LORD M'LAREN—I agree with your Lordship and Lord Adam as to the conditions under which this question is raised, and also as to the manner in which this question should be answered. The condition of the statute is that the person who institutes a claim must be in a position to raise an action for damages or *solatium* against the employer, supposing that the employer were in fault. Now, the claimant in this case might, if she survived her husband, have a claim to institute such an action; but again, if she should predecease her husband, she not only has no claim but never would have a claim. I cannot read the statute, when it gives a definition of persons who are entitled to raise an action of damages, as meaning that you are within the class if you have the possibility at some future time, and under events which may never occur, of coming within the definition. What is plainly meant is that at the date of making a claim against an employer the claimant must be a person who in the event contemplated would be entitled to raise an action of damages. Now, I agree with your Lordship that as the father of the deceased young man is in life, although living apart from his wife, he is the only person who could raise such an action, and that the mother, who is not in that position and is unable to comply with the statutory requirements, cannot do so.

LORD KINNEAR concurred.

The Court dismissed the appeal.

Counsel for the Appellant — Salvesen, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents — Wilson, K.C.—Younger. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, February 6.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

SMITH *v.* HARVEY.

Writ—Sale of Heritage—Improbative Writ Adopted as Holograph.

Circumstances in which *held* that a contract of sale of heritage entered into by an offer and acceptance, which were both written by the law-agent for the seller and bore to be "adopted as holograph" by the respective parties, was not binding on the purchaser.

Observations on the mode of validating improbative writs by the words "adopted as holograph."

Contract—Consensus in idem—Acceptance Less Full than Offer.

A purchaser offered to buy a lodging-house, with the fittings and fixtures therein, and the goodwill of the business there carried on. The seller accepted the offer to purchase the lodging-house, fittings, and fixtures, but made no mention of the goodwill.

Opinion (*per* the Lord President) that there was no *consensus in idem* between the parties.

Opinion (*per* Lord Kinnear) *contra.*

Process—Summons—Principal and Accessory Conclusions—Conclusions for Implement or Damages—Conclusions for Implement Dismissed.

In an action against the purchaser of a house, concluding that he should be ordained to implement the contract of sale, and, failing implement, for damages, the Lord Ordinary dismissed the action so far as concluding for implement as premature, but found the defender liable in damages. The pursuer did not reclaim against the interlocutor dismissing the conclusions for implement, and before the case was heard in the Inner House altered the subjects which he alleged he had sold.

Opinion (*per* Lord Kinnear) that as the pursuer could not obtain a decree for implement he had no right to damages.

This was an action at the instance of Edward Harvey, spirit merchant, Lochgelly, against John J. Smith, lodging-house keeper, 88 Candlemaker Row, Edinburgh, concluding that the defender should be ordained "to implement and fulfil in all respects his part of the missives of sale of the subjects in Lochgelly used by the pursuer as a lodging-house, with the fittings and fixtures therein, and the goodwill of the business carried on in the premises, entered into betwixt him and the pursuer, dated the 5th day of May 1902, by accepting a valid disposition containing all usual and necessary clauses executed by the pursuer in his favour of all and whole these premises in High Street, Lochgelly, used as a lodging-house and belonging to the pursuer, with the fittings and fixtures therein and the goodwill of the business carried on in the premises, and tendered to him, and also by making payment to the pursuer of the sum of £1200 sterling, the agreed-on price and value of the said premises in Lochgelly and others, with interest."

There was a further conclusion "that in the event of the defender failing within one month from the date of the decree to follow hereon to implement the foresaid missives of sale" he should be ordained to make payment to the pursuer of the sum of £250 in name of damages.

The pursuer founded on an offer made by the defender to the pursuer, and on a letter of acceptance by the pursuer, both dated 5th May 1902. The offer of the defender, which was produced, bore that the defender offered "to purchase from you the subjects in Lochgelly used by you as a model lodging-house, together with the fittings and fixtures therein, and the goodwill of the business carried on in the premises, at the price of £1200," on the following conditions—(1) that entry should be given by 1st June 1902, when the price should be payable; (2) of the said price the

sum of £1000 should be allowed to remain as a first bond on the property, with interest at 4½ per cent. per annum, the amount in said bond to be paid in instalments of not less than £100 per annum; and (3) that a formal conveyance should be given to the defender with the usual clauses.

The letter of acceptance bore that the pursuer accepted the defender's "offer of this date to purchase the lodging-house property in Lochgelly belonging to me, together with the fittings and fixtures therein, at the price of twelve hundred pounds sterling, on the conditions stated in said offer."

The offer by the defender and the acceptance by the pursuer were not written by but were signed by the defender and pursuer respectively. On the offer, opposite the pursuer's signature, were the words "adopted as holograph." On the acceptance, opposite the defender's signature, were the words "adoped" or "ddoped as holograph."

The defender averred, *inter alia*, that he "on 5th May 1902 was on a holiday to Lochgelly. He met several acquaintances and had a considerable quantity of liquor. He thereafter called at the pursuer's public-house there where he was supplied with more liquor. The pursuer and defender were old acquaintances. While the defender was considerably under the influence of drink the pursuer offered to sell him the property in question, along with the fixtures, fittings, and goodwill of the business. The defender stated at the time that the purchase could only be carried out with the consent of his wife, who was to supply the money, and also on condition of his obtaining the consent of his landlord in Edinburgh for the disposal of his present business, which is that of a common lodging-house, and licensed as such. This was agreed to, and later on in the day the pursuer persuaded the defender to go to Thornton along with him, where he had telegraphed to Mr David Robertson, solicitor, Markinch, who acts as the pursuer's agent, to meet them. The parties met there, and the pursuer's agent drew up and wrote out the alleged offer, of which he did not give the defender a copy, along with the alleged acceptance. The defender in writing and signing the docquet appended to said alleged offer did so in the belief that the premises were duly licensed, and that the alleged offer contained all the conditions of the proposed purchase. . . . The defender is very illiterate and can barely read writing or write. The defender was induced by the pursuer to write and sign said docquet under the belief that the lodging-house was licensed by the authorities, and that he was making a conditional offer, the pursuer having fraudulently concealed from the defender that the local authority had refused to renew the licence, and that the said conditions of the purchase had been omitted, or that it was necessary that the offer should have embraced them; and further, the pursuer fraudulently took advantage of the defender's state of intoxication and his illiteracy and inability to read writing so as to induce him to write and sign said docquet when he was wholly incapable of understanding it and the effect of said alleged offer. On the defender's return home he consulted his wife, who refused her consent. He also approached his landlord, but he refused to allow him to renounce his lease, or to allow him to assign it to another. The defender on the following day, through his solicitor, who had not seen the alleged offer, acquainted the pursuer that the proposed purchase was off. . . . A few days thereafter the defender discovered that the licence for said lodging-house had been withdrawn by the authorities a considerable time previous to the alleged purchase. . . . The pursuer well knowing how matters stood in his acceptance of the defender's alleged offer carefully kept out the goodwill of the business, which previous to the withdrawal of the licence was the most valuable asset."

The pursuer admitted that the pursuer and defender met at Lochgelly on 5th May 1902 and that the offer and acceptance, excepting both the signatures and the holograph docquets thereof, were written by Mr Robertson. He explained that the omission of goodwill in the acceptance was purely a clerical error, and that he had always been willing to convey the same to the defender. *Quoad ultra* he denied the defender's statements.

The action was raised on May 21st 1902, although the date at which under the contract entry was to be given and the price become payable was June 1st 1902. The pursuer averred that before the summons was served the defender had given written intimation to the pursuer that he refused to carry out the agreement come to in the said missives of sale.

The pursuer pleaded, *inter alia*—"(1) The defender having by missives of sale entered into an agreement with the pursuer to purchase the said property, should be decerned and ordained to implement and fulfil his part of said agreement, and ought to be found liable in the expenses of the present action. (2) Failing implement of the said missives of sale by the defender, the pursuer is entitled to compensation for the loss and damage sustained by him in consequence of the defender's breach of the agreement contained in said missives."

The defender pleaded, *inter alia*—"(2) The action is premature. (3) The alleged offer and acceptance do not form a concluded contract of purchase, and being neither holograph nor tested, the defender ought to be assoilzied. (4) In any view, the pursuer cannot enforce it, on the ground (1st) of fraudulent concealment on the part of the pursuer; (2nd) essential error of the defender as to the substance and effect of said alleged offer; (3rd) that when the defender wrote and signed said docquet he was so much intoxicated as to be wholly incapable of understanding it and the effect of said alleged offer; and (4th) that the said alleged offer, in consequence of the defender being unable to read writing, and its

effect not having been explained to him, is not his deed."

On January 27th 1903 the Lord Ordinary (KINCAIRNEY) found that the defender refused to implement the contract libelled, repelled the first plea-in-law for the pursuer, and dismissed the action in so far as regards the primary conclusion of the summons, repelled the third plea-in-law for the defender, and sustained the second plea-in-law for the defender so far as regards the said primary conclusion of the summons, and *quoad ultra* repelled said plea, and before further answer allowed the parties a proof of their averments.

A proof was led, the purport of which sufficiently appears from the opinions of the Lord Ordinary and of the Judges in the Inner House.

On June 17th 1903 the Lord Ordinary found—(1) That a contract of sale and purchase of the subjects set forth in the summons was concluded between the parties on 5th May 1902 by the missives; (2) that the defender had refused to carry out said missives; (3) that no sufficient grounds for such refusal had been established; (4) that the defender was liable in damages for breach of contract, and assessed the damages at £50.

