Thursday, January 27.

FIRST DIVISION.

[Lord Hunter, Ordinary.

LOPES *v.* GREENOCK CORPORATION.

Burgh — Police — Magistrates' Powers — Public Refreshment—Part of a Building to be Registered—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 380 (6) *—Burgh Police (Scotland) Act* 1903 (3 *Edw. VII, cap.* 33), *sec.* 82 (1), (2), (3) — *Burgh Police (Scotland) Amendment Act* 1911 (1 *and* 2 *Geo. V, cap.* 51), *sec.* 1.

Part of a building may be registered as a place of public refreshment in terms of the Burgh Police Amendment (Scotland) Act 1911 provided that it is divided from the remainder of the building in such manner that it can be effectively closed for business during forbidden hours; and it may be so effectively closed for business notwithstanding that the keeper of the premises or his servants have access to the same from the remainder of the building, and are thus enabled to serve customers therein with refreshments for consumption off the premises brought from the part of the building registered as a place of public refreshment.

The Burgh Police (Scotland) Act 1892, section 380, enacts—"Every person who is guilty of any of the following acts or omissions within the burgh shall, in respect thereof, be liable to a penalty. . . . (6) 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 or cigars, opens his premises for business before five o'clock in the morning, or keeps them open or does business therein after midnight, unless specially allowed by the magistrates."

The Burgh Police (Scotland) Act 1903, section 82, enacts—"(1) Every person who shall keep, or suffer to be kept or used, or use any house, building, part of a building or other premises, as an ice-cream shop or aerated water shop without being registered in a register to be kept by the town council, who are hereby required to keep a register for that purpose, in which they shall enter the names of applicants without charge, shall be liable to a penalty not exceeding five pounds, and in the event of such premises being continued to be kept or used for such purpose after conviction, to a continuing penalty not exceeding five pounds for every day during which the offence is committed or continued. (2) Section 316 of the principal Act 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. (3) The town council may at any time authorise the inspection of any house, building, part of a building, or other premises used, or suspected of being used, as an ice-cream shop or aerated water shop, and the occupier, keeper, or other person having charge thereof shall give admission thereto at any time to the medical officer, sanitary inspector, constable, or any other person authorised in writing by the town council, and every occupier or keeper or other person having the charge of such premises who shall not admit such authorised person on exhibition of his authority shall be liable to a penalty not exceeding two pounds. . . ."

The Burgh Police (Scotland) Amendment Act 1911, section 1, enacts—"(1) Sub-section (1) and sub-section (3) of section 82 of the Burgh Police (Scotland) 1903 shall respectively be amended by the omission of the words 'an ice-cream shop or aerated water shop' occurring therein, and by the insertion in lieu thereof of the words 'a place for public refreshment, at any time between the hours of eight of the clock at night and five of the clock of the following morning, or at any time on Sunday.' (2) Sub-section (2) of the said section shall be amended by the insertion after the word 'daily' occurring therein of the words 'except on Sunday, when the bye-laws may provide for closing throughout the day or for any specified hours; and to make bye-laws regulating the internal construction, lighting, and arrangement of such premises with a view to the orderly conduct and control thereof, and such bye-laws may be made either for the whole burgh or for any specified part or parts thereof'; and sub-section (4) of the said section shall be amended by the insertion at the end thereof of the words 'provided that no bye-law made in pursuance of the powers conferred by this section shall take effect until it has been confirmed by the Secretary for Scotland. . . . (7) Nothing contained in section 82 of the Burgh Police (Scotland) Act 1903, as amended by this Act, shall affect or prejudice the sale or supply of refreshments or provisions in any premises to persons residing or lodging therein, or at any railway refreshment room; or shall be construed as allowing any premises to be kept open at any time at which they are required under the provisions of the said Act, or any other Act for the time being in force, to be kept closed, or (except as expressly provided) as affecting or derogating from the provisions of the said Act or any other Act respecting the right of entry to or other regulation of premises to which the said section 82 applies."

Acting under the powers conferred upon them by the above Acts the Magistrates of Greenock enacted the following *bye-law*:—"The Corporation of Greenock, in virtue of the powers conferred by the Burgh Police (Scotland) Acts 1892 to 1911, and particularly section 82 (2) of the Burgh Police (Scotland) Act 1903, and section 1 (2) of the Burgh Police (Scotland) Amendment Act 1911, and sections 316 and 317 of the Burgh Police (Scotland) Act 1892, and of other powers, do hereby make and

enact the following bye-laws:—'No person registered in terms of section 82 (1) of the Burgh Police (Scotland) Act 1903, as amended by the Burgh Police (Scotland) Amendment Act 1911, to keep or use any house, building, part of a building, or other premises, as a place of public refreshment, shall keep such premises open, or suffer them to be kept open at any time on Sundays, or except during the hours between five of the clock in the morning and ten of the clock at night on any other day, with the exception of Saturday, when the hour of closing shall be eleven o'clock p.m.' *Penalty.* — Every person who shall commit a breach of the foregoing bye-law shall be liable to a penalty not exceeding forty shillings for each breach, provided always that the magistrates or other court before whom the penalty hereby imposed is sought to be recovered, may order the whole or part only of such penalty to be paid, or may remit the whole penalty. Made by the Corporation of Greenock, this Twenty-ninth day of April, Nineteen hundred and twelve.—W. B. M'MILLAN, Provost; ADAM P. SMITH, Magistrate; ANDREW DUNN, Magistrate; C. MACCULLOCH, Town Clerk."

