LORD YOUNG—I am not very willing to assent to the general proposition that a will is revoked by the birth of a child. Of course that supposed rule of law is applicable only to cases in which the testator was a bachelor when he made his will, or at least was childless. I am not prepared to say that in every case the birth of a child revokes a will made prior to its birth.

I think the circumstances of the particular case must always be attended to, and what the Court has to consider is whether in the circumstances they are satisfied that the testator could not have intended his will to operate in the event of his having a child. I think the circumstances disclosed here, as stated in the case, certainly entitle us to declare judicially that the testator did not intend this will to operate.

In the first place the will is a mere provision to the testator's wife; it takes notice of nothing else but that. I should say that at the time when it was executed, immediately before his marriage, the testator only intended to provide for his wife in case any calamity should carry him off before he knew the state of his affairs and his family.

In the second place, by the terms of the destination of certain heritable property to which Mr Rankin succeeded, his wife was given the liferent of a residence—a very proper provision for a wife. And in the manner stated in the minute which was put in, which we were asked to consider as part of the case, Mr Rankin made provision for his wife in terms which show that he had then no intention that the will he had made before his marriage should have effect, for thereby he had given all his personal estate to his wife. In assigning the policies of assurance referred to in the minute he expressly says, "Seeing that I have not yet made any marriage provision for my wife, and with the view of making such provision." I think in these circumstances we may reasonably conclude that he had not the existence of his will in his mind at all, especially in view of the fact, which is also stated, that he was very ill for a considerable period before his death, and that he died at an age when most men do not feel called upon to make a settlement of their estate. Therefore in the circumstances I am disposed to apply the rule as to the birth of a child by answering the first question in the affirmative, but I would rather not answer it as put, but by finding that the will was not intended in the circumstances to receive effect.

LORD TRAYNER—I concur in the opinion delivered by Lord M'Laren in the case of *M'Kie*, and the decision in that case, I think, rules the decision of the question before us, and I am therefore prepared to answer the first question in the special case in the affirmative.

LORD MONCREIFF was absent.

The Court answered the first question in the affirmative.

Counsel for the First Party—Guthrie, K.C.—Hunter. Agent—W. B. Rankin, W.S.

Counsel for the Second Party—Dundas, K.C. — Horne. Agents — Dalgleish & Dobbie, W.S.

Wednesday, July 9.

SECOND DIVISION.

[Sheriff-Substitute at Paisley.

DUNN *v.* CUNINGHAME.

Process—Appeal for Jury Trial—Remit to Sheriff—Questions of Property and Right-of-Way.

In an action of damages for the death of a son, the pursuer averred that the deceased, a boy aged eleven years, was playing on a public roadway which ran close to a mill-lade, the property of the defender, when owing to the lade being unfenced the boy fell into the water and was drowned. She further averred that the said road was at the place in question also the property of the defender, and that the mill-lade being on a public road was frequented by the public and by numbers of children. The defender admitted that "the lade and private path in question" were situate on his property. The Sheriff allowed a proof. The pursuer appealed for jury trial. The Court, in respect that the case involved questions of property, and as to the existence of a right-of-way, *refused* the appeal and *remitted* the case to the Sheriff for proof.

M'Intosh v. *Commissioners of Lochgelly*, November 31, 1897, 25 R. 32, 35 S.L.R. 50, *doubted, per* Lord Trayner.

This was an action raised in the Sheriff Court at Paisley by Mrs Elizabeth Mullen or Dunn, widow, residing at Crosslee, near Houston, against John Charles Cuninghame, Craigends House, Johnstone, in which she craved decree for payment of £250 as reparation for the death of her son.

The pursuer averred, *inter alia*, as follows:—"(Cond. 2) On or about the 13th day of August 1901, between three and four o'clock afternoon, the pursuer's only child James Shearer Dunn, aged eleven years or thereby, was playing on the roadway which runs from the village of Crosslee to Bridge of Weir at a point opposite Crosslee Mill in said road close to a mill-lade known as Crosslee Mill Lade, the property of the defender, when owing to the said lade being unfenced, unguarded, and unprotected, the said child slipped into the water in said lade and was drowned. The said road from Crosslee to Bridge of Weir aforesaid is at the place in question also the property of the defender. (Cond. 3) The said accident was due to the fault and negligence of the defender, or of those for whom he is responsible, in failing to have said mill-lade, so far as it abuts and forms part of the said roadway, particularly at the place in question, fenced, guarded, or

protected. The said mill-lade being on the road leading from Crosslee to Bridge-of-Weir aforesaid is much frequented by members of the public and others, and particularly by children of tender years. This was or ought to have been well known to the defender. In these circumstances it was the defender's duty, or the duty of those for whom he is responsible, to fence or otherwise protect or guard the said road or said mill-lade so far as it forms part of the said road, particularly at the place in question, where access to said mill-lade is easily obtainable, and particularly in view of the number of children who resorted there, and so to render both safe and secure." . . .

