

Saturday, February 19.

(Before Lord Young, Lord Craighill, and  
Lord M'Laren.)

LAUDER V. M'DOUGALL (P.-F. OF J.P. COURT  
OF ROXBURGH).

*Justiciary Cases—Public-House—Complaint—  
Locus—Jurisdiction.*

Where a summary complaint, charging an offence by a publican against the Public-Houses Acts, did not specify the *locus* of the alleged offence—*held* that a statement of the *locus* of the alleged offence was necessary to jurisdiction, and *therefore* that a conviction following on the complaint must be set aside.

Edwin Meekison Lauder, public-house keeper, Kelso, was charged before the Justices of Peace for the county of Roxburgh upon a complaint under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, at the instance of the Procurator-Fiscal of Court, with an offence within the meaning of the Public-House Acts, "in so far as upon Sunday, the tenth day of October Eighteen hundred and eighty-six years, or about that time, the said Edwin Meekison Lauder, who holds a certificate to keep a public-house at Coal Market, Kelso, in the parish of Kelso and county of Roxburgh, did sell one gill or thereby of whisky or spirits, in contravention or breach of the terms, provisions, and conditions of his said certificate, being an offence within the meaning of the said Act or Acts." The Justices, on the evidence adduced, convicted Lauder of the offence charged, and he took this Case for appeal.

The only question stated by the Justices was, Whether the evidence of the two constables, on which they proceeded, and of which they stated the tenor in the Case, was sufficient to warrant the conviction?

Argued for the appellant—There was in the complaint no specification of *locus*, or of the person to whom the whisky or spirits was said to have been sold.

Argued for the respondent—The objection ought to have been taken at the trial before the Justices, and not after a conviction on the merits. The certificate infringed had been granted in respect of one particular public-house, and the complaint had necessarily reference to that public-house and no other. The *locus* was therefore perfectly definite. The appellant could not be held to have been in any way misled or deceived, and therefore under sections 5 and 34 of Summary Procedure Act of 1864 no objection to the complaint ought to be allowed—*M'Intosh v. Metcalfe*, July 20, 1886, 23 S.L.R. 842, and 13 R., J.C. 96.

At advising—

LORD YOUNG—This is the first case of this kind that has come before us with no specification of the *locus* or indication of the person to whom the sale was made. The complaint only states that on a particular Sunday the public-house keeper sold a gill or thereby of whisky. There is no specification of the *locus* in any way. This is objectionable—first, because it is contrary to practice and without precedent; and second,

because it affords no guarantee against another conviction for the same offence before another magistrate. It might be said that the second complaint referred to another gill of whisky sold to a different person. Paley, in his book on Summary Convictions, under the English Acts, says—there must be such specification of the particular offence as will distinguish it from all other offences. As to the question of jurisdiction, it is clear that without specification of *locus* there can be no jurisdiction. Nor are we entitled to reason that the offence could only be committed in one particular place and no other. It is by no means certain that the offence could not have been committed outwith the premises. In the case of *M'Intosh*, referred to in the respondent's argument, it was held that a complaint which did not set forth the *locus* of the offence was null and could not be amended under section 5 of the Summary Procedure Act 1864. It is my opinion that the conviction is bad, and ought to be set aside without entering into facts.

LORD CRAIGHILL—It is true that complaints under Summary Jurisdiction Acts are to be dealt with differently from other complaints, but this matter of jurisdiction is fundamental. There is no getting over the objection of want of *locus*, and therefore I am of opinion that the conviction ought to be quashed.

LORD M'LAREN—I concur. Everyone is entitled to know what he is convicted for. As this is not done here the conviction ought to be set aside.

Conviction quashed.

Counsel for Appellant—Rhind. Agent—Thomas M'Naught, S.S.C.

Counsel for Respondent—J. Clark. Agent—Party.

## COURT OF SESSION.

Tuesday, January 18.

### OUTER HOUSE.

[Lord Trayner.

LORD SALTOUN, PETITIONER.

*Entail—Valuing of Provisions—Deductions from Rental before Ascertaining Provisions—Aberdeen Act, secs. 1 and 5—5 Geo. IV. c. 87, sec. 1.*

In a petition by an heir of entail for authority to fix annuity to the widow of the preceding heir, and to fix and charge younger children's provisions—*held* that in estimating the amount of the free rent the petitioner was entitled to deduct the whole amount of the current rent-charges.

