Thursday, May 17.

FIRST DIVISION.

CORPORATION OF GLASGOW *v.* CALEDONIAN RAILWAY COMPANY.

Process—Reclaiming—Competency—Interlocutory Judgment—Reservation of Expenses—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 54.

An interlocutor disposing of the whole merits of a cause but reserving the question of expenses does not dispose of the "whole cause" within the meaning of section 54 of the Court of Session Act 1868, and cannot therefore be reclaimed against without the leave of the Lord Ordinary.

Baird v. *Barton*, June 22, 1882, 9 R. 970, and *Burns* v. *Waddell & Son*, January 14, 1897, 24 R. 325, *followed.*

The Caledonian Railway Company brought a note of suspension and interdict against the Corporation of Glasgow, concluding for interdict against the Corporation laying pipes in Eglinton Street, Glasgow, over the company's line. By a supplementary note they averred that certain pipes had already been laid down, and asked for an order for their removal.

On 27th February 1900 the Lord Ordinary (Low) pronounced the following interlocutor: — "Sustains head (*d*) of the complainers' plea-in-law: Interdicts, prohibits, and discharges the respondents in terms of the prayer of the note of suspension and interdict, and decerns: Further, in regard to the supplementary note for the complainers, in respect that the operations of the respondents complained of have been completed, ordains them to remove the water-pipes and troughs placed by them in or through the structure of the bridge carrying the street or road known as Eglinton Street, Glasgow, over the complainers' line of railway known as the Pollok and Govan Railway, and to restore completely the structure of the said bridge to the condition in which it was before the respondents placed their said pipes and troughs therein, all at their own expense and at the sight and under the direction of Mr Donald Mathieson, civil engineer, Glasgow: Reserves all questions of expenses and continues the cause."

The Corporation of Glasgow reclaimed.

On the case being called in the Single Bills, the respondent objected to the competency of the reclaiming-note, and argued —This was an interlocutory judgment, and could not be reclaimed against without the leave of the Lord Ordinary, which had not been asked for—Court of Session Act 1868, sec. 54. It was settled that the words "whole cause," as used in section 54 of the Court of Session Act 1868, included expenses, and that an interlocutor was not final unless expenses were disposed of—*Baird* v. *Barton*, June 22, 1882, 9 R. 970; *Gowans' Trustees* v. *Gowans*, December 14, 1889, 27 S.L.R. 210; *Burns* v. *Waddell & Sons*, January 14, 1897, 24 R. 325.

Argued for the reclaimers—This was an exceptional case, where a decree *ad factum præstandum* was granted. In such cases the interlocutor granting the decree disposed of the whole matter of the cause, though the case might be continued to secure that the decree was carried out—*Kirkwood* v. *Park*, July 14, 1874, 1 R. 1190. In such an interlocutor it was impossible to deal with the whole expenses of the cause, because some expense would be incurred in carrying out the decree, and therefore the fact that in *Kirkwood* expenses "to this date" were found due did not distinguish it in principle from the present case. There was no direct statutory provision that expenses must be disposed of before an interlocutor could be reclaimed against; it was merely an inference from the provision in section 53 that an interlocutor might be final although expenses had not been taxed.

Lord President—This question primarily depends on the construction of certain statutory provisions which have been the subject of repeated and careful consideration by the Court. Section 54 of the Court of Session Act 1868 declares that except in so far as otherwise provided by section 28, until the whole cause has been decided in the Outer House, it shall not be competent to present a reclaiming-note against any interlocutor of the Lord Ordinary without his leave first had and obtained, and it is admitted that in the present case leave to reclaim has not been obtained. That leaves open the question whether this interlocutor can be held to dispose of the whole cause when it does not dispose of, but on the contrary reserves, all questions of expenses.

It was decided in *Baird* v. *Barton* (June 22, 1882, 9 R. 970) that unless an interlocutor disposes of the question of expenses, it does not dispose of the whole subject-matter of the cause and cannot be reclaimed against without leave. That view again received effect in the recent case of *Burns* v. *Waddell & Sons* (January 14, 1897, 24 R. 325), and under these circumstances I think that the objection to the competency of the reclaiming-note must be sustained.

