without objection. But what is that after all but a shop. I fail to see any interest which the defenders can qualify to maintain such a restriction, if such a restriction exists, it being one so easily evaded. But in truth I think the objection resolves itself into one as to the use to which the building can be put; and I think there is no restriction imposed on the use by the clauses I have referred to. There is in another part of the deed an express restriction as to the erection of factories, &c., or to the carrying on of certain trades, but this restriction the pursuers do not wish to violate. On the contrary, they expressly stated that such restriction is to be observed, and they are willing to take their declarator subject to it. The Lord Ordinary seems to be of opinion that the pursuers are entitled to build tenements of houses with shops, and I am rather inclined to agree with him. But I do not press that view, as I understand your Lordships are of a different opinion.

LORD MONCREIFF—As regards the steadings fronting Carlton Terrace, I agree with your Lordships that there is not sufficient warrant in the feu-contract, to restrict the pursuers to erecting self-contained dwelling houses.

I think they are entitled to erect tenements of dwelling-houses not inferior in character and design to the houses already built. But I do not think they are entitled to build shops. Reading the second, third, and fourth heads of the contract, I think it is stipulated with sufficient distinctness to be binding upon the pursuers that the houses to be erected by them or their disponees on steadings fronting Carlton Terrace shall not only be placed on the same building-line as those already erected, and be not inferior in character and design to them, but shall, externally at least, be dwelling-houses, the object of the stipulation being to preserve the residential appearance of the locality.

It may be that when tenements of houses are erected they may be used as shops. The contract does not contain any general prohibition against such a use, and the provisions of the fourth head of the contract are by no means inconsistent with it. But as regards Carlton Terrace, I do not think that the pursuers are entitled to a decree which would enable them wholly to disregard what I take to be the contract of parties as to the external appearance of the buildings.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against: Find and declare (1) that as regards that part of the subjects described in the conclusion of the summons, of which the pursuers are proprietors, fronting Carlton Terrace, the pursuers are entitled to erect thereon tenements of dwelling-houses, provided that in doing so they observe the existing building line in front, and that the houses so to be erected are not inferior in character and design to the houses already built and forming part of said terrace: Reserving to the defenders any rights which they may have to enforce any other conditions, provisions, and obligations imposed on the pursuers or their authors by the titles granted by them, or either of them, in favour of the defenders or their authors: *Quoad ultra* dismiss the action."

Counsel for the Pursuers—Balfour, Q.C.—Salvesen. Agent—J. Smith Clark, S.S.C.

Counsel for the Defenders—Guthrie—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Friday, December 11.

SECOND DIVISION.

[Sheriff of Lanarkshire.

A *v.* THE NORTHERN ACCIDENT INSURANCE COMPANY, LIMITED.

Insurance — Accident Insurance — Proof — Confidentiality — Medical Etiquette — Accidental Blood Poisoning in course of Medical Practice.

A policy of insurance against, *inter alia*, accidental blood-poisoning was issued to a medical man. In an action on the policy by the insured, it appeared that while he was performing an operation on the uterus of a woman he cut his finger. About a fortnight afterwards he developed a sore upon the finger, the nature of which was disputed, and at the same time showed secondary syphilitic symptoms. The pursuer averred that he had been inoculated through the cut in his finger by this patient, but led no evidence to show that she was suffering from syphilis.

Medical evidence was led by the defenders to show that it was contrary to experience that secondary symptoms should develope within fourteen days of inoculation. The pursuer refused to give the name of the patient, on the ground of professional etiquette.

Held that he had failed to prove that the blood-poisoning had been accidentally contracted in the course of his professional duty—*diss.* Lord Young, on the ground that the parties must be held to have contracted in view of the known rule of professional etiquette, and that on this footing the pursuer had sufficiently proved his case.

This was an action brought in the Sheriff Court at Glasgow by a doctor of medicine in Glasgow, against The Northern Accident

Insurance Company, Limited. The pursuer craved decree for £123 as due to him under a policy of insurance issued to him by the defenders, and dated 1st May 1894.

The facts sufficiently appear from the following note appended to the interlocutor of the Sheriff (BERRY):—"This is a most painful case, and I wish I could have been spared the necessity of entering into detail regarding it. The pursuer sues on a policy dated 1st May 1894, whereby the defenders agreed to compensate him according to a specified scale of payments if during the period of twelve months from 27th April 1894 he should sustain any bodily injury 'caused by violent, accidental, external and visible means, operating *accidently* (*sic*) on the person of the insured, and capable of direct proof.' The policy bears an endorsement that it 'covers compensation for blood poisoning which is the result of an accidental injury within the meaning of the policy.' One of the conditions attached to the policy is that no compensation shall be payable unless such evidence as the directors may from time to time require be furnished as to any alleged accident or injury on the ground of which a claim is made.

"The ground of claim is that the pursuer, who is a doctor of medicine engaged in obstetrical practice, was for some time during the latter part of 1894, through syphilitic blood poisoning resulting from accidental injury, disabled either totally or partially within the sense of the policy, and prevented from attending to his business. He says that on 14th August 1894, while operating on a female patient in a private nursing institution in Glasgow, he accidentally inflicted a slight wound on the middle finger of his left hand, and that through this wound syphilitic blood poisoning was communicated to him by inoculation.

"That blood poisoning of that nature showed itself after the middle of August, and that he suffered more or less from consequent disablement is proved beyond doubt. The question, however, is seriously disputed whether it is sufficiently proved that it was through the wound in the finger that the poison was communicated.

"The pursuer's averment on that point is contained in article 10 of the condescendence, as allowed to be amended by interlocutor of 11th January 1895, after there had been a debate on the closed record. The averment is to the effect that the pursuer is medical officer of certain Magdalene institutions in Glasgow, and as such has to examine all the inmates immediately on admission; that on 17th August he examined a girl (whose name is given) who was suffering from syphilis; that the disease was communicated to him by accidental inoculation through the wound on his finger; and that this happened either at the operation at which the wound was inflicted or at his examination of the girl in the Magdalene Institution.

"It has been clearly shown, from entries in the examination book of the Magdalene Institution and otherwise, that the examination there of the patient referred to could not have been the cause of the inoculation, and I think that the case may be regarded as narrowed down to the inquiry whether it is reasonably established that the disease was communicated at the operation on 14th August, when the wound on the finger was inflicted. It has been suggested in argument, and also in the course of the proof, that the infection may have come from some other operation or examination at which the pursuer may have been engaged, and which he is unable to specify, but as the record stands I doubt if that suggestion is open. I do not think that the insurance company were, especially in the circumstances to be mentioned afterwards, bound to accept it as satisfying the burden of proof which the pursuer has to meet, that it was through the wound on the finger that the disease was communicated, and as far as the proof is concerned no such other occasion of infection has been disclosed.

"The claim on the policy was made on 29th August 1894 by the document No. 9 of process. In describing the injury it is there stated that the pursuer had in the operation of 14th August cut his finger, and that poisoning had appeared with local and constitutional effects. It is not stated that the poisoning was syphilitic, and the pursuer himself says in evidence that he had no idea at that time that it was of that nature. Dr Macphee, the medical officer of the Insurance Company, only learned for the first time that that was its nature when he saw the pursuer on the evening of 11th September. Before that time secondary symptoms had shown themselves fully developed, and the syphilitic rash was then all over the pursuer's body. In the meantime, between 1st and 8th September, the pursuer had been in Dublin.

"It forms a serious difficulty in the way of the pursuer's case that from 14th August, when the pursuer wounded his finger, the time in which the disease developed itself was unusually short. The medical witnesses are not at one as to the period from the time of infection in which the different symptoms may be exhibited, but that in the present case, if the infection came from the wound in the finger, the development was more than ordinarily rapid seems beyond doubt. Dr Dalziel, who examined the wound on 26th August, and again more carefully a day or two afterwards, says that he thought it then very like a hard chancre, that is, a primary syphilitic sore. He says subseqnently that at the end of August there was no doubt it was a typical hard chancre, and that statement is important. It would appear, however, from his evidence, that it was not from the appearance of the wound alone that he formed his conclusion. His opinion was influenced by the secondary symptoms which almost immediately presented themselves. The pursuer is himself an expert in syphilitic disease, and on 29th August, when he made his claim against the company, he says, as above mentioned, that he had no idea that the sore on his hand was syphilitic. It seems difficult therefore to believe that at

that time it can have presented the undoubted appearance of a typical chancre. He says that it was when he was in Dublin that it first took the appearance of a Hunterian chancre, and that he began to be a little suspicious about 2nd September. The evidence of Dr Newman, who on 31st August crossed with him by the day steamer to Belfast, has been relied on in support of the case. Dr Newman says that the pursuer spoke to him then about his hand, and showed it to him, and that he (Dr Newman) then told him that he considered the sore to be a primary sore of true syphilis. It can hardly be supposed that Dr Newman is mistaken in giving this evidence. It is true that it does not consist with the statement of the pursuer, who says, in his examination-in-chief, that he did not show his hand to Dr Newman. I think that Dr Newman's recollection on this matter may be taken as correct.

"A distinction, as appears from the proof, is taken by some medical men between a hard chancre and what is called a typical hard chancre, and it is said, as for example by Professor M'Call Anderson, to be quite possible to mistake a cauterised wound for a hard chancre, although not for a typical hard chancre. In the present case the wound on the finger had been cauterised more than once before it was examined by Dr Dalziel or any of the medical witnesses. I doubt if it can be held as sufficiently proved that it presented the characteristics of a typical chancre. Dr Dalziel admits that there is an undoubted difficulty 'in distinguishing with certainty a cauterised wound from a hard chancre.' He adds—'My diagnosis was confirmed by the occurrence of secondary symptoms.'

"The opinion referred to by the pursuer as having been given by two medical gentlemen whom he consulted in Dublin cannot in my view be treated as evidence in the case. To make their evidence competent they ought to have been examined as witnesses.

"It is in the pursuer's favour that apparently there was no trace of a syphilitic sore on any other part of his body, but against this must be placed the evidence given by some of the medical experts that the disease may exist without the appearance of a sore. I may refer to the evidence of Dr Macphee and of Professor M'Call Anderson. The latter says that 'it is not very uncommon for patients to say that they never noticed the primary sore, and that their attention was first called to the secondary symptoms,' and again 'there is sometimes a little scar left and sometimes none at all.'

"The appearance of the wound on the finger, however, and the absence of any trace of a syphilitic sore elsewhere, tend to give substantial support to the pursuer's case. Still the important element of time has to be considered. If the wound was the channel of infection, the course of the disease was much within what, according to the evidence, must be regarded as the normal period. On 28th August, that is, only fourteen days after the date of the wound, secondary symptoms had begun to show themselves in the shape of a slight appearance of spots under the abdomen. Dr Dalziel says it is a common thing for the secondary symptoms to appear simultaneously with the development of the hard chancre. On the other hand, Dr H. Cameron, who is also a witness for the pursuer, says he does not think he has ever known a case of the hard chancre and the rash coming together. According to him there is usually an interval of from a fortnight to three months, and possibly more, between the two. Other witnesses substantially support this view.

"Considering the unusually rapid development of the disease on the assumption that it came from the wound, the directors of the company hesitated to admit the claim, and they asked for further information. The pursuer refused to give to them the name of the patient on whom he operated on 14th August, and he has all along refused to do so. He refused to give it when under examination as a witness in the case. Before the action was brought, it appears that the directors were prepared to deal with any information given to them as confidential, and that they would have been satisfied if the name of the patient had been communicated privately either to Professor M'Kendrick, one of the directors, or to Dr Macphee. I think that, whatever effect the refusal might have on his claim for compensation, the pursuer acted in accordance with strict rules of professional confidentiality in declining to give the name to the directors. His right to withhold it when called upon in Court may not have been the same, but here again the only question is how far the refusal should affect his claim in the action.

"As the case stands, there is no evidence, apart from the pursuer's statement, that at or after the operation on 14th August he had been in contact with any patient suffering from syphilis. The name of a certain married woman has been suggested by the defenders as that of the patient on whom the operation was performed, and if she was the person, any independent evidence which we have is unfavourable to the notion that the infection was derived from her. She seems to be a respectable married woman with three or four children, living in family with her husband. She has been attended by two medical gentlemen besides the pursuer and his father, and those two gentlemen give evidence to the effect that they never suspected her to be afflicted with syphilis in any of its forms. Dr Dunlop, who assisted the pursuer at the operation, could not, as a letter in process shows, state that the patient operated on was suffering from any disease of the kind, and the pursuer himself admitted in evidence that at the time of the operation he was not of opinion that she was. He had had at that time opportunity of judging regarding her health, having had her as a patient for some three or four years. He says, no doubt, that she has since exhibited symptoms which he

considers indicative of syphilis, and that he is treating her accordingly. He also says that his father, who had attended her for years before he did, and in consultation with whom he had first seen her about eight years ago, had given her anti-syphilitic treatment before the date of the operation, although he was unable to say when his father began to give her treatment of that kind. It is unfortunate that his father has not been called as a witness. It will be understood that the pursuer has declined to say if the person whose name has been suggested was the patient on whom he operated.

"Assuming that the pursuer is not to fail in his case simply because he refused in Court to disclose the name of the patient, it is much to be regretted that his father was not called to confirm the statement as to his previous treatment of her. That might have been done without disclosing the patient's name. Had it been done, and if the father's evidence had borne out what the pursuer says, the claim in the action would have been much strengthened. As it is, the case seems to me surrounded with doubt, and when the doubt arises from the failure of the pursuer to produce available evidence which might have cleared it up, I am afraid that it is he and not the defenders who should suffer.

"In coming to a conclusion on the case it is impossible to overlook the mis-statements made by the pursuer on various points. Some of these may be of minor importance, but that cannot be said of others. I may refer particularly to what he says with regard to the examination of the girl in the Magdalene Institution. It is averred in the condescendence that the date on which he examined her was 17th August, and to that date he adhered in giving his evidence. It is proved beyond doubt that the examination was not till the 23rd.

"Again, he says in evidence that he was touching the patient when he examined her, and that he used his left or wounded hand for the purpose. Five days before the examination, viz., on the 18th, Dr Dalziel, in driving home with him from an operation, noticed the wound on his finger, having then, as Dr Dalziel says, the appearance of an inflamed sore about the size of a small split pea. Dr Dalziel advised him to put on a surgical dressing. He did so, and burned the wound with carbolic, and about the same time, or at all events as early as the 20th, he says that he began wearing his arm in a sling, and that he kept it in the sling till he returned from Dublin. The girl was examined as a witness, and she says that he had one of his hands tied up and in a sling when he examined her, and that he did not touch her with either of his hands. It is, I am afraid, impossible to accept his statement that he touched her, and indeed so untenable is the suggestion that this examination could have been the cause of the infection that it was frankly given up by his agent at the appeal.

"It has been suggested, and may possibly be the true explanation of the mis-statement regarding the date, that the pursuer, in looking for a case that might serve to account for the infection, mistook in the book of the institution the entry of the girl's age (17) for the entry of the date, and so was led into the error. That of itself would argue a recklessness of statement which cannot be defended, and it fails to explain away the fabric of evidence as to personal contact with the girl without which the introduction of her name into the case was unmeaning.

"Looking to the unsatisfactory state of the evidence, I have, with much reluctance and regret, found myself unable to give judgment for the pursuer. I hope I may not be supposed to imply that the blood poisoning may not have come from the wound on the finger. There are elements in the proof which favour the view that it did, and that it may not improbably have done so. But that is not enough for the case. Sufficient doubt remains behind to prevent me from finding it established in fact that that was the source of infection."

On 27th August 1895 the Sheriff-Substitute (BALFOUR) issued an interlocutor by which he found in favour of the pursuer.

The defenders appealed to the Sheriff, who on 25th April 1896 issued the following interlocutor:—"Finds that the pursuer, a medical gentleman, was insured with the defenders for the period of twelve months from 27th April 1894, in terms of the policy, which provided for compensation being paid to him according to a specified scale in the event of his sustaining any bodily injury caused by violent, accidental, external, and visible means operating accidentally on his person, and capable of direct proof, and that the policy bore an endorsement that it covered compensation for blood poisoning, the result of an accidental injury within the meaning of the policy: Finds that the pursuer, in the course of performing an operation on 14th August 1894, cut his finger, and that about the end of the same month he showed symptoms of syphilitic blood poisoning, which he avers was communicated through the wound: Finds it not proved that the said poisoning was so communicated, or was the result of an accidental injury within the meaning of the policy: Therefore recals the interlocutor appealed against, assoilzies the defenders from the conclusions of the action: Finds them entitled to expenses, including those of the appeal."

The Sheriff added to this interlocutor the note quoted above.

The pursuer appealed to the Second Division of the Court of Session, and argued—It was proved that the pursuer accidentally cut himself while performing an operation, and that he got syphilis by inoculation in the cut. The fact that the primary sore developed in the cut proved this concluclusively. From the nature of his practice it was not possible for him to say definitely when the inoculation took place. It was not reasonable to expect that he should. But he stated that to the best of his belief it was from the patient on whom he was operating when he got the cut on his finger.

This was sufficient proof under the policy It was not reasonable or even admissible to demand in addition that the patient's name should be given up. This the pursuer was prevented from doing by the rules of his profession, and it must be taken that the defenders in granting this policy, granted it subject to the condition that such a disclosure would not be required. Even if that evidence was available there was sufficient evidence without it, and the defenders were not entitled to prevail simply because it had been withheld—See *Ballantine* v. *Employers Insurance Company of Great Britain, Limited*, December 15, 1893, 21 R. 305.

Argued for the defenders—The case was narrowed down to inoculation on the occasion when the pursuer cut himself. If that were proved, the defenders admitted liability. It was very improbable that inoculation could have taken place later. No subsequent occasion was even suggested which would not have been according to the medical evidence too late. But apart from that, if it did take place subsequent to the date of the cut, then there was no "external and visible means," and the pursuer could only have contracted the disease through inoculation, by "wilfully or wantonly exposing himself to unnecessary danger," which by one of the clauses of the policy was a bar to his success in this action. It was not proved that the pursuer got the disease by inoculation from the patient on whom he was operating when he cut himself. The evidence led by the pursuer was not sufficient under the policy to establish that. It might be that he had shown a *prima facie* case, but by refusing to give the name of his patient he had prevented the defenders from testing his story as they were entitled to do. Even though he was absolutely prevented from revealing the name, that was his misfortune, and if he was thus precluded from proving his case, he and not the defenders must suffer the consequences. Moreover, the evidence of the pursuer's father, which would have been of the greatest importance, had been withheld, and the other doctor who was present at the operation was not asked whether the patient was affected with the disease or not.

The Court made avizandum with the cause on 10th June. On 23rd June it appeared in the Single Bills by order, and the Court recommended the pursuer to obtain the patient's consent to be examined. On 14th July a minute was lodged for the pursuer to the effect that the pursuer was willing, after the recommendation of the Court, to divulge the patient's name to medical men to be named in order that she might be examined. On 15th July the case was continued in order that the defenders' consent might be obtained to a remit to medical men to examine the patient. On 17th July the defenders intimated that they declined to give their consent to this course, and the Court pronounced the following interlocutor:—"The Lords having heard parties on the minute for the pursuer, on the motion of the pursuer, allow him further proof, and appoint the same to proceed before Lord at such time and place as he may fix; and grant diligence against witnesses and havers."

On 3rd November the pursuer lodged a minute explaining that there had been some misunderstanding on his part as to the patient's willingness to submit herself to examination; that he had now ascertained that she declined to be examined; that he did not propose to lead further proof under the interlocutor of 17th July, and that he desired to have the case decided as it stood at the close of the debate.

At advising—

LORD JUSTICE-CLERK—This case is now before the Court for decision precisely as it stood when the debate closed. The pursuer in his latest minute has intimated that he so desires it to be disposed of. It is therefore in this position, that the pursuer has failed to give to the defenders the information who it was from whom he accidentally got blood-poisoning, so as to give rise to the present claim, and to afford them the opportunity of examining into the grounds of the claim.

I desire to say that, so far as I can judge, there is no reason to doubt the *bona fides* of the pursuer, and that in refusing to disclose his patient he is acting on his belief of the honourable duty of secrecy which the rules of his profession lay down for him to observe. But while that is so, it has in my opinion the unfortunate result for him that he does not fulfil the obligation incumbent upon him as a pursuer to make good his claim by evidence according to the contract between him and the defenders. The evidence required—the best evidence available—is not furnished, and therefore I come to the conclusion that the Sheriff was right in finding that the pursuer has not proved his case, and that the defenders must be assoilzied.

LORD YOUNG—I do not think it is disputed that if the facts are as averred by the pursuer, and as found by the Sheriff-Substitute, the pursuer is entitled to prevail. The only question is, whether the pursuer's averments are true in fact, that is, whether the judgment of the Sheriff-Substitute on the evidence or that of the Sheriff is the sounder judgment.

I agree with your Lordship's remark that there is no reason for doubting the honour and good faith of the pursuer, but if that is so, then I have much difficulty in doubting his truthfulness. I think that his statement is true and reasonably supported by reliable evidence. His medical brethren, who heard his account at the time as to how he became affected with the disease which they saw upon him, are clear that his account is not only probable and in accordance with the genesis of the disease and its appearance on his body, but that no other reasonably probable account occurred to them then, or does so now, and, indeed, no other has been suggested, or can be suggested, without imputing to the pursuer falsehood and immorality without evidence or reason for suspicion. In fact the

case presented for the defenders comes to this, that, however candid the pursuer's statements may be, and however much they may be believed and supported by evidence, and although there may be no other way of accounting for his condition than what he alleges, unless you impute immoral conduct and perjury to him, his claim must be rejected, unless he is prepared to do what would confessedly be dishonourable, that is, to disclose the name of the patient from whom he received the infection. I agree again with your Lordship that his only honourable course was to refuse to do so. It would have been dishonourable and possibly illegal to disclose her name He might have been subjected to a claim of damages for doing so. We have heard lately of a case in which very large damages were awarded for a violation of professional honour not more flagrant.

It seems to me that we are dealing very hardly with the pursuer in rejecting as insufficient the evidence he has laid before us unless accompanied by such dishonourable conduct as is demanded of him. On the other hand, I think there is no hardship on the insurance office in holding the case proved without it. Any insurance office when insuring a medical man against the risk of blood-poisoning, must have contemplated that he could not give them such information. No honourable medical man would insure on such terms, and no honourable insurance company would insure him only upon condition of his being bound to make to them a dishonourable disclosure.

It is conceded that this dishonourable disclosure is all that is wanting to entitle the pursuer to our judgment.

I concur with the Sheriff-Substitute, who saw and heard the witnesses, that the case is satisfactorily proved without the unprofessional disclosure demanded of the pursuer, and assuming that it is, I am of opinion that the rule of professional etiquette (or honour) so often referred to, excludes any such prejudicial presumption as may occur when the best available evidence is withheld by the party on whom the *onus* lies.

LORD TRAYNER—The pursuer in May 1894 entered into the contract of insurance with the defenders, the terms and conditions of which are contained in the policy before us. Under that policy the pursuer now claims to be indemnified for loss and injury sustained by him from accidental blood poisoning; and the question is whether the pursuer has established his claim, regard being had, of course, to the terms of the policy. I have found the determination of this question attended with considerable difficulty. The Sheriff and Sheriff-Substitute have differed in opinion, and there is a difference of opinion among ourselves. I cannot say that my own opinion is expressed without hesitation or doubt. It is needless to recapitulate all the facts; what is necessary for the purposes of my opinion can be stated briefly. The pursuer performed an operation on the uterus of a patient on 14th August 1894, in the course of which he cut one of his fingers with the surgical instrument he was using. Four days later, that is, on 18th August, there was an inflamed sore on the injured finger "about the size of a small split pea" which Dr Dalziel (who so describes it) found on the 26th August to be a primary syphilitic sore. That was followed by the appearance on the pursuer's body of marks indicative of the secondary symptons of syphilis, and there is no doubt that the pursuer was suffering from syphilis. He attributes this to accidental inoculation arising from his injured finger having come in contact with the syphilitic poison in the course of the operation I have referred to, or otherwise by his having come in contact with the poison while professionally examining a girl on the 17th of August. I put the latter case out of view. I think it is proved that the examination of this girl did not take place until the 23rd August, and that the sore was then well developed on the pursuer's finger. The sore, besides, which was seen by Dr Dalziel on the 18th August, could not have been the result of contact with the poison on the 17th, even if the pursuer was right in saying (I think he is mistaken) that he examined Cotton on that day. The question is therefore narrowed down to this—Has the pursuer established that he was inoculated with the poison in the course of the operation performed on the 14th August? Now, I feel the full force of the argument addressed to us on behalf of the pursuer. He was not affected, so far as is known, with syphilis on 14th August before the operation that day performed—his finger was cut and scratched during the operation, and thus rendered him subject to inoculation if his patient was syphilitic—the sore appeared at the place of the injury on the finger, and it follows reasonably as an inference that that sore and the disease which it indicated was the result of inoculation received during that operation. The inference, I admit, is not unreasonable. But the defenders say that inference is not proof; that by the terms of the policy the pursuer can only recover for the consequences of an accident "capable of direct proof"; that if direct proof is not obtainable in cases of blood poisoning, at least the best proof obtainable must be given; that such proof, namely, the evidence derivable from the patient herself, has been deliberately withheld by the pursuer although frequently demanded, and the name even of the patient withheld; that there is no proof that that patient was affected with syphilis, and no presumption that she was; that if she was not so affected, she could not have communicated the disease to the pursuer; and that therefore the pursuer has failed to afford the proof necessary to warrant his claim, namely, that the patient operated upon was in fact affected with syphilis, and consequently in a condition to communicate it.

