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, entituled "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 c. 39, was not repealed by the provisions of the Public-Houses Acts, and that the holder of a licence granted under the Act for regulating theatres (6 and 7 Vict.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

is entituled "An Act to regulate the granting of certificates by justices of the peace and magistrates authorising persons to keep common inns, alehouses, and victualling houses in Scotland, in which ale, beer, spirits, wine, and other exciseable liquors may be sold by retail under Excise licences, and for the better regulation of such houses, and for the prevention of such houses being kept without such certificate." By section 18 of the Act it is provided "That no licence for the sale of any exciseable liquors by retail to be drunk or consumed on the premises of the person licensed shall be granted by the Commissioners of Excise or by any officer of Excise to any person whatsoever, unless such person shall have previously obtained from the justices a certificate under this Act, and which said certificate of such justices shall be retained by such person after being produced to the Commissioners or officers of Excise; and every licence granted by the Commissioners of Excise or by any officer of Excise contrary to this provision shall be null and void to all intents and purposes." The enactment of section 18 was repealed by the Statute Law Revision Act, 1873 (36 and 37 Vict., cap. 91), but was revived by the Statute Law Revision Act, 1878 (41 and 42 Vict. cap. 79).

The Act 5 and 6 William IV. (1835) cap. 39, by sec. 7 provides:—"And be it further enacted that it shall be lawful for the Commissioners and Officers of Excise, and they are hereby authorised and empowered, to grant retail licences to any person to sell beer, spirits, and wines in any theatre established under a royal patent, or in any theatre or other place of public entertainment licensed by the Lord Chamberlain or by justices of the peace, without the production by the person applying for such licence or licences of any certificate or authority for such person to keep a common inn, alehouse, or victualling house; anything in any Act or Acts to the contrary notwithstanding."

In 1853 the Forbes-Mackenzie Act (16 and 17 Vict., cap. 67), entitled "An Act for the better regulation of Public-Houses in Scotland," was passed. It amended but did not repeal the Home-Drummond Act, and it contained no reference to the Act of 1835. By sec. 7 it enacted that "No licence for the sale of any spirits, wine, porter, ale, beer, cider, perry, or other exciseable liquors by retail to be drunk or consumed on the premises of the person licensed shall be granted by the Commissioners of Inland Revenue or by any officer of Excise to any person in Scotland who shall not produce to the said Commissioners or officer a certificate granted in terms of the said recited Act of the ninth year of the reign of King George the Fourth and of this Act, enabling the party to obtain such licence; and every such licence which shall be granted without the authority or contrary to the terms of a certificate in that behalf shall be null and void to all intents and purposes." Section 17, the interpretation clause of the Act, provided that the expression "Public House" shall "include a common inn, alehouse, victualling house, or other premises in which any exciseable liquors are sold by retail to be drunk or consumed on the premises in which the same are sold." Section 18 enacted that "all other statutes, laws, and usages, shall be, and the same are hereby repealed in so far as is inconsistent with the provisions of this Act." Section 7 of the Act of 1853 was repealed by the Statute Law Revision Act, 1875 (38 and 39 Vict. cap. 66), but was enacted anew in sec. 5 of The Public Houses Acts Amendment (Scotland) Act, 1862 (25 and 26 Vict. cap. 35). Section 5 provides that "No licence for the sale of spirits, wine, porter, ale, beer, cider, perry, or other exciseable liquors by retail, whether to be drunk or consumed on the premises of the person licensed or not, shall be granted by the Commissioners of Inland Revenue or by any officer of Inland Revenue, to any person in Scotland who shall not produce to the said Commissioners or officer a certificate granted in terms of this Act enabling the party to obtain such licence, and every licence which shall be granted contrary to the terms of this Act shall be null and void to all intents and purposes." Section 8 provides that "If any person shall be desirous of keeping an inn and hotel, public house, shop, or premises for the sale therein of spirits, wine, beer, or other exciseable liquors, whether to be consumed on the premises or not," he must make application in the prescribed form to the proper licensing authority for a certificate for that purpose; and as provided by the same Act, any person trafficking in spirits or other exciseable liquors without having obtained a certificate is guilty of an offence under section 17 thereof. Appended to the Act are new forms of certificates applicable to (1) inns and hotels, (2) public houses, and (3) spirit dealers, grocers, and provision dealers respectively. This Act also contains no reference to the Act of 1835.

