Wednesday, July 19.

FIRST DIVISION.

(Before Seven Judges.)

[Lord Kyllachy, Ordinary.

WALSH *v.* MAGISTRATES OF POLLOKSHAWS AND OTHERS.

Public-House — Licensing Court — Certificate—Refusal to Renew — Statement by Inspector of Police, but without Evidence Led, that Premises Insanitary and District Congested—Discretion of Licensing Authority—Licensing (Scotland) Act 1903 (3 *Edw. VII, c.* 25), *secs.* 11, 19, and 20.

At a meeting of a Licensing Court, without notice objection was taken to the renewal of a certificate by an inspector of police that the premises were insanitary and the district congested. The applicant having been heard but no evidence led, the Court refused the application and its decision was affirmed by the Licensing Appeal Court.

The applicant having raised an action of reduction in the Court of Session, on the ground (1) that the Court had exceeded its statutory power in allowing an inspector of police to state objections without notice, and (2) that in refusing to renew the certificate it had not judicially discriminated, and had acted illegally, inasmuch as there was no evidence to support the objection, the Lord Ordinary allowed a proof on the first ground, but as to the second held that the averments were irrelevant. The pursuer reclaimed and sought a proof on both branches.

The Court *adhered*, holding that it had no power to interfere with the discretion of the licensing authority exercised within its statutory limitations, unless such discretion had not been exercised judicially.

Lundie v. *Magistrates of Falkirk*, October 30, 1890, 18 R. 60, 28 S.L.R. 72, *followed; Evans* v. *Conway Justices*, [1900] 2 Q.B. 224; and *Raven* v. *Southampton Justices*, [1904] 1 K.B. 430, *distinguished.*

The Licensing (Scotland) Act 1903 (3 Edw. VII, c. 25), enacts—sec. 11—"*Certificates to Keep Inns, &c., to be Granted at Meetings* —(1) At any general half-yearly meeting of a licensing court or at any adjournment thereof . . . it shall be lawful for the said court to grant certificates for the year or half-year next ensuing as the case may be . . . to such and so many persons as the court then assembled at such meeting shall think meet and convenient, to keep inns and hotels or public-houses within which exciseable liquors may under Excise licences be sold by retail to be drunk or consumed in the premises within the jurisdiction of such court: . . . Provided always that all such meetings shall be held with open doors, and that it shall not be competent to refuse the renewal of any certificate without hearing the party in support of the application for renewal in open court, if such party shall think fit to attend, and any certificate granted otherwise than at such meetings shall be void and of no effect. . . ." Section 19—"Any person or the agent of any person owning or occupying property in the neighbourhood of the house or premises in respect of which any certificate or renewal of any certificate shall be applied for, may object to the granting or renewal of such certificate by lodging at any time, not less than five days before the general meeting of the licensing court, with the clerk to such court a notice in writing to that effect, signed by such person or his agent, specifying the grounds of such objection, which objection shall be heard at the then ensuing general meeting: . . . Provided always that no such objection shall be entertained unless it shall be proved or admitted that the person so objecting or his agent did, at least five days before such general meeting, deliver or cause to be delivered to the person applying for such certificate a copy of the aforesaid notice, or did forward to him by post, or did leave for him a copy thereof addressed to him at his place of abode as mentioned in his application, or, in the case of an application for the renewal of any certificate, at the licensed premises for which the application is made. . . ." Section 20—"It shall be lawful for the licensing court at any general meeting to hear and determine without the notice required by the immediately preceding section, any objections to be made verbally or in writing by any member of such court or by the procurator-fiscal, chief constable, or superintendent of police against the granting or renewing of any certificate."

This was an action of reduction and declarator at the instance of Mrs Agnes Boyle or Walsh, formerly spirit merchant in Pollokshaws, and residing at 106 King Street there, against, *inter alios*, (1) the Provost and Magistrates of the said burgh as the licensing authority thereof under the Licensing (Scotland) Act 1903, and (2) the members of the Burgh Licensing Courts and the Justices of Peace for the county of Renfrew who attended and constituted the Licensing Appeal Court for the said burgh of Pollokshaws held at Paisley on 5th May 1904.

The pursuer craved reduction, of (1) a deliverance of the Magistrates of Pollokshaws made at a meeting for the granting and renewing of certificates for the sale of exciseable liquors under the Licensing (Scotland) Act 1903 held at Paisley on 12th April 1904, whereby the Magistrates refused the pursuer's application for a renewal of her certificate; (2) a deliverance of the other defenders sitting as the Court of Appeal for the said burgh.

