the overturning of the said cart, which fell upon him near the entrance to a field which adjoins the road to Barry railway station; that the defence that his death was brought about or caused by his wilful or conscious default has not been proved in point of fact; that the causes of this fatal accident were complex and not capable of definite separation, and included (1) the leaving open of the gate of the field into which the steady horse that he was sitting behind on the head of the coup cart suddenly bolted; (2) that at the left-hand pillar of entry by this open gate a small mound of road scrapings had been piled up; (3) that the left wheel mounted this small mound as an inclined plane: and (4) that it knocked over or broke the left-hand pillar of the gate and climbed it so far as to capsize the cart and cause the fall of the deceased below the cart thus thrown off its balance and turned over on its right wheel. The deceased was not holding the ropes called 'reins' in his hand at the time, but had tied them within reach to the left upper and most accessible and convenient ring of the britchen on leaving the steading, as the farmer's son who followed and accompanied him had also done, and for the defence it is maintained that the failure to hold the reins in his hand was in law wilful default on his part, and was in fact the truly sufficient cause of the death; but the Sheriff-Substitute . . . held in law that no working man is bound to foresee the unusual, much less the unprecedented, or to be wiser than his class; and found in fact that the death of the workman in this case was not attributable to any serious and wilful misconduct on his part. The Sheriff-Substitute therefore found the respondents entitled to compensation, and granted decree as craved, with five guineas of expenses."

The *question of law* was—"Was the accident to the deceased attributable to his own serious and wilful misconduct within the meaning of section 1, sub-section 2 (*c*), of the Workmen's Compensation Act 1897?"

Argued for appellant—The deceased in not having hold of the reins was in breach of a statutory regulation — Roads and Bridges (Scotland) Act 1878, section 123, incorporating, *inter alia*, section 97 of the General Turnpike Act (1 and 2 Will. IV, cap. 43)—and breach of a statutory regulation amounted to serious and wilful misconduct—*Dobson* v. *United Collieries, Limited*, December 16, 1905, 8 F. 241, 43 S.L.R. 260.

Counsel for respondents were not called on.

LORD PRESIDENT—I think this is a pure question of fact, and that the Sheriff-Substitute's statement of the circumstances discloses nothing that can give rise to a question of law. I therefore think it is not a case for review. In such cases there may be a question raised which is one of mixed fact and law and so capable of review, but I do not think the question here is of that nature. But even if I could have reviewed the decision I should have come to the same conclusion, for I think there is nothing disclosed here which amounts to serious and wilful misconduct as that has been interpreted in various well-known decisions in the House of Lords. I think, therefore, the question must be answered in the negative.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court answered the question of law in the negative and dismissed the appeal.

Counsel for Appellant—Morison, K.C. —James Macdonald. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for Respondents (Claimants)—Watt, K.C.—Macmillan. Agents—Gardiner & Macfie, S.S.C.

Saturday, July 20.

SECOND DIVISION.

COLLINS' TRUSTEES *v.* BORLAND & COMPANY, LIMITED, AND ANOTHER.

Company—Voluntary Winding-up—Future or Contingent Claims—Necessity of Lodging Affidavit and Claim with Liquidator—Distribution of Assets without Making Provision for such Claims—Companies Act 1886 (49 *Vict. cap.* 23), *sec.* 4.

The proprietors of paper mills were also tenants of lands and reservoirs under leases which in most cases excluded assignees, and in all cases imposed on the tenants obligations of maintenance and restoration. They disponed the mills, and assigned the leases to a limited company which undertook to relieve the vendors of all obligations under the leases, which were at the same time declared to be real burdens on the mill property. At a time when the leases had still some twelve years to run the company went into voluntary liquidation, being unable to carry on business except at a loss, but able to pay and more than pay all claims of creditors except possible future and contingent claims by the vendors in respect of the obligations in the leases.

Held (1) that the vendors were not bound to lodge with the liquidator an affidavit and claim as for breach by the company of its future obligations under the disposition and assignation, and (2) that they were entitled to prevent him from distributing among the shareholders any assets of the company which might remain after payment of ordinary creditors without making provision for the implement of these obligations as they from time to time might become prestable.

