the Lord Ordinary's interlocutor so far as it sustains the second plea-in-law for the defenders and dismisses the conclusion of the summons as regards courtesy, and also in so far as it finds the defenders entitled to expenses; find and declare that the pursuer is entitled to his courtesy out of all lands and heritages which belonged to his deceased wife, and in which she was infeft at the date of her death, 6th January 1915; repel the second plea-in-law for the defenders; *quoad ultra* adhere to the interlocutor; and remit the cause to the Lord Ordinary to proceed therein as may be just. The pursuer must have the expenses of the reclaiming note.

The LORD JUSTICE-CLERK, LORD SALVESEN, and LORD GUTHRIE concurred.

The Court recalled the interlocutor of the Lord Ordinary in so far as it sustained the second plea-in-law for the defenders, repelled that plea, and found and declared that the pursuer was entitled to courtesy out of all lands and heritages in which his deceased wife was infeft at her death.

Counsel for Pursuer and Reclaimer—Wilson, K.C. — M. P. Fraser. Agents—Patrick & James, S.S.C.

Counsel for Defenders and Respondents—Christie, K.C.—Ingram. Agents—Allan, Lowson, & Hood, S.S.C.

Thursday, November 9.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

BAILLIE AND OTHERS *v.* MOTHERWELL LICENSING COURT.

Public-House—Licensing Authority—Certificate—Procedure—Renewal of Certificate—Omission of Power to Sell Spirits.

The holders of innkeepers, publicans, and grocers' certificates in a burgh all applied for renewal of their certificates. They were summoned to attend the Licensing Court of the burgh; no notice of any objection to the renewal of their certificates was given them; and no objection was stated at the Court to their applications. Each case was separately called, and after calling the first case the magistrates retired, and on their return intimated to the applicant that his certificate was renewed for the sale of all the liquors which his former certificate allowed him to sell with the exception of spirits. Without retiring, they made a similar intimation to each of the other applicants in turn. In none of the cases was the applicant heard in support of his application. The applicants appealed to the Licensing Appeal Court, in which after a hearing their appeals were refused. The applicants brought an action concluding for reduction of the deliverance of the Licensing Court and subsequent proceedings, and for declarator that their certificates were valid and effectual to the same extent as if they had contained authority to sell spirits, and for decree ordaining the clerk to the Licensing Court to correct the certificates. *Held* (1) that to except the sale of spirits was "to refuse to renew" the certificates within the meaning of the proviso to section 11 of the Licensing (Scotland) Act 1903, which it was incompetent under that proviso for the Licensing Court to do without first having heard in open court the parties in support of their applications; (2) that the proceedings of the Licensing Court were therefore irregular and must be set aside; (3) (*rev.* Lord Ormidale, *dub.* Lord Skerrington) that the certificates did not therefore *ipso facto* fall to be renewed, but must be considered *de novo* by the Licensing Court.

The Licensing (Scotland) Act 1903 (3 Edw. VII, cap. 25), enacts, section 11—"At any general half-yearly meeting of a licensing court, or at any adjournment thereof, . . . it shall be lawful for the said court to grant certificates for the year or half-year next ensuing as the case may be . . . to such and so many persons as the court then assembled at such meeting shall think meet and convenient, to keep inns and hotels, or public-houses, within which exciseable liquors may, under Excise licences, be sold by retail, to be drunk or consumed in the premises, within the jurisdiction of such court. . . . Provided always that all such meetings shall be held with open doors, and that it shall not be competent to refuse the renewal of any certificate without hearing the party in support of the application for renewal in open court, if such party shall think fit to attend, and any certificate granted otherwise than at such meetings shall be void and of no effect."

(1) Daniel Baillie and others, all retail wine and spirit merchants, and all carrying on business in Motherwell, (2) Joseph Blair and others, all licensed grocers carrying on business in Motherwell, and (3) William Duffy, hotel-keeper, Motherwell, *pursuers*, brought an action against (1) Andrew Wilson and others, the Licensing Court of the Burgh of Motherwell, (2) James Burns, town-clerk of Motherwell, (3) Archibald Colville and others, the Licensing Appeal Court for the Burgh of Motherwell, and (4) John T. T. Brown, Clerk of the Peace for the Middle Ward of Lanark, Hamilton, concluding as follows:—"Therefore (*first*) the defenders ought and should be decerned and ordained by decree of the Lords of our Council and Session to exhibit and produce before our said Lords (*a*) a pretended deliverance of the defenders first called at the Licensing Court held at Motherwell, dated 11th April 1916, and purporting to exclude the sale of spirits from all the licences granted at said meeting, and (*b*) a pretended letter from the defender fourth-named to the defender second-named, dated 3rd May 1916, and purporting to intimate in terms of section 30 of the said Licensing Act that appeals taken by the pursuers against the said

deliverance of the defenders first-named were refused by the Court of Appeal, and (*c*) a pretended minute dated 4th May 1916, purporting to record in the register kept under the authority of said Licensing Act that said appeals had been refused by the Court of Appeal, and the said pretended deliverance, letter, and minute, in so far as they purport to exclude the sale of spirits from the licences granted or to be granted to the pursuers for the year beginning 28th May 1916, ought and should be reduced by decree of our said Lords, and the pursuers reponed and restored thereagainst *in integrum;* and further, it ought and should be found and declared by decree foresaid that it was illegal and *ultra vires* of the defenders first and third called to prohibit the sale by retail of spirits within the burgh of Motherwell by the pursuers during the year from Whitsunday 1916 until Whitsunday 1917; and (*second*) it ought and should be found and declared by decree of the Lords of our Council and Session that the certificates for the sale of exciseable liquors in force for the year from 28th May 1916, granted by the defenders first called, and made out and issued by their said clerk, the defender second-called, to the pursuers severally, for their respective premises above mentioned, all of which certificates bear to be for 'the sale of victuals and of wine, porter, ale, beer, cyder, or perry,' or for 'the sale of wine, porter, ale, beer, cyder, or perry,' are and shall be valid and effectual to the pursuers for the whole of the current year, as if there had been inserted therein the word 'spirits,' and the words 'or other exciseable liquors;' and the defender second-called, as clerk foresaid, ought and should be decerned and ordained by decree foresaid (*a*) to correct the foresaid certificates granted to the pursuers, severally and respectively, by inserting the words 'spirits' and the words 'or other exciseable liquors,' in terms of the forms of certificates for inns and hotels, for public-houses, and for grocers and provision dealers trading in exciseable liquors respectively, contained in the Sixth Schedule appended to the Licensing (Scotland) Act 1903, and duly authenticating and subscribing the said corrections; and (*b*) to make and authenticate the necessary corrections consequent on the said corrections of the certificates in the register of licences kept for the said burgh; or otherwise (*third*), as an alternative to the foregoing conclusion, it ought and should be found and declared by decree of our said Lords, that in granting all the foresaid certificates in said terms, and in refusing to entertain the pursuers' applications for renewal, and in dismissing the pursuers' appeals thereagainst, the defenders first-called, and the defenders third-called respectively, acted irregularly, illegally, and contrary to their statutory duties, to the hurt and prejudice of the several pursuers, and that the pursuers are entitled to obtain warrant and decree against the defenders first and third called to the effect of compelling the performance of their statutory duty to the pursuers; and it having been so found and declared, the defenders first and third called ought and should be decerned and ordained by decree of our said Lords, and should receive the warrant, authority, and remit of our said Lords, to hold a meeting or meetings within such short space of time as our said Lords may appoint, and thereat to entertain and hear the applications or appeals of the pursuers for renewal of their certificates, in accordance with statute, and also in accordance with such special directions as our said Lords may think fit to give."

