from the averments of the pursuers, the statutory conditions and procedure were substantially fulfilled and carried out; the technical irregularity founded on by the pursuers did not affect and could not have affected either the requisition for the poll or the result of the poll. The desire of the statutory percentage of the electors to have a poll was freely expressed and the poll was duly taken. These facts are not even put in issue on the pursuers' pleadings.

"For the reasons which I have given on both branches of my opinion I consider that the pursuers' averments are irrelevant and that no ground has been shown for treating the proceedings complained of as nugatory or for setting aside the declared result of the poll.

"I shall therefore sustain the first plea-in-law for the defenders."

The pursuers reclaimed, and argued—There was here a breach of the statute, which invalidated the requisition and the poll. The provision that the requisition papers should be issued to an elector was imperative. To issue them wholesale to a propaganda society was to defeat the purpose of the Act. It was evident from the provision as to the time between the requisition and the poll that canvassing was to be discouraged.

Counsel for the defenders and respondents were not called upon.

LORD PRESIDENT—My opinion is in substantial agreement with that of the Lord Ordinary except as to one minor point. The Lord Ordinary expresses the view that even if the issue of the requisition forms to non-electors were illegal, such an irregularity would not affect the validity of the proceedings which follow, on the ground that it would not disturb the numbers of the poll. I do not think that the question whether such an irregularity—assuming that it is one—would or would not disturb the numbers of the poll is relevant to the point at issue, which is whether that which is a condition-precedent to the statutory poll, namely, a valid requisition, did actually precede it. On the merits of the case I need say but little. It is clear that in terms of section 5 the requisition papers must be in a particular form, must emanate from the clerk to the local authority, and must be issued to any elector on demand, but I am unable to read that provision as meaning that the issue of a requisition paper to a person who is not an elector is forbidden. The Act contains careful precautions against the abuse of requisition papers by non-electors being induced to put their names to them, but even in the case of a genuine elector there is nothing in the Act to prevent the issue of a plurality of requisition forms to him, and once they reach his hands there is nothing that I can see to prevent him (if he is so minded) committing one or more of such papers to the agent of some organisation which promotes a "no licence" policy in the area. I am far from thinking that a wholesale devolution by the Town Clerk to persons other than his own proper deputes of the function of issuing requisition papers would be consistent with the Act. I do not, however, read the averments of the pursuers as amounting to an allegation of that kind. What is said is that the Town Clerk referred some of those who asked him for requisition forms to a non-elector other than one of his proper deputes, who had applied for and obtained a large number of such forms. This is not an averment of wholesale devolution by the Town Clerk of his functions to an outsider, nor does it amount to an allegation of refusal by the Town Clerk to supply any elector with a form on his request. It is inevitable in connection with any appeal to the methods of popular requisition and popular suffrage that the ordinary methods of popular agitation and propaganda in favour of this view and that should be resorted to, and that while it is possible that what was done in this case may be open to criticism from the administrative point of view, I do not think that anything is alleged which amounted to a breach of the statute. I therefore think that the Lord Ordinary's judgment ought to be affirmed.

LORD MACKENZIE—I concur.

LORD SKERRINGTON—I concur.

LORD CULLEN—I concur.

The Court adhered.

Counsel for Pursuers—Moncrieff, K.C.—Fleming—Thom. Agents—Bruce & Stoddart, S.S.C.

Counsel for Defenders—Macmillan, K.C.—Graham Robertson. Agents—Campbell & Smith, S.S.C.

Thursday, May 26.

FIRST DIVISION.

[Lord Ashmore, Ordinary.

MACFARLANE *v.* GLASGOW CORPORATION. (CATHCART CASE.)

DENHOLM *v.* GLASGOW CORPORATION. (CAMPHILL CASE.)

GOW *v.* GLASGOW CORPORATION. (WHITEINCH CASE.)

Election Law — Combination of Polls — Legality—Ballot Act 1872 (35 *and* 36 *Vict. cap.* 33), *First Schedule—Temperance Scotland) Act* 1913 (3 *and* 4 *Geo. V, cap.* 33), *sec.* 5 (3).

A poll under the Temperance (Scotland) Act 1913 and a municipal election took place on the same day, in the same place, before the same presiding officers, and by means of the same ballot boxes, distinctively coloured ballot papers being issued. In an action for reduction of the poll under the Temperance Act, *held* (1) that there was no illegality in so combining the polls, and (2) that such a combination was not contrary to the true intent and meaning of the Act, and action *dismissed* as irrelevant.

Election Law—"Votes Recorded"—Temperance (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 33), *sec.* 2 (3).

The Temperance (Scotland) Act 1913 (3 and 4 Geo. V, cap. 33), sec. 2 (3) (*a*), enacts—"If fifty-five per cent. at least of the votes recorded are in favour of a no-licence resolution, and not less than thirty-five per cent. of the electors for such area on the register have voted in favour thereof, such resolution shall be deemed to be carried. *Held* that in ascertaining the number of votes recorded all ballot papers put into the ballot box, including any that are afterwards rejected by the returning officer, must be counted.

Election Law—Poll—Closing of the Poll—Temperance (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 33)—*Temperance (Scotland) Act Regulations* 1920, *Rule* 17.

The Temperance (Scotland) Act Regulations 1920, Rule 17, provides—"The poll shall be open from 8 a.m. to 8 p.m."

In a poll held under the Temperance (Scotland) Act 1913 electors who were in a polling booth at 8 p.m. received ballot papers after that hour and voted. *Held* that the presiding officer was not entitled to issue a ballot paper after eight o'clock, and that accordingly the poll was void.

Islington Division case, 1901, 5 O'M. & H. 120, *followed.*

Expenses—Expenses as between Agent and Client—Action against Local Authority for Reduction of Poll—Temperance (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 33)—*Public Authorities Protection Act* 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1.

Held in an unsuccessful action of declarator and reduction against a corporation as local authority under the Temperance (Scotland) Act 1913 that the defenders were entitled to expenses as between agent and client.