The pursuer averred that she had held a public-house certificate for the premises at 81 King Street, Pollokshaws, since the death of her husband James Matthew Walsh on 22nd February 1902, and was entirely dependent for her support and that

of her family upon the business; that she obtained the transfer from the Justices in the usual way a few days before the death of her husband, and renewals were granted to her without objection at the annual meetings of the Justices in April 1902 and April 1903.

She further averred—"(Cond. 2) . . . The deceased James Matthew Walsh purchased the business from the previous holder Alexander Finlayson. The price paid for the goodwill and fittings was £1050, and a transfer of the certificate was granted to said James Matthew Walsh in or about June 1900. The seller Alexander Finlayson had held the certificate for the long period of about fifty years, and his father had held it for some years before that. In addition to the £1050 for goodwill, the deceased paid A. Finlayson £47, 17s. for stock taken over, and he also spent considerable sums for additional fittings and alterations of a minor nature. (Cond. 3) No complaint was ever made against the management of the business by the licensing authorities or by the police, nor any objection taken to the renewal of the public-house certificate, and no complaint in regard to the suitability or the sanitary condition of the premises was ever made by the licensing authorities, the police, or the sanitary authorities prior to the Licensing Court of 12th April 1904. No notice of any objection to the application for renewal of the certificate was given to the pursuer prior to the meeting of the Court on said 12th April 1904. (Cond. 4) At the Licensing Court, on 12th April 1904, applications were made for the renewal of thirty-five public-house certificates in the burgh. The Magistrates dealt with various of these applications in four groups. The first group consisted of six applications, the second group consisted of ten, the third of five, and the fourth of eight applications. The remainder of the thirty-five were treated separately. The pursuer's application was in the third group of five. These were first all called together. Each of the applicants was then heard separately. When pursuer's agent moved for the renewal, Inspector Alexander Geddes, of the Renfrewshire County Police, verbally objected to the renewal on the ground that the premises were insanitary and the district congested. He did not, in stating the objections, give any explanation as to the alleged insanitary condition, and as to in what respect it consisted, but merely the *pro forma* objection, nor did he give any explanation as to the alleged congested condition of the district, and no questions were asked on these points by the Magistrates. The procurator-fiscal for the burgh was present but did not object. The said Alexander Geddes was not put on oath, and did not farther explain in what respect the premises were insanitary, and no evidence was led in support of either of said objections. After Inspector Geddes had verbally intimated his said objections, the pursuer's agent, in respect of the powers of the Licensing Court under the Act of 1903, sec. 42, sub.-sec. 3, informed the court that the pursuer would undertake, if her application were granted, to carry out any recommendation the court might make in regard to the sanitary arrangements of the premises, but his offer was disregarded. In point of fact, as the court knew nothing about the sanitary condition of the premises, and made no inquiry, they could make no recommendation. After hearing the agent for the pursuer, the members of the court, without calling for evidence, retired to consider the pursuer's application along with the four applications in the same group by other persons for renewal of certificates for other premises, and on returning to the court hall . . . Provost Robert Wilson, as chairman, intimated that the court refused two of the applications, including the pursuer's, on the ground that the premises were insanitary and the district congested, and her application was accordingly refused by the said court. No indication whatever was given, or has yet been given, in what respect pursuer's premises were insanitary. (Cond. 6) Said refusal to renew pursuer's licence was in pursuance of a preconceived determination of the Magistrates of Pollokshaws, adopted prior to the said Licensing Court. On 1st April 1904 the Town-Clerk, acting on behalf of the Magistrates, sent a letter to the pursuer and each of the other licence-holders in the following terms:—'After full consideration of all circumstances, the Magistrates, at a meeting last night, were unanimously of opinion that the number of licensed premises in the burgh of Pollokshaws is greatly in excess of the reasonable requirements of the inhabitants. In view of this they have instructed me to write to all certificate holders in the burgh and inquire whether they have any scheme to propose or any suggestion to make whereby the number of licences may be reduced for the ensuing year. You are requested to let me have a reply to this communication not later than 7th inst.—Yours truly, ROBERT BRYCE WALKER, *Town Clerk*.' The Magistrates in so acting and arriving at their unanimous opinion, and that before the statutory Licensing Court, exceeded their statutory powers and duties, acted illegally and to the pursuer's serious loss and prejudice. To this circular letter the Magistrates received a reply from the licence-holders collectively and from individual licence-holders personally. As their replies did not satisfy them, they arranged that Inspector Geddes should take objections to certain of the renewals in order to give them the opportunity of making the reduction on which they had determined. And at the said Licensing Court the Magistrates dealt with the applications without having any evidence before them that the district was over-supplied or which would enable them to discriminate among the various premises for the suppression of any of them, and in particular having no evidence before them that the pursuer's premises were insanitary, but disposed of the applications entirely on their own preconceived determination. (Cond. 9) The refusal to renew the pursuer's certificate was unwarranted, and the grounds given by the Magistrates

