of interest on the bond, and the pursuer cannot look for his relief from rents which are beyond the reach of the annuitant. I agree with the Lord Ordinary that the pursuer has no title to inquire whether the debt might or might not have been cleared off by Mr Cowan's trustees in the execution of their trust. He has no personal claim against the defender, who is under no personal obligation either to him or to the annuitant. His right to relief depends upon the incidence of real burdens, and these must be taken as they stood when he acquired the estate of Kirkton, and as they still stand when his claim for contribution is brought forward. If the debt on Drumcrosshall were cleared off, the income available from that estate to meet the annuity would be enlarged, and the proportionate liability of the estate to contribute along with Kirkton would be increased. But in the meantime there is a real security over Drumcrosshall which is preferable to the annuity, and the rental available for the annuity must be so much the less, so long as that security subsists.

The third point decided by the Lord Ordinary is not now in dispute. His Lordship has repelled the second plea-in-law for the defender, and that part of his interlocutor is not brought under review.

The question which the Lord Ordinary has reserved is whether the pursuer is entitled to a decree which may prejudice the interests of secondary creditors over Drumcrosshall. The only point of this kind that has been argued is whether the equity which in certain circumstances enables creditors holding postponed securities over part of an insolvent estate, to prevent a catholic creditor from impairing their securities unnecessarily in the exercise of his preferable rights, can be made applicable to such a case as the present, where the right which it is proposed to control by equity is not that of another creditor on the estate of a common debtor, but of the owner of a separate property, who is under no personal obligation either to the creditor in the real burden or to the creditors on the other estate over which the burden extends. But it is not clear that that question arises in the shape in which it was presented in argument. We have heard no argument as yet as to the precise terms of the decree to which the pursuer may be entitled, and I think it would be premature to decide anything as to the rights of postponed creditors, until the conclusions of the summons have been fully considered. I am of opinion that we should adhere to the interlocutor of the Lord Ordinary.

The LORD PRESIDENT and LORD ADAM concurred.

LORD M'LAREN was absent.

The Court adhered to the interlocutor of the Lord Ordinary, with the exception that the words "latter estate" as quoted above were altered to "said estate."

Counsel for the Pursuer—C. S. Dickson—Constable. Agents — Carment, Wedderburn, & Watson, W.S.

Counsel for the Defender—H. Johnston—C. N. Johnston. Agents—Dalgleish & Bell, W.S.

HOUSE OF LORDS.

Monday, February 17.

(Before the Lord Chancellor (Halsbury), Lord Watson, Lord Herschell, Lord Macnaghten, Lord Morris, and Lord Shand.)

STRACHEY'S TRUSTEES *v.* JOHNSTONE'S TRUSTEES.

(*Ante*, vol. xxxii. p. 305, and 22 R. p. 396. The case is also reported in the Law Reports by G. J. Wheeler, Esq., under the title *Johnstone* v. *Haviland.*)

Succession—Debitor non presumitur donare—Double Provisions—Marriage-Contract Provision—Legacy.

A testator by his trust-disposition and settlement directed his trustees to pay to Mrs S., out of funds invested in his business, a legacy of £4000, with interest at the rate of 5 per cent. if she allowed the money to remain in the business.

In an indenture of settlement made three years previously in contemplation of the marriage of Mrs S., the testator had bound his executors, within six months after his death, to pay to the trustees named in the indenture a sum of £4000, with interest at the rate of 4 per cent. from the date of his death, in trust for behoof of Mrs S., and her husband if he survived her, in liferent, and the children of the marriage in fee. Failing children, the sum was to revert to the granter's estate. By the indenture Mrs S. conveyed her *acquirenda* to the trustees upon the same trusts, except that if there should be no son of the marriage who should attain majority, or daughter who should attain that age or marry, the trustees were to hold the capital of such *acquirenda* for such purposes as Mrs S. should by will direct, or failing such direction, for her representatives in intestacy.

Held (*aff.* judgment of the Second Division) that the legacy was not in satisfaction of the marriage-contract provision, and that the trustees were entitled to payment of both.

Opinion by Lord Watson and Lord Shand, that it was not competent to lead evidence to show that the testator used the term "legacy" in his will in a sense other than its ordinary sense.

This case is reported *ante*, vol. xxxii. p. 305, and 22 R. p. 396.

