in the interlocutor of the Sheriff-Substitute. I think that the servant's right to warning rests upon equity and custom, and has been fixed from the analogy of the warning required between a landlord and tenant. The law of landlord and tenant has been changed by the Act of 1853, so that now it is sufficient if a removing be intimated forty days previous to the actual term of removal; and I agree with the Sheriff-Substitute that the analogy should rule the question between master and servant. It seems to have been laid down that reasonable notice is sufficient, and custom has fixed that what is sufficient in the case of a tenant should be reasonable for a servant. The inconvenience to a servant pointed out in the note of the Sheriff-Substitute is also important.

With regard to custom, I do not think that we have any sufficient averment of a custom to justify us in allowing a proof. I am of opinion that we should decide the case on the same grounds as the Sheriff-Substitute.

LORD COWAN—I should not wish that we should interfere with any local custom, but we have here no allegation of such custom, and it appears to me that we ought not to allow a proof of such local custom when it has not been averred. The contract was specially covenanted in writing, but Wm. Cameron agreed to act as cattle-herd from Whitsunday to Whitsunday. There was a difficulty as to what was meant by Whitsunday, whether it was 15th May or 26th May. But it seems to me that the letter of 8th April makes it clear that the parties understood Whitsunday to be 26th May. The notice which the pursuer got on 8th April was enough. It was a reasonable time, and beyond the forty days which has always been recognised as the time at which such notice should be given. It has been observed that by the Act of 1853 the forty days' notice are counted from the actual term of removal in the case of landlord and tenant. The same rule may reasonably be applied to the case of master and servant. On this point the reasoning of the Sheriff-Substitute is very satisfactory. There being no allegation of local usage or hardship, I am clearly of opinion that we ought to affirm the judgment of the Sheriff-Substitute.

LORD BENHOLME concurred.

LORD NEAVES—I think your Lordships are quite right. Forty days has been held enough. I do not say that if there had been systematic arrangements for hiring servants, such as a feeing market, it might not be unreasonable for the master to allow that time to pass. I do not think that contracts with yearly servants are to be judged of on the same principle as those engaged only for half a-year. But in this case I am quite satisfied that there is no case calling for us to interfere.

Agent for the Pursuer—Wm. R. Skinner, S.S.C.
Agent for the Defender—Æneas M'Bean, W.S.

Tuesday, December 6.

SPECIAL CASE—EWART AND COTTOM.

Executors—Intestate Succession Act, 1855—18 *Vict., cap.* 23, § 1. By mutual disposition and deed of settlement, dated in 1849, two spouses disponed their whole estate to the longest liver in fee, declaring that, in the event of the survivor executing no conveyance of the estate or any part of it, a certain share should belong to "the executors of the deceased A B," and a certain other share should belong to the executors of C B, who was alive in 1849, but predeceased the surviving testator in 1851. The survivor made no alteration in the destination of the estate, and died in 1867. *Held* (1) that "the executors of the deceased A B" meant not those persons who were his executors in 1849, the date of the deed, but those who were so in 1867, when the succession opened, under the provisions of the Intestate Succession Act of 1855; and (2), on the same principle, that the "executors of C B" meant, not those persons who were so at her death in 1851, but her executors, according to the law as it stood in 1867, when the succession opened.

This was a Special Case presented for the opinion of the Court by the following parties—viz., Mr Ewart, factor and commissioner for James Hawkins, eldest son of the deceased Robert Hawkins senior, and also factor and commissioner for the eldest son, and executor of Samuel Proudfoot Hawkins, another son of Robert Hawkins senior, of the first part; and Mrs Cottom and others, granddaughters, grandnephews, and neices of the said deceased Robert Hawkins senior, of the second part.

The following were the facts agreed on by the parties:—"The said parties respectfully submit the following statement of facts, adjusted and agreed upon by them, for the opinion of the Court, upon the questions after stated:—The late William Bell of Sinclairburn, in the county of Dumfries, surgeon in the Royal Navy, and Mrs Janet Hawkins, residing at Sinclairburn, his wife, by their mutual disposition and deed of settlement, dated 1st September 1849, gave, granted, assigned, disponed, and made over from them, their respective heirs and successors, to and in favour of the longest liver of them, and the disponees and assignees of such longest lives, all and sundry lands, heritages, and heritable subjects then belonging to them or either of them, or which might belong to them or either of them, at the death of the first deceaser of them; also all and sundry goods, gear, and effects in communion then belonging, or which might at the death of the first deceaser belong to them or either of them; and declaring that the longest liver of said William Bell and Janet Hawkins should have full and uncontrolled power to dispose of the foresaid subjects or any part of them, at pleasure, by any disposition and assignation, gratuitous or otherwise; and should the longest liver of them execute no disposition and assignation of the foresaid subjects, heritable and moveable, generally and particularly thereby conveyed, or should such longest liver execute a disposition and assignation of part of them only, then they thereby declared that on the death of such longest liver one-half of the said subjects, or of what of them might not have been disponed and assigned by the longest liver of them, should belong to and be the property of . . and the other half thereof should, in equal portions, one-third to each, belong to and be the property of the executors of the deceased Robert Hawkins senior, sometime blacksmith in Lockerbie, father of her, the said Janet Hawkins, the executors of the deceased John Hawkins senior, sometime blacksmith in Glasgow, uncle of the testators, and Jean Hawkins, wife of

