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.

Section 33 of the Corrupt Practices Act 1883 requires a return to be made of election expenses within thirty days of the election, containing certain particulars as to the expenses. It is further provided, sub-sec. 6, that "If without such authorised excuse as is in this Act mentioned, a candidate or an election agent fails to comply with the requirements of this section he shall be guilty of an illegal practice."

Section 34 of the Act provides — "(1) Where the return and declarations respecting election expenses of a candidate at an election for a county or borough have not been transmitted as required by this Act, or being transmitted contain some error or false statement, then—(*a*) If the candidate applies to the High Court or an election court and shows that the failure to transmit such return and declarations, or any of them, or any part thereof, or any error or false statement therein, has arisen by reason of his illness, or of the absence, death, illness, or misconduct of his election agent or sub-agent, or of any clerk or officer of such agent, or by reason of inadvertence or of any reasonable cause of a like nature, and not by reason of any want of good faith on the part of the applicant, . . . the Court may, after such notice of the application in the said county or borough, and on production of such evidence of the grounds stated in the application, and of the good faith of the application, and otherwise, as to the Court seems fit, make such order for allowing an authorised excuse for the failure to transmit such return and declaration, or for an error or false statement in such return and declaration, as to the Court seems just."

Section 23 provides—"Where, on application made, it is shown to the High Court or to an election court, by such evidence as seems to the Court sufficient, (*a*) That any act or omission of a candidate at any election, or of his election agent, or of any other agent or person, would by reason of being a payment, engagement, employment, or contract in contravention of this Act, or being the payment of a sum or the incurring of expense in excess of any maximum amount allowed by this Act, or of otherwise being in contravention of any of the provisions of this Act, be but for this section an illegal practice, payment, employment, or hiring; and (*b*) that such act or omission arose from inadvertence or from accidental miscalculation or from some other reasonable cause of a like nature, and in any case did not arise from any want of good faith; and (*c*) that such notice of the application has been given in the county or burgh for which the election was held as to the Court seems fit; and under the circumstances it seems to the Court to be just that the candidate and the said election and other agent and person, or any of them, should not be subject to any of the consequences under this Act of the said act or omission, the Court may make an order allowing such act or omission to be an exception from the provisions of this Act which would otherwise make the same an illegal practice, payment, employment, or hiring, and thereupon such candidate, agent, or person shall not be subject to any of the consequences under this Act of the said act or omission."

Dr G. B. Clark, M.P. for the county of Caithness, presented a petition craving the Court "to find that the petitioner did timeously transmit a true return of his election expenses incurred by him as candidate for the county of Caithness at the election which took place therein on 23rd July 1895, to the returning officer for the said county, in terms of the Statute 46 and 47 Vict. cap. 51, sec. 33, or otherwise; and in any event to make an order for allowing an authorised excuse for the petitioner's failure (1) to transmit the return of his election expenses within the time fixed by the statute 46 and 47 Vict. cap. 51, sec. 33; (2) to enclose as part of said return the receipt for £2, 2s. paid by the petitioner to the Lybster Temperance Hall Committee; (3) to enclose as part of the said return the receipt for £5, 15s. paid by the petitioner to James Nicol, Wick; (4) to insert the date of the election in the return which he made; and (5) to state accurately the Christian name of the said James Nicol in the said return, or for his failure to do any of the above wherein your Lordships shall consider that the petitioner has not complied with the statute; and further, to make an order allowing all or any of the above failures or omissions, if found to have been committed, to be an exception or exceptions from the provisions of the said Act, which would otherwise make the same an illegal practice; and to declare that the petitioner shall not be subject to any of the consequences under the said Act of his said acts, failures, or omissions; or to do further or otherwise in the premises as to your Lordships shall seem proper."

The petition set forth that "in July 1895 the petitioner became a candidate to represent the county of Caithness in Parliament, the seat being then vacant owing to a general election. On the 23rd July 1895 the petitioner was duly elected as member for the said constituency. The petitioner, in terms of section 24 of the Act, intimated to the returning officer that he would be his own election agent."

