the contracted quantity had been delivered and disposed of; would B be bound to contract with C for the remaining fourth? I answer again in the negative. B may contract with C if he pleases, but he cannot be compelled to contract with him. No more can the pursuer be compelled to take the defender as his lessor—as his co-contractor—in the partial fulfilment of a contract made with Mr Hamilton and him only. In the case just supposed I spoke of C as a third party, and did so of set purpose, in order to note that I am not touching upon the question of how far one who is really a principal may insist on a contract partially fulfilled originally entered into by his agent in his own (that is, the agent's) name, or how far a contract partially fulfilled may be insisted in by one who is the successor or representative of the person who originally contracted. This question does not arise here, for Mr Hamilton never was the agent for Watson's trustees, and Watson's trustees are in no sense the successors or representatives of Mr Hamilton in the lands of Bankhead. Further, let me observe that the willingness of the defenders to continue the pursuer in possession under the lease cannot make such continuance an obligation on the pursuer. Their willingness rather points to there being no such obligation. If the pursuer is bound to remain as tenant, the defenders are bound—willing or unwilling—to keep him. If the pursuer remained tenant only because of the defenders' willingness or consent that he should do so, then he remains tenant not by obligation but by consent on his part. And this leads me to notice, in the third place, another ground on which I think the pursuer entitled to our judgment. At the date when Mr Hamilton's pretended title was reduced, and the estate of Bankhead declared to be vested in Mr Watson's trustees by virtue of Mr Watson's settlement, Watson's trustees were not bound by the lease either under the provisions of the Act 1449 or otherwise. They were absolutely entitled to say to the pursuer—You are occupying our subjects without title, and you must leave. To that there was no answer. There was not even the answer that Mr Hamilton at the time of granting the lease had a title on record which was *ex facie* valid. In my opinion, the record if examined would have shown that he had no title whatever to Bankhead. "Eventual fee" (which was all that the record showed in Mr Hamilton) if it means anything, does not mean present fee, but a fee which may eventually descend—but equally may not. It was not an infeftment as of fee. Accordingly, I repeat that Mr Watson's trustees were not bound by the lease in question when they vindicated their right to Bankhead. But if they were not bound, neither was the pursuer—it was a bilateral contract by which both parties must be bound or neither. And if the pursuer was not then bound by the lease, he has done nothing since which could have the effect of making the lease binding upon him.

The Lord Ordinary says that the parties could by means of a conveyancing device have made the lease binding. Perhaps they could (I offer no opinion as to that), although as the Lord Justice-Clerk said in *Weir's* case in reference to the same suggestion—"it would not have been fair and honest." But the device was not resorted to, and we have to deal now with things as they are, and not as they might have been.

It was also suggested in the course of the argument that if the pursuer succeeded in this action he would lay himself open to a claim at the instance of Watson's trustees for the value of their minerals which he had worked without a title. If that is the consequence of success in the present action the pursuer of course must face it. It is not in the least the question now before us, and cannot affect that question. With regard to that matter I would only say that the suggestion does not seem to me to be one calculated to cause the pursuer any serious alarm.

I am of opinion that the judgment of the Lord Ordinary should be affirmed.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Pursuers—Sym—Salvesen. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Defenders—H. Johnston—Clyde—King. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, March 6.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

MONCRIEFF *v.* LAWRIE.

Sale—Sale of Heritage—Essential Error—Implement in Knowledge of Grounds of Challenge—Personal Bar—Private Knowledge of Prior Right.

