Substitute was not entitled to consider any legal point or plea which was not set forth in the written note of objections which was lodged. That, as it appears to me, is just an invitation to us to review the judgment of the Sheriff upon each vote, and the objection on the ground of excess of jurisdiction comes to this, that while the vote in question was objected to on grounds which were stated, the ground to which the Sheriff-Substitute gave effect was not specifically set forth, although it arose *ex facie* of the voucher produced. I think the Sheriff was within his jurisdiction in so proceeding, and that we ought therefore to refuse the appeal as incompetent.

LORD ADAM—I agree. I do not think *Farquharson's* case the same as the present. If the Sheriff had sustained an objection to a vote not objected to, that would have been a different matter, but he has not done so.

LORD KINNEAR—I am entirely of the same opinion. I think the case of *Farquharson*, 15 R. 759, is not in point. In that case the Sheriff refused to exercise the jurisdiction given him by the statute, because he declined, on a ground that had not been pleaded, to examine a number of votes, and the vouchers tendered in their support, and therefore the Court called upon him to perform his statutory functions and examine these votes and vouchers. In the present case the Sheriff seems to me to have done exactly what he was bound to do, for he has considered the objections raised, and has decided upon them. It is suggested that he has gone beyond his jurisdiction, because he has disposed of an objection on a ground not stated to him. The objection is to the amount of a creditor's claim, and is rested on the ground that part of the claim is sought to be vouched by a bill which has suffered the sexennial prescription. It was answered that prescription had been elided by a holograph acknowledgment endorsed on the bill. To that it was replied that the acknowledgment did not set up the bill, because it did not prove its own date, and the Sheriff decided that it did not set up the bill because it did not prove itself to be holograph. Whether that was right or wrong, it was certainly a decision of the question submitted to him for his judgment, viz., whether the bill, together with the acknowledgment, was or was not a good voucher, and it appears to me of no consequence whether in so deciding he proceeded on grounds that were stated in argument or on grounds that occurred to himself.

But then it is said that the ground of the Sheriff's decision is contradicted by an admission made by the objectors. It is unnecessary to consider whether the judgment would have been set aside if it had proceeded on a ground of fact which was contrary to what was stated by one party and admitted by the other, because in this case the supposed admission does not appear to me to be an admission in fact at all. What the objector says is that the acknowledgment "being holograph" does not prove its own date. Now, it is not the fact of its being holograph which prevents the document from proving its own date, but the fact that it is not tested, and the objection seems to me to mean no more than this—that assuming the document to be holograph, it is ineffectual for the reasons stated. Whether the objection is well founded or not it is not for us to consider, because I do not think it doubtful that the Sheriff has decided the question on grounds which were competently before him.

LORD M'LAREN was absent.

The Court dismissed the appeal as incompetent.

Counsel for the Appellant—W. C. Smith—A. S. D. Thomson. Agent—T. Temple Muir, S.S.C.

Counsel for the Respondent — Gunn. Agents—Whigham & Cowan, S.S.C.

Friday, February 5.

FIRST DIVISION.

[Sheriff of Banff.

IRVINE *v.* M'HARDY.

Writ — Assignation — Notarial Docquet — Holograph—Conveyancing Act 1874, *secs.* 39 *and* 41.

An assignation signed for a person unable to write by a justice of the peace and two witnesses *held* invalid in respect that the notarial docquet attached to the deed was not in the handwriting of the justice of the peace.

The Conveyancing (Scotland) Act 1874 (37 and 38 Victoria, cap. 94), sec. 3, enacts—"No deed, instrument, or writing, subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on, or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses."

Section 41 enacts—"Without prejudice to the present law and practice, any deed, instrument, or writing, whether relating to land or not, may, after having been read over

to the granter, be validly executed on behalf of such granter, who from any cause, whether permanent or temporary, is unable to write, by one notary-public or justice of the peace subscribing the same for him in his presence and by his authority, without the ceremony of touching the pen, all before two witnesses, and the docquet there to shall set forth that the granter of the deed authorised the execution thereof, and that the same had been read over to him in presence of the witnesses."

By an alleged assignation, dated 19th March 1891, Charles M'Intosh, Lowend, Tomintoul, assigned to George M'Hardy, merchant there, a lease, dated July 1824, by which the Duke of Gordon let to M'Intosh's author a piece of ground or tenement in Tomintoul, for a period of one hundred and fourteen years from Whitsunday 1825. As M'Intosh was unable to write from bodily weakness the assignation bore to be executed notarially, but the docquet appended to the deed, though signed by a justice of the peace in the presence of two witnesses, was not in the handwriting of the justice.

