which followed on the marriage contract.

I am of opinion that the Lord Ordinary's interlocutor should be affirmed.

LORD MACKENZIE—I am of the same opinion. It is not necessary for the decision of the present case to consider what would be the effect of that part of section 28 of the Rutherfurd Act which deals with the direction to entail land if there had been here no nomination of trustees, because in the marriage contract of the late Sir William Gardiner Baird, which he entered into with the consent of his father, his father being a party, there is a nomination of trustees at whose instance execution is to pass. The marriage contract imposed an obligation upon, first of all, Sir James Gardiner Baird, and failing him his son, who afterwards became Sir William, to execute and record the deed of entail.

Accordingly I think that the contention of the reclaimer fails.

LORD SKERRINGTON—A trust has been defined as a combination of mandate and deposit, and the latter element was absent in the present case because there was no conveyance in favour of trustees. On the other hand the marriage contract conferred a fiduciary power upon certain persons whom it described as "trustees," and this power was to be exercised for the express purpose of securing that the family estate should be first disentailed and then re-entailed as directed in that deed. A trust of this kind, though imperfect when compared with an ordinary trust, confers a certain measure of protection upon the issue of a marriage both at common law and also by section 8 of the Rutherfurd Act, and is in my judgment sufficient to meet the requirements of sections 27 and 28 of the same statute so far as applicable to a case where land has been directed to be entailed. Like your Lordships I reserve my opinion as to whether in such a case the creation of a trust of some kind is indispensable in order that sections 27 and 28 may be applicable.

As regards the next point—the inability of Sir James to execute a new entail of lands which he held under an existing entail—I think that the objection is met by the leading case of *Auld* v. *Black*, 1 R. 133.

I am of opinion therefore that the Lord Ordinary came to a right decision, and that the reclaiming note should be refused.

LORD CULLEN—I have very great doubt whether a personal obligation to grant an entail, even if declared prestable at the instance of certain named persons for behoof of unborn creditors in the obligation, represents a trust direction to entail such as the Act of 1848 in terms postulates. But as your Lordships are all quite clear that it does, I feel constrained to think that my doubt must be a mistaken one, and I do not dissent. The result is probably in accordance with the general spirit of the Act.

As regards the matter of date, I concur in the view which your Lordships take.

The Court adhered.

Counsel for the Petitioner — Dean of Faculty (Sandeman, K.C.)—Skelton. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Curator *ad litem*—Maitland. Agents—Mackintosh & Boyd, W.S.

Tuesday, July 11.

SECOND DIVISION.

NICOLSON *v.* NICOLSON.

Succession—Will—Revocation—Conditio si sine liberis decesserit—Prior Will.

A testator who died on 16th February 1922 left two testamentary writings, viz., a trust-disposition and settlement dated 13th February 1917, and a holograph will dated 31st July 1917. By the trust-disposition and settlement he made provision for his wife and also for his issue who should survive her and attain majority. By the holograph will he bequeathed his whole estate to his wife without expressly revoking the trust-disposition and settlement. The testator was survived by his wife and two children, the elder of whom was born before the date of the trust-disposition and settlement, and the younger after the date of the holograph will. *Held* (*following Elder's Trustees* v. *Elder*, (1894) 21 R. 704, 31 S.L.R. 594) that there were no special circumstances sufficient to elide the presumption that the holograph will was revoked by the birth of the second child, the fact that there was a child in existence at the date of the holograph will, and that the testator made no provision for it therein not being sufficient to do so; and (2) (*distinguishing Elder's Trustees* v. *Elder*, (1895) 22 R. 505, 32 S.L.R. 365) that the trust-disposition and settlement having been only impliedly and not expressly revoked by the holograph will, became operative as an effectual disposition of the testator's estate.

In order to determine the succession to the estate of Andrew Nicolson, Edinburgh, a Special Case was presented for the opinion and judgment of the Court by Mrs Nicolson, Andrew Nicolson's widow, as an individual *of the first part*, Mrs Nicolson as tutor of their two pupil children, *of the second part*, and Mrs Nicolson and others, as the trustees nominated in a trust-disposition and settlement executed by Andrew Nicolson on 13th February 1917, *of the third part*.