The Inland Revenue Act of 1880 (43 and 44 Vict. cap. 20) by sec. 43, sub-sec. 5, enacts that "the amount of duty to be paid for a licence to retail spirits in any theatre granted under the provisions contained in the 7th sec. of the Act of the 5th and 6th year of the reign of King William IV., cap. 39, shall not exceed £20.

Upon 12th December 1894 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor:—"Finds that section 7 of the Act 5 and 6 William IV., chapter 39, has not been repealed, as regards Scotland, by the Acts 16 and 17 Victoria, chapter 67, and 25 and 26 Victoria, chapter 35, or either of them: Finds that the pursuer, upon production by him to the Commissioners of Inland Revenue of a licence granted to him under the Statute 6 and 7 Victoria, chapter 68, authorising him to keep a theatre at Seagate, Dundee, and upon payment of the duties exigible under the Act 43 and 44 Victoria, chapter 20, will be entitled to obtain from the said Commissioners a retail licence to sell beer, spirits, and wine in the said theatre without the production of any certificate, under The Public

Houses Acts Amendment (Scotland) Act 1862: Therefore decerns and ordains the said Commissioners, upon production of the said first-mentioned licence, and payment of the said duties, to grant the pursuer the said retail licence, as concluded for: Finds the pursuer entitled to expenses."

"*Opinion.*—The Commissioners of Inland Revenue refuse the pursuer, who is lessee of Her Majesty's Theatre in Dundee, an Excise licence, because he has not produced a certificate from the competent licensing authority under the Public House Statutes.

"The pursuer maintains that it is not necessary that he should produce such a certificate, as, he being the lessee of a theatre duly licensed to carry on the theatre, both by the Magistrates of Dundee, under the Dundee Police and Improvement Consolidation Act 1882, section 218, and by the Justices of the Peace for the Dundee district, acting under the Statute 6 and 7 Victoria, chapter 68, a certificate under the Public House Statutes is not required, being dispensed with by section 7 of the Act 5 and 6 William IV., chapter 39. The clause is as follows:—'And be it further enacted that it shall be lawful for the Commissioners and officers of Excise, and they are hereby authorised and empowered, to grant retail licences to any person to sell beer, spirits, and wine in any theatre established under a Royal Patent, or in any theatre or other place of public entertainment licensed by the Lord Chamberlain or by Justices of the Peace, without the production by the person applying for such licence or licences, of any certificate or authority for such person to keep a common inn, alehouse, or victualling house, anything in any Act or Acts to the contrary notwithstanding.'

"To this the defender answers that that enactment was repealed, as regards Scotland, by the subsequent Public House Statutes of 1853 and 1862. The defender does not admit that, even if the provision in question is not repealed, the Commissioners are bound to grant a licence as a matter of right; but for the purposes of this case that defence, I understand, is waived.

"The demand now made by the Commissioners for production of a certificate is made under somewhat peculiar circumstances. Section 7 of the Act of William IV. has never been expressly repealed. It is in full force, at least as regards theatres, in England; and in Ireland it is in full force as regards both theatres and other places of public entertainment, subject to certain statutory regulations specially enacted by the Intoxicating Liquors (Ireland) Act, 1874 (37 and 38 Victoria, chapter 69), section 7. Its existence has been expressly recognised by subsequent statutes, and in particular by the Inland Revenue Act of 1880 (43 and 44 Victoria, chapter 20), section 43. Subsection 5 of that section is as follows:—'(5) The amount of duty to be paid for a licence to retail spirits in any theatre granted under the provisions contained in the seventh section of the Act of the fifth and sixth years of the reign of King William the Fourth, chapter thirty-nine, shall not exceed twenty pounds.' And, indeed, until within the last year or two Excise licences have been granted to the lessees of theatres in Scotland in terms of that provision.

