says that she binds herself to keep them skaithless from any claim arising from their not demanding the rent. I do not think that it is possible to treat that as a writ instructing a discharge of this claim. It may have a place in the case once the facts are ascertained, and may support or corroborate the other averments made by the defender. But it seems to me, and indeed I think it was only faintly argued to the contrary, that the Sheriff-Substitute has been premature in treating this as a conclusive ground of judgment.

What I have said leads to the first plea being repelled. As regards the second plea, I should like to make this remark. Scientifically speaking, I do not think it is supported by any averments, and I should be inclined to go further and say that the plea is bad in itself. But at the same time I think it would be safer not *hoc statu* to repel it, because that might be misconstrued into meaning that the element of delay should be eliminated from the consideration of the judge in the Court below, to which I propose that the case should revert. Therefore it is perhaps more expedient not now formally to repel the plea, and the considerations which it is intended to embody may have their legitimate weight in combination with the other facts of the case.

LORD ADAM—The first question in the rent case is, whether the quinquennial prescription provided by the 1669 Act applies. I agree that it does not, because the point of time specified by the Act for the prescription beginning to run is the date when the tenant removed from the land. I think that to bring a case under the Act a defender must aver that he is a tenant who has *de facto* removed from the land, and that five years have elapsed since then. There is no such averment on record here, but the tenant is still on the land. It is true that the character in which he is there is different, because formerly he held as a tenant, and now he does so as liferenter; but that is not the question under the Act, which is, whether or not in fact the tenant has removed. As he has done so, I am of opinion the Act has no application. I may observe that it appears from the arguments used in old cases on this point, that one of the reasons for this rule was the liability of a removing tenant to lose his documents of debt after his removal, which consideration does not apply to a tenant who never has removed, but this is not material since the question of fact in the Act is quite clear.

As regards the judgment of the Sheriff-Substitute, it was somewhat faintly supported, but it was suggested that the letter was a link in a chain of circumstances, but if this be so, what are the circumstances, and when were they proved? In point of fact they are neither admitted nor proved, and accordingly I agree with your Lordships that there is no apparent foundation for the summary dismissal of the action. As to the remaining pleas, I think the plea of *mora* might have been dismissed had we been dealing strictly with the case. As I understand, prescription depends merely on the efflux of time, but *mora* not merely on this, which would make it equivalent to prescription, but the party founding on *mora* must show that his position was prejudiced by the delay. But I should have been unwilling to repel the plea, because while it was admitted by Mr Thomson that he was not prejudiced by the delay, it may become an important element hereafter in connection with the subsequent proceedings in the case.

LORD M'LAREN and LORD KINNEAR concurred.

The Court recalled the interlocutor of the Sheriff-Substitute dated 9th December 1896 and repelled the defender's first plea-in-law.

Counsel for the Pursuers—W. Campbell — Cullen. Agents — Webster, Will, & Ritchie, S.S.C.

Counsel for the Defender—A. S. D. Thomson—Abel. Agents—W. & J. L. Officer, W.S.

Thursday, March 4.

FIRST DIVISION.

TURNER'S TRUSTEES *v.* TURNER.

Succession — Testamentary Provision — "Issue"—Whether Confined to Children.

The term "issue" in a testamentary provision, unless a more restricted signification is imposed by the context, is to be taken in its ordinary sense as including direct descendants of every degree. Accordingly a gift to the issue of the testator's children will take effect in favour of their grandchildren, and a gift over in the event of a child having no issue will not take effect if the child dies leaving grandchildren, although their parents, the testator's immediate children, have died before the succession opens—*Young's Trustees* v. *M'Nab*, July 13, 1883, 10 R. 1165, *commented on.*

By trust-disposition and settlement dated 14th January 1848, Mr James Turner, flesher, Glasgow, conveyed to trustees his whole estate heritable and moveable. After directing his trustees to make payment to his wife of an annuity of £70, and to allow her the liferent of his house, and to pay an annuity of £20 to his second son James Turner, the truster proceeded — "After implementing and fulfilling the foregoing purposes of the trust, I direct my said trustees to hold the residue and remainder of my means and estate in equal proportions, share and share alike, for behoof of the children already born or who may yet be born to me (exclusive always of the foresaid James Turner, whom I hereby debar from any share or interest in said residue), and the survivors and survivor of them, but in liferent only for their respec-

tive liferent use allenarly, and for behoof of the respective issue of my said children *per stirpes* in fee. But I hereby provide and declare that in the event of any of my said children predeceasing me (excluding always the foresaid James Turner) leaving issue of his or her body, such issue, if surviving at the time of my death, shall succeed to the share of said residue which would have fallen to the parent in liferent and his or her issue in fee had such parent survived me; and in the event of the death of any of my said children, whether the same shall happen before or after my own death, without leaving issue, the share of such deceasing child or children shall go and belong in equal proportions to my surviving children, excluding always the said James Turner, the families of a deceased child or children representing the parent and succeeding to the share that would have fallen to such parent if in life." The truster then proceeded to declare that these provisions were to be in full of the legal claims of his wife and children.

