deemed to be registered as a county elector," and further, is not entitled to be registered in the supplementary list. It is difficult to see why failure to pay county rates should be a disqualification as regards the parish council franchise, while failure to pay burgh rates should be immaterial. I am accordingly of opinion that the appeal ought to be sustained and that the question of law should be answered in the negative.

LORD ARDWALL—That is the opinion of the Court.

The Court answered the question in the case in the negative, and sustained the appeal.

Counsel for the Appellant—C. Johnston, K.C.—Russell. Agents—Russell & Dunlop, W.S.

Counsel for the Respondent—Lyon Mackenzie—Waugh. Agent—Alex. Ramsay, S.S.C.

COURT OF SESSION.

Friday, December 23.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

JOHNSTONE *v.* MACKENZIE'S TRUSTEES.

Succession—Public Burdens, Incidence of —"Liferent Use and Enjoyment" of Dwelling-house—Liferent or Right of Occupancy—Liability for Feu-Duty, Proprietor's Taxes, and Landlord's Repairs.

A testator conveyed his whole estate to trustees, and directed "That my trustees shall give to my wife . . . the liferent use and enjoyment of my dwelling-house . . . together with the whole household furniture and plenishing therein." He further provided for payment of an annuity of £500 to his wife and certain legacies to his brothers, and then directed his trustees, after setting aside the sum of £20,000 to provide for the said annuity, to pay the whole residue of his estate in certain proportions to his wife and brothers, and on the death of his wife to pay and convey to his brothers in certain proportions the said dwelling-house, household furniture and plenishing, and the said sum of £20,000, and any surplus revenue accrued thereon. The testator was survived by his widow, who entered into possession of the dwelling-house. Questions having arisen as to her liability to pay feu-duty, proprietor's taxes, and landlord's repairs, she brought an action for (1) declarator that she was entitled to occupy the dwelling-house free of liability for these burdens, and that the trustees were bound to pay the same, and (2) for reimbursement by the trustees of the amount paid by her in respect of the said charges since the testator's death. *Held* that on a sound construction of the bequest the widow's right was not a true liferent but merely a right of occupancy, and was not therefore burdened by any obligation to pay feu-duties, proprietor's taxes, and landlord's repairs.

Personal Objection—Bar—Taciturnity—Acquiescence—Actings—Liferent Use of House—Payment of Public Burdens.

A testator directed his trustees to give his wife the "liferent use and enjoyment" of his dwelling-house. Circumstances in which *held* that the widow, who without demur had acquiesced in the distribution of the residue without any sum being set aside to meet feu-duty, proprietor's taxes, and landlord's repairs applicable to the dwelling-house, and had paid these burdens for eight years after the testator's death, was not barred from recovering from the trustees the amounts so disbursed.

James Whitelaw Mackenzie died on 10th September 1900, leaving a trust-disposition and settlement whereby he conveyed his whole property, heritable and moveable, to his wife, the pursuer in this action, and to his brothers Robert Mackenzie and Walter Mackenzie, in trust for, *inter alia*, the following purposes—"(First) For payment of all my just and lawful debts, deathbed and funeral expenses, and the expenses of executing this trust; (Second) That my trustees shall give to my said wife in the event of her surviving me, during all the days of her life, the liferent use and enjoyment of my dwelling-house, number nine Glencairn Crescent, Edinburgh, or of such other house as shall at the time of my death be my residence in Edinburgh, and belong to me, together with the whole household furniture and plenishing therein at the time of my death, including books, pictures, linen, china, plate, plated articles and others, without however any obligation upon her to replace articles broken or perishing with the using; and in the event of the said dwelling-house and the whole or any part of said household furniture and plenishing being sold by my trustees, as they are hereby with consent of my said wife empowered to do, they shall pay to her the annual income of the price or prices obtained therefor during all the days of her life; Declaring that the said liferent provisions shall be for the alimentary use of my said wife, and shall not be assignable by her, or affectable by the diligence of her creditors; (Third) That my trustees shall pay to my said wife, in the event of her surviving me, an annuity after the rate of Five hundred pounds per annum, payable in advance, and that half-yearly, commencing at the first term of Whitsunday or Martinmas which shall occur after my death, declaring that the said annuity is granted to my said wife in name of aliment allenarly, and for her own personal support and subsistence only, and it shall not be in the power of my said wife

