Thursday, December 8.

SECOND DIVISION.

WILLIAMSON *v.* ALEXANDER MACPHERSON & COMPANY.

Appeal to the House of Lords—Interim Execution Pending Appeal—Expenses—Expenses Found Due Reserving Question of Modification—Taxed Amount of Expenses not Modified Prior to Appeal—48 Geo. III., cap. 151, *sec.* 17.

In an action of damages for breach of contract the pursuer was found entitled to expenses, "reserving consideration as to modification." After the expenses had been taxed, but before the question of modification had been dealt with, the defenders appealed to the House of Lords. In a petition presented by the pursuer for interim execution pending the appeal, *held* that, as the question of modification of expenses had not been dealt with prior to the appeal, it was not competent thereafter to determine that question and decern for expenses.

In an action at the instance of John Williamson, shipowner, Glasgow, against Alexander Macpherson & Company, contractors for ship machinery, Greenock, the pursuer sought to recover £1100 damages for breach of contract.

On 13th January 1904 the Lord Ordinary (KINCAIRNEY) granted decree in favour of the pursuer, assessing the damages at £243, 9s. 9d. The interlocutor proceeded as follows:—"Finds the pursuer entitled to expenses, reserving consideration as to modification; allows an account of said expenses to be given in, and remits the same when lodged to the Auditor of Court to tax and to report."

The defenders reclaimed, and on 28th June 1904 the Second Division adhered to the interlocutor reclaimed against. With regard to expenses, their Lordships' interlocutor was in the following terms:—"Find the pursuer entitled to additional expenses; remit to the Auditor to tax the same, and to report to the Lord Ordinary, to whom remit the cause to proceed therein, and to decern for said expenses."

The expenses found due by said interlocutors were thereafter taxed at £1299, 6s. 4d., but before the Auditor's report was approved and decree obtained against the defenders for said expenses the defenders on 8th November 1904 presented a petition of appeal to the House of Lords.

On 8th December the pursuer petitioned for interim execution pending appeal, praying the Court "to allow execution to proceed on the said judgments and decrees of date 13th January 1904 and 28th June 1904 before mentioned, notwithstanding the said appeal, to the effect of enabling the petitioner to recover payment of the sums thereby found due to him, as well as the taxed expenses before mentioned and dues of extract, . . . and, if necessary for that purpose, of new to remit to the Lord Ordinary to decern for the taxed expenses found due to the petitioner."

On the calling of the pursuer's petition in the Single Bills, counsel for the defenders argued—The prayer of the petition could only be granted in so far as it related to the sum found due to the pursuer in name of damages. The pursuer had not been entirely successful, and the question of modification of expenses could not be dealt with after appeal had been taken to the House of Lords—Mackay's Practice, p. 582; *Gordon* v. *Hyslop & Company*, July 11, 1821, 1 S. 120; *Lord Medwyn* v. *Dickson*, July 7, 1829, 7 S. 837; *Hogarth* v. *Balmer*, July 6, 1830, 8 S. 1017. The process being no longer in the Court of Session, it would be impossible for the Lord Ordinary to deal with the question of modification.

Argued for the pursuer—The cases relied on by the defenders were too remote in date to be regarded as throwing light on the existing state of practice. The proper and competent course was for the Court to remit to the Lord Ordinary to deal with the question of expenses—48 Geo. III, c. 151, sec. 17.

LORD JUSTICE-CLERK—I think the prayer of the petition should be granted so far as it refers to the sums found due, and refused *quoad ultra*.

LORD YOUNG concurred.

LORD TRAYNER—I see no reason for departing from the practice established by the cases cited to us.

LORD MONCREIFF concurred.

The Court pronounced an interlocutor in terms of the prayer of the petition so far as it related to the sums found due to the petitioner, and *quoad ultra* refused the prayer.

Counsel for the Pursuer—Horne. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Defenders—Salvesen, K.C.—MacRobert. Agents—Campbell & Smith, S.S.C.

Friday, December 9.

FIRST DIVISION.

[Lord Low, Ordinary.

DARNEY & SON *v.* THE CALDER DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF MIDLOTHIAN.

Local Government — County Council — "Offensive Trade"—Condition in Sanction of Local Authority—Action to Reduce Condition — Competency—Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. c.* 38), *sec.* 32 (1), (2), (3).

