but to enforce it, and compel implement of the obligation; nor could John Fleeming, by resisting such action, prolong the period of his lawful enjoyment of the rents, or postpone until decree in that action the period when the rights of the next heir would commence. It has been suggested that at least the instituting of an action at the instance of the next heir was necessary to put an end to the right of John Fleeming. We do not think so; but we would observe, that whether the date of succeeding to the peerage, or the date of instituting the action, be taken as the date at which John Fleeming's right ceased and that of the next heir commenced, the practical consequences in this case appear to us to be the same, because both of these events occurred during the currency of the half year between Whitsunday and Martinmas, and there being no unusual condition in the leases, no right to any part of the rents of that half-year ever belonged to John Fleeming. (2.) As regards the competition referred to between Lady Hawarden and the defender Mr Dunlop, we are of opinion that Lady Hawarden was entitled to the rents and profits of the estates for the period between the date when the succession to the peerage opened to John Fleeming and the date of his death. When John Fleeming's right ceased, that of Mr Dunlop, derived from him, also ceased. This, we think, follows on principle, and from the terms of Mr Dunlop's title. (3.) We are of opinion that Lady Hawarden was, in competition with the trustee on the sequestrated estate of John Fleeming, entitled to the rents or profits in question."

Lord Deas, Lord Kinloch, and Lord Barcaple returned separate opinions, in which they arrived substantially at the same result.

Saturday, Feb. 3.

FIRST DIVISION.

KENNEDY *v.* KENNEDY.

Husband and Wife—Desertion of Husband—Order of Protection—Conjugal Rights Act—Proof. Application by a wife for protection of her property (aff. Lord Barcaple) *refused*, there being no proof of desertion.

Question.—Is a wife entitled to an order of protection if, though deserted at the date of the application, the desertion has ceased before the order is granted?

Counsel for Mrs Kennedy—The Solicitor-General and Mr W. M. Thomson. Agents—Messrs J. & W. C. Murray, W.S.

Counsel for Husband—Mr Mackenzie and Mr Gifford. Agent—Mr L. M. Macara, W.S.

This is a petition by a wife for protection of her property, presented under section 1 of the "Conjugal Rights (Scotland) Amendment Act, 1861," on the ground that she had been deserted by her husband. The parties were married in 1849. They had both been previously married, and by his first marriage the husband had had three children, while the wife had had two by hers. Two children were born of the second marriage, one of whom still survives. The wife's first husband was a grocer and spirit dealer in Lochee, and after his death in 1848 she continued to carry on the business. At the time of the marriage the respondent Robert Kennedy was a shore porter in Dundee. On 1st April 1852 the respondent left Lochee and went to California. The business of a shore porter was not paying, and it was agreed by both husband and wife that he should try his fortune at the gold diggings. She went with him to Glasgow, from which port he sailed. The three families of children were all left with Mrs Kennedy at Lochee. She was left in possession of the stock and business of the spirit shop, and he only took with him such money as was necessary to carry him abroad. They corresponded for two and a half years, but the correspondence then ceased for eight years. It was, however, resumed in 1862, and continued until 1864. On 22d August 1864 the husband wrote to his wife that he intended to sail for Scotland on the following day, and in this letter he enclosed a bank bill for £180, a large part of his whole means, in order to secure the safety of the money in case anything should happen to himself on the voyage. Before receiving this letter, the wife had employed a law agent to present this petition, and it was presented on 21st July 1864. During her husband's absence she had saved about £400. The husband arrived in Scotland two days after his letter of 22d August, and as soon as he arrived he went to his wife's house in Lochee. Since then the parties have lived together as man and wife—he working at a trade and giving his earnings to her. The wife alleged that she consented to resume cohabitation with her husband, and to abandon this petition on his promising to sign a post-nuptial contract on certain terms. The husband, on the other hand, stated that he had never agreed to the terms which were embodied in a contract which was prepared, and that he refused to sign the contract, because it gave his wife power at any moment to turn him out of doors. The proceedings in these circumstances went on, and a proof was led, in which the circumstances which have been detailed were brought out. The parties, however, are still living together notwithstanding this litigation.

The Lord Ordinary (Barcaple) refused the petition, finding that when it was presented the petitioner was not deserted by her husband. And he further thought that, even were it otherwise, no protection should be granted in this case, because the wife was not now deserted by her husband. Section 3 of the statute provides that where the husband makes appearance the order "shall continue operative until such time as the wife shall again cohabit with her husband, or until the Lord Ordinary, upon a petition by the husband, shall be satisfied that he has ceased from his desertion, and cohabits with his wife," in which case he is to recall the order. His Lordship did not think that the order should now be made in circumstances which in his opinion would require its recall if it had been already pronounced.

Mrs Kennedy reclaimed. She founded on the case of Turnbull, 14th Jan. 1864 (2 Macp. 402), and argued that, if there was desertion when the petition was presented, she was entitled to an order of protection. The Court adhered.

The LORD PRESIDENT said—This is a peculiar case both as regards the branch of the law to which it belongs, and the history of the parties. On a consideration of the whole evidence, parole and written, I have arrived at the conclusion that the wife has not proved desertion on the part of the husband. When he went abroad, it was not in the way of desertion. He went after consultation with his wife, and for the purpose of benefiting her and the family. He kept up correspondence with her when away, which ceased, no doubt, for a time, but was afterwards resumed. It is difficult to say that, at any period of his absence, the manner of his leaving was converted into desertion. It appears that he was not so successful as he expected, but it does not appear that he ever realised the purpose for which he left this country. He accounts for the cessation of the correspondence by saying that he wrote a number of letters which were not answered; and it does appear that some of the letters miscarried. He also made enquiries after his wife and family, and he does not appear to have ever lost the proper feeling which as a husband and father he ought to have for his family. If he had come home in June instead of September, it is quite clear this application could not have been entertained. But his purpose to come home existed in June, and it never left him. The statute, I think, contemplates a wilful desertion for the purpose of avoiding cohabitation, and I think this is shown by section 3. It appears that the parties are now living on a good

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 Ormidale) 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 (Ormidale), 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 sujbect 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-