Tuesday, June 5.

SECOND DIVISION.

[Lord Young, Ordinary.

MITCHELL v. MITCHELL'S TRUSTEES.

Husband and Wife—Mutual Settlement—Donatio inter virum et uxorem—*Revocation*—Jus quæsitum tertio.

A husband and wife, by a mutual settlement proceeding on a narrative of favour and affection, conveyed to trustees all estate belonging or which should belong to the spouses, jointly or individually, at the death of the predeceaser, in trust for payment of the debts of both spouses at that date, and to allow the survivor the use and possession and management of the estate, the trustees interfering only to protect the capital of the trust, and then only with the survivor's consent; and for payment on the death of the survivor of the residue in equal halves to the brothers and sisters of the spouses respectively, and the issue of predeceasers, excluding two nephews of the husband. The trustees were declared to be entitled, but not bound, to take possession on the death of the predeceaser; and to be liable only for what they should receive from the survivor. The settlement reserved the liferent during the joint lives, and joint power to revoke. It was specially declared that upon the death of either "these presents shall become absolute and irrevocable," and delivery was dispensed with. The husband's estate amounted to about £3000, the wife's to about £460. The trustees entered into possession on the death of the wife, who predeceased. The husband married again, and thereafter raised a declarator that the mutual deed was revocable as regarded estate belonging to him at his wife's death.—*Held*, upon the husband consenting to renounce all interest in his wife's estate (*diss.* Lord Ormidale), that he was entitled to revoke his part of the settlement as a *donatio inter virum et uxorem*.

Held by Lord Ormidale that there was no such inequality in the counter-considerations in the deed as to justify revocation, and that revocation was also excluded on the principles of mutual contract and *jus quæsitum tertio*.

Held by Lord Gifford that in the event which occurred the wife's whole estate was carried to her brothers and sisters.

Opinions by the Court as to whether the equality of provisions between spouses is to be determined at the date when the settlement is executed or when it comes into operation; and *observations* on the case of *Hunter* v. *Dickson*, 5 W. and S. 455.

Observations by Lord Ormidale on the case of *Kidd* v. *Kidds*, Dec. 10, 1863, 2 Macph. 227.

This was an action brought by John Mitchell, shipmaster, Carnoustie, against the trustees under a mutual settlement executed by himself and his deceased wife Helen Hogg or Mitchell on 27th December 1873, seeking to have it declared that the said settlement was revocable by the pursuer in so far as it affected estate belonging to him at the dissolution of the marriage by his wife's death on 18th October 1874; and that the defenders should account to the pursuer for such estate, and should pay him the sum of £3463, 16s. as the amount of such estate, with interest from 15th May 1876: *Alternatively*, that to the extent of one-half of the whole trust-estate held by the defenders the pursuer was entitled to revoke and to dispose of the same at pleasure, with relative conclusions for accounting and payment; and in either event, that the defenders should convey over to the pursuer such portions of the trust-estate as might be found to belong to him and to require conveyance.

The settlement in question proceeded on a narrative of the love, favour, and affection of the spouses towards each other and towards the other parties mentioned, and of the duty of settling affairs so as to prevent disputes after death. It then conveyed to the trustees the whole estate, heritable and moveable, presently belonging or which should belong to the spouses jointly, or to them as individuals, at the death of the predeceaser; and bound the survivor and the heirs and successors of the predeceaser to grant all necessary deeds. The trustees were nominated executors on the estate of the predeceasers. The trust purposes were—(1) Payment of debts owing by the spouses or either of them at the death of the predeceaser, of the deathbed and funeral expenses of each of the spouses, and of trust expenses to the date of division. (3) Ascertainment of the nett amount of the trust-estate on the death of the predeceaser after deduction of debts then due by the spouses or either of them, excluding, however, from the trust-estate the body clothes and other such personal effects of the predeceaser, which, if not disposed of by the predeceaser, should belong to the survivor. (4) To allow the survivor, during his or her life, the use and possession of the household furniture and effects belonging to the spouses or either of them, and the management of the trust-estate, with power to uplift the income and apply it to his or her own use, the trustees not interfering with the management during the life of the survivor except where necessary for the protection of the capital and the investment and sale thereof, and then only with the consent of the survivor; the deed further declaring that should the survivor consider the free income insufficient for comfortable maintenance he or she should be entitled, with the consent of the trustees, to use the capital estate as might be necessary, but not exceeding one-half thereof. (5) Payment on the death of the survivor of one-half of the realised estate to the brothers and sisters then alive of the said John Mitchell, and the issue of such as might have predeceased *per stirpes*, and the other half to the brothers and sisters then alive of the said Helen Hogg or Mitchell, and the issue of such as might have predeceased *per stirpes*. Two of Mr Mitchell's nephews were, however, specially excluded from participating in the residue. The deed further declared that any portion of capital paid to the survivor for maintenance, as above provided for, should form a deduction from the one-half of residue to be paid to the brothers and sisters of the survivor. The trustees were authorised to enter into possession of the estate on the death of the predeceaser, and to sue for debts

