as payment of the debt to which they are in right. Nor is it immaterial to remember (although these considerations might not be conclusive if they stood alone) that the amount of the debt and of the gratuitous provision are widely different in amount—the provision being more than double the debt—and that the destination in each is different, the daughter Isabella being unlimited fiar of the provision, while of the sum contained in the obligation she is only entitled to a liferent, and the fee (burdened with possibly an additional liferent) is destined to her children. It is perhaps more material to the question before us to notice that the testator has specially directed a deduction of £200 to be made from Isabella's share of the succession, being the amount of an advance he had made to her on the occasion of her marriage, and does not direct any deduction to be made therefrom in respect of the obligation he had undertaken in favour of the marriage-contract trustees. I am therefore of opinion that the £1000 must be provided for, as a debt of the testator, before his estate is divided among his children; that of the estate then remaining, Isabella is entitled to one-fifth; and that that fifth goes to her husband as Isabella's assignee.

The Court answered the first alternative of the first question in the negative, and the second alternative in the affirmative; the first alternative of the second question in the affirmative, and the second in the negative, and the third in the negative; and the first alternative of the third question in the negative, and the second alternative in the affirmative.

Counsel for the First Parties—Abel; for the Second Parties—Orr; for the Third Parties—Macfarlane; for the Fourth, Fifth, Sixth, and Seventh Parties — Rankine. Agent—W. A. Hartley, W.S.

Saturday, November 3.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

DURIE'S TRUSTEES *v.* AYTOUN.

Sale—Sale of Heritage—Public Burdens—Seller's Right of Relief—Land Tax—Heritors' Assessment — Arrears — Interest.

The proprietor of the estate af Craigluscar sold a portion of it in 1861. From that date to 1893 the assessments for land tax and heritors' assessment were made upon the estate of Craigluscar, including the lands sold, on a gross valued rent for the whole estate, and were paid by the seller. In 1893 the seller took steps to have the proportion of valued rent effeiring to the lands sold disjoined and separated from the gross valued rent, and the proportions were accordingly fixed by decree of the Sheriff.

Thereafter the seller claimed from the purchaser the proportion of land tax and heritors' assessment effeiring to the land sold for the period from 1861 to 1893, with interest at 3 per cent. on the yearly payment of these assessments for the same period. The purchaser admitted liability for the arrears of land tax, but disputed the claim for heritors' assessment and interest

Held, by Lord Wellwood (Ordinary), that he was liable both for heritors' assessment and interest.

The purchaser having reclaimed against this interlocutor, in so far as it found him liable for interest, *held* (*rev.* judgment of Lord Wellwood (Ordinary) and *dub.* Lord Trayner) that he was not liable for interest.

Question per Lord Young and Lord Rutherfurd Clark, whether the purchaser was liable for any part of the land tax and heritors' assessment paid by the seller before the apportionment of the valued rent was made between the lands sold and retained.

On May 15, 1861, Robert Durie of Craigluscar sold to Major Aytoun the estate of Knock and South Lethans, with entry at Martinmas 1860. The disposition contained a clause in the following terms—"I," the said Robert Durie, "bind myself to free and relieve the said James Aytoun and his foresaids of all feu-duties, casualties, and public burdens." By the Titles to Land Act 1847 (10 and 11 Vict. cap. 48), sec. 1, it is enacted that a clause of obligation "to free and relieve of feu-duties and casualties due to the superior and of public burdens" in a disposition in the terms above set forth "shall be as valid, effectual, and operative to all intents, effects, and purposes as if they had been expressed in the fuller mode or form" generally in use at the passing of said Act. The fuller mode or form was in the following terms—"And further, I hereby oblige himself, my heirs and successors, to free and relieve the said B and his foresaids of all feu-duties, cess, minister's stipend, and other public and parochial burdens exigible furth of the said lands and others, at and preceding the term of , which is hereby declared the term of the said B's entry to the premises in virtue hereof, the said B and his foresaids being bound to free and relieve me and my foresaids of the same thereafter in all time coming."

Until February 1894 the assessments for land tax and heritors' assessment were made upon the lands of Craigluscar and other lands, including Knock and South Lethans, on a valued rent of £742, 14s. Scots, and on that slump sum the land tax and heritors' assessment were paid by the proprietors of Craigluscar. In October 1893, however, the marriage-contract trustees of Mrs Dewar Durie, who were then proprietors of Craigluscar, took steps to have the gross valued rent separated and disjoined, and the proportions stated against each of the estates of Craigluscar and Knock and South Lethans. This was accordingly done by decree of the Sheriff dated 7th February 1894.

