witnesses' signatures as named on the document. It is, I think, settled law that a testator may prescribe formalities in addition to those required by law, and that if the document in which these are prescribed does not give effect to what he has laid down for himself, the will will be bad. The leading case is *Naismith* v. *Hare*, July 27, 1821, 1 Shaw's App. 65, where the House of Lords, reversing the judgment in the Court of Session, held that where a testator had stated on the testament in question 'I hereto set my hand and seal,' and a piece of it which was presumed to have contained the seal was found cut off, the will was inept. The whole question, of course, is one of presumed intention. . . . The presumption, it appears to me is that having prescribed for himself what he believed to be an essential, the testator must be held to have hesitated as to doing that which he thought necessary to make the will a binding deed." . . .

Mrs Elizabeth Pursey appealed to the Sheriff (CLARK) who adhered.

Mrs Pursey appealed to the Second Division of the Court of Session.

The Court pronounced this interlocutor :—

"Recal the interlocutors of the Sheriff-Substitute and of the Sheriff appealed against: Remit to the Sheriff with instructions to issue confirmation in favour of the petitioner J. Jones junior and Gavin Watson as executors-nominate under the wills of 10th September 1875 and 10th September 1882, mentioned in the record, without prejudice to any questions that may be raised as to the validity of the said wills: Find the parties entitled to expenses out of the estate of the testator."

Counsel for Petitioners—M'Clure. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for Mrs Pursey — Lorimer — Boyd. Agent—Thomas Hart, L.A.

Wednesday, May 26.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

RANKIN *v.* WITHER.

Husband and Wife—Donation inter virum et uxorem—*Recompense—Meliorations—Whether Meliorations by Husband on Wife's Property will found Claim of Recompense.*

The husband of the proprietrix of a house advanced a sum of money for the purpose of making improvements upon it. The result was that the house was entirely reconstructed and greatly increased in value. The house was let and the annual rent was enjoyed by the husband in virtue of his *jus mariti*. The wife died intestate, without issue. *Held* (1) that the husband was not entitled to any sum as recompense from the heir-at-law who succeeded to the house, although the value of it was greatly increased by the husband's outlay; and (2) that the sum expended by him could not be regarded as a donation which he was entitled to revoke and so recover from the wife's heir.

The late Mrs Mary Wither or Rankin succeeded under the settlement of her father to a house in Stranraer destined to her and her heirs and assignees. She died in August 1884 without a will, and her heir-at-law, who was her nephew John Wither, succeeded to the house. This was an action by her husband Alexander Rankin for declarator that John Wither was bound to pay him the sums he had disbursed upon the house, or at least to pay him such sums in so far as the house had been ameliorated, his claim being therefore first for repayment, and alternatively for recompense for meliorations. There was a petitory conclusion for £457 as the sum expended, or alternatively for such sums as should be held to be the value of the meliorations.

The facts were, that the pursuer and his wife were married without any contract, and the pursuer had therefore by his *jus mariti* the rents of the house, which was in and prior to 1867 let for £17 annually. It had fallen into very bad repair, and in 1879 the spouses agreed that it should be taken down and rebuilt, which was done by the pursuer at an expense of about £457. After the rebuilding the house was let at £35 a-year. The wife got these rents, but occasionally gave the pursuer part of them, and she also handed over to him a sum of £100. It was the intention of the wife to leave the house to her husband, but she died suddenly without a will.

The pursuer stated that his advances constituted a donation which he now revoked.

He pleaded—"(1) The pursuer having revoked the donation in favour of his wife, is entitled to recover the same from the defender, in so far as he is in enjoyment of that donation. (2) The subjects in question having been meliorated by the pursuer, he is entitled to recover from the defender the value of the meliorations in so far as he is *lucratus* thereby."

