or diligence upon the decree, or to refuse the note or do otherwise as he shall think just."

The Sheriff-Substitute, after hearing parties' procurators, refused the note, adding to his interlocutor this note:—"Considering the stage to which this action has been allowed to advance, and the unsatisfactory nature of the excuse for the defender's negligence, the Sheriff-Substitute does not think it desirable to grant the defender's motion."

On appeal the Sheriff (THOMS) adhered, and added this note:—"Looking to the terms of the order for service, and the fact of personal service, the Sheriff agrees with the Sheriff-Substitute as to the unsatisfactory nature of the excuse made by the defender for not attending to his interests in this case. It would just be a premium upon procrastination were a defender, three months after he allows decree to go out against him, to be enabled to begin a litigation which would in ordinary course have been ended by this time."

The defender appealed to the Court of Session.

It was stated at the bar that the pursuer had used arrestments on the dependence of the action, and obtained a decree of furthcoming against the defender.

The pursuer (respondent) objected to the competency of the appeal. He argued that the remedy provided by the Sheriff Court Act was one entirely in the discretion of the Sheriff. If he thought fit to refuse the note, his judgment could not be appealed. The only course open to the defender was to proceed by suspension or reduction of such a decree after extract. The decree of furthcoming was "implement" in the sense of the section in question—*M'Gibbon* v. *Thomson*, July 14, 1877, 4 R. 1085.

Counsel having then been heard on the merits of the appeal—

LORD PRESIDENT—This is a matter in which I should be slow to interfere with the discretion of the Sheriff unless he had clearly gone wrong. There seems to be no evidence that he has done so here.

Of the competency of the appeal I entertain no doubt.

LORDS DEAS, MURE, and SHAND concurred.

The Court refused the appeal with expenses, modified to £4, 4s.

Counsel for Pursuer (Respondent)—R. V. Campbell. Agents—Davidson & Syme, W.S.

Counsel for Defender (Appellant)—R. K. Galloway. Agent—Thomas Carmichael, S.S.C.

Tuesday, June 14.

FIRST DIVISION.

[Court of Exchequer.

THE STRATHEARN HYDROPATHIC ESTABLISHMENT COMPANY (LIMITED) *v.* THE SOLICITOR OF INLAND REVENUE.

Revenue—Inhabited-House-Duty—The Customs and Inland Revenue Act 1871 (34 *and* 35 *Vict. c.* 103), *sec.* 31—*Hydropathic Establishment—Hotel.*

A hydropathic establishment is entitled to be assessed for inhabited house-duty at the modified rate of sixpence per £1, under sec. 31 of the Customs and Inland Revenue Act 1871, as being a dwelling-house wherein is carried on "the business of an hotel-keeper or an inn-keeper or coffeehouse-keeper, although not licensed to sell therein by retail beer, ale, wine, or other liquors."

The Strathearn Hydropathic Establishment Company (Limited), appealed to the Commissioners for the General Purposes of the Property and Income Tax Acts against an assessment of £36, 7s. 6d., being inhabited-house-duty on £970 at the rate of 9d. in the pound, made on them for the year ending Whitsunday 1881, in respect of their being occupiers of the Strathearn Hydropathic Establishment at Crieff, and claimed to have the assessment restricted to £24, 5s., the duty on £970 at the rate of 6d. in the pound, on the ground that they carried on in their establishment the business of an hotel-keeper or an inn-keeper within the meaning of section 31 of the Act 34 and 35 Vict. cap. 103. The following facts were stated in the case for the opinion of the Court of Exchequer:—

. . . . "3. The object of the hydropathic establishment is the treatment, under the advice of a resident physician, of patients by hydropathy, and for the boarding and lodging of them in the establishment. The company board and lodge visitors who may not desire to undergo hydropathic treatment.

"4. The patients and visitors are subject to the strict rules of the establishment. They are rung up in the morning at a fixed hour. The meals are served only at certain fixed hours, and any inmate sitting down to table after grace is said, or making allusion to hydropathic treatment during meals, is fined. Family worship is held morning and evening. The front-door is locked at 10·30 P.M., and the gas turned off at 11 P.M., when perfect quietness must be maintained by all.

