The minute proposed to be registered was as follows—"The capital of the Scottish Vulcanite Company, Limited, is £70,800, divided into 500 A shares of £100 each, and 1040 B shares of £20 each. At the time of the registration of this minute, the whole of the said 500 A shares have been issued, allotted, and £100 each paid up or deemed to be paid up thereon; and the whole of the said 1040 B shares have been issued, allotted, and £20 each paid up or deemed to be paid up thereon. But in respect of each of the said shares the company is empowered to pay or return to the shareholders 20 per cent. of the amount so paid up, upon the footing that the amount so paid or returned, or any part thereof, may be called up again."

There was also a prayer that the Court should dispense altogether with the addition of the words "and reduced" to the company's name, or otherwise after a short period.

The petition was intimated and advertised in the usual way, and the Court remitted to Mr Edward Young, W.S., to report upon the proceeding.

Mr Young reported that the whole proceedings had been regular, and that, subject to the approval of the Court on certain points he mentioned, the confirmation order might be pronounced. He also reported that in his opinion this was a case in which the Court might authorise the petitioners to dispense with the addition of the words "and reduced" to the name of the company. He further reported—"I think it proper to call your Lordships' attention to the qualification of the proposed reduction and return of capital, contained in the company's resolutions of 24th January and 12th February 1894, viz.—'That it shall be made upon the footing that the amounts returned, or any part thereof, may be called up again.' The petitioners ask your Lordships to confirm the proposed reduction and return, subject to this qualification. . . . I think it proper to notice that in the proposed minute set forth in the petition, and referred to in the prayer, '20 per cent.' is erroneously put instead of '10 per cent.' The blunder is obvious, and probably therefore harmless. Your Lordships will judge whether or not it affects the validity of the intimations and publications of the application. I must, however, further notice that in the prayer of the petition reference is made to 'section 23 of the Companies Acts 1867' (which section applies to 'associations for profit,' and does not in any way apply to the present case), instead, apparently as intended, to 'section 13 of the Companies Act 1867.' This, although also an obvious error, would appear to affect the intimations and publications, more especially as it also occurs in the interlocutor of 1st March, appointing the petition to be intimated and advertised," &c.

At advising—

LORD JUSTICE-CLERK — I think there must be intimation and advertisement of the petition of new.

LORD RUTHERFURD CLARK and LORD KYLLACHY concurred.

LORD YOUNG and LORD TRAYNER were absent.

The Court ordered further intimation and advertisement in terms of their previous interlocutor, and remitted to the Lord Ordinary on the Bills to grant the prayer of the petition after such intimation and advertisement had been made.

Counsel for the Petitioners—Lorimer. Agents—Boyd, Jameson, & Kelly, W.S.

Tuesday, March 20.

FIRST DIVISION.

[Lord Low, Ordinary.

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

Succession—General Disposition and Settlement—Conditio si sine liberis decesserit—Implied Revocation by Subsequent Birth of a Child.

A testator died in 1891 leaving a trust-disposition and settlement dated in 1886, whereby he directed his trustees, after payment of certain legacies and annuities, to hold the whole residue of his estate for behoof of his daughters Elizabeth, Martha, and Margaret, in liferent and their issue in fee. At the date of the settlement these daughters were the only children of the testator, but a son was born in 1890, ten months before the testator's death. The testator left a considerable amount of heritable as well as moveable estate.

Held that the settlement was subject to the *conditio si sine liberis*, and was revoked by the subsequent birth of the testator's son.

Thomas Elder died on 24th October 1891, leaving a trust-disposition and settlement dated 26th March 1886, whereby he conveyed his whole estate, heritable and moveable, to trustees. After providing for payment of debts and expenses, for implement of marriage-contract provisions in favour of his second wife, and for payment of certain legacies and annuities, the testator directed his trustees in the last place to hold the free residue of his estate for behoof of such of his three daughters—Elizabeth, Martha, and Margaret, as might be alive at his death, equally among them, and to pay over to each the free annual income of her share, during her life, as a strictly alimentary provision, the fee of each daughter's share at her death to be paid over to her issue, and survivors and survivor of them, in such shares as she might direct, and failing which then equally among them. In the event of any of his daughters failing without leaving issue, the testator provided that they should have power to test on the fee of the shares liferented by them, and

failing the exercise of this power, that the fee of the shares liferented by them should at their death accresce to the surviving daughters in liferent and their issue in fee. The settlement made no provision for children *nascituri*.

