manufacture were really practically the same as the complainer's. This is admitted by the complainer's witness Professor Jenkin, who, on being shewn an old bush of Hurrell's, says,—"I think an action might be raised on that" (meaning an action for infringement of patent). "It is very like it. The thread is a similar thread, and it is put on to a taper. The difference is merely one of proportion." I do not need to go into the evidence. The truth is that the anticipation of the complainer's thread was very likely to be made in practical manufacture as opposed to mere theory. It was simply the adoption of a wood screw for the outside of the bush, that is, a screw for screwing into wood, instead of a Whitworth or metal screw for screwing into metal, the difference being that the threads of a wood screw have a much wider interval between them than the threads of a metal screw. This difference has been known immemorially, the object, being to leave a space of wood or interval between the convolutions of the screw uncut and undisturbed by the screw, and this is precisely the object of the complainer's thread. The complainer simply did in his drawing what Hurrell's brother had done in practice, varying in this respect from Hurrell's patent, that is, he applied a wood screw, and not a metal screw, to the outside of the screw bush, and the practical advantage of this was that a portion of the wood was left undisturbed, by jamming upon which a watertight junction was obtained. All this is explained in the evidence, to which I need not specially refer.

If I am right in these two points, they are sufficient for the determination of the case. The pursuer's patent is bad in itself, and what he now claims was in prior use.

I am much more doubtful as to whether the tool claimed by the patentee was or was not new at the date of the patent. There is very great similarity between it and those founded on as anticipations. The differences are merely in the details of construction. The mode of action is precisely the same. They are not only the same in principle, but they take hold of the inside of the bush really in the same way and by the same action of the hand. I do not think that anything turns on the mere detail of how the cam is jammed, and whether it is fastened to the spindle, or whether it moves on a separate axis. In both cases its eccentricity in the act of turning tightens the tool in the interior of the bush, and thus the bush is grasped and forced round.

There are other questions in the case into which I do not deem it necessary to go. It was not contended that the complainer's patent could be read as a patent for a combination. The complainer does not say he has made a new bush as a whole. He now confines himself under his disclaimers to a new thread on a bush. But even if he could claim as for a combination, he would fail on the question of infringement, for it is not asserted that the respondents have taken his drawing as a whole. Separately, the question of infringement is one of nicety, for if the complainer is limited to the thread shewn on his drawing, which is a V thread, with equal sides, and forming equal angles with the wood, then it can hardly be said that the respondent's thread, which is different in several respects, is a mere colourable alteration. There are substantial advantages attending the form used by the respondents, which is not a thread with equal angles on both sides, but a thread one side of which is perpendicular to the bush. On the whole, I am for adhering to the Lord Ordinary's judgment.

The Court adhered.

Counsel for Complainer (Reclaimer)—Solicitor-General (Macdonald) — Balfour — J. P. B. Robertson. Agents—Dewar & Deas, W.S.

Counsel for Respondent—Asher—Mackintosh. Agents—Davidson & Syme, W.S.

Thursday, December 20.

SECOND DIVISION.

SPECIAL CASE—SHARPE'S TRUSTEES AND KIRKPATRICK AND OTHERS.

Succession—Residuary Legatee—Legacy—Intention of Truster.

A truster bequeathed to A. "£2000, and to each of his brothers £1000." A. was the third of eight brothers, the eldest of whom was appointed one of two residuary legatees under the settlement. *Held*, upon a construction of the terms of the deed, that it was not the truster's intention that the eldest brother should take a legacy of £1000 in addition to his share of the residue.

Interest—Whether Chargeable on Legacies where Payment Postponed.

A testator left directions to his trustees to realise his estate and pay certain legacies out of the proceeds. Before they could realise his estate the trustees had to establish their right to it by a litigation, and did not realise it for two years after his death. *Held* that interest on the legacies was due from the date of realisation at the rate of 5 per cent., but not earlier.

This was a Special Case arising out of certain provisions in a deed of instructions by the late William Sharpe of Hoddom to his trustees. Mr Sharpe died on December 18, 1875, leaving a trust-disposition and settlement, in which he conveyed his whole means and estate to John Gillespie, W.S., and Henry Gordon, Sheriff-Clerk of Dumfriesshire, to be applied according to the provisions of certain holograph instructions by him. In order to complete their title to the estates the trustees raised the actions reported of date March 10, 1877, 4 R. 641, 14 Scot. Law Rep. 405, in which they were successful. Having completed their title by recording the disposition granted to them in obedience to the decision of the Court in that case, they exposed the lands for sale and sold them, according to the truster's instructions, with entry at Martinmas 1877, for a sum of £240,895. Mr Sharpe left personal estate to the amount of £10,701.

The deed of instructions by Mr Sharpe ran, *inter alia*—"That being, I deem, a sufficient instruction to sell, I now proceed to instruct my trustees as to the distribution of the price, viz., of the price of the heritage, ... I

hereby order and instruct my said trustees to make payment of all my just debts which may stand against me at the time of my death, also the following legacies:—To my nephew Charles Bedford the sum of five thousand pounds, and the like sum of five thousand to his brother Campbell Bedford; to Roger Kirkpatrick, son of my nephew Sir Charles Kirkpatrick, deceased, the sum of two thousand pounds; and to each of his brothers the sum of one thousand, the share of any brother predeceasing to go in equal division among the others." Then followed several legacies to old servants of his family. The deed further proceeded—"All which legacies I desire my said trustees to pay over from the first and readiest of my saleable estate; and finally, so far as I see at the present moment, I desire and require my said trustees to pay over the residue of my whole estate, excepting as before excepted and bequeathed, to Sir Thomas Kirkpatrick, Baronet, presently abroad, and the Reverend Riland Bedford, my nephews, equally among them, or rather between them, share and share alike." On the page of the instructions which dealt with legacies to the servants Mr Sharpe had added and signed this marginal note, written lengthways, not across the page—"All free of legacy duty."

William Sharpe's trustees were the parties of the first part. Sir Thomas Kirkpatrick, who was the party of the second part, was the eldest of a family of eight brothers, of whom Roger Kirkpatrick was the third. The Reverend Riland Bedford, one of the residuary legatees, and the party to the case of the third part, was the eldest brother of the legatees Charles and Campbell Bedford. Charles Bedford and Campbell Bedford were parties of the fourth part.

The following questions were stated for the opinion of the Court—"(1) Is Sir Thomas Kirkpatrick entitled, as one of Roger Kirkpatrick's brothers, to receive payment of a legacy of £1000 under the provisions of William Sharpe's instructions to his testamentary trustees? (2) Are the first parties bound to pay to any or all of the legatees interest upon their respective legacies; and if so, from what date will such interest fall to be computed, and at what rates? (3) Is the said marginal note or addition by the said William Sharpe respecting legacy duty of any force and effect; and if so, to which of the legacies and other provisions in the said deed of instructions is it applicable?"

Mr Riland Bedford met the claim of Sir Thomas Kirkpatrick to a legacy of £1000 by arguing that it was plainly the testator's intention to provide by the legacies in the earlier part of the deed for the younger members only of the two families, and that that intention was so manifest as to override the expression used, viz., "each of his brothers."

Sir Thomas argued that to disregard the plain meaning of the words was to make a will for the testator, which the Court were certainly not called on to do, there being no incompetency or singularity in giving a legacy to a residuary legatee as well as his share of residue.

The parties of the fourth part claimed interest upon their legacies from William Sharpe's death, and further that they should be paid free of legacy duty. It was answered that there had been no undue delay in the realisation of the trust-estate, until which time payment was impossible, and that the legacies were not payable free of legacy duty, the marginal addition referring only to the legacies opposite to which it was written.

At advising the first question—

Lord Justice-Clerk—Fortunately in this case there is no very serious issue at stake, for as there is a very large sum to be divided between the beneficiaries, the amount here in question between the parties cannot make much difference. My own impression is a very strong one, and it is, that the testator never intended the eldest brother Sir Thomas Kirkpatrick to be included in the terms of the bequest. The whole conception of the deed is, as I read it, opposed to this view. [His Lordship then referred to the various provisions of the deed quoted above]. Now, it is quite clear that what the trustees were directed to do was to arrange as to the distribution of heritage and nothing else. Following out his intention, he directs them to make payment of all his debts, &c.; but the very fact that he says he is advised that he is entitled to sell the estate, shows that there existed in his mind a doubt as to whether he really had the power of disposal. Of course, the terms used as regards the legacy would, if used in an ordinary sense, include all the brothers of the person mentioned, Sir Thomas among the number; but it is very remarkable that the clause in question occurs in the middle of a portion of the deed wherein provision is being made, not for the residuary legatees, but for the other younger members of two families, in the persons of whose eldest sons the residuary interest was vested. Following this class of legacies come the legacies to servants; and then last comes the disposal of the residue. Upon the whole conception of the deed I think the testator meant to express himself somewhat thus—"If I have a right to sell the heritage, then I intend that all the members of these two families shall derive some pecuniary benefit. But, on the other hand, if I have not this power, then only the heads of the two families will get the residue." It seems to me that it was most improbable that the testator should have intended under the "brothers of Roger Kirkpatrick" to include Sir Thomas, the head of the family. In conclusion, I only would add, that although I do not hold any dogmatic views on the matter, I have a very clear opinion that Sir Thomas was not intended to be one of the beneficiaries under this clause.

Lord Ormidale—In this case the parties have concurred in stating that there is no precedent in Scotland in the way of any decided case to guide the Court, and we are accordingly left with the intention of the testator as the sole means of arriving at some conclusion.

