ledgment delivered to the claimant, for the list of debts in question is not an obligatory document, nor was it delivered so as to enable the claimant to proceed upon it against the trust-estate. For whatever purpose it was drawn up, it remained the private document of the trustee and beneficiaries. The observations of Lord Neaves in *Duncan* v. *Shand* seem to me to be in point when he says that a written acknowledgment of the receipt of money will not infer a loan or a debt unless the writing has been delivered to the creditor. His Lordship says—"The doctrine as repeatedly laid down is that he who gives another a document acknowledging the receipt of money, without qualification or explanation, as a chirographum to be preserved against him, infers an obligation to repay, and this obligation arises not so much from the document itself as from its possession by the other party. That is the case of *Ross* v. *Fidler* and a whole series of decisions."

If the documents are insufficient to prove the alleged loan, I am unable to see upon what grounds they should be held sufficient to let in parole evidence. The rule is that loans cannot be proved except by the writ of the borrower. It is quite consistent with the rule to admit parole evidence of facts extrinsic to the writing, in order to prove that it is in truth and in law the borrower's writ. It may be necessary and it is perfectly competent to prove handwriting or to prove delivery, or it may be to prove the authority of an agent. There may be other purposes which might be figured similar to these. But parole evidence is not admissible except for the purpose of enabling the creditor to prove the loan, not by the parole evidence itself but by his debtor's writ. It cannot be admitted to prove the essential facts which go to constitute loan without violating the rule of loan. Now, what are the facts which it is proposed to prove by parole? There is no averment whatever except that the claimant from time to time made loans to the deceased. If that is to be remitted to proof, the case must turn not upon the purport and effect of writings but entirely upon the parole evidence. It would be contrary to the rule of law to allow a loan to be proved partly by the writing and partly by the acts and words of the alleged borrowers. But in the present case there is no writing of the testator which could be treated as an item of evidence if a parole proof were allowable.

I do not think it necessary to examine in detail the cases which were cited to justify a departure from the rule. In some of these cases it may have been doubtful whether the writing founded on was sufficient, or whether it was the writ of the borrower. But in all the result depended upon its being held that the loan was proved *scripto*. The case of *Laidlaw* v. *Shaw* is an apparent exception. But that was a case of intromission, to which the rule is inapplicable, and not of the direct loan of money. The money contained in a deposit-receipt belonging to one sister was uplifted by her agent and applied in payment of debts due by another. It was not thought doubtful that this could be proved by the testimony of the agent. The case of *Williamson* v. *Allan* on the other hand is no exception to the rule. A loan was proved by an I O U. But that is an obligatory document which requires no evidence to support it. Parole evidence was led not to set up the document or to supplement its deficiencies, but because it was alleged to have been granted by a bankrupt in fraud of creditors. It was found to be an honest document, and that being established the debt was held to be proved by the writ of the borrower, and not by the parole evidence.

For these reasons I am of opinion that the claimant's case can only be proved by the writ of the deceased, and that as no such writ has been produced the claim must be repelled.

The LORD PRESIDENT and LORD ADAM concurred.

The LORD PRESIDENT intimated that LORD M'LAREN, who was not present at the advising, concurred.

The Court recalled the interlocutor of the Lord Ordinary and repelled the claim of Mrs Tait.

Counsel for Pursuer and Real Raiser, and for Claimants and Reclaimers—Salvesen—Chree. Agent—Keith R. Maitland, W.S.

Counsel for Claimants John Dunn and his M.-C. Trustees—W. Campbell. Agent—Thomas Liddle, S.S.C.

Counsel for Claimant Mrs Tait—M'Lennan—Gray. Agents — Donaldson & Nisbet, Solicitors.

Counsel for Claimants the Trustee on Sequestrated Estate of John Dunn and Assignee of Robert Dunn—Wilson—Clyde. Agent—Hugh Martin, S.S.C.

Friday, March 13.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

REID'S TRUSTEES *v.* WATSON'S TRUSTEES.

Landlord and Tenant—Lease—Validity of Lease Granted by Bona fide Possessor without Title—Assignation to True Owner—Homologation.

A lease of minerals, upon which the tenant possessed for upwards of eight years, was granted by a *bona fide* possessor whose title to the lands was afterwards reduced. On the reduction of his title the lessor granted an assignation of existing leases upon the lands in favour of the persons in whom the property was found to be vested, the latter undertaking to guarantee possession to the tenants. In an action

by the mineral tenant to have it declared that he was not bound by the lease—*held* (*diss.* Lord Young) that the lease was invalid and therefore voidable, the lessor having no title as heritable proprietor, and having granted the lease in that character. *Weir* v. *Dunlop*, 23 D. 1293, *followed*.

[See *Hamilton* v. *Watson's Trustees*, reported *ante*, vol. xxxi. 374, 21 R. 451, and in the House of Lords, *ante*, vol. xxxi. 934, 21 R. (H. of L.) 35.]

This was an action at the instance of David Simpson Carson, C.A., trustee under a trust-deed granted by Francis Robertson Reid of Gallowflat, for declarator that the said F. R. Reid was no longer bound by a contract of lease of a mineral coal-field entered into in 1884 between him and John Andrew Hamilton, writer, Glasgow, and for reduction of the lease and of an assignation granted by the lessor in favour of the trustees of the late James Francis Watson.

The circumstances of the case were as follows:—The proprietor of the estate of Bankhead, the late Walter Whyte, died in 1880, leaving a trust-disposition and settlement in which the following clause occurs:—"I also leave to my nephew James Francis Watson my estate of Bankhead, but I wish it expressly understood that in the event of my said nephew James Francis Watson dying without leaving any lawful male heir of his body, then and in that event my said lands of Bankhead are to revert back to my nephew John Hamilton."

J. F. Watson never made up any title under this disposition, and died in April 1883 without any lawful male heir of his body, leaving a trust-disposition and settlement by which he conveyed his whole estate to David Ritchie and W. L. Brown as trustees.

In 1882 J. A. Hamilton expede a notarial instrument upon (1) the infeftment of Thomas Whyte, and (2) the trust-disposition by him which is narrated above. This instrument was recorded in the Register of Sasines for the burgh of Rutherglen with a warrant of registration in the following terms:—Register on behalf of Mrs Margaret Pollok or Whyte in liferent, and J. A. Hamilton, nephew of deceased Walter Whyte, in eventual fee as within mentioned."

In 1884 J. A. Hamilton granted the lease which is the subject of the present action, by which he let the minerals of the estate of Bankhead to Francis R. Reid for a period of twelve years from Whitsunday 1884. Under this lease F. Reid entered into possession and worked the minerals until 1888, when he discontinued working, but paid the rent to Hamilton until Martinmas 1892.

In 1893 the trustees of James Francis Watson brought an action against Hamilton concluding for declarator that the estate of Bankhead had vested in Watson at the death of the testator Whyte, and had passed to them by Watson's trust-disposition and settlement. The summons also contained conclusions for reduction of the title made up by Hamilton to the estate of Bankhead.

In this action decree in terms of the conclusions of the summons was obtained from the Lord Ordinary (Low) on 1st July 1893, and this judgment was affirmed by the Second Division of the Court of Session on 31st January 1894, and by the House of Lords on 4th June 1894. On 21st June 1894 decree of reduction of the title of J. A. Hamilton to the lands of Bankhead was pronounced—See *Hamilton* v. *Watson's Trustees, cited supra.*

Ritchie and Brown, as trustees of the late J. F. Watson, made up an independent title to the lands of Bankhead, and obtained an assignation dated 24th October 1894 from J. A. Hamilton, which, after narrating the leases granted by him, and the reduction of his title above narrated, proceeded as follows:—"Therefore I do hereby, at the request of the said David Ritchie and William Lochore Brown, as trustees foresaid, but without any price being paid to me, assign, convey, and make over to the said David Ritchie and William Lochore Brown, and survivor of them, as trustees foresaid, and their successors and assignees, all my right and interest in and to the foresaid leases, agreement, and letter of lease during the whole years and terms thereof yet to run, and in and to all the clauses and obligements therein contained, and rents, lordships, and profits which may arise therefrom, and in and to all action and execution competent to me thereupon, surrogating and substituting the said David Ritchie and William Lochore Brown, as trustees foresaid, and their foresaids, in my full right and place of the premises for ever, with full power to them to do everything requisite and necessary concerning the premises which I could have done myself before granting hereof."

On 18th November 1890, Reid, the tenant in the lease of minerals granted by Hamilton, granted a trust-deed for behoof of his creditors in favour of Laurence H. Watson, C.A., Glasgow. On the death of Watson, David Simpson Carson was appointed by the Court of Session on 2nd June 1893 as trustee in his place.

Watson's trustees intimated to Reid's trustee that they were in right of Hamilton's part of the lease, in virtue of the assignation above mentioned, and demanded that the rent should be paid to them. This Carson, as Reid's trustee, declined to do, and instituted the present action, calling Watson's trustees and Hamilton as defender. The conclusions of the action sufficiently appear from the Lord Ordinary's interlocutor and opinion.

Hamilton did not defend the action.

The pursuer pleaded—"(1) The defender John Andrew Hamilton never having had any right to the said lands of Bankhead or the minerals therein, the alleged agreement between him and the said Francis Robertson Reid for a lease of the coal and other minerals mentioned therein was on his part *ultra vires* and wholly ineffectual. (3) The defender, the said John Andrew Hamilton, had no power to assign to the defenders, the trustees of the said James Francis Watson, the said agreement or any right

or title to demand from the pursuers implement of the obligations undertaken by the said Francis Robertson Reid under the said agreement, and the said last-mentioned defenders are accordingly not entitled to enforce implement thereof. (6) The agreement of lease is not enforceable against the pursuers, in respect that the said John Andrew Hamilton had no right to the subjects let, and that his pretended title to the same *ex facie* of the Register of Sasines, being without warrant and inherently null, did not enable him to bind the defenders, the true owners, to implement its provisions."

Watson's trustees pleaded—"(2) It being *jus tertii* to the pursuers to found any plea upon the said decree of declarator and reduction and the said assignation, or upon the settlement of Mr Whyte, and title made up by John Andrew Hamilton thereon, and the defenders, the trustees of the late James Francis Watson, being able and willing to implement the conditions of the said agreement of lease, the defenders are entitled to be assoilzied from the conclusions of the summons."

On 7th November 1895 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Finds, decerns, and declares in terms of the declaratory conclusion of the summons, declaring the term of Martinmas 1892 to be the date at which the pursuers were, and are now, and in all time coming freed and relieved of and from all the obligations purporting to be imposed on the pursuer Francis Robertson Reid by the agreement mentioned in the second conclusion, and reduces, decerns, and declares in terms of the reductive conclusions of the summons," &c.

