apply, it would at first sight appear that under their procedure (Act of 1864, section 16) the document in question should have been noted, and that has not been done. But at the end of section 3 of the 1881 Act there is this provision:—"Provided also that where there is a general or local Police Act in force it shall be optional in police prosecutions either to use the forms prescribed by such Act or the forms provided by the Summary Jurisdiction Acts." In this case the prosecutor has chosen to use the form under the Burgh Police (Scotland) Act 1892, and under that Act, section 477, it is not necessary to note productions. Besides, the Act of 1892 is subsequent in date to that of 1881.

LORD JUSTICE-CLERK—I am of the same opinion. This complaint is brought under the Burgh Police (Scotland) Act 1892. If the Court procedure is particularly laid down under that Act, it could not be held to be overruled by any previous statute, and so far as it differed from the procedure appointed by the Summary Jurisdiction Acts it would be quite competent. Therefore the procedure in this case was good.

The Court refused the suspension.

Counsel for the Complainer — Hunter. Agent—James Purves, S.S.C.

Counsel for the Respondent—Salvesen, K.C.—Orr. Agents—Inglis, Orr, & Bruce, W.S.

COURT OF SESSION.

Friday, February 20.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

CAMERON *v.* MAGISTRATES OF GLASGOW.

Public-House—Early Closing—"Particular Locality"—Resolution Defining Area as "Particular Locality"—Public-Houses Acts Amendment (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 35), *sec.* 2.

Held that under section 2 of the Public-Houses Acts Amendment (Scotland) Act 1862 the Magistrates of Glasgow were entitled by resolution to define an area in the centre of the city, three-fourths of a mile in length and 350 yards in breadth, as a "particular locality" for the purposes of that section.

Public-House—Certificate—Hours of Opening and Closing—Reduction of Hours within which Public-Houses to be Kept Open—Public-Houses Acts Amendment (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 35), *sec.* 2.

Held that under section 2 of the Public-Houses Acts Amendment (Scotland) Act 1862 the magistrates of a burgh were entitled to reduce the total number of hours during which the public-houses within a particular locality might be kept open below the total number of hours allowed in the schedule form of certificate.

Public-House—Public-Houses Acts Amendment (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 35), *sec.* 2—*Definition of Particular Locality—Capacity in which Magistrates Act—Judicial or Administrative—Employment of Counsel on behalf of Procurator-Fiscal and Chief-Constable.*

Held that in considering and adopting a resolution defining a certain area within a burgh as a "particular locality" in terms of section 2 of the Public-Houses Acts Amendment (Scotland) Act 1862, the magistrates act not in a judicial but in an administrative capacity; and that the resolution was not liable to reduction upon the ground that they had authorised the employment of counsel for the procurator-fiscal and chief-constable to speak in favour of the resolution.

Public-House—Quarter Sessions—Appeal to Quarter Sessions against Resolution Defining "Particular Locality" and Certificates in Terms thereof—Public-Houses Acts Amendment (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 35), *sec.* 2—*Licensing (Scotland) Act* 1828 (9 *Geo. IV. cap.* 58) (*Home Drummond Act*), *sec.* 14.

Held (*aff.* judgment of Lord Kincairney, Ordinary—*diss.* Lord Moncreiff) that it was incompetent to appeal to Quarter Sessions against either (1) a resolution of the magistrates defining a particular locality under section 2 of the Public-Houses Acts Amendment (Scotland) Act 1862, or (2) a restriction of hours in the certificates granted by the magistrates in accordance with the terms of their resolution.

By section 2 of the Public-Houses Acts Amendment (Scotland) Act 1862 (25 and 26 Vict. cap. 35) it is enacted that "the forms of certificates contained in Schedule (A) of the Act annexed (which prohibit the sale of liquors before 8 a.m. and after 11 p.m.) shall come in place of previous forms of certificates, "provided always that in any particular locality within any county or district or burgh requiring other hours for opening and closing inns and hotels and public-houses than those specified in the forms of certificates in said schedule applicable thereto, it shall be lawful for such justices or magistrates respectively to insert in such certificates such other hours, not being earlier than six of the clock or later than eight of the clock in the morning for opening, or earlier than nine of the clock or later than eleven of the clock in the evening for closing the same, as they shall think fit."

The Licensing (Scotland) Act 1828 (9 Geo. IV. c. 58) (Home Drummond Act) enacts—sec. 14—"If any justice of the peace or proprietor or occupier of any house in respect whereof any such certificate shall be applied for, shall be dissatisfied with any proceeding of any justices or magistrates assembled for granting certificates

as aforesaid, whether in granting or refusing or otherwise disposing of any such application, it shall be lawful to such justices of the peace, proprietor, or occupier to appeal therefrom to the next Quarter Sessions of the Peace for the county: Provided always that such appeal shall be lodged with the clerk of the peace within ten days after such proceeding, and provided such appellant, being a proprietor or occupier as aforesaid, shall find caution to abide such appeal and the expenses thereof, and shall give intimation of such appeal to the opposite party and to the justices of whose proceeding he complains."

In June 1902 Archibald Cameron, Edward Cronin, Alexander Gray, James Ward, and Charles Marchant senior, all wine and spirit merchants in Broomielaw, Glasgow, raised an action against (1) the Magistrates of the royal burgh of Glasgow, (2) the Town-Clerk and Depute Town-Clerk of Glasgow, (3) the Justices of the Peace of the County of the City of Glasgow who attended and acted at a meeting of the Quarter Sessions of the Peace for said county held at Glasgow on 8th May 1902, (4) the remaining Justices of the Peace for the County of the City of Glasgow, (5) the Clerk of the Peace and the Depute Clerk of the Peace, County Buildings, Glasgow, and (6) the Chief-Constable and the Procurator-Fiscal of the said City.

The conclusions of the action were for reduction (1) of a resolution adopted by the Magistrates of Glasgow on 11th April 1902, in these terms, viz., "The Magistrates having in view the circumstances and requirements of the locality referred to as the Broomielaw area, and shown in blue on the map now submitted to the meeting, . . . thereupon, in virtue of the powers conferred on them by section 2 of the Public-Houses Acts Amendment (Scotland) Act 1862, resolved and hereby resolve that the said area is a particular locality within the burgh of Glasgow, under and within the meaning of said section, and further, the Magistrates resolved and hereby resolve that the hour for closing to be inserted in the certificates granted for inns and hotels and public-houses in that particular locality shall be ten of the clock in the evening;" (2) of deliverances granting renewals of the pursuers' certificates; (3) of the certificates granted to the pursuers for the year from Whitsunday 1902 to Whitsunday 1903, which provided that the pursuers should not keep open house after ten; and (4) of judgments of the Quarter Sessions pronounced on 8th May 1902 "refusing to entertain, and dismissing as incompetent and illegal," appeals taken by the pursuers against the resolution and the deliverances, and against the insertion of the said condition as to the hour of closing in the certificates granted to the pursuers.

The pursuers averred that they duly lodged applications under the Scottish Licensing Acts 1828 to 1897 for renewal of their then current public-house certificates to the general half-yearly meeting for granting and renewing such certificates, held at Glasgow on 8th April 1902; that their then current certificates permitted them to keep open and sell exciseable liquors between 8 a.m. and 11 p.m.; that at the meeting counsel were heard for the pursuers on the subject of forming Broomielaw into a particular locality for early closing purposes, and notwithstanding the objections of pursuers' counsel, counsel instructed by the Clerk of Court was heard on behalf of the Chief-Constable and the Procurator-Fiscal, who were both present; that the evidence of police officials was then taken, and thereafter, despite the objections of the pursuers' counsel, the evidence of objectors to certain specific licences; that at the close of this evidence the pursuers' counsel said he had been taken by surprise by the procedure, and asked an adjournment for a week in order to submit evidence in reply; that this was nimiously and oppressively refused by the Magistrates, who ordered the pursuers to lead any evidence they wished on 11th April; that evidence was led for them on that day, and after hearing counsel the Magistrates passed the resolution sought to be reduced; that on 22nd or 30th April the pursuers' applications for renewal of their certificates were granted at adjourned meetings; that the pursuers appealed against the alleged resolution and the restriction of hours in their certificates to the Quarter Sessions; that the Quarter Sessions met in Glasgow on 8th May 1902; that after hearing counsel for the pursuers, and also, notwithstanding the pursuers' objections, counsel for the Chief-Constable and the Procurator-Fiscal, the meeting dismissed the appeals as incompetent and illegal; and that thereafter the Town-Clerk, or his depute, issued public-house certificates to the pursuers, bearing that they were not to sell in their licensed premises before 8 a.m. or after 10 p.m.

The grounds of action stated on record by the pursuers were as follows:—(1) They averred that the Magistrates in resolving to turn the Broomielaw area into a particular locality exceeded their statutory powers, and acted illegally and irregularly. The area defined was not the parliamentary or the municipal area, but an arbitrary area, three-fourths of a mile in length and 350 yards in breadth, selected at their own discretion. To close public-houses in that area would simply incommode the resident population and divert business to public-houses a few feet outside the area. There were no particular circumstances differentiating the area from other parts of the centre of the city. The resolution had been passed, not in the *bona fide* execution of the Licensing Acts, but solely for the purpose of carrying out the views entertained by the makers individually, and by it the Magistrates had dealt unfairly and inequitably with the pursuers. (2) The pursuers further averred that the Magistrates had acted illegally and *ultra vires* in resolving that the pursuers should shut at 10 p.m. instead of 11 p.m. without inserting a corresponding earlier hour of opening in the morning. (3) The Magistrates on the bench at the licensing meeting had disqualified themselves from acting as judges

by their proceedings. During six months before the meeting they had had private and official conferences among themselves and with the Magistrates of Aberdeen and Dundee, and had determined to delineate early closing areas in Glasgow. They had further resolved that counsel should be instructed to appear before them for the Chief-Constable and Procurator-Fiscal at the licensing meeting, and by so doing had deprived themselves of an opportunity of hearing an unbiased statement of facts from those officials as contemplated in the Licensing Acts. The Magistrates who voted for the resolution sought to be reduced had previously disqualified themselves from acting as judges and from forming an impartial judgment by employing and instructing counsel to appear and act before them against the present pursuers. The Magistrates who voted for the resolution at the licensing meeting also sat on the Bench in the Quarter Sessions and again heard counsel for the Chief-Constable and Procurator-Fiscal, who had really been instructed by themselves to oppose the pursuers' appeals. The Magistrates had thus disqualified themselves from forming an impartial judgment. (4) The pursuers lastly averred that the defenders third and fifth called had acted illegally and oppressively in refusing their appeals at the Quarter Sessions. These appeals were based on section 14 of the Licensing (Scotland) Act 1828 (the Home Drummond Act).

