

footing, and it is very much to be regretted that the wife's savings, which are very creditable to her, as well as the husband's earnings, should have been squandered in this discussion.

The other Judges concurred.

SMITH v. EDINBURGH AND GLASGOW
RAILWAY COMPANY.

Statute—*Construction*—*Railways Clauses Act*—*Special Amalgamation Statute*. Terms of a statute amalgamating two railway companies which held (aff. Lord Ormisdale) not to exempt the dissolved company from liability to be sued for payment of a claim of damage arising before the date of amalgamation.

Declinator. A judge is not entitled to decline on the ground that he is a shareholder in a company having an interest in the result of an action, but not a party to it.

Counsel for Pursuer—Mr Gordon and Mr Scott. Agents—Messrs Macgregor & Barclay, S.S.C.

Counsel for Defenders—The Solicitor-General and Mr Blackburn. Agents—Messrs Hill, Reid, & Drummond, W.S.

This is an action of damages for personal injuries said to have been suffered by the pursuer on 27th May 1865 through the fault of the defenders. The summons was signeted on 2d October 1865. A preliminary defence was stated by the defenders that the action was incompetently directed against them, because by the Act amalgamating their company with the North British Railway Company the former company was dissolved from and after 1st August 1865. This defence was repelled by the Lord Ordinary (Ormisdale), and the defenders reclaimed.

Lord DEAS stated, shortly after the debate commenced, that as the defence seemed to be that the North British Railway Company, and not the defenders, were the parties liable, he begged to decline judging, as he was a shareholder in the North British Company. The Court having considered the declinator, unanimously repelled it, in respect the North British Railway Company were not parties to the action.

The plea stated depends on certain sections of the Amalgamation Act (28 and 29 Vict. c. 308) and of the Railways Clauses Act 1863 (26 and 27 Vict. c. 92).

By the 1st section of the Amalgamation Act, Part V. of the Railways' Clauses Act 1863 is incorporated therewith; by the 2d it is declared that the Edinburgh and Glasgow Railway Company shall be dissolved on the 1st of August last (1865) and transferred to and amalgamated with the North British Railway Company, and by the 12th it is provided that "all monies belonging or due to the dissolved company upon revenue account at the date of the amalgamation shall be assets of that company; and all sums due from the dissolved company upon revenue account at the date of the amalgamation shall, as between that company and the (amalgamated) company be debts of the dissolved company, and the dissolved company shall continue to exist for the purpose of enforcing payment of, receiving, and administering such assets, and paying such debts, as if this Act had not been passed; and the directors of the dissolved company at the date of amalgamation, and the survivors of them, shall continue to be such directors for these purposes; and, when all claims on the said revenue accounts are discharged, shall divide the balance remaining on the said account among the holders of Edinburgh and Glasgow Preference and Ordinary stock, according to their several rights and interests therein."

By section 40 of the Railways' Clauses Act it is enacted—"Except as may be otherwise provided in the Special Acts, all debts or money due from or to the dissolved company, or any persons on their behalf, shall be payable and paid by or to the amalgamated company; and all tolls, rates, duties, and money due or payable by virtue of any Act relating

to the dissolved company, from or to that company, shall be due and payable from or to the amalgamated company, and shall be recoverable from or by the amalgamated company by the same ways and means, and subject to the same conditions, as the same would or might have been recoverable from or by the dissolved company, if the amalgamating Act had not been passed." And by section 42 it is enacted—"All causes and rights of action or suit, accrued before the time of the amalgamation, and then in any manner enforceable by, for, or against the dissolved company shall be and remain as good, valid, and effectual for or against the amalgamated company as they would or might have been for or against the dissolved company affected thereby, if the amalgamating Act had not been passed."

The Court to-day adhered to the Lord Ordinary's interlocutor, Lord Deas dissenting.

