through, it is clear that it was written under the influence of anger, no satisfactory reason can, as I have said, be shown for refusing it effect. Another of the writings, of older date, but equally emphatic, is in these terms—[*Reads writing as quoted above*]. It is not necessary to go into any of the other writings, which are precisely to the same effect, as these two are holograph of the testator and of very clear meaning. I must say in passing that there does not appear to me to be any relevancy in the reference, which was made in the argument by counsel for the second and third parties, to the envelope dated 28th February 1888 as showing that the testator merely entertained the idea of excluding his daughter Margaret from a share in his estate, but took no subsequent step to give effect to his intention. For that date is anterior to the execution of the holograph writings founded on by the first parties, and it is therefore quite possible to suppose that by executing them he accomplished the purpose he had in view upon 28th February 1888, or shortly after that date. I therefore think that the provision in favour of Mrs Millar was absolutely revoked and annulled.

But the question still remains, whether that revocation affects the provisions under the trust-disposition in favour of her children? and our view upon that point must depend upon the construction to be put upon the original deed itself. Now, the first clause which calls for attention in that deed is the fourth purpose. It is in these terms—"That my trustees shall hold the whole residue of my means and estate hereby conveyed for behoof of such of my children as shall survive me and attain the age of twenty-five years complete if sons, or shall attain said age or be married under said age if daughters, and the lawful issue of such of my children as shall die without becoming entitled under this purpose leaving lawful issue, equally among said children and issue *per stirpes*." Here there is a very clear intention expressed that even if any of the testator's immediate children should die the children of that child should take. "And shall pay over their shares to my sons surviving me on their attaining said age, or on my death if they shall then have attained said age, and shall set apart as after mentioned the shares of my daughters surviving me on their attaining said age, or being married under said age, whichever event shall first happen, or on my death if they shall previous thereto have attained said age, or shall have been married." And then there follows the direction of the testator with regard to the shares destined primarily to daughters, in these words—"And as regards the shares of such of my said children as are daughters, my trustees shall, on and after the arrival of the period of payment of their shares, hold in trust and apply the shares of such daughters, or place the same in the names of other trustees, with like powers, privileges, and immunities as their own, in trust for such daughters respectively in liferent, for their liferent use only, and for the lawful issue of said respective daughters, or failing lawful issue, for their next-of-kin, in fee." Now, the only thing which a daughter can take under that destination is a liferent, while the fee of the share is destined to her children. The holograph codicil accordingly forfeits Margaret's share, which is a liferent only, but by its operation the children's right of fee is not in any way impaired. Whether the effect to be given to the cancellation of Margaret's share may not result in an increased share of the testator's estate falling to her and her family is not *hujus loci*, and we do not express any opinion upon that question. We are merely asked to answer the question whether the children are prejudicially affected by the execution of the codicil, and I do not think that they are.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court answered the first and second questions in the affirmative, and the third question in the negative.

Counsel for the First Parties—Asher, Q.C. —Gillespie. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Second and Third Parties —D.-F. Balfour Q.C.—Jameson. Agents—R.R. Simpson & Lawson, W.S.

Friday, December 19.

SECOND DIVISION.

[Sheriff-Substitute of Dumfries.

KERR *v.* LINDSAY.

Parent and Child—Proof of Paternity—Presumption of Fact arising from Marriage with Pregnant Woman.

The mother of a child born upon 5th January 1890 raised an action of affiliation and aliment, alleging that it was the result of an act of connection upon 7th April 1889. The defender admitted that he had once had connection with the pursuer, but that that was in February. They continued to live in the same town. Upon 12th April 1889 the pursuer became engaged to a widower, to whom, three weeks later, she confided that she was pregnant, and whom she married the following August. She and her husband both denied ever having been unduly intimate before their marriage.

Upon a proof the Sheriff-Substitute found the case proved against the defender, but the Court *held* (*diss.* Lord Trayner) that the very strong presumption of fact arising from the pursuer's husband having married her in full knowledge of her pregnancy, which pointed to him as her child's father, had not been rebutted by the evidence, and assoilzied the defender.

Mrs Jane White or Kerr, with the consent and concurrence of her husband Samuel Kerr, shoemaker, Sanquhar, brought an action in the Sheriff Court at Dumfries against William Lindsay, shovel finisher, Crawick Bridge, near Sanquhar, concluding for inlying expenses and aliment of a child borne by her upon 5th January 1890, of which she alleged the defender was the father.

