question of general importance. In the first place, I think it is quite clear that there may be the goodwill of the practice of a professional man as well as of a trade. You have instances of this in the case of medical men every day. It is said that this is only the case when both parties are living, the retiring doctor and his successor. But I cannot assent to this. I see nothing to prevent a medical man bequeathing his practice to a friend. All the other elements referred to here —the possession of the house, the widow's recommendation, &c., may add to the value of the goodwill, but they are not the goodwill itself; that is only what can be attributed to the doctor himself. Supposing Dr Munro had said in his will, "I direct that my widow shall employ A B to sell my practice, one-half of the proceeds for behoof of herself, and the other half for my friend C D," and supposing the will had been carried out by the executor-nominate, who predeceased the testator, instead of by the widow as executrix *qua* relict, and that everything else had been carried out in the same way, what would have been the defence of the widow to a claim for one-half of the £400 by the special legatee? I may be wrong, but I cannot see any defence. She might injure the goodwill by withholding her good word, but if the £400 is got for it, I cannot see how she could resist such a claim.

In a case of this kind I rather prefer to look at the documents, *e.g.*, the missives of sale and the bond for the price, than at the opinions of the witnesses. Now, look at the documents and see what is sold. "A medical practice" is advertised. This is said not to be the case; it is said that a house was sold, along with the good word of the medical practitioner's widow, but I cannot take this. It was a medical practice that was advertised, and a medical practice that was sold.

It seems to me that two things are fixed—(1) that Dr Munro's medical practice was sold; (2) that £400 was paid for it. Now, will it do to say that that sum was not paid for the practice, but for other things, as, *e.g.*, the practice along with the house? I do not think we can accept such a statement as that, for the two things were sold separately—the house for £1500, the practice for £400. Now, whose property was the practice? Did it belong to a different person from him who bequeathed it? Surely not. I put the case of children by a former marriage during the discussion, not as a case of hardship, but to test whose property the goodwill really was. I put another case. Suppose there had been a competition between the widow on the one part, and children, executor, creditor, or a special legatee, on the other part, would the widow have got it all? I cannot lay down such a proposition, and I am speaking not for this case alone but in general law.

You cannot say, "The goodwill would have been worth nothing if such a thing had happened," when this thing did not happen. You must take it as you find it, bringing £400 in the market. Supposing a dispute had arisen as to who was to sell the medical practice, surely the executor of the husband would have been preferred. The widow might have sold her own recommendation if she pleased, but that is all. The goodwill of the practice was a thing that was derived from the deceased alone, and must be included in his executry.

I do not absolutely differ from your Lordships seeing that the case is already decided. I only wish to express my very serious doubts and my dissent from the principles laid down by the Lord Ordinary.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Fraser—Mair. Agent—R. Menzies, S.S.C.

Counsel for Defenders (Respondents)—Trayner—Thorburn. Agents—Boyd, Macdonald, & Co., S.S.C.

Saturday, January 12.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

CRUM EWING AND OTHERS *v.* HASTIES.

Superior and Vassal—Feu-Charter—Is a Boarding-School a Private Dwelling-House?

In the feu-charter of certain subjects feued for the purpose of making a street there was this condition—that the houses to be built upon them should be "used as private dwelling-houses only in all time coming." There was also a clause enumerating at length certain objectionable trades and manufactories to which the feu was not to be applied. Both conditions were made real burdens on the feus in favour of the whole feuars and their disponees upon the lands. Where it was proposed to use one of the houses as a boarding and day-school, the proprietors themselves residing there—*held (rev.* the Lord Ordinary, Curriehill) that such a use would be a contravention of the conditions of feu, and interdict granted accordingly against it at the instance of other feuars in the street.

The complainers in this action were Mr Crum Ewing and others, residents in Belhaven Terrace, West, Glasgow, a street which consisted of twelve dwelling-houses, forming a separate division, facing the Great Western Road. The situation was highly eligible, and the houses were of a superior class, being of the value of from £5000 to £7000 each. All but three belonged to the complainers severally. Two of the three were for sale, and the respondents, who were Misses Hastie, had recently purchased the third, which was No. 23 of the terrace.

The original titles of these subjects when feued out by the superior all contained the following clauses:—"(*Fourth*) . . . And it shall not be lawful to nor in the power of the second party" (feuar) "or his foresaids, or his or their tenants in the said lots of ground, to . . . exercise or carry on, erect, or set down upon or within the said lots of ground, or the buildings erected or to be erected thereon, any trade, businesses, process, occupation, or manufacture of brewing, distilling" (a number of different manufactories were here specified) . . . "or any other manufactories and works; nor shall it be lawful for them to erect on said lots of ground any inn, hotel, or public stable; and they are prohibited from carrying on therein the businesses of an inn, or hotel-keeper, or stabler, or of selling porter, ale, or spirituous liquors, from occupying any

buildings erected or to be erected on said lots of ground as a shop, warehouse, or store; and without prejudice to the foresaid enumeration, the second party shall not carry on any trade or business whatever, though not above specified, which may be considered injurious, offensive, nauseous, or hurtful, or occasion annoyance to the neighbouring feuars and disponees upon the first party's lands, or make any other erections whatever, except such as are hereinafter provided for." "(*Ninth*) The second party and their foresaids shall be bound, on or before the term of Martinmas 1873, to erect, so far as not already done, a lodging on each of said lots of ground fronting said Great Western Road, not exceeding three storeys in height above the level of the said Great Western Road, with attics, and which shall be used as private dwelling-houses only in all time coming . . . and declaring that before proceeding to build, the plans shall be submitted to the first party" (the superior) "or his foresaids, or his or their architect for the time being, for approval."

