

minority could equally complain when he had married a great heiress, renouncing his courtesy. The day after the marriage he could complain that he had been entrapped into this marriage-contract to his lesion, and ask to have it set aside. I think that is an extravagant proposition, and I know of no case which gives it the slightest countenance. The cases hitherto have all been of this kind—that the minor had property either in possession or in prospect, the prospect having been afterwards realised, and had been stripped of that property by the instrumentality of an unfair contract which he or she had been induced to sign while still a minor. I shall not, however, enlarge further on the question. I do not think it is incumbent where a man in an antenuptial marriage-contract gives an annuity to his wife, or a wife to her husband, to show that it was equivalent to what the law would have given had there been no contract. I do not think it within the category of lesion.

Without, therefore, enlarging any further on the matter, I would only, for myself, repeat that I am quite prepared to put the judgment on more general grounds than those of Lord Craighill, while concurring with him without hesitation or doubt in the conclusion that the defenders should be assolizied.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Trayner—Comrie Thomson. Agents—H. B. & F. J. Dewar, W.S.

Counsel for Defenders (Respondents)—J. F. B. Robertson—Pearson. Agents—Webster, Will, & Ritchie, W.S.

Friday, January 9.

## SECOND DIVISION.

[Sheriff of Inverness, Elgin,  
and Nairn.

ROBERTSON v. BOYD AND WINANS.

*Lease—Informal Minute of Agreement—Rent Fixed by Arbitration—Assignment—Homologation.*

R., the tenant of a farm, sublet by an informal minute of agreement to B., for sporting purposes, with liberty to assign, part of his grazing ground, the rent to be assessed or valued by two valuers, one for each of the above-named parties, with an oversman if required. Possession followed on the agreement. B. offered to W. an assignment of the sublease, the offer to be binding for a certain time. During the currency of this offer, B. and R., by formal minute of reference, nominated arbiters and an oversman, who accepted the reference and fixed the rent by an improbativ award. Thereafter W. accepted B.'s offer, and entered on possession under the assignment, and while he was in possession B. paid R. the rent fixed by the award for the period prior to the assignment. In an action by R. against W.

for the rent applicable to his possession at the sum fixed by the award—*held (diss. Lord Rutherford Clark)* that the informal award having been homologated by the payment by B., was binding on him and on W. as his assignee.

On 27th May 1880 Duncan Robertson, tenant for fifteen years from Whitsunday 1873 of the farm and lands of Comar, Strathglass, situated in the counties of Inverness and Ross, entered into a minute of agreement with Major Walter Boyd, residing at Fasnakyle, Strathglass, whereby he agreed to sublet to him a portion of his grazing ground for sporting purposes for and during the remainder of his (Robertson's) lease, with entry at Whitsunday 1880. This agreement bore that "the yearly rent for the land hereby let shall be assessed or valued by two valuers, one for each of the above-named parties, with an oversman if required, and the two contracting parties hereby agree, one to accept, and the other to pay over his yearly rent thus assessed as rent for said lands." It was further provided that Major Boyd should be at liberty to sublet or assign the sublease. The rent of each year was to be payable in one sum at Martinmas in order to correspond with the way in which Robertson had to pay his rent under the principal lease, and the first payment was to be at Martinmas 1880. Major Boyd thereupon entered on possession under this sublease.

On 1st September 1880 Major Boyd offered to assign his sublease to a Mr Winans, the offer to be open to the end of 1880. It was not accepted till the 13th December 1880, as after stated.

On the 9th and 10th November 1880, on the narrative of the previous agreement, Mr Robertson and Major Boyd entered into a minute of agreement and reference providing that, "Whereas the subrent payable by the said Major Walter Boyd to the said Duncan Robertson for the said portion of land has, by the arrangement of parties, to be ascertained and fixed by persons of skill to be mutually chosen, or an oversman, Therefore the parties hereto have agreed, and do hereby agree, as follows, viz., that Duncan Macmillan, farmer, Drumclune, Drumnadrochit, and Alexander MacLennan, grazier, Leanassie, Kintail, shall be, and they are hereby, mutually chosen and nominated and appointed as valuers in the premises, and in the event of their differing in opinion, John Mundell, tacksman of Gorthlick, shall be oversman, with full power to them respectively to inquire into, ascertain, and fix the yearly subrent payable by the said Major Walter Boyd to the said Duncan Robertson for the said portion of land; and whatever the said valuers, or in the event of their differing in opinion, the said oversman, shall fix and award in the premises, the parties hereto bind and oblige themselves, and their respective heirs, executors, and successors whomsoever, to implement and fulfil to each other." This document was executed before witnesses, and contained a formal testing-clause.

The valuers and oversman accepted the reference in writing as follows:—"Inverness, 10th December 1880.—We accept of the foregoing reference." Then followed the signatures of Macmillan, MacLennan, and Mundell. On the same date, 10th December, this minute, written by one of them, and signed by him and the others, was endorsed on the submission:—"Inverness, 10th December

1880.—We, agreeably to the foregoing submission, hereby fix the yearly rent of the ground inspected by us in September last, as specified above, at Ninety-five pounds sterling (£95).—DUNCAN MACMILLAN. A. MACLENNAN. JOHN MUNDELL.”