After a proof, in which the facts above stated were elicited, the Lord Ordinary (M'LAREN) pronounced this interlocutor:—"Finds that the subjects libelled were ameliorated on the order of the pursuer and at his cost, and that the consequent increase in the value of the subjects is not less than £350: Finds that such meliorations were made by the pursuer for his own benefit as a temporary possessor in virtue of his *jus mariti* and right of administration of his wife's property: Finds that the said meliorations became part of the wife's estate by accession, and were not acquired by her under the title of donation: Finds further that the defender is under no obligation to make a compensatory payment to the pursuer for the value of the said meliorations: Therefore assoilzies the defender from the conclusions of the action, and decerns: Finds the defender entitled to expenses, &c.

"*Opinion.*—In this case a claim is made by the pursuer against his wife's heir for the whole or part of the sum which he laid out in improving and adding to the value of his wife's heritable estate.

"The claim is made alternatively on the ground of donation or recompense. In the first view the sum claimed is £457. In the second view the sum claimed may be stated as £350. The subject in question is a house in Stranraer, valued at £550, and the claim is for the difference between the present value and the original value (£200) of that house. I do not understand that the parties differ as to the figures which I have

stated as embodying the result of the proof which was taken before me.

"The question is whether the pursuer has a good claim on either of the grounds indicated.

"In considering this claim I hold it to be proved that the house in question was pulled down and rebuilt with greater accommodation in the years 1878-79. It was converted from a one-storey house with attics into a two-storey shop and house.

"I also hold that this was done in a fair administration of the property, that is, in a fair exercise of the husband's right of administration. The old house was in a ruinous state, and it would have been difficult to get a tenant to take it, except upon an agreement to lay out a considerable sum in repairs; and it was thought preferable to make the most of the site by rebuilding. The house was accordingly rebuilt at a cost of £457, and brought in a fair return.

"If it had appeared to me that the pursuer undertook this work and expended the £457 for the benefit of his wife, I should still have felt difficulty in awarding anything under the claim to be restored against donation. I think it would have constituted a case of *donatio remuneratoria*. There was another small house which the pursuer's wife had inherited, bringing in a rent of £7 per annum. This was sold, and the pursuer received the proceeds; and on another occasion he received £100 from his wife which had come to her by gift or succession. I think that in a question of donation these acquisitions might very fairly be set off against the pursuer's outlay for the benefit of the wife's property, it being always remembered that where value is given the Court will not be disposed to enter into the question of the precise equivalents of the gifts.

"But the truth is, that in the pursuer's intention the rebuilding was undertaken purely as a matter of business; and donation, so far as I can see, is the last thing which he had in view. The rent of his wife's property belonged to the pursuer in virtue of the *jus mariti*. The property being of value as a site he naturally wished to make the most of it as a rent-producing subject; and this, as I conceive, was the only and sufficient motive of the transaction. Mr Rankin did not mean to make a donation to anyone, or to benefit anyone except himself, by this little building speculation. But in the matter of donation intention is everything, and in the absence of such intention I cannot hold that a case of donation has been established. On the contrary, I feel perfectly sure that if Mr Rankin had really given a donation to his wife he would not have come into Court seeking to take the property back again. It is just because he had no such intention that he thinks there is some hardship in this property having gone to his wife's heir—a hardship which justifies him in trying the question.

"It is a more difficult question whether the expenditure of money in the circumstances described will give rise to a claim of recompense. This is not the case of a person building *mala fide* on property which does not belong to him. Neither is it the case of a person who builds on the property of another in the *bona fide* belief that it is his own. The pursuer was quite aware that the property was his wife's estate; there was no mistake on his part as to the nature of his rights, such as in other circumstances would give rise to a claim of recompense. It is the case of a temporary possessor improving the property for his own benefit; and in such cases the general rule is, that the building or improvement falls to the estate by accession. If the pursuer had been a tenant under a lease for years (it might be for nineteen or for ninety-nine years), in either case the building would have fallen to the landlord on the expiration of the temporary interest. Here the pursuer was virtually a tenant for life (his wife's life) in respect of the *jus mariti;* and I am unable to see in this distinction anything on which a claim for recompense can be founded. The element of life tenure clearly makes no difference. But then his right is something higher than that of a tenant, because the *jus mariti* is a sort of property. Then he made the improvements, so far as I am able to judge, for his own benefit as a *quasi* proprietor; and like the tenant for years he is presumed to have reaped the benefit of the improvements during his tenure. He may not actually do so; the investment may be a losing speculation, just as in the case of a tenant under the rules of the common law. But he has added to the value of his wife's estate, and he cannot get his money back again. This is the view I take of the case—a view which necessarily leads to absolvitor from the conclusions of the action."

