Friday, December 22.

FIRST DIVISION.

[Lord Craighill, Ordinary.

SHIELLS *v.* FERGUSON, DAVIDSON, & CO.

Debtor and Creditor—Compensation—Assignation—Partnership—Unlimited Liability.

B assigned a document of debt due to him by a Building Association with unlimited liability, of which he was a member. At the date of the assignation the liabilities of the Association exceeded their assets, although this was not known to the assignees.—*Held* that B's liability as a partner of the Association was a good defence against B's assignees to a partner of the Association who had been charged by them for payment of the debt.

This was a suspension brought by Robert Thornton Shiells, architect, Edinburgh, of a charge against him at the instance of Messrs Ferguson, Davidson, & Co., merchants in Leith, to make payment of the sum of £500, with interest at 5 per cent. from 2d October 1874, and of the sum of £19, 11s. 4d., being the taxed amount of expenses of an action in the Court of Session, in the following circumstances:—

The Imperial Building Association was an association with unlimited liability, formed for the purpose of acquiring building-ground, erecting houses thereon, and then selling them. There were seventeen members; and it was intended by the Association that the tenements should be completed by the members of the Association, who were almost all concerned in some department of the building trade; that each of the members so employed in building for the Association should be entitled to receive payment by instalments for the work done by him, upon presenting a certificate from the architect (Mr Shiells the complainer) of the amount done; and that the tenements when completed should then be sold for the benefit of the Association.

Mr Brodie, a builder in Edinburgh, one of the members of this Association, got an extensive contract from the Association. He received payment of various instalments as his work proceeded, and in October 1874 assigned to the chargers a certificate for work executed by him to the amount of £500, granted to him by the complainer on 15th September. This assignation was intimated formally to Mr Garson, the agent of the Association, on 5th November. In the course of a correspondence passing between the agent of the Association and the chargers, assurances were given by the Association's agent that there were ample funds to meet all claims if no obstacle were presented to injure the credit of the parties. But on 28th January 1875 the chargers raised an action against the Association, and against certain individual members or partners of said Association, including the present complainer, for the sum of £500. No defences were lodged, decree was given, and on 16th June 1875 the complainer, who was a member of the Association, was served with a charge for the amount. The estates of the Association had been sequestrated on 11th March 1875.

The complainer alleged that "The said Association is not due the sum sued for, or any sum, to the said William Brodie, or to any person in his right. The said William Brodie was, and is himself, a partner of the said Association. The affairs of the said Association are in an embarrassed condition, and its assets are not sufficient to meet its liabilities. With the exception, moreover, of the present complainer, and one or two others, the whole individual members of the Association are insolvent. The share of the deficit in the funds of the said Association falling to be paid by the said William Brodie, and due by him to the said Association and to the present complainer, is largely in excess of the sum charged for."

He pleaded—"1. The said Association not being due any sum to the said William Brodie, but being on the contrary his creditors to a large amount, the complainer is not liable as a member of said Association in the sum charged for. 2. More particularly, the complainer is not liable for said instalment, in respect (1) that the said William Brodie failed to complete his contract, and (2) that he is due to the Association, as a partner thereof, a sum in excess of the sum sued for."

The chargers, in answer, referred to the condescendence annexed to the summons in the action raised by them, which substantially was a narrative of the facts as given above, and pleaded—"1. The said Association being indebted to the said William Brodie at the date of said certificate in the sum charged for, the complainer, as a partner of said Association, was and is liable for said amount. 2. The respondents being now in the right of said sum of £500, and the same being still resting-owing and due as aforesaid, the respondents are entitled to decree therefor against the complainer."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 18th January* 1876.—The Lord Ordinary having heard parties' procurators on the closed record, productions, and proof, and having considered the debate and whole process, ... Finds as matter of fact (1) that the said William Brodie, the granter of the said draft, order, or mandate, was a partner of the Imperial Building Association, to which that document was addressed; (2) that the £500 covered by the said draft, order, or mandate, was due by said Association for work done for them by the said William Brodie; (3) that before said draft, order, or mandate was intimated—that is to say, before the 15th of October 1874—the affairs of the said Association had become embarrassed, and the said Association, for want of funds had become unable to meet their obligations, as these ought to have been discharged; (4) that in March 1875 the affairs of the Company were placed in the hands of Peter Couper, accountant in Edinburgh, as judicial factor appointed by the Court for the purpose of liquidation; (5) that according to the estimate of the value of the assets of the Association, made by the judicial factor for the purposes of this action, as contrasted with the debts of the Association, calls or contributions from the partners will be required, that funds with which their obligations can be discharged may be provided; and (6) that it has not been shewn, and is at present uncertain, whether the calls or contributions leviable from the said William Brodie will exceed or fall short of the sum due to him for work done for the Association: And, in the fourth place, finds as matter of law (1) that calls or contribu tions leviable by the said Association from th