The truster died on 2nd April 1861 survived by the following children: William Turner, James Turner, George Turner, Alexander Turner, Joseph Turner, Agnes Turner or Young, and John Turner. Six of these were entitled to participate in the liferent of the residue, James being debarred. Of these the only survivors at the present date are George Turner and Mrs Agnes Turner or Young. John Turner died in 1883, and Alexander in 1890, both without issue; Joseph Turner died in 1867 leaving two sons and three daughters; William Turner, who died in 1895, had two children who predeceased him leaving issue.

On the death of William his grandchildren claimed that their parents had each a vested right of fee in one *pro indiviso* half of the share of residue liferented by William, and that they were entitled to receive a corresponding proportion of the income of the residue so long as it remained in the hands of the trustees. A special case was presented by (1) the trustees of James Turner; (2) George Turner; (3) Mrs Agnes Turner or Young; (4) the children of Joseph Turner; and (5) the grandchildren of William Turner.

The questions submitted to the Court were—"(1) Does the income of the residue of the late James Turner's estate, so long as such residue remains in the hands of the trustees, fall to be divided equally between the second, third, and fourth parties *per stirpes?* or (2) Does it fall to be divided equally between the second, third, fourth, and fifth parties *per stirpes?* (3) Have the fifth parties now a vested right in the fee of the share of residue of which their grandfather William Turner possessed the liferent?

Argued for the first four parties—The word "issue" did not in this case include grandchildren, and accordingly the provision to the issue of the truster's children did not cover the case of the fifth parties. Until the decision in *Young's Trustees* v. *M'Nab* July 13, 1883, 10 R. 1165, there was no technical meaning attached to the word "issue." From the *dicta* quoted in that case it appeared that in England it had a technical meaning "in the language of lawyers," which covered descendants. But here at any rate it must be construed as a term of popular language, and as such it meant only children, as was held by Lord Shand at p. 1171 of *Young's Trustees.* It was true that in *Hall's Trustees* v. *Macdonald,* July 24, 1893, 20 R. (H. of L.) 88, there were *dicta* to the opposite effect, but that was a question of the pactional provisions in a marriage-contract, where there was a strong presumption that a man intended to provide for all his descendants, while in an ordinary will there was no such presumption. The whole tenor of this settlement indicated that the words "issue of his or her body"—issue being limited in this way—did not include grandchildren. In the latter part of the clause the term "families" was used, evidently embracing the whole *stirpes,* and was in significant distinction from the term "issue" above.

Argued for the fifth party—The principles laid down in *Hall's Trustees* v. *Macdonald* were of general application; indeed, with regard to a will they were *a fortiori* of the case of a marriage-contract. Accordingly the construction there given overruled the expression of opinion in *Young's Trustees,* and must govern the present case; and the term "issue" must in its primary sense be held to include "grandchildren"—*Leigh* v. *Norbury,* February, 1807, 13 Ves. 344. That being so, there was nothing in the terms of this deed to prevent that ordinary meaning from being given effect to. On the contrary, the context was all in favour of this view, for this was a provision *per stirpes,* with nothing to indicate that it was to be cut off at one particular generation. In *Irvine* v. *Irvine,* July 9, 1873, 11 Macph. 892, there was a similar use of the word "families" with regard to a provision *per stirpes.*

At advising—

LORD KINNEAR—The question in this case is whether certain great-grandchildren of the testator are entitled to share with his grandchildren *per stirpes* in the residue of his estate. By his trust-disposition and settlement the deceased James Turner directed his trustees "to hold the residue and remainder of my means and estate in equal proportions, share and share alike, for behoof of the children already born or who may yet be born to me, and the survivors and survivor of them, but in liferent only for their respective liferent use thereof allenarly, and for behoof of the respective issue of my said children *per stirpes* in fee," and to this he adds a provision declaring that "in the event of any of my said children predeceasing me . . . leaving issue of his or her body, such issue, if surviving at the time of my death shall succeed to the share of said residue which would have fallen to the parent in liferent, and his or her issue in fee, had such parent survived me; and in the event of the death of any of my said

children, whether the same shall happen before or after my own death, without leaving issue, the share of such deceasing child or children shall go and belong in equal proportions to my surviving children, . . . the families of a deceased child or children representing the parent and succeeding to the share that would have fallen to such parent if in life."

