on the croft, in order that if he does not mean to do so the landlord may put in some other tenant. This seems to me in accordance with common sense and justice, and it is, I think, consistent with the general tenor of the statute. Now, the facts in this case are not quite the same as in the example I have taken of a son going away from home and engaging in some other business. The heir here remained at home but he had a croft provided, and I do not see that he could have given any stronger proof of his assent to the widow becoming tenant of the croft which belonged to her husband than that they went together to the Crofters Commission, and, without any objection or demur on either side, were established in their respective portions of the original divided croft. That then, after a lapse of many years, and in consequence of disagreement or other circumstances, the heir can come forward and claim to dispossess the tenant, is, I think, altogether extravagant. The landlord and the new tenant have entered into mutual obligations on the assumption which they were entitled to make, that the heir had abandoned his right to the croft. The heir had announced his intention, and he cannot consistently with the general principles of law change his mind when the effect of that is to deprive other parties, who have entered into a new contract, of their contract rights, and so to alter their position to their disadvantage. But while I hold these views very strongly, I do not think the heir, if he really means to enter upon the croft when he becomes heir, can ever have a difficulty in doing so, because he has only to intimate his intention to enter to the landlord, and without any expense or process of law he is at once put into possession.

LORD KINNEAR—I am entirely of the same opinion.

LORD PEARSON was absent.

The Court sustained the appeal, recalled the interlocutor of the Sheriff-Substitute, dated 11th December 1906; found in fact in the terms above quoted; found in law that the pursuer was barred by acquiescence and delay from insisting in his present claim; therefore assoilzied the defender from the conclusions of the action; and decerned.

Counsel for the Pursuer (Respondent)—Forbes. Agent—Alex. Ross, S.S.C.

Counsel for the Defender (Appellant)—R. C. Henderson. Agent—John Grieve, W.S.

Friday, March 19.

FIRST DIVISION.

[Lord Johnston, Ordinary.

GOODALL *v.* BILSLAND AND OTHERS. CASSIDY *v.* BILSLAND AND OTHERS.

Licensing — Appeal — Mandate — Construction — Licensing (Scotland) Act 1903 (3 *Edw. VII, c.* 25), *sec.* 22.

Held that a mandate to A to appear and object to a licence "at the forthcoming Licensing Court" did not entitle him to lodge an appeal in his client's name to the Licensing Appeal Court.

Homologation — Appeal — Mandate — Homologation after Expiry of Time within which Appeal might be Taken — Validity.

The holder of a mandate to object on behalf of certain persons to the renewal of a licence at a Licensing Court, lodged, without obtaining his clients' authority, an appeal in their names to the Licensing Appeal Court. *Held* that his clients could not, after the expiry of the time within which an appeal might be taken, ratify, *quoad* the opposite party, the appeal lodged in their name.

Licensing Laws — Administration — Member of Court — Disqualification — Interest — Bias — Subscriber to Society in whose Interest Proceedings Taken.

Certain members of a Licensing Court were subscribers to a society, part of whose work it was to oppose the granting of new licences, and to press for the reduction of existing licences. *Held* that as they were not members of the society, but merely subscribers to its funds, they were not disqualified from acting as members of the Court.

Opinion reserved per the Lord President as to whether membership of such a society would amount to a disqualification.

Licensing Laws — Administration — Absence of Members of Court during Part of Case — Decision Taken Part in by Semi-Absentees — Validity.

Certain members of a Licensing Appeal Court who were absent during a considerable portion of a case took part in its decision. *Held* that the decision was thereby rendered null, and that it could not be validated by deducting the votes of the disqualified members.

On 20th May 1907 Alexander Goodall, wine and spirit merchant, 68 M'Alpine Street, Glasgow, brought an action against (1) Sir William Bilsland and others, the members of the Licensing Appeal Court for the city of Glasgow, acting under the Licensing Scotland Act 1903, and (2) John Green and others, in whose names objections had been lodged against a renewal of the pursuer's licence, first in the Licensing Court and afterwards in the Licensing Appeal Court, in which he sought reduction of a deliverance of the Licensing Appeal Court dated

8th May 1907, depriving him of his licence, a renewal of which had been granted him by the Licensing Court on 9th April 1907.

Similar actions were raised at the instance of two other licence holders in Glasgow, Cassidy and M'Lean, who had also been deprived of their certificates by the said Licensing Appeal Court. Cassidy's case was heard and disposed of at the same time as that of Goodall. M'Lean's case was sisted to await the decision in the other two cases.

The *facts* and the *grounds* on which the actions were raised are given in the opinion (*infra*) of the Lord Ordinary (JOHNSTON), who on 29th January 1908 granted decree as craved.

Opinion.—"In these cases which are raised for setting aside, at the instance of three licence holders in Glasgow, Goodall, Cassidy, and M'Lean, the deliverances of the Glasgow Spring Licensing Appeal Court of 1907, sustaining appeals against deliverances of the Licensing Court renewing their certificates, I have already disposed of the first ground of action holding the Licensing Appeal Court held on 7th and 8th May 1907 to have been validly convened and constituted, and have accordingly repelled the first plea-in-law for each of the pursuers.

"It now falls to consider the remaining grounds of action, which are threefold.

"First, that the appeals against the renewals of the pursuers' certificates were not instructed or authorised by the parties in whose names they were presented and insisted in, but by or on behalf of a certain association styled the Citizens' Vigilance Association, which had no *locus standi* to be heard in the matter, and therefore that there were no competent appeals before the Court.

"Second, that the appeals having been taken and insisted in for and on behalf of the said Citizens' Vigilance Association, certain members of and subscribers to that Association sat as members of the Appeal Court and took part in the determination of the appeals, which rendered the proceedings null; and

"Third, that certain members of the Appeal Court who took part in the determination of the appeals had not been present during the whole of the proceedings, and consequently that their intervention rendered the proceedings null.

"The whole of these grounds of action are applicable to the cases of Goodall and M'Lean, but the first and second only are applicable to that of Cassidy. It was arranged that the case of M'Lean should be sisted to await the determination of the other two. Before these grounds of action can be considered it is necessary to ascertain precisely the true state of facts as disclosed on the proof which has been led. As matter of convenience it was arranged that the proof in Goodall's and Cassidy's cases should be taken together. That proof, exhaustive as it necessarily had to be, has, I think, been somewhat unduly protracted by the anxiety of the defenders' witnesses to explain away the import of documentary evidence, and considerable discrimination is necessary in order to educe the essential facts.

"The defenders are, firstly, certain of the nominal objectors and appellants—objectors in the Licensing Court and appellants in the Appeal Court—and, secondly, the members of the City of Glasgow Licensing Appeal Court. The first set of defenders ostensibly defend in their own interest, but it is a question with which I may subsequently have to deal whether these defences are really proponed in their own interest or in that of the Citizens' Vigilance Association, or in what circumstances.

"I shall for the present confine my attention entirely to the questions of fact raised on the evidence.

"The Citizens' Vigilance Association came into existence in 1902 as the outcome of certain public meetings held in Glasgow in the early half of that year. The Association is not in any way a corporate body, but a mere voluntary association. Its constitution is a very brief document. It sets forth as the objects of the association (*a*) the due enforcement of existing licensing and related laws; (*b*) the suppression of drunkenness; and (*c*) the promotion of good government in the city.

"Despite the best efforts of its officials in the witness box, I am satisfied from a perusal of its reports, the literature of its propaganda, and the excerpts, which were taken from its minutes and those of its committees for the purpose of showing its objects, and from samples of its correspondence, that the whole *raison d'etre* of the Association was, or at least had long before the present questions arose, become the improvement of the licensing administration of the city of Glasgow, and by effecting a reduction of licences to work towards the reduction of intemperance in the city. I cannot find any trace of the third avowed object of the association, viz., the promotion of good government of the city, being prosecuted in any other direction than that of purging the Council in the interests of temperance. But I desire to say that the association has throughout its history disclaimed the extremes of the temperance movement, and has refused to associate itself with the more extreme organisations of the temperance party. It has never advocated a total abstinence policy, but it has aimed solely at the purification of the city from the charge of being extravagantly over-licensed, a charge in justification of which it has only to refer to the statistics prepared for the Licensing Authority by the Justice of Peace Clerk, which disclose the astonishing fact that in the Broomielaw, the district in which the public-houses in question are situated, there is one licensed house to every 122 of the inhabitants, old and young. And to that end it has sought merely to compass the reduction of the temptations to drunkenness which it conceives to be thrown in the way of the lower classes of the population to an inordinate degree by the over-licensing of the districts in which they

congregate. I desire further to state that, though I shall have to criticise its methods and its actings in the present cases, I do not for a moment wish to impute to it anything but the highest motives, or by anything which I may be called on to say to detract from the good which I believe it has done and will still do. These are matters which have no part in determining my judgment. That must depend on a consideration restricted to the facts and law of the actual cases before me.

"To return to the constitution, it provides for certain office-bearers to be elected annually, and for the affairs of the Association being managed by an elective board of directors, with power to appoint committees from their own number, supplemented, if expedient, from the General Committee, to deal with any business affecting the work of the Association. This General Committee was to consist of (1) the office-bearers, (2) the directors; (3) the secretary and three representatives from each Vigilance District Committee, and (4) all members of the Association who have subscribed to its funds during the preceding year. Perhaps the main feature of the Association is the district committees. These were to consist of all the members of the Association residing in each municipal ward—district and ward being synonymous. Their duties were to be 'to report any breaches of the licensing Acts, to assist the authorities in preventing irregularities, and periodically to review the condition of the ward with regard to licensed premises, also to co-operate with the directors in the selection of suitable candidates for the Town Council, and in the promotion of good government in the city.'

"As regards membership, it was provided that 'all who approve of the objects of the Association and who are willing to assist in carrying them out may be enrolled as members. All members are invited to subscribe to the funds of the Association.' It is thus made clear that subscription to the funds was not made essential to membership. But it has been strenuously maintained that subscription to the funds did not in itself constitute membership. In this, so far as concerns the question raised in this case, I cannot concur.

"The Association has been in the custom of enrolling as members, at its public meetings and on separate occasions, sympathisers and those willing to assist, by obtaining their signatures to a form. Its terms involved no obligation to subscribe or afford financial support. And a roll of members has been, with some attempts at accuracy, kept by wards in the ledger. None of the forms signed have been retained, and there is I think reason to believe that the names of many persons who have never been subscribers, as well as of some at least of those who have been subscribers, have been entered on this roll, though they have never signed a membership form. I do not, however, rest my opinion that subscription to the funds of the Association constituted membership upon these details, but on the consideration that it is impossible to conceive of a subscriber to this Association who has not all the essentials of membership, who does not approve of its objects, and who is not willing to assist and does not substantially assist in carrying them out. As I think is clearly shown by the whole documentary evidence, financial support was essentially necessary, and was in fact the most important assistance that could be afforded, and looking to the terms of its constitution and its mode of conducting its business, I cannot regard a subscriber as other than a member of this very loosely knit Association. On the roll of members as stated by Mr Wedderburn in his evidence, there are still standing above 1850 names, and about 450 more have been scored out as presumably having ceased to be members. But the total subscribers from first to last whose names appear in the treasurer's accounts from the formation of the Association (the account for one year having at the date of Mr Wedderburn's evidence gone amissing) is only 282, and of these 282 subscribers only 168 are found among those entered on the roll of members. The importance of this matter is in its bearing upon the question of whether certain of the members of the Licensing Appeal Court were members of the Association. I hold that if they were subscribers they were essentially members whether their names appeared on the roll of members or not. In point of fact subscription is to my mind more emphatic proof of membership than enrolment. The so-called enrolment slips are not extant, and there is nothing to prove the justification of the enrolment. In one very crucial instance—that of Mr W. F. Anderson, one of the members of the Appeal Court who is to be found enrolled as a member in No. 10 or Exchange Ward, though his name is now deleted — Mr Anderson denies that he ever was a member, or gave any justification for his enrolment, and the same may possibly be said with equal justice of others. On the other hand, as direct proof of subscription, we have the receipts for subscriptions in one or two cases and the receipt counterfoil in, I understand, all cases.

