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SECOND DIVISION.

[Scottish Land Court.

DUFF-DUNBAR'S TRUSTEES

v. WARES.

Lease—Writ—Rei interventus—Document in Landlord's Books Purporting to be Copy Lease Unsigned but Bearing Tenant's Mark—Specific Agreement in Writing—Crofters' Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29), sec. 8.

The Crofters' Holdings (Scotland) Act 1886, section 8, enacts—"When a crofter renounces his tenancy . . . he shall be entitled to compensation for any permanent improvements, provided that . . . (c) The improvements have not been executed in virtue of any specific agreement in writing under which the crofter was bound to execute such improvements."

A document engrossed in a landlord's books bore to be a copy of a lease, which was unsigned and only bore the tenant's mark. The lease bound the tenant to execute certain improvements and to pay rent at a certain varying rate. These improvements had been duly executed and the rent paid as stipulated in the lease. In an application to the Land Court by the existing tenant, who was a descendant of the original holder, to fix the amount of compensation due to him in respect of these improvements on his quitting the holding, *held* (1) that the document in the landlord's books could competently be founded on as evidence of the lease, and that the lease though unsigned was sufficient to form a basis for *rei interventus*; (2) that the lease thus set up was a "specific agreement in writing" in the sense of the Crofters' Holdings (Scotland) Act 1886, section 8 (c), so as to exclude the tenant's claim for compensation.

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The Crofters' Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29), section 8, is quoted *supra in rubric*.

Mrs Jane Louisa Duff or Duff-Dunbar and others, trustees of the deceased Garden Duff-Dunbar of Hempriggs, Wick, *appellants*, being dissatisfied with a decision of the Scottish Land Court in an application at the instance of James Wares, Wick, *respondent*, for an order fixing the amount of compensation to which he was entitled in respect of improvements executed or paid for by him, or his predecessors in the same family, on the holding at Hempriggs Row, near Wick, occupied by him as a landholder under the appellants until Whitsunday 1917, applied for a Case for the opinion of the Court.

The Case stated—"3. The holding had been occupied by David Wares, the applicant's grandfather, at least from 1816 until his death sometime prior to 1830. He was succeeded by his widow, and subsequently by his son Donald Wares, the applicant's father. On Donald Wares' death, about twenty-seven years ago, the said James Wares became tenant and occupied the holding till the date of his removal before mentioned. 4. The claim for compensation was originally stated at £171, 13s. 1d., but was by subsequent amendment increased to £223, 18s. 1d. The claim included sums alleged to be due in respect of (1) dwelling-house built on the holding, (2) reclamation from heather of the whole extent of the holding, and (3) the cutting of a ditch 4 feet wide and 3 feet deep across the holding. It was proved that these improvements had been effected by the applicant or his predecessors. The appellants maintained that items 1 and 3 above mentioned, and part of item 2 to the extent of about 14 acres, were improvements executed by the applicant's grandfather in virtue of a specific agreement in writing under which he was bound to execute said improvements, and that the applicant was therefore not entitled to claim compensation therefor under the terms of section 8 of the Crofters Act 1886. 5. In support of this contention the appellants

NO. I.

produced what purported to be a copy of a lease granted in favour of the applicant's grandfather, bearing to be dated 20th December 1819. No original lease has been produced, but a volume belonging to the proprietor and containing copies of estate leases and other documents is produced and founded on. The copy of the alleged lease is inserted in this volume at about the place it would naturally occupy in chronological order according to its date. It is not signed by the landlord or anyone representing him, and bears to be executed by the applicant's grandfather David Wares by his having adhibited his mark before two witnesses, David Angus and William Murray. No place of execution is stated, the witnesses are not designed, and there is no testing clause or notarial docquet. . . . The position and construction of the dwelling-house and ditch for which compensation is claimed comply with the requirements with reference thereto specified in the said copy lease. [The lease further provided for the payment of rent according to three specific rates—the first year at £7, 4s., the next three years at £10, 15s. 10d., and the remainder of the term at £14, 8s.] 6. The application was delegated by the Land Court to Mr Morrison, and on 8th June 1918 a hearing took place before him at Wick, at which proof was led. The subjects were inspected by Mr Morrison on 11th June 1918. On 4th July 1918 Mr Morrison issued an order in the following terms:—'*Edinburgh, 4th July 1918.*—The Land Court having considered the evidence adduced and inspected the subjects in respect of which compensation is claimed, Find that the applicant is entitled to compensation for improvements executed or paid for by him or his predecessors in the same family under and in terms of sections 8 and 10 of the Act of 1886, in so far as the said improvements are suitable to the holding and have not been executed in virtue of any specific agreement in writing under which he was bound to execute the same: Assess the compensation to which the applicant is so entitled at the sum of £121 sterling, as representing the value of such improvements to an incoming tenant: Ordain the respondent to make payment to the applicant of the said sum, and decern. . . .—E. E. MORRISON.' 7. The landlords appealed against this decision to the full Court, and the appeal was heard on 14th October 1918. No further oral evidence was adduced by either party, but the landlords produced three estate rentals for the years 1816-17, 1830-31, and 1834-35, which had been discovered since the previous hearing, and each of which contains an entry specifying the rent of the holding. The earliest of these rentals is prior to the date of the execution of the alleged lease, and the entry shows the said David Wares as being then tenant. The two later rentals are subsequent to the death of David Wares during the tenancy of his widow. These rentals show the rents of the holding to have been as follows:—1816-17, £7, 4s.; 1830-31 and 1834-35, £14, 8s. 8. On 30th November 1918 a final order in the following terms was pronounced by the Court:—'*Edinburgh, 30th November*