The testator died on the 2nd of April 1861 survived by seven children, six of whom were entitled to participate in the liferent of the residue. Of these, the second and third parties, George Turner and Mrs Young, are the only survivors. The others died without issue, except Joseph, who died on the 24th of January 1867, leaving five children, who are the fourth parties to this case, and William, who died on the 1st July 1875, predeceased by two children, Mrs Wylie and James Turner, the former of whom left two children, and the latter one child. These three grandchildren of William Turner are the fifth parties; and the question is, whether they are entitled to participate in the residue. This may be stated in two forms, whether the testator's great grandchildren can take under the gift in favour of the respective issue of his children, and whether the gift-over, in the event of the death of any of the children without leaving issue, takes effect in a case where the child has left grandchildren by children who had died before him. In either form the question seems to be one and the same, and to depend on the construction which ought to be given to the word "issue." It was decided in *Young's Trustees* v. *M'Nab*, 10 R. 1165, that in the law of Scotland the term "issue" has no technical meaning. The Lord President says—"I think 'issue' and 'lawful issue' are merely words of popular signification, and that we must take them to mean just what we can gather to be the meaning intended to be attached to them by the testator, so far as we can apprehend it in the ordinary way by examining the whole terms of his settlement." Now, if the term is not technical, the general rule for construing the will is that stated by Lord Blackburn in *Caledonian Railway Company* v. *North British Railway Company*, Feb. 17, 1881, 8 R. 25, at p. 30—"There is not much doubt about the general principle. Lord Wensleydale used to enunciate that which he called the golden rule for construing written instruments. I find that he stated it very clearly and accurately in *Gray* v. *Pearson* in the following terms:—'I have been long and deeply impressed with the wisdom of the rule, now I believe universally adopted at least in the courts of law at Westminster Hall, that in construing wills and indeed statutes and all written instruments, the grammatical and ordinary sense of words is to be adhered to unless that would lead to some absurdity or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further.'" Now, it appears to me that in the ordinary sense the word "issue" includes direct descendants of every degree, and therefore that a gift to the issue of the testator's children will take effect in favour of their grandchildren, and that a gift-over in the event of a child leaving no issue will not take effect if the child dies leaving grandchildren, although their parents, his immediate children, have died before the succession opens.

The question is this, whether, according to the ordinary use of language, a man who has died leaving grandchildren surviving him can be said to have died without issue. I think not, and that would be enough for the decision, were it not for the difficulty which arises from the observations of Lord Shand in the case of *Young's Trustees* v. *M'Nab*, where his Lordship quotes as decisive the opinion of Lord Justice James in the case of *Ralph* v. *Carrick*, 11 Ch. Div. 873—"The word 'issue' is an ambiguous word. In the ordinary parlance of laymen it means children, and only children. When you talk of what issue a man has, or what issue there has been of a marriage, you mean children, not grandchildren or great-grandchildren. But in the language of lawyers, and only in that language, it means descendants." His Lordship therefore holds that the word has a technical meaning in the law of England which is different from its ordinary meaning, and in this view we should be bound, in construing a Scotch will, to give the word a different meaning from that which it would bear in an English will, inasmuch as we must hold that it has no technical meaning in the law of Scotland. In construing words of ordinary language I should be disposed to defer to the authority of an English Judge of the eminence of Lord Justice James. But his Lordship's construction does not appear to me to be altogether in accordance with other authorities. It is not consistent with the definition of Dr Johnson, who is the highest authority upon a question as to the ordinary meaning of English words. And what is more important, it appears to me to be inconsistent with the decision of the House of Lords in the case of *Macdonald* v. *Hall*, where it was held that a conveyance to the issue of children of a marriage conferred a protected right of succession on a grandchild. The Lord Chancellor quotes the following passage from Erskine—"The father lies under no degree of restraint in favour of the substitutes who are called by the marriage-contract after the issue of the marriage, and who acquire no right by such substitution." And he adds—"Now, it seems to me that in the natural meaning of the words 'issue of the marriage,' the grandchildren are included as much as the children. I do not accede to the argument that the primary meaning of 'issue' is children only, and that it is departing from the primary meaning if in 'issue of the marriage' you include the children of children." I do not understand his Lordship in this passage to be giving the technical meaning of the word in English law, He is construing the language of a Scotch

institutional writer for the purpose of ascertaining the true meaning of a Scotch marriage-contract. I think his Lordship's construction is binding upon us, and that we are therefore relieved of the difficulty which might otherwise have been created by the opinion to which I have referred in *Young's Trustees* v. *M'Nab*, and in *Ralph* v. *Carrick*.