"After it was formed the Association immediately set itself to the work of opposing the granting of any new licences and of influencing to the utmost of its power a reduction in the number of old licences. For information as to its proceedings I rely much more confidently upon the documentary productions than upon the parole evidence of its officials and supporters. These documents are the annual reports of the Association from the year 1902-03 to the year 1906-07, its pamphlet or flyleaf literature, a sample of its correspondence, its treasurer's accounts, and the excerpts from its law agent's books; I cannot, except at inordinate length, refer to these items of evidence in detail, and shall content myself with a summary of the matters which I hold them to establish.

"The Association at its inception ap-

pointed Mr James Stewart, writer, Glasgow, its law agent. Mr Stewart became clerk to the Justices of Peace of the county of the city of Glasgow in the spring of 1906 and before the Spring Licensing Court of that year. He was succeeded by Mr Robert Kyle, writer, Glasgow. The Association's law agent was paid by a salary, and while his appointment was general there cannot I think be any question that practically his sole duty to the Association was to give his services in the Licensing Courts in opposing the granting and renewing of licences, and this duty these two gentlemen in succession appear to have performed with ability and with considerable success. But neither under the old law nor since the Act of 1903 came into operation could the Association, as an Association, have any *locus standi* to be heard in the Licensing Courts. It necessarily had to act through the medium of competent objectors and appellants. And these had to be found. The method of proceeding was not uniform throughout the whole period of the Association's existence, nor even with reference to any one Court. It varied from time to time, and it also varied with circumstances. Excerpts from three different minute books are produced, being I understand from the general minute book of the Association, from the Licensing Laws Executive Committee minute book, and from the minute book of a sub-committee, the precise composition and powers of which I have no means of ascertaining, nor wherein it differed from the Licensing Laws Executive Committee with which it was co-existent. The evidence of the Association's officials notwithstanding, I am satisfied that the course which the Association took was to select the more congested areas of the more congested wards of the city—congested in reference not merely to population but to the numbers of existing public-houses; congestion indeed in the mouth of the Association means the existence of an excessive number of public-houses in any area compared with the population. Having fixed on the district, the committee or committees of the Association then, with the assistance of that District's Vigilance Committee, marked down the licences to be made subject of attack. And the next step was to find competent local objectors. This matter was left largely to the District Vigilance Committees, but their efforts were sometimes supplemented by the services of a paid assistant. It is at the same time right to say that the Association was sometimes, and probably more frequently latterly, aided by the voluntary intervention of persons locally interested, and particularly of the office-bearers of local churches. But however they were found, there is no doubt that the nominal objectors were generally obtained by canvassing in one form or another, and were rarely if ever people who came forward of their own accord. There was seldom anything said about the expense of lodging and supporting the objections. It was tacitly assumed that the Association undertook the whole burden and expense connected with the lodging and supporting the objections. Further, having found the objectors, the Association took absolute possession and control of their objections. The practice was to obtain a mandate from the objectors to oppose a certain licence in favour of the Association's law agent. The law agent then lodged objections under his own hand in name of the objectors, and the nominal objectors were no further concerned or communicated with. They were not, unless in very exceptional instances, called as witnesses, and they were not, so far as I can see, consulted as to appeals. The Association's law agent, unless in a few very exceptional cases, where churches were concerned, appeared at the Licensing Court and Licensing Appeal Court, and conducted both objections and appeals, nominally in name of the objectors, but really on behalf of the Association. That is my conclusion by reason of the direct evidence of the procedure in the present cases, made general in its effect, where taken in conjunction with the terms in which the law agent's reports to the Association's committees are couched, and in which the committees minute their resolutions and directions.

"But the two cases with which I am concerned were somewhat different from what I conceive to have been the usual run of things, at least in the earlier history of the Association's activity. I am not sure whether or not the operation of the 1903 Act put difficulties in the way of the Association, but I find it minuted by the Licensing Laws Executive Committee on 7th March 1907 that 'Mr Kyle stated that an area had been selected but there was difficulty in getting witnesses. . . . It was agreed to insert advertisements in the morning and evening newspapers regarding the forthcoming Licensing Court on 9th April.' This may have been done before, though I find no trace of it, but at any rate there appeared in the *Glasgow Herald* of 27th and 28th March 1907 an advertisement under the heading 'Glasgow Public-House Licenses' in the following terms:—'The Annual Licensing Court begins its sittings in the City Hall, Glasgow, on Tuesday, 9th April, at 11 a.m. The meetings of the Court are open to the public. The list of applications is advertised in the *Daily Record and Mail* of 27th and 28th March. Statutory objections to any house must be lodged not later than Wednesday, 3rd April. All necessary information and guidance can be obtained by citizens willing to help from the Citizens' Vigilance Association, 21 West Nile Street.'

"This advertisement bore fruit in a call from Mr Ritchie, one of the missionaries of St Mark's Institutional United Free Church, upon Mr Battersby, the organising secretary of the Association, by whom he was directed to Mr Kyle. St Mark's Church has an allied church or mission in Carrick Street in the Broomielaw ward, nearly opposite to Cassidy's public-house. Carrick Street is a short side street running from the Broomielaw to Argyle Street. M'Alpine Street is a similar adjoining street parallel to Carrick Street, in which Goodall's public-

house is situated, being indeed back to back with Cassidy's. Mr Ritchie and his fellow workers in the mission had long been keenly anxious, in the interests of their people, for the suppression of these two public-houses, and if the accounts given of their surroundings, or their habitués, and of the scenes enacted in their proximity, are correct, no reasonable person can wonder at their anxiety, and I am perfectly satisfied of their *bona fides*. At Mr Ritchie's request Mr Kyle went the same evening and met Mr Ritchie and a few of his leading deacons and workers in the vestry of the mission, and they explained to him their view of the position of matters, and he explained to them what was necessary to be done. The result was that he arranged to send to Mr Ritchie a form of mandate, and on Mr Ritchie or his friends getting it filled up with the names of competent objectors, Mr Kyle undertook to lodge objections and to conduct their case. Accordingly he at once sent down forms of mandates for *inter alia* both Goodall's and Cassidy's cases. I am not concerned with the Association's other operations in this Ward, though they were instrumental I think in lodging as many as 18 objections altogether in this one Ward. It is necessary to confine attention entirely to the two instances in question.

"The form of mandate in Goodall's case, and Cassidy's was in precisely the same terms, was as follows—

'To Robert Kyle, Esq.,
Writer,
'45 West Nile Street,
Glasgow.

'We hereby authorise you to sign and lodge on our behalf objections to the granting of the Certificate for Licence for a public-house applied for by Alexander Goodall for premises at 68 M'Alpine Street, at the forthcoming Licensing Court of the City and Royal Burgh of Glasgow, and to appear on our behalf in support of said objections.'

"These and the other mandates, which he had undertaken to get filled up, Mr Ritchie distributed among deacons or others of his workers, who, though they might not live themselves in the district, were familiar with the circumstances and acquainted with their Church's people resident in it. James M'Dade took charge of the mandate referring to Goodall's licence, and R. Ferguson and W. Stevenson took charge of that referring to Cassidy's licence. Now these men, though influential members of the Mission Congregation, were themselves only working men, and though it was carefully explained to them, that the only competent objectors were owners or occupiers of property in the neighbourhood of the licensed premises in question, I do not think that they had any very definite idea, which they could explain to others of inferior position and intelligence to themselves, what the precise purpose of the mandate was, and what was intended to follow on it. In Goodall's case M'Dade obtained the signatures of John Green, John M'Leod, John Kennedy (since dead) Isabella Hamilton, Sarah Cairnduff, George Queen and John Birkby; while in Cassidy's case Ferguson and Stevenson obtained the signatures of Robert Henderson, James Flannagan, W. E. Callagan, Samuel Austen, Bella Buchanan, Sarah Moore, John Fowler, David Moore, Christina Montgomery, Robert Paterson, James Wilson, John Buchanan, James M'Dade and J. E. Dryden. Most of these people were examined, and I think that the objections of but a small minority in each case could, on the most benevolent construction, be described as spontaneous; that an analysis of the evidence would show that a certain section of them wanted any proper occupancy qualification; that a certain section did not understand that they were signing anything more than what I might term a petition to the Licensing Authority, against either licences in general or against the particular licence, which petition was to be presented and would have effect by its own virtue; that a certain section altogether misunderstood the import of the mandate, but that in each case there were two or three of the signatories who were genuinely anxious to see the licences in question suppressed, and were glad to have the opportunity of assisting to that end, and who had a general though indefinite understanding that something was to be done in the Licensing Court by Mr Kyle to effect what they desired. In Goodall's case I might instance John Green and John M'Leod, and in Cassidy's case J. Fowler, R. Henderson, and J. Flannagan. Even M'Dade, the emissary, does not appear to have understood what was to follow the mandates, and himself rather regarded them as of the nature of a petition to be presented to the Licensing Authority. But I have no doubt that had these and probably others of the signatories been approached by Mr Kyle himself or by anyone having a full understanding of the situation they would have willingly joined in going the whole length necessary with a view to obtaining a reduction of the licences in the district. I must add that as regards any expenses which might be incurred in proceeding upon these mandates, this matter does not appear to have occurred to any of the signatories at the time, and so far as they may have had any afterthought on the subject as matters progressed they seemed to have considered that it was their Church which was taking the matter up, and that any expenses involved would fall upon it. They knew nothing whatever about the Citizens' Vigilance Association or Mr Kyle's relation to it.

"The mandates having been signed, they were sent by Mr Ritchie to Mr Kyle, who prepared the objections, which were the same in both cases. From this point Mr Kyle had no further communication whatever with the objectors. He acted in their name indeed but entirely in his character as representing the Vigilance Association. The objections were never submitted to any of the objectors, and the third, viz., 'The applicant is not a fit and proper person to hold a public-house licence,' they all unanimously disclaimed. Mr Kyle paid

the dues to the Town Clerk on the objections in the Licensing Court, and again the dues to the Justice of Peace Clerk for the subsequent appeal to the Licensing Appeal Court. In preparing his evidence he precognosced no objectors, and called no objector as a witness. He prepared the evidence, and led it entirely from what, with one exception, I must term the stock witnesses of the Association, for they appear to repeat their evidence in case after case.

"The objections had no success in the Licensing Court, but that fact was not communicated by Mr Kyle to the objectors. Yet notwithstanding this and the terms of his mandate, he presented appeals in the names of the respective sets of objectors to the Licensing Appeal Court, in which he stated that 'the appellants are dissatisfied with the proceedings in the Licensing Court in granting the applications for renewal, and appeal therefrom to the Licensing Appeal Court.'

"But to my mind one of the most pregnant facts in the case is, not merely that Mr Kyle took these appeals along with a great number of others without communication with or authority from his nominal clients, but the terms in which he reported to his committee his dissatisfaction with the decisions of the Licensing Court and his determination to challenge them before the Appeal Court, and in which they approve his action.

