ment, then it follows, and was not disputed, that the deed of appointment was perfectly valid. I therefore agree that the first two questions must be answered in the affirmative, and that the other requires no answer.

LORD KINNEAR—If we were to read the obligation contained in this marriage-contract as we ought to do, for the purpose of ascertaining the fair meaning of the words used in it according to the ordinary acceptation of language, irrespective of any previous decision, there could be very little doubt indeed as to the meaning of the obligation. The husband obliges himself to pay a certain sum or certain sums, varying according to the number of children, at the first term of Whitsunday or Martinmas after the death of the longest liver of himself and his wife, and then he goes on to provide—(omitting words which are not necessary for the construction of the obligation itself, but only describing the qualifications which pertain to the right created by that obligation)—that this sum which he obliges himself to pay at that time is to be divisible, failing apportionment by him, among the survivors of his children and the issue of such as may have predeceased. That appears to me to be an obligation to the children surviving the term of Whitsunday or Martinmas after the death of the longest liver of the spouses, and to the issue of those who predecease, and to nobody else; and therefore I have no hesitation in coming to the conclusion which your Lordships have expressed that the husband had undertaken no obligation in favour of anybody except the children surviving at the time.

If that be the natural meaning of the words used, the only question is whether there is any rule in law founded on prior decisions which obliges us to put upon this marriage-contract a construction different from that which we would otherwise place upon it. I am not aware of any such rule, and, taking it by itself, I concur.

The LORD PRESIDENT concurred.

The Court answered the first two questions in the affirmative and found it unnecessary to answer the third.

Counsel for the First and Second Parties—Craigie—Blackburn. Agents—Mackenzie & Black, W.S.

Counsel for the Third Party—Guthrie—Macfarlane. Agents—J. C. Brodie & Sons, W.S.

Friday, March 20.

FIRST DIVISION.

[Lord Low, Ordinary.

FERRIER *v.* COWAN.

Right in Security — Bond of Annuity — Separation of Estates Burdened by Bond —Apportionment of Liability—Contribution—Relief.

When two estates in land upon which a debt is secured come into the hands of different proprietors, they are liable for the debt ratably according to the value of the estates. In applying this rule to the case of a bond of annuity, *held* that the contributions must be in proportion to the annual rents or proceeds of the estates, and that in estimating the annual rents or proceeds the interest due upon preferable heritable bonds must be deducted.

This was an action at the instance of William Cochrane Ferrier of Birkenshaw, as an individual and as assignee of Mrs Elizabeth Mary Hancock or Cowan, widow of William Cowan of Kirkton, Boghall, and Linburn, the annuitant after mentioned, against James Henry Cowan of Boghall and Drumcrosshall.

The facts of the case and the contentions of the parties appear from the following note by the Lord Ordinary:—"By his trust-disposition and settlement the late William Cowan conveyed his whole estates to trustees and directed them to infeft his widow in an annuity of £200 to be paid to her out of the rents of the estate of Boghall. He also directed his trustees to convey the estate of Boghall to his eldest son, the present defender, under burden of the annuity to his widow, and to convey to his second son John Robert Cowan the estates of Drumcrosshall and Kirkton.

"By a codicil Mr Cowan directed his trustees 'when the time arrives, to convey my estates of Drumcrosshall and Kirkton to John Robert Cowan, my second son, to do so under burden of the annuity of £200 in favour of my wife . . . and I declare that my estate of Boghall shall be conveyed when the time arrives to James Henry Cowan, my eldest son, entirely free from said annuity.'

"The trustees duly carried out the truster's instructions, and conveyed, at the appointed time, Boghall to the defender free of the annuity, and the estates of Drumcrosshall and Kirkton to John Robert Cowan under the real burden of the annuity.

"In 1886 the estate of Kirkton was sold by a heritable creditor and purchased by the pursuer. The disposition in the pursuer's favour disponed the lands under the real burden of the annuity to Mrs Cowan.

"In 1887 John Robert Cowan disponed the estate of Drumcrosshall to his brother, the defender. There is excepted from the warrandice 'any right which Mrs Cowan has to receive payment of her annuity, or part thereof, out of the lands of Drumcrosshall.'

"It is stated by the defender that Drumcrosshall was burdened with a bond, preferable to Mrs Cowan's annuity, for £10,000, and also with bonds postponed to her annuity, the total burdens now affecting Drumcrosshall amounting to £16,450. The defender also avers that the rental of that estate does not exceed £500 a-year, and, if that is so, it is obvious that it is burdened to more than its full value. It was further stated—and I did not understand the statement to be controverted—that the consideration which the defender gave to his brother for the disposition of the estate was taking over the personal obligation in the bond for £10,000.