At delivering judgment—

LORD CHANCELLOR (HALSBURY)—In this case the question is susceptible of a very short solution. Had the English rule of law prevailed, I am not quite certain that we should not have been involved in this case in a good many difficulties; what the ultimate decision might have been it is immaterial to inquire. The English law, of course, is now established, as Lord Wensleydale said in *Kippen* v. *Darley* (18 D. 1137, 1186; 3 Macq. 203)—"The rule is now by a long course of decisions firmly and fully established and cannot be disputed." He adds, what I entirely concur with, "and any comment upon it would now be worse than useless." But after the decision of *Kippen* v. *Darley* it is no longer competent to your Lordships to assume that the rule of law—the presumption arising from what are called double portions—is applicable to the law of Scotland. That was a decision upon that very question in this House, and we are, therefore, remitted to the simple question as it arises under Scottish jurisprudence.

Now, although the two sets of provisions are very different, both in their application and in the decisions upon them, there is one observation which was made by Sir John Leach with reference to the English rule which is, to my mind, applicable to the Scottish rule. Sir John Leach said in *Weall* v. *Rice* (2 Russ. & My. 268)—"It is not possible to define what are to be considered as slight differences between two provisions." "Slight differences," he adds—and one cannot help observing that after the learned Judge had said it is not possible to define, he begins with something like a definition—"are such as, in the opinion of the judge, leave the two provisions substantially of the same nature; and every judge must decide that question"—of what are slight differences—"for himself." My Lords, I believe that to be perfectly true as applicable to the construction of the instrument now under your Lordships' consideration, and although I propose to mention one or two differences between the two provisions, I protest against anybody hereafter arguing from the particular provisions to which I refer that I am laying down, or affecting to lay down, any general proposition which governs other instruments. I am speaking of this instrument with all its circumstances, with all its conditions, and the language which I find therein. There is no greater source of error than, where you have been dealing with one instrument, and dealing with it upon what are general principles of construction, and pointing to the particular provisions of it as exhibiting the necessity of applying those general principles of construction, to apply any observations made with regard to the particular language used or the particular circumstances in which the language is used as amounting to a general canon of construction which is applicable to all other instruments whatsoever, though the language may be different, though the collocation may be different, and though the circumstances with which the instrument is dealing may be entirely different. I am, therefore, only endeavouring to construe this particular instrument; and when I look at the two instruments in this case, it appears to me that they differ in very material particulars. There is in the one instrument the language of gift. There is in the other instrument the language of obligation. And I find that where the two things are dealt with they are dealt with differently. In the first deed the obligation is an obligation to the trustees; whereas in the second deed the gift is a gift to the lady herself. And although it may be perfectly true that the gift to the trustees was for the benefit of the lady herself, I am endeavouring to find out from the language of the instrument itself what was in the mind of the testator at the time when he wrote those words; and I cannot doubt that the person who writes these words has in his mind the fact that the provision he has already made for the trustees is a different thing from giving to the lady herself. And although it will indeed, by a circuitous process, perhaps, come round to the trustees, yet it is not the same thing. Therefore, when I am asked to say whether these two are to be read as one, and the one is to be in substitution for the other, I cannot entertain the smallest doubt that the person who wrote these words was under the impression that he was doing what he said he was doing—making a gift, and not implementing the obligation into which he had already entered.

For these reasons—and they are very short and simple ones—it appears to me that we must affirm the judgment of the Court below; and I confess it seems to me that it would be very difficult, getting rid as I say of the confusion that has arisen in some of the English cases from a different rule of law, to suggest that anybody can read these two documents and suppose that the one was intended to be in substitution for the other. That seems to me to be enough to say on the principal argument addressed to us, long as that argument lasted.

With regard to the question of interest, I entirely decline to deal with that. I neither understand that any such question was properly raised in the Court below, nor that there are any materials upon which your Lordships could properly entertain the question again. The fact that interest of some sort or other was admitted to be due, or was not contested to be due, is conclusive against the point as to there being any right to recover it; and if it comes to be a mere question of the amount of interest which ought to be allowed, I have neither the materials nor does there appear to be any ground for altering what the Court has already done.

For these reasons I submit to your Lordships that the proper judgment is, that the interlocutor should be affirmed and the appeal dismissed with costs.