"Neither in these appeals did Mr Kyle call any of the objectors as witnesses, and his excuse that he expected them to be called by his opponent is not I think ingenuous. In both cases he again called his stock witnesses, who had already been repeatedly examined by him before the Appeal Court as they had been formerly before the Licensing Court, such as Mr J. P. Maclay, Mr Alexander Galbraith, Miss Flora MacNaught, and Mr William M'Ghee, with two others in Cassidy's case, and Mr James Ritchie, the St Mark's missionary, in Goodall's case. Mr James Ritchie was the only individual called who had any connection with the objectors. Mr J. P. Maclay was one of the leading members of the Association, without whose quite munificent financial support it could hardly have carried on its work.

"The appeals came on for hearing, Cassidy's on the 7th, and Goodall's on the 8th May 1907, and again Mr Kyle communicated with none of the objectors.

"Before touching the progress of the cases in question, it is necessary to go back on certain circumstances which had occurred at earlier sittings of the Appeal Court. That Court included among its members Bailie John Battersby, who was the salaried organising secretary of the Citizens' Vigilance Association. At a preliminary meeting of the Court on 22nd April, Bailie Battersby was one of a small committee nominated to inspect the premises and localities in connection with which appeals had been lodged, with a view to reporting to a private meeting of the members before the sitting of the Appeal Court. Again, at the Appeal Court on 29th April, it is minuted that the Court adjourned to discuss certain appeals in private and that 'on their return to Court Bailie Scott asked Bailie Battersby a series of questions as to his connection and position with the Vigilance Committee or Association and as to his legal right to vote in the Court. The chairman ruled that these questions were not competent for the Court to consider.' Notwithstanding this challenge, Bailie Battersby continued to sit and vote, and the three appeals in question were sustained by a majority of one—thirteen votes to twelve. In the next appeal, that against the renewal of Mrs Masterton's certificate, Mr Kyle, who I may note in passing regularly appeared for the appellants in all the appeals, 'was heard for the appellants and Mr Campbell for the said Catherine Murray or Masterton. Before proceeding Mr Campbell requested the clerk to note that he objected to the presence of Bailie Battersby on the Bench.' Before the next effective sitting an interdict was presented against Bailie Battersby's taking further part in the proceedings in the Licensing Appeal Court, and when the Court met on 7th May there was read by the clerk a letter from Bailie Battersby in the following terms:—

"'139 Rutherglen Road,
"'6th *May* 1907.

"'James Stewart Esq.,
"'Clerk to the Licensing Appeal Court.

"'Dear Sir, — While maintaining my right to act as a member of the Licensing Appeal Court, I have decided, in order to facilitate the business of the Court, not to attend further the present sittings,—I am, Yours truly, (signed) JOHN BATTERSBY.'

"I have mentioned these matters, not that they have a direct bearing upon the question at issue, but because they have an indirect but most important bearing upon what follows.

"The Court of 7th May proceeded with the appeals, Mr Kyle appearing as usual for the appellants. The first appeal was dismissed. On the second appeal being called, Mr Kyle withdrew from that and a number of his other appeals the names of certain of the appellants, who represented societies of which the magistrates were *ex officio* members, and it was then agreed to adjourn until 2 o'clock p.m. On resuming Mr Kyle intimated to the Court that he withdrew the pending appeal and seventeen others, that is to say, eighteen out of the thirty-five appeals in the roll, for all of which as representing the Vigilance Association he was responsible. This is another, to my mind, most pregnant piece of evidence. For it betokens that Mr Kyle in doing so assumed such control of the proceedings that he could withdraw appeals without any communication with his nominal clients the objectors, and did so after some hint from the Lord Provost, the precise nature of the communication not appearing. The last appeal to be heard on that day was that against Cassidy's licence, when Mr Kyle appeared for the appellants and Mr J. M. Connell, writer, Glasgow, for Cassidy.

This appeal so far as the minutes show was allowed to proceed without any objection to Mr Kyle's *locus standi* to appear. On Goodall's case being next called, Mr MacQuisten, writer, Glasgow, who appeared for Goodall, took such objection. But as the adjournment of the Court was then moved, nothing further was then done on it.

"On the following morning, 8th May, the Appeal Court sat at 11, and the appeal in Goodall's case was at once called. Mr Kyle appeared for the appellants, and Mr MacQuisten for Goodall. 'Before hearing agents Mr MacQuisten intimated that he objected to the *status* of Mr Kyle as representing the appellants in respect that he did not represent the appellants, but represented the Citizens' Vigilance Association, who were the true *dominus litis* in this appeal, and that the said Association was not entitled to appear as appellant in this appeal. The chairman, on the advice of the clerk, ruled that it was incompetent for the Court to consider the point raised by Mr MacQuisten, as Mr Kyle *prima facie* represented persons who were qualified to be heard as objectors under the provisions of the Licensing Act.' The case accordingly proceeded and the appeal was sustained. With reference to this episode I refer to the evidence of Bailies M'Innes, Shaw, Thomas Dunlop, and Archibald Campbell. Bailie Shaw stated that all about the Association and Mr Kyle's position was public property—'I understood he was there for objectors, but I understood that the Vigilance Association had him there. I often wondered why none of the objectors appeared at the Court. Nothing occurred on that occasion to alter what was my understanding and belief, viz., that Mr Kyle was there prosecuting the appeals on behalf of the Vigilance Association,'—and Bailie Dunlop stated that he knew all about the Vigilance Association and Mr Kyle. That the chairman took the advice of the Clerk of Court, who ruled that the matter could not be gone into, and that the rest of the bench acquiesced in the chairman's ruling. On the other hand several of the members of the Appeal Court who appeared for the defence professed a surprising ignorance of the Association and its action, and of Mr Kyle's connection with it. I regret to find that I have innocently committed myself on this subject by stating in my former judgment on the objection to the constitution of the Appeal Court that 'it is common knowledge that the Association is a patriotic body which has done most excellent work in connection with Glasgow municipal affairs.' Though apparently the knowledge had not reached members of the Glasgow Licensing Appeal Court, I was personally aware generally of the existence and objects of the Association long before this case arose, from the public press, and I had understood that what I stated was made common ground in the Procedure Roll discussion. Having regard to the history of the Association as disclosed in its own documents, and to the campaign which had been carried on by it for some years, much the same as in the Spring Licensing Court of 1907, against the renewal of certificates, through the agency of its two salaried law agents, Mr Stewart and Mr Kyle, the former of whom was sitting as Clerk to the Licensing Appeal Court, and the latter appearing for every set of appellants, and looking particularly to what had occurred with regard to Bailie Battersby at the earlier sittings of the last-mentioned Court, I feel the greatest difficulty in accepting that the state of information regarding the Vigilance Association and Mr Kyle of Bailies Shaw, Dunlop, and Campbell was any different from that of the rest of the Court.

"What actually happened was that Mr MacQuisten had cited the whole objectors as his witnesses. What would have been the result of examining them we cannot tell, but on Mr Kyle holding up a sheaf of mandates, without any examination of them, after a short passage between the agents, the clerk's advice was taken, the chairman gave the above ruling, and the Court acquiesced. I think, however, that there must have been some doubt thrown on Mr Kyle's position at some earlier stage of the proceedings of which I have no definite information, and that his sheaf of mandates, I understand in the form of a bound volume, had been handed up to the bench, turned over by a few of the members, and I must assume examined by the clerk.

"There remains one more episode in the proceedings of the Court which must be dealt with. It bears upon the challenge in Goodall's case of the votes of Mr Ross and Mr King, Justices of the Peace. These gentlemen are alleged to have taken their seats on the bench after the case had proceeded for some time.—[*His Lordship then dealt with the evidence on this subject.*] I think it is therefore proved that these gentlemen, and particularly the latter, took their seats on the bench after a substantial part of the evidence had been led.

"Before leaving the evidence the only matter which still remains to be considered is the question upon which the second point before me depends, viz., the disqualification of certain members of the bench by reason that they were members of the Vigilance Association. On this point the averment is—"The following members of said Court are or were then, or had previously been, members of and subscribers to the said Association, viz., Sir Samuel Chisholm, Bart., D. M. Stevenson, W. F. Anderson, John King, Robert F. Allan, R. G. Ross, and James Stewart, and are so disqualified. Nevertheless these members took part in the vote against the pursuer and in favour of the said appeals being sustained.' I have already referred to the roll of members of and list of subscribers to this Association. With regard to the roll of members, I find that three out of the gentlemen named were at one time upon the roll of members, viz., Mr Anderson, Mr Wallace, and Mr Stewart, but that all their names had been deleted. I confess to some doubt on the subject of their deletion. I am not satisfied on the

proof as to the time when that deletion was made, and I think it is most unfortunate that the ledger in which the roll was kept was not openly produced to the pursuers at the commission for the recovery of documents. I can see no reason why it was not produced, or why there was any difficulty made in connection with its production, and it was ultimately compelled to be produced during the proof. But although I am not satisfied as to the somewhat remarkable fact that all these crucial names turned out to have a pen drawn through them when that ledger came to be examined, from my point of view this did not matter, because, as I have already explained, I hold that a subscriber was, at any rate for the purposes of this case, as much a member, if not more a member, of this Association as anyone who was merely enrolled on the members' roll. I therefore turn to the question of subscription, and as a preliminary I must deal with the plea maintained by the learned Lord Advocate, to the effect that none of the alleged subscribers had paid their subscription for the year in which the Licensing Appeal Court was held. Now I find that the Association's year runs from the last day of September until the last day of September, and that a number of subscribers were in the custom of giving their subscription at or about a definite time of year, for instance, one in July, another in August, and another in October. Where I find a gentleman a continuous subscriber for a period of years, I cannot hold him to have ceased to be a subscriber because the Association's financial year had run out, and because, according to his practice, the time for his paying his subscription had not been reached. I hold such a gentleman to be a subscriber, and to remain a subscriber during the current year, although he might pay his subscription six or seven or eight months late according to his custom. Now Sir Samuel Chisholm was a subscriber, but he had not paid any subscription since July 1905. He was therefore not a subscriber for the year 1905-06, and I cannot therefore hold him to have been a subscriber in the current year 1906-07. Mr Stevenson, on the other hand, had been a regular subscriber, and his custom was to pay his subscription in the month of August, and he paid his last subscription on August 6th, 1906. Notwithstanding that the period at which the subscription would naturally have been paid had not been reached, I hold that he did not cease to be a subscriber at the intermediate period when this Licensing Appeal Court was held, viz., in April and May 1907. Mr R. S. Allan was in the same position—May 10th, 1906, was the date of his last subscription. Sir William Bilsland's firm were in the habit of paying in or about October. They had paid in October 1906, and they were the only ones of these subscribers who paid again in October 1907. I do not regard that latter payment; but by reason of the payment in October 1906 I hold that they were still subscribers at the date of this Court, and Sir William Bilsland being a partner—the fact that he was senior partner is not material—of that firm, I think that for the purpose of this case he must be held to be a subscriber to the Association through his firm. Mr Wallace, like Sir Samuel Chisholm, had ceased to subscribe in 1906. The others—Mr Anderson, Mr King, Mr Ross, Mr Stewart, and Mr Stevenson—had never been subscribers at all. The result is that at the date of this Court two of the members of the Court had been subscribers—Sir Samuel Chisholm and Mr Wallace—but had more than a twelvemonth before the Court sat ceased to be subscribers; that Mr Stevenson and Mr Allan had been subscribers and continued to be subscribers; and that Sir William Bilsland, through his firm, was in the same position. I count nothing of the fact that Mr Stevenson and Mr Allan ceased their subscriptions after this question arose. The question is not what in prudence they thought it right to do *post litem motam*—and I think it was right that they should do so—the question is what was the state of matters as at the date of the Court in question, and at that date they were in my opinion subscribers to the Association.

