Counsel for the Pursuer (Respondent)—Constable, K.C.—Black. Agent—Thomas Liddle, S.S.C.

Counsel for the Defenders (Appellants)—Macmillan.—J. A. Christie. Agent—Henry Bower, S.S.C.

Friday, June 4.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

QUINN *v.* EADIE AND OTHERS.

Licensing Laws—Hotel—Confirmation—"New Certificate"—Renewal of Certificate—Holder of Six-Day Certificate Granted a Seven-Day Certificate—Necessity of Confirmation—Personal Bar to Claim, No Confirmation Required—Licensing (Scotland) Act 1903 (3 *Edw. VII, cap.* 25), *secs.* 13 *and* 107.

The Licensing (Scotland) Act 1903 enacts—Section 13—"A grant of a new certificate by any Licensing Court shall not be valid unless it shall be confirmed by the Court of Appeal from such Licensing Court." Section 107—"... Unless there be something in the subject or context repugnant to such construction ... 'new certificate' means a certificate granted to any person in respect of any premises which are not certificated at the time of the application for such grant, but shall not apply to the rebuilding of certificated premises which have been destroyed by fire, tempest, or other unforeseen and unavoidable calamity.

Held that where an unrestricted certificate for his hotel is granted by the Licensing Court to the holder of a six-day certificate, the unrestricted certificate is not a "new certificate" within the meaning of the Act, and consequently does not require confirmation.

Circumstances in which *held* that the holder of a six-day licence had barred himself from maintaining that an unrestricted certificate granted to him by the Licensing Court did not require confirmation.

Licensing Laws—Hotel—Six-Day Certificate—Time for Limiting Application to Six-Day Certificate—Licensing (Scotland) Act 1903 (3 *Edw. VII, cap.* 25), *sec.* 38 (1).

The Licensing (Scotland) Act 1903, enacts—Section 38 (1)—"Where on the occasion of an application for a new certificate or transfer or renewal of a certificate for an inn and hotel, the applicant at the time of his application applies to the Licensing Court to insert in his certificate a condition that he shall keep the premises in respect of which such certificate is or is to be granted closed during the whole of Sunday, the Licensing Court shall modify such certificate by the omission therefrom of the words 'and travellers.'"

Opinion by the Lord President that it was not necessary to state in the application for an hotel certificate that the crave was for a six-day licence, but that the restriction was timeously brought before the Court when it was disposing of the application.

The Licensing (Scotland) Act 1903 (3 Edw. VII, cap. 25), sections 13, 38 (1), and 107, are sufficiently quoted *supra* in the rubric.

George Quinn, Globe Hotel, Paisley, raised an action against Peter Eadie and others, the Magistrates of Paisley attending the Licensing Court for the burgh of Paisley, held on 14th April 1908, Francis Martin, town clerk of Paisley, and William Walker, burgh prosecutor in Paisley, for declarator "that the certificate granted on 14th April 1908 by the said Burgh Licensing Court in favour of the pursuer for an inn and hotel, for the said Globe Hotel, was not a 'new certificate' within the meaning of the Licensing (Scotland) Act 1903 (3 Edw. VII, cap. 25), and did not require confirmation by the said Court of Appeal, and that the said certificate made out by the defender second called and delivered by him to the pursuer in terms of the Act, is valid"; and "that the pursuer was and is entitled to traffic in exciseable liquors under said certificate in said hotel, and in terms of said Licensing Act."

The pursuer pleaded, *inter alia*—"(2) The certificate granted in favour of the pursuer by the Licensing Court not being a 'new certificate' within the meaning of the Licensing (Scotland) Act 1903, the pursuer is entitled to decree of declarator in terms of the conclusions of the summons."

