SUMMER SESSION, 1900.

COURT OF SESSION.

Wednesday, May 16, 1900.

FIRST DIVISION.

WOOD'S TRUSTEES *v.* WOOD.

Expenses — Employment of Counsel in Sheriff Court—A.S., December 4, 1878.

In the table of fees annexed to the general regulations in the Act of Sederunt of 4th December 1878 "regulating the fees of agents practising in the Sheriff Courts of Scotland," the following entry occurs—"4. Instructing Counsel.—Where the employment of counsel is authorised or subsequently sanctioned."

Held that where the employment of counsel in the Sheriff Court had not been expressly authorised or subsequently sanctioned by the Sheriff, fees paid to them could not be recovered from the party found liable in expenses, and that such authority or sanction could not be implied from a note on the process by the Sheriff-Clerk, to the effect that the case was to be put out for hearing on a particular day to enable counsel to attend.

In this appeal from the Sheriff Court of Perth the appellants (Wood's Trustees) were found liable in expenses both in the Court of Session and Sheriff Court. The Auditor allowed a fee to counsel for attendance on the debate in the Sheriff Court. On the motion for the approval of the Auditor's report counsel for the appellants objected to the charge in respect that the employment of counsel had neither been authorised nor subsequently sanctioned by the Sheriff, as required by Act of Sederunt, December 4, 1878. No such authority or sanction appeared in any interlocutor by the Sheriff, but there was a note on the process by the Sheriff-Clerk, to the effect that the case was put out for a certain day to enable counsel to attend.

The respondent argued that this was sufficient to infer the Sheriff's sanction.

LORD PRESIDENT—Looking to the terms of the regulations regarding the employment of counsel in the Sheriff Court, which require that the employment should be either antecedently authorised or subsequently sanctioned by the Sheriff before the expense can be charged against the opposing party, I do not think that we can grant that part of the respondent's claim, inasmuch as there was neither antecedent authority or subsequent sanction given to the employment of counsel in the present case. It does not appear to me that the interlocutor or order signed by the Sheriff-Clerk can be regarded as giving the requisite authority, seeing that the Sheriff was not asked to apply and did not apply his mind to the question whether the employment of counsel was proper, and although we may think that the case was a proper one for the employment of counsel, we are not entitled to substitute our judgment or the judgment of the Auditor for that of the Sheriff in this matter.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court approved of the Auditor's report with the exception of the fee in question.

Counsel for the Appellant—A. M. Anderson. Agent—W. R. Mackay, W.S.

Counsel for the Respondent — Wilson. Agent—Henry Wakelin, S.S.C.

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