consent, which was refused the very day he entered. Lobley took no pains to ascertain the real state of matters, and, although Westland handed him the lease, he seems never to have looked at it. When the landlord declined to recognise him as tenant, he ought to have left the premises, and gone no further with a transaction which could not be carried out, and which was of an improper nature from the outset; for Westland was insolvent, and Lobley knew that he could not hold two licenses, and his daughter Martha, a girl of seventeen, was not a proper party to manage such a shop.

"Lobley having disposed of shop-fittings and part of the goods to the succeeding tenant, is clearly liable in the balance of the price. At the same time, it is only according to equity that he should be allowed to retain the sums disbursed by him in payment of rent, taxes, and wages. This brings out nearly the same result as if there had been an accounting between the parties, which probably ought to have been combined with this action for payment. It appears that Lobley has paid £34 in connection with this transaction, but he has received in all £63, 19s. 6d., so that he is not a loser in being found liable in £28."

Lobley appealed.

SCOTT for him.

KEIR in answer.

The Court adhered. Westland was to assign the lease, but it was not assignable. This, therefore, only meant it was to be assigned if assignable, or if the consent of the landlord could be procured. The transaction just proceeded on the hope that the parties would get the lease assigned. Lobley had not been two days in the shop, and *res* could have easily been restored *in integrum*. Lord Kinloch observed that as the obligation was to assign the lease, not to give one, the onus of getting the necessary consent lay on the assignee. Lord Deas thought the reverse.

Agents for M'Dougall—Stuart & Cheyne, W.S.
Agent for Lobley—W. S. Stuart, S.S.C.

Friday, June 24.

SECOND DIVISION.

MACKIE'S TRS. *v.* MACKIE AND OTHERS.

Succession—Mortis Causa—*Trust-Disposition—Mutual Settlement—Revocation.* A joint *mortis Causa* trust-disposition and settlement executed by three parties in favour of trustees for certain purposes therein named, but reserving always to the parties themselves and the survivor of them the whole estate thereby disponed, and also reserving to them full power during their lives, or even on deathbed, to burden, as also to alter, to innovate, or revoke said deed, in whole or in part, as they should see cause—*held* to be a mutual settlement of the estates of the grantors, and as such to have become irrevocable by the death of one of the parties; and codicils and a trust-disposition and settlement executed by the survivors, for the purpose of altering the provisions of the mutual settlement, set aside as ineffectual.

The question raised in this case regarded a joint *mortis causa* trust-disposition and settlement executed by Miss Agnes Craich, Mrs Christian Craich or Mackie, and her husband Mr James Mackie, by which they conveyed to trustees their whole estates, heritable and moveable, for the benefit of the five children of Mr and Mrs Mackie, reserving however to themselves and the survivor of them full power over said estates. Mr Mackie died some years afterwards—and up to his death no alteration had been made by the parties on the above-mentioned joint-settlement. But three years thereafter the survivors executed a codicil purporting to revoke certain of the provisions of the joint-settlement; and on Miss Craich also dying, the sole survivor, Mrs Mackie, executed two deeds, purporting to recal the joint-settlement, and dispose of the estates therein conveyed. After Mrs Mackie's death the trustees under the joint-settlement brought this action of multiplepoinding, in order to decide the question, whether the joint-settlement executed by the three parties above-mentioned could be altered or revoked by the subsequent deeds?

The Lord Ordinary (MACKENZIE) pronounced an interlocutor finding that the joint trust-disposition was a mutual settlement between the parties thereto, and as such could not be revoked or altered by the survivors after the death of one of the parties, and therefore finding that the subsequent deeds were ineffectual, and that the mutual settlement must regulate the succession to the whole heritable and moveable estates which belonged to the parties thereto at the dates of their respective deaths.

