Thursday, July 27.

(Before the Lord Chancellor (Halsbury), Lord Shand, and Lord Davey.)

SCOTT AND OTHERS *v.* MAGISTRATES OF GLASGOW.

(*Ante*, p. 458.)

Local Government—Burgh—Regulation of Markets—Ultra vires—Markets and Fairs Clauses Act 1847 (10 *and* 11 *Vict. c.* 14), *sec.* 42.

The Glasgow Magistrates, as the local authority under the Diseases of Animals Acts 1894 and 1896, established at Glasgow a wharf and public market for the reception and sale of foreign cattle. They are empowered by the terms of section 42 of the Markets and Fairs Clauses Act 1847 (incorporated with the Act of 1894) to make bye-laws "for regulating the use of the market-place and fair, and the buildings, stalls, pens, and standings therein, and for preventing nuisances or obstructions therein, or in the immediate approaches thereto." They are also empowered, from time to time as they think fit, to repeal or alter any such byelaws, "provided always that such bye-laws shall not be repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special Act."

Under these powers the Magistrates issued a bye-law providing that "the sale rings shall be used only for public sales of cattle by auction on conditions of sale which shall be equally applicable to all bidders and buyers. The sale rings shall not be used for private sales, or for sales to any limited number of persons, or for sales in which any class of the public are excluded from bidding and buying."

Objection was taken to this bye-law by certain traders, who desired to limit their auction sales to a certain class of customers, and who maintained that the bye-law was *ultra vires*, and directed against a particular line of trade policy.

Held (*aff.* judgment of the First Division—*diss.* Lord Shand) that the bye-law was valid.

The case is reported *ante*, *ut supra*.

The pursuers appealed against the judgment of the First Division.

At delivering judgment—

Lord Chancellor—I am of opinion that this appeal should be dismissed.

The respondents (the Lord Provost, Magistrates, and Town Council of Glasgow) have, with the sanction of the Board of Agriculculture—without which the bye-law in dispute would have had no validity—framed a bye-law which purports to be a bye-law for the regulation of the use of a certain market in which foreign cattle are sold. The bye-law is in these terms:—"1. The sale rings shall be used only for public sales of cattle by auction on conditions of sale which shall be equally applicable to all bidders and buyers. The sale rings shall not be used for private sales, or for sales to any limited number of persons, or for sales in which any class of the public are excluded from bidding or buying."

It is argued against this bye-law that it is *ultra vires*, and undoubtedly if that can be made out the approval of the Board of Agriculture could not make it valid. But it is a little difficult to see why a bye-law made for the regulation of the market of which the respondents are the local authority is either in its terms or in respect of its substance outside the jurisdiction of the local authority, which is invested with the power and the duty of regulating the public market in question.

It seems to me that the bye-law, however expressed, means that a place intended for the public sale of cattle by auction shall be sanctioned, and that the public and every member of it shall be permitted to go to that place, and upon equal terms with his neighbour be permitted to buy and to have his bid treated on equal terms, so far as validity is concerned, with that of everyone else.

The opposite contention appears to be that it ought to be competent to the appellants to exclude any but a selected body of purchasers from attending the auction and bidding at a sale by auction which is nevertheless to be treated as a public one. I do not know whether they would go so far as to contend that the public ought not to be permitted to enter, but in substance it would to my mind make no difference if their contention did go so far as that, because if they cannot be permitted to enter as purchasers, it becomes a very idle distinction to inquire whether their physical presence is actually excluded when their right to enter as purchasers is taken away.

I think it is important to notice that no one suggests any right in anyone to restrict their perfect freedom to sell to whom they please, but what has been done is to regulate the use of a part of a public market dedicated to public sales by auction and prevent its being made a place for private sale to a restricted class of customers.

I am wholly unable to understand how it can be suggested that such a bye-law controls either sellers or buyers as to the conditions upon which they shall sell or buy. What the bye-law does is to prevent a particular class of buyers and sellers from appropriating to themselves accommodations intended for the public. I have a difficulty in even following the argument that the bye-law in question purports to place any restriction upon any form of trade or free trade. There is hardly any market in which the regulating authority does not make and properly make some restrictions as to what particular form of trade shall be carried on at particular parts of the market, and it is impossible, as it appears to me, to say that such regulations are not within both the words and the spirit of the statute, which authorises the local authority to make such bye-laws as they think fit for regulating the use of the

market-place and fair and buildings, &c., therein. Such bye-laws certainly seem to regulate the use of the market, and in order to show that they are invalid it seems to me to be necessary to establish that they were repugnant to the laws of that part of the United Kingdom where they were to have effect. I cannot follow the reasoning that in dealing with the public sale by public auction there is anything contrary to the laws of Scotland in providing that at a public auction all mankind may bid, and that no auction shall be held in this particular place unless it is so held that all mankind may bid.

I am by no means certain that the language of the bye-laws is not unnecessarily diffuse, and if it had described the sale rings as the place at which cattle should be sold by public auction it would not have been quite enough to render unlawful the use of the sale rings for any sales but those by public auction, and such a sale as the appellants insist on holding would not in my view be a public auction at all.

I notice that one learned Lord (Lord Kinnear) uses the phrase that the form of the bye-law is one which appeared to him to be "in design and purpose a regulation of the conditions of contract and not of the use of the market." But with the greatest submission to that learned Lord, such a description of the bye-law seems to leave out of sight that it is not the conditions of contract generally but such conditions as shall restrict the use of a part of the market dedicated for public sales to a particular class of buyers and sellers.

Nor am I able to agree with the same learned Judge, who points out that it is one thing to say that you may regulate the use of the market-place so as to provide accommodation for buyers and sellers, although your regulations may confine the persons who make a particular kind of contract to one part of the market and exclude these from others (which the learned Judge appears to admit would be perfectly lawful), but he adds—"It is a totally different thing to say that, irrespective of all conditions of accommodation or convenient use, you may forbid those who make use of the market to make contracts, of which on economical grounds you do not approve, and to choose their own customers."

I agree entirely with the learned Judge in saying that what he puts as an equivalent of what is done here would be *ultra vires* of those who attempted to enact such a bye-law; but my answer would be that the present bye-law does nothing of the sort. What it does say is, you shall not use this particular place as a public auction unless it is a public auction, and you shall not use it so as to exclude the public from bidding here as at a public auction.

The truth is, if one analyses what is the real grievance it appears to consist in this—that the local authority have not provided peculiar accommodations for the classes who wish to deal in this restrictive way. Whether they are under any obligation to do so I am not prepared to say, although I do not see anything in the statute which creates such an obligation, but whether they are under such an obligation or no is not the question that arises upon this appeal.

I am of opinion that the local authority have acted strictly within their jurisdiction in regulating this particular place in this market, and I think that it matters little whether in the language they have used—and I am disposed to think unnecessarily used—they have seemed to prescribe the terms of a contract. I think in substance what they have simply done is to make this particular place a place for public auctions with all the incidents which, according to ordinary practice, are attached to a public auction, and to prohibit its use for any other purpose.

I am therefore of opinion that this appeal ought to be dismissed with costs, and I move your Lordships accordingly.

Lord Watson (*read by Lord Davey*)—The respondents, as the Local Authority under the Cattle Diseases Acts 1894 and 1896, have established a Foreign Animals Wharf at Pointhouse, Glasgow, where all cattle brought to Scotland from the United States of America and from Canada are landed, and where such cattle must be slaughtered within ten days of their arrival. The wharf is a public market, and is the only place in Scotland at which American and Canadian cattle are permitted by the order of the Board of Agriculture to be landed and sold.

By section 2 (2) of the Contagious Diseases Animals Act 1894, there are incorporated with it the Markets and Fairs Clauses Act 1847, with the exception of sections six to nine, and fifty-one to sixty thereof. By the 42nd section of the Act of 1847 the undertakers, who are in this case the respondents, are *inter alia* empowered to make bye-laws "for regulating the use of the market-place and fair. and the buildings, stalls, pens, and standings therein, and for preventing nuisances or obstructions therein, or in the immediate approaches thereto." They are also authorised from time to time, as they shall think fit, to repeal or alter any such bye-laws, "provided always that such bye-laws shall not be repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special Act.

The respondents provided at Pointhouse Wharf certain enclosures or sale-rings in which foreign cattle might be exposed and sold by auction; and in August 1896 bye-laws for the regulation of these rings were prepared by the respondents, and were duly approved by the Board of Agriculture. In August 1898 additional bye-laws for the management, regulation, and use of these sale-rings were made by the respondents, and were approved and confirmed by the Board of Agriculture. By the first article of these additional bye-laws it was enacted that "the sale-rings shall be used only for public sales of cattle by auction, on conditions of sale which shall be equally applicable to all bidders and buyers. The

sale-rings shall not be used for private sales, or for sales to any limited number of persons, or for sales in which any class of the public are excluded from bidding or buying." The rest of the additional bye-laws relates to penalties for contravention of, or failure to observe the foregoing enactments, and to the date at which the bye-laws were to come into operation.

