a subscription to a Protestant charity was at least a proceeding calculated to provoke criticism. The article should therefore be construed more favourably to the defenders than if this element had not been present.

Counsel for the pursuer was not called on.

LORD M'LAREN—I am not surprised that the defenders should have raised the question of the relevancy of this record as they have done, because in such cases one has not implicit confidence in the view that may be taken by a jury, especially where the elements of political or religious prejudice come into play. But what we as a Court have to consider is whether the words published regarding the pursuer are capable of bearing the interpretation or innuendo which is sought to be put upon them. Now the Lord Ordinary has held that they are capable of being put in issue with the innuendo which he accepts as a possible meaning, and I cannot say that I entertain any doubt upon the subject. I adhere to all that I said in my judgment in the First Division in the case of *Archer* v. *Ritchie & Company*, 18 R. 719, and whenever a critique, however severe it may be in its terms, is in the opinion of any fair-minded reader nothing but criticism of public conduct I should be against sending such a case to a jury. But I am unable to say that the paragraph complained of here is of that character. I therefore agree with the Lord Ordinary, and I concur in everything he has said in his opinion, with one slight reservation as to the passage where he says—"When the writer goes on to suggest that the money subscribed may go to the private profit of the pursuer, he does not appear to me to be in the region of legitimate comment on a matter of public interest, but to have exposed himself to the charge of attacking private character." It is only necessary for me to say that I think that the observation with regard to subscriptions going to the private profit of the pursuer is not so clearly within the region of legitimate comment that the case should be withheld from the jury. I think it is for the jury to say whether the intention was to point out that the public were in danger of being defrauded by a system of appeals for subscriptions without the publication of accounts or any other guarantee as to the proper application of the funds subscribed, or whether the intention was to say that Mr Diver and Mr Boal were persons who sought for money for the purpose of converting it to their private profit. Even if the writer had not named any person, but, having taken the appeal for subscriptions as his text, had gone on to ask what guarantee was given that money so subscribed did not go to the private profit of those appealing for it, I think he would have come perilously near to the region of attacking private character. Here, however, the defenders do not even give themselves the chance of escaping on the ground that they have made no attack on anyone, for the names of the two gentlemen, to whom they suggest that their criticism is applicable, are given. I have no doubt therefore that this case must go to a jury.

LORD PEARSON—I also think that the Lord Ordinary is right in the decision he has come to, and I agree with all that the Lord Ordinary has said, subject to the qualifications which your Lordship has pointed out.

LORD ARDWALL—I also agree with the Lord Ordinary, subject to your Lordship's remarks on his opinion. I think it cannot be said that the article in question might not be interpreted as suggesting that the persons therein referred to are persons capable of putting money subscribed for a charity into their own pockets. It is indeed true that the sentence complained of takes the form of an interrogation and not of an assertion, but I cannot think that that makes any real difference. It is no better than if it had consisted of an assertion that there was no guarantee that the money subscribed did not go into the pockets of Diver and Boal. The pursuer is in my opinion entitled to lay such a statement before a jury and ask them if it can bear the innuendo suggested by him. I therefore agree with your Lordships that this case must go to trial.

The Court adhered.

Counsel for the Pursuer (Respondent)—Crabb Watt, K.C.—Trotter. Agents—Bryson & Grant, S.S.C.

Counsel for the Defenders (Reclaimers)—Morison, K.C.—Munro. Agent—E. Rolland M'Nab, S.S.C.

Wednesday, July 10.

FIRST DIVISION.

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

Succession — Trust — Will — Revocation — Conditio si testator sine liberis decesserit.

A man who died in 1905 unexpectedly, after a short illness, had executed in 1896 a universal trust-disposition and settlement making provision, *inter alia*, for his two children and none for children *nascituri*, but in 1897 a third child had been born and all three survived. In 1901 the father had instructed a law agent, other than that who had prepared the trust-disposition of 1896, to redraft a trust-disposition originally drafted in 1894, gave instructions as to its tenor, and received it when prepared. In 1904 he had returned this draft to the agent requesting suggestions thereon and had received it back again. In his jottings for the trust-disposition of 1896 he apparently had had in view the possibility of his having more children. On his death the trust-disposition of 1896 and the draft trust-disposition of 1901 were found together in his repositories.

