liable at common law, the pursuer would have been entitled to decree against both conjunctly and severally for the full amount of the damages found due, and not merely to decree against each of the defenders for one-half of the damages, although, seeing that both defenders are good for the money a decree in such terms would have produced payment in full. If that is the proper form of decree where the defenders are equally liable, the fact that the liability of one is limited by statute cannot affect the liability of the other whose liability is for the full amount awarded.

It is not necessary to consider whether judge or jury may, if they think that there are degrees of culpability, limit the damages as against one or other of two defenders, although I doubt the competency of this course. It is, in my opinion, sufficient that they are not entitled to apportion the total damages found due between the defenders so as to deprive the pursuer of his right to recover the full amount from the defender whose liability is not limited. In other words, the liability of each defender must be judged of just as if he were the only defender to the action.

In the present case it is clear that but for the operation of the statute the Sheriff-Substitute would have assessed the total damages at £500, which is not too much for the pursuer's terrible injuries. The statutory restriction of the Caledonian Railway Company's liability should not have affected the pursuer's claim for the full £500 against the North British Railway Company. But the Sheriff-Substitute not only reduced the total amount of the damages from £500 to £406, but he pronounced a decree under which the pursuer could not have received more than £250 from the North British Railway Company. In my opinion the pursuer is entitled to a decree which will enable him in his option to recover the full £500 from the North British Railway Company, or £344 from them and £156 from the Caledonian Railway Company. The pursuer's strict right, in my opinion, is to have a decree for £156 against both defenders conjunctly and severally, and *quoad ultra* decree against the North British Railway Company alone for the balance, £344. In the present case it may be sufficient to decern against the Caledonian Railway Company for £156, and against the North British Railway Company for £500 under deduction of what is recovered from the Caledonian Railway Company. But with deference I think that in such cases, as a general rule, the decree should admit of the pursuer, if he chooses, recovering the full amount from the defender, whose liability is not limited by statute. I do not think the Court is concerned with questions of relief between the defenders.

The Court pronounced the following interlocutor:—

"Sustain the appeal, and recal the said interlocutor of 20th January 1898: Find in fact and in law in terms of the findings in fact, and in law in the said interlocutor of 24th July 1897, except so far as regards the amount of damages found due: Find the pursuer entitled to £500 of damages: Find that the defenders the North British Railway Company are liable for the full amount thereof at common law, and that the defenders the Caledonian Railway Company are liable to the extent of £156 under the Employers Liability Act 1880: Therefore decern against the defenders conjunctly and severally for the said sum of £156, and against the defenders the North British Railway Company for the sum of £344, being the balance of the damages of £500 found due to the pursuer: Find the defenders jointly and severally liable in expenses in the inferior Court and also in this Court."

Counsel for the Pursuer—Salvesen—W. Brown. Agent—Alexander Morison, S.S.C.

Counsel for Defenders the Caledonian Railway Company—Guthrie, Q.C.—Nicolson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for Defenders the North British Railway Company—The Solicitor-General—Grierson. Agent—James Watson, S.S.C.

Saturday, June 4.

FIRST DIVISION.

MACPHERSON *v.* BROWN (LIQUIDATOR OF D. S. IRELAND, LIMITED).

Company — Winding-up — Voluntary Winding-up—Summary Application to the Court by a Creditor—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 138.

Summary application to the Court under section 138 of the Companies Act 1862 is not competent to the creditor of a company in voluntary liquidation, who, though once the liquidator of the company, has ceased to be so, and who, although a contributory, does not seek to make such application in that capacity.

Company — Winding-up — Voluntary Winding-up — Liquidator — Remuneration of Liquidator—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 133 (3), 138.

The remuneration of the liquidator of a company in voluntary liquidation is left by sec. 133 (3) of the Companies Act 1862 in the hands of the company, and it is incompetent for the liquidator in such a liquidation to apply directly to the Court to fix the amount of his fee.

Company — Winding-up — Voluntary Winding-up—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 141.

Observed (*per* L. P. Robertson) that the fact that the Court has in a voluntary liquidation removed a defaulting liquidator and appointed another liquidator in his place does not convert that liquidation into one under supervision of the Court.

At an extraordinary general meeting of the company of D. S. Ireland, Limited, held on 28th January 1896, it was resolved that the company be wound up voluntarily, and that Robert Graham Abercrombie, C.A., Glasgow, be appointed liquidator of the company for the purposes of such winding-up, "and that his remuneration be fixed by the directors."

Mr Abercrombie having absconded, the Court on July 7, 1896, upon the petition of certain contributories of the company, removed him from the office of liquidator, and appointed Mr John Lumsden Macpherson, solicitor, St Andrews, to be liquidator in his stead. Mr Macpherson was a contributory of the company.

On 7th August 1897 Mr Macpherson resigned office as liquidator, and on 23rd August Mr C. H. T. Brown, stockbroker, Glasgow, was, upon the petition of a contributory of the company, appointed liquidator.

On 15th April 1898 Mr Macpherson presented a note to the Court craving their Lordships to fix and declare the amount of remuneration to be paid to him as liquidator of the company. He averred that the present liquidator had refused to pay him a just and proper fee for his services, or to refer the determination of the amount thereof to a neutral third party. The application bore to be made in terms of secs. 93 and 138 of the Companies Act 1862.

The liquidator lodged answers, in which he maintained that the note was incompetent and irrelevant.

The Companies Act 1862 (25 and 26 Vict. cap. 89), sec. 93, enacts—"There shall be paid to the official liquidator such salary or remuneration, by way of percentage or otherwise, as the Court may direct."

Sec. 133—"The following consequences shall ensue upon the voluntary winding-up of a company . . . (3) The company in general meeting shall appoint such persons or person as it thinks fit to be liquidators or liquidator, and may fix the remuneration to be paid to them or him."

Sec. 138—"Where a company is being wound up voluntarily the liquidators or any contributory may apply to the Court . . . to determine any question arising in the matter of such winding-up, or to exercise . . . all or any of the powers which the Court might exercise if the company were being wound up by the Court."

Sec. 141 empowers the Court to remove and appoint liquidators in a voluntary winding-up.

Sec. 151 enacts that "in the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidators, the expression 'official liquidators' shall be deemed to mean the liquidators conducting the winding-up subject to the supervision of the Court."

Argued for the petitioner—The petitioner was entitled to have the amount of his remuneration fixed by the Court. Section 138 applied to such a question as well as to any other matters of dispute which might arise in course of the liquidation, and it was erroneous to contend that the remuneration of voluntary liquidators was regulated exclusively by section 133 (3). In the Juridical Styles, vol. iii, p. 601, there was a form of petition under section 138 for fixing the fee of a liquidator in a voluntary liquidation. It was said that the terms of Mr Abercrombie's appointment were binding on Mr Macpherson; but there was no express undertaking on the part of the latter to abide by these terms, and he had been appointed liquidator by the Court *de plano* in Mr Abercrombie's room.—*City of Glasgow Bank, Liquidator*, July 20, 1880, 7 R. 1196, referred to.

Argued for the liquidator—I. This application was incompetent. (1) Sec. 93 was clearly out of the case, for it applied only to official liquidators, the scope of that term being defined by section 151. Nor was the petitioner entitled to the benefit of section 138, which was reserved for liquidators and contributories. He had ceased to be the liquidator of the company, and though he was actually a contributory, he appeared here solely in the capacity of a creditor. It was not the object of section 138 to enable a creditor in a voluntary liquidation to submit his claim to the jurisdiction of the Court—*See* Buckley on Companies, on section 138. (2) The question of the remuneration of the liquidator in a voluntary liquidation had been expressly dealt with by section 133 (3), which left the determination thereof in the hands of the company itself. If the company fixed a ridiculously inadequate amount, or declined to fix any amount at all, the liquidator would have his remedy not under section 138 but by an ordinary action. II. The application was irrelevant. Even assuming the petitioner's view on the statute to be correct, the terms of his appointment precluded his appealing to it. The company had duly resolved under section 133 (3) that the liquidator's remuneration should be fixed by the directors. That resolution stated the conditions on which the first liquidator accepted office, and it was equally binding on his successor, though the latter was appointed by the Court.

LORD PRESIDENT—Three objections have been taken to the petition, or at least the argument has branched itself into three heads.

The first is, that this application is made to the Court by a person who is neither the liquidator nor one of the contributories of the company. He is only an ex-liquidator, that is to say, he resigned office nine months ago, and his successor has been in the saddle ever since. So far, therefore, as remuneration for his services as liquidator is concerned, he has stepped down into the position of a creditor of the company. It is true that he is in fact a shareholder, therefore a contributory; but he is not approaching the Court in the quality or with the interest of a contributory, for the claim he is here to advance is adverse to the interest of the contributories, and accordingly I do not think that his petition

can be treated as that of a shareholder, and it is certainly not that of a liquidator.

Now, when one reads section 138, I think it is pretty plain that this summary mode of getting a dispute settled is in the interest of furthering the liquidation, and the case which we should have to consider is that of a liquidator who, finding the liquidation impeded by a question which admits of settlement, comes to the Court to have the answer given. But that has no application to the case of one who, so far as this question is concerned, is a creditor of the company, and accordingly, while it is quite possible that this question might have been submitted by the liquidator for the decision of the Court, it by no means follows that his opponent in that question has the same summary remedy. Therefore I think that the argument presented by Mr Salvesen on this head is sound, and that the petition is vulnerable and defective because the person presenting it is not a legitimate applicant within the section.

But there is another objection which is perhaps still more cogent, and it is this—this is a voluntary liquidation. It is not a judicial winding-up, nor yet a voluntary winding-up under the supervision of the Court. The circumstance or incident that the Court was approached to remove a defaulting liquidator and put another in his place does not remove the winding-up from the category of a voluntary winding-up, or bring the Court into a more intimate relation with the winding-up in other respects. Now, the Act of Parliament is distinct as to the normal way in which the remuneration of such a liquidator is to be fixed. It is a matter for the company. In the present instance there is a question whether the company has not already fixed a scale of remuneration which is binding on this liquidator. But it seems to me that, irrespective of the question whether this gentleman was or was not bound by the terms of his predecessor's appointment, he cannot step past the company and come straight to the Court to determine a question which in the ordinary case is placed in the hands of the company itself, and which the company says it has already settled, or if this be not so is ready to settle. The company itself is extant for such purposes, and I think the applicant has no answer to the objection that it is to the company he must go.

Now, it is said in the third place, as I have already indicated, that this gentleman is subject to the same terms as his predecessor. That is a point upon which I do not think it is necessary to express an opinion. It is a point on which opinion may very well differ, and it seems to me on the two solid grounds — as I venture to think them — which I have already expressed, that our judgment should be to refuse the petition.

LORD ADAM—I am of the same opinion. I confess that I have some doubt as to whether this gentleman's appointment as liquidator was subject to the same conditions as the appointment of Mr Abercrombie, but I agree that it is not necessary to decide that. I hold that there is no sufficient reason why this gentleman should not in the first instance go to the directors of the company, and apply to them to give him proper remuneration, and that he is not entitled to come direct to the Court with an application for that purpose. I agree further with your Lordship on the construction of section 138 of the Companies Act. This note is not presented by Mr Macpherson as the existing liquidator of the company, or in the character of a contributory. It is clear that the character in which he makes the application is that of creditor, and on the construction of section 138 I am of opinion that a creditor has no right to make an application under it. Further, where the clause mentions the liquidator, it means the existing and acting liquidator.

On these grounds I agree with your Lordship that this application is incompetent.

LORD M'LAREN—If this were an ordinary action setting forth that the pursuer had rendered service to the company as liquidator, and that the company refused or delayed to pay him suitable remuneration, as far as I am able at present to see, I should have considered that to be a relevant ground of action, and that it was not necessary, as a condition of the pursuer's right to come into Court that he should set forth that he had applied to the company or the directors to fix his remuneration. I fail to see in the documents before us such an explicit reference of the amount of the liquidator's remuneration to the company or the directors as would bind the liquidator. I prefer, therefore, like your Lordship, to rest my judgment on the ground that this is not a case for an application in the summary form provided by the Companies Acts. The right to apply to the Court in that manner is given for the benefit of the company in liquidation, and it is given to the liquidator or a contributory acting in the interests of the company. It is only when the liquidation becomes a creditor's liquidation that creditors obtain the benefit of the summary procedure authorised by the statute, and that they can only do by putting the liquidation under the supervision of the Court.

LORD KINNEAR—I concur.

The Court refused the note.

Counsel for the Petitioner—J. Wilson—Kemp. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondent—Salvesen—Clyde. Agent—John Martin, L.A.