The pursuer reclaimed, and argued—This was a case of donation by a husband to a wife, and therefore revocable. The husband had advanced the money to the wife to make the alterations upon the house; he now revoked this donation, and the result of the revocation was to raise up a claim of debt against the defender, who had succeeded as Mrs Rankin's heir-at-law, and who was therefore bound to repay to the pursuer the money laid out, at least in so far as he was *lucratus* by the expenditure. (2) The defender was bound to repay the sums laid out upon the subject in so far as he was *lucratus*, on the principle of recompense. The pursuer had laid out this large sum of money for the benefit of his wife. The subject was his wife's and not his, therefore the heir-at-law who succeeded Mrs Rankin in the subject, and who was reaping the benefit of the meliorations made upon the subject, was bound to recompense the pursuer. —*Jack* v. *Pollock*, Feb. 23, 1665, M. 13,412; *Rutherford* v. *Rankine & Lees*, Feb 28, 1782, M. 13,422; *Scott* v. *Forbes*, March 5, 1755, M. 8278; Stair's Inst. i. 8, 6; *Fernie* v. *Robertson*, Jan. 19, 1871, 9 Macph. 437; *Paterson* v. *Greig*, July 18, 1862, 24 D. 1370; *Nelson* v. *Gordon*, June 26, 1874, 1 R. 1093. This decision was not followed in the next case, which was an Outer House case—*Reddie* v. *Yeaman*, July 1875, 12 S.L.R. 625. These authorities went to show that where repairs were made upon any subject by any person in possession of the subject, and where these repairs were necessary, the fiar was bound to repay to the liferenter's representatives the amount by which the estate was *lucratus* owing to these repairs. In this case there was almost complete reconstruction of the subjects, and therefore a great deal more than merely making meliorations on the subject.

Argued for the defender—This was not an instance of the doctrine of recompense at all. The typical case was where some-one who believed, but erroneously, that the property was really his

own made alterations by which it was improved in value; by the law of recompense the true owner was bound to repay such a one any outlay by which the estate was *lucratus*. But here the pursuer knew quite well that his wife and not he was the owner of the subject; any alterations made upon the house were therefore made for his own use and benefit, and he was not entitled to recompense for his outlay. The pursuer thought the property would be left to him, but disappointed expectation was not equivalent to the erroneous belief that they belonged to him, and it was necessary to show that the person who made the alterations was in error as to his right of property in the subject in order to set up a claim for recompense.—*Buchanan* v. *Stewart*, Nov. 10, 1874, 2 R. 78. The case of *Jack* was not an authority upon this point at all. It was really an authority upon the law of deathbed, as was shown by the longer report of it in M. 3213.

At advising—

Lord Justice-Clerk—This case can be compressed within a very reasonable compass. I think that the Lord Ordinary has come to a right decision. This case does not fall under the principle regulating the cases between liferenter and fiar, and no case was quoted to us that is upon all-fours with this one. It seems that the wife of the pursuer was the fiar and in possession of certain property in Stranraer, and then the husband says that he was led by his wife to believe that she intended to leave this property to him, and that she had made a will in his favour. Unfortunately she died suddenly without executing any will to that effect; but before her death, relying upon the assurance that the property would be his at her death, the husband had laid out a certain sum of money upon it, with the result that the property was increased in value. After the wife's death, as there was no will, her heir-at-law of course succeeded, and the question now arises, can the husband get back from the heir-at-law the money he spent upon the property to the extent to which the heir is *lucratus?* This money was thus spent partly for the benefit and convenience of the wife of the pursuer if she should survive him, and partly for his own use if he should be the survivor, as according to her assurance he was to obtain the property. The question is put to us whether he can recover that sum under the head of recompense, and I think that he cannot. Certainly I think that on these considerations the husband must be taken, as Lord Neaves says [in *Buchanan* v. *Stewart*, cited *supra*], as "acting *in suo*,"—in fact, that any money expended on the property was for his own benefit. That is the general view I take of the case, although, no doubt, it ran into many subtleties, and according to that view the defender must prevail.

