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as his property goods included in the sequestration, is to appear in the Sheriff Court and claim to have the goods withdrawn from the sequestration.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

have been inventoried, and he can therein fully vindicate his right to these effects. As stated by Lord President M'Neill in the case of *M'Kechnie*, v. *The Duke of Montrose*, 15 D. 626—'the process of sequestration, though a process for securing the landlord's rights, is also to some extent a process of repetition, for in it a person may claim to have articles withdrawn from the sequestration.' The proper course for the complainer is to enter appearance in the depending sequestration process, and not unnecessarily to multiply proceedings. In so far as regards the grounds or objections above stated, the whole matter has been competently brought before the Sheriff. It is for that Judge to pronounce, in the first instance, a decision upon these objections when stated to him, and he cannot, it is thought, be prevented from proceeding in the exercise of his jurisdiction by means of the interdict now craved by the complainer. The complainer can suffer no prejudice from following this course, because, if the Sheriff's judgment is adverse, he has his right of appeal.

"2. But although the respondent cannot be prevented from proceeding with his sequestration process, and obtaining the judgment of the Sheriff therein, he is not entitled, the Lord Ordinary is of opinion, to use any part of the articles averred to have been duly sequestrated by him, in carrying on the coal-workings and other works at Wallyford. His right of hypothec confers upon him no such power. The factor, who was on his application appointed by the Sheriff in terms of the powers conferred by the Act of Sederunt of 10th July 1839, § 152, to take charge of the sequestrated subjects, is not entitled to use them. The Lord Ordinary has accordingly granted interim interdict, prohibiting the respondent from using the sequestrated effects for carrying on the collieries and other works which were leased by the Messrs Christie. The respondent, in his answers, avers that the engines and other constructions erected upon the leasehold subjects by the Messrs Christie (commonly called trade fixtures) are his property, and were improperly inventoried in the process of sequestration. The Lord Ordinary considers that the respondent will require to show very special grounds to support his claim to the property of these subjects. None such have been averred by him, and the lease appears in some respects adverse to such a claim, inasmuch as it is thereby provided, with respect to engines, apparatus, or utensils fitted up by the tenant, that he shall, at the termination of the lease, have right thereto, if he thinks proper, and shall be entitled to take the same at a valuation, but not a part merely."

The complainer reclaimed.

The SOLICITOR-GENERAL and BALFOUR for him, argued that he was not bound to appear in the Sheriff Court, and was entitled to vindicate in any competent Court goods belonging to him which had been improperly included in the sequestration. The questions raised by the complainer were, in my view, sufficiently doubtful to entitle him to seek a decision of the Supreme Court, and to have the note passed.

At advising—

LORD-PRESIDENT—If the complainer were well founded in the first plea stated by Mr Balfour, viz., that the goods were not validly sequestrated, we should be bound to entertain the application and pass the note, because, if the goods are not legally sequestrated, they are not within the jurisdiction of the Sheriff in the process of sequestration. But I am not of that opinion. I think the construction of the prayer for sequestration, on which the argument proceeds, to be judaical. I am of opinion that it prays for sequestration of the goods as well as of the minerals. And, being of that opinion, I have no further doubt. Every other point that the complainer seeks to raise is competent in the Sheriff Court and that is the proper tribunal. I do not doubt the power of this Court to interfere, if they considered a case for interference to be made out. But they will be very slow to exercise this power where a competent and convenient remedy exists in the Sheriff Court.

The other Judges concurred.

The Court adhered.

Agents for the Complainer—Boyd, Macdonald, & Lowson, S.S.C.

Agents for the Respondent—Tods, Murray & Jamieson, W.S.

Saturday, May 18.

SECOND DIVISION.

SPECIAL CASE—FERRIER *v.* FERRIER.

Legacy—Vesting—Term of Payment.

In a *mortis causa* trust-disposition and settlement a testator directed his trustees to retain from his estate the sum of £500, and pay over the free income thereof to his sister during her lifetime; and as soon as convenient after her death, or after his own death in case of his sister predeceasing him, to pay the £500 to his nephew; but if his nephew should die before the "period of payment," the said sum was to be disposed of otherwise. The testator died, having been predeceased by his sister. *Held* that the vesting of the legacy took place on the death of the testator, and was not to be suspended until the trustees should find it "convenient" to pay it.

This was a Special Case between Mrs Louisa Spence or Ferrier, widow, executrix, and universal legatee of William Ferrier, of the first part, and John Ferrier and James Ferrier, of the second part.

Alexander Black, bookseller in Brechin, died on 12th December, 1870, leaving a trust disposition and settlement, the 3rd purpose of which was to the following effect:—"My trustees shall retain from my estate the sum of £500 sterling, and pay over the free income or annual proceeds thereof half-yearly to or for behoof of my sister, Mrs Ann Black or Ferrier, during her lifetime, and after the death of my said sister, or after my own death in the event of the said Ann Black or Ferrier predeceasing me, that my said trustees shall, as soon thereafter as my trustees shall find it convenient, pay the capital of said sum of £500 to my nephew, the said William Ferrier, whom failing, to the lawful issue of his body equally; and in the event of the said William Ferrier dying before the period of payment of said sum of £500 without leaving lawful issue, my trustees shall pay over £200 thereof to the widow of the said William Ferrier, and the balance of said sum of £500 shall be divided equally between John and James Ferrier, brothers of the said William Ferrier." The moveable estate of the testator at his death was sufficient for the payment of his debts, and to meet all the