and the resulting frequency with which the appellant and his family may be exposed to danger does not create a difference in kind but only in degree between the danger incurred by the appellant and his family and that incurred by any other persons traversing the streets of Glasgow, and therefore that his interest to prosecute is no greater than theirs, but I am not convinced that this view is correct, as a difference in degree may practically resolve into a difference in kind for the purposes of such a question as the present. It is true that the restrictions on the speed at which the cars may travel are imposed in the interest of the public, but they are also imposed in the interest of the persons who may, by property or otherwise, be brought into close relations with the Tramway undertaking, and such persons may suffer a particular grievance by the breach of a statute or bye-law which the public generally do not suffer. The decisions of the High Court of Justiciary in the cases of the *Great North of Scotland Railway Company* v. *Anderson*, 25 R. (J.C.) 14, and *Burns* v. *Turner*, 25 R. (J.C.) 38, sanction the view that a person or company having interest, although it may be a comparatively slight interest, can, with the concurrence of the Procurator-Fiscal (which has been given in this case), prosecute for a statutory offence or a contravention of a bye-law. Any other view would be highly inexpedient in the public interest, especially in a case like the present, where the servants of the respondents, whose officials are charged with the duty of seeing that the law is complied with, are alleged to have committed the offence.

It was further maintained by the respondents that the present appeal is incompetent in this Court on the ground that it is "criminal," not "civil," within the definition contained in section 28 of the Summary Procedure Act 1864, which provides that the jurisdiction shall be deemed and taken to be of a criminal nature where, in pursuance of a conviction or judgment upon a complaint or as part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or shall be authorised or required in case of default of payment or recovery of a penalty or expenses or in case of disobedience to their order to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation. Even assuming that this section would otherwise have been applicable to the present case, I am of opinion that it does not apply, because the Corporation of Glasgow could not be imprisoned. In the case of the *North British Railway* v. *Dumbarton Harbour Board*, 2 F. (J.C.) 28, it was held by the High Court of Justiciary (*diss.* Lord Moncreiff) that in cases where it would have been competent to grant a warrant of imprisonment if the accused had been an individual, but where it is incompetent by reason of the accused being a company which cannot be imprisoned, the proceeding is to be regarded as civil.

For these reasons I am of opinion (1) that the appellant had a title and interest to prosecute, and (2) that the rulings of the Sheriff-Substitute upon the various objections stated were correct.

Lord M'Laren and Lord Kinnear concurred.

The Lord President intimated that Lord Adam, who was absent at the advising, concurred.

The Court answered both the questions in the case in the affirmative.

Counsel for the Appellant — Campbell, K.C.—M'Clure. Agent — Charles George, S.S.C.

Counsel for the Respondents—Ure, K.C. —C. N. Johnston. Agents — Simpson & Marwick, W.S.

Thursday, January 30.

SECOND DIVISION.

M'DOUGAL'S TRUSTEES *v.* M'DOUGAL'S TRUSTEES.

Succession—Vesting—Survivorship Clause —Clause Specifying the Date of Vesting —Vesting Subject to Defeasance.

A testator directed his trustees to divide the residue of his estate into six equal parts and to hold three-sixths thereof for behoof of his three daughters equally among them in liferent allenarly. On the death of a daughter the trustees were to pay the interest of each daughter's share to her children equally until they respectively attained majority, when the fee was to be payable to them equally. The period of vesting was declared to be the first term of Whitsunday or Martinmas after the youngest child of the testator had attained majority. In the event of the death of a child before the testator or before the date of vesting the share of such predeceaser was to go to increase the shares of the "surviving" children, and in the event of daughters dying after the said date without issue the share of the daughter so deceasing was to go to increase the shares of the "surviving" children.

In a codicil made after all the children had attained majority and one of them, a daughter, A, had died leaving issue, the testator declared that the date of vesting should be the date of his death, and provided that if any of the testator's other children should predecease the period of vesting without leaving issue the share of the predeceaser should go to increase the share of his "other" children, and in the case of either of his two surviving daughters dying after him without

leaving children, the share liferented by such daughter should go to increase "not only the share of my remaining children but the shares falling to the children of any of them who have died leaving children." He also declared that the shares of daughters' children should not vest till they attained majority.

