expenses. The pursuer was, in the first place, obliged to come here to get the relevancy of the action sustained; and, in the second place, as the accident occurred in Glasgow, probably as much expense would have been caused by taking witnesses to Dundee to have the case tried before the Sheriff as by bringing them here to have it tried before a jury.

As to the power of the Court in such cases if they think fit to modify the expenses even after a verdict, I do not entertain any doubt, and we have had within the last two years a case in which by the decision of this Court, where a jury returned a verdict for £25, we did modify the expenses at least by one-third—from £150 to £100. I think that is a very necessary power, although I think it ought to be exercised only in extreme cases. Seeing that the right of appeal for jury trial still exists it must receive fair play; but, on the other hand, that right I think must be exercised in a reasonable manner, and I think there is no doubt a great number of cases have been brought here with great hardship to the defender, which should have been taken in the Sheriff Court. The Court has inherent power with regard to expenses to modify to some extent to prevent injustice, but, as I have said, I do not think that that power should be exercised except in extreme cases, and this is not a case in which I think that power should be exercised for the reasons stated.

The Court found the pursuer entitled to expenses, and remitted to the Auditor to tax and to report.

Counsel for the Pursuer and Appellant—Young—Gunn. Agents—Mackay & Young, W.S.

Counsel for the Defenders and Respondents—Clyde, K.C.—M'Clure. Agents—Hope, Todd, & Kirk, W.S.

Friday, February 20.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

ROSSI *v.* MAGISTRATES OF EDINBURGH.

Police—Burgh—Ice-Cream Shops—Conditions Inserted in Licence for Premises where Ice-Cream is Sold—Ultra vires—Edinburgh Corporation Act 1900 (63 *and* 64 *Vict. cap. xxxiii.), section* 80.

By section 80 of the Edinburgh Corporation Act 1900, as amended by section 57 of the Edinburgh Corporation Order 1901, it is provided, *inter alia*, that any person selling ice-cream (except in a duly licensed hotel) without a licence from the Magistrates, "who are hereby empowered to grant the same," for the house, building, or premises where such ice-cream is kept for sale or sold, shall be liable to a penalty, provided that such licences shall run from the date of issue until the 15th May ensuing, and upon renewal, from the date of expiry of the licence so renewed to the 15th May succeeding, "unless the same shall be sooner forfeited, revoked, or suspended," and that "every person licensed . . . to sell ice-cream under the provisions of the Act who shall . . . sell ice-cream except during the hours between" 8 a.m. and 11 p.m. "on any lawful day, or at such extended hour at night as the Magistrates may by special regulation, in particular cases and for reasons assigned, permit," shall be liable to the penalty prescribed. No statutory form of licence was provided.

Held that under this provision the Magistrates were entitled to issue licences for the sale of ice-cream containing the following conditions:—(1) That the licencee should not keep open his premises or sell ice-cream therein on Sundays, or on any other days set apart for public worship by lawful authority; (2) that he should not keep open his premises or sell ice-cream therein before 8 a.m. or after 11 p.m.; and (3) that the Magistrates, or any of them, might at any time revoke or suspend the licence.

By section 80 of the Edinburgh Corporation Act 1900, as amended by section 57 of the Edinburgh Corporation Order 1901, it is enacted—"From and after the commencement of this Act every person who shall keep or suffer to be kept or used or use any house, building, room, or place, for public billiard playing, or shall keep a public billiard table or bagatelle board, or other table or instrument used in any game of the like kind at which persons are admitted to play, or shall sell ice-cream (except in any premises duly licensed as a hotel), without having obtained a licence from the Magistrates, who are hereby empowered to grant the same, for the house, building, or premises where such billiard table, bagatelle board, or other table or instrument as aforesaid is kept or used, or such ice-cream is kept for sale or sold, and also every person licensed under this Act who shall not, during the continuance of such licence, put and keep up the words 'licensed for billiards,' or 'licensed for the sale of ice-cream,' as the case may be, legibly printed in some conspicuous place on or near the door and on the outside of the house or building specified in the licence, shall be liable to a penalty not exceeding ten pounds, and in the event of such house, building, room, or place being continued to be kept or used for such purpose after such conviction, to a continuing penalty of ten pounds for every day during which the offence is committed or continued, together with the reasonable costs and charges of the conviction: Provided always that such licences shall run from the date of issue until the 15th day of May next ensuing, and upon renewal, from the date of expiry of the licence so renewed to the 15th day of May succeeding after expiry, unless the same shall be sooner forfeited, revoked, or suspended; and the

