Lord Deas—I agree with your Lordship in the chair. I think this cannot be allowed on the footing of being money expended by the former heir of entail. We have decided in many cases that the improvement must be made by the heir in possession, who makes the application. But, further, I am of opinion that we may grant the application on the ground that this is an improvement not yet made, but to be made. As to this being an improvement for the benefit of the estate, there is no room for doubt. We had the proceedings before us formerly, from which we had reason to see that this lodge is a most important improvement in the way of letting the shootings of Birse Forest. These are of great value, and bring a large rental to the estate. If this lodge is let along with the shootings, a much larger rental is paid than when they are let without it. All parties are agreed on that, and there is no doubt, therefore, of the advantage to the estate. The question is, whether the buying up of this lease is a permanent improvement in the sense of the Statute? As to the question of permanency, I agree with your Lordship. I don't know anything of this description that lasts for ever. It is a long stretch of time that entitles us to call anything permanent. Anything which is to last for the greater part of a century may fairly be called permanent in the sense of the Statute. Many improvements under the Statute will not last so long, and if the money is not got now, there is no good ground for thinking it will ever be got. It is true that the building belongs to the estate, and that the ground on which it is built will, at the end of 85 years, fall into the occupation of the proprietor; but it does not belong to the estate in the sense of the estate getting any benefit from it during all that time. Perhaps at the end of that time there may be no lodge there. The lessees are not bound to keep the building in repair, and it is possible that the building may not last that time. We don't know what may be the state of game leases at the time when this long lease expires. There may be a great change in such matters then, and it does not follow that because a great profit may be had now, there will be the same profit to be had then. What the proprietor wants is the profit at present, as to which there is no doubt. The question is, whether the use of this lodge cannot be got in any other way than by paying this money to the bank; will the payment be an improvement in the sense of the Statute? It would be taking too strict a view of the Statute—which was intended to encourage improvements on entailed estates—to say that that while you may spend money on improvements that will not last so long, you must not spend it on this improvement.

Lord Ardmillan—There cannot be any doubt that this proposed application of the consigned money is for the benefit of the estate, and the only question is whether, under the Statute, it can be sustained. Two suggestions have been made as to the footing on which this may be done—one, that it may be considered as a sum payable now for an improvement previously made. I think there is very great difficulty in giving effect to that suggestion, and I am not disposed to agree to it. The other suggestion is, that it is to be viewed as a present act of improvement. Suppose the case of there being a physical obstruction between the house and the rest of the estate which would endure for other 89 years, and that it was proposed to remove it, for example, by pulling down a wall. I think that the expenditure of money in removing that obstruction, so as to give the proprietor of the estate the use and enjoyment of the premises for the 89 years, would be a permanent improvement. Or suppose that a river intervenes between the house and the estate, and a bridge is proposed to be built—though that indeed would be more of the nature of creation of a means of access than removal of an obstruction—that would be a permanent improvement. Now, the proposal here is to connect the house with the estate for the remainder of the lease, or to remove the obstacle which prevents that from being done. I think the removal of this obstacle may fairly be held as much within the Statute as the removal of a physical obstacle would be. That is the view which I take of the case, and in that view I think the application may be sustained.

Agents for Petitioner—Henry & Shiress, S.S.C.

Friday, March 6.

MACINTYRE *v.* MACRAILD.

(5 Macph. 526, 4 Macph. 571.)

Agreement—Construction—Obligation not to Practise within certain district—Pactum illicitum—*Interdict.* An assistant to a physician undertook not to accept of the practice of the locality to the exclusion and disadvantage of his employer. In an action by the physician to enforce the agreement, *held* that the agreement was lawful; that the assistant had broken it by commencing to practise within the district, that being to the exclusion and disadvantage of the other contracting party; and perpetual interdict granted.

Duncan Macintyre, M.D., Fort-William, sought to interdict Donald Macraild, sometime surgeon, Ballachulish, from practising as a physician or surgeon at the slate quarries of Ballachulish and in the neighbouring villages. The respondent had been engaged by the complainer in August 1864 as his assistant. The complainer hearing a rumour that the respondent was endeavouring to supplant him, obtained from him a written obligation not to practise on his own account so long as his connection with the complainer should last, and not to practise at Ballachulish, or settle there at any future time, "to the complainer's exclusion and disadvantage." The engagement of the respondent as assistant ceased in October 1865. In the following month he was appointed to the post of medical practitioner there, in room of the complainer, who now brought this suspension and interdict. The Court granted interim interdict. The respondent was allowed time to substantiate a charge of forgery of the obligation founded on, by bringing, if he chose, a reduction and improbation of the document. He failed to do so, and the Lord Ordinary sustained the obligation, and made the interdict perpetual.

The respondent reclaimed.

W. N. M'Laren for reclaimer.

N. C. Campbell, for respondent, was not called on.

Lord Curriehill—This case has been before the Court already, but it is quite true, as has been said by the reclaimer's counsel, that nothing was then done to preclude the Court from coming to any decision on the case which they think right. We must look at the case apart from what took place formerly, but at the same time it is true that when the note was passed the Court

considered the matter very deliberately and formed opinions on it, subject of course to any argument which might be heard afterwards. I say this for the purpose of showing that the case is not new in this Division. After hearing the argument which has been addressed to us for the reclaimer, my opinion is that there are no facts stated here which are relevant to go to proof, and that we are in a position to decide the case on the law. On that I have a clear opinion.

