a source of serious danger to life and property.

The Court remitted to Mr George M'Intosh junior, W.S., to report on the petition. He reported in favour of the petition being granted on the merits, but raised a question whether the present application was necessary "The petitioners' powers of sale are regulated by section 55, sub-section 5, of the Burgh Police (Scotland) Act 1892, which sub-section is in the following terms:—'The commissioners shall have power from time to time to purchase or take in feu and build, or to lease such lands and premises as shall be required, and to sell or feu or dispose of such lands and premises as may have become unfit or otherwise unnecessary for the purposes of this Act.' The petitioners consider that as the subjects mentioned in the petition were acquired under section 59 of the Airdrie Police and Municipal Act 1849, which section is still in force, they are not held for the purposes of the Burgh Police (Scotland) Act 1892, and that therefore the power of sale conferred upon the petitioners by sec. 55, sub-sec. 5, of that Act does not extend to these subjects."

The Court granted the prayer of the petition.

Counsel for the Petitioners — Horne. Agent—W. B. Rankin, W.S.

Tuesday, January 24.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

BLACK AND OTHERS *v.* TENNENT AND OTHERS.

Public-House—Licensing Courts—Application for Certificate—Major Part of Justices Assembled—Home Drummond Act 1828 (9 *Geo. IV. cap.* 58), *sec.* 7.

The 7th section of the Home Drummond Act provides that it shall be lawful for justices to grant certificates to such persons "as the justices then assembled, or the major part of them, shall think meet and convenient." *Held* that to fulfil the statutory requisition a majority of the justices sitting at the time when the vote was taken must vote in favour of granting the application, and that it was not sufficient that there should be a majority of those actually voting.

Public-House — Licensing Courts — Certificate — Exclusion of Review — Excess of Jurisdiction — Process — Title to Sue — Home Drummond Act 1828 (9 *Geo. IV. cap.*58)—*Public-Houses Acts Amendment Act* 1862 (25 *and* 26 *Vict. cap.* 35), *sec.* 34.

The 34th section of the Public-Houses Acts Amendment Act 1862 provides that "no warrant, sentence, order, decree, judgment, or decision made or given by justices of the peace under the authority of the said recited Acts or of this Act shall be subject to reduction, advocation, suspension, or appeal or any other form of review" on any ground except that stated by the Act, viz., with regard to appeals in cases of breach of certificate.

At a meeting of justices dealing with applications for licences, a vote was taken upon an application, and a majority of those voting were in favour of granting the licence, but as some justices abstained from voting there was not a majority of all the justices sitting in favour of granting it. Objection was thereupon taken by one of the justices that a majority had not voted for granting, and that the licence had not been granted. The objection was overruled by the chairman without putting the question to the meeting, and he directed the clerk to make an entry to the effect that the application was granted. The certificate was confirmed by the county licensing court, though objections were lodged on behalf of an objector who had opposed the application before the justices, on the ground that the certificate had not been duly granted at the licensing meeting. An action of declarator and reduction was raised by the objector to have it found that the certificate and the entry were null and void.

Held (1) that the pursuer had a good title to sue; (2) that as the action was based upon defect of jurisdiction on the part of the justices, it was not excluded by the 34th section of the Act of 1862.

Section 7 of the Home Drummond Act 1828 (9 Geo. IV. cap. 58) enacts that "At such general or district meetings, or at any adjournment thereof . . . it shall be lawful for the said justices and magistrates respectively to grant certificates for the year next ensuing . . . to such and so many persons as the justices or magistrates then assembled at such general or district meeting, or the major part of them, shall think meet and convenient, to keep common inns . . . and such justices or magistrates shall deliver or cause to be delivered to every person so authorised or empowered a certificate . . . provided always that all such meetings shall be held with open doors."

Section 34 of the Public-Houses Acts Amendment Act 1862 (25 and 26 Vict. cap. 35) enacts that "No warrant, sentence, order, decree, judgment, or decision made or given by any quarter sessions, sheriff, justice, or justices of the peace, or magistrate, in any cause, prosecution, or complaint, or in any other matter under the authority of the said recited Acts or of this Act, shall be subject to reduction . . . suspension, or appeal, or to any other form of review or stay of execution, on any ground or for any reason whatever, other than by this Act provided."

The provision referred to is that in the previous section of the Act by which power is given to appeal on certain grounds against decisions relating to breach of certificate, or to trafficking in excisable liquors without a certificate.

An action was raised at the instance of

Mr Alexander Black, Whiteinch, and others, against Mr Hugh Tennent junior, spirit merchant, and against certain Justices of the Peace for the County of Lanark, who had been present at a licensing meeting on 19th April 1898, together with their clerk, Mr George Gray, and against the County Licensing Committee. The action concluded for declarator that "the entry in the Register of Applications for the sale of excisable liquors for the district of the Lower Ward of the county of Lanark, relating to the application of the said defender Hugh Tennent junior for a public-house certificate for new premises at Nos. 1197 and 1199 Dumbarton Road, and Nos. 1 and 3 Jordan Street, Whiteinch, in the parish of Govan and county of Lanark, to the licensing meeting of the said Lower Ward of Lanarkshire, held on Tuesday, 19th April 1898, whereby it is specified that the said application was granted by the said licensing meeting, is null and void and of no legal effect whatever; and it ought and should be found and declared, by decree of our said Lords, that the said application was not granted by the said licensing meeting, and that it ought and should be specified in the said register of Applications that the said application was not granted, and that the said Register ought and should be amended to that effect by the said defender George Gray; (*Secundo*) It ought and should be found and declared that the public-house certificate for the premises in Whiteinch aforesaid, issued by the said defender George Gray to the said defender Hugh Tennent junior, in consequence of the said pretended deliverance of the said licensing meeting on Tuesday, 19th April 1898, together with the pretended confirmation of said certificate, granted in terms of 39 and 40 Vict. cap. 26, by the county licensing committee of said Lower Ward of the county of Lanark, at a meeting held on 6th May 1898, are null and void to all intents and purposes; (*Tertio*) And the said defender Hugh Tennent junior ought and should be interdicted and prohibited, by decree of our said Lords, from trafficking in exciseable liquors in the said premises in Whiteinch aforesaid."

There was a further conclusion for reduction of the various entries and certificates.

The pursuers were occupiers of property in the neighbourhood of the premises in question.