Held (1), following *Elder's Trustees* v. *Elder*, March 16, 1894, 21 R. 704, 31 S.L.R. 594, that the *conditio si testator sine liberis decesserit* was applicable to the trust-disposition of 1896; (2) that there were no special circumstances to rebut the presumption in favour of revocation; (3) that the deceased had consequently died intestate; and (4) that the revocation being complete, the administrative clauses of the trust-disposition were also inoperative.

Per Lord President—"I do not think it is possible to use Lord Watson's dictum in the case of *Hughes* (July 25, 1892, 19 R. (H.L.) 33, 29 S.L.R. 911) as subversive of the idea that there is a legal presumption."

Robert Knox, thread manufacturer, Moorpark, Kilbirnie, Ayrshire, died on June 19 1905, survived by his widow Mrs Jessie Fulton or Knox and by three children, William, born 9th April 1888, Anne Montgomerie, born 28th June 1891, Barbara Jean, born 22nd July 1897, and leaving a trust-disposition and settlement dated January 14, 1896, which was recorded in the Books of Council and Session August 16, 1905. By it he conveyed his whole means and estate both heritable and moveable to Mrs Knox, his widow, and others as trustees, and appointed them his executors and tutors and curators to such of the beneficiaries as might be in pupillarity or minority at the date of his death.

On 27th September 1906 a special case was presented, the parties to which were (1) the trustees acting under the said trust-disposition and settlement, (2) William Knox and Anne Montgomerie Knox, the two elder children being minors and having the consent of the trustees as their curators, (3) Mrs Knox the testator's widow, as guardian of their pupil and only other child Barbara Jean Knox, and (4) Mrs Knox as an individual. The matters dealt with were (1) whether the trust-disposition was operative or had become inoperative owing to the birth of the child Barbara Jean subsequent to its execution, and (2) whether, supposing the *conditio si testator sine liberis decesserit* to apply, the administrative clauses of the trust-disposition did not hold good.

Mr Knox had had no marriage-contract, had not been previously married, and had had no child who had predeceased him. His estate consisted of moveable estate, net £274,650, 13s. 1d., and of heritable estate, still subject to estate duty, £32,540. The purposes of the trust-disposition were shortly—(1) payment of debts, funeral expenses, &c., and the expenses of executing the trust; (2) payment of a legacy of £2500 to the fourth party as soon as convenient after the testator's decease; (3) a liferent to the fourth party of the household furniture and plenishing at the testator's residence of Moorpark; (4) payment of an annuity to the fourth party of £1800, and a certain allowance for the maintenance of each of the testator's children William and Anne Montgomerie Knox (the second parties) so long as they continued to live in family with her, until they respectively reached 21 years of age; (5) a liferent to the fourth party of the mansion-house of Moorpark with certain lands adjoining; (6) the expenditure of such sums as might be necessary for the suitable education of the second parties; (7) conveyance to his son William, on the expiry of the fourth party's liferent, of the household furniture and plenishing liferented by her; (8) conveyance to his son William, on his attaining 21 years of age, of certain lands and farms in the parish of Kilbirnie and certain other properties in the town of Kilbirnie, and also, on the death of the fourth party, of the mansionhouse of Moorpark and adjoining lands of which the testator had given the liferent to her, and it was declared that in the event of the testator's said son dying before attaining 21 years of age, the whole heritable properties directed to be conveyed to him should form part of the residuary estate; (9) conveyance to the testator's daughter Anne Montgomerie Knox, on attaining 21 years of age, of certain lands in the parishes of Lochwinnoch and Dalry and dwelling-house in the parish of Kilbirnie, as to which it was also declared that, in the event of his said daughter dying before attaining 21 years of age, these properties should form part of the testator's residuary estate; (10) subject to providing for the annuity to his widow, and upon the youngest of his said children attaining 21 years of age, for division of the residue of the testator's means and estate, heritable and moveable, into three parts or shares, two of these parts or shares being bequeathed to his son William and his heirs, and the other part or share to his daughter Anne and her heirs.

The *facts* were stated in the case as follows—"No provision is made for any child or children of the testator other than his two children who existed at the date of the said trust-disposition and settlement, viz., William and Anne, the second parties hereto. His other child Barbara, who by her legal guardian is the third party to the case, was not born until 22nd July 1897, eighteen months after the date of the said trust-disposition and settlement. The said trust-disposition and settlement . . . was prepared by the firm of Fulton & Kirkhope, Writers, Dalry, of which Mr Robert Fulton, one of the parties of the first part and a brother-in-law of the testator, was then a partner, and was executed by the testator at Dalry on 14th January 1896 as aforesaid. The testator furnished the said Fulton & Kirkhope with certain jottings in his own handwriting for the preparation of the said trust-disposition and settlement. . . . The said trust-disposition and settlement after its execution was retained by Messrs Fulton & Kirkhope until 16th September 1904, on which date it was sent by Robert Fulton to the testator at his verbal request. . . . In the year 1894 Messrs Love & Williamson, Writers, Beith, who for many years prior to the death of the testator acted generally as his legal advisers, received instructions from the testator to prepare a trust-disposition and settlement

for him. A draft trust-disposition and settlement was thereupon prepared by Messrs Love & Williamson and sent by Mr Walter Williamson, a member of the firm, to the testator on 24th May 1894 under a covering letter in these terms—'I beg to enclose draft of settlement for your consideration.' This draft was never completed. It was retained by the testator, who had casual and occasional conversations with his said legal advisers regarding its terms, but he never finally approved of the draft. On 4th February 1901 the testator called on Mr Williamson and gave instructions for the preparation of a fresh draft, and two days later he returned the said draft trust-disposition and settlement of 1894 to the said firm by letter in the following terms—'Moorpark, Kilbirnie, Ayrshire, 6th February 1901.—Dear Mr Williamson—I enclose draft trust-disposition, dated 1894, which please go over and alter on the lines spoken of on 4th curt., or draft a new one if needed. Should you want more details than spoken of I will call. Acknowledge receipt and oblige, yours truly, R. W. KNOX. Walter Williamson, Esq., Beith.' In compliance with the directions contained in the said letter, Messrs Love & Williamson re-drafted the trust-disposition and settlement of 1894, and upon 28th March 1901 they sent a new draft trust-disposition and settlement to the testator under a covering letter in these terms—'Beith, March 28th, 1901.—Dear Sir,—As recently instructed, we enclose draft of trust-disposition and settlement for your consideration. The purposes as expressed will probably not give effect to what you decide on doing, but may afford assistance in coming to a conclusion.—We are, yours faithfully, LOVE & WILLIAMSON. R. W. Knox, Esq., of Moorpark, Kilbirnie.' . . . The said draft trust-disposition and settlement of 1901 purported to convey the testator's whole means and estate, both heritable and moveable, to trustees, whom he appointed his executors and tutors and curators to such of his children as might be in pupillarity or minority at the time of his death. The trust purposes expressed therein are—(1) payment of debts, funeral expenses, &c., and the expenses of executing the trust; (2) a liferent to the testator's said widow of the mansion-house of Moorpark, with certain lands adjoining; (3) delivery to the testator's said widow, as her absolute property, of the household furniture and effects in said mansion-house, and also the testator's horses, carriages, &c.; (4) payment to the testator's said widow of an annuity of £ , subject, the said provisions to his widow, to the maintenance, clothing, and education by her of 'our children remaining in family with her on payment by my trustees to her of a yearly sum in respect thereof;' (5) conveyance to 'my only or eldest surviving son' of all the testator's lands and heritages on his attaining twenty-one years of age, under exception, in the event of the testator's said widow surviving him, of the dwelling-house of Hillhead, Kilbirnie, and its offices, but subject to the liferent of the parts of said lands provided to the testator's said widow, and to the real lien and burden of the sum of £ per annum, 'being the proportion of said annuity of £ , which is hereby allocated by me upon the said lands and others directed to be conveyed to such son;' (6) conveyance of the said house of Hillhead and its offices to 'such one or more of our children as my said wife may direct by any writing under her hand,' and in the event of no such writing, then to the testator's eldest son; (7) 'to my children other than my son, who shall become entitled to my lands and heritages under the fifth purpose of the trust above written legacies of the following amounts, viz., if only one other such child, the sum of £ , if two other such children, the sum of £ equally between them, and if three or more other such children the sum of £ equally among them, payable the said legacy or legacies at the first term of Whitsunday or Martinmas after the legatee or respective legatees, as the case may be, shall have attained twenty-one years of age, but declaring that if any of the legatees predecease the term of payment leaving lawful issue, such issue shall be entitled equally among them to the legacies their parents would have received had they survived such term;' (8) to set aside, after the testator's eldest son attains twenty-one years of age, a capital sum to meet the annuity given to the testator's widow; (lastly) to hold the residue of the testator's means and estate for behoof of the whole of his children in such proportions and on such conditions as he might direct by any writing under his hand, and 'failing any such writing, then to and for behoof of the whole of my said children in the proportions of one equal share to each son, and one-half of an equal share to each daughter, that is to say, for each £2 or proportion thereof that each son shall receive each daughter shall receive £1 or proportion thereof, payable the said shares to them on their respectively attaining to the years of majority.'

"The said draft trust-disposition and settlement of 1901 was never completed. During the years from 1901 until his death the testator was closely engaged in the affairs of the Linen Thread Company, Limited, of which he was chairman. He was frequently away from home on business, and no further steps were taken in connection with this draft trust-disposition and settlement, which was meantime retained by him until the 21st October 1904, when the testator had a meeting with Mr Williamson, and instructed him to consider the draft of 1901, which he then left with Mr Williamson, and to write him with suggestions upon it. Upon 24th October 1904 Mr Williamson returned the draft of 1901 to the testator with a letter in the following terms:—

"'Beith, 24th October, 1904.

"'Dear Mr Knox,—I return the draft will received from you last week. In view of what was said in conversation the following suggestions are offered:—

"'1. Let the first, second, and third purposes stand, as on pages 4 and 5.

"'2. Substitute for the fourth purpose (beginning at foot of page 5) a capital sum of substantial amount in place of the annuity.

"'3. Let the fifth and sixth purposes stand, omitting from the first of them reference to annuity.

"'4. Let the seventh purpose also stand. To obtain a measure of equality among children (as far as this point of the will) the sums to be filled in would be arrived at on the basis of an estimate of what is given to son under the fifth purpose. This seems the main difficulty in carrying out the conception of the will. It can only be dealt with broadly because of the liferent of Moorpark, &c., created in favour of Mrs Knox. Look at it apart from the liferent. One can see that the value of the bequest of the mansionhouse, &c., must not be put at anything like cost or even sale value. The idea is that the legatee is to occupy, which means maintaining a considerable establishment. For that reason alone the figure of this item should be relatively moderate. I would not complicate the estimate by considering the effect of the liferent, for if Mrs Knox were the survivor she could out of the legacy to her remedy any inequality that might appear of such importance as to call for a remedy.

"'5. The eighth purpose would be unnecessary.

"'6. The last needs no remark.

"'I think the theory of the will as in draft is suitable and expresses arrangements suited to your family and circumstances. But the suggested changes would be of advantage, unless you thought also of an annuity to Mrs Knox in addition to her special legacy, on this ground that she would be maintaining Moorpark as a residence both for herself and the family.—Yours very truly, WALTER WILLIAMSON.' Nothing further is known to have been done by the testator in regard to this will.

"Upon the death of the testator, which took place unexpectedly on 19th June 1905 after a short illness at the age of sixty, a search was made at Moorpark . . . for testamentary documents, with the result that in a drawer of the writing table in the morning room which the testator was in the constant habit of using there were found—(1) An envelope addressed in the handwriting of Mr Robert Fulton 'R. W. Knox, Esq., Moorpark, Kilbirnie,' and containing an endorsement in pencil by the testator himself 'Trust-disposition and settlement, 1896.' That document and the said covering letter from Mr Robert Fulton, dated 16th September 1904, were found in this envelope. (2) Another envelope addressed in the handwriting of Mr Williamson 'Personal, R. W. Knox, Esq., of Moorpark, Kilbirnie,' containing the said draft trust-disposition and settlement prepared by Messrs Love & Williamson in 1901, along with two letters, the one the said letter by that firm to the testator, quoted in article 4 hereof, sending him the draft and dated 28th March 1901, and the other the said letter from Mr Williamson to the testator, dated 24th October 1904. . . .

