Lord Mure and Lord Shand concurred.

Lord Adam—This is a petition under the Entail Amendment Act 1848 to disentail the estates of Kelburne, and section 6 of that statute provides that before authorising such disentail to be recorded the Court may order such provisions as may appear just to be made for parties in right of such burdens as we are dealing with here. That is the duty that is laid upon us. And I agree that it would not be just to make provisions for less than the maximum amount which the widow and children may possibly claim. I think that if an heir of entail wishes to disentail, that is no reason why his widow and children should suffer. Now, the maximum amount to which his widow may be entitled depends on whether his children survive the date of payment. If there should be none the amount would be larger, and I think it would be manifestly unjust to provide for the widow on any footing other than that of assuming that all the children had predeceased the date of payment. In the same way I think it would be manifestly unjust to provide for the children on any assumption other than that of his widow's death prior to the date of payment. Now, that view necessitates the charging on the estate of provisions which can never be required. But nobody can say which of the possible events may happen, and therefore it is necessary to provide for all. But I agree with your Lordship that the hardship is more apparent than real. For if his heir of entail is about to enter into a contract of sale he can have an actuarial calculation of the whole probabilities of the case. I most certainly concur with your Lordship in thinking that whether such a calculation is to be made or not, we cannot deal with the interest of the widow and children in any other way than that which your Lordship has proposed.

The Court adhered.

Counsel for Petitioner — Raukine — Dundas. Agents—J. & F. Anderson, W.S.

Counsel for the Countess and Children — Graham Murray—W. C. Smith. Agents—Tods, Murray, & Jamieson, W.S.—Hope, Mann, & Kirk, W.S.

Thursday, July 15, 1886.

OUTER HOUSE.

[Lord Kinnear.

FINDLAY'S TRUSTEES *v.* FINDLAY AND OTHERS.

Parent and Child—Succession—Conditio si sine liberis decesserit—*Implied Will—Posthumous Child.*

A father by a holograph will directed his trustees to make over his whole estate to his children George and Jessie, naming them. They were his whole family, and he was then a widower. Six years later he married again, providing a sum of £3000 to trustees under his marriage-contract to pay an annuity to his wife, and the fee to the whole children of both marriages if his wife should survive, that provision being declared to be in satisfaction of legitim; if she predeceased, no provision was made for the children. He died six months after this marriage, survived by his wife, who bore a posthumous child to him. The amount of his estate carried by his will was about £5000. The posthumous child having claimed a third of the provision by the will in addition to a third of the provision settled by the marriage-contract, the claim was *repelled.*

George Findlay, hatter in Aberdeen, died on 15th May 1885 leaving a holograph will in the following terms—"I, George Findlay, with the full intention if spared to make a proper will fully detailed, do hereby appoint Mr George Findlay Shirras, my nephew, and Mr Patrick Morgan, 11 Richmond Terrace, to be trustees on my estate, and my son George to be trustee when the age of twenty-one, but to be present at all meetings till then but not to vote only to express his wish but to have full power @ twenty-one. The trustees to give my sister Ann Findlay the sum of forty pounds per annum during her lifetime, George Findlay, my son, and Jessie Ann Findlay, my daughter, to have share and share alike both of heritable and moveable, or the survivor of them. George Findlay. *P.S.*—The trustees to have a gift of nineteen guineas each."

At the date of the will the testator was a widower, his wife having died in 1875, and the two children named in it were his only children. In 1884 he contracted a second marriage, and by an antenuptial contract he bound himself to make payment of an annuity of £150 to his second wife in case she should survive him, and in security of the annuity he assigned to trustees certain stocks and shares of the value of £3000 or thereby. In the event of the wife surviving the trustees were directed on her death, leaving issue, to realise the trust funds and divide the proceeds among all the children of both marriages equally, share and share alike; and it was declared that the provisions of the contract so far as in favour of the children of the marriage should be in full satisfaction of legitim, executry, and everything else they could claim through the father's decease, goodwill excepted. In the event of his wife's predecease the trustees were to refund the stocks and shares so handed to them, and that whether there were any children of the marriage or not.

Findlay died about six months after his second marriage, survived by his wife. She gave birth a few months after her husband's death to a posthumous daughter. She shortly thereafter died.

Findlay's moveable estate was worth about £5066. He had two heritable properties, the title to the first of which, a house in Victoria Street, Aberdeen, was taken in 1867, in favour of him and his first wife in conjunct fee and liferent, but for her liferent use only, and after the death of the longest liver, of the children procreated or to be procreated between them, equally, share and share alike, in fee. The title to the other, a house in Aberdeen, let to tenants, and which was purchased in 1874, was in favour of Findlay, the testator, and his heirs and assignees whomsoever.

Findlay's trustees raised a multiplepoinding to determine the rights of his children in his estate. Mr Harry Cheyne, W.S., was appointed *curator ad litem* to Jane, the posthumous daughter, and claimed a third of the estate, heritable and moveable. George and Jessie claimed share and share alike of the estate to the exclusion of Jane.

