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.

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*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-

leum in Kirkcaldy, and in the course of their business they have occasion to use large quantities of cork shavings. They claim that on 29th January 1907 they purchased from the defenders, who are cork merchants and importers in Leith, 300 tons of cork shavings at 87s. 6d. per ton, to be delivered at Kirkcaldy at the rate of 25 to 30 tons per month during 1907, subject to the pursuers' approval of a 20 ton lot which was to be delivered in March and was to be considered a standard. No deliveries were made by the defenders, and prices having risen the pursuers bring this action of damages for breach of contract.

"The defenders maintain that there was no concluded contract of sale. They say that the negotiations between the parties resulted in nothing more than an offer on the part of the pursuers to purchase the goods; that this offer required acceptance on the part of the defenders, and that they did not accept it.

"The pursuers' case is that the contract was made at an interview between the representatives of the parties which took place at Kirkcaldy on 29th January. They say that the terms of the contract were in the first instance settled verbally; that before the close of the interview they were reduced to writing by the pursuers' representative in the document number 56 of process; and that this document was then and there delivered to the defenders' representative, who took it away with him and handed it to the defenders, his principals in Leith.

"Thereafter six weeks elapsed before either party moved in the matter. The pursuers regarded it as closed, and were awaiting the appearance of the 20 ton lot which was to be delivered in March, when they received a letter from the defenders, dated 13th March, referring to what they describe as 'your conditional order of 29th January.' In this letter the defenders stated that the steamer on which they had depended to bring the shavings from foreign parts had refused to carry shavings, and asking the pursuers to allow the matter to remain until their representative returned from his journey about the beginning of May. The pursuers replied on the following day saying they 'must insist on having delivery of the cork shavings as per terms of contract'; and in the course of a correspondence which extended into the month of June they consistently adhered to this position."

The defenders were represented at the interview of 29th January 1907 by Mr Lawrie, their manager, who called upon the pursuers at Kirkcaldy on that day.

The document No. 56 of process, which was delivered to Mr Lawrie at the close of the interview of 29th January, was in the following terms:—

"Kirkcaldy, 29th January 1907.

"Order from
Barry, Ostlere, & Shepherd, Ltd.,
Floorcloth and Linoleum Manufacturers.
This order No. 4647
must be quoted on invoice. To the Edinburgh Cork Co., Edinburgh.

300 tons cork shavings at 87s. 6d. per ton delivered Kirkcaldy.

Delivery 25/30 tons per month during 1907, subject to our approval of 20 ton lot, which will be delivered in March, and which is to be considered a standard. J. E. S."

The defenders, *inter alia*, pleaded—"(2) The said Mr Lawrie having in point of fact no authority to enter into contracts on behalf of the defenders the latter are entitled to absolvitor."

On 9th July 1908 the Lord Ordinary (GUTHRIE), after a proof, the import of which sufficiently appears from the opinion of Lord Pearson, assoilzied the defenders.

*Opinion.*—"On 29th January 1907 an interview took place at Kirkcaldy between Mr Samuel Lawrie, the defenders' representative, and Mr George Wilson, the pursuers' representative, in connection with cork shavings. The question in the case is whether that interview resulted in a sale by the defenders to the pursuers of 300 tons of cork shavings at 87s. 6d. a ton on the terms stated in No. 56 of process, which document the pursuers allege was handed by Mr Wilson to Mr Lawrie as a record of the verbal bargain made at that interview. The defenders deny the alleged verbal contract, and say that No. 56 of process was merely an offer made or order given by the pursuers to their agent for their consideration, and which they never accepted.

"On the evidence, taken along with the correspondence, I think there was a mutual misunderstanding. I believe the pursuers when they say that they thought a contract had been concluded. On the other hand, it seems to me clear that the defenders did not intend Lawrie to make a final bargain, and did not understand that he had done so.

"The document which is said to record a contract does not bear to do so. It is a mere order which might or might not be accepted. This is not a case of bought and sold notes. It may be that on ordinary occasions in this and other classes of business no other document passes, and that on previous occasions, as between these parties, the orders given in such documents were in fact executed although not followed by express acceptance. But such custom goes a very short way, if it helps at all, to decide whether the order of 29th January 1907 bound the defenders, especially when it is seen (*first*) that the previous 'order' for 25 tons of cork shavings, dated 1st October 1904, was not treated as a concluded contract, the defenders refusing to comply with the stipulation for delivery by rail, and (*second*) that although No. 56 of process is said to be a record of the antecedent verbal contract, it introduces a new stipulation not referred to at the original interview between Wilson, Lawrie, and Hunter, namely that a 20 ton lot shall be delivered in March on approval as a standard.

"The form of the document being thus ambiguous, if not adverse to the pursuers' contention, the *onus* is on them to prove the contract alleged by them. I do not

think there is any presumption. Employees in the position of Lawrie have sometimes absolute power to adjust prices and settle conditions; sometimes they have powers of adjustment and settlement within certain limits; and sometimes their function is confined to that of obtaining offers or orders for communication to their principals, whose consent must be obtained and expressed before a bargain can be held concluded. In this case I hold it proved that, generally speaking, Lawrie had no power to conclude bargains, except for goods lying in stock ready for delivery, and at the price prescribed to him by the defenders; that Lawrie had no authority on this occasion to conclude a bargain with the pursuers for goods belonging to foreign principals abroad; and also that the defenders acted as agents and communicated the fact to the pursuers by the letter dated 22nd November 1906.

"But it is said (*first*)—a point not on record—that Lawrie, whatever his actual powers were, was held out by the defenders as having power to contract on their behalf; (*second*) that he concluded a bargain with the pursuers on this occasion; and (*third*) that the defenders, in correspondence, recognised what had passed between him and Wilson as constituting a bargain, under which the defenders were bound to deliver, in terms of No. 56 of process.

"The pursuers have not, in my opinion, made out these propositions. There is no evidence to support the first, except the defender's letters of 25th October 1904 and 28th May 1906, signed by Lawrie, referring to the pursuers' 'valued orders or enquiries'; in which, although a distinction is made between a general enquiry and a specific order, it cannot be meant that the defenders undertook to execute any order which the pursuers chose to give them apart from price and conditions of delivery. In support of the other two propositions, there is much to be said. But I think the weight of the evidence is against the pursuers. Lawrie was a slow unintelligent witness, with no power of expression, whose acquiescent manner might well lead Wilson to think that a bargain was concluded when only an offer had been made. There was an easy way for the pursuers to evidence a concluded bargain, and it was their own fault if they did not take it. They should have got Lawrie to write an acceptance at the foot of the order."

The pursuers reclaimed, and argued—(1) A verbal contract was established by the evidence. Further, the terms of the document of 29th January, especially the note thereon referring to "invoice," and the subsequent actings and correspondence of the defenders, were inconsistent with the view that there was no completed contract between the parties. (2) Lawrie was admittedly manager of the defenders' firm, and therefore the pursuers were entitled to rely on his having authority to contract on their behalf.

Argued for the defenders and respondents—The Lord Ordinary was right. There was no concluded contract of sale here. Dealing in cork shavings was no part of the defenders' ordinary or recognised business. As regards these, they only acted as agents for foreign principals. Therefore the pursuers were not warranted in assuming without inquiry that Lawrie had authority to make contracts with regard to cork shavings, which were outside the scope of their business—*North of Scotland Banking Company* v. *Behn Möller & Company*, January 21, 1881, 8 R. 423, 18 S.L.R. 259; *Stagg* v. *Elliot*, 1862, 31 L.J. C.P. 260; *Alexander* v. *Mackenzie*, 1848, 18 L.J. C.P. 94. There was no case made on record of holding out on the part of the defenders.

At advising—

LORD PEARSON—[*After narrating the facts as above quoted*]—The main question in the case is whether the interview of 29th January resulted in a completed contract. The Lord Ordinary answers this in the negative, on two grounds. (1) The first is that "although number 56 of process is said to be a record of the antecedent verbal contract, it introduces a new stipulation not referred to at the original interview between Wilson, Lawrie, and Hunter, namely, that a twenty ton lot shall be delivered in March on approval as a standard." As I read the evidence in the case, there was really but one interview, in the course of which Mr Wilson had occasion to go into an adjoining room to consult Mr Shepherd, the manager, and obtain his approval. In giving his approval Mr Shepherd suggested the clause about a 20 ton lot to be delivered in March as a standard. But there is evidence, which I see no good reason to doubt, that this was then and there communicated to Lawrie, the defenders' representative, and assented to by him. (2) The Lord Ordinary's second ground for holding that there was no completed contract is that there was a "mutual misunderstanding." It is, however, necessary to consider what was the subject-matter of the misunderstanding. The expression usually means that one of the parties has assented to the contract under a mistake. The language of the contract may be so ambiguous as to be unintelligible; or, short of that, one of the parties may have assented to the contract under a mistake as to the description of the thing sold, or (it may be) as to the quantity, or as to the price. None of these features is present here. They can only be present when both parties intend a contract. Here the defenders' position is that they did not intend to contract, but only to obtain an offer requiring their acceptance. Now the Lord Ordinary is so far with the pursuers as to hold that they intended to make a contract at that interview, and he expressly says he believes them when they say that they thought a contract had been concluded. But he adds, "On the other hand it seems to me clear that the defenders did not intend Lawrie to make a final bargain and did not understand that he had done

so." Now it is obvious that when the question is so put it is not really a question as to mistake or misunderstanding in the ordinary sense, but as to the agent's authority to bind his principal. But in a question with the pursuers, that is, with the other party to the negotiations, it is not a relevant answer to say that the defenders did not intend their agent to make a final bargain, or that they did not understand that he had done so. That depends on the position of the agent.

Now it does appear to me that upon the facts of this case the pursuers were warranted in assuming that Mr Lawrie had authority to conclude the bargain. He is described on the record by the defenders themselves as "the defenders' manager." He describes himself as their "salesman." I hold that he was in such a position as to be within the rule stated by Professor Bell (Comment. 3, i. 3, page 515)—"In general, it appears that a riding or travelling agent has not only authority to receive payment for his principal of the monies due to him, but to take orders by which the principal shall be bound as much as if he himself had accepted and bound the contract" (see the case of *Milne* v. *Harris, James, & Company*, 1803, M. 8493, there referred to). Nor was there here in the surrounding circumstances anything to put the pursuers on their inquiry as to the extent of Mr Lawrie's authority. There had been previous communications and transactions between the parties during the preceding three years. But while on the one hand these hardly warrant the pursuers in saying that there was a course of dealing which was conclusive in their favour, there was on the other hand nothing in them to lay upon the pursuers the duty of making special inquiry as to the extent of Lawrie's powers. In this particular the present case stands distinguished from the case of *The North of Scotland Banking Company* v. *Behn Möller & Company* (1881, 8 R. 423) to which we were referred, for there the agent's authority to sign bills per procuration of the firm had not only been recalled, but the bank knew that it had been recalled, and yet they discounted bills signed by the agent. The case was decided on the footing that the circumstances were such as to give rise to grave suspicion of the agent's honesty, and to throw upon the pursuers the duty of making inquiry. There is nothing corresponding to that in the present case.

Nor do I think that the defenders can succeed upon the distinction which they suggest between Lawrie's powers to contract for deliveries of cork wood and cork on the one hand, and cork shavings on the other. They say that while they kept the former in stock they only dealt in the latter upon commission, and as the hands of the foreign importer. It does not, however, appear that this distinction was ever brought before the pursuers. And even if it had been brought before them, the defenders would still be met with the difficulty that if they were agents for sale, they were agents for an undisclosed principal.

I have assumed down to this point that the terms of the document No. 56 of process are such as, when taken in connection with the surrounding circumstances, amount to a contract of sale. The defenders maintain that they do not. Their contention is, that although the document is in form an order, it was not intended as an order but was merely an offer on the part of the pursuers to purchase cork shavings, which required the defenders' acceptance to make it a binding contract. I cannot so read the document. It bears to be not an offer but an order, and in my opinion it assumes the existence of a contract, and is the expression of an order in pursuance of that contract. The defenders themselves certainly did not treat it as an offer, nor had the pursuers any notice that they meant to do so. On the contrary, the defenders, having the document in their hands, allowed six weeks to elapse before making any communication to the pursuers on the subject; and when they did it was not to accept or reject it as an offer but to ask for delay in the fulfilment of the "conditional order." To this the pursuers promptly replied claiming delivery of the cork shavings "as per terms of contract," and a correspondence ensued in which the defenders notably abstained from answering or repudiating the reiterated demands of the pursuers for fulfilment of the contract of sale.

In my opinion therefore, the judgment of the Lord Ordinary should be recalled and the pursuers be found entitled to damages. I understand that in this event the amount of damages is not in dispute.

LORD DUNDAS—I concur. Having had the opportunity of reading Lord Pearson's judgment, I have nothing to add to it.

LORD M'LAREN—I also concur. I would only add this, that when it is kept in view that sale is a consensual contract, there cannot be much doubt where the justice of this case lies. There have been many alterations by statute on the details of the law of sale, but not on the principle that sale is a consensual contract, and may be proved by any evidence showing that the parties entered into a bargain. I should be against any attempt to throw contracts of sale into categories, and to say that if a particular bargain does not fall into one of these, the parties are to be held to be only in negotiation. I have very little doubt that thousands of sales in this country are effected by manufacturers and wholesale dealers by means not materially different from the circumstances of the present case.

The Court recalled the interlocutor reclaimed against, and found the pursuers entitled to damages.

Counsel for Pursuers (Reclaimers) — Cooper, K.C. — Munro. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Defenders (Respondents) — Sandeman — Ballingall. Agents — Bruce & Black, W.S.