tial changes as to make it in substance a new issue, and that it may not be therefore convenient in the course of adjustment to have the remodelled issue in a clean draft before adjustment. But the statutory system is that the Lord Ordinary having begun, must go through the work of adjusting issues and then quit it. It seems entirely inconsistent with the procedure prescribed by the Act that he should proceed piecemeal first to take up one issue and refuse it, and then take up another issue and refuse it, and that by interlocutors extending as here over a period of two months. Now, this report brings before us this process under somewhat singular conditions. I suppose that it may be said that a Lord Ordinary may report any cause at any stage; but it is, at least, equally certain that the Court, dealing with the cause upon the report, can deal with it only as regards its future progress, and cannot touch any interlocutor which has been pronounced in the Outer House up to the point of the report. Therefore we have it not in our power to reconsider, review, or recal, any of the interlocutors by which the case has, if I may say so, been embarrassed in the past. We can only consider what is to be done with the case as regards its future progress, the previous interlocutors being final, although they may lead by process of logic to certain inevitable conclusions. I think, therefore, that we are not in a position to do better for the case than to remit to the Lord Ordinary to proceed. I am against giving any instructions at all as to what the future procedure ought to be, because it may well turn out that, in consequence of the pass into which the cause has been brought by the somewhat irregular procedure, there will be a serious question whether more or better can be done than to dismiss the action. I say no more than that that is a question; but as matters at present stand, it is a question for the Lord Ordinary, and not for us, to decide. Our hands remain entirely free to dispose of the question if and when it is brought before us by a competent form of procedure. At present we are, as regards the past, powerless, and as regards the future the Outer House is the proper tribunal in which to extricate the matter.

LORD ADAM—I concur.

LORD M'LAREN—I also agree. I think that we should not be able to adjust an issue under this report. When we proceed in the ordinary course to adjust an issue, the whole case is open to us, while as the case now stands the Judge has refused one issue, and as regards another has not allowed it to be put in. Supposing it to turn out that we should think one of the rejected issues suitable for the trial of the case—I am not suggesting that it is suitable but it is a possible view—then, as there is no reclaiming-note against the interlocutors disallowing the issues, we should be disabled from giving effect to our view. I mention this to show that if we were to consider the case on the merits we might find ourselves in an *impasse;* therefore we must replace the case in the position in which it was before the Lord Ordinary made his report.

LORD KINNEAR—I am entirely of the same opinion. The Lord Ordinary has presented a report upon the mistaken assumption that the 38th section of the statute of 1850 is still in force and regulates the procedure now to be followed. I agree with all of your Lordships that that is entirely erroneous, and indeed the contrary is not maintained. That that section of the statute has been repealed, and that the matter is regulated by subsequent legislation, there can be no doubt. That does not prevent the Lord Ordinary from reporting any question upon which he desires to be advised by the Court. But his Lordship's interlocutor states no such question. We cannot deal with the procedure which has already taken place, because there are a number of interlocutors which cannot be brought before us otherwise than by reclaiming-note. Therefore I quite agree that the only practicable course is to remit to the Lord Ordinary to proceed, leaving his Lordship and the Court free to consider what the proper course of procedure in the present stage of the process ought to be.

The Court remitted to the Lord Ordinary to proceed with the cause.

Counsel for the Pursuer—Jameson, Q.C. —M'Lennan. Agent—T. M. Pole, Solicitor.

Counsel for the Defenders—Ure, Q.C.—T. B. Morison. Agent—Peter Morison, S.S.C.

Friday, June 18, 1897.

OUTER HOUSE.

[Lord Stormonth-Darling.

CAIRNS *v.* DICKSON AND OTHERS.

Company—Directors—Liability—Directors Liability Act 1890 (53 *and* 54 *Vict. c.* 64), *sec.* 3.

Circumstances in which *held* that a shareholder in a company which had fallen into liquidation had failed to prove such misrepresentations of fact on the part of the directors as to infer liability on their part either at common law or under the Directors Liability Act 1890.

This was an action at the instance of Andrew Cairns, ironfounder, 321 Rutherglen Road, Glasgow, against James H. Dickson and others, directors of the Employers Insurance Company of Great Britain, which fell into liquidation in July 1895, concluding for payment of £441, 17s. 11d., being the amount paid by him for shares in the said company, *plus* the calls made thereon, and *minus* the dividends paid thereon.

