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