with injuries sustained "by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed." Is there any averment here to bring the case within that category? Again I say none whatever. The nearest approach to it—though it stops a long way off—is the third article of the condescendence. There it is stated that the deceased was working under the instructions and superintendence of one of the defenders' foremen, and that the said foreman was a person whose orders the deceased was bound to obey. I suppose most contractors have got a foreman, and in the sense of the language used here all the workmen of such contractors work under a foreman. According to the contention of the pursuer, wherever there is a foreman, then there is liability on the part of the master. That view is extravagant. Such is not the case provided for by the statute, which contemplates a particular order given by a foreman, and injury resulting from a workman's having conformed to said particular order. It is not said here that there was any particular order given. It is only said that the deceased was working in a drain which he had dug down to a certain depth, and that he and all the others engaged in that work were acting under a foreman. No order is said to have been given. To whose order did the pursuer conform and in conforming was injured? It would be altogether a misapplication of ingenuity to try and argue, with the words of the statute before one, the case of workmen working under a foreman in a drain to whose safe state they should *prima facie* have themselves attended. Even supposing the foreman had directly superintended this operation—which is not said—I think that the case would not have been relevant under the Act unless it had been alleged that a special order was given. I am clearly of opinion that the case is irrelevant at common law—that is not disputed—and also that it is as irrelevant a case under the statute as could well be figured. There have been previous cases of banks coming down—more commonly, no doubt, upon strangers—but I know of no case sustained as relevant where it was alleged that the bank came down through the fault of the foreman.

LORD RUTHERFURD CLARK—The question here is, whether or not we should dismiss this action as irrelevant or allow further inquiry? I think the case arises not absolutely upon relevancy, but upon whether the pursuer should have an issue, and I think she should. I do not say she has any case at common law, but she may prevail under the statute.

LORD TRAYNER was absent when the case was argued, and gave no opinion.

The Court held the action relevant and approved of the issue proposed.

Counsel for the Pursuer and Appellant—Wilson. Agent—A. B. Cartwright Wood, W.S.

Counsel for the Defenders and Respondents—Ure—Salvesen. Agents—Macpherson & Mackay, W.S.

Friday, February 6.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

SMITH *v.* MILLER.

Public Company—Voluntary Liquidation Continued subject to Supervision of Court—Expenses Incurred Prior to Supervision Order in Attempting to Float New Company—Companies Act 1862, *sec.* 161.

The shareholders of a company by special resolutions resolved upon voluntary liquidation and appointed a liquidator with full powers under the 161st sec. of the Companies Act 1862, to accept shares or other like interests in any other joint-stock company in payment of the business, assets, or property of the company in liquidation, and fixed his remuneration at a certain figure in addition to "out-of-pocket expenses." This liquidator, with the approval of the shareholders, endeavoured to float a new company to take over said business and assets, but failed, and upon the petition of a creditor of the company, the Court within twelve months of the resolutions above mentioned pronounced a supervision order, removed the liquidator, and appointed another. No application was made to the Court to sanction the special resolutions of the shareholders.

In an action of accounting at the instance of the new liquidator, *held* (*rev.* Lord Kincairney), by Lord Justice-Clerk, Lords Young and Rutherfurd Clark—that the former liquidator was not entitled to credit for the expenses incurred by him in his endeavour to float a new company, these not being under the Companies Act legitimate expenses in the liquidation; by Lord Trayner—that the said expenses were not chargeable as expenses in the liquidation, the special resolutions not having been sanctioned.

Upon 10th June 1889 an extraordinary general meeting of the Scottish Assurance Corporation, Limited, incorporated under the Companies Acts 1862 to 1886, was held, at which it was resolved that the said corporation should be wound up voluntarily, and at which Mr Thomas Leander Moyaart Miller was unanimously appointed liquidator, "with full powers under sec. 161 of the Companies Act 1862, to accept shares or other like interests in any other joint-stock company in payment or part payment of the business assets or property of the corporation, and that the remuneration of said liquidator for his services be fixed at the rate per annum of his present salary

[as manager of the company] in addition to his 'out-of-pocket expenses.'"