The nature of the pursuer's averments and the facts elicited by a proof are set

forth in the opinion of the Lord Ordinary. By section 3 of the Directors Liability Act 1890 it is provided as follows:—"(1) When after the passing of this Act a prospectus or notice invites persons to subscribe for shares in, or debentures, or debenture stock of a company, every person who is a director of the company at the time of the issue of the prospectus or notice, and every person who, having authorised such naming of him, is named in the prospectus or notice as a director of the company or as having agreed to become a director of the company, either immediately or after an interval of time, and every promoter of the company, and every person who has authorised the issue of the prospectus or notice, shall be liable to pay compensation to all persons who shall subscribe for any share, debenture, or debenture stock, on the faith of such prospectus or notice, for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any report or memorandum appearing on the face thereof, or by reference imported therein or issued therewith, unless it is proved (*a*) with respect to every such untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares, debentures, or debenture stock, as the case may be, believe that the statement was true."

On 18th June 1897 the Lord Ordinary (STORMONTH DARLING) assoilzied the defenders from the conclusions of the summons.

Opinion.—"This is an action at the instance of a shareholder in the Employers Insurance Company of Great Britain, Limited (now in liquidation), against the directors of the company as individuals, to recover compensation for the loss which he has sustained by becoming a shareholder. That loss he measures by the price which he paid for the shares, *plus* the calls thereon with interest, *minus* the dividends which he received with interest. The ground on which he seeks to make the directors liable is that he took the shares in three lots of 30, 30, and 40 respectively on the faith (1) of a prospectus and circular of June 1891 addressed to the public, and containing extracts from the reports and balance-sheets for 1889 and 1890; (2) of a circular of March 1892 addressed to the shareholders, together with the report and balance-sheet for 1891; and (3) of a circular of April 1893 also addressed to the shareholders, together with the report and balance sheet for 1892. These documents, he says, contained untrue statements, which were made by the defenders either fraudulently or at least without any reasonable ground for believing them to be true. In other words, the action is laid alternatively at common law and under the Directors Liability Act of 1890.

"The charge of fraud was not withdrawn by the pursuer's counsel, but it was very faintly urged. There is, in my opinion, not the smallest foundation for it. The directors may have erred in judgment, and they were undoubtedly sanguine in their view of the company's prospects, but I think there can be no doubt that they believed the statements they made and honestly entertained the opinions they expressed. Most of them from time to time increased their holding in the company, and there was nothing like unloading on the part of any of them.

"The pursuer's case, if he has any, rests entirely on the Act of 1890. That Act arose out of the judgment of the House of Lords in *Derry* v. *Peek*, 14 App. Ca. 337; and the change which it made in the law is that a director is now liable for something which in *Derry* v. *Peek* he was held not to be liable for, *i.e.*, for 'a false statement made through carelessness and without reasonable ground for believing it to be true.' Moreover, there is now a shifting of the onus, for so soon as the pursuer has proved the untruthfulness of the statement, his subscription on the faith of it, and the damage resulting therefrom, the defender's liability arises, unless he can prove that he believed the statement and had reasonable ground for his belief. There is here undoubtedly a considerable widening of the area of liability, but its limits are statutory and must be strictly observed. The Act does not make directors liable to shareholders for general mismanagement, nor for oversanguine policy. The new liability is based entirely upon untrue statements which induce a man, whether he be an existing shareholder or not, to subscribe for shares, and the untrue statements must be made in a prospectus or notice, or in a report or memorandum, either appearing on the face of the prospectus or notice, or by reference incorporated therein, or issued therewith. Moreover, the untrue statements must be in the region of fact, and not of opinion. That being so, it is necessary to attend very closely to the statements which are complained of. And *First*, with reference to the circular and prospectus of June 1891, it is not said that these documents in themselves contain any misrepresentation of fact except in so far as they assert the soundness of the company's financial position, and, by way of proving it, reproduce extracts from the report and balance-sheet for the ten months ending 31st December 1889, and from the report and balance-sheet for the year ending 31st December 1890. When I turn to these reports I do not find that they state any figure, so far as taken from the books, incorrectly. The first report, which was only for the first ten months of the company's operations, proceeded on the principle of debiting actual payments (for claims, commission, expenses of management, and the like), and bringing out a balance of £3668, 6s. 5d., out of which the directors proposed to write off a sum for preliminary expenses, and to pay the sum of £341, 8s. 9d. as dividend at the rate of 4 per cent., leaving a sum of £3031, 3s. to be carried forward to the following year. The pursuer says he was not aware that this

