

Friday, July 10.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

BALLACHULISH SLATE QUARRIES,
LIMITED v. GRANT.

*Contract—Obligation in Restraint of Trade
—Interest to Enforce Agreement in Restraint—Medical Practitioner.*

By an agreement entered into between a doctor of medicine and the employers of about 600 workmen in B., which was a village in a remote district, the doctor became bound to give professional attendance to the employees and their families at a fixed salary payable by the employers, he being at liberty to hold local appointments, and to practise in the district, but "only during the tenure of his appointment as medical officer" to the employers. The employers by arrangement with their workmen made deductions from their wages for the payment of the doctor's salary. The agreement between the employers and the doctor was terminable upon one month's notice on either side, and in the event of either party giving notice it was agreed that the doctor should "then discontinue practice in the district." When this agreement had been acted upon for two years the employers gave notice of termination thereof. After receipt of the notice the doctor intimated to the employers that he had decided to continue to reside in the village of B. and practice his profession. The employers then raised an action against the doctor for declarator that the defender's right to practice his profession in the village of B. had been lawfully terminated, and for interdict against his practising in the district. The defender averred that at a mass meeting, attended not only by the pursuers' employees "but by practically the entire population," he had been unanimously requested to remain in the district. He further averred that a medical committee, unanimously elected at a mass meeting of the pursuers' employees, had given notice on their behalf that they would not allow any deductions to be made from their wages on behalf of any doctor who was not appointed by themselves, and that they had appointed the defender as their medical officer and requested him to practise his profession amongst them and their families. The defender pleaded that as the pursuers' authority to arrange for medical attendance for their employees had been withdrawn, and as they were truly trustees for their workmen in the appointment of a medical officer, they had no interest or right to enforce the restriction, and that it was against public policy. *Held (aff. judgment of Lord Kyllachy, Ordinary—diss. Lord Young)* that the defences were irrele-

vant, and that the pursuers were entitled to declarator and interdict as concluded for.

Process—Appeal—Appeal to House of Lords—Execution Pending Appeal—Interdict.

An agreement was entered into between a doctor and the employers of a number of workmen in a remote district, under which the former acted as medical officer among the employees of the latter at a fixed salary, under certain conditions as to cessation of practice in the district by the doctor on his ceasing to hold the employers' appointment. In an action of declarator and interdict at the instance of the employers against the doctor to prevent his continuing to practice in the district after the termination of his engagement with them, the pursuers were successful, and the defender was interdicted from practising his profession in the district in question. The defender having given notice of appeal to the House of Lords, the pursuers presented a petition for interim execution. The defender alleged that he held public appointments in the district, and that if interim execution were granted it would be impossible to reinstate him in the event of his appeal being successful. *Held* that the pursuers were entitled to interim execution, but extract of decree superseded for two months to allow the defender to make arrangements.

This was an action raised on 2nd August 1902 at the instance of the Ballachulish Slate Quarries Company, Limited, against Lachlan Grant, Doctor of Medicine, West Laroeh, Ballachulish, in which the pursuers concluded for declarator that the defender was bound from and after 4th August 1902 to discontinue practice as a doctor of medicine in the village or district of Ballachulish, and further for interdict against the defender "from carrying on the practice of a doctor of medicine in the said village or district of Ballachulish, and in particular from acting as a medical practitioner or surgeon in any manner of way to the employees of the pursuers and their families, and the old men who had previously been employees of the pursuers, and their families, in said village or district of Ballachulish."

In August 1900 an agreement was entered into between the pursuers' company as first party and the defender as second party, which provided as follows:—"First, The second party shall when required give professional attendance and provide medicine to all employees employed at the Ballachulish Slate Quarries' works, and to their families, in consideration of which the first party shall pay to the second party a fixed salary of Two hundred and seventy pounds sterling per annum, to be paid in eight equal instalments. Second, The term of the second party's engagement shall commence as at 4th August 1900, and shall cease at any time upon one month's notice being given in writing by either

party to this agreement. . . . *Sixth*, The second party shall be allowed to accept of any local appointments, such as parish council, friendly society, &c., which appointments he will hold only during the tenure of his appointment as medical officer to the first party, and he shall also hold any other practice in the immediate locality on the same understanding. . . . *Eighth*, In the event of either party giving notice of the termination of this engagement, which will be sufficiently effected by a notice in writing sent by registered letter signed in the case of the first party by the secretary of the company, the second party shall then discontinue practice in the district without further formal warning or process of law." . . .

