I am in no way impugning that doctrine. I go upon the ground that if the servitude is clearly to be inferred from that which is in the title-deeds of the parties, there may be a right both in the superior and the co-feuars to enforce it. But so far as the co-feuars are concerned, I do not go the length of deciding that that right would have been theirs if the obligation upon the superior, to extend the servitude over all his feuars, had not been inserted in the deed. I do not go into the question of what might have been done by other co-feuars whose case is not before us. I should have come to the same conclusion had there been no others,—had no other stances been feued out. I think as soon as you come to a question, as to what might be done by other feuars not neighbouring, you come to a more difficult and complex question, and one which we have neither the right nor the means of entering upon just now. I have only to add, that I do not wish by any means to impugn the farther doctrine, that when one feuar has contravened the restrictions laid upon him, he is barred from interfering with others, as we have had decided in the cases of *Walker* v. *Wishart*, 7th July 1825, 4 S. 148, and others.

On these simple grounds therefore, without meddling with more difficult and complex questions, I am of opinion that this lady is entitled to enforce these restrictions. And I may also add, that this is undoubtedly a case where the requirement of Mr Erskine, that there must be a material interest in the party enforcing the servitude, is most fully complied with.

The LORD PRESIDENT—I agree with all your Lordships that the Lord Ordinary's interlocutor should be adhered to; and as to the first question, that namely on the plea of bar by acquiescence, I do not think it necessary to add anything to what your Lordships have already said. I think, with Lord Kinloch, that it is a question of relevancy. It did not appear upon the record as at first made up, and looking at the record as now amended, I cannot say that I see valid and sufficient grounds for holding that this lady is precluded from making the challenge which she now brings in this action.

On the merits of the case, I also agree with your Lordships. It appears to me that the question between the parties can be summed up in a very few words, and is as follows:—Whether the pursuer is entitled to found on, and enforce the negative servitude *altius non tollendi*, contained in the defenders' titles, and imposed upon them by the common superior. Now the pursuer was certainly not a party to those deeds; indeed, neither she nor her predecessors or authors could have been so, as at the date of the defenders grant they had no connection with the property at all. Her stance was feued out some years later than either of theirs. Accordingly, Mrs M'Gibbon cannot be directly the creditor in any obligation imposed upon the defenders. Nor am I prepared to say that she is the assignee of the superior as creditor in the obligation, or has right to it as singular successor, in virtue of any implied assignation. That being so, I know of no legal ground upon which the pursuer would be entitled to enforce this obligation against the defenders, except that of *jus quæsitum tertio*—a ground which has a well-known place in our law. The state of the titles, the subjects which they convey, the nature of the properties, and their relations one to another, seem to me very clearly to create such a *jus quæsitum* in the pursuer. I am just as anxious as my brother Lord Deas not to appear to decide anything beyond this, but in the facts of the case, I find quite enough to enable me to come to this decision, and unless I am quite mistaken, I think that the same is the foundation of my brother Lord Kinloch's judgment. On these grounds, I think we should adhere to the Lord Ordinary's judgment, and remit the process back to him to proceed with the case.

Agents for Pursuers — Jardine, Stoddart, & Frasers, W.S.

Agents for Defenders—J. W. & J. Mackenzie, W.S.

Thursday, January 19.

SPECIAL CASE—MRS CATHERINE CLARK AND OTHERS.

Trust — Widow — Furnished House — Landlord and Tenant—Feu-duty—Assessments—Repairs. A testator conveyed his whole estate to trustees, directing them *inter alia* to give his widow the use of his house and furniture during her widowhood. *Held* that the feu-duty, assessments on property, and expense of repairs on the fabric, must be paid by the trustees out of the general estate, but that the widow was liable for the assessments on occupancy, the custom in leases of furnished houses not being applicable.

Husband and Wife—Jus Mariti—*Donation—Interest.* A married woman succeeded to certain sums during her husband's life, the *jus mariti* not being excluded. The husband, however, credited her with these sums in his books. *Held*, in a question with his testamentary trustees, that, though the husband must be presumed to have made a gift to her of the principal sums, she was not entitled to interest.

Testament—Error. Circumstances in which it was *held* that a party had failed to satisfy the Court that a testator had by mistake written one number for another.

