

Counsel for Pursuers—Salvesen—Constable. Agents—Wallace & Pennell, W.S.

Counsel for Defenders—Sol.-Gen. Dickson—Clyde. Agent—Richard Johnstone, S.S.C.

Saturday, January 23.

FIRST DIVISION.
NISBET, PETITIONER.

Writ—Authentication—Proof of Improbative Will—Attestation—Conveyancing Act 1874 (37 and 38 Vict. cap. 94), sec. 39.

A person died leaving a will and codicil, partly printed and partly written, bearing to be subscribed by herself and attested by two witnesses, whose designations were neither contained in the will and codicil nor appended to their signatures. The executor appointed by the said will and codicil presented a petition under sec. 39 of the Conveyancing Act 1874, craving a proof, and thereafter to have it declared that the deed was subscribed by the grantor and witnesses. The Court allowed a proof by commission, and thereafter found and declared as craved.

This was a petition presented, under section 39 of the Conveyancing (Scotland) Act 1874, by Robert Nisbet, executor of the deceased Miss Agnes Nisbet, Glasgow. The petition stated that Miss Agnes Nisbet died on 6th January 1896, leaving, among other testamentary writings, a will and codicil dated 26th November 1892; that the said will and codicil were subscribed by Miss Agnes Nisbet, and bore to be attested by William Barton, and Dorothea S. Kerr; and that the designations of the said witnesses were not contained in the will and codicil, nor appended to their signatures.

The petition further stated that the said will and codicil were prepared on the instructions of Miss Agnes Nisbet by Mr William Meikle, Actuary of the Glasgow Savings Bank; that the will was partly written and partly printed, the printed part being a form supplied by the said Bank, and the written form being in Mr Meikle's handwriting, with the exception of the date in the testing clause, which was in the handwriting of Dr David Smith, Glasgow, and that the codicil was also written by Mr Meikle, with the exception of the date, which was written by Dr David Smith.

The prayer was in these terms—"To allow the petitioner a proof of the averments contained in this petition, and thereafter to declare that the will and codicil above mentioned were subscribed by the said Agnes Nisbet, the grantor or maker thereof, and by the said William Barton and the said Dorothea Stewart or Kerr, the witnesses by whom the said will and codicil bear to be attested."

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 39, enacts that

' No deed, instrument, or writing subscribed by the grantor 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 grantor 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 grantor or maker and witnesses."

On 16th December 1896 the Court allowed the petitioner a proof of the averments contained in the petition, that the will and codicil mentioned and founded on therein were written, subscribed, and witnessed by the persons, and as mentioned in the petition; and granted diligence at the instance of the petitioner against witnesses and havers; and granted commission for their examination to Professor Moir, Glasgow.

The import of the proof thus allowed, and as reported by the Commissioner, was that the will and codicil had been signed and subscribed and averred.

The petitioner cited *Addison, &c.*, February 23, 1875, 2 R. 457, and argued that in terms of sec. 39 of the Conveyancing Act of 1874 the petition should be granted. It made no difference that the will was partly printed and partly written. [LORD KINNEAR referred to sec. 149 of the Titles to Land Consolidation Act 1868 (31 and 32 Vict. cap. 101).]

LORD ADAM—I think this petition should be granted. In my opinion the petitioner has discharged the burden placed upon him by the latter clause of the 39th section of the Conveyancing Act 1874, and has proved that the deed was subscribed by the grantor and witnesses by whom it bears to be subscribed. That is all the statute requires of him.

LORD M'LAREN—I agree with Lord Adam. In calling attention to the fact that the deed was partly written and partly printed I did not intend to support any doubt that such a deed was valid if authenticated by two instrumentary witnesses, but of course it is always right to look at the statutory enactments when such a difficulty occurs.

LORD KINNEAR—I am of the same opinion. We are not at present called upon to express any opinion as to the legal effect of the instrument where it has been so far set up, as the declaration which Mr Aitken asks for will set it up. At the same time, as the question has been mooted, I do not think it out of place to say, that, so far as I see, there probably would have been a question

under the Titles to Lands Acts of 1858 and 1868, which the petitioner desires to remove by proceeding under the Act of 1874. Whether it has been effectually obviated we cannot determine in this process.

