

sion in the case of *Church v. Caledonian Railway Company* (1883, 11 R. 398), where such expenses were disallowed. There is a familiar rule that expenses of taking precognitions are only allowed where an action has reached the stage of an interlocutor allowing proof. The argument in that case, which was successful, was that when the case was appealed to this Court for jury trial it became a Court of Session case and not a Sheriff Court case, and that as a compromise took place when a tender was accepted before adjustment of an issue, prior to which no proof was allowed in the Court of Session, therefore the expenses of precognitions could not be allowed. There is no doubt that was what was decided in the case of *Church*.

After hearing counsel in the present case we were of opinion that we could not deal with the matter without consulting the Second Division. Having done so we are of opinion that, notwithstanding the case of *Church*, the expenses here charged on the Sheriff Court scale were rightly allowed by the Auditor. The precognitions were taken while the case was still in the Sheriff Court, and if it had remained there and the tender had been put in and accepted after proof had been allowed in that Court, undoubtedly the expenses would have been allowed. The case having come to this Court and followed the procedure necessary to attain the same stage as it had already attained in the Sheriff Court, because an order for issues is tantamount to an allowance of proof, we are of opinion that that ought not to prevent the expenses being recovered. We shall therefore disallow the objection and approve of the Auditor's report.

The Court repelled the objections, approved of the Auditor's report, and decerned against the defenders for payment of the taxed amount of the pursuer's account.

Counsel for Pursuer—Lippe. Agents—Scott & Glover, W.S.

Counsel for Defenders—Russell. Agents—St Clair Swanson & Manson, W.S.

Wednesday, March 19.

FIRST DIVISION.

[Lord Ordinary on the Bills.]

LOCHABER DISTRICT COMMITTEE OF INVERNESS-SHIRE COUNTY COUNCIL AND OTHERS v. THE INVERGARRY AND FORT AUGUSTUS RAILWAY COMPANY.

Railway—Abandonment—Power of Directors to Dismantle whole Undertaking and Sell the Plant—Invergarry and Fort Augustus Railway Act 1896 (59 and 60 Vict. cap. cccxl).

The directors of a railway company have no power at their own hand to dismantle the whole undertaking and convert the plant into money.

The directors of a railway company having proposed to dismantle the line and to sell the plant, objection was taken thereto by, *inter alios*, one of the shareholders (who was also a debenture holder) on the ground that the proposal was *ultra vires* and illegal.

Held that the directors had no power to dismantle the line, and interdict granted as craved.

The Fourth or Lochaber District Committee of the County Council of Inverness-shire and others, *complainers*, presented a note of suspension and interdict in the Bill Chamber in which they craved the Court to interdict the Invergarry and Fort Augustus Railway Company, incorporated under the Invergarry and Fort Augustus Railway Acts of 1896 (59 and 60 Vict. cap. cccxl) and 1897 (61 and 62 Vict. cap. cccvii), *respondents*, from selling or otherwise disposing of the steel rails, &c., comprising the material of the permanent way of the railway, or from otherwise taking any steps to dismantle the line.

The following *narrative of the facts* is taken from the opinion (*infra*) of the Lord President—"The history of the matter is this. The respondents, the railway company, are incorporated under the Invergarry and Fort Augustus Railway Act 1896, which provided for the making of a railway and pier in the county of Inverness to be called the Invergarry and Fort Augustus Railway, and for other purposes. The works authorised by the Act consisted of, besides the pier, a railway 24 miles roughly in length, which began by a junction with the West Highland Railway near Spean Bridge and terminated near the centre bridge carrying the public road from Invermoriston to Fort Augustus over the river Oich. The railway was constructed and was for some time worked by the Highland Railway Company under an agreement. At the expiry of the agreement the Highland Railway Company refused to renew it, and the railway was then worked by the North British Railway Company under another agreement up till 31st October 1911. Since that agreement terminated the respondents have been entirely unable to work the railway. They cannot get any of the Scottish railway companies to work it. They have no money to work it themselves, and having come to the conclusion that it was hopeless to suppose that the railway could be worked, they resolved to sell off the whole of the railway plant, and accordingly they inserted an advertisement in the papers on 16th December 1912 to the following effect—'Invergarry and Fort Augustus Railway. Permanent way material, steel girders, and station equipment for sale.' And they then say that they are prepared to sell the rails, chairs, &c., &c., comprising the material of the permanent way of the railway situated between Spean Bridge and Fort Augustus, together with the steel bridge work, turntables, &c., &c., the length of the single line, exclusive of loops and sidings, being about 24 miles."