Lord Elphinstone v. *Monkland Iron and Coal Company*, June 29, 1886, 13 R. (H.L.) 98, 23 S.L.R. 870, and section 4 of the Companies Act 1886, *considered.*

The Companies Act 1886 (49 Vict. cap. 23), section 4, enacts:—"*Ranking of Claims.*—In the winding-up of any company under the Companies Acts, 1862 to 1886, whose registered office is in Scotland, and where the winding-up shall commence after the passing of this Act, the general and special rules in regard to voting and ranking for payment of dividends provided by the Bankruptcy (Scotland) Act, 1856, sections forty-nine to sixty-six inclusive, or any other rules in regard thereto which may be in force for the time being in the sequestration of the estates of bankrupts in Scotland, shall, so far as consistent with the tenor of the said recited Acts, apply to creditors of such companies voting in matters relating to the winding-up and ranking for payment of dividends; and for this purpose sequestration shall be taken to mean liquidation, trustee to mean liquidator, and Sheriff to mean the Court."

William Clark and others (Sir William Collins' trustees) presented a petition to the Court under section 138 of the Companies Act 1862, and section 25 of the Companies Act 1900, for the determination of a question which arose in the winding up of Borland & Company, Limited.

The petition stated—"1. That the petitioners are the surviving and acting trustees, original and assumed, of the late Sir William Collins, knight, publisher, Glasgow. Borland & Company, the respondent company, was incorporated on 31st March 1906, for the purpose, *inter alia*, of acquiring certain paper mills belonging to the petitioners, known as Milton Mills, Bowling, and carrying on the business of paper manufacturers therein. The nominal capital of the company was 20,000 shares, divided into 5000 preference shares of £1 each, and 15,000 ordinary shares of £1 each, but only about 8000 ordinary shares were issued. . . .

"2. As trustees foresaid, the petitioners were owners of the said Milton Paper Mills, and were in right of certain leases granted to the late Sir William Collins in connection therewith. The said leases included" (1) lease dated 26th May and 19th June 1879 of certain portions of the Barnhill reservoir, for the period of forty years from Whitsunday 1879, at a yearly rent of £42; (2) lease dated 14th and 26th May 1879 of a piece of ground to be used for a reservoir, for the period of forty years from Whitsunday 1879, at a yearly rent of £21; (3) lease dated 2nd and 4th April 1879, of three dams, for a period of forty years from Whitsunday 1879, at a yearly rent of £135; and (4) lease dated 6th and 14th March 1883, of various parts of the lands of Auchentorlie, expiring in 1919. Each of the said leases contained, in addition to the obligation for rent, various onerous stipulations upon the tenants with regard to maintenance, restoration, and other matters. . . .

"3. Upon the respondent company being formed, the petitioners sold to the company the Milton Mills, and assigned to it the relative leases by disposition and assignation dated 7th, 13th, and 14th April, and recorded 20th April 1906. The subjects included in the conveyance were disponed under burden in favour of the petitioners of the complete implement of the terms and conditions of the various leases above referred to, including the payment of rent therein stated, which implement was declared to be a real burden affecting the subjects, and was directed to be inserted in all future deeds affecting the subjects. It was further provided that the company should be bound to make payment of the rents stipulated in the said leases, and to perform the whole other obligations incumbent upon the tenants under the same. The landlords under the various leases were not parties to the assignation granted by the petitioners, and the petitioners are still liable to the landlords for implement of all the obligations in the leases. . . .

"4. The company duly entered into the possession of the mills, in which they proceeded to carry on the business of papermakers, and they also entered into possession of the subjects leased, and paid to the petitioners their proportion of the rents due under the leases at the term of Whitsunday 1906, and to the landlords the rents which fell due at the term of Martinmas 1906.

"5. At an extraordinary general meeting of the company held on 5th January 1907 the following special resolutions were passed, and confirmed at a subsequent extraordinary general meeting held on 23rd January 1907, viz.:—'(1) That this company be wound up voluntarily'; and '(2) That Samuel Greenhalgh, of 20 Acresfield, Bolton, chartered accountant, be and is hereby appointed liquidator for the purpose of such winding up.' The said Samuel Greenhalgh has since administered the affairs of the company, as voluntary liquidator thereof, with a view to winding up the company. The said proceedings were an entirely voluntary act on the part of the shareholders, and were in no way necessitated by the pressure of creditors or by the financial position of the company.

"6. Shortly after his appointment the liquidator intimated to the petitioners and also to the landlords, under the various leases above mentioned, that he did not intend to adopt any of the said leases. Notwithstanding the said intimation the liquidator proceeded to expose the mill subjects, together with the right to the leases for public sale, but did not succeed in effecting a sale thereof. He has also taken possession of the stock and materials in the mill premises, and has partially realised the same.

"7. The liquidator also advertised for claims of creditors to be lodged before 1st March 1907, and the petitioners replied, intimating that they held the company bound to continue to implement the tenants' obligations under the leases, and refused to treat their whole bargain with the company as repudiated. Without prejudice to the position so stated, the petitioners further intimated that their claims as for a breach of future obligations under the said contract by the company would be £5000.

