

The other judges concurred.
 Agent for Appellant—A. K. Mackie, S.S.C.
 Agents for Respondent—Neilson & Cowan, W.S.

Friday, February 5.

MITCHELL v. CANAL BASIN FOUNDRY
 COMPANY.

Compensation—Partnership—Bankrupt—Assignment. A debtor incurred a debt to the firm of D. & W., of which firm D. and W. were sole partners. D. and W. were at the same time the partners, along with another, of the U. S. Company. The U. S. Company, and D. and W., its partners, individually, were sequestrated, the firm of D. & W. remaining solvent. The trustee on the sequestrated estates of the U. S. Company, and of the partners, having obtained an assignation of the debt due to the firm of D. & W., sued the debtor for payment. Held that the debtor was entitled to plead compensation in respect of a debt due to him by the U. S. Company, on the ground that the trustee, in seeking to recover the original debt, truly represented the private estates of D. and W., and these persons were, as partners of the U. S. Company, liable to the debtor in payment of the debt on which he pleaded compensation.

This was an action at the instance of Moncrieff Mitchell, accountant in Glasgow, trustee on the sequestrated estates of the Union Shipbuilding Company, shipbuilders in Glasgow, and individual partners thereof, conform to act and warrant of confirmation in his favour by the Sheriff of Lanarkshire, dated the 23d day of March 1865, assignee of Davidson & Wood, boiler-makers in Glasgow, and the individual partners of the said firm, in and to the debt aftermentioned, against the Canal Basin Foundry Company, founders, engineers, millwrights, and boiler-makers in Glasgow, and John Turnbull, Robert Adie, and Richard Robb Grant, all founders, engineers, millwrights, and boiler-makers in Glasgow, the individual partners of the said Canal Basin Foundry Company, as such partners and as individuals, concluding for payment to the pursuer of the sum of £461, 4s. 6d., being the balance (less a contra account of £3, 1s. 7d.) of the amount of an account incurred by the defenders to the said Davidson & Wood, for goods furnished and supplied to, and work performed for them by the said Davidson & Wood, conform to account commencing the 20th day of July 1864, and ending 23d February 1865.

The defenders pleaded compensation, in respect of a debt of £510, 11s. 4d. due on a bill, dated 25th November 1864, granted to the defenders by the Union Shipbuilding Company, of which firm Davidson and Wood were partners, along with another.

The Lord Ordinary (BARCAPLE) repelled the defender's plea.

The Court recalled, and allowed a proof.

Thereafter the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the closed record, proof, productions, and process: Finds that the defenders do not dispute that the debt sued for is due by them to the firm of Davidson & Wood, the cedents of the pursuer, except in so far as they may be entitled to plead compensation against the same: Finds that the debt on which the defenders

plead compensation is constituted by a bill dated 25th November 1864, accepted by the Union Shipbuilding Company to the defenders for £510, 11s. 4d., being the second instalment of the price of a pair of marine engines furnished by the defenders to the Union Shipbuilding Company in September and October 1864: Finds that the said engines were made and delivered by the defenders under a contract proceeding upon a specification, dated 10th December 1863, signed 'Union Shipbuilding Company, W. H.,' and constituted by an offer, dated 11th December 1863, by the defenders, addressed to Messieurs Davidson & Wood, Union Shipbuilding Yard, and acceptance thereof, dated 17th December 1863, signed Union Shipbuilding Company, W. H.: Finds that at and prior to said 10th day of December 1863, David Davidson and John Wood, the sole partners of the firm of Davidson & Wood, boiler-makers, Union Foundry, Union Place, Glasgow, as individuals, and George Robinson Andrews, were carrying on business as ship and boat builders in partnership, under the firm or designation of 'The Union Shipbuilding Company, at the Union Shipbuilding Yard, Kelvinhaugh, being premises separate and at some distance from the said Union Foundry: Finds that in May or June 1864 the defenders were aware that the said George Robinson Andrews was a partner of the Union Shipbuilding Company: Finds that the defenders, in the knowledge that the Union Shipbuilding Company was a separate Company, with different partners, from the firm of Davidson & Wood, furnished the said pair of engines to the Union Shipbuilding Company, and took from them in settlement of the price thereof two instalment bills, the second of which is the bill constituting the debt on which compensation is pleaded: Finds that the first of said bills was duly retired by the Union Shipbuilding Company: Finds that the Union Shipbuilding Company has become bankrupt, and been sequestrated, and the pursuer is trustee in their sequestration: Finds that the firm of Davidson & Wood have assigned to the pursuer the said debt due to them by the defenders: Finds that the defenders are not entitled, in defence against this action, for payment of the said debt due by them originally to the firm of Davidson & Wood, and now to the pursuer as their assignee, to plead compensation in respect of their claim for the amount of the said bill for £510, 11s. 4d., granted to them by the Union Shipbuilding Company in settlement of the price of the said engines furnished to said Company: Repels the defences, and decerns in terms of the conclusion of the libel: Finds the defenders liable in expenses."