The Case stated *inter alia*—"1. The late Mr Andrew Nicolson, solicitor, Edinburgh (hereinafter called 'the testator'), who died on 16th February 1922, was a partner of the firm of Winchester & Nicolson, S.S.C., Edinburgh, and was in active practice until five days prior to his death. He was survived by his wife, the first party hereto, and by two daughters Edith Helen Donaldson Nicolson and Janet Andrew Nicolson, who were born on 23rd January 1915 and 6th April 1918 respectively, and are accordingly in pupillarity. The testator's widow, as

their tutor, is the second party hereto. 2. After the death of the testator the following testamentary writings . . . were found amongst his papers—(1) Trust-disposition and settlement dated 29th May 1914; (2) Codicil thereto dated 10th April 1915; (3) Holograph will dated 31st July 1916; (4) Trust-disposition and settlement dated 13th February 1917; (5) Holograph settlement dated 31st July 1917. After an exhaustive search no other writings or documents of a testamentary nature have been found, and it is believed that the documents enumerated above are the only writings extant relating to the disposal of the testator's estate. 3. The gross amount of the estate is approximately £8400, made up of heritable properties (including feu-duties) of the approximate value of £3100; heritable securities of the approximate value of £2550; and miscellaneous moveable estate of the approximate value of £2750. 4. By the holograph settlement dated 31st July 1917 the testator left his whole estate, heritable and moveable, to the first party. By the trust-disposition and settlement dated 13th February 1917 the testator conveyed his estate to the trustees therein named, the principal directions being to pay the income thereof to the first party during her life and to pay the capital over to his issue who should survive his wife and attain twenty-one years of age. The trustees nominated by the said trust-disposition and settlement have accepted office and are the third parties hereto. 5. Questions have arisen (first) as to whether the settlement of 31st July 1917 has been revoked by the birth of the testator's second child on 6th April 1918, and (second) as to whether, in the event of that settlement being held to be revoked, the trust-disposition and settlement of 13th February 1917 is effectual and operative. 6. The first party maintains that the holograph settlement of 31st July 1917 was not revoked by the birth of the testator's second child and that the *conditio si sine liberis testator decesserit* does not apply to a case where as here a testator, there being a child or children in existence, destines the whole of his estate to a person or persons other than his children. In such a case the subsequent birth of another child raises no presumption sufficient to override the express will and intention manifested in the deed. In any event she maintains that the *conditio* is at best a presumption which may be rebutted and that the circumstances of this case are sufficient to rebut the presumption if it does arise. The first party further contends that in the event of it being held that the holograph settlement of 31st July 1917 is revoked, the trust-disposition and settlement of 13th February 1917 is thereby set up as a valid and effectual disposition of the testator's estate. 7. The second party maintains that the legal presumption that a will is revoked by the subsequent birth of a child to the testator applies, that there are no facts in the case sufficient to overcome the presumption, and that accordingly the settlement of 31st July 1917 must be held to have been revoked. In that event she maintains further that the trust-disposition and settlement of 13th February 1917 is not thereby set up, but that the testator's estate falls to be disposed of as intestate estate. 8. The third parties maintain that by virtue of the application of the *conditio si sine liberis testator decesserit* the holograph settlement of 31st July 1917 was revoked by the birth of the testator's second child. They, however, maintain that the trust-disposition and settlement of 13th February 1917 has been thereby set up. In terms thereof the fee of the testator's whole estate is given to the issue of the testator who shall survive the testator's wife and attain twenty-one years of age, and the settlement accordingly provides for the testator's second child. In the events which have happened the third parties contend that the said trust-disposition and settlement of 13th February is operative as an effectual disposition of the testator's estate and that the said estate falls to be administered in terms thereof."

