was of a conditional constitution. The respondent was only to pay what he could, and this he had done. Further, the respondent had abandoned his actions, and the pursuer had gone on with them at his own risk. In the circumstances the oath was plainly negative of the reference, as the Sheriffs had held.

At advising—

LORD PRESIDENT—This case having been referred to the oath of the defender, the question is, what is the true meaning of the defender's deposition? Now, the defender admits that the pursuer acted as law-agent for him in two actions, and did the business shown in the account sued for. He says that at the commencement an arrangement was made between him and the pursuer—"(Q) Were you to pay no money at all?—(A) I said I would give you what I actually could."

The main question is, what is the legal result of that arrangement? I do not agree in the view of the Sheriffs. The words of the deposition import that the pursuer was to be remunerated by the defender, and the remaining question is, what is the effect of the qualification that the amount is measured by the ability of the defender. Now, the cases cited by the pursuer seem in point, and they settle that such words do not set up any limit to the liability other than the whole means of the person undertaking.

This, then, being the legal meaning of the words which I have quoted, I do not think their effect is abated by the words, "I understood you were carrying it" (*i.e.*, the case) "on as a speculation." This is not, like the words I have commented on, a statement of the bargain made, but a conjecture of the defender as to the pursuer's estimate of the comparative values of the liability of the defender and the liability of his opponent in the litigation in the event of success. Nor can I adopt the suggestion of the defender that the deposition imports that he terminated the employment of the pursuer. The words founded on are too vague to support this contention, the proposition being the substantive one that there was a cesser of an employment sworn to as having commenced. I am therefore of opinion that the oath is affirmative, and that the pursuer must have decree.

LORD ADAM—I concur with your Lordship. I have only to add with reference to the documents which have been printed, and to which we were referred in the course of the debate, that I think they cannot be looked at. The oath must be construed by itself, and without any reference to these documents.

LORD M'LAREN—I concur. I wish only to add a word with regard to a point noticed by Lord Adam—the competency of referring to the correspondence which is printed in this case. There is a good deal of law in previous cases upon the question how far writings may be made available for the construction of an oath of reference, but it seems to me that consistently with all that has been laid down in the decisions the rule is, and ought to be, exactly the same as the rule which regulates the use which may be made of one document which is referred to in another document for purposes of construction. The rule is, that you can only make use of the writing referred to for the purpose for which it is referred to in the principal writing. Accordingly, where a deponent under a reference to his oath has referred to his letters as containing his answer to an interrogatory, you are entitled to look at the whole correspondence as part of the evidence in answer to the particular question, but you are not entitled to look at it as contradicting or illustrative of his evidence upon any other point regarding which he has made no reference to the correspondence.

LORD KINNEAR—I am of the same opinion. I entirely agree with your Lordship. With reference to the point to which Lord Adam and Lord M'Laren have referred, I think the law is very clearly laid down by the late Lord President in *Gordon* v. *Pratt*, February 24, 1860, 22 D. 903, where he says—"It is not difficult to make writings available in an examination on reference if what is necessary is done—that is, placing the writings in the hands of the deponer and interrogating him in reference to them, his answers to which interrogatories are part of the evidence. But all that is evidence is what the deponer says on his oath."

The Court sustained the appeal and found the oath affirmative of the reference.

Counsel for the Pursuer and Appellant—M'Lennan—M'Laren. Agent—Party.

Counsel for the Defender and Respondent—Guy. Agents—Wishart & Macnaughton, W.S.

Saturday, June 11.

FIRST DIVISION.

[Sheriff-Substitute of Perthshire.

RATTRAY *v.* YEAMAN (LESLIE'S TRUSTEE).

Landlord and Tenant—Lease—Alteration of Written Lease—Proof—Return to Valuation Roll.

A landlord having allowed a tenant a reduction on the rent stipulated in his lease for the years 1885 and 1886, returned the reduced rent to the valuation roll for the years 1887 to 1889. In the year 1890 the tenant's estates were sequestrated, and at the date of the sequestration part of the rent for crop 1888 and the whole of the rent for crop 1889 was in arrear.

Held that the return to the valuation roll was not sufficient proof that the written lease had been departed from,

and that the landlord was entitled to rank for the arrears of rent due under the lease.

By lease dated in September 1867 Lieutenant-General James Clerk Rattray of Craighall, let the farm of Thorn, in the county of Perth, to James Leslie for 19 years from Martinmas 1871, at the yearly rent of £650.