due to either of the spouses, and, with the consent of the survivor, to output and input tenants and to sell and dispose of the subjects. The investments and changes of investment by the trustees were also to be with the consent of the survivor. It was further declared that the trustees should not be bound to take possession until the death of the survivor, and should not be responsible for the capital or income left with the survivor, but only for what they should receive on the survivor's death. The parties reserved their liferents during their joint lives, "with full power to us during our joint lives to alter, innovate, or revoke these presents in whole or in part as we shall think proper: But declaring that upon the death of either of us these presents shall become absolute and irrevocable; it being hereby specially agreed betwixt us that the survivor of us shall not have any power to alter or recall these presents, which shall be a valid and effectual deed immediately upon the death of the predeceaser of us, although found lying in the repositories of the predeceaser of us, or in the custody of the survivor of us, or of any other person to whom we or either of us may entrust the same, undelivered at the time of the death of the predeceaser of us, with the delivery whereof we hereby dispense for ever; and we revoke all former settlements made by us or either of us at any time heretofore; and we consent to the registration hereof, and of any codicils or additions which we make hereto, for preservation."

Upon the death of Mrs Mitchell, who had no children, the trustees accepted office, ascertained the nett amount of the trust-estate, completed titles to the heritage, lodged a residue account, sold part of the heritage invested funds, and advanced part of the capital to the pursuer. The estate of the pursuer settled by the mutual trust-deed amounted to £3000; the estate of the pursuer's wife amounted to about £500. The pursuer was also proprietor of some heritable property in Carnoustie. In the year 1875 the pursuer entered into a second marriage.

The pursuer made various averments with regard to the intention of himself and wife in entering into the said mutual settlement, and pleaded that it was revocable by him so far as it disposed of his estate, or at least in so far as it disposed of one-half of the residue in favour of his brothers and sisters; further, that the settlement was revocable as a *donatio inter virum et uxorem.*

The defenders, the trustees, pleaded that the settlement was not revocable by the pursuer, because it was a mutual and onerous contract intended to take effect during the survivor's lifetime; and *separatim*, because the power of revocation was expressly excluded. They also pleaded that the pursuer could not revoke the provisions in favour of his wife's brothers and sisters.

The Lord Ordinary pronounced the following interlocutor:— . . . . "Finds that the trust-disposition and settlement referred to in the summons and record is revocable by the pursuer in so far as it disposes of his own estate, but that only on the condition that he shall renounce all benefit under the said disposition and settlement in the estate of his deceased wife, and refund with interest any part of said estate which he may have received under the same: Grants leave to reclaim against this interlocutor.

"*Note.*—Applying the language of the mutual trust-disposition to the event that happened (viz. the predecease of the wife on 18th October 1874), the pursuer thereby divested himself of his whole property as then (18th October 1874) existing, conveying it to trustees, with a direction to allow him the liferent, and on his death to divide the fee among his own and his deceased wife's brothers and sisters. If this be the legal import and plain meaning of the language employed, as I think it is, I must assume that the pursuer so understood and at the time intended, whatever doubt I may have of the fact, looking to the extraordinary and apparently improvident character of the proceeding, whether the deed was revocable by him or not. The question in the case is, whether or not he is at liberty to revoke?

"In the event that happened, the pursuer's part of the deed was not testamentary, but an alienation in his lifetime of his estate as it stood on 18th October 1874, in which his wife, who died on that day, had no interest except the benefit intended to her brothers and sisters or their issue, to take effect at the pursuer's death. But such a conveyance while unimplemented is, I think, clearly subject to revocation as a donation, unless protected therefrom by onerosity, *i.e.* (looking to the facts of the particular case), by being the consideration or counterpart of some conveyance or obligation by the wife in favour of the husband or others for whom he chose so to purchase a benefit. The defenders accordingly contend, in defence of their trust and the interests under their protection, that the conveyance which the pursuer seeks to revoke is onerous, and therefore irrevocable. The ground of the contention is, that by the same deed the wife made an exactly corresponding conveyance of her estate, which the defenders say has passed to them, to be held subject to the same trusts as the estate of the husband. As she predeceased, her conveyance, with the relative direction, operates testamentarily; but as the pursuer's conveyance would have done so also had he been the predeceaser, there is in this circumstance no interference with the exactness of the mutuality.

"It is, I think, clear that as regards the benefits conferred by the spouses on each other, the deed was onerous and not revocable by either. The survivor was thus secured irrevocably in the benefit designed by the deed to him or her, and this was no doubt the primary purpose of the deed. With respect to the ulterior benefit designed to the brothers and sisters of the spouses, to be satisfied out of the estate on the death of the survivor after the primary purpose of the deed was served, I think this was gratuitous when regarded as the joint act of the spouses, who were under no obligation or duty of which the law can take account to provide for them. It follows that these parties had no *jus quæsitum* which would have been available against a joint revocation by the spouses, or, I am disposed to think (though this is not so clear), by one of them so far as regards his or her estate. The effect of such revocation by one only, on the interest under the deed of the revoking spouse in the estate of the other, is another matter, and involves the doctrine of election or approbate and reprobate. If the survivor (say the husband) took the interest in his wife's estate which the deed designed to him, I should hold that he was thereby precluded from

revoking his own part of the deed, though in favour of strangers, which was the consideration (or part of it) of that benefit. In an ordinary contract a party cannot, of course, free himself of the obligations upon him by simply renouncing those in his favour. But such a contract (as this deed implies) between husband and wife is, I think, exceptional to this extent, that as regards strangers—gratuitously benefitted, and having nothing but the contract of a man and his wife to urge for legal onerosity—either spouse may by revocation free his or her estate from its operation on the condition of surrendering all benefit under it in the estate of the other. If this is any extension of the doctrine which allows the revocation of gifts passing between husband and wife (which I doubt), it is in my opinion allowable as being according to the spirit and policy of the doctrine.