Actions were brought by (1) David Macfarlane and others, licence-holders in Cathcart Ward, Glasgow, (2) James Denholm and others, licence-holders in Camphill Ward, Glasgow, and (3) David Drummond Gow and others, licence-holders in Whiteinch Ward, Glasgow, against the Corporation of the City of Glasgow as the local authority under the Temperance (Scotland) Act 1913, Sir James Watson Stewart, Baronet, returning officer for the polls under said Act held in the said wards on 2nd November 1920, and Sir John Lindsay, Town Clerk, Glasgow, and as such clerk to the said local authority, concluding for reduction of the whole proceedings in connection with the polls.

1. *Cathcart Case.*

In this case the pursuers averred, *inter alia*—"(Cond. 4) Further, the said poll was not taken in accordance with the provisions of said Act and of the Temporance (Scotland) Act Regulations 1920, made by the Secretary for Scotland on 9th June 1920, in pursuance of the powers conferred on him by section 5, sub-section 4, of said Act. Under section 18 of the said Regulations the provisions of the Ballot Act 1872 with respect to the taking of the poll and the counting of the votes, are to have effect as applied and modified by the rules in the second schedule to the Regulations. The poll under the Act for the Cathcart Ward and certain other wards was held simultaneously with the ordinary municipal election of the City of Glasgow. The same polling stations and the same ballot boxes were used for both purposes, the ballot papers for both purposes being put into the same ballot box. The same presiding officer presided at the municipal elections and the polls under the Act. Separate ballot papers were issued to the electors, and ballot papers for both these purposes were handed to each elector entering the polling station without any request being made by him therefor. In consequence many electors voted at the poll who would not have voted at all if it had been held on a different day from the municipal elections, or if the casting of their votes had been dependent, as is contemplated by the Act and Regulations, upon their making application for a ballot paper. The pursuers maintain that this procedure was not in accordance with the provisions of said Statute and Regulations, and substantially affected the result of the ballot."

The pursuers pleaded, *inter alia*—"1. The pursuers are entitled to decree of reduction or declarator as concluded for in respect that . . . (*b*) No independent poll of the electors was taken nor was the will of the electors ascertained within the requirements of the Act and Regulations."

The defenders pleaded, *inter alia*—"1. The pursuers' averments being irrelevant, the action should be dismissed. 7. The defenders being entitled to expenses as between agent and client in terms of the Public Authorities Protection Act 1893, expenses should be decerned for accordingly."

2. *Camphill Case.*

In this case the parties averred, *inter alia*—"(Cond. 5) By section 2, sub-section 3, of the Temperance (Scotland) Act 1913 a no-licence resolution is deemed to be carried if 55 per cent. at least of the votes recorded are in favour of it. The total number of votes recorded at said poll was 9470, 55 per cent. of which is 5208. As only 5139 persons voted for no licence the requisite percentage was not obtained. The returning officer in computing the 55 per cent. took into consideration only the votes actually counted by him, viz., 9305, and entirely left out of account the spoiled papers. The pursuers submit that he erred in so doing. The pursuers maintain that a duly qualified voter who has applied for and received a ballot paper and has put the same into the ballot box must be deemed to have recorded his vote, and that all such votes must be taken into account. If the spoiled papers are taken into account the result is that the requisite majority in favour of a no-licence resolution has not been obtained. With reference to the averments in answer, it is explained that the pursuers do not take objection to the spoiled papers being rejected. *Quoad ultra* the

averments in answer in so far as not coinciding herewith are denied. (*Ans.* 5) The section of the Temperance (Scotland) Act 1913 condescended on is referred to for its terms. Admitted that in computing the 55 per cent. referred to in section 2, sub-section 3, of the said Act the returning officer took into consideration only the votes duly recorded and counted by him, and left out of account the spoiled ballot papers."

The pursuers pleaded, *inter alia*—"1. The pursuers are entitled to decree of reduction or declarator as concluded for in respect that . . . (*d*) the statutory percentage which determined the result of the ballot was ascertained without reckoning the whole of the ballot papers returned by qualified electors who took part in the election."

The defenders pleaded, *inter alia* — "1. The pursuers averments being irrelevant the action should be dismissed. 6. The statutory majority of 55 per cent. required for carrying a no-licence resolution having been duly obtained at the said poll, the defenders should be assoilzied. 7. *Esto* that any irregularity took place in the arrangements for the said poll or the carrying out thereof in respect that the same did not affect the result of the poll, the defenders should be assoilzied."

3. *Whiteinch Case.*

The facts and averments sufficiently appear from the following narrative taken from the opinion of the Lord Ordinary—"In this case the pursuers, who are licence-holders for the current year in the Whiteinch Ward of the City of Glasgow, are challenging the regularity and validity of the whole proceedings in connection with the poll under the Temperance Act, taken in the ward referred to on 2nd November 1920. The results of the poll as given by the returning officer were as follows—For no change, 4150; for limitation, 274; for no licence, 5429; spoiled papers, 147. On these figures the returning officer declared that a no-licence resolution had been carried by a majority of 10. The pursuers seek to have the whole proceedings, including the declaration of the result of the poll judicially reduced and declared to be null and void and of no force and effect. They base their claim to these remedies on various grounds; but the question raised for my determination at this stage relates to one ground only, viz., the averment that a substantial number of voters to whom ballot papers were issued after 8 p.m. were permitted to vote. For the pursuer it is maintained that on the admitted facts they are entitled to decree *de plano* at this stage of the procedings without any inquiry into the circumstances. On this question it is necessary to direct attention to the state of the pleadings as these now stand after amendment. The material averments of the pursuers with reference to the voting at the polling stations read as follows—'At these polling stations ballot papers were delivered to electors after 8 p.m. and they were allowed to mark and deposit them in the ballot box. This wrongful conduct of the poll affected and vitiated the result of the ballot.' The passages which I have quoted were added by way of amendment to the pursuers' pleading after the closing of the record. Counsel for both parties had been partly heard on the closed record, the debate having been continued for the purpose of enabling the pursuers to consider as to amending their pleadings. The defenders in their defences as originally lodged had frankly made averments to the following effect — (*a*) that the hall door admitting intending voters to the polling stations 'was duly closed at 8 o'clock, but votes were thereafter taken from persons who entered the hall prior to 8 o'clock, and were at that hour waiting at their appropriate stations for the purpose of recording their votes,' and (*b*) 'ballot papers continued to be issued and received at station No. 2 till about 8·30 p.m.' These statements by the defenders remain unaltered. I think that I have referred to the only passages in the pleadings which have any bearing on the question now under consideration."

The pursuers pleaded, *inter alia*—"1. The pursuers are entitled to decree of reduction or declarator as concluded for, in respect that . . . (*h*) A substantial number of voters to whom ballot papers were issued after 8 p.m. were permitted to vote."

On 9th May 1921 the Lord Ordinary (ASHMORE) sustained the first plea-in-law in the Cathcart and Camphill cases, and dismissed the actions. In the Whiteinch case he sustained the pursuers' plea-in-law 1 (*h*) and granted decree of declarator.

Opinion.—Cathcart Case—"In this case the pursuers, who are licence-holders for the current year in the Cathcart Ward of the City of Glasgow, are challenging the regularity and validity of the whole proceedings in connection with the poll under the Temperance Act taken in the ward referred to in November 1920.

"They are seeking to have these proceedings, including the declaration of the result of the poll, judicially reduced and declared to be null and void.

"The results of the poll as given by the returning officer were as follows:—For no change, 2584; for limitation, 301; for no licence, 3743; spoiled papers, 78. On these figures the returning officer declared that a no-licence resolution had been carried.

"The grounds on which the pursuers base their case may be stated shortly as follows: —. . . (2) That no independent poll was taken, the poll having been held simultaneously with the municipal election of the city, with the result that the will of the electors was not ascertained in accordance with the statutory requirements.

"I shall deal with these grounds of action seriatim in their order. . . . (2) With regard to the holding on the same day the poll for municipal election and the poll under the Temperance Act, it is necessary in the first place to refer to the statutory provision as to the fixing of the poll.

"Section 5 (3) of the Temperance Act commits the selection of the day to the Corporation of the City as the local authority. The sub-section referred to reads as follows:—'A poll shall be taken on any day not being a market day which the local

authority may fix in the month either of November or of December immediately following the lodging of the requisition: Provided that in a county a poll shall be taken only in the year of a triennial election of county councillors, except in the case of a poll held in the year in which a resolution under this Act is first competent.'

"Speculations as to the possible reasons which may have led the Legislature to adopt particular provisions in an Act of Parliament are generally to be avoided as unreliable, but as regards the statutory provision now under consideration, counsel for the defenders maintained that there are intrinsic indications which may be reasonably and properly used as showing that the choice of the same day for the municipal election and the temperance poll is within the discretion committed to the local authority.

"Thus it was maintained that the express restriction of the choice of a day for the poll to the month either of November or December immediately following the lodging of the requisition was explained by the fact that November is the month in which municipal elections in the burghs take place, and that December is the month for county council elections. As supporting this view, counsel for the defenders referred to the fact that under the Local Government (Scotland) Act 1894 the election of parish councillors is directed to be held 'on the same day and as nearly as may be in the same manner, in the same places, and with the same returning and presiding officers and clerks as the election of county councillors for the county.'

"In my opinion on the question raised by the pursuers in this case as to the alleged impropriety and irregularity on the part of the Corporation in selecting the same day for the municipal poll and the Temperance Act poll, the terms of the statutory provision may be properly considered in the light of the facts to which I have been referring.

"It seems to me, however, that the outstanding feature of the discretion committed to the local authority is the fact that within the two months specified they are empowered to fix 'any day' subject to one qualification only, namely, that it is not to be the market day. In my opinion the exercise of such a power by the local authority in virtue of the administrative duty entrusted to them could only be successfully impugned under exceptional circumstances of a kind not present in this case.

"The Corporation of the City in fixing the 2nd November for the two polls presumably took into account various considerations, *e.g.*, expediency, convenience, and economy, and whether on the whole their decision was the wisest and best does not seem to me to be relevant on the question which I have to determine, namely, whether the selection of the day was or was not within their administrative power and discretion under the statutes. What the Legislature had done under the Local Government Act may or may not have weighed with the Corporation, but that I think was one of the considerations which they would have been entitled to take into account Whatever influenced the fixing of the day, I am of opinion that *prima facie* the Corporation acted in accordance with the statutory power, and I have come to the conclusion that the pursuers have averred no relevant ground for challenging in any respect the regularity or validity of the procedure adopted. . . .

"For the reasons which I have given I have come to the conclusion that the pursuers' averments are irrelevant, and therefore that the action must be dismissed."

Camphill Case.—The Lord Ordinary dealt with the points with which this report is concerned by reference to his opinion in another case—*Denholm and Others* v. *Corporation of Glasgow* — in which a proof was allowed, and which is not at present reported. The passage referred to was as follows:—"(5) The only remaining head of objection relates to the alleged failure to take into account spoilt papers in determining the statutory percentage.

"The importance of this question from the pursuers' standpoint is that if spoiled papers ought to be taken into account the limiting resolution would not have been carried.

"It will be convenient in the first place to refer to the statutory provisions bearing on the question. By section 2 (3) (*b*) of the Temperance Act it is provided that if a majority 'of the votes recorded' are in favour of a limiting resolution, and not less than 35 per cent. of the electors for such area on the register have voted in favour thereof, such resolution shall be carried, and by section 2 (4) of the same Act it is further provided that if a no-licence resolution be not carried 'the votes recorded' in favour of such resolution shall be added 'to those recorded' in favour of the limiting resolution, and shall be deemed 'to have been recorded' in favour thereof.

