

For these reasons I think that the legatees, as that word is used by the truster, and not the next-of-kin, are entitled to the residue of the trust-estate. Who are they? In my opinion only those who have received pecuniary bequests. The residuary legatees are legatees of money, and those *ejusdem generis*, and they alone are presumably the parties among whom the residue of the trust-estate according to the will of the truster is to be divided. Should your Lordships agree in this opinion the interlocutor reclaimed against will be recalled, and the legatees of prior pecuniary bequests bequeathed in the codicils be found entitled to the fund *in medio*—that is to say, the residue of her trust-estate.

LORD RUTHERFURD CLARK—I rather think that the interlocutor should be adhered to. I do not doubt that the testator intended to leave some legacies to her legatees. She practically says so, and when she uses such words, the testatrix, I cannot doubt, intended to leave more money to the legatees. But I confess I am unable to satisfy myself with any certainty what is the subject of the legacy which is referred to in the words in question, and I would prefer to hold that the legacy was void in consequence of the uncertainty of the subject of it.

LORD JUSTICE-CLERK—I cannot say that I have found this case unattended with difficulty, nor do I come to the conclusion at which I have arrived with any very great confidence. All the less can I do so from the opinion that Lord Rutherford Clark has intimated. At the same time my impression at the hearing—and it has been strengthened by my consideration of the case since—was in favour of the view of Lord Craighill; and the views that weighed with me in coming to that result were substantially those which he has fully explained, and mainly this—the original destination of this lady's property contained a clause directing her trustees to pay, assign, and make over the residue of the estate, “and any accumulations thereof, in such manner and way as I shall direct and appoint by any writing to be subscribed by me at any time hereafter during my life,” and failing such direction then to her nearest heirs. Now, the first question is, Is there any such writing that bears the character described in that clause in her settlement? I think the presumption is that at the time when she used these words she did intend to make a writing which should have that character, and should regulate the residue of her estate. We find that she executed codicils at intervals, and that dated 24th April 1850 begins—“I, May Innes, at present intend this to be my last codicil to my will.” And as therefore she intended to make her last settlement, we may assume that she meant to fill up the blank that she had left in her original settlement, and to make an arrangement with regard to the residue of her estate; and I should commence the reading of this codicil, which is certainly a writing under her hand, with the expectation of finding that that had been done. And I find in the course of that codicil words which certainly bear that interpretation, namely, “whatever more money I leave after paying my lawful debts shall be divided among my legatees.” These words were not in any way restrained by the rule which seems to prevail in England, that

the word “money” will not carry property other than money in the strict sense. That question has been considered and decided here, but we do not acknowledge that limitation of the term at all. The only question is, whether it was meant in this particular case to be a bequest of residue? It was a bequest of the surplus of that fund out of which debts were to be paid, and beyond all question the *corpus* of the estate was to be liable for the debts. My opinion is that she meant that writing to be a writing under her own hand disposing of the residue, and that the words she uses are fitted to carry the residue. I think so all the more that the presumption is in favour of and not against sustaining the testament.

I thus prefer the opinion of Lord Craighill. And I think he is also right in limiting the legatees to pecuniary legatees. Your Lordships will therefore alter the judgment and find that on a sound construction of these writings the residue is conveyed to the pecuniary legatees.

LORD YOUNG was absent.

The Court pronounced this interlocutor:—

“The Lords having heard counsel for the parties on the reclaiming-note for the claimant William Fairweather Russell against Lord Kinnear's interlocutor of 15th February last, Recall the said interlocutor: Find that on a sound construction of the testamentary writings of the testatrix Mrs May Grant or Innes the persons entitled to the residue of her estate are the persons to whom she bequeathed pecuniary legacies, and who survived her, or the representatives of such of them as have since died: Find that the claimant the Reverend Robert Smith, as one of the guardians of Mary Innes, the daughter of the testatrix, is entitled to a legacy of £50 sterling out of the fund *in medio* before division thereof in terms of the first branch of his claim: Find that the whole claimants are entitled to payment of their expenses out of the fund *in medio*, and decern; and with these findings remit the cause to the Lord Ordinary with instructions to proceed therein as accords.”

Counsel for William Fairweather Russell—Keir-Wallace. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for Next-of-Kin—Jameson—Low. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Mrs Grant—Armour. Agents—Lindsay, Howe, & Co., W.S.

