Wednesday, December 2.

FIRST DIVISION.

[Sheriff Court at Glasgow.

RODGER *v.* HERBERTSON.

Contract — Sale — Assignation of Contract — Obligation in Restraint of Trade — Delectus Personæ—Agreement of a Doctor not to Practise—Personal or Assignable.

By minute of agreement between H., a physician and surgeon, and M., his assistant, H. bound and obliged "himself and his heirs, executors, and successors that" M. "and his heirs, executors and successors shall have the exclusive right to the medical practice" carried on by H. in a certain district "and the goodwill thereof," on certain conditions, including, *inter alia*—(1) H. "hereby agrees to cease to practise his profession" in the district "from and after the date hereof, except in such cases as shall be sanctioned in writing by" M.; (2) M. "agrees to purchase the said practice and goodwill thereof" at a certain price; (3) H. "shall introduce M. "to his patients and others" in the district; (4) H. agrees "to enforce the whole obligations imposed on" K. (from whom he had acquired the practice) contained in a minute of agreement between K. and him whenever requested by M.; (6) M. "shall collect free of charge the whole outstanding debts due to" H. "in the said district."

Held that the terms of the agreement, especially conditions (3) and (6), showed that it was a personal contract and incapable of being assigned—*dissenting* Lord Johnston, who was of opinion that as the contract was expressed to be between not merely H. and M., but also their "heirs, executors, and successors," and in view of the interpretation of the parties' intentions afforded by condition (4), the contract was not personal and was assignable, the restrictive covenant passing as an incident of the goodwill.

In October 1907 Thomas Ritchie Rodger, M.D., Crichton Hall, Sanquhar, raised an action in the Sheriff Court at Glasgow against Richard Gilbertson Herbertson, L.R.C.P., Bridgeville, New Cumnock, in which he prayed the Court "(1) To find and declare that the pursuer is entitled to, and is vested in, the exclusive right to the medical practice which was carried on by the defender in Sanquhar prior to May 1891, and the goodwill thereof, and to interdict the defender from practising the profession of medicine and surgery, or either of them, in Sanquhar or surrounding district except in such cases as shall be sanctioned in writing by the pursuer; reserving to the defender right to practise in that part of the parish of Kirkconnel situated north of a straight line drawn across the valley of the river Nith from the farm of Rigg to the farm of Nethertown, both in the said parish of Kirkconnel; (2) to grant a decree against the above-named defender ordaining him to pay to the pursuer the sum of £250 sterling, with the legal interest thereon from the date of citation hereon until payment; and to find the defender liable in expenses."

The pursuer averred that the defender had repeatedly practised in Sanquhar and surrounding district in breach of the agreement after mentioned.

The defender pleaded, *inter alia*—"(2) No title to sue."

On 16th May 1891 Dr Herbertson, the defender, who was then carrying on a practice as physician and surgeon in New Cumnock and in Sanquhar and the surrounding district, entered into the following agreement with Dr Macgregor his then assistant:—"Minute of Agreement beween Richard Gilbertson Herbertson, surgeon in New Cumnock, hereinafter called the first party, and Patrick Fraser Macgregor, M.B. and C.M., Sanquhar, hereinafter called the second party. Whereas the first party has agreed to sell to the second party the medical practice presently carried on by him in Sanquhar and surrounding district, he binds and obliges himself and his heirs, executors, and successors that the second party and his heirs, executors, and successors shall have the exclusive right to the said medical practice and the goodwill thereof, on the conditions after mentioned, viz.—*First*—The first party hereby agrees to cease to practise his profession in Sanquhar and surrounding district from and after the date hereof, except in such cases as shall be sanctioned in writing by the second party; reserving always his right to practise in that part of the parish of Kirkconnel situated north of a straight line drawn across the valley of the river Nith from the farm of Rigg to the farm of Nethertown, both in the said parish of Kirkconnel. *Second*—The second party agrees to purchase the said medical practice and goodwill thereof, subject always to the before-mentioned reservation, and that at the price of one hundred and fifty pounds sterling, which sum he binds and obliges himself and his heirs and executors to pay to the said first party and his foresaids in three equal instalments of fifty pounds, payable as follows, viz.—Fifty pounds as at the date hereof, fifty pounds six months thereafter, and fifty pounds one year after said date. *Third*—The first party shall introduce the second party to his patients and others in Sanquhar and surrounding district as before defined, and generally shall use his influence in favour of the second party, so far as he is able, in the carrying on of the said practice. *Fourth*—The first party agrees to carry into effect the minute of agreement entered into between William Kay, surgeon, Sanquhar, and him in the year Eighteen hundred and ninety, and to enforce the whole obligations therein contained imposed on the said William Kay whenever requested by the said second party, and which agreement is herewith delivered up

