

right on the part of the Presbytery, because after they came to know, as they certainly did in the beginning of the present century, that the volumes were in the University Library, they, instead of claiming them as their property, got a copy made for themselves at considerable expense which subsequently disappeared. At least, a copy was then obtained and presented to the Presbytery. At the same time, while I think that these considerations would be conclusive if the records were capable of alienation, I do not think that in the circumstances the defences can be sustained."

Counsel for the Pursuers—Sir Charles Pearson—Wallace. Agents—W. & J. Cook, W.S.

Counsel for the Defenders—Mackay—Guthrie. Agents—Menzies, Coventry, & Black, W.S.

Friday, July 13.

## OUTER HOUSE.

[Lord Kincairney.

### HOUSTON v. KER AND OTHERS.

*Public-House—Licensing Court—Disqualification of Magistrate.*

Held that a magistrate who is proprietor of an inn in a burgh is not thereby disqualified from acting as a licensing magistrate in an application having reference to other premises in the burgh.

This was an action at the instance of Samuel Houston, accountant, Dumfries, proprietor of the Caledonian Inn, Annan, against Hugh Ker, builder, Annan, provost of that burgh, Campbell M'Lean, retired merchant, Annan, proprietor of the Blue Bell Inn there, John Smith Millar, residing in Annan, and Alexander Scott, solicitor, Annan, all bailies of the burghs of Annan, concluding for declarator that the defender Campbell M'Lean was on the 8th day of April 1890 disqualified from acting as a licensing magistrate in the burgh of Annan, and that the vote given by him in the application for a renewal of a public-house certificate in favour of the pursuer for the Caledonian Inn, situated in the High Street of the burgh, presented by the pursuer to the licensing magistrates of the burgh, and which came up for consideration before the defenders on the 8th day of April 1890, was null and void, and of no force and effect; and further, that a majority of the licensing magistrates then entitled to vote, and voting, voted in favour of the granting of the renewal of said public-house certificate, and that said certificate was accordingly renewed by said licensing Court in favour of the pursuer.

The pursuer averred, and the defenders admitted, that Campbell M'Lean when he voted for the refusal of the renewal of the certificate was proprietor of the Blue Bell Inn in the burgh of Annan.

The pursuer pleaded—"(1) The defender the said Campbell M'Lean being proprietor of a licensed inn in said burgh was disqualified from voting in applications for public-house certificates or licences in that burgh, and the vote given by him against the renewal of said public-house certificate for the Caledonian Inn in favour of the pursuer was null and void. (2) Said vote of the said Campbell M'Lean being null and void, and a majority of the licensing magistrates entitled to vote having thus voted for the renewal of said certificate in favour of the pursuer, the pursuer is entitled to decree of declarator as concluded for."

LORD KINCAIRNEY delivered this judgment—"The pursuer is proprietor of an inn in the town of Annan, and he states that at a licensing court an application was presented for a renewal of his licence for the inn, that the bench were equally divided, two of the magistrates being for granting the licence and two for refusing it, and that the licence was therefore refused. He has raised this action concluding for declarator that one of the magistrates who voted against him was disqualified, and that therefore the licence was truly granted by a majority of the magistrates entitled to vote. The disqualification of the magistrate was said to arise from the fact that he was himself proprietor of the Blue Bell Inn in the burgh of Annan, and had therefore an interest in getting the pursuer's licence for a rival house refused. I am of opinion that the magistrate was not disqualified on the ground stated, and that the defenders are therefore entitled to absolvitor. The question depends, I apprehend, primarily and chiefly on the terms of the Home Drummond Act (9 Geo. IV., cap. 58), in virtue of which I understand this licensing court sat on the occasion in question.

"Now, the jurisdiction exercised by the magistrates was statutory. A statutory power to deal with licences is conferred on the justices and magistrates acting within certain limits, and it is provided by the 13th section of the Act that certain judges shall be disqualified from acting in the execution of the Act.

