is not said that it was so mixed by order of the defenders. It is only said that as a matter of fact it contained too much sand. That is not an averment of fault against anyone. One cannot help knowing that the mixing of lime is an operation usually carried out by ordinary workmen. They get a heap of lime and a heap of sand and mix it in certain proportions which are perfectly well known to them. That is the work of an ordinary mason's labourer. There is nothing in this record to the contrary. It is said the lime was insufficiently worked—that is to say, insufficiently worked by the ordinary labourers who were appointed to mix it. Again, that is not an averment of fault for which the defenders are responsible. No want of due supervision by the defenders is averred.

Then the pursuer says that the wall was defective in respect "(2) That no proper 'header' or binding-stones were used in the building of said wall by the defenders, the stones used being insufficient in size and otherwise unsuitable for that purpose." It is not said that the defenders did not supply suitable stones. It is not said that there was any fault on their part in making no provision for the proper selection of stones. They would naturally expect that the workmen would apply for suitable stones, and that if they were not supplied they would complain. There is no averment to the effect that complaints as to the size of the stones were disregarded, or that stones of a proper size were asked for and refused by the defenders.

The next averment is—[*His Lordship read condescendence* 4].

It is not alleged that if the carpenter comes and proposes, in accordance with his contract, to drive in dooks, he can be prevented by the mason from doing so. It is not even said that the defenders knew when he was coming, and failed to take steps to prevent dooks from being driven in. It is said that the carpenter was suffered to drive dooks into the wall "contrary to established custom," but it is not said that the defenders knew the carpenters were working at the wall at all. If the pursuer has any action for what was done by the carpenter, it must be against the carpenter himself.

It seems to me that by such loose and loosely put-together averments the pursuer has not stated a relevant case of fault against the defenders to go to a jury. I think the case should be dismissed. If there are really facts and circumstances known to the pursuer which would form the grounds of a relevant case against the defenders, she can bring another action.

LORD TRAYNER—I agree. There is here no fault relevantly averred against the defenders.

LORD MONCREIFF—I am of the same opinion. This record is too vague and wanting in specification to warrant us in granting the pursuer an issue to go to a jury.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute and the Sheriff of Aberdeen, &c., appealed against, dated respectively 14th July and 5th October 1896: Sustain the first plea-in-law for the defenders: Dismiss the action, and decern: Find the defenders entitled to expenses in this and the Inferior Court," &c.

Counsel for the Pursuer and Respondent—Salvesen—P. J. Blair. Agent—R. Macdougald, S.S.C.

Counsel for the Defenders and Appellants — Jameson — Constable. Agents — Simpson & Marwick, W.S.

Tuesday, November 24.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

NOBLE *v.* HART.

Lease—Public-House—Conditions of Lease—Doing Anything to Endanger Renewal of Licence Certificate—Action of Forfeiture.

In a lease of a restaurant for eleven years from 28th May 1892, it was declared that in the event of the lessee failing to conduct the business properly, or of his committing a breach of the licence certificate, or an offence against the Public-House Acts or Excise laws, or permitting betting on the premises, or "doing anything which may endanger the continuance or renewal" of the licence certificate, it should be competent for the lessors to terminate the lease and enter into possession either immediately or at any term of Whitsunday or Martinmas thereafter.

In June 1896 the lessors brought an action of declarator of forfeiture of the lease and of removal against the lessee, in which they averred that on 8th June 1895 the defender had been drunk and incapable while in personal charge of the business; that on 14th April 1896, at the Licensing Court before which he was summoned, he had admitted the charge, and that the Court, while renewing the licence, had stated that if a similar charge were brought against him the licence would probably be taken away.

Held that the pursuer's averments were irrelevant, and the action *dismissed.*

By lease dated July 1893 Crawford Noble junior, and John Alexander Henderson, both merchants in Aberdeen, trustees for behoof of the Aberdeen Cork Manufacturing Company, let to Edward Hart the restaurant and cellarage No. 26 Guild Street, Aberdeen, for eleven years from 28th May 1892.

