fault of his that this occurred, and that he did all in his power to comply with the requisitions of the statute.

The second objection taken is, that no notice or intimation of the appeal was given to the respondent, as required by sub-section 5 of section 3 of the Act, the fact being that notice was given to the respondent's agent, and not to the respondent himself.

I think that this second objection is well founded. The fifth sub-section specifies clearly that the notice must be given to the respondent, and not to his agent, and I would point out that in many of the cases contemplated by the Act an alternative choice is given, *e.g.*, this very sub-section speaks of "a certificate under the hand of himself or his agent." Again, in sub-section 2 the Clerk of Court is required to submit the case in draft "to the parties or their agents." I think it is not hard to see why the Act requires the intimation of appeal to be made to the party personally, the reason being that after the preparation of the case all the proceedings in the Inferior Court are at an end. There is now a different tribunal, and therefore any intimation to the agent is dispensed with, and, there being now a new litigation, intimation must be made to the respondent himself, who, if he wishes to do so, may instruct an agent in the Supreme Court to carry on his case.

As regards the first objection, I am not clear about it, and prefer to reserve my opinion.

I am therefore of opinion that the objection should be sustained, and that the appeal is incompetent.

LORD M'LAREN—Two objections have been taken to the competency of this appeal. The first is that, while the statute provides that the appellant shall not be entitled to have a case delivered to him unless he finds caution or makes consignation within three days after the determination of the judge of the Inferior Court, consignation was in this case offered by the appellant within three days, but, the sum not having been fixed by the inferior judge, consignation was not in fact made until after the expiry of the three days.

If we are agreed in maintaining the second objection it is not necessary, perhaps, to give a definite opinion on the first, but as the point has been argued I think it is right to say that, as at present advised, I should not be able to sustain the first objection. The statute does not attach any nullity as a condition to finding consignation within three days, but merely provides that the penalty for failure to do so is that the appellant shall not be entitled to have a case delivered to him. If I were sitting as a judge in the Inferior Court, and consignation were offered but not made because of unavoidable delay on my part in not fixing the amount, I should certainly deliver a case, and then, as a judge sitting in the Court of Appeal, I should hold that the inferior judge had followed a perfectly correct course, and that the Court was not entitled to refuse the appeal as incompetent.

The party has done all that it was possible for him to do to satisfy the requirement of the statute, and the requirement of the statute is matter of regulation only, and does not affect the merits of the appeal.

On the second objection I agree with Lord Adam. There may be cases where it is sufficient to give notice to the agent and not to the party, especially where the matter in hand affects only the conduct of a going case. But it is impossible to take that view here where the statute has itself drawn the distinction, for the certificate, it is provided, may be in the hand of the party himself or of his law agent. I can see a reason why the notice or intimation should be made to the party himself, when the notice refers to the commencement of an entirely new process or appeal, and I need hardly point out that there can be no decree in absence, as in an ordinary action, in an appeal under the Summary Jurisdiction Act of 1875, and therefore it is quite right that the respondent should himself get notice in order that he may consider whether he should support the judgment by counsel, or whether he should leave his case in the hands of the Court. Now, in the present case, as personal intimation was not given, although in the circumstances that omission may be of little moment, I think that the objection, critical as it is, is a good objection and should be sustained.

LORD KINNEAR—I do not wish to indicate any dissent with Lord M'Laren's opinion as to the first objection, but prefer to reserve my opinion on it, as I agree with Lord Adam that it is not necessary to consider it, seeing that we hold the second objection to be good.

LORD PRESIDENT was absent.

The Court dismissed the appeal as incompetent.

Counsel for the Appellants — Craigie — Trotter. Agent—C. K. Harris, Solicitor.

Counsel for the Respondent — Wilton. Agents—Gray & Handyside, S.S.C.

Friday, February 22.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

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

Succession—Marriage-Contract Provision—Legacy—Cumulative Provisions.

A testator by his trust-disposition and settlement directed his trustees to pay to Mrs S, to whom he stood in *loco parentis*, 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. The deed further declared that, if Mrs S should during the marriage become entitled to any property of the value of £200, such property should be conveyed to the trustees under the indenture for purposes therein set forth.

Held that the legacy was not given by the testator in satisfaction of the provision which he had made in the indenture of settlement, but that the trustees under that deed were entitled to payment of both the provision and the legacy.

