Friday, July 12.

FIRST DIVISION.

(SINGLE BILLS.)

ROBERTSON *v.* BRANDES, SCHÖNWALD & COMPANY.

(See *ante*, May 23, 1906, 43 S.L.R. 635, 8 F. 210.)

Expenses—Process—Contract—Arbitration—Expenses of Action where Defender Repudiates Liability but on Action being Raised Calls for Arbitration, and is Successful as to Applicability of Arbitration though Eventually Unsuccessful before the Arbiter.

A merchant claimed damages from a firm from whom he had purchased goods, on the ground that goods of inferior quality had been delivered. The firm repudiated liability, but, on a summons being served, called on the pursuer in terms of the contract to arbitrate, and a question thereupon arose whether the arbitration clause was valid and the dispute covered by it. In the discussion of this question the defenders were throughout successful. The pursuer, who had contested the arbitration but had obtained an award thereunder, asked for the expenses of raising the action and of the discussion in the procedure roll, the other expenses having already been dealt with.

Held that the defenders were not liable in expenses, having been willing to arbitrate, but were not entitled to expenses, having at first repudiated liability.

The case is reported *ante ut supra.*

The action was by John Robertson, grain merchant, Perth, against Brandes, Schönwald, & Company, Place de la Meir, Antwerp, to recover damages for breach of contract, the defenders having delivered, as alleged, goods disconform to contract. On May 23rd 1906, on a reclaiming note, the Division had sisted procedure *in hoc statu*, holding that the arbitration clause in the contract between the parties, and consequently whether the dispute between the parties came within it, fell to be construed by the law of England. An award of damages in arbitration proceedings had now been given to the pursuer, and the case came up upon a note. The only question remaining between the parties was as to the expenses of raising the action and of the discussion in the procedure roll.

The damage claimed had been discovered on the 4th January 1906, and intimated by cable to the defenders on the 5th, when they repudiated liability, and a correspondence had thereafter ensued, in which they had maintained that position. The pursuer used arrestments *jurisdictionis fundandæ causa*, and served his summons edictally on 22nd January. On the 24th January the defenders called upon the pursuer to arbitrate, and there arose difficulty connected with the arbitration (reported in previous report, 43 S.L.R. 635).

The expenses of the arbitration proceedings had been dealt with in the award; the expenses of the reclaiming note had been dealt with in the interlocutor sisting procedure, pronounced thereon on May 23rd 1906; and the expenses of an amendment of the record had been dealt with when the amendment was allowed.

The pursuer moved for the expenses of raising the action and the discussion in the procedure roll, and argued—The result of the arbitration showed that the claim made was in large part well founded. The defenders being foreigners the action was necessary—(1) to arrest, (2) to get a decree, the arbiter having no power to pronounce a a decree. Thus the defenders were liable in the expenses claimed. Arbitration was only offered by the defenders after the summons was served.

Argued for the defenders—The action was unnecessary, and the pursuer had been uniformly unsuccessful in this Court though he had succeeded before the arbiter; therefore the defenders were entitled to the expenses, they having all along been willing to arbitrate. *Levy & Co.* v. *Thomsons*, July 10, 1883, 10 R. 1134, 20 S.L.R. 753, was referred to.

LORD PRESIDENT — The point to be decided here is a question of expenses. The pursuer is a merchant in this country who had bought a certain quantity of slag from the defenders, who are a foreign firm, and the action is an action for damages for faulty delivery of the slag. The action having been raised, the defenders pleaded an arbitration clause. There was a decision by the Lord Ordinary on that point, which was affirmed by your Lordships, with the result that the dispute had to go to arbitration. The arbitration then proceeded, and in it the pursuer got an award of a sum of money as damages and also an award of expenses. The defenders have paid these sums; so there is now no question that the action must be taken out of Court, and that, in consequence of the payments I have referred to, the defenders are entitled to be assoilzied.

There only remains the question of expenses. Now the expenses of the cause have to a great extent been already dealt with. An amendment of the record was allowed and the expenses of the amendment have been disposed of. So also have the expenses of the reclaiming-note to this Court; and the only expenses now remaining to be dealt with are the expenses of the raising of the action and of the discussion in the procedure roll. Now, I am not aware that this is a point which has yet been settled by decision—at any rate no trace of it is to be found in the case of *Levy & Company* v. *Thomsons*, July 10, 1883, 10 R. 1134. In that case there is nothing in the books to show what happened in the preliminary stages. Here, however, we have some correspondence, from which it is quite clear that the defenders were all along quite willing to arbitrate. There

may be cases where a pursuer is entitled to bring the defender into Court—where, for instance, the defender refuses either to pay or to arbitrate—and in such cases, if the defender subsequently pleads arbitration, the pursuer would naturally be entitled to recover the expenses of raising the action. But I think that, following on what was said in *Levy*, where as here the defender is all along willing to arbitrate, the pursuer cannot recover the expenses of raising the action.