The Companies Act 1862 (25 and 26 Vict. c. 89) by section 161 provides that "Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale shares, policies, or other like interests in such other company for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits or receive any other benefits from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up; . . . no special resolution shall be deemed invalid for the purposes of this section by reason that it is passed antecedently to or concurrently with any resolution for winding-up the company, or for appointing liquidators; but if an order be made within a year for winding-up the company by or subject to the supervision of the Court, such resolution shall not be of any validity unless it is sanctioned by the Court."

Mr Miller proceeded to London and endeavoured, but in vain, to float a new company which would take up the business of the said corporation. In doing so he incurred expenses amounting to £280, 19s. 7d. Upon 16th September 1889 a general meeting of shareholders approved of the efforts then in progress to secure the end in view.

Upon 15th March 1890 the Court, on a petition presented by a creditor of the said incorporation, pronounced an order continuing the voluntary liquidation but subject to the supervision of the Court, removed Mr Miller from the office of liquidator, and appointed Mr Adam Davidson Smith in his place. No application was made to the Court to sanction the special resolutions of the company.

In June 1890 the new liquidator brought an action of accounting against the former liquidator, in which the latter claimed that he should be allowed to credit himself with the said sum of £280. 19s. 7d. And the pursuer pleaded—"(3) The defender is not entitled to credit for the expenses in London incurred in endeavouring to float a new company, in respect the same are not legitimate expenses of the liquidation."

The Lord Ordinary (KINCAIRNEY) repelled said plea-in-law.

"*Opinion.*—In this action of accounting by the voluntary liquidator of the Scottish Assurance Corporation, Limited, against his predecessor in office, it appears that the defender has rendered to the pursuer a preliminary account, and that the pursuer has objected to various items for which the defender takes credit, amounting to £314, 10s. Of that sum there are items or an item amounting to £280, 19s. 7d. entered as consisting of expenses out of pocket incurred in London, and connected with the floating of the new company, and it is represented to me by both parties that if the question as to the right of the defender to take credit for this sum were decided they would probably be able to adjust their other differences.

"I sympathise in the desire of the parties to limit the expenses of litigation as much as possible, but I feel there is some danger of increasing the expenses instead of diminishing it by deciding one special question in a case without a proof or formal renunciation of probation.

"It is averred by the defender, and the averment is admitted, that at a meeting of the corporation held on 10th June 1889 it was resolved that the corporation should be wound up voluntarily, that the defender should be appointed liquidator, with full powers, under sec. 161 of the Companies Act 1862, to accept shares or other like interests in any other joint-stock company in payment or part payment of the business assets or property of the corporation, and a committee was appointed to confer with the liquidator as to the manner in which a scheme of reconstruction or amalgamation should be carried out if possible.

"The defender avers that he proceeded to London and endeavoured to carry out the scheme of amalgamation and reconstruction in conformity with these resolutions, and that in doing so he incurred the expense which is in question.

"The pursuer admits that the defender proceeded to London to carry out a scheme of reconstruction or amalgamation, and that he tried to float another company to take up the business of the company in liquidation; and then he proceeds thus:—'Admitted that the pursuer refuses to allow credit for expenses so incurred. Explained that an examination of the company's affairs at once disclosed to the defender and others that the liquidation was a creditor's liquidation, and that the defender had no right to incur expenses in floating another company without the authority or concurrence of the creditors,' and the pursuer's plea relative to the point is this:—'3. The defender is not entitled to credit for the expenses in London incurred in endeavouring to float a new company, in respect the same were not legitimate expenses in the liquidation.'

"I was asked by the parties to decide the question expressed by this plea, and that on the assumption (1) that the resolutions of 10th June 1889 are not challenged on the ground of informality, but are to be taken as special resolutions of the corporation such as are required to sanction procedure under the 161st section of the statute; (2) that the creditors of the corporation have

not been paid in full; and (3) that the sum in question was wholly expended by the defender in an endeavour to carry out the above resolutions of the company by floating or constituting a new company in order to make over to it the interests of the old.

"I rather think that the question thus raised may be decided now, and that the parties may probably be able to avoid the expense of a proof.

"The sum claimed was an outlay made by the defender on behalf of the corporation, and it would, it must be admitted, be a very hard case if he were required to pay it himself.

"The argument of the pursuer was that the sum should be disallowed because section 161 was applicable only to the case of a liquidation where all the creditors had been paid, and not applicable to this case where the creditors had not been paid. The argument, therefore, was that the resolution to proceed under sec. 161 was *ultra vires*, and that therefore outlay by the liquidator in endeavouring to carry out that invalid resolution could not be allowed. It was pointed out that the section contained provisions to secure the interests of dissentient members, but none in reference to the interests of dissentient creditors.