"5. By the rules and regulations of the company, which are hung up in the bedrooms of the establishment for the information of the public, the officials of the company are empowered to refuse admission and to send away such as they judge unsuitable. No children under six years of age are admitted except under special arrangement.

"6. The company board and lodge patients and visitors at a certain fixed rate per day or per week. Visitors wishing to invite a friend to the *table d'hote* or to spend the evening, require to give notice at the office. The company declined to say that they are bound to supply the travelling public with meals at odd hours, but they stated they had never refused to do so.

"7. The company have no signboard, and they have never in their official papers, nor in their advertisements to the public, designated themselves as hotel-keepers or as inn-keepers, nor their establishment as an hotel or an inn."

The Commissioners were of opinion that the appellants did not carry on the business of an hotel-keeper or an inn-keeper in their establishment within the meaning of the 31st section of the Act 34 and 35 Victoria, cap. 103. They accordingly refused the appeal, and confirmed the assessment, but at the request of the Hydropathic Company stated a Case for the Court of Exchequer.

The question of law for the opinion of the Court was:—"Whether the company carry on in their establishment the business of an hotel-keeper or an inn-keeper within the meaning of the 31st section of the Act 34 and 35 Victoria, cap. 103, so as to entitle them to have the assessment on them to inhabited house-duty made at the rate of sixpence in the pound?"

The Inhabited House-Duty Act 1851 (14 and 15 Vict. cap. 36), provides, in the Schedule thereto attached, that Inhabited House-Duty shall be payable "for every inhabited dwelling-house which, with the household and other offices, yards, and gardens therewith occupied and charged, is or shall be worth the rent of £20 or upwards, by the year . . . And also where any such dwelling-house shall be occupied by any person who shall be duly licensed by the laws in force to sell therein by retail beer, ale, wine, or other liquors, although the room or rooms thereof in which any such liquors shall be exposed to sale, sold, drunk, or consumed, shall not be such shop or warehouse as aforesaid, . . . There shall be charged for every twenty shillings of such annual value of any such dwelling-house the sum of sixpence. And where any such dwelling-house shall not be occupied and used for any such purpose, and in manner aforesaid, there shall be charged for every twenty shillings of such annual value thereof the sum of ninepence."

The Customs and Inland Revenue Act 1871 (34 and 35 Vict. cap. 103), sec. 31, provides—"From and after the 5th day of April 1871 every inhabited dwelling-house which with the household and other offices, yards, and gardens therewith occupied and charged is or shall be worth the rent of £20 or upwards by the year, which shall be occupied by any person who shall carry on in the said dwelling-house the business of an hotel-keeper or an inn-keeper or coffeehouse-keeper, although not licensed to sell therein by retail beer, ale, wine, or other liquors, there shall be charged for every twenty shillings of such annual value of any such dwelling-house the sum of sixpence."

The appellant argued — Their establishment should only be assessed at 6d. under the 1871 Act, as being in fact an unlicensed hotel. The opinions of the Court in *Ewing* v. *Campbells*, showed that a hydropathic establishment fell under the *genus* "hotel." The business of hotel-keeping was not their sole occupation, but if the special element of hydropathic treatment were eliminated, their establishment was just a temperance hotel.

Replied for the Inland Revenue—The business of the appellants only resembled to a very limited extent that of a genuine hotel-keeper, in the ordinary and well-accepted sense of the term. Their real and main object was treatment of patients by water cure, and many of the stringent regulations of their house were quite inconsistent with the maintenance of an hotel for the reception of the public. The case of *Ewing* was decided with reference to the construction of a feu-contract, and did not apply. The duty should be imposed at 9d. under the Act of 1851.

Authorities — *Ewing* v. *Campbells*, Nov. 23, 1877, 5 R. 230; *Douglas* v. *Young*, Nov. 14, 1879, 7 R. 229; *Glasgow Coal Exchange Co.* v. *Inland Revenue*, Mar. 18, 1879, 6 R. 850.

At advising—

Lord President—It is of course conceded that a person carrying on the business of an hotel-keeper in any dwelling-house is liable in respect of that dwelling-house to be charged only at the rate of sixpence in the pound for inhabited-house-duty. But it seems to have been thought, prior to the year 1871, that it depended in some degree upon whether the hotel-keeper held a licence for the sale of exciseable liquors; and by the statute which was passed in that year, section 31, it is provided that for the future every "inhabited dwelling-house which . . . is or shall be worth the rent of £20 or upwards by the year, which shall be occupied by any person who shall carry on in the said dwelling-house the business of an hotel-keeper, or an innkeeper, or coffee-house keeper, although not licensed to sell therein by retail beer, ale, wine, or other liquors, there shall be charged for every twenty shillings of such annual value of any such dwelling-house the sum of sixpence." Now, this section in itself contains from the date of this statute the whole law applicable to the particular kind of hotel here mentioned—a hotel in which there is not a licence to sell exciseable liquors, and therefore I think we may confine our attention to the construction of this particular clause. And upon that I observe, in the first place, that if the dwelling-house be occupied by any person who shall carry on in the said dwelling-house the business of an hotel-keeper, he is to be charged only at the rate of sixpence per pound. It certainly is not necessary in order to enable him to claim the lower rate that he shall carry on no other business or no other occupation in that dwelling-house. He must carry on the business of an hotel-keeper there, but I should suppose that he might carry on another business also; and in many hotels which have licences to sell exciseable liquors we know very well that the hotel-keeper carries on the business of a wine merchant as well as that of an hotel-keeper. That is quite a common thing; and I suppose where the hotel-keeper has a conscientious objection to selling exciseable liquors he might deal in provisions, and that would not prevent him from being a hotel-keeper within the meaning of this section. Therefore the circumstance that the people who dwell in this house that we are dealing with, to a certain extent come there for medical treatment, is, I think, not by any means conclusive as to its not being an hotel, or conclusive against the keepers of this establishment carrying on in the building the business of an hotel-keeper. Then, in the next place, it must be observed that the essential business of an hotel-keeper is entertaining guests at bed and board, and it certainly is very difficult to say that the appellants in this case do not

