to the effect that a pauper who had not acquired a settlement and who was born in England might be sent back to England, or an Irishman or Irishwoman might be sent back to Ireland, and I know no statute where you can find authority to transport a native-born Scotsman or Scotswoman to England, and I agree with your Lordship and the judgment pronounced by the Sheriff-Substitute.

LORD M'LAREN—In considering the 77th section of the Poor Law Act of 1845 it would seem that the Legislature while recognising that the conditions of an acquired settlement varied in different parts of the kingdom, yet the laws of all parts of the kingdom agreed in this, that a poor person who had never acquired a settlement, had a settlement in his or her place of birth, and the power of removal to another part of the kingdom is limited to the case of such persons. If we consider Scotland as the country from which a pauper is to be removed then the power is limited to the case of a pauper who has not acquired a settlement in Scotland and who has a birth settlement in England or Ireland or the Isle of Man. In the ordinary sense of the language used in the papers in this case Mrs Bartlett certainly had not a birth settlement in England, because it is said that her parents were Scottish and that she was born in Boulogne in France. Now, the mere statement of these facts appears to me to dispose of any argument that may be founded by the petitioner on the Act of 1845.

Then when we come to the extending clause of the Act of 1862 I do not see that the fundamental condition is in any way varied except in one particular case which obviously will not cover the present case. The hypothesis of the Act of 1862 is that the pauper to be extradited from Scotland is born in England or Ireland, and then the Act makes certain provisions with regard to the particular part of England or Ireland to which the pauper is to be removed, with the view of preventing injustice being done to those parishes which are nearest to the country of deportation. The only change in regard to birth domicile which is made by the Act of 1862 is that where the head of the family is to be removed from Scotland to England such of his children as have been maintained by a Scottish parish may be removed along with him. Now if Mr Bartlett were in Scotland and were being maintained by the parish of New Monkland, then he might be removed, and his wife might be removed with him irrespective of her birth. But as Mr Bartlett is apparently a person self-supporting, and at all events living in Whitechapel, it is impossible to say that that particular provision applies, and apparently it is the only exception to the rule that to warrant the removal the pauper must have been born in some part of the United Kingdom. I am therefore of opinion that the Sheriff-Substitute has come to a sound decision in refusing the prayer of the application.

LORD KINNEAR—I also think that the Sheriff-Substitute's judgment is quite right.

The Court refused the appeal.

Counsel for the Petitioner and Appellant—A. O. Deas. Agent—A. P. Nimmo, W.S.

Thursday, June 18.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

CROW *v.* CATHRO.

Succession — Testament — Revocation — Implied Revocation — Conditio si testator sine liberis decesserit—Partial Revocation—Implied Partial Revocation.

Where the inference of revocation derivable from the subsequent birth of a child to the testator is held to be applicable it can only apply to the effect of revoking the testament *in toto*, and it is not admissible to hold that the testament has been only partially revoked, leaving standing certain of its provisions.

A derived the greater part of his property from the will of his first wife, who died childless. He promised her on her deathbed to make some provision for her sister. Within a month of her death he made a will disposing of his whole property and leaving £500, subsequently by codicil increased to £800, to his wife's sister. He also informed the sister that he had made provision for her in his will. Two years after his first wife's death A married again and thus legitimated a child which his second wife had borne to him three weeks before the marriage. After the birth of the child A had spoken to a lawyer about getting him to make alterations on his will. Within a week of his marriage A died.

Held that the will was revoked by the subsequent birth and legitimation of the child, and that it was not admissible to hold that it had only been partially revoked so as to leave standing the bequest to the first wife's sister.

Obligation—Trust—Promise by Testamentary Disponee to Testator at Testator's Deathbed.

A, who derived the greater part of his property from his first wife under her will, had promised her at her deathbed that he would make provision for her sister by his will, and he did so, but he ultimately was held to have died intestate through his will being revoked owing to the subsequent birth of a child by a second marriage. *Held* that the promise made to the first wife did not create any obligation in favour of her sister by way of trust or otherwise which a Court of Law could enforce against his representatives.

In October 1902 Mrs Jeanette Smith or Crow, widow and executrix-dative *qua* relict of the late David Crow, and David Smith Crow, the only child of the said

David Crow, and Mrs Jeanette Smith or Crow as tutor and administrator-in-law to her said pupil child, raised an action against the trustees and executors acting under a trust-disposition and settlement executed by the said David Crow, dated 24th March 1900, with relative codicils, dated respectively 9th, 11th, and 13th July 1900, and 1st March 1902, and also against Mrs Alison Thomson or Cathro and others, the whole beneficiaries under the said trust-disposition and settlement and codicils. The action concluded for declarator (1) that the said trust-disposition and settlement and codicils had been revoked by the birth of the pursuer David Smith Crow on 31st March 1902, the marriage of the pursuer Mrs Jeanette Smith or Crow to the said deceased David Crow on 21st April 1902, and the consequent legitimation of the child David Smith Crow; and (2) that the whole means and estate, heritable and moveable, which belonged to the deceased David Crow at the time of his death now belonged to the pursuers for their respective rights and interests as his sole legal representatives *ab intestato*.