The appellants, who are the pursuers of the action, are all members of the fleshers trade generally in Glasgow and its suburbs; and when buyers of foreign cattle they purchase for retail disposal. They allege, and it does not seem to be disputed, that they act as importers, auctioneers, and buyers, as the case may be, of American and Canadian cattle. There has been considerable friction between the appellants and members of the same trade with them and purchasers of co-operative societies, who make a practice of buying imported cattle at the Pointhouse sales in order to supply co-operative consumers buying retail at their stores at wholesale prices. The appellants and other persons in the same position have undoubtedly the right, according to the law of Scotland, so long as they sell at their own mart or in their own premises, to select the customers to whom they will sell; and although such a sale would not in the strict sense of law be a sale by public auction, they have a right, as one of the conditions of their selling, to prescribe the persons or class of persons from whom they are willing to accept a bid.

The sole conclusion of the appellants' action is for reduction of the additional bye-laws of 1898, on the ground that (1) these bye-laws were illegal and unauthorised by statute, and (2) that they were not duly approved by the Board of Agriculture in terms of the statute. The second ground of reduction is not now insisted in. The Lord Ordinary (Kincairney) repelled both reasons of reduction, and assoilzied the respondents, with expenses. On a reclaiming-note to the First Division of the Court, the Lord President (Robertson), with Lords Adam and M'Laren, *dissentiente* Lord Kinnear, adhered to the interlocutor of the Lord Ordinary, with additional expenses.

In my opinion bye-laws made for the Pointhouse Wharf, in virtue of the power conferred by the Markets and Fairs Act, 1847, must, in order to their validity, in the first place relate to the wharf itself, or to the conduct of the persons who use it; and, in the second place, must not be repugnant to the law of that part of the United Kingdom in which the wharf is situated. If a bye-law offends in either of these particulars it is *ultra vires* of the respondents, as undertakers of the wharf, and cannot derive any validity from the approval of the Board of Agriculture. Now, it does not appear to me to admit of reasonable doubt that the bye-laws sought to be reduced relate to the use of those portions of the wharf which are designated "sale rings;" and that the provisions which they contain in regard to the sale of cattle in these rings by what is known to the law as public auction are in accordance with the law of Scotland. The appellants, however, contend that the bye-laws are, in the sense of section 42 of the Markets and Fairs Act 1847, repugnant to the law of sale which prevails in Scotland, in so far as they provide that it shall be open to any member of the public present to bid for the cattle, and that it shall not be competent for the seller to use the sale ring "for sales in which any class of the public are excluded from bidding or buying."

The *gravamen* of the appellants' complaint when closely examined resolves into the objection—not that the additional bye-laws *per se* are necessarily repugnant to the public law—but that they are repugnant so long as no provision is made at the wharf for enabling the seller to dispose of his foreign cattle to any class of purchasers whom he may select, who alone shall be entitled to bid, he undertaking to sell to the member of that class who makes the highest offer. If suitable accommodation were provided in which the exposers of foreign cattle were permitted by the bye-laws to sell to the highest bidder of a circle of customers not representing the public, but selected by the exposers themselves, the objection of the appellants would disappear.

Accordingly, the real question at issue between the parties appears to me to come to this—Do the Cattle Diseases Acts of 1894 and 1896, or the Markets and Fairs Act 1847, either directly or by implication impose upon the respondents the duty of providing accommodation at the landing wharf in which each importer of American or Canadian cattle can sell, not by public auction, but by auction upon the same terms and conditions, in so far as regards the persons or class of persons entitled to purchase, which he could lawfully impose in the case of a sale upon his own premises? In the Cattle Diseases Acts there is not a word to suggest that any such duty is incumbent upon the undertakers; and I am of opinion that the provisions of the Act of 1847 to the effect that the bye-laws or regulations of the market must not be repugnant to public law cannot be reasonably construed as imposing upon the undertakers the duty of establishing sale rings for cattle in which each individual importer can sell by auction to a class of customers or bidders selected by him.

On these grounds I am of opinion that the judgment appealed from ought to be affirmed.

Lord Shand—This case raises, as I think, an important general question—the question, viz., whether the administrators of a public market, under the statutory authority given to them to make regulations or bye-laws for regulating the use of the market, are entitled in circumstances such as here occur to impose conditions which shall have the effect of preventing sellers of goods from limiting the class of purchasers with whom they mean to deal, as they undoubtedly can do in premises of their own.

