

what sort of a dispute with a depositor would be comprehended.

I quite agree with your Lordship and the Lord Ordinary, and think it a clear case.

LORD M'LAREN—I agree. I think there is no doubt that the question in dispute is referred to arbitration.

LORD KINNEAR—I entirely agree. The pursuer avers that she deposited certain sums in the defenders' bank. She is suing on the contract of deposit, and the only defence is founded on what the defenders allege to be the terms of the contract. The dispute is as to what are the rights of the parties to the contract of deposit, *inter se*. I agree in an observation of the Lord Ordinary, that the defenders' argument that the pursuer is not a depositor in their bank, because, as they say, the money deposited has been paid, resolves itself into a mere play of words.

I have no doubt whatever that the Lord Ordinary's judgment is right.

The Court pronounced this interlocutor:—"Adhere to the interlocutor [of the Lord Ordinary], with the variation that in place of dismissing the action they sist the same."

Counsel for the Pursuer—Cook—D. Anderson. Agent—David Murray, Solicitor.

Counsel for the Defenders—Shaw, Q.C.—W. Campbell—J. G. Stewart. Agents—Curror, Cowper, & Curror, W.S.

Thursday, February 4.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CLARK v. SUTHERLAND.

(*Ante*, p. 153.)

Election Law—Proof—Corrupt Practices Act 1883 (46 and 47 Vict. cap. 51), sec. 34—Authorised Excuse—Competency of Evidence as to Irregularities for which Excuse not Sought.

In a proof on a petition presented under sec. 34 of the Corrupt Practices Act 1883 for an authorised excuse for failure to transmit the statutory return of expenses at a parliamentary election in respect of certain specified errors and omissions in the return actually made, *held* competent for the respondent both to cross-examine the petitioner and to lead substantive evidence with respect to further irregularities in the said return which were not mentioned in the petition, and for which no excuse was sought, on the ground that such evidence was relevant to the main question under the section, *viz.*, whether any error or false statement in the return arose by reason of "inadvertence" and not by reason of "any want of good faith" on the part of the applicant.

This was a petition presented by Dr Gavin Brown Clark, M.P. for the county of Caithness, craving the Court "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 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; (5) to state accurately the Christian name of the said James Nicol in the said return; (6) to insert the date of the election in the declaration as to the petitioner's expenses; and (7) to insert in the said declaration the amount paid by him for the purpose of the said election, 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."

The election in question took place in July 1895, and the petitioner acted as his own election agent.

Answers were lodged by Robert Sutherland, an elector in the county, whose averments will be found *ante*, p. 155.

The Corrupt Practices Act 1883 (46 and 47 Vict. cap. 51), in terms of which this application was presented, section 34, enacts "(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."

Sections 23 and 33, the only others which need be referred to, will be found in the report of the previous stage of the case, *ante*, p. 154.

In terms of a remit from the Court, the Lord Ordinary (KYLACHY) granted the

petitioner and the respondent Sutherland a proof of their averments.

In the course of the proof the following questions were put in cross-examination to the petitioner and were objected to, the objections being sustained—“(Q) In the summary of election expenses, No. 16 of process, all the personal expenses you have put down are £2, 2s. 6d.? [Objected to by counsel for petitioner in respect that the object of the question is to discover further errors and omissions in the account, which are not in this petition sought to be excused. Counsel for respondent Sutherland contended that he was entitled to put such questions to witness for the purpose of showing that in his return he wilfully or with gross carelessness understated the amount of his personal expenses. Objection sustained.] (Q) Have you omitted to enter in your summary of election expenses an account for hiring incurred in connection with the election to Henderson’s Royal Hotel, Mr Macrae, manager, which account was paid on your behalf by your wife’s cheque in October? [Question objected to. Objection sustained.]”