By assignation, dated 14th April 1891, Charles M'Intosh assigned to George Irvine, Knockandhu, Glenlivet, the foresaid lease. This assignation was also notarially executed, and the docquet was holograph of the notary-public who subscribed it.

In May 1891 George Irvine raised an action in the Sheriff Court of Aberdeen, Kincardine, and Banff, at Banff, against Charles M'Intosh and George M'Hardy, praying the Court to find and declare that the pursuer had the exclusive right to the said lease, and to grant warrant to eject the defenders from the subjects contained in it, and to interdict them from interfering with the pursuer's occupation and possession thereof.

The pursuer pleaded, *inter alia*—"(1) The pursuer being in the right of said lease is entitled to the declaration prayed for. (2) The defender George M'Hardy having groundlessly and unwarrantably claimed right to enter upon the said subjects, and the defender Charles M'Intosh having refused to quit the same, the pursuer is entitled to decree of ejection and interdict as craved."

George M'Hardy lodged defences in which he pleaded, *inter alia*—"(2) The defender George M'Hardy being in right of the original lease of the subjects in virtue of an assignation duly intimated and completed prior to the date of the assignation founded on by the pursuer, is entitled to decree of absolvitor, with expenses. (3) The assignation in favour of the defender George M'Hardy, though informally executed, may be set up in terms of section 39 of the Conveyancing Act (37 and 38 Vict. c. 94), and the defender George M'Hardy is entitled to have it set up accordingly."

On 23rd July 1891 the Sheriff-Substitute (J. P. GRANT) pronounced the following interlocutor:—"Finds in fact that the docquet appended to No. 8 of process is not holograph of John Grant, the justice of the peace executing the same, and in law that the said writ No. 8 of process is not executed in terms of law, and of no force or effect: Therefore repels the third plea-in-law for the said defender, and sustains the first and second pleas-in-law for the pursuer, and therefore finds and declares, decerns ejection against the defenders as prayed for, and declares the interim interdict already granted perpetual, and decerns."

"*Note.*—In this case two separate deeds are produced, one in favour of the pursuer Irvine, and one in favour of the defender M'Hardy, each purporting to be an assignation by the defender M'Intosh (who does not appear) of a lease of the same heritable subjects in Tomintoul. The question to be decided is between Irvine and M'Hardy, who is to be found entitled to the possession of these subjects. Each claims that M'Intosh gave only him a good title.

"At the debate parties' agents were agreed that the defender's writ, being prior in date of execution and of intimation to the landlord to the corresponding writ of the pursuer, other things being equal, would prevail; and the only point taken by the pursuer was that the defender's writ was not executed in terms of law, and was therefore to be held as not executed at all.

"The objection taken is that the docquet by the justice of the peace who signs on behalf of the granter, is not holograph of the justice, and that this is absolutely essential—*Henry* v. *Reid*, 9 Macph. 503. To this the defender replies, that while he admits the docquet not to be holograph, yet that under the provisions of section 39 of the Conveyancing (Scotland) Act 1874, which is subsequent in date to the case of *Henry*, he is now entitled to set up the deed by proof. The question therefore only is, whether the provisions of that section apply to the docquet of a justice of the peace signing on behalf and by authority of the granter of a deed.

"I think it might be held, without straining the ordinary use of the words, that the justice of the peace is the 'maker' of such a docquet, and that the docquet is a 'writing,' and even that it may be separately regarded as a 'writing,' by itself if that were necessary; and it bears to be attested by two witnesses. But the difficulty to my mind is in applying the words of the section to the defect which its remedial provisions were devised to cure. Is this an 'informality of execution?' It was very forcibly put to me by Mr Watson that the defect here was not a mere informality of execution, but an intrinsic nullity in the deed which shows it never to have been executed at all.

"It may be observed that the docquet in point of form is admitted by both parties to be good enough—*Aitchison's Trustees*, 1876, 3 R. 388.