In the First Division of the Court of Session Lord Kinnear was alone in holding

that the Magistrates of Glasgow, as the administrators of the market, had no power to make the regulation complained of, having the effect above stated—the learned Lord Ordinary and the three other Judges of the Division holding a different view. I regret to say I fear I shall occupy a similar position in this House, for, with every desire to make the judgment to be now pronounced unanimous, I remain of the opinion which I formed in the course of the discussion—and this after the renewed and careful consideration I have given to the case from my knowledge of your Lordships' views to a contrary effect.

The origin and history of the question raised is interesting, and has in my opinion a material bearing on the judgment to be now given. In 1879 the Magistrates of Glasgow, on the requisition of the Privy Council, acting under the Diseases of Animals Acts then in force, opened a pier and market for the reception, slaughter, and sale of foreign cattle and sheep at Point House Wharf in Glasgow, and from that time onwards a very large trade in the importation of cattle from the United States and Canada has taken place. The market served for the whole of Scotland, and was provided, as the respondents state, like every other public market, "for the benefit of the whole community." The business is subject to all the restrictions imposed for the prevention of disease under the Diseases of Animals Acts, and the Glasgow Magistrates are the local authority under whose administration it is carried on. They have the right to make the charges authorised as dues at the rates authorised by the Board of Agriculture from the public, who, on the other hand, have the right to the accommodation they require for their trade or business. The cattle, as the statute requires, must be slaughtered within a limited time, and may either be thereafter removed for use by their owners or may be sold by them when alive or dead privately or by auction.

In the use of the market in which sale rings are provided for auction sales, a number of butchers, the owners of imported cattle, were for some years in use to sell their cattle privately or by auction as they thought fit, and, considering it to be for their interest to sell only to persons of their own trade, they imposed the condition in regard to their sales by auction that these sales should thus be limited as regards the class of purchasers who might compete. Their object was to exclude co-operative societies, purchases by whom, without the intervention of retail butchers or middlemen, being in their opinion injurious to the trade profits of their business generally. The Scottish Co-operative Wholesale Society, in the interests of themselves and other similar societies, raised an action in the Court of Session seeking to have it declared that these sales in which the sellers limited the class of purchasers were not lawful. In that action the Lord Ordinary (Lord Kincairney), in an able and exhaustive judgment (S.L.R. vol. 35, p. 645), held that the sellers in the use of the public market for the sale of their cattle were entitled to impose the condition they did. The law he so laid down was merely the affirmation of the elementary principle that any owner of property is entitled to fix the manner and terms and conditions on which he will agree to part with it, and of the soundness of a decision affirming that principle there can, I think, be no doubt. The further contention of the societies that the proceedings of the butchers amounted to an illegal conspiracy was rejected on the ground that they were pursuing a legitimate trade object; and the decision was acquiesced in.

The co-operative societies seem, however, to have thought that their object might be gained in another way, and to have applied to the magistrates and council as local authority to pass a regulation which would have the effect they desired. Accordingly, they procured the following bye-law to be made, or at least this bye-law was passed by the magistrates as local authority—"The sale rings shall be used only for public sales of cattle by auction on conditions of sale which shall be equally applicable to all bidders and buyers. The sale rings shall not be used for private sales, or for sales to any limited numbers of persons, or for sales in which any class of the public are excluded from bidding or buying.

This bye-law was passed, not because of any want of the fullest accommodation in the market for the requirements of all sellers, nor in any way because of any additional risk of the spread of cattle disease, but entirely on the views the Council, or it may be a majority of the Council, entertained on a question of general policy or economics. The bye-law received the approval of the Board of Agriculture. Without such approval it would have been of no avail under the statute of 1894, but that approval cannot validate the bye-law if it was *ultra vires* of the Council. In my opinion it should not have been approved of, because it went beyond the powers of the Town Council under the statutes as administrators, and because it was sanctioning an unwarranted, and as many persons will think, a mischievous interference with the liberty of persons in the disposal in a public market of their own property.

