dents), the Glasgow and South-Western Railway Company, hold themselves out to be, and are common carriers of coal and minerals from the collieries set forth in the account annexed to the summons to the harbour of Irvine, and, as such, supplied the waggons, and carried the coals and minerals set forth in the account, from the said collieries to the said harbour of Irvine; that in the rectified account the numbers on the waggons consigned to the defender (appellant), the number of waggons, the place where from, and what loaded with, the dates of arrival and of advice of arrival, and of being emptied, are correctly set forth; that the waggons set forth in this account (with the exception of those entered August 20th, 21st, 23d, to August 25th, 1877) were detained by the defender after notice of their arrival for an unreasonable time before being emptied; that the defender has failed (under the above exception), to prove that in any of the cases in which damages for detention are claimed, the period of twelve working hours after advice of arrival was not a sufficient or reasonable allowance of time for him to take delivery: Find in law that the defender wrongfully failed to take delivery of the coals conveyed in the said waggons, and is liable in damages for the loss sustained by the pursuers in consequence of the said wrongful failure: Find that the amount of the said damage has been fairly assessed by the Sheriff-Substitute at £83, 11s. 9d: Therefore refuse the appeal, and decern: Find the appellant liable in expenses," &c.

Agents for Pursuer—Gibson Craig, Dalziel, & Brodies, W.S.

Agent for Defenders—J. Young Guthrie, S.S.C.

Tuesday, March 16.

FIRST DIVISION.

FERGUSON BEQUEST FUND TRUSTEES *v.* EDUCATIONAL ENDOWMENT COMMISSIONERS AND OTHERS.

Trust — Charitable Foundation — Educational Endowments (Scotland) Act 1882 (45 *and* 46 *Vict. c.* 59)—*The Ferguson Bequest Fund.*

A testator left the residue of his estate to be held as a permanent fund, the annual income of which he directed to be applied "towards the maintenance and promotion of religious ordinances, and education, and missionary operations . . . and that by means of payment for the erection or support of churches and schools, other than and excepting parish churches and parish schools, belonging to" certain churches in Scotland; "declaring that the application and appropriation of the trust-fund shall be entirely at the option and discretion of the quorum of my said trustees as to the proportions thereof to be applied to the said several objects." *Held* (1) that the trustees were not thereby empowered to appropriate the whole fund to two of the three objects to the exclusion of the third, but that their power was a power merely of apportionment. *Held* (2) that the fund was an "educational endowment" within the meaning of the Educational Endowments Act 1882.

Held that under section 10 of the Educational Endowments Act 1882 it is within the discretion of the Commissioners under that Act to fix the number of years upon which to calculate the average proportion of the fund appropriated to educational purposes, and this discretion is not subject to the review of the Court.

Educational Endowments Act 1882, *sec.* 15.

Held that while this section directs that the Commissioners are "to have regard to the spirit of the founder's intentions," they have an absolute discretion as to the way in which they shall follow that direction.

Nature of a scheme for the future administration of certain educational endowments, which was *held* to be within the scope of and conform to the Educational Endowments (Scotland) Act 1882.

The late John Ferguson of Cairnbrock died on the 8th January 1856 leaving a trust-disposition and settlement dated 13th May 1853, with relative codicil or deed of instructions dated 22d September 1855. By the last purpose of the codicil he directed his trustees "to hold, retain, set apart, and invest, as after written, the rest, residue, remainder, and reversion of my whole subjects, property, means, assets, estates, funds, debts, effects, and sums of money, heritable and moveable, real and personal, as a permanent fund, to be called the FERGUSON BEQUEST FUND; and to pay, apply, and appropriate the interest and other annual income, profits, and produce thereof, in and towards the maintenance and promotion of religious ordinances and education and missionary operations; in the first instance, in the county of Ayr, Stewartry of Kirkcudbright, and counties of Wigton, Lanark, Renfrew, and Dumbarton; and thereafter, if my said trustees in Great Britain shall think fit, in any other counties in Scotland; and that by means of payments for the erection or support of churches and schools (other than and excepting parish churches and parish schools) belonging to or in connection with *quoad sacra* churches belonging to the Established Church of Scotland, and belonging to or in connection with the Free Church, the United Presbyterian Church, the Reformed Presbyterian Church, and the Congregational or Independent Church, all in Scotland, or any or either of them; or in supplement of funds collected for these purposes; or in supplement of the stipends or salaries of the ministers of the said *quoad sacra* and other four churches; and by payments of salaries, or in supplement of the salaries of religious missionaries and of teachers of schools of or in connection with the said *quoad sacra* churches, and the said Free Church, United Presbyterian Church, Reformed Presbyterian Church, and Congregational or Independent Church; and by payments for forming and maintaining, or in aid of funds raised for forming and maintaining libraries for the use of the general public; such missionaries, schools, and libraries

