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.

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*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

tenant's rights in and to the premises situated at 151 Union Street aforesaid as described in the lease thereof . . . (*d*) all the stock-in-trade, fittings, furnishings, chattels, business books, book debts (which the defender guarantees), and effects (cash in hand and at bankers excepted), which belonged to the defender in connection with the said business, and that in the condition in which the same stood as at 10th August 1895; (*e*) the goodwill of the said business, and the exclusive right to the pursuer, or any company that may be formed to work the business, to carry on the business in continuation of or in succession to the defender, and to use the defender's name in a subsidiary manner to such an extent as may be necessary to make the change clearly known, and that on the following conditions and stipulations, viz.—(1) That the defender should pay and discharge all the debts and liabilities of the said business, and that on or before the last instalment of the price should be paid to him; (2) that the whole stock-in-trade agreed to be sold should" be valued by arbitration; "(3) that the pursuer should pay the whole expense of any deed or deeds required for vesting in the pursuer or the said company the subjects and others contracted to be sold, and giving them the full benefit of said contract, which deed or deeds the defender should be bound to execute if and when called on; (4) the entry to said subjects and others should be held to be as on the 10th day of August 1895, from and after which date the pursuer should pay, and thereby relieve the defender of all rents, taxes, and other burdens or proportions thereof payable in respect of the said leasehold subjects, and relieve the defender of all obligations of every kind prestable against the tenant under said leases; (5) that the defender should be bound not in any way to oppose in business the pursuer or any company which might be formed to work the said business, or engage in Aberdeen in any business similar to the business so sold, but should, on the contrary, help the success of the said business in every way in his power."

The pursuer averred—"(Cond. 4) Following upon said negotiations, the defender on or about 2nd April 1895 offered to sell to the pursuer the said business as carried on by him at 151 Union Street, with the stock, fittings, goodwill, leasehold rights and effects belonging thereto, the pursuer to pay the defender for the stock at the valuation of two men mutually chosen by them, and cost price for fittings and furniture, and the sum of £4000 for goodwill. Further negotiations took place between the parties as to the terms and conditions of the defender's offer, but ultimately the offer was declined by the pursuer on or about 16th April on the ground that the sum of £4000 asked for the goodwill was excessive. (Cond. 5) On 11th May thereafter the defender again approached the pursuer on the subject, and offered to take £3250 for the goodwill. The pursuer declined to pay this sum, but indicated that he was prepared to consider the defender's offer if the price to be paid for the goodwill was reduced to £1500. The defender immediately amended his offer by reducing the price demanded to this sum. (Cond. 6) The pursuer proceeded to arrange for the formation of a company to take over from him and work the said business, and by the 16th July he had succeeded in finding parties prepared to subscribe the capital necessary for that purpose, and the company was in a position to be formed immediately. Further negotiations had meantime been proceeding with the defender as to the details of the terms of his offer, and on 17th July a meeting took place between the pursuer and others interested in the proposed company, and the defender, when the whole matter was discussed in connection with the correspondence and verbal negotiations which had passed previously, and at that meeting the contract and agreement for the sale of the said business by the defender to the pursuer was concluded in the terms and on the conditions and stipulations set forth in the declaratory conclusions of the summons."

The defender admitted that negotiations had taken place, but denied that a completed contract had been concluded. He averred (Ans. 6)—"It was throughout the understanding of parties that the contract should be reduced to writing;" and (Ans. 7) "In particular the parties to the said agreement failed to agree upon (1) the terms of payment of the price of the business, fittings, &c.; (2) the expenses connected with the transfer; and (3) the limitations under which the defender should continue to carry on his former business. . . . They have failed to come to terms upon this matter, and until the terms of the contract are finally reduced to writing, the defender claims his right to resile."

He pleaded, *inter alia*—"(2) The pursuer's averments are irrelevant and insufficient to support the conclusions of the action. (7) The pursuer's averments can only be proved by defender's writ or oath.

In the leases to the defender of the business premises in question sub-tenants and assignees, unless with the written consent of the proprietor, were excluded. The defender carried on a second business in Aberdeen, which the pursuer averred was distinct from that which he proposed to sell. The defender denied that the two businesses were distinct.

On 4th February 1896 the Lord Ordinary (Low) sustained the second plea-in-law for the defender and dismissed the action.

*Opinion.*—"This is an action for declarator that the pursuer and the defender entered into a contract, in the terms set forth in the summons, for the sale to the pursuer of a business carried on by the defender at No. 151 Union Street, Aberdeen.