The testator was twice married, and was survived by his second wife, and by four children, viz., Elizabeth (Mrs Reid), and Martha (Mrs Lockhart), children of the first marriage; Margaret and Thomas, children of the second marriage. Elizabeth, Martha, and Margaret were the only children of the testator in existence when his trust-disposition and settlement were executed. Thomas was born subsequently on 18th December 1890, ten months before his father's death.

On the occasion of his second marriage the testator had entered into an antenuptial contract, whereby he had provided an annuity of £200 to his intended wife, but this contract contained no provision in favour of children.

The testator left heritable estate to the value of over £10,000, and moveable estate to the value of £14,000, of which a great part consisted of bonds and dispositions in security.

After his death the trustees were advised that the trust-estate fell to be administered in terms of the settlement notwithstanding the subsequent birth of the testator's son. The testator's widow Mrs Elder, as tutor of her pupil son, disputed this, and a multiplepoinding was therefore raised by the trustees to determine the rights of parties in the trust-estate.

The trustees claimed to be ranked and preferred to the whole fund *in medio* to be held and administered by them in terms of the trust-disposition and settlement.

Mrs Elder, as tutor to her pupil son Thomas, claimed in the first place to be ranked and preferred to the whole heritable property of the deceased, with the revenues accrued since his death.

She averred — "(1) The pupil Thomas Elder is the only son of the deceased Thomas Elder. His father had wished for many years to have a son, and he expressed disappointment that the first child of his second marriage was a girl. He was, on the other hand, very much pleased that the second child was a boy. He was, and continued until his death, to be extremely fond and proud of his son. The deceased by his industry had acquired a considerable fortune, a great part of which he had invested in heritable property which he managed himself. He was commonly addressed by his intimates as 'the Laird,' and he liked the title. From the day that his son was born he constantly spoke of him both to the members of his family and to others as his 'heir,' and he usually referred to him in conversation with others as 'the young laird,' meaning thereby that his son would succeed to his heritable properties after his death. During the period which elapsed between the birth of his son and his own death the deceased repeatedly expressed both to his wife and to others not merely his will and intention that his son should succeed to his heritable properties after his death, but his belief and understanding that his son was entitled to succeed to the said properties, and would in point of fact inherit them, and that notwithstanding the terms of his trust-disposition and settlement. Among the persons to whom the deceased so spoke were. . . . The deceased regarded the said trust-disposition and settlement as revoked by the birth of his son and as ineffectual to prejudice in any way the right of his son to succeed as his heir, and he stated this to his wife as his reason for not making a new will."

She pleaded—"(1) In respect of the birth of the said Thomas Elder, and in the circumstances stated, the trust-dispositions and settlements mentioned in the condescendence must be held to have been and were revoked, and the said Thomas Elder as his father's heir *ab intestato* is entitled to be ranked and preferred in terms of the first alternative of the claim."

Mrs Reid and Mrs Lockhart, the testator's daughters by his first marriage, claimed to be ranked and preferred to the liferent of one-third each of the fund *in medio*, after deduction from the capital of the estate of the legitim due to Thomas Elder, and subject to the administration of the real raisers.

On 10th November 1893 the Lord Ordinary (Low) allowed the claimant Mrs Elder a proof of her averments in article 2nd of her condescendence, and to the other claimants a conjunct probation.

"*Opinion.*—The question of law which is raised in this case is, whether a general settlement made by a father in favour of children in existence at the date of the settlement *nominatim* can be revoked by the subsequent birth of a child whose birth the father survived only for a short time.

"It was argued on the one hand, that the principles embodied in the maxim *si testator sine liberis decesserit* may apply to such a case just as strongly as to the case of a settlement made in favour of strangers before any children have come into existence. On the other hand, it was contended that implied revocation by the birth of children was confined, as the words of the maxim showed, to the case of a will made by a person who had no children at the time when it was executed.

"So far as I know, all the cases in Scotland in which the application of the *conditio* has been in question have been cases where the settlement was made when there were no children in existence, and therefore it is necessary to consider whether the principle upon which these decisions proceeded is applicable to such a case as the present.

"The decisions appear to me to have proceeded upon presumed intention. Where the position of the testator has been entirely changed, and new moral obligations have come into existence by the birth of children, there is a strong presumption that a settlement which amounts to a disinheritance of the chil-

dren no longer expresses the intention of the testator. I see no reason in principle why the presumption should not also apply (unless, of course, the circumstances of the case preclude it) in favour of a child or children born after the date of a settlement making provision for children in existence at its date. Indeed, the fact of such a settlement having been made seems to me to be rather in favour of the presumption, because it shows that the father was alive to and desirous of fulfilling the duty of providing for his children.

