those averments are contained in the third, fourth, and sixth articles of the condescendence.

Having joined issue on those questions of fact, I think he was entitled to the judgment of the Court upon them; and that the Lord Ordinary not having disposed of them, the case should go back to his Lordship in order that he may say whether, in his opinion, they are proved or not as in a question with the minuter.

We were asked by the learned Dean of Faculty to make a finding that there was no evidence relevant to infer G H's guilt of adultery with the defender in this case, and it was suggested that the way was open for this Court making that finding by the admission that Mr Blackburn tendered at the bar. Mr Blackburn's admission was to the effect that he was prepared to admit that no evidence had been led which would justify him, as in a question with G H, arguing in this case that he had proved the averments made against him. But it was carefully pointed out that that admission was limited to the purposes of this case, and he made it quite evident he desired to safeguard himself with regard to any future action of damages he might raise.

In my opinion we cannot proceed to make a finding with regard to evidence as to the import of which we are entirely ignorant, and in a case of this kind I should entirely demur, for my own part, to expressing any opinion without knowing what impression that evidence made on the Lord Ordinary, who heard and saw the witnesses. I agree with what your Lordships have said.

The Court pronounced this interlocutor—

"Adhere to said interlocutor [of 13th April 1912] in so far as it finds facts, circumstances, and qualifications proved relevant to infer the defender's guilt of adultery: Finds her guilty of adultery accordingly, and therefore divorce and separate the defender from the pursuer, his society, fellowship, and company, in all time coming: Recal said interlocutor in so far as it finds and declares in terms of the conclusion of the summons, and in place thereof find and declare the defender to have forfeited all the rights and privileges of a lawful wife, and that the pursuer is entitled to live singly or to marry any free woman, as if he had never been married to the defender or as if she were naturally dead: *Quoad ultra* adhere to said interlocutor: Remit to the Lord Ordinary to consider and dispose of the first conclusion of the summons so far as directed against the minuting defender, and to proceed as may be just, and decern."

On 14th November 1912 the Lord Ordinary (DEWAR) pronounced this interlocutor—

"The Lord Ordinary, on the motion of the minuting defender, G H, for absolvitor from the conclusion of the summons so far as directed against him, in respect that the pursuer admitted that no sufficient evidence had been led to infer that the said G H had been guilty of adultery with the defender—the pursuer not opposing said motion—assoilzies the said G H from the said conclusion, and decerns."

Counsel for the Pursuer and Respondent—Blackburn, K.C.—C. H. Brown. Agents—W. & W. Finlay, W.S.

Counsel for Minuting Defender and Reclaimer—The Dean of Faculty (Dickson, K.C.)—The Hon. W. Watson. Agents—Bruce, Kerr, & Burns, W.S.

Tuesday, November 5.

EXTRA DIVISION.

PARK AND OTHERS (GLOVER'S TRUSTEES).

Succession — Testament — Construction — "Liferent Use and Enjoyment" of House —Liferent or Right of Occupancy—Public Burdens—Liability for Feu-Duty, Landlord's Taxes, Repairs, Insurance Premiums, and Interest on Bonds.

A directed his trustees to retain for "the liferent use and enjoyment" of his unmarried daughters certain houses with the furniture and other effects therein and to pay an allowance of £400 per annum out of the income of his estate for the upkeep of the said residences. In paying this allowance the trustees deducted from it the feuduties, landlord's taxes, and repairs effeiring to the houses and the insurance premiums for the furniture therein. They did not, however, deduct the interest of two bonds over one of the houses.

Held that all these items, including the interest on the bonds, formed proper charges against the liferentrix.

Succession — Testament — Construction — "Allowance at the Rate of"—Deficit in a Particular Year.

A testator who had provided a residence for his unmarried daughters directed his trustees "to pay to my said unmarried daughter or daughters, out of the income of my estate, an allowance at the rate of £400 per annum towards the upkeep of said residence."

Held that if in any year there was not sufficient revenue to yield £400, any part thereof unpaid must be paid out of the income of future years.

David Francis Park and others, trustees acting under the trust-disposition and settlement of the late Thomas Craigie Glover of Mount Grange, Edinburgh, *first parties;* Thomas Glover, Eastbourne, and others, the persons entitled to shares of the fee of residue of the trust estate, *second parties;* Mrs Janet Cumming Glover or Park and others, the whole persons entitled to the liferent of shares of residue, *third parties;* and Alexandria Malcolm Glover, the only unmarried daughter of the testator, *fourth party*, presented a Special

Case for the opinion and judgment of the Court of Session. On 22nd May 1912 the Court answered two of the questions put, with which this report is not concerned, and deferred consideration of the other two.