The only defender who lodged defences was Mrs Alison Thomson or Cathro, to whom a legacy of £800 and sundry small articles had been bequeathed by Mr Crow's trust settlement. She was a sister of Mr Crow's first wife, Mrs Elizabeth Thomson or Crow. Her defence was founded on the fact that Mr Crow had made the bequest to her in fulfilment of an undertaking to his first wife on her deathbed.

A proof was led.

The following statement of the facts is in substance taken from the opinion of the Lord Ordinary (STORMONTH DARLING):—Mr Crow died on 28th April 1902, leaving estate worth about £4000. He had been twice married. His first wife, Mrs Elizabeth Thomson or Crow, from whose will he derived the greater part of his property, died childless in March 1900. Shortly before her death she called him to her bedside and expressed regret that she had not been spared to go to her agent in Dundee and make some provision for her sister Mrs Cathro. He at once said 'Dont let that trouble you, I will make that all right," and knelt down and said he hoped he would have strength to go to Edinburgh to fulfil the promise he had made. On 24th March 1900 he executed the trust-disposition and settlement referred to in the summons, and he added codicils on 9th, 11th, and 13th July 1900, and 1st March 1902. By these he disposed of his whole estate, giving a legacy of £800 and a number of small articles to Mrs Cathro, other legacies to members of Mrs Cathro's family, to other persons, and the residue to three hospitals in Dundee. On two occasions Mr Crow called on Mrs Cathro and told her that he had looked after her in his will, and on the second of these, in April 1901, he mentioned that what he had left her would bring in about £30 a-year. On 31st March 1902 the pursuer, who had been for some time in attendance on Mr Crow as a professional nurse, bore a child in his house. He admitted the paternity of the child. He married the pursuer by declaration before witnesses on 21st April and on 22nd April the marriage was registered on a warrant by one of the Sheriff-Substitutes of the county of Forfar. On 28th April Mr Crow died of apoplexy. On 1st April he had called on a law-agent and talked of getting him to make alterations on his settlement, but nothing further had been done.

On 18th February 1903 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor;—"Finds and declares that the trust-disposition and settlement and codicils of the deceased David Crow mentioned in the summons have been rendered inoperative by the birth of the pursuer David Smith Crow on 31st March 1902, the marriage of the pursuer Mrs Jeanette Smith or Crow to the said deceased David Crow on 21st April 1902, and the consequent legitimation of the said David Smith Crow, except as regards the bequests contained in the said trust-disposition and settlement and codicils in favour of the compearing defender Mrs Alison Thomson or Cathro: Finds it unnecessary to deal with the remaining declaratory conclusions of the summons, and decerns," &c.

Opinion.—"According to the law of Scotland the question whether the testament of a person is revoked by the subsequent birth of a child is one wholly dependent 'upon the circumstances of the case.' So said Lord Watson in *Hughes* v. *Edwards*, L.R. (1892) at p. 591, and this statement of the law has been adopted and acted upon by the First Division in *Millar's Trustees*, 20 R. 1040, and *Stuart Gordon*, 1 F. 1105

[*His Lordship then stated the facts ut supra.*]

"In these circumstances it cannot be maintained that the will is to stand in its entirety. Indeed, the action is not defended by the residuary legatees or by any beneficiary except Mrs Cathro. Not only the birth of the child but the marriage were subsequent to its date. Accordingly there was no provision for the child either in the will itself or in any other instrument. And it disposed of Mr Crow's whole estate.