were not such as they were entitled in law to proceed upon. Her premises were in the same condition, so far as sanitary arrangements are concerned, as they had been in for many years without any objection being taken thereto. The said defenders were bound, before proceeding upon such a ground to refuse a renewal of the pursuer's premises, to give her an opportunity of altering said premises to meet the requirements of the Magistrates. The action of the defenders was oppressive. Further, the defenders were not entitled to single out the pursuer's licence as they did and arbitrarily to refuse it on the ground that the district in which the pursuer's public-house was situated was congested. (Cond. 10) The pursuer duly appealed against the said defender's refusal to renew her licence to the Court of Appeal for the Burgh of Pollokshaws. . . . That appeal court, actuated by the same motives and in the pursuance of the same preconceived determination, refused to reverse the deliverance or judgment wrongfully come to by said Magistrates, and their deliverance is the second document sought to be reduced. There was no appearance for any objector in the appeal, and no evidence of any kind, or in support of any objection, was heard or suggested. No one having a right to appear did appear and lead evidence against the appeal, and the pursuer, as the appellant, had, *prima facie*, a right to have her appeal sustained, but notwithstanding thereof said appeal was refused."

In answer the defenders averred that the whole actings of the Magistrates in regard to the pursuer's application were perfectly lawful and regular, and were entirely within their powers and discretion.

They further averred as follows:—(Ans. 4) "Admitted that at the said Licensing Court applications were made for the renewal of all the public-house certificates in Pollokshaws, being thirty-five in all. Admitted that the Magistrates, as a matter of convenience, dealt with the applications in the order of the groups into which they naturally fell, according to the locality of the premises. Explained that the names of the applicants in the group of which the pursuer was one were first called over to see that all the applicants were in attendance. Admitted that each of the said applicants was then heard separately in support of his or her application, and that the Magistrates then retired and considered each of the said cases separately. Admitted that when pursuer's agent moved for the renewal of her licence Inspector Geddes, acting on behalf of, and as authorised in writing by, the Chief-Constable of Renfrewshire, read to the Licensing Court objections taken by the said Chief-Constable to the granting of said renewal. The objections of the Chief-Constable were in writing and were in the hands of the said Inspector Geddes, who read them out to the Licensing Court. Inspector Geddes himself took no objections to the said application. The Chief-Constable was unable to be present in person, because five licensing courts were being held simultaneously in Renfrewshire upon the said date, and he was personally present at one of these other than Pollokshaws. There are only two superintendents of police in Renfrewshire, and they also were personally present at other licensing courts being held at the same time. In these circumstances the Chief Constable authorised and instructed (as he was entitled to do) the said Inspector Geddes, who is located in the burgh of Pollokshaws and discharges the duties of chief officer of police there, to state on his behalf to the said Licensing Court at Pollokshaws his (the Chief-Constable's) objections against the renewal of pursuer's certificate. The Chief-Constable was entitled to make any objections either verbally or in writing against the renewing of said certificate without previous notice, and the Licensing Court were entitled to hear and determine said objections. The objections taken by the Chief-Constable to the pursuer's application were that the premises were unsuitable from a sanitary point of view, and that the licence was not required in the district. It was within the power of the Magistrates to dispose of said objections without hearing evidence. The Magistrates had visited before the date in question all the licensed premises in the burgh, and were acquainted with the sanitary condition of the pursuer's premises. Admitted that after hearing the pursuer's agent and the objections taken by the Chief-Constable, and without evidence led, the Magistrates retired and considered the pursuer's application, and thereafter returned to the court-room and announced their decision. Explained that when the Magistrates returned to the court, the clerk called over each application, and the chairman, as each was called, announced the judgment of the court separately in each instance. Admitted that the Magistrates refused the pursuer's application, on the grounds that the premises were insanitary, and that the licence was not required. Admitted that another application was also refused upon similar grounds. Explained that all the five premises in the said group were situated within a radius of 50 yards."

The pursuer pleaded, *inter alia*—"(1) The refusal of the pursuer's application, and the affirmance thereof by the Court of Appeal, should be reduced or declared of no effect in respect the proceedings complained of were outwith the statutes and unlawful. (2) The deliverance of the Magistrates refusing the pursuer a renewal of her certificate ought to be reduced on one or other of the following grounds:—(*a*) Because the Magistrates had previously to the Licensing Court prejudged the application by forming a policy to reduce the number of certificates, and *separatim*, had acted thereon without judicially discriminating. (*c*) Because the said Alexander Geddes (he not being a chief-constable or superintendent of police) was heard by the Magistrates without his having given notice of objection to the renewal of the pursuer's certificate."