The defender William Walker pleaded, *inter alia*—"(3) In respect the pursuer holds no valid certificate within the meaning of the Licensing (Scotland) Act 1903, this action is incompetent and should be dismissed. (4) The certificate granted to the pursuer by the Licensing Court not being valid without the confirmation of the Appeal Court, and such confirmation having been refused, this defender is entitled to absolvitor. (5) The certificate founded on by the pursuer being a 'new certificate' within the meaning of said Licensing Act, and as such requiring confirmation, and such confirmation not having been granted, this defender is entitled to absolvitor." [Similar pleas were stated for the Magistrates and town clerk.]

The pursuer was proprietor of the Globe Hotel, Paisley, and up to 28th May 1908, he held what is described in the Licensing Act as a six-day certificate for his hotel, *i.e.*, a certificate having the words "and travellers" deleted, which required him to keep his hotel closed during the whole of Sunday. On 30th March 1908 he presented two applications to the Licensing Court. The one application set forth—"That the applicant is desirous to obtain a Certificate for Licence for an inn and hotel at No. 92 High Street, in the burgh of Paisley and county of Renfrew, for the ensuing year, in terms of this Act, and refers to the answers which are truly made to the subjoined queries." And in reply to the

query—"State whether it is a renewal of a certificate at present in applicant's name, or in that of another party, or renewal of a transferred certificate, or a certificate for a new house that applicant desires," the answer was returned "certificate for a new house." This application was subsequently advertised by the clerk to the Licensing Court as being one for a new certificate. The other application proceeded on the same narrative, with this exception, that following the words "inn and hotel" were the words "six-day certificate." In answer to the query above quoted, the reply was "renewal of a certificate at present in applicant's name." At the Licensing Court held at Paisley on 14th April 1908 the Court granted the former application and refused the latter. The applicant then applied to the Appeal Court for confirmation of the former application, and appealed against the refusal of the Magistrates to renew his six-day certificate, but at the Appeal Court on 28th May he withdrew the application and the appeal. The Appeal Court ruled that the withdrawal was incompetent, and refused confirmation and dismissed the appeal. Thereafter the pursuer was prosecuted at the instance of the burgh prosecutor for selling drink without a certificate, the theory of the prosecution being that the certificate granted on 14th April 1908 was a "new certificate," and therefore invalid because it had not been confirmed by the Licensing Appeal Court. The Magistrate decided that the pursuer's certificate was valid and accordingly acquitted him. The prosecutor appealed to the High Court of Justiciary, and the pursuer then brought this action in the Court of Session for declarator as above set forth. The High Court of Justiciary sisted the appeal to await the decision in this action.

On 19th December 1908 the Lord Ordinary (SKERRINGTON) repelled the pleas-in-law stated for the pursuer, dismissed the action, and decerned.

Opinion.—[*After stating the circumstances in which the action was raised*]—"If it had not been for the fact that the Licensing (Scotland) Act 1903 contains a somewhat puzzling definition of the phrase 'new certificate,' I should have thought it tolerably clear that a seven-day certificate could not be regarded as a renewal of a six-day certificate. As was said by Cockburn, C.-J., in *Marwick* v. *Codlin*, 1874, L.R., 9 Q.B. 509, p. 514, 'A renewal of a licence is a repetition of an old one, and cannot include anything not contained in the old one.' So, too, in *Reg.* v. *Licensing Justices of Crewkerne*, 1888, 21 Q.B.D. 85, p. 87, Lord (then L. J.) Lindley said—'Now what is the meaning of applying for a renewal of a licence? It can only mean that the licence-holder is applying to renew that which is in existence and is on the point of expiring, which in the present case is a six-day and not a seven-day licence.'

"The definition which creates the difficulty is contained in section 107 of the Act of 1903, which enacts that '. . . [*Quotes, v. sup. in rubric.*] . . .'