Winans on 13th December 1880 accepted the offer of the sublease made by Major Boyd, as already stated, and on the 26th and 27th December a formal transfer of the sublease was made to him by assignation. In the assignation, to which Robertson was not a party, there was this clause with regard to the rent under the sublease to Robertson—“It having been further agreed that the yearly rent for this land thereby let should be assessed or valued by two valuers, one for each of the said parties, Duncan Robertson and Major Walter Boyd, with an oversman if required, and the two said contracting parties having agreed, one to accept and the other to pay over his yearly rent thus assessed as the rent for said lands, but the agreement appointing the valuers not having been made, and the exact amount of said rent not having been agreed upon and fixed at the date of the proposal of Major Walter Boyd to transfer this sublease to said William Louis Winans, viz., 1st September 1880, it is left as an obligation to the said Duncan Robertson and said William Louis Winans to make an agreement appointing valuers, and to have the exact amount of this rent, so far as it becomes payable after the date of this transfer, agreed upon and fixed by measures to be taken by themselves hereafter, in accordance with said sublease.”

Winans by the assignation undertook liability for the whole rents to become due after the assignation, and to observe the whole conditions and obligations of the sub-lease to Boyd; Major Boyd, on the other hand, undertaking to relieve him of all claims for rent previous to the transfer.

Immediately after the date of the assignation, Winans entered on possession, and continued to possess at the date of this action. The assignation of the sub-lease was intimated to Robertson on 14th April 1881. The first rent under the sublease, viz., that for 1880, was due at Martinmas 1880, according to its terms, as above stated, and on 3d February 1881 Major Boyd paid Robertson £95 as the rent, that being the sum fixed by the submission. No further rents had since been paid either by Major Boyd or by Mr Winans as at the date of this action, the former contending that Winans had become the tenant and that he himself was no longer liable, the latter contending that he was not bound by the alleged reference or award, even if it were good, as he had been no party to it, and further that the reference was incompetent, and the award informal and invalid.

Robertson in February 1883 presented this petition in order to have Major Boyd and Winans ordained, conjunctly and severally, to pay him (first) the sum of £95 sterling, with interest thereon at the rate of 5 per cent. per annum from the term of Martinmas 1881 until paid; and (second), of the like sum of £95 sterling, with interest thereon at said rate from the term of Martinmas 1882 until paid.

The defender Boyd stated that though he considered the award as irregular and invalid, and the amount excessive, he had consented to pay the rent for 1880-81, as his interest in the sub-

lease nearly was terminated. The award was neither holograph nor tested. It professed to be a joint award of the arbiters and oversman, as if the reference were to three persons in place of two; there was nothing to show whether or not the arbiters differed or made any devolution. Neither the arbiters nor oversman heard parties, nor gave them an opportunity of being heard, nor did they make any inquiry for themselves after the reference was entered into. By the assignation of the sublease he had been divested, and he therefore refused to pay the rents due after its date. He also stated that the reason no reference was made in the assignation to the rent fixed under the reference was that both he and Winans considered it excessive, and Winans required, therefore, that no reference should be made to it, in the hope of making better terms with the pursuer afterwards.

The pursuer pleaded—“(1) The defender Major Walter Boyd having acted upon and so far implemented the said award, has homologated the same, and is now barred from raising technical objections as to its form. (2) The defender Major Walter Boyd having taken the pursuer's land, and agreed to pay such annual rent therefor as should be fixed by arbitration, is liable for the rents sued for. (3) The defender the said William Louis Winans, in respect of his use and possession of said land, is also liable to the pursuer for the rents thereof.”

Boyd pleaded—“(1) The defender Boyd having assigned the sublease in virtue of powers therein contained, and the sublessee having received possession and been accepted and recognised as assignee by the pursuer, the defender Boyd is liberated from liability for the rent sued for, and is entitled to absolvitor with expenses. (2) The pretended award being *ex facie* irregular and invalid, it cannot be made the foundation of an action.”

The defender Winans stated that the proceedings in the reference founded on by the pursuer took place without his knowledge, and after Major Boyd had on the 1st September made him the offer to assign the sublease which he ultimately accepted. He therefore declined to recognise the reference or award as in any way binding on him, even though they might be valid and effectual in themselves. Further, the award was *ex facie* informal and invalid, and the sum fixed was excessive. He was quite willing to pay a fair rent which might be fixed by an arrangement with the pursuer.

He pleaded—“(3) The defender having been no party to the reference founded on, though he was the party chiefly interested in the subject of the reference, cannot be bound by an award pronounced in said reference. (4) The defender having all along been willing to pay for the said grazings a fair and reasonable rent, this action is premature and unnecessary, and should be dismissed with expenses. (5) *Separatim*, The reference or alleged reference having been incompetent, and the award or pretended award being informal and invalid, these cannot be founded on in support of this action.”