"In the civil law it appears that if a child was not expressly instituted or expressly disinherited, the testament was held to be ineffectual—Inst. lib. 2, tit. 13.

"Again, in England, prior to the Wills Act of 1838 (which seems to have practically put an end to such questions by providing that every will shall be revoked by marriage, and that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances), it was more than once decided that the will of a married man having several children was revoked by the subsequent birth of other children unprovided for. I may specially refer to the case of *Johnston* v. *Johnston*, 1 Phil. 447, in which Sir John Nicholl, in a very elaborate judgment, deals with the law of implied revocation of a will by the subsequent birth of children.

"I am therefore of opinion that the presumption is applicable to such a case as the present, unless it is excluded by the special circumstances.

"*Prima facie* the circumstances of the present case are favourable for the application of the presumption.

"The testator was twice married. By his first marriage he had two daughters, the youngest of whom was born in 1860. In 1879 the testator married a second time, and there was no issue of that marriage until 1885, when a daughter was born. It was not until the 18th December 1890 that a son, in whose favour the presumption is now pleaded, was born. The testator died on 24th October 1891.

"The settlement was made in March 1886, a few months after the birth of the first child of the second marriage. After bequeathing a few legacies of inconsiderable amount, the testator directed his trustees to hold the whole residue of his estate for his three daughters, equally among them in liferent, and for their children in fee.

"In such circumstances it seems to me that the presumption is that the testator did not intend to leave his son wholly unprovided for, except to the extent of the few hundreds of pounds which represents his share of legitim, and I am inclined to think that the question might have been disposed of upon the admitted facts. The son's guardian, however, did not ask me to dispose finally of the question now, but to allow her a proof of her averments. The motion for proof was only opposed because it was argued that whatever were the facts the *conditio* did not apply to the case. As I am of opinion that that argument is not well founded, and as it is desirable that all the circumstances should be before the Court, I shall allow a proof of the averments in article 2 of the condescendence for Mrs Elder as guardian for her pupil son."

The claimants, the trustees, and Mrs Reid and Mrs Lockhart, reclaimed, and argued—The proof allowed was incompetent. The *conditio si sine liberis* only applied when there were no children in existence at the date when the settlement was executed. It could not be pleaded by one child against others—*Colquhoun* v. *Campbell*, June 5, 1829, 7 S. 709; *Findlay's Trustees* v. *Findlays*, December 7, 1886, 14 R. 167. At one time it had been held that the condition operated to extend the benefits of a father's will to a child born after the date of the will so as to give such a child the right to share the benefits of the will along with the children who had been in existence at the date of its execution—M'Laren on Wills, i. 259. But that theory had since disappeared and was now held unknown to the law—*Spalding* v. *Spalding's Trustees*, December 18, 1874, 2 R. 237. The doctrine of implied revocation might have been urged in *Hastie* v. *Hastie*, 1671, M. 416, and in *Spalding*, but was not. The authority of the English cases was inapplicable, as the English law on this point was not founded on the same principles as the Scots—Jarman on Wills, iii. The case of *Johnston* v. *Johnston*, on which the Lord Ordinary relied, was not cited in Jarman, and it was at variance with the later case of *Doe* v. *Barford*, 4 M. & G. 10. The English law, therefore, even if applicable, was not against the contention of these claimants. Nor was the Roman law directly applicable, for there the estate belonged to the family and not to the father. Assuming that the *conditio* could be pleaded by one child against another, no relevant case was stated in favour of implied revocation. The averments made by Mrs Elder were merely to the effect that the settlement did not express the last will of the testator, which was simply an attempt to make a will for the testator by parole—*Brown and Others*, July 20, 1893, 30 S.L.R. 865.