"I am of opinion that this contention is ill-founded. The section is expressed as applicable to all cases of voluntary winding-up, and I find no warrant for restricting it to that very limited number of cases where all the debts of the company are paid. The powers in the section have apparently been frequently put into operation in England in liquidations where the debts had not been paid. Several such cases are referred to in Mr Buckley's notes on section 161, and mention may be made in particular of the case of *The City and County Investment Company*, November 19, 1879, 13 Ch., Div. 475, where the point was, I think, decided, and where it was said that the remedy of a dissentient creditor was to take advantage of the provision in the last clause of the section, and by obtaining an order for winding-up by the Court on a supervision order to make the validity of the resolution dependent on the sanction of the Court.

"The case of *The Wreck Recovery Company*, 15 Ch., Div. 363, referred to for the pursuer, raised a question under section 95, not section 161, and does not, in my opinion, support the pursuer's contention. I think, therefore, that the resolution in question was not *ultra vires*, on the ground that the debts of the company were unpaid.

"It was further contended that the 161st section contemplated the transfer of the assets to an existing company, and not a transfer to a company to be brought into existence for the purpose of taking over the assets. No authority for that proposition was quoted, and the section has not been so understood in the English Courts.

"In *The Imperial Mercantile Credit Association*, 1871, 12 Eq. 504, it was decided that the 161st section applied to a liquidation under supervision, and a resolution to transfer to a company to be formed for the purpose of taking the assets was supported.

"In *The Irrigation Company of France*, 1872, 6 Ch. 176, a resolution authorising a transfer to a French company to be formed, was regarded as not *ultra vires*, and although in that case irregular, capable of confirmation.

"In *Bird* v. *Bird's Patent Deodorising and Utilising Sewage Company*, March 7, 1874, 9 Ch. 358, an agreement to sell the assets of the company to an individual on certain special terms was held to be *ultra vires*, and not sanctioned by the 161st section.

"But in the case of *Hester & Company, Limited*, August 4, 1875, 44 L.J., Ch. 757, James, L.J., pointed out that in the case of *Bird* the sale was to an individual, but that in the case of *Hester* the sale was to an agent for the company to be formed, and was 'therefore within the terms of the section.' This is an opinion of great weight, expressly opposed to the contention of the pursuer.

"I see no reason to question the correctness of the view taken in the English Courts of this section, and therefore I think that the resolution in question could not be regarded as *ultra vires*, on the ground that it may have contemplated the formation of a new company, and that the defender in endeavouring to float a new company was engaged in an attempt by which, had he succeeded in it, the resolution of the company might have been validly carried into effect.

"If, then, there be no other reason for disallowing this outlay, I think the reason that it was an outlay expended in the endeavour to float a new company is not a sufficient reason for disallowing it. It was an outlay made in a legitimate attempt to carry out the resolutions of the company.

"No other reasons were offered in support of the contention of the pursuer. It was not suggested that the outlay should be disallowed because the defender's attempt had failed, nor that the resolutions were *ultra vires* for any other reasons than those which have been mentioned.

"I think, therefore, that the pursuer's third plea-in-law has not been supported, and is bad in law. I therefore repel it, and will hear the parties further, if they wish it, on the effect of that judgment."

The pursuer reclaimed.

It was admitted by joint-minute "That the resolutions of the corporation, dated 10th June 1889, are not challenged on the ground of informality, but are to be taken as special resolutions of the corporation, such as are required to sanction procedure under the 161st section of the Companies Act 1862."

Argued for pursuer and reclaimer—The Lord Ordinary had scarcely touched upon the really important question here, viz., whether expenses incurred in an effectual effort to create a new company to take over the assets of one in voluntary liquida-

tion were legitimate expenses in that liquidation. It was a question of statutory powers and none such were conferred by the 161st section, which was admittedly the only one in the Act upon which the defender could found. Besides, the resolution of 10th June 1889 became invalid by reason of the supervision order, and had not been subsequently sanctioned by the Court—see opinions *in re Callas Bis Company*, 1889, L.R., 42 C.D. 169. Further, the special resolution which the 161st section contemplated the Court sanctioning was one to accept shares, &c., in a new company formed or to be formed, and not one authorising the endeavour to create such a company.

