be necessary, because if those are statutorily fixed charges I do not know upon what ground a trader who admitted that the service had been rendered could refuse payment. But it is made quite clear afterwards by sub-section (*e*), which says that the charges directed by the Minister "shall be deemed to be reasonable, and may be charged notwithstanding any agreement or statutory provisions limiting the amount of such charges."

Now it is the fact—and I do not think this was actually noticed in the argument—that this section 5 in the Order Confirmation Act of 1892, which deals with the right to charge for detention of waggons is inserted under the general heading of "maximum rates and charges," so that I think it is perfectly clear that this is referred to in the expression in sub-section (*e*) just as much as the ordinary conveyance charges which are referred to under the well-known name of maxima. Accordingly I think it is abundantly clear that the whole solution is contained in a very short sentence of Lord Dundas, "that the question of amount of rate, and that as to the period of days, are both involved as necessary ingredients in the making of a charge for detention."

Their Lordships dismissed the appeal, with costs.

Counsel for the Appellants — Mackay, K.C. — Aitchison — Clements. Agents — Drummond & Reid, W.S., Edinburgh — Ince, Colt, Ince, & Roscoe, Solicitors, London.

Counsel for the Respondents—Macmillan, K.C. — Graham Robertson. Agents — James Watson, S.S.C., Edinburgh—Lewin, Gregory, & Anderson, Solicitors, Westminster.

COURT OF SESSION.

Tuesday, March 14.

FIRST DIVISION.

[Lord Ashmore, Ordinary.

NICOLSON AND OTHERS *v.* MAGISTRATES OF WICK AND OTHERS.

Election Law—Poll—Validity—Secrecy of Poll—Construction of Voting Compartments—"Screened from Observation"—Poll under Temperance (Scotland) Act 1913 (2 *and* 3 *Geo. V, cap.* 33), *sec.* 2 (1)—*Ballot Act* 1872 (35 *and* 36 *Vict. cap.* 33), *secs.* 2 *and* 13, *and First Schedule, Part 1, Rule* 16.

The Ballot Act 1872 (35 and 36 Vict. cap. 33), enacts—Section 2—". . . And the voter having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in a closed box in the presence of the officer presiding. . . ." Section 4—"Every officer, clerk, and agent in attendance at a polling station shall maintain and aid in maintaining the secrecy of the voting in such station. . . . No person shall directly or indirectly induce any voter to display his ballot paper after he shall have marked the same so as to make known to any person the name of the candidate for or against whom he has so marked his vote." First Schedule, Part 1, Rule 16—"Each polling station shall be furnished with such number of compartments in which the voters can mark their votes screened from observation as the returning officer thinks necessary. . . ."

Circumstances in which *held* that voting compartments provided at a poll afforded reasonable facilities for secret voting, and were therefore in conformity with the requirements of the Ballot Act 1872.

William Nicolson, wine merchant, and other licence-holders in Wick, *pursuers*, brought an action against (*first*) the Provost, Magistrates, and Councillors of the Royal Burgh of Wick, as the local authority for the town and Royal Burgh of Wick under the Temperance (Scotland) Act 1913, (*second*) David Davidson, Wick, returning officer for the poll under said Act held in Wick on 14th December 1920, and (*third*) Alexander Bruce, town clerk, Wick, and as such clerk to the said local authority, *defenders*, concluding for reduction of the pretended requisitions demanding a poll under said Act in the burgh of Wick, lodged with the third-named defender on or about 30th September 1920, all minutes, resolutions, and other writings of the first-named defenders fixing the 14th day of December 1920 as the day for holding a poll in said burgh under said Act, the pretended declaration made by the second-named defender as returning officer on or about 15th December 1920, or other minute or writing whereby it was declared that a no-licence resolution was carried at said poll in terms of said Act, and any letter or other writing containing intimation of the declared result of said poll sent by the third-named defender to the Licensing Court of Wick.