Joseph Lopes, keeper of a place for public refreshment at No. 45 Hamilton Street, Greenock, *pursuer*, brought an action against the Corporation of Greenock, *defenders*, the second conclusion of which asked for declarator "that the defenders have no power, title, warrant, or authority by themselves or any of them, or by their servants or anyone acting on their behalf or by their authority, to refuse to register in said register that part of the pursuer's premises situated on the street floor of No. 45 Hamilton Street, Greenock, and extending from a red line, marked with the letter A on the plan to be produced at the calling hereof, backwards to the back wall of said premises, indicated by the letter B on said plan, and measuring 70 feet or thereby in length from front to back, and 12 feet or thereby wide, said area being indicated on said plan by the letters A, B, C, D; or to order or require the pursuer to register in said register the whole area or ground floor of said shop, building, or premises from the wall thereof abutting on the south side of Hamilton Street, indicated by the letter X, to the back wall of said premises, indicated by the letter B, and measuring 90 feet or thereby in length from front to back, and 12 feet or thereby wide, the whole of said area of said ground floor of said shop or premises being indicated by the letters X, Y, Z, A, C, D, B."

The pursuer pleaded—"(6) The said statute having enacted that parts of buildings may be registered, the defenders have no title or warrant to require as a condition-precedent to registration that other parts of the same buildings should also be registered, and the pursuer is therefore entitled to decree in terms of the conclusions of the summons. (8) The defenders' discretion extending only to the making of bye-laws affecting premises when registered they have no title or warrant to require the inclusion of the pursuer's front shop as a condition-precedent to registration. (9) The pursuer having applied for registration of part of said premises, and (*a*) said part being suitable for registration, or (*b*) the pursuer having offered all reasonable alterations to make them still more suitable, the pursuer is entitled to decree as aforesaid."

The defenders pleaded—"(2) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. . . ."

The *facts* and the gist of the *averments* are given in the opinion (*infra*) of the Lord Ordinary (HUNTER) who on 1st July pronounced an interlocutor sustaining the first part of the second plea-in-law for the defenders and dismissed the action.

Opinion.—"The pursuer, who is the occupier of various places for public refreshment in the burgh of Greenock, has brought this action against the Corporation of said burgh with a view to having certain of his rights as a trader determined. His specific ground of complaint against the defenders is this—One of his shops is situated on the south side of Hamilton Street, Greenock. The premises are said to be large and of a superior class, extending backwards from the street a distance of 90 feet. They are from 10 to 15 feet wide. He desires to have the portion of these premises extending from a red line marked by the letter A on the plan to the back wall at letter B thereof registered as a place of public refreshment, but the defenders, who are the local authority entrusted with the duty of registering places for public refreshment, have refused his request for registration.

"The statutory provisions bearing upon the registration of places of public refreshment so far as it is necessary to note them in disposing of the present action are as follows:—[*His Lordship quoted the sections and bye-law above set forth.*] . . .]

"Acting under the provisions of the statutes to which I have referred the defenders have passed bye-laws that no person registered under the Acts shall 'keep such premises open, or suffer them to be kept open at any time on Sundays, or except during the hours between five of the clock in the morning and ten of the clock at night on any other day, with the exception of Saturday, when the hour of closing shall be eleven o'clock p.m.' '*Penalty.*—Every person who shall commit a breach of the foregoing bye-law shall be liable to a penalty not exceeding forty shillings for each breach.'

"It may be noted that registration is not necessary when articles are sold for consumption off but not on the premises, or where the premises are kept closed on Sundays and during the hours from eight at night till five in the morning. If, however, premises are licensed I do not think that the trader is entitled to have them open during hours when bye-laws prescribe for their being closed, although they are kept open for trading which might lawfully be carried on in unregistered premises. In other words, a trader is not entitled to say I shall sell for consumption on the premises only during the hours when registered pre-

mises may be kept open, but I shall sell during other hours for consumption off the premises. That appears to me to result from the decision of the High Court of Justiciary in *Lena* v. *Davidson*, 1913 S.C. (J.) 76, at p. 82.

"According to the pursuer's contention a town council are not entitled to exercise any discretion in the registration of places of public refreshment, but are bound to place upon the register any premises or any part thereof where an applicant indicates that he desires to carry on business. The pursuer has framed certain conclusions giving effect to his general contention. It was argued for the defenders that the action so far as the general conclusions are concerned is incompetent. I do not think that a party is entitled to bring an action against a public authority for the construction of a statute except in so far as that authority has acted or proposes to act upon a construction of the statute adverse to the interests of the individual complaining. It is not necessary for me, however, in the present case to give a decision upon the plea of competency. Upon the assumption that all the conclusions of the action may be competently entertained I think that the pursuer's contention is not well-founded. If these general conclusions are affirmed there would be nothing to prevent the occupier of premises from separating them by a moveable curtain and asking for registration of one part, the other part being left unregistered. It would be equally open to him to designate by a chalk mark the portion of his premises which he desired to register. The pursuer's case is that the Town Council must pass bye-laws to secure proper construction and internal arrangement of the part of his premises that he has selected for registration. I do not agree with this view. According to the statute what is to be registered is a place of public refreshment, which in turn is defined as a building or part of a building or other place of public resort for the 'sale for consumption therein' of certain enumerated articles. It is not said that any portion of premises where such sales as are indicated take place may be registered. I think therefore that the Town Council must in each case consider whether the place proposed to be registered complies with the statutory requirements.

