of the question in the liquidation proceedings will supersede the necessity of proceeding with the present action, which is wholly unnecessary and uncalled for. By sections 87 and 151 of the Companies Act of 1862, it is provided that no suit, action, or other proceeding shall be proceeded with or commenced against a company in liquidation except with the leave of the Court and subject to such terms as the Court may impose. The pursuer commenced the present action without obtaining leave of the Court, and the association is not called as a defender."

The liquidator pleaded—"(1) The action is incompetent as laid. (2) the action is irrelevant. (3) The action having been commenced without the leave of the Court being first obtained, falls to be dismissed. (4) There being no double distress, the action should be dismissed. (5) The present proceedings are inconvenient and unnecessary, in respect the rights of the claimants fall to be, and are in course of being, decided by the Court in a summary proceeding in the liquidation, and the action should in consequence be dismissed, or at all events sisted until the respective rights of the claimants shall have been settled in said summary proceeding. (6) In the circumstances the action should be dismissed with expenses."

The Lord Ordinary (STORMONTH DARLING) on 29th January 1890 dismissed the action with expenses.

"*Opinion.*—It seems to me that although the pursuer may have acted under a reasonable apprehension of his being sued by more than one party, he really was in too great a hurry, and in particular, that he omitted a statutory duty—for so I regard it—of coming to this Court before he raised his action. I think sections 87 and 151 taken together made it necessary for him to obtain the leave of the Court before he raised his action of multiplepoinding, and that for want of that the action is bad. I think that even apart from that he was premature in raising the action when he did, and of course in considering whether an action of multiplepoinding is necessary at common law, what the Court has to judge of is entirely a matter of conduct—whether the real raiser of the action is acting under a reasonable apprehension of accumulation of actions, or whether he is crying out before he is hurt. Now, here I think the pursuer was in the latter category. Of course although two very definite claims had been made upon him, still neither was accompanied by any threat of immediate action, and I think any reasonable person must have known, when he was only one out of a very large number of guarantors, that it would be unlikely that either the liquidator or the bank would proceed against each one of them separately, and there was no intimation of their selecting his case as a test case. Therefore I think he ought to have held his hand, and only if it were proposed to select him out of the whole number of guarantors would he have been justified in raising this action. But, as I have said already, apart from that I think it was his statutory duty to obtain the leave of the Court although there was a third party who was a necessary defender to the action. I do not read the section as in any way excluding that case, and it would be in the highest degree inconvenient if such a rule were laid down. There are many actions where there is a necessary third or fourth party, but where it is most undesirable that the company in liquidation should be harassed with actions without the leave of the Court. I shall dismiss the action and find the pursuer liable in expenses to the liquidator."

Counsel for the Pursuer and Real Raiser—Baxter. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Defender—J. A. Robertson—A. S. D. Thomson. Agents—Davidson & Syme, W.S.

Saturday, March 14.

OUTER HOUSE.

[Lord Kincairney.

PORTEOUS *v.* CALEDONIAN RAILWAY COMPANY.

Process—Lis alibi pendens.

A person brought an action of damages for personal injury in the Sheriff Court, which was dismissed as irrelevant, and in which expenses were found due to the defenders. Thereafter, but before the defenders' account of expenses had been taxed, he brought an action against them in the Court of Session founding upon the same circumstances. Plea of *lis alibi pendens sustained.*

James Porteous brought an action against The Caledonian Railway Company for the sum of £1000 as damages sustained by him through his being injured in his person by his being jammed between a truck and the terminus buffers at the Terminus Quay, Glasgow, by the fault of the defenders. The defenders in their answers stated "that the pursuer on 4th August 1890 raised an action in the Sheriff Court at Glasgow against the defenders in the present action for a sum in name of damages for the accident, which is the cause of action in the present case. The defenders lodged defences to the said action of 4th August 1890, and on 22nd October 1890, Sheriff-Substitute GUTHRIE, before whom the said action depended, pronounced therein an interlocutor in the following terms—'*Glasgow, 22nd October* 1890.—Having heard parties' procurators, Finds that the pursuer has failed to set forth a revelant case inferring liability against the defenders: Therefore dismisses the petition, and decerns: Finds the defenders entitled to expenses; allows an account thereof to be given in, and remits the same, when lodged, to the Auditor to tax and

report. W. GUTHRIE.' The defenders' account of expenses in said action has not yet been taxed. The said action of 4th August 1890 was in dependence when the present summons was signeted, executed, and called."