"After full consideration I give effect to the pursuer's objection for these reasons. The point settled in *Henry's* case, where all the authorities are reviewed, is clear, and the ground on which that judgment, following on these authorities, proceeds, is also clear. It is the exceptional position of a notary's docquet in these cases, as is fully

set forth in the opinions of the learned Judges, and, as far as I can see, that ground is as cogent now as it was then. The docquet is a solemn record by a public officer (now he may be a justice of the peace, formerly he could only be a notary, but that does not affect the argument) of certain concurring facts and circumstances; and the witnesses to the docquet are not merely witnesses to that officer's signature, but also to the truth of his record. Then, what is it that the defender asks to be allowed to prove in this case? I can only take it that he wants to prove what is necessary to make the docquet a good docquet—the truth of what it bears record of; but the 39th section of the Conveyancing (Scotland) Act 1874, on which he founds, contemplates no more than the proof that the writing in question was subscribed by the maker and witnesses, which, if proved in this case, would still leave him short of what is necessary to maintain his position. There are strong considerations of public policy against weakening any of the safeguards provided against an abuse of the power of notarial subscription on behalf of another party. I cannot find warrant for the course the defender proposes to take, which tends in this direction, under the section of the statute on which he founds, for from its language I do not take it to be applicable to the present case. And in conclusion I am glad to think that there is less occasion for the defender in the present case to complain of hardship, because we have not here, as in all the previous cases, so far as I am aware, a competition between the heir *ex lege* and a person who claims *ex provisione hominis*, but between two competing deeds of the same granter, and there is room for the presumption that the deed unexceptionally executed truly represents his matured intentions."

The defender George M'Hardy appealed to the Sheriff (GUTHRIE SMITH), who on 5th November dismissed the appeal and affirmed the interlocutor appealed against.

The defender appealed to the First Division of the Court of Session, and argued—(1) Under section 41 of the Conveyancing Act of 1874 the docquet signed by a justice of the peace did not require to be holograph. The justice of the peace had nothing to look to but this section, which enacted that he must subscribe the docquet, but not that the docquet was to be in his handwriting. The Act professed to curtail the technicalities of the law, and must receive a liberal construction. This was a mere formality of execution, and was impliedly dispensed with under the Act—*M'Laren* v. *Menzies*, July 20, 1876, 3 R. 1151, Lord Gifford's opinion, 1166. The case of *Henry* v. *Reid*, February 10, 1871, 9 Macph. 503, was decided before the Act of 1874 was passed, and therefore had no bearing on the present case. (2) Even if the docquet ought to have been holograph, it could be set up by proof under section 39 of the Conveyancing Act. Though the docquet was not in the handwriting of the Justice of the Peace that was a mere informality of execution, and all objections to it on that ground were denied effect under section 39—*Gardener* v. *Lucas*, February 8, 1878, 5 R. 638.

Argued for the pursuer—(1) The opening words of section 41 showed that the former law still applied except where a definite change had been made by the statute. The necessity of the docquet being holograph had not been dispensed with, and the law remained as laid down in *Henry* v. *Reid;* opinion of Lord Deas in *Aitchison's Trustees* v. *Aitchison*, January 21, 1876, 3 R. 393. (2) Section 39, on the face of it, plainly did not apply to notarial docquets at all, as the notary or justice of the peace was not the granter or maker of the deed. In *Henry* v. *Reid* it was decided that the docquet was part of the notary's subscription. The assignation founded on by the defender was therefore invalid.

At advising—

LORD PRESIDENT—I think that the judgment of the Sheriffs is right. The Sheriff-Substitute finds in fact that the docquet appended to the assignation held by the defender is not holograph of the Justice of the Peace executing the same, and in law that the said writ is not executed in terms of law, and is of no force and effect. Now, the question that first arises is, what was the law prior to the Conveyancing Act of 1874? On that subject the case of *Henry* v. *Reid* leaves no doubt that the docquet of the notary to deeds executed before the date of the Act requires to be holograph, and unless it is so the deed has no force. The authorities as stated in the Sheriff-Substitute's note are clear, and it is unnecessary to enter further into the matter.

To turn to the Conveyancing Act of 1874, there are two sections, viz., 41 and 39, which are founded on by the appellant. As to section 41, it is said that it does away with the necessity of the docquet being holograph. That section makes two changes—(1) it enables one notary or justice of the peace to take the place of two notaries, and thus gives considerable facilities to notarial subscription, and (2) it alters the form of the docquet. The question therefore arises, is any further change implied? Does the docquet not still require to be holograph? In the cases cited all the Judges assume the high importance of the docquet as a part of the instrument, and the Lord President in the case of *Henry* remarked—"The legal equivalent for the subscription of a person physically incapable of signing his own name is not merely the notary's signature, which would be a very imperfect security for compliance with the requirements of the law, but the notary's docquet signed by him and the witnesses in attestation of the special mandate conferred by the granter of the deed." I put the question, is that remark applicable to the docquet introduced by the Act of 1874? I think it is, and if so, the reason remains for requiring that the docquet should be holograph. The fact that two alterations were made by the Act does not imply a further relaxation of the law, nay,

rather, it points to the necessity of resisting further infringements of its execution, and Mr Morison said with much plausibility that the opening words of this section bore on the face of them that such was the meaning of the Act. Section 49 therefore does not apply.

