plement the lease, which is the subject matter of the suit.

I do not think that the pursuer of such an action, which involves, and was plainly intended by him to involve, the decision of a matter of greatly more value than £25, can exclude advocation by the adoption of any particular form of action or of conclusion. The conclusions of this action are petitory, and the sum concluded for is only £12. But under these conclusions, the pursuer is trying the question as to the subsisting obligation under the lease. That question is involved in the conclusions, not incidentally, nor as a matter emerging in the course of the action, but as the matter on which the parties were at issue, and which the action, with its conclusions libelled as they are, was brought to try.

The lease as a subsisting and binding contract is the pursuer's ground of action in the present case; and therefore the action is expressly laid upon it. The question in regard to it is not merely brought forward by the defender as matter of defence, not necessarily involved in the action as laid, and which may not even have been in the knowledge of the pursuer when it was raised. If that had been the nature of the present case, it would have given rise to considerations on which it is unnecessary at present to enter, and on which I offer no opinion.

On the whole matter, I am of opinion that this cannot be held to be a cause not exceeding the value of £25, and that the advocation is therefore competent.

LORD MURE and LORD JERVISWOODE concurred.

On the merits, the Court adhered to the judgment of the Sheriff; holding that while such cases were always cases of circumstances, there was no doubt here, where the premises were in fact rendered useless, and were not restored for six weeks after the fire, that the respondents were not bound to adhere to the lease, but were entitled to look out for other premises in which to carry on their business.

Agents for Advocator—Tawse & Bonar, W.S.
Agents for Respondents—G. & H. Cairns, W.S.

Wednesday, January 13.

FIRST DIVISION.

TAYLOR *v.* DUFF'S TRUSTEES.

Landlord and Tenant—Rotation of Crops—Miscropping—Acquiescence—White Crops—Grass Crops—Pactional Rent. Held, on a proof, that a landlord had acquiesced in his tenant changing the rotation of crops from a six-shift to a five-shift, and also taking a third white crop from a certain field.

Question, Whether, apart from acquiescence, the landlord had a claim of pactional rent for miscropping, the clause of pactional rent not being in the lease but in regulations of older date, to which the lease referred, and in which a different shift was stipulated from that in the lease?

A lease stipulated the six-shift rotation, and payment to the tenant at expiry of the lease, for first and second years' grass. The rotation being, by consent, changed to five-shift, and nothing being said as to grass, *held* that the tenant was not entitled to payment for the second year's grass, the landlord being entitled to that grass free, there being under the five-shift rotation no third year's grass, as contemplated in the lease.

In this action William Taylor, sometime tenant of Floors, in the parish of Auchterless, sued the trustee of the late Garden William Duff of Hatton, for £500, 19s. 11d., alleged to be due for meliorations, and for value of way-going grain crops, and of second year's grass left on the farm.

The pursuer's lease of Floors was dated in 1847, the farm being let for 19 years from Whitsunday 1847, under the reservations and upon the conditions contained in the general regulations established by Garden Duff for the management of his lands and estates of Balquholly, Woodtoun, Oldmill, Hatton, and others, upon the 8th February 1825, so far as these regulations were not varied or departed from by the lease. The lease bound the tenant, on entering on possession of the farm, to proceed to bring the farm into a six-shift rotation of cropping, and "to have at the term of Whitsunday in each year" (after the rotation had been established), "and leave at the term of removal one-sixth part or thereby of the arable lands on the farm, in grass of the first year, sown down with the preceding grain crop after green crop; one-sixth in grass of the second year; one-sixth in grass of the third year; one-sixth in grain, broke up from three years' old grass; one-sixth in preparation for green crop or summer fallow; and one-sixth in grain, after green crop or summer fallow." The lease also bound the tenant to "leave the last or way-going grain-crop on the farm for the use of the proprietor or his in-coming tenant, to whom the same shall belong on payment of the value thereof, as the same shall be determined by the county of Aberdeen fiars' prices of grain and straw, of the year of which it may be the crop, the quantity to be ascertained according to the then existing practice of the county, and one-half of the value to be paid when the fiars are struck; and the other half at Whitsunday following;" and farther provided that the tenant should, "at the issue of this lease, be entitled to payment for first and second grass on the farm as the same shall be valued by arbiters to be mutually chosen at the term of removal, and the value thereof is thereby declared payable at Martinmas following."