The parties averred, *inter alia*—"(Cond. 2) On or about the 30th day of September 1920 a requisition, signed by certain electors in the said royal burgh, was lodged with the defender the said Alexander Bruce as clerk to the said local authority demanding a poll under the provisions of the Temperance (Scotland) Act 1913. Upon receipt of the said requisition the said local authority fixed Tuesday the 14th December 1920 as the day for a poll to be taken under said Act. (*Ans.* 2) Admitted. . . . (Cond. 3) On or about 14th December 1920 a pretended poll under said Act was held for the royal burgh of Wick, the electorate of which numbers 3032, and for premises in which there are 29 licences (including one wine licence only). The result of the pretended poll was declared by the returning officer to be as follows:—No Change 851, Limitation 29, No-Licence 1438, Spoiled Papers 27—Total 2345. The returning officer further declared that as a result of the said poll a no-licence resolution had been carried. The

town clerk reported to the local authority that more than 55 per cent. of the votes recorded having been in favour of no-licence resolution, and more than 35 per cent. of the electors having voted in favour thereof, the no-licence resolution had been carried. The pursuers, for the reasons hereinafter stated, maintain that said poll and the declared result thereof are null and void. (*Ans.* 3) Admitted. . . . (Cond. 4) The said poll was not taken in accordance with the provisions of the Temperance (Scotland) Act 1913 and of the Temperance (Scotland) Act Regulations 1920 made by the Secretary for Scotland on 9th June 1920 in pursuance of the powers conferred on him by section 5, sub-section 4, of said Act. Under section 18 of the said Regulations the provisions of the Ballot Act 1872 with respect to the taking of the poll and the counting of the votes are to have effect as applied and modified by the rules in the Second Schedule to the Regulations. . . . (*Ans.* 4) . . . The provisions of the said Temperance (Scotland) Act 1913 and of the Temperance (Scotland) Act Regulations 1920 are referred to for their terms. . . . (Cond. 5) By rule 16 of the Ballot Act 1872 it is provided that each polling station shall be furnished with such number of compartments in which the voters can mark their votes screened from observation, as the returning officer thinks necessary, and by rule 25 it is provided that 'the elector on receiving the ballot paper shall forthwith proceed into one of the compartments in the polling station and there mark his paper and fold it up so as to conceal his vote, and shall then put his ballot paper so folded up into the ballot box. He shall vote without undue delay, and shall quit the polling station as soon as he has put his ballot paper into the ballot box.' At the poll taken in Wick there were five polling places, viz.—the Town Hall, the Parish Church Hall, the Rifle Drill Hall, and the Academy Public School, all in Wick. At the stations in all of these polling places, with the exception of the station at the Town Hall Wick, the arrangements made for carrying out the provisions of the Ballot Act were inadequate for that purpose. The booths which had been provided by His Majesty's Board of Works during the period of the war for parliamentary elections and had been lent by the Sheriff Clerk of Caithness for the purpose of the election, consisted of a framework of wood covered on the back and sides with thin canvas, divided into compartments of 2 feet 5 inches in width by projected pieces of canvas on wooden frames intended to act as screens. The total depth of this defective screen, which separated the one compartment from the other, was only one foot 4¼ inches, including in this depth the depth of the desk itself, so that the projection beyond the desk only amounted to 8¼ inches. . . . The arrangements made in regard to lighting of the compartments were also defective, the light coming from behind the voter, so that in order to see the paper while marking it it was necessary for him to turn round in such a way as to expose the ballot paper. In consequence of the defective arrangements the marks placed on the ballot papers could be seen and were in fact seen not only by the persons voting in the adjoining compartments but also by other persons in the polling place. During the course of the day many complaints were made to the returning officer and the presiding officers by the electors in regard to these defective arrangements. The returning officer himself was dissatisfied with the voting compartments and complained to the town clerk that the voters were not properly screened from observation. Early in the day it had become known to many electors who had not voted that the arrangements at the polling stations were defective, and this caused many electors to refrain from voting, as they were apprehensive that it would become known in what way they had voted. There was a good deal of feeling in the burgh of Wick in regard to the voting at this poll, and it was accordingly of very great importance that the ballot should be kept secret. Many electors who would have voted in favour of a no-change resolution abstained from voting because of their apprehension that in consequence of the said defective arrangements it would become known how they had voted. The result of the poll was affected by the irregularities here condescended on. The averments in answer in so far as not coinciding herewith are denied. (*Ans.* 5) Admitted that there were five polling stations, situated one each at the Town Hall, the Parish Church Hall, and the Rifle Drill Hall, and two at the Academy Public School. Rules 16 and 25 of the Ballot Act 1872 are referred to for their terms. . . . *Quoad ultra* denied. Explained that the voting compartments at the Town Hall belonged to the first-named defenders, and that the compartments at the other stations were formed of portable partitions borrowed from the Sheriff-Clerk of Caithness in terms of an arrangement between the Scottish Office and the Treasury whereby sheriff-clerks were authorised to lend the same for use at other polls, all in terms of article 16 of the Temperance Act Regulations. It is believed that the compartments used at the said poll were used at the parliamentary election for Caithness and Sutherland in 1918, and at the election of the Caithness Education Authority in 1919, without any objection being taken to them. They were sufficient to ensure secrecy as to the voting, and the lighting arrangements were in no way defective. . . (Cond. 7) The failure of the defenders to provide for the proper carrying out of the provisions of the Ballot Act was to prevent the electors from giving expression to their wishes at the poll and affected the result of the poll, and this action has thus become necessary. The statements in answer in so far as not coinciding herewith are denied. (*Ans.* 7) Denied. Explained that by section 13 of the Ballot Act 1872 it is enacted that "no election shall be declared invalid by reason of a non-compliance with the rules contained in the First Schedule to this Act, or any mistake in the use of the forms in the Second Schedule to this Act, if it appears to the tribunal having cognisance of the