being under the superintendence or management of members in full communion with one or other of the said five churches: Declaring that the application and appropriation of the trust-funds shall be entirely at the option and discretion of the quorum of my said trustees as to the proportions thereof to be applied to the said several objects . . . And in respect it is my desire that the trustees for the execution and management of the permanent trusts hereby created shall be thirteen in number, and shall consist of members of the said five churches, in the following proportions—namely, three members of the Established Church, four members of the Free Church, four members of the United Presbyterian Church, one member of the Reformed Presbyterian Church, and one member of the Congregational or Independent Church, all in Scotland, I hereby direct and appoint my said trustees in Great Britain, at or before the first term of Whitsunday or Martinmas which shall occur after the lapse of twelve months from the date of my decease, to nominate, assume, and appoint, by a writing under their hands, such a number of persons, members in full communion with one or other of the said five churches, as shall be necessary to make up the number of trustees to thirteen, and to complete the above proportions of church membership, to be trustees along with and in succession to my said trustees in Great Britain, for the execution and management of the permanent trusts hereinbefore created; and also, in the month of January in each successive year thereafter, to nominate, assume, and appoint, by a writing under the hands of the then surviving trustees, or their quorum, one or more persons, a member or members in full communion with the church or churches with which any trustee or trustees who may have died during the preceding twelve months shall have been a member or members, to be trustee or trustees in the room and stead of such deceased trustee or trustees, for the execution and management of the said permanent trusts, along with and after the death of the then surviving trustees."

The method in which the trustees dealt with the residue was as follows:—The free yearly income was allocated at the outset of the trust among the five churches in proportion to their representation in the body of trustees, *i.e.*, the free income was divided into thirteenths, of which the Established Church was allocated three parts, each of the Free and United Presbyterian Churches four, the Reformed Presbyterian Church one, and the Congregational or Independent Church one. Applications for grants out of the money so allocated were received by the trustees from the various congregations of the five churches. These applications were dealt with and disposed of by the trustees, the sums granted being paid to the applicants preferred.

The free revenue expended in carrying out the provisions of the trust from 1858 to 1883 amounted to £399,164, 10s. 9d.; and it was apportioned among the three general objects as follows:—

Religious ordinances, . .	£307,244	0	0
Missionary operations, . .	37,144	0	0
Grants for school building and repairs, and teachers' salaries in connection with the churches, including libraries, ...	54,776	10	9

These schools were under the direct management of congregations belonging to the different churches specified by the testator. Many of them were either in remote country districts or in poorer quarters of large towns. The education and religious instruction given in them was substantially the same as that given in parish schools, except in the case of those of them which were mission schools. There the education was largely religious in character.

The annual appropriation of the sum of £54,776 10s. 9d. above-mentioned varied not only in amount, but in the objects to which it was applied. In 1858 the sum of £3290 was appropriated to school building, school repairs, and teacher's salaries. But after 1867 nothing was given to school building, and after 1871 notbing was given to school repairs. After 1873, and for several years, nothing was given to teachers, but grants for that purpose at the rate of £300 a-year were renewed after 1881; on school libraries about £200 a-year was spent in years prior to 1881, and after that year from £200 to £300.

