The LORD PRESIDENT and LORD KINNEAR concurred.

LORD ARDWALL, who was sitting in the Division at the advising, gave no opinion, not having heard the case.

LORD M'LAREN was absent.

The Court pronounced this interlocutor:—

"Find that Mr M'Cabe and Mr Stewart were not validly elected as town councillors, and that the two vacancies thus occurring fall under subsection (*f*) of section 36 of the Town Councils (Scotland) Act 1900, and fall to be filled up in one or other of the methods prescribed in said section, and decern: Find no expenses due to or by any of the parties, and decern. . . ."

Counsel for Petitioner—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Respondents—D. Anderson. Agents—M'Neill & Sime, S.S.C,

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Wednesday, November 24.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

COLE (SPENCERS' TRUSTEE) *v.* HANDASYDE & COMPANY.

Contract — Assignation — Assignability — Delectus Personæ—Title to Sue.

A firm of oil merchants sold to manufacturers a quantity of black grease. The contract note provided, *inter alia*, that the grease was to be of usual good merchantable quality; that the price was to be £15, 15s. per ton on basis of 95 per cent. fatty matter soluble in carbon bisulphide, any excess or deficiency of 95 per cent. to be paid or allowed for; and that the minimum fatty matter was to be 88 per cent. The "terms" stated in the note were as follows:—"Cash in 14 days from shipment, less 2½ per cent. discount: The goods to be sampled by an independent sampler prior to shipment: Analysis to be made by Dr W. Gray of Liverpool, whose decision shall be final." In acknowledging receipt of the contract note the buyers added—"Please note, however, that all the grease is to be soft and seedy as sample in our possession."

The sellers having thereafter granted an assignment for behoof of creditors, the trustee thereunder proposed himself to fulfil the contract and called on the buyers to accept delivery, which they declined to do on the ground that the contract was unassignable. In an action of damages at the instance of the trustee they averred that the sellers were skilled in the trade whereas the pursuer was not, and pleaded "no title to sue."

Held—rev. judgment of Lord Mackenzie (Ordinary)—that the contract involved no *delectus personæ* and so was assignable, that the trustee therefore had a good title to sue, and plea *repelled.*

On 28th August 1908 Stewart Cole, C.A., London, trustee under an assignment for behoof of creditors dated 25th January 1908, granted in his favour by R. Knowles Spencer and Maurice Spencer, carrying on business there as oil and seed merchants and commission agents under the firm name of Knowles Spencer & Son, with consent and concurrence of the said R. Knowles Spencer and Maurice Spencer, brought an action against C. H. Handasyde & Company, Dean Oil Works, Dalkeith, and the said C. H. Handasyde, the only known partner thereof, in which they sought payment of (1) the sum of £83, 1s. 2d.; (2) the sum of £2500; and (3) the sum of £148, 6s. 8d., which sums he alleged to be due under certain contracts for the delivery of black grease entered into by Knowles Spencer & Son (the sellers) prior to their granting the assignment in his (the pursuer's) favour.

At the date of the assignment two of the contracts were fulfilled, the sums due thereunder being the sums first and third concluded for. No question was raised by the defenders as to the title of the pursuer to sue for payment of these sums. They objected however to his title to sue for the sum second concluded for, being £2500 damages for breach of the second contract, which was unfulfilled at the date of the assignment, and maintained that the contract was one involving *delectus personæ* and therefore unassignable.

The contract in question was as follows:—

"17th June 1907.

"We [*i.e.*, Knowles Spencer & Son] confirm having sold to you this day—

"*Quantity.*—Two hundred and fifty to three hundred (250/300) tons.

"*Goods.*—Black grease from cotton oil mucilage.

"*Quality.*—Usual good merchantable.

"*Price.*—Fifteen pounds fifteen shillings per ton, on basis of 95 per cent. fatty matter soluble in carbon bisulphide, any excess or deficiency of 95 per cent. to be paid or allowed for, minimum F.M. 88 per cent.

"*Packages.*—Good strong iron-bound barrels, seller's option to deliver in pipes at 7/6 per ton less.

"*Delivery.*—January to December 1908, as and when ready, f.o.b., London and/or Bristol, seller's option.