The petitioner further stated — "After his return the petitioner was supplied by the Sheriff-Clerk of Caithness with a lithographed form on which to enter and make a return of his election expenses. Section 29 (1) of the said Act provides that every payment of over forty shillings made by an election agent shall be vouched for by a bill and a receipt. The petitioner's total expenses at said election only amounted to £77, 10s. 6½d., and only two accounts were of such a nature as to require vouchers. These were (1) an account of £2, 2s. for hire of a hall at Lybster, and (2) an account of £5, 15s. incurred by the petitioner to James Nicol, Wick, for hiring during his candidature. The petitioner paid these and all other accounts as provided for by the said Act, but James Nicol failed to let the petitioner have a receipt for the payment to him when he received the peti-

tioner's cheque. The petitioner wrote and asked James Nicol for this receipt, and delayed sending in the return of his election expenses in the hope that it would arrive, as it, in terms of the aforesaid section 34 (1) (*a*) of the said Act, would form part of the return. The petitioner, who was in London and in attendance at the House of Commons, which was then sitting, waited thus in the hope of receiving this receipt until the evening of 27th August 1895, being the thirty-fifth day after his return. Not having received the said receipt the petitioner filled in the said lithographed form of return of election expenses and posted it, along with the receipt for £2, 2s. for the Lybster Temperance Hall, at about eleven P.M. on the said 27th August 1895, at the House of Commons Post-Office. . . . The return of election expenses made by the petitioner is said to be not in conformity with the said Act (*a*) because the envelope in which it was sent from London bears the London post-mark of the 28th August 1895, while the last day on which, in terms of the Act, the return could be made was the 27th August 1895; (*b*) because it was not accompanied by the receipt for the £2, 2s. paid to the Lybster Temperance Committee; and (*c*) because it was not accompanied by the receipt for the £5, 15s. paid to James Nicol. With regard to (*a*) the petitioner has discovered that letters posted after 10 P.M. at the House of Commons post-office are not removed therefrom and marked with a date stamp till after midnight. The consequence is that although the petitioner put the return of his election expenses into the post within the thirty-five days fixed by the said Act, it bore a post-mark as if it had been posted on the thirty-sixth day. With regard to (*b*) the petitioner can swear that he enclosed the receipt for £2, 2s. along with the return, but the Sheriff-Clerk of Caithness, who received the return for the returning officer, declares it was not among the papers which were sent him. The petitioner on being informed of this applied to the Secretary of the Lybster Temperance Hall Committee, who granted a duplicate receipt, showing that the sum was paid on 2nd August 1895. With regard to (*c*), when the petitioner on 27th August 1895 found that the receipt from Nicol was not forthcoming, and sent off the return without it, he wrote to Nicol requesting him to hand over the receipt direct to the Sheriff-Clerk, and Nicol did so on 2nd September 1895. . . . In filling up the lithographed form of return of election expenses the petitioner inadvertantly omitted to fill in the date on which the election took place. He also by inadvertence gave Mr Nicol's Christian name as John instead of James. Neither the omission nor the inaccuracy in the name appear to the petitioner to be in material nonconformity with the said Act; but the petitioner in making this application desires *ob majorem cautelam* to obtain from the Court an authorised excuse for having made the omission and committed the inaccuracy, if the Court should be of opinion that they render his return not in conformity with the statute."

Answers were lodged by Alexander Dugald Mackinnon and by Robert Sutherland, farm servant, Halkirk, the latter of whom was an elector in the county of Caithness. Mackinnon was not an elector in the said county. He, however, alleged that he had an interest to oppose the petition in respect that an action had been raised by him in England for recovery of penalties against the petitioner. He submitted that the first alternative of the prayer was incompetent, and that the matters referred to in the petition were at present under the consideration of the English courts, and accordingly craved the Court "not to pronounce any order which would prejudice the respondent in his said action in England against the petitioner."

The respondent Sutherland stated in his answers—"This respondent applied through his agents to the petitioner's agents for a copy of the petition, but this was refused, and he was referred to the intimation on the walls of Court. With reference to the statements of fact contained in the petition, this respondent avers that the petitioner's declaration as to expenses was not in statutory form, as it did not specify the amount of the expenses (which was left blank) or the date of the election; that the return and declaration were not transmitted to the Sheriff-Clerk within the statutory period, which expired on 27th August 1895; that the return was not accompanied by the statutory bills and receipts, and was therefore no true return; that although the petitioner's attention was directed by the Sheriff-Clerk of Caithness-shire to these facts shortly after the said defective return was made, the petitioner took his seat and voted in the House of Commons for a whole session without making any application for relief. This respondent accordingly submits that the petitioner is not now entitled to the relief craved."

Argued for petitioner—1. The respondent Mackinnon was acting in England merely as a common informer; he was not an elector in Caithness, and accordingly he had no *locus standi* in an application for rectification of the petitioner's errors. There was undoubtedly wide power given by the Act to recover penalties, but there was no indication that the same wide power extended to obstruction against relief being given to a member. It was true that an order in the terms craved would be an answer to the action for penalties in England. 2. The respondent Sutherland was an elector, but had also no *locus standi*, because he had failed to add anything to the case, having simply repeated the petitioner's statements without stating the grounds on which he objected to relief being given. The petitioner was entitled to know the grounds of objection, or he would be at a disadvantage in going to proof.

Argued for Mackinnon—This was not a petition concluding only for an authorised excuse, but also for declarator that no

offence had been committed, and for relief from penalties already incurred. Accordingly the result of granting it would be—as the petitioner admitted—to get rid of the action in England. He had adjourned to this Court the same issue which was before the English Court, to be tried here under a section giving a different jurisdiction. His application was quite incompetent, as he ought to have admitted his error instead of craving the Court to declare that he had not committed one. The respondent was clearly entitled to appear and see that his action in England was not cut down by the granting of this incompetent application.

Argued for Sutherland—As an elector he was entitled to appear and contest the question whether his representative had complied with the statute. He stated clearly in his answers that the petitioner had not so complied, and was entitled to discuss the question whether he had acted from inadvertence.

In the course of the discussion the petitioner moved for leave to strike out the first and last conclusions of the petition, and this was accordingly done.

LORD PRESIDENT—It seems to me that the amendments which have been made on the petition are sufficient to make it competent under the statute. As I take it, we have jurisdiction only to furnish an authorised excuse to persons who have something to be excused, not to try the question whether something has occurred which requires an excuse. The petitioner must make up his mind on that question, and Mr Ure has done well for his client in striking out of the prayer the crave for a finding that the principal thing—the first of the three offences supposed to have been committed—has not been done. Accordingly, the proceedings must necessarily go on from this point, on the footing that the question is whether an excuse should be awarded. He has also done well to strike out of the last part of the prayer a declaration for which no statutory warrant can be found. The last part of the amended prayer, which desires the Court to make an order under section 23, is one which we do not require at present to consider, as it will be entirely open to the Court subsequently disposing of the case to settle whether effect can be given to section 23 at one and the same time with section 34. In my view, therefore, the petition has been reduced by these very material alterations to an ordinary plain-sailing application under section 34. I presume that your Lordships will consider that we should remit, as we have power to, to one of the Judges to proceed with the case. Probably an Election Judge will be the best to select.

We have been challenged to determine whether either of the parties who have appeared as respondents have a title so to appear. I think there is force in Mr Ure's observation that if the petition could have been treated as it stood when the debate commenced, as a petition under section 34, there would be great room for doubt whether Mr Mackinnon had any place in the controversy. But unfortunately for the petitioner the application was not then for an excuse, but for a declarator that there was no need of an excuse, and the only possible reason suggested for that crave being allowed was that the petitioner is at present defendant in an action in the English courts at the instance of this respondent, where he affirms, and the petitioner denies, that there has been an offence in contravention of the Act. In these circumstances it seems to me that the petitioner by his own choice has really convened Mr Mackinnon to this Court to see that an order is not pronounced which might be incompetent, but which would have the appearance of a decree by a court of law cutting away the ground of his action in the English courts. Accordingly, I am of opinion that Mr Mackinnon was well entitled to come here, and, what is more, that he has succeeded in his contention. We have not to determine more than this at present, but I am at a loss to see what *locus standi* Mr Mackinnon would have in the sequel to this case now that it has been reduced to the scale and compass of an ordinary application for an excuse for an offence admittedly committed. As regards Mr Sutherland, he has in his answers confined his statements within very sober and modest limits, and has not made any aggressive or injurious reflections on the conduct of his Parliamentary representative, but, on the other hand, though his social position may not be of the most important, he is, like every elector, entitled to come forward—it may be at his own expense—but at all events to come forward and appear in this proceeding. I should therefore be averse to pronouncing anything which would discourage his laudable vigilance, but at the same time he must bear in mind that it will depend on the sequel and the course of the proceedings what the pecuniary result may be to him.

LORD M'LAREN—I am of the same opinion. It appears to me that the condition of an application under section 34 is that some act has been committed, either by the candidate or his agent or other representative, which is a contravention of the provisions of the statute that are intended to secure a complete return of election expenses. The powers of the Court are very ample to allow an authorised excuse, which shall have some effect—I do not say what effect—in relieving the candidate from the consequences of the contravention. But unless the petitioner comes here setting forth that there has been contravention, the foundation on which our jurisdiction depends does not exist. I agree that the petition as framed was open to observations affecting its relevancy, and I also agree that Mr Mackinnon was entitled to come here in order to see that no decree was given out (as it might be if the attention of the Court were not called to the point) to the prejudice of his action in the English court.

