If it had been shown that the underground railways—that is, the railways in the pit-roads, whether heading-roads or branch-roads—were of a different construction from ordinary railways above ground—for example, if it had been shown that the underground railways were mere detached and moveable tramplates simply laid on the ground longitudinally without structural fastenings, merely to afford a smooth surface for the wheels of the hutches, it might very well be that such moveable tramplates were in no proper sense of the word fixtures. But this is not the state of the case. On turning to the report, the articles in group No. 2 are described thus—"The various articles in this group form the underground railways, the rails being nailed to the sleepers, and the sleepers laid upon the strata, a little packing being occasionally required under and around the sleepers."

This description is very short, but I think it indicates sufficient fixture to bring the underground railways really into the same category as those above ground. There are sleepers, and these sleepers are laid upon the strata just as ordinary sleepers are laid upon the permanent way. A little packing is required in and around the sleepers. This corresponds with and is indistinguishable from ordinary ballast in a public railway, the only difference being in degree. Then the rails are nailed to the sleepers. This implies even greater fixture than is usual in many public railways where the rails are set in chairs, and merely wedged tightly to the chair by a wooden wedge or key which the blow of a hammer would remove. But in many public railways—for example the Great Western—chairs are not used, but the flanged rail is directly nailed to the sleeper just as in the present case. That underground rails so constructed may be often shifted or removed is doubtless true, especially in branch roads or roads leading to the working-faces. But although easily removeable, while they remain laid and fixed they seem to be as heritable in character as many railways substantially constructed on the surface of the ground. A railway in a heading-road may often be as permanent as a railway leading from the pithead—that is, it will be used as long as the pit is wrought.

I think therefore the Lord Ordinary's interlocutor should be affirmed.

The Lord Justice-Clerk and Lord Ormidale concurred.

The Court adhered.

Counsel for Robert Brand jun.'s Trustees (Reclaimers)—Balfour—Readman. Agents—Mil Bonar, W.S.

Counsel for Alex. Brand's Trustees (Respondents)—Asher—Mackintosh. Agent—Alex. Morison, S.S.C.

Saturday, February 2.

FIRST DIVISION.

[Sheriff of Banffshire.

FRASER *v.* LAING.

Master and Servant—Damages by a Servant against a Master for Ill-treatment during Service—Issue.

As a general rule, a servant is not entitled to remain in service for the stipulated period, and at the end to sue his master for damages on the ground that during the whole or part of the period of service the master, in breach of his obligation, failed to supply his servant properly and sufficiently with bed and board, and subjected him to cruel treatment, to his loss, injury, and damage.

Averments in such an action upon which an issue was allowed, and terms of the issue adjusted for the trial of the cause.

The pursuer in this action was engaged by the defender, a cattle-dealer and butcher in Keith, as a general domestic servant for the half-year from Martinmas (old style) 1875 to Whitsunday (old style) 1876. When she entered the defender's employment she was not sixteen years old. Her mother had been dead for several years, and her father was a farm-grieve resident at Dulsie Bridge, near Nairn. The defender was married, and had five children, who all, during the period of the pursuer's service, resided in family with him and his wife. The pursuer was the only domestic servant then in the house.

After leaving the defender's service the pursuer raised an action against him in the Sheriff Court of Banffshire, concluding for payment of £500 damages. She alleged that about two months after entering his service he and his wife commenced a systematic course of oppressing her, of outraging her feelings, and of treating her with the greatest cruelty, wanton maliciousness, and inhumanity; and that they continued these practices until she left. In particular, that they oppressed her with work, without allowing her sufficient intervals for sleep; that they did not supply her with the proper quantity or quality of food, but merely with crusts of bread, cold porridge, and other leavings of the family meals; and that during the last month of the period in question they deprived her of regular meals altogether; that they exposed her to cold, without fire, and without proper bedroom accommodation; that they struck her and kicked her, and used abusive language towards her; in short, that they reduced her to a state of unspeakable wretchedness and suffering, and that her life, except during sleep, became a grievous and sickening burden.

In consequence of this barbarous treatment the pursuer averred that her mental faculties as well as her bodily powers came to be affected. She became depressed, abject, feeble, and in a great measure helpless in mind. Her person became emaciated and prematurely decrepit. Her skin was discoloured and wrinkled. Her hands and feet were very much swollen, and covered with chilblains and sores. Unable as she was, thus reduced both physically and mentally, to pay proper attention to personal cleanliness, her person became dirty and covered with vermin, so

that when she returned to her father's house she presented a humiliating and deplorable spectacle. Owing to the injuries she thus received she was disabled from going out to service during the half-year following Whitsunday 1876; and although in the succeeding half-year she was able to enter upon a period of service, her prospects in life have been very materially damaged by the defender's treatment.