The defenders reclaimed.

After argument, the Court pronounced this interlocutor:—

"*Edinburgh, 17th December 1868.*—The Lords having heard counsel on the reclaiming note for the defenders against Lord Barcaple's interlocutor of 30th June 1868, recall the said interlocutor: Find that the defenders are owing to the firm or company of Davidson & Wood, and to the pursuer, as the assignee of the said firm or company, the sum of £461, 4s. 6d. sued for, as the balance of an account for furnishing made and work done for the defenders by said firm or company between 20th July 1864 and 23d February 1865: Find that the Union Shipbuilding Company are owing to the defenders £510, 11s. 4d., being the amount of a bill drawn by the defenders and accepted by the said Union Shipbuilding Company, dated the 25th

November 1864: Find that the only partners of the said company of Davidson & Wood are, and were at the dates above specified, David Davidson and John Wood, and that those two partners are and were equally interested in the said company concern: Find that at the date of the said bill for £510, 11s. 4d. the partners of the said Union Shipbuilding Company were the said David Davidson, the said John Wood, and another person named George Robinson Andrews, and that these three persons were equally interested in the said company concern of the Union Shipbuilding Company: Find that the said Union Shipbuilding Company is bankrupt, and has been sequestrated, and that the pursuer is trustee in the sequestration: Find that the firm or company of Davidson & Wood is solvent: Appoint the cause to be argued before the Judges of this Division, with the assistance of three Judges of the Second Division, on the question whether the defenders are entitled, in respect of the said debt of £510, 11s. 4d., due to them by the Union Shipbuilding Company, to plead compensation as a defence against the demand of Davidson and Wood, and the pursuer, as their assignee, for payment of the debt of £461, 4s. 6d., due by the defenders to the said firm or company of Davidson & Wood."

Solicitor-General (YOUNG) and SHAND for reclaimers.

CLARK and LANCASTER for respondent.

At advising—

LORD PRESIDENT—The sum of £461, 4s. 6d. sued for in the present action is the balance of an account incurred by the defenders to the firm of Davidson & Wood, for furnishings made and work done between the 20th July 1864 and the 23d February 1865. This balance is now claimed by the pursuer as assignee of the firm of Davidson & Wood, and of its individual partners. The defenders plead compensation, in respect of a bill debt of £510, 11s. 4d. owing to them by the Union Shipbuilding Company, in and since the month of November 1864. At the date when the above debts were incurred, the individual partners of Davidson & Wood were David Davidson and John Wood. The individual partners of the Union Shipbuilding Company were the said David Davidson and John Wood, with the addition of George Robinson Andrews. The two partners of Davidson and Wood were equally interested in that concern; and the three partners of the Union Shipbuilding Company were equally interested in that concern.

On the 9th of March 1865, the Union Shipbuilding Company having become bankrupt, their estates were sequestrated, and the private estates of the individual partners, including those of David Davidson and John Wood, were at the same time sequestrated. The firm of Davidson and Wood remained solvent, and all its debts have been paid or provided for. The pursuer was confirmed trustee on the sequestrated estates of the Union Shipbuilding Company, and on the private estates of the individual partners, as partners and as individuals, on the 23d of March 1865.

During the dependence of the sequestration, and on the 20th May 1865, the pursuer obtained an assignation of the debt now sued for in favour of him as trustee and his successors in office. This assignation bears to be granted by "David Davidson, boiler maker in Glasgow, and John Wood, boiler maker there, copartners, carrying on business in Glasgow as boiler makers under the firm of Davidson & Wood." It is subscribed both by the

firm name and by David Davidson and John Wood. It is admitted that no present value was given for the assignation, and the only consideration expressed is "certain good and onerous causes and considerations."

