

Tuesday, May 17.

FIRST DIVISION.

[Lord Ashmore, Ordinary.]

MACFARLANE AND OTHERS v.
COUNTY COUNCIL OF LANARK.

*Statute—Construction—“Market Day” —
Temperance (Scotland) Act 1913 (3 and 4
Geo. V, cap. 33), sec. 5 (3).*

The Temperance (Scotland) Act 1913, section 5 (3), enacts—“A poll shall be taken on any day not being a market day which the local authority may fix in the month either of November or of December immediately following the lodging of the requisition. . . .”

Held that the day upon which the market actually took place, though not fixed by charter or formal appointment, was market day in the meaning of the section.

Archibald Macfarlane, Sun Inn, Strathaven, and other licence-holders under the Licensing (Scotland) Act 1903 in the parish of Avondale, Lanarkshire, *pursuers*, brought an action against the County Council of the County of Lanark, as the local authority under the Temperance (Scotland) Act 1913, and against Sir Thomas Munro, G.B.E., the County Clerk, as returning officer for the purposes of a poll held under the last-mentioned Act and as clerk to the said local authority, *defenders*, concluding for reduction of the documents and proceedings connected with the said poll, and for declarator “that it was illegal and *ultra vires* of the defenders, the said County Council, as local authority foresaid, to hold the said poll on Tuesday the ninth day of November Nineteen hundred and twenty, and that the said poll and the declared results thereof are null and void.”

The facts sufficiently appear from the opinion (*infra*) of the Lord Ordinary.

The *pursuers pleaded, inter alia*—“2. The poll referred to in the condescence having been held on a market day within the meaning of the Act 3 and 4 Geo. V, cap. 33, and contrary to the provisions thereof, is null and void. 3. The procedure in connection with the said poll having been illegal and incompetent and *ultra vires* of the defenders or one or other of them, decree of reduction and declarator should be granted as craved.”

The *defenders pleaded, inter alia*—“3. The poll referred to not having been held on a market day within the meaning of the Act 3 and 4 Geo. V, cap. 33, and contrary to the provisions thereof, the defenders should be assolized. 4. The procedure in connection with the said poll not having been illegal and incompetent and *ultra vires* of the defenders or one or other of them, they should be assolized.”

On 8th April the Lord Ordinary (ASHMORE) after a proof sustained the third and fourth pleas-in-law for the defenders and assolized them from the conclusions of the summons.

Opinion.—“In this case the pursuers,

hotelkeepers and others holding licence certificates in Strathaven or in the parish of Avondale, Lanarkshire, are challenging the validity of the poll held under the Temperance Act of 1913 in Strathaven on Tuesday, 9th November 1920, as the result of which a ‘no licence’ resolution was declared to be carried.

“The ground of the challenge is that, contrary to the express provision of the Act, the day on which the poll was held was the weekly market day in Strathaven. The statutory provision referred to is contained in section 5, sub-section 3, and it reads as follows:—‘A poll shall be taken on any day not being a market day which the local authority may fix in the month either of November or December immediately following the lodging of the requisition.’

“The defence stated is that the poll was not held on the weekly market day, and that the weekly market day is Thursday.

“Strathaven was constituted a burgh of barony under a charter granted by James II of Scotland in 1450, and the charter conferred on the inhabitants the right of holding a market on Sunday in every week. The grant reads as follows:—‘Moreover we have granted to the inhabitants to have and possess in the foresaid burgh (Strathaven) a cross and a market on Sunday every week.’

“A statute of King James IV, Act 1503, cap. 28 (80), a later Act of King James VI of the year 1579, Act 1579, cap. 8 (70), ordained generally that no market or fair should be held on Sundays under the pain of the escheat of the goods.

“Then in 1592 another statute of King James VI made it lawful for all towns which formerly had the right of holding markets on Sunday ‘to elect and choose’ any other day in the week for the holding of the markets. Nothing further is said in the statute as to how the election and choosing fell to be made, and so far as appears there is no written record of the choice having been made or of the time at which it was made.

