the case would have been in a different position.

LORD M'LAREN—I concur in the decision proposed by your Lordship, and in all the reasoning in support of it. But that on one point there is some diversity of opinion, I should not have desired to add anything, but I would like to point out very shortly that I think the position of this case has been entirely altered, and the complexion of the charge against the captain is altogether different from what it was in the course of the inquiry, in consequence of the further light we have had upon the questions of seamanship that have been argued. We are advised by our assessors that the course steered was a perfectly proper course, and I must say, looking at it as a question of geography, I should have been much surprised if any different opinion could have come to be entertained upon such a question, unless the action of the tides inshore had been very much greater than has been suggested. I understand from Captain Barlow that he has taken the trouble to verify the calculation made by one of the witnesses, and found it to be quite correct, and that really the tide, if it were such as is assumed in the tables, would not have carried the vessel more than six miles out of the course laid down. Now, we know that tides and currents are subject to unaccountable variations. Whether there had been such a variation at the time, or whether the vessel had been carried out of her course by bad steering, in neither view was the captain to blame under this head. Well, then, we are reduced to the second ground indicated in the sentence passed by the Court of Inquiry, that there was a fault of seamanship in the master not having taken means to verify his position by the log and lead. Now, at the time—between two and three A.M.—when the ship ought to have been abreast of these two lights, the St John's Light or the South Light, or one of them, one would suppose that the master of the ship, not seeing lights, would have seen there was something wrong in his course, either that the weather was exceptionally foggy, thicker than he supposed, or that he was a long way to the east, and therefore out of danger. Probably he took the latter view, and thought that he was so distant from the lights that he could not see them. Now, if he had been examined upon that point, and had not been able to give any further explanation, I should have thought—and I think all of your Lordships would have been of opinion—that that was an error upon which some censure or sentence might follow, but I agree with your Lordship in the chair that it is not in general safe to proceed, under an inquiry which has punishment or censure for one of its objects, without giving fair notice to the accused of all points that are to be made against him. I do not say that, because there has been an omission to examine the person in fault upon one of the subsidiary points of the case, that would constitute such a technical error of procedure that the sentence could not be upheld, but we are in this position, that what in the view of the Court of Inquiry was the principal fault of the master has now been displaced, and that on the other ground to which they must have attached very little importance, because no questions were put to him upon it, we are not fully in possession of the facts. We have no evidence as to the state of the weather, which is very material, because it would only be in the case of thick weather that the duty of surveillance would arise, and then we have not got such light in the examination of the captain and his mate as would have made apparent the reasons why he did not think it necessary to verify the ship's course. In these circumstances I think we could not, consistently with justice to the defender, maintain the sentence.

LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Sustain the appeal; recal the finding and sentence of the Sheriff-Substitute of Lanarkshire dated 16th August 1894 appealed against: Find that the stranding of the s.s. 'Samara' on the 'South' or 'Cannon' Rock, off the County Down, Ireland, on the morning of the 1st of August 1894, has not been proved to have been due to the default of the appellant: Find that the appellant's certificate ought to be returned to him: Direct that it be returned to him accordingly: Further, direct that this judgment be registered to the Board of Trade in terms of the rules to that effect; and decern," &c.

Counsel for the Appellant—Dickson—Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Board of Trade—Solicitor General Shaw, Q.C.—W. Campbell. Agent—David Turnbull, W.S.

Saturday, November 3.

SECOND DIVISION.

KEITH JOHNSTON'S TRUSTEES *v.* JOHNSTON AND OTHERS.

Succession—Marriage-Contract—Legacy—Cumulative Provisions.

A father in his daughter's marriage-contract bound himself to pay to the trustees named therein "a sum of not less than one thousand pounds," on the death of the survivor of his wife and himself, for behoof of his said daughter in liferent, and her children in fee. Two years afterwards he executed a holograph codicil to a previously executed trust-disposition and settlement, by which he directed his trustees to hold his whole estate for behoof of his widow in liferent, and that on her decease the whole pro-

ceeds should be divided among his children in equal proportions, share and share alike. The codicil contained a reference to the marriage-contract on another matter, and in it the testator directed his trustees to deduct from the portion payable to his daughter the sum of £200, "advanced to her for marriage outfit," with interest till the date of division.

In a special case presented after the widow's death—*held* (*diss.* Lord Young) that the provision of £1000 made in the marriage-contract fell to be paid to the trustees under that deed, as a debt due by the testator, before the estate was divided, and that the married daughter was entitled to an equal share of the residue with the other children.

Alexander Keith Johnston died on July 9th 1871, leaving a trust-disposition and settlement dated July 18th 1846, and a holograph codicil annexed thereto dated June 28th 1866. He was survived by his wife and six children, one son and five daughters. In the codicil he stated that he had resolved to alter the provisions of the trust-deed, and desired and directed his trustees to retain the proceeds of his whole estate for the benefit of his spouse, and proceeded—"On her decease the whole proceeds shall be divided among my six children in equal proportions, share and share alike. Previous to this event, should any of my children have died, having been married, the portion that would have fallen to them shall descend to their child or children if any survive at the time, subject to the terms of any marriage-contract that may exist, as in the case of my daughter Isabella, and should any of them have died unmarried, the portion that would have fallen to them shall go to augment the shares of the surviving children, it being declared that the issue of such as may have died shall be entitled equally among them to the share which would have fallen to their parent only, subject to the terms of any marriage-contract as aforesaid. With reference to the terms of the said deed relative to advances, I hereby direct my trustees to deduct from the portion payable to my daughter Isabella the sum of two hundred pounds (£200), advanced to her for marriage outfit, with interest at the rate of 2 per cent. from the 1st May 1862 till the period of division."

The testator's daughter, Isabella, had been married to John Alexander Johnston, merchant in London, in 1862, and in contemplation of the marriage a minute of agreement, dated May 1st 1862, had been entered into between the intended spouses and Alexander Keith Johnston. By this minute the intending husband agreed to hand over annually for twenty-one years, to trustees named, £27, 6s. 8d., being the ascertained annual premium required for insuring £1000 on his life, which sum, in the event of his dying before his wife without issue, was to be paid to her, and in the event of his predeceasing his wife and leaving issue, was to be invested for her liferent use, and also to pay to his wife in the event of her survivance an annuity of £200 in the event of there being no issue of the marriage, or of £300 in the event of there being such issue. *On the second part*, Isabella Keith Johnston, in consideration of these provisions, agreed to convey to her intended husband all the real or personal estate of which she was possessed, or to which she might succeed during the marriage. Further, Alexander Keith Johnston agreed, "without prejudice to the foresaid generality, and in consideration of the provisions herein, and in the event of the death of the survivor of me and Margaret Gray or Johnston, my wife, to pay to the said trustees a sum of not less than one thousand pounds, . . . for the liferent use of the said Isabella Keith Johnston, on her sole receipt and discharge, exclusive of any right or control whatever of the said John Alexander Johnston, her husband, or of his creditors in any way, and at the dissolution of the marriage by her death, then for the liferent use of the said John Alexander Johnston, and for the child or children of the marriage." The parties also agreed in the minute to execute a contract of marriage to carry out the conditions of the minute. As a matter of fact no contract was entered into, but the parties allowed their rights, interests, and obligations to remain as set out in the minute.

Of the other daughters of the testator three were married, and in the case of two marriage-contracts had been executed. In both of these contracts, which were dated in 1870 and 1871, the only obligation undertaken by the truster was in these terms—"The said Alexander Keith Johnston binds himself, his heirs, and successors, within twelve months after the death of the survivor of himself and his spouse, to transfer and pay to the said trustees the share in his said succession accruing to the said as one of his children, and which shall be of an amount or value equal to the amount falling to her brothers or sisters, which payment shall be in full satisfaction to the said of any claim of legitim or other claim competent to her against the said Alexander Keith Johnston, her father."

The testator's widow died on 26th July 1893, predeceased by her only son, who died in 1878 unmarried.

A question thereafter arose as to the payment of £1000 to Isabella under the minute of agreement entered into on May 1st 1862 in contemplation of her marriage, and a special case was presented by (1) the trustees under Alexander Keith Johnston's trust-disposition and settlement; (2) the trustees under the minute of agreement; (3) Isabella Johnston and her husband for his interest. The fourth, fifth, sixth, and seventh parties were the remaining daughters of Alexander Keith Johnston or their representatives. The funds in the hands of the trustees amounted to £11,000.

The questions for the consideration of the Court were—"(1) Are the second parties entitled to receive payment of one-fifth of the whole trust-estate without deduction

other than the said £200? or are the second parties entitled to receive payment of £1000 only? (2) Are the parties of the third part or either of them entitled to receive payment of one-fifth of the residue of the estate remaining over after payment of £1000 to the second party, and under deduction of £200? or of the balance of one-fifth of the estate after deduction from said fifth of £1000 to be paid to the secoud party, and under deduction of £200? or of one-fifth of the trust-estate without any deduction except said £200? (3) Are the fourth, fifth, sixth, and seventh parties, or any one or more of them, entitled to receive payment of one-fifth of the trust-estate? or one-fifth of the residue of the said estate remaining over after payment of £1000 to the second parties?"

