Lord CHELMSFORD—That is merely a question of over-rating.

The LORD ADVOCATE said he contended the appellants were not liable in respect of their whole valuation.

The LORD CHANCELLOR—The principle laid down in the Mersey Dock case was that the only exemption was in the case of the Crown, to which a very extended meaning was attached, so as to include prisons, rooms at the assizes, and other places. The case was not decided as to charities. Lord Kenyon thought hospitals were not liable, because there was no occupier; I should have thought the trustees were the occupiers; but however that may be, it is quite clear that in the Mersey Dock case the trustees were considered occupiers.

The LORD ADVOCATE referred to a decision of the Court of Queen's Bench exempting the University of Oxford.

The LORD CHANCELLOR—That won't do. You can't make this out to be a royal foundation.

The LORD ADVOCATE further referred to the case of the University of Edinburgh decided by the Court of Session.

The LORD CHANCELLOR—But it has been decided that harbours and docks are not occupied for Crown purposes.

The LORD ADVOCATE said he would only then say a few words in supplement of what the Attorney-General had said with reference to *res judicata*.

Lord KINGSDOWN—The two actions were between the same classes of persons, though not between the same persons.

The LORD ADVOCATE submitted that the trustees were a corporation, so that the parties were the same.

Lord CHELMSFORD—The actions were not brought for the same rate; and besides, there are three persons in whose names the action is brought, along with the inspector of the poor. The previous action was not brought in the names of the same persons.

The LORD ADVOCATE submitted that the parties were the same. He referred to Erskine 4, 4, 3, as to *res judicata*, and submitted it had been finally decided by the Court of Session in 1852 that the revenues of the appellants were not liable in respect of the sum of £7680.

Without calling upon the respondents, the LORD CHANCELLOR then rose and moved the judgment of the House. He said—My Lords, after the very full investigation which the point raised in this case has already received, your Lordships can have no difficulty in arriving at a proper conclusion. The two latter points raised by the appellants were, after an intimation from your Lordships, very properly abandoned by them without further contention. We can quite understand that such cases as the present should be brought from time to time before us, because all the courts in the kingdom were in error upon the subject. Lord Mansfield, Lord Kenyon, and Lord Tenterdon, all thought that trustees holding property entirely for public purposes could not be beneficial owners, so as to make the trust property assessable. But in the Mersey Dock case it was finally decided, after a very elaborate argument, that all trustees are beneficial occupiers in the sense in which those words are used in the statute of Elizabeth, which does not differ from the law of Scotland—that, with exception of the Crown, the royal palaces, the House in which your Lordships administer justice, and other places of a similar kind, all the property in the kingdom was liable to be assessed for relief of the poor. Now, harbours, docks, and rivers are not in the occupation of the Crown, and are therefore rateable. Upon the general principle, therefore, there can be no doubt, and he thought that the particular point raised in this case had been decided in Adamson's case; but it does appear that some matters did not form the subject of the interlocutor then. There has therefore been strictly no adjudication upon this particular point. It is now for the first time to be established that in Scotland, as in England, all trustees of harbours, docks, and rivers, for whatever purpose their revenues may be applied, are liable to be assessed for relief of the poor. The appellants further urged that this matter was already *res judicata*—a contention more plausible than substantial. Ten years ago it would appear that the then inspector of the poor brought an action against the commissioners for the time being to recover the rates imposed from 1846 to 1847, and that the latter pleaded *inter alia* that the subjects being held by them solely and exclusively for the benefit of the public, and the rates and revenues leviable by them being by law limited and appropriated to the maintenance and repair of the harbour and liquidation of the debt incurred in the construction of the works, they were not liable to the assessment concluded for in the summons. An interlocutor was pronounced sustaining the plea, with exception as to a sum of £7680, and upon appeal to your Lordships' House that interlocutor was reversed in so far as it constituted that sum an exception, and affirmed as to the remainder. But what was affirmed? Only this, that the dues were not liable to assessment for that particular time. It would indeed be grievous if that had concluded their non-liability for the time, seeing that the liability of harbours, docks, and rivers had never been expressly and finally established. I therefore beg to advise your Lordships to affirm this interlocutor, and to dismiss the appeal with costs.