They averred—"(Cond. 5) A meeting of the Justices of the Peace for the county of Lanark, acting for the district of the Lower Ward of Lanarkshire, in virtue of 25 and 26 Vict. cap. 35, section 1, was held at Glasgow on Tuesday 19th April 1898, for the purpose of granting certificates for the sale of exciseable liquors under the Acts relating to public-houses in Scotland. Thomas Craig Christie, Esquire of Bedley, was the chairman and preses of said meeting. When the said application of the defender Hugh Tenant junior was called, Mr James Andrew, writer, Glasgow, appeared for and on behalf of the objectors Mr James William Gordon Oswald and Mr Lindsay Talbot Crosbie, and Mr James Stewart, writer, Glasgow, appeared for and on behalf of the pursuers and the other objectors, and stated the objections which had been lodged with the Clerk of the Peace by them against the said application as set forth in the third article of this condescendence. After parties had been fully heard, it was duly moved and seconded that the application be granted, and a counter motion that the application be refused was also made and seconded. A vote was taken by a show of hands, when the clerk stated that 29 Justices had voted that the application be granted and 22 Justices that the application be refused. Immediately upon the Clerk of Peace declaring the result of the vote one of the Justices present publicly stated to the meeting that a number of Justices present had not voted, and that a majority of the Justices assembled had not voted for granting the application. Only 29 Justices voted in favour of the application being granted, but in addition to these 29 there were assembled at said meeting at least 30 Justices duly qualified to vote on said application. The said 30 Justices of the Peace were assembled and were sitting and acting as Justices during the whole time the said application was being heard and considered and when the vote was taken. Neither the Justices then assembled nor the major part of them sitting and acting as Justices and entitled to vote, thought it meet and convenient that said certificate should be granted; on the contrary, only a minority of them thought it meet and convenient, and immediately on the vote being taken the objection was taken by one of the Justices that a majority of the Justices had not voted for granting, and that the licence had not been granted. The objection, however, was overruled by the chairman without putting the question to the meeting. (Cond. 7) As only 29 Justices out of fifty-nine Justices assembled voted that a certificate should be granted to the defender Hugh Tenent junior, it was, under these circumstances, the duty of the chairman, Mr Thomas Craig Christie, to declare that the application was refused, and to direct the defender the said George Gray, as Clerk of the Peace, who was in attendance in the Court, to make an entry in the Register of Applications kept by him to that effect, and this was pointed out to him at the time. Instead of doing this, however, the chairman illegally and unwarrantably declared that the application was granted, and directed the Clerk to make the entry to that effect in the Register of Applications. The said entry is accordingly null and void, and does not represent the true result of the vote."

The pursuers further averred that when the defender Hugh Tennent applied to the County Licensing Committee for confirmation of the certificate, objections had been lodged on their behalf on the ground, *inter alia*, that the certificate had not been duly granted at the licensing meeting.

The defenders pleaded—"(1) No title to sue. (2) All parties not called. (4) In

respect the questions raised in the present action relate only to procedure, the action is barred by 25 and 26 Vict., cap. 35, sections 34 and 35, and 39 and 40 Vict., cap. 26, section 11. (6) The major part of the Justices of the Peace assembled at the licensing meeting having voted for the application of the defender Hugh Tennent junior, and his application having been granted in terms of statute, the action should be dismissed."

A similar action had been raised by the same pursuers with regard to a certificate of a licence granted to Hugh Tennent in respect of these premises on 20th April 1897. The question raised by them was the same as in the present action, and the Lord Ordinary (Kincairney) on 17th November 1898, repelled certain of the defender's pleas, and granted a proof. Against this interlocutor the defenders reclaimed, but seeing that before the case could be heard the time for which the certificate was granted had expired, the case was sisted on the pursuer's motion, and the present action was raised.

The Lord Ordinary's opinion in the first action was as follows:—"The pursuers sue as occupiers of property in the neighbourhood of Nos. 1197 and 1199 Dumbarton Road, and Nos. 1 and 3 Jordan Street, Whiteinch, and they conclude—*First*, for declarator (1) that an entry in the Register of Applications for the sale of exciseable liquors kept for a district in the Lower Ward of Lanarkshire, bearing that an application by the defender Tennent for a public-house certificate for new premises at these places had been granted by a Licensing Court held on 20th April 1897, is null; and (2) that the application was refused; *Secondly*, for declarator that the certificate issued by the Clerk of Court to Tennent, and the confirmation of it by a Confirming Court held on 4th May 1897 are null; and *Thirdly*, for corresponding interdict.

"The legislation on the subject appears to be as follows:—The procedure in the Licensing Court in regard to an application for a certificate is prescribed by section 7 of the Licensing Scotland Act 1828 (9 Geo. IV. cap. 58), popularly known as the Home Drummond Act. That section provides that it shall be lawful for justices of the county to grant certificates for the year next ensuing to such persons 'as the justices' then assembled 'at such general or district meeting, *or the major part of them*, shall think meet and convenient to keep common inns,' &c., within which exciseable liquors may, under Excise licences, be sold to be consumed on the premises within their respective counties or districts, and shall deliver to the person so authorised a certificate—provided that all such meetings shall be held with open doors; that it shall not be competent to refuse the renewal of a certificate without hearing the applicant, if he attends; and that there shall be two justices of the peace present at such meetings; and it is provided that any certificate granted, otherwise than at such meetings, shall be void.

"Section 13 provides that persons interested, and among others the proprietor or the tenant of the house, shall not act in the execution of the Act.

"Section 14 provides for an appeal to the Quarter Sessions by 'any justice of the peace, or proprietor, or occupier of any house in respect whereof any such certificate shall be applied for.' Subsequent sections make provisions about offences against the terms of the certificate, and section 26 excluded review of any judgment under the Act. That section has been repealed, but in substance repeated in section 34 of 25 and 26 Vict. c. 35.

"There is no mention of the appearance in Licensing Court of objectors to an application for a certificate, and therefore the pursuer's title does not depend on this Act. The Act 16 and 17 Vict., c. 67, 1852, provides for the insertion of various conditions in licences; and by section 12, certificates not in conformity with the Act are declared to be null and void—a provision which has been repealed.