The defender denied fault. In his answers he stated as follows—"(Ans. 2) . . . Admitted that the lade and private path in question are situate on the lands of Crosslee belonging to the defender." . . .

The defender pleaded, *inter alia*—"(1) The action is irrelevant. (2) The averments of the pursuer, so far as material, being unfounded in fact, defender is entitled to be assoilzied. (3) The pursuer not having suffered loss, injury, and damage through the fault of the defender, or of those for whom he is responsible, the defender is entitled to be assoilzied with expenses."

By interlocutor dated 6th March 1902 the Sheriff-Substitute (LYELL) held the action relevant and allowed the parties a proof of their averments.

The pursuer having appealed to the Court of Session for jury trial, the defender objected to the relevancy, and argued (1) that the action fell to be dismissed as irrelevant; (2) that in the event of the Court holding the action relevant the case should be sent to proof and not to a jury. In support of his second contention he argued that as the case involved questions as to the ownership of heritable property, and as to the existence of a public right-of-way along the mill-lade in question it was more appropriate for inquiry by means of a proof than for jury trial. He cited the following authorities:—*Pollock* v. *Mair*, January 10, 1901, 3 F. 332, 38 S.L.R. 250; *Bethune* v. *Denham*, March 20, 1886, 13 R. 882, 23 S.L.R. 456; *Mitchell* v. *Sutherland*, January 23, 1886, 13 R. 882 (note), 23 S.L.R. 317; *Tosh* v. *Ferguson*, October 27, 1896, 24 R. 54, 34 S.L.R. 46.

The Court, holding that the action was relevant, called for a reply only as to the method of inquiry.

Argued for the pursuer—This was a case of personal injury, and such cases were peculiarly appropriate for jury trial—*M'Intosh* v. *Commissioners of Lochgelly*, November 3, 1897, 25 R. 32, 35 S.L.R. 50. He had a right under statute to appeal for jury trial. The cases cited by the defender were distinguishable from the present. The case of *Bethune* was before the Court in *M'Intosh* and was fully considered; the case of *Tosh* was really an action of accounting; the case of *Pollock* involved the consideration of local customs, and the bulk of the evidence in that case was that of local witnesses.

LORD JUSTICE-CLERK—I think that this case is within the category of cases in regard to which it is more in accordance with recent practice to allow proof without a jury, particularly where the right to the ownership of heritable property is more or less involved. Formerly such cases were more commonly sent to trial before a jury, but the result of that was generally found to be very unsatisfactory. In the present case I think that the necessary inquiry will be conducted more satisfactorily if the case is sent back to the Sheriff for a proof.

LORD YOUNG—It was certainly a question at one time whether, when appeal was made under the statute with a view to jury trial, it was competent for the Court to remit to the Sheriff or to order proof here, but I think it has now been settled that it is competent, and as I understand both your Lordships to be of opinion that our discretion should be exercised by making a remit to the Sheriff I shall not interfere although I should have been disposed to send the case to trial.

LORD TRAYNER—The parties will get just as expeditious and satisfactory a decision from the Sheriff as they would get if the case were tried here with a jury. I think that the case is one suitable for trial before a sheriff. For my own part I am not disposed to acquiesce in the reasoning which led to the decision in the case of *M'Intosh*.

LORD MONCREIFF was absent.

The Court dismissed the appeal, affirmed the interlocutor of the Sheriff-Substitute, and remitted to him to proceed, and found the pursuer entitled to expenses since 6th March 1902, the date of the interlocutor appealed against.

Counsel for the Pursuer and Appellant—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defender and Respondent—Dundas, K.C.—Pitman. Agents—Forrester & Davidson, W.S.

Thursday, July 10.

FIRST DIVISION.

THE GOVERNORS OF THE GLASGOW AND WEST OF SCOTLAND TECHNICAL COLLEGE, PETITIONERS.

Educational Trust—Scheme—Educational Endowment Commissioners—Alteration of Scheme—Power to Borrow—Retiring Allowances to Officials and Employees.

Under a scheme framed by the Educational Endowment Commissioners the governors of an endowment were given power to borrow certain limited sums for repairing and adding to existing buildings. They were also empowered to grant—with the consent of