"But there remains the question whether the will, though rendered inoperative by presumption of law as regards its main provisions, may not be held good as regards a special legacy in the very peculiar circumstances of this case. I am alive to the difficulty of holding that a testament shall be accepted in part as expressing the will of the testator at the moment of his death, and rejected as regards all the rest. Every case on this branch of the law, so far as I know, has either held the will good altogether or bad altogether. But there has been no case at all resembling the present, and where a rule of law so far departs from ordinary and established principle as to disregard the regular expression of a man's last will, merely on a presumption of its own that he cannot be held to have continued to mean what he had left as the only record of his meaning, I confess I see no anomaly in inquiring whether the presumption is necessarily destructive of the whole

instrument. I agree that no court of law can attempt to make a will for a testator merely on its own view of what would have been just for him to provide. But where he has made his own will, and the question arises whether, owing to a material alteration of circumstances, it is still to receive effect, a court is bound, I think, to take a complete survey of the situation, to consider every clause in the will, and every relevant circumstance connected with the testator, in order to discover, first, whether the will is to stand as a whole, and if not, whether there is any separable part of it to which the legal presumption is inapplicable. All the cases in which the legal presumption has been held to have been overcome—from *Yula* v. *Yule* in 1758 (M. 6400) down to such recent cases as *Adamson's Trustees*, 18 R. 1133, and the two cases of *Millar* and *Stuart Gordon*, *supra cit.*—while differing widely in their circumstances from the present case, have yet had one feature in common with it. They have, it is true, proceeded on the view, either that the testator when he made his will had the possibility of a child being born in contemplation, or that after the birth of the child he deliberately forbore to alter his will. But in every one of them this conclusion has been rendered possible by the particular disposition of his affairs which was in question being of such a nature as to be quite consistent with his natural obligation to make suitable provision for his child.

"Now, in the view which I take of this case, it is not possible consistently with the authorities to hold that the testator desired the will to stand as regulating the distribution of his whole estate. When he made it he had no expectation of a child. The evidence is that he did not know it was coming, and after the birth, or rather after the subsequent marriage, the time was too short to allow of any conclusive inference being drawn from his omission to alter. It may be unreasonable to suppose that he desired charities and strangers, who had no special claim on him, to oust his own child, even a child born under the exceptional circumstances in which this child was born. But these considerations seem to me entirely inapplicable to the special legacy in favour of Mrs Cathro. I cannot believe that if Mr Crow had been making a new settlement he would have desired for a moment to break the solemn promise which he had made to his first wife on her deathbed, particularly as it was to her affection and trust in him that he owed nearly all that he had. I am surprised that the pursuer has not voluntarily conceded Mrs Cathro's legacy, if only in justice to her husband's memory. But since it is left to the law to settle what right feeling ought to have determined for itself, I am bound to say that I know of no reason why a Court, in weighing (as in this matter it must weigh) the motives and intentions of a dead man, should assume that at the close of his life he would act otherwise than *tanquam bonus vir*. And if Mr Crow is to be credited with the most ordinary notions of honour and good faith, I cannot doubt that he would have left this one legacy standing, child or no child. His obligation to keep his promise to his dying wife lost none of its force by the mere fact of his having a child by another woman. This legacy seems therefore to stand entirely by itself. The other legacies to members of Mrs Cathro's family, and to other relations of his first wife, were no doubt given from a sense that it was just and right so to leave them, and I own to some regret that these also cannot be enforced. But the deathbed promise applied to Mrs Cathro's legacy alone, and it is this circumstance, more than the obvious equity of the bequest itself, and far more than the testator's own assurances given to the defender personally, that leads me to the conclusion that this legacy ought to be treated differently from all the others. In short, I regard the case as entirely exceptional.

"I shall find and declare that the trust-disposition and settlement and codicils of the deceased David Crow, mentioned in the summons, have been rendered inoperative by the birth of the pursuer David Smith Crow on 31st March 1902, the marriage of the pursuer Mrs Jeanette Smith or Crow to the said deceased David Crow on 21st April 1902, and the consequent legitimation of the said David Smith Crow, except as regards the bequests contained in the said trust deed and codicils in favour of the compearing defender Mrs Alison Thomson or Cathro, and I shall find the said defender entitled to expenses."

The pursuers reclaimed, and argued—The birth and legitimation of the child had the effect of revoking the will *in toto*. In the cases where the presumption in favour of revocation had been held to apply the settlement had been annulled as a whole—*M'Kie's Tutor* v. *M'Kie*, February 16, 1897, 24 R. 526, 34 S.L.R. 399; *Rankin* v. *Rankin's Tutor*, July 9, 1902, 4 F. 979, 39 S.L.R. 753. The judgment of the Lord Ordinary annulling part of the will and upholding part had no authority to support it. The proof showed that the testator had the alteration of his will in contemplation, and there were no facts and circumstances indicating that his intention was that the will should take effect either in whole or in part.