The defenders pleaded—"*Lis alibi pendens.*"

The Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Sustains the first plea-in-law for the defenders, and dismisses the action and decerns: Finds the defenders entitled to expenses, &c.

"*Opinion.*—I am of opinion that the plea of *lis alibi pendens* must be sustained. It is founded on an action to the same effect as the present, raised in the Sheriff Court at Glasgow on 4th August 1890. On 21st October that action was dismissed as irrelevant, with expenses. The defenders have not laid their account before the Auditor.

"This action was raised on 29th January 1891, and the record was closed on 24th February. Thereafter the pursuer moved in the Sheriff Court action that the defenders should be ordained to proceed with the taxation of their account, and the defenders resisted that motion. The pursuer made the motion in order to obviate the plea of *lis alibi.* The defenders do not conceal that they resisted it in order to be able to maintain their plea. The Sheriff-Substitute on 10th March refused the motion, which in his note he describes as unprecedented.

"The pursuer maintained that the plea of *lis alibi pendens* only applied when the earlier action was in dependence when the plea came up for decision, and he referred to *dicta* by the Lord President in the case *M'Aulay* v. *Cowe*, December 13, 1873, 1 R. 307, which he represented to be to that effect. But I think it was decided in the cases of *Aitken* v. *Dick*, July 9, 1863, 1 Macph. 1038, and *Kennedy* v. *M'Dougal*, June 12, 1876, 3 R. 813, that the plea applies if the former action was pending when the second action was raised. I think I am bound to follow these decisions and to hold that the *dicta* of the Lord President in *M'Aulay* v. *Cowe* were not intended to conflict with them.

"The action in the Sheriff Court was in dependence when this action was brought, and at that time the pursuer had taken no steps to have it brought to a conclusion. It is in dependence still, but the pursuer has done his best to have it brought to an end, and I doubt greatly whether a defender is entitled to hold up his account so as to keep the action in which he has been awarded expenses alive for the purpose of disabling the pursuer from bringing a second action. I am disposed to think that I would be entitled to defeat such an attempt by repelling the plea. But if the plea applies whenever the second action is raised, as I think it does, no such question arises, because although the defenders had certainly delayed to submit their account to the Auditor, the pursuer had taken no step to endeavour to compel them to do so, and he has therefore no equitable ground to urge against the plea receiving its ordinary effect."

Counsel for the Pursuer—Orr. Agent—W. A. Hyslop, W.S.

Counsel for the Defenders—Deas. Agents—Hope, Mann, & Kirk, W.S.

Saturday, October 17.

FIRST DIVISION.

[Sheriff Court at Hamilton.

STEWART *v.* GORDON (DUNSMORE'S TRUSTEE).

Bankruptcy—Claim by Undischarged Bankrupt—Appeal—Caution.

Held that an undischarged bankrupt, who had lodged a claim in a sequestration which had been rejected, must find caution as a condition of being allowed to proceed with an appeal against the trustee's decision.

On December 16th 1884, James Stewart, accountant, Motherwell, lodged a claim in the sequestration of Peter Dunsmore, merchant in Blantyre, for the sum of £301, 5s. 2d., being the amount of two bills at three months granted him by Dunsmore on 12th June (£100) and 1st August 1884 (£200) respectively, with the interest due on the first of said bills.

The claim was rejected by Alexander Gordon, S.S.C., the trustee in Dunsmore's sequestration.

Stewart appealed to the Sheriff.

On 22nd May 1891 the Sheriff-Substitute (BIRNIE) appointed parties to lodge minutes prepared in terms of the statute within six days, each to be exchanged, revised, and re-lodged within six days thereafter.

The following minute was lodged for Stewart—"The appellant submits and avers that the bills on which his claim is founded were granted for value, and that therefore he is entitled to succeed in this appeal."

The following minute was lodged for Dunsmore's trustee—"(1) The claimant acted as factor for the bankrupt, and collected rents and other moneys belonging to him, and has all along failed to account to his trustee for his intromissions. (2) In the commencement of the sequestration a petition was presented in this court for the examination of the claimant, and to have him ordained to produce an account. Repeated diets were fixed for his examination and the production of these, but claimant never attended but made continual excuses. Up to this date he has produced no account. (3) The bills on which the claim is made were given by the bankrupt to cover advances to be made by the claimant on behalf of the bankrupt in the management of his affairs, and not for cash advanced at their dates. The claimant has made no advances and he has all along failed to satisfy the trustee that the bankrupt was indebted to him in anything at the date of the bills or the sequestration.