"By section 11 of the Act 25 and 26 Vict., c. 35, objections to an application for a certificate are allowed by 'any person or the agent of any person owning or occupying property in the neighbourhood of the house or premises, in respect of which any certificate may be applied for,' and it is provided 'that if such objection shall be considered of sufficient importance by the justices of the peace . . . in such general meeting, and shall be proved to their satisfaction, the certificate shall not be granted.' Section 12 authorises the justices to hear even verbal objections by any justices of the peace, procurator-fiscal, the chief constable, or superintendent of police.

Section 34 excludes all review of any decision on any matter under the authority of the Act or recited Acts 'on any ground or for any reason whatever other than by this Act provided.' The language is extremely comprehensive, and it has been decided that it applies to the granting or refusing of licenses—*Lundie* v. *Magistrates of Falkirk*, 31st October 1890, 18 R. 60.

"By 39 and 40 Vict., c. 26, s. 5, it is declared that a refusal of a new certificate by the licensing justices shall be final, and by section 6 it is provided that a grant of a new certificate shall not be valid unless confirmed. By section 11 provision is made against the acting of disqualified justices, but it is provided 'that no grant of a new certificate confirmed under the provisions of the Act shall be liable to objection on the ground that the . . . justices of the peace who granted or confirmed the same, or any of them, were not qualified to make such grant or confirmation.' Section 12 provides that 'any person who appears before the justices of the peace' . . . and opposes 'the grant of a new certificate, and no other person except the procurator-fiscal for the public interest may appear and oppose the confirmation of such grant by the confirming authority.'

"What is said by the appellant to have taken place at the Licensing Court held

on 20th April is that the pursuers appeared in support of their objection to the defenders' application, and that a vote was taken by show of hands; that the clerk stated that seventeen had voted for granting the application and seventeen against granting it; that the chairman then gave his vote for the application, and declared that the application was granted. Now, what the pursuers aver is that besides the thirty-five Justices who thus voted, seven other Justices qualified and entitled to vote were assembled and were sitting and acting as Justices during the whole time when the application was heard and considered and when the vote was taken. They further averred that the objection was then taken by one of the Justices that a majority had not voted for granting the certificate, but that his objection was overruled. The question on the merits which the pursuers desire to raise is therefore as to the true construction of the words in section 7 of the Act of 9 Geo. IV. which empower the justices to grant certificates to such persons 'as the justices then assembled' . . . 'or the major part of them shall think meet,' and the question may be said to be whether a certificate is authorised when the major part who vote are in favour of it, or whether the majority of the whole justices present is necessary whether they vote or not.

"At the Quarter Sessions the pursuers appeared again and re-stated their objections. But the certificate was confirmed. I do not understand that it is said that there was any irregularity at Quarter Sessions. The only objection is that there was no certificate which could be confirmed.

"Considered as a general point, the question may be of considerable importance; but I do not imagine that it is of much consequence in this case, because in any view the present certificate endures only until May, and the question whether there shall be a licensed house at the places in question can in any other case be reconsidered on an application for a renewal. It may be true that an applicant for a renewal is in a more favourable position than an applicant for a new certificate, and in any case the pursuers' desire to have the general question settled may be regarded as legitimate.

"But the defenders object to the question being considered. They plead—(1) That the pursuers have no title. What the pursuers maintain is, as I understand, that the certificate was *ultra vires* of the Licensing Justices, and what the defenders plead is that they have no title to raise that question. They maintain that a mere member of the public has no title to object to the sale of excisable liquors by a man with a defective licence or without any licence, and that the pursuers are in no better position than members of the public, and have no exceptional rights except what the statutes confer, and that these are only to appear and state their objections at the Licensing Court and Quarter Sessions, and having done that they have exhausted their statutory rights. My opinion is against that contention. I think the pursuers have a title to shew, if they can, that the procedure of which they complain was unauthorised by the statute and *ultra vires* of the Justices.

"Reference was made in the argument to the recent case of *Boulter* v. *Justices of Kent*, 1897, Appeal Cases 596, from which I think it appears that justices of the peace when disposing of licences are not, properly speaking, a court or judicial tribunal. Although that case was decided with reference to the English Licensing Statutes, I do not doubt its application to the corresponding Scotch Statutes. At the same time I do not see the precise bearing of the decision on this case. The pursuer further referred to the case of *Thomson* v. *Renwick*, 24th June 1834, 8 S. 966, in order to shew that a mere member of the public has a title to sue an action such as this. I think, however, that that is a case of no importance. It was an action by an innkeeper for interdict against the tacksman of a neighbouring toll bar from selling spirits contrary to the Road Act. Lord Moncreiff in the Bill Chamber threw out the note on the ground of want of title. The Court recalled that interlocutor and passed the note. But that only shows that it was thought in the Inner House that there was a question to try. Nothing was decided, and I hardly understand why it was reported.

"At this point I may refer to a somewhat curious case raised, as I am told, by the present respondent, *Tennent* v. *Magistrates of Partick*, 20th March 1894, 21 R. 735, where an action by a party holding a licence from county justices for declarator that the power to grant licences had not been transferred from the justices to the magistrates of a burgh, was sustained. As I read the report, it was announced from the Bench that the Court were of opinion that the pursuers had a title; yet it appears that in order to remove doubts on that point the justices were sisted as pursuers. The circumstances are noticed in the Scottish Law Reporter, vol. 33, p. 822, and a copy of the interlocutor sisting the justices was produced by the defenders. The case has but a distant bearing, but I think it is rather for than against the pursuers' title.

"There is something to be said for the pursuers' argument, that every member of the public might pursue such an action as this, looking to the provision that the proceedings must be with open doors, and to the fact that section 23 of the Act of 9 George IV. seems to confer power on any one to complain of breaches of certificate. But I am not prepared to sustain the pursuers' title on that ground. But I do not think them at all in the same position as other members of the public. They have a statutory right to object at the Licensing Court and Confirmation Court, and it appears to me that that involves the right to see that their objections are disposed of in accordance with the provisions of the statute. In support of that view I refer to

the note of Lord Ivory in *Minto* v. *Roxburgh*, February 7, 1846, 8 D. 481, in which the right of a justice of peace to reduce a determination at Quarter Session was sustained. The opinions in the Inner House indicated no dissent from his Lordship's view, and I think that his opinion and the principle of that judgment apply to the case of the present objectors. The pursuers say that they objected to the defenders' application—that, in fact, the application was not granted, and that on a sound construction of the Act it could not be granted, and I think they have a title to maintain that position.