The defender entered upon the duties of his office in August 1900, and continued to occupy the position for about two years.

On 3rd July 1902 the pursuers gave notice to the defender that the agreement would terminate at the end of one month, viz., on 4th August 1902.

After receipt of the pursuers' notice the defender intimated that he had decided to continue to reside and practice his profession in Ballachulish.

In the present action the pursuers averred—" (Cond. 2) The pursuers have a very extensive business at Ballachulish, and employ about six hundred men at their quarries there. For over forty years the lessees of the said quarries have been in use to make arrangements for the medical attendance of their workmen, and for that purpose the pursuers entered into the minute of agreement (referred to above) with the defender. (Cond. 10) On 31st July 1902 the directors, after some negotiations, appointed another medical man to take the place of the defender on 4th August 1902 at a salary of £270 per annum, but owing to the illegal conduct of the defender in persisting to practice in the district or village of Ballachulish the pursuers have not been able to place the new doctor appointed by them in the position they have agreed to give him."

The defender averred—" (Stat. 4) After it became known in the district that the pursuers' directors had terminated the defender's appointment there was general and widespread indignation, and on 8th July a mass meeting of the pursuers' employees and others was held at Ballachulish, when resolutions were unanimously adopted expressing regret at the dismissal of defender, respectfully requesting the directors to reconsider their decision, and expressing regret that the workmen had had no voice in the matter. (Stat. 6) As the directors adhered to their resolution another mass meeting was held on 15th July, which was attended not only by the quarry workers but by practically the entire population, including landed proprietors, clergymen, and other influential residents in the district. The defender was unanimously requested by this meeting to remain in the district, and a medical committee of the quarrymen, which had been reconstituted at said meeting, passed the

following resolution, which was also unanimously approved of by the said mass meeting, and signed by all the members of committee and communicated to the pursuers —' We, the medical committee unanimously elected at a mass meeting of the employees of the Ballachulish Slate Quarries, Limited, on 15th July 1902, having learned with extreme surprise and regret that the petition signed by over 400 names, and the resolution of the employees in favour of Dr Grant, have been ignored by the directors, and that they still insist in terminating his agreement, do hereby reserve to ourselves the right of appointing our own medical officer, and hereby give notice on behalf of the employees that they will not allow any deductions to be made from their wages on behalf of any doctor who is not appointed by us.' At the same meeting the committee nominated defender as their medical adviser. (Stat. 9) The defender decided to accept the said appointment, and to accede to the unanimous public demand that he should continue to practice his profession in Ballachulish and district. Moreover, he holds many public appointments in the district, including those of medical officer appointed by the Government under the Factory Acts, Poor-law medical officer under the Parish Council, medical officer to the Lettermore Granite Quarries, medical officer to the Foresters' Friendly Society, Ancient Shepherds' Friendly Society, Friendly Society of Rechabites, and others. It was impossible for defender to terminate his contracts with all these public bodies without occasioning much public inconvenience and incurring considerable pecuniary obligations. (Stat. 11) The directors of pursuers' company are all non-resident. For a long time past the pursuers have persuaded their employees to sign an agreement authorising the pursuers to make a deduction from the weekly pay of each employee for 'the sums to be paid by you (i.e., the pursuers) on our behalf for medicine and medical attendance.' . . . (Stat. 12) The pursuers have no mandate from the workmen to employ any medical adviser whomsoever on their behalf, or to prevent defender practising in the district, and no obligation rests on the pursuers to provide medical attendance for their workmen. Even if the pursuers appoint a medical officer they cannot compel their employees to consult him."

In answer to these averments the pursuers stated that all the appointments mentioned, except the Lettermore Granite Quarries, were held by the defender's predecessor, who terminated all these contracts on his retirement. They also stated as follows:—"The pursuers have a substantial interest in the appointment of the medical officer who attends to their workmen, and for over forty years the lessees of the Ballachulish Quarries have been accustomed to appoint a medical officer for the village and district of Ballachulish. The pursuers have a substantial interest in seeing that their workmen obtain competent medical attendance from a medical

man in whom they have confidence. The work conducted at the quarries, namely, blasting, quarrying, &c., is of a hazardous nature, and the pursuers' sole aim in contracting with their medical man (for whose salary of £270 they are responsible) is to secure efficient medical attendance to their employees and their families."

