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.

Question, whether in the case of appeals falling within the scope of sec. 40 of the Judicature Act 1825, a remit to the Court of Session for further findings is competent where the facts relied on in argument, and as to which the remit is asked, appear from the opinions to have been established, but are inconsistent with the formal findings of fact in the interlocutor.

The case is reported *ante*, vol. xxxii., p. 575, and 22 R. p. 796.

The pursuer appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—My Lords, I confess that I myself am under a very strong impression that it is not open to the appellant here to raise the argument which has principally occupied your Lordships' attention. I think the language of the 6th Geo. IV., chap. 120, sec. 40, is very material indeed, which is — "That when in causes commenced in any of the Courts of the Sheriffs, or of the Magistrates of Burghs, or other inferior courts, matter of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide, and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matter of law, but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor."

I confess I cannot read those words as allowing the possibility of placing in the interlocutor as found a new set of facts which may make the language ambiguous. As they stand they are supposed to be exhaustively disposing of the facts. It appears to me that the interlocutor is absolutely inconsistent with the argument as presented to your Lordships on behalf of the appellant. It may not, however, be necessary to determine that question, because I am not certain that we are all agreed upon this subject; but on the argument presented before us I cannot understand there being any doubt at all.

This action is not raised upon any specific provision in the charter-party at all. The contract relations between the persons who entered into that contract do not specifically apply to the case now suggested to be open to the appellant to argue. What is suggested is this—not that the provision in respect of demurrage ever in fact arose, because it certainly did not arise, but that inasmuch as there was a default on the part of the shippers to provide coal, which default by a series of causes prevented the vessel obtaining her berth, therefore the default was in the shippers, and accordingly the shipowners have made good this claim.

Now, when one comes to examine the series of propositions which establish that cause of action, it comes to this. It is true that the provision for demurrage in the charter-party itself never arose. The ship got to Bo'ness on the 19th in the roads. As a matter of fact she never got into the dock, and never got into a berth ready for loading until the 26th of October. But the harbour-master gave evidence that if there had been a cargo ready there she might have got in sooner. A vessel, the "Ecossaise," had forfeited her right to continue at her berth, according to the harbour-master's views, because she had not completed her loading, and therefore he sent her away from the berth at which she was lying. If all this had been known to the parties, and if the harbour-master had in his discretion allowed the "River Ettrick" to come, as I understand he says he would have allowed her to come in, then this vessel might have got in on the 21st.

That is the proposition of fact. The proposition of law is that a merchant must be always ready with his cargo at all times and in all places and under all circumstances to take advantage of any such contingency if it should arise. My Lords, there is not a fragment of authority for any such proposition, and I can imagine it would be a most serious thing if such a proposition were supposed to be laid down to regulate the mercantile community, because it might very seriously imperil the conduct of merchants in their business if it were to be supposed that the charterers of all these twenty or thirty ships (for it is said there were twenty or thirty ships there) were guilty of a breach of implied duty (the charter-party being in the ordinary form) in not having all their cargoes ready. I think I am entitled to say that no such case has ever been suggested in the Courts.

I therefore move your Lordships that this appeal be dismissed with costs.

LORD HERSCHELL—My Lords, I am of the same opinion. The question which the appellant seeks to raise at the bar is not raised by any finding of fact in the interlocutor. The utmost that could be done under any circumstances would be to remit the case with the view of having the facts which raised the point, if they were facts that had been really found in the appellant's favour in the Court below, inserted in the interlocutor. If the findings in the interlocutor are at variance with and contradict the facts which it is sought to have found, then of course there would be no ground for sending the case back. This House would be bound by the findings in the interlocutor. I cannot help saying this, that being very desirous of not in any way departing from the spirit of the statute which prevents appeals to this House except upon facts found in the interlocutor, I think it would be extremely desirable that in the case of these appeals from the Sheriff Court the facts should be found in the interlocutor.