The jottings by Mr Knox, upon which the trust-disposition of 1896 had been prepared, contained the following as the eighth purpose of the proposed deed, the words in italics being deleted in pencil, the words in round brackets being in pencil, and the words in square brackets being interlineations:—"*Eighth.*—(Residue)—To pay to [each of] *my* [each] son out of said *my* moneys [at the rate of] £2 and to *my* [each] daughter [at the rate of] £1 *out of every* £3 thereof [till finished on] *at* the completion of the 21st year of the youngest child I *may* leave *but* [and] my trustees may advance to any son or daughter any sum they think fit to begin business with, or as a marriage portion, or otherwise not exceeding £4000 & £2000 respectively."

The *question of law* was — "Was the said trust-disposition and settlement of the said deceased Robert William Knox, dated 14th January 1896, revoked by the subsequent birth of his daughter the said Barbara Jean Knox, either (*a*) in whole, including the appointment of trustees and executors and tutors and curators, or (*b*) in so far only as it disposes of the testator's estate in favour of the beneficiaries therein named?"

The first and second parties argued — The testator's settlement of 1896 was not revoked by the birth of the third child subsequent to its date. The presumption in favour of revocation might be elided by facts and circumstances — *Elder's Trustees* v. *Elder*, March 16, 1894, 21 R. 704, 31 S.L.R. 594, *v.* opinions; *Hughes* v. *Edwards*, July 25, 1892, 19 R. (H.L.) 33, Lord Watson at p. 35, 29 S.L.R. 911. The question depended on the testator's intention and the state of his knowledge—*Adamson's Trustees* v. *Adamson's Executors*, July 14, 1891, 18 R. 1133, 28 S.L.R. 869; *Millar's Trustees* v. *Millar*, July 20, 1893, 20 R. 1040, Lord M'Laren at p. 1042, 30 S.L.R. 865; *Stuart-Gordon* v. *Stuart-Gordon*, June 27, 1899, 1 F. 1005, Lord M'Laren at p. 1011, 36 S.L.R. 779. The facts and circumstances necessary to elide the presumption were present in this case, viz. (1) lapse of time between the birth of the child and the testator's death—*Colquhoun* v. *Campbell*, June 5, 1829, 7 S. 709, Lord Pitmilly at p. 712; and (2) the existence of other children at the date of the settlement—*Rankin* v. *Rankin's Tutor*, July 9, 1902, 4 F. 979, Lord Young at p. 981, 39 S.L.R. 753. The testator had had the draft settlement of 1901 under consideration for years in full knowledge of the circumstances, and not having completed it he must, on the authorities cited above, be held to have preferred his settlement of 1896, which he had not destroyed. In preparing that settlement the jottings showed he had in contemplation possible additions to his family. If the settlement of 1896 was given effect to the division of the testator's estate would more closely approximate to his intention as expressed in the jottings used in 1896 and also in the draft

will of 1901, viz., the son to have of residue twice a daughter's share, than if the succession became intestate when the shares of the son and each daughter would be equal. In *Elder's Trustees* v. *Elder*, *ut supra*, which case stood alone, the presumption was stronger, as the whole heritage went to the daughters if the *conditio* were not applied, the after-born son only getting a share of moveable estate very small in proportion. On the alternative in the question, if the presumption applied, it was only to the operative and not to the administrative clauses of the settlement, and those appointed to office thereunder should perform their assigned functions even if the estate were intestate—*Elder's Trustees* v. *Elder*, March 16, 1895, 22 R. 505, Lord M'Laren at p. 511, 32 S.L.R. 365. *Crow* v. *Cathro*, June 18, 1903, 5 F. 950, 40 S.L.R. 687, was so different in its circumstances as to be distinct. The true analogy was the law of deathbed, under which an heir could reduce a will in part. The question should be answered in the negative.