The only point now raised under the appeal is, whether the bye-law just quoted, passed by the respondents as the local authority in the administration of the public market, is effectual as being within their powers. The answer to this question depends primarily on the terms of the general statute, the Markets and Fairs Clauses Act 1847, which, however, in so far as incorporated, must be read and construed as one Act with the Diseases of Animals Act of 1894, of which for the present question it forms part, and the provisions of which have an important bearing on the purposes for which the power to make bye-laws has been committed to the local authority. The object of passing a general Markets and Fairs Clauses Act was to enable the Legislature in legislation after 1847, in regard to markets to incorporate such of its provisions as might suit particular cases, and

any decision to be now pronounced determining the limits and scope of the local authority to make bye-laws, though no doubt applying, in the first instance, only to the circumstances of this case, must be of authority in many other questions with reference to other public markets administered by local authorities having the powers conferred by the Act of 1847.

In coming to the question, what are the powers which the Legislature has thought fit to delegate to the local authorities — that is, to the magistrates and town conncil in burghs, and to the county council in counties—before looking, as one must do, with much care at the language of the general Act, it seems to me that in providing for an authority which is to have the administration of the markets for the use of the public, sellers, and buyers, it is difficult to suppose there should be given the extraordinary and unprecedented power of interfering with the conditions of sale which the seller may desire to impose in the sale of his goods. One would naturally expect that the administrators of a public market maintained by a public rate, and from the dues which persons requiring accommodation must pay, should acquire no right to control the exercise of the ordinary rights which sellers have in the sale of their goods and merchandise, whether by private sales or sales more or less of a public nature. Accordingly, unless the language of the statute in clear terms gives the power to restrain that right, the statute cannot have that effect. Again, no one would, I suppose, maintain that the powers delegated to the local authority are unlimited, and that the Legislature has given to the administrators the full powers which Parliament itself possesses, which might conceivably go so far as to prescribe the conditions which must enter into contracts of sale or offers to sell goods in the market. There is no indication of what is to be taken as the limit of the powers of the local authority, such as no doubt your Lordships' judgment should now supply, in any of the judgments appealed from, with the exception of that of Lord Kinnear, with whose views, as I have said, I concur.

In the provisions of the Diseases of Animals Act 1894, provision is made for the sale or disposal of imported foreign animals and of their carcases, and for the creation of an administrative body for the management of the market, by section 32 of the statute, which provides as follows:—"(1) A local authority may provide, erect, and fit up wharves, stations, lairs, sheds, and other places for the landing, reception, keeping, sale, slaughter, or disposal of foreign or other animals, carcases, fodder, litter, dung, and other things. (2) There shall be incorporated with this Act the Markets and Fairs Clauses Act 1847, except sections 6 to 9, and 51 to 60 thereof. (3) A wharf or other place provided by a local authority shall be a market within that Act, and this Act shall be the special Act.

In order to form a sound judgment as to the scope and effect of the provision by which the delegated powers are committed to the local authority, it is in my opinion essential to give particular attention in detail to the language of the clause by which these powers are given. That power of enacting bye-laws is conferred by section 42 of the Markets and Fairs Clauses Act 1847, in the following terms:—"The undertakers may from time to time make such bye-laws as they think fit for all or any of the following purposes — that is to say, "For regulating the use of the market-place and fair, and the buildings, stalls, pens, and standings therein, and for preventing nuisances or obstructions therein, or in the immediate approaches thereto; For fixing the days and the hours during each day on which the market or fair shall be held: For inspection of the slaughter-houses, and for keeping the same in a cleanly and proper state, and for removing filth and refuse at least once in every twenty-four hours, and for requiring that they be provided with a sufficient supply of water, and preventing the exercise of cruelty therein: For regulating the carriers resorting to the market or fair, and fixing the rates for carrying articles carried therefrom within the limits of the special Act: For regulating the use of the weighing-machines provided by the undertakers, and for preventing the use of false or defective weights, scales, or measures: For preventing the sale or exposure for sale of unwholesome provisions in the market or fair: And the undertakers may from time to time as they shall think fit repeal or alter any such bye-laws; provided always that such bye-laws shall not be repugnant to the laws of that part of the United Kingdom where the same are to have effect."

In my judgment this section gives what I would call the ordinary powers of administration of the market in question, of which the traders are entitled to have the use, on the footing that the administrators shall afford the facilities which the accommodation admits of to sellers and buyers for the sale and disposal of cattle. With great deference to your Lordships' opinion to a contrary effect, I am unable to find anything in the language of the statute giving the extraordinary power of controlling sellers or buyers as to the conditions on which they shall sell or buy, whether in making private sales or sales of a more or less public nature—whether in making sales to individual purchasers or amongst a limited class of purchasers, or thrown open to all. But I am further and separately of opinion that even if the language used admitted of the construction that the administrators can prescribe the conditions on which alone sales shall take place, the condition they have imposed in this case is ineffectual because it is repugnant to the law.