By indenture of settlement dated January 20, 1874, made in contemplation of the marriage (shortly after solemnised) between John Wombwell Strachey and Jane Ellen Cooper, John Johnstone of Halleaths covenanted with the trustees named in the settlement that his executors should within six months after his death, pay to the said trustees the sum of £4000, with interest at the rate of 4 per cent. per annum from his death, to be held by them upon the trusts declared in the deed, these being that the trustees should pay the income of the said sum to Mrs Strachey during her life for her sole and separate use, and, in the event of Mr Strachey surviving her, to him during his life, and after the death of the survivor should hold the said sum in trust for the children of the marriage, who being sons should attain the age of twenty-one years, or being daughters should attain that age or marry. In the event of there being no child of the marriage, who being a son should attain twenty-one years, or being a daughter attain that age or be married, the said sum was to revert to the estate of Mr Johnstone. It was further declared that, if Mrs Strachey should become entitled during the coverture to any property of the value of £200, then such property should be conveyed to the trustees to be held by them in trust for behoof of Mrs Strachey and her husband, if he survived her, in liferent, and the children of the marriage in fee, who being sons should attain majority, or being daughters should attain that age or marry; and that in default of children the trustees should stand possessed of such property in trust as Mrs Strachey should appoint, and in default of such appointment upon the trust following, viz., if Mrs Strachey should survive her husband, in trust for her, but if Mr Strachey should survive his wife, then in trust for such persons as under the statutes for the distribution of the estates of intestates would have become entitled to such property at the death of Mrs Strachey, if she had died possessed thereof intestate and without having been married.

Upon February 27, 1877, Mr Johnstone of Halleaths executed a trust-disposition and settlement whereby he assigned his whole heritable and moveable estate to trustees for, *inter alia*, the following purposes:—*First*, payment of debts, expenses, and legacies; *Third*, the trustees were directed to convey the testator's whole heritable estate in Scotland to his eldest son Andrew and a certain succession of heirs, "but subject always and under burden of the debts secured thereon and of such parts of the legacies of £500 and £4000 and annuities of £400 and £300 mentioned in the fifth purpose hereof as my shares in the East India indigo concern or my personal estate may not be sufficient to meet;" *Fifth*, the testator directed that his shares and interest in the East India indigo concern carried on under the name of Robert Watson & Co. should stand in the name of his son Andrew, for the purpose of paying one fourth to his son Charles, and another fourth to be divided equally among his three daughters. The remaining two-fourths were to be sold, and the proceeds applied in paying the following legacies, viz., "£500 to my said wife at the time of my death; an annuity of £400 to her during her life; an annuity of £300 to Mrs Louisa Popham, residing in London —said annuities to be paid half-yearly at Whitsunday and Martinmas, and to commence at the first of these terms after my death for the half-year following, and a legacy of £4000 to Jane Helen Strachey, residing at Bognor, who shall be allowed interest at 5 per cent. on that sum so long as she shall prefer to allow it to remain as part of the share in the indigo concern;" lastly, the trustees were directed to pay the residue of the estate to the testator's son, Andrew, and his heirs. Mr Johnstone of Halleaths died on 20th December 1884.

Upon 20th June 1885 the trustees under his trust-disposition and settlement paid the sum of £4000, with interest at the rate of 4 per cent. from the date of his death, to the trustees under Mrs Strachey's marriage-settlement. Mrs Strachey died on 28th December 1889.

Upon May 3rd 1894 the trustees under Mrs Strachey's marriage-settlement raised an action against the trustees under Mr Johnstone's trust-disposition and settlement for payment of £4000, as the amount of the legacy bequeathed by Mr Johnstone to Mrs Strachey in his trust-disposition and settlement, with interest at 5 per cent. from the date of his death.

The defenders averred—"Mrs Strachey had come from India at the age of three, and Mr Johnstone took upon himself her entire maintenance and education, and provided her with a home until her marriage."

They pleaded—"(3) The presumption of law being that the legacy of £4000 was intended by the testator to be in satisfaction of the obligation in Mrs Strachey's marriage-contract, and there being no circumstances sufficient to rebut this presumption, the defenders are entitled to be assoilzied. (4) The intention of the testator being that the legacy of £4000

should be in satisfaction of the obligation in the marriage-contract, the defenders are entitled to be assoilzied."

Upon December 22nd 1894 the Lord Ordinary (KYLLACHY) sustained the defences and assoilzied the defenders from the conclusions of the action.

