been attempted to enforce that obligation by legal proceedings since 1764, though the obligation by its terms is to relieve of public burdens in all time coming.

I therefore concur with your Lordship.

Lord Shand—I am not prepared to say that I have found this case altogether free from difficulty, but after giving it full consideration I have come without difficulty to be of the same opinion as your Lordships. If the document of 1764 had been a feu-contract containing clauses to the effect that the subjects were conveyed on condition of payment of feu-duty, and with an obligation to relieve of public burdens, I should have had no doubt, after the decision to which we have been referred, that it would have been held that the obligation of relief was the counterpart of the obligation to pay feu-duty, but the case falls far short of that. The only case presented on behalf of the vassal is that he can show from a series of titles that the parties accepted this deed as a feu-contract, and looking to the terms of the deed it would require a very clear statement of obligation in the later deeds to operate the result argued for by the pursuers. There is nothing in any deed to which we have been referred which does so operate. It is quite plain that when the document in question was originally granted, it was not intended to be a feu-contract regulating the rights of parties. No doubt the person who desired to have the lands desired to have infeftment and got it, but there was no direct disposition of the lands, and when the obligations were inserted, and, among others, one of relief from public burdens, they were all subject to this undertaking to pay £600. Now, whether that sum was paid or not, as a matter of fact we do not know, but it may fairly be assumed that if it had been paid a feu-contract would have been granted. If it was not paid, what were the terms on which the parties allowed this deed to become the permanent title? If a feu-contract had been prepared the seller might have decided to insert the clause of relief, but he might not, and so, taking the document as we have it, unless it is made clear by a subsequent title that the superior treated this contract as a feu right, not merely as to the title of the vassal, but also as to the obligations *inter se* of the parties, the pursuers cannot succeed.

Now, we have been referred to the charter of 1814. The conveyancer who drew that deed seems to have had very imperfect knowledge of the contract of 1764, but it is to be observed that in narrating the obligation in question he does not treat it as anything but a personal obligation by Chalmers. There is no indication that he looked on it as an obligation on the heirs and successors of Chalmers in the superiority, and one might argue from that that it was probably ultimately arranged that it was not to affect persons taking the title of superior in time coming. That is not a reference which favours the view of the pursuers that the superior is liable to that obligation. The later charters also make no reference back to the conditions of the original deed.

Now, I do not think when a condition contained in an extraordinary deed of this sort is omitted in the subsequent charters we can go back to the original deed to supply it. I say so for the reason that we have no feu-charter here, and in accepting this deed as the title the parties accepted it with the character it had, but I am not prepared to say that they imported all the conditions contained in it into the title, or that they intended to do so.

I am therefore of opinion that the Lord Ordinary has reached a right conclusion.

Lord Adam—I have no doubt at all that it is lawful to go back to the original investiture to correct an alleged omission in a charter by progress, but I am not aware that it is lawful to correct an alleged omission by reference to anything but the original investiture. It is new to me that it is possible to correct an omission in one charter by progress by reference to another, and if an attempt were made to control a later charter by progress by an earlier, I should say there was no authority for it. I should rather be inclined to say that the later charter by progress must rule or correct the earlier. The insuperable difficulty in the defender's case is that they cannot produce the original grant. They produce a deed called a contract, but it is a mere personal contract. We do not know whether a feu-contract was ever granted, or, if it was, on what terms or conditions it was granted. Therefore the only means of supplying the alleged omission in the charter by progress is awanting, and consequently I think it must be ruled by the later documents.

The Court adhered.

Counsel for the Pursuers—Sir C. Pearson—Salvesen. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Defender—Gloag—Jamieson. Agents—Thomson, Dickson, & Shaw, W.S.

Friday, July 12.

FIRST DIVISION.

MUIR AND OTHERS (MUIR'S TRUSTEES) *v.* MUIR.

Sucession—Legacy—Accretion—Residue—Unascertained Class.

