from that, however, and on the preceding cases, I think it very clear that the only competent court of appeal is the Court of Justiciary—either the High Court or a Circuit Court. That being so, I have no doubt whatever we must throw out the action on the ground of no jurisdiction.

Lord Deas—I am of the same opinion. The object of the Small-Debt Act was to give a summary remedy for small cases, and by the 30th and 31st sections a cheap and summary mode of reviewing judgments of the Small Debt Court was given. With that intent the review is limited either to a Circuit Court or to the High Court of Justiciary. Here the decree being pronounced in Midlothian, the appeal lay to the High Court. Had an appeal been taken to the High Court, and had the only ground stated against the reduction been that the ten days during which it is competent to appeal had elapsed, it could, and no doubt would, have been stated that the decree had not come to the knowledge of the party within the requisite time. If the Court had then been satisfied that justice had from that cause not been done, they would no doubt have granted the remedy. The party certainly had the remedy of going to the High Court, and he has not taken advantage of it.

The only case which has even the appearance of being against this view is that of *Murchie* v. *Fairbairn*, 1 Macph. 800; but when that case is considered, it is really a precedent in favour of the result we have arrived at. The only question there was, whether the extract written out by the Sheriff-Clerk was the judgment? All the Judges were of opinion that if that was the judgment of the Inferior Court reduction was incompetent. But they held that what was objected to was something done after judgment, and that therefore reduction was competent in the Court of Session. There is nothing in that case adverse, but everything favourable, to the course your Lordship has proposed here.

Lord Mure and Lord Shand concurred.

The Court therefore recalled the Lord Ordinary's interlocutor, and dismissed the action with expenses.

Counsel for Pursuer (Respondent)—Campbell Smith—Rhind. Agent—A. Clark, S.S.C.

Counsel for Defender (Reclaimer)—Asher—Shaw. Agent—P. Morison, S.S.C.

Tuesday, July 15.

SECOND DIVISION.

SPECIAL CASE—MELVILLE *v.* DAVIDSON AND OTHERS (MELVILLE'S TRUSTEES).

Husband and Wife — Mutual Trust-Disposition—Revocable Deed—Donation—Onerous Consideration.

A husband and wife, there being no antenuptial contract, executed a mutual trust-disposition and settlement of their "whole estate . . . presently belonging and addebted to us . . . or which shall belong or be addebted to us at the time of our decease," in favour of trustees, for themselves and the survivor in liferent, and the issue of the marriage in fee. The whole estate save a fund of £400 (as to which *jus mariti* and rights of administration were expressly excluded) belonged to the husband. *Held*, on the death of the wife, that the mutual deed was revocable in so far as the husband's estate was concerned, the conveyance of it having been truly a donation by the husband, and neither remuneratory nor a provision for the issue of the marriage.

This was a Special Case presented for the opinion of the Court by (1) Captain William G. B. Melville, Fraserburgh, and (2) Sylvester Davidson and others, trustees under a trust-disposition and settlement executed by Captain Melville and his wife Mrs Sarah Noble or Melville. On September 27, 1875, Captain and Mrs Melville had executed a trust-disposition and settlement by which they conveyed to trustees "all and sundry lands and heritages, ships and shares of ships, and in general the whole estate, heritable and moveable, real and personal, of what kind or nature soever, or wheresoever situated, presently belonging and addebted to us, or to either of us, or which shall belong or be addebted to us at the time of our decease." The purposes of the trust were principally, after payment of debts, funeral expenses, and the expenses of the trust, that the survivor of the spouses should have the liferent of the whole estate, terminable on his or her second marriage, and that on the death or second marriage of the survivor the whole estate should be divisible equally, share and share alike, among the children of their marriage.

The seventh purpose was—"Declaring further, and hereby specially providing, that the principal sum of £400 sterling which accrued to the said Sarah Noble or Melville through and at the death of her father William Noble, late flesher and shipowner, Fraserburgh, having been handed over by her to the said William Gordon Burnett Melville to be invested by him and in his name in shares of the schooner or vessel 'George Noble' of Fraserburgh, whereof he is also master, the said sum, and all profits accruing therefrom from and after the date of these presents, shall be set apart as a special and separate fund for behoof of our said family or children of our present marriage, and paid to them share and share alike at our death, or upon the second marriage of either of us, as before provided for, and that to the entire exclusion of children or family of any second marriage of either of us."

Mrs Melville died on 13th April 1878 survived by her husband. There were two children of their marriage, aged respectively five and two years.

The property consisted of £1400 in cash and heritable subjects yielding about £50 per annum. The whole of this belonged to Captain Melville, with the exception of the sum of £400 dealt with in the seventh purpose, which was the separate property of Mrs Melville, derived from the estate of her father, under whose settlement the *jus mariti* and right of administration of her husband was expressly excluded. Captain Melville on August 20, 1878, executed a deed of revocation of

the mutual trust-disposition and settlement, by which he recalled the whole of its provisions, except so far as regarded these in the seventh purpose, and redisponed to himself and his heirs and successors the heritable property.