The Sheriff-Substitute (BLAIR) pronounced this interlocutor—“Finds (1st) That although the decree-arbitral which is written on the minute of agreement and reference between the pursuer Duncan Robertson and the defender Major Boyd

is informal and not tested, it is subscribed by the arbiters and the oversman named in the said minute of reference, and contains all the essentials of an award by the said arbiters and oversman; (2d) That the defender Boyd on or before the 3d February 1881 accepted the terms of the award contained in the said decree-arbitral, and paid to the pursuer the sum of £95 as the rent of the subjects in question for the period from Whitsunday 1880 to Whitsunday 1881; (3d) That the defender Boyd by assignation dated 26th and 27th December 1880 assigned the lease of the said subjects to the defender Winans, and intimation thereof was made on 14th April 1881 by the said defender Winans to the pursuer, who acquiesced therein; (4th) That the defender Winans entered into possession of the said subjects on or about the 27th December 1880, and still continues in possession under the said assignation: Finds in law that the informal writing containing as it does all the essentials of an award, and followed by *rei interventus* showing that the decision of the arbiters and oversman had been accepted by the defender Boyd, is binding on the defender Boyd and on his assignee the defender Winans, and that under the said minute of reference, and the decision of the arbiters and oversman, the pursuer is entitled to decree against the defender Winans as concluded for: Finds further in law that after the assignation of the lease had been duly intimated to and acquiesced in by the pursuer and the defender Winans, the assignee admitted into possession, the obligation of the defender Boyd for rents was limited to those due prior to the possession of the said defender Winans, the assignee: Therefore sustains the defences for the defender Boyd, and assolvies him from the conclusions of the action, and repels the defences for the defender Winans, and decerns against him in terms of the prayer of the petition: Finds the pursuer entitled to expenses against the defender Winans, and liable in expenses to the defender Boyd.

“*Note.*—In making their award the arbiters and oversman have not observed the usual formalities, for although holograph of one of the arbiters, the award is neither tested nor executed in the form of a regular decree-arbitral. If this award has stood alone, I must have found that the pursuer had failed to instruct his claim. But as the award, informal and improbate as it is, has been adopted and homologated by the defender Boyd, I am of opinion that it must now be held to be valid and effectual, and that the pursuer is entitled to decree. Decree, however, has been given against the defender Winans only, because where the assignation of a lease is intimated to and acquiesced in by the lessor, and the assignee is admitted to possession, the liability of the original lessee ceases. ‘The very nature of the thing implies that the cedent must be free. Lease is a mutual contract, and if the lessor consents to a substitution, there is an assignation on the one hand and a delegation on the other’—*Skene v. Greenhill*, May 20, 1825, 4 S. 25.

“Authorities cited by defender Boyd—*Dickson*, sec. 656; *Bell on Arbitration*, secs. 452 and 784; *Hunter*, vol. ii. p. 170.

“Defender Winans—*Bell's Com.* i. p. 140; *Hunter*, ii. p. 170, i. p. 235.”

Winans appealed to the Sheriff (Ivory), who recalled the interlocutor appealed against in so

far as it found the pursuer liable in expenses to the defender Boyd; *quoad ultra* affirmed the interlocutor appealed against; and found the pursuer entitled to additional expenses against the defender Winans.

Winans appealed, and argued—He could not be found liable to pay any rent fixed under the reference founded on by the pursuer, which was nothing more than a private agreement between the latter and Major Boyd, and of which the appellant knew nothing. To make the reference binding on him he should have been made aware of it from the very first, and as soon as he accepted Boyd's offer to assign the lease he should have been sisted as a party to the reference. The pursuer's true remedy, then, lay against Major Boyd, with whom alone he had a contract under the reference. But whatever effect the reference might be said to have in a question between the pursuer and Boyd, the award of the arbiters appointed in the reference was improbate and invalid, and therefore of no binding force whatever.—*Short*, July 3, 1711, M. 16,867, in which it was held that a decree-arbitral was not a probative writ in respect it lacked the writer's name and designation; *Haliburton v. Haliburton*, July 1708, M. 16,970, in which a decree-arbitral was held not to be a privileged writ, and therefore to be null for want of witnesses; *Percy*, Nov. 25, 1807, F.C. 13. The award here, then, was mere waste-paper, and (3) no homologation or *rei interventus* could make it of legal effect. Even if it was capable of having been homologated by Major Boyd it could not be enforced against the appellant, who was no party to it. It was idle to argue that it had been homologated by Major Boyd's paying the rent on 3d February 1881, for by that time he had been divested of the lease, and this was within the pursuer's knowledge.

The pursuer replied—The reference was a good fulfilment of the obligation to have the rent fixed during the whole of Major Boyd's tenancy, which had been placed on both parties in the informal lease. The obligation was not such as would justify the expectation that it would be carried out in a deed which should be probative in form. But was it necessary that the award should be probative? There were many classes of decrees-arbitral which need not be probative—*Lees v. Burroughes*, 1810, 12 East. 1; *Moncur v. Waddell*, June 22, 1615, M. 644; *Dykes v. Roy*, Jan 13, 1869, 7 Macph. 357, *vide* Lord Cowan, p. 360; *Fraser v. Lovat*, Feb. 29, 1850, 7 Bell's App. 171; *Campbell v. M'Holm*, Dec. 11, 1873, 2 Macph. 271, (Lord Deas' opinion, 281). It was enough that it was valid under the new law as being signed before witnesses, and that it was admittedly a genuine document. (2) It was homologated by Boyd when he possessed under it and paid the rent to the pursuer on 3d February 1881. It then effectually bound Winans, who was Boyd's assignee in the lease. There was no averment on record in support of the argument that the pursuer knew that Boyd had divested himself in favour of Winans when he paid the rent on 3d February 1881.