"About two years have elapsed since the death of the pursuer's wife, but I am nevertheless of opinion that the pursuer ought not, on the ground of undue delay to be denied a remedy otherwise competent to him. The deed was manifestly improvident, and I think he ought to be dealt with as having challenged it so soon as he realised its import and practical operation. The only parties having an adverse interest are in no way prejudiced by any delay that has occurred. I shall therefore allow the proposed revocation on the condition of the pursuer renouncing all benefit under the deed, and refunding with interest any part of his wife's estate which he may have drawn under it. Beyond this I cannot in this process decide anything. In the meantime I shall only pronounce a general finding, which may be taken to review. With regard to expenses, in case the action should be ultimately disposed of in conformity with the opinion which I have expressed, I think the whole expenses of the trustees (the defenders) ought to be paid out of the pursuer's estate."

The defenders reclaimed, and argued—The settlement consisted of counter-stipulations in favour of relatives, and was therefore a contract. The death of a party rendered a joint settlement irrevocable. The deed came into operation during the survivor's life, and was therefore not *mortis causa*. The provision made by the pursuer was a reasonable one, and therefore not revocable—*Hepburn* v. *Brown*, June 6, 1814, 2 Dow's App. 342; *Fernie* v. *Colquhoun's Trustees*, December 20, 1854, 17 D. 232; *Craich's Trustees* v. *Mackie and Others*, June 24, 1870, 8 Macph. 898; *Lang* v. *Brown*, May 24, 1867, 5 Macph. 789; *Wood* v. *Fairley*, December 3, 1823, 2 S. 549; *Gentles* v. *Aitken*, June 23, 1826, 4 S. 749; *Rae* v. *Neilson*, May 14, 1875, 2 R. 676; *Kidd* v. *Kidds*, December 10, 1863, 2 Macph. 227.

Argued for pursuer—The next-of-kin had no *jus quæsitum*, and even between the spouses the provision by the pursuer was excessive, and therefore revocable. *Restitutio in integrum* was always made a condition of revocation, and the pursuer had stated by minute that he renounced all interest in his wife's estate—Erskine's Inst. i. 6, 30; *Jardine* v. *Currie*, June 17, 1830, 8 S. 937; *Cousin* v. *Caldwell*, June 5, 1838, 16 S. 1109; *M'Neill* v. *Steel's Trustees*, December 8, 1829, 8 S. 210, F.C. 129; *Thomson* v. *Thomson*, February 20, 1838, 16 S. 641; *Spalding* v. *Spalding's Trustees*, December 18, 1874, 2 R. 237; *Davidson and Others*, May 27, 1870, 8 Macph. 807; *Blaikie* v. *Milne*, November 14, 1838, 1 D. 18. Rationality was to be judged of at the date of dissolution of marriage—*Hunter* v. *Dickson*, September 19, 1831, 5 W. and S. 455. A provision by a wife to the husband's next-of-kin was a covert donation—*Stewart* v. *Foulis*, February 7, 1686, M. 6096; *Denyssen* v. *Mostert*, L.R., 4 P.C. App. 236.

At advising—

Lord Gifford—This case involves the consideration of several very important principles regulating settlements, mutual deeds, and donations between husband and wife, and particularly the rights of revocation and alteration which a surviving spouse has after the death of the predeceaser.

The mutual trust-disposition and settlement in the present case, executed between the pursuer Mr Mitchell and his late wife, is a very peculiar deed, expressed in unusual terms, and containing very unusual provisions, and I have felt its construction and effect to be attended with a great deal of difficulty. Ultimately, however, I have come to substantially the same result as that reached by the Lord Ordinary, only, instead of making the renunciation by the husband of all interest in his wife's estate a condition of the revocation which the husband seeks, I am disposed to put such renunciation as a matter of consent upon the minute lodged by the pursuer. I hardly think it follows in all cases that a husband or wife who revokes the provisions of a mutual settlement as donations must give up all right to the estate of the other spouse, and although such renunciation by the husband may be quite reasonable in the present case, I decline to lay down any general rule on the subject.

The first observation which occurs in relation to the mutual disposition and settlement is, that it is in substance a *mortis causa* deed, or, at all events, it is a deed not intended to have any effect whatever until the dissolution of the marriage by the death of one or other of the spouses. It is not a contract or remuneratory grant which is to be operative *stante matrimonio*, but is both in form and in substance a settlement of, in the words of the deed itself, "our affairs, so as to prevent disputes in regard thereto after our deaths." No doubt it is to take effect on the death of either of the spouses, and it contains a clause dispensing with delivery. Still, it is to a large extent of a proper testamentary nature in reference to the estates of both the granters.