Lord CHELMSFORD—I am of the same opinion as to the objection of *res judicata*. I shall not enter further into the details of the action in which the former judgment was pronounced than to observe that whether the declaration appended to its judgment by the House of Lords amounted to a reservation of the question, or a declaration of general liability, the matter was equally left open to future question. It would appear that the appellant had not attended sufficiently to what was meant by a plea of *res judicata*. The maxim is, "*res judicata pro veritate accipitur*," and is only applicable when the parties and the cause of action in the one case are identical with those in the other—the rule as laid down by the Digest being "*excepti nem rei judicatae obstare quotiens eadem quæstio inter easdem personas revocatur.*" The plea, therefore, is not competent where the parties only are identical, but, like that of "judgment recovered" in this country, must, so as to operate as an estoppel, refer to a case in which precisely the same question was at issue. In a case where the plea of *res judicata* properly applied, the jurisdiction of the Court is not taken away, though it is impossible to go behind the judgment. With regard to the liability of the harbour dues and the sum of £7680, the objections have been sufficiently answered in the course of the argument, and by my noble and learned friend.

Lord KINGSDOWN concurred.

Interlocutor affirmed.

COURT OF SESSION.

Tuesday, March 13.

FIRST DIVISION.

PETITION—H. H. DRUMMOND.

Process—20 and 21 Vict. c. 56—Petition. Question whether a petition for the recal of an appointment of a *curator bonis* made by the Inner House should be presented to the Junior Lord Ordinary, or to the Inner House.

Counsel for Petitioner—Mr Dundas and Mr Shand. Agents—Messrs Dundas & Wilson, C.S.

This was an application by Mr Home Drummond, in which he stated that he desired to be relieved of an office of *curator bonis*, to which he had been

appointed by the Court in the year 1832. He therefore prayed for the recall of his appointment, and the appointment of a successor. The petition had been presented to the junior Lord Ordinary, who ordered intimation and service. The petition was in his Lordship's roll to-day, and he reported it in respect of a doubt as to whether, under section 4 of the Distribution of Business Act, 20 and 21 Vict. c. 56, the application being "incidental to an action or cause actually depending," had been competently presented to him. The petitioner referred to the case of Kyle, 10th June 1862 (24 D. 1083).

The Court, having expressed opinions to the effect that the competency of applying to the Lord Ordinary, in the circumstances, was, at least, doubtful, and that it would not be prudent to run the risk of having the proceeding declared hereafter invalid, the petition was abandoned, and a new one presented to the Inner House.

MACINTYRE *v.* MACRAILD.

Obligation—Master and Servant. Terms of an obligation by a medical man's assistant to his employer, which held to debar the assistant from accepting an office which had been formerly held by the employer.

Counsel for Complainer—Mr Patton and Mr N. C. Campbell. Agent—Mr John Patten, W.S.

Counsel for Respondent—The Solicitor-General and Mr Shand. Agents — Messrs Webster & Sprott, S.S.C.

This is an application by Duncan MacIntyre, M.D., Fort-William, for interdict against Donald MacRaild, surgeon, Brecklet, South Ballachulish, "from practising medicine or surgery at the slate quarries of South Ballachulish, and in the adjacent villages of South Ballachulish, Brecklet, and Carnock, where the workmen at the said quarries reside, and from otherwise interfering with the professional practice of the complainer and his assistant, William Willoughby Cole Burton, at the said quarries and in the said villages."