to anticipate or assign the said alimentary provision, nor shall the same be arrestable or affectable for her debts or deeds of any description whatsoever; (Fourth) That my trustees shall pay to my said brother Walter Mackenzie the sum of One thousand pounds sterling, and to my said brother Robert Mackenzie the sum of Five hundred pounds sterling; (Fifth) That my trustees shall, in the event of my said wife surviving me, after setting aside the sum of Twenty thousand pounds to provide for the foresaid annuity, pay and convey to her one-half of the whole residue and remainder of my means and estate, and shall pay and convey the remaining one-half to my said brother Walter Mackenzie to the extent of two-thirds thereof, and to my said brother Robert Mackenzie to the extent of one-third thereof; and shall, on the death of my said wife pay and convey to them in the same proportions the said dwelling-house and household furniture and plenishing, or, if the same shall have been sold, the prices thereof, and the sum set aside to provide the said annuity, and any surplus revenue accrued thereon."

The trust-disposition and settlement also contained a declaration that the foresaid provisions in favour of the pursuer should be in full of all her legal rights. On the death of the testator the pursuer was separately advised by Messrs Davidson & Syme, W.S., regarding her legal rights and her rights under the will, and to enable her to make her election between the legal and conventional provisions the trustees submitted to her and her agents a statement showing the respective values of the said rights. This statement, under the head of provisions conceived in favour of the pursuer under the will, contained the following item—"1. Liferent of dwelling-house No. 9 Glencairn Crescent, Edinburgh—annual value of house after deducting feu-duty, landlord's taxes, repairs, &c., say, £100—capital value of liferent, £1896, 2s. 6d." Thereafter the pursuer intimated to the trustees her intention to abide by the settlement. The trustees made up title to the dwelling-house in their names as trustees, and allowed the pursuer to obtain possession of the house and furniture therein. They invested £20,000 to provide for the annuity, and paid the legacies, and thereafter divided the whole residue of the estate. A formal discharge was thereupon granted, *inter alios*, by the pursuer in favour of the trustees, exonering and discharging them of their whole actings and intromissions with the trust estate up to 10th November 1902, including the distribution of the residue. The pursuer married again. From the testator's death until and including the term of Martinmas 1908 the pursuer paid the feu-duty, proprietor's taxes, and landlord's repairs applicable to the said dwelling-house without demur. Before the following term, however, she intimated to the trustees that she would no longer make these payments, and demanded from them reimbursement of the payments she had already made. The trustees refused to admit liability, and at the term of Whitsunday 1909 deducted the amount of the feu-duty from the alimentary annuity due to her at that term. The pursuer thereupon raised the present action, which concluded for (1) declarator that she was entitled to occupy the said dwelling-house free of all liability for feu-duties, proprietor's taxes, and landlord's repairs, and that the trustees were bound to pay same, and (2) payment to her by the trustees of £441, 9s. 4d., being the amount of the feu-duties, proprietor's taxes, and landlord's repairs disbursed by her since the date of the testator's death, together with the interest thereon.

The pursuer pleaded—"(1) The pursuer being entitled on a sound construction of the trust-disposition and settlement of the late James Whitelaw Mackenzie to occupy the testator's dwelling-house free of all liability for the burdens referred to on record, decree of declarator should be pronounced in terms of one or other of the alternatives of the first conclusion of the summons. (2) The pursuer having disbursed sums in connection with the said house which were properly payable by the defenders as trustees, is entitled to decree in terms of the second conclusion."

The defenders pleaded—"(4) Upon a sound construction of the trust-disposition and settlement of the deceased James Whitelaw Mackenzie, the pursuer is liable for the several burdens sued for, and decree of absolvitor should be pronounced. (5) In any event, in the circumstances stated, the pursuer is barred *personali exceptione* from insisting in her present claim, and the defenders should be assoilzied."