The defenders pleaded, *inter alia*—"(3) The whole actings of the said Magistrates

in the matter libelled being lawful and regular, and being within their powers and discretion, the action is groundless, and these defenders should be assoilzied, with expenses. (4) The objections stated in the Licensing Court against pursuer's application being lawful and competent, the deliverance of the Magistrates is not open to reduction on the ground that said objections were heard by the Magistrates."

On 24th December 1904 the Lord Ordinary (KYLLACHY) pronounced this interlocutor—"Finds that, apart from the pursuer's averments in condescendence 4 relating to the alleged departure by the Magistrates from the statutory enactments on receiving and entertaining an objection to the renewal of the pursuer's licence stated by Alexander Geddes therein designed, the pursuer has stated no relevant case for the interference of the Court; therefore repels the pursuer's pleas except so far as founded on said alleged illegal procedure, and in respect that the parties are at issue as to the facts regarding the said procedure, and are agreed that the same must be ascertained by a proof before further answer, allows to both parties a proof of their respective averments as to said matter as contained in condescendence 4 and the defenders' answer thereto, and to the pursuer a conjunct probation."

The pursuer having reclaimed, the First Division, on 23rd February 1905, appointed the case to be argued before Seven Judges.

Argued for reclaimer—By section 42 (2) of the Licensing Act 1903 it was made illegal to alter licensed premises without the consent of the Licensing Court. The Magistrates here had taken an unfair advantage of that provision of the statute, as they had not made any complaint as to the state of the premises in question and so had prevented the pursuer from putting them right. The discretion of the Magistrates in refusing the renewal had not been judicially exercised. It did not appear what was the ground of discrimination. Proof of the ground of discrimination should be allowed. This the Lord Ordinary had refused. The case of *Lundie* v. *Magistrates of Falkirk*, October 31, 1890, 18 R. 60, 28 S.L.R. 72, relied on by the Lord Ordinary, was inapplicable, as the question here was not so much excess of jurisdiction as the non-judicial exercise of a discretion. Moreover, *Lundie's* case was prior to several well-known English authorities on the point, viz., *Sharp* v. *Wakefield* [1891], A.C. 173, *per* Lord Chancellor, at p. 179; *Rex* v. *Howard* [1902], 2 K.B. 363; *Raven* v. *Southampton Justices* [1904], 1 K.B. 430. The pursuer's premises were free from sanitary defects, and the mere fact that the Magistrates had resolved that there were too many public-houses was not a good ground of discrimination—*Evans* v. *Conway Justices*, [1900] 2 Q.B. 224.

Argued for the respondents—The Magistrates after careful consideration had come to the conclusion that this burgh was over-licensed, and their discretion as to that was absolute. There was sufficient ground of discrimination, viz., inadequacy of sanitary arrangements. The Magistrates had visited and carefully inspected all the public-houses in the locality. There was no collusive arrangement to take away the pursuer's licence. The Magistrates were entitled under the Act to refuse licences without specifying the grounds of their refusal. The English cases cited as to the discretion of the Justices were inapplicable, and in any event not binding in Scotland. The cases cited as to the powers of Quarter-Sessions in England were not in point, as the statutes regulating the matter were different from the Scottish Licensing Acts—*Boulter* v. *Kent Justices* [1897], A.C. 556. The Magistrates here had an absolute discretion, with which the Court would not interfere unless the procedure had been irregular or the discretion had been capriciously exercised—*Lundie, cit. supra; Miller* v. *Campell*, January 17, 1849, 11 D. 355; *Cameron* v. *Magistrates of Glasgow*, February 20, 1903, 5 F. 490, 40 S.L.R. 577.

At advising—

LORD PRESIDENT—In this case the pursuer is a Mrs Walsh, who until recently was a licence-holder in a shop in Pollokshaws. The defenders are the licensing authorities of Pollokshaws, constituted under the recent Act and the Appeal Court of the burgh of Pollokshaws and county of Renfrew, who are the appeal authority under the same Act. The pursuer got a transfer of the licence in the premises which she recently occupied in the years 1902 and 1903. She succeeded her husband, deceased, who had acquired the business about two years before, the business being at that time an old one and having, as we are told, had a licence for the period of about fifty years. At the Licensing Court in April 1904 the pursuer was refused a renewal of her licence and the present action is brought by her and directed against the licensing authority, and seeks for reduction of the proceedings then carried through upon various grounds which are set forth in her condescendence.