The pursuers pleaded—"(1) The pursuers are entitled to decree of reduction of the pretended resolution and the condition as to the closing at ten o'clock inserted in their certificates, as concluded for, in respect that (*a*) the whole proceedings of the said Magistrates, with regard to the said pretended resolution and the early closing condition were illegal, irregular, nimious, and oppressive; (*b*) in any view, it was incompetent and illegal to compel the pursuers to close their licensed premises at ten o'clock at night without allowing them to open their said premises at seven o'clock in the morning, and to insert a condition as to closing at ten o'clock, in the pursuers' certificates; and (*c*) the Magistrates and Justices were not entitled to deal with the said area as a particular locality within the meaning of section 2 of the 1862 Act. (2) The pursuers are entitled to decree of reduction of the said deliverance or judgment of the Quarter Sessions in respect that (*a*) the whole proceedings of and relating to the said pretended meeting of Quarter Sessions were illegal, irregular, nimious, and oppressive; (*b*) in any view, the Quarter Sessions were bound to have entertained the said appeals and to have heard and determined the same on their merits; and that in refusing to entertain and in dismissing said appeals the Quarter Sessions acted in excess of their statutory power and duty. (3) The pursuers are entitled to decree of reduction as concluded for, in respect that both at the meeting of Magistrates and the meeting of Quarter Sessions the Magistrates, who sat and adjudicated upon whether the said resolution should be adopted and the pursuers' appeals be dismissed, had employed and instructed counsel to conduct the proceedings against the pursuers. (4) In respect of the facts and circumstances condescended on, the pursuers are also entitled to other remedies sought by them in the remaining conclusions of the summons."

Defences were lodged by the first and second defenders, who pleaded, *inter alia*—"(2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons."

On 27th November 1902 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor—"Finds (1) that the resolution of the Magistrates of Glasgow adopted on 11th April 1902, and sought to be reduced, was within the powers conferred by section 2 of the Act 25 and 26 Vict. cap. 35; (2) that there are no averments relevant to infer reduction of the said resolution on the ground of irregularity of procedure, or of partiality or bias on the part of the said Magistrates; (3) that the said resolution was not subject to review by the Quarter-Sessions; (4) that the appeals to the Quarter-Sessions against the licences granted to the pursuers were incompetent; (5) that there are no relevant grounds stated on record for the reduction of the said resolution or of the said licences: Therefore repels the pleas-in-law for the pursuers, assoilzies the defenders from the conclusions of the summons, and decerns," &c.

Opinion.—. . . "The first and principal question in this case is whether the provision above quoted (25 and 26 Vict. cap. 35, sec. 2) authorises the resolution requiring hotels and public-houses in the Broomielaw to be closed at ten instead of eleven, or whether the resolution was *ultra vires* of the Magistrates.

"The statute does not expressly authorise the adoption of any general resolution in reference to licensing, or the definition or designation of any particular locality by boundaries, but is confined to certificates and to the modification of previous statutory certificates. Whether it would be competent to justices or magistrates to carry out the provisions of the Act by applying them to a single certificate, or whether it would be competent to grant certificates with different hours applicable to different houses in the same vicinity, need not be considered. These questions have not arisen. The Magistrates have sought to carry out the Act in a different manner, namely, by designing a particular district in which the modifications of the former certificates permitted by the second section of the Act should have effect, and I am of opinion that this was undoubtedly a competent mode of carrying out the Act, and the only reasonable mode of doing so. The power to do so is not, it is true, expressly given, but may be legitimately inferred. The expression 'particular locality' seems to me to involve the fixing or definition of some particular area over which the powers of the Act were to be

exercised. This section of the Act underwent very searching scrutiny in the case of the Magistrates of Rothesay, reported as *Macbeth* v. *Ashley*, June 20, 1873, 11 Macph. 708, and April 17, 1874, 1 R. (H.L.) 14; but it was never suggested that the Act could not be put into operation by means of laying out definite localities and applying the provisions of the section to these localities. Accordingly, I have no doubt that it was competent for the Magistrates, as licensing authority, to define a district or districts, and to grant certificates for the inns and public-houses in that district in the terms authorised by the section.

"The pursuers founded on the case of *Macbeth*. In that case a resolution of the Magistrates purporting to define a particular locality was reduced as *ultra vires*. But the district defined was practically the whole burgh—at least it included all the public-houses—and that was held to be beyond the power conferred in the statute, and the district was held not to be a 'particular locality within the burgh,' because it was practically the whole burgh. The resolution was regarded as a fraud on the statute. But the judgment took for granted the competency of designing a district which was truly a part of the burgh; and apparently it would have denied all effect to the Act had it not done so. I do not see how it can be disputed that the area of the Broomielaw is a part of the burgh of Glasgow, and therefore I think that the case does not apply. Whether it is a district in which it is desirable to modify the ordinary rule as to closing at night, or whether the resolution was a wise or prudent one, is a different matter, with which I consider I am in no way concerned. These were points for the Magistrates.

