Saturday, February 8.

SECOND DIVISION.

[Lord Johnston, Ordinary.

R. D. SIMPSON, LIMITED, AND LIQUIDATOR *v.* HUDSON BEARE AND OTHERS.

Company—Liquidation under Supervision—Claim Based on Compromise—Duty of Liquidator to Disclose Facts to Court—Claim Admitted by Liquidator Reduced by Court—Circumstances—Directors.

In an action brought by Van B. & Co. against R. D. S., Ltd., the pursuers obtained a perpetual interdict against the defenders infringing certain patent rights of which the pursuers were proprietors. R. D. S., Limited, as a result of the action, went into a voluntary liquidation, which was placed under supervision of the Court. At a meeting of creditors, called by the liquidator, the liability of R. D. S., Ltd., to Van B. & Co., in respect of the action (expenses, claims of damage), was estimated at £2000. At a date subsequent to this meeting Van B. & Co. raised an action against C. D. & F., directors of R. D. S., Ltd., as individuals, for £4250 (£3000 representing expenses in the action above mentioned, £1250 representing damages for infringements). This action was compromised by C. D. & F. paying to Van B. & Co. the sum of £1000, in full of all claims against them, and obtaining from Van B. & Co. an assignation of all their claims and rights of action against R. D. S., Ltd. Thereafter C. D. & F. lodged a claim in the liquidation for £2000, which was allowed in full by the liquidator. Neither in the note presented by him to the Court for authority to intimate deliverances, approval of accounts, etc., nor on any other occasion, was the attention of the Court directed to the circumstances connected with the claim, the matter being eventually noticed by the chartered accountant to whom the Lord Ordinary had remitted the liquidator's accounts.

Held (1) that the liquidator had acted wrongly in treating the claim as an ordinary claim instead of as a compromise requiring the special sanction of the judge of the liquidation upon a note presented for the purpose; (2) that the claim must be restricted to £1000, the payment by C. D. & F. having been made in settlement of a personal debt and not on behalf of the company, and they consequently having no right to sue the company other than that conferred by the assignation, viz., a right to sue the debt, as fixed, £2000, less the amount already recovered, £1000.

Company — Patent — Directors — Personal Liability—Infringement of Patent.

Opinions (*per* Lord Stormonth Darling and Lord Ardwall) (*contra dub.* Lord Johnston) that directors of a company are personally liable both in damages and expenses of the action, for infringements committed by the company under their direction.

On 11th September 1907 Charles J. Munro, Chartered Accountant, Edinburgh, as liquidator of R. D. Simpson, Limited, presented a note to the Court craving authority to intimate deliverances, approval of accounts, etc.

The Lord Ordinary (JOHNSTON) remitted the liquidator's accounts to John Scott Tait, C.A., Edinburgh, to report. In his report the reporter drew the Lord Ordinary's attention to a claim for £2000 lodged by Professor Beare, R. B. Mathie, and Andrew Scott, and admitted by the liquidator. The liquidator thereafter lodged answers dealing with the reporter's objections. Thereafter the Lord Ordinary on 4th December pronounced an interlocutor in which he reduced the ranking of the claimants above mentioned to £1000, and directed a deduction of £15, 15s. to be made from the fee to be afterwards allowed to the liquidator.

The *facts* of the case, briefly stated in the rubric, are fully narrated (*infra*) by the Lord Ordinary and by Lord Ardwall.

The Lord Ordinary's *note* to his interlocutor was as follows—"In the liquidation of R. D. Simpson, Limited, a serious question has been raised by Mr J. Scott Tait, to whom I remitted the liquidator's accounts for audit.

"In the note to his report, in dealing with the deliverances pronounced by the liquidator on the claims lodged in the liquidation, Mr Tait brought specially under the notice of the Court the claim No. 82 in the liquidator's schedule of deliverances.

"I must say at once that Mr Tait has not gone beyond his sphere in bringing this matter to my notice, but on the contrary, had he not done so, he would have fallen short of his duty, and would not have justified the trust which the Court places in these professional gentlemen to whom it remits liquidators' accounts for audit. The Court relies upon them for the most confidential assistance in performing the judicial duty of supervising liquidations in the interest of all concerned. On the other hand, I am compelled to characterise the conduct of the liquidator as wanting in that openness which the Court looks for from the gentlemen who occupy this important position, and as conclusively proving the necessity of the Court's supervision.

"The claim and deliverance is as follows—

'82. Professor Beare, R. B. Mathie, and Andrew Scott, Edinburgh.

'Claim lodged £2000. Claim admitted £2000.

'The liquidator admits this claim.'

"This is the whole reference which the liquidator makes to this claim. He treats it as if it were a tradesman's account for goods supplied, and gives no suggestion of the nature of the claim, or of the circum-

stances under which he admits it to a ranking, though he does so in every other case which is not merely a claim for a trade debt.

