that in contravention of the Act of Parliament. But then it is said that if this be done the ice-cream shops or aerated water shops in Partick will not be able to carry on their business at a profit, and therefore must cease carrying on their business, and that that was not the intention of the statute. The intention of the statute is that for the general benefit of the community the magistrates should fix suitable hours for closing these premises; and they having fixed what they consider suitable hours for closing these premises, the question how that may affect the business of persons who sell such commodities as ice-cream and aerated water may be doubtful. But if it has a tendency to stop what is a legitimate business, it is for the Legislature to interfere and put that right. But it would not do for us, merely upon averments that the bye-law will have that effect, to hold that it was *ultra vires* to pass the bye-law. Therefore upon the whole matter I am for adhering to the Lord Ordinary's interlocutor.

LORD KYLLACHY—I am entirely of the same opinion and have nothing to add.

LORD STORMONTH DARLING—The state of the law with regard to ice-cream shops apparently is that for some reason which is not disclosed on the face of either of the Acts of Parliament the Legislature thought fit to regulate the hours during which they were to remain open. They did so by the Act of 1892 in this way. They fixed the hour in the morning before which, and the hour at night after which, they were not to be open, and that left a period of nineteen hours at the utmost for business. They gave no power at that time to any local authority to fix different hours. But in 1903, by sec. 82 of the Act of that year, they did give power to town councils of burghs to make bye-laws in regard to the opening and closing of these shops, guarding it only by this, that the hours for business were not to be restricted to less than fifteen daily. That being read along with the previous Act of 1892, the effect was to retain the earliest possible hour of five and the latest possible hour of twelve, and within that margin to allow the local authority to select any period of fifteen hours, subject to the control of the Sheriff of the county and the Secretary for Scotland. The Magistrates of Partick have fixed the fifteen hours within those limits, and the purpose of this action is to reduce the bye-law of September 1904. It is perfectly plain that we can only give effect to these conclusions if we are prepared to hold that the bye-law is *ultra vires*. I agree with the Lord Ordinary and with your Lordships that no relevant case has been presented to that effect. An averment of that kind, I think, must proceed upon something which on the face of the bye-law shows it to be *ultra vires*. There is nothing on the face of the bye-law to impeach its validity. Here the averments, even taking them at their highest as we are bound to do, come to no more than this, that if the bye-law is allowed to stand, the pursuers, who are all the ice-cream dealers in Partick, will find their business ruined, and will have to close their shops. But that averment, when examined, really comes to no more than this, that they anticipate that they will find their business so unprofitable that it will not be worth carrying on. The persons who had to judge of the probable effect on the pursuers' business, taking all the local circumstances into account, were the same persons who had to judge of the reasonableness of the bye-law which was about to be passed, namely, the Magistrates in the first instance, the Sheriff in the second, and the Secretary for Scotland in the third. All these authorities have considered the matter; all have concurred in passing the bye-law, and it seems to me that we should not be justified by the result of any proof that might be adduced in quashing the bye-law on the ground that it was likely to be followed by these results. I therefore entirely agree with your Lordships.

LORD LOW was not present.

The Court adhered.

Counsel for Pursuers and Reclaimers—Crabb Watt, K.C.—T. B. Morison. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Defenders and Respondents—Guthrie, K.C.—C. D. Murray. Agents—Simpson & Marwick, W.S.

Saturday, March 3.

FIRST DIVISION.

MAGISTRATES OF ABERCHIRDER *v.* BANFF DISTRICT COMMITTEE AND OTHERS.

Expenses—Process—Interlocutor—Taxation—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1 (*b*)—*Interlocutor in Ordinary Form Giving Expenses to a Defending Public Authority—Proper Time to Move for Expenses as between Agent and Client.*

In an action against the District Committee of a County Council and the County Road Board the defenders were found entitled to expenses. The interlocutors were in ordinary form.

The defenders having presented a note to the Lord President in which they craved his Lordship to move the Court to direct the Auditor to tax their account as between agent and client in terms of section 1 (*b*) of the Public Authorities Protection Act 1893, and stated that the Auditor had refused to do so on the ground that he had no warrant to tax the account otherwise than as between party and party—*held* that the defenders' motion not having been made before the interlocutors were signed was not timeous, and note *refused.*

The Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61) is entituled "An Act to generalise and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties."

Section 1 enacts—"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:—(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of . . . (*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client. (*c*) . . ."

This was a note to the Lord President for (1) the Banff District Committee of the County Council of the County of Banff, and (2) James Campbell, LL.D., Old Cullen, and others, the County Road Board of the County of Banff, defenders and respondents in an action against them at the instance of the Provost, Magistrates, and Councillors of the Police Burgh of Aberchirder, pursuers and reclaimers.

The action had concluded for (1) reduction of certain minutes or resolutions of the defenders the Banff District Committee and the Road Board, and (2) declarator that the District Committee was bound to maintain and repair the roads, streets, and lanes of the Burgh of Aberchirder.

On 13th January 1905 the Lord Ordinary (Low) had assoilzied the defenders from the conclusions of the action and had found them entitled to expenses except those incurred for a discussion in the Procedure Roll.

The pursuers had reclaimed, and on 20th October 1905 the First Division had pronounced this interlocutor—"Adhere to the said interlocutor, refuse the reclaiming note, and decern; Find the defenders entitled to additional expenses since the date of the interlocutor reclaimed against, and remit the account thereof, together with the account of the expenses found due by the interlocutor reclaimed against, to the Auditor to tax and to report."

The note, after narrating the provision as to expenses of the Public Authorities Protection Act 1893, sec. 1 (*supra*), stated—"The defenders have lodged in process their account of expenses made up in accordance with said statute as between solicitor and client, but on the same being submitted to the Auditor of this date (27th February 1906) he refused to receive or consider the same, on the ground, as he alleges, that he has no warrant to tax the account otherwise than as between party and party. The defenders are therefore under the necessity of presenting this note.

"May it therefore please your Lordship to move the Court to pronounce an interlocutor directing the Auditor of Court to proceed with the taxation of the said account . . . as an account of expenses between solicitor and client."

On the note appearing in the Single Bills counsel for the Burgh of Aberchirder (the pursuers in the action) argued that the note was incompetent and should be refused on the ground that it was too late now to move for expenses as between agent and client. The motion now made was doubly belated as the Lord Ordinary had only allowed ordinary expenses. An award of expenses in ordinary form carried only expenses as between party and party, and such award could not be altered after the interlocutor granting it was signed—*Wilson's Trustees* v. *Wilson's Factor*, February 2, 1869, 7 Macph. 457, 6 S.L.R. 285; *Fletcher's Trustees* v. *Fletcher*, July 7, 1888, 15 R. 862, 25 S.L.R. 606. The Auditor was not to be made a judge of whether the Act applied; the Court must decide that and intimate its decision in the interlocutor.

Argued for defenders—The case of *Fletcher* (*cit. supra*) was inapplicable, as there the Court had applied its mind specially to the question of expenses; that was not so here. In England the practice was to tax such an account as between agent and client without a specific finding to that effect. The words of the statute were imperative; that being so, the words "as between agent and client" should be read in—*Shaw* v. *Hertfordshire County Council*, [1899] 2 Q.B. 282. All that was asked here was a direction to the auditor. No alteration of the interlocutor awarding the expenses in question was necessary. The motion was therefore competent.

LORD PRESIDENT—I am clearly of opinion that this motion is too late. Under section 1 of the Public Authorities Protection Act provisions are made as to the timeous prosecution of actions "where any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority," Then sub-section (*b*) provides, "wherever in any such action a judgment is obtained by the defendant it shall carry costs to be taxed as between solicitor and client."

Now, I am not doubting that the decisions in the English courts which have been quoted are right, namely, that if the court is satisfied that an action falls under the first section of the Act and finds expenses in favour of the defendant these expenses must be as between agent and client. But in many cases questions may arise as to whether an action does fall under the first section, and so, according to the universal practice of this Court, it is necessary for a person wishing to benefit by the section to make a motion before the interlocutor in the cause is signed, to allow the Court to determine whether the section is applicable or not. In the present case this was not done, and the interlocutor found expenses in the ordinary terms, and the Court has no power to alter that interlocutor. The

defenders asked the Auditor to tax the account as between agent and client, and the Auditor refused as he found no warrant for doing so in the interlocutor. The application to alter the interlocutor is too late, and it is vain to quote to us English cases as to the rules of procedure in our own Court. There is a perfectly appropriate time for such a motion being made, and the present contention would lead to this, that such questions as to whether or no a party was a public authority would be left to the decision of the Auditor.

LORD M'LAREN—It is a well-established rule by practice in this Court that where expenses are to be given on any other than the ordinary scale, this should be specified in the interlocutor awarding expenses. The Public Authorities Protection Act is not the only illustration of the application of that rule. There is, for instance, the very familiar case where the question is whether expenses are to be given against trustees or a judicial factor individually or in a representative capacity.

In such cases it is settled that the Court has no power to alter what is contained in its interlocutor awarding expenses. In a well-known case as to individual or collective liability, which went to a Court of Seven Judges, it was held that the only question was the construction of the interlocutor which was under consideration.

I agree with your Lordship in thinking that the practice of the English Courts cannot be a guide to us in settling what is the proper time in this Court at which application ought to be made for carrying out the provisions of the Act. I do not know whether, if this motion had been made at the proper time, it would have been granted; but it was not made, and we have no power to alter or amend our interlocutor.

LORD KINNEAR—I concur.

LORD PEARSON—I agree on the ground that the motion is made too late.

The Court refused the prayer of the note.

Counsel for Pursuers and Reclaimers—The Solicitor-General (Ure, K.C.)—T. B. Morison. Agents—P. Morison & Son, S.S.C.

Counsel for Defenders and Respondents—Clyde, K.C.—Chree. Agents—Alex Morison & Co., W.S.

Saturday, March 3.

FIRST DIVISION.

[Lord Johnston, Ordinary.

A B *v.* C B.

Husband and Wife—Nullity of Marriage—Impotency—Incapacity of Woman—Absence of Structural Defect—Impracticability of Consummation—Circumstances in which Impracticability Inferred.

Seven months after the marriage, a husband brought an action of nullity against the wife on the ground of her impotency. The spouses had separated three and a-half months after the marriage, but prior to that date the husband, who was able and anxious to consummate the marriage and had had sufficient opportunities, had used every means to that end short of physical violence, but without attaining his object. There was no structural incapacity in the wife. No reason was suggested for a wilful refusal on her part.

Held (1) (*aff.* Lord Ordinary Johnston's opinion) that incapacity on the part of the woman was not restricted to cases where some structural incapacity existed, but included cases where consummation was impractical, an inference to be drawn from the facts; and (2) (*rev.* Lord Ordinary Johnston) that in the circumstances of the case incapacity on the part of the woman was to be inferred, and consequently that the man was entitled to decree.

On 3rd January 1905 A B (the man) brought an action against C B (the woman) to have it declared that a marriage between them, which had been celebrated on 10th June 1904, was null, on the ground that the defender was at the time of the marriage, and was still, impotent.

The facts proved and the circumstances of the case are given in the opinion (*infra*) of the Lord Ordinary (JOHNSTON), who on 22nd November 1905 pronounced this interlocutor—"Finds that the pursuer has failed to adduce evidence by which the alleged impotency of the defender is established, or from which it can be inferred; therefore dismisses the summons and decerns: Finds the defender entitled to expenses down to and including 17th March last, under deduction of £5, 5s. paid *ad interim* under the interlocutor of 17th February last, and of £5 paid voluntarily on 17th March last; allows an account to be given in," &c.

Opinion.—"The pursuer A B seeks to have his marriage with the defender C B, which was solemnised on 10th June 1904, annulled on the ground of her impotency. The parties lived together until 24th September 1904, and the summons was signeted on 3rd January 1905, less than seven months after the marriage.

"The evidence is so narrow and the case so complicated by the briefness of the period of cohabitation, and by the conduct of the wife towards the litigation, that it is necessary to deal with it with care.

"The pursuer necessarily undertakes the onus of showing, as the ordinary form of summons sets forth, 'that the defender was at the time of the pretended marriage between her and the pursuer, and still is, impotent and unable to consummate marriage by carnal copulation:' Has he satisfied that onus?

"His averment is the general one, that 'the defender is impotent and unable, either from malformation or from functional or nervous defects in her constitution, or from some other cause or causes to the pursuer more particularly unknown, to have connection with the pursuer.'