On 9th February 1910 the Lord Ordinary (GUTHRIE) assoilzied the defenders.

Opinion. — ". . . . The case cannot be decided by attention only to the opening words of the clause quoted, namely, 'that my trustees shall give to my said wife, in the event of her surviving me, during all the days of her life, the liferent use and enjoyment of my dwelling-house.' This appears from a statement of the corresponding clauses in the cases quoted to me. I refer to—

1. *Clark*, 1871, 9 M. 435, in which the clause to be construed ran as follows :—	'also to give her (his wife) the use of my house No. 36 Drummond Place, with the whole furniture and effects contained therein so long as she remained his widow.
2. *Rodger*, 1875, 2 R. 294, in which the testator bequeathed	to his wife 'the liferent use and enjoyment of the house in which I reside at the time of my death, free of all feu-duty, ground-annual, taxes, and all other deductions.'
3. *Bayne*, 1894, 22 R. 26. In this case the testator ordered his trustees	'to make over to Miss D the house at present occupied by me at C , together with the whole furniture, &c., therein, and that during all the days of her natural life, and so long as she shall not enter into any marriage after my death.'
4. *Cathcart*, 1899, 2 F. 326. The testator bequeathed	to his wife 'the liferent use of any one house he may die possessed of.'

"In *Cathcart* and *Rodger* the right was held one of occupancy notwithstanding the use of the word 'liferent.' The same result followed in the case of *Bayne*, although the house was to be 'made over,' and also in the case of *Clark;* but in both these cases the benefit of the bequest was to terminate on marriage.

"I hold that the pursuer must be dealt with as a liferenter, liable to meet the feu-duty, proprietor's taxes, and landlord's repairs, as well as the occupant's rates and tenant's repairs. In the four cases above cited there was residue not directed to be divided during the lifetime of the beneficiary, and not specially destined at her death, which was available for payment by the trustees of the burdens in question. These cases are, in that particular, in contrast with the present case. On the testator's death, after paying two legacies of £1000 and £500 to Mr Mackenzie's brothers, setting aside £20,000 for the pursuer's annuity of £500, and retaining the furniture for the pursuer's liferent use and enjoyment, the residue was immediately divisible—half to the pursuer and the other half in unequal proportions to the testator's brothers. Except it may be by necessary inference in so far as necessary for the expenses of executing the trust, there is no direction to set aside and retain during the pursuer's lifetime any sum to meet debts. The burdens in question would require a sum not less than £2000, which would at the pursuer's death be intestate succession of the deceased, the only provisions in favour of the testator's brothers being a right to the dwelling-house and furniture in fee, and the sum set apart for the pursuer's annuity with accumulations. The opening words of the clause in question being capable of being read either in the sense of liferent or of occupancy, I think the testator's intention not to free the pursuer from the burdens which she seeks to throw on the trustees may be fairly inferred from his failure to provide the trustees with any fund out of which the burdens can be met, and from the unlikelihood, if he had meant such a fund to be retained without any special direction, of his not providing for its distribution after the pursuer's death.

"Another point confirms me in the view above expressed. The testator provides that the pursuer shall not be under any obligation 'to replace articles broken or perishing with the using.' If the pursuer is a liferenter such a provision is necessary, but if she is an occupant the provision, so far as referring to articles broken, is useless, for a mere occupant would not be liable for articles broken.

"If the view above expressed be sound it is unnecessary to consider the case of personal bar presented by the defenders."