"Turning to the averments as to the part of his premises which the pursuer desires to be registered, I find that the defenders in their answers say—'On week-days, from the hour of opening of the said premises to 8 p.m., the pursuer uses the whole of his said premises for the sale of refreshments for consumption both off and on the premises, but mainly for consumption on the premises. On week-days at the hour of 8 p.m. service of customers for consumption on the premises ceases to be made over the counter marked C, H, I on the said plan produced herewith, and consumption in the front part of the said premises, from the line F, G, D, E on the said plan to the street, ceases. Sales for consumption off the premises continue to be made from the said counter and consumption on the premises takes place in the back portion of the said premises from the line F, G, D, E on the said plan to the back wall of the premises. At 10 p.m. on week-days, with the exception of Saturdays, when the hour is 11 p.m., consumption on the premises ceases. A hurdle or barricade is then put into position, and sales for consumption off the premises are continued in the front portion of the premises up till 12 o'clock midnight. On Sunday an all-day trade for consumption off the premises is carried on by the pursuer in the said front portion of his premises till 12 o'clock midnight. At all times when the said premises are open refreshments brought from the said back portion of the premises are sold over the said counter in the said front portion of the premises. Up till 11 o'clock p.m. on Saturdays and 10 o'clock p.m. on other week-days refreshments brought from the said front portion of the premises are sold in the said back portion of the premises. At all times the pursuer's servants pass freely from the one part of the premises to the other in the course of their duties in serving customers.' The pursuer neither admits nor denies the accuracy of these averments. In argument, however, he maintained that he was quite entitled to do what he is said to have done. I had some doubt as to whether I should not allow inquiry as to these averments, and also as to whether the portion of the premises proposed to be registered is in a proper sense of the term separated from the rest of the premises. The pursuer, however, admits that the gate which he puts up for the purpose of excluding the public from the registered part of his premises does not prevent the pursuer or his servants from serving the customers across the counter in the front shop 'with refreshments for consumption off and brought from the said back portion of the said premises.' The kitchen is in the back portion of the premises, and it is plain that the pursuer, while he excludes the public from that portion of his building, intends to keep it open in connection with his business for sale off the premises during hours when registered premises must be closed. In my opinion he is not entitled to do this, and as his premises are constructed with the very object of enabling him to effect what I consider a breach of the statute I think that the defenders were entitled to refuse registration. I shall therefore dismiss the action as irrelevant."

The pursuer reclaimed, and argued—The defenders had power to issue bye-laws regulating internal construction, but in the absence of any such bye-law they were bound to register if a building or part of a building was tendered to them. That servants had access to the premises to be registered after the prescribed hours, and that the mode of excluding the public was a sparred gate was irrelevant in the question of registration, for so long as the premises were not open to the public as a place of public refreshment they were in law closed—*Clapperton* v. *Dickie Smith*, 1915, S.C. (J.) 60, 7 Adam 637, 52 S.L.R. 667. In these circumstances the pursuer's business was a legal one, and the defenders' refusal to register was an illegal restriction placed on a legal trade—*Corporation of Toronto* v. *Virgo*, [1896] A.C. 88; *Rossi* v.

Magistrates of Edinburgh, 1904, 7 F. (H.L.) 86, 42 S.L.R. 79; *Scott* v. *Corporation of Glasgow*, 1899, 1 F. (H.L.) 51, 36 S.L.R. 965. *Lena* v. *Davidson*, 1913 S.C. (J.) 76, 7 Adam 129, 50 S.L.R. 757, and *M'Intyre* v. *Persichini*, 1914 S.C. (J.) 126, 7 Adam 433, 51 S.L.R. 610, were not in point, for there the premises were open to the public. *De Prato* v. *Magistrates of Partick*, 1906, 8 F. 564, 44 S.L.R. 366, was not in point, for the decision related only to the question of whether or not a bye-law was *ultra vires*. No doubt the defenders had an administrative duty to perform, but the statutes did not indicate the evil that that duty was imposed to check, and it was illegitimate to go beyond the Acts to discover this evil, and in respect to registration of these premises the defenders were in the same position as with regard to registration under other sections of the Acts. The premises tendered for registration were "part of a building" in the sense of the Acts—Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 81; Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), secs. 386 (*b*) and 316-324. "Part of a building" meant a part divided effectively from the rest, but not necessarily permanently or continuously. Such a part of a building had been tendered to the defenders, and they had no option but to register it. If they considered the construction of the premises rendered evasion of the Act easy, their remedy was to pass a bye-law dealing with internal construction or to appeal to the criminal law. The Shops Act 1912 (2 Geo. V, cap. 3), sec. 10, recognised that various trades might be carried on in the same shop.