The parties to this case were:—Mrs Catherine Clark, widow of the late Robert Clark, tea merchant in Edinburgh, *of the first part;* James Clark and Robert Clark, sons of the late Robert Clark, *of the second part;* Mrs Catherine Clark or Drybrough and others, daughters of the late Robert Clark, *of the third part;* The trustees of the late Robert Clark, *of the fourth part.*

The late Robert Clark, by trust-disposition and settlement dated 2d May 1865, conveyed to certain persons therein named as trustees his whole estate, heritable and moveable. The trustees are directed to pay to the truster's widow an annuity of £600, with a further sum of £500 for mournings, and to give her the use of his house, No. 36 Drummond Place, with the whole furniture and effects therein. In case of her contracting a second marriage, the annuity is to be restricted to £300 a-year, and the use of the house and furniture to cease. Then followed certain provisions to the truster's children, expressed as follows:—"*Fourth*, I direct my trustees, at the first term of Whitsunday or Martinmas occurring twelve months after my death, to divide the sum of ten thousand pounds (£10,000) equally among my children then in life, or should any of them have predeceased me leaving lawful

issue, such issue, share and share alike, to take the place of their deceased parent in manner following: My said trustees shall retain in their own hands the shares of this provision which may fall to my two sons until my youngest son Robert has attained the age of twenty-one years; and I farther authorise my said trustees, should they think it advisable, farther to delay the payment of the principal sum to my said sons, or either of them, until a period not exceeding seven years after my death: Farther, I direct my said trustees to retain in their own hands the shares which may fall to my said daughters or their children, and to pay the interest to my said daughters during their lives, and at their death to pay the principal to their lawful children, share and share alike, and failing such children, to the heirs or assignees of my said daughters: Farther, I authorise my trustees, should they deem it prudent, to advance to such of my daughters as may be married, on the application of such daughter and her husband, a portion of this provision not exceeding one-half, and such advance is to be considered a debt due by such daughter and her husband and their children to my estate. *Fifth*, At the death of my said wife Catherine Clark, I direct my said trustees to realise and convert into money my whole means and estate, and to divide a farther sum of £10,000 among those of my children then in life, or should any of them have died leaving lawful issue, such issue, share and share alike, to take the place of their parent, investing the same in the names of my said trustees, the interest only of such shares to be paid to my said children during their lives, and the principal equally divided among their children after their death; and failing such children, to the heir or assignees of my said sons and daughters." It was declared that the provisions to the truster's widow and children should be in full of all their legal claims against his estate, except any sums which might appear at their credit in his books.

By a codicil dated 6th May 1865, four days after the date of the trust settlement, Mr Clark directed payment to his two aunts of small annuities. The codicil proceeded:—"And I direct my trustees that it is my intention that interest shall be paid to my sons, from and after my death, on their shares of the sum of £10,000, directed to be put aside in article number four of my said trust-disposition; and as this sum will, until the final winding-up of my estate, form part of my general estate, I direct that, until such final winding-up, the rate of interest to be paid to my sons and daughters on their shares of the above sum of £10,000 shall be at the rate of 4½ per cent. per annum; and I fix this rate of interest to save any trouble or question between my children and my trustees."

By a subsequent codicil, Mr Clark revoked the nomination of trustees made in the trust-settlement, and nominated the parties of the fourth part to be his trustees.

Mr Clark died on 19th February 1869. He was survived by his widow, two sons, and three daughters. The younger son, Robert Clark, attained majority on 30th March 1869. After payment of the widow's annuity, and setting aside a sufficient sum to meet interest on the unpaid portions of the £10,000 mentioned in the fourth purpose of the trust-deed, there remained a balance of annual income from the trust-estate of about £650.

The first question between the parties had reference to the incidence of the burdens on the house No. 36 Drummond Place. The burdens were of four classes—(1) Feu-duty; (2) assessments in respect of property; (3) assessments in respect of occupancy; (4) repairs on the fabric of the house. The trustees maintained that Mrs Clark was bound to relieve them of all these payments, and proposed to deduct them from her annuity. Mrs Clark maintained that she was entitled to the use of the house free of all charges.