Both parties founded on the holograph writing referred to, the *curator ad litem* for Jane pleading —"Upon a sound construction of the testamentary writing of 9th March 1878, in the circumstances which have occurred, the pupil defender is entitled to an equal share of the whole estate conveyed by the said testamentary writing, along with the pursuer George Findlay and his sister Jessie Ann Findlay, and the claimant, as *curator ad litem* to the pupil defender, is therefore entitled to be ranked in terms of his claim."

Argued for Jane—The will was holograph, and in the form of a direction to trustees, and was therefore open to construction—*per* Lord Young in *Mitchell's Executor* v. *Smith*, &c., July 7, 1880, 7 R. 1090. In proceeding to construe the will it could not be disputed that in cases where a father had died before any child was born to him, a will in which no provision was made for the event of the birth of a child could be reduced by a *post natus*—*Colquhoun* v. *Campbell*, June 5, 1829, 7 S. 709; *A's Executors* v. *B and Others*, 1874, 11 S.L.R. 259—on the principle of the *conditio si sine liberis decesserit*—Cod. vi. 42, 30. The law showed favour to the child's claim, and it must be made "as plain as a pike-staff that the testator did not intend the succession to go to the child"—Lord Glenlee in *Colquhoun's* case—before a right so deeply founded could be disappointed. The same reasoning covered the case of a child in the position of the claimant here, and authority had sanctioned such a claim —*Oliphant*, Dec. 10, 1794, Bell's Fol. Ca. 126, cited *ad longum* in the opinion of the Lord President in *Spalding* v. *Spalding's Trustees*, Dec. 18, 1874, 2 R. 247. It was said that that authority, resting as it did on the case of *Anderson*—*Anderson* v. *Anderson*, 1729, M. 6590, *rev.* H. of L. 1 Craigie, 136—which had been reversed in the House of Lords, carried no weight. But although Lord President Campbell in deciding *Oliphant's* case had referred to *Anderson's* case as an analogy, the judgment in *Oliphant's* case rested on entirely different grounds, the claim in *Anderson's* case being a claim to share in a contract provision made by a father who was still alive at the date of the claim, the claim in *Oliphant's* case being a claim to participate in a succession as here. The remedy, it was said, open to a posthumous child was reduction; that was so where there were no other children and no means of ascertaining the father's mind to his children. Here his mind was plain, namely, to divide his whole estate equally among his children. Nor was the provision for children in the contract on the occasion of his second marriage a good ground of exclusion. In that contract all children—of both marriages—were equally favoured, and it was not a provision for all events, but only for the event of the father predeceasing the mother.

Argued for George and Jessie—(1) the authority of *Oliphant's* case had been denied; and (2) the principle to which the other claimant appealed, viz., that a father could not be presumed to intend to leave a child unprovided for, was inapplicable in a case in which he had provided for the child. In *Spalding's* case (*cit. supra*) Lord President Inglis had pointed out that *Oliphant's* case had been rested on *Anderson's*, and that the reversal in that latter case could not have been known when the judgment in *Oliphant's* case was pronounced. His Lordship and the other Judges of the First Division in *Spalding's* case spoke of *Oliphant's* case as being therefore of no authority. Whatever might be the result in a case where a posthumous child was left destitute, the presumption of parental affection on which the whole case of the other claimant was founded could have no existence when, as here, the father had considered the possibility of his having more children, and had made provision for them if they should be born. That the posthumous child got less than the others was of no moment, for there was no presumption for an equal provision to all children. There was thus no ground for the application of the doctrine of implied will. If, again, the claimant pleaded the *conditio si sine liberis decesserit*, the result of that would be to reduce the will. The other claimant could cite no authority (unless *Oliphant*) for admitting the posthumous child to a share in the provision made *nominatim* for the others. If she had any remedy it must be by way of reduction.

The Lord Ordinary (KINNEAR) pronounced this interlocutor:—"Repels the claim for Harry Cheyne, W.S., *curator at litem* to Jane Elmslie Henderson Findlay; sustains the claim for George Findlay Shirras, *curator bonis* to Jessie Ann Findlay, and ranks and prefers them in terms thereof, and decerns.

"*Opinion.*— . . . The *curator ad litem* maintains on behalf of this posthumous daughter that by an implication founded on the *pietas paterna* the will may be so construed as to entitle her to share in the general estate along with her brother and sister. The only authority cited in support of this claim is the case of *Oliphant* (Bell's Fol. Ca. 125), where the claim of a posthumous child was sustained to a share of a bond of provision destined to two elder children *nominatim*. But no weight can be attached to that decision, because, as was pointed out in the case of *Spalding* (2 R. 247), it proceeded upon the supposed authority of a previous case of *Anderson* which was reversed in the House of Lords. The case of *Anderson* is perhaps distinguishable, because what was proposed in that case was not to extend a will, but to extend a contract by implication. But if the judgment of the House of Lords cannot be taken as a direct authority against the present claim, it is at least sufficient, as was held in the case of *Spalding*, to displace the only authority which can be cited in support of it.