question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election." By section 18 of the Temperance (Scotland) Act Regulations 1920 it is provided that the provisions of the said Ballot Act with respect to the taking of the poll shall have effect as applied and modified by the rules in the Second Schedule to the Regulations, and by paragraph 7 of the said schedule it is provided that the provisions of section 13 are applied, with the substitution of the Temperance (Scotland) Act Regulations 1920, and of the forms thereby prescribed, for the rules and forms mentioned in the section. Even if the pursuers' averments as to the defects in the arrangements for taking the said poll were well founded in fact, which is denied, the result of the poll was not thereby affected."

The pursuers *pleaded*, *inter alia*—"The pursuers are entitled to decree of reduction or declarator as concluded for in respect that (1) no independent poll of the electors was taken, nor was the will of the electors ascertained within the requirements of the Act and Regulations; (2) the voting compartments were so constructed that the voters were unable to mark their votes screened from observation, and that the voting marks were in fact seen by persons other than the voter and the secrecy of the ballot violated, resulting in many persons not recording their votes as they would otherwise have done."

The defenders pleaded, *inter alia*—"3. The arrangements in regard to the said poll having been in conformity with the requirements of the law, these defenders are entitled to decree of absolvitor. 4. In any event, the said poll having been conducted in accordance with the principles of the Ballot Act, and the result of the poll not having been affected by the defects alleged by the pursuers, the defenders should be assoilzied."

On 22nd December 1921 the Lord Ordinary (ASHMORE), after a proof, assoilzied the defenders from the conclusions of the summons. The import of the evidence sufficiently appears from his Lordship's opinion.

Opinion.—[*After a narrative of the pleadings, and dealing with a matter with which this report is not concerned*]—"Coming now to what is the main ground on which the pursuers ask reduction—I mean their contention that the voting compartments were not screened from observation—I think that it will be best to deal with the evidence chronologically. I shall accordingly refer in the first place to what was proved regarding the circumstances under which voting compartments of the kind in question in this case (I will call them for convenience the new voting compartments) were provided, and to the previous general use of these throughout England, Scotland, and Wales, and in particular in Wick and the county of Caithness. . . .

"What was the result of the actual experience of the new compartments? The evidence seems to me to indicate an almost general approval of them. . . .

"I must now refer, but only generally, to the evidence as to the previous use in Wick and the county of Caithness of the very same new voting compartments which form the subject of complaint in this case.