Opinion.—"This is an action of declarator and reduction brought by the tenants under a mineral lease; and it is directed against the lessor and certain other parties who are (as it now appears) the true proprietors of the mineral field, and are also assignees to the lease under an assignation of the lessor's part of the lease granted by the lessor. The object of the action is to have it declared as against both defenders that the lease is no longer binding; and it seeks, as against both defenders, to reduce both the lease and the assignation. I do not know that I need refer to the exact terms of the summons. The proposition which it involves shortly is, that neither together nor separately can the defenders to any effect enforce the obligations of the lease as against the pursuers.

[*His Lordship here stated the facts.*]

"The pursuers maintain that John Andrew Hamilton's title having been reduced, the lease in question entered into between them and him is at an end; and in reply to the argument that the personal contract under the lease still subsists, and that the lessor, through his assignees, is still able and willing to perform the lessor's part of the contract, they contend (1) that they cannot be called upon to perform at the instance of John Andrew Hamilton, because, being no longer proprietor of the subject, he can no longer maintain them in possession; (2) that the other defenders, although proprietors of the subject, have no title to enforce a lease to which they were not parties; and (3) that they (the other defenders) acquired no such title by the assignation under reduction, because (*a*) the contract of lease had, as they say, fallen before the assignation was granted, and (*b*) because the lessor's interest in a lease is not, as they say, assignable except as incident to a conveyance of the subjects let.

"Considered in point of principle, the questions thus raised appear to me to be difficult. I am not, I confess, prepared to accept the proposition that the reduction of a lessor's title *per se* puts an end to the contract of lease; so that although the lessor were still able by arrangement with the new owner to secure the tenant in continued possession, the tenant would nevertheless be at liberty to refuse implement of his part of the contract. On the contrary, I should think *prima facie* that both parties would in that case still be bound—bound, that is to say, by their personal contract. If either was liberated, it could only be by the other party being disabled from performance. And, at least in other contracts than that of lease of land, such disablement would not necessarily follow from loss or absence of title. There may, I apprehend, be a quite valid sale or hire of what is or turns out to be a *res aliena*; nor is there, so far as I know, any legal impossibility in the seller or hirer duly performing such a contract. He may be able to do so, and may do so quite duly, by arrangement with the true owner. The peculiarity, however, of the contract of lease of land is this—that it is part of the lessor's obligation to give the lessee a title which shall be good against singular successors. And if, under a lease, the rent is or becomes payable to a person other than the proprietor of the lands, the lease cannot, I apprehend, be good against singular successors. That is to say, it cannot comply with the conditions of the Act 1449, c. 18. To secure, therefore, the lessee, and so perform his (the lessor's) part of the contract, it is necessary for a lessor whose title has been set aside, either to reacquire the subjects under a valid title, or effectually to transfer his contract rights to the true proprietor. And that being so, the question in the present case seems really to come to this—whether the pursuers are right in their contention that the assignation which the lessor has here made in favour of the other defenders is incompetent and inept. If such an assignation is incompetent—that is to say, legally impossible—there is of course an end of the matter. If, again, it is competent and effectual, there seems no reason why the lessee should be liberated.

"Now, can it be affirmed that the assignation by Hamilton to the other defenders of his contract rights under the various leases which he had granted during his possession was incompetent and inept? *Ex hypothesi* at the date of the assignation the contracts of lease as personal contracts held good. There had, as yet, been no

default—no failure on the lessor's part to perform his obligations. Why, the defenders ask, should there in these circumstances be any legal impediment to an assignation by the lessor to an assignee who is willing and able to give performance? There is of course no *delectus personæ* with respect to the lessor under a lease; and as regards the suggestion that the lessor's interest cannot be assigned except as incident to a disposition of the subjects—that, the defenders urge, is a proposition unsupported by principle, unless in the sense (which is conceded) that such an assignation can only be effectual if made to the proprietor of the subjects—so as to vest in the same person the right both to the rents and the property of the subject.

"The defenders also urge, and I think with force, that the object of the defenders could have been obtained circuitously by a conveyance of the estate to Hamilton by the other defenders (which would have validated the lease by accretion), and a reconveyance by Hamilton to them which would have carried the lease as an accessory of the estate. That, they say, would have been clearly competent; and being so, they deny the right of the pursuers to compel such circuity of procedure. They also point out (although this is perhaps a different matter) that upon the theory of the pursuers, Hamilton remains liable to them, the pursuers, in damages for breach of contract, and is yet disabled from relieving himself by securing them in all their rights.

"I am bound to say that I feel the force of these considerations, and if the point at issue had been still open, I should have had great difficulty. But the pursuers found on a judgment of the Court in the case of *Weir* v. *Dunlop & Company*, 23 D. 1293, which they say is conclusive, to the effect that such an assignation as was here granted is incompetent. And the defenders do not profess, or at least have not been able to my satisfaction to distinguish that case from the present. That being so, I consider that I am bound by that decision, and do not feel at liberty to canvas its grounds. The only distinction which I can find—apart from the very unfavourable circumstances in which the question was there raised—is this, that in that case there was perhaps ground for holding that before the assignation there in question was made, the lessor had failed to keep the lessees in possession—they having before the date of the assignation been, as I gather, practically evicted by the true owner. I do not, however, find sufficient evidence that the judgment proceeded on that ground; and on the whole, I think my proper course is to follow the decision, which I need hardly say, looking to the Judges who took part in it, is one of high authority.