Friday, July 13.

FIRST DIVISION.

SPECIAL CASE — KING AND OTHERS
 (YOUNG'S TRUSTEES) v. WALKINSHAW
 AND OTHERS.

Succession—Issue—Children—Meaning of Term
 “Issue.”

The word “issue” has no technical or specific meaning by the law of Scotland, and is capable of applying to descendants in any

degree, according to the context in which it is used.

Observed (per Lord Shand) that in the ordinary case the term "issue" occurring in a settlement is to be taken in its ordinary popular meaning of children as opposed to more remote descendants.

Terms of a deed in which "issue" was held equivalent to immediate children, to the exclusion of grandchildren.

In 1845 William Young and his wife Rebecca Lowndes or Young executed a mutual trust-disposition and settlement conveying to trustees all their means and estate which should belong to them at the death of Mr Young.

In 1851 they executed a codicil by the fifth purpose of which Mr Young directed his trustees to hold his farm and lands of Eastwood Mains and his farm and lands of Bagabout, both in the county of Renfrew, for the liferent use and behoof of his nephew William Whyte, and to pay him the rents thereof, under burden of all necessary charges, and after the death of William Whyte to dispoise and convey the farm and lands of Eastwood Mains and Bagabout "to and in favour of his, the said William Whyte's, lawful children equally, share and share alike; and failing his leaving lawful children, to the lawful issue of my said niece Mary Whyte or Walkinshaw equally, share and share alike." All his other heritable property and heritable bonds (reserving to his widow a liferent of his mansion-house and grounds of Auldhousefield) he directed his trustees to hold for the liferent use and behoof of his niece Mary Whyte or Walkinshaw, paying her the whole rents and interest thereof, under deduction of the expense of collection, taxes, &c., and after her death "to sell and dispose of the same as soon as convenient, and hold the proceeds thereof for behoof of her lawful children equally, share and share alike, and apply the interest thereof for such children's support, or such part of such interest as they may think proper, until said children shall respectively attain the age of twenty-four years, when each child upon so attaining such age shall receive, and my said trustees shall then pay, the share of the capital stock to which such child is entitled: Declaring that my said trustees shall have full power, if they think proper, to sell and dispose and realise, even during the lifetime of the said Mary White or Walkinshaw, the whole lands, houses, and other heritages and heritable estates above conveyed by me to my said trustees for behoof of the said Mary Whyte or Walkinshaw and her children, and invest the proceeds thereof in such securities as they may think proper, and pay her the interest, profits, or returns in the same way as the rents were directed to be paid to her; and in like manner after her death to pay her children in the first place the said interests or profits, and in the second place their respective shares of the capital stock, all in the way and at the times above mentioned." His moveable estate, after paying debts, legacies, &c., he directed his trustees to hold "for the liferent use of my nephew the said William Whyte and niece Mary Whyte or Walkinshaw equally, share and share alike, and to divide between them during their respective lives the annual proceeds or interest of such residue: Declaring that at the death of the said William Whyte his share of the annual proceeds or interest

of such residue shall be payable to his lawful children equally until they respectively attain the age of twenty-four years, when their share of the capital stock shall be paid to them: And failing the said William Whyte leaving lawful children, such interest or proceeds shall be payable to the said Mary Whyte or Walkinshaw during her lifetime, and after her death shall be payable to her lawful children equally until they respectively attain the age of twenty-four years, when such share of the capital stock of such residue shall be payable to them: And in like manner declaring that at the death of the said Mary Whyte her share of the annual proceeds or interest of such residue of my said moveable estate shall be payable to her lawful children equally until they respectively attain the age of twenty-four years, when their share of the capital of such residue shall be payable to them: Declaring that the whole of the provisions in favour of the said William Whyte junior and his children, and in favour of the said Mary Whyte or Walkinshaw and her children, till the period of final division as aforesaid, are purely alimentary, and shall not be liable for or affectable by their debts or deeds, or the debts or deeds of any husband any of them may have already married, or of any future husband any of them may still marry, and shall be payable upon their own receipt alone, and exclusive of the *jus mariti* of any such husband, and the same shall not be assignable in any manner of way."

At the date of this codicil Mr Whyte, the testator's nephew, was unmarried. Mrs Walkinshaw, the niece, had five children, but had no grandchildren.

