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

year—Martinmas and Whitsunday—in equal portions, commencing at the first term of Whitsunday or Martinmas immediately after my death: and with regard to the remaining third share of said free annual income or proceeds, I direct my said trustees to pay therefrom to Caroline Graham or Henderson, relict of my eldest son John Henderson, architect in Edinburgh, now deceased, a free annuity of £10 sterling, payable half-yearly at two terms of the year—Whitsunday and Martinmas—in equal portions, commencing at the first term of Whitsunday or Martinmas that shall happen immediately after my decease, but so long only as she remains unmarried, declaring that if the said Caroline Graham or Henderson shall enter into a second marriage, said annuity shall cease and determine. And I further direct my said trustees, out of said third share of income, to pay to John Henderson, eldest son of the said Caroline Graham or Henderson, an annuity of £20 sterling until he attains twenty-one years of age, and to pay to Walter Henderson, younger son of the said Caroline Graham or Henderson, an annuity of £20 sterling until he attains twenty-one years of age; said annuities to my said two grandsons John and Walter Henderson being paid to them half-yearly at the terms of Martinmas and Whitsunday, in equal portions, commencing at the first term of Martinmas or Whitsunday that shall happen immediately after my decease, or, in the option of my said trustees, said annuities to be expended for behoof of the said John and Walter Henderson in such manner as to my said trustees shall seem beneficial and expedient, of which they shall be sole judges; and with regard to the balance or surplus of the said third share of income after satisfying the said annuities to the said Caroline Graham or Henderson and her two children before named, I direct my said trustees to accumulate and invest the same for behoof of the parties who shall at the period of division hereinafter specified become entitled to the fee of the residue of my said estate in virtue of these presents, and if either of my said daughters shall die before the expiry of the said ten years, leaving lawful issue of her body, I direct my said trustees to hold and accumulate the third share of the income of my estates effeiring to such deceased daughter for behoof of her said issue until the said ten years expire, with power to my said trustees to apply the whole or any part of such third share of said income for the maintenance and education of the lawful issue of such of my said daughters as shall decease, in a suitable manner, if my said trustees shall consider it expedient, of which they are to be the sole judges. *Third*, Upon the expiry of said ten years after my decease, if both or either of my said daughters are then in life, I direct my said trustees to set apart and invest as much of the capital of my said estate as will yield a free annuity of £75 sterling to each of my said daughters during all the days of their lives, payable half-yearly at Martinmas and Whitsunday in equal portions, and as will further yield the foresaid annuity of £10 sterling herein provided to the said Caroline Graham or Henderson during all the days of her lifetime, so long as she remains unmarried: And I appoint the residue of my said estate to be divided amongst the said John and Walter Henderson, being the only children of my said deceased son John Henderson; Robert, Margaret, Christina, Helenore, Louisa, John Henderson, and Mary Catherine Brown, being the seven children presently in life of my said daughter Margaret Henderson or Brown, and Margaret Wilhelmina Nisbet, child of my said daughter Catherine Henderson or Nisbet, and amongst any other children who may hereafter, before the expiry of the said period of ten years after my decease, be procreated of the bodies of my said two daughters Margaret Henderson or Brown and Catherine Henderson or Nisbet, or either of them, or amongst such of my whole grandchildren herein before specially named, or to be procreated as aforesaid, as shall be in life at the expiry of the said period of ten years after my death, and that equally share and share alike, said shares to be immediately paid over to such of my said grandchildren as shall then have attained twenty-one years complete; and the shares of such of them as shall be in minority to be consigned in bank or invested for their behoof until they attain majority; but in the meantime my said trustees may pay to them, or expend for their behoof, the income of the shares of such of said grandchildren until they severally attain twenty-one years: Declaring that in all cases the children or issue of any of my grandchildren deceasing shall take equally share and share alike the portion of said residue of my means and estate which their parent would have taken if in life. *Fourth*, In the event of my said daughters, or either of them, being in life at the expiry of the said period of ten years after my death, in which case a portion of my said estate is to be set apart and invested in order to yield to each of them the foresaid annuities of £75 sterling as before provided, I hereby direct that upon the death of the survivor of my said daughters, the fee or capital sums set apart for said annuities shall be divided equally amongst my whole grandchildren before specified—that is, the children of my son, the said deceased John Henderson, and of my daughters, the said Margaret Henderson or Brown and Catherine Henderson or Nisbet, who may be then in life, share and share alike, and paid over to such of my said grandchildren as shall have attained majority, and in the event of any of them being then in minority, I appoint their shares to be invested or consigned in bank, until they so arrive at twenty-one years of age, in the same manner as above provided, with reference to the division herein appointed to be made of my said funds and estate upon the expiry of ten years immediately after my death: Declaring that in the event of both of my said daughters being in life at the expiry of the said period of ten years, the sums set apart and invested to meet the annuity of £75 to her who shall thereafter first decease, shall not be divided until her surviving sister also die as above specified, but shall be held, and the interest thereon accumulated, by my said trustees from the date of the death of my said first deceasing daughter, aye and until the said period of division hereby appointed to take place at the death of my surviving daughter: And further, declaring that no right shall be held to have vested in any of my said grandchildren until they are respectively entitled to demand payment of their shares of my means and estate above provided to them.