"I propose, therefore, following that judgment, to give the pursuers decree in terms of the conclusions of the summons."

The defenders reclaimed.

Argued for the reclaimers—The Lord Ordinary rested his judgment on *Weir* v. *Dunlop*, July 17, 1861, 23 D. 1293. But that was a case of a very special character, and might be distinguished from the present case by the fact that the original lessor there was never infeft, and had no higher right to the lands than missives of sale. The present case was one of a right granted by a party infeft in lands on an *ex facie* regular title, which was subsequently reduced. Hamilton was infeft on a notarial instrument, which was registered on behalf of the widow, Mrs Whyte, in liferent, and on his own behalf in eventual fee. That was at the date of the granting of the lease an *ex facie* valid and regular title, *i.e.*, it was valid on the assumption that the destination to James Francis Watson as institute was evacuated by his dying without leaving a lawful male heir of his body. Real rights granted by a party infeft in lands on an *ex facie* valid title were good even if the title of the granter were afterwards reduced—*Heron* v. *Stewart*, May 30, 1749, Hume 440, 3 Ross, L.C. 243; *Calder* v. *Stewart*, November 18, 1806, 3 Ross, L.C. 248. Here, even admitting that a purchaser from Hamilton would not have obtained a good title, because he would have discovered, on examination of the record, the defect in Hamilton's title, the case of a lease was much stronger than that of a purchaser, because a lessee was entitled to rely on apparent ownership, and was not bound or entitled to submit the title of the lessor to an exact scrutiny. The law laid down in Rankine on Leases, p. 48, to the effect that if the lessor's title was reduced, or never existed, the lessee's title fell, was not supported by the case there quoted—*Macniven* v. *Murray*, May 25, 1847, 9 D. 1138. The ground of that judgment was that there was a reservation in the lease that if the title of the lessor should fall, the lessee's right should cease. Apart from these cases, the lease was good as the *bona fide* act of a possessor in the administration of property belonging to another—*Mackenzie* v. *York Buildings Company*, May 16, 1769, 3 Pat. Ap. 378. There was no *delectus personæ* on the part of the lessee in the contract of lease. (2) Even supposing that the lease was not binding as between the respondents and the reclaimers without an assignation, yet the reclaimers had obtained an assignation of Hamilton's right in the contract. A lease was a contract *sui generis* and assignable, provided that the assignee was in a position to implement the conditions of the lease. Again, a lease by a party who had no title to the lands would be good if he afterwards acquired a title. If, therefore, when the title of Hamilton had been reduced, the reclaimers had conveyed the estate to Hamilton, and accepted a re-conveyance from him, they could, as singular successors, have enforced the lease. The same effect should be given to the assignation, because the law will not require circuity when a direct proceeding will suffice.

Argued for the repondents—(1) The case is ruled by *Weir* v. *Dunlop*, *cited supra*, which is practically indistinguishable. (2) The reclaimers are wrong in their assumption that the title of Hamilton, the original lessor, was *ex facie* valid. It was on the face of it a nullity, because the notarial

instrument on which he was infeft, while describing him as eventual fiar, showed that the actual fee was in James Francis Watson. A lease was not good against singular successors under the Act 1449, cap. 17, and consequently was not binding on the tenant in a question with singular successors, unless the granter was infeft, and had an *ex facie* regular title—Bell's Principles, section 1181. Here the title of the granter was not *ex facie* regular, and therefore neither the tenant nor the true owner could enforce it. Nor could the reclaimers maintain that the lease was good as an ordinary act of administration —*Mackenzie* v. *York Buildings Company, cited supra,* was explained by Lord Young in *Liquidator of West Lothian Oil Company* v. *Mair,* November 18, 1892, 20 R. 64, at p. 70. It was not an authority to the effect that if a person who has no right to an estate chooses to assume the administration of it, the true owner is bound by his acts. That could not be the law. (3) The assignation by Hamilton gave the reclaimers no right to enforce the lease, because a personal contract of this kind cannot be assigned. The right of a landlord is not assignable except by and along with a conveyance of the lands. In the present case Hamilton could not have enforced the lease after his title to the lands was reduced, because he could not implement its conditions by giving possession; he could not therefore by an assignation convey to the reclaimers any higher right than he himself had. But for the Act 1449, cap. 17, a lease would be merely a personal contract. By that Act the tenant is given a real right in a question with singular successors. Conceding that this infers that a singular successor has the right to enforce the lease against the tenant, still the defenders were not singular successors of Hamilton, and did not represent him in any way. Their position was therefore solely that of assignees of a personal contract which is not assignable, and which, even if it were assignable, was not valid or binding on the respondents at the date of the assignation.