A testator directed his trustees to hold the residue of his estate for behoof of and equally among the issue of his only child, to accumulate the interest, and to pay the shares of accumulated principal and interest to sons on their attaining twenty-five years, and on the daughters attaining that age or being married, to hold their shares for them in liferent for their liferent alimentary use allenarly, and their respective children in fee. He provided that if a grandson died before the period of payment without issue his share should accresce to the survivors, but there was no similar provision with regard to the granddaughters' shares. A granddaughter survived the testator, but died before the period of payment without leaving issue. *Held* that the share set free by her death went to form part of the undivided residue of the testator's estate.

William Muir of Inistrynich, Argyllshire, died on

30th May 1880, survived by his only child William Campbell Muir. The deceased left personal estate available for carrying out the purposes of his settlement amounting to £148,414.

His trust-disposition and settlement, dated 16th October 1877, contained the following clauses:—"(*Quarto*) I direct and appoint my said trustees and their foresaids to hold and administer the whole residue and remainder of my means and estate for behoof of and equally among the children of the said William Campbell Muir, and to accumulate the interest, dividends, and annual proceeds thereof until the said children respectively attain the age of twenty-five, or in case of daughters, until they attain that age or be married, whichever of these events shall first happen; and the shares of the accumulated principal and interest shall, in the case of sons, be paid to them on their respectively attaining to twenty-five years of age; and in the case of daughters, on their respectively attaining the said age or at marriage (if sooner), their accumulated shares shall be ascertained and set apart, and be held and applied for them respectively in liferent, for their liferent alimentary use allenarly, and their respective children in fee," subject to certain following conditions —"(3) On the death of any of the said daughters of the said William Campbell Muir, and of any husband enjoying a liferent interest in the trust moneys, my trustees shall pay over to their children and the heirs of such children, in equal shares, the fee of their mother's share, held in trust as aforesaid, payable to them respectively, in the case of sons, on their attaining twenty-years of age, and in the case of daughters, on their attaining to that age or being married, whichever of these events shall first happen, until which time the income shall be applied for behoof of the said children respectively: And it is hereby specially provided and declared, that in the event of any of the sons of the said William Campbell Muir dying before the said period of payment, leaving lawful issue, such issue shall be entitled, equally among them, to the share to which their parent would have been entitled if in life, the issue of my female grandchildren being provided for under the above destination; and in the event of any of the said sons of the said William Campbell Muir or their issue dying before the respective periods of payment of their shares without leaving lawful issue, the share of such deceaser shall fall to and be divided equally among the survivors and survivor of my said grandchildren jointly with the lawful issue of any of them who may have deceased leaving children, such issue succeeding equally among them to the share to which their parent would have been entitled if in life: Declaring that in the event of any share accrescing to any of my said female grandchildren or their issue through the death of any of my grandchildren, such share shall be held for their behoof in liferent, and their children in fee, as is above provided with regard to the original share falling to them."

At the time of the testator's death his son William Campbell Muir had six children, two sons and four daughters, the eldest of whom was born in 1869. Subsequent to 1880 two children were born to William Campbell Muir, and one of his daughters, Annie Elizabeth Muir, died aged seventeen without leaving issue.

A question arose as to the parties entitled to the share of the residue of William Muir's estate provided for Annie Elizabeth Muir, and the present special case was presented for the opinion of the Court by (1) William Muir's trustees, (2) William Campbell Muir, and (3) the surviving children of William Campbell Muir, and himself as their administrator-in-law.

The first and third parties maintained that on a sound construction of the said trust-disposition and settlement no right to a share of the residue of the late William Muir's estate vested in the deceased Annie Elizabeth Muir, but that the share which the first parties would have been bound to set apart for her if she had attained twenty-five years of age or had been married still formed part of the undivided residue of the said trust-estate, to which those children only who should survive the term of payment, or in the case of daughters be married, should that event first happen, should have right.

