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:

2*d*, That the road which runs on the east side of the shop of the pursuer is not fitted for use as a road for the passage of carts, and has not, in fact, been used for such passage, in so far as the same lies between the subjects of the pursuer and those of the defender, for forty years, or otherwise, as alleged on the record on behalf of the pursuer: 3*d*, That the said road is not the common road referred to as such in the titles of the property belonging to the defender, but finds that the road so referred to is that which, in fact, is situated to the west of the said shop of the pursuer: 4*th*, That the middenstead referred to in the fourth head of the condescendence, and which had previously been in the occupation and use of the pursuer, was filled up by the defender at or about the time at which the latter filled up a middenstead adjoining thereto, which he himself had occupied, and which he filled up in consequence of the interference of the inspector of the parishes of Falkland and Auchtermuchty therewith as a nuisance: And 5*thly*, That the pursuer has failed to prove that the defender has built a shed or sheds and a byre on the site of the pursuer's said middenstead, so as to prevent free ish and entry to the same, or to the pursuer's shop and yard,"—and assoilzied the defender.

The pursuer reclaimed.

J. C. Smith for him.

Gebbie, for respondent, was not called on.

The Court (Lord President absent) adhered, holding that although the defender's building had rested partly on the pursuer's, the pursuer had been a party to the building being erected in that way; and besides, the defender had not only offered to discontinue the use of the pursuer's wall as a support, but had actually discontinued it; that the alleged obstructions were clearly not erected on the pursuer's property, and that his right of footpath, which was all the right he had, was not interfered with; and that the pursuer's allegations of encroachment by the defender on the commonty had not been substantiated.

Agent for Pursuer—W. Milne, S.S.C.

Agents for Defender—Adamson & Gulland, W.S.

Saturday, March 7.

CAMPBELL'S TRUSTEES *v.* CAMPBELL AND OTHERS.

Reclaiming Note—Judicature Act—Intimation to Opposite Party—Competency. The reclaiming days expired on 6th March. The case appeared in the Single Bills of 7th March. Objection to competency, on the ground that the six copies required by the Judicature Act, 6 Geo. IV., c. 120, sec. 18, had not been timeously sent to the respondent, *repelled,* in respect it appeared that the copies had been sent and received previous to the calling of the case in the Single Bills.

This case was in the Single Bills of Saturday 7th March.

Crichton, for respondent, objected to the competency. The interlocutor reclaimed against had been pronounced on 25th February. The reclaiming days expired on Friday 6th March, and the reclaimer had not complied with the requirement of the Statute by timeously sending six copies of the reclaiming note to the opposite party.

Clark, for reclaimer, stated that the required number of copies had been sent to the respondent on the morning of Saturday 7th March, by ten o'clock.

The following cases were cited:—Shands Pr. 2, 959; *Lothian* v. *Tod*, 7 Sh. 525, 3d March 1829; *Bell* v. *Warden*, 8 Sh. 1007, July 2 1830; *Taylor* v. *Macdonald*, 6 D. 637, 10th February 1844.

Lord Curriehill—If such a case had never previously been under the consideration of the Court, I should have thought this to be attended with some difficulty, for the words "delivery at the same time" might lead to the reading that the intimation must be made at the same time as the boxing. But fortunately the Court has had occasion to consider the matter, and it has been held that that is not the meaning of the Act, and if once we get rid of that reading, I see nothing to make it incompetent to give intimation any time before the calling of the cause in the Single Bills. In this case it is admitted that that intimation was made. Consistently with the construction put on this Act in former cases, I think we must hold that the competency of this reclaiming note has been saved, though in the narrowest possible way.

Lord Deas.—I am of the same opinion. There are some things in that Statute that are imperative, and there are other things that are merely directed. The judgment in *Lothian* and *Warden* implied that this particular thing is not imperative, but merely directed, because if it was imperative it certainly was not done, and therefore the Court could not have sustained the competency of the reclaiming note. Whenever that is settled the case is pretty clear. It was held in another case that if the copies are not furnished before the case is moved in the Single Bills the reclaiming note falls. That cannot, consistently with the previous cases, be on the ground of the imperative nature of the enactment, but on the ground that it would not be proper to relax the enactment to the extent of allowing copies to be furnished after the case comes to be moved in the Single Bills, and there is good reason for this, for there may be an objection to the competency of a reclaiming note which may require to be stated when the case is in the Single Bills, and it would be a strong thing to hold that parties who had not seen the note were to be precluded from taking the objection by the case being sent to the roll, without their ever having had an opportunity of seeing the note. It is plain that if the contention of the respondent is sound, it would be the same thing whether the reclaiming note was lodged on the first of the reclaiming days or on the last. If it were lodged in the first of the reclaiming days, it would come into the Single Bills long before the reclaiming days were over. I have the strongest possible recollection that we decided a case of this nature not long ago in this Division. It may have been, as was suggested, a case of the boxing of copies, but it is obvious that that would not be a weaker case than the present. It would be a great deal stronger. But whatever was the nature of the case, the authority founded on by the respondent was quoted, and the Court held, notwithstanding, that the Act was not imperative.

Lord Ardmillan concurred.

Lord President absent.

Agents for Reclaimers—A & A. Campbell, W.S.

Agents for Respondents—Weddell & M'Intosh, W.S.