being made he was liable to pay up the few shillings a year effeiring to these lands which the proprietor of Craigluscar had paid between 1864 and 1893. I shall assume that, although I am far from being of opinion that that is so. The only question argued before us was, whether the defender was liable in interest at 3 per cent. or any other rate, he being willing to pay the principal. The Lord Ordinary says that the question is attended with difficulty, because the proprietors of Craigluscar have unduly delayed making their claim, but as the claim for interest was restricted to 3 per cent. he thinks that it should be allowed. I must say I am unable to agree with that. I think the law on the subject of interest is that stated by Lord Westbury in the case of *Carmichael* v. *Caledonian Railway Company*, June 28, 1870, 8 Macph. (H. of L.) 131. It is a Scots case, and the Scots law as to interest is thus stated—"Interest can be demanded only in virtue of a contract, expressed or implied, or by virtue of the principal sum of money having been wrongfully withheld and not paid on the day when it ought to have been paid." Now, the first question is, Can the circumstances here entitle us to infer an implied contract that interest should be paid? I cannot imply a contract under the circumstance I have stated, the assessments having been paid for more than thirty years before the discovery was made that a separation could be made. I think it was for the proprietor of Craigluscar to discover whether it was for his interest to have the valued rent separated. I doubt if the proprietor of Knock and Lethans was in a position to apply for a separation, but, assuming that he could, I cannot affirm that he was in fault in not taking that step. And when the proprietor of Craigluscar had taken the necessary steps and the separation had been made, I think that the proprietor of Knock and South Lethans did his part when he satisfied the claim under the contract for assessment then first made on him. I think there are no grounds for implying a contract to pay interest. Decree for the principal sum of £26 is assented to, and that therefore will stand.

LORD RUTHERFURD CLARK—So long as the valued rent remained undivided the pursuers were bound to pay the whole of these assessments. The defender was under no obligation to apply for an apportionment of the valued rent. If it was the pursuers' duty to take the necessary steps for apportionment, I confess that I have great doubt whether the defender is liable for the principal sums, I am clear that he was under no obligation to pay them until they were demanded from him, and there being no delay or default on his part I think that he is not liable for interest.

LORD TRAYNER—I am inclined to say nothing on the subject of the pursuers' liability for the principal sums sued for. As regards the interest, it was my inclination to adhere to the opinion of the Lord Ordinary, but in deference to the opinions of your Lordships I have come to the conclusion not to dissent.

LORD JUSTICE-CLERK—I have had great difficulty with this case, but I have come to the conclusion to agree with your Lordships.

The Court recalled the interlocutor of the Lord Ordinary, found the defender liable to the pursuers in the sum of £26, 5s. 4d., the sum sued for *primo*, and *quoad ultra* assoilzied the defender from the conclusions of the action.

Counsel for the Pursuers—Sym—Boswell. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Defender—Jameson—Burnet. Agents—Mitchell & Baxter, W.S.

Saturday, November 3.

SECOND DIVISION.

BAYNE'S TRUSTEES *v.* BAYNE.

Landlord and Tenant—Liferent of House and Furniture—Assessments—Repairs.

A testator provided—"In respect that Miss E. D. has arranged with me to take entire charge of my children in the event of my decease, I hereby direct my trustees to make over to her the house at present occupied by me, . . . together with the whole furniture, . . . and that during all the days of her natural life, and so long as she shall not enter into any marriage after my decease."

After the testator's death, *held* (*dub.* Lord Young) that the trustees were liable for the feu-duty, assessments in respect of property, and landlord's repairs, but that the widow must pay the assessments in respect of occupancy, including the proportion of taxes ordinarily payable by an occupant, and tenant's repairs. *Clark* v. *Clark*, January 19, 1871, 9 Macph. 435, *followed*.

Christopher Alexander Bayne died on 1st December 1881 leaving a trust-disposition and deed of settlement dated 9th April 1873, in which he assigned and disponed his whole means and estate to trustees for the purposes therein specified. The fourth purpose of the said trust-disposition and settlement was in the following terms:—"Fourth, In respect that the said Miss Emma Duckworth has arranged with me to take entire charge of my children in the event of my decease, I hereby direct my trustees to make over to her the house at present occupied by me at Craigview aforesaid, together with the whole furniture, furnishings, plate, linen, and every article of a household character therein, and that during all the days of her natural life, and so long as she shall not enter into any marriage after my

