of majority, it was held that the annual proceeds must be applied for his maintenance and education. There is no such case here. This is not a case in which there is a right of fee with a postponement of the time of denuding in favour of the fiar. No right vests until the youngest child obtains majority. The time of vesting and the time of actual denuding in favour of the intended fiar is simultaneous with the vesting of the fiar.

This view of the case is further confirmed by the testator having gifted over this sum of £10,000 specially and *nominatim* to his residuary legatees in the event of there being no child of Mrs Hunter to take under the destination to her children.

In my opinion the first three alternatives of the question should be answered in the negative and the fourth alternative in the affirmative.

LORD RUTHERFURD CLARK—I think that this trust-deed directs the trustees to pay a specific sum at a specified time to the legatees entitled to receive it. I think that they cannot take more than this specific sum, and that everything else goes to the residuary legatees.

LORD LEE—I think everything is residue except this sum of £10,000. I think therefore no interest can run.

The Court answered the first three alternatives of the question in the negative, and the fourth in the affirmative.

Counsel for the First Party—Jameson—Craigie. Agents—Philip, Laing, & Co., S.S.C.

Counsel for Second and Third Parties—Graham Murray—Maconochie—Constable. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, July 18.

FIRST DIVISION.

MAGISTRATES AND TOWN COUNCIL OF LANARK *v.* HONYMAN.

Superior and Vassal — Feu-Contract — Public Burdens—Relief.

A feu-contract bore that the lands were to be held in feu-farm, fee, and heritage forever for payment of a certain annual sum "in name of feu-duty, and in full of all casualties upon the entry of heirs and singular successors, cess, minister's stipend, school salary, and all other burdens whatsoever affecting or which may affect said lands." *Held* that the superior was not bound to relieve his vassal of stipend or poor-rates, the language of the deed importing neither a direct nor an implied clause of relief.

The question raised by this special case was whether the Town Council of the burgh of Lanark, as superiors of certain lands (originally forming part of the common muir of Lanark), were bound, in terms of two feu-contracts, to relieve their vassal Sir William Macdonald Honyman of Armadale and Graemsay of the payment of stipend and poor rates from 1886 to the date of the present action and in all time coming.

The first feu-contract was dated 5th June 1789, and by it the then provost of the burgh of Lanark, on behalf of the town council and community of the said burgh, conveyed to William Honyman of Graemsay, his heirs and assignees whatsoever, heritably and irredeemably, "All and Whole these 110 acres of land or thereby of 'the muir of Lanark,' as therein particularly set forth, together with the teinds thereof, to be holden of the burgh 'in feu-farm, fee, and heritage forever, for payment of the sum of £27, 10s sterling at the term of Martinmas yearly in name of feu-duty, and in full of all casualties upon the entry of heirs and singular successors and burdens affecting said lands, excepting as after mentioned, any law or practice to the contrary notwithstanding, beginning the first term's payment thereof at the term of Martinmas 1790 for the year immediately preceding, and so forth yearly and in all time coming thereafter, the said William Honyman, Esquire, his entry to said lands beginning at the term of Martinmas next." The exception referred to a clause of thirlage contained in the deed. By the said feu-contract the said William Honyman bound himself to pay to the said provost and his successors in office £27, 10s. of feu-duty at the terms specified.

By feu-contract dated 17th September 1791, and registered in the Burgh Court Books of Lanark 10th April 1849, the said John Bannatyne, acting as aforesaid, conveyed to the said William Honyman and his foresaids, for the yearly feu-duty after mentioned, "All and Haill these 125 acres of land of the muir of Lanark lying next and adjacent to the said William Honyman, Esquire, his other lands feued from the burgh of Lanark, as therein particularly set forth, together with the teinds thereof,' to be holden of the burgh 'in feu-farm, fee, and heritage for ever for payment of the sum of £27, 10s. sterling at the term of Martinmas yearly in name of feu-duty, and in full of all casualties upon the entry of heirs and singular successors, cess, minister's stipend, school salary, and all other burdens whatsoever affecting or which may affect said lands, any law or practice to the contrary notwithstanding."

By this feu-contract the vassal undertook to make an annual payment of £27, 10s. in respect of the lands mentioned in the feu-contract. From the date of the feu-contracts down to 1885 the *cumulo* feu-duty under them of £55 was paid by the original vassal and his successors in the feu without recourse or relief being obtained by them from their superiors for stipend, poor rate, or any other public burden.

