LORD COWAN—The three most important points of time to consider are—(1) The date of the deed in 1849; (2) The date of the death of the surviving spouse in 1867; (3) The date of the death of Robert Hawkins senior, prior to the date of the deed. In the case of *Nimmo, supra*, the date of the deed was April 1855, and the death of the testator occurred on 2d July 1855; and in the interval between these dates the Intestate Succession Act came into operation—viz., in May 1855. The destination in the deed was to "heirs and executors." The Court gave effect to the Act, and held that the destination was to "heirs and executors as at July 1855. The next case was *Masson, supra*. There the deed of the testator was dated in 1836, and it contained a legacy to A B and his heirs and executors. A B died in 1852, and the testator survived till 1858. The question was, whether the legacy was to go to the heirs and executors of A B at his death in 1852, or to those persons who were his heirs and executors according to the law as it stood in 1858, the date of the death of the testator. The First Division decided in favour of the executors as at 1858. *Stodart's* case was to the same effect.

In the present case the question is, who are to be held to be "heirs and executors" of a person who was dead at the date of the deed.

We must apply the principle that a deed of this kind must be held to contain the will of the surviving testator at the last moment of his life, and that, when he does not alter the destination to the "heirs and executors" of Robert Hawkins, he means those persons whom the law considers to be the "heirs and executors" of Robert Hawkins at the time of the testator's death.

Thus the descendants of parties who are dead will be entitled to take the places which their parents would have taken if they had survived.

I am of opinion that we ought to answer the first question in favour of the second alternative, and find that the children of the deceased sons of Robert Hawkins senior—viz., Mrs Cottom and others—are entitled to participate with Samuel and James Hawkins in the succession.

The second question must be solved, on the same principle, in favour of the grandchildren of Robert and John Hawkins.

LORD BENHOLME concurred. The leading date is the date of the succession opening. The term executor did not mean the person who was so at the date of the instrument, because, if he died before the testator, there would be intestacy. The proper course to take in dividing the estate of A B, who had left a legacy to the executor of B C, was to hold those persons entitled to succeed who were in law the "executors" of B C at the death of A B, whether B C had been alive or dead at the time of the execution of the deed.

LORD NEAVES was not prepared to differ, but considered the question to be one of great subtlety.

The LORD JUSTICE-CLERK concurred.

Agents—James Stewart, W.S.; Malcolm M'Gregor, S.S.C.

Wednesday, December 7.

SPECIAL CASE—PARIS' TRUSTEES AND OTHERS.

Trust-deed — Legacy — Accretion — Condition. By his trust-disposition A left directions to his trustees to retain one-third of the free income of his estate and invest it for behoof of B, paying her the interest annually until she attained the age of twenty-five years, when she was to receive the accumulated sum. He directed them to pay to C two-thirds of the free annual income, and declared that if either B or C died before B attained the age of 25 years, "the share of the predeceasor shall accrue and belong to the survivor." C died within a year of the death of the testator, without issue, and owing to the testator a sum of money greater than he had succeeded to under the trust-disposition. *Held* (1) that B, the survivor, must take her accescing share subject to the same conditions as the original share; and (2) that the legacy to C must be imputed *pro tanto* in tinction of his debt to the testator.

This was a Special Case for the opinion of the Court in the following circumstances. James Paris, S.S.C., died on 27th July 1869, leaving a trust-disposition and settlement containing the following clauses. By this deed he disponed all his property, real and personal, to trustees (1) for the payment of his debts; (2) for payment of annuities to his sisters and aunts; (3) for payment of certain legacies. The deed proceeded—"(5) My trustees shall, after making provision for the foresaid annuities out of the free income of my estate, and there happen to be any free income remaining, they shall divide the same into three shares, two of which shares they shall pay to the said Alexander Paris, and one share they shall lay aside and invest for behoof of my said niece Jane Gow, and allow her the interest only on such sums as may be invested till she attain the age of twenty-five years complete, when (should she live till that time) my trustees will hand over to her, as her own absolute property, the accumulated shares of income from my estate; . . . and farther declaring, that in the event of the death of either of the said Jane Gow or Alexander Paris, without leaving lawful issue, before the period when the said Jane Gow would have reached the age of twenty-five years, the share of the predeceaser, with all accumulations, shall accresce and belong to the survivor; . . . and (6) At the period when the said Jane Gow (if alive) shall have attained the age of twenty-five years complete, should my said sister Christina have predeceased that period, and if not, then at her death, so soon as it happens thereafter, I authorise and appoint my trustees to divide my whole estate, heritable and moveable, into three equal parts or shares, and pay or convey over to my said brother Alexander Paris two of these shares, and to my said neice Jane Gow one of these shares, declaring that the shares of either dying without leaving lawful issue shall accresce and belong to the survivor; but in the event of either dying leaving lawful issue, such issue shall be entitled equally among them to their parent's share; and failing the said Jane Gow and Alexander Paris by death before the final division of my estate, without leaving lawful issue, I direct my trustees to divide the same equally, share and

share alike, among the whole children then alive of the said Mrs Mary Paris or Wotherspoon and John Paris; and I hereby further declare that the sums destined to be paid from my estate to the said Alexander Paris and Jane Gow shall be strictly alimentary, and not liable to their debts or deeds, or subject to the legal diligence of their creditors, and the same shall not be assignable by them, either onerously or gratuitously."