On the other hand, I do not think the defenders here are entitled to an award of their expenses, for they have been to a certain extent in the wrong, since they disputed their liability for any payment at all. We shall therefore pronounce a decree of absolvitor and find no expenses due to or by either party.

LORD KINNEAR and LORD DUNDAS concurred.

The Court recalled the sist and assoilzied the defenders, finding no expenses due to or by either party.

Counsel for the Pursuer—Morison, K.C. —T. Graham Robertson. Agents—J. & J. Galletly, S.S.C.

Counsel for the Defenders—Boyd. Agents —Boyd, Jameson, & Young, W.S.

Tuesday, July 16.

SECOND DIVISION.

M'ALPINE AND OTHERS (M'LAREN'S TRUSTEES) *v.* M'LAREN AND OTHERS.

Succession—Accretion—Repugnancy—Vesting—Intestacy—Residue—Vesting subject to Defeasance—Presumption.

A testator appointed his trustees "to hold the free residue and remainder of my estate, heritable and moveable, . . . and to apply the same for behoof of my sister" Mrs M'A. "and her children, or such of them as shall be alive at my death, in manner following: That is to say, the said residue and remainder of my said estate shall be divided into eight equal parts or shares, and the said" Mrs M'A "shall be entitled to one of said shares, and her children" J., R., E., and G. "shall each be entitled to one of said shares, and" M. and A., two other children, "shall be entitled equally between them to three of said shares." The trustees were directed to "pay" to sons their shares on attaining twenty-five years, and to daughters on attaining that age or being married, "but said provisions of residue in favour of the children of my said sister shall not vest until they respectively attain the said age, or being daughters respectively attain said age or be married; and . . . in case any of said children shall predecease me or die before his or her share of residue becomes vested, leaving lawful issue alive at the period for vesting, such issue shall be entitled, and that equally amongst them if more than one, to the share or respective shares which his or her or their parent would have taken if alive, and the same shall become payable . . .; and providing and declaring that it shall be in the power of my trustees, if they see fit, to apply the free proceeds or income of the presumptive share of any child or lawful issue foresaid . . . towards his or her maintenance, education, or advancement in life."

M. survived the testator, but died, intestate and unmarried, without having attained the age of twenty-five.

Held (*dissenting* Lord Low) that the share of residue destined to M. had fallen into intestacy of the testator, inasmuch as (1) there was no accretion, the gift being a series of separate bequests—*Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191, 23 S.L.R. 830, *followed*; and (2) the word "vest" was to be read in its ordinary sense, the deed being clear and there being no repugnancy.

Opinion per Lord Low that the share of residue destined to M. was intestate succession of M. and not of the testator, and that "vest" must be read as "obtain an absolute and indefeasible right," inasmuch as otherwise the vesting clause was repugnant since M. took *a morte testatoris*.

John M'Laren, grocer and wine merchant, Dunblane, died on 26th July 1900, leaving a trust-disposition and settlement dated 10th August 1899, and registered in the Books of Council and Session 28th July 1900. The residue of his trust estate consisted of heritable properties in Dunblane valued at £2850, but subject to a heritable debt of £1000, and moveable estate amounting to £197, 9s. 2d.

The purposes of the trust-disposition, whereby the testator conveyed his whole estate to trustees, were (1) to pay debts and the expenses of executing the trust; (2) to allow two nieces of the testator, Mary Hastie M'Alpine and Agnes Roy M'Alpine, or either of them, not being married at his death and so long as they should remain unmarried, the use rent free of one of his houses and of the whole household furnishings belonging to him, with provisions as to survivorship, etc.; (3) "Subject to the foregoing provisions and payment of any further provisions or legacies I may hereafter make or leave, I appoint my trustees to hold the free residue and remainder of my estate, heritable and moveable, real and personal, above conveyed and to apply the same for behoof of my sister Mary M'Laren or M'Alpine, wife of John M'Alpine, Grafton Square, Glasgow, and her children or such of them as shall be alive at my death, in manner following: That is to say, the said residue and remainder of my said estate shall be divided into eight equal parts or shares, and the said Mrs Mary M'Laren or M'Alpine shall be entitled to one of said shares, and her children John M'Alpine, Robert