"No reason has been assigned or suggested why the exemption should have been wholly repealed as regards Scotland alone; and all that is said for the defence is that the Commissioners are now, after the lapse of nearly forty years, advised that it was repealed by implication in 1853 by the Forbes-Mackenzie Act. Repeal by implication is never readily presumed; and where all parties have, as here, for nearly forty years acted on the footing that the later statutes did not by implication repeal the earlier one, the burden of showing that they did so is very heavy. In this case, in my opinion, the burden has not been discharged.

"When the statute of William IV. was passed, the statute in force which regulated the granting of publicans' certificates was the Home-Drummond Act of 1828 (9 George IV., chapter 58): '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 ale, beer, spirits, wine, and other exciseable liquors may be sold by retail under Excise licences; and for the better regulation of such houses, and for the prevention of such houses being kept without such certificate.'

"By the 18th section it is provided:—'And be it further enacted that no licence for the sale of any exciseable liquors by retail to be drunk or consumed on the premises of the person licensed shall be granted by the Commissioners of Excise, or by any officer of Excise, to any person whatsoever, unless such person shall have previously obtained from the Justices a certificate under this Act, and which said certificate of such Justices shall be retained by such person after being produced to the Commissioners or officers of Excise, and every licence granted by the Commissioners of Excise, or by any officer of Excise, contrary to this provision, shall be null and void to all intents and purposes.'

"I gather from the terms of section 7 of the Act of William IV. that, prior to the passing of that Act, theatres were held as falling under the Home-Drummond Act, and required a publican's certificate; or, at least, that a question had been raised as to their position; because the exemption is that a party applying for an Excise licence for a theatre need not produce a certificate authorising him to keep a 'common inn, alehouse, or victualling house.'

"But it must have become apparent that the provisions of the Public-house Statutes, and the terms of the certificate provided by it, were inapplicable to the case of a theatre or other place of public entertainment; and, as sufficient check was kept upon such places by requiring owners or lessees to obtain a licence from the justices of the peace, authorising them to carry on the theatre subject to regulation, the provision

in section 7 was passed for the purpose of exempting them from the general prohibition in section 18 of the Home-Drummond Act, and taking them out of the category of premises affected by that Act.

"In 1853 the Forbes-Mackenzie Act was passed for the purpose of amending, not repealing, the prior statute of 1828, the Home-Drummond Act. It is entitled 'An Act for the better regulation of Public-Houses in Scotland.' The 7th section is almost in precisely the same terms as the 18th section of the Home-Drummond Act. In words it is simply a re-enactment of the earlier provision. But the forms of certificate provided by the Forbes-Mackenzie Act for public-houses, &c., contain somewhat fuller regulations than the certificate provided by the Home-Drummond Act; and, in particular, they regulate the hours of opening and closing, and the sale of spirits on Sunday.

"The Act of 1862, which is entitled 'An Act to Amend the Acts for the Regulation of Public-Houses in Scotland,' contains in section 5 a prohibition, practically in the same terms as section 18 of the Home-Drummond Act, and section 7 of the Forbes-Mackenzie Act. But new forms of certificates are substituted for those in the earlier Acts, those forms being three in number, for (1) inns and hotels, (2) public-houses, and (3) spirit dealers, grocers, and provision dealers respectively. Neither in the Act of 1853 nor in that of 1862 is there any allusion to theatres or other places of public entertainment. The amending provisions of these statutes all have reference in terms to inns, public-houses, victualling-houses and premises *ejusdem generis*.