The district committee of a county council, in virtue of their powers as local authority, under sec. 32, sub-sec. 1, of the Public Health (Scotland) Act 1897, issued an order declaring the manufacture of glue to be an "offensive business" within the meaning of the Act, and, in virtue of their powers under sec. 32, sub-sec. 3, passed bye-laws regu-

lating such manufacture. The order and bye-laws were confirmed by the Local Government Board. Subsequently the local authority granted to a firm of manufacturers sanction to establish a glue manufactory "under the condition that the products of the business are manufactured from hide clippings *only*." The bye-laws contained no regulation restricting in this manner the material to be used in the manufacture of glue.

In an action by the manufacturers concluding for reduction of the condition and for declarator that the sanction should be valid as if the condition had not been inserted, *held* (*aff.* Lord Low, Ordinary) that the Court had no power to convert the conditional sanction into an unconditional sanction, and action *dismissed* as incompetent.

Opinion per Lord Adam that the manufacturers' remedy lay in an appeal, under sec. 32, sub-sec. 2, of the Act, to the County Council, and thence to the Local Government Board, in respect the limited sanction given was tantamount to a refusal.

The Public Health (Scotland) Act 1897 (60 and 61 Vict. c. 38), sec. 32, which is headed "Offensive Trades," enacts—"(1) If any person after the commencement of this Act establishes, without the sanction of the local authority, the following businesses, or any of them, . . . or any other business which the local authority may declare, by order confirmed by the Board," *i.e.*, the Local Government Board for Scotland, "and published in the *Edinburgh Gazette*, to be an offensive business, he shall be liable to a fine not exceeding . . . (2) The local authority shall give their sanction by order, but at least fourteen days before making any such order shall make public the application for it, by advertisement in one or more local newspapers or by the posting of handbills in the locality setting forth the time and place at which they will be willing to hear all persons objecting to the order, and they shall consider any objections made at that time and place, and shall grant or withhold their sanction as they think expedient; and where the local authority grants or withholds such sanction, any person aggrieved may appeal to the Board, whose decision shall be final, but in the case of a district other than a burgh the appeal to the Board shall only arise after the county council has given its determination on the matter; and a local authority may appeal to the Board against the determination of the county council. (3) The local authority may make bye-laws for regulating the conduct of any businesses within the meaning of this section . . . which are for the time being lawfully carried on in their district, and the structure of the premises in which any such business is being carried on, in order to prevent or diminish the noxious or injurious effect thereof, and the mode in which the said application is to be made."

By section 185 bye-laws made by a local authority under the Act do not take effect unless and until they have been submitted to and confirmed by the Local Government Board.

In April 1903 the Calder District Committee of the County Council of Midlothian, as local authority for the Calder District of that county, issued an order, in virtue of the powers to that effect conferred on them by section 32 (1) of the Public Health (Scotland) Act 1897, declaring "that the business of glue manufacturing should be an offensive business under and within the meaning of" section 32 (1) of the said Act. This order was confirmed by the Local Government Board.

On 10th July 1903 John Darney & Son made application to the District Committee for sanction to commence the manufacture of glue and gelatine in premises erected and equipped by them at Kinauld, near Currie, Midlothian. This application was not immediately dealt with pending the preparation by the District Committee of bye-laws as to the manufacture of glue and the confirmation of these by the Local Government Board. On 6th January 1904 the bye-laws proposed by the District Committee were confirmed by the Local Government Board. The bye-laws contained regulations as to the manufacture of glue, but contained no regulation restricting the material to be used in said manufacture to hide clippings.

On 9th February 1904 the District Committee issued the following order:—"In terms of section 32 of The Public Health (Scotland) Act 1897, we, the Local Authority of the Calder District of the County of Midlothian, by this our order, sanction, under the condition that the products of the business are manufactured from hide clippings *only*, the establishment of the business of glue, gelatine, or size manufacture in the premises situated at Kinauld, near Currie, as shown on the plans submitted along with the application of Messrs John Darney & Son, glue manufacturers, Kinghorn, dated 10th July 1903."

On 2nd March 1904 Darney & Son raised an action against the District Committee in which they sought (1) reduction of the resolution of the District Committee to issue the order of 9th February 1904, and the order itself, in so far as they or either of them imposed a condition not authorised by the Public Health (Scotland) Act 1897, and not in conformity with the bye-laws for glue manufacture enacted by the District Committee; and (2) declarator that the said "resolution and order granted to the pursuers sha l be valid and effectual to the pursuers in all time coming, and that as if the said condition, whereby the pursuers are required to manufacture their products from hide clippings *only*, had not been inserted in the said order."

The pursuers averred that the condition attached to the sanction would seriously prejudice them in the prosecution of their business, and that the imposition of such a condition was *ultra vires* of the defenders as Local Authority.

The defenders pleaded, *inter alia*, that the action was incompetent.

On 30th June 1904 the Lord Ordinary (Low) issued an interlocutor sustaining this plea of the defenders.

Opinion—[*After narrating the facts*]—"The pursuers aver that the condition attached to the order will seriously prejudice them in their business, and that it was *ultra vires* of the defenders to impose such a condition. The pursuers argued that under the Act the defenders were bound either to grant or withhold their sanction to an offensive business, and that although they were empowered to make bye-laws for regulating such businesses, they were not entitled to qualify an order sanctioning a business with a condition not appearing in the bye-laws. The defenders had in fact made bye-laws dealing, *inter alia*, with the manufacture of glue, in which there was no such condition as that appearing in the order sanctioning the pursuer's business.

"In these circumstances the pursuers seek in this action to have the order reduced in so far as it imposes the condition, and also a decree declaring that the order 'shall be valid and effectual to the pursuers in all time coming, and that as if the said condition, whereby the pursuers are required to manufacture their products from hide clippings only had not been inserted in said order.'

"What therefore the pursuers ask the Court to do is to convert a conditional order of the defenders into an absolute order unfettered by any condition.

"The first question is, whether the Court has power to do any such thing, and that depends upon the provisions of sub-section 2 of section 32 of the Act. The sub-section provides that the local authority shall give their sanction to the establishment of a business falling within the category of 'offensive,' by order, but that before making such order they shall, after advertisement of the application, hear and consider any objections which may be made to the granting of the order, and shall then 'grant or withhold their sanction as they think expedient; and where the local authority grants or withholds such sanction, any person aggrieved may appeal to the Board, whose decision shall be final.'

"These provisions make it plain that the granting or withholding of sanction to establish an offensive business is a matter with which this Court has nothing to do, and therefore it seems to me to be quite incompetent to ask the Court to declare that a conditional sanction which was given by the Local Authority falls to be regarded and acted on as if it had been an absolute and unconditional sanction.

"The pursuers argued, however, that they could not appeal to the Local Government Board against the order which had been made, because the Act only allowed an appeal 'where the local authority grants or withholds such sanction,' and here it could not be said that the Local Authority had done either the one or the other.

"Now, if the pursuers had simply sought to have the order set aside altogether, so as to leave it to the defenders to issue a new order, either unconditionally granting or withholding sanction to the business, there would have been something to be said in favour of that being done. What the pursuers ask, however, is only a partial reduction, and I doubt whether under the summons as framed it would be competent to pronounce a decree reducing the order *in toto*.

"Further, I am not impressed by the argument that, looking to the form of the order, the pursuers might not be entitled to appeal. I think that it is clear that the pursuers have right to appeal to the Local Government Board against the order. The criticism upon the way in which the order is framed is very technical. The defenders were not prepared to sanction the establishment by the pursuers of a glue manufactory in which all the materials from which glue may be made might be used, but only of a manufactory in which hide clippings alone were used. If the order had sanctioned the establishment of a business of glue manufacturer from hide clippings only, it would, I think, have been unobjectionable in point of form, but the order which the defenders granted was in substance precisely to the same effect.

"I shall therefore dismiss the action as being incompetent."

The pursuers reclaimed, and argued—The Local Authority was limited under section 32 (2) of the Public Health (Scotland) Act 1897 to granting or withholding its sanction and had no power to add to a sanction a condition not contained in the bye-laws. By adding the condition the defenders had deprived the pursuer of his remedy under the Act of appealing to the County Council and the Local Government Board, for that was only available where the sanction was either granted or withheld. Here it was neither granted nor withheld, and the pursuers were consequently driven to seek redress in the present action—*Cameron* v. *Magistrates of Glasgow*, February 20, 1903, 5 F. 490, 40 S.L.R. 577. The Local Authority had acted *ultra vires* in imposing this restrictive condition, which was unwarranted by any statute, and could only have been properly imposed by a bye-law duly confirmed. A sanction might be freed by the Court from such a restrictive condition—*Ashley* v. *Magistrates of Rothesay*, June 20, 1873, 11 Macph. 708, 10 S.L.R. 513, 1 R. (H.L.) 14, 11 S.L.R. 487; *Rossi* v. *Magistrates of Edinburgh*, February 20, 1903, 5 F. 480, 40 S.L.R. 375, 42 S.L.R. 79.