"*Opinion.*—In this case of Mr and Mrs Strachey's marriage trustees against Mr Johnstone's trustees I have come to the conclusion that the bequest of Mr Johnstone of £4000 to Mrs Strachey must be held as in satisfaction of the obligation which he (Mr Johnstone) undertook in Mrs Strachey's marriage-contract. I think that the two provisions are substantially identical—they are identical in amount, they are identical as regards the term of payment, viz., Mr Johnstone's death. And although the bequest is in favour of Mrs Strachey, while the obligation was in favour of her marriage-contract trustees, I think it is quite apparent, on the examination of the deeds, that the bequest operated as a bequest to the trustees, and placed the fund in the trustees' hands for the purposes of the trust quite as effectually as if the bequest had been to the trustees direct.

"I am therefore of opinion that the trustees are entitled to my judgment, and I presume the judgment should take the form of absolvitor from the conclusions of the summons. I should perhaps add that I have not thought it necessary to inquire into the matter of Mr Johnstone's relationship to Mrs Strachey. It is stated, and it is not denied, that she had been brought up as a member of his family, and, supposing the fact to be essential, it, I think, sufficiently appears that he had assumed the responsibilities of a parent, and became a party to the marriage-contract as one who stood to the lady *in loco parentis*."

The pursuers reclaimed, and argued—This was a question of the intention of the testator, and viewed as such it was plain from the terms of the two deeds in question that he intended Mrs Strachey to have not only the provision in the marriage-contract, but also the legacy given by his settlement. It must be held that what was given by a father to his daughter by marriage-contract provision was a debt due by him and to be paid as such, and what he gave afterwards was from his good will—*Grant* v. *Anderson*, November 19, 1840, 3 D. 89. Although the truster here was not Mrs Strachey's father, he stood to her *in loco parentis*, and the same rule applied. It was true that in that case the maxim *debitor non præsumitur donare* was held to apply, but that maxim was easily overcome in the case of a *mortis causa* settlement, unless it were shown that either expressly or by necessary implication the granter intended the one sum to be in satisfaction of the other. In this case the destination of the two funds was quite distinct. In the case of the marriage-contract provision, if there were no children of the marriage, the money was to revert to Mr Johnstone's estate on the death of the liferenter, while in the settlement the legacy was given to Mrs Strachey personally. It is true that it went to her marriage-contract trustees under the clause in the contract, but that did not prevent it being a gift to her, because the trustees were different from those under the settlement, and the destination was different. In the case of the legacy also, the interest allowed was 5 per cent. while the sum given remained in the East India Indigo concern, but in the marriage-contract provision the interest allowed was only 4 per cent—*Keith Johnstone's Trustees* v. *Johnstone and Others*, November 3, 1894, 32 S.L.R. 24; *Kippen's Trustees* v. *Kippen*, July 3, 1856, 18 D. 1137, affirmed *Kippen* v. *Darly*, May 21, 1858, 3 Macq. 203; *Elliot* v. *Bowhill*, June 21, 1873, 11 Macph. 735.

Argued for the defenders—It was admitted that this was a question of the truster's intention. Although it was admitted that there was no presumption against double provision in Scotland generally, still the case of *Kippen* (cited *supra*) was an authority that, where a father made a prior provision for his child by a bond, a subsequent provision would be deemed a satisfaction of the debt—*Smith* v. *Common Agent, &c.*, June 29, 1841, 3 D. 1109. It was to be noted that the marriage-contract was an English deed, and the trust-disposition and settlement a Scottish deed, and it might be presumed that in giving directions for the latter Mr Johnstone had not fully in his mind all the trusts expressed in the former deed. It was true that there were variations in the destinations and the amount of interest allowed upon the two sums, but it would require much greater variations before a Court could judicially come to the conclusion that the latter sum was not meant to be given in satisfaction of the former—*Chichester* v. *Coventry*, May 14, 1867, L.R. (H. of L.) 71; M'Laren on Wills, &c. 746.

At advising—

LORD YOUNG—This is an action by trustees under a Mrs Strachey's marriage-contract for payment of a legacy of £4000 which by the testator's will is bequeathed to Mrs Strachey, the will directing that she shall be allowed interest at 5 per cent. so long as she shall allow it to remain in a certain indigo business, and the question is whether she is entitled to decree for payment. The Lord Ordinary has refused decree, and given the defenders absolvitor, on the ground which is pleaded in the answer to the 3rd article of the pursuer's condescendence—"The said legacy was paid or satisfied on or about 20th June 1885."

Now, this is so or not, that is, the legacy has been paid or satisfied or not, according to the view we take of whether or not the legacy is in fact only a direction by the truster to the trustees under his will to pay certain provisions under Mrs Strachey's marriage-contract, under which marriage-contract the pursuers are the trustees, or is a sum given to Mrs Strachey over and above the provision in the marriage-contract.