LORD WATSON—I agree with the Lord Chancellor in thinking that there is according to the law of Scotland no presumption

which necessarily governs the decision of the present case. The Court have to consider together the obligatory provision made in favour of Mrs Strachey by her marriage-contract, and the voluntary provision which is made in her favour by the will of the late Mr Johnstone; and to determine whether the testator meant to substitute the second of these provisions for the first of them. I think the only materials to which we can legitimately refer in deciding that question are, first, the terms of the marriage-contract, and in the second place, the terms of the settlement, which must be read in the light of a known maxim of Scottish law—*Debitor non presumitur donare.* But that maxim will only prevail in cases where, according to the opinion of the Court upon the terms of the documents, the construction of the will favours the substitution of a new and substantially similar provision for the onerous provision which had been previously made in the marriage-contract.

My Lords, with regard to this case, having indicated the view which ought to be taken in considering it, I have only to add that I agree in the conclusion which has been expressed by the Lord Chancellor. *Prima facie* there is the gift as a legacy. I do not say that is sufficient by itself, but in this case it is coupled with such differences in the character of the two provisions that the one cannot, in my estimation be held to be in substitution for the other.

With regard to the tender of evidence made by the pursuer at the bar, whatever authority there may be for the admission of such evidence in the law of England, it is contrary to the rules of the law of Scotland. The other points pleaded by the learned counsel were very technical, and are open to this objection, that they are not pleaded on the record, and were not considered by the Court below.

LORD HERSCHELL—I am of the same opinion. I think the maxim which has been so often referred to is a maxim which embodies common sense; it is only this—that a debtor is not presumed to make a gift. That is, of course, very far from implying that he may not perfectly well make a gift. I take it to mean this and this only—that where a debtor makes a disposition of his property in favour of his creditor under circumstances such that a gift would be presumed in the case of a person who was not his creditor, it will not be presumed in the case of a person who is; it will then be regarded as a discharge of his obligation. But if there are circumstances which indicate that he did not intend it to be a mere discharge of his obligation, but intended to benefit the creditor and so make that person an object of his bounty, then it is just as effectual as though no such relationship existed between them. It comes then to be a question of fact to be determined in each case whether there is enough to show that he did not intend the disposition to be in satisfaction of his obligation, but did intend it to be a gift.

I agree with my noble and learned friends who have preceded me that there is ample to show this in the present case. I am not going over the circumstances again beyond stating that my mind is influenced not by one thing alone, but by a combination of things—by the fact that it is described as a "legacy," by the circumstance that it is given to the lady, and not to the trustees to whom the obligation was; and if it be said in answer that the testator would know that giving it to her was the same thing as giving it to the trustees because of the covenant she had come under, then I say, in reply to that, you must again take into account the fact that he gives it coupled with a benefit or privilege which she could not enjoy if those trusts were carried out. Taking all those considerations together, I am satisfied that it was intended to be a gift and not in satisfaction of an obligation.

LORD MACNAGHTEN—I am of the same opinion. I do not think effect could be given to the argument on behalf of the appellants without overruling directly or indirectly the judgment of this House in *Kippen* v. *Darley*. Once it has been established that the rule against double portions does not obtain in Scotland, it appears to me there is no substantial ground on which it can be contended that the obligation of the marriage settlement has been extinguished by the will.

LORD MORRIS—I concur.

LORD SHAND—I am also of the same opinion. I think there can be no doubt that according to the law of Scotland in a case of this class the maxim *Debitor non presumitur donare* has a direct application in the first instance. The testator had three years before he made his will come under an obligation to pay a sum of £4000 to marriage-contract trustees for behoof of Mrs Strachey and any children of the marriage. When we find that three years afterwards when he made his will he gives the lady the same sum, I think the presumption is against donation. Accordingly, if there had been here a mere direction to the trustees to pay the money to the marriage-contract trustees or even to herself, and nothing beyond that, or if the words used were not to be held by implication to go further, the maxim would have received effect. But, my Lords, the language of the will, I think, shews that he did not intend merely to discharge a debt but to confer an additional benefit. Your Lordships have referred to most of the circumstances which lead to this inference, and I shall not enlarge upon them, but they are mainly these: In the first place, there is the use of the word "legacy." As to that I agree with what was said by Lord Moncreiff in the *Balfour Case* (4 D. 1044), which has been referred to, that though that is not necessarily conclusive, it must be held to be of great weight in a case of this kind. It rather implies gift than payment of debt. But in addition to this we have, as has

