

head, we will deal fairly in fixing it at one half of the expense incurred.

LORD M'LAREN—I concur entirely in your Lordship's observations. As regards the part of the piping injured through mere subsidence, I think the result of our judgment is that there is no obligation under which the owners of the minerals can be made to pay damages. It is not suggested that they worked negligently, and therefore they are not liable *ex delicto*. Then the pipes were not laid under any contract to which the mineral owners are parties, and they are not liable in respect of contract. Again, the pipes do not belong to the owner of the surface, and therefore there is no obligation *quasi ex contractu*, or in respect of neighbourhood, obliging the mineral owners to give support to those pipes. No other category of obligation is suggested under which this pecuniary claim can be made, and it follows that the claim so far as founded on subsidence must be disallowed. I also agree with your Lordship that in assessing the damages resulting from the negligent operations of the defenders in shifting a portion of the piping, we must deal with it just as a jury would do, and I think we shall do justice by dividing the amount.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent at the advising.

The Court pronounced the following interlocutor:—

“Finds as matter of fact,” (1) to (9)—
[These findings repeated findings 1 to 4 and 6 to 10 contained in the Sheriff-Substitute's interlocutor of 20th January 1890, as above quoted]—“(10) That between the beginning of February 1887 and the present time there has been great leakage of gas from the said pipes, caused by subsidence of the ground owing to the mining operations of the defenders and the original oil company, and by the defective manner in which the defenders replaced that portion of the said pipes which they uplifted and relaid as aforesaid: Further find that the defenders are bound to renew, repair, and relay the said gas-pipes in so far as they were uplifted and relaid, but that they are not liable for any damage that may have been caused to them by the subsidence of the ground: Find that in the circumstances the defenders are liable to pay half of the expense which has been incurred under the remit by the Sheriff in relaying the said gas-pipes; also in one-half of the reporter's fee: Therefore decern and ordain the defenders to make payment to the pursuers of the sum of £10, 18s. 2d. and £4, 4s.” &c.

Counsel for the Pursuers—Jameson—Watt. Agents—J. & A. Hastie, S.S.C.

Counsel for the Defenders—Graham Murray—Maconochie. Agents—Maconochie & Hare, W.S.

Wednesday, July 16, 1890.

OUTER HOUSE.

[Lord Wellwood.]

PRESBYTERY OF EDINBURGH v. UNIVERSITY OF EDINBURGH.

Property—Presbytery Records—Title to Sue—Prescription—Mora.

In an action brought by the Presbytery of Edinburgh against the University of Edinburgh to recover certain records of the Presbytery of Edinburgh which were all prior in date to 1603, and which had been in the possession of the University since 1697, it was objected that the pursuers were not the representatives of the Presbytery of Edinburgh to whom the records originally belonged, and that they were barred from insisting in the action by prescription, *mora*, and taciturnity. Held (1), on a construction of the Act 1690, c. 5, and the Act of Security 1707, that the pursuers were the successors of the Presbytery, to whom the records originally belonged, and were therefore *in titulo* to sue; and (2) that the records being those of one of the established courts of the country, were *extra commercium*, and that accordingly the pursuers were not barred by prescription or the presumption arising from long possession or acquiescence.

This was an action by the Presbytery of Edinburgh against the University of Edinburgh, in which the pursuers sought to have it found and declared “that the books and documents following, viz., (first), volume titled on the back and on a fly leaf—‘The book of the Presbytery of Edinburgh, containing the Acts and Constitutions of the same since the 19th April, year of God 1586, holden in the town of Edinburgh, continued to 27th March 1593, excepting for the period betwixt 24th March 1589-90 and 13th April 1591;’ (second), volume titled on the back—‘Records of the Presbytery of Edinburgh, April 1593 to September 1601;’ and (third), volume containing the Records of the Presbytery of Edinburgh from November 11th 1601, to 24th August 1603, and relative documents, which three volumes are now in the possession of the defenders, belong in property to the pursuers, and that the pursuers are entitled to have the same forthwith delivered to them; or otherwise, that the pursuers are the only true and lawful custodiers of the books and documents above specified, and are entitled to the exclusive custody and possession of the same, and are entitled to have the same forthwith delivered to them; and concluded for decree ordaining the defenders to deliver the volumes to them.

The pursuers' averments on record, and the defenders' answers thereto, were as follow—“(Cond. 1) The three volumes specified in the Summons contain the original records of the Presbytery of Edinburgh for the years to which they relate.

