bags of the potatoes at 7s. 3d. per bag, and of these he got 180 bags, amounting at said rate to the sum of £65, 5s. Finds that this was all the extent to which the bill for £153 (No. 20), granted by Smellie to the defender, was liquidated, Smellie having become bankrupt, so that the defender never received for the potatoes so much as he had paid Jackson. Finds that although there can be little doubt that Jackson himself knew he was insolvent at the time he bought the potatoes from Forrest, and that he re-sold them to the defender at so large a deduction merely for the sake of obtaining some ready cash, it is not only not proved that the defender knew Jackson to be insolvent at that time, but it is on the contrary proved, more especially by the evidence of the bank agent Spiers, that Jackson was generally believed to be solvent, and that he was in good credit. Finds that, although the defender resold the potatoes at a large advance on what he paid for them, the evidence is very inconclusive as to what their real value was. Finds that the defender himself depones that he considered he gave Jackson their full value, that he saw them when they were being lifted, that part of them was a fairish crop, and part of them very bad, and that he bought better potatoes that season for less money. Finds that this statement is corroborated by Smellie, who depones—'I now think the value of the potatoes when I purchased them was about £15 per acre;' by John Bell, labourer, who was employed to lift the potatoes, and who depones they were 'a very poor crop, small, with a good deal of second growth;' and by Alexander Walker, merchant, Larkhall, who depones that he bought a good many potatoes that season, that the prices varied from £15 to £31 an acre, that the potato trade is a very uncertain one, and that he would consider £14 per acre enough to pay if the crop was poor. Finds in point of law that there is here no allegation of an illegal preference to a favoured creditor, or challenge of a transaction as reducible under the Acts 1621 or 1696, but only the averment of a fraud at common law, the contention of the pursuer being that the defender having obtained the potatoes at so much less than their true value, and having resold them soon afterwards at nearly the same price as Jackson had agreed to pay for them, must be held to have acquired no legal right to them, and to be liable to the pursuer, as representing Jackson's creditors, in payment of the alleged value of £160: But finds that although a debtor, knowing himself to be insolvent, cannot validly make *gratuitous* alienations to the prejudice of his general body of creditors,—even to a party who is ignorant of the insolvency,—the same rule does not apply to an alienation made by an insolvent still carrying on business for an onerous consideration, to a party giving the consideration in good faith, in which case the transaction does not admit of challenge. Finds that in as far as the defender actually paid £85, 18s. [8s.] 6d. for the potatoes, the alienation to that extent was clearly not gratuitous, and the only question which can remain is whether it was gratuitous to the extent of the difference between that sum and £160, the said difference being £74, 1s. 6d. Finds that this question falls to be answered in the negative, in respect that the real test of the gross value of the potatoes, in as far as the defender is concerned, is not what Jackson gave for them, or what the defender was able to sell them for, but what they were likely to realise in the market after being lifted and seen. Finds that there is no evidence to shew that they would then have realised more than £85, 18s. [8s.] 6d., and in point of fact they did not ultimately realise that amount to the defender, so that the price he paid to Jackson was an onerous, or, in the words of Professor Bell (Com., vol. ii. p. 197), 'a valuable consideration,' as applicable to the whole potatoes. Finds further that it has not been shown that the defender acted collusively or fraudulently in the bargain he made with Jackson, for although he no doubt expected to make a profit from the potatoes, he paid a substantial price for them, and bought them in the usual course of trade from one who was *in titulo* to sell. Finds in the whole circumstances that whilst the defender could not in any view be called upon to repay the money he has already paid, neither is he now bound to pay to the pursuer any more than he would have been bound to pay to Jackson an additional sum as effeiring to an assumed additional value. Recalls the interlocutor appealed against, sustains the defences, and assoilzies the defender. Finds the pursuer liable in expenses, allows an account thereof to be given in, and remits the same to the Depute-clerk of Court at Hamilton, as auditor, to tax and report, and decerns."

The pursuer appealed.

HORN and ASHER for him.

FRASER and BALFOUR in answer.

The Court adhered. The trustee could not succeed unless he could have shew the sale was not for value, or greatly under it; and that Miller knew of the state of Jackson's affairs; and he had proved neither. There was great difficulty in judging of the value of a growing potato crop; and Miller, if any one, as being a potato merchant, should have been able to estimate their value. Also Smellie found he had made a bad bargain, and estimated the real value at only £1 per acre more than Jackson sold them at.

Agent for Pursuer—M. Macgregor, S.S.C.

Agents for Defender—Miller, Allardice & Robson, W.S.

Friday, June 24.

M'DOUGALL *v.* LOBLEY.

Lease—Landlord and Tenant—Assignee—Onus—Representative. The lessee of a shop under a lease which excluded assignees and sub-tenants agreed to assign the lease, representing the landlord would consent without any difficulty. The landlord did not consent. *Held* the sub-lessee was liable to the lessee for the stipulated rent.

Opinion, per Lord Kinloch, that the onus of getting the landlord's consent lay on the assignee.

Opposite opinion, per Lord Deas.

The pursuer is trustee on the sequestrated estate of Robert Westland, grocer, 1 South College Street, Aberdeen. Westland held the shop in College Street under a lease excluding sub-tenants and assignees. Lobley being desirous to occupy the shop, and to place his daughter in it, agreed to purchase the shop and fittings for the sum of £50. Westland granted the following letter and receipt to Lobley's daughter:—

"Mis Martha Lobley, Aberbeen.

"*Aberdeen*, 18*th August* 1869.