"Having carefully considered the terms of the later statutes, I am of opinion that they do not, by implication, repeal the 7th section of the Act of William IV., and I do not think that their provisions are inconsistent with that enactment. The following passage in Maxwell on Statutes, p. 212, states very clearly and concisely the ground on which my opinion is based:—'It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute to say that a general Act is to be construed as not repealing a particular one, that is, one directed towards a special object or a special class of objects. A general later law does not abrogate an earlier special one by mere implication. *Generalia specialibus non derogant;* the law does not allow the exposition to revoke or alter, by construction of general words, any particular statute where the words may have their proper operation without it. It is usually presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special Act, or, what is the same thing, by a local custom. Having already given its attention to the particular subject and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the Legislature had been turned to the special Act, and that the general one was intended to embrace the special cases within the previous one, or something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one.'

"Applying that statement of the law to the present case, by the 7th section of the Act of William IV. theatres were specially excepted from the general provisions as to publicans' certificates under the Public Houses Act, on the ground presumably that, although they might, by a strained construction, be brought within the scope of the statute, its provisions were inapplicable, and, besides, were not required. That being so, when it was found necessary to amend the Home-Drummond Act, which, after the passing of the Act of William IV. applied only to public-houses and similar premises, I cannot see why the exemption in favour of theatres, which was no less proper and necessary after 1853 than it was before, should be deemed inconsistent with the stricter terms of certificate that were thought necessary for other premises that were not so exempted. It is said that the prohibition against granting an Excise licence without the production of a publican's certificate in section 7 of the Forbes-Mackenzie Act is absolute. Well, that in section 18 of the Home-Drummond Act was equally so, and yet theatres were excepted from it. It is a rule in the construction of statutes that if a later statute simply re-enacts the provisions of an earlier one, it is not held as repealing the provisions of an intermediate statute which contains an exception from the earlier one. It draws back in date to the earlier statute. So far as theatres were concerned, section 7 of the Forbes-Mackenzie Act simply re-enacted the 18th section of the Home-Drummond Act. It is true that the forms of certificate in the Acts of 1853 and 1862 contain further regulations as to public-houses and other such premises which are not to be found in the Home-Drummond Act. But, as I have pointed out, those amendments have reference to a class of houses which, since the Act of William IV., had been dealt with in an entirely different manner as regarded the granting of publicans' certificates from theatres and other places of entertainment.

"The necessity for obtaining a publicans' certificate as the condition of obtaining an Excise licence was just as strong under the Home-Drummond Act as under the later Acts. The terms of the certificate alone were altered. Now, if theatres did not require a certificate at all, alteration of the terms of the certificate did not affect them. And I may here observe that, if it had been intended to repeal the provisions of the Act of William IV., some form of certificate suited to theatres would surely have been added to the schedules of the later Acts. The forms which we find there are as

inapplicable to them as the form of certificate under the Home-Drummond Act.

"If the exemption was repealed by implication, it is clear that it was repealed by an oversight. But I do not feel constrained to hold that it was repealed at all; its existence is not inconsistent with the provisions of the later statutes, and so all concerned believed till now. I was referred by the defender's counsel to an English case—*The Queen* v. *Commissioners of Inland Revenue*, L.R., 21 Q.B.D., p. 569 (1888). That decision is not binding upon me, but it is entitled to respectful consideration. Section 72 of 'The Licensing Act, 1872,' which applies to England and Ireland, contains a clause saving certain established privileges and rights, providing, in particular, 'that nothing in the Act should affect or apply to (4) the sale of intoxicating liquor by proprietors of theatres in pursuance of the Acts in that behalf.' On the proprietors of the Empire Theatre applying for an Excise licence under section 7 of the Act of William IV. without producing a publican's licence or certificate, the Commissioners of Inland Revenue declined to grant it, on the ground that it was not a theatre; and that, although it was a place of public entertainment, and might have got the benefit of the provision in the Act of William IV. prior to the passing of the Licensing Act of 1872, the exception or exemption had been repealed except as regards theatres, the saving clause applying to theatres alone. The question which I have now to decide did not necessarily arise in that case. If the word 'theatre' in the saving clause covered 'places of public entertainment,' no question arose as to whether 'The Licensing Act, 1872,' by implication, repealed section 7 of the Act of William IV. If, on the other hand, as the learned Judges held, the word 'theatre' did not cover 'places of public entertainment,' there was room for the argument that the terms of the saving clause showed that the exemption under the Act of William IV. had been under the notice of the Legislature, with the result that it was saved only to a limited extent. and therefore was impliedly repealed except in regard to theatres. The opinions of the learned Judges are not confined to this ground of judgment; but it is sufficient to show that the decision—apart from the reasons given, with some of which I do not agree—is not in point.

