whether this young woman was or was not dependent on her father is competently before us under the statute. Now, in considering whether she was dependent I find that in the definition clause of the Act, which is substantially the same for Scotland as for England, the right of compensation is limited to such persons as are entitled to sue for damages "as were wholly or in part dependent upon the earnings of the workman at the time of his death." If it had been meant that the right was to be limited to those who were in the position to sue an action for aliment it would have been very easy to say so, or if it had been meant to exclude those who were earning wages for themselves, that again could have been very shortly and definitely expressed in the statute. The right to aliment is a much more limited right than is apparently given under this statute, because a father is not bound to support an able-bodied son who might be earning wages for himself. It is only in cases of sickness or inability to earn a living, it may be from mental inability or want of instruction, that a parent becomes liable in aliment. But the analogy of an alimentary claim is not suggested by anything in the statute; the condition of total or partial dependence upon a man at the time of his death introduces an idea wholly foreign to the common law.

I can see no other construction for this provision except that the ground of liability is whether the wages of the workman at the time of his death were in fact applied to the maintenance of the person who is making the claim. Now, if that be the true construction of the Act the appellant in this case has established her claim, and I am unable to see any other criterion consistent with the language of the statute. I do not say that there may not be exceptional cases, but in the present case, although the woman was no doubt able to earn, and had been in the habit of earning, a small subsistence by doing out-door work, she had come to her father's house to keep his house for him, and that seems to be one of the normal cases where a grown-up child may be dependent on the father. The statute does not limit the case of "dependant" to those who are either minors or infirm or otherwise incapable — it is a general right with a qualification, and the qualification, in my judgment, is that the deceased person at the time of his death had recognised the claim upon him by giving support out of his earnings.

LORD ARDWALL—I concur. The question here is whether or not, in the words of the Act, the appellant was "wholly or in part dependent on the earnings of the workman at the time of his death." Primarily that is a question of fact, and I think it is to be solved by putting it thus—How was this appellant supported? The answer to that question which is given in the findings of the Sheriff-Substitute is that she was supported by the earnings of the workman and in no other way at the time of his death. She had no other source of income whatever. She was dependent for her board, clothing, and lodging entirely on the wages of the workman her father, with whom she resided, and that being so I cannot see how it can be said in fact or in law that she was not dependent on the wages of the workman at the time of his death.

I consider it quite irrelevant to inquire whether she could have supported herself. If instead of doing what it was, I think, her duty to do in the circumstances—staying at home and keeping house for her father—she had gone outside and earned money by her labour and compelled her father to get a strange woman for his housekeeper, she might have laid past some savings out of her earnings to provide for the future, but I think it would be establishing a very hard precedent, and a precedent that might work very badly in practice, to say that a daughter who acts as the appellant did here shall not only lose the opportunity of saving money but shall have no claim under this Act in respect of her father's death. Mr Hunter seemed to fear that in deciding this case as your Lordships propose to do a dangerous precedent would be established for holding that any able-bodied son or daughter residing with his or her father and doing no work whatever should be entitled to the benefits of this statute. I should say such a case would have to be dealt with in a very special way if it came up for decision, but as matter of actual fact I do not think there is much fear of any such question arising, for I should think it would be a most unusual occurrence for a working man to allow an able-bodied son or daughter to live at home without any good reason for doing so, such as the appellant had, and to sorn on their father for a living. I think the fear expressed on behalf of the respondents here is entirely illusory, and on the facts and the law I entirely agree with your Lordships.

LORD KINNEAR was absent.

The Court answered the question in the affirmative.

Counsel for the Claimant and Appellant —Watt, K.C.—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Respondents — Salvesen, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Saturday, January 14.

SECOND DIVISION.

[Lord Pearson, Ordinary.

HOWLING'S TRUSTEES *v.* SMITH.

Company — Liquidation — Irregularity in Appointment of Liquidator — Title of Trustees of Deceased Shareholder to Object — Contributories — Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 76.

Held that the testamentary trustees and executors of a person who at his death was the registered owner of shares in a limited liability company

had, as "contributories," under section 76 of the Companies Act of 1862, a good title to challenge the validity of the appointment of a liquidator on the ground that the special resolution by which he had been appointed had not been carried in conformity with the articles of association.

