Tuesday, May 14.

PETER ROBB AND ANOTHER (ROBB'S TRUSTEE) *v.* THOMAS ROBB.

Trustee—Title to sue—Titles to Land Consolidation (Scotland) Act, 1868 (31 *and* 32 *Vict. c.* 101) § 20.

A holograph deed, bequeathing heritable subjects, and containing a nomination of trustees, though without any conveyance of the subjects to them, or statement of their powers and duties, *held* to be a valid *mortis causa* settlement of the said subjects, and to confer a title to sue for the same on the persons named as trustees.

The late James Robb, who was a grocer in Dundee, left a writing which purported to bequeath eight houses which belonged to him to his grandsons, and a certain other tenement to an adopted daughter in liferent, and the trustees of a Wesleyan Chapel in fee. The writing also contained the words, "My wish is, that Peter Robb be one trustee and Alexander Smith be the other." Mr Robb died in March 1871, intestate as to his moveable estate, to which his only son, Thomas, obtained himself decerned executor-dative *qua* nearest of kin.

Peter Robb and Smith, as trustees under this writing, sued Thomas, as his father's heir-at-law, and other defenders, who did not appear, to have it found and declared, *inter alia*, that the writing constituted a valid and effectual conveyance of the heritable subjects therein mentioned, and that the heir-at-law was bound to make up a title to these subjects and convey them to the pursuers for the purposes of the trust. There were also conclusions in the summons relating to the rents of the properties, and other matters depending on the decision of the main question.

Thomas Robb defended the action, on the ground, first, that the pursuers had no title to sue, because the writing, even if it constituted a valid conveyance of the subjects, must be treated as creating certain specific bequests which could only be sued for by the beneficiaries themselves. He further denied that the writing was holograph, and averred that it was not expressive of the true and final intention of the granter, but was handed to his agent in order that a will might afterwards be written out, for which, however, instructions were never given.

The Lord Ordinary (GIFFORD) allowed a proof, which was taken on 23d November last. His Lordship thereupon pronounced an interlocutor, *inter alia*, repelling the defender's objection to the pursuers' title to sue, and finding in favour of the writing as a holograph *mortis causa* settlement of the whole subjects.

The defender reclaimed.

SCOTT and J. P. B. ROBERTSON for him.

CRICHTON and R. V. CAMPBELL, for the respondents, were not called on.

The Court adhered.

Their Lordships held that the defender had not made any averment which ought to have been remitted to probation except his denial of the writing being holograph; and that having been satisfactorily established, it must receive effect. On the objection taken to the title to sue, they were of opinion that the settlement constituted a valid conveyance of the heritable subjects under the titles to Land Act, 1868, sect. 20, to the persons named as trustees, for the purposes of the trust. If the objection were good, it would follow that the trustees could not have defended an action of reduction. However slight the duties of the trust might be, it was sufficient to give a title to sue.

Agent for Pursuers—James Young, S.S.C.
Agent for Defenders—D. F. Bridgeford, S.S.C.

Friday, May 17.

ROGERSON *v.* ROGERSON AND OTHERS.

Entail—Prohibition to entail debt.

A prohibition against "burdening the lands in whole or in part with debts or sums of money, infeftments of annual rent, or any other servitude or burden whatsoever" *held* to be a sufficient prohibition against the contraction of debt.

*Entail—Provisions to Wives and Children—Locality —*11 *and* 12 *Vict. c.* 36 (*Entail Amendment Act*), § 43

An entail gave power to the heirs in possession to secure and infeft their wives and husbands and also their younger children with liferent provisions, payable out of the rents of the entailed estate, not exceeding a certain amount, by way of locality, the liferent provisions to younger children being redeemable at the option of the heir in possession, at their majorities or marriages, by payment of ten years' purchase thereof. *Held* that the power so given did not render the entail defective in regard to the prohibition against alienation, in the sense of 11 and 12 Vict. c. 36 § 43.

This was an action at the instance of James Alexander Rogerson, heir in possession of the entailed estate of Wamphray, to have it found that the entail of the said estate, executed by Dr John Rogerson, in 1824, was ineffectual, and that the pursuer was entitled to deal with the estate as unlimited fiar.

The action was defended by the substitute heirs of entail.

The objections taken by the pursuer to the validity of the entail were two in number.

The first objection was in reference to the clause prohibiting the contraction of debt, which was in the following terms:—"And with and under this restriction and limitation also, that it shall not be lawful to or in the power of the said Dr John Rogerson, my son, or of any of the said heirs of taillie, to sell, alienate, wadset, impignorate, or dispone the said lands and estate hereby disponed, or any part thereof, either irredeemably or under reversion, or to burden the same, in whole or in part, with debts or sums of money, infeftments of annual-rent, or any other servitude or burden whatsoever, excepting as hereinafter mentioned, or to do or commit any act, civil or criminal, or to grant any deed, directly or indirectly, whereby the said lands and estate, or any part thereof, may be affected, apprized, adjudged, forfeited, or become escheat or confiscated, or in any other manner of way evicted from the said heirs of taillie, or this taillie prejudged, hurt or changed: And it is hereby expressly provided and declared that the said lands and estate before disponed shall not be affected or burdened with or subjected, or liable to be adjudged, apprized, or any other way evicted, either in whole or in part,

for or by the debts or deeds contracted or granted by the said Dr John Rogerson, my son, or by any of the said heirs of taillie, whether before or after their succession to or attaining possession thereof, nor for or by any act, civil or criminal, committed or done by them, or any of them, prior or posterior to their succession."

The pursuer maintained that this was not an effectual prohibition against the contraction of debt, inasmuch as the prohibition was confined to burdens voluntarily granted by the heir in possession, and did not strike against personal debts, which might be made the foundation of real diligence.

The second objection turned upon a clause in the entail:—"But excepting always and reserving from the restrictions, limitations, and irritancies before written, full power and liberty to the said Dr John Rogerson, my son, and to the whole heirs of taillie succeeding to the said lands and estate, and being in the right and possession thereof for the time (except in the case of remoter heirs attaining possession, but who shall afterwards be excluded by the existence of a nearer heir as mentioned in a preceding clause), notwithstanding of the premises, to secure and infeft their lawful wives and husbands in such liferent provisions payable out of the rents of the said estate by way of locality (in lieu of terce and courtesy, which are hereby excluded), as shall not exceed one-fifth part of the rents of the said lands and estate at the time of the death of the granters of such liferent localities, after discounting the yearly interest of debts, and the prior liferent provisions to wives, husbands, or younger children, if any such there then be, affecting or which may affect the rents of the said estate during the existence of such debts and prior liferent provisions to wives, husbands, and children, so that the liferent provision to a wife or husband may always extend to one-fifth part of the surplus rents during the existence of such debts or former liferent provisions, and may increase in proportion as the said debts and prior liferent provisions to wives, husbands, or younger children shall be paid off or cease, and may amount to one full fifth part of the whole rents of the said estate, so soon as the said debts and former liferent provisions shall all be paid off and cease, or become extinguished respectively; . . . And excepting and reserving also full power and liberty to the said Dr John Rogerson, my son, and to the whole heirs of taillie who shall succeed to the said lands and estate, and be in the right and possession thereof for the time (excepting as in the immediate preceding clause), to secure and infeft their younger children who do not succeed to the said land and estate, in liferent provisions, payable out of the rents thereof by way of locality to the extent after mentioned, viz.—if there shall be only one such younger child, for a liferent provision to him or her not exceeding one-eighth part of the rents of the said estate; if there shall be two such younger children, for a liferent provision to them, equally between them, not exceeding one-seventh part of the rents of the said estate; and if there shall be three or more such younger children, for a liferent provision to them, equally among them, not exceeding one-sixth part of the rents of the said estate, all to be computed as at the time of the death of the granters, and after discounting in all these events of provisions to children the interests of debts and the prior liferent provisions to wives, husbands, or younger children, if any such there be, then affecting, or which may affect the said rents during the existence of such debts and former liferent provisions. . . . . And declaring also that it shall be in the power of the heir in possession of the said lands and estate for the time to redeem the said liferent provisions to younger children at their respective ages of twenty-one years, or at their marriages respectively, by paying to them ten years' purchase thereof, and upon payment of that price, they shall be obliged to discharge and renounce their respective liferent provisions."