By the regulations of 1825 a seven-shift rotation was stipulated, and it was provided that "in order that strict punctuality and attention may be paid to these regulations and the mode of cropping herein prescribed during the lease, each tenant shall be bound to pay the sum of £10 sterling of yearly additional rent, over and above the rents specified in the lease, for each arable Scotch acre treated or cropped differently from the mode herein laid down during the lease, so as to have the possession in a rotation in any shape different from what is here prescribed; and which additional rent is not to be considered penal but pactional, and the tenant is hereby bound to pay the same to the heritor along with the other stipulated rent for the year or years in which any alteration or deviation shall take place, with interest and penalty in case of failure." The tenant continued in possession until the issue of the lease in 1866. A dispute having then arisen between the parties, the tenant raised this action. The claim for meliorations was not insisted in.

The defenders stated certain counter claims, which they contended must be deducted from the sum sued for. They alleged that the tenant had, without the consent of the landlord, and several

years before the expiry of the lease, altered the rotation from a six-shift to a five-shift. "The adoption by the pursuer of a five-shift rotation had the result of there being no third year's grass on the farm at the expiry of the pursuer's occupation. The pursuer, on his entry to the farm, got all the third year's grass upon it without any payment. The landlord, at the expiry of the lease under a six-shift rotation, would have got 40 acres of third year's grass, free of any claim by the tenant. The pursuer having left no third year's grass, the landlord got possession of the second year's in lieu thereof." The defenders also alleged that the tenant in the last year of his lease, without any authority or consent of the landlord, but on the contrary, in the face of the landlord's refusal to consent, violated the five-shift course which he had adopted, without authority, by taking a third white crop from field No. 14 on the plan of the farm herewith produced, consisting of 12 acres 1 rood 14 poles imperial measure, equal to 9½ Scotch acres, in violation of the lease and relative regulations, and of the rules of good husbandry, thereby incurring the additional rent of £10 per acre.

The pursuer, in answer, explained, that at the commencement of the lease only about 140 acres were in a state of cultivation. The pursuer commenced shortly after that to bring into cultivation large quantities of barren ground on the farm, and at the expiry of the lease upwards of 240 acres were under the plough. The lease prescribes a six-shift rotation of cropping, but shortly after the commencement of it, it was found that this shift could not be adhered to, in consequence of the quantity of barren land that was being newly brought into cultivation, and also as the new ground, which formed a large proportion of the farm, would not keep grass for three years, as required by the six-shift rotation. The pursuer accordingly applied to the proprietor, Mr Garden Duff, the granter of the lease, for permission to change the rotation to the five-shift rotation, and this the proprietor granted. The pursuer thereafter put the farm into the five-shift rotation, and adhered to this rotation during the remainder of the lease. At least there was never any deviation from that course beyond what was necessary and incidental to the bringing of large quantities of waste land into cultivation, and adding the same to the farm. The proprietor, and his ground-officer, inspected the cultivation of the farm yearly, and the ground-officer reported on the same annually to the proprietor. No complaint was ever made about the rotation on which the farm was worked. The pursuer regularly paid the rent stipulated by the lease, and got receipts for the same, in full of all claim for rent for the different crops and years, as the lease ran on. At the time that the last portion of waste land was reclaimed, viz., about five years before the expiry of the lease, the pursuer asked the proprietor, Mr Garden William Duff, whether it would be necessary to restore the course of cropping to the six-shift rotation before the expiry of the lease, and offered to restore it. The proprietor told the pursuer that this would not be necessary. The defenders, or their author the late Mr Garden William Duff, took the farm off the pursuer's hands, without challenge as to the rotation of cropping that it was in. He also let it on lease to the present tenant on the express footing that it was on the five-course shift. He received payment from the in-coming tenant for the second year's grass, payment of which is concluded for in this action. The tenant also pleaded acquiescence with regard to field No. 14. He contended, also, that the clause of pactional rent in the regulations did not apply to the farm.