The second party maintained that on a sound construction of the said trust-disposition and settlement (*a*) the equal share of the residue of the said William Muir's estate provided for the said deceased Annie Elizabeth Muir along with the other children of the said William Campbell Muir alive at the date of the death of the said William Muir became, by her death without leaving issue, intestate estate of the late William Muir, to which he was entitled to succeed as his father's heir *in mobilibus;* or (*b*) alternatively, that he was entitled to one-half of the capital of said share, to be ascertained as at the date of Miss Annie Elizabeth Muir's death, as heir of his daughter, the remaining half devolving on his surviving children as next-of-kin of their deceased sister.

The following were the questions of law—"(1) Did the share of the residue of the late William Muir's estate, which under his trust-disposition and settlement would have been set apart for Miss Annie Elizabeth Muir in liferent, and for her children in fee, had she attained the age of twenty-five years or been married, become on her death without leaving issue—(*a*) Intestate estate of the said William Muir, to which the second party is now entitled to succeed as heir *in mobilibus*, or (*b*) intestate estate of the said Miss Annie Elizabeth Muir, to one-half of the capital of which the second party is now entitled to succeed in terms of section 3 of the Intestate Moveable Succession Act 1855, and the other half of which falls to be paid to her surviving brothers and sisters as her next-of-kin? or (2) Did no right to the fee of a share of the residue of the late William Muir's estate vest in the said Miss Annie Elizabeth Muir, and does the whole of said residue fall to be divided, in terms of the said trust-disposition and settlement, among the other children of the said William Campbell Muir or their issue to the exclusion of the said Annie Elizabeth Muir, or anyone claiming through her?"

Argued for the second party—The events contemplated by the testator and provided for had occurred, as one of the daughters had died unmarried and under twenty-five years. It was provided by the deed by implication that in the case of daughters predeceasing the period of division, there was to be no accretion of their

shares, which accordingly became intestate estate either of the testator or of the predeceasing daughter. In either case the second party was entitled to take. The share of residue did not vest—*Torrie* v. *Munsie*, May 31, 1832, 10 S. 597, as followed in *Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191; *Fulton's Trustees* v. *Fulton*, February 6, 1880, 7 R. 566. The deceased daughter's interest in her share was that of a contingent liferent, as she had survived the testator. It was at his death that the class who were to take had to be ascertained, and the question was not affected by the existence of *postnati*. If the case was not ruled by that of *Fulton*, *supra*, it fell under *Carlton* v. *Thomson*, July 30, 1867, 5 Macph. (H. of L.) 151, and was a case of vesting subject to defeasance, in which case the second party benefited to the extent of one-half—*Lindsay's Trustees* v. *Lindsay*, December 14, 1880, 8 R. 281; *Dalgleish's Trustees* v. *Bannerman*, March 6, 1889, 16 R. 559.

Argued for the first and third parties—The scheme of this deed was that the trustees should administer this fund, and accumulate the interest until the period of division arrived. Because there was accretion in the case of sons it did not follow that the same was to hold in the case of daughters. A daughter was to take only in certain events. If she died before taking, it was as if she had never existed, and the trustees must continue to administer her share for the behoof of the survivors as part of the trust-estate under their charge. The daughter here died before she could have demanded her share, and accordingly her share remained in residue; there was nothing to fall into intestacy, because it has never been taken out of residue. The provisions of the fourth purpose of the deed determined the questions between the parties—*Buchanan's Trustees* v. *Buchanan*, May 26, 1877, 4 R. 754; *Lindsay's Trustees* v. *Lindsay*, December 14, 1880, 8 R. 281; *Ross* v. *Dunlop*, May 31, 1878, 5 R. 833.

At advising—

Lord President—The questions in the present case arise upon the construction which is to be put upon certain clauses in the trust-disposition and settlement of the late Mr Muir of Inistrynich dated 16th October 1877.