In April 1886 Sir William Macdonald Honyman succeeded as heir of entail to the lands contained in the two feu-contracts

above set forth. The two portions of land conveyed in the said feu-contracts were now sub-divided into three holdings, each of which was let to a separate tenant. The rental of the three holdings amounted in all to £213, 14s. For considerably more than forty years the proportion of stipend payable to the minister of the parish for the said lands and teinds thereof had been paid by Sir William Macdonald Honyman or his predecessors as proprietors of the lands, and they had also paid the poor rates and other taxes charged upon them as landlords.

In Martinmas 1886 Sir William Macdonald Honyman made a claim against his superiors to be relieved of all public burdens affecting the land feued, but the claim was refused.

The present special case was accordingly presented by—(1) The Provost, Magistrates, and Town Council of the royal burgh of Lanark; and (2) Sir William Macdonald Honyman, Baronet, of Armadale and Graemsay.

The first parties maintained that on a sound construction of the said feu-contracts they were not bound to relieve the second party of the public burdens now in question, payable by him as proprietor of either or both of the said portions of land, but further that any possible doubt as to the true intent and meaning of the feu-contracts was settled in favour of the first parties by the course of dealing between the parties for nearly a century before the question was raised by the second party.

The second party maintained that in terms of the said feu-contracts the feu-duty being in full of public burdens, he was not liable to pay public burdens exigible at the date of the contracts over and above feu-duty, but was entitled to be relieved therefrom by the first party.

The following questions were submitted for the opinion of the Court—"(1) Are the first parties bound to relieve the second party of stipend and poor rates, or either of them, payable in respect of the lands held by him for the years 1886, 1887, 1888, and 1889 under the feu-contract of June 5th 1789? (2) Are the first parties bound to relieve the second party of stipend and poor rates, or either of them, payable in respect of the lands held by him for the years 1886, 1887, 1888, and 1889 under the feu-contract of 17th September 1791?"

Argued for the First Parties—The feu-contracts contained no clause of relief, and in the absence of this the claim of the second party was untenable; (2) prescription.

Argued for the Second Party—If any doubt existed as to the rights of the parties under the first feu contract, the language of the second made it quite clear that the feu-duty specified in it was to cover all burdens affecting the lands. The question between the parties was one of relief for the future. Actings of parties could only be looked at where the language of the clause was ambiguous; here it was quite plain, and supported the second party's claim. Nor could actings of parties be looked at when the question between them depended entirely, as in the present case, upon the construction of deeds—*Hope* v. *Hope*, February 20, 1864, 2 Macph. 670; *Wilson* v. *Magistrates of Musselburgh*, February 22, 1868, 6 Macph. 483; *Dunbar's Trustees* v. *British Fisheries Society*, July 12, 1878, 5 R. (H. of L.) 221.

At advising—

LORD PRESIDENT—I think that this is a very hopeless case for the second party.

As regards the first feu-contract the words founded on are these—The lands are to be holden of the burgh "in feu-farm, fee, and heritage forever for payment of the sum of £27, 10s. sterling at the term of Martinmas yearly in name of feu-duty, and in full of all casualties upon the entry of heirs and singular successors and burdens affecting said lands, excepting as after mentioned." Now, as to the latter words "excepting as after mentioned," it has been explained to us that the parties are agreed that the words refer to the clause as to thirlage and multures; and therefore, taking these words entirely out of the clause of tenendas, it runs thus—The feu-duty is to be "in full of all casualties upon the entry of heirs and singular successors, and of burdens affecting said lands." Now, there is just one possible construction of such a clause, and it is this, that the feu-duty is to be the only duty payable to the superior of the vassal. I cannot conceive how by any process of construction such words can import an obligation upon the superior to relieve the vassal of any burdens which ought properly to rest upon him.

There are no words of obligation upon the superior, and the whole purpose and scope of the clause is to show that nothing more than £27, 10s. is to be paid by the vassal to his superior.

As regards the second feu-contract, the clause in it is rather more difficult to construe. There the words are, the feu-duty is "to be in full of all casualties upon the entry of heirs and singular successors, less minister's stipend, school salary, and all other burdens whatsoever affecting or which may affect said lands."

I have not the least doubt that the framer of this deed proceeded upon a misconception or misunderstanding of the relation of parties with reference to the subject feued. The superior makes it clear that he is not going to ask a casualty upon the entry of either heirs or singular successors; neither is he to make any demand upon the vassal for cess, minister's stipend, school salary, or any of the other burdens affecting the lands. But how can it be said that a clause such as this, in which the superior renounces certain casualties and other payments is to be construed into a clause of relief and an obligation upon the part of the superior to free the vassal from these burdens I am not able to understand.