Argued for the defender and respondent —The Lord Ordinary's judgment was sound. Whether the *condilio si testator sine liberis decesserit* revoked a bequest was wholly dependent on the circumstances of the case —opinion of Lord Watson in *Hughes* v. *Edwardes*, July 25, 1892, 19 R. (H.L.) at p. 35, 29 S.L.R. at p. 912 *sub fin.* The presumption of the revocation of the bequest by the birth of the child was an equitable presumption. It should therefore yield to equitable considerations. All these considerations pointed to this bequest standing. The husband's property had come from the first wife, and it was just that he should give part of it to his first wife's sister. Mr Crow had solemnly promised his first wife on deathbed that he would provide for the defender, and the property was left to him on the faith of

that promise. It was thus in effect a case of trust which he was bound to carry out, as he did by this bequest—*Jones* v. *Budley*, 1868, L.R., 3 Ch. Ap., opinion of Lord Chancellor Cairns, p. 363, foot of page; *M'Cormick* v. *Grogan*, 1869, L.R., 4 Eng. and Irish Ap., opinions of Lord Chancellor Hatherley at p. 88, and of Lord Westbury at p. 97. In these circumstances the Court should uphold the bequest.

LORD JUSTICE-CLERK—I think that Mr Gunn has mentioned all that can be said on behalf of the defender. It is, no doubt, a hard case for her. But the question which we have to determine is whether we are able to hold that a particular sum of money was left to this defender by Mr Crow. I am of opinion that we cannot so hold. By the birth of the child as legitimated any will made prior thereto was revoked. The rule of our law is that in such circumstances as we have here the will must be held to be impliedly revoked even if a considerable time has elapsed between the birth of the child and the death of the father without the will being destroyed. If the will is held to be revoked I do not see how any one of its provisions can be held to subsist, or how any sum can be found to be due to the defender.

On the whole matter I am of opinion that the Lord Ordinary's interlocutor is not sound and ought to be reversed.

LORD YOUNG—The view of the Lord Ordinary, and the argument which we have heard in support of it, are both quite intelligible, and the question which we have to consider is whether the law is such as to enable us to give effect to that view.

The first question is—Whether the promise which the deceased Mr Crow made to his wife put any obligation upon him which by the law of Scotland a court of law could enforce? For my own part I see no reason for concluding that it could. I do not think that Mr Crow was put under any obligation enforceable by a court of law.

Mr Crow made a will leaving £800 to Mrs Cathro, and it is probable that he would not have revoked this legacy if circumstances had remained unaltered. But after making his will he married and had a child. Now the law of Scotland in such circumstances is not doubtful. Where a man who is childless makes a will, and thereafter he marries and a child is born to him, he is thereby rendered intestate, unless after he becomes a father he says or does something to show that he considers his former will still good. Now, there is nothing in this case to suggest that Mr Crow ever said or did anything to show that notwithstanding the birth of his child he wished the will to stand. In fact the evidence points the other way, for it shows that his intention was to make a new will. In these circumstances I am of opinion that according to the law, both of this country and of England, the will is inoperative in all respects. I know of no law to support the view of the Lord Ordinary that the will should remain operative in part. I therefore think that the judgment of the Lord Ordinary should be reversed.

LORD TRAYNER—I am of the same opinion. I think that upon the authorities the case is a clear one. Mr Crow executed a will, and afterwards had a son, who was legitimated *per subsequens matrimonium*. Less than a month after his son was born Mr Crow died. There is no doubt that the birth of the child revoked the existing will. Nothing was done subsequently by Mr Crow to show that he desired that will to be treated as his will. On the contrary, it is plain from the evidence that he did not, because before his death he had commenced to make arrangements for changing it. The position of matters therefore was this—Mr Crow executed a will which was revoked by the birth of his son. He did not make another, and therefore he died intestate, and his heirs *ab intestato* are entitled to succeed to his property. I have read the cases of *M'Cormick* and *Jones*, cited by Mr Gunn, but they belong to a different category from the present, and I do not think they have any bearing on the question before us. I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled.

LORD MONCREIFF—This is a peculiarly hard case for the defender, for the deceased undertook to carry out the wishes of his first wife, and from what appears in the evidence there is no doubt that at least at one time he fully intended to do so. But he became the father of a child, and the effect of that in law was to revoke the will which he had made. In order to elide the presumption of revocation it is necessary to prove circumstances showing the intention of the testator that notwithstanding his will should stand. There are no such circumstances in the present case. On the contrary, the testator lived only for a month after the birth of his son, and during that period he announced his intention to make a new will. There is therefore nothing to prevent the application of the general rule. The Lord Ordinary has held that there was partial revocation of the will, but there is no authority for such a decision. In all the cases decided in similar circumstances the will has been either upheld or held revoked *in toto*. It was also suggested on behalf of the defender that the promise made by Mr Crow to his wife was a binding promise of the nature of a trust, so that it could be enforced against his heirs if not against his creditors. I can find no authority for such a proposition, and even if there were, it is difficult to see how such a principle could be worked out in practice owing to the impossibility of ascertaining to what extent the testator would have intended his sister-in-law to benefit under his new will. I think the decision of the Lord Ordinary should be reversed.

