

[20th Feb. 1837.]

POOR DAVID PHILLIPS and WILLIAM PHILLIPS his  
Son, Appellants.—*Dr. Lushington.*

DANIEL INNES, Barber and Hair-dresser, Dundee,  
Respondent.

*Master and Servant—Apprentice—Sabbath—Statute—Acts 1579, c. 70, and 1690, c. 21—Construction—Barber—Handicraft.*—Held (reversing the judgment of the Court of Session) that a barber's apprentice, under an indenture which bound him "not to absent himself from his master's business, holiday or week-day, late hours or early, without leave first asked and obtained," could not be lawfully required to attend his master's shop on Sunday mornings for the purpose of shaving customers, in respect such employment infers a violation of the act 1579 and other statutes enacted for enforcing the observance of the Sabbath.

Opinions of the judges on appeal in regard to the proper interpretation of the exception in the act 1690, c. 21, respecting "the duties of necessity and mercy."

BY an indenture bearing date the 18th day of March, entered into between Daniel Innes, barber and hair-dresser in Dundee, the respondent, of the one part, and William Phillips, son of David Phillips, with consent of his said father, and the said David Phillips as cautioner and surety for his said son, the appellants, of the other part, the appellant William Phillips became bound apprentice and servant to the respondent in his trade

2D DIVISION.

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and business of barber and hair-dresser, and that “ for  
 “ the full space and term of four years from and after  
 “ the 1st day of July 1833, and during that space to  
 “ serve the respondent as a faithful and obedient ap-  
 “ prentice, and not to absent himself from his master’s  
 “ business, holiday or week-day, late hours or early,  
 “ without leave first asked and obtained, and that under  
 “ the penalty of 10*l.* sterling, over and above perform-  
 “ ance.”

The appellant entered into the service of the re-  
 spondent on the 1st of July 1833, and attended regularly  
 to the business on Sunday mornings, until Sunday the  
 4th of May 1834, and the following Sunday, on both of  
 which days he absented himself without the leave of the  
 respondent, who, in consequence, presented the following  
 petition to the magistrates of the burgh of Dundee:—

“ That from the nature of the petitioner’s trade and  
 “ business he requires the attendance of his said appren-  
 “ tice on the mornings of Sunday, as on other days, till  
 “ at least ten o’clock; and accordingly, from the period  
 “ of his entering the petitioner’s service, on 1st July  
 “ 1833, until Sunday the 4th day of May current, the  
 “ said William Phillips did attend the petitioner’s busi-  
 “ ness on the Sunday mornings; that having absented  
 “ himself on that morning the petitioner caused his  
 “ agent to write the said David Phillips, the father and  
 “ cautioner for the said apprentice, complaining of such  
 “ absence, and he was in hopes that such would not be  
 “ repeated; that in this, however, the petitioner was  
 “ disappointed, as the said apprentice did absent him-  
 “ self again on the morning of Sunday the 11th day of  
 “ May current, and this, as the petitioner understands,  
 “ by the order of the said David Phillips. That the

“ petitioner suffers considerable loss and inconvenience  
 “ from the absence of his apprentice on the Sunday  
 “ mornings, which renders the present application  
 “ necessary. May it therefore please your honours to  
 “ grant warrant for service of this petition on the said  
 “ William Phillips and David Phillips, and appoint  
 “ them to lodge answers thereto, within a certain short  
 “ space; and thereafter to find that the petitioner is  
 “ entitled to the services of the said apprentice at his  
 “ trade and business on the mornings of Sunday, and  
 “ until ten o’clock at least, and ordain him to attend to  
 “ the petitioner’s trade and business accordingly, and  
 “ failing his so attending, to decern and ordain him  
 “ the said apprentice, and the said David Phillips, as  
 “ his cautioner, to make payment to the petitioner of  
 “ the foresaid sum of ten pounds sterling of penalty  
 “ stipulated by the said indenture; reserving to the  
 “ petitioner to claim the services of the said apprentice,  
 “ on the issue of the said indenture, for four days in  
 “ lieu of the two Sundays before mentioned, as stipu-  
 “ lated in the said indenture; and in either event to find  
 “ the said William Phillips and David Phillips liable  
 “ in the expenses of this application, warrants, proce-  
 “ dure, and decree hereon to follow.”

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To this petition the following answer was lodged by the appellants:—

“ That the business of the respondent did not require  
 “ the attendance of the appellant on the mornings of  
 “ Sunday, and that he was not bound to work for his  
 “ master on the Sabbath; that it was illegal for any  
 “ person to carry on his ordinary trade on Sunday;  
 “ and that it was not in the power of any Court to  
 “ ordain an apprentice to work for his master, in the

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“ ordinary labour or employment of the master, on the  
“ Sabbath.”

On the 13th day of August the magistrates of Dundee pronounced the following decision:—

“ Having advised the minutes of debate and whole  
“ process, finds, that it is matter of public notoriety that  
“ among the great body of mechanics, common la-  
“ bourers, and seafaring men residing in and frequenting  
“ this town and its port, a very considerable number  
“ are not in the use of shaving their beards with their  
“ own hands, but resort to barbers shops in order to be  
“ shaved, many on the evenings of Saturday, but some  
“ on the mornings of Sunday: Finds, that however desir-  
“ able it may be that the resorting to shaving shops on  
“ the mornings of Sunday should be discontinued, if that  
“ could be effected without greater evil, yet it does not  
“ appear to be either necessary or expedient for a due  
“ observance of the Sabbath to forbid the existing usage,  
“ so long as the shops continue, as at present, open early  
“ in the morning, and closed before the time fixed for  
“ the commencement of divine service; for on no  
“ occasion have the authorities of the town seen any  
“ cause to regard the conduct of the barbers in their  
“ vocation, or the conduct of those resorting to their  
“ shops, on the mornings of the Sundays, as other than  
“ decent and orderly, or as apt to give reasonable cause  
“ of offence to any man; and it appears very obvious  
“ that if working men, who are not themselves ac-  
“ customed to shave, were forbidden the aid of the  
“ barbers in their shops on the Sunday mornings, many  
“ decently disposed men would be prevented from  
“ frequenting places of worship, and from associating  
“ in a becoming manner with their families and friends,

“ through want of personal cleanness; and the attempt  
 “ to reduce the minor evil might lead to some more  
 “ serious : Finds, therefore, that in so far as the defender,  
 “ the apprentice, is called upon to aid his master in  
 “ shaving his customers on the mornings of Sunday  
 “ before ten o’clock, it is not contrary to the spirit of  
 “ the statutes regarding the Sabbath, nor contrary to  
 “ the recognized usages under them, that the apprentice  
 “ should give such aid ; but finds that the apprentice  
 “ is not bound, nor is it lawful for him, to work in the  
 “ making of wigs, or in similar employment not immedi-  
 “ ately necessary for the day ; and, with this explanation,  
 “ ordains the defender, the apprentice, to aid his master  
 “ on the mornings of Sunday, when his master has occa-  
 “ sion for his services in shaving his customers, the work  
 “ not continuing after ten o’clock in the morning.”

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This decision having been brought under the review of the Court of Session, the following interlocutor, with the subjoined note, was pronounced by the Lord Ordinary (Jeffrey) on the 14th March 1835 :—

“ The Lord Ordinary, having heard counsel on the  
 “ closed record and whole process, advocates the cause;  
 “ alters the interlocutor of the magistrates complained  
 “ of; sustains the defences, and assoilzies the defenders  
 “ from the conclusions of the action, and decerns; finds  
 “ the advocators entitled to their expenses both in this  
 “ Court and before the magistrates; allows an account  
 “ thereof to be given in, and remits the same, when  
 “ lodged, to the auditor for his taxation and report.

“ *Note.*—This is the first instance, in so far as the  
 “ Lord Ordinary is aware, in which a court of law has  
 “ directly and positively ordained a handicraftsman  
 “ (without any pretence of necessity or serious urgency)

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“ to work at his handicraft on a Sunday; and he certainly  
 “ is in noways anxious to establish such a precedent.  
 “ The cases of apothecaries shops, Sunday travelling,  
 “ and others that were cited, are evidently quite inap-  
 “ plicable. These exceptions have been admitted (with  
 “ more or less scruple and reluctance) on the ground  
 “ that they may frequently be requisite for purposes of  
 “ necessity and mercy, and that it would be imprac-  
 “ ticable to investigate cases of occasional abuse. But  
 “ it is ridiculous to speak of a public shaving-shop as  
 “ an establishment of such necessity as not to admit of  
 “ interruption for a single day in the week. If the  
 “ advocator had refused to shave the head of a lunatic  
 “ or one whose skull had been fractured, the cases would  
 “ have been parallel. The pretence of usage, especially  
 “ such a partial usage as is alleged, is irrelevant in a  
 “ question of illegality by violation of a public law.  
 “ That and the mitigated nature of the offence may  
 “ account for the connivance of the civil and ecclesias-  
 “ tical authorities, and may raise a doubt as to the  
 “ wisdom of proceedings for interdict and penalties.  
 “ But it is impossible to connive when these authorities  
 “ enjoin what they may have blamelessly permitted,  
 “ and actually subject a man to penalties for not doing  
 “ what the law has forbidden.

“ As to the alleged contract of the parties, it was  
 “ admitted by the respondent at the bar, that if what  
 “ was required was illegal the contract must go for  
 “ nothing. The words are ambiguous, and the whole  
 “ argument of the respondent imported that his sense of  
 “ them could not be maintained. If holidays meant  
 “ Sundays (which is his construction), then the contract  
 “ must have meant that the apprentice should serve on

“ Sundays exactly as he did on week-days, and that  
 “ there should be no distinction between them. Yet he  
 “ admits that he could not require him to work even at  
 “ shaving during divine service, nor at wig-making  
 “ even on the Sunday morning. If he says he should  
 “ only work when consistent with law and decency, then  
 “ the Lord Ordinary is of opinion that he should not  
 “ work on that day at all.”

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This interlocutor was submitted to the review of their Lordships of the Second Division of the Court of Session, who, after hearing counsel, pronounced the following interlocutor on the 19th of May 1835 :—

“ The Lords having considered this Note, with the  
 “ other proceedings, and heard counsel thereon, alter the  
 “ interlocutor of the Lord Ordinary ; remit simpliciter  
 “ to the magistrates of Dundee ; find, expenses due ;  
 “ allow the account to be given in, and, when lodged,  
 “ remit to the auditor to tax and report.”