Argued for the respondents—The Local Authority had sanctioned only a particular kind of glue factory, viz., such as used hide clippings only, and it was incompetent to ask the Court to convert this particular sanction into a general sanction. To give decree as asked would be to make the Local Authority sanction for all time an offensive business such as it had not sanctioned. The case of *Ashley* had reference to a certificate granted under the Public House Acts, at variance with the provisions of these Acts, and further, the condition there was quite separable from the certificate, while here it was not so. In *Rossi* no licence had yet

been issued, so that case was not in point. Further, the statute had provided a proper mode of appeal, viz., to the County Council and the Local Government Board. The pursuers ought to have sought their remedy in that way if they had a grievance.

LORD ADAM—This is an action brought by a firm who are manufacturers of glue, and propose to set up a glue manufactory in the defenders' district. On 10th July 1903 they made application to the defenders, who are the Local Authority under the Public Health Act, for their sanction to commence the manufacture of glue. That application stood over for some time because the Local Authority was preparing bye-laws as to the manufacture of glue. We are told that after considerable delay these bye-laws were adjusted, and that they were finally confirmed by the Local Government Board on 6th January 1904. The pursuers set forth two of these bye-laws which refer to the manner in which the business of glue manufacture is to be carried on. These bye-laws having been confirmed, the Local Authority on 9th February 1904 issued this order:—[*His Lordship read the defenders' order of that date*]. That is the only order pronounced, and that is the order which we have to consider. The pursuers' application was an unlimited application for sanction to manufacture glue in any way they could. The sanction given was subject to the condition that the products of the business should be manufactured "from hide clippings only." That was a limited sanction granted on an application for an unlimited sanction.

That being so, this action was brought concluding not for a total reduction of the order but only for reduction of it to a limited extent. The pursuers ask for reduction of the order in so far as it imposes a condition "that the products of the pursuers' business are to be manufactured from hide clippings *only*." Then there follows a conclusion for declaractor that the "order granted to the pursuers shall be valid and effectual to the pursuers in all time coming, and that as if the said condition whereby the pursuers are required to manufacture their products from hide clippings *only* had not been inserted in the said order."

It is perfectly clear that the effect of a decree of reduction in the terms asked would be to turn a limited order sanctioning the manufacture of glue from hide clippings only into an order sanctioning the manufacture of glue in any way whatever.

The ground of the pursuers' contention in support of the conclusions of their summons is this—The Public Health (Scotland) Act 1897 (60 & 61 Vict. c. 38), sec. 32, by subsection (1) enacts that anyone who establishes, without the sanction of the local authority, any of certain businesses enumerated, or any other business which the local authority by order, confirmed by the Local Government Board, may declare to be an offensive business, shall be liable to a penalty. The business of glue manufacturing is not one of the businesses enumerated, but the defenders by order duly confirmed had declared it to be an offensive business. By sub-section (3) it is enacted that the local authority, subject to confirmation by the Local Government Board (as provided by section 185 of the Act), may make bye-laws for regulating the conduct of offensive businesses, and the pursuers say that the defenders accordingly made application for the sanction of certain bye-laws by the Local Government Board with regard to the manufacture of glue, and that certain bye-laws were duly confirmed, and these they contend contain the only conditions with regard to the making of glue which it is legal for the local authority to impose on any manufacturer who wants to make glue in their district. The pursuers say that by their order the defenders have imposed a condition which is not in their bye-laws, namely the restriction to manufacture from hide clippings only. They say this is illegal, and that, being illegal, they are entitled to have it struck out of the order and to have the order left standing as an unconditional sanction to manufacture glue in any way whatever—that is to say, they want to convert a conditional sanction into an unconditional sanction which the local authority never gave them.

The Lord Ordinary has dismissed the action as incompetent, and I entirely agree with the Lord Ordinary. The question is whether the pursuers had the sanction of the Local Authority to the carrying on of this business in any way, or only their sanction to carrying it on in a particular limited way. No one can doubt that the defenders' sanction was not unlimited. An unlimited sanction was what was asked and refused. What authority has this Court to convert an order giving a limited sanction into an order giving a sanction unlimited in any way? It has none.

In the case of *Ashley* v. *Magistrates of Rothesay* the condition was quite separable from the licence. If here the condition were separable I could understand the pursuers' contention, but that is not the case. The sanction granted is for the manufacture of glue in a particular way and in that way only.

It may be a question whether that condition was legal or not, but whether it was legal or not it is plain that the pursuers did not get the sanction of the Local Authority to carry on the manufacture in the way they desire.