Clerk to the Magistrates shall keep a register of such licences or renewals, and for such licences or renewals he shall be entitled to receive such reasonable fees as the Magistrates may fix. Every person licensed to keep any public billiard table, or bagatelle board, or table or instrument used in any game of the like kind, or to sell ice-cream under the provisions of this Act, who shall allow any person to play at such table, board, or instrument, or shall sell ice-cream, except during the hours between eight of the clock in the morning and eleven of the clock at night on any lawful day, or at such extended hour at night as the Magistrates may, by special regulation, in particular cases, for reasons assigned, permit; and every person holding an hotel licence who shall allow any person to play at such table, board, or other instrument kept on the premises specified in such hotel at any time when such premises are not by law allowed to be open for the sale of wine, spirits, or beer, or other fermented or distilled liquors, except to *bona fide* residents in such hotel, or sell ice-cream, as the case may be, shall be liable to the penalties in this Act provided in the case of persons keeping such public billiard table, bagatelle board, or other table or instrument as aforesaid for the public use without licence."

In pursuance of the powers conferred on them by the Act, the Magistrates of Edinburgh drew up and printed the following form of licence, which they proposed to issue to the ice-cream vendors licensed by them:—

"*The Edinburgh Municipal and Police Acts 1879 to 1901.*

"LICENCE

"FOR THE

"SALE OF ICE-CREAM.

"The Magistrates of the City of Edinburgh, in virtue of the powers conferred upon them by the Edinburgh Municipal and Police Acts 1879 to 1901, Did, and hereby Do, Licence residing at to keep the premises situated at as a place where ice-cream may be kept for sale or sold, and that for the period from the day of nineteen hundred and to the fifteenth day of May nineteen hundred and (unless said licence shall be sooner forfeited, revoked, or suspended), and under the following conditions, viz.:—

"1. That the said licencee shall not keep open said premises, or sell or permit the sale of ice-cream therein on Sunday, or on any other day set apart for public worship by lawful authority.

"2. That the said licencee shall not keep open said premises, or sell or permit the sale of ice-cream therein before eight o'clock in the morning or after eleven o'clock at night.

"3. That the said Magistrates, or any of them, may at any time suspend or revoke this licence.

"Given at Edinburgh, this day of Nineteen hundred and years.

"*Magistrate.*"

Thereafter, in November 1901, Francisco Rossi, carrying on business as an ice-cream vendor at 158 High Street, Edinburgh, raised against the Lord Provost and Bailies of the City of Edinburgh, being the whole magistrates of the city acting under the said Act, and also against the Town Clerk, Depute Town Clerk, and the Corporation of the city for any interest they might have in the premises, an action for declarator that the defenders the said Magistrates were not entitled to grant or issue to the pursuer, and the pursuer was not bound to accept, any licence containing conditions prohibiting the pursuer from keeping open his premises and selling ice-cream therein on Sundays and on other days appointed for public worship, from keeping open his premises before eight o'clock in the morning or after eleven o'clock at night, or binding him to assent to the Magistrates at any time revoking or suspending his licence; or otherwise (1) for declarator that the Magistrates were not empowered to grant licences to ice-cream vendors for premises in the city of Edinburgh subject to any restrictions other than those specified in section 80 of the Edinburgh Corporation Act 1900, as amended by the Edinburgh Corporation Order 1901; and (2), (3), and (4) for declarator that the Magistrates were not entitled to grant licences to persons for premises where ice-cream may be kept for sale or sold subject to any of the three conditions in the form of licence above quoted; and furthermore to interdict the Magistrates, Town Clerk, and Depute Town Clerk, by themselves or others acting on their behalf, granting or issuing licences, under the provisions of said statute containing these conditions.

The pursuer averred that he and many of his fellow-traders had applied for licences for the sale of ice-cream in terms of the Act, amended as aforesaid; that he had been informed on behalf of the Magistrates that a licence was to be issued to him in the terms complained of; that such a licence was *ultra vires* of the Magistrates in respect of the conditions proposed to be imposed on the pursuer; and that, as the Magistrates refused to issue licences in terms of the Act as amended, and had intimated that they were about to grant licences in the terms complained of, the present action of declarator and interdict had become necessary.

The pursuer pleaded—"The defenders the said Magistrates having intimated that they intend to issue licences to the pursuer and his fellow-traders in the terms condescended on, and the conditions imposed or sought to be imposed in said licence being *ultra vires* of said defenders, the pursuer is entitled to decree of declarator and interdict as concluded for."

The defenders pleaded, *inter alia*—"(3) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (4) The defenders being entitled to issue licences in the terms complained of should be assoilzied from the conclusions of the action."