"Having so delivered himself upon this and the other claims, the liquidator, on 11th September 1907, submitted a note in the liquidation for approval of his deliverances on claims, audit of his accounts, and authority to pay dividends. For aught that appeared, or that unaided I could have known, I should have found nothing to do but approve, as in ordinary course, deliverances on claims unobjected to, and it is difficult to see how any creditor should have objected to the deliverance in question, for although intimation was ordered to the creditors, they received from the liquidator no further information, and could have had no further grounds to suspect his deliverance than had the Court. Further, when called upon to reply to the notes issued by Mr Tait with his *interim* report, the liquidator stated that after careful consideration he had decided that it was in the interest of the 'general body of creditors' to compromise a certain large claim at the instance of Professor Beare and Messrs Mathie and Scott at £2000, 'subject to the approval of the Court to be taken in the note since lodged on 11th September 1907.' I take leave to say that, having regard to the terms of the note referred to, and with which I am now dealing, this is a most misleading statement, and I can only regard the liquidator's conduct in not openly applying to the Court for approval of the compromise which he was making in connection with this claim, and in presenting it to the Court as a mere question of approving a deliverance, as a deliberate attempt to smuggle this matter through without the Court being made aware of the circumstances. And I should not be doing my duty in supervision of this liquidation if I passed over the matter without taking notice of the liquidator's conduct.

"The circumstances under which the claim in question arose appear to be these: I am not exactly informed as to what the proper business of R. D. Simpson, Limited, was, but one of their lines of business was apparently the sale of certain labour-saving machines. Amongst other machines, they were selling in 1905-6 a machine for slicing sausages and the like meat goods. This proved to be a breach of the patent of Mr Van Berkel of Rotterdam, and accordingly the respondents in 1905 were subjected to an interdict at the instance of Van Berkel and the Dutch Company which were working his patent. The suspension and interdict was resisted by R. D. Simpson, Limited, and a trial took place in this Court in which the Van Berkel patent was upheld both by Lord Dundas in the Outer House and by the First Division on reclaiming note, and interdict was granted. The report of the case will be found under date November 20, 1906-1907, S.C. 165. The case was a difficult one, and the trial must have been costly. I can readily believe that the account of judicial expenses of the successful complainers must have been a substantial one, and that of their extra-judicial expenses even larger. On the issue of the suspension and interdict there arose a claim of damages for infringement in addition to the claim for costs under the suspension. The former would have had to be made the subject of a new action, the latter, although not entirely liquid, was capable of being immediately made so by the complainers by having their account of expenses audited and taking decree for the taxed amount. But instead of doing either, the successful complainers entered into negotiation with R. D. Simpson, Limited, and their claim of damages and for expenses of the suspension process was adjusted at £1000, and steps were being taken for reducing the settlement of the claim which had been agreed on to writing, and arranging a guarantee for payment satisfactory to the complainers. This was in December 1906 and January-February 1907. But before final adjustment of the guarantee to be given the company found itself obliged, in March 1907, to go into voluntary liquidation, when Mr C. J. Munro, C.A., was appointed liquidator. On 19th March the liquidation was placed under supervision. Van Berkel and his company at once intimated to Professor Beare and Messrs Mathie, Scott, and Simpson, the directors of R. D. Simpson, Limited, that they held them personally liable for the damages they had sustained, and the costs, judicial and extra-judicial, which they had incurred in litigating with R. D. Simpson, Limited, and on 17th April 1907 they raised an action against these gentlemen concluding for £4250, made up of £1250 of damages for infringement of patent and £3000 of costs alleged to have been incurred in the previous suit. The record in this action was closed, but it did not proceed further, as the defenders, or at least Professor Beare and Messrs Mathie and Scott, took up the negotiation which had become abortive on the bankruptcy of the company, and paid the £1000 which had been originally agreed upon to Van Berkel & Company. This payment was made in full settlement of all claims of damage competent to Van Berkel and his associates in respect of the infringement of patent and of the expenses in the action of suspension and interdict. But on making the payment the directors took from the payees an assignation in their favour as individuals of all claims of damages and rights of action of whatever kind competent to the payees against the company. This settlement was effected on 30th June 1907, and the directors at once proceeded to formulate a claim in the liquidation. My information is largely obtained from Mr Tait's report, as no other information has been vouchsafed me except a copy of the open record in the action at the instance of Van Berkel & Company against the directors. I have no certain assurance, but I think there is enough to justify the assumption that the liquidator was approached before the claim was lodged, and that the directors ascertained

what amount he was prepared to pass before lodging their claim. For their claim, lodged on 25th August 1907, is for the exact amount which the liquidator, a few days afterwards, admitted to a ranking.

"In the circumstances which I have thus shortly narrated, and which will be found much more fully set out in Mr Tait's report, and in sundry papers in the liquidation, it must, I think, be apparent that questions of some delicacy and difficulty arise, and I should have expected any liquidator to have relieved himself of responsibility by applying to the Court, on a full statement, for directions as to what he should do. I should have expected him to take such an attitude that, though he might have adjusted a provisional figure with the creditors claiming, he would have come to the Court for sanction, and have given the Court all the assistance in his power in the interest of the general liquidation, while leaving the creditors claiming to fight their own battle. This, however, has not been the course taken by the liquidator, and I thought it proper to require the appearance of the directors who are the creditors claiming, for their interest, and having received no assistance from the liquidator, I am now obliged to consider the merits of the claim on an entirely *ex parte* argument.

"In the first place, were the directors under liability to Van Berkel & Company? This is a question which has not been tried, but the liability has been accepted. I think there is much doubt as to the liability. Directors are agents of their company as well as trustees. Now, if by his negligence or even his wanton act in the line of his employment, injury is done by an agent or servant to a third party, the employer is responsible for his servant's wrong, and the servant is liable for his own wrong. They may either be sued separately or both may be sued jointly and severally. But it is not a case of wrong-doers, as in the case of *Palmer* v. *Wick and Pulteneytown Steam Shipping Company*, 20 R. 318, and 21 R. (H.L.) 39. The employer is responsible derivately or vicariously only, and would certainly have relief, not merely *pro rata*, but entirely against his agent or servant, and the agent or servant no relief against his employer. But where injury has been done to a third party by the *bona fide* error of judgment of the servant, while the employer is no doubt liable for the act of the agent or servant in his business, I think that there is a grave doubt whether the servant is liable to the third party at all. The present is an extreme example. I am not saying too much when I say that the question whether Van Berkel's patent was valid, and the company therefore liable in breach, was a question which the Court found to be one of intricacy and difficulty and worthy of a solemn judgment. The result of that judgment is that it must now be accepted that the directors committed an error in judgment, though a most venial one, in not treating it, if they knew of it, and they must be, I think, presumed to have known of it, as valid. But would the error of judgment thus committed have given Van Berkel & Company a direct action against the directors personally? I think that this is very doubtful. But assume it to be the law that they were personally liable, I am satisfied that there being *bona fides* and no negligence, they would have been entitled to relief, not *pro rata* merely, but entirely from the company. For in undertaking the office of director I think a man only undertakes to act honestly, carefully, and to the best of his judgment, and does not warrant the company against the results of his *bona fide* error of judgment.

"The directors have elected to assume their liability, and have made terms with Van Berkel & Company. But having done so, while I agree that they are entitled to relief, I am at a loss to see how they can claim from the company in liquidation more than they could have claimed from the company as a going concern, that is, exactly what they have paid to Van Berkel & Company. The only measure we have of the latter's claim is the sum they were willing to accept. No doubt that sum was arrived at as a compromise, first with the company and afterwards with the directors, but I can see no reason to assume that it was not a just estimate of the claim. And even if I thought that Van Berkel & Company could by pressing their claim to the bitter end have made more of it, in the first place I have, and the liquidator had, no other measure by which to gauge it. I have no more reason for taking it at £2000 than at £3000, or at the full sum of £4250. And, in the second place, whatever it was adjusted at, whether by litigation or by compromise, that sum alone could be claimed from the company.

"Suppose that the company had remained solvent, and the directors had intervened and settled with Van Berkel & Company, could they have, in the highest view of their right of relief, claimed more from the company than they had paid? I think not, because the fiduciary capacity of the directors would have precluded them recovering more than the sum which they were out of pocket. They could not have bought up the claim as a compromise, and then have enforced it to the extreme point against their company. I do not find that liquidation makes any difference. Liquidation does not sever the tie between directors and the company. Their functions are only suspended while their office is, so to speak, put in commission. If the liquidation proves unnecessary, and is recalled. they resume their duties *ipso facto* without reappointment. Pending liquidation I do not think that they are free to buy up debts against the company, so as to state them against the company at a higher figure, any more than they were when the company was a going concern under their management. For both these reasons then, first, that the sum paid by them is the only measure of the value of the claim that the Court and the liquidator can look at, and, second, that the directors are barred from putting a higher value upon it as against the company, I think that the

directors must be, in their own interest, content to treat their claim as one for £1000 only. For that sum they have, I think, made the company in liquidation their debtors, and for that sum, like other creditors, they can only get a ranking.

"And I see no hardship in the result. They have accepted personal liability, and this they have made the law of the situation. I am prepared to give them the benefit of holding that they were not *correi debendi* jointly and severally liable, but only joint-obligants, with a right of relief, or exactly in the position of cautioners. But, unfortunately for them, they are joint-obligants with a right of relief along with an insolvent principal, and they must therefore face a loss. They have, I assume, wisely minimised that loss, but there is no ground for enabling them to escape that loss, either in whole or in part, by allowing them to rank for some vaguely estimated sum different from and higher than the sum they have actually paid. I confess I have even some doubt whether I am entitled, without further inquiry, to assume that the claim against the company was properly estimated at £1000. I know from the papers that the extra-judicial expenses in the action of suspension and interdict bulked very largely in Van Berkel and his company's claim, and I think there is authority for doubting whether such extrajudicial expenses are a relevant item in a claim for damages. Here, as at other points, I should have had the liquidator's assistance. On the information I have, I think, even discounting their extra-judicial expenses, there is good ground for assuming £1000 was a fair settlement, and I shall accept it as such.

"I shall therefore reduce the claimants' Professor Beare and Messrs Mathie and Scott, ranking to £1000, and I feel it my duty to direct that a deduction be made from the fee to be allowed to the liquidator, which I shall modify to 15 guineas, to mark my estimation of his conduct, and cover the expense to the liquidation which his method of dealing with this question has caused."