The pursuer reclaimed, and argued—(1) Although not so in form, this was truly an action of relief by the trustees, who had put the pursuer *in petitorio* by deducting the feu-duty from her alimentary liferent. The dwelling-house being feudally vested in them they were *prima facie* liable for feu-duty, proprietor's taxes, and landlord's repairs, and it would require a very special indication of intention by the testator to put such expenses on the beneficiary. The terms of the will would never have entitled the pursuer to demand from the trustees a conveyance of the dwelling-house in liferent, and the right given was quite different from that conferred when there was a direct conveyance of heritage in liferent—M'Laren's Wills and Succession, vol. i, p. 614, *et seq.* Where there was a direct conveyance the beneficiary was put in the position of a registered owner with a limited title, whose name would appear in the valuation roll, and who would be liable for such charges as were here in dispute. The trustees in the present case occupied that position, and the so-called liferenter was merely an occupier. The case of *Campbell* v. *Wardlaw*, March 15, 1882, 9 R. 725, 19 S.L.R. 498, July 6, 1883, 10 R. (H.L.) 65, 20 S.L.R. 748, was in quite a different category. The present case could not be distinguished from *Clark and Others*, January 19, 1871, 9 Macph. 435, 8 S.L.R. 314; *Rodger's Trustees* v. *Rodger*, January 9, 1875, 2 R. 294, 12 S.L.R. 204; *Bayne's Trustees* v. *Bayne*, November 3, 1894, 22 R. 26, 32 S.L.R. 31; and *Cathcart's Trustees* v. *Allardice*, December 21, 1899, 2 F. 326, 37 S.L.R. 252, which must be taken as deciding that phraseology such as the testator here used did not confer a proper liferent. The circumstance that the will contained no express provision for the payment of these particular burdens and no indication of a source out of which they should be paid did not show the testator's intention that they should be borne by the pursuer. Such provisions would be quite contrary to practice. The direction to the trustees to pay the expenses of administration was sufficient, and that direction fell to be executed before any of the other provisions of the will. In any event the £20,000 would obviously yield much more than was necessary to pay the widow's annuity, and the testator, who would be alive to this, must have intended the surplus revenue of this fund to be devoted to purposes other than the payment of the annuity. Moreover it was unlikely that the testator should intend these expenses to be paid out of a provision which he had made alimentary. The power to sell the house given to the trustees, subject no doubt to the pursuer's consent, supported the view that this was a mere right of occupancy. The pursuer also referred to *Kinloch's Trustees* v. *Kinloch*, February 24, 1880, 7 R. 596, 17 S.L.R. 444, and the *Heritable Securities Investment Association, Limited* v. *Miller's Trustees*, December 17, 1892, 20 R. 675, 30 S.L.R. 354. (2) The pursuer was not barred from insisting in her claim by having elected to abide by the settlement without objecting to the accuracy of the statement submitted to her by the trustees. Because the trustees chose to put a value upon her rights under the will she was not therefore bound by that value, and in any event the statement expressly provided that the valuations contained in it should not be binding on either party. Neither was she barred by

the discharge granted to the trustees, which merely exonerated them so far as the estate had been paid away, but did not discharge them from carrying out their duties as trustees so far as the trust was still subsisting. Nor was it material that before the pursuer made her claim the whole of the residue had been divided without objection on her part. If there were no trust funds available and it was sought to make the trustees personally liable the position might be different, but the defenders were only sued *qua* trustees, and there were ample trust funds available to meet these charges.