"The questions which it remains for me to decide are these—

"First, whether the appeals against Goodall's and Cassidy's licences were not in fact 'taken for and on behalf of the parties whose names they bear, but were prosecuted and insisted in solely by and on behalf of an Association in Glasgow, known as the Citizens' Vigilance Association, and at its expense.'

"And if so, must the decisions of the Licensing Appeal Court, which entertained the appeals, be set aside?

"But before this question can be disposed of it is necessary to determine whether the objection can be competently raised before this Court.

"On that preliminary point there is considerable difficulty. But on the best consideration I can give to the authorities, I think that the objection can competently be raised, and must be considered.

"Though there is not now, in the 103rd section of the Licensing Act 1903, such a widely expressed limitation of review as there was under the 34th section of the previous Act of 1862, it has been held authoritatively that while there is committed to the new Licensing Court and Licensing Appeal Court a privative jurisdiction in the matter of granting and refusing certificates for licences, their decision may yet be reviewed by this Court if they exceed their statutory jurisdiction. But it has been explained that excess of jurisdiction in this collocation means, not excess of jurisdiction in the narrow and technical sense merely, but also the use of discretion in a manner which is not judicial, not according to reason and justice, but so as flagrantly to violate the conditions of a judicial spirit—*Walsh*, 7 F. 1009, and L.R. (1907) A.C. 45.

The objection, however, in the present case partakes, I think, more of the strict and technical sense.

Section 19 of the Act of 1903 gives the power of objecting to the renewal of a certificate, subject to certain exceptions introduced by section 20, only to any person or the agent of any person owning or occupying property in the neighbourhood of the licensed premises. Notice specifying the objections must be in writing, and served upon the licence holder. These objections must be heard, and before the renewal can be refused, these objections must be proved to the satisfaction of the Court. It is true that the objector does not become properly a party to a *lis*, and that his function is rather the informing the Court of what objections there are to the licence being renewed. But notwithstanding, the whole purview of the enactment shows conclusively that it was intended to confine the right to object and to be heard in support of objections to those locally interested, and it would be contrary to its spirit to allow outsiders to intervene indirectly where they cannot intervene directly.

"I had a good deal of argument on the cases in which the question of *dominus litis* has been raised, but I confess that I do not think them to any extent applicable. These cases divide themselves into two categories—first, those in which the alleged *dominus litis* has a direct patrimonial interest, but sues or defends in the name of a person who has a title but either no interest or only a secondary interest; and second, those in which persons of means put up a man of straw to sue what may be called an *actio popularis*. Of the first class *Frazer* v. *Malloch*, 23 R. 619, *Kerr* v. *Employers' Liability Insurance Company*, 2 F. 17, and *Stevenson*, 3 F. 182, are examples, and of the latter *Jenkins'* case, 7 Macph. 739. In both these classes of cases the question is simply one of rendering the true *dominus litis* liable in expenses, though in the latter the liability for expenses may be brought home *ab ante* to the *dominus* by making the nominal pursuers find caution for expenses. In neither class of cases does the question of title to sue or defend arise. The present case has some of the elements of the *actio popularis*, and were the case a proper litigation, I think that there would have been good grounds for making the nominal objectors find caution for expenses. But the matter is not a litigation, it is a question of statutory right to bring the objectors' views before the Licensing Authority, which is only in a *quasi* sense a Court, and I think that if the Licensing Authority admits objectors who have no statutory right to be heard, it exceeds its jurisdiction and in doing so exposes its procedure to review, though not on the merits. There can be no doubt that if the Citizens' Vigilance Association had been admitted as objectors *eo nomine*, and on their objections either the Licensing Court or the Appeal Court had refused a renewal of certificate, these Courts would have gone contrary to the statute, and that review of their action would not have been excluded. One branch of *Walsh's* case *supra* bears on this, for proof was allowed as to whether a party claiming the right of privileged objection under the 20th section of the Act really held the position entitling him thereto. And though the Lord Chancellor does say that in coming to an administrative conclusion on questions of licensing policy the Licensing Court 'may use their own judgment and hear whom they please,' I do not understand him by the last words to indicate that that freedom may be exercised independently of the statutory limits.

"It may be that there are difficulties in checking the outsider intervening through a man of straw or put-up objector. But there are two sides to this question. The earnest temperance reformer may seek to advance the cause which he has at heart through the medium of a nominal objector with a title, but the owner of a tied house or rival publican may also seek to obtain a local monopoly by the same means. I do not think that either were intended to have the opportunity. And if by determination of the Licensing Authority they have received the opportunity, that authority has in my opinion overstepped its jurisdiction, and whatever the difficulty of proof may be, it is I think open to this Court to rectify the mistake in an appropriate process such as the present. I conclude therefore that there is no incompetency in raising in this Court the first question which I have to consider.

"But that question is a matter of degree. There is no reason why a wealthy individual or a philanthropic association should not find money or skill to assist a poor and *bona fide* objector to make good his objections. It may be difficult to ascertain when the assistance goes beyond this, but if it can be truly said, adapting the words of the late Lord President in *Kerr* v. *Employers' Liability Insurance Company*, *supra*, to suit the circumstances here, 'was the nominal party ever in Court at all? His name was, but he had nothing to do with the objections or the appeal, having long ago transferred to the Association the right to support the one and prosecute the other'—then I think that that point has been reached, and that it is the duty of the Licensing Court to refuse to hear the objections or entertain the appeal, and that if they do not do so, their subsequent proceedings are invalidated. Further, in determining the question thus raised, the reality of the situation and not merely the form falls, I think, to be considered.

"Now I am not in this case directly concerned with the proceedings in the Licensing Court. Still it is necessary to take a preliminary survey of them. There can, I think be no doubt that the office-bearers of St Mark's Church Mission were perfectly justified in moving in the matter of these two licences. Irrespective of personal residence in the district, the trustees vested with the property of their premises, whether freehold or leasehold, had a good statutory

title to object. So I should be prepared to hold that the Session or even the Deacon's Court had, as representing the Mission Congregation, even though the church belonged to one of the independent bodies. Nor could there be any objection to the office-bearers assisting local members of the congregation to present and support objections which they personally had, or even arranging that the objections of the general congregation should be put forward in the name of certain local and *bona fide* objectors. Further, I see no objection to the objectors, whether office-bearers or their *bona fide* nominees, accepting the assistance of such a body as the Citizens' Vigilance Association and the services of that Association's paid agent. Though the matter was gone about in a very bungling fashion, that was at the outset its true complexion. Had the Association and its agent been content to let things work themselves out on this footing it would have been difficult to find ground of challenge of what was done. Accordingly, though in reality the complexion of the matter changed as soon as Mr Kyle got his mandate, I think it would have been difficult, if not impossible, to challenge effectually his position and his action in the Licensing Court.

"But the initial complexion of the matter had, as I have said, in reality changed, and that change became most tangible the moment the Appeal Court was reached. The objections in the Licensing Court were not really those of the nominal objectors, but of the Association, who through Mr Kyle took absolute possession and control of the proceedings from the moment the mandate was in his hands, and in their zeal for licensing reform thought no more of the nominal objectors. In the Licensing Court this was latent, in the Appeal Court it became patent. And it is the procedure in the Appeal Court which is alone in issue, because the pursuers here are content with the decision of the Licensing Court, which in spite of Mr Kyle's objections renewed their licences. Now appeal is provided for by the 22nd section of the 1903 Act, which provides, *inter alia*, that 'if any proprietor or occupier of property in the neighbourhood of such house who has objected before the Licensing Court to the granting or renewal of such certificates shall be dissatisfied with any proceeding of any Licensing Court assembled for granting certificates as aforesaid, whether in granting or refusing or otherwise disposing of' an application for a certificate or renewal of certificate, it shall be lawful to such proprietor or occupier 'to appeal therefrom to the next Court of Appeal from such Licensing Court' provided the appeal be lodged with the clerk to the Appeal Court within ten days, and that the appellant shall intimate the appeal to the opposite party and to the Licensing Court of whose proceeding he complains, and 'shall find caution to abide such appeal and the expenses thereof.' This appears to me to be an entirely new departure or new proceeding, and one which an agent authorised to lodge objections in the Licensing Court had no right to take without the authority of his client, yet Mr Kyle's mandate merely authorised him to sign and lodge objections on behalf of those who signed the mandate at the forthcoming Licensing Court, and to appear on their behalf in support of said objections. Did this justify Mr Kyle without consulting them in stating that the objectors were dissatisfied with the decision of the Licensing Court, in taking the appeal and giving the notices, and above all in laying them under the obligation to find caution for expenses? I think not. Yet he not only does all this without consulting his nominal clients and without even communicating to them the result of their objections in the Licensing Court, but he arranges for caution being found for them without any one of the objectors being the least aware of what he was doing. In fact, he acted, according to the reality, not as agent for the nominal objectors, but for the Association who employed him, and a glance at the minutes of their committees amply illustrates this. How then is the matter dealt with by the Appeal Court when Goodall's appeal is called? I quote from the Court's own minute—'Before hearing agents, Mr MacQuisten intimated that he objected to the status of Mr Kyle as representing the appellants, in respect that he truly did not represent the appellants, but represented the Citizens' Vigilance Association, who were the true *dominus litis* in this appeal, and that the said Association was not entitled to appear as appellant in this appeal.' Let it be noted that the objection was not merely to want of mandate on the part of Mr Kyle, or to the informality or fictitiousness of his mandate, but was something deeper and more far reaching. At that stage, in my opinion, Mr Kyle had indeed no mandate, and did not even nominally represent the nominal appellants. But more than this did he represent the Citizens' Vigilance Association, who were not entitled to appear as appellants? And how is the objection disposed of—'The chairman, on the advice of the clerk, ruled that it was incompetent for the Court to consider the point raised by Mr MacQuisten, as Mr Kyle *prima facie* represented persons who were qualified to be heard as objectors under the provisions of the Licensing Act'—that is to say, the Court refused to entertain the objection. I am somewhat at a loss to understand the Court's action in this matter, for the alleged relation of the Vigilance Association to these appeals was no new matter to them. I am not prepared to take it off the hands of any of the members that they had no previous knowledge of the Vigilance Association or of its activities with reference to licensing proceedings. But even if they had no previous knowledge, they had had their attention very sharply and pertinently called to the matter at previous stages of the same Appeal Sittings in relation to Mr Battersby, and they had had notice of the attitude Mr MacQuisten was to take up the afternoon before. But they assumed this position—'Mr Kyle tables a bundle of man-

dates, *ex facie* regular; that is enough for us; we cannot competently look behind them.' In that I think they were wrong. In the first place, if they had looked at the mandates they would have seen that they were not mandates authorising appeal. In the second place, if they had gone further they would have found what the evidence in this case has disclosed, what I take to be the case, as I have already said, that through the missionary of St Mark's Church and some of his colleagues in its mission work, mandates to object had been placed in Mr Kyle's hands, some at least of the signatories of which had a title to object and *bona fide* did object, but that from the point at which they signed these mandates they had ceased to have any relation to or control over Mr Kyle's action, and that the reality of all that followed was that Mr Kyle was representing not the nominal objectors but the Vigilance Association, who through him found the objections, paid the fees of Court, and found the witnesses who were dissatisfied with the first decision, and through him took the appeal, paid the fees of Court, and found caution for the expenses of the appeal, and who again found the witnesses who were their witnesses and not the objectors' witnesses, and that this Vigilance Association were acting in the matter as part of a large scheme for forcing the views of outsiders, sound as these views may have been, on the Licensing Authority, without any statutory *locus standi* to do so. It may be that it might have been difficult in the Appeal Court to have exposed the true situation of matters. It may be that had there been a *prima facie* mandate in Mr Kyle's favour the Appeal Court might reasonably have said, and it is possible that this is what they meant by their deliverance, that in the summary procedure of a Licensing Appeal Court it was out of place to go beyond an agent's *prima facie* mandate, that the business must proceed, and their decision be taken *periculo petentis*, leaving any such serious question as has been raised to be determined by a court of law. But they could not, in my opinion, shelve the question either by holding it not competent to entertain it, or by, as far as they were concerned, disregarding it.

"Now that it has been brought before a court of law, it is established in my opinion, in the first place, that there was no valid appeal, because the appeal was taken by Mr Kyle without authority, but in the second place, that even if there had been a *prima facie* mandate to appeal, Mr Kyle in reality represented not the nominal objectors but the Vigilance Association, and on these grounds I think the decision which the Appeal Court proceeded to give on the merits must be set aside.

"It was contended for the defenders that the objectors, or at least those who had a competent title to object, had homologated Mr Kyle's action. This is based on the idea that they had not disclaimed his appeal, though what they did not know of it is difficult to see how they could disclaim. If he had cited them as his witnesses and they had appeared with him in Court, he might have pleaded that they had put him at least in as good a position as he had been in in the Licensing Court, or even stronger. But they did not do so; they knew nothing about his appeal; they were not in Court; they were not cited as his witnesses; they were cited as the witnesses of his opponent, and they were prevented by Mr Kyle himself from being adduced in Court, and giving the Court any opportunity of knowing their frame of mind. It was further contended that they had homologated Mr Kyle's procedure by granting him mandates to defend the present actions of reduction. I make no comment on the manner in which this latter mandate was obtained, but I cannot find any justification in the authorities cited to me for holding that such *ex post facto* homologation can validate irregular and illegal procedure already closed.

"The second question which I have to dispose of is, whether the decision of the Appeal Court was invalidated by the fact that the appeal having been truly taken and insisted in for and on behalf of the Citizens' Vigilance Association, certain members of, and subscribers to, said Association sat as members of the Appeal Court. I have already shown that if membership required enrolment in the Association's roll of members, there were no members of the Appeal Court upon that roll whose names had not been deleted, and though the circumstances that they have been deleted is to my mind accompanied by the gravest suspicion, I take the case upon the footing that no members of the Court were in that sense members of the Association. On the other hand I find that Bailie Stevenson, Mr Allan, Mr Murray, and the firm of which Lord Provost Sir William Bilsland was principal partner, were current subscribers, though Sir Samuel Chisholm and Mr Wallace had ceased for more than a twelvemonth to be such, and I hold, as I think I have already said, that in respect of the present objection the position of subscriber to is the same as that of member of this Association. Now, even though, contrary to my opinion, Mr Kyle, by the mandates which he originally obtained was clothed with a legal right to represent qualified objectors in the Licensing Court, and even if the difficulty of his want of mandate in the Appeal Court could be got over, it appears to me that neither of these things would alter the fact that the Citizens' Vigilance Association was the real and true objector and appellant, and by the whole history of its action was deeply committed, however laudable its motive and beneficial its action may have been, to a crusade against licences of which the episode into which I have been inquiring was a mere incident. This crusade was made possible only by the subscriptions of the gentlemen I have mentioned and others interested, and they must have known or must be held to have known that it was to prosecute this crusade that the moneys to which they contributed by their subscription were to be so applied. Was

the position therefore of these gentlemen not substantially that of sitting in judgment in a case in which they were themselves the prosecutors.

"I was referred to a great number of English authorities bearing on this subject. These appear to me to fall into three categories.

"First, the class of cases where from the interest of the member of the Court bias may be inferred. Such cases are—*Reg.* v. *Meyer*, 1875, L.R., 1 Q.B.D. 173; *Reg.* v. *Milledge*, 1879, L.R., 4 Q.B.D. 332; *Reg.* v. *Handsley*, 1881, L.R., 8 Q.B.D. 383; *Rex* v. *Justices of Sunderland*, [1901] 2 K.B. 357; *Reg.* v. *Taylor*, 14 Times L.R. 105; *Reg.* v. *Tempest*, 18 Times L.R. 433; and they were followed by Lord Stormonth Darling in the only Scottish case quoted, viz., *Blaik* v. *Anderson*, 1900, 7 S.L.T. 299. Of these I think I may take the *Sunderland Justices* case as the leading one, and the principle it embodies is that pecuniary interest is enough to disqualify, but if the interest is not pecuniary, then the likelihood of bias in the circumstances must be substantial. The existence of bias is a question of fact for the Court, who must determine whether there was or was not under the circumstances a real likelihood that there would be a bias on the part of the member of the Court challenged. Further, it has been laid down that, assuming that bias is to be inferred in the circumstances, the mere presence of the interested party on the bench is enough to vitiate the proceedings, whether he takes part in the vote or not—*Reg.* v. *Justices of Hertfordshire*, 1845, 6 Ad. & El. 753, and L.J. 14 Mag. Cases, 73. It is indeed immaterial what part he takes in the proceedings—*Reg.* v. *Meyer, supra.*

"Second, the class of cases in which a member of the Court is directly or indirectly a party to the prosecution, using that term for convenience in a comprehensive sense. It is said to be a principle, founded on the very essence of justice, that a person who is connected with the prosecution, using the word in such comprehensive sense, should not take part in the decision. And if an individual who assumes the position of prosecutor directly, as in *Reg.* v. *London County Council*, [1892] 1 Q.B. 190, is debarred, so also is a member of an Association which promotes and initiates such prosecution as *Reg.* v. *Allan*, 1864, 4 B. & S. 915, and still more pertinent to the present case *Reg.* v. *Fraser*, 9 Times L.R. 613, where one out of three magistrates was a member of an association very similar to the Vigilance Association, whose object was almost identical, though it may not have been actuated by the same breadth of view. The association had resolved to oppose, and instructed the solicitor who did oppose, the licence, and it was of no avail to sustain the judgment that the vote of the individual magistrate challenged was not necessary for a majority, as the bench was unanimous.

"I should without hesitation follow the broad general principle of this latter class of cases but for the third class of cases to which I was referred. But I venture to think that these improperly aud inconsistently attempt to combine the principles of decision of the first two classes, and make the question of disqualification depend upon the likelihood of bias arising not from interest but from the quality or degree of the relation to the prosecution. These cases are *Leeson* v. *The Medical Council*, L.R., 43 Ch. Div. 366; *Allinson*, [1894] 1 Q.B. 750, another Medical Council case; and *Reg.* v. *Burton*, [1897] 2 Q.B. 468, the Incorporated Law Society case. It may be that these cases may be supported on the view of the remoteness of the relation between the member of the Court challenged and the prosecuting body. But if it be not so I should respectfully adopt the dissentient view of Fry, L.J., in the case of *Leeson, supra*, in preference to the reasoning of his colleagues, and I cannot distinguish the present case from that of *Reg.* v. *Fraser, supra*, following which I think that the decision of the Appeal Court in question was vitiated by the presence on the bench of subscribers to the Citizens' Vigilance Association.

"The third and last question which I have to consider is whether the decision is also vitiated by the fact that two members of the Court who took part in it had not been present during the whole progress of the case, Mr Ross having joined the Court during the examination of the second witness, and Mr King at a considerably later stage. I do not find any precedent directly applicable, but I think that it is a broad general principle that unless the absence can be regarded on the principle of *de minimis*, which it cannot be here, whoever takes part in the decision of a court or body of men who, if not a court properly, are bound to act judicially, must have been present during the hearing of the case and the whole case. Further, I think that on the analogy of *Reg.* v. *The Justices of Hertfordshire, supra*, and *Reg.* v. *Meyer, supra*, it is immaterial how far the vote is affected by counting or discounting that of the member disqualified by partial absence. The only circumstances in which a decision taken part in by a disqualified member can stand that I know of are those exemplified by *Livingstone* v. *Presbytery of Hamilton*, 6 Bell's Appeals 469.

"Accordingly I shall sustain the second, third, and fifth pleas for the pursuers in Goodall's case, and grant decree as craved.

"The same result will follow in Cassidy's case, except that the pleas to be sustained will be the second and third only, as I think it makes no difference that objection was not taken in the Appeal Court to Mr Kyle's position as not truly representing the nominal appellants, but representing an outside body, and I shall reserve to hear parties as to expenses."

The defenders reclaimed, and argued—1. The appeals were competent, for (*a*) Kyle had a good written mandate, or (*b*) he had a verbal mandate or a tacit mandate to be inferred from facts and circumstances, or (*c*) his appeals had been subsequently homologated by the objectors, which was

equivalent to a mandate. (*a*) The objectors clearly intended the licences to be opposed throughout, and the terms of the mandate were therefore wide enough to cover both courts. (*b*) Kyle had general instructions to oppose the licences, and that implied that he was to use his own discretion as to how that should be done, and if (as the evidence showed) he had acted reasonably and in good faith and without repudiation on the part of his principals, his act would be regarded as that of his principals. It was not necessary that an agent whose instructions were general should show specific authority for each separate step. It was immaterial even whether his clients were aware of what these separate steps were. Kyle's clients were clearly liable for his expenses, and that was a sufficient test of his authority—*Robertson* v. *Foulds*, Feb. 9, 1860, 22 D. 714. Further, the magistrates might entertain an appeal as an act of administration in the public interest even though the appeal were withdrawn—Licensing (Scotland) Act 1903 (3 Edw. VII. c. 25), secs. 21 and 22. The Licensing Courts were not courts in the proper sense of the term; they were administrative bodies acting in the public interest and an appeal was simply a rehearing—*Walsh* v. *Magistrates of Pollokshaws*, December 3, 1906, (1907) S.C. (H.L.) 1, 44 S.L.R. 64; *Boulter* v. *Kent Justices*, [1897] A.C. 556, *per* Lord Herschell at p. 569; *Rex* v. *Howard*, [1902] 2 K.B. 363. Questions as to the sufficiency of a mandate to appear in the Licensing Courts were for these courts to decide. A tacit mandate was as good as a verbal mandate—Stair, i, 12, 12. (*c*) Ratification was equivalent to mandate. There were many cases where owing to absence or other causes a client could not communicate with his agent, and an appeal taken by an agent without a mandate, but subsequently ratified, was clearly a valid appeal. The objectors were aware of the appeals, for they were present in Court when they were being heard, and they now stated that they strongly approved of what had been done. Such homologation was equivalent to mandate—*Wallace* v. *Miller*, May 31, 1821, 1 S. 40; *Macqueen & Macintosh* v. *Colvin*, July 4, 1826, 4 S. 786; *Wylie* v. *Adam*, February 5, 1836, 14 S. 430; *Hepburn* v. *Tait*, May 12, 1874, 1 R. 875, 11 S.L.R. 502; *Anderson* v. *Watson*, 3 C. & P. 214; *Ancona* v. *Marks*, 7 H. & N. 686, and Smith's Leading Cases (11th ed.), i, p. 363; *Bolton* v. *Lambert*, L.R., 41 C.D. 295; *Marsh* v. *Joseph*, [1897] 1 Ch. 213, at p. 246 foot; *Lyell* v. *Kennedy*, L.R., 14 A.C. 437, *per* Lord Selborne at p. 461; *Fleming* v. *Bank of New Zealand*, [1900] A.C. 577. *Esto* that, as the respondents contended, ratification after the expiry of a time limit was *quoad* the opposite party invalid, the time limit had not expired here, for the appeal at the instance of the Seamen's Union (one of those withdrawn) prevented the judgment of the Licensing Court from becoming final, and consequently the ratification was timeously made. 2. The Lord Ordinary was in error in thinking that the Justices were parties to the cause. *Esto* that certain of the Justices were sympathisers with and subscribers to the Vigilance Association, they were not members. They had no personal interest in the licences one way or the other, and could not therefore be held to be biassed. *Esto*, however, that some of the Justices were members of the Association, they were not members of the executive, and mere membership could not be held to disqualify—*Reg.* v. *Mayor and Justices of Deal*, 45 L.T. 439; *Reg.* v. *Justices of Hertfordshire* (1845), 6 A. & E. (Queen's Bench), 753; *Leeson* v. *General Council of Medical Education and Registration*, L.R., 43 C.D. 366; *Allinson* v. *General Council of Medical Education and Registration*, [1894] 1 Q.B. 750; *Reg.* v. *Burton*, [1897] 2 Q.B. 468; *Findlater* v. *Recorder and Justices of Dublin*, (1903) 37 Ir.L.T. Rep. 202, *per* Palles, C.B. The cases of *Fraser* (*cit. infra*) and *Allan* (*cit. infra*), relied on by the respondents, were cases of obvious bias, for direct personal interest was involved. 3. The fact that two members of the Court did not hear the whole case did not render the judgment invalid, for (*a*) they missed nothing material, and (*b*), even if their votes were disallowed, there was still a sufficient majority—*Livingstone* v. *Proudfoot*, May 15, 1849, 6 Bell's App. 469. This was a matter of procedure as to which the Court was final. The principle of *de minimis* applied. In any event the whole judgment did not fall, for if the votes objected to were invalid they fell to be disallowed.

