

LORD ADAM—The concluding words of the pursuer's issue form, I think, a substantial part of the libel, and if there is to be a counter issue, it must be made to meet that issue, and must include these words.

The Court approved of the following issues for the trial of the cause—“(1) Whether, on or about 5th October 1888, within the ring or paddock of the ‘Lothians Racing Club and Edinburgh Meeting’ at Musselburgh, the defender Cosmo Reid, in the presence and hearing of Augustus Francis Meredith Powell, medical student, Edinburgh, and Walter Sprott, of Edinburgh Police Force, and others, falsely and calumniously said of and concerning the pursuer, ‘This is the man who owes me money,’ or used words of similar import, meaning thereby that the pursuer was owing him money on betting transactions which he dishonourably refused to pay, and was a person who ought not to be allowed to remain in the said ring or paddock, to the loss, injury, and damage of the pursuer?—Damages laid at £2000. Or whether the pursuer was owing the defender money on betting transactions which he dishonourably refused to pay, and was a person who ought not to be allowed to remain in the said ring or paddock? (2) Whether, on or about 5th October 1888, the defender Cosmo Reid wrongfully expelled the pursuer, or caused him to be expelled, from the ring or paddock of the ‘Lothians Racing Club and Edinburgh Meeting’ at Musselburgh, to the loss, injury, and damage of the pursuer?—Damages laid at £5000. (3) Whether, on or about 5th October 1888, the defenders, the Lothians Racing Club, wrongfully expelled the pursuer, or caused him to be expelled, from the ring or paddock of the ‘Lothians Racing Club and Edinburgh Meeting’ at Musselburgh, to the loss, injury, and damage of the pursuer?—Damages laid at £5000.”

Counsel for the Pursuer—Graham Murray—Wilson. Agent—A. W. Gordon, Solicitor.

Counsel for the Defenders, the Lothians Racing Club—Comrie Thomson—H. Johnston. Agents—Gillespie & Paterson, W.S.

Counsel for the Defender Reid—M'Kechnie—Sym. Agent—D. Hill Murray, S.S.C.

Tuesday, July 2.

FIRST DIVISION.

[Lord Kyllachy,
Ordinary on the Bills.

MARSHALL & AITKEN v. MILLAR.

Sequestration—Compromise of Claim—Resolution of Creditors—Right of Creditor to Sue.

The brother of a bankrupt before the sequestration had received certain funds of the bankrupt and paid therewith certain of his creditors. The trustee on the estate agreed to receive the balance of these funds in full of all claims against the bankrupt's brother, who in turn waived certain alleged claims against the trust-estate for payments

made by him on behalf of the bankrupt before the funds came into his hands. A special general meeting of creditors approved of this settlement, and rejected a counter motion by a creditor that as he was prepared to guarantee the expenses in an action against the bankrupt's brother in connection with his alleged illegal intrusions as agent for the bankrupt, the trustee should be requested to give his consent to the said action. The Court *refused* an appeal by this creditor, in respect that the transaction between the trustee and the bankrupt's brother was truly of the nature of a compromise, and that loss might possibly result to the trust-estate if the question was re-opened.

The estates of Captain J. A. L. Campbell were sequestrated on 28th August 1888, and R. C. Millar, C.A., was appointed trustee thereon. The bankrupt had retired in the previous April from the service, and had then received a gratuity of £1200 from the War Office. That sum had at first been put to his credit with Messrs Cox & Company, and subsequently, after deduction of £67, 11s. 10d., the balance due to Messrs Cox & Company by the bankrupt, the remainder, amounting to £1132, 8s. 2d., had been transferred to the account of the bankrupt's brother Captain E. P. Campbell.

On 3rd October the trustee wrote to Captain E. P. Campbell's agent, Mr Greig, for an account of the disbursements made by Captain E. P. Campbell from that sum, and relative vouchers. In reply Mr Greig sent (1) an account showing that Captain E. P. Campbell had disbursed £891, 2s. 7d. of the above sum in payments on behalf of Captain J. A. L. Campbell; and (2) an account of previous payments made by Captain E. P. Campbell to or for Captain J. A. L. Campbell amounting to £1042. He also sent the relative vouchers.

