

COURT OF SESSION.

Tuesday, January 29.

SECOND DIVISION.

[Sheriff of Stirlingshire.

THOMSON, JACKSON, GOURLAY, & TAYLOR
v. LOCHHEAD.

Implied Contract—Employment—Recompense.

A trader having fallen into difficulties laid before his creditors a state of his affairs prepared by his agent. An accountant employed by two of the creditors attended the meeting, and was requested by the meeting of creditors to examine into the affairs. He did so, and thereafter, having ceased to act for the two individual creditors, he negotiated and carried through a composition arrangement, which the creditors accepted. Thereafter he sued the trader for his professional fee, maintaining that he was liable for it either (1) because he had constructively employed him, or (2) because he had obtained the benefit of his services. *Held (diss. Lord Rutherford Clark)* that the trader, not having employed the pursuer, was not liable for his account.

Upon 2nd November 1887 Mr Robert Lochhead, manufacturer, Alva, called a meeting of his creditors, when a statement of his affairs, prepared by his man of business Mr Archibald, was presented to them. By minute of that date it was agreed that Mr John Gourlay, C.A., Glasgow, who attended the meeting, as the minute thereof bore, on behalf of two creditors, and Mr John Lochhead should be appointed to make an examination into the bankrupt's affairs. Mr Gourlay made an examination of Lochhead's affairs, and at a meeting of creditors in his office in Glasgow on 11th November laid a statement of affairs before the creditors. At the same meeting Lochhead, by the advice of his agent, offered a composition of 13s. 4d. in the £. This was refused by the creditors. Thereafter Gourlay, having seen certain of the creditors, wrote to Lochhead's agent enclosing an offer of 14s., which he thought would be accepted. At a meeting on 16th November, the minute whereof stated that "Mr Gourlay, on behalf of Mr Robert Lochhead, submitted the following offer of composition, viz., to pay 14s. per £ as follows"—and then came the various times at which the sums were to be paid—"the last instalment to be secured to the satisfaction of John Gourlay, C.A., Glasgow." This offer, with a slight alteration, was agreed to, and Mr Gourlay thereafter made up a scheme of ranking and division for the composition dated 16th December 1887. To this scheme was appended the following docquet:—"16th December 1887.—We have examined the foregoing scheme of ranking and division, compared it with the assents of creditors and the list of liabilities, and we find same correct, and authorise Messrs Thomson, Jackson, Gourlay, & Taylor, C.A., Glasgow, to complete the composition arrangement, notwithstanding that Mr John Clachan and Messrs Walker, Drybrough, & Company have not yet assented.—JOHN ARCHIBALD; ROB. LOCHHEAD."

Mr Gourlay then procured bill-stamps, &c., and prepared the composition bills. Thereafter his firm, Thomson, Jackson, Gourlay, & Taylor, C.A., Glasgow, sued Lochhead for outlays and fees for professional services, amounting to £58, 9s. 9d.

The defender averred that "at no time did the defender or his agent employ the pursuers, who throughout acted in the interests and under the instructions of the creditors of the defender."

The pursuers pleaded—" (2) The defender having employed the pursuers, or at all events availed himself of their services, he cannot now refuse to pay for the same, and decree should be granted in terms of the prayer of the petition."

The defender pleaded—" (2) The defender not having employed the pursuers, the action should be dismissed."

The Sheriff-Substitute (BUNTINE) allowed a proof, and the defender deponed that he had consulted Mr Archibald only as to the conduct of the affair, that he had never employed Mr Gourlay, and that he considered him as acting in the interests of the creditors, and that he never instructed his agent to employ Mr Gourlay. He never supposed Mr Gourlay had any claim upon him for professional services.

The pursuer deponed that he was employed by two of the creditors to attend the first meeting, and made an investigation of the bankrupt's affairs. "I was certainly acting in the interest of the defender, because his estate would have been in bankruptcy if it had not been for me. When I went to Alva I found there had been concealment of assets, and this being brought to light made an alteration of the statement of affairs, and the creditors thought they were entitled to get a larger offer than was submitted in Stirling. Before the meeting in Glasgow I showed my statement to defender, and it was there and then Mr Archibald and the defender agreed to make the offer of 13s. 4d. Then the offer was made in the meeting and refused, the creditors indicating 14s. or 14s. 6d. After the meeting dispersed, two of the creditors said that if I could get an offer of 14s. or 14s. 6d. they would advise acceptance. I wrote to Mr Archibald, got that offer submitted, and carried it through. I afterwards made up the scheme of ranking. When Mr Archibald offered to become security, I advised the creditors to accept the offer. *Cross-examined*—I never indicated either to defender or his agent that I had any claim upon them in regard to this matter."