The third party argued—The trustees under the trust-disposition must deduct and pay over to the trustees under the minute of agreement the sum of £1000 before they proceeded to divide the truster's estate equally among his surviving children; the provision in the codici did not go to discharge the obligation Mr Keith Johnston had undertaken in the minute. It was a question of intention, and the presumption *debitor non præsumitur donare* did not apply. It was important to observe that the bequest to the daughter under the codicil was not a favouring of the same person as in the minute, because under that latter deed a liferent was given to the husband if he survived his wife, but there was no such provision in the codicil. The provisions were cumulative —*Elliot* v. *Bowhill*, June 21, 1873, 11 Macph. 735; *Elliot* v. *Lord Stair's Trustees*, February 27, 1823, 2 S. 250; *Orr's Trustees* v. *Mather*, November 10, 1881, 9 R. 107; *Grant* v. *Anderson*, November 19, 1840, 3 D. 89; *Smith* v. *Common Agent of Ranking and Sale of Auchinblane*, June 29, 1841, 3 D. 1109; *Milne* v. *Scott*, November 17, 1880, 8 R. 83; *Cowan* v. *Dick's Trustees*, November 1, 1873, 1 R. 119. The trustees under the minute of agreement were entitled to get payment of £1000 out of the truster's estate, but were entitled to nothing else.

Argued for the fourth, fifth, sixth, and seventh parties—The estate of the truster ought to be divided into five equal shares without deducting £1000 as Isabella's share under the minute of agreement. The intention of the testator was the thing to be looked to, and it was plain in this case that equality among the children was the desired object to be obtained by the codicil provisions. If Isabella was given £1000 more than the other sisters that equality would not exist. What the truster intended to bind himself to do was to give his daughter Isabella not less than £1000, paid into the hands of her marriage-contract trustees; her share of the succession would be paid into the hands of the trustees. This share amounted to more than £1000, and therefore the debt due to them was extinguished.

At advising—

LORD JUSTICE-CLERK — The question raised by the special case is, whether the legacy of an equal share of residue to his daughter Isabella is to be held to cover the £1000 which her father was under obligation to pay into trust under her contract of marriage, or whether this sum, being a debt due from the deceased's estate, is to be paid to the marriage-trust, and her equal share of residue, provided by the codicil to be divided between Mr Keith Johnston's children, to be paid to her. I am of opinion that the proper result is that the £1000 be paid, and that Isabella receive an equal share of the residue, after debts are paid, with the other members of the family. I see no ground for holding that the bequest was intended to be in satisfaction of the obligation contained in the marriage-contract. There is no doubt that cases may occur where, there being double bequests, or a bequest following on a provision in a marriage-contract, the latter may be held to be in satisfaction of the former, and this although the actual amount contained in the later bequest may not be identical with the amount in the previous provision or bequest. Further, in such cases, where an obligation is undertaken, the question whether the presumption is against gift where there is pre-existing obligation, is one which requires consideration. But all such questions are ultimately questions of intention, and particularly so where settlement *mortis causa* is under consideration. It appears to me that when a parent by settlement declares that a child is to receive a certain benefit, this is to be read as a gift, unless there be such grounds for an opposite conclusion as compel a judicial affirmation that such was not the intention. If the matter be left even doubtful after the legitimate considerations have been weighed, then the construction favourable to the gift is that which must be adopted.

In this case I do not think that any legal presumption tells against the gift. The sum which Mr Keith Johnston bound himself for in the marriage-contract is made payable not to Isabella but to her trustees. It is not gifted to her, but she is only to have the annual proceeds, and the fee goes to her children. On the other hand, the legacy is a sum of uncertain amount, and is not payable to the trustees but to herself. It is in no sense a gift to the trustees. There is thus no form of identity or even resemblance between the two gifts. In these particulars this case is the same as that of *Elliot* v *Bowhill* (11 Macph. 735), in which it was held that, "as the testator has not himself chosen in his trust-deed to make any allowance for or reference to the £1000, the Court cannot make a will for him, even though it were much more clearly shown than it is that he had overlooked or forgotten his daughter's marriage-contract." But this case is in the last particular just quoted a stronger case than that of *Elliot*. For in this case, not only is there no ground for suggesting that Mr Keith Johnston overlooked or forgot the daughter's marriage-contract, but, on the contrary, he had it distinctly before him in making his codicil, and makes

express reference to it. And further, he in the codicil directs that a sum of £200 advanced to Isabella for marriage outfit shall be deducted with interest from her share.

