

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 revision. 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 THOMAS 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 condensation 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—Rutherford Act—Act 1685. An entail held to be invalid, the irritant and resolute 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 resolute 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 resolute 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 resolute 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 Rutherford 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 Rutherford Act, the prohibition as to altering the order of succession was effectual at common law