Counsel for the First and Second Parties —Wilson. Agent—R. Cunningham, S.S.C.

Counsel for the Third Parties—Guthrie—Grainger Stewart. Agents—Boyd, Jameson, & Kelly, W.S.

Thursday, June 28.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MANN AND BEATTIE *v.* EDINBURGH NORTHERN TRAMWAYS COMPANY.

Process — Reclaiming-Note—Competency — Leave to Reclaim—Court of Session Act 1868, secs. 27, 28, and 54.

The record in an action of accounting was closed in 1889 and a proof allowed. In 1894 the Lord Ordinary remitted to the Taxing Master of the House of Commons to report on certain objections to the accounts. Against this interlocutor a reclaiming-note was presented within six days, but without the leave of the Lord Ordinary.

Held that the reclaiming-note was by sec. 54 of the Court of Session Act 1868 incompetent, as the interlocutor reclaimed against was not pronounced under sec. 27 of that Act.

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), by sec. 27 enumerates what interlocutors as to future procedure the Lord Ordinary may pronounce at the closing of the record. Section 28 provides that against an interlocutor pronounced under section 27, a reclaiming-note may be presented within six days without leave of the Lord Ordinary, and section 54 enacts that against all other interlocutory judgments a reclaiming-note can only be presented with leave.

The record in an action of accounting brought by the Edinburgh Northern Tramways Company against Mann and Beattie —see June 26, 1891, 18 R. 1140, and H. of L. November 29, 1892, 20 R. (H. of L.) 7—was closed in 1889 and a proof allowed.

Upon 13th June 1894 certain objections to the defenders' accounts having been lodged by the pursuer, the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:— . . . "Remits also to C. W. Campion, Taxing Master of the House of Commons, to report on objection XI." . . .

Against this interlocutor the pursuers reclaimed without leave upon 19th June.

They argued—(1) The reclaiming-note was competent, because it was virtually an interlocutor fixing the mode of proof—*Quin* v. *Gardner & Sons, Limited*, June 22, 1888, 15 R. 776. This was really a new litigation in which new facts had to be ascertained. (2) The Taxing Master of the House of Commons was not a suitable person in the circumstances. He had not the necessary experience, and would pass the accounts as a matter of form. A civil engineer should have been nominated.

Argued for respondents—The reclaiming-note was incompetent, as the leave of the Lord Ordinary had not been obtained—Court of Session Act of 1868, secs. 27, 28, and 54, and A.S., March 10, 1870.

At advising—

LORD PRESIDENT—In the Single Bills notice was taken by the counsel for the respondents in the reclaiming-note that this reclaiming-note was in his judgment incompetent, and we sent the case to the roll, reserving that objection. That objection falls now to be disposed of. In my opinion it is well founded. The reclaiming-note is presented without leave of the Lord Ordinary, and that raises the question whether it is a reclaiming-note falling under section 28 of the Court of Session Act 1868; because, if it is not, then it is excluded by the 54th section of that Act as being without leave. Now, the question whether it is a reclaiming-note under section 28 seems to me to be very easily decided. Section 28 provides that any interlocutor pronounced by the Lord Ordinary under the 27th section shall be reclaimable without leave within six days of its date. I have stated it shortly, but that is the substance of the provision. Accordingly, unless this interlocutor is an interlocutor pronounced under section 27, this reclaiming-note against it is not competent under section 28. Now, the broad facts of this case seem to preclude the idea that this is an interlocutor under section 27. Section 27 is dealing with that stage of the case at which the record is being closed, and the future procedure in the case determined. At that stage parties are allowed to reclaim against an interlocutor of the Lord Ordinary without leave. But then we find in the present case that so long ago as 1889 the closing of the record stage of the case was reached and passed, and the Lord Ordinary in actually closing the record pronounced an interlocutor sending the whole cause to probation. It seems to me that that was the first, last, and only interlocutor reclaimable under section 28 of the Court of Session Act in this case. It is true that the interlocutor reclaimed against is but a mode of ascertaining certain facts; but it may very well happen that in the incidental stages of a case, which has gone to proof and been judged of after proof, there will arise certain matters of detail to be ascertained, and these are just the kind of cases where it seemed very proper that the leave of the Lord Ordinary should be required before another appeal is taken to the Inner House. But it seems to me that while the reason of the Act applied to cases which have somewhat detailed procedure is entirely sound, the more direct and conclusive reason for refusing this reclaiming-note is that on the terms of sections 28 and 27, compared with section 54 of the Act of 1868, this is not a reclaiming-note under section 28.