The second question arose as to interest on certain sums to which Mrs Clark had succeeded during the subsistence of the marriage. Mr Clark's *jus mariti* over these sums was not excluded, but he entered each of the sums in his business ledger, and also in a private ledger kept in Mrs Clark's name, in which he made himself her debtor. There was no entry of interest. Parties were, however, agreed that in other cases in which money was deposited with him by relatives, although he did pay interest on it, it was not his practice to enter the interest to their credit. On Mr Clark's death his trustees paid Mrs Clark the principal sums entered in the books to her credit. Mrs Clark claimed periodic interest at 5 per cent. on the sums from the dates when they were respectively received. The trustees denied that any interest was due.

The remaining questions were in reference to the construction of the fourth and fifth purposes of the trust-settlement as affected by the provisions of the first codicil. The sons of the deceased maintained that the truster had inadvertently used the word "four" instead of "five" in the said codicil, and that the codicil fell to be read as if the reference had been to the fifth purpose of the trust. In this view they claimed payment of interest at 4½ per cent. from the truster's death until the residue of the estate should be finally divided, or at least during such part of that period as they respectively survived, on their shares of the sum of £10,000 mentioned in the fifth purpose. The daughters, on the other hand, maintained that the codicil was to be read as it stood, and referred exclusively to the fourth purpose, but alternatively, in the event of its being held that the codicil or any part of it referred to the fifth purpose, they made the same claim as the sons. The trustees maintained that the codicil referred exclusively to the fourth purpose.

The questions submitted to the Court were the following:—"(1) Whether the charges before mentioned, or any of them, payable in respect of the house No. 36 Drummond Place, fall to be defrayed by the parties of the fourth part out of the general trust-estate? (2) Whether the said sum of £187, 14s. 3d. of interest is payable by the parties of the fourth part to Mrs Clark? (3) Whether in that part of the first codicil where he directs his trustees 'that it is my intention that interest shall be paid to my sons from and after my death on their shares of the sum of £10,000 directed to be put aside in article number four of my said trust-disposition,' the truster refers to the sum of £10,000 mentioned in that article, or to the £10,000 mentioned in article number five of the trust-disposition. (4) Assuming that said part of the first codicil quoted in the third question falls to be applied to the fifth purpose of the trust-disposition, whether the daughters as well as the sons of the truster are entitled under it to receive interest from the truster's death on their shares of the sum of £10,000 mentioned in the fifth purpose at the rate

of 4½ per cent.? (5) Assuming that the said part of the first codicil, quoted in the third question, falls to be applied to the fourth purpose of the trust-disposition, whether the remaining part of the codicil refers and falls to be applied to the fourth or to the fifth purpose? (6) Assuming that the fifth question falls to be answered by affirming the application of the last part of the codicil to the fifth purpose, whether sons and daughters are both entitled, so long as they respectively survive, to draw interest from the date of the truster's death, until the division of the residue of the estate, on their shares of the sum of £10,000, mentioned in the fifth purpose, at the rate of 4½ per cent.?"

SOLICITOR-GENERAL and KEIR for the first and second parties.

LORD ADVOCATE and WATSON for the third parties.

MAIR for the fourth parties.

In support of the contention by the second parties that "four" had been written by mistake for "five" in the codicil, it was argued—There are two sums of £10,000 mentioned in the trust-deed, one in the fourth purpose, the other in the fifth purpose. The first of these sums is to be divided at or soon after the truster's death, the second not till the death of his widow. The truster has occasion to refer to one of the sums in the codicil. He does so by a double reference, a numerical reference to the part of the deed in which it is mentioned, and a description of the way in which the sum is dealt with—viz., "as this sum will, until the final winding-up of my estate, form part of my general estate." These references cannot be both correct. The description is perfectly accurate if applied to the sum mentioned in the fifth purpose, but quite unintelligible if it refers to the fourth purpose. There must be a mistake in one of the two references. Considering that the codicil was executed only four days after the deed, it is difficult to suppose that the testator was in complete error as to the nature of the fund, but quite easy to suppose that he made a slip as to a mere number.

