the valuator for Mr Robertson. To keep matters in proper shape, I think it would be well to have a short minute of reference, and shall send you the same for revisal at once." Now, Mr Lawson, either in answer to that letter or to one to the same effect, but of later date, says: "Dear Sir,—I am favoured with yours of yesterday, with dft minute of reference, which I return to you unrevised; for, as mentioned in my letter of 29th ultimo, as you allege there is an agreement between the parties, I do not understand why there should be another. I have already informed you, as also your clients, on their call here, that I would implement the decision of the parties mutually chosen, and you have it now in writing that I will so implement it. You are perfectly aware that there is no binding obligation on my client to dispose of the property to yours, and that he has resiled from the incomplete contract by disposing of the property to me; and it was only on the most anxious and repeated solicitations of your client's wife that, on the action being dropped, and they paying your expenses, that I would advise my client to name a party to value the property, along with a party fixed by your client. My client has, by virtue of this, named Mr Goalen, and you have fixed Monday first, at three P.M., as the time for him to meet the party named by your client; and I have agreed, and hereby agree to implement their decision. More than this hitherto has not been demanded by your client, and it is impossible for me to see, in the face of the alleged agreement, what more can reasonably be demanded or desired." Now, dealing with this as constituting *rei interventus* in a question with Cameron, it is important to observe that Mr Lawson says that Cameron denies the agreement, and represents Cameron as being wholly out of the case, and as having set aside the incomplete contract. That leaves the case as one wholly between the pursuer and Mr Lawson, who lays down his own conditions, which seem to me to substitute a new agreement for the old one, and if so Mr Lawson can only be bound by the agreement into which he has himself entered. These valuators have failed to fix a price, and there seems to be no hope of their ever coming to an agreement, and how that can be said to be in pursuance of the informal contract I do not see. The contract is confessedly invalid, and can only be validated by *rei interventus*, and there is none relevantly averred. I am therefore for assoilzieing the defender.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Find that the missives on which the action is laid are informal and invalid, being neither holograph nor duly tested: Find that the pursuer has not relevantly averred any fact which as *rei interventus* can have the effect in law of validating the said informal and invalid missives: Therefore sustain the defences, assoilzie the defender Lawson, and decern: Find the defender Lawson entitled to expenses, so far as not already disposed of: Allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and to report."

Counsel for Pursuer—Solicitor-General (Watson) and Trayner. Agents—J. & A. Hastie, S.S.C.

Counsel for Defender—M'Laren and Kirkpatrick. Agent—James Campbell Irons, S.S.C.

Saturday, October 24.

SECOND DIVISION.

SPECIAL CASE—SIR J. COXE AND OTHERS.

Succession—Testament—Construction.

Terms of settlements, under which—*Held* that where the last of several testamentary writings contained no express revocation of a former will, it operated as a modification, and not a revocation, of the former will.