It is true that by adopting this view of the bequest the benefit to Isabella from her father's estate is greater than that of the other children. But this does not in itself raise any presumption that he did not intend the provision and the gift to be cumulative. Reasons which may induce a father to make a difference between his children often exist, and cannot be assumed not to exist, in order to determine an intention. There must be legitimately cognisable grounds for so determining. In this case there are none such. Indeed, the only indication in the present case is in a contrary direction. For while in Isabella's contract the £1000 is provided by the father expressly "in consideration of the provisions" made by the intending son-in-law, in the marriage-contracts of his other daughters we see nothing of provisions made by the intending son-in-law, and no indication that what the father provides is to cover what the intending husband brings into trust. In the case of one married daughter there was no marriage-contract at all.

All these considerations lead me to the conclusion that here there is no ground for holding that the gift in the codicil was not intended to do what it expresses, viz., to give to Isabella an equal share of her father's free estate, after his debts and obligations, including the £1000 due to her marriage-contract trustees, had been satisfied.

I propose, therefore, that the first alternative of the first question be answered in the negative, and the second alternative in the affirmative; that the first alternative of the second question be answered in the affirmative, and the second alternative in the negative; that the first alternative of the third question be answered in the negative, and the second alternative in the affirmative.

LORD YOUNG—I cannot say that I think this a clear case, and I must necessarily be doubtful of my own opinion when it differs not only from that expressed by your Lordship in the chair, but also, I understand, from that held by my brethren.

The late Mr Keith Johnston, in a minute entered into on the occasion of his daughter Isabella's marriage in 1862, bound himself to pay to the trustees named in the minute a sum of not less than £1000 for behoof of his daughter and the children of the marriage. That was an obligation on him to pay a sum of not less than £1000. Six years after the marriage he executed a deed by which he left his whole estate to trustees with directions to them that it was to be divided after his wife's death among his six children, in equal proportions, share and share alike.

Isabella was one of the six children, and the share which she would receive under that direction would amount to more than £1000. The question is therefore whether we ought to be judicially convinced that the intention of the truster was that this provision to the children, by which Isabella would receive more than £1000, should satisfy the obligation he had come under in her marriage-contract, or whether we are judicially satisfied that he intended she should receive more than the other members of the family.

I have a distinct impression that he intended her to have at least £1000, but that he did not intend that she should have any more than the other children, and therefore I think that this £1000, which the truster undertook to provide under his daughter's marriage-contract, should be taken as going so far towards what she was to receive under the trust-deed.

LORD RUTHERFURD CLARK—I am of the same opinion as your Lordship in the chair.

LORD TRAYNER — The late Mr Keith Johnston, by the minute of agreement dated 1st May 1862, which must be regarded for all practical purposes as the marriage-contract of his daughter Isabella, bound himself, on the death of the survivor of himself and his wife, to pay to certain trustees a sum of at least £1000, to be held by them for the benefit (1) of his daughter Isabella in liferent; (2) at her death for the liferent use of her husband; and (3) for the children of their marriage in fee. I take it to be clear that this was an obligation which these trustees could enforce against Mr Keith Johnston's estate as a proper debt due by him to them. By a testamentary writing dated 28th June 1866, Mr Keith Johnston bequeathed to his children, on the decease of his wife, his whole estate in equal proportions, share and share alike. According to the statement in the case before us, there are five children of the testator entitled under this bequest to a share in the succession; and the leading question put to us for determination is, whether Isabella is entitled to one-fifth of the estate after her trustees have been paid the £1000 above referred to, or whether the bequest under the testamentary writing must not be held to include, and on payment of it to discharge, the obligation in favour of the trustees. In other words, we are asked to determine whether the testamentary provision is given in addition to the £1000 provided for under the agreement or contract of marriage, or given in substitution thereof.