Now, the averments in the condescendence are contained specially in cond. 4 and following articles. I shall not read them at length to your Lordships, but for practical purposes they may be summarised thus—the pursuer says that before her appearance at the Court, where I need not remind you she was about to seek renewal of the licence, no objection had ever been taken to the way in which she conducted her business in any respect, but that when she got to the Court she heard for the first time an objection stated which was stated by a certain inspector, Alexander Geddes, of the Renfrewshire County Police. The objection stated by him was twofold, and was that the pursuer's premises were insanitary and the district congested.

Now, I ought to explain that Alexander Geddes was, as I have said, an inspector, but he was not the chief-constable. Your Lordships will remember that under the provisions of the Act it is laid down that no objection shall be dealt with of which due

notice, as prescribed by the Act, has not been given, except that there are certain privileged persons who may state objections on the spot, of whom the chief-constable is one. Alexander Geddes, we are told, affected to act on behalf of the chief-constable, but was not the chief-constable himself. In that state of the averments Lord Kyllachy, before whom the case depended, pronounced this interlocutor:—"Finds that, apart from the pursuer's averments in cond. 4 relating to the alleged departure by the Magistrates from the statutory enactments on receiving and entertaining an objection to the renewal of the pursuer's licence stated by Alexander Geddes therein designed, the pursuer has stated no relevant case for the interference of the Court: Therefore repels the pursuer's pleas except so far as founded on said alleged illegal procedure; and in respect that the parties are at issue as to the facts regarding the said procedure, and are agreed that the same must be ascertained by a proof before further answer, allows to both parties a proof of their respective averments as to said matter as contained in cond. 4, and the defenders' answer thereto, and to the pursuer a conjunct probation." Against that interlocutor this reclaiming note has been taken, the pursuer urging that she should be entitled to a proof of the whole of her averments on record. The respondents do not desire to disturb the Lord Ordinary's interlocutor, and therefore in any case there must be a proof upon the limited matter allowed.

The Lord Ordinary's interlocutor is confessedly based upon the judgment which was pronounced by this Division of the Court in the case of *Lundie* v. *The Magistrates of Falkirk*, 18 R. 60. The facts in that case are these—Lundie, who was a public-house keeper and had applied in ordinary form for a renewal of his certificate, had his certificate refused, and the ground on which it was refused was that he had improperly conducted his house; and the way in which that was sought to be proved in Court was that two constables deponed to having seen drunk persons issuing from the public-house, and that state of facts was corroborated by the personal knowledge of the presiding member of the Licensing Court at that time. Lundie complained that he had not had an opportunity of showing, as he said he was prepared to show, that these drunk persons had not been supplied with liquor by him, and that so far consequently from the fact of these drunk persons having been seen issuing from his public-house being evidence of the bad keeping of the public-house, it really, if the facts had been truly known, would have proved something quite the other way, namely, that in his anxiety to obey the conditions of his certificate by maintaining good order and rule in his premises, he had properly turned away men who had entered his premises intoxicated without supplying them with further liquor, so as not to contravene the statute. He complained that, though he could prove all these facts, he never had an opportunity of doing so, and judgment had been pronounced *de plano* against him. Now the reasons that are alleged why the application of *Lundie's* case to the present case should be considered or reconsidered are these—in the first place, that that case was under a different Act, for as your Lordships know, a recent Act has passed since that date; and secondly that that case was decided upon 31st October 1890, whereas the well-known case of *Sharp* v. *Wakefield* in the House of Lords was not decided until 1891.

As regards the first point, I mean the point of the difference of the two Acts, there is no doubt one specialty in *Lundie's* case which does not apply to this. Lord President Inglis, who delivered the judgment of the Court in *Lundie's* case, says at one portion of his judgment—"When an appeal is given to a particular tribunal, that would in ordinary circumstances impliedly exclude any other appeal; but in the present case the statutes do not leave the matter there, for they provide not only that there shall be an appeal to the quarter sessions, but by the 34th section of the Act 25 and 26 Vict. cap. 35," that being the ruling licensing Act in this country at that date, "it is further provided that no warrant, sentence, order, decree, judgment, or decision made or given by any quarter sessions, sheriff, justice, or justices of the peace, or magistrate, in any matter under the authority of these Acts shall be subject to reduction or appeal or any other form of review, on any ground or for any reason whatever, other than by this Act provided." So that to a certain extent, no doubt, the Lord President in that case did go upon the finality clause, and he held that, as this was a judgment given by justices of the peace and quarter sessions, the finality clause applied. Now, that cannot be said of the present Act, because the finality clause in the present Act is in somewhat different terms. The finality clause of the present Act is embodied in section 103, and it is this—"No warrant, sentence, order, decree, judgment, or decision, made or given by any quarter sessions, sheriff, justice or justices of the peace, or magistrate, in any cause, prosecution, or complaint, or in any other matter under the authority of this Act, shall be subject to reduction," and so on. Now, it is clear on the construction of that section that that applies to matters such as prosecutions, and that it does not apply to decisions given by a licensing court, because a licensing court is a specially constituted Court under the Act and does not come under the nomenclature of quarter sessions, sheriff or justices of the peace, or magistrates; and accordingly the pursuer is probably entitled to say that, in so far as Lord President Inglis' judgment in *Lundie's* case rested on the finality clause, he has been able to make good a distinction between the state of the law as it existed then and the state of the law as it exists now. But that, I think, is all that can be said upon the differences between the two cases. As your Lordships know, the recent Act