The complainers averred—" (Stat. 8) In connection with the construction of the

said railway it was necessary to erect various overline and underline bridges, level crossings, cattle creeps, culverts and embankments, in addition to the accommodation works specially provided for in the sections of the Act of 1896 above quoted. It is essential in the interest of the complainers that the various works thus carried out should be permanently maintained, as otherwise serious damage will be caused to the roads affected, and also to the lands upon which the same have been constructed. In particular, the complainers, the Fourth District Committee of the County Council of the County of Inverness, are bound in the interests of the public to see that, *inter alia*, the following works are permanently maintained by the respondents, namely . . . [A specification of the work followed] . . . and the complainers, the Second District Committee of the County Council of the County of Inverness are bound in the interests of the public to see that, *inter alia*, the following works are permanently maintained by the respondents, namely . . . [A specification of the work followed] . . . If these works are not permanently maintained by the respondents great loss and injury will be sustained by the said complainers. The other complainers are also interested in having certain level crossings, culverts, cattle creeps, and bridges constructed by the respondents in connection with the railway in and upon their respective districts and estates permanently maintained by the respondents. If the said works are not maintained by the respondents the said complainers will sustain great loss and damage. (Stat. 8A) By section 23 of the Companies Clauses Act 1863 (26 and 27 Vict. c. 118), which is incorporated with the respondents' special Act of 1896, the debenture stock issued by the respondents is constituted a charge upon the respondents' undertaking. The permanent way of the railway and the other plant which the respondents have advertised for sale are the essential and vital parts of the undertaking in question. The respondents thus propose to delapidate and destroy the undertaking which constitutes the security of the debenture stock holders, and upon which by statute their debenture stock is charged. Neither the shareholders nor the debenture stockholders have been consulted upon the proposed sale nor as to the disposal of the proceeds. . . . The respondents have no power to sell and dispose of their undertaking, or of the plant in question which constitutes the essential part thereof, at their own hand without taking any of the usual steps for abandoning the undertaking, or providing any of the usual safeguards for the protection of the interests of the parties concerned. (Stat. 10) The said actings of the respondents in discontinuing the working of the railway and in proceeding to sell the permanent way, material and other plant of the railway are illegal and unwarranted, and contrary to the provisions of their Acts, and to the public interest. The respondents have not taken any statutory or other steps to abandon their undertaking.

It is not competent for the respondents to abandon and dismantle the railway at their own hand without the sanction of Parliament. If the respondents had applied to Parliament in ordinary course for authority to abandon their undertaking the complainers would have received intimation thereof under the Standing Orders of Parliament, and would have had an opportunity of appearing and safeguarding their interests by obtaining the usual clauses for their protection and compensation. The complainers are apprehensive that if the respondents succeed in selling the material of their line they will attempt to dissolve the Company and abandon the undertaking without making any provision for the maintenance of the works they have constructed, which are necessary for the beneficial use of the complainers' roads and properties, and without taking any steps to provide compensation to the complainers for the injury which their property and the public interests under their charge will thereby sustain. Moreover, there are included in the plant which the respondents have advertised for sale various items, including steel bridge work, station platform buildings, sheds, and others, which form part of the works which the respondents have constructed in implement of the obligations imposed upon them by the said Act of 1896 for the accommodation and benefit of the complainers as above set forth, and which they are under statutory obligation to maintain in all time coming. The respondents by selling and authorising the removal of the said material will disable themselves from fulfilling their statutory obligations to the complainers. The respondents are not entitled to make away at their own hand with the plant of the railway, which is protected from diligence in the public interest, to the prejudice of the complainers, who are entitled to look to the same for the satisfaction of their just claims in the event of the abandonment of the railway being duly authorised. In these circumstances the complainers have been compelled to institute the present proceedings for their protection."