"Those who are disqualified are enumerated in considerable detail, and it is provided that those justices of the peace or magistrates who shall knowingly or wilfully offend shall forfeit and pay the sum of £50, to be recovered by any person who will prosecute for the same. It appears to me to follow that every magistrate or justice, except those enumerated, must needs have the power, and that there is no authority at all for extending the list of exceptions. I apprehend that all are qualified except those who are expressly disqualified. Persons who exercise certain trades are disqualified for acting in the execution of the Act. It is not said that the owner of an inn is disqualified. The proprietor of a house is disqualified from acting in an application for a certificate for the house of which he is the proprietor, and it appears to follow directly that he is not disqualified from acting in regard to an application for a certificate for any other

house. A passage was read from Dr Barclay's Justice of the Peace to the effect that the disqualification of a magistrate to act in his own case should be extended to the case of a proprietor of other licensed premises in the same burgh. I cannot but think that that involves a very alarming extension of the provisions of this section of the Act. The just inference appears to me to be the opposite. It is significant that that passage does not, it is admitted, appear in the last edition of the book.

"It is admitted that this case does not fall within the words of section 13, and I think it is equally clear that the alleged disqualification cannot be said to be of the same kind as those mentioned in section 13. It is said that the disqualification should be extended to the owner of a house in the immediate neighbourhood of the premises for which licence is asked, and it is said that two inns in a burgh so small as Annan is must be held to be in the immediate neighbourhood of each other, but bearing in view that a magistrate is subject to a fine if he acts when he is disqualified, it is impossible to hold that the disqualification arises on a ground so vague and uncertain as the proximity of the two houses.

"Various English decisions were referred to, but none support the pursuer's contention. The question appears to have been mooted but not decided in a case which was quoted from Fisher's Digest, but which is not to be found in any reports in our library—*Rex v. Kent*, 34 J.P. Rep. 298, Fisher's Dig. 4, 1182. In *Queen v. Lee*, 9 Q.B.D. 394, a magistrate was held disqualified from judging in a prosecution which he directed. In *Rex v. Commissioners of Cheltenham*, 1 Q.B.D. 467, an appeal was sustained in reference to rates imposed by certain justices on their own premises. These cases illustrate the sorts of interests which will disqualify a judge, but I do not think they apply, and I think it quite illegitimate when a statute which confers a jurisdiction enumerates the disqualifications of the judges in detail to add to these any other general ground of disqualification."

The Lord Ordinary assolized the defenders.

Counsel for the Pursuer—Graham Stewart. Agent—Alexander Wylie, S.S.C.

Counsel for the Defenders—Vary Campbell—C. J. Guthrie. Agents—Morton, Smart, & Macdonald, W.S.

Friday, October 17.

OUTER HOUSE.

[Lord Wellwood.]

H. M. ADVOCATE v. THE FORTH BRIDGE RAILWAY COMPANY.

*Revenue—Income-Tax—Railway Company Yielding no Profit but Paying Interest on Capital—Customs and Inland Revenue Act 1888 (51 Vict. cap. 8), sec. 24, sub-sec. 3—Income-Tax Act (5 and 6 Vict. cap. 35), Schedule A, rule 3.*

The Income-Tax Act 1853, Schedule D, provides that duty shall be chargeable upon all interest, &c., not charged by virtue of any of the other schedules contained in the Act.

The Customs and Inland Revenue Act 1888, sec. 24, sub-sec. 3, provides that upon payment of interest of money, charged with income tax under Schedule D, and not payable or not wholly payable out of profits or gains brought into charge for such tax, the person by whom such interest is paid shall deduct the income-tax and account to the Revenue therefor, and such amount shall be a debt from such person to Her Majesty.

The Income-Tax Act (5 and 6 Vict. cap. 35), Schedule A, rule 3, provides that the assessment on profits made by railways shall be made on the profits of the year preceding the year of assessment.

A railway company whose undertaking was in course of construction, and therefore yielded no profit, but which paid annually a sum of interest on its share capital and debenture stock, returned to the Inland Revenue the amount so paid in the year previous to the year of assessment under the Income-Tax Act (5 and 6 Vict. cap. 35), and was assessed thereon. The amount paid in interest in the year of assessment having turned out to be greater than the amount in the previous year, action was raised by the Revenue against the company claiming the assessment upon the difference which had been deducted by the company in paying the interest as a debt due to Her Majesty under the enactment first above recited. *Held* that the company was liable.

The Income-Tax Act (5 and 6 Vict. cap. 35), Schedule A, rule 3, provides—"The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited . . . Third, of iron works, gas works, salt springs or works, alum mines or works, water works, streams of water, canals, inland navigations, docks, drains and levels, fishings, rights of markets and fairs, tolls, railways, and other ways, bridges, ferries and other concerns of the