It was maintained by the pursuer that the entail thus permitted portions of the estate to be evicted from succeeding heirs of entail, and was, therefore, defective in the prohibition against alienation, and wholly invalid under sect. 43 of 11 and 12 Vict. c. 36.

The Lord Ordinary (JERVISWOODE) assoilzied the defenders.

The pursuer reclaimed.

The LORD ADVOCATE, MILLER, Q.C., and DUNCAN for him.

The SOLICITOR-GENERAL and MARSHALL in reply.

The following cases were referred to:—(1) *Hagart* v. *Vans Agnew* (*Sheuchan*), Dec. 19, 1820, F.C.; *Mackenzie*, May 23, 1823, 2 S. 331; *Nisbet*, June 10, 1823, 2 S. 381; *Adam* v. *Farquharson* (*Finzean*), June 18, 1840, 2 D. 1163, aff. Sept. 5, 1844, 3 Bell's Ap. 275; *Lindsay* v. *Earl of Aboyne* (*Aboyne*), March 2, 1842, 4 D. 843, aff. Sept. 5, 1844, 3 Bell's Ap. 254. (2) *Hay Newton*, July 18, 1867, 5 Macph. 1056, aff. May 9, 1870, 8 Macph. H.L. 66; *Hamilton*, November 20, 1868, 7 Macph. 139, aff. April 29, 1870, Macph. H.L. 48; *Catton* v. *Mackenzie*, H.L., March 11, 1872, *ante*, p. 425.

At advising—

The LORD PRESIDENT—Unless there had been no doubt in this case, we would have taken time to consider it, but we cannot hesitate to affirm the interlocutor of the Lord Ordinary.

There are two objections urged by the pursuers. In the first place, it is argued that here there is no effectual prohibition against the contraction of debt. In the deed itself the prohibition is as follows:—"That it shall not be lawful to or in the power of the said Dr John Rogerson, my son, or of any of the said heirs of taillie, to sell, alienate, wadset, impignorate, or dispone the said lands and estate hereby disponed, or any part thereof, either irredeemably or under reversion, or to burden the same, in whole or in part, with debts or sums of money, infeftments of annual rent, or any other servitude or burden whatsoever, excepting as hereinafter mentioned." And then follows:—"That said lands and estate before disponed shall not be affected or burdened with or subjected, or liable to be adjudged, apprized, or any other way evicted, either in whole or in part, for or by the debts or deeds contracted or granted by the said Dr John Rogerson, my son, or by any of the said heirs of taillie, whether before or after their succession to or attaining possession thereof."

The first question which arises in regard to these passages is, whether the prohibition contained in them is a good prohibition. It is impossible not to answer this question in the affirmative. In the case of *Aboyne*, indeed, the words used are not the same as in this case, for the words there used are to "burden and affect." The latter word, it is argued, has a different signification from the word burden, but I cannot give effect to this argument, for to burden means the same thing as to

affect with debt. Burden and affect are synomymous.

But the case of *Aboyne* is not the only authority in support of this view of the case, for in the cases of *Sheuchan*, *Nisbet*, and *Farquharson*, the word burden stood alone, and although the other words used were the same as in this case, it was held that the prohibition against the contraction of debt was sufficient.