The pursuer and her husband were married upon 30th August 1889.

The pursuer averred that she had repeatedly had carnal connection with the defender, and especially on or about the 7th day of April 1889. The defender admitted that he had had connection with the pursuer prior to the month of March 1889. He averred that the pursuer and Kerr had had connection with each other repeatedly during the months of March and April 1889, and that it was in consequence of that connection that the pursuer had become pregnant. This the pursuer denied.

A proof was allowed.

The pursuer repeated her averments upon oath, and further deponed that Kerr offered her marriage upon 12th April; that she accepted him, but said that she would have to see the defender; that three weeks after 7th April she told both her mother and Kerr that she was afraid that she was with child to the defender; that Kerr's family and hers had always been intimate, but that she never walked with him until 10th April; that after she told him of her condition he stopped walking with her, but came to her mother's house; that they renewed their walks about three weeks before their marriage, but had only about two walks then; and that she had never had connection with Kerr until they were married. In cross-examination she stated that she was at a ball upon 29th March; that Kerr was there; that she had several dances with him; that they were in the same party driving home; and that he left her at her mother's door.

Samuel Kerr, her husband, gave corroborative evidence. He also deponed that when he married the pursuer he was forty years of age, a widower with four children, and an elder in the United Presbyterian Church; that he had been called before his kirk-session to explain why the child was born so soon after marriage; and that he had written to the defender the day after the birth of the child to remove it and have it nursed elsewhere.

John Hiddleston, aged twenty-two, deponed that the defender in a conversation upon 17th August said the pursuer was going to have a child to him, and that he had offered to marry her, but she had refused.

The pursuer's mother deponed to seeing the defender pass the window upon the evening of 7th April; that the pursuer was out at that time, and that in the end of April or beginning of May her daughter confessed to her that she was afraid she was going to have a child; that the defender was the cause of that, and that the mischief had happened the night he had been seen passing the window.

The defender denied the accuracy of Hiddleston's statement. He deponed he had only once had connection with the pursuer in the end of February, and had only offered to marry her if the child came to his time.

One witness deponed to having seen the pursuer and Kerr together in March, and another to having seen Kerr walking with his arm round the pursuer's waist in April or the beginning of May.

Upon 21st May 1890 the Sheriff-Substitute (HOPE) granted decree in favour of the pursuer.

"*Note.*—The rule *Pater est quem nuptiæ demonstrant* does not apply to the present case. To enable it to apply the child must have been conceived during the period of wedlock. As Mr Dickson says—'This presumption applies only where there is such an interval between the marriage and the birth that by the laws of nature the conception can reasonably be believed to have taken place during marriage'—(sec. 134).

"The pursuer's child was born on 5th January last, and her marriage did not take place till 30th August 1889, so that no presumption arises out of the fact of the marriage. The defender's case is rather that there is a presumption that the child is Samuel Kerr's, seeing that he married her although he knew that she was pregnant. I think that is a fair argument to use, but a presumption — especially one which is not the subject of a rule of law—is not proof, and this presumption is not an irresistible one. I have known a good many cases where men have acted in the way in which Samuel Kerr says he has done. It is all a matter of taste. Some men would not marry an unchaste woman; others would, and many do. Very few would marry a woman who was pregnant to another man, but experience shows that some men do. Again, many men—I hope most men if they did so—would rather seek to hide their wife's shame than expose it in a Court. But this again is a matter of taste. To some extent it may be a matter of compulsion with Mr Kerr, because he appears to run the risk of having to stand discipline unless he can show that the child was begotten by another man. I do not think there is any evidence to show that he was ever unduly intimate with the pursuer before marriage, and the trifling circumstances upon which the defender seems to lay stress do not seem to me even to give ground for suspicion that such was the case.