The Commissioners appointed under the Educational Endowments (Scotland) Act 1882 (45 and 46 Vict. c. 59) submitted to the Scottish Education Department, under section 25 of the said Act, a scheme for the future administration of the Ferguson Bequest Fund. The scheme provided for the constitution of a governing body to consist of fifteen persons, of whom a certain proportion was to be elected by the trustees of the Ferguson Bequest Fund, by the Senatus of each of the four Scottish universities, and by the chairmen of school boards in certain districts respectively. Further, it provided that the trustees of the Ferguson Bequest Fund should pay annually the sum of £1600 to the said governing body to be applied in maintaining the Ferguson scholarship, in continuing, if they thought fit, an annual grant to the Normal Schools of Glasgow, and as regards the remainder of the free income in making grants to assist schools in giving higher instruction in the counties of Lanark, Ayr, Renfrew, Dumbarton, Kircudbright, and Wigtown.

The case now reported was a Special Case to which the trustees of the Ferguson Bequest Fund were the first parties, the representatives of officials of the five churches specified by the testator were the second parties, and the Commissioners were the third parties—presented for the purpose of having the objections made by the first and second parties to the scheme decided.

The judgment of the Court was asked upon the following question—"Whether the said scheme, in so far as it ordains £1600 per annum out of the residue of the Ferguson Bequest Fund to be paid to the trustees thereby created, is in terms of the Educational Endowments (Scotland) Act 1882?"

These objections were—"(1) that the Ferguson Bequest Fund is not an 'educational endowment' on a sound construction of section 1 of the Educational Endowments (Scotland) Act 1882; (2) that on a sound construction of section 8 of the said Act, the said residue is not within the scope of the Act; (3) that the scheme of the third parties is not in terms of the said Act, and particularly section 10 thereof, in respect that it diverts from other charitable purposes money in use to be applied to the same; and (4) that it is con-

trary to the terms of the said Act, and particularly section 15 thereof, in so far as it does not have regard to the spirit of the founder's intentions in respect that (*first*) it renders impossible the exercise by the trustees of that absolute discretion which it was a cardinal point of the founder's scheme should be reserved to them, and supersedes them by a body whose members are not required to have the qualifications of membership of the respective churches which the testator thought essential; (*second*) it disintegrates the Ferguson Bequest Fund, which it was the wish of the testator to preserve 'as a permanent fund;' (*third*) it diverts to secular education what the founder enjoined should be devoted to denominational purposes controlled by the various churches alone."

By section 1 of the Act it is provided that "'Educational endowment' shall mean any property, heritable or moveable, dedicated to charitable uses, and which has been applied or is applicable in whole or in part, whether by the declared intention of the founder or the consent of the governing body, or by custom or otherwise, to educational purposes, but shall not, except with the consent of the governing body, include the funds, whether capital or revenue, of any incorporation or society contributed or paid by the members of such incorporation or society by way of entry-moneys or other fixed or stated payments, nor burgess fines paid to any such incorporation or corporate society, except as hereafter provided. 'Governing body' shall mean the managers, governors, or trustees of any endowment or other persons having the administration of the revenues thereof."

Section 4 of the Act provides for the appointment of Commissioners, and by section 5 it is enacted—"Subject to the provisions hereinafter contained the Commissioners shall have power to prepare drafts of schemes for the future government and management of educational endowment, which schemes may provide for altering the conditions and provisions of such endowments, including the powers of investing the funds thereof, or amalgamating, combining, or dividing such endowments, or altering the constitution of the governing bodies thereof, or uniting two or more existing governing bodies, or establishing new governing bodies with such powers as shall seem necessary, and to insert in such schemes clauses incorporating the governing bodies, whether new or old."

Section 8, sub-section (3), provides that the Act shall not apply "to any endowment solely or mainly applicable or applied for the purposes of theological instruction or belonging to any theological institution."

Section 10 provides that "where any part of an endowment is an educational endowment within the meaning of this Act, and part of it is applicable or applied to other charitable purposes, the scheme shall be in conformity with the following provisions (except so far as the governing body of such endowment assent to the scheme departing therefrom). . . . (2) The proportion of the endowment or annual income, for the time being, so applicable to such other charitable uses shall be deemed to be the proportion which, in the opinion of the Commissioners, is the proportion which has according to the average of such number of years as the Commissioners shall determine been appropriated as regards capital, or applied as regards income, to such uses." . . .