In a "state of the funds belonging to the Union Shipbuilding Company, and of the individual partners thereof," contained in the sederunt book of the sequestration in July 1865, there is, under the head "funds outstanding," this entry—"Sum to be recovered from Davidson & Wood, being surplus from their estates after paying their creditors 20s. per £, £650."

On the 29th November 1865 the present action was raised.

Under date December 1865 "the state of funds" contained an entry similar to that of July, with this difference only, that the sum is reduced to £550.

The account of the trustee's intromissions brought down to 9th February 1866 contains the following entry, under date December 13, 1865:—"By cash, Davidson & Wood, per M'Lure, Naismith & Brodie, cash payable by them as per minute of agreement, being part surplus of their estate, £88, 15s. 6d." And in a relative "state of the funds" the following entry appears:—"Balance of surplus of Davidson & Wood's private estates, after paying their creditors 20s. per £, £461, 4s. 6d. Note—this sum of £461, 4s. 6d. is the subject of an action in the Court of Session, raised by the trustee against the Canal Basin Foundry Company."

The cash received by the trustee on the 13th December 1865, £88, 15s. 6d., is precisely the difference between the balance of account due by the defenders and the sum of £550, entered in the state of funds in December 1865 as the sum to be recovered from Davidson & Wood.

From this time onwards the sum of £461, 4s. 6d. continues to be entered from time to time as an asset still to be realised, belonging to the private estates of Davidson & Wood. The sequestration is still in dependence, and it does not appear that either David Davidson or John Wood has yet been discharged, though John Robinson Andrews was discharged on the 8th of February 1866.

In these circumstances, the defenders maintain that they are entitled to set off the debt of £510, 11s. 4d. due to them by the Union Shipbuilding Company against the debt of £461 4s. 6d., due by them to Davidson and Wood; and the question is, whether this plea of compensation ought to be sustained?

The pursuer contends that he is the assignee of the firm of Davidson & Wood, and, in that character and no other, has right to the debt sued for; that though he cannot have any higher right than his cedent, he is vested in the full right of his cedent, and is not exposed to any exceptions or pleas that would not have been competent against Davidson & Wood as a company. If this were a correct description of the position and rights of the pursuer, the question would assume a different aspect, and might be attended with greater difficulty. But it appears to me that the pursuer mistakes entirely his own character and position as the pursuer of this action.

When David Davidson and John Wood were sequestrated on the 9th March 1865, as partners of the Union Shipbuilding Company and as individuals, the company of Davidson & Wood was necessarily *eo ipso* dissolved, because the whole estate and interest which the only two partners had in

the concern of Davidson & Wood passed to the trustee in the sequestration of their private estates. In effect, therefore, every shilling of surplus after paying the company creditors that remained to the firm of Davidson & Wood was attachable by the creditors of the two bankrupt partners (being the only partners) and was attached by the sequestration and the confirmation of the pursuer as trustee on their private estates for behoof of the creditors of the Union Shipbuilding Company.

It is settled law that so soon as a trading company is dissolved, without becoming bankrupt or being insolvent, the assets of the company are no longer company property, and cannot be uplifted by any of the partners without special authority, but belong to the partners, either in equal shares, or in such other proportions as may be provided by the contract of copartnership; *Oswald's Trustees v. Dickson*, 12 S. 156; *Heggie v. Heggie*, 21 D. 31. This is by no means inconsistent with the equally well-known rule, that after dissolution a company may still subsist for the purpose of winding-up, and that either one of the partners or some other person may be appointed and authorised by the whole partners to ingather the company's assets, using the company name for that purpose, to pay the creditors, and to divide the surplus among the partners. But this winding-up has for its very object to realise those separate rights and interests of the individual partners, which, by the dissolution of the company, came in place of what was formerly the one undivided and (standing the partnership) indivisible estate of the company.

When, therefore, the company of Davidson & Wood was dissolved by the bankruptcy of both its partners, but remained solvent as a company, the right and interest in the surplus of the company estate, after paying its creditors, was vested to the extent of one-half in David Davidson, and to the extent of the other half in John Wood. But these individual rights and interests were transferred to the trustee in the sequestration of the private estates by virtue of his confirmation; so that the pursuer, before he obtained the assignation on which his main argument is founded, was truly by the operation of the bankrupt law vested as trustee on the estate of David Davidson in one-half, and as trustee on the estate of John Wood in the other half, of the surplus assets of the firm of Davidson & Wood. He could not take the estate of either partner without the burden by which it was legally affected, or without being exposed to the pleas competent to third parties, as in a question with the bankrupts as individuals. ●

But it is proved by the entries in the Sederunt-book kept by the pursuer as trustee, that, after paying or providing for the payment of the company creditors of Davidson & Wood, the surplus of the company estate was ascertained to consist of a sum of £88, 15s. 6d. in cash, and the debt sued for.