The pursuers pleaded—"2. The deliverances of the Licensing Court and the Licensing Appeal Court libelled being illegal and *ultra vires*, the documents libelled ought to be reduced as concluded for. 3. The defenders first called having acted irregularly and incompetently in refusing the pursuers' applications for renewal of their licences, without considering and hearing each of the pursuers upon the circumstances of his or her individual case, and the defenders third called having acted irregularly and incompetently in affirming the said refusal, the pursuers are entitled to decree in terms of the first conclusion of the summons. 4. The excision from the certificates of the pursuers and the whole licence-holders in the said burgh of the sale of spirits or other exciseable liquors, as condescended on, being beyond the statutory powers of the defenders first called, the pursuers are entitled to decree in terms of the second conclusion of the summons."

The *facts* of the case appear from the opinion of the Lord Ordinary (ORMIDALE), who on 18th July 1916 pronounced an interlocutor in the following terms:—"Sustains the second and fourth pleas-in-law for the pursuers: Reduces and decerns in terms of the reductive conclusion of the summons: Finds, decerns, and declares in terms of the second conclusion of the summons."

Opinion.—"All the holders of certificates in the burgh of Motherwell, for public-houses, for grocers, and for inns and hotels, applied for renewal of their certificates to the Licensing Court of the burgh held on 11th April 1916. The members of that Court are the Provost and Magistrates of Motherwell. Up to that date all the licence-holders had had full certificates granted to them authorising them to sell spirits, wine, porter, ale, beer, cyder, and perry and other exciseable liquors.

"On 11th April the Court intimated to each of the licence-holders in turn, all of them having been summoned to attend the Court with the exception of William Capes, whose application for a renewal of his licence in the name of John Granger was refused, that certificates were granted to them for the sale of wine, porter, ale, beer, cyder, and perry, but not for the sale of spirits. A licence was granted for John Granger in similar terms.

"The licence-holders then appealed to the Licensing Appeal Court held on the 3rd May, and counsel were heard for them in support of their appeals. By the casting vote of the chairman the appeals were refused.

"The present action was then raised

against the members of the two Courts and their respective clerks, concluding in effect, first, for reduction of the deliverance of the Magistrates of 11th April and the writs which followed on the refusal of the appeals, and for declarator that it was illegal and *ultra vires* of the defenders to prohibit the sale by retail of spirits within the burgh of Motherwell during the year from Whitsunday 1916 to Whitsunday 1917; second, for an order on the clerk of the Licensing Court to insert the words 'spirits' and 'other exciseable liquors' in the certificates, and to make the appropriate corrections in the Register of Licences; or otherwise, third, as an alternative to the foregoing conclusion, for a remit to the defenders to hold a meeting, and thereat to entertain and hear the applications or appeals of the pursuers for renewal of their certificates. I refer to the summons for the full terms of the conclusions.

"From the averments it appears that many of the pursuers are owners of their licensed premises, that many of them are tenants under leases with several years to run, at assessed rents varying from £45 to £190, and that several of them have been licence-holders in Motherwell for a very considerable number of years. No objections were intimated or taken by anyone at the Licensing Court on 11th April to the renewal of any of the certificates. After the first application had been called the Magistrates retired, and on their return intimated to the applicant that his certificate was granted for the sale of other liquors, but not for the sale of spirits. Each of the other applicants was called individually, and without again retiring the Magistrates made the same intimation to each.

"It is admitted that the result of the proceedings in the Licensing Courts has been to withdraw from the whole licence-holders in the burgh of Motherwell authority to sell spirits. That, the pursuers say, is tantamount to a prohibition by the Magistrates of the sale of spirits for the space of one year within the whole licensing area, and for this, they maintain, there is no warrant whatever in the Statute of 1903. There is certainly no express authority to this far-reaching effect conferred upon the licensing tribunals. The defenders contend that while this may be so there is vested in them a discretionary power, if they deem it expedient, to refuse to grant any new licence or any renewal of an existing licence except in a restricted form excluding the right to sell spirits. This, they say, is clearly within their competency in the case of any particular applicant for a licence or for a renewal, and that being so it follows that it is also within their competency to deal in precisely the same way and at the same time with the certificates of each and every applicant for a new licence or for a renewal of a certificate. If they can so deal with the certificates piecemeal they maintain that they can also so deal with them wholesale, although the result of their proceedings may be to prevent the licence-holders from selling and the public from purchasing spirits within the whole licensing area. They challenged the pursuers to say what number, if they cannot deal with the whole certificates, they can so deal with at any particular Court—one certificate, or one-half of the whole certificates, or three-fourths, and so on. The answer to that challenge, it seems to me, falls to be given only if and when the particular circumstances figured arise. It is not the question in the present case. The same kind of argument was dealt with by the Lord Chancellor in *MacBeth* v. *The Magistrates of Rothesay*, 1 R. (H.L.) 14, 11 S.L.R. 487, and I take it that if the wholesale prohibition of spirits at one Court is *ultra vires* of the tribunal the indirect attainment of the same end will be no less so. Now, for the reasons I shall give later on, it does not appear to me to be necessary to decide this general question. I shall only say that as at present advised I am of opinion that the contention of the Solicitor-General is sound, and that nowhere within the four corners of the Act of 1903 is there to be found any warrant for a licensing court prohibiting the sale of spirits in the whole area subject to its jurisdiction. I assume that the motive of the Magistrates of Motherwell in refusing authority to any of the licence-holders in the burgh to sell spirits was a good one. It was not suggested that it was not, and it may be readily admitted that in the present circumstances many persons would maintain that it was a reasonable view to take that if all facilities for the purchase of spirits were removed it would be greatly to the advantage not only of Motherwell but of the country at large. But the Magistrates must proceed strictly according to the statute, and in the statute as I read it there is no warrant given, either directly or impliedly, to the Magistrates at their option to veto the sale of spirits within their jurisdiction. Such a power would require to be very clearly enacted. It seems to me not only foreign to but contradictory of the intendment of the statute. The purpose and the scope of the Act is truly to regulate the sale of exciseable liquors. The right of the public to be supplied with liquors and the right of members of the public to sell liquors, if only the statutory regulations thereanent are observed, seem to me to be recognised, and that in each licensing area. There is certainly no duty imposed on the licensing tribunals to see that each area is kept supplied with whisky and public-houses, but section 11, which enacts that it shall be lawful for the Licensing Court to grant certificates for the year to such and so many persons as the Court shall think meet and convenient, appears to me to mean that if there are persons duly qualified according to the statute applying for licences a duty is imposed on the Court to grant certificates to some at least of the applicants. It may have a very wide discretion as to the number of persons to whom full certificates are to be granted, but there is no suggestion of a right to come to a resolution *ab ante* to grant no certificates at all for the sale of spirits. Accordingly, without dwelling longer on this point, my

opinion is that while the Magistrates have a power to regulate and control of the fullest and most unrestricted character, they have no power wholly to prohibit the sale of spirits within their jurisdiction—*Municipal Council of Toronto* v. *Virgo*, [1896] A.C. 88; *Rossi* v. *Magistrates of Edinburgh*, (1903) 5 F. 480, 40 S.L.R. 375.