Further, in the respondent’s proof, “counsel for the respondent Sutherland proposed to tender a witness to prove from the books of the Royal Hotel, Thurso, that charges for hiring in connection with the election were incurred by Dr Clark, and not included in his election account. Counsel for the petitioner objected on the ground that the proposed inquiry was not within the present petition. The Lord Ordinary sustained the objection.”

On 14th January 1897 the Lord Ordinary found the petitioner entitled to an order for an authorised excuse in terms of sec. 34 of the statute, excused the errors or omissions in terms of said section, and also excused the petitioner’s failure to transmit the statutory return in so far as the said errors or omissions imported such failure; to the above extent and effect granted the prayer of the petition; *quoad ultra* dismissed the same, and found no expenses due to or by either party.

Opinion.—“Having considered the proof, I see no reason for refusing the petitioner the order which he seeks for an authorised excuse for the errors and omissions set forth in the prayer of the petition. The excuse suggested, and which I propose to affirm, is that these errors and omissions arose by reason of inadvertence, and not by reason of any want of good faith on the part of the petitioner.

“I do not think that it is necessary to attempt to define abstractly the meaning of the term ‘inadvertence’ as used in the statute. I am not sure that the term can be better paraphrased than by saying (in the words of one of the English Judges) that inadvertence is just negligence or carelessness where the circumstances show an absence of bad faith. There may, of course, be degrees of carelessness, and perhaps in this case the degree was considerable. But it was not, I think, the intention of the Legislature that the Court should grant or refuse an order for an ex-

cuse according to what might happen to be their estimate of the degree of inadvertence. Bad faith is of course another matter, and it may be that a deliberate and open defiance of the statute would have that character. It has been said that a late eminent legislator used to declare that he would undertake to drive a coach and six through any Act of Parliament that might be passed, and if it appeared that the petitioner had acted in that spirit or with that motive, I do not say that he could have been excused. But I have hardly, I think, to deal with a case of that description.

“... The respondents seem to suggest that the petitioner had committed other and similar irregularities for which an excuse was not sought. I refused to allow evidence as to these, because I thought, and still think, that I have only here to deal with the specific errors and omissions for which an excuse is sought. It did not appear that the irregularities in question were connected with those covered by the petition, or that (for that reason or otherwise) their investigation was likely to throw light upon the subject-matter of the petition.

The respondent reclaimed, and argued—The Lord Ordinary was wrong in sustaining the objections taken to the respondent’s questions and his proposed evidence. The petitioner had under the statute to prove inadvertence and good faith; the questions objected to, though dealing with details not mentioned in the petition, were absolutely relevant to these important matters. [The respondent further argued that on the evidence as it stood the petitioner had failed to prove inadvertence.]

The petitioner also presented an argument on the proof, which need not here be recapitulated, and further argued—The Lord Ordinary had acted properly in sustaining the objections. The questions proposed to be put were quite irrelevant, and dealt with matters extraneous to the petitions. At all events, it was clear that the Lord Ordinary was right in refusing the evidence tendered by the respondent, for it was a well-known rule of law that while considerable latitude must be allowed in the cross-examination of a party with a view to testing his credibility and character, no substantive evidence as to facts outside the particular case could be adduced though for the same purpose.

At advising—

LORD PRESIDENT—I think the rulings of the Lord Ordinary cannot be sustained.

The first question put was to Dr Clark, the petitioner, himself. He was asked—“In the summary of election expenses all the personal expenses you have put down are £2, 2s. 6d.?” Now, that was a very innocent question, but it was indicative, and was avowed to be indicative, of what was to follow, and that was that questions were to be put tending to show that more personal expenses had been incurred than the sum which was put down. Now, the objection was this—“Objected to by counsel for the petitioner, in respect that the object