On 15th November the trustee, with the consent of the only commissioner then acting on the estate, wrote to Mr Greig as follows—“I beg to acknowledge receipt of your letter of 14th inst. with the vouchers therein referred to, with the further exception of the £5 paid W. Gordon on 9th February, of which only a memorandum without any account has been produced. I have very carefully considered the accounts sent to me by you, and I am advised that I must claim payment of the balance of the £1200, the gratuity paid on Captain Campbell's retirement, under deduction only of the sums legally paid thereof of by Captain E. P. Campbell. Without prejudice to my right to sue for a larger sum, I am disposed to accept the balance of the £1200 0 0

Less—

Retained by Cox & Co. £67 11 10
and paid per account 801 2 7

958 14 5

Balance, . . . £241 5 7
if paid to me within five days, as a full accounting by Captain E. P. Campbell with said sum of £1200. I hope you will be able to advise Captain E. P. Campbell to pay over that amount, and should I not receive payment within five days, this letter is to be held *pro non scripto*.”

On 22nd November Mr Greig replied in the following terms—“Referring to your letter of

15th inst., and my interview with you yesterday, I now beg to enclose, on Captain Edward P. Campbell's behalf, a cheque for £241, 5s. 7d. in full of all your claims as trustee against him in connection with his brother's sequestration, except the value of the clothes in his possession, of which, as we arranged, he is to send me a list. Please acknowledge receipt."

On 23rd November the trustee wrote again to Mr Greig as follows—"I duly received your favour of yesterday's date with cheque for £241, 5s. 7d., for which I enclose receipt, which I hope will be satisfactory as I cannot accept the money on the broad terms you state, but only in respect of the matters covered by my letter of 15th inst. You are to obtain and send me a letter by Captain E. P. Campbell, stating any other effects under his control belonging to the estate, and which I understand are only the clothes you mentioned."

On the same date Mr Greig replied in these terms—"I have received your letter of to-day and receipt for the £241, 5s. 7d. It must be understood that that payment is in full of all claims on Captain Edward P. Campbell, except the value of the clothes, which he wishes to retain. It was on that footing that he agreed to pay the money, and if you have any other claim on him I must ask you now to intimate it to him through me."

A special general meeting of creditors was held on 25th March 1889, the minute of which meeting bore—"Mr Christie and Mr Dickson were unanimously appointed commissioners on the estate. Mr Christie proposed, and Mr Dickson seconded, that the meeting approve of the conduct of the trustee in settling with Captain E. P. Campbell. Mr Tait, on behalf of Messrs Marshall & Aitken, creditors, moved with reference to the correspondence between his firm (Messrs Tait & Johnston, S.S.C.) and the trustee, that in respect Messrs Marshall & Aitken are prepared to guarantee the expenses in an action to be instituted against Captain E. P. Campbell in connection with his alleged illegal intrusions as agent for the bankrupt, that he, the trustee, be requested to give his consent as such trustee to the said action, the said guarantee to be delivered to the trustee before service of the summons. The preses put the motion to the meeting, but declared that it was not seconded, and that the former motion, approving of the trustee's conduct in settling, was duly carried."

Messrs Marshall & Aitken then appealed against the above resolution to the Lord Ordinary on the Bills, under the 169th section of the Bankruptcy Act 1856, craving the Court to recal the resolution, and in respect of the motion made at the said meeting on their behalf, to ordain the trustee to grant his consent, as concurring pursuer, to an action proposed to be raised by the appellants against Captain E. P. Campbell.

At the suggestion of the Lord Ordinary on the Bills (KYLACHY) the following minute was lodged for the trustee—"Goudy, for the respondents, stated with reference to the negotiations between Mr R. C. Millar, the trustee in the sequestration, and Captain E. P. Campbell, the bankrupt's brother, for payment of the sum of £1132, 8s. 2d. received by him on behalf of his brother from Cox & Company, being the balance of the 'gratuity' payable to the bankrupt on his leaving

