there should be inquiry into and detailed proof of damage resulting from delay in delivery. The loss sustained by a belligerent or an intending belligerent owing to a contractor's failure to furnish timeously warships or munitions of war does not admit of precise proof or calculation; and it would be preposterous to expect that conflicting evidence of naval or military experts should be taken as to the probable effect on the suppression of the rebellion in Cuba or on the war with America of the defenders' delay in completing and delivering those torpedo-boat destroyers."

The appellants' counsel frankly maintained that the delay merely saved the Spanish Government so much expense, as vessels of war do not earn freight, an argument which would be equally applicable to the case of the vessels never being delivered at all, so that a total breach of the contract would be a positive good in itself. But in truth the only apparent difficulty in the present case arises from the magnitude and complexity of the interests involved and of the vicissitudes affecting them, and as the question is whether this stipulation of £500 a-week is unconscionable or exorbitant these considerations can hardly be considered a formidable difficulty in the way of the respondents.

On the question of waiver I must say I think the appellants' case completely fails, and this matter is very adequately dealt with by the Lord Ordinary.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Counsel for the Pursuers and Respondents—The Solicitor-General for Scotland (Dundas, K.C.) — Blackburn. Agents — Macandrew, Wright, & Murray, W.S., Edinburgh—J. T. Davies, London.

Counsel for the Defenders, Reclaimers, and Appellants — Lawson Walton, K.C.—Ure, K.C.—Rufus D. Isaacs, K.C.—Tait—Cassel. Agents—M'Gregor, Donald, & Co., Glasgow — Forrester & Davidson, W.S., Edinburgh — Ashurst, Morris, Crisp, & Co., London.

Monday, November 21.

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

ROSSI *v.* MAGISTRATES OF EDINBURGH.

(In the Court of Session, February 20, 1903, 5 F. 480, 40 S.L.R. 375.)

Burgh — Magistrates — Powers — Police — Ice Cream Vendors — Conditions in Licences for Premises where Ice Cream Sold—Ultra vires—Lawful Day—Sunday —Edinburgh Corporation Act 1900 (63 *and* 64 *Vict. cap. cxxxiii*), *sec.* 80—*Edinburgh Corporation Order Confirmation Act* 1901 (1 *Edw. VII. cap. clxxxiv*), *sec.* 57.

By section 80 of the Edinburgh Corporation Act 1900, as amended by section 57 of the Edinburgh Corporation Order 1901, it is provided, *inter alia*, that any person selling ice cream (except in a duly licensed hotel) without a licence from the Magistrates, "who are hereby empowered to grant the same" for the house, building, or premises where such ice cream is kept for sale or sold, shall be liable to a penalty, provided that such licences shall run from the date of issue until the 15th of May next ensuing, and upon renewal from the date of the expiry of the licence so renewed to the 15th of May succeeding, "unless the same shall be sooner forfeited, revoked, or suspended," and that "every person licensed . . . to sell ice cream under the provisions of this Act who shall . . . sell ice cream except during the hours between" 8 a.m. and 11 p.m. "on any lawful day or at such extended hour at night as the Magistrates may by special regulation in particular cases, for reasons assigned, permit," shall be liable to the penalty prescribed. No statutory form of licence was provided by the Act.

The Magistrates proposed to issue to ice cream vendors licences containing the following conditions—"(1) That the said licensee shall not keep open said premises or sell or permit the sale of ice cream therein on Sunday or on any other day set apart for public worship by lawful authority. (2) That the said licensee shall not keep open said premises or sell or permit the sale of ice cream therein before 8 o'clock in the morning or after 11 o'clock at night. (3) That the said Magistrates, or any of them, may at any time suspend or revoke this licence."

Held (*rev.* judgment of the Second Division) that the insertion of these conditions in the proposed form of licence was *ultra vires* of the Magistrates, because (1) with respect to the first and second conditions there was no prohibition in the Act against a person who combined the sale of ice-cream with other branches of trade, keeping his premises open for the sale of other commodities during the hours and days when the sale of ice-cream was prohibited; and (2) with respect to the third condition, that the Act did not confer on the Magistrates any power to suspend or revoke the licence.

Opinion (*per* Lord Davey and Lord Robertson) that while Sunday was not a "lawful day" in the sense of the Act, the words "any other day set apart for public worship by lawful authority" were ambiguous; and (*per* Lord Robertson) "it is quite out of place for a licensing body to put into the licence their gloss on the statute on such points, whether it be more or less probably correct."

