tor, at last resolved to treat the case as a breach of contract, and he intimated that he was prepared to leave. No doubt in such circumstances a landlord would in general be disposed to meet the tenant, and to come to an understanding, or to appoint some neutral person in their confidence to see what was to be done to remedy the mischief. I think that if a landlord took that position, and the mischief was one that admitted of a remedy in a short time, it might very well be that the tenant would not be justified in persisting in terminating the contract. But then I fail to see that such a position was taken up by the landlord in this case. I think upon justifiable grounds it was for him to come forward and make some proposal. Instead of that he took up the position that he would only do what he pleased, and I do not think that anyone has said that the proposed remedies were sufficient to protect the house from the recurrence of damp. I think, then, that the parties having each held to his rights, and the tenant having offered proof that the house was in so insanitary a condition that he was obliged to give notice to leave, it lay upon the landlord to prove the contrary if he desired to retain the tenant. My opinion is that he has not proved that the house was in a tenantable condition. I agree with the observations Lord Adam has made on the evidence, which I think is altogether insufficient to establish a point of this kind. I am therefore of opinion that the action has failed, and that we ought to return to the judgment of the Sheriff-Substitute.

LORD KINNEAR—I quite agree with your Lordships, and I only add that I entirely agree with Lord M'Laren's observations, that if in the course of a tenancy a house has become uninhabitable from some emergent cause which was not known to the parties at the beginning of the contract, and if that defect be remediable, then if the landlord looks into the matter and ascertains what is the cause of the defect which exists, and if there is reasonable ground for believing that he honestly intends to set it right, then it would be improper for the tenant to say, "I will not give time to put matters right, but I will go at once." I do not know that there is any rule of law governing the relation of landlord and tenant at that stage except this, that both parties must be reasonable, and that if the landlord undertakes to put the house into a habitable condition, the tenant should give him sufficient opportunity to do so. But then I agree that that is not a condition of fact which we find established in this case, because the tenant having again and again complained, the landlord's agent writes, in the first place, that he does not admit that the house is in an insanitary condition or unfit for habitation as the tenant was trying to make out, and then says, "but I will put in a few extra gratings." And then the tenant replies repeating his complaint, and intimating the opinion that he had received from his doctor, that the condition of the house was prejudicial to the health of his family, and the final answer to that was that there was nothing wrong with the house at all—that it was neither damp nor troubled with smells, and that it was not uninhabitable; and then the writer referred to the operations which had been carried through, of putting in new ventilators, and said that was all he was going to do. Now, I confess I agree with your Lordships that there is nothing to lay any duty upon the tenant to remain longer after he had been advised by his own medical attendant that his wife's health was being seriously injured, in order to give the landlord an opportunity of doing something which it was quite certain the landlord did not intend to do. I therefore agree that the view taken by the Sheriff-Substitute is the right one, and that we ought to revert to his interlocutor. There is, however, one point in that interlocutor upon which your Lordship has not made any observation, and that is that the Sheriff-Substitute finds the defender entitled only to three-fourths of the expenses incurred by him. Mr Kennedy, in opening, complained of that finding, and asked that we should find him entitled to the whole expenses of process; and so far as I am concerned, I agree with that; so far as my view goes, I am inclined to think that he must get the whole of the expenses.

LORD ADAM—I do not think there is any ground for modifying the expenses.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff dated 17th April 1899: Find in terms of the findings in fact and in law of the Sheriff-Substitute dated 14th February 1889, except in so far as he finds defender entitled to three-fourths of the expenses incurred by him in the action, and decern: Find the defender entitled to the expenses incurred by him both in this and in the inferior courts.

Counsel for the Appellant — Kennedy — W. Thomson. Agent—Wm. Balfour, S.S.C.

Counsel for the Respondent—Campbell, Q.C. — M'Lennan. Agents — Cumming & Duff, S.S.C.

Thursday November 23.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

CRAM (WALKER'S FACTOR) *v.* CUMMING AND OTHERS.

Succession — Trust — Absolute Conveyance or Conveyances in Trust—Substitution.

A testator bequeathed his whole estate consisting of heritage and moveable property to his wife "and heirs and assignees, heritably and irredeemably," and proceeded—"But these presents are granted and shall be accepted

by the said Elizabeth Walker, and the foresaid lands and other heritages hereby conveyed are disponed with and under the burden of the payment of my whole just and lawful debts, and sick-bed and funeral charges, and of the payment of the following legacies, viz., at my wife's death what she had from me shall go to my nephews and nieces,* all to have an equal share. Would like the old house where we were all born to be kept in the family. *What I mean by my nephews and nieces is my three sisters' families—the Stephens, Balsillies, and Marion Cumming."