By that marriage-contract Mr Johnstone

of Halleaths, the testator, who left the legacy sued for, having an interest in the young lady who was to be married, undertook and bound his executors and administrators within six calendar months from his death to pay to the trustees under the marriage-contract the sum of £4000, free of all deductions for duty or otherwise, with interest on the same at the rate of 4 per cent. per annum from the day of the death of the said John Johnstone. If the legacy of £4000 is to be looked upon merely as a direction to his trustees to pay the sum which he had bound himself under the marriage-contract to pay, then it was paid in June 1885, for there is no doubt that the marriage-contract trustees asked for payment of the £4000 given in the marriage-contract, and got it from the testator's trustees or executors in 1885.

Now, looking at the provisions of the marriage-contract, it appears that the trustees were to hold this sum of £4000 for behoof of the husband and wife and the survivor in liferent, and the children in fee. The language of the deed is rather involved, but that is the effect of the provisions, but there is also a provision that if children of the marriage failed, then the trustees were to hold it for behoof of John Johnstone himself, *i.e.*, it was to revert to his estate.

There is no such provision attached to the legacy to Mrs Strachey; it was not to revert to John Johnstone's estate. But it is said with reference to the marriage-contract that Mrs Strachey was bound, with respect to any property to which she might acquire right above the value of £200 during the subsistence of the marriage, to make a conveyance of such property to the marriage-contract trustees, to be held, as provided in reference to the sum of £4000, for the survivor of the spouses in liferent and for the children in fee. Now, it is said that the right to this legacy was conveyed to the trustees under the marriage-contract; it was not so in fact; but there is no doubt about Mrs Strachey's obligation to pay any sum received during her marriage to her marriage-con tract trustees, and no doubt about their right to recover any such sum, and we must deal with the case on the footing that this legacy of £4000 had been properly assigned to them and that they are now suing for it to be held by them for the purposes stated in the trust-deeds applicable thereto.

I need not point out that this is a different trust from that constituted by the marriage-contract provision, and it would seem to follow that a payment in satisfaction of the one trust purpose is not necessarily in satisfaction of the other. The one payment has been made in satisfaction of the marriage-contract provision, but this action is brought by the trustees to recover the legacy, as trustees no doubt, but under a different trust. I therefore cannot concur in the view of the Lord Ordinary that this legacy is in sense and substance indistinguishable from the marriage-contract provision, and that payment in satisfaction of the one is satisfaction of the other.

My view therefore is that the testator's trustees paid the marriage-contract provision as a debt due by the testator which they were bound to pay, and that the legacy is a distinct and separate provision. I think, therefore, we must recal the Lord Ordinary's interlocutor and give decree in favour of the pursuers.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred.

LORD TRAYNER was absent.

The Court recalled the Lord Ordinary's interlocutor, and gave decree for the sum claimed, with interest at the rate of 4 per cent. per annum from 20th December 1884.

Counsel for the Pursuers—Guthrie—Sym—Chree. Agents—J. & J. Ross, W.S.

Counsel for the Defenders—H. Johnston—C. K. Mackenzie. Agents—J. C. & A. Stewart, W.S.

Thursday, March 7.

SECOND DIVISION.

[Lord Low, Ordinary.

CARSON AND ANOTHER *v.* M'KELVIE & COMPANY.

Contract—Contract for Delivery of Coal—Exemption from Delivery in Case of Strikes.

A coalmaster contracted to supply a coal merchant with the whole output of cannel coal in his colliery at an agreed-on price for a period of twelve months, it being provided that "strikes or other unforeseen circumstances" should exempt the coalmaster from delivery. During the first six months of the contract wages rose considerably, with the result that the contract became unprofitable to the coalmaster, and in the seventh month he gave notice to the miners working in the cannel coal seam that their wages would be reduced by a shilling per ton, which would have brought them below the ordinary rate of wages paid in the district. The men having thereupon ceased work, the coalmaster was unable for several months to deliver coal in terms of his contract, and the merchant was obliged to buy coal elsewhere at more than the contract price.

The coalmaster having sued the merchant for the price of certain coal which had been delivered under the contract, the defender pleaded that he was entitled to compensate the pursuer's claim with the loss which he had sustained in consequence of the pursuer having failed to deliver coal in terms of the contract.

The Court *sustained* the plea of compensation, *holding* that the pursuer's failure to fulfil his obligation had not