COURT OF SESSION.

Friday, June 6.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MILLAR, WALKER, & MILLAR *v.* BRODIE'S TRUSTEES.

Prescription — Triennial — Written Obligation — Appointment of Law-Agent to a Trust — Appointment Recorded in Sederunt-Book—Act 1579, *cap.* 83.

Held (*rev.* judgment of Lord Kyllachy, Ordinary) that the triennial prescription did not apply to the account of the law-agent to a trust, where his appointment as law-agent was recorded in a minute entered in the sederunt-book of the trust.

The late Robert Brodie died in 1871, leaving a trust-disposition and settlement by which he appointed Andrew Millar junior, writer in Paisley, and others, as his trustees. The trust-disposition contained, *inter alia*, a power to the trustees "to appoint any one or more of their own number, or any other proper person or persons, to be factor or factors or law-agent or law-agents under them for the management of the trust estate, and to allow such factors suitable remuneration for their trouble, and such law-agents the usual professional fees."

At the first meeting of the trust, held on 1st March 1871, the trustees appointed the said Andrew Millar junior to be law-agent and factor to the trust. The appointment was recorded in the minute book of the trust in the following terms:—"The meeting then appointed Mr Andrew Millar junior, one of their number, to be law-agent and factor on the estate, with the usual remuneration." The minute from which this is an extract was signed on behalf of the trustees by one of the trustees, who had been appointed chairman, and had been authorised by the meeting to sign the minute.

Andrew Millar junior, who was a partner of the firm of Millar, Walker, & Millar, solicitors in Paisley, died in 1888. In 1901 the present action was brought at the instance of the firm of Millar, Walker, & Millar, Thomas Walker and James Millar, the surviving partners thereof, and Alexander Millar, executor-dative of the late Andrew Millar junior, against James H. Dunn, writer in Paisley, and others, the surviving and assumed trustees in Robert Brodie's trust. The action concluded for payment of £174, 12s. 10d., being the account for professional services rendered by Andrew Millar junior, as agent for the trust, from 20th February 1871 to 7th July 1880.

The defenders pleaded, *inter alia*—"(4) The account sued for having undergone the triennial prescription, it can be proved only by the writ or oath of the defenders."

The Act 1579, cap. 83, enacts—"That all actiones of debt for house-mailles, mennis ordinars, servands' fees, merchantes' comtes, and uther the like debts that are not founded upon written obligations be persewed within three zeires, utherwise the creditour sall have na action except he outher preife be writ or be aith of his partie."

On 8th March 1902 the Lord Ordinary (KYLLACHY) pronounced an interlocutor by which he sustained the fourth plea-in-law for the defenders, and before answer allowed the pursuers a proof *scripto* in support of the account sued for, and the defenders a conjunct probation.

The pursuers reclaimed and argued—It was now settled that the triennial prescription was elided where the account sued for depended on a written contract of employment, even although there was no written obligation to pay for that employment—*Broatch* v. *Jackson*, June 8, 1900, 2 F. 968, 37 S.L.R. 707. What was required was a written mandate. Here the mandate was the minute. The law-agent of a trust carried on the legal work under the authority of the minute by which he was appointed law-agent; he did not require a special mandate for each piece of work. When appointed law-agent, it would be his duty to summon a new meeting of the trust. He would charge for that, but the only mandate which he could have would be the minute constituting his employment. For later pieces of work he might be expressly instructed by the trustees, but that was only instructions as to how his mandate was to be carried out. The case of the law-agent to the trust was not analogous to the case of an individual employing a law-agent, because while the individual might or might not have occasion for the continuous services of a law-agent, a trust necessarily required them. *Neilson* v. *Magistrates of Falkirk*, November 17, 1899, 2 F. 118, 37 S.L.R. 71, was not inconsistent with this theory, because in that case the pursuer, though he alleged that he had originally had a written contract of employment, averred that that contract had been departed from, and that the salary he sued for depended on a verbal agreement.

Argued for the respondents—This was not a case of written obligation. The minute did not constitute Millar's employment, it was only a historical record that he had been employed. A contract recorded in writing was not the same thing as a contract constituted by writing—*Ireland & Son* v. *Rosewell Gas Coal Company*, March 9, 1900, 37 S.L.R. 521. Even if the minute was a written obligation, the law-agent did not act under it. He required separate instructions in order to perform particular work. There was no real destinction between the appointment of a law-agent by a trust and by an individual. *Broatch* v. *Jackson* (cited *supra*) was the case of the employment of a law-agent to do a particular piece of business. To bring the present case under the same rule the

pursuers would require to show minutes of the trust employing Andrew Millar to do each particular item for which there was a charge in the account. *Separatim*—the firm of Millar, Walker, & Millar had no title to sue. Andrew Millar was appointed as a factor, and the debt sued for was due to him, not to the firm of which he was a partner—*Mabon* v. *Christie* February 8, 1844, 6 D. 619.

At advising—

LORD PRESIDENT—This is an action at the instance of Messrs Millar, Walker & Millar, sometime solicitors and notaries-public in Paisley, the two surviving partners of that firm, and the executor dative of the deceased Mr Andrew Millar junior, who was also a partner of the firm, concluding for payment of £174, 12s. 10d, which they allege to be due to them in respect of professional work done and outlays made by Mr Andrew Millar junior and his firm on the employment and on behalf of the testamentary trustees of the deceased Mr Robert Brodie.

