Tuesday, February 27.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

DA PRATO AND OTHERS *v.* MAGISTRATES OF PARTICK.

Statute—Bye-Law—Ultra vires—Powers of Magistrates — Hours of Closing — Ice-Cream Shops—Burgh Police (Scotland) Acts 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 316, 317, 318, 380 (6); 1903 (3 *Ed. VII. cap.* 33), *sec.* 82 (2).

Under the Burgh Police (Scotland) Act 1892, sec. 380 (6), ice-cream shops may only be open between the hours of 5 in the morning and 12 midnight. The Burgh Police (Scotland) Act 1903, sec. 82 (2), empowers town councils of burghs to make bye-laws (subject to confirmation by the Sheriff and Secretary for Scotland) in regard to the hours of opening and closing ice-cream shops within the limits prescribed by the Act of 1892, subject to the proviso that the hours for business are not to be restricted to less than 15 hours daily.

The town council of a burgh duly passed a bye-law making it illegal for such premises to be kept open except between 7 o'clock in the morning and 10 o'clock at night.

In an action for reduction of the bye-law at the instance of the ice-cream vendors of the burgh, on the ground that it was unreasonable, oppressive, and *ultra vires*, the pursuers averred that unless the bye-law was reduced their businesses would be ruined, as they would be precluded from doing business during the most profitable period of the 24 hours.

Held (1) that the only ground upon which the Court could proceed was that of *ultra vires;* (2) that the pursuer's averments were irrelevant to support such a case, as they disclosed nothing which on the face of the bye-law showed it to be *ultra vires.*

By the Burgh Police (Scotland) Act 1892, sec. 380, sub-sec. 6, every person is subjected to a penalty of £5 who "being the occupier of a building or part of a building or other place of public resort for the sale or consumption of provisions or refreshments of any kind, or for the sale or consumption of tobacco and cigars, opens his premises for business before 5 o'clock in the morning, or keeps them open or does business therein after midnight, unless specially allowed by the magistrates."

Secs. 316, 317, 318 of the same Act confer on the police commissioners power to make bye-laws subject to confirmation by the Sheriff and Secretary for Scotland.

Sec. 82 of the Burgh Police (Scotland) Act 1903 provides as follows by sub-sec. 1 that ice-cream shops must be registered; by sub-sec. 2 "Section 316 of the principal Act (the Act of 1892) shall be deemed to confer power on the town council to make bye-laws in regard to the hours of opening and closing of premises registered under this section, the hours for business not being more restricted than fifteen hours daily, and the provisions of the principal Act relating to bye-laws and the confirmation and enforcement thereof shall apply accordingly."

The Provost and Magistrates of Partick on 3rd December 1904 passed a bye-law in the following terms:—"The Provost, Magistrates, and Councillors of the Burgh of Partick, in virtue of the powers conferred upon them by the Burgh Police (Scotland) Acts 1892 to 1903, and particularly section 82 (2) of the Act of 1903, and sections 316 and 317 of the Act of 1892, and of other powers, do hereby make and enact the following bye-law:—1. No person registered in terms of section 82 (1) of the said Burgh Police (Scotland) Act 1903 to keep or use any house, building, part of a building, or other premises as an ice-cream shop or aerated water shop shall keep such premises open or suffer them to be kept open except during the hours between seven of the clock in the morning and ten of the clock at night on any day."

The bye-law was confirmed by the Sheriff of Lanarkshire and by the Secretary for Scotland.

In May 1905 Mansueto da Prato and others, vendors of ice-cream and aerated waters, registered under sec. 82 (1) of the Burgh Police (Scotland) Act 1903, brought an action against the Provost, Magistrates, and Councillors of the Burgh of Partick and others for reduction of the bye-law.

They averred, *inter alia*—"(Cond. 8) The said bye-law is illegal, incompetent, and *ultra vires*, and in contravention of section 82, sub-section 2, of the Burgh Police (Scotland) Act 1903, which confers 'powers on the town council to make bye-laws in regard to the hours of opening and closing of premises registered under this section, the hours for business not being more restricted than 15 hours daily,' in respect that in fixing 7 a.m. as the opening hour the Commissioners include in the minimum of 15 hours allowed by statute hours which cannot reasonably be regarded as 'hours for business.' It is the true intention and meaning of the statute that the said minimum of 15 hours during which business can be carried on shall be the usual and convenient hours during which traders find it profitable and the public find it convenient that business should be carried on. No business in the articles in which pursuers trade is transacted in the burgh at so early an hour as 7 a.m. and none of the pursuers have opened or keep open their premises for business earlier than 9 a.m. The pursuers do little or no trade until about mid-day, as the defenders well knew when they fixed the hour of 7 a.m. as the opening hour. The said hour of 7 a.m. was not fixed upon any consideration of public need, convenience, or interest, but to enable the said defenders the Provost, Magistrates, and Councillors

of the said burgh to maintain that the said 15 hours allowed by statute expire at 10 p.m. and so carry out extreme views held on the question of early closing which is not imposed by or under the authority of any statute, and that wholly irrespective of the necessities of the pursuers' business and regardless of the consequences which follow to the pursuers. In point of fact the hours during which the public most desire to purchase the commodities which the pursuers sell are later than 10 o'clock p.m., and in Glasgow those carrying on the same business as the pursuers carry on business until midnight. The said bye-law operates as a prohibition of the pursuers' business during the hours between 10 and 12 o'clock p.m. and constitutes a serious and illegal attempt to encroach on the pursuers' liberty of trade. The said bye-law will also destroy the pursuers' said established business connection in the supply of suppers, food, ice-cream, aerated waters, &c., during the hours between 10 and 11·15 p.m., and so strike at the volume of the pursuers' business turnover as to render the lawful carrying on of their business impossible. If allowed to stand the said bye-law will cause such loss and damage to the pursuers that they believe and aver they will be forced to cease their said businesses altogether. (Cond. 9) Moreover, such restriction is not merely an invasion of the pursuers' rights as citizens conducting a lawful calling, but it is also against the interests of the public. No public necessity exists for such restriction, as no evil of any kind is traceable to the pursuers' businesses. On the contrary, the pursuers' shops, situated as they are in the main thoroughfare of Partick, are great public conveniences, and are resorted to by an average of 750 customers every night after 10 o'clock. The hours from 1 afternoon to 12 at night are the hours in which nearly all the pursuers' trade is done, and their shops are now the only places in which food can be obtained after 10 o'clock in Partick. The enforcement of the said bye-law will destroy the pursuers' business altogether and result in similar businesses, though of a much inferior kind, being started in the back or side streets of the burgh and in smaller and less sanitary business premises."

They pleaded—"(1) The said bye-law being incompetent and illegal, and unauthorised by statute, should be reduced. (2) The said bye-law being *ultra vires* of the defenders, *et separatim* being unreasonable and oppressive, should be reduced or otherwise declared null and void. (3) In respect the said bye-law operates as an absolute prohibition of the businesses which the defenders under the powers of the statute were empowered to regulate, it is *ultra vires*, and the pursuers are accordingly entitled to decree in terms of the conclusions of the summons. (4) The pursuers being by law entitled to open their premises during fifteen hours for business in each day, the defenders have no power to make bye-laws restricting said hours for business, or substituting hours which are not hours for business."

The defenders pleaded, *inter alia*—"(2) The averments of the pursuers are irrelevant and insufficient to support the conclusions of the summons. (3) The bye-law in question being legal and valid and warranted by statute, the defenders should be assoilzied from the conclusions of the summons."

The Lord Ordinary (ARDWALL) on 1st November 1905 sustained the second plea-in-law for the defenders and dismissed the action.

Opinion.—"There seem to be two points for decision in this case—first, whether the bye-law complained of is *ultra vires*, next whether it is unreasonable; and the question which has been so well argued by Mr Morison and Mr Crabb Watt is whether the Court can interfere on one or other or both of these grounds. Now, if this bye-law is *ultra vires* the Court would be bound to set it aside at the instance of any person aggrieved thereby. It is said to be *ultra vires* because it restricts the natural right and liberty of the pursuers to carry on business within certain hours which they say are the best for carrying on their business, and a case was cited by Mr Morison where a bye-law prohibiting hawkers from carrying on business in certain parts of Toronto was held to be *ultra vires*. But then the question of *ultra vires* is to be judged of by the powers of the Corporation making the bye-law, and the Privy Council held that in that case the Corporation's powers were limited to regulating the business of hawking, and did not extend to prohibiting it in any part of Toronto. That is the case—*Virgo* v. *The Municipal Corporation of the City of Toronto*, 1896, App. Cas. 88. But here it cannot be said that this case is on all fours with that at all, because by the section of the Act restriction of the hours in the way of opening and closing premises is expressly given; it confers power on Town Councils to make bye-laws 'in regard to the hours of opening and closing of premises registered under this section, the hours for business not being more restricted than fifteen hours daily.' Now, it is not easy to see how bye-laws can be made with regard to the hours of opening and closing premises without in some way restricting carrying on trade at some time or another. But it is said that what is added makes the bye-law complained of *ultra vires*. The Act proceeds as follows—'The hours for business not being more restricted than fifteen hours daily,'—and it is argued that means the hours in which business can *profitably* be carried on are not to be restricted to less than fifteen hours, and that by this bye-law they are really restricted to thirteen, as ice-cream shops do no business before 9 a.m. and do most of their paying business between 10 and 12 p.m. I think if anything so absurd were done as the only time for being open should be during the night, I should say that that would be *ultra vires*, for that would be plainly against the true meaning of this clause. But the clause seems to be satisfied if within *reasonable* hours the pursuers have fifteen hours during

which their shops may be kept open, and I cannot say that allowing them to be open between seven in the morning and ten at night is not sufficient compliance with the terms of this clause and does not give them fifteen hours daily for business. I accordingly am not prepared to hold that this bye-law is *ultra vires*. It is said whether it is so or not it is at all events so unreasonable that this Court is entitled to set it aside and ought to do so. I do not assent to this contention. If the pursuers can prove that between seven and nine in the morning there is absolutely no business done in such shops, and that, on the other hand, between ten and twelve at night is the time that really they make enough money to pay their rents and to pay their rates to these magistrates, I think that that would prove that the bye-law was unreasonable and had been passed in disregard of the interests of persons carrying on a perfectly legitimate and harmless trade, for while alcoholic refreshments frequently lead to disturbances and crime, ice-cream cannot be said to be other than an innocuous form of refreshment. But the question comes to be, is this Court entitled to judge of this matter? I am of opinion that it is not for this Court to judge whether the bye-law is reasonable or unreasonable in view of the trade that is being carried on. I think that all such questions must be held to be left by statute to the decision of the two authorities without whose consent and concurrence these bye-laws cannot be passed, namely, the sheriff of the county and the Secretary of State for Scotland. I think it is for them to decide what is reasonable and what is unreasonable with reference to the trades affected thereby, and if they are of opinion that the bye-laws are reasonable and ought to be passed I do not think this Court is entitled practically to review their decision. Accordingly, I am not disposed to allow a proof of the pursuers' averments. Such proof could only show that the bye-law prevented the pursuers carrying on a profitable business during the prescribed hours. Even if this were true, however, I could not set aside this bye-law merely because it inflicted hardship on these pursuers. They must submit, as other traders have to do, to the passing of such bye-laws by municipalities who have been clothed with *quasi* legislative powers by Act of Parliament. I accordingly sustain the second plea-in-law for the defenders, and dismiss the action, with expenses."

The pursuers reclaimed, and argued—The bye-law was *ultra vires*, unreasonable, and oppressive, and ought to be reduced. To that end the pursuers should be allowed a proof of their averments. The bye-law was *ultra vires*, because whereas the only power conferred on the Town Council was a power of regulating ice-cream businesses, the Town Council by the present bye-law had to all intents and purposes prohibited such businesses. Further, section 80 (2) provided for an allowance of at least fifteen "hours for business," and the meaning of that was fifteen hours in which there was a reasonable chance of business being done, but under the bye-law complained of they did not get that, a large portion of the hours allowed being utterly useless. Even if the bye-law was not technically *ultra vires* it could be reduced if it were unreasonable and oppressive. The case of *The Municipal Corporation of the City of Toronto* v. *Virgo*, [1896] A.C. 88, was directly authoritative. The following were also referred to:—Lumley on Bye-laws, p. 85; *Scott* v. *Glasgow Corporation*, July 27, 1899, 1 F. (H.L.) 51, 36 S.L.R. 965; *Eastern District Committee of Dumbartonshire County Council* v. *Police Commissioners of Clydebank*, October 19, 1893, 21 R. 12, 31 S.L.R. 22; *Duncan* v. *Crighton*, March 10, 1892, 19 R. 594, 29 S.L.R. 448; *Eastburn* v. *Wood*, July 14, 1892, 19 R. (J.C.) 100, 29 S.L.R. 844; *Dunsmore* v. *Lindsay*, December 19, 1903, 6 F. (J.C.) 14, 41 S.L.R. 199; *Rae* v. *Hamilton*, June 17, 1904, 6 F. (J.C.) 42, 41 S.L.R. 633.

The defenders and respondents argued—The Court could only reduce the bye-law if it was *ex facie ultra vires*. That could be inferred from the cases cited by the pursuers *supra*. The bye-law here was within the powers conferred by the Legislature, and the Court could not interfere—*Crichton* v. *Forfar County Road Trustees*, July 20, 1886, 13 R. (J.C.) 99, Lord M'Laren at p. 101, 23 S.L.R. 840. There was no room for proof, for the averments on record were irrelevant.

LORD JUSTICE-CLERK—I see no ground for reversing the judgment of the Lord Ordinary. This Act of Parliament and consequent regulations may or may not be for the benefit of the community, but the administration of them is entrusted to the magistrates of the different places to which they apply, and they must be assumed to be *bona fide* exercising their reasonable judgment in doing what they do. We cannot test the amount of common sense they possess. The only question which we can deal with is whether they have acted *ultra vires*. The magistrates here have done, in the case of ice-cream and aerated water shops, practically the same thing as they have done in the case of public-houses as regards closing at night. The magistrates have come to the conclusion that it is advisable that public-houses and hotels should be closed against service to visitors or strangers coming into these places after ten o'clock at night. Many people hold the contrary view, many people agree with them; but in the exercise of their discretion they have fixed ten o'clock as the time of closing. That they could fix ten o'clock as the time for closing other places of refreshment which are struck at by the Act of 1903 I have no doubt. They cannot close every place, but they can close those places over which the Act has given them jurisdiction as regards the hours of keeping open; and they have held, while giving the fifteen hours which are allowed by the Act, that it is the best mode of exercising their discretion to fix the hours between seven o'clock in the morning and ten o'clock at night. I am unable to see anything in

that in contravention of the Act of Parliament. But then it is said that if this be done the ice-cream shops or aerated water shops in Partick will not be able to carry on their business at a profit, and therefore must cease carrying on their business, and that that was not the intention of the statute. The intention of the statute is that for the general benefit of the community the magistrates should fix suitable hours for closing these premises; and they having fixed what they consider suitable hours for closing these premises, the question how that may affect the business of persons who sell such commodities as ice-cream and aerated water may be doubtful. But if it has a tendency to stop what is a legitimate business, it is for the Legislature to interfere and put that right. But it would not do for us, merely upon averments that the bye-law will have that effect, to hold that it was *ultra vires* to pass the bye-law. Therefore upon the whole matter I am for adhering to the Lord Ordinary's interlocutor.

LORD KYLLACHY—I am entirely of the same opinion and have nothing to add.

LORD STORMONTH DARLING—The state of the law with regard to ice-cream shops apparently is that for some reason which is not disclosed on the face of either of the Acts of Parliament the Legislature thought fit to regulate the hours during which they were to remain open. They did so by the Act of 1892 in this way. They fixed the hour in the morning before which, and the hour at night after which, they were not to be open, and that left a period of nineteen hours at the utmost for business. They gave no power at that time to any local authority to fix different hours. But in 1903, by sec. 82 of the Act of that year, they did give power to town councils of burghs to make bye-laws in regard to the opening and closing of these shops, guarding it only by this, that the hours for business were not to be restricted to less than fifteen daily. That being read along with the previous Act of 1892, the effect was to retain the earliest possible hour of five and the latest possible hour of twelve, and within that margin to allow the local authority to select any period of fifteen hours, subject to the control of the Sheriff of the county and the Secretary for Scotland. The Magistrates of Partick have fixed the fifteen hours within those limits, and the purpose of this action is to reduce the bye-law of September 1904. It is perfectly plain that we can only give effect to these conclusions if we are prepared to hold that the bye-law is *ultra vires*. I agree with the Lord Ordinary and with your Lordships that no relevant case has been presented to that effect. An averment of that kind, I think, must proceed upon something which on the face of the bye-law shows it to be *ultra vires*. There is nothing on the face of the bye-law to impeach its validity. Here the averments, even taking them at their highest as we are bound to do, come to no more than this, that if the bye-law is allowed to stand, the pursuers, who are all the ice-cream dealers in Partick, will find their business ruined, and will have to close their shops. But that averment, when examined, really comes to no more than this, that they anticipate that they will find their business so unprofitable that it will not be worth carrying on. The persons who had to judge of the probable effect on the pursuers' business, taking all the local circumstances into account, were the same persons who had to judge of the reasonableness of the bye-law which was about to be passed, namely, the Magistrates in the first instance, the Sheriff in the second, and the Secretary for Scotland in the third. All these authorities have considered the matter; all have concurred in passing the bye-law, and it seems to me that we should not be justified by the result of any proof that might be adduced in quashing the bye-law on the ground that it was likely to be followed by these results. I therefore entirely agree with your Lordships.

LORD LOW was not present.

The Court adhered.

Counsel for Pursuers and Reclaimers—Crabb Watt, K.C.—T. B. Morison. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Defenders and Respondents—Guthrie, K.C.—C. D. Murray. Agents—Simpson & Marwick, W.S.

Saturday, March 3.

FIRST DIVISION.

MAGISTRATES OF ABERCHIRDER *v.* BANFF DISTRICT COMMITTEE AND OTHERS.

Expenses—Process—Interlocutor—Taxation—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1 (*b*)—*Interlocutor in Ordinary Form Giving Expenses to a Defending Public Authority—Proper Time to Move for Expenses as between Agent and Client.*

In an action against the District Committee of a County Council and the County Road Board the defenders were found entitled to expenses. The interlocutors were in ordinary form.

The defenders having presented a note to the Lord President in which they craved his Lordship to move the Court to direct the Auditor to tax their account as between agent and client in terms of section 1 (*b*) of the Public Authorities Protection Act 1893, and stated that the Auditor had refused to do so on the ground that he had no warrant to tax the account otherwise than as between party and party—*held* that the defenders' motion not having been made before the interlocutors were signed was not timeous, and note *refused.*