And this leads, in the second place, to the inquiry, At what date are the estates of the spouses to be considered, and the relative value of the grants or provisions made by the spouses *hinc inde* to be considered, so as to judge how far they are onerous and mutual, or how far they are donations? Is the date at which the comparison is to be made the date of the deed itself when both spouses were alive and when their chances of life or of future successions were unknown, or is it the date of the dissolution of the marriage by the predecease of the wife, when the rights of the husband and of his wife's next-of-kin became by law fixed and known?

Now, I am of opinion that in this case it is the date of the death of the wife, the date of the dissolution of the marriage by her death, which is to

be taken as the date of comparison of the value of what the husband took and received, and of what he gave or obliged himself to give *per contra* by the deed in question, so as to judge how far the grants by the husband were donations or not. I think this is the general rule in all cases where the alleged deed of donation is not to take effect till the dissolution of the marriage. It is then, and then only, you can exactly ascertain how far it is a donation or not. Where there is a proper contract between the living spouses, with remuneratory or onerous grants to take effect instantly or *stante matrimonio*, the case might be otherwise, but a provision to take effect at the dissolution of the marriage must, I think, as to its reasonableness, extent, or onerosity, be judged of at the dissolution. And so, accordingly, I think it has been fixed by the decided cases. In *M'Neill or Steel* v. *Steel's Trustees*, December 8, 1829, F.C. 179, this was one of the points, and the value of the husband's estate was taken, not at the date of the postnuptial contract (which was reduced as a donation), but at the date of Mr Steel's death. Lord Justice-Clerk Boyle says, and the other Judges concur—"I am clear that we are not to look at its value as at the date of the deed, but as at the time of his (Mr Steel's) death, when the question arises. We are therefore to take the value of his estate as at the time of his death." In *Hunter* v. *Dickson*, as decided in the House of Lords, September 19, 1831, 5 W. and S. 455, the same principle was applied even when the contract challenged as a donation was a contract of separation which had taken effect during marriage and had not been revoked at its dissolution. The annuity to the wife stipulated in the contract, and which she had received *stante matrimonio*, was held inadequate, and a donation made to her, in respect that at the death of her husband he left an estate which would have given her by law a much larger provision. The Lord Chancellor says—"In order to ascertain whether there is inadequacy of consideration, another question, and that of law and not of fact, is to be determined, namely, whether the consideration given by the one party in respect to and in comparison with the rights surrendered by the other is to be compared with the amount and value of those rights at the date of the contract executed, or at the determination of the matrimonial contract, that is to say, at the death of the husband? I was at first inclined to think, on general principles (for no doubt in other cases it would be so), that the comparison of the consideration with the value given up was to be taken at the date of the contract, and not at any subsequent time; but I am satisfied now by the case decided on the authority of the Lord Justice-Clerk, and that recent case not dissented from by his brethren, and I am still more satisfied from the reason of the thing, that there is a peculiarity in the irrevocable nature of the marriage-contract, and that in those donations you are upon the plainest principle to regard not merely the date of the contract, but also the last period, namely, the decease of the husband." The same principle seems to have been applied in subsequent cases, among which I may mention *Thomson*, February 20, 1838, 16 S. 641; *Blaikie* v. *Milne*, November 14, 1838, 1 D. 18.

How, then, did matters stand at the dissolution of the marriage by the death of Mrs Mitchell? We have not the relative values of the estates of the husband and wife respectively very accurately ascertained or stated on record, but as in such questions, to use the expression of Lord Eldon, matters are not to be weighed in very nice scales, probably we have enough for the purposes of the case. The wife's estate, then, at the dissolution, may be taken as consisting of two heritable bonds, together of the value of £460, and the husband's means, including his heritable estate, about £3000. Now, as there was no antenuptial contract, if there had been no mutual settlement the husband on his wife's death would have retained the whole of his own estate, and in virtue of his courtesy would have liferented his wife's two bonds. By the mutual settlement he gets a liferent of the whole—that is, practically, and leaving his own estate out of view, he gets a simple liferent of his wife's two bonds, and the result is that under the deed he takes nothing whatever to which he had not right independent of the deed and at common law. On the other hand, by the mutual deed he gives away gratuitously the absolute fee of his whole estate, one-half to his own brothers and sisters, and the other half to the brothers and sisters of his deceased wife and their issue, excluding David and Thomas Hogg, two of his wife's nephews specially named, and he retains a bare liferent of his own property. I think it can hardly be maintained that the provisions *hinc inde* here, and as the case has turned out, are mutual or remuneratory, or that there is any reasonable or equitable relation between the two. The husband really gives all and gets nothing, and so, instead of being an onerous or remuneratory contract, it is very nearly, indeed altogether, a pure donation so far as the husband is concerned. If the case stopped here, I think there would be no doubt of the husband's power to revoke, for it is quite fixed that a husband or wife being the donor may revoke the gift even after the death of the other spouse, and at anytime during the life of the donor.