The *questions of law* were—"1. Has the holograph settlement of 31st July 1917 been revoked by the birth of the testator's second child on 6th April 1918? 2. In the event of the preceding question being answered in the affirmative, (*a*) is the trust-disposition and settlement of 13th February 1917 operative as an effectual disposition of the testator's estate? or (*b*) does the testator's estate fall to be dealt with as intestate succession?"

On 31st May 1922, on the motion of counsel for the second party in the Single Bills the Court appointed W. G. Skinner, Esq., advocate, to be curator *ad litem* to the two pupil children of the testator.

Thereafter at the discussion in the Short Roll on 24th June and 1st July 1922 the following authorities were cited by the parties:—By the first party in support of her contention that the holograph will of 31st July 1917 was not revoked by the birth of the second child — *Knox's Trustees* v. *Knox*, 1907 S.C. 1123, 44 S.L.R. 838, *per* Lord President (Dunedin) at 1907 S.C. 1128, 44 S.L.R. 842; *Stuart-Gordon* v. *Stuart-Gordon*, (1899) 1 F. 1005, 36 S.L.R. 779; *Elder's Trustees* v. *Elder*, (1894) 21 R. 704, 31 S.L.R. 594, *per* Lord Kinnear at 21 R. 709, 31 S.L.R. 597; *Hughes* v. *Edwardes*, (1892) 19 R. (H.L.) 33, 29 S.L.R. 911, *per* Lord Watson at 19 R. (H.L.) 35, 29 S.L.R. 912; *Dobie's Trustee* v. *Pritchard*, (1887) 15 R. 2, 25 S.L.R. 6, *per* Lord Rutherfurd Clark at 15 R. 4, 25 S.L.R. 7; M'Laren's Wills and Succession (3rd ed.), p. 403-4.

By the third parties in support of their contention (1) that the holograph will of 31st July 1917 was revoked by the birth of the second child—*Milligan's Judicial Factor* v. *Milligan*, 1910 S.C. 58, 47 S.L.R. 75, *per* Lord Low at 1910 S.C. 61, 47 S.L.R. 76; *Elder's Trustees* v. *Elder*, (1894) 21 R. 704, 31 S.L.R. 594 (*cit.*); and (2) that the trust-disposition and settlement of 13th February 1917 was thereby set up—*Elder's Trustees* v. *Elder*, (1895) 22 R. 505, 32 S.L.R. 365, *per* Lord M'Laren at 22 R. 512, 32 S.L.R. 369, and Lord Kinnear at 22 R. 512, 32 S.L.R. 369; *Leith* v. *Leith*, (1863) 1 Macph. 949, *per* Lord Justice-Clerk (Inglis) at p. 955; *Dove* v.

Smith, (1827) 5 S. 734, (N.E. 684); M'Laren's Wills and Succession (3rd ed.), p. 414.

By the second party (the curator *ad litem*) in support of his contention that the testator's estate fell to be disposed of as intestate estate—*Elder's Trustees* v. *Elder*, (1895) 22 R. 505, 32 S.L.R. 365 (*cit.*), *per* Lord Adam at 22 R. 509, 32 S.L.R. 368.

At advising—

LORD JUSTICE-CLERK—In this case the testator died on 16th February 1922. He was survived by his widow and two children, one born on 23rd January 1915 and the other on 6th April 1918. He left several testatmentary writings, but we need refer to only two of these. The last one was a holograph will executed on 31st July 1917, which is in the following terms:—"I, Andrew Nicolson, solicitor, Edinburgh, do hereby leave, bequeath, and convey the whole means and estate, heritable and moveable, real and personal, belonging to me at the time of my death, to my wife Mrs Edith Jane Henderson or Nicolson, whom I hereby appoint to be my executrix and universal legatory, as well as tutor and curator to our daughter Edith Helen Donaldson Nicolson.—In witness whereof these presents, written by myself, are subscribed by me at Edinburgh on the thirty-first day of July Nineteen hundred and seventeen.—AND. NICOLSON."