These clauses further were declared to be real burdens and servitudes upon the ground feued," "not only in favour of the first party and his foresaids, but also of the whole feuars and disponees upon the first party's lands and their successors."

The complainers averred that the Misses Hastie, the respondents, intended to use No. 23 not as a private dwelling-house, and that they intended to transfer thither a school which they were then carrying on at another house, and which was attended by from fifty to seventy day-scholars and about twelve resident boarders. The respondents admitted that they intended to use the house for the purposes of a school, with the explanation that the house would be furnished in all respects as a private dwelling-house, that the street door would be kept closed, and that they were to reside in it themselves, with their mother, niece, and servants.

The complainers presented this note of suspension and interdict, to have them restrained from so doing, on the ground that it was a contravention of the conditions of their titles, and otherwise injurious to them.

The respondents pleaded that the complainers had no title or interest, and further that there was no contravention.

The Lord Ordinary pronounced an interlocutor containing these findings:—"(1) Finds that by the feu-contract . . . under which the ground upon which the houses belonging to the complainers and the respondents respectively are built is held, it is provided that said houses are to be used as private dwelling-houses only, and that there shall not be carried on upon the said ground, or in the buildings erected or to be erected thereon, any trade or business which may be considered injurious, offensive, nauseous, or hurtful, or occasion annoyance to the neighbouring feuars and disponees: (2) Finds that the complainers aver, and that the respondents admit, that the house belonging to the respondents is to be occupied by them as a dwelling-house for themselves and certain members of their family, and for twelve young ladies as resident boarders, who are to receive tuition in said house along with upwards of fifty young ladies who are to attend as day-scholars: (3) Finds that the complainers have no title or interest to complain of the proposed use and occupation of said house by the respondents, except in so far as the same may be injurious, offensive, nauseous or hurtful, or occasion annoyance to the complainers as neighbouring feuars: (4) Finds that the complainers aver that the proposed use and occupation of the respondents' house will be injurious to the complainers' property, and will occasion annoyance to the complainers as neighbouring feuars: Appoints the cause to be enrolled for further procedure, and reserves all questions of expenses."

The complainers after obtaining leave reclaimed, relying in their argument upon the 9th clause of the feu-charter.

Authorities—*Doe* v. *Keilling*, 1 Maule and Selwyn, 95; *Kemp* v. *Sober*, 1851, 1 Simon's Chanc. Reps. 517 (N. S.); *Frame* v. *Cameron*, Dec. 21 1864, 3 Macph. 290.

Argued for the respondents—The 9th clause could not have effect without evidence of injury. The complainer must have a substantial interest, as was held necessary in *Frame's* case. The clauses must all be read together. Such an interpretation as would make the 9th clause restrict the use to a dwelling-house only would altogether obliterate the 4th, which was however clearly meant to define the uses of the ground and of the houses to be built upon it. Even, however, taking the 9th clause alone, they were within it. The restriction must be of the nature of a known servitude. What was the use of carefully enumerating all objectionable uses if the general clause was to be deemed capable of covering every possible objectionable use.

Authorities—*Mackenzie* v. *M'Neill*, Feb. 5, 1870, 8 Macph. 520; *M'Gibbon* v. *Rankin*, Jan. 19, 1871, 9 Macph. 423.

At advising—

Lord Ormidale—Although the title-deeds of all the parties in this case contain a variety of conditions of a restrictive and prohibitory nature, only one of them requires—in the view of the case as I think it should now be disposed of—to be particularly noticed, viz., that which makes it obligatory on all the feuars in Belhaven Terrace to build houses of a certain description, "which shall be used as private dwelling-houses only in all time coming." That obligation or condition is along with many others declared to be a real burden on the feus, and it as well as the other conditions are appointed to be inserted in each and all of the feu-rights. This appears from the titles or excerpts from them produced to have been accordingly done.

It is in this state of the titles that the complainers ask to have the respondents interdicted from using, as they have intimated their intention of doing, the house No. 23 Belhaven Terrace, which they have recently bought, not as "a dwelling-house only," but as a boarding-school for about six resident boarders and fifty day boarders. To this application for interdict the respondents have stated as their first plea-in-law that the complainers have neither title nor interest to insist in their complaint, and the Lord Ordinary has substantially given effect to this plea.