The Lord Ordinary (KINLOCH), after a proof, pronounced this interlocutor:—"Finds that the pursuer does not now insist in his claim for the sum of £44, 2s. 6d. originally claimed as the amount of meliorations, and in so far as concerns this claim, assoilzies the defenders from the conclusions of the action, and decerns: Finds it admitted that the pursuer, at the issue of his lease, left on the farm a way-going crop of the value of £501, 19s. 2d., for which the landlord was bound to make payment: But finds that the defenders plead compensation on an alleged counter claim against the pursuer in respect of miscropping: With reference to this counter-claim, finds it proved in matter of fact that by the terms of his lease, the pursuer was bound to observe a six-shift rotation of crops; but that, in the course of his possession under the said lease, the pursuer changed to a five-shift, with the assent and acquiescence of his landlord, and continued to prosecute the same, with the like assent and acquiesence, down to the termination of the lease: And finds, in point of law, that no claim on this ground lies at the instance of the defenders against the pursuer: Further, finds it proved, in matter of fact, that in the last year of his lease the pursuer took a third white crop, in immediate succession, from a portion of a field amounting to eight or nine acres, contrary to the terms of his lease; but finds that this was done with the knowledge and acquiescence of his landlord; and finds, in point of law, that no claim on this ground lies at the instance of the defenders against the pursuer: Further, finds that, by the terms of his lease, the pursuer was entitled to payment by his landlord of the value of the second year's grass left on the farm, of which the value is admitted to have been £32, 3s. 6d., and finds that no sufficient ground in point of law has been established by the defenders for this payment being refused: Finds it admitted that the pursuer is indebted to his landlord in a balance of rent amounting to £86, 13s. 11d.: Decerns and ordains the defenders, as trustees and executors of the deceased Garden William Duff, to make payment to the pursuer of the foresaid sums of £501, 19s. 2d. and £32, 3s. 6d., being together £534, 2s. 8d., under deduction of the said sum of £86, 13s. 11d., with interest on the balance of £447, 8s. 9d., at the rate of 5 per cent. per annum from Whitsunday 1867 till payment: Finds the pursuer entitled to expenses," &c.

On the question as to the second year's grass, his Lordship, in the note to his interlocutor, said: "With regard to the second year's grass, the lease contains an express clause, providing that 'the said William Taylor and his foresaids shall, at the issue of this lease, be entitled to payment for first and second grass on the farm, as the same shall be valued by arbiters to be mutually chosen at the time of removal.' The value of the second year's grass left on the farm is admitted. But the defenders contend that the stipulation is indissolubly connected with the agreement for a six-shift rotation; under which, besides the first and second year's grass to be paid for, there would also have been third year's grass left without payment; and they plead that when a five course shift was authorised, under which no third year's grass would be left, the whole stipulations connected with the six-shift rotation were abrogated, and this for payment

of the grass amongst the rest. This is an argument which proves too much, for, if well-founded, it would equally strike at the payment for the first as for the second year's grass; which, however, the defenders do not refuse. The Lord Ordinary thinks the argument an unsound one. When the rotation was, with mutual consent, changed from a six to a five shift, both parties alike knew the result, viz., that there would be no three years' grass at removal; but first and second years' grass only. So far the state of things was altered by the very fact of the rotation being changed; and both parties must be held to have acquiesced in this result with their eyes open. But nothing in the nature of the case implied that the first and second years' grass, which were still to be left, were not to be paid for as the lease provided. For aught that appears, there remained as much propriety in this payment as before. At all events, if the first and second years' grass, unquestionably to be still left, or either of them, were now to be left without payment, the parties should have so provided by distinct contract; and not have left the lease on this point to remain exactly as before. It is not pretended that on this point any direct alteration of the contract was made between them. The argument of the defenders is founded on a supposed implication from the change of the shift; which implication the Lord Ordinary cannot see necessarily to hold. They say that although the first year's grass was properly paid for, the second year's grass should be given without payment, as now coming in room of the third year's grass, which was no more to be left. This is a sort of argument to which the Lord Ordinary cannot give effect. He cannot say that he is deeply versed in the mysteries of grasses; but he thinks the law of the case very clearly to be, that whilst the obligation to leave third year's grass fell by mutual consent, the obligation to pay for first and second years' grass remained under the lease as before, being neither altered by express stipulation nor by any implication necessarily arising, and which the Court is compelled on that account to adopt."

The defenders reclaimed.

CLARK and MACDONALD for reclaimers.

GIFFORD and MAIR for respondent.

At advising—

LORD PRESIDENT—As regards the first question, I confess I have no doubt that the Lord Ordinary is right. I think there is sufficient proof of a verbal arrangement between the landlord and tenant to alter the lease, in so far as regards the prescribed rotation of cropping, from a six-shift to a five-shift rotation. This may undoubtedly be done by a verbal arrangement, although the lease is in writing, and I think it is proved that such an arrangement was made. We have the statements of the two Taylors, father and son, as to the original arrangement with the elder Duff, and its renewal with Duff the younger; and, as it seems to me, that evidence is very much confirmed by the consideration that, although the landlord had both a factor, who was a practical farmer, and a ground officer who was also a practical farmer, both going along the farms and seeing what was going on, no word of objection to the five-shift rotation has been uttered during the whole currency of the leases. Therefore I cannot help giving credit to the statement made by the tenants.

If necessary, there is another ground on which I think this part of the interlocutor may be supported, because this claim of the landlord for departure from his six-shift rotation is a claim of pactional rent, additional £10 per acre, and that depended on a clause, not of the lease, but of the regulations to which the lease refers. Now the pactional rent is to be paid in the event of a departure from the rules in the regulations, but the six-shift rotation, which the landlord says has been departed from, is not in the regulations, but instead there is something quite different. Therefore, on that ground too, I think there is no claim for pactional rent. There is no distinct reference making that pactional rent applicable to this six-shift rotation stipulated in the lease, and it will not do to import such a penal clause from one writing into another unless it appears clearly that the parties so intended.

The second question relates to alleged miscropping of some eight or nine acres forming part of field number 14. The fact alleged, and not disputed, is that the tenant took three white crops in succession from it. At first sight that is rather a startling fact, for it implies a very manifest departure from the rules of good husbandry. But then we know that such a departure is sometimes expressly permitted, and sometimes winked at, because, to a slight extent, and to bring some field more completely into the general rotation to which it is decided to subject the farm, such a departure from ordinary rules may be advisable. The question is, whether enough passed between the outgoing tenant on the one hand, and the incoming tenant and the landlord on the other, to justify the outgoing tenant in what he did as to this field. Taking the whole matter together, although it was a rather loose kind of proceeding, I cannot see my way to subject the tenant in any penal consequences for doing what is here alleged. On the contrary, while the younger Taylor may have gone about it in rather an adroit way, I still think he was, on the whole, sufficiently excused by the arrangement he made for this departure. And therefore I agree with the Lord Ordinary.

But the remaining question stands in a different position, and involves consideration of very great importance to landlords and tenants.

It must be assumed here that there was an arrangement between the landlord and the tenant to alter the rotation of cropping from the six-shift to the five-shift rotation, and that it was made loosely by verbal arrangement, without any consideration of the different clauses of the lease bearing on the rotation of crops. Now the lease, by prescribing the six-shift rotation, prescribes that there shall always be three-sixths, that is one-half, of the farm in grass. The total extent of the farm was 240 acres, and thus there would have been at the termination of the lease 120 acres in pasture; one-third of that—being one-sixth of the entire farm—would be first year's grass; one-third would be second year's grass, and one-third would be third year's grass. Now, according to the clause of the lease which provides that the tenant is to be entitled to payment for the first and second year's grass at the termination of the lease, he would then have been entitled to payment for 40 acres of first year's grass, and 40 acres of second years' grass, and he would have left 40 acres of third year's grass to the landlord or incoming tenant, without payment. I think I may say that no one ever heard of a lease where the landlord was not to get some grass at the termination of the lease without paying for it. Now it is obvious that this clause as to payment of first and second years'

grass is applicable to the six-shift rotation. But it is a clause totally inapplicable to the five-shift rotation on this farm. Applying that rotation to the 240 acres, and dividing the farm into fifths, one-fifth is 48 acres. Now, at the end of the five years, if 48 acres are in first year's grass, and 48 in second year's grass, then the landlord would have 96 acres only in grass in place of one hundred-and-twenty under the six-shift rotation, and would, according to the tenant's view, have to pay for the whole, and would not get the grass free at all. That would be rather an extraordinary result. But consider what the result would be in a lease with the five-shift rotation, without any clause as to payment for grass at all. The result would be that, there being 48 acres of first year's grass, and 48 acres of second year's grass, the law would give the tenant payment for the 48 acres of first year's grass, and would give the other 48 acres free to the landlord; and the question is whether, when the landlord and tenant, by verbal contract, agreed that the six-shift should be converted into the five-shift rotation, they did, by implication, stipulate that the arrangement for taking over the grass at the termination of the lease should be that applicable to a five-shift instead of a six-shift rotation? I have no doubt on that point. I think the claim thus made by the tenant is manifestly unjust on his part, and clearly contrary to the good faith of the parties. Therefore I cannot agree with the Lord Ordinary on this point.