decease, and I also direct my trustees to allow and pay to the said Miss Emma Duckworth from the annual proceeds and profits, or from the capital of my estate, an annuity of £500 sterling per annum, free of all legacy-duty, . . . and such annuity shall be purely alimentary, and shall not be assignable . . . nor dischargeable, . . . and it shall not be in any way subject to the diligence of her creditors. But it is hereby expressly declared that the foresaid liferent and alimentary provisions conceived in favour of the said Miss Emma Duckworth shall be subject to the burden of maintaining, alimenting, and educating such of my children as may be alive at the time of my death so long as they may reside with her, or so long as and to such an extent as all or any of them may be unable properly to support themselves, it being my express desire as after mentioned that my said children shall be entrusted solely to the care of the said Miss Emma Duckworth so long as she remain unmarried as aforesaid." . . . By the fifth purpose of the trust-disposition and settlement it was provided that if Miss Emma Duckworth should marry after the testator's death the liferent of the house should cease, and the annuity be restricted to £250.

Subsequent to the date of the trust-disposition and settlement the testator married Miss Emma Duckworth. After the testator's death she occupied the house, Craigview, Murrayfield, and used the furniture therein as provided in the fourth purpose of the trust-disposition and settlement, and she also received payment of the annuity from the trustees.

In 1894 doubts arose regarding the construction of the said trust-disposition and settlement, Mrs Emma Duckworth or Bayne being of opinion that her husband's trustees were bound out of the general trust-estate under their charge to pay the whole annual burdens and assessments affecting the said house, Craigview, Murrayfield, whether in respect of property or occupancy, and also to pay for all repairs thereon; while the trustees, on the other hand, maintained that, upon a true construction of the said trust-disposition and settlement, the truster's intention was that Mrs Bayne should bear all such charges and expenses.

A special case was accordingly presented in order to obtain the opinion of the Court on the following questions by (1) Mr Bayne's trustees, and (2) Mrs Bayne—"(1) Whether the first parties are entitled and bound to make payment of the annual charges in respect of the said house, Craigview, Murrayfield, including (1) the feu-duty; (2) assessments in respect of property; (3) assessments in respect of occupancy; (4) landlord's repairs; and (5) tenant's repairs, or any of them? or (2) Do the said annual charges or any of them fall to be borne by the second party?"

Argued for first parties—The conveyance to the widow being an absolute liferent, the second party was bound to pay all the burdens on the house—Bell's Prin., sec. 1062; Erskine ii. 9, 61. This case was distinguished from that of *Clark* v. *Clark*, Jan. 19, 1871, 9 Macph. 435, as in the latter the words of the deed were "give her the use of," while in the present case the words were "make over to."

Argued for second party—The words "make over" were not equivalent to "dispone." The use only of the house was given to the widow. The case of *Clark* ruled the present.

At advising—

LORD JUSTICE-CLERK — The late Mr Christopher Alexander Bayne by the fourth purpose of his trust-disposition and settlement directed that "in respect that the said Miss Emma Duckworth has arranged with me to take entire charge of my children in the event of my decease, I hereby direct my trustees to make over to her the house at present occupied by me at Craigview aforesaid, together with the whole furniture, furnishings, plate, linen, and every article of a household character therein, and that during all the days of her natural life and so long as she shall not enter into any marriage after my decease."

The question which has arisen under this clause is, whether Mrs Bayne, the lady who was Miss Duckworth when the will was made, is liable to pay certain burdens, taxes, and expenses attached to the house in question.

The contention of the trustees under the settlement is that Mrs Bayne must bear the burdens and charges which would be payable in respect not only of occupancy but of property. Mrs Bayne on the other hand maintains that upon a true construction of the deed she has only an occupancy, and is not liable for any charges properly falling upon a proprietor.

I am of opinion that the view maintained by Mrs Bayne is sound. The direction to the trustees is to make over the house to her during her life, and as long as she shall remain unmarried, and under that direction the trustees have allowed her to continue to occupy, the direction being carried out without any legal formality, but simply by giving her the use of the house. Should she marry again, they would be bound to deprive her of that use whenever that event occurred. And as long as they in present circumstances have her in peaceable occupation of the house, the purpose of the testator is fulfilled. Mrs Bayne is not the proprietor, but only an occupant. Therefore she cannot, as I think, be liable for feu-duty or for assessments in respect of property. Further, she cannot, I think, be liable for repairs, with which as a mere occupant she has no concern. It is the duty of the proprietor to keep the building and its approaches, &c., in repair.