But then it is said—and here also are questions attended with nicety—that the donation by the husband in this case is not a donation to the wife at all, but a donation to third parties, namely, to his own brothers and sisters as to one-half of his estate, and to the brothers and sisters of his wife and their children, with two specified exceptions, as to the other half of his estate. It is contended that the deed *quoad* these ultimate legatees has been delivered, or must be held as such; that *jus quæsitum tertiis* has taken place; and that the whole estate both of the husband and the wife are now disposed of beyond recal, the deed being expressly declared irrevocable.

Now, this would be a very startling result, for its effect would be, if the contention is well founded, that the pursuer Mr Mitchell stands divested of every farthing he possessed—of his whole estate, heritable and moveable, including even his furniture and body clothes, for although the body clothes of the predeceaser are excepted, there is no such exception as to the survivor, and accordingly, although the pursuer has married again, and may have a family, he is not to be allowed to make any provision for his new wife or for his children, but everything he has is to go to his own brothers and sisters and the brothers and sisters of his late wife. His present wife and any children he may leave are

to be left destitute unless he should happen to earn in his later years a new estate.

I find myself unable to accede to this contention. In the first place, the declaration as to irrevocability really goes for nothing if the bequest is in its nature revocable, for the clause of irrevocability may be itself revoked. It falls with the deed. No man by merely calling his will his last and irrevocable will can bar himself from altering it.

In the next place, I think the deed, though delivered as between the spouses, and in the hands of their mutual agent, has not been delivered *quoad* the ultimate residuary legatees of the husband. It would be held delivered *quoad* the wife's estate, because it is really her will, and she is dead, and in testaments death is delivery, or rather no delivery is needed; but it cannot be said, as in a question between the husband and either his wife's brothers and sisters or his own brothers and sisters, that he, the husband, has delivered the deed to them. Apart from the deed being left in the hands of the agent of the spouses, there has been no delivery whatever.

But, in the third place, and this is the main point, I am of opinion that the provisions made by the husband, and by the wife too for that part of it, in favour of their respective brothers and sisters or nephews and nieces are testamentary in their nature, and are not conventional or obligatory. The very narrative of the deed shows this, for it proceeds on a statement not only of the love and favour which the spouses bear to each other, and certain onerous causes, and this relates to the provisions to the spouses respectively *inter se*, but it goes on to say that it is a "duty incumbent on us to settle our affairs so as to prevent disputes in regard thereto after our deaths," that is, after the death of both of us, and that is just the narrative of an ordinary testament. It often happens that the same deed embraces various ends, and is intended to accomplish various purposes, and the effects in such cases will not be different from those which would have followed had they been provided for in separate deeds. The nature and essence of the provisions must always be ascertained, and the proper interpretation applied. An antenuptial contract of marriage very often embraces a settlement by each of the engaging spouses of their separate and independent estates in case the marriage be dissolved without issue, and although the contract is onerous and irrevocable *quoad* the spouses and their issue, it will be read as a mere testament and be ambulatory and revocable during the life of each spouse *quoad* their respective estates. The same may happen perhaps even more frequently in postnuptial contracts, and there are many instances of this. I think the present case is an example. The spouses, after providing for each other, whichever be the survivor, contemplate the death of both without issue, and proceed to make their respective testaments accordingly. The wife gives her estate to her brothers' and sisters' next-of-kin, with certain exceptions, and the husband leaves his estate to his brothers and sisters. If either of them had had children would this not have operated as a revocation? If either of them, after the dissolution of the marriage, had married again, as has happened, would not the spouse so marrying be entitled to revoke his testamentary arrangements? Nor do I think any difficulty really arises from the circumstance which, no doubt, is an important peculiarity that instead of using separate testamentary words—each spouse bequeathing his or her own estate—they use mutual words, each bequeathing the estate as a whole, one-half to each set of next-of-kin. If this had been done between strangers, it might easily have been held in certain circumstances to have been a mutual settlement which in general, and except in some unforeseen cases, may be only revocable by mutual consent. But when such a deed is made between husband and wife the general law of revocation of donations comes into play, and a wife or husband who stipulates for a bequest to their heirs or next-of-kin is really, unless there is something very exceptional, in the same position as if stipulating for her or himself. This was the principle recognised in the cases of *Glassford* v. *Dalling*, M. 6106; *Stewart* v. *Foulis*, M. 6096; *Jardine* v. *Currie*, June 17, 1830, 8 S. 937.

In the present case I cannot hold that it was *pars contractus* between husband and wife and an onerous contract that the husband should at the dissolution of the marriage divest himself of his whole estate, and I think no distinction can be taken so far as the husband's estate is concerned between his wife's relatives and his own. If the one set of relatives have a *jus quæsitum*, so have the other.

Of course it is quite different *quoad* the wife's estate, because her testament has become final by her death, and I am of opinion that it will carry the fee of the whole of her estate, and not merely of one-half of it, to her preferred next-of-kin, for it was a condition of her bequest of one-half of her estate to her husband's brother that one-half of the husband's estate should come to her own preferred heirs. If this condition is not fulfilled, the wife's heirs-nominate will claim her whole estate in part compensation of what the husband has revoked and withheld.

There might have been a question whether the husband besides retaining his own estate might not have also claimed the liferent or courtesy (of course he could not claim the fee) of the wife's bonds, but as he has wisely and properly given up this it is needless to consider it.