The pursuer further stated that the defender confined her closely to the house even on Sundays, and that he prevented her from writing to her father and from associating with anyone in Keith; in consequence of which, taken along with the helpless physical and mental condition to which she was reduced, she was unable to make known her state to her family or to anyone outside the defender's house.

The pursuer had duly received her wages when she left the defender's service in May 1876, but she averred that her father had reserved on her behalf all her other claims against the defender.

The Sheriff-Substitute (SCOTT MONCRIEFF) and the Sheriff (BELL) each allowed the pursuer a proof.

The pursuer appealed under the Judicature Act (6 Geo. IV. cap. 120), for jury trial to the Court of Session.

At advising—

LORD PRESIDENT—It must not be supposed that in allowing an issue in this case the Court intend to lay down any general rule as to the right of a servant to sue his master for damages. As a general rule, a servant is not entitled to remain in service and at the end sue the master for damages of this nature. It is entirely on account of the peculiar circumstances which are averred in the record, but which it is not necessary to set forth in the issue, that we allow it. The pursuer was a young girl, sixteen years of age, far from the place of her residence, and with no money to carry her home. The treatment which she is alleged to have suffered was such as seriously to affect her energy at least, if not her mental capacity. In these circumstances I am of opinion that we should allow the issue.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The following was the issue:—"Whether the pursuer was a domestic servant in the employment of the defender from Martinmas 1875 (old style) till on or about the 25th May 1876; and whether during the whole or part of that period the defender, in breach of his obligation as the pursuer's master, failed to supply the pursuer properly and sufficiently with bed and board, and subjected her to cruel treatment, to her loss, injury, and damage."

Counsel for Pursuer (Appellant)—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Counsel for Defender (Respondent)—J. P. B. Robertson. Agent—Alexander Morison, S.S.C.

Saturday, February 2. *

FIRST DIVISION.

DUKE OF HAMILTON, PETITIONER *v.* BUCHANAN

Process—Appeal—House of Lords—Interim Possession—Where Decree of Removing had been pronounced.

Where an appeal had been taken to the House of Lords against a decree of removing from a certain farm and lands, on a petition being presented by the landlord for execution upon the decree, or alternatively for consignation of the rents, the Court ordered the tenant to consign the sum of rents that had become overdue.

This was the sequel to the cases reported *ante*, Jan. 26, 1877, vol. xiv. p. 253; June 8, 1877, vol. xiv. p. 545; and 4 R. 328 and 854, in which the Court decerned against the defender Andrew Buchanan in terms of the conclusions of removing, and of consent of both parties fixed the terms of removing at Martinmas 1877 for the arable land, and Whitsunday 1878 for the houses and grass, reserving to the defender all claims which might be competent to him in connection with his possession of the farm of Flemington. Thereupon the defender, having been charged to remove from the lands and farm, presented a petition of appeal to the House of Lords against the interlocutors pronounced by the Court.

The Duke of Hamilton having thereafter raised an action for payment of the half-year's rent due for the farm at Whitsunday 1877, Mr Buchanan lodged defences, in which, *inter alia*, he pleaded that the action should be sisted till the issue of the appeal in the House of Lords, and that, in the event of the judgment of the Court in the declarator case being affirmed, the rent of the farm should be reduced. The Lord Ordinary (RUTHERFURD CLARK), before whom the action depended, intimated that he would not pronounce decree of payment while the terms of the lease were still subject to interpretation in the House of Lords, but that Mr Buchanan ought either to consign the rent *in manibus curiæ*, or find caution for payment of the amount that should ultimately be found due by him. Mr Buchanan refused to make any provision for satisfying either of these requirements. The Duke of Hamilton accordingly applied to the Court under the Act 48 Geo. III. cap. 151, sec. 17, to allow execution to proceed upon the decree of removing, or to ordain Mr Buchanan to consign a year's rent (another half-year's rent having by this time fallen due) as a condition of his being allowed to remain in possession.

The Court had doubt whether it was competent to order consignation under such a petition; and the respondent intimated that he was willing to obey any order that should be pronounced, but would not consign unless ordered to do so.

Ultimately, on the authority of the cases of *Earl of Mansfield* v. *Henderson*, 2d March 1815, F.C., and *Earl of Queensberry* v. *Robert Wilkin*, there referred to, the Court ordered the respondent to consign the amount of rent that was overdue.

* Decided 29th January 1878.