"8. In answer to a request for information by the petitioners the liquidator stated

that he estimated that the company's estate would realise about £3000, against which there were claims by trade creditors for about £500 and other two claims amounting to about £1000. It accordingly appeared and is the case that apart from the petitioners' claims in respect of future obligations under the leases, which claims, as already explained, the petitioners do not desire to make or ask payment of at present, the company was and is perfectly solvent.

"9. A correspondence thereafter took place between the agents for the petitioners and the agents of the liquidator, which is herewith produced and referred to. Shortly stated, the claim for the liquidator was that the petitioners should lodge a formal affidavit and claim, the effect of which would be to compel the petitioners to value and deduct their security, consisting of the real burden imposed upon the mill subjects by the disposition and assignation above referred to. Failing the petitioners lodging such an affidavit and claim, the liquidator refused to give any undertaking that he would not proceed to distribute the assets. The petitioners on the other hand maintained that the company was not entitled while still solvent, by going into liquidation, to repudiate all its future obligations under the disposition and assignation, and to force the petitioners to claim as in a sequestration for breach of all such obligations, but that the petitioners were entitled to hold the company to its bargain, and to prevent the assets of the company being distributed among the shareholders without due provision being made for the relief of the petitioners from these obligations as they should become prestable. . . . . .

"11. The mill property, which forms the subject of the petitioners' security, is one which it is exceedingly difficult to value, and if the petitioners were bound at once to make a valuation and lodge a claim for the balance of their full claim, present and future, against the company it might result in their failing to obtain payment of 20s. per £. Whereas if the free assets of the company are reserved and applied in payment of the rents due under the leases as they accrue, the petitioners are satisfied that the subjects of security would in the end sufficiently protect them against loss. In these circumstances the petitioners have a material interest to object to being compelled to make a claim as in a sequestration for the purpose of sharing in the assets, unless they are bound to do so. They do not object to the liquidator paying other creditors, but only to his returning capital to the shareholders while the obligations of the company remain unfulfilled."

The following question was submitted to the Court:—"Are the petitioners entitled to refuse to lodge an affidavit and claim as for breach by the company of its future obligations under the disposition and assignation above mentioned, and at the same time to prevent the liquidator from distributing the assets of the company among the shareholders without making due provision for the implement of these obligations as they from time to time become prestable?"

Answers were lodged for Borland & Company, Limited, and the liquidator, in which, *inter alia*, they stated—"The mill property is capable of valuation like any other property of a similar class. The petitioners are in no worse position in making a claim and valuing their security than they would be in a sequestration. The retention of the free assets, as proposed by the petitioners, would involve keeping the liquidation open for twelve years or thereby. Unless the security subjects are realised soon, they will, through depreciation, become of little value. The petitioners have, for the first time, in this petition taken up the position that they have no objection to the liquidator paying the other creditors of the company. Hitherto the liquidator has been unable to distribute the assets of the company or to pay the company's debts in the absence of an affidavit and claim by the petitioners, which would permit of the money value of their claims being ascertained, and in view of the fact that the whole assets of the company are estimated to realise not more than £3000, without taking into account the paper mill and machinery and plant therein, over which the petitioners hold a security by way of real burden for the payment and implement of the rents and obligations of the leases of the water rights. If the petitioners' estimate of the money value of their claim be correct, then, looking to the claims upon the company's assets, the company would be insolvent unless the security held by the petitioners would yield £4000. The liquidator has been unable hitherto to pay the debts of the company in consequence of the petitioners' intimation and their refusal to lodge an affidavit and claim. The liquidator respectfully submits that (1) as regards the future and contingent claims of the petitioners they are bound to lodge a claim, and if they desire to draw a dividend, to have the said claim valued by the liquidator. . . ."

Argued for the petitioners—The question should be answered in the affirmative. Section 4 of the Companies Act 1886, which made sections 49 to 66 of the Bankruptcy (Scotland) Act 1856 applicable to the winding up of any company under the Companies Acts 1862 to 1886, applied only to the case of an insolvent company and not to a company going into voluntary liquidation, as in the present case. Accordingly the Bankruptcy Act of 1856 was out of the question altogether, which fell to be determined by reference to the Companies Acts, and in particular the Act of 1862, secs. 129, 131, 133 (esp. sub-secs. (1) (10)), 142, 148, and the cases which had been decided upon them. With regard, however, to the Bankruptcy Act of 1856 it might be noted that in the sections which dealt with contingent claims (53, 65, 126, 129) the object of the Act was to confer a privilege upon contingent creditors, and there was nothing to suggest that they were to be compelled, against their will and interest, to lodge claims. The following cases were authorities for