They belong to the pursuers as the Presbytery of Edinburgh, and they are the only authentic records of the transactions and judgments of the said Presbytery during those years. As such they are of importance to the pursuers as a Presbytery, and as one of the Courts of the country recognised by law. It has recently been brought under the notice of the pursuers that the said volumes are at present in the library of the University of Edinburgh. It is not known how they came to be there, but it was not with the sanction or in the knowledge of the said Presbytery. With reference to the answer, it is explained that after the Reformation various Acts of Parliament were passed ratifying the liberties of the Church of Scotland, and among others the Act 1592, cap. 116, ratified and approved all liberties, privileges, and others theretofore granted 'to the trew and halie kirk presently established within the realm,' and recognised and gave statutory authority to the government of the Church by general and provincial assemblies, presbyteries, and kirk-sessions. By the Act 1690, cap. 5, the said Act was (except as regards patronage) renewed and confirmed, and certain Acts of Parliament which had been enacted for the establishment of Episcopacy were rescinded and annulled, and the Church government declared to be established in the hands of and exercised by those presbyterian ministers who were 'outed' since 1st January 1661 for nonconformity to prelacy. It was thereby further provided that the said presbyterian ministers should have right to the maintenance, rights, and other privileges by law provided to the ministers of Christ's Church within this kingdom. The said Act 1690, cap. 5, is itself ratified and confirmed by the Treaty of Union 1707, cap. 7, in terms of the Act 1707, cap. 6. The Presbytery of Edinburgh has ever since its erection in or prior to 1581, and, at all events, since 1592, acted and been recognised as one of the established judicatories of the realm, except during the intervals of Episcopacy, and its continuity as one of the courts of the country has all along been recognised in law, and has never been called in question. Explained further that the whole records and documents, as well as the benefices and property of the Church as originally established, and as the same existed (with the exception above mentioned) down to 1690, have ever since been recognised both in law and in fact as belonging inalienably to the existing establishment. In particular, the records of the various synods, presbyteries, and kirk-sessions of the Church, for a period long anterior to 1690, are, and have all along been, in the hands of the officials of said courts, so far as such records were known to said courts to be extant. *Quoad ultra*, the statements in answer are not known, and not admitted. (Ans. 1) The volumes specified in the summons are referred to, and subject to this reference it is believed to be true that they contain a record of the proceedings of the Presbytery of Edinburgh during

the periods stated on the back of the said volumes, viz., with certain intervals from 19th April 1586 to 17th August 1603. Denied that they belong to the pursuers. Not known that they are the only authentic record of the proceedings for the said periods. Denied that it has been recently brought under the notice of the pursuers that the said volumes are in the library of the University. It has been well known for at least nearly two centuries that they were possessed by the defenders. Explained that they are contained in the catalogue of the library of the University, compiled by Mr Robert Henderson, then librarian, in the year 1697, and titled in the dedication 'Catalogum Bibliothecae Publicae nunc primum post annos centum et quindecim contextum elaboratum et secundum scientias et artes (quantum servato librorum ordine licuit) digestum,' and they were possessed by and belonged to the said library for sometime prior to the date of this catalogue. They form part of the valuable manuscript collections belonging to the University, and as such have always been and now are open to inspection by all persons entitled to use the library, and also by all persons who satisfy the librarian and library committee that they desire to consult them for any useful purpose. Denied that the said volumes have been and are now in the University Library without the knowledge of the Presbytery. They have been frequently referred to for historical purposes, and in particular were so referred to and used by the Reverend Hew Scott for the purposes of his work, the 'Fasti Ecclesiae Scoticanæ,' published in 1866, as well as by earlier historians and historical students. The Acts of Parliament 1592, c. 116, and 1690, c. 5, are referred to for their terms. Admitted that the Presbytery of Edinburgh was one of the Ecclesiastical Courts in Scotland during the period when the Established Church of Scotland was presbyterian, and ceased to be one of such courts during the intervals of Episcopacy, viz., from 1606 to 1638, and from 1662 to 1690. Denied that the records and documents, as well as the benefices and property of the Church, as originally established, have been recognised, either in fact or law, as belonging inalienably to the existing Established Church. In particular, denied that the records of the various synods, presbyteries, and kirk-sessions, for a period long anterior to 1690, are, and have been all along, in the hands of the officials of said courts. Besides the volumes in question, which have been for more than two centuries in the possession of the University of Edinburgh, similar records are and have for long been in other public libraries—as the library of the University of St Andrews, and the library of the Faculty of Advocates in Edinburgh. *Quoad ultra* denied. (Cond. 2) The defenders have been requested to hand over the said volumes to the pursuers. They refuse to do so, and dispute the pursuers' title to vindicate the property and custody of their said records, and this action has thus been rendered necessary. With reference to the