Opinion.—"I have found this to be a very difficult case, the evidence is incomplete, obscure, conflicting, and on both sides unreliable. It is an action brought to enforce implement of missives of sale of a lodging-house at Lochgelly belonging to the pursuer. The missives bear to be dated 5th May 1902, and consist of an offer by the defender Smith to purchase the house and an acceptance of the offer by the pursuer Harvey. The price specified in the missives is £1200. The defender has refused to implement the missives, and he has pleaded that this action is premature. That plea has been sustained by interlocutor dated 27th January 1903, and the action resolves itself into an action of damages for breach of contract. The grounds on which the defender has refused to fulfil the contract are in substance these. He disputes the authenticity of the missives, and he pleads besides that the contract, if completed, cannot be enforced because of the defender's state of intoxication at the date of the bargain, and his inability in any case to understand the missives; and he pleads besides fraudulent concealment and essential error. These two last grounds depend on the averment that the defender believed that the house was a licensed house and that it was not, and that the pursuer concealed that it was not licensed, and further that the authorities had refused to renew its licence, it being averred that it had been licensed before. It is also averred, at least so I understand the defender's answer 2, that the sale was conditional on the consent of the defender's wife, and also on the consent of his landlord in Edinburgh allowing the defender to give up a lease of a common lodging-house in Candlemaker Row. There are no reductive conclusions. A proof has been taken of these pleadings, and the case has now to be disposed of on the proof. The narrative of the transaction is introduced very abruptly, and it is desirable if not necessary to advert to the antecedent relations of the parties. They were well acquainted. Both had kept common lodging-houses in Lochgelly. The defender had kept one there in or about the years 1897 and 1898. In May 1900 he left Lochgelly and came to Edinburgh, where he has since kept a common lodging-house in Candlemaker Row. The pursuer built the lodging-house which is the subject of this action in or about 1898 or 1899, and he depones that he occupied it as a licensed lodging-house until 1900, when he says it ceased to have a licence, but he continued to occupy it as a lodging-house. The witness Small, Town-Clerk of Lochgelly, depones that the licence was refused on the 14th May 1900, and has not been re-granted. The reason for this refusal does not clearly appear, but apparently it was because the defender kept a public-house, and it was thought undesirable that the keeper of a common lodging-house should do so.

"It does not appear clearly whether this alleged withdrawal of a licence was known to the defender. His knowledge of it is not proved. But it appears that more than once there had been negotiations for the purchase of the pursuer's lodging-house by the defender at the price of £1000 or thereby, but these negotiations came to nothing.

"With regard to the transaction now in question, the facts seem to be somewhat as follows:—"On 5th May 1902 the defender went to Lochgelly. He says that he went for a holiday, and he did not tell his wife that he had any intention of buying the pursuer's lodging-house. He made no appointment with the defender, but he called on him at his public-house, and found him at home, and the pursuer depones that the defender then agreed to buy the pursuer's lodging-house for £1200. The pursuer gives no details, and does not account for the price being run up to £1200. The pursuer proposed that they should have the contract written out by an agent, and with the defender's consent he telegraphed to his agent Mr Robertson, writer, Markinch, to meet them at Thornton Junction. As it happened, Mr Robertson was at home and received the telegram, and as it happened he was able to meet them at Thornton Junction. At this point the story is taken up by Mr Robertson, who explains that he was informed of the bargain and the terms of it, getting his information chiefly from the pursuer. He then wrote an offer as from the defender, and an acceptance of the offer by the pursuer; the one is No. 6 and the other No. 9 of process. He depones that the documents were signed by the parties, and that each at his dictation, wrote opposite his signature the words 'adopted as holograph,' the word 'adopted' being misspelled in the offer. Mr Robertson depones that he read these documents to the parties. The evidence on this point is corroborated by the pursuer Harvey.

"Mr Robertson also says that the defender

instructed him to advertise his business in Edinburgh for sale, which he did. He made, however, no inquiries about the business, nor any inquiry whether the defender had an agent in Edinburgh. The whole of the business in which Mr Robertson was engaged occupied about twenty minutes, after which the defender took the train to Edinburgh. It seems that on parting he said, 'I must consult my wife about this.'

"The pursuer and Mr Robertson both depone that all this time the defender Smith was perfectly sober, evidence which receives somewhat important corroboration from a witness, Bailie Laing, at whose shop the pursuer and defender called.

"This account is given almost entirely by the pursuer and Mr Robertson for the reason that the defender depones that he was so drunk that he did not understand what he was about. When examined about his signature he vacillates extremely. He admits his signature, but ends by denying that he wrote the words adopted as holograph, because he says that were not like his 'hand of write,' although he says he had hardly ever written before. I did not consider this part of the evidence creditable to the defender. The defender's evidence about his state of intoxication is poorly corroborated, the best witness for him being a miner called Donaldson; but he, on being asked at the end of his evidence 'Are you prepared to swear that Mr Smith was so drunk that he could not understand what he was bargaining about?' answers 'No, at the time he left me.'

