the pursuer must also have sustained loss and damage in consequence of the defender's operations—1*st*, In goods which were not examined or spoken to by M'Gregor and Forrest, viz., soft goods, consisting partly of what had been sold by her before their inspection took place, and partly of old or second-hand things which they did not examine; 2*dly*, In ironmongery goods, and the furniture of the house; 3*dly*, In loss of custom arising from the condition in which the premises were for some time; and 4*thly*, In the discomfort and inconvenience to which she and her family were subjected. It would be difficult, perhaps impossible, to estimate with exactness the amount of loss and damage sustained by the pursuer in these various ways; but, judging of the matter as a jury would probably do, the Lord Ordinary believes he is within rather than beyond very moderate limits when he assesses them at £20, 13s. 0½d., which, with £19, 6s. 11½d. spoken to by M'Gregor and Forrest, make £40, being the amount of damage decerned for."

The defender reclaimed.

GUTHRIE SMITH for him.

BLACK, for the pursuer, was not called on.

The Court adhered.

Agent for Pursuers—David Forsyth, S.S.C.

Agent for Defenders—William Milne, S.S.C.

Wednesday, June 7.

FIRST DIVISION.

SPECIAL CASE—MACMORINE AND OTHERS.

Faculty—Trust—Fee—Vesting—Clause—Construction. Circumstances in which it was *held* that a power of disposal given in a trust-deed did not entitle the person on whom it was conferred to execute a deed in his own favour, and demand a conveyance from the trustees,—the power being restrained, among other things, by the fact that over its subject certain legacies were secured, which were not payable till the death of the person gifted with the power; and that a substitution of another person, failing the assignee of the person gifted with the power, showed it was a mere faculty of appointment, only exerciseable in a deed to take effect after death.

This Special Case arose under the trust-disposition and settlement of the late Miss Eliza MacMorine. The parties to it were:—

1. George MacMorine, the brother of the said testatrix, and a beneficiary under her settlement, and at the same time proprietor of one-half *pro indiviso*, in his own right, of the property of Glenarm, the other half *pro indiviso* of which belonged to the testatrix, and was disposed of by her settlement.

2. The trustees acting under the said trust-disposition and settlement of Miss MacMorine.

3. General Maxwell of Portrack, a conditional residuary legatee under the settlement.

By her trust-disposition and settlement Miss MacMorine left to her trustees, the second parties to this case, her whole heritable property, including the one-half *pro indiviso* of the estate of Glenarm; as also her whole moveable property.

The first four purposes of this trust were for payment of lawful debts, &c., and of certain legacies, and for the provision of certain annuities, to meet which about £1600 of the trust funds were required. The trust-deed then proceeded:—"And lastly, for conveying or paying over to the said George MacMorine, during all the days of his life, in the event of his surviving me, the annual income or produce of my said estate and effects above conveyed, under deduction of said legacies;" "and upon the lapse of three months from his (George MacMorine's) death in the event of his surviving me, or on the lapse of six months from my death in the event of his predeceasing me, for payment of the following legacies, videlicet:" (then followed an enumeration of legacies to the amount of about £3000), "and for conveying or paying over to the assignees of the said George MacMorine in the event of his surviving me, in fee, and failing such assignees, or in the event of the said George MacMorine predeceasing me, for conveying or paying over to the said Colonel John Harley Maxwell, and his heirs or assignees, in fee, the residue and remainder of my said estate and effects; and in respect I believe that my heritable property will be more than sufficient for the said legacies, bequeathed by the last purpose of this trust, I give and grant to my said trustees full power, should they at any time during the subsistence of this trust, see it to be for the advantage of the said George MacMorine to advance, and convey, and pay over to him such portion of the said personal estate and effects as they may resolve upon, and in the event of a deficiency of funds for meeting these legacies after such advance, the said trustees shall not be liable therefor, but my said legatees shall rank proportionally upon the estate retained by my said trustees." By a codicil to her settlement Miss MacMorine left farther legacies amounting to nearly £3000, to be paid like those in the last narrated clause of her settlement, six months from the date of her own death, or three months from the date of her brother George's death, should he survive her and enjoy the liferent provided him.