answer, it is explained that the pursuers' records since the fire of 28th October 1701 have been kept in perfect safety in the custody of their officials, and the pursuers are in course of procuring a fire-proof safe in which their records will be kept. The pursuers are willing, and hereby offer to reimburse the defenders for their outlay in binding referred to in the answer. (Ans. 2) Admitted that the defenders have been recently required by the pursuers to hand over the said volumes to them, and have declined to do so, but explained that they have not stated that the volumes are required for any judicial or legal purpose. The Presbytery of which these volumes contain the proceedings ceased to exist as a church court on or shortly after the restoration of Episcopacy by King James VI. in 1606. The last entry in the said volumes is dated 17th August 1603, and the Presbytery of Edinburgh, which is represented by the present pursuers, only came into existence after the passing of the Act of 1690 (1 William and Mary, cap. 5), settling the presbyterian form of Church government. It is further explained that the pursuers have no office or place for the safe custody of the said volumes, and that the defenders are quite willing and have offered full access to them to any member of the Presbytery, and also that a copy may be made of them if desired by the Presbytery. The volumes in question, although not required for any judicial or legal purpose, are of considerable historical interest. The defenders have some time ago had them strongly bound for their better preservation, and they are placed along with the other MSS. of the University and the Drummond of Hawthornden collection of books in a room specially reserved for valuable documents and unique or rare books."

The pursuers pleaded—"(1) The volumes libelled being the property of the pursuers as a Presbytery, they are entitled to decree of declarator and delivery, as concluded for. (2) Alternatively, the pursuers being the only lawful custodiers of the said volumes, are entitled to decree in terms of the conclusions of the summons to that effect, and to delivery. (3) The defenders' averments being irrelevant, their pleas ought to be repelled."

The defenders pleaded—"(1) No title to sue. (2) The averments of the pursuers are not relevant or sufficient to warrant decree in terms of the conclusions of the summons. (3) The present action is excluded by prescription, and, *separatim*, by *mora* and *taciturnity*. (4) The volumes in question being the property of the University of Edinburgh, the defenders, they are entitled to *absolvitor*. (5) Alternatively, the said volumes having been held and preserved by the University, in trust for public uses, for two centuries at least, and no claim having been made on behalf of the Presbytery of Edinburgh until quite recently, either to the property or possession thereof, the University is entitled and bound to retain them for such public uses. (6) Generally, the defenders are entitled to be assoilzied

from the conclusions of the summons, with expenses."

A proof was led, the result of which sufficiently appears from the opinion of the Lord Ordinary.

The Lord Ordinary (WELLWOOD), on 16th July 1890, pronounced the following interlocutor:—"Finds that the books and documents of which delivery is sought by the pursuers are original and authentic records of the Presbytery of Edinburgh for the years to which they relate: Finds that the said books and documents belong to the pursuers as the successors and representatives of the Presbytery of Edinburgh at the date of the said records: Finds that the defenders have not established any right or title to retain the said books and documents, and that the pursuers are entitled to have the same delivered to them: Therefore repels the defences: Finds and declares in terms of the first alternative declaratory conclusion of the summons, and decerns and ordains the defenders to deliver to the pursuers the said books and documents: Finds no expenses due to or by either party, and decerns.

"*Opinion*.—In this case the Presbytery of Edinburgh seek to recover from the University of Edinburgh three volumes which are said to contain the original records of the Presbytery of Edinburgh between the years 1586 and 1603 with a certain exception. The said books are described in the Summons as follows:—'(First) Volume titled on the back and on a fly-leaf—"The Book of the Presbytery of Edinburgh, containing the Acts and Constitutions of the same since the 19th April year of God 1586, holden in the town of Edinburgh, continued to 27th March 1593, excepting for the period betwixt 24th March 1589-90 and 13th April 1591." (Second) Volume titled on the back—"Records of the Presbytery of Edinburgh, April 1593 to September 1601;" and (Third) Volume containing the records of the Presbytery of Edinburgh from November 11th 1601 to 24th August 1603, and relative documents.' The questions raised in this action are of great interest and importance, not merely as regards the volumes in question, but also as regards other records of Church Courts which are stated to be in the possession of other universities and private individuals, right to which may depend on or be affected by the decision to be pronounced in the present case.

"It is not disputed that the volumes and documents in question have been in the possession of the University of Edinburgh at least since the year 1697. They are entered in the catalogue compiled by Mr Robert Henderson, librarian of this University, in or about that year, and are described as follows:—'*In pasceolo*.—The Books of the Presbytery from 1586 (beginning Aprile 19) to 17 Agust 1603 inclusive & ends wt King James's Letter dated 9 Agust 1603 three voll's folio bound in parchment. It. Acts General Assembly or Provincial of Louthian from 1589 to 27 Aprile 1596. It. Old fashioned band or Ruffle.' It will be observed from this entry (1) that the volumes were then bound in

parchment; (2) that they were contained in the same *pasceolum* or bag as the records of the Synod of Lothian for part of the same period; and (3) that the third volume contains a letter of King James the Sixth, dated 9th August 1603. It is admitted that this is an autograph letter of King James, and that it appears at the appropriate place in the minutes.

"1. The first question which I have to decide is, whether those volumes contain the original records of the Presbytery of Edinburgh for the years to which they relate? The defenders scarcely deny this on record, although they do not expressly admit it. In answer to the pursuers' averment that the records are original the defenders say (Answer 1): 'The volumes specified in the summonses are referred to, and subject to this reference it is believed to be true that they contain a record of the proceedings of the Presbytery of Edinburgh during the periods stated on the back of the said volumes, viz., with certain intervals, from 19th April 1586 to 17th August 1603. Denied that they belong to the pursuers. Not known that they are the only authentic record of the proceedings for the said periods.' This answer is followed by statements to the effect that the volumes have been frequently referred to for historical purposes, and in particular by the Reverend Dr Hew Scott. This is quite true, but it goes to shew that those volumes were regarded by eminent men of learning and research, whose eye and judgment could not be easily deceived, as undoubtedly containing original records of the Presbytery of Edinburgh; and indeed they would probably not have been consulted but for the belief that they were what they profess to be.

"However, the defenders are entitled to put the pursuers to the proof, whatever weight may be attached to the consideration, that those books have, so far as appears, been universally regarded, at least since 1697, as containing original and authentic records.

"The evidence in support of the pursuers' case stands thus:—

"1. The handwriting—that is, the style of handwriting, the characters, contractions, etc.—is that of the period covered by the minutes. This indeed is not disputed. The paper also, as appears from the watermark, is of that period. It is therefore clear that, whether the records are original or not, they were written at or about the dates they bear.

"2. The mode in which the minutes are written points to their being the work of the clerk or an assistant, and not the work of a copyist. I may observe in passing, that there is unfortunately no evidence as to who were the writers of the minutes. I think it is proved that volumes 1 and 2, and part of volume 3, are in the same handwriting; and that the latter part of vol. 3 is written in a different hand. But while it thus appears that at least the first two volumes were written by the same scribe, they are not written so continuously, and with such uniformity of style, as might be

expected from a copyist. That is to say, it appears from an inspection of the books, that different inks and different pens have frequently been used, which indicates that the minutes were not copied continuously, but were written up from time to time. I consider this a matter of considerable importance, and I think it is perceptible even to an unskilled eye.

"3. The books contain lists which are apparently lists of the members of the Presbytery who took part in the exercises, and regents of the University, and students who were permitted to attend. The most important of those lists is that on the fly-leaf of volume 1. That list has been altered by the deletion of certain names and the insertion of others. It is clearly proved—and an inspection of the list confirms this—that the alterations must have been made at a different time from the preparation or transcription of the original list; and probably were made from time to time as the persons in the list died, or were translated, or for some other reason ceased to be able to attend. Indeed this is practically admitted by the defenders' principal witness, Mr Anderson, who says—'I do not think the first list was written by a man taking it and copying it out at once;' and again, 'I have said that the deletions were not all made at the same time. I think this is shown by some of them appearing to have been inserted or written in different inks.' Now it is inconceivable that a copyist would go to work in this way. He might perhaps copy the list, deletions, interlineations and all, but the list being short he would do so at one and the same time, and with the same pen and ink. It cannot now be said for certain what the precise use of these lists was. Presumably they were used as a roll from which to select the ministers and others who were to take part in the exercises. That the first list at least was in regular use, and was probably used for some such purpose for a considerable period of time is clearly shown by its present condition. I regard the presence among the minutes of these lists, and especially the first list, as material evidence that the records are the original records of the Presbytery.

"4. There is inserted at the end of the third volume an autograph letter of King James the Sixth addressed to the Presbytery of Edinburgh, written from Hampton Court, and dated 9th August 1603. This letter, which is admitted to be genuine, is appended to the minute of 24th August 1603. It is needless to say that it is in the highest degree improbable that a document of such importance should have found its way into a mere copy of the Presbytery's records.

"5. There is inserted in the minutes of 30th September 1595 a bond, subscribed thus—'Mr William Johnstone, with my hand.' An interesting account is given of this man by the witness Dr Dickson, to which I need not at present refer. In his opinion the signature at least is an autograph. The importance of that fact is that a bond would not have been inserted and

signed by the granter in anything but the original and final record. It is also to be observed that the expression 'with my hand' is inconsistent with this being a copy, because a copyist would not have used these words, but would have written *sic subscribitur*, as was usual in the case of copied documents. On this point Mr Anderson, with his usual candour, speaks thus in answer to the defenders' counsel: '(Q) If a copy were taken of the original minute would the copyist naturally keep it as it stood in the original minute?—(A) not usually;' and I do not regard the witness' answers to the questions subsequently put to him by the defenders' counsel as materially qualifying the view thus expressed.

"I have now enumerated the matters appearing from an inspection of the volumes which indicate that they contain original records.

"It remains to notice the points made on the other side.

"1. It is objected that the minutes are not authenticated by the clerk or other official of the Presbytery. This is true, but the answer is that at that time it was not a common practice to authenticate minutes. This is so much a matter of notoriety that I need not refer in detail to the evidence on the point—*Ferguson v. Heritors of Kirkpatrick Durham*, July 2, 1850, 12 D. 1145, and report by Principal Lee and Mr R. Bell. Mr Anderson himself says in answer to the question, 'Have you ever known records at that date unquestionably genuine but not authenticated by officials?'—(A) It was not very common at that date. If they had been authenticated it would rather have been the exception than the rule.'

"I may also refer to the reasons given by a Committee of the General Assembly in 1638 for proving certain registers of the Assembly to be authentic. Reason XVIII. is as follows—'It is certain and notour to all those who are entrusted with the keeping of the publick records of the kingdom, that the same are never subscribed by the Clerk, but only written and filled up by servants, and most frequently by unknown hands, yet they and the extracts thereof make publick faith, and the same are uncontrovertedly authentick registers.'

"2. It is objected that there is no evidence that the books are in the handwriting of the Clerk to the Presbytery. It certainly would have been a very strong and perhaps unanswerable piece of evidence for the pursuers if it could have been shown that the minutes were in the handwriting of Charles Lumsden, the clerk. It is not proved that they are not in his handwriting, but it is not proved that they are—I think there is no reliable evidence one way or the other. But while the absence of such authentication weakens the pursuers' case, it would not be fatal to it if it were proved that none of the minutes were written by the clerk, as it was a common practice at that time that minutes should be written by an assistant and not by the clerk.

"3. The defenders found upon certain

blanks which occur in the minutes. The shorter blanks appear to me not only not to tell in favour of the defenders' case, but actually to support that of the pursuers, because they have palpably been left for the subsequent insertion of documents or reports which presumably were in the possession of the person who wrote the minutes and left the blanks. Now, if the minutes had been scroll minutes no blanks would have been left; the writer would have simply written, 'Here take in' such and such a report or document. Again, it is improbable that a copyist who had not in his possession the document to be engrossed, and therefore could form no idea of the length of blank which should be left for it would have left a blank at all. In short, it seems to me that the blanks were left for the purpose of being filled up at some subsequent time by the proper custodian of the documents.

"A more serious blank, however, occurs in the middle of the first volume. The minutes of a whole year are amissing, viz., from 24th March 1589-90 to 13th April 1591. The minute of 24th March 1589 ends abruptly with the words, 'anent the commission given to Mr Robert Pont,' and then a blank space is left apparently for the insertion of the commission. This would account for the clerk leaving a page or two of blank paper; but there then follows a blank sufficient for the minutes of a whole year, the space being filled up with paper of the same water-mark as the paper of the rest of the volumes. The only thing which clearly appears is that the original minutes for that interval were and are still amissing. I do not think that that fact has an important bearing on the question whether the minutes which exist are copies or not. If they are copies, it just shows that the copyist had not before him the original minutes for that period. If they are original, it shows that when the book came to be bound the binder left a space for the missing minutes, and had at hand paper of the same period to insert. It is impossible to say when the blank paper was put in. It may have been inserted when the books were first bound in parchment, or it may be that when the books were bound in their present binding the *fasciculus* containing the minutes of that year went amissing, and that the blank paper was taken from the third volume, which is of much smaller size than the other two."

"The main reason, I take it, for the defenders founding so strongly on this blank is that it appears that on 7th October 1591 the books of the Presbytery must have been inspected by a committee appointed by the Synod of Lothian and Tweeddale, who reported 'that in sychtting of the said bookis thair fand all thingis weil and formali led.' The defenders argue that the Synod would not have passed, as well kept, books containing such a blank, but this argument proceeds on the assumption that the books were then in their present condition, for which I do not think there is any warrant.