Thereafter Mrs Durie's trustees claimed from Roger Sinclair Aytoun, the successor of Major Aytoun in the lands of Knock and South Lethans, payment of £47, 11s. 1d., as the proportion of land tax, and £26, 5s. 4d. as the proportion of heritors' assessment, effeiring to Knock and South Lethans for the period from 1861 to 1893. They also claimed payment of interest at the modified rate of £3 per cent. per annum on the yearly payments of land tax and heritors' assessment for the periods above mentioned.

Mr Aytoun admitted liability for the land tax, and made payment of it, but he repudiated the claims for heritors' assessment and interest on land tax and heritors' assessment.

Mrs Durie's trustees thereupon raised an action against Mr Aytoun for (*primo*) £26, 5s. 4d., being the amount of heritors' assessment as above stated, and (*secundo*) £33, 18s. 5d., being the amount of interest at 3 per cent. on the arrears of land tax to the date of payment and arrears of heritors' assessment to the date of citation.

The defender lodged defences in which he stated—"Prior to the present year (1894) neither the name of the defender nor that of his predecessor was entered in the books of the collector of cess of the county of Fife or of the clerk to the heritors of the parish of Dunfermline, and no demand for land tax or heritors' assessment was made upon the defender or his predecessor. Neither the defender nor his predecessor was ever cited to, or was present at, any meeting of heritors by which these assessments are alleged to have been imposed, and neither of them had any voice or part in the imposition of them."

The defender pleaded—"(3) The heritors' assessment sued for not being the debt of the defender, he is not liable for the same, nor for interest thereon, as sued for. (4) The claim for interest is not maintainable, in respect that no demand for the said land tax and heritors' assessments was ever made upon the defender or his predecessor."

On 28th June 1894 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor:—"Decerns against the defender for payment to the pursuers of the sum of £26, 5s. 4d. sterling, the sum first sued for, and of the sum of £33, 18s. 5d., being the sum second sued for," &c.

"*Note.*—The proprietors of Craigluscar have paid land tax and heritors' assessment in respect of the lands of Knock and South Lethans ever since the date of the disposition of these lands by the late Robert Durie in favour of the defender's predecessor Major Aytoun. Under the disposition it is admitted that the disponee and his heirs and successors were bound to relieve the disponer, and his heirs and successors, of all 'feu-duties, cess, minister's stipend, and other public and parochial burdens exigible furth of' the lands disponed from the term of Major Aytoun's entry, viz., Martinmas 1860.

"The reason why the proprietors of Craigluscar have continued to pay land tax and heritors' assessment seems to be that the valued rent upon which the proprietors of Craigluscar were paying the said two taxes at the date of the disposition included the proportion of valued rent effeiring to Knock and South Lethans, and no steps were taken to have the gross valued rent divided and allocated until the beginning of the present year 1894.

"The defender admits liability for land tax, amounting to £47, 11s. 1d., and has paid the same, but he denies liability for interest on that sum.

"He, however, disputes liability for heritors' assessment, on the ground, as I understand, that he got no notice of the heritors' meetings at which the assessments were imposed, and therefore had no opportunity of objecting to the assessments.

"In my opinion, the pursuers are entitled to repayment of the amount of the heritors' assessment. From the terms of their title, the defender and his predecessor must or should have been aware that, in respect of the disposition and the clause of relief, they were liable in all the personal prestations incident to the ownership of land, including land tax and parochial assessments, and that if those burdens were paid by the disponer or his representatives, they were bound to relieve him or them of the payments so made. As to the land tax, they could be in no doubt, because that was an annual uniform imposition for imperial purposes. And even as to the heritors' assessments, they must have known that as heritors they were liable in such assessments as from year to year fell to be imposed. They were thus put on their inquiry to see how it came that they were not personally cited to the heritors' meetings. No doubt the reason why they were not cited was because the valued rent had not been split up, and their names had not been entered in the cess-books or the books of the clerk to the heritors of the parish of Dunfermline. But I am not satisfied that there was any greater duty on the proprietors of Craigluscar to have the correction made than on the disponees. Of course, until the correction was made, the proprietors of Craigluscar were exposed to the inconvenience of being called on to pay in respect of the lands disponed. But they had their right of relief.

"The question comes to be, whether, when payments are made by a person who has a right of relief, that person loses his right to repayment if he does not immediately demand repayment from the person bound to relieve him. It seems to me that the existence of a right of relief implies that the party entitled to relief may be called upon to pay, or may pay in the first instance; and accordingly, if he does so, there is no presumption that he has abandoned his claim for relief, or waived inquiry as to his liability, or paid in the discharge of a natural obligation to the true debtor. He pays, relying on his right of relief, and nothing short of the long prescription or circumstances sufficient to sustain the

defence of *mora* can deprive him of it.

"I have more difficulty about the claim for interest, because the proprietors of Craigluscar have unduly delayed making their claim; but as the claim for interest is now restricted to 3 per cent., I think it should be allowed.

"I shall allow no expenses."