In 1886 General Rattray's agents wrote to Leslie informing him that General Rattray had decided to allow him a reduction of £100 on his rent for crop and year 1885, and a similar intimation was again made to Leslie in 1887 with regard to the rent for the crop of 1886.

In 1890 Leslie's estates were sequestrated, and John Graham was appointed trustee in the sequestration. General Rattray lodged two claims in the sequestration. He claimed (1) to rank for the balance still due for crop 1888 of the full rent of £650 stipulated in the lease, and (2) to rank preferably for the full amount of the rent as stipulated in the lease for crop 1889, for payment and in security of which rent the Sheriff-Substitute of Perth had sequestrated the tenant's stock and crop on 6th December 1889.

It appeared from a letter from the Assessor of Perth, written in reply to a letter from the trustee, "that the rent of Thorn farm was returned reduced in May 1887 for year 1887-88, and the reduced rent was continued for 1888-89 and 1889-90."

On 15th April 1892 the trustee issued the following deliverance—"1. Preferable claim for rent—In respect that an abatement of £100 per annum was from 1886 allowed on the rent mentioned in the lease, and that the reduced rent of £550 was returned to the valuation roll on behalf of the landlord and by his authority as the rent of the farm, the trustee rejects this claim to the extent of £100 and admits the balance. 2. Claim for rent—For the reason above stated the trustee rejects the claim to the extent of £100."

Against this deliverance General Rattray appealed to the Sheriff of Perthshire, and on 6th May 1892 the Sheriff-Substitute (GRAHAME) dismissed the appeal and adhered to the deliverance of the trustee.

General Rattray appealed to the Court of Session, and argued—To justify his decision, the trustee was bound to show that the appellant had come under an obligation to his tenant to grant the abatement of rent, and such an alteration on the written contract of lease could only be proved by the writ or oath of the appellant. The valuation roll was made up entirely for purposes of assessment, and the fact that the reduced rent had been returned for the purposes of the valuation roll was not sufficient proof that the landlord had come under any obligation to grant the abatement of £100. He might have been ready to accept the reduced rent, though not under any obligation to do so—*Menzies* v. *Assessor for County of Perth*, June 19, 1889, 16 R. 805; *Emslie* v. *Duff*, July 2, 1865, 3 Macph. 854.

Argued for the respondent—It was possible to prove that parties had agreed to modify a written contract by proving that they had transacted with one another on the footing that the contract had been so modified—*Baillie* v. *Fraser*, June 14, 1853, 15 D. 747. There was here sufficient proof that the landlord had agreed to grant the reduction of rent. If, however, the Court thought the proof insufficient, the case should be remitted to the trustee for further inquiry.

At advising—

LORD PRESIDENT—In the view I take the case divides itself into two parts in consequence of the decree of 6th December 1889 which was granted by the Sheriff-Substitute of Perthshire in an ordinary process of sequestration and payment. It appears to me that when that decree was produced to the trustee his duty was to give effect to it and to rank the appellant in terms of his claim.

The question as to the appellant's other claim is left over, and the first point to be determined is, whether the Sheriff's judgment should stand. I am clearly of opinion that it should not, because the Sheriff holds that the rent stipulated in the lease had been reduced to a smaller rent. Now, the lease is the writ of the parties, and there must be competent evidence that it was departed from. The Sheriff, apparently resting merely on the letter of the assessor, held that it had. The letter is in itself no evidence of such departure, but when we look at its terms we find that the case made is, that because in the words of the assessor the rent of the farm was returned at a reduced figure, it must be held as proved against the landlord that the stipulation in the lease had been departed from. The case of *Emslie* v. *Duff* does not import that the mere return made to the assessor is conclusive against the landlord. In that case the landlord returned the farm as let on a nineteen years' lease, and not content with making this return, he wrote to the assessor saying that all his tenants were tenants on nineteen years' leases. In these circumstances it was held that the duration of the lease was proved by the writ of the landlord, but the opinions of the judges indicate that they must not be held as laying down any absolute law as to the validity and effect of returns made to the assessor in questions of this kind. It appears to me that this case has been wrongly decided by the Sheriff, because there is no proof that the stipulations of the lease have been departed from, and I think that it would be inappropriate to send the case back to the Sheriff to direct the trustee to call for further evidence, as the evidence before us may be taken to be the whole evidence in the case.

LORD ADAM concurred.