"It has been maintained that it follows from this definition that if an applicant for a certificate holds at the time of his application a certificate of any kind for the premises under the Licensing Act, the certificate which he receives is not a 'new certificate' but a renewal of the certificate previously granted, however different the two certificates may be. In this view a public-house or grocer's certificate might be converted into a hotel certificate without confirmation by the Appeal Court, and without the applicant being bound to lodge with his application plans showing that the premises contain the necessary sleeping accommodation. This contention was rejected by the High Court of Justiciary in the case of *Weir* v. *Bryce*, March 12, 1897, 24 R. (J.) 42, and the soundness of this decision was not impugned by the pursuer's counsel. He argued, however, that the Licensing Act recognises only three kinds of certificate, viz. (1), for hotels, (2) for public-houses, and (3) for grocers, and that every certificate is a renewal, provided it falls within the same class as the certificate previously held by the applicant. While I agree that the licences granted under the statute fall within one or other of these three classes, it is not the case that the statute recognises only three kinds of certificates. It is plain from sections 38 and 48 that it also recognises 'six day' and 'early closing' certificates. Further, it appears from section 37, and from the forms of certificates in the 6th schedule, that a certificate may authorise the sale either of beer and similar liquors, or of beer, &c., and wine, or of spirits and intoxicating liquors generally. It is difficult to see how a spirit licence can be regarded as a renewal of a beer licence, and the contrary was decided in the English case of *Marwick* v. *Codlin* above referred to. So too in the case of *Reg.* v. *Crewkerne* above referred to, it was decided that a seven-day licence was not a renewal of a six-day licence. Though the English statutes are not in exactly the same terms as the Scottish Act of 1903, I do not think that there is any material difference between them so far as the present question is concerned. In the case of *Stevenson* v. *Hunter*, March 20, 1903, 5 F. 761, the English decisions on this branch of the law were regarded as of high authority. The Court also attached importance to the fact that the now repealed Act of 1876 (39 and 40 Vict. cap. 26), which is substantially re-enacted in the Act of 1903, was intended to assimilate the law of Scotland relating to the granting of licences to sell intoxicating liquors to the law of England.

"While I have come to the conclusion that the pursuer is not entitled to the declarator which he asks, I think it right to mention two considerations which militate in his favour and which gave me some difficulty. In the first place, it may be said that my decision deprives the definition of 'new certificate' of all meaning and effect, as the result would have been exactly the same if the statute had contained no such definition and had left the Court to deter-

mine, as best it might, whether a certificate was a new one or a renewal of one already granted. I think that probably the real object of the definition was to make it clear that a certificate cannot be held to have been renewed unless it was actually in force and being exercised at the time of the application for a further certificate, save only in the case where business has been suspended owing to the premises having been destroyed by unavoidable calamity. See *Stevenson* v. *Hunter*, *supra*. In the second place, though section 38 of the Act of 1903 does not in so many words enact that a six-day certificate granted to an applicant who already holds a seven-day certificate shall be deemed to be a renewal, I think that this may be fairly implied. If I am right in this opinion it may be argued with some plausibility that it is a much more serious interference with public convenience to allow an innkeeper to evade his common law duty to accommodate travellers on Sundays than it is to remove a restriction in his certificate which prevents him from giving such accommodation. Accordingly it may be said that the whole question of Sunday trading is left by the statute to the Licensing Court, and does not require confirmation by the Appeal Court. It is, I think, a sufficient answer to this objection to point out that while the Act may be construed as having for some reason enacted that confirmation by the Appeal Court is unnecessary in a case where restrictions are imposed, it has not, either expressly or by necessary implication, made any such enactment in regard to cases where restrictions are removed.

"I accordingly dismiss the action with expenses."

The pursuer reclaimed, and argued—(1) At the time of the pursuer's application the premises were certificated, and thus under section 107 of the Licensing (Scotland) Act 1903 (3 Edw. VII, cap. 25) the certificate granted by the Licensing Court was not a "new certificate," and did not under section 13 require confirmation. The Act recognised only three forms of certificate—(1) for inns and hotels, (2) for public-houses, (3) for grocers. *Weir* v. *Bryce*, March 12, 1897, 24 R. (J.) 42, 34 S.L.R. 523, had no application, because not only was it before the 1903 Act, but also the certificates there in question fell into different categories. *Marwick* v. *Codlin*, 1874, L.R., 9 Q.B. 509, and *The Queen* v. *Licensing Justices of Crewkerne*, 21 Q.B.D. 85, were decided on English statutes and could not affect the interpretation of a Scottish Act subsequent to their date. In *Marwick*, moreover, what was attempted was to convert a beer-house licence into a public-house licence, and these in England were distinct categories. (2) It was true that in the form filled up by the pursuer he had stated that he desired "certificate for new house," but this mis-description had prejudiced no one, and no one had appeared to object to the application.