Argued for the respondents—The premises tendered for registration were divided at one point from the other premises by an ideal line. In construing the Act the respondents were bound to keep in view the evil to be abated, which was well known. Keeping this in view, the respondents were bound and entitled to construe "part of a building" as meaning part of a building effectively divided from the rest, and if, as here, the division was purely ideal, they might refuse to register. The possibility of any effective closing was excluded by the access of the servants to the back premises. If the magistrates had no discretion in this matter, absurd results would follow, *e.g.*, they might have to register an ex-fever hospital. Further, the object of the Act was to give the magistrates a definite administrative area; that was impossible if there were no definite boundaries. Premises did not cease to be open so long as servants could enter or leave them—*M'Intyre* v. *Perischini* (*cit. sup.*); *Lena* v. *Davidson* (*cit. sup.*). *De Prato* v. *Magistrates of Partick* (*cit. sup.*) showed that in this matter the magistrates were not in the same position as with regard to granting of licences.

At advising—

LORD PRESIDENT—The resumé of the statutory enactments relative to this question written by the Lord Ordinary is so adequate, and his description of the premises is so full and accurate, that I think it unnecessary to resume them.

The result of my consideration of this case is that neither party is right in the extreme contention advanced on their behalf.

The pursuer is the occupant of the premises called the Thistle Ice Saloon, consisting of a shop fronting Hamilton Street, used apparently for the sale of confectionery and other edibles. Behind the shop is what I may call for shortness the temperance refreshment saloon. It is a part of the building which is devoted to the sale for consumption therein of refreshments, and the pursuer seeks to have it registered under the provisions of the recent Burgh Police (Scotland) Amendment Act 1911. The defenders decline to register on the ground, as set out in their fifth plea-in-law, that the pursuer's premises at 45 Hamilton Street are in themselves a complete set of premises, forming in their entirety a place of public refreshment within the meaning of the Burgh Police (Scotland) Amendment Act 1911, and that partial registration of the premises is without statutory warrant or authority.

Therein I think I may say that, abstractly stated, the defenders are in the wrong. But it appears that by virtue of their statutory powers they have passed a bye-law to the effect that any part of a building used as a place of public refreshment shall not be kept open at any time on Sundays, nor except during the hours between five o'clock in the morning and ten o'clock at night on any other day, with the exception of Saturday, when the hour of closing shall be eleven o'clock p.m. In other words, the premises must be closed all day on Sunday, at eleven o'clock at night on Saturdays, and ten o'clock on other nights. And they say that the part of the building now sought to be registered is so arranged as not to be susceptible of being effectively closed during the forbidden hours; in other words, that the ingress and egress of the public cannot be successfully prevented if the premises remain as they are. Accordingly they decline to register.

The pursuer's position, on the other hand, is that it is for him, and for him alone, to decide where the part of the building sought to be registered is to be, that it is not incumbent upon him to provide means for the effective exclusion of the public during forbidden hours, and that it is quite sufficient if he designates and identifies the part of the building sought to be registered. The defenders have, in terms of the statute, so he contends, no option but must register the part of the building which he so designates. Accordingly he concludes, in the second conclusion of the summons, for declarator that the defenders have no power to refuse to register that part of his premises "situated on the street floor of No. 45 Hamilton Street, Greenock, and extending from a red line marked with the letter A on the plan" produced, "backwards to the back wall of said premises, indicated by the letter B on said plan, and measuring 70 feet or thereby in length from front to

back, and 12 feet or thereby wide, said area being indicated on said plan by the letters A B C D; or to order or require the pursuer to register in said Register the whole area or ground floor of said shop, building, or premises from the wall thereof abutting on the south side of Hamilton Street, indicated by the letter X, to the back wall of said premises indicated by the letter B."

Now if decree were given in terms of that conclusion of the summons, then it would be quite unnecessary for the pursuer to provide any division, effective or otherwise, between the shop in front and the premises behind. He would be entitled to have them completely open, the one to the other, if decree in terms of that conclusion was given. And it was upon this conclusion alone that he took his final stand. We were not invited to consider or to give decree in terms of any of the other conclusions of the summons, although I may say in passing they appear to me to be to the like effect.

I am of opinion that the pursuer is not entitled to designate at will the part of the building sought to be registered, and that the defenders are right in their contention that in order to be registered the part of the building must be effectively divided from the remainder of the building, so as effectually to prevent ingress or egress by the public during the forbidden hours; but that the defenders are not entitled to refuse the part of the buildings which the pursuer desires to have registered and to insist upon the whole if the pursuer provides an effective division between the two, so as to permit of the exclusion of the public during the forbidden hours.

But, on the other hand, differing from the Lord Ordinary, I consider that the premises sought to be registered would be effectively divided from the shop in front, and ought to be registered, even although the pursuer's servants could serve the customers across the counter in the front shop with refreshments for consumption off and brought from the back portion of the premises. In short, I think if the pursuer excludes the public from that portion of his premises which he seeks to have registered he is entitled to keep open an access to it which only he and his servants can use in connection with his business for sale for consumption off the premises during hours that registered premises must be closed.