to the said second party. *Fifth*—The existing agreement between the first party and the second party as his assistant in the said district is hereby cancelled and declared to be ended as at the date of this agreement. *Sixth*—The second party shall collect free of charge the whole outstanding debts due to the said first party in the said district, but shall not resort to legal diligence in the recovery of the same, and shall account for all receipts to the said first party. *Lastly*—And in the event of any dispute arising between the parties as to the meaning and intention of these presents, the same shall be referred to John Henderson, solicitor, Dumfries, as sole arbiter, whom failing David Dougall, solicitor, Ayr, and his decision shall be final and binding: And both parties bind and oblige themselves and their foresaids to perform their respective parts of this agreement under the penalty of fifty pounds, to be paid by the party failing to the party performing or willing to perform, over and above performance."

Dr Macgregor practised in Sanquhar and district until February 1896, when he sold his practice to Thomas Houston Jackson, physician and surgeon, for £535. Dr Jackson practised in the said district until May 1904, when he in turn sold his practice to Dr Rodger, the pursuer, for £600. Dr Macgregor and Dr Jackson on selling the practice respectively agreed to grant, when called upon, a formal assignation of, *inter alia*, their rights under the minute of agreement between Dr Herbertson and Dr Macgregor. In pursuance of this undertaking they granted a formal assignation, dated 28th and 30th September 1907, by which they assigned all rights and interests competent to them or either of them under the said agreement.

On 9th January 1908 the Sheriff-Substitute (BALFOUR), before answer, allowed the parties a proof of their averments.

On the 19th March 1908 the Sheriff (GUTHRIE) recalled this interlocutor, sustained the second plea-in-law for the defender, and dismissed the petition.

Note.—"On considering the agreement and the circumstances with all possible care I come to think that the contract of 1891 was a purely personal contract and incapable of being assigned so far as the restraint on the defender is concerned. I confess that I may be influenced in reaching this result by the difficulty of defining the limits of restriction, and the absence of any clear definition of the space from which the defender is excluded, but it seems to me, apart from such questions, that it is sufficiently clear that the restraint was imposed with reference to the personality of Dr Macgregor. The defender could not in 1891 have been required to introduce to his patients any other than Dr Macgregor, and the exception of attendance on patients with the written sanction of Dr Macgregor has a personal reference, implies knowledge of the party and a certain confidence in him, and excludes the 'sanction' of any stranger to whom Dr Macgregor might transfer the practice.

"See *International Fibre Synd.* v. *Dawson*, 2 F. 636; *Berlitz School* v. *Duchene*, 6 F. 181; *Davies* v. *Davies*, 36 Ch. D. 359."

The pursuer appealed, and argued—The cases cited by the Sheriff did not apply. They all dealt either with contracts of service or contracts for delivery of goods. Here the restrictive conditions applied, because they were part of the goodwill, and as such were transmissible—*Jacobi* v. *Whitemore*, 1883, 49 L.T. (N.S.) 335; *Townsend* v. *Jarman*, [1900] 2 Ch. 698; *Henry Leitham & Sons, Limited* v. *Johnston-White*, [1907] 1 Ch. 322; *William Fraser & Son* v. *Renwick*, November 21, 1906, 14 S.L.T. 446; *Elves* v. *Crofts*, 1850, 10 C.B. 241, 84 R.R. 553; *Davies* v. *Davies*, 1887, 36 Ch. D. 359, Bowen, L.J., at 394; *Hitchcock* v. *Coker*, 1837, 6 Adol. & Ell. 438, 45 R.R. 522. That the restriction was not limited in time did not show it to be unreasonable—*Jacobi*, *Elves*, *Hastings*, *Hitchcock* (*omnes cit. sup.*); Pollock on Contracts, p. 363. The exception of the restriction "in such cases as shall be sanctioned in writing" did not show *delectus personæ* or affect the transmissibility—*Hastings* v. *Whitley*, 1848, 2 Ex. (W.H. and G.) 611; *Smith* v. *Hawthorn*, 1897, 76 I.L.R. 716. The defender in his contract bound not only himself but "his heirs, executors, and successors." That phrase was not meaningless, but showed that the contract was not purely personal but was transmissible—transmissible in any case as regards the goodwill with its accompanying restrictive covenant.