The claimants Beare, Mathie, and Scott, and the liquidator Munro, reclaimed.

The claimants argued—At the date of the appointment of the liquidator the directors *ipso facto* ceased to be directors—Companies Act 1862, section 133 (5). In their transaction with Van Berkel & Company they were simply third parties settling the debt due by R. D. Simpson, Limited, to Van Berkel & Company, and obtaining in return an assignation of that debt from Van Berkel & Company. The debt admittedly amounted to at least £2000, and for that they were entitled to rank. Even if they had acted as directors, or as trustees for the company, the company were bound to keep them *indemnis*. All their actions had been open and above-board — see *Imperial Land Company of Marseilles*, 4 Ch. D. 566.

Argued for the liquidator—Probably the liquidator would have been wiser to have drawn the Lord Ordinary's attention specially to this particular claim. But the procedure he had adopted was normal, and there was nothing in his conduct to justify either the language used or the penalty imposed by the Lord Ordinary. This was not an ordinary case of compromise. The following were cited—On procedure, Companies Act 1862, sections 89, 138, 158; on the fiduciary relation of directors to their company, Buckley, Companies Acts, p. 403; on the personal liability of directors in action for infringement of patent rights, Frost's Patent Law and Practice, 3rd ed., vol i, p. 389; *Van Berkel* v. *R. D. Simpson, Limited*, 1907 S.C. 165, 44 S.L.R. 87.

At advising—

LORD STORMONTH DARLING—It is always a rather delicate matter for a court of review to interfere with the discretion exercised by a judge in the Outer House who has been charged with the supervision of the liquidation of a company. Not only is he more intimately acquainted with the details of the liquidation than any other judge can be, but his knowledge is derived from recurring experience of both the persons and the questions connected with it. I have come to the conclusion that in the particular question raised by this reclaiming note the Lord Ordinary has come to a right conclusion, although I cannot help wishing that his Lordship had remembered how heavily a judicial hand may fall on professional men when he has occasion to animadvert on their conduct.

The Lord Ordinary has correctly resumed the circumstances out of which the question has arisen. The company in liquidation was practically brought down by an action of interdict at the instance of a foreign patentee and the Dutch Company which worked his patent. On the successful result of the interdict by the foreigners, there arose a claim of damages for infringement in addition to the claim for costs under the suspension. Negotiations were entered into between the company and the foreign litigants, and these had proceeded a certain length but had not been finally adjusted when the company found itself obliged, in March 1907, to go into voluntary liquidation, and Mr C. J. Munro, C.A., was appointed liquidator. On 19th March the liquidation was placed under Lord Johnston's supervision. Shortly after the date of liquidation the foreign complainers intimated to the directors of the company that they held them personally liable for the expenses incurred in the interdict action, and also for the damage sustained by them through the infringement of their patent. This action was served on the directors as individuals on 17th April 1907, concluding for £4250, made up of £1250 for infringement of patent, and £3000 for costs said to have been incurred in the previous suit. Before the action was raised, and while it was still possible that the foreign patentees might sue the company, a meeting of the general body of creditors was held in the liquidator's chambers, at which

a state of the company's affairs was submitted by the liquidator, estimating the company's liability under an action by Van Berkel at the sum of £2000. When the action against the directors was actually launched the individual directors, or at least those of them who are reclaimers in the present proceedings, being advised that they were personally liable, resumed negotiations with the foreign complainers, and finally on 30th July 1907 they settled the action in full by payment of £1000, taking in exchange for the money an assignation in their favour as individuals of all claims of damage and rights of action competent to the payees against the company. It is upon this assignation, and this alone, that the claim of the individual directors against the company in liquidation rests. The liquidator in his answers to Mr Scott Tait's report admits that he was "threatened with an action at the instance of the assignees, but negotiations took place between the assignees and the liquidator for the adjustment of the said claim."

It is here that Mr Tait's chief objection to the liquidator's action comes in. He states his opinion that "before the liquidator came to any bargain whatever with the claimants in respect of the amount of the claim for which they considered they were entitled to receive a ranking, he ought to have submitted the matter to the Court for sanction." With regard to Mr Tait's action in this matter I should like to express my entire concurrence with the commendation which the Lord Ordinary has bestowed on it, all the more that, as it happens, I myself was the Lord Ordinary on the Bills who made the remit to Mr Tait to examine the liquidator's accounts (I did so because I had confidence in Mr Tait's care and thoroughness), and it might quite well have escaped the attention of a less careful reporter that such comment was necessary in the interests of the liquidation. The Lord Ordinary is of the same opinion, and there, I think, his Lordship is unquestionably right. If the assignees were to receive anything more than a dividend on the £1000 which they had actually paid there were only two ways of doing it. The transaction must have taken the form either of a preferable ranking for £1000, or of a compromise of the debt, of £1000. The latter is the view which the liquidator takes of the matter in his answers, where he says that "the *compromise* with the directors as assignees foresaid is conditional upon the Court's sanction being obtained thereto." In either case the attention of the supervising judge ought to have been pointedly called to the transaction, and most liquidators, for their own protection, would have taken care that a bargain should not be concluded with directors in the character of assignees without obtaining such permission and approval. It is certainly remarkable that not a hint was given by the liquidator either in the note presented to the Lord Ordinary on the Bills of 11th September 1907, or afterwards to the supervising judge, that any such sanction was necessary or would be asked for. I do not wonder, therefore, that the Lord Ordinary was seriously dissatisfied with this omission, although I do not share his Lordship's suspicions of the liquidator's motive in so acting, because it is to be observed that throughout the liquidation both the directors and the liquidator had every reason to suppose that the general body of creditors, who had the only adverse interest (for this was from the beginning what is called a creditors' liquidation) were quite satisfied. Even when the Lord Ordinary on 19th November last drew their attention pointedly to the whole matter (including Mr Tait's report) by ordering a circular letter to be sent to each of them, and appointing all parties interested to be heard, no appearance was made by anybody. I suppose the creditors' view was that the directors had lost enough through the ruin of the company, and probably also they thought that the directors were not much to blame, so far as infringement went. In short, although I do not think that, strictly speaking, the liquidator was justified in acting as he did, yet I do think that both he and the directors may have supposed that in settling their own debt they were truly settling the debt of the company, and were entitled to something more than an ordinary ranking, especially as the general body of creditors were not complaining, but were still apparently of the same mind as they had been in (under somewhat different circumstances) at the meeting of the creditors on 4th April 1907, when they passed an item of £2000 as an estimate of the company's liability under the threatened action by the foreign patentees.

The Lord Ordinary in his opinion indicates a doubt as to whether the directors were personally liable at all, having acted honestly, carefully, and to the best of their judgment. Unfortunately I cannot find much support for this suggested legal doubt in the English cases on the subject. In *Betts* v. *De Vitre* (1868), 3 Ch. App. 430, it was held by Lord Chelmsford, sitting in the Lord Chancellor's Court, that in order to free directors of a company from personal liability it was not enough to show that acts had been done by servants of the company contrary to orders; the directors must see that their orders were obeyed; and the directors were personally ordered by the Lord Chancellor to pay the costs of an action of infringement which had been brought against the company itself. There cannot, therefore, be much doubt, I think, that the foreign patentees were entitled to proceed against the directors personally. At all events, they did so proceed, and the directors came to an arrangement with them in their individual capacity. The Lord Ordinary is satisfied that the directors are entitled to relief, and the only question is whether they can claim from the company, now that it is insolvent, more than a dividend on what they actually paid. Now, the liquidator has admitted them to an ordinary ranking on £2000, apparently on the view that this

sum would yield a dividend of something less than the sum they have actually paid, although more than if he had ranked them for that exact sum. We are not told what the actual calculation was, but even apart from all questions as to the necessity of getting the approval of the supervising judge, I am of opinion that a liquidator is not entitled to enter with a creditor into any calculation as to what dividend an ordinary ranking will produce, and to concert with him the amount for which he is to be ranked accordingly. His duty is to treat a creditor who has a claim against the company founded on assignation as a person to be dealt with at arm's length, because the ranking of his claim will proportionately diminish the dividend payable to each of the other creditors, and the primary duty of a liquidator is to distribute the property of the company in satisfaction of its liabilities *pari passu*—see sec. 133 (1). If, therefore, a creditor is only entitled to an ordinary ranking—and that was the legal position of the directors here—he must be content with the dividend which that ordinary ranking will afford.

I agree with Lord Ardwall that the disallowance of the liquidator's expenses of this reclaiming note as a charge against the funds of the liquidation will be sufficient reparation for any error which the liquidator has committed in the conduct of this liquidation, and that we should therefore recal that portion of the Lord Ordinary's interlocutor in which he practically imposes a fine upon the liquidator by directing a deduction of £15, 15s. from the fee to be afterwards allowed to him.

Lord Low—This does not seem to me to be purely a case of a proposed compromise of the claim of a creditor in a liquidation. If it were I apprehend that the Court could only determine whether the compromise was or was not one which ought to be sanctioned, and could not say that the creditor must be content to be ranked for a smaller sum than that for which he was willing to compromise his claim. It is, however, clear from the liquidator's answers to Mr Tait's report that he regarded the negotiations which took place between him and the directors before the latter lodged a claim in the liquidation as being negotiations for a compromise (as no doubt in a sense they were), which actually resulted in a compromise, the directors agreeing to limit their claim in the liquidation to the £2000—the amount at which the liquidator had previously estimated the liability of R. D. Simpson, Limited, to Van Berkel & Company. In these circumstances the liquidator ought certainly upon his own showing to have submitted the matter to the supervising Judge, and no very satisfactory explanation of his failure to do so has been given. At the same time, seeing that the directors accepted, and limited their claim to, the amount at which the liquidator had, before any question with them arose, estimated the liability of R. D. Simpson, Limited, to Van Berkel & Co., I see no reason to infer that there was anything of the nature of collusion between the directors and the liquidator, or that the failure of the latter to bring the matter pointedly to the notice of the Lord Ordinary was more than an error in judgment. I therefore agree with Lord Stormonth Darling that there is no occasion to cut down his fee as proposed by the Lord Ordinary.

The true question which has to be determined appears to me to be, what is the nature of the claim which the directors have against R. D. Simpson, Limited? If they are in the position of persons who have paid to Van Berkel & Company a debt due to that company by R. D. Simpson, Limited, and who have obtained from the former company an assignation of the debt, then they are entitled to claim and to be ranked in the liquidation for the full amount of the debt. I gather that that was the footing upon which the directors made their claim in the liquidation, and upon which the liquidator gave them a ranking.

I am of opinion, however, that that is not a sound view of the claim. The directors are not, in my judgment, in the position of a person who has paid the debt of another, or of a cautioner who has paid the debt of his principal, and who has obtained an assignation of the creditor's right. The claim of Van Berkel & Company against the directors was a claim against them personally, on account of what they had done when acting as directors. In short, I take it that the claim was founded upon *quasi* delict on the directors' part. Now, if the directors had not compromised the claim, but if the litigation had gone on and Van Berkel & Company had obtained decree for the amount which was ascertained to be the loss which they had sustained through infringement of their patent rights, and the costs which they had incurred in vindicating these rights, I do not think that the directors would have been entitled to claim relief—that is to say, total relief—from R. D. Simpson, Limited; nor is it altogether clear that they would have been entitled to claim even partial relief upon the principle of contribution. No question of that kind, however, has been raised. The directors claim solely as assignees of Van Berkel; and no one is challenging their right to claim as such assignees. The only question is as to amount.

Now for the purpose of this case the total loss and damage sustained by Van Berkel & Company must be taken to be £2000. That is the amount estimated by the liquidator, and it has been accepted by all parties interested. One half of that sum has been paid by the directors to Van Berkel & Company, but the latter have never discharged their claim against R. D. Simpson, Limited, but have assigned it to the directors. It seems to me that in the position of matters which I have explained the directors as such assignees cannot claim in the liquidation more than the amount by which the debt to Van Berkel & Company is still unpaid, that is to say,

£1000. I have had the advantage of reading the opinion of my brother Lord Ardwall, in which he deals fully with the view of the case which I have indicated, and as I concur in that opinion it is unnecessary for me to say more on the subject.

I have only to add that I agree entirely with what Lord Stormonth Darling has said in regard to Mr Tait's report.

LORD ARDWALL—I am of opinion that the Lord Ordinary's interlocutor ought to be affirmed, except in so far as it directs the reduction of £15, 15s. to be made from the fee to be afterwards allowed to the liquidator.

It is necessary to advert only shortly to one or two points of fact, as the Lord Ordinary has detailed them very thoroughly in his opinion.

The insolvency of the company in liquidation was principally caused by their having been unsuccessful in an action of interdict brought against them for infringement of the patent of Mr Van Berkel of Rotterdam. The case was a narrow and difficult one, and not the slightest blame attaches to the directors for having on behalf of the company resisted the action as strenuously as they could. But the Van Berkel patent, the validity of which was questioned, was upheld by both Lord Dundas and the First Division on a reclaiming-note, and perpetual interdict was granted on 20th November 1906. That action having been so decided, there arose a claim against R. D. Simpson, Limited, for the expenses of the suspension process and for damages. The Lord Ordinary in his note states that this claim for damages and expenses was before liquidation adjusted by the Van Berkel Company and R. D. Simpson, Limited, at £1000, but this, though so far correct, is somewhat misleading, inasmuch as the £1000 was only agreed to by the complainers in the suspension on the footing of the payment being adequately secured to the satisfaction of the complainers, and proportional instalments paid every quarter, but in reality the claim for damages amounted to at least £1440, and the expenses on a very moderate computation to about £600, and accordingly the liquidator, who very properly and without being obliged to do so, called a meeting of creditors on 4th April 1907, laid before them a state of affairs showing the assets and liabilities of the company, and amongst the liabilities there was the following entry:—"Liability under action by W. A. Van Berkel, estimated at £2000." This sum was mentioned and laid before a meeting of creditors nearly a fortnight before any action was taken against the directors of the company, amongst whom are the three claimants, and there is therefore no room for the suggestion that this sum was long subsequently fixed between the liquidator and the said claimants collusively or clandestinely as the measure of the debt due to Van Berkel's Company by R. D. Simpson, Limited. On the 17th of April 1907 an action was raised against the directors of R. D. Simpson, Limited, not as directors, but personally and individually, for £4250, being £1250 of damages claimed in respect of the breach of the pursuers' patent, and £3000, being the estimated costs, judicial and extrajudicial, of the action of suspension and interdict. It perhaps ought here to be noted that the voluntary liquidation was ordered to proceed under supervision of the Court on 19th March 1907. Accordingly, at the time this action was raised against the individual directors, their powers as directors had for the time come to an end—see Companies Act 1862, section 133 (5)—although, as observed by the Lord Ordinary, they for some purposes remained officers of the company. But, as has been laid down in a number of decided cases, they were liable personally as persons who had authorised an infringement of a patent for the damages, including expenses, occasioned to the complainers by the infringement—see Frost on Patents, i, 389.

In this state of matters the claimants compromised the said action by a cash payment of £1000 in full of the conclusions of the summons, and under a settlement which exonerated them from all liability of any kind. They deemed it right, however, in their own interests to obtain as part of the settlement with the Van Berkel Company an assignation of all claims for damages and rights of action whatever competent to the complainers against R. D. Simpson, Limited, in respect of the infringement of patent or arising in the way of claims for expenses, and specially including £1000, being the amount of their judicial expenses in the said action.

On this assignation such of the directors as are in right of it made a claim against the company for which they were prepared to raise an action, but before doing so they quite properly submitted their claims to the liquidator who went carefully into the whole matter, and the claim was adjusted at £2000, for which the liquidator arranged to give them an ordinary ranking, and thus obviated a litigation.

If the claimants had been persons wholly unconnected with the infringement of the patent and had purchased the claims of the Van Berkel Company against R. D. Simpson, Limited, before the former company had received anything to account of these claims, I think £2000 would have been a very fair and reasonable sum at which to estimate the debt and at which to compromise the claim. As has been already noticed, £2000 was the sum at which the liquidator had estimated Van Berkel's claim in the original state of affairs, and I think that this circumstance led the liquidator, mistakenly as I think in point of law, to consider the claimants entitled to a ranking for £2000.

But in my opinion the claim ought to be restricted to £1000, not exactly on the grounds stated by the Lord Ordinary, but for the following reasons.

The directors did not intervene in the matter and pay the £1000 in order to free the company from liability, nor did they pay that sum on behalf of the company.

They paid it in settlement of a personal action directed against themselves as persons who had authorised the infringement of a patent. This is clearly set forth in all the documents relating to the matter, and is common ground to both Mr Tait and the liquidator. This being so, it follows that the only right in virtue of which the directors were entitled to sue the company is the right conferred by the assignation. Now what is the value of that right?

On the assumption that all that was due to the Van Berkel Company in respect of damages and expenses caused by R. D. Simpson, Limited's, infringement of their patent was fairly estimated at £2000, it was in my opinion only that sum under deduction of the £1000 already recovered by the Van Berkel Company from the directors. It may make this clearer if we suppose that the Van Berkel Company, after receiving the £1000 from the directors in settlement of the personal action against them, had assigned their whole claims against R. D. Simpson, Limited, to some third person called "A" who was willing to speculate on the chance of recovering more than the price in the liquidation, and that "A" had raised an action against R. D. Simpson, Limited, in liquidation for £2000. It would have been an absolutely good defence to the extent of £1000 for the liquidator to plead that the Van Berkel Company had recovered £1000 from the directors as individuals, and were entitled to sue only for the balance of their claim of £2000, and that "A" as their assignee was in no better position. In my opinion the present claimants are in no better position. They are suing in right of the Van Berkel Company, who have already received £1000, and on the footing that £2000 properly represents the whole damages and expenses, that leaves only the remaining £1000 to be recovered in any action they might have raised, and accordingly I think that this is all that the liquidator ought to have ranked them for. If the facts had been different, and if the directors had paid the £1000 to the Van Berkel Company on behalf of R. D. Simpson, Limited, and were entitled on that ground to be relieved of loss by the company, the pecuniary result would have been the same, because all that they could have recovered in that case had the company been solvent would have been the £1000 they were out of pocket, and now that the company is in liquidation that is all that the liquidator would have been entitled to rank them for. But it being clear in fact and in law that the claimants did not pay the £1000 on behalf of R. D. Simpson, Limited, and are claiming in the liquidation solely as assignees of the Van Berkel Company, I am of opinion, for the reasons I have stated, that they are only entitled to be ranked for £1000, being the balance of the debt of £2000 which the Van Berkel Company have not recovered otherwise.

While I think the liquidator acted *bona fide* though mistakenly in the matter of the compromise and ranking, and that what he did was probably due to his mixing up the character of the claimants as directors and their character as individual assignees, yet I entirely agree with the Lord Ordinary that in a compromise involving difficult and delicate questions of both fact and law the liquidator ought to have obtained special sanction to the compromise from the Judge of the liquidation upon a note presented for the purpose, and I think that the Lord Ordinary had good reason to be seriously displeased with this not having been done, but at the same time I differ altogether from him in his criticisms of the liquidator's moral conduct. Though it would have been the proper course to have made a special application for a sanction to this compromise, I cannot find in the conduct of the liquidator anything to justify the remark that he deliberately attempted "to smuggle" the matter through without the Court being made aware of the circumstances, and there is no evidence in the case to show that the liquidator withheld any information from the Lord Ordinary, or indeed that he was ever asked to "vouchsafe" such. Still less do I think that there is any ground for the assumption that there was some sort of collusive agreement or conspiracy between the liquidator and the directors as to the lodging and admission of their claim. It is quite true that the claim was made after consultation with the liquidator, and after the directors had satisfied him that the claim was a reasonable one to be admitted to an ordinary ranking, but the idea that the sum was fixed collusively to the detriment of creditors I think is conclusively disposed of by the fact that that very sum had been estimated at the outset by the liquidator before the directors had incurred any liability, as the estimated amount of R. D. Simpson, Limited's liability to the Van Berkel Company, and had been embodied in the state of affairs submitted to the meeting of creditors on 4th April 1907. This being so, it is not surprising that not a single creditor has come forward in response to the invitation contained in the circular which the Lord Ordinary directed to be sent to them at considerable expense.