This respondent was for some time in the service of the suspender. While he was in that position some circumstances had arisen which created a suspicion on the part of his employer that he was not acting fairly with regard to some patients. That led to a bargain which is embodied in the writing on which the present case is founded. The terms of that agreement are very precise. The respondent sets forth that he had, during the three months of his service with the suspender, always acted consistently with professional honour, and that he bound himself to continue so to act so long as his engagement subsisted. And then he bound himself under a penalty of £500 that after the termination of his connection with the suspender as assistant, he would not accept of the practice of the slate quarries to the exclusion and disadvantage of the suspender. We have nothing to do here with the penalty. This is an action to enforce performance of the obligation itself. It proceeds upon the statement that the respondent had accepted the practice of the slate quarries to the exclusion and disadvantage of the suspender. Now, the first question is, is the admitted fact that he had accepted that practice on its being offered to him, a contravention of that agreement? It is said that it is not, and the only reason urged in support of that contention is, that it is not to the suspender's exclusion and disadvantage. Now, what is the meaning of these words except this, that he would not put himself into the position of being a rival of the suspender in the practice of medicine in this locality. That is the meaning of the words; for in all such professions a man who has had the exclusive privilege of practising in a certain district, experiences exclusion whenever another man comes in and practises, in so far as he gets any practice, and to that extent it is to his disadvantage and exclusion. And accordingly when this case was before us formerly these words were carefully considered, and Lord Colonsay made them the subject of remarks in which we all concurred. I am of the same opinion as I was then, that the respondent, by beginning practice within the district mentioned in this agreement, was to that extent operating to the exclusion and disadvantage of the suspender, who had at that time the exclusive practice of that locality. There is no doubt therefore that what the respondent did was directly within the meaning of this agreement. We are told that the suspender, if he had not been excluded by the respondent, would have been excluded by some one else. But that did not put an end to this man's agreement. Assuming it to be true, it may have diminished to some extent the interest of the suspender to enforce this agreement, but it did not liberate the respondent, and that is the only question with which we have to deal.

I have attended carefully to all the statements made by the respondent in this record, because I was anxious to see that I had not overlooked anything that might have been held a relevant ground for liberating this respondent from his agreement. I have not been able to find any such statement. I think the agreement is subsisting and binding.

But it is contended that this is a *pactum illicitum*, and cannot be enforced by a court of law. But no reason for that has been stated by the respondent. There are a number of authorities which show that such agreements are lawful and enforceable. The case of *Curtis*, 29th Nov. 1831; *Watson*, 14th July 1863, and Stalker M. 9455, all show that such agreements were recognised by the Court. Neither on authority nor on principle do I see any objection to such agreements. It was said that there were several authorities leading to the opposite conclusion. But the answer to that is, that these authorities relate to the emoluments of public officers. Now, a public officer is appointed with such an amount of remuneration for his services as is held to be required in order to ensure the services of a properly qualified person; and if such a person, by a deliberate bargain, passes from a portion of his emoluments with the view of getting rid of competition, it is held that he is guilty of a breach of duty as a public officer, and that there is reason to fear that, he being deprived of the emoluments necessary for the due performance of these duties, these duties may not be performed. That principle has no application to the case of a private contract such as that now before the Court. On these grounds, I think the interlocutor of the Lord Ordinary is well founded.

Lord Deas and Lord Ardmillan concurred.

Lord President absent.

Agent for Respondent—J. M. Macqueen, S.S.C.

Agent for Reclaimer—J. Patton, W.S.

Friday, March 6.

HALKERSTON *v.* SCOTT

Property — Possession — Acquiescence—Servitude—Commonty. A defender assoilzied from conclusion of removal of buildings and obstructions alleged to interfere with rights of pursuer, and from conclusion of declarator of encroachment on commonty.

The pursuer, a millwright, and proprietor of a shop and yard in Freuchie, in the county of Fife, brought this action against the defender, a carrier there, for the purpose of having it found that the defender ought to remove certain buildings and obstructions which, the pursuer alleged, interfered with his property and means of access thereto; and that it should be declared that he had encroached upon a commonty belonging to the pursuer and others, adjoining the pursuer's shop. The Lord Ordinary (Jerviswoode), after a proof, pronounced an interlocutor, finding, "as matter of fact—1*st*. That the site of the building described and referred to in the third head of the revised condescendence for the pursuer has been in the possession of, and has been used by, the defender and his authors as the site of a building or buildings used formerly as a swine's cruive, and more recently as a stable, for time immemorial, and for forty years; that the building now existing thereon was erected by the defender, with the knowledge, and without objection thereto on the part of the pursuer; and finds that the defender offers, if called on by the pursuer, to remove the said building, in so far as it rests on the gable of the pursuer's house, and to erect a gable adjoining thereto, but within the limits of his own property, so as to support the roof of the said stable: