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

daughter Margaret Macleod an annuity of £20, to be paid to her half-yearly during her life. In 1849 Margaret Macleod was married to the Baron de Virte, then and now resident in Italy. The contract of marriage provided that, "with respect to her dowry, the aforesaid Miss Macleod being of an age to contract obligations, declares herself the possessor of the sum of 7000 scudi in specie, and 300 scudi in personal property, consisting of dress, linen, ornaments of gold, and other female attire which constitutes her marriage outfit, appraised and valued at 300 scudi, with the full approval of her future spouse, Signor Virte, acknowledges having received the objects of this outfit valued at 300 scudi. and undertakes to preserve and keep both dowry and outfit, and to restitute both in case the marriage holds good or is hereafter broken according to the prescribed legal forms. The dowry in money, amounting to 7000 scudi, consists of the lady's capital both in the Bank of London and thro' credits to her account in Tuscany, and is by clear compact assigned by her to be paid to her husband on his offering all due legal guarantees for its preservation. Meanwhile her said spouse, pending the payment and investment of the said dowry of 7000 scudi, is entitled to draw interest thereon at five per cent, in consideration of the claims and demands of the matrimonial status, and until this payment is effected the lady remains free administratrix of the said capital. Every other possession beyond the said dowry of 7000 scudi belonging to the lady is to be always considered as independent of her dowry, and therefore in her full disposal and management." The annuity in question did not form part of the 7000 scudi. The Baroness now brought this action against R. B. Æ. Macleod of Cadboll, eldest son of Roderick Macleod, and liable in fulfilment of the obligation in the indenture, for payment of the annuity.

The defender relied upon a document signed by the pursuer in 1864, which ran thus:—"When I am put in full possession of the money due to me from Bruce, I agree to pay to my brother Henry the sum of £50 as a compensation for his trouble and various expenses incurred on my behalf, and as soon as I am in possession of half the sum, and regular payments begun, I then give up to him the annuity of £20 that I enjoy, for the exchange of the Devonshire estates. MARGARET DE VIRTE."

The defender stated that he had purchased the annuity from Henry Dunning Macleod, mentioned in the document. He alleged that "By the law of Tuscany, of the kingdom of Italy, and of France, as well as of this country, the whole rights of the Baron, of what nature soever. including any rights of administration he might have had in or to the property, funds, or estate of the Baroness, were excluded, and her whole rights of every description with respect to the same were reserved to her entire in the same way as if she had continued unmarried. The annuity in question formed no part of the said dowry; Throughout the whole period during which the said marriage has subsisted the said Baroness de Virte has represented and held herself out as a person entitled to act, and, in point of fact, she has during the whole of the said period acted with reference to her property, funds, and estate, upon the footing of her whole rights thereto of every description being reserved to herself, in the same manner as if she had continued unmarried, and of her said husband having no right either of administration or otherwise in or to the said property, funds, or estate. The said Baron de Virte was well aware that his wife so regularly held herself out as entitled to act, and did act, with reference to her propery, funds, and estate, upon the footing of his having no right of administration, or otherwise, therein, and he did not object to her doing so, but, on the contrary, permitted her so to do, and allowed other parties to deal with her upon this footing."

He alleged further that the pursuer, when she employed H. D. Macleod to act for her in some matters, and promised to him the said remuneration, expressly stated to him that her husband's rights were excluded by the said marriage-contract which she then exhibited to him, as also that she had full power to deal with her whole funds and estate, and contract in relation thereto, without the consent or intervention of her said husband.

The defender pleaded that there was a valid assignation, or at least a valid obligation to assign, and further, that "the pursuers are, and each of them is, bound by the said document of assignation or obligation, and barred from repudiating the same, in respect that—(1) Under her marriage-contract the Baroness de Virte is entitled by the law of Tuscany, and of the kingdom of Italy, as well as of France and of this country, to deal with her property and estates in the same way as if she were unmarried; (2) or, at least, with the knowledge and acquiescence of the other pursuer, she held herself out as entitled so to act, and did so act with reference thereto; (3) the pursuers accepted and took benefit by the services rendered by the said Henry Dunning Macleod, in reliance and on the faith of the said assignation or obligation; (4) the said assignation or obligation was onerous, and was granted for full value in the services rendered by the said Henry Dunning Macleod."

An opinion was obtained from Italian counsel, to the effect that the assignation was null, being executed by the pursuer, wife of a domiciled Italian, without consent of her husband.

The Lord Ordinary pronounced an interlocutor finding that the document pleaded by the defender "does not constitute an assignation and obligation to assign valid and effectual in law, in respect that by the law of Italy foresaid, and in which country the pursuer, the Baroness de Virte, the granter of the said document, had then her domicile, and to which law she, as the spouse of the Baron de Virte, a domiciled Italian, was and is subject, the said granter, the pursuer, could not validly or effectually grant the said alleged assignation, which, under the said law, is, without the assent and authority of her husband thereto, a nullity; and, with reference to the preceding finding, repels the defences, and decerns in terms of the conclusions of the summons."

The defender reclaimed, and contended that the pursuer was barred from pleading the nullity of the assignation.

BALFOUR (CLARK with him) for reclaimer.

WATSON and HALL, for respondent, were not called on.

