absolution from the instance, or he can give judgment for the defendant. Without deciding which particular order would have been the correct one in this case, the magistrate would have acted more judiciously if he had followed the wording of rule 20, and dismissed the claim. But he gave final judgment, and it is argued that it was a definitive judgment against the claimant, which prevented him from instituting a fresh action to claim his property. Assuming that the magistrate was wrong in giving final judgment, the applicant's redress was by way of appeal. If the magistrate was wrong in giving the judgment he did, he erred in the form of the order which he gave. He had to give some form of judgment against the plaintiff, and it may be that in giving final judgment he gave too wide an order against the plaintiff. But that could have been remedied on appeal. The applicant could have noted an appeal within eight days, as prescribed by the rules of the magistrate's court, and if the magistrate had given a wrong order this Court could have corrected it in due course. The applicant did not choose to exercise that remedy, but now, six or seven months afterwards, he asks us to regard the action of the magistrate, in entering final judgment instead of giving absolution, as a gross irregularity which entitles him to ask for review. The applicant had his remedy by way of appeal. He has failed to avail himself of that remedy, and after this lapse of time I do not think the court should assist him.

Applicant's Attorney: *A. Kantor;* Respondent's Attorneys: *Weavind & Weavind.*

[G. v. P.]

REX v. SWARTZ.

1914. *November* 9 and 30. De Villiers, J.P., Wessels and Gregorowski, JJ.

Evidence.—Provincial Council Ordinances.—Judicial cognisance of Shop hours.—Kaffir eating-house.—Power of Provincial Council to regulate.—Act 10 *of* 1913, *second schedule, sec.* 8.—*Ord.* 11 *of* 1914, *sec.* 4 (2).

The Courts will take judicial cognisance of Provincial Council Ordinances without proof thereof.

A Kaffir eating house is a shop within the meaning of sec. 8 of the Second Schedule to Act 10 of 1913.

Where a Provincial Council was given power to regulate the opening and closing of shops, *Held*, that it had power to prohibit the exercise of portion of a Kaffir eating house keeper's trade on Sundays.

Appeal against a judgment by the magistrate at Boksburg.

The accused was found guilty of contravening sec. 4 (2) of Transvaal Ordinance 11 of 1914 in selling meat on a Sunday for consumption off the premises of his Kaffir eating house. He was sentenced to pay a fine of £1 or ten days I.H.L. He appealed against this conviction.

F. E. T. Krause, K.C. (with him *Pyemont*), for the accused: Provincial Council Ordinances should be proved in the same way as municipal regulations. In this case there was no proof of promulgation, see *Cajee* v. *Verulam Local Board* (26 S.A.L.J. 170); *R.* v. *Watson* (8 E.D.C. 23); *Brown & Bezuidenhout* v. *R.* (1909, T.S. 1014).

A kaffir eating house is not a shop and the court will bear in mind the rights accused had at the time of Union, *Pretorius* v. *Barkly East Divisional Council* (1914, A.D. 407), Act 32 of 1908 contained no definition of kaffir eating house. The enabling Act (10 of 1913), second schedule, merely enables the Provincial Council to regulate the hours of opening and closing of shops. *Lax* v. *R.* (1911, T.P.D. 20), shows what the old law was.

Moreover the present law does not regulate the hours of opening and closing. It regulates the trade by prohibiting the sale of certain articles at certain times and allowing the sale of others. This curtails the right to trade and the ordinance is therefore *ultra vires:* see *R.* v. *Williams* (1914, A.D. 460).

C. W. de Villiers, A.-G., for the Crown was not called upon to argue the question of proof of promulgation.

A kafir eating house is a shop, *i.e.*, a place where goods are sold by retail. A restaurant is a shop. For a definition of kafir eating house see *Chon Ki* v. *Pretoria Municipality* (1912, A.D. 712). As to "shop" see *Grant* v. *Langston* (69, L.J.P.C. 73); Stroud's *Judicial Dictionary* (Supplement) *sub voce* "shop."

The prohibition of the sale of certain commodities during certain hours amounts to a regulation of the hours of opening and closing of the shop. If it can be closed altogether, it can be allowed to remain open for the purpose of selling certain articles.

Pyemont, replied.

Cur. adv. vult.

Postea (November 30).

GREGOROWSKI, J. delivered the following judgment of the Court: The appellant, a kaffir eating house proprietor, was

charged with contravention of sec. 4 (2) of Transvaal Ordinance No. 11 of 1914, in that on the 11th October last he sold on a Sunday out of the eating house, on stand 38 Driefontein in the Municipality of Boksburg, to one Tshevekin for the sum of 6d. a quantity of meat for consumption off the premises. He was found guilty and sentenced to a fine of £1 or ten days' imprisonment with hard labour.

The sub-section prohibits the occupier of a kaffir eating house from selling or supplying "at any time on Sunday any article of food or drink for consumption off the premises except sweets." There is a definition of kaffir eating house in section 1 (2) as meaning a shop "wherein is carried on the sale of food or drink exclusively to native and coloured persons for consumption on the premises." Section 2 (1) of the Ordinance fixes the customary hours of shops generally, but in regard to special businesses provision is made in Schedule 1 for the hours during which they may keep open. In the case of kaffir eating houses the provision in the Schedule is that they may keep open every day including Sundays till 8 p.m.

According to the definition given in sec. 2 of a kaffir eating house, one would not expect a provision such as we find in sec. 4 (2), as presumably from this definition it would always be an offence for the occupier of an eating house to sell for consumption off the premises, and the offence would consist in the occupier selling foodstuffs to be consumed off the premises when he was only licensed to sell for consumption on the premises. It seems admitted, however, that this definition is not enforced, and kaffir eating house keepers habitually sell foodstuffs for consumption off the premises and are not prosecuted for so doing. Previous to Ordinance 11 of 1914 it was decided in *Lax* v. *R.* (1911, T.P.D., p. 20), that the licensee of a kaffir eating house was entitled to sell foodstuffs for consumption off the premises. The prosecution was under Act 32 of 1908, but this Act only deals with the hours of opening and closing of the business; as to the licensing reference has to be made to Ordinance 23 of 1905 as amended by Act 15 of 1909.

It appears from Ordinance 23 of 1905, as amended by Act 15 of 1909, that there are two kinds of kaffir eating houses; namely those carrying on business outside of municipalities, and taking out their licences from the revenue officer of the district, their business being regulated under the ordinary law; and those carrying on business within the municipality, and whose licences are

issued and whose trade is regulated by the bye-laws of the municipality. These enactments are still in force and recognise the right of municipalities to licence and regulate kaffir eating houses within the municipal areas.

The municipalities derived their power to license and regulate kaffir eating houses from Ordinance 58 of 1903, sec. 42 sub-section (21), and in the case of Johannesburg from Ordinance II (private) of 1906, sec. 41 sub-section (32). *Chon Ki* v. *Pretoria Municipality* (1912, A.D., p. 712), dealt with a kaffir eating house regulated by the bye-laws of the Pretoria Municipality, made under sec. 42 (21) of Ord. 58, 1903. These provisions are now repealed, and sec. 72, sub-sec. (19), of the Local Government Ordinance (No. 9 of 1912), has taken their place, and empowers municipalities to make bye-laws licensing and regulating kaffir eating houses within their area. There is no definition given in these enactments of the business of the occupiers of kaffir eating houses, but there has been the definition given in the recent Transvaal Ordinance, No. 11 of 1914 to which I have already referred. This Ordinance deals with the hours of opening and closing of shops and is of general application, and would apply to kaffir eating houses whether without or within a municipality.

Under the Municipal Amending Ordinance, No. 26 of 1906, sec. 4 (1) the Lieutenant-Governor received power to prescribe the hours during which the sales of merchandise by retail may be conducted and the hours during which persons may be employed in any such sale within the municipality, but this power was never exercised, and the section was repealed by the Shop Hours' Act of 1908 (No. 32) which dealt with this subject.

The Transvaal Parliament passed various acts dealing with shop hours and amending Act 32 of 1908. After Union the Provincial Council took up the subject, repealed Act 32 of 1908 and the amending Acts, and regulated the subject by Ordinance No. 9 of 1913. It was decided that the Provincial legislature had no power to deal with the subject and this Ordinance was declared *ultra vires*, *Rex* v. *Sher* (1914, T.P.D. 270). Under the Financial Relations Act of 1913 passed by the Union Parliament—sec. 12 (1) and (2)—it was provided that Provincial Councils could be entrusted with the right of legislating on certain subjects enumerated in the second Schedule of the Act, provided the Governor-General, with the concurrence of the Executive Committee of the Province, so determined, and a proclamation was

issued to this effect and published in the Gazette. This was done and the subject of shop hours was brought within the competency of the Provincial Council, and Ordinance, No. 11 of 1914 was passed, which re-enacted without any alteration Ordinance No. 9 of 1913.

Ordinance No. 11 of 1914 would apply to all kaffir eating houses within the Province, whether licensed and regulated by the ordinary law or under municipal bye-laws.

The first point raised by Dr. *Krause* on behalf of the appellant is that there is no proof that the subject of shop hours has in terms of section 12 (1) and (2) been entrusted to the Provincial Council. The argument is that the Provincial Council is a subordinate legislature and to be regarded in the same way as a municipality, and therefore the principles of evidence applicable in the case of municipal bye-laws must be complied with also in the case of Provincial Council Ordinances, where the power to legislate is not derived direct from the South Africa Act, but is supplied by the machinery given by the Financial Relations Act—Section 12 (1) and (2), and that the Proclamation issued in terms of sec. 12 (2) of Act 10 of 1913 ought to have been handed in in the lower court. Counsel relied upon sec. 53 of Proclamation 16 of 1902 and on the decisions in *Watson* v. *R.* (8 E.D.C., p. 23); *Cajee* v. *Verulam Local Board* (26 S.A.L.J., p. 170), and *Brown and Bezuidenhout* v. *R.* (1909, T.S., p. 1014).