By the lease it was declared that "the said premises are let for the purpose of

carrying on a first-class restaurant and refreshment rooms, and are not to be used for any other purpose, the second party (Hart) undertaking duly and properly to conduct the business during the continuance of this lease, and in the event of the second party failing so to conduct the said business, or of his committing any breach of the licence certificate held for said premises, or any offence against the Public-Houses Acts or Excise laws, permitting betting on the premises, or doing anything which may endanger the continuance or renewal of the certificate of licence held for the premises under the statutes for the regulation of public-houses in Scotland. . . . it shall be competent for the first parties to bring this lease to a termination, and to enter into possession of the said premises, either immediately or in their option at any term of Whitsunday or Martinmas thereafter, in the same manner as if the whole years of this lease had run and expired, without any process of law or proceeding of any kind other than a letter addressed and delivered or posted to the second party at the premises hereby let."

On 16th June 1896 Crawford Noble junior, and John Alexander Henderson, as trustees foresaid, raised an action against Hart to have it declared that he had incurred a forfeiture of the lease, and that the pursuers were entitled to bring the lease to a termination, and to have the defender ordained to remove from the premises.

They averred—"(Cond. 4) The defender has contravened the stipulations of the said lease, and has incurred a forfeiture thereof, in respect that he failed duly and properly to conduct the business carried on by him in the premises, and endangered the continuance and renewal of the said licence by becoming drunk and incapable while in personal charge of the business. It is the fact that on or about Saturday, 8th June 1895, the defender was drunk, and was in consequence totally incapable of duly and properly conducting the said business, and he was found in this condition by a police inspector and constable. At the Licensing Court held in Aberdeen on 14th April 1896, the matter was reported to the Magistrates by the Chief-Constable, who informed the bench that the defender was addicted to drink, and was found in that condition on the said premises as stated above. By an error the date assigned for the said offence was 3rd June, whereas it ought to have been 8th June. The defender, who was present, and who was represented by an agent, was personally asked by the Court whether he denied the Chief-Constable's statements, and he replied that he did not. Bailie Edwards then stated for the Court that they had no wish to take away defender's business at this time, but if a similar charge were brought against him, very likely it would be taken away. A renewal of the licence was then granted to defender."

The defender pleaded, *inter alia*—"(1) Pursuers' averments are irrelevant."

On 29th October 1896 Lord Kincairney, before answer, allowed to the pursuers a proof of their averments in Cond. 4, and to the defender a conjunct probation.

The defender reclaimed, and argued—The averments in condescendence 4 were not relevant to support the conclusions of the summons. The sole charge made therein was that on one occasion the pursuer was drunk. No allegation was made that he was addicted to drink. A single instance of intoxication during three or four years of the lease could not be held to endanger the continuance or renewal of the licence in the sense of the lease—*Wooler* v. *Knott*, 1870, L.R., 1 Exch. Div. 124; *Fleetwood* v. *Hall*, 1889, L.R., 23 Q.B.D. 35.

Argued for the pursuers—Their averments were relevant. These were that the defender had been drunk and incapable while in personal charge of the business; that he had admitted this before the Licensing Court; and that the Court, while renewing the licence, had stated that if a similar charge was brought against him, very likely the licence would be taken away. If these averments were proved, it was plain that the licence had been put in jeopardy by the defender's conduct, and the pursuers were entitled to decree—*Hurmann* v. *Powell*, 1891, 60 L.J., Q.B. 628.

Lord Justice-Clerk.—I am of opinion that nothing is averred in condescendence 4 sufficient to bring this case under the clause of forfeiture in the lease. The words at the end of that clause, "doing anything which may endanger the continuance or renewal of the certificate of licence," must be read in connection with the specific examples which go before. These show that before forfeiture can take place something must be done which seriously endangers the licence. The question what may seriously endanger the licence may be difficult to decide, but the averment of what occurred to endanger the licence must be specific and certain. Now, I think that nothing of that sort has been averred against the defender. I am unable to take the averments on record as more than this, that the pursuer was intoxicated on one occasion, and that at the Licensing Court he admitted that he had been so. There is no indication on the part of the magistrates that they thought this one act had endangered the licence. It was said by one of them that if a similar charge was again brought the licence might probably be taken away. But this was as regards the future, and shows that as regards the past the magistrates had no intention of dealing with the case at all.

It is remarkable that the whole of the pursuers' contention is based on what took place in June 1895, a year before this action was brought. There is no ground for thinking that since June 1895 the defender has done anything to endanger the licence. I must say that I think there is a great deal in the suggestion made by Lord Moncreiff to the effect that if action is to be taken under the lease it must be taken either immediately or at the next ensuing term. If that is so, then of course there is an end of the case. But even assuming that the pursuers had a right under the

lease to allow the matter to stand over and to bring it up at a subsequent date, I think they have not stated on record anything done by the defender to endanger this certificate, which has been renewed by the magistrates since the act of which the pursuers complain is said to have occurred.

