the said Lord . . . Binning, being . . . two years' free rental of said entailed lands and estates in the year current at the date of death of the said Lord Binning, within the meaning of said statutes, . . . and declaring always that said . . . provisions shall rank on said entailed lands and estates and rents and proceeds thereof immediately posterior to the provisions of £5000 to the younger children of the said George Baillie Arden Hamilton, Earl of Haddington, hereafter mentioned. . . ."

Counsel for Petitioner—R. C. Henderson. Agents—D. & J. H. Campbell, W.S.

Counsel for Respondents, the Children of Lord Binning — Leadbetter. Agents — D. & J. H. Campbell, W.S.

Wednesday, May 28.

FIRST DIVISION.

LANDAUER & COMPANY *v.* W. H. ALEXANDER & COMPANY.

Company—Winding-up—Disputed Debt—Sist—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 129.

A company brought a petition for the winding-up of another company, and averred that that company had admitted its inability to pay for goods ordered from the petitioners, that the petitioners had treated the contract as broken and claimed damages, that the respondents admitted that they were liable in damages, and offered, subject to certain conditions, a composition in respect of the sums due by them. The respondents denied those allegations, and averred that no demand for payment of the alleged contract price of the goods had been made. The Court, in respect that there was a doubt as to whether there was a *bona fide* dispute between the parties as to the indebtedness of the respondents, *sisted* the petition to enable the petitioners to constitute their debt by action.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), enacts—Section 129—"A company may be wound up by the Court—(v) if the company is unable to pay its debts; (vi) if the Court is of opinion that it is just and equitable that the company should be wound up." Section 130—"A company shall be deemed to be unable to pay its debts—(iv) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company."

Landauer & Company, *petitioners*, brought a petition craving an order that W. H. Alexander & Co, Limited, *respondents*, be wound up by the Court under the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69).

Answers were lodged for the respondents.

The *petition* set forth—"That W. H. Alexander & Company, Limited, was on 9th July 1915 registered and incorporated under the Companies (Consolidation) Act 1908, and its registered office is situated at 166 Buchanan Street, Glasgow. By the memorandum and articles of association the object for which the company was formed was declared to be, *inter alia*, the carrying on of the business of general merchants, commission agents, and produce brokers, with powers, *inter alia*, to acquire businesses of a kindred character. The company thereafter carried on business and it continues to do so. On or about 19th October 1918 the petitioners, through Messrs L. M. Fischel & Company, brokers, of 36 and 37 Mincing Lane, London, sold to the said company one hundred tons of Japanese potato starch, No. 1 quality, at the price of £82 per ton, amounting under deduction of two brokerages of ½ per cent. to the sum of £8118, payable against shipping documents. On or about 3rd February 1919, before the said price had become payable, at a meeting between a representative of the said company and the said L. M. Fischel & Company as representing the petitioners, the said company intimated that they were not in a position to implement their obligations under, *inter alia*, the said contract, and the petitioners accordingly, through the said L. M. Fischel & Company, by letter dated 4th February 1919, intimated that they would regard the said contract as broken. On or about 12th February 1919 the said goods were invoiced to the said company, but delivery was not accepted by the company, and on or about 27th February 1919 the petitioners sold the goods against the said contract at the price of £33 per ton, being the market price thereof at the said date. The said price, under deduction of brokerage at the rate of 1 per cent., amounted to the sum of £3267, being the net amount realised subject to certain small adjustments. The loss to the petitioners due to the said breach of contract thus amounts to about the sum of £4851, being the said sum of £8118 less the said sum of £3267 subject to adjustment as aforesaid. The said sum of £4851 is due and owing by the said company to the petitioners. Thereafter, both by correspondence and at meetings between the representatives of the parties held on 12th February and 1st March 1919, the said company admitted that they were liable for the said damages and declared that they were unable to pay the same. Further, at the said meeting of 1st March they offered, subject to certain conditions, to pay a composition upon the sums due by them to the petitioners, but the petitioners were not and are not willing to accept the said offer."