At advising—

LORD JUSTICE-CLERK—[*After narrating the facts*]—Upon these facts the following considerations seem to me to arise. At the time the defender John Andrew Hamilton granted this lease he was not in a position to do so effectively. He was not infeft, he had no title, and no right to the use and enjoyment of the estate, and therefore he could not as proprietor grant any effectual right of lease. The case was not one in which the personal obligation under a lease and the right to the subject of the lease were in one person, and there could be no effectual lease. By the decree of reduction in the former action John Andrew Hamilton was found to have no title to the estate, and therefore in a question between him and the pursuers of this action, there was and could be no effectual lease. But if he was in no position to fulfil his part of the obligation of lease, can he enforce the other part against the other party or transfer to anyone else the right to do so? At the time when it was found that he had no right, and for months afterwards, the other parties to the contract could have had no answer to a demand by the proprietor infeft that they should cede possession, on the ground that the person who had professed to give them rights had himself none, and if they were in this position, then as they had no one bound by their contract who could effectually keep them in possession, the question is, could they themselves be held bound? And if not bound, then a subsequent assignation by John Andrew Hamilton could not make binding on the pursuers obligations the correlative obligations to which the pursuers could not have enforced as binding on the true proprietor. But if the latter was not bound, no one was bound, and if the pursuers were not bound at the time immediately following the reduction of John Andrew Hamilton's title, they have done nothing since which can bind them in obligation to the new proprietors with whom they had no contract.

These considerations have appeared to me to be of great weight. I have given attention again and again to the views suggested by the Lord Ordinary tending in an opposite direction, but without being able to see that they are sufficiently weighty to overcome them.

The case of *Weir* quoted by the pursuers seems to me to be in point upon the general principle. I observe that the Lord Ordinary states that the defenders were unable to distinguish the present case from it, and he states that he has also been unable to do so. I must say that when I first read that case, that was my very distinct impression, and I endeavoured when listening to senior counsel for the defenders to discover in the argument any sound ground for holding that the case did not apply, but I, like the Lord Ordinary, have been unable to do so. I think, therefore, that there is precedent for the judgment which the Lord Ordinary has pronounced. I confess I should have had diffidence rather than confidence in expressing my own view in such a case as this, had the question been an entirely new one not already considered and dealt with in this Court, knowing that there is a difference of opinion on the bench in regard to it, and I have not come to the opinion that the Lord Ordinary's interlocutor should be adhered to without much and repeated consideration of the arguments *pro* and *con,* both on the general principle and on the case of *Weir.* But having done so, the conclusion at which I have arrived is that the interlocutor of the Lord Ordinary is right, and ought to be adhered to.

LORD YOUNG—The Lord Ordinary, if I rightly understand his note, is of opinion that the agreement of 24th January 1884 was at its date valid, and therefore binding on both parties to it, and further that it remained so down to the term of Martinmas 1892,—that is, for eight years and a half of the twelve years of endurance specified in it. As to the residue (3½ years), I gather from his Lordship's observations that but for the

decision in the case of *Weir* v. *Dunlop* he would have been disposed to hold that, as between the parties to the agreement, it was as binding after as it was before Martinmas 1892; that the agreement of August 1894 between the competitors for the property of Bankhead, made on the determination of the litigation between them, including the assignation by the defeated to the successful competitor of the outstanding leases on the lands of which his success had made him owner, was in all respects proper, and is not impeachable by the present pursuers; and that the pursuers, the lessees under the agreement of 1884, having got full and undisturbed possession of the subject thereby let, and complete implement of the obligations in their favour, not only during the 8¾ years till Martinmas 1892, but thereafter during the subsistence of the litigation between the competitors for the property, and the continuance of their possession till the expiry of the term of twelve years at Whitsunday next, being guaranteed to them by the owner of the land in an onerous contract with the party (John Andrew Hamilton) who was bound to give it or procure it, they must fulfil their part of the agreement which has hitherto been, and must, under the obligation validly imposed on the owners of Bankhead, continue to be fulfilled to them.

The Lord Ordinary, although he indicates pretty distinctly that he has been influenced by the case of *Weir* v. *Dunlop* to go against what would otherwise have been at least the strong inclination of his own judgment, does not seem to me, if I may presume to say so, to be quite satisfied that it is in point. I think it is not in point, and that we must consider the case before us irrespective of it. I think it is a peculiar and special case, and that it determines no general principle.

And *first*, with respect to the agreement of 1884, the only ground for the declarator and reduction concluded for respecting it, is that Mr Hamilton, not being proprietor of Bankhead, it was for him *ultra vires* to enter into it. There is no other. Now, it is true no doubt that in a question with an objecting owner it is *ultra vires* of a stranger to grant a lease of the owner's property. Here Mr Hamilton thought himself owner, and acted accordingly for fourteen years, during twelve of which his title was not questioned by those, viz., Watson's trustees, who turned out to be the true owners. Of course, no one other than the true owner could challenge Mr Hamilton's possession or the possession of tenants under him during these years. His tenants, who took leases from him and entered on possession, could not challenge his title to the property. I may say that I think it a universally true proposition that a tenant accepting a lease from anyone cannot challenge the title of his landlord. The trustees of James Francis Watson, who instituted proceedings in 1892, were the only parties who could disturb his possession or that of any tenant of his.

It is certainly unusual for the claimant to an estate during his litigation with the party in possession, to do anything whatever to disturb tenants in *bona fide* possession, and indeed such disturbance would, speaking generally, be impossible. But it is sufficient here to say that the successful claimants (Watson's trustees) did nothing whatever to disturb the possession or the rights under agreement with Hamilton of the pursuer or any other tenants, during the dependence of the title litigation, that is, between 1892 and 1894, and it does not occur to me that they could have done anything. After success it was for their consideration whether it was possible, or if possible desirable, to interfere with possession on current leases from Mr Hamilton. I doubt if it was possible, and strongly incline to think it was not. As to the prudence and good feeling of simply homologating, as they did, the leases he had granted during the period of his possession, and relieving him of the obligations he had thereby undertaken by taking these obligations on themselves, I am unable to entertain a doubt.