On 7th November 1902 the Lord Ordinary

(KINCAIRNEY) pronounced the following interlocutor:—"Finds that the averments of the pursuer are irrelevant: Sustains the third and fourth pleas-in-law for the defenders: Assoilzies the defenders from the conclusions of the summons, and decerns," &c.

Note.—"This is an action by Francisco Rossi, vendor of ice-cream in Edinburgh, against the Magistrates of Edinburgh, concluding for declarator that the Magistrates are not entitled to issue, and that the pursuer is not bound to accept, a licence for the sale of ice-cream containing certain conditions to which the pursuer objects. The conditions are these:—(1) That the licencee shall not keep open his premises or sell ice-cream therein on Sundays and on other days appointed for public worship by lawful authority; (2) that he shall not keep open his premises or sell ice-cream therein before 8 a.m. or after 11 p.m.; (3) that the Magistrates, or any of them, may at any time revoke or suspend the licence. A form of the licence for the sale of ice-cream, framed by the Magistrates, is produced, and is printed as part of Condescendence 9.

"There are other conclusions to a similar effect having reference to licences for the sale of ice-cream in Edinburgh generally, and not relating to the pursuer's licence in particular.

"I should not be prepared to hold that the pursuer has a title to sue these conclusions, but there is no need to decide that point, because these conclusions are only alternative, and because a decision as to the first conclusion will decide the whole questions raised.

"The summons contains corresponding conclusions for interdict, but no reductive conclusions. The Court is not asked to approve of any form of licence or to adjust any form of licence, but merely to give a decision as to the power of the Magistrates to impose the conditions complained of.

"The plea and contention of the pursuer is that the insertion of these conditions was *ultra vires* of the Magistrates.

"The conditions, whether lawful or not, do not appear to be burdensome, and do not subject the pursuer to any serious hardship; but, if they are *ultra vires* of the Magistrates he may be entitled to be relieved from them.

"Some details are given on record as to previous regulations in this matter. I do not think it necessary to refer to them, because I apprehend that the whole powers conferred on the Magistrates are now expressed in the section of the Corporation Act 1901, which is set forth in condescendence 8.

"I do not remember that either party asked a proof, and in any view I think there is no averment which need be remitted to probation.

"What evil or danger attends the sale of ice-cream I do not know, but it is certain that by the provision referred to a penalty is imposed on every person who sells ice-cream (except in a duly licensed hotel) without a licence from the Magistrates for the house, building, or premises where such ice-cream is kept for sale or sold. There is no statutory form of the licence; and the power of the Magistrates to grant it is expressed in these words—'who are hereby empowered to grant the same'—no conditions of the licence being referred to.

"The Act, for some recondite reason, associates the sale of ice-cream with keeping billiard tables or bagatelle boards. In further quoting the provision I shall omit the words referring to bagatelle boards and billiard tables.

"The Act, in the section referred to, proceeds to provide that any person licensed under the Act who shall not put and keep up the words 'licensed for the sale of ice-cream' legibly printed in some conspicuous place on or near the door, and on the outside of the house or building specified in the licence, shall be liable to the penalty enacted; provided that such licences shall run from the date of issue until the 15th May ensuing, and, upon renewal, from the date of expiry of the licence so renewed to the 15th May succeeding, 'unless the same shall be sooner forfeited, revoked, or suspended.'

"The Act further provides as follows:—'Every person licenced . . . to sell ice-cream under the provisions of the Act who shall . . . sell ice-cream except during the hours between' 8 a.m. and 11 p.m., 'on any lawful day, or at such extended hour at night as the Magistrates may by special regulation, in particular cases, and for reasons assigned, permit,' shall be liable to the penalty prescribed; then there follows a very perplexing sentence, which, happily, I need not attempt to construe, because it applies only to hotels and does not bear on the present question.

"I understand the pursuer to contend that the whole powers of the Magistrates as to granting licences for the sale of ice-cream are contained in these provisions, and that they have no power to restrain the pursuer in the exercise of his rights as a citizen and shopkeeper, except what is thereby conferred expressly or by implication. That contention, however, leaves out of view the fact that the powers are conferred on Magistrates who have duties and powers as such, which may bear on their duties as licensing authority, but which are not expressed in this Act, and that they are not to be lightly interfered with in the exercise of their duties. The Magistrates are the best judges of the public interest, and it is for them and not for me to adjust the terms of licences. But, no doubt, it is within the power, and may be the duty of the Court, to decide whether the terms of a licence are such as the statute authorises or permits. So long as the Magistrates keep within the provisions of the Act there can, of course, be no question. When they deviate from the words of it, the question may be said to be whether what they have done amounts merely to regulation and so is within their discretion, or whether it amounts to legislation and is therefore beyond their discretion.