Two contiguous properties belonging to the same proprietors, but held under different titles, were sold by public roup to two purchasers as lots No. 1 and No. 2. The articles of roup described the properties by the old descriptions in the titles, but as it was intended to sell certain out-buildings, which were included in the description of lot No. 2, along with lot No. 1, a marginal addition was introduced into the description of lot No. 1, with the effect of including the out-buildings in question, but no corresponding restriction was introduced into the description of lot No 2. Lot No. 1 was sold first, and the purchaser of lot No. 2 was aware that it was intended by the parties that the out-buildings should be sold with this property, but owing to an informality in the minute of enactment following upon the roup, the purchaser of lot No. 1 never obtained a completed contract right to the out-buildings in question. After the sale the purchaser of lot No. 2 demanded

and obtained from the exposers, in full knowledge of the circumstances, a conveyance of the subjects sold to him, described in the same terms as in the articles of roup and including the outbuildings, which he duly recorded. He thereafter brought an action for declarator that the out-buildings were his property and for decree of removing against the purchaser of lot No. 1, who had obtained possession. To this action the exposers of the properties were sisted as defenders.

The Lord Ordinary (Kyllachy) after a proof pronounced decree in favour of the pursuer on the ground (1) that the exposers were not entitled after implementing the sale by granting a disposition in knowledge of the grounds of challenge, to prevent its receiving effect; and (2) that the pursuer was not barred by his knowledge of the intention of parties, there being no completed prior right in the purchaser of lot No. 1.

On a reclaiming-note the Court *affirmed* this judgment, but on the ground that, as regards the present action, the titles were conclusive of the rights of the parties.

Opinions reserved whether the pursuer's title was not open to reduction at the instance of either of the defenders.

This was an action of declarator and removing at the instance of John Balleny Moncrieff, insurance agent, Ochil Street, Alloa, and his wife, against Thomas Lawrie, hotel-keeper, Mill Street, Alloa. The trustees of the late Stephen Nicol Morison, bookseller and publisher, Alloa, were allowed to sist themselves as defenders. The facts sufficiently appear from the opinion of the Lord Ordinary (Kyllachy), who by interlocutor dated 8th January 1896, gave decree in terms of the conclusions of the summons.

Opinion.—"The pursuer in this case seeks to have it declared that certain back premises adjacent to a certain tenement belonging to him in Mar Street, Alloa, belong in property to him (the pursuer). He also seeks to have decree of removal against the defender—the owner of a neighbouring tenement—who is in possession of the back premises. Both parties derive right from a common author, viz., Morison's trustees, and these trustees have been allowed to sist themselves as defenders to the action, and to adopt the defences. The case has accordingly been taken as if these trustees had been called as defenders, and as if the conclusions of the summons—or at least the declaratory conclusion—had been directed also against them.

"One peculiarity of the case is that the pursuer has undoubtedly obtained a title to the premises in question, and a title prior in date to that alleged by the defender. This is not admitted on record, but the proof shows, I think conclusively, that the description in the pursuer's title includes the ground on which the buildings in dispute stand. It also appears, and indeed was not disputed, that the pursuer's title was prior in date, and was first recorded in the Register of Sasines.

"It is therefore perhaps doubtful whether the defenders should have been allowed to try the question raised upon this record without bringing in the first place an action of reduction. I have not, however, felt bound to decide the case upon that technical point. I incline to think that the defenders, having come into Court in response to the pursuer's challenge, are entitled to table all defences which go to negative the pursuer's right. At all events, as some proof was necessary, I (rightly or wrongly) allowed proof in general terms, and the whole case being now before me, I propose to decide it upon its merits.