“Thus stands the evidence on the books themselves. Although it is narrow, I think it is sufficient to support the pursuers’ case. If the records are not original, what are they? To this question I do not think the defenders have given a satisfactory answer. The most plausible explanation is that they are not the ultimate records of the Presbytery’s proceedings, but intermediate minutes—that is, minutes extended from the scroll minutes. For various reasons, to which I have already adverted, I do not think that this explanation of their character will hold good. But even if it were well founded, the minutes would still be in a sense original minutes, the property of the Presbytery, and would be the only minutes extant if, as is suggested by the defenders, the finally recorded minutes were burned in the fire of 1701.

“Again, it is said by the defenders that the books have not been traced back to the custody of the officials of the Presbytery, but, on the other hand, have been shown to have been in the custody of the University of Edinburgh, at least since 1697. This is a matter of much greater importance in connection with the defenders’ right to retain the volumes than with the question of their authenticity. While the books have certainly not been traced into the custody of the Presbytery, it has not been proved how the University became possessed of them. This much, however, is known, that in 1697 they were contained in a bag along with the minutes of the Synod of Lothian and Tweeddale, and this, I think, throws some light not merely upon their authenticity, but on the question how they came there. In the first place, it has not been suggested that the minutes of the Synod are not original. On the contrary, the defenders found on one of those minutes in connection with the examination of the books of the Presbytery in 1591. In the next place, Charles Lumsden, clerk of the Presbytery, was also clerk of the Synod of Lothian and Tweeddale, and he was also, it is said, regent of the University of Edinburgh. It also appears that the Presbytery often met in the University of Edinburgh. Now, it is a mere matter of surmise, but these facts seem to point to a possible explanation of the records of the Presbytery and of the Synod being found together and found where they were. It is also possible that King James may have impounded the books in the University for his own purposes in 1603, and that they may have remained there ever since.

“The only other matter which need be adverted to is that those records have been treated by the many learned men who have consulted them as original. It is sufficient to mention the names of Dr Hew Scott, Dr David Laing, Dr M’Crie, and Pincinal Lee to show that they must be subjected to careful scrutiny, and never until the present time has any doubt been thrown upon their authenticity. In the case of *Ferguson* already referred to a remit was made by the Lord Ordinary to Principal Lee, the clerk of the Assembly, and Mr Robert Bell, the procurator for the

Church, to report as to the practice of the General Assembly and other church judicatories in regard to the form and mode of authentication of their interlocutors, sentences, and minutes. In the course of their inquiries the reporters examined the records in question and those of the Synod of Lothian and Tweeddale, which have already been referred to. Now, it was essential to the proper discharge of their duties under the remit that the records examined should be authentic, and I regard it as a matter of considerable importance that the records in question, and also those of the Synod of Lothian and Tweeddale, should have been accepted as original and authentic by those two experienced and learned men. Of course their acceptance is not conclusive, but it is a material circumstance, because they must have made a very thorough examination of the volumes to enable them to make the report which they made.

“These considerations confirm the view which I have formed on the evidence from the books themselves as to their originality and authenticity. A more careful examination of them would, I believe, strengthen the view that they are original; but even on the evidence as it stands I am prepared to hold with some confidence that they are the authentic records of the Presbytery for the period covered by them.

“II. The next question to be considered is, whether assuming the records to be original, the pursuers are entitled to recover them from the defenders?

“1. I think it can scarcely be doubted that the pursuers are *in titulo* to make the demand, because they are the successors and representatives of the Presbytery of Edinburgh, to whom the records originally belonged. This, I think, necessarily follows from the Act 1690, c. 5, and the Act of Security 1707. The former Act, following on the Claim of Right, revived, ratified, and perpetually confirmed all laws, statutes, and Acts of Parliament made against Popery and Papists, and for the maintenance and preservation of the true Reformed Protestant religion. The Act then proceeds:—‘As also they do establish, ratify, and confirm the Presbyterian Church government and discipline—that is to say, the government of the church by kirk-sessions, presbyteries, provincial synods, and General Assemblies, ratified and established by the 114 Act, Ja. 6, Parl. 12, anno 1592, entitled, Ratification of the Liberty of the true Kirk, etc., and thereafter received by the general consent of this nation to be the only government of Christ’s church within this kingdom: reviving, renewing, and confirming the fore-said Act of Parliament in the whole heads thereof, except that part of it relating to patronages, which is hereafter to be taken into consideration.’

“The Act then rescinds and annuls various Acts passed during the intervals of Episcopacy, in so far as inconsistent with or derogatory from the Protestant religion and Presbyterian form of government then established:—‘And allowing

and declaring that the church government be established in the hands of and exercised by these Presbyterian ministers who were ousted since the 1st of January 1661 for non-conformity to Prelacy, or not complying with the courses of the times, and are now restored by the late Act of Parliament, and such ministers and elders only as they have admitted or received, or shall hereafter admit or receive; and also that all the said Presbyterian ministers have right to the maintenance, rights, and other privileges by law provided to the ministers of Christ's church within this kingdom, as they are or shall be legally admitted to the particular churches.'