"*Terms.*—Cash in fourteen days from shipment, less 2½ per cent. discount. The goods to be sampled by an independent sampler prior to shipment. Analysis to be made by Dr Watson Gray of Liverpool, whose decision shall be final. Sampling and analysis fees to be divided between buyers and sellers.

"Each delivery to stand as a separate contract.

"Should strikes of workmen, fire, or other exceptional causes suspend or par-

tially suspend deliveries, such may be postponed until such interruption is removed.

"Any dispute arising from this contract is to be settled by arbitration in London in the usual way as soon as it may arise."

On receipt of the contract note Handasyde & Co. wrote to Knowles Spencer & Son, as follows:— "18th June 1907.

"Yours of 17th inst. received with contract note for 250/300 tons black grease, for 1908, which appears in order. Please note, however, that all the grease is *to be soft and seedy* as sample in our possession. . . ."

With regard to this contract the defenders averred—"(Ans. 4)—The contract with Knowles Spencer & Son is referred to for its terms. Messrs Knowles Spencer & Son were skilled in their trade, which is one requiring considerable technical knowledge. The pursuer had no contract with the defenders. He has no such knowledge of the business, and in conversation with the defenders admitted that he did not even know what black grease was. . . ."

They pleaded, *inter alia*—"(2) So far as the contracts were unfulfilled at the date of the trust deed, the pursuer has no title to sue."

On July 20, 1909, the Lord Ordinary (MACKENZIE), after a proof, the import of which appears from his opinion (*infra*), sustained the defenders' plea of no title to sue, and dismissed the second conclusion of the summons.

Opinion.—"Proof has been taken in regard to two questions in this case—(1) whether the executorial contract in question was assignable to the pursuer or not, and (2) whether it was cancelled in the knowledge or with the authority of the pursuer by Knowles Spencer & Son on 28th January 1908.

"To take first the question of the assignability of the contract. The law is that if the execution of a contract involves *delectus personæ* the trustee and creditors are not entitled to take it up. As Lord Neaves says in *Anderson* v. *Hamilton & Company*, 2 R. 355, at p. 363—'Where it is of the essence of the contract that the thing to be done requires special skill, genius, art, or even strict personal supervision, such a contract cannot be taken up by a trustee and creditors. . . . If the trustee of the insolvent party can arrange to take up the contract and carry it out as efficiently as the bankrupt could have done, well and good.' The test applied in the English case of *Jaeger's Company* v. *Walker & Son*, 77 L.T. 180, was whether the agreement was a 'personal' one, *i.e.*, one requiring a certain amount of skill, knowledge, or supervision. The decision of such a question depends on the true meaning and effect of the particular contract, as Lord Macnaghten points out in *Tolhurst*, A.C. 1903, 414. Lord Kincairney, who was the Lord Ordinary in *Grierson, Oldham & Company*, 22 R. 812, after reviewing the authorities, reached the conclusion that it was not competent for a party to a contract of the character of that libelled to substitute for himself as contractor some other person. The Lord Justice-Clerk in *Grierson's* case refers to *Boulton* v. *Jones* in 2 H. and N. 564, and says—'It is thus authoritatively decided that an assignee of a business cannot have effectually assigned to him the rights of the assignor in mutual contracts, so as to give the assignee a title to sue for enforcement of the obligations undertaken by the other party to the contract.' It was maintained that the law so stated means that no executorial contract can be assigned. This, however, could not be what was meant. Bramwell, B., in *Boulton* v. *Jones*, states the principle as it is stated by Lindley, Lopes, and Chitty, LJJ., in *Jaeger's* case—'When a contract is made in which the personality of the contracting party is or may be of importance, as a contract with a man to write a book or the like, or where there might be a set off, no other person can interpose and adopt the contract.' This is the law as stated by Lord Neaves in *Anderson's* case. It may be that in *Boulton's* case, as in *Robson & Sharpe*, 2 Barn and Ad. 303, the evidence of *delectus personæ* was slight, but the true question in each case is whether the agreement was personal or not. The House of Lords in *Tolhurst's* case recognised that the contract then under consideration was one capable of being assigned, and in the *International Fibre Syndicate*, 2 F. 636, *affd.* 3 F. (H.L.) 32, it was stated that contracts involving *delectus personæ* are not assignable. There was no suggestion that unless there was *delectus personæ* the contract could not be assigned.