Company—Winding-up—Appointment of Liquidator—Validity—Special Resolution Complying with Companies Acts but not with Articles of Association.

One of the articles of association of a limited liability company provided that no business should be transacted at any general meeting, except the declaration of a dividend, unless there were personally present ten or more members. Another article provided that on dissolution the affairs of the company should be wound up in terms of the Companies Acts.

A special resolution appointing a liquidator was passed at a general meeting in conformity with the provisions of the Companies Acts, but ten members were not present.

Held that the liquidator was not validly appointed.

Section 76 of the Companies Act 1862 provides as follows—"If any contributory dies either before or after he has been placed on the list of contributories hereinafter mentioned, his personal representatives, heirs, and devisees shall be liable, in due course of administration, to contribute to the assets of the company in discharge of the liability of such deceased contributory, and such personal representatives, heirs, and devisees shall be deemed to be contributories accordingly."

Abram Edward Howling and others, trustees of the late Abraham Howling, brought a note of suspension and interdict against A. Davidson Smith, C.A., Edinburgh, in which they sought to interdict him from acting in any way as liquidator, or representing himself to be liquidator of the North British Property Investment Company, under an alleged resolution of said Company dated 31st March 1904.

The facts of the case are fully set forth in the opinion of the Lord Ordinary.

The following are the articles of association referred to:—"XI. *Proceedings at General Meetings*—(Art. 61) Every notice shall be signed by the manager, or such other officer as the board may appoint, except in the case of a meeting convened by members in accordance with these articles, in which case the notice may be signed by the manager or such other officer, or by the members convening the same, or by one or more of their number duly appointed by them for that purpose. No business shall be transacted at any general meeting, except the declaration of a dividend, unless there shall be personally present at the commencement of the business ten or more members, and it is declared that ten members shall at all times form a quorum of the company. XXI. *Dissolution of the Company*—(Art. 128) It shall be in the power of members holding a fifth part of the subscribed capital of the company, or of five of the directors, to require an extraordinary general meeting of the company to be called for considering any proposition for the dissolution of the company, and if members holding three-fourths of the subscribed capital of the company, personally present at such meeting, or by proxy, shall agree to such dissolution, the company shall be dissolved, but not otherwise: Provided that such meeting shall be called by public advertisement in two Edinburgh newspapers, once each week for two months at least before such meeting, in which advertisement the intention of proposing such dissolution shall be expressly notified, and a minute in the books of the company declaratory of their resolution to this purpose shall be binding on the company without any other form. (Art. 129) No dissolution, however, of the company, other than by order of the Court, under the Companies Acts, 1862 and 1867, shall take place, if, at or before or within fourteen days after the extraordinary meeting to be held in terms of the 127th article, any of the members enter into a sufficient and binding contract to purchase, on such terms as shall be mutually agreed on, the shares of all those members who wish to retire from the company, and to indemnify them against any further liability arising therefrom. (Art. 130) On the dissolution of the company the affairs of the company shall be wound up in terms of the Acts of Parliament under which the company is incorporated."

The complainers pleaded, *inter alia*—"(1) The respondent not having been validly appointed liquidator ought to be interdicted as craved. (2) A quorum of members not having been present when the said resolution was passed and confirmed the respondent is not entitled to found thereon."

The respondent pleaded, *inter alia*—"(1) No title to sue. (2) No relevant case. (3) The note being incompetent should be dismissed. (4) The complainers' averments so far as material being unfounded in fact interdict ought to be refused. (5) The appointment of the respondent having been made in accordance with the statutory requirements, and being in every way regular and valid, interdict should be refused, with expenses."

On 7th June 1904 LORD PEARSON granted interim interdict.

On 6th December 1904 he pronounced the following interlocutor:—"Sustains the first plea-in-law for the respondent: Recals the interim interdict formerly granted, dismisses the note of suspension and interdict, and decerns."

Opinion.—"The complainers are the trustees and executors of the late Captain Howling, who died in April 1902. He was at his death the registered owner of 140 shares, of the nominal value of £10 each, in the North British Property Investment Company, Limited. The executors gave up these shares in their inventory. They also executed a transfer of them in favour of a third party, and sent it in for registration in October 1902, but after some delay the

directors, acting under a power conferred on them by the articles, declined to accept the transferree. Thus the executors were and remained liable only in their representative capacity under section 76 of the statute, and did not become members of the company.