Upon 17th August 1888 the Sheriff-Substitute issued this interlocutor:—"Finds in fact that the pursuer Mr Gourlay has failed to prove either that he was employed by the defender, or that the latter has made himself liable in payment of his professional account: Therefore assolvies the defender from the conclusions of the petition: Finds him entitled to expenses of process, and decerns, &c.

"*Note.*—It is admitted by the pursuer, the said Mr Gourlay, that he was originally employed by two creditors of the defender to attend the first meeting of creditors, and that the creditors then assembled employed him to make an investigation into the affairs of the defender, and report to a future meeting of creditors.

"It is true that defender assented to this

investigation, and gave every facility to the pursuer in carrying it out. But it cannot be said that it was conducted on defender's employment, or that it was carried out in defender's interests.

"It is further admitted that at no time did defender employ the pursuer, but it is contended that the defender having availed himself of the professional services of the pursuer is liable in payment therefor.

"The Sheriff-Substitute is unable to concur in this proposition.

"The pursuer throughout the whole negotiations which resulted in the composition arrangement acted on the express employment and entirely in the interest of the creditors. The defender was represented by his law-agent.

"The composition arrangement must be assumed to have been beneficial alike to the creditors and to the insolvent.

"The negotiations which preceded it were conducted by the pursuer and by defender's law-agent. It appears to the Sheriff-Substitute that both creditors and insolvent benefited equally by the services of both these parties fully, and availed themselves of them. But this does not make the creditors responsible for the payment of the insolvent's law-agent any more than it makes the defender liable for his professional account.

"It may be the general custom that the professional accountant employed by the creditors to carry out a composition arrangement is paid out of the insolvent's estate, and such an arrangement is probably both convenient and just. But undoubtedly the claim ought to be made and admitted before the debtor has paid over his estate to the creditors under the composition arrangement, and not held over, as in the present case, till the debtor has been practically discharged."

The pursuers appealed, and argued — The defender had employed the pursuer to carry through this composition, and was therefore liable to pay him for his services. It is true that he originally attended the meeting in Glasgow on the employment of certain creditors, but afterwards, although no doubt he attended to the interests of the creditors, he also attended to the interests of the bankrupt, and got this composition carried through. It was plain from the character of the items, purchase of bill-stamps, &c., that the debtor was really due the account, as the creditors obviously could not pay these sums. If the debtor did not pay this account he had not carried out his contract, because he had not paid a composition of 1*s.*, but only one subject to the deduction of carrying through the composition. It was an understood thing in all cases of a composition that the debtor paid the expenses of carrying it through, as the man of business by whomever originally employed was acting in the interests of the debtor. If the composition was not successfully arranged, then sequestration must be taken out, and that was not in the debtor's interests.

The respondent argued—The pursuer had failed to discharge the burden of proof upon him that he was employed by the pursuer. He was employed by certain of the creditors to look after their interests, and it was absurd to ask the debtor to pay him for doing the work of others. The mere fact that the defender took

benefit from the work of the pursuer did not entitle the latter to make a claim for payment. The defender had employed a man of business to look after his interest, and in the case of the debtor employing one man of business and the creditors another, in the absence of any bargain, the rule of law was that each party should pay his own agent. Although the docquet attached to the scheme of division appeared at first sight to show that the pursuer was acting in the defender's interests, it really was not so as appeared from the minutes, and the docquet must be read in that light.

At advising—

Lord Young—This action is put either on the ground of employment or on that of recompense for services rendered to and taken advantage of by the defender without employment. Employment indeed is not averred on record, the pursuers' averment being merely that the defender is "due to the pursuers for outlays and fees for professional services incurred by him," the sum sued for. The second plea-in-law, however, comes nearer a case of employment, for it runs—"The defender having employed the pursuers, or at all events availed himself of their services, he cannot now refuse to pay for same, and decree should be granted in terms of the prayer of the petition." The Sheriff-Substitute states in his note that before him it was "admitted that at no time did defender employ the pursuers, but it is contended that the defender, having availed himself of the professional services of the pursuer, is entitled to payment therefor."

Now, the pursuer Gourlay was employed, and very properly employed, as he explains in his evidence, first by two creditors, and then by other two. There were other creditors who did not employ him, or indeed employ anyone. The defender employed a man of business of his own. I say a man of business, and he was not less such or less qualified to act because he was no otherwise an accountant than all men of business are. On the advice of this man of business the defender called together his creditors, and laid before them a state of his affairs. I cannot enter on the question whether it was a satisfactory state or one to which there existed objections. The four creditors I have mentioned employed the pursuer, sending him to the meeting to attend to their interests, and to see that they did not suffer wrong in any arrangement with the defender. That was very proper. The result was that the creditors who were at the meeting desired the pursuer Mr Gourlay to examine into their debtor's affairs, and see his books and papers so far as necessary, and he on his part, with his man of business, undertook to give every facility for the examination.