On the other hand, charges which are properly such as are paid by an occupant should, as it appears to me, be paid by Mrs Bayne, she being an occupant free of charge. As the Lord President said in the case of *Clark* v. *Clark's Trustees*—practically a similar case to this—"It is only

reasonable that she should pay the taxes payable by the occupant of the house, including inhabited-house-duty, and her share of those taxes which are divisible between landlord and tenant.

I would therefore propose that we should answer the questions by finding that the first parties must pay the feu-duty, property assessments, and repairs, and that the second party must pay the assessments in respect of occupancy, including the proportion of ordinary taxes payable by an occupant.

LORD YOUNG—Your Lordship's judgment goes to sustain the view on which the parties have been acting for a great many years, and I am not disposed to interpose any expression of disagreement on my part. I should, however, have been inclined to agree with the view that, as the second party got the house for her own benefit, not merely to occupy it but to take rent or even sell it when she pleased, the costs and charges connected with it should fall on herself.

LORD RUTHERFURD CLARK—I think we should follow the case of *Clark*, which I think is the same as the present.

LORD TRAYNER—I agree.

The Court pronounced the following interlocutor:—

"Answer the first question by declaring that the first parties are bound to make payment of the annual charges numbered (1), (2), and (4), and that they are not bound to pay the charges numbered (3) and (5): Find it unnecessary to answer the second question."

Counsel for First Parties—Macfarlane. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for Second Party — Dewar. Agents—Cornillon, Craig, & Thomas, S.S.C.

Saturday November 3.

SECOND DIVISION.

[Sheriff of Inverness.

COLQUHOUN AND ANOTHER *v.* MACKENZIE.

Process — Possession — Interdict — Competency—Crofters Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. c.* 29), *sec.* 16—*Legatee.*

Section 16 of the Crofters Holdings Act 1886 provides that a crofter may bequeath his holding to any one person of a specified class, thereinafter called the "legatee;" that, if the landlord objects to receive the legatee, the latter may present a petition to the sheriff praying for decree that he is crofter in the holding, in which petition the landlord may appear and state his ground of objection; and that, pending the proceedings in such petition, the legatee shall have possession of the croft unless the sheriff otherwise direct.

A crofter died leaving a general settlement in A B's favour, by which he bequeathed to A B, *inter alia*, his whole right and interest in his croft. The proprietor of the croft intimated that he objected to receive A B as crofter in the holding. Thereafter A B reaped the crop belonging to the testator, and continued to keep on the holding certain cattle which had belonged to the testator, but, on his attempting to break up the land for the purpose of sowing another crop, the proprietor raised an action to have him interdicted from taking possession of or interfering with the croft.

During the dependence of the action of interdict A B presented a petition to the Sheriff for decree that he was crofter in the holding, and the action of interdict was sisted to await the result of the proceedings in the petition, which was ultimately refused on the ground that A B was not a legatee in the sense of the Act.

The proceedings in the process of interdict having been resumed, the Court *held* that an action in that form was the pursuer's proper remedy, A B having had no right or title to interfere with the croft, and granted interdict.

By section 16 of the Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. c. 29) it is enacted — "A crofter may by will or other testamentary writing bequeath his right to his holding to one person, being a member of the same family—that is to say, his wife or any person who failing nearer heirs would succeed to him in case of intestacy (hereinafter called the 'legatee') subject to the following provisions:—(*a*) The legatee shall intimate the testamentary bequest to the landlord or his known agent within twenty-one days . . . (*d*) If the landlord or his known agent intimates that he objects to receive the legatee as crofter in the holding, the legatee may present a petition to the sheriff praying for decree that he is the crofter therein from the date of the death of the deceased crofter, of which petition due notice shall be given to the landlord, who may enter appearance and state his ground of objection, and if any reasonable ground of objection is established to the satisfaction of the sheriff, he shall declare the bequest to be null and void, but otherwise he shall decern and declare in terms of the prayer of the petition. . . . (*f*) Where the legatee shall have presented a petition to the sheriff as aforesaid, the legatee, pending any proceedings, shall have possession of the holding, unless the sheriff shall otherwise direct, on cause shown." . . .

Donald M'Innes, tenant of a small croft at North Ballachulish, died on 9th May 1892 leaving a general disposition and settlement dated 27th August 1891 in favour of John Mackenzie, the son of his mother's sister, whereby, *inter alia*, he specially bequeathed his whole right, title,