Friday, November 20.

WILSON *v.* DOUGLAS.

Landlord and tenant—Mineral lease—Agreement—Remit to men of skill. A minute of agreement between a proprietor and his mineral tenant gave power to the latter to erect all necessary buildings, and contained various other stipulations as to working the minerals, and otherwise, both parties binding themselves, when required by either, to execute a formal tack to the foregoing effect, "containing all clauses usual and necessary." *Held*, on a report by a law-agent and a mining engineer, that the tenant was entitled to a formal tack containing a clause giving the landlord the option of taking the buildings and machinery at the end of the lease at a valuation, and, in the event of the buildings not being so taken, empowering their removal by the tenant.

In 1858 Mrs Douglas of Lochead and her husband entered into a minute of agreement with Alexander Wilson, agreeing to let to him, on a lease of 21 years, the clay field on the estate of Lochead, with liberty to work and win the said clay, and to manufacture and burn the same upon the lands; and for that purpose to erect all necessary sheds, kilns, and other buildings, and to form a road or waggon way, &c.

After various stipulations the deed proceeded thus:—"And lastly, both of the said parties hereto bind themselves, when required by either, to execute a formal tack of the said seams of clay to the foregoing effect, containing all clauses usual and necessary."

In 1861 Wilson applied to the defenders' agents for a formal lease. A draft of the proposed lease was forwarded to him, and was sent by him to his own agents for revisal. In revising, his agents inserted a clause as follows:—"And it is hereby further provided and agreed to, that upon the expiration of this lease, or upon its being declared at an end as after specified, the said Mrs Christian Stenhouse or Douglas, and her heirs and successors, shall be at liberty, if they shall so incline, to take the whole buildings and erections of every description, erected on the premises, with the whole machinery, at a valuation to be put thereon by two neutral men to be mutually chosen, or by an oversman to be named by such men in case of their differing in opinion; and in case the said Mrs Christian Stenhouse or Douglas, or her foresaids, shall not incline to accept of the said buildings and machinery, then the said Alexander Wilson and his foresaids shall be entitled to remove or otherwise to dispose thereof at pleasure."

The defenders' agents declined to allow the insertion of this clause, on the ground that they were not bound by the minute of agreement to consent thereto.

James Wilson, son of Alexander Wilson, now deceased, brought this action for the purpose of enforcing his right to a lease with the clause in question.

The Lord Ordinary (JERVISWOODE) held that the defenders were not bound to allow the insertion of the said clause, and dismissed the action.

The pursuer reclaimed.

CLARK and THOMS for reclaimer.

WATSON and ASHER for respondents.

After hearing parties, the Court remitted to James Melville, W.S., and David Landale, mining engineer, to examine and report upon the draft lease. The reporters reported as follows:—"We humbly venture to premise, that the rule to allow the tenant of a mineral or clay field compensation for the buildings, and for any fixed machinery he may erect, which may be taken by the landlord at the termination of the lease, is a 'usual' one, and has been universally conceded by us in our practice.

"And we humbly report it as our opinion, that in this case the clause set forth in the seventh article of the condescendence is aptly and properly phrased, so as to give to the tenant fair compensation for such buildings and fixed machinery as he may have erected, in the case of the lease running its appointed time, or coming to a premature conclusion by reason of the impossibility of carrying it on to profit. And we report it as our opinion, on the other hand, that the clause is or may be of value to the landlord, as giving that party power to acquire the moveable machinery. In other respects the draft lease appears to us to be properly framed."

The Court, in accordance with the report, sustained the claim of the pursuer.

Agents for Pursuer—Lindsay & Paterson, W.S.
Agent for Defender—A. D. Murphy, S.S.C.

Friday, November 20.

DUKE OF HAMILTON *v.* HAMILTON AND OTHERS.

Entail—Prohibitions — Irritant Clause—Rutherfurd Act—Act 1685. An entail *held* to be invalid, the irritant and resolutive clauses not applying to the prohibition against altering the order of succession.

In this action the Duke of Hamilton, heir in possession of the Hamilton estates and others, sought declarator that the various deeds of entail under which he held these lands were invalid and ineffectual, in so far as regarded all the prohibitions and irritant and resolutive clauses therein contained or referred to, and that he was entitled to dispose of the lands at pleasure.

The Lord Ordinary (BARCAPLE) gave judgment in favour of the pursuer, adding this note:—"The Lord Ordinary thinks there is no room for question that the irritant and resolutive clauses do not apply to the prohibition against altering the order of succession. They are clearly framed on the principle of enumeration; and, on the strict principle of construction applicable to the fettering clauses of an entail, it must be held that alteration of the order of succession is not included among the acts of contravention enumerated.

"The defender contends that, assuming the prohibition against altering the order of succession not to be fenced by the irritant and resolutive clauses, the pursuer is not entitled to the declarator of freedom from the whole fetters of the entail which he asks, on the ground of the provision contained in the 43d section of the Rutherfurd Act. The Lord Ordinary must hold that this is not an open question, but that it is settled by a series of judgments both in this Court and in the House of Lords. The defender chiefly relies upon the well established principle that, before the passing of the Rutherfurd Act, the prohibition as to altering the order of succession was effectual at common law

inter hæredes, though not fenced in terms of the Act 1685. On this ground he contends that it cannot he held that the entails of the Hamilton estates are to all effects invalid as regards the prohibition against altering the order of succession, and that therefore the condition necessary to the application of the 43d section of the Act does not exist, but the cases of *Dick Cunyngham*, 14 D. 636; *Dewar*, 14 D. 1062; and *Ferguson*, 15 D. 19, are express authorities against that construction of the Statute. It has been authoritatively determined in these and other cases that the terms of the clause are too clear and imperative to admit of any doubt as to the effect which it must receive wherever any one of the three cardinal provisions is not valid in terms of the Act 1685, by compliance with the provisions of that Statute. This is nowhere more distinctly pressed than in the case of *Dempster* in the House of Lords, 3 Macq. 62."

