held entitled to renew the same claim, as the appellants now do, after an exhaustive trial and litigation had already taken place, and so hang up the proceedings in the sequestration. In the present case the effect of the appellant's proceedings has been that the trustee—I think quite properly as matter of precaution—has been obliged to lock up a very considerable sum of money awaiting the decision of this claim, money which ought to have been divided amongst the creditors a considerable time ago.

I have only further to observe that it appears to me that if the proceedings and the judgment in this Court had been fully laid before the Court of Chancery, and pleaded as *res judicata*, or, as I think the plea in England is, judgment recovered, I cannot help thinking that that plea would have been sustained, and at all events I am satisfied it ought to have been sustained. The proceedings in this Court, as appears from the report, received some notice in the Court of Chancery; but certainly the learned judges there were not speaking with full knowledge either of the claim and record that had been made up in this Court or of the evidence that had been led in support of that claim. That this is so I think is obvious from the appellants' statement at the end of art. 1 of the condescendence, in which they say—"Although the said suit did not come on for hearing till 15th November 1875, the respondent did not raise by his pleadings (as he might have done by amendment) any defence founded on his deliverance of the 27th October 1873 hereinafter mentioned, nor on the affirmance thereof by the Court of Session on the 18th July 1874." It may be that the respondent was well advised in taking that course. There was perhaps a good deal to say for the view that if the trial was to occupy 16 days before the Vice-Chancellor, and a great many different parties were engaged in it—many different defendants and many counsel—it could scarcely be expected that this question would have been taken up with that detail which was necessary, by an examination of the record and proceedings, to do justice to it. But however that may be, the fact remains that the point was not taken up and discussed there, and the trustee is quite entitled to raise the question now. I say it was not taken up with all confidence, not only because of the appellant's statement just quoted, but because neither the judgment of the Vice-Chancellor nor the judgment of the Lords Justices deals with this question of *res judicata* or judgment recovered. It is true that in a passage in the judgment of the Appellate Court, given by Lord Justice James—a passage which is noticed by the Lord Ordinary, he says—"We feel ourselves pressed by the decision of the House of Lords in the appeal from Scotland, but all the learned Lords who advised the House on that occasion most carefully confined their judgments to the case presented on the Scotch pleadings. The case so presented is substantially different from the case which by means of the discovery and evidence in the English suit the plaintiff company has been able to allege and prove against the Lawsons. Nothing in our present judgment conflicts with anything said or decided in that house, except perhaps as to the one statement relating to the expenditure of the £39000, as to which, on the fullest consideration and reconsideration, we retain our opinion that it was calculated and intended to deceive, and was substantially, therefore, a false representation. And in fact the plaintiffs were enabled to place that part of the case like the other parts of it in a very different way from that which they were able to do in the Scotch proceedings." I read that passage as quite distinctly dealing, not with any plea of *res judicata*, —a plea excluding the jurisdiction of the Court to consider the merits of this question—but rather as dealing with the general nature of the evidence in each case. It was evidently maintained in argument for the defendants in the English suit that the case proved was substantially the same as that which had been held insufficient by the Court of last resort, and the Lords Justices felt that in dealing with the evidence they had a case which in some respects had a close resemblance to the case which the House of Lords had before them. It was in comparing evidence with evidence, and not dealing with a plea of *res judicata*, that the observations above quoted were made, and it may be that the House of Lords would have taken the same view of the evidence adduced in the Court of Chancery. That evidence cannot, however, in my opinion, in any way affect the present judgment.

On the whole, I am of opinion that the judgment of the Lord Ordinary ought to be adhered to.

The Court adhered.

Counsel for Claimants (Appellants)—Kinnear—Jameson. Agents—Davidson & Syme, W.S.

Counsel for Respondent—Balfour—Mackintosh. Agents—Stuart & Cheyne, W.S.

Friday, July 5.

FIRST DIVISION.

M'PHAIL *v.* HAMILTON.

