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-

perty held and claimed by William Robertson is increased in value to him to the extent of at least £80, and that after taking into account all partial payments made to the pursuer and his cedents by Grace Robertson.

"The Lord Ordinary abstains from entering into any detail of the evidence by which he thinks the foregoing propositions are established. Most of them, it is thought, can hardly admit of serious dispute. In reference to the last point, the Lord Ordinary has necessarily acted as a jury, assessing the value of the meliorations. Although the whole expenditure is proved to have been prudent and beneficial, it is plain that the property is not thereby increased in value to the defender to the full amount of the expenditure, and, as in the Lord Ordinary's view, the defender is only liable in *quantum factus est locupletior*, the Lord Ordinary has been obliged to make a jury estimate of the extent of the defender's *lucrum*. He thinks the sum of £80 is very moderate, taking everything into account. The defender had an ingenious argument, that the amount of the defender's gain must first be fixed, and then the payments to account made by Grace Robertson must be deducted therefrom. The Lord Ordinary, however, does not feel it to be necessary to go into strict accounting on this principle, and, indeed, there are not materials for doing so."

"Holding the facts above noted as established, the Lord Ordinary is of opinion—(1) That the circumstances raise a case for the application of the law of recompense. The principle of recompense is a very broad one, and admits of wide application. See Stair 1, 8, § 3, 6, and 7; 2, 1, 40; Erskine 1, 7, 33; 3, 1, 11; and 3, 3, 52. Bell's Principles, § 538 and 937, and cases quoted. Lord Stair holds that even he who builds *mala fide* on another man's property is entitled to recompense. Erskine doubts this; and the case of *Barbour* v. *Halliday*, 3d July 1840, 2 D. 1279, seems to establish that the builder's *mala fides* may exclude his claim for recompense. For illustrations of the general rule, reference may be made to Morrison's Dictionary *v.* Recompense, 13,399. See particularly *Jack*, 13,412; *Halkett*, 13,412; *Rutherford*. 13,422. The principle has also been applied in several more modern cases.

"Now, if the Lord Ordinary be right in point of fact, that the defender is reaping benefit or *lucrum* from expenditure disbursed by the pursuer and his cedents upon the defender's property in *bona fide* and *sine animo donandi*, there are strong equitable grounds for finding the defender liable in recompense, the amount being strictly limited *in quantum locupletior factus est*.

"(2) It was strongly contended that recompense was excluded, because, when the employment was given, Grace Robertson knew that she was not proprietrix, but that she had only a *spes successionis* under her mother's settlement. The Lord Ordinary is not insensible to the difficulty which this specialty raises. It is not necessary to determine whether *bona fide* expenditure by an apparent or presumptive heir, made during the ancestor's life, would entitle to recompense against a disponee who defeated the heir's expectations. The Lord Ordinary thinks it would. The circumstances of the present case, however, are much stronger. The mother was an aged paralytic, hopelessly imbecile, and incapable of altering the settlement which she had made seven years before. The daughter resided with her, and took charge generally of her affairs, and the son, William Robertson, the present defender, was also resident in the same house, and was perfectly cognisant of the whole improvements and restorations made upon the property. He says he remonstrated with his sister, but it is certain he never intimated any objections to the pursuer or his cedents, the other tradesmen employed. The Lord Ordinary thinks it would be against all justice to allow the defender to claim, without recompense, the meliorations of which he has unquestionably taken the advantage. Instead of an old house dilapidated, ruinous, and absolutely done, the defender has got a new and substantial house, larger in size, and producing from £6 to £7 per annum more rent.

"(3) It was further contended by the defender that any claim for meliorations lay at the instance of Grace Robertson alone, and not at the instance of the tradesmen, who were mere personal creditors of Grace Robertson. This point also is attended with nicety; and if Grace Robertson had been sequestrated, it might possibly have been held that the trustee upon her estate could claim the meliorations, leaving the pursuer merely a ranking as an unsecured creditor. But Grace Robertson is called as a party to this action. Her rights are not vested in, or transferred to, any competing third party, and the meliorations if due are, so to speak, *in medio*, in the defender's hands unpaid. The Lord Ordinary thinks that, in the absence of competition, the claim may be directly enforced by the pursuer, without the circuitous process of attaching or adjudging Grace Robertson's rights separately, and then making them good against the defender or the property.

"(4) The Lord Ordinary does not think that this case can be assimilated to the case of meliorations made by a tenant, which, in the absence of special stipulation, are held to be made for his own behoof, and which found no claim for recompense. (See *Thomson* v. *Fowler*, 8th February 1859, 21 D. 453, and cases quoted.) In the present case, the meliorations were made by and for a supposed proprietor or expectant proprietor, whose right of succession was supposed practically indefeasible.

"(5) A difficulty was raised from the circumstance that the *ex facie* valid and effectual disposition and settlement, No. 28 of process, was not reduced or renounced, and that, *ex facie*, Grace Robertson was still proprietrix.

"If this were so, it would only alter the form of the decree, for there are alternative conclusions for adjudication against Grace Robertson, in case it shall be held that the property belongs to her. It is proved, however, that the settlement has been challenged as null. The witness, J. G. Robertson, seems to admit that he either led the testatrix's hand or pencilled her signature, but, what is more material, Grace Robertson seems to have abandoned the settlement, and the defender, the son, is in actual possession as heir. It is said that this is a collusive arrangement to defeat the pursuer's claims, and there are some traces which favour this view. But, however this may be, the defender is the heir, he has been charged to enter, and has refused to renounce the succession; and the Lord Ordinary has therefore dealt with him as the party entitled to take the property, and actually in possession thereof, as proprietor."