The third and fourth parties argued—The presumption applied, and the testator's settlement of 1896 being inoperative the estate fell into intestacy. It was immaterial whether there were children or not when the settlement was made—*Elder's Trustees* v. *Elder*, *ut supra*. There were no circumstances to elide the presumption. Lapse of time between the birth and the testator's death was immaterial—*Dobie's Trustee* v. *Pritchard*, October 19, 1887, 15 R. 2, Lord Rutherfurd Clark at p. 4, 25 S.L.R. 6. Further, it was to be noted that the settlement was universal, not partial, and in 1901 the testator showed it did not express his intentions by preparing to make a new one. In *Adamson's Trustees* v. *Adamson's Executors*, *ut supra*, the will was not universal, and was made in the knowledge that the testator's wife was pregnant. In *Millar's Trustees* v. *Millar*, *ut supra*, there was a sufficient provision for the after-born child in a marriage-contract, and in *Stuart-Gordon* v. *Stuart-Gordon*, both these elements were present, the testatrix having made an *addendum* to her settlement two months before the birth of her child. Thus these cases did not apply. The testator could have defeated the presumption by doing something after the birth of his third daughter to set up the settlement—*Elder* v. *Elder's Trustees*, *ut sup.*, Lord Kinnear at p. 709; *Rankine* v. *Rankine's Trustees*, March 11, 1904, 6 F. 581, Lord Kinnear, at p. 584, 41 S.L.R. 479—but he had not done so. The question should be answered in the affirmative. *Johnston* v. *Johnston*, 1817, 1 Phill. 447, was also referred to for the English law upon the application of the presumption.

LORD PRESIDENT—The doctrine of law which is involved in the question put in this special case is, if I may say so, in a somewhat artificial condition; and I think that that springs from the fact that the law of Scotland, and for the matter of that in older times the law of England, seems to have adopted a doctrine from the law of Rome, and at the same time to have rejected the only strict logical basis on which that doctrine rested. But it is impossible at this time of day to treat the question as an open question, and I am of opinion that the case before us is practically ruled by the case of *Elder's Trustees*, which is a binding authority upon us, and I can see no good reason for reconsidering that decision by taking it to a larger Court. *Elder's Trustees* for the first time in terms decided that the application of the *conditio si sine liberis decesserit* might take effect equally in a case where the person at the time of the will already had children, as in the case where the person at the time of the will had no children. Now, that being so, we have an undoubted presumption in favour of this will being revoked, and the only question that arises is whether there are special circumstances sufficient to rebut that presumption. I entirely associate myself with the remarks that were made by some of my brethren as to the question of Lord Watson's dictum in the case of *Hughes* 19 R. (H.L.) 33. I do not think it is possible to use Lord Watson's dictum in the case of *Hughes* as subversive of the idea that there is a legal presumption. I do not find that there are circumstances in this case to rebut the presumption, because truly I think that there is no circumstance tending in that direction except the mere efflux of time. On the contrary, such circumstances as there are seem to me rather to point the other way, because we have the fact that this testator was reconsidering his will, and was reconsidering it in such a way as points, in my opinion, to the idea that he looked upon the will of 1896 rather as a draft for his future will than as his existing will at the time. I cannot help thinking that the fact that he sent for the will from the one set of agents, whom he was no longer going to employ in the preparation of his new will, and that he put jottings upon it, and left it in his repositories in the same place as he left the draft of the second or new will, which he never made, all points to the idea that he practically looked upon his old will as merely material for the making of his new will and not as an existing will. I am not at all by these observations meaning to throw any doubt upon the fact that the old will was a will, because it would be impossible to dislodge the general doctrine that when a man leaves in his repositories a testamentary document duly signed, that is a delivered document, although it is in his own repositories. We cannot go back upon that at this time of day, but, nevertheless, I mean that so far as presumption is concerned, the circumstances I have referred to, so far from tending to rebut the general presumption which is laid down in *Elder's Trustees* (21 R. 704) and the cases which preceded it, rather go to support the observation that was made by the learned counsel on the other side, which I thought a weighty one. They said, and I think with force, that if this gentleman had been given his choice, under the

