raised in the cause, but it shall not prevent a cause from being held as so decided that expenses, if found due, have not been taxed, modified, or decerned for." The "whole merits of the cause" in terms of the Sheriff Court Act is the same thing as "decision of the whole cause" in terms of the Court of Session Act. But it is quite plain that under sec. 53, the whole cause in the sense of the section may be decided more than once in a multiplepoinding, for in one multiplepoinding there may be more competitions than one, and so it is plain that in that process there may be more than one interlocutor disposing of the whole merits of the cause; but the question is, whether an interlocutor disposing of the whole question as to the fund *in medio* is an interlocutor disposing of the whole merits of the cause. It is maintained that the case of *The North British Railway Co.* v. *Gledden*, 26th June 1872, 10 Macph. 870, settles that question, and that when the fund has been ascertained, and the holder found liable in once and single payment, and the fund consigned, that is the whole case. But there is another question here, viz., whether the rule laid down in that case rules the present. What the Sheriff-Substitute has done by his interlocutor of May 29 is this, he finds "(1), that the question raised in the first head of defence involves the merits of the competing claims, and does not fall to be disposed of at this stage." Now, in so far as that finding is concerned, it disposes of nothing at all; but he finds, "(2), that there is double distress in reference to the fund *in medio;* therefore finds that the action has been competently raised, repels the defences, and decerns, reserving the question of expenses." Now all that is done here is to find that there is double distress, and to repel the defences; but nothing is said about the fund *in medio;* its amount is not ascertained, nor is there any order for consignation; there is no disposal of the question of expenses, but that is reserved. That clearly is not an interlocutor disposing of the whole merits of the cause; the holder of the fund is still in Court, and still holding it, and if there were nothing else in the case but the mere reservation of expenses, that would be conclusive, for it is necessary that they should be disposed of. So it seems to me that the case does not fall under the rule laid down in the *North British Railway Co.* v. *Gledden*, and this interlocutor has none of the characteristics of an interlocutor disposing of the whole merits of a cause.

The Court pronounced the following interlocutor:—

"Sustain the objection to the competency of the appeal; dismiss the appeal, and decern; find the appellant liable in expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for the Appellants—Kinnear. Agent—John Whitehead, S.S.C.

Counsel for the Respondents—Johnstone. Agent—John Galletly, S.S.C.

Tuesday, June 23.

SECOND DIVISION.

[Lord Gifford, Ordinary.

MURRAY *v.* FINLAY.

Act 16 *and* 17 *Vict. c.* 80, § 32—*Action of Removing—Minority—Tack-duty—Arrears.*

Certain heritable subjects were let on a lease for 999 years: an action of removing was thereafter raised in the Sheriff-court against the heir of the original lessee, who was at the time in minority, on the ground that large arrears of tack-duty remained unpaid, and decree was granted. On attaining majority the heir raised a reduction of this decree, and this was opposed on the ground that the arrears at the date of the decree exceeded the value of the subjects at the time. *Held* (aff. judgment of Lord Gifford) that parties were entitled to a proof of their respective averments.

This case came up by reclaiming note against an interlocutor pronounced on the 16th June 1874, by the Lord Ordinary (GIFFORD.)

The pursuer's great grandfather, James Murray, mason, in Catrine, leased certain subjects in the village of Catrine from the defenders, James Finlay & Co., merchants, Glasgow, for 999 years from and after Whitsunday 1825. On the 18th of February 1861 the defenders, James Finlay & Company, as heritable proprietors of the subjects thus leased, raised an action of removing in the Sheriff Court of Ayrshire against the pursuer, John Murray, as great-grandson and nearest and lawful heir in general of the deceased James Murray, and the tutors and curators of John Murray, for their interest as tenants in the said subjects, and also against Helen Murray, mill-worker, residing in Catrine, designed as the present possessor of said subjects. The summons concluded that the pursuer and the said Helen Murray ought, in terms of the Act 16 and 17 Victoria, chapter 80, section 32, to be decerned and ordained to remove from the subjects, on the ground that the tack rent and burdens for 22 years at and preceding the term of Martinmas 1860 were in arrear. The amount of the arrears was said to be £27, 14s. 7½d. When this action was raised the pursuer was in a state of pupillarity, being only nine years of age, having been born in the year 1852. His father was dead, and he had no tutors or curators. The pursuer was therefore *non valens agere*, and not in a position to resist the conclusions of the action. On 9th July 1861 the Sheriff-Substitute held him as confessed, and decerned in removing, as libelled. No tutor *ad litem* to the pursuer was appointed. Immediately after the decree of removing was pronounced, James Finlay & Company entered into possession of the subjects, and have since continued to possess, and draw the rents thereof. The value of the subjects at the date of the decree of removing greatly exceeded the amount of arrears of tack rents alleged to be in arrear. The pursuer attained the age of 21 on 2d June 1873. The defenders in reply averred that since they entered on the possession of the subjects in 1861 they had expended £269, 8s. 1d. in erecting buildings thereon. They did not admit the age or identity of the pursuer, and they maintained that the decree in absence had the same effect, under 16 and 17 Vict., chap. 80 sec. 32, as a decree of irritancy *ob non sol-*

utum canonem has in the case of a feu. Further, that the value of the subjects in 1861 was considerably less than the amount of arrears due, and that in 1825 £19, 19s. was the value of the subjects let, while in 1860 there were no additional buildings, and the whole were in worse repair than in 1825.

The pursuer pleaded—"(1) The decree sought to be reduced having been taken by the defenders against the pursuer when he was only nine years of age, and when he was known by them to be in pupillarity, it is null and void, and reducible. (2) The said decree having been pronounced, to the pursuer's great lesion, when he was a pupil and unable to defend himself thereagainst, the pursuer is entitled now to challenge the same, and to be restored thereagainst. (3) The pursuer, as heir of his great-grandfather and great-grandmother, the lessees in the tack, is entitled to have his right thereto declared, and to obtain decree of removing, as concluded for. (4) The pursuer is also entitled to count and reckoning, and decree for payment, in terms of the conclusions of the summons.

The defenders pleaded—"(1) The pursuer has not set forth, and does not possess, any right or title to sue or insist in the present action. (2) The statements of the pursuer are not relevant or sufficient to support the conclusions of the summons. (3) The arrears of rent at the date of the said decree having exceeded the value of the subjects let, and the said decree being in all respects regular and formal, and the defenders having entered into and continued in possession under the same, it cannot be set aside. (4) The statements of the pursuer being unfounded in fact, the defenders should be assoilzied."

The Lord Ordinary (GIFFORD) pronounced the following interlocutor.—"The Lord Ordinary having heard parties' procurators, before answer, and under reservation of all questions, allows them a proof of their averments in the closed record under 'The Evidence (Scotland) Act, 1866,' on Thursday the 16th of July next, at half-past ten o'clock forenoon; and grants diligence for citing witnesses accordingly."

Against this judgment the defenders reclaimed, and argued—this case falls under the Act 16 and 17 Vict., cap. 80, sec. 32. The decree was not *funditas* null—*Sinclair*, 15th January 1828, 6 S. 336. The pursuer (respondent) maintained that sec. 32 of the Act referred to merely extended the jurisdiction of the Sheriff. The decree against the pupil is either null and void, or there is redress against it. *Bannatyne*, Dec. 14, 1814, F.C.; *Dick*, 6 S. 798, and 7 S. 364.

The Court pronounced the following interlocutor:—

"Refuse the note: Adhere to the interlocutor reclaimed against: Find expenses due by the reclaimer since the date of the Lord Ordinary's interlocutor, and remit to the Auditor to tax and report, and remit the cause to the Lord Ordinary with power to decern for the expenses when taxed."

Counsel for the Pursuer—Burnet. Agent—R. A. Veitch, S.S.C.

Counsel for the Defenders—Dean of Faculty (Clark), Q.C., and Asher. Agents—Webster & Will, S.S.C.

Friday, June 26.

FIRST DIVISION.

[Lord Shand, Ordinary.

JOHN SHIELL *v.* GUTHRIE'S TRUSTEES and GUTHRIES.

Sale by Roup—Beneficial Interest—Idem Venditor et Emptor—*Heritage—Writ.*

In a case where two out of ten beneficiaries under a trust deed employed an agent to bid for and buy the trust property at a public roup—*held* that the sale was not reducible on the ground of their beneficial interest in the subject sold, it not being a case of *idem venditor et emptor*. *Held* that one of the public, who called upon the trustees for conveyance to him of the subject (which was heritable property) at his first bode above the upset price, had no title to sue, in respect that his offer was not in writing.

The late Alexander Guthrie, surgeon in Brechin, conveyed his estate to trustees, defenders of this action, for the benefit of his ten children, of whom two, Misses Clementina and Eliza Guthrie, were also defenders, their interest in the trust estate amounting to one-tenth each. The trustees in the course of realizing the trust estate exposed to public sale a house which formed part of it, at an upset price of £2000, the articles of roup providing that biddings were to advance by not less than £2 at a time. The pursuer, Mr Shiell, offered verbally £2002, and after a competition the subject was knocked down (for £2510) to Mr Lamb, banker, who thereupon declared that he had bought for the defenders, the Misses Guthrie. The pursuer then raised this action for the reduction of the sale to the Misses Guthrie, and for declarator that he was entitled to get the subject at his first bode of £2002, on the ground that the Misses Guthrie were disqualified by their beneficial interest in the subject from bidding at all.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 10*th March* 1874.—The Lord Ordinary having considered the cause, Finds that the pursuer's averments are not relevant or sufficient to support the conclusions of the action; assoilzies the defenders from the conclusions thereof, and decerns: Finds them entitled to expenses: Allows an account thereof to be given in; and remits the same, when lodged, to the Auditor to tax and to report.

"*Note.*—The defenders, Miss Clementina Guthrie and Miss Eliza Guthrie, are daughters of the late Alexander Guthrie, surgeon in Brechin, who died in August 1869, leaving estate, real and personal, the residue of which, amounting to about £30,000, is divisible under his trust-disposition and settlement amongst his ten children in equal shares.

"On 30th July 1873 the other defenders, the late Mr Guthrie's trustees, exposed the house at Townhead of Brechin, in which Mr Guthrie and his family had long resided, to public sale, their purpose being to realise the whole estate of Mr Guthrie for division amongst his children, as directed by his settlement. The defenders, the two Misses Guthrie above named, having become desirous of acquiring the house as their own pro-