The pursuers pleaded—“(1) The pursuers having right to terminate the defender's appointment in terms of the agreement condescended upon on giving him one month's notice in writing, and such notice having been given, the pursuers are entitled to decree in terms of the declaratory conclusions of the summons. (2) The defender having intimated that he is to disregard the said termination of his appointment and to remain in practice at Ballachulish, interdict should be granted as craved. (3) The defender having in breach of his obligation in said agreement persisted in practising in the district of Ballachulish, the pursuers are entitled to decree in terms of the conclusions of the summons, with expenses. (4) The defences being irrelevant ought to be repelled, with expenses.”

The defender pleaded—“(3) The defender is entitled to absolvitor, in respect (a) that pursuers' authority to arrange for medical attendance for their men has been absolutely withdrawn; (b) that consequently they have no title or interest to maintain the action; and (c) that the restraint in the agreement founded on is against public policy. (4) The pursuers being only trustees for their workmen in the appointment of a medical officer, and the workmen having unanimously passed and communicated to the pursuers their resolution that the defender is to continue as their medical adviser, the action of the directors to prevent him from doing so is *ultra vires*, and the action should be dismissed.”

On 30th December 1902 the Lord Ordinary (KYLLACHY) decerned against the defendef in terms of the conclusions of the summons.

Opinion—“The defender in this case was in August 1900 appointed by the pursuers as their medical officer in connection with their quarries at Ballachulish. His duties were, *inter alia*, to give medical attendance to the men engaged at the quarries and to their families, and also to old men who had been previously employed at the quarries and to their families. His salary, for which the pursuers became responsible, was to be £270, and he was allowed in addition to accept other local appointments, and to practise in the district. But it was an express term of the contract of employment, which was embodied in a formal agreement, that he should hold any such appointments only during his tenure of office under the pursuers, and that upon the termination of his engagement (which might take place at the instance of either party at a month's notice) he should discontinue practising in the district without any further warning or process of law.

“The pursuers lately, for reasons which it is unnecessary to consider, terminated the defender's appointment, and appointed

another person as his successor. And the question now is whether the defender can, notwithstanding the terms of his agreement, continue to carry on a medical practice in the district. He has apparently resolved to do so, and the present action is the result.

“There is no dispute as to the material facts. Nor is it disputed that if the defender had engaged himself on the same terms, say as assistant to some medical practitioner in the locality, the stipulation in question would have been lawful and might be enforced. But it was contended at the recent discussion that the pursuers not being themselves medical practitioners, they had no interest to enforce such a stipulation.

“Now, as to the pursuers' interest to make the stipulation, I am unable to entertain any doubt. It appears to me, in the admitted circumstances and having regard particularly to the known situation and character of the district of Ballachulish, that the pursuers had a material and quite legitimate interest to make it a condition of the defender's employment that if he ceased to be their salaried officer he should not compete with his successor for appointments or practise within the district. The stipulated restriction, if observed, could not fail to materially help the pursuers in obtaining a good man as the defender's successor; and without such a restriction it was to be anticipated as at least probable that the defender if he became popular might become master of the situation, and able in a question with the pursuers to dictate his own terms.

“It was, however, argued that admitting such to be the position when the agreement was made, the pursuers' interest to make the agreement was a different thing from their interest now to enforce it; and the suggestion seemed to be that, assuming the defender's averments, enough now appeared to exclude the continuance of the pursuers' interest. It was said, in particular, that the body of pursuers' workman, as also a great part of the population (such as it is) outside the quarries are resolved, unless they can keep the defender, to have no medical attendant of the pursuers' selection; and that accordingly there has thus arisen a change of circumstances which excludes for the future all interest on the pursuers' part in the medical arrangements of the locality. I am not, however, able to assent to that argument. It may be doubtful—perhaps more than doubtful (for the reasons expressed in the case of *Elves v. Croft*, 24th June 1850, 10 C.B. 241)—whether if a contract of this kind is lawfully made there can afterwards be a question raised by one of the parties as to the interest of the other party to enforce it. But waiving in the meantime that point of law, it appears to me to be a conclusive answer to the defender's argument that the position of matters which now exists, and on which he (the defender) founds, is a position resulting from his own breach of contract, and on which therefore he cannot found. It would be strange indeed if he could be permitted

to do so. For it is at least possible (and I should think highly probable) that if he performed his contract and went away the situation would very soon, if not immediately, right itself—doing so just in the way which the parties contemplated when they made the stipulation in question a term of the defender's employment.