"Section 2 of the Ballot Act 1872 (incorporated in the Temperance Act by the relative statutory rules and orders) makes the following provision regarding spoilt ballot papers:—Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the number on the back is written or marked by which the votes can be identified, shall be 'void and not counted.'

"These being the material statutory provisions, I think that the question for determination may be put thus:—Are spoilt ballot papers to be taken into account in computing 'votes recorded'?

"In my opinion the answer must be in the negative. By the statute spoilt papers are declared to be 'void and not to be counted,' and it seems to me that that concludes the matter."

Opinion — Whiteinch Case. — [*After the narrative quoted supra*] — "On the legal aspect of the question I begin by referring to the statutory provision contained in regulation 17 of the statutory rules and orders relative to the Temperance Act. It reads as

follows:—'The poll shall be open from 8 a.m. to 8 p.m.' In the Elections (Hours of Poll) Act 1885 (48 Vict. cap. 10), sec. 1, which applies only to parliamentary and municipal elections, the provision is that 'the poll shall commence at 8 o'clock in the forenoon and be kept open till 8 o'clock in the afternoon of the same day and no longer.' But although the words 'and no longer' do not appear in the regulation applicable to this case, I am of opinion that the hours stated in the regulation must be literally observed as regards the duration and the opening and closing of the poll.

"In the *Islington* parliamentary election case (1901, 5 O'Malley and Hardcastle 120) a question arose under the Election (Hours of Poll) Act 1885 similar to that under consideration in the present case. In the *Islington* case the petition prayed that the election of the respondent should be declared void on the ground, *inter alia*, that at the polling stations voters had been allowed to vote after 8 p.m. It was admitted that the room in which each polling station was situated had been closed at 8 p.m., but that voters then within the room were allowed to vote. The respondent had been elected by a majority of 19. As the result of the inquiry under the election petition it was proved that the total number of persons to whom ballot papers were issued after eight o'clock p.m. was 14, and assuming that all of these were given for the respondent there remained a clear majority of five votes for him. In these circumstances the objection stated by the petitioner was not sustained, on the express ground, however, that the respondent had succeeded in satisfying the Court that the result of the election was not and could not be affected by the irregularity referred to.

"The joint opinion of Mr Justice Kennedy and Mr Justice Darling in the *Islington* case seems to me to be apposite in the present case on the question of when the issue of ballot papers must cease. I quote the following passage:—'We are of opinion that the true dividing line is the delivery of the ballot paper to the voter. If he has had a ballot paper delivered to him before 8 p.m. he is entitled in our judgment to mark that ballot paper and deposit it in the ballot box before the ballot box is closed and sealed. This interpretation of the enactment . . . appears to us to give a simple, definite, and just rule of procedure.'

"After considering the reasoning on which the learned Judges base the conclusion at which they arrive, I respectfully concur in the opinion expressed in the passage which I have quoted, and adopt it as embodying my own opinion of the question with which I have been dealing in this case.

"That means that I hold that on the admitted facts in this case ballot papers were issued and received up till after eight o'clock and up till about 8·30 in violation of the statutory rule, which on a true interpretation requires that no ballot paper can be validly issued after eight o'clock p.m.

"The question remains whether on the pleadings as they stand and on the admitted facts the case can be finally disposed of at this stage. I think it can. No doubt there is no express admission that more than ten voters received ballot papers and voted after eight o'clock, ten votes being the declared majority. On the other hand the defenders do not aver that the number was less than ten, and do not deny the averment of the pursuers that the issue and receipt of ballot papers after eight o'clock affected the result of the ballot. Now I think that the admitted infringement of the statutory provision puts the burden on the defenders of averring and proving that the infringement did not and could not affect the result of the poll. I refer on this question also to the joint opinion in the *Islington* case, and in particular to the following passage:—'We think that the gist of the judgment of Chief-Justice Monaghan in the case of *Gribbin* v. *Kirker* . . . is that in such a case as the present the petitioner is not called upon to prove affirmatively that the result of the election was affected by the proved transgression of the law, but that the respondents must satisfy the Court that it was not and could not have been affected by it.'

"It seems to me to follow that in this case it must be held that the admitted violation of the statute law either did result or at least may have affected the result. In either case I am of the opinion that the pursuers' case is sufficiently established.

"I shall therefore sustain the plea-in-law for the pursuers 1 (*h*), and find and declare in terms of the alternative or declaratory conclusions of the summons."

On 17th May 1921 the Lord Ordinary (ASHMORE) found the defenders in the Cathcart and Camphill cases entitled to expenses as between agent and client.

Opinion.—Cathcart Case.—"In this case the defenders having been successful moved for expenses as between agent and client in terms of the Public Authorities Protection Act 1893.

"For the pursuers it was conceded that an award of expenses to the defenders was incident to the judgment in their favour on the merits, but it was maintained that the provisions of the Act of 1893 were inapplicable in this case, and that the ordinary award of expenses as between party and party was the appropriate award.

"Section 1 of the Act provides, *inter alia*, as follows:—'Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, the following provisions shall have effect:— . . . (*b*) Whenever in such action a judgment is obtained by the defendant it shall carry costs to be taxed as between solicitor and client.'

"The action in question is an action brought against (1) the Corporation of Glasgow as the local authority under the Temperance Act, (2) the Lord Provost as returning officer for the poll under the Temperance Act, and (3) the Town Clerk as the

administrative functionary under the Act, and it concludes for reduction of the proceedings connected with the poll, including the declaration of the result, and alternatively for declarator that the whole proceedings were null and void.

"The remedies concluded for are sought on the ground that the defenders had committed irregularities in the carrying out of their respective statutory duties.

"*Prima facie* the conditions under which the Public Authorities Protection Act entitles successful defenders to an award of expenses as between agent and client are present in this case, and it was not contended that the defenders' claim is excluded under the decision in the case of *Hunter* v. *Dundee Water Commissioners*, 1920 S.C. 628.