At advising—

LORD PRESIDENT.—The question in this case is whether, when this lady comes to sue for her annuity, she can be held to be barred from insisting in her right to it by the allegation, if made out in fact, which appears in the defender's statement of facts. They appear to me to amount to this, that this lady herself represented to her brother, an English barrister, that she had power to dispose of this annuity without the consent of

her husband. There are other general and vague averments that the husband was aware that his wife held herself out as entitled to act on that footing. That is too general an averment as the foundation, or even part of the foundation, of a plea of bar. But suppose we take that in connection with what is said to have been done. We are told that this lady stated to her brother that she was in a position to assign to him without the consent of her husband; and her brother, being an English lawyer, says he took on himself to read and construe for himself the marriage settlement by which her rights were determined, going on her assurance as to the law of Tuscany, and his own judgment as to the meaning of the marriage-contract, and on that footing being satisfied that his sister could assign. That is not a good foundation for a plea in bar. If this lady could not assign without the consent of her husband, it follows that the representations which she made were as incapable of rearing up any obligation against her as the assignation itself.

This case has been likened to that of a minor approaching majority, who represents that he is major, and on that footing induces parties to contract with him. There is no resemblance between the cases, because in the case of a minor there is a plain misapprehension of fact, which must be assumed to be caused for the purpose of deceit, and no man, even though a minor, and therefore in many ways specially under the protection of the law, can take advantage of his own deceit for getting the better of them. But that case is entirely different from the case where the invalidity of a deed arises from the incapacity of a married woman to contract without the consent of her husband, and I arrive without any difficulty at the conclusion that the allegations here are insufficient to sustain the defence.

Lord Deas—I am clearly of the same opinion. This assignation is challenged on the ground that it is invalid without the consent of the husband. Admittedly the question must be governed by the law of Tuscany. That law has been ascertained, and by it the deed is invalid, not having the consent of the husband. All that is stated against that conclusion is the vague averment in the second statement by the defender, that the wife was in the habit of acting as if her husband had no right of administration or otherwise in her estate, and that the husband knew that his wife so acted. There is no averment of that sort with reference to this particular assignation; but that is of no importance, for whether she made these representations or no, or whether she made them in good or bad faith, the result is the same, that these representations are no more binding than the writing which they are said to validate. It is not said that that question depends on the law of Tuscany. If that were maintained, then there must have been an averment of the law of Tuscany on that point. There is no such averment, and we must therefore assume that it is immaterial which law we apply.

Lord Ardmillan—I am of the same opinion. It is said that at the date of this assignation the granter was a married woman residing in Italy; that her husband did not consent to it; and that by the law of Italy his consent was necessary. We have ascertained that that statement of the foreign law is correct. But the defender answers that there is a plea in bar which arises for the determination of the Scotch Court, namely, that in respect of the conduct of the lady and the representation which she made, she cannot maintain her plea against the deed. I agree in the view stated by the reclaimer, that that plea is one for this Court to dispose of, and that it does not fall under the rule which applies to the plea of invalidity of the deed. But the question being one of Scotch law, I agree in holding that the plea of bar is not well founded.

Lord Kinloch—I am of the same opinion. The determination of this case depends on the question whether there is or is not a valid assignation of the annuity. All the parties admit that this question must be determined by the foreign law; and we have the opinion of a foreign lawyer that the deed is invalid for want of the husband's consent.

But it is said that this lady represented that the assignation could be validly made, and is therefore personally barred from maintaining its invalidity. It is not said that she made that representation fraudulently, or in order to take advantage of any one. For anything in the defender's averments, the representation was made *bona fide;* and that consideration might itself go far to exclude the plea of personal bar. But I agree that, in any view, the plea cannot be sustained; for it simply comes to this, that she who could not validly grant an assignation could validly contract that a good assignation should be granted. It appears to me that she was as much excluded from making such a contract without her husband's consent, as she was barred from making the assignation itself. The one proposition seems necessarily involved in the other. I am therefore of opinion that the plea of personal bar cannot be given effect to.

Agent for Pursuer—Wm. Mitchell, S.S.C.
Agent for Defender—Colin Mackenzie, W.S.

Thursday, January 14.

FERGUSON *v.* ROBERTSON AND OTHERS.

Trust—Testamentary Trustees — Guardian—Discretionary Power— Custody of Pupil — Factor loco tutoris—Expenses. Where trustees are empowered by the truster to fix what part of the income of the trust-estate shall be appropriated for the maintenance and education of the child or children of the marriage, the Court will not interfere with the exercise of that discretion by the trustees unless they abuse the power vested in them.

The late David Ferguson, by his marriage-contract, and by a subsequent deed, assigned certain funds to trustees, declaring, *inter alia*, that it should be lawful for them, after the death of the survivor of himself and his wife, "to apply any part of the yearly or other income of the share or shares to which my minor or unmarried child or children of the said intended marriage shall be presumptively entitled in the trust-premises for his, her, or their maintenance and education, until such, his, her or their, share or shares shall become vested, or he, she, or they shall die, with power for the said trustees or trustee, in their or his discretion, to pay the monies so intended for maintenance and education to the guardian or guardians of the person or persons for whose maintenance and education the same is intended, for the purpose of being so applied; and the surplus income (if any) shall be invested by the said trustees or trustee, in their or his names or name, in or upon any of the funds,