"The question therefore which I have to consider is whether there was such *delectus personæ* in regard to the contract of June 17, 1907, that it could not be assigned.

"I assume for the purpose of the present case that Mr Cole is in as good a position as if he were a trustee in bankruptcy. It is he who tenders performance of the contract, and therefore it is not open to him to appeal to such decisions as that in the *British Waggon Company*, 5 Q.B.D. 149, in which the original contracting party was tendered to fulfil the contract. Mr Cole is not tendering Mr Knowles Spencer as the party who is to fulfil the contract. He is himself offering to perform the contract, and the case must be taken upon that footing. . . .

"The important clauses in the contract note were:—Quality—Usual good merchantable. Price—Fifteen pounds fifteen shillings per ton, on basis of 95 per cent. fatty matter soluble in carbon bisulphide, any excess or deficiency of 95 per cent. to be paid or allowed for. Minimum fatty matter 88 per cent. Delivery—January to December 1908, as and when ready, f.o.b. Bristol. Terms—Cash in 14 days from shipment, less 2½ per cent. discount. The goods to be sampled by an independent sampler prior to shipment. Analysis to be made by Dr Watson Gray of Liverpool, whose decision shall be final. Sampling and analysis fees to be divided between buyers and sellers. Each delivery to stand as a separate contract. Any dispute aris-

ing from this contract is to be settled by arbitration in London in the usual way as soon as it may arise.

"On receipt of the contract note Handasyde & Company wrote to Knowles Spencer & Son on 18th June, acknowledging receipt of the contract note and said the same appeared to be in order. They added, 'Please note, however, that all the grease is to be soft and seedy as sample in our possession.'

"The sample in the defenders' possession must refer to a type sample which Knowles Spencer & Son had sent them, and there seems no reason to doubt that this refers to the sample which had been sent on 31st May. Knowles Spencer & Son made no objection to the condition attached by the defenders, and must be held to have acquiesced in this as being a term of the contract. Under the contract Knowles Spencer & Son occupied the position of merchants, not brokers.

"From the evidence it appears that black grease is a bye-product in the process of manufacturing cotton oil. When the cotton seed is crushed the result is a dark brown crude oil. That is treated with caustic alkalies to draw off the clear oil, and there is left a mucilage or initial bye-product. The mucilage is treated with sulphuric acid in order to produce the second stage of the bye-product, which is black grease. Mr Handasyde has carried on business as an oil refiner and distiller of black grease for thirty-eight years. His works are at Dalkeith and Paisley. He is the only refiner of black grease in Scotland, and there are very few in England. The principal places of production of black grease are London, Hull, and Bristol. There is only a comparatively small production in Scotland. All the witnesses agree that the quality of the black grease varies very largely. The defenders' business is by distilling the black grease to separate it into its main constituent elements of stearine and pitch. Stearine is the valuable product, and the amount obtained depends upon the proportion of fatty matter in the black grease that is soluble in carbon bisulphide. The proportion of fatty matter is not, however, the only important matter. I think the evidence of the defender and his witnesses shows clearly that two samples of black grease that contain the same quantity of fatty matter on analysis may be of different values for distilling purposes. They may be of different quality, and though the language used by the different witnesses is different in describing the indications of good quality, they concur in saying that an expert judges by the feel and look of the grease. Dr Watson Gray, the analyst, says a buyer may be better off with 88 per cent. of fat than with 90 per cent. if the grease with 90 per cent. is thick bad grease. The expression "soft and seedy," used by Mr Handasyde in his letter of 18th June is, according to Dr Watson Gray, a known expression in the trade, though some of the witnesses were not acquainted with it, and the evidence is conflicting as to what these expressions represent.

"The defender bought his black grease from manufacturers, and from manufacturers only, with one exception. He had no dealings with brokers, either on the Baltic Exchange in London or elsewhere. The one exception was Mr Knowles Spencer, who had been a manufacturer, and who had introduced himself to Mr Handasyde as a merchant in this line by writing on 27th July 1905.