the proposition that when a limited company is in course of being wound up voluntarily a creditor with a claim for a contingent debt may prevent the liquidator dividing the surplus assets among the shareholders without making provision to meet his claims when they shall arise—*Lord Elphinstone* v. *Monkland Iron and Coal Company, Limited*, June 29, 1886, 13 R. (H.L.) 98, 23 S.L.R. 870; *Gartness Iron Company*, L.R. 10 Eq. 412, V. C. Bacon at foot of p. 417; *Gooch* v. *London Banking Association*, 32 Ch. Div. 41; *New Oriental Bank Corporation*, [1895] 1 Ch. 753; *In re Panther Lead Company*, [1896] 1 Ch. 978. The question would have been a different one had the petitioners proposed to rank in competition with other creditors; in that case admittedly they would have had to lodge a claim; here, however, they were only asking for the reversion after all other creditors had been paid.

Argued for the respondents—The question should be answered in the negative. Section 4 of the Companies Act of 1886 was perfectly general in its terms and appropriate to the voluntary winding-up of a solvent company. The provisions of the Bankruptcy (Scotland) Act of 1856, sections 49 to 66, were accordingly applicable to the present case, and under them every creditor must produce a formal claim. If this was so, it disposed of all the authorities relied upon by the petitioners. But, in any event, it might be said generally that English cases upon bankruptcy questions were of little or no value in Scotland owing to the difference of the bankruptcy law of the two countries, and that the particular cases quoted were quite different in their circumstances, *e.g.*, in certain of them the creditor had in fact lodged a claim and the liquidator had declined to deal with it. Further, however, it was at least doubtful whether these cases would now be followed in England after the decision of the House of Lords in *Hardy* v. *Fothergill*, 13 App. Cas. 351. That was the view indicated by the Court of Appeal in *Craig's Claim*, [1895] 1 Ch. 267, at 276, and also by Romer, J., in *In re Panther*, *cit. sup.* These last three cases were authorities for the respondents' contentions. Lastly, however, the petitioners' whole argument was based upon the assumption that the company was solvent, an assumption which had no foundation in fact—Palmer's Company Precedents, part ii, p. 379, was also referred to.

Lord Low—The petitioners are the testamentary trustees of the late Sir William Collins, who was proprietor of certain paper mills near Bowling known as the Milton Mills. In connection with the mills Sir William Collins had acquired certain leases from neighbouring proprietors, the main object of which appears to have been to obtain a supply of water for the use of the mills. I understand that these leases have still about twelve years to run. The total rental payable under the leases is £278 per annum, of which £215 are due under leases which exclude assignees. All the leases contained obligations undertaken by the tenant in regard to maintenance, restoration, and so forth.

In 1906 the petitioners sold the Milton Mills to the respondents, Borland & Company, Limited, and assigned the leases to them. It is admitted that as regards the leases, in which assignees are excluded, the landlords did not accept the company as the sole tenant, and accordingly the petitioners remain liable for rent and the other obligations of these leases. The company, however, bound themselves to relieve the petitioners of all the obligations in the leases, and these were declared to be real burdens upon the mills property.

On 5th January 1907 the shareholders passed a resolution that the company be wound up voluntarily. The reason for that course being adopted was that the business was being conducted at a loss, and it was thought not to be prudent to continue it longer, but there does not seem to have been anything in the way of pressure by creditors, nor any suggestion that the company was not able to pay its debts. Indeed, apart from any claim which might be open to the petitioners as for a future and contingent debt, it is admitted, that after paying all the creditors there would be a substantial balance remaining in the liquidator's hands.

In these circumstances the liquidator maintains that the petitioners are bound to lodge an affidavit and claim (as in a sequestration under the Bankruptcy Acts) stating the amount at which they estimate their contingent debt, and valuing and deducting the security given by the real burden over the mill property.

The petitioners on the other hand contend that, the company not being insolvent, they cannot be compelled to lodge a claim, as if the proceedings were in bankruptcy, for a debt which is both future and contingent. They are quite willing that the trade creditors should be paid in full, but they demand that any surplus remaining should not be divided among the shareholders, but should be retained to relieve them of any claims on the part of the landlords which they may be compelled to meet.