of the question is to discover further errors and omissions in the account, which are not in this petition sought to be excused. Counsel for the respondent Sutherland contended that he was entitled to put such questions to witness for the purpose of showing that in his return he wilfully, or with gross carelessness, understated the amount of his personal expenses," and the Lord Ordinary sustained the objection. I think that was a bad objection. The petitioner in an application of this kind cannot, by limiting the application to certain omissions, limit the inquiry as to his conduct to these particulars, because the Act of Parliament says that what he has to make out in regard to the omissions sought to be excused is, that they were occasioned by inadvertence—which is the allegation here—and not by any want of good faith. Suppose it should appear that the petitioner, over and above the omissions which he seeks to be excused from, has, wholesale, omitted other items which were proper to the heads of his account, would that not bear on the question whether a particular omission was to be excused, whether particular omissions were inadvertent or not, and also on the question whether the omissions were in good faith. In like manner, even one additional omission might, from its character or circumstances, be strong evidence of want of good faith; and in questions of conduct it is impossible to shut out evidence of the *animus* which actuates proceedings of which, by accident, only part are directly under consideration. It seems to me, therefore, that the Lord Ordinary has mistaken the scope of the proof, which it is part of the petitioner's case to offer to the Court—proof, namely, of inadvertence and of the presence of good faith. To my thinking, the question objected to is highly relevant to the inquiry, and the same observation applies to the second question which was objected to, the objection being again sustained.

The same reasoning leads me to a like conclusion in regard to the evidence tendered of expense having been incurred for hiring, and not included in the return.

With reference to what Mr Ure said as to the distinction to be drawn between the cross-examination of the party to the cause on a particular topic, and substantive evidence being led on the same subject, there is no doubt that such a distinction is recognised. But it does not occur when the subject-matter of the inquiry is relevant to the issue, and, as I have already said, evidence of this character seems to me to be completely relevant on the question of inadvertence and good faith. The cases to which Mr Ure refers are cases where the party to the cause may be cross-examined on matters not bearing on the issue, with a view to testing his character and credibility. But here the vital point is, that the evidence was relevant to the cause. I am therefore of opinion that these objections ought not to be sustained, and that the case should go back to the Lord Ordinary.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

The Court pronounced this interlocutor:—

"Find that the objections set forth on page 17 of the petitioner's proof, and on page 27 of the respondent's proof, ought not to have been sustained by the Lord Ordinary: Therefore recal the interlocutor reclaimed against; repel the said objections, and decern: Find the reclaimer entitled to expenses since the date of said interlocutor . . . : Remit to the Lord Ordinary to proceed as shall be just."

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

Counsel for the Respondent—Jameson—Crole. Agents—A. & S. F. Sutherland, S.S.C.

Thursday February 4.

FIRST DIVISION.

BAIN (SURVEYOR OF TAXES) *v.*
TRUSTEES OF FREE CHURCH OF
SCOTLAND.

Revenue—Income Tax—Exemption—Free Church College—Income Tax Act 1842, sec. 61, Sched. A, No. VI.

Held that a theological college used for the purpose of qualifying for the ministry students who had passed through a university course, was not a "public school" in the sense of section 61, Sched. A, No. VI., of the Income Tax, Act 1842, and consequently was not within the exemption conferred by that section.

At a meeting of the Commissioners of Income Tax held in Edinburgh on 5th May 1896, the trustees of the Free Church of Scotland appealed against an assessment under Schedule A of the Property and Income Tax Acts on £665, duty £22, 3s. 4d., made on them for the year ended 5th April 1896 as occupiers of the Free Church or New College Buildings, Edinburgh, and claimed exemption from the tax on the ground "that the said College being a public school is exempt under the Act.

The Commissioners sustained the appeal on this ground, and the Surveyor of Taxes obtained a case.

The case stated—" (3) The College referred to is what is known in Scotland as a divinity hall—and it is in this sense that the word 'college' is used in this case—and is intended for the training of candidates for the ministry after they have completed their undergraduate course at one or other of the national universities, although other students who may be desirous to make themselves proficient in any of the subjects taught therein may be and are admitted. The ordinary theological curriculum consists of four years' regular attendance, and