The appellant's counsel craved leave at this stage to add to the record the following averment:—“Admitted that at the period here mentioned (*i.e.*, the end of 1880 or beginning of 1881) the appellant took possession of and used

the subjects in question, and explained and averred that the pursuer knew of this at the time, or at least before 3d February 1881."

The pursuer's counsel objected to the amendment being allowed, on the grounds—(1) That there was enough on record to decide whether the appellant was responsible for the rent; and (2) that the proposed averment was not specific enough to warrant alteration of the record, or to be remitted to probation.

Counsel for the defender Major Boyd appeared and stated, that as no decree had been pronounced against the defender he merely watched the cause in the latter's interest in case the pursuer should now move for decree against him.

At advising—

**LORD CRAIGHILL**—We made avizandum in this case to consider, first, whether a motion made for the amendment of the record should be allowed. That amendment was proposed with the view that an opportunity might be had of inquiring into certain matters connected with the reference, which is said to be informal. Upon a full consideration of the matter I have come to the conclusion that it is not incumbent upon us to grant the motion that has been made. The Sheriff has decided the case, and it has been brought here for the review of the interlocutors pronounced in the Court below. And it appears to me that even if the defender were to put on the record that which he wishes to state, and were to prove the subject-matter of that averment, the case substantially would be the same as that on which the Sheriff-Substitute has given judgment. I therefore proceed to consider whether or not the interlocutor ought to be affirmed on the record as presented to the Sheriff.

There is brought before the Court by this appeal an action raised in the Sheriff Court of Inverness by Duncan Robertson, farmer, Comar, Strathglass, against Major Boyd and the appellant Mr Winans. The purpose of the action is to recover from the defenders, or one or other of them, the sum of £95 alleged to be due as the rent of a portion of the pursuer's farm sublet to the defender Boyd, which was due at Martinmas 1881, and a like sum of £95 of rent which became due at Martinmas 1882, with interest from these terms respectively.

The facts as disclosed on the record appear to be these. The pursuer, who is tenant of the lands of Comar and others by minute dated 27th May 1880, sublet to the defender Boyd a part of his grazing farm with entry at Whitsunday 1880. The rent of the subject let was not fixed by the parties, but by the sublease they arranged and agreed that such annual rent or subrent as should be fixed by persons of skill to be mutually chosen, or by an oversman in the event of their differing in opinion, should be the rent which the one was to be entitled to receive and the other was to be bound to pay. Upon this agreement the defender Boyd entered on possession. The first rent payable was to be paid at Martinmas 1880. By that time the rent had not been fixed, but a minute was signed by the parties on 9th and 10th November 1880, by which they nominated and appointed Duncan Macmillan and Alexander M'Lennan as valuers, and in the event of their differing in opinion John Mundell as oversman, giving full power to them respectively to inquire,

ascertain, and fix the yearly subrent to be paid by Boyd to the pursuer for the portion of land in question. The valuers and oversman accepted of the reference, and on the 10th December they fixed the rent by minute endorsed on the submission at £95. This deliverance was intimated on 18th December, and on the 3d of February following the rent as thus fixed, due at the preceding Martinmas, was paid by Boyd to the pursuer. The formality and indeed the sufficiency of the deliverance of the valuers and oversman have been objected to, and it must be confessed that they are not in the form, and have not been authenticated in the way, which business men, experts in legal forms, would have adopted. But assuming that it would not have been obligatory if not homologated, it seems to be plain that Boyd, having paid the rent as fixed, must be held to have adopted that which was done in the reference, and could not afterwards challenge its regularity and sufficiency in a question with the pursuer. Boyd, however, is not the party against whom decree has been pronounced, and he appears in this appeal only to watch the proceedings, and to defend himself in case it should be necessary, against any decree which might be moved for against him on the part of the pursuer.

The defender Winans is a party to the action, and against him decree has been pronounced upon this consideration. The sublease from the pursuer to Boyd provided that the latter should "be at liberty to sublet or assign this sublease, with the rest of the Coinbuidh forest, as he may think fit." And Boyd, availing himself of this liberty, on 1st September 1880 wrote to Winans offering to assign with other subjects the sublease from the pursuer above referred to, this offer being left open for Winans' acceptance at any time during the year 1880. Mr Winans on 13th December accepted the offer thus made, and on the 26th and 27th of the same month there was executed a formal assignation. Within a day or two Winans entered on possession, and from that time he has continued in occupation. The rent for 1880 was paid by Boyd, but the rents which became due at Martinmas 1881 and at Martinmas 1882 have not been paid, and these are the rents sued for. Decree has been given against Winans on the ground that he is assignee of the subtenant, that he has undertaken his obligations, and that he has been in the occupation of the premises from the end of 1880. The question which has now to be determined is, whether or not the decree thus pronounced can be sustained? If the rent was well fixed, admittedly nothing can be said against the judgment, but if, on the other hand, the rent has not been well fixed as in a question with Winans, then the decerniture must be recalled.