"Mr Knowles Spencer had technical knowledge and skill as regards black grease. It is plain that the brokers in the trade, to judge from Mr Bayley, profess and have none. The defender says he did business with Mr Knowles Spencer because he had this knowledge and skill, and that he relied on his exercising it on his behalf. It is admitted that the pursuer Mr Cole has no technical knowledge of black grease.

"The position taken up by Mr Knowles Spencer in the witness-box was that he covered himself by making a contract with manufacturers in terms similar to the contract he made with the defenders; that it was not his business to see that the deliveries of black grease extending over 1908 corresponded with the type sample sent by him to the defenders; and that this was the business of the original sellers. I do not think Mr Knowles Spencer can take up this position, and that for two reasons—(1) because Knowles Spencer & Co. were under the contract in the position of principals, not agents; it was they who were bound to the defenders; and (2) because Mr Knowles Spencer admitted that he never said anything about the type sample to the sellers. Nor did he disclose to Mr Handasyde the name of his seller. As he explains it was not his interest to do so. Mr Knowles Spencer's view is that it was nobody's business to see that the deliveries corresponded with the sample, or at all events that he had no responsibility.

"In my opinion the contract of 17th June was a contract on a type sample for future delivery, and there was a duty on Mr Knowles Spencer to see that the bulk corresponded with the sample. If this is so, this duty obviously could not be performed by Mr Cole, the trustee. The only reply that counsel for the pursuer made to this view of the case was that Mr Handasyde made no such case in the witness-box. I may say that Mr Handasyde did not make a good witness. He seemed unable to grasp the points that were put to him, and certainly did not appreciate what were the good and bad points in his case. I have no reason to doubt that he was honest in his evidence. Some of his answers can certainly be turned against him, as, for example, when he said that in examining samples Mr Knowles Spencer did so for his own protection, and that he (Handasyde) was doing so for his. At a later stage, however, he added that Mr Knowles Spencer was always to protect him, and I think the letters show that Mr Knowles Spencer

regarded that he had a duty to protect Mr Handasyde.

"The question I have to decide is whether there was *delectus personæ* as regards the contract of 17th June 1907. In my opinion there was, for the reasons already stated. In this view of the case it is not necessary to discuss in detail the evidence which was led after the case was originally heard in regard to the custom as regards other contracts between the parties. I may, however, state my opinion generally as regards the points raised. As already explained the contracts were either 'spot,' for delivery within a definite short period (Mr Knowles Spencer put it at fourteen days usually), or 'forward' contracts, in which case the consignments were delivered as and when the black grease was manufactured. The samples fall substantially under the three categories put to and admitted by Mr Handasyde in cross-examination, viz.—(1) Samples sent for a bid before the contract was made; these were open samples taken by the seller. In the case of 'spot' contracts the sample was from bulk, and in the case of 'forward' contracts the sample was a type sample. (2) Samples from bulk after the contract had been made and prior to delivery; these were also open; were taken generally by an independent sampler, though sometimes by the seller; and were sent for the purpose of avoiding questions whether the bulk was up to the contract conditions. I think these samples were only sent when the contract expressly so provided, *e.g.* in the contract of 17th May 1906; there was no such stipulation in the contract in question. And (3) samples taken in terms of the contract after the contract was made and prior to the delivery of each instalment; these were sealed and were invariably taken by an independent sampler in conformity with instructions, of which a copy is produced, sent by Mr Handasyde. It is not proved that Mr Knowles Spencer actually supervised the drawing of the samples. His experience would, however, be of use in the selection of a sampler, and also in taking measures to secure that the sampler took his samples with proper care. In the particular contract in question I think he by its terms undertook a duty to see that the deliveries corresponded as regards quality with the sample he had sent Mr Handasyde. The important point here is that analysis alone, according to Dr Watson Gray's evidence, would not show whether the black grease tendered was up to contract. Mr Knowles Spencer must be taken to have known what Mr Handasyde meant by 'soft and seedy,' and it was only by the look and feel of the grease that it could be ascertained whether a particular parcel answered this description. This was not a contract in which samples of the class second above referred to were sent, which would be examined by Mr Handasyde, and therefore the answer is not open to the pursuer that Mr Handasyde did not rely on Mr Knowles Spencer seeing that the deliveries corresponded with the sample.