Argued for the respondents—(1) In none of the cases cited by the pursuer was any particular significance given to the words used in making the bequest. The question was treated as one of intention to be gathered from the settlement as a whole. If the scheme of settlement in the present case was so considered it became clear that the testator intended these burdens to be borne by the pursuer. Expenses of administration were a proper charge on residue, but here, distinguishing this case from all the authorities relied upon by the pursuer, the settlement provided for an immediate distribution of residue. Further, there was specific appropriation of the dwelling-house and of the £20,000 and the surplus revenue thereon, which constituted the whole trust funds after the division of the residue. In these circumstances omission to provide for payment of the said burdens was significant as indicating the testator's intention that they should be borne by the pursuer. It would be a breach of trust for the trustees to use any part of the revenue from the £20,000 for payment of any administration expenses except those incurred in connection with the administration of this fund. The testator had directed the trustees in the event of the house being sold to pay to the pursuer the annual income of the price realised. If the pursuer's contention were sound this *surrogatum* would be of less value, to the extent of the income on the amount of the burdens capitalised, than the right she at present enjoyed, but it must be presumed that the testator regarded the two rights as of approximately equal value. It was not material that the dwelling-house was vested in the trustees without any direction to convey it to the beneficiary in liferent. There might be a proper liferent although there was a trust and no title in the liferenter—*Campbell* v. *Wardlaw*, *cit. sup.* The words "liferent use and enjoyment" had a well-recognised meaning in law—*Morris*, *&c.* v. *Anderson*, *&c.*, June 16, 1882, 9 R. 952, 19 S.L.R. 716; *Mackenzie's Trustees* v. *Kilmarnock's Trustees*, 1909 S.C. 472, 46 S.L.R. 217. This case was distinguishable from the authorities relied on by the pursuer, in all of which the house formed part of the residue, and there was residue available for payment of the burdens. Moreover, in *Clark and Others*, *cit. sup.*, the mere use of the house was given till the second marriage or death of the beneficiary. In *Bayne's Trustees* v. *Bagne*, *cit. sup.*, also the right was terminable on marriage, while in *Cathcart's Trustees* v. *Allardice*, *cit. sup.*, the right was conferred by an onerous obligation contained in an antenuptial marriage contract. In none of these cases was the liferentrix interested in the residue at all, whereas here she took the largest share of it. The defender also referred to *Brand* v. *Scott's Trustees*, May 13, 1892, 19 R. 768, 29 S.L.R. 641. 2. In any event the pursuer was personally barred from insisting in her claim. She was herself a trustee and residuary legatee. Having all along paid the burdens in question, having elected to abide by the settlement without disputing the accuracy of the statement showing the value of her conventional provisions submitted to her by the trustees, and having granted to the trustees a discharge, which ratified and approved their whole actings, after they had without objection on her part divided the residue, she could not call upon them to pay these charges now, when they had no funds that could be used for that purpose without a breach of trust, or in any event without putting the whole burden on other beneficiaries to the complete relief of the pursuer, who would have had to bear one half of it had her claim been made when it could have been met out of residue.

At advising—

LORD DUNDAS—[*After a narrative of the facts*]—The first question is whether, upon a sound construction of Mr Mackenzie's settlement, the pursuer's right as regards the house is one of proper liferent, inferring liability for payment of the sums in question, or one of mere occupancy, which would not usually infer such liability. The Lord Ordinary holds that it is the former, but I have come to the conclusion that her right is truly one of occupancy only. It has been established by a series of decisions, to which the Lord Ordinary makes sufficient reference, that the use of words more or less closely similar to those here employed will in general confer a right of occupancy without the liabilities attaching to a real right of liferent. The Lord Ordinary, however, distinguishes these cases from the present, and contrasts them with it, principally upon the ground that in them the period of realisation and distribution of residue was expressly postponed till the death of the "occupant," whereas Mr Mackenzie's settlement directs the trustees to divide and distribute residue as at his own death. This distinction does, no doubt, exist, and affords ground for an argument not without force. Why, it was pressed for the defenders, did not Mr Mackenzie expressly provide, as he might easily have done if such was his intention, either that a portion of the residue should be set aside to meet the payment of the feu-duties and taxes in question, or that these might be paid out of the surplus revenue accruing on the sum set aside to provide for the pursuer's annuity? I agree with the defenders' counsel that the testator's direction for the distribution of the residue at his death indicates clearly enough that