"The pursuer maintained in the first place that the duty of the Magistrates was simply to grant or to refuse a licence after having considered the applicant and the premises, and that there was no statutory warrant for the addition to the licence of any conditions whatever. In that case the enforcement of the prohibitions in the statute would depend on the statute alone, and not on conditions in the licence. I am free to confess that I am not without sympathy with that view. I see no benefit in converting the prohibitions in the statute into conditions of the licence. It seems a futile proceeding if the prohibitions and conditions correspond. But then that view did not commend itself to the Magistrates. They saw some benefit, which I fail to see, in having to deal with conditions in a licence rather than with prohibitions in a statute; and I am not prepared to say that the insertion of conditions was *ultra vires* so long as they corresponded with the statutory prohibitions. The statute, it was said, in abstaining from providing a statutory form of licence left the Magistrates an exceptionally free hand in regard to the form or phraseology of licences.

"The defenders maintained that the power of licensing magistrates was essentially discretionary; that there was no obligation on them to grant to the pursuer or any other applicant a licence at all; and that it followed that when in the exercise of their discretion they chose to grant a licence, they could add such conditions as they thought expedient.

"The defenders referred to *Harrington*, 1888, 4 T.L.R. 435, and to *Reg.* v. *Yorkshire (West Riding) County Council*, June 5, 1896, 2 Q.B. 386. These cases related to licences for theatres under the Act 5 and 6 Will. IV., c. 39 (an Act in force in Scotland, see *Arthur* v. *Lord Advocate*, February 20, 1895, 22 R. 382); but it appears to me that they sufficiently establish that some discretionary power is necessarily vested in all licensing authorities, that it may be exercised by granting the licence under conditions, and that these conditions need not be expressly authorised by statute but may have regard to the special circumstances of each case. The case of *West Riding*, in which a licence for a theatre was granted under the condition that the applicants for the licence should not apply to the licensing authorities for a liquor licence, shows the considerable scope of the discretion which in that case was held vested in the licensing authority.

"On these authorities, I think it must be held that some discretion and power not expressed in the statute was vested in the Magistrates in granting this licence.

"On the other hand, it cannot be, and has not been, maintained that this discretion is absolute. The limits of the power are illustrated by the case of *Ashley* v. *The Magistrates of Rothesay*, June 20, 1873, 11 Macph. 708, aff. April 17, 1874, 1 R. (H.L.) 14. It is not very easy to define the extent of the discretion of the licensing authority when they travel beyond the express words of their statutory power. But that there are limits to it must be admitted. For example, suppose Magistrates desired to enforce the closing of ice-cream shops at 10 o'clock instead of 11 o'clock in all cases, I am not prepared to say that they could do so by a condition to that effect without special statutory authority, in the licence which they tendered, and that if they did so an applicant might not have redress in Court.

"It is therefore necessary to consider the special conditions objected to.

"The most important is that which provides that the licencee shall not keep open his premises, or sell ice-cream therein, 'on Sunday or any other day set apart for public worship.' The pursuer has two objections to this condition. He objects to the specification of the time during which the sale of ice-cream is prohibited and also to the prohibition to keep his premises open.

"The condition about the sale of ice-cream is said to be warranted by the provision in the statute that every person licensed to sell ice-cream who shall sell it except on any 'lawful day' shall suffer a penalty.

"The clause in the statute is very awkwardly expressed. It does not expressly prohibit anything, but excepts from the scope of the licence days that are not lawful days, and by implication it prohibits the sale of ice-cream on such days. By the condition in the licence sales are prohibited on Sundays or any other day set apart for public worship by lawful authority. Are these prohibitions equivalent, or is the prohibition in the licence wider than the prohibition in the statute? I do not know why the Magistrates were not content with the words of the Act, on which I do not think they have improved. If they had been so this question might not have arisen.

"The question is not quite simple, and no authority affording much assistance was quoted. *Menzies' Lectures*, p. 64, and also the case of *Philip* v. *Innes*, February 20, 1837, 2 S. & M'L. 465, and 6 Sc. Rev. Rep. 647, may be usefully consulted. But no express interpretation of the words 'lawful day' has been referred to. I do not, however, doubt that, according to the customary use of language a lawful day excludes Sunday, and that a licence to sell ice-cream only on lawful days is an implied prohibition against selling on Sunday.