The first contention on behalf of Winans, the appellant, is, that the offer to assign having been made to him by Boyd on the 1st of September 1880, and that offer remaining open till the end of the year, the nomination of valuers and the proceedings in the reference following upon the nomination were unwarranted, inasmuch as they were without the sanction of Winans. This appears to me to be plainly an erroneous contention. The pursuer had rights on the contract with Boyd. The two had covenanted to enter into a reference

to valuers for the fixing of a rent, and Boyd by offering to assign did not deprive himself of the power, nor the pursuer of the right, to carry into effect the conditions of the sublease. Mr Winans must be presumed to have known the terms of the sublease, and he could not but know that there was an obligation as to the fixing of the rent, which whether in the end he accepted or not, behoved to be fulfilled. On this part of the case there seems to me to be no difficulty.

The next, and it is the leading contention on the part of the appellant Winans is, that the writing by which the rent was fixed was irregular in form and destitute of due authentication. The Sheriff-Substitute has adopted this view of the document, and I am not disposed to differ from the opinion which he has expressed. But I also agree with him in thinking that the valuation has been homologated, not merely in a question with Boyd but in a question with Winans. There was to be but one fixing of rent, and the rent fixed was to be the rent, not merely of the subtenant Boyd, but of any assignee to whom the sublease might be transferred. In terms of the sublease valuers and an oversman were named; they issued a deliverance, formal or informal, sufficiently or insufficiently authenticated, during Boyd's occupation. He acquiesced in the sufficiency of that which had been done, and he paid the rent as thus determined. He could not afterwards repudiate what had been thus sanctioned, and no more could Mr Winans, in the circumstances of the case. The assignation had not been intimated to the pursuer when Boyd paid, as he was bound by the assignation to pay, the past due rent. Mr Boyd was the only person, therefore, to whom the pursuer could look for implementation of the subtenant's part of the contract before Mr Winans came forward, and by the intimation of the assignation in his favour claimed to have the rights of the subtenant. The rent had by that time been fixed, not merely by the deliverance which had been issued by the valuers, but by the homologation and adoption of that valuation by Mr Boyd when he paid the rent for 1880, according as that had been determined under the provisions of the contract.

For these reasons, which are substantially those which have been presented by the Sheriff-Substitute, I concur with your Lordship in thinking that this appeal ought to be dismissed, and the judgment of the Sheriff to be affirmed.

**LORD RUTHERFURD CLARK**—In regard to the amendment proposed by Mr Winans' counsel at the close of the debate, I am of opinion that that amendment should be allowed. By that amendment the defender desired to put on the record a statement which at the close of the debate was considered desirable. I think it would be contrary to our usual practice to withhold from the defender the right of amending his record to the effect which he proposes.

But taking the record as it stands, the question which presents itself to us is of this nature:—The pursuer had granted a lease in favour of the defender Boyd, and that lease has been assigned to the defender Winans. The pursuer is now suing both Boyd and Winans for the rent, although confessedly only one of them can be due that rent. The action, therefore, is an action upon a lease, and the rent which is sued for must

be due by the tenant under the lease on which the action is brought. Now, the lease that had been granted in favour (first) of the defender Boyd was undoubtedly an improbate writing—that is to say, was not tested according to law. But it was made a probative writing, or as good as a probative writing, by the possession which followed upon it. That document or lease did not fix the rent that was payable by the tenant under it. It provided, however, a means by which the rent was to be ascertained, and to be ascertained once for all, so that the rent should be fixed for the whole period of the lease, and that was by reference to men of skill, who were to say what they thought was the fair rent payable for the lands.

Accordingly, a reference was duly made to two men of skill by the pursuer, on the one hand, and by Major Boyd, on the other, and that by a proper deed, namely, a proper and tested deed of reference. It was not in any sense a submission to arbiters, but was a document by which the parties to it empowered the gentlemen to whom the reference was made to settle the value of the farm which was to be paid as rent for a certain number of years.

Those referees proceeded in the discharge of their duties so far that they issued what may be called, although not very technically, an informal award, by which they fixed the rent at £95.

Now, the first question to decide is, Was that a binding award upon anyone? Because if it were a binding award upon anyone, probably it might be upon all. Because the proper procedure pointed out in the lease was so pointed out with the view and for the purpose of fixing the rent. If the rent was well fixed when that award was pronounced, I do not see any reason to doubt that the rent so fixed was well fixed once and for all. The sum fixed by those gentlemen, therefore, would be the rent payable, not only by Boyd, but by Winans, so long as he continued tenant under the lease.

The objection that is taken to that document is that it is not a probative document. The Sheriff-Substitute and the Sheriff have both held that that is a good objection to the document. Lord Craighill concurs with them, and so do I. The purpose of the proceedings was to fix a rent which had been omitted from a probative lease, or a lease constructively probative, and there could have been no objection to the award if it had been as probative as the original deed, or if something effectual in the way of homologation had followed upon it as an informal writing. But I do not very well see how a rent-clause can be introduced into a lease other than by a document as probative as the lease itself, or made as probative by something following upon it. I am unable, therefore, to see how the pursuer could, simply in virtue of that award, nothing having happened on it, have sued Major Boyd for the rent alleged to be fixed by it. Nor do I see how he could sue Mr Winans, who has come in Major Boyd's place. I think that both of them were entitled to say, "That is no proof against me that the rent has been fixed, and therefore I decline to pay a sum which I think out of proportion to the value of my subject."

