have been done animo cancellandi; on the face of it it is most carefully done, and has all the appearance of design; the law cannot resort to fanciful suppositions in opposition to such an act; we admit the act to be equivocal, and that the presumption might have been rebutted, but we contend that all attempts to rebut it have failed.

Thus stands the argument on the documentary evidence; but when reference is had to oral testimony to shew that Mrs. Moore did not consider B as cancelled, and that her affection to her son **[445]** Thomas continued unabated till her death, the facts established by evidence utterly refute any such notion.

Mr. French shews his impression of what the deceased's intentions were, by the reasons he gives for not having, according to her request, sent Mr. Butler to her: all the witnesses speak to her displeasure, her dissatisfaction, and her acrimony (these are their expressions) at her son Thomas's marriage; to the bitter reproaches and opprobrious epithets she lavished upon him—to her declarations that she now considered herself as having no relations; and above all, there is clear testimony of the anxiety she expressed to the latest moment of her life, to see Mr. Butler for the avowed purpose of making a new will. It is in vain, in opposition to such stubborn facts, to argue that her letters begin and end with those expressions of affection and endearment, which a mother usually employs when writing to a son; that her anger was only occasional, and that she never seriously came to the resolution of making a new will.

The sum of the argument is that there is clear proof of the cancellation of B—that from the facts and documents before the Court, it is equally clear that if she intended to revoke A she must be presumed to have intended at the same time to revoke B; and though she might not, and probably did not, intend to die intestate, yet it is obvious that neither of the wills before the Court contain the disposition she intended to make of her property; **[446]** whatever that disposition might have been, it would probably have been inofficious. It may be some satisfaction, therefore, to the Court (if it is permitted to courts of justice to feel satisfaction on such subjects), that the only conclusion of law at which it can arrive is to pronounce for an intestacy, since there can be no doubt but that such a sentence will make a more just disposition of the property of this unhappy lady, than she, if she had lived a short time longer, would herself have made of it by will.

Feb. 5.—The Judges Delegates affirmed the sentence of the Prerogative Court of Canterbury; but gave no costs.

[447] JOHNSTON *v.* JOHNSTON. Prerogative Court, Hilary Term, Feb. 19th, March 1st, 1817.—The birth of children, combined with other circumstances, will revoke the will of a married man.

[Applied, *Castle* v. *Torre*, 1837, 2 Moore P. C. 133.]

James Johnston made a will on the 21st of July, 1793; he was then resident in the island of Jamaica, and had two children, a girl and a boy, and his wife was pregnant. By this will he bequeathed "10,000l. to his daughter, 10,000l. to the child of which his wife was ensient, and if more than one, then 10,000l. to each, and the residue of his property to his son." He quitted Jamaica shortly after the making of this will, and returned to England, where he continued to reside till his death, which happened suddenly, on the 3d of July, 1815, at his house in Wimpole-street; he had four children born subsequent to the date of his will; and his personal property at the time of his decease amounted to nearly 300,000l. His widow was possessed of a considerable landed estate in fee.

The will of the 21st of July, 1793, was propounded by the widow, who was one of the executors under it. The three youngest children, who were minors, appeared by their guardian, and prayed an intestacy.

At the time of the deceased's death, the will of the 21st of July, 1793, was in the custody of his agent in Jamaica; but in the pigeon-hole of an **[448]** escrutoire in the library in Wimpole-street was found a will bearing date June 21, 1793, originally prepared for execution, but afterwards altered in several places by the deceased, and obviously used as a draft for the will of July 21, 1793. There was also found within the blotting paper leaves of a writing book in the same escrutoire (*a*) the sketch of a

(*a*) This paper was propounded in the Prerogative Court on the 26th of June, 1816, as the last will of the deceased; but the Court held that it could not be entitled to

will in the deceased's own handwriting, without date or signature, written on the back of a printed letter from the West India Dock-house, which letter was dated July 6, 1814. And, lastly, there was in the same escrutoire a will made prior to his marriage, and dated Charleston, November 30, 1782.

Swabey and Jenner in support of the will. The question turns upon the birth of three children born subsequent to the date of the will, for whom no provision is prospectively made in that instrument, and upon the legal effect of this circumstance, on a will duly made and executed after marriage. It is important, if the law is already settled on this point, that it should remain unshaken. The will was made just previous to the voyage of the deceased to England; and it is said that it was only intended to operate in the event of his dying on the passage; but his intent is not to **[449]** be collected from circumstances, or other collateral matter, but from the words and tenor of the will, which is absolute and unconditional, neither temporary nor contingent, in the terms in which it is expressed; and if that construction from circumstances cannot be allowed where words are to be explained, much less ought they to be admitted to supersede a will regularly and deliberately made. In order to substantiate the opposite case, it must be shewn to form an exception to the general law, which is very accurately laid down by Swinburne (*a*) under the head of revoking the testament, and will be found to include most, if not all, the circumstances to be found in this case.

Such as the law stood in Swinburne's time, it still continues; but not entirely without exception as from about the year 1682, which we take to be the æra of its introduction in *Overbury* v. *Overbury* (Shower's Reports, vol. ii. p. 253); which was followed by *Lugg* v. *Lugg* (Salkeld, 592, and Lord Raymond), 1698; and afterwards by *Meredith* v. *Meredith* (1710) in 1710, there have been many decided cases in which wills made before marriage have been set aside both in this Court and in the Delegates, by reason of marriage and issue, as well from the alteration of the state of the testator as his presumed intention, subject, nevertheless, like any other presumption of law, to be rebutted by evidence of a contrary intent.

All such exceptions are stricti juris, and we shall **[450]** contend that there has as yet been no instance, where either marriage alone, or birth of children alone, though attended with hard circumstances, has been thought sufficient, by the law of England, to revoke a will made after marriage. No doubt but that by the civil law the birth of a child only was the revocation of a will, for by that law a will was void when a father passed by a child without notice: and a will was equally destroyed by the birth of a posthumous child. This depended on the strictness of the Roman law, by which a child had a right to a portion of the father's estate, of which he could not be deprived without just cause; but this law was never received here—there is no instance of it. By our law, the father of a family may dispose of his estate as he pleases; it is wholly in his own discretion; if that discretion is exercised imprudently or improvidently, Courts of justice can afford no relief, except in cases of ideotcy or madness. Every will, and revocation of it, must be the act of the testator himself; and it cannot be set aside on any other foundation than a legal revocation by the laws of this country. Alteration of circumstances may reasonably require the alteration of a will; it would be matter of prudence to make a disposition suitable to the change, yet men do not always act with prudence.

The testator also may think of doing it, but die without having made up his mind as to the specific disposition he would substitute, or death may have suddenly intervened before he has taken any final resolution about it: if that should be the impediment, wherever it may occur, it is unfortu-**[451]**-nate; but the law has no remedy for such evils; if the deceased is in the progress of a testamentary act, the law will relieve if possible; but a different disposition, if meditated, may from various circumstances be deferred where a person has a will by him; but why persevere in keeping a will if it was his intention to die intestate? Mr. Johnston, by his conversations with his wife, was aware of the existence of this will, and of its operation; to get rid of her importunity on the subject of making another will, he told her it was

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probate. It was marked with the letter C, in the registry of the Court, and is the the paper referred to under this denomination, in the arguments of the counsel, and the sentence of the Judge.

(*a*) Part vii. s. 15, title "Of revoking the testament."

time enough to think of that; and on being asked what the consequence would be to his family if he died without a will, he would reply in general terms, "that the law would make the best will for a man," but not that it would make the best will for him. His not having made up his mind to what specific alterations he would wish, if he proceeded to make a new will, may, in great measure, likewise account for his not having done it; he was aware also of the power his wife would have, if she should survive him, over a large real estate which she might charge with provision as she might think fit for any of her children; but it never was his intention by any act or declaration to leave her in addition to her real property one-third of his personal estate. There may be grounds on which to expect that the deceased, if he had lived, might have revoked this will by a new instrument. But it is sufficient for us to say that there is no case in which circumstances, aided by the birth of children alone, has been held to revoke the will of a married man; nor is such a question res in-**[452]**-tegra, the point was fully and clearly decided by the Delegates in *Ward* v. *Philips* (Prerog. 1732. Deleg. 1734), which is mentioned by Sir George Hay, in his judgment in *Shepherd* v. *Shepherd*, and as appears also from the manuscript notes of Dr. Andrews who was counsel in that case. The case of *Combe* v. *York* (Deleg. 1738) seems decided on the same ground.