More general questions arise on the second objection of the pursuer. This objection is, that by reason of exceptions from the prohibition against alienation the entail is made invalid *in toto* under the 43d sec. of the Act of 1848. In dealing with this objection the nature of the exceptions must be attended to. In the first place, liberty is given to heirs in possession "to secure and infeft their lawful wives and husbands in such liferent provisions, payable out of the rents of the said estate by way of locality (in lieu of terce and courtesy, which are hereby excluded), as shall not exceed one-fifth part of the rents of the said lands and estate at the time of the death of the granters of such liferent localities, after discounting the yearly interests of debts and the prior liferent provisions to wives, husbands, or younger children, if any such there then be, affecting or which may affect the rents of the said estate, during the existence of such debts." And also "to secure and infeft their younger children who do not succeed to the said lands and estate, in liferent provisions, payable out of the rents thereof, by way of locality, to the extent after mentioned." The only remarkable thing about this exception is, that provisions to younger children are to be made by locality. Now, although provisions to widows are often made in this way, it is not usual in regard to younger children; but all that can be said of it is, that it is unusual; it is only a peculiarity of this entail, and is not important. It is true that a provision by locality differs from a provision by annuity. If an annuity or a proportion of the rents is settled on a widow or younger child, then the heir in possession is debtor in that amount, and the liferenter is not given access to the lands or a right to draw the rents. But if a provision is made by locality, the widow or younger child is liferenter of a part of the lands, and the effect of that is, not to fix the amount which the liferenter is to receive annually, but to set off a part of the estate to the rents of which he has a right, and this portion may increase or diminish according to circumstances. The effect of provision by locality thus is, to infeft the widow or child as liferenter in part of the lands. Now, it is argued that this is an alienation, and there is no doubt that in a sense it is so, for there is no infeftment without some sort of alienation. But in this case it is only alienation in a very limited sense, for it is not permanent but temporary. In the case of a widow only a liferent is given, and in the case of younger children it is provided that "it shall be in the power of the heir in possession of the said lands and estate for the time to redeem the said liferent provisions to younger children at their respective ages of twenty-one years, or at their marriages respectively, by paying to them ten years' purchase thereof." So the estate is not ultimately impaired, and the fee remains in the heir of entail in possession, even as regards the locality lands, although his right to the rents is suspended. He is still proprietor of the whole estate.

So the question arises, Whether this exception to the prohibition to alienate is so destructive of it that under the 43d sec. of the Act of 1848 the entail is defective in that prohibition? In order to see this we must look at the section of the Act, which says—"That where any tailzie shall not be valid and effectual, in terms of the said recited Act of the Scottish Parliament, passed in the year one thousand six hundred and eighty-five, in regard to the prohibitions against alienation and contraction of debt, and alteration of the order of succession, in consequence of defects either of the original deed of entail, or of the investiture following thereon, but shall be invalid and ineffectual as regards any one of such prohibitions, then and in that case such tailzie shall be deemed and taken, from and after the passing of this Act, to be invalid and ineffectual as regards all the prohibitions."

These words suggest two points in regard to this entail. In the first place, Is this an entail which is not valid in the prohibition to alienate? in the second place, Is it invalid in regard to any one of the cardinal prohibitions?

Both these questions must be answered against the pursuer. As regards the first point, this is a valid entail under the Act of 1685. It is one of those entails in which the prohibitions are relaxed for family provisions, and as this occurs in most entails under the Act of 1685, to hold this entail defective would be to hold most entails under the Act of 1685 as also defective and invalid.

As regards the second point, this entail is good in all the cardinal prohibitions, and each of them is valid and effectual; there is only a relaxation as regards one of them.

This construction of the 43d sec. of the Act of 1848 receives confirmation by the consideration of the mischief which that Act was introduced to remedy. For before the Act, when an entail was invalid in one prohibition, it might be defeated by the heir in possession doing the act not prohibited; for example, if the contraction of debt were not prohibited, the entail might be lost by contracting debt. But it was necessary that the heir should hit the blot, that is, that he should avail himself of the defect. Under this state of the law many undesirable proceedings took place, and as it was evident that this was not a satisfactory state of matters, it was enacted in the 43d sec. of the Act of 1848 that an entail defective in one of the cardinal prohibitions should be defective in regard to all.

The other Judges concurred.

The Court adhered.

Agents for Pursuer—J. C. & A. Stewart, W.S.

Agents for Defenders—Tods, Murray, & Jamieson, W.S.

Friday, May 17.

SECOND DIVISION.

STEWART AND OTHERS *v.* MATHESON.

Interdict—Sheriff—Possessory Judgment.

Held that a proprietor, having sold one of two contiguous estates, the marches of which were in dispute, was entitled to obtain interdict in the Sheriff Court against the buyers encroaching on subjects alleged by him not to be included in the estate sold; and that the seller was not bound to prove whether he had