"It may be noticed that the judgment in the case of Rothesay (*Macbeth*, *supra*) cannot now be repeated in reference to burghs like Rothesay, because by the Act 50 and 51 Vict. cap. 38, the form of certificate is altered, and now contains the provision that the licensee shall not keep open house before 8 a.m. 'or after such hour at night not earlier than ten and not later than eleven, as the licensing authority may direct,' but probably it would still be competent to divide a small burgh into different 'localities.' That Act, however, does not apply to towns of 50,000 inhabitants. Hence in this question about Glasgow the case of Rothesay may still be cited.

"I am of opinion that it was not *ultra vires* of the Magistrates to define an area for the purpose of altering the hours in the certificate to be granted, and that there is no reason why that area should not be the area of the Broomielaw.

"The pursuers contended that it was not within the power of the Magistrates to reduce the number of hours during which public-houses might lawfully be kept open, *i.e.*, from fifteen to fourteen. It was contended that it was a great hardship to such shopkeepers to reduce their business day, and that if an hour was cut off in the morning or at night, an hour must be added at night or morning, and that if the public-house keepers were compelled to close at ten they ought to be authorised to open at seven. That argument was founded on an observation or suggestion, but certainly not an opinion, by Lord President Inglis in the case of Rothesay. There are observations of a contrary tendency in the opinion of Lord Chelmsford in the House of Lords. I am unable to find any warrant for the argument in the second section of the Act of 1862, or elsewhere in that Act, and I must reject it. It seems to follow that a resolution in terms of that adopted by the Magistrates on the 11th April 1902 was *intra vires* if adopted in a legal manner.

"The pursuers further maintained that, even if the resolution should be held to be *intra vires*, it was vitiated and open to reduction on account of the manner in which it was adopted. The Magistrates were said to have prejudged the question before they heard the parties, and to have acted unjudicially and with bias; and various averments are made on this point which, if relevant, might require inquiry. But I am of opinion that they are not relevant.

"Although it may be a point not perfectly settled whether justices of peace sitting as a licensing authority are, strictly speaking, acting as judges, and although in any case they have a large discretion, which it is their right and their duty to exercise, still it is their duty to exercise that discretion fairly and (as it is said) judicially. They must be without interest, and must hear parties with judicial impartiality. The mere risk of bias, it has been said, is enough to vitiate their conclusions, and there have been very important and striking decisions pronounced in England enforcing and illustrating that position, to some of which it may be sufficient to refer. See *Sharp* v. *Wakefield* [1891], A. C. 173; *Rex* v. *Howard* [1902], 2 K.B. 363, 373; *Reg.* v. *Justices of Walsall*, 1854, 24 L.T. 111; *Reg.* v. *Sylvester*, 1862, 31 L.J., Mag. Cases 93; *Blaik* v. *Anderson*, December 20, 1899, 7 S.L.T. 302; *Rex* v. *Sunderland Justices* [1901], 2 K.B. 357.

"But in adopting the resolution in question the Magistrates were in a different position, and it is not clear that these principles can be strictly applied. I am disposed to think that in coming to that resolution the Magistrates were not acting in a judicial but in an administrative capacity. They were in no sense conducting a *lis*, and had no litigating parties before them, and it does not appear that they were bound by such rules as judges must follow in an ordinary court of justice or justices in a licensing court. They were not bound to conduct their inquiries according to the legal rules of evidence, but might competently investigate and gather information how and whence they could. It was enough that they should consider the subject impartially. It was, of course, right that they should consider it not only with an open but with a fully-informed mind. In this case they heard counsel both for the public-house keepers, to which

no one objects, and also for the Procurator-Fiscal and Chief-Constable, which has been challenged, and which in some views seems rather an eccentric thing to do. But I can see nothing illegal or incompetent about it. They were not bound to hear counsel at all. But on the other hand I take it they were entitled to hear as many people (counsel or otherwise) as they chose. It might have been better not to have heard counsel for the Fiscal and Chief-Constable, and so to have avoided all appearance of partiality, but it was a matter entirely within their own discretion, and I think there is no relevant averment for the conclusion of reduction of the resolution on the ground of prejudgment or bias by the Magistrates.

"If the resolution cannot be challenged, and if the document first called for cannot be reduced, it follows that the second and third documents cannot be reduced, and these include all that took place before the Magistrates.

"The pursuers appealed to the Quarter-Sessions, and they appealed separately against the resolution and against the certificates which had been granted but with the clause as to closing at ten, and it is averred that when the appeals came up at Quarter-Sessions they were dismissed as incompetent and illegal. It appears from the certified excerpts, No 31 of process, that they were dismissed as incompetent. The addition of the word illegal is of no consequence.

"My attention has been drawn to the fact that no defences have been lodged by the Justices assembled at Quarter-Sessions nor by the Clerk of the Peace. No notice is taken of that circumstance by the pursuers on record. The defenders, who have lodged defences, are, at all events, entitled to support the resolution adopted by the Magistrates and the licences granted, and to maintain the incompetency of the appeals—and the first question is, whether these appeals were competent or not? I am of opinion that the appeals were incompetent.

"There are two appeals to be considered —(1st) the appeal against the resolution, and (2nd) the appeal against the certificates.