The tenant, the pursuer (I use the singular for clearness), says that he did not work the coal after 1888. I assume this to be the fact although there is no admission, but think it clearly immaterial. He entered into possession in 1884, paid rent down to Martinmas 1892, and his possession, as the defender truly avers, "was not and never had been disturbed." Why did he not pay after Martinmas 1892? His only answer is — "in consequence of the litigation after mentioned" — that is, the litigation as to the property title which commenced on 1st March 1893. I cannot accept this as a good reason, not being prepared to affirm it as a sound general proposition that a litigation challenging the title of the party in possession of an estate entitles the tenants thereon on leases from him to throw up their leases. I should even go the length of saying that the proposition is extravagant on the statement of it. If the litigants cannot agree to leave matters undisturbed till the issue of the suit, they may apply to the Court to protect the interests of the party who may succeed, which may be done by appointing a factor to receive the rents and pay expenses meanwhile. But as I have already observed, the familiar and usual course is to leave things alone and undisturbed, exactly as was done here. As to disturbing, pending such litigation, the possession of a tenant, I repeat that, in my opinion, the law would not, unless on some very special and exceptional ground, permit it, and would, on the contrary, protect such possession. It follows that the tenants being thus secured in their rights must fulfil their obligations.

This brings me down to the termination of the litigation on 4th June 1894, when the defenders, Watson's trustees, were ascertained to be the owners of Bankhead. Was the tenant—the pursuer (I still use the singular)—then and thereby "freed and relieved" of the obligations imposed on him by the lease, and theretofore, I assume, incumbent on him as the counterpart of his

rights? The pursuer's case here, if I understand it, is this—that his obligations by the lease being to John Andrew Hamilton as proprietor of Bankhead, ceased when it was judicially ascertained that he was not proprietor. I cannot assent to this proposition. The pursuer's obligations could not cease while his rights subsisted, and it is too clear to require argument that his rights were not terminated by the judgment of 1894. John Andrew Hamilton could not after June 1894 satisfy these rights specifically without the aid of Watson's trustees, and it may be a question whether or not they were bound to give it. If they were bound, or whether bound or not did give it, I am of opinion that Hamilton was bound to satisfy the pursuer's rights specifically. The pursuer's argument here was that Watson's trustees did not enable Hamilton to satisfy his right to be continued in the possession and enjoyment of the subject let, but only undertook themselves to satisfy it on his behalf. There is, of course, no doubt of their ability to satisfy it, or of the validity and obligatory character of their undertaking to do so. What, then, is the distinction, or what can it signify to the pursuer whether his right is satisfied by Hamilton directly, or by Watson's trustees upon an onerous obligation which Hamilton procured from them? Suppose that on the judgment being pronounced Hamilton had bought the property from Watson's trustees, is it doubtful that the lease in question would have been good and enforceable *hinc inde* till its expiry? But the case is really not distinguishable from the present as regards the satisfaction of the pursuer's rights, the only subject which I am now considering, and the point which I desire to make clear being that if his rights exist, and he is sufficiently assured that they will be satisfied in the future as they have been in the past, his obligations also exist and must be fulfilled.

It was not till 24th October 1894 that Watson's trustees executed the deed whereby they bound and obliged themselves "to perform, implement, and fulfil the whole obligations and prestations incumbent on me (J. A. Hamilton) by the leases, &c.," referred to, including that to the pursuer. This was four months after the judgment in their favour, and in the view that they were during these four months free of any obligation by the lease or otherwise to the pursuer, it is urged that he on his part was also free, and was not put under obligation to them by their subsequent adoption and ratification of the lease.

Now, in the first place, I cannot assent to the assumption on which this argument rests, viz., that by the judgment in their favour they took the property free of the leases upon it, granted by Mr Hamilton during his possession, and were at liberty if they pleased to eject tenants possessing under such leases. On the contrary, I am of opinion that when the title of a party in the *bona fide* possession of an estate is successfully assailed, as Mr Hamilton's title was here, the owner is on the one hand entitled to have it, and on the other must be content to take it as it exists—that is to say, in so far as its existing state and condition has been produced by ordinarily prudent management. There must of course be management during the period, long or short, that the possessor and the owner are both ignorant of their respective positions, and if it was ordinarily prudent I am of opinion that the owner cannot assail it, or the rights acquired by third parties in the course of it and by reason of it. Innumerable cases might be put illustrative of this view, but it is sufficient to take the illustration of leases such as ordinarily prudent management required or even warranted. I should hold, I must say without doubt, that the owner will, as the result of his success, take the estate with the advantage or disadvantage of these leases upon it, and that as regards the tenants he must take the place of the possessor who granted them and whose title he defeated. This is the manifest justice of the matter as regards both the possessor who *bona fide* granted the leases, and the tenants who *bona fide* took them and possessed upon them.

