Counsel for Pursuers (Reclaimers)—Guthrie Smith—M'Kechnie. Agents—Philip, Laing, & Monro, W.S.

Counsel for Defenders (Respondents)—J. A. Crichton. Agent—John Gill, S.S.C.

Wednesday, March 13.

FIRST DIVISION.

HOPE, PETITIONER.

Public Officers—Appointment of Interim Keeper of the Signet.

On March 12th the Keeper of Her Majesty's Signet in Scotland died. In consequence of this the deputation granted by him to the Deputy Keeper of the Signets, James Hope, Esq., W.S., fell, and it was necessary to petition the Court to grant a commission to an interim Keeper. This petition, following the precedents, was presented by Mr Hope, and prayed their Lordships to appoint him to act as interim Keeper. The concurrence of the Lord Advocate in the petition having been obtained, the Court made the appointment as craved.

The following interlocutor was pronounced:—

"The Lords having heard counsel for the petitioner, and for the Lord Advocate, who through his counsel expressed his consent thereto, Appoint the petitioner to act as interim Keeper of the Signet till Her Majesty shall be pleased to issue a commission appointing a new Keeper; and grant warrant and authority to the petitioner in terms of the prayer of the petition: And appoint the petition, with this deliverance, to be recorded in the Books of Sederunt.

Counsel for Petitioner—Maconochie. Agents—Hope, Mann, & Kirk, W.S.

Wednesday, March 13.

OUTER HOUSE.

[Lord Rutherfurd Clark.

BARBOUR'S TRUSTEES *v.* DAVIDSONS.

Process—Discharge of an Inhibition used on Dependence of Action.

Where an inhibition is used on the dependence of an action, it is not necessary to present a petition for the purpose of getting it discharged, as the Court will pronounce an order to that effect *in causa*, and grant a warrant to the Keeper of the Register to mark the discharge and recall upon the record.

In this action inhibitions were used by the pursuers upon the dependence of the summons, and on the case being taken out of Court by a joint minute for the parties, the defenders moved the Lord Ordinary to insert in his interlocutor dismissing the action an order for discharge of the inhibitions, and a warrant to the Keeper of the Register of Inhibitions to mark upon the record the discharge and recall thereof. The Lord Ordinary (Rutherfurd Clark) was doubtful whether he had power to do so without a petition being presented, having regard to the forms of section 148 of the Titles to Land Consolidation Act of 1868. On inquiry, however, into the practice, and on the authority of three unreported cases—*Ward's Trustees* v. *Tennent*, 5th Dec. 1871; *Williamson* v. *Rodger*, 24th June 1874; *Marschner* v. *Edinburgh and Leith Joiners Building Company*, 25th Feb. 1876—the Lord Ordinary granted the motion, and pronounced the following interlocutor:—

"The Lord Ordinary, in respect of the joint minute, discharges and recals the inhibition recorded 14th June 1877, used upon the dependence of the action; grants warrant to and authorises the Keeper of the Register of Inhibitions to mark upon the record thereof the discharge and recall of said inhibitions," &c.

Counsel for Barbour's Trustees — Moody Stuart. Agent—H. R. Macrae, W.S.

Counsel for Davidson—Wallace. Agents—Adam & Sang, W.S.

Thursday, March 14.

FIRST DIVISION.

[Sheriff of Caithness.

ROSS *v.* BRIMS.

Expenses—Process—Judicature Act, sec. 44, *and Court of Session Act* 1868, *sec.* 64.

Where an objection to the competency of an appeal is not taken till the case is put out for hearing, the Court, although they dismiss the appeal as incompetent, will not give the respondent his expenses.

This was an appeal against a judgment ordaining a tenant to remove. When the case came up for hearing, the respondent submitted that by 6 Geo. IV. c. 120, sec. 44, followed by 31 and 32 Vict. c. 100 (Court of Session Act 1868), sec. 64, an appeal in such an action is incompetent, suspension being the proper remedy, and referred to the case of *Fletcher* v. *Davidson*, 3d March, 1874, 2 R. 71.

At advising—

Lord President (in sustaining the objection to the competency of the appeal)—It is the duty of a respondent to state any objection he may have to the competency of an appeal when the case appears in the Single Bills. I do not say that if he fails to do so that that precludes him from stating it afterwards. On the contrary, the Court will *ex proprio motu* take up any such objection. But it is a consequence of such failure that parties are put to unnecessary expense, and, as in the present case, counsel may be instructed to discuss the case on the merits. That expense is due to the respondent's omission, and therefore we shall give him no expenses.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Sustain the objection; dismiss the appeal as incompetent; but find no expenses due, in respect the objection was not stated when the case was in the Single Bills; and decern."