"With regard to the resolution, it appears to me that no appeal to Quarter-Sessions is allowed against it. The right of appeal to Quarter-Sessions is conferred by sec. 14 of the Home Drummond Act, 9 Geo. IV. c. 58; and it was not argued, so far as I understood, that there existed any right of appeal to Quarter-Sessions except what was conferred by that section. Now, in that section, appeal to Quarter-Sessions is allowed to any justice of the peace, proprietor or occupier of a house in respect of which a certificate is applied for, who shall be dissatisfied with any proceeding of any magistrates assembled for granting certificates, 'whether in granting or refusing or otherwise disposing of any such application.' In this clause there are to be noted—(1) the persons to whom the appeal is allowed, (2) the proceeding in which the appeal is to be taken. It may be open to question whether in this case the appellants to Quarter-Sessions against the resolution fall within the words 'proprietors or occupiers'; but supposing they do, I am unable to see how the resolution can be held to be a proceeding in disposing of an application for a certificate, and I am therefore of opinion that it is not a deliverance of the Justices against which an appeal is allowed. It is to be noticed that the power to adopt such a resolution was conferred after the date of the Home Drummond Act. The power, so far as concerns burghs, is conferred by sec. 2 of the Public-House Act on magistrates alone, and no reference is made to Quarter-Sessions. It is true that the power seems conferred on magistrates as Licensing Authority, but a right of appeal to Quarter-Sessions is not a necessary consequence. If the resolution be final, then it follows that the certificate in terms of the resolution is the statutory certificate for the 'particular locality.'

"The deliverance of Quarter-Sessions dismissing as incompetent the appeals of the pursuers against the terms of the certificate remains to be considered. Now, if it be sound to say that a certificate in the terms of the resolution is, so long as the resolution remains in force, a statutory certificate, then the pursuers are in the position of holding certificates which have been granted, and not in the position of persons whose applications for certificates have been refused. There is, in fact, no refusal, and the pursuers are appellants against certificates granted. I am disposed to think that such an appeal is incompetent.

"If the appeals were incompetent, the regularity or irregularity of the proceedings at Quarter-Sessions becomes unimportant. But it has not appeared to me that any relevant ground for the reduction of these proceedings has been stated.

"I am alive to the importance of the resolution complained of, which in some sense and some views involves hardship. But the only question is, whether it was within the discretion committed to the Magistrates, or was *ultra vires?* and I am of opinion that the defenders should have decree."

The pursuers appealed, and argued—(1) The Magistrates' resolution defining the Broomielaw area as a particular area was *ultra vires.* No reasons had been assigned for fixing this area, which had no features distinctive from those of the locality of which it formed a part. The decision of the Magistrates in defining this area had been purely arbitrary, and was therefore illegal—Opinion of Lord Selborne in *Macbeth* v. *Ashley*, April 17, 1874, 1 R. (H.L.) 20, 11 S.L.R. 487. (2) The Magistrates had no power under section 2 of the 1862 Act to restrict the hours for selling exciseable liquors to 14 instead of 15. It would require a proviso of a different kind from this to allow the Magistrates to interfere with the number of hours allowed to public-house keepers to remain open—Opinion of Lord President Inglis in *Ashley* v. *Magistrates of Rothesay*, June 20, 1873, 11 Macph. 716, 10 S.L.R. 513. (3) The Magistrates were disqualified

on account of their actings from judging the case with impartiality. They had had previous communings on the matter and had made up their minds beforehand. They also had employed counsel to represent one of the sides of the case. In adjudicating on licences, magistrates were not emancipated from the ordinary principles on which justice was administered—*The Queen* v. *The London County Council* [1892], 1 Q.B. 190—Opinion of A. L. Smith, J., 195. (4) An appeal to the Quarter-Sessions was competent. The passing of the resolution and the granting of the certificates in terms thereof was a proceeding of magistrates assembled for granting certificates, and therefore appealable under section 14 of the Home Drummond Act. In the case of *Ashley* v. *Magistrates of Rothesay*, *supra*, such an appeal had been taken without objection.

Argued for the defenders and respondents —(1) The magistrates were authorised by the statute to define a particular locality within which to exercise the power conferred by the Act. They had heard evidence on the question and must be assumed to have acted *bona fide* and in the interests of the community. (2) There was nothing in the statute requiring the Magistrates to add an hour in the morning for each hour taken away at night, or *vice versa*. The statute had in view the requirements of the locality and it might be in the interests of the locality to limit the hours during which public-houses should remain open to fewer than 15. The opinion of Lord President Inglis in the case of *Ashley*, *supra*, founded on by the pursuer, was directly negatived by that of Lord Chelmsford in the same case on appeal in 1 R. (H.L.) 20, 11 S.L.R. at p. 490. (3) The Chief-Constable and Procurator-Fiscal had desired to be represented by counsel at the Licensing Court and Quarter-Sessions as they knew that the pursuers were to have counsel of their own. The Magistrates thought it proper that they should be so represented, and their committee had authorised the employment of counsel so that the matter might be thoroughly discussed. In dealing with questions of licences the Magistrates were entitled to use their own local knowledge and to take any steps which in their discretion they considered would inform their minds on the point. In dealing with licences they were not strictly a judicial body—*Rex* v. *Howard* [1902], 2 K.B. 363, opinion of Collins, M.R. 375 and 376. (4) Section 2 of the Act of 1862 gave the justices or magistrates alone power to modify the statutory form of the licence. An appeal to the Quarter-Sessions against either the resolution or against the certificate granted in the form authorised by the resolution was therefore incompetent.