Argued for the defenders (respondents)—The certificate granted on 14th April 1908 was correctly described by the applicant as and held by the Lord Ordinary to be a new certificate. The former certificate was a six-day certificate; this was a seven-day. The result of treating the latter as a renewal of the former would be that the Court of Appeal would not have an opportunity of considering the licence for Sunday in a case where the holder of a six-day licence for the year about to expire applied for, and was granted by the Licensing Court, a seven-day certificate for the succeeding year, for such holder would not require to get it confirmed by the Appeal Court. The reasoning in *Marwick* and *The Queen* v. *Licensing Justices of Crewkerne* (*cit. sup.*) was applicable to the present case. The argument on the other side really came to this, that a six-day certificate was a seven-day certificate with a restriction; that was precisely the argument negatived in the last-mentioned case. There was no reason why a six-day licence should be regarded as a species of seven-day licence in Scotland more than in England. The six-day licence and early closing were introduced in England by the Licensing Act 1872 (35 and 36 Vict. cap. 94), section 49, and the Licensing Act 1874 (37 and 38 Vict. cap. 49), sections 8 and 9, and that Act, section 32, contained a definition of "new licence." The Inland Revenue Act 1880 (43 and 44 Vict. cap. 20), section 44, extended to Scotland the provisions as to six-day and early closing licences contained in section 49 of the Licensing Act 1872, and sections 7 and 8 of the Licensing Act of 1874. The Act of 1903 did not make any change in the meaning of six-day or early closing licences, and these terms had before its date known meanings. (2) In any case the pursuer had applied for a new certificate and his application had been advertised as such. He could not now maintain that the certificate did not require confirmation. Objectors might have appeared had they not thought that the matter would be considered by the Appeal Court.

At advising—

LORD PRESIDENT — This is an action brought by the proprietor and occupier of the Globe Hotel, Paisley, in which declarator is sought that a certificate for an inn and hotel, granted to him on 14th April 1908 by the Burgh Licensing Court for the Globe Hotel, was not a "new certificate" within the meaning of the Licensing (Scotland) Act 1903, and did not require confirmation by the Court of Appeal. The action also concludes for declarator that the pursuer is entitled "to traffic in excisable liquors under the said certificate and in terms of said Licensing Act." Defences were lodged by the licensing authority, the Magistrates of Paisley, and it is explained that this action has really arisen out of the fact that the pursuer has been prosecuted for trafficking in liquors without a licence; that the Magistrates refused to convict; that thereupon an appeal was taken to the High Court of Justiciary; and that the Court of Justiciary sisted the case until the question was determined by this civil declarator, which had in the meantime, as I understand, been raised.

The whole of the argument in the Outer House, so far as appears from the Lord Ordinary's note, turned upon the purely legal question whether an application for a hotel certificate, not limited to six days, was an application for a new certificate when presented by a person who held for the same premises a hotel certificate limited to six days, and the Lord Ordinary has held that that is an application for a new certificate. I am of opinion that the Lord Ordinary's decision upon that matter is not in conformity with the statute. It seems to me to contravene the whole scheme and structure of the Scottish statute, and it is really based I think upon the supposed application of English cases, which were decided upon different statutes, and which are no guides in this case. The matter depends entirely upon the Licensing (Scotland) Act 1903, which was a consolidating as well as an amending Act, and in this matter I think there is no difference between it and earlier Acts. There are only three forms of certificate under that Act, namely, a certificate for an inn or hotel, a certificate for a public-house, and a certificate granted to a dealer in groceries and provisions; and there is only one form of application to the Court embodying a request for one or other of these three forms of certificate. In that matter this statute is really an echo of the statutes which have gone before it, for there have always been these three forms of certificate in Scotland. I point this out particularly, because the Scottish Act is so entirely different from the structure of the Licensing Act in England, which takes a distinction between beer-houses and public-houses, and between beer-houses before a certain date and beer-houses after that date. I refer to these matters only to say that one set of statutes does not throw much light on the other.