"Having received from you £50 as the value of shop furniture and fittings, including signboard, and the whole stock-in-trade presently in my shop, No. 1 South College Street, Aberdeen, I hereby undertake to give you instant possession, and to assign in your favour, or in favour of any person named by you, my lease of said shop, and the excise certificates presently in my name.—Yours, &c.

ROBERT WESTLAND."

"Miss Martha Lobley

"To Robert Westland.

"1869.

"Aug. 18.—To purchase-price of shop furniture and fittings, including signboard, and the whole stock-in-trade in my premises, No. 1 South College Street, Aberdeen, sold by me to you, with immediate entry, £50.

Aberdeen, 18*th August* 1869. Received payment,

ROBERT WESTLAND."

In reality, however, Lobley only paid £10 to account of the £50. He also put stock into the shop, and paid part of the rent and taxes. The landlord, however, declined to recognise him as tenant of the shop, and he had to leave.

In these circumstances M'Dougall raised an action for payment of the balance of £40: and Lobley defended on the following grounds:—"(1) That the defender's daughter, with the consent and approbation of her father, who is her administrator-in-law, and who, in his own behalf, adopted and homologated said agreement, entered into the agreement to purchase, and actually did purchase, the stock and shop-fittings, the price of which is sued for, but that the pursuer's author has failed to implement his part of the bargain, in so far as he undertook to assign his lease of the premises in question, which he had no power to do without the landlord's consent, and which consent he has failed to obtain, and in reality has been refused by the landlord, unless on payment by the defender of a large increase of rent; (2) that the landlord not only refused said consent when applied to, but, declining in any way to recognise the defender as his tenant, he sequestrated the whole effects and fittings in the shop; in consequence of which, and of the pursuer's conduct in unwarrantably placing policemen and others at the door of the shop as a watch upon the defender, the defender's business was so interrupted as to compel him to shut up the shop, to his serious loss and injury: (3) that the defender is ready to pay to the pursuer the sum sued for, immediately on his implementing the terms of the bargain above referred to, and paying to the pursuer the damage sustained by him by the interruption to his business, and loss of his whole perishable goods within the shop in question, which can be ascertained by valuation of parties mutually chosen, which the defender is ready to agree to."

Lobley raised a counter action for breach of contract, and damages sustained by Westland's conduct. A proof was led, and the actions conjoined. The Sheriff-Substitute (COMRIE THOMSON) held, in point of law, that Westland failed to implement his agreement. He held Lobley entitled to credit for the £10 paid to account, for £24 for goods put into the shop, payment of rent, taxes, wages &c., and to £20 of damages; and Westland entitled to credit for £59, 15s. 6d., as Lobley had drawn £5, 15s. 6d. whilst in the shop, received from the next tenant £35 for fittings, £9, 4s. for transferred licenses, &c., and £10 for balance of stock; and he gave decree against Lobley for the balance, and found no expenses due in consequence of certain circumstances in the proof.

On appeal the Sheriff (JAMESON) altered in the following interlocutor:—"The Sheriff having heard parties' procurators on their respective appeals, and having thereafter considered the proof and whole process, recals the interlocutor appealed from, conjoins this action with the action presently depending at the instance of the defender in this action against Robert Westland and the pursuer, as trustee for behoof of Westland's creditors: And, in the conjoined actions, Finds it instructed that on 18th August 1869 Edwin Lobley bought from Westland, at the price of £50, the shop furniture, and fittings, and stock-in-trade in the premises, No. 1 South College Street, Aberdeen, with the view of carrying on the business there in name of his daughter: That next morning Westland gave Lobley the key of the shop, and also handed to him the certified copy lease thereof, No. 5 of process, which contained an express exclusion of subtenants and assignees; that afterwards Lobley paid to Westland £10 to account of the said price, and in the course of the same day the landlord declined to recognise Lobley as tenant, and soon afterwards instituted proceedings, in consequence of which Lobley found it necessary to leave the shop; Finds it proved that Westland represented to Lobley that there would be no difficulty in getting the landlord's consent to the change of tenant, but that Lobley made no enquiry to ascertain whether the landlord was willing to recognise him as tenant; that he took his risk of getting that consent, and was informed, on the very day he entered on possession, that the consent would not be given: In these circumstances, finds that Lobley's claim of damages cannot be maintained upon the grounds libelled in his summons; assoilzies Westland, and the trustee for his creditors, from the said claim of damages; and, in reference to the trustee's claim against Lobley for the balance of the aforesaid price, finds it instructed that Lobley received from the tenant who succeeded him in the shop £35 for the fittings, and also £3, 17s. and £5, 7s. for value of transferred licenses and for goods; Finds that Lobley is due the balance of the said price, viz., £40, but that, in the circumstances, he is entitled to retain therefrom the sum of £12 paid by him as proportion of rent, taxes, and wages, whereby the trust-estate was *pro tanto* relieved: Therefore decerns against the said Edwin Lobley for the sum of £28 sterling, to be paid to Duncan M'Dougall, as trustee for Westland's creditors: Finds Edwin Lobley liable in expenses of process, subject to considerable modification: allows an account to be given in, and when lodged, remits the same to the auditor to tax and report.

"*Note*—The transaction which has given rise to these two actions seems to have been entered into very loosely, and is not creditable to either Westland or Lobley. The agreement between them in reference to the shop furniture, fittings, and stock in the shop, is admitted and founded on by both parties in their respective actions, and has been given effect to as far as appears just. Lobley has failed to prove the basis of his action of damages, that Westland or his trustee failed wrongfully to transfer the lease. The reason that Lobley could not keep the shop was the want of the landlord's

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