"On the whole, therefore, I see no sufficient grounds for refusing the pursuers decree in terms of their summons. No question was raised as to the precise scope of the decree asked, the parties being, no doubt, satisfied that what is called 'district' of Ballachulish is for the purposes of the question between them a locality sufficiently well defined. The pursuers must also have their expenses."

The defender reclaimed, and argued—The agreement founded on was in restraint of professional freedom, and in order that it should be enforceable it was necessary that consideration should have been given for it—*Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Company*, (1894), A.C. 535, Lord Herschell, pp. 541, 542; *Stewart v. Stewart*, June 16, 1899, 1 F. 1158, 36 S.L.R. 787. It was also necessary that the party seeking to enforce the stipulation should have an interest in doing so—*Elves v. Croft* (1850), 19 L.J.C.P. 385; *Rogers v. Maddocks*, (1892), 3 Ch. 346. In the present case no consideration had been given by the pursuers, and they had no interest to restrain the defender. They could not practice medicine themselves. A medical officer holding appointments under the Government and under the Parish Council such as those held by the defender could not be dismissable at the pleasure of the largest employer of labour in the parish. The restraint which the pursuers sought to enforce was against public policy.

Argued for the respondents—In a question between the parties there was sufficient consideration given by the pursuers in the fact that the defender was taken into their employment and received his salary, and the pursuers had a legitimate interest in securing the services of a good medical man for their employees, which could not easily be obtained in the remote country district in question but for the advantages which they had to offer. The defender having accepted these advantages, under his contract with the pursuers was not entitled to continue in the enjoyment thereof in breach of that contract. The defender had subjected himself to a legitimate restraint which the pursuers were entitled to enforce—*Watson v. Neuffert*, July 14, 1863, 1 Macph. 1110; *Underwood & Sons v. Barker*, (1899), 1 Ch. 300; *Menzies v. Commissioners of Caledonian Canal*, June 7, 1900, 2 F. 953, 37 S.L.R. 742; *Macintyre v. MacRaild*, March 13, 1866, 4 Macph. 571, 1 S.L.R. 216.

At advising—

LORD JUSTICE-CLERK—The defender entered voluntarily into a contract with the pursuers whereby they were to pay him a certain salary for services to be rendered as a medical man to their em-

ployees, he being entitled to accept other local official appointments in the same capacity, and to practice generally in the district, but it being further expressly stipulated that should his engagement with the pursuers come to an end, on notice by either himself or the pursuers, he should not thereafter exercise his profession in that particular district. That agreement was one between the pursuers and the defender, and was in my opinion legal. There are no other parties to the contract, and it must, I think, be dealt with as a contract between these two parties, and the contention that other persons have a right to insist that he shall be permitted to break his contract is one which I cannot accept. The agreement has been brought to a termination on notice by the pursuers, but the defender refuses to give obedience to the terms of the contract by which he is precluded from practising in the district.

In such cases as the present the question of interest in the party insisting on the terms of the contract is of importance. Now, in the present case I consider it not doubtful that the pursuers have a practical and substantial interest to enforce the obligation undertaken by the defender. The volume of practice in the district in question is necessarily limited, and if the pursuers desire to have a medical man of their own selection for attendance on their workers, it may be of the greatest importance that there should not be competition in the district by one who has been in their service but has ceased to be employed by them, as thereby the value of the appointment might be so much diminished that their choice of candidates might be limited to less eligible practitioners. Of course that is a difficulty of their position which might arise at any time if a practitioner not bound to them by contract were to come to the district, but that they are entitled to protect themselves so far as is possible by the contracts they make with medical men whom they employ I cannot doubt. I adopt the language of Lord Herschell, which he used in the case of *Nordenfelt*, to the effect that wherever there is sufficient consideration making a useful contract it should be upheld. That view appears to me to apply to this case, which, although it may be novel in its character, is nevertheless a case in which the pursuers had an interest to make the contract which they did, and the defender cannot, as I think, now refuse obedience to the contract which he signed, on the ground that the pursuers having brought his engagement to an end have now no interest to enforce the stipulation. It was made for the very purpose of meeting the case of the engagement being terminated on notice by either party; and it was exactly in these circumstances that both parties must be held to have intended that it should take effect.