LORD ADAM—I am of the same opinion. It is very clear that this is not an interlocutor pronounced by the Lord Ordinary as provided for in the 27th section of the Act, and it therefore follows that a reclaiming-note under the 28th section is not competent.

LORD M'LAREN—If I had been considering the question of practice which the Lord Ordinary has disposed of, I should not have had the smallest hesitation in making a remit to Mr Campion, if I believed him to be the most suitable person, without asking the consent of the parties; because in this interlocutor the direction to remit to an engineer is merely administrative, and a proposal to remit to an unnamed person can never fetter the discretion of the Court when the actual remit comes to be made. But I agree with your Lordship that this reclaiming-note is not competent, because the leave of the Lord Ordinary has not been obtained as required by the statute. I mentioned my impression about the authority of the Lord Ordinary in order that Mr Salvesen's clients may not think that they have suffered any prejudice by the circumstance that their agent had not taken the necessary steps to have obtained the Lord Ordinary's leave.

LORD KINNEAR—I agree with your Lordship that the reclaiming-note is incompetent for the reasons which your Lordship has stated.

The Court refused the reclaiming-note as incompetent.

Counsel for Pursuers and Reclaimers—Salvesen. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Defenders and Respondents—Johnston. Agents—A. & G. V. Mann, S.S.C.

Thursday, June 28.

SECOND DIVISION.

ROSS'S TRUSTEES *v.* ROSS.

Succession—Vesting—Period of Payment—Effect of Wife's Repudiation of Testamentary Provisions by Husband.

A truster directed his trustees to pay to his widow an annuity during all the years of her life and as long as she remained unmarried, and "on the death or second marriage of my said wife" he appointed his trustees to realise the residue of his whole estate, and to pay one-half to his brother W. R. and divide the other half equally among the three children of his late brother C. R., and "in the event of the said W. R. dying before the period of payment, which shall be the period of vesting," not leaving lawful issue, the whole residue of the testator's estate was to be divided equally among the children of C. R. or the survivors and their issue *per stirpes*. The testator further provided and declared that the interests of the residuary legatees should vest in them "at and only upon the arrival of the period when the residue of my estate falls to be realised and divided."

The widow repudiated the annuity provided for her, and took her legal rights.

Held (*diss.* Lord Young) (1) that the widow's repudiation of the annuity had not the effect of hastening the period of payment of residue to the residuary legatees, and that the periods of vesting and of distribution did not arrive until the death or second marriage of the widow; and (2) that the trustees were bound to accumulate the income of the residue until the period of distribution.

Muirhead v. *Muirhead*, May 12, 1890, 17 R. (H. of L.) 45, *followed.*

Douglas Ross died on 23rd March 1892, leaving a trust-disposition and settlement dated 2nd October 1889. By the trust-deed he conveyed his whole estate, heritable and moveable, to trustees. After making provision for the payment of debts, sick-bed and funeral expenses, and certain legacies, the testator in the third purpose of the deed directed his trustees "to make over to my wife Christina Cunningham or Ross, as her absolute property, the whole household furniture and plenishing of every description belonging to me at the time of my decease; and to pay her an annuity of £50 sterling per annum during all the years of her life so long as she continues to remain my widow, which sum of £50 stg. per annum shall be paid to her in such proportions and at such times as my trustees may think proper or necessary, and shall be held to be in full satisfaction to her of all claims she may have against my estate; and in the event of my said wife marrying again, said annuity of £50 stg. shall be discontinued. Fourthly, On the death or second marriage of my said wife, I direct and appoint my trustees to realise the whole residue and remainder of my estate, heritable and moveable, real and personal, and to pay and divide the same between my nephew William Ross, son of my late brother William Ross, who shall be entitled to one-half, and the other half shall be equally divided among the said Charles Ross, John Ross, and Jessie Ross, the children of my late brother John Ross, and in the event of the said William Ross dying before the period of payment, which shall be the period of vesting, not leaving lawful issue, then the whole residue of my estate shall fall to and be divided equally among the said Charles Ross, John Ross, and Jessie Ross, and the survivors or survivor of them and their respective issue, the issue in each case being entitled to the share which their parent would have been entitled to on survivance; and I provide and declare that the interests of the residuary legatees shall vest in them at and only upon the arrival of the period