Held (1) that the words "surviving" and "remaining" referred to the periods of vesting specified in the trust-disposition and codicil respectively; and (2) that the date of vesting under the codicil being the death of the testator, a right to a proportional part of the fee of a share liferented by a daughter, B, who survived the testator and died without leaving issue, had vested at the testator's death in those of his children who survived the testator but predeceased their sister B, subject to defeasance in the event of B leaving issue who attained majority.

Thomas M'Dougal, paper maker, Esk Mills, Penicuik, died on October 12, 1871, leaving a trust-disposition and settlement dated February 28, 1862, and several codicils thereto.

By the said trust-disposition and settlement Mr M'Dougal assigned, disponed, and conveyed to and in favour of certain trustees his whole estate heritable and moveable. The truster, after providing for certain legacies and provisions, including an annuity to his wife if she should survive him, directed as follows:—"(*Seventh*) At the first term of Whitsunday or Martinmas after the youngest of my surviving children shall have attained the age of twenty-one years, or as soon thereafter as conveniently can be, I hereby direct and appoint my trustees . . . to divide the residue of my estate heritable and moveable above conveyed into six equal parts or shares, three-sixth shares whereof my trustees shall hold for behoof of my daughters Dinah M'Dougall, Flora M'Dougal or Williams, and Henrietta M'Dougal, equally among them in liferent for their liferent and alimentary use allenarly . . . and on the death of my said daughters respectively . . . my trustees shall pay the interest of their respective mother's shares to or for behoof of their respective children, my grandchildren, equally among them until they respectively attain majority, when the fee or capital thereof shall be payable equally among them share and share alike, . . . and in case of the death of any of my said children before me or before the first term of Whitsunday or Martinmas after my youngest child shall have attained majority (which is hereby declared to be the term of vesting of their provisions under this settlement) without leaving issue, then the share of such predeceaser shall go to increase the shares of the surviving children; but in the event of such predeceaser leaving issue, then such issue shall succeed equally among them, if more than one, to their parent's share; and in the event of any of my daughters dying after the date of the period of division foresaid without leaving children, then the share of the daughter so deceasing shall go to increase the shares of my surviving children, whether sons or daughters, my daughters' shares thereof to be held by my trustees in trust in like manner with their original shares . . ."

By codicil dated 4th February 1870 Mr M'Dougal, in respect that his daughter Flora M'Dougal or Williams had predeceased him, directed, *inter alia*, that the share of his estate, the liferent of which was intended for his said daughter, should be held by his trustees for behoof of her children in the manner and proportions mentioned in the settlement; and further provided as follows:—"I declare that in case of the death of any of my other children before the period of my death (which, now that all my children have attained majority, I declare to be the time of vesting of their provisions under my settlement) without leaving issue, then the share of such predeceaser shall go to increase the shares of my other children and the issue of children deceased, . . . and in case of either of my two surviving daughters dying after me without leaving children, the share liferented by such daughter shall go to increase not only the share of my remaining children but the shares falling to the children of any of them who may have died leaving children, such grandchildren being entitled equally among them to the share which would have gone to or been liferented by their parent had he or she survived, my daughters' share thereof or the shares falling to children of daughters deceased to be held by my trustees in like manner with their original shares . . . further, I declare that notwithstanding the liferent conferred on the children of my daughters and the powers given to my trustees to make advances to them as mentioned in my settlement, the fee or capital of the shares of the children of my daughters in the residue of my estate shall not vest in them until they respectively attain majority, and in the event of the death of all my said daughters' children before attaining majority and without issue, such share, subject always to the right of liferent conferred on my sons-in-law, shall go to my other children or their issue as before provided."

The testator was predeceased by his wife and by one daughter, Mrs Flora M'Dougal or Williams, and was survived by three sons, Edward Sambourne M'Dougal, Thomas M'Dougal, and James Brown M'Dougal, and by two daughters, Dinah M'Dougal and Henrietta M'Dougal (afterwards Mrs Hosack).

Mrs Flora M'Dougal or Williams, who predeceased the testator, left issue.

Thomas M'Dougal, son of the testator, died on March 8, 1898, leaving two children.

James Brown M'Dougal died on October 5, 1899, without issue.

Henrietta M'Dougal (afterwards Mrs Hosack), died on May 24, 1901, survived by her husband, but without any surviving issue, her only child having predeceased her.

Two children of the testator survived Mrs Hosack, viz., the said Edward Sambourne M'Dougal and Dinah M'Dougal.