I can see also no ground in public policy for the defender being allowed to break his contract. The restriction imposed upon him relates only to a very limited area, and he may practise anywhere else without

interference. It is just such a restriction as regards extent as has been often upheld in previous cases, where agreements have been enforced by which a party was excluded from carrying on business in a certain town or district. That is not in the eye of the law such a general restraint of trade as should require a court of law to declare it null.

Therefore on these grounds I am prepared to move that the judgment of the Lord Ordinary be adhered to.

LORD YOUNG—The defender's averments in fact on which his 3rd and 4th pleas-in-law are based are not in terms admitted on record by the pursuers. The case was, however, argued to us, as it necessarily had been to the Lord Ordinary, on the assumption of their truth, which indeed is not doubtful. The Lord Ordinary being of opinion that they are irrelevant has without inquiry repelled the defence founded on them. Such being the judgment we are required to review we must assume the facts to be as averred by the defender, which, I repeat, I see no reason to doubt.

The pursuers state (Cond. 2) that they "employ about 600 men at their quarries," and although it is not doubtful that they might lawfully decline to employ any one of them except on the footing that he should for himself and family take the medical attendance of a doctor selected by them, the continuous employment of all or any of them on such condition was manifestly impracticable and certainly never attempted. There does not seem to have heretofore been any contract on the subject with individual workmen, or anything other than arrangement between the pursuers as employers on the one part and "a medical committee elected by the quarrymen" as employees on the other, regarding the doctor to be selected from time to time, and the deduction to be made from the employees' termly wages to pay him. Any such arrangement was of course terminable at pleasure by either party, and the last which ever existed was admittedly terminated in August 1902. Since that time the pursuers have had no arrangement with all or any of their workmen regarding medical attendance, and of course have supplied none and made no deduction from wages on that account.

These facts sufficiently show that the 8th clause in the contract between the parties, as the pursuers construe and seek to enforce it, is in restraint of trade and professional employment. The 600 men working at the Ballachulish quarries desire the services of the defender as medical attendant to themselves and families, and he desires to give them. At a meeting held by these workmen, and as the defender avers "practically the entire population, including landed proprietors, clergymen, and other influential residents in the district, the defender was unanimously requested to remain in the district"—(Stat. 6). We have been informed that the dis-

trict is not populous or important in any way. It is, however, important that the 600 workmen who are most immediately concerned, and the other inhabitants of the district, though not numerous, should be free to employ the defender as their medical attendant so long as they choose, and that we should not interpose to restrain them from doing so unless the circumstances in which we are asked to interpose show that the legitimate and reasonable interest of the applicants would be sacrificed or suffer seriously if we refused. The rule of law is that an undertaking in restraint of trade or freedom of professional employment will not be recognised and enforced by a court of law unless (and this is the only exception to the rule) it is a reasonable, proper, and useful term of a contract, the judicial enforcement of which is necessary to satisfy the interest of the party in whose favour it is given. We had a full and interesting argument on the rule and the exceptions to it, with a citation of cases and observations of learned judges illustrative of both. I think it is sufficient for me to say, that looking to the purpose and terms of the contract, and taking the facts to be as averred by the defender, I am of opinion that this case does not come under any exception to the rule, and therefore that the rule must prevail. The most familiar illustration of the rule and the exception is that of a party in business selling his business with the goodwill of it for a price, and undertaking not to carry on any business himself to the detriment of the right which he has for such price communicated to the other party. That is the most familiar instance of the rule.

Another illustration of the rule is where a man purchases information of the secret manufacture of any particular article, such as a gun, or it may be some pharmaceutical compound, upon the condition that he shall not use the information in a particular district to the detriment of the party from whom he has obtained it.

