

the petitioner find caution for any consequent damage to the respondent." The interdict granted was conditional, not absolute; if and when the defender found caution, the interdict would attach, but unless and until caution was found, and if it never was found, there was no interdict. As caution was not found, there was no interdict. The pursuer was entitled to plough until caution was found, and if he stopped ploughing when caution had not been found, this was a purely voluntary act on his part which could not entitle him to damages. I therefore think that the judgment of the Sheriff should be affirmed.

LORD ADAM—I have always understood, in the course of a somewhat long experience, that when interdict is granted on caution, it is a condition of the interdict being effective that caution should first be found, and if it is not found within a reasonable time the case is dismissed. I have no doubt that the rule is the same in the Sheriff Courts. In this case, accordingly, I am of opinion that there never was an interdict to prevent the pursuer ploughing. There could not possibly have been a complaint for breach of interdict if he had gone on ploughing. I therefore agree with your Lordship.

LORD KINNEAR — I am quite of the same opinion. The only question seems to be, whether an interlocutor by which a sheriff grants interdict "on condition" that caution shall be found, means that the sheriff grants interdict whether caution is found or not. I am very clearly of opinion that the interlocutor means exactly what it says; and that its legal effect is entirely in accordance with the plain meaning of the words. The defender, therefore, not having satisfied the condition on which the Sheriff was prepared to grant interdict, did not in fact obtain an interdict at all.

LORD M'LAREN was absent

The Court refused the appeal.

Counsel for the Pursuer—Watt. Agent
—A. C. D. Vert, S.S.C.

Counsel for the Defender—Lees. Agents
—W. & F. C. MacIvor, S.S.C.

Thursday, January 18.

FIRST DIVISION.

[Lord, Low Ordinary.

CALLENDER'S CABLE AND CONSTRUCTION COMPANY, LIMITED v. CORPORATION OF GLASGOW.

Process—Declarator—Competency—Declarator that Article Satisfies Requirements of Bye-law.

The Glasgow Police Commissioners made a bye-law to the effect that the walls of every building should have a damp-course, and that such damp-

course should be "of durable material, impervious to moisture." The manufacturers of a damp-course known as Callender's Pure Bitumen Damp Course, brought an action against the Corporation of Glasgow (in whom the powers of the Glasgow Police Commissioners are now vested), and their Master of Works, concluding for declarator that their damp-course was "in conformity with and satisfied the provisions of" the bye-law. They averred that the Master of Works had led certain specified builders to understand that the said damp course was not in conformity with the bye-laws and that its use would not meet with his approval, with the result that Glasgow builders declined to use it. Held that the action was incompetent.

By the Glasgow Building Regulation Act 1892, section 72, it is provided that the Commissioners—that is, the Glasgow Police Commissioners, now, by section 4 of the Glasgow Corporation and Police Act 1895, the Corporation of the City of Glasgow—may from time to time make bye-laws with respect to, *inter alia*, the following matters: . . . "Third, the materials to be used in the construction of buildings, the protection of columns, beams, and other supports of buildings, projections over streets and courts, recesses in walls, openings in party and cross walls, and the erection and removal of hoardings and platforms.

Among the bye-laws which were on the 21st of November 1892 made by the said Commissioners under and by virtue of the above-mentioned section of the said Glasgow Building Regulations Act, and which were on the 18th of April 1893 confirmed by the Secretary of State for Scotland, the 21st provides as follows, viz. — "Every wall, dwarf wall, and partition wall of a building, if built of stone, brick, or concrete, and resting on the ground, shall have a damp course throughout its entire thickness, and such damp-course shall be of durable material impervious to moisture. The damp-course shall be beneath the level of the underside of the joists of the lowest floor, and not under the level of the surface of the ground, and such damp-course may be of sheet lead weighing four pounds to the square foot, or rock asphalt, or Caithness flags square cut and laid in cement. The damp-course in dwarf walls may be of large squared slates laid in cement. Where necessary, the damp course shall be stepped to suit different levels in the lowest floor."

The Callender's Cable and Construction Company, Limited, proprietors of a damp-course known as Callender's Pure Bitumen Damp Course, brought an action of declarator against the Corporation of Glasgow and John Whyte, master of works there, to have it declared that a damp-course, known as Callender's Pure Bitumen Damp Course, of which the pursuers are the manufacturers, is a damp-course which is in conformity with, and which satisfies the provisions of bye-law 21, made on the 21st day of November 1892, under and in virtue of

the 72nd section of the Glasgow Building Regulations Act 1892, by the Glasgow Police Commissioners, whose powers and liabilities are now vested in and transferred to the defenders, the Corporation of the City of Glasgow, and confirmed by our Secretary of State for Scotland on the 18th day of April 1893.