“In Sinclair’s Statistical Account of Scotland, published in 1793, it is stated that ‘Strathaven has a weekly market and a number of annual fairs,’ but the day of the week is not mentioned.

“In the New Statistical Account of Scotland, published in 1845, however, a fuller statement by the minister of the parish (the Reverend William Proudfoot) is given, and in view of the oral evidence to which I am about to refer I shall quote the passage verbatim—‘We (in Strathaven) have a regular market every Thursday which is well attended and much business done. The country people have a very bad practice of not coming to market till 4 or 5 or perhaps 6 o’clock in the evening. They seem to think that by doing this they gain a day’s work, but they must in consequence be often late in returning to their families. It is strange that though there are here weekly markets and a great number of fairs, there are no markets or times fixed for hiring servants.’

“Two comments on this passage are suggested by the oral evidence. The first is

that there was ample corroboration of the 'bad practice' referred to having continued right on to about the year 1904. It was proved that to accommodate the farmers who came into town late on Thursday the banks, closing for two hours in the afternoon, were opened again from six till eight o'clock at night. This reopening of the banks in the evening on each Thursday of the week seems to me to be one of several indications of Thursday being the market day.

"The other comment is that it was proved that four fairs were held in the year, and that all those four fairs were held on Thursday. I may add that sometime subsequent to 1845 (perhaps in consequence of the Rev. Mr. Proudfoot's suggestion) two of the four local fairs were used for the hiring of servants.

"In my opinion statistical records of the parish of the kind I have been referring to may be used as *adminicles* of evidence on the question under consideration, giving as they do the testimony of those living at the place who were personally acquainted with the facts, and who were recording what they knew without interest or bias with reference to matters beyond the memory of witnesses now living.

"Evidence of a similar kind is afforded by two little local histories. The earliest is entitled 'A Short Sketch of the History of Strathaven,' and the author was William Mack, a native of the place. The book was originally published in 1811 by a printer in Strathaven, and it was reprinted in 1911. It refers, but only in a general way, to the markets, stating that there had been a regular market in Strathaven from the time it was constituted a burgh.

"A later local history is more explicit. It was published in 1880 by the late Miss Mary Gebbie, and she and her forbears were natives of the district. The book is entitled 'Sketches of the Town of Strathaven and Parish of Avondale,' and under the head of markets there is the statement 'Besides the weekly market on Thursdays various fairs are held.'

"As regards the oral evidence, several of the pursuers' witnesses admitted that up till 1904 Thursday was in fact recognised and held as the market day, and in my opinion these admissions by the pursuers' witnesses, taken along with the definite testimony of two local witnesses adduced by the defenders, put the matter beyond doubt. The truth is that the only ground for suggesting Tuesday as the market day is that the local auction company, incorporated in 1904, made Tuesday their sale day, with the result that farmers and others, who before the institution of the auction sales on Tuesday had come to town on Thursdays, ceased to come on Thursdays and came instead on Tuesdays. In other words, the case for the pursuers proceeds on the erroneous assumption that in the way described the auction mart day has subsequent to 1904 been the market day. A market day, constituted as it must be by charter or Act of Parliament or otherwise by prescription implying a grant is not superseded by incidental

changes made for temporary convenience—Bell's Prin., 664; *Blackie*, 1884, 11 R. 783, *aff.* 13 R. (H.L.) 78.

"To sum up—Having considered the oral evidence along with the original charter of 1450, the Scottish Statutes, and the statistical and historical records to which I have referred, I am of opinion that the pursuers have failed to establish that the poll held on Tuesday, 9th November 1920, was held on the market day of Strathaven. That finding is sufficient for the decision of the case. I may add, however, that the reasonable, and indeed the necessary, inference from the evidence seems to me to be that Thursday was and still is the legally constituted market day, and that as regards the poll in Strathaven Thursday is the market day contemplated in section 5, subsection 3, of the Temperance Act of 1913.

"It follows that the procedure adopted in connection with the poll in Strathaven must be held to have been regular and in accordance with the statutory provisions, and I must *assoilzie* the defenders."

The pursuers reclaimed, and argued—Tuesday was the market day in the meaning of the section. It was according to the evidence the *de facto* market day, which was the ordinary meaning of the words, and was the meaning to be given to them in a proper interpretation of the section—Maxwell, Interpretation of Statutes (6th ed.), pp. 95 and 98. The intention of the Act was that a poll and a market should not be held on the same day. The words "market day" were not technical, and could not be intended to mean a day appointed by statute or usage to be a market day, but on which in fact no market was held. In the Shops Act 1912 (2 Geo. V, cap. 3), First Schedule, "market day" meant the *de facto* day. The definition of "market" in the Markets Clauses Act 1847 (10 and 11 Vict. cap. 14), sec. 3, had no application. That Act dealt only with the regulation of markets controlled by local bodies. It was no objection that the particular day was not fixed by authority. Where there was, as in this case, a right of market, the day on which the market was actually held was the market day—Bell's Prin., sec. 664. The poll was therefore null.

Argued for respondents—The Lord Ordinary was right. The question should be looked at from an administrative point of view. The section was to be interpreted, not by the public, but by a qualified official. It was not safe for him to interpret it otherwise than he had done. The *de jure* market day was usually the *de facto* market day. There was no evidence upon which he could have decided that Tuesday was the market day. The holding of an auction mart did not make it so—Markets and Fairs (Weighing of Cattle) Act 1887 (54 and 55 Vict. cap. 70), sec. 4—nor did a mere concourse of people buying and selling. To constitute a market day either grant by charter or Act of Parliament or immemorial usage was required—*Henderson v. Earl of Minto*, 1860, 22 D. 1126; *Blackie v. Magistrates of Edinburgh*, 1884, 11 R. 783, 21 S.L.R. 352; *Benjamin v. Andrews*, 1858, 5 C.B. (N.S.) 299.

The expression connoted the idea of a franchise—*Downshire v. O'Brien*, 1887, 19 L.R.I. 380; Pease and Chitty, Markets and Fairs, pp. 1 and 2; Bell's Dictionary, s.v. "Fairs and Markets." To interpret the words in the colloquial sense would lead to confusion. This was therefore a case for applying the rule that a legal term must be assumed to be used in the sense in which it has been judicially interpreted—Craie's edition of Hardcastle's Interpretation of Statutes (2nd ed.), p. 169. "Market day" in the section must therefore be taken to mean the *de jure* market day. It might mean the *de jure* market day upon which a market was actually held. Reference was also made to Marwick's List of Markets and Fairs now and formerly held in Scotland, and the following dictionaries s.v. "Market"—Imperial, Stormonth's, Wharton's, and Stroud's.

LORD PRESIDENT.—The question for determination on this reclaiming note is one of statutory construction with regard to one of the provisions of the Temperance (Scotland) Act 1913. Under that Act, in any statutory area, on compliance with certain conditions, a poll can be demanded with regard to certain questions of licensing policy. It is provided by section 5, sub-section (2), that when such a poll is taken in any area all the certificated premises in such area are to remain closed. And then by sub-section (3) of the same section it is enacted that such poll shall be taken on any day not being a market day which the local authority may fix. It is the expression "market day" which has led to difficulty. It appears that in the statutory area formed by the parish of Avondale a poll was demanded and taken. The town of Strathaven—not being a royal or police burgh—is situated within and forms a part of that area, and it was the actual locality of the poll. The poll was taken on a Tuesday. The pursuers say that Tuesday is a "market day" in Strathaven, and they impugn the legality of the poll on the ground that it was contrary to the statute to take the poll in the area of the parish of Avondale on a day which was a "market day" anywhere within the area. The defenders answer that Tuesday is not a "market day" in Strathaven—Thursday they say is the "market day" there. Both days have claims to the distinction of being "market day"; and a decision on these rival claims turns on the true meaning of "market day" as used in the enactment in question.

I imagine it would not be disputed that the word "market" designates a meeting of persons, held on stated days and in some particular locality, for the purpose of making private bargains of purchase and sale in merchandise of some kind or other; and that any one of the stated days on which such a meeting occurs is a "market day." Now the root of the dispute between parties in this case is that the defenders maintain that the days must be stated days in the sense that they have been appointed either by charter or Act of Parliament with reference to what in Scotland were anciently

known as the privileges of a market, or to what in England they call the franchise of a market. The answer which the pursuers make is that the days may be stated days in the sense that they are publicly recognised, used, and observed as days on which a market is held, apart altogether from appointment by charter or Act of Parliament. In the debate the expression "*de facto* market day" was conveniently used to describe the latter conception of the meaning of "market day," and the expression "*de jure* market day" to describe the former conception of it.

The result of the proof which was taken in the case is to show that the town, or, as it is called in the charter, "village" of Strathaven is a burgh of barony, and that market privileges were granted to its inhabitants by the ancient charter of the barony, and that the day assigned for the market by the charter was Sunday. At a somewhat later date the holding of markets on Sunday was declared illegal by Act of Parliament, and the inhabitants of such privileged localities as Strathaven—by which I understand the magistrates who represented them—were authorised to pass a resolution fixing the market for some other day. Whether they did so in Strathaven, in form and in fact, nobody knows. But it must, I think, be assumed that they did, because for far more than forty years after the passage of that Act of Parliament a market was held in Strathaven regularly every Thursday. This long practice leads to the conclusion in law that, though all trace of any resolution under the Act of Parliament is lost, there was such a resolution by which in form and in fact Thursday became the constitutionally appointed market day. But the fact is that for something like twenty years past there has been no market on Thursdays. The actual marketing has been transferred to the *de facto* market day, namely, Tuesday. No resolution altering the market day to Tuesday has been passed by the magistrates. Indeed this burgh of barony like many others of similar status has had no magistrates elected—not even we were told a baron bailie—within the memory of man, and probably no second resolution would have been competent even if magistrates had been in existence. It is not a circumstance favourable to holding Tuesday to be the market day that the change seems to have been largely the result of the institution of a live stock auction mart in Strathaven which held its sales on Tuesday. Sales by auction have nothing to do with the idea, either legal or popular, of a market. But the mere fact that the auction sales in the live stock mart may have had a good deal to do with attracting people to Strathaven on Tuesday and concentrating business of other kinds on that day does not detract from the fact (which I hold to be clearly proved) that the people who regularly resort to Strathaven on Tuesdays do hold a market *de facto* in which a considerable traffic by private bargain is carried on in provisions, seeds, implements, manures, and other merchandise. This market is in all respects—apart from the origin and history of the

selection of the day on which it is held—the same as those held in many county towns by neighbouring farmers and traders in agricultural requisites and produce. In short, while *de jure* Thursday is still technically the market day, *de facto* Tuesday is the actual market day, and has been the actual market day for something like twenty years. There are, I understand, othersimilar instances to be found in Scotland—but not many—of the abandonment in recent times of the ancient market day for another better suited to local conditions and requirements, and where, as in the case of the Strathaven Tuesday market, the business is done by meeting other farmers or traders in the street or on the village green, no occasion arises either for asserting ancient market privileges or for enforcing ancient market restrictions.

The question then is whether in this state of facts Tuesday is market day in Strathaven within the meaning of the Temperance Act. We have to choose between the view that the expression “market day” is to be taken in the strict technical sense in which a lawyer would use it if he were discussing a question of chartered or statutory market rights or privileges, and the view that it is to be taken in its broad popular sense. According to the former it is immaterial that actual marketing on the market day has fallen into complete desuetude; according to the latter it is immaterial that the market day has behind it no sanction except public recognition, use, and observance. I do not think there is room for any middle interpretation. It was suggested in the course of the debate by the Dean of Faculty—and it is a suggestion which had considerable attraction for me—that the word might be held to mean a market day in the legal sense on which there was in point of fact marketing done. But, I am afraid, to attribute such a meaning to the word would be to invent an entirely original meaning. The word has either its technical meaning or its popular one, and I do not think we should be entitled to invent any original or *ad hoc* interpretation unless there was something in the context which justified and required it. There is, however, nothing of the kind.

There are reasons which are obvious enough why a concurrence of the two events—polling day and market day—were regarded by the framers of the Act as undesirable. To shut all the licensed premises in the area on the day of a poll which is concerned with a question of licensing policy is an intelligible precaution against influence, while to shut them on a market day is to cause needless inconvenience and annoyance. The Act of Parliament is framed in view of both these considerations. But it is difficult to imagine any ground upon which it could be thought to be undesirable to hold the poll upon a day which was indeed legally a market day but upon which no marketing whatever was done. I ventured to say during the debate that to attribute that meaning to the enactment would be to reduce it to an absurdity. On the other hand it is most intelligible that the Act of Parliament should intend that a *de facto* market day is

to be avoided, and I am for construing it accordingly. I think therefore that the Lord Ordinary’s judgment ought to be recalled.

LORD MACKENZIE— I am of the same opinion. The question for our decision is what is the proper construction to be put upon section 5 (3) of the Temperance (Scotland) Act of 1913, which provides that a poll shall be taken on any day “not being market day.”

I adopt as applicable to the present case the rule of construction to which we were referred in Maxwell on Statutes at p. 95. I think it is our duty to give to the words “market day” the meaning which best harmonises with the object we consider the framers of the statute desired to see attained. I do not think we are here dealing with a legal term which it is necessary to interpret in a legal sense with reference, it may be, to feudal grants. I think it plain from a consideration of the provision of the Act that its object in sub-section (3) was to prevent a concurrence of persons in such a place as Strathaven for the purpose of buying and selling, and for the purpose of recording their votes at a poll under the Act on the same day. And if, as in the present case, there is a clear body of evidence practically uncontradicted that *de facto* the day upon which there is in use to assemble in Strathaven a concourse of persons for buying and selling is Tuesday, then I think within the meaning of the statute Tuesday could not be a day on which a poll could be legally taken, or in other words, that the language of the statute is to be taken in a popular and not in any technical sense.

That being the case, I think it is quite clear that we are in a position on the evidence in the case to make a finding in fact that *de facto* Tuesday is the market day in Strathaven. Accordingly I reach the same conclusion as your Lordship.

LORD SKERRINGTON—In construing this enactment we have to keep in view its subject-matter and object. Its subject-matter has no connection with the right and privilege of holding a market, or with the regulation of a market. Its object is to prevent a supposed inconvenience which might arise from holding a poll under the Temperance Act upon the same day on which a market is held. *Prima facie*, therefore, a “market day” within the meaning of the Act is a day which is recognised as such by the public, and on which business of the kind usually transacted at a market is transacted at the place or within the area contemplated by section 5 (3) of the Act—in the present case Strathaven, a burgh of barony, which is included within the area (the parish of Avondale) to which a notice resolution was sought to be applied. Having regard to the purpose of the enactment it is difficult to see the relevancy of the question whether the market regularly held at Strathaven every Tuesday is so held by authority of a royal charter or Act of Parliament. It may be the fact for all I know that the legal theory that a market cannot be held except in virtue of some law-

ful authority found its reflection at one time in the life and habits and ordinary language of the people of Scotland, and that few, if any, *de facto* markets were held which were not also markets *de jure*. If that was so, then a "market day" would be understood to mean a day on which a market established by lawful authority was or might be held. As regards the present day, however, I do not think that according to the ordinary use of language in Scotland the words "market" and "market day" bear that meaning. I think that when one speaks of a market one generally means what Mr Webster in his Dictionary describes as "A meeting together of people, at a stated time and place for the purpose of traffic (as in cattle, provisions, &c.) by private purchase and sale, and usually not by auction; also, the people assembled at such a meeting, as, a market is held in the town every week." He then proceeds to give other meanings of the word "market," and his fourth heading is "English law—the privilege granted to a town of having a public market." I hold that in this particular statute the expression "market day" must be construed in a practical and popular sense, and that the pursuers here have proved, as indeed it is admitted that they have proved, that Tuesday is in that sense the market day of the burgh of Strathaven. It follows that the pursuers are entitled to the remedy for which they ask.