1918.—The Land Court having resumed consideration of the application and heard parties, refuse the appeal and affirm the order appealed against.—DAVID ANDERSON. E. E. MORRISON. NORMAN REID. W. BARBER.' The Appeal Court held that the alleged lease not having been signed nor legally executed by the parties could not be founded on as evidence of a specific agreement in writing, and compensation was awarded on the footing that no such specific agreement existed. They did not find it necessary to decide whether if the alleged lease were set up as a document capable of being founded on a unilateral deed could be held to constitute an agreement in writing, or whether on a sound construction of its terms it could be interpreted as containing an agreement which was specific."

In a note appended to their order the Land Court, *inter alia*, gave the following reasons for their decision:—"1. The document founded on is admittedly a copy, but it is engrossed in a volume belonging to the landlord, who would be its natural custodian, and the volume is apparently an estate record containing similar documents all executed at or about the same time. In view of the authorities cited by Professor Rankine (*Leases*, p. 125), we would not consider this objection in itself fatal to the possibility of using it as a foundation for the *rei interventus* if sufficient facts and circumstances were proved to satisfy the plea. . . . 3. The most difficult question arises from the fact that the copy shows that the original document did not bear the signature of David Wares, but was executed by him by adhibiting his mark before two witnesses. There is very little authority on the question whether a document executed by mark can be made the foundation of *rei interventus*. It seems to be settled apart from a question of *rei interventus* that a deed executed by mark is of no effect except under certain circumstances in the case of documents *in re mercatoria*—*Erskine*, iii. 2, 8, and 26; *Dickson on Evidence*, section 672. It has been so held with reference to documents of a testamentary nature—*Crosbie v. Wilson*, 3 Macph. 870; *Stirling Stewart v. Crawford's Trustees*, 12 R. 610, 22 S.L.R. 391; *Morton v. French*, 1908 S.C. 171, 45 S.L.R. 126. Most of the cases where an exception has been allowed to meet the case of documents *in re mercatoria* deal with bills of exchange. In such cases the mere existence of a mark alone will not be held sufficient, but in general 'there must appear on the face of the instrument sufficient legal evidence that the writing was signed before witnesses'—*L. J.-C. Boyle in Stewart v. Russell*, F.C., 11th July 1815—although this does not appear to be indispensable. If the mark is not admitted, proof has been allowed to clear up the matter, including evidence that the person could not write and was in use so to subscribe—*Kennedy v. Watson*, F.C., 25th May 1816; see also *Din v. Gillies*, referred to in note to *Weirs*, F.C., 22nd June 1813; *Craigie v. Scobie*, 10 S. 510.

"The case of *Graham v. M'Leod*, 11 D. 173, does not fall within either of these categories. It was a suspension of a charge on

a decree for aliment, in which it was averred that a discharge of the sums contained therein had been granted by the pursuer in a document signed by her mark before two witnesses. The authenticity of the alleged mark was denied, but facts and circumstances were averred which it was alleged showed that the discharge had been acted on, and a plea of *rei interventus* was set up. Lord Jeffrey in disposing of the case said—'*Rei interventus* is only available to supply want of form or regular authentication, and can never be founded on where there is no admitted subscription'; and his judgment was affirmed in the Inner House, when the Lord Justice-Clerk observed—'I do not think this is a legal document at all. There is one mode, and one alone, of authenticating a document when the party cannot write.' There is in this case no admitted subscription, and the transaction does not fall within the category of cases *in re mercatoria*. We therefore feel bound to follow that decision, and to hold there is here no legal document upon which *rei interventus* even if sufficient facts and circumstances were proved could have been founded to set up the alleged lease. We are therefore of opinion that the objection taken by the respondents that there was a specific agreement in writing in terms of which the applicant's predecessor was bound to make these improvements has not been made out."

