Accordingly, I am of opinion that we should answer the first question in the affirmative, the second in the negative, the fourth (in its second branch) in the affirmative, and find all the others superseded.

LORD PEARSON—I concur with your Lordship.

LORD DUNDAS—I agree, and have nothing to add.

LORD M'LAREN and LORD KINNEAR were absent.

The Court answered the first question of law in the affirmative, the second question in the negative, the fourth question in the affirmative of its second alternative, and found it unnecessary to answer the other questions.

Counsel for First and Second Parties—Craigie, K.C.—King. Agents—Henderson & Jackson, W.S.

Counsel for Third Parties—Blackburn, K.C.—D. Anderson. Agents—W. & J. Cook, W.S.

Friday, May 28.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

INGRAM-JOHNSON *v.* CENTURY INSURANCE COMPANY, LIMITED.

Insurance—Contract—Policy—Surrender—Offer and Acceptance—Locus Pœnitentiæ.

A, the holder of a policy of insurance which contained the following clause—"At any time after five years' premiums have been paid, this policy may be surrendered for a cash payment,". . . —wrote to the company as follows:—"I have decided that I will accept the surrender value of my full return policy, and shall be glad to have the money as soon as possible. If there are any special forms to fill up, kindly forward them to me." In reply, the secretary of the company wrote asking A to forward the policy, and stating that a cheque would be sent in a day or two. Shortly thereafter the secretary again wrote returning the policy for signature of the endorsement thereon, and stating that on its receipt duly completed the surrender value would be sent. Before any formalities connected with the surrender had been executed, or the surrender value paid, A claimed under the policy, maintaining that it was still in force.

Held that the clause in the policy was a standing offer by the company which the pursuer had accepted by his letter, thus constituting a concluded contract to surrender, and that the company were thereafter only liable for the surrender value.

On 27th March 1908 Dr Ingram-Johnson, South Moor, Durham, brought an action against the Century Insurance Company, Limited, Edinburgh, in which he sought declarator that a certain insurance policy issued by them to him was still in force. He also claimed payment of a sum alleged to be due thereunder.

The following narrative is taken from the opinion (*infra*) of the Lord President—"This is an action brought by the holder of a sickness and accident policy, called a Full Return Policy, against an insurance company, in which he seeks to recover certain benefits which are said to be due under that policy in respect of sickness. There is no dispute as to the facts in the case, and though there has been no formal proof, a correspondence has been put in upon which the Lord Ordinary has sisted the case in order to allow the pursuer to go to arbitration as provided by the policy. But the defence which is made to the action is that the policy was surrendered, and that the only claim competent to the pursuer is a claim for a definite money payment, which has been tendered. The policy is printed, and is a policy by which in respect of certain payments, which were duly made, the holder of it, the assured, is to be entitled, if he is unfortunately the victim of sickness or accident, to certain weekly payments, and then, if at the time he has attained the age of sixty-five years he has duly paid the premiums agreed upon, he, or, in the event of his death, his executors, will be entitled to a return of the premiums paid. There are various conditions and provisions incorporated with the policy, and one of these, which is admittedly a part of the contract, is as follows—'At any time after five years' premiums have been paid this policy may be surrendered for a cash payment which in no case will be less than one-third of the whole premiums received, and will increase with the duration of the policy.' Now I read that as part of the contract, and as a part of the contract it is a standing offer on the part of the Insurance Company that if a person chooses to surrender he may do so, and if he does so he will be entitled to a cash payment in no case less than one-third of the whole premiums, and which will increase with the duration of the policy. This gentleman did pay five premiums, and then he wrote to the Insurance Company asking to know what the surrender value that he would be entitled to was. He also asks certain questions as to whether he could commute the policy for other policies. His inquiries were duly answered, and then, on 12th December 1906, he wrote to the resident secretary of the company the following letter—'Dear Sir, I have decided that I will accept the surrender value of my Full Return Policy, and shall be glad to have the money as soon as possible. If there are any special forms to fill up kindly forward them to me.' That letter was acknowledged as follows—'Your note to hand this morning requiring surrender value on the above policy. You might kindly forward me your policy by return, and cheque will be forwarded you in the course of a day or two.' Upon 18th Dec-

ember 1906 the resident secretary again wrote to the pursuer—'I return you herewith your policy, and shall be glad if you will kindly sign the endorsement we have placed thereon, and at the same time get a witness to sign. On receipt of same duly completed to the above address we shall forward you the £80, 15s., being amount of surrender value.' The assured did not return the endorsed policy, and nothing was done for a couple of months. He then fell ill, and made a claim under the policy. Shortly afterwards, when the matter was looked into, intimation was made to him that the policy had been surrendered as at the date of his letter of 12th December. To this intimation he replied on the 18th of March, being four months after the transaction, as follows—"In reply to your letter dated 14th March, you have been misinformed as to my policy having been surrendered. I certainly wrote saying that I had decided to surrender the policy at the end of last year, but the transaction was not completed. I have not signed the form of surrender nor have I received any money as surrender value, hence I maintain that the policy is still in force.'"