"The following facts were proved:—(*a*) Mr Trotter, the resident Sheriff-Substitute at Wick, who was the deputy returning officer at the contested parliamentary election for the combined counties of Caithness and Sutherland in 1918 when the new voting compartments arrived, had them put up for his inspection, and after examining them he was satisfied that they complied with the Ballot Act; (*b*) that the same compartments were used at the county parliamentary election in 1918 at the various polling stations, at the Education Authority election in 1919, and at the County Temperance Poll which was held in 1920, about a fortnight before the Burgh Temperance Poll with which this case is concerned; (*c*) that as regards the use of these voting compartments at all the elections above mentioned there was no evidence of any complaint being made that voters were not able to vote free from observation.

"I come now to the evidence directly bearing on the pursuers' averments regarding the alleged insufficiency of the new voting compartments as disclosed at the polls of 14th December 1920.

"The evidence led for the pursuers on this part of the case falls very far short of what might be expected from the averments made by them on record, and I shall begin by eliminating certain of the allegations which the pursuers did not attempt to substantiate by evidence or argument, or which in my opinion have been clearly disproved.

"(1) Notwithstanding the averment that many electors had refrained from voting as they were apprehensive that it would become known how they had voted, it has not been proved that a single elector so refrained.

"Mr Green, the leading witness for the pursuers, who from his known interest on the side of the no-change policy would be likely to be made the recipient of information on the subject, being asked in chief—'Did any voter indicate whether he was reluctant to vote?' replied—'There were some very reluctant to go. (Q) Do you know whether they voted or not?—(A) Yes, they voted.' Under cross-examination he was more explicit. Asked whether he agreed with the pursuers' averment that voters had abstained from voting because of the apprehension of want of secrecy he replied—'I don't know anyone who refrained from voting for that reason.'

"Another witness for the pursuers, Bailie Davidson, returning officer at the election, who because of his official position might also be expected to have been the recipient of information from the disappointed electors, repudiated the pursuers' averment altogether. He had not been questioned about it in chief, but in cross it was put to him. I quote verbatim what passed—'It is said (by the pursuers) that many people were prevented from going to the poll because of the meagre nature of the voting

compartments. Do you agree with that ?—(A) I do not. (Q) Do you think that the nature of the compartments prevented anybody from recording his vote ?—(A) I don't believe that anybody did not record his vote directly through this.'

"I think it unnecessary to refer to the evidence for the defence to the same effect. The pursuers have clearly failed on this head of their averments. . . .

"(3) A third averment by the pursuers is to the effect that the lighting arrangements at the polling stations were defective by reason of the light coming from behind the voter, so that he had to turn sideways to see his ballot paper. This averment was limited in its application in the course of the proof to one of the five stations, viz., the station at the Rifle Drill Hall. It was proved that the presiding officer for the municipal poll at that station the day before the poll got a plumber to renew the mantles for the incandescent lights, and that he that night tested the lights and satisfied himself that they were sufficient. It was also proved that on the polling day, although the day was bright, the incandescent lights were kept on all day except for two hours, between twelve and two.

"In my opinion the evidence demonstrated that both the natural light and the artificial light were satisfactory, and that especially when the artificial light was on there would be no necessity for a voter turning sideways in order to catch the light on his ballot paper.

"The contention of the pursuers' counsel was that because of the light coming from behind, a voter would be inclined to turn sideways, and that if he did so he would thereby expose his ballot paper to anyone looking on ; but it seems to me that even if occasionally a voter turned sideways it would be extremely unlikely that he would be turning to the side either when in the act of marking his paper or after he had marked it and before he had folded it.

"As regards the new voting compartments not screening the voters from observation, the evidence adduced by the pursuers seems to me to be neither substantial nor convincing.

"Omitting meantime mere opinion evidence, direct evidence from personal observation as to the marking by voters of ballot papers having been seen by others is given only by two witnesses, viz., Bailie Davidson and Mr Doull.

"Bailie Davidson as returning officer was present in the Rifle Drill Hall when a lady was voting, not in the temperance poll, however, but in the municipal poll, and he deponed that he saw her put her cross on her ballot paper opposite the top name and the centre name and the lower name.

