

LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court pronounced the following interlocutor:—

“Find that the Sheriff has jurisdiction to decide the application of the appellants for the extension of the boundaries of the burgh so as to include the piers in question: Therefore recal the deliverance of the Sheriff, and remit to him to consider and decide the application on its merits.”

Counsel for the Petitioners—C. S. Dickson—Constable. Agent—Alexander Campbell, S.S.C.

Counsel for the Proprietors of the Piers—Dundas—Graham. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the County Council of Argyll—Pitman. Agent—W. A. Harris, L.A.

Counsel for the Board of Trade—C. K. Mackenzie. Agents—Davidson & Syme, W.S.

Saturday, February 23.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

DOMBROWIZKY *v.* DOMBROWIZKY.

Process—Reclaiming-Note—Act of Sederunt 11th July 1828, sec. 77—Competency.

The defender in an action of divorce was allowed to put in defences after the evidence for the pursuer had been led. Thereafter the Lord Ordinary repelled the defences, and granted decree of divorce. The defender having reclaimed, the pursuer objected to the competency of the reclaiming-note on the ground that a copy of the record had not been appended thereto in terms of the Act of Sederunt of 11th July 1828, section 77.

The Court *repelled* the objection on the ground that the record had never been closed, and that the section only applied to cases in which there was a closed record.

On 10th November 1894 Dina Dombrowizky, 23 St Mary Street, Edinburgh, raised an action of divorce against her husband Joseph Dombrowizky, on the ground of adultery.

The time for lodging defences having passed without any defences having been lodged, the Lord Ordinary, on the pursuer's motion, found the libel relevant, and fixed a diet for proof.

The defender appeared at the diet of proof by counsel, and cross-examined the pursuer's witnesses. At the close of the pursuer's evidence he moved for and obtained an adjournment in order that he might lead evidence in defence. He was also allowed to put in defences, in which he denied the adultery, and pleaded no jurisdiction.

On 31st January 1895 the Lord Ordinary

(KINCAIRNEY), without having closed the record, repelled the defences, and granted decree of divorce.

The defender reclaimed—The pursuer objected to the competency of the reclaiming-note on the ground, *inter alia*, that a copy of the record was not appended thereto in terms of section 77 of the Act of Sederunt of 11th July 1828, which provides—“That reclaiming-notes not being against decrees in absence, or upon failure to comply with orders, shall at first be moved merely as single bills, and immediately ordered to the roll, and shall then be put out in the short or summar roll as the case may be: Provided always that such notes if reclaiming against an Outer House interlocutor shall not be received unless there be appended thereto copies of the mutual cases, if any, and of the papers authenticated as the record in terms of the statute, if the record has been closed, and also copies of the letters of suspension or advocacy and of the summons with amendment, if any, and defences.”

Argued for the pursuer—A copy of the record was not appended to the reclaiming-note as was prescribed by section 77 of the Act of Sederunt, 11th July 1828, and it therefore should be dismissed as not being in due form.

Argued for the defender—The section did not apply, for in this case the record had never been closed, and the section only dealt with cases in which there were closed records—*Fleming v. Morrison*, June 4, 1835, 13 S. 859.

At advising—

LORD PRESIDENT—The objection fails on the ground that the Act of Sederunt, 11th July 1828, section 77, does not apply.

The Act of Sederunt imposes on a claimer the duty of appending to the reclaiming-note “copies of the mutual cases, if any, and of the papers authenticated as the record, in terms of the statute, if the record has been closed,” and it goes on to say that the claimer must append “copies of the letters of suspension or advocacy and of the summons with amendment, if any, and defences.”

The duty of producing the summons and of appending the record to the reclaiming-note does not arise unless you have a closed record, which here you have not.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court repelled the objection.

Counsel for the Pursuer—Trotter. Agent—G. Jack, S.S.C.

Counsel for the Defender—Blackburn. Agents—Anderson & Green, S.S.C.

Wednesday, February 20.

FIRST DIVISION.

[Lord Wellwood, Ordinary.]

ARTHUR v. LORD ADVOCATE.

Revenue—Excise—Licence to Retail Liquors—Theatre—Act 5 and 6 Will. IV. c. 39, sec. 7—Public-Houses (Scotland) Act 1853 (16 and 17 Vict. c. 67), sec. 7—Public-Houses Acts Amendment (Scotland) Act 1862 (25 and 26 Vict. c. 35), sec. 5—Act of Parliament—Construction.

