her with favour. But that is not a consideration such as must be taken into account in regard to the question whether the deed was gratuitous or not. The benefit was all on one side, and I do not see that there is any mutuality in it. It was purely gratuitous so far as the husband was concerned. The existence of the marriage-contract and the provisions it contains put out of view altogether the obligation which there is upon him to make a sufficient provision for his wife in the event of her surviving. That had been already done by the marriage-contract.

The conclusion therefore to which I come without any hesitation is that the mutual settlement was a gratuitous deed, and has been revoked by the codicil executed by Mr Beattie in 1878.

Lord Mure—I am of the same opinion. I think that the general rule of law is quite settled, that a mutual settlement executed by spouses is revocable—if it is not for an onerous consideration, or in fulfilment of some obligation to make a provision—on the ground that it is a donation *inter virum et uxorem*.

The only question to be considered then is, whether there was, at the time of the mutual deed, any obligation on Mr Beattie to provide for his wife? I think there was no such obligation, for there was an antenuptial marriage-contract in which proper provision was made for her on the death of her husband. Therefore there was in the case of *Mitchell*, and the other cases to which we were referred, the element which is here wanting, viz., that in them there was no provision by marriage-contract for the wife. As regards the question, whether there was here such a consideration as the cause of the deed as to make it onerous, I do not think that there was, for all that Mrs Beattie made over was a bare expectancy.

Lord Adam—The only question in this case is, whether the mutual settlement executed by Mr and Mrs Beattie has been duly revoked by the husband as being a donation *inter virum et uxorem*?

Here there was an antenuptial marriage-contract, by which there was secured to the wife an annuity of £500 and a liferent of the household furniture belonging to the husband, which were, in my opinion, looking to the circumstances of the parties, rational and proper provisions for the widow in the event of her surviving her husband. Anything which the mutual settlement gave her over and above these provisions seems to be a donation, except in so far as it can be sustained by Mrs Beattie giving what the law will consider a valuable consideration. I think that the rule of law on this matter is accurately stated by Mr Erskine (i. 6, 30), where he says—"*First*, Mutual remuneratory grants between the spouses made in consideration of each other are not revocable (*Chisholm*, Jan. 26, 1669, M. 6137) where there is any reasonable proportion between the value of the two; for as trifling inequalities ought to be overlooked in the transactions of those who are so closely united, the excess on the one side ought to be considerable in order to found the party who is hurt in a right of revocation. But where an onerous cause or remuneration is simulated, and a donation appears truly intended, the grant is revocable as a pure donation. Hence, *Secondly*, Grants given in consequence of a natural obligation are not subject to revocation." The question here therefore is, whether the counterpart which the wife is said to have given is of such value as to bear a reasonable proportion to that given by the husband? There has been a good deal of argument as to the date at which the proportion is to be estimated—whether at the time of the execution of the deed or at the date of the dissolution of the marriage. I do not think that point is of the slightest consequence here—the wife gets under the mutual deed the absolute fee of about £16,000. The consideration she gives for this sum is an expectation that she will succeed to something substantial on the death of an uncle who married a second time, and who had a daughter by his first marriage alive at the time when the mutual settlement was executed. It is made matter of admission that she had nothing beyond this expectation, and I cannot think that was sufficient to support a gift of £16,000. Whether that date is to be taken as a basis for the calculation, or the date of the dissolution of the marriage is to be so taken, it is all the same. The expectation was realised at the latter date, and it amounted to the one-fifteenth part of £12,000, payable at some future time—it is not known when. If I ask myself the question, as Mr Erskine puts it, whether this latter sum bears a reasonable proportion to the £18,000—to which sum Mr Beattie's estate had increased, and which fell to the wife from her husband—or whether there is a merely trifling inequality between them—or whether the excess of the one over the other is inconsiderable—I cannot but answer in the negative. I think therefore that the mutual settlement was nothing else than a donation by the husband to the wife, and that being so, it was revocable by the husband alone, and was in point of fact effectually revoked by him.

Lord Deas and Lord Shand were absent.

The Court found that the mutual settlement of Mr Beattie was revocable, and had been validly revoked.

Counsel for First Parties—Gloag—Darling. Agents—J. & F. Anderson, W.S.

Counsel for Second Parties—Keir—Dickson. Agents—Curror & Cowper, S.S.C.

Wednesday, May 28.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MAGEE *v.* DALGLISH, FALCONER, & COMPANY.

Process — Jury Trial — Issue — Reparation — Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42)—*Factory and Workshop Act* 1878 (41 *Vict. c.* 16), *secs.* 82, 89.

A lad employed in a calico factory was killed by being caught and crushed in some revolving machinery. His mother raised an action of damages and for *solatium* against his employers, and laid her claim at common law, and alternatively under the Employers Liability Act. Form of issue *adjusted* for the trial of the cause.