I offer no opinion whatever upon the question whether the defenders might not by a bye-law prevent the use of the back premises during prohibited hours. It is sufficient for my judgment to say that at present there is no such bye-law in existence. Of course it will be for the defenders in administering this Act, in the first instance at all events, to consider and decide whether the means provided by the pursuer for the effective exclusion of the public during forbidden hours are adequate or inadequate. I cannot for my part conceive that there could be or should be any difficulty in so determining between people who are reasonably desirous of observing the provisions of this statute. The aid of the Court can always be invoked in an extreme case, but this is really a matter in which no difficulty should arise or can arise between reasonable people.

The logical result of my opinion, no doubt, is to follow the course adopted by the Lord Ordinary, but both parties expressed a desire for guidance by the Court in the settlement of the controversy which had arisen between them, and I propose to your Lordships therefore findings which I hope and believe may have a desirable effect. They are as follow:—Find (first) that the pursuer is entitled to have part of the building forming the premises 45 Hamilton Street, Greenock, registered as a place of public refreshment in terms of the Burgh Police (Scotland) Act 1911 only if it is divided from the remainder of the building in such a manner that it can be effectively closed for business during the forbidden hours; find (second) that the said part of the building may be so effectively closed for business, notwithstanding that the pursuer or his servants have access to the same from the remainder of the building and are thus enabled to supply customers therein with refreshments for consumption off the premises brought from part of the building registered as a place of public refreshment. *Quoad ultra* I am not disposed to give the pursuer decree, for the reasons I have explained.

LORD MACKENZIE—I have reached the same conclusion as your Lordship. The only conclusion of the action that it is necessary to turn to is the second, and that, I think, presents a position which the pursuer cannot effectively maintain, because it seeks declarator that the defenders are not entitled to refuse to register the part of a building which is shown on a plan which is produced. When one turns to that plan it plainly appears that one essential element is wanting, namely, the means of effectively excluding the public from that part of the building during the hours when it cannot be open for business. I say that whether the line of demarcation be taken to be a mathematical line or whether it be taken to be the spar gate, because I think it is plain that in no real sense can a moveable spar gate which is put up be characterised as a means of effectually excluding the public.

The Magistrates are, I think, entitled to see before they consent to put the proprietor or tenant on the register that there are effectual means of excluding the public, and I say that in consequence of the terms of section 82 of the Burgh Police (Scotland) Act 1903. That plainly contemplates that the house, building, part of building, or other premises in respect to which the person is to go upon the register shall be capable of being opened and closed, because it was plainly futile to give magistrates the power to pass a bye-law regulating the hours of opening and closing if there were no means of closing the premises at all.

The magistrates, in pursuance of the powers in that section, proceeded to make the bye-law which is set out. As I

construe that bye-law it refers only to opening and closing the place of public refreshment as a place of public refreshment—that is to say, for the purposes of business—and accordingly if the part of the building sought to be registered is closed for the purpose of carrying on the business of a place of public refreshment during the hours prohibited that will be compliance with the bye-law.

But, as I ventured to point out in the course of the argument, I think that in a case of this kind parties are entitled to get what assistance the Court can give them, because after all we are dealing here with an administrative matter, and the Magistrates are anxious to do their best in the interests of the community, and they are anxious that the duties of the police shall not be made more arduous than the necessities of the case require. Speaking for myself, I am entirely ignorant of the evils which are said to attend these places of public refreshment, and therefore I cannot say whether or not it is necessary in the interests of the wellbeing of the community that not only members of the public but also servants of the person on the register should be excluded during the hours that the place of public refreshment cannot be open for the purposes of business. That is a matter which the police in the first place, and the Magistrates in the second, can form an opinion upon, because they have access to the facts and we have not; and accordingly if there is an evil to be combated it would be for the Magistrates to deal with it by way of an amended bye-law or another bye-law.

I refrain from expressing any opinion upon the point whether a bye-law drafted for the purpose of preventing servants of the registered person from getting access to the premises would be *ultra vires* of the powers of the Act or not. That is a question which plainly is not before us just now. It accordingly would be necessary for the Magistrates, first of all, to form an opinion whether it is necessary to exclude servants during the hours when the restaurant is shut for public business. If they form the opinion that they ought to be excluded, then it would be for them to consider whether they can frame a bye-law so as to prevent it, and in considering that question they would, of course, require to take legal advice whether it would be *intra vires* under the Act of Parliament to frame such a bye-law. If their course was clear so far they would then require to convince the Sheriff, and lastly they would require to get the approval of the Secretary for Scotland. All that we can say at present is that on the bye-law as drafted there is no power to exclude servants of the registered person.

It was pointed out in argument, or suggested in argument, that there should be no difficulty whatever in carrying out the views which I have ventured to express, because that can plainly be done by a wooden erection so constructed that there will be a door which can be locked when the hours for business terminate, and yet have an opening by means of another door or small opening to the back of the counter through which the public do not get an access, so that the servants can go into the kitchen at the back for the purpose of bringing what is necessary to supply them during the time when the shop is open for consumption off the premises. There is no practical difficulty in dealing with that matter.