On the death of Mrs Hosack the capital of the share of residue liferented by her became available for division. Questions having arisen as to the interpretation of the trust settlement and as to the persons who were entitled to participate in the said share of residue, the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the trustees; (2) the surviving son and daughter of the testator and a daughter of the deceased Thomas M'Dougal (a son of the testator), and a son of the deceased Flora M'Dougal or Williams, the testator's daughter; (3) the testamentary trustees of the deceased Thomas M'Dougal and of the deceased James Brown M'Dougal (sons of the testator), a son of the testator's son Thomas M'Dougal, and a son and the marriage-contract trustees of two daughters of the testator's daughter Mrs Williams, who predeceased him, these three children of Mrs Williams being the residuary legatees under the trust-disposition and settlement of James Brown M'Dougal.

The second parties maintained that vesting of the fee of the share of residue which was liferented by Mrs Hosack was suspended until her death; that the beneficiaries entitled to participate in the said share fell to be ascertained as at that date, and that only those of Mrs Hosack's brothers and sisters who personally survived her, and the issue of any who predeceased, were entitled to participate in the said share.

The third parties maintained that the fee of the shares of residue liferented by the daughters of the testator vested *a morte testatoris* in the remaining children of the testator who survived him, subject to defeasance in whole or in part in the event of the daughters or either of them leaving issue. They maintained therefore that each of the sons of the testator acquired a vested interest at their father's death in the fee of the share of residue liferented by Mrs Hosack.

The questions in the case were as follows:—(1) Was vesting of the fee of the share of residue liferented by Mrs Hosack suspended until her death, and does said share (subject to the liferent of her husband of one-third thereof) fall to be divided in the proportions of one-fourth part thereof to the said Edward Sambourne M'Dougal, one-fourth part thereof to the said two children of Thomas M'Dougal, one-fourth part thereof to the said children of Mrs Williams, and one-fourth part to be added to the share of residue liferented by the said Dinah M'Dougal? or (2) (*a*) Did the fee of the said share of residue vest at the testator's death in his remaining children who survived him and the issue of his daughter Mrs Williams, who predeceased him, subject to defeasance in whole or in part in the event of Mrs Hosack leaving issue who attained majority? and (*b*) Does said share (subject to the liferent of Major Hosack of one-third thereof) fall to be divided in the proportions of one-fifth part to the said Edward Sambourne M'Dougal, one-fifth part to the testamentary trustees of the deceased Thomas M'Dougal, one-fifth part to the testamentary trustees of the said James Brown M'Dougal, one-fifth part to the said children of Mrs Williams, and one-fifth part to be added to the share of residue liferented by the said Dinah M'Dougal?

Argued for the second parties—The share in question was the share liferented by the deceased Mrs Hosack, a daughter of the testator. The destination of the share in question was to a daughter in liferent, and if she should leave issue who should attain majority, to such issue in fee. Failing such issue the share so liferented was to go to "my surviving children" and the children of any who might have died leaving children. This was an ordinary clause of survivorship, and on the well-recognised principle of interpretation applicable to such clauses the words were to be taken as referring to the period of distribution, viz., the death of the liferentrix — *Young* v. *Robertson*, February 14, 1862, 4 Macq. 314.

Argued for the third parties—The direction to the trustees was to "hold" for behoof of daughters and their issue, it being specially provided that the fee was not to vest in the issue before majority. The children entitled to the fee were the children remaining at the date of the testator's death, that date being declared to be the period of vesting—under deduction of the shares of Mrs Flora Williams and of any others who might predecease the testator—*Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151, *per* Lord Colonsay, at p. 154; 4 S.L.R. 226. The codicil of 1870 was designed to meet a new set of contingencies, viz., others of the testator's children predeceasing him. The death of Flora was the occasion of the codicil, and the codicil must be read as having been made to provide for the predecease of others of the testator's children. It was accordingly provided that if a daughter should die leaving no issue, then the "remaining" children and issue of predeceasers (the latter being here mentioned for the first time) were instituted. If daughters should die leaving issue who should die in minority, "other" children and issue of predeceasers were instituted. "Remaining" and "other" meant the same thing, *i.e.*, those remaining after the death of children predeceasing the testator. That being so, the will and codicil read together supported the view that vesting was intended to take place as to the whole provisions at the testator's death. There was also the special clause in the codicil declaring the death of the testator to be the date of vesting. Only where the words of the deed were inconsistent with vesting *a morte testatoris* would a later period be taken, and the opposite was the case here — *Taylor* v. *Gilbert's Trustees*, July 12, 1878, 5 R. (H.L.) 217, *per* Lord Blackburn, at p. 221, 15 S.L.R. 776; *Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346.