The total value of the trust-estate, exclusive of the heritable property, was about £9000, as given up in the inventory. There was therefore amply sufficient to meet the legacies and other payments of the first class, amounting, as already said, to £1600, and also to provide for the legacies of the second class, amounting to less than £6000, payable after the death of George MacMorine, and the termination of his liferent.

On the other hand, the value of the heritable estate was between £4000 and £5000, and therefore insufficient to pay or secure the said legacies of the second class, payable after the death of the first party.

Upon the construction of this settlement certain questions arose between Mr George MacMorine, the first party, and General Maxwell, the third party, chiefly connected with the power of disposal of the residue conferred upon the former.

"According to the construction of the last purpose of the said trust-deed contended for by Mr MacMorine, the said first party, he is entitled to the liferent of the residue of Miss MacMorine's trust-estate, with an absolute power of disposal of said residue, either by testamentary settlement or deed *inter vivos*. Upon this assumption, Mr MacMorine, the said first party, executed upon 2d December 1870 an assignation, disposition, and appointment of the fee of the said one-half share *pro indiviso* of the estate of Glenarm, &c., now vested in said trustees, in favour of himself, the said George MacMorine, and his heirs whatsoever,

and intimated upon 3d December 1870, the said assignation, disposition, and appointment to the agent of the said second parties. In virtue of the said trust-disposition and settlement, and of the said assignation, disposition, and appointment in his own favour, he claimed to be entitled to divest the said second parties of the said one-half share *pro indiviso* of the estate of Glenarm, &c., which belonged solely to the truster.

"General Maxwell, the said third party, notwithstanding the execution of the said assignation, disposition, and appointment, claimed an interest in the said estate of Glenarm, &c., under the destination in his favour, contingent on the failure of assignees of the first party, and he disputed the right of the said first party to require the said trustees to convey the said estate and dwelling-house to Mr MacMorine in his lifetime.

"According to the construction of the trust-disposition and settlement contended for by the trustees, the said second parties, the said trustees are bound to retain, during the lifetime of the said first party, the whole of the said heritable estate, or the proceeds thereof, along with so much of the said personal estate as may be necessary to afford reasonable security for the payment of the legacies, payable three months after the death of the first party, and they cannot be called upon to denude of the said heritable estate during the lifetime of the said first party, without receiving the consent of all the said legatees, and of General Maxwell, and a discharge by the whole of these persons of all liability in case the personal estate to be retained by them, to meet said legacies, shall be found to be insufficient at the term of payment to pay said legacies in full."

The following questions were therefore submitted for the determination of the Court:—"(1) Is the first party, in respect of the life interest and power of disposal conferred on him by the truster, and in respect of the said intimated assignation, disposition, and appointment in his own favour, entitled, without procuring the consent of the postponed legatees, and of General Maxwell, the third party hereto, to require the second parties to execute a conveyance in his favour of the one-half share *pro indiviso* of the estate of Glenarm, together with the dwelling-house situated in Castle Street, Dumfries, which belonged solely to the truster, or proceeds thereof, both presently vested in them as trustees? (2) Is the first party entitled to require the second parties to convey, as aforesaid, upon procuring the consent of the said postponed legatees, and without the consent of General Maxwell, the third party?"

The second of these questions the Court declined to entertain, as there was no appearance for the legatees, and no consents produced.

J. M'LAREN and MACKIE, for the first party.

MARSHALL, for the second parties.

R. JOHNSTONE, for the third party.

Authorities referred to—*Alves* v. *Alves*, March 8, 1861, 23 D. 712; *Pursell* v. *Elder*, Macph. 3, H. of L. 59; *Ness* v. *Waddell*, Feb. 3, 1849, Exch. Dec.; Sugden on Powers, p. 104; Barker, 16, Vesey 135; Irman, 19 Vesey, 85; *Maxwell* v. *Hislop*, 12 S. 413.