On the whole, then, I think the Lord Ordinary's interlocutor should be adhered to, inserting in reference to the renunciation by the husband of all interest in the wife's estate that this renunciation is in terms of the pursuer's minute of consent.

Lord Ormidale—This is a peculiar case as regards its circumstances, and various nice and difficult questions in law have been raised in it; and it is certainly not without misgiving that I have now to express my opinion on these questions, seeing it differs not only from that of Lord Gifford, but also, I understand, from that of your Lordship in the chair, and, in reference to one branch of the case, from that of the Lord Ordinary.

The first and most important inquiry is how far the mutual disposition and settlement must be held to have been onerous and obligatory; or, to put it differently, how far were the considerations given by the wife fair and reasonable as counterparts of those which were given to her by her husband. The Lord Ordinary in the note to

his judgment says that he thinks "it clear that as regards the benefits conferred by the spouses on each other the deed was onerous and not revocable by either." But this view of the matter was disputed by the pursuer, and as the case depends very much upon whether it is to be taken as sound or not, it is right that I should at once and at the outset address myself to it.

It is not, I think, quite clear from the record what were the means and estate belonging to each of the spouses when they executed the mutual disposition and settlement in question in December 1873. In the first article of his condescendence the pursuer states that at its date he "was possessed of means and estate to the extent of £3000 or thereby, and his said wife was lender and creditor in two bonds and dispositions in security, together of the value of £460, and which were executed by the granters thereof in her favour before her marriage with the pursuer;" and the answer made by the defenders to this statement is, that "the value of the means and estate belonging to the pursuer and his said wife respectively at that date is admitted." Whether any, and if any how much, of the £3000 consisted of heritage is not stated, but neither in regard to this or any other matter of fact did either of the parties ask a proof. The debate took place on the footing that probation was not desired. I have not, however, overlooked the statement in the condescendence, from which it appears that at his death the truster had heritable property in Carnoustie, but what was its value is not said, although it was stated, if I recollect rightly, at the debate, on the part of the pursuer, that its value was £2000.

The question then arises, was there any such inequality in the counter-consideration in reference to which the mutual disposition and settlement was executed as to entitle the pursuer as the husband to revoke it after the death of his wife, on the principle of *donatio inter virum et uxorem.* There were no children of the marriage, and it does not appear, and was not said, that any antenuptial contract of marriage had been entered into between the parties. It was therefore not unreasonable that the husband should by postnuptial deed make some provision for his wife in the event of her survivance. Independently, however, of this, I am not prepared to say that there was any such inequality in the mutual considerations in the deed in question as to entitle the pursuer as husband to revoke it after his wife's death. According to the general rule, as illustrated by many decided cases, a mutual deed of settlement, partaking as it does of the nature of contract, cannot be altered or revoked except by both of the parties to it. And in the present case the deed expressly bears that it was specially agreed by the parties that the survivor should not have any power to alter or recal it, but that immediately on the death of the predeceaser it should be a valid and effectual deed.

It is true that while the husband is admitted to have had means and estate to the extent of £3000, and the wife £460 only, when the deed was executed, it is also true that the £3000, so far as moveable estate, formed the fund in communion between the spouses, to one-half of which the wife would have been entitled in the event of her surviving her husband. In this view the wife's own £460, and half of her husband's £3000 of moveable, would belong to her. But supposing that some portion of the £3000 was heritable estate, it does not appear to me that even in that view, and bearing in mind the rights which would arise of terce and courtesy, according as the death of the one spouse or the other first happened, there is sufficient room for holding that there was inequality in the counter-consideration in reference to which the deed in question was executed, attending to what the parties did by that deed. Now, what the parties did by the fourth purpose of the deed was to declare that the survivor was to enjoy the liferent of the whole of their means and estate, and even to encroach on the capital if necessary for his or her subsistence; and by the fifth purpose it is provided that the capital, or what might remain of it, that is the free residue on the death of the longest liver of the spouses, should go in equal halves to the brothers and sisters then alive of the parties respectively, and their issue, to the exclusion of two of the wife's nephews specially named.

I must own my inability in this state of matters, on any fair and reasonable view I can adopt, to hold that there was any such inequality in the counter-considerations in the deed as to entitle the husband to revoke it after the death of his wife. It is true that in virtue of the Intestate Moveable Succession Act, 18 Vict. cap. 23, section 6, the wife's representatives could have no right to any part of the £3000, supposing it were wholly moveable, as forming the goods in communion, in the event, which happened, of her predeceasing her husband, and in reference to that contingency, if it alone were to be looked at, there would be a considerable inequality. But in reference to the other contingency, of the wife surviving her husband, and this might have happened just as well, or rather more likely than the other if she was considerably younger than her husband, as I understand from what was stated at the debate she was, the preponderance of consideration was in favour of the wife. And at anyrate she gave all she had and all that might come to her, and the pursuer, her husband, gave no more. In these circumstances, and as it was impossible to tell at the time the mutual disposition and settlement was executed which of the two spouses would predecease the other, I cannot say there was any such inequality in the counter-considerations as to entitle the pursuer as husband to revoke the deed after the death of his wife.