sum was subject to future claims arising out of current policies. If so, all I can say is that his ignorance was inexcusable, because it was evident on the face of the report, that there was no other source from which such claims could be met. His real complaint is, that as things turned out, the small sum paid by way of dividend ought not to have been paid. But even if that were so (and I am not convinced of it, for the accountants differ as to the figures) it is clear that the directors had not the means of knowing it in June 1891. Similarly, with regard to the report for the year 1890, in which the directors proceeded on the principle of estimating the outstanding claims for the year, and also of making specific provision for possible claims on unexpired policies, it is said that both of these estimates were insufficient, and that if proper sums had been set aside there would have been nothing left for the dividend of 5 per cent. (amounting to £804, 5s.) which was actually paid. But neither in March 1891, when the balance-sheet was prepared, nor in June 1891, when the prospectus was issued, had anything occurred to certiorate the directors that these estimates were insufficient. Thus, the figure which they had put upon outstanding claims as at 31st December 1890 was £1370. No doubt in the end that sum was exceeded, but Mr Moore's own figures prove that by June 1891 it had not been exhausted. The evidence shows that a comparatively small proportion of the claims sent in resulted in payment, and that payment was often delayed for months and even years by negotiation and litigation. It also shows that the auditor regularly insisted on obtaining estimates of outstanding claims not only from the manager but from the agents at the principal centres.

"The truth is that estimates of this kind can only be made to the best of the judgment of the person making them. They are not, and they do not profess to be, statements of fact. I do not say that directors would be justified in asserting the financial soundness of an insurance company if they had neglected altogether to take so obvious and necessary a precaution as to provide for outstanding claims and unexpired risks. That would be a degree of recklessness which would bring them, I think, within the lash of the Act. Nor do I say that they would be justified in putting forth *ex intervallo* estimates which had been honestly made at the time, but which subsequent events had clearly shown to be wrong. On the other hand, they cannot be held as warranting the accuracy of their estimates. They can only make them on the best information to be obtained from their officials, with such aid as may be derived from the experience and practice of other companies doing similar business. And they are not bound to be constantly burrowing in the books for the purpose of checking the information which they receive. Their responsibility for founding on a report and balance-sheet some months old goes no further than this—that they ought not to put it forward as representing the actual state of things if it is shown to be inaccurate in material respects by such emerging facts as ordinarily and naturally fall within the cognisance of directors.

"I complete what I have to say upon the circular and prospectus of June 1891 by a single observation on the pursuer's objection that the defenders made no allowance for bad debts and cancelled premiums. It would not be fair to make a deduction for cancelled premiums without also making an addition for what are called 'endorsements,' *i.e.*, for increased premiums, and of these the pursuer takes no account. But it is not usual or necessary to make any such allowance on either side, for the thing rights itself as time goes on by the cancelments or endorsements of one year diminishing or increasing the income of the next. So as to bad debts.

"With regard to the circular of 24th March 1892, it is not said that it contains any untrue statement. The pursuer's objections are entirely founded on the report issued to the shareholders on 12th March. But that report did not appear on the face of the circular; it was not by reference incorporated therein; and it was not issued therewith. Therefore, in my view, it is not within the statute at all. Even assuming that it can be looked at for the purposes of this case, I find that the pursuer's criticisms on it are just repetitions of what he had to say on the earlier reports. The figures are different, but the grounds of attack are the same. They all come to this, that the directors underestimated their future liabilities, and that instead of recommending a sum of £1054, 16s. as dividend at the rate of 6 per cent., they ought not to have recommended any dividend at all. I am not satisfied that in this particular case the estimates were insufficient, but even if they were they do not seem to me to fall within the category of untrue statements.

"It is only when we come to the circular of 24th April 1893 that the case, in my view, presents any real difficulty. The pursuer seeks to connect this circular with the report and balance-sheet for 1892 in this way. The two documents were not sent out together, for the report had been issued eleven days before the circular. But the circular contained the words, 'As a shareholder of the company you are aware that its progress has been very satisfactory.' And the pursuer says that those words necessarily incorporate by reference the immediately preceding report. I am inclined to think that this contention is well founded.