But it does not appear that these authorities support the contention; on the contrary, *Brown and Bezuidenhout* v. *R.*, following *Watson* v. *R.*, lays down that judges and magistrates must take judicial cognisance of the statutes of the land and of the Proclamations promulgating them. The Provincial Council, though a subordinate legislature for the Province, cannot be fitly compared to a municipality, which is an administrative body charged with purely local concerns and issuing bye-laws of a very restricted application. It is quite reasonable that formal proof should be given of municipal bye-laws, but it is quite a different matter that courts should require proof to be formally put in on each occasion that the various steps required to give the Provincial Council the right to legislate on the topics referred to in the second Schedule of Act No. 13 of 1913 have been complied with. Courts are bound to inform themselves of the laws applicable to the whole Province passed by the legislature of the Province. If the parties wish to complain of any informality or illegality in the Ordinances passed

by the Provincial legislature, they are amply protected by the right which they have of raising any objections which there may be to the capacity of the Provincial Council to deal with the matter. This ground of appeal must therefore be dismissed.

The second ground of appeal raised was that sec. 4 (2) of Ordinance 11 of 1914 was *ultra vires*, as a kaffir eating house is not a shop, and therefore does not fall under the second Schedule (No. 8) of Act 10 of 1913. It seems obvious that this objection is not well founded. In the various statutes passed by the Transvaal legislature prior to Union regulating shop hours, kaffir eating houses were included within the scope of the Acts, and second Schedule No. 8 of Act 10, 1913, was intended to have an equally wide range. In *Lax* v. *R.* (1911, T.P.D., p. 20), the appellants who were occupiers of kaffir eating houses were charged under sec. 12 of Act 32 of 1908 as coming under the designation of "shop-keepers," and it was not questioned that they were rightly embraced under this designation. The term "shop" is a very wide one and would include a place where foodstuffs are sold and supplied for consumption—whether on or off the premises.

The third ground of appeal was that Provincial Councils were only empowered to regulate the hours of opening and closing of shops, but that sec. 4 (2) of Ordinance 11 of 1914 goes further than this, as it restricts the trade by prohibiting a portion of the appellant's legitimate business. It was contended that the Provincial Council could have enacted that kaffir eating houses should be closed on Sunday, but it could not enact that they were only to be open for a limited trade, and *R.* v. *Williams* (1914, A.D.—not yet reported)—was quoted, in which it was held that a power to regulate bookmaking did not justify abolishing bookmakers. But it does not seem to me that there can be any objection to a provision such as the legislature in this case enacted. Sunday trading is only presumed to be permissible in so far as necessity requires, and the appellant need not have opened his business at all on Sundays, and it seems absurd for the appellant to complain that the restrictions imposed upon him were less than they might have been, as it would have been legitimate for the Council to have suppressed his Sunday trading altogether. Exactly the same course was adopted by the Transvaal legislature before Union in dealing with chemists and mixed businesses, and limitations of this kind cannot be put on the same basis as with the overruled decision of the Cape Provincial Division in *R.* v. *Williams*. I think this ground of appeal must also be overruled.

A further ground of appeal was based on the contradiction in terms between the definition of kaffir eating house in sec. 2 of Ordinance 11 of 1914 and the prohibition in sec. 4 (2), but it is hard to see how this can avail the appellant. The definition would go to show that at no time can the appellant sell for consumption off the premises. The prohibition imposes a penalty for selling for consumption off the premises on a Sunday.

Attorneys for accused: *Wagner & Klagsbrun.*

[A. D.]

REX v. MILMAN.

1914. *November* 16 and 30. DE VILLIERS, J.P., CURLEWIS and GREGOROWSKI, JJ.

Criminal law.—Procedure.—Review.—Private prosecution.—Power of Attorney-General.—Sec. 43, *Proclamation* 21 *of* 1902.

Municipality.—Assize.—Power to control.—Approval of bye-laws by Administrator.—Penalty.—Ordinance 9 *of* 1912, *secs.* 99 *and* 106.

In criminal cases where the Crown is not the prosecutor the Attorney-General may bring the matter into review under sec. 43 of Proclamation 21 of 1902.

Assize matters fall within the powers of municipal institutions in South Africa, and Provincial Councils have the power to legislate with regard thereto. The Administrator is the proper officer to approve of assize bye-laws under sec. 99 of Ord 9 of 1912 and the penalties prescribed by sec. 106 can be imposed.

Argument on review at the instance of the Attorney-General under sec. 43 of Proclamation 21 of 1902.

The accused was charged at the instance of the Johannesburg Municipality with contravening certain assize bye-laws. The said bye-laws were found by the magistrate to be *ultra vires*, Ordinance 9 of 1912, and the Administrator was held to have no power to approve of bye-laws dealing with assize matters.

This decision was now brought into review. The facts appear fully from the judgment.

C. W. de Villiers, A.-G., for the Crown. [CURLEWIS, J.: Does sec. 43 of Proclamation 21 of 1902 apply to private prosecu-