It was argued, however, for the pursuer that the date at which the equality or inequality must be judged of is the death of the wife, when the deed came into operation. But I must take leave to doubt this, either as a general rule or one which is applicable to the circumstances with which we are here dealing. In the case of *Hunter* v. *Dickson*, as decided in the House of Lords (Sept. 19, 1831, 5 W. and S. 455), it would rather appear to have been held by the Lord Chancellor, looking at the whole of his observations, that both the date of the deed and the date when it comes into operation ought to be taken into consideration. In the present case, having regard to its circumstances, and especially that the spouses became parties to a deed partaking of the nature of contract, I am disposed to think that the date of the deed was that which the parties themselves

had chiefly, if not exclusively, in view when it was executed by them; but I am not unwilling to hold that both the date of the deed and the date when it came into operation should be looked at, and in this view my opinion as to the right of the husband to revoke after the death of his wife is that which has been already expressed by me.

There is still another ground in respect of which the mutual disposition and settlement in question must, in my opinion, be held irrevocable by the pursuer after the death of his wife, and that is the vested interests which have been created by it in favour of third parties, viz., the brothers and sisters of the spouses respectively. A mere *spes successionis* would not have been sufficient to prevent revocation, as was decided in the case of *Fernie* v. *Colquhoun*, December 20, 1854, 17 D. 233; but the opinions of the Judges were in that case to the effect that the decision would have been otherwise if there had been any *jus quæsitum tertio* in respect of a vested interest. Nor did I understand it to be disputed that there were in the present case interests vested in third parties, and not a mere *spes successionis*. The deed being a mutual disposition and settlement in favour of trustees, and so expressed and dealt with as to have become operative, and indeed put into full operation immediately on the death of the wife, it is difficult to come to the conclusion—at least I feel it to be difficult—that effect should be given to the pursuer's demands in the present action. I find it stated by the pursuer himself that his own agent, after his wife died, "requested the trustees to accept of office, and so to act therein as to dispossess the pursuer, after he had proved to be survivor of the spouses, of the possession and control of his own means and estate." And again, it is also stated by the pursuer that the trustees have, in virtue of the trust-disposition and settlement, taken infeftment in his property in Carnoustie. The Lord Ordinary says that the infeftment was taken two years before the date of his interlocutor.

In these circumstances, it appears to me that, consistently with well-established law, the pursuer cannot now be held entitled to revoke the mutual disposition and settlement in question. The case of *Kidd* v. *Kidds*, 10th Dec. 1863, 2 Macph. 227, seems to me to be very much in point in regard to all the questions which here arise. Excepting that the pecuniary interests involved were there more limited than they are here, and that the beneficiaries in whose favour a *jus quæsitum* was created were the children of the marriage, in place of, as here, the brothers and sisters of the spouses, all the essential circumstances were very similar. The husband was to be restricted to a liferent, but to terminate if he entered into a second marriage. Such a deed was all the harder, as it turned out that the husband survived his wife, then entered into a second marriage and had more children. And yet his whole estate, capital and income, as it stood at the death of his first wife, passed entirely from him to his children by that wife.

The amount of the pecuniary interest involved in *Kidd's* case cannot, I think, affect the matter, and neither do I think can the circumstances of the parties entitled to the ultimate benefit, being the children of the first marriage. In regard to the latter point Lord Deas said—"I agree in the observation that in this case the children who are donees are to be regarded as third parties, in whom an interest has vested under the delivered deed, more especially as the wife had rights in respect of which she was entitled to bargain for behoof of the children," just as the wife in the present case may be said to have had rights for which she was entitled to bargain for behoof of her brothers and sisters. It is indeed obvious from the report that the decision in the case of *Kidd* proceeds, not on specialties, but on general principles, applicable alike to all cases of the class to which it and the present case belong.

I must therefore hold it to have been settled in the case of *Kidd* v. *Kidds* that a mutual deed of settlement, such as that here in question, is not revocable by the husband after his wife's death on the ground of its being *mortis causa*, or on the principle of *donatio inter virum et uxorem stante matrimonio*; and that revocation is barred in the present, as it was in that case, by the interposition of vested interests, creating a *jus quæsitum tertio*. And if I am right in these propositions, it necessarily follows that the deed is in all respects, including the benefits intended by it for the brothers and sisters of the spouses, irrevocable. These interests are associated with, and made to depend in such a way upon the rights of, the spouses themselves, which form the other object of the mutual deed, as to render it impossible, I think, to deal with them as separate and independent legacies or interests. They are unmistakably made to form a part, and a very important part, of the counter-consideration, in reference to which the spouses contracted and agreed to execute the mutual deed. As was observed by Lord Glenlee in the case of *Gentles* v. *Aitken*, 23d June 1826, 4 S. 749, (and his observation was concurred in by the rest of the Court) —"A party may undoubtedly give legacies to strangers in a contract, and where it is clear that they are not in lieu of the other stipulations they would be revocable as if in a separate deed. But the provision here was a counter stipulation in favour of the husband's family, and irrevocable."

In the whole matter I am, for the reasons I have now stated, of opinion that the Lord Ordinary's interlocutor ought to be recalled, and the defenders assoilzied from the conclusions of the action.