[Statement 8A was added by amendment in the Inner House.]

The complainers pleaded, *inter alia*—“(1) The actings of the respondents as condescended on being illegal and *ultra vires*, the complainers are entitled to interdict as craved. (4) The respondents having no right to dismantle the said railway or to abandon their said undertaking without making provision for the maintenance of the works constructed under the said Acts interdict should be granted as craved. (5) The actings of the respondents being in breach of their statutory obligations to the complainers, interdict should be granted as craved. (5A) The undertaking of the respondents being subject to a statutory charge in favour of the debenture stockholders, the respondents are not entitled at their own hand to carry out the proposed sale.”

[Plea 5A was added by amendment in the Inner House.]

The respondents, *inter alia*, pleaded—

“(1) No title to sue. (2) The complainers' material averments are irrelevant and insufficient to support the prayer of the Note. (3) The actings of the respondents being legal and *intra vires*, the prayer of the Note should be refused.”

On 5th February 1913 the Lord Ordinary (HUNTER) passed the Note and granted interim interdict.

The company reclaimed, and argued—*Esto* that the company proposed to dismantle the railway and to sell their plant, they were entitled to do so, provided they did not dispose of the price without parliamentary sanction. The proposed sale was in the interests of the creditors and shareholders, for it was turning the company's assets to the best advantage. That being so, the sale could not be said to be *ultra vires*, and if that were so the shareholders had no title to object, for they could not interfere with the management. The company could not be compelled to make the railway, for the Company's Act was permissive in its terms. Nor could they be compelled to carry it on or to restore it if it became derelict—*York and North Midland Railway Company v. The Queen*, (1853) 1 E. & B. 858 (22 L.J., Q.B. 225); *Reg. v. The Great Western Railway Company*, (1893) 69 L.T. 443, *affd.* 69 L.T. 572 (62 L.J., Q.B. 572); *Darlaston Local Board v. London and North-Western Railway Company*, [1894] 2 Q.B. 694, *per Kay* (L.J.) at p. 706 foot. It was quite a common thing to dismantle a branch line and sell the rails, &c. The company were not proposing to abandon the undertaking, but merely to convert their plant into cash, and they could relay it when the likelihood of traffic increased. They were bound as a matter of prudent administration to realise their perishable assets, and that was all that they proposed to do.

Argued for respondents—The proposed sale was *ultra vires* without the consent of Parliament—*Haldane v. Rushton*, December 10, 1881, 9 R. 253, *per the Lord President* at p. 256, 19 S.L.R. 192; *Muir v. Forman's Trustees*, March 3, 1903, 5 F. 546, *per Lord Kinnear* at p. 571, 40 S.L.R. 404. The directors of a railway company could not at their own hand transform it into an investment company, or make themselves metal merchants, for their powers were limited by the constitution of the company—*Lindley on Companies* (6th ed.), 215. Parliament had entrusted the company with certain powers for behoof of the public, and just as trustees could not dispose of their trust estate without the consent of the trustor or the Court, so neither could the company without the consent of Parliament. They had been entrusted with the management of a public undertaking which was to be open to the public on the payment of tolls, and though they might close it temporarily they could not do so permanently. There were three parties to the transaction—Parliament, the promoters, and the public—and just as the company owed its creation to Parliament so it must owe its deace. *Esto* that