"It appears that the defender reached his house in Edinburgh at a late hour that night, when his wife 'thought he had got a little drink.' He said nothing to his wife about what he had done, but she found in his pockets in the morning the pursuer's acceptance of his offer (No. 9 of process); and on examination he admitted he had been trying to settle to buy the lodging-house; when she said she would never put her foot in it. It appears also that he remembered enough of what had happened to go to his landlord to get his consent, which the landlord refused. He afterwards discovered, as he says, that the house was unlicensed. He then intimated that he would not carry out the sale, and he offered first £5, and afterwards £50 to get off the bargain,—offers which were refused. These are the main facts. I think it cannot be denied that they are singular and suspicious. The defender does not appear to have intended to buy the pursuer's business when he left Edinburgh, and his conduct seemed more like that of a drunk man than a sober. The transaction was a large one. The price offered was £1200, £200 higher than he had previously offered, although it is to be kept in view that only £200 of it was to be paid in money. Besides, it is to be kept in view that the transaction involved the change of his house from Edinburgh to Lochgelly. It certainly seems as if Mr Robertson took very little time to transact such an important piece of business—especially when Smith had no independent adviser. Mr Robertson, indeed, says that he considered he was acting for both. But he had acted for the pursuer, and he charged him with the whole account, and charged the defender nothing. I hold that he was agent for the pursuer, and I am not prepared to accept his view that he was acting for the defender also. No doubt he did act for the defender in advertising his Edinburgh business for sale, about which proposed sale we hear no more.

"Having gone over these facts, I can do little more than merely state the conclusions to which I have come about the defender—except about one important point which I will refer to immediately.

"I am then of opinion (*first*) that the authenticity of the missives is sufficiently established; (*secondly*) that it is not proved that the defender was so intoxicated at the time of the transaction as to be incapable of understanding it, or that the offer made by him is not his deed, and therefore I think that the third and fourth heads of plea four should be repelled. I do not say that the considerations as to the defender's state of intoxication are all one way, but only that the proof in support of the defence on this head is insufficient. I do not require to decide whether these pleas can be entertained without a reduction.

"I further hold that it is not proved that the bargain was conditional on the consent of the pursuer's wife or of the defender's landlord. I do not in saying so mean to affirm that it would have been competent to prove that there were these conditions, but I do not require to consider the question of competency.

"But there remain for consideration the first and second heads of pleas four, which raise to my mind by far the most difficult questions in the case, the pleas of essential error and of concealment, and it is not without much hesitation that I have come to the conclusion that they should be repelled. I think that they are pleas which could not receive effect except in a reduction. The essential error averred is that the defender thought that the pursuer's premises were licensed, whereas they were not. A great deal is said in the evidence about licensed and unlicensed lodging-houses, but it was not explained either in the proof or the arguments what the licence of a lodging-house was, and under what authority it was granted.

"I understand that common lodging-houses are regulated under the provisions of certain sections of the Public Health (Scotland) Act 1897, part 5, but in none of these sections is there any mention of a licence. The control and good management of common lodging-houses seems under the Act to be attained by registration in a register of lodging-houses. From section 40 it would appear that the approval of the local authority is required for common lodging-houses, and it may be that that approval is known as a licence. At all events, what is meant by the averments of the want of licence of the pursuer's house I take to be that it has not the advantages, whatever they may be, of a common lodg-

ing-house as defined in the statute.

"A common-lodging is defined in the statute, section 3, as 'a house or part thereof where lodgers are housed at an amount not exceeding 4d. per night, or such other sum as shall be fixed under the provisions of the Act.' And I understand that anyone who keeps lodgers at that low rate in a house which is not registered as a common lodging-house is liable to prosecution. Now, I gather from the proof that the pursuer's house is not a house (whether from want of registration or want of licence) authorised to take in lodgers at these low prices; and if the missives in this case had described the subjects as a common lodging-house I would have been disposed to hold that under such missives the defender could not have been compelled to accept a disposition of a house which did not answer to the statutory definition of a common lodging-house. But the term 'common lodging-house' is not used in the missives. The one missive speaks of a house used as a model lodging-house (not a statutory term), and in the other the only term used is lodging-house. So that it seems to me that there is no warrant for affirming that the subject of the sale was a common lodging-house. There is no representation to that effect. The pursuer says that there are licensed lodging-houses and unlicensed, and that the rooms in unlicensed lodging-houses are let at higher rates than rooms in licensed houses, that he prefers a house to be unlicensed, and that he keeps a lodging-house though it is not a licensed one, and there seems no evidence against that. Now, the bargain was made on the premises where the pursuer was carrying on his business openly, and the defender ought to have seen, or if he did not see, to have inquired, what kind of lodging-house he carried on, and not having done so I think that he has not established a right to reject a disposition of the subjects merely because the house did not correspond with the definition of a common lodging-house in the statute. It is one of the consequences of carrying out a business transaction hurriedly that points of importance are omitted. I might add that there is no proof that the defender would have had any difficulty in getting his house registered.

"I have therefore come to the conclusion that I cannot sustain these pleas.

"It is further said that the pursuer's house was under a challenge at the time by the local authority, and that the pursuer was bound to have informed the defender of this. He says he did inform him, and I cannot hold the contrary proved. In any case, I could not have held an omission to mention this circumstance a sufficient ground for setting aside the bargain. I am therefore of opinion that the defender is chargeable with breach of contract, and is liable in damages.

"As to the amount of damage, I am really without reliable evidence. The pursuer has not tested the market. Proceeding on such evidence as I have, I assess the damages at £50."

The defender reclaimed.