It may be doubted whether, in these circumstances, the assignation gave the pursuer any other right than he previously had by virtue of his confirmation. His right to the whole surplus of what had been the company estate of Davidson & Wood might not give him an active title to sue for and recover any particular asset of that company, and in this view the assignation was probably granted to vest him with such an active title. But unless the debt assigned formed part of the free surplus of the company estate of Davidson & Wood, the pursuer could not have obtained, and Davidson & Wood

could not have granted, the assignation. The only legal consideration for the granting of that deed by the two bankrupts, David Davidson and John Wood, was the obligation under which they lay to execute all deeds that were necessary or convenient for fully vesting in the pursuer, as their trustee, every part of their estate. But if the company creditors of Davidson & Wood were not fully paid or provided for, the debt of £461, 4s. 6d., the subject of the assignation, belonged to these creditors, and not to the granters of the assignation. The inevitable alternative, therefore, is either that the assignation was a fraud on the company creditors of Davidson & Wood, or that the debt assigned was part of the free surplus of the company estate, belonging in equal shares to the only two partners of the dissolved company. But the evidence afforded by the sederunt-book shows that the latter and not the former branch of the alternative represents the truth of the case.

The debt sued for, then, being vested in the pursuer as trustee on the sequestered estate of the two individuals David Davidson and John Wood, for behoof their creditors, are the defenders entitled to set off against that debt the debt due to them by the Union Shipbuilding Company, on the ground that as David Davidson and John Wood, in their character of partners of the Union Shipbuilding Company, are jointly and severally liable in the debt due by that company to the defenders there is *concursum debiti et crediti*? I am of opinion that this plea of compensation is well founded. It is settled by a series of cases, that a creditor of a company may plead compensation, in respect of the debt due to him by the company, against a debt due by him to one of the partners of the company, because, the partner being liable *in solidum* for the company debt, there is proper *concursum debiti et crediti*. Nor will it make any difference that (as in the present case) both the company and the partner are bankrupt; for in the case of *Russel v. M'Nab*, 3 S. 41, the pursuer sued as trustee on the sequestered private estate of one of the partners of the Falkirk Bank, which was also bankrupt. The defender pleaded compensation, in respect of a debt due to him by the Falkirk Bank, and the plea was sustained upon the general ground, as stated by the Lord President, "that as a partner was liable in payment of the debts of the company, so compensation on such debts was pleadable against him."

When, therefore, it is established, as it appears to be very satisfactorily, that the pursuer in seeking to recover this debt of £461, 4s. 6d. is truly representing the private estates of David Davidson and John Wood, the *concursum* is clear, for these two persons are, as partners of the Union Shipbuilding Company, liable to the defenders in payment of the debt of £510, 11s. 4d., on which the plea of compensation is founded.

The defence must be sustained.

LORD KINLOCH—I entirely concur in the opinion delivered by your Lordship in the chair; and I think the facts of the case, as these have ultimately turned out, supersede the necessity of considering and disposing of a question originally presented to us, but which, as matters stand, is not the true question in the case.

I think it right to add, in consequence of the observations of two of your Lordships, that were the question now to be disposed of simply whether a claim by the company of Davidson & Wood, considered as a subsisting and going company, against

the defenders, could be compensated by a claim held by the defenders against the Union Shipbuilding Company, I would say that no answer but one in the negative could be given to that question. It is almost a truism to affirm that a claim by one company cannot be compensated by a counter-claim against another and wholly different company. Yet this is what is involved in the case, stated as I have just stated it.