The pursuers made the following averments:—“(Cond. 3) The damp-course manufactured by the pursuers, which is of uniform character and quality, is of durable material, impervious to moisture, and is in conformity with and satisfies the provisions of the bye-law set forth in the preceding article. It consists of pure bitumen, the jute which serves as a wrapping being merely employed for convenience in laying the course, and the efficiency of the damp-course is not affected in the slightest, even if the jute wrapping in course of time should disappear. It is in extensive use throughout the United Kingdom in the construction not only of ordinary houses and tenements, but also of public buildings and railway bridges, and in all cases it has proved itself as possessing in an eminent degree the above-mentioned qualities of durability and imperviousness. Notwithstanding, however, the defenders, the said Corporation, through the other defender the said John Whyte, have repeatedly intimated to builders erecting buildings in Glasgow, or at least have given them to understand, that the said damp-course is not in conformity with said bye-law, and that the use by them of the said damp course will not meet with approval. Among others of such builders are the following: T. & W. Anderson, 64 Douglas Street; Wm. Anderson, 49 Bellfield Street; Wm. Waddell, 94 Ledard Road; J. & A. Mitchell, 27 Whitevale Street; Alex. W. Dougall, 45 Bellfield Street. Hence builders in Glasgow, who would otherwise use it, are prevented from using it. Knowing the views which the defender Mr Whyte has expressed as to the pursuer's damp-course, builders who would otherwise be prepared to adopt it do not even propose its use for buildings which they erect in Glasgow, they having no sufficient interest to promote its adoption, and being desirous of avoiding any conflict with Mr Whyte. Moreover, builders have not appealed, and will not appeal, to the Dean of Guild against Mr Whyte's decision, for the reasons above mentioned and also because such an appeal would involve such a delay in proceeding with their building of possibly several months, which no builders would expose themselves to even if they had to adopt a more expensive and less satisfactory damp-course than that of the pursuers in order to avoid it. The large and important market of Glasgow is thus practically closed to the pursuers for their damp-course entirely because of Mr Whyte's actings. The defender Mr Whyte has admitted to the pursuers, in writing, that their damp-course is impervious to moisture. The opinion with regard to its durability, on which he has acted, has been formed without due consideration and proper investigation.”

In their answer the Corporation of Glasgow averred, *inter alia*:—“The Master of Works, as a statutory officer, is to be called as a party to applications for lining, and to have large powers of inspection, &c., of the material, &c., used in buildings, and the duty of seeing to the enforcement of compliance with the Acts and bye-laws is also laid upon him. All disputed questions or requisitions by him are under the Acts, &c., settled by the Dean of Guild in his judicial capacity. These defenders have no right to and do not interfere with or control the procedure so taken. With regard to the damp-course mentioned in the condescendence, these defenders have never taken any action in regard thereto, and they have no knowledge or duty with respect to the same.”

Mr White averred—“With regard to the damp-course mentioned in the article of the condescendence, the defender has on only one occasion had such material brought under his notice as material proposed for certain buildings, and prior to that occasion a complaint had been made to this defender that part of a wall in which the pursuers' damp-course had been used was damp, a complaint which on investigation by this defender was discovered by him to be well founded. The material, which was composed of hemp impregnated with bitumen, appeared to the defender on the occasion on which it was proposed to use it to be quite unsuitable and insufficient for the purpose of a damp-course either in point of durability or imperviousness. On his indicating his view to this effect, a proper damp course was at once put in, and no proceedings were required. On future occasions the defender will also use his best judgment on the materials proposed in the particular circumstances, and if this view be not acquiesced in will issue any requisite orders and make the requisite appearances before the Dean of Guild Court, and abide by the determination arrived at.”

The pursuers pleaded—“(1) The damp-course of which the pursuers are the manufacturers being constructed of durable material impervious to moisture, and being thus in conformity with and satisfying the requirements of the bye-law condescended on, the pursuers are entitled to decree of declarator as craved.” (2) In respect of the injury which the pursuers have suffered through the actings of the defenders condescended on, the present action was necessary for the protection of their rights.”

The defenders pleaded, *inter alia*—“The action is incompetent.”

On 4th July 1899 the Lord Ordinary (Low) dismissed the action.