"Now, the balance-sheet for 1892 is fuller and more detailed than any of its predecessors, because it had been personally revised with more than ordinary care by Mr Mair, the skilful and experienced auditor of the company. It showed that the expenditure of the year had exceeded the revenue by close on £1100. It showed that the losses had nearly equalled the premiums in the fire department. It also showed to anyone like the pursuer, who had the means of comparing it with the

report of the year before, that the balance at the credit of revenue account was very much diminished, although the income from premiums had largely increased. These were all disquieting figures, and were not calculated, I should have thought, to encourage any shareholder to increase his holding. The figures are not challenged by the pursuer, except in so far as the revenue was represented as including a premium of £1250 which had been cancelled prior to 31st December 1892, but it is certain that the directors were ignorant of this fact, and had not the means of knowing it. The real attack of the pursuer is not on the figures of the balance-sheet, but on the language of the report, and on the directors' recommendation of a dividend at the rate of 6 per cent., in face of a statement made up by the auditor for their information.

"That statement is printed. I say nothing of the two letters which Mr Mair addressed to the directors on 6th and 13th April, because there is some doubt if these ever reached the board, and they do not materially add to the information contained in the statement. Undoubtedly it was a document which demanded very grave consideration. Mr Mair explains that its main purpose was to convince the directors that they ought to give up the fire business altogether. It showed a loss in that department, and a gain on the accident and guarantee business. But even in this department it suggested the setting aside of one-third of the annual premiums as a provision for unexpired risks, which would have absorbed all the available credit balance, and have left nothing for dividend. Mr Mair admits that if he had been asked, he would have advised that no dividend should be paid.

"In the face of such a communication I think it would have been well if the directors had resolved not to recommend the payment of a dividend, and had also modified somewhat the language of their report. They were perfectly candid about their fire losses, and they announced their resolution to discontinue that branch of the business altogether. But they reported that 'the company's general business continues to be profitable,' and again that 'experience has proved that the company's accident business is both sound and lucrative.' I cannot wonder that shareholders who were told this in April 1893, and who took more shares in consequence, should have been rather disgusted to find that within four months the directors were compelled to make a call of £1 per share, that in July 1894 the capital had to be reduced from £5 a share to £3, 2s., and that in July 1895 the company had to go into liquidation. At the same time it must be admitted that the directors were placed in a difficult position. They had every reason to believe that the accident business was worth carrying on, and if they were to do so, it would undoubtedly have given a great shock to the company's credit to discontinue suddenly the payment of a dividend. They also, I think, may fairly have considered that Mr Mair's proposed retention of one-third of the premiums was unnecessarily cautious. It was certainly more than other companies of similar standing, and doing similar business, were in the habit of retaining. On the whole, I cannot come to the conclusion that anything which they said in the report amounted to an untrue statement, within the meaning of the Act.

"The subsequent history of the company tends, I think, to support this view. But for the failure of the Australian Banks it might have weathered the storm. I do not mean to say that any branch of the business was of a high class, or that the risks as a whole were prudently selected, or that the estimates were cautiously framed. But the evidence shows that the two main causes of the company's downfall were losses on the fire business, which chiefly consisted of reinsurance, and the locking-up of its funds caused by the Australian crisis, which culminated in the latter part of 1893. If these calamities had not occurred—and their full effect was not known till after April 1893—I think the company might have recovered its position, and might, with improved management, have now been doing a fairly prosperous business.

"On the whole matter I have come to the conclusion that the pursuer has failed to prove such misrepresentation of facts as to infer liability on the part of the defenders, and that they must therefore be assoilzied.

"On the construction of the statute no aid is to be derived from authority. The present case is, I believe, only the second which has arisen under the Act either in England or Scotland. The first (*Smith* v. *Moncreiffe and Others*, July 6, 1894, 2 S.L.T. 140) was decided by me as Lord Ordinary, but I am informed that it was afterwards settled, and so never came under the review of the Inner House. My judgment was against the directors in that case, and I do not recede from anything I then said on the construction of the Act. But the circumstances were very different. It was the case of a company like the present doing miscellaneous insurance business, and the statements in the prospectus complained of were that the company had earned a particular dividend, and that it possessed a premium reserve of specified amount. But the inaccuracy of these statements was practically admitted by the directors, for within five months of issuing the prospectus they addressed a circular to the new shareholders offering to present a petition to the Court for the purpose of having their names removed from the register, on the ground that 'a grave injustice' had been done to them, inasmuch as subsequent investigations had shown that no profit had been earned for the previous year, and that the sum treated as a premium reserve had been more than exhausted before the prospectus was issued. There was, therefore, no question as to the statements being untrue, and the

only question was whether the directors had proved that they had reasonable grounds for believing them. I thought they had not, one reason being that they had not even attempted to make any provision for outstanding claims. But that is a very different thing from making a substantial estimate which only proves inadequate in the light of subsequent events."