By a subsequent codicil he provided—"I appoint James Stephen, William Stephen, and David Stephen to be trustees; also my wife Elizabeth Walker. I confirm the above will with the exception that I leave my wife Eliza Walker sole trustee, to use principal of money if she requires it."

His wife survived and entered on possession of the estate, but did not make up a title to the heritage. On her death without disposing of it, *held* that whether the deed imported a trust or a substitution, the testator's nephews and nieces were entitled to the property in preference to the wife's relations.

The late William Walker, shipmaster, Tayport, died in January 1897, survived by his widow but without issue. He left a general disposition and deed of settlement dated 1881, by which he gave, granted, assigned, disponed, devised, legated, and bequeathed to and in favour of his wife Elizabeth Walker "and heirs and assignees, heritably and irredeemably," all his estate, heritable and moveable, and he nominated and appointed his said wife to be his sole executor. The general settlement then proceeded—"But these presents are granted and shall be accepted by the said Elizabeth Walker, and the foresaid lands and other heritages hereby conveyed are disponed with and under the burden of the payment of my whole just and lawful debts, and sick-bed and funeral charges, and of the payment of the following legacies, viz.—at my wife's death what she had from me shall go to my nephews and nieces,* all to have an equal share. Would like the old house where we were all born to be kept in the family. *What I mean by my nephews and nieces is my three sisters' families—the Stephens, Balsillies, and Marion Cumming.
"W. W."

A holograph codicil dated in 1891 was docqueted on the general settlement in the following terms, viz.—"I appoint James Stephen, William Stephen, and David Stephen to be trustees; also my wife Elizabeth Walker. I confirm the above will with the exception that I leave my wife Eliza Walker sole trustee, to use principal of money if she requires it.
"WILLIAM WALKER."

On the death of her husband Mrs Walker entered on the possession of the estate and was confirmed executrix. She did not, however, make up a title to the heritable estate. Upon her death in November 1897 a petition was presented to the Court of Session for appointment of a judicial factor on the trust-estate, and Mr James Cram was appointed. After realising the heritable and ingathering the moveable estate there was in the factor's hands a sum of about £1350. He then raised this action of multiplepoinding.

A claim was lodged on behalf of the persons, twelve in number, described in the testator's general settlement, viz.—"my nephews and nieces — my three sisters' families, the Stephens, Balsillies, and Marion Cumming." They maintained that Mrs Walker, the widow, was only trustee under the said general settlement, with a power (which she did not exercise, or which at all events she only exercised to a very small extent) to use a part of the capital of the estate for her necessities. Alternatively, they maintained that even if it were held that, on a sound construction of the settlement, Mrs Walker was fiar of part or all of the estate of her husband, the claimants were substitutes to her under a destination which she did not evacuate, and therefore that they were entitled to the said estate, heritable and moveable, of William Walker.

A claim was also lodged on behalf of Mrs Walker's heir-at-law, who averred that the whole of William Walker's estate passed to his widow, and that she died intestate *quoad* the heritable estate. He therefore claimed the heritable property forming part of the trust-estate, and an equal portion, along with the claimants to be mentioned, of the moveable estate left by Mrs Walker under a will left by her.

A number of children of brothers of Mrs Walker, including the reclaimers, also lodged claims which they based upon the contention that the fee of William Walker's estates, heritable and moveable, had passed to her at his death. They made alternative claims either on the assumption that the estates which they alleged Mrs Walker derived from her husband on his death had been conveyed to them by her said will, or on the assumption that in regard to these estates she had died intestate.

Mrs Walker left a will dated in 1892, and relative codicils dated in 1894. It dealt only with a sum in the Union Bank at Dundee, which in 1892 amounted to £80, and in 1894 to £100, and with certain articles belonging to herself.

The Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"Repels the claim for Mrs Sarah Lees Lindsay or Stewart and others; also the claim for David George Lindsay; and also the claim for John Roberts Lindsay: Ranks and prefers the claimants, Marion Mansfield Cumming and others, to the whole fund *in medio*, in terms of their condescendence and claim: Finds no expenses due to or by any of the claimants in the competition, and decerns."

Opinion—"The late Mr William Walker, shipmaster at Tayport, made his will by filling up in his own hand one of those skeleton forms which I believe can be obtained at a stationer's, and it must be admitted that he and the Birmingham printer between them have not made a very good job of it. But I think it is not difficult to discover what his real meaning was. He had not very much estate to leave, and his first care very properly was that his wife should derive the utmost possible benefit from his estate. Next to her he seemed to have wished to benefit his nephews and nieces, the children of his three sisters.

"Now, the way in which he proceeded to do that was by leaving everything to his wife, whom he appointed his executor, but under burden of payment at her death of what he calls legacies, or rather what the printer calls legacies, but which he afterwards described as 'what she had from me,' to the nephews and nieces. Then he says that he would like the old house where they were all born to be kept in the family (but that of course is simply precatory), and before finishing the deed he appoints his wife and two other persons as his trustees. Then it seems to have occurred to him at a later stage, ten years afterwards, that it might not be sufficient that his wife should merely have the income of his estate, and accordingly he adds what is truly a codicil to this effect, 'I confirm the above will, with the exception that I leave my wife, Eliza Walker, sole trustee, to use principal of money if she requires it.'

"Well, now it might perhaps be maintained that his true meaning in all this was to give his wife the fullest power of spending his estate for her own use and benefit, but not of willing it away. It is, however, quite unnecessary to decide the case upon any of the rules which govern 'protected succession,' that being in truth a doctrine rather applicable to marriage-contracts than to testamentary deeds, although in some cases it has been applied to testamentary deeds. I say that, because, to take the lowest view for the nephews and nieces who are claimants in this process, it seems to me that there was a valid substitution of these persons to the widow, she being in that view full fiar although she was called trustee, being entitled to spend the estate as she liked and even to will it away, but the intention being that if she did not will it away it should go to the favoured legatees of the second class. This intention, I think, is to be gathered from the deed as a whole, but in particular from the fact that he burdened his wife with the payment of the legacies, as he calls them, to his nephews and nieces; that he appointed her a trustee, and that he said they were to have at her death all that she had from him.

"Now, it is said for her relations who are here claiming the estate that this was not a substitution because it was a mixed succession, and in cases of moveables or mixed succession substitution is not to be presumed. That is perfectly true. But the presumption against substitution means no more than this, that in moveable and mixed succession a gift over is *in dubio* to be read as if intended merely to provide for the case of the primary legatee predeceasing the testator or the period of vesting. There is no law to the effect that there cannot be substitution in moveables if the intention is clearly expressed, and if the moveable estate can be clearly identified. But the expression of the intention here is, I think, quite clear. It is also quite possible to identify the estate because the widow only survived her husband for a few months.

"She had nothing of her own except a little money which she dealt with in her own will, and although she had proceeded during those few months to ingather the estate, and even to alter some of the investments (taking them, I observe in passing, in her own name as trustee), still it is the easiest thing in the world to identify this estate, because it simply consists of everything she had except her money in the bank and her personal belongings. Therefore it seems to me there are here present all the elements which are required to constitute a valid substitution in moveables, and if that be so, it is not maintained, and it cannot be maintained, that Mrs Walker ever attempted to evacuate the substitution by any deed of her own. Accordingly, I shall sustain the claim for the husband's relations, and repel the claims for the heir-at-law and next of kin of the wife."

Certain of the claimants, being children of a brother of Mrs Walker, reclaimed.

Argued for the reclaimers—This is a case of a mixed estate, and our rules of moveable succession apply—*Bell's Executors* v. *Borthwick*, 24 R. 1120. The substitution is therefore evacuated by the wife taking. There was no trust in the wife, because she is only made trustee for herself, and in that case there is no difference whether a person is constituted trustee or not, he takes without trust limitations — *Paul* v. *Hume*, 10 Macph. 937.

Argued for the respondents Marion Cumming and others—There is no absolute gift to Mrs Walker. Trustees are appointed. *Bell's Executor* is based on the fact that there is there no trust. There is by implication here a limitation of Mrs Walker's right to a liferent, viz., from the right to encroach on capital given by the codicil—M'Laren on Wills (3rd ed.), p. 322.