This was a petition by Lord Saltoun, heir of entail in possession of the estate of Philorth, in the county of Aberdeen. The object of the petition was twofold (first) to restrict provisions made by the last heir in possession, Alexander, Lord Saltoun, who died 1st February 1886, in favour of his

widow of £2000 per annum of jointure, and a provision of £30,000 to his younger children, to £1935, 6s. 8d. of jointure, and £13,661, 3s. 7d. of younger children's provisions, which the petitioner considered to be the limits respectively of what was due to the widow and younger children under the deed of entail and the Aberdeen Act, and (second) for authority to the petitioner to charge the fee of the entailed estate of Philorth (other than the mansion-house, &c.) with the amount of the provisions due to the younger children. The petitioner set forth the sum for younger children's provisions in the following way—He stated the free rental of the estate of Philorth as at the date of the death of the late Lord Saltoun to be . . . . . £6489 1 2½

Deduct annuity, which the petitioner stated as the widow's jointure . . . . .	1935 6 8
Leaving	£4553 14 6½

three years of which taken for the amount of younger children's provisions made £13,661, 3s. 7d. In arriving at the sum stated as the free rental at his father's death the petitioner deducted, *inter alia*, the sum of £995, 14s. 9d. as drainage rent-charges payable in 1886, the year in which the late Lord Saltoun died. The question therefore arose whether the petitioner was entitled, in striking the free rent, to deduct the whole instalment of the annual rent-charges payable in 1886 or only such portion thereof as consists strictly of interest, or, in other words, whether the whole of the said sum of £995, 14s. 9d. (consisting partly of principal and partly of interest) fell to be deducted, or only the sum of £435, 5s. 6d., being the proportion thereof which consisted exclusively of interest at £4, 10s. per annum on the capital sum of drainage money advanced and remaining unpaid.

In reference to this point the reporter (Mr H. B. Dewar, S.S.C.), to whom the Lord Ordinary remitted to inquire into the circumstances set forth in the petition, and to report whether the proceedings had been regular and proper and in conformity to the statutes, reported that the practice on the point in question varied. He reported in favour of deducting not the whole instalment of the rent-charge, but only that portion which consisted of interest for one year at 4½ per cent. on the unrepaid portion of the capital of the drainage loan. He referred to *Keith Macalister v. Finlay*, July 10, 1867, 5 Macph. 1008, and 39 Jur. 558; *Marquis of Queensberry, Petitioner*, August 12, 1873, not reported (provisions for younger children)—Lord Shand's opinion is printed *infra*; *Earl of Glasgow*, Nov. 12, 1886, 14 R. 59 (in Session papers of which case Lord Shand's opinion in the *Queensberry* case was laid before the Court); *Hamilton*, March 11, 1857, 19 D. 723, and 29 Jur. 322; *Irving*, February 22, 1871, 9 Macph. 539 and 43 Jur. 306; *Duke of Roxburgh*, June 28, 1881, 8 R. 862.

At advising—

LORD TRAYNER—In ascertaining the free rental I think that the petitioner is entitled to deduct from the rental the whole amount of the current rent-charges. I concur with the opinion of Lord Shand in the *Queensberry* petition [printed *infra*] that the terms of the Aberdeen Act (5 Geo. IV. c. 87), sec. 1, are so wide as to embrace every annual burden on the annual rent of the lands.

His Lordship pronounced an interlocutor whereby the provisions were fixed on the footing that the whole instalment of rent-charge, £995, 14s. 9d., was to be deducted in ascertaining the free rental.

Counsel for Petitioner—Low. Agents—W. & J. Cook, W.S.

The opinion of Lord Shand in the *Queensberry* Petition, referred to by his Lordship, was pronounced on August 12, 1873, and was as follows:—"The Lord Ordinary has given due consideration to the question raised by Mr Dewar in his supplementary report as to whether the annual rent-charges specified in the rental of the estates, and amounting to £180, 15s. 2d., ought to be deducted in fixing the free rent according to which the children's provisions must be calculated, and is of opinion that this deduction ought to be made.

"The provision in the entail authorises the granting of such provisions 'as shall not exceed three years' free rent of the said lands and estates, so far as the same shall be unaffected at the granter's death with liferent infestments, and after the deduction of the yearly interest of former debts or provisions contracted by virtue of the power thereby reserved.' These words, in so far as regards deductions from the rental, are not so comprehensive as the terms used in the Aberdeen Act, which concludes with these words 'the yearly amount of other burdens of what nature soever;' but it is evident that they are not intended to be exhaustive of the deductions by a particular enumeration of every deduction. Thus 'public burdens,' though expressly mentioned in the Aberdeen Act, are not mentioned in the Entail Act, yet it is clear that such burdens must be deducted in order to reach the free rent. It appears to the Lord Ordinary that annual rent-charges which under the Statute of 9 and 10 Vict. cap. 101, are imposed on the entailed estate, are burdens which to their extent diminish the free rent. By section 34 of the Act it is declared that the land shall be charged with the annual payment of these charges, and although section 36 provides that the rent-charge shall not be made use of as a ground of adjudging or evicting the lands contrary to the entail, yet it is thereby provided that 'every such rent-charge shall be a good and effectual charge upon and against such entailed estate to every other effect and upon and against the rent and profits thereof.' It appears to the Lord Ordinary that in reaching the free rent of the estate at the granter's death, the actual free rent which the heir receives, after making such annual payments as are effectually charged on the estate and its rents, must be the amount to be taken. If an heir succeeded to an estate charged with a bond of annual rent under the Rutherford Act for improvements effected by a predecessor, it would be difficult to say that the free rent was the sum received from the tenants without deducting the annual rent, which necessarily diminished the free rent to him. The same rule must be applied with reference to rent-charges under the Act 9 and 10 Vict., and as the statute affords no ground for distinguishing between the amount of the rent-charge which was to be regarded as a payment of interest as distinguished from capital, the Lord Ordinary is of opinion that the whole amount, being the sum which the heir of entail must pay, and which dim-

inishes the free rent to him, ought to be deducted in ascertaining the free rent as the measure of the children's provisions."

Wednesday, February 16.

## SECOND DIVISION.

[Sheriff of Sutherland.]

CAMPBELL v. MACKENZIE.

*Master and Servant—Dismissal—Wrongous Dismissal.*

A master re-engaged a servant for a new term. Shortly afterwards, and before the new term had begun, there was a disagreement between them as to an allowance the servant was receiving under the original contract, and the master told him that if not satisfied he could leave. Thereafter, hearing that the servant had stated that he was leaving, and would on no account stay, he engaged another servant without further communication with him. *Held* that he was not justified in doing so, and was liable in damages for breach of the re-engagement.

John Campbell was engaged for the year from Whitsunday 1885 to Whitsunday 1886 as farm servant with the Rev. D. Mackenzie, minister of Lairg. Campbell's duties were to work upon the glebe, and his wages were £18 in money and certain allowances—house, meal, milk, &c.

In January 1886 Mr Mackenzie and Campbell had a conversation about a re-engagement, the result of which was that Campbell was re-engaged for the year from Whitsunday 1886 to Whitsunday 1887 at £20 in money and the same allowances as he had before. On 6th April there was a dispute as to the alleged failure of Mr Mackenzie to give Campbell the quantity of milk to which he was entitled, and in the course of it Mr Mackenzie told him he might leave if he was not satisfied.

In a few days thereafter Mr Mackenzie heard reports that Campbell had said that he would not stay with him, and that he had mentioned to more than one person that he was leaving the service. Mr Mackenzie then, without saying more to him on the matter, advertised on 11th April for a new servant, and engaged one shortly thereafter.

Campbell intimated to him that he would look to him for his year's wages. He failed to get a place before Whitsunday, when he left the service, though he endeavoured to do so at various markets in April. He raised this action for £43 (estimated as the value of his wages, house, and allowance for the year 1886 to 1887) as damages for wrongful dismissal, or as the amount to which he was entitled in respect of his dismissal.

The Sheriff-Substitute (MACKENZIE) found that the pursuer had been wrongously deprived of the situation for which the defender had so engaged him in January, and that the defender had not shown that he was justified in refusing to implement the re-engagement. He therefore decreed for £43 with expenses.

On appeal the Sheriff (CHEYNE) found "that on 8th or 9th April the pursuer applied to Mr Butters, hotel-keeper, Lairg, for employment, stating that he was leaving the defender, and that on 11th April he said to Mr Campbell, inspector of poor, Lairg, who was advising him to make it up with the defender, that he would not remain with the defender for any money: Finds that this, which was reported to the defender, amounted to a waiver on the part of the pursuer of his right to insist on the fulfilment of the arrangement entered into in January, which arrangement was thus departed from by mutual consent: Finds that the defender was accordingly free to engage, as he did engage, another servant to come to him in the pursuer's place at Whitsunday, and is not liable in damages for refusing to retain the pursuer in his service for the current year: Therefore assolizies the defender from the conclusions of the action," &c.

The pursuer appealed, and argued—Both Sheriffs had found it proved, and it was clear, that there was a re-engagement. The statement by the defender that pursuer might go if he was not satisfied about the milk was not a dismissal, and the pursuer did not take it as such. It was only when he found the defender was getting another servant that he began to seek a new place, as was his proper course. His reported conversation as to leaving the defender was no good ground for the defender going on to engage another servant without speaking to him.

Authorities—*Macleod v. Fyfe*, February 4, 1813, F.C.; *Ross v. Pender*, January 8, 1874, 1 R. 352.

The defender argued—No re-engagement in January was proved. The defender had only said that he would keep on pursuer at increased wages if pleased with him. Even if he were re-engaged, the pursuer had waived his right to stay by the observations which he made to Mr Butters and to Mr Campbell, and these statements coming to the defender's ears, he was entitled to take it that the pursuer had made up his mind to leave at the Whitsunday term 1885. Even assuming that damages were due to the pursuer by the defender, the amount given by the Sheriff-Substitute was a great deal too large.

At advising—

LORD JUSTICE-CLERK—This is an unfortunate case, because although both parties regretted the condition into which affairs had got, neither party took means to avoid the result of their acting, and the consequence is this action. I entertain no doubt that there was a re-engagement by the defender of the pursuer, which under other circumstances would have gone on to its natural termination. But a quarrel arose between the parties on a very trivial occasion, and during the quarrel the master said to the servant that he was at liberty to go if he wished. That was not a dismissal at all. Unfortunately the master took no steps to find out what was really his servant's determination, but from communications made to him by other parties, made up his mind that he did not intend to remain, and took steps to engage another servant. I think he was sorry for what had happened, and when he found that the pursuer did not intend to remain in his service. The matter would have been