Process—Action of Declarator—Competency of Action — Title to Sue — Appropriate Form of Remedy—Action by Trader for Declarator that Conditions in Proposed Licence by Magistrates Illegal.

Where magistrates are empowered by Act of Parliament to grant licences

to members of a particular trade, and inform the traders that they propose to insert in the licences certain conditions, any member of the trade who is of opinion that the proposed conditions are not authorised by the statute is entitled before receiving his licence to bring an action of declarator against the magistrates in order to have the proposed conditions declared illegal.

This case is reported *ante ut supra.*

Francisco Rossi, pursuer and reclaimer, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—The question here may be reduced to a very short point, namely, whether the civic authorities have power to make these regulations which are complained of, because in substance they are regulations although they are contained in the form of a licence which they issue and which involves the power to make a regulation. Whether it is called a regulation or a bye-law it is a legislative power which in my view the Legislature has not confided to them.

It is idle to say that a great many of these things, as has been urged in the arguments which have been addressed to your Lordships, would be very desirable for the sake, it is said, of public order. I confess, for myself, I am wholly unable to understand what question of public order arises in the sale of ice cream, but I pass that by, because I do not know what was the occasion of this legislation. We have had no opportunity of considering it, neither is there anything in the statute itself, nor has anything been put before us, to show that which would have been undoubtedly a proper and legitimate source of information—what was the occasion and what was the evil aimed at to be remedied by the legislation which the Legislature has adopted. It is enough for me to say that I know nothing about it. I do not know what the evil aimed at was.

I can give, therefore, no general view of what is the intention and purpose of the statute. I can only look at the statute itself and construe it by itself, and when I construe the statute by itself I find there is in the statute itself a plain prohibition with respect to certain things. The magistrates of course are not only empowered but bound to give effect to legislation which has been passed, but when it is argued that because they are given the power to restrict within certain hours the sale of ice cream, therefore they have implied power to do all that might be desirable or expedient with reference to the times and circumstances under which ice cream shall be sold, it seems to me the argument entirely fails. What is sought to be done, whether directly by bye-laws, or indirectly by the language of the licence that is issued, is something that can only be done by the Legislature. It is a restraint of a common right which all His Majesty's subjects have—the right to open their shops and to sell what they please subject to legislative restriction, and if there is no legislative restriction which is appropriate to the particular thing in dispute, it seems to me it would be a very serious inroad upon the liberty of the subject if it could be supposed that a mere single restriction which the Legislature has imposed could be enlarged and applied to things and circumstances other than that which the Legislature has contemplated.

The result is, as it appears to me, that this form of this licence is entirely irregular, and when it is said that any Court can construe it so as not to infringe the liberty of the subject, and that they would simply withdraw the licence under certain circumstances, I think in the first place that is an untenable proposition. You have no right to allow to stand that which on its face would involve an undue restriction of the liberty of the subject on the ground that any court afterwards would construe it so that it should not do so because it would be *ultra vires* on the face of it. I think that would be wrong in itself, but it would be much more wrong to allow the subject to be called upon to take such a question from court to court, and ultimately to your Lordships' House, because they would not interfere with the language which the civic authority had used which, upon the face of it, involved an infringement upon the liberty of the subject.

I confess for my own part I have entertained no doubt from the commencement of this case that this was *ultra vires* on the part of the civic authority. The only doubt I have entertained has been whether this was an appropriate form of remedy. I am told now—indeed one of the learned Judges himself points out—that if the fact is, as was contended before him, that a form of licence involving as I say a prohibition of this sort was *ultra vires*, this is an appropriate form of remedy. Under those circumstances I can have no difficulty at all in advising your Lordships to allow this appeal and to condemn the respondents in costs.

LORD DAVEY—I certainly am not disposed to entertain the objection to the competency of this appeal, because looking at the judgments of the experienced Lord Ordinary and the Inner House I do not see in any of the judgments delivered by those learned Judges, who of course must be assumed to know their own procedure, any objection to the competency of the action. Indeed, Lord Moncreiff says—"If the pursuer had been able to show that the Magistrates had exceeded their powers in this licence, he no doubt would have succeeded." I turn therefore to the substance of the argument of the learned counsel.