LORD JUSTICE-CLERK—Though this case has the peculiarity that the will of the late Mr Walker consists of a form of will procured from a Birmingham stationer and altered in Mr Walker's hand, I have not felt so much difficulty in ascertaining his intention as I have sometimes felt in considering more elaborate deeds prepared with professional advice. Under the will I think that Mr Walker's intention was

plainly shown to be that his wife should have the benefit of his means during her life, and at her death his means should go to his own nephews and nieces. My opinion is that that can be ascertained from the deed itself, but that construction is strongly confirmed by the codicil in which Mr Walker says that he appoints certain persons to be trustees, and confirms the will, "with the exception that I leave my wife Eliza Walker sole trustee, to use principal of money if she requires it." That is inconsistent with the idea that the wife was already owner of the whole, for the purpose of the codicil is not to cut down a right already given to the widow but to give her more than the will gave, viz., a power to encroach on the capital.

I therefore agree with the result arrived at by the Lord Ordinary, my opinion being based on the testator's intention in my view of it.

LORD YOUNG—I think the Lord Ordinary's conclusion is right, that the nephews and nieces are entitled to the whole property, but I am not satisfied with the reasons by which he reaches that result, though I agree that if you take the case as a gift of the fee to the widow, there is substitution in favour of the nephews and nieces on her death without having evacuated the destination. But I am disposed to take this view, that we have here only a trust-deed in which the will of the truster is expressed to be carried into execution by the trustees, to whom he commits the execution of the whole. I do not think the wife was sole trustee, for this codicil appoints other trustees. She is the sole trustee to whom the property is conveyed, but he appoints others, and he goes on—"I confirm the above will, with the exception that I leave my wife, Eliza Walker, sole trustee, to use principal of money if she requires it"—that is to say, the other trustees are not to interfere with the use of the funds if she requires it. The other trustees never accepted, and upon the wife's death the estate was handed to a factor to act as trustee. What was the wife to do with the estate of which she was trustee? I look for the expression of the truster's will, and I think it is that the estate should pass to the wife as sole trustee, and then at her death to the nephews and nieces. The wife is to pay the following legacies, viz., "At my wife's death what she had from me shall go to my nephews and nieces," *i.e.*, the estate conveyed to her in trust shall by her death pass to her husband's relations. There is no doubt of his intention that she shall be entitled to use the principal sum, but I think he intended that she should have the income of the estate to do with as she liked while she lived. It would be absurd to say that a man gave power to use the capital but not to use the income. I think his meaning and intention too clear to be resisted that his wife should have the income while she lived. If that should not be enough, she should use as much of the capital as she required, but that upon her death it should go to her husband's nephews and nieces. Her own will shows that she thought her whole property consisted of the property which she disposes of, viz., £80 in the bank in Dundee. The truster meant that the whole should be handed over to his nephews and nieces. Therefore, arriving at the same conclusion as the Lord Ordinary, I should prefer to put their right on the ground I have stated.

LORD TRAYNER—I offer no opinion on the question of substitution. I am satisfied that the Lord Ordinary has given effect to the intention of the testator.

LORD MONCREIFF—I concur. I think it is immaterial to decide whether the wife was only a trustee or whether she was fiar, and there was a substitution in favour of the husband's nephews and nieces. I think if the right interpretation be given to the will and the terms of the codicil, it will be seen that what the testator intended was that the lady might use the principal sum till her death, but that it should then go to his nephews and nieces. Had the writing stopped at the end of the will a case of substitution would have been raised, but the codicil indicates a trust.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the Reclaimers—Craigie—W. Thomson. Agent—Marcus J. Brown, S.S.C.

Counsel for Respondent—Sym. Agents—Wishart & Sanderson, W.S.

Friday, November 24.

FIRST DIVISION.

(Without the Lord President.)

MACKAY *v.* MACLACHLAN.

Expenses — Withdrawal of Reclaiming-Note.

Where a reclaiming-note was withdrawn before the case was put out for hearing, the Court *refused* to grant an award of expenses exceeding £2, 2s., although the respondent had printed a plan produced by him at the proof, after four letters to the reclaimer's agent inquiring what documents he proposed to print had remained unanswered.

D. E. Maclachlan, of South Aros, Mull, brought an action against John F. Mackay, W.S., in which, after a proof, the Lord Ordinary (KYLLACHY) assoilzied the defender.

On 3rd July 1899 Maclachlan reclaimed.

On 23rd November the reclaimer lodged a note craving leave to withdraw the reclaiming-note on payment of £2, 2s. of modified expenses.

Counsel for the respondent moved for the expenses of printing a plan which had been produced by him at the proof. He stated that he had printed it when the case stood eleventh in the roll from the last case put out for hearing, and that he had previously