I need not here resume the various grounds on which the latter view was maintained before us. I have come to be of opinion that it cannot prevail. I admit the full force of the maxim *debitor non præsumitur donare*, but I think it has no application here, for the simple reason that in the present case the debtor makes no donation or gift to his creditor. The creditor in the obligation for £1000 is not the testator's daughter, but certain trustees. No gift or gratuitous provision is made to them; and therefore nothing has been given to them which can be regarded

as payment of the debt to which they are in right. Nor is it immaterial to remember (although these considerations might not be conclusive if they stood alone) that the amount of the debt and of the gratuitous provision are widely different in amount—the provision being more than double the debt—and that the destination in each is different, the daughter Isabella being unlimited fiar of the provision, while of the sum contained in the obligation she is only entitled to a liferent, and the fee (burdened with possibly an additional liferent) is destined to her children. It is perhaps more material to the question before us to notice that the testator has specially directed a deduction of £200 to be made from Isabella's share of the succession, being the amount of an advance he had made to her on the occasion of her marriage, and does not direct any deduction to be made therefrom in respect of the obligation he had undertaken in favour of the marriage-contract trustees. I am therefore of opinion that the £1000 must be provided for, as a debt of the testator, before his estate is divided among his children; that of the estate then remaining, Isabella is entitled to one-fifth; and that that fifth goes to her husband as Isabella's assignee.

The Court answered the first alternative of the first question in the negative, and the second alternative in the affirmative; the first alternative of the second question in the affirmative, and the second in the negative, and the third in the negative; and the first alternative of the third question in the negative, and the second alternative in the affirmative.

Counsel for the First Parties—Abel; for the Second Parties—Orr; for the Third Parties—Macfarlane; for the Fourth, Fifth, Sixth, and Seventh Parties — Rankine. Agent—W. A. Hartley, W.S.

Saturday, November 3.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

DURIE'S TRUSTEES *v.* AYTOUN.

Sale—Sale of Heritage—Public Burdens—Seller's Right of Relief—Land Tax—Heritors' Assessment — Arrears — Interest.

The proprietor of the estate af Craigluscar sold a portion of it in 1861. From that date to 1893 the assessments for land tax and heritors' assessment were made upon the estate of Craigluscar, including the lands sold, on a gross valued rent for the whole estate, and were paid by the seller. In 1893 the seller took steps to have the proportion of valued rent effeiring to the lands sold disjoined and separated from the gross valued rent, and the proportions were accordingly fixed by decree of the Sheriff.

Thereafter the seller claimed from the purchaser the proportion of land tax and heritors' assessment effeiring to the land sold for the period from 1861 to 1893, with interest at 3 per cent. on the yearly payment of these assessments for the same period. The purchaser admitted liability for the arrears of land tax, but disputed the claim for heritors' assessment and interest

Held, by Lord Wellwood (Ordinary), that he was liable both for heritors' assessment and interest.

The purchaser having reclaimed against this interlocutor, in so far as it found him liable for interest, *held* (*rev.* judgment of Lord Wellwood (Ordinary) and *dub.* Lord Trayner) that he was not liable for interest.

Question per Lord Young and Lord Rutherfurd Clark, whether the purchaser was liable for any part of the land tax and heritors' assessment paid by the seller before the apportionment of the valued rent was made between the lands sold and retained.

On May 15, 1861, Robert Durie of Craigluscar sold to Major Aytoun the estate of Knock and South Lethans, with entry at Martinmas 1860. The disposition contained a clause in the following terms—"I," the said Robert Durie, "bind myself to free and relieve the said James Aytoun and his foresaids of all feu-duties, casualties, and public burdens." By the Titles to Land Act 1847 (10 and 11 Vict. cap. 48), sec. 1, it is enacted that a clause of obligation "to free and relieve of feu-duties and casualties due to the superior and of public burdens" in a disposition in the terms above set forth "shall be as valid, effectual, and operative to all intents, effects, and purposes as if they had been expressed in the fuller mode or form" generally in use at the passing of said Act. The fuller mode or form was in the following terms—"And further, I hereby oblige himself, my heirs and successors, to free and relieve the said B and his foresaids of all feu-duties, cess, minister's stipend, and other public and parochial burdens exigible furth of the said lands and others, at and preceding the term of , which is hereby declared the term of the said B's entry to the premises in virtue hereof, the said B and his foresaids being bound to free and relieve me and my foresaids of the same thereafter in all time coming."

Until February 1894 the assessments for land tax and heritors' assessment were made upon the lands of Craigluscar and other lands, including Knock and South Lethans, on a valued rent of £742, 14s. Scots, and on that slump sum the land tax and heritors' assessment were paid by the proprietors of Craigluscar. In October 1893, however, the marriage-contract trustees of Mrs Dewar Durie, who were then proprietors of Craigluscar, took steps to have the gross valued rent separated and disjoined, and the proportions stated against each of the estates of Craigluscar and Knock and South Lethans. This was accordingly done by decree of the Sheriff dated 7th February 1894.