LORD MONCREIFF — The only share in question is the share which was liferented by a daughter of the testator, Henrietta M'Dougal, afterwards Mrs Hosack, who died in 1901. Now the direction with regard to the shares of the daughters in the original will was this—The trustees were to divide the residue of the testator's estate into six equal parts, each of his daughters receiving one-sixth, of which, however, they were only to have a liferent; and on their deaths, if their husbands had predeceased them, the trustees were to pay the interest of each daughter's share to her children equally until they respectively attained majority.

Mrs Hosack died without issue. The provision of the original will applicable generally to the shares of predeceasing children was this—"In case of the death of any of my said children before me or before the first term of Whitsunday or Martinmas after my youngest child shall have attained majority (which is hereby declared to be the term of vesting of their provisions under this settlement) without leaving issue, then the share of such predeceaser shall go to increase the shares of the surviving children." Therefore, according to the original settlement, the period of vesting was the time when the youngest child of the testator attained majority. The settlement goes on to deal more particularly with the case of daughters dying after that period without issue, and the provision for that event is to this effect—"And in the event of any of my daughters dying after the date of the period of division aforesaid" (that is the period of vesting) "without leaving issue, then the share of the daughters so deceasing shall go to increase the shares of my surviving children." No mention is made in the meantime of children of those who predeceased the period of vesting and division.

Now, the codicil makes two alterations on the will—(1) At the time when the codicil was executed the testator's children had all attained majority, and in view of that fact the testator declared that the period of his own death should be the period of vesting instead of the attainment of majority of his youngest child. (2) Then it is provided that in case of the death of any of the testator's other children before that period of vesting without leaving issue, "then the share of such predeceaser shall go to increase the share of my other children and the issue of children deceased, which latter shall be entitled to the share which would have gone to or been liferented by their parent; and in case of either of my two surviving daughters dying after me without leaving children, the share liferented by such daughter shall go to increase not only the share of my remaining children but the shares falling to the children of any of them who have died leaving children." The codicil then declares that the fee of shares destined to children of the testator's daughters shall not vest in such children until they respectively attain majority.

The question is this, when the testator talks of children remaining or surviving, to what period does he refer? After the best consideration I can give to the case, my opinion is that he is speaking of the period of vesting which he expressly specifies in both deeds; in the first deed as being the attainment of majority by his youngest child; in the second deed as being his own death. And when he speaks of children remaining he means surviving himself. Now, as regards a share liferented by a daughter who survived him, the testator, any right to such share which vested in the other children was subject to defeasance if the daughter left issue who attained majority. But the testator's daughter Mrs Hosack died without issue; therefore, in my opinion, right to a share of the fee of her share became absolute on her death in the children of the testator who survived him, the representatives of those who survived him and predeceased Mrs Hosack, and the children who attained majority of the daughter who predeceased him leaving children who survived him.

Accordingly I think the first alternative of the second question should be answered in the affirmative.

The LORD JUSTICE-CLERK and LORD TRAYNER concurred.

LORD YOUNG was absent.

The Court answered the first alternative of the second question in the affirmative.

Counsel for the First and Second Parties—Mackenzie, K.C.—Cullen. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Third Parties—Lees, K.C.—Berry. Agents—Hagart & Burn Murdoch, W.S.

Friday, January 31.

FIRST DIVISION.

[Sheriff of Ayrshire.

METCALFE *v.* PURDON.

Servitude—Negative Servitude—Light and Air—Implied Grant—Adjoining Subjects Derived from Common Author—Lease—Long Lease—Servitude as between Tenants under Long Lease from Common Author—Servitude Necessary for Reasonable Enjoyment of Property.

Two plots of ground with buildings thereon, both parts of the subjects held under a lease for a period of more than 900 years, were conveyed at the same time, the one to one purchaser and the other to another. At the date of the severance a window in the house erected upon one plot looked upon the other, but no reference to any servitude of light in favour of the former plot was made in either conveyance.

Circumstances in which *held* that the person in right of the plot, upon which stood the building containing the win-