Now, first, in regard to the pursuers' title, it is quite true that there is no direct contract between the complainers and the respondents. But it is

equally true that the feu-rights of the complainers and respondents, as well as of all the other proprietors in Belhaven Terrace, flow from the same source, that each and all of them contain obligations and conditions of the same character, and that in particular they contain the obligation or condition more immediately in question, to the effect that the feuars must use their houses "as private dwelling-houses only." And what is of great importance, the whole obligations and conditions referred to are in the feu-rights of each and all of them, including the complainers and respondents, "declared real liens, burdens, and servitudes upon the lots of ground hereby feued, not only in favour of the first party" (the granter of the feus) "and his foresaids, but also of the whole feuars and disponees upon the first parties' lands, and their successors."

Having regard to the terms in which the feu-rights of the feuars in Belhaven Terrace are expressed, as now referred to, I can have no doubt that the question of the complainers' title to insist in the present application for interdict against the respondents must be sustained, in the same way and for the same reasons as the title of a party similarly situated was sustained in the recent case of *M'Gibbon* v. *Rankin senr. and Others*, January 19, 1871, 9 Macph. 423, a case not only analagous, but, so far as the matter of titles is concerned, in all respects identical with the present. The Judges in that case, while unanimous in sustaining the pursuer's title, appear to have differed as to whether it rested on *jus quæsitum tertio* or implied contract. So far, however, as the parties litigants are interested, it is of little or no consequence which of the principles is the true one. For my own part, I am inclined to hold that both of them are applicable—that while the principle of implied contract arises from the mutuality of right and obligation which is created amongst all the feuars in Belhaven Terrace by the terms of their feu-rights, a *jus quæsitum tertio* is also conferred by their titles on each of them. In accordance with the decision in the case of *M'Gibbon*, judgment was shortly afterwards pronounced in the case of *Alexander and Others* v. *Stobo and Miller*, March 3, 1871, 9 Macph. 599.

As to the complainers' interest as well as title to insist in the present application, I can have no doubt. It is impossible, I think, to say that such a school, attended by so many young persons as the respondents admit they are likely to have as residents and day-boarders, may not in many ways be disagreeable and annoying to the residenters in the neighbouring and especially in the adjoining houses. The complainers, all of whom have houses in Belhaven Terrace, and two of whom are owners of the houses adjoining the respondents, have therefore a clear and undoubted interest to prevent if they can the respondents from occupying their house as they propose and threaten to do, in respect of the noise and bustle and annoyance otherwise which such occupation would unavoidably give rise to.

Nor do I think there can be any doubt that the respondents' threatened occupation of their house would be a contravention of their as well as the complainers' feu-rights, that their houses can only be used as private dwellings. This very point, in circumstances almost identical, was recently, and since the Lord Ordinary's judgment, so determined in the Court of Appeal in England, Chancery Division—*German* v. *Chapman*—where, as appears from the notice of the case in the Weekly Notes, No. 49, Dec. 8, 1877, p. 243, it was held, without requiring proof, reversing a judgment of Vice-Chancellor Bacon, that the use of a house as a school for girls was a breach of a contract such as there is here, and therefore injunction was granted.

In these circumstances, I am of opinion that the Lord Ordinary's interlocutor reclaimed against ought to be recalled, and interdict granted against the respondents using their house No. 23 Belhaven Terrace as proposed by them.

Lord Gifford and the Lord Justice-Clerk concurred.

The Court recalled the interlocutor reclaimed against, and granted the interdict craved.

Counsel for Complainers—(Reclaimers) Balfour—Robertson. Agent—C. S. Taylor, S.S.C.
Counsel for Respondents—Asher—Lorimer. Agents—Finlay & Wilson, S.S.C.

Saturday, January 12.

FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

TENNENT *v.* CRAWFORD.

Process—Appeal—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 71 *and* 170—*Review of Sheriff's Interlocutor preliminary to Appointment of Trustee.*

Held that the exclusion of review under the 71st section of the Bankruptcy (Scotland) Act 1856 applies only to interlocutors confirming the election of a trustee, and not to those which deal with questions preliminary to the election, *e.g.*, the validity of the creditors' votes.

Observed per Lord Shand, that he would not have concurred in so holding had the point not been prejudged by the case of *Wiseman* v. *Skene*, March 5, 1870, 8 Macph. 661.

Bill—Promissory-Note—Bond—Bank Interest.

A document granted for a certain sum, to be paid back at a certain date with bank interest, is not a promissory-note, extraneous evidence being necessary to determine the exact sum due, and it may therefore if unstamped be admitted in evidence on payment of the duty and penalty under the Act 33 and 34 Vict. c. 97.

Bankrupt—Diligence—Election of Trustee, Vouching of Claims for.

A diligence may be granted for the recovery of specified documents in the hands of specified persons, in order that parties claiming to vote in the election of a trustee in bankruptcy may instruct their claims.

This was a competition for the office of trustee on the sequestrated estate of William M'Culloch jun., farmer, between Mr Tennent, accountant, Glasgow, and Mr Crawford, accountant, Ayr. Mr Tennent objected to the claims of certain creditors who supported Mr Crawford for the office, amongst others to the claims of