Graham Stewart. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Claimant Arthur Moubray—Dundas—J. H. Millar. Agents—Melville & Lindsay, W.S.

Counsel for the Claimants S. & J. Philipps—M'Lennan. Agent—William Gunn, S.S.C.

Thursday, June 27.

FIRST DIVISION.

[Sheriff of Chancery.

FULTON *v.* EGLINTON.

Process—Ex parte Proceeding—Unopposed Petition for Service—Res judicata.

Held that the decision of the Sheriff of Chancery, dismissing a petition for service which no party appeared to oppose, did not constitute *res judicata* to the effect of excluding a second petition for service by the same person.

On 10th September 1883 William Stephen John Fulton, 2 Salisbury Square, Edinburgh, presented a petition to the Sheriff of Chancery for service as nearest and lawful heir of tailzie and provision in general to Archibald, 11th Earl of Eglintoune, Lord Montgomery and Kilwinning, who died in 1796 without leaving any male issue. The petitioner averred that the deceased Earl had a younger brother, James Montgomery, who predeceased him, and who was otherwise called James Fulton or Fultoune of High Warwickhill, Dreghorn, Ayrshire. He maintained that he was the great grandson of James Montgomery and great-great-grandson of Alexander, ninth Earl of Eglinton, and contended that as such he was the nearest and lawful heir-male of tailzie and provision in general to Archibald, 11th Earl of Eglinton under a series of titles enumerated in the petition.

No appearance was made for the existing Earl of Eglinton, and on 15th February 1884 the Sheriff of Chancery (MUIRHEAD) pronounced the following interlocutor:—"Finds that the petitioner has failed to establish that his great-grandfather, James Fulton of Fultowne, designed in the petitioner's service to him in 1877, as 'farmer in High Warwickhill, Dreghorn, Ayrshire,' was a lawful son of Alexander, 9th Earl of Eglinton, and younger brother of Archibald, 11th Earl: Therefore refuses to serve as craved, dismisses the petition, and decerns."

On 14th March 1893 Mr Fulton presented another petition to the Sheriff of Chancery, craving the Court to serve him as heir to Archibald, 11th Earl of Eglinton as in the former petition. The petitioner made the same averments of fact as previously, but founded his claim on a new document.

Answers were lodged by the Earl of Eglinton, who pleaded *res judicata*.

On 2nd March 1895 the Sheriff of Chancery (WALLACE) dismissed the petition in respect that "in the present petition there is no relevant averment of *res noviter veniens ad notitiam*, and that the judgment of 15th February 1884 is *res judicata*."

The petitioner appealed, and argued—There could be no *res judicata* in an *ex parte* petition where no appearance was made for any other person.

At advising—

LORD PRESIDENT—I think that the Sheriff's interlocutor cannot stand. The only operative finding is that a previous judgment of the Sheriff of Chancery is *res judicata*. Now, the proceedings in the former petition are printed in the appendix, and it appears that the petition was an *ex parte* proceeding on the part of the present petitioner which the Sheriff disposed of without appearance being made for the Earl of Eglinton. *De facto*, the Earl of Eglinton had been served years ago, but without two parties being in the field no judgment can be *res judicata*. I think therefore that the case must go back to the Sheriff, all pleas of parties being left open.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court sustained the appeal and remitted to the Sheriff.

Counsel for the Appellant — Party. Agent—Party.

Counsel for the Respondent—Rankine—C. K. Mackenzie. Agents—Blair & Finlay, W.S.

Thursday, June 27.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

GRIERSON, OLDHAM, & COMPANY, LIMITED *v.* FORBES, MAXWELL, & COMPANY, LIMITED.

Contract—Assignation—Title of Assignee to Sue on Contract.

The defenders entered into a contract by which they agreed to pay a firm of wine merchants the sum of £200 per annum by half-yearly instalments for the advertisement in their wine list of a non-intoxicating wine, in which the defenders were interested. Before the second instalment had been paid the wine merchants transferred their business, including the benefit of all contracts to which they were entitled, to a limited company.

Held (*aff.* judgment of Lord Kincairney) that, as the contract involved mutual obligations and *delectus personæ*, it was not assignable, and that the company had therefore no title to enforce it against the defenders.

Upon 1st January 1894 Messrs Forbes, Maxwell, & Company, who were the patentees of a non-alcoholic wine named "Mersano," entered into an agreement

with Messrs Grierson, Oldham, & Company of 11 Regent Street, Pall Mall, London, in these terms—"It is hereby agreed that Messrs Grierson, Oldham, & Company purchase 'Mersano' from time to time as they may require in quantities of not less than ten gross pints, delivered at London or Liverpool free at 3s. 6d. per dozen. . . . Messrs Grierson, Oldham, & Company agree to quote 'Mersano' in their list at 5s. per dozen pints, and agree to let Messrs Forbes, Maxwell, & Company, Limited, the full page of cover now devoted to Italian wines, cider, &c., in their price list for 100,000 copies per annum for the annual sum of £200 for three years, to be paid half-yearly in advance from the date hereof, viz., first day of January One thousand eight hundred and ninety-four. Messrs Grierson, Oldham, & Company reserve to themselves the right . . . to conclude this arrangement by six months' notice, in writing, of their intention in that behalf. Messrs Grierson, Oldham, & Company to have the right to reject any advertisement blocks or matter that they may think unsuitable to the character of their list."

Upon August 30th 1894 the business of Grierson, Oldham, & Company was transferred to a company, Grierson, Oldham, & Company, Limited. According to the memorandum of association of the company, one of the objects for which it was established was to acquire and take over as a going concern the business of wine and spirit merchants carried on by Messrs Oldham, Grierson, & Company, "together with the goodwill thereof, and all or any of the assets and liabilities of the proprietors of that business in connection therewith," and also to carry into effect an agreement dated August 23rd 1894 between the members of the old company and a Mr Harold Walker on behalf of the new company. One condition of the agreement was that the vendors should sell and the company purchase as from December 31st 1893—"*Fourthly*, All cash in hand and at bank, all book and other debts due to the vendors in connection with the said business, and the full benefit of all securities for such debts, and of all contracts, engagements, consignments, rights, and privileges to which the vendors, as at the said date, were or might be entitled in relation to the said business."

Messrs Forbes, Maxwell, & Company paid the hire or rent stipulated (£100) for the half-year from January 1st to June 30th, 1894, but refused to pay any rent on July 1st.

Messrs Grierson, Oldham, & Company, Limited, brought an action on September 1st 1894, against Forbes Maxwell & Company, Limited, to have it found and declared that the defenders were "bound to implement and fulfil to the pursuers, as having right to the whole assets of the firm of Grierson, Oldham, & Company, wine merchants and shippers, their (the defenders') part" of the agreement dated January 1st 1894, and also that they should be ordained to pay to the pursuers £200 per annum half-yearly until January 1st 1897.

The pursuers averred that they were "willing, and have already offered, to implement their part of said agreement, by continuing to issue the stipulated copies of their price list with the advertisement of the said wine thereon, all as stipulated for in the agreement; and they hereby repeat that offer."

The pursuers pleaded, *inter alia*—"(1) The defenders having entered into the agreement founded on, and being bound to implement the same, and having failed to do so, and the pursuers being in right thereto, decree, in terms of the first conclusion of the summons, ought to be pronounced with expenses."

The defenders pleaded, *inter alia*—"(1) No title to sue. (2) The action is irrelevant. (3) The pursuers not being parties to the alleged agreement, are not entitled to sue thereon."

Upon 7th February 1895 the Lord Ordinary pronounced this interlocutor—"Finds (1) that this action is brought to enforce implement of a contract between Grierson, Oldham, & Company and the defenders, and alternatively for damages for breach of that contract; (2) that it is not alleged that the pursuers Grierson, Oldham, & Company, Limited, were parties to the said contract; (3) that the pursuers have set forth no valid right to sue thereon: Therefore finds that the pursuers have no title to sue this action to the effect foresaid; sustains the first, second, and third pleas-in-law for the defenders; dismisses the action, and decerns.'

"*Opinion.*—Grierson, Oldham, & Company, Limited, sue for implement of a contract between the defenders and Grierson, Oldham, & Company, dated 1st January 1894, and alternatively for damages for breach of that contract. On examining the process I find that the contract has not been produced, but what the pursuers aver about it is, that, on the one hand, Grierson, Oldham, & Company, who were wine merchants, agreed to advertise in their circular, for a period of three years, a 'non-intoxicating wine' called Mersano, which the defender desires to sell; and on the other hand, that the defenders agreed to pay for that privilege £200 per annum, half-yearly in advance from 1st January 1894. The pursuers aver that the defenders paid £100 for the half-year from 1st January to 30th June 1894, but that they refused to pay any further sums, or to implement the contract.

"The defenders say that they had no contract with the pursuers Grierson, Oldham, & Company, Limited, but only with Grierson, Oldham, & Company, and plead that the pursuers have no title to sue on that contract.

"The pursuers connect themselves with the contract with Grierson, Oldham, & Company by (1) an agreement on their (pursuers') behalf with Grierson, Oldham, & Company, dated 23rd August 1894; (2) the memorandum and articles of association under which the pursuers were registered on 28th August 1894; and (3) a subsequent agreement. These documents bear that the pursuers take over the whole

assets and liabilities of Grierson, Oldham, & Company, and are vested in the full benefit of all their contracts. The pursuers plead that they thus came to be in right of the contract between the defenders and Grierson, Oldham, & Company, and are now entitled to enforce it.

"The defenders maintain that no such right could be conferred by these deeds; that Grierson, Oldham, & Company could not convert a contract with them into a contract with Grierson, Oldham, & Company, Limited; and that the action falls to be dismissed on the plea of no title to sue.

"The pursuers contend that a mutual contract such as that averred is assignable by one of the contracting parties, and that an assignation confers on the assignee a right to enforce the contract, unless the other party to the contract can qualify some disadvantage by the substitution of one contract for the other. They stated in the argument that there was substantially no difference between Grierson, Oldham, & Company, and Grierson, Oldham, & Company, Limited; that the latter company continued the business of the former company, and continued to issue the old wine circulars; that it made no difference to the defenders whether their contract was with the old company or with the new, and that they had suffered no detriment from the change. These particulars are not averred in the condescendence, but I think that, for the purposes of this judgment, they may be considered. I suppose that the pursuers would be prepared to amend their condescendence by adding them.

"The defenders do not condescend on record on any disadvantage to which they would be put if the new company were substituted for the old in the contract, although they founded in argument on this manifest disadvantage, that a company with limited liability would be substituted for a company whose liability was unlimited. But it is clear from their statement that they were disappointed and dissatisfied with the original contract, and they say that Grierson, Oldham, & Company did not fulfil it fairly, and it is hardly unfair to conjecture that their desire to be rid of the contract arises, not so much from the transference of the business to the new company, as from their belief that they had made an unprofitable bargain originally. They contend, however, that their sole contract was with the old company, and that they are not bound by it if that company have put it out of their own power to fulfil it. They maintain that their contract is obviously a contract involving *delectus personæ*, and is, from its nature, not assignable by the other party. The defenders urged that it was impossible to hold that the new company of Grierson, Oldham, & Company, Limited, had become bound to them in this contract, and that it followed that they could not be bound to that company, because, if there existed any contractual obligation between them, it must of necessity be mutual.

"On considering the arguments with the authorities, I have formed the opinion that the preponderance of authority is with the defenders, and that they are entitled to insist that the action shall be dismissed on their plea of want of title to sue. It is not necessary to affirm that no executorial contract can be assigned to the effect of substituting one contractor for another. The case does not necessitate the decision one way or the other of such a general and important question, but relates only to executorial contracts such as that averred, which obviously involve mutual obligations and *delectus personæ*.

"The defenders referred to the case of *Robson & Sharpe* v. *Drummond*, 2nd May 1831, 2 Barn. and Ad., 303, in which the principle for which they contend was carried to its extreme length. The defendant Drummond had hired a carriage from Sharpe for five years at £75 per annum. Robson was, in fact, although not ostensibly, or with Drummond's knowledge, a partner of Sharpe. After the contract had been carried out for two years, Sharpe made over the business to Robson, who intimated the change to Drummond, and stated that the business would be carried on by him in the old premises. It was held that Drummond was entitled to return the carriage and to refuse to carry out the contract, although he could qualify no disadvantage, and although he gained a benefit never contemplated, for he paid the hire for the carriage when it was new, and was relieved from the payment of the same hire after two years' use.

"In *Boulton* v. *Jones*, 25th November 1857, 2 H. and N. 564, the defendant Jones had ordered goods from Brocklehurst. Boulton (Brocklehurst's foreman and manager), who had at that time purchased Boulton's business, furnished the goods and sued for the price. It was held that he could not maintain the action. In advising, Pollock, C.B., said—'It is a rule of law that, if a person intends to contract with A, B cannot give himself any right under it. . . . Possibly Brocklehurst might have adopted the act of the plaintiff in supplying the goods, and maintained an action for their price. But, since the plaintiff has chosen to sue, the only course the defendants could take was to plead that there was no contract with him.' The dictum of Bramwell, B., has a close bearing on this case. 'When' he says, 'a contract is made in which the personality of the contracting party is or may be of importance, as a contract with a man to write a book or the like, or where there might be a set off, no other person can interpose and adopt the contract.'

"The defenders referred also to *The Family Endowment Society*, 1870, L.R., 5 Ch., App. 118, where an annuitant, under a bond of annuity granted by an insurance company, was held not entitled to sue another insurance company to which the business of the former insurance company had been transferred. The case is consistent with the defenders' argument, but is somewhat too special to be available as a case in point.

"On the other hand, the pursuers referred

to the case of *The British Waggon Company and the Parkgate Waggon Company* v. *Lea & Company*, 1880, L.R., 5 Q.B.D., 149, a case apparently of considerable importance. The facts were that the defendants had hired railway waggons from the Parkgate Waggon Company for seven years for a stipulated sum per annum, the waggon company being bound to keep the waggons in repair. In the same year the Parkgate Waggon Company passed a resolution for the voluntary winding-up of the Company; liquidators were appointed, and the liquidation was continued under supervision. Four years or thereby from the date of the contract, their business was transferred to the British Waggon Company, which company offered to fulfil the contract with the defendants, but the defendants asserted their right to bring the contract to an end. The question was tried in a special case, to which the Parkgate Waggon Company and its liquidators, and also the British Waggon Company, were parties, and it was decided that the repairs of the waggons by the British Company would be sufficient implement of the contract with the Parkgate Company, and consequently that so long as the Parkgate Company continued to exist, and, through the British Company, continued to fulfil its obligations to keep the waggons in repair, the defendants could not be heard to say that the Parkgate Company was not entitled to the performance of the contract by them. This judgment does not relate to the possibility or effect of an assignation of a mutual contract by one of the parties, but only to the question whether the original contract could be duly fulfilled through other parties—a different question altogether. The judgment is rested to some extent on the ground that the contract was one which involved no selection by the one party or the other as possessed of special qualifications for its fulfilment, but which might be fulfilled by any ordinary workman conversant with the kind of work, and I think it must be admitted that the approval by the Court of the case of *Robson & Sharpe* v. *Drummond* is expressed in very qualified language. Still that case and also *Boulton* v. *Jones* are approved of and adopted. The case of *The British Waggon Company* would have been more applicable had this been an action by Grierson, Oldham, & Company claiming right to fulfil their contract through the agency of Grierson, Oldham, & Company, Limited, although even in that case its application might have been doubtful and remote because of the radical difference between the two contracts, the one involving the principle of special selection or *delectus personæ*, and the other not.

"I think that the cases of *The West Stockton Iron Company* v. *Neilson & Maxwell*, July 3, 1880, 7 R. 1055; and *Johnson & Reay* v. *Nicol & Son*, January 25, 1881, 8 R. 437, in which it was decided that an order for goods from a manufacturer might be fulfilled by delivery of goods manufactured by another party of equal quality with the goods manufactured by the person contracted with, were of the same character as the case of *The British Waggon Company*.

"Since the debate I have been referred to the case of *Jacoby* v. *Whitmore*, November 24, 1883, 49 Law Times (new series), 335, where a contract by the defendant with a shopkeeper in whose employment he had been, not to carry on during his master's life the same kind of business within a certain distance of his shop, was held to be enforcible by a plaintiff to whom the shopkeeper had sold his business. It was held that the benefit of that contract was assignable, but that was a contract not involving any mutual obligations, but merely an obligation on one party and a benefit to the other. It was held that the contract was really in favour of the shopkeeper and his assignees, although assignees were not specially mentioned. The case does not decide any general question as to the assignability of contract, and does not affirm that a contract involving mutual obligations could be assigned.

"I was also referred to a report in the *Times* newspaper, under date 1st December 1894—*Allan & Company, Limited* v. *Glennie*. The report is imperfect, and the precise point decided does not appear with certainty. The defendant had in 1885 contracted with Allen & Company that they should publish a book for him, and they did publish the first volume, and after that the defendant ceased to furnish additional manuscript. In October 1890 Allen & Company, Limited, was formed, and took over the business of Allen & Company. The action was raised by the new company, who claimed damages for breach of contract in failing to furnish manuscript. The defendant pleaded that the contract was not assignable, and that that was his reason for not furnishing manuscript to the new company. It would appear from the short report that Mr Justice Collins did not believe him, and held that the breach had been committed before the formation of the new company, and I suppose that all that was conveyed to the new company was a claim of damages—so I understand the case. If Mr Justice Collins held that this contract was assigned, then there would be his authority in favour of the pursuers, but it is not clear that his opinion goes that length. On the whole, I think that these English authorities support the pleas of the defenders.

"There is a series of cases which have been decided in our courts which all involve the same principle, to which I think it desirable to advert. They bear somewhat closely on the question under consideration although they do not decide it.

"The first of these is *Fleming* v. *Robertson*, February 19, 1859, 21 D. 548, and in the House of Lords, 4 Macq. 167, and 33 Scot. Jur. 591. In that case it was held in this Court that an agent, instructed to prepare a security for behoof of a third party, was responsible to him for professional negligence though not employed by him, and issues framed on that footing were adjusted to try an action of damages against the agent, but in the House of Lords the issues

were altered and framed so as to put the question, whether the defender was employed by or by the authority of the pursuer, and the general principle was thus expressed by Lord Chancellor Westbury—'I never had any doubt of the unsoundness of the doctrine that, where A, employing B, a professional lawyer, to do any act for the benefit of C, A having to pay B, and there being no intercourse of any sort between B and C, if, through the gross negligence or ignorance of B in transacting the business, C loses the benefits intended for him by A, C may maintain an action against B, and recover damages for the loss sustained.'

"The recent case of *Tully* v. *Ingram*, November 10, 1891, 19 R. 65, is a judgment to the same effect. There it was held in effect that a donee who had lost the benefit of the gift through the fault of a law-agent employed by the donor had no action against the law-agent.

"The important case of *Blumer & Company and Ellis & Sons* v. *Scott & Sons*, January 16, 1874, 1 R. 379, seems to involve substantially the same principle. On 20th July 1871 Blumer & Company, shipbuilders, sold to Ellis & Sons a steamship then being built. On 24th July Blumer & Company contracted with Scott & Sons for the supply by the latter of the engines for the ship. Scott & Sons failed to supply the engines, and Blumer & Company and Ellis & Sons raised this action, concluding (1) for payment to Blumer & Company of a certain amount of damage said to have been suffered by them; (2) for a payment to Ellis & Sons of a larger sum said to be the damage suffered by them; (3) alternatively, for payment of the total of the two sums to Blumer & Company. The Court assoilzied Scott & Sons from the second and third conclusions on the ground that there was no contract between them and Ellis & Sons, who were therefore not entitled to sue them, and that the whole sums could not be recovered by Blumer & Company, because Ellis & Sons and not Blumer & Company had suffered the damage.

"Lastly, in *Tinnevelly Sugar Refining Company, Limited, and Darley and Butler* v. *Mirrlees, Watson, & Yaryan Company, Limited*, July 17, 1894, 21 R. 1009, which was an action of damages for breach of contract for the supply of machinery, the action was dismissed because Darley & Butler, who had made the contract with the defender, had suffered no damage, and because the Tinnevelly Company, on whose behalf Darley & Butler had contracted, had not, at the date of the contract, come into existence, and were held in the circumstances not entitled to sue on the contract.

"In all these cases (except perhaps *Fleming* v. *Robertson*, where an issue of direct employment was allowed) the defenders escaped a liability which they had undertaken, and the result appeared to be a wrong suffered by the person for whose benefit the agreement had been entered into, a wrong which, in *Blumer & Company*, Lord Ardmillan thought to look as if it were a wrong without a remedy. I do not find it suggested in any of these cases that the difficulty could have been overcome by the original contractors assigning their contracts to the persons for whose behoof the contracts had been undertaken, about which there could have been no difficulty, and I am disposed to think that it was assumed that that could not be effectually done.

"On the whole, I think, on the authorities, that it is not competent for a party to a contract of the character of that libelled to substitute for himself as contractor some other person though able and willing to fulfil the contract.

"I think that this case falls to be decided according to that general rule, and that it cannot be treated as exceptional on the ground argued by the pursuers, that Grierson, Oldham, & Company, Limited, and Grierson, Oldham, & Company, were substantially the same company, and differed only in name. I think they must be regarded as different companies, and I cannot hold that a person who has entered into a contract without restriction of liability can by any method limit his liability under that contract.

"It was maintained that as £100 were due under the contract on 1st July 1894 before the transference of the business to Grierson, Oldham, & Company, Limited, the right to sue for that £100 had been duly assigned. But I think to that argument the defenders conclusively and effectually answer that that sum could not be recovered unless Grierson, Oldham, & Company were in a position to fulfil their side of the contract, which admittedly they were not, and that it could only be recovered by the pursuers on the footing that they are entitled to adopt and implement the contract.

"I am of opinion that the first, second, and third pleas-in-law for the defenders should be sustained, and that the action should be dismissed."

The pursuers reclaimed, and argued—This was an ordinary contract and did not imply any *delectus personæ*, because the individual members of the former firm had not been selected by the defenders on account of their individual skill or competency, and it was upon that ground alone that the Court would hold that the right to sue under a contract was lost, where there was a change in the firm—*British Waggon Company* v. *Lea*, 1880, 5 Q.B.D. 149. Where no real change was made in the partnership, and the business was carried on in the same way as before, contractors' rights and liabilities as regarded the old firm were not affected—*Heddle's Executrix* v. *Marwick & Company*, June 1, 1888, 15 R. 698. No prejudice had been sustained by the defenders by the change in the firm, and none was averred, and it was upon the ground of prejudice that the cases of *Robson* v. *Drummond* and *Boulton* v. *Jones*, relied on by the Lord Ordinary, had been decided—*Jacoby* v. *Whitmore*, November 24, 1883, 49 Law Times Reps. (N.S.) 335; *West Stockton Iron Company* v. *Neilson & Maxwell*, July 3, 1880, 7 R. 1055; *Johnson & Reay* v. *Nicoll & Son*, January 25, 1881, 8 R. 427.

The defenders argued — The pursuers could not aver any contract between them and the defenders, because their company was not in existence when the contract was made, so that they had no title to sue. The contract involved *delectus personæ*, as was shown by the agreement that Grierson, Oldham, & Company should take "Mersano" wine in such quantities as they might require, and therefore, upon the authorities, the defenders were entitled to put an end to the contract when the former firm was changed into a limited liability company—*Robson & Sharpe* v. *Drummond*, 1831, 2 Barn. & Adolph. 303; *Boulton* v. *Jones, &c.*, 1857, 2 H. and N. 564; *Family Endowment Society*, 1870, L.R., 5 Chan. App. 118; *The West Stockton Iron Company* had been reviewed in *Johnson* v. *Raylter*, 1881, L.R., 7 Q.B.D. 438, and a view adverse to the decision had been expressed by L.-J. Cotton.

At advising—

LORD JUSTICE-CLERK—Messrs Forbes, Maxwell, & Company, who have upon the market a certain non-alcoholic wine called "Mersano," in 1894 contracted with Messrs Grierson, Oldham, and Company for a space in their advertising wine list for a period of three years at the rate of £200 per annum. The firm of Grierson, Oldham, & Company was brought to an end by the formation of a limited liability company, which took over the business of the old firm.

The question which has arisen is whether Messrs Forbes, Maxwell, & Company can be sued by the new company to pay for an advertisement in the wine list of the limited company. I shall assume that the limited company did, upon an advertising list in the same style, circulate it to the same extent as the old firm had undertaken to do.

I am of opinion that the new limited company cannot be held to be the same contracting party as the old firm, and that Messrs Forbes, Maxwell, & Company are not under their contract with Messrs Grierson, Oldham, & Company bound to pay for an advertisement in the wine list of the limited company, with which company they have no contract. It appears to me that the case is ruled by authority, and that the case of *Boulton* v. *Jones*, in 2 Hurlston and Norman is quite in point. There, one Jones having ordered goods from Brocklehurst, and Brocklehurst having sold his business to one Boulton, it was held that Boulton could not maintain an action against Jones, as having supplied goods under the contract with Brocklehurst. Whether the party originally contracting could supply through another, and sue for the price is a different question. But it is thus authoritatively decided that an assignee of a business cannot have effectually assigned to him the rights of the assignor in mutual contracts, so as to give the assignee a title to sue for enforcement of the obligations undertaken by the other party to the contract. In such a case the assignee has no title to sue, the other party not having contracted with him.

I am therefore of opinion that the interlocutor of the Lord Ordinary is right, and ought to be adhered to.

LORD YOUNG concurred.

LORD TRAYNER—I agree with the Lord Ordinary in all he says, and have nothing to add.

The LORD JUSTICE-CLERK stated that Lord Rutherfurd Clark, who was not present at the advising, concurred in the judgment.

The Court adhered.

Counsel for the Pursuers — Jameson — Deas. Agents—J. & A. Hastie, Solicitors.

Counsel for the Defenders — Ure — Younger. Agents — Webster, Will, & Ritchie, S.S.C.

HIGH COURT OF JUSTICIARY.

Friday, June 28.

(Before Lord Adam, Lord M'Laren, and Lord Kinnear.)

DUNLOP *v.* GOUDIE.

Justiciary Cases — Citation — Insufficient Inducice — Offer of Adjournment — Sale of Food and Drugs Act (Amendment) Act 1879 (42 *and* 43 *Vict. cap.* 30), *sec.* 10.

Section 10 of the Sale of Food and Drugs (Amendment) Act 1879 provides, that "in all prosecutions under the principal Act" (the Sale of Food and Drugs Act 1875) . . . "the summons shall not be made returnable in a less time than seven days from the day it is served upon the person summoned."

Held (1) that this provision, although expressed in English legal phraseology, was applicable to Scotland, and required that the accused should not be cited on less than seven days' *inducice*; (2) that an objection to a complaint founded on a failure to give the required *inducice* was not obviated by an offer on the part of the presiding judge to adjourn the trial to a subsequent day more than seven days after citation, that offer not having been accepted by the accused.

James Dunlop, publican, Jarvey Street, Bathgate, was charged in the Sheriff Court at Linlithgow with a contravention of the Sale of Food and Drugs Acts 1875 and 1879.

The complaint was served upon Dunlop on 15th January 1895, and he was cited to appear in Court on the 18th January. He appeared on that day and stated certain preliminary objections to the complaint, and in particular "(3) that in terms of section 10 of the Act 42 and 43 Vict. c. 30, the summons should not have been made returnable in a less time than seven days from the day it was served upon the re-