"The defenders' second plea is that the action is incompetent as laid. I consider that no argument was stated in support of that plea. It was argued instead that the Justices were not competently called by calling their clerk; and that may be so, and it was argued that the Justices were not called at all, and that it was necessary to call them. The plea that all parties are not called is not stated, and it does not appear to me to be *pars judicis* in this case to take it. The case of *Waterston* v. *Morrison*, May 20, 1888, not reported except in Dewar's Liquor Laws, p. 217, was cited, in which Lord Fraser held that justices of the peace were not competently called by calling their clerk; and that may be so, but in this case Gray, the clerk, is not called as representing the Justices, but as the custodier of the register of the certificate sought to be reduced, and the pursuers do not maintain that they have called the Justices. They maintain that there is no necessity to call them. The defenders cited no authority on the point, and I do not think that it was necessary to call them. They were no doubt sufficiently certified of the existence of the action.

"I take next the defenders' fourth plea, which is that reduction is barred by sections 34 and 35 of 25 and 26 Vict., c. 35, and section 11 of 39 and 40 Vict., c. 26, which exclude review. These sections are certainly expressed in the most comprehensive language, and must exclude review by action of reduction of everything done in the execution of the statutes. There is no doubt that the justices' discretion in the administration of the statutes is absolute, and will not be interfered with—*Miller* v. *Campbell*, January 17, 1849, 11 D. 355; *Sharp* v. *Wakefield*, March 20, 1891, App. Cas. p. 179; *Lundie* v. *Mags. of Falkirk*, October 31, 1890, 18 R. 60. The determination of the Confirming Court is certainly final unless it has exceeded its jurisdiction.

"But many things might possibly be done in Licensing Courts which would be beyond the power of the justices. They might refuse to hear an applicant for a renewal; they might disregard known disqualifications, and take the votes of justices known to be disqualified; they might hold their meetings with closed doors; they might grant licences in disregard of statutory conditions; or might impose unauthorised conditions, as in *Ashley* v. *Mags. of Rothesay*, June 20, 1873, 11 Macph. 708, where the party aggrieved was held entitled to reduction.

"In all such cases the statutory exclusion of review would not prevent a reduction. Now, the question is whether, supposing the pursuers to be right in their contention that a majority of all the Justices present in favour of the pursuers was necessary in order to empower them to grant them a certificate, it was *ultra vires* to grant the certificate when that majority had not voted; and I am of opinion that on that hypothesis it was. I think the Justices had no power to grant the certificate unless there was a statutory majority in favour of it, and that their deliverance is not protected by the provisions which exclude review of what has been done under the statute. Does it make a difference that the confirmation by Quarter Sessions, unexceptionable in point of procedure, has intervened? I think not. If there was no legal certificate I think there could be no valid confirmation. I am therefore of opinion that this action is not barred by these provisions of the statute.

"The last question is as to relevancy, and that, subject to what may appear when the exact state of the facts is ascertained, is just the question on the merits, that is, the question of construction of section 7 of the Act of Geo. IV. Now, the words to be construed are 'the justices assembled, or the major part of them,' and the question is, are the 'justices assembled' the justices who vote, or all the justices present.

"The question or a similar question has been decided in England, and I think that the English decisions which were cited are in point.

"There is no doubt a difference between section 7 of the Scotch Act and section 9 of the corresponding English Act, 9 Geo. IV. c. 61. In the one the expression is the 'justices assembled,' in the other the 'justices present.' I find no substantial distinction between these phrases. Then the English has the expression 'not disqualified.' But these words appear to be of necessity implied in the Scotch Act. What may perhaps seem of greater consequence is that the section in the English Act provides that the licence shall be signed by the majority present, a provision not mentioned in the Scotch Act. But I do not think this difference is of sufficient consequence.

"On this point I was referred to the case of *Garton* v. *Southampton Justices*, April 27, 1893, 57 Justice of Peace Rep. 328, and 9 Times Law Reports 430, where an application for a renewal of a licence was held to be refused when out of sixteen justices present eight voted for the renewal and six against it, and two declined to vote, it being held by Justices Day and Bruce that there was not a majority of the justices in favour of the application.

"The same question arose in *Ratepayers of Eynsham*, April 21, 1849, 18 L.J., Q.B. 210, where the question was as to the adoption of the Watching and Lighting Act. The majority required by the statute in question was a certain majority of the ratepayers

present, and it was held that all the ratepayers present were to be counted, and not those only who voted.

"Again in the *Queen* v. *The Overseers of Christchurch*, February 24, 1857, 26 L.J., M.C. 68, affirmed in Exchequer Chambers, July 4, 1857, 27 L.J., M.C. 23, where a similar judgment was pronounced in regard to a majority of vestrymen acting under a different statute.

"In all these cases the decision was that by 'a majority' of those assembled, justices of peace, ratepayers, or vestrymen, was meant a majority of those present, and not a majority of those who voted.

"Now, I do not think that any substantial distinction is to be taken between the two expressions 'assembled' or 'present,' and therefore I regard these English decisions as applicable and important. The point does not seem to have arisen for judicial consideration in Scotland. I do not think that the meaning of the expression in either statute is obvious, because in either case the questions remain, when and where are the justices or voters to be present or assembled? Must they be present during the whole discussion, or would it be sufficient that they were present when the question was put to the vote? Again, must they be counted if they are in the court room, or only if they are seated on the bench? or lastly, are those only to be counted who take part in the vote?

"It is, I think, worthy of notice that the Act of George IV. does not seem to contemplate a vote between two opposing parties—the one being for granting the application and the other against it, but only for the ascertainment of the number of justices who think it meet and convenient that the application should be granted. I doubt whether it contemplates the taking of a vote of those opposed to the application at all.

"I think it would be unsafe to decide this question without ascertaining the facts. Of course it cannot be decided for the pursuers without a proof, and they accordingly moved for a proof; and I am not prepared at present to decide against the pursuers without a proof, having regard to the English cases. I wish to reserve my judgment on the point until the facts are ascertained."

In the present action the Lord Ordinary on 17th November 1898 repelled the defenders' 1st, 2nd, and 4th pleas, and allowed a proof.