The defenders plead, *inter alia*, that the account sued for having undergone the triennial prescription, it can be proved only by the writ or oath of the defenders, and the Lord Ordinary has sustained this plea, and before answer allowed to the pursuers a proof *scripto* in support of the account sued for, and to the defenders a conjunct probation. The question therefore which we have to decide is whether the claim of the pursuers is founded upon a written obligation within the meaning of the Act of 1579, c. 83. If it is not founded upon a written obligation the Act applies—if it is founded upon a written obligation, the Act does not apply, and the pursuers are entitled to a proof of their claim *prout de jure*.

Mr Robert Brodie died in February 1871, and on 1st March of that year a meeting of his testamentary trustees, four in number, was held, Mr Robert Robertson being appointed chairman, and authorised to sign the minute of the meeting. Mr Robert Brodie by his testamentary settlement authorised his trustees to appoint one or more of their own number, or any other proper person or persons, to be factor or factors or law-agent or law-agents under them for the management of the trust estate, and to allow such factors suitable remuneration for their trouble, and such law agents the usual professional fees. The trustees accepted the offices severally conferred upon them, and signed a minute to that effect appended to the testamentary settlement. The minute bears that "the meeting then appointed Mr Andrew Millar junior, one of their number, to be law-agent and factor on the estate, with the usual remuneration," and authority was given to him to perform certain duties appropriate to the situation.

Mr Andrew Millar junior was at this time a partner of the firm of Millar, Walker, & Millar, and I understand that it is not disputed that this was known to the trustees when they appointed him to be law-agent and factor with the usual remuneration. The pursuers allege in their condescendence that "in appointing the said Andrew Millar junior they made the appointment for behoof of the said firm of Millar, Walker, & Millar," and that "the said minute constituted a written obligation by the said trustees to pay to the said Andrew Millar junior and his said firm the amount of the account incurred by the said trustees under and in respect of the said appointment of the said Andrew Millar junior." The pursuers further allege that in pursuance of this appointment, and of instructions given by the trustees from time to time, Andrew Millar junior, or his firm, performed the the legal business of and connected with Mr Robert Brodie's trust from 7th February 1871 to 7th July 1880, being the work and expenditure in respect of which the sum sued for is claimed.

The important question is whether the minute of meeting of 1st March 1871 expresses or implies such a written obligation as to prevent the Act of 1579, c. 83, from being applicable to the case, and I am of opinion that it does. We had occasion in the case of *Broatch* v. *Jackson*, June 8, 1900, 2 F. 968, to consider the construction and effect of the Act of 1579, c. 83, and we there held that the triennial limitation did not apply to a law-agent's account where the agency was constituted by a letter from the client requesting the agent to act for him and a letter from the agent agreeing to do so. As the previous decisions were carefully examined and commented on in that case, I do not think that it is necessary to repeat that examination and comment now. It is sufficient to say that I am of opinion that the minute of 1st March 1871, taken along with the acceptance by Mr Andrew Millar junior of the offices of law-agent and factor on the estate with the usual remuneration, constituted a written obligation on the part of Mr Robert Brodie's trustees to pay to him or to his firm the usual professional charges for his services as law-agent and factor, and that consequently the present claim is founded upon a written obligation within the meaning of the Act of 1579, c. 83. It is well known that where a law-agent is a member of a legal firm he must in the ordinary case contribute to the firm the profits derived from any business which he may bring, and that much of the business may be performed by other members of the firm, unless the client stipulates that it shall be done by the particular partner alone. Being of this opinion, I consider that the defenders' fourth plea-in-law should not have been sustained, and that the pursuers should not have been limited to a proof *scripto*, and I think that the Lord Ordinary's interlocutor of 8th March 1902 should be recalled, and that the parties should be allowed a proof of their respective averments, and that the pursuers should be allowed a conjunct probation.

LORD ADAM concurred.

LORD M'LAREN—In a recent case in which this question was considered I expressed some doubts on the point, based upon practice and on certain decisions in mer-

cantile cases. These doubts did not prevent me from concurring in the judgment. In the present case I have no doubt as to the decision. The case is governed by the rule which has been laid down that professional employment following on instructions in writing amounts to a written obligation in terms of the statute.

LORD KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary and allowed a proof.

Counsel for the Pursuers and Reclaimers —Clyde K.C.—Guy. Agents—Campbell & Smith, S.S.C.

Counsel for the Defenders and Respongents — W. Campbell, K.C. — M'Lennan. Agent—J. Murray Lawson, S.S.C.

Saturday, June 7.

FIRST DIVISION.

CRAWFORD, PETITIONER.

Company—Voluntary Winding-up—Petition for Supervision Order — Creditor's Petition—Right of Creditor—Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 147.

Section 147 of the Companies Act 1862 provides that "when a resolution has been passed by a company to wind up voluntarily, the Court may make an order directing that the voluntary winding-up should continue but subject to such supervision of the Court, and with such liberty for creditors, . . . to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just."

A creditor of a company incorporated under the Companies Acts is not entitled as matter of right to demand that a voluntary liquidation should be placed under the supervision of the Court, and the Court will not grant such a petition if no special cause is shown for doing so.

The creditor of a company which was in the course of being voluntarily wound up petitioned for a supervision order, but made only a general averment to the effect that complicated questions were likely to arise as to the respective rights of security-holders and ordinary trade creditors, and that it was desirable in the interests of the creditors that the petition should be granted. The great majority of the creditors were opposed to the application being granted. The Court *refused* the petition.

A. R. Cowper, Limited, was incorporated under the Companies Acts in 1899, having its registered office in Glasgow. The objects of the company were to carry on the business of carting and removing contractors.

On 8th March 1902 a resolution was passed at an extraordinