servants to relieve him had not arrived, and therefore he could not leave his train, but for the convenience of the traffic the train was not allowed to remain at Forfar station, but was shunted on to a branch line. While it stood there the relief arrived. So that when the deceased man left his engine his train was on the branch line. It is according to the Sheriff's statement of the case that it then became his duty to proceed at once to Forfar goods shed in order to report himself and sign himself off work and obtain a pass which would enable him to go to his home at Perth. The direct way of proceeding from the place where he left his engine to the goods shed at Forfar, and for some part of the way the only way of proceeding there, was along the line, and accordingly he was going along the line when he was overtaken by a train and killed. I cannot have the slightest doubt that in these circumstances he was still in the employment of the Railway Company. He had not fully discharged his duty to them, because although it appears that the duty was not invariably enforced, still it was according to his duty to go to Forfar and report himself, and while the time was passing during which he had to perform that duty he was being paid his wages. The only argument to the contrary was that the moment a workman leaves the specific work on which he is engaged he ceases to be in the employment of his employer in the sense of the statute, although he is still of necessity upon the dangerous premises and exposed to all the special risks which are incidental to his employment, as distinguished from the risks to which the general public are exposed; and indeed the argument was carried so far as this, that it was said that if workmen are employed in different parts of a factory where they are exposed to danger they cease to be in the employment the moment the bell rings which intimates to them that they are dismissed for the day, although they are still exposed to all the dangers of their employment in coming from and going to the place where their specific work requires them to be. I agree with Lord Adam, for the reason he gave, that it is not necessary to decide absolutely that point, because in this case the facts bring the man within the course of his employment even if that theory were sound; but I must say for myself I should be very reluctant indeed to adopt such a construction of the statute. On the second point I quite agree with your Lordships. The man was exposed to risks in walking along the line, and he knew quite well what the risk was to which he was exposed, because he knew that the Perth train was due and that it had been signalled, but it does not follow that he was guilty of serious and wilful misconduct in being on the line at that juncture. If a man has no occasion at all to be upon a line of rails he is of course in a very different position from that of a railway servant whose duty brings him there, and who must get along it somehow in order to get away from the place where he is employed. That he should be walking on the four-foot way at the time the train overtakes him may be owing, in the case of such a man—I mean an experienced railway servant—to negligence, or to rashness, or error of judgment, or to some inevitable accident, or it may be to serious and wilful misconduct, but we cannot ascribe it to any one of these causes without some evidence to show that it is to be attributed to one or the other, and there is no evidence to show that here it was owing to serious and wilful misconduct. If the Sheriff had found that the deceased was transgressing any rule or bye-law of the company in being there I think a totally different question would have arisen, but he finds expressly that there was no such rule or bye-law. He was not doing anything that he was prohibited from doing; on the contrary, he was doing what in the ordinary course of his work he had frequently had occasion to do. Whether conduct is wilful, and whether it is erroneous or excusable or misconduct, seem to me to be questions of fact. We have no evidence whatever before us which would justify our saying that it was serious and wilful misconduct in the present case. Therefore I agree that both questions should be answered as your Lordship has proposed.

The Court answered the first question in the affirmative and the second in the negative.

Counsel for the Appellants—Balfour, Q.C. —King. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondents—Hunter. Agents—M'Neill & Sime, S.S.C.

Friday, June 16.

SECOND DIVISION.

[Sheriff of Inverness, &c.

STEWART *v.* STEWART.

Pactum Illicitum—Contract in Restraint of Trade—Obligation not to Trade as Consideration for a Loan.

An obligation in restraint of trade is legal and effectual provided (1) that it is partial, (2) that a real and not merely colourable consideration is given for it whether such consideration is adequate or not, and (3) that it is reasonably necessary for the protection of the person in whose favour it is granted.

A photographer for many years assisted in the carrying on of a photographic business in Elgin, at one time as assistant to his father, who had originally owned the business, and subsequently as assistant to and manager for his elder brother, who had acquired the business from his father. After he had ceased for some years to be in his elder brother's employment, or to have any business relations with him, the younger brother bound himself not to start or carry on the business of a photographer, or to enter into or continue in the employment of a photographer, either in Elgin or

within twenty miles of that town. The consideration for this obligation was a loan of five pounds to enable the younger brother to pay an alimentary debt, for the non-payment of which he had been imprisoned, and which he was then unable to pay, and so to obtain his release from jail.

It was argued that such an obligation was only valid if incidental to the sale of a business or other similar contract, and that it could not validly be adjected to a contract of loan.

Held (*diss.* Lord Young) that the obligation was valid and effectual.

Question—Whether in Scotland it is necessary to the validity of such a contract that any consideration should be given for the obligation in restraint.

This was an action brought in the Sheriff Court at Elgin by Robert Stewart junior, photographer there, against his brother Ernest Stewart, also a photographer in Elgin. The pursuer prayed the Court to interdict the defender from starting and carrying on the business or trade of a photographer on his own account or in partnership in Elgin. In support of this craving the pursuer produced an agreement between him of the first part and the defender of the second part dated 9th July 1897. This agreement was as follows:—"(*First*) The first party shall *unico contextu* with these presents advance to the second party the sum of five pounds sterling. (*Second*) The second party shall, if and when required, repay to the first party not only the said sum of five pounds, but also the sum of twenty-two pounds, or such larger sum as may be found to have been advanced by the first party to the second party, or as may have been obtained by the second party from the first party, and not accounted for to the first party. (*Third*) The second party binds himself that he will not hereafter start or carry on the business or trade of a photographer, and that he will not enter into or continue in the employment of a photographer, either in Elgin or within twenty miles of that town. Nor shall the second party be entitled to enter into partnership with a photographer in Elgin or within twenty miles thereof. Should the second party at any time infringe said obligations, the first party and his successors in his business of a photographer shall be entitled forthwith to interdict the second party."

The defender admitted that he had started business as a photographer, and intended to carry on business as such in Elgin.

In defence to the action the defender pleaded—"(4) The said pretended agreement dated 9th July 1897, having been impetrated from the defender by misrepresentation, and in circumstances amounting to fraud, force, and fear, as condescended on, it is void, and cannot be competently founded on by the pursuer. (5) The agreement in question being an agreement in restraint of trade, signed without adequate consideration, it is of no binding effect upon the defender."

A proof was allowed and led, from which it appeared that the pursuer, who at the date of the proof was 48 years of age, carried on business at High Street, Elgin, and that the defender, who at the same date was 36 years of age, also carried on the business of a photographer at Institution Road there. In 1886 the pursuer purchased the photographic business carried on at High Street, Elgin, from his father, Robert Stewart, senior. The defender alleged and attempted to prove that the pursuer so purchased the business for the benefit of his brothers the defender and another brother named Charles Stewart, as well as for the benefit of himself, but it was ultimately conceded that this allegation was not proved. From 1862 onwards the pursuer had assisted his father in the business carried on at High Street, Elgin. The defender and his brother Charles had also assisted their father in that business. All three brothers were brought up and trained as photographers. In 1883 the pursuer left Elgin and went to Yorkshire. He returned to Elgin for a time in 1885, but left after some months to go to a situation as a photographer in Dumfriesshire, where he remained till 1886. When the pursuer acquired the Elgin business from his father he did not return to Elgin, but employed his brothers the defender and Charles Stewart to manage the business for him. They were paid a wage for doing so. After 1886 the pursuer was working in Stranraer, and afterwards in London, but in 1887 he purchased a business in Torquay. In 1890 the defender went to Torquay for a time, and the pursuer went to Elgin. In the same year the Torquay business was sold, and the defender returned to Elgin, where he was employed by the pursuer as an assistant at a wage in the High Street business. From the time when the pursuer acquired that business till he returned to manage it himself in 1890, and while it was being managed by his brothers, a sum of £1000 was remitted by them to him as the proceeds of the business. The defender alleged that he and his brother Charles conducted the Elgin business "with great attention, care, and success." In 1892 the defender left the pursuer's employment and set up a photographic business in Forres, which he carried on till 1897, when he gave it up.

On 8th July 1897 the defender was imprisoned in the Elgin prison for an alimentary debt which he was unable to pay. On 9th July the pursuer's law-agent came to him in the prison with the agreement above quoted, and he signed it there on the same day.

The pursuer deponed that he agreed to help his brother to get out of prison at the request of their mother, but only upon condition of his agreeing not to carry on an opposition business in Elgin. The Court ultimately found that the defender had failed to prove that this agreement was signed by him in error as to its nature, or was impetrated from him by misrepresentation and in circumstances amounting to fraud, force, and fear.

The keeper of the prison deponed that the defender was very excited and anxious

to get out of prison, and was very distressed about his condition.

After the agreement was signed and completed the pursuer advanced the sum of £5 to the defender, and so enabled him to pay his alimentary debt and get out of prison.

More than a year after this the defender started business as a photographer in Elgin. Thereupon the pursuer raised the present action.

On 26th November 1898 the Sheriff-Substitute (RAMPINI) issued the following interlocutor:—"Finds that the pursuer is a photographer, and that he carries on business as such at High Street, Elgin; (2) that the defender, who is a brother of the pursuer, also at present carries on the business of a photographer at Institution Road, Elgin; (3) that the pursuer purchased from his father Robert Stewart senior, photographer, Elgin, in or about the year 1883, the photographic business carried on by him at High Street aforesaid; (4) that the defender has failed to prove that the pursuer so purchased this business for the benefit of his brothers the defender and the witness Charles Stewart as well as for the benefit of himself; (5) finds that in or about the 8th day of July 1897 the defender was imprisoned in the Elgin prison for an alimentary debt which he was then unable to pay; (6) finds that on the 9th day of July aforesaid, the defender, in the said Elgin prison signed the minute of agreement; (7) finds in fact that he was fully aware of what he was signing at the time of the execution of said deed, and in law that no circumstances amounting to misrepresentation, force, fraud, or fear are proved: Therefore interdicts, prohibits, and declares against the defender in terms of the prayer of the petition: Finds the pursuer entitled to his expenses according to the higher scale," &c.

Note.— . . . . "The Sheriff-Substitute accepts the statement of the law on restraint of trade as laid down by Lord Kyllachy in the case of *Meikle* v. *Meikle*, 33 S.L.R. 362.

"The defender's fourth plea-in-law is that on which he principally relies. But the Sheriff-Substitute fails to see on what evidence that can be maintained. He is perfectly satisfied that the statement given by the witness William Rose Black is the correct version of what took place in the prison, and that the defender's evidence as to what occurred is either a wilful misrepresentation of the circumstances or the result of a singularly and suspiciously defective memory. No facts amounting to misrepresentation, force, fraud, or fear on the part of the pursuer or his agent are to be found in the proof.

"The fifth plea raises the important legal question of adequate consideration. In the Sheriff-Substitute's view the law of Scotland is not the same as that of England on this point. Adequate consideration it appears to him is a matter more for the consideration of parties than for the Court. Even were it otherwise the Sheriff-Substitute would hesitate to say that the consideration which the defender received from the pursuer—that is to say, a small sum of money down, and release from imprisonment—was not sufficient in the circumstances of the case.

"The Sheriff-Substitute would only add that there appears to him to be no ground for the statement that the purchase of the business by the pursuer from his father was ever intended to be for behoof of any other person than himself."

The defender appealed to the Sheriff (IVORY), who on 11th February 1899 issued the following interlocutor:—"The Sheriff having considered the defender's appeal, with relative reclaiming petition and answers and whole process, alters the year 1883 to 1886 in the third finding of the interlocutor appealed against, recals the seventh finding in the interlocutor appealed against, and all subsequent portions of the said interlocutor, and in lieu thereof Finds in fact (7) that by the said agreement the pursuer bound himself whenever the same was completed to advance to the pursuer the sum of £5 sterling, and that on the 9th July 1897 (being the day when the said deed was signed and completed) the pursuer advanced the said sum to the defender, and thereby enabled him to pay his alimentary debt and get out of prison; (8) that by the said agreement the defender, *inter alia*, bound himself that he would not thereafter start or carry on the business of a photographer in Elgin, or within twenty miles thereof; and it was thereby stipulated and agreed that if the defender should at any time infringe the said stipulation, the pursuer should be entitled forthwith to interdict him; (9) that notwithstanding the said stipulation, the defender, after the lapse of more than a year from the date of the said agreement, started the business of a photographer in Elgin, and has since continued to carry on the same; (10) that the defender has failed to prove that the said agreement was signed by him in error, or was impetrated from him by misrepresentation and in circumstances amounting to fraud, force, and fear: (11) Finds in law that the restraint in question being limited to a particular district, and being reasonably necessary for the protection of the pursuer with whom the contract was made, and the pursuer having given a legal consideration therefor of some value, was valid and binding on the defender: Therefore to the above extent and effect repels the defences; grants interdict against the defender in terms of the prayer of the petition: Finds the pursuer entitled to his expenses according to the higher scale, and remits," &c.

Note.—"The defender seeks to have the agreement in question set aside because it was signed by him in error, because it was impetrated from him by misrepresentation and in circumstances amounting to fraud, force, and fear, and because it was a deed in restraint of trade and was signed without adequate consideration. The *onus* of establishing these propositions rests with the defender.

"The Sheriff, after carefully considering the evidence, which—more particularly in regard to what passed on the occasion when the agreement was signed—is very conflict-

ing, has arrived at the conclusion that the defender has failed to prove that the said deed was signed by him in error, or that it was impetrated from him by misrepresentation and in circumstances amounting to fraud, force, and fear.

"The defender has also in the Sheriff's opinion failed to establish that the said agreement is invalid on the ground that it was in restraint of trade and was signed by the defender without adequate consideration. In the first place, the restraint in question was limited to a particular district. In the second place, it was reasonably necessary for the protection of the pursuer with whom the contract was made, the pursuer having in 1886 purchased the photographic business carried on by his father in Elgin, and the defender having for a considerable time acted as the pursuer's manager or clerk in that business for a stated salary, and so acquired a knowledge of it which might be prejudicial to the pursuer if the defender carried on business in Elgin on his own account. See *Meikle* v. *Meikle*, December 13, 1895, 33 S.L.R. p. 161; *Nordenfeldt*, 1894, App. Cas. 535, and cases there cited. In the third place, the pursuer gave a legal consideration for it of some value. The defender contends that the consideration given was quite inadequate to recompense him for the serious restriction imposed on him. But he should have thought of this before he signed the agreement and accepted payment of the consideration money, and by means of it obtained his release from prison. It is now too late for him to plead that the consideration was inadequate. In the case of *Gravely*, 18 Eq. Cas. 521, Sir G. Jessel, M.R., thus lays down the law—'The case of *Hitchcock* v. *Cohn* has settled what consideration is sufficient in these cases. It is enough, in the words of Lord Chief-Justice Tindal, if there is a legal consideration and of some value. Therefore if in the present case the plaintiff can show that he gave any valuable consideration, however small, that is enough to warrant the granting of an injunction, the Court not taking upon itself to decide upon the adequacy of the consideration.' In Pollock on Contracts, p. 282, the cases of *Hitchcock* and *Gravely* are referred to, and the law is thus stated —'It is enough if a legal consideration of any value, however small, be shown.' And a similar rule is laid down in Smith's Leading Cases, last edition (notes in *Mitchell* v. *Reynolds*) i. 404. It is said that the Scotch law is different from the law of England with regard to this question. But the Sheriff entertains no doubt that the law as to restraint of trade is the same in both countries, and that in deciding this case he is bound to give effect to the English authorities above referred to. See *per* Lord Kyllachy in *Meikle*, *supra;* Bell's Prin., sec. 40, and the English cases there cited; Green's Encyclopædia, 'Restraints of Trade,' vol. x., and English cases there cited.

"On the whole, therefore, the Sheriff has arrived at the conclusion that the pursuer has established his case, and that he is entitled to interdict as craved."

The defender appealed.

Counsel for the defender conceded that the findings in fact (1) to (6) inclusive in the Sheriff-Substitute's interlocutor as adopted by the Sheriff, and the findings in fact (7) to (10) inclusive in the interlocutor of the Sheriff were correct.

They maintained that the contract was not binding upon the defender in respect of the circumstances under which his signature to it was obtained, and referred to *Mackintosh* v. *Chalmers*, October 17, 1883, 11 R. 8; but the facts upon which this contention was founded were ultimately found by the Court to be not proved.

Argued for the defender—The general rule was that obligations in restraint of trade were bad, but this rule was subject to certain exceptions. No obligation in restraint of trade was enforceable unless it was (1), partial, (2) granted for a consideration not illusory, and (3) was reasonable having regard to the subject-matter of the contract of which it formed part or to which it was incidental, that is to say, no absolute and universal restraints were enforceable, but partial restraints might be enforceable if they satisfied the conditions (2) and (3) above mentioned—*Leather Cloth Company* v. *Lorsont* (1869), L.R., 9 Eq. 345, *per* James, V.C., at page 354; *Mills v. Dunham* [1891], 1 Ch. 576, *per* Lindley, L.J., at page 586; *Collins* v. *Locke* (1879), 4 App. Cas. 674; *Rousillon* v. *Rousillon* (1880), 14. Ch. D. 351; *Davies v. Davies* (1887), 36 Ch. D. 359; *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company* [1894], A.C. 535; Smith's Leading Cases (10th ed.), vol. i. under the case of *Mitchell* v. *Reynolds* p. 391 at page 410. The rule formerly enforced that the consideration must be adquate was no longer in observance, and the application of the rule that the restraint must be partial, had been to some extent restricted by change of circumstances, but the rule that the restraint must be reasonable looking to the nature of the contract had not been affected, but had rather been made more essential by the later decisions *cit. supra.* An obligation in restraint of trade, therefore, could only be validly imposed as a term of or as incidental to some contract to the carrying out of which such a stipulation was reasonably necessary. Such a stipulation could only be reasonably necessary where it was incidental to either (1) a contract for the sale of a business (2) a contract for the sale of a patent, (3) a contract of copartnery, or for the dissolution of a copartnership, or (4) a contract of employment. There was no case in England or Scotland where a restraint had been held good which did not form part of or was not accessory to a contract falling under one or other of these categories—*Avery* v. *Longford* (1854), 1 Kay 663, at pages 667-8, and continued in Pollock on Contract (6th ed.) 345-7. The case of *M'Intyre* v. *MacRaild*, March 13, 1866, 4 Macph. 571, was really a case of an obligation in restraint which was incidental to a contract of employment, and reasonable looking to the nature of that contract. Unless the obligation in restraint was incidental to

some contract, there was no criterion by which its reasonableness could be judged. It was illegal to sell such an obligation by itself. The only reason why a man was ever allowed so to bind himself was that it might be necessary for him to do so in order to enable him to dispose of his business or of his skill and experience to the best advantage — see *Leather Cloth Company, loc. cit.* The necessity for such a restraint being incidental to a contract appeared from the ease of *Nordenfelt cit. per* Lord Herschell, L.C., at page 540. Had it not been the fact that the appellant there had been really a party to the second sale, the obligation which he gave when that sale took place would not have been binding upon him, in respect that it was not incidental to that contract. If this contention were not well founded then all restraints not universal would be effectual, a length to which the authorities did not go, and further the requirement that restraints should be reasonable would have no effect, because in that view the meaning which "reasonable" would have was that the party in whose favour the obligation in restraint was granted must have a reasonable interest to enforce it, which would practically always be the case. If it were essential that the obligation in restraint should be incidental to some contract, and should be reasonably necessary to the carrying out of that contract, then the pursuer here must fail, because an obligation in restraint of trade could never be necessary as an incidental stipulation to a contract of loan, which was the nature of the contract here. It would be *pessimi exempli* to allow such stipulation to be used for the first time as a means of adding to the stringency of a contraet of loan. At the time when this contract was entered into there were no business relations between the parties.

Argued for the pursuer—In Scotland the law with regard to obligations in restraint of trade was treated as a branch of the law in favour of personal liberty—More's Notes to Stair, note i., 4, page lxiv.; Bell's Comm. (7th ed.) i. 322; *Stalker* v. *Carmichael*, January 15, 1735, M. 9455, which was the earliest case on the subject. Such obligations were not so much illegal as not enforceable, in so far as they were contrary to public policy, in respect of either (1) unduly restricting personal liberty, or (2) restraining the freedom of trade and depriving the public of the covenanter's services. In so far as not contrary to public policy on one or other of these grounds, the Court would, and indeed was bound to, enforce such contracts. An obligation not to carry on a particular trade within a certain limited area of space was not contrary to public policy on either of the grounds specified. Such an obligation was not undue restraint upon personal liberty, nor could it effect the interest of the public either (1) directly, or even (2) indirectly, by preventing a citizen from earning his living by the labour to which he had been trained. It had consequently been always held in Scotland that such partial restraints were legal, and that the law against bargains in restraint of trade did not apply to them.—More's Notes, *loc. cit.*; Bell's Comm., *loc. cit.*; *Stalker* v. *Carmichael*, *cit.*; *Curtis* v. *Sandison*, November 29, 1831, 10 S. 72; *Watson* v. *Neuffert*, July 14, 1863, 1 Macph. 1110; *Macintyre* v. *MacRaild*, *cit.* Even a restraint general as regards space might be effectual. —*Meikle* v. *Meikle*, December 13, 1895, 33 S.L.R. 362, and in the case of such restraints the question whether they were "reasonable" became of importance. Restraints, however, which were limited to a particular trade in a particular place were assumed to be reasonable in respect of their limited character. On the other hand, a restraint not limited as regards space might elide the rule against general restraints if it were shown that a restraint unlimited as regards space was "reasonable" in the circumstances. No doubt a restraint which might at one time have been considered general and so obnoxious to public policy might now be regarded as partial and so unobjectionable if it were "reasonable," but that did not affect the validity of restraints against carrying on a particular trade in a particular area, which had always been regarded as undoubtedly partial, and therefore unobjectionable. The agreement here only prevented the defender from working as a photographer within twenty miles of Elgin. The restraint was therefore partial, and must be enforced. If it were necessary in such contracts that there should be some consideration, there was sufficient consideration here. The consideration did not require to be adequate; it was sufficient if there was a "legal consideration, and of some value"—*Gravely* v. *Barnard* (1874), L.R., 18 Eq. 518, *per* Jessel, M.R., at p. 521. But in Scotland it was not necessary that there should be any consideration at all, and therefore, even if there was no consideration here the contract was binding. (2) The law of England with regard to restraint of trade arrived at much the same result as the law of Scotland, but in a somewhat different way. The rule in England appeared to be that covenants in restraint of trade are bad, except in so far as their enforcement was required by the rule that contracts must be enforced and fair dealing maintained. See *per* Lord Watson in *Nordenfeldt*, *cit.*, at p. 552. If a restraint was partial it was enforceable, but if in some respect it was general, then it could only be enforced if reasonably necessary in the legitimate interest of the covenantee. See *Mills* v. *Dunham*, *cit.*, *per* Lindley, L.J., at p. 586. (3) It was said that under the rule enunciated in *Leather Cloth Company* v. *Lorsont*, *cit.*, the restraint must be reasonably necessary to the carrying out of some contract to which it is incidental, and that as such an obligation could not be reasonably necessary to the carrying out of a contract of loan, the restraint in this case was not enforceable. It was to be observed that that was a case of a general restraint. Apart from that, however, that was not an authority binding upon this Court, and

there was no reason in principle why a restraint which could have been effectual as a term of one of the contracts mentioned in the pursuer's argument should not be effectual if forming a term of any legal contract, or if forming the subject of a contract by itself. But further, what was in fact laid down in *Lorsont's* case was that the restraint must not be "unreasonable for the protection of the parties in dealing legally with some subject-matter of contract." Here the facts were that the parties were potential rivals in business. The defender, according to his own account, was from his local experience and previous connection with the pursuer's business the most dangerous rival whom the pursuer could have. What the parties were dealing with here was the defender's potential capacity of starting a rival photographic business in Elgin, and the contract was not primarily a contract of loan, but a contract whereby the defender, in consideration of being enabled to get out of prison, disposed of that potential capacity, the extent of the restraint not being greater than was reasonably necessary for the protection of the pursuer against the defender's potential rivalry. Such a contract was perfectly legal. There was no reason in principle why it should not be. It could make no difference whether the contract in restraint of trading was entered before the beginning, during the continuance of, or after the expiry of an agreement for employment. The interest of the public was the same, and the interest of the covenantee was the same. The case of *Macintyre* v. *MacRaild*, *cit.*, was really an instance of an independent and unilateral obligation in restraint of trade. If it were essential that such a contract as the present must be "reasonable," then it was submitted that reasonableness must be judged by reference to the business carried on or professed to be carried on by the covenantee and his interest. It might be that a contract like the present would not have been enforceable if entered into between the defender and some person not a photographer in Elgin or its neighbourhood; for example, with a money-lender, but here the restraint was "reasonable," looking to the legitimate interests of the pursuer.

At advising—

Lord Justice-Clerk—The circumstances giving rise to this case are that the pursuer and the defender, who are brothers, were both trained photographers, and that the pursuer carried on a business as photographer in Elgin, having purchased his father's business there, and the defender had been in that employment in that business. The defender had through some misconduct brought himself into the position of being committed to prison for payment of a debt due in respect of a legal claim, a decree for which is still a competent ground for the compulsitor of imprisonment, notwithstanding the abolition of imprisonment for debt. He was unable to pay the £5 for which he was committed, and being in prison the pursuer offered to lend him that sum in consideration of an undertaking to pay the debt on demand, also to pay a further sum in which he was already indebted, and then followed this stipulation—"That he will not start or carry on the business or trade of a photographer, and that he will not enter into or continue in the employment of a photographer, either in Elgin or within 20 miles of that town." The £5 was duly handed to the defender to pay his debt, and he was thus released from confinement. The agreement was duly signed before witnesses, and the defender has taken no legal steps to set it aside on any competent ground. But although the agreement is still in force the defender has not adhered to his part of the agreement, and has started a business as a photographer in Elgin. Against this proceeding the pursuer asks for interdict. The defender resists the interdict on various pleas, but as it appears to me, the only plea which requires to be considered is his fifth plea, which is "in restraint of trade," or "without adequate consideration," for I cannot hold that the defender has in any competent form attacked the agreement on the ground of its being illegally impetrated from him.

Taking the second part of this plea first, it is quite certain that in earlier times the question of adequacy of consideration was considered of consequence in determining whether an agreement in restraint of trade could be allowed to stand when challenged in a Court having jurisdiction in such a matter. Without stopping to consider whether according to Scots law a consideration is a necessary element to give validity to a contract, it is in my opinion the effect of the authorities in which this matter has been dealt with that a covenant otherwise good cannot be set aside on the ground that the consideration offered, and which the other party agreed to accept, was not adequate. On this matter I quote from the opinion of Lord Justice Lindley, which was approved of in the House of Lords, in the case of *Maxim* v. *Nordenfelt*. He says—"For many years it was considered that the consideration for covenants in partial restraint of trade must be adequate. This, however, was held in *Hitchcock* v. *Cohn* not to be necessary, and the old view on this point has never since been entertained."

It remains only to consider whether effect can be refused to the agreement in respect that it involves a restraint of trade which is illegal as being contrary to public policy, I am unable to see that there is any ground for coming to that conclusion. The agreement imports no restriction on any business except that of photography, and that only in Elgin and the immediately neighbouring district. Such a restriction leaves it open to the defender to carry on any business he pleases, including photographic business, anywhere throughout the world except in a small town in the north of Scotland and a circle of 20 miles round it. I cannot hold that either as regards the defender's own interests as a citizen or as regards the interests of the public in that district, there is anything that can be called unreasonable in

restraint of trade, or more than a reasonable protection to the other contracting party. Taking the law as laid down by C.-J. Tindal, that the restraint to be good "must be reasonable with reference to the particular case," I think that a more reasonable case could hardly be imagined than the present. A photographer in a small town is desirous that his brother should not set up a rival business beside him and avail himself of the knowledge of the business and the customers of the existing establishment in which he has been an employee. That appears to me to be a most reasonable ground for such an agreement, not unduly restrictive of the liberty of the appellant to carry on business, and not detrimental to any interest in the community.

On the whole matter my opinion is that the interdict was properly granted in the Court below.

Lord Young—This is an appeal from a judgment of the Sheriff of Elgin whereby the appellant is interdicted "from starting and carrying on the business or trade of a photographer on his own account or in partnership in Elgin."

The parties are brothers, and the question between them regards the third term of the agreement referred to in articles 4 and 5 of the condescendence, whereby the appellant "binds himself that he will not hereafter start or carry on the business or trade of a photographer, and that he will not enter into or continue in the employment of a photographer either in Elgin or within twenty miles of that town," and also that he shall not "be entitled to enter into partnership with a photographer in Elgin or within twenty miles thereof."

If this is in itself a valid obligation, having regard to the agreement or contract of which it is a part, and if the appellant has no good ground to complain of the circumstances and manner in which it was got from him, the Sheriff's judgment seems to me to be sound, the interdict prayed for and granted being not beyond but considerably within the obligation in the agreement which the appellant admits on record that he has disregarded.

The appellant objects to the enforcement of this obligation, not only in respect of the circumstances and manner in which the evidence (as he contends) shows that he was got to subscribe it, but also on the rules of law regarding contracts in restraint of trade and personal freedom which were the chief subject of argument before us at the hearing of the appeal. I think the import and application of these rules—meaning, of course, their bearing and effect on the obligation now in question—ought first to be considered.

The general rule of law is that a man is not allowed to restrain himself by contract from exercising any lawful trade, art, or business at his own discretion, and where he will—unless where the restraint is natural and not unreasonable for the protection of the parties to the contract by which it is imposed, in dealing legally with the subject-matter of that contract, or, to use the language of Vice-Chancellor, afterwards Lord Justice, James—"in the judgment of the Court is not unreasonable having regard to the subject-matter of the contract." We were referred to authorities both Scotch and English, but chiefly English, explanatory and illustrative of the rule, and also of the exception, and the reason and principle of both. The reason and principle of the rule is that it is in the interest of individual liberty and of the public that a man shall not be restrained by obligation taken from him, or which he has spontaneously put on himself, from giving to those who choose to resort to him as customers, employers, or clients, such services as they require of him and he is willing to give. The reason and principle of the exception are best, and I think satisfactorily, explained by a reference to the most familiar illustrative example of it which occurs in a contract for the sale of a business. The purchaser desires and, as a condition of the price which he offers, demands an obligation by the seller not to resume and carry on the same or a similar business within a specified area during a specified period. If the contract is concluded on that footing, and the Court, applied to for the enforcement of the restraint, is of opinion that it is not unreasonable having regard to the subject-matter of the contract, the restraint will be regarded as within the exception, being a natural and not unreasonable term of the contract containing it. Other contracts illustrative of the exception are noticed in the decided cases which were cited by the appellant's counsel. In all of these cases the contracts, containing the restraint as one of the terms, related to the trade or business to which the restraint applied and which (that is the restraint) was sustained as within the exception only because it was a natural and not unreasonable term of the contract of which it was part.

In the case of *Collins* v. *Locke* (4 App. Cas. 686) Sir Montague Smith, referring to the numerous cases collected in the report of *Mitchel* v. *Reynolds* in Smith's Leading Cases (vol. i, p. 356, 6th ed.), observes:—"It may be gathered from them that agreements in restraint of trade are against public policy and void unless the restraint they impose is partial only and they are made on good consideration and are reasonable." In the case of *Davies* (L.R., 36 Chan. 382), Lord Justice Cotton referring to this judgment of Sir Montague Smith observes—"He (Sir Montague Smith) clearly, therefore, lays down the two things that are necessary; they must not be unlimited, and then, also, if they are limited, there is the further question to be considered whether, even having regard to the limit, they are reasonable, and in my opinion, that old law still ought to be recognised and regarded by us as the law and ought not to be departed from." Again, the same judge says—"What I think is now the true rule is that where there is a limited covenant you have to consider how far, having regard to the particular circumstances of the case, the limit is reasonable."

It does not occur to me as probable, or even possible, that in thus speaking of the reasonableness of a specially limited covenant of restraint, "having regard to the particular circumstances of the case," these learned judges were contemplating the possibility even of such limited restraint occurring in a simple sale of the restraint, (that is, of an obligation to submit to it for a price paid) or in a contract of loan—for in either of these cases the standard or criterion of reasonableness could be no other than the amount of the price or of the loan. I cannot conceive it possible that any judge would pronounce a certain limit of restraint reasonable for one sum (whether paid or lent), and a larger or smaller limit reasonable according as the sum (paid or lent) was larger or smaller. So much restraint for 5s.; twenty times as much for £5, and so on till you reached a sum large enough to make unlimited restraint reasonable.

The view which I have taken of the cases to which I have referred, and the opinion which I have now expressed is confirmed by the judgment and the opinions delivered in the latest (I think) authority cited to us—*Nordenfelt*, July 31, 1894 (App. Cas. 1894, p. 535). In that case the contract in which the restraint occurred as one of its terms was distinctly of the character which I have said is, according to all the authorities as I read them, necessary to bring any such restraint within the exception to the rule that a man may not restrain himself from exercising any lawful craft or business at his own discretion and in his own way. In that case a patentee and manufacturer of his own patented articles sold his patent and business for a price, and as a term of the contract bound himself for a specified term (25 years), but without any specified limit of area, not to engage, except on behalf of the buyers, in the manufacture of the patented articles. The only question regarded the want of any specified limit of area. The objection on this ground was founded on a decision, and still more on some general *obiter* observations by judges as to the necessity in every case of a limitation of area in order to make such a restraint valid and enforceable. The judgment of the House of Lords, affirming the judgment of the Court of Chancery, was that there might be cases, and that this was one, in which a limitation of area was not necessary in order to make the otherwise limited restraint reasonable and enforceable. The very full opinions delivered by the noble and learned Lords in that case support, as I think, the opinion which I have expressed.

The agreement we have now to consider is a contract of loan of money, the trade restraint in question occurring simply as an obligation put on the borrower in addition to his obligation to repay the lent money. The question is, does it fall under the rule regarding obligations in restraint of trade, or under the exception to that rule. It must fall under the one or the other, for it is manifestly and admittedly an obligation in restraint of trade, which the Sheriff has by his judgment enforced by interdicting the appellant from carrying on a specified and unquestionably lawful trade in Elgin. The question is general and of first class importance, although Elgin is a town of moderate size, photography a business of moderate importance, and Mr Ernest Stewart the appellant, an artist or tradesman in whom the general public probably take a very moderate interest.

The proposition that in a bond for borrowed money an obligation may lawfully, and therefore effectually, be put on the borrower restraining him from carrying on a specified business in a specified place is quite novel, and I have no hesitation in rejecting it as in my opinion untenable. Such an obligation in a bond for borrowed money is admittedly unprecedented. But it was suggested, and indeed argued (although I thought feebly) that it might make a difference if the lender carried on a business of the kind to which the restraint applied. I do not see how this could affect the question. It is, no doubt, true that those who are carrying on a business in a particular district are the persons most immediately and obviously interested to get obligations from others restraining them from coming to compete with them in that business. But the object and reason of the general rule (if indeed there be such a rule) prohibiting obligations in restraint of trade is just to prevent such obligations being got to the detriment of the public, and in restraint of personal liberty, by those interested to get them.

It cannot, I think, be maintained, consistently with this rule and the authorities explaining it and illustrating its application and the exceptions to it which have been allowed, that a man may sell his liberty to start and carry on a lawful business in a particular place to anyone who is carrying on a business of the same kind in that place. If he can he may of course take any price, or agree to any terms he pleases and can get, or even put his liberty into the hands of another gratuitously—for a man may generally (I should say always) make a gift of anything which is his own and which the law allows him to sell or otherwise part with at his pleasure. At the date of the agreement (9th July 1897) the appellant had no business in Elgin or elsewhere, and was at liberty to start and carry on any lawful business he pleased, and where he pleased. This liberty the law, which gave it, did not permit him to renounce gratuitously, or to sell for money whether paid as a price or advanced as a loan. By selling or gifting away freedom or liberty such as I have been speaking of, I, of course, mean parting with it by bestowing on another power to restrain the exercise or use of it.

We were assured by the learned counsel for the appellant that there has been no instance hitherto of such a restraint as that which has been imposed on the appellant being sustained (or even having occurred) except as a term of a contract relating to the business to which it applied, and certainly no case presenting such an instance has been cited to us. But assuming, con-

trary to the opinion which I have expressed, that it may be sustained although simply sold for a money price, the question must still arise and be answered, whether, having regard to the terms of the sale and the circumstances in which it was made, the restraint was reasonable, and therefore ought to be enforced. It cannot, I think, be maintained that the respondents' position would have been different and weaker if, instead of only lending he had paid £5 to his brother as the consideration for submitting to the restraint on his liberty. Is, then, the respondent's contention this, that while in all the cases which have hitherto occurred, the Court applied to for the enforcement of such a restraint on liberty had to consider its reasonableness in the whole circumstances of the case in which it was imposed, there is no such necessity or indeed competency when it is imposed, as it is now for the first time, in a contract of sale or loan? I cannot find any reason for such a view.

But if the Court may and ought to consider the reasonableness, or not, of the restraint, looking to the circumstances in which it was imposed, and the consideration given for it, we must in the case before us take account of these, I should think, important circumstances — first, that the restraint is so severe that it may possibly, and indeed not improbably, ruin the appellant's trade prospects for a long while or for his life; second, that he was taken out of a cell into the corridor of a prison to give his assent to it; third, that he was very "excited and anxious to get out of the prison," and "very distressed as to his condition;" and fourth, that the only consideration given for it was the payment (by way of advance to him) of £5 to the jailor to let him out of the prison.

And in considering the question of reasonableness, regard must, I think, be had to the full measure of the restraint expressed in the bond, although, as I have pointed out, the interdict asked and granted is much within it. As to the relation in which the parties stood to each other, I can only take account of these facts; that they are brothers, natives of Elgin; that they were both taught and from boyhood brought up there by their father as photographers; that the respondent, the elder brother, left Elgin in 1885, and did not return till, I think, 1891; that the appellant worked as a photographer in Elgin continually from his boyhood (with a short interval of absence at Torquay) till 1891, when being dismissed by the respondent he went to Forres, where he practised the same trade on his own account till 1897, when he returned to Elgin. I am unable on the evidence to form any satisfactory opinion regarding the behaviour of the brothers to each other prior to the date of the agreement in question, and it is not, I think necessary. It is plain enough that neither of them was pleased with the conduct of the other, or felt himself under any obligation even of gratitude to the other. Regarding the purchase of the father's business in 1886 by the respondent, and the difference between him and both his brothers, and his father also, as to whether or not he has acted towards his brothers as was intended and proper, I can only say that I think it unnecessary to form an opinion, even if the evidence enabled me to do so. I must, I think, consider and deal with the matter before us on the footing that the respondent is lawfully in possession of the business, and that the appellant has no claim or ground of complaint against him. On the other hand, I must hold that outside and irrespective of the loan agreement now sued on, the respondent had and has no claim or ground of complaint against the appellant, and therefore deal with the case on that footing. I would only further observe that there is no ground for thinking that at the date of the agreement, or indeed at any time, there were any honourable, family, or moral grounds on which the respondent could reasonably require the appellant to abstain from taking employment as a photographer within twenty miles of Elgin. It has not been suggested that there were.

The last point on the question of reasonable or not, is that this obligation, admittedly unprecedented in a contract of loan, was got from a nervous and excited prisoner as the condition of an advance of £5, made in order that he (or rather his brother's man of business) might pay it to the jailor to let him out. The case is not so gross as would have been a similar obligation obtained by an elder from a younger brother, when starving of hunger, in return for a meal, or when starving of cold in return for a wrapper or a shelter from the weather; but it is, in my opinion, gross enough to require the Court to hold that in the circumstances the obligation in restraint of trade and personal liberty is not reasonable, or such as ought to be enforced by interdict.

Holding the opinion which I have, I hope, sufficiently indicated, with the grounds of it, I think it unnecessary to express any opinion on the question whether or not the agreement was read over to the appellant and understood by him before he signed it. I have not so favourable an opinion of the man of business as I should have had if he had declined to give his services in this, I think, discreditable business, but I assume, and indeed believe, that he speaks the truth when he says that he read over the agreement and thought the appellant understood it. At the same time, I am not satisfied that the appellant followed and understood the reading, and am just as little disposed to impute falsehood to him in saying that to the best of his belief it was not read, as to the man of business in saying that it was. I must therefore say that I am doubtful whether the appellant understood the import of what he signed. But I give the opinion that the restraint in the agreement is bad, and ought not to be enforced by us, even on the assumption that the appellant understood it when he signed it.

Lord Trayner—The law in regard to contracts or obligations imposing a restraint upon trade has undoubtedly undergone a

considerable change within late years. Such contracts or obligations are not now regarded with so much disfavour as formerly. We had a large citation of authority from both sides of the bar, and a consideration of the cases cited has led me to the conclusion that the judgment of the Sheriff is well founded. It would merely be repeating the work already so well done by the counsel for the parties were I to go into any detailed examination of the cases they referred to. The result of these seems to me to be this—that a contract or obligation in restraint of trade will be sustained if it satisfies these conditions—(1) that the restraint is only partial, (2) that it is founded on a real and not merely colourable consideration, and (3) that it is reasonable. And the test by which its reasonableness is to be judged is this—"whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public." This is the test applied by Chief-Justice Tindal in *Horner* v. *Graves*, and adopted by the Lord Chancellor in *Nordenfelt's* case.

It appears to me that in the present case all the three conditions I have referred to are fulfilled. The restriction imposed upon the defender by himself is certainly partial. It prohibits him from carrying on or being concerned in the business of photography in Elgin or within twenty miles thereof. The restricted area is very small when compared with the rest of Scotland, in which the defender may exercise his calling as a photographer without let or hindrance. This fact excludes the idea that the restriction in question can in any view of it be contrary to public policy or public interest. The defender is not hindered from pursuing his calling or deprived of the means of earning his livelihood by means of it, nor are the public deprived of any benefit which the defender in the exercise of his profession can confer upon them.

The second condition has reference to the consideration given for the restriction. On this head it might be enough to say that according to our law consideration is not essential to a contract or obligation. Either may be quite binding without any consideration being given therefor. But assuming that the matter of consideration does enter into the question, the consideration that is required is not adequate consideration. That view, formerly held in England, is no longer held. It must be a valuable consideration, not merely a colourable consideration. Now, in this case, the consideration in money was not large. It was the loan of £5. But the amount of the loan is not in itself the only thing to be considered. In the circumstances in which the loan was given it was of a real value beyond merely the money value. It was a loan which enabled the defender to obtain his release from confinement in jail. The consideration, therefore, was the means by which the defender regained his personal liberty—a valuable consideration one would think, at least for the defender. There was thus given to the defender a real and valuable, not merely illusory, consideration for the restriction he imposed upon himself.

The third condition is, that the restriction self-imposed on the defender was reasonably necessary for the protection of the pursuer, in whose favour it was given. The pursuer, a photographer in Elgin, who had succeeded to a business established there by his father, desired to be free from the competition or rivalry of his brother in the same kind of business, and the purpose of the restriction on the defender was to ensure this freedom to the pursuer. To stipulate or arrange that the defender should abstain from engaging in any business of photography in Elgin or within 20 miles thereof was not more than reasonable for the pursuer's protection. Anything short of that restriction would have been practically no protection to the pursuer's business, and would have been practically no hindrance to the defender engaging in that competition or rivalry which it was the intention and purpose of the agreement in question to prevent.

It therefore appears to me that the whole conditions which must concur in order to a valid restraint upon trade are to be found here.

It has been said that the restraint in question was illegal and not to be sustained on the ground that it was an interference with personal liberty. I think that view cannot be maintained, regard being had to the many decisions to which we were referred. All restraints upon trade are to a certain extent restraints on or interference with personal liberty. But the restraints upon trade are not illegal, and therefore there are some interferences with personal liberty which are not illegal. But limited restraints on personal liberty are not only legal but forcible. No man in one country can bind himself in service to another for his whole life, but he may validly do so for a term of years. So again, in exercise of rights of property, any proprietor of land may bind himself not to make a certain use of it, as, for example, not to build on it a certain kind of tenement. These are not more in restraint of personal liberty than the restraint in question, and yet their legality is not open to dispute.

Lastly, I notice the argument very much urged upon us by the appellant that this obligation or agreement made by him with and in favour of the pursuer cannot be maintained because it is not attached to some substantive contract of which it was only a condition. He says that the restriction is only valid in relation to "the subject-matter of the contract," and that if there is no contract (apart from the restriction) there can be restriction. I think this argument is based on a mistaken view of some expressions to be found in the reported cases. Generally, no doubt, the restriction on trade is to be found as a condition of a contract—a contract of service, or partnership, or sale. And the reasonableness of the restriction is considered in the light of the "subject-matter of the contract," of which it forms a part. But it does not follow that because

this is generally so it must necessarily be always so. For that which may lawfully be a condition or part of a contract may just as well (if legal in itself) be the subject of a contract. And in our Courts we have an instance of this very thing happening, and the contract of restraint given effect to in the case of *M'Intyre*, 4 Macph. 571.

I concur in the view that the defender has failed to establish any good ground for the reduction or setting aside of the agreement, and indeed it was not seriously argued for him that he had. If the defender had already established a business in Elgin when the agreement in question was made, he could then have sold it and bound himself not to enter upon the same kind of business in Elgin or within 20 miles thereof. I can see no principle on which he might not just as legally bind himself not to commence a business within the same area.

On the whole matter I think the Sheriff has reached the right conclusion, and that this appeal should therefore be dismissed.

Lord Moncreiff—In this case there are two distinct questions which must be considered separately. If the defender has proved that the agreement which is sought to be enforced against him was impetrated by fraud or misrepresentation on the part of the pursuer, or those who acted for him, there is an end to the pursuer's case. But if, on the other hand, the defender has not succeeded in doing this, we must proceed to the consideration of the second question on the assumption that the defender voluntarily entered into the agreement, and that he did so for valuable consideration, if that were necessary to support the agreement in point of law. But even assuming this, if the agreement is illegal as being in restraint of trade and against public policy, it cannot be enforced against the defender.

1. On the first point, viz., whether the agreement was obtained by fraud or misrepresentation, I would only say that I see no reason to differ from the very decided opinion given by the Sheriff-Substitute before whom the proof was taken. The third head of the agreement was twice pointedly brought under the notice of the defender, and I have no doubt that he thoroughly understood its meaning and effect. I will only add that I greatly doubt whether the defender himself attached much importance to the undertaking which he gave. His one object was to get out of prison, and as he had no established business in the neighbourhood of Elgin at the time, although he proposed to start one, it was no great sacrifice to him to agree to his brother's proposal.

2. The more serious question is, whether the defender is entitled against the good faith of the contract to be quit of his obligation, on the ground that the undertaking which he gave was one in restraint of trade. It may be that the pursuer drove a hard bargain with the defender, but in considering this question we have nothing whatever to do with the adequacy or inadequacy of the consideration which the defender accepted and received. The only matter which we have ... this partial restric... right to carry on ... grapher is or is ... circumstances.

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The law on the subject is not uncertain, the difficulty lies in applying it to the particular case. A condition in restraint of trade will (especially where, as here, it is partial) receive effect if, in the opinion of the Court, it is "not unreasonable, having regard to the subject-matter of the contract," or "not unreasonable for the protection of the parties in dealing with some subject-matter of contract." I adopt the words used in two passages of his opinion by Vice-Chancellor James in *The Leather Cloth Company* v. *Lorsont*, L.R., 9 Eq. 354. These words, as I understand them, simply mean, "not unreasonable having regard to the purpose for which and the business in relation to which the covenant or undertaking is asked for and given." If the covenant is reasonably necessary to protect the interests of the "covenantee" in his business it will be enforced; if, on the other hand, it is excessive and unnecessary, it will be disregarded as being against public policy.

Now, applying this to the present case the pursuer's object (as the defender well knew) in stipulating for the undertaking was to prevent the defender from competing with and injuring the family photographic business which the pursuer purchased in 1886 and still carries on in Elgin. The defender having, I assume, given the undertaking voluntarily and for value, was it or was it not reasonably necessary for the effectual prevention of competition by the defender and the protection of the pursuer that the defender should undertake not to carry on the business of a photographer in Elgin and the neighbourhood? I entertain no doubt that nothing short of such an undertaking would have effected the purpose which both parties had in view.

But it is said that the subject-matter of the contract was not the protection of the pursuer's business but the loan of £5, and that the undertaking given by the defender was adjected to that independent contract with which it had no proper connection. This, I think, is fallacious. The loan of £5 was no doubt a contract in itself involving an obligation to repay, but it was a contract within a contract, being simply the consideration which was given by the pursuer for the defender's undertaking. It is immaterial whether the consideration given was a sum paid down or a sum lent; in either case it was the price of the defender's undertaking, with the adequacy or inadequacy of which we are not concerned. The undertaking was not obtained to aid the pursuer in enforcing repayment of the loan.

I am therefore for affirming the Sheriff's judgment.

LORD YOUNG—I should like to say with reference to the case of *M'Intyre*, which was mentioned by Lord Trayner, that I had referred to that case and was acquainted

with it; indeed, I see that I was counsel in it. I think that was clearly a case in which the agreement in restraint was incidental to a contract of employment.

The Court pronounced this interlocutor:—

"Sustain the appeal, and recal the interlocutors appealed against: Find in fact (1) that the pursuer is a photographer, and carries on business as such at High Street, Elgin: (2) That the defender, a brother of the pursuer, also carries on the business of a photographer at present at Institution Road, Elgin; (3) that the pursuer in 1886 purchased from his father Robert Stewart senior, photographer, Elgin, the photographic business carried on by him at High Street, aforesaid; (4) that the defender has failed to prove that the pursuer so purchased the business for the benefit of his brothers, the defender and the witness Charles Stewart, as well as for the benefit of himself; (5) that on or about 8th July 1897 the defender was imprisoned in the Elgin prison for an alimentary debt which he was then unable to pay; (6) that on 9th July aforesaid, the defender, in the said prison, signed the minute of agreement; (7) that by said agreement the pursuer bound himself to advance the sum of £5 sterling, and that on said 9th July (after the agreement was signed and completed) the pursuer advanced the said sum to the defender, and so enabled him to pay his alimentary debt and get out of prison; (8) that by said agreement the defender, *inter alia*, bound himself that he would not thereafter start or carry on the business of a photographer in Elgin, or within twenty miles thereof, and that it was thereby stipulated that if the defender should infringe said stipulation the pursuer should be entitled forthwith to interdict him; (9) that notwithstanding thereof the defender, more than a year after said date, started the business of a photographer in Elgin, and has since continued to carry on the same; and (10) that the defender has failed to prove that the said agreement was signed by him in error, or was impetrated from him by misrepresentation and in circumstances amounting to fraud, force, and fear: Find in law that the restraint in question, being limited to a particular district, and reasonably necessary for the protection of the pursuer, with whom the contract was made, and the pursuer having given a legal consideration therefor, was valid and binding on the defender: Therefore repel the defences: Grant interdict in terms of the prayer of the petition: Find the pursuer entitled to expenses in this and in the Inferior Court, and remit," &c.

Counsel for the Pursuer — Shaw, Q.C. —C. D. Murray. Agent—William Geddes, Solicitor.

Counsel for the Defender—Dundas, Q.C. —Clyde. Agent—Charles George, S.S.C.

Friday, June 30.

FIRST DIVISION.

[Lord Pearson, Ordinary.

GUNN *v.* MUIRHEAD.

Company—Companies Act 1867 (30 *and* 31 *Vict. c.* 131), *sec.* 25—*Fully Paid-up Shares —Payment in Cash.*

The Companies' Act 1867 provides by section 25 that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

Aitchison & Sons, Limited, purchased the heritable and moveable property belonging to the West End Cafe Company, Limited, for a certain sum payable at entry, on the understanding that such shareholders in that company as desired to reinvest their shares in the company of Aitchison & Sons should be offered an opportunity of doing so, and that for that purpose the amounts of their shares should be deducted from the price payable by the new company to the old company, and upon the winding up of the old company the shareholders in question should grant discharges of their shares and receive shares in the new company for the amount thus discharged. Gunn, a shareholder in the West End Cafe Company, applied for shares in Aitchison & Sons, authorising the directors thereof to intimate to the liquidator of the former company that the amount to be realised from his shares therein would be reinvested in the shares in Aitchison & Sons applied for by him.

Gunn also entered into an agreement with Muirhead, one of the promoters of Aitchison & Sons, Limited, by which, after setting forth the transactions between the selling and the buying company, he agreed to accept shares in Aitchison & Sons in lieu of the shares held by him in the West End Cafe Company, while Muirhead agreed, if called upon, to relieve Gunn of the £1 shares allotted to him in Aitchison & Sons, paying therefor the sum of £1 each. Gunn subsequently called upon Muirhead to fulfil his part of the agreement, tendering the shares allotted to him in Aitchison & Sons in terms of his application. Muirhead declined to do so, on the ground that the shares tendered to him were not fully paid up.

In an action raised by Gunn against Muirhead for implement of the agreement, *held* (1) that under sec. 25 of the Companies Act 1867 the shares must be deemed to be held subject to the payment of the whole amount thereof in cash, and (2) that it lay upon the pursuer, as he sought to enforce the contract to take