said William Brodie, for the discharge of the debts of the Association, may be set off against the debt due to him by the Association, and consequently against the £500 covered by the said draft, order, or mandate, of which the chargers are now in right; and (2) that as the affairs of the Company are only now in course of liquidation, and it is uncertain whether there is any sum which the chargers, as in right of the said William Brodie, are entitled to recover from the said Association, and from the suspender as one of the partners, all the questions on which parties have joined issue in this suspension cannot at present be determined: Therefore sists the process *hoc statu*, reserving, however, leave to the suspender, as well as to the chargers, to move that this sist shall be recalled when the mutual liabilities of the said William Brodie and the said Association shall have been or can be definitely ascertained: Finds no expenses of process hitherto incurred to be due either to or by either the suspender or the chargers, and decerns.

"*Note.*—William Brodie, a builder, was a partner of the Imperial Building Association, and he was also a creditor for work done in the erection of three tenements in Prince Regent Street, Leith, which are now the larger part of its property. In September 1874 he received from the architect a certificate to the effect that an instalment of £500 was due under his contract, and the debt thus established he transferred to Messrs Ferguson, Davidson, & Co., the chargers, by the draft, order, or mandate in process. The chargers failed to obtain payment in consequence of the embarrassed state of the affairs of the Association, and, as things went on from bad to worse, these affairs in March 1875 were placed in the hands of a judicial factor for liquidation. The suspender is a partner of the Association, and liable consequently for its debt. He, as well as the other partners, were sued upon the draft, and decree in absence passed against all; but the present suspension was subsequently presented by the suspender, and the same pleas as would have been available had defences been lodged have now been stated as reasons for which the decree so pronounced ought, so far as he is concerned, to be suspended.

"The second, and here the most important, of the pleas of the suspender, is to the effect that Brodie is due to the Association as a partner a sum larger than the £500 claimed by the chargers. Brodie was a partner, and, as the Lord Ordinary thinks, there is no doubt that against this debt, which originally was due to Brodie, there might be set off whatever was due by Brodie to the Association. But it unfortunately happens that the mutual liability of Brodie and the Association have not yet been ascertained. The affairs of the Association are only in course of liquidation, and in the meantime it is impossible to say, unless conjecturally, whether there is or there is not due by Brodie, as a partner of the Association, a sum as large as that which is due to him as a creditor of the Association. In this predicament the Lord Ordinary considers that it would be unsafe to give judgment at present upon the plea in question, and therefore the cause has for the present been sisted. This, as he thinks, is the only course by which possible, or rather probable, injustice will be prevented."

The chargers reclaimed, and argued—If any right of retention is competent to the suspender it must be that which was competent in October 1874; but it was the suspender himself who then certified that £500 was due to Brodie by the Association. There was no notice then given of insolvency; the Association had not then become Brodie's creditor. The debtor is barred from afterwards stating objections to such a debt if he admits his liability when the assignation is intimated to him; much more is he barred from stating objections that are founded on facts that emerge after the date of the assignation. *Esto* that the Association had claims against Brodie; these were illiquid and unascertained, and cannot therefore found a plea of compensation. The chargers were also led to believe that the Association was solvent.