"I prefer, however, to rest my decision on more technical grounds. The position of the defenders the Licensing Court is set out in answer 10—'The Licensing Act imposes no duty on the Magistrates of making provision for the sale by retail in the town of Motherwell of spirits unless they consider it expedient to do so. The Magistrates in the exercise of their discretion under the said Licensing Act, and acting with due regard to the present interests and requirements of the public, deemed it in each of the cases inexpedient to grant a licence certificate in the form applied for, and granted instead a licence certificate in one of the other forms contained in the said sixth schedule to the said Act, under which no power to sell spirits is conferred.' I take that to mean, and it was their contention, that they were entitled to issue and did issue the restricted certificates in virtue of the powers conferred by section 35 of the Act. Before examining that section, however, there has to be considered the contention of the defenders that in granting the certificates they did they granted renewals of the certificates applied for. It is maintained by the pursuers that they did not, that on the contrary they refused the renewals applied for, and that they refused them without hearing the parties in support of their applications, which it was incompetent for them to do. Section 11 deals with this matter.

"In my opinion the documents handed to the applicants were not renewals of their certificates. It may be difficult to define in statutory terms exactly what these documents were if not renewals. The Solicitor-General was inclined at first to describe them as 'new certificates,' though he afterwards withdrew that description. Certainly it seems to me they were not 'new certificates' as that term is defined in the Act, section 107. Just as certainly they were not what the licence-holders applied to the Court to grant—that is to say, they were not renewals in terms of the certificates heretofore issued to and held by them. To the extent of the difference—and it was a very vital difference—the Court refused to grant the renewals applied for. In so doing the Court in my judgment in the sense of section 11 refused the renewal of the certificates. The certificates held by the applicants were what may be called the first alternative of the several forms of certificates prescribed by the statute. That was what the holders applied for a renewal of. They did not get it. In its place they got a certificate in the third alternative of the forms. They were not refused certificates, and the certificates granted were of the same class as those applied for. But a renewal of a certificate is, I take it, a repetition of the old certificate. It need not be, perhaps, *verbatim* the same, but the new must be in all essential particulars identical with the old. If that be so, then the applicants were refused the renewals of the certificates held by them for which they applied. It was not competent for the Court so to refuse the renewals without first hearing the parties in support of their applications in open Court. The pursuers were not so heard. It is said that they had an opportunity of being heard, and that it was their own fault if they did not speak. They were not invited to speak, and no indication was given that there was any necessity for their speaking. It was not even necessary for them to say that they desired renewal. They had already done so by lodging their applications, and there was no contradictor. Mere notification to attend the Court does not certainly indicate that an application is to be challenged. At most it is a warning that it may be. No doubt it was said with some force that it was not necessary for the applicants to be heard on this occasion, keeping in view the nature of the ground on which the Court had made up its mind to act, the ground, namely, of general expediency, having no relation to the circumstances of any particular application. But the words of the section are perfectly general. Accordingly it appears to me that the Magistrates went wrong in not hearing the pursuers before they refused to grant them renewals of their certificates. They exceeded their jurisdiction in so doing.

"If the view I have just expressed is not well founded there falls to be considered the question whether the Magistrates were entitled under section 35 to grant restricted certificates instead of the full certificates which were applied for. What section 35 says is—'It shall be lawful for a licensing court where they shall deem it inexpedient to grant to any person a certificate in the form applied for to grant him a certificate in any other of the forms contained in the sixth schedule annexed hereto.'

"If the Magistrates are right in their construction of this section, then the statute provides nine different 'forms.' In my opinion it provides only three. The statutory forms are first mentioned in section 11, under which the certificate to be granted is to be 'in such a form as hereinafter directed.' That refers to section 34, which provides that the forms are to be those contained in the sixth schedule. The forms contained in the sixth schedule are described as (1) the form of certificates for inns and hotels, (2) the form of certificate for public-houses, and (3) the form of certificates for grocers, &c. Each of these three forms of certificate contains a clause which enumerates the particular liquors for the sale of which authority is given, and that clause is expressed in one of three alternative ways according to the sorts of liquors the grantee of the certificate is authorised to sell. These alternatives are not, as I read the statute, anywhere referred to as substantive forms; they are mere variations of the three forms which are themselves ascertained and determined by the purpose for which the certificate is sought, for an inn or hotel, for a public-house, or for a grocer. The proviso

in section 37 seems to recognise this construction—'Provided always that nothing herein contained shall be held to prevent the licensing court from granting a certificate in any of the forms in the sixth schedule annexed hereto for the sale by retail of' wine, porter, ale, &c., or of porter, ale, &c., only. If the word 'forms' fell to be read as descriptive of and including the alternatives, making nine forms in all, then the words of the proviso from 'for the sale by retail' onwards would be quite superfluous. The form in which a certificate is to be applied for is a statutory form—section 14 and the first part of the fourth schedule. The application when duly filled up in accordance with the statutory directions will disclose which one of three forms of certificate is requested, viz., for an inn or hotel, or for a public-house, or for a grocer, and not which one of nine forms. The statutory register of applications, again, in the fifth schedule also treats the 'forms' of certificate as three in number. The matter of the alternatives was not before the Court in *Quin* v. *Magistrates of Paisley*, 1909 S.C. 1085, 46 S.L.R. 825. But the Lord President refers to 'forms of certificate' in language which appears to me very applicable to the present question. At page 1090 he says—'There are only three forms of certificate under that Act' (*i.e.*, the Act of 1903), 'viz., a certificate for an inn or hotel, a certificate for a public-house, and a certificate granted to a dealer in groceries and provisions, and there is only one form of application to the Court embodying a request for one or other of these three forms of certificate.' If this be the correct construction to place upon the word 'form,' then the power conferred on the Licensing Court by section 35 is to substitute for the form of certificate applied for as disclosed in the statutory application any other of three forms contained in the sixth schedule, *e.g.*, a public-house certificate for an inn or hotel certificate. This was the view taken by the Court in *Weir* v. *Bryce*, (1897) 24 R. (J.) 42, 34 S.L.R. 523, when construing identical phraseology in the earlier Act of 1876. To give a restricted form of public-house certificate instead of a full certificate is not therefore to grant a certificate in another of the statutory forms; it is to grant a certificate in the identical form applied for, although not in the particular alternative that is sought.

"Accordingly the Licensing Court in my opinion, in proceeding under section 35 to vary the certificates applied for, acted without statutory warrant, and so exceeded their jurisdiction.

"Whether on the assumption that the Magistrates had, under section 35 or otherwise, a discretionary power to proceed as they did, they duly and fairly exercised their discretion, is a question into which, in the view I take and have just expressed, it is not necessary that I should go.