Now, in this case the facts raising one point of law which was discussed and debated, and upon which the decision was pronounced in the Court of Session, are not found in the interlocutor at all. Whatever may be the true construction of the later words, and even if, looking at them alone, they are inconsistent with such a finding, it is obvious, and no one can read the judgment without seeing, that they were not intended to be inconsistent with it, and that in truth the facts relating to this point are not found at all. It is true that the Court below decided the question against the appellant on another and a different ground altogether; but it seems to me that that was no reason for abstaining from finding in the interlocutor those facts upon which not only a point of law depended, but a point of law which was decided in favour of the appellant. I think they should have been stated, because although, for reasons which I will give in a moment, I do not think they would have been sufficient, differing as I do from what was said by Lord Trayner, to entitle the appellant to judgment, yet at the same time it was a matter for discussion here, and a different view might have been taken of it on appeal.

My Lords, it is not necessary to say whether the finding as worded in the latter part of the interlocutor is inconsistent with those facts or not, because I am of opinion that, even supposing all the facts upon which the learned counsel for the appellant rely were stated, there would be no case made out for disturbing the judgment of the Court below. The case suggested on behalf of the appellant is this—by the charter-party the ship was to proceed to Bo'ness, and she was to load at a berth to be selected by the charterer, and the lay-days were to count from the time when she was berthed, and notice was given to the charterer. Undoubtedly that would impose by implication upon the charterer the duty of doing any act that was necessary on his part according to the custom of the port to enable her to get a berth. He could not defend himself from a complaint of the shipowner that his vessel had been delayed by saying that she was not in a berth, when she was not in a berth because the charterer himself had failed in his duty to do some act on his part to enable her to get there. The appellant's case therefore is put in this way. It is said, although she did not get into a berth until the 26th of October, she might have got into a berth on the 21st if the appellant had done an act which he failed to do, namely, had a cargo ready there. That arises in this way. In ordinary turn she could not have been berthed until the 26th, but owing to a vessel which was in the berth not having her cargo there, the harbour-master would have put the "River Ettrick" in berth if her cargo had been ready to be immediately put on board. The question is whether on these mere facts there was an obligation on the part of the charterer to have the cargo on the quay so that the vessel might have been berthed on the 21st. It is alleged that the obligation existed in point of law, that at all ports, under all circumstances, however unreasonable it might be to anticipate such a contingency, however deficient the quay might be in the means necessary for storing or protecting or preserving cargo, whatever difficulties there might be in short, that was an obligation always resting upon the shipper.

My Lords, no authority has been cited for that at all, and I am of opinion that such a construction of the shipper's obligations would be altogether unreasonable. I do not for a moment deny that he is bound to do whatever is reasonable on his part with a view of getting the ship berthed at the earliest period that is reasonably possible; and it may be that there are circumstances in which owing to the custom of the port, owing to contingencies of this kind being very common, owing to the provision that is made to facilitate cargo remaining there for a few days, and a variety of other circumstances, it would be the duty of the shipper to be prepared by having his cargo there, to do that which would have enabled the vessel to obtain an earlier berthing than would otherwise have been obtained. All that, I say, may be the case, but no such facts are found in the present case, and the appeal can only be decided in favour of the appellant by holding that at all ports, and under all circumstances, however remote and improbable might be the contingency, the duty lay upon the charterer to have cargo there. That is a proposition to which I am unable to give my assent. For these reasons I agree in thinking that the appeal must be dismissed.

LORD MACNAGHTEN and LORD MORRIS concurred.

Ordered that the appeal be dismissed with costs.

Counsel for the Pursuer and Appellant—Joseph Walton, Q.C.—Leck. Agents—Lowless & Co., for J. & J. Galletly, S.S.C.

Counsel for the Defenders and Respondents—Bighan, Q.C.—H. T. Boyd—J. J. Cook. Agents—Wilson & Son, for Boyd, Jameson, & Kelly, W.S.

Thursday, March 26.

(Before the Lord Chancellor (Halsbury), Lord Watson, Lord Macnaghten, and Lord Davey.)

OGSTON *v.* STEWART'S TRUSTEES.

(*Ante*, vol. xxxi. p. 153, and 21 R. p. 282.)

Fishings—Boundaries of Salmon Fishings—Salmon Fishings ex adverso of Adjacent Lands—Possession—Prescription.

A glebe bounded on the north by a river for a distance of 350 yards, marched