Lord Adam—By this interlocutor the Lord Ordinary "interdicts, prohibits, and discharges the respondents in terms of the prayer of the note of suspension and interdict, and decerns," and thereby in one sense disposes of the whole matter. He goes on to deal with the supplementary note for the complainers, and ordains the respondents to remove their pipes. He then "reserves all questions of expenses, and continues the cause." Now, ever since the case of *Baird*, I have been of opinion that it was settled that unless the interlocutor dealt with the question of expenses, either by awarding or refusing them, the whole subject of the cause, in the sense of the Act of 1868, was not disposed of, and therefore a reclaiming-note was not competent without leave. In this interlocutor the question of expenses is reserved. Now, it would have been easy to have applied to the Lord Ordinary for leave to reclaim, but as this has not been

done, we have no alternative but to dismiss the reclaiming-note as incompetent. With reference to the case of *Kirkwood*, I should like to reserve my opinion as to whether, when the whole subject-matter of the action, including expenses, is disposed of, and all that remains to be done is merely executorial, that may or may not be treated as a final interlocutor.

LORD M'LAREN—In considering the provisions of the Act of 1868 it must be kept in view that the policy of the Act is to discourage intermediary reclaiming-notes, while providing that a reclaiming-note shall bring all previous interlocutors under review. If the point were doubtful, I should venture to think that the provisions of section 53 do not amount to making expenses a part of the subject-matter of the cause, but are merely provisions inserted in case anyone should think that it was necessary to have the expenses taxed, modified, or decerned for before the whole cause was taken to be decided. But as this matter has been considered for many years, it is impossible now to go back on the decisions. In the present case there is no finding disposing of expenses, and therefore there is a part of the subject-matter of the cause not disposed of. Of course it would have been competent to get the leave of the Lord Ordinary to reclaim, and for anything I know, it may still be competent to get his leave. For these reasons, though with some doubt, I concur with your Lordship.

LORD KINNEAR—I quite agree. These provisions of the Act of 1868 were judicially construed very shortly after the Act was passed, and the construction then put upon them by the highest authority has been uniformly followed. It is out of the question to raise the point again, as if it were now a new one. I see no reason for hesitating to accept the construction which these sections have received. At the same time I quite agree with Lord Adam that we should reserve our opinions on the special point that might have arisen if the Lord Ordinary had disposed of the expenses in the cause, so far as already incurred. That question does not arise, and the case of *Kirkwood* is sufficient to show that a point might be taken in such a case which we are not required to consider at present.

The Court dismissed the reclaiming-note.

Counsel for the Reclaimers—Guthrie, Q.C.—Younger. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Dundas, Q.C.—Cooper. Agents—Hope, Todd, & Kirk, W.S.

Thursday, May 17.

SECOND DIVISION.

[Lord Pearson, Ordinary.

BROWNE'S TRUSTEES v. BROWNE.

Succession — Conditional Institution or Substitution — Direction to Invest in Heritage — No Evacuation of Destination.

A testator who died in 1845 left a trust-disposition and settlement in which he directed his trustees to divide the residue of his estate into as many shares as he might have children at the period of his death, the issue of a predeceasing child being entitled to the share their parent would have taken if he or she had survived the testator. As to the daughters' shares, he directed his trustees upon a daughter attaining majority or being married "to invest the shares falling to such daughters either in the purchase of heritable property or upon heritable security, taking the rights thereto in favour of such daughters in liferent for their liferent use allenarly, exclusive of the *jus mariti* or right of administration of any husband, and to their lawful issue respectively, and failing such issue, then to the survivors of my said children, equally among them, share and share alike, in fee."

The testator was survived by several children, including a daughter A, who married in 1846 and gave birth to a child in 1848. The child died in 1849. A herself died in 1850, survived by her husband. The testator's direction to his trustees to invest in heritable property or heritable securities was never carried out by them.

Held that the destination in the testator's settlement imported a substitution, and not merely a conditional institution, in favour of his surviving children, and that the share liferented by his daughter A fell to such surviving children in respect of her only child having died without evacuating the destination.

Watson v. *Giffen*, January 23, 1884, 11 R. 444, *followed*.

Cunningham v. *Cunningham*, November 30, 1889, 17 R. 218, *distinguished*.

In July 1898 the trustees of James Browne, who died on 9th February 1845, raised an action of multiplepoinding for the purpose of determining who were entitled to the fee of the portion of his estate which had been liferented by his daughter Isabella under his trust-disposition and settlement dated 25th January 1842, and which had been set free by the death of Isabella unmarried on 8th December 1897.

The facts of the case and the claims of the various parties are fully set forth in the opinion of the Lord Ordinary (PEARSON).

On 28th December 1899 the Lord Ordinary pronounced the following interlocutor:—

"Finds that the fund *in medio* vested to