The LORD PRESIDENT said—In this case the injury complained of occurred before the amalgamation; the action was not raised till after it. The objection is that the action could only be competently directed against the amalgamated company. The question is, whether it has been competently directed against the defenders. I am humbly of opinion that it has. There can be no doubt that the grounds for the action existed before the amalgamation, and that if it had been raised before the amalgamation, as it might have been, it must have been directed against the defenders. Has this right been taken away by the Amalgamation Act? The Railways' Clauses Act is a general Act, and by section 37 companies shall be deemed amalgamated by a Special Act in either of the following cases:—"(1) Where by the Special Act two or more companies are dissolved, and the members thereof respectively are united into, and incorporated as, a new company; (2) Where by the Special Act a company or companies is or are dissolved, and the undertaking or undertakings of the dissolved company or companies is or are transferred to another existing company, with or without a change in the name of the company." It is in the last of these predicaments that the present case stands. But this Act is framed so as to meet the case of a total dissolution, as well as such a case as the present, which is not so. The Special Act provides that the company shall be dissolved except to certain effects. It is still a subsisting company for these purposes. It has its directors and the necessary machinery for carrying out these purposes. Sections 40 and 42 of the General Act plainly have reference to the case of total dissolution. The object of these sections was to preserve rights of action which, without them, would have been altogether cut away in the case of a total dissolution. This is not such a case. Section 12 of the Amalgamation Act gives the defenders exclusive right to all funds in the revenue account, and exclusive power over them, to administer and dispose of them in such a way that none shall ever go to the amalgamated company. The only difficulty arises from the words "as between that company and the (amalgamated) company." It was contended that this showed that the clause was meant solely as an arrangement betwixt the two companies. But in article 7 of the minute lodged by the defenders they say—"The only purposes for which the defenders, since the said 1st of August 1865, exist as a separate company are set out in the 12th section of the said Amalgamation Act, and are—1st, for the enforcing payment of, and receiving and administering the assets of the company, which assets are defined in the said section to be all monies belonging or due to the dissolved company upon revenue account at the date of amalgamation; and 2d, for paying debts which are in the said section defined to be all sums due from the dissolved company upon revenue account at the date of amalgamation, which debts shall, as between the dissolved company and the amalgamated company, be debts of the dissolved company." I cannot therefore read this section in any other way than as saying that the company exists for recovering and paying all sums due on revenue ac-

count. The defenders alone can raise action for such sums. The amalgamated company cannot, and they have no claim of relief against the amalgamated company for the claims they pay. I think the word "debts" must be read comprehensively, as meaning all claims, and they are so called in a subsequent part of section 12. In one sense the sum here sued for is not a debt. It is not yet constituted; but it is a liability which, when constituted, becomes a debt payable out of the revenue account, and which, as betwixt the two companies, must be so paid. Though the pursuer may have also a right of action against the amalgamated company—a point on which I do not consider it necessary to give any opinion—I think that company would be entitled to get relief from the defenders out of their revenue account. But it is enough to say that in the defenders the pursuer has a proper debtor, against whom he is entitled to direct his action.

Lord CURRIEHILL concurred. This claim was due on 27th May 1865. Diligence might have been then used for the purpose of securing it. If the Edinburgh and Glasgow Company had been wound up under the winding-up Acts the claim might have been recovered without action. Action and decree only liquidate a debt. This was a debt payable not out of the capital but out of the revenue. According to the rules of all such companies, the directors could not have paid it out of capital as long as there was revenue to meet it. This claim is said to have been extinguished on 1st August 1865 by delegation, the creditor having got one debtor instead of another. But in order to make out this it is not enough to say that the creditor has got an additional debtor. There must also be the extinction of the claim against the original debtor. That is sometimes the case in the amalgamation of companies. It would have been the case here if all the property and obligations had been transferred. But there is only a partial transference. For certain purposes the company is kept in subsistence, and the payment of the pursuer's claim, if it is well founded, is one of them.

Lord DEAS differed. He thought the action was directed against the wrong party; but at all events that both companies ought to have been made parties, on the principle that all parties interested should be called. The general Act was perfectly clear. The whole question was whether there was an exception introduced by the special Act. He thought that section 12 could only be read as creating an arrangement betwixt the companies themselves, and not as taking away any right which a third party had. The only ground for going against the defenders is that they remain in possession of a portion of the funds; but who ever heard of an action of this kind against a fund? The defenders have not the capital, which is also liable. The whole revenue may be divided or attached by creditors before this pursuer gets his decree. There is no law to compel a company to pay such claims as this out of revenue. They may be in the habit of doing so, but that practice they may change to-morrow. The creditor has no concern with that. There is here a complete transfer, subject only to an arrangement about the revenue account.