The opening part of section 42 gives power to make bye-laws "for regulating the use of the market-place and fair," and under these words alone, *taken by themselves*, the learned Judges have held that the power claimed has been given. The term used is not markets but "market-place," which means only the locality or ground on which the market is held. Any-

one who enters the market and there makes a purchase or sale is, no doubt, in a popular sense, making a "use" of the "market-place," and the ground of the judgment, now the subject of appeal, would apparently authorise any regulations whatever which the local authority may think fit to make dealing with the conditions of contracts there made. The test, and the only test, which, for example, the learned Lord President gives, is that of ascertaining whether the contract is made within the physical boundaries of the market-place. If so, the local authority is, in the judgment of his Lordship, all powerful, subject only to this, that the bye-law shall not be repugnant to the general law. I cannot think this is a sound view. The language of the provision of section 42 is, in my opinion, intended and calculated to cover those matters of detail and of detailed organisation which every market authority must attend in order to make and keep the market-place suitable and proper and convenient as a place for the purpose for which it exists and nothing more. The vital matter to which the local authority in their regulations (which, though called by the higher-sounding term of "bye-laws," are regulations only) must in this instance give attention is, of course, the prevention of cattle disease arising or spreading. Again, provisions must be made in this, as in the case of all markets existing for the public use, for securing cleanliness throughout the whole premises including accesses, and for preserving order, and for the like subjects which occur to one as necessary in the administration of any market. The full meaning of the language of the statute is entirely satisfied by reference to these matters, and if it was the purpose of the Legislature to give the extraordinary power claimed, this would have been done in express terms and not by such terms as are quite suited and indeed necessary for the objects I have stated.

The words in the statute, "for regulating the use of the market-place and fair," are followed by these words, "and the buildings, stalls, pens, and standings therein, and for preventing nuisances or obstructions therein, or in the immediate approaches thereto,"—all of these terms relating only to the arrangements required for carrying on the traffic as regards convenience, good order, and cleanliness. The same observation applies with even greater force to the whole of the other details with which the local authority is by the rest of section 42 to deal by its bye-laws, viz., the fixing of days and hours on which the market is to be held, inspection of the slaughter-houses, the removing filth, the providing of a proper supply of water, the prevention of cruelty to the animals, the preservation of order amongst the carriers and fixing their charges, and regulating the "use" of the weighing-machines, and providing of proper weights and measures. The only clause which touches or refers to sales, or the sale of goods or articles, is in these terms—"For preventing the sale or exposure for sale of unwholesome provisions." It seems to me that here, if anywhere, had it been intended that the local authority should have the extraordinary power to impose conditions relating to the stipulations of the contracts which sellers and buyers might make with each other, that authority would have been given.

The peculiarity of this particular market consists in this, but in this only, that to prevent the introduction or spread of cattle disease the cattle must be killed and removed within a very limited time, and everything conducted under careful and stringent regulations with that object. As to the sale of cattle, the market, subject to regulations for the prevention of disease, is in the same position as all other public markets. It follows that if the bye-law now in question is held to be within the powers of the local authority, it will be within the power of such authorities generally to make similar bye-laws applicable to any market in which sales take place, and consequently to make bye-laws which shall limit or prescribe the conditions on which buyers and sellers may deal with each other although they are exercising a public right in a public place. The bye-law in question is confined to the power of sale by auction. If the provision or a similar provision were made by a bye-law which should apply to private sales also, and sellers were required to sell to all proposed purchasers on the same terms and with the same advantages, so that the butcher could not limit his sales to the trade only though he desired to do so, the ground of judgment in the Court below involves the conclusion that the bye-law must be effectual, for the sole ground of judgment is that the transaction takes place "in the use of the market place," and the local authority is entitled to pass bye-laws "regulating the use of the market-place." The same reasoning would apply to a regulation restricting the conditions of sale in another way, and declaring that sales must be confined to purchasers living within a certain district or area only favoured by the local authority. Such a construction of the words of the Act goes greatly beyond administration as given to public bodies holding a public market for the public behoof, and I cannot find anything in the language used in the statute to warrant this.