As I understand, it was suggested that these views might be in conflict with some previously decided cases. I do not so regard the matter. I think that the case of *Lena* v. *Davidson*, 1913 S.C. (J.) 76, 7 Ad. 129, 50 S.L.R. 757, was one of those which was urged upon us. In that case the judgment of the Court merely dealt with the question of relevancy, and did not make matter of judgment what could be set up as a defence to a complaint otherwise relevantly stated. As I read the opinions in the case of *Clapperton* v. *Dickie-Smith*, 1915 S.C. (J.) 60, 7 Ad. 637, 52 S.L.R. 667, they are in entire agreement with the views I am expressing, because I notice that your Lordship in the chair, and also Lord Cullen, construed the bye-law in that case, which is in substantially the same terms as the present one, as merely an embargo upon keeping the premises open for the purpose of business. And the case of *M'Intyre* v. *Persichini*, 1914 S.C. (J.) 126, 7 Ad. 433, 51 S.L.R. 610, does not appear to me to be adverse to these views, because there the door to the public street was open, and it is impossible to deny that there was an opportunity for a member of the public to get into as well as out of the restaurant after the prohibited hours.

Accordingly I agree with the course that your Lordship suggests, and think that by those findings we are rendering as much assistance to the parties as we can in the present state of the facts and law.

LORD SKERRINGTON—Section 82 (1) of the Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), as amended by section 1 (1) of the Burgh Police (Scotland) Amendment Act 1911 (1 and 2 Geo. V, cap. 51), enacts that "Every person who shall keep, or suffer to be kept or used, or use any house, building, part of a building, or other premises, as a place for public refreshment at any time between the hours of eight of the clock at night and five of the clock of the following morning or at any time on Sunday, without being registered in a register to be kept by the town council, who are hereby required to keep a register for that purpose, in which they shall enter the names of applicants without charge, shall be liable to a penalty not exceeding five pounds, and in the event of such premises being continued to be kept or used for such purpose after conviction, to a continuing penalty not exceeding five pounds for every day during which the offence is committed or continued." Section 82 (2) of the 1903 Act, as amended by section 1 (2) of the 1911 Act, enacts—"Section three hundred and sixteen of the principal Act" [Burgh Police (Scotland) Act 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, except on Sunday, when the bye-laws may provide for closing throughout the day or for any specified hours; and to make bye-laws regulating the internal construction, lighting, and arrangement of such premises with a view to the orderly conduct and control thereof, and such bye-laws may be made either for the whole burgh, or for any specified part or parts thereof; and the provisions of the principal Act relating to bye-laws and the confirmation and enforcement thereof shall apply accordingly." By section 82 (4) of the 1903 Act, as amended by section 1 (2) of the 1911 Act, it is, *inter alia*, enacted that "no bye-law made in pursuance of the powers conferred by this section shall take effect until it has been confirmed by the Secretary for Scotland." By section 3 of the 1911 Act the expression "place for public refreshment" is defined as including "any building or part of a building or other place of public resort for the sale for consumption therein of provisions or refreshments of any kind (including confectionery, ice-cream, as defined in the said section, fruit, and aerated waters)" with certain exceptions. By section 3 of the 1903 Act, that Act is to be read and construed as one Act with the principal Act so far as consistent with their tenor.

The only bye-law made by the town council in pursuance of the power conferred upon them by section 82 of the 1903 Act is to the effect that no person registered in terms of said section "to keep or use any house, building, part of a building, or other premises, as a place for public refreshment, shall keep such premises open, or suffer them to be kept open at any time on Sundays, or except during the hours between five of the clock in the morning and ten of the clock at night on any other day, with the exception of Saturday, when the hour of closing shall be eleven o'clock p.m.," under a penalty not exceeding forty shillings for each breach. Section 317 of the 1892 Act authorises the imposition of penalties not exceeding forty shillings for each breach of a bye-law, and in case of continuous violation of a bye-law the sum of ten shillings for every day during which such violation shall be continued. It will be observed that the penalty imposed for breach of a bye-law is light compared with the penalties imposed by section 82 of the 1903 Act upon the keeper of a place of public refreshment who fails to register his premises in the register therein referred to. The purpose of registration being to enable the town council to observe the manner in which places of public refreshment are conducted, failure to comply with the requirements of the statute as to registration is properly treated as a serious offence. Conversely, it is enacted by section 1 (6) of the 1911 Act that any occupier of such premises who allows them to be used as a place of resort for persons of bad character or for drinking exciseable liquors when licensed houses are closed, is liable to have his name removed from the register for a period not exceeding six months—obviously a very serious punishment.

Seeing that the statute makes registration a necessary condition for the carrying on of a lawful trade, and in express language imposes on the town council the duty to enter therein the names of the applicants, it would, in my opinion, require very clear language to entitle the town council to refuse an application for registration of premises intended to be used as a place for public refreshment. No such power is conferred upon the town council in express terms, but I do not doubt that in certain circumstances it might be applied—for example, if the premises which the applicant wished to have registered did not possess some quality which either the statute itself or a lawful bye-law made in pursuance thereof required that premises registered under section 82 of the Act of 1903 should possess. The defenders maintain that they are entitled to refuse to register the premises which the pursuer is at present using as a place for public refreshment, in respect that these premises consist of part of a building, and that the part in question which the pursuer desires to have registered does not contain within itself a door or gate which when closed will fence off and completely separate that part from the remainder of the same building. This criticism is correct in point of fact, but it is not, so far as I can discover, justified either by the language of the Act of Parliament or by necessary implication from the subject-matter of the enactment. A refreshment room is capable of being effectually and satisfactorily closed against access by the public during certain hours by means of doors which structurally are not part of the refreshment room but which are situated in another part of the same building. That is shown to be the fact in the present case by the plan which is referred to in the second conclusion of the summons. That plan shows that the back premises now used as a public refreshment room may be completely closed against all access by the public in one or other of two different ways, viz., either by shutting the external door of the front shop which opens on to Hamilton Street, or alternatively by shutting the sparred gate which when closed bars all access from the front shop to the public refreshment room. It is said, however, that one must shut one's eyes to the existence of these two doors because they form no part of the premises sought to be registered. I cannot understand why that circumstance should be regarded as material, or why premises which in point of fact can be effectually closed against all access by the public, must, contrary to the fact, be deemed to be incapable of being so closed. A simple mode of testing the soundness of the defenders' construction of the statutes is to inquire whether the pursuer could be convicted of an offence against section 82 (1) of the 1903 Act, as amended by section 1 (1) of the 1911 Act, if he refused to apply for registration but kept either (*a*) the external door of his front shop, or alternatively (*b*) the