The *answers* set forth—"1. Subject to the explanation hereinafter stated, the respondents deny the alleged sale by petitioners to them of 100 tons of Japanese potato starch, and further deny (*a*) that petitioners have sustained the loss averred by them; (*b*) that the respondents have admitted liability for damages; (*c*) that the respondents have admitted inability to pay said damages; (*d*) that they have offered to pay a composition to the petitioners; and (*e*) that they are unable to pay their debts. The respondents received no notice by or on

behalf of petitioners of the alleged sale of the goods by petitioners against their alleged contract with respondents, and they have no knowledge of and do not admit that sale or the price alleged to have been realised by petitioners. 2. The respondents explain that in the year 1918 they employed the firm of L. M. Fischel & Company to advise them as brokers in regard to the purchase for them of sundry lots of Japanese potato starch, and that firm, acting as brokers on behalf of the respondents, did purchase sundry lots for the respondents' account upon the terms of the printed rules of the General Produce Brokers' Association of London, the price to be payable in cash 'against documents in London on or (at buyers' option) before arrival of vessel or vessels at port of discharge; but in no case later than the due date of sellers' draft at ninety days sight.' 3. The said L. M. Fischel & Company did not in the case of any of the transactions entered into by them disclose to the respondents the name of the sellers of the goods, and it is believed and averred that they did not in any case disclose to the sellers the name of the purchasers. 4. The respondents have never had any communication with the petitioners, and do not know whether it is true or not, and they do not admit, that the said L. M. Fischel & Company, acting as brokers for the respondents, have on respondents' account purchased from the petitioners the lot of starch in question. 5. No tender of the shipping documents or of the goods has ever been made to the respondents by the petitioners, and no demand has ever been made by them upon the respondents for payment of the alleged contract price. The service of the petition was the first intimation which the respondents received that the petitioners claimed to be their creditors. 6. The petitioners are, *inter alia*, importers of potato and other starches. In the year in which the alleged contract of sale is said to have been entered into the petitioners were not entitled to sell potato starch to the respondents unless they held an importer's licence issued by the Ministry of Food under the Defence of the Realm Regulations, and subject to, *inter alia*, the condition that no sub-sale should be made by them at a rate of profit exceeding 5 per cent. (including selling brokerage not exceeding 1 per cent.) on the c.i.f. cost. The respondents believe and aver that the petitioners held such an importer's licence, and that if they made the alleged sale to the respondents (which is not admitted) they did so subject to the said condition. The respondents further believe and aver that if the petitioners made the alleged sale they did so at a rate of profit many times in excess of the maximum rate of 5 per cent. above referred to. On that footing the respondents submit and contend that the alleged sale, if it was actually made, was and is invalid, and that the respondents are not bound thereby, and are under no obligation or liability to accept delivery or pay damages for breach of contract in respect of non-acceptance of delivery or non-payment of the purchase price. Alternatively the respondents submit and contend that if it be that the alleged contract of sale is valid and binding upon the respondents, they are not liable to the petitioners for more than the difference between the c.i.f. cost to the petitioners plus 5 per cent. of profit and the value of the goods in this country when sold by or for the owners. 7. The respondents further explain that if the alleged sale by the petitioners to the respondents was made, it was a condition of the contract that any dispute arising under the contract should be settled by arbitration in London in the usual manner according to the rules of the General Produce Brokers' Association of London. The respondents submit and contend that if the alleged contract of sale be valid and binding upon the respondents, there is a *bona fide* dispute as to the extent of the respondents' liability to the petitioners, which falls to be settled by arbitration in terms of the contract."

Argued for the petitioners—The prayer of the petition should be granted *de plano*. There was between the parties a debt—the fact that the petitioners were creditors was proved, in that the respondents had offered a composition, though no doubt the amount of the debt was not ascertained. The respondents' only competent defence was to deny liability, but in such circumstances as the present they must make out a strong *prima facie* case in favour of their freedom of liability. That they had failed to do. If, however, they were to be allowed to dispute their liability they should be ordained to find caution before further procedure. In any event the petition should not be dismissed but should be kept in Court and the petitioners allowed to constitute their debt. The defence founded on the Defence of the Realm Regulations was irrelevant, because the respondents did not aver any regulation affecting the petitioners. The following were referred to—The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sections 129, 130, 137, and 141; *W. & J. C. Pollock* v. *Gaeta Pioneer Mining Company, Limited*, 1907 S.C. 182, 44 S.L.R. 144; *in re A Company*, [1894] 2 Ch. 349; *Cunninghame* v. *Walkinshaw Oil Company Limited*, 1886, 14 R. 87, 24 S.L.R. 66; *in re London & Paris Banking Corporation*, 1874, L.R., 19 Eq. 444; *re The Brighton Club and Norfolk Hotel Company, Limited*, 1865, 35 Beav. 204; *in re King's Cross Industrial Dwellings Company*, 1870, L.R., 11 Eq. 149; *re The Catholic Publishing and Bookselling Company, Limited*, 1864, 2 De G. J. & S. 116; *Bowes* v. *Directors, &c., of the Hope Life Insurance and Guarantee Company*, 1865, 11 H.L. Cas. 389; *in re Great Britain Mutual Life Assurance Society*, 1880, 16 Ch. D. 246; *in re Imperial Guardian Society*, 1869, 9 Eq. 447.