Argued for the defender (respondent)—They did not contend that a medical practice was incapable of being assigned, nor that a restrictive stipulation might not be so worded as to be transmissible with the goodwill, provided it did not appear that the contract involved *delectus personæ*. The present case involved *delectus personæ*; it was to be distinguished from *Jacobi* v. *Whitemore* (*cit. sup.*), because the contract involved mutual obligation—*Grierson, Oldham, & Company, Limited* v. *Forbes, Maxwell, & Company, Limited*, June 27, 1895, 22 R. 812, Lord Kincairney at 816, 32 S.L.R. 601. The obligation on the second party to collect the debts due to the first party, and the obligation on the first party to introduce the second party to his patients, could not without the consent of the debtor in the obligation be transferred in favour of a new creditor, because each involved "a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided"—Pollock on Contracts (7th ed.) p. 47—and because the obligations could not be transferred without altering their character—*Berlitz School of Languages* v. *Duchene*, December 3, 1903, 6 F. 181, 41 S.L.R. 110. The reason that the obligations were imposed "on heirs, executors, and successors" was merely to express that the pecuniary obligations should be so binding.

[Arguments were also submitted with reference to whether the district was sufficiently defined, with which the Court did not find it necessary to deal.]

At advising—

LORD PRESIDENT — This is an action in which the pursuer, who is a doctor, seeks an interdict against the defender, another doctor, from practising within a certain not very well-defined district around Sanquhar. The defender in the year 1891 sold a part of his practice to his then assistant, a certain Patrick Fraser Macgregor. Patrick Fraser Macgregor in 1896, after having practised in that district, sold his practice to Thomas Houston Jackson, and Thomas Houston Jackson in 1904, having practised for some time, sold his practice to the present pursuer. The original contract of sale between the defender and Macgregor is contained in a minute of agreement which we have before us. And that minute of agreement contained this as the first article—"The first party hereby agrees to cease to practise his profession in Sanquhar and surrounding district from and after the date hereof, except in such cases as shall be sanctioned in writing by the said second party, reserving always his right to practise in that part of the parish of Kirkconnel" above a certain line. It is in virtue of that stipulation, which the pursuer says has been transmitted to him by the successive assignations of Macgregor and Jackson, that he avers that he is entitled to restrain the present defender from practising.

The learned Sheriff has assoilzied the defender upon the ground that he considers the stipulation as to not practising was a personal contract incapable of being assigned.

I have come to the same conclusion as the Sheriff. I do not doubt that a stipulation may be so conceived that it would be transmissible on successive sales of the business of which the stipulation is an adjunct. But each case I think must depend upon its own terms and upon the just construction of the bargain between the two parties—in other words, it is not a matter in which I think there is anything that can be termed a general rule of law. The point is, what did the two parties bargain between each other? Now when I look at the agreement as a whole I come to the conclusion—I cannot say with any great doubt—that the agreement between Dr Herbertson and his old apprentice—for that was the relation between the parties—and the stipulations on both sides contained in it, were of a purely personal character.

The phraseology of the agreement begins with this, that the first party has agreed to sell, and "binds and obliges himself and his heirs, executors, and successors that the second party and his heirs, executors, and successors shall have the exclusive right to the said medical practice and the goodwill thereof." I do not think that the pursuer can found any argument upon the word "successors." It is not essential in the collocation with "heirs and executors." I confess that I think it is really just an unmeaning phrase. I think it is put in because the parties wished to show quite clearly that, so far as the pecuniary part of the stipulation was concerned, their heirs, executors, and successors were to be bound; and it was quite unnecessary, because a man's heirs are usually bound, unless he stipulates that they shall not be. Hence it does not seem to me that the term "successors" really aids the argument one way or the other.