Now, if the word "issue" in its primary meaning includes the children of children, and not the immediate children only, I think there is nothing in the context which requires us to depart from the ordinary meaning, and to give the word a more restricted signification.

On the contrary, if we are to gather the meaning which the testator intended to attach to the language by examining the whole terms of his settlement, we should, in my opinion, be forcing upon the words a meaning for which there is no justification if we were to hold that in the event which has happened he intended to cut out the grandchildren of his son William from all share in the succession.

I am therefore of opinion that we should answer the first question in the negative, and the second and third questions in the affirmative.

LORD M'LAREN—I have endeavoured to keep an open mind to the arguments which have been addressed to us in favour of the more limited construction of the word "issue," especially when I find a difference of opinion existing amongst Judges of high authority as to the meaning of the word in ordinary parlance. I must candidly admit that I had formed an opinion before hearing the argument—an opinion, however, which I was quite prepared to abandon if convinced. There are some points on which a Judge must have a formed opinion, *e.g.*, as to whether a destination to "issue" or "heirs of the body" would carry estate to collaterals. This being premised, it is natural to go on and consider whether "issue" applies to other descendants than children. Accordingly, in a work published by me as a private individual, for the guidance of practitioners, I expressed an opinion—and it has been confirmed by the very satisfactory discussion which we have heard—in accordance with the judgment proposed by Lord Kinnear. I have only to mention, in addition to the cases referred to by his Lordship, a case of historical interest, viz., that in the Act settling the Crown upon William and Mary and their royal successors, the expressions "issue" and "heirs of the body" are used interchangeably, so as to convey the impression that they are words of identical meaning. In the different branches of succession the Crown is settled on an individual and "the heirs of his body," and then the Act goes on to say that on the failure of "issue" the other branch is to come in. This may be good authority for the technical meaning given to the word by Lord Justice James, but I think it is also good authority for the ordinary meaning, because the question determined by the Act is one interesting all the subjects of the empire, and the Act is not to be regarded as a purely English Act of Parliament.

I agree with Lord Kinnear that if it is determined that "issue" comprehends descendants of all degrees, the answers to be given to the questions in the case present no difficulty.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court answered the first question in the negative, and the second and third in the affirmative.

Counsel for the First Four Parties—Balfour, Q.C.—Clyde. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Fifth Party—H. Johnston—W. L. Mackenzie. Agents—Mill, Bonar, & Hunter, W.S.

Thursday, March 4.

FIRST DIVISION.

[Glasgow Dean of Guild Court.

WHYTE *v.* DIXON'S TRUSTEES.

Police — Street — Petition for Declaration that a Street is Public—Jurisdiction of Dean of Guild—Glasgow Police Act 1866 (29 *and* 30 *Vict. c. cclxxiii.*), *secs.* 286 *and* 290.

Section 286 of the Glasgow Police Act 1866 enables a proprietor to have a private street declared public by applying to the Dean of Guild along with the Master of Works. Section 290 provides that the Police Commissioners if satisfied with a street whose construction has been authorised by the Dean of Guild, may declare it public without application to him.

A petitioner obtained a warrant from the Dean of Guild under section 290 to form a street as a public street. Having made the street, he applied to the Police Commissioners, under that section, to have the street taken over as public, but they refused to take it over on the ground that it was not lighted or fenced. He subsequently applied to the Dean of Guild to declare the street public.

Held that the Dean of Guild had no power under section 290 to declare the street public, and that this could only be done with the concurrence of the Police Commissioners in one of the methods provided by sections 286 and 290.

Section 286 of the Glasgow Police Act 1866 provides—"The Master of Works, by direction of the Board (now the Police Commissioners), jointly with the proprietor of any land or heritage adjoining to and having a right of access by any private street or court of which the *solum* does not belong to the Trustees of the Clyde Navi-