At advising—

LORD PRESIDENT—The first question is, whether the charges on the house fall to be defrayed by the widow, or by the trustees out of the general trust funds. The testator conveys his whole property to trustees, and directs them to give the use of the house in which he lived and its furniture to his widow during her life, or at least her widowhood. The charges in question are divided into four classes. As regards the feu-duty, there is no doubt that the widow, as a mere occupant, has nothing to do with it. The same applies to the repairs; no tenant of any kind has to pay for repairs on pavement, walls, and such like. As to the charges under class 2, I have as little doubt. Supposing this lady to be a tenant in the proper sense, she would be under no obligation to relieve the proprietor of his share of the assessments, and it is difficult to see how she can stand in a less favourable position. Class 3 raises a question of a different kind. It consists of assessments in respect of occupancy, and the question arises whether Mrs Clark is to be considered as a tenant of a furnished house. It is difficult to decide this as a mere question of intention, and we must seek for some principle of equity. Plainly the testator intended that his widow should occupy the house in which he lived and died rent free. Mrs Clark contends that she is just the tenant for life of a furnished house, and appeals to the custom that in furnished houses the proprietor pays the tenant's taxes (*Macome*, 6th June 1868, 5 Scot. Law Rep., 587). But in real life a tenancy for life of a furnished house is unknown, and I do not think the custom would be applicable to such a case. The custom has probably arisen in this way. A tenant who comes for a short time to a furnished house is not to be troubled with taxes at all. The landlord, in fact, pays them for him, and includes them in the rent. But here this lady pays no rent. It seems to me fair, considering the relation established between this lady and the trustees, that she should pay the taxes on occupancy. This view is strengthened in the case of some of the assessments under this head, by the fact that their very existence depends on her occupying the house.

The next question is in regard to interest on certain sums to which Mrs Clark succeeded during the lifetime of her husband. These sums fell to Mr Clark *jure mariti*, but he chose to deal with them as if they did not. Accordingly, he must be held to have made a gift of them to her; but there is no presumption that he made a gift of the interest. The spouses are presumed to have spent it year by year as it accrued, and Mrs Clark cannot now claim it from her husband's trustees.

Next, as regards the first codicil, the question is, whether the testator used "four" by mistake for "five;" and whether, consequently, we must read this codicil as applicable to the fifth purpose of the trust-deed, and not to the fourth. Each of these clauses deals with a sum of £10,000, and it is that circumstance alone which gives some plausibility to the contention of Mr Clark's sons. What they ask the Court to do is not to fill in a blank, but to delete one number and substitute another. In order to judge of the reasonableness of this request, we must first understand the scope of the fourth and fifth purposes.—*(Reads fourth purpose.)* No express provision is made as to what is to be done with the interest on the sons' shares of this £10,000. With regard to that on the daughters' shares the directions are perfectly clear. We come now to the fifth purpose.—*(Reads.)* This does not come into operation till the widow's death. The trustees are then to realise the estate, and out of it to take £10,000, and divide it in a certain way among the children *then* alive—not necessarily the same parties as the beneficiaries under the fourth purpose, who are the children alive at his own death. The class to be benefited is or may be different, and the mode of dealing with the two sums is also different, and the reason is obvious. The truster evidently relied on the second sum of £10,000 as part of the capital to secure his widow's annuity. All interest on the part of the children in that fund is necessarily postponed till the widow's death.

Let us now examine the proposal of the second parties to read "five" for "four" in the codicil. The conclusion I have come to is, that the codicil as it stands is badly enough expressed; but if we read "five" for "four" in it, it becomes utter nonsense—(*reads codicil with the variation proposed*). There is an obvious inconsistency between its two parts. By the first part the sons are to have interest on the sum of £10,000, dealt with in the fifth purpose, while the daughters are to have none. By the second part, sons and daughters alike are to have interest at the rate of 4½ per cent. Moreover, even if we confine ourselves to the first part, it does not seem probable that the truster would

give his sons interest on a sum which was partly intended to secure the widow's annuity. We can read the codicil as it stands harmoniously with the trust-deed. The truster had provided in the fourth purpose that the term of division of the sum there dealt with should be the Whitsunday or Martinmas that occurred twelve months after his death. He alters that, and makes his death the term. Again, there is no express mention of interest in the trust-deed on the sons' shares. And though by operation of law, I think interest would have been payable, still the truster may have thought the point at least doubtful, and determined to make it clear. At the same time he fixes the rate of interest in the case of both sons and daughters. Thus we have clear and intelligible motives for the addition of the codicil to the trust-deed.

The main argument of the second parties is based on the clause, "as this sum will until the final winding up of my estate form part of my general estate." Undoubtedly this is not accurate. The strong probability was that the £10,000 under the fourth purpose, at least the sons' portions, would be paid before the widow's death. There is some mistake about the clause, how engendered I do not know. But I am clearly of opinion that the codicil refers to the fourth purpose, and to that alone. Even if there had been a blank, it would have been far easier to read "four" than "five."