But it is said that the award has been homologated. Now, if homologation took place, it only took place on the 3d of February 1881 by the

payment of the rent of £95, the sum mentioned in that document. That payment was made by Major Boyd. Now, what was the state of parties at that time? The lease which had been held by Major Boyd was no longer held by him. He had assigned it to Mr Winans, and not only did the pursuer know of the assignation, but in point of fact the defender Mr Winans had taken possession under it, I think in the end of 1880 or the beginning of 1881. So that the assignation to the lease was completed in the most formal way—that is to say, the assignation was not only known to the landlord, but possession was taken under it—and thus Major Boyd was divested, and Mr Winans was vested, in the right to the lease. Now, that being so, I am not sure that there was much necessity for any amendment of the record, or for any farther proof on the part of Mr Winans. I would be almost inclined to read the statement of the pursuer as meaning that he knew of this possession when it was taken. That, at all events, was the way in which the pursuer first read his own record. But certainly I would allow the defender, if he desires it, to prove that the pursuer not only knew of the assignation but of possession being taken under the assignation, so that the defender Boyd was divested, and the defender Winans invested, in the lease. If the defender Winans be invested in the lease, and (as I should hold even on this record) invested in the lease to the knowledge of the pursuer, the question then comes to be, how does the rent fixed by this document become the rent payable under the lease held by Mr Winans? If Lord Craighill and I and the Sheriffs are all right as to the effect of the document standing by itself, when Mr Winans was invested in the lease and Major Boyd entirely divested, there was no rent fixed at all. The document was nothing but waste-paper, and the pursuer could have had no action at all against either the one or the other upon it. But then it is said that it becomes binding on Mr Winans. How? Because Mr Boyd paid £95 to the pursuer in name of rent on the 3d of February 1881, after he had been divested of the subject. I cannot see how that can affect Mr Winans, or how it makes this a document fixing the rent under the lease. It is nothing more after all than a private agreement between the pursuer and Mr Boyd, after Mr Boyd had ceased to be tenant or to be connected in any way with the lease; and if, for example, he had said to the pursuer, "I will agree with you that the rent is to be £100 or £120," that of course, never could possibly have any effect on Mr Winans. No doubt the rent was to be fixed once for all under the lease, but then it was to be fixed in the manner pointed out and prescribed by the lease, namely, by a reference resulting in a binding award given after the matter had been remitted to the arbiters. It was not to be fixed, and could not be fixed, by an agreement between the landlord and a person who had ceased to have any connection with the subject. No doubt if Major Boyd had continued in possession he might have departed from the terms of the lease altogether, and entered into an agreement with the pursuer fixing the rent, and that would have been perfectly binding against him and his successors in the lease beyond all question. But then that is not the case. He had power to fix the rent for the lease under which he held, but he

had not the power to fix the rent for a lease under which he had ceased to hold—at least I see nothing empowering him to do so. Therefore I think that as this action is laid on the contract of lease, and that contract is not binding as regards this sum of rent on this defender, he ought to be assolized.

LORD YOUNG—I concur in the opinion of Lord Craighill, subject to the modification which I am now going to express. The action, as Lord Rutherford Clark has pointed out, is one for payment of rent, and the rent, if due at all, is due by virtue of the minute of agreement between Duncan Robertson and Major Boyd. That is an improbativ document, but possession has been had upon it for about four years, at first by Major Boyd, and subsequently—since, I think, the 27th December 1880—by Mr Winans. If any rent is due under that lease at all for the period sued for, there is no doubt whatever that Mr Winans is liable, for he has admittedly been in possession with no other title except that lease since the month of December 1880. I think that will be found to solve the case—that Winans has been in possession during the period for which the rent is sued—ever since December 1880—with no other title to possession excepting this minute of agreement.

Now, that minute of agreement does not specify the rent, but it provides the means of ascertaining what the rent shall be. The agreement is between the present pursuer, the principal tenant of the farm, and Major Boyd, the sub-tenant; and with respect to rent, it provides that the yearly "rent for the land hereby let shall be assessed or valued by two valutors, one for each of the above-named parties, with an oversman if required." The rent is to be assessed or valued by these two valutors. Then the above-named parties—that is, the tacksman and his sub-tenant—appointed a valuator for each of them by a probative deed. I should have thought that they made the appointment quite superfluously by a probative deed, for it did not appear to me, and would not have occurred to me, that in an improbativ minute of lease such as this, and upon which possession followed, stipulating that the land should be assessed or valued by two valutors—a valuator for each of the parties—any probative deed whatever was in the contemplation of the parties; nor would it have occurred to me that the case was at all different from a provision to have the price of goods sold determined by valutors chosen by the parties, or different from a provision that the price of stock taken over by an incoming from an outgoing tenant should be so fixed, or different from a provision that fences should be erected or be only repaired according to the determination of persons chosen by the parties. Probative deeds are not in the contemplation of parties in such cases, and probative deeds have not been exacted by the Court. And my own opinion is that it is a wholesome exception from the rule about probative deeds, which I take leave to think is a rule which has operated very inconveniently, and exceptions from which, for my own part, I am greatly disposed to favour. It is a rule the origin of which, and the whole sense and *rationale* of which, is a safeguard against forgery. Subscription in presence of attesting witnesses, as re-

quired by law, is neither more nor less than a legal safeguard for the genuineness of deeds, that is, against forgery; and the most significant and extensive exception from the rule is a very striking one. The exception applies to all mercantile documents whatsoever. Mercantile documents are excepted from the rule, as if safeguards against forgery were not as much required in their case as in other cases. We are quite familiar with cases in which this rule—this safeguard against forgery—has operated the most tremendous injustice, and has been invoked and applied to the effect of doing injustice, upon evidence which of necessity established the genuineness of the particular deed. For we have seen cases in which it was proved that the party executed a deed and signed it outwith the presence of the witnesses named, so that the proof that it was genuine and that it had been signed at a certain time and place was the very evidence upon which the document was set aside as of no effect, by virtue of this rule established as a safeguard against forgery.