Mr Young died in 1860. He was survived by his wife, but by no children. His widow revoked the settlement so far as she was concerned, and took her legal rights.

Mr Whyte survived Mr Young. He died unmarried in 1880.

Mrs Walkinshaw predeceased Mr Young. She left nine children, who all survived Mr Young, but none of whom had children at the date of his death in 1860. Two of them predeceased Mr Whyte without issue. Certain of the others had married and had children, seven in all, who were alive at the date of Mr Whyte's death.

In these circumstances a question arose as to the meaning of the word "issue" in the fifth purpose of the codicil, it being maintained by the children of Mrs Walkinshaw that it included them only, and by the grandchildren that it included all her lawful descendants. This Special Case was therefore adjusted. The trustees under the settlement of Mr and Mrs Young were first parties. The children of Mrs Walkinshaw, with the assignees of certain of them who had assigned their shares, were the second parties; and the grandchildren (to whom being in minority or in pupillarity a tutor *ad litem* was appointed) were the third parties.

The question of law was—"Do the words 'the lawful issue' of Mrs Walkinshaw, in the fifth purpose of the first codicil, include Mrs Walkinshaw's children only; or do they include all descendants of Mrs Walkinshaw—grandchildren as well as children—alive at the date of Mr Whyte's death, to the effect of entitling said grandchildren and children to equal shares *per capita* of the estate bequeathed in the said codicil?"

Argued for Mrs Walkinshaw's children—The meaning of the word "issue" was simply children in the ordinary sense of that word, and it was clear from the terms of the deed that the testators meant to confine the benefits they were going to confer to the children, and not to extend them to grandchildren. The scheme of the deed was for equality of division among the children of Mrs Walkinshaw. The children got the moveable estate, and it would be a curious circumstance if when heritage came to be divided grandchildren should be admitted. At the time when the deed was executed no grandchildren were in existence. The Court was unfettered in the construction of the word "issue," as the word had seldom or never been construed in Scotland.

Authorities—*Donaldson's Trustees*, January 15, 1854, 2 Macph. 428; *M'Dougall*, February 6, 1866, 4 Macph. 372; *in re Hopkin's Trustees*, 9 Ch. Div. 131; Jarman on Wills, vol. ii., 4th ed., pp. 101 and 440.

Argued for Mrs Walkinshaw's grandchildren—In the absence of any controlling words, "issue" must be held to mean descendants—*McLaren on Wills*, i. 722. The deed was carefully framed, and did not import an equal division to the beneficiaries. There were three distinct gifts—1st, certain specified estate; 2d, other heritable property; 3d, general moveables. Vesting was postponed until the death of William Whyte. The declaration clause was in favour of this construction. See case of *Ross v. Dunlop*, May 31, 1878, 5 R. 833. In the case of a bequest to a class, the time to find out the number of the class is the date of distribution. Where there is no balance of considerations, the widest meaning ought to be attached to the word "issue." The word is used in contrast to children; had "descendants" been used instead of "issue," the children here would have taken along with their parents.

At advising—

LORD PRESIDENT—This Special Case raises a question whether the words "lawful issue" in a certain clause of the settlement of the late Mr Young means the children or the descendants of Mrs Walkinshaw, a niece of the testator. And before examining the terms of the settlement itself, particularly of the clause in which these words occur, I think it right to say that in the law of Scotland the term "issue" or "lawful issue" has no technical meaning. It may mean children, or it may mean descendants generally according to the way in which it is used, and the terms of the clause in which the word or words occur, and the mind of the testator in so far as it can be gathered either from the particular clause or from the whole scope and purpose of his settlement. 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 gather it in the ordinary way by examining the whole terms of his settlement. The testator divided his estate in this first codicil (which really has the effect of disposing of almost the whole of his estate) into three parts. One of these he describes as the farm of Eastwood Mains and the farm of Bagabout, the second he calls all his other heritable estate, including heritable bonds, and the third he describes as his whole

moveable estate. The immediate objects of his affection were his nephew William Whyte, and his niece Mary Whyte (Mrs Walkinshaw) and the object of the clauses which I am about to call attention to is to provide for that nephew and niece and their respective families. Now, in regard to the first part of his estate, Eastwood Mains and Bagabout, he settles it in this way, he gives the liferent of it to his nephew William Whyte, and after his death to his lawful children equally, share and share alike, and failing his leaving lawful children "then come the words which raise the question before us, "to the lawful issue of my said niece Mary Whyte or Walkinshaw, equally share and share alike." So that as regards Eastwood Mains and Bagabout there is a liferent to William Whyte, the fee to his children if he has any, and failing his children the fee to the lawful children of Mary Whyte, but no liferent to Mary Whyte herself. In the event of William Whyte dying without children then the fee descends directly to the lawful issue of Mary Whyte. In regard to the second portion of his estate, which consists of his other heritable subjects, including heritable bonds, he gives that to Mrs Walkinshaw for her liferent, and after her death he directs his trustees to sell and dispose of the same as soon as convenient, and hold the proceeds thereof for behoof of her lawful children, and apply the interest for such children's support till they attain the age of twenty-four years, and then the fee is to be divided among them. That is a provision entirely for Mrs Walkinshaw and her children. Then comes the third portion—the moveable estate—and that he gives for the liferent use of his nephew William Whyte and his niece Mary Whyte equally, share and share alike, and to divide between them during their lives the annual proceeds or interest, and on the death of William Whyte his share shall be payable to his lawful children equally until they respectively attain the age of twenty-four years, when their share of the capital stock shall be paid to them, and failing William Whyte leaving lawful children then the interest shall be payable to Mary Whyte or Walkinshaw during her lifetime, and after her death shall be payable to her lawful children equally until they attain the age of twenty-four, and then the whole is to be paid to them. There is a declaration following that which has been the subject of some argument, to which I shall advert by-and-by. But it appears that each of these three parts of this estate is settled in a different manner. The one that we have specially to do with here is the settlement of the first portion, Eastwood Mains and Bagabout, and there is no doubt that as regards the descendants of the nephew and the niece he uses language in the same clause which is not only different but stands in a certain sense in contrast or contradistinction. Failing William Whyte the estate goes to William Whyte's "lawful children" equally, share and share alike, and failing his leaving children to the "lawful issue" of Mary Whyte. Of course the strength of the case on the one side is, that there is a marked change of language here when he deals with the family of the niece from that which has been used in regard to the family of the nephew. But there are some considerations which I think are very much calculated to get the better of any presumption that may arise

in that way. In the first place, we must consider what was the state of the family at the date of this deed, and at the date of the testator's death. The deed was executed in 1851, and at that time Mrs Walkinshaw had five children, but they must have been young, and she had no grandchildren. Mr Whyte, the nephew, had no children. When the testator died on the 29th of May 1860 Mrs Walkinshaw was dead, but she had left nine children, who all survived the testator, and none of whom were married at the time of his death. William Whyte was still unmarried, and although he survived the testator he died in the year 1880 without any children. So that the condition of the matter at the time of the execution of the deed, and at the time of the death of the testator, was this—he had a childless nephew and he had a niece alive at the one date and dead at the other, whose children were in existence but who had not married or got any children of their own. The objects of his favour, therefore, in existence at both those important dates—the date of the deed and the date of his death—were the nephew and niece and the children of the niece and nobody else. Now, it seems not a very probable thing that in these circumstances he should make the distinction which it is contended he did make in the clause under consideration, that in regard to William Whyte's children, if he should have any, they were to take this estate equally among them, share and share alike, although the testator could have no particular personal favour for such children, as they were not in existence, and as regards Mrs Walkinshaw's children, that he should, while they were the only persons of that generation, or the only persons who were descendants of his favourite nephew or niece of whom he had any personal knowledge, intend to limit their enjoyment of this estate by sharing it with all their children who might come into existence before the succession opened. That is certainly not a probable thing for a testator to do. But such would be the result if the contention of the third party to this case were given effect to, because of course the succession did not open to Mrs Walkinshaw's descendants until the death of Mr Young's nephew, because if he had survived the estate would have belonged to him in the first instance, and it could not have been known until his death that he would not leave children who would take preferably to the children of Mrs Walkinshaw. But at the death of William Whyte the state of matters was this—two of the children of Mrs Walkinshaw had died, but there were seven still surviving, and in the meantime—that is, between 1860 at the death of the testator and 1880, the death of Mr Whyte—they had begotten among them seven grandchildren, and so the question comes to be, whether the division of these farms of Eastwood Mains and Bagabout is to be between fourteen or seven. Now, the nature of the subject also renders it somewhat improbable that such a sub-division as this could be in the mind of the testator. He seems to have had some preference or affection for this piece of land over the rest of his estate, and yet the representation is that he intends Eastwood Mains and Bagabout to be cut up into little fragments for the purpose of dividing it equally among all the individuals of two generations, whereas in regard to every other part of his

estate—his other heritages in the first place, and his moveable estate in the second place—there is no such provision. It goes entirely to one generation, the children either of William Whyte or of Mrs Walkinshaw, or of both. Now, these are improbabilities which in my mind are quite sufficient to get the better of the presumption, if it may be so called, raised by the change of language in the clause before us. And I am inclined on these grounds to hold that the variance of expression is accidental—that when he said that he left his estate to the children of William Whyte, and failing them to the lawful issue of Mrs Walkinshaw, he meant simply the same thing in both cases, the immediate issue of both. The declaration upon which the second party founds, following on the different clauses that I have already read is in these terms—“Declaring that the whole of the provisions in favour of the said William Whyte junior, and his children, and in favour of the said Mary Whyte or Walkinshaw and her children till the final division as aforesaid, are purely alimentary.” Now, it is said that this must embrace the whole of the previous provisions, and if so it interprets the word “issue” in the first provision as meaning children, because it speaks of the whole of the provisions in favour of William Whyte and his children, and in favour of Mary Whyte and her children, but I am afraid the answer to that probably would be—It does not apply to the provision in favour of the issue of Mrs Walkinshaw; it simply limits the effect of the declaration. But there is another reason also probably why it should not apply to that provision in favour of the issue of Mrs Walkinshaw, and that is, that it was quite impossible to make that provision alimentary which is the subject of this declaration. The provision in favour of the issue of Mrs Walkinshaw is a provision of a fee and nothing but a fee. There is no attempt at any life interest or provision of income—nothing but an ultimate fee—and that of course can never be made alimentary by any declaration in such a deed. Therefore I do not attach any importance to that declaration. But apart from that altogether, and taking the whole deed, and also taking the circumstances of the case as regards the condition of the family, and the manner in which he disposed of other portions of his estate, I am satisfied that he did not intend to use the word “issue” in the first of these clauses in any other sense except that of children.

LORD MURE—I have little to add to what your Lordship has said. I concur in the opinion which your Lordship has expressed as to the meaning in the law of Scotland of the word “issue.” It has, I think, no fixed technical meaning, but the sense in which it is used in any particular case must depend upon the context, and must be gathered from the provisions of the deed. Keeping this in view, I am of opinion, for the reasons and on the grounds which have now been explained by your Lordship, that in the clause here under consideration, notwithstanding the difficulty raised by the change of the phraseology used in it, which at first sight I admit does create some difficulty, but notwithstanding that, I am of opinion that the words “lawful issue” were not intended to include the grandchildren of Mrs Walkinshaw.

LORD SHAND—I concur with your Lordships in thinking that the term "issue" is here to be construed as equivalent to children. It is rather remarkable that there is no decision, and as far as I am aware no *dictum*, as yet in the law of Scotland as to the effect or meaning of the word "issue" in a bequest to a person and his issue. I observe that Lord M'Laren, in section 1381 of his valuable work on Wills and Succession, states—"The word issue when not restrained by the context is construed according to the natural meaning of the term, and comprehends descendants of every degree alive at the period when the succession is held to vest. This is exemplified by the decision in reference to the claim of John Lawford Young in the noted case of *Donaldson's Trustees*." But having referred to the case which the learned author has here cited, I think that upon examination it will be found that it scarcely bears out the view which is there stated. There seems to me from a perusal of that case to have been no question as to the meaning of the word "issue." The question was whether a child of a grandnephew who had predeceased the testator was or was not one of the beneficiaries. The form under which he was called to the succession was as issue, that is, issue of the grandnephew of the testator; but he was a child of that grandnephew. It was not a case of a more remote descendant than a child of the person named, and therefore the case has no bearing on the question of the meaning of the term "issue." And I venture, with deference, to dissent from the view stated by his Lordship, that the word "issue" according to the natural meaning of the term, comprehends descendants of every degree alive at the period when the succession is held to vest. In England a technical meaning is given to the term, as is explained by Mr Jarman in vol. ii of his work on Wills, p. 101, where he says—"The word issue (though its popular sense is said to be children) is technically, and when not restrained by the context, co-extensive and synonymous with descendants, comprehending objects of every degree." That is to say, that according to the law of England a technical meaning is given to the word "issue" which is different from its popular sense. And again, in the most recent case in which that subject has been discussed, before the High Court in England, in the Chancery Division, I find Lord Justice James said (11 Chan. Div. Rep., p. 893, in the case of *Ralph v. Carrick*)—"Now 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." Now, although it seems to be quite clear that in the law of England the word "issue" has acquired from a remote date a technical meaning, being descendants, I agree with your Lordships in holding that there is no such rule in Scotland; and dealing with this question for the first time, I am of opinion that in the ordinary case the term "issue" occurring in a settlement is to be taken in its ordinary or primary sense, so that a bequest to a person and his or her issue, is a bequest to children and not to descendants. The word no doubt may be so used, and often will be so used, in settlements, as to have a wider