Opinion.—"On the 20th April 1897 a certificate of a licence to keep a public-house in Dumbarton Road and Jordan Street was granted to Hugh Tennent by the Justices of Peace for the Lower Ward of Lanarkshire. An action was brought by the pursuers of the present action to have it found that that certificate and that the entry in the appropriate register were null. The point which the pursuers desired to raise was whether it was sufficient, in order to authorise a certificate, that a majority of those who voted were in favour of granting it, or whether a certificate could not be granted unless a majority of the Justices present, whether voting or not, were in favour of the application. Various preliminary pleas were stated by Mr Tennent. By interlocutor, dated 31st March 1898, I repelled three of these pleas—viz. the pleas of no title, incompetency, and statutory bar—and allowed a proof. The defender reclaimed against this interlocutor, but seeing that before the case could be heard the time for which the certificate had been granted had expired, and Mr Tennent had obtained a new certificate, the case was sisted, on the motion, I understand, of the pursuers, with the view of bringing up the point again in a new action challenging the new certificate.

"Mr Tennent made a new application, and on 19th April 1898 a certificate was granted to him to continue in force until May 1899. The pursuers have raised this action to have it found that that certificate ought not to have been granted, and is null. The pursuers are the same individuals as the pursuers in the former action, and the grounds of action are the same. The action is defended, as the former action was, by Mr Tennent, and (formally) by the Clerk of the Justices. In these circumstances I at first thought that it might be sufficient to report this cause, under reference to my opinion in the former action. But it seems on the whole more in order to decide it. To a considerable extent the grounds dealt with in the former case were not re-argued, and I have not thought it necessary to reconsider the points not argued.

"But counsel for Mr Tennent brought under my notice that the defender had stated a new plea, viz., that all parties were not called, and it was explained that by that plea was meant that the whole of the Justices (I presume of the Lower Ward) were not called. The pursuers profess to call all the Justices present when the certificate was granted, but not the whole of the Justices. In the former action no one was called but Mr Tennent and the clerk. Although the point was not pleaded in the former case, it seems to have been discussed, for I observe that I express the opinion that it was not necessary to call them. No decision in support of the new plea was quoted, and the argument did not satisfy me that it was necessary to call the whole Justices or to appoint the action to be intimated to them.

"Counsel for Mr Tennent offered besides a very powerful argument in support of the plea that the deliverances of the Justices and Quarter Sessions were final, and that review was excluded. That point, no doubt, was argued before; but he thought it desirable to bring under my notice certain English decisions which had not then been quoted—the principal of these being *King* v. *Justices of Leicestershire*, 1813, 1 Maule & Selwyn, 442; and *ex parte Evans*, November 30, 1894, Appeal Cases, 16, where Lord Herschell quoted with approval the former case. He referred also to *The Queen* v. *Sherman*, 1898, 1 Q.B. 578, and to the *The Queen* v. *Cothan*, 1898, 1 Q.B. 802. It is perhaps not perfectly easy or safe to apply these cases about

English practice to practice in our own Courts. But in this case what the pursuers contend for is that the certificate was wholly null, and I do not think that these English cases negative an action challenging the certificate on that ground.

"The defender maintained that the Court will not review the Justices on a point of procedure, and, in particular, will not undertake a re-count, which the defender contends is involved in this case. There would certainly be great difficulty in this Court undertaking a re-count of a vote taken by a show of hands, and if it should turn out that a re-count is involved, I am not prepared to say what course will be followed. But the pursuers maintain that their case does not involve a re-count, because they do not challenge but accept the figures which they say were announced by the clerk. In the former action they did so expressly; but in this action all that can be said is that they do not dispute them. On the whole, having considered what I may call the supplementary argument on this point, I remain of the opinion delivered in the former case, to which I refer. The pursuers table a fair question of law on which a decision is desirable, and I am disposed to think that the defender has not shown that that question cannot be entertained in this action.

"As the pursuers have the names of all the Justices alleged to have been present, it is to be regretted that they have not made their averments more explicit. But it was said that they were unable to do so.

"I shall repel pleas 1, 2, and 4, and allow a proof."

The defenders reclaimed, and argued—(1) The action was barred by the 34th section in the Act of 1862. In view of the terms of that section there could be no review except on the ground of excess of jurisdiction. The respondents had not formulated any point in which they could say the magistrates had exceeded their jurisdiction. The act of granting the certificate was clearly one of the acts which they were authorised by statute to do. Surely, also, the act of ascertaining the mind of the meeting was equally so. There must be finality attaching to their decision as to what was that mind. It was simply a question of procedure—*Brand* v. *Police Commissioners of Arbroath*, May 23, 1890, 17 R. 790. No *mala fides* had been averred on the part of anyone, and there was no good ground for saying that this was outside their jurisdiction, even though it was averred to have been done in the wrong way—*Lundie* v. *Magistrates of Falkirk*, October 31, 1890, 18 R. 60; *Rex* v. *Justices of Monmouthshire* (1825), 4 Barn. & Cress. 844; *Rex* v. *Justices of Leicestershire* (1813), 1 Maule & Selwyn, 442, *approved* in *ex parte Evans*, November 30, 1894, App. Ca. 16; *Miller* v. *Campbell*, January 17, 1849, 11 D. 355; *The Queen* v. *Somersetshire Justices* (1892), 56 J.P. 183. Not one of the Justices had come here to object to the chairman's ruling, and it must be held that they had all assented to it—*Earl of Minto* v. *Roxburgh*, February 7, 1846, 8 D. 481. It would be a most inconvenient and impracticable course to allow a proof on a question such as this. The Court would not go behind the written deliverance in the statutory register, which was final. (2) The respondents' reading of the meaning of the Act as to "majority" was not the right one. It ought to be limited to those Justices who were present for the purposes of the particular application, that is, to those who took part in the decision. The principle of the cases was that when a meeting was convened, with a duty to perform, a person taking no part assented to the views of the majority of the meeting. Here it was the *prima facie* duty of the meeting to grant the application, and accordingly anyone present bnt not voting must be held to have voted for granting—*Walkinshaw* v. *Orr*, June 28, 1860, 22 D. 627, at 631; *Taylor* v. *Mayor of Bath* (1745), 3 Luder's Election Cases, 324; *Barton* v. *Hannant* (1862) 31 L.J. Mag. Ca. 227. As regards the cases quoted by the Lord Ordinary—in *The Ratepayers of Eynsham*, the resolution could only be adopted by two-thirds of the ratepayers present, and abstention would indicate dissent. Again, in the *Christchurch* case there was no duty or obligation to vote; there was not the element of a meeting with a duty to discharge. The case of *Garton* was nearer to the present one, but the words of the English statute—"the Justices present"—were different, being of much greater precision than those in the Scotch Act. (3) The respondents having once stated their objections to the Justices, had no title to bring before the Court a question as to the propriety of their procedure. They had no right beyond that given them by the statute to object to the sale of liquor. That right was to appear and state their objections at the Licensing Court and Quarter Sessions, and no more. They were in no sense in the position of a party to the application—*Boulter* v. *Justices of Kent* (1897)—App. Ca. 596. Certain persons were given rights of appeal under section 14 of 9 Geo. IV. cap. 58, such as justices, occupiers or owners of the premises in question, but not persons in the respondents' position. The case of *Minto*, *supra*, had no bearing on the present, for there it was a justice—one of the specially privileged persons—who was held to have the right to come into Court. In the English statutes there were no clauses as in the Scotch fencing the decisions of the justices against appeals. All the cases there were raised in the name of the Queen, and did not bear upon the question of the title of an individual. Moreover, they showed that it was not competent to challenge the decisions of justices by way of reduction, but by an order for *mandamus* to compel them to do their duty under the statute.