LORD CULLEN—I have felt some difficulty in this case, and I am not at all surprised that the County Clerk should have taken the view he did take of the meaning of the words of the Act. But on a consideration of the practical objects of the provision which we have to construe I think one is forced to the view which your Lordships adopt.

The Court recalled the interlocutor of the Lord Ordinary, reduced the documents, and declared, decerned, and ordained in terms of the conclusions of the summons.

Counsel for Pursuers (Reclaimers)—Macquisten, K.C.—Keith. Agents—J. Miller Thomson & Company, W.S.

Counsel for Defenders (Respondents)—Dean of Faculty (Constable, K.C.)—Graham Robertson. Agents—Carmichael & Miller, W.S.

HIGH COURT OF JUSTICIARY.

Monday, June 13.

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

[Sheriff Court at Perth.]

LAWRENCE v. AMES.

Justiciary Cases—Procedure—Proof—Sale of Liquor without a Licence—Evidence of One Credible Witness—Excise Management Act 1827 (7 and 8 Geo. IV, cap. 53), sec. 65—Summary Jurisdiction (Scotland)

Act 1881 (44 and 45 Vict. cap. 33), sec. 11—Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65), secs. 4 and 11.

The Excise Management Act 1827, which confers jurisdiction upon Justices of the Peace to deal with prosecutions relating to the Revenue and Excise, empowers them in dealing with such matters to convict on the evidence of one credible witness. The Summary Jurisdiction (Scotland) Act 1908 confers on the Sheriff concurrent jurisdiction with any other court within his sheriffdom in regard to all offences competent for trial in such courts.

Held that as an ingredient in that concurrent jurisdiction there was given to the Sheriff in prosecutions for recovery of such Excise penalties power to convict on the evidence of one credible witness.

The Excise Management Act 1827 (7 and 8 Geo. IV, cap. 53), sec. 65, grants jurisdiction for the recovery of any penalty imposed under the Acts relating to the Revenue and Excise, outwith the limits of the chief office of Excise, to His Majesty's Justices of the Peace, and in the exercise of such jurisdiction authorises them to pronounce judgment as regards the exaction of penalties on the evidence of "one or more credible witness or witnesses upon oath."

The Summary Jurisdiction (Scotland) Act 1881 (44 and 45 Vict. cap. 33), enacts—Section 11—" . . . The Summary Jurisdiction Acts shall, notwithstanding any special provisions to the contrary contained in any of the statutes relating to Her Majesty's revenue under the control of the Commissioners of Inland Revenue or the Commissioners of Customs, apply to all summary proceedings under or by virtue of any of the said statutes. . . ."

The Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65), while repealing the preceding Act, by section 4 re-enacted the provision which has been quoted from it, and further enacted—Section 11—" . . . The Sheriff shall have a concurrent jurisdiction with every other Court within his sheriffdom in regard to all offences competent for trial in such Courts."

William Ames, 86 South Street, Perth, respondent, was charged in the Sheriff Court of Perth at the instance of George Henry Lawrence, Officer of Customs and Excise at Perth, appellant, upon a summary complaint in the following terms:—"You are charged at the instance of the complainer that on the twenty-second day of June in the year One thousand nine hundred and twenty, at 86 South Street, Perth, in said parish and county, you did, contrary to the Finance (1909-10) Act 1910, section 50, sub-section 3, sell by retail to John Shepherd, Customs and Excise officer, of 40 Tay Street, Perth, in said parish and county, two bottles of beer, for the retail sale of which you were required to take out a licence under said Finance (1909-10) Act 1910, without having taken out such licence, whereby you are liable to an Excise penalty of fifty pounds, set forth in said section 50, sub-section 3 of said Act, the said Com-