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.

At advising—

Lord Justice-Clerk—This reclaiming-note may be technically competent, but I do not think this is a mode of procedure which should be encouraged. I think that it would need very strong grounds indeed to lead us to interfere with an interlocutor such as this pronounced by a Lord Ordinary.

This reclaiming-note is pronounced against an interlocutor of the Lord Ordinary ordering an adjustment of issues, and naming a day for that purpose. But that interlocutor does not in the least preclude the Lord Ordinary in the exercise of his discretion when the issues are before him from ordering the evidence in the case to be given in a jury trial or in a proof before himself. That question remains entirely open.

The only result, so far as I can see, if we allowed this method of procedure, would be that we might have two reclaiming-notes in every case; one upon the interlocutor ordering the adjustment of issues, and another afterwards when the issues had been brought forward and either adjusted or refused. I think there has been no ground stated here for holding that the Lord Ordinary should be debarred from exercising his discretion in the matter of how the proof should be taken.

Lord Young—That is my opinion also, and I think that this reclaiming-note should be dismissed.

I abstain from giving any opinion as to the competency of this note, but without any reference to the competency I think that a reclaiming-note against such an interlocutor as this ought at once, and as of course, to be dismissed, for if it is competent, it is only accidentally so, and I think that it should not be allowed.

The provisions of the Act of Parliament were not exactly followed in this case, but substantially they were so. When the record was closed the Lord Ordinary ought to have asked the parties if they renounced probation. They would certainly have said they did not, but supposing that that part of the procedure was unnecessary, then the statute provides by section 27—"The Lord Ordinary shall appoint the cause to be debated summarily at the end of the motion roll on a day to be fixed, before which day the parties shall respectively lodge the issue or issues, if any, which they propose for the trial of the cause, and the Lord Ordinary, after hearing parties, shall on the said day determine whether further probation should be allowed." It was not necessary therefore to appoint a day on which parties should adjust the issues; it would have been more proper to appoint a day on which the case would be summarily argued, and the parties could have lodged their issues if they wished to do so. In this case "this day week" was the day appointed to hear parties, and before which issues were to be lodged. Then the statute proceeds—"If the Lord Ordinary shall consider that it is necessary, he shall determine whether it is to be limited to proof by writ or oath, and if not, whether it is to be taken before a jury, or in whatever manner of way."

Now, supposing that on the day week after closing the record the parties come before the Lord Ordinary with the issues they think proper for the trial of the cause, and he is of opinion that the case ought to be tried by jury trial, and approves of issues to carry out that purpose, what then? The statute provides in the next section to the one I read—"Any interlocutor pronounced by the Lord Ordinary as provided for in the preceding section, except under sub-division (1)"—which does not concern us here—"shall be final, unless within six days from its date the parties, or either of them, shall present a reclaiming-note against it to one of the Divisions of the Court, by whom the cause shall be heard summarily." Well then, on that day—in the present case "this day week"—the Lord Ordinary hears parties, and adjusts an issue for the trial of the cause, and there is a reclaiming-note competent to either party, what then is the meaning of this reclaiming-note?

I think it is an extravagant reclaiming-note, and I think we would be doing an injustice to litigants if we gave any countenance to such a course of procedure. The case must go back to the Lord Ordinary. Of course I do not say anything as to what course he may think proper to adopt when the parties are before him with their issue to be adjusted. When he has heard them he may judge whether the case is to be tried by a jury or a proof before himself, and then a reclaiming-note will be competent to either party whatever he should decide. But this reclaiming-note must be dismissed with expenses.

Lord Rutherfurd Clark and Lord Lee concurred.

The Court adhered.

Counsel for the Appellants—Salvesen. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Respondent—A. S. D. Thomson. Agent—Wm. Officer, S.S.C.

Tuesday, July 16.

SECOND DIVISION.

BOWIE AND OTHERS *v.* PATERSON.

Succession—Power of Appointment.

In an antenuptial contract of marriage the power was reserved to the husband to apportion a sum, which it was stipulated he should provide, as he thought proper among the children of the marriage, and failing his doing so, a similar power was given to the wife should she survive him. Should neither exercise the power of apportionment the sum was to be divided equally among the children. The husband died first, without having exercised the said power. After his death the wife became party to a bond and assignation in security by a son in favour of an assurance company, whereby she apportioned to the said son, his heirs and assignees, a sum of not less than one-fifth part or share of the sum stipulated for in the marriage-contract. She died possessed of considerable moveable property, leaving a trust-disposition and settlement in which she directed the trustees to pay the residue of her whole estate to the children who should survive her, with the exception of one daughter, to whom only a sum of £100 was left, in such shares as she