The Act 9 Geo. IV. (1828) c. 58, entitled "An Act to regulate the granting of certificates by justices of the peace and magistrates, authorising persons to keep common inns, ale-houses, and victualling-houses in Scotland, in which . . . exciseable liquors may be sold by retail under Excise licences," provided by section 18 that no licences for the sale of exciseable liquors by retail to be drunk on the premises of the person licensed should be granted by the Commissioners or officers of Excise to any person whatsoever, unless he should have previously obtained from the justices a certificate under the Act.

Sec. 7 of the Act 5 and 6 Will. IV. (1835) c. 39, empowered the Commissioners and Officers of Excise to grant retail licences to any person for the sale of exciseable liquors in any theatre licensed by justices of the peace, without the production by the applicant of any certificate or authority to keep a common inn, ale-house, or victualling-house.

The Public-Houses Act of 1853, which amended but did not repeal the Act of 1828, provided by section 7 that no licence for the sale of exciseable liquors by retail should be granted by the Commissioners of Inland Revenue to any person in Scotland who should not produce a certificate granted in terms of the Act enabling the party to obtain such licence. This provision was enacted anew in section 5 of the Public-Houses Amendment Act of 1862. Neither of these Acts contains any reference to the Act of 1835.

Held (aff. judgment of Lord Wellwood) that section 7 of the Act 5 and 6 Will. IV. c. 39, was not repealed by the provisions of the Public-Houses Acts, and that the holder of a licence granted under the Act for regulating theatres (6 and 7 Vict. c. 68), authorising him to keep a theatre, is entitled, upon production of such licence and payment of the duties exigible, to obtain from the Commissioners of Inland Revenue a retail licence to sell exciseable liquors in his theatre without the production of any certificate under the Public-Houses Acts.

In July 1894 Robert Arthur, lessee of Her Majesty's Theatre and Opera House, Seagate, Dundee, who held a licence to carry on said theatre both from the Magistrates of Dundee, under the Dundee Police and

Improvement Consolidation Act 1882, and from the Justices of the Peace for the Dundee district under the Act of 1843 for regulating theatres (6 and 7 Vict. c. 68), applied to the Collector of Inland Revenue for a licence to retail spirits in said theatre. He produced his theatre licence, and tendered the duties exigible, but his application was refused on the ground that he had not obtained a certificate under the Public-House Statutes.

He thereupon brought an action against the Lord Advocate, as representing the Commissioners of Inland Revenue, to have it found and declared that the pursuer, on obtaining for any period a licence under and in virtue of the Statute 6 and 7 Vict. c. 68, was entitled, in respect of said licence, to obtain from the Commissioners of Inland Revenue, and the said Commissioners were bound to grant him, a retail licence to sell beer, spirits, and wine within the theatre in respect of which the first-mentioned licence had been granted, without the production by the pursuer of any certificate under the Public-Houses Act of 1862, and that the pursuer having obtained a licence for his theatre from the Justices of the Peace for the Dundee district under the Statute 6 and 7 Vict. c. 68, for one year from the 27th July 1894, was entitled to obtain, and the defenders, the Commissioners of the Board of Inland Revenue, were bound and obliged, on the pursuer paying the duty or duties exigible under 43 and 44 Vict. c. 20, to grant a retail licence to the pursuer to sell beer, spirits, and wine within the said theatre without the production by the pursuer of any certificate under the Public-Houses Act of 1862.

The pursuer pleaded—"The pursuer, as holder of a licence from the Justices of Peace for the county of Forfar for Her Majesty Theatre and Opera House, Dundee, is entitled, in virtue of the provisions of 5 and 6 Will. IV. c. 39, sec. 7, to decree for declarator and implement as craved, with expenses."

The defender averred that the provision prohibiting the granting of an Excise licence without the production of a certificate obtained conform to the Act of 1862, was absolute and unqualified. There was no saving clause, and no exception was made in connection with the sale of exciseable liquors in theatres or other places of public amusement.

He pleaded—" (2) The Commissioners of Inland Revenue being under no obligation to grant an Excise licence to the pursuer, he is not entitled to declarator as concluded for, and the defender ought to be assoilzied with expenses. (3) The pursuer can have no claim to an Excise licence, and the Commissioners of Inland Revenue have no power to grant him one, unless he obtains and produces a certificate in terms of the Licensing Acts. (4) The provision of the Act of 1835 pleaded by the pursuer has been repealed by subsequent Licensing Acts, and in particular by the Acts of 1853 and 1862.

In 1828 the Act 9 Geo. IV. (the Home Drummond Act) cap. 58, was passed. It