Authorities—*Parter* v. *Mackintosh*, March 20, 1862, 24 D. 925, opinion of Lord Justice-Clerk; *Bedford* v. *Brutton*, Nov. 25, 1834, 1 Bingham, 399.

Argued for the suspender—This is a question really between partners. Shiells and Brodie were both members of the Association, and one is perfectly entitled to say to the other, "We must settle our respective rights by an accounting." The Association was bankrupt in October, as Brodie, a partner, must be held to have known, and the rights of partners could not be ascertained without an accounting. The assignation could not prejudice the right of the debtor, and as against Brodie he had the rights of one partner in an insolvent company against another.

Authorities—Bell's Com. ii. 131 (M'Laren's ed); Prin. sec. 1468; *Caven* v. *Mackie*, May 18, 1832, 10 S. 550; *Malcolm* v. *West Lothian Ry. Coy.*, June 10, 1835, 13 S. 887.

At this stage of the case the Court appointed the suspender to amend his 6th reason of suspension, so that the state of liabilities as between Brodie and the Association, and the financial position of the Association itself, might be clearly ascertained, and appointed answers in four days thereafter.

The suspender put in a minute and a state of accounts, and added to the 6th reason of suspension a statement based on that state of accounts, from which it appeared that on 2d October 1875 there was a deficiency of £3635, 2s. 9d. in the affairs of the Society. The proportion of liability attaching to each share in the hands of solvent members of the Society was £201, 19s. Brodie held three shares; his liability was therefore £605, 17s.

The chargers admitted the correctness of the state, but answered that at the date of 2d October 1875, Brodie, being creditor to the amount of £700, there was a balance of £94, 3s. due to him; and that, besides, the claim of the Association was illiquid and inconsistent at that date, and was not in any way made known to them.

At advising—

Lord President—William Brodie, the cedent to the chargers, was a builder in Edinburgh, and a member of a company of unlimited liability, called the Imperial Building Association. The business of this Association was to acquire building-ground, build houses on it, and then sell them. Another object was to afford employment to its various members. Brodie got a pretty extensive contract from this company—the slump sum which he was to receive being £2520. He got into embarrassment before his work was completed, but it appears that on producing the architect's certificate he had received certain sums

to account from time to time, amounting in all to £1700. Brodie was indebted to the chargers Ferguson, Davidson, & Co., for timber with which they had supplied him, and being unable to pay their account he assigned to them a certificate obtained from the architect Mr Thornton Shiells, dated 15th September 1874, which bore "that Mr William Brodie has executed such portions of the joiner work, Imperial Building Association, Leith, as entitle him to payment of 4th instalment, amounting to the sum of Five hundred pounds (£500)." The way in which this assignation was effected was by Brodie adding a letter to the Association requesting them to pay the amount to the order of Ferguson, Davidson, & Co., and it seems that this order was given almost immediately, for there is a correspondence upon it commencing on the 15th October immediately after. At all events it was intimated by 5th November 1874. If the Building Association had been prosperous, no difficulty, I suppose, would have arisen about making this payment; but when a charge was given on 11th June 1875 it was suspended, on the ground that the Association was insolvent, and that every partner would be called upon to contribute his share. This is stated in the 6th reason of suspension—"The said William Brodie was and is himself a partner of the said Association. The affairs of the said Association are in an embarrassed condition, and its assets are not sufficient to meet its liabilities. With the exception, moreover, of the present complainer, and one or two others, the whole individual members of the Association are insolvent. The share of the deficit in the funds of the said Association falling to be paid by the said William Brodie, and due by him to the said Association and to the present complainer, is largely in excess of the sum charged for." The complainer being Mr Thornton Shiells, who was one of the members of the Association against whom this charge was directed, the Lord Ordinary came to the conclusion that, if that were the fact, the Association and Mr Shiells, a member of it, were entitled to resist the demand made, on the ground that Brodie was bound to relieve the Association, and that that claim could be set off against the £500 due to him; and further, that this claim was good against Brodie's assignee. He therefore sisted procedure, "reserving, however, leave to the suspender, as well as to the chargers, to move that this sist shall be recalled when the mutual liabilities of the said William Brodie and the said Association shall have been or can be definitely ascertained. It occurred to the Court, on hearing counsel on the reclaiming note, that the evidence was hardly sufficient to justify the course adopted by the Lord Ordinary. It might be that Brodie was due to the Association sums exceeding that which the Association owed him, but it might also be that at the date of the assignation he was not due to the Association a sum in excess of what it owed him, and it might therefore be doubtful whether the claims of the Association were good against Brodie's assignees or not.

We therefore allowed an amendment of the record, to show that Brodie was under an obligation of relief to the Association at the date of the assignation exceeding that which was due to him. The result of the amendment and admissions enables us to see how that matter of fact stood. The result is, that at the date of the assignation the liabilities of the Association exceeded its assets by £3635, and very few, if any, of its members were able to contribute anything.

The question comes to be—Was Brodie liable to relieve the complainer to an amount not far short of or equal to the amount charged for? I am of opinion that he was, and that therefore the complainer is entitled to hold the Lord Ordinary's interlocutor. The principle is that an assignee is liable to all pleas competent against his author when the assignation was made. A claim emerging subsequently has never been held competent to be pleaded against the assignee, but the assignee is certainly liable to all pleas maintainable against his author at the date of the assignation.

Lord Deas—I concur with your Lordship. Brodie was a member of this Association, by whom he was employed to erect certain buildings, contracting on the usual footing that the cost was to be paid by instalments from time to time, according to certificates granted by the architect.

On 15th September 1874 Brodie obtained a certificate entitling him to receive an instalment of £500. The right conferred by that certificate he made over to Ferguson, Davidson & Co. In that state of matters it rather appeared to me that Brodie had strong equitable claims to payment of that instalment by his employers. There could be no doubt that he would have been entitled to decree for the amount. The claim of his assignees also seems very equitable. When the claims of the assignees were intimated, the agent of the Association wrote to say there would be plenty to meet all claims. I think that so far it would be a very nice question on the ordinary rule "*Assignatus utitur jure auctoris.*" But then an amendment of the record was allowed, and a state of the affairs of the Association at the date of the assignation was given in. If this had been an association with limited liability, the question would have been different. But the liability was unlimited. Brodie was not the only person employed. There were many other tradesmen who had been employed, and who all held the architect's certificate, as well entitled to payment as Brodie was. That makes a great difference. These tradesmen and the architect himself were all in as favourable a condition as Brodie; on the other hand, their liability to the Association was unlimited. This is a peculiar state of affairs, and I am for adhering to the interlocutor of the Lord Ordinary.

Lord Mure—When this case was before us recently it was pleaded that the fact of Brodie being a member of the Company, and the Company insolvent, could not operate against the assignees. The answer to that was an allegation that at the date of the assignation the Company was insolvent, and Brodie indebted to it. From a note on my papers I see that that was not admitted, and we required a distinct averment as to how that fact stood: We have now an averment that at the date of the assignation Brodie was indebted to the amount of £605, 17s. to the Association. The question is, whether Ferguson, Davidson, & Co. can be met by any such claim of compensation. If it could be shown that by delay caused by the assurances of the agent of the Association they lost the chance of recovering this money, there should have been a special plea to that

effect; but in the absence of any such plea, and taking the case on the footing that Brodie was indebted to the Association in a sum exceeding £500, I have come to the conclusion that the assignees cannot raise any question against the complainer.

Lord Shand—The law of this question is accurately stated in Bell's Commentaries, vol. ii. 131, 6th ed.—"The right to compensate passes against assignees, if once vested, against the cedent by a proper concourse before assignation. But if debt be assigned, and the assignation intimated before the counter debt arises, the concourse is prevented, and there is no compensation;" and I think that the decision your Lordships have arrived at is in accordance with the law there stated. When Brodie got this certificate the state of affairs was this—The assets of the Company consisted of three blocks of buildings, valued at £3900, but burdened with a bond for £4817. The remaining assets were trifling, and there was close on £2000 due to different banks, so that the actual state of affairs was that there was a deficiency of £3000. Now, I do not think that Brodie's certificate put him in any better position than any one who had furnished goods to the Association. The moment he presented it he would be met by the answer—"We have no funds; you must yourself contribute to pay it, and many other claims, so that there is a larger sum due by you than to you." That raises at once a question of compensation. It would be very inequitable that Brodie's assignee should get a higher right than Brodie himself had—it would be inequitable to the other partners; the assignees were bound to see what the value of Brodie's claim was.