But, in the second place, on the assumption, contrary to my opinion, that Watson's trustees were not bound to recognise the pursuer's lease, and take him as their tenant under it, I am unable to appreciate the only reason which has been suggested why in October 1894 they were not at liberty to homologate that lease, or why their homologation then should be inoperative. The only reason suggested is that there was a delay of four months. This delay obviously enough does not render the homologation inoperative in favour of the pursuer and against Watson's trustees, and it cannot be suggested that it (the delay) was, or conceivably could be, prejudicial to the pursuer. Watson's trustees were owners of Bankhead when the lease was granted, and had Hamilton possessed their mandate his act would have been *intra vires*, and needed no homologation. But subsequent assent by the party whose prior mandate would have validated the act from the beginning is homologation and equivalent to prior mandate. It was intended that the lease should be by the proprietor of Bankhead, or one having his authority, express or implied—for none other could grant it—and error on the subject seems to present a typical case for homologation. Who was the proprietor, there being no *delectus*, was immaterial, provided he (whoever he was) authorised the lease, and equally so whether the error consisted in the granter thinking that he was himself the proprietor when he was not, or that he had the proprietor's authority when he had not. I am unable to perceive any distinction in this matter between a mineral lease, or indeed any other lease, and a sale or hire or loan of a specific subject. The seller, hirer, or lender is absolutely bound by his contract, and may undoubtedly fulfil it by procuring homologation. I do not mean to say that a purchaser or lessee might not declare off if when matters were entire he discovered that the contract required

homologation which had not been granted. But the pursuer's case is as far removed from one of that kind as would be that of a buyer who had got delivery of the goods he bought, and re-sold or consumed four-fifths of them. The pursuer has under the lease in question been in exclusive possession of the property of Watson's trustees since 1884, and removed and, I suppose, sold some considerable portion of its mineral substance.

I have already said that I assume (though we have neither admission nor evidence on the subject) that the lease, after four and a-half years working under it, proved unprofitable to the tenant, but that I think the circumstance immaterial to the question we have to decide. It may, however, be useful to point out more distinctly, that had the lease proved profitable to the tenant the legal rights and obligations of the parties before us would have been the same, and the decision upon them dependant on the same considerations. The purpose of doing so is to test the reason and justice of the pursuer's pleas by the consequences to which they lead.

Suppose that the lease had proved profitable to the tenant and disadvantageous to the proprietor, and that the defenders (Watson's trustees), prompted by a consideration of interest similar to that which actuates the present pursuer, had repudiated the lease as a nullity, or at any rate invalid to affect them, and therefore desired the pursuer to remove from their ground and make reparation to them for having without authority sunk and worked pits upon it, and removed a quantity of coal, their property — such contention and demand by Watson's trustees would, indisputably, be in accord with the pursuer's pleas on record and his argument to us, and could not, consistently with them, be resisted. The continuous working and extraction of coal having endured for only a few years (4½), and the fixed rent being only £75 (we do not know what the lordship amounted to), the case is not so gross as may (legitimately for illustration) be figured. Suppose the working and extraction had continued for, say, ten or twenty years, and that the rent (fixed rent or lordship) regularly paid to the honestly supposed owner during that period, had amounted to £20,000, and further suppose that the tenants' prospects for the residue of the lease had been undoubtedly good, the legal rights of the parties would, I repeat, have stood exactly as they do here, and depended on the same legal considerations, for I know of no rule of law to enable me to distinguish between possession for five years and possession for ten or twenty years during which there was honest error as to the ownership of the ground, or between £100 and £1000 a-year of value.

I can see no answer consistent with the pursuer's argument to the claim of the true owner for reparation. There might be a right of relief or to damages from the party who granted the lease and thereby put the tenant in a false position, but this might be worthless, and probably would be in most cases where a large property is taken from the possessor, and all the tenantry thereon evicted with such claims upon him. I do not believe that it has hitherto occurred to any lawyer that our law was such as to admit of such results.

I venture in conclusion, and in the interest of both parties, to point out that on the assumption that the pursuer's case is well founded, viz., that this lease must be regarded as of no avail between him and Watson's trustees, and reduced accordingly, it follows clearly, in my opinion, that Watson's trustees have an unanswerable claim of damages against him for sinking pits in their land and extracting and removing coal therefrom, nor do I think that he, on his part, could have any corresponding claim against J. A. Hamilton, who offers him full implement, in spirit and to the letter of his contract, and is admittedly in a position to give it.

LORD TRAYNER—The Lord Ordinary has pronounced the interlocutor now under review chiefly, if not altogether, out of deference to the decision in *Weir* v. *Dunlop*, a case which, in his Lordship's opinion, cannot be distinguished in any material respect from the present. There is obviously a similarity between the two cases; and although each presents certain specialties in fact and circumstance, I agree with the Lord Ordinary in thinking that in all essential respects they are the same, to be decided on the same grounds, and therefore with the same result. I shall not examine the case of *Weir* further than to say that in it, as in the present case, there was a lease (or missives of lease) granted by one who had no title to the subjects let, that possession followed in respect thereof on the part of the lessee, that there was an assignation subsequently granted by the lessor of all his rights under the lease (or missive of lease) in favour of the person vested with the property of the subject let, and that the person so vested with the property (and assignee of the lessor) was willing to continue the rights to the lessees which the lease conferred. The cases differ in respect that the possession had by the lessee in the former case was shorter and of a different character from that enjoyed by the lessee in the present case. This difference does not strike me as having any material bearing on the question before us, while, as I have said, the points of agreement seem to me to make the decision in the one case a precedent for the decision of the other.