that fund was not to be made available for payment of these burdens, and I doubt whether the trustees could properly have set aside any part of it for that purpose; though I may observe in passing that I cannot agree with the Lord Ordinary that such an arrangement could, in any case, have resulted in *pro tanto* intestacy of Mr Mackenzie. But even if I am correct in holding that the burdens in question could not be met out of the residue which has been distributed in accordance with the truster's direction, that is not, in my judgment, enough to carry the defenders to success, if I am right in thinking that upon a sound construction the bequest to the widow imports a right of occupancy unburdened by any obligation to pay feu-duty, &c., and if there be, as I think there is, another fund which may properly be applied to that end. I refer to the surplus income of the £20,000 set aside to provide for the pursuer's annuity. The sum so set aside was obviously a very ample one for that purpose; and I do not see why surplus revenue accruing after the primary object is satisfied should not be applied, *secundo loco*, towards any proper trust outgoings, *e.g.*, the payment of feu-duties, &c., necessary to give the pursuer full enjoyment of her right to the house. The defenders argued that upon a just construction of the fifth purpose the interest as well as the capital of the sum directed to be set aside to provide for the annuity was destined as a special bequest to third parties. I do not say the matter is clear; but upon the whole I am unable so to read the provision. The word "surplus," after all, like the word "residue," merely refers to what may be left over after all payments expressed or sufficiently implied by the testator's directions have been duly met. If as I consider the payments now in question were intended by the truster to fall upon his estate and not upon his widow, I see no reason why they should not be made before the "surplus" (within the meaning of the fifth purpose) can be ascertained. The Lord Ordinary finds further support for his view in the testator's direction that his widow shall not be obliged to replace articles broken or perishing in the using; but his Lordship's deduction is not to my mind convincing, for I am not aware of any authority—and none was forthcoming at our Bar—for the broad proposition that "a mere occupant would not be liable for articles broken." This point was not, as I understood, maintained in the argument before us. I hold, therefore, differing from the Lord Ordinary, that no sufficient distinction exists between the language and scope of this settlement and of those which were considered in the reported decisions to warrant a different result upon the first and main question with which I have now dealt.

But, then, it was contended that, even assuming the pursuer's right to be one of mere occupancy and not a proper liferent, she is personally barred by what has passed from now insisting in her claim. Upon this branch of the case it was not necessary for the Lord Ordinary in the view which he took to pronounce any opinion; but if my conclusion on the first question is correct this matter must be decided by us. In my judgment the pursuer is not in any way barred from insisting in her claim. The strength of the defenders' argument upon this point was that the residue having been distributed without objection or reservation on behalf of the pursuer, there is now no part of the trust estate extant that can be applied to meet her claim, which must accordingly be refused. I think the distribution of the residue was a proper act of trust administration; but I have already stated my reasons for holding that there is another part of the trust estate available for satisfaction of the pursuer's demand. Thus far, then, the defender's plea of bar seems to me to fail, and it only remains to notice some subsidiary arguments which were urged in support of it. I do not think the pursuer's claim can be barred merely by the lapse of a few years during which she made these payments, erroneously as it now turns out. Nor do I attach much weight to her approval of the accounts or to the correspondence. The pursuer received advice, apparently of a prudent and sensible kind, from law agents of standing, but there is nothing in the accounts or in the letters to suggest that she knew or was advised in regard to the matter now in dispute or that she made any bargain to waive her claim. Similarly, the discharge produced seems to me in no way to operate as a bar to the pursuer's claim, for she is not seeking to enforce personal liability against the trustees. It appears to me that if they have trust funds in their hands available to meet the claim, there is no sufficient ground for holding that she is barred from making it good.

Upon the whole matter, therefore, I am of opinion that we ought to recall the Lord Ordinary's interlocutor, repel the defenders' pleas-in-law, find and declare that upon a sound construction of Mr Mackenzie's settlement the pursuer is entitled to occupy the house free of all liability for feu duties, proprietor's taxes, and landlord's repairs, and that the trustees are bound to pay the same out of the surplus revenue accruing in their hands from time to time from the sum set aside to provide for the pursuer's annuity, after providing for the same; and further, to decern and ordain the trustees to make payment to the pursuer of the sum sued for, unless indeed (which was not suggested at the discussion) there is any dispute between the parties as to the proper amount to be paid, assuming liability.

LORD ARDWALL—I agree with the result at which I understand all your Lordships have arrived, and I agree generally with the opinion of my brother Lord Dundas, although I differ slighty from him in the point of view from which I approach a part of the case.