Lord ARDMILLAN agreed with the majority. There was no difficulty in construing each of these statutes taken by itself. The difficulty arose from the two touching each other. But the general Act applies to cases where one company is absorbed in another. With no obligations, liabilities, or powers of administration left to it. If there is in the special Act an exception, a sum of money severed from the rest, if there are reserved a right of administration, a power to recover and a liability to pay debts, for which a dissolved company is still to subsist, then the general Act must be read as qualified by the exception embodied in the special Act. These Acts were not meant to injure the rights of creditors who have their claim against both capital and revenue. If the revenue account proves insufficient, then the creditor may go against the amalgamated company which has got the capital. It is just to

save such a right that the words "as betwixt the companies" are introduced. If the action is well laid against the defenders, there was no use of calling any one else. There is no plea to that effect. But, farther, though the amalgamated company were called and found liable, it would have a claim of relief against the defenders under section 12 of the Special Act.

SECOND DIVISION.

GARDINER v. BLACKWOOD.

Diligence—Arrestment in Security—Recal. Nature of a claim which held (alt. Lord Barcaple) to warrant arrestment on dependence.

Process. A petition for the recal of an arrestment on dependence ought to be addressed to the Lord Ordinary before whom the action depends, and not to the Lords of Council and Session.

Counsel for the Petitioner—The Lord Advocate and Mr Mackay. Agent—Mr Alexander Howe, W.S. Counsel for the Respondent—Mr Gordon and Mr Lee. Agents—Messrs Horne, Horne, & Lyell, W.S.

This is a petition for recal of arrestments used upon the dependence of an action of count and reckoning. The Lord Ordinary, on 15th December last, pronounced an interlocutor recalling the arrestments. A reclaiming note against this interlocutor was lodged on 4th January 1866, the box-day in the Christmas recess. The respondent objected to the competency of the note, on the ground that the 1st and 2d Vic. c. 114, section 20, required it to be lodged within ten days from the date of the interlocutor reclaimed against, and that it had been decided in *Lockhart v. Cumming*, 27th May 1851 (13 D. 996), that this provision applied even when the ten days expired before the box-day in vacation or recess. The petition for recal of arrestments had been addressed to the Lords of Council and Session, and not to the Lord Ordinary; and, on the suggestion of the Court, the claimer argued that this was not a competent petition under the above Act, which gives power to the Lord Ordinary to recal or restrict arrestments on the application of the debtor or defender, duly intimated to the creditor or pursuer. He also impeached the authority of *Lockhart v. Cumming* on the ground that it was impossible to lodge a reclaiming note before the box-day, the clerks' office not being open in vacation. The Court, without deciding either point, of consent held the petition to be now before the Inner House, and appointed parties to be heard on the merits; but the Lord Justice-Clerk and Lord Cowan expressed a strong opinion that the address of the petition was irregular, and the interlocutor of the Lord Ordinary null, his jurisdiction not having been competently evoked. The Court then proceeded with the case upon the merits. The action is one of mutual accounting among partners, the object being to obtain a final settlement. The summons founds upon a certain state of accounts and continuation thereof, and concludes that such of the defenders—that is, the whole other partners—as shall appear on an accounting to be debtors to the pursuers, shall be decreed to make payment of the amount that shall appear to be due to them, "and that conform to the said state of accounts and continuation thereof, or in such other manner and proportions" as may be ascertained in the course of the process—"the pursuers being always ready to make payment to the defenders, or any of them, of any balance that may be due by the pursuers to them respectively, if after such count and reckoning it shall appear that such balance is due."

The Lord Ordinary (Barcaple) held that there was not here such an absolute and unambiguous statement of a claim and demand for payment against any particular partner as to warrant the protective diligence of arrestment on the dependence. The Court to-day held there was, altered the interlocutor of the Lord Ordinary recalling the arrestments, and refused the petition.