Argued for respondents—(1) There was no competent appeal, for (*a*) Kyle had no valid written mandate, inasmuch as the document founded on clearly applied only to the ordinary Licensing Court. In the Licensing Act there was a clear distinction between the ordinary Court and the Appeal Court, *e.g.*, sections 1 to 5. It was the Licensing Court, not the Licensing Appeal Court, that granted or refused licences. The Appeal Court was an entirely different Court where new evidence might be led. Caution for expenses was required in the Licensing Appeal Court. To say, as the appellants did, that Kyle would have been liable in expenses if the appeal had been lost, or in damages if he had failed to appeal, was absurd. (*b*) No verbal mandate had been proved, and even if verbal communings had been proved they could not alter the true construction of the written mandate. Further, there was no proper relationship of agent and client here at all. The objectors merely gave their names, and Kyle stated such objections as he thought proper; he never reported to them as to the progress of the case, and never examined them as witnesses. (*c*) Homologation had not been proved, and further, no homologation could set up what was in fact a nullity—*Gall* v. *Bird*, July 3, 1855, 17 D. 1027. Homologation could not be equivalent to mandate, for the statute made a mandate essential. It was irrelevant to say that the objectors were present in Court when the appeals were being heard. They were cited as witnesses by the opposite party, and were not there in support of their case. The objectors had ten days in which to

appeal, and not having done so the opposite party was entitled to plead "no process." After the expiry of the ten days the objectors could not—*quoad* the opposite party—ratify what another had done in their name but without their authority—Ersk. Instit., iii, 3, 47-9. No inference as to the objectors' intention *pendente processu* could be drawn from their statements after the case had been won. In the domain of contract, ratification after the expiry of a time limit was, *quoad* the opposite party, invalid—*Bird* v. *Brown* (1850), 4 W. H. & G. 786; *Keighley, Maxsted, & Company* v. *Durant*, [1901] A.C. 240. Similarly, in litigation, homologation could not set up an inchoate action as against an opponent after the case had been finally disposed of. It was only competent *pendente processu* when both could be bound. What was at stake was an adverse right. After decree, homologation as against the opposite party would be too late, for there would be nothing to homologate save the decree. The cases of *Wallace, Macqueen, Hepburn*, and *Wylie* (cited by the appellants) were inapplicable, for they were cases of personal bar pure and simple. The present case was more akin to *Cumming* v. *Munro*, November 19, 1833, 12 S. 61. (2) Bias had been clearly established. Three of the Court were subscribers to the Vigilance Association, and that made them Judges in their own cause. The Vigilance Association was one which *de facto* dealt solely with licensing. It was settled that instructing an appearance on one side was sufficient disqualification, and it made no difference that the Justices here were some out of many subscribers. Subscribing to this Association was equivalent to paying Kyle individually to conduct the cases, and that was sufficient to infer bias—*Reg.* v. *Fraser*, (1893) 9 T.L.R. 613; *Reg.* v. *Allan*, 4 B. & S. 915; *Reg.* v. *Meyer*, L.R., 1 Q.B.D. 173; *Reg.* v. *Gibbon*, L.R., 6 Q.B.D. 168; *Reg.* v. *Huggins*, [1895] 1 Q.B. 563; *Rex* v. *Sunderland Justices* [1901], 2 K.B. 357. The cases of *Leeson* and *Allinson* cited by the appellants were distinguishable, for in these cases there was no such intimate connexion between the Judge and the prosecution as there was here, and therefore no "apprehension of bias." 3. It was admitted that two of the Justices did not hear the whole case—in fact the whole of the evidence on one side had been led before King came in. That was sufficient to render the judgment biassed, and so invalid—*Reg.* v. *Justices of Hertfordshire, cit. supra.* The Licensing Court was not a public meeting but a judicial body giving a considered judgment, and if some of the Court were misinformed or biassed the whole judgment fell. It was not sufficient to deduct the votes given by the absentees.

At advising—

LORD PRESIDENT—This is an action of reduction of a certain deliverance of the Licensing Appeal Court. The case is very voluminous. It has been most anxiously argued, and no doubt one or two interesting questions are raised in it. But I confess I am unable to attribute the importance to it which the parties seem to have done. The practical effect of reduction or no reduction is almost historical, because the year in which the licence, which was the subject of contention, would have flourished has long ago passed away, and at least one of the other defects which may have vitiated the proceedings could easily be cured on another occasion. But still the case is before us and it must be decided.

The Lord Ordinary has granted decree of reduction, and he has granted decree upon each and all of three separate grounds, the first ground being that for want of authority there really were no true proceedings in the Appeal Court at all, because, although proceedings were carried on in the name of parties who under the Act of Parliament had a right to carry on these proceedings, his Lordship holds that those parties never gave their authority, and that what was done for them was done by the paid agent of a voluntary society who are not given a title by the Act of Parliament to appear as objectors.

The second ground upon which the Lord Ordinary has reduced the proceedings is that several of the members of the Court who sat and adjudicated upon this occasion were members of this very society—the society which was directing the proceedings—and that accordingly the judgment for this reason was vitiated.

The third ground upon which his Lordship has also held that the proceedings were bad is that there being an inquiry before the Court of Appeal conducted by means of witnesses, two at least of the members of the Court were absent during a large portion of the progress of the case, and then, none the less, proceeded to give judgment without having heard a good deal of the testimony that had been led.

I shall take each of those matters in their order. As regards the first, the facts which give rise to the contention are these—There is a society called the Vigilance Society which in its documents of constitution professes to be for the promotion of temperance, the suppression of drunkenness—I am not actually quoting, I am glossing the words—the due enforcement and proper observance in every sense of the licensing laws, and, in fine, the good government of the city of Glasgow. From the proof that has been led in this case it is quite evident that the society is purely a society, in its action, for dealing with licensing matters in the interests of what it denominates the temperance cause. Now I am not going for one moment into controversial matters of opinion. Persons are entitled to their own views upon this matter, just as other persons are entitled to views which differ. There is nothing illegal in persons thinking that the more you reduce licences the more you promote the cause of temperance. There is nothing illegal in thinking that the mere reducing of licences will have little effect in promoting the cause of temperance. There is nothing illegal in a set of people banding themselves together with a view to promote their views; and

there is nothing illegal in their assisting by money contributions those litigants, if I may use the word—it is not precisely accurate but it does well enough to express what I mean—to assist litigants who are appearing before the Licensing Courts and Appeal Courts as objectors to licences—assisting them with funds to carry on their cases. Accordingly this society did so.

Under the Act of Parliament I need scarcely remind your Lordships no general society has any title to appear directly. The title to object to licences is confined under the Act to certain specified people, one class of whom are people who live in the immediate vicinity of the premises for which a licence is sought. And, accordingly, one of the methods of this society was that when a licence was applied for, whether it was a new licence or whether it was merely a renewal of an old licence, they sent out canvassers who sought in the immediate neighbourhood for persons who would be ready to object, and then if they found such persons they represented to them that if they would give them their names the society would, if I may use the expression, see them through in the matter of expense. More than that, once that was done it is quite evident that the whole conduct of the case, if I may so call it, was left entirely in the hands of the agent of the society, who appeared in all or nearly all of such cases, who selected his witnesses, conducted the case, withdrew the case if he thought fit without consulting his clients, and indeed acted entirely as if the litigation were his own.

Now in all of this there is nothing that I see illegal. But at the same time it is quite clear that if persons act in that way they must be careful to go precisely according to the lines of the Act of Parliament under which the proceedings are being taken, that is to say, they cannot by these means create in themselves a title which the Act of Parliament has not given them. Now, in the licences in question which are dealt with by these cases the practice followed was this. The agent for the society sent out his emissaries and found out a certain number of people who wished to object to the licences, and I am not for one moment questioning that these persons who wished to object were perfectly *bona fide* in so doing. He then proceeded to get a mandate, and the mandate—there is more than one in the case but they are all in the same terms—was in this form—"To Robert Kyle, Esq., writer" (Robert Kyle being the paid agent of the society)—"We hereby authorise you to sign and lodge on our behalf objections to the granting of the certificate for licence for a public-house applied for by Alexander Goodall for premises at 68 M'Alpine Street, at the forthcoming Licensing Court of the City and Royal Burgh of Glasgow, and to appear on our behalf in support of said objections."

Accordingly Mr Kyle did appear. He framed the objections for the parties. He arranged, as I say, about the whole of the witnesses, and he conducted the case. In all that I think he was entirely authorised by the terms of the mandate which I have just read. But the Licensing Court sat and it granted the licence. Whereupon, acting upon the idea (which I do not doubt was in good faith too) that this mandate which I have just read covered not only proceedings at the Licensing Court but also proceedings at the Appeal Court, Mr Kyle, at his own hand, put in, in name of one or more of these objectors, a note of appeal to the Appeal Court. He then at the Appeal Court behaved in precisely the same way. An objection was made at the Appeal Court to Mr Kyle's appearance upon the ground that he was not a party at all, but that he was a mere creature of the Association. This mandate was produced, and the Appeal Court decided that they could not hear any more upon the matter. Proceedings went on, and the result was that the Appeal Court reversed the determination of the Licensing Court and refused the licence, and it is for reduction of that proceeding that this action is brought.