The reasoning of Baron Carter in the case of *Noel* v. *Noel* (*c*) is to the same effect. The case of *Shepherd* (*d*) itself was expressly referred by Lord Camden from the Court of Chancery to the Ecclesiastical Court, upon a question arising on the birth of a posthumous child, and whether such a circumstance could operate as a revocation of the will and codicil of the father; the case was ably argued, and solemnly decided by an eminent Judge, than whom none could have more feeling for the distress of such an incident, or would more gladly have found ground to set that will aside, as well as all others of a similar kind, as he declared; but he could not break in upon a known rule of law. He readily admitted that marriage, with the birth of children, would vitiate the will of a batchelor made in a state of celibacy; but said that marriage alone would not. Children also born after the making of the will by a married man will not. For a married man must have children in view at the time of **[453]** marriage; and children only add to his family, they do not alter his state or condition.

It appears also from the case of *Doe on the demise of White* v. *Barford*,(*a*) that it is the opinion of the present Chief Justice of the King's Bench, that it would be dangerous to extend the doctrine of presumptive revocations any further than it has been already carried.

The only remaining circumstance is the inception of paper C; and if such a rude and unfinished sketch as this, or any other paper, about which no testator can be said to have taken any final resolution, could be permitted to revoke a will which must be presumed to have been made with deliberation, infinite mischief must frequently ensue; but the rule of law posterius imperfectum non tollit prius perfectum has been recognized in numerous decisions, and is not now to be called in question.

Adams and Lushington contrà, for an intestacy. We admit that marriage, or the birth of children alone, will not revoke a will; but the question is, whether the birth of children, with other circumstances, will not: Lord Mansfield and Lord Kenyon have put the principles of presumptive revocations on different grounds; the former presumed alteration of intention, the latter held that there was a tacit condition annexed to the will that it should not operate under such circumstances; it is admitted by them, however, and all other Judges, **[454]** that this principle of revocation is derived from the civil law. The civil law is so far admitted into our law that the birth of children may revoke a will, if accompanied by other strong circumstances; what these strong circumstances are the law does not define; the nature of them may be discovered from decided cases; they are circumstances under which no rational man would expect a will to stand. *Overbury* v. *Overbury* admits the general principle. In *Parsons* v. *Lanoe*, Lord Hardwicke takes the distinction between real and personal property and admits the principle of these revocations, though the case rendered it unnecessary to decide the point.

(*c*) Referred to in the case of *Parsons* v. *Lanoe*, Ambler, p. 557.

(*d*) *Shepherd* v. *Shepherd*, reported in a note to *Doe on the demise of Lancashire* v. *Lancashire*, T. R. vol. v. p. 49.

(*a*) *Doe on the demise of White* v. *Barford*, Maule and Selwyn, vol. iv. p. 10.

In *Wells* v. *Wilson*,(*a*) the Judges at the Cockpit, after much deliberation and repeated hearings, pronounced for the principle we contend for, and decided that the will was revoked; it is impossible to find a case in which a stronger coincidence exists than between this and that; in both, the wills provided for children in ventre de sa mere; in both, the children born subsequently were totally unprovided for; in both the testator had disposed of all his property; in both, the death was sudden. In *Shepherd* v. *Shepherd* Sir George Hay admits the principle of the decision in *Wells* v. *Wilson*.

The alteration of circumstances in the present case is as great as can be imagined; the time since the making of the will is twenty-two years; the fortune is augmented from 20,000l. to 300,000l.; his family from two children to six; nor is it any **[455]** thing to say that Mrs. Johnston had property of her own, for the estate was hers in fee, and how she might dispose of that can be no argument in law; and so Lord Hardwicke held in the case of *Parsons* v. *Lanoe*.

Swabey and Jenner in reply. The case of *Wells* v. *Wilson* was decided on different grounds from those stated; the decision was that a man cannot die with two wills which are substantive and independent of each other, and that where two inconsistent wills are produced of the same date, neither of which can be proved to have been last executed, they are both necessarily void, by construction of law.

Judgment—Sir John Nicholl. This is a case certainly of much importance, both to the parties, and as involving a question of law of great extent and consequence. I have considered it with all the attention and circumspection in my power; and I now proceed to the decision of it with much anxiety, and a painful sense of the responsibility that belongs to it. My chief consolation, however, is that, if the judgment I am about to give should be erroneous, it may be corrected by a superior tribunal.

The question of law involved in this case, and to which I have referred, is whether a will made by a married man having certain children is revoked by the subsequent birth of other children **[456]** left unprovided for, aided by other circumstances concurring clearly to shew (if such should be the result of the facts) that it was not the intention of the deceased that the will should operate.

I will first advert to the facts of the case, observing upon their effect as I proceed, in order to arrive at their true result; and I shall then consider the question of law.

The facts themselves admit of no controversy; they are not involved in contradictory and conflicting evidence. They are stated in the plea, and are admitted in the answers. The testator, Mr. James Johnston, died upon the 3rd of July, 1815, at his house in Wimpole-street, leaving behind him a wife, three sons, and three daughters; one daughter being married, one son and two of the daughters being minors, which son has come of age since the commencement of the suit, and now appears in his own person. The deceased left personal property amounting to upwards of 200,000l. There was also a real estate in the West Indies settled upon him and his wife in survivorship in fee. The deceased several years ago resided with his family in the island of Jamaica. In the month of June, 1793, being about to return to England, he made, and duly executed, the will in question, a very few days before he sailed. The prospect of the voyage was probably the incitement to make the will; but there is nothing in the instrument itself, nor is any sufficient evidence laid before me, to render the validity of the will in any degree conditional and contingent upon the event of the testator's safe arrival in Eng-**[457]**-land. I am of opinion, therefore, on this part of the case, that the will remained valid after the arrival in England of the testator; and that, unless it has been revoked by subsequent circumstances, it now remains valid.

At the time of making this will the testator had two children, a son and a daughter; and his wife was then supposed to be ensient. It is admitted in the answers that his personal property at that time amounted to no more than from ten to fifteen thousand pounds, and his wife was provided for by the settlement of the real estate already mentioned.

Now, by the will in question, he gives 10,000l. to the child of which his wife was then ensient; if more than one child, 10,000l. to each of them: the residue of his real and personal property he gives to his son; and in the event of his dying without issue, he gives certain legacies.

(*a*) *Wells* v. *Wilson*, mentioned in Sir George Hay's judgment of the case of *Shepherd* v. *Shepherd*, T. R. vol. v. p. 49.

Let me here pause, in order to look at the principle of this will, and at the effect which it now would have if valid. The principle or character of the deceased's testamentary disposition of his personal property (if I may so express it) is to provide amply for his younger children; he is so anxious to discharge that duty that he provides for the child or children of which his wife might then be pregnant. Even if there should be only one child born (which was the case) the whole personalty would be exhausted, and the eldest son would have nothing but the real estate.

Such would have been the effect of the will, and such was the intended disposition if the deceased had died soon after his arrival in England. He, **[458]** however, lived above twenty years afterwards, and had three other children born besides the one of which his wife was pregnant when he made his will; and his personal property had increased to upwards of 200,000l. The effect then of the will at his death under the residuary clause is to carry 180,000l. of the personalty to the eldest son, in total exclusion of the three youngest children, who will be left entirely unprovided for, and even in great disproportion to the other two children, of one of whom his wife was ensient at the time of making his will. This effect is totally inconsistent with the principle and character of the testator's intentions at the time of making his will.

It is also admitted that this will was left in the hands of one of his executors, or his agent in Jamaica; it was handed over from one agent to another, as they severally succeeded to the situation, but it was never in the possession of the deceased himself; it is admitted that he brought over with him no duplicate of this will, he did not execute it in duplicate. He did, indeed, bring over a draft or corrected copy of the will; and in the year 1798 he received an inventory of the papers which he had left at Jamaica, one item of which inventory is in these words: "Under an open cover addressed to Alexander Wright, Esq., is a sealed paper in form of a letter, which was received by Mr. Landale from a Mr. Forsyth; on the sealed paper is written, in Mr. Johnston's handwriting, 'Not to be opened till certain accounts are received of the death of James Johnston.'" The draft of the will and this inventory were found together in the de-**[459]**-ceased's escritoir, where he generally wrote. Now, from these circumstances, and from the conversations with his wife to which I shall presently refer, though there is no reason to conclude that the deceased had neither forgotten that he had made such a will, nor supposed it was no longer in existence; yet still the will was not in his possession, so that he could at any time cancel or burn, or otherwise destroy it. He could only do that by sending for it to Jamaica, or by sending directions there to destroy it, to which he might not choose to trust.