On that short view, that the defence raises at once a claim of compensation, I think it is a clear answer to this claim. Any debt arising afterwards would not have been pleadable; but I think that here, as the debt was due, there was concourse, and the assignee is in no better position than the cedent.

The Court adhered.

Counsel for the Complainer—Solicitor-General (Macdonald) — Asher — Robertson — Darling. Agents—Lindsay, Paterson, & Co., W.S.

Counsel for the Respondents—Lord Advocate (Watson)—Trayner—Kinnear—Maclean. Agent—Patrick S. Beveridge, S.S.C.

Wednesday, December 22.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

DUDGEON *v.* THOMSON & CO.

Patent—Infringement—Combination.

Circumstances in which *held* that there were such essential differences between two tools, which both effected the expansion of boiler tubes by means of rollers, that one of them was not an infringement of a patent previously obtained for the other—*diss.* Lord Deas, who thought that the differences did not amount to more than a "colourable evasion" of the prior patent.

This is the sequel of the cases reported before, of dates 17th March and July 5, 1876 (vol. xiii, p. 384 and 629; the former reported also in 3 Rettie, p. 604).

The Lord Ordinary, after hearing proof led, reported the evidence to the Court, under the provisions of the Act of Sederunt 11th July 1828.

The complainer contended that the manufacture carried on by Thomson & Co. was a breach of the interdict granted on his application on July 4, 1873 (11 Macph. 863).

The respondent answered that the alterations on the tool manufactured by him, that had been made since the date of the interdict, were such that it could no longer be said to be an infringement of the complainer's patent, and consequently could involve no breach of interdict.

What these alterations were, and what was the outcome of the evidence, will be found in the opinion of the Lord President.

At advising—

Lord President—This is a petition and complaint for breach of interdict. The interdict was granted by Lord Mackenzie, Ordinary, and his interlocutor was affirmed by this Division of the Court on 4th July 1873. That interdict was "to prevent William Thomson, engineer in Glasgow, from infringing" Dudgeon's "letters-patent by making, vending, or using, in whole or in part, the improvements in apparatus used in expanding boiler tubes described in the specification filed on 30th August 1866, in pursuance of the proviso contained in the said letters-patent, and in particular from making, vending, or using any apparatus for expanding boiler tubes constructed or used in the manner described in the said specification, or in manner substantially the same, and from infringing the said letters-patent in any other manner or way." The patentee, Dudgeon, had obtained a patent for a certain invention for improvements in the apparatus for expanding boiler tubes, and his allegation was that Thomson was using a tool substantially the same as that described in his specification. That allegation we thought well-founded, and adhered therefore to the interlocutor.

Now, first, we must have a distinct notion of the tool described in the specification. Since the case was last before us there has been lodged a disclaimer and memorandum of alterations, but I do not think that that is material—the nature of the invention remains unaltered. The object of the complainer's invention is "to enable the ends of boiler tubes to be expanded in the holes in the flue sheet." There is no doubt that the ordinary mode in use before this invention was very rude and unsatisfactory; it was done by mere violence, and the favourite method was to expand the tube by putting into it a series of swages radiating from a common centre, and then to expand the tube by driving in a tapering plug with the blows of a heavy hammer. The invention of the complainer is to expand the tubes by the application of pressure rollers to the interior, so that the metal is expanded by rolling, in contradistinction to the old system of driving it outwards by hammering. Now, that is an obvious idea; the difficulty is to find a good mode of doing it. The patentee does not claim the invention of expansion by rolling—for that would be dangerous—and accordingly he shows that he does not intend