For these reasons I am myself very favourable to the exceptions which have been recognised from time to time to the application of the rule. I should have thought that if the parties to this improbable minute of lease, upon which possession had followed, had named their valuers, although not by a probative deed, yet by an admittedly genuine nomination, and these valuers had given the value, the fixing of which had been committed to them, and given it by an admittedly genuine deliverance or valuation—I say I should have given effect to that as according to the bargain of the parties. But although in my opinion it was superfluous to have a nomination of valuers by a probative deed, I do not think that the fact that it was probative is prejudicial to the parties or subversive of the ends of justice. I have the deed before me now. It is prepared by a man of business, and regularly executed. Immediately after the signature of the parties I find these words plainly in the handwriting of one of those who subscribed it, namely—“*Inverness, 10th December 1880.*—We accept of the foregoing reference.—DUNCAN MACMILLAN. A. MACLENNAN. JOHN MUNDELL.” Are we to set that aside because it has not a testing-clause and subscribing witnesses simply upon the rule of probative deeds, or on the ground that the parties contemplated that these gentlemen should accept of the reference by a probative deed? I could not listen to that for a moment. Probably their acceptance was a superfluity altogether, but it is there, and being admittedly genuine I should hold it to be good. Immediately following these lines, and in the same handwriting, is this passage—“*Inverness, 10th December 1880.*—We, agreeably to the foregoing submission, hereby fix the yearly rent of the ground inspected by us in September last, as specified above, at Ninety-five pounds sterling (£95).—DUNCAN MACMILLAN. A. MACLENNAN. JOHN MUNDELL.” Now, that is signed by the whole three, plainly intimating, as I think, that the arbiters were agreed upon the value to be fixed as the rent of the ground, and that the oversman agreed with them in that valuation. They had all inspected the ground together, and were all of one mind. I put this to the parties in the course of the discussion, “Is there any doubt about the genuineness of the docu-

ment?” The answer was, “None in the world. We do not require any proof of that.” But what is done is this, the law of probative deeds, the safeguard against forgery, is invoked in order here to do injustice.

Now, I am for dealing fairly with the exception to the rule which I have referred to. That rule may be too strongly fixed for any rectification short of an Act of Parliament with respect to decrees-arbital upon a proper submission, which Lord Rutherford Clark agrees with the rest of us in thinking this is not; the rule, I say, requiring such a decree-arbital to be by probative deed may be too firmly fixed to be rectified otherwise than by statute, but then this Court has already decided that a valuation of goods, a valuation of fences, and a variety of things of that sort—for instance, stock taken over, and so on—is not of that character, and not within the rule. I am of opinion that it is a rational, perfectly reasonable, and certainly wholesome application of the exception, rather than the rule, to hold that it is applicable to the assessment or valuation of the rent of a shooting subject by two valuers, one chosen by each of the parties interested.

Therefore, this being admitted to be genuine, and it being admitted that the two valuers, one appointed by each of the parties, did assess and fix the rent under this missive, which has been possessed upon since 1880, I have no difficulty in the world in enforcing it. For my own part I will not listen—at all events I am not disposed to listen—to the application of the rule here as a safeguard against forgery. I am not disposed to listen to the application of that rule to aid manifest injustice—if indeed it is the case that it would do so here. At all events, I take leave to observe that there is no obstacle that I can see or conceive at this moment against this award being put in any form that the parties please. It has been held that in the case of a proper submission of a *lis*, the parties binding themselves “to implement and obey whatever the arbiter named or determined betwixt and the day of next to come,” the reference will fall unless decree-arbital is pronounced within a year and day. But there is no such clause in this nomination of valuers to fix the rent. The valuers here are well enough nominated by the only parties who could nominate them. There is no falling of the nomination by lapse of year and day, and if the question is about the probative character of their determination, it may be made as probative at this moment, for anything I can see, as any person can desire. But it would be the idlest of all idle proceedings when the parties admit that what was intended is genuinely done, and but for the matter of form altogether well done, by the document before us. I am therefore of opinion that, irrespective of all homology, this rent has been well fixed in the manner provided for by the informal lease upon which possession has been had, and that an action for a formal lease in terms of that informal one would result in a formal lease being ordered, with the rent which had been ascertained in the manner contemplated by the parties inserted in the document.

But I also agree with Lord Craighill that if the formal objection were well-founded, which I think it is not, it would not be good in the mouth of Major Boyd. He was to pay the first year's rent.