"The directors had, for some time before Captain Howling's death, been realising the investments with a view to the ultimate winding-up of the company. The realisation evidently proved much worse than was expected, and ultimately a final call of £1 per share was made, which was duly paid by the executors early in 1903.

"In February 1904 the company intimated that the surplus funds, after discharging the whole debts and obligations of the company, admitted of a return of 4s. 3d. per share. This was tendered to the executors, and a formal receipt for £29, 15s. was sent them for signature. They explain that as the receipt bore to discharge the company of all claims they declined to sign it until there had been a final meeting of shareholders and a satisfactory accounting made.

"Thereupon the company issued notices for a meeting to be held on 31st March 1904, to pass a special resolution that the company be wound up voluntarily, and that Mr Davidson Smith, C.A., be appointed liquidator. It is said by the respondents that this resolution was duly carried and was duly confirmed at a subsequent meeting on 15th April.

"Within a month of that date the executors presented this note to have Mr Davidson Smith interdicted from acting as liquidator under the special resolution of 31st March. The sole ground alleged for interdict is that by article 61 of the company's articles of association it is provided that 'no business shall be transacted at any general meeting, except the declaration of a dividend, unless there shall be personally present at the commencement of the business ten or more members; and it is declared that ten members shall at all times form a quorum of the company,' and it is averred, and not denied, that ten members were not personally present at either of the meetings I have mentioned. The reply made by the respondents is that article 61 does not apply to any general meeting which has to do with liquidation, that such meetings are governed by article 130, which prescribes that the affairs of the company shall on dissolution be wound up in terms of the Acts of Parliament—that is, in terms of sections 129 and 51 of the Act of 1862, the provisions of which (it is said) were observed. Looking to the collocation of article 130 with articles 128 and 129, I doubt if it has any application to the present case. But even if it has, the question remains whether article 61 does not also apply to make more stringent the provisions of section 51 of the statute as to the requirements for passing a special resolution. In my opinion it does, and I therefore take the case on the footing that the special resolution was not legally passed.

"The question then comes to be, whether the complainers are entitled to state this objection in a process of interdict in which the bare legal objection is the sole ground of action, and in which on the one hand no misfeasance is alleged against anyone, and on the other no loss or damage is said to have accrued to the executry estate held by the complainers. I do not doubt that, if such averments had been made, the complainers would have a sufficient title to sue the wrongdoer, and to obtain redress upon making a relevant averment of breach of duty to them, and of loss accruing from it. They might even have a title to call for an accounting with a view to pecuniary redress. But I am unable to find any good ground in law for sustaining a claim at the instance of persons who are neither members of the company nor outside creditors to have the liquidation virtually declared null, without any averment whatever of loss or damage. In a case of urgency they might even have been entitled to apply to have the liquidation proceedings stopped until they had an opportunity of constituting their claim. But I have heard no suggestion of that here, and I am of opinion that the complainers' statement discloses no title or interest on their part to demand the remedy which they ask."

The complainers reclaimed, and argued—As contributors, and liable as such to pay calls under section 76 of the Companies Act of 1862, they were entitled to see that the winding-up was properly carried out—*Norwich Yarn Company*, January 14, 1850, 12 Beavan, 366. The special resolution appointing the liquidator was illegal, as it directly contravened article 61 of the articles of association. The fact that it may have complied with the provisions of the Companies Acts as to special resolutions, particularly section 51 of the Act of 1862, was really immaterial, as the provisions of the Companies Act did not supersede those in the articles of association. The requirements of both must be strictly observed—*De La Mott and Turner*, January 14, 1875, 31 L.T. 773.

Argued for the respondent—The complainers had no title. They were not members of the company, and did not even aver that they had been in any way prejudiced by the appointment. As to the validity of the special resolution, there was nothing in the articles of the company properly construed to evade the provisions of the Companies Acts which had been duly complied with.