The following narrative of the *facts* is taken from the opinion of Lord Dundas:—"We decided in the summer session the first and second questions (as amended) put to us in this Special Case. We have now to dispose of the third and fourth questions. They arise upon a construction of the terms of the seventh purpose of the truster's settlement, whereby he directed his trustees 'to retain for the liferent use and enjoyment of my unmarried daughters or daughter my residences of Mount Grange and Earlsferry House, and the household furniture, plenishing, and other effects therein not hereinbefore specially bequeathed, or in lieu and place of Earlsferry House and furniture, my villa at Earlsferry known as Gordon Villa, with the furniture, plenishing, and effects therein, as my said unmarried daughters or daughter may elect; and I also direct my trustees to pay to my said unmarried daughters or daughter, out of the income of my estate, an allowance at the rate of four hundred pounds per annum towards the upkeep of said residence; . . . declaring that my sister the said Ann Linton Glover shall be entitled to live in family with my said unmarried daughters or daughter so long as she desires to do so, and that my said unmarried daughters or daughter shall be bound to receive her.' The testator died on 7th July 1904. His daughters, other than the fourth party, Miss Alexandria Malcolm Glover, are married; his sister Miss Ann Linton Glover is dead. It is stated in the case that 'since the testator's death, the fourth party has resided at Mount Grange and Gordon Villa, and has received from the first parties payment of the annual allowance of £400, under deduction, however, of the feu-duties, landlord's taxes, insurance premiums, and repairs effeiring to the said houses, and the insurance premiums for the furniture therein. The average annual amount of said deductions is upwards of £80. In addition to these deductions the fourth party has also to pay, in respect of her occupancy of said houses, tenants' rates and taxes amounting on an average to upwards of £60 annually. The assessed rental of Mount Grange is £230, and the assessed rental of Gordon Villa is £50. At the testator's death Mount Grange was burdened with two bonds for £2000 and £1000 respectively, the annual interest on which amounted, less tax, to £124, 9s. The bond for £1000 was repaid at Whitsunday 1907. The fourth party has not hitherto been debited by the first parties with interest on said bonds.' The third question put to us is—'If the first question is answered in the negative—as we have answered it—'do the feu-duties, landlord's taxes, insurance premiums, repairs, and interest on bonds effeiring to the said houses of Mount Grange and Gordon Villa, and insurance premiums for said furniture therein, or any and which of them, form proper damages against the fourth party; or otherwise, against said allowance of £400?' When the case was before us in summer, counsel for the parties very properly suggested that we should defer consideration of this question, seeing that the case of *Johnstone* v. *Mackenzie's Trs.* (1911 S.C. 321), which obviously bore a marked resemblance to this aspect of the present case, was under appeal to the House of Lords. The House of Lords has since recently decided that appeal (49 S.L.R. 986); and having now heard counsel at our bar, we are in a position to answer the third question."

The following were the *questions of law*, as amended, dealt with at this hearing:—"(3) If the first question is answered in the negative, do the feu-duties, landlord's taxes, insurance premiums, repairs, and interest on bonds effeiring to the said houses of Mount Grange and Gordon Villa, and insurance premiums for said furniture therein, or any and which of them, form proper charges against the fourth party; or otherwise, against said allowance of £400? (4) In the event of there not being in any year sufficient trust revenue to meet said allowance of £400 to the fourth party in full, is she entitled to payment of any arrears thereof out of the income of future years?"

Argued for the first, second, and third parties—The language of the testator here was appropriate to an ordinary liferent, and on a sound construction of the trust disposition it was a right of liferent and not occupancy merely that was conferred. Consequently the case of *Johnstone* v. *Mackenzie's Trustees*, 49 S.L.R. 986, applied in terms. This case laid down the proposition that where a will contains terms expressing a right equivalent to a proper liferent, the burdens of a liferent are attached to that right. This had now superseded the old proposition that where a testator confers on his wife the enjoyment of a house protected by a trust, the burdens of a liferent do not fall on her. The ratio of the cases before *Johnstone* v. *Mackenzie's Trustees* was to be found in the case of *Clark*, 9 Macph. 435. There was no reason for differentiating the interest on the bonds or the insurance premiums from the charges put on the liferentrix in the case of *Johnstone*. In any event, by the terms of the will if there was not sufficient revenue in any year to yield the allowance of £400, the fourth party was not entitled to receive payment out of the income of future years. The following authorities were also referred to:—Ersk. Inst. ii., tit. 9, sec. 61; Bell's Prin. 1060 *et seq.*; Stair, More's Notes, 215; *Lady Forbes*, 2 Pat. 84; *Brand* v. *Scott's Trustees*, May 13, 1892, 19 R. 768, 29 S.L.R. 641; *Cathcart's Trustees* v. *Allardice*, December 21, 1899, 2 F. 326, 37 S.L.R. 252; *Smart's Trustee* v. *Smart's Trustees*, 1912 S.C. 87, 49 S.L.R. 42; *in re Courtier*, 34 Ch. D. 136; *in re Baring*, [1893] 1 Ch. 61; *in re Redding*,

[1897] 1 Ch. 876; *in re Tomlinson*, [1898] 1 Ch. 232; *in re Betty*, [1899] 1 Ch. 821; *in re Gjers*, [1899] 2 Ch. 54.

