Agents, which in the Second Division we held to have been *ultra vires* of the Board of Trade, and which the House of Lords on appeal held to be a valid regulation. But there the point was that we held, that although the power given to the Board of Trade to make the regulations was in very general terms, it could not be held to include the power to exact a fee, which we considered to be of the nature of the assessment of a tax competent to Parliament alone; and the power given to Parliament to approve of the regulations when made could not remove this objection. The House of Lords held that the regulation in question was within the very wide powers conferred on the Board of Trade, and was therefore valid.

The case here is quite different. The bye-law is *ultra vires*, and no confirmation can make it valid.

LORD YOUNG—I am of the same opinion. But I desire to point out distinctly that the argument has been confined to bye-law 6. We have heard no argument on any of the other bye-laws, and they may raise other questions. My opinion therefore is confined to the validity of bye-law 6.

LORD ADAM—I think the intention and aim of this statute was, that the lieges, who had, we are told, up to that time an unlimited right to use the highways with vehicles of any description, or of any weight, should be restricted in the use of locomotives to a weight of 6 tons on waggons of a specified construction. But, as it was quite obvious that there might be cases where even that weight might prove dangerous, the Legislature allowed the local authority to apply their minds to particular cases, where it might appear that, owing to the narrowness, inclination, or defective construction of a road or bridge, the use of locomotive power, even within the statutory limit, might be attended with danger to the public, and in these cases the Legislature allowed the local authority to make the requisite inquiry, and having applied their minds to the particular case, and having come to the conclusion that the use of locomotives in any case would be attended with danger to the public, to issue bye-laws regulating the use of locomotives in that particular case.

In the exercise of what they consider their powers under this section of the statute of 1878 the respondents have issued a set of bye-laws, by which they declare that the whole of the highways and bridges in Aberdeenshire were in such a condition, that the maximum fixed by the Legislature as applicable to the whole Kingdom was not applicable with safety to their highways and bridges.

This result seems to come directly within the principle laid down in the Rothesay Licensing Case. There the Legislature had given the licensing authority power, where it considered it for the benefit of any district within its jurisdiction, to order the public-houses in that district to close an hour earlier than prescribed by the general regulation, and the licensing authority for the burgh of Rothesay issued a general regulation, practically applicable to the whole burgh, ordering that the public-houses be all closed earlier. It was maintained that the magistrates had considered the requirements of each particular district in the town, and been satisfied that in each the early closing was advisable, and that, the whole being made up of the sum of all these parts, they had the power to issue the regulation complained of, and had therefore validly exercised their power. But that was just what it was decided not to be—a valid exercise of their power, and I have therefore no difficulty in agreeing with your Lordships that the bye-law complained of here was not within the powers conferred on the local authority, and is therefore invalid.

The Court quashed the conviction.

Counsel for the Appellant — William Brown. Agents—Henry & Scott, W.S.

Counsel for the Respondents — Abel. Agents—Macpherson & Mackay, S.S.C.

COURT OF SESSION.

Tuesday, October 23.

FIRST DIVISION.

[Sheriff of Aberdeen.

PENNY *v.* PENNY.

Process—Minor—Judicial Factor—Curator bonis—Power of Sheriff to Appoint a Curator bonis to a Minor—Judicial Factors (Scotland) Act 1880 (43 *and* 44 *Vict. c.* 4), *sec.* 4.

Held that it is competent for a sheriff, under section 4 of the Judicial Factors Act 1880, to appoint a *curator bonis* to a minor.

Section 4 of the Judicial Factors Act 1880 provides that "From and after the commencement of this Act it shall be competent for sheriffs in the several sheriff courts in Scotland or for their substitutes, and they are hereby authorised and empowered, to appoint judicial factors in cases of estates the yearly value of which (heritable and moveable estate being taken together) does not exceed £100; . . . and for the purposes of this enactment the following provisions shall have effect—that is to say, (1) until otherwise prescribed, proceedings for the appointment of judicial factors in the sheriff court shall commence by petition to be presented to the sheriff or sheriff-substitute of the county in which the pupil or insane person is resident." . . .

The interpretation clause of the same Act (section 3) provides—"In this Act the following words and expressions shall have the meanings hereinafter assigned to them, unless there be something in the subject or

context repugnant to such construction—that is to say, the expression 'judicial factor' shall mean factor *loco tutoris* and *curator bonis*." . . .