Shipping Law—Merchant Shipping Act 1854 (17 *and* 18 *Vict. c.* 104), *sec.* 65—*Petition under that Section for Interdict against a Co-partner dealing with Ship in way of Sale, Mortgage, &c.—Competency.*

Held (*diss.* Lord Shand) that a petition presented under the 65th section of the Merchant Shipping Act 1854 by one of two parties in a joint-adventure, to interdict the other from dealing with a ship, in which both were interested, by way of sale, mortgage, or otherwise, was incompetent, on the ground that (following *Roy* v. *Hamilton & Co.*, 5 Macph. 573) that section was not applicable to such a case, but only to cases where a ship or share of a ship had become vested in a person not qualified to own a British ship.

This was a petition under the 65th section of the Merchant Shipping Act 1854, at the instance of Hugh M'Phail, steamship owner, Glasgow, praying the Court to restrain his partner in a joint-adventure from dealing "by way of sale, mortgage, or otherwise" with a certain ship in which they had a joint-interest. The 65th section of the Act was as follows:—"It shall be lawful in England or Ireland for the Court of Chancery, in

Scotland for the Court of Session, in any British possession for any Court possessing the principal civil jurisdiction within such possession, without prejudice to the exercise of any other power such Court may possess, upon the summary application of any interested person, made either by petition or otherwise, and either *ex parte* or upon service of notice on any other person as the Court may direct, to issue an order prohibiting for a time to be named in such order any dealing with such ship or share; and it shall be in the discretion of such Court to make or refuse any such order, and to annex thereto any terms or conditions it may think fit, and to discharge such order when granted with or without costs, and generally to act in the premises in such manner as the justice of the case requires," &c.

The petition set forth that in 1873 the petitioner and John Hamilton, the respondent, agreed to join in a joint-adventure, by which they were to carry on a trade between Glasgow and Limerick, &c., by means of certain steamers to be jointly owned by them. The petition further stated that a draft agreement was drawn up, but not signed by Mr Hamilton; that, however, it had been acted upon, and homologated by both parties; that in September 1873, in terms of article 2 of the agreement, which provided "that one or more steamers should be acquired and jointly owned by the joint-adventurers," a new steamer, the "Earnholm," was built, which was put on the station, and continued to run till 13th May 1878; that during all the term of the joint-adventure the petitioner had the management of the ships as managing owner and ships' husband; and that at 31st March 1878 the balance at the debit of the joint-adventure due to the petitioner for insurance, repairs, &c., was £6212, 11d. 1d., and that Mr Hamilton was liable for one-half thereof.

The petition then stated—That on 8th October 1877 Mr Hamilton raised an action before the Court of Session against the petitioner, concluding, *inter alia*, for declarator "that the steamship 'Earnholm,' of Glasgow, with her float-boats, furniture, and apparelling, ought and should be publicly rouped and sold by warrant of our said Lords after due advertisement, and the free price or proceeds thereof, after deducting the expenses of this action and of the decree to be pronounced therein, and of all the expenses attending the same, and of the sale so to take place, should be divided into two equal parts, one of which parts should be decerned to belong and to be paid to the pursuer, and the other part to the defender." The petitioner had lodged defences to that action, and the record had been closed, but no further procedure had taken place.

It was averred that Mr Hamilton had on various occasions since endeavoured by himself or others on his behalf to deal with the "Earnholm," or his interest therein, by way of mortgage or otherwise, and thus to bring the joint-adventure to an end, or to impose another party or parties upon the petitioner as joint-owners while the joint-adventure still subsisted.

The petition therefore prayed the Court, after intimation to Mr Hamilton, "if considered necessary . . . to pronounce an order hereon restraining, prohibiting, and discharging the said John Hamilton from dealing with his joint-right or interest or share in the said ship by way of sale, mortgage, or otherwise, for the period of one year from the date of the said order, or for such other period as your Lordships shall consider reasonable and proper in the circumstances: And in the event of your Lordships ordering service of this petition on the said John Hamilton, to pronounce an interim order restraining, prohibiting, and discharging him in the meantime to the above effect: And further to grant warrant for service of a copy of the said order upon the said John Hamilton, and also upon the Registrar of Shipping for the port and harbour of Glasgow," &c.