The heritable subjects were originally purchased in 1871 with Captain Melville's funds. He was then at sea, and the title was taken, without any instructions from him, in the name of Mrs Melville and her heirs and assignees. While the title so stood, part of the subjects so acquired were sold, Mrs Melville's name appearing as seller; and thereafter, by disposition dated 25th March 1875 she disponed the remainder to herself and husband in conjunct fee and liferent, and to the longest liver of them, and the children of their marriage equally in fee. The price of the portion sold was expended in building a house on the rest of the ground.

The questions submitted to the Court were in these terms—"(1) Are the second parties entitled to demand from the first party a conveyance of the property and estate, heritable and moveable, falling under the said mutual trust-disposition and settlement? (2) Are the provisions contained in the said mutual trust-disposition and settlement revocable by the first party in so far as they relate to his separate property, heritable and moveable? (3) Does the deed of revocation effectually recall the provisions in so far as they relate to the said property, and relieve the trustees from responsibility thereanent?"

Argued for the first parties—This was a revocable deed, being really a donation *inter virum et uxorem*, and in similar cases the Court had held that power of revocation existed. There was no consideration save as regarded the £400, and it was not proposed to touch that. The whole fund was Captain Melville's from the outset, and he was receiving nothing for what he gave.

Authorities—*Mitchell* v. *Mitchell's Trs.*, June 5, 1877, 4 R. 800; *Gibson's Trs.* v. *Gibson*, June 8, 1877, 4 R. 867; *Stiven* v. *Brown's Trs.*, Jan. 10, 1873, 11 Macph. 262.

Argued for the second parties—This was truly an onerous deed in favour of the children of the marriage. The interests of the children must be regarded as paramount. The wife had purchased by this deed a succession for them.

Authorities—*Hepburn* v. *Brown*, 1814, 2 Dow's Apps. 342; *Kidd* v. *Kidds*, Dec. 10, 1863, 2 Macph. 227.

At advising—

Lord Gifford—Captain and Mrs Melville were married in 1870, but at that time no marriage-contract or marriage-settlement was executed between them. On 29th September 1875 the two spouses executed a mutual disposition and deed of settlement whereby they conveyed to certain trustees the whole property, heritable and moveable, presently belonging to either of them, or which should belong to them at the time of their decease, for the purposes therein mentioned. The deed provides both for the case of the predecease of the wife and for the case of the predecease of the husband; and the husband's interest in the estate conveyed in the event of his surviving his wife is limited to a liferent defeasible upon his second marriage.

The marriage was dissolved by the death of Mrs Melville on 13th April 1878, survived by her husband Captain Melville and by two children of the marriage, who are in pupillarity. In August 1878 Captain Melville, by a deed dated 20th August 1878, revoked the mutual settlement between him and Mrs Melville, excepting as to a sum of £400, which was Mrs Melville's exclusive property; and the question now arises, whether Captain Melville was entitled so to revoke the mutual settlement, and what are the rights and duties of the trustees named in the mutual settlement under which they are now called upon to act?

Questions regarding the revocability of mutual settlements are often attended with great difficulty, and involve considerations of nicety and importance depending upon the circumstances of each particular case. The present case, however, appears to me to be solved by the application of the rule of law that donations between husband and wife are revocable during the life of the granter, even after the dissolution of the marriage and the death of the spouse to whom the donation is made. I am of opinion that the provisions granted by Captain Melville in the mutual settlement were substantially donations made by him in favour of his wife, that they are revocable by him even after his wife's death, and that they have been effectually revoked by the deed of revocation of 20th August 1878.

There was no antenuptial marriage settlement between the spouses, and therefore their rights were governed by the rules of common law. The husband was bound to make a reasonable provision for his wife in case of her widowhood, but if he gave her anything beyond this it would be considered in law a donation, and would be revocable by him at any time of his life.

Now, by the deed in question he gives the wife in the event of her surviving him a liferent of the whole estate, and looking to the very moderate amount of the estate in question, I think this would have been held reasonable and proper. But no question has arisen regarding this, for the wife has predeceased the husband, and it is the restriction of the husband's rights as surviving spouse that is now complained of as unreasonable and revocable. It is contended that by the mutual settlement the husband is divested and denuded of his whole estate, and bound to hand it over to the trustees named in the mutual settlement, that he is thereafter only to enjoy a liferent of his own estate, and that this liferent is to be forfeited if he should enter into a second marriage. I understand his present age is about forty-five.

