this witness to those payable on the footing of his being brought from Yarmouth to give evidence.

"The basis upon which the expenses of detention are to be assessed has also been raised. The pursuers claimed in respect of the master William Hill, not only the witness's allowance of £1, 1s. per day, but the wages of a substitute, while in respect of the second officer and the quartermaster the allowance claimed is at the rate of £1, 1s. per day. In party and party taxation maintenance and not wages is the appropriate allowance for witnesses. The Auditor accordingly does not consider he is justified, without a ruling by the Court, in departing from the scales of maintenance and travelling expenses allowed to witnesses under the table of fees, and he has taxed these allowances accordingly.

"The chief officer of the vessel, B. H. Constable, was brought by the pursuers to attend the proof from Alexandria, where he was stationed at the time. The Auditor is of opinion that he also was a witness whom it was necessary the Judge should see, and he has allowed the expenses of bringing him from Alexandria (which would include his maintenance on the way), together with the usual witness's allowance for seven days in this country, during which, either at the proof or at a special diet, his evidence could have been taken."

Counsel for the pursuers was heard in the Single Bills. Counsel for the defenders was not called upon.

LORD PRESIDENT — The claim made in this note of objections is an extreme one. I think the Auditor did what was perfectly right. He gave the witnesses their travelling expenses and an allowance for every day from the time they started until they returned, including of course the time at the trial. It is a general condition of the right to recover expenses from the other side that the expenses must be necessarily incurred, and that qualification appears in the paragraph of the table of fees which regulates the present charges. Nothing has been stated to us which would lead one to think it possible that the allowances extending over fourteen days, as made by the Auditor, were not ample to cover the expenses incurred. I think the note should be refused.

LORD MACKENZIE, LORD SKERRINGTON, and LORD CULLEN concurred.

The Court repelled the objections.

Counsel for the Pursuers — Normand. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders — Ingram. Agents—J. K. & W. P. Lindsay, W.S.

Saturday, July 8.

FIRST DIVISION.

[Bill Chamber.

BAIRD *v.* BAIRD'S CURATOR *AD LITEM.*

Entail — Disentail — Consents — Date of Entail—Trust with Direction to Entail —Marriage-Contract—Heir Born before Direction to Entail Carried Out—Entail Amendment Act 1848 (11 *and* 12 *Vict. cap.* 36), *secs.* 27 *and* 28.

In 1879 the heir of entail in possession of an estate under an entail of old date made an agreement with his only son, who was about to marry, whereby he undertook in contemplation of the marriage to disentail the estate, and after placing certain burdens on the fee-simple to re-entail it on the son and certain heirs. Thereafter on 2nd April 1879 he became a party to the son's antenuptial marriage contract, under which he bound himself to fulfil the obligations to the son undertaken by him in the agreement, and became a party to the appointment of trustees, who were directed to see that the agreement between himself and his son was carried out. There was no conveyance of the estate to the trustees, the father being at the date of the marriage, which took place on 3rd April 1879, heir of entail in possession under the old entail. The estate was immediately thereafter disentailed, but the re-entail was not carried out until 1889. On the application by a child of the marriage, born before the actual date of the re-entail, who was heir of entail in possession, for authority to record a deed of disentail and to acquire certain entailed moneys arising from the sale of portions of the estate in fee-simple, *held* that under the marriage contract there was constituted a trust with a direction to entail to which the provisions of sections 27 and 28 of the Entail Amendment Act 1848 applied; (2) that for the purposes of the statute the date of the entail was the date of the marriage; and (3) that the petitioner was entitled to disentail the estate and to acquire the entailed money without the consents of any of the next heirs.