The pursuer reclaimed, and argued—The decree asked for was necessary to place this damp-course on an equal footing with others. It would not prevent the Master of Works or Dean of Guild from exercising his judgment in any particular instance. The case must be taken at its present stage on the pursuers' averments, and they averred that the Master of Works had unfairly intimated to Glasgow builders that he would not even consider their damp-

course. Unless this declarator was granted the pursuers had no remedy, because it was not at present worth while for any builder to try their damp-course and appeal against the decision of the Master of Works. In answer to the objection that their damp-course might alter or be badly produced, they were prepared to prove that from its nature it must be always the same.

The defenders' arguments are stated in the opinions of the Judges.

LORD PRESIDENT—This is certainly a very singular action. The pursuers seek declarator that an article manufactured by them called Callender's Pure Bitumen Damp-Course satisfies the requirements of a bye-law made by the Glasgow Police Commissioners under the Glasgow Building Regulations Act 1892—that is to say, that it constitutes a damp-course of durable material and impervious to moisture. If that proposition were affirmed by this Court the decision would in effect declare authoritatively that whatever material the pursuers might in future put upon the market under that name would satisfy the requirements of the bye-law. All, or most, manufactured articles may vary according to the materials used and the skill and care of the manufacturer, so that such an article as the pursuers make and sell is in a very different position from well-known natural substances, such as sheet lead, Caithness flags, or squared slates, which are mentioned in the bye-law. The pursuers claim is that this Court should declare that their manufactured article has such qualities of durability and imperviousness to moisture as to make it as good a damp-course as the natural substances mentioned. In the case of any such action it is important to observe against whom it is directed. Two defenders are called, the first a public authority, the Corporation of Glasgow. The answer of the Corporation is that they have nothing to do with the matter—that the Legislature has provided a court and a public officer by whom building regulations in Glasgow are administered. This answer appears to me to be conclusive in so far as the action is directed against the Corporation. But the action is also directed against Mr Whyte, the Master of Works, who has important public duties to perform. It is his duty to consider in each particular application for the sanction of the Dean of Guild the sufficiency of the damp-course proposed as regards the material of which it is composed, its quality, and otherwise. But if the declarator sought was granted it would bind Mr Whyte to pass as suitable for a damp-course whatever manufactured article the pursuers might in all time coming issue under the name of Callender's Pure Bitumen Damp-Course; in other words, the pursuers ask the Court to regulate, or rather to supersede, the action of a public officer in the performance of his very practical duties. Not only so, if we were to decide that the pursuers' damp-course satisfies the requirements of the bye-law, the declarator

would (if it was effectual at all) be binding on the Dean of Guild Court, and we should thus be superseding the judgment both of the Master of Works in the performance of his administrative duty, and of the Dean of Guild Court in regulating the buildings in Glasgow. The position taken up by Mr Whyte, I think quite properly, is that he declines to try a question of this kind. He says on record that his judgment is perfectly open, and that he is ready to pass the pursuers' damp-course if they can satisfy him that it is a good and sufficient one. But his judgment would be entirely superseded by this Court if the declarator sought was granted, and an advertisement be given to the pursuers' damp-course which would doubtless be represented as having received the imprimatur of this Court. No instance has been cited of a declarator being granted against such parties in regard to such a matter, and I think therefore that we should adhere to the interlocutor of the Lord Ordinary, dismissing the action as incompetent.

LORD ADAM—I confess I am not able to see why the Corporation of Glasgow should have been made parties to this case. I understand the position of the Corporation is simply this, that they are under a legal obligation to appoint a statutory officer and that then their whole duty ceases, and the regulation of buildings is entirely in the hands of the Dean of Guild. It would be a strange proposition that whenever power to appoint an officer is vested in a public body they are responsible for every word, act, or deed of that officer. Therefore, if this case was directed solely against the Corporation, I should have no hesitation in dismissing it. But then there is the other defender, the Master of Works, and his duty no doubt is to consider the specifications and materials of proposed buildings, and to apply his mind in each particular case and say whether the particular specification and material proposed are satisfactory. Well, when a builder comes forward and proposes to use a particular damp course, it is the duty of the Master of Works to consider it with an open mind and to decide whether it is adequate. If he fails to do so I suppose there is an appeal to the Dean of Guild. I can understand that if the Master of Works, apart from and outwith his duties, went about maligning the pursuer's damp-course and proclaiming that he would not receive it, he might be liable to an action of damages. That is a very different remedy from that which is sought here. What is sought here, as your Lordship has pointed out, is that we should pronounce that a particular manufactured article satisfies the requirements of the Corporation's bye-law, not with reference to any particular case, but in general. That means that we should declare that this particular material is "durable and impervious to moisture." If we pronounce such a finding and declare that is so, and will be so in all time coming—for the pursuers are prepared to prove that their material is invariably the same—

what would be the position of the Dean of Guild Court? All that is required in a damp-course is that it shall be of durable material and impervious to moisture. How could the Dean of Guild Court ever refuse this material as not conform to their requirements when we had declared that it was? I think such a finding is quite out of the question, and agree with your Lordship that the action should be dismissed.

