sufficient ground for our selecting as a separate question what is really part of the train of facts for the consideration of the jury.

LORD M'LAREN—I agree. I think the question of employment is so involved in the merits of the case that it cannot easily be separated. In that respect this case is very different from the case referred to by Mr Moncreiff as to the sufficiency of the notice given to the defender in terms of the Employers Liability Act. Of course the question of the sufficiency of the notice of action is a distinct and separable thing from the merits of the case.

LORD ADAM concurred.

LORD KINNEAR was absent.

The Court ordered issues.

Counsel for Pursuer — R. S. Brown. Agent—Henry Robertson, S.S.C.

Counsel for Defender—Moncreiff. Agents —Drummond & Reid, W.S.

Friday, May 13.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

THE COUNTESS OF SEAFIELD *v.* KEMP.

Process—Reclaiming-Note—Whether Timeously Presented—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 94—*Act of Sederunt*, 14*th March* 1894.

On 25th March the Lord Ordinary pronounced an interlocutor in a case which had been heard during session, disposing of part of the case, and granting leave to reclaim. The first box-day in vacation was on April 7th. *Held* that a reclaiming-note was timeously lodged on the second box-day.

Section 94 of the Court of Session Act 1868 (31 and 32 Vict. cap. 100) enacts—"It shall be lawful for the Lords Ordinary at any time in vacation or recess to sign interlocutors pronounced in causes heard in time of session or at any extended sittings or at the trial of causes by jury or by proof before the Lord Ordinary; provided that where any such interlocutor is dated at or prior to the first box-day in vacation, the same may be reclaimed against on the second box-day; and where the interlocutor is dated after the first box-day, then on the first sederunt day ensuing, or within such number of days from the date of such interlocutor as may be competent in the case of a reclaiming-note against such interlocutor dated and signed during session. . . . Provided that in the case of an interlocutor which cannot be reclaimed against without the leave of the Lord Ordinary, such leave may be given by such Lord Ordinary, or in his absence by the Lord Ordinary sitting on the Bills, during vacation."

The Act of Sederunt of 14th March 1894 enacts—"That in all cases where the days allowed for presenting a reclaiming-note against an interlocutor pronounced by a Lord Ordinary in the Outer House expire during any vacation, recess, or adjournment of the Court, such reclaiming-note may be presented on the first box-day occurring in said vacation, recess, or adjournment after the reclaiming days have expired; and if there be no such box-day, then on the first ensuing sederunt day."

An action of declarator and interdict was raised by the Countess of Seafield and others, proprietors of lands on the banks of the river Spey, against Mr Robert Kemp, distiller, Elgin, concluding for declarator that the pursuers were entitled to have the water in a fit state for primary purposes, and craving the Court to interdict the defender from polluting the river by discharges from his distillery.

The case having been heard during session, the Lord Ordinary (KYLLACHY) on 25th March 1898—which date was within the spring vacation—pronounced an interlocutor by which he disposed of the declaratory conclusions of the summons, superseded in the meantime consideration of the conclusion for interdict, and granted leave to reclaim.

The defender lodged a reclaiming-note on the 28th April, being the second box-day in vacation, the first having been on 7th April. The pursuers, on the case being called in Single Bills, objected to the competency of the reclaiming-note, on the ground that it ought to have been lodged upon the first box-day, the reclaiming days having expired upon the 5th of April. They argued that the 94th section of the Court of Session Act had in contemplation final interlocutors which could be reclaimed without leave, not interlocutory judgments which could be reclaimed against only within ten days. The last class, of which the present case was one, fell under the provisions of the Act of Sederunt of 1894. If it did not apply, the result of section 94 of the Court of Session Act would be to extend greatly the time for reclaiming, and the defender would have thirty-three days instead of ten in which to reclaim.

[In answer to a question from the Lord President, counsel for the defender stated that the Act of Sederunt had been passed in consequence of the decision in the case of *Mackenzie* v. *Lucas & Aird*, February 15, 1894, 1894, 21 R. 544. Counsel for the defender was not called upon.]

LORD PRESIDENT—It is quite clear that this reclaiming-note was presented under the section of the Act of Parliament, and I think it is impossible to get over its provisions.

LORD ADAM—I am of the same opinion. I have never been able to see why this reclaiming-note was said to be incompetent.

LORD M'LAREN—I am also of the same opinion. There may be cases where the Act of Sederunt might have a beneficial

effect in regard to reclaiming-notes by extending the time allowed for reclaiming, but it is not intended to take away from the latitude in time allowed by the statute.