Applying the observations I have made (and made at greater length than I desired, because of my difference of opinion from your Lordships) I must now observe that it is essential to bear in mind that the question whether the bye-law complained of is within the powers of the local authority is to be answered in these circumstances, that it is not suggested (1) that sales under the prohibited condition have any relation to precautions required for the prevention of disease; or (2) that there is any want of accommodation in the market-place, furnished as it is with sale rings for sales by auction, just as it is provided with sheds or yards for sales by private bargain. If any reasons in support of the bye-law on either of these grounds had existed they would have been stated, and might have been fatal to the

appellants' contention. Thus, had it been the fact that the market-place was so limited in extent that there was space only for one class of sales by auction, and that the local authority had been compelled to select between auctions amongst a limited class and auctions open to all buyers, and had chosen the latter, and had in consequence issued this bye-law, the appellants would probably have no answer to a plea which would be founded on the necessity of the case. Any regulation founded either on risk of spreading disease or deficient accommodation would fall under administrative powers as to the use of the market-place, as such powers are and must be generally understood. There is, however, no room for the suggestion that by arrangement of days and hours of sale that the sale-rings cannot be put at the disposal of the appellants when they desire it. Accordingly, all that can be said for the bye-law is not that it is required on account of any risk of disease, or because there is any want of suitable accommodation, but only this—"We, the Town Council, think, as a matter of public or general policy, that it is for the advantage of the public that sales by auction should be open to all bidders, and therefore we forbid such sales on any other terms." I say nothing of the policy of such a regulation excepting this, that if it be sound it should be by public law made applicable to all sales by auction, even those made by persons on their own premises, or on premises taken by them for the purpose of such sales, and that till such legislation is proposed and carried (if it could be carried) sellers in a market-place, which they have a right to use, have right also as members of the public to sell their goods subject to the conditions they think fit as to the prices they will accept, and just as much to the class of competitors they will admit.

I put the case that a dealer having received a consignment of more or less cattle has been in treaty to sell the lot with five or six different dealers. Why should he not be able in a public market to offer these cattle by auction amongst these five or six persons exclusively? And I can find no good reason in answer to this question. I fear the true reason of the decision of the learned Judges in the Court below, as it was the reason of the local authority in passing the bye-law, is the disapproval of dealing which excludes one or more class of purchasers, but the liberty of an owner of property to deal with his own without restriction is of far more importance than an attempted check to a kind of dealing of which a local authority may not think fit to approve.

On these grounds I am of opinion that the local authority, as administrators only of the market, have no power to limit the conditions under which the sellers may dispose of their cattle. But even if the statute can be read as going beyond administration, and giving power to interfere with the conditions of contracts, that power is limited by the provision that the bye-laws shall not be repugnant to the general law of the country. What is the meaning of this restriction? The market is a public market, and in such a market those who use it and have a right to use it on payment of the dues have the right according to the common law affecting public markets to fix the conditions on which they shall sell their goods as to price, for example, and as to the persons to whom they shall sell. This seems to me to be an incident of the common law, and that it is repugnant to the law that the local authority should by regulation interfere with or abridge this right. Thus if the local authority should attempt by regulation to fix a maximum price which a seller must charge for his stock, alive or dead, I think this would be repugnant to the law, and I say the same as to restriction of the persons to whom sales shall be made privately, or by auction, or to impose similar conditions. In the case of the *Corporation of Toronto* v. *Virgo*, 1896, App. Cas., p. 94, the question raised was whether under a power to pass bye-laws, "for regulating and governing hawkers or petty chapmen and others carrying on petty trades." the corporation were entitled to pass a bye-law prohibiting hawkers from plying their trade in an important part of the municipality, no question of apprehended nuisance having been raised. The ground of judgment of the Privy Council delivered by my noble and learned friend Lord Davey was expressed in these terms, which seem to me to apply directly to this case. The general principle of the result of the cases is "that a municipal power of regulation or of making bye-laws for good government without express words of prohibition does not authorise the making it unlawful to carry on a lawful trade in a lawful manner." That principle seems to me to apply directly to this case.

I observe that Lord Adam in his judgment observes of the regulation in question—"The result is that it prevents owners or consigners of cattle from selling them by auction to such persons or at such prices as they please. There is no interference with sales by private bargain in any way. Now, I can see nothing repugnant to the laws of Scotland in the owners of a public market so regulating their public market that only sales by auction open to the whole public shall be held therein." His Lordship thus finds the power to make the regulation not in the right of administration but the right of ownership of the market, and indicates that a similar regulation as to private sales would be *ultra vires*. To my mind it is clear, under the statutes, that the ownership of a market dedicated to public use gives no power to make bye-laws, that power being conferred on the local authority alone, subject to the statutory restriction. If ownership gave the right I see no reason for holding that a regulation of private sales would not be equally good.