The testator was possessed of considerable heritable estate, to which his son Mr Campbell Muir, the party hereto of the second part, succeeded, but the settlement which we are now dealing with conveys moveables only, and by its fourth purpose the testator directed his trustees to hold and administer the residue of his estate for behoof of the children of his son. At the time when the testator died Mr Campbell Muir had six children, two sons and four daughters, and since that date two more children have been born, both daughters. Accordingly the testator, in making the provisions which he has done in this deed in favour of his grandchildren, was dealing with an unascertained class, and the directions which he gave to his trustees in this matter were in these terms—"(*Quarto*) I direct and appoint my said trustees and their foresaids to hold and administer the whole residue and remainder of my means and estate for behoof of and equally among the children of the said William Campbell Muir, and to accumulate the interest, dividends, and annual proceeds thereof until the said children respectively attain the age of twenty-five, or in case of daughters, until they attain that age or be married, whichever of these events shall first happen; and the shares of the accumulated principal and interest shall, in the case of sons, be paid to them on their respectively attaining to twenty-five years of age; and in the case of daughters, on their respectively attaining the said age or at marriage (if sooner), their accumulated shares shall be ascertained and set apart, and be held and applied for them respectively in liferent, for their liferent alimentary use allenarly, and their respective children in fee."

By the third head of this fourth purpose there is a provision relating to the death of any of the daughters in these terms—"On the death of any of the said daughters of the said William Campbell Muir, and of any husband enjoying a liferent interest in the trust monies, my trustees shall pay over to their children and the heirs of such children in equal shares, the fee of their mother's share, held in trust as aforesaid, payable to them respectively, in the case of sons, on their attaining twenty-five years of age, and in the case of daughters, on their attaining to that age or being married, whichever of these events shall first happen, until which time the income shall be applied for behoof of the said children respectively: And it is hereby specially provided and declared, that in the event of any of the sons of the said William Campbell Muir dying before the said period of payment leaving lawful issue, such issue shall be entitled, equally among them, to the share to which their parent would have been entitled if in life, the issue of my female grandchildren being provided for under the above destination; and in the event of any of the said sons of the said William Campbell Muir or their issue dying before the respective periods of payment of their shares without leaving lawful issue, the share of such deceaser shall fall to and be divided equally among the survivors and survivor of my said grandchildren jointly with the lawful issue of any of them who may have deceased leaving children, such issue succeeding equally among them to the share to which their parent would have been entitled if in life: Declaring that in the event of any share accrescing to any of my said female grandchildren or their issue through the death of any of my grandchildren, such share shall be held for their behoof in liferent, and their children in fee, as is above provided with regard to the original share falling to them."

It thus appears that as regards the daughters of Mr Campbell Muir they cannot take anything more than an alimentary liferent in their shares of their grandfather's estate, and there is no clause of survivorship applicable to them, while as regards the sons there is in their case a clause of survivorship in the event of any of them or their issue predeceasing the period of payment, and this constitutes one of the peculiarities of the deed.

Annie Elizabeth Muir died in 1887, having survived the testator almost seven years, and the question which we have to determine is, what is now to become of that portion of the late Mr Muir's estate so provided to her in liferent? Her father claims it on the ground, first, that it is intestate succession of his father the late William Muir; or alternatively, that it is intestate estate of his daughter, and that he is accordingly entitled to

one-half of the capital. As to the second alternative, that is clearly impossible; while as to this share being intestate succession of the testator, the terms of the deed are opposed to any such contention. In the case of *Paxton's Trustees*, 13 R. 1191, I made the following observations, which I venture to repeat as having a bearing upon the present case—"When a legacy is given to a plurality of persons named or sufficiently described for identification, 'equally among them,' or 'share and share alike,' or 'in equal shares,' or in any other language of the same import, each is entitled to his own share and no more, and there is no room for accretion in the event of the predecease of one or more of the legatees. The rule is applicable whether the gift is in liferent or in fee to the whole equally, and whether the subject of the bequest be residue, or a sum of fixed amount, or corporeal moveables."