Now, it is provided by the Scottish Act that a new certificate needs confirmation. That is provided by section 13—"A grant of a new certificate by any Licensing Court shall not be valid unless it shall be confirmed by the Court of Appeal from such Licensing Court." I need scarcely remind your Lordships that under the scheme of the statute there is first a Licensing Court and then an Appeal Court. If a new certificate is refused by the Licensing Court there is an end of the matter. If, on the other hand, it is allowed, it is nevertheless, under section 13, not valid until it is confirmed by the Court of Appeal. As to the renewal of a certificate, if it is refused by the Licensing Court the matter can then be appealed by the licence-holder; if granted by the Licensing Court, there is an appeal given to a certain specified set of people. Now the statute goes on in the definition clause to define what is a "new certificate" for the purposes of the Act. "New certificate," it is provided, means "a certificate granted to any person in respect of any premises which are not certificated at the time of the application for such grant, but shall not apply to the rebuilding of certificated premises which have been destroyed by fire, tempest, or other unforeseen and unavoidable calamity." It seems to me that the language here is exceedingly clear. In order that a certificate may be a "new certificate" it must be in respect of premises which are not certificated at the time of the application for the grant. Of course if a person were seeking a hotel certificate, it could not be said that the premises were certificated if there was an existing public-house certificate for the premises. I think that that is quite clear, but none the less what must be looked to is whether the premises are certificated at the time a person asks for a renewal. In this case the premises were certificated and they were certificated for precisely the same class of certificate as the pursuer was applying for. It was a hotel certificate in the past, and it was to be a hotel certificate in the future. The only difference was that he did not propose to ask for the insertion in the certificate of a clause that the premises were to be closed during Sunday. There is no form of certificate given for closing of premises on Sunday. There is no separate *genus* of certificate described as a six-day certificate. The whole matter is regulated by section 38, which says that "Where, on the occasion of an application for a new certificate or transfer or renewal of a certificate for an inn and hotel, the applicant at the time of his application applies to the Licensing Court to insert in his certificate a condition that he shall keep the premises in respect of which such certificate is or is to be granted closed during the whole of Sunday, the Licensing Court shall modify such certificate by the omission therefrom of the words 'and travellers.'"

It seems to me that every sentence of that section affords an argument against the result arrived at by the Lord Ordinary. In the first place, it is clear from it that this proposal to insert a condition may find a place not only in an application for a new certificate but in an application for transfer or renewal, and that shows that a clause may be inserted in a certificate granted on an application for renewal, but that none the less the certificate will still remain a renewal certificate. Secondly, the section does not speak of the grant of a certificate, but of the insertion of a condition in the certificate, which of course implies that the certificate is there already, in order that the condition may be inserted; and the deletion of the words "and travellers" is spoken of as a modification of a certificate, and not as the issue of a different certificate. The same thing is provided as regards voluntary early closing in the second sub-section of that same section, and the same thing is to be found also in the case of what I may call non-voluntary early closing, that is, early closing within certain limits by the magistrates under section 35. There again there is no question of there being a different certificate, but it is provided that in such certificates other hours than the regulation hours shall be inserted.