"I think further that the framers of the Act must have intended by the term 'lawful day' to indicate other days besides Sunday, otherwise the word 'Sunday' and not the periphrasis 'except on any lawful day' would of course have been used; and I am of opinion that the term 'lawful days' may fairly be read as excluding days set apart for public worship by lawful authority.

"I am therefore of opinion that the condition under consideration does not put any greater restraint on the pursuer than the Statute does; and that there was nothing *ultra vires* in the change of expression, however little reason for it there may have been.

"The other part of this condition to which the pursuer objects is the requirement that the licencee shall not keep open his premises 'on Sunday or on any other day set apart for public worship.' That condition does not mean that the house shall not be opened for any purpose, but that it shall not be opened for the purpose of trade, and the question is whether the imposition of that condition in the licence was *ultra vires* of the Magistrates.

"The pursuer maintained that there is no warrant for it in the Act. He pointed out that premises are not mentioned at all in the last part of the Act in connection with ice-cream, and that the only prohibition is against selling ice-cream. It appears to me, however, that, on a fair reading of the whole section it must be held to deal with premises licensed for the sale of ice-cream, and to refer to the sale of ice-cream in such licensed premises.

"But the pursuer further maintains that, whether that be so or not, there are no words in the section of the Statute requiring the closing of the premises on Sundays except for the sale of ice-cream. It was maintained that, whether Sunday trading be legal or not, the defenders were not entitled to prevent it by inserting this condition in their licences.

"I understood the defenders to maintain that the keeping open of the licensed premises is prohibited, if not expressly yet by implication, in the statutory provision. I am, however, unable to hold that there is in the Statute any such prohibition, express or implied; and the question is whether the condition can be maintained without the aid of the Act. Was it or was it not *ultra vires* of the Magistrates? On this point I have come to think that it was within the discretion of the Magistrates to make this condition. I think that the Magistrates might consider whether persons who were in the habit of trading on Sunday were persons to whom a licence to sell ice-cream might safely be given; and that they might, if they thought proper, refuse a licence to anyone who was in the use of carrying on trade on Sundays or who would not agree not to do so; and if that were within their power, I think it was also within their power to effect the same object by means of a condition in the licence; and I therefore am not in a position to say that this condition is *ultra vires*. I take it that this was the ground of judgment in the case of the *West Riding* already cited. It also seems to derive some support from the case of *Auld* v. *Moretti*, July 17, 1902, 39 S.L.R. 784. But the provisions of the Greenock Corporation Act to which that case referred were materially different from those in this case, and the application cannot be said to be close.

"The second condition objected to is that the licencee shall not keep open his premises or sell ice-cream therein before 8 a.m. or after 11 p.m. The hours are not objected to so far as the sale of ice-cream is concerned. The objection is to the clause against having the premises open. The pursuer complains that this condition will prevent him opening his shop before 8 a.m. and keeping it open after 11 p.m. for other purposes than the sale of ice-cream. He does not say for what purposes he desires to have his shop open. The hardship is not grievous. It is true that the Act does not expressly provide for the closing of the premises, but if it does not do so by implication, as I rather think it does, the condition may be supported on the same grounds as the condition last considered.

"The last condition is that the Magistrates, or any of them, may at any time suspend or revoke the licence. This condition involves an extremely wide power in the Magistrates, and the question seems to be whether it arrogates to the Magistrates a greater power than the Statute confers, or limits the rights of a licencee more than the Statute does. The Statute provides that a licence shall run from the date of issue until the 15th May ensuing, and upon renewal, from the date of expiry of the licence until the 15th May, 'unless the same shall be sooner forfeited, revoked or suspended,' and I am informed that there are no other words in the Act relating to forfeiture, revocation, or suspension. These words imply that some power of forfeiture, revocation, or suspension was vested by the Act in the Magistrates, and as no grounds of forfeiture, revocation, or suspension are mentioned in the Act, they must needs be left to the discretion of the Magistrates, which is natural and reasonable, seeing that in regard to such a matter the Magistrates may be trusted to exercise their discretion reasonably, and that it may be convenient to authorise them to execute it informally. If that be the correct reading of the Statute, then it appears to me that this condition of the licence does not put the licencee more in the power of the licensing authority than the Act does, except in this apparent particular that the power is to be exercised by one Magistrate. As to this point, I am informed that duties of Magistrates of this kind are habitually exercised by one of their number, and there is nothing in the Act requiring any quorum of the Magistrates for the conduct of business of that sort. I think, therefore, that the third condition merely puts the statutory law in the form of a condition, and is therefore not *ultra vires*.

"On the whole, I am of opinion that the pursuer's averments are irrelevant, and that the third and fourth pleas should be sustained, and that the defenders should be assoilzied."