The Entail Amendment Act 1848 (11 and 12 Vict. cap. 36) enacts — Section 1 — "That where any estate in Scotland shall be entailed by deed of tailzie dated on or after the 1st day of August one thousand eight hundred and forty-eight, it shall be lawful for any heir of entail born after the date of such tailzie, being of full age and in possession of such entailed estate by virtue of such tailzie, to acquire such estate in whole or in part in fee-simple by applying to the Court of Session for authority to execute and executing and recording in the register of tailzies under the authority of the Court an instrument of disentail in the form and manner hereinafter provided. . . ." Section

26—"That in all cases where money has been derived or may hereafter be derived from the sale or disposal of any portion of an entailed estate in Scotland or of any right or interest in or concerning the same . . . and where such money would fall to be invested in lands or heritages to be entailed on the same series of heirs as are called to the succession of such entailed estate by the tailzie thereof, and under the same prohibitions, conditions, restrictions, and limitations as are contained in such tailzie, and where the heir in possession of such entailed estate could by virtue of this Act acquire to himself such estate in fee-simple by executing and recording an instrument of disentail as aforesaid, it shall be lawful for such heir to make summary application to the Court in manner hereinafter provided for warrant and authority, and the Court upon such application shall have power to grant warrant and authority to and in favour of such heir of entail for payment to such heir of such sums of money as belonging to himself in fee-simple. . . ." Section 27—"That where any money or other property, real or personal, has been or shall be invested in trust for the purpose of purchasing land to be entailed, or where any land is or shall be directed to be entailed, but the direction has not been carried into effect, it shall be lawful for the party who if the land had been entailed in terms of the trust would be the heir in possession of the entailed land, and who in that case might by virtue of this Act have acquired to himself such land in fee-simple, by executing and recording an instrument of disentail as aforesaid, to make summary application to the Court as hereinafter provided for warrant and authority for the payment to him of such money or for the conveyance to him of such land in fee-simple; and the Court shall upon such application, and with such consents, if any, as would have been required to the acquisition of such land in fee-simple, have power to grant such warrant and authority." Section 28—"That for the purposes of this Act the date at which the Act of Parliament, deed, or writing placing such money or other property under trust or directing such land to be entailed first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust whatever be the actual date of such entail."

Sir James Hozier Gardiner Baird of Saughtonhall, Baronet, heir of entail in possession of the lands and barony of Saughtonhall and other lands in the county of Edinburgh, presented a petition for authority to record an instrument of disentail, and for payment to himself in fee-simple of certain sums of money arising from the sale of portions of the estate, and invested in the names of trustees for the heirs of entail or consigned subject to the orders of the Court.

On 9th March the Junior Lord Ordinary (MORISON) appointed the Right Honourable Lord Kinross to be curator *ad litem* to the children of the petitioner's deceased younger brother, who were the three nearest heirs of entail for the time entitled to succeed to the entailed estate, and remitted to Mr H. Bell Scott, W.S., Edinburgh, to inquire and to report.

The petitioner averred, *inter alia*—"The petitioner is heir of entail in possession of the entailed lands and barony of Saughtonhall and other lands in the county of Edinburgh (excepting certain portions thereof which have been since disponed) particularly described in (first) a disposition and deed of entail granted by the late Sir James Gardiner Baird of Saughtonhall, Baronet, with consent of William James Gardiner Baird, Esquire, younger of Saughtonhall (afterwards Sir William James Gardiner Baird of Saughtonhall, Baronet), his only son, in favour of himself the said Sir James Gardiner Baird, whom failing his said son and the heirs-male of his body, whom failing the heirs-female of his body, whom failing the other heirs therein mentioned, dated 17th and 20th December 1889, and recorded in the Register of Entails the 10th day of March, and in the Division of the General Register of Sasines applicable to the county of Edinburgh for publication, and also as in the Books of Council and Session for preservation the 9th day of April, both in the year 1890, and which disposition and deed of entail was granted by the said Sir James Gardiner Baird with consent foresaid on the narrative and in pursuance and in implement of the obligations undertaken by him in the minute of agreement entered into between him the said Sir James Gardiner Baird and the said William James Gardiner Baird, dated the 17th and 20th March 1879, and in the antenuptial contract of marriage entered into between the said William James Gardiner Baird and Miss Arabella Rose Evelyn Hozier, afterwards Lady Arabella Rose Evelyn Hozier or Baird, with the consents therein mentioned, dated 2nd April 1879. . . . By the said minute of agreement, on the narrative that the said Sir James Gardiner Baird was the heir of entail in possession, and the said William James Gardiner Baird heir-apparent next entitled to succeed to the said entailed lands and estate, and that the said William James Gardiner Baird was about to enter into a marriage with the said Miss Arabella Rose Evelyn Hozier, it was agreed that the said Sir James Gardiner Baird should forthwith execute and record a valid instrument of disentail of the said lands and estate, that immediately on such instrument being executed and recorded he should grant certain deeds for the constitution or continuation of certain real securities and burdens thereon, and that immediately on the completion of the said deeds he should execute and record in the Register of Tailzies a valid and effectual deed of entail of the said lands and estate and of certain adjoining lands then held by him in fee-simple. By the said antenuptial contract of marriage the said Sir James Gardiner Baird and William James Gardiner Baird bound and obliged themselves and their respective heirs, executors, and successors,

at the sight of the trustees thereby appointed, to implement the said agreement, and in particular (*First*) so far as not already done, forthwith to execute and deliver all such deeds, and proceed with such applications to the Court, and do all such other acts as might be necessary effectually to free the said entailed lands and estate from the fetters of the entails under which the same were then held; (*Second*) that immediately on the necessary instrument of disentail being executed and recorded the said Sir James Gardiner Baird, and failing him by decease the said William James Gardiner Baird, should execute and deliver such deeds as might be necessary for constituting the following burdens upon the said lands and estate, viz.—*primo*, a free liferent annuity to and in favour of the said Arabella Rose Evelyn Hozier in the event of her surviving the said William James Gardiner Baird, and *secundo*, a provision for behoof of the child or children of the said marriage other than the child succeeding to the said lands and estate; and (*Third*) [The terms of the third provision are here given in place of the narrative contained in the petition]—'Immediately on the completion of the deeds necessary to carry into effect the preceding articles hereof, the said Sir James Gardiner Baird, and failing him the said William James Gardiner Baird, shall execute and record in the Register of Tailzies and in the appropriate Division of the General Register of Sasines a valid and effectual disposition and deed of strict entail of the said lands and estate of Saughtonhall comprehending as aforesaid, and of the foresaid fee-simple portion of the said lands of Damside and Factors Park, disponing the said lands and estate and others with and under such conditions, provisions, and powers, excepting powers to sell and burden, as he shall think proper, and also under and subject to the following real and preferable securities, annuities, and burdens, viz. . . . to and in favour of himself, whom failing the said William James Gardiner Baird and the heirs-male of his body, whom failing the heirs-female of his body, whom failing the other heirs-male of the body of the said Sir James Gardiner Baird, whom failing the heirs-female of the body of the said Sir James Gardiner Baird; and the said Sir James Gardiner Baird and William James Gardiner Baird hereby bind themselves and their foresaids to have all the necessary procedure completed and the necessary deeds executed and recorded to implement the foregoing obligations not later than the third day of July next. . . . And it is hereby specially agreed and declared that all action and execution upon this contract for implement of the whole provisions herein conceived in favour of the said Arabella Rose Eveyln Hozier and the children of the intended marriage shall pass and be directed at the instance of the trustees before named or to be assumed as aforesaid; and the whole parties hereto consent to registration hereof for preservation and execution.' The said marriage took place on 3rd April 1879, and in implement of the foresaid obligations the said Sir James Gardiner Baird executed (1) a bond of annuity in favour of the said Arabella Rose Evelyn Hozier or Baird (who, however, predeceased the said William James Gardiner Baird), and (2) a bond of provision and disposition in security in favour of the trustees under said contract of marriage for the said provision for behoof of the younger children of the said marriage, both dated 7th and recorded in the said Division of the General Register of Sasines 31st, both days of October 1879. The said Sir James Gardiner Baird further granted the disposition and deed of entail first above mentioned, but notwithstanding the foresaid obligation to have all the necessary deeds executed and recorded not later than 3rd July 1879, the said disposition and deed of entail was not executed till 1889, and is dated and recorded as above mentioned. That the petitioner is infeft in the said entailed lands and barony of Saughtonhall (excepting the portions thereof which have been disponed) conform to extract decree of the service of the petitioner as nearest and lawful heir of tailzie and provision in special and general of the said Sir William James Gardiner Baird in the said lands and barony, expede before the Sheriff of Chancery the 6th and recorded in Chancery the 15th, both days of August, and, with warrant of registration thereon on behalf of the petitioner, recorded in the said Division of the General Register of Sasines the 22nd day of September, all in the year 1921."