The Court recalled the interlocutor reclaimed against, and found and decerned in terms of the conclusions of the summons.

Counsel for the Pursuers and Reclaimers—Wilson, K.C.—M'Clure. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders and Respondents—Campbell, K.C.—Gunn. Agents—Mackay & Young, W.S.

Tuesday, June 9.

SECOND DIVISION.

[Lord Pearson, Ordinary.

MOORE *v.* M'COSH.

Arbitration — Interdict of Arbiter before Decision—Order Claimed ultra vires of Arbiter—Objection to Form of Claim—Claim for Damages.

A claim having been lodged in an arbitration, the respondent, before the arbiter had considered the claim or pronounced any decision thereon, presented a note for interdict against the arbiter proceeding with the reference, on the ground that the form of the claim was such that the arbiter was asked to pronounce an order which would be *ultra vires*. *Held* (*reversing* judgment of Lord Pearson) that although it might be the claim as stated could not be competently sustained, yet, as the matters in question fell *prima facie* under the clause of reference, and the claim might be amended so as to be competent, the objections raised resolved into a question of pleading, which fell primarily to be dealt with by the arbiter; that it could not be assumed that the arbiter would pronounce incompetent orders; and that in these circumstances the complainer was not entitled to have the arbitration interdicted *ab ante*.

A note of suspension and interdict was presented by Alexander George Moore, coalmaster, 142 St Vincent Street, Glasgow, against Andrew Kirkwood M'Cosh, ironmaster, Cairnhill, Airdrie, and James M'Creath, civil and mining engineer, Glasgow, in which the complainer sought to have the respondent M'Cosh interdicted from in any manner of way following up and proceeding with pretended references to the respondent James M'Creath.

The complainer had been tenant under two leases of certain minerals and of a tramway connected therewith which belonged to the respondent M'Cosh.

Each of these leases contained an arbitration clause in the following terms:—"Further, it is hereby specially agreed that in the event of any misunderstandings or disputes arising in regard to the true intent and meaning of these presents, or any of the terms and provisions hereof, or the rights or obligations of either party, or in any way in relation to the premises, all such are hereby referred to the amicable decision and final sentence of . . . James M'Creath, civil and mining engineer in Glasgow, as sole arbiter in the premises, whose decision both parties bind themselves to implement and abide by."

The leases also contained provisions by which the tenant was taken bound (1) to leave a body of solid coal under a farmsteading; (2) to make up and pay all damage occasioned by sits or sinks; and (3) before the expiry of the lease to restore the land occupied by him, and to render the same fit for purposes of agriculture.

After the expiry of the complainer's leases, and after he had finally quitted possession, the respondent M'Cosh made certain claims founded upon the tenant's said obligations under the leases. In 1902 he called upon Mr M'Creath to act as arbiter with regard to these claims. Thereafter he lodged two condescendences and claims referring to the obligations in the two leases respectively.

In his condescendences M'Cosh alleged failure on the part of the tenant to implement his said obligations under the leases.

The claim relating to the lease of the minerals was as follows:—"That the respondent should be ordained to perform the operations necessary to restore the several areas of land before referred to, and to render the same arable, and as suitable and fit for the purposes of agriculture or any other purpose in every respect as they were before being originally interfered with by the respondent or his predecessors, as also to restore the drains and watercourses, to securely and properly fence the open pit shafts, and to make good to the claimant the loss and damage occasioned by sits, and by the working out of the whole coal under and around the farmsteading on Garrockhill; and in the event of the respondent failing to do so within a limited period, to find that the respondent is liable in the cost of such restoration, &c., as the loss and damage occasioned to the claimant's property by the workings of the respondent."

The other claim was to the same effect, and the concluding alternative claim was in identical terms.

In the present note of suspension and interdict the complainer pleaded—"The complainer is entitled to interdict as craved, in respect that (*a*) the questions submitted by the respondent Andrew Kirkwood M'Cosh to the respondent James M'Creath do not fall within the scope of the clauses of reference in the said leases, (*b*) even if they do fall within the scope of the clause of reference, they cannot be insisted on in respect that the complainer had yielded up possession of the subjects let before the claims were made, and (*c*) the claims made by the respondent Andrew Kirkwood M'Cosh are for damages, and the said clauses of reference do not authorise the respondent James M'Creath to assess damages."

The respondent M'Cosh pleaded—"(2) The action should be refused, in respect the matters submitted to the arbiter fall