Intimation was made, after which the respondent put in answers objecting, *inter alia*, to the competency of the petition as not authorised by the statute founded on. He argued that it was decided in *Roy* v. *Hamilton & Company*, March 9, 1867, 5 Macph. 573, that the 65th section of the Act was intended to afford a remedy only for cases occurring under the 62d, 63d, and 64th sections, which sections referred only to a judicial remedy in cases where a vessel or share of a vessel had come to belong under certain circumstances to a person not qualified to be the owner of a British ship.

The petitioner answered that the 65th section must be taken as qualifying the whole of that part of the Act dealing with "transfers and transmissions," namely, from section 55 onwards, and that the petitioner was an "interested person" within the meaning of section 65.

At advising—

Lord President—The ship in question was built for the purpose of a joint-adventure, and was owned by the joint adventurers as part-owners. The grounds on which the petitioner asks for the interposition of the Court it is not, I think, necessary to consider in dealing with the question of competency. For the case of *Roy* v. *Hamilton & Company*, March 9, 1867, 5 Macph. 573, is directly in point, unless the position of the petitioner and the respondent as joint-adventurers introduces any specialty which prevents the application of that judgment to the present case.

In *Roy* v. *Hamilton & Company* the vessels in question belonged to the partners of a firm as part-owners, and were owned and used for the purposes of the firm. The application was presented at the instance of a personal creditor of the firm for the purpose of preventing the owners in any way dealing with the vessels until they had consigned or found caution for the amount of his claim against them. The ground of judgment as regards three of the four Judges who then constituted this Division of the Court was that the 65th section of the statute under which the application professed to proceed was intended to afford a remedy only for cases occurring under the 62d, 63d, and 64th sections. That being so, it appears to me that the decision in *Roy* v. *Hamilton & Company* is entirely in point in the present case. Those sections—the 62d to the 64th—refer only to cases where a vessel or share of a vessel has come to belong to a person who is not qualified to be the owner of a British ship. In such circumstances it was evidently necessary to provide some proceeding for the sale—it may be called the judicial sale—of the vessel. It was also evident that it was necessary to provide for the interests of third parties who might appear, and for that purpose to stay the sale of the vessel for a time.

That was the object—and I think the sole object—of the 65th section.

The present case is a very good illustration of the purpose for which the 65th section was intended. For in the present case the ordinary remedy of interdict is plainly open to the petitioner, if he has any legal right, to prevent his co-adventurer from dealing with the shares of the ship or from selling or mortgaging her. The extraordinary remedy provided by the 65th section is quite unnecessary. These considerations only tend to confirm the very strong impression I had in deciding the case of *Roy* v. *Hamilton*, that the 65th section was only intended for an anomalous and exceptional case which required an exceptional remedy.

LORD DEAS concurred.

LORD MURE—I have looked carefully into the case of *Roy* v. *Hamilton*, which was decided before I had a seat in this Division. It is quite clear from the report of the opinions delivered by your Lordship in the chair, and by Lord Deas and Lord Ardmillan, that it was held in that case that the 65th section only applied where a British ship came to belong to an unqualified person. Lord Curriehill, it appears, did not find it necessary to deal with that particular point. That case was decided in 1867, and it is binding on this Division of the Court. I cannot see that the fact that the petitioner here is a joint-adventurer with the party he desires to restrain, and is not his creditor, as the petitioner in *Roy* v. *Hamilton* was, makes any distinction between the two cases.