I am of opinion that this restriction of Captain Melville's right over an estate which was absolutely his own can only be regarded as a gratuitous donation to his wife or a gift at her instance undelivered, and as such is revocable by the husband. In no sense can it be said that the mutual settlement is remuneratory. The husband takes nothing under it from the wife as a consideration for giving up the capital of his whole estate. He receives nothing in return. The wife's whole separate property, consisting of £400, is secured to the children of the marriage. Regarding this sum there is no dispute, and in this sum Captain Melville claims no right, but he very naturally objects to hand over his whole estate to the

trustees under the settlement, and he revokes it so far as it contains any such conveyance. I think he is entitled to do so.

It was ingeniously urged that although a donation to the wife herself might be revoked, it was otherwise with a provision made by Captain Melville in the mutual settlement for the children of the marriage. It was said the wife had purchased a succession for them by the mutual deed which the husband could not revoke even for behoof of any children which he might have by a second marriage. I cannot so regard the deed. The children of the marriage are no parties thereto, and in so far as they are concerned I think the spouses must be regarded as merely making testamentary provisions, each spouse conveying for behoof of the children merely his or her own estate. Logically the argument for the second party would come to this, that every penny Captain Melville may hereafter earn, and everything that he may hereafter succeed to, must be instantly handed over to the trustees for behoof of the children of his late marriage, for the mutual settlement conveys to the trustees everything that may belong to either of the spouses at their respective deaths, and although this view was hardly pressed in argument to its full extent, there was some difficulty and inconsistency felt in restricting the claim to the estate which might belong to the husband at the dissolution of the marriage. I am of opinion, however, that there is no ground at all for the contention that by the deed the wife purchased a succession to the children of the marriage. She really purchased nothing. She paid no price, and she gave no consideration for a sacrifice so great on the part of the husband—a sacrifice which might impair his wellbeing and hamper him all his future life.

I am of opinion, therefore, that all that the trustees, the second parties to the case, can claim under the mutual settlement is the £400 mentioned in the seventh purpose, which they will administer for behoof of the two children of the marriage between Captain Melville and his late spouse.

Lord Ormidale—Although in previous cases I have indicated, I think, a greater leaning than your Lordships in favour of such contracts as that in this Special Case, still here I do not feel any difficulty whatever. To adopt any other course than that proposed by Lord Gifford would amount even to an injustice to the husband.

Lord Justice-Clerk—I entirely concur in your Lordships' opinion.

The Court therefore answered the first question in the negative, and the second and third in the affirmative.

Counsel for First Party—Pearson. Agents—Pearson, Robertson, & Finlay, W.S.

Counsel for Second Parties—Low. Agents—Menzies, Coventry, & Soote, W.S.

Tuesday, July 15.

FIRST DIVISION

CITY OF GLASGOW BANK LIQUIDATION —(*CALEDONIAN BANK CASE*)— FRASER AND OTHERS *v.* THE LIQUIDATORS.

Public Company—Title to Sue—Individual Shareholder—Ultra vires—*Bank Advance on Security of Shares of another Bank.*

The contract of copartnery of a banking company of unlimited liability registered under the Companies Act of 1862 authorised investments in, *inter alia*, its own stock, or "the stocks of the Bank of England, or the Bank of the United States of America, or of any other banks or banking companies." The directors were to have all the powers that belonged to the company. In the course of its business a cash-credit advance was given to a customer upon the security of certain shares held by him in another bank. The directors had a transfer of these shares made out, and the name of the first bank was entered on the register of the second. On the failure of the latter the name of the former was placed on the list of contributories in the winding-up, and a petition was then presented by eight of its shareholders, in their own names, to have its name removed, on the ground that what had been done was *ultra vires* of the directors. *Held* that the petitioners had no title to sue, as neither the company nor its directors had acted *ultra vires* in making their bank a partner in another bank in order to secure advances.

Observed by Lord Shand that if the transaction had been *ultra vires*, individual shareholders either in their own or in the company name would have had a title to sue a petition such as that in question.

Opinion per Lord Shand that the mere statement in an article of copartnery that the business of a company is to consist of banking in all its branches will not of itself give a power of making a bank a partner in another bank.

This was a petition by Alexander Fraser, accountant, Inverness, and seven other shareholders of the Caledonian Banking Company, to have the name of the company removed from the register of the City of Glasgow Bank.

The Caledonian Banking Company was established in 1838, and was subsequently incorporated under the Companies Act 1862. By its contract of copartnership the parties thereto agreed to form themselves into a joint-stock banking company for carrying on the business of banking in all its branches and departments within the burgh or town of Inverness, and such other towns, cities, and places in Scotland as the ordinary directors for the time being should think fit; and for conducting the business thereby undertaken they agreed upon certain rules, regulations, stipulations, and conditions mentioned in the contract, all of which they and each of them bound and obliged themselves, and those in their right, to fulfil and observe. The liability of the shareholders was unlimited, and the capital stock