"Mr Doull, an elector who voted at the same time as his wife, said that after he had finished voting in the compartment and was turning to put his paper in the ballot box his eye lit on the shelf where his wife's ballot paper was lying and he saw distinctly how she had voted. In cross-examination he said—'I could infer from where I saw the mark going what she voted for. She was standing half round in the compartment.'

"I have referred to the only instances of observation by others of the marking by voters of their ballot papers. The evidence is certainly meagre.

"As regards the mere opinions adverse to the new voting compartments expressed by the pursuers' witnesses and evidently held by others who were not adduced as witnesses, I think that these opinions are largely if not entirely explained and accounted for by the following considerations :—(*a*) The Wick electors had been familiarised with voting compartments which were provided with curtains in front, and which being four feet from front to back had deep sides, and many persons on seeing the new voting compartments would not unnaturally be struck with the greater protection against outside observation afforded by the old-fashioned compartments ; and (*b*) the temperance poll in Wick evoked strong feeling and keen rivalry between the two sides, and any suggestion that the result of the poll might be overturned would no doubt be regarded with great favour by many on the losing side and perhaps unconsciously might influence the views and comments of some.

"Such considerations as these at least go far to explain the contrast between the individual opinions held and expressed by some of the electors at the extreme north of the Island on the one hand and what seems to be the general opinion prevailing throughout England, Scotland, and Wales on the other hand.

"Counsel for the pursuers submitted that under the statute it was necessary that the voting compartments should be so screened that any inadvertent or careless exposure of the ballot papers might not involve the risk of observation by others.

"The statutory provision (Article 16 of the First Schedule to the Ballot Act of 1872) reads as follows :—'Each polling station shall be furnished with such number of compartments in which the voters can mark their votes screened from observation as the returning officer thinks necessary.'

"In my opinion, on the sound construction of Article 16, if the voting compartments which are provided are so constructed that voters who exercise ordinary and reasonable care can vote screened from observation, the statutory requirement is fulfilled.

"Counsel for the pursuers further maintained that the evidence given by the returning officer and Mr Doull showed that they had observed how voters marked their papers and that thereby the burden was cast on the defenders of establishing that irregularities of the kind referred to had not and could not affect the result of the poll. (Opinion of Lord Bramwell in the *North Durham* case, 1874, 2 O'M. & H. 152, at p. 157.)

"In considering this argument these facts must be kept in view, viz., that the returning officer was bound to secrecy and that the votes which he saw were votes in the municipal poll, and that as regards Mr and Mrs Doull, the mutual confidence of husband

and wife may have led both of them to be indifferent to considerations of secrecy as between themselves and may have facilitated observation by him of her ballot paper as marked by her. A single incident of that kind, however, in itself implies no defect in the arrangements for the proper carrying out of the poll and yields no inference that any such defect existed.

"In law I see no ground either under the Ballot Act or otherwise for holding that a disclosure by a voter to some one else of how he had voted is in itself an irregularity or *per se* infers any defect or irregularity in the arrangements for the due conduct of the poll.

"Section 4 of the Ballot Act in its code of provisions against the infringement of the secrecy of the ballot is in my opinion designed to protect the voter and does not prohibit or strike at either a mere voluntary disclosure by the voter at any time or place of how he or she voted or an involuntary disclosure the result of inadvertence or carelessness on the part of the voter and accidental overlooking on the part of the observer.

"With reference to the contention that an onus of proof rests on the defenders to show that the alleged irregularities founded on by the pursuers did not and could not have affected the result of the poll, I am of opinion that, even on the assumption that the alleged irregularities have been established, no onus of the kind referred to lies on the defenders. I think that the condition-precedent is absent, the condition-precedent being that irregularities have occurred which may have affected the result of the poll. This seems to me to be really in accordance with Lord Bramwell's opinion in the *North Durham* case.

"I have only to add that, even if the irregularities founded on by the pursuers did occur, I am clearly of opinion that they did not and could not have affected the result of the poll. In other words, on the assumption which I have figured the principle embodied in section 13 of the Ballot Act is applicable. In the words of Lord Chief-Justice Coleridge, 'If in the opinion of the tribunal the election was substantially an election by ballot, then no mistake or misconduct, however great, in the use of the machinery of the Ballot Act could justify the tribunal in declaring the election void.'—*Woodward* v. *Sarsons*, 1875 L.R., 10 C.P. 733, at p. 745.