I should indeed be prepared to go the length of holding that having regard to the terms and purpose of the contract between the parties, the eighth head of it is unreasonable and quite unnecessary for the protection or satisfaction of any legitimate interest of the pursuers. Their employees have not during the last two years exceeded their lawful right by choosing for themselves their medical attendant, and will not by continuing to do so. The pursuers' design to indirectly prohibit them from continuing to act on their own judgment by having the defender interdicted from taking their employment is, in my opinion, unreasonable and illegitimate, and therefore of a character which this Court ought to refuse to aid them in carrying out. The contract is indeed of a different character from any contract containing a term in restraint of trade or professional freedom which this or any Court of law has recognised as expedient and reasonable, and therefore properly and legitimately enforceable. It is a monthly contract between the defender and the pursuers as the lessees of

a quarry to give medical attendance "when sent for," and provide medicine to all their employees and their families, the contract remuneration being exactly £22, 10s. per month. It was exactly fulfilled on both sides for two years when the lessees (the pursuers) terminated it. It is true that the employees of the lessees—the quarrymen—did not till after the dismissal of the defender intimate their determination to end the arrangement under which their employers had been providing a medical man for them and their families at a salary paid with termly deductions from their wages.

The case would, however, have been in no respect different with regard to the law applicable to it had the pursuers by notice dismissed the defender at the end of the first month of his employment, and done so in consequence of a determination of the quarrymen in the same terms as that formed and intimated in July 1902, but two years earlier in date. All connection between the parties terminated with the contract.

The pursuers received nothing from the defender except the services which entitled them to make the deductions which they did from their workmen's wages under the temporary arrangement with them, so that there is no room for a suggestion that the value of anything the pursuers obtained under the contract was or might be diminished or in any way affected by the defender's conduct. Put the case of a monthly lease of a shop along with the goodwill of the business carried on in it by the lessor, and that the lease is terminated and the lessee ejected by the lessor at the end of a month (or two years)—would the Court enforce a term in the lease whereby the lessee undertook never after ejection to carry on any similar business in the district?

Again, the defender received nothing from the pursuers except his salary while the contract subsisted. They communicated to him no trade business or manufacturing secret, and indeed gave him no information of any kind by using which in the district any interest of theirs could be damaged.

I do not propose to notice in detail or refer specially to the authorities and judicial *dicta* which were cited to us—having already stated, I hope distinctly enough, what I understand them to import. One of the conclusions which I draw from them, and indeed have already perhaps pointedly enough noticed, is that the consideration for any contract term which is in restraint of trade must be reasonable and substantial. There was in the contract we are now dealing with no consideration in favour of the defender other than the monthly salary for attendance on the workmen and their families which was paid by retention from the workmen's wages so long as they received the attendance. It was argued by the pursuers' counsel as an argument on this head of reasonable and substantial consideration, that residence in Ballachulish which the contract required was a consideration reasonably and substantially valuable to the defender inasmuch

as it gave him opportunity to make friends in the village and neighbourhood who might become his private patients or assist him with their influence or votes in obtaining local offices. I am unable to appreciate, I may say apprehend, this argument. Assuming as I do—though we have no evidence on this or any other subject—that the defender did make good friends, win private patients, and get local offices during his short residence in Ballachulish, I am unable to regard this as a reasonable and substantial consideration for renouncing these and right to practice his profession and hold local office in the district so soon as his engagement to the pursuers terminated.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled and this application for interdict refused with expenses.

LORD TRAYNER—I agree with the Lord Ordinary. The contract which the defender made with the pursuers is in my judgment quite a reasonable one, and one which the pursuers have an interest to enforce. I see no reason why the defender should not be compelled to abide by the bargain which he made deliberately, that bargain being in itself quite lawful.

The defender's contention that on his appointment the pursuers acted on the mandate of their servants is one which I think cannot here be listened to. I think it is irrelevant to the present case. It is an attempt to introduce here without any warrant a new party to the contract. For the agreement which we are asked to give effect to is one between the pursuers and defender as principals, and there is no suggestion in the agreement that the pursuers acted as mandatories for their servants.

LORD MONCREIFF—I am of opinion that the Lord Ordinary has arrived at a sound conclusion, and as I entirely agree in his reasons I have not much to add. We have to ascertain the rights of parties under a contract to which the only parties were the pursuers and the defender. The defence is against the good faith of the contract, and it lay on the defender to show conclusively why the Court should not enforce the conditions. In my opinion he has failed to do so. The conditions attached to the defender's appointment though unusual are legal and reasonable, and they were assented to by the defender in the full knowledge of what he was doing.