He was a party to nominating these gentlemen, and he accepted their deliverance as genuine. Moreover, he paid the amount of the award under it. What in these circumstances had the other party to do with Mr Winans? If, according to this missive of lease, which was the only title to possession, the rent was well fixed as in a question with Boyd, it was well fixed as in a question with any possessor under the lease, and if Mr Winans is not content to continue his possession upon the rent well fixed as in a question with the party from whom alone he derives his title to any possession he may go away. If he remain, the condition, in my opinion, of his remaining is that he shall pay the rent which under the only title of his possession has been well fixed as in a question with the party from whom he derived his title to possess. And so, if it is well fixed as in a question with Boyd, I could not listen to the argument that it is not well fixed as in a question with any possessor deriving right only from him.

Upon the whole matter I am of opinion that the Sheriff's judgment is right in the result, and that this rent, well fixed as in a question with Boyd, and in my opinion well fixed as in a question with anyone possessing through him, must be paid by Mr Winans as the possessing party. The judgment of the Court will be to dismiss the appeal, and with expenses.

The LORD JUSTICE-CLERK was absent.

The Court dismissed the appeal, and affirmed the judgment of the Sheriff, and found the appellant liable in expenses.

Counsel for Pursuer—Trayner—W. C. Smith.  
Agents—Gordon, Pringle, Dallas, & Co., W.S.

Counsel for Defender Boyd—Mackintosh—  
MacLennan. Agents—J. & A. Peddie & Ivory,  
W.S.

Counsel for Defender Winans (Appellant)—  
J. P. B. Robertson—Pearson. Agents—Skene,  
Edwards, & Bilton, W.S.

Friday, January 9.

## FIRST DIVISION.

[Lord Fraser, Ordinary.]

STUART GRAY v. FLEMING AND ANOTHER.

*Property—Salmon-Fishings—River—Boundaries.*

In an action brought in 1874 to determine the right to salmon-fishings in the river Tay, the Court pronounced a decree finding that the pursuer had the sole and exclusive right of salmon-fishing *ex adverso* of a piece of ground which lay to the westward of a certain shore as indicated on a plan produced. The pursuer in 1884 brought an action to give effect to this decree by having the boundaries of the fishing determined. *Held* that on account of the peculiarities of the case the ordinary rule that the boundaries of salmon-fishings *ex adverso* of land upon a river are to be fixed with reference to the *medium flum* of the river by dropping perpendiculars from the land boundaries at right angles to the *medium flum* was not applic-

able, and boundaries fixed in accordance with the report of a man of skill.

This was the sequel of the case of *Baroness Gray* against *Sir John Stewart Richardson of Pitfour and Mrs Fleming of Inchyra*, reported 14th July 1876, 3 R. 1031, 13 S.L.R. 230, *aff.* 4 R. (H. of L.) 76. In that action the Court of Session found "that the pursuer had the sole and exclusive right of salmon-fishing in the river Tay *ex adverso* of that piece of ground formerly called the Meadow Pows or Powlands of Inchyra, which lies to the westward of the shore indicated by the letter C on the plan No 79 of process . . . Find that neither of the defenders have any right of salmon-fishing *ex adverso* of the said piece of ground."

That decision was affirmed in the House of Lords.

This was an action at the instance of Edmund Archibald Stuart Gray, of Gray and Kinfauns, the successor of Baroness Gray, against Mrs Fleming of Inchyra, and her husband the Rev. Archibald Fleming, and against Sir James Thomas Stewart Richardson of Pitfour, the successor of Sir John Richardson, to have it found and declared "that the western boundary of the salmon-fishing in the river Tay belonging to the pursuer, *ex adverso* of that piece of ground formerly called the Meadow Pows, or Powlands of Inchyra, which formerly belonged to the pursuer's predecessors, and which now belongs to the defender Sir James Thomas Stewart Richardson, is a line drawn across the said river due south from the point indicated by the letter P on the plan produced, and that the eastern boundary of the said fishing is a parallel line drawn across the said river due south from the point indicated by the letter C on said plan: Or otherwise, that the western and eastern boundaries of the pursuer's said fishing are lines drawn across the said river from the points indicated on said plan by the letters P and C, or by the letters Q and C, in such direction, either due south across the said river, or at right angles to the *medium flum* thereof; or otherwise, as may be ascertained and fixed by our said Lords in the course of the process to follow hereon;" and that it should be found and declared that the defenders had no right of salmon-fishing in the river within these boundaries, or within such limits as might be fixed by the Court. There were also conclusions for interdict.

The pursuer stated that "for a number of years previous to the year 1874 the defenders Mr and Mrs Fleming and their fishing tenants had been in the practice of fishing for salmon *ex adverso* of the said Meadow Pows or Powlands of Inchyra," but that in that year Baroness Gray had raised the action which terminated in the judgment above quoted, by which the pursuer's rights to the fishings *ex adverso* of that piece of ground formerly called the Meadow Pows or Powlands of Inchyra, which lies to the westward of the stone indicated by the letter C on the plan, was established.

Mr and Mrs Fleming's answer to this was as follows—"Admitted that for a number of years previous to 1874 the defenders and their fishing tenants fished for salmon *ex adverso* of the said Meadow Pow. Explained that they did so as they believed they had the right thereto, and explained further that the said fishings *ex adverso* of the Meadow Pow are not of sufficient extent