"The facts are shortly these:—Morison's trustees were owners of two sets of subjects in Alloa, viz., (1) certain shops and houses in Mill Street; and (2) certain shops and houses in Mar Street. The two properties were contiguous, but held under different titles, and there was certain back ground between them, which beyond doubt belonged to the Mar Street property, but on which a back-shop, bedroom above, and wash-house adjoining, had been erected and used in connection with the Mill Street property. Both properties were exposed for public sale on the same day, and under the same articles — the Mill Street property being the first lot and the Mar Street the second. The description of each lot was taken from the old titles, by which, as I have said, the back buildings went with Mar Street (lot No. 2). This, however, not being intended, a marginal note was added to the description in the articles of lot No. 1 (the Mill Street subjects) in these terms, 'as the said subjects are presently occupied and possessed by the representatives of the late Mr Stephen Nicol Morison and the London and Newcastle Tea Company, &c. (the Mill Street tenants).' This marginal note was read at the roup as part of the articles, but was not authenticated by being mentioned in the testing clause, nor was any corresponding alteration made in the description of lot 2. The roup having proceeded, lot 1 (Mill Street) was (subject to the point which I shall presently notice) purchased by the defender Lawrie. Lot 2 (Mar Street) was similarly purchased by the pursuer Moncrieff. And I have no doubt whatever that the pursuer and his agent knew quite well (1) that according to the description of lot 2 in the articles (read in connection with the situation and history of the premises) he (the pursuer) was purchasing the back premises in question, and (2) that the exposers (Morison's trustees) were under a different belief, and had no intention of selling these premises as part of lot 2.

"In these circumstances, if the question had been at once raised and tried whether the pursuer could hold to his bargain and enforce implement of it according to its legal construction, I should have had little doubt that the decision must have been in the negative. The exposers were in error as to the extent of the subjects sold,

and the pursuer knew of their error, and took advantage of it. The pursuer allowed the exposers to agree with him in certain terms, knowing that the exposers attached one meaning to those terms, while he, the pursuer, attached to them another and different meaning. A contract so made the law will not enforce, and will, if necessary, reduce. The case would have come within the principle of *Steuart's Trustees* v. *Hart*, 3 R. 192. See also the English cases collected in Anson on Contracts, 6th ed., pp. 133-139.

"What happened, however, was this. The pursuer at once tabled his construction of the articles, and claimed a conveyance of the Mar Street property as therein described—avowing that he held, and meant to maintain, that the back-shop, bedroom, and wash-house were within the description. The exposers demurred, but after some correspondence they gave way; and in the full knowledge not only of the pursuer's contention, but of its soundness in point of fact, granted him the conveyance which he claimed. In other words, having power to repudiate the contract of sale, they preferred not to do so, but accepted it as valid, and executed it; and did so by disposition delivered prior to the defender's disposition, and with the result, as I have already said, that the pursuer's disposition was the first to be made real by infeftment.

"I cannot, I confess, see how in that state of the facts, the defenders, or either of them, can appeal to the doctrine of *Steuart's Trustees* v. *Hart*. Whatever may have been their error as to the effect of the articles, the trustees and exposers were under no error as to the effect of the disposition. They had ample notice of the pursuer's contention, and for reasons, good or bad, they accepted it. That is their position; and as regards this ground of defence, it does not appear to me that the defender Lawrie is in a better position, or can have higher rights than his authors.

"It remains to consider whether the defender Lawrie has not, in virtue of his prior purchase of the Mill Street subjects, and of the pursuer's knowledge of what was embraced in that purchase, a separate and independent ground of challenge of the pursuer's title so far as applying to the premises in dispute. There is no doubt that the Mill Street subjects were first exposed and sold at the roup. There is also no doubt that by the marginal addition to the articles of roup, these subjects were described in terms which may be held to cover the out-buildings in question. It is also certain that the pursuer heard the articles of roup read, including the marginal addition, before he himself bought the Mar Street subjects, and saw and heard the Mill Street subjects knocked down and sold to the defender Lawrie. If, therefore, the sale of the Mill Street subjects was a completed sale—if Lawrie had a completed contract right to those subjects before the Mar Street subjects were exposed and sold—I do not at present see reason to doubt that the defender Lawrie might reduce the pursuer's title as a title obtained and taken by the pursuer in the knowledge of his (Lawrie's) prior right. That would appear to follow from the legal doctrine established by the cases in the Dictionary under the head of 'Private Knowledge of a Prior Right,' Mor. 1689, *et seq.*; and by the more recent cases of *Marshall* v. *Hynd*, 6 S. 384; *Petrie* v. *Forsyth*, 2 R. 214; *Stodart* v. *Dalziel*, 4 R. 236. See also the English cases noted in Lord Shand's note in the last of these cases.