After the reclaiming-note had been lodged the defender and reclaimer lodged a minute averring that "after the date of the judgment pronounced by Lord Kincairney in this cause the pursuer and respondent made application to the Dean of Guild Court of the burgh of Lochgelly for warrant to enlarge his lodging-house there (being the subject in dispute), and that on 14th September 1903 plans were passed and warrant granted by the said Dean of Guild Court for such enlargement. Following upon the said warrant an addition was made by the pursuer and respondent to the said lodging-house property, the said addition was duly roofed in, and a door was slapped in the gable of the ground floor of the property in dispute in order to connect it with the new building."

The pursuer and respondent in his answers admitted these statements, and explained that the said addition was built upon property which was not included in the sale, and had in no way injured or depreciated in value the subject in dispute. If the defender now desired to implement the contract the pursuer offered to close up the said door and to restore the subject sold to its former condition.

Argued for the defender and reclaimer—The action having been raised before the date fixed for the implement of the contract, was premature, and should be dismissed altogether as being incompetent on that ground — Ersk. iii. 6, 10; *Crear* v. *Morrison*, June 2, 1882, 9 R. 890, 19 S.L.R. 639. The conclusion for implement was the primary and fundamental conclusion of the summons, and if it failed the conclusion also for damages, being merely ancillary, fell to be dismissed—*Skerret* v. *Oliver*, January 30, 1896, 23 R. 468, 33 S.L.R. 323. There was no *consensus in idem*, in respect that the acceptance did not meet the offer, there being no mention in the acceptance of the goodwill of the business. The omission of the goodwill was particularly significant and important in view of the fact that the licence of the lodging-house sold had, unknown to the defender, been withdrawn before the alleged sale. It was admitted that an acceptance might be in general terms and that it need not contain an enumeration of items accepted, but if items were enumerated, as in this case, and some item was omitted, there was no *consensus in idem*. The acceptance was not to be regarded as holograph in spite of the addition of the words "adopted as holograph." These words were neither signed nor initialled by the defender. He did not understand the meaning of the word "holograph," and it was not explained to him. There had been no *rei interventus*. In determining the effect of these words the whole circumstances must be looked to—the fact that the transaction was carried through by an agent of the pursuer, and the defender was not advised by a separate agent, the defender's illiteracy, and his condition of intoxication,—and in the circumstances it should not be held that the defender thereby bound him-

self irrevocably as by a duly tested writ. The pursuer had personlly barred himself from now seeking implement of the contract, for at his own hand he had altered in a very material way the subjects alleged to have been sold, and so rendered himself unable to implement the contract.

Argued for the pursuer and respondent—Before the action was raised the defender had given written intimation to the pursuer that he refused to carry out his contract. In view of this intimation it was competent for the pursuer to bring his action before the date fixed for implement. The pursuer, however, accepted the Lord Ordinary's view, and did not ask decree of implement, so that the action became merely an action of damages for breach of contract. There was here a duly completed contract. The acceptance was distinct, its plain meaning being to accept the offer as it was made. The omission to mention the goodwill in the acceptance was a clerical error, but that omission did not prevent the parties being *in idem*. The pursuer was in fact willing to hand over the goodwill. It was unnecessary in an acceptance to recapitulate every item. It was settled that a missive which was neither holograph nor tested was to be regarded as holograph if attested in the manner here employed—*Gavine's Trustee* v. *Lee*, January 12, 1883, 10 R. 448, 20 S.L.R. 303. The mere illegibility of the words written by the defender afforded no ground for not giving effect to them—*Stirling Stuart* v. *Stirling Crawfurd's Trustees*, February 6, 1885, 12 R. 610, 22 S.L.R. 391. The alterations made by the pursuer in the subjects could not bar him from getting damages for breach of contract. The Lord Ordinary had found that the defender had refused to implement the contract, and that fact was undisputed. Acting on the view taken by the Lord Ordinary that the action had resolved itself merely into an action for damages, the pursuer had made the alterations on the subject, but he was willing to restore the subjects exactly to their condition at the date of the sale.

At advising—

LORD PRESIDENT—The first and most important question in this case is whether a valid and effectual contract of purchase and sale of certain subjects in Lochgelly belonging to the pursuer, and used by him as a lodging-house, was entered into by written missive letters exchanged between him and the defender on 5th May 1902.

The defender, who is now lodging-house-keeper in Candlemaker Row, Edinburgh, had formerly kept a lodging-house in Lochgelly, and was well acquainted with the pursuer, who is a publican as well as a lodging-housekeeper there. The defender left Lochgelly and came to reside in Edinburgh in May 1900.

The defender on 5th May 1902 went to Lochgelly, as he states for a holiday, and he did not before leaving Edinburgh inform his wife, or so far as appears anyone else, that he had any intention of purchasing the pursuer's lodging-house. The pursuer, however, states that the defender, when he was at Lochgelly on the day just mentioned, agreed to purchase that lodging-house for £1200, being an advance of £200 on the amount which he seems to have been formerly willing to give for it. There does not appear to have been any adequate or intelligible reason for his being willing to assent to so considerable an advance.