"The argument founded on implied will, therefore, would be unsupported by authority even if there had been no other provision for the ward. But it is a material consideration that she is in fact provided for by the marriage-contract. It is impossible to say, therefore, that the testator did not advert to the possibility of his having children by his second marriage. But if he has provided, whether by the will or by marriage-contract, for the contingency of such children coming into existence and surviving him, that appears to me to displace the assumption upon which alone they could be admitted to participate in an estate bequeathed *nominatim* to elder children."

This judgment was acquiesced in.

Counsel for Trustees and for George and Jessie Findlay—Pearson — Baxter. Agents — Stuart & Stuart, W.S.

Counsel for *Curator ad litem* to Jane Findlay—G. R. Gillespie. Agents—Mackenzie & Kermack, W.S.

Saturday, November 13.

FIRST DIVISION.

HARVIE *v.* WILLIAM ROSS AND THOMAS ROSS.

Process—Interdict—Breach of Interdict—Petition and Complaint.

The holder of a patent obtained interdict against the respondent, an alleged infringer, who thereafter assumed another person as his partner. A petition and complaint was then brought against him and his partner alleging that he had broken the interdict, and that his partner was knowingly aiding and abetting him in doing so. They lodged separate answers, the latter maintaining, *inter alia*, that the complainer's patent was bad. Both denied the alleged breach of interdict. The Court allowed the parties a proof as to the alleged breach of interdict, but *refused* (in that process) to allow to the assumed partner a proof of his averments that the patent was invalid.

By deed of assignment dated 26th December 1883, registered in the Patent Office, William Harvie, lampmaker, Broomielaw, Glasgow, sole partner of "The Ross Patent Paragon Valve Company," acquired exclusive right to certain letters-patent granted for an improved valve to prevent waste of water in water-closets, urinals, &c.

In April 1886 Harvie brought a suspension and interdict against William Ross, brassfounder, for an alleged infringement of the said letters-patent, and on May 25th interim interdict was granted by Lord Trayner. This interlocutor bore that the "Lord Ordinary having heard counsel for the complainer, and considered the proceedings, in respect that the respondent has failed to find caution as appointed by interlocutor of 1st May, grants interim interdict."

Upon 18th October the present petition and complaint was presented (with the concurrence of the Lord Advocate) for breach of interdict against William Ross, and Thomas Ross, his son.

The complainer averred that William Ross manufactured and sold valves and apparatus so constructed as to be in infringement of the foresaid patent rights, and further, that in order to evade the interdict he had assumed as a partner his son Thomas Ross, who was pushing the sale of the said valves both in Glasgow and elsewhere; that the said Thomas Ross was well aware of the interdict against his father, and of the fact that the articles sold were made and sold in infringement of complainer's patent, and knowingly and wilfully aided him in breaking it, to the great prejudice of the complainer.

William Ross and Thomas Ross lodged separate answers. William Ross denied that his firm manufactured or sold valves of the kind referred to in the interdict proceedings, and stated that the valves which they now manufactured were not those referred to in the interdict, but were made and sold under a patent of his own, and were dissimilar.

Thomas Ross, while admitting the existence of the interdict against his father and partner, stated that no interdict had been ever obtained against him, and denied that he or his firm sold any valve to which the interdict against his father applied. He also took various objections to the validity of the letters-patent, in respect that the complainer was not the full and true inventor, that the alleged invention was not publicly known before the letters-patent, and not of public utility, &c.

Argued for the complainer—Proof should be allowed against both respondents, and the statements in the answers for Thomas Ross relative to the alleged invalidity of the letters-patent should be disallowed as irrelevant. The respondent Thomas Ross had been assumed as a partner since the interdict was granted, and with a view to enable the respondents to try and break it with impunity. The son was well aware of the existing interdict against his father, and that being so, he was not entitled to raise any question as to the validity of the letters-patent.

Authority—*Dudgeon* v. *Thomson*, March 17, 1876, 3 R. 604 and 975, and 4 R. (H. of L.) 88.

Replied for respondents—There was no case against Thomas Ross. He was assumed a partner after the interdict was granted. He was a partner working for his own interest, and not merely as the hand of another. *Alternatively*, if there was any case against Thomas Ross, then he was entitled to a proof of all his averments, including his allegations against the validity of the letters-patent. In any view, the complainer had not made his statements sufficiently specific against either of the respondents.

At advising—

Lord President—I am of opinion that the complainer is entitled to a proof of his averments, and that the respondent William Ross is also entitled to a proof of his averments, while as regards Thomas Ross, he is entitled to a proof of what is contained in articles 1 and 2 of his answers, but not of anything else. As to the competency of trying the present question by means of petition and complaint for breach of interdict, I entertain no doubt.

The question is as to an alleged infringement of letters-patent, and what will have to be determined is, whether or not the respondents have committed a breach of interdict.

The complainer alleges that his patent has been infringed, and I can see nothing in the case of *Dudgeon*, to which we were referred, to indicate that the trying of such a question by means of a petition and complaint for breach of interdict is in any way incompetent.

In the case of *Dudgeon* the House of Lords thought we had gone wrong, because after interdict had been granted by the Lord Ordinary, the complainer lodged a disclaimer and memorandum of alteration of his specification, and thereafter judgment was pronounced by this Division of the Court upon a petition and complaint for breach of the interdict which had been granted before the specification was altered. Nothing of that