Now, the first condition of the application of that rule is, that the parties to whom the legacy is left are named or can be identified. It is therefore clearly inapplicable in the case of an unascertained class. Each share is a separate bequest, and if the legatee dies his or her share falls into residue. Here the class of persons who are to be benefited is unascertained. Some of the beneficiaries take only a liferent interest, while others again take the fee; in the case of sons, also, there is an express clause of survivorship, and in the event of a son dying prior to the period of payment without issue his share would accresce to the survivors. When once we reach this point any difficulty which may have existed in the case disappears, and it becomes clear that the share of Miss Annie Elizabeth Muir which has been set free by her death goes to form part of the residue of this estate.

When the period of division arrives it will be time enough to determine who the parties are who are to take the benefit of this bequest. All that has at present to be decided is, that the share set free by the death of Annie Elizabeth Muir goes to form part of the undivided residue of the testator's estate.

The result of all this is, that question 1 falls to be answered in the negative, seeing that the share set free by the death of Annie Elizabeth Muir is neither intestate estate of the testator nor of the deceased. With reference to question 2, it falls to be answered in the affirmative.

Lord Mure and Lord Adam concurred.

Lord Shand was absent at the discussion, and delivered no opinion.

The interlocutor of the Court was in the terms above quoted.

Counsel for the First and Third Parties—Jameson—Guthrie. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Second Party—Vary Campbell—Begg. Agents—Forrester & Davidson, W.S.

Tuesday, July 16.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

J. S. VIRTUE & COMPANY (LIMITED) *v.* BROWN.

Process—Reclaiming-Note—Proof—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 27 *and* 28—*A.S.*, 10*th March* 1870, *sec.* 1, *sub-sec.* 5, *and sec.* 2.

An interlocutor by which the Lord Ordinary closes the record and assigns a day "for the adjustment of issues," is not an interlocutor deciding the manner in which proof is to be taken, and cannot therefore be reclaimed against without leave, under the 28th section of the Court of Session Act 1868.

This was an action by John Brown, residing in Glasgow, against J. S. Virtue & Company (Limited), publishers in London and Edinburgh. The purpose of the action was to recover damages for alleged illegal dismissal in breach of an agreement libelled.

Upon 26th June 1889 the Lord Ordinary (M'Laren) pronounced this interlocutor:—"The Lord Ordinary closes the record on the summons and defences, and assigns this day week for the adjustment of issues."

Upon 29th June the defenders presented a reclaiming-note without leave of the Lord Ordinary.

A question was raised by the Court whether the interlocutor was competent without leave of the Lord Ordinary.

The defenders argued—This was a competent reclaiming-note against an interlocutor of the Lord Ordinary giving an allowance of proof. The question had been considered and the same thing done in *Little* v. *North British Railway Company*, July 5, 1877, 4 R. 981. [Lord Young—In that case the defenders objected to any proof being given at all, but that is not the case here.] It was true the defenders here admitted there must be proof, but the Lord Ordinary had already prejudged the question by ordering issues, which showed he intended to have the case tried by a jury. That was giving an allowance of proof, as the test of whether an interlocutor could be reclaimed against or not was the purpose with which it was pronounced and not its form—*Mason & Stewart* v. *Stewart*, February 21, 1877, 4 R. 513. The question in that case arose under the same conditions as here, under the A.S., 10th March 1870, sec. 1, sub-sec. 5, and sec. 2. This was not a proper question to be tried before a jury, as there was no question of character concerned, but the construction of an agreement. The practice was quite settled—*Blair* v. *Macfie*, February 2, 1884, 11 R. 515; *Scottish Rights of Way Society* v. *Macpherson*, October 23, 1886, 14 R. 7; *Cook & Wallace* v. *Wilson*, March 7, 1889, 16 R. 565. If the Lord Ordinary had allowed a proof before himself the pursuer could have reclaimed for jury trial, and the procedure here was just the converse of that.

Counsel for the respondent was not called on.