Argued for the claimant Mrs Elder—As a mere matter of procedure the Lord Ordinary's interlocutor should not be interfered with. Further, assuming that this case was not strictly within the words of the maxim *si sine liberis*, it certainly fell within the principle. The principle of the Roman law, that the case of each child must be considered by the parent before it could be excluded from a share of his estate, had been adopted both in Scotland and England. The maxim naturally included such a case as the present, and the question whether it applied in such a case was treated as open by Lord M'Laren in his Book on Wills—M'Laren on Wills, i. 259. In every case it was a question of circumstances whether a will was revoked by the subsequent birth of children—*Hughes* v. *Edwards*, January 25,

1892, 19 R. (H of L), 33. The presumption was in favour of revocation—*A's Executors* v. *B & Others*, January 22, 1874, 11 S.L.R. 259; *Dobie's Trustees* v. *Pritchard*, October 19, 1887, 15 R. 2; *Munro's Executors* v. *Munro*, November 18, 1890, 18 R. 122. In *Colquhoun's* case Lord Glenlee had laid it down that unless it was as plain as a pikestaff that the father intended the will to stand, it would be held revoked. The condition was subject to this qualification, that the subsequent birth of a child which died before the parent did not affect the validity of the will in the circumstances. The question here was not one of the construction of a will, but whether there was a will at all, and in such a case parole proof was competent.

At advising—

LORD ADAM—The late Mr Elder was twice married. By his first marriage he had two daughters Mrs Reid and Mrs Lockhart, who are claimants in this multiplepoinding.

He married a second time in 1879, and by this marriage he had two children, a daughter Margaret, born on 11th December 1885, and a son Thomas, born on 18th December 1890. Mr Elder died on 24th October 1891, about ten months after the birth of his son Thomas.

On 26th March 1886, a few months after the birth of his daughter Margaret, he executed a trust-disposition and settlement in favour of trustees, who are the present pursuers and claimants, and by which he conveyed to them his whole estate, heritable and moveable.

By this settlement, after providing for the payment of some small legacies and annuities, he directed the residue of his estate to be equally divided among his four daughters. He made no provision for children *nascituri*.

The first question raised by this reclaiming-note is whether this settlement was revoked by the subsequent birth of his son Thomas.

It cannot be disputed that the *conditio si testator sine liberis decesserit* has been adopted in the law of Scotland, but it was argued that that was only in a question with strangers, and did not apply to a case like the present, where the testator had children in existence at the date of the will, and had provided for them therein.

We were not referred to any case in which the matter had been the subject of discussion in the law of Scotland.

It is clear, however, that in the civil law, from which the condition was derived, that it applies whether previously born children were in existence or not at the time when the will was made, and that the subsequent birth of a child revoked the will. It also appears, as has been pointed out by the Lord Ordinary, that in the law of England which also adopted the *conditio si sine liberis*, it was applied equally whether there were other children in existence or not.

I see no reason to doubt that that also is the law of Scotland. It is the duty of a father to provide for his children, and the law presumes that he must intend to do so, and therefore if there be a will in existence which has the effect of disinheriting subsequently born children, the presumption is that it was not his intention that the will should continue valid. But it appears to me that the presumption applies equally in the case of all children, and if the effect of a will is to leave any subsequently born child unprovided for, the presumption is that the father did not intend that the will should continue in force. I therefore concur with the Lord Ordinary in thinking that there is no reason why the *conditio* should not apply in a question with other children, as in a question with strangers.

The next question raised by the interlocutor is whether a proof should be allowed to Mrs Elder of her averments in article 2 of her condescendence. She desires to have this proof in order to show that the testator understood that the will had been revoked and acted on that footing.

It appears to me that while we have adopted the principle of the *conditio* from the law of Rome, we have not adopted it to the same extent and effect. By that law it was regarded as an implied condition of the will, and therefore the birth of a child *eo ipso* revoked the settlement. But that does not appear to be the law of Scotland. In the recent case of *Brown* v. *Brown's Trustees*, 30 S.L.R. 865, the Court held that whether revocation of a will by the subsequent birth of a child was to be implied or not was entirely a question of circumstances. That being so, it appears to me that the birth of a child affords only a *presumptio juris* that the testator does not thereafter intend the will to remain valid.

That presumption will be of varying force according to the circumstances of the case, and may like any other presumption of law be rebutted by evidence of contrary intention. But if there be no evidence of any contrary intention, it appears to me that the presumption must prevail.

Now, I can find no averments made by any of the claimants in this record of any facts or circumstances implying that the testator did not intend to revoke the will. The only fact stated is, that ten months elapsed between the date of the birth and the death of the father, during which time he had an opportunity of revoking the will had he so desired, but did not do so. But it appears to me that that is not sufficient to overcome the presumption—and there is nothing else.

I think, therefore, that the proof allowed to Mrs Elder is unnecessary, and that we should sustain the first alternative of her claim as guardian or tutor of her pupil son.