This was an action raised in the Sheriff Court of Glasgow by Mrs Roseann Stevenson or Magee, Lennoxtown, widow of Patrick Magee, ploughman, Lennoxtown, against Messrs Dalglish, Falconer & Co. (Limited), calico printers at Lennox Mills, Lennoxtown. The action was for damages and in name of *solatium* for the death of the pursuer's son John Magee, a youth of 18 years of age, who was in the employment of the defenders, and who while in their service met with an accident which resulted in his death. Besides being brought at common law, the action was laid alternatively under the Employers Liability Act of 1880, and the prayer of the petition contained, in addition to a conclusion for £1000, a conclusion praying that the defenders should be found liable in payment of a sum of £70, 4s., or such other sum as should be found due as compensation under the said Act for the injury.

The pursuer averred, *inter alia*, that the accident occurred through the deceased's clothing coming in contact with a rapidly revolving shaft, by which means he was drawn into the machinery and crushed to death. She further alleged that the said shaft was "mill gearing" within the term of the Factory and Workshops Act of 1878, and that being so, it ought to have been covered or boxed in; that during a portion of the time that the deceased was in the defenders' employment the said shaft was partially fenced in with a square wooden box, but that about a week before the accident in question occurred the fencing was removed and the shaft again exposed, in which condition it remained down to the date of the accident. The pursuer also set forth that the defenders had incurred the penalty of £100 provided by the said Factory and Workshops Act for contravention of its provisions.

The defenders averred that the accident occurred through the deceased failing to follow the instructions given to him by them or their foreman; that the deceased had charge of the fencing over the shaft as a part of the machinery under his care, and that he ought to have reported to them or their foreman if the shaft was at any time unfenced. They denied that they removed or gave instructions for the removal of the fencing, or that they were aware that it had been removed.

The pursuer pleaded, that as the deceased had lost his life through the fault or neglect of the defenders, or those for whom they are responsible, the pursuer as his mother was entitled to decree as concluded for. "(2) The defenders having contravened the provisions of the Factories and Workshops Act, are liable in terms of these provisions. (3) The deceased having, while employed as a workman in the service of the defenders, been injured by reason of the negligence of the defenders, or of a person for whom they are reponsible under the Employers Liability Act 1880, the pursuer is entitled to decree in terms of the second conclusion of the petition."

The defenders denied fault, and pleaded, that as the deceased had brought about his own death by disobedience, neglect, or rashness, they were not liable therefor, or in compensation either under the Factory and Workshops Act of 1878 or the Employers Liability Act of 1880, or at common law. "(3) In any event, pursuer is not entitled to recover from defenders any penalty incurred under the Factory and Workshops Act 1878 under this action."

The Sheriff-Substitute having allowed a proof, the pursuer appealed for jury trial. She lodged this issue—"Whether on or about the 26th September 1883 the pursuer's son John Magee, while in the employment of the defenders in the starching and mangling room of their factory at Lennox Mills, Lennoxtown, was caught by an unfenced horizontal unpolished revolving shaft, and killed, through the fault of the defenders, to the loss, injury, and damage of the pursuer. Damages laid at common law at £1000, or under the Employers Liability Act at £70, 6s."

The defenders objected to the proposed issue on the ground that it did not exhaust the cause, and in particular that although in the condescendence a sum of £100 was claimed as a penalty exigible under the Factory and Workshops Act of 1878, and this claim was repeated in the second plea-in-law for the pursuer, yet the proposed issue contained no reference to this claim. Further, the case was one more suited for proof than for jury trial, as it involved questions of law as well as intricate matters of facts relating to machinery.

The pursuer replied, that besides being one of the enumerated causes it was itself a case eminently suited for jury trial.

It being pointed out by the Court that the £100 penalty provided by the Factory and Workshops Act 1878 (sec. 82), must be recovered by summary conviction before a Court of summary jurisdiction under sec. 89, the pursuer's counsel agreed to delete the second plea-in-law above quoted, and this having been done at the bar,

Lord President—I cannot say that I have the slightest doubt about the appropriateness of trying this case by jury. I think also that we should allow the schedule to stand as it is, so as to enable the jury in assessing the damages to have clearly before their minds the alternative grounds upon quoted, which this action is laid.

Lords Mure and Adam concurred.

Counsel for Pursuer—Boyd. Agent—Thomas Hart, L.A.

Counsel for Defenders—Jameson. Agents—Auld & Macdonald, W.S.

Wednesday, May 28.

SECOND DIVISION.

[Sheriff of Aberdeen.

ADAMS *v.* TOWN COUNCIL OF ABERDEEN.

Reparation—Negligence—Street—Open Manhole.

A boy was injured by falling into a manhole which had been opened in a street in town, and at which several men were engaged at work. In an action of damages against the employers of the men, it appeared that the men engaged at the manhole had used all reasonable precautions, and that the boy was at the time of the accident looking