As to section 39 the appellant is in a dilemma. If he says "the deed, instrument, or writing" is the docquet, a decree finding that it is subscribed by the Justice of the Peace would not advance him one inch. He would have it declared—which is not disputed—that the docquet was not holograph, but that would not do his assignation one bit of good. If, however, the appellant says that the assignation is "the deed, instrument, or writing," he is put out of Court by the words "subscribed by the granter or maker thereof." This deed is not subscribed by the granter or maker thereof.

This appeal must therefore be dismissed.

LORD ADAM—The question in this case is whether a certain assignation is valid, an objection having been taken to it on the ground that the docquet of the justice of the peace requires to be holograph? The question therefore comes to be, whether or not a notarial docquet requires to be holograph? Previous to the Conveyancing Act of 1874 it was authoritatively settled that the docquet required to be holograph, and we have only to consider what is the effect of the changes in the law in regard to the matter introduced by the clauses of the Act of 1874. The changes introduced by section 41 are that all deeds whether relating to land or not may now be executed notarially, that one notary or a justice of the peace, or in the case of testamentary writings the minister of the parish, may now act in place of two notaries, that the ceremony of touching the pen is no longer necessary, and that the deed must be read over before execution to the granter in presence of the witnesses. I agree with Mr Morison that the opening words of section 41 show that these changes were only in part introduced, and were introduced without prejudice to the present law and practice. If the alterations specified had the effect of taking away the necessity of the docquet being holograph, such a result would be very much to the prejudice of the existing law. I do not think that the changes introduced had any such effect.

Section 39 appears to me to have no application to the question before us. If the docquet of the notary no longer requires to be holograph, there could be no objection to a deed having a docquet in the form prescribed by the Act whether the docquet was written by the person subscribing or not. If, however, the docquet does require to be holograph, that it is so is essential to the validity of the deed.

The whole case therefore turns on whether or not the docquet requires to be holograph. I have no hesitation in agreeing that the judgment of the Sheriffs is right.

LORD KINNEAR—I also concur. The reasons supporting the judgment of the Sheriff-Substitute are all fully referred to in his note. I agree with him and also with what your Lordship has said, and therefore think it unnecessary to add anything further.

LORD M'LAREN was absent.

The Court dismissed the appeal and found in terms of the judgment of the Sheriff-Substitute.

Counsel for the Pursuer—Young—Morrison. Agent—D. Howard Smith, S.S.C.

Counsel for the Defender — Morison. Agent—Alexander Morison, S.S.C.

Friday, February 5.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

M'DUFF *v.* BALFOUR.

Lease—Construction—Application of Stipulations to New System of Farming.

The tenant of a farm under a lease for a term of years was bound to leave to the proprietor the dung made after the 15th of June immediately before the expiry, at a price to be fixed by arbitration, the lease requiring that all dung made previously should be applied to the lands. It was also stipulated that the tenant should consume all the straw grown on the farm annually for manure, and apply such manure to the lands yearly. The district in which the farm was situated was not a wheat growing one, and the green crop was the only crop to which manure was applied, the custom which prevailed at the date of the lease being to consume the bulk of the straw crop in the cattle courts during the winter—reserving only what was required for the minor uses of the farm during summer—and to apply the manure so made to the next year's green crop. In the course of the lease the tenant adopted a new system of management. He kept cattle in the courts in summer as well as in winter, and made a considerable part of the straw crop into manure during the summer months, with the result that he left on the farm at the end of the lease an amount of manure, made after the immediately preceding 15th of June, which was quite abnormal for the district.

In an action by the tenant to compel the proprietor to pay for this manure, *held* (1) that the obligations laid on the tenant by the lease were (*a*) to consume one year's straw crop before the next was ingathered, and (*b*) to apply all the manure made after June 15th to the green crop of the following year; and therefore (2) that the proprietor was bound to pay for the manure left on the