The defenders pleaded, *inter alia*—"(1) The pursuer having surrendered the policy sued upon, and the same not being now in force, the defenders are entitled to absolvitor."

On 27th October 1908 the Lord Ordinary (SKERRINGTON) repelled the first plea-in-law for the defenders, found in terms of the declaratory conclusions of the summons, and *quoad ultra* sisted the action to await arbitration.

Opinion.—. . . [*After narrating the nature of the action and the correspondence between the parties*] . . . "It is apparent from the correspondence that between the 13th and the 18th of December the policy had found its way into the hands of the defenders, but there is no letter sending it. The defenders allege in article 3 of their statement of facts that the pursuer forwarded the policy to them a day or two after the 13th of December, and although this allegation is denied in the answer, its accuracy was not, I think, disputed by the pursuer's counsel.

"The pursuer neither signed the endorsement nor returned the policy, nor did the defenders send him their cheque for the surrender value. Nothing further followed upon the resident secretary's letter of 18th December 1906 until 13th February 1907, when the pursuer's wife wrote to the resident secretary stating that she wished to send in a claim for sickness payment on behalf of her husband who had had to stop work. Instead of repudiating liability, the defenders sent to the pursuer a schedule to be filled up with particulars regarding his illness. The schedule was duly returned to them with the particulars, and it was not until 14th March 1907 that the defenders stated in a letter to the pursuer's wife that the policy had been surrendered on the 12th of December last, and was therefore not in force. An argumentative correspondence followed. On 29th April 1907 the pursuer sent to the defenders his cheque for £48, 9s. in payment of renewal of premium due April 30th on his policy. On the following day the defenders' general manager acknowledged receipt of the cheque and promised to send the renewal receipt for the premium. On 2nd May the defenders' actuary wrote to the pursuer that it appeared that the cash office had received his premium in ignorance of the fact that the policy had been cancelled on 12th December last, and stating that the defenders held the premium of £48, 9s. along with the surrender value of £80, 15s. at the pursuer's disposal.

"While the conduct of the defenders in sending to the pursuer the schedule and accepting payment of his cheque appears inconsistent with the view that the policy was surrendered upon 12th December 1906, the pursuer's counsel did not argue that the actings of the defenders would avail to revive the policy if it had really been surrendered, or would preclude the defenders by way of personal bar from pleading the surrender.

"The primary argument of the defenders, as I understood it, was that the pursuer's letter of 12th December 1906 amounted to the exercise of an option conferred upon him by the policy, and so is equivalent to a discharge of the sickness and accident benefits to which he was entitled under the policy in the event of disablement. I am unable to accept this argument. Where a contract provides that if one of the parties gives a certain notice he shall have certain rights, I do not doubt that, if that notice is duly given, it cannot be recalled without the consent of the other party. On reference to the conditions of the policy, however, it appears that no notice of any kind was contemplated. All that the condition provides for is that the policy may be surrendered or, as I read it, discharged in return for a certain money payment. I do not think that by the mere fact of dispatching the letter of 12th December the pursuer invested himself with an immediate money claim against the defenders, and divested himself of his other rights under the policy.

"The defenders attempted to eke out their argument by maintaining that the resident secretary's letter of 13th December 1906 amounted to an acceptance of the pursuer's letter of the preceding day, and that the two letters taken together constitute an agreement to the effect that the policy should be surrendered. I cannot read the correspondence as containing any such agreement. The parties in my opinion were simply endeavouring to give effect to their rights and obligations as constituted by the original policy.