Then comes the stipulation by which Dr Herbertson undertook to cease practising in the district. This is followed by the agreement as to the price; and the next clause is—"The first party (that is, Dr Herbertson) shall introduce the second party to his patients and others in Sanquhar and surrounding district as before defined, and generally shall use his influence in favour of the second party, so far as he is able, in the carrying on of the said practice." That seems to me, in plain English, to mean that the second party shall himself personally practise. Dr Herbertson knew his own assistant, and may have been perfectly willing to come under an obligation to introduce his assistant and push his practice. But if the argument upon the other side is right, the very next day the assistant might have sold his practice to a gentleman of no qualification, and the doctor, although he considered him a perfectly worthless practitioner, would still have been bound to have introduced this gentleman to all his patients, and tried to make them employ him as their medical adviser.

The sixth stipulation is—"The second party shall collect free of charge the whole outstanding debts due to the said first party." That is a stipulation which it would be impossible for the second party, except with the other party's consent, to impose upon any assignee. And, accordingly, that portion of the agreement, it seems to me, takes you precisely into the class of law that was applied in this Court in the case of *Berlitz* v. *Duchene*.

Accordingly, taking the agreement as a whole, I come to the conclusion that the Sheriff was right in holding that it was not meant to be assignable. That is all the more likely when you come to consider that after the passage of years it is not the same subject that is assigned. I do not mean to say that you cannot have a goodwill in a doctor's practice. But it is a very peculiar sort of goodwill. It is not like the goodwill of a commercial business, because it is nothing more than what you might call the chance of introduction. It cannot come to more; and as a matter of fact the selling of doctors' practices is not nearly so common in Scotland as it appears to be in England. But although there is goodwill to that extent, surely the practice does not remain the same after a series of years; it seems to me that it really alters, and that what the purchaser of a practice has to sell when after a lapse of time he comes to sell is not really what he got but that which he has himself retained and created. Of course I do not mean to say that that view can be pressed too far. There may be one patient of each all through the years. I only mean that the class of goodwill makes it very much less likely that an agreement of this sort should

be so conditioned as to be transmissible rather than not transmissible.

Upon the whole matter I agree with the conclusion at which the Sheriff has arrived.

LORD JOHNSTON—I regret that I find myself unable to concur in the judgment which your Lordship proposes.

The facts, so far as we are at present concerned with them, are that the defender Dr Herbertson, practising in New Cumnock, who had himself in 1890 entered into an agreement with William Kay, surgeon, Sanquhar, the particulars of which are not stated, but under which he acquired certain rights in the latter's practice, started a branch practice in Sanquhar. By minute of agreement, dated 16th May 1891, he sold this practice and the goodwill thereof on conditions which I shall immediately consider, but, in particular, with an obligation to abstain from practice in the Sanquhar district, to his assistant, Dr P. F. Macgregor, for £150. In February 1896 Dr Macgregor sold his practice to Dr Jackson for £535, and again in 1904 Dr Jackson sold his practice to the pursuer Dr Thomas Ritchie Rodger for £600. Dr Macgregor and Dr Jackson in pursuance—so the assignation bears—of obligation to that effect by Dr Macgregor to Dr Jackson, and by Dr Jackson to the pursuer, assigned the pursuer into the benefit of Dr Macgregor's agreement of 1891 with the defender. The pursuer seeks to enforce that agreement by preventing the defender resuming his practice in the area defined by the said agreement, and in defence the defender Dr Herbertson pleads that the pursuer Dr Rodger has no title to sue upon the agreement, which he maintains was personal between him and Dr Macgregor. So far as the contract is assignable, the assignation by Drs Macgregor and Jackson is, at least *ex facie*, unexceptionable. The real question is whether the contract of 1891 is assignable.

On examining the authorities referred to, it is plain I think that they fall into two classes. One, in which there are mutual and continuing obligations *hinc inde*, giving place to *delectus personæ*—the other in which the obligation is incident to goodwill of a business, and follows it, and has nothing to do with *delectus personæ*.