sparred gate, locked so as to exclude the public from the refreshment room between the hours of 8 p.m. and 5 a.m., and if not why not? According to the defenders' theory, the refreshment room must be deemed to be open to the public even when the external door of the front shop and the sparred gate, or one or other, are securely locked. If it is possible, as it certainly is possible, for the pursuer to close his public refreshment room after 8 p.m. so as to comply with section 82 of the 1903 Act, or after midnight so as to comply with section 380 (6) of the 1892 Act, why is it to be deemed to be impossible for him to close his refreshment room after 10 or 11 p.m. so as to comply with the bye-law?

According to my reading of the statutes, the Town Council as the keepers of the register established by section 82 of the 1903 Act have no concern with the hours during which the pursuer or any other person who happens to be the occupier for the time being of the front shop may choose to keep it open. All that they are concerned to know is that the public can be effectually excluded from the refreshment room during forbidden hours by closing the external door of the front shop. If the pursuer or other occupier of the shop for the time being chooses to keep that shop open after the hour at which, according to the bye-law, the refreshment-room in the back premises ought to be closed, then any person with a title to prosecute for breach of the bye-law will be free to prove, if he can do so, that the public could enter the refreshment-room by way of and through the front shop at an hour when the former ought to have been closed. In order to obtain a conviction in such a case it would be necessary for the prosecutor to prove that the sparred gate shown on the plan was not in fact kept closed during the forbidden hours, or that it was so constructed as to form no real barrier against access by the public from the front shop to the refreshment-room. For my own part I am unable to understand what difference it would make either in law or in fact if the pursuer were to make a small structural addition to the premises which he proposes to register whereby these would be converted into a part of the building which could be completely separated from the remainder of the building. The addition would consist of a three-sided box like a sentry-box placed at the entrance from the front shop into the refreshment-room and provided with a door opening into the shop and another opening into the space behind the counter. The pursuer would none the less continue to enjoy precisely the same opportunity which he at present possesses of evading the law by unlocking and opening the door which when closed prevented (as the sparred gate, when closed, at present prevents) the public from passing from the front shop into the refreshment-room.

The defenders allege that the sparred gate shown on the plan and at present in use is too short by 10 inches and is capable of being moved to another part of the premises. If this objection means that the sparred gate when closed does not effectually and satisfactorily prevent access from the front shop to the refreshment-room then that gate ought to be superseded by something more substantial; but the fact that the sparred gate is not an integral part of the premises sought to be registered has no bearing one way or another upon the question whether it constitutes an efficient and satisfactory barrier between the front and back portions of the building. That, as it seems to me, is a question which ought to be tried, if at all, in a prosecution for breach of the bye-law. In my opinion the defenders are not entitled to refuse to register the pursuer's premises merely because they apprehend that when the front shop is open to the public some persons may make their way into the refreshment-room during forbidden hours and so cause a breach of the bye-law. It is, however, perfectly plain from the defenders' pleadings that they entertain no such apprehension, and they practically admit that nothing of the kind takes place. The reason why the defenders object to the present arrangement of the pursuer's building and refuse to register the back premises as a refreshment-room is fully and clearly explained by them. They consider it to be an evasion of the statute that the pursuer's servants should during the forbidden hours continue to use the refreshment-room with its kitchen for the purpose of preparing refreshments which they carry into the front shop and there sell for consumption off the premises. The Lord Ordinary has adopted this view and has made it his ground of judgment. I find nothing in the statutes or in the bye-law which disentitles the pursuer to make this use of the refreshment-room during the forbidden hours, and I am of opinion that the defenders are not entitled to refuse registration upon the ground that the premises are so laid out as to facilitate this use of them by the pursuer and his servants. In my opinion the pursuer is entitled to decree substantially as craved by him in the second conclusion of the summons—the question whether the sparred gate does or does not form an effective barrier being one which is not *hujus loci*. On the other hand, the result would be practically the same even if the narrower construction of the statute were affirmed. The pursuer has from first to last and also in his pleadings taken up the very reasonable position that he is willing and offers to improve the sparred gate in any way desired by the defenders, and to keep it locked during the forbidden hours. The defender's objection to the pursuer's servants having access to the refreshment-room after the public have been excluded therefrom prevented them from accepting the pursuer's offer, but that objection having been repelled it now lies upon the defenders to state specifically what alteration, if any, upon the sparred gate is in their opinion really necessary.