The petitioner was born on 25th November 1883.

From the report by Mr Bell Scott, dated 12th June 1922, it appeared that the instrument of disentail freeing the lands of Saughtonhall from the original entail was executed on 8th May and recorded in the Register of Entails on 14th July, and in the Register of Sasines and Books of Council and Session 6th September, 1879. The reporter further stated, *inter alia*—"The petitioner is subject to no legal incapacity, and was born on 25th November 1883, *i.e.*, he was born *before* the actual execution of the new disposition and deed of entail, but *after* the date 'at which the land should have been entailed' in terms of the said marriage contract. Your reporter specially directs your Lordship's attention to the question as to what is the date of the entail. If it can be held under the provisions of the said Entail Act and the terms of the minute of agreement or the marriage contract that the date of entail must be taken to be not later than 3rd July 1879, then the petitioner having been born after the date of the entail is entitled in virtue of section 1 of the said 1848 Act to disentail without consents. If on the other hand the date of the entail is held to be the date when the disposition and deed of entail was actually executed, then the petitioner would require consents to the disentail, the petitioner in that event having been born after the date of the entail. In the case of *Earl of Mansfield* v. *Lord Scone's Tutor* (1908 S.C. 459) the construction of section 28 of the 1848 Act was before the Court. It humbly appears to the reporter that the date of the entail of Saughtonhall must be

taken to be not later than 3rd July 1879." Subject to his observations regarding the date of the deed of entail the reporter found the circumstances set forth in the petition to be correct and the proceedings to have been regular and proper and in conformity with the statutes and relative Acts of Sederunt.

At the hearing on the report the curator *ad litem* appeared by counsel and argued that the date of the entail was 17th and 20th December 1889, being the actual date of the disposition and deed of entail, and that as the petitioner was born prior thereto he could not disentail under section 1 of the Entail Amendment Act 1848 without consent of the next heir.

On 21st June 1922 the Lord Ordinary (MORISON) pronounced an interlocutor finding that for the purposes of the application the antenuptial marriage-contract, dated 2nd April 1879, was a deed or writing directing the lands and others to be entailed within the meaning of section 28 of the Act (11 and 12 Vict. cap. 36), and that the said deed or writing first came into operation on 3rd April 1879, which was for the purposes of the said Act the date of the entail of the lands and others mentioned in the petition; and that no consents were required from any of the next heirs to the disentail by the petitioner of the lands of Saughtonhall and the acquisition by him of the entailed money referred to in the petition.

Opinion.—"In this application by Sir James Gardiner Baird to disentail *inter alia* the lands of Saughtonhall, in the county of Edinburgh, the reporter has raised a question as to the power of the petitioner to obtain decree without purchasing the consents of the three nearest heirs who are in pupillarity.

"Their curator *ad litem* in the discharge of his duty appeared by counsel and argued the question raised. It is, I think, a new point arising on the construction of section 28 of the Entail (Scotland) Act 1848, 11 and 12 Vict. cap. 36.