I think that is enough for the decision of this case. But I am disposed to think the defenders' order was tantamount to a refusal of the pursuers' application, and it would rather appear to me that the pursuers had a right of appeal to the County Council and from them to the Local Government Board, and if so this action would be incompetent on that ground, for if an appeal is given by the statute the statutory procedure must be followed. But it is not necessary to decide that question, for I think it is quite incompetent by means of a partial reduction to convert a *conditional* sanction into a sanction which is unlimited.

I therefore agree with the Lord Ordinary

and think that we should adhere to his interlocutor.

LORD KINNEAR—I agree. I do not think it is competent for the Court to grant decree in the terms asked for, and I do not think that the competency of doing so is a technical question arising out of criticism of the terms of the summons, but is a question of substance as to the right of the pursuers to obtain the remedy they seek and the power of the Court to grant such a remedy. I agree with your Lordship that we cannot grant it. The pursuers made application to the defenders for sanction to commence the manufacture of glue and gelatine in the premises erected and equipped by them at Kinauld, which is within the defenders' district. I understand that the application was for an absolute sanction, and that, had it been granted in the terms asked for, it would have enabled the pursuers to carry on their manufacture by any lawful methods known to the trade. It was, however, not granted in this form, but the Local Authority issued an order giving their sanction "under the conditions that the products of the business are manufactured from hide clippings *only*." Now, that order starts, no doubt, by giving a sanction in affirmative form, but it goes on to add a condition implying a distinct negative to what the pursuers ask for, for it says—"You are to carry on this manufacture from hide clippings only," while what was asked for was leave to carry it on by every lawful method. I do not think it necessary to decide whether this condition was or was not *ultra vires* of the Local Authority, for it is not brought before us in a form in which we can decide that question, although I think it is a perfectly proper question to be brought before the Court for consideration if it is brought in a proper way. But here what we are asked to do is not only to determine as a question of law that the condition was incompetent, but to strike out of the order that portion of it which is said to be incompetent and to leave the rest standing, so that it will be transformed into an unconditional sanction to carry on the manufacture of glue by any known method. Now, I agree with your Lordship and with the Lord Ordinary that that is just acting as to grant what was refused by the Local Authority. It is said to be a question whether the local authority can be held to have withheld this sanction or not, and we cannot say what they would do if they were advised that they must either grant it unconditionally or refuse it. But certainly they have not granted it unconditionally as yet, and if we give decree in the terms asked for we shall just be doing what they have not yet done. We shall in fact be giving a sanction to carry on one of the offensive trades, and that I think this Court has no power to do.

I do not see that any difficulty is created by the two cases that were cited by the reclaimers. In the case of *Ashley* the licence and the illegal condition were quite easily separable, and the Court held that if the condition were struck out the licence, which the licensing authority intended to grant, could still stand. The difficulty which arises here was not raised by any of the Judges or by counsel in that case. The case of *Rossi*, too, does not apply to the present proceedings, for there what was sought was a general declarator that certain conditions could not be legally inserted in a certificate, but no certificate had as yet been granted. So in that case there was no risk that the effect of the decree would be to grant a sanction which had been refused; the applicant would still have to go to the licensing authority for his licence, and would not be obtaining it by a decree of this Court. Here what we are asked to do must have a very different consequence. I agree with your Lordship and the Lord Ordinary that this action must be dismissed.

LORD KINCAIRNEY—I agree with your Lordships and the Lord Ordinary.

This is an "offensive business" which cannot be established without the sanction of the Local Authority, and noone else can give that sanction. This Court cannot. The question is, have the pursuers got the sanction of the Local Authority? They have not, except under a certain condition. I do not say whether it was legal to impose that condition or not. The pursuers will not accept the sanction with that condition. But they have no other. The question is, can we, by striking out the condition said to be *ultra vires*, affirm that the Local Authority have sanctioned this manufacture? I think we cannot. The point is well expressed by the Lord Ordinary when he says—"What, therefore, the pursuers ask the Court to do is to convert a conditional order of the defenders into an absolute order unfettered by any condition. The first question is whether the Court has power to do any such thing." I think there is no doubt the answer must be, as the Lord Ordinary has answered, in the negative. I concur in the judgment proposed by your Lordship.

The LORD PRESIDENT and LORD M'LAREN were absent.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Campbell, K.C.—Hunter. Agent—Arch. Menzies, S.S.C.

Counsel for the Defenders and Respondents—The Solicitor-General (Dundas, K.C.)—Macphail. Agent—A. G. G. Asher, W.S.