LORD JOHNSTON, who did not hear the case, delivered no opinion.

The Court pronounced this interlocutor—

"Find that the pursuer is entitled to have part of the building forming the premises at No. 45 Hamilton Street, Greenock, registered as a place of public refreshment in terms of the Burgh Police Amendment (Scotland) Act 1911, only if it is divided from the remainder of the building in such manner that it can be effectively closed for business during the forbidden hours: Find that the said part of the building may be so effectively closed for business notwithstanding that the pursuer or his servants have access to the same from the remainder of the building and are thus enabled to serve customers therein with refreshments for consumption off the premises brought from the part of the building registered as a place of public refreshment: Dismiss the action; and decern."

Counsel for the Reclaimer—Crabb Watt, K.C.—W. J. Robertson. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Respondents—M'Clure, K.C.—Gentles. Agents—Cumming & Duff, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, January 24.

(Before the Lord Justice-Clerk, Lord Guthrie, and Lord Hunter.)

FINNEGAN *v.* HART.
ARCHIBALD *v.* DODDS.

Justiciary Cases — War — Public-House — Liquor Control — Statute — Order of the Central Control Board (Liquor Traffic) for the Scotland West Central Area (dated 12th August 1915) *Article* 2 (1) (*c*)*—Permitting Consumption of Exciseable Liquor on Licensed Premises after Closing Hour.*

The Order of the Central Control Board (Liquor Traffic) for the Scotland West Central Area, dated 12th August 1915, is in the following terms:—"The days and hours on and during which exciseable liquor may be sold or supplied in any licensed premises for consumption on the premises shall be restricted and be as follows:—On Mondays, Tuesdays, Wednesdays, Thursdays, and Fridays between the hours of 12 noon and 2·30 p.m., and between the hours of 6 p.m. and 9 p.m. On Saturdays between the hours of 4 p.m. and 9 p.m. Except on the days and between the hours aforesaid, no person shall . . . (*c*) permit any person to consume in any such premises . . . any exciseable liquor."

In a summary complaint a publican was charged with permitting the consumption of exciseable liquor on his licensed premises after the hour of 9 p.m. It was proved that the liquor was supplied shortly before 9 p.m. and was consumed shortly thereafter. *Held* that the regulations were peremptory, that an offence had been committed, and that it was illegal to give a reasonable time after 9 p.m. for the consumption of liquor purchased shortly before 9 p.m.

James Rennie Archibald, *complainer*, brought a summary complaint in the Sheriff Court at Stirling against Charles Dodds, *respondent;* and James Neil Hart, *complainer*, brought a similar complaint in the Sheriff Court at Glasgow against John Finnegan, *respondent.*

The *charge* against Charles Dodds was—"Charles Dodds, publican, residing at No. 57 Port Street, Stirling, you are charged at the instance of the complainer that you did after 9 p.m. on Saturday, 13th November 1915, viz., between 9·16 and 9·19 p.m., permit James Monteath, plumber, 34 Newhouse, Stirling, Philip Coyne, labourer, 10 Raploch, Stirling, and William Hannah, miner, 39 Lower Craigs, Stirling, to consume exciseable liquor, namely, beer, in the licensed premises occupied by you at 55 Port Street, burgh of Stirling"; and the charge against John Finnegan was—"John Finnegan, 292 Thistle Street, South Side, Glasgow, you are charged at the instance of the complainer that you did at 9·12 p.m. on Thursday, 11th November 1915, in Hugh Walker Brown's licensed premises, 70 Bedford Street, Glasgow, permit Frank Godenzie, 106 Renfrew Street, Glasgow, and David Moultrie, 33 Warwick Street, Glasgow, to consume a quantity of exciseable liquor, viz., each part of a glass of beer." Both complaints thereafter continued—"Contrary to the Defence of the Realm Consolidation Act 1914, the Defence of the Realm (Consolidation) Regulations 1914, the Defence of the Realm (Amendment) (No. 3) Act 1915, the Defence of the Realm (Liquor Control) Regulations 1915, and Article 2 (1) (*c*) of the Order of the Central Control Board (Liquor Traffic) for the Scotland West Central Area, dated 12th August 1915; whereby you are liable to imprisonment with or without hard labour for a term not exceeding six months, or to a fine not exceeding £100, or to both such imprisonment and fine."

In *Dodds'* case the Sheriff-Substitute (DEAN LESLIE), after proof found the accused not guilty, and in *Finnegan's* case, after proof, the Sheriff-Substitute (A. S. D. THOMSON), found the accused guilty.

In each case the Sheriff-Substitute stated a case for the opinion of the High Court of Justiciary. Both cases were heard together.

In *Dodds'* case the Case stated—"I found the following *facts* proved:—On Saturday night, 13th November 1915, two police officers waited outside the premises of the respondent from 9 to 9·15 p.m. The door of the public-house was shut at 9 p.m., the blinds were drawn down, and some of the gaslights lowered. A number of men came out of the public-house at intervals during that time. None entered after 8·50 p.m. No exciseable liquor was sold after 9 p.m. The police officers themselves went in at 9·15 p.m. They found eighteen men, in-