"It cannot be left out of view that Mr Knowles Spencer's knowledge was of some importance as regards the casks in which the consignments were sent. The letters show there were complaints by Mr Handasyde as regards these. Mr Knowles Spencer cannot take up the position that he fulfilled his duty by merely calling in an independent cooper. The point was made by the defender that it was of importance to him to have a man of Mr Knowles Spencer's skill and knowledge to deal with if a dispute arose as to quality, because the matter might be settled without recourse to arbitration. The settlement of a dispute does not depend so much on technical knowledge as on temperament, but Mr Knowles Spencer admits that his knowledge and skill would be of use in settling a dispute before proceeding to arbitration. This element, therefore, cannot be left out of sight. I should also notice an argument for the defender that it was of importance for him to have a man of skill to select the source from which the black grease was to be got. This, however, does not seem to me to bear on the question of *delectus personæ* as regards the execution of a contract in such terms as the present. So far as regards this point, grease from any manufacturer which satisfied the terms of the contract would be a good delivery.

"For the reasons already stated, I am of opinion that there was *delectus personæ* as regards this particular contract.

"The pursuer, however, contends that before the date of the assignation Mr Knowles Spencer had made a covering contract with Messrs Robinson & Company of Bristol for the delivery of their whole make during the year 1908, in terms, as regards quality and proportion of fatty matter, which were practically the same as that he had made with the defender; that even assuming the defender relied on the skill and knowledge of Mr Knowles Spencer, this had been exercised before he divested himself of his estate; and that, accordingly, all that Mr Cole, as his trustee, had to do was to make delivery to Mr Handasyde of the parcels as and when they were tendered by Messrs Robinson. I cannot find that the pursuer was under any obligation to deliver to Mr Handasyde the grease under Robinson's contract. Mr Cole indeed says he was not. 'I would have been quite entitled to substitute another make if it had suited me. I see no reason why I should not have bought it on the market. As long as I get good merchantable grease in the market I could have fulfilled the contract.' The result of this reasoning would be to hold that Mr Handasyde, who had contracted with a man of skill, is bound by his contract to accept delivery of what is tendered by the pursuer, who, as he admits, has no technical knowledge of the subject-matter of the contract. Mr Cole could form no opinion on the question whether the deliveries were 'soft and seedy as sample in our possession.' What the result would have been if Mr Cole had written to Mr Handasyde, stating that the contract with him was covered by a contract with Messrs

Robinson, and undertaking to deliver the grease tendered by Messrs Robinson and no other, it is not necessary to consider. This was never done. Again, it is not necessary to decide what the result would have been if Mr Cole had tendered Mr Knowles Spencer to fulfil his contract. He did not do so. What he offered was to fulfil the contract himself. It is quite consistent with the position taken up by Mr Cole that there is no mention on record of the name of Messrs Robinson. The conclusion which I reach is that the contract was not assignable, and that the pursuer has no title to sue. . . . [*His Lordship then dealt with the question of cancellation, on which the case is not reported.*] . . . ."

The pursuer reclaimed, and argued—The contract was assignable, for there was no *delectus personæ* involved. To make a contract non-assignable there must be reliance on the personal skill of the other contracting party, and that was absent here. A mere preference for a particular individual was not enough. The contract did not involve (as the respondents contended) such work as could only be performed by an expert. What it stipulated for was delivery of grease of a certain quality which should comply with a certain analysis, and such delivery could quite well be made by the trustee. This was not a contract of service as the Lord Ordinary seemed to think, but a contract of sale, and there was no stipulation that the sellers were to be the sole judge of the quality of the grease. [Counsel for the reclaimer was proceeding to deal with the evidence when the Court called on counsel for the respondents.]