"By the Act of Security 1707 again it is provided:—'And Her Majesty, with advice and consent foresaid, expressly provides and declares that the foresaid true Protestant religion contained in the above mentioned Confession of Faith, with the form and purity of worship presently in use within this church, and its Presbyterian church government and discipline—that is to say, the government of the church by kirk-sessions, presbyteries, provincial synods, and General Assemblies, all established by the foresaid Acts of Parliament pursuant to the Claims of Right—shall remain and continue unalterable; and that the said Presbyterian government shall be the only government of the church within the kingdom of Scotland.'

"The effect of these statutes was entirely to obliterate and tear up by the roots all that had been done during the intervals of Episcopacy to interfere with or suppress Presbyterian church government, and to restore, with certain exceptions, their former rights and privileges to the Presbyteries and other church courts.

"2. It remains to consider whether the pursuers are barred by the lapse of time or acquiescence from insisting in their demand for restitution of their records. I have come to the conclusion that they are not barred by prescription or the presumption arising from long possession or acquiescence, on the simple ground that the records which they claim are the records of one of the established courts of the country, and as such were and are *extra commercium*, and could not and cannot be the subject of commerce or alienation. It is scarcely necessary to quote authority for the statement that the Presbyteries of the Church are as much courts of the country established by law as the Court of Session itself. In *Wight v. The Presbytery of Dunkeld*, 29th June 1870, 8 Macph. 921, Lord Justice-Clerk Moncrieff said, p. 925:—'The jurisdiction of the Church Courts as recognised judicatories of this realm rests on a similar statutory foundation to that under which we administer justice within these walls.' And the Lord President Inglis said in *The Presbytery of Lewis v. Fraser*, 16th May 1874, 1 R. 888 (see p. 892)—'We are dealing with a Presbytery, an established judicature of the country as much recognised by law as the Court of Session itself. Its jurisdiction, indeed, differs widely from that of the Civil Courts, but it is just as

much the creation of law as that of any other court in the kingdom.' Lord Deas says (p. 893)—'As your Lordship has remarked, the petitioners (the Presbytery) form one of the established judicatories of the land with certain judicial duties to perform; and again (p. 894)—'The Courts of the Church of Scotland are established by Act of Parliament. Their jurisdiction is derived from the supreme authority which alone can confer proper jurisdiction, and that being so, I have no doubt of the competency of aiding them in the way here sought for in explicating their jurisdiction.'

"It being thus clear that the Presbytery is a court established by law, and what is called a court of record, it seems to me that its records belong to, and are held by it inalienably for the benefit of the public; that being so held they are *extra commercium* and cannot be alienated so as to become private property by sale or gift; and that the right to recover them cannot be cut off by the lapse of time. If I am wrong in this, the defence founded on long and uninterrupted possession is irresistible.

"There is unfortunately a dearth of authority, or rather of authoritative precedents, on this subject, but the principle is recognised both in the Roman law and in our own. In treating of the presumption arising from the possession of moveables, Lord Stair says that that presumption can be redargued or overcome by a stronger presumption, such as that the article possessed cannot be acquired by commerce. His words are:—'If he (*i.e.* the original owner of the goods) 'prove that he so ceased to possess as that it could not be presumed to be by commerce . . . or if he prove that he was in possession, and that the goods could not pass from him by commerce to the defender because they were goods altogether unsuitable for him to have by commerce'—Stair, iv. 45, 17, 8. Again, in dealing with the question of prescription, he says (ii. 12, 10):—'In the civil law, though prescription reacheth all kinds of things, moveable and immoveable, yet with these exceptions, first, those things that are not in commerce as they are not capable of express alienation, so neither of prescription.'

"In Erskine's Institutes, iii. 7, 14, the author says:—'Sundry rights are incapable of the positive prescription, thus things sacred or public could not by the Roman law be acquired by usucapion, because they were exempted from commerce, and this reason being founded in nature must extend to all countries, for whatever is incapable of becoming one's property is also incapable of being acquired by the positive prescription, since prescription is one way of establishing property.' He is here speaking of the positive prescription, but the same reasons apply, I think, with equal force to the long negative prescription, which is the prescription on which the defenders rely as excluding all claims by the pursuers. The negative prescription may exclude objections to the way in which an article came into the possession

of the holder. But it does not exclude inspection of the article and inquiry into its characteristics and uses, and if on examination they are found to be such as clearly to preclude acquisition of the article as private property, prescription will not apprehend protect the holder. This is analogous to an intrinsic nullity appearing *ex facie* of a deed, in which case prescription does not apply.

