course it must be the same when the question arises in the other way.

LORD M'LAREN and LORD PEARSON were absent.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for Pursuer (Respondent)—Chree—Duncan Millar. Agents—Jack & Bryson, S.S.C.

Counsel for Defenders (Reclaimers)—Lorimer, K.C.—Ingram. Agents—Inglis, Orr, & Bruce, W.S.

Friday, May 28.

EXTRA DIVISION.

(Before Lord M'Laren, Lord Pearson, and Lord Dundas.)

CRAWFORD *v.* M'CULLOCH (LIQUIDATOR OF MITCHELL, WALKER, & CRAWFORD, LIMITED) AND OTHERS.

Company—Voluntary Winding-up—Question Arising in Winding-up—Application to Court by Creditor and Contributory—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 138—*Companies Act* 1900 (63 *and* 64 *Vict. cap.* 48), *sec.* 25—*Companies Consolidation Act* 1908 (8 *Edw. VII, cap.* 69), *sec.* 193—*Claim by Managing Director for Breach of Contract—Claims by Others of Similar Character.*

A managing director of a company, now in voluntary liquidation, presented a petition under the Companies Acts 1862, section 138, and 1900, section 25, in which he asked the Court to determine authoritatively:—(1st) Whether a claim for arrears of salary at the instance of another managing director against the company was a good claim against the company in liquidation to any, and if so, to what extent? And (2nd) Whether a similar claim by the petitioner was a good claim, and if so, to what extent? *Held* that the claim of the petitioner against the company, being a claim for damages, did not form an appropriate question to be decided in an application under the section and that its determination did not fall within the description "just and beneficial" required by the statute, and petition *dismissed.*

The Companies Act 1862 (25 and 26 Vict. cap. 89), section 138, enacts:—"Where a company is being wound-up voluntarily the liquidators or any contributory of the company may apply to the Court in England, Ireland, or Scotland, or to the Lord Ordinary on the Bills in Scotland in time of vacation, to determine any question arising in the matter of such winding-up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound-up by the Court; and the Court, or Lord Ordinary in the case aforesaid, if satisfied that the determination of such question, or the required exercise of power . . . will be just and beneficial, may accede, wholly or partially, to such application on such terms and subject to such conditions as the Court thinks fit, or it may make such other order, interlocutor, or decree on such application as the Court thinks just."

The Companies Act 1900 (63 and 64 Vict. cap. 48), section 25, enacts—"In a voluntary winding-up an application under section 138 of the Companies Act 1862 may be made by any creditor of the company."

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), which came into operation 1st April 1909, by section 193 enacts—"(1) Where a company is being wound-up voluntarily the liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding-up, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court. (2) The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as the Court thinks fit, or may make such other order on the application as the Court thinks just."

On 20th March 1909 A. T. Crawford, as a contributory and creditor of Mitchell, Walker, & Crawford, Limited, in voluntary liquidation, presented a petition under the Companies Act 1862, section 138, and the Companies Act 1900, section 25, in which he asked the Court to determine authoritatively the following questions:—(1st) Whether a claim by Henry Walker for £2833, 6s. 8d. was a good claim against the company in liquidation to any, and if so, to what extent? And (2nd) Whether a claim by the petitioner for £1291, 13s. 4d. was a good claim against the company in liquidation, and if so to what extent?

The petitioner made *averments* to the following effect:—By the articles of association of the company it was provided that the petitioner Mr Walker and Mr William Mitchell should be managing directors of the company for a period of ten years from its formation (15th September 1900) with entire control of its business, and under the proviso that none of them should without the consent of the other two be concerned or interested directly or indirectly in other business. It was provided that for their services they should be paid salaries—Mr Mitchell at the rate of £600 per annum and Mr Crawford and Mr Walker at the rate of £500 per annum, and that they should be entitled to directors' fees. Under this arrangement the three directors continued to manage the affairs of the company till July 1902, when Mr Walker, by resolution of his co-directors, was retired in consequence of his not devoting his whole time to the business. Since that time Mr

Walker had not acted as managing director. On 8th February 1900 a resolution was passed by the shareholders that the company should be wound up voluntarily, and Mr Richard M'Culloch, accountant, Glasgow, was appointed liquidator. The liquidator subsequently intimated to the petitioner that his services as managing director would no longer be required, and the petitioner thereupon lodged with the liquidator a claim against the company for breach of agreement with him, amounting to £1291, 13s. 4d. estimated upon the basis of his salary for the unexpired period of his service to 31st October 1910. On 29th August 1908 the liquidator forwarded to the petitioner a copy of a deliverance issued by him on the claim in the following terms:—"Deliverance by liquidator on the claim of £1291, 13s. 4d. lodged by A. Thomson Crawford. The liquidator rejects this claim as stated. *Note.*—If the company has been guilty of breach of contract, and if Mr Crawford has all along been the observing party, then at the best his claim can only be one of damages. Inasmuch, however, as the liquidator's claims against Mr Crawford far exceed any such possible claim of damages, it might be well to defer consideration of such claim until after Mr Crawford had settled with the liquidator his indebtedness to the company." At the same time the liquidator intimated to the petitioner a claim in respect of calls on shares amounting to £712, 10s. The petitioner thereupon claimed to set off this amount against his claim for damages, and the liquidator then raised an action in the Sheriff Court at Hamilton for the amount of the calls, in which he obtained decree. The petitioner appealed to the Sheriff, and then presented this petition to the Court of Session on the averment that for the proper disposal of the claim against him it was necessary that certain other questions in the liquidation should be determined. These questions concerned a claim made by Mr Walker, petitioner's co-director, for salary from July 1902 to the date of liquidation at the rate of £500 per annum—£2833, 6s. 8d. The only outstanding claims of creditors against the company were his own and Mr Walker's claims. The liquidator had refused or delayed to deal with Mr Walker's claim, and further, had taken no steps to enact payment of calls on shares due by Mr Mitchell, petitioner's remaining co-director. In consequence of the liquidator's actings he, the petitioner, had suffered prejudice, as if Mr Walker's claim was unfounded there would be a surplus for division among the shareholders without taking into account the calls alleged to be due by himself and Mr Mitchell.

The liquidator lodged answers, in which he admitted that Mr Walker was dismissed from the office of managing director on 2nd July 1902, but stated that on 30th January 1905 he was re-elected a member of the board, and continued to act as such till the liquidation. He averred further that he hoped to compromise Mr Walker's claim. He maintained, *inter alia*, that the present petition was incompetent in respect that no deliverances had been pronounced by the liquidator upon the two claims upon which the Court was asked to adjudicate.

Argued for the petitioner—The present application was competent. The petitioner was both a contributory and a creditor, and applied to have questions as to the claim by himself and the competing claim by another creditor and contributory determined by the Court. The Court would grant this application subject only to the condition that it was "just and beneficial." Had the question arisen under a supervision order this procedure would have been competent. The statute had failed to provide the machinery in the case of a voluntary liquidation, but the right remained—*Union Bank of Kingston-upon-Hull*, 13 Ch. Div. 803; *Central de Kaap Gold Mines*, 69 L.J. Ch. Div. 18; *The Licensed Victuallers' General Plate Glass Insurance Company, Limited*, 17 L.T. 8; Buckley on the Companies Acts, 9th ed., p. 438.

Argued for the respondent—The petition was incompetent. The petitioner's claim was unconstituted, and was properly a jury question. The present procedure was not an advantageous method of dealing with claims of damages. The cases quoted referred to a sharp question of law or mixed law and fact, and were not relevant.

LORD M'LAREN — This case is brought here under section 138 of the Companies Act of 1862, and may be held to be now depending under the corresponding clause 193 of the Consolidation Act of last year. But while we are considering the matter under the later statute, we must bear in mind that this is not a new provision, and therefore there has been ample time for a practice to grow up under the earlier enactment by which we may be guided. The words descriptive of the matters that may be brought up in this way are very wide. The Court is empowered to determine any question "arising in the matter of such winding up, or to exercise, as respects the enforcing of calls or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court." But then these general words are qualified by the condition that the Court must be satisfied that "the determination of such questions or the required exercise of power will be just and beneficial." It is only in that case that they may accede wholly or partially to such an application. Now, taking together all the conditions, it is perfectly plain that a large discretion is given to the Court either to accede to the petition and go on to a decision of the case, or if it thinks, there will be no benefit to the liquidation or the parties, the alternative is that the Court may refuse the application, or entertain it in part and refuse it in part, because that intermediate alternative is expressly contemplated by the statute. Now there are questions which it is perfectly plain that the Court would entertain under such

an application, *e.g.*, if the question were whether the liquidator was sacrificing the property of the company by a premature and incautious sale, or if he were going to divide the assets among a limited number of creditors before proper means had been taken to get in all claims. And again, there may be cases of individual claims in the liquidation which depend either wholly or mainly on matters of law and where the proof would be of a formal character. In such cases it is often a benefit to the estate to have a summary application, and to the parties in the application to have these points determined. There are other cases where it would in general be advisable to leave the party to seek the ordinary remedy of the law, and *prima facie* a claim of damages is a claim of that character. I have great doubts as to whether, sitting as a Court of special jurisdiction under the Companies Acts we have power to summon a jury. No doubt we have power on cause shown to try any question of damages without the intervention of a jury. But we are not here as a Court of ordinary jurisdiction, and in this case matters would not go through the ordinary course preparatory to trial.

Another objection is that there is nothing in the statutory provision to imply that it was intended that in matters of liquidation this Court should take upon itself the functions of a Sheriff or a Small Debt Court in determining questions of damages. Although the subject is treated in Lord Justice Buckley's book on Company Law, and there seems to be a considerable body of authority in England as to applications under section 138, it does not appear that a claim of damages is regarded as an appropriate question to be brought under the powers of the section. I am not satisfied that it is either just or beneficial that we should take up this unconstituted claim of damages under the powers of the old 138th section and send it to a jury for trial. I propose, therefore, that we decline to accede to Mr Crawford's application, reserving to the claimant his right to constitute his claim by ordinary action. With regard to Mr Walker's claim, I am not satisfied that the petitioner has been prejudiced in the meantime by the delay, and we must give the liquidator some room for discretion. Of course, if the liquidator admits the claim without inquiry and without its having been constituted, and the petitioner thinks he is prejudiced, he will have his appeal.

LORD PEARSON — I am of the same opinion. I should be unwilling to hold that the application is incompetent. It is always a question of circumstances, and the case truly turns on whether the application falls within the clause occurring in the later part of section 138, which provides that the Court may interfere "if satisfied that the determination of such question or the required exercise of power will be just and beneficial." I am not satisfied that we have here any question which it would be just or beneficial to bring up at this stage for determination by the Court. I think the learned Dean is right in saying that in all or nearly all the cases here and in England where this section has been applied there has been a short and sharp question of pure law, or of mixed law and fact, capable of being proceeded with under the section. I think the present case falls very far short of answering that description.

LORD DUNDAS concurred.

The Court dismissed the petition.

Counsel for the Petitioner—J. R. Christie. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—D.-F. Scott Dickson, K.C.—Horne. Agents—Macrae, Flett, & Rennie, W.S.

Saturday, June 5.

EXTRA DIVISION.

(Before Lord M'Laren, Lord Pearson, and Lord Dundas.)

BARRY, OSTLERE, & SHEPHERD, LIMITED *v.* THE EDINBURGH CORK IMPORTING COMPANY.

Contract — Sale — Constitution — Verbal Contract Proved by Subsequent Letter and Actings of Parties.

Where defenders, following on verbal negotiations between their manager and the pursuers, received a letter from the pursuers in the form of an order for goods, to which they did not reply for a space of six weeks, and when replying did not reject it as an offer to purchase, but asked for delay in the execution of the "conditional order," *held* (*reversing* Lord Guthrie) that the letter was not merely an offer to purchase, which required acceptance by the defenders, but was an order assuming the existence of a prior verbal completed contract of sale of the goods.

Agent and Principal — Contract of Sale — Liability of Principal for Contract Entered into by Agent — Authority of Manager to Bind his Firm.

Circumstances in which *held* that a firm employing a person as their manager were bound by a contract of sale entered into by him with third parties on whom no special duty lay of inquiring into the manager's authority to act for the firm.

North of Scotland Banking Company v. *Behn Möller & Company*, January 21, 1881, 8 R. 423, 18 S.L.R. 259, *distinguished.*

On 11th January 1908, Barry, Ostlere, & Shepherd, Limited, floorcloth and linoleum manufacturers in Kirkcaldy, raised an action against the Edinburgh Cork Importing Company, Leith, in which they sued for £600 as damages for breach of contract.

The following narrative is taken from the opinion of Lord Pearson:—"The pursuers are manufacturers of floorcloth and lino-