"In the *East Clare* case Mr Justice O'Brien and Mr Justice Johnson, in respect of section 13 of the Act of 1872, upheld an election in which gross irregularities had been proved, being satisfied that the election was conducted in substance according to the rules of law, and that the irregularities did not and could not affect the result—*East Clare* case, 1892, 4 O'M & H. 162.

"In the same case it was in effect laid down (in accordance with the judgment in *Woodward* v. *Sarsons*) that 'the result' contemplated by section 13 is the total result, which in the present case was the carrying of a no-licence resolution, and that a mere diminution of the number of votes constituting the majority, not sufficient to wipe out the declared majority absolutely, would not exclude the application of section 13.

"On the whole, for the various reasons which I have given, I have come to the following conclusions on the facts proved in evidence and on the law applicable thereto, viz.—(1) That the voting compartments as provided and used at the temperance poll were so constructed that the voters could mark their votes screened from observation in accordance with the statutory provision. (2) That no irregularities of the kind alleged by the pursuers have been established. (3) That in my view the poll was conducted in accordance with the principles of the Ballot Act; and assuming, contrary to my opinion that the irregularities complained of by the pursuers did occur, they did not affect and could not have effected the result of the poll.

"I shall accordingly sustain the defences and assoilzie the defenders from the conclusions of the action."

The pursuers reclaimed, and argued—The direction in the Temperance (Scotland) Act 1913 that a poll was to be taken meant that the poll was to be a poll in the sense of the Ballot Act 1872. The root principle of the Ballot Act was secrecy in voting—*Haswell* v. *Stewart*, 1874, 1 R. 927, *per* Lord Neaves at p. 927, and Lord Ormidale at p. 929, 11 S.L.R. 533; *Hamilton* v. *Police Commissioners of Dunoon*, 1875, 2 R. 299, *per* Lord Gifford at p. 298. It had been violated here by the voter not being sufficiently screened from observation as required by Rule 16 of the First Schedule, and by the lighting being such that the voter had to stand when voting in a position which made it possible for others to see his paper. The election was therefore void unless it was proved that the result had not been affected, the onus of doing so being on the respondents—*Woodward* v. *Sarsons*, 1875, L.R., 10 C.P. 733, *per* Lord Coleridge, L.J. at p. 743; *Deans* v. *Magistrates of Haddington*, 1882, 9 R. 1077, *per* Lord M'Laren at p. 1082, Lord President at p. 1089, and Lord Shand at p. 1090, 19 S.L.R. 794; *East Clare* case, 1892, 4 O'M. & H. 162; *Islington* case, 1901, 5 O'M. & H. 120; *Latham* v. *Corporation of Glasgow*, 1921 S.C. 694 at p. 706; *Cathcart* case, 58 S.L.R. 501. The onus had not been discharged. The pursuers had proved that the principle of a secret ballot had been violated, that complaints had been made, and voting papers seen by persons other than the voters, and were entitled to the inference that the election was affected. The absence of complaints at other elections proved nothing against the pursuer's case.

Counsel for the respondents were not called upon.

Lord President—The question in this case is whether the poll under the Temperance Act in Wick was conducted conformably with the principle of an election by ballot—that is to say, conformably with the principle of secret voting. It is obvious that in order to carry that principle into practical effect some facilities in the form

of furnishings must be provided in the polling station. Their general character is prescribed by Rule 16 of the First Schedule, Part 1, of the Ballot Act 1872. The taking of a poll is itself a very practical piece of business, and it seems to me that the facilities which are provided must be such as are reasonably necessary and convenient for enabling the voter to secure the secrecy of the vote which he records. If that is so it is clear that the facilities provided, while they fulfil that standard, may nevertheless fall considerably short of providing an inviolable shield against all possible observation. I think that to vitiate the poll it must be established that the voters were not provided with reasonable facilities to mark their vote in secrecy.