"The argument submitted for the pursuers was on these lines, viz., that the actions referred to in the Act of 1893 are actions under which some pecuniary liability is sought to be imposed on the defenders, and not an action like the present in which the conclusions on the merits are merely reductive and declaratory, and the conclusion for expenses is conditional on the defenders appearing to oppose the conclusions on the merits.

"In support of the pursuers' argument reference was made to the following cases, viz., *Farquhar & Gill* v. *Magistrates of Aberdeen*, 1912 S.C. 1294; *The 'Burns,'* 1907 P. 137; and the Outer House decision in *Morries Stirling* v. *Stirling County Council*, 1900, 7 S.L.T. 351.

"The first two cases seem to me to be inapplicable. In *Farquhar & Gill's* case the question raised for determination was whether the time limit of six months imposed by the Act with reference to actions against public authorities struck at the action which was one of suspension and interdict, and what was decided was that the time limit was inappropriate in the circumstances having regard to the nature of the wrong, which was one of a continuous character.

"In the Admiralty case *The 'Burns'* the action for damages by collision was a proceeding *in rem*, *i.e.*, against the ship, and the Act of 1893 was held inapplicable to such an action on the ground that the scope of the Act is expressly restricted to an action, prosecution, or other proceeding 'against a person'—that is to say, to an action *in personam*.

"The *Morries Stirling* case is *prima facie* apposite, because it was a declarator against (*a*) the Stirling County Council, (*b*) the County Clerk as returning officer, and (*c*) a county councillor, and the Lord Ordinary (Lord Pearson) upheld the contention for the pursuer that the successful defenders were not entitled to expenses as between agent and client under the Act of 1893 on the ground that the conclusions of the action being purely declaratory and involving the defenders in no pecuniary liability the provisions of the Act of 1893 were inapplicable.

"The report does not disclose the grounds on which Lord Pearson based his decision and on examining the cases cited in argument I find nothing in them to justify the judgment.

"As I read the statutory provisions they do apply to actions other than actions involving pecuniary liability, and do apply, for example, to actions of interdict, reduction, and declarator.

"I refer in the first place to the generality of the language used, *e.g.*, 'any action, prosecution, or other proceeding'—language which seems to me to be inconsistent with the restricted meaning contended for by the pursuers in this case, and apparently affirmed by the Lord Ordinary in the *Morries Stirling* case.

"Then in *Fielding* v. *Morley Corporation*, 1899, 1 Ch. 1, the Act of 1893, which applies to the United Kingdom, was construed by the Master of the Rolls (Sir N. Lindley) as follows:—'It appears to me and to all of us that the section I have just read (section 1 (*a*) and (*b*)) . . . applies to all actions . . . to injunction actions as well as to actions for damages.'

"I refer also to Mr Justice Romer's opinion to the same effect in *Harrop* v. *Ossett Corporation*, 1898, 1 Ch. 525. His Lordship said—'The word action as used in the Act of 1893 refers to every action, and not to an action of damages or substantially for damages only. In considering this Act I see no sufficient reason for cutting down the generality of the word "action" or limiting it in any way. I do not see why it should be limited.'

"For the reasons which I have given I cannot follow the Outer House decision in the case of *Morries Stirling*, and must give effect to my own opinion, supported as it is by the English decisions to which I have been referring.

"I shall accordingly, in conformity with the peremptory terms of the Act of 1893, award expenses to the defenders as between agent and client."

The unsuccessful parties reclaimed.

The reclaimers argued—*Cathcart Case*—The holding of the temperance poll and the municipal election together rendered the poll void. Two elections with separate and distinct issues were never held together unless authorised by statute, as in the case of parish and county council elections—Local Government (Scotland) Act 1893, sec. 14—which was the only precedent. It was also contrary to the intention of the Act. The requirement that 35 per cent. of the electors should vote—section 2 (3) (*a*)—was to ensure no change unless sufficient electors were interested. Here people interested only in the municipal election were tempted to vote. Further, election agents who were entitled to be present at a municipal election might interfere with the poll. This was not a case of non-compliance with rules but one of fundamental nullity. In any event the onus was upon the respondents to prove that the result had not been affected—*Islington* Division Case, 5 O'M. & H. 120. The respondents if successful were not entitled to expenses as between agent and client. The Public Authorities Protection Act 1893 did not apply to cases where there was no pecuniary conclusion—*Stirling* v. *Stirling County Council*, 1900 (O.H.), 7 S.L.T. 351: *Farquhar & Gill* v. *Magistrates of Aberdeen*, 1912 S.C. 1294.

Camphill Case.—In ascertaining for the purposes of sections 2 (3) and 5 (4) of the Act the number of votes recorded all ballot papers, whether spoiled or not, put into the ballot box were to be counted. A spoiled ballot paper was a vote within the meaning of article 19 of the Temperance (Scotland) Act Regulations 1920 and of the Ballot Act 1872, section 24. "Voting" meant the application for a ballot paper—Ballot Act, sec. 15, First Schedule, Arts. 34 and 41. A voter's ballot paper might be spoiled by the presiding officer. Section 2 of the Ballot Act related to counting the valid votes and did not apply.

Whiteinch Case.—The practice in Scotland, which had been to allow all electors who were in the booth when the door was closed to vote, should be maintained. There was no ground for altering the practice. In the *Islington Division* case, 1901, 5 O'M. & H. 120, where it was held that the issue of ballot papers must stop at the closing hour, the law had been extended to make a rule. In any event there was a sufficient majority for limitation and the poll should not be declared void.

Argued for the respondents—*Cathcart Case.*—There was nothing illegal in holding the poll and the election together. That more electors had voted than would otherwise have done so did not constitute an illegality, nor did the issue of two ballot papers. The registers were the same and it was expedient to hold the two elections together. The Act gave no direction, but any intention that could be read from it was in favour of holding the poll along with another election Any day except a market day could be fixed for the poll, and the months in which the poll was to be taken were those in which the municipal and county council elections took place—(section 5 (3)). Further, eighty per cent. of the electors having voted it was clear that the result had not been affected. To invalidate an election there must be some substantial illegality or the result must have been affected--Ballot Act 1872, section 13; Temperance (Scotland) Act Regulations 1920, Rule 18; *Woodward* v. *Sarsons*, 1875, 10 C. P. 733, *per* Coleridge, C.J., at p. 745; *Deans* v. *Magistrates of Haddington*, 1882, 9 R. 1077, 19 S.L.R. 794. If the respondents were successful they were entitled to expenses as between agent and client. The terms of the Public Authorities' Protection Act were general, and there was no ground for limiting its application to actions with pecuniary conclusions. *Farquhar & Gill* v. *Magistrates of Aberdeen* did not apply. In *Stirling* v. *Stirling County Council* no reason was given for the decision.

Camphill Case.—"Votes recorded" meant effective votes and could not include spoiled ballot papers. That was the obvious meaning of "vote" in the provision as to recounting—(section 5 (4)). Section 15 of the Ballot Act did not apply—(Temperance (Scotland) Act Regulations 1920, Rule 18 and Second Schedule, art. 7).

Whiteinch Case.—Certainty in practice was required, and what had already been decided that no ballot papers could be issued after the closing hour (*Islington Division* case, *supra*) should be followed. The poll must therefore be declared void. That was all the Court had power to do under the Act—(section 5 (3)).

LORD PRESIDENT—*Cathcart Case.*—The point on which this case turns is this. With a view, no doubt, to minimise the burden and expense which is thrown upon local authorities and the community by a poll under the Temperance Act, the Local Authority decided to take the poll *unico contextu*, if I may use the phrase, with the poll for the municipal election. The two polls were taken in combination — not merely were they held on the same day and place, but they were conducted before the presiding officers and by means of the same ballot-boxes — two distinctively coloured ballot papers being issued to every elector who came into the polling-booths, one of which was for the municipal election and the other for the temperance poll. It appears highly probable that serious risks are incurred by adopting this procedure, for the conditions both under the Ballot Act and otherwise which apply to these two polls are not identical. In that connection the discussion has raised large and difficult questions, and they constitute proper matter for reflection by local authorities who should think of adopting in future the same plan of procedure as was adopted here. Fortunately, however, it is not necessary to come to a decision upon them in this case, because the only grounds upon which the procedure of combining the two elections was challenged were (first) that such a combination is in itself illegal; and (second) that whether in itself illegal or not it is contrary to the true intent and meaning of the Temperance Act of 1913. It was argued that it was inconsistent with the nature of a poll to present two unconnected sets of issues to the electors at one and the same time. In support of the alleged illegality of such a course it was pointed out that a combination of polls is unprecedented in this country except under such statutory provision as that contained in the Local Government (Scotland) Act 1894, section 14 (1). The argument on the Temperance Act was that in the case of polls taken under it important results depend on the proportion of the total electorate which exercises its privilege to vote, and that the combination of the poll for the municipal election with that under the Act presents to electors who might otherwise be apathetic on the temperance issue a sort of adventitious inducement to participate in the temperance poll. I am not myself able to see any intrinsic illegality in taking the two polls together, although as I have said I think there is grave risk of possible miscarriage. Combination is certainly not expressly forbidden, and while it is true that it is unprecedented, at least in this country, except under legislative provision, I see nothing which is necessarily illegal about it apart from some relevantly averred violation of the Ballot Act or other statutory enactment. Nor am I able to regard what I

have described as the adventitious attraction of the electorate to the temperance poll resulting from its combination with the municipal one as affording a consideration strong enough to condemn it as contrary to the Statute of 1913, and so to make it illegal. Accordingly I see no sufficient ground to lead me to a conclusion differing from that which the Lord Ordinary has reached.

Camphill Case.—This case raises another question. In terms of sub-section (3) of section 2 of the Act of 1913, the effect of the poll depends on whether or not certain percentages of the total "votes recorded" are in favour of a resolution or resolutions to a certain effect. The question which is raised is, What is the meaning of the expression "votes recorded"? According to one contention, "votes recorded" are those ballot papers which when submitted to the returning officer at the count are passed by him as good and effective votes. If this contention is correct, spoiled ballot papers which the returning officer rejects at the count as either unmarked or as marked ineffectually are excluded in the computation of the statutory proportions. The other view is that by "votes recorded" is meant all votes in the form of a ballot paper put into the ballot box by a voter in the exercise of his right or duty to vote. If this view is the right one it matters nothing whether on examination the votes so recorded turns out to be "spoiled" because the ballot paper is unintelligible to the returning officer or—not being marked at all—is purely neutral and ineffective. Between these two views we have to decide. The phrase "votes recorded" is not used in any Act with regard to elections by ballot passed prior to the Act of 1913, nor so far as I am aware since the Act of 1913. Its use in the Act of 1913 can hardly have been accidental; and in sub-section (4) of section 5 there is a provision which seems to leave little doubt with regard to its meaning. The provision is that the Secretary for Scotland shall make rules for regulating the procedure with respect to requisitions and the taking of polls, and providing for the re-counting or scrutiny of the "votes recorded" on any poll when a demand is made therefor. It seems plain that if the votes which are to be subjected to a re-count and scrutiny are the "recorded votes," then the "recorded votes" must include all the ballot papers which were put into the ballot box by the voters in the exercise of their right or duty to vote, and cannot exclude those which the returning officer at the first count held to be insufficiently or improperly marked or not to be marked at all. I think a voter records his vote when he puts his ballot paper into the ballot box, and I do not think it is material that owing to carelessness or ignorance or inexperience he has failed so to mark his ballot paper as to make the vote he thus "records" an effective exposition of his opinions. Moreover, having regard to the requirement of certain proportions and majorities of votes contained in sub-section (3) of section 2, I have difficulty in construing that sub-section on any other basis than that those proportions or majorities relate to the total number of persons who come and exercise their privileges at the poll, whether those privileges have been exercised effectively or ineffectively. The view which the Lord Ordinary took was that "votes recorded" meant ballot papers passed by the returning officer at the count For the reasons stated it seems to me that this view is unsound.