"The petitioner is heir of entail in possession of the lands in question under a disposition and deed of entail granted by the late Sir James Gardiner Baird with the consent of his only son William James Gardiner Baird. The disposition is dated 17th and 20th December 1889.

"This disposition and deed of entail was—as it bears—made and granted in implement of (1) the obligations undertaken by Sir James in a minute of agreement between him and his son William James, and (2) their joint obligations in the antenuptial marriage contract entered into between William James and Miss Hozier. The minute of agreement is dated the 17th and 20th March 1879. The antenuptial marriage contract is dated 2nd April 1879 and took effect on the following day when the marriage was solemnised.

"The petitioner was born in 1883—prior to the execution of the deed of entail but subsequent to the date of the minute of agreement and the marriage contract.

"The petitioner contends that the date of the entail for the purposes of the Entail (Scotland) Act 1848 is 3rd April 1879, and that as he is of full age and in possession of the lands he is entitled to disentail without consents in terms of section 1 of the statute.

"The curator *ad litem* contends that the date of the entail is 20th December 1889—the date of the disposition and deed of entail—and that as the petitioner was born prior to that date section 1 does not apply.

"It is necessary, accordingly, to consider the effect of the marriage contract. After a narrative of some obligations which are not material to this question the marriage contract narrates the agreement between Sir James and William James to disentail the lands, and they bind themselves to execute and carry out at the sight of trustees named and appointed such applications to the Court and such deeds as are necessary to free the lands from the fetters of the entails subsisting which were created in 1711. The marriage contract then proceeds—'(*Third*)' [*The Lord Ordinary here quoted the third provision*].

"It is clear from the terms of the deed that it was anticipated that the new entail would be formally created not later than 3rd July 1879. I think also that a trust was imposed upon the appointed trustees, who were required to take action in order that the deeds necessary to constitute the entail should be duly completed.

"If the deed of entail had been executed by the 3rd July 1879 the question at issue could not have arisen.

"Section 28 of the Entail Act of 1848 (11 and 12 Vict. cap. 36) provides—'For the purposes of this Act the date at which . . . the deed or writing . . . directing such land to be entailed first came into operation shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail.'

"In my view the marriage contract is a deed or writing within the meaning of this section. It is a writing requiring the lands to be entailed, and it imposes the duty on the trustees to see that this is duly carried out by the 3rd July 1879. A number of arguments were presented for the curator *ad litem* in support of his contention. It was contended that the marriage contract did not contain a direction to disentail, and did not create a trust. The obligations of Sir James and Mr William James are in form contractual. But the deed, in my opinion, contains a binding obligation to entail the lands, and imposes a trust on the trustees to see that this direction is carried into effect. This is, in my view, in substance and effect a direction that the lands be entailed. It was also contended that section 28 could not apply to lands then fettered with an entail. There is no limitation of this kind expressed in the statute and I can see no reason for implying it. It was further argued that it was a 'legal or conveyancing impossibility' for the date of a new entail to be a date during the currency of an existing entail.

"I think the terms of the statute afford

the answer to this suggestion. The date created by the statute is an artificial date. The lands must be disentailed before they can come under the fetters of the new entail, and one date seems to me to be as capable of being held for the purposes of the statute as the date of this entail as any other."

The curator *ad litem* reclaimed, and argued—The petitioner was not entitled to disentail or to acquire the entailed moneys without consents. He was born before the date of the entail. Sections 27 and 28 of the Entail Amendment Act 1848 could not be applied to date back the entail to the date of the marriage contract. The sections only applied where there had been a conveyance of the land to trustees and a direction to entail given by a person who could at the time have entailed the lands himself. Here there had been no such conveyance, and the heir of entail in possession at the time of the marriage contract could not owing to the existing entail have re-entailed. The present case was different from those where it had been held that the purpose of the Act would be defeated if the entail was not dated back—*Black* v. *Auld*, 1873, 1 R. 133, *per* Lord President Inglis at p. 144 and Lord Deas at p. 147, 11 S.L.R. 48; *Earl of Mansfield* v. *Lord Scone's Tutor*, 1908 S.C. 459, 45 S.L.R. 378. Here it would lead to the anomaly of an estate being held under two entails at one time. [LORD SKERRINGTON referred to *Craig* v. *Picken's Trustees*, 1886, 13 R. 603, 23 S.L.R. 411.]