LORD KINNEAR—I am of the same opinion. I think there can be no question that our law recognises a presumption arising from the birth of a child after the execution of the will. It is a presumption which may be rebutted by evidence of con-

trary intention; and therefore in agreeing with Lord Adam that the presumption is recognised in our law, I do not think that we are saying anything at all contrary to the *dictum* ascribed to Lord Watson in the case of *Hughes* v. *Adams*, that whether a revocation of a will is to be presumed from the subsequent birth of a child is, according to the law of Scotland, a question of circumstances, because I apprehend his Lordship did not thereby mean to say that in the absence of special circumstances there was no presumption in law to support revocation, but only that the fact of the presumption may depend upon the circumstances of each particular case. I therefore agree with Lord Adam that the true principle is this, that the subsequent birth of the child presumes revocation, that the inference which the law requires us to draw from that single fact may be rebutted, and the law will not allow it to stand if there be evidence of a contrary intention on the part of the testator; but in the absence of such evidence the presumption must hold.

Now, the only facts that are stated in this case do not appear to me to suggest any contrary inference from that which the law directs us to draw, because the material facts are that the child born after the execution of the will was a son, and that a considerable part of the testator's property consisted of heritage, all the previous children alive at the date of the will being daughters. Now, if these facts affect the presumption at all, they would certainly tend to support and not to rebut. The only other fact that we are required to consider is, that the testator lived for ten months after the execution of his will without actually revoking it, and therefore the question seems to me to be whether the mere fact of the testator's survivance for such a period as that is of itself sufficient to rebut the presumption; and I do not think it is. The principle upon which evidence may be admitted in such cases is elaborately discussed by Lord St Leonards in the case of *Hill* v. *Hill*. The decisions which that great judge considers in his opinion are all of them English, but the principles which he deduces from those decisions are common to the law of both England and Scotland, and are indeed necessary consequences of the legal conception of a presumption of law as applicable to a will which the law of the country requires to be expressed in writing. The principle which Lord St Leonards lays down, as I understand it, is this—that the law draws certain presumptions from particular facts, that these presumptions may be rebutted, and therefore that the Court must admit parole evidence to rebut the presumption. But if the law itself benignantly draws such a presumption from the facts parole evidence cannot be resorted to to fortify the presumption, because that would tend to the introduction of parole evidence in every case. If the presumption is rebutted by the terms of the gift, then to let in evidence contrary to the words or legal effect of the instrument would be contrary to the law. If it is not rebutted, then the presumption stands in place of parole evidence, and parole evidence is not admissible at all. But then if the Court is required to admit evidence to rebut presumption it follows that the like evidence must be admitted on the other side to set it up; and therefore if we were asked to allow a proof of facts tending to show that the testator did intend to revoke the will, tending to set aside the presumption of law, then it would be quite right and necessary that all relevant facts on the other side should be admitted to probation also. But in a case like the present where no such proof is asked, it appears to me that it would be contrary to settled rules of law to admit evidence of such facts as are alleged in the claim that we are sustaining for the purpose of fortifying presumption. I therefore agree with Lord Adam that the claim should be sustained as it stands.

The effect of that finding upon the other questions raised upon the record I do not know that we are asked to consider.

LORD PRESIDENT—I concur. We recal the Lord Ordinary's interlocutor. The result is that Mrs Margaret Blair, the guardian, is ranked and preferred in terms of the first of her alternative claims. I suppose the case must go to the Outer House.

The Court recalled the interlocutor of the Lord Ordinary, and ranked and preferred Mrs Blair as guardian of her pupil child, in terms of the first of her alternative claims.

Counsel for Mr Elder's Trustees—Younger. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Mrs Reid and Mrs Lockhart—M'Clure. Agents—Simpson & Marwick, W.S.

Counsel for Mrs Blair or Elder—Shaw—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Tuesday, March 20.

FIRST DIVISION.

[Lord Low, Ordinary.

EDINBURGH STREET TRAMWAYS COMPANY *v.* MAGISTRATES AND COUNCIL OF EDINBURGH.

Tramway—Sale to Local Authority—Profits—Rental Value—Tramways Act 1870 (33 *and* 34 *Vict. cap.* 78), *sec.* 43.

By the 43rd section of the Tramways Act 1870 it is provided that where the promoters of a tramway in a district are not the local authority, the local authority may, after the expiry of twenty-one years from the time when such promoters were empowered to construct such tramway, require the promoters to sell to them their undertaking, or so much of the same as is within such district, "upon terms of