Now, we may at the outset inquire whether this deed was meant to be one governing the disposal of the whole of Mr Sharpe's means, heritable and moveable. I do not think there can be any doubt upon this point. Reference is distinctly made to "my whole means and estate." That being so, what was the intention of this special bequest? It is true that Sir Thomas Kirkpatrick is not named in the clause, and yet he is certainly one of Roger's brothers. Were this fact standing alone—were there nothing else to guide me—I should have little room to doubt; but the

deed must, I think, be read as a whole, as one connected document. What occurs to me is, that the testator intended that if the estate of Hoddom should be found not to belong to him in fee-simple, then at all events he would make a provision for Sir Thomas Kirkpatrick as well as for the other brothers; but that if, on the contrary, the disposal of the estate was really in the power of the testator, Sir Thomas getting his half of the residue would not be a special legatee under the clause, his right being extinguished by his becoming a residuary legatee. I cannot arrive from a full consideration of the deed at any such conclusion as that Mr Sharpe intended Sir Thomas Kirkpatrick to receive both his half-share of the large residue and this £1000 special legacy.

LORD GIFFORD—This is a matter which does not bulk much pecuniarily to the parties in this large succession. It is not a *quæstio voluntatis* enabling the Court to guess what the testator's intention may have been; but it is a matter to be made out from the deed before us, which must, I think, be read continuously. A bequest to "each of the brothers" of a person named means, in my opinion, the same as one "to all the brothers," and Sir Thomas Kirkpatrick is certainly one of the brothers. There may possibly be some other intention, but it is not shown. I think that to hold that there was such an intention would be to make a will for the testator, and although I may perhaps think that what has occurred has been the result of an oversight, I cannot go so far as this, nor can I help reading this deed in the sense that Sir Thomas Kirkpatrick was under it to receive this legacy of £1000 besides his residuary rights.

On the second and third questions—

LORD JUSTICE-CLERK—I am very far from thinking that where a testator directs the sale of his estate the legatees are not as a general rule entitled to interest on their legacies, but in the present instance it is quite manifest that the trustees could not pay interest until (1) their right to sell had been established, and (2) the sale had been actually effected. The only interest due is from Martinmas 1877, when the property was sold, and that will be allowed at the rate of 5 per cent.

Then as to the marginal note. The question as to its intrinsic validity has not been raised, but I think it was only intended to apply to the legacies opposite to which it was written.

LORDS ORMIDALE and GIFFORD concurred.

Counsel for Sharpe's Trustees—G. R. Gillespie. Agents—Gillespie & Paterson, W.S.

Counsel for Sir Thomas Kirkpatrick—Balfour—Low. Agents—W. & J. Cook, W.S.

Counsel for Rev. W. K. R. Bedford—Lord Advocate (Watson) — Kinnear. Agent — T. Hamilton Gillespie, W.S.

Counsel for C. T. Bedford and C. R. Bedford—M'Laren—Readman. Agents—J. & J. Milligan, W.S.

Thursday, December 20.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

DAWSON'S TRUSTEES *v.* DAWSON AND OTHERS.

(*Vide ante*, November 10, 1876, vol. xiv. p. 71, 4 R. 597.)

Succession—Real Burden—Right to a Lapsed Bequest which was a Real Burden on a Special Part of Estate.

Where a legacy in favour of a daughter in liferent and her issue in fee was made a real burden on a portion of an estate which was the subject of special bequest, and afterwards lapsed by the failure of issue—*held* that the burden being thus removed, the benefit of the legacy fell (1) by presumption of law, and (2) by the terms of the testamentary deed, to the beneficiary of the subject originally burdened, and not to the residuary legatees appointed by the testator under the deed.

This was a sequel to the Special Case, John Dawson and Others, reported *ante*, November 10, 1876, vol. xiv. 71, 4 Rettie 597.

Adam Dawson, *primus* of Bonnytoun, in his settlement disponed his estate of Bonnytoun to his eldest son William Dawson, under the real burden of the sum of £6000, payable in the following manner, viz.:—"*First*, £2000 thereof shall belong to my son James Dawson, to whom the principal shall be payable upon his attaining the age of twenty-one. . . . *Secundo*, £1500 shall, under the conditions and restrictions after mentioned, belong in liferent to each of my daughters Frances and Margaret, viz., £3000 betwixt them, and to their children in fee, the interest at 4 per cent. being payable to them respectively, as alimentary provisions, from the term of Whitsunday or Martinmas immediately preceding my death, the principal sum in each case to be divided among the children of each: Providing always, as it is hereby expressly provided and declared, that any husband whom the said Frances or Margaret Dawson may respectively marry shall in no event have any right, either of property, liferent, courtesy, or administration, or any other right or interest whatever, in and to the sums of money above provided to them respectively, or in and to the lands and sums of money hereinafter provided to them, or any part thereof, or the rents, annualrents, or profits of the same, in virtue of the *jus mariti*, or otherwise, nor shall the same be affectable by the debts or deeds of such husband, but the said Frances and Margaret Dawson shall have power to uplift and dispose of the whole subjects and sums of money hereby conveyed to them respectively, and rent, annualrents, and profits of the same, in any manner not inconsistent with the provisions of this deed, without the consent of any such husband or husbands; and that every deed to be done by them, or either of them, in relation to the premises, though without the consent of any husband whom either of them may have, shall be as valid and effectual as if they had