The defender reclaimed against the Lord Ordinary's interlocutor in so far as it decerned him to pay interest on the arrears of land tax and heritors' assessment, but *quoad ultra* acquiesced in the Lord Ordinary's judgment.

He argued—Until the pursuers had taken steps to apportion the land tax and the heritors' assessment among the different portions of the estate, these burdens were exigible not from the particular parts but from the estate as a whole. The pursuers had no claim of relief against the defenders until they had got the proportions fixed. Until that was done the debt was the pursuer's. He had a claim against the defender, but the latter was entitled to consider himself free until the claim was made upon him. There was here no enjoyment of money which ought to have been paid; the sum due in this case could not be paid until it was ascertained and demanded. The authorities all pointed to this, that interest was only given on a clause of relief from the time interest was demanded—*Hope* v. *Lumsden*, June 22, 1871, 9 Macph. 865; *Dunbar's Trustees* v. *British Fisheries Society*, December 19, 1877, 5 R. 350; *Maxwell's Trustees* v. *Bothwell School Board*, July 14, 1893, 20 R. 958; *Glasgow Gaslight Company* v. *Barony Parish of Glasgow*, February, 15, 1868, 6 Macph. 406.

Argued for pursuers—The Lord Ordinary's judgment was right. By implied agreement interest was due in all cases of the use of money where it had been overpaid, and a claim of repetition arose—Bell's Prin. sec. 32. By implied contract interest was due here, as the defender had full enjoyment of the fruits and profits of the lands without payment of the assessments exigible from them—Bell's Comm. (7th ed.) i. 693. He was *lucratus* in receiving the rents, and must pay the burdens and interest in the arrears—*Durie* v. *Ramsay*, Feb. 17, 1624, M. 542; *Cluny* v. *Ogilvie*, July 20, 1626, M. 543; *Home* v. *Renton*, February 7, 1628, M. 545; *Peters* v. *Magistrates of Greenock*, June 9, 1894, 31 S.L.R. 723. On the face of his title the defender was bound to have known that he was liable for these burdens. The pursuers wished to make no profit; they only wanted to be put to no loss; they had been paying taxes which ought to have been paid by the defender, and were entitled to full relief against him for any loss they had incurred. It was as much the business of the defender as that of the pursuer to take steps to get the land tax and heritors' assessment apportioned, and he was not entitled to profit by his having neglected to do so.

At advising—

LORD YOUNG — In this case Mr Durie, proprietor of the estate bearing the general name of Craigluscar, sold a comparatively small portion called Knock and South Lethans to Mr Aytoun, and his disposition, granted in 1861, contained this clause—"I" the said Robert Durie "bind myself to free and relieve the said James Aytoun and his foresaids of all feu-duties, casualties, and public burdens." That general clause is interpreted in condescendence 1 to be equivalent to this, that "I" the seller "hereby oblige myself, my heirs and successors, to free and relieve the said B and his foresaid of all feu-duties, cess, minister's stipend, and other public and parochial burdens exigible furth of the said lands and others at and preceding the said term of which is hereby declared the term of the said B's entry to the premises in virtue hereof, the said B and his foresaids being bound to free and relieve me and my foresaids of the same thereafter in all time coming." The clause is one really of style, and occurs in all conveyances, and I do not know anything in general which it affects which would not be effected without it. I suppose that it is not doubtful that from 1861 onwards Mr Aytoun and his successors have paid feu-duties, minister's stipend and other parochial burdens, including poor rate and school rate. Accordingly, the only taxes which we have heard of are (1) land tax, which is always imposed on the valued rent, and on the person entered in the cess-book as proprietor; and (2) heritors' assessment. No question of land tax has been brought before us, as the whole of the land tax had been paid before the case came into Court. The case came into Court to try the question of the heritors' assessments from 1861 onward, and the question of interest on them and on the land tax. I do not know exactly what these heritors' assessments were for, but they must have been very trifling—some 14s. a-year, I think. I suppose they were imposed to meet the expense of weeding the churchyard, paying the bellringer, and perhaps cleaning the church. I do not know of any other parochial ecclesiastical assessments since the school rate was taken off. These assessments were properly laid on the valued rent, and were properly paid by the proprietor entered in the roll, but after the lapse of thirty-two years it occurred to the proprietor or his advisers in October 1893, for the first time, that the valued rent on which the proprietors of Craigluscar were paying the said two taxes, included the proportions of valued rent effeiring to Knock and South Lethans, and steps were thereupon taken to have the gross valued rent separated and disjoined, and the proportions stated against each of the two estates. Now, there could be no possible objection to the steps being taken which were taken by the proprietor of Craigluscar to have the gross valued rent separated and disjoined. That accordingly was done, and after that there can be no doubt that the proprietor of Knock and South Lethans was liable for these taxes. I shall assume that on this separation

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