the company might grant a lease of the line—*Railways Clauses Consolidation* (Scotland) Act 1845 (8 and 9 Vict. cap. 33), sec. 105—what was proposed here was not a lease but an alienation—a thing much more inconsistent with trust administration. Moreover, the proposed sale would destroy the security of the debenture-holders, who had a prior charge on the undertaking—*Companies Clauses Act 1863* (26 and 27 Vict. cap. 118), sec. 23—and would mean the winding-up of the company, for that was the only remedy open to them—*Gardner v. London, Chatham, and Dover Railway Company* (1867), L.R., 2 Ch. App. 201, *per Cairns* (L.J.) at p. 216-17. The ratio of that case was that as the company could not at their own hand dismantle their railway they were not entitled to convey that right in security, and accordingly the lenders' remedy was not a sale but the appointment of a judicial factor to carry on the undertaking for behoof of the public and the company—*Redfield v. Corporation of Wickham* (1888), L.R., 13 A.C. 467, *per Lord Watson* at p. 474; *Dundee Union Bank v. Dundee and Newtyle Railway Company*, January 25, 1844, 6 D. 521, *per the Lord Justice-Clerk* at p. 527; *Potts v. The Warwick and Birmingham Canal Navigation Company* (1853), Kay's Rep. 142, *per Page Wood* (V.C.) at 146-7. The company were also under obligation to the District Committees, who would have a good claim for compensation in the event of the works being abandoned—*in re Ruthin and Cerrig-y-Druidion Railway Act* (1886), L.R., 32 C.D. 438; *in re Southport and Lytham Tramroad Act 1900*, [1911] 1 Ch. 120, *per Buckley* (L.J.) at p. 133. The company's proper course was to apply to Parliament for special powers—*Redfield* (*cit.*); *in re Barton-upon-Humber and District Water Company* (1889), L.R., 42 C.D. 585, *per North* (J.) at p. 587. Such authority was applied for in *Furness v. The Caterham Railway Company* (1859), 27 Beavan 358, and should be applied for here.

At advising—

LORD PRESIDENT—This is a reclaiming note from an interlocutor pronounced in the Bill Chamber passing the note and granting interim interdict. The note of suspension and interdict was presented at the instance of two district committees of the County Council of Inverness, and also by certain gentlemen who are the trustees of the deceased Edward Ellice of Glengarry and as such hold considerable heritable property in the county of Inverness, and by Major George James Bailey of Inverglo, another heritable proprietor, and it sought to interdict the respondents, the Invergarry and Fort Augustus Railway Company, from selling or disposing of the rails, cast-iron chairs, and other things which form the material of the permanent way of the railway, and also the steel bridge work, turntables, signal cabins, &c. which form what I may call the equipment of the railway line. . . .

[After the narrative *ut supra*] . . .

Now it is admitted that that means dis-

mantling the whole railway, and that if the sale is carried through the railway as a railway in the ordinary sense of the word will cease to exist, though no doubt there will still be the strip of ground on which the railway once was. That the Lord Ordinary was right in passing the note and in granting interim interdict cannot be doubted, and if this had been an ordinary case we should simply have adhered to his interlocutor, but when parties came to be heard it became quite obvious that it would be very expedient that they should be allowed to get a final judgment upon the matter at once. It also became equally obvious that we really had the whole facts before us and that nothing would be truly gained by making up a record in the ordinary way in the Court of Session. While that was so, your Lordships thought that there was considerable doubt as to the title of some of the parties to the case, and as we were informed that Captain Ellice was not only, as he appeared in the original note, a trustee of the late Edward Ellice, but also that he as an individual was a shareholder, we invited him to put in a minute of amendment. A minute of sise and amendment was accordingly put in by which Captain Ellice was sisted to the action as an individual, and the statement is also added that he is the holder of 222 shares of £10 each and £606, 5s. debenture stock of the company. The respondents admitted these facts and made no objection to the minute of sise and amendment.

Your Lordships are therefore now in a position to deal with the case as effectively as if it were here upon a record made up in the Court of Session, and it is eminently expedient that we should so deal with it. The respondents in this matter are perfectly frank. The justification for what they are doing is, according to them, this—and the truth of what I am now going to state is really not controverted by the other side—they say—“Experience has shown us that we have not got the slightest chance at present of working the railway. We have attempted to get a working agreement out of the North British—we cannot. We cannot get one out of the Highland. It is not to be supposed that any other Scottish railway will want to work this railway branch, the line from Fort Augustus to Spean Bridge, and we have no money and no possibility of raising any money to do it ourselves. The result is that the whole of our railway plant is being subject to rapid deterioration. The rails are very much more attacked by oxidisation when they are not used than when they are used, and the only result of leaving things as they are is that the plant in a very little time will perish entirely. It is better policy for us therefore—the market at present being a good one for steel rails—to turn our plant into money, and having got the money to await the course of events. If times change and for some reason or other we can raise money we can always put the plant back again, and we will be in a better position to do so if we have the money in our pocket than we should be if

we were now to allow the whole line to go to wreck and ruin.”

Now, as I have said, the truth of that statement and the *bona fides* of it are really not controverted by the complainers, but what they maintain is that the proposal to dismantle the railway is a proceeding which is entirely *ultra vires* and which must be restrained. As I have already indicated, your Lordships had considerable doubts as to the title of the two county council committees to raise any such question. The only way in which they could say that they had a title was this—they pointed out that in connection with their undertaking the respondents were empowered to alter roads, to construct bridges, and to divert certain highways, and that, in the interests of the public, they, the county council committees, were bound to see that these bridges, level crossings, and road diversions were properly maintained. Well, that I think is a slender matter on which to support a title for raising this question, because it was explained that there was no intention of selling any bridge where the bridge is an overline bridge. Those bridges were to be left. Where, on the other hand, it is an underline bridge the only effect of its removal would be to leave the road open to the heavens instead of being under a bridge. Then, so far as the maintenance of the road diversions is concerned, probably the committees would have very much better security for the performance of that obligation if the company were allowed to have a sum of money in the bank than they would have if the company were left there with a set of rusty rails. I do not think, however, that we need particularly trouble ourselves about the question of title, because it is perfectly clear that Captain Ellice as a shareholder and debenture-holder has a good title to interfere with anything that is *ultra vires*. So far as it is an act of management he has no title to interfere, because the directors are the proper persons to manage the railway, but if the directors propose to do something that is *ultra vires* then his title to interfere is undoubted.

The respondents' argument on the merits was chiefly rested on this—they said that it had been decided again and again, and that it was now trite law, that the clause in the special Act—“may make and maintain”—was not obligatory but permissive, and that although you get the power to make a railway and maintain it you are not bound to make it, or, having made it, to maintain it. I think that is perfectly true. I need not go into the authorities which were quoted to us, because it has been so held in the Courts of both countries. A railway undertaking is in a very curious position. It is, as your Lordships know, exempt from ordinary diligence. The ground of a railway may not be adjudged. The rolling stock is protected by special Act, and the undertaking as a whole cannot in any way be broken up by the action of creditors using the ordinary forms of diligence. All that was settled in the

well-known case of *Gardner v. The London Chatham and Dover Railway Company* (1867, L.R. 2 Ch. App. 201), and was subsequently given effect to in our own Courts in the case of *Haldane v. The Girvan and Portpatrick Junction Railway Company* (1881, 8 R. 669, 18 S.L.R. 451). That being so, and the idea of the railway being that it should be kept as an undertaking for the public, originally no doubt with the intention that the public themselves might use it as a highway with their own carriages, though that form of use, which is to be found in all the older railway statutes, has practically long ago gone into desuetude, I am of opinion that it is *ultra vires* for the directors by their own act to put an end to the railway as a railway, and that that is a different thing from saying that they are bound to run it. That they cannot be compelled to run the railway has been settled, as I have said, quite clearly, and one can easily see why it was settled in that way. If they were bound to continue the railway I suppose there would be a decree against them ordering them to do so, and if they did not obey it they would be put in prison. It would be a hard case indeed for the directors of a railway company if they were to be put in prison when there was no possibility of their working the railway for want of money to run it. But that is a totally different thing from saying that they are entitled at their own hand to put an end to the railway as a railway. If this sale is carried through there will no longer be such a thing as the Fort Augustus Railway. No doubt there will still be the Fort Augustus Railway Company, and there will still be a strip of ground on which the Fort Augustus Railway used to run, but the Fort Augustus Railway there will not be. Now I cannot bring myself to think that that is within their power. It may be that this railway has no future at all, but then I think the only answer to that is that the company must go to Parliament to get fresh powers.