Argued for the fourth party—The right here conferred was a right of occupancy and not a proper liferent and therefore the case of *Johnstone* did not apply, and the case must be ruled by the principle laid down in *Clark* (*cit.*). Assuming, however, that *Johnstone's* case did apply, then there was room here for differentiation between the various items. *Johnstone's* case only dealt with the feu-duty, landlord's taxes, and repairs. In accordance with this decision the liferentrix was saddled with such burdens as naturally fell on the land, but not with such as might or might not be put on as security against some future risk. It was expressly held in Ireland that a liferentrix was not liable to pay insurance premiums—*Kingham*, [1897] 1 Ir. Rep. 170. Further, in *Johnstone's* case Lord Shaw founded on the fact that the residue was distributed and the fund available for disbursement of trust charges was gone.

At advising—

LORD DUNDAS—[*After the narrative quoted above*]—I can see no ground for making any material distinction between the provisions of the present trustee's settlements, above quoted, and those of the testator in *Johnstone's* case, which directed his trustees to "to give to" his wife "the liferent use and enjoyment of his" house. It seems to me therefore that, in accordance with the decision of the House of Lords, we must find that the feu-duties, landlord's taxes, and repairs form proper charges against the fourth party.

The question, however, so far as relating to the interest on bonds and the insurance premiums, is not expressly covered by *Johnstone's* case. As regards the former of these items, I can see no good reason to differentiate the interest from the other matters which, in accordance with the House of Lords judgment, must be charged against the fourth party. The insurance premiums seem to present a somewhat different question. I am not aware of any direct authority by way of decision on the point. We were referred to an Irish case—*Kingham*, 1897, 1 Ir. Rep. 170. The testator there directed his trustees to allow his wife, if she pleased, to occupy his house during her life, with the use of the furniture, &c. Chatterton, V.-C., held that the widow must pay the head rent and taxes payable in respect of her period of occupation and do such repairs as a tenant would be liable for in absence of express contract, but that as it was the duty of the trustees to keep the premises sufficiently insured against fire, "so as to preserve the property for their *cestui que* trust," they could not require these premiums to be repaid to them by the widow. The decision seems to me, with all respect, to be inconclusive, for I should have thought that the liferentrix (or occupant) was a *cestui que* trust as well as the fiars of the house. In the case before us I do not doubt that it was a proper act of trust administration for the trustees to insure the houses and furniture in question against risk of fire. I think that in theory there might be something to say, under given circumstances, for the view that insurance, being truly for the benefit of all parties concerned, the cost of it might fairly be debited proportionally against liferent and fee respectively, and if the parties had been willing to concur in this view such an arrangement might have afforded a fair and equitable solution of the problem. However this may be, the present case supplies no material for any attempt at apportionment of the sum, which cannot be a large one. It seems to me that, as the question is put to us, there is no sufficient ground for treating these premiums—which *prima facie* are yearly payments appropriate as charges against revenue — in any different way from the items of charge already dealt with, especially looking to the express terms of the truster's allowance of £400 a year "towards the upkeep of said residence." I am therefore for answering the third question, in the circumstances of the case before us, by finding that all the items mentioned in it form proper charges against the fourth party.

The last question has regard to the truster's direction, already quoted, to his trustees to pay to his unmarried daughters or daughter, out of the income of his estate, "an allowance at the rate of £400 per annum towards the upkeep of said residence." The fourth party contends that "in the event of there not being in any year sufficient revenue to yield said allowance of £400, any part thereof unpaid falls to be paid out of the income of future years." The matter is to some extent one of impression, but I think the contention is right. The yearly allowance is to be "at the rate of" £400. I see no reason why the shortcoming of that rate in one year should not be made good, by way of arrears, out of the income of a succeeding and more prosperous year. I am therefore for answering the fourth question in the affirmative.

LORD KINNEAR—I concur.

LORD MACKENZIE—I concur.

The Court answered the third question by finding that all the items in it formed proper charges against the fourth party, and answered the fourth question in the affirmative.

Counsel for the First and Second Parties—Blackburn, K.C.—Kirkland. Agents—Thomas White & Park, W.S.

Counsel for the Third Parties—Constable, K.C. — Pitman. Agents — T. & R. B. Ranken, W.S.

Counsel for the Fourth Party—Chree, K.C.—C. H. Brown. Agents—Lindsay, Howe, & Co., W.S.