After repeated consideration of the proof and whole case, I have come to the conclusion, not without hesitation as I have said, and I rather think with some reluctance, that the defenders' argument is the stronger

of the two. I think the pursuer cannot prove that he was inoculated with syphilis on 14th August as averred unless he can show that the patient he then operated on was syphilitic. That patient, we have been informed, is a respectable married woman with a family. I cannot pronounce a judgment in the pursuer's favour without affirming that that respectable woman was affected with syphilis. I do not see my way to do that. The refusal on the part of the pursuer to give the name of his patient is justified on the ground of professional etiquette. I do not say one word against that professional rule which the pursuer thinks himself bound to observe. But the defenders are not bound by it; and if professional rule prohibits the pursuer from doing what is necessary to ensure success in his action, the remark of the Sheriff appears a just one, that "it is he and not the defenders who should suffer." Without the disclosure of the patient's name the defenders are unable to test the bearing of the pursuer's averments. When they ask that they should be put in a position enabling them to do so, I think they only ask what they are entitled to get.

I have taken no notice of the minute lodged for the defenders since the case was last before us. We have been asked by the pursuer to decide the case as it stood when the argument for the parties was concluded, and it is on that view of it that I have proceeded. I think the appeal should be dismissed and the judgment of the Sheriff affirmed.

LORD MONCREIFF—With great reluctance I have, after repeated consideration, come to the conclusion that the pursuer has not proved his case. No one can read the evidence without at first being impressed with the probability that infection was communicated to the pursuer at the time and in the manner suggested by him. It is proved that upon 14th August 1894 he cut the middle finger of his left hand while performing an operation on a female patient; that shortly afterwards (about 26th August) a sore appeared upon the wound (whether syphilitic or not is a matter of dispute); that about 31st August or 1st September secondary symptoms appeared; and that on the pursuer subsequently tendering himself to the defenders' medical man for personal examination no trace of any other primary sore could be found on his body.

But when the evidence is examined, difficulties appear. There may be a question whether, in order to recover under this policy, the blood-poisoning must be shown to be coincident or simultaneous with the physical injury—*e.g.*, that it was caused by the dirty condition of the knife or other instrument, or by the condition of the blood of the patient operated on. But it is clear that it is material to know, if possible, the time and way at and in which inoculation took place in order to ascertain its precise connection, near or remote, with the physical injury through which the virus was absorbed. Now, the defenders suggest the possibility of two other ways in which inoculation might have taken place. In the first place there is medical evidence to the effect that secondary symptoms appeared at an abnormally short interval after 14th August, and that therefore the presumption is that inoculation took place before that date. They suggest that the appearance of the sore upon the finger may have been due to caustic. They further maintain that assuming that inoculation took place through the cut, this may have occurred, not at the time of the operation, but through carelessness on the part of the pursuer on some subsequent occasion, or in some way as to which there is no evidence.

In these circumstances, the case for the pursuer being at best extremely narrow, it was incumbent upon the pursuer to give the defenders and the Court every available assistance to aid them in determining as to the truth of his statements and the correctness of his conjecture. But this he has failed to do. He refused to give the name of the patient on whom he operated on 14th August. It cannot be said that it was not legitimate for the defenders to test the accuracy of the pursuer's statements by inquiring into the circumstances attending the operation of 14th August. On the ground of professional etiquette the pursuer declined to disclose the name. The defenders' agent then, without prejudice to the defenders' right to demand the name, asked the pursuer to obtain from Drs James Dunlop and Robertson, who were present at the operation, their opinion whether the patient operated upon was suffering from such a disease as to inoculate the pursuer with syphilis. The answer was that Dr Dunlop could not state that the patient operated upon in his presence on 14th August was suffering from any constitutional disease which might have been conveyed to the pursuer by inoculation, "although from the history of the case he thinks this by no means improbable." Dr Dunlop is examined as a witness for the pursuer, but he is not asked a question as to the condition of the patient.

Evidence is led for the defenders as to a female patient upon whom the pursuer operated in August 1894. Two medical men, the witnesses William Stewart and Robert Pollock, state that so far as they knew, the lady, a respectable married woman with a family of 3 or 4 children, was not suffering from syphilis at that time or since. Those witnesses are both cross-examined for the pursuer as to the patient's symptoms, with a view apparently of showing that there were symptoms of syphilis. But when the pursuer is asked whether that lady was the patient upon whom he operated on 14th August he declines even to answer that question.

The evidence which he gives as to the patient on whom he operated is, in the circumstances, very unsatisfactory. He says that previously to the operation his father had for some time treated the patient for syphilitic symptoms. As the Sheriff points out, it would have been of the last importance to the pursuer to examine his father on this matter, but he

did not do so; and then there being thus, through his own reticence and failure to adduce available evidence, no means of testing his own evidence, the pursuer proceeds to say that after the operation he formed the opinion that the patient was suffering from syphilis, and gives various distinct reasons for his opinion.