Accordingly I am clearly of opinion that the Lord Ordinary is wrong in this matter,

and that when a person who has got a hotel licence with a condition inserted in it that he shall close on Sundays applies for another hotel licence and does not ask for the insertion of the condition, he is applying for a renewal and not for a new certificate. In the view of the Lord Ordinary, if the one certificate in every word is not an echo of the other it becomes a new one. The result of his Lordship's doctrine would be to drive a coach and horses through the Act of Parliament, because it would then be possible for the Licensing Court by their own action to turn every certificate into a new certificate, for all that they would have to do would be to insist on making a slight reduction of the hours within the permitted period — it might be by only five minutes—and then at once it would become a new certificate.

I ought to say this also, that when you come to the form of the application it seems to me perfectly clear that it is not in any way necessary to state in the case of a hotel certificate that the crave is to be for a six-day licence. It is, under the 28th section, quite timeous if that matter is brought before the Court when disposing of the application. I do not say, of course, that it is in any way wrong to state in the application that you mean to ask for a six-day licence only, for it is far more convenient that you should say so, and therefore I am not for one moment wishing to alter what has been the practice in the body of these applications to put in the restriction asked for. But at the same time, so far as the strict letter of the law is concerned, it is not necessary, because the only forms of certificate are for an inn and hotel, a public-house, or for a dealer in groceries and provisions, and the other matter of the six days is really merely the insertion of a condition in the licence that the hotel shall not be kept open on Sundays.

But while that is my opinion on the general question—and I thought it as well to make it perfectly clear for the guidance of licensing authorities throughout Scotland—I do not think that in the circumstances the pursuer can possibly get his declarator, because when we come to look at the facts we find that what he did was this. Being the holder of this six-day licence he presents an application for renewal, and he also presents an application for a new licence. We have been supplied with the print in the Justiciary case which contains the averments, and there is no question that he fills up a form in which he puts, in answer to the question whether it is a renewal of certificate or transfer or new house that the applicant asks, "Certificate for new house." Well, then, he takes those two concurrent applications, one for renewal in which he gives notice that he is going to ask for the reimposition of the six-day condition, and the other an application for a new certificate in which he makes no intimation that he is going to ask for any condition of six-day restriction. Going in that way to the Licensing Court he allows the first to be refused and the second to be granted, and accordingly the record of the Licensing Court bears that a new licence has been granted subject to confirmation. He then takes an appeal upon the first case that has been refused, goes to the Licensing Court, abandons that claim, and then calmly tells the Licensing Court that he does not consider that the new certificate requires confirmation, because he says, "Though I have called it a new certificate it is not really in its essence a new certificate at all." He goes away and says, "I have got my licence." It seems to me that he was entirely the author of his own undoing in this matter. As he proceeded upon a new application, everybody certiorated of what he was doing, or who happened to know what he was doing, and who might have had an opportunity of appearing and objecting, knew perfectly well that he would have to get confirmation and was entitled to say "I will do nothing, because the consideration of the Appeal Court will be enough for me, and I will trust to that." If he had not done that, and had proceeded in the proper way of making an application for renewal without intimating that he intended to apply for the six-day restriction, then anybody who was entitled to object might have objected, and if their objections had been repelled might have gone to the Appeal Court.

Accordingly it seems to me that the Lord Ordinary's interlocutor is right, although I arrive at it on entirely different grounds from those on which he proceeded.

LORD KINNEAR—I agree with your Lordship on both points.

LORD GUTHRIE—I concur. It seems to me that upon the question of the statute the Lord Ordinary really concludes the matter when, dealing with section 38, he says that if an applicant who already held a seven-days' certificate applied to have it reduced or modified to a seven-days' licence that would be a renewal, and that was admitted by Mr Fraser in the course of the argument. But I do not see, if the circumstances are reversed, how it is possible to hold that the result is not the proposed renewal, for equally there are questions of public policy and interest which would apply in both instances.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court adhered.

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Counsel for the Magistrates and Town Clerk of Paisley—Blackburn, K.C.—M. P. Fraser. Agent—F. J. Martin, W.S.

Counsel for the Burgh Prosecutor of Paisley — Blackburn, K.C. — M. P. Fraser. Agents—Campbell & Smith, S.S.C.