Charles Penny, a minor, whose father was deceased, presented a petition in the Sheriff Court at Aberdeen, with his mother's consent, for the appointment to him of a *curator bonis*. The yearly value of his estate was less than £100. The next-of-kin of the petitioner's father resident in Scotland were called as defenders, but no defences were lodged.

On 21st July 1894 the Sheriff-Substitute (BROWN) refused the petition as incompetent.

The petitioner having appealed, the Sheriff (GUTHRIE SMITH) dismissed the appeal and affirmed the Sheriff-Substitute's interlocutor.

The petitioner appealed to the Court of Session, and argued—Taking the principal enactment contained in section 4 by itself, there was no difficulty in holding that the Sheriff had power to make the appointment craved. The difficulty arose from the terms of the first sub-section of section 4, which referred to pupils and insane persons, but made no mention of minors. But that was a subsidiary provision dealing with matters of procedure, and could not be held to limit the purpose of the main enactment. Apart from the terms of that sub-section, there was every reason for holding that the 4th section was intended to confer upon the Sheriff the power to appoint in the case of minors. It was important that he should have that power, as a summons for choosing curators was an expensive form of process, and no reason could be suggested why he should have power to appoint to insane persons and not to minors. The view of the Legislature seemed to be that sheriffs had this power, for under the Judicial Factors Act of 1889 a factor *loco tutoris* appointed by a sheriff became *ipso facto curator bonis* on the pupil emerging from pupillarity—52 and 53 Vict. c. 39, sec. 11.

At advising—

LORD PRESIDENT—This question arises under an appeal from the Sheriff Court of Aberdeen, and I think Mr Johnston is right in saying that, as the Sheriff has held that he has no jurisdiction, therefore the 10th sub-section of section 4 of the Judicial Factors Act of 1880 does not preclude us from reviewing his decision. The sub-section says that in all cases under the Act the decision of the Sheriff shall be final; but as it appears that the Sheriff has refused to exercise his jurisdiction, we have a right to review his refusal.

That refusal of the Sheriff proceeds upon his own view of the limitations of the Act. I think the Sheriff is wrong. The main enactment is contained in the first part of section 4 of the Act—that part which precedes the various sub-sections. That enactment is expressed in quite general terms, and from it the Sheriff derives his jurisdiction. The section says—"From and after the commencement of this Act it shall be competent for sheriffs in the several sheriff courts of Scotland, or for their substitutes, and they are hereby authorised and empowered, to appoint judicial factors in cases of estates the yearly value of which (heritable and moveable estate being taken together) does not exceed £100" . . . Now, the words "judicial factor" have in the immediately preceding section been defined to mean "factor *loco tutoris* and *curator bonis*."

Now, it appears from the sequence of the Acts of Parliament bearing on this matter, and in accordance with the ordinary and proper use of the term, that "*curator bonis*" is applicable to the factor appointed both in the case of minors and of the insane; and, putting section 4 and the immediately preceding section together, the intention of the Act seems clear, and there appears to be no doubt of the Sheriff's power to appoint a *curator bonis* in the case of a minor. The difficulty arises from the 1st sub-section of section 4, but that sub-section has a subsidiary position to the main enactment, and does no more than provide how petitions for the appointment of judicial factors are to proceed, and it takes as the criterion for ascertaining the mode by which the Sheriff Court is to be selected "the county in which the pupil or insane person is resident." But that is not enough to lead us to hold that the broad words of the main part of the 4th section are to be restricted to the cases of pupils and insane persons by a clause which avows itself to be one concerned with procedure.

I then inquire, "Is there any reason that can be suggested for limiting the application of that section, seeing that the mode of introducing the alleged limitation is inartistic and inappropriate?" I see none. There is no consideration of convenience that makes it desirable that the Sheriff should have a power of appointment in the case of an insane person and not in the case of a minor. The question is, as has been remarked, a comparatively short one; and it seems to me that there are adequate grounds for holding that the Sheriff has the power of appointing a *curator bonis* in the case of a minor.

I am therefore of opinion that we should recal the Sheriff's interlocutor and remit to him to proceed.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute and remitted to the Sheriff to proceed.

Counsel for the Petitioner—H. Johnston. Agent—R. C. Gray, S.S.C.