The testator's sister Christina died on 28th April 1870, and his brother Alexander on 16th June 1870, without issue and unmarried. Alexander had, on 5th January 1870, granted a trust-deed for behoof of his creditors in favour of William Myrtle, and when he died, in July, he was owing £440 to the Commercial Bank for overdrafts on his account, and for these overdrafts the testator had been cautioner to the bank, and consequently his trustees were liable.

The parties to this Special Case were—(1) The trustees of the testator; (2) the said Jane Gow and her tutors; (3) the said Mrs Wotherspoon or Forrest and her children and others; and (4) William Myrtle, as trustee for the creditors of Alexander Paris.

The questions had reference (1) to the two-thirds of the free annual income of the estate which were destined to Alexander, and which, in the event of his death without issue, were to accresce and belong to Jane Gow as survivor.

The following were the questions of law:—"1, Are the trustees of the said James Paris bound to retain and invest the said two-thirds for behoof of the said Jane Gow till she attain the said age of twenty-five years complete, and during that time to pay to her, or for her behoof, no more than the interest of the sums to be so invested? Or, 2, Do the said two-thirds, as they from time to time accrue, fall to be paid to the said Jane Gow, or her guardians, as her own absolute property?"

The other questions had reference to the sum of £123, being two-thirds of the balance of the free income of the estate from the testator's death till that of Alexander Paris. This sum was claimed—(1) By the trustees in part payment of the above sum of £440 which they had paid to the bank for behoof of Alexander Paris; (2) by the trustee of Alexander's creditors; and (3) by Jane Gow.

The questions were as follows:—"1, Are the trustees of the said James Paris entitled to retain the sum, or any and what part thereof, until they receive payment of the foresaid sum of £440? 2, Is the said William Myrtle, as trustee foresaid, entitled to payment of the foresaid balance, or any and what part thereof? 3, Is the said Jane Gow, by virtue of the provisions in the foresaid trust-disposition and settlement, entitled to the foresaid balance, or any and what part thereof? 4, Is the said Jane Gow, as next of kin of the said Alexander Paris, entitled to confirm for her own behoof to the said balance, or to any and what part thereof?"

BLACK for the parties of the first and third parts.
FRASER for the parties of the second part.
STRACHAN for the parties of the fourth part.

The Court unanimously were of opinion that the testator intended that Jane Gow should take the share of the free annual income which might come to her if she survived Alexander Paris, under the same conditions as had been made regarding her own share, and therefore answered the first branch of the questions to the effect that the trustees must retain and invest the said two-thirds of the free annual income for behoof of Jane Gow until she attained the age of twenty-five years, paying her the interest.

With regard to the second branch of questions, they were of opinion that the trustee for Alexander's creditors had no claim to the £123 odd, as it was not attachable for his debts, nor indeed assigned by his trust-deed. It must be imputed *pro tanto* to extinguish the debt of £440 due by Alexander to the testator; and accordingly they answered question No. 1 in the affirmative, and the others in the negative.

Agents—David Forsyth, S.S.C.; Lindsay Mackersy, W.S.; and Hugh Martin, S.S.C.

Friday, December 9.

FIRST DIVISION.

SPECIAL CASE—CURROR (HENDERSON'S FACTOR) AND OTHERS.

Trust — Period of Division — Codicil — Expenses — Clause — Construction. Circumstances in which the provision in a codicil, by which a preference was given to certain beneficiaries, who were also beneficiaries under the trust-deed, was held only to affect special funds, though the truster used the expression "share and interest in my succession."

Held, also, that the parties to a special case must be looked upon as ordinary litigants, and the successful parties were accordingly found entitled to expenses as against the other parties.

The parties to this Special Case were (1) David Curror, Solicitor Supreme Courts, judicial factor on the trust-estate of the deceased John Henderson, builder, No. 2 Stafford Street, Edinburgh; (2) Mrs Margaret Henderson or Brown, relict of Robert Brown, architect, Edinburgh; Mrs Catherine Henderson or Nisbet, wife of George Nisbet, farmer, Tranent; and the said George Nisbet, for his own rights and interests; and Mrs Caroline Graham or Henderson, relict of John Henderson, architect, Edinburgh, son of the said deceased John Henderson; (3) Miss Margaret Wilhelmina Nisbet, and Miss Agnes Nisbet, daughters of the said George Nisbet, and grandchildren of the said deceased John Henderson; and (4) Mrs Margaret Brown or Thomas, Mrs Helenore Brown or Macgregor, Miss Louisa Brown, and Miss Mary Catherine Brown, daughters of the said Mrs Margaret Henderson or Brown; and John Henderson and Walter Henderson, sons of the said Mrs Caroline Graham or Henderson, all grandchildren of the said deceased John Henderson.

The said John Henderson died on 11th March 1860, leaving a trust-disposition and settlement, dated 28th May 1857, whereby, after appointing trustees, and directing payment of his debts, and sick-bed and funeral charges, he provided as follows:—"*Second*, I direct my said trustees to hold and retain the residue of my whole heritable and moveable, real and personal estate, for the period of ten years from and after my decease, and during that time annually to divide the free income or proceeds arising therefrom into three equal shares, and to pay one of these shares to each of my daughters, Margaret Henderson or Brown, wife of Robert Brown, architect in Edinburgh, and Catherine Henderson or Nisbet, wife of George Nisbet, farmer, Tranent, half-yearly at two terms of the