In the case of *Stewart*, 1 F. 1158, we had occasion to consider fully the law applicable to conditions in restraint of trade, and the circumstances in which such conditions will receive effect, and the authorities bearing on the subject. The general law is not doubtful. But shortly, such a condition (especially if partial as regards area) will receive effect if it is not unreasonable, having regard to the subject-matter of the contract and the interests of the party in whose favour it is made, and not contrary to public policy. On the other hand "whatever restraint is larger than the

necessary protection of the party can be of no benefit to either; it can only be oppressive, and if oppressive it is in the eye of the law unreasonable."—Quoted in *Rogers* [1892], 3 Ch. 346, at p. 355. Here the pursuers found by long experience that in the locality there was not sufficient work to attract more than one good medical man; that the salary which they were prepared to offer was not by itself sufficient, but that if the medical man appointed were allowed to take other practice and accept local appointments they could get a superior man.

But then they foresaw that if on the termination of the engagement the medical man appointed by them were allowed to remain and practice in the locality, and continue to hold such other local appointments, they would have nothing to offer his successor except the salary, and thus would not get so good a man. Hence the insertion of the sixth and eighth articles of the agreement.

The defender pleads that the pursuers have no interest to insist upon the conditions because the pursuers' workmen, or the great majority of them, as well as other patients and employers, are desirous that notwithstanding his dismissal the defender should continue to attend them. I do not think that that plea is open to the defender. He is not entitled to found upon a state of matters which, as the Lord Ordinary points out, has been created entirely by his own breach of contract, and which would never have occurred if he had not professed loyalty to abide by the conditions.

The defender also pleads that to enforce the conditions and compel him to resign local appointments and discontinue practice in the neighbourhood would cause much public inconvenience. As regards this plea, which is plausible, it is to be observed that if the bodies who appointed the defender did not know of the conditions of his agreement with the pursuers it was through the fault of the defender, who was bound to have told them before he accepted the appointments. But no doubt they knew of the conditions quite well, as the defender's predecessor held the same appointments on the same footing and (unlike the defender) resigned them when he left the pursuers' service. The pursuers' arrangements and conditions as to the appointment of a medical man, which are of old standing, are probably as convenient for the public bodies in question as for the pursuers. They get the services of a superior medical man on easy terms, and there is no reason to think that they would not be as well served by the defender's successor.

So much at least is clear that the defender has been guilty of a deliberate breach of faith which has already caused much trouble and inconvenience to the pursuers; and I have heard nothing in the argument to satisfy me that the law compels us to assist him in repudiating his contract.

On the whole matter I am for affirming the Lord Ordinary's interlocutor.

On 19th June 1903 the Court adhered.

On 10th July the defender having given notice of appeal to the House of Lords, the pursuers presented a petition for interim execution of the decree in their favour pending the appeal.

Argued for the defender—If the interdict was enforced pending the appeal it would be impossible to reinstate the defender in the event of his appeal being successful, seeing that in addition to private practice he held public appointments. In these circumstances the *status quo* should be maintained pending the appeal—Mackay's Manual of Practice, 582. In any event, the defender should be allowed time to make arrangements before being forced to leave his present position.

Argued for the pursuers—It would impose great hardship on the pursuers if they were deprived of the immediate benefit of the judgment which they held, and the Court should act as if that judgment was to be affirmed. Interim execution should be allowed, even if it would prevent the defender, if successful in his appeal, from receiving the full benefit of his success—*Young v. Collins*, March 11, 1852, 14 D. 746; *Stevenson v. Stevenson*, March 7, 1894, 21 R. 617, 31 S.L.R. 500.

LORD JUSTICE-CLERK—I do not think that this is a case in which interim execution pending appeal ought to be granted on the spot. I think that the defender is entitled to a reasonable opportunity of looking round and making such arrangements as he may be able to make for the future. I think that it would be a hardship if this opportunity were not given to the defender. On the other hand, I think it would be a hardship to the pursuers if their application for interdict, in which they have up to the present been entirely successful, were to be hung up until the decision of the case by the House of Lords. In my opinion the pursuers are entitled to interim execution provided that the defender has ample opportunity in which to make new arrangements. Two months from this date would give him ample opportunity for that purpose. As to the expenses, there is no objection to interim execution being granted for them on the usual conditions.