Lord Justice-Clerk—This is a difficult and important case, but after considering it I have come clearly to agree with Lord Gifford, and substantially with the Lord Ordinary. The first question is, Whether this settlement contains a donation on the part of the husband to his wife; the second, and a totally distinct question, is, Whether, assuming there was a donation which was therefore revocable as regards the wife, an interest had not been created in third parties so as to prevent the revocation otherwise competent. There is also an important preliminary point, viz., at what point of time are we to consider the value of the estates settled. On that point Lord Gifford has referred to the case of *Hunter* v. *Dickson*, and founds on it the opinion that we ought to confine our attention to the position of matters at the time when the settlement comes into operation. Now, I think that inequality of considerations, either when the settlement is made or when it comes into operation, gives sufficient

ground for revocation. The taint may be original, or the inequality may supervene, but both cases depend on the same equitable principle. Now, if we take the later point of time in the present case, the inequality is almost unparallelled—the wife gives little and takes much. And the importance of taking the second date is illustrated by considering what are called the counter stipulations by the wife, for although, had she survived, the liferent provided to her might have been a reasonable provision, yet, in the event that has happened of the husband's survivance, the case is totally different. But then there is the second question, whether as regards the disponees the deed is revocable? The trustees have been infeft, the deed has been delivered, and some forcible argument has been submitted to us on that point. There are a great many cases decided in favour of revocability and irrevocability, but I know of none in which a purely gratuitous deed has been held to be irrevocable. The cases are well summed up in the judgment in *Spalding* v. *Spalding's Trustees*, 2 R. 237. I will only mention that of *Somerville*, May 15, 1819, F. C., in which a deed had been delivered, but because it was gratuitous and testamentary the Court held that the right to revoke remained. Again, in the case of *Kidd* v. *Kidds* there was a contract to settle money on the children of the marriage, and on the wife's death it was held that the husband had no right to revoke, not so much because a stipulation had been made by the wife, but because it had been made for the children of the marriage.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for Mitchell's Trustees against Lord Young's interlocutor of 20th December 1876, Find that the trust-disposition and settlement referred to in the summons and record is revocable by the pursuer in so far as it disposes of his own estate; but find, in terms of the minute No. 12 of process, that such revocation is on the condition that he shall renounce all benefit under the said disposition and settlement in the estate of his deceased wife, and refund with interest any part of said estate which he may have received under the same; with the above variation, adhere to the interlocutor of the Lord Ordinary: Find both parties entitled to expenses out of the fund in the hands of the trustees, and remit to the Auditor to tax the same and to report: Remit to the Lord Ordinary to proceed with the cause and to decern for the expenses now found due, and decern."

Counsel for Pursuer (Respondent)—Fraser—Millie. Agent—W. G. Roy, S.S.C.

Counsel for Defenders (Reclaimers)—Asher—A. J. Young. Agents—Fyfe, Miller, Fyfe & Ireland, S.S.C.

Wednesday, June 6.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

THE LORD ADVOCATE *v.* SIDGWICK.

Revenue—Succession-Duty Act (16 *and* 17 *Vict. cap.* 51) *sec.* 17—*Exception from Duty in the case of a Marriage-contract Provision to one of the Spouses.*

In a marriage-contract a father-in-law bound himself to pay an annuity of £3000 to the lady in the event of the decease of his son, her husband, the annuity to be made a real burden upon certain lands which it was provided should be entailed upon the son and the heirs of the marriage. The lady renounced her right to terce and *jus relictæ*, the husband at that date being possessed of neither heritable nor moveable estate. Her father further became bound under the deed to grant a bond for payment of £10,000 to the lady and her children.—*Held* (*rev.* the Lord Ordinary (Curriehill)—*diss.* Lord Deas) that the annuity, on its becoming payable, was chargeable with succession-duty; and objection, that it was exempted under section 17 of the Succession Duty Act, as being granted "for valuable consideration in money or money's worth," repelled.

Opinions that in most marriage-contracts the sole consideration of any provision under them is the marriage, which is not under the 17th section of the Succession-Duty Act "a consideration in money or money's worth."

Observed by Lord Shand that the only subject of exception under the 17th section of the Succession-Duty Act is that of a *bona fide* proper purchase.

This was a Special Case under the Act 19 and 20 Vict. cap. 56, in which the question submitted for the opinion and judgment of the Court was, Whether an annuity provided under a certain marriage-contract was chargeable with succession duty?

The following were, *inter alia*, the facts as stated: — "By indenture, dated 2d February 1821, made between certain parties (being articles for a settlement made in contemplation of the marriage then intended to be and afterwards duly solemnised between the Marquess of Salisbury and Frances Mary Gascoyne), certain hereditaments and real estates, forming part of the fortune of the said Frances Mary Gascoyne, were covenanted to be settled, *inter alia*, upon trust for raising, by the means therein mentioned, out of the estates thereby covenanted to be settled, portions for the younger children of the said intended marriage, in manner following:—That is to say, if there should be one child, the sum of £10,000; if two or more such children, the sum of £15,000; if three or more, the sum of £20,000,—the said sum or sums of money intended for the portions of such children (being more than one) to be shared and divided between or among them in such parts and proportions and in such manner as the said Marquess of Salisbury and Frances Mary Gascoyne should direct or appoint; and in