The defenders reclaimed.

WATSON for reclaimers.

LANCASTER, for respondents, was not called on.

The Court adhered.

Agents for Pursuer—H. & A. Inglis, W.S.

Agents for Defender—Tods, Murray, & Jameson, W.S.

Saturday, November 21.

MORTIMER *v.* HAMILTON.

Master and Servant—Trade Debts—Mandate—Furnishing Goods on Credit. A servant cannot bind his master for the price of goods without a mandate, express or implied.

Mortimer, a butcher, sued Hamilton for £26, as the amount of an account for butcher-meat sold by the pursuer to the defender. Hamilton defended, on the ground that he had not ordered the articles, and that he had been in the habit of giving regular weekly supplies of money to his servant to purchase butcher-meat for his household for cash.

After a proof, the Sheriff-substitute (CAMPBELL) pronounced this interlocutor:—"Finds, in point of fact, that the various articles of butcher-meat specified in the pass-book which is annexed to the summons, and contains the account libelled, were furnished by the pursuer on the order of the defender's servant, Euphemia Webster or Mathieson, and were delivered to her personally, or at the dwelling-house of the defender, and were so delivered by the pursuer on the understanding and belief that the same were for the use of the defender; but finds that the defender did not order any of the said articles, or contract with the pursuer for the supply of these or any other furnishings, and that he did not authorize the said Euphemia Webster or Murray to contract debt on his account, or interpose his credit for the price of the said articles, or any part thereof; and that he did not know that the same had been furnished on his credit; and finds that, during the whole currency of the said account, the defender paid to the said Euphemia Webster or Mathieson £1 sterling weekly, and in advance, for the purpose of enabling her to purchase the butcher-meat necessary for the defender's household: Finds, in the above state of the facts, that in point of law the defender is not liable in payment of the account sued for; Therefore assoilzies the defender; Finds him entitled to expenses, &c., and decerns."

The Sheriff-substitute referred to the following authorities:—*Inches* v. *Elder*, 27th November 1793, Hume 322; Fraser, Pers. and Dom. Relations, vol. ii, p. 450-1, and notes; *Hamilton*, 22d February 1825, 3 Shaw 394; *Dewar*, 22d June 1804, Hume 340; *Faulds*, 5th February 1861, 23 D. 437.

The pursuer appealed.

The following authorities were cited:—*Stebbing* v. *Hainly*, Peake, 47; *Fleming* v. *Hector*, 1836, 2 M. & W. 181; *Pearce* v. *Rodgers*, 11th July, 1800, 3 Esp. 214; *Hunter* v. *Berkley*, 1836, T. C. & P. 413; *Hiscox* v. *Greenwood*, 4 Esp. 174.

TRAYNER for appellant.

BRAND for respondent.

The Court dismissed the appeal.

The majority of the Court held that the Sheriffs were right. The principle ruling this case had long since been fixed in the cases of *Inches* v. *Elder*, Hume, 322, and *Dewar*, Hume, 340. There was the greatest difference between giving a servant authority to purchase goods for ready money and giving her a mandate to pledge the master's credit. If a tradesman supplied goods on credit on the mere order of a servant, without having ever ascertained whether the master was cognisant of the servant having opened an account, he had only to blame his own rashness if he lost his money. A master supplying money to his servant for the necessary disbursements of his house, which money is appropriated by the servant to other purposes, is not to be made liable in double payment because a tradesman, without his authority, rashly supplies goods to that servant on credit. That was also the principle of the English cases. There must be a mandate, express or implied, before a servant can impledge a master's credit.

LORD DEAS differed, thinking that tradesmen would be very much surprised by the doctrine now laid down. Householders would be very much annoyed if tradesmen were always to insist on express authority from the master before furnishing goods ordered through servants.

Agents for Appellant—Murdoch, Boyd, & Co., S.S.C.

Agent for Respondent—D. F. Bridgeford, S.S.C.

TEIND COURT.

Monday, November 23.

FOGO (MINISTER OF ROWE) *v.* CALDWELL.

Teinds—Glebe Lands (Scotland) Act 1866—*Conterminous Proprietor.* A conterminous heritor offering to purchase portion of a glebe under section 17 of the Glebe Lands (Scotland) Act 1866, may withdraw his offer before a remit has been made to a surveyor to value the lands.

The Rev. Mr Fogo, minister of the parish of Rowe, obtained authority from the Court, under the provisions of the Glebe Lands (Scotland) Act 1866. to feu certain portions of his glebe. By section 17 of that Act, a conterminous proprietor may, within thirty days of the issuing of the interlocutor authorising the feuing of the glebe, intimate his willingness to feu, lease, or purchase as much of the glebe, at such a price as the Court shall fix, and on his so doing he is entitled to obtain the lands. Mr Caldwell, a proprietor whose lands are conterminous with the portion of the glebe to be feued, in virtue of his