Of the former class are such cases as *Grierson, Oldham, & Company, Limited*, v. *Forbes, Maxwell, & Company, Limited*, 22 R. 812, and *International Fibre Syndicate, Limited* v. *Dawson*, 2 F. 636, where it was held that in a contract of mutual obligation, and where the one party's obligation was not such as anyone in the same line of business could equally perform, but involved *delectus personæ*, such obligor could not transfer his rights and obligations under the contract to a third party so as to give that third party a title to enforce the contract. Another instance of the same class of case is the *Berlitz School of Languages*, 6 F. 181. A good example of the exception to the rule of this class of case, the exception depending on the fact that there is no real *delectus personæ*, is the case of *Johnson & Reay* v. *Nicoll & Son*, 8 R. 437.

But the other class of cases depend on very different considerations. Of these *Townsend* v. *Jarman*, L.R., (1900) 2 Ch. 698, is a leading example. As between two partners of a business one was bound on withdrawing from the partnership not to trade within forty miles of the firm's premises for twenty-one years. It was held that the covenant was incident to the business, and enured to the goodwill when the business was sold, so as to be conveyed with it. This case followed on *Jacobi* v. *Whitmore*, 1883, 49 L.T. 335, which perhaps I should have mentioned first, where it was held that the benefit of such an agreement, since it adds value to the goodwill of the business, passes, on an assignment either of the "goodwill" or of the "beneficial interest" in the business, and that the agreement may be enforced by the assignee, although assignees are not expressly mentioned in the agreement. As Brett, M.R., said—"It has been said that such an agreement does not add to the value of the goodwill because it does not bring fresh customers, but it prevents them from being taken away."

I do not need to multiply instances. But I think there can be little doubt that the present case falls under the category of *Jacobi* and *Townsend's* cases, and if so Dr Macgregor's contract with the defender was assignable. I gather that your Lordship finds enough in the particular agreement in question to render it an exception to any such general rule if it exists, and to infer that it was the intention of parties that that contract should be personal to Dr Macgregor and not transmissible. I have accordingly given the closest attention in my power to the terms of the document.

I confess that the preamble is such as to influence me very much in the direction of the authorities I have quoted. It bears "Whereas the first party has agreed to sell to the second party the medical practice presently carried on by him in Sanquhar and surrounding district." When a gentleman agrees to sell his medical practice, it requires a good deal to persuade me that he is not selling an exclusive right or parting for ever with a goodwill, but may again resume what he has sold if the purchaser assigns his rights under the agreement. Now it must be noted that the preamble is limited to the words which I have quoted, and that what follows contains a full and complete contract of purchase and sale in these words—The first party "binds and obliges himself and his heirs, executors, and successors that the second party and his heirs, executors, and successors shall have the exclusive right to the said medical practice and the goodwill thereof." Accordingly what the preamble leads one to expect, the contract expressly bears. I cannot understand how such an express contract is to be controlled by such considerations as have been drawn from a number of incidental conditions which are attached to it, and the right which is parted with and conferred by the main

contract is to be so reduced from an absolute and exclusive right to the goodwill of the practice, which is the subject of the contract, to a mere licence to a selected individual to enjoy that goodwill so long only as he chooses himself to carry it on personally.

Though assignees are not expressly mentioned, there is in the first place a flavour of something much more than personal when it is said that not merely the purchaser but his heirs, executors, and successors are to have this exclusive right to the practice and the goodwill. If the defender's contention is sound, it equally follows that as the right conferred is personal, the moment the purchaser dies the seller can resume what he has sold, and any reference to heirs, executors, and successors is therefore meaningless.

But it is said next that there is no goodwill in a professional practice. This matter was considered in *Bain's* case, 5 R. 416, where, while holding that the goodwill of a medical practice was not a subject of administration for which the widow and executrix of a debtor could be made accountable to a creditor, L. J.-C. Moncreiff says —"My remarks have no relation to a bargain *inter vivos* for the sale of a practice—a transaction common enough among medical practitioners. I deal only with the value of a practice (as a surgeon) when the practitioner is dead, and I think the authorities agree in holding it of no value." It may be of no appreciable value for probate, yet as in *Bain's* case it may be made of value to the representatives, particularly if there is attached to it as an incident a covenant by a potential rival not to enter into competition. Now the main contract, which as I have pointed out may be intrinsically of little value, is accompanied by a condition that "the first party hereby agrees to cease to practise his profession in Sanquhar and surrounding district from and after the date hereof." It is that incident which I hold, following the cases to which I have referred, enures to and enhances the value of the goodwill. It can hardly be maintained that the goodwill has not been sold. What is it, then, that divorces the incident from it?

In order to give force and value to the agreement of sale of his practice the seller agrees to cease practice in Sanquhar and district from the date of the agreement. That is absolute and with no limitation of time. But it is said that the words following, "except in such cases as shall be sanctioned in writing by the purchaser," take the edge off it and show that Dr Herbertson was conferring on Dr Macgregor a personal privilege only. I cannot so hold. There was no obligation on Dr Macgregor to give any such sanction, and I can see nothing to prevent Dr Macgregor placing it beyond his control to give such sanction. In *Hastings* v. *Whiteley*, 1848, 2 W. H. & G. Exchq. Rep. 611, death had placed it out of the obligor's control to grant such consent, yet the obligor was held bound by a similar undertaking; and the case related to a medical practice. Similarly in the case of *Elves* v. *Crofts*, 10 C.B. 241 and 84 R.R. 553.

The second condition bears on matter of price. There is nothing in it to suggest the personal element, and everything to import the contrary.

But then it is said—and I understand that this weighs most with your Lordship—that the seller next undertakes to introduce the purchaser to his patients and to use his influence in his favour, and that that clearly shows that the agreement is personal. This I cannot follow. I agree that this condition is personal. But I cannot follow how it is thought to make the whole agreement personal. It is said that it imports the conception of *delectus personæ* into the contract that the defender was willing to introduce Dr Macgregor whom he knew to the patients, but was not prepared to introduce anyone else. But I would note that he undertakes to introduce no one else. Can it be said that the seller so charged himself with concern for the sick of the Sanquhar district that he looked beyond the immediate transference of his practice to Dr Macgregor and kept it in his own hands, if Dr Macgregor retired, to enter again into the field that he might either attend to them himself or put in another practitioner at a premium as he had done Dr Macgregor. I do not think that he did anything of the kind. He parted with his practice, and all he did was to safeguard not his patients but himself by saying, "I take the responsibility of introducing to them Dr Macgregor but nothing further. When the practice again changes hands the introduction must be on someone else's responsibility." The stipulation is not a continuing one. It is exhausted at the first infeftment of Dr Macgregor in the practice, and has no bearing on his power to assign the goodwill which he has acquired, and the incidental covenant which gives the goodwill value.

But if the above be, contrary to my view, *indicia* of the personal, they give way to this conclusive consideration. Dr Herbertson has himself afforded an interpretation clause which emphatically overrides them. He was himself in possession of the practice under a similar contract with his predecessor Dr Kay, and he obliges himself to enforce the whole obligations therein imposed on Dr Kay whenever requested by Dr Macgregor to do so, and he delivers up the said agreement. It is true he does not assign it, and not having seen the agreement I cannot say whether there was anything to prevent him doing so. But he holds himself out as passing on what he has received and ready to give Dr Macgregor all the benefit of his agreement with Dr Kay, which *ex hypothesi* of his present argument must have been as personal as Dr Macgregor's with him. It is not conceivable that the parties contemplated that he should be free to do what he undertook to prevent Dr Kay doing, and that Dr Macgregor was not to be free to do what he was doing. But I do not found my judgment on this. I only say that it

is a consideration in favour of assignability far outweighing any that can be found in favour of any personal limitation. What I found my judgment on is the absolute obligation undertaken by the seller for himself, his heirs, executors, and successors, that the purchaser "shall have the exclusive right to the said medical practice and the goodwill thereof" in which there is nothing personal. I think the purchaser is entitled to the goodwill which he has bought and paid for, and to dispose of it as he pleases, and that the covenant not to practise passes as an incident of the goodwill, and that to enhance that goodwill he himself will cease from practice in the district from and after the date of the agreement.

I think, therefore, that the Sheriff's interlocutor should be recalled and the defender's second plea repelled.

I say nothing on the question whether the area of restriction is indefinite, and the restriction therefore bad on that account. I do not think that that question can be determined without proof.