Argued for the respondents—The petition should be dismissed as incompetent. Such a petition was a form of diligence to obtain satisfaction of a liquid debt. Here the debt was illiquid; payment had not been demanded from the respondents; they had no knowledge of the petitioners as creditors until the present petition was presented.

The contract upon which they claimed was not in their favour. The alleged debt was an illiquid claim for damage, for which in an ordinary action decree could not be given *de plano*. The petitioners' title depended on whether there was a legal contract and that depended upon whether they were entitled to sell under the Defence of the Realm Regulations. The offer of a composition was subject to the reservation that all claims should be examined. If that had been done many of the claims might have been cut down, and since that offer the whole circumstances might have changed. *Brightman & Company, Limited* v. *Tate*, 1919, 35 T.L.R. 209; *Sykes* v. *Bridges, Routh, & Company*, 1919, 35 T.L.R. 464, were referred to.

LORD PRESIDENT — This petition is brought for the judicial winding-up of the respondent company. The question for our consideration is whether there is an honest and *bona fide* dispute between the parties as to the indebtedness of the respondent company. If there were a *bona fide* dispute between the parties as to that fact we should dismiss the petition; if there were no *bona fide* dispute we should grant the petition; but in the existing state of doubt there is a middle course open to us, and I propose to your Lordships that we should adopt that middle course, viz., to sist procedure in this petition so as to afford the petitioners an opportunity to constitute their debt by an action in Court.

LORD MACKENZIE—I am of the same opinion. There is no doubt that if the respondents' counsel had seen his way to give consent there might have been inquiry into the facts in the present proceedings and delay might thereby have been avoided.

But I am certainly not disposed to create a precedent, and for the Court to order an inquiry in the present proceedings would be to establish a precedent. Therefore I think that the ordinary course should be followed and the petitioners left to constitute their claim. I am of opinion that this is a case in which the petition should not be dismissed.

LORD SKERRINGTON—I agree with your Lordship that the petition must remain in Court and that the petitioners should be given an opportunity to constitute their claim. It seems to me that it is entirely a question for the Court whether the inquiry should be in a separate action or in this petition. If the respondents' counsel had indicated that he thought it in the interests of his clients that the inquiry should for the sake of speed take place in this Court, that would have been a material circumstance for us to consider, but he has not asked us to take that course. In the whole circumstances I think that the petitioners should constitute their claim in the ordinary way.

LORD CULLEN—I agree in the course of procedure which your Lordship proposes.

The Court *in hoc statu* sisted the process.

Counsel for the Petitioners—Constable, K.C.—Hamilton. Agents—Lindsay, Howe, & Co., W.S.

Counsel for the Respondents—Sandeman, K.C. — Gentles. Agents — Webster, Will, & Co., W.S.

Friday, June 6.

FIRST DIVISION.

[Lord Hunter, Ordinary.

BUCHANAN *v.* GLASGOW CORPORATION.

Reparation — Negligence — Tramway — Unauthorised Acts of Strangers—Natural and Probable Result—Liability for Injury to Passenger Thrown off Tramway Car by Rush of Passengers to Board Car.

A passenger on a tramway car was on the platform and about to alight at an "all car" stopping-station. The car failed to stop. She was jolted off the platform by a rush of persons who desired to board the car, sustained injuries, and now brought an action against the corporation which ran the cars, averring that crowds of workmen from adjoining works in order to get home as early as possible were in use to collect at the stopping-station and to rush on to cars arriving there even although such cars did not stop, that that practice was known to the servants of the corporation in charge of the cars, and that she had been injured by such a rush. *Held* that those averments were relevant to infer liability on the corporation.

Mrs Martha Adam or Buchanan (with consent), *pursuer*, brought an action against the Corporation of Glasgow, *defenders*, concluding for £250 damages for personal injuries.

The defenders pleaded, *inter alia*—"1. The pursuer's material averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed."

For the *averments* which were amended in the Inner House see *infra*.

On 22nd November 1918 the Lord Ordinary (HUNTER) found that there was no issuable matter set forth in the record, disallowed the issue proposed, and assoilzied the defenders from the conclusions of the action as laid.

Opinion.—"This is an action for personal injuries brought by a Mrs Buchanan against the Corporation of Glasgow. It seems that on 18th March 1918 the pursuer boarded one of the tramway cars belonging to the defenders at Renfrew for the purpose of proceeding to Shieldhall. Shieldhall is on the main road to Govan, and about two miles from Renfrew Cross, where she boarded the car. Her intention of course was to get out at Shieldhall, which is a station where there is a notice to the effect that 'All cars stop.'