Lord M'Laren again says—"If the bye-law in question were applied to sales by private bargain I should be disposed to hold that it would be an undue interference with the rights of a seller making use of the

market to say that he should not be entitled to confine his dealings to persons belonging to his trade." I entirely agree with the views of these learned Judges that a similar bye-law prohibiting private sales, except on the conditions which have been imposed on sales by auction, would be repugnant to the law, but I am unable to distinguish in principle between the two cases, and no distinction in principle has been stated in the Court below, nor, I believe, by your Lordships.

It has been said that the appellants' claim is really one to have an additional facility given for making sales to one class only of purchasers. The same observation could be made as to the other cases I have given by way of illustration. But in truth the bye-law complained of is a prohibition against free trading so long as no opportunity for free powers of sale is given, and while the bye-law cannot be justified on the ground of want of accommodation.

For the reasons I have given, I am, with deference to your Lordships, of opinion that a local authority having the administration of the premises within which a market open to the public is held, have no right, acting only on their notions of what is for the public advantage, as the local authority has here done, under the Statute of 1847 or otherwise, to make bye-laws to interfere with the conditions on which sellers desire to dispose of their property, or buyers and sellers desire to contract. I think the appeal should be sustained, and that the appellants should have their costs here and in the Courts below.

Lord Davey—I must admit that I have felt some hesitation in this case, but I have come to a clear conclusion that the judgment ought to be affirmed. No doubt the principle laid down in Lord Kinnear's opinion, and relied on by Mr Balfour, is a perfectly sound and important one, viz., that the power of making bye-laws entrusted to a municipal or other public authority is so given for the purpose only of better enabling them to perform their general duties, and ought not to be used for any collateral or outside purpose. And I agree that it is not the office of the market authority to make bye-laws for the purpose of advocating or supporting particular views of public policy or economics. But I do not think that the bye-law complained of is really open to objection on that score.

It is a little difficult to put into formal or precise language exactly what it is that the pursuers and appellants complain of, and which is said to be *ultra vires*. When you examine their complaint I think it will be found to be that facilities are not provided for them for enabling them to carry on their business in the limited and peculiar manner which at present they find it their interest to adopt. The question therefore is, whether there is any duty on the respondents to provide such facilities. Now, I can only say that for myself I am not aware of any duty in a market authority to provide special facilities for every trader who chooses to sell to a select and limited class of customers in carrying on his business in that manner, and I can find nothing to that effect in the Acts of Parliament which have been referred to. The duty of the market authority, as was said by Mr Justice Littledale in the *Islington Market* Case, is to keep the market open for the accommodation of the public who wish to buy or sell there. But there is not, in my own opinion, any obligation to provide facilities for enabling particular members of the public to carry on their business in any special or unusual manner. Mr Balfour said in the course of his argument that his clients were practically excluded from the market. This is in my opinion a fallacy, and a very common one. Persons are not excluded from the benefits provided for the public because, for good or bad reasons, they do not choose to avail themselves of those benefits on the terms on which they are offered to the public generally. I therefore come to the conclusion that there is no duty in the market authority to provide facilities for every special mode of dealing, although the same may be perfectly lawful.

The real complaint against the bye-law is that it does not go far enough, but that does not make it *ultra vires*. As was observed in the course of the argument, the words "on conditions of sale which shall be equally applicable to all bidders and buyers," and the words "or for sales to any limited number of persons, or for sales in which any class of the public are excluded from bidding or buying," might just as well have been left out, as they add nothing to what is included in the expression "public sales by auction." It would then stand thus—"The sale-rings shall be used only for public sales of cattle by public auction. The sale-rings shall not be used for private sales." No objection could have been taken to the validity of a bye-law in that form. It must be within their competence to reserve a place for public sales by auction, and that is really the only question before your Lordships in this appeal. The addition of the words which I have omitted do not seem to me to add anything to the sense of the bye-law, though they have unfortunately given occasion for the argument that has been addressed to us. Indeed, I should myself have come to the same conclusion on the earlier bye-law, for I should understand "sales by auction" in a bye-law made by a market authority to mean sales by auction to which all members of the public are admitted to bid. It is not necessary to express any opinion whether, consistently with their duties to the public, the market authority could have provided for sales by auction from which a certain portion of the public were excluded.

Appeal *dismissed* with costs.

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