"But the difficulty here is that by an unfortunate oversight in the conduct of the sale, there was not only an omission to authenticate the marginal addition on which the defender Lawrie's case depends, but also an omission to have the minute of enactment which constituted his purchase subscribed by one of the instrumentary witnesses. The pursuer maintains that these omissions are fatal to the defender's case, inasmuch as the alleged prior right was, as it now appears, not a completed right. He says—what is clear—that writing was necessary, and the only writing being improbative, he contends that at the time of his (the pursuer's) purchase of the Mar Street property there was *locus pœnitentiæ* with respect to the Mill Street subjects on the part of all concerned.

"So far as the marginal addition is concerned, I am disposed to think that this difficulty might be met. There appears to be some doubt how far a marginal addition requires, as matter of solemnity, to be noticed in the testing clause (Bell's Lect. i. p. 75); and in any case it may perhaps be held that the defect of authentication was here redressed by *rei interventus*. But the failure to obtain the subscription of one of the instrumentary witnesses to the minute of enactment is a more serious matter, and after full consideration I have been unable to see any answer to the objection. It may be that the non-subscribing witness might have subscribed *ex intervallo*. That is a question not, I think, quite settled (see *Thomson* v. *Clarkson's Trustees*, 20 R. 39). But in point of fact the witness has not yet subscribed, and it can hardly be suggested that he can now do so. The 38th and 39th sections of the Conveyancing Act of 1874 do not, I am afraid, either of them, apply, and under the old law there can, I think, be no doubt that the minute of enactment is still improbative.

"On the whole, therefore, I have been compelled to the conclusion that the pursuer is entitled to decree. I regret that such is the result, because I think it clear that he took and obtained an unfair advantage. But as against Morison's trustees, he obtained that advantage while the latter had their eyes fully open; and as against the defender Lawrie, he prevails by reason simply of the unfortunate mistake made with respect to the authentication of the minute of enactment."

The defenders reclaimed, and argued—The sellers here were in essential error as to the extent of the subjects sold, and the pursuer by not disclosing his position until

after the minute of enactment with him was signed took advantage of that error. He was not entitled to enforce a bargain made under such circumstances—*Steuart's Trustees* v. *Hart*, December 2, 1875, 3 R. 192. The disposition subsequently granted in his favour did not put him in a better position. It could only do so if it was a confirmation of the previous contract, and in order to operate as such it was necessary that it should have been granted (1) with knowledge that the contract on which it proceeded was not enforceable in law, (2) with the intention of waiving a ground of objection to the contract known by the granter to be good, and (3) with knowledge that it would have the effect of barring the granter from putting forward an objection which, apart from the confirmation would have been open to him—Kerr on Fraud and Mistake, 2nd ed., p. 330; *Crowe* v. *Ballard*, July 13, 1790, 2 Cox's Equity Cases, 253, *per* Thurlow, L.C., at p. 257; *Murray* v. *Palmer*, July 15, 1805; 2 Scho. and Lef. 474, per Redesdale, L.C. (Ireland), at p. 486; *Morse* v. *Royal*, March 8, 1806, 12 Vesey Jr., 355, *per* Erskine, L.C., at p. 373; *Cockerell* v. *Cholmeley*, March 17, 1830, 1 Russ. and My. 418, *per* Leach, M.R., at p. 425; *Mulhallen* v. *Marum*, January 18, 1843, 3 Dr. and War. 317, *per* Sugden, L.C. (Ireland), at p. 334; *Kempson* v. *Ashbee*, November 6, 1874, L.R., 10 Ch. 15, *per* Cairns, L.C., at p. 20. These conditions, or at least some of them, were absent here. (2) As in a question with Lawrie, the pursuer knew that prior to his contract for the purchase of the Mar Street subjects a right to the back premises in question had been acquired by Lawrie, and he was therefore barred from insisting on declarator in terms of the description in his disposition, and on removing as against Lawrie—Morison, *sub voce Bona et mala fides*, Private knowledge of prior right, 1689, *et seq.*; *Marshall* v. *Hynd*, January 18, 1828, 6 S. 384; *Petrie* v. *Forsyth*, December 16, 1874, 2 R. 214; *Stodart* v. *Dalzell*, December 16, 1876, 4 R. 236. There was here a duly completed contract, for the pursuer was not entitled to found on the defect in the minute of enactment as it was *res inter alios acta* for him. The signature of the second witness might have been added afterwards, but the necessity of this was superseded by the granting of a disposition in Lawrie's favour. The failure to mention a marginal addition in the testing-clause was not fatal to the validity of a deed.