The pursuer reclaimed, and argued—The Magistrates could only grant licences on the conditions mentioned in the Act. They could not add conditions which were not justified by the words of the Act. In the proposed licence all the three conditions were disconform to the terms of the Act. There was nothing in the statute to prevent him opening up his shop on Sunday or before 8. a.m. or after 11 p.m. for the sale of other things than ice-cream, such as sweeties or firewood. Indeed, there was

no prohibition in the statute against opening the shop for the sale of ice-cream on Sunday. The third condition was also not authorised by statute. The licences were to run for a year according to the Act, and this was against the idea that the licencee was to hold his licence at the caprice of the Magistrates. This Act was not to be treated as if it conferred on Magistrates the power to make bye-laws. Even where Magistrates were empowered by Act of Parliament to make bye-laws, the bye-laws required to be conform to the terms of the statute—*Eastburn* v. *Wood*, July 14, 1892, 19 R. (J.C.) 100, 29 S.L.R. 844. Much more should this rule be applied where the Magistrates were only empowered to grant licences the conditions of which were definitely laid down in the Act.

Argued for the defenders and respondents —The decision of the Lord Ordinary was right. The argument on the other side came to this—that the Magistrates were to act as keepers of a register in place of granters of licences. The Act gave them power to license, and there were no words in it requiring them to grant a licence. The discretion was given to the Magistrates to licence or not as they pleased, so long as they acted in good faith. The suspension and revocation of the licence was also authorised by the Act. The Magistrates had no intention of revoking a licence granted unless there was a conviction for a breach of the licence. It was impossible for the Court to grant the general declarator and interdict asked for in the summons.

At advising—

LORD JUSTICE-CLERK — This is a very simple case. I cannot doubt that the Legislature gave to the Magistrates authority for the careful restriction of the sale of this article, namely, ice-cream, and that the regulations followed upon some ascertainment of the intentions of the Legislature we must assume. Now, the Magistrates having the power to make such regulations, I think the regulations cannot be impugned on the ground of their not being legal. The first of these is that the licencee shall not keep open his premises or sell ice-cream therein on Sundays and on other days appointed for public worship by lawful authority. Of the legality of that regulation I cannot have any doubt. Then it is declared that he shall not keep open his premises or sell ice-cream therein before 8 a.m. or after 11 p.m. That is perfectly within the power of the Magistrates. One can very well see the grounds or reasons for it. It is desirable that these establishments should not be open at certain hours. The only restriction about which there is a difficulty is the third condition, that the Magistrates may at any time revoke or suspend the licence. I think it would be as well if that were taken out. It is quite unnecessary. Whatever powers the Magistrates have in regard to revoking or suspending or in any way modifying licences are powers conferred by Act of Parliament, and must necessarily be carried out in accordance with the provisions of the statute. But I should not be inclined to hold that these words mean anything more than that a notice is given to the licencee that it is in the powerof the Magistrates on cause shown to withdraw or suspend a licence, and that the power may be exercised. The Lord Ordinary decided the case properly in my opinion.

LORD YOUNG—I think the conclusions of this action are untenable. For a person in the position of the pursuer here to ask declarator that the certificate for selling ice-cream in the premises occupied by him was illegal, and that the Magistrates should be interdicted from granting such a certificate in such terms is as extravagant as could possibly be imagined. No other authority but the Magistrates has any power to grant a licence for the premises which he conducts, and he could only get it from the Magistrates. They having the power to grant, have the power to refuse it, and they are not bound to give any reasons to an applicant whose application is refused for such refusal. If the Magistrates refused to grant a licence for selling ice-cream to an Italian because he was an Italian, or to a Scotsman because he was a Scotsman, or to anybody who did not have a good head of hair, or who did not stand six feet high, I think such conduct would be redressed without the necessity of bringing an action of declarator in this Court. I remember an extreme case being put by a very learned Judge who made many interesting remarks in this Court. I was at the bar, and was maintaining in defence of a sheriff-officer or messenger-at-arms, I think, in an action of damages against him for executing an illegal warrant, that the sheriff-officer was not to be expected to construe the legality or illegality of a warrant granted by a properly constituted magistrate, and was not liable to an action for damages. The learned Judge I am referring to put the case—"Suppose I granted a warrant to apprehend and strip a man naked in the High Street, would the messenger-at-arms be bound to execute that, or what would he do?" I think I made answer—"What he should do would be to apply to your Lordship's friends to take the necessary steps to prevent a repetition of your action." Illustrations could be put of extravagant conduct on the part of magistrates in exercising a statutory power. But here they, in the exercise of their judgment, say—"We will only grant a certificate in the exercise of our power in favour of those who are content to take those conditions which we think are necessary for the public safety. We regard that as our duty in the exercise of the power which is conferred upon us by the Legislature." Now, if this pursuer makes an application for a certificate it will not be granted unless he is willing to submit to these conditions. It will not necessarily be granted even if he is, because they may refuse it upon other grounds which they are not bound to specify to him or to the public. It is

assumed that they properly and quite honestly in the exercise of their judgment act on the power which is conferred upon them, and this Italian, no more than any other foreigner residing in this country, has any right to do other than submit to the judgment of the authority to whom he makes application. I am therefore very clearly of opinion that this action is altogether unfounded, and ought to be dealt with accordingly. I have only to make this observation about the third article. I gave out at a very early stage of the argument that it was unnecessary, but if the Magistrates and their advisers think it better on the whole to put it in I am indisposed to say judicially that it ought to be struck out, especially in an action of this sort which is unfounded. I am satisfied—indeed the assurance was given in answer to a desire expressed by Lord Moncreiff that such an assurance should be given—that it was regarded and was to be taken as merely an intimation that they might in the lawful exercise of the powers conferred upon them by Act of Parliament suspend or recal the licence, and that they had no intention whatsoever to use the arbitrary power so conferred upon them without exercising judgment in the matter.

LORD TRAYNER—The pursuer's complaint is that the defenders have added to the licence which they have issued to him certain conditions which they had no right to impose. My opinion, agreeing with that of the Lord Ordinary, is that the defenders have not exceeded their powers, and that it was quite competent for them to add to the pursuer's licence the conditions in question.

The first condition is that the pursuer's premises licensed for the sale of ice-cream shall not "be open" on Sunday, or on any day set apart by lawful authority for public worship, and akin to this objection is the second, that the pursuer's premises shall not be "kept open" before 8 a.m. or after 11 p.m. The pursuer's contention is that while the statute forbids the opening of premises on Sunday or beyond the limited hours for the sale of ice-cream, it does not exclude him from opening his premises on any day or at any hour for the sale of other commodities. I think the statute was intended to apply not only to the trader but also to his premises, and gave the defenders power to regulate both. The trader is licensed, but so are the premises—that is, the licence can only be used in the premises specified, and it appears to me that the clear purpose and intention of the statute is to prevent any licencee who proposes to sell ice-cream from opening his premises for the sale of it or anything else except on the days and for the hours specified. The hours and days specified in the licence are the same as those specified in the statute. To permit the licencee to open his premises without restriction on the pretence that he was selling or offering for sale something else than ice-cream might go far to thwart the purpose of the statute. I agree with the views on this matter expressed by Lord Young in the case of *Auld* v. *Moretti*.

The third objection has not appeared to me to be so serious as I think it has to some of your Lordships. We were told at the bar that no licence would be revoked or suspended except on the exercise of lawful authority. I should have assumed that. It is plain that the statute contemplates the possibility of a licence being revoked or suspended, and that by the same authority which granted it. If such suspension or revocation was illegal the pursuer would not be without his remedy. But if the defenders revoked or suspended any licence, it would require a very clear case of illegality or oppression to warrant our interfering with what they had done in exercise of a discretion which is entrusted to them. I agree with your Lordships that this reclaiming-note should be refused.

LORD MONCREIFF—I have come to be of the same opinion. If the pursuer had been able to show that the magistrates had exceeded their powers in this licence, he no doubt would have succeeded, but on consideration I do not think that that argument can be supported. It was argued that in more than one respect the Magistrates had exceeded the powers conferred upon them by law. Now, we do not know precisely the reasons which led to legislation on this matter, but it is quite clear that there were reasons which satisfied the Legislature and led to the Act being passed for placing the sale of ice-cream under regulation, and as regarded the hours during which sales should be carried on. The first objection of any importance was with reference to the Sunday, and the second one that the licencee shall not keep his premises open for any other purpose before 8 a.m. and after 11 p.m. I think that is a condition which the Magistrates were entitled to make. One can only speculate as to their reasons, but one would be this, that although the vendor might suspend the sale of ice-cream at 11 o'clock, it would entail a good deal of watching and supervision, if the shop were kept open for other purposes, to see that the provision with regard to selling ice-cream was not being contravened. I think the Magistrates were entitled to say if you are not entitled to sell ice-cream you shall not open your shop for other purposes. The last article, I think, would have been better out. It introduces some doubt and confusion. I am quite content with the explanation—I do not call it an assurance—which Mr Cooper gave, that it was not intended that a man should be deprived of his licence except on the ground of misconduct, and it is plain, I think, that the Magistrates would not be allowed to deprive a man of his licence without some adequate reason. If a man is granted a licence to run for a year he necessarily incurs expense on the strength of that licence, and it would not do if it were revoked at will. But we have been told that the Magistrates simply intended to give notice that there was a risk of the licence being recalled before the

end of the year. On that footing I am prepared to concur with your Lordships in refusing this reclaiming-note.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Crabb Watt—T. B. Morison. Agents—Donaldson & Nisbet, S.S.C.