made no difference, on what may be called the general scheme of licensing, from the old law. It altered the tribunal, making a specially constituted tribunal instead of justices of peace in counties and magistrates in cities, which was the old tribunal, and it constituted a new appeal court; but it left the general scheme of the law as to the granting of licences, and in particular it left the whole question as to discretion, precisely where it found it. Accordingly the subsequent remarks of Lord President Inglis may be right or may be wrong, but I do not think that they can be fairly put aside because they were made under a different Act. I think, for his purpose, they might just as well have been made under the present Act. Then his Lordship goes on thus. He says—"I cannot comprehend upon what ground we are asked to entertain this reduction. The true nature of the action is not disguised. We are asked to reduce the proceeding of the justices upon their merits, perhaps not in this sense, that the pursuer of the reduction takes up the position that the Court came to a wrong conclusion upon the evidence before it. It may be that the ground of objection is that the defenders did not take the proper evidence to enable them to decide the question before them, or that they excluded evidence which ought to have been admitted, or allowed evidence which ought to have been excluded. But all these things are within the jurisdiction of the Court to whom is committed a privity of jurisdiction under the statutes, and we have nothing to do with the way in which that Court conducts its inquiries or with the propriety of its proceedings, any more than we have with the general result at which it may arrive. In short, we are not entitled to touch a judgment of the justices or of the quarter sessions unless it can be shown that these tribunals, or either of them, have exceeded their statutory jurisdiction, and I cannot find any relevant averment in the present case that they have done so."

Now, it remains for us therefore to see whether or not, in the light of what I think now must be considered a supreme authority, namely, in the light of what the Lord Chancellor said in the case of *Sharp* v. *Wakefield*, there is anything to take back from this observation of Lord President Inglis. I am bound to say I do not think there is, except to this extent, that there may be a criticism on the actual form of the words used, especially where he says that the tribunals cannot be touched unless they have exceeded their statutory jurisdiction. But even then I think a good deal depends on how you construe these words "exceed their statutory jurisdiction." The leading passage in the case of *Sharp* v. *Wakefield*, [1891] A.C. 173, is a passage in the judgment of Lord Halsbury, the Lord Chancellor, on page 179, where his Lordship says this—"An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and 'discretion' means when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not according to private opinion, according to law and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular." If, consequently, you were to read the words "exceed their statutory jurisdiction" in their very narrowest sense, then I admit that I think the words used by Lord President Inglis would require reconsideration; but I am not at all sure that his Lordship used them in their narrowest sense, and I have not the slightest doubt that if the question could have been put to him he would have quite admitted that if the justices or tribunals he was then dealing with—and the same is to be said of the tribunal we are now dealing with—should have so flagrantly violated all conditions which show a judicial spirit, they might be interfered with to the extent of being told that they must consider the matter in a judicial frame of mind.

But as regards the merits it seems to me that the judgment of Lord President Inglis remains, that no change is made by the recent Act, and that on the merits the tribunals are absolute judges. And when I say "the merits" I mean not an adjudication of right on the one side or on the other, but the right to say "aye" or "no" to an application, after having given a judicial consideration to the request. As I have said, I think, of course, on the question of evidence there might be such a flagrant departure from all laws and practice of judicial consideration as to admit of interference by this Court. I think the analogy is very close between this matter and one on which there is much authority, namely where the Court will interfere with the proceedings of an arbiter; and, without citing further authority on that, I will only say that I know no authority from which may better be gathered the true rules under which this Court will proceed than by a contrast of the circumstances of the two old but well-known cases of *Mitchell* (*Mitchell* v. *Cable*, June 17, 1848, 10 D. 1297) and *Mowbray* (*Mowbray* v. *Dickson*, June 2, 1848, 10 D. 402), which are both reported in the tenth volume of Dunlop.