At advising—

LORD PRESIDENT—It is impossible to read the settlement of Miss MacMorine, expressed as it is in rather unusual terms, without seeing that questions of considerable difficulty may arise under it. The only question before us at present is,—whether Mr George MacMorine is entitled, without procuring the consent of the postponed legatees, and of General Maxwell, to require Miss MacMorine's trustees to execute a conveyance in his favour of the heritable estate which belonged to the truster? That question I have no hesitation in answering in the negative. It is quite inconsistent with the duty of the trustees to make any present conveyance, and I do not think that Mr MacMorine is entitled to require them to proceed as he proposes.

The scheme of the settlement is, as I have said, somewhat peculiar. There are two classes of legatees provided for. One is to be paid out of the first end of the estate in the usual way. Besides these first legacies, there are certain annuities left which are also to be provided out of the first end of the estate. After the payment of this first class of legacies, and provision for these annuities, the next purpose of the settlement is to secure the liferent of what remains of the estate to Mr George MacMorine. This purpose is expressed thus:—"and lastly, for conveying or paying over to the said George MacMorine, during all the days of his life, in the event of his surviving me, the annual income or produce of my said estate and effects above conveyed, under deduction of said legacies." But there follows this further provision of a second class of legacies:—"and upon the lapse of three months from his (George MacMorine's) death, in the event of his surviving me, or on the lapse of six months from my death, in the event of his predeceasing me, for payment of the following legacies, *videlicet*," and then there follows a list of legacies, amounting with those in a codicil afterwards executed, to about £6000. As Mr MacMorine survived the truster, it results that these legacies are to be paid three months after his death. Finally, after the enumeration of these legacies, the words follow:—"and for conveying or paying over to the assignees of the said George MacMorine, in the event of his surviving me, in fee, and failing such assignees, or in the event of the said George MacMorine predeceasing me, for conveying or paying over to the said Colonel John Harley Maxwell, and his heirs or assignees, in fee, the residue and remainder of my said estate and effects."

Now, I think that there is nothing clearer in point of construction than that the direction to pay over to the assignees of Mr MacMorine is one which the trustees are only entitled to implement after they have paid the legatees of the second class. I give no opinion whatever as to what the state of the case might be were all these legatees provided for, but while they remain unpaid—and they cannot be otherwise under the provisions of the deed until Mr MacMorine's death—the trustees have no possible right to execute any such conveyance as is here required of them. And this is made the more clear by what follows. The testatrix immediately relaxes the previous provisions somewhat in favour of Mr MacMorine. On the narrative that she believed her heritable estate to be more than sufficient to meet these legacies of the second class, she confers a power on her trustees, in the exercise of their discretion, to convey over absolutely to Mr MacMorine such part of her moveable estate as they may resolve upon, and secures them against any liability for a deficiency of funds in so doing. Now this very plainly implies that she does not give them power to convey absolutely any part of her real estate, for it is to the real estate that she manifestly intends her trustees to look, as the valuable security on which the subsequent payment of the legacies is to depend.

Until these are paid or provided for the heritable estate cannot be set free in accordance with the intention of the testator. I am therefore for answering the first question in the negative, and to the second question I must decline to return any answer, as it is one which I consider the parties are not entitled to submit to us without producing the consents of the legatees, and without their presence.

LORDS DEAS, ARDMILLAN, and KINLOCH concurred.

The Court accordingly found and declared in terms of the first question:—That the said first party is not, in the circumstances of the case, entitled to require the second parties to execute a conveyance in his favour of the heritable estate of the testator, presently vested in them as trustees: and declined to make any answer to the second question.

Agent for Mr George MacMorine, the first party —Ralph Richardson, W.S.

Agent for Miss MacMorine's Trustees, and for General Maxwell, the second and third parties, Archibald Steuart, W.S.

Friday, June 9.

BAIN *v.* SMITH AND MORRISON.