Counsel for the Pursuer—Dundas, Q.C.—Salvesen. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Defenders—Ure, Q.C.—Cook — Chree. Agents — Waddell & M'Intosh, W.S., and Morton, Smart, & Macdonald, W.S.

Friday, March 4, 1898.

FIRST DIVISION.

DUNN *v.* CHAMBERS AND OTHERS.

(*Ante*, p. 203.)

Revenue—Income-Tax—Right to Deduct Income-Tax from Interest Due under a Decree—Income-Tax Act 1853 (16 *and* 17 *Vict. cap.* 34), *secs.* 1 *and* 40.

In an action at the instance of a ward for the reduction of the sale of part of her estate, the Court found that on payment by her to the purchaser of the price, with interest at five per cent. from the date of the sale, she would be entitled to decree of reduction.

Held (under reservation of any question that might be raised by the Revenue Department) that the pursuer was not entitled, under sec. 40 of the Income-Tax Act 1853, to deduct from the amount payable by her to the purchaser a sum representing income-tax on the interest.

In this action, which was raised by a ward for reduction of the sale of part of her estate by her *curator bonis*, the Court on December 3, 1897, pronounced the following interlocutor:—"Find that on payment to the defenders first named in the summons, or to Messrs W. & R. Chambers, Limited, of £15,000, being the price of the shares in dispute with interest thereon at the rate of five per cent. from 31st March 1896, the date of the transfer of said shares, the pursuers will be entitled to obtain a decree of reduction of said transfer . . . and continue the cause."

On 3rd February 1898 the Court appointed the defenders to lodge a minute stating the amount of the dividends declared and paid to the defenders first named in the summons in respect of the shares in dispute since said shares were transferred, and the date or dates when said dividends were paid.

The pursuers subsequently made up to 1st March a state of the amount due by them in respect of the £15,000 with interest thereon, under deduction of the amount of the dividends as set forth by the defenders in their minute. This state showed the sum due by them on 1st March to be £14,061, 1s. 8d.; but this sum was arrived at after deduction not only of the dividends on the shares, but also of income-tax on the interest of the capital sum.

The defenders' agent having declined to receive the sum of £14,061, 1s. 8d., the pursuers consigned the money in bank, and presented a note in which they set forth the facts as above stated, and craved the Court to grant the decree of reduction mentioned in the foresaid interlocutor of 3rd December 1897, and to ordain the defenders W. & R. Chambers, Limited, to issue in favour of the pursuer a certificate in her favour of 100 shares of said company.

The Income-Tax Act 1853 (16 and 17 Vict. cap. 34), sec. 1, imposes income-tax for and in respect of, *inter alia*, "all interest of money, annuities, dividends, and shares of annuities payable to any person or persons."

Sec. 40—"Every person who shall be liable to the payment of any rent or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation, by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled and is hereby authorised, on making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable under this Act . . . and the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had been actually paid unto the person to whom such payment shall have been due and payable."

Argued for the defenders — The note should be refused. The debt here due arose out of no contract, nor was the interest "yearly interest of money," which was what sec. 40 had in view. It was a single and exceptional payment of interest which would not be repeated.

Argued for the pursuer—Income-tax was due on the interest. Sec. 1 of the Income-Tax Act of 1853 was very sweeping, and expressly said "all interest of money." The Income-Tax Act of 1842 (5 and 6 Vict. cap. 35), sec. 1, was couched in more restricted language, and referred only to "all profits arising from annuities, dividends, and shares of annuities." If income-tax was due, the pursuer was entitled to make the deduction under sec. 40. This was unquestionably "a personal debt."—*Bebb* v. *Bunny*, 1 K. & J. 216, referred to.

LORD M'LAREN — In considering this question I may begin by pointing out what has been done or what is ordered to be done by the reductive decree. The action was one of reduction of a sale of a ward's estate, and the judgment of the Court ordered the restitution of a capital