Now, the first question that therefore arises is—What is the true construction of this mandate? I cannot say that I have had any difficulty in coming to the conclusion that the mandate must be construed according to its own terms, and that the Licensing Court is the Licensing Court and not the Appeal Court. I need not go through the Act to your Lordships, but all through there is no question that the Licensing Court and the Appeal Court are spoken of as different things. There is not the slightest confusion between the two. Nor is the one a branch of the other. The proceedings in the one are perfectly independent of the other. Even the meaning of the word "appeal" as there used is different from the ordinary sense of the term, such as, for instance, an appeal from the Sheriff Court to this Court, or an appeal taken from the Outer House to the Inner House by means of a reclaiming note, because there, of course, the Appeal Court deals with the material that has been before the Court below. But here there is no such thing. The case, in the strict sense of the word, is really not appealed; it is really reheard, and witnesses are examined again, and the whole thing begins *de novo*. And, accordingly, all through the statute there is never the slightest confusion between the one Court and the other.

Now, that being so, I agree with the Lord Ordinary that this was a mandate which upon its terms limited Mr Kyle's authority—I will not say limited, but never gave Mr Kyle authority—to do more than appear at the Licensing Court, and that, consequently, when he lodged an appeal in these parties' names he did an entirely unauthorised act.

Well, now, what is the result of that? I think the result is that there were in law no proceedings at all, because what the Act says is this. After providing in the earlier sections for the way in which a Licensing Court is to be assembled and to listen to the applications and objections

which are made—I need not remind your Lordships that every licence is a yearly matter, whether it is a new licence or a renewal of an old licence—section 22 says this—"If any member of a Licensing Court, or proprietor or occupier of any house and premises in respect whereof any such certificate shall be applied for"—now that is not in point in this case—"or if any proprietor or occupier of property in the neighbourhood of such house who has objected before the Licensing Court to the granting or renewal of such certificate shall be dissatisfied with any proceeding of any Licensing Court assembled for granting certificates as aforesaid, whether in granting or refusing or otherwise disposing of any such application, it shall be lawful to such member of the Licensing Court, proprietor, or occupier, to appeal therefrom to the next Court of Appeal from such Licensing Court: Provided always that such appeal shall be lodged with the clerk of such Court of Appeal within ten days of such proceeding. . . ." Now it is certain that within ten days of such proceeding there was no note of appeal lodged by the only persons qualified, namely, the persons whom I have just mentioned. Some of these persons, having objected, would have been qualified to lodge a note of appeal, but they did not do so, and the only thing that was done was that a note of appeal was lodged for them by an unauthorised person, Mr Kyle.

Now, that he was unauthorised there is no doubt, because he is asked about this. He says so quite frankly himself. He is asked this question—"Before obtaining the mandate which purported to be signed by certain objectors, had you any communication, from beginning to end of the proceedings, with your alleged clients, either written or verbal?" And his answer is—"I saw the objectors in *Goodall's* case at the Court, and I had a conversation with them. I am referring to the Appeal Court. I think that until that date I had never seen any of them." Accordingly the first interview he had with his clients was actually when the Appeal Court was going on. That, of course, was long after the ten days; and therefore you have it out of his own mouth that he never saw any of them; that, consequently, the question of verbal authorisation is out of the question; and that really his only authority was his mandate. I do not doubt that Mr Kyle had in good faith not adverted to the terms of his own mandate and really thought it did authorise him to appear in the two Courts. But if it did not, it leaves him bereft of authority when he puts in that application.

Now it is said, and it was argued very strenuously, that although Mr Kyle had no authority when he lodged the appeal, his proceedings were homologated afterwards. Now it is first of all necessary to see exactly what homologation in this case means. Homologation in this case means that after the whole thing was over and when this case of reduction was raised, then the parties in whose names the appeal was taken are asked, in the action of reduction, whether they approved of everything that Mr Kyle did, and they said "Oh certainly we do." Well that is homologation of a very easy character. It is homologation—I am afraid it is not a very judicial expression, but it expresses it better than any other phrase—of "the heads I win tails you lose" character, because it is homologation after you perfectly well know that the case has been decided in your favour.

We had a great deal of argument as to the different circumstances in which homologation might arise, and the case was said to be assimilated to what is done in litigations. I do not think that those supposed analogies give one very much help. Of course one knows perfectly well that an agent who is conducting a litigation for a client in, say, the Court of Session, does not go back to the client to get authority for each particular step in the litigation, as, for example, for each minute that is put in. In the Court of Session, in truth, there is very little difficulty upon the subject, but I think the very brocard that I am going to use shows that the view is that authority is always necessary—the brocard, I mean, that the counsel's gown covers his mandate—and the meaning of that brocard, I take it, is this, that once you have started a litigation in the Court of Session, whether as pursuer or defender, and instructed counsel, the very instruction of counsel would be held, as in law, a mandate for that counsel to take all ordinary steps in the progress of the case. And accordingly this question of authority, and consequently in default of authority, homologation, really seems to me never to arise in the course of an ordinary litigation. It would be possible for such a case to be raised as upon questions coming from the Sheriff Court to the Court of Session. I think it will be time to decide those cases when they arise. No such cases have been decided so far; and therefore I do not think there is any standard to appeal to by way of analogy on this point.

Accordingly my opinion is that, although a society of this sort is, as I say, quite entitled to assist people if they choose, if they really take upon themselves to do so, they must see that they walk by the card. It seems to me that the gentleman here who got his licence was entitled to hold that licence unless within the ten days a note of appeal was lodged by a person authorised to lodge that note of appeal; that no such person was here in this case, and that consequently the whole proceedings were *funditus* null and void.

Now as regards the second question. That is a question which one can easily see in the course of the proof developed a great deal of heat. The Lord Ordinary has found that several of the gentlemen composing the Court were disqualified. My own view is that that view of the case fails because I do not think it is, as a matter of fact, proved that the gentlemen in question were actually members of the society. There is nothing proved against them at all except that it is proved that one of them

in one case directly, and another of them in another case through the medium of a firm of which he was a partner, gave a subscription to the funds of this society. Now I am not prepared to hold that everyone who gives a subscription to the funds of a society becomes a member of that society. I should think it would very much astonish anybody who had ever given anything to the Salvation Army to find that he was a member of the Salvation Army; and there are many other cases which one may call to mind. And of course if that is so, that ends it. But I should like to say, as the matter has been discussed in the long and very careful note of the Lord Ordinary, that even if they had been members I should wish to reserve my judgment as to whether that would vitiate the proceedings. To my mind there is a very great distinction between being a mere member and being one of the operating officials of the society. In other words, taking the facts as established in the proof, I have no doubt whatsoever that Bailie Battersby was truly disqualified, and never ought to have sat in the Court at all, and that he was most rightly interdicted by my brother Lord Salvesen, because he was the organising secretary of the society, and it is contrary to the idea of elementary justice that a man should get up cases and then proceed to adjudicate upon these cases upon the bench. But it is a very different thing when you have a member of the society who may not have anything to do with the practical campaign that is going on, and whose membership of the society may really mean no more than this, that he is in sympathy with the general objects of the society but has not got any control over the particular things that the society is doing, and, in particular, no control over the case that is going on. And therefore I must not be held as necessarily agreeing with the conclusion at which the Lord Ordinary has arrived, even if I were of opinion, which I am not, that these gentlemen were members of the society.

Well, now, I come to the last point, and it, to my mind, is the only really important point in this case, because, as I say, the other things I do not think will occur again. This last point, however, is important, because it goes to the way in which these Appeal Courts are to be conducted. The Court is not, of course, a properly judicial body. The expression "court" does not turn it into anything else than what it was before, namely, a licensing tribunal. None the less, of course, parties who are there have got to conduct matters in a judicial way, and not against all rules of judicial fairness. They are not in the same position, for instance, as judges in a court like this, because they are entitled to do what we are not entitled to do, namely, to please themselves in the matter of proof and supplement a defect of proof by their own local knowledge obtained in any manner whatsoever. They may go and look at things for themselves. They may find out things for themselves. We cannot do that. We are not entitled to go and investigate, for instance, a machine and come to a conclusion by ourselves, apart from the witnesses, as to whether it was in a wrong state or whether it was not. They are entitled to do anything that is analogous to that. But none the less they are bound to exercise their office in a judicial spirit. And one of the things that is necessary for the judicial spirit is that you should hear the witnesses and hear the people who speak before you, and that if you do not you should not presume to give judgment. What would be said of a judge who proceeded to give judgment in a case which he had never heard? And the person who is absent for a considerable portion of the evidence is just in the position of a person who has not heard the case. Of course, all this must be regarded from a commonsense point of view. *De minimis non curat lex.* No one supposes that if one were out of the room for a minute, or two minutes, that the judgment to which he contributed would be vitiated by that fact. But here the absence was very considerable. With one of the gentlemen it was absence during the whole examination of the witnesses on one side; with another it was not quite so much, but it was absence for a considerable time.

Well, now, I think it must go forth that in these courts that must not be done. If gentlemen happen to be late with their trains or anything of that sort the remedy is exceedingly simple. It is only for the particular case which is going on, and in that case if they have been absent they must say that they decline to vote; and if they do that nobody will think that their mere presence in the Court beside their brethren will vitiate the determination to which these brethren come. But if they vote and take part consequently in the total deliberation of the Court, then I am clearly of opinion that it does vitiate the whole proceedings, and that you cannot simply knock off these votes and say the result would have been the same even if they had not voted. That, I think, is elementary, and goes upon the ground, which has been held again and again, that if one of the judges is disqualified for a reason—say, of interest or relationship or so on—and takes part in the decision, he vitiates the whole decision and does not merely disqualify his own vote, and for this very good reason, that in the deliberations of judges, whoever they are, one judge's view may have an effect upon another. Accordingly upon this part of the case I agree with the Lord Ordinary, and I hope it will serve as a rule for the future conduct of these cases, and that if people cannot be there during the time the witness is being examined and the case is debated, then they must refrain from voting upon that occasion.

Accordingly, upon the whole matter, my conclusion is that the reclaiming note should be refused and the Lord Ordinary's judgment adhered to.

LORD KINNEAR — I agree with your Lordship.

LORD SALVESEN—The Lord Ordinary has narrated in full detail the facts out of which the questions for our decision arise. As I agree with the conclusions in fact at which he arrived, and as these were indeed not seriously disputed by the reclaimers, it is unnecessary that I should to any extent recapitulate them.

The Lord Ordinary's first ground of judgment is that the appeals against the renewal of the pursuers' certificates were not authorised by the parties in whose names they were presented; and therefore that there were no competent appeals before the Court. This question depends in the first instance on a construction of the mandate signed by the objectors in favour of Mr Kyle, for Mr Kyle had no other communication from these persons. In my opinion the mandate is not reasonably open to two interpretations. According to its terms it authorised the mandatory to sign and lodge on behalf of the signatories objections to the granting of the certificate of certain licences "at the forthcoming Licensing Court" and to appear on their behalf in support of said objections. That was a limited mandate applicable to the Licensing Court only, and upon no fair construction can it be held to have authorised Mr Kyle to lodge an appeal against the granting of a certificate to an entirely different Court which is described in the statute which now regulates the matter as "the Court of Appeal" as distinguished from the Licensing Court—a distinction with which Mr Kyle, who drafted the mandate, was perfectly familiar. It was strenously urged that the last words "to appear on our behalf in support of said objections" are absolutely general, and authorised Mr Kyle to lodge an appeal and to appear at the Appeal Court. In my opinion the apparent generality is controlled by the context; and I think it is almost too clear for argument that if the question had arisen between Mr Kyle and the objectors as to their liability for the expenses of the appeal the mandate would have been conclusive against such liability.