When the compensation is attempted to be supported by the fact that David Davidson and John Wood, the individual partners of the firm of Davidson & Wood, are two out of the partners of the indebted firm, the Union Shipbuilding Company, and so are individually liable for the debts of that company, it still strongly occurs that there is a flaw in the legal plea. For so soon as the counter-claim involves a claim against Davidson individually, or against Wood individually, the case ranges itself under the well established rule that a claim made by a company cannot be compensated by a counter claim against individual members of that company. It is difficult to see how the case can ever escape from the operation of this rule. The debt due by the Union Shipbuilding Company, on which compensation is pleaded, is plainly not a subject of compensation, whilst continuing (as in truth it always does) a company debt. When made to take the form of an individual liability by Davidson, or by Wood, it does not appear to be different from any other individual debt due by these parties; as, for instance, a debt due by Davidson on an individual bill, and a different debt due by Wood for an individual purchase. These two individuals are not better situated than if they were unconnected third parties interposing as cautioners for the Union Shipbuilding Company. Such individual debts, taken singly, would not afford the ground of compensation; and as little can they do so taken together. The two negatives will not combine to make up a positive.

But I think the whole question superseded by the fact which I consider established in the present case, that the claim against which compensation is pleaded is not a claim made by a subsisting company of Davidson & Wood. It is a claim made in right of the two individual partners of the once existing company of that name, now dissolved, and for what forms the surplus assets of the company, after all their debts are paid, belonging to these two gentlemen in their individual capacity, in equal shares. The claim made in the present action is in substance just a claim by David Davidson individually for one-half the debt sued for, and by John Wood individually for the other half of the same debt. There then arises a clear compensation on the debt due by each of them individually as partners of the Union Shipbuilding Company. It is an individual credit met by an individual debit. The *concursum debiti et crediti* is complete.

I do not find any difficulty in the shape of the case,—and especially nothing in the way in which the pursuer has endeavoured to state his claim in order to avoid the plea,—preventive of the defenders insisting in the plea of compensation thus arising in their favour. And I am of opinion that the plea should be sustained.

The other Judges substantially concurred.

Agents for Pursuer—Wilson, Burn, & Gloag, W.S.

Agents for Defenders—Campbell & Smith, S.S.C.

Friday, February 5.

ALEXANDER V. BRIDGE OF ALLAN WATER COMPANY.

(Ante v, pp. 174, 227.)

Arbitration—Award—Legal Corruption—Ultra vires—Reduction—Statute—Proof—Notes of Arbitrator. Circumstances in which *held* (Lord Kinloch *diss.*) that an award in a statutory arbitration fell to be reduced by reason of the arbitrator not having acted in conformity with the directions of the Statute.

An arbitrator being asked by one of the parties to make it clear on the face of the award that he gave the party no compensation for a certain subject because he held the party to have no legal right to it, and refusing, and this being established by evidence, and the Court being of opinion that he was bound to give such compensation, *held* that this amounted to 'legal corruption.'

The pursuer, Sir James Edward Alexander, is proprietor of the lands of Westerton, on which a part of the Bridge of Allan is built. In 1863 the Act 29 and 30 Vict. c. 241, was passed, entitled "An act for supplying with water the town of Bridge of Allan and places adjacent."

By section 28 of the Statute it is enacted,—“ And whereas the existing water-works at Bridge of Allan belong, or are reputed to belong, to Sir James Edward Alexander of Westerton, knight, in fee-simple, and the company have agreed with him for the purchase thereof on the terms hereinafter mentioned, the company shall purchase and take the said water-works, including the reservoir, conduit, or main pipe, and distributing pipes, and all appurtenances connected therewith; and the compensation payable to the said Sir James Edward Alexander, or his heirs or successors, for his or their rights in the said water-works, may be agreed on between him, or his heirs and successors, and the company; or, in case of difference, such compensation shall be fixed and determined by two arbitrators, to be mutually chosen by the company and the said Sir James Edward Alexander, or his heirs or successors, with power to the said arbitrators to name an oversman in the event of their differing in opinion; and failing the arbitrators agreeing on an oversman, he shall be appointed by the Sheriff of the county of Sterling, on the application of the company, or of the said Sir James Edward Alexander, or his heirs or successors, and the company and the said Sir James Edward Alexander, or his heirs or successors, shall be bound to enter into the said arbitration within three months after the passing of this Act; and in the event of either of the parties failing to enter into such arbitration within the said period, then the said Sheriff, on the application of the other party, shall appoint a fit and proper person as sole arbitrator to fix and determine the said compensation, and the decision of the said arbitrators, or sole arbitrator, or of the said oversman, shall be final; and the said arbitration shall be proceeded in under and subject to the provisions of 'The Lands Clauses Consolidation (Scotland) Act 1845,' with respect to the settlement of questions of disputed compensation by arbitration, except in so far as such provisions are varied by this Act; provided that, in fixing the compensation to be paid to the said Sir James Edward Alex-