The pursuer says that it was desired that the contract which he alleges to have been verbally entered into between him and the defender for the purchase and sale of the lodging-house should be reduced to writing by a law-agent, and he accordingly telegraphed to his law-agent Mr Robertson, solicitor in Markinch, asking him to meet the defender and him at Thornton Junction on that day. Mr Robertson received the telegram and at once came to Thornton Junction, where he met with the pursuer and the defender. They went into the refreshment-room there, and Mr Robertson states that he was informed of the alleged bargain, and that he then and there wrote out an offer by the defender to purchase the lodging-house and an acceptance of that offer by the pursuer. He further states that these documents were signed by the pursuer and the defender respectively, and that each wrote opposite to his signature the words "adopted as holograph," the word appearing on the pursuer's offer being "adoped" or "ddoped." Mr Robertson appears to have been with the pursuer and the defender at Thornton for about twenty minutes, and the defender thereafter returned to Edinburgh by train. It seems to be sufficiently proved that before returning to Edinburgh he said, "I must consult my wife about this," and it further appears that he had not sufficient money to pay such a price as £1200 for the pursuer's lodging-house, so that if the transaction was to be carried through it would have required to be by the financial assistance of his wife, or of some other person who was able and willing to provide the money.

I concur with the Lord Ordinary in thinking that it is not proved that in what Mr Robertson did on the occasion he was acting to any extent on the employment of the defender, but that he acted only on the employment of the pursuer, by whom he was telegraphed for and paid.

The defender states he was much the worse for drink at the time of his meeting with the pursuer, but both the pursuer and Mr Robertson say that he was then quite sober, and their statements to this effect are corroberated by a Mr Laing. On the other hand, there is some evidence in support of the defender's statement that he was the worse for drink, although the corroboration does not go the length of proving that he was incapable of understanding what he was doing when he signed the missive. He did not on his return to Edinburgh say anything to his wife in regard to the alleged purchase of the lodging-house, and she only became aware of what had taken place in regard to it by finding in his pocket on the following

morning the pursuer's acceptance of his offer. The defender seems to have had sufficient recollection of what had passed to lead him to go to his landlord in Edinburgh with the view of endeavouring to obtain his consent to his giving up the lodging-house in Edinburgh and going to Lochgelly, but his landlord declined to release him from his obligations to him. The defender states that he afterwards learned that the pursuer's lodging-house at Lochgelly, which he is alleged to have purchased, and which had formerly been licensed, had lost that licence, whereby its value was materially diminished.

I agree with the Lord Ordinary in thinking that the defender does not appear to have intended to purchase the pursuer's lodging-house when he left Edinburgh on the day in question, and that his conduct was more like that of a drunk man than that of a sober one. The price offered, £1200, was, as already stated, £200 more than an offer which he had previously made for the same house, and there does not appear to be any explanation of this increase in price, especially as the house had lost its licence, although this was not known to the defender at the time when the alleged contract is said to have been made. The whole transaction seems to have been characterised by a haste for which there does not appear to have been any adequate reason, and the defender had not, in my view, any independent assistance or advice in regard to it.

The Lord Ordinary says that he has found this to be a very difficult case, and he adds that "the evidence is incomplete, obscure, conflicting, and on both sides unreliable," an observation in which I entirely concur. I also agree with the Lord Ordinary in thinking that it is sufficiently proved that the missives were signed by the pursuer and defender respectively at the time and place alleged, and that it is not established by sufficient evidence that the defender was at the time when he signed so much under the influence of drink as to be unaware of what he was doing.

But even making these assumptions, the question remains whether the signature and interchange of the missives under the circumstances proved constituted a valid and effectual contract of sale of the pursuer's lodging-house to the defender, and I am upon the whole of opinion that it did not.

It is settled that a missive offer or acceptance for the sale or purchase of heritable property in Scotland, which is neither holograph nor tested, may be effectually adopted by the offerer or acceptor, as the case may be, writing and signing below the body of the document written by some-one else the words "adopted as holograph"—*Gavine's Trustee* v. *Lee*, 10 R. 448. Where, however, this mode of attestation is used, it is, in my judgment, requisite that the part of the writing which is holograph shall have been written by the person who signs it intelligently, and under such circumstances as to show that he truly and intentionally adopted it as his writ. In the present case the words of alleged holograph adoption above the defender's signature are different as regards the character and size of the writing from the actual signature, and they are, from their appearance, fitted to convey the impression that they were not written at the same time, as also that the defender did not by what he wrote make an intelligent adoption of the missive, which was in the handwriting of some-one else, probably Mr Robertson, as his writ. Below the words, "Yours truly," written in the hand of that other person, there follow the words said to be written by the pursuer, "adoped" (or "ddoped") as holograph," and upon the latter word there appear to have been alterations, or otherwise it seems to have assumed its present form only after one or more unsuccessful attempts to write. The word "adopted" does not occur among those which are alleged to have been written by the defender, and the word on which the pursuer relies as constituting an adoption appears to begin not with an "a" but with two "dds," so as to read "ddoped." Even apart from the evidence as to the circumstances under which the document is said to have been signed, I think it would be unsafe to hold that the words actually occurring above the defender's signature were written by him with an intelligent appreciation of what it is said that they were intended to convey. Although the mode of attestation which Mr Robertson appears to have meant to be used has received judicial sanction—*Gavine's Trustee* v. *Lee*, January 12, 1883, 10 R. 448, and other cases—it appears to me that it must be accurately and intelligently carried out, and an inspection of the writing seems to me to show that it would be quite unsafe to hold that this requisite was fulfilled in the present case. Caution in accepting anything less than has been held to be sufficient in the decided cases is all the more necessary in a case like the present, where, even assuming that the defender was not wholly incapable of knowing what he was doing, I think it is proved that he was not a person of much education or intelligence, that he was more or less under the influence of drink, and that he was not protected or advised by a separate agent.