Against this interlocutor the present appeal has been brought.

*Appellants.*—Upon the subject of the strict observance of the Sabbath there are perhaps more enactments in the Scottish acts than upon any other subject whatever. The legislature appeared to have felt more anxiety for the strict enforcement, both of a religious and decent observance of the Sunday, than they appear to have felt upon any other subject. Baron Hume<sup>1</sup>, in his valuable Commentaries on the Criminal Law, remarks :—“ To  
 “ secure the due observance of the Lord’s Day we have  
 “ a long succession of statutes, most of them passed

<sup>1</sup> 1 Hume, 522.

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“ after the Reformation, which prohibited the holding  
 “ of fairs and markets, all buying and selling, working,  
 “ gaming, or playing, resort to alehouses or taverns,  
 “ salmon-fishing, going of salt-pans, mills, or kilns,  
 “ hiring of reapers, and in general all use of ordinary  
 “ labour, employment, or sport on that day.”<sup>1</sup>

The appellants will refer your Lordships particularly to the provisions of the act 1579, which are as follows :  
 —“ Item, For sa meikle as it is statute and 'ordained by  
 “ a good and godly act, made in the days of King  
 “ James the Fourth, our Sovereign Lord's grandfather,  
 “ of worthy memory, that there be no markets nor fairs  
 “ halden upon halydays, nor yet within kirk or kirk-  
 “ yards upon halydays or other days, under the pain of  
 “ escheating of the guidis; quhilk act our Sovereign  
 “ Lord, and his thrie estatis, ratifeis and appreuis,  
 “ ordainis the same to have effect and execution in  
 “ time coming. And seeing that the Sabbath dayis are  
 “ now commonlie violat and brokin, als weill within  
 “ burgh as to landwart, to the great dishonour of God,  
 “ be halding and keeping of the saidis markets and  
 “ fairis on Sondayis, using of handy laubor and working  
 “ thereon, as on the remanent dayis of the oulk,  
 “ be gaming and playing, passing to tavernis, to ail  
 “ houses, and wilfull remaining fra the paroche kirk in  
 “ tyme of sermone or prayers on the Sunday; Thair-  
 “ foir his Maiestie, and his thrie estatis, in this present  
 “ parliament, statutis and ordanis, that thair be na  
 “ markets nor fairs haldin upon the Sunday, nor yet  
 “ within kirkis or kirk yairdis that day or ony uther

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<sup>1</sup> The statutes referred to in the quotation are 1579, cap. 70; 1593, cap. 159; 1594, cap. 198; 1661, cap. 18; 1672, cap. 22; 1693, cap. 40; 1695, cap. 13; 1701, cap. 11; 1690, cap. 25; 1696, cap. 31.

“ day, undir the pane of escheating of the guidis to the  
 “ use of the puyr within the parschyne. And siclike  
 “ that na handy lauboring or wirking be used on the  
 “ Sondag.”

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The provisions of that statute are confirmed and corroborated by the other statutes referred to, and, if possible, still more enforced by the statute of 1690, c. 5, by which the confession of faith prepared in the assembly of divines at Westminster was made a part of the common law of Scotland. The observance of the Sabbath required in that confession, which is embodied in the act of parliament, is as follows:—“ This Sabbath  
 “ is then kept holy unto the Lord, when men after a  
 “ due preparing of their hearts and ordering of their  
 “ common affairs beforehand, do not only observe a  
 “ holy rest all the day from their own works, words,  
 “ and thoughts about their worldly employments and  
 “ recreations, but also are taken up the whole time in  
 “ the public and private exercises of His worship, and  
 “ in the duties of necessity and mercy.”

In the interpretation of these statutes there would seem to be little room for doubt. The exercise of handicrafts is most specially prohibited; and it cannot be doubted that shaving is a handicraft. If we look from the letter of the statute to its spirit, still less doubt, if possible, can be entertained as to its meaning and effect. If we look, above all, to the statute 1690, which sets forth the nature of those avocations which alone are proper for that holy day, can we conceive it for a moment to have been within the contemplation of those by whom it was framed and sanctioned that shops should be open during any part of the day for the exercise of any such trade? The duties of necessity and mercy,

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which are referred to, are of a very different class and description from the acts sought here to be enforced. The reverend divines by whom the confession was drawn up belonged to the strictest class of Sabbatarians. The Parliament by whom the English part of it was appointed had a few years before sentenced the Book of Sports, issued by King Charles, to be burnt by the hands of the common hangman. The Scottish commissioners who were present at the conference shared those opinions upon the subject, which sprung up, not certainly immediately, but in the course of the half century after the Reformation, and which had extended and been received throughout all Scotland. A reverend divine, when examined a few years ago before a parliamentary committee, produced an extract from the books of the kirk session of St. Andrew's, of date 31st May 1649, in which Mr. James Sharp, afterwards Archbishop, moderating,—  
“ James Allen for breaking of the Sabbath was to be  
“ scourged in the Tolbooth by one of the town officers,  
“ at the sight of the magistrates.” Other examples of severe and rigorous enforcement of the law as then understood and prevailing were mentioned, by which it abundantly appears what the opinions entertained among the clergy on that subject were. If it be a fair canon of interpretation, therefore, to take the construction of an act from the intentions of its framers, very slender doubt can exist as to the meaning attachable to the law in this case. It may be assumed, therefore, as established, that the act which is sought to be enforced here is struck at by the statute.

Can it be said to come within the exception of necessity? The magistrates find, “ that among the great  
“ body of mechanics, common labourers, and seafaring

“ men residing in and frequenting this town and its  
 “ port, a very considerable number are not in the use  
 “ of shaving their beards with their own hands, but resort  
 “ to barbers shops in order *to be shaved*, MANY ON THE  
 “ EVENINGS OF SATURDAY, BUT SOME ON THE MORNINGS  
 “ OF SUNDAY.”

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It is only some who are in the use of resorting to the shop on the morning of Sunday; the majority finding no difficulty in resorting to it upon the evening of the Saturday. As to these parties there is no necessity. Persons in [the class of life referred to are in use of shaving once in the week only. It can make little difference to them upon which of the seven days of the week the operation is performed, and the time of no one class among them is so wholly occupied as to prevent them from having it performed on a week-day. To talk of necessity as applying to such a case, therefore, is ludicrous. The practice, then, is not within the exception, and, being clearly struck at by the enacting clause, is illegal.

It seems difficult to understand upon what legal principle the Court have proceeded in fixing upon a portion of the Sunday as one in which it is legal to practise the trade, and upon another in which the same practice is to be held as illegal. The Sabbath, by the law, is to be entirely kept sacred. There is no distinction taken in any single statute, except one of very recent date, between the hours of divine service and the hours in which divine service is not usually performed. The ancient law is entirely irrespective of the fact of divine service being or not being performed during the time in which the acts prohibited are to be performed. The rule by which the hour of ten is fixed as the latest at

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which the trade may be openly exercised is, legally speaking, entirely capricious. If the trade may be openly followed at one part of the day, it is equally legal at any part of it. Courts of law are, it is thought, not vested with any such jurisdiction as they seem to lay claim to. It is not within their province to make the law conformable to the supposed usages and exigencies of society, but to determine what the law is, whether that may or may not quadrate with their notions of propriety. In the form of licence for alehouses the prohibition is made to extend only to hours of divine service. This has by some been erroneously considered as so far repealing the common law as to render it legal to keep these houses open at other times, and a practice has accordingly in many places most improperly been allowed to prevail conformable to that erroneous interpretation; but with the exception of that act there is no trace of any distinction to be found in the law of Scotland between different parts of the day.

It is said that the practice may be justified on the ground of expediency. If the practice were thought to be expedient, that would only justify an application for a change of the law, and not cause the law to be differently interpreted. It is said that the practice tends to cleanliness, and that if the opportunity of shaving upon the morning of Sunday were denied, it would go to encourage the poor man to abstain from attendance on religious worship altogether. It is a sufficient answer to say, that such has never been found to be the case in those numerous places where a contrary practice has prevailed.

The appellants cannot help thinking that the arguments derived from the expediency are entirely irrelevant,

and that the question falls to be determined by the interpretation of very clear and unambiguous statutes. One of the learned judges asks, "If I am paralytic is my hired servant not to assist me in this operation, because it is laid down that you are not to work on Sunday? Is an apothecary's apprentice not to serve his master on that day on the same ground?" The appellant is not called upon to shave paralytics; he is not even called upon to shave those only who are unable to perform the operation themselves; he is called upon to assist, not those whom it is necessary or right to assist, but any one who may please to require assistance, whether incapable of acting without that assistance or not. But with reference to the service of domestics, there is this very plain distinction to be taken, that in the one case there is a shop opened inviting the public promiscuously to resort to it, whereas in the other all that passes is *intra parietes* of a private house, with which the public has little concern.

One of the learned judges, whose opinion was unfavourable to the appellants, expressed his apprehension lest the judgment might be held to countenance laxity in Sabbath observance. These apprehensions are certainly well founded, for if the pretext be good in a case like this, it would equally justify the baker, the butcher, or the fishmonger for dealing openly on the Sunday. Whatever rule may have prevailed in other parts of the empire, no deviation has hitherto occurred in the northern part of the island from the strictest observance of the Sunday in respect of trading. It is believed that there is no example of any tradesman venturing to deal on Sunday in any part of Scotland; yet might it not be urged with much plausibility by those various tradesmen,

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that their customers could not provide themselves on Saturday, and might, if no opportunity were given to purchase, absolutely starve upon Sunday ?

In short, if pretexts of necessity, so lame and so little supported by the facts, are to justify the non-observance of the Sabbath, there seems to be hardly a limit to which it may not be carried.

The interlocutor of the magistrates, now adhered to, proceeds upon a general view of the legality of the practice. It humbly appears to the appellant that no legal judgment can possibly rest upon grounds more vague or less satisfactory. It assumes, as matter of public notoriety, that some of the labourers, mechanics, and seafaring men of Dundee resort to barbers shops upon the morning of Sunday. Upon that basis the interlocutor rests. Notoriety of a general and universal practice may possibly justify an interpretation of a statute which may sanction the practice ; but the notoriety of a practice limited to a particular locality, and not universal even within that locality, can give no sanction to any particular interpretation of a law which is applicable to the whole kingdom. It may intimate a persuasion on the part of the magistrates or other local authorities, that the practice is legal, or it may argue an indifference to the mode in which the Sunday is observed, or neglect of the law in that particular municipality, but it can go no farther. If the practice of some of the mechanics of Dundee were to legalize the custom adopted by them, we should find a considerable number of offences justified, which, for all that, were contrary both to the statute law and the moral law. Suppose that an objection were taken to inebriation on the Sunday, would it do to plead in justification that some of the mechanics of

Dundee were in the use of employing the Sunday in tavern dissipation? Assuredly not. Yet on precisely the same ground has the Court here decided the legality of Sunday shaving.

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It is quite plain that in pronouncing this judgment they confounded their characters of city magistrates and local judges. In their former character it might not have been improper for them to inquire whether the acts were so done as to cause public offence or annoyance. In their latter character, (being that in which the present case came before them,) their inquiry was restricted to the actual state of the law. If the act which the appellants were required to do was truly illegal, it was no matter how quietly or unostentatiously the illegal act was to be done. It would not justify a tradesman in selling his commodities on that day, that the whole was conducted without noise or ostentation,—that the purchaser did not speak above his breath,—or that the whole was so managed as not to come within the notice of their near neighbours. How then can the mode in which the act is done affect the quality of the act, in point of its legality? The act may be more reprehensible if accompanied by a breach of decorum; but that there is no such breach can never render legal an act which is plainly contrary to statute. From these two propositions, each of them separately unsound, the magistrates deduce a third, though by what form of logic they reach the consequence it is somewhat difficult to understand. They “ find, therefore, that in so far as  
“ the defender, the apprentice, is called upon to aid his  
“ master in shaving his customers on the mornings of  
“ Sunday before ten o’clock, it is not contrary to the  
“ spirit of the statutes regarding the Sabbath, nor con-

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“ trary to the recognized usages under them, that the apprentice should give such aid.” So, because some of the mechanics of Dundee chose to resort to the shops of barbers upon the morning of Sunday, and because the magistrates chose to hold that the balance of expediency is favourable to a continuance of the practice, the spirit of the law of Scotland must be held to sanction it. It is submitted that no specimen of more inconsecutive reasoning can be given. This interlocutor, by the remit to the magistrates, has become the interlocutor of the Court of Session. It is submitted that a judgment less surely rested on fact or law has never been brought under the review of your most honourable house.

No counsel appeared for the respondent, nor was any case printed by him.

LORD CHANCELLOR.—My Lords, there was a case argued at your Lordships bar some days since, of Phillips v. Innes, which raised a question, in one view of it, of considerable importance to the law of Scotland, and as to the rule of law in Scotland as applicable to the observance of the Sabbath.

My Lords, it appears that an apprentice at Dundee was bound to a person carrying on the business of a barber and hair-dresser. By the terms of apprenticeship he was to serve for a full term of four years after the 1st of July 1833, and during that service he was to serve the petitioner as a faithful and obedient apprentice, and not to absent himself from his master’s business, “ holiday or week-day, late hours or early, without leave first asked and obtained.”

My Lords, it appears that this party absented himself on a Sunday, and the case was brought before the

magistrates of Dundee, who pronounced an interlocutor, by which they found, “ That however desirable it may be that the resorting to shaving-shops on the morning of Sunday should be discontinued, if that could be effected without greater evil, yet it does not appear to be either necessary or expedient for a due observance of the Sabbath to forbid the existing usage so long as the shops continue, as at present, open early in the morning and closed before the time fixed for the commencement of divine service; for on no occasion have the authorities of the town seen any cause to regard the conduct of the barbers in their vocation, or the conduct of those resorting to their shops, on the mornings of the Sundays, as other than decent and orderly, or as apt to give reasonable cause of offence to any man; and it appears very obvious, that if working men, who are not themselves accustomed to shave, were forbidden the aid of the barbers in their shops on the Sunday mornings, many decently disposed men would be prevented from frequenting places of worship, and from associating in a becoming manner with their families and friends, through want of personal cleanness, and the attempt to reduce the minor evil might lead to some more serious: Finds, therefore, that in so far as the defender, the apprentice, is called upon to aid his master in shaving his customers on the morning of Sunday before ten o’clock, it is not contrary to the spirit of the statutes regarding the Sabbath, nor contrary to the recognised usages under them, that the apprentice should give such aid; but finds that the apprentice is not bound, nor is it lawful for him, to work in the making of wigs,

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“ or in similar employment not immediately necessary  
 “ for the day; and, with this explanation, ordains the  
 “ defender, the apprentice, to aid his master on the  
 “ mornings of Sunday, when his master has occasion for  
 “ his services, in shaving his customers, the work not  
 “ continuing after ten o'clock in the morning.”

My Lords, this case having been brought before the Court of Session, the Lord Ordinary, Lord Jeffrey, was of opinion, that that which the magistrates of Dundee had considered as not infringing upon the spirit of the statutes for the observance of the Sabbath was not well founded, and his Lordship was of opinion, that that work so directed by the magistrates to be performed by the apprentice was contrary to the statutes. The case was afterwards brought before the Second Division of the Court of Session, which, by a majority of three, against the opinion of Lord Chief Justice Clerk, decided that it was not contrary to the statutes, and that the magistrates of Dundee therefore were justified in the opinion which they had delivered. Under these circumstances it comes before your Lordships, with the authority of Lord Jeffrey and Lord Chief Justice Clerk on one side, and that of the other three judges of that Court on the other, and it is for your Lordships to come to a conclusion upon which side the proper judgment rests.

Now, my Lords, of the acts which regulate the observance of the Sabbath there are several, and the two which relate more immediately to the present subject, and which are the most explicit upon the present subject, are, first, an act of 1579, by which it is provided,  
 “ For sa meikle as it is statute and ordained by a good  
 “ and godly act, made in the days of King James the

“ Fourth, our sovereign lord’s grandfather, of worthy  
 “ memory, that there be no markets nor fairs halden  
 “ upon halydays, nor yet within kirk or kirkyards  
 “ upon halydays or other days, under the pain of es-  
 “ cheating of the guidis; quhilk act our sovereign  
 “ lord, and his thrie estatis, ratifeis and appreuis,  
 “ ordainis the same to have effect and execution in time  
 “ coming. And seeing that the Sabbath dayis are now  
 “ commonlie violat and broken, als weill within burgh  
 “ as to landwart, to the great dishonour of God, be  
 “ halding and keeping of the saidis markets and fairis on  
 “ Sondagis, using of handy laubor and working thereon,  
 “ as on the remanent dayis of the oulk, be gaming and  
 “ playing, passing to tavernis, to ail houses, and wilfull  
 “ remaining fra the paroche kirk in tyme of sermone or  
 “ prayers on the Sondag; thairfoir his Maiestie, and his  
 “ thrie estatis, in this present parliament, statutis and  
 “ ordainis that thair be na markets nor fairs haldin  
 “ upon the Sondag, nor yet within kirkis or kirk yairdis  
 “ that day or ony uther day, undir the pane of escheat-  
 “ ing of the guidis to the use of the puyr within the  
 “ parschyne. And siclike that na handy lauboring or  
 “ wirking be used on the Sondag.” That, your Lord-  
 ships observe, would prohibit all handy labouring or  
 work to be used on the Sabbath.

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The next statute is in 1690, by which it is provided,  
 “ This Sabbath is then kept holy unto the Lord, when  
 “ men, after a due preparing of their hearts and order-  
 “ ing of their common affairs beforehand, do not only  
 “ observe a holy rest all the day from their own works,  
 “ words, and thoughts about their worldly employments  
 “ and recreations, but also are taken up the whole time

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“ in the public and private exercise of His worship,  
“ and in the duties of necessity and mercy.”

Now, my Lords, these words “duties of necessity and  
“ mercy,” though they are found only in the statute of  
1690, and are not to be found in the statute of 1579,  
have been considered as qualifying the statute of 1579,  
so that in certain excepted cases, described as “duties of  
“ necessity and mercy,” certain acts, which would other-  
wise fall within the strong prohibition of the act of  
1579, have been considered as falling within the rule  
upon this subject.

My Lords, the English act of Parliament upon this  
subject, 29th of Charles 2d, chapter 7, has very similar  
words to those which are to be found in this act. The  
words are, “that no tradesman, artificer, workman,  
“ labourer, or other person whatsoever shall do or  
“ exercise any worldly labour, business, or work, of  
“ their ordinary callings, upon the Lord’s Day, or any  
“ part thereof, works of necessity and charity only  
“ excepted.”

Now, my Lords, it is not in dispute that the works  
which by the articles of apprenticeship the apprentice is  
bound to do are within the prohibitions of the act of  
1579, because it has been considered that as a general  
contract to work on Sundays it would not be in force.  
It is therefore to be considered, not whether the con-  
tract for working on the Sundays be or be not within  
the terms of the act, but whether the exceptions made  
by the interlocutor be or not within the exceptions in  
the act, or whether that act which the apprentice was  
called upon to do can be considered as an act of  
“ necessity and mercy,” otherwise there would be no

ground upon which the duty of the apprentice would be limited to serving his master in a particular mode, or as to a certain and particular period of the Sunday only.

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My Lords, the question therefore for your Lordships to consider is, whether there be ground, and whether there be an authority according to the law of Scotland, for saying that the barber's shop is to be kept open, and his usual occupation, so far as shaving his customers is concerned, is to be carried on before ten o'clock on the Sunday morning.

My Lords, an immediate authority upon the subject has not been produced at your Lordships bar, with one exception, which is the case of *Learmouth v. Blackie*, on the 13th of February 1828. The point did not then immediately arise for judgment, but an opinion was very distinctly expressed by the Lord Chief Justice Clerk, who in fact puts this identical case. The case was the case of an apprentice who had bound himself by articles precisely similar to the articles in the present case; he had absented himself; and by that contract for every day he had absented himself he was to give two days service to his master. The Lord Chief Justice Clerk expressed himself in these words, "The boy's being absent on a Sunday was no breach of the indenture, and the master cannot make him work on that day." That same learned judge (who is one of the judges before whom this case came), after referring to the opinion that he had before given, states that he adheres to the opinion then expressed.