LORD YOUNG—I am clearly of opinion that the Lord Ordinary is wrong. He has sustained the first plea-in-law for the respondents, viz., no title to sue. He has determined the case simply on the ground that the complainers have no title to be heard. The point that they desire to make is that the special resolution that the company should be wound up, and that a certain gentleman should be appointed liquidator, was not legally passed owing to the fact that a quorum of members was not present. The Lord Ordinary apparently thinks the objection a sound one, but is of opinion he

cannot hear it from these complainers. I am clearly of opinion that they have a good title to be heard as proprietors of the shares, although not members of the company. This is the only question we require to determine, although I agree with the Lord Ordinary that the resolution was illegal.

LORD KYLLACHY—I concur. I should have been glad to have seen my way to support the judgment of the Lord Ordinary, because I think we see sufficiently behind the scenes to realise that the complainers' interest to raise this question is not of a very substantial character; but the question having to be decided, I am unable to hold otherwise than that these persons being contributories of this company have a sufficient title to complain that the proceedings which resulted in the appointment of this liquidator were irregular and therefore illegal. That being so, the only question is whether the respondent has succeeded in showing (contrary to the Lord Ordinary's opinion) that, assuming the complainers' title, their objection to the regularity of the proceedings is well founded. As to that I am afraid that the terms of the company's articles of association are conclusive in the complainers' favour. I do not, I confess, see how, having regard to those articles, any meeting of the company capable of passing a special resolution for winding up could be legally constituted without the personal presence of at least ten members of the company.

As to the competency of trying such a question by a process of interdict, I should, if the point had been raised, have had some difficulty. But the respondent's counsel I think very properly stated that they did not take any objection and were quite willing that the question should be decided in the present process.

The LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor—

". . . Recal the said interlocutor reclaimed against: Recal also the interlocutor of 7th June: Sustain the 1st and 2nd pleas-in-law for the complainers: Interdict, prohibit, and discharge the respondent from acting in any way as liquidator, or representing himself as liquidator, of the North British Property Investment Company, Limited, under an alleged resolution of said company dated 31st March 1904, and decern." . . .

Counsel for the Complainers and Reclaimers — Hunter — Grainger Stewart. Agent—William Green, S.S.C.

Counsel for the Respondent—Cooper, K.C. Welsh. Agents—Welsh & Forbes, W.S.

Thursday, January 19.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

EDGAR *v.* KENNEDY AND HUTTON'S TRUSTEE.

Bankruptcy — Trustee — Compromise by Trustee of Action against Bankrupt Approved by Commissoners—Dissentient Creditor Proposing to Prosecute Action —Indemnity to Trustee and Trust Estate —Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 169 *and* 176.

A trustee on a sequestrated estate proposed to compromise an action which had been raised against the bankrupt, and the terms of compromise were approved at a meeting of the commissioners, and were subsequently embodied in a joint-minute. A creditor who was a commissioner and had dissented from the approval of the compromise, but had not appealed under section 169 of the Bankruptcy Act 1856, lodged a minute in the cause maintaining his right to take up the defence of the action for his own behoof in the name of the trustee, on the footing that he should pay the trustee the sum to be paid under the compromise, and should grant a bond of indemnity for £500, with satisfactory caution—such bond being, he contended, sufficient to secure the trustee and the trust estate against all liability. In these circumstances the creditor sought to prevent authority being interponed to the joint-minute.

The Lord Ordinary having refused the crave of this minute, and interponed authority to the joint-minute, the creditor reclaimed.

The Court *adhered*, on the grounds—(1) that, the dissentient creditor not having appealed under section 169 of the Bankruptcy Act 1856 against the resolution of the trustee and commissioners to compromise the action, the compromise was finally concluded, and (2) that in the circumstances of the action it was not certain that the bond of indemnity offered by the dissentient creditor would be adequate to secure the trustee and the trust estate against all liability.

On the 15th April 1904 Angus Kennedy, builder, Hillhead, Glasgow, raised an action against Robert Hodgson Hutton, house factor, formerly of 115 North Montrose Street, Glasgow, concluding for (1) reduction of a disposition of certain property in Paisley, upon which the Carlile Boarding House had been erected, granted by him in favour of the defender, dated 3rd and 8th March, and recorded in the Division of the Register of Sasines applicable to the county of Renfrew 9th March 1904, and (2) payment of £500 of damages with expenses.

The pursuer averred that having agreed to sell the property in Paisley to the defender and to accept the price in instalments, he had stipulated that the disposition, which