Rule 16 requires that compartments shall be provided in the polling station in order that voters may mark their votes in those compartments in a certain manner, defined by the words "screened from observation." As I understand those words the requirement is not that the voter's person is to be screened from observation while he is voting, but that the process of marking the vote by the voter is to be screened from observation. The furniture which composes the compartment may therefore comply with Rule 16 although it does not completely enclose the voter when he is engaged in marking his vote—back, front, and sides. It is enough if the compartment affords sufficient cover for screening from observation the actual process of marking the vote. The pursuers maintained that the cover provided must be such that secrecy would be ensured to the voter without his taking any thought about it. I think that is putting the case too high. If, as I think is the case, the compartment need not be fitted with a door which (being closed) completely encloses him, it follows that the voter is himself responsible for using such care in the performance of his duty as is involved in seeing that his own body forms the cover on the open or front side of the compartment, behind which his hand carries out the operation of marking the ballot paper. The voter must himself use at anyrate that moderate amount of care to comply with the injunction of secrecy which section 2 of the Ballot Act of 1872 addresses to him.

Now the question on which everything turns is whether the furniture of the compartments provided at the Wick Temperance Poll provided the reasonable facilities which I have endeavoured to define. We have had specimens of the furniture itself exhibited to us. It was originally provided by Government in 1918 for use in the parliamentary election, and it has been used for several local elections as well as for the temperance poll. I think myself that the margin of safety has been cut a little fine in the design of these compartments, but they do not appear to me to fall short of providing reasonable facility for secret voting, or to be such that a voter who was minded to do his duty under the Ballot Act would have any difficulty in marking his vote in the secrecy which the Act enjoins. It is a striking fact in the case that the evidence of actual observation of votes given should be so exceedingly meagre as it is; and the absence from the case of any substantial complaint on the part of the electorate—apart from a certain amount of gossip which took place on the polling day—fortifies the conclusion to which I in common with the Lord Ordinary have come, namely, that there is no ground for holding that the poll was conducted otherwise than in accordance with the principle of secret voting, or that any violation of the rules appended to the Ballot Act occurred.

The reclaimers told us that they are also raising the question of the legitimacy of taking the temperance poll and the municipal poll together. They did not argue that because the point was determined in the *Cathcart* case (*Latham* v. *Glasgow Corporation*, 1921 S.C. 694) adversely to their contention, but of course it is open to them if they go further.

LORD MACKENZIE—The provisions of the Ballot Act clearly show that there must be co-operation on the part of the voter to secure secrecy in voting. The question is whether there were in this case reasonable facilities given to the voters to secure that with the necessary amount of co-operation on their part the object of the Act would be achieved.

The object of the Act is, as is explained in section 2, that the voter shall secretly mark his (or, as it now is, her) vote on the paper. By Rule 16 the machinery which has to be provided in order to enable him or her to do that is in the form of compartments in which the voters can mark their votes screened from observation. The question—and the only question in this case—is whether the facilities which were provided by the returning officer on the occasion of the Temperance Poll at Wick were reasonable having regard to the circumstances of the case. We have had exhibited to us specimens of the actual compartments which were in use. I agree with what your Lordship has already said—which is the view taken by certain of the witnesses in the case—that the margin of safety was a rather fine one. But I am quite unable to take the view that, given the necessary amount of co-operation on the part of the voter, there was not the possibility—in a reasonable sense of the word—that the voter could discharge the duty imposed upon him or her under section 2 and mark the paper secretly.

It follows that the construction that I put upon Rule 16 is that the words "screened from observation" refer to the voter in the act of marking his voting paper; it does not apply to the body of the voter, but applies to the hand in the act of marking. I think that there was sufficient provision made for doing that in secret. In addition to the evidence of opinion which was led in the case there is a certain body of evidence that in the practical working of booths of similar construction the difficulty which apparently disclosed itself in Wick has been experienced in only one or two other places

throughout the whole of Great Britain. For my own part I should not be disposed to put my judgment upon what has occurred elsewhere. I prefer to take the actual evidence in regard to the booths as used at Wick.