carry on that kind of business. Every person that comes to their house is entertained at bed or board. Some of them get in addition to that medical treatment, but that does not prevent them being guests who use this house just as other persons use an hotel, viz., by sleeping and eating and drinking in it, and sleeping and eating and drinking nowhere else. So that the business carried on, independent of and in addition to the medical treatment, is undoubtedly of the nature of the business of an hotel-keeper. But then it is said that the rules and regulations of this establishment are such as no hotel-keeper could be allowed to make or to carry into effect, and that an hotel-keeper is bound to open his house to all lawful travellers, unless there be any special objection to particular individuals who claim admission; that he is liable for the property of the persons in his establishment under the edict *nautæ caupones;* and that the guests who resort to his house are not liable to have their liberty infringed or limited in the manner that is proposed in the regulations of this establishment. Now, in the first place, with regard to the obligation of an hotel-keeper to receive all lawful travellers unless there is some special objection to individuals, I do not find in the regulations of this establishment anything at all inconsistent with that. It is said that the officials—by which, of course, are meant the persons who under the company are carrying on this business—have power to refuse admission and to send away such as they judge unsuitable—and that those "suffering from infectious diseases or intoxication cannot be received or allowed to remain in the establishment." It does not appear to me that that, properly construed, would enable the keepers of this establishment to refuse guests capriciously or maliciously; and every hotel-keeper must have a certain power of selecting his guests, or perhaps, to speak more precisely, of rejecting certain guests. He is bound to attend to the decency and order of his establishment. That is one of his obligations, and that would be inconsistent with admitting certain classes of guests. He is bound also to attend to the health of his guests and salubrity of his house, and that would lead to his rejecting certain guests. He is bound also, I think, to exercise a discretion as to the class of people whom he will admit to his hotel. A man who is carrying on business as an hotel-keeper in a first-class establishment is not bound to admit to his hotel persons in every rank and condition of life. Sometimes persons in the condition of working men become for the time very rich and very extravagant. We have heard tales of navvies drinking up all the champagne and eating all the spring chickens of a whole neighbourhood; and if any of that class of people presented themselves to an hotel-keeper of the character we are supposing, I cannot doubt that he would have a discretion to reject them, because their manners and habits are not suitable to the class of people whom he receives. So that there is a pretty wide discretion in hotel-keepers as to rejecting guests that are not suitable, which are the very words used in this regulation; and I do not think therefore that that regulation is intended, or can be fairly construed as meaning anything more than the exercise of such a discretion as the law allows to every hotel-keeper. It is said, further, that they do not admit their liability under the edict for the property of their guests. Now, it does not appear to me to be at all material whether they admit that or not, because I should not have much difficulty in holding that they were liable under the edict if the case arose. Then as to all those little regulations about hours and the like, I cannot say that I think there is anything in that to show that this differs from the business of a hotel. I can quite understand an hotel-keeper saying to his guests and to the public—"My establishment is of such a limited character that I cannot afford and have not the means of giving dinners in private apartments—you must all dine in the public room when you come to my hotel." I can quite understand that, and if he can say that, he can also surely fix the hour at which the dinners in the public apartments are to be prepared. People cannot expect to have a table-d'-hote every hour for a great number of hours. They must be satisfied with one or perhaps two dinners being allowed in the course of a day in a hotel of that kind. Then with reference to the fines, I must say that appears to me to be rediculous. Whether they are in practice exacted we do not know, because the case does not tell us, but I am very clear of this, that if they were attempted to be exacted and were resisted this hotel-keeper would have no means of enforcing them. And therefore I do not attach any importance to that. Upon the whole matter I cannot say that this company are not carrying on the business of hotel-keepers. They are carrying on the business of a hydropathic establishment, which may be represented as having for its primary use the cure of disease, but that is not inconsistent with carrying on in the same building, and with reference to the very same people who come there to have their diseases cured, the business of an hotel-keeper. I think therefore the determination of the Commissioners is wrong, and that the rate should be reduced.

Lord Deas—I confess I have had a good deal of difficulty about this case, according as I directed my attention to one clause or another of the statute; but I have come latterly to think that it all depends on section 31, and that as to the other clauses of the statute they have very little to do with the question. Section 31 deals with inhabited dwelling-houses, and it enacts that everyone who lives in an inhabited dwelling-house, if he carries on certain kinds of business, shall on that account, and that account alone, pay sixpence in the pound in place of ninepence. Now, this is undoubtedly an inhabited dwelling-house, and I think it is hardly contested that if a party carries on in his inhabited dwelling-house a temperance hotel he is liable only at the rate of sixpence. As your Lordship has observed, there is no restriction upon a man who has an inhabited dwelling-house, as to what kind of other business he should carry on in that dwelling-house. An hotel-keeper may also carry on the business of a horse and carriage hirer, and that would not make him liable for any higher rate than he would otherwise be liable for. If that is the right construction of the statute, what does it matter what kind of business it is that a party carries on in his inhabited

dwelling-house; and if he can carry on a temperance hotel and only be liable at the rate of sixpence, I think that comes very near the case of this hydropathic establishment. It comes more under the category of a temperance hotel than any other; and therefore, on the whole matter, I come to the same conclusion as your Lordship.

