in the particular case by exertion the party can fairly be said to have found out and to have proved; it is not simply to say that it is within a reasonable time as a general mode; it is in the shortest time that he can do it if he has made every exertion which he ought to have made. So that if a person really delays the examination of his affairs, although it may not be unreasonable for him to delay, if he really delays it beyond the time when if he had made all the exertion he ought to have made he would have found it out sooner, he is too late; he has not complied with this stipulation 'at the end of the year;' but if he has made every exertion which he ought to have made, then to say because a man has been several months, or in some cases more than a year, or, if you please, more than two years—for you cannot fix a time—if he has made every exertion that he ought to have made, and yet cannot have done it within a less time than he has done it, to my mind he has satisfied the meaning of the section."

Lord Justice Lindley said—"It appears to me the true view of that expression has been stated correctly by the Master of the Rolls. It is as soon after the end of the year as is reasonably possible having regard to the facts of each particular case. Not literally at the end; that is absurd—everyone sees that it is impossible. Nor does it mean at any time hereafter, nor even within a reasonable time afterwards, unless diligence be employed as a limitation."

These opinions commend themselves to my mind as presenting the only rational and satisfactory view of the intention of the Legislature in using the language under construction. And therefore, without further discussion, I content myself with expressing my entire concurrence in these opinions.

The application of the rule so established to the present case does not admit of any dispute. As already mentioned, the fact and the amount of the overpayment of tax was ascertained so far back as the 12th of October 1888, but no claim was made for a certificate of over-assessment till the 10th of July 1890. The company therefore, in full knowledge of the facts, delayed their application to the Commissioners for a period of twenty months. This is certainly not the "due diligence" nor "every exertion which he ought to have made" in the language of the learned Judges already quoted.

The judgment of the Court, I think, ought to be, to reverse the determination of the Commissioners, and remit to them to refuse the certificate of over-assessment for the year of assessment mentioned in the case.

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

The Court reversed the determination of the Commissioners, and remitted to them to refuse the certificate of over-assessment.

Counsel for the Inland Revenue—Asher, Q.C.—Young. Agent—D. Crole, Solicitor of Inland Revenue.

Counsel for the Bank—C. S. Dickson. Agent—Alex. Morison, S.S.C.

Saturday, February 21.

SECOND DIVISION.

[Sheriff of Lanarkshire.

FLYNN *v.* M'GAW.

Reparation—Master and Servant—Labourer Falling through Insecure Floor—Alleged Incompetency of Foreman—Relevancy.

A workman who sued his employer for damages for injury sustained in his service, averred that the foreman who was in charge, and to whose orders he was bound to conform, had ordered him to go upon the floor of the first flat of a building which was insecure from decay, and which had been rendered more insecure by the removal of certain joists from below, which fact the foreman was aware of but the pursuer was not, and that the accident happened in consequence of the foreman's negligence in failing to see that the floor was secure. The pursuer also averred that the foreman was incompetent to be left in charge of the operations, and that if a skilled foreman had been employed he would have taken means to guard against such an accident as happened.

Held (*diss.* Lord Young) that the pursuer had averred a relevant case for inquiry.

David Flynn, labourer, Glasgow, sued his employer William M'Gaw, mason, Maryhill, for damages for personal injury, both at common law and under the Employers Liability Act 1880.

He averred that during September 1890 he and two other men were under the superintendence of Samuel Merrigan, a foreman in the employment of the defender, pulling down an old house in Glasgow. He was bound to conform to Merrigan's orders. Upon 23rd September Merrigan ordered the pursuer to go up to the floor of the first flat of the building in order to remove the flooring and joists. Several of the joists had already been removed, and the floor was covered with the bricks, lime, and rubbish of the partition walls of the flat which had been taken down. While clearing away the rubbish preparatory to removing the floor a portion of the floor gave way, and the pursuer was precipitated to the bottom of the building, whereby he received severe injuries.