LORD KINNEAR—I am quite of the same opinion, and have nothing to add, except that when the claimer's counsel says that he has no remedy unless we grant this declarator that only shows that he complains of no wrong. He has not made any relevant averment of any legal wrong. His case as stated is that Mr White is Master of Works in Glasgow, and that one of his duties is to see that buildings erected under warrant from the Dean of Guild are built of proper material. He goes on to show that in the ordinary course of the procedure by which that duty is executed the builder brings within the knowledge of the Master of Works the material which he is going to use for a damp-course. He then goes on to say that in Glasgow builders do not propose to the Master of Works to use his damp-course, because they have no sufficient interest to do so. He further says that builders will not appeal from the decision of the Master of Works, because the expense makes it not worth their while. The second complaint seems to us rather contradictory of the first, since it implies that some builders have proposed to use the damp-course and that Mr White has refused to allow it. The procedure which is followed is quite clearly brought out. The builder asks the Master of Works for approval of his plans, and the Master of Works is bound to consider each case. If he refuses to approve, the builder may appeal to the Dean of Guild Court. The pursuers complain that nobody will appeal when their damp-course is disapproved, and they ask this Court to supersede this whole procedure, and to declare *ab ante* that their damp-course does and always will satisfy the requirements of the Corporation bye-law. I think it is quite impossible for the Court to entertain any such action. It is perfectly clear that by refusing this declarator we do not refuse any remedy for any legal wrong. If the pursuers were wronged by slander of their goods, or if the Master of Works instead of discharging his duty refused their material arbitrarily, or from an indirect motive, they might or might not have a remedy; but if they have, it will certainly not be the remedy they ask in this petition. Whether they would in any such case have an action of damages it is unnecessary to consider. As it is, they have an appeal against his decision, provided that somebody wants to use their damp-course. If nobody wants to use it they have suffered no injury, for they have no legal right to compel a builder to adopt it.

On the whole matter I am quite clearly of opinion that this action ought not to be entertained.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuers—Salvesen, Q. C.—Horne. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Defenders—Shaw, Q. C.—Lees—Craigie. Agents—Campbell & Smith, S.S.C.

Friday, January 19.

FIRST DIVISION.

DONALD v. EGLINTON CHEMICAL COMPANY, LIMITED.

Company — Winding-up Voluntarily — Supervision Order—Application for Appointment of Joint Liquidator — Dissident Shareholder.

Where a shareholder of a company in voluntary liquidation presented a petition for a supervision order and for the appointment of a joint-liquidator, on the averment that the existing liquidator and the directors proposed to sell the whole assets to a new company in which they held the controlling interest, and answers were lodged for the company in liquidation, and the liquidator stating that this was the best way to dispose of the assets, the Court pronounced a supervision order, but refused to appoint a joint-liquidator.

In December 1898 the shareholders of the Eglinton Chemical Company, Limited, passed a resolution that the company should be wound up voluntarily, and Mr Patrick Graham, C.A., Glasgow, was appointed liquidator.

William John Alexander Donald, manufacturer, 8 Firhill Road, Glasgow, a shareholder in the company, presented a petition under the Companies Acts 1862 to 1898, and especially by the Act 25 and 26 Vict. cap. 89, secs. 147 to 152, 138 and 82, in which he prayed the Court "to order the voluntary winding-up of the said The Eglinton Chemical Company, Limited, resolved on by the special resolution above referred to, to be continued, but subject to the supervision of the Court, in terms of the Companies Acts 1862 to 1898, and to appoint the said David Guthrie, or such other fit person or persons as your Lordships may select, as additional liquidator or liquidators of the said company, and to determine whether any and what security or caution is to be given by such additional liquidator or liquidators; and further, if your Lordships think fit, to direct all subsequent proceedings in the winding-up to be taken before one of the permanent Lords Ordinary, and to remit the winding-up to him accordingly; or alternatively, to interdict, prohibit, and restrain the said Patrick Graham, as liquidator foresaid, from selling or otherwise disposing of the assets of the said The Eglinton Chemical Company, Limited, to the said Eglinton Limestone Company, Limited, and to order such report as to the