Now, in those circumstances, I think the pursuer has not furnished evidence which should have been forthcoming in order to verify his story. It is his misfortune that he is precluded by professional etiquette from disclosing the name of the patient, but it does not follow that the defenders must suffer on account of that. But apart from that, he might and should have adduced his father as a witness. He has not done so, and he has given no explanation of his failure to do so. Therefore, however probable I may think the pursuer's story, I feel constrained to agree in the very carefully considered opinion of the Sheriff, and hold the case not proved.

The Court pronounced the following interlocutor:—

> "Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against: Therefore of new assoilzie the defenders from the conclusions of the action and decerned."

Counsel for the Pursuer and Appellant—Lees—King. Agents—Mitchell & Baxter, W.S.

Counsel for the Defenders and Respondents—Salvesen—J. J. Cook. Agents—Simpson & Marwick, W.S.

Friday, December 11.

SECOND DIVISION.

[Sheriff of Argyllshire.

WILSON *v.* M'KELLAR.

Poinding—Breach of Poinding—Personal Diligence Act 1838 (1 *and* 2 *Vict. cap.* 114), *sec.* 30—*Concurrence of Procurator-Fiscal.*

Held that a petition to the Sheriff under sec. 30 of the Personal Diligence Act 1838 is a civil process, and does not require the concurrence of the procurator-fiscal.

Opinions that the term "summary complaint" in that section is not used in the sense in which it is employed in the Summary Jurisdiction Acts, but means a summary application *ad factum præstandum* as distinguished from an ordinary action.

By section 30 of the Personal Diligence Act 1838 (1 and 2 Vict. cap. 114) it is enacted "that if any person shall unlawfully intromit with or carry off the poinded effects, he shall be liable on summary complaint to the Sheriff of the county where the effects were poinded, or where he is domiciled, to be imprisoned until he restore the effects or pay double the appraised value."

David Wilson, grain merchant, Greenock, raised an action in the Sheriff Court of Argyllshire at Dunoon against Donald M'Kellar, baker, Kirn, and Sarah M'Kellar, his wife, in which he prayed the Court to ordain the defenders jointly and severally or severally to restore to the premises at Woodburn Place, Kirn, specified articles of the appraised value of £17 belonging to the defender Donald M'Kellar, and in the event of the defenders failing to restore the articles to the premises within such period as the Court should appoint, to grant warrant to officers of Court to apprehend the defenders and commit them to prison, therein to be detained until they restore the effects, or paid the sum of £34 to the pursuer.

The pursuer averred—On 12th November 1895 he obtained a decree against the male defender for £91, 10s. On 13th March 1896 the defender was charged on the decree to make payment of £91, 10s. less £19, 8s. 11d. paid to account. Following on this charge the articles mentioned in the summons were poinded at their appraised value in the defenders' house at Woodburn Place, Kirn. On 8th June 1896 the pursuer obtained a warrant of sale of the poinded effects, which was served personally on the defender on 13th June. On 20th June the auctioneer proceeded to Woodburn Place to sell the poinded effects, but on arriving there found that the articles had been removed, having been sold by the female defender, with consent of the male defender, to Alexander Morris, baker, Port-Glasgow.

The defender pleaded, *inter alia*—"(2) The action is incompetent, in respect that the concurrence of the Procurator-Fiscal has not been obtained."

On 7th August the Sheriff-Substitute (MARTIN) repelled the 2nd plea-in-law for the defenders, and allowed a proof.

The defender appealed to the Sheriff (WALLACE), who on 29th Septemer 1896 recalled the interlocutor of the Sheriff-Substitute, sustained the 2nd plea-in-law for the defenders, and dismissed the action as incompetent.

Note.—"As regards the second plea that the action is incompetent without the concurrence of the Procurator-Fiscal, I have delayed giving judgment until I had an opportunity of ascertaining the practice in other Sheriff Courts. The result of my inquiry is that I find it to be the practice in the Sheriff Courts of Edinburgh, Glasgow, and Aberdeen, to obtain the concurrence of the procurator-fiscal in petitions for breach of poinding, and I am not prepared to depart from this general practice. . . . Having regard to what appears to be the general practice and the penal nature of the conclusions of the petition, I am unable to see my way to sustain the competency of the proceedings without the concurrence of the public prosecutor."

The pursuer appealed, and argued—The concurrence of the Procurator-Fiscal was unnecessary. He had no concern in the matter, he being an officer of the Crown, with a duty to guard the fisc, and there