Argued for respondents—(1) The whole case of the respondents was that there had been excess of jurisdiction. It was necessary for a majority of the Justices assembled to be in favour of granting the application, but here it had been granted without such

majority. That was a direct violation by the Justices of their statutory powers, and accordingly that deliverance was not protected by the provisions excluding review. The case was precisely the same as where any inferior court acted outwith their powers, and there was a remedy by appeal to the Justiciary Court or Court of Session—*Ashley* v. *Magistrates of Rothesay*, April 17, 1874, 1 R. (H.L.) 14. There was nothing in this contention at variance with the decision in *Lundie*. It made no difference in the case that there had been confirmation by the Licensing Committee, for where there was no legal certificate there could be no legal confirmation. This was not an action to wipe out what had been done by the Justices and make this Court decide whether the application should be granted, but to give legal effect to what had actually been done. The question was in no way different in principle from that decided in *Lord Minto's* case. (2) It was a question of discretion whether the Justices should renew the licence, it being their duty to "consider and dispose of the application," and it was not a *prima facie* duty that they should grant it, as the reclaimers maintained. Accordingly, it could not be assumed that those who abstained from voting were in favour of granting the application. To fulfil the statutory requirement there must be a clear majority of the Justices "assembled," not merely of those voting. There was no real distinction betweeen that word and the word "present" in the English statute, and accordingly the case of *Garton* was very much to the point.—See also *Henderson* v. *Louttit & Company*, March 15, 1894, 21 R. 674. (3) The question was not whether the objectors had a right to appeal, but whether having the statutory right to appear and state objections they were not entitled to insist that the Justices acted according to the statutory provisions—*Earl of Minto* v. *Roxburgh*, *supra*. In fact they had sufficient title both as neighbouring proprietors and members of the public, seeing that the proceedings took place with open doors and that every member of the public had the right to see that the statutory provisions were complied with—*Thomson* v. *Renwick*, June 24, 1834, 8 S. 966. The objectors in Scotland were in a different position from that held by them in England, because they could be mulcted in costs, and were in reality parties to the application, and not merely witnesses. The case of *Boulter* did not apply, being concerned with the English Acts as to summary jurisdiction, and not really dealing with the Licensing Acts.

At advising—

LORD PRESIDENT—Shortly stated, the case of the pursuers is, that whereas the Home Drummond Act authorises justices to grant certificates to such persons as a majority think meet and convenient, this certificate has been issued to a person to whom only a minority thought it meet and convenient to grant it. The pursuers say (so I read their averments) that the vote taken on the question whether the certificate in question should be granted or refused was the last word of the Justices on the subject; that that vote showed only a minority in favour of the certificate; and that the certificate comes to have been issued simply through the action of the chairman, who, contrary to a protest from one of the Justices, declared the certificate granted, and signed a deliverance to that effect. This having been done, the certificate issued automatically under the provisions of sections 12 and 16 of the Act, for the clerk is bound to issue or withhold certificates simply according to the entry in the book.

Now, there are various pleas stated against the action which require serious consideration. But so far as the ground of the pursuers' challenge is concerned, it must be allowed to be of a radical nature. The jurisdiction of the justices to grant certificates originates in this statute, and it is a jurisdiction to grant them only to such persons as the major part think meet and convenient.

The resolution to grant is therefore the act of the majority. There is no jurisdiction to a minority to issue certificates. In quality, therefore, the objection stated by the pursuers seemed to me to lift their case clean over any clause of exclusion of review, for it is an objection that this is not the act of the Justices under the statute at all.

Considering the question at close quarters, the pursuers' averment is that on the occasion in question a vote was taken on the question whether the defender should be granted a certificate. There were present at the time fifty-nine Justices—of these, twenty-nine voted for granting the certificate, and twenty-two against, and eight abstained from voting. Now, as I have said, the pursuers' statement is that this was the final expression of opinion of the assembled Justices on the question whether it was meet and convenient that the certificate should be granted. All that followed was that a Justice present claimed that the legal result was that the certificate was refused, that the chairman held the contrary, and directed the clerk to record the decision as granting the certificate, and that he did this without putting the matter to the meeting.

First of all, then, what was the legal result of the vote, assuming the matter to end there, so far as the Justices are concerned? Now, it seems to me that the true reading of the statute is, first, that when it speaks of the major part of the justices assembled, it means the major part of the justices sitting at the time when the vote was taken. I do not think it reasonable to hold that by justices assembled it is intended to include justices who had assembled at the beginning of the meeting but had since left, or, on the other hand, that those only are to be held to have assembled who took part in the vote. It seems to me that the Act requires that of those who are at the time sitting as justices a majority must affirmatively

manifest their opinion that it is meet and convenient that A B should get a certificate, and that a vote having been called for, and certain persons abstaining from voting, those persons cannot be held to affirm that they deem it meet and convenient that A B should get a certificate. It has been suggested that persons who abstain from voting implicitly indicate their assent to whichever is the prevalent opinion. But then this means that they assent *ab ante* to both of two contradictories. Their position is not that of people who form their opinion after others have expressed it; their mandate, *ex hypothesi*, is given antecedently to both sides, but conditionally on success. I find it impossible to hold that it can be predicated of a person so minded that he thinks it meet and convenient that the certificate shall be granted and therefore shall not be refused. It can be predicated of him upon the same grounds that he thought the exact opposite.