"The Licensing Court having acted *ultra vires*, the affirmation of their proceedings by the Licensing Court of Appeal cannot cure the defect or prevent the remedies sought, if otherwise competent, being granted.

"With regard to the order which ought to be pronounced, no assistance can be obtained from the English cases which were referred to. *The Queen* v. *Farquhar*, (1874) L.R., 9 Q.B. 258; *The Queen* v. *Howard*, (1889) 23 Q.B.D. 502; *Rex* v. *Kingston Justices*, (1902) 66 J.P. 547. In them relief was given to licence-holders by the Court of King's Bench by *mandamus*, a writ which is not known to our Courts, and the properties and functions of which appear to be somewhat technical.

"I am not aware of any limitation on the authority of this Court, where an inferior tribunal has exceeded its jurisdiction and in so doing committed an illegality, itself to make an order for the correction of that illegality. As I understand the position of matters at the Licensing Court was this, that no objection was stated to the renewal of any of the certificates in question arising in any instance for reasons applicable to the premises or to the licence-holder. Expediency, it now appears, was the sole cause of the declinature to grant the renewals applied for, and it was in the exercise of that discretion said to be conferred by section 35, and only in the exercise of that discretion, that substitute certificates were granted in modified terms. I have held that under that section the Magistrates had no warrant for acting as they did. If that be so, then the renewals of the certificates ought to have been granted as applied for in unrestricted terms, and I see no reason why this Court should not by its order operate the result which should have been reached by the Licensing Court.

"The case of *Ashley* v. *Magistrates of Rothesay*, 11 Macph. 708, 10 S.L.R. 513, affords a guide as to the order which should be pronounced in the circumstances. There is not here, as there was in that case, a general resolution by the Magistrates which falls to be set aside. What the pursuers ask to be reduced are the writs instructing the deliverance of the Licensing Court of 11th April 1916 and its affirmation by the Appeal Court, so far as these purport to exclude the sale of spirits from the certificates granted to the pursuers. That seems to me an appropriate order to grant. The second conclusion of the summons is for an order on the clerk of the Licensing Court to insert in the certificates such words as will give the licence-holder authority to sell spirits or other exciseable liquors in addition to the liquors already enumerated in the certificates, and to make the necessary corrections in the register of licences. Keeping in view what was done in *Ashley's* case, that also, in my opinion, is a competent order to make in the circumstances.

"The conclusion for declarator that it was *ultra vires* of the defenders to prohibit the sale of spirits within the burgh of Motherwell was, *inter alia*, added by way of amendment, and my attention was not called to it at the debate, but there do not appear to me to be any averments relevant to support it. Whatever may have been

the result of the procedure followed by the Magistrates, they did not pronounce or profess to pronounce any such prohibitory order.

"I shall sustain the second and fourth pleas-in-law for the pursuers, and grant decree in terms of the reductive and second conclusions of the summons."

The defenders reclaimed, and argued—The Lord Ordinary was wrong, and his interlocutor should be recalled; the defenders acted within their statutory powers in refusing to grant any licences for the sale of spirits. Their powers were derived from the Licensing (Scotland) Act 1903 (3 Edw. VII, cap. 25). Their functions were not judicial but administrative. They were not bound to grant but might grant certificates to such and so many persons as they considered meet and convenient—section 11. If they considered it meet and convenient to grant no certificates, they were entitled to take that course. Further, they had power to substitute for the certificate applied for a certificate in a different form—sections 35 and 37 and Schedule 6. That was what they had done. Their action was not invalidated by the fact that they had done in all cases what they could validly do in one or more. *M'Beth* v. *Ashley*, 1873, 11 Macph. 708, 10 S.L.R. 513, 1 R. (H.L.) 14, 11 S.L.R. 487, was not in point, for in that case the magistrates were given power to make a particular locality an exception to a general rule, whereas they used that power to make a rule and apply it to all licensed premises within their jurisdiction. But here there was no general rule; the defenders were entitled to grant or refuse, and to substitute one form of certificate for another, according as they considered meet and convenient. The repeated exercise of that discretion in a particular way could not be held, as was held in *Ashley's* case (*cit.*) to be a fraud on the statute. The *Municipal Council of Toronto* v. *Virgo*, [1896] A.C. 88, was not in point, for in that case power to regulate a trade was given and was held not to warrant total prohibition; here the power was not one of regulation, for the defenders had power to refuse certificates. *Black* v. *Magistrates of Grangemouth*, 1907 S.C. 218, 44 S.L.R. 185, was contrasted with *Ashley's* case (*cit.*), and showed that so long as the defenders did not commit a fraud on the Act their proceedings could not be impugned. In order to make the action of the defenders *ultra vires* they must have acted in excess of their statutory jurisdiction—*Lundie* v. *Magistrates of Falkirk*, 1890, 18 R. 60, 28 S.L.R. 72. Here the statutory jurisdiction had not been exceeded; the certificates they granted were under the Act, section 1, and they acted as they considered meet and convenient—section 11. They might refuse all applications for certificates—*e.g.*, if all the applicants were unsuitable. Hence the objection of the pursuers could not be to the universality of the result arrived at, but only to the method of arriving at that result. *Rossi* v. *Magistrates of Edinburgh*, 1903, 5 F. 480, 40 S.L.R. 375, 7 F. (H.L.) 85, 42 S.L.R. 79, was not in point, for it related to the importation of restrictions not authorised by the statute into certificates granted under it. Reference was also made to *Green* v. *Leith*, 1896, 23 R. (J.) 50, 33 S.L.R. 260; *Wilson* v. *Rust* and *Wilson* v. *Mackenzie*, 1896, 23 R. (J.) 56, 33 S.L.R. 421. (2) The procedure adopted by the defenders was unimpeachable. The defenders had not heard the pursuers, but they were under no obligation to hear them unless they had refused the renewal of their certificates—section 11. Here there was no refusal to renew; the pursuers each obtained the same class of certificate as he had previously held—*e.g.*, a hotel-keeper was given his hotel licence, a publican his public-house licence, and a licensed grocer his licensed grocer's licence. No doubt the licences had been varied, but there was no statutory provision that the pursuers were entitled to a hearing on a question of variation. An application for a certificate was either an application for a new certificate in the sense of section 107, or for a renewal of a certificate—Schedule 4. The applications here were for renewals of certificates, and none of the applications had been refused. Had the defenders been bound to hear the pursuers on a question of variation, provision would have been expressly made therefor in section 11. A certificate was renewed though it was not in exactly the same words as it had been before—*Quinn* v. *Magistrates of Paisley*, 1909 S.C. 1085, *per* Lord Pres. Dunedin, p. 1090, 46 S.L.R. 825. A right to a hearing could not be rested on a common law equity in this case, for the pursuers had no vested right, and the defenders were an administrative not a judicial body. There was no need to give notice of any objection to the granting of the certificates, for objection could be taken by the members of the Licensing Court themselves without notice—section 20. It could not be said that each case had not been dealt with separately, and the defenders were quite entitled to consider each case *ab ante* in private, and on calling it to refuse it. (3) In granting the certificates, including therein the right to sell spirits, the Lord Ordinary had exceeded his jurisdiction. He had no power to grant licences, and *non constat* that all the pursuers would be granted full or any certificate by the Licensing Court. A jurisdiction still remained in that Court even if its prior actings were invalid — *Moss's Empires, Limited* v. *Walker*, 1916, 54 S.L.R. 12. On that point *Ashley's* case (*cit.*) was distinguished, for the Licensing Court had completely discharged its functions.

Argued for the pursuers (respondents)—The Lord Ordinary was right, and his interlocutor should be adhered to. (1) The defenders had in effect totally prohibited the sale of spirits within their jurisdiction *per aversionem*. The logical result of the argument for the defenders was that if the statutory procedure was followed the Licensing (Scotland) Act 1903 must be held to have conferred power on the defenders to prohibit totally the sale of spirits—indeed of all exciseable liquor. That could never be said to have been the object and purpose of the Act. The sale of liquor was a lawful trade, and the object of the Licensing Act 1903 and

the earlier Acts was to control the prosecution of that trade by the granting of licences—section 1. No doubt if each individual applicant for a licence was an unsuitable person, then on an individual consideration of each case the defenders might in each case refuse the licence, but what the defenders had done here was, not to refuse each licence on its merits, but to refuse all in gross. The pursuers were all the licenceholders in Motherwell, and they had all been treated in the mass. The result was in effect a total prohibition. If the Act had enabled the defenders to achieve that result the long-continued agitation in favour of local option, the Temperance (Scotland) Act 1913 (3 and 4 Geo. V, cap. 33), and the establishment and powers of the Liquor Control Board were not required. Thus the defenders had exercised the very powers conferred upon the Liquor Control Board by the Defence of the Realm (Liquor Control) Regulations of 10th June 1915 (Supplement 4, p. 167), and had gone further, for the exercise of these powers was under that Act modified by a right to compensation, whereas the action of the defenders had produced the same result without compensation, and further, without hearing the parties affected. If the practical effect of the defenders' actions was total prohibition their actings could not stand—*Ashley's* case (*cit.*), *per* Lord President Inglis at p. 715, and Lord Deas at p. 717. The defenders therefore had used their power to control as equivalent to a power to prohibit, which was *ultra vires*—*Virgo's* case (*cit*). (2) The procedure in the Licensing Courts was illegal and irregular. All the applications were for renewal of certificates. The certificates had not been renewed, for renewal of a certificate meant its re-issue in identical terms to those in which it had been previously granted—*Marwick* v. *Codlin*, 1874, L.R., 9 Q.B. 509, *per* Cockburn, C.J., at p. 514; *The Queen* v. *The Licensing Justices of Crewkerne*, 1888, 21 Q.B.D 85—whereas here certificates had been granted which omitted a material part of the former certificates. Renewal of a certificate was not defined in the Licensing Act 1903 (*cit*), but what was renewed was a subsisting certificate (section 18). Further, where the application was for renewal, as it was here, it was clearly implied in the statute the renewal would follow as a matter of course unless objected to, for unless required to attend the Court the applicant need not do so (section 18), and it was not competent to refuse a renewal without hearing the applicant in open Court (section 11). Here the applicants were required to attend the Licensing Court, but no objections to the renewal of any of their certificates were stated or heard, whereas the statute provided that objections to renewals must be lodged at least five days before the meeting of the court intimated to the applicant and heard at that court (section 19). Objections might be made by official persons without notice, but these also must be heard at the Licensing Court (section 20). Those provisions were intended to secure that the applicant for renewal should know of any objections to the renewal of his certificate and should have a chance to meet them. Here he was not informed of any objections, and was not in a position to meet any objections. *Quinn's* case (*cit.*) was not in point. The only question decided was that of confirmation, which did not arise in the case of a renewal. Apart from the statute it was inequitable to deprive a man of his rights without hearing him in support thereof. (3) The remedy allowed by the Lord Ordinary was not only competent, but was the only available remedy in the circumstances. If there were no objections competently stated the applicants were entitled to a renewal, and the defenders could not refuse it. No objections were competently stated, and none could now be competently stated, and accordingly no jurisdiction was left in the defenders except to grant the licences, but they could not review themselves, and therefore could not grant the licences to which the pursuers were entitled, and accordingly the Lord Ordinary had granted the only proper and competent remedy. *Ashley's* case (*cit.*) and *Rossi's* case (*cit.*) were authorities for that course. *Moss's Empires* v. *Walker* (*cit.*) was not in point.

At advising—

LORD PRESIDENT—In my judgment the proceedings at the Licensing Court held at Motherwell which are challenged in this action were contrary to the provisions of the Licensing (Scotland) Act 1903, and cannot therefore be allowed to stand. The material facts of the case, which are undisputed, are so fully and accurately set out in the opinion of the Lord Ordinary that I find it unnecessary to resume them. The pursuers, who held certificates for the sale of exciseable liquors in the burgh of Motherwell, applied for the renewal of their certificates at the Licensing Court held on the 11th April last. It was not incumbent on them to appear at the Court unless they were required to do so. They were entitled to assume that their certificates would be renewed as a matter of course. That is, I think, the effect of section 18 (2) of the statute. But they were summoned by the Clerk of the Court to appear in the Licensing Court on that day—I assume because the Magistrates were minded to reconsider the question of the renewal of the licences—and if the certificates were to be refused, either in whole or in part, then it was imperative that each applicant for renewal should be heard by the Licensing Court in support of his application, for it is distinctly enacted by the 11th section of the statute that it shall not be competent to refuse renewal of any certificate without hearing the party in support of the application for renewal in open court, if such party shall think fit to attend. It might be that on reconsideration of the application for renewal of a licence, the Licensing Court might come to the conclusion that the certificate should be refused in whole or in part. I am unable to read the provisions of the 11th section otherwise than as meaning that when it speaks of "renewal," renewal in

whole or in part is meant. Refusal of a part of the existing licence is refusal of the existing licence. A licence cannot be said to be renewed if it is granted with a material part left out. If that be so, then there is an end of the controversy, and it seems to me to be so because it would be contrary to good sense, as well as to the sound canons of construction, to interpret these clauses of the Act in any other way.

The pursuers being summoned to the Court, appeared, and what happened was as follows:—After the first application had been called, the Magistrates retired. On their return the chairman intimated to that applicant that his licence was granted for the sale of victuals, wine, beer, ale, porter, cider, and perry, but was refused for the sale of spirits; and on each of the other applications being called individually the chairman intimated to each applicant in turn that his or her certificate was renewed in part and refused in part. These are the admitted facts. That was what occurred at the Licensing Court. It was plainly all wrong. It was contrary to the provisions of the Act of Parliament, for if the certificates were renewed in part and refused in part, then the existing certificates were, beyond all doubt, refused. The existing certificates could not be renewed if a material part were left out. There was therefore a clear violation of the express and distinct stipulations of the statute. I think the pursuers are well founded when they say that they were not asked to make themselves heard in support of their applications and were not given, either collectively or separately, an opportunity of being heard in support thereof, and that by the provisions of the Act they were each entitled to be heard in support of their applications for renewal in the terms granted in the previous years.

If, then, there has been, as I think, a clear violation of the express enactment, what is the remedy? Obviously, in my judgment, the remedy is that the Licensing Court shall now be afforded an opportunity of fulfilling its statutory duty in relation to the applications for these renewals of licences. The remedy given by the Lord Ordinary appears to me incompetent, because in effect it makes this Court usurp the functions of the Licensing Court. We cannot grant or renew licences. We have no authority to do so. Exclusive authority has been given to the Licensing Court. Their discretion is unfettered, but it must be exercised strictly in terms of the statutory provisions.

On the other questions raised in this case I offer no opinion, because in the result none of them may arise. But I am not to be held as assenting to the view that there is any limitation of the discretion which is confided to the Licensing Court if that discretion be properly exercised in conformity with the provisions of the statute. All that I now decide is that if an existing certificate is granted in part and refused in part, then unless the applicant has been heard in open court in support of his application, the proceeding is forbidden by the Act of Parliament.

LORD JOHNSTON—The result of the statutory meeting of the Licensing Court of the Burgh of Motherwell on 11th April 1916 was that the whole certificates for sale of liquor in the burgh, with an exception which it is not necessary to notice, were renewed, but with a variation, that variation being the withdrawal from each of them of the authorisation to sell spirits. The result was that for the year Whitsunday 1916 to Whitsunday 1917 there is no certificate, and therefore no licence, to sell spirits within the burgh. The action of the Magistrates in thus reducing the whole certificates in the burgh in the matter of the liquor saleable is challenged by the licensees on two grounds —1st, the illegality of a virtual prohibition in the burgh by the Magistrates of the sale of spirits, and 2nd, the irregularity of the proceedings of the Licensing Court. The Lord Ordinary has sustained both grounds of action; and he has not only reduced accordingly, but he has virtually granted renewals of certificates to all the licensees in the old form. In so doing he has, I think, exceeded his powers. Much of his reasoning I am not prepared to adopt. But I agree with him as to the irregularity of the Magistrates' proceedings, and I find in that ground of judgment sufficient for the disposal of the case.

I shall, however, advert for a moment to the first ground of action. It may be stated in the words of the pursuers' own record thus—That the Magistrates have "a statutory duty of making provision for the sale by retail in the town of Motherwell of all spirits—that is, whisky, brandy, rum, gin, and liqueurs—to the inhabitants and visiting public"; that they have in effect evaded this duty, and virtually prohibited in the burgh the sale of spirits; that such virtual prohibition is against public policy, and can only be effected by legislation. In argument the pursuers maintained that the Magistrates have a power and duty to regulate, but not under the guise of regulation to prohibit.

Now the Licensing Act 1903, sec. 11, makes it "lawful" for the Licensing Court to grant certificates for the year or half-year ensuing their sittings "to such and so many persons as the Court assembled at such meeting shall think meet and convenient" to keep premises "within which exciseable liquors may, under Excise licences, be sold by retail." What it is lawful for them to do it may be contended that the Magistrates are bound to do, if their position can be distinguished from that of the Bishop in *The Queen* v. *Bishop of Oxford*, (1879) 4 Q.B.D. 525. But the generic term "exciseable liquors" is used. There is no specification, and sections 34 to 37, which deal with the forms of certificates, allow such discrimination to the magistrates in the matter of the classes of liquors for which premises may be certificated, and therefore may be licensed, so that it is not clear to me as at present advised that they may not—not capriciously, not for the advancement of peculiar tenets, which

is *in pari casu*, but in their discretion honestly exercised—determine to make that discrimination not locally but throughout their whole area. They have replied in answer that the Act imposes no duty on them of making provision for the sale of spirits by retail in the town unless they consider it expedient to do so, and that "in the exercise of their discretion under the said Licensing Act, and acting with due regard to the present interests and requirements of the public," they deemed it in each of the cases before them inexpedient to grant a licence certificate in the form applied for, and granted instead a licence certificate in one of the other forms contained in the Sixth Schedule to the said Act, under which no power to sell spirits is conferred. From this I understand that they claim no absolute or universal right of veto, but only an option to restrict in the matter of the class of liquors authorised to be sold as suggested or dictated to their discretion by special circumstances of time and place. I merely desire to say that I hold an open mind upon the question whether, had their proceedings been regular, their action could have been impugned on this ground.

On the question of the regularity of the Magistrates' procedure I have no difficulty. The Lord Ordinary has analysed the statutory provisions regarding the different forms of certificate to be granted. He then concludes—"To give a restricted form of public-house certificate instead of a full certificate is not therefore to grant a certificate in another of the statutory forms; it is to grant a certificate in the identical form applied for, though not in the particular alternative that is sought."

Accordingly the Licensing Court in his Lordship's opinion, "in proceeding under section 35 to vary the certificates applied for, acted without statutory warrant and so exceeded their jurisdiction." While I agree with the Lord Ordinary's construction of section 35 of the Act, I think he has failed to appreciate the bearing of section 37.

The statute speaks of certificates, of new certificates, of renewal of certificates. But whether the certificate is new (that is, new in respect of the premises or of the licensee), or one of renewal (that is, in respect of the same premises and the same licensee), it is still a fresh certificate (to avoid for distinction's sake the statutory term new certificate) and complete in itself. If any certificate is looked at without knowledge *aliunde* of the circumstances no one could tell whether it was a new or a renewal certificate.

Section 34 of the Act deals with the forms of certificate, and I agree with the Lord Ordinary that there are only three forms given in the relative Schedule Sixth—the first for hotels, the second for public-houses, and the third for grocers' premises. But then when the Sixth Schedule is examined it is found that there are three variants of each of the three forms open to the selection of the Licensing Court. Section 35 provides that it shall be competent to the Licensing Court though one form of certificate is applied for to grant to the applicant a licence in another of the forms, *e.g.*, to grant to the applicant for a hotel licence a licence for a public-house. I agree that this power conferred on the licensing authority refers to the forms of the schedule and not to the variants of those forms. But then section 37 deals with the variants. These variants are (1) for the sale of victuals, spirits, wine, porter, ale, beer, cider, perry, or other exciseable liquor; (2) for the sale of victuals and of wine, porter, ale, beer, cider, or perry; and (3) for the sale of victuals and of porter, ale, beer, cider, or perry. One thing which section 37 does is to provide that the minor variant No. 3, "porter, ale, beer, cider, or perry," shall always be included or deemed to be included in the major variants Nos. 1 and 2. The other thing which it does is to make it clear by its proviso that nothing herein contained shall be held to prevent the Licensing Court from granting a certificate in any of the forms of the Sixth Schedule in any of the variants.

Having then in mind that every renewal requires the granting of a new in the sense of a fresh certificate, I can have no hesitation in holding that as on the application for a renewal of a current certificate the Licensing Court has power under section 35 to grant a certificate in a different form from that applied for, so on such application the Court has power under section 37 to grant a certificate in a different variant of the same form.