The question of law stated in the Case was as follows:—"Was the Land Court right in holding that the document contained in the volume of estate leases, &c., and printed in the appendix, could not competently be founded on as evidence."

The following additional question of law was by agreement added at the hearing in the Inner House:—" (2) On the assumption that the first question is answered in the negative, does the copy of the lease in the estate lease book embody 'a specific agreement in writing' within the meaning of section 8 of the Crofters' Holdings (Scotland) Act 1886?"

Argued for the appellants—Any document, even estate regulations or advertisements, might be looked at to found *rei interventus*. Further, it was not necessary that the writing should be subscribed by the parties. The case of *Graham v. M'Leod*, 1848, 11 D. 173, founded on by the respondents was an altogether different case, and Lord Jeffrey's dictum in that case if meant to lay down the law was negatived by many other cases—*Campbell v. M'Lean*, 1870, 8 Macph. (H.L.) 40, 7 S.L.R. 448; *Bathie v. Lord Wharnduffe*, 1873, 11 Macph. 490, 10 S.L.R. 308; *Wight v. Newton*, 1911 S.C. 762, 48 S.L.R. 637; *M'Moran v. Black*, 1924, M. 17,012; *Craigie v. Scobie*, 1832, 10 Sh. 510. In the last case Lord Meadowbank charged the jury that it could be inferred from facts and circumstances that the signature had been adhibited. In the whole circumstances there was set up in the present case a document sufficient to constitute a lease. If that were so, then this document answered the requirements of "specific agreement in writing" in the Crofters'

Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29), section 8.

Argued for the respondent—There must be some writ on which *rei interventus* could follow. A document without a signature, and which could not be connected with the party against whom it was to be used, could not afford such a foundation. There was no doubt of the inefficacy of a document signed by a mark unless brought into relation with the person who adhibited the mark—*Graham v. M'Leod*; *Morton v. French*, 1908 S.C. 171, 45 S.L.R. 126. *Rei interventus* barred *locus pœnitentiæ*, but it must be *pœnitentia* of some writ. Appellants in the present case were attempting to make a writ by reference to subsequent actings. In any event this was not a "specific agreement in writing" in the sense of the Crofters' Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29), section 8. "Specific agreement in writing" could only mean an agreement constituted by writing. The present was not such an agreement, but only an adminicle of evidence. Leases validated by *rei interventus* were not agreements in writing, but leases in which writing was used only *in modum probationis*—*Earl of Dalhousie v. Crockat*, 1868, 6 Macph. 659; *Walker v. Flint*, 1863, 1 Macph. 417; Bell's Prin., sections 1187 and 1189. The entry in the landlord's books was in the same position as to evidence as a reference to oath would have been. An imperfect document, followed by *rei interventus*, could never be a specific agreement in writing, which required to be an operative document in the sense used by Lord Kyllachy in *Paterson v. Paterson*, 1897, 25 R. 144, at p. 146, 35 S.L.R. 150.

LORD JUSTICE-CLERK—In this case the only question submitted to us originally was whether the Land Court were right in holding that the document contained in the volume of estate leases, &c., could not competently be founded on as evidence. The facts are that there was a document, purporting to be a copy of a lease and containing all the essentials of a lease, found in the estate lease book, but it was not signed in accordance with the requirements of the law in respect that it only bore the tenant's mark—the words "David Wares his mark"—which was attested by two witnesses. Manifestly that was not a lease which in any sense of the term could be regarded as in itself valid in point of law. But the facts which have been disclosed show that all the requirements set out in the document, particularly those as to the erection of a dwelling-house, the cutting of a trench of a particular size across the whole holding, and the payment of rent according to three specific rates—the first year at a certain rate, the next three years at a higher rate, and the remainder of the term at a still higher rate—have been observed.