That the legislature looks upon it in that light is also I think to be inferred from the preamble of the Abandonment of Railways Act. You do not require an Act of Parliament to allow you to abandon other undertakings. You do require it in order to abandon a railway. And that again just makes clear the point that once a railway has been established it is to a certain extent an asset of the public as well as an asset of the particular company.

I need scarcely say that if there was any question that what was being done here was a question of ordinary management my view would be perfectly different, and therefore my opinion now must not be held to cover such a case, for instance, as a large railway choosing to give up the working of an unrenumerative branch and then proceeding perhaps to sell the rails and bolts. That would not be putting their undertaking out of existence, it would be merely an act of management. But here we are not hampered with any such question, because it is frankly admitted

that this is a sale of the whole railway, and that if it is carried out no railway will be left at all.

Upon the whole matter, therefore, I am of opinion that we should affirm the judgment of the Lord Ordinary. Technically speaking, as we are in the Bill Chamber, we cannot make the interdict perpetual. The next stage, therefore, would be that the case should go back to the Lord Ordinary in order to make up a record, and then on that record might grant perpetual interdict, but our interlocutor affirming the judgment of the Lord Ordinary and remitting the case to him in order that the record may be made up will give an opportunity to the railway company of taking our judgment to the House of Lords if they wish to and of getting judgment upon what is really the merits of the case at once.

LORD KINNEAR—I concur.

LORD MACKENZIE—The Invergarry and Fort-Augustus Railway Company propose to sell the rails and other material forming the permanent way of their line between Spean Bridge and Fort-Augustus, together with the steel bridgework, &c., as advertised. Regarded solely as a business proposition there is much to be said for what the Board desire to do. We were informed that no train has run on the line since October 1911, and that there is no prospect of trains being run. The rails are rusting and deteriorating in value. The time is said to be opportune for realisation, and the respondents' counsel stated that a better price could be got at the present time for the materials than was offered by the North British Railway for the undertaking as a whole.

If, therefore, the question were one of the prudent administration by an individual of his property it would probably be said that the best thing to do in the circumstances would be to turn assets which are at present unproductive and depreciating in value into cash and hold the land to await developments in the future.

The company is, however, not in the same position as an individual. The railway is a public undertaking, and the sole question before us is whether the proposed sale is *ultra vires*. The respondents are quite frank about the matter. The total length of their line is 24 miles, and it is the rails on these 24 miles that they propose to sell, with their adjuncts. They are not selling them because they are worn out and need to be renewed. It is a case of realisation pure and simple. What they mean to do is to dismantle the whole line. The 24 miles in question do not form part of a larger system worked by the same company. It is not a case of a going concern ceasing to use a dead branch. The 24 miles of rails constitute the whole undertaking. The permanent way is the substratum of this company. If they are lifted and carried away the Railway Company would be relegated to the position of landowners merely. The sale by the directors of the rails would not be an act of administration

by them as railway managers, but would be a transaction into which any metal broker might enter.

The position of the Board is thus quite different to what it would be if the question raised was as to their duty to make or work and maintain the line authorised by their special Act. There is abundant authority that they could resist any attempt to force them to do either the one or the other. The powers conferred by the statute are permissive only.