But then in so doing the Licensing Court must proceed regularly and with judicial fairness in their methods, for they cannot otherwise exercise the discretion committed to them judicially, as is their duty. Turn then to section 11 and the other sections which, subject to their power to make regulations for their own procedure under section 15, indicate the lines on which they ought to proceed. Section 11 provides that at all general meetings for granting certificates, without distinction between new and renewal, the Licensing Court shall sit with open doors, and that it shall not be competent to refuse the renewal of any certificate without hearing the party in support of the application for renewal in open Court. Under section 14 every applicant for a certificate, whether new or renewal, must lodge a signed application with particulars in a scheduled form. Under section 16 a register of applications and of the Court's disposal of them is to be kept. Under section 17 a list of all applications, at least ten days before the general meeting of the Court for their disposal, is to be published parochially and advertised more generally. All this is leading up to section 19, which provides for the taking and disposing of objections. Section 19 says that any person qualified as therein defined may object either to the granting or to the renewal of any certificate, but only on condition of lodging with the clerk and also delivering to the applicant five days before the meeting a written notice specifying the grounds of his objection, so as to notify the applicant. Only if this is complied with can the objection be heard. To this general provision there is an exception. By section

20 the Court is empowered to hear and determine without such notice any objection taken by a member of the Court at the Court's sitting. As the applicant for the renewal of a certificate does not need (section 18 (2)) to appear unless required to do so by the Court, and the Court cannot (section 11) refuse renewal without hearing him, it is clear that the Court's duty in such circumstances, if the applicant is not present or represented, is to use its power of adjournment under section 6. The above, as I have suggested, indicate to the Licensing Court the lines of fair, if not judicial, procedure which they must adopt. If, then, under an application for renewal, where the current licence is what has been called a full licence, the Court were moved by an objector, whether of the one kind or of the other, to alter the form of the licence, say from a hotel to a public-house licence, could they have done so with closed doors, without objection stated and communicated to the applicant, and without hearing him and giving him a reasonable opportunity of being heard? I certainly think not, and that for two reasons—first, that though the certificate so issued is not a new but a renewal certificate, it is a fresh certificate and is not a renewal *de plano*, but a renewal with a variance. That is not a renewal as applied for. The question cannot arise unless objection is taken from the outside or, directly or constructively from the course of their discussion among themselves, from the inside of the Court, and therefore the statutory directions for procedure are applicable in their terms; and second, that if not so applicable in their terms, they are so by necessary analogy, and are dictated by the nature of things as a proper course for any Court to take, which is bound to dispose of any matter committed to it fairly in a judicial exercise of discretion.

If this is sound where the proposal is to substitute an inferior form of certificate for a superior, it is equally applicable where the proposal is to retain the same form, but to substitute an inferior variant for a superior. The procedure of the Magistrates has neglected all the safeguards above referred to for securing a fair exercise of the power conferred upon and fulfilment of the duty committed to them. To reach their conclusions legitimately, an objection must have been duly lodged, or an objection must have been taken or been deemed to have been taken by one of themselves, if only *pro forma*, to raise the question, and the applicant must have been notified and given the opportunity of being heard, and if he availed himself of the opportunity, must have been heard, and his contention must have been considered. Though such course had been taken in the first case, all subsequent applications must have been dealt with on a similar footing, and each applicant have been given an opportunity of adding anything which he might wish to add, though not necessarily to travel over the whole ground of new. I think therefore with the Lord Ordinary that the whole actings of the Licensing Court were inept. Even assuming that they might have done what they did in a right way, they have done it in a wrong way, and accordingly their actings are open to be quashed.

But then appeal was taken to the Licensing Appeal Court. The Lord Ordinary disposes of that matter shortly thus—"The Licensing Court having acted *ultra vires* the affirmation of their proceedings by the Licensing Appeal Court cannot cure the defect or prevent the remedies otherwise competent being granted." I am not altogether satisfied, in view of the terms of section 22, that this is sound as a general proposition. The functions and procedure of the Appeal Court are rather sketchily dealt with in the statute. But I think that they are intended to re-hear any case or question brought to them by appeal, as if disposing of it *de novo*. The right of appeal is given to those interested who are "dissatisfied with any proceeding of any licensing court assembled for granting certificates as aforesaid, whether in granting or refusing or otherwise disposing of any such application." These are very general terms. But it was not maintained before us in support of the deliverance of the Licensing Appeal Court that their proceedings were unobjectionable, and must stand, however irregular the proceedings appealed against may have been. This is probably accounted for by the knowledge that their determination was carried by the casting vote of the chairman, who is alleged to have intimated when giving it that seeing that possibly the case might be tested, and would come back to them if they had made a mistake, he gave his casting vote for the refusal of the appeal. Even if this remark, which is virtually admitted, was not intended to qualify his vote, and it was given according to the opinion which he entertained, the attitude so indicated not improbably accounts for the acceptance by the parties defenders of the Lord Ordinary's views. We are not therefore, in my opinion, called on to consider the proceedings before the Appeal Court.

The disposal of the case is attended with some little nicety. We cannot straightway reduce, lest we leave the pursuers without any valid licences, for I agree with your Lordship that we cannot adhere to the part of the Lord Ordinary's judgment which decerns and declares in terms of the second conclusion of the summons. That would be to substitute this Court for the Licensing Court. I agree further that we must take the course indicated in the alternative conclusion of the summons, and send the whole matter back to the Licensing Court to proceed in terms of the statute. The applicants will then be fairly heard in support of their applications, and with notice in one form or the other of the point, if any, to which they require to apply themselves. When the result is reported to us the matter of reduction can then be dealt with after further hearing the parties.

LORD MACKENZIE—The pursuers in this case complain that the Licensing Court, without hearing them, refused renewal of

their certificates. If they are well founded in that contention, then the Licensing Court were guilty of a breach of the provisions of section 11 of the Licensing (Scotland) Act 1903, because that Act provides—"It shall not be competent to refuse the renewal of any certificate without hearing the party in support of the application for renewal, in open court, if such party shall think fit to appear."

There are two questions which have to be considered upon the terms of that section. In the first place, did the Licensing Court refuse renewal of the certificate? If they did refuse renewal, did they hear the party in support of his application for renewal in open Court? I am clearly of opinion, in the first place, that the Licensing Court did refuse the renewal, and, in the second place, that they did not hear the party in support of the application in open Court. I think the first question is solved by reference to what is on page 9 of the printed documents. That is an extract from the register kept by James Burns, town-clerk, Motherwell, clerk to the Motherwell Licensing Court. It sets out the preliminaries and then proceeds—"The applications for renewal of licences and by new tenant or occupant were considered and disposed of as follows, viz." Then follow numbers 1 to 49, and the operative part of the finding is in these terms—"Granted for the sale of victuals, and of wine, porter, ale, beer, cyder, or perry only—but not granted for the sale of spirits."