The argument founded upon by the landlord was that this was a written lease which had been validated by *rei interventus*, and that accordingly it fell within the terms of the statute, which excluded claims of compensation where the improvements had

been executed in terms of any specific agreement in writing. The first point therefore which we have to consider is whether the Land Court were right in holding that they could not accept that document as one which could be founded upon as evidence in any way whatever, even to the extent of supporting a case of *rei interventus*. I am of opinion that this was a document, which, if sufficient *rei interventus* followed upon it, was validated and binding upon all concerned.

But the Court below found in their reading of the case of *Graham v. M'Leod* (11 D. 173) what they regarded as sufficient authority to entitle them to say that even in a question of *rei interventus* a document like this is not a legal document at all. When the case of *Graham v. M'Leod* is examined I do not think that the observations of Lord Jeffrey founded on by the Land Court bear out what was said in the Land Court. Quoted in full what his Lordship said was this—“*Rei interventus* is only available to supply want of form or regular authentication, and can never be founded on when there is no admitted subscription, and where the payment or other proceeding is positively averred to have had no reference to, or connection with, the improbate and disavowed writing, which it is alleged to make effectual. In this case the writing makes no mention of any payment either made or agreed to be made.” I do not desire to express any opinion contrary to the judgment in *Graham v. M'Leod*. All I say is that it seems to me that the judgment does not in the least affect the question we have here to consider. To read the case as the respondent does, and as the Land Court did, would be to disregard many decisions that have been given to the contrary effect for a period extending from the eighteenth century down to the present day. I think the document here in question contains all the requirements, which, in the circumstances of this case, are sufficient to make it a perfectly good basis for *rei interventus*, and that accordingly the question ought to be answered by us in the negative, to the effect that the Land Court were not right in holding that the document could not competently be founded upon as evidence.

But then at the suggestion of the Court the parties agreed that it would be unfortunate if this case were sent back to the Land Court, to have our judgment applied, with the chance of the decision which the Land Court gave upon that point being brought up here on a second appeal, and accordingly at the request of the parties we allowed this second question to be added to the case—namely, “If the first question is answered in the negative, does the copy of the lease in the estate lease book embody a specific agreement in writing within the meaning of section 8 of the statute?” Upon that question I really do not have any doubt either. I think the effect of *rei interventus* is simply this, that if you have a document which is in itself improbate and therefore not complete, and if there has followed upon it sufficient

rei interventus, then that would complete the document so as to make it a valid and binding agreement upon both parties. I think the law has been so stated both in the text books and in the cases to which we have been referred.

Accordingly where you find that the very improvements with which we are here concerned were carried out precisely in terms of this document, where the rent was paid exactly in terms of it, and where the landholder's holding was possessed in terms of it, I think that the document, although informal and not solemnly executed at the time it was delivered, was by *rei interventus* perfected so that the objections to it were taken away, and that it is in law to be regarded as a perfectly good and valid written document. I am therefore of opinion that the second question, which has been added by the parties since the case came before us, should be answered in the affirmative.

LORD DUNDAS—I am of the same opinion. It seems to me that the Land Court have erred in point of law. The ground of their decision seems to have been that inasmuch as the document here in question bears no admitted subscription, therefore it must follow that it cannot be a basis for *rei interventus*. With that view I am unable to concur. There are a great many cases in the books, a sufficient number of which were brought to our attention, where documents bearing no signature at all were held to have been perfected by *rei interventus*. As regards the case of *Graham v. M'Leod* (11 D. 173), which seems to have wrought strongly with the Land Court, I concur with your Lordship in the chair. I gravely doubt whether Lord Jeffrey intended to lay down as a general proposition that *rei interventus* can never validate a document which is unsigned. I rather believe that he meant no such thing, but if he did so mean, then I must say with all respect that his Lordship's *obiter dictum* is in my judgment erroneous. I think, therefore, that the first question must be answered in the negative, and that the Land Court was not right in holding that the document could not competently be founded upon as evidence.

As regards the other question, I agree in thinking that we should answer it in the affirmative. It appears to me that the case falls under the third sub-section of the eighth section of the Crofters Act, which in terms is made part of the Act of 1911. Mr Valentine would have it that a “specific agreement in writing,” to quote the words of the sub-section, could not include the case of an imperfect writing perfected by *rei interventus*. That seems to me to be saying in other words that a specific agreement in writing must be a probative written agreement, and for that I can see no warrant. It appears to me that the document here in question is no less an agreement in writing because it was imperfect if it has been perfected, as I think it has been, by *rei interventus*. I agree with your Lordship in thinking that the close correspondence between the terms specifically prescribed by the document in question and the works

actually carried out by the respondent's ancestors makes it impossible to reject the conclusion that *rei interventus* followed upon the imperfect lease.