LORD KINNEAR—I am entirely of the same opinion. It is admitted—and the admission could not have been withheld—that the interlocutor reclaimed against was competently pronounced under section 94 of the Court of Session Act. But if the interlocutor falls under the main provision of the section, why is the provision inapplicable to this reclaiming-note? If there were any doubt on the point, it is completely removed by the later proviso, because the effect of the statute, when the two provisos are taken into consideration, is simply this, that where the Lord Ordinary pronounces an interlocutor in vacation in a case heard during session, a reclaiming-note may be lodged on specified dates, but then, as certain interlocutors can only be reclaimed against with leave of the Lord Ordinary, and the Lord Ordinary may not have thought fit to embody leave to reclaim in the interlocutor, the further proviso is added that in that case leave to reclaim may be granted by the Lord Ordinary on the Bills.

The Court repelled the objections.

Counsel for the Pursuers — Cooper. Agents — John C. Brodie & Sons, W.S.

Counsel for the Defender — J. Wilson. Agents—Davidson & Syme, W.S.

HOUSE OF LORDS.

Thursday, May 12.

(Before the Lord Chancellor, Lords Herschell, Macnaghten, Morris, and Shand.)

BAIRD *v.* ALEXANDER.

Property—Mutual Gable—Recompense for Use of Mutual Gable—Special Agreement.

The proprietor of two adjoining building stances erected a house upon one of them, and conveyed the ground and the buildings erected thereon to A. The south wall of the house was built half upon the one stance and half upon the other, and the disposition declared that the wall was to be a mutual gable. In the missives the subject proposed to be sold was described as "the house No. 8 Braid Road," and shortly before the execution of the disposition the seller wrote to the purchaser—"I should have mentioned in my offer to you of this date (4th February 1891) that the unused half of the gable and boundary walls is not included in the offer."

The seller subsequently disponed the vacant stance adjoining the south gable to B, who proceeded to build upon it and to make use of the wall which had been declared to be a mutual gable.

Held (*aff.* judgment of the Second Division) that A was entitled to recover from B one-half of the cost of the mutual gable. *Berkeley* v. *Baird*, February 16, 1895, 22 R. 372, *approved* and *followed*.

Observed that the terms of the seller's letter founded on as a special agreement were consistent with the terms of the disposition, and that both were consistent with the ordinary rule.

Opinion reserved whether it would have been competent to refer to it as evidence contradicting the disposition.

In the year 1890, William Murray, builder, Edinburgh, was proprietor of a portion of the estate of Plewlands, in the county of Edinburgh. On these lands he proceeded to erect a row of self-contained houses on adjacent lots, marked Nos. 3 to 10 on the feuing plan of the said lands. The south gable of the house upon lot 10, and also the front and back boundary walls, were, in accordance with the usual custom, erected to the extent of one-half their thickness on lot No. 10, and to the extent of the other half on lot No. 11, which was also the property of Murray, and at that time unbuilt upon.

Thereafter Murray conveyed lot No. 10 to H. S. Monteagle, solicitor, Edinburgh, by disposition dated 14th and recorded 16th February 1891. In this disposition the subjects were described as follows:—"All and whole that area or piece of ground, part of the lands of Plewlands, in the parish of St Cuthberts and county of Edinburgh, lying on the west side of the old Penicuik Road, now called Braid Road, as the same is delineated and coloured red and green and marked 'lot 10' on the plan marked 'No. 2,' annexed and signed 'as relative to the feu-contract after mentioned,' viz., a feu-contract of a larger portion of the said lands of Plewlands entered into between the said Scottish Heritages Company, Limited, on the one part, and John Baird, solicitor, Edinburgh, on the other part, dated 1st and 2nd, and recorded in the Division of the General Register of Sasines applicable to the county of Edinburgh, 7th June 1888; 'together with the whole buildings and other erections erected or to be erected on the plot or area of ground before disponed, the whole parts, privileges, and pertinents thereof, the teinds of the same, in so far as I, the said William Murray, have right thereto, and all my right, title, and interest, present and future, therein: Declaring that the gable, boundary walls, parapet walls, and railings surrounding the subjects before disponed are mutual, with the exception of the parapet wall and railing facing Braid Road, which belongs solely to said subjects.'"

On 4th February 1891, preceding the execution of the disposition, Murray had written to Monteagle two letters containing the offer of the said subjects, which was accepted by Monteagle on the same day. In the first of these he said—"Dear Sir—I hereby offer to sell you the house No. 8 Braid Road, subject to the following condi-