At advising—

LORD JUSTICE-CLERK—I have considered the exceedingly careful opinion of the Lord Ordinary with the greatest care, and find myself in such thorough concurrence with all that is said by him and with the conclusions at which he has arrived that I find it unnecessary to add anything in moving that his interlocutor be adhered to.

LORD YOUNG concurred.

LORD TRAYNER—I am of the same opinion. The defenders, in exercise of the powers conferred on them by the 2nd section of the Act of 1862, resolved that the licences to be granted in the particular locality in which the pursuers' premises are situated—a locality very clearly designated —should provide for the opening of licensed premises not earlier than eight o'clock in the morning, and for closing not later than ten at night. This resolution having been given effect to in the licence granted to the pursuer, he seeks to have what was done set aside on the ground that the defenders acted illegally. His first objection is that the defenders did not hear him or anyone on his behalf before they made the resolution to which they have given effect. I think they were not bound to hear the pursuer on that matter. The statute leaves it to the magistrates of the burgh to determine on this question "as they shall think fit," always within the limit that they shall not authorise the opening of licensed premises before 6 a.m. or require them to be closed sooner than 9 p.m. Within these limits it is entirely within the discretion of the magistrates to fix the hours of opening and closing within the "particular locality." It is presumed that the magistrates, before coming to any resolution such as that complained of, will satisfy themselves of the requirements of the locality, but they are not limited to any mode of inquiry in reference to such requirements, and they are certainly not bound to consult the holders of licences as to any proposed change in the hours or hear them in objection thereto.

The pursuers' second ground of complaint is, that having appealed against the decision of the Magistrates, the Appeal Court would not hear the appeal, but dismissed it as incompetent. I think the Court of Appeal was right. If the view which I have already stated of the effect of the 2nd section of the Act of 1862 is correct there plainly was no room for an appeal. All that the pursuer complained of was that the Magistrates had limited the hours during which he might have his premises open for business. If, however, that was a matter entirely in the discretion of the Magistrates—a thing with which they might deal "as they should think fit"—the Court of Appeal could not meddle with that. To do so would be an exercise of their discretion, but to their discretion the statute had committed nothing. If the Court of Appeal was not competent to give the remedy sought by the appeal there could be no competent appeal—there was nothing appealable. It is said, however, that the 14th section of the Home Drummond Act gives a right of appeal, and that clause is no doubt expressed in very comprehensive terms. It allows an appeal against any proceeding disposing of an application for a licence. I think this, however, must be read along with the later

Act of 1862, and cannot be read as allowing an appeal on any matter which has been placed exclusively within the discretion of some other Court or body. The appeal under the Home Drummond Act must, I think, by fair implication be limited by the subsequent legislation.

LORD MONCREIFF—I do not differ from your Lordships and the Lord Ordinary in regard to most of the objections stated by the pursuers to the proceedings of the defenders. It sufficiently appears from the pursuers' own statements that they were fully and fairly heard (by counsel) at the general meeting held on 8th April 1902, and the adjourned meeting on 11th April, and that the Magistrates allowed evidence to be led at these meetings before deciding as to the alteration of the hours of closing.

The pursuers complain that before the meeting of 8th April the Magistrates had prejudged the question by having private and official conferences and communings among themselves and with the magistrates of other towns. Now, the magistrates as licensing authority are an exceptional tribunal. While they are bound, as Lord Halsbury says in the case of *Sharp* v. *Wakefield* (L.R. App., Ca. 1891, p. 181), "to exercise a judicial discretion," they have a very wide discretion, and their duties to a great extent are ministerial. They are therefore entitled to take steps to inform themselves on matters connected with granting of licences, and provided that they have no personal interest in the matter and hear and consider what is to be said by the parties who will be affected by their decision and who are entitled to be heard, their decision will not be invalidated in consequence of previous inquiries on the question of early closing generally, and in particular as to the requirements of a certain locality.

Neither (although this objection presents more difficulty) do I think that the proceedings are invalidated in consequence of the Magistrates having authorised the employment of counsel by the Procurator-Fiscal and Chief-constable. These parties have an official *locus standi*, and are entitled under the statutes to object to the granting or renewal of licenses in the interest of the public. I think that, looking to the relations in which they stood to the Magistrates, and to the fact that it was known that the pursuers were to be represented by counsel, and having regard to the importance of the question, the Magistrates as a body were entitled, before any decision had been arrived at, to authorise the employment of counsel. I think the case can be distinguished from the case of *The Queen* v. *London County Council* (L.R., 1892, 1 Q.B. 190), because in that case counsel were appointed, after the majority of the committee had refused the licence, by four individual members of the committee, to represent not an independent official but themselves, and defend their judgment before the council. The distinction may be narrow, but in the absence of any prejudice caused to the pursuers I am not prepared to sustain this ground of reduction.

The only question on which I propose to differ from the Lord Ordinary and your Lordships is as to the competency of appeal to Quarter Sessions.

The Lord Ordinary has held that appeal to Quarter Sessions is incompetent. The question depends upon the construction of section 14 of the Home Drummond Act of 1828 and section 2 of the Public-Houses Act of 1862. The pursuers, who are wine and spirit merchants in the Broomielaw district of Glasgow, lodged applications for renewal of their current public-house certificates to the general half-yearly meeting held by the Magistrates of Glasgow on 8th April 1902. Their current certificates bore that the pursuers were "not to keep open and sell exciseable liquors before 8 of the clock in the morning or after 11 of the clock at night of any day." As the pursuers were holders of licenses and applied for renewals the Magistrates were not entitled to refuse to renew the certificates without hearing the pursuers if they wished to be heard (Act of 1828, sec. 7).