Argued for respondents—The contract involved *delectus personæ*, for its fulfilment depended on the proper selection of a peculiar kind of grease. For this selection the respondents relied on the knowledge and skill of the assignor. That was what he was paid for. It was enough to infer *delectus personæ* that there was skill relied on however slight, and the respondents could not be expected to rely on the assignee, who had not even slight skill in regard to the selection of grease. The evidence showed that the respondents had relied on Mr Knowles Spencer's personal skill and knowledge. Reference was made to the following authorities—*Anderson* v. *Hamilton & Company*, January 22, 1875, 2 R. 355, 12 S.L.R. 267; *Grierson, Oldham, & Company, Limited* v. *Forbes, Maxwell, & Company, Limited*, June 27, 1895, 22 R. 812, 32 S.L.R. 601; *International Fibre Syndicate, Limited* v. *Dawson*, February 20, 1900, 2 F. 636, 37 S.L.R. 451, *affd.* May 9, 1901, 3 F. (H.L.) 32, 38 S.L.R. 578; *Asphaltic Limestone Concrete Company Limited* v. *Glasgow Corporation*, 1907 S.C. 463, 44 S.L.R. 327; *Robson and Sharpe* v. *Drummond*, (1831) 2 B. & A. 303; *Boulton* v. *Jones*, (1857) 2 H. & N. 564; *British Waggon Company* v. *Lea & Company*, (1880) L.R., 5 Q.B.D. 149, *per* Cockburn, C.J., at p. 153; *Jaeger's Sanitary Woollen System Company, Limited* v. *Walker & Sons*, (1897) 77 L.T.R. 180; *Tolhurst* v. *Associated Portland Cement Manufacturers*, (1900) [1903] A.C. 414.

LORD PRESIDENT—The pursuer in this case is one Stewart Cole, who is the assignee in England of Knowles Spencer & Son. It does not matter for the moment whether he is assignee in bankruptcy or assignee under a voluntary arrangement, because there is no question that he is suing here as the assignee of Knowles Spencer. He is suing upon a contract which he says was assigned to him, and the contract was entered into between Knowles Spencer and the defenders Handasyde & Company, who are distillers of an article known as black grease. Knowles Spencer was a person who used to enter into contracts with Handasyde for the supply of the black grease. He was not a manufacturer of black grease, and that was perfectly well known to Handasyde; he therefore was in one sense of the word a broker, although as a matter of fact the contracts entered into were not upon the face of them broking contracts, that is to say, they were contracts in which Knowles Spencer assumed the place of principal and became bound to deliver the goods which he therein contracted to deliver, but nevertheless it was quite well known that the black grease was an article which Knowles Spencer would have to procure elsewhere. I will look at the contract in a moment, but the defence which is made to the action at the instance of Cole, who proposes to tender black grease and to get paid for it, is that Handasyde is no longer bound by the contract because the contract itself is unassignable. The Lord Ordinary has held that it is unassignable, and that is the only question brought up by the reclaiming note before your Lordships.

I have not been able to follow the reasoning of the Lord Ordinary, but for myself it seems to be a very clear case. Nobody doubts that the law as to whether a contract is assignable or not depends upon whether, as the expression goes, there is the element of *delectus personæ* in it or not. Now I think by way of illustration there are three stages to be taken. The highest and easiest example of a contract in which there is *delectus personæ* is where the contract is one for a personal service of a peculiar nature. Nobody supposes that in a contract with A or B to paint a picture or write a book it is possible for A or B to say—"I will get somebody else to paint you the picture or write you the book, and that must satisfy you, and you must pay me the price." Next you have another class where the *delectus personæ* is not so clear. I mean the case of manufactured articles. It may quite well be that an article is of such a character and quality, and the reputation of the manufacturer such that when you contract for a thing from so-and-so you really imply that the article is to be made by so-and-so. For instance, a contract for a gun from Purdie would not be well implemented by giving you a gun bought in the ordinary market

in Birmingham. There are of course cases where it is not very easy to determine on which side the matter falls, but these are cases where the difficulty lies in the application of the law to the particular circumstances. But when we come away from manufacturers, and this is the case here, and when you come to a contract with a person who does not himself manufacture, and does not profess to—a contract for goods of a certain description (it really does not matter whether at this present moment these goods have been made or not)—then it seems to me that you may go on and contract in one form or another; you may either say "I contract with you that you shall supply me with goods as to which you shall do something, or as to which you shall satisfy yourself in such-and-such a way," and then you really incorporate into your contract for the goods a contract also for the personal services of the person with whom you contract. Or, on the other hand, you may contract for an article and then stipulate that the article is to be of a certain standard which is specified in the contract and say no more. It seems to me that in this latter case the whole element of *delectus personæ* is gone.