In the absence of anything further, I think the pursuer attended on the employment he had received, which was to act in the interest of the creditors, and by seeing that the debtor and his man of business acted justly to them, and preventing them from accepting an offer which was not satisfactory. The result was that a composition was ultimately effected by means of a correspondence between the pursuer Gourlay and the defender's man of business, a higher composition being obtained than had formerly been offered. Here there is the case of the employ-

ment of a man of business by the debtor, and another by the creditors, each of these gentlemen with the interest of his own employer in his care, the result being an arrangement for a compromise by which the debtor got his discharge.

Now, I think it would be a fair matter of arrangement that the creditors should stipulate that the debtor should pay the expense incurred by them in looking into his affairs. But I do not think that was done here. How the proposal would have been received if made we do not know. In the absence of any such bargain I think Mr Gourlay must look for payment to those who employed him for their interest. They might have been satisfied with the examination of the debtor's affairs by his own man of business, and if so, they would have had no other expense. It is no blame to them that they were not, and they seem to have got a better composition because they were not. But I concur with the Sheriff-Substitute in thinking that the person they employed has no action against anyone but them, and that he cannot maintain an action against the defender on the suggestion that but for his services no composition would have been arrived at.

LORD RUTHERFURD CLARK—I have felt a good deal of hesitation in this case, and all the more because I know that I stand alone. I incline to think, however, that the pursuer is entitled to our judgment on the simple ground that all the expenses necessarily incurred in carrying through the composition arrangement should be paid by the defender. In my opinion such expenses should all be charged against the debtor.

It appears to me that the composition contract was effected by means of the pursuers' services, and by means of them alone. Being services which were necessary to the end which the defender had in view, and which were successfully attained, I think that he should pay for them. He has had the benefit of them, and in such a case, when he obtains a discharge on a composition, I think that it may be fairly said that he alone has had the benefit of them.

It is said that the defender employed another person. It is true that at first he did. But the services of this person were of no use, and gave no aid in effecting the composition contract. The chief, if not the only thing which he did, was to prepare a state of affairs; but it was so defective that the creditors would not consider it.

LORD LEE—I do not doubt that in the general case it is reasonable that the expenses properly incurred in carrying through a composition arrangement should fall on the debtor. But I think the question here is whether any arrangement to that effect has been proved? The pursuer was employed by the creditors and not by the defender. In that state of the facts I think that if it was intended to throw the expenses incurred under that employment on the defender, this ought to have been intimated to and should have been made a condition of the acceptance by the creditors of the composition. That might have been quite a reasonable arrangement, and my impression is that it is quite a common one, but in this case I find no trace of such an arrangement. I concur in the opinion of Lord Young.

I think there is no proof of the ground of action.

LORD JUSTICE-CLERK—I concur in the opinion of Lord Young. It is unfortunate that the pursuers did not accept the offer of £30 which appears to have been made in the original defences. Mr Gourlay, it is certain, was in the first place employed not by the defender but by the creditors. I cannot find evidence to show that he afterwards became the agent of the defender, or that it was ever suggested to the defender that he was to be held liable to pay for Mr Gourlay's services. It would have been easy to bring to the defender's knowledge that Mr Gourlay's services were to be understood as rendered to him, and I think it would be dangerous to hold that a professional man who was originally employed for one party should without some clear change in his position obvious to the other party be held to have become entitled to claim remuneration from the other whose interest is altogether different from that of the original employer.

The very fact that Mr Gourlay was employed by the creditors leads to the inference that he was to endeavour to come to an arrangement as favourable as possible to them. Now, if he was afterwards to act for both, or for the debtor Lochhead alone, the change ought to be made perfectly clear. Lochhead ought, if he was to be expected to pay for two professional men—both his own agent and Mr Gourlay—to have had that put before him. It is quite clear that if we gave the pursuers decree the result would be that the defender would have to pay for the services both of Mr Gourlay and of his own agent, and there is no ground for supposing he intended to incur double costs. On these grounds I agree with Lord Young.

The Court pronounced this interlocutor:—

“Find in fact that the pursuer Mr Gourlay was employed by the creditors of the defender and not by the defender: Find in law that the defender is not liable in payment of the sum sued for: Therefore dismiss the appeal, and affirm the judgment of the Sheriff-Substitute; of new, assoilzie the defender from the conclusions of the petition,” &c.

Counsel for the Pursuers—Ure. Agents—Davidson & Syme, W.S.

Counsel for the Defender—Wilson. Agents—Wishart & M'Naughton, W.S.

Tuesday, January 29.

FIRST DIVISION.

[Lord Fraser, Ordinary.

BROWNE AND OTHERS v. M'FARLANE.

Reparation—Slander—Issues—Evidence in Mitigation of Damages without Issue in Justification.

An action of damages for written slander was brought against the proprietor of a newspaper published in Scotland, in which it was represented that one of the pursuers had planned an outrage on himself in order to