It was said that the evidence of the objectors made it plain that they were all along quite willing that Mr Kyle should take any action that he thought fit in order to get the licences to which objections were lodged discontinued. I daresay they were, and that they might have given the necessary authority if they had been asked; but an intention which was never disclosed cannot in my opinion be appealed to as enlarging the scope of a written mandate; and I find no trace in the evidence of any of the objectors that the possibility of an appeal in the event of their objections being unsuccessful in the Licensing Court was ever present to their minds when they signed the mandate. Indeed, the fact appears to be that the objectors had scarcely any intelligent idea as to the meaning of the mandate which they signed, except that they understood in a vague way that it was essential to secure the removal of the licences to which some of them at all events had a genuine objection. It is unnecessary to consider whether a mandate obtained, as this one was, from persons who did not fully understand what it meant, would have been a good mandate for Mr Kyle's appearance even in the Licensing Court, because his appearance there did not result in the licence being refused. Every one of the objectors disclaimed the idea that he desired to make any attack upon the character or fitness of the licence-holder; and yet this was one of the objections which Mr Kyle took in pursuance of the mandate. I would only say on this part of the case that I disapprove of a mandate being obtained from persons entirely unacquainted with legal procedure without their having had fully explained to them the meaning and effect of the document they signed.

The statute provides that proprietors or occupiers of property in the neighbourhood of a licensed house who have objected before the Licensing Court to the granting or renewal of a certificate shall be entitled to appeal, provided that the appeal be lodged within ten days and that the appellant shall find caution for expenses. An appeal in the names of the objectors was accordingly lodged by Mr Kyle; but it is now admitted that the appeal was lodged without communication with his supposed clients, none of whom seems to have known what was the result of the application to the Licensing Court. In my opinion this appeal was not a compliance with sec. 22 of the statute. Mr Kyle stated on behalf of the objectors that they were dissatisfied with the proceedings of the Licensing Court, and that they appealed therefrom. He had no warrant for making such statements. He might indeed believe that the persons who had authorised objections to a licence would in all probability not object to a further attempt being made to have the licence withdrawn; but if in his note of appeal he had stated the true facts it is plain that the appeal would not have been competently entertained. His duty was to have communicated with the objectors and obtained their authority to lodge the appeal; and the only reason why he did not take that step is that his true clients were the Citizens' Vigilance Association from whom alone he took his instructions; and that the objectors' names were simply used because the Association had no *locus standi* of its own.

It was further urged that, assuming the appeal was not authorised either by the written mandate or by any larger verbal mandate previously given, Mr Kyle's action in taking it might be subsequently ratified by the persons in whose names it was presented, and that in point of fact they did so ratify it. I do not doubt that if within the appealing days Mr Kyle had obtained the objectors' authority to proceed with the appeal, which he had lodged without authority, such ratification would have met the initial defect; but it is a totally different proposition that a ratification

long after the time for appealing has expired will draw back to the date of the unauthorised act as in a question with third parties. We are not concerned here with questions as between the principal and the agent, because as between these parties it does not so far as I see matter how long after the unauthorised act the ratification was obtained, but where the element of a time limit and the interests of third parties enter into the question totally different considerations may apply.

As regards the facts, I do not think it is proved that Mr Kyle had any communication with his alleged clients prior to the decision of the Appeal Court. Some of them were cited as witnesses to attend that Court, but they were so cited at the instance of the agent for the licence-holder and were never present in Court before the judgment was delivered. To say that because they were so cited they must have known of the appeal in their names and must have approved of that appeal because they did not appear and disclaim it, is I think preposterous. No doubt they now say that they approved of all that Mr Kyle did, but it does not at all follow that their attitude would have been the same while the matter was still *in dubio*. In my opinion it is however unnecessary to go into questions of this kind, because I hold that such a ratification could never draw back so as to validate the originally unauthorised act after the time fixed by the statute for appealing had expired. I do not hesitate to say that an appeal lodged by a person who has no *locus standi* to appeal at all is a nullity, and it is made no better by the fact that that person falsely represents that the appeal is lodged by the instructions of others who had such a *locus*. Any other view would open wide the door to great abuse. A person who for his own reasons desired to get rid of a licence would only have to lodge objections in the names of a sufficient number of persons residing in the locality, and when the mandate was challenged to prevail upon some one of them to express his approval of what he had done. There is sufficient laxity already in the conduct of cases in the Licensing Courts, and I see no reason why we should encourage greater laxity than at present exists or dispense in any way with strict compliance with the statutory procedure. The number and character of the names attached to a note of objections must always exercise an influence upon the Court, and I think the Court has a right to assume that all these persons have duly authorised the proceedings to which their names are attached.

The cases cited by the reclaimers, with one exception, appear to me to present no difficulty whatever. They may be explained either on the footing that the agent acted with the implied authority of his client, or that he in fact had a general authority to act as he did. The exception is the English case of *Bolton Brothers* v. *Lambert*, 41 C.D. p. 295. In that case an offer of purchase was made by the defendant to a person who was the agent of the plaintiffs but was not authorised to make any contract for sale. The offer was accepted by the agent, but the defendant withdrew his offer, and it was only after this withdrawal that the plaintiffs ratified the offer of their agent. It was held that the ratification related back to the acceptance, and that therefore the withdrawal by the defendant was inoperative. It is unnecessary to consider whether that decision was right, although it was pointed out that it had been seriously questioned in a subsequent case in the Privy Council—*Fleming*, A.C., 1900, per Lord Lindley at p. 587. There are grounds on which it may be supported. more especially as the reason of the defendant's withdrawal of his offer did not proceed upon his knowledge that the agent who accepted it was unauthorised, but I do not think it is applicable to the present case. To use the words of Lord Selborne in *Lyell* v. *Kennedy*, 14 A.C. 437, at page 462—there was here "a *jus tertii* complete before ratification, as there was in *Lord Audley* v. *Pollard* and *Bird* v. *Brown*." These cases are said by Lord Selborne to be good law, and if so they have a direct application to the facts of the present case although they have no application to a question between the self-constituted agent and the ratifying principal. I accordingly reach the conclusion that on this point also the reclaimers' argument fails.

If I am right so far, it is unnecessary to consider the other questions with which the Lord Ordinary has dealt, for if the appeal taken in name of the objecting owners and occupiers was a nullity, the grant of a licence in favour of the pursuer had become final, and the decision of the Licensing Court could not competently be reviewed. Whether there was such bias as would disqualify any member of the Court is a question of circumstances in each case, and as the decision on the special circumstances is not necessary here, and can be of little value in a subsequent case, I do not think that we are called upon to determine it.

The third question, however, raises a pure question of law, because the facts are not in controversy. Two of the members of the Court who insisted in taking part in the decision were not present on the bench while a substantial part of the evidence was being led, and I think that it cannot be doubted that they were thereby disqualified from deciding in the case. The parties cannot of course compel the members of the Court to give their attention to the case throughout the proceedings, but I think they are at all events entitled to have their bodily presence during substantially the whole time that the proceedings last. If, however, the votes of Mr Ross and Mr King are simply disallowed now, the decision of the Court would stand as there was still a majority in favour of refusing the licence. The Lord Ordinary, however, has held that just as the presence of a biassed party on the Bench is enough to vitiate the proceedings where he takes part in the vote, so the

presence on the Bench of a person who has not been present during substantially the whole hearing of the case has the same result. I agree with the Lord Ordinary that there can be no distinction in law. The decision is the decision of the whole Court, and as it cannot now be ascertained how far the votes of the other members of the Court were influenced by the arguments or example of the disqualified persons, it appears to me that the whole judgment is vitiated by their taking part in its deliberations. It was suggested that if this were affirmed any decision might be vitiated by a Justice who had heard only a part of the case insisting on sitting on the bench and discussing the case with his colleagues. There appears to me to be no real substance in this argument, because the Court can readily protect itself against the intrusion of such disqualified persons, and indeed can much more readily do so than in the case of a person who is disqualified by bias. I am accordingly of opinion that the Lord Ordinary's third ground of judgment, which is expressed by his sustaining the fifth plea-in-law for the pursuer, ought also to be affirmed.

LORD M'LAREN and LORD PEARSON, who were present at the advising, gave no opinion, not having heard the case.

The Court recalled the Lord Ordinary's interlocutor in so far as he sustained the third plea-in-law for the respective pursuers [*viz.*, "The said appeal having been taken and insisted in for and on behalf of the said Citizens' Vigilance Association, and certain members of and subscribers to said Association having taken part in the discussion and determination thereof, the decision of the Appeal Court should be reduced as concluded for"], and *quoad ultra* adhered.

Counsel for Pursuers (Respondents)—Clyde, K.C.—Horne. Agents—Alex. Morison & Co., W.S.

Counsel for Sir William Bilsland and Others, Defenders (Reclaimers) — Lord Advocate (Shaw, K.C.) — Cooper, K.C. — W. Thomson—Lyon Mackenzie. Agent—Norman M. Macpherson, S.S.C.

Counsel for John Green and Others, Defenders (Reclaimers)—Morison, K.C. — J. Duncan Millar. Agents—Clark & Macdonald, S.S.C.

Friday, March 12.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

DUKE OF ABERCORN *v.* MERRY & CUNINGHAME, LIMITED.

Mineral Lease—Reparation—Subsidence—Second Action for Same Cause of Injury — Nemo debet bis vexari pro eadem causa.

In February 1907 a landowner raised an action against his mineral tenants, who were under their lease liable for damages caused by their operations, to recover damages in respect of 62·028 acres injured by their workings. This action was settled, the pursuer recovering substantial damages. Thereafter, in February 1908, a new action was raised by the same pursuer against the same defenders claiming further damages, in which the pursuer averred that "subsequent to the raising of" the first action he had "ascertained" that a further larger extent of ground had been injured by the defenders' operations.

The Court *allowed* a proof before answer.

Opinion per Lord M'Laren—"If it is found as the result of the inquiry into the facts of the case that the pursuer's advisers knew, or ought to have known, that the subsidence was in progress, we might hold that the pursuer had elected to make the claim in the first action as representing the measure of what he was content to recover. But if it appears from the proof that no further extension was expected, and that the pursuer was excusably ignorant of the fact that the excavation was not exhausted, then I see no reason why he should not bring a new action for what is substantially a new claim."

The Duke of Abercorn raised an action against Merry & Cuninghame, Limited, carrying on business as coal and iron masters in Glasgow and elsewhere, to recover damages from them for subsidence caused by their mineral workings.

The defenders pleaded, *inter alia*—"(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (2) The action is incompetent in respect that the damages claimable by the pursuer in respect of the defenders' mineral workings have been assessed and paid for in the former action. (4) The pursuer is in the circumstances barred from maintaining the present action."

The facts of the case and the nature of the pursuer's averments sufficiently appear from the opinion of the Lord Ordinary (MACKENZIE), who on 30th June 1908 sustained the first plea-in-law for the defenders and dismissed the action.

Opinion.—"This is an action by the owner of land against the mineral tenants to recover damages for subsidence caused by their mineral workings.

"The pursuer let the coal in his lands and farms of Linclive, Barskiven, and the South and East Candrens, in the Barony Parish of Paisley, to the defenders for fifteen years from Martinmas 1900, with certain breaks. The defenders terminated the lease at Martinmas 1906.

"By the lease it was provided, *inter alia*, as follows—'And further, the said tenants hereby bind and oblige themselves to pay all damages of what kind soever that may be occasioned in any way by their opera-