In the year 1900 the Town Council or the Magistrates of Edinburgh thought fit to apply to the Legislature, and the Legislature passed an Act for the regulation of billiard rooms and the sale of ice cream. I must assume that there were circumstances connected with the trade of selling ice cream in the city of Edinburgh which justified the intervention of the Legislature and made it right to impose special provisions on the

sale of ice cream which are not applicable to the sale of similar commodities. But every restriction and every regulation such as I find in the Act of 1900, repeated in the Provisional Order of 1901, is of course *pro tanto* a restraint upon the ordinary right of every British subject. It is in fact a restraint of trade, and I am of opinion that although the section of the Act and the Provisional Order in which I find such provisions ought to be construed fairly and ought to be construed so as reasonably to effect the object which the Legislature must be presumed to have had in view, you ought not by implication to extend the restriction in restraint of that particular trade further than the Legislature has sanctioned, and still less ought you to give such a construction to clauses of that description as would impose a restraint not only upon the exercise of the particular trade which is in question but also upon the exercise of other trades which are not in question.

Bearing that in mind I confess I should have used the same words as the Lord Justice-Clerk used, though not in the same sense as that in which he used them, but with a meaning of their own. He says, "This is a very simple case," and so far I I agree with him, but I regret to say I cannot agree in the conclusion which he has come to, for I am of opinion that everyone of the so-called conditions in the way of restricting the pursuer's trade goes beyond anything that is sanctioned by the Legislature in the Act or the Provisional Order. I need not read to your Lordships, or refer at length to the section—it is the section of the Provisional Order which is called clause 57, which repeats with some verbal differences clause 80 of the Corporation Act of 1900, but I will merely point out to your Lordships that it provides for a licence being granted for the premises in which ice cream may be sold, and prohibits any unlicensed person from selling ice cream except on premises so licensed. But the prohibition is merely to selling ice creams upon those premises, and then the section imposes a penalty for that offence and also for not writing or putting up upon his premises the words—"Licensed for the sale of ice cream," and it provides that the licence shall run from the 15th day of May in one year to the 15th day of May following "unless the same be sooner forfeited, revoked, or suspended." Then it prohibits the selling of ice cream except during the hours between 8 o'clock in the morning and 11 o'clock at night "on any lawful day."

Now, the first condition in the licence which I think is open to objection is, that it not only prohibits the sale of ice cream but it also prohibits the licensee from keeping open his said premises at other times. That, I think, is wholly unwarranted by the Act. There is nothing whatever there to prevent or prohibit the licensee's keeping open his premises during such hours as he may otherwise lawfully do so. The prohibition is against selling ice cream, but there is no prohibition against keeping open his premises for other purposes. For example, I suppose it is quite possible that the sale of ice cream may be combined with other branches of trade, and the effect of this proviso is to extend the prohibition as regards the hours and days when ice cream may be sold to the sale of other commodities which may be lawfully sold on other days and at other times.

It is said that this is in the nature of a condition for giving effect to the provisions of the statute, but I am not prepared to say that you can do that. I am of opinion that you cannot under the guise of giving better effect to the provisions of a statute extend the statute to the prohibition or the restraint of trades which are not included in the statute. Although I quite feel the effect of the argument used by Lord Trayner on this part of the case, the answer really is that which has been given by my noble and learned friend on the Woolsack, that it might have been a very reasonable provision for the Legislature to have prescribed and inserted in the statute, but the Legislature has not done so.

Then the words in the statute are "on any lawful day," which I agree are ambiguous. The Town Council have construed those words to mean on Sunday or any other day set apart for public worship by lawful authority. Now, Sunday, no doubt, is properly included, but as regards the further words "or on any other day set apart for public worship by lawful authority," I do not know what is meant by lawful authority. If it means that the Government or any other authority acting under the powers of an Act of Parliament prohibits the sale of ice cream upon a certain day the prohibition will have effect, but if it does not do so I do not, I confess, agree that because a day other than Sunday is fixed for public worship by some authority it extends the restriction to such a day. That consideration derives still more force when it is considered that the prohibition is not only against the selling of ice cream but against the licensee keeping open his premises for other purposes.

The same observation applies to No. 2, and then we come to No. 3, which is, "That the magistrates or any of them may at any time suspend or revoke this licence." Now, I confess that I have not heard from the learned counsel—and I took the liberty of pressing the learned counsel on this point—of any power in the Magistrates either to revoke or to suspend this licence. It is said that the words which I have read, "unless the same be sooner forfeited, revoked, or suspended," give the power. That construction of the Act of Parliament seems to me to be entirely contrary to principle. The utmost that you can say is that the words seem to assume that the Corporation either have already or may at some future time acquire a power to forfeit, revoke, or suspend the licence. That it does not give the power seems to me plain from a consideration of the words, because the words are, as your Lordships will observe, "forfeited, revoked, or suspended.' Now "forfeited" has a clear and definite meaning when you are speaking of licences of this description. It means that

if the licensee does certain acts his licence will be forfeited. That is the plain meaning of it. Well, you will look in vain in this statute or in this Provisional Order for anything that defines the conditions upon which the licence is to become forfeited. It is plain, then, that this clause does not make any provision for the licensee forfeiting his licence, and it is equally plain to my mind that it does not contain any power either to revoke or suspend the licence. I therefore agree with the motion which has been made by your Lordship that the interlocutors be reversed.