Apart from precedent I should have arrived at the same conclusion. In the first place, I think there never was a valid lease at all—that is, a lease which the lessee could not have challenged during any period of its currency. The granter of a lease of heritable subjects "must be either the proprietor of the subject let, or one entitled to the full use and possession of the subject, or one in the administration of it. The proper title, therefore, of the granter of a lease as heritable proprietor is an infeftment." — Bell's Prin. sec. 1181. Now, Mr Hamilton does not pretend that he

was in the administration of this estate on behalf of some other; nor was he entitled to the full use and enjoyment of it as life-renter or otherwise. The lease, or more correctly the agreement to lease, entered into between Mr Hamilton and the pursuer bears to be "of coal and other minerals as after mentioned in part of his (that is, Mr Hamilton's) lands of Bankhead." It was therefore as proprietor, and in no other character, that Mr Hamilton agreed to lease the minerals. But he had no infeftment. The title on which Mr Hamilton proceeded, and the only title he had, was not an infeftment in the lands. A reference to the case of *Watson's Trustees* v. *Hamilton* decided in this Division of the Court will show exactly how the matter of title stood. Shortly stated, it was this. The late Mr Whyte of Bankhead by his last settlement left his estate of Bankhead to his widow in liferent and to his nephew James Francis Watson in fee, with this addition, "that in the event of my said nephew James Francis Watson dying without leaving any lawful heir-male of his body, then and in that event my said lands of Bankhead are to revert back to my said nephew John Hamilton." It was decided that under that destination there was a direct conveyance of the estate to Mr Watson vesting him with the estate as at Mr Whyte's death, and a simple substitution of Mr Hamilton which could be evacuated by Watson; that Watson did evacuate it by his general disposition; and that no right of fee ever descended to Hamilton. Upon Mr Whyte's settlement, however, Mr Hamilton had expede a notarial instrument, which was recorded on behalf of Mrs Whyte in liferent and himself in "eventual fee." It goes without saying that there was no warrant for recording any notarial instrument in favour of Mr Hamilton as fiar of Bankhead. He was not the fiar; the deed upon which the notarial instrument proceeds gave him no fee. The phrase "eventual fee" is novel, and expresses rather Mr Hamilton's expectation than his right. But certainly the recording of that notarial instrument did not give Mr Hamilton any infeftment as fiar or proprietor of Bankhead. That being so, Mr Hamilton lacked the qualification necessary to enable him to grant a valid and binding lease of Bankhead or the minerals therein. Now, I think the pursuer could at any time during the currency of the pretended lease have thrown it up on the ground that the lessor had no title to the minerals let, and could not consequently protect him, the tenant, in his possession under it. He was not bound to wait until the real owner came forward to eject him.

If it be said that I am here disregarding the principle that a lessee cannot challenge his lessor's title, my answer is that that principle has no application to the case I am considering. That principle only applies where the lessee, in a question with the lessor, or one in right of the lessor, is maintaining some right or claiming some benefit under or in respect of the lease, not where he is renouncing or repudiating the lease.

In the second place, if the lease was not valid and binding on the pursuer, then the subsequent assignation of it to the defender was of no avail. Mr Hamilton by his assignation could give no higher or better right to his assignee than he had himself. If he had no enforceable right under the lease, his assignee could have none by virtue of the assignation. But further, when the assignation was granted, the lease as a contract had come to an end. The lessor's title, such as it was, had been reduced, and the reduction of a lessor's title extinguishes the lease. It was therefore an assignation to a lease which the supposed lessor had no title whatever to enforce; it was a lease which he was never in a position effectually to grant. But what he never had power to grant, and could certainly not now enforce, he could not with any effect assign. Without a valid assignation in their favour, the defenders cannot enforce the lease. It is a contract to which they are not parties.

It is said, however, on behalf of the defenders, that the pursuer should be held bound by the lease, because he was not, in point of fact, disturbed in his possession while he held under Mr Hamilton, and that they do not wish or propose to disturb him now; that he has got all he bargained for either from Mr Hamilton or them. This argument was thought to be illustrated or enforced by reference to the case of a sale of a *res aliena*. I confess I do not see how the illustration aids the argument. Suppose a case. Suppose that A sells to B a subject belonging to C, and that whether B knows or does not know that, the thing belongs to C. When the time for delivery of the thing sold arrives, if A can deliver it, it is of no consequence to whom it had previously belonged. It is in the lawful possession of A at the time for delivery, he can fulfil his contract by delivery, and it is not in B's mouth to say, "When you sold this to me it was not yours." But if A said to B "I cannot deliver the subject sold because it belongs to C, but he is willing to sell it to you on the very same terms as those on which I sold," would that be fulfilment of his contract, or would B be bound to transact with C? Certainly not. Yet here, according to the defenders' argument, B is bound to contract with C, and must take from C what he had bought from A. But it may perhaps be said that the case I have used in illustration is different from the case here, inasmuch as in the case supposed there was no delivery at all under the contract, while here there was at least partial delivery. Well, I will suppose another case. A contracts with B to supply him with 500 tons of a special brand of pig-iron in each month for a year. He fulfils his contract for the first nine months and then informs B that he is not in a condition to fulfil the contract farther, and that C, a third party, will take up the contract and fulfil it on the same terms as had originally been bargained for. That case is very like the present. Three-fourths of the contract time had passed; three-fourths of

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