It is also to be observed that the alleged offer and acceptance do not meet each other, and that so far as appears from them the parties never were *in idem* as to the transaction. The defender's letter purports to be an offer to purchase from the pursuer "the subjects in Lochgelly used by you as a model lodging-house, together with the fittings and fixtures therein, and the goodwill of the business carried on in the premises." The pursuer's acceptance is of the defender's offer to purchase the lodging-house property in Lochgelly belonging to him, together with the fittings and fixtures therein, but there is no mention in the acceptance of "the goodwill of the business carried on in the premises." It is to be assumed that the defender attached a value to that goodwill, as *ex facie* of the

documents he stipulated for it, and without some such stipulation the pursuer might, if the transaction had been carried out, after receiving what seems to have been a very large price for the lodging-house, and the goodwill of the business carried on in it, have set up a rival lodging-house in close proximity to it, and thereby kept to himself the trade connection which the pursuer must be assumed to have desired to acquire along with the lodging-house. The result is that the alleged offer and acceptance do not meet each other, or in other words that upon the missives the parties are not *in idem*, and keeping this in view, along with the other circumstances to which I have already adverted, I do not think it would be safe to hold that the offer and acceptance (read in the light of the evidence), are sufficient to constitute a binding or enforcible contract for the purchase and sale of the lodging-house.

If these views are correct it is unnecessary that we should deal with other questions considered by the Lord Ordinary.

For the reasons now given, I am of opinion that the Lord Ordinary's interlocutors of 29th May and 17th June 1903 should be recalled, and that the defender should be assoilzied from the conclusions of the summons.

LORD ADAM concurred.

LORD M'LAREN—This case is no doubt one of much interest to the parties, but to a lawyer it is chiefly interesting as touching the question of the power claimed of dispensing with the formalities of attestation by merely adding the words "adopted as holograph" to an otherwise improbative writing. I have thought, and still think, that in sanctioning this practice the Court came dangerously near to legislation, and extended the former rule of law that the formalities of attestation can be dispensed with only where (first) informal subscription is sanctioned by inveterate usage, and (second) in the case of holograph writings which contain within themselves the evidence that they are the deeds of the person who signs them. But as it is not suggested that the question is to be reconsidered by a larger number of Judges, I content myself with saying that if we are to give sanction to this innovation we must be fully satisfied that the party who is to be bound by the words "adopted as holograph" really understood the effect of what he was doing and meant by adding these words to make the document irrevocably binding upon him. In considering the docquet in this case I do not think it is necessary to discuss the effect of defective or illegible handwriting, for since the case of *Stirling Stuart* v. *Stirling Crawfurd's Trustees* (12 R. 610) it cannot be maintained that the illegibility of the granter's writing can be put forward as a ground for invalidating his deed. But where, as in this case, the docquet is so blundered that its words cannot even be recognised as English words, I am unable to give it the effect of raising what would otherwise be an improbative writing into a deed binding on the defender.

LORD KINNEAR—I agree, and very much for the reasons stated by your Lordship. The only point upon which I cannot altogether concur is that there was here no binding contract. If the letters of offer and acceptance do not by themselves constitute a completed contract there is no necessity for considering any other question; but I cannot see that the parties were not here *in idem*. There was a perfectly distinct offer of "the subjects in Lochgelly used by you as a model lodging-house, together with the fittings and fixtures therein, and the goodwill of the business carried on in the premises, at the price of £1200." The answer is "I accept your offer of this date to purchase the lodging-house property in Lochgelly belonging to me, together with the fittings and fixtures therein, at the price of £1200 stg., on the conditions stated in said offer." That appears to me to be a clear acceptance of an offer clearly identified. I cannot assent to the view that the answer excludes the goodwill of the business from the acceptance. It is not necessary for the acceptance of an offer that every item should be recapitulated, provided the answer, fairly construed, means that the promisee accepts the offer as it is made; and that appears to me to be the plain meaning of the answer in question. If the pursuer's intention had been to accept the offer for a purchase of the house on the conditions specified, but to reject the proposal to take the goodwill along with it, he must have said so in plain terms. I am therefore not prepared to agree that the letters of offer and acceptance themselves show that the parties were not *in idem*. But I agree on the other ground stated by your Lordship. It appears from the evidence that the defender did not consider himself finally bound. He supposed that he was to have an opportunity of consulting his wife and his landlord. It is quite true that he had no very clear understanding of what it was exactly that he had done, and his ideas as to the transaction were very confused and unintelligent. But undoubtedly he was under the impression that he was not irrevocably bound, and he would have been perfectly right in that impression if the words "adopted as holograph" had not been added. I confess that I do not attach much importance to the misspelling of the word "adopted." It merely shows that the defender was an uneducated man, but that is not of much significance. But apart from the character of the spelling and the writing, it is clear enough upon the evidence that the defender did not know what he was doing when he put these words on the missives. I do not doubt that a man must be held bound by the plain meaning of words to which he puts his hand, but that is a different thing from holding that he must be assumed to know the legal effect of words to which a very artificial operation is ascribed by a highly technical rule of law, when he knew nothing of the rule beforehand, and when it was not explained to him at the time. It is clear that the technical effect of the