Mr Dundas was not able to point to any case of an obligation of relief being enforced against a superior as regards minister's stipend and the like burdens where there were not direct words of obligation to relieve, and it would be very late in the his-

tory of our law to sustain words not expressly importing such an obligation.

I think the question must be answered in favour of the first parties.

LORD SHAND—I have always understood that such clauses are to be strictly construed. They impose burdens, and the language must be made perfectly clear if it is intended to shift the obligation to pay such burdens from the person who ought naturally to pay them.

It would in my opinion require the rule to be reversed in order to entitle the second party to succeed here.

There are two categories of cases in this branch of the law. There is either an express obligation of relief in the deed, or else there is a clause warranting the vassal against the payment of the burdens. The proposal here is to extend these two categories, and to say that a mere stipulation as to a feu-duty being in full of certain burdens is to import an obligation of relief against the superior in favour of the vassal. No doubt reference was made to the words "affecting or which may affect" as importing a contract with reference to the future. I do not, however, think the words can be held as sufficient to support the contention of the second party.

LORD ADAM and LORD M'LAREN concurred.

The Court answered the questions in the negative.

Counsel for the First Parties—R. V. Campbell—Maconochie. Agents—Maconochie & Hare, W.S.

Counsel for the Second Parties—Dundas. Agents—Waddell & M'Intosh, W.S.

Friday, July 18.

FIRST DIVISION.

SMITH AND OTHERS (MRS CRAWFORD BROWN'S TRUSTEES) *v.* BROWN AND OTHERS.

Succession — Trust Conveyance — "Heirs and Assignees"—Foreign.

By antenuptial trust-deed executed in Scotland a domiciled Scotswoman in contemplation of her marriage conveyed her whole estate to trustees, directing them to pay her the income during her life, to hold and apply the capital for behoof of the issue of the marriage, and failing them "for behoof of my heirs and assignees in fee." The truster married in Australia a domiciled Australian, and died there without issue.

In a competition between her heir-at-law, her heirs *in mobilibus*, and her husband, the latter maintained that he was entitled to the whole estate in terms of the law of the truster's domicile.

Held that although according to the law of Australia the husband would have taken *jure mariti* if there had been no destination in the deed beyond the wife, as there was a destination to "heirs and assignees," which did not include the husband, and as the deed regarded as a will was not revoked by marriage, the husband's claim fell to be dismissed.

This action related to an antenuptial deed of trust executed by Miss Josephine Anne Bayne, Cumin Place, Grange, Edinburgh, in contemplation of her marriage with Henry Crawford Brown, New South Wales. By the said trust conveyance Miss Bayne conveyed to the trustees named in the deed her whole means and estate, *acquisita* and *acquirenda*, and especially her shares of provision under her father's and mother's marriage-contract, and also her share of succession under her mother's settlement.

The object of the trust-deed as set forth in the narrative was to secure the funds of the truster from the creditors of her intended husband.

The purposes of the trust were (1) for the payment to the truster of the free annual income, and (2) for payment of the fee to the children of the marriage in the proportions and in the terms specified in the deed, and failing children, the destination was thus expressed, "for behoof of my heirs or assignees in fee." The deed also reserved to the truster a power of apportionment among the children of the marriage, and also a power to provide a liferent of her estate to her husband if he should survive her.

Shortly after the execution of this deed Miss Bayne proceeded to New South Wales and was married to the said Henry Crawford Brown.

Mrs Brown died in Australia in February 1888 without issue, and without leaving any writing other than the trust-deed above referred to relative to the disposal of her means and estate.

On Mrs Brown's death the fee of her estate was claimed (1) by her husband, as heir to his wife according to the law of Australia. It was also claimed (2) by her brother and sister, as heirs and next-of-kin of the deceased. In these circumstances Mrs Brown's trustees raised the present action of multiplepoinding.

A claim was lodged for Henry Crawford Brown, who averred, *inter alia*—The said Mrs Josephine Anne Bayne or Brown was at the date of her death domiciled in New South Wales. By the law of said Colony, the marriage of the said Mrs Josephine Anne Bayne or Brown to the claimant operated *ipso facto* a revocation of all testamentary deeds or writings made and executed by her before marriage, including the deed of 17th May 1886, in so far as the same was of a testamentary and revocable character; and in particular it operated a revocation of the destination in said deed to her "heirs or assignees in fee." The said law fell to be applied in determining (1) whether the succession to the estate of the said Mrs Brown was to be regarded as testate or intestate; and (2) the persons