Now I turn to the contract in question. It was made upon the 17th of June 1907, and is in this form—"We confirm having sold you this day," the quantity of goods, the designation of them, the quality "usual good merchantable." Then follows a stipulation as to the amount of fatty matter that is to be in the grease, and then it is provided that the goods are to be sampled by an independent sampler, and that analyses are to be made by Dr Watson Gray. There is nothing left after that for the party supplying the goods to do except to supply the goods. If they come up to these terms then it is good delivery; if they do not then it is bad. It was said that that contract was added to so far by another stipulation which was contained in the letter accepting that proposition, which said, "Please note, however, that all the grease is to be soft and seedy, as sample in our possession." There may be a question as to whether that was an adjected term which was agreed to or whether it was merely a recommendation as to which the other party said he would do his best. I will assume for the purpose of this argument that it is a firm term of the contract, but in my view that makes no difference, because if it is a firm term of the contract, and if the grease when proffered is not soft and seedy, then it is not good delivery. If it is soft and seedy it is good delivery, and there again there is nothing left for Knowles Spencer & Son to do as affecting the contract. It is said that they were very good judges and they would be sure to select grease that was soft and seedy. Probably they would do so for their own protection, for if they did not select it they would know that it would be rejected, but what they did would not alter the contract. If as a matter of fact the grease when delivered was not in the view of the buyer soft and seedy, he would be entitled to raise that question whatever Spencer & Son said.

Accordingly I am unable to see how in this there is any question of *delectus personæ* at all. It seems to me that the contract is assignable, and as that is the only question raised at this stage I think the Lord Ordinary's judgment on that matter must be recalled.

LORD KINNEAR—I agree. The principle which we call *delectus personæ*, as I understand it, applies when a person is employed to do work or to perform services requiring some degree of skill or experience, and it is therefore to be inferred that he is selected for the employment in consequence of his own personal qualifications. Such a contract is not assignable by him to a third person, who may or may not be competent for the work. But this is not a contract of that nature at all. It is a contract for the purchase of a certain commodity, and although we are told that the seller was specially skilled to judge of the qualities of the commodity in question, the contract refers nothing to his skill or experience, but, on the contrary, provides for inspection, and lays down a totally different standard according to which the goods are to be delivered and accepted. I quite agree with your Lordship that it makes no difference whether we assume that the proviso in the letter of 18th June expresses an additional term of the contract or whether it does not. If it does, then the standard to which the letter refers, like that provided by the original contract, excludes the idea of reliance on the special skill of the pursuer in the selection of goods, since it provides for the correspondence of the goods supplied with a sample in the possession of the buyers. I agree that there is no room for the principle of *delectus personæ*, and therefore the objection to the pursuer's title cannot be sustained.

LORD JOHNSTON—I think the Lord Ordinary's mistake commences at an early stage in his judgment. He says—"The defender bought his black grease from manufacturers and from manufacturers only with one exception. He had no dealings with brokers either on the Baltic Exchange in London or elsewhere. The one exception was Mr Knowles Spencer, who had been a manufacturer, and who had introduced himself to Mr Handasyde as a merchant in this line by writing on 27th July 1905. Mr Knowles Spencer had technical knowledge and skill as regards black grease. It is plain that the brokers in the trade, to judge from Mr Bayley, profess and have none. The defender says he did business with Mr Knowles Spencer because he had this knowledge and skill, and that he relied on his exercising it on his behalf. It is admitted that the pursuer Mr Cole has no technical knowledge of black grease."

Now I cannot, of course, say what reliance the defender did place on Mr Knowles Spencer's experience and technical skill, but I see no grounds for holding that the fact of Mr Knowles Spencer's assumed ex-

perience and of Mr Handasyde's alleged reliance on its exercise on his behalf in any way affect the plain terms of the contract. It is this false departure which leads the Lord Ordinary to say that "the contract of 17th June was a contract on a type sample for future delivery, and there was a duty on Mr Knowles Spencer to see that the bulk corresponded with the sample." I am by no means satisfied that this was a sale on sample, but assuming that it was, his Lordship goes on to say that this duty of seeing that the bulk corresponded with the sample was one which could obviously not be performed by Mr Cole, the trustee.

