken, and which was simply to lift the air compresser sufficiently high to put a lorry under it, and to load it on the lorry, did not bring the respondent within the definition of 'undertaker,' nor did his contract fall within the definition of 'engineering work' in section 7 (2) of the Workmen's Compensation Act 1897."

The question of law submitted to the Court was as follows:—"Whether the word 'alteration' in the definition of engineering work,' in section 7 of the said Act, means *structural* alteration only, and does not apply to the raising of an air compresser by means of a hydraulic jack so as to place it on a lorry?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 7, sub-sec. (1) enacts—"This Act shall apply only to employment by the undertakers as hereinafter defined on or in or about a railway, factory, mine, quarry, or engineering work." . . . By sub-section (2) Engineering work is defined as "any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used."

By the same sub-section "Factory" is declared to have the same meaning as in the Factory and Workshop Acts 1878 to 1891, "and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act 1895 (58 and 59 Vict. cap. 37).

By Act of Sederunt, 3rd June 1898, sec. 9, sub-sec. (*g*), the Court are empowered, before giving their determination, to send back the case to the Sheriff for amendment.

Argued for the appellant — What the Sheriff had determined here was something more than the limited issue set forth in the question submitted to the Court. He had decided the much broader point "that the accident is not one for which compensation falls to be awarded" under the Act. That finding made it competent for the appellant to argue the question whether the fact that this accident had occurred on a quay, to which the provisions of the Factory Acts had been applied by the Factory Act of 1895, did not bring the present case within the Act of 1897. If it were not open to the appellant at that stage to argue that question, the case should be sent back to the Sheriff for re-statement in terms of the Act of Sederunt. [It is unnecessary to recapitulate the appellant's argument on section 7].

Counsel for the respondent were not called upon.

Lord President—On the question stated by the Sheriff I cannot say that I think there is room for argument. The raising of an air presser does not alter it. Accordingly, the Sheriff, upon the plainest of grounds, seems to have decided rightly in holding that there was no alteration in the sense of the Act.

Then Mr Hunter says, "That may be, but there was another question which was not argued before the Sheriff, which I should like to argue, and I make use of this stated case on one specific question in order to introduce to your notice another point which I omitted to state to the Sheriff, and which I should like an opportunity of stating to the Sheriff." What right have we to make use of a case stated on this specific question in order to have a hearing before the Sheriff of a point omitted before the Sheriff? The condition on which these cases are stated is that the Sheriff has to determine the case summarily, and then to state the question which has been argued to him and decided by him, for the consideration of this Court. To that question we are confined. We may send the case down to the Sheriff in order to have a clearer statement of that question, or if the case be obscure, we may require him to re-state it, but that does not authorise us to ask for a statement of another question of law, or require him to have a rehearing. I am therefore clearly of opinion that we must answer the latter part of the question in the negative and do nothing more, for the Sheriff has disposed of the case in accordance with what we regard as a right determination of the question of law.

Lord Adam concurred.

Lord M'Laren—On the merits of the question raised by the case I think there is really no room for two opinions. The 7th section, which describes the application of the Act, confines the right of compensation to employment as afterwards defined on, in, or about, *inter alia*, a railway, factory, or engineering work. As regards a railway or factory we have a definition of the thing but not of the employment, but when we come to the definition of engineering work we find that it also includes a definition of the employment, because it must be on "work of construction, alteration, or repair" of a railway, harbour, dock, canal, or sewer, or any other "work for the construction, altera tion, or repair" of which mechanical power is used. It is quite plain that the removal of an engineering tool which had done its work and been sold is not a work of construction, alteration, or repair.

I also agree that there is no occasion for a remit to the Sheriff with a view to the case being amended. An amendment must be a variation on the questions sent to us, or the introduction of others consequential upon them. The purpose of the proposed amendment is to state a question entirely independent of that in the case, and on which the Sheriff, so far as we know, may not have formed an opinion. I am clearly of opinion that we have no power to remit to the Sheriff for any such purpose as I have described.

Lord Kinnear—I agree with your Lordship.

The Court answered the latter part of the question in the negative.

Counsel for the Appellant—Guy—Hunter. Agent—Henry Robertson, S.S.C.

Counsel for the Respondent—Kennedy—Glegg. Agents — Macpherson & Mackay, S.S.C.