Now, my Lords, there appears to have been some attempt in the papers to raise a question as to the meaning of the expression "on holidays or week-days." If the

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word “holidays,” as contradistinguished from week-days, did not mean Sundays, but if it meant other days directed to be kept as holidays in Scotland, then the contract would be to work upon such holidays as well as upon other days, and in such a case the master could have no claim, for the contract could not have bound the apprentice to serve on the Sunday, because a general contract to serve cannot be considered as binding a party to serve on that day, the service on which by the law would be illegal; but if the word “holiday” put in contradistinction with “week-days” be taken to refer to Sundays, the contract would be to work on Sundays, and the objection to that would be, that by the law of Scotland work on Sundays was prohibited, and that this work did not come within the description of a work of necessity or mercy.

My Lords, if the act in question be an exception to the law of Scotland as to the observance of the Sabbath, it is impossible to say where it will stop. Is it necessity? It cannot be; and mercy it cannot be: then it is convenience; and if your Lordships were acting upon this case as a precedent to lay down a rule in other cases founded upon no more than convenience, I apprehend that your Lordships would be laying down a rule by which the law of Scotland which prohibits parties from carrying on their ordinary labour on the Sundays would be done away with. I find no authority for that exception, and after considering the reasons given by the Lord Chief Justice Clerk and the Lord Ordinary, I coincide in the opinions of those two learned judges, and I cannot find sufficient ground to support the decision of the other three.

I submit to your Lordships, therefore, that the interlocutor as it now stands cannot be supported, and that the apprentice was justified in absenting himself on the Sunday, and that the master cannot call upon him to work on that day.

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LORD WYNFORD.—My Lords, I entirely agree with my noble and learned friend in the opinion he has just pronounced. We are not called upon in this case to decide what would be a convenient practice; no doubt it would be a convenient practice that the barbers shops should be open on the Sunday, as the lower class cannot shave themselves, and without being shaved they would not be fit to go to a place of worship; but we are called upon to say what is the law; and upon looking at the statutes which have been referred to by my noble and learned friend, I cannot doubt for a moment that those statutes embrace every mode of working in Scotland (for there may be some difference in England), except it be a work of “necessity or mercy.” It cannot be said that it is absolutely necessary that people should be shaved on a Sunday in a public shop. It cannot be said that it is an act of mercy; there may be cases of shaving in which it would be an act of mercy to do it. A special case might arise,—such as a case of lunacy, or of a person in a fever,—in which it would be an act of mercy or of necessity, and would excuse the person from the penalties of the act of parliament who should perform this act. It is handicraft beyond all doubt, and that brings it within the words of the statute; and unless it is saved from the operation of the act by the words of exception the provisions of the section attach upon it. My Lords, this is the construction put upon these statutes by a

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very learned law writer, who states that this is the construction of these acts of parliament. I submit therefore to your Lordships that the interlocutor of the Court below ought to be reversed.

LORD BROUGHAM.—My Lords, I entirely agree with my two noble and learned friends who have addressed your Lordships, that this interlocutor must be reversed; and had this been an ordinary case I would not have troubled your Lordships with any observations; but this case stands under peculiar circumstances. We have heard the argument of the counsel for the appellants, and we are upon that argument called upon to reverse the interlocutor of the Court below, without having heard what may be said in support of it; and this may justify me in stating at greater length than I should otherwise do the grounds upon which I agree with my noble and learned friends in thinking that the decision of the Court below is wrong.

My Lords, it is perfectly clear that we are here upon the dry question of the construction of an act of parliament; and it must be great satisfaction to your Lordships to think that in reversing the decision come to by the Court below (though by a narrow majority, yet by a majority, of the learned judges below) without hearing what could be urged in support of that judgment, that you are not called upon to decide against the Court below upon a question involving principles of practice peculiar to the law of Scotland, but that this case depends simply upon the construction of a statute, which might have arisen upon an English bond, and which might have come before your Lordships as a writ of error. The same principles of construction are to be applied to this case which you would then have been

called upon to apply to that case ; and the only difference between them is, that in the latter case you would have the authority of former English cases to guide you, whereas here you have to resort to the authority of former Scotch decisions.

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Now, my Lords, it is perfectly clear that the statute prohibiting handy labouring and working prohibits the handy labouring and working here in question ; and it is not denied even by the learned judges who have come to the decision in the Court below, that but for the argument which brings or which seems to bring the working in question within the exception of works of necessity or mercy, that this working would have been within the statutory prohibitions, and that consequently the interlocutor of the magistrates of Dundee was ill founded which compelled the apprentice to do that which the statute has forbidden him to do. The question then before the Court below appears to have been, whether the working in question could come within that exception or not. Now, it appears to me absurd to contend that this was in any strictness of construction or in any reasonable construction a work of necessity or mercy. “ Mercy ” is the word used in the Scotch statute ; “ charity ” in our statute of the 29th of Charles the Second ; and as my noble and learned friend has observed, there is no constriction in the Scotch acts to ordinary calling, upon which the questions in our courts have generally arisen, but handicraft and labour in general is prohibited, without regard to its being in the ordinary calling of a party or not. I incline to think that the sort of necessity which alone is contemplated in this exception must be the necessity originating in

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the party himself called upon to work, and that no necessity of another party to whom he may lend himself to assist him comes under the ordinary description of charity or mercy. But it is immaterial to consider that, for in such a case, whatever construction we give to the word "necessity," it is clearly an abuse of terms to say that the kind of working here in question amounts to necessity.