Now, unless the Lord Advocate had succeeded in convincing us that "not granted" was not equivalent to "refused," I think the case for the defenders on that point is hopeless. It appears to me that "not granted" is equivalent to "refused," and inasmuch as the certificate held by the applicants for the previous year was a certificate which entitled him to sell spirits, and inasmuch as what they have got as the result of the proceedings in the Licensing Court is a refusal of a certificate for the sale of spirits, I think that the answer to the first point is plain. It seems to me to be the merest casuistry to say that the certificate was renewed because the applicants got a certificate in the same class. That appears to me not to be to the point at all. They did not get the same certificate to the extent to which I have indicated the renewal of the certificate was refused. Then the next point is, were they heard? Now upon this it is no use to call the applicant and tell him that you are prepared to hear what he has got to say. He might waste his breath entirely unless you first give him an indication of the point upon which you desire to hear him. That means that you must give him notice or intimation of the objection which is taken to his application. That there was to be a point against these certificates is apparent from the fact that the clerk proceeded in terms of section 18 (2), which provides that "where a person holding a certificate applies for the renewal of his certificate he need not attend in person at the meeting for granting certificates unless he is required by the Licensing Court so to attend." Accordingly, as I understand, the applicants were present in Court in consequence of having been required to attend. But the point is, had they any intimation of the purpose for which they were convened? I refer to the pleadings upon this point because I think they make the matter plain. In cond. 5 the statement made on behalf of the pursuers is—"No member of the Court took or intimated any objection to the renewal of any of the pursuers' certificates." And that is echoed in the answer—"Admitted that prior to the respective decisions pronounced by the Court no member of the Court took or intimated any objection to the renewal of the respective certificates." And further, in support of the same point, in answer 8 it is "admitted that no intimation of any objection was made to them," that is, to the applicants.

Now in that state of matters it was to no purpose that the applicants were in Court. They did not know what point was to be made against them, and within the fair meaning of section 11 they had no opportunity of being heard, and in point of fact were not heard. The result of that, to my mind, is that the proceedings in the Licensing Court are *funditus* null, and *funditus* null because these applicants were deprived of a chance—a valuable chance it might be—and if that were so I am unable to see how any proceedings in the Appeal Court can set on the rails again a process which has got in the initial stage completely off the rails. The proceedings set out in cond. 11 do not therefore seem to me to affect in the very least the question as to whether there was a statutory nullity in the procedure in the Licensing Court.

As regards the remedy, I think the conclusive answer to the view taken by the Lord Ordinary is to be found in the recent case in the House of Lords of *Moss's Empires*. We have been furnished with a copy of the opinions delivered by the learned Lords on 24th October last, and there it is very clearly pointed out what the functions of the Supreme Court are when an inferior judicatory has failed to observe its statutory powers. It was pointed out by Lord Kinnear that the Court of Session was not a Court of review to consider whether an entry in the valuation roll was right or not. His Lordship says—"Wherever any inferior tribunal or any administrative body has exceeded the powers conferred upon it by statute, the jurisdiction of the Court to set aside such excess of power as incompetent and illegal is not open to dispute." But in that case the House of Lords declined to say what was to follow from their judgment. They said that the function of the Court of Session was merely to say there has been a failure to observe the statute and that it must be put right. So here it is not for us to lay down the way in which the mistake is to be rectified. In the case before the House of Lords it was held that was a matter for the Valuation Committee, and in the present case it appears to me it must be for the Licensing Court.

To take the contrary view would involve this, that because there was a failure to

observe the terms of the statute these licences—I think some fifty in number—are *per aversionem* to be granted. Nothing more contrary to the policy of the Act could be imagined. I have no knowledge of the circumstances of any of the cases, but it may be in the highest degree prejudicial to the interests of the community that licences A, B, C, and D should be granted, and yet that would be the effect of sustaining what the Lord Ordinary has done to the latter part of his judgment. Accordingly it appears to me that the cases ought to go back, and the applicants afforded an opportunity of being heard *de novo*. As to the other matters which are discussed by the Lord Ordinary in his opinion, they are obviously of the highest importance, and may at a later stage come to be vital in the disposal of the case. They do not come up for disposal now, and I accordingly reserve my opinion with regard to them.

LORD SKERRINGTON—I have no difficulty in holding that the members of the Licensing Court acted illegally and in violation of the statute, in respect that they did not first hear the applicants before refusing to renew a material part of their certificates. I have more difficulty in concurring with your Lordships as regards the consequences of that illegality. The language of section 11 is very special, and there is much to be said for the construction that as it was incompetent in the circumstances for the Court to refuse to renew the certificates, and as no competent objection to the renewals had been submitted to the Court in the manner pointed at by sections 19 and 20 of the statute, the Court had no discretion in the matter, but lay under a duty to grant the renewals. It is also unfortunate that we should be compelled to take a course which may result in the pursuers' applications having to be reconsidered by persons who have already illegally prejudged the question. My doubts, however, are not sufficiently clear to justify me in formally dissenting.

The Court pronounced this interlocutor—

"Recal *in hoc statu* the said interlocutor [18th July 1916]: Find and declare that in refusing the renewal of the pursuers' certificates without hearing the pursuers in support of their applications for renewal in open Court, the defenders first called acted contrary to their statutory duties: Therefore appoint the defender second called to summon a meeting of the Licensing Court of the Burgh of Motherwell, to be held on Friday, the 17th of November current, to entertain, hear, and dispose of the applications of the pursuers for renewal of their respective certificates condescended on, irrespective of the deliverances of the defenders first called, all in terms of the Licensing (Scotland) Acts 1903 to 1913, with power to the said Court to adjourn to a day or days, but not later than seven days from the 17th November foresaid: Further, appoint the defender fourth called to summon a meeting of the Licensing Court of Appeal for the Burgh of Motherwell, to be held on Friday, the 8th day of December next, to hear and dispose of any appeal or appeals which may be taken against any proceedings of the Licensing Court for the Burgh of Motherwell at the meeting above appointed: Appoint the defender second called to advertise this interlocutor in the *Glasgow Herald* and *Motherwell Times* newspapers *quam primum*: Dispense with further intimation or advertisement of such meetings of the Licensing Court and Court of Appeal: Further, appoint the defenders second and fourth called respectively to lodge a report of the proceedings at the said respective meeting or meetings within eight days after the latest of said meetings."

Counsel for the Pursuers (Respondents)—Horne, K.C.—A. M. Mackay. Agent—James Purves, S.S.C.

Counsel for the Defenders (the Licensing Court of Motherwell)—Macmillan, K.C.—D. M. Wilson. Agents—Burns & Waugh, W.S.

Counsel for the Defenders (the Licensing Appeal Court)—The Lord Advocate (Munro, K.C.)—Sandeman, K.C.—Gentles. Agents—Weir & Macgregor, S.S.C.

Tuesday, November 7.

FIRST DIVISION.

MACEWAN'S TRUSTEES *v.* MACEWAN.

Succession — Faculties and Powers — Appointment—Exercise of Power—Validity.

By antenuptial marriage contract a father conveyed the whole of his means and estate to and in favour of the child or children of the intended marriage, under burden of a liferent and annuity to his intended wife, and "also under such burdens and conditions and payable at such periods and in such shares or proportions amongst the said children respectively if more than one, and their lawful issue in case any of them" should predecease him "leaving lawful issue of their bodies as" he should "appoint by any writing under his hand, and failing such appointment then the said means and estate shall fall and belong to the said children if more than one equally, share and share alike, and shall be payable to them if sons upon their respectively attaining twenty-one years of age, and if daughters upon their respectively attaining majority or being married whichever of these events shall first happen, and in case any of the children shall die without leaving lawful issue of their own bodies before their shares shall respectively become due to them the share or shares of any of them so dying shall accrue to the survivors or survivor, but in case of their leaving lawful issue, such issue shall be entitled to the share or shares which would have