It is farther admitted that for these after-born children the deceased shewed an equal degree of affection, as for those provided for by the will. The youngest son was placed with a merchant, with a view to his establishment with the deceased's assistance in a mercantile house; so that there is every reason to suppose, both from the presumed sense of duty, as well as from his actual conduct and affection towards these children, that he did not intend to exclude them from a provision after his death.

It is also admitted that the deceased at all times, and especially during the latter parts of his life, was very reserved respecting his property and testamentary intentions; and was very reluctant to enter upon the subject, even with his wife: when she commenced the conversation he seemed rather displeased; yet, notwithstanding this disinclination, she did at different times, and as fit opportunities occurred, suggest to him the propriety of his making a will, representing to him that, according to the will made at Jamaica, the **[460]** younger children would be left unprovided for; that the deceased on some such occasions answered generally, "That there was time enough for making a will, he would take care of that;" now here is not the least appearance of approbation of, or adherence to, the will in question, in these conversations; where the wife represents that the younger children will be utterly unprovided for. He does not in the most distant manner intimate, what has been thrown out in argument, that as his wife in case of surviving him would have the real estate, she might have an opportunity of providing out of the real estate for younger children. Such a thought seems wholly inconsistent, indeed, with the will itself, and with the whole of his conduct, and seems never to have entered his imagination. So far from his having the slightest intention that the Jamaica will should operate, he accedes to the representations of his wife as to the propriety of making a new will; he merely procrastinates, and says, "That it is time enough to make a will, but I will take care of that."

It is further admitted that Mrs. Johnston on one occasion mentioned to the deceased what the consequences to his family would be if he died without having made a new will; when he replied in general terms "that the law made the best will for a man."

Certainly, parole declarations are always to be received with very great caution; in general, they are the lowest species of evidence; though in this Court upon questions of factum, and also upon questions of revocation, the declarations of the de-**[461]**-ceased are always received as corroborative evidence of intention—both of the animus testandi, and the animus revocandi. The loose declarations which a man often makes in conversation with his friends and acquaintance are of very little weight indeed. They may, on the part of the testator, be insincere, or at best the mere passing thought of the moment, and are liable on the part of witnesses to be misapprehended and misrepresented. But these confidential communications with his wife, upon her serious representations to him respecting so important a subject, are deserving of rather more weight as evidence of the deceased's mind and intentions; and, judging from those declarations, he does not seem to have had any strong objection, even to an intestacy; for upon her enquiring whether he intended to make a will he answered "that the law made the best will for a man." Yet, even upon these declarations the Court would be cautious in placing much reliance if they were not confirmed by something more unequivocal and solid coming from the deceased himself in a different shape, and not open to any of the same objections.

There is before the Court a paper marked C written by the deceased, certainly within the last year, possibly at a later period, of his life. A paper which, if it could have been shewn that it was written at a very short period indeed before his sudden death (as might possibly be the fact), might have prevented the whole of the present question; for in that case it might have been established as a will, and in its effect it would be completely revoca-**[462]**-tory of the present will. Paper C is in these words, "Whitehall estate, in the parish of St. Mary's, with the negroes, stock, &c. is settled on J. Johnston and Mary Ballard Beckford, his wife, for their joint lives, and to the survivor of them. If, therefore, I should survive my said wife, I give, &c. the said estate, &c. to my eldest son James Johnston;" there are then some words struck through; then follows:—"In the event of his dying without issue, to Robert Ballard Johnston, my second son; and in the like event as to him, to my third son William Clarke Johnston, their heirs, &c. subject to the payment of legacies; to my other children, in equal shares, to the following amount, that is to say, to each of my said children, Robert Ballard, William Clarke, Mary Beckford Bevan, wife of Charles Bevan, Esq., Eliza Johnston, and Helen Johnston, and their respective executors and assigns, the sum of out of my said estate, besides the respective shares of my money in the funds, as hereafter mentioned. I give to my brother David Johnston, if he should survive me, and if not, to such children of his as shall be living at my decease, the sum of .

"And to my sisters Jane Johnston and Eliza Johnston, the sum of , and to my sister Helen Carruthers, if she survived me, and if not, to her children equally, as in the case of my brother David's children, the sum of ;" there is a mark with a caret, which refers to a clause at the end, intended to come in here; "And I give to my said wife, if she survive me, and if not, to my son James, &c. the house in Up-**[463]**-per Wimpole-street, in which I now live, with the furniture, plate, horses, carriages, &c. which I shall die possessed of; and to my friends, Patrick Lynch and J. H. Deffell, and to each, the sum of , and all the residue of my property to be equally divided between such of my said children as shall survive me, share and share alike; and I appoint executrix and executors of this my will, my dear wife, Mary B. Beckford, if she shall survive me; my son, James Johnston, or the eldest of my sons that survive me; my brother David Johnston, and my friends Patrick Lynch, of the island of Jamaica, Esq., and John Henry Deffell, of the city of London, merchant."

These are the exact words of paper C; and this paper is written upon the back of an old letter, which was dated the 6th of July, 1814, so that it must have been written after the date of that letter. The deceased died in less than a year afterwards, namely, the 3d of July, 1815. This paper, for the reasons assigned by the Court, when it was propounded, could not operate as a new will: not being valid as a dispositive paper, it is not per se valid as a revocatory paper: but it is a circumstance

of evidence tending to shew that the deceased did not mean the will made at Jamaica to operate; and it is extremely strong. In its principle of disposition it is the same as the Jamaica will; but in their effect the two wills, from the change of circumstances that had intervened, would be very different indeed. By paper C the whole of his personal property is to be divided equally among his children. The eldest son, so far from **[464]** taking the residue 180,000l. of personalty to the utter exclusion of the three younger children, and in great disproportion even to the other two, would take only the real estate in tail, and subject to the payment of legacies to the other children; the amount of which legacies is left in blank. This approaches, therefore, very nearly to an intestacy: for though the widow was not intended to have her distributive share, as she was provided for by settlement; yet she was to take some benefit under the will; the house and certain effects in Wimpole-street are left to her; and she had in no degree lost the affection of the deceased, for she is appointed to be his executrix.

Now this paper proves, in some degree, the sincerity of the deceased's declarations "that the law makes the best will for a man;" not meaning, however, himself literally to die intestate, for it is clear he meant to make a will: his declarations are, "There is time enough to make a will, but I will take care of that;" but still it shews that it was not the intention of the deceased to depart very far from that disposition which the law would make of his property.

Lastly, it is admitted that the deceased died suddenly of apoplexy, having this intention of making a will; but from indolence, from procrastination, or possibly from not having made up his mind as to the amount of the legacies with which he should charge his real estate, while he is thinking there is time enough, he is suddenly overtaken by death in the manner stated.

Such are the facts of the case. The result of **[465]** them, so far as respects the intentions of the deceased to revoke, can hardly, I think, admit of question: there is not the slightest circumstance of a contrary bearing. If the deceased had had this will in his own possession, and had not cancelled it, as he did the other old will in his possession, that might raise an inference that he intended it should operate till he had made a new will. If, when his wife conversed with him, he had expressed any adherence to this will, or any substitution for it; such as a desire that she should provide for those younger children; if he had left the residue to her, and thereby devolved upon her the duty of providing for those younger children, by giving the bulk of his property to her, that circumstance might have raised a similar inference: but his answer negatives all these suppositions. It is, "There is time enough to make a will, but I will take care of that;" if, notwithstanding those declarations, he had done nothing, he had taken no steps, some doubt might have been raised; but he does write this paper. If this paper had been the mere inception of a will, or if it had shewn an intention to give a very large portion of the personal estate to the eldest son, it might in some degree appear confirmatory of the will at Jamaica; and, adhering rather to the effect than the principle of that will, it might have raised some doubts whether he had made up his mind to revoke the Jamaica will. But the paper C is the very reverse of all this in its disposition. Again, if, notwithstanding the writing of this paper containing such a disposition, the deceased had had a long **[466]** illness; had been aware of his approaching death, and yet had taken no steps, nor expressed any desire to make another will; such a circumstance might have carried some inference adverse to revocation; but he died suddenly of an apoplexy.