Counsel for Pursuer (Respondent)—Strachan. Agents—Philip, Laing, & Monro, W.S.

Counsel for Defender (Appellant) — Black. Agents—Curror & Cowper, S.S.C.

HIGH COURT OF JUSTICIARY.

Thursday, March 14.

WOOD *v.* MACCALL.

(Before Lord Justice-Clerk, Lord Young, and Lord Adam.)

Justiciary Cases—25 and 26 Vict. c. 35—Public Houses Acts Amendment Act 1862—Breach of Certificate by Publican—Keeping Open House.

A party remained in a public-house until at least fifteen minutes after eleven, the door having been locked at that hour and only opened afterwards to let the party out. It was not proved that liquor was served after the prohibited hour. It had been served previously to that party, and glasses were found on the bar and in the parlour of it. A conviction by the Justices against the publican upon these facts for "keeping open house," under the Public-Houses Acts Amendment Act 1862, *quashed* on appeal.

This was an appeal under the Summary Prosecutions Appeal Act, presented by Peter Maccall, spirit dealer, Coltbridge, Edinburgh, against a decision pronounced by the Justices of the Peace in a complaint presented by the Procurator-Fiscal against the appellant.

The complaint charged Maccall with an offence against the laws for the regulation of licensed public-houses in Scotland, in so far as upon 26th January 1878 he "did keep open his premises and did permit or suffer drinking therein, or sell or give out whisky, ale, or other exciseable liquors" to certain persons. In the case stated by the Justices they stated that it was proved that the two men mentioned in the complaint, with five or six others, were in the public-house on the evening in question, and remained within "until at least fifteen minutes after eleven o'clock." Further, it was proved that the door was locked after eleven, except when they were leaving the house. Also, that after eleven there were glasses on the bar and in the parlour off the bar, and that the men were during that evening supplied with liquor, but it was not proved that any was supplied to them after eleven o'clock. The Justices convicted Maccall on these facts of breach of certificate in having "kept open his public-house after eleven o'clock," and fined him £2, 10s., with 18s. 6d. of expenses.

The question of law submitted was as follows:—"Whether, in the state of matters so proved, the said Peter Maccall did, in the sense of the statute, keep open his public-house after eleven of the clock at night, and thus was guilty of a breach of his certificate?"

Authorities cited—*Sturrock* v. *Lang*, Dec. 14, 1877, 15 Scot. Law Rep. 197; *Tennant*, 1 Ellis, 401; *Gates*, 2 Law Times, 1; *Newman* v. *Bendish*, 10 Adolphus and Ellis, 11.

At advising—

Lord Young—It is very unfortunate that this statute, which should have been quite intelligible to the publicans affected by it, and to magistrates trying questions arising under it, has given rise in the past to so many difficulties, and still continues to do so.

As to the question now raised, I am of opinion that there are three classes of offences which may be committed in breach of that portion of the certificate here referred to. The clause is as follows:—"Do not keep open house or permit or suffer any drinking in any part of the premises belonging thereto, or sell or give out therefrom any liquors before eight of the clock in the morning or after eleven of the clock at night of any day." Now, I should interpret these words "do not keep open house" as meaning also "for the sale of liquors"—for, in fact, carrying on the trade; but as these statutes are characterised by a variety of expression—probably to avoid sameness—we have the next clause, "or permit," &c., and then the third clause, "or sell," &c. Now, although in this complaint all three offences are referred to, the Justices have found the appellant guilty of one, and one only, namely, "keeping open house," and there is nothing to show that they would have convicted of any other offence. Indeed, from what appears, probably they would not.

From the statement of facts it seems to me that keeping open house was exactly what the appellant did not do. There were a party of men who had been admitted to this house before eleven, but who did not depart till 11·15. It would have been entirely different had the magistrates found that these men were drinking on the premises. But I must say that it appears to me if under these circumstances a party stop a few minutes engaged in conversation—or even though it should be to finish their glasses—to convict the publican would be to push the statute beyond what I feel disposed to do.

When the magistrates on the facts here stated held that Maccall kept open house, I think their decision was in law erroneous, and that we must sustain the appeal and quash the conviction.

Lord Adam—I concur, and upon the same grounds. The magistrates might perfectly well have convicted Maccall of allowing drinking on the premises, but they did not do so, and indeed on the evidence as it stands could not have done so.

Lord Justice-Clerk—I concur in the result, but wish shortly to state the grounds on which I do so. I do not think it essential to decide whether there are one or several offences under the clause in the certificate, but I am not prepared to say that even with a closed door the