Now, what is it that is said here. It is said that there was no evidence allowed as to the insanitary condition of these premises; but on the other hand one is not entitled to disregard the fact that these persons were local gentlemen, and that they might have personal knowledge of the subject which made it in their view useless for them to insist upon evidence in the matter. Then it is also said that there was an offer to put the premises right. Now, if putting them right would have given the licence-holder a right to the licence, then certainly I should have been of opinion that the disregarding of that offer would have amounted to substantial injustice. But if the premises had been put right it gave the licence-holder no absolute right in law to have his licence. The licensing authorities were perfectly entitled if they chose to go upon this view, that the district

was what they called congested—that is to say, in other words, that there were more public-houses than the public required—and I think all that they needed over and above that was that they must give personal consideration—I mean in the sense of not mixing it up with other cases—to the case on hand. They were entitled to refuse A or B or C for any reason that seemed best to them as long as they had truly considered the cases of A and B and C; and whether in my view it would have been a good reason or not, I cannot say that I think it is an illegal reason, that they refused A and preferred B upon the ground that in the past A had not been in such a good sanitary condition as B, even although they were met with a standing offer on the part of A that if they chose, A would put his premises in as good a condition as B's were. They did in this case all that they were bound to do under section 11 of the Act, which, dealing with the granting of certificates, provides that it shall not be lawful to refuse a certificate without hearing the party in support of the application in open court. Now, if they had contravened that provision, then I think this Court would have had a jurisdiction to interfere; but they did not do that, and, for the reasons I have stated, I do not think that here we could interfere upon the ground that, if we had to form our opinions, we would have liked more evidence on this matter or the other. These are my views formed on the Act.

But the pursuer here urged very strongly upon your Lordships, and that very rightly, certain decisions which have been come to in England, which, though not binding on us, are, I need scarcely say, entitled to the very greatest respect. The decisions which she brought before our notice were the decision of *Evans* v. *The Justices of Conway*, [1900] 2 Q.B. 224. The rubric, which is short, brings out the point of the case well enough. It is this—"On an appeal to quarter sessions against the refusal of licensing justices to renew a licence, the quarter sessions are not entitled to refuse to renew a licence without evidence of any ground of objection to its renewal." And the case was followed in the case of *Raven* v. *Justices of Southampton* ([1904] 1 K.B. 430) where, although there was not, in one sense, no evidence at all, there was something which the Court held tantamount to no evidence. There was the mere production of a map showing public-houses upon it, but not showing anything about one particular house as against another. Now, the reclaimer argued that these cases were decided after *Sharp* v. *Wakefield*—in other words, that they would live with *Sharp* v. *Wakefield*, but were explanatory of the discretion as set forth in *Sharp* v. *Wakefield*—and she asked your Lordships to come to the same conclusion in this case. But without for one moment saying that I, if I had been on that bench, would not have agreed with these judgments, I am bound to say I think they were pronounced upon a law which differs in one very important particular from the law which we are now administering. The section on which much turns on this matter is the 42nd section of the Licensing Act of 1872—I am of course referring to the English Act. Now, that section has provisions as to the renewal of licences, and is in the following terms:—"Where a licensed person applies for the renewal of his licence the following provisions shall have effect:—(1) He need not attend in person . . . unless he is required by the licensing justices so to attend. (2) The justices shall not entertain any objection to the renewal of such licence or take any evidence with respect to the renewal thereof unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting. . . . (3) The justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath;" and then it goes on to say, "subject as aforesaid, licences shall be renewed and the powers and discretion of justices relative to such renewal shall be exercised as heretofore." I need scarcely point out that we have nothing at all corresponding to that section. That section was greatly canvassed in the case of *Sharp* v. *Wakefield*, because, of course, it was really a strong point of those who argued against the decision of *Sharp* v. *Wakefield* as it was eventually given. They argued, naturally enough, that these words which I have read at the end of the section left no discretion in the justices at all, but showed that if these things were not done the right to renewal was an absolute right. The House of Lords held otherwise, and it assigned to section 42 its proper place. It said, 42 is a procedure section and that procedure must be followed, but, subject to that procedure being followed, then the justices have got full discretion.

Now, I think in the light of the decision in *Sharp* v. *Wakefield*, when it is properly considered, it is not at all difficult to see the true ground of judgment in *Evans* v. *The Conway Justices* and *Raven* v. *The Justices of Southampton*. These decisions simply amount to this and nothing more, that they are a finding that in these cases the provisions of section 42 had not been followed, and accordingly if they had been disregarded I say no doubt the Court was perfectly right in setting aside the judgment; just as, if we had a completely analogous case here, I should think we would be right in setting aside the judgment if the provisions of that particular procedure section I have referred to, section 11, had not been followed in this case. I should have been prepared then to interfere with the judgment just as they did there, but I do not think these decisions can be raised beyond that, looking to the interpretation authoritatively given to section 42 by the House of Lords in the case of *Wakefield*.