meaning, for it is a word capable of construction, and it may mean not issue—that is, children or immediate issue—but issue of issue, or descendants. I should be disposed to think it quite permissible and reasonable to hold that the term would include descendants in a case where the immediate issue had died, and so to prevent the lapse of a bequest. But I think that when so used the word is employed in a secondary and wider, looser, and less accurate sense of the term than when applied to children or immediate issue, and at all events this secondary meaning is not to be presumed to be the use which the testator makes of it. Having said so much on the general question, I have only to add that I concur with your Lordships in the view which you take of this deed. I think it is enough for the decision of the case that we take the word issue in what is its natural and primary sense. Taking it so, it includes the children of the testator's niece, but does not include their children or issue. The contention here has been on the part of those who do not succeed in the Special Case, that under a bequest to the lawful issue of my said niece Mary Whyte or Walkinshaw, although there were a number of children of that lady in existence when the truster died, the grandchildren of these children, born since that time, are to come in and take with their parents, share and share alike, the bequest that is given. I think it is a very improbable thing in itself that in a bequest to the issue of a person named there is thereby called to share equally in that bequest not only the children but the grandchildren, each taking *per capita*; and if there were nothing special in the deed I should be against so holding. But the various considerations to which your Lordship has pointed lead me to the conclusion without any difficulty that even if it were necessary to construe the word "issue" as meaning descendants in the general case, and even if there were an *onus* on the part of the persons so contending, the specialities of this deed are sufficient to discharge that *onus*; and the only observation which I have to make, in addition is, that I attach rather more importance than your Lordship has done to the declaration at the close of this deed, by which it is said that "the whole of the provisions in favour of the said William Whyte junior and his children, and in favour of the said Mary Whyte or Walkinshaw and her children, till the period of final division as aforesaid, are purely alimentary," &c. It appears to me that the testator there in referring to Mary Whyte and her children was referring to everything he had given to Mary Whyte and her issue in the previous part of the deed. It is true, as your Lordship observed, that it is not possible to make alimentary a capital sum or fee, but although we happen to know that, I think the testator might be pardoned if in the year 1851 he took a different view, because within the last few years we have had it very strongly contended on the terms of a settlement that a fee had been made alimentary, and I cannot help thinking from what I have seen of deeds of this description, both at the bar and on the bench, that there had been an idea that a capital sum might be so tied up as to be alimentary, although in recent times it has been decided very clearly otherwise. Therefore on the question what the testator thought, and not what we may think sitting here

as lawyers, when he spoke of the whole of the provisions in favour of Mary Whyte and her children, I think he was dealing with everything he had provided in the other parts of the deed, and that he thereby designated "issue" by the term "children." And I think that is an additional circumstance beyond those mentioned by your Lordship in favour of coming to the conclusion that the term issue means children and children only.

LORD DEAS was absent.

The Court pronounced this interlocutor:—

"Find and decern that the words 'lawful issue' of Mrs Walkinshaw in the fifth purpose of the first codicil of the late William Young's settlement include Mrs Walkinshaw's children only, and do not include grandchildren."

Counsel for First Parties (Young's Trustees)—Rankine. Agent—David Turnbull, W.S.