The case of *Scott* which was quoted to us has, I think, been rather shaken by the later decisions, especially by the decision in the case of *Barbour* v. *Halliday*, July 3, 1840, 2 D. 1279. I have, on the whole, come to the conclusion that the pursuer's case cannot be sustained.

As regards the argument that the payment of this money in repairing the house was a donation by the husband to the wife, I do not think that it can be reduced to a practical form at all.

Lord Young—I am of the same opinion, and I should not like to say that there is anything doubtful about the principles that govern the decision in such a case as this—that is, where a tenant for years or for life, or a possessor of property on a limited title, improves the subject for his own profit or enjoyment. It is said that if in consequence of these improvements it should turn out that the heir who succeeds to the property is *lucratus*, that therefore the representatives of the tenant for years should have a claim against the heir. I think that it is quite clear that there is no such claim. If the tenant for years or in possession on a limited title should improve the subject—perhaps decorate it, which may be done at great expense—or make additions to it for his own use and enjoyment, there shall be no claim against the successor by his representatives. I think that is quite clear, and I quite agree with the statement of the principle of recompense laid down by Lord Neaves in the case of *Buchanan* v. *Stewart* (Nov. 10, 1874, 2 R. 78), that where a man, in the honest, although erroneous, belief that the subject is his own, spends money and makes improvements upon it, the party who shall finally make good his title to that property shall not be entitled to take the benefit of these meliorations without making recompense. I think that the statement in Lord Stair's work [cited *supra*] carried that doctrine too far when he states that this obligation of recompense obtains in so far as the owner is *lucratus*, even in favour of a builder *mala fide* upon another man's ground, and that is what Lord Neaves says is the law of Scotland upon the recent authorities. Lord Neaves distinguishes the case where a party who honestly believes that the property is his own makes some meliorations upon it, from the case of one who makes a change upon the subject for his own convenience and comfort. In the latter case there is no error at all, and that is essential to success in a case under the law of recompense.

Probably the case of *Nelson* v. *Gordon*, June 26, 1874, 1 R. 1093, may not be taken as affording any countenance to that theory, but it was pointed out during the argument that in that case the decision was influenced by certain considerations which do not enter into this case. That case was decided on the ground that the defender was a creditor in possession of the subject upon a security title. If that was so, we have no occasion to consider whether in the circumstances it was rightly decided. In that case the subject was a house, and the liferent belonged to a lady, who occupied it for seventeen years along with her second husband. During that period of seventeen years the occupiers laid out £70 upon the house, and at the end of that time and expenditure the house was said to be £12 more valuable than it had been at the beginning of the time. That was the case. But it was complicated to some extent by the fact that the lady's second husband had bought up a heritable debt upon the subject, not a very large debt, some £50. Of course the debtors were liable for the payment of the interest on the debt so long as it existed, but then it was merely a wife paying over the interest to her husband with whom she was living, and within a month of the termination of the liferent the principal of the heritable debt was paid. I should have had difficulty in seeing any peculiarity in that case.

The case seemed too clear for argument, and accordingly I decided the case at the end of the debate. Upon re-consideration of the case I still adhere to the view of the case I took at the time.

But that does not interfere with our judgment in this case. The deceased lady here was the fiar, and she only could build the house, or give consent to its being built. She got money to build it with. Now, it does not matter in the least that it was her husband who provided the money, it would not have been different if she had obtained the money from any third party, unless it was given in donation. But the view that this sum was given to the wife as a donation and was revocable, and so was revoked, was not persisted in, and, indeed, there can be no revocation; the money was given to build the house, and there the house stands. That being the case, the idea that the sum was given by the husband to the wife as a donation is out of the question. I think the case is quite clear, and agree with your Lordship's judgment.