Mr John Cox died on 16th January 1874, survived by his wife, but without issue. This Special Case was raised to determine the shares of his residuary estate falling to be divided amongst the following parties. The first parties were Sir James Coxe and Mrs Ivory, the surviving next of kin of the deceased. The second parties were the two children and the marriage contract trustees of one child of his brother George Cox, who predeceased Mr John Cox; and the third parties were his wife and a niece, daughter of his sister Mrs Ivory. The questions turned upon the construction of various deeds left by Mr Cox. On 24th December 1850 he executed a holograph will, by which, *inter alia*, he appointed his wife, and two brothers, who predeceased him, to be his sole executors, and he directed them to divide the residue of his means and estate equally among his next of kin, declaring that with respect to any of his next of kin who predeceased him leaving issue, such issue should succeed equally to their parent's share. By a holograph codicil, dated 7th November 1859, Mr Cox declared that if Robert Cox, only son of his late brother George, should succeed to Gorgie Mill as heir-at-law, his share of residue should be only one-half of what otherwise it would have been, and that the other half should be divided amongst his remaining residuary legatees in proportion to the sums otherwise falling to them. By this deed he also added his brother-in-law to be an executor along with the persons named in his former will. But by a holograph codicil, on 23d November 1871, he withdrew that name and added those of Robert Cox, his nephew, and Andrew M'Culloch, his clerk, to be trustees along with others mentioned in his former will. On 10th August 1872 Mr Cox executed a holograph writing as follows:—"In case I may not have made alterations on my last will, I now declare it to be my will and wish, that my dear wife Margaret Cox be paid out of my funds the sum of £20,000 over and above the amount left her in other documents: That Robert Cox, my nephew, after succeeding to Gorgie Mills (subject to such occupation as my wife wishes during her life), shall be one of my residuary legatees, along with my dear wife, my nieces Isabella and Anne Cox, and Anne Ivory; but before the residuary amount be arrived at, my will is that my sister-in-law Mrs George Cox receive £2000, my brother Sir James Coxe £1000, and my sister Mrs Ivory £1000." Certain other legacies were also bequeathed by the said holograph writing of 10th August 1872. At the date of this writing, Sir James Coxe and Mrs Ivory were the only surviving next of kin, the testator's brothers Robert Cox and Abram Cox having died without issue.

It was maintained by Sir James Coxe and Mrs Ivory that the residuary personal estate was divisible, in terms of Mr Cox's testamentary writings, into seven parts, and that his residuary legatees were—Sir James Coxe, his brother; Mrs Ivory, his sister; his widow, Mrs Cox; his nephew, Mr Robert Cox; and his nieces, Miss Isabella Cox, Mrs Chiene, and Miss Ivory. It was further maintained by them and Mrs Cox and Miss Ivory, that, as Mr Robert Cox had succeeded to the estate of Gorgie Mills as his uncle's heir-at-law, he was entitled, in terms of the holograph codicil of 7th November 1859, only to one-half of the share of the residue of the personal estate which he would otherwise have taken, and that the other half was divisible amongst the remaining residuary legatees in proportion to the sums otherwise falling to them.

On the other hand, it was maintained by the parties of the second and third part that the residuary personal estate was divisible, in terms of the holograph writing of 10th August 1872, into five parts, and that the residuary legatees were—the testator's widow Mrs Cox; his nephew Mr Robert Cox; and his nieces Miss Isabella Cox, Mrs Chiene, and Miss Ivory, and that the said writing operated an implied revocation of the previous bequest of residue under which the first parties claimed.

It was separately maintained by the parties of the second part, that in the event of its being held that Sir James Coxe and Mrs Ivory were entitled to shares of the residue under the holograph will of 24th December 1850, they were also entitled to shares of the residue in virtue of the said holograph will and as representing or coming in place of their brother Mr George Cox, in addition to the shares which they take individually under the holograph writing of 10th August 1872.

The questions submitted for the opinion of the Court were—"(1) Whether, under the testamentary writings of the late Mr John Cox, the said Sir James Coxe, Mrs Ivory, Mrs Cox, Mr Robert Cox, Miss Isabella Cox, Mrs Chiene, and Miss Ivory, are entitled to the residue of his personal estate? or (2) Whether, under the said testamentary writings, the said Mrs Cox, Mr Robert Cox, Miss Isabella Cox, Mrs Chiene, and Miss Ivory, are entitled to the said residue? (3) In the event of the first of these questions being answered in the affirmative,—What share of the residue is each of the said Sir James Coxe, Mrs Ivory, Mrs Cox, Mr Robert Cox, Miss Isabella Cox, Mrs Chiene, and Miss Ivory, entitled respectively to take? (4) In the event of the second question being answered in the affirmative,—What share of the residue is each of the said Mrs Cox, Mr Robert Cox, Miss Isabella Cox, Mrs Chiene, and Miss Ivory, respectively entitled to take?

At advising—

Lord Justice-Clerk—The question which here arises is with regard to the effect of the holograph writing of 7th November 1859 upon the original will of 24th December 1850, with regard to appointment of the residuary legatees.