Accordingly, I hold that assuming the facts to be as stated, this certificate was refused. I desire, however, to emphasise the importance which I attach to the pursuers' averment being that the vote was the ultimate expression of the mind of the Justices. Had the pursuers' averments included or admitted of the explanation that after the vote the neutral Justices acceded to the grant of the certificate, that would be a totally different case. I do not assert that a vote is necessarily final so as to exclude either neutrals or the minority in the vote from acceding to the opinion which has proved to have the most active adherents. On the contrary, the modes of ascertaining the opinion of the majority are left by the statutes, with which we have to deal, to the justices themselves; and I am far from suggesting that a court of law would be entitled to interfere with the modes of procedure adopted towards this end. There are various modes in fact adopted in deliberative and administrative bodies for ascertaining the prevalent opinion. Sometimes by custom the chairman gathers the mind of the meeting without counting, as by the volume of sound in crying Aye and No, or by the sight of a show of hands, and a count takes place only on his estimate being expressly challenged. Again, sometimes an enumeration is effected by counting persons in lobbies, or by counting hands, or by calling a roll. But in the present case the point is that in fact there was an enumeration, and by that enumeration it was proved that a majority of the Justices sitting was not in favour of granting this certificate. It seems to me, therefore, that we are out of the region of procedure altogether, and that the mind of the meeting had been ascertained.

It is said, however, that all question is excluded by the fact that the entry in the statutory register bears that this deliverance was granted, and that this is authenticated by the signature of the chairman in conformity with the statute. No doubt this entry, which is called in the statute the deliverance, forms the authentic record of what was done. It is true also that in two English cases—*Rex* v. *Leicestershire Justices* and *Rex* v. *Monmouthshire Justices*—the Court declined to look behind the record, and that the former of these cases goes a long way. I am alive also to the convenience of holding questions about voting as concluded by the record, a great many being unsuited for trial in courts of law. But in the present case I find these distinguishing features — that the error complained of, which is capital and palpable, amounts to a direct violation of the enactment creating the jurisdiction, and that nothing has been omitted at the time which could have prevented or redressed the action of the chairman in signing the deliverance consequentially on which the certificate was issued. I am not prepared to hold that we are concluded by the record to the effect of having to treat as a statutory grant of a certificate that which, according to the statute, is a refusal of it. Nor do I think that the exclusion of reductions and review contained in the 34th section of the Act of 1862 protects the written deliverance or record against challenge on the ground of defect of jurisdiction, which is the true nature of the present objection. In the debate before us the learned counsel on both sides found it necessary first to examine and discuss the other branches of the case before dealing with the question of title, and I have followed the same order. The present pursuers are persons occupying property in the neighbourhood of the defender's premises, and as such they were entitled to object, under section 11 of the Act of 1862, to the certificate being granted. They did in fact object, and were heard by the Justices in support of their objection. They craved the Justices to refuse the licence, and they say that in fact it was refused. In my opinion they have a good title judicially to insist that effect is given to that decision.

I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM—By the 7th section of the Act 9 Geo. IV. c. 58, it is enacted that at general or district meetings held for the purpose of granting certificates for the sale of exciseable liquors, it shall be lawful for the justices to grant certificates for the year next ensuing to such and so many persons as the justices then assembled at such general or district meetings or the major part of them shall think meet and convenient to keep common inns, and so on, within which ales and other exciseable liquors may be sold.

The question on the merits in this case arises on the construction of this clause, and is, whether, when an application for such a certificate is before the justices it can be lawfully granted when a vote is taken, where the majority of those actually voting are in favour of granting it, or whether it can only be lawfully granted where a majority of the justices assembled vote in favour of granting it.

The facts averred by the pursuers which

raise the question are clearly stated. It appears that at a statutory meeting held on 19th April 1898 by the Justices acting for the Lower Ward of Lanarkshire, an application by the defender for a certificate came up for consideration. The pursuers had lodged objections to its being granted, and after parties had been heard a motion was made that the certificate should be granted, and a counter motion that it should be refused. It is averred by the pursuers that there were assembled at this meeting at least fifty-nine Justices qualified to vote, and who were sitting and acting as Justices during the whole time the application was under consideration, and when the vote was taken, that the result of the vote was that 29 voted for granting the application and 22 for refusing it, leaving at least 8 of the Justices assembled who did not vote one way or another.

It is averred that a Justice present, on the state of the vote being declared by the clerk, pointed out that a majority of the Justices assembled had not voted for granting the certificate. This objection, however, was overruled by the chairman without putting the matter to the meeting, and he then directed the clerk to make an entry in the register of applications kept by him that the application had been granted.

On the construction of the statute I agree with the Lord Ordinary that it is necessary to the lawful granting of a certificate that the justices assembled at the meeting, or the major part of them—that is, the major part of those assembled—should think it meet and convenient that the application should be granted. I do not see how the mind of the meeting on the matter can be ascertained except by a vote. I think it is not at all material how the vote be taken, whether by show of hands, calling the roll, or otherwise, provided the mind of the meeting is ascertained. In this case, if the pursuers' averment be true, 29 thought it meet and expedient that the application should be granted, and 22 thought it should not, and expressed their thoughts by their votes. But what did the 8 who did not vote think on the matter? If they had thought it meet and convenient that the application should be granted, one would have expected that they would have so voted, or if they thought it should not, that they would have voted accordingly. The legitimate conclusion appears to me to be that they had not made up their minds one way or another on the matter. But the result is that it cannot be affirmed that they thought it meet and convenient that the application should be granted. If that be so, then they cannot be counted along with the 29 who voted for granting the application, and it follows that there was not the requisite majority which made it lawful for the Justices to grant the certificate.

I think therefore that the granting of the certificate in question was *ultra vires* of the Justices, being outwith their statutory powers.

What is said to have subsequently taken place at the meeting does not in my opinion alter the case.