"It was argued for him that the fact that he was an elder in a church raised a presumption in his favour. Left to myself, I would not have so held, but in the case of *Martin* v. *Smith*, May 17, 1834, 12 S. 604, this view was entertained by the Court, and it has been acted on since. As regards the defender, the points which tell against him to a certain extent are his admitted connection with the pursuer at a date prior to the conception and her oath. It has been held that the combination of such facts as these with continued opportunity

are sufficient to prove a pursuer's case. What is to be considered opportunity is a question of circumstances. I have generally held that there was opportunity either when the parties lived in the same house or at the same farm-steading, or (where they lived at different places) when they had been seen together in suspicious circumstances. Here the opportunity is very meagrely established, unless the fact that the parties lived in the same place, as they did, when connection admittedly took place is sufficient. Margaret Kerr, the pursuer's mother, says that on the evening of Sunday, 7th April 1889, she saw him pass her house, that the pursuer had gone out before that, and that she did no come in till between nine and ten. Further, she says that the defender was along with Thomas Mathieson, and Mathieson does not deny it. He says that he has been in the defender's company many a time on Sunday evenings, but can give no date. The defender says he did not walk with the pursuer at all in April, and only once in May, but his examination by the Court brought out a contradiction of this. He must therefore have had an object in minimising his walks with the pursuer. The 7th of April is the date when pursuer says that the child was begotten, and that defender had connection with her that evening. Lastly, when pursuer's mother found out, about three weeks afterwards, that her daughter was pregnant, the latter told her that defender was the cause of it, and that the mischief happened on 7th April.

"On the whole, I am of opinion, though I have arrived at it with hesitation, that opportunity has been proved.

"I also think that the alleged admission of the paternity is proved. From the manner of the witnesses, I believe Hiddleston and Sharp rather than the defender, and M'Millan's evidence did not shake my opinion. I do not see any reason to believe that Hiddleston concocted the story. He told it long before this case was or could be thought of, and he gave his evidence apparently with reluctance."

The defender appealed to the Court of Session, and argued—There was an almost irresistible presumption of fact that Kerr was the father of this child arising from his having married the pursuer well knowing her condition. That presumption he had failed to rebut. There was also direct evidence at least suggesting undue familiarity about the time this child must have been begotten. The cases of *Gardner* v. *Gardner*, May 30, 1876, 3 R. 695—*aff.* May 17, 1877, 4 R. (H. of L.) 56, and *Reid* v. *Mill*, February 8, 1879, 6 R. 659, were directly in point.

Argued for pursuer—There was absolutely no direct evidence of undue familiarity between her and her husband before marriage. The presumption against the husband was only one of fact. The maxim *pater est* did not apply. The defender admitted connection at an earlier date, and that with subsequent opportunity and the pursuer's oath, as here, entitled the pursuer to decree. There were no grounds for disturbing the Sheriff's judgment.

At advising—

LORD JUSTICE-CLERK—This is a very curious case, and presents some curious features. It is certain that the pursuer and her husband were married not many months after she became pregnant, having become engaged very soon after that event, and when both of them were in knowledge of her condition. Now, it is also certain that the pursuer had connection with the defender in spring. It was possible therefore that the child might be the defender's, and I do not think that the defender could have been relieved of his liability because he only admitted connection some months before the date alleged by the pursuer, there being opportunity after the admitted date, combined with the pursuer's oath. That I apprehend is the ordinary rule of law, but the circumstances here are so peculiar that I do not think they come under any rule. A common rule is that if a woman is proved to have been with several men, her oath may be taken as to which of them is the father of her child, but that rule also does not apply to this case. It was a very extraordinary position for the man Kerr to take up to say that he married his wife knowing that she was pregnant, and after the birth of her child to take proceedings against another man for its aliment. That is a most unlikely thing for any man to do. There might be circumstances which would explain such a proceeding, but I cannot find any such here. The husband gives no explanation of his conduct, which is quite inexplicable. It is said he is an elder in his church. I do not think that makes any difference, except as making him probably more susceptible to feeling an accusation of immorality if he were innocent. He was not a man of inexperience who could be said to have been led into this false position by a designing woman. He was a man of mature years, and the father of a family. When such a man is found marrying a pregnant woman the presumption is almost irresistible that he is endeavouring so far as possible to repair a wrong done to the woman. There is a very strong presumption against him so acting if this were not the case, and I cannot imagine a case in which the presumption could be stronger than in the case before us. Apart from the husband's actings, it might be quite as likely that the defender was the father of the pursuer's child as that he was not, but beyond that there is nothing of weight against the defender. I do not lay stress upon the stories of the pursuer's witnesses. Everything said to have been admitted by the pursuer depends upon time, but I think the reputed conversations far too vague and general to have any weight in a case in which the presumption is so much the other way as it is here. I see no grounds for not holding as a presumption of fact that the pursuer and her present husband had connection before marriage, as the result of which this child was born. I see nothing approaching a sufficient reason for setting aside that presumption of fact. I am therefore for sustaining the appeal.