Counsel for the Defenders and Respondents—Guthrie, K.C.—Cooper. Agent—Thomas Hunter, W.S.

Saturday, February 21.

FIRST DIVISION.

PENDER'S TRUSTEES, PETITIONERS.

Trust—Nobile officium—Petition by Trustees on English Trust for Authority to Feu and Grant Mineral Leases in Scotland.

Trustees under an English trust, having obtained the sanction of the High Court of Justice in England, petitioned the Court, in the exercise of its *nobile officium*, for authority to feu and grant mineral leases of certain heritable property in Scotland which formed part of the trust estate. The Court *granted* the petition.

This was an application to the *nobile officium* of the Court by Sir John Denison-Pender and others, trustees and executors of the late Sir John Pender of 18 Arlington Street, London, and Seafield, Blackburn, and Whitehill, in the county of Linlithgow.

The prayer of the petition was in the following terms:—"To grant warrant to authorise and empower the petitioners to grant mineral leases of the minerals in the said lands of Seafield, Blackburn, and Whitehill, in the county of Linlithgow, for periods not exceeding thirty-one years, and to grant feus of the said lands or any part thereof, or otherwise and in any event to grant warrant to authorise and empower the petitioners to grant a new lease of the shale and coal in the lands of Seafield, Blackburn, and Whitehill, formerly let by the said late Sir John Pender to the Pumpherston Oil Company, Limited, in terms of" certain "missives, and to grant a feu to the School Board of the parish of Livingstone of a piece of ground not exceeding one acre in extent for the erection of a school." The petitioners did not ultimately insist in the prayer of the petition in so far as it craved authority to grant feus and mineral leases in the future.

The petition set forth that the petitioners had no express power under the last will and testament of the late Sir John Pender to grant feus or long leases; that in the administration of the trust it was desirable to grant of new mineral leases of subjects formerly leased by the truster, and also to grant a feu for the purpose of erecting the school above referred to; and that they had accordingly instituted proceedings in the High Court of Justice in England. In these proceedings Mr Justice Swinfen Eady pronounced, on 1st December 1902, the following order:—"And the Judge being of opinion that it is expedient in the interests of beneficiaries under the said will that the trustees thereof should have power to deal with the lands of the testator in Scotland devised by the said will by granting feus thereof for building purposes, or by leasing the same and the minerals thereunder for mining purposes, in accordance in either case with the custom of the locality in which the said lands are respectively situate, and as regards any mining lease, subject to setting aside as capital money such part of the rent as is required by section 11 of the Settled Land Act 1882, and also being of opinion that by the law of England, so far as it controls the trusts of the lands devised by the said will and codicils, such feus and leases for mining purposes might be made of the said lands and minerals under the Settled Lands Acts, but the said Acts do not extend to property in Scotland: And the plaintiffs by their counsel, and the defendants Sir James Pender and Dame Marion Denison Des Voeux by their solicitor, consenting to the following order:—It is ordered that the plaintiffs Sir John Denison-Pender, Lord John Hay, and Richard Enfield, as such trustees as aforesaid, be empowered to apply at any time or from time to time to the proper Court or Courts in Scotland for all necessary relief to enable them to give effect to this direction, and particularly to obtain power and authority to enable the granting with regard to the lands in Scotland devised by and subject to the trusts of the said will of feus for building purposes, and of leases for mining purposes."

At the hearing counsel for the petitioners referred to *Allan's Trustees*, March 13, 1897, 24 R. 718, 34 S.L.R. 532.

The Court pronounced this interlocutor—

"Grant warrant and empower the petitioners to grant a new lease of the shale and coal in the lands of Seafield, Blackburn, and Whitehill, in the county of Linlithgow, formerly let by the late Sir John Pender to the Pumpherston Oil Company, and to grant a feu to the School Board of the parish of Livingstone of a piece of ground of said lands of Seafield not exceeding one acre in extent: *Quoad ultra* continue the petition and decern."

Counsel for the Petitioners—Mackenzie, K.C.—Blackburn. Agents—Murray, Beith, & Murray, W.S.