Counsel for Second Parties (Children of Mrs Walkinshaw)—J. P. B. Robertson—Jameson. Agent—F. J. Martin, W.S.

Counsel for Third Parties (Grandchildren of Mrs Walkinshaw)—Mackintosh—Graham Murray. Agents—Torry & Sym, W.S.

Friday, July 13.

SECOND DIVISION.

[Lord M'Laren, Ordinary.]

THE LIQUIDATORS OF THE SCOTTISH PROPERTY INVESTMENT COMPANY BUILDING SOCIETY *v.* SMALL AND OTHERS (SHIELL'S TRUSTEES).

Building Society—Powers of Directors—Ultra vires.

The directors of a building society, who had power under the rules to borrow money on the society's behalf, advanced £1000 to A, taking from him a bond by which he undertook to repay the loan in fourteen instalments of £101 each, and also a disposition to the heritable subjects belonging to him which was *ex facie* absolute, but really in security of the loan. There were prior bonds over the property. A having been sequestrated, the prior bondholders gave notice of their intention to exercise the power of sale contained in their bonds, and in order to prevent the sale the directors of the society granted to them a bond of corroboration, binding the society to pay to them the sum contained in their bonds. In the subsequent liquidation of the company, held that the bond of corroboration was *ultra vires* of the directors, being an obligation not warranted by the rules, and which they were under no obligations to grant, and that it fell to be *reduced*.

This was an action raised by the liquidators of the Scottish Property Investment Company Building Society against the trustees of the late John Shiell, for reduction of a bond of corroboration granted in favour of the defenders by the direc-

tors of the Society previous to its going into liquidation. The circumstances under which the bond was granted were as follows—The Scottish Property Investment Company Building Society was a Society incorporated under the Building Societies Act 1874, in terms of rules which had been duly certified as being in conformity with that Act. By article 2 of the rules in force at the time of the transactions after mentioned it was provided—"The objects of the Society shall be, by the subscriptions or payments of its members, to form a fund in shares of £25 each, half shares of £12, 10s. each, and quarter shares of £6, 5s. each, out of which fund members who are desirous of erecting or acquiring dwelling-houses, or other heritable property, may receive advances upon heritable security by way of mortgage to enable them to do so; and generally the objects allowed by the Building Societies Act 1874. No preferential shares shall be issued."

By article 86 it was further provided—"The Society may receive deposits or loans at interest from the members or other persons, or from corporate bodies, joint-stock companies, or any terminating building society, to be applied to the purposes of the Society, and the directors shall, for the purposes of the Society, have power to borrow such sums from the Society's bankers, or other persons, as they may deem advisable: Provided always, that the total sum of money to be received or borrowed under this rule shall not at any one time exceed two-thirds of the amount for the time being secured by mortgage from its members to the Society. The sums so borrowed shall form a preferable charge against the funds, claims, and effects of the Society."

Rule 96 provided—"The directors shall have power to act for the Society in accordance with these rules in all matters that may arise. Their proceedings shall be regularly entered in a minute-book which shall be kept by the secretary. Each minute shall be authenticated by the signature of the chairman of the meeting."

In pursuance of the ordinary business of the Society, as set forth in these rules, William M'Donald, solicitor in Dundee, obtained from the directors an advance of £1000 upon the security of certain subjects in Reform Street, Dundee. With the view of securing the advance the said William M'Donald granted the following deeds in favour of the Society—First, a bond by him for £1000, dated 5th August 1876, undertaking to repay the same in fourteen yearly instalments of £101 sterling each; and second, disposition *ex facie* absolute by him in favour of the Society of the subjects above referred to, dated 3d August, and recorded in the register of sasines kept for the burgh of Dundee on 11th September 1876. At the time this disposition in favour of the Society was granted there existed as prior burdens upon the said subjects (1) a bond and disposition in security by M'Donald in favour of the defenders for £2500, dated 2d August 1876, and duly recorded on the following day; and (2) a bond and disposition in security by M'Donald in favour of David Marnie Mills, surgeon, Newtyle, dated and recorded 30th August 1876. This latter bond and disposition in security was, by assignation dated 13th, and with warrant of registration thereon recorded 22d November 1878, assigned to David Small, solicitor in Dundee, who still held it at the date of this action.