Now it seems to me that if all the Lord Ordinary meant was that it was Mr Spencer's duty to see that he delivered up to sample, this was quite sound, for without doing so he could not implement his contract. But this could not lead the Lord Ordinary to his conclusion. What the Lord Ordinary, led away by his original mistaken premise, means, is that it was Mr Spencer's duty to exercise the functions of a specialist on defenders' behalf in seeing that the goods delivered were up to sample. If he does not mean that, he could not reach his conclusion that this contract involves a *delectus personæ* which deprives Mr Spencer's trustee of any title to sue. But for this there is no foundation in the contract.

Accordingly, I agree that the Lord Ordinary's interlocutor should be recalled so far as it sustains the plea of no title to sue.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor and repelled the defenders' plea of no title to sue.

Counsel for Pursuer (Reclaimer)—Munro—Hossell Henderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Defenders (Respondents)—Constable, K.C. — Carmont. Agents—Balfour & Manson, S.S.C.

HIGH COURT OF JUSTICIARY.

Thursday, September 9.

(Before Lord Ardwall.)

LOWSON *v.* H. M. ADVOCATE.

Justiciary Cases — Bail — Appeal—Competency -Committal for Further Examination—Refusal of Bail—Appeal by Accused to High Court of Justiciary—Bail (Scotland) Act 1888 (51 *and* 52 *Vict. cap.* 36), *sec.* 5.

The Bail (Scotland) Act 1888, sec. 5, enacts — "Where an application for bail after commitment until liberation in due course of law is refused by any magistrate, or where the applicant is dissatisfied with the amount of bail fixed, he may appeal to the High Court of Justiciary, and the said Court may in its discretion, order intimation to the Lord Advocate; and where an application for bail is granted by any magistrate, whether before or after commitment until liberation in due course of law, the public prosecutor, if dissatisfied with the decision allowing bail, or with the amount of bail fixed, may appeal in like manner, . . . provided always that . . . every appeal shall be disposed of by the said High Court of Justiciary, or any Lord Commissioner thereof in Court or in Chambers, after such inquiry and hearing of parties as shall seem just. . . ."

An accused was committed to prison for further examination by the Sheriff-Substitute and his application for bail was refused. The accused appealed against this refusal to the High Court.

Held (*per* Lord Ardwall), dismissing the appeal, that an appeal was only competent to an accused where he had been committed until liberation in due course of law, and not where he had merely been committed for further examination.

Justiciary Cases—Nobile Officium—Bail—Petition for Bail to the High Court of Justiciary—Application to Single Lord Commissioner of Justiciary Sitting in Chambers—Competency.

Held (*per* Lord Ardwall) that the jurisdiction of the High Court of Justiciary to entertain, in the exercise of its *nobile officium*, a petition for bail which had been refused in an inferior Court, could not be exercised by a single Lord Commissioner of Justiciary sitting alone, but only by the Court sitting with a quorum of three Judges.

The Bail (Scotland) Act 1888 (51 and 52 Vict. cap. 36) enacts—Section 2—". . . From and after the passing of this Act all crimes and offences, except murder and treason, shall be bailable, and any magistrate having jurisdiction to try the offence or to commit the accused until liberated in due course of law may henceforth, at his discretion, on the application of any person who has been committed until liberated in due course of law for any crime or offence, except murder or treason, and after opportunity shall have been given to the prosecutor to be heard thereon, admit or refuse to admit such person to bail. . . ." Section 5 is quoted *supra in first rubric.* Section 8—"Nothing in this Act contained shall affect the right of the Lord Advocate or the High Court of Justiciary to admit to bail any person charged with any crime or offence."

On 6th September 1909 Francis Lamond Lowson was arrested under a warrant of the Sheriff on a charge of attempted subornation of perjury, and was committed to prison. On the following day he presented an application to the Sheriff of the Lothians and Peebles at Edinburgh to be liberated on bail. This was opposed by the Crown, and was eventually refused by the Sheriff-Substitute (ORR).