The other Judges concurred as to all the questions.

The findings of the Court were accordingly to the effect that the first question was to be answered in the affirmative, except as regards the assessments on occupancy; that the second question was to be answered in the negative; and in regard to the remaining questions, that the first codicil refers exclusively to article number four of the trust-deed.

Agent for First and Second Parties—Thomas J. Wilson, S.S.C.

Agent for Third Parties—James Webster, S.S.C.

Agent for Fourth Parties—James Finlay, S.S.C.

Thursday, January 19.

SECOND DIVISION.

FERNIE *v.* ROBERTSON.

Heir—Meliorations—bona fides. An heir is bound to pay for repairs made in *bona fide* on the subject to which he suceeds by a person who believed herself heir, in so far as the subjects are increased in value by the repairs.

This was an action at the instance of James Fernie, against William Robertson and Grace Robertson. Grace Robertson did not defend the action. The summons concluded for payment of several sums of money, and for adjudication of certain subjects at East Wemyss which had belonged to the mother of the defenders.

The circumstances are fully set out in the Lord Ordinary's (GIFFORD) Note.

"The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, productions, and whole process, repels the plea stated by the defender to the pursuer's title to sue,—Finds, in point of fact, that the property claimed by the defender William Robertson, as heir of his mother, the deceased Mrs Margaret Salmond or Robertson, has been, and is improved and increased in value to the defender, as heir foresaid, to the extent of at least £80 sterling, by reason of the work done, and meliorations made by the pursuer and his cedents, and that, after making allowance for the sums paid to account to the pursuer and his cedents, Finds that the said meliorations were made by the pursuer and his cedents in *bona fide;* and Finds, in point of law, that the defender cannot claim the property without becoming liable for the meliorations to the extent above-mentioned: Therefore decerns and ordains the defender, the said William Robertson, as heir of his said mother, held as charged to enter heir to her, and who has declined to renounce the succession, to make payment to the pursuer of the said sum of £80 sterling, with interest thereon at 5 per cent. per annum from 12th October 1869, and until paid; and in payment and satisfaction thereof, adjudges, decerns, and declares, in terms of the conclusions for adjudication directed against the said defender, as heir foresaid: *Quoad ultra*, finds it unnecessary to dispose of the remaining conclusions of the summons: Finds the pursuer entitled to expenses, and remits, &c.

"*Note.*—Although the sums involved in the present action are not large, the case raises several questions of great nicety and difficulty.

"The Lord Ordinary is of opinion that it has been sufficiently established in point of fact—(1) That the work embraced in the various accounts sued for was actually performed by the pursuer and his cedents, and that the charges therefor are moderate and reasonable: (2) That the expenditure in repairing, renewing, or reinstating the property, was judicious and profitable, and such as would have been incurred by a prudent proprietor: (3) That the work was done by the pursuer and his cedents on the employment of Grace Robertson: (4) That when the employment was given, and the work done, the property belonged to the deceased Mrs Margaret Salmond or Robertson, who resided in family with Grace Robertson, her daughter, and that the said Mrs Robertson was then, and had been for some time previously, totally incapable of managing her affairs from mental imbecility, resulting from paralysis and old age: (5) That the said employment was given and accepted, and the work was done in the *bona fide* belief, both on the part of Grace Robertson and of the pursuer and his cedents, that there was a valid disposition and settlement of the said property in favour of Grace Robertson: (6) That a disposition and settlement by Mrs Robertson in favour of Grace Robertson, dated 27th April 1861, had been executed, being No. 28 of process, and that the said deed is, *ex facie*, valid and effectual: (7) That after the death of Mrs Robertson in December 1868, and after the repairs and rebuilding had been executed, the defender, William Robertson objected to the said disposition and settlement, on the ground that his mother's hand had been led in signing it, and that Grace Robertson has not insisted on her rights under the said disposition and settlement, but has allowed the said William Robertson to take possession of the said property as his mother's heir: (8) That accordingly, the said William Robertson is now in possession of the property, and claims to be absolute proprietor thereof: (9) That there is still due to the pursuer and his cedents a sum of about £132, being the balance of their accounts for the work done on said property, besides interest, and besides expenses incurred in proceedings against Grace Robertson; and (lastly), That by reason of the said expenditure, the pro-