The other was a more formal deed executed on 13th February 1917, and by which provision was made for children of the testator who should survive his wife and attain twenty-one years of age.

Two points were argued before us—(1) What was the effect of the *conditio si sine liberis* as to the holograph will? and (2) How far in the circumstances was the deed of 13th February 1917 affected by said *conditio?*

As to the first of these questions, in my opinion the holograph will was revoked by the subsequent birth of the testator's second child. At the date of the said will the elder child was about three years of age, and assuming that the second child had been conceived at said date this would not be in the knowledge of the testator. While the application of the *conditio* depends according to the law of Scotland on the special circumstances of each case, there are in my opinion in this case no circumstances sufficient to elide the *conditio*. I refer particularly to the case of *Elder* (21 R. 704, 31 S.L.R. 594). In my opinion the first question should be answered in the affirmative.

With regard to the second question, viz., How far was the deed of February 1917 affected by the birth of the testator's second child? In my opinion the holograph document of July must be regarded as having in the circumstances existing at the date revoked the prior deed of February. The document of July disposed of the testator's "whole means and estate." It was therefore a universal settlement, and so must be held to have revoked the prior settlement of February. But this was an implied and not an express revocation. The birth of the second child revoked the document of July, the result being that the testator's estate must in my opinion be distributed as if the July document had never existed. But in my opinion it is not a legitimate inference that because the deed of July was revoked by the birth of the second child the prior deed of February was also thereby revoked. On the contrary, in my opinion the deed of February remained unaffected by the birth of the second child. If there had been no deed in July the birth of the second child would not in my opinion have affected the February deed, and I cannot accept the reasoning that because of the July deed which proved ineffective in consequence of the birth of the second child the February deed also became ineffective. I think the consequences of the birth of the second child were exhausted by the revocation of the July deed, and left the February deed unaffected.

I cannot agree with some of the observations which were made in the second *Elder* case; moreover, the circumstances in that case were materially different from those in the present case. In particular, the revocation in the *Elder* case was express, and the will there in question was some thirty years prior to the testator's death.

In my opinion question 2 (*a*) falls to be answered in the affirmative and 2 (*b*) in the negative.

LORD ORMIDALE—Two questions are submitted to the Court in this Special Case. With regard to the first, Whether the holograph settlement of 31st July 1917 was revoked by the birth of the testator's second child on 5th April 1918? I agree with your Lordship in holding that it was. The presumption is that it was, and that presumption can only be rebutted by circumstances relevant to infer that the testator, notwithstanding the birth of the child, intended that his will, which made no provision for her, should stand. Two circumstances are founded on by the first party—the terms of the will itself, and the lapse of four years between the birth of the child and the death of the testator. It cannot be disputed that mere lapse of time is not sufficient by itself to rebut the presumption. That is concluded by authority. But I see no reason for holding that it may not be an element of some force, taken in conjunction with other considerations, if there are any, bearing on the question. The only other circumstance founded on by the first party is the fact that there was a child in existence at the date of the will, and that the testator excluded it from any benefit thereunder. I do not, however, think that, strictly speaking, it is legitimate to take into consideration the terms of the will which is impliedly revoked as relevant to instruct to any extent the intention of the testator after its revocation, for by presumption of law whatever the intention of the testator may have been at the date of his will it ceased to be his intention when the second child was born to him. That was so decided in *Elder's Trustees* (21 R. 704, 31 S.L.R. 594). As I read that decision the presumption of law operates with precisely the same effect in the case of a tes-

tator to whom an additional child is born after the date of his will, as in the case of a testator who was childless when he executed his settlement but afterwards has issue. If that is so, then the special circumstances which are habile to rebut the presumption must be sought for after the date of the child's birth if the will is to stand. The case of *Stewart Gordon* (1 F. 1005, 36 S.L.R. 779) is not really an exception. As Lord Young puts it in *Crow* v. *Cathro* (5 F. 950, at 954, 40 S.L.R. 687, at 690) the testator must say or do something to show that he considers his former will still good. It may be that in the present case he would have preferred his wife to two children just as he did to one. But that is mere conjecture in the absence of any indication of what was in the testator's mind subsequent to the birth of the second child. For the like reason I think no assistance can be obtained from a consideration of the will of 13th February 1917.

