

Hebenton, in the Burgh Court, as a preliminary plea, that the summons was inept, being in the form prescribed for Sheriff-Courts by the Act of 1853; whereas it ought to have been in the form prescribed by the Act of Sederunt of 13th February 1845, or Act of Sederunt of 18th July 1851, and no condescendence was annexed as required by the latter Act. The Bailie (CRAIG) repelled this plea, holding that it was to be assumed that the form of process prescribed in 1853 for Sheriff-Courts was applicable to Burgh Courts. After proof, the Bailie found Hebenton liable in certain sums to the pursuer. In the suspension at Hebenton's instance it was now pleaded, in addition to the objection to the form of the summons, that two of the interlocutors were not duly authenticated by the Judge's signature; that the proof was irregularly taken, in the shape of notes instead of in the form of a deposition; and that the proof was not authenticated by the signatures of the witnesses and magistrate on each page.

The Lord Ordinary (BARCAPLE) pronounced this interlocutor:—"Finds that the summons is libelled in an incompetent form according to the legal rules of procedure in Burgh Courts: Finds that the proof on which the judgment of the Inferior Court proceeded was incompetently taken, and not duly recorded or authenticated, having regard to the rules of law in that matter applicable to Burgh Courts; on these grounds sustains the reasons of suspension, suspends the letters and charge *simpliciter*, and decerns; reserving to the respondent his right to bring a new action in the premises in competent form: Finds the respondent liable in expenses," &c.

"*Note.*—The summons is framed according to the form prescribed by the Sheriff-Court Act 1853, 16th and 17th Vict., cap. 80. That would have been a form altogether incompetent in any court in Scotland before the passing of that Act, and the Statute only authorises its adoption in the Sheriff-Courts. The judgment (in the Burgh Court) sustaining it as competent refers to the Act 6th Geo. IV., cap. 23. By section 7 of that Statute, the Acts of Sederunt which it authorises the Court of Session to pass in regard to Sheriff-Courts are made equally applicable to the courts of royal burghs, and the power to make such Acts of Sederunt was continued by 1st and 2d Vict., cap. 119, sec. 31. But the former Statute had relation to the fees of the clerks of Court, and the Act of Sederunt which followed upon it, on 27th January 1830, has reference to that matter. The form of proceedings in Sheriff and Burgh Courts had been already dealt with in separate Acts of Sederunt on 12th November 1825, following on the Judicature Act. The Lord Ordinary cannot discover any ground for holding that the new forms of summons introduced by statute into the Sheriff-Courts has been in any way imported into the Burgh Courts.

"In the same way, there has been adopted in this case the form introduced by the Sheriff-Court Act of 1853 of taking evidence, by the Judge taking notes of the evidence. This is materially different from the mode of taking depositions sanctioned by law prior to that Statute. The functions with which the Sheriff was thereby vested have not been conferred by the Legislature upon Judges in other inferior courts, and it does not appear that they can be assumed without statutory authority.

"The suspender also objected that the interlocutors are not duly subscribed by the Judge. There

is certainly great looseness and departure from ordinary practice in this matter. But the Lord Ordinary is not disposed to hold that it amounts to a fatal defect. The Judge signs at the end of each interlocutor, and in every instance the whole interlocutor is written on the same sheet."

Milne reclaimed.

WATSON, Solicitor-General MILLAR) with him, for reclaimer.

FRASER and ASHER, for respondent, were not called on.

The Court adhered.

Agents for Suspender—Henry & Shiress, S.S.C.

Agent for Respondent—James Webster, S.S.C.

Tuesday, November 17.

THOMSON v. THOMSON'S TRUSTEES.

Husband and Wife—Conjugal Rights (Scotland) Amendment Act 1861—Aliment—Revocable Deed. A trust-deed executed by a husband and wife, proceeding on the narrative of a claim by the wife under the 16th sec. of the Conjugal Rights Act, and conveying to trusteer funds coming to the wife, the income to be paid as aliment to the wife, held not revocable by the husband.

In January 1866 Jane Duncan or Thomson, wife of the pursuer, became entitled to a share in the estate of her deceased uncle, William Grant, and in the following month she intimated to Grant's executor a claim for a provision in terms of the 16th section of the "Conjugal Rights (Scotland) Amendment Act 1861," to be made to her from the property thus falling to her. Thereafter, in November 1866, the pursuer and his wife executed a trust-deed narrating the 16th section of the Act, the claim made by Mrs Thomson, and that £236 of the fund had been paid to the granter of the deed, and conveying to trustees a sum of £600, and a farther sum not then realised coming to the wife from Grant's estate, for the purpose of paying the income to the wife, exclusive of the *jus mariti*, and after her death to the pursuer, and the fee to the children.

The pursuer, in December 1867, brought this action, asking declarator that the trust-deed was revocable, and had been revoked by him, and that he was entitled to payment of the £600. His wife had previously brought an action of separation and aliment against the pursuer, and on 5th February 1868 obtained decree, the Lord Ordinary (KINLOCK) holding that the provision in the trust-deed was sufficient aliment.

In this action his Lordship held that "the trust-deed libelled, so far as granted for the purpose of paying the yearly proceeds of the sums thereby conveyed to the defender Jane Gray Duncan, the wife of the pursuer, by way of aliment, was not, and is not, revocable by the pursuer, and that the trustees under the same are entitled to hold and invest the said sums for the purpose of making such payment to the said defender during her lifetime."

The pursuer reclaimed.

FRASER and GUTHRIE for reclaimer.

CLARK and LEE for respondent.

The Court adhered.

Agents for Pursuer—Neilson & Cowan, W.S.

Agents for Defender—Mackenzie & Kermack, W.S.

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