It is said that a Justice present stated the objection that a majority of the Justices assembled had not voted for granting the certificate. Had this objection been brought before the meeting for their consideration, it is impossible to say what the result might have been. But that was not done. It is said that the chairman of the meeting at his own hand repelled the objection, and desired the clerk to register the application as having been granted. The result of the voting, therefore, remained the last expression of the mind of the Justices on the matter, and it was *ultra vires* of the chairman to desire the clerk to register the application as having been granted.

Nor does it appear to me that the pursuers are seeking to submit any determination or decision of the Justices in meeting assembled to review. What they say is that the statutory effect of the determination of the Justices at the meeting in question was that the certificate should be refused, and what they now seek is that effect should be given to that determination by setting aside acts done inconsistent with it, and for which it furnishes no warrant.

I have only further to add that I agree with the Lord Ordinary that the pursuers have a good title to insist. They have a statutory right to object to the certificate being granted, and to appear and be heard before the Justices, and it appears to me, as it does to the Lord Ordinary, that they have a right and title to see that their objections are disposed of in accordance with the provisions of the statute.

I think the interlocutor should be affirmed.

LORD M'LAREN—It appears to me that in the conduct of public business, whether judicial or administrative, it is the right of any member of the court or counsel to require that the opinions or votes of the members should be taken *seriatim*, and the decision recorded in conformity with the opinions of the majority. This is usually done by calling the roll, and I think that where no other mode of voting is prescribed by the constitution of the assembly or by usage, then calling the roll is the legal mode of ascertaining the votes of the members. In this case the Act prescribes that licences may be granted by a majority of the justices assembled, and this, in my opinion, implies that an absolute majority is necessary, and not merely a majority of those justices who give their votes for or against the licence.

But then it is not to be assumed that in every case there is to be a division of opinion amongst the justices; and, for example, if after hearing the parties one or more members of the court move that the licence be granted, and no justice offer a contrary opinion, I do not doubt that the chairman would be acting according to his duty in declaring that the application was granted. If no justice should then challenge the decision, I should hold that the application was granted by a unanimous vote of the justices assembled.

Again, I think that if the chairman upon

hearing the views of the Justices who offered their opinions, or as the result of a show of hands, was satisfied that a majority of the justices present desired that the licence should be granted, he would be within his rights in declaring that the licence was granted by a majority of votes, and if his decision were allowed to pass unchallenged I think that according to the common law and usage of public assemblies this would be a good vote. But then, according to that same usage, it is open to any member of the court or assembly to challenge the chairman's decision and to demand a poll or formal vote of the members present. The chairman is merely the spokesman of the collective body—their officer for the purpose of collecting their votes, and announcing their decision when given—and when he announces a decision without taking a formal vote, the validity of the decision depends on the tacit assent of the whole body, which results from the fact that his decision is unchallenged.

Now, it is alleged by the pursuer that the chairman's decision after the show of hands was challenged, and that, notwithstanding the challenge, the chairman directed the clerk to record that the licence was granted. If this averment be true, I consider that the chairman exceeded his powers, and that as a matter of fact the licence was not granted by a vote of a majority of the Justices assembled. On this ground I agree that there is a case for inquiry, and that the interlocutor of the Lord Ordinary allowing a proof is right.

Lord Kinnear—I agree with your Lordship in the chair.

The Court adhered.

Counsel for the Pursuers—Sol.-Gen. Dickson, Q.C.—W. S. Mackenzie. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders—D.-F. Asher, Q.C. — Clyde. Agents — James Purves, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, January 23.

(Before the Lord Justice Clerk, Lord Adam, and Lord Kincairney.)

LLOYD v. H.M. ADVOCATE.

Justiciary Cases—Falsehood, Fraud, and Wilful Imposition—Relevancy.

An indictment set forth that the party charged had advertised that he had a piano for sale which a family leaving for abroad was obliged to sell, that he represented to five persons that a piano shown to them was the piano referred to in the advertisement, that he sold to each of those persons a piano which had not belonged to a family leaving for abroad, and that in the case of four out of those five persons he sold to them a piano which was not the one which they had seen and tried. *Held* that the indictment was relevant.

Justiciary Cases — Process — Citation — Timeous Objection.

Held that if the accused allows the case to proceed to trial without stating any objection to the method of his arrest or citation, he must be held to have waived any objection in these respects.

Justiciary Cases—Verdict—Guilty as Laid before them.

In a trial before a Sheriff and jury, the jury returned a verdict of guilty of the crime charged "as laid before them." One of the charges originally brought had been withdrawn. The Court read the verdict as meaning guilty of the crime charged as ultimately put forward, and *observed* that even if the words "as laid before them" meant "as laid before them by the Sheriff," no objection could be taken, unless it were shown that the law laid down by the Sheriff was flagrantly wrong.

Justiciary Cases—Indictment—Qualifying Words—Criminal Procedure (Scotland) Act 1887 (50 *and* 51 *Vict. cap.* 35), *sec.* 8.

Observed (*per* the Lord Justice Clerk) that under section 8 of the Criminal Procedure (Scotland) Act 1887, by which certain qualifying words are implied in indictments, the insertion of such words is not only unnecessary but improper.

This was a suspension at the instance of John Lloyd, carrying on business at 268 Moseley Road, Birmingham, of a conviction pronounced against him in the Sheriff Court of Forfarshire in a prosecution at the instance of H.M. Advocate, whereby he was sentenced to imprisonment for two months.

The indictment was in the following terms:—"John Lloyd, 268 Moseley Road, Birmingham, you are indicted at the instance of the Right Honourable Andrew Graham Murray, Her Majesty's Advocate, and the charges against you are that you, having devised a scheme for defrauding members of the public by obtaining money on false and fraudulent pretences, did cause to be inserted in the *Dundee Advertiser* of 7th and 10th, the *People's Journal* of 11th, and the *Evening Telegraph* of 13th, all days of June 1898, said newspapers being all published in Dundee, an advertisement in the following terms:—'Pianoforte, upright iron grand.—Family leaving for abroad must sell their magnificent walnut wood drawing-room piano, full trichord, patent check action, every latest improvement, beautiful marquetrie panel, new last season. List price 50 guineas; accept 19 guineas to immediate purchaser. Warranty transferred to purchaser from reliable firm. Bargain for dealer to sell again. "Lloyd," c/o Mrs Smith, 10 Airlie Terrace, Perth Road, Dundee;' and did, at 10 Airlie Terrace aforesaid, upon the dates and to the persons named and designed in the first schedule subjoined hereto, falsely and