LORD ROBERTSON—I am of the same opinion.

The first question is whether the proposed form of licence does or does not accurately state the restrictions imposed by the statute on dealers in ice cream. It seems to me that it does not, and that it purports to impose on the dealers more restrictions than does the statute. I can find no warrant in the statute for forcing the dealer to close his premises at the hours during which he is forbidden to sell ice cream, and I know of no principle upon which the magistrates can be held entitled to take out what they may consider a weak prohibition by imposing an additional one. The licence would compel a man who had a general baking or confectionery business to shut shop at the specified hours merely because one (and it might be an unimportant) item of his business was ice cream. If the Legislature should in the future come to estimate the importance of ice cream higher than it seems to do at present it may adopt the stringent measure proposed. But in the meantime the respondents must be content to keep pace with the Legislature.

I further think that the respondents in the third condition arrogate to the Magistrates a power not conferred on them.

As regards lawful days, I think Sundays are not, in the sense of the Act, lawful days, on the principle stated in this House in the case of *Phillips* v. *Innes*, February 20, 1837, 2 S. & M'L. 465. As regards the other days described in the proposed licence, I do not feel called on to discuss dubious questions about public fasts which have little or no practical importance, and shall only remark that it is quite out of place for a licensing body to put into the licence their gloss on the statute on such points whether it be more or less probably correct. On the present point the respondents, I have no doubt with the best intentions, have gone out of their way to court discussion.

The next question is as to the form of action. Now, the substance of the matter is that the Magistrates have publicly threatened to impose and enforce on a lawful trade restrictions which are illegal. This being so it would be unfortunate if it were necessary that a lawful trade should be interrupted and harassed by actual prosecution. It seems to me that the action of declarator which is peculiar to the Scots system exactly meets the case. It is quite a mistake to assume that this trader requires to postulate what he has not got, viz., a licence, in order to find himself a title to sue. His title is his trade, which the respondents avow that they intend to interfere with by refusing to give a trader a licence except upon terms more onerous than the law allows. In my opinion the appellant has a perfectly good title to have those restrictions declared illegal.

Ordered that the interlocutors appealed from be reversed, and that it be declared that the Magistrates are not empowered to grant licences to ice-cream vendors for premises in the City of Edinburgh for the keeping for sale or sale of ice-cream, subject to any conditions other than those specified in section 80 of the Edinburgh Corporation Act 1900 as amended by the Edinburgh Corporation Order 1901, or in accordance therewith, and the licence (proposed by the Magistrates) is not conform to the said statutes.

Counsel for the Pursuer, Reclaimer, and Appellant—Crabb Watt, K.C.—T. B. Morison—Crabb Watt junior. Agents—Donaldson & Nisbet, S.S.C., Edinburgh—Traill, Howell, & Page, London.

Counsel for the Defenders and Respondents—Cripps, K.C.—Cooper, K.C.—H. W. Beveridge. Agents—Thomas Hunter, W.S., Town-Clerk, Edinburgh—A. & W. Beveridge, Westminster.

COURT OF SESSION.

Tuesday, November 22.

FIRST DIVISION.

[Exchequer Cause.

MURDOCH *v.* INLAND REVENUE.

Revenue — Inhabited-House-Duty — Two Houses Belonging to Different Owners and Held by Different Parties Connected so as to Form One Dwelling-House in Joint Occupation — Inhabited-House-Duty Act (48 *Geo. III, cap.* 55), *Schedule B, Rules* 1, 6, *and* 14—*Customs and Inland Revenue Act* 1878 (41 *Vict. cap.* 15), *sec.* 13.

Two originally distinct houses were in the possession, the one of a father, who was part owner, the other of his son, who was the tenant of an uncle. They established between the houses internal communication by a doorway made in the separating wall. The son who was tenant and one daughter slept in the rented house, and its sitting-rooms were used by the son for professional purposes. The father and the rest of his household slept in the other house. All meals were taken in this house and were cooked in its kitchen. Only one servant was kept.

Held that the two houses formed one dwelling-house in the joint occupation of the father and the son, on whom