This is a case in which the petitioners have good reasons for objecting to lodge for adjudication in the liquidation a claim estimating the amount which may become due to them. If it were assumed that they would be liable for all the prestations of the leases during the periods still to run, there would of course be no difficulty in regard to the money rents, but it is difficult to see how an equivalent in money to obligations to maintain such structures as reservoirs or dams could be arrived at with any approach to certainty, because presumably the extent of such obligations must depend in large measure upon circumstances which cannot be foreseen. On the other hand, although it may be extremely improbable, I suppose that it is not impossible that the mills might be sold and the leases assigned to a paper maker who would be able to carry on the business to a profit, and who would pay the rents and implement the other obligations of the leases. If that

were to happen, the result would be that no debt at all would in fact become due to the petitioners by the company. Therefore if the petitioners were compelled to lodge an affidavit and claim, and to accept a present payment, they might very likely get either a great deal too little or a great deal too much.

In these circumstances, if the Companies Act 1886 had not been passed, I think the judgment of the House of Lords in *Lord Elphinstone* v. *Monkland Iron and Coal Company* (13 R. (H.L.) 98) would have been a clear authority in the petitioners' favour. That indeed was hardly disputed, but it was argued that such considerations as were given effect to in that case are excluded by the provisions of the 4th section of the Act of 1886.

That section provides that in the winding up of any company under the Companies Act 1862 to 1886, the general and special rules for voting and ranking for payment of dividends provided by sections 49 to 66 of the Bankruptcy (Scotland) Act 1856, shall, "so far as consistent with the tenor of the said recited Acts, apply to creditors of such companies voting in matters relating to the winding up and ranking for payment of dividends."

Now I agree that if that provision applies to this case, the petitioners must lodge an affidavit and claim, and the liquidator must put a value on their debt as at the date of the valuation. It is plain, however, that the provision is not to be applicable to every winding up under the Companies Acts, because the rules in regard to voting and ranking are only to apply "so far as consistent with the tenor of the Companies Acts," and to creditors "ranking for payment of dividends." That being so, it seems to be clear that one case to which the enactment would not apply would be where the shareholders of a solvent company, possessed of ample means to pay all its creditors in full, chose to discontinue business and to wind the company up. Such a winding up would be quite competent under the Companies Acts, but there would be no need to follow the complicated procedure of the incorporated sections of the Bankruptcy Act, because there would be no question of the payment of a dividend only, or of the ranking of creditors. The creditors would simply be paid in full; any surplus assets would be divided among the shareholders; and the company would then be dissolved.

Now this is not quite a case of the kind which I have figured, because if a present value were put upon the petitioners' claim it may be that the assets of the company would not be sufficient to pay in full such estimated amount, and also the debts due to other creditors. Any difficulty, however, which that circumstance might have raised seems to me to be removed by the consent which the petitioners give to the other creditors being paid in full. If that be done, I do not think that the shareholders will be really prejudiced by the adoption of the course proposed by the petitioners, because it seems to be very improbable that whatever course is adopted there will be any surplus for division among the shareholders. It is true that the result of allowing the petitioners' claim to stand over may be to postpone the formal dissolution of the company for some time, but that would not hurt the shareholders, because postponement of the formal dissolution cannot add in any way to the liabilities and losses which they have already incurred.

I am therefore of opinion that the question stated in the petition should be answered in the affirmative.

LORD JUSTICE-CLERK—I have formed a very decided opinion in accordance with the opinion of Lord Low, who has stated the grounds of his opinion so fully and clearly, that it is quite unnecessary to repeat them.

LORD STORMONTH DARLING concurred.

LORD ARDWALL was not present.

The Court answered the question in the affirmative.

Counsel for the Petitioners—The Dean of Faculty (Campbell, K.C.) — Constable. Agent—Thomas Liddle, S.S.C.

Counsel for the Respondents — Hunter, K.C.—Munro. Agents—Paterson & Salmon, Solicitors.

Saturday, July 20.

SECOND DIVISION.

DICKIE'S TRUSTEES *v.* RUTHERFORD'S TRUSTEES.

Succession—Trust-Disposition and Settlement—Revocation—Two General Settlements—Implied Revocation.

Terms of a general trust-disposition and settlement executed in 1897 which were held impliedly to revoke a prior general trust-disposition and settle- executed in 1860.

Succession—Trust-Disposition and Settlement—Direction to Give Effect to Any Writing which Truster might Leave—Prior Trust-Disposition and Settlement which had been Impliedly Revoked.

Two trust-dispositions and settlements were found together in the repositories of a deceased person. The later, executed in 1897, impliedly revoked the earlier, executed in 1860. By the later the truster directed his trustees to pay any legacies which he might leave by any writing under his hand, and to dispose of the residue of his estate in the way to be directed by any writing under his hand, and in default of such writing to pay over the residue in the manner thereafter directed.

Circumstances in which *held* that "by any writing under my hand" the truster meant only writings to be thereafter made by him, and that the revoked