Section 15 provides that "in framing schemes it shall be the duty of the Commissioners, with respect alike to the constitution of the governing body and to educational provisions, to have regard to the spirit of founders' intentions, and in every scheme which abolishes or modifies any privileges or educational advantages to which a particular class of persons is entitled, whether as inhabitants of a particular area or as belonging to a particular class in life or otherwise, they shall have regard to the educational interests of such class of persons: Provided always that where the founder of any educational endowment has expressly provided for the education of children belonging to the poorer classes, either generally or within a particular area, or otherwise for their benefit, such endowment for such education, or otherwise for their benefit, shall continue, so far as requisite, to be applied for the benefit of such children."

Section 30 provides that "(1) If the governing body of any endowment to which a scheme relates, or any person or body corporate directly affected by such scheme, feel aggrieved by the scheme on the ground of the scheme being one which is not within the scope of, or made in conformity with this Act . . . such governing body, person, or body corporate may, within one month after the first publication of the scheme or amended scheme, submit a case to the Court of Session, to which the Commissioners shall, and any others directly interested may be parties, for the opinion of the said Court on the question or questions therein stated, and if the Court is of opinion that the scheme is contrary to law on any of the grounds in this section mentioned, the Scotch Education Department shall not approve thereof, but they may, if they think fit, remit the same to the Commissioners with a declaration as hereinbefore provided." . . .

For the first parties, the Ferguson trustees, it was argued that what the testator had in view was a denominational and a religious object. Both these elements were essential. It was denominational as opposed to undenominational and secular. The parish churches and schools were already so equipped as to serve his purpose—*i.e.*, to secure Presbyterian religious instruction. It was religious, both expressly and by implication. The schools were to be under the control of certain churches, both as regarded management, and the character of the instruction to be supplied. Moreover, the qualifications prescribed as essential in the trustees pointed in the same direction. Thus the testator's intention was clear, and that was always to be regarded in the formation of a scheme — Educational Endowments Act 1882 (45 and 46 Vict. c. 59), sec. 15; *The Ferguson Bequest Fund* case, January 16, 1879, 6 R. 486. But according to the scheme proposed, the fund might be appropriated to provide instruction from which religion was systematically excluded, while the members of the governing body might be of any or no religion. The provisions of the testator's will taken along with the history of the trustees' administration showed that the fund was not an "educational endowment" in the sense of section 1 of the

Act. The Court had the power and ability to review the Commissioners—to discriminate between the letter of the will and its spirit. The Commissioners had ignored both.

The second parties adopted the first parties' argument.

It was argued for the third parties that the question was whether this scheme was within the scope of Act, or in conformity with it—*Forrest's Trustees* v. *Commissioners on Educational Endowments*, March 18, 1884, 11 R. 719. (1) Was the fund within the scope of the Act? This fund had always been applied in part to education. The churches were merely the means of a larger purpose, namely, education. It was true that the testator made it essential that his trustees should be members of the religious bodies; but "expressly" there was not a word in the will about "religious education." And if religious education had exclusively been meant, the trustees would by their actings have been guilty of breach of trust. The testator wanted to promote education in certain districts. He wished to make a provision where parish schools were insufficient, and where the denominations were doing good work; and he made them his instruments. That certainly could not take his bequest out of section 1 of the Act. (2) Was the scheme in conformity with the Act? Did it violate the spirit of the founder's intention? In order to answer these questions the main object of the testator must be considered, and the statutory powers of the Commissioners. These powers were so wide that the matter was really wholly within the discretion of the Commissioners—*Donaldson's Hospital* v. *Commissioners on Educational Endowments*, Oct. 31, 1885, 13 R. 101. The Commissioners had full power under section 10 to fix a proportion by taking an average of years. They had arrived at the sum of £1600 by taking the average of the whole years during which the fund had been in existence.

