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 reclaimer 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 tc 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 Ordinay 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 decerned 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.