words was not explained to him, and it is out of the question to suppose that he should have understood it himself. Now, I think it was the duty of the pursuer's agent when he required such a person as the defender to add words to the missives, to explain not only the meaning of the words but their legal effect. It is clear from his evidence that Robertson did not do this. He says—"I told him he would require to sign the document, and that before putting his signature to it he would require to put the words "adopted as holograph." I explained that that meant that the document was practically written by himself. I used words to that effect, I put it in as plain words as possible to him;" and then again—"I read over the document to him so as to let him know what was in it. I did not take any pains to test whether he understood the terms I had employed, except that I read it over very carefully and very slowly to him." There is nothing there to show that he explained that if the words "adopted as holograph" were not added the defender would not be finally bound, but that he would be so bound if they were added. The defender was therefore induced to write the words "adopted as holograph" without knowing their true meaning and effect. I think it would be altogether inequitable to hold him bound by having done so under such circumstances, since he had no independent legal advice, and did only what he was told to do by the pursuer's agent. But I am unable to sustain the interlocutor for another reason. This is an action for implement of a contract of purchase and sale, and failing implement for damages, and the Lord Ordinary holds that the defender is not bound to implement the contract, and yet that he is liable in damages. For the Lord Ordinary has repelled the first plea-in-law for pursuer and dismissed the action so far as regards the primary conclusion of the summons. Now, the primary conclusion of the summons is that the defender should be ordained "to perform his part of the contract by accepting a disposition and paying the price, and the conclusion for damages is in terms made dependent on the pursuer's obtaining that decree. It is only if the defender fails to perform the contract which the decree is to ordain him to perform that damages were claimed. And yet the Lord Ordinary holds that he is not bound to perform the contract, and at the same time that he is liable in damages for not doing what he is not bound to do. It does not seem to me to make any difference that the Lord Ordinary dismisses the primary conclusion on the ground that it is premature, because it does not signify what may be the reason which disentitles the pursuer having decree ordaining the defender to implement the missives if he in fact is not entitled to such a decree. It is too soon to require the contract to be performed; it is too soon to find that the defender is in default.

But the pursuer accepts the Lord Ordinary's view. He does not reclaim against the judgment that he is not entitled to specific implement, and what has happened since the Lord Ordinary's judgment fixes his position. The pursuer has at his own hand altered the subjects which he alleges were sold to the defender. It follows that he cannot now make over the subject in the same condition as when he alleges that the defender bound himself to purchase. And the only explanation is that he accepts the view of the Lord Ordinary that he cannot insist upon implement of the contract. But if he cannot have decree for performance he cannot have damages for failure to perform.

The Court assoilzied the defender.

Counsel for the Pursuer and Respondent—Guy—Mitchell. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defender and Reclaimer—Jameson, K.C.—Munro. Agent—James Andrews, Solicitor.

Friday, November 20

OUTER HOUSE.

[Lord Low.

CHISHOLM AND OTHERS *v.* MACRAE AND ANOTHER.

Writ—Execution—Validity—Will—Subscription by Clergyman as Notary—Notary Sole Executor and Intromitter.

A person who is nominated sole executor and intromitter under a settlement cannot competently act as notary in the execution of that settlement. *Ferrie* v. *Ferrie's Trustees*, January 23, 1863, 1 Macph. 291, *followed.*

The pursuers in this action sought reduction of a deed purporting to be the last will and testament of Farquhar Macrae, and signed on his behalf by the Rev. Duncan Macrae acting as notary. The testator, owing to paralysis, was incapable of writing, and the deed was written out by the Rev. Duncan Macrae. It was in the following terms:—"I, Farquhar Macrae, residing at Letterfearn, in the parish of Glenshiel, as by this, my last will and testament, leave and bequeath all that may belong or be resting-owing to me at the time of my death, as under; and for the purpose of carrying out the provisions of this will I hereby appoint the Reverend Duncan Macrae, minister of Glenshiel, to be my sole executor and intromitter with my moveable estate, with all powers competent to an executor according to law; and I ordain my said executor to pay out of present monies funeral expenses, &c., and various legacies. The Rev. Duncan Macrae was not among the beneficiaries.

The pursuers argued that following *Ferrie* v. *Ferrie's Trustees*, 1863, 1 Macph. 291, the deed was not duly executed and was accordingly invalid, in respect that the notary by whom it bore to be signed