At advising—

Lord President—In the argument presented by the first and second parties, whose interest is the same, we were reminded that we have a jurisdiction, the scope of which has been defined in various cases, and, in particular, in the case of *Clephane* v. *Magistrates of Edinburgh*, Feb. 26, 1869, 7 Macph. (H. of L.) 7. There it was well laid down that while a court of equity cannot change the object of a charity, it has jurisdiction to vary the means for obtaining that object when circumstances have rendered a change expedient. I mention this at the outset only to remark that in the present case we have nothing to do with that jurisdiction. In this case we are not to exercise an equitable jurisdiction, but as a court of law to construe a statute. This is made very clear by the 30th section of the Educational Endowments (Scotland) Act 1882, which provides that "If the governing body of any endowment to which a scheme relates, or any person or body corporate, directly affected by such scheme, feel aggrieved by the scheme on the ground of the scheme being one which is not within the scope of or made in conformity with this Act," they may complain to this Court; "and if the Court is of opinion that the scheme is contrary to law on any of the grounds in this section, the Scotch Education Department shall not approve thereof, but they may, if they think fit, remit to the Commissioners." . . . The question, accordingly, before us is, whether this scheme is contrary to law, as being either not within the scope of the Act, or not in conformity with it? That that is the only question for our judgment, has been already decided in two cases—in the case of *Forrest's Trustees* v. *Commissioners on Educational Endowments*, March 18, 1884, 11 R. 719, in this Division; and in the case of *Donaldson's Hospital* v. *Commissioners on Educational Endowments*, Oct. 31, 1885, 1885, 13 R. 101, in the Second Division; and therefore we are to proceed to answer that question, and that question only.

Now, the objections which have been stated to the scheme by the complaining parties are enumerated under the twelfth article of this case. The first is that "the Ferguson Bequest Fund is not an 'Educational Endowment' on a sound construction of section 1 of this said Act." Now the first section of the Educational Endowments Act provides that "'Educational Endowment' shall mean any property, heritable or moveable, dedicated to charitable uses, and which has been applied or is applicable in whole or in part, whether by the declared intention of the founder or the consent of the governing body or by custom or otherwise, to educational purposes." . . . The section therefore contemplates that an educational endowment may be a fund which has been applied to educational purposes, or which is applicable to educational purposes; and it may be applicable, although it has not been applied, if it has been made applicable by the declared intention of the founder, or by the consent of the governing body, or by custom. Now, in this case, I think this endowment is applicable, or at all events in part if not in whole, according to the intention of the founder; and that of course requires to be shown from the testamentary deed of the founder himself. The disposal of the residue is made in these terms:—He directed his trustees to hold the residue "as a permanent fund to be called the *Ferguson Bequest Fund;* and to pay, apply, and appropriate the interest and other annual income, profits, and produce thereof in and towards the maintenance and promotion of religious ordinances and education and missionary operations" within certain counties, which are specified; and the grant made for these purposes to the different churches is to be applied "by means of payments for the erection or support of churches and schools (other than and excepting parish churches and parish schools)." Now, if that had stood alone, there could have been little difficulty in answering the question whether this bequest was in part an educational endowment, for one of the objects of it is expressly said to be education. It is not disputed that it is religious education that is intended; that is to say, education conducted on religious principles and embracing religious instruction, and if this matter had stopped there, it could not have been doubted that the endowment is in part an "educational endowment." But then there is a clause, following this provision disposing of the residue, and couched in these terms:—"Declaring that the application and appropriation of the trust funds shall be entirely at the option and discretion of the quorum of my said trustees, as to the proportions thereof to be applied to the

said several objects." Now, that has been read, or at least it has been argued that it may be read, as conferring on the trustees an absolute discretion to apply the whole fund to one or two of the objects which the testator had in view to the exclusion of the third; and, accordingly, that the trustees were entitled, if they thought fit, to give the whole funds for the maintenance and promotion of religious ordinances and missionary operations to the exclusion of education altogether. I do not think that that is a sound construction of the clause. The clause gives to the trustees merely power to apportion the fund among the three objects specified. I think we must come to the conclusion that the endowment is partly applicable to the purposes of education. The discretion enjoyed by the trustees as to the proportion has probably been superseded entirely by this scheme; and whether that is in itself contrary to the scope of the Act, or is outwith the scope of the Act, or is illegal on any other grounds, is a different question. The first objection is thus completely answered by a reference to the provisions of the deed itself.