the service, that the trustee brought the matter before the second meeting of creditors, conform to report herewith produced, but no directions were given to the trustee at that meeting; that thereafter the trustee, with the consent of the only commissioner acting in the sequestration, entered into communication with Captain E. P. Campbell and his agent, Mr Somerville Greig, W.S., Edinburgh, and made a claim for payment of the whole of said sum of £1132, 8s. 2d.; that Mr Greig thereupon submitted to the trustee duly vouched accounts, two in number (herewith produced and referred to), and which showed disbursements by Captain E. P. Campbell on his brother's behalf amounting to £1933, 10s. 5d., including the sum of £1042, 7s. 10d. due to himself personally for advances made by him to or for his brother between 1879 and 1884, and claimed to set off the whole of said sum of £1132, 8s. 2d. as against these disbursements; that the trustee and commissioner, after examining said accounts, admitted £391, 2s. 7d. as proper deductions from said sum of £1132, 8s. 2d., but declined to admit the said sum of £1042, 7s. 10d., and claimed payment of the balance of said sum of £1132, 8s. 2d., which amounted to £241, 5s. 7d.; that Mr Greig at first refused to admit liability for said last-mentioned sum, but ultimately, after certain negotiations, and having obtained the opinion of counsel, he agreed to pay over the said sum of £241, 5s. 7d. in full of all claims by the estate against his client, and this sum was accepted by the trustee and commissioner in terms of this arrangement. A copy of the letters between the trustee and Mr Greig, and of the receipt granted by the trustee, are produced and referred to."

The Lord Ordinary on 4th June 1889 refused the appeal.

"*Opinion.*—This is an appeal against a resolution of creditors approving of the conduct of the trustee in a sequestration in settling certain claims against Captain E. P. Campbell, the bankrupt's brother. The appellants contend that the settlement approved of involves the renunciation of a claim competent to the estate which ought to be enforced, and they desire to be allowed to prosecute the same at their own expense, and to obtain the trustee's instance to enable them to do so.

"Had the transaction complained of been of the character alleged I should have thought the appellants were right. Neither the trustee nor the other creditors would in that case have had any legitimate interest to prevent the claim being prosecuted at the appellants' expense. But I am satisfied upon the documents produced, and upon the minute which has been lodged for the trustee, that the transaction was truly of the nature of a compromise whereby the trustee waived certain claims against Captain E. P. Campbell, and on the other hand Captain Campbell waived certain claims of retention which, if well founded, would have extinguished the trustee's claims altogether. I have not the means of judging how far the claims thus mutually waived were well founded. That is a matter on which it appears to me that the trustee and the creditors were entitled to judge. It is enough for the present purpose that by the settlement in question the bankrupt estate obtains payment of a sum of £241, 5s. 7d., to which, according to Captain Campbell's contention, they were not entitled, and which, if the

question were re-opened, as the appellants propose, might be ultimately lost to the estate. It cannot, I think, be said that in these circumstances the body of creditors have no legitimate interest to prevent the matter being re-opened. I therefore refuse the appeal, and find the appellants liable in expenses."

The appellants reclaimed, and argued—The transaction between the trustee and Captain E. P. Campbell was not of the nature of a compromise. It was not a valid compromise, having been made by the trustee and only one commissioner—Bankruptcy Act 1856, secs. 75 and 176: Bell's Comm. (5th ed.) ii. 415, note; *Dennistoun v. Dennistoun's Trustee*, June 4, 1853, 1 Macph. 869; *Gray v. Fraser*, February 6, 1850, 12 D. 684. The appellants desired to proceed against Captain E. P. Campbell on account of his actings. He was aware of the debt due to them and of his brother's insolvency, and while paying them nothing had paid a number of other creditors in full. If one was entrusted with money for behoof of the creditors of an insolvent, he was not in the same position as the insolvent himself—*Allan v. Marquis*, February 23, 1828, 6 S. 595. Captain E. P. Campbell could never have been entitled to pay himself in full, and assuming that he would be entitled to an equal dividend with the other creditors, the trust-estate would still be a large gainer. The appellants were content to sue merely for their own dividend.

The respondents argued—No doubt there was a power in the Court to interfere with the discretionary powers of creditors—Bell's Comm. (7th ed.) ii. 321. But where there had been a compromise creditors were barred from proceeding against an alleged debtor of the trust-estate. In the case of *Spence v. Gibson*, December 13, 1832, 11 S. 212, the compromise was inchoate, and the creditor offered to pay the whole sum guaranteed to the trust-estate thereby as well as the expenses of the action.