circumstances which have now happened, as to whether he would sooner have his estate divided under the rules of intestacy or whether he would sooner have his old, and in his own view imperfect, will carried into effect, he would have preferred the latter alternative, because it would have given a certain preference to his son, which, so far as all his attempts at testing were concerned, seems to have been *enixa voluntas*. It would have given that preference to his son which a distribution under intestacy would have denied. If the question is put in that way, 'Which under the circumstances that have arisen he would sooner have done?' I agree with the learned counsel, but then that is not really the question. The question is, what was his state of mind at the time? Now, I think it is quite in accordance with human experience that a man, if asked after the event, if such a thing could be possible, "Would you prefer to die testate or intestate"? would always say "I would prefer to die testate"; yet he may have died in a state of conscious intestacy, with the view of probably making a will. In other words, I think that probably the state of mind of every man, who commences operations for a new will by tearing up his old one, is that he does not at all mean to die intestate when he is sitting down to write his new will. But he puts it off and death surprises him,—and he may put it off, according to the nature of his dilatoriness, for a very long time. I think that was the case here. I think this man undoubtedly meant to make his new will, and he was surprised by death. That, I think, is quite consistent with the idea that he knew for the moment that he was in a state of intestacy, although I agree that if you could ask him now he would probably prefer that he should have died testate, even with the old will, than intestate. While I make these observations I base my decision upon this, that the case is really ruled by the case of *Elder's Trustees* (21 R. 704) and there are no special circumstances to overcome the presumption. I am therefore for answering the first portion of the question in the case in that sense. As to the other question that was mooted, I have no doubt that the revocation is a complete one.

LORD KINNEAR—I am of the same opinion. If the question were open I should think it one of some difficulty, but I am of opinion with your Lordship that the case is ruled by authority, and we must follow it.

LORD DUNDAS—I agree with your Lordships and have nothing to add.

The Court answered the first alternative of the question in the case in the affirmative.

Counsel for the First and Second Parties—Johnston, K.C.—Cochran Patrick. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Third and Fourth Parties—Cullen, K.C.—Constable. Agents—Graham, Johnston, & Fleming, W.S.

Thursday, July 11.

SECOND DIVISION.

[Lord Dundas, Ordinary.

TURNBULL *v.* TURNBULL'S TRUSTEE.

Trust — Succession—Denuding—Presumption as to Childbearing—Anticipation of Period of Payment on Finding Caution for the Event of a Child being Born.

A testator directed his trustees to pay the income of his estate to his daughter, and on her death to pay the capital to her children, on the youngest child attaining majority. In the event of the daughter leaving no issue, or of none of her children living to attain majority when the estate came to be accounted for, the testator provided for payment of certain legacies. The daughter brought an action against the sole surviving trustee for payment of the trust estate. She averred that the whole legatees called on the failure of her issue were dead and their legacies lapsed, that she was fifty-eight years and past the age of childbearing, that she was the heir-at-law and sole next-of-kin of the testator, and the only person who had any beneficial interest in the trust estate. She offered to find caution to repeat the sum paid to her in the event of children being born to her. The trustee pleaded that he was bound to hold the estate for behoof of the children *nascituri* of the pursuer.

Held that, on the pursuer finding caution, the trustee was not bound to hold the trust estate for behoof of children *nascituri*, and a proof *allowed*.

On 17th May 1906 Miss E. M. Turnbull, Wallace Street, Stirling, brought an action against J. S. Fleming, solicitor, Stirling, the sole surviving trustee acting under the trust-disposition and settlement of the pursuer's father, the late David Turnbull, in which she sought declarator that the residue of the trust estate fell to be treated as intestate succession, that the pursuer was the testator's heir-at-law and sole next-of-kin, and as such entitled to the said residue.

The defender pleaded—"(1) The averments of the pursuer are irrelevant. (2) On a sound construction of said trust-disposition and settlement, the defender is bound to hold the trust estate for behoof of the children *nascituri* of the pursuer. (3) The residue of said trust estate having vested in the beneficiaries called in the last purpose of the said trust-disposition and settlement, and being disposed of, the pursuer is not entitled to decree as concluded for."

The *facts* are given in the following excerpt from the opinion of the Lord Ordinary (DUNDAS)—"The pursuer avers that she is the only child of the late David Turnbull, who died in 1876 leaving a trust-disposition and settlement, dated 1875, under which the defender is admittedly the sole surviving trustee. By the said settlement