The second question, Whether in the event of an affirmative answer being given to the first question, the trust-disposition and settlement of 13th February 1917 is operative as an effective disposition of the testator's estate, or does the estate fall to be dealt with as intestate succession? is to my mind one of great difficulty. In the second report of *Elder's Trustees* (22 R. 505, 32 S.L.R. 365) the effect of the revocation, implied by the birth of a child, of a testator's will which contained no provision for children *nascituri* on an earlier will which did contain such a provision was considered, and it was decided that the earlier will did not become operative. But in the will impliedly revoked by the birth of the child there was an express revocation of all prior deeds, and the express revocation it was held did not itself suffer implied revocation along with the provisions affecting the disposal of the estate. My first impression was that the present case was covered by the reasoning of the judges in *Elder's* case, although Mr Nicolson's will of 31st July 1917 contained no words expressly revoking the prior settlement of 13th February 1917. It was a universal settlement, and therefore impliedly revoked the prior will. On principle therefore I was inclined to think that revocation being plainly the intention of the testator and being just as effectively secured as if he had used the words "I revoke the will of 13th February 1917," and further, as the deed expressing that intention was not set aside by any act of the testator himself, but by a rule of law which presumes a change of intention on the testator's part in the altered circumstances with regard to the disposition of his estate and nothing else, his implied intention ought still to be effective and that the result would be intestacy. But the opinions of the judges must be read with reference to the precise terms of the deed with which they were dealing. So reading them, the question now to be determined was not matter of decision, though there is a clear expression of opinion on it by Lord M'Laren. Having in view the law as to express revocation laid down by the Lord Justice-Clerk (Inglis) in *Leith* v. *Leith* (1 Macph. 949, at p. 955), and the distinction drawn by him between express revocation and implied revocation, I have come, though with some hesitation, to agree with your Lordship that Mr Nicolson's settlement of 13th February 1917, which contains provisions for children *nascituri*, and is not therefore affected by the presumption *si testator sine liberis*, has become operative as an effective disposition of his estate.

LORD HUNTER—I concur. The first decision in *Elder* is authority for the proposition that the birth of a second child creates a presumption in favour of the settlement being revoked, just as if the case were that of a childless man who having made a settlement has a child subsequent to the date of the settlement. And I agree with your Lordship that in this case there are no special circumstances to take it outwith the scope of the presumption.

As regards the second question, I agree that there is some difficulty, particularly in view of the expressions of opinion in the second case of *Elder*. But it appears to me that the sound way of looking at the matter is, that as the deed that is being revoked by the birth of the second child did not expressly revoke the previous settlement, the implied revocation is swept away and the earlier deed is restored as your Lordship has indicated.

The Court answered the first question in the affirmative, branch (*a*) of the second question also in the affirmative, and branch (*b*) thereof in the negative.

Counsel for the First Party — Black. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for the Second Party—Duffes. Agent—Charles N. Cowper, W.S.

Counsel for the Third Parties—Gilchrist. Agents—Winchester & Nicolson, S.S.C.

Friday, July 14.

SECOND DIVISION.

[Sheriff Court at Kilmarnock.

ADAIR *v.* DAVID COLVILLE & SONS, LIMITED.

Process — Sheriff — Jury Trial — Appeal — Competency — Exclusion of Review — Nobile Officium — Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *First Schedule, Rules* 137, 147, *and* 148.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), First Schedule, provides—Rule 137—"The law and practice relating to the taking of evidence in proofs before the sheriffs shall apply to jury trials. Unless all the parties appearing put in a minute . . . dispensing with a record of the proceedings, the same shall be taken by an official shorthand writer of the Court. . . ." Rule 147—"Where no shorthand notes of the proceedings have been taken,