LORD TRAYNER—I concur. As the case stands the defender has been found to be in the wrong. He has been litigating with the pursuers for a considerable time, and his proposal is that he should be allowed to go on now as if no judgment had been pronounced against him. This would not be fair to the pursuers, who might be quite as much inconvenienced by the granting of the defender's motion as he may be by its being refused. I think the course which your Lordship proposes is reasonable and should be followed.

LORD MONCREIFF and LORD KINCAIRNEY concurred.

LORD YOUNG was absent.

The Court pronounced this interlocutor—

“Allow execution to proceed upon the interlocutors of Lord Kyllachy

dated 30th December 1902, and of this Court dated 19th June 1903, notwithstanding the appeal to the House of Lords, to the effect that the defender ought and should be interdicted, prohibited, and discharged from carrying on the practice of a doctor of medicine and surgeon in the village or district of Ballachulish, and in particular from acting as a medical practitioner or surgeon in any manner of way to the employees of the petitioners and their families, and to the old men who had previously been employees of the pursuers and to their families in the said village or district of Ballachulish, and of enabling the petitioners to lodge their account of expenses with the Auditor of the Court of Session to tax and to report, and thereafter to recover the taxed amount thereof on caution for repetition of the said amount in the event of the before-mentioned interlocutors being reversed by the House of Lords: Supersede extract for two months from this date, and decern."

Counsel for the Pursuers and Respondents — Clyde, K.C.—Cooper. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Defender and Reclaimer — Campbell, K.C.—T. B. Morison. Agents — Menzies, Bruce-Low, & Thomson, W.S.

Tuesday, July 14.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

NIDDRIE AND BENHAR COAL COMPANY, LIMITED v. M'KAY.

Master and Servant — Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), First Schedule, secs. 11 and 12; Second Schedule, sec. 13—Medical Examination—Refusal—Obstruction—Workman Dissatisfied with Certificate—Application for Review—Failure of Workman to Submit himself for Examination by Official Medical Practitioner under the Act—Remit by Sheriff—Suspension of Compensation—Powers of Sheriff as Arbitrator under the Act.

A workman who had been injured in the course of his employment entered into an agreement with his employers whereby compensation was paid at the rate of 12s. 6d. per week. A memorandum of this agreement was recorded in the register kept by the sheriff-clerk. The workman submitted himself for examination by a medical man, provided and paid for by the employers, who on 7th December 1902, certified that the workman was fit for work. The workman intimated to the employers that he was dissatisfied with this medical certificate, but did not submit himself for examination by one of

the medical practitioners appointed for the purposes of the Workmen's Compensation Act, owing, as he alleged, to inability to pay the fee. On February 11th 1903 the employers, while continuing to pay the compensation fixed by the agreement, presented an application for review under section 12 of the First Schedule of the Workmen's Compensation Act 1897 before the Sheriff, alleging that the workman's incapacity for work had ceased on November 7th 1902. The employers offered no evidence, and objected to an allowance of proof, on the ground that the workman's right to compensation was suspended from November 7th 1902 until he should submit himself for examination by one of the medical practitioners appointed under the Act. The Sheriff remitted, under section 13 of the Second Schedule to the Act, to a medical practitioner appointed for the purposes of the Act to report as to the condition of the workman, and thereafter, on consideration of his report, ordained the employers to pay to the workman 9s. 6d. per week.

Held (1) that the workman's failure to submit himself for examination by one of the medical practitioners appointed for the purposes of the Act did not disentitle him to a proof in the application to the Sheriff for review, and (2) that in the circumstances the remit by the Sheriff and the award of compensation following thereon were within the powers of the Sheriff as arbitrator under the Act.

Davidson v. Mossend and Summerlee Iron and Steel Company, Limited, June 10, 1903, 40 S.L.R. 764, distinguished and commented on.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), First Schedule, enacts (Sec. 11—"Any workman receiving weekly payments under this Act shall, if so required by the employer, . . . from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, . . . but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, . . . and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place." Sec. 12—"Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased." . . .

John M'Kay, 76 Jewel Cottages, Portobello, a miner in the employment of the Niddrie