Argued for the pursuer—(1) As in a question with the trustees—There was here no fraud. The pursuer made his proposition openly, and demanded and obtained a disposition without any restriction. In these circumstances the trustees were not entitled to prevent the disposition, which they had granted with full knowledge of the consequences, from now receiving effect. (2) As in a question with Lawrie — To bar the pursuer from the remedy he sought there must be a prior completed and binding contract of which the pursuer was aware. Here there was no such contract. The marginal addition was not mentioned in the testing clause, and one of the witnesses had not signed the minute of enactment. The latter defect could not now be remedied —Conveyancing and Land Transfer (Scotland) Act 1874, sections 38 and 39. There was therefore no legal evidence of a contract for the sale of heritage at the roup to Lawrie—*Shiell* v. *Guthrie's Trustees*, June 26, 1874, 1 R. 1083. The trustees could not have succeeded in an action for implement against Lawrie—*Goldston* v. *Young*, December 8, 1868, 7 Macph. 188. Such a contract could not be proved even to the effect of founding a claim of damages without a probative or holograph writing—*Allan* v. *Gilchrist*, March 10, 1875, 2 R. 587, where *Walker* v. *Milne*, June 10, 1823, 2 S. 338, was distinguished. If a contract could not be enforced by specific implement, it could not have any effect at all—*M'Arthur* v. *Lawson*, July 19, 1877, 4 R. 1134. The trustees were bound to take an available objection to an inchoate contract with Lawrie after they had given the pursuer a title to the same subjects. Accordingly, the objections to the pursuer's disposition receiving effect were groundless, and the case came to this, that he had a title to the subjects, and the defender Lawrie had none. The pursuer was consequently entitled to decree of declarator and removing as concluded for.

At advising—

LORD JUSTICE-CLERK—The facts in this case are these :—Morison's trustees were owners of two sets of subjects, one situated in Mar Street and the other in Mill Street Alloa. These two properties were contiguous, but they were held under different titles. There was a certain piece of background, now in question, belonging to the Mar Street subjects on which certain buildings were erected. After these buildings were erected they were used not in connection with the Mar Street subjects, but in connection with the Mill Street subjects. Both properties were exposed for sale under articles of roup, the descriptions in which were taken from the old descriptions in the titles, and accordingly the description of the Mar Street subjects included the back premises, which had been used in connection with the Mill Street property. To correct this a marginal addition was added to the description of the Mill Street subjects, which I need not quote. The effect of that addition was to indicate that the piece of ground, which under the descriptions of the two properties really belonged to the Mar Street subjects, was to go with the Mill Street subjects. Accordingly the sale was conducted under that supposition. It is not disputed that this was announced and well known to Mr Moncrieff. What happened was very peculiar. The pursuer bought the Mar Street property, and at once claimed the back premises as being included under the description in the articles of roup. Correspondence followed, but after some letters had passed between the parties the trustees gave the pursuer a disposition with a description in terms of the old titles, thus including the back

premises in question. Accordingly I think we must hold that that conveyance carried these back premises and gave the pursuer a good title to them.

Another question has arisen, whether the pursuer, who had perfect knowledge, before he bought the Mar Street property, that the Mill Street property as described subject to the marginal addition, had been knocked down to Mr Lawrie, can, in spite of his knowledge of what was intended, succeed in his contention as in a question between him and Mr Lawrie. In this respect we have also a very extraordinary state of matters. Not only was the marginal addition never authenticated, by being mentioned in the testing clause, but in the minute of enactment, which concluded the contract of sale with Mr Lawrie, the signature of the second witness was never appended. Whether a marginal addition must be authenticated by being mentioned in the testing clause or not, in this case the question would arise whether there had not been *rei interventus;* but in my opinion the failure to obtain the signature of the instrumentary witness is a much more serious defect, and indeed fatal to the validity of the deed. I agree with the Lord Ordinary that for the purpose of defeating the rights of Mr Moncrieff the omission cannot be supplied now.

On the whole matter I agree with the Lord Ordinary and think his judgment is correct.

Upon the question, whether or not the defenders may have a right to have the pursuer's title set aside in other proceedings, I give no opinion, indeed I expressly reserve my opinion.

LORD YOUNG—My opinion is to the same effect, but without any disposition to make any reservation or give any encouragement to any such proceedings as your Lordship has mentioned.

My opinion on the merits is clear and simple and can be shortly expressed.

This is a summons at the instance of a husband and wife as proprietor and liferentrix of certain property. The conclusions are (1) for declarator that these back premises are comprehended under the description of the property, and that the same pertain heritably in property to the pursuers in conjunct fee and liferent for the liferent use allenarly of the wife; and (2) for decree of removing against the defender Lawrie. I am of opinion—and indeed it was not disputed—that the property in question is included under the pursuer's title, his title being such as to give him a good title to it. The defender, on the other hand, is in possession of the property, and he has no title except the disposition produced, which does not include it. He has no other title. I am therefore of opinion that the pursuer, who has a title to these premises, is entitled to have the defender, who has none, removed.

Whether the defender, with the assistance of others, can have this property taken out of the pursuer's title and included under his, I give no opinion; but I would not like to say one word to encourage the defender to believe that such proceedings would be successful. I make no reservation except this, that the pursuer can take any proceedings which the law allows.

I think the interlocutor of the Lord Ordinary should be affirmed.

LORD TRAYNER—I agree in the result arrived at by the Lord Ordinary. The property here in dispute is certainly within the pursuer's title. It was duly conveyed to him, and he is infeft therein. It is equally certain that the property in dispute is not in the defender Lawrie's title—was never conveyed to him. In this state of the title I see no answer to the pursuer's case. It may be that there is a question behind this, whether in the circumstances the pursuer can maintain his title as it now stands, or whether it is liable to reduction at the instance of either of the defenders. That question may be a very serious one for the pursuer, but it is not the question now before us.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Pursuer—Dickson—Forsyth. Agent — William Ritchie Rodger, S.S.C.

Counsel for the Defenders—Henry Johnston — Constable. Agents — Constable & Johnstone, W.S.

Wednesday, March 11.

SECOND DIVISION.

[Lord Low, Ordinary.

MONCRIEFF *v.* SEIVWRIGHT.

Proof—Writ or Oath—Contract relating to Leasehold Rights—Innominate Contract of Unusual Character.

Averments in an action for implement of the sale of a business of which the Court allowed a proof before answer, reversing the judgment of the Lord Ordinary, who held that the alleged contract could not be proved by parole, in respect that it provided for the transfer of leasehold rights, and was, moreover, an innominate contract containing stipulations of an unusual character.

This was an action at the instance of Hugh Moncrieff, writer in Glasgow, against John Seivwright, Berlin wool and fancy goods merchant, Aberdeen. The summons concluded for declarator that the defender had "contracted and agreed to sell to the pursuer the business of a dealer in cabinet and leather goods, electro plate, cutlery, clocks, toys, games, fancy goods and general furnishings, now or lately carried on by the defender at the Trinity Hall warehouse and showrooms, 151 Union Street, Aberdeen, all as hereinafter described, viz. — (*a*) The