been pointed out, the circumstance that the two sums are payable to different persons, namely, the provision to the trustees of the marriage-contract, and the legacy to Mrs Strachey herself. Then what seems to me to be much more material is the further fact, that in giving this legacy there are two benefits or advantages given to Mrs Strachey which she never could have had under the marriage-contract. The first of these is that the legacy when given by her to the marriage-contract trustees under her obligation to transfer acquirenda to them is to be held on a different destination from that of the marriage-contract provision. The ultimate destination under the marriage-contract in case of the failure of issue is that the sum provided is to revert to Mr Johnstone's heirs; while the destination under the will would, failing children, leave the legacy at the disposal of Mrs Strachey herself. In addition to that, as has been pointed out, the testator has expressly altered the rate of interest in the two cases. Under the marriage-contract 4 per cent. is fixed as the limit; while under the will Mrs Strachey has right to have 5 per cent. by leaving the money bequeathed to her in the indigo business. Under these circumstances I am of opinion that it is a matter of direct inference that the testator intended to confer and has given an additional benefit by his will.

It has been said that there are other provisions in the same clause which tend to show that the testator was only providing for the fulfilment of his obligation under the marriage-contract. In the same clause which provides for the legacy to Mrs Strachey, there is a direction to pay an annuity of £300 to a lady to whom he was under an obligation by a bond of annuity for that amount. The appellants' counsel maintains that in the case of this annuity there is clearly no duplication, but a provision only for fulfilment of the testator's obligation, and for the purpose of the argument this may be assumed to be so. There are obviously considerations which support the view that the legacy to Mrs Strachey is an additional benefit which do not apply in the case of the annuity, in the use of the word "legacy" and the other circumstances to which I have specially referred. But whatever may be said of the direction as to the annuity, there is in the same clause also a provision in favour of the testator's widow, which, like the legacy to Mrs Strachey, gives her additional benefits beyond those which he was under obligation to grant. I have only to add that I think there has been no sufficient ground shown for disturbing the judgment of the Court with regard to the rate of interest.

I entirely concur with what has been said by my noble and learned friend Lord Watson, that such evidence as was proposed to be led could not be admitted under the law of evidence in Scotland. It is said that the evidence is not proposed for the purpose of showing the intention of the testator—we are to gather that from the deed—but for the purpose of showing that he used the word "legacy" in a sense that was not its ordinary sense, and I think that evidence for such a purpose, that is, for the purpose of substituting the word "provision" for the word "legacy" used by the testator, is clearly inadmissible.

On these grounds I am of opinion with your Lordships that the judgment appealed against should be affirmed.

Judgment affirmed.

Counsel for the Appellants—H. Johnston—C. K. Mackenzie. Agents—Preston, Stow, & Preston, for J. C. & A. Steuart, W.S.

Counsel for the Respondents—Sol.-Gen. Graham Murray, Q.C.—S. Dickenson—Sym. Agents—Janson, Cobb, Pearson, & Co., for J. & J. Ross, W.S.

Thursday, March 19.

(Before the Lord Chancellor (Halsbury), Lord Herschell, Lord Macnaghten, and Lord Morris.)

LITTLE *v.* STEVENSON & COMPANY.

(*Ante*, vol. xxxii. p. 575, and 22 R. p. 796.)

Ship—Demurrage—Lay-Days—Duty of Shipper to have Cargo Ready.

A charter-party provided that the "River Ettrick" should proceed to Bo'ness and there receive a full cargo of coals.

On 17th October the shipowners intimated in writing to the charterers that the vessel had left for Bo'ness, and requested them to have the cargo forward on the 19th. The "River Ettrick" arrived in Bo'ness roads on the 19th, but was not allowed to enter the dock owing to its crowded state. The fact of her arrival was known to the charterers' agent, who was also agent for the ship.

On 21st October a berth became unexpectedly vacant in the dock, and would have been given to the "River Ettrick" if her cargo had been forward. As her cargo was not forward the "River Ettrick" failed to obtain this berth, and no other berth became available for her until the 26th, on which date she was docked.

Held (*aff.* judgment of the Second Division, but on different grounds) that the charterers were not liable to the shipowners for demurrage, in respect that there was no obligation upon a charterer, apart from special circumstances, to have his cargo forward before the ship would in the ordinary course, and according to the custom of the port, obtain a berth for loading.

Appeal—Cause Originating in Sheriff Court—Findings in Fact—Competency of Remit for Further Findings—Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40.