Samuel Proudfoot, in Marchbank, their aunt, or her executors. Mrs Janet Hawkins or Bell died in April 1864, and the said William Bell on 16th January 1867. There was no issue of the marriage. At and for some time previous to Mrs Bell's death, Mr Bell was in a state of complete mental incapacity, from which he never recovered. No further disposition and assignation or other settlement was ever executed by Mr and Mrs Bell, or either of them. There was no question involved regarding the first half or moiety of the estate bequeathed to Mr Bell's executors and to Margaret Hart Hotchkis. Of the second half or moiety of the said estate, dealt with in the final destination contained in said deed of settlement, one-third was declared to belong to and be the property of the executors of the deceased Robert Hawkins senior. He was twice married. By his first marriage he had only one child, the said Janet Hawkins or Bell, the testatrix. By the second marriage he had four sons—viz., Robert Hawkins junior, blacksmith, Manchester, who predeceased the said William Bell, leaving a family; John Hawkins, manager of Steel Works, Sheffield, who also predeceased Mr Bell, leaving a family; Samuel Proudfoot Hawkins, of Melville Forrest Station, Victoria, who survived the said William Bell, but had since died, leaving a family; and James Hawkins, teacher, now in Portland, Victoria. Of the family of the said Robert Hawkins junior, the said Mrs Penelope Hawkins or Cottom was the only known survivor. The children of John Hawkins were the said Mrs Barbara Hawkins or Manson, Mrs Margaret Hawkins or Milwain, Mrs Fanny Hawkins or Rae, and Robert Hawkins or Greendale, all parties hereto. These persons, Mrs Cottom and others, were therefore grandchildren of Robert Hawkins senior, blacksmith in Victoria. By the Act 18 Vict., cap. 23, entituled 'An Act to alter in certain respects the Law of Intestate Moveable Succession,' it is enacted (section 1) that 'In all cases of intestate moveable succession in Scotland accruing after the passing of this Act, where any person who, had he survived the intestate, would have been among his next of kin, shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in the place of such person, and the issue of any such child or children, or of any descendant of any such child or children, who may in like manner have predeceased the intestate, shall come in the place of his or their parent predeceasing, and shall respectively have right to the share of the moveable estate of the intestate to which the parent of such child or children, or of such issue, if he had survived the intestate, would have been entitled: Provided always, that no representation shall be admitted among collaterals after brothers' and sisters' descendants, and that the surviving next of kin of the intestate claiming the office of executor shall have exclusive right thereto, in preference to the children or other descendants of any predeceasing next of kin, but that such children or descendants shall be entitled to confirmation when no next of kin shall compete for said office.' In these circumstances, the question was raised whether Samuel Proudfoot Hawkins and James Hawkins, as the only surviving children and next of kin of Robert Hawkins senior, at the opening of the succession upon Mr Bell's death, and therefore entitled to claim the office of executor in preference to the said children of their deceased brothers, were the parties to whom said destination in favour of the executors of the deceased Robert Hawkins senior, applied; or whether the said destination included and applied also to the children of the predeceasing next of kin, as heirs *in mobilibus*, and entitled, in room of their parents, to a share of the executry funds and estate of Robert Hawkins senior, who died intestate? No question arose as to the third of said moiety of the estate bequeathed to the executors of the deceased John Hawkins senior. The remaining third of said moiety was, by said mutual deed of settlement, declared to belong to and be the property of 'Jean Hawkins, wife of Samuel Proudfoot, in Marchbank, our aunt, or her executors.' Jean Hawkins and Samuel Proudfoot both predeceased William Bell, without leaving any issue. Jean Hawkins or Proudfoot had only two brothers, who both predeceased her—viz., the said Robert Hawkins senior (whose children and grandchildren have been before specified), and John Hawkins senior, sometime blacksmith in Glasgow. John Hawkins, senior had two sons, William and John Hawkins, both of whom predeceased Dr Bell. John died without issue, but William left a family, of whom there were, at Dr Bell's death, and still are surviving, the foresaid Christina Hawkins, Marion Hawkins or Moffat, John Hawkins, and William Hawkins, who were grandchildren therefore of John Hawkins senior. At the death of the said William Bell, Samuel Proudfoot Hawkins and James Hawkins were the nephews and next of kin to the said Jean Hawkins or Proudfoot, and entitled in the first instance to claim the office of executors to her, under the foresaid Act, in preference to the grandchildren of her deceased brothers; and the question in like manner arose, whether the said Samuel and James Hawkins should take the share of said estate destined to Jean Hawkins or Proudfoot or her executors, or whether the other parties, the grandchildren of Robert Hawkins senior, and John Hawkins senior, as heirs *in mobilibus*, in room of their grandparents, were entitled to participate with Samuel and James Hawkins in the share of Mr Bell's estate destined to Jean Hawkins or Proudfoot or her executors."

The following were the questions for the opinion of the Court:—

"(1) Under the said destination in Mr and Mrs Bell's deed of settlement in favour of the executors of the deceased Robert Hawkins senior; Are his sons, the said Samuel and James Hawkins, who were alive at Mr Bell's death, entitled to succeed; or are the children of his deceased sons—viz., Mrs Cottom, Mrs Manson, Mrs Milwain, Mrs Rae, and Robert Hawkins, entitled to participate with the said Samuel and James Hawkins in the succession? (2) Under the said destination in favour of Jean Hawkins or Proudfoot, or her executors; Are her nephews, the said Samuel and James Hawkins, sons of her deceased brother Robert, who survived the said Mr Bell, entitled to succeed; or are the grandchildren of her said deceased brothers Robert and John entitled to participate in said succession?"

The SOLICITOR-GENERAL and JOHNSTONE for the first parties.

SHAND and GEBBIE for the second parties.

The following cases were referred to:—*Nimmo* v. *Murray's Trs.*, 1864, 2 Macph. 1144; *Maxwell*, 24th December 1864, 3 Macph. 318; *Stodart*, 5th March 1870, 8 Macph.

At advising—

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