I have no doubt that the provisions of

the statute as to advertisement within the applicant's constituency are intended to enable any elector to appear and watch the case, and to see that the application is fully scrutinised before being granted.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Allow the amendments on the petition proposed at the bar, and the same having been made, remit the cause to Lord Kyllachy to proceed as may be just: Find the respondent Alexander Dugald Mackinnon entitled to his expenses," &c.

Counsel for the Petitioner—Ure—Cooper. Agents—M'Naught & M'Queen, S.S.C.

Counsel for the Respondent Mackinnon—Crole. Agents—Duncan Smith & Maclaren, S.S.C.

Counsel for the Respondent Sutherland—Will. C. Smith. Agents—A. & F. Sutherland, S.S.C.

Friday, December 4.

OUTER HOUSE.

[Lord Kyllachy.

YOUNG AND ANOTHER (CHANCELLOR'S TRUSTEES).

(Sequel of Chancellor's Trustees *v.* Chancellor, January 24, 1896, reported *ante*, 33 S.L.R. 313.)

Succession—Family Provisions—Provisions to Younger Children out of Entailed Estate—Construction.

In his contract of marriage an heir of entail, under an entail limited to heirs-male, provided that a sum of £2000 should be held by trustees "in trust for behoof of the children of the said intended marriage not succeeding to the said entailed estate," in such proportions as he should appoint, and that failing such appointment the said sum should be held "for behoof of the younger children who shall be alive at the death" of the truster, "in equal shares or proportions, the issue of such other child or children as may have predeceased always coming in place of their parents, and being entitled to the share that would have fallen to the parent had he or she been alive." *Held* (by Lord Kyllachy, Ordinary) that in the provision the phrase "younger child" was to be construed as equivalent to "child not succeeding to the entailed estate," and that the daughter of a predeceasing eldest son was entitled to take, under the survivorship clause, notwithstanding that her father, had he survived the truster, would have succeeded to the entailed estate, and could therefore have taken no benefit under the trust.

Subsequent to the judgment of the Second Division a condescendence and claim was lodged for Mrs Florence Julia Kelleher or Fitzgerald, residing at Aysgarth, Rawul Pindi, Punjaub, India, as guardian or administrator-in-law of her pupil child Isabella Blanche Dora Chancellor.

The claimant stated that the said Isabella Blanche Dora Chancellor is the only child of her first marriage with Major Alexander Chancellor, the eldest son of John George Chancellor of Shieldhill, and who but for his predecease would have succeeded him in the entailed estate.

The claimant explained that being resident with her daughter in India, and being unacquainted until recently with the legal rights of her daughter, she did not timeously lodge a claim on her behalf so as to be disposed of in the previous competition, but that she now did so in the discharge, as she believed, of her duty to her child.

She therefore claimed, as tutor or administrator-in-law of her said child, to be ranked and preferred to the balance of the fund *in medio* equally along with the claimants Elizabeth Blanche Chancellor and the marriage-contract trustees of Mrs Chadwick, after deducting the proportion thereof forming the subject of specific appointment; and she pleaded, that the said Isabella Blanche Dora Chancellor, being the sole issue of one of the children of the marriage of the said John George Chancellor and Mrs Isabella Adolphus Ross or Chancellor, not succeeding to the entailed estate, was, upon a proper construction of their marriage-contract, entitled to be ranked and preferred in terms of her claim.

The clauses of the marriage-contract bearing upon the question raised by the claim appear in the previous report.

The claimant relied on M'Laren on Wills, ii. 1072-1074, and Jarman on Wills, 5th ed. 1058, and referred to *Wemyss*, November 23, 1810, F.C., and the case of *Smollett*, reported *ibi* in footnote; *Ellison* v. *Thomas*, 32 L.J., Ch. 32, 1862; *Davies* v. *Huguenin*, 32 L.J., Ch. 417, 1863; and to the opinion of Lord Young, *ante*.

The claimants Miss Elizabeth Blanche Chancellor and Mrs Chancellor's Trustees resisted the claim, and argued that as the pupil's father was the first-born and eldest son of John George Chancellor, he could not be regarded as a younger child in the sense of the marriage-contract, and further that the issue of predeceasing children were only given the same rights in the entail provision as their parents would have taken in survivance, and that in this case the claimant could not succeed, as the child's father could never have taken any share of the provision in his own right.

The Lord Ordinary sustained the claim of Mrs Fitzgerald, and gave the following opinion:—"The question in this case arises upon the construction of the marriage-contract of the late Mr J. G. Chancellor of Shieldhill, and particularly that part of it by which he bound himself to pay to the marriage-contract trustees certain moneys to be held under certain trusts for behoof (speaking generally) of his younger children.