Whiteinch Case.—This case raises yet another point. It appears that some voters who were admitted into the polling station before eight o'clock did not complete the operation of voting until after eight o'clock; and the dispute which has arisen is as to whether the rule laid down in England as applicable to such circumstances by the judgment in the *Islington* case (5 O'M. & H. 120.) should be followed in Scotland, or whether on a sound construction of the statutory provisions a different rule ought to be laid down. According to the *Islington* case a voter who receives his ballot paper before eight o'clock is entitled to carry out the obligation imposed upon him under the Ballot Act of returning the ballot paper after he has marked it into the ballot box after eight o'clock, but the presiding officer is not entitled after that hour to issue a fresh ballot paper to any voter. The rule which is suggested as preferable would be to allow the presiding officer to distribute ballot papers after eight o'clock to voters who had been admitted to his station before eight o'clock, and to allow such voters to complete the operation of voting. In so practical a matter as the conduct of an election which involves a poll, working rules—and workable rules—are essential. The mathematically precise application of moments of time to the process of voting is impossible, and it cannot be said that the statute contemplates anything of the kind. It provides for the orderly performance of a practical piece of business. Whatever working rules are adopted they must be consistent with the statute, and should carry out its provisions as logically as possible. The working rule laid down in the *Islington* case has been criticised as carrying out with imperfect logic the rules of the Ballot Act; but it is impossible to say that it is a rule which is contrary to the Act, and it is a rule which has been in operation, or at all events understood to be authoritative for twenty years in this country as well as south of the Border. I should be very slow, unless I were compelled, to make any alteration in a working rule thus firmly established. We were told that it is a rule which has not been consistently honoured in precise observance. That is possibly true, because until the passage of the Act of 1913 we have had no public polls other than those at contested elections—and at those polls there are present agents for the candidates who stand rather on the rules of fair-play and good sense than on the minute application of technical rules. In this way the question of whether it is the door of the polling room that should be shut at eight o'clock, or the ballot box which should have its slit closed at eight

o'clock, or whether it is the register (as Mr Moncrieff says) which should be closed at eight o'clock, has been rarely if ever brought up for exact and precise determination. I am not prepared to disturb a rule not inconsistent with the Act, and certainly a workable rule, which has been regarded as authoritative for twenty years. I think the Lord Ordinary's judgment ought to be affirmed.

LORD MACKENZIE—I agree with the views expressed by your Lordship.

Cathcart Case.—In this case the circumstances which gave rise to the objection which was urged in regard to this matter are set out in the condescendence. [*His Lordship read the passage*]. The pleas which gave rise to the argument are plea 1 (*b*) for the pursuers to the effect that no independent poll of the electors was taken, and plea 4 for the defenders to the effect that the poll under the Temperance (Scotland) Act 1913 having been validly held in combination with the municipal election the defenders should be assoilzied. The point which the pursuers make upon the mode of conducting the election and the poll is this. They say in condescendence 4—"In consequence many electors voted at the poll who would not have voted at all if it had been held on a different day from the municipal elections, or if the casting of their votes had been dependent as is contemplated by the Act and Regulations upon their making application for a ballot paper." One would be slow to reach a conclusion which would prevent an arrangement which obviously makes for economy in ascertaining the views of the electors unless one was satisfied that there was something *per se* illegal in what was done. It is of course impossible to shut one's eyes to the risk that is run by having municipal elections and elections under the Temperance Act held simultaneously, and one of the later cases illustrated very well what may be the practical difficulty in working the matter out on these lines. It may be that the presence of electors for one purpose may have obstructed electors who wished only to exercise their franchise for another purpose from getting the necessary opportunity. But the only question which we are asked to decide in the Cathcart case is whether there is any naked illegality in holding the election and the poll in the manner which is set out in condescendence 4. In my opinion there is no fundamental nullity, because I am unable to see that merely by adopting this method of procedure there is any difficulty in submitting the questions which have to be submitted under section 2, sub-section 2, of the Temperance Act to the electors at the poll. The questions to be submitted are the adoption or not of (*a*) a no-change resolution, or (*b*) a limiting resolution, or (*c*) a no-licence resolution. That can quite well be done by handing the appropriate ballot paper to an elector who tenders himself to vote. It was not disputed that if there had been a duplication of rooms then all would have been well. It is said that the duplication of the ballot papers is not a sufficient compliance with the provisions of the Temperance Act. The objection really comes down to this, that persons who might not have voted may have voted. I am unable for the reasons which have already been explained by your Lordship to hold that there is any illegality, and accordingly I adopt what has been already said as regards the Cathcart case.

Camphill Case.—This case as argued to us raises the question as to the meaning of what is a recorded vote. To my mind that question is solved by a consideration of the terms of the Ballot Act 1872, First Schedule, rule 25, which provides that "The elector on receiving the ballot paper shall forthwith proceed into one of the compartments in the polling station and there mark his paper and fold it up so as to conceal his vote, and shall then put his ballot paper, so folded up, into the ballot box." When he has done that, in my opinion he has recorded his vote. And that view is confirmed by a reference to section 5, sub-section 4, of the Temperance Act of 1913, which provides for the re-counting or scrutiny of the votes recorded on any poll; and accordingly what the fate of the vote is after it is placed in the ballot box does not I think matter. The vote has been recorded. That was the only question upon which we were asked to give an opinion in the case of Camphill.