LORD SHAND—After the opinions which have now been delivered, any contrary view expressed by me can have no practical effect. But after full consideration of the case I find myself unable to agree with your Lordships. If I thought that the case of *Roy* v. *Hamilton* decided this case, I should at once acknowledge its authority as conclusive, but I do not think that decision settles the present question. In the case of *Roy* the judgment of Lord Curriehill proceeded on the ground that the applicant was not an "interested person" within the meaning of the Act. That was the case of a creditor of an owner of certain ships seeking to use section 65 of the statute as a means of doing diligence against his debtor. I should have concurred in the decision arrived at, for I think that the expression an "interested person" in that section of the Act must refer to a person having some direct interest in the ship or shares of a ship which are the subject of the application, and does not cover the case of mere creditors who have no more immediate interest in the ship or shares of a ship belonging to their debtor than in any other property or right, real or personal, which their debtor may possess. The petitioner in this application is in an entirely different position from a mere creditor. He alleges that he has a direct interest in the ship in virtue of a contract of copartnery. It is averred that the ship really belongs to him and the respondent, and that though the shares were placed in their names in the register separately, they were in fact owned jointly under the contract of copartnery. The petitioner is, in my opinion, an "interested person" within the meaning of section 65, if he be right in his argument that the operation of that section is not of the limited nature for which the respondent contends.

The question then arises whether section 65 refers merely to cases provided for in sections 62, 63, and 64, being the case of property in a ship or share of a ship becoming vested in any way in a person not qualified to be an owner of British ships. The view upon this point which the Court took in the previous case is expressed in a single sentence by your Lordship in the chair in your opinion—"An unqualified person is the only one who can sell under these provisions of the statute, or who can obtain an order for sale by which an interest is created to interfere. It is when an order for sale has been pronounced that section 65 entitles a person to ask the Court to prevent the nominee going on to sell. He is to be stopped in the meantime by anyone showing interest." I am unable, with deference and much respect for the opinions pronounced, to concur in the limited view of the statute which would restrict its operation to a single case of a most exceptional character and to one point of time only in the proceedings for the sale of a vessel. The Legislature has provided a means of promptly obtaining an order prohibiting dealings with a ship at the instance of any interested person by application directly to this Court, thus avoiding an appeal and procedure which might occur in the Bill Chamber. A remedial provision of this kind should, according to all ordinary rules of construction, have a liberal interpretation—an interpretation which will cover all the cases which can fairly come within the meaning of the language used. The construction which your Lordships have adopted seems to me to violate or ignore this rule; but, apart from this, I think it is open to the objection that the operation of section 65 is narrowed so as to apply to a case which can scarcely be expected ever to occur, and which, if it did occur, would, in my opinion, be met without any special provision such as section 65 contains, by the person interested coming forward in virtue of section 62, and asking the Court to stay the proceedings while in the course of being carried out by their own nominee. The expression "to issue an order prohibiting . . . any dealing with such ship or share" is not, I think, such as would have been used to denote an order by the Court to its own nominee to delay proceeding under the order of the Court to sell the ship.

For these reasons, I cannot think that sec. 65—an entirely independent section—has been inserted for so limited a purpose. I agree with Lord Deas in his opinion in the case of *Roy*, where he says—"I concede that the words 'such ship or share of such ship' might grammatically enough refer back to the words in the commencement of the statute, 'a British ship or a share of a British ship within Her Majesty's dominions;' and I so read them, with the result of making the remedy introduced applicable in a variety of circumstances. Under the general branch of the statute headed "Transfers and Transmissions," beginning with section 55, the cases of transmission of shares in a ship by the death or bankruptcy or insolvency of a registered owner, or in consequence of the marriage of a female registered owner, are provided for (secs. 58 and 59), in each of which cases the person asserting that he has so acquired a right may go to the registrar and be put upon the register on

making a declaration of right and producing certain evidence of title. This is a great privilege or facility given, and it is, I think, only giving to section 65 a reasonable meaning to read it as referring back to these provisions, and giving a remedy to a person interested in such cases. The provision of the section is as follows [*quotes ut supra*]; and I think that in cases in which shares of a ship have become vested in another by the death or bankruptcy of the owner, or by the marriage of a female owner, there may often be persons interested in the shares who may have valid objections to the new owner dealing with them. A person having such an interest is, in my opinion, in the situation contemplated by section 65.

But the operation of section 65 is not, I think, limited to these cases, for there is an important section (sec. 43) which may often make it necessary for persons having an interest to ask the Court to prohibit dealings with the shares of a ship—"No notice of any trust, express, implied, or constructive, shall be entered in the register book or receivable by the registrar; and, subject to any rights and powers appearing by the register book to be vested in any other party, the registered owner of any other ship or share therein shall have power absolutely to dispose in manner hereinafter mentioned of any such ship or share." Thus third parties are not affected by any trust, for persons who have been regularly placed on the register have absolute power to dispose in a specific manner of the ship or share. An *ex facie* owner may however, in fact, be a trustee, and it may at times be the right of the beneficiary to prevent dealings with the ship to his prejudice. In this view the section of the Act of 1862 (Merchant Shipping Act Amendment Act) to which Mr M'Laren referred, is not without force. That Act, in section 3, gives an interpretation of "beneficial interest." "Beneficial interest whenever used in the second part of the principal Act includes interests arising under contract and other equitable interests." The effect is to recognize the existence of such equities as controlling *ex facie* owners, and the effect of the 65th section of the principal Act is I think to give a short means of bringing these equities, as well as interests arising under contract, into play against *ex facie* owners. The words "for a time to be named in such order" occurring in section 65, create no difficulty. The order is to be preventative merely. The right in dispute is to be settled in the process appropriate for the purpose.

My opinion is that *Roy* v. *Hamilton* does not apply here; that section 65 applies to a large class of cases in which persons can qualify a direct interest in a ship; and that the petitioner is an interested person within the meaning of the Act.

The Court therefore pronounced an interlocutor refusing the petition as incompetent.

Counsel for Petitioner—M'Laren—Pearson. Agent—R. Ainslie Brown, L.A.

Counsel for Respondent—Maclean. Agents—Hamilton, Kinnear, & Beatson, W.S.

---

*Friday, July 5.**

FIRST DIVISION.

[Lord Young, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* GREENOCK AND WEMYSS BAY RAILWAY COMPANY.

Jurisdiction—Court of Session—Railway Commissioners—Regulation of Railways Act 1873 (36 *and* 37 *Vict. c.* 48).

Held (1) that the "Regulation of Railways Act 1873," under which the Railway Commissioners were appointed and their powers defined, does not exclude the common law jurisdiction of the Court of Session in a case where it is sought to set aside an order pronounced by them on the ground of excess of jurisdiction; and (2) that such a proceeding is not a process of review, and need not be raised in the form of a case stated by the Railway Commissioners under the 26th section of that Act.

Railway—Regulation of Railways Act 1873—*Railway Commissioners—Through Rates—Parties Entitled to Apply to Railway Commissioners to fix Through Rates.*

Two railway companies entered into an agreement whereby, *inter alia*, the one, W, was to construct a railway, which when completed the other, C, was to work. C was to appoint the servants to work the traffic, W the office-bearers to superintend the financial department. Three directors of each were to form a joint-committee to regulate the traffic, the cost of working which was to be paid by C, who in return was to receive 50 per cent. of the gross earnings. The remainder was to belong to W, to be applied, in the first place, in maintenance of the railway, payment of burdens, and general charges in conducting the business. Thereafter one-fourth of the balance was to be paid to C in respect of a money contribution by them to W, and the other three-fourths to W.

Held that W, holding a right of property in their line, and being interested in its profits, was a "forwarding" company in the sense of the 11th section of the "Regulation of Railways Act 1873," and as such entitled to apply to the Railway Commissioners to adjust their through traffic rates with C.

Opinion (*per* Lord Young) that the Regulation of Railways Act 1873 confers the power of enforcing the right of railways to appeal on through traffic questions to the Railway Commissioners upon the companies who own or work these railways, and takes no account of the bodies, such, *e.g.*, as the joint-committee mentioned above, who may have the management of the traffic and the fixing of rates or suchlike.

Opinion (*per* Lord Shand) that the joint-committee in question would have been entitled to make the application to the Commissioners.

The Greenock and Wemyss Bay Railway Company were the owners of a line of railway con-

* Decided June 28, 1878.