LORD YOUNG—The question in this case is whether the pursuers have proved as matter of fact that the defender is the father of the female pursuer's child, and I am of opinion that they have not. Indeed I am prepared to find in fact that he is not the father of the child. I am far from saying that there is no evidence tending to prove that he is, but there is no evidence convincing my mind that he is. The case is peculiar. The husband is an elderly man, the father of a family, and an elder in a Dissenting church, and he begins sweethearting a mill-worker of twenty-nine. He commenced his attentions about March or April, and his wife swears that he offered her marriage upon 12th April. Before that they were seen going about together at the place where the child is alleged to have been begotten by another man. He was seen with his arm round the pursuer's waist. I do not say there was the least impropriety in that. But she says she told him that she must speak to the defender, and that within three weeks of their engagement she told him that she was with child. She avers that she had connection with the defender five days before her husband proposed to her. Her information made no difference to Kerr, and he married her in August. When the child was born the attention of the kirk-session was aroused, and he then pointed to another man as the father of his wife's child. Has he proved that that other man is the child's father? I think that he has not. Irrespective of the evidence of the wife, it seems to me that the case is just as strong against the man who married her as against the defender, but when the marriage is taken into account, the presumption against the husband becomes infinitely stronger. I agree with your Lordship that the appeal should be sustained.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—I am sorry to have to dissent, but I cannot reach the conclusion at which your Lordships have arrived, and I think that the judgment of the Sheriff should be affirmed. The question we have to decide is, whether or not the pursuers have proved that the defender is the father of the child in question? I do not think the pursuers need fear to face that question in the bald fashion in which I have stated it. I put aside the marriage for the moment, and without the marriage it was admitted at the bar—fairly admitted, I think, looking to the decisions in previous cases—that the evidence was sufficient to establish liability against the defender. But if the marriage were out of the way and the defender were not here, could you convict Kerr of being the father of this child? I am as clear against that view as I am in favour of finding the case proved against the defender. Now, look at the marriage. Even in the case of a child born in the ordinary time after marriage, the maxim *pater est quem* is not absolute. The existing husband is not necessarily held to be the father of his wife's child. There was a very strong case indeed where that presumption was held to have been redargued which has not been referred, viz., the case of *Mackay*, February 24, 1855, 17 D. 494. Here, however, we have not so strong a presumption to deal with as the presumption of law *pater est*. Here we have only a *præsumptio hominis et facti* arising from Kerr having married a pregnant woman. I fail to see that the presumption is irresistible. Lord Young has mentioned circumstances tending to show intimacy before marriage. I can see no signs of such intimacy except the night of the ball, and there is no evidence that the parties were five minutes alone together on that evening. The evidence about Kerr's arm being seen round pursuer's waist might be of consequence if that had taken place before the conception of this child, but it occurred when they were betrothed lovers, and when Kerr knew that she was pregnant. I do not say his conduct was in good taste. That should not affect our judgment any more than the fact that Kerr was an elder and his wife a mill-worker. Now, we have the defender's admission of improper intimacy. The Lord Justice-Clerk says he does not believe Hiddleston. I do, because the Sheriff believed him, and because the defender admits that the conversation he speaks to did take place, except as to the defender's saying the pursuer was going to have a child to him. That, the defender depones, he said would only be the case if the child was born within a certain period. I consider this case to be better proved than many in which I have seen the Court find the defender liable. To summarise my view—Without the marriage I think the case conclusive against the defender, and without the marriage I think there would be no case against Kerr. This is not a case of attempting to extort blackmail. The male pursuer only desired that the defender should remove the child from his house.

The Court sustained the appeal and assoilzied the defender.

Council for Pursuers and Respondents—G. W. Burnet. Agents—Emslie & Guthrie, S.S.C.

Counsel for Defender and Appellant—Sym. Agent—Alex. Wyllie, Solicitor.

Friday, December 19.

SECOND DIVISION.

(Before Seven Judges.)

SIR WILLIAM MILLER'S TRUSTEES.

Succession—Trust—Direction to Trustees to Manage until Beneficiary Attained Twenty-five—Right of Fiar to Demand Conveyance and Payment—Repugnancy.

A testator directed his trustees to manage certain heritable property until his son, the person entitled thereto, attained the age of twenty-five, and