Servitude — Road — Interdict. Circumstances in which it was *held* that the owner of the servient tenement was not entitled to make certain alterations upon a servitude footroad at his own hand, though they might have been quite proper and legal had he proceeded either by agreement with the owner of the dominant tenement, or, failing that, by judicial warrant.

This was an action of suspension and interdict at the instance of Mr Edwin Sandys Bain of Easter Livilands, against Mr James Morrison of Wester Livilands, and his feuar Mr Smith.

The interdict craved was to prohibit the respondents from shutting up or inclosing a footroad running through their lands, and from interfering with the said road, so as to injure or affect the complainer's use and enjoyment thereof. And farther, to order the said respondent to restore the said footroad to the state in which it was prior to certain illegal operations alleged to have been executed by the respondents.

The respondents pleaded *inter alia* that, "having provided a road equally convenient to the complainer with that which has been closed up, the complainer is not entitled to interdict."

The Lord Ordinary (MURE), pronounced the following interlocutor, from which the circumstances of the case will sufficiently appear:—

"18*th January* 1871.—The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process, finds it admitted that the complainer and his authors have for time immemorial had the use of a servitude foot-road through the lands of Bizzetland, Wester Livilands, and Braehead, as a means of passage from the complainer's property of Easter Livilands to the town of Stirling: Finds (2) that in the year 1839, disputes having arisen between the complainer and Mr Murray, then proprietor of Wester Livilands, relative to a proposed alteration of the said foot-road, an action of declarator was raised at the instance of the complainer against Mr Murray, to have the complainer's right of foot-road declared, and to have Mr Murray ordained to remove certain obstructions which he had erected thereon at or near the points marked C and D on the plan No. 37 of process: Finds (3) that after various proceedings had been taken in the said action, a joint-minute was entered into between the parties, in respect of which a judgment was pronounced giving effect to the complainer's right of foot-road; and finding and declaring that the said road was to be in the line and direction of that now claimed by the complainer as marked yellow on the said plan, with right to the complainer to take all competent steps in reference to the state and condition of the foot-road, and the walls and stiles thereon: Finds (4) that since the date of that judgment the complainer and his family and dependants have had the full and uninterrupted use of this foot-road down to the date of the proceedings now complained of: Finds (5) that the field marked No. 6 on said plan, through which the said foot-road runs, having been acquired by the respondent Mr Smith, he proceeded in the beginning of June 1870, with the knowledge and approval of the other respondent, to obstruct the complainer's road through the said field, by erecting an iron railing or other fence thereon, at and between the points marked C and D on the plan, and thereby preventing the complainer from making use of that portion of the foot-road: Finds (6) that this was done without judicial authority, or obtaining the consent of the complainer, and without any communication having been made to him relative to the proposed alteration: Finds (7) that upon this proceeding coming to the knowledge of the complainer, he communicated with the respondent Mr Morrison on the subject, when he was informed that the other respondent was acting in terms of the feuing plan of the estate of Livilands, and it was at the same time intimated to the complainer that it was the intention of the respondent, in carrying out the feuing plan, still farther to alter the foot-road as shown upon the plan, and to substitute for it the road to be called Livilands Road, as marked pink and blue upon the plan: Finds (8) that the road so proposed to be substituted for the foot-road in question has no foot-road upon it separate and distinct from the carriage-way, and is not therefore as convenient a road for the complainer as the servitude road; and that the respondents have not come under any obligation to give the complainer the use, in time to come, of the road so proposed to be substituted, or to make a proper foot-path thereon: Therefore grants interdict as craved, and ordains the respondents to restore the foot-road in question, between the points C and D on the plan, to the state in which it was prior to the operations complained of, but without prejudice to the respondents, or either of them, establishing in any competent process their right to have the foot-road in question, or any part thereof, shut up or altered upon their substituting, or undertaking to substitute therefor, an equally safe and convenient foot-path for the use of the complainer; and decerns: Finds the complainer entitled to expenses, of which appoints an account to be given in, and remits the same, when lodged, to the auditor to tax and report.

"*Note.*—It appears to the Lord Ordinary that the respondents are under some misapprehension as to the position in which the owner of a servient