He further averred—"(Cond. 7) The said accident, and the injuries which resulted to the pursuer therefrom, were due to the fault of the defender, or the said Samuel Merrigan, for whom the defender is responsible. The floor in question was in an insecure state in consequence of its age and the state of decay into which it had fallen prior to the operations in question, and it had been rendered still more insecure and dangerous by the operations of the defender, under which are included the removal of the joists from beneath a portion of it, said

removal having taken place by the instructions of the said Samuel Merrigan, or the defender, who from time to time personally supervised the work. The pursuer was not aware of the danger he incurred by obeying said order, and he received no warning on the subject. It was the duty of the said Samuel Merrigan to have first ascertained whether the work which he ordered pursuer to do could safely be carried out before giving him said order. Had he done so, the weakness or defect in the floor would have been discovered, and the accident would not have occurred. The said Samuel Merrigan was grossly negligent in ordering the pursuer to proceed to do work at a place which he knew, or ought to have known, was insecure and dangerous, without in any way guarding against such an accident as occurred, or enabling the pursuer to guard against it. (Cond. 8) Alternatively, the defender is responsible for the said accident, in respect that the said Samuel Merrigan was quite incompetent to be left in charge of said operations. Had a skilful foreman been put over the job at which the pursuer was engaged, as ought to have been done owing to the difficulties and dangers connected with it, he would presumably have taken means to guard his gang against dangers such as those which led to the pursuer's accident. The said Samuel Merrigan was not sufficiently skilled or experienced to be entrusted with the direction of such operations, and his want of skill caused or contributed to the accident to the pursuer."

The pursuer pleaded—"(1) The injuries to the pursuer having been caused through the fault or negligence of the defender, or those for whom he is responsible, the defender is liable in reparation to the pursuer."

The defender pleaded—"(2) The pursuer's alleged injuries not being due to any fault or negligence of the defender, or of anyone for whom he is responsible, the defender is entitled to be assoilzied. (3) The pursuer's alleged injuries having been caused, or at least materially contributed to by his own negligence, he is not entitled to recover compensation from the defender therefor."

Upon 23rd January 1891 the Sheriff-Substitute (SPENS) allowed a proof.

The pursuer appealed for jury trial.

The defender argued—The issue proposed ought not to be allowed, as the pursuer had not made any relevant averment of fault on the part of the defender. It was plain from his own averments that he had been engaged in pulling down the old house for some time, and he was as well aware as anyone of the gang in what condition the floor of the first flat was. He ought therefore to have taken care to do his work in a safe manner. It was not enough to say that Merrigan was a foreman to whose orders the pursuer was bound to conform; it ought also to have been averred that he was not ordinarily employed in manual labour. With regard to Merrigan's alleged incompetency, he was not a foreman at all; he was merely a labourer, and the pursuer had as much knowledge and skill in the matter as Merrigan himself.

The pursuer argued—His case was relevant. He had averred that Merrigan was a foreman to whose orders he was bound to conform; that he had ordered him to go to an insecure place, which he knew, as a man of skill and under whose superintendence the work had been carried on, was a dangerous place, which the pursuer did not. It was further averred that the foreman was incompetent for the discharge of his duty. In the circumstances the Court ought to allow an issue—*M'Aulay* v. *Brownlie*, March 9, 1860, 22 D. 975.

At advising—

LORD JUSTICE-CLERK—The case made by the pursuer is, that he and several other men, working under charge of a foreman, were engaged in pulling down a ruinous old building, that this was an operation requiring more knowledge and skill than could be expected from an ordinary workman, and that the foreman was the proper person to direct the operations, he having special knowledge and skill. It is also alleged that the master, in appointing the person he did as foreman, appointed a man who was incompetent and unskilled for the work. That is the fault alleged against him, and it is averred that that fault led to the accident. It is rather an unusual averment, because in almost all these cases the pursuer does not dispute the skill of the foreman, and the averment of the defender is that the foreman was quite a competent person, and that the master was justified in appointing him. Now, whether this work of pulling down the old house was a work requiring more skill than could reasonably be expected from the pursuer is a question of fact, and I think also that the question of whether the foreman appointed by the master was a person incompetent for the duty assigned to him is also a question of fact.

The case is no doubt a narrow one, but I do not think that I would have excluded inquiry in this even if that averment of the incompetency of the foreman had not been upon record, because the pursuer avers that he was bound to conform to the orders of the foreman who knew that the place he was sent to was insecure, which he did not. He was sent up to help in taking down this storey of the house, and while he was doing some necessary preliminary work of clearing away lime and rubbish he fell through the flooring. The question whether this person was a foreman in the sense of the Employers Liability Act is also a question of fact.