LORD M'LAREN—If the appellant had come here asking that the case should be investigated by his writ or oath, the proper course might have been to remit the case back to the trustee, but in the

course of the argument both parties have admitted that the whole evidence is before us. I agree that the bare fact that a lower rent than that stipulated in the lease appears in the valuation roll is not sufficient to prove that the parties had concluded a different contract from that which appears on the face of the lease, and in the absence of other evidence I agree that the landlord is entitled to rank for the arrears of the rents due to him under the stipulations of the lease.

LORD KINNEAR—I agree entirely with your Lordships, and think the trustee has made no sufficient statement to justify us in remitting the cause back to him. If it had been said that he had now discovered evidence which was not previously before him, that would be a different case, but we have no statement of any specific piece of evidence which would make the case different from what it was when it was previously before him.

The Court recalled the judgment of the Sheriff, and remitted to him to direct the trustee to rank the appellant for the arrears of rent due to him under the lease.

Counsel for Appellant—Craigie. Agents—J. & F. Anderson, W.S.

Counsel for Trustee—Law. Agent—John Rhind, S.S.C.

Thursday June 16.

SECOND DIVISION.

[Lord Low, Ordinary.

MAVOR & COULSON *v.* GRIERSON.

Expenses—Expenses of Process—Tender—Reasonable Conduct of Defender.

A firm of electric contractors raised an action against a person whose house they had lighted with electricity, for £169, 0s. 7d., the balance of their account. After the summons had been signeted, but before it was called, the defender offered the pursuers £155 in full of their claims. This offer was refused. In the defences to the action the defender tendered the pursuers £50 "in full of their claims in this action." The Court in decerning against the defender for payment to the pursuers of £44, 13s. 1d., *held* that the defender was entitled to expenses of process.

In May 1890 Messrs Mavor & Coulson, electric light engineers and contractors, Glasgow, entered into a contract with Henry Grierson, Craigend Park, Liberton, to light his house by electricity at the cost of £1100. This sum was exclusive of mason and joiner work in the engine and battery-house, foundations for engine and dynamo, and of fittings.

The accounts rendered by Messrs Mavor & Coulson for the value of goods supplied and work done amounted to £1471, 14s. 9d. Of this amount Mr Grierson paid £1302, 14s. 2d. in successive payments, the last of which was made on 11th December 1890. Mr Grierson refused to pay the balance of the account until he had inspected the items with Messrs Mavor & Coulson, and got explanations from them, as he held that the work had not been executed in terms of the contract, that it had not been carried out in a satisfactory and workmanlike way, and that part of it was still unfinished.

After a long correspondence between the parties, Messrs Mavor & Coulson raised an action against Mr Grierson for the payment of £169, 0s. 7d., the balance of their account. The summons was signeted on 22nd May 1891.

On 24th June 1891 the defender made an offer of £155 in full of the pursuers' claim. This offer the pursuers refused to accept.

On 15th July 1891 the defender offered to pay the pursuers the whole amount sued for if they would satisfy him that there were 150 electric lights in his house as charged for in the account. The pursuers on 30th July sent to the defender a list showing 150 lights. On 6th August the defender wrote the pursuers stating that an expert had informed him that 18 more lights were charged for than really existed, and asking for an explanation. The only reply to this was a letter dated 11th August 1891 from the pursuers' agents that the pursuers had instructed them to call the summons on the first box-day.

The defender lodged defences, in which he made the following tender—"In order to avoid litigation the defender tenders to the pursuers the sum of £50 in full of their claims in this action."

A proof followed, and on 14th April 1892 the Lord Ordinary (LOW) decerned against the defender for payment to the pursuers of the sum of £128, 4s. 2d. with interest, and found the defender liable in expenses, subject to modification.

The defender reclaimed, and on 16th May the Court recalled the interlocutor of the Lord Ordinary and decerned against the defender for payment to the pursuer of the sum of £44, 13s. 1d.

Counsel were then heard on the question of expenses.

Argued for the pursuers—No expenses should be awarded to the defender. His extrajudicial offer of £155 had not been repeated on record, and therefore could not be looked at, while the offer of £50 in the defences was not accompanied by a tender of expenses down to date, and was therefore of no avail in a question of expenses—*Critchley* v. *Campbell*, February 1, 1884, 11 R. 475; *Gunn* v. *Hunter*, February 17, 1886, 13 R. 573.

Argued for the defender—The Court was entitled to act according to their discretion in the matter of expenses. They could look at the reasonable or unreasonable conduct of the parties to the action and award expenses accordingly — Lord President M'Neill's opinion in *Aitchison* v. *Steven*, November 24, 1864, 3 R. 82. The cases