His Lordship added the following note:—

"John Craich, coalmaster near Alloa, died on 22d February 1854, intestate and without issue, and his three sisters, Agnes Craich, Mary Craich, and Mrs Christian Craich or Mackie, the wife of James Mackie, succeeded to his heritable and moveable estates. Mary Craich died on 17th April 1854, unmarried and intestate, survived by her two sisters and Mr Mackie. There does not appear to have been any marriage-contract between Mr and Mrs Mackie, and Mr Mackie therefore acquired right to his wife's share of her deceased brother's and sister's moveable estate. Thereafter Agnes Craich and Mr and Mrs Mackie executed the *mortis causa* trust-disposition and settlement dated 9th and 10th May 1854. By that deed they, in order to regulate their succession after their death, conveyed *mortis causa*, to and in favour of the pursuers and of the now deceased Joseph Mackie, as their trustees, to the effect therein written, their whole moveable estate and their whole heritable estate generally and specially therein described; and they further nominated the survivor of them the grantors, and upon the death of the said survivor, their said trustees, to be their sole executors, which trustees they authorised and empowered not only to sue for and uplift all sums of money due to them, but also to take possession of and convert into money their whole means and estate, and to sell and dispose of the same by public roup or private bargain, as also to lend out or otherwise invest their trust-funds on such securities, heritable or personal, or in such other manner as they shall approve of, and to call up and re-invest the same as often as they shall think proper to do so; and they bound and obliged themselves to infeft their trustees in the subjects thereby disponed to them, and to warrant their said means and estate, and their said disposition to the trustees, at all hands, and against all deadly. The trust purposes were—*First*, the 'payment of any just debts that may be due by us at our death, including our deathbed and funeral expenses, and the expenses of executing this trust.' *Secondly*, the allocation and division of the whole said means and estate, heritable

and moveable, belonging to the testators, in shares of one-fifth among the five children of Mr and Mrs Mackie, and their issue, 'declaring that the said shares shall not vest in the said parties or their issue or heirs until the death of the longest liver of us, the said Agnes Craich, Christian Craich or Mackie, and James Mackie,' and provision was made for the event of any of these children predeceasing the longest liver of the testators without issue. After giving, in the *third* place, certain directions to the trustees when making the allocation of their estate before mentioned, with a view to their properties of Carsebridge and Chapelhill conveyed by the deed remaining in the family, the deed proceeds as follows:—'Reserving always, and giving and granting to us and each of us, and the survivor of us, the whole estate hereby disponed by us, and also reserving to us full power during our lives, or even on deathbed, to burden, as also to alter, to innovate, or revoke these presents, in whole or in part, as we shall see cause; and we dispense with the delivery of these presents, and we resign the said subjects and others for new infeftment; and we assign the rents, and we consent to the registration hereof for preservation. Moreover, we desire any notary-public to whom these presents may be presented to give to our said trustees and their foresaids sasine of the lands, subjects, and others above disponed.'

"James Mackie having died on 23d February 1857, Agnes Craich and Mrs Mackie executed, on 11th May 1860, a codicil, purporting to revoke the provision made in favour of one of James Mackie's children by the foresaid trust-disposition and settlement, and otherwise to alter that deed. Agnes Craich having died on 14th April 1863, Mrs Mackie executed thereafter the two deeds mentioned in the foregoing interlocutor, purporting to alter and recal the said disposition and settlement. The question now presented for decision is, Whether the trust-disposition and settlement of 9th and 10th May 1854 could be altered or revoked after the death of James Mackie by Agnes Craich and Mrs Mackie, and after the death of Agnes Craich, by Mrs Mackie?

"The Lord Ordinary is of opinion that the trust-disposition and settlement of 9th and 10th May 1854 is a mutual settlement of the estates of the grantors, which was not revokable by the survivors or survivor after the death of one or more of them. By that deed important provisions were mutually made in favour of the survivors and survivor of the grantors, and they stood, as regards each other, in the relation of contracting parties who, for their mutual benefit during their respective lives and the benefit of the children of two of them, after the death of all of them, entered into that mutual deed for the settlement of their whole estates. The survivors and survivor took the full benefit of that deed as regards the estate and effects thereby conveyed. During their lifetime the three grantors were entitled by their joint act to revoke or alter that deed. The deed, indeed, expressly reserves that power to them. But after the death of one or more of them, the deed could not, it is thought, be revoked or altered by the survivors or survivor. No power to that effect is given by the deed, because it only reserves 'to us full power during our lives,' that is, as the Lord Ordinary reads it, during our joint lives, to burden, alter, or revoke. This reservation further is in marked contrast with the phraseology of the immediately preceding reservation, giving and granting 'to us and each of us, and the survivor of us, the whole estate hereby disponed by us.'