"The subjects of the alleged sale for which the price was to be paid consisted of (1) 'the tenant's right in and to the premises' at 151 Union Street, and in Trinity Hall Buildings, Union Street, 'as described' in three separate leases; (2) the stock-in-trade and fittings; and (3) the goodwill of the business. The price of the stock-in-trade and fittings was to be fixed by valuation,

and the sum of £1500 was to be paid for the goodwill 'and the rights under said leases.'

"The pursuer avers that the contract was concluded at a meeting upon 17th July 1895 between him and certain persons interested in a company which he proposed to form to work the business, and the defender. It is admitted that the alleged contract was not put in writing, and the pursuer proposes to prove its terms by the evidence of those who were present at the meeting.

"I am of opinion that the pursuer cannot prove the part of the contract in regard to the leases by parole evidence. In the summons the agreement is said to be for a sale of 'the tenant's rights in and to the premises,' and in article 4 of the condescendence what the defender offered to sell to the pursuer is described as the business 'with the stock, fittings, goodwill, leasehold rights, and effects belonging thereto.'

"That appears to me to be an alleged contract for the transfer or assignation of leases, because if the pursuer agreed to buy the tenant's right under the leases he must have contemplated getting a title to these rights, which he could only get by being put into the tenant's place by an assignation of the leases. And I do not think that a contract for an assignation of a lease can be proved by parole any more than a contract for the constitution of a lease. No doubt if the leases were for a year or under, parole evidence would be competent, but I understand that the leases here were for a period of years.

"The pursuer's counsel, however, stated at the bar that in the leases assignees and sub-tenants were excluded, and that therefore the defender was not in a position to give the pursuer any right to the leases except with the landlord's consent. He therefore argued that an agreement that the defender should sell to the pursuer his tenant's right could amount to no more than this, that the pursuer on his part became bound to relieve the defender of liability for rent, and that the defender became bound to do his best to induce the landlord to accept the pursuer as tenant. The case of *Kinninmont*, 20 R. 128, was cited as an authority, to the effect that such a contract could be proved by parole.

"It is sufficient, in my opinion, to say that such a contract as was held to be proved in the case of *Kinninmont* is not averred in this case. What is averred is an absolute and unconditional sale of the tenant's rights to the premises. That appears to me to be a contract for the assignation of leases made real by possession, which can only be proved by writing.

"That is enough for the decision of the case, because if the pursuer cannot prove a material part of the contract he cannot prove the contract. I may say, however, that looking to the character of the remainder of the contract, I think that it is at least doubtful whether it could be proved without writing. The contract, although it is properly enough described as one for the sale of a business, is really a congeries of contracts, some of which are innominate contracts of an unusual character. There is, for example, the stipulation that the price shall not be paid until, and (apparently) unless, a company is formed to carry on the business. Then there is the stipulation that the defender is not to carry on any business in Aberdeen 'similar' to the business sold. Now, the defender carries on two businesses in Aberdeen, one only of which he is alleged to have sold. It is obvious, therefore, that an agreement limiting the business which the defender is to continue to carry on is of great moment to him, and that a slight variation in the terms of the agreement might make all the difference as to his power to engage in trade. In such circumstances I doubt very much whether, apart from the branch of it relating to the leases, the alleged agreement is one which can be proved by parole."

The pursuer reclaimed, and argued—The pursuer was entitled to a proof *prout de jure* (1) The constitution or transfer of a lease could not be proved except by probative writ, but as the leases in this case excluded sub-tenants and assignees, the contract here alleged was merely an arrangement of the same nature as the bargain in *Kinninmont* v. *Paxton*, November 29, 1892, 20 R. 128, which it had been held did not require probative writ, and that case was conclusive of the present. Moreover, this was really a bargain for the sale of a business, and the arrangement as to the leases was merely a subordinate part of it. It would be an extension of the rule as to the proof of bargains relating to heritage, to say that such a contract as this fell under it, and the rule should not be extended as it was now anomalous. (2) There was no rule in the law of Scotland that innominate contracts as such must be proved by writ or oath. The rule was that when the stipulations alleged were of an unusual and extraordinary character writ or oath was required—*Forbes* v. *Caird*, July 20, 1877, 4 R. 1141, *per* Lord Deas at page 1142, approved in *Downie* v. *Black*, December 5, 1885, 13 R. 271. This contract was not of such an unusual character as to come under the rule. The stipulations here alleged were simply those provided for in every contract for the sale of a business with a view to its being taken over by a company, and this was specially true of the stipulation limiting the defender from carrying on similar business.