At advising—

LORD PRESIDENT—In this case I agree with the Lord Ordinary.

It seems to be questioned whether the arrangement arrived at between the creditors and Captain E. P. Campbell was in the nature of a compromise, and I have no doubt that it was. The claim of Captain Campbell on the one hand to retain all the money was waived, and on the other hand the trustee restricted his claim to £241, 5s. 7d. There was the giving and taking on both sides necessary to constitute a compromise. The compromise is not made, as is the usual case, merely by the trustee and the commissioners in consequence of there being only one commissioner on the estate at the time, and the trustee and that commissioner thought it desirable to bring the matter before the general body of creditors. A special meeting of creditors was accordingly called, and when it was held the creditors unanimously approved of what had been done with the exception of the appellants Marshall & Aitken. They desired to open up the whole matter, and to sue Captain E. P. Campbell in the trustee's name for payment of a much larger amount than the trustee undertook to receive as a matter of compromise. Of course such a proceeding would bring into peril the £241, 5s. 7d. paid to the trustee, for if Captain

Campbell is sued for a larger sum than he has paid over under the compromise he must be allowed to plead that he is not due anything to the trust-estate, and the trust-estate may consequently lose the £241 altogether.

In these circumstances I do not think it can be said that the creditors have done wrong in refusing to allow the appellants to use the trustee's name, for the question which the appellants propose to raise might be to the great detriment of the trust-estate.

LORD MURE—I am of the same opinion. I agree with your Lordship that there was a compromise arrived at here, and it appears to have been of this sort—the matter was brought before the general body of creditors, and the arrangement come to by the trustee was approved of. Now, if an arrangement by the trustee has been deliberately approved of, it will not help the matter to a proper conclusion if we sanction a demand by an individual creditor to waive the resolution of the general body of creditors that he may sue a particular claim. I think therefore the decision of the Lord Ordinary is sound.

LORD SHAND—I am of the same opinion. The case as now presented is one in which a compromise was made, not by the trustee and commissioners, but by the creditors sanctioning an arrangement made by the trustee.

In most cases it appears to me that the Court will refuse to confirm a resolution of creditors appealed against if it appears that the creditors are sacrificing the interests of the estate in any way. For instance, if they are taking a small sum to give up a large claim, where one or more creditors are opposed to such a course. But even then I take it that a person who proposes to have a claim assigned to him to enable him to sue the debtor therein must make it clear that he secures the bankrupt estate against loss. He must undertake that the bankrupt estate will not lose by the course proposed any advantage it may have gained by the compromise. The appellants do not bring their case up to that. There was a question between Captain E. P. Campbell and the trustee, in which Captain Campbell alleged that he was entitled to retain the money in his hands, and the trustee agreed if he got £241, 5s. 7d. not to go back on the payments made by Captain Campbell to some of his brother's creditors. The proposal of the appellants is to re-open the whole affair. This might be a cause of loss to the bankrupt estate, for if they were allowed to take that course the trustee would have to pay the £241, 5s. 7d. back again to Captain Campbell. I agree with the Lord Ordinary when he says—"It is enough for the present purpose that by the settlement in question the bankrupt estate obtains payment of a sum of £241, 5s. 7d., to which, according to Captain Campbell's contention, they were not entitled, and which, if the question were re-opened as the appellants propose, might be ultimately lost to the estate."

Now, the appellants cannot dispute that such may be the ultimate result of an action of the kind proposed, and it humbly appears to me therefore that the resolution of creditors in question is not of the class which the Court can interfere with.

LOED ADAM—I concur. I think the Lord Ordinary has decided the case on the right ground. I think the arrangement come to was of the nature of a compromise, and the resolution of the creditors, it appears to me, should not be disturbed. If Marshall & Aitken had appeared and made an offer to keep the estate *indemnitas* of any loss which might occur as well as to pay the costs of the action, if allowed to sue, and the creditors had refused such an offer, quite a different question would have been raised.

The Court adhered.

Counsel for the Appellants—Henderson Begg—Napier. Agents—Tait & Johnston, S.S.C.

Counsel for the Respondents—Goudy. Agents—Smith & Mason, S.S.C.

Friday, July 5.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

GILCHRIST *v.* YOUNG PENTLAND AND ANOTHER (GILCHRIST'S TRUSTEES).

