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

possessed the disputed subjects as parts of the sold or of the unsold estate. *Observed* that the remedy of the purchasers was by action of declarator.

In 1870, Sir James Matheson, of Achany and Gruids, sold to Charles Stewart, solicitor, George Grant Mackay, civil engineer, and William Taylor Rule, solicitor, all of Inverness, the estate of Rosehall, in the parish of Creich and the shire of Sutherland. Rosehall and Sir James' property of Gruids are contiguous, being separated by a ridge, in a bend of which are situated Loch-na-Fuarlich and some pasture land. The plans of the estates showed some discrepancy with regard to the boundaries of the property; but Sir James maintained that no part of Rosehall abutted on the loch, while the purchasers contended that the loch was included in the estate of Rosehall. No question as to the boundaries had arisen until the bargain had been concluded, but some doubts had been expressed before Sir James granted a disposition to the purchasers. In the course of the correspondence which took place before the execution of the disposition, Sir James expressly denied the right of the appellants to the subjects claimed. The terms of the disposition were, however, adjusted in such a way as to leave the question open. The purchasers then entered into possession of Rosehall, put a boat on the loch, and proceeded to erect a boat-house on the disputed pasture land. Sir James thereupon presented a petition to the Sheriff of Sutherland, craving that the purchasers should be interdicted from completing the said boat-house, fishing in the loch, or encroaching on the pasture land. The purchasers contended that the subjects in dispute were not the property of Sir James, and that the authors and shooting-tenants of Sir James in the estate of Rosehall had always enjoyed the right of fishing in the loch. After a proof of the averments of parties, the Sheriff-Substitute (MACKENZIE) found the petitioner's possessory right established, and granted interdict as craved; and the Sheriff (FORDYCE), on appeal, adhered to his Substitute's interlocutor.

The respondents appealed to the Court of Session.

WATSON and MACKINTOSH, for the appellants, contended that the subjects in dispute had been possessed for seven years and upwards by the shooting-tenants of Rosehall, and must, therefore, be presumed to belong to that estate.

The SOLICITOR-GENERAL and KEIR, for the respondent, answered that the subjects in dispute had been possessed for forty years and upwards by the agricultural tenants of Gruids, and therefore appertained to the latter estate; that the shooting-tenants of Rosehall had merely been permitted to fish in the loch by the courtesy of the proprietor; and that, as the respondent had refused to convey the subjects in dispute, the appellants could not resist the interdict, but must have recourse to a regular action of declarator.

At advising—

LORD NEAVES—I have no doubt as to the principle on which this case ought to be decided. A sale was effected between the parties of a certain subject called Rosehall. By that sale the appellants acquired right to every subject falling under that name, but to nothing else. The bargain having been completed, it appears that the parties were not at one as to the precise subjects embraced by the name. Such differences often occur, and in order to settle them investigation is necessary. The seller means to dispone portions A, B, and C of his estate, while the buyer imagines that his disposition also includes the portions D, E, and F. How is the question to be settled? Is the buyer to take possession of the portions D, E, and F in spite of the protest of the seller? Is the latter to be coerced in the matter by the *ipse dixit* of the buyer? Surely not. I think that the rule *melior est conditio possidentis* holds in such a case. The matter must be cleared up by a declarator, and I cannot think that, pending such a proceeding, the buyer is to be permitted, at his own hand, to take possession of what he claims. The seller, who was originally in possession, is the party to be preferred, and he is not thus to be ousted. There has been an ingenious attempt to show that this is not an ordinary question of marches, but of some special right to the subjects in dispute; that, whatever may have been the agricultural possessions of these subjects, the appellants had possessed them for sporting purposes, and entertained for them a sort of *pretium affectionis*. But there is no ground for any such distinction, and the matter is purely a question of the adjustment of marches, involving an investigation as to the right of property, to determine which a regular action is necessary.

I do not regard this as a possessory question at all. The same proprietor possessed the two adjacent estates for a much longer period than seven years, and it matters little what he possessed under the name of Gruids, and what under the name of Rosehall. The evidence led by the appellants is totally insufficient to support their case; and even were it otherwise, the question is not one that can be competently decided in proceedings of the present nature. It was, therefore, clearly competent to Sir James Matheson to say, "I have a title to these subjects, and I protest against and interdict you from taking possession of them until you have proved your title by a formal declarator."

LORD BENHOLME—While I arrive at the same result in favour of the respondent in this case, I entirely differ from the ground on which Lord Neaves has rested his judgment. I consider that ground too narrow, and I concur with the Sheriff in the view of the case which he has taken. I regard this strictly as a possessory question. There is no doubt as to the fact, that the Rosehall shooting-tenants exercised the privilege of fishing in the loch in dispute, but we have no evidence as to their title to do so. Had their title been established, I should have arrived at a different result. On the other hand, it has been satisfactorily proved that an agricultural tenant of Sir James possessed the subjects in dispute as pertinents of the estate of Gruids. Sir James has, therefore, established a possessory right to the subjects as portions of his estate of Gruids, and on that ground he is entitled to his interdict.

The LORD JUSTICE-CLERK and LORD COWAN concurred with Lord Neaves.