The question raised here is whether the company can by their own act, and at their own hand, put it out of their power to fulfil those duties for the discharge of which they were incorporated by Act of Parliament. It may be that the directors are doing no more than their duty by the shareholders, and even the debenture-holders, for the price might, under orders of the Court, be treated as a surrogatum for the materials. It may be that matters are in such a position that no prejudice would be suffered by any members of the public, for if no train is to be run it would not matter whether the company had metal or money. These considerations, however, are not relevant when the company has made a contract with the public under public sanction. The undertaking owes its existence to statute, and by statute only can its existence be terminated. There is careful provision made by statute for the steps which must be taken before a railway undertaking can be abandoned. What the respondents seek to do here is really equivalent to abandoning the undertaking as a railway. Once that conclusion is reached it follows that they must comply with the statutory enactments before they can effect their purpose. If they do not, the powers of the directors are those of administration, which may be defined as the transaction of the company's legitimate business in the way in which such business is usually carried on by other people. They have not power to alienate. The reason why the undertaking of the company is protected against the diligence of the creditors is because Parliament has given effect by enactment to its intention that a railway shall be permanent. The company cannot itself sell, and this is the reason why it cannot create such a security in favour of a creditor as would enable him to destroy the undertaking. The remedy provided in the interest of debenture-holders of the appointment of a receiver indicates the policy of the Legislature.

I am of opinion that there is sufficient to warrant the Court in sustaining the title of the complainers, and in holding that the note should be passed and the interim interdict continued.

It is therefore not necessary to go into other points which were argued, but I may add that the respondents failed, in my opinion, to answer the pertinent question put by the other side in regard to their power to dispose of the proceeds of the sale without going to Parliament.

LORD JOHNSTON did not hear the case.

The Court adhered.

Counsel for Complainers (Respondents)—
Macmillan, K.C.—D. Anderson. Agents
—John C. Brodie & Sons, W.S.

Counsel for Respondents (Reclaimers)
—Morrison, K.C.—Gentles. Agents—J.
Miller Thomson & Company, W.S.

Wednesday, March 19.

FIRST DIVISION.

[Lord Hunter, Ordinary.]

M'ENANEY v. THE CALEDONIAN RAILWAY COMPANY.

Title to Sue—Executor—Reparation—Personal Injury—Claim made, but Action not Raised, in Lifetime of Injured Person—Actio personalis moritur cum persona.

On 25th December 1911 a man was knocked down in a street by a van belonging to a railway company. On 28th December 1911 the law agents of the injured man wrote to the railway company intimating that he held them liable for his injuries. On 5th January 1912 he executed a will in favour of a certain lady whom he appointed his executrix, and the will contained a declaration that the said lady was to be entitled to any sum of money which the Company might pay in name of damages or otherwise. On 6th January 1912 the injured man died.

Held (rev. Lord Hunter, Ordinary) that though no action had been raised in the lifetime of the injured man his executrix had a title to sue the railway company for damages.

Bern's Executor v. Montrose Asylum, June 22, 1893, 20 R. 859, 30 S.L.R. 748, distinguished.

Kathleen M'Enaney, asexecutrix-nominate of the deceased Ernest Leigh, Charing Cross Road, London, and as an individual, pursuer, brought an action against the Caledonian Railway Company, defenders, concluding for £1500 as damages for personal injuries sustained by Mr Leigh.

The following *narrative of facts* is taken from the opinion of the Lord Ordinary (HUNTER)—“This is an action brought by the executrix-nominate of the late Mr Leigh to recover damages from the defenders in respect of personal injuries sustained by him owing to the fault of the defenders or their servants. On 25th December 1911 Mr Leigh was knocked down in a Glasgow street by a two-horse van belonging to the defenders. On 6th January 1912 he died in consequence of the physical injuries which he then sustained. Prior to his death Mr Leigh had, on 28th December 1911, in a letter written by his agents to the defenders, intimated that he held them liable for the injuries he had sustained, and on 5th January 1912 he had