"The defenders founded strongly upon the well-known case of *The Parishioners of Aberscherder or Abercherdo v. The Parish of Gemrie*, 1663, M. 10,972. The kirk bell of Aberscherder was said to have been borrowed by the parishioners of the kirk of Gemrie, who used it without interruption for upwards of forty years, after which time the parishioners of Aberscherder brought an action for restitution. The report given in Morison is short, and the reasons given for the Court sustaining the defence of prescription (which evidently must have been the negative prescription—Napier, 39) are—'In respect of the forty years' possession by-past uninterrupted no action was sustained for the bell libelled.' It appears from the statement of the pursuers' argument that they relied to a certain extent on their claim being made on a sacred matter. It does not appear what view the Court took of that element, but there is a manifest difference between the article sought to be recovered in that case, viz., a bell, and the records of a Court. It is not improper that a church bell should be exchanged or sold by the heritors and kirk-session if no longer required or unsuitable to the church. But the records of a Court are, in Lord Stair's words, 'altogether unsuitable to be acquired by commerce.' This distinction is well explained by Erskine in his Principles, ii. 1, 3 (Guthrie's ed. 114):—'Of the same nature with the *res universitatis* are things appropriated for the service of God, as churches, church bells, communion cups, &c., which by the Roman law were reckoned the property of none, but by ours may be disposed of or sold on proper occasions, and others substituted in their room. Thus churches may be removed from place to place,' (i. 5, sec. 11), 'and church bells or communion cups when they become unfit for use may be sold, either by the heritors or by the kirk-session with their consent.'

"The same observation applies *a fortiori* to the case of *Scott v. Fletcher*, 1665, M. 11,616, where the moveable in dispute was a book, and *Scott v. Elliott*, 1672, M. 12,727, where the moveables were nine score sheep. If the defenders' argument were well founded, the pursuers would have been barred by the negative prescription, although they offered to prove that the books were stolen from them forty-one years ago—Ersk. iii. 7, 14, and Napier, 600.

"I have hitherto been dealing with the question on the assumption that there was practically no break in the continuity of the Presbytery's existence. I must, however, also deal with the defenders' argument, that assuming that such records are inalienable so long as the Court to which

they belong exists, there were intervals during the seventeenth century during which the records might have been lawfully acquired by private individuals. The defenders refer to the intervals of Episcopacy, the first of which was between 1606 and 1641, and the second and more serious between 1660 and 1690. As to the first interval, it is perhaps enough to observe that although Episcopacy was established, the Presbyterian form of government was not entirely suppressed. The Assemblies met at intervals during the whole of that period, although they may not have been able to transact very much business. It is also certain that many of the Presbyteries met and transacted business during that time. After 1660 the ministers were ousted, and there are therefore stronger grounds for saying that the Presbyterian form of Church government was by law suppressed. But even after that date and until 1689-90 some Presbyteries met regularly and others at intervals. This will be seen in a compendious shape in No. 34 of process. It appears from the evidence of Dr Langwill, minister of Currie, that during the period from 1662 to 1690 the Presbytery of Edinburgh must have been sitting, because he finds from an examination of the records of the kirk-session of South Leith and of that of Currie, that these kirk-sessions referred frequently to the Presbytery for advice. It would thus appear that *de facto* the Presbyteries were wont to meet and transact business during that period.

"But even supposing that the Presbytery of Edinburgh during those intervals of Episcopacy had no legal title to hold or vindicate their records, it does not follow that the records became the subject of commerce. They were the records of what at least had been a Court of the Realm, they contained entries which required to be preserved in the interest of the public, and the Crown at least had a duty and a title to preserve and vindicate them in the public interest.

"Apart from all this, I think that the effect of the Act 1690, c. 5, and following Acts, was completely to restore to the Presbyteries all the powers, rights, and privileges of which they had been deprived, including the right to vindicate and possess the records of their own Courts.

"While I am of opinion that the pursuers are entitled to recover the volumes, I have come to that conclusion with some hesitation and doubt, and solely because I hold that it is repugnant to and inconsistent with the position of a Court of record established by law that its records, which it holds in trust for public uses, should be the subject of commerce or alienation, and that the Court should be barred by the lapse of time or the neglect or omission of its members or officials from recovering its records into whosever's hands they may have come. Did I not hold this opinion, I should have no hesitation in sustaining the defences. Apart from the plea of prescription and the presumption arising from long possession, there is some evidence of acquiescence or recognition of the University's

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