"It is under this last-mentioned clause that the survivors and survivor of the grantors derived benefit under the deed from the estate of the predeceaser and predeceasers. And it is this clause which, in the Lord Ordinary's opinion, raises great difficulty in deciding the question whether the survivors and survivor had right to recal or alter the mutual settlement, because, if under this clause the survivors and survivor acquired a right of fee in the estate of those predeceasing, it would be difficult to hold that the survivors and survivor could not recal and alter the mutual settlement. After careful consideration the Lord Ordinary is of opinion that it does not convey to the survivors and survivor of the testators the fee of the estate of those predeceasing, or give them an absolute right thereto. By the previous, as well as by the subsequent clauses of the deed, the whole estates of the testators were conveyed to and vested in the trustees for the purpose of division among the children of Mr and Mrs Mackie or their issue, on the death of the whole testators. Such a construction, as that the survivors and survivor had right to the whole estates, is utterly inconsistent with these clauses and with the trust. The Lord Ordinary thinks that the leading trust purposes is to secure the estates of the whole testators to the children of Mr and Mrs Mackie and their issue on the death of the last survivor of the testators. If that had not been the leading trust purpose, and if the leading purpose of the testators had been to give the estates to the survivors and survivor, a trust was quite unnecessary, and the tenor of the deed would have been altogether different. The clause in question also expressly recognises the conveyance to the trustees, and, as a consequence, the purposes of that conveyance. That clause must, therefore, the Lord Ordinary conceives, be construed consistently with the previous trust purposes, and that can, he thinks, alone be done by holding that the survivors and survivor of the testators were only entitled under it to the liferent use of the estates belonging to the predeceasing testators, which vested in the trustees upon their respective deaths, for the purpose of being allocated among the children of Mr and Mrs Mackie or their issue upon the death of the last survivor of the grantors.

"The Lord Ordinary is, for these reasons, of opinion that the survivors and survivor of the testators were not entitled to revoke or alter the mutual disposition and settlement by the gratuitous *mortis causa* deeds executed by them."

John Mackie, the claimant and real raiser (one of the children of the marriage between Mrs Christian Craich or Mackie and James Mackie), reclaimed.

FRASER and KINNEAR for him.

SOLICITOR-GENERAL and BALFOUR in answer.

At advising—

LORD JUSTICE-CLERK—The question in this case is rendered difficult by the confused and inartistic form of the joint trust-disposition and settlement, which distributes the property of the parties among Mr and Mrs Mackie's children. But what the Court has to do, in the first place, is to discover the true intention of the parties to the joint settlement at the time it was executed. (His Lordship then recapitulated the circumstances.) I am of opinion that the trust-disposition and settlement of 1854 is a tripartite mutual settlement, whereby each of the parties receives and confers a mutual

benefit—the one in consideration of the other. And I am also of opinion that the trust was not intended to come into operation until after the death of the survivor. During life each was to be the uncontrolled proprietor. The trustees were not even to have a title till after the death of the survivor; for the deed provides that when one of the parties dies the survivor is to be his or her executor, and the trustees are not to be executors till the death of the last survivor. The intention of the parties, that the administration of the estate was not to vest in the trustees till the death of the last survivor, was quite a reasonable one; and therefore I cannot agree with the Lord Ordinary in his view of the clause of reservation. I find no machinery for working that clause out under his view. I cannot interpret that clause as indicating a mere liferent. I think it means the very opposite.

We then come to the point, how far the clause of reservation is necessarily limited by the ultimate destination contained in the deed. The reservation of power to revoke and alter must be read collectively and not separately. It was a power reserved to the whole three parties collectively, as they collectively might think fit. While thinking the Lord Ordinary is not accurate in reading the clause of reservation as a clause merely of liferent, I think him quite correct in holding that the deed could not be altered without the consent of the whole three parties.

This leaves over a question of great importance. If the deed, while all the three parties were alive, could not be altered but with their collective consent, what effect has the death of one or more of the parties? Apparently the law is in the general case well established. Where there is a mutual settlement, by which each of the parties gives and receives a substantial benefit, that deed cannot be altered after the death of one of them. Whether it can be revoked during the life of the parties by all or by one depends on the terms of the deed. Generally speaking, it requires the consent of all. But if one of the parties is dead then the deed is unalterable. This rule is, however, subject to the consideration that the party deceased must have an interest in the provisions of the deed being carried out. Here, if Agnes Craich had predeceased, I do not know that Mr and Mrs Mackie could not have altered. But this is not the actual case. Mr Mackie, who predeceased the others, had a direct interest in the proper carrying out of the provisions of the deed. For these affected his children.

Looking to all the authorities, I am of opinion, while not agreeing with all the views expressed in the Lord Ordinary's note, that the Court should adhere to the Lord Ordinary's interlocutor.

LORD COWAN—The trust-disposition and settlement is an anomalous one, and not consistent with the ordinary character of deeds of the kind. But its general character is undoubted. It is a mutual disposition and settlement. If the power of altering it after the death of one of the parties comes in question it becomes necessary to look at the clause of reservation. That clause is clear and distinct. There is, I think, no room for doubt that the reservation applied to all the parties during their joint lives; but that the deed, being a mutual deed, became irrevocable on the death of one. There is a clause of great importance in it which is never found in an ordinary disposition and settlement—a clause of absolute warrandice. This shows the onerous and irrevocable character of the deed, as it is never found in any deed not intended to be invested with that character. On the other grounds mentioned by your Lordship, I concur in thinking that the Lord Ordinary's interlocutor should be adhered to.

LORD BENHOLME and LORD NEAVES concurred.

Expenses allowed against the reclaimer.

Agent for Mackie's Trustees—William B. Glen, S.S.C.

Agents for Real Raiser—Murray, Beith & Murray, W.S.

Saturday, June 25.

FIRST DIVISION.

LOVAT *v.* FRASER AND OTHERS.

Expenses—Interdict. A complainer who had asked for interdict in respect of two alleged infringements of his proprietary rights, latterly insisted only in one branch of the prayer of his note; and to the granting of interdict as thus restricted no opposition was offered. *Held* he was only entitled to one-half of his expenses.

This was a suspension and interdict at the instance of Lord Lovat to have the respondents, who are resident in the town of Beauly, in Inverness-shire, interdicted from entering upon certain lands belonging to the complainer, and cutting and taking away grass therefrom. The lands in question extend along both sides of the river Beauly, are covered with grass, and formed by the erection of embankments. They are held by Lord Lovat as proprietor of and duly infeft in the lands and barony of Lovat, in which they are comprised. Upon various specified occasions the respondents had, the complainer said, gone upon these lands and cut and carried off large quantities of grass. The respondents pleaded access to, and use of, the lands for forty years and upwards, and also the exercise of cutting and carrying off grass, &c., during all that time. The Lord Ordinary (JERVISWOODE) granted the parties respectively a proof, before answer, of their averments.

The respondents reclaimed.

THOMS and RHIND for them.

SOLICITOR-GENERAL and RUTHERFORD in answer.

After some procedure the complainer modified the prayer of his note for interdict. Originally it was in the following terms:—"May it therefore please your Lordships to suspend the proceedings complained of, and to interdict, prohibit, and discharge the said respondents from unlawfully entering or in any way trespassing upon the complainer's lands of Barnyards, Tomich, and the carse lands of Beauly, situate in the parishes of Kilmorack and Urray, and county of Inverness; and the complainer's lands of Wester Lovat, situate in the parish of Kirkhill, and county of Inverness; and from in any way interfering with the complainer and his tenants in the peaceable possession and enjoyment of his said lands in any manner of way, and from cutting and taking away grass from the said lands, or any part thereof, or to do otherwise in the premises as to your Lordships shall seem proper."

The complainer now asked the Court only "to interdict, prohibit, and discharge the said respondents from cutting and taking away grass" from the lands mentioned. The complainer was only allowed half of his expenses, as he had asked for