"Lastly, the defenders maintained that the return of the policy by the pursuer to the defenders, on some day between the 13th and 18th December, amounted to a surrender or discharge of the policy. I do not think it necessary to consider how the rights of parties might have stood if the defenders had either cancelled the policy when it was in their hands, or if they had retained it as their document and sent

the pursuer a cheque for the surrender value in exchange. Instead of following either of these courses they returned the policy to the pursuer with a request that he would sign an endorsement thereon and promising on receipt of the same duly completed to forward him the amount of the surrender value. The endorsement is to the effect that the pursuer acknowledges to have received from the defenders the sum of £80, 15s., being the surrender value of the policy and all rights and privileges thereunder, the policy being thereby given up to be cancelled.

"In my opinion the defenders acted within their rights in demanding a written discharge of the policy, but as the pursuer changed his mind and refused to sign the endorsement and return the policy, I do not think it can be successfully maintained that the surrender was ever completed.

"I am therefore of opinion that the first plea-in-law for the defenders ought to be repelled, that the pursuer is entitled to decree in terms of the declaratory conclusion of the summons, and that *quoad ultra* the action ought to be sisted in order to enable the pursuer to submit his claim to arbitration in terms of the conditions of the policy. I shall give leave to reclaim."

The defenders reclaimed, and argued—By his letter of 12th December 1906 the pursuer had surrendered the policy. That was clearly his intention at the date of the letter, and the fact that he had afterwards changed his mind was immaterial. The policy contained a standing offer of the surrender value, which the pursuer had accepted. It was immaterial that certain formalities remained to be executed — Bell's Com. (7th ed.), i, 345; *Erskine* v. *Glendinning*, March 7, 1871, 9 Macph. 656, 8 S.L.R. 410.

Argued for respondent — The letter founded on by the reclaimers was not a surrender of the policy but merely a proposal to do so. The respondent changed his mind before the bargain had been duly completed, and accordingly the policy was still in force.

At advising—

LORD PRESIDENT—[*After narrating the facts, ut supra.*]—Now, the whole question in the case is just whether that attitude is correct or not. I am of the opinion that it is not correct. It seems to me that the letter of 12th December 1906, which I have read, was an acceptance of what I have described as a standing offer on the part of the company to pay the surrender value, and that after that there was no more to be said. It does not seem to me to make the slightest difference that as a matter of fact the documents which it was quite proper to have duly completed—I mean the documents acknowledging the receipt of the money, and acknowledging that the policy was no longer in force—had not been sent. It would seem to me just as little to the point to say that if anyone made a contract with his stockbroker for the buying or selling of shares, he might say that the contract had not been completed because the transfer had not been signed. I am sorry I cannot agree with the Lord Ordinary. I think the question simply comes to this—Was there a concluded contract or was there not? I think there was a concluded contract, and after that the only money which the Insurance Company were due was the surrender value that has been tendered in the present action, and accordingly I think that is the end of the matter.

LORD KINNEAR—I quite agree with your Lordship. I think this is a case of a completed contract between the parties, concluded by the pursuer's letter of 12th December, and that the policy containing an offer to accept a surrender on certain terms, and the letter, together, announcing that the insured wishes to surrender, and demanding the surrender value, make a completed bargain from which neither party could afterwards withdraw. The whole argument for the respondent seemed to me to be founded upon a confusion between the completion and the execution of a contract. It does not affect the completion of a bargain that something remains to be done in order to carry it out; and all that remained to be done after this letter of 12th December had been received was to carry out the contract then made by delivering or discharging the policy on the one part and paying over the surrender value on the other. It seems to me clear on the facts stated in the proceedings that either party could have enforced the execution of the bargain against the other, and nothing that followed can make any difference. No doubt the pursuer changed his mind, but then it was too late, for he had made his bargain. Upon thus changing his mind he made certain claims on the strength of the policy. It does not appear to me to be of any importance that the company's officers, on the assured subsequently claiming under the policy, seem to have made a mistake about the true position of their relations to him. No amount of blundering as to the way in which his claim should be dealt with can make any difference to the fact that there was a concluded bargain between the parties.

LORD GUTHRIE—I think the defenders are entitled to our judgment. The pursuer was in a position to exercise a certain option, namely, the option to surrender. He did exercise that option by the letter of 12th December 1906. But, in addition, I think it fair to say that it seems to me the good faith of the matter is with the defenders. They did not induce the pursuer to surrender; it was proposed by himself. Nor did they seek to hurry his action. The negotiations for surrender were begun by the pursuer on 27th September, and it was not for two months and a half, and after five letters had passed between them, that he, after full consideration, wrote the letter of 12th December. After that letter I do not see how, if it had suited him to hold on to the surrender, the defenders could possibly have disputed the matter, and of

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