Looking then at the different papers, attending to the bearing of all the circumstances, seeing that they are all set in one direction, endeavouring also to divest myself as much as possible of any impression arising from the hardship of the case upon the younger children, and looking solely to the just result of the circumstances upon the mere question of fact as to the intentions of the testator, it is the clear moral conviction of my mind that the deceased had not any intention whatever, at the time of his death, that the will made at Jamaica, which is propounded in this cause, should operate.

But the question still remains whether, in point of law, these circumstances, and this result, amount to a revocation of the will.

The general rule certainly is, that a will once executed remains in force, unless revoked by some act done by the testator, animo revocandi; such as burning, cancelling, making a new will, and the like. Swinburne lays it down in the passage which was

quoted, and read by the counsel, that length of time, increase of wealth, prejudices to relations, or, as he expresses it, to those in administration, all concurring, will not revoke. If a will be made on account of sickness, yet it is not revoked on recovery; though it be made on account of a journey, it is not revoked by a return. He adds, "If a testator, after making **[467]** a testament, should have a child born, I suppose the testament is not thereby presumed to be revoked, especially if the testator live a long time after the birth of the child, and might have altered the testament, and did not." He then puts several cases where revocation shall be presumed, such as the executor becoming the enemy of the testator, and two or three other cases, which are certainly not law at the present day: Swinburne wrote in the latter part of Queen Elizabeth's reign; the statute of frauds (29 Charles 2) enacted some new positive rules, not only in respect to the factum of wills, but in respect to the revocation of wills: but since that statute there have been several cases decided of implied revocations, many of which have been cited in argument. Under those various cases several points are now settled which may be stated without reference to the particular cases themselves in which they were so decided; first, that implied revocations are not within the statute of frauds; secondly, that a marriage and birth of children do together amount to an implied revocation; thirdly, that marriage, without birth of children, does not amount to an implied revocation; fourthly, that the subsequent birth of children is not alone and without other circumstances an implied revocation. But the point remaining for consideration is whether the subsequent birth of children, accompanied by other circumstances such as those in the present case, and leaving no doubt of intention, will or will not raise the implication of law: or, in other words, whether the circumstance of subsequent marriage concurring with the subsequent birth of issue is an essential ingredient; **[468]** a sine quâ non, in order to produce an implied revocation.

Now, to solve this question it is necessary to trace this rule (if it may be so called) with respect to implied revocations up to its origin, to see upon what authority the rule stands, and upon what principles it is founded. The importance of the present question requires that this should be done, and in detail.

A presumptive revocation of a will arising from marriage and the birth of a child is not mentioned, as far as I am aware, by any ancient text writer upon the law of England as a part of our English jurisprudence; nor, as far as I am informed, was it a part of the ancient jurisprudence of any other country. It is not mentioned as a rule existing in Swinburne's time; nor is it enacted by the statute of frauds, or any other statute.

The first reported case in which this rule was applied is, I believe, that of *Overbury* v. *Overbury*. That was a case of personal property; and after that the case of *Lugg* v. *Lugg* in 1696, *Meredith* v. *Meredith*, 1711, and many other cases of personal property, occurred. It was, however, not finally admitted as a revocation of a will of real property until the year 1771, in the case of *Christopher* v. *Christopher* (cited in 4 Burrows, 2132), in the Exchequer; in that case one of the judges was dissentient, thinking the words of the statute too strong to be got over. Certainly, the words of the statute are very strong that "no devise of lands shall be revocable, except" by certain modes prescribed by the statute, "any former usage to the **[469]** contrary notwithstanding." No words can be well more clear than these words; but, strong as they are, the judges ventured to get over them—so far as to consider the case out of their operation; and the decision in that case has been adopted in other cases, and has been approved by other judges. The rule then of revocation by marriage and issue stands, in point of authority, not upon any ancient rule of law; not upon positive enactment; but as the result of decisions of courts of justice, even against strong words of positive law; yet founded certainly, in my apprehension, on sound principles, and in order to arrive at substantial justice.

Having thus considered the authority upon which the rule stands, I will next examine the nature and extent of the rule. It is not an absolute, it is only a presumptive, revocation; and this presumption, or presumed intention to revoke, may be rebutted by other evidence. Some questions have arisen as to the species of evidence to be let in. The evidence of circumstances has been admitted in all Courts, and in all cases. In this Court parole declarations have always been admitted in concurrence with other evidence. Doubts upon the admissibility of parole declarations have been raised in courts of common law; Lord Mansfield, in the case of *Cubit and Brady*

(*Brady* v. *Cubit*, Douglas, p. 38), was decidedly of opinion for their admissibility; but in all cases circumstances tending to rebut the presumption have been received.

It may be proper to refer very briefly to some of the cases in which the presumption has been considered as rebutted. The case of *Brown* v. **[470]** *Thompson* (1 Equity Cases Abridged, p. 413) was the case of a will before marriage, made in favour of a woman whom the testator afterwards married, and by whom he had afterwards a posthumous son; and it was held not to be revoked by such marriage and issue, and upon the ground that the will made a provision for the wife, and through her for the son.

In *Cubit* v. *Brady*, Lord Mansfield lays it down "that a subsequent marriage and the birth of a child affords a mere presumption; there may be many circumstances where a revocation may be presumed. The case in Cicero (*b*) is an old and well known instance of such presumption;" and Lord Mansfield there is made to say further, "I do not recollect any instance in which marriage and the birth of a child have been held to raise an implied revocation where there has not been a disposition of the whole estate. The testator disposed of a small part of his estate in charity; then, in contemplation of his marriage, he settles 600l. a-year on his intended wife, with remainder to himself in fee; it is clear, therefore, that he contemplated the change in his situation, and provided for it as to his wife; and with regard to the children he will be supposed to say, I will keep them in my own power;" he goes on and says, "I am clear on the other ground;" the admissibility of a parole declaration, **[471]** "that this presumption like all others may be rebutted by every sort of evidence." In this decision the other judges concur; and Mr. Justice Buller, in the conclusion of his judgment, says, "Implied revocations must depend on the circumstances at the time of the testator's death."

The case of *Kenebel* v. *Scrafton* (2 East, 530) was that of a will made in contemplation of marriage; and by the birth of children after marriage the Court held it was not revoked. Lord Ellenborough says in that case, "Upon whatever grounds this rule of revocation may be supposed to stand, it is on all hands allowed to apply only to cases where the wife and children, the new objects of duty, are wholly unprovided for, and where there is an entire disposition of the whole estate to their exclusion and prejudice. This cannot be said to be the case where the same persons who, after the making of the will, stand in the legal relation of wife and children, were before specifically contemplated and provided for by the testator, though under a different character."

In the case *Ex parte Lord Ilchester* (7 Vesey, jun. 348) a disposition was made in favour of the children of the first marriage: the testator afterwards married, and had children of that marriage; but that was held not to revoke the will, upon the ground that the children of the second marriage were provided for by the settlement.

In the case of *Sheaf* v. *York* before the Rolls the question arose on a devise of the real estate to the children of a first marriage; and it was held not to be revoked by the subsequent marriage and **[472]** issue, because the children of the second marriage would derive no provision, since the whole real estate would descend in case of intestacy to the son of the first marriage; consequently, the revocation of the will, as to the real estate, would not furnish any provision for the children.

I will only mention one or two cases out of these Courts. In the case of *Thompson formerly Myall* v. *Sheppard and Duffield* (Prerog. Trinity Term, 1782) before Dr. Calvert, it was held that though there was marriage and the birth of children after making the will, yet that the presumption was rebutted; he concludes his judgment in these words, "The facts thus operating against the presumption, I must pronounce it to be the will of the deceased." So again in *Wright* v. *Samuda* in 1793, before Sir William Wynne. The testator gave some legacies, and then gave the residue of his fortune to his wife; she died, and he married again, and had other children; Sir William Wynne after stating "that there was no difference between the will of a bachelor and the will of a married man, or widower with children, as to revocation;" yet held

(*b*) Quæ potuit esse causa major quam illius militis? de cujus morte, cum domum falsus, ab exercitu nuntius venisset, et pater ejus re creditâ testamentum mutâsset, et quem ei visum esset, fecisset hæredem, essetque ipse mortuus: res delata est ad centumviros, cum miles domum revenisset, egissetque lege in hæreditatem paternam testamenti exheres filius. Cicero, De Oratore, lib. 1, c. 38.

that under the circumstances the presumption was rebutted, and the will was still a valid will. In the case of *Calder* v. *Calder* Sir William Wynne laid it down "that marriage and birth of children is a presumptive revocation, but the contrary may be shewn, and the presumption be rebutted; declarations of the deceased are admissible, not to revoke a will, but to explain the intention."