Argued for the respondents—This was a contract relating to heritage, and as such could only be proved by a probative writ. But apart from that it was an innominate contract of such an unusual and extraordinary character that it should not be allowed to be proved otherwise than by writ or oath—*Edmonston* v. *Edmonston*, June 7, 1861, 23 D. 995; *Johnston* v. *Goodlet*, July 16, 1868, 6 Macph. 1067.

The Court (without delivering any opinions) recalled the interlocutor reclaimed

against, and remitted to the Lord Ordinary to allow the parties before answer a proof of their averments.

Counsel for the Pursuer—Aitken. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defender—Abel. Agents—Morton, Smart, & Macdonald, W.S.

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*Thursday, March* 12.

## SECOND DIVISION.

[Lord Low, Ordinary.

## WESTERN DISTRICT COMMITTEE OF COUNTY COUNCIL OF STIRLING *v.* NORTH BRITISH RAILWAY COMPANY.

*Railway—Statutory Powers—Expiration of Time for Completion of Railway—Railway Clauses Consolidation (Scotland) Act* 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 16—*Work "Necessary for Use of Line"—Doubling Rails at Level-Crossing on Requisition of Board of Trade.*

The Railway Clauses Consolidation (Scotland) Act 1845, by section 16, provides *inter alia* that a railway company "may from time to time alter, repair, or discontinue the before-mentioned works, or any of them, and substitute others in their stead; and they may do all other acts necessary for making, maintaining, altering, or repairing and using the railway."

A railway company was authorised by their special Act to carry the railway across and on the level of a certain public road. The special Act further provided that after the expiration of five years from the passing of the Act the powers granted to the railway company should cease to be exercised except as to so much of the railway as should then be completed. More than five years after that date the Board of Trade required the company to interlock the signals at a station immediately to the west of the level-crossing in question. When the arrangements for this purpose were examined by the Board of Trade Inspector, he refused to pass them unless a loop-line at the station was prolonged eastwards and across the level-crossing. The company accordingly made a new loop-line, with the result that the line at the level-crossing was doubled. *Held* that they were entitled to do so, as the doubling of the line at the point in question was "an act necessary for using the railway" within the meaning of the Railways Clauses Consolidation (Scotland) Act 1845, section 16.

*Opinion* (*per* Lord Trayner) that the laying of a second line of rails at the place in question was a "substitution" of a double for a single line, and as a "substitution" warranted by the same section.

The Forth and Clyde Junction Railway was constructed under the powers of the Forth and Clyde Junction Railway Act 1853. Section 32 of that Act provides as follows:—"It shall be lawful for the company, in constructing the railway hereby authorised, to carry the same across and on the level of the following roads," including, *inter alia*, the road from Buchlyvie to Gartmore and Aberfoyle. The railway was carried across that road accordingly at a point a little westward of Buchlyvie Station. The company were authorised to acquire, and under their compulsory powers did acquire, sufficient land to lay a double line of railway, and within the gates at the level-crossing sufficient space for a double line was enclosed, but in fact only a single line was laid.

The Forth and Clyde Junction Railway Act 1853, section 37, provides as follows:—"The railway hereby authorised shall be completed within five years from the passing of this Act, and on the expiration of such period the powers by this Act, or the Acts incorporated herewith, granted to the company for executing the railway, or otherwise in relation thereto, shall cease to be exercised, except as to so much of the railway as shall then be completed."

By an agreement concluded in 1871 between the Forth and Clyde Junction Railway Company and the North British Railway Company, the whole undertaking of the former company was leased to the latter for a period of thirty years. In 1875 the agreement was extended to a period of fifty years from 31st July 1875. Under these agreements the North British Railway Company was vested in and was to exercise all the powers of the Forth and Clyde Junction Railway Company, and in particular all works connected with the maintenance, improvement, or alteration of the line were to be executed by the North British Railway Company, who were also taken bound to perform every statutory or other obligation proper to be performed in respect of the working of the railway.

In November 1890 the Board of Trade, in exercise of powers conferred on it by the Regulation of Railways Act 1889, called upon the defenders, as the working company under the said agreements, to interlock (so far as not then done) the whole stations upon their system for signalling purposes. The defenders in obedience to this order carried through the interlocking of the signals of Buchlyvie Station. After completion of the work, the Board of Trade sent Major Marindin, who was one of their inspectors, to inspect it, with a view to his reporting to the Board whether the interlocking had been satisfactorily carried out, and could be passed by the Board. His inspection took place on 15th February 1894. Buchlyvie Station had at the time of Major Marindin's inspection only one platform, situated on the north side of the main line. A loop-line branched off from the main line immediately to the west of the level-crossing, and ran westwards alongside of the main line opposite the station platform, returning back into the