It appears that the complainer has for some time practised his profession at Fort-William and the adjoining districts of country, including the slate quarries and villages above-mentioned, which are fifteen miles from Fort-William, where he resides. It was his practice to have an assistant resident at the quarries for that part of his business, and to visit the locality himself once a week. In August 1864 he engaged the respondent as his assistant. In consequence, as the complainer alleged, of his having heard that the respondent was seeking to undermine or supplant him, he remonstrated with the respondent, and on 28th November 1864 the latter wrote out and signed the following obligation :—

"I, Donald MacRaild, licentiate of the Faculty of Physicians and Surgeons of Glasgow, who have been and still am medical and surgical assistant to and for Duncan MacIntyre, doctor of medicine, Fort-William, at the Slate Quarries, South Ballachulish, for the last three months, a capacity in which I always acted consistent with professional honour and the said Duncan MacIntyre's interest, do hereby solemnly bind myself to continue to do so as long as my connection with him as assistant lasts: But whereas it has been represented to the said Duncan MacIntyre that his connection with me affected the safety of his present position, or tended to do so, in so far as it appears I have been represented to him as using direct or indirect means to undermine and usurp his charge or practice at Ballachulish; in order to vindicate my own professional honour, and to relieve the said Duncan MacIntyre from any anxiety arising from or caused by any such misrepresentations for the present or the future, and in proof of my integrity, I bind and oblige myself, under a penalty of £500 sterling, in case of infringement on my part, that after my connection with the said Duncan MacIntyre, as his assistant, has ceased, I shall not accept of the practice of the slate quarries in the case of its being offered to me, to his exclusion and disadvantage, at any future period, and that I shall never take advantage of any introductions or insight into his affairs the exigencies of my relations with him as his assistant require I should have and know, thereby settling down in his vicinity, and practising to his detriment or in opposition to him in any of the districts in which he practises his profession: Be it therefore known that, in the event of my infringement on this agreement or promise, or any part thereof, the said sum of £500 sterling is to be paid by me to the said Duncan MacIntyre or his heirs or executors: This agreement, in so far as my engagement is concerned, shall subsist until one month's previous intimation that it is to terminate shall be given by me to, or received by me from, the said Duncan MacIntyre. In witness whereof, these presents, written on this and the preceding page by my own hand, are subscribed by me at Fort-William the 28th November 1864."

The respondent's engagement with the complainer terminated on 3d November 1865, when he left the quarries, but he returned on 5th December, as the complainer alleged, "for the avowed purpose of practising there as a medical man in opposition to the complainer, in violation alike of professional honour and his foresaid obligation." The respondent's statement, on the other hand, was that after he left the quarries, an advertisement appeared in the *Glasgow Herald* for a resident registered practitioner; that, knowing that the complainer would not accept such an appointment, he applied for it, and was appointed. He said that before he applied the complainer had ceased to hold his office at the quarries; that it had been decided that he should not be continued as medical man there, because he was non-resident; and that, if he had not been appointed, a Mr Wilson, of Bathgate, would have been. In these circumstances, he pleaded that he had not violated his obligation.

The LORD ORDINARY (Mure) passed the note and granted interim interdict on caution. The respondent reclaimed, and the Court to-day adhered.

The LORD PRESIDENT said—The real question is whether or not there shall be an interim interdict? The complainer's case mainly rests on the obligation, which is a peculiar document. The respondent's case is that, after he resigned his position as assistant, a vacancy occurred in the office, and that he applied and was appointed. He states also that if he had not been appointed, a Mr Wilson, of Bathgate, who was also a candidate, would have been. We have not much evidence as to this at present; but so it was that Mr MacRaild was elected and returned as medical man to the quarries. The complainer says this is an infringement of the obligation. The document is very stringent, and I do not see very well how it is possible to hold that Mr MacRaild has not fallen under the provisions of his own obligation. He has accepted the office. The complainer says he has done so to his detriment. Mr MacRaild, on the other hand, says that it has not been to his detriment. I think that the acceptance of office was the thing meant to be provided against, and that Mr MacRaild has no right to say—"I shall continue to practise until it shall be ascertained whether my actings have been detrimental or not." I am therefore for refusing this reclaiming note.

Lord CURRIEHILL—I have no doubt of the legality and efficacy of this obligation. I think its true import is that Mr MacRaild was not to compete with Dr MacIntyre for the office, nor to accept of the office even if offered to him, which was the surest way of preventing competition. Thus construing the obligation, the respondent's admissions amount to a violation of it. It is of consequence also to keep in view that the interim interdict has been granted only on caution by Dr MacIntyre. If he fails ultimately in the action he and his cautioner will be responsible for all damage the respondent may suffer. On the other hand, if we were to refuse