

previous action raised by the pursuer against the defenders, of which this action is practically a repetition, he (having during the dependence of that action been rendered bankrupt) was ordained to find caution for expenses, which having failed to do, the Lord Ordinary before whom the case depended dismissed the action. It is maintained by the defenders that in those circumstances the present action is excluded. I do not agree in that view, and I base my opinion on the grounds expressed by Lord Deas in the case of *Stewart*, 6 Macph. 958. The former action having been "dismissed" does not preclude the pursuer from bringing and insisting in this action. The defenders say that the interlocutor in the former action, having been pronounced in respect of the pursuer's failure to obtemper an order of Court, should have been one of absolvitor, and not merely of dismissal. In this I think the defenders are right. But we have not now to consider the effect of an interlocutor which might have been pronounced but was not, but the effect of an interlocutor as pronounced. Dealing with the matter so, and agreeing, as I have said, with the views of Lord Deas in *Stewart's* case, I am for repelling the defenders' plea of *res judicata*.

The delay in bringing this action has been very great, but it is not without explanation. The pursuer's case as averred is that the defenders' slander ruined him and brought about his bankruptcy; that he is only now in a position pecuniarily to vindicate his character; and that as he has done nothing to indicate an abandonment of his present claim, but proceeded to enforce it as soon as he was in a position to do so, the mere delay in bringing this action is not *per se* sufficient to exclude it. I take the pursuer's view of this matter.

Lastly, I think there is no reason for ordering the pursuer to find caution. He has been discharged under his sequestration, and is therefore no longer a bankrupt. He may be poor, but that is not a reason for ordering him to find caution.

The pursuer has moved us to vary the issues as adjusted by the Lord Ordinary by striking out the word "maliciously," leaving the necessity for proving malice to be determined at the trial. But I think the Lord Ordinary did right in inserting that word, because the pursuer's averments disclose a *prima facie* case of privilege on the part of the defenders. I am therefore for refusing the pursuer's motion to have the issues varied as proposed.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—Salvesen, K.C.—A. M. Anderson. Agents—Deas & Kennedy, W.S.

Counsel for the Defenders and Reclaimers Ure, K.C.—M'Clure. Agent—F. J. Martin, W.S.

Saturday, June 21.

## SECOND DIVISION.

[Sheriff Court at Edinburgh.]

CHISHOLM v. MOSS.

CHISHOLM v. KELLOCK.

*Licensing—Penalty—Title to Sue—Common Informer—Licensing (Scotland) Act 1828 (Home Drummond Act) (9 Geo. IV. c. 58), sec. 13—Public-Houses Acts Amendment (Scotland) Act 1862 (25 and 26 Vict. c. 35), secs. 25 and 29—Publicans' Certificates (Scotland) Act 1876 (39 and 40 Vict. c. 26), sec. 11—Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. c. 53), secs. 2, 27, and 28—Public-House.*

Held that a common informer has no title to sue for a penalty under section 13 of the Licensing Act 1828 (Home Drummond Act), in respect that by section 25 of the Public-Houses Acts Amendment (Scotland) Act 1862 (25 and 26 Vict. c. 35) all offences against section 13 of the Home Drummond Act must be prosecuted at the instance of the procurator - fiscal or some person specially appointed for the purpose.

The Licensing (Scotland) Act 1828 (Home Drummond Act) (9 Geo. IV. c. 58) enacts, Sec. 13—. . . "No justice of the peace or magistrate in any county or royal burgh who is a brewer, maltster, distiller, or dealer in or retailer of ale, beer, spirits, wine, or other exciseable liquors, or who shall be in partnership with any person as a brewer, maltster, distiller, or dealer in or retailer of ale, beer, spirits, wine, or other exciseable liquors, shall act as such justice of the peace or magistrate respectively in the execution of this Act; nor shall any justice of the peace or magistrate act in the granting of any certificate when he shall be proprietor or tenant of the house or premises for which such certificate shall be applied for; and everything done by a justice of the peace or magistrate respectively in any case in which he is so disqualified to act shall be null and void; and every justice of the peace or magistrate who shall knowingly or wilfully offend in any of the premises aforesaid shall forfeit and pay the sum of fifty pounds, to be recovered by any person who will prosecute for the same, before the sheriff of the county, within six calendar months next after the offence has been committed."

The Public-Houses Acts Amendment (Scotland) Act 1862 (25 and 26 Vict. c. 35) enacts, Sec. 25—"Every person who shall commit any breach of certificate, or who shall in any other manner offend against either of the recited Acts (viz., 9 Geo. IV. c. 58, and 16 and 17 Vict. c. 67), or this Act, shall be prosecuted, and all penalties, together with the expenses of prosecution and conviction, to be ascertained on conviction, shall be recovered, unless by this Act otherwise specially directed or authorised, before the sheriff or any two or more

justices of the peace of the county, or any magistrate of the burgh having jurisdiction in the county or burgh, as the case may be, in which such offender shall reside or such offence shall have been committed, at the instance of the procurator-fiscal, or of such other party as shall be specially appointed to prosecute such class of offences by the justices of the peace of the county in general quarter sessions assembled, or the magistrates of the burgh, as the case may be, and which appointment they are hereby specially authorised to make." . . . Section 29—"Nothing contained in the recited Acts, or this Act, shall prevent anything done which may be an offence under this Act, but which might have been prosecuted and punished as an offence at common law, or under any other Act, if this Act had not passed, from being so prosecuted and punished as if this Act had not passed."

The Publicans' Certificates (Scotland) Act 1876 (39 and 40 Vict. c. 26), enacts, Sec. 11—"No justice of the peace or magistrate of a burgh shall be qualified to be appointed a member of any county licensing committee or joint committee of a burgh under this Act unless he is qualified to act as such justice of the peace or magistrate in the execution of the Act of the ninth year of the reign of His Majesty King George the Fourth, chapter fifty-eight, according to the provisions contained in the thirteenth section thereof; and every justice of the peace or magistrate of a burgh who shall be appointed a member of any such committee, not being qualified as aforesaid, shall, if he shall knowingly or wilfully act as a member of such committee, be liable to forfeit and pay the same penalty, to be recovered and applied in the same manner, and subject to the same conditions as if he had been guilty of an offence under the said thirteenth section. . . ."

The Summary Procedure Scotland (Act) 1864 (27 and 28 Vict. c. 53), enacts, Sec. 2—"Penalty shall mean any sum of money which may under the authority of any Act of Parliament be recoverable from any person in respect of the contravention of any statutory requirement or prohibition, and also any sum which may under the provisions of any Act of Parliament be recoverable as a penalty or forfeiture, whether such sum shall be payable to the party complaining, prosecuting, or suing for the same, or shall be payable in whole or in part, to any other person." . . . Section 27—"Nor shall anything in this Act contained affect any right to sue by way of ordinary action in the Court of Session or Sheriff Court in Scotland for the recovery of any penalty or forfeiture." . . . Section 28—"In all proceedings by way of complaint instituted in Scotland . . . the jurisdiction shall be deemed and taken to be of a criminal nature where, in pursuance of a conviction or judgment upon such complaint, or as part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent . . . and in all other pro-

ceedings instituted by way of complaint, under the authority of any Act of Parliament, the jurisdiction shall be held to be civil." . . .

John Chisholm, grocer and wine merchant, residing at Ormiston, Haddingtonshire, raised an action in the Sheriff Court of the Lothians and Peebles at Edinburgh, in which he prayed the Court to "grant a decree against" the defender, Horace Edward Moss, residing at Middleton, Gorebridge, Midlothian, "ordaining him to pay to the pursuer the sum of £50 sterling."

The pursuer averred that at the statutory meeting of the Quarter-Sessions of the Peace for the county of the city of Edinburgh, held within the Burgh Court-Room in the City Chambers at Edinburgh on Friday, 26th April 1901, for the purpose of hearing and disposing of appeals under section 14 of the Act 9 Geo. IV. c. 58, the defender sat as a member of the Court or Bench of Justices of the Peace, and took part in hearing and disposing of such appeals.

He also averred that at the date of the meeting the defender was a dealer in or retailer of ale, beer, spirits, wine, or other exciseable liquors in the sense of the said Act as managing director and a shareholder of Moss's Empires, Limited, within the premises known as the Empire Palace Theatre, Nicolson Street, Edinburgh, and was therefore disqualified from acting as a Justice of the Peace, as provided by the 13th section of the said Act; that before the Court proceeded to hear appeals the said section was read aloud by the Clerk of Court in the presence and hearing of the Justices; and that the defender had thus knowingly or wilfully contravened the 13th section of the said Act, and was therefore liable to forfeit and pay the sum of £50, to be recovered by any person prosecuting therefor in the Sheriff Court of the county within six calendar months from the date of the alleged offence.

The defender admitted that he had been present at the meeting of Justices, and had taken part in disposing of two of the appeals. He averred that on a sound construction of the Act in question he was entitled to attend the meeting of Quarter-Sessions and to take part in its decisions. He further averred that any penalties exigible in respect of a violation of the 13th section of the statute were not recoverable by a member of the general public, but only by the Inland Revenue authorities or someone acting on their behalf, and that the form of the present action was incompetent.

The defender pleaded, *inter alia*—“(1) The pursuer has no title or interest to sue. (2) The action is incompetent. (3) The statements of the pursuer are irrelevant and insufficient to support the conclusions of the petition.”

The case of *Chisholm v. Kellock*, was another action at the instance of the same pursuer based upon the same grounds.

On 2nd December 1901 the Sheriff-Substitute (HENDERSON) pronounced this interlocutor—"Finds in law (1) that the petition is incompetent in the ordinary Sheriff Court,

and therefore sustains the second plea-in-law for the defender: Further (2) also finds in law that, even were the action competent in the ordinary court, the petition is irrelevant as laid: Therefore sustains the third plea-in-law for the defender: Therefore dismisses the action; finds the defender entitled to expenses; allows an account thereof to be given in, and remits," &c.

*Note.*—"I am of opinion that the petitioner here has mistaken his remedy, and that the only competent manner in which to 'prosecute for' this penalty is by summary complaint in the form prescribed by the Summary Jurisdiction Acts, 1864 and 1881, in the summary criminal court.

"A perusal of the section of the Home Drummond Act (4 Geo. IV. cap. 58) for an alleged contravention of the 13th section whereof this procedure has taken its rise, shews plainly that the court in which offences and penalties under that statute were to be prosecuted was to be one of summary criminal jurisdiction. The phraseology made use of is descriptive and distinctive of such a court—"complaint," "prosecute," "conviction," "offence," "forfeit and pay," and "penalty," all point at proceedings in a summary criminal court and not in the ordinary court. It is true that neither "complaint" nor "conviction" appears in this 13th section, nor is there provided any alternative of imprisonment, but the words "forfeit and pay" "penalty" and "prosecute" are all contained in the section. These words seem to me sufficiently cognate to the provisions in the other sections of the statute, which clearly and exclusively apply to summary criminal proceedings only, so as to make it a necessary assumption that this penalty was meant to be recovered in a like manner. The provisions of the 25th section of the "Public-Houses Acts Amendment Act, 1862," seem also specially intended to enact that such a penalty as the present was only to be prosecuted for in a court of summary criminal jurisdiction, in which case the informer here would apparently have to obtain the consent of the procurator-fiscal before he could proceed.

"It was argued for the pursuer that the provisions of the 3rd sections respectively of the Summary Procedure Act, 1864, and of the Summary Jurisdiction Act, 1881, precluded this penalty being sued for in a summary criminal court, on account of the wording of the 13th section of the Home Drummond Act, which provides no alternative form of recovering the penalty, and therefore this penalty does not fall under the class of cases enumerated in these sections. I am unable to give effect to that contention, as I think that this penalty does fall under these descriptions.

"If, however, I am wrong in the first ground of decision, that this petition is incompetent in the ordinary court, I think there is still another ground on which the defender can escape, at all events from the conclusions of this petition as laid. That ground is that I am of opinion that the petition is irrelevant. There is in the

prayer of the petition no attempt at stating that the penalty has been found due, nor is there any conclusion to have it found that the penalty has been incurred. The prayer of the petition is framed as if what is sued for was a past due and well constituted debt, though no attempt is or has been made at constitution. To succeed in recovering a penalty, surely it is necessary to have it held that the penalty has truly been incurred. It seems to me that the pursuer here should either have obtained a conviction in a competent court, or at all events should conclude for a finding that the penalty has been incurred, before he can proceed to ask for an ordinary decree for payment. A reference to Sheriff Lees' Sheriff Court Styles (p. 294) shews that the style recommended by him to be adopted in the event of a pactional penalty being sued for should contain in the prayer a statement of the penalty and that it has been incurred. The absence of anything of this sort in the prayer of the petition makes the petition in my judgment quite irrelevant.

"In conclusion, I should possibly add that, as was pointed out by counsel for the defender, whereas under the provisions of the Summary Jurisdiction Acts of 1864 and 1881, power is given to the presiding judge to remit or mitigate the penalties sued for, it is extremely doubtful whether such a step could be taken in the ordinary court. This state of matters may partially account for this action being brought in its present form."

The pursuer appealed, and argued—The action was competent. Section 13 of 9 Geo. IV. cap. 58, did not say "penalty," but "sum of £50." No special form of action was prescribed. The sum of £50 was "to be recovered by any person . . . before the sheriff of the county." The Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. c. 53) contained a saving clause (sec. 27) as follows—" . . . nor shall anything in this Act contained affect any right to sue by way of ordinary action in the Court of Session or Sheriff Court in Scotland for the recovery of a penalty or forfeiture" . . . Therefore if before 1864 the sum forfeited was recoverable in the ordinary Sheriff Court, it was so still. Section 28 of the same Act (the Summary Procedure Act of 1864), which defined the limits of civil and criminal jurisdiction with regard to proceedings by way of summary complaint, provided that the jurisdiction should be deemed to be criminal "where . . . the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or . . . in case of default of payment or recovery of a penalty . . . to grant warrant for the imprisonment of the respondent . . . and in all other proceedings instituted by way of complaint . . . the jurisdiction shall be held to be civil." No method of recovery by imprisonment was provided in the present case, therefore the jurisdiction was civil and not criminal—*Simpson v. Corporation of Glasgow*, January 29, 1902, 39 S.L.R. 371. Section 25 of the Public-Houses Acts Amendment

(Scotland) Act 1862 (25 and 26 Vict. c. 35) applied to such offences as breaches of certificate and the like on the part of public-house keepers, and not to such an offence as was here alleged. The Act of 1876 (39 and 40 Vict. c. 26) re-enacted the provisions of the Home Drummond Act as regards offences on the part of Justices. The right to prosecute in the manner provided by section 13 of the Act of 1828 was preserved by section 29 of the Act of 1862.

Argued for the defender—The Act of 1862 (25 and 26 Vict. c. 35), sec. 25, took away the right of a common informer to prosecute for such offences as the present. The object of that statute was to transfer all this class of prosecutions at the instance of common informers to the category of offences which could only be prosecuted by the procurator-fiscal. Section 16 of the Home Drummond Act (9 Geo. IV. c. 58), used the word “offence,” and section 30 used the word “penalty.” That inferred criminal jurisdiction, for a penalty was not a civil debt—*Lawson v. Jopp*, February 16, 1853, 15 D. 392. The 11th section of the Publicans’ Certificates (Scotland) Act 1876 (39 and 40 Vict. c. 26) did not abrogate the provisions of section 25 of the Act of 1862. Therefore every offence against the Home Drummond Act after 1862 could only be sued for by a public prosecutor. The Summary Procedure Act 1864 defined penalty (section 2) as “any sum of money which may under the authority of any Act of Parliament be recoverable from any person in respect of the contravention of any statutory requirement or prohibition, and also any sum which may under the provisions of any Act of Parliament be recoverable as a penalty or forfeiture.” . . . Such a penalty might be recovered under the Summary Jurisdiction Acts—*Fletcher v. Eglinton Chemical Company*, November 13, 1886, 1 White 259, 24 S.L.R. 47.

At advising—

LORD YOUNG—This is an appeal against a judgment of the Sheriff of the Lothians and Peebles at Edinburgh. By section 13 of the Act 9 Geo. IV. c. 58, it is provided that any justice of the peace or magistrate who is a distiller or dealer in spirits, wine, or other exciseable liquors shall not act as a justice of the peace or magistrate in any Court for the granting of certificates, and this includes Quarter Sessions where there are appeals on that subject; and it is further provided that every justice of the peace or magistrate 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 before the sheriff of the county within six calendar months next after the offence has been committed.”

Now, the appellant here, who is a spirit dealer, presented a petition to the Sheriff of the Lothians, in which he averred that the defender was a Justice of the Peace, and had violated the provision in clause 13 of the Home Drummond Act (9 Geo. IV. c. 58), and that he had offended knowingly and wilfully, and concluding for payment

of £50. That petition was objected to on the ground of no title to sue, and on the ground that it was in the form of an ordinary application for payment of a debt to the Civil Court, which was not the proper proceeding in which to sue for a penalty. The answer made was that the provision of clause 13 was to be strictly observed, and that it provided that the penalty should be “recovered by anyone who will prosecute for the same before the sheriff of the county.” The question therefore is, had the petitioner a title to sue, and has he presented his application in proper form and to the proper Court? There is also an objection to the relevancy, but that objection has not to be considered, unless we determine that the petitioner had a title to sue, and that he has sued in proper form. The main answer to the petitioner’s contention that he has complied with the terms of the statute is a reference to clause 25 of the Act 25 and 26 Vict. c. 35 (the Public-Houses Acts Amendment (Scotland) Act 1862), which provides that “Every person who shall commit any breach of certificate, or who shall in any other manner offend against either of the recited Acts or this Act, shall be prosecuted, and all penalties . . . shall be recovered unless by this Act otherwise specially directed or authorised before the sheriff or any two or more justices of the peace of the county . . . in which such offender shall reside or such offence shall have been committed, at the instance of the procurator-fiscal, or of such other party as shall be specially appointed to prosecute such class of offences.”

Now, the question is, does that Act of 1862 apply to the present proceedings, and I must say that it seems to me to be clear that it does, because the Home Drummond Act is one of the recited Acts, and the provision in the section is distinct that the prosecution under any of the recited Acts or this Act shall be . . . “at the instance of the procurator-fiscal or such other party as shall be specially appointed to prosecute such class of offence.”

But clause 29 of the Act of 1862 provides that “nothing contained in the recited Act or this Act shall prevent anything done which may be an offence under this Act, but which might have been prosecuted and punished as an offence at common law or under any other Act if this Act had not passed, from being so prosecuted and punished as if this Act had not passed;” and the contention was that this provision left it open to prosecute in the manner provided in section 13 of the Home Drummond Act.

My opinion is that this section is not applicable, and does not affect the argument founded on section 25, because the offence here charged is not an offence under “this” Act, and section 29 only applies to an offence under “this” Act. Now, a contravention of section 13 of the Home Drummond Act is not an offence under the Act of 1862 at all, so that if section 13 were repealed it could not be prosecuted under the Act of 1862. It can only be prosecuted as an offence under section

13 of the Home Drummond Act, which must be prosecuted at the instance of the procurator-fiscal or some public official appointed by the magistrates.

I therefore think that section 25 applies, and that it is adverse to the course here taken, but reference was also made to 39 and 40 Vict. c. 26 (the Publicans' Certificates (Scotland) Act 1876), section 11, which provides that "no justice of the peace or magistrate of a burgh shall be qualified to be appointed a member of any county licensing committee or joint-committee of a burgh under this Act" unless he is qualified to act under section 13 of the Home Drummond Act, and every such justice or magistrate not being so qualified shall, if he act knowingly and wilfully, be liable to forfeit and pay the same penalty, to be recovered in the same manner as if he had been guilty of an offence against section 13 of the Home Drummond Act.

Now, it appears to me that this does not touch the question at all, because if anyone had in 1876 violated section 13 of the Home Drummond Act he must have been prosecuted at the instance of the procurator-fiscal as provided for by the Act of 1862.

My opinion therefore is that the prosecution in this case not having been in the manner specified in the 25th section of the Act of 1862, viz., at the instance of the procurator-fiscal or other person specially appointed for the purpose, we should sustain the first plea-in-law for the respondent of "No title to sue." I would suggest that we should sustain this plea and affirm the judgment of the Sheriff dismissing the petition.

LORD TRAYNER and LORD KYLLACHY concurred.

The LORD JUSTICE-CLERK and LORD MONCREIFF were absent.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff-Substitute of the Lothians dated 2nd December 1901: Sustain the first plea-in-law for the defender: Dismiss the action, and decern: Find the defender entitled to expenses in this and in the Inferior Court, allowing fees to counsel in the Sheriff Court, and remit," &c.

Counsel for the Pursuer and Appellant—Gunn. Agent—Robert Macdougald, S.S.C.

Counsel for the Defender and Respondent—Campbell, K.C.—Dewar. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Tuesday, July 1.

FIRST DIVISION.

[Lord Kincairney,  
Ordinary.

CORPORATION OF EDINBURGH v.  
IRVINE'S TRUSTEE.

*Superior and Vassal — Composition — Implied Entry—Trustee not Holding for Heir of Investiture—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 4 — Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887 (50 and 51 Vict. cap. 69), sec. 1.*

A vassal infeft in certain lands, and entered with the superior, granted a trust-disposition by which he conveyed these lands to A and himself as trustees. The trustees were directed to hold for the truster's daughter in life, for her alimentary use only, and for such of the daughter's lawful children as she should appoint in fee. In the event of the daughter dying without children the trustees were directed to convey the subjects to the "heirs or assignees" of the truster. This disposition was recorded in the Register of Sasines in the lifetime of the truster.

On the death of the truster, survived by his daughter, who was his only child, and was then unmarried, the superiors claimed a composition from the surviving trustee. He maintained that relief duty only was due.

*Held* (aff. judgment of Lord Kincairney, Ordinary) that the superiors were entitled to a composition, in respect (1) that the trustee, not holding for the heir of the last-entered vassal, was a singular successor impliedly entered with the superiors by virtue of section 4 of the Conveyancing (Scotland) Act 1874, and (2) that section 1 of the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887 was not applicable to the facts of the case.

This was an action at the instance of the Lord Provost, Magistrates, and Town Council of Edinburgh, superiors of certain subjects in Bristo Street, Edinburgh, described in the summons, against James Wright, draper, Leeds, sole surviving trustee under a disposition granted by the late John Irvine, spirit merchant, Edinburgh, the vassal last vest and seized in the said subjects, dated 14th February 1881, and recorded in the Division of the General Register of Sasines applicable to the county of Edinburgh on 23rd February of the same year.

The pursuers concluded for declarator that in consequence of the death of the said John Irvine a casualty, being one year's rent of the said lands, became due to the pursuers as superiors of the lands upon 7th November 1888, being the date of the death of the said John Irvine, and that this casualty was still unpaid, and for