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

the interdict Mr MacRaild would in the meantime go on practising, and that without caution, which he says he cannot find.

Lord DEAS—I agree that this agreement is legal, and I also consider that it is a most equitable kind of agreement. It is not fair that a medical man should be deprived by his assistant of a practice which it has taken him years to form, and unless such an agreement was legal the younger members of the medical profession would never be appointed assistants. I also agree with Lord Curriehill that the construction of this obligation is that the respondent was not to accept the office. In my view the agreement would be the same, if the words "to his detriment" were not in it. I think they would have been implied in what preceded. Although we cannot now in point of form finally decide this case, my opinion proceeds upon the merits of it, and I think the parties should consider the propriety of discontinuing the litigation.

Lord ARDMILLAN also concurred.

URQUHART *v.* BONNAR.

New Trial. A third trial granted on the ground that the second verdict, as well as the first, was contrary to evidence.

Counsel for Pursuer—Mr Fraser and Mr J. C. Smith. Agents—Messrs Macgregor & Barclay, S.S.C.

Counsel for Defender—Mr Macdonald and Mr Rhind. Agent—Mr Thomas Ranken, S.S.C.

In this case betwixt John Urquhart, shoemaker in Cupar, and George Lindsay Bonnar, M.D., there, the following issue was on 27th July 1865 tried before the Lord President and a jury:—

"Whether the assignation dated on or about 24th May 1859, No. 6 of process, was signed by the pursuer when he was under essential error as to its nature and effect, induced through fraud and misrepresentation, or undue concealment on the part of the defender?"

The jury, by a majority of nine to three, returned a verdict for the pursuer. The issue had been previously tried before Lord Kinloch and a jury, when a similar verdict was returned by the same majority; but the Court found that this verdict was contrary to evidence, and granted a new trial.

The defender again moved for a new trial, and the Court having granted a rule upon the pursuer to show cause why it should not be granted, the parties were heard thereon. The following cases were cited—Railton *v.* Mathews, 11th March 1846 (8 D. 747); Macaulay *v.* Buist & Co., 9th December 1846 (9 D. 245); and Lenaghan and Others, 10th July 1857 (19 D. 975.) The Court to-day granted a third trial.

SECOND DIVISION.

PETITION—ANDERSON.

Bankruptcy—Recal of Sequestration. A person's estates were sequestrated, but no other procedure took place under the statute. The bankrupt was afterwards discharged of his debts by an arrangement with his creditors, and the Court, after intimation, declared the sequestration at an end.

Counsel for Petitioner—Mr Gifford. Agent—Mr Renton, jun., S.S.C.

This is an application by a bankrupt, made with the concurrence of his creditors, to have his sequestration recalled or declared to be at an end. Sequestration was awarded in 1864; and under the provision of the 48th section of the Bankrupt Act an abbreviate of the petition and deliverance was recorded in the Register of Inhibitions in the usual way. No other proceedings have been taken under the statute, and shortly after negotiations took place between the petitioner and his creditors, which resulted in an arrangement between them by which he has been discharged of all his debts. In these circumstances the petitioner presented his application to have his sequestration judicially declared at an end, and to have the necessary marking made upon the registers. The Lord Ordinary (Murel), holding that the jurisdiction which he exercises in such matters is purely statutory, and that the case is one which can scarcely be held within the provision either of sec. 31 or sec. 32, which regulate the recall of sequestration, reported the case. When the case first came before the Court, they ordered intimation of the petition to be made in the *Gazette*, and a meeting of creditors to be called. The meeting was called and no creditors appeared; and to-day the Court, in the circumstances, granted the prayer of the petition, and declared the sequestration at an end.

Wednesday, March 14.

FIRST DIVISION.

PEARSON *v.* J. AND G. DEWAR.

Process—Advocation—Reference to Oath. The Court having in an advocation repelled the reasons, and remitted the cause to the Sheriff, held that a minute of reference to oath, lodged in the Court of Session, was incompetent.

Counsel for Advocator—Mr Scott. Agent—Mr D. Crawford, S.S.C.

Counsel for Respondents—Mr Thoms. Agent—Mr W. Officer, S.S.C.

In this advocation from Fifeshire, the Court, after hearing the advocator some days ago, pronounced the following interlocutor:—"Having heard parties' procurators on the question of expenses decided by the Sheriff, this being the only matter now insisted in by the advocator, as stated by his counsel at the bar, repel the reasons of advocation, and remit the cause *simpliciter* to the Sheriff.

The advocator having lodged a minute of reference to oath of the whole cause, the Court to-day refused it as incompetent in this Court. The merits of the case had been withdrawn from the Court by the advocator himself, and the cause had not been advocated, but remitted to the Sheriff. It only remained here for the purpose of ascertaining and decerning for the expenses incurred in this Court. The advocator was entitled to lodge his reference in the Sheriff Court; but whatever the result of the reference he could never get quit of the expenses incurred in this Court.

LOWSON *v.* FINLAY (*ante*, p. 89).

Expenses. The expense of a witness cited to give evidence at a jury trial, but not examined, *allowed.*

Counsel for Pursuer—Mr Crichton. Agents—Messrs G. & J. Binny, W.S.

Counsel for Defender—Mr Shand. Agents—Messrs Morton, Whitehead, & Greig, W.S.

This case was tried at Christmas, when the jury returned a verdict for the pursuer. In his account of expenses he made a charge of £11 odds for the citation and attendance at the trial of a witness from Ireland to prove a practice of trade. The auditor disallowed the charge, in conformity with his rule of allowing only the expenses of witnesses who are examined at the trial. This witness was not examined, because it became evident in the course of the trial that the part of the defender's case, as stated on record, which he had been brought to meet, was not to be insisted on.

The Court allowed the charge, in respect the pursuer's case had not been overloaded with evidence on the point referred to.