Argued for the petitioner—Although there was no conveyance to the trustees, they had power under the marriage contract to enforce the obligation to re-entail. That was sufficient to make sections 27 and 28 of the Entail Amendment Act 1848 applicable. The terms of the sections were purposely wide to prevent the intention of the statute from being defeated, and were not to be read in a narrow sense. Section 8, under which the position of the trustees must be similar to that here, supported the petitioner's case. The fact that the old entail was in existence at the time of the marriage could not interfere with the operation of section 28, which created an artificial date for the purposes of the statute—*Mansfield* v. *Lord Scone's Tutor* (*cit.*), *per* Lord Kinnear at p. 473. The date of the entail was therefore, for the purposes of the statute, the date of the marriage, and the petitioner was entitled to disentail and to acquire the entailed money in fee-simple without any consents.

LORD PRESIDENT—Different as the circumstances in this case are from those in *Black* v. *Auld* (1 R. 133) and in the *Earl of Mansfield* v. *Lord Scone's Tutor* (1908 S.C. 459), I think it is not irrelevant to keep in mind that in both those cases it was urged as a reason against a narrow or technical construction of the Rutherfurd Act that its main object was to prevent proprietors of land born after the date of an entail affecting such land from being made subject—without the possibility of relief—to its fetters.

In the present case the first question is whether the lands of Saughtonhall—as these were dealt with in the marriage contract of 2nd April 1879—were lands directed to be entailed within the meaning of sections 27 and 28? The opening words of these sections deal with two distinct cases—first, money held in trust for the purchase of land to be entailed, and second, land directed to be entailed. But in the body of both clauses expressions are used which seem to imply that the direction to entail is contemplated as being itself a feature of a trust under which the land is held in the same way as the money. It may be that an interesting question may yet arise as to whether (in a case in which no trust machinery is used at all) a direction to entail—forming, let us say, a condition of the succession to an estate by an heir of provision—would satisfy the conditions necessary for the application of sections 27 and 28. But it is unnecessary to decide anything of this sort here. The circumstances are that a father who was heir in possession under an entail of old date had a son who was about to marry. The father made an agreement with the son by which he undertook in contemplation of the marriage to disentail, and, after placing certain burdens on the fee-simple, to re-entail on the son and certain heirs. The father then became a party to the son's marriage contract, in which he bound himself to carry out the obligations which he had made to his son in the agreement, and became a party to the appointment of a set of trustees who were directed to see that the agreement between himself and his son (corroborated in the marriage contract) was carried out according to its terms. There was no conveyance of the lands to those trustees, the father being at the date of the marriage contract still heir of entail in possession under the old entail, but there was undoubtedly constituted a trust with a direction to see that the disentail and the re-entail were carried through. I think in these circumstances there was to all intents and purposes a direction to entail. There was also a trust holding a mandate to see that that direction was duly carried out. That is in my opinion enough to satisfy the conditions for bringing sections 27 and 28 into application.

The second question is—What is to be regarded as the true date of the entail? The disentail was promptly effected, but for some reason or other the re-entail was delayed for ten years. In the end, however, it was carried out according to the marriage contract. It is settled that in applying the artificial rule of section 28 it is immaterial that the conditions of the direction to entail are such that in certain events it might never become effective, *e.g.*, failure by the contemplated institute to reach a certain age, or the selection of English in preference to Scottish land to be entailed where the deed leaves that alternative open. Once the direction does become effective the entail is artificially dated back to the time when the deed containing the direction first came into operation. In the present case that is the day of the marriage

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