The defender, William Robertson, reclaimed.

RHIND (MILLAR, Q.C., with him), for reclaimers.

WEBSTER and GIBSON, for respondent, were not called upon.

At advising—

The LORD JUSTICE-CLERK—I am satisfied with the judgment of the Lord Ordinary. The old woman could not act for herself, and it was well known that her daughter acted for her. The tradesmen knew that she was acting for her mother, and did not rely on her as proprietor, because they were aware that her right only arose on the death of her mother. The property belonged to the old woman, and on her death was claimed by her son as heir at law. The debts due to the pursuer were good against the mother, and must descend to her heir. I could understand his saying that he was not liable for improvements which were not properly executed. But as the Lord Ordinary has limited his judgment to what were necessary repairs, there is no room for that contention.

I am not much impressed by the quarrel between the defender and his sister as to these improvements. He was living in the house on which the repairs were made, and, if he had desired the tradesmen not to go on with the work, he might easily have stopped them. He cannot now take the property without paying for these improvements.

Agent for Pursuer—Wm. Mitchell, S.S.C.

Agents for Defender—D. Crawford and J. Y. Guthrie, S.S.C.

Saturday, January 21.

FORSTER v. FORSTER.

Reduction—Perjury. The allegation that a decree was obtained by perjury is not sufficient ground for reducing it.

This was an action of reduction of a decree of declarator of marriage obtained by the present defender Mrs Jessie Grigor or Forster, against the present pursuer James O. T. Forster, on 25th May 1869. The pursuer alleged "For the greater part of the time during which said action was in dependence the present pursuer was absent from this country. Especially he was absent while the preparations were made for the proof, and while the proof was being taken. Owing to this, much evidence that might have been available to the present pursuer was overlooked and not laid before the Court. In that action the present defender produced a bible, with the following writings therein:—'I, James Ogilvie Tod Forster, take thee, Jessie Grigor, to be my wedded wife from this day henceforth until death us do part; and thus do I plight thee my troth.' 'I, Jessie Grigor, take thee, James Ogilvie Tod Forster, to be my wedded husband from this day henceforth until death us do part; and thus do I plight thee my troth.' (Signed) 'James Ogilvie Tod Forster; Jessie Grigor. *Sept. 2d*, 1865.' These writings she alleged to be in the handwriting of the present pursuer, with the exception of her own signature; and she adduced two witnesses, William Atkinson and Jane Bain, who expressed their belief that the said writings were in his handwriting. The witnesses who spoke to these writings, namely, William Atkinson and Jane Bain, were not in a position of knowledge which entitled them to speak on such a matter. Moreover, the pursuer avers that the said witnesses are not entitled to credit. They gave wilfully false testimony on other parts of the case essential to the success of the pursuer in that action, and that with regard to facts within their own knowledge."

The Lord Ordinary (JERVISWOODE) sustained the 2d and 3rd pleas of the defender, which were "The statements in the condescendence are not relevant or sufficient to support the conclusions of the summons. The decree of declarator of marriage having been pronounced *in foro* in an action in which the present pursuer was throughout duly represented, after proof had been led, and the pursuer heard thereon, the present action of reduction ought to be dismissed."

"*Note*—The questions here raised are of importance not only to the parties immediately interested in the present suit, but in a more general aspect.

"As respects the interests of the pursuer and defender here, it may be, and has been, argued with much force, that if the decree under challenge proceeded on evidence which can now be proved to have been unworthy of credit, it ought not to stand. But the opinion of the Lord Ordinary is that where a decree of this Court is challenged on allegations of falsehood in the evidence, it is essential to their relevancy that these should be of the most specific and direct character in their terms. What shall be held to be such it is not necessary here to inquire further than in so far as respects the matters of averment made on the part of the pursuer. But these, in the opinion of the Lord Ordinary, fall short in material respects of that specification and precision which the Court are warranted and bound to expect and require."

The pursuer reclaimed.

KEIR, for the defender, moved the Court to remit the reclaiming-note to the other Division of the Court, in respect that the decree in question had been pronounced by that Division.

LANCASTER objected to the competency of this course.

The Court refused the motion, on the ground that, under Act of Sederunt, it was neither imperative nor competent for them to grant it.

LANCASTER (the DEAN OF FACULTY (GORDON), and the SOLICITOR-GENERAL (CLARK) with him) argued that there was no authority or principle for holding that a reduction on the ground of falsehood was incompetent. Was there to be no remedy? The cases of *De La Motte* v. *Jardine*, M. 447; and *Robertson* v. *White*, M. 12,100, showed that an action of reduction was competent. The pursuer could not know that the witnesses were going to perjure themselves till they gave their evidence, and as he was then out of the country he was at great disadvantage.

KEIR (with him SHAND) were not heard in reply.

The Court held that the Lord Ordinary was right. There was no allegation of *res noviter*, nor of subornation of perjury, which might have made a difference. The pursuer had notice that the writing alleged to be in his handwriting was to be produced at the proof, and he did not bring a single witness to prove that it was not his. He cannot now be allowed to do what he ought to have done at the proof.

Agents for Pursuer—H. & A. Inglis, W.S.

Agents for Defender — Macdonald & Roger S.S.C.