LORD YOUNG.—I think this case requires careful consideration before we can come to the conclusion to alter the interlocutor of the Lord Ordinary allowing a proof. I am greatly averse to interfering with an interlocutor allowing proof, and I have therefore given this case careful consideration before coming to the conclusion that it is exceptional.

The only violation of the lease is averred in condescendence 4, and in my opinion that averment simply amounts to this, that the defender was drunk on 8th June 1895, a year before this action was brought. There is no averment that the defender was addicted to drinking, or had done anything, or left anything undone, in consequence of any bad habit of his, which would interfere with the regularity of the conduct of the business or the renewal of the licence. It is, no doubt, averred that a policeman stated to the Licensing Court that the defender was addicted to drink; but I cannot take an averment that a statement was made by a policeman to the magistrates as a statement by the pursuers of facts inferring violation of the conditions of the lease by the defender. I have therefore come to the conclusion that the only averment we have here is an averment that on 8th June 1895, a year before the action was brought, the defender, who had been in possession of the premises for four years, was drunk on one occasion. I do not think that such an averment entitles the pursuers to a proof before answer.

I am therefore of opinion that there is no case presented, or facts averred by the pursuers, sufficient to entitle them to a proof.

LORD TRAYNER.—I agree. I think the first plea for the defender must be sustained. The only averment stated by the pursuers at all relevant to infer forfeiture of the licence is that the defender was intoxicated on 8th June 1895. But the rest of the pursuers' averments show that, as the matter stands, this conduct on the part of the defender did not endanger the licence. It may be said that, when the case came up before the Licensing Court the licence was granted, Bailie Edwards remarked that if a similar charge was again brought against the defender his licence would very likely be taken away. But this is only the expression of a possibility. Taking into account the mode in which the Court dealt with the matter, I think it is plain that they did not consider the defender's conduct a matter which really endangered the licence. The licence having been renewed, and there being no averment that anything has occurred since to endanger the licence, I am of opinion that this action should be dismissed.

LORD MONCREIFF.—I agree in the conclusion at which your Lordships have arrived. I am influenced a great deal by the long delay which took place before the pursuers took action. In that respect the case is in marked contrast to that of *Hurmann*. The act charged is said to have been committed in June 1895, and the case was not raised until a year afterwards, while the clause of forfeiture, if truly construed, in my opinion, provides that action must be taken either at once or at the term of Whitsunday or Martinmas following the alleged offence. The landlord took no action, and when the Licensing Court was held this isolated act of drunkenness on the part of the defender was brought to the notice of the magistrates. I think it must be held that the Court did not think that this solitary act endangered the licence, because they renewed the licence. I am of opinion that it is now too late for the pursuers to take action. If they had taken action either at once or at the term after the alleged offence was committed, they might have been entitled to a proof. But on account of the delay in bringing the action, and as a result of what took place at the Licensing Court, I think that the licence has as yet never been really endangered, and that the present action is irrelevant.

The Court recalled the interlocutor reclaimed against, sustained the first plea-in-law for the defender, and dismissed the action.

Counsel for the Pursuers—Ure—A. S. D. Thomson. Agent — Andrew Newlands, S.S.C.

Counsel for the Defender—Comrie Thomson—W. Brown. Agents—Simpson & Marwick, W.S.

Wednesday, December 2.

FIRST DIVISION.

CLARK, PETITIONER.

Election Law—Return respecting Election Expenses—Petition for Authorised Excuse—Corrupt Practices Act 1883 (46 *and* 47 *Vict. cap.* 51), *secs.* 33 *and* 34.

In order that the Court may have jurisdiction to entertain a petition under section 34 of the Corrupt Practices Act 1883, a contravention of the Act must have been committed, for which an "authorised excuse" may be allowed, and therefore a conclusion in such a petition for a finding that no contravention has been committed is incompetent.

In a petition under sec. 34 an elector is entitled to appear as a respondent, and if the petition contains conclusions for findings that no contravention has been committed, the plaintiff in an action for recovery of penalties in respect of the alleged contraventions (although not an elector) has a sufficient interest to object to their competency.