In all these cases, and in several others, the will is **[473]** not absolutely revoked, though followed both by marriage and issue. On such questions, whether it be to examine if the presumption be raised, or whether it be to examine if the presumption be rebutted, the Courts do always inquire into all the circumstances of the case.

What then is the true sense and sound reason and foundation of the rule itself? In looking through the several cases, the foundation upon which the presumption stands, as pretty constantly stated, is the alteration in the testator's circumstances between the time of making his will and the time of his death. If it stood so general, as the mere alteration of circumstances, it would be very loose indeed. If it be added, "total alteration of circumstances," it is not much more definite. But if the case be further examined, we shall find that Courts have required such an alteration of circumstances arising from new moral duties accruing subsequent to the date of the will, as by necessary implication creates an intention to revoke. Here then, I think, we touch upon safer ground, and upon more solid principles. Intention is the very foundation and corner-stone, the very essence, of all wills. The term "Will" necessarily means that it is the testatio mentis. Intention is the principle of factum and of revocation; it is the principle of revocation whether it be direct by act, or implied by circumstances; the animus testandi or revocandi is the governing principle. By Courts holding that marriage and the birth of children are not an absolute revocation, but only an implied revocation; by their inquiring, in the manner I have al-**[474]**-ready stated, into all the circumstances, it is quite obvious that they examined into and endeavoured to get at the real intention: but it might be opening too wide a door, if this enquiry were to be directed to every change of circumstances. Those loose rules which prevailed in Swinburne's time are no longer admitted. Courts have, therefore, required that the rule shall have for its basis a change of intention, produced by, and to be presumed from, some new moral obligation arising after the will was made; marriage and issue are supposed to produce those new moral duties; every man is presumed to intend the making of a provision for his family.

Having thus arrived at the true foundation of the rule, the question remains to be considered whether both circumstances are required to concur; whether the rule has been so limited, as that subsequent marriage is an essential requisite. Now I cannot help thinking that upon plain reason, and upon substantial justice, it should seem that the concurrence of marriage is not an essential part. The birth of children, after making a will by a married man, may have imposed as strong a moral duty upon him, forming the ground work of presumed intention, and may be accompanied by circumstances furnishing as indisputable proof of real intention, as if the will had been made previous to the marriage. Marriage alone may possibly stand upon a different foundation and footing from after born issue. Marriage is a civil contract: the wife may make her own conditions before marriage in order to provide against the negligence or injustice of the husband: marriage settlements are **[475]** usual: the law, out of the real property, makes a provision for the wife by dower. If she enters into the contract, and takes no precaution of this sort, she takes her chance either of the husband providing for her, or of providing for herself. But after-born issue are parties to no contract; they come into the world entirely dependent upon the parent; and if it is the legal duty of a father while living to maintain his children, so it is a strong moral obligation upon him not to exclude them from a provision after his death. It is true he has a right to do it; though at one time, at least in particular districts, he had not the right of excluding them, the law did not allow him to dispose of his whole property; at present he may if he pleases, and the law can afford no relief; but by moral obligation there is a strong foundation laid for presuming that he did not intend to exclude them. In point then of true reason and sound sense the concurrence of subsequent marriage is not essential in all cases. The circumstances of this very case in the most forcible manner do, I think, illustrate the truth of this position.

It must, however, be enquired in the next place whether the authorities and the adjudged cases have held marriage to be an essential requisite.

It appears from the first reported case, as well as from what has been stated in subsequent cases, that the rule was originally borrowed from the civil law. The civil law is certainly no binding authority in this country; it is received where the law of England is silent, and where it is not at variance with the spirit and principles of the law of England; **[476]** and when it furnishes a sound rule of equity and substantial justice: at all times, however, it has been adopted with great caution and jealousy. Yet, so far as the rule in question has been borrowed from the civil law, it is quite clear that marriage, far from being an essential to that rule, had nothing to do with the subject. By the civil law the matter stands upon a different footing; it is the birth (*a*) of issue alone that revokes. But even by the civil law the birth of children revokes upon the principle of presumed intention; for it supposes that the exclusion of children was not intended by the testator. The same notion seems to have prevailed in this country, and has given rise to a common error, existing to this day, that it is necessary to cut off a child with a shilling, or some small sum.

In the next place, if we look at our earliest testamentary writer, Swinburne, the result is the same: treating of an implied revocation, he speaks of cases wherein it is raised, and what circumstances will not raise it; but he does not mention subsequent marriage as an essential ingredient, or as in any degree applying to the subject. In the passage already quoted he seems to doubt whether by the law as it was then understood the birth of children would or would not revoke; "he supposes"—that is the way in **[477]** which he qualifies his expression—"he supposes it would not," especially if there were circumstances tending to shew an adherence to the will. His words are, "If the testator live a long time, and might have revoked the testament, and did not, the rule of the civil law that the birth of issue revokes would not avail." And so is the rule at present; the mere circumstance of subsequent birth of issue, without any other circumstances, is admitted not to revoke; it has been so adjudged: but as to subsequent marriage, Swinburne does not in any manner advert to it.

I come now to the adjudged cases. The first to which the attention of the Court has been called is that of *Wingfield* v. *Comb* (Cases in Chancery, 16), in 1669; which, not being a question of revocation, is not mentioned as having much bearing upon the point. The case reported is to this effect—A., having a son and other children, married again; five years before he died he made a will, taking notice therein that his wife was ensient, and giving to the child en ventre sa mere 1000l. if a daughter, and 100l. a year if a son, to be settled upon him and his heirs male; and if the son died without issue, then to the plaintiff. The wife was brought to bed of a son, and this son died in the life time of the father; the testator died leaving the wife ensient with a daughter, to whom no portion was left or other provision: the Lord Chancellor Nottingham said, "In case of a devise I cannot help where the law fixeth the estate; but if you come for relief in equity, and there falleth out an unforeseen accident which if the testator had foreseen he would have altered his **[478]** will, I shall consider of it:" "here he meant, in case he left a daughter born after his decease, to have provided for her; and though it happened the wife had no such daughter when he made his will, yet she was ensient at the time of his death;" the Lord Chancellor then directed a bill to be brought, and that the posthumous daughter should be made a party. This does not seem to be a question of revocation, and therefore does not strictly apply: but it shews the anxiety of the Court to get at the object, and at the intentions of testators; and the circumstance of subsequent marriage did not occur in that case. The Lord Chancellor refers to another case in the course of his judgment: he says, "A. having only a daughter, devised to trustees to convey to the daughter in fee; the testator recovered and had a son; the daughter shall not carry land from the son." Here then, if I rightly understand the matter, the after born son revoked the devise to the daughter, which could only be upon the ground of presumed intention. But here again, as in the former branch of the case, subsequent marriage is not an ingredient.

The first case directly upon the question of revocation was that of *Overbury* v. *Overbury* (2 Shower, 253) in 1684; and the report is in these words, "Upon an appeal to the Delegates it was adjudged that if a man makes his will, and disposes of his

(*a*) This was the law of Rome from a very early period: In Cicero's time we know that the point was considered so settled as not to be arguable. Num quis eo testamento quod paterfamilias ante fecit quam ei filius natus est, hæreditatem petit? Nemo: quia constat agnascendo rumpi testamentum. Cicero, De Oratore, lib. 1.

personal estate among his relations, and afterwards has children and dies, that this is a revocation of this will according to the notions of the civilians, this being an inofficiosum testamentum." In this report it is to be observed there is no mention whatever of subsequent **[479]** marriage being an ingredient: upon looking into the original proceedings I find that the marriage was also subsequent to the will; but the report shews that it was not understood by the lawyers of that day that marriage was a material circumstance; for so far from its being considered essential, it is not even adverted to in the report. He states the revocation to be founded upon the idea of the civilians that it was testamentum inofficiosum; if it was so, it could only be upon the birth of children, for the civil law looks to that circumstance only; marriage has nothing to do with the subject according to that law. Here then is the civil law from which the rule is supposed to be borrowed; here is the opinion of Swinburne; and here is the report of the first adjudged case upon the question of revocation, all concurring in considering the birth of children as the essential ingredient, and in which marriage is in no degree adverted to as a material circumstance.

The next case is that of *Lugg* v. *Lugg* (2 Salkeld, 592. 1 Lord Raymond, 441), which happened in the 8th William III.; the report in Salkeld is in these words—"Before a commission of Delegates—one being single made his will, and devised all his personal estate to I. S.; afterwards he married and had several children, and died without other will or dispositions: and now coram delegatis of which Treby, C. J. was one, it was ruled that there being such an alteration in his estate and circumstances so different at the time of his death from what they were when he made the will, here was room and presumptive evidence to believe a revocation, and that the testator continued not of the **[480]** same mind." Here both of the circumstances are mentioned—the subsequent marriage and the birth of children; but it is put upon the evidence of presumed change of intention arising from change of circumstances, not adverting specifically to marriage as one of the circumstances, but that all the circumstances taken together did amount to presumptive evidence to shew that the testator did not continue of the same mind.

The next case which has been adverted to is *Meredith* v. *Meredith* (Prerog. 1811) in 1711; of that case I happen to have two manuscript notes, both in the handwriting of Dr. Andrews. I am not able to ascertain which was first made; but they both state the circumstances of the case to the same effect, and I will read them both at length. "*Meredith* v. *Meredith*, 1711. Henry Meredith in 1708 made his will, and therein makes his brother Roger Meredith his executor; he afterwards marries and settles the leasehold estate in trust for him and his wife, during both their lives; and after their decease for his executors if he makes a will, or administrators if he dies intestate: he leaves issue one daughter, and dies. Among his writings is found the draft of a will, which begins in these words: 'In the name of God, Amen. I give all my estate in the manner and form following, that is to say, I give to my wife all my plate and jewels,' and there leaves off. The brother prays probate of the will of 1708; the widow desires administration with the testamentary schedule annexed. Per Curiam. Sir Charles Hedges decrees administration to the widow with the testamentary **[481]** schedule annexed. In *Overbury's case* it was determined that the subsequent marriage and the birth of issue destroys a will made before marriage. The beginning another will shews that he intended the first should not be in force, but was supposed to be revoked by the marriage settlement." Dr. Andrews, in this report, does not state the question or the grounds of decision very pointedly. The other report is in these words: "*Meredith* v. *Meredith*. The testator left a daughter, and died possessed of a lease of tithes about 100l. a year, held under the Archbishop of York; by marriage articles this was settled on his wife for life, then to his executors and administrators; he died at Christmas, 1710. Among his papers was found a will dated 1694, and another 1708, in which Roger Meredith, the plaintiff, was executor, and this lease given him; there was likewise an imperfect will, in which the testator gave his wife some jewels and plate, but went no farther. Question if the marriage articles, a child born after this will, and another will began, was not a revocation of that of 1708. Judge of opinion it was, and founded himself principally upon the birth of the child; and *Overbury's case*, which has been adjudged in the Delegates, was quoted as an authority, and decreed administration to the widow with the paper annexed." Here then Dr. Andrews does state the question: he mentions the circumstances upon which the case was to be decided, and states the ground of decision.

Now there are some observations which present themselves upon these notes. In the first place, the putting this lease in settlement could **[482]** only have revoked the will pro tanto; namely, so far as respected the bequest of that lease. The testamentary schedule could not be a very material circumstance, except as a circumstance of evidence, because it certainly of itself could not have revoked the whole will, inasmuch as it was merely the inception of a new will, and according to every rule the inception of a new will will not revoke; but as far as it goes, it is to be taken in conjunction with the former will. The marriage itself could not be a very material circumstance, because there was a settlement made providing for the wife; but the report says the judge founded himself principally upon the birth of the child: that is expressly stated by the reporter as the principal foundation of the decision. The marriage is not even adverted to; where he is stating authorities he considers *Overbury* v. *Overbury* as a parallel case, and seems to have been aware that subsequent marriage had occurred in that case, though the report in enumerating the grounds of the sentence does not mention that circumstance; so that it seems to have been, upon all the circumstances considered together, the birth of a child being the principal circumstance, and marriage not even mentioned (at least by the learned reporter it was so understood), that Sir Charles Hedges held the will to be revoked in the case of *Meredith* v. *Meredith.*

The next case adverted to is that of *Ward* v. *Phillips* in 1734; it is very shortly stated in *Shepherd* v. *Shepherd*, in the 5th Term Reports. The circumstances were these: Captain Rowland Phillips died in September, 1731; leaving a widow and three children at the time of his death; no will **[483]** was found; the widow had renounced the administration; which was granted to the grandmother of the children; the widow afterwards married Ward, the plaintiff; a will was subsequently found in a portmanteau among a parcel of papers; it was made twelve days after the marriage, and gave every thing to the wife; evidence was gone into to shew that the testator had afterwards a bad opinion of his wife, that they lived upon very bad terms, that she had been confined in a madhouse for a very considerable time, and that in the latter part of his life he lived separate. The Prerogative Court appears to have pronounced against this will, not upon any question of revocation, but upon failure of the proof of the factum. I have looked into the pleadings and evidence; and, as far as can be collected, it appears that the opposition was directed against the factum; it was offered to prove that it was a forgery, that the testator was abroad at the time the will was made, that he lived on ill terms with his wife, &c. Thus the original grounds intended to shew that he had made no will, and not to raise the question of presumed revocation. The Delegates reversed that decision, and were of opinion that the factum was fully proved; they were also of opinion it was not revoked—for from the notes of counsel it appears that this point was raised and discussed, namely, whether the will was revoked or not—and I find in some subsequent cases it has been quoted, both in argument and decision, as an authority that the birth of children alone will not revoke. But suppose the direct point to have been raised, solemnly raised, instead of occurring accidentally in argument, I think that there were **[484]** grounds upon which the Delegates could not decide otherwise than for the validity of that will. The will is made twelve days after the marriage; why, certainly, at that time the testator must be presumed to have contemplated the birth of children; he must have made his will in contemplation of that event; he thought it proper at the time to give the whole to his wife; it is by no means an uncommon thing both for a husband expecting children, and a husband having children, to give every thing to the wife, under the idea that his death will devolve upon her the duty of providing for those children; and that he enables her to discharge that duty, and provide for them by leaving her the bulk of his property. In the case of a will made in that way twelve days after the marriage, when the event of children must be presumed to be contemplated, it would have been exceedingly dangerous to have held such a will to be void; besides, it was proved that the will remained in the deceased's own possession, in a trunk with his own letters; there was no inception of any new will, so that the revocation must have arisen, if at all, upon the state in which the deceased afterwards lived with his wife; but the two great circumstances of difference between that case and the present are those already referred to, first, that the property being given to the wife, the duty of providing for the children devolved upon her, and, therefore, they could not be considered as unprovided for; and, secondly, that the will was made at

a time when he contemplated the fact of his having children. That case then, though of very considerable weight, yet does not appear to me to go the whole **[485]** length of establishing that the birth of subsequent children accompanied by a different combination of circumstances may not, without subsequent marriage, raise a presumption of revocation.

The case of *Parsons* v. *Lanoe* (Ambler's Reports, 557) in 1748, was this: Colonel Lanoe, a married man, but without children, made his will on going to Ireland; he afterwards returned, and children were born; the question was, whether the will was revoked by his return, or by the subsequent birth of children. The Lord Chancellor decided that, upon the words of the will, it was to be considered as contingent upon his return from Ireland, and consequently was void, and he thought it therefore unnecessary to decide the second point; but the very circumstance of the second point being argued, and the reserve which is maintained upon it by the Lord Chancellor, shews that, at that time at least, there was no such rule understood in the Court of Chancery, as that the concurrence of subsequent marriage was essential to the revocation of a will.

The case of *Altham* v. *Gray* is, I think, admitted on all hands to have very little bearing on the question, and therefore it is useless to quote it.

The next case is that of *Wells* v. *Wilson*, decided at the Cockpit in 1756. It is cited in the case of *Shepherd* v. *Shepherd*, as reported in a note of the 5th Term Reports, and given in the judgment of Sir George Hay. I have seen the printed cases; and several inaccuracies in the case as reported in *Shepherd* v. *Shepherd* certainly exist. I have never seen the appendix of the case, so that I am not ex-**[486]**-actly aware how the evidence stood upon the contrary statements which are made in the printed cases; but, from them I think the facts may be collected to have been as follows:—Mr. Nicholas Taylor was the deceased; he died at St. Christopher's in 1751; he left a widow, and five children, and a very considerable real and personal estate; the will in question was dated November 5, 1748; he gave to the wife one-third of certain plantations for life—and the furniture absolutely; he gave to his daughter Elizabeth, and his son William, and the child or children of which his wife was then pregnant, 31,000l. between them; the instrument concluded with the words, "I hereby revoke all former wills by me made, and acknowledge this my last will and testament;" the will was written on one side of a sheet of paper; on the other side of which was written another testamentary paper, expressed nearly in the same words, and almost to the same effect, but which was neither dated nor signed; the deceased left two children born after the will was made; one of them I collect to have been the child of which the wife was then ensient—the other was wholly unprovided for; in 1749 the deceased had a fall from his horse, but recovered and lived two years afterwards; it was alleged on one side that he frequently declared that he had made no will; and after his fall he said "it was lucky that he had recovered, for his affairs would have been left in great confusion;" but on the other side it was asserted that he had often declared he had made his will, and only thought of altering it: six months before his death, he had asked Mr. Wilson to be his executor; **[487]** it appeared that he was equally fond of those two younger children, as of the others, and his fortune had considerably increased since the making of his will; in his last moments a person had been sent for, to make a will for him, but when he arrived, the deceased had become delirious, and consequently could not make another will: the will in question was found in the bottom drawer of his bureau; on one side it was asserted that it was found among loose papers; on the other, it was asserted that it was folded up among papers of consequence. At St. Kitts the will was pronounced for; but this sentence was reversed before the Committee of the Privy Council for hearing plantation appeals. It has been contended that doubts must have arisen which of the two papers was first or last written, and also whether the will was meant to act upon real estate. As to which of the two papers was first or last written it could not be material, because the one paper was executed, and the other was not; the papers were nearly transcripts of each other, there was no very material difference in the disposition; taking them either way (though certainly, the probability is that the unexecuted was first written because the executed one was more formal than the other—the one was dated, the other without date—the concluding words of the one are, "I do hereby revoke all former wills by me made;" the other was the same, with the addition of, "and I acknowledge this to be my last will and testament"), but take it either way, suppose

that he wrote the unexecuted paper first as a rough draft of his will, and the other afterwards, making some alterations as he proceeded, and then dated and [488] signed it; there can be no doubt whatever but that the executed instrument would supersede the other: taking it the other way, that he having executed the one paper began this other paper, but did not go on to complete and sign it, what would be the construction in that case? Why, that he afterwards gave it up, and abandoned it, remaining content and satisfied with the will as it was executed and before signed by him. There can be no doubt, therefore, but that the executed paper was the only valid instrument. The Court might well wish to see the paper itself; they might well suspend their judgment till it was produced, for there might have been something important arising upon the face of it; but it is evident from the report of the case that Sir George Hay, who had been counsel in the cause, did not consider the cause to have turned upon any point as to which of the two instruments was the last. Again, it has been said that the will was intended to operate upon real estate; and therefore not being sufficiently executed for that purpose, that it could not be a valid will, as to the rest of the property; but it is surely unnecessary to state that this circumstance would not affect its validity as to the personalty. The factum then of the paper having been established, as it must have been in that case, the Court could only hold that it was revoked by circumstances. Now among the circumstances, subsequent marriage did not occur; the birth of children, accompanied by other circumstances, must have been the ground of holding the instrument revoked. Sir George Hay, in speaking of this case in *Shepherd* v. *Shepherd*, evidently so considers it. This then is an affirm-[489]-ative case; and upon the point whether marriage is essential to revoke, one affirmative case holding a will revoked without that ingredient is infinitely more decisive than many cases without that circumstance in which the will is not held to be revoked; because it might be held not to be revoked on account of the absence of other circumstances tending to prove the intention of the testator to revoke it.

The case of *Shepherd* v. *Shepherd* goes no further than to shew that the naked fact of after-born children does not revoke. That was a case sent out of the Court of Chancery for the opinion of the Prerogative Court. In the Term Reports (vol. 5, p. 51) it is thus stated, "Shepherd, the testator, having made his will, after some small legacies to his collateral relations, made his wife residuary legatee; after the will in 1763 his wife was brought to bed of a daughter; upon the birth of this child the testator added a codicil, whereby he directed that the legacies should be paid, and that an annuity of 300l. should be secured on the residuum, and paid to his daughter; the codicil and will were found together," I presume found together in possession of the deceased. "In 1765 another daughter was born; in 1768 a son, who was a posthumous child, the testator having died about six months before his birth; these two last children being unprovided for, this suit is commenced to set aside the will, and decree an intestacy: whence it appears that the question is [490] whether the testator's will is revoked by the subsequent birth of two children who now remain unprovided for." That very able judge decided that under the circumstances of the case the will was not revoked, that the mere fact of after-born children did not revoke. Certainly, that case, as far as it goes, is binding upon me; and if it be not presumptuous, I should add, that it is a decision in which I am disposed to concur. Upon the question of intention, which in the judgment given by Sir G. Hay is admitted to be the governing principle, he says, "It has been urged that the intention of the testator would govern, if the intention be consistent with law: this is certainly true, but that intention must be plain and without doubt; but that is not the case at present, for here is no guide to be found." Upon the intention to revoke very considerable doubts might well be entertained under the circumstances—the will was not of very old date; it was in the testator's own custody; and upon the birth of the first child, so far from revoking it, he makes a codicil providing for that child out of the residue, and confirms the will: and upon the birth of other children he might also intend to make a provision for them out of the residue by further codicils, or he might not ever intend to do so; for having given the residue to the wife, having lived with her a longer time, he might be presumed to have confided to her the duty of providing for those children. Here was no inception of a new will: still less was there an entire new disposition, inconsistent with and therefore tending to revoke [491] the former. So far, therefore, from the intention being "plain and without doubt"—which Sir G. Hay

states as being necessary—the probability of fact is rather an adherence to the will, or at most that he meant to provide by codicil for after-born children.

The utmost length, therefore, that the decision in that case goes is, that the mere subsequent birth of children, unaccompanied by other circumstances proving intention, does not amount to a presumed revocation.

To the same extent but no further, hardly indeed so far, goes this last case which has been decided, viz. that of *Doe on the demise of White* v. *Barford* (4 M. & S. 10) and another. The plaintiff claimed under the will of one J. Borteel, who, being seized in fee in 1791, married, and in 1792 made his will and devised the premises in question to his niece, from whom the plaintiff derived her title. Borteel died leaving his wife ensient, which was unknown to either of them at the time of his death; and afterwards the wife was delivered of a daughter, from whom as heir at law the defendant derived his title; and the question was, whether the alteration of circumstances was a revocation of the will. The learned Judge at nisi prius ruled that it was not a revocation; and the Court of King's Bench was of the same opinion. Lord Ellenborough says, "The argument seems to be that the testator, had he known his situation, ought to have revoked his will; therefore, the law will impliedly revoke it:" then he goes on to say, "Where are we to stop?" **[492]** so that it was the mere naked fact of the after-born child—no corroboratory fact to shew an intention to revoke; indeed, if actual intention be necessary, in this case of *White* v. *Barford* it could not have existed, because the wife was not herself aware of being ensient; and, therefore, the husband could not, in fact, have intended to revoke; and the will could only be held to be revoked by fiction of law. The Court of King's Bench did not, I apprehend, mean to lay it down that no possible combination of circumstances, accompanying subsequent birth of children, can amount to an implied revocation, unless marriage be one of the concurrent circumstances.

The very circumstance of trying this case so recently, and even applying to the Court for a new trial, shews by some degree of inference that no such rule is considered, even at the present moment, as being settled in Westminster Hall.

The same inference is to be drawn from the Court of Chancery's having sent the case of *Shepherd* v. *Shepherd* to this Court: nay, Sir George Hay himself seems to me to have laid down the reverse; and seems to have held that the case of *Wells* v. *Wilson* was a case establishing that, with special corroborating circumstances, the birth of children might revoke without after-marriage; for he states, "as marriage alone will not revoke, so the birth of children will not revoke unless upon very special circumstances. It has been done sometimes under a combination of circumstances, but never on the mere ground of the birth of a child: the first case I remember of that kind is the case of **[493]** *Wells* v. *Wilson*, at the Cockpit." Laying it down, therefore, that the birth of children, with special circumstances, may revoke; and referring to the case, of *Wells* v. *Wilson*, as a case in which it had been so held; and speaking of that case, not as a singular case, but only as the first case. It is very possible that the report may be incorrect in that respect; or it may be that though no other case has been found, one or more may have existed; though, from the decisions of this Court not being reported, it is possible it may have escaped notice. Sir George Hay, in stating the case, specified the combination of circumstances under which the revocation was held: he had been of counsel (as already noticed) in the case, and is now stating the facts judicially, so that it must be inferred that he stated them correctly. The way in which he states them is this, "The decision did not turn upon the naked fact of the birth of a child unprovided for, but upon that, and the frequent declarations of the testator, the state of his mind, and his repeatedly declared intention in the interval between the fall and his death." Now it so happens that all those circumstances do occur here: and even others still more decidedly furnishing evidence of intention to revoke. In this case, as in that, there is a strong anxiety to provide for after-born children shewn in the will itself; for in each case the testator provides for the child with which his wife is ensient: in this case as in that the residue is given to the eldest son; but here it is clear that he did not mean to give to his eldest son more of his personal estate than to the rest of his family: as far as we can rely on **[494]** the papers produced in that case, the declarations were loose and general; but here the declarations to his wife are confidential and precise, that "there is time enough to make a new will, but he will take care of that." In that case, though he intended to make a new will, and the person was sent for, but arrived too late, yet there were no

instructions given—nothing begun—nor was it known what the import of such new will might be: though he had had a violent fall from his horse two or three years before, endangering his life, yet, even under that sort of incitement, he only talks of, but does not set about, making a new will: but in the case before the Court, here is not only the inception but the entire outline of a new will: this new will shews a complete departure from the effect of the former will, as I have already mentioned: this new will shews that, so far from intending that the immense residue of his personal property should go to his eldest son, he even meant to charge the real estate, before the son was to enjoy it, with legacies to younger children.

The deceased, when talking of intestacy, seems to have had but little objection to it; he says, "The law makes the best will for a man." He might not mean to die intestate, and yet have no very great objection to it.

Finally, here is sudden and unexpected death. Now in some of the earlier cases the inception of a will was considered a very important circumstance, as shewing an intention to revoke; at one period, before the law of this Court and its principles were correctly settled, an unfinished paper, coupled **[495]** with sudden death, would have been established, even though a considerable interval had elapsed between the writing of the paper and the death of the testator. I doubt whether at the period to which I allude, paper C might not have been established: but it is now clearly settled that in respect to an unfinished paper, though followed by sudden death, the interval must be accounted for; and it must be shewn that the testator adhered to the intention, but was prevented from finishing it. But still the writing such a paper and sudden death are extremely strong circumstances, in addition to the birth of subsequent children, to establish the intention to revoke. The present case, therefore, has a combination of circumstances, which appear to me to be stronger than those of *Wells* v. *Wilson*; and as strong as can well be imagined, tending to shew that it was the intention of the deceased not to adhere to the old will which he had made under very different circumstances twenty years before.

The Court has been reminded, and not improperly, that it cannot make or alter the law; that it cannot make or revoke wills; and undoubtedly it cannot: it is bound conscientiously to administer the law as it finds it; to ascertain its true principles; and to be governed by established rules. It is for this reason that the Court has endeavoured, as far as was in its power, to trace this matter up to its true principles; and to ascertain the rules growing out of those principles; and to be governed by them. The first principle of all **[496]** wills is the intention of the testator. Positive law and the decisions of Courts have prescribed certain rules for ascertaining that intention. They have prescribed that a will of land shall not be good unless executed in the presence of three witnesses; that a will of personalty shall not be good (with certain exceptions), unless it be in writing. So again, the law has established rules for ascertaining the intention of revoking; in some cases it requires certain acts to be done by the testator. It has also, from certain circumstances, implied an intention to revoke. The change of circumstances may imply a change of intention; but the great circumstance which has been regarded as laying the foundation of this implied change of intention is the subsequent acquirement of new moral duties. It is the duty of a father to provide for his children. The law upon that duty as the principal circumstance may safely found the intention to discharge it. The Roman law acted upon that circumstance alone, and presumed an intention not to exclude the children. The law of England has not gone so far. It has adopted it as a leading circumstance, but not as alone sufficient to shew an intention to revoke; marriage, however strong it may be as a concurrent circumstance, is not, as far as I have been able to trace the matter, absolutely essential: it was not the doctrine of the civil law; it was not held to be essential by any thing laid down by earlier writers. It is not considered as essential in the earliest cases. And in tracing the doctrine downwards, I have been unable to find it settled, **[497]** that a revocation cannot take place without the concurrence of subsequent marriage. On the contrary, as far as I can understand the case of *Wells* v. *Wilson*, there is one case at least in which a will has been held to be revoked by the birth of children, without the concurrence of subsequent marriage, but accompanied by other circumstances.

The Court has been also warned in respect to the danger of rendering the law vague and uncertain: undoubtedly it is the duty of every Court to be cautious of opening a door to uncertainty; but Courts must also be cautious lest, whilst they are

attempting to establish rules to guide to certainty, they do not undermine principles, defeat intention, and thereby lead to injustice. Courts have not gone that length. Even where marriage and issue do concur, they have not held such a concurrence to be a positive revocation; but all the circumstances are let in for the purpose of ascertaining whether it was, or was not, really the intention of the testator to revoke. The danger of uncertainty appears to me to be little, if at all, greater in that case than in the present.

Unquestionably where a will has been once regularly made, the presumption of law is strong in its favour; and, as Sir George Hay states, "The intention to revoke must be plain, and without doubt." But, under all the facts of this case, taking the subsequent birth of issue as the essential basis of the proof, and accompanied as it is by the other concurrent circumstances, I am of opinion that the intention of the testator is "plain, and without doubt," **[498]** and, therefore, that I am warranted in law and justice to pronounce against this will, upon the ground that it has been revoked.

Application was made that the Court would direct the expences of the suit to be paid out of the estate.

Per Curiam. Certainly.

[499] CONSISTORY COURT OF LONDON.

POUGET *v.* TOMKINS, FALSELY CALLING HERSELF POUGET. Hilary Term, Jan. 24th, 1812.—The marriage of a minor annulled on account of a fraudulent publication of banns.

[S. C. 2 Hag. Con. 142. Referred to, *Holmes* v. *Simmons*, 1868, L. R. 1 P. & D. 530.]

William Peter Pouget was born at Surat, in the East Indies, on the 5th of May, 1794. In the month of May, 1810, his father, who at that time resided in Blandford-street, Portman Square, was informed by one of the servants in his family that his son had been married, in the preceding January, to Lucretia Tomkins, his grandmother's maid. Upon investigation, it was ascertained that the marriage ceremony had taken place in the church of St. Andrew's, Holborn, after a publication of banns, under the names of William Pouget and Lucretia Tomkins, in which they were both described as residing in that parish. It was in evidence also that an attempt had been first made to have the banns published in Highgate Church: but, upon the names being delivered to the clerk, he asked if the parties resided in Highgate parish; to which the bearer of the paper on which the banns were written (a servant girl in Mr. Pouget's family) replied, "That she believed they did, but she did not know where." This answer not satisfying the clerk, no further steps were taken for their publication in that parish.

[500] *Judgment—Sir William Scott.* This is a suit brought by the father of William Peter Pouget to annul a marriage contracted by his son, on the grounds of minority, want of consent, and undue publication of banns.

William Peter Pouget was a minor at the time of the marriage, having been born in May, 1794, and married in January, 1810, at St. Andrew's, Holborn; his father's residence, and consequently his, he being resident with his father, was in the parish of Marybone; his alleged wife was a servant in the family; her age does not appear; the letters exhibited from her shew her to have been an uneducated person.

The minor's name of baptism is William Peter; it is proved that the name of William was merged in that of Peter, which was the only appellation in common use. Maria Perkins says that he was scarcely known to have any other name, except by his very near relations; she is supported in this by other witnesses; his letters were generally subscribed Peter, and rarely William Peter Pouget; in the letters of the party against whom the suit is brought she styles him Peter, and it appears that she always, in mentioning him, termed him Master Peter; so that it is clear, however William might compose a part of his baptismal name, the other had obliterated it in common use. The name of William Pouget would not describe him to most persons so as to notify him to be the person so described.

[501] By what preliminary measures the marriage was brought about does not appear; nothing transpires before an attempt to publish the banns at Highgate, which miscarried. One of the witnesses carried the banns to the clerk at Highgate, who asked if the parties resided in the parish; her answer implied that she believed they did not, and in consequence thereof the publication was declined.