Argued for defender and respondent—The resolution was lawful under section 161. The shareholders had throughout regarded the action of the defender as the best possible in the interests of the company and its creditors. If the new company had been floated, the preliminary expenses could have been arranged for in the terms of the transfer. Upon the cases referred to by the Lord Ordinary it was immaterial whether the new company was formed or to be formed. Because the effort to form it had failed, was the liquidator to be held personally liable for the expenses? It must be presumed that the Court would, if it had been asked, have sanctioned the resolution, being a reasonable one. If not, the case should be sisted to allow of that sanction being still applied, there being no limit as to time.

At advising—

LORD JUSTICE-CLERK — The Scottish Assurance Corporation, Limited, which was formed in 1888, came shortly to find itself in financial difficulties, and accordingly Mr Miller was appointed voluntary liquidator for the purpose of winding-up the affairs of the company. After the liquidator had gone on with his duties for some time a petition was presented for his removal, and a new liquidator was appointed by the Court, which at the same time placed the liquidation under judicial supervision. The new liquidator appointed was the present pursuer. The question immediately before us has been raised by the present liquidator in order to have the intromissions of Miller dealt with, and the particular point we are now asked to decide is whether or not certain expenses incurred by Miller in endeavouring to float a company to take over the assets of the Scottish Assurance Corporation are such charges as he is entitled to credit for as between himself and the present liquidator? The only ground upon which he can claim these expenses for attempting to float a new company must be found in the Companies Act 1862, and both parties are agreed that if there is any ground at all for the claim in that Act, it can only be in the provisions of the 161st section.

It is important to see what the exact terms of that section are that we may judge how far they are applicable to this case.

The section provides—[*His Lordship read the section as given above*].

That is all which it is necessary to read of the section, for the rest of it is a proviso giving power to members of a company to dissent, and has no bearing on this case.

Now, that section shows that it is quite within the powers of shareholders of a company in voluntary liquidation by resolution to enter into negotiations, and to carry out an arrangement under which their business will be transferred to another company. Upon that point there is no dispute between the parties. I also think that in coming to such a resolution it is immaterial whether the company to whom the business is to be transferred is an existing company or one to be formed. But that in no way touches the question here, which is, whether the liquidator had or had not the right to spend the sums coming into his hands in endeavouring to form such a company. The cases referred to decide that the business may be transferred to a company either formed or to be formed, but I find in none of them authority for holding that the sums spent by a liquidator in trying to float a new company are a legitimate part of the expenses which he is entitled to incur. There is nothing in the Act itself to justify such an idea. The Act is very express in its terms, and gives no hint that a liquidator may so spend the money still remaining to the creditors.

These being my views, I have no doubt that we must recal the judgment of the Lord Ordinary, and disallow the claim of the removed liquidator to charge the sums expended by him, as I have explained, as proper liquidation expenses. I am of opinion that we must sustain the pursuer's third plea-in-law.

LORD YOUNG—I am almost sorry to say that I am of the same opinion. I should very willingly have come to the same opinion as the Lord Ordinary, as I thoroughly approve of a result by which the former liquidator would be reimbursed in the expenses incurred by him under the instructions of the shareholders, and laid out in good faith, while acting in the manner considered to be all round the one most likely to promote the interests of the company in liquidation. I hope sincerely that those under whose directions these expenses were incurred will consider themselves bound to prevent the burden of the expenses falling upon the liquidator. Still I am constrained, after every reasonable effort to resist it, to come to the conclusion that the expenses of the ineffectual attempt to create a company to take over the assets of the company in liquidation are not legitimate expenses of the liquidation. If the effort had been successful, no doubt arrangements would have been made in the transfer to meet the expenses of the negotiations. But seeing that there was here only an ineffectual attempt, which must always be made in view of the fact that those who make it must meet the expenses of making it if it fails, I think these were not legitimate expenses under the Act, and I agree with your Lordship in thinking they must be disallowed in this accounting.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD TRAYNER—I am also of the same opinion but upon somewhat different grounds. These expenses, if they could in any case have been chargeable as expenses of liquidation, could only be so as incurred under a resolution of a company in voluntary liquidation. Now, that resolution fell by reason of the liquidation being put under the supervision of the Court within twelve months of its being passed, and sanction of that resolution not having been asked. I therefore think the case is to be dealt with as if the liquidator had incurred this expense without any resolution being passed. It was suggested in the course of the argument that the sanction of the Court might be taken as given, as it would undoubtedly have been given and could be given now. I think it doubtful whether, even if given now, it would validate *ex post facto* the expenditure here disputed, and even if it would, whether the Court would now give its sanction.

The Court recalled the interlocutor of the Lord Ordinary, sustained the third plea-in-law for the pursuer, and found no expenses due to or by either party.

Counsel for the Pursuer and Reclaimer—Asher, Q.C. — Lorimer. Agent — A. C. D. Vert, S.S.C.

Counsel for the Defender and Respondent — Graham Murray — A. S. D. Thomson. Agent—A. B. Cartwright Wood, W.S.

Friday, February 6.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

EDWARD'S TRUSTEES *v.* YOUNG AND OTHERS.

Testament—Uncertainty—Direction to Accumlate Income—Thellusson Act (39 *and* 40 *Geo. III., cap.* 98).

A testator after expressly excluding one of his nephews from any share in his estate, and leaving certain legacies to other persons named, directed his trustees to accumulate the interest of his estate for fifty years, and thereafter lay out the money in purchasing "an estate in my name that cannot be sold nor indebted, and the income from it . . . to be divided amongst those mentioned in my will yearly." There was no disposal of the fee of the estate.

Held (1) that the direction to accumulate being clear, must receive effect, although under the Thellusson Act the period of accumulation fell to be limited to twenty-one years; and (2) that it was premature to determine the rights of parties in the capital and interest of the residue.

The late William Edward, surgeon, Letham, Forfar, died there upon 6th August 1889, leaving the following trust-disposition and settlement, dated 13th September 1888, and duly recorded.

"*Letham*, 13*th September* 1888.

"This is the will of William Edward, surgeon.

"1. Charles Smith Edward, my brother James' son, is to get nothing, not to be allowed to enter my house, that's him settled.

"2. John Young, my sister Ann's son, is to get £5; William Young £5; Jane Young, their sister, £5.

"3. John Ogilvy, stationmaster upon the Caledonian Railway, £20; Jessie Ogilvy £30 yearly, to help to bring her family up and educate them, and also money to college her three sons; and John Ogilvy money to college one son, the amount each year not to exceed £30 for each of them.

"It has taken me hard work fifty years to make the money that I have, and I want it kept for another fifty years, and what is over expenses paying each year added twice a-year to the stock. The estate at present is as follows—£3400 in the Royal Bank at Forfar, £2000 in the Bank of Scotland at Forfar, £2600 in the Commercial Bank at Forfar, all upon deposit-receipt, besides my book accounts, pony, and furniture. I appoint Robert Bruce, agent in the Commercial Bank at Forfar, and John Ogilvy, stationmaster, and Jessie Ogilvy, his sister, and Jane Edward, my sister, my trustees. The trustees always to be four. Haldane Edward Fyfe, if he come up well, to be appointed one at twenty-one years. Everything here is my own, and if any person enter objections beat them off.

"WILLIAM EDWARD, *Surgeon.*"

"It requires no witnesses. See left side."

[*On left side.*]—"After the fifty years is past, the money (*sic*) to purchess an estate in my name that cannot be sold nor indebted, and the income from it, after paying expenses, to be divided amongst those mentioned in my will yearly.

"WILLIAM EDWARD, *Surgeon.*"

The deceased Dr William Edward had three sisters, Innes Edward or Ogilvy, Annie Edward or Young, and Jane Edward, of whom only the last survived him. He also had one brother, James Edward, who predeceased him. Mrs Innes Edward or Ogilvy left two children, John Ogilvy and Jessie Ogilvy or Fyfe (two of the trustees). Mrs Annie Edward or Young left three children, the said John Young, William Young, and Jane Young or Adam. James Edward left one child, the said Charles Smith Edward. These were all the nearest of kin of the testator.

The four trustees, after having accepted office and assumed the administration of the estate, found it necessary to bring—as pursuers and real raisers—an action of multiplepoinding in order to have the rights of competing claimants to the estate determined by the Court.

The trustees claimed "to retain the residue of the estate forming the fund *in medio* until 6th August 1910 (being the period to which accumulation of the inte-