By the original will of December 1850 the late Mr Cox, the testator, directed his executors, after payment of his debts, an annuity, and certain legacies, to divide the residue of his means and estate equally amongst his next of kin, the children of deceasing parents having a right of representation.

At the date of the original will he had three brothers and one sister alive, one brother George Cox had died in 1847 leaving three children, and his sister Marion Cox had died unmarried in 1850. However, before 1872 the testator's brothers Robert and Abram Cox had died, and Sir James Cox and Mrs Ivory were the only surviving next of kin.

By the death of the testator's brother George Cox, his son Robert Cox became heir-at-law of his uncle, and by a holograph codicil dated 7th November 1859 Mr Cox provides that if his nephew Robert Cox should succeed to his heritable estate, his share of the residue of the moveable estate should be only one-half what it otherwise would have been, and the other half shall be divided amongst the remaining residuary legatees in proportion to the sums otherwise falling to them. This holograph writing is appended to another writing of the same date, in which the testator refers to the original will and nominates another person, Alexander M'Culloch, whose name however he afterwards withdraws, to be one of his executors along with the persons named in the original will, showing clearly that he intended the original will to subsist.

But then there comes the holograph writing of 10th August 1872, by which the testator appoints his nephew Robert Cox, after succeeding to the Gorgie Mills, to be one of his residuary legatees along with his wife and his nieces Isabella and Annie Cox, and Annie Ivory.

Taking this sentence as it stands, the question arises, are the persons here mentioned to be sole residuary legatees, or in addition to those already appointed. No doubt the words will suit either interpretation. But in the previous holograph writing of 23d November 1871 Robert Cox is mentioned as a trustee, along with other persons mentioned in a former will. It would therefore seem that these persons were already appointed as executors and residuary legatees, and that he was to take along with them.

It is quite consistent with these words that all the persons mentioned both in the original will and the writing of 10th August 1872 should together be residuary legatees.

In such a case as the present, if there be any doubt, a presumption arises in favour of the next of kin. They were most favoured by the testator in the original will, and there is no clear expression of intention to recal that original will, so if there is any doubt as to the nomination of these persons, whether they are to be additional or exclusive, we derive some assistance from the principle of the appointment in the original deed, which, as I have said, was in favour of next of kin.

But it is urged that it was the intention of the testator to favour the younger generation rather than those of his own age. I am not, however, able to find anything in support of this view to justify me in thinking that there was any revocation of the original will to that effect.

Next there arises the question, is the condition appended to the holograph codicil of 1859 with regard to Robert Cox in the event of his succeeding to the heritable estate imported into the deed of 10th August 1872? I am of opinion that it is not; on the contrary, I think that it is expressly excluded. The third question is, whether the children of deceasing next of kin are to take as residuary legatees in addition to the share that they received as representing their parents. I am unable to take the view of the case which would answer this question in the affirmative.

Lord Neaves—I concur on all points. The most difficult question is as to the nomination of residuary legatees. By the original will Mr Cox made as little deviation from the natural order of succession as he could; he left his moveable property equally amongst his next of kin, and by express nomination he allowed a system of representation amongst the children of next of kin. Until, therefore, the writing of 10th August 1872 the next of kin were nominatim residuary legatees.

It is possible that at that time he may have altered his views, as was suggested, in favour of the younger generation, but the question is, did he by the writing of 10th August 1872 change the appointment of the residuary legatees, or merely modify it. I am of opinion that he only modified it. There is at any rate the substantive nomination of Robert Cox as one of his residuary legatees, and if we are to look at these words as to appointing Robert Cox as one of several legatees, we are not entitled to do more than apply them in the same way to all the rest there mentioned.

Thus, there is no exclusive appointment. If the testator had wished he might have made such an appointment by saying these persons are to be my sole legatees, but he has done nothing of the kind.

On these grounds, I cannot hold that there is any revoking clause substituting these persons for the residuary legatees formerly appointed, but appointing them in addition.