I must say I think that in cases of this kind, where the Sheriff has granted an inquiry, it is unfortunate that the pursuer should bring the case here and ask for the much more expensive form of inquiry by jury trial; but I see no ground to refuse the pursuer an issue.

LORD YOUNG—I am bound to say that I think this case as stated is irrelevant, and ought not to be submitted to a jury.

In the first place, I take the case as it is presented to us at common law. The parties are at issue whether a certain person was a foreman or whether he was a labourer. The statement of the pursuer is, that he and two other men, under the direction of a foreman, had been engaged for a period of three weeks in taking down this old building. The defender says that there were four labourers engaged, and that the pursuer, who was one of them, had as much skill as any of the others, and was as well qualified as them in looking out for himself. Now, whether this man Merrigan was a foreman or not, the pursuer has not stated any case against the master so as to make him liable, because he has not averred any ground upon which he thinks a more experienced foreman should have been appointed over the work. If one workman or a number of workmen accept the contract with a master that they shall pull down a ruinous old building, and one of them is injured in the course of carrying out the work, I do not think that he has any ground for an action at common law against the master because he did not appoint a skilled foreman to superintend the work which the men had contracted to do.

I can understand a workman making some such accusation as this in a very special case, that he had been led into going on with the work having been deceived into the idea that he was going to work under a skilled foreman, whereas in fact the man put over him as foreman was not really a skilled man at all. But that is not the case here. The pursuer had been engaged with Merrigan in this job for some weeks, and there is no suggestion upon the record that he had been deceived into the belief that Merrigan was a specially skilled man in matters of this sort. I think that no blame can be attributed to the master for any failure in his duty as a master to provide a specially skilled foreman for this job, and therefore I think that there is no relevant case of fault alleged against Merrigan, one of the four labourers who were engaged.

Then a point was made that Merrigan was a person to whose orders the pursuer was bound to conform. No doubt the language in the Act of Parliament is very loose and general language, but I cannot read that language as meaning that whenever the master has appointed one of the workmen as foreman over the others, and the foreman gives a perfectly general order to his men to go on with their work, that the master shall be responsible for any accident which may happen in the course of the work. I think that that provision applies only to the case where one is acting as a deputy-master, whose orders are given as if they were the master's own orders, and who is giving a special order to the workmen which is being specially obeyed. Here no special order had been given, but merely a general order to go on with the work. Looking to the sum and substance of the whole case, I think that no relevant case has been averred either at common law or under the statute.

LORD RUTHERFURD CLARK—I do not think that it would be safe to exclude inquiry in this case, and therefore I think the case must go to a jury.

LORD TRAYNER—The question before us is one of relevancy only, and in the consideration of such a question I think it is impossible to keep too strictly to the pursuer's averments. The question is, whether if these are true the pursuer has not stated enough to entitle him to the remedy he seeks. I confess I think the record narrow, but I cannot say that, assuming the truth of the pursuer's averments, it is so irrelevant that he has put himself out of Court.

The Court approved of this issue:—"Whether on or about 23rd September 1890, at or near the old building at 216 Holm Street, Glasgow, which the defender had contracted to take down, the pursuer, while in the employment of the defender, was injured in his person through the fault of the defender, to the loss, injury, and damage of the pursuer?"

Counsel for the Pursuer—Shaw—Salvesen. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defender—Jameson—Sym. Agents—Mitchell & Baxter, W.S.

Thursday, February 26.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

HAWORTH & COMPANY *v.* SICKNESS AND ACCIDENT ASSURANCE ASSOCIATION, LIMITED.

Insurance—Guarantee against Embezzlement by Servant—Checks Promised by Employer Insured.

An insurance company guaranteed a firm of tea merchants against embezzlement by one of their servants, upon a proposal which formed by stipulation the basis of the contract, and in which the employers stated, in answer to certain questions, that they would balance and settle their servant's accounts monthly, and would send accounts direct to customers every three months. The employers did not settle monthly with their servant, because, as they alleged, there was never anything to settle. They sent accounts direct to their customers in the ordinary course of business, but not for more than three months after the debts had been incurred.

In an action raised by the employers against the insurance company to recover sums embezzled by their servant, it was *held* that they had not observed the checks promised, and accordingly could not recover under the guarantee.

By agreement to guarantee, dated 26th, 29th, and 30th July 1889, the Sickness and