LORD KINNEAR—I agree with your Lordship in the chair that the learned Sheriff has put his judgment upon the right ground when he assoilzies the defender because the contract of 1891 was personal and intransmissible. I do not think it is at all doubtful that a contract in restraint of trade, which is not otherwise objectionable, may be annexed to a contract for the purchase and sale of the goodwill of a business and may follow it as an incidental obligation. Whether it does so or not must, in my view, depend entirely upon the construction of the particular contract and not upon any rule of law. But I think there is a well-settled rule of our law which governs the effect of contracts of that kind, and that is, that wherever an obligation is founded on the confidence which the party undertaking the obligation has in the skill and capacity of the person with whom he is contracting, that is a personal obligation and is not assignable.

The question therefore really is, whether upon a construction of this agreement the obligations undertaken by the defender are personal to the gentleman with whom he contracted? I think it is useful to begin by observing the admitted relation between the two parties. The defender Dr Herbertson was a doctor carrying on practice in the neighbourhood of New Cumnock and Sanquhar, and the other party to the contract was his assistant. This is set forth by the defender, but his statement is not denied by the pursuer, and I think it must be taken as a correct statement of the arrangement which was embodied in the agreement which was made between himself and Dr Macgregor as his assistant. Now, then, he undertakes to give a certain share of his practice to Dr Macgregor upon certain conditions. That is said, and I think correctly, to be a sale of the goodwill of his business, but it must be kept in mind that the goodwill of a doctor's practice is necessarily a personal goodwill. Goodwill has been defined to be the benefit arising from the reputation and connection of an established business; and its value is the chance of being able to keep that connection. That is a chance which may in many cases depend upon other considerations than the reputation of the person selling. But in the case of a doctor's practice it depends upon nothing else. His patients go to him because of his reputation and their own personal confidence in his skill; and on a sale of his practice he can do nothing to transfer the benefit of such reputation except to introduce the purchaser as a successor whom he recommends to his patients as worthy of their confidence. And therefore there is nothing but a personal goodwill to assign; and it can hardly be assigned except on considerations personal to the assignee. Now if these are the obligations naturally involved in a transference of medical practice, it appears to me that they are also the conditions set forth in the contract now in question. The defender undertakes, in the first place, that he shall cease to practise his profession in a certain area except under a specified condition of an arrangement in writing between him and his purchaser; and, second—and I think this is the main obligation—that he "shall introduce the second party to his patients and others in Sanquhar and surrounding district as before defined, and generally shall use his influence in favour of the second party, so far as he is able, in the carrying on of the said practice." The whole force of the undertaking lies in that undertaking. "I will introduce you to my patients, and I will use my influence, so far as I can, in your favour, so that you may be able to carry on the practice that I have been carrying on hitherto." I cannot assent to the proposition that this is a condition that is merely ancillary to a contract for the purchase and sale of something—whatever it be—which would pass under the name of goodwill, independently of the condition. It is the sum and substance of the contract. Now, I apprehend, upon the general doctrine to which I adverted at the outset, that that is an undertaking eminently personal. It was solely because of his knowledge of the doctor with whom he was contracting, that he was his own assistant, and that he had confidence in him and his ability and skill, that Dr Herbertson undertook to introduce him to his patients, and use his influence with his patients that they should continue to resort to him as their medical adviser. Nothing can be conceived more purely personal than that obligation.

I apprehend, therefore, that, as your Lordship pointed out, if—immediately on the completion of the contract and the payment of the price—Dr Macgregor, instead of taking up the practice for himself, had assigned the agreement to somebody else unknown to Dr Herbertson, the latter would have been quite entitled to say—"I decline to carry out and implement in favour of a stranger an obligation which I undertook only to a person I knew." He was not legally bound to introduce some-

body of whom he knew nothing to his patients as a medical adviser in whom they might have confidence, because he had undertaken to introduce to them a gentleman in whom he had perfect confidence himself. That seems to me sufficient to show the personal character of this agreement. It can make no difference that he is not asked to recommend a stranger to the old patients until after the lapse of thirteen years, and the introduction by others of two successive assignees. I agree with your Lordship that in following out the various clauses of the agreement they all have a personal character tending in the same direction. But the most material clause for that purpose appears to me to be that which I have mentioned. I am therefore of opinion that the Sheriff's interlocutor should be affirmed.