Lord Craighill—I am of the same opinion. It appears that the pursuer, having right of administration of his wife's property, made improvements upon this property at Stranraer. I think that the pursuer was acting in his own interest and convenience in making those improvements, and merely took an opportunity of carrying into effect these improvements at a cost defrayed by himself. He is not therefore entitled to recover the value of these meliorations from the heir-at-law of the late proprietrix. I do not think that in this case the pursuer has shown any ground on which he is entitled to succeed. The spending of this sum of money was not a donation to his wife, nor was there any error, which is necessary in a claim for recompense.

Lord Rutherfurd Clark—I am of the same opinion as your Lordships, and think that the defender ought to be assoilzied. I do not think that in the circumstances a case for recompense arises. I would prefer to put my judgment upon another ground—upon a peculiarity which arises in this case. The pursuer has no right of title to this house, nor did he have any through his wife; he had no right even to possession. No doubt under the circumstances of their marriage he had the *jus mariti* and the right of administration to his wife. But these powers gave him no right either to title or to possession. The Lord Ordinary says in his interlocutor—"Finds that such meliorations were made by the pursuer for his own benefit as a temporary possessor, in virtue of his *jus mariti* and right of administration of his wife's property." I never heard of the *jus mariti* giving a husband the right of possession over his wife's heritable property, and in any dealings with the wife's heritable property, so far as the *jus mariti* is concerned, the husband is in no way different from a total stranger. Of course when the rents of the heritable property are paid he may claim them under his *jus mariti*, because they then become part of his wife's moveable property. But with respect to his wife's heritable property he has no right to it whatever. There is nothing in this case but this. While the life-rentrix was in possession of the house she made or allowed to be made certain changes upon the house. I do not care where the money to make these changes came from. The only way in which that money could be recovered was by raising up a claim of debt against her estate—in the first place against her moveable estate, and if that was not large enough to satisfy the claim, then by proceeding against her heritable estate. But I do not see where any claim of debt can come in in this case, so that her executor may claim as his own any benefit made to the estate after her death. The claim must be for debt or nothing. As the money was given by her husband, it might be said that here was a case of donation; but that ground of claim has been rightly abandoned. I am therefore for assoilzieing the defender, but I confess I do not like the form of the Lord Ordinary's interlocutor.

The Court pronounced this interlocutor:—

"Find that the subjects libelled were ameliorated on the order of the pursuer and at his cost, and that the consequent increase in the value of the subjects is not less than £350: Find that the defender is under no obligation to make a compensatory payment to the pursuer for the value of the said meliorations; therefore refuse the reclaiming-note: Of new assoilzie the defender from the conclusions of the action, reserving to the pursuer all claims competent to him for the use of his gable adjoining the said subjects: Of new find the defender entitled to expenses in the Outer House: Find him entitled also to expenses in the Inner House," &c.

Counsel for Pursuer — Darling — Graham Murray. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Defender—J. P. B. Robertson—Low. Agents—Morton, Neilson, & Smart, W.S.

Thursday, May 27.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

LIFE ASSOCIATION OF SCOTLAND *v.* CAMPBELL SMITH AND OTHERS.

Obligation—Delivery—Mandate—Death of Signatory of Bond before it was Delivered.

A bond for money to be advanced was subscribed by one of the co-obligants, who thereafter died while the bond was in the hands of the agent of the borrowers, and before it had been delivered to the lenders. The borrowers' agent thereafter delivered the bond to the lenders in return for the money. *Held* that the implied mandate to the borrowers' agent to deliver had fallen by the death of the obligant, and that therefore the bond must be considered as undelivered in a question with his representatives.

This was an action at the instance of the Life Association of Scotland against John Campbell Smith, Sheriff-Substitute of Forfarshire at Dundee; Patrick Don Swan, Provost of Kirkcaldy; and William Andrew Douglas, merchant, Dundee, executor-dative of the deceased Andrew Douglas,