It is said, (and that is one of the observations of some of the judges of the Court below, or one of the arguments urged by the parties below,) that unless the labouring classes, who can have themselves shaved only once a week, are allowed to resort to the barber's shop on Sunday morning, they will not be in a condition to attend divine service, or to associate with their families on the Sabbath-day. The answer to that (and which I think is given in the proceedings below) is, that there is no necessity for that shaving being performed on the Sunday morning, that it can be very well performed on the Saturday evening; and in many towns in Scotland, for instance in Glasgow, that is known to be the practice, and the magistrates have prohibited the barbers shops from being kept open on the Sunday.

The case of accident does not apply, for the answer of my noble and learned friend who last addressed your Lordships is decisive, and meets that without any possibility of reply,—that no person who on the Sabbath shaves an individual who had a contusion on the brain, or who had been seized with madness,—that no person so called upon to lend his assistance would lie under prohibition of the statute, and he could not be said under the statute to have done an unlawful act. But

is that at all similar to the case of a person keeping a shop open for every person who may come to the shop, whether in a case which would admit of delay till after the Sunday or not; whether in a case that would admit of the operation being performed on the Saturday evening or not? It is clearly not the same case at all. This is opening a shop for all purposes, whether for necessity, or for motives of convenience, or only for mere caprice, choosing to violate the rest of the Sabbath, and to infringe the provisions of the statute.

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Then another consideration totally differs this from the case of necessity contemplated in one of those statutes. One very material difference is this;—gain is the object of the master; he keeps his shop open for hire; and I have never seen yet a decision (though I know the practice is to gain by those operations which are performed on the Sunday in certain kinds of shops),—but I have yet to know that this comes within the description of an act of necessity and mercy, where the shop is kept open for the gain of the party opening it. When such a case arises for decision it may be time enough to deal with it: there certainly has been no decision yet.

My Lords, something has been said before the magistrates of Dundee, and I think was also said in the Court of Session, with respect to holidays; but I take it to be quite clear that the word “holidays” which is used in the indenture does not mean Sundays, but that it means fast days and saints days; not Sundays, because, if it means Sundays, then the apprentice bound himself to work equally on Sundays and on week-days, making no distinction as to his working on the two

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kinds of days. Now it is admitted on all hands that he had not bound himself to do that, and the decision of the magistrates of Dundee did not assume that the master was entitled to call upon him to do that, for they only say that the apprentice is to work for his master in the morning of Sunday till ten o'clock,—rather making an act of parliament than construing the act of parliament,—and that he is not bound to work at wig-working, which is one part and the principal part of his master's business.

My Lords, to say one word more with respect to necessity, I think that it puts out of Court at once the argument upon which the decision of the Court below was founded. They say that personal convenience, and the power of attending divine service, and the comfortable associating with the families of the working classes, is obtained by allowing a shop of this sort to be kept open for those who have no other means of having this operation performed. My Lords, it is not a grade more necessary for a person to appear shaved on the Sunday than it is for a person to be decently clothed, or to be fed with convenient food; yet can it be contended that a tailor keeping his shop open on a Sunday morning would be within the statute, or a butcher or even a baker keeping his shop open would be within the statute? Assuredly not. The answer would be,—Let the party who wishes to be decently clothed, and ought to be so, provide himself with clothing on the Saturday before the Sunday; or, let the party who wishes to provide himself with a supply of food for the Sunday lay in his provision on the day before, and let him resort to the market or the shop for that purpose. But the same

answer would apply to the argument, that it is a matter of necessity that a person should get himself shaved on the Sunday; let him resort to the barber's shop on the Saturday evening, and let the barber for that purpose on the Saturday evening keep his shop open.

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My Lords, I consider that this decision is one in many respects of very considerable importance, and I am sure that it will be one of very considerable interest in that part of the United Kingdom; and I am perfectly clear that it would have been a most unfortunate circumstance had your Lordships felt that you were bound to give your support to the judgment of the Court below, which appears for the first time to have decided, that that which has been prohibited by the statute, namely handy labour and working on the Sunday, can be enforced by the decision of a court of justice under indenture of apprenticeship.

My Lords, I am clearly of opinion that the judgment of the Court below is erroneous, and ought to be reversed; and the course that your Lordships will, I suppose, take, will be to remit the case back to the magistrates of Dundee to alter the interlocutor, in fact, to restore the judgment of the Lord Ordinary.

The House of Lords ordered and adjudged, That the several interlocutors complained of in the said appeal be, and the same are hereby reversed: And it is further ordered, That the said cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

JOHNSTON and FARQUHAR, Solicitors.