LORD SALVESEN—I concur. The whole matter in controversy arises on the construction of the words "any specific agreement in writing." Are these words to be construed as confined to a probative agreement in writing as Mr Valentine contended, or as including an agreement in writing which is not probative but which has been validated and made as effective as if it had been probative by *rei interventus*? I have no difficulty in answering this question as your Lordship in the chair has done.

I only note further that the Land Court in their decision have taken the case on the same footing as if the original of this document had been in the possession of the parties, and did not lay stress upon the fact that it was only a copy. I concur in their view that when you are dealing with a document a hundred years old the mode in which the copy has been preserved is very material, and when, as here, one finds a copy engrossed in a book belonging to the landlord in the place it would naturally occupy in chronological order (which would make it evidence against him) substantially the copy is as good as the original.

LORD GUTHRIE—I concur with your Lordships in thinking that the Land Court's view of the law as regards the admissibility as evidence of the document in question is not accurate. On the second point I think there was here a specific agreement in writing, imperfect no doubt when made, but perfected by *rei interventus*.

The Court answered the first question in the negative and the second question in the affirmative.

Counsel for the Appellants—C. H. Brown, K.C.—Fleming. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Respondent—Mitchell—Valentine. Agents—Robert Stewart & Scott, S.S.C.

Wednesday, July 16.

FIRST DIVISION.

[Lord Hunter, Ordinary.]

AINSLIE v. LEITH DOCK COMMISSIONERS.

Reparation—Master and Servant—Negligence—Liability of Master for Fault of his Servant Working for Another.

The docks and their equipment, including the cranes upon the piers, belonged at the harbour of Leith to certain Commissioners. In unloading vessels the practice was for the stevedore employed by the ship to hire a crane from the Commissioners, who made charge therefor and provided a man to work the crane. The craneman was

engaged, paid, and dismissed by the Commissioners, and the stevedore was entitled to give directions to the crane-man to raise or lower the load or to slew the crane round, *quoad ultra* the stevedore had no control over the crane-man.

Stevedores were discharging a ship by means of a crane hired from the Commissioners and worked by a crane-man of theirs. In the course of unloading the crane-man instead of raising a load clear over the ship's side on to the pier swung it across the ship, hitting an employee of the stevedores and precipitating him into the hold. He sustained injuries which were fatal. In an action of damages by the representatives of the injured man against the Commissioners, held that at the time of the accident the crane-man was not a servant of the stevedores but was a servant of the Commissioners, who were liable for his fault.

Cairns v. Clyde Navigation Trustees, 1898, 25 R. 1021, 35 S.L.R. 808, followed.

Donovan v. Laing and Construction Syndicate, [1893], 1 Q.B. 629, distinguished.

Mrs Jane Kerr or Ainslie and Georgina Ross Ainslie, the widow and daughter respectively of the deceased Robert Ainslie, *pursuers*, brought an action against the Commissioners for the Harbour and Docks of Leith, *defenders*, concluding for decree in favour of the pursuer first named for damages of £1000, and in favour of the pursuer second named for damages of £500, in respect of the death of Robert Ainslie.

The facts of the case were—Robert Ainslie was employed as a stevedore's labourer with Young & Leslie, stevedores, Leith. On 25th July 1918 while in that employment he was engaged with other men in unloading battens from the s.s. "Hurons," which was lying in the Imperial Dock, Leith. A chain was passed round a bundle of battens in the hold and was fastened by a hook to the ship's winch, which lifted the bundle from the hold on to the combings of the hatch. The bundle was then attached to a chain from a crane standing upon the pier, by which it was lifted over the ship's side on to the quay. The docks and equipment thereof were the property of the defenders. It was necessary for the stevedores to provide themselves with a crane to unload the ship, and it was the invariable practice at the Leith Docks to hire one of the cranes belonging to the defenders, who imposed certain rates and charges for the hire. The sum paid covered the use of the crane and the crane-man. The crane-man was employed and paid by the defenders and was engaged and dismissed by them. When not employed at cranes hired out he was controlled by the defenders. On the occasion in question the crane-man, while a bundle of battens was being lifted from the ship to the quay, swung the jib of the crane towards the ship so that the battens instead of being swung clear over the ship's side swung over the ship and struck Robert Ainslie, causing