Lord Ormidale—This case has raised three questions. Of these the first is the most important. I keep in view that in 1850 the next of kin were appointed to succeed to the residuary estate.

Then arises the question, does the holograph writing of 1872 show any intention to change the disposal of the estate? I cannot say what may have been in the mind of the testator, for I cannot go beyond the case to ascertain if there was any alteration of his intentions. I am not able to see any indication of such change. I know, on the contrary, that when he wrote that holograph writing he had in view the original settlement—there is in fact express reference to the original settlement. And my view is, that not only is there no express recall of the settlement in the original will, but that there is no necessary implication of such intention in this holograph writing.

As to the second question, I have had some little difficulty, but still not enough to lead me to differ from your Lordships.

On the third question, I have had no difficulty, and therefore I concur without any hesitation.

Lord Justice-Clerk—The Court then answers the first question in the affirmative; the second in the negative; and as to the third, finds that the persons therein named are to take an equal share of the residue.

Counsel for the First Parties—Dean of Faculty (Clark) and Mackay. Agents—Leburn, Henderson, & Wilson, S.S.C.

Counsel for Second Parties—Solicitor-General (Watson) and M'Laren. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Third Parties—Adam and Kinnear. Agents—Adam Kirk, & Robertson, W.S.

Tuesday, October 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.

KING *v.* POLLOCK.

Injury to the Person—Reparation—Culpa.

A received back his gun, which he had left at a neighbour's house. He examined the nipple, and finding no cap on it, he supposed it unloaded, and put the gun away in a closet. In his absence B took out the gun, which exploded and injured C. *Held* that A had taken sufficient precaution against risk, and was not liable in damages to C.

This was an appeal from the Sheriff of Lanarkshire in an action at the instance of Archibald King, blacksmith, Hamilton, against James Pollock, blacksmith, Hamilton, John Dun, farmer, Kennedies, as curator for his son James Dun; and James Frew, ironfounder, Hamilton, as curator for his son James Frew,—in the following circumstances:—

It appeared that the defender Pollock was in the habit of occasionally shooting rabbits over the farm of the other defender Dun, and for this purpose he was in the habit of using a single-barrelled gun belonging to himself. It further appeared that Pollock did not always bring his gun home after shooting at Dun's farm; and on the particular occasion in question he had left it within a bothy at Mr Dun's house. Some considerable time after this—on or about the 3d of October 1872—the defender Dun sent his son James Dun to return the gun to Pollock, the gun being, as subsequently appeared, loaded, but this being unknown to the defender. Pollock took the gun from the boy Dun and asked him if it were loaded; Dun replied that he did not know. Pollock then raised the hammer of the gun and saw that there was no cap on the nipple, he then tried to draw the ramrod to ascertain by the application of it if the gun were loaded. This, however, he could not do from the ramrod having stuck fast in its place. He then put the gun away in a press or closet in his smithy to which no one but himself or his men had access.

At this time the pursuer King was a journeyman blacksmith in the employment of Pollock, earning wages of twenty-three shillings a-week, and on the occasion in question was in the smithy in discharge of his daily avocation.

On the afternoon of the day on which Pollock had put the gun into the press in the smithy, a boy named James Frew came into the smithy. Frew was known to the defender, who asked him to blow the bellows for him, which Frew did for a few minutes, when Pollock was called out of the smithy by a gentleman. While Pollock was absent Frew took the gun from the press where Pollock had placed it, and while the gun was in his hands it exploded and injured the pursuer King so seriously in the right arm that he was permanently disabled from following his trade as a blacksmith.

The pursuer thereupon raised an action in the Sheriff Court against all the defenders, concluding for £500 as damages for the injury sustained by the pursuer through the carelessness of the defenders.

The Sheriff-Substitute at Hamilton, to whose interlocutor the Sheriff adhered, dismissed the action as regarded the defender Dun, but found there had been culpa on the part of the defenders