The next objection is, that "on a sound construction of section 3 of the said Act, the said residue is not within the scope of the Act." It is needless to read that section at length. Its main purpose is that the Commissioners are not to interfere with any endowment appropriated exclusively to the teaching of theology; and certainly it cannot be maintained, on even plausible grounds, that the Ferguson Bequest was intended to be applied to the teaching of theology. There is no appearance of such an intention in any part of the deed.

The third objection is that the scheme of the Commissioners "is not in terms of the said Act, and particularly section 10 thereof, in respect that it diverts from other charitable purposes money in use to be applied to the same." Now that requires a consideration of section 10. This section provides that "where any part of an endowment is an educational endowment within the meaning of this Act, and part of it is applicable or applied to other charitable purposes, the scheme shall be in accordance with the following provisions (except so far as the governing body of such endowment assent to the scheme departing therefrom);" and then follows a sub-section which is inapplicable. But the second sub-section says this:—"The proportion of the endowment or annual income for the time being so applicable to such other charitable uses shall be deemed to be the proportion which in the opinion of the Commissioners is the proportion which has, according to the average of such number of years as the Commissioners shall determine, been appropriated as regards capital, or applied as regards income, to such uses." . . . It is quite clear that this is the only part of the sub-section which is applicable, for the latter part deals with a proportion fixed by deed or statute, which is not the present case. It was left entirely to the trustees to fix the proportion, and accordingly the proportion now to be settled must be settled by the first branch of the second sub-section, and that leaves the matter wholly in the discretion of the Commissioners. Now, the course there prescribed is that which has been followed by the Commissioners. Whether they have acted rightly, or whether the proportion as fixed by them is a just one I am not at liberty to inquire. That is a matter to be regulated wholly by what in their opinion is the average proportion on the number of years taken by them. It is wholly within their discretion, and accordingly they cannot be said to have committed any illegality in exercising that discretion. This is just one of those cases in which an appeal is attempted to the discretion of this Court to overrule the discretion of the Commissioners. But this Court is vested in no such discretion.

The fourth objection is that the scheme "is contrary to the terms of the said Act, and particularly section 15 thereof, in so far as it does not have regard to the spirit of the founder's intentions in respect that (first) it renders impossible the exercise by the trustees of that absolute discretion which it was a cardinal point of the founder's scheme should be reserved to them, and supersedes them by a body whose members are not required to have the qualifications of membership of the respective churches which the testator thought essential; (second) it disintegrates the Ferguson Bequest Fund, which it was the wish of the testator to preserve 'as a permanent fund;' (third) it diverts to secular education what the founder enjoined should be devoted to denominational purposes controlled by the various churches alone." Now, with regard to section 15, it appears to me to contain instructions or directions to the Commissioners as to what they shall do, but leaves them full discretion as to the manner in which they shall do it. Therefore an objection grounded on the manner in which they have followed out these directions is an objection not to the scheme of the Commissioners but to the statute itself. It is the same kind of objection as the third objection, and is a similar attempt to get the Court to override the discretion of the Commissioners. Accordingly I think that all these objections must be disallowed.

Lord Mure concurred.

Lord Adam—The only grounds of objection to a scheme which we can entertain are that it is not within the scope of the Act, or that it is not in conformity with the Act. These objections are different in kind, for in the second place only is it possible that the scheme can be amended. The first and second objections are of the first kind. Now with regard to the first objection I agree with your Lordship. I am clearly of opinion that this is an educational endowment, and I am equally clear that the trustees have no option as to the application of part of that fund to educational purposes. The clause following the provision which disposes of the residue gives them entire discretion as to the proportions; but they must apply some part of the funds to each of the three purposes mentioned. But further I think it has been so applied. That appears quite clearly from the statements in the case. Accordingly I have no doubt that this is an educational endowment, and that the scheme is within the scope of the Act. That disposes of the first and second objections.

The answer to the third objection depends upon whether the portion of the fund appropriated to education is greater than that to which the Commissioners are entitled under the statute.

It is clear that that depends upon the number of years which the Commissioners are entitled to take in order to fix an average. If they had taken the recent years only the sum brought out would no doubt have been very small. But they have fixed an average by taking all the years together since the institution of the fund. Having done so, it is not said that they have taken more than the average to which they were entitled. Now, what they did was entirely within their discretion, and accordingly we cannot interfere. As to the fourth objection I entirely agree with your Lordship.

The Court answered the question in the affirmative.

Counsel for First Parties—D.-F. Mackintosh, Q.C.—Dundas. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Second Parties—Comrie Thomson—Guthrie—MacWatt. Agents—Millar, Robson, & Innes, S.S.C.—Cowan & Dalmahoy, W.S.—Mack & Grant, S.S.C.

Counsel for Third Parties—Darling—Gillespie. Agent—Donald Beith, W.S.

Tuesday, March 16.

FIRST DIVISION.

HALDEN AND OTHERS, PETITIONERS.

Company—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 156—*Expense of Meetings in Reference to a Proposed Reconstruction of the Company.*

Creditors of a company in liquidation obtained an order under section 156 of the Companies Act 1832 for access to the books and papers, the object being to consider as to a proposed reconstruction of the company. The scheme proved abortive. *Held* that the expense of the attempted reconstruction could not be paid by the liquidator out of the funds of the company as part of the expense of the liquidation.

On the 7th January 1886 James Halden and others, creditors of the Scottish Heritable Security Company (Limited), in liquidation, presented a petition under the 156th section of the Companies Act 1862, praying the Court to appoint James Romanes, chartered accountant, Edinburgh, liquidator of the said company, to furnish to the petitioners or their agents a list of the creditors of the company, in order that they might convene a meeting of creditors to consider a proposal for reconstruction of the company, and to ordain the liquidator to give to the petitioners, or to such committee as might be appointed by a meeting of creditors, access to the books and papers of the company, and to find the expenses of the petition, procedure thereon of said meetings, and relative procedure, to be expenses in the liquidation; and to authorise the liquidator to pay said expenses out of the funds in his hands, as said expenses might be taxed by the Auditor of Court.

The petition was intimated and served, and answers were lodged for the liquidator, who expressed his readiness to meet the petitioners' views, subject to the approval of the Court. On 20th January 1886 the Court pronounced this interlocutor:—"The Lords having resumed consideration of the petition, with the answers for the liquidator, reserve the question of expenses craved; *quoad ultra* grant the prayer of the petition, and decern."

The 156th section of the Companies Act 1856 provides that "Where an order has been made for winding-up a company by the Court or subject to the supervision of the Court, the Court may make such order for the inspection by the creditors and contributories of the company of its books and papers as the Court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributories in conformity with this order of the Court, but not further or otherwise."

The liquidator furnished a list of the creditors of the company, and at a meeting of the creditors held on February 26, 1886, a committee was appointed to meet the committee engaged in the proposed reconstruction of the company, and the liquidator, and to report as to the proposal. The committee so appointed issued a report containing certain recommendations as to the future management and realisation of the company's estate, but recommended that the proposed reconstruction be not approved. This report was approved at the adjourned meeting of the depositors held on 26th March 1886, at which the liquidator was present. At that meeting a motion was made to allow £100 to cover expenses incurred by the reconstruction committee, and £10 as outlays for the committee appointed on 26th February, and there being no counter motion it was agreed to remit these motions to the committee of advice now appointed to settle the matter with the liquidator. The liquidator, although not opposed to the payment of these expenses, was of opinion that he was unable to pay them without the authority of the Court, and accordingly James Halden and certain other creditors of the company presented a note to the Court, in which they craved the Court to find the expenses of the petition and procedure thereon, and of said meetings and relative procedure, to be expenses in the said liquidation; and to authorise the liquidator to pay these expenses out of the funds in his hands as liquidator foresaid, as such expenses might be taxed by the Auditor of Court.

At advising—

Lord President—The original petition here was presented under section 156 of the Companies Act 1862, which empowers the Court to make an order "for the inspection by the creditors and contributories of the company of its books and papers as the Court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributories in conformity with the order of the Court, but not further or otherwise." Now, that is of course intended to give creditors the means of ascertaining anything they might want to know from the books of the company; but it was certainly not intended to be used for the purpose of enabling creditors to consider whether they should put an