The Court pronounced the following interlocutor:—

"*Edinburgh*, 17*th May* 1872.—The Lords having heard counsel on the appeal: Find, in point of fact, that prior to the sale of the estate of Rosehall to the appellants the respondent was, and had been since 1844, in possession of the subjects in dispute: Find that in the year 1870 the appellant pur-

chased from the respondent the estate of Rosehall: Find that prior to the purchase the appellants were informed by the respondent that they must satisfy themselves as to the extent of the estate, and that before the disposition was executed a question was raised between the seller and purchasers in regard to the subjects now in dispute: Find that the purchasers accepted the disposition without that dispute having been adjusted: Find that in these circumstances the appellants were not entitled at their own hand to assume possession of the disputed subjects: Therefore dismiss the appeal, affirm the judgment appealed against, and decern: Find the appellants liable in expenses, and remit to the auditor to tax and report.

Agents for Appellants—Mackenzie, Innes, & Logan, W.S.
Agents for Respondent—Stuart & Cheyne, W.S.

Saturday, May 18.

FIRST DIVISION.

LINDSAY *v.* EARL OF WEMYSS.

Landlord and Tenant—Hypothec—Sequestration—Bankruptcy.

Where a process of sequestration of the tenant's effects at the instance of the landlord is depending in a Sheriff Court, the proper remedy, in the first instance, for a person who claims as his property goods included in the sequestration, is to appear in the Sheriff Court and claim to have the goods withdrawn from the sequestration.

Messrs C. & A. Christie, coal and iron-masters, Gladsmuir, were tenants under the Earl of Wemyss of the Wallyford mineral field, conform to a lease for 31 years, dated May 1856.

On 10th February 1871, Messrs Christie being largely in arrear of rent for the said minerals, the Earl of Wemyss applied to the Sheriff of Edinburgh for sequestration of their effects at Wallyford, for payment of the rent due at Martinmas 1870, and in security of payment of the rent of the current year.

The prayer for sequestration was in the following terms:—"May it therefore please your Lordship to grant warrant of sequestration of the whole coal, clay, calcined blackband ironstone, &c., and other minerals dug out from the said coal-field by the respondents . . . *item*, to grant warrant to the Clerk of Court, or any of his assistants, to proceed to the said colliery pits, and to take an inventory of the whole coal, clay, and other minerals dug and won from the said coal-fields or pits, either lying in the said pits or carried to the coal-hill or pit mouth; *item*, the whole *invecta et illata* in the pits, or brought to the surface, or lying at the pit mouth or coal-hill."

On the same day (10th February 1871), the Sheriff-Substitute granted sequestration, and warrant to inventory as craved, and ordered intimation to the Messrs Christie.

The assistant Sheriff-Clerk accordingly proceeded to Wallyford, and took an inventory of the whole worked minerals, and goods, and gear, at the work. On 3d March an additional inventory was, in terms of a warrant by the Sheriff-Substitute, taken of the stock in trade contained in a shop or store kept by Messrs Christie at Wallyford for the use of their workmen.

On 5th April 1871, the estates of C. & A Christie were sequestrated, and on 17th April Mr T. S. Lindsay confirmed trustee thereon.

Neither Messrs Christie nor their trustee appeared in the process of sequestration at the instance of the landlord, but in November 1871 the trustee presented a note of suspension and interdict in the Bill Chamber against the Earl of Wemyss, praying the Court to interdict the respondent from selling, disposing of, or in any way interfering with a number of articles of a very miscellaneous description, consisting chiefly of the machinery and implements used by the bankrupt, and of the contents of their shop or store.

The complainer maintained that the only articles which were included in the prayer for sequestration by the landlord were the minerals, and that the other articles were therefore improperly included in the sequestration. He also maintained that these other articles, viz., the implements and contents of the shop, did not fall under the landlord's hypothec.

The Lord-Ordinary (MACKENZIE) pronounced the following interlocutor:—"Grants interim interdict against the respondent using, for the purpose of carrying on the collieries and other works at Wallyford, the articles specified in the prayer of the note; and, as regards the question, whether the respondent is entitled so to use the said articles, passes the Note. *Quoad ultra*, refuses the Note, and reserves all questions of expenses.

"*Note.*—1. The Lord-Ordinary is of opinion that the complainer, as trustee on the sequestrated estate of C. & A. Christie, has not taken the proper course to vindicate his right to the articles specified in the prayer of the petition. The grounds of his application are,—1st, That the articles were not sequestrated by the Sheriff on the petition for sequestration presented by the respondent as landlord; 2d, That these articles are not subject to the landlord's hypothec; 3d, That even if sequestrated by the Sheriff, such sequestration is illegal and invalid, in respect that it was done within the time limited for the exercise of the landlord's right to sequestrate, and that these articles cannot be made available for payment of the year's rent falling due at Martinmas 1870; and, 4th, That the lease was terminated on 15th February 1871 by the respondent, under the powers conferred by the lease, so that no rent is due after that date.

"By the Bankruptcy Act of 1856 (§ 119), it is enacted, that 'nothing in this Act contained shall affect the landlord's right of hypothec.' The respondent, as landlord, having, nearly two months before the mercantile sequestration, taken proceedings by a petition for sequestration to make the hypothec available for payment of the rents due to him by the Messrs Christie, his right to carry on these proceedings, in so far as regular and proper, is not therefore affected by the complainer's act and warrant as trustee. That for sequestration is still a depending process. The Sheriff has sequestrated and granted warrant to inventory as craved, and has appointed a person to take charge of the sequestrated subjects, as authorised by the Act of Sederunt of 10th July 1839 (§ 152), and two inventories have been taken and lodged in process. Nothing further can be done in that process without the warrant of the Sheriff; and by appearing in that process the complainer can state his whole objections thereto, and to the proceedings therein. He can also object to any application which may be made for a warrant to sell the effects which