Lord Deas concurred.

Lord Ardmillan concurred, although he was not satisfied that the clause of pactional rent contained in the regulations was not applicable to the lease of 1847, stipulating the six-shift rotation.

Lord Kinloch concurred in the first two questions, inclining to agree with Lord Ardmillan as to the application of the clause of pactional rent, though he had preferred to rest his judgment on the evidence of acquiescence. On the third point he had difficulty in concurring, although he did not dissent.

Agent for Pursuer—James Finlay, S.S.C.

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

Wednesday, January 13.

SECOND DIVISION.

DYKES & SON *v.* ROY.

Reference—Award—Probative—Excess of Powers—Homolgation—Res mercatoria. Circumstances in which *held* that an award resulting in a compromise between the parties of the matter referred to the arbitor had been homologated, and was moreover not in excess of the powers of the arbiter.

Opinion, per Lord Cowan and Lord Neaves, that the reference having been informal, the award was not liable to objection on the ground of informality, it being priviledged as in *re mercatoria.*

This was an appeal from the Sheriff-court of Aberdeenshire of an interlocutor pronounced by the Sheriff-substitute (Comrie Thomson), allowing a proof in a case in which the appellants were pursuers. In 1867 the appellants had sold to the respondent 300 quarters of seed, the price of which was to be paid six months after the date of sale, and the seed was in the meantime to lie with the sellers. The seed was sold by sample. About the time of payment the respondent, Roy, wrote to the appellants asking for a bulk sample, which was forwarded. Roy then objected that the bulk sample was disconform to the sale sample—that the seed was dirty and mixed with goose grass. After some correspondence, the parties agreed to refer the matter to Mr Edgar, seed merchant, Edinburgh.

The reference was merely made by letters holograph of the parties. Mr Edgar, after examining the samples, wrote a letter to the parties intimating his decision to be that there was a slight disconformity in the samples, and that the grass tendered was in some respects inferior to the grass sold. He thought, however, that this was no sufficent reason why Mr Roy should not take delivery; and he decided that he should do so on the seed being put through the machine of the appellants.

Some correspondence followed upon this award, the appellants maintaining that it was an award in their favour, while Mr Roy contended that nothing had been referred to Mr Edgar but the question of alleged disconformity between the sale and the bulk sample. In the end the appellants raised an action for the price of the seed.

A record having been made up, the Sheriff-substitute pronounced the judgment appealed from. The Sheriff-substitute was of opinion that, apart from the improbativeness of the award, which was neither holograph nor tested, it was *ultra vires* of the referee to make such a compromise between the parties.

The pursuers appealed, with a view to jury trial.

Gifford and Gebbie for appellants.

Mackintosh for respondent.

The Court recalled the interlocutor of the Sheriff-substitute, and decerned in terms of the conclusions of the summons. The judgment was rested on these grounds—(1) that the award had been homologated; (2) that it was in favour of the pursuers; (3) that the referee had not exceeded his powers. Lord Cowan and Lord Neaves were further of opinion that the award, apart from the question of its probativeness, was valid, because the reference itself was informal, and was privileged in respect it was *in re mercatoria.*

It is worthy of note in this case that the interlocutor of the Sheriff-substitute was pronounced on the 11th of December, that the appeal was sent to the roll on the 6th of January, and was finally disposed of on the 13th.

Agent for Appellants—M. Macgregor, S.S.C.

Agents for Respondent—Renton & Gray, S.S.C.

Wednesday, January 13.

FIRST DIVISION.

DE VIRTE *v.* MACLEOD.

Husband and Wife—Foreign Law—Assignation—Personal Bar. Assignation of an annuity, granted by a married woman, wife of a domiciled Italian, without her husband's consent, *held,* on opinion of Italian counsel, to be invalid. The assignation being invalid, *held* that the granter was not barred from pleading its invalidity by certain representations alleged to have been made by her to the effect that she could validly assign without her husband's consent.

In 1844 Roderick Macleod of Cadboll, by an indenture in the English form, settled upon his