The LORD PRESIDENT concurred.

The Court pronounced the following interlocutor:—

“Having resumed consideration of the petition, together with the report by Professor Moir, . . . Find and declare that the said will and codicil . . . of Miss Agnes Nisbet were subscribed by her as maker or grantor thereof, and by William Barton and Dorothea Stewart or Kerr, the witnesses by whom the said will and codicil bear to be attested, and decern; and find the petitioner entitled to the expenses of the present proceedings out of the funds of the trust-estate of the said Agnes Nisbet.”

Counsel for the Petitioner — Aitken.
Agents—Bell & Bannerman, W.S.

Wednesday, January 27.

SECOND DIVISION.

[Sheriff-Substitute
at Glasgow.]

STEWART, BROWN, & COMPANY v.
GRIME.

Contract—Construction—Scope of Clause of Reference—Incorporation of Rules of Association in Contract between Member and Non-Member.

By contract of sale dated 29th May 1895 entered into between A, a member of the Beetroot Sugar Association, and B, a non-member, A, subject always to the rules, regulations, and bye-laws of the association, sold to B a quantity of beetroot sugar at a fixed price, the sugar to be delivered in October to December 1895 in equal quantities per month. It was provided that the rules, regulations, and bye-laws of the association were incorporated in the contract as fully as if the same had been expressly inserted therein, and further that the council of the association was the referee of all disputes.

Rule 32 provided that “if any member liable on the face of unmatured contracts shall suspend payment or be declared a defaulter, . . . the Council of the United Kingdom Association to which he belongs shall, as soon as possible, after the suspension or default, . . . meet, fix, and publish official quotations and due dates for all periods of delivery that may be in question, the prices to be according to the average buying and selling market value of the day on which the member defaulted or suspended payment. The contracts in question shall then be closed upon the terms so fixed.”

A having suspended payment in June 1895, a dispute arose between him and B as to whether rule 32 applied to the contract. A submitted the matter to the council of the association, who decided that the rule applied. B refused to recognise the award, and A raised an action to enforce it.

Held (1) that the council were the arbiters of the dispute in terms of the contract, and that the award was binding on B; (2) that rule 32 applied to B, just as if he were a member of the association.

By contract of sale dated 29th May 1895, entered into between Stewart, Brown, & Govan, merchants, Glasgow, who were members of the Beetroot Sugar Association, and James Grime, Rosebank, Busby, who was not a member of that association, the former, “subject always to the printed rules, regulations, and bye-laws of the Beetroot Sugar Association,” sold to Grime 1500 bags of beetroot sugar of 100 kilos each, the crop of 1895-96 at 10s. 9d. per cwt., free on board at Hamburg, the sugar to be at the shipping port ready for shipment in October-December, in equal quantities per month. By the contract it was provided — “The above-mentioned rules, regulations, and bye-laws are incorporated in this contract as fully as if the same had been expressly inserted therein,” and further, “the Council of the Beetroot Sugar Association of London is the referee of all disputes.”

Rule No. 32 of the rules relating to contracts of the association provides as follows:—“If any member liable on the face of unmatured contracts shall suspend payment or be declared a defaulter, or when through death his firm ceases to exist, the Council of the United Kingdom Association to which he belongs shall, as soon as possible after the suspension or death has become officially known, or be satisfactorily proved to the council by other members concerned in such contracts, meet, fix, and publish official quotations and due dates for all periods of delivery that may be in question, the prices to be according to the average buying and selling market value of the day on which the member defaulted or suspended payment. The contracts in question shall then be closed upon the terms so fixed. It shall also, on any given day, be in the power of any member, on payment of fees according to rule 45, to call upon the council of his association to fix official prices and to certify thereto. Such certificates may be used for the closing of contracts with non-members who may have suspended payment, or may have been declared defaulters.”

Rule No. 35 of these rules provides as follows:—“Any disputes that may arise out of or in relation to any contract shall be referred either to such member of the association at the port of destination, as both parties may agree on, or else to two members thereof, one to be chosen by each party or else to the council.”

Rule 41 of these rules provides as follows:—“A registration fee of 10s. shall be paid