The first question is whether the use of the house conferred upon the pursuer was a proper liferent or a mere right of occu-

pancy. Upon this I am of opinion that, comparing the destination here with the destination in the cases quoted in the Lord Ordinary's opinion, the right conferred upon the pursuer with regard to the house was merely the right of use and occupancy of the same, and not a liferent in the proper sense of that term. In the words of the deed, what she got was the "liferent use and enjoyment of the dwelling-house." It is, I think, quite plain that under this bequest the trustees would not have been entitled to execute a disposition of the house in favour of the pursuer in liferent; that on the contrary they were, according to the scheme of the deed, to remain the proprietors of the house to all effects and purposes, the pursuer being in the position, in every respect, of a tenant, except that she was to occupy the premises free of rent; in other words, the position of matters was this, that the defenders were the proprietors of the house and the pursuer the tenant. It follows as matter of law that the burdens attaching to these respective characters fell to be borne by the defenders and the pursuer respectively, and that accordingly the defenders are liable for (1) the feu-duty, payment of which was necessary to enable them to remain the vassals in the feu; (2) the landlord's rates and taxes imposed on all persons holding that character by the local authorities; and (3) repairs, such as at common law fall to be performed by proprietors of houses; the pursuer, on the other hand, being liable only for payment of occupant's rates and taxes, and such repairs as a tenant is at common law bound to execute.

If I am right in my construction of the clause in the trust-disposition and settlement, it follows that the intention of the testator as expressed in that deed was that his trustees should hold the house as proprietors, and necessarily be liable to pay the various burdens I have above enumerated falling to be paid by them in that character. It therefore was necessary for the due execution of the trust that the feu-duties and other landlord's burdens should be paid by the trustees, and therefore such expenses necessarily must be regarded as expenses of executing the trust. Now such expenses are expressly provided for in the first head of the trust deed, and I must say I am at a loss to understand how the Lord Ordinary came to the conclusion that there was no provision made for payment of these feu-duties and burdens in the trust deed, and still less how the fact that there was no special provision could possibly affect, one way or another, the interpretation of the clause by which the liferent use of the property was given to the wife. It would be contrary to all practice for a conveyancer to attempt to enumerate all possible trust expenses, or even all contemplated trust expenses, in a clause providing for payment of such expenses out of the trust estate, and if it be once settled that any expenses are expenses of executing the trust, or in other words trust expenses, it follows as matter of course that under a deed providing primarily for payment of such expenses out of the estate conveyed in trust, these expenses must be held to be provided for and to form a first charge against the trust estate. If it is apparent, as I think it should have been, from this deed that the burdens falling on the proprietors of this house would require to be paid by the trustees, it was the trustees' duty, unless they saw some other way of paying them, to have made provision for their payment before arriving at the amount of the residue of the estate, but of course if, as seems to have been the case here, the trustees made no provision for payment of these expenses before arriving at the residue of the estate and paying it away, they must just take the best means they can of putting themselves in funds to do so now; and, for the reasons stated by Lord Dundas, I think the trustees may very properly apply the surplus revenue arising on the £20,000 set aside to provide for the pursuer's annuity towards payment of the annual trust outgoings, and I think it not unlikely that this was the intention of the testator, and that the words "surplus revenue" may most reasonably and without any forced construction be taken to mean the surplus after providing not only for the widow's annuity but for all proper current expenses of trust estate, such as those in question.

I entirely agree with what my brother Lord Dundas has said regarding the Lord Ordinary's opinion that his view of the construction of the settlement derives support from the direction that the widow should not be obliged to replace articles broken or perishing in the using, and I further agree with him, and for the reasons he has stated, in holding that the pursuer is not barred by anything that has been done or suffered from now enforcing her claim against the trust estate. I also concur with him as to the interlocutor which he proposes should be pronounced.

LORD JUSTICE-CLERK—I concur in the opinion of Lord Dundas, and have nothing to add.

The LORD JUSTICE-CLERK intimated that LORD SALVESEN, who was present at the hearing but absent at the advising, concurred in the opinion of Lord Dundas.

The Court found and declared that the pursuer was entitled to occupy the said dwelling-house free of all liability for feu-duties, proprietor's taxes, and landlord's repairs, and that the defenders were bound to pay the same, and granted decree for payment of the sum sued for.

Counsel for Pursuer (Reclaimer)—Dean of Faculty (Scott Dickson, K.C.)—Constable, K.C.—Lyon Mackenzie. Agents—Bonar, Hunter & Johnstone, W.S.

Counsel for Defenders (Respondents)—M'Lennan, K.C.—Mercer. Agents—Cumming & Duff, S.S.C.