On the whole matter I must absolve the liquidator from any intention to conceal this matter or to sacrifice the interests of the creditors to those of the directors of the company.

For the error he committed in not applying to the Lord Ordinary for sanction to the compromise in question, it will be sufficient reparation if the Court disallow his expenses in this reclaiming note as a charge against the estate in the liquidation. He has succeeded, it is true, in having his professional character vindicated from the aspersions cast on it by the Lord Ordinary, but it was his own error in procedure that led the Lord Ordinary to make the remarks he did, and therefore I think his expenses in the reclaiming note should not form a charge against the funds of the liquidation.

With regard to the other reclaimers, they have not succeeded in having the Lord

Ordinary's judgment altered in their favour, and they must accordingly bear their own expenses in the appeal.

LORD JUSTICE-CLERK — The somewhat painful position into which the liquidator has been brought by the animadversions of the Lord Ordinary on his personal conduct made it necessary that the subject of the reclaiming note should receive anxious consideration. I can only say that I entirely concur with what has fallen from your Lordships on that matter, and with the course proposed.

Upon the other questions involved, I have had an opportunity of perusing the opinions which your Lordships have just read. I entirely concur in them, and do not think it necessary to do more than express my adhesion to the views which are expressed in those opinions.

The Court adhered to the interlocutor of the Lord Ordinary, except his direction to deduct £15, 15s. from the liquidator's fee, and found the liquidator not entitled to charge his expenses in the reclaiming note against the estate in the liquidation, and the claimants not entitled to expenses in the cause since 4th December 1907.

Counsel for the Claimants—Clyde, K.C. —Constable. Agents—Davidson & Syme, W.S.

Counsel for the Liquidator—Scott Dickson, K.C. — Sandeman. Agent for the Liquidator in the Reclaiming Note—A. C. D. Vert, S.S.C. Agents for the Liquidator in the Liquidation—Paterson & Gardiner, S.S.C.

Saturday, March 7.

SECOND DIVISION.

[Sheriff Court at Ayr.

DEMPSTER *v.* WILLIAM BAIRD & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (3) *—Recurrence of Incapacity after Seven Years' Wage-Earning—Prior Unrecorded Agreement — Competency of Arbitration Proceedings.*

A miner who on March 1st 1899 had received injuries through an accident, agreed to accept from his employers compensation, as for total incapacity, at the maximum rate, and did so down to 21st May 1900, when payments of compensation ceased and he was taken back into employment, worked when he was able, and was paid wages. Seven years later, on 1st April 1907, he became again, as the result of his injuries, totally incapacitated. No memorandum of the agreement had been recorded.

The miner having by ordinary application under section 1 (3) of the Workmen's Compensation Act 1897 instituted arbitration proceedings to fix the compensation due to him, beginning the first payment as from 21st May 1900, the arbiter dismissed the application as incompetent in respect of the previous agreement, stating "it is not averred or proved that such agreement has been ended or varied." The employers admitted liability from the time when total incapacity had again supervened.

Held that the arbitration proceedings were competent, there being no existing agreement regulating the rights of parties.

Expenses—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37)—*"Expenses of the Stated Case"—Adjustment of Case.*

In a stated case under the Workmen's Compensation Act 1897 the Court allowed the appellant "his expenses of the stated case." The Auditor having allowed £5, 0s. 8d. as expenses of preparing the case prior to its actual presentation in Court, the respondents objected that this amount was not "fair and reasonable," and proposed £2, 2s.

The Court, *following London and Edinburgh Shipping Company* v. *Brown*, February 16, 1905, 7 F. 488, 42 S.L.R. 357, *modified* the expenses, and allowed £3, 3s.—to include £1 paid to the sheriff-clerk.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 1 (3), enacts—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies) or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration in accordance with the Second Schedule to this Act."

In 1907 Alexander Dempster, miner, Muirkirk, who on 1st March 1899, while in the employment of Wm. Baird & Company, Limited, had received severe injuries through a fall of rock from the roof of the pit where he was working, presented an ordinary application under the Workmen's Compensation Act 1897, sec. 1 (3), in the Sheriff Court at Ayr, craving the arbiter to ascertain and fix such weekly payments as might be found to be due and payable to him under and in terms of the said Act, and to grant an award against the said William Baird & Company, Limited, in his favour, finding him entitled to such weekly payments, beginning the first payment as on the 28th day of May 1900 for the week preceding that date, and so on weekly thereafter until he was again able to earn his full wages, or such weekly payment was varied, with interest on each weekly payment at the rate of 5 per centum per annum from the date when the same became payable till payment, with expenses.