Whiteinch Case. When one finds that there has been a practical rule which has been in work for some twenty years, one would be slow to say that it was necessary to put a construction upon the Act which would lead to a different result, and accordingly I am prepared to adopt as a sound working rule that which has been laid down in the *Islington* case (5 O'M. & H. 120) that if an elector receives his ballot paper before eight o'clock then he may carry out what is necessary thereafter, but that the presiding officer cannot issue to an elector a ballot paper after eight o'clock. It seems to me that that practical rule is not inconsistent with the working of the Ballot Act in Scotland, because when one turns to rule 21 of the First Schedule it provides—"The returning officer shall appoint a presiding officer to preside at each station, and the officer so appointed shall keep order at his station, shall regulate the number of electors to be admitted at a time, and shall exclude all other persons except the clerks, the agents of the candidates, and the constables on duty." Now according to one's recollection of one's own experience it is necessary for the presiding officer to give instructions to the constable who has charge of the door as to what is to be done as the hour of eight approaches. The rule in the *Islington* case is quite consistent with the presiding officer exercising his right to say that as the hour of eight approached more electors were not to be admitted into the station than could be handled in such a way that all would receive their ballot papers before eight o'clock, and if that is done then it appears to me that the requisites of the Act will be satisfied.

LORD SKERRINGTON—I have come to the same conclusion in regard to the various questions which we have now to decide.

Cathcart Case.—I shall refer only to the question whether it is lawful to hold a poll under the Temperance Act along with a municipal election. That is a large and important question, and a decision in regard to it might affect the validity both of the polls under the Temperance Act and also that of the municipal elections. There is much to be said for the view that the Ballot Act did not contemplate or intend that two elections for two different purposes should be combined. There is also much to be said for the view that the Temperance Act did not contemplate or intend that a poll under that statute should be combined with a municipal election. It seems contrary to the spirit of the Temperance Act that the practical interest of the electors in the temperance question should be artificially stimulated in this way. I cannot say that my difficulties have been entirely overcome by the able arguments addressed to us, but I do not feel sufficiently clear on the subject to justify me in dissenting.

LORD CULLEN—I concur in the decision arrived at by your Lordships with regard to all the cases, and that on the grounds stated by your Lordship in the chair.

Cathcart Case.—The Court adhered, and found the defenders entitled to expenses as between agent and client.

Camphill Case.—The Court recalled the interlocutors appealed against, and declared the pretended declaration of the poll to be void.

Whiteinch Case.—The Court declared the pretended declaration of the poll to be void.

Counsel for the Pursuers — Moncrieff, K.C.—Fleming—Thom. Agents—Bruce & Stoddart, S.S.C.

Counsel for the Defenders — Macmillan, K.C.—Graham Robertson. Agents—Campbell & Smith, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, June 13.

(Before the Lord Justice-General, Lord Cullen, and Lord Blackburn.)

STRATHERN *v.* BURNS.

Justiciary Cases — Perjury — Complaint — Relevancy — Want of Specification — Failure to State Names of Parties in Civil Cause in which the Testimony was Given, and that Alleged False Statements were Relevant to the Issue in said Cause — Criminal Procedure (Scotland) Act 1887 (50 *and* 51 *Vict. cap.* 35), *Schedule A — Summary Jurisdiction (Scotland) Act* 1908 (8 *Edw. VII, cap.* 65), *Schedule C.*

In a prosecution for perjury the form of complaint adopted was that given in Schedule A of the Act of 1887, which is incorporated in Schedule C of the Summary Jurisdiction (Scotland) Act 1908. The Sheriff-Substitute dismissed the complaint as irrelevant on the ground of want of specification in respect that the names of the parties to the civil cause in which the testimony was given had not been stated, and also because the complaint failed to set forth that the alleged false statements were relevant to the issue in said cause. *Held* that the fact that the complaint was in the statutory form was a sufficient answer to the objections stated.

Margaret Burns, *respondent*, was charged in the Sheriff Court of Lanarkshire at Glasgow at the instance of John Drummond Strathern, Procurator-Fiscal, *appellant*, upon a summary complaint in the following terms:—"You are charged at the instance of the complainer that on 18th November 1920, in the Small Debt Court, County Buildings, Glasgow, you being sworn as a witness in a civil cause then proceeding there, deponed (1) that you had never got any goods from Betsy Raitt, 741 Springburn Road, Glasgow, (2) that you had never got goods from said Betsy Raitt for another woman, (3) that you did not owe any money to the firm of J. Orr Comrie, Limited, 142 Gardner Street, Glasgow, and (4) that no traveller of said firm was then pressing you for payment of an account to said firm; the truth, as you knew, being (1) that you had between 26th May and 28th August 1919 got goods from said Betsy Raitt to the value of £6, 16s. 2d., (2) that you had between 1st January and 31st December 1919 got goods from said Betsy Raitt for Mrs Harrigan, 799 Springburn Road, Glasgow, (3) that you owed the sum of £2, 16s. 10d. to said firm, and (4) that James Orr Comrie, 28 Napiershall Street, Glasgow, a traveller of said firm was then pressing you for payment of said sum."

The Sheriff-Substitute (FYFE) having dismissed the complaint the appellant obtained a Case for appeal.

The Case stated—"The complaint was called in Court before me on the 2nd day of April 1921, when, before pleading, the respondent's agent stated the following objection to the relevancy of the complaint, viz., want of specification in respect that the civil cause is not mentioned and the questions referred to are not stated to have been relevant to the issue of said cause. Having heard appellant in reply to said objection I sustained it and dismissed the complaint."

The *question of law* was—"Was I right in sustaining the objection to the relevancy of the complaint?"

Argued for the appellant—The complaint contained all that was necessary for relevancy. Prior to the Criminal Procedure (Scotland) Act 1887 it had not been the practice to state in an indictment for perjury that the false deposition was material to the issue in the case—Macdonald's Criminal Law (3rd ed.), p. 216, sec. 2. By that Act the form of the indictment was prescribed, and by section 71 of that statute it was made applicable to summary complaints. By the Summary Jurisdiction (Scot-