There was one point on which we heard argument—that the lighting arrangements were not sufficient, and that in combination with the scantiness of the accommodation that circumstance led to a violation of the secrecy of the Ballot Act. I do not think the evidence warrants one in coming to a different conclusion from that which the Lord Ordinary reached upon that point, and on the whole matter I am of opinion that the Lord Ordinary's judgment ought to be affirmed.

LORD SKERRINGTON—Our decision depends primarily upon the construction which ought to be put upon Rule 16 of Part I of the First Schedule annexed to the Ballot Act. The pursuers' counsel, as I understood him, maintained that compartments must be provided of such a kind as make it unnecessary for the voter to take precautions against being overlooked while he is in the act of marking his vote. That is not what the rule says, and I do not think that it is implied. The rule, as I construe it, requires that the compartments shall be such as to give a voter who uses ordinary care reasonable facilities for marking his vote without other persons being able to observe how he votes. The compartments, specimens of which were exhibited to us, seem to me to be capable of fulfilling what is required by the rule, and the evidence falls far short of establishing that they failed to do so on the occasion in question.

LORD CULLEN—The standard of due provision for secrecy required by the Act, according to the pursuers' view, is that the compartment must be such as to ensure that all voters may secretly mark their votes "without taking thought of the matter," to use Mr Robertson's words. I think this is too extreme a view. Under section 2 of the Act the voter is under a duty to record his vote secretly, and he is bound to take thought of the matter in order to discharge that duty. The question on the evidence thus is whether the compartments here in question furnished reasonable facilities for secrecy to a voter who was minded to take care to avail himself of them. I agree with your Lordships that that question should be answered in the affirmative.

The Court adhered.

Counsel for the Pursuers—Sandeman, K.C.—Graham Robertson. Agents—Bruce & Stoddart, S.S.C.

Counsel for the Defenders—M'Phail, K.C. —Henderson, K.C.—S. M'Donald. Agents—Melville & Lindesay, W.S.

HIGH COURT OF JUSTICIARY.

Monday, January 16.

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

[Sheriff Court at Glasgow.

LAIRD *v.* H. M. ADVOCATE.
HOSIE *v.* H. M. ADVOCATE.

Justiciary Cases—Procedure—Jury Trial—Illness of a Juryman—Trial Proceeded with Before Jury of Fourteen.

During a criminal trial, and while a witness was being examined, one of the jury was taken ill and was unable to continue to serve. The diet was adjourned till the following day, when the same juryman was unable to attend. The Sheriff-Substitute directed that the trial proceed before the remaining fourteen members of the jury. It was recorded—though denied by the accused —that the prosecutor and the accused consented to the trial proceeding before a jury of fourteen. Certain of the accused were found guilty, and were sentenced. *Held*, on a bill of suspension, that even though the accused consented, trial before a jury of fourteen persons was incompetent, and convictions *quashed*.

Opinions reserved as to whether the accused had tholed an assize.

George Laird junior, Jessie Thomson or Hosie, and others, were indicted at the instance of His Majesty's Advocate before the Sheriff Court at Glasgow on a charge of reset. The accused all pled not guilty, and were remitted to an assize on 27th October 1921. The members of the assize who were not empanelled were dismissed at the commencement of the trial of the accused. During the examination of a witness for the defence one of the jurymen became unwell, and the Sheriff-Substitute (BOYD) adjourned the diet to the following day. The juryman was still unable for duty at the adjourned diet, and—according to the record of the proceedings—by consent of all parties the trial proceeded before the remaining fourteen jurors. The two accused named were found guilty, and were sentenced to a term of imprisonment. The other accused were found not guilty.

The two accused named brought bills of suspension, and pleaded, *inter alia*—". . . 2. The assize to which the complainer was remitted for trial not having duly returned a verdict, suspension and liberation ought to be granted as craved. 3. The pretended verdict returned by the fourteen persons being inept, the conviction and sentence following thereon and whole grounds and warrants thereof should be suspended, and the complainer liberated. 4. The said proceedings which led to the complainer's incarceration being irregular, incompetent, illegal and *funditus* null, suspension and liberation should be granted. 5. *Separatim*. In the event of suspension and liberation