Now, under the appeal clause, the 14th section of the Home Drummond Act, it is provided that if "any justice of the peace" —I note in passing that the appeal is not limited to the applicant—"or proprietor or occupier of any house in respect whereof any such certificate shall be applied for, shall be dissatisfied with any proceeding of any justices or magistrates assembled for granting certificates as aforesaid, whether in granting or refusing or otherwise disposing of any such application, it shall be lawful for such justices of the peace, proprietor, or occupier, to appeal therefrom to the next Quarter Sessions of the peace for the county." I point out in passing that in regard to appeal the decision of the magistrates in a burgh is regarded as being *in pari casu* with the decision of justices in a county. An appeal to Quarter Sessions is allowed equally in either case. This case must be disposed of on that footing.

What the Magistrates did at the general meeting held on 8th and 11th April 1902 was, while renewing the pursuers' certificates, to alter the hour of closing from eleven o'clock to ten, inserting the latter hour in the certificates. They maintain that not only were they empowered to do so by the terms of the 2nd section of the Act of 1862, but that their decision upon the point is final and not subject to review or reconsideration by Quarter-Sessions. In altering the hours of closing the Magistrates were, in my opinion, refusing or at least "disposing of" the pursuers' applications within the meaning of the 14th section of the Home Drummond Act. The applicant for renewal asks for a certificate in the same terms as before. The Magistrates refuse the application as made, but grant a certificate with altered hours. That, *prima facie*, is refusing or "disposing of" the application. Therefore, in the absence of a clear exclusion of review, their deliverance would seem to be appealable to Quarter-Sessions.

I am unable to find such an exclusion of review in the 2nd section of the Act of 1862. The Lord Ordinary's judgment proceeds on the assumption that the justices or magistrates' resolution to alter the hours of closing in a particular locality is something separate and apart from the disposal of applications for renewal of certificates. He holds that when the justices or magistrates have passed a resolution to alter the hours of closing in a particular locality, which in his opinion they may do before a single application is heard or considered, they thereafter act just as if they were simply administering the Act in terms of a schedule in which such altered hours were substituted, and that the applicants have no more right to question or object to the substituted hours than they have to question or object to the ordinary statutory hours of opening and closing in the schedule. In this view it is maintained there is nothing to appeal against, as the applicants get a certificate in proper statutory form, the magistrates not having refused the application or disposed of it otherwise than in strict accordance with the letter of the statute.

That may be the correct view. It is certainly extremely simple, but I do not think that the words of the statute support it. Indeed there is no mention whatever in the statute of a resolution, and the alteration of the hours of opening and closing is only authorised in connection with the consideration and granting of applications for certificates. The words are—"It shall be lawful for such justices or magistrates respectively to insert in such certificates such other hours," &c. There is here no provision for giving notice of a resolution, and there is no definition of the word "locality," which may apply equally to one or to a dozen houses. Must the resolution be passed in open court? and if so, may no applicant object? On these points the statute is silent—a remarkable omission if the resolution is a separate and independent step. If the Lord Ordinary is right the Magistrates are entitled to announce at the outset that they have resolved to alter the hours in the certificates without having heard the applicants for renewal. In short, in the Lord Ordinary's opinion, the alteration of the hours of closing is a matter with which the certificate-holder has no concern, and as the statutes do not specially provide for an appeal against an alteration of the hours of closing, the decision of the Magistrates is final.

No doubt before resolving to insert a different hour for opening or closing in the certificate the magistrates must consider and decide whether the locality in which the public-house stands requires other hours than those in the statutory schedule. But I find nothing in the statute which authorises an antecedent abstract resolution. The only practical expression of the magistrates' decision which is contemplated by the statute is the insertion of other hours in the individual certificates granted.

Perhaps the logical result of this view should be to hold that the resolution invalidated the proceedings of the Magistrates at the general meeting, and I should be prepared so to hold if I thought that the resolution prevented an appeal to Quarter Sessions. I think, however, that looking to the peculiar functions and procedure of a licensing authority at the general meetings, such a resolution may be regarded simply as a convenient mode of ascertaining the mind of the meeting on the matter, just as if, for instance, on the first application for renewal of a certificate coming up for consideration, the magistrates, after hearing parties, announced that in that case and in the case of other public-houses in the same locality they intended to restrict the hours of trading. In this view, if the decision were arrived at in open Court, and after hearing all that was to be said by the parties interested and entitled to be heard (including other applicants in the same locality), I see no reason why it should vitiate the proceedings. But as regards the right of appeal, the thing to be looked at is not the resolution but the certificate, and the effect of the resolution on the certificate. The appeal is against the insertion of other hours in the certificate, and the resolution is only a record of the reasons which led the Magistrates to make the alteration.

The power conferred on the justices or magistrates is one the exercise of which may have important and serious consequences to the holders of certificates and to the public. It is no trifling regulation. The defenders themselves did not treat it as a matter of regulation; they took evidence and heard parties upon it, which they need not have done if it had been a mere regulation. A reduction of the hours of trading may be just as fatal to the holder of a certificate as a refusal. The justices or magistrates may reduce the hours of trading from fifteen to thirteen in the case of one publican, while a rival not in the same locality but in the next street may be allowed to keep his shop open for fifteen hours, or even for seventeen if the magistrates think fit. That is an extreme case, but it is possible. Again, they may extend the hours from fifteen to seventeen in all cases in a locality against the wishes and opinion of other justices who may desire to appeal. What we have to consider is, whether it is necessarily implied (it certainly has not been expressly enacted) that so wide a power is not subject to reconsideration by the justices in Quarter Sessions. In this case there was a pretty full bench of Magistrates, but it must be remembered that two justices of the peace or two magistrates form a quorum. It would therefore be in the power of two justices or two magistrates to make such an alteration in the hours and without previous notice.

I do not find in the statutes any warrant for holding that the decision of the magistrates or justices at the general meeting is final on this matter. I think it is appealable to Quarter Sessions under section 14 of the Home Drummond Act, and this has been the understanding hitherto. I observe

that in the case of *Ashley* v. *Magistrates of Rothesay*, 11 Macph. 709, an appeal to Quarter Sessions was entertained apparently without objection; and in the case of *Irvine and Others* v. *Magistrates of Dundee*, now before us, an appeal was also taken and considered.

The Early Closing Act of 1887 has been referred to by the Lord Ordinary, and I only mention it by way of showing what a very different question might have arisen under that Act. That Act admittedly does not apply to this case, because here the Magistrates were dealing with a community of above 50,000 inhabitants; but if it had applied a different question would have arisen. In the first place, the Statute of 1887 expressly alters the schedule of the Act of 1862 in regard to the hours of closing by taking out "the hour of eleven at night" and substituting for that part of the schedule the words "and do not keep open house or permit or suffer any drinking on any part of the premises belonging thereto, or sell or give out therefrom any liquors before eight of the clock in the morning, or after such hour at night of any day not earlier than ten and not later than eleven as the licensing authority may direct." Next, in defining the licensing authority it defines the licensing authority in burghs to be the magistrates of the burgh, and in counties to be "the justices of the peace of a county," not in General Session, but "in Quarter Sessions assembled within their districts of jurisdiction respectively." Now, that may be read as indicating that it was intended that the resolution to alter the hour of closing from eleven to ten under that Act was to be a proceeding quite separate from consideration of the renewal or granting of certificates at the ordinary Licensing Court. For observe, in the one case the magistrates alone—not the justices in Quarter Sessions—are to be the licensing authorities in burghs who are to determine the question, and in counties, not the justices of the peace in general meetings (who are the licensing authority in the first instance), but the justices in Quarter Sessions, are to be the parties to decide whether the hours are to be reduced from eleven to ten. I only refer to that Act to show how different its terms are from those in the Home Drummond Act and the Act of 1862. Under these Acts, as I read them, the magistrates could only alter the hours of closing when applications for certificates were under consideration at the Licensing Court, and with special reference to the individual certificates. Under the Early Closing Act of 1887, as I read it, the magistrates in burghs and the justices in Quarter Sessions assembled in counties are for the first time empowered to resolve upon early closing by a general resolution, which need not be come to at the Licensing Court or with reference to any particular application.

I am therefore of opinion that although, as I assume, the Magistrates at the general meeting acted within their powers, an appeal to Quarter Sessions against their decision was competent and should have been entertained, and that we should find accordingly.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Sol.-Gen. Dickson, K.C.—Wilson, K.C.—Hunter. Agent—James Purves, S.S.C.

Counsel for the Defenders and Respondents the Magistrates of Glasgow—Salvesen, K.C.—Cooper. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders and Respondents the Town Clerk and Depute Town Clerk of Glasgow—Shaw, K.C.—T. B. Morison. Agents—Campbell & Smith, S.S.C.

Friday, February 20.

SECOND DIVISION.

BAIRD'S TRUSTEES *v.* BAIRD'S TRUSTEES.

Succession—Fee or Liferent—Repugnancy.

In his trust-disposition and settlement a testator directed his trustees to "divide and apportion" the residue of his estate between his two daughters. He then directed and appointed the trustees to hold the daughters' shares for their liferent alimentary use allenarly, and to pay to each the annual interest, rents, and proceeds of her share half-yearly during their respective lives, with a power to the trustees of making certain specified advances out of capital. The deed further provided that on the death of each of the daughters her share was to go to her issue, if she had any, in fee equally, subject to a power of apportionment in the daughter, but that if the daughter did not leave issue the fee was to go to the daughter's own nearest heirs, with a limited power in the daughter of burdening her share with an annuity not exceeding £100 in favour of her husband.

Held that the daughters had a liferent only of one-half each of the residue, and not a fee thereof subject to defeasance in the event of their having issue.

John Baird, architect in Glasgow, died on 18th December 1859, leaving a trust-disposition and settlement, dated 20th January 1859, and a codicil thereto dated 14th July 1859. By the trust-disposition and settlement he conveyed his whole means and estate, heritable and moveable, to trustees for the purposes specified. With regard to the residue of the trust-estate the trust-disposition and settlement provided as follows:—"With regard to the residue of my means and estate or of the prices and produce thereof, I direct my trustees to divide and apportion the same equally between my said two daughters Flora Baird and Agnes Ann Baird: And I direct and appoint my trustees to hold the shares of my said daughters respectively for their