The Court dismissed the appeal and affirmed the interlocutor of the Sheriff appealed against.

Counsel for the Pursuer (Appellant)—Wilson, K.C. — D. Anderson. Agents—Fraser & Davidson, W.S.

Counsel for the Defender (Respondent)—Morison, K.C.—Macmillan. Agent—W. J. Forrester, Solicitor.

Wednesday, December 2.

FIRST DIVISION.

[Sheriff Court at Glasgow.

CLARK *v.* BEATTIE AND OTHERS.

Reparation—Wrongous Use of Diligence—Small Debt (Scotland) Act 1837 (1 *Vict. c.* 41), *secs.* 16 *and* 30.

B raised a Small Debt action against C, and employed N, a sheriff officer, to serve it. The summons was never really served upon C, but was served at the house of his mother, in which he did not reside. The execution of the service was filled up as if the summons had been duly served. A decree was obtained in absence, which was extracted by B, and in virtue of it an arrestment was lodged by N in the hands of C's employers. C thereupon applied for and obtained a rehearing of the case, with the result that the decree was recalled. C then brought an action of damages against B, and also against N, for wrongous use of diligence.

Held (1) that as the decree had been set aside, it and the diligence proceeding thereon were not protected by the Small Debt Act, section 30; (2) that the diligence was wrongous, and B liable in damages; but (3), *following Scott* v. *Banks*, 1628, M. 6016, that N, the sheriff officer, was not liable, as there was nothing in the decree to show it was taken in absence or was invalid.

The Small Debt (Scotland) Act 1837 (1 Vict. c. 41), sec. 16, provides regulations for the rehearing of cases where a decree has been pronounced in absence.

Section 30 enacts—"No decree given by any sheriff in any cause or prosecution decided under the authority of this Act shall be subject to reduction, advocation, suspension, or appeal, or any other form of review or stay of execution other than provided by this Act, either on account of any omission or irregularity or informality in the citation or proceedings, or on the merits, or any ground or reason whatever."

Malcolm Clark, tinplate worker, residing at 8 Henrietta Street, Scotstoun, Glasgow, raised an action against Andrew Beattie, draper, 11 Great Wellington Street, Glasgow, Thomas Nisbet, sheriff officer, 3 Henrietta Street, Partick, and John Bennett and Robert Hunter, cautioners for and with the said Thomas Nisbet as a sheriff officer, for damages in respect of wrongous use of diligence.

The pursuer averred—"(Cond. 2) In or about May 1907 the defender Beattie instructed the defender Nisbet to take out a Small Debt summons in the Small Debt Court, Glasgow, at the instance of the defender Beattie against pursuer's mother, pursuer, and pursuer's brother Archibald Clark, jointly and severally or severally, concluding for payment of £7, 1s. 6½d., being balance of an account alleged to be due by pursuer and his mother and brother to Beattie, and a summons was accordingly taken out by the defender Nisbet or his servant for whom he is responsible. Pursuer is not liable for said account or any part thereof. (Cond. 3) In said Small Debt summons the pursuer and his mother and brother were designed as 'all residing at 769 Dumbarton Road, Partick,' but pursuer was not residing there and never had resided there, which was well known to the defender Beattie and the defender Nisbet at the time the said Small Debt summons was served. (Cond. 4) Acting on the instructions of the defender Beattie, the defender Nisbet, or his servant, for whom he is responsible, pretended to serve said summons on the pursuer by leaving a copy thereof at the house of pursuer's mother at 769 Dumbarton Road, Partick, well knowing that pursuer did not reside there. Pursuer's mother explained that pursuer was not residing there, and never had resided there, and refused to take the service copy of said summons for pursuer, but notwithstanding this explanation and his own knowledge, the defender Nisbet, or his said servant, maliciously persisted in leaving said copy summons, and it was actually left by the sheriff officer on a table at pursuer's mother's house as aforesaid. The said copy never reached pursuer, and he had no knowledge of the proceedings until the arrestment after condescended on was effected. . . . (Cond. 5) Thereafter the defender Nisbet or his said servant filled up the execution of service on said summons in common form and returned the summons to Court. The case was called in the Small Debt Court at Glasgow on 30th May 1907, when decree passed in absence against pursuer's