Parent and Child—Legitim—Time of Valuation to Ascertain Legitim—Discretion to Trustees.

A trustor directed his trustees immediately after his death, or as soon thereafter as they should deem it expedient, to realise his whole estate, which included certain ship shares, and to invest the proceeds for the purposes of the trust. Six months after the trustor's death the trustees announced their resolution to retain the estate for the behoof of the beneficiaries. The son of the trustor sued the trustees for legitim.

Held (1) that the trustees were not bound to realise the estate in order to ascertain its value, and (2) (*rev. Lord Fraser*) that as legitim was a claim of debt against the estate as at the father's death, the pursuer was not entitled to a proof that the market value of the shares had risen since that date.

Lord Shand *diss.* on the ground that in so far as the shares had risen in value between the date of the father's death and the resolution of the trustees to retain the property, the additional value should be taken into account in fixing the amount of the pursuer's claim.

John Gilchrist, wine merchant, Leith, died on 14th June 1888, survived by his wife and four children.

By trust-disposition and settlement he directed his trustees "immediately after my death, or as soon thereafter as they shall deem expedient, to realise my whole moveable means and estate, including my present business of wine and spirit merchant, and invest the proceeds thereof in good heritable security, and apply the income or annual produce thereof for the purposes of the trust." By codicil he recalled certain provisions which he had made in favour of his son James Watson Gilchrist, and in place thereof bequeathed to him £100 in full of all his claims.

James Watson Gilchrist claimed legitim, and

raised this action against the trustees.

The defenders lodged a vidimus of the deceased's personal estate as at the date of his death, including various stocks and shares in the ownership of three steamships and one sailing vessel. The estate liable for legitim was shown at £7359, one-twelfth whereof, being the pursuer's share, was £612, 10s., and the entry embracing the ship shares was as follows:—"8. Ship shares—(1) 6/64 shares of the steamship 'Scotsman' of Leith, at £137, 10s. per share, per Messrs Blaik & Company's valuation, £825; (2) 6/64 shares of the steamship 'Sicilian' of Leith, at £10 per share, per Messrs Blaik & Company's valuation, £60; (3) 6/64 shares of the steamship 'Nicosian' of Leith, at £20 per share, per Messrs Blaik & Company's valuation, £120; (4) 5/64 shares of the ship 'Zuleika' of Leith, per Thomas Law & Company's valuation, £350."

The pursuer objected to the principle upon which the statement was made up. He alleged (1) that the vidimus represented the value of the stocks and shares as at the date of his father's death on 14th June 1888, whereas these stocks, some of which had increased in value since the death, must be estimated as at the value of the present time; and (2) that that value could only be ascertained by selling the whole of the stocks and shares.

The defenders lodged answers, and explained that they regarded the pursuer's claim of legitim as a claim of debt which emerged on the death of his father, and the amount of which was to be ascertained according to the value of the free moveable estate as it then stood. They maintained that the pursuer's claim amounted to his legal proportion of the estate, according to its fair value, as at the date of death, less the necessary expenses of realisation, or according to the amount which it would have fetched if the whole estate had been immediately realised; that his claim was not affected by subsequent fluctuations in value of investments which the defenders continued to hold; and that they were not bound to realise the whole estate under their charge in order that the amount of the pursuer's one-twelfth share might be thereafter ascertained. In explaining their principle of valuation they stated with regard to the ship shares—"Item 8. This item represents the value of certain shares in three steamers and one sailing ship held by the deceased. At the date of his death two of the steamers were heavily burdened with debt, for which each individual owner was liable *in solidum*. The value of the shares in each vessel was obtained from information supplied by the managing owners, which was based upon their knowledge of the condition in which the ships were at the time, and the price received for other shares in said steamers sold during the month current at the death. Had these shares been immediately realised, the defenders believe they would not have fetched more than the sums stated, if so much. The defenders repeatedly advertised the shares for sale, but no offers were made for the steamship shares in answer to their advertisement. The shares in the sailing ship were sold on 4th September 1888 at an increase of £80 on the valued price. At this time the market price for ship property had considerably improved. The defenders, at the request of the beneficiaries, have continued to hold said steamship shares,