Accordingly, I have come to the conclusion on the whole matter that the judgment of Lord Kyllachy was right and that we ought to adhere thereto.

LORD JUSTICE-CLERK—Your Lordship has so clearly expressed the views I entertain in this case that I feel it is quite unnecessary for me to add anything.

LORD ADAM, LORD M'LAREN, LORD KINNEAR, LORD KINCAIRNEY, and LORD STORMONTH DARLING concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Clyde, K.C.—Hunter. Agent—James Purves, S.S.C.

Counsel for the Defenders and Respondents—C. N. Johnston, K.C.—Orr, K.C.—Duncan Millar. Agents—Inglis, Orr, & Bruce, W.S.

Tuesday, June 6.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

MACGILLIVRAY'S TRUSTEES *v.* DALLAS AND OTHERS.

Process — Multiplepoinding—Double Distress—Competency.

A testator left legacies of specific sums of money to certain beneficiaries, and after bequeathing the residue of her estate to one of them provided that "in the event of any of the persons to whom legacies are or may be bequeathed by me" dying before payment such legacy should be paid "to the children of such deceaser equally among them, and failing children, then to the executors or next of kin of such deceaser." At her death it was found that the beneficiaries had predeceased the testatrix. One of them having died without children, doubt arose as to who was entitled to the legacy, and it was also suggested that it might be maintained that it had lapsed. Lest such a contention should be advanced not only with regard to the specific legacies but also as to the bequest of residue, the trustees declined to pay the legacies to the representatives of the predeceasing legatees unless they, being also the testatrix's heirs *in mobilibus*, granted a discharge of any possible claim to the residue based on the contention of such a lapse, and on this being refused they raised an action of multiplepoinding, in which they made the whole trust estate the fund *in medio*. The children of one of the predeceasing legatees, to whose legacy no one else had advanced a claim, lodged defences, in which they opposed the action as unnecessary and incompetent.

Held that the action in so far as it dealt with the specific legacy was incompetent, the right to participate therein not being in dispute.

This was an action of multiplepoinding raised by Alexander Fowler Steele, agent of the Bank of Scotland, Inverness, and William Mackay, solicitor, there, the trustees of the late Mrs Isabella Gollan or Macgillivray, of Geelong Villa, Kenneth Street, Inverness. By her trust-disposition and settlement dated 1st May 1890, with two relative codicils, all recorded 30th May 1903, the testatrix, *inter alia*, bequeathed certain legacies to persons who at her death were found to have predeceased her, including a legacy of £300 to a Mrs Isabella Gollan or Dallas. By the ninth purpose it was provided as follows — "That my trustees shall . . . realise the whole of my means and estate, heritable and moveable, real and personal, and shall pay and make over the residue and remainder thereof (after making payment of or provision for the foresaid debts and legacies) to . . . . Mrs Mary Macgillivray or Cameron; and it is hereby declared that in the event of any of the persons to whom legacies are or may be bequeathed by me by these presents, or by any codicil or codicils hereto, deceasing before complete payment of the legacy to which said deceasing person would, if he or she had survived, have been entitled, such legacy shall, so far as not paid to such deceaser, be paid by my trustees to the children of such deceaser equally among them, or failing children, then to the executors or next of kin of such deceaser."

The said Mrs Mary Macgillivray or Cameron, the residuary legatee, was one of the beneficiaries to whom the above-mentioned specific legacies had been bequeathed, and who had predeceased the testatrix.

The trustees were proceeding to pay over the estate when a question arose as to a legacy of £300 bequeathed to a Miss Catherine Gollan, who had died unmarried, which legacy was claimed by her sister on the assumption that Miss Gollan's nephews and nieces were not entitled to participate therein. The trustees submitted, with regard to this legacy, a memorial to counsel, who advised them, *inter alia*, that they should raise a multiplepoinding to which the whole parties interested in the legacy should be called as defenders, and also those interested in the residue, in case it might be maintained that the legacy had lapsed.

The trustees, in view of counsel's suggestion as to the possibility of the legacies being held to have lapsed, came to the conclusion that they were not in safety to pay the legacies including the residue without a full discharge, and intimated to the persons claiming as the representatives of the predeceasing legatees that payment could not be made. With the view of avoiding an action of multiplepoinding, however, the trustees endeavoured to obtain a discharge from the heirs *in mobilibus* of the testatrix, who would be entitled to the residue of the estate in the event of its being held that the bequests to beneficiaries who had predeceased the testatrix had lapsed. Certain of the representatives of the legatees, being such heirs, refused to grant such a discharge, and the trustees accordingly raised the present action, in which they placed as the fund *in medio* the whole trust estate, including the legacies to the beneficiaries who had predeceased.