"Since the pursuer purchased Kirkton, Mrs Cowan has demanded and received from him payment of her full annuity, and in the present action he seeks to operate relief of the payments which he has made, to the extent of one-half, against the defender as proprietor of Drumcrosshall.

"The pursuer avers that Kirkton and Drumcrosshall are practically of the same value, and that therefore, in a question between him and the defender, each estate is liable to contribute one-half of the annuity.

"I did not understand the defender seriously to dispute that, as a general rule, when two estates, upon which a debt is secured, came into the hands of separate proprietors, they must pay the debt ratably according to the value of the estates. He contended, however, that the debt of £10,000 having been secured over Drumcrosshall before the widow's annuity was made a burden upon that estate, the interest upon the £10,000 must be deducted from the rental, and only the surplus rental taken into account in comparing the value of the two estates, and allocating the annuity between them.

"The answer which the pursuer makes to that view is that, even assuming that the debt of £10,000 is preferable to the annuity, which he does not admit, William Cowan gave directions to his trustees to pay out of his moveable estate the whole heritable debts affecting his lands, before they conveyed his estates to his sons. The direction in the settlement upon which the pursuer founds is to sell certain railway stock and to pay the heritable debts out of the proceeds. In a codicil, however, Mr Cowan directed his trustees only to realise the railway stock in certain events, and declared his wish to be that 'the existing mortgages shall remain secured on my estates of Boghall, Drumcrosshall, and Kirkton, until all my other debts are paid.' It is not said that the railway stock has been realised, or that all the other debts of Mr Cowan have been paid, and therefore if it were material to consider whether, in terms of the settlement, the debts with which Drumcrosshall is burdened might not have been paid off, inquiry would be necessary.

"It seems to me, however, that the pursuer has no title to found upon the directions in the settlement. Drumcrosshall and Kirkton were both left to John Robert Cowan, and if he chose to allow the heritable debts to remain upon these estates, or either of them, instead of calling upon the trustees to pay them off, it seems to me that he was quite entitled to do so. If the security for the widow's annuity had depended upon the debts being paid, she might perhaps have had right to insist that the directions of the settlement should be carried out, but I do not think that the pursuer has any such right. I think that he must take matters as they stood when the separation of the estates occurred by his purchase of Kirkton, and at that date (assuming the defender's statement to be correct), Drumcrosshall was burdened with a debt of £10,000 preferably to the widow's annuity.

"I am therefore of opinion that the defender's contention, that if the bond for £10,000 is preferable to the annuity, it falls to be taken into account in any allocation of the annuity between Drumcrosshall and Kirkton, is sound.

"The defender further contends that the pursuer is barred from making any claim of relief against him or the estate of Drumcrosshall, in respect, first, that in the disposition of Kirkton to the pursuer the whole annuity is declared to be a burden upon that property; and secondly, that the upset price at which the pursuer purchased Kirkton was estimated, to his knowledge, upon the footing that the whole annuity was exigible from the estate.

"In regard to the first point, the whole annuity was, as matter of fact, a burden upon Kirkton, and the disposition seems to me to do no more than state that fact in order that there might be no dubiety on the point between disponer and disponee.

"In regard to the second point, if the defender's statement is correct, that after deducting the preferable debt of £10,000 there is practically no free value or rental of Drumcrosshall to meet the annuity, it was very natural that the bondholders in fixing the reduced upset price of Kirkton should have proceeded upon the assumption that the purchaser would have to pay the whole annuity. I do not think, however, that the way in which the sellers arrived at the upset price, even if known to the pursuer, barred him from enforcing any right of relief which he might find to be open to him.

"The defender also argued that no part of the annuity could be demanded against Drumcrosshall, because to do so would prejudice the rights of the postponed creditors on that estate.

"The defender states that when the pursuer purchased Kirkton the debts secured upon the two estates were as follows — There was first the bond for £10,000 over Drumcrosshall only, which was prior in date and preferable to the widow's annuity. Then there were bonds, postponed to the annuity, granted over both estates for £3000, £7950, and £1000.

"Kirkton was sold by the creditors in right of the bond for £3000, and out of the price that bond was paid and also the bond for £7950 to the extent of £2500.

"The result was that the balance of the latter bond, viz., £5450, and the bond for £1000, remained burdens upon Drumcrosshall alone, postponed to the bond for £10,000.

"The defender argued that the pursuer could have no higher right than the widow had, and that she as a catholic creditor was not entitled to prejudice the secondary creditors over Drumcrosshall by demanding payment of any part of her annuity out of that estate, Kirkton being sufficient for the payment of the whole annuity.

"The question is one of some nicety, but although it was stated there was little argument upon this point and no citation of authorities, and I do not propose at this stage to express any opinion upon it, because as the defender's statements in regard to the burdens upon the estates are not admitted, the facts must be ascertained."

The Lord Ordinary accordingly on 21st December pronounced this interlocutor, against which he granted leave to reclaim:—"Repels the fourth plea-in-law for the pursuer and the second plea-in-law for the defender: Before further answer, allows to the defender a proof of his statements in the defences in regard to the burdens on the estates of Kirkton and Drumcrosshall, and also as to the value of the latter estate; and to the pursuer a proof of his averments in answer thereto."

The pleas referred to were (for the pursuer)—"(4) In any case, the truster having directed the said debt to be paid out of his moveable estate, the defender is not entitled to take the debt into account in allocating the annuity; and (for the defender)—"(2) The pursuer having purchased the estate of Kirkton expressly under burden of the payment by him out of the said estate of the whole of the said annuity, he is not entitled to relief against the defender or the estate of Drumcrosshall."

The pursuer reclaimed—On the first point dealt with by the Lord Ordinary the following authorities were cited—Fisher on Mortgages, p. 660; *Ley* v. *Ley*, 1868, L.R., 6 Eq. 174; *Rose* v. *Rose*, 1787, 3 Pat. 66.

At advising—

Lord Kinnear—The estates of Kirkton and Drumcrosshall belonging to the pursuer and defender respectively are subject to the common burden of an annuity of £200 payable to the widow of William Cowan, a former proprietor. The burden is imposed by the trust-disposition and settlement of Mr Cowan, who directed his trustees to infeft his widow in an annuity of £200 a-year "to be paid to her out of the rents of the estate of Boghall in each year so long as she lives and continues my widow;" and by a codicil directed that the estates of Kirkton and Drumcrosshall should be conveyed to his son John Robert Cowan under burden of this annuity, and that the estate of Boghall should be conveyed to his son James Henry entirely free from the said annuity. The disposition to John Robert Cowan, which the trustees executed in terms of the direction, has not been laid before us, but the parties are agreed that the directions of the truster were duly carried out by his trustees. So long as Kirkton and Drumcrosshall remained in the hands of John Robert Cowan there could be no question of contribution as between these estates. But the question arose when the two estates were separated and came into the hands of different owners by the pursuer's purchase of Kirkton in 1886. Since that date the pursuer avers that he has been required to pay the entire annuity to Mrs Cowan as if it had been a burden upon his property of Kirkton alone; and he brings this action, founding upon assignations which he has taken from the annuitant, for the purpose of establishing his claim to a proportional relief from the Drumcrosshall estate. It is not now disputed that both estates must contribute rateably to the annuity, but the parties are in controversy as to the conditions on which the common liability is to be apportioned. The Lord Ordinary has decided three questions which have been raised, but he has reserved his judgment as to a fourth point until the facts shall be ascertained. I think that this was a proper course, and also that, subject to one qualification, his Lordship's judgment on the points he has decided is right. The Lord Ordinary holds, in the first place, that the burden must be apportioned according to the value of the estates. If this means the saleable value or the capitalised value of the rental, I am unable to agree with it. It is unnecessary for the present purpose to consider what the remedy of the annuitant might be, if the rents were insufficient to meet her claim. But primarily at all events, her annuity is a charge upon the rents, or if the lands be unlet upon the income or annual proceeds of the estate. I think it follows that in the application to this particular case of the general rule which his Lordship has correctly stated, the contribution must be in proportion to the rent or annual proceeds. The burden to be divided is an annual charge from year to year during the widowhood of the annuitant; and the contribution must be made from year to year as the claim arises in proportion to the income of each year. On the second point which the Lord Ordinary has decided, I agree with him for the reasons he has stated. The defender claims that the interest of a heritable debt of £10,000 which was secured over Drumcrosshall before the burden was imposed and is therefore preferable to the claim of the annuitant, must be deducted, and that only the balance of the rental is to be taken into account in apportioning the annuity between the two estates. This appears to me to follow from the rule that the burden is to be divided in proportion to the value of the estate charged. The estate of Drumcrosshall is charged with the annuity, subject always to the preferable claims of the creditors in the £10,000 bond. The annuitant could not have attached the rents which have in fact been applied, or the rents which may in future years be applicable to payment

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—