Lord Mure—The words of section 31 are very broad. They expressly provide that any person who shall carry on in the said dwelling-house the business of an hotel-keeper, innkeeper, or coffee-house keeper, although not licensed to sell by retail intoxicating liquors, shall be assessed in the sum of sixpence per pound instead of ninepence. It extends to everyone who carries on the business of an hotel-keeper, and I confess I have come to the same conclusion as your Lordship. I do not see how it is possible to say that what is carried on in this house, according to the admitted facts of this case, is not, in part at all events, the business of an hotel-keeper. People are received and lodged there and fed, and they are charged for that a certain sum. No doubt there are certain specialties. They are said to be treated hydropathically. That is so, but the establishment is not exclusively for that—because it is admitted that people go there who are not so treated. It seems in fact to be a kind of temperance hotel, where, besides conforming to the rule of abstaining from alcoholic liquors, the guests are treated hydropathically by means of the water cure, and I cannot see how that puts the case in a different category from that of an hotel-keeper. I cannot see how that can be maintained under the words of section 31, and although there may be some rather absurd rules, as it seems to me, I do not think that they are so inconsistent with the carrying on of the business of an hotel-keeper as take the case out of the exemption in the 31st section.

Lord Shand—Throughout the discussion in this case I thought the question rather attended with difficulty and doubt, but at the same time, having heard the reasons stated by your Lordships, I do not feel that I am in a position to differ from the judgment which your Lordship proposes. If the case had been one in which the building had been exclusively devoted to the reception of the guests for medical treatment, although an incident of that treatment was that they should be boarded and reside in the house, I should certainly have been of opinion that this was not in any reasonable sense within the meaning of section 31 a carrying of on the business of an hotel-keeper, innkeeper, or coffee-house keeper. But it appears in the case that there is a very large class of persons coming there as visitors who do not want medical treatment, but who just come to a beautiful district to live for a time, as people live in hotels in the country, paying for their rooms and for their board, or for separate meals if they choose to have them. In that respect undoubtedly the establishment is substantially of the same kind as an hotel. The difficulty I have felt in the case has arisen from the two circumstances, that I do think the rules leave some power in the hands of those who are managing their business to exclude guests as in their opinion unsuitable, and in addition to that when guests are received they are put under some very remarkable restrictions which are not, I think, to be found in any hotel in this country. At the same time, I am not disposed to give undue weight to that circumstance. The broad features of the case are, as your Lordship has put it, that people are there living temporarily in a house which is practically open to the public, and they are living there as in an hotel at bed and board, paying hotel charges or what may be represented as hotel charges; and therefore, looking to the whole matter, I am not disposed to differ from the judgment which your Lordship proposes.

The Lords pronounced this interlocutor:—

"Having considered the case and heard counsel for the parties, and being of opinion that the appellants carry on in their establishment the business of an hotel-keeper within the meaning of the 31st section of the Statute 34 and 35 Vict. cap. 103, Remit to the Commissioners to reduce the assessment appealed against from £36, 7s. 6d. to £24, 5s., and decern," &c.

Counsel for Appellants—Mackintosh—Shaw. Agents—Henry & Scott, S.S.C.

Counsel for Respondents—Rutherfurd. Agent—Solicitor of Inland Revenue.

Thursday, June 16.

SECOND DIVISION.

SPECIAL CASE—SIR PETER COATS AND OTHERS.

Trust—Construction—Power of Revocation.

A. and E, sisters, executed a trust-deed in which they directed their trustees to pay out of their estate, as at the date of the death of the predeceaser, certain legacies, and give a liferent of their estate to the survivor of them during her life, with certain provisions as to residue. By a codicil they further directed their trustees to carry out the instructions of the survivor as to any change of destination of one-half of the estate, and to pay the survivor absolutely such part of one-half as she might demand in addition to the proceeds of the whole estate. In two other codicils variations and additions were made on the bequests, and all existing provisions with regard to residue were recalled and a new bequest of residue was made. A. died and was survived by E., who executed a deed of directions in which she reduced the annuities of two of her relatives and disposed of one-half of the estate to parties not named under the original trust-disposition and codicils. *Held* that the deed of directions was a valid exercise of her right under the first codicil, and that she was therefore entitled to revoke to the extent of half the annuities and the bequest of residue.

On the 18th July 1867 Alexander Boswall, flax-spinner, Leven, died intestate, leaving an estate worth £13,000 in which he was succeeded by his two sisters Agnes and Elizabeth Boswall as next-of-kin, in equal shares. On 15th October there-