Thereafter, on 16th February 1869 he executed a codicil, whereby, after making certain alterations in the names of his trustees, he provided as follows:—"In the second place, I hereby provide and declare that when the period of division of my trust-estate specified under the fourth purpose of said trust-deed and settlement shall arrive, my said trustees shall pay over to the child or children

then in life procreated of the body of my daughter Catherine Henderson or Nisbet, one equal share of the residue of my means and estate, whatever that share may amount to, and that over and above the equal share provided to each of my other grandchildren who may then be in life, all in manner set forth in the said trust-deed and settlement, that is to say, the child or children of the said Catherine Henderson or Nisbet shall respectively receive double the sum as their share and interest in my succession which will be exigible by any individual child procreated of the bodies of my deceased son John Henderson, or of my other daughter Margaret Henderson or Brown: Declaring hereby, that the whole other provisions in my said trust-disposition and settlement, in so far as not inconsistent with this codicil, are hereby confirmed in all respects; and, *quoad ultra*, I ratify and approve of the said trust-disposition and settlement."

On 4th May 1860 the said David Curror was appointed judicial factor on the said trust-estate, in consequence of the trustees nominated in the said trust-disposition and codicil declining to act, and he has since proceeded with the discharge of the duties of his office. In terms of the first purpose of the trust he paid the truster's debts, &c., and in terms of the second purpose, he, during the period of ten years from and after the testator's decease, annually dealt with the free income or proceeds of the residue of the trust-estate in manner provided by the second purpose. The said period of ten years having expired on 11th March 1870, it now became the duty of the judicial factor to apportion the said estate in the manner directed by the truster.

The second and fourth parties to this Special Case are the sole surviving grandchildren of the truster. The parties of the fourth part—being the grandchildren other than the two children of Mrs Nisbet—maintained that after sufficient capital had been set aside to pay the annuities provided in the second purpose of the trust, the residue of the trust-estate should be divided into eight equal shares, and paid over as directed in the third purpose thereof.

Mrs Nisbet's two children—the truster's remaining grandchildren—the parties of the third part—contended that the said residue fell to be divided into ten equal shares, and that each of them was entitled to payment of two of said one-tenth shares, and that, as regarded the other grandchildren of the truster, each was entitled to no more than one of the said one-tenth shares; at least, that each of the daughters of the said Mrs Nisbet was entitled to immediate payment of one of said one-tenth shares, and to have another of said one-tenth shares set apart, to the effect that the same might be paid to her at the time fixed by the fourth purpose of the trust for the division of the fee or capital sums therein specified.

The questions for the opinion and judgment of the Court were:—

"(1) Whether, after setting apart and investing as much of the capital of the foresaid trust-estate as is required to be set apart and invested in terms of the third purpose of the foresaid trust, the said judicial factor is, in regard to the remainder of the said trust-estate, bound forthwith to divide the said remainder into eight equal shares, and to make immediate payment of one of said one-eighth shares to each of such of the testator's eight surviving grandchildren foresaid as have attained majority, and to consign in bank or invest for behoof of each grandchild now in minority one of said one-eighth shares until she shall attain majority? or,

"(2) Whether the said judicial factor is bound forthwith to divide the said remainder into ten equal shares, and—subject to consignation or investment as aforesaid, in the case of grandchildren still in minority—(1) to make immediate payment of two of said one-tenth shares to each of the said Margaret Wilhelmina Nisbet and Agnes Nisbet, and one of said one-tenth shares to each of the remaining six surviving grandchildren of the said testator; or (2) to make immediate payment of one of said one-tenth shares to each of the eight surviving grandchildren of the testator, and to set apart one of said one-tenth shares for behoof of each of said Margaret Wilhelmina Nisbet and Agnes Nisbet, to the effect that the same may, with the interest which shall have accrued thereon, be paid to her at the period fixed in the fourth purpose of the said trust for the division of 'the fee or capital sums' therein specified?

"(3) Whether the amount of capital to be set apart and invested in terms of the third purpose of the trust-deed to yield the free annuities therein specified, is such a sum as, if invested in the purchase of government stocks, public funds, or securities of the United Kingdom, would yield the said free annuities, and the necessary expenses of management? or,

"(4) Whether it is such a sum as, if invested on good heritable security, would yield said annuities and expenses on the footing of the average rate of interest being 3½ per cent?"

In the absence of any dispute among the parties, and on the ground that this was a subject for the judicial factor's discretion, the Court refused to entertain any consideration of the third and fourth questions. The argument was therefore confined to the first two.

BLACK for the judicial factor.

MACDONALD, for the parties of the second and fourth parts, contended that the provision in the codicil was not intended to affect the third purpose of the trust-deed, but only to come into operation when the remainder of the estate fell to be divided under the fourth purpose.

MARSHALL, for the parties of the third part, maintained that the codicil was meant to affect the whole share or interest which any grandchild could take in the succession, and that accordingly the children of Mrs Nisbet were entitled to a preference over the other grandchildren of the truster.

At advising—

The LORD PRESIDENT—The testator died on 11th March 1860, leaving a trust-disposition and settlement dated 28th May 1857, and a codicil of date 16th February 1869. He had one son and two daughters. The testator's son was dead previous to the date of the settlement, but had left behind him a widow and two sons. The daughters are both alive, have both married, and both have issue. The testator set about making a settlement which should secure certain liferents, and afterwards dispose of the fee. At the time of making this settlement he had ten grandchildren, viz., (1st) His son's children, John Henderson and Walter Henderson; (2d) The children of his elder daughter, Margaret Henderson or Brown, Robert

Brown (since deceased), Mrs Margaret Brown or Thomas, Christina Brown (since deceased), Mrs Helenore Brown or M'Gregor, Miss Louisa Brown, John Henderson Brown (since deceased), and Miss Mary Catherine Brown; (3d) Miss Margaret Wilhelmina Nisbet, daughter of his younger daughter Mrs Catherine Henderson or Nisbet; but at the time of his death he had eleven, for Agnes Nisbet was born in the interval. The parties before us are the children of Mrs Nisbet on the one side, and the whole of the other grandchildren on the other, and the question between them is in regard to the construction of the codicil which the testator added to his settlement. The deed of settlement itself does not raise any question of construction. It is very clearly expressed. I need not quote the different provisions of liferents and annuities. The important parts of the deed are the third and fourth purposes. He provides in the previous part of the deed that there shall be no division until ten years after his death. He then proceeds, "*Third*," &c. (*reads third purpose of trust*). The period contemplated in this purpose has arrived, and the first thing to ascertain is, who are the now existing grandchildren? There are now only eight surviving,—two Hendersons, four Browns, and two Nisbets. Now, taking this purpose of the deed alone, there could be no doubt that the residue, after setting aside sufficient to meet the claims of the liferenters and annuitant, is now to be divided among these eight grandchildren. But then there is a fourth purpose of the deed, into which the codicil is said to introduce a difficulty. This fourth purpose provides for the time when the liferents shall fall in as follows:—"I hereby," &c. (*reads fourth purpose of trust*). Here, again, there is no room for doubt in interpreting the clause in the deed—at least at present. It is true there is no provision for grandchildren dying and leaving issue, and thus future difficulties may arise, but no such question falls now to be decided. The whole difficulty now before us arises from the codicil, by which he provides and declares, "That when the period of division of my trust-estate specified under the fourth purpose of said trust-deed and settlement shall arise, my said trustees shall pay over to the child or children then in life, procreated of the body of my daughter Catherine Henderson or Nisbet, one equal share of the residue of my means and estate, whatever that share may amount to, and that over and above the equal share provided to each of my other grandchildren who may then be in life, all in manner set forth in the said trust-deed and settlement." Stopping here, there is not much difficulty in seeing that he is providing for the last period contemplated in the settlement—namely, the falling in of the liferents. But then there follows a clause which may be called exegetical or explanatory, "that is to say, the child or children of the said Catherine Henderson or Nisbet shall respectively receive double the sum as their share and interest in my succession which will be exigible by any individual child" of his deceased son, or of his other daughter. The daughters of Mrs Nisbet say that the effect of this last clause is to give them a preference, not only in the fund which will be freed by the falling in of the liferents, but also in the fund at present falling to be divided. Certainly there are some words which would seem to support and favour this contention. On the other hand, it is contended that the clause is to be read in connection with the first part of the provision in the codicil, and as being confined to the fund to be divided under the fourth purpose of the trust-deed. I confess I am of opinion that this is what was intended, and that the use of the words "share and interest in my succession" was not meant to have any other meaning than in the earlier part of the provision, where he speaks of "the residue of my means and estate." One reason which leads me to this conclusion is, that I think I see the testator's object in inserting this exegetical sentence. The first part of the provision in the codicil is ambiguous, and the subsequent clause is intended to explain it. Observe what is said in the first part, "my trustees shall pay over to the child or children then in life, procreated of the body of my daughter Catherine Henderson or Nisbet, one equal share of the residue of my means and estate, whatever that share may amount to, and that over and above the equal share provided to each of my other grandchildren who may then be in life." Now, that might mean that however many children Mrs Nisbet might have they were only to receive one additional share among them. Whereas, if we look at the last clause, we have his real intention explained, that Mrs Nisbet's child or children shall respectively receive double the sum which will be exigible by any other individual grandchild. The result of my opinion is, that we should answer the first question in the affirmative, and the second question in the negative. With regard to the third and fourth questions, it appeared that there was no dispute between the parties on the subject. We are not therefore called upon to answer them.

The other Judges concurred.

Expenses out of the fund having been moved for, the Court held that in Special Cases the parties must be dealt with just as ordinary litigants, and the successful party, in the absence of special circumstances, be found entitled to expenses. The parties here designed as of "the second and fourth parts" were accordingly found entitled to expenses against the other parties.

Agent for the Judicial Factor—Ebenezer Mill, S.S.C.

Agent for the Parties of the Second and Fourth Parts—Robert Menzies, S.S.C.

Agent for the Parties of the Third Part—H. W. Cornillon, S.S.C.

Friday, December 9.

SECOND DIVISION.

FREER *v.* ALBION SHIPPING COMPANY.

Contract—Ship Surgeon—Usage. A ship surgeon having been engaged for the outward voyage for a certain salary, was entitled under his contract of service to a free passage home. *Held*, in an action at his instance for damages for breach of contract, that according to custom and usage he was bound to give professional attendance gratuitously to the crew on the homeward voyage.

This was an appeal from the Sheriff-court of Lanarkshire against the interlocutors of the Sheriff pronounced in an action against the Albion Shipping Company at the instance of the appellant (Freer), a surgeon in Glasgow, concluding for damages for alleged breach of contract. The pursuer had been engaged to act as surgeon on board