"The present case, which turns upon the interpretation of an Act passed nearly twenty years before, 'The Licensing Act, 1872,' and which contains no reference whatever to theatres or the Act of William IV., is not embarrassed with difficulties which may have weighed with the learned Judges in the case which I have been considering. A saving clause would certainly have removed all doubt; but I do not think that a saving clause was required in order to prevent repeal by implication.

"I shall therefore find that section 7 of 5 and 6 William IV., chapter 39, founded on by the pursuer, has not been repealed, and that in order to obtaining an Excise licence it is not necessary that he should produce a publican's certificate under The Public Houses (Scotland) Amendment Act, 1862."

The defender reclaimed, and argued—The question to be decided really was, whether the Act of 1835 had been repealed by subsequent legislation or not. That Act was properly a Revenue Act and not a Theatre Act. It must be read as one of the series of Revenue Acts, and when so regarded, it was plainly repealed with respect to the granting to theatres of licences to sell spirits by the subsequent Acts of 1853 and 1862. Those Acts applied to every place where liquor was sold. There was no exception made in favour of theatres. It was therefore necessary for the pursuer here to produce to the Commissioners of Inland Revenue a certificate in the form prescribed by the Act of 1862 before they would be entitled to grant him a licence, but this he had failed to do.

Argued for the respondent—The Act of 1835 took theatres, as regarded the sale of liquors therein, out of the category of licensed premises regulated by the provisions of the Public House Acts. No later Act had been passed altering their position and that could not be affected by subsequent legislation having reference solely to Public Houses. It was not competent to take a section out of one set of statutes and apply it to a different set, or to make general provisions override special ones—Maxwell on the Interpretation of Statutes, p. 212, *et seq*; *Sharp* v. *Wakefield*, L.R. App. Cas., 1891, p. 173, opinion of Lord Chancellor (Halsbury), p. 182; *Morisse* v. *Royal British Bank* (1856), 1 C.B. (New Series), 67, see Justice Willes, p. 87; *Thorpe* v. *Adams* (1871), L.R., 6 C.P., 125; *Tennent* v. *Magistrates of Partick*, March 20, 1894, 21 R. 735. Further, the subsequent Acts, by their preambles, professed to deal, and did deal, with public houses. A theatre was not a public house. Many of the provisions applicable to the regulation of public houses were plainly inapplicable to theatres. The certificates given in the schedules appended to the Act of 1862, and one of which the respondent was here asked to produce, were all of them totally inappropriate, because the lessee of a theatre did not keep either an inn or a public house or a grocer's shop. The Lord Ordinary's views were sound, and his judgment should be affirmed.

At advising—

LORD PRESIDENT—The pursuer is lessee of a theatre in Dundee, duly licensed for the performance of plays and other theatrical representations. He has presented his licence, and (as he avers in his condescendence) tendered in gold to the collectors of Inland Revenue the duties payable for a licence to sell beer, spirits, and wine in a theatre. The Board of Inland Revenue decline to take his money and give him a licence, on the ground that the pursuer has not first obtained what, for shortness, may be called a public-house certificate from the magis-

trates. It is said that the 7th section of 5 and 6 Will. IV. cap. 39, which certainly at one time authorised the issue of the licence without a public-house certificate, has been repealed.

The Lord Ordinary decided in favour of the pursuer. The Board of Inland Revenue have not been content to have their scruple removed by this decision of a competent Court. The result, however, of the argument on their reclaiming-note is that, in my opinion, the pursuer's gold must be pressed upon their acceptance.

It seems to me that by the Act 5 and 6 Will. IV. cap. 39, the sale of drink in theatres has been made to form the subject of a separate and independent chapter of legislation. Under it the Commissioners of Excise had opened to them the right and duty to give liquor licences to the patent theatres, and to theatres licenced for plays by the Lord Chamberlain. The letters-patent, or the theatrical licence, as the case might be, was the warrant to the Excise authorities to issue the liquor licence, just as in other cases their warrant was the public-house certificate of the magistrates. Accordingly, this enactment does not occur in a public-house Act at all; and, although the statute expressly negatives the necessity of producing a public-house certificate, this seems to me to mark out theatrical liquor licences, not as an exception, but as a separate category.

If this be the true view of the Act of Will. IV., it would require pretty clear enactment within a public-house Act to effect its repeal, and the general prohibition in the Public House Acts against issuing licences without a magistrates' certificate is to be read with reference to the scope and purview of those Acts. It has not been suggested that any social change or any abuse had arisen or was supposed to have arisen, so as to render a change in the statute law about theatres probable. But an examination of the Acts relied on by the reclaimers shows that theatres were never in their contemplation. The theory of the reclaimers, be it observed, is not that the Legislature intended that theatres should cease to be licenced for the sale of liquor, but that they should be forced first to get public-house certificates. Now, the application, procedure, and certificate in use for public-house certificates under the statutes subsequent to the Act of Will. IV. are completely, and in some instances extremely, inappropriate to theatres. Yet the argument of the reclaimers involves that, in those enactments and schedules, the Legislature was minded to bring theatres within the system of public-house licensing, (they being at the time outside it), that it was framing a system appropriate to theatres in common with public-houses, and that the intention was so well disclosed that theatres did not require to be mentioned.

I am of opinion that the 7th section of the Act of 5 and 6 Will. IV. cap. 39 stands unrepealed, and that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer—C. S. Dickson—Lyon Mackenzie. Agents—Henderson & Clark, W.S.

Counsel for the Defender—Lord Adv. Balfour, Q.C. — Sol. Gen. Shaw, Q.C. — A. J. Young. Agent — P. J. Hamilton Grierson, Solicitor of Inland Revenue.

HIGH COURT OF JUSTICIARY.

Thursday, December 20, 1894.

(Before Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Trayner).

WALKER *v.* BONNAR.

Justiciary Cases—Gambling—Complaint—Relevancy—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 393.

The 393rd section of the Burgh Police (Scotland) Act 1892 provides—"If any two or more persons assemble together in any street or open place within the burgh for the purpose of engaging in lotteries, betting, or gaming, each of such persons shall be liable to a penalty not exceeding forty shillings."

Held that a complaint charging a single person with having committed an offence under this section "along with one or more persons to the complainer unknown" was relevant.

Observed by the Lord Justice-Clerk that, if it turned out at the trial that such persons were in truth known to the prosecutor, he might not be entitled to a conviction on the ground that such concealment was oppressive to the accused.

A complaint was brought under the Summary Jurisdiction (Scotland) Act 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887, at the instance of the prosecutor of the burgh of Paisley, setting forth that James Bonnar, commission agent, Paisley, "along with one or more persons to the complainer unknown, did assemble together for the purpose of engaging in betting contrary to the Burgh Police (Scotland) Act 1892, and particularly section 393 thereof." That section provides as follows:—"If any two or more persons assemble together in any street or open place within the burgh for the purpose of engaging in lotteries, betting, or gaming, each of such persons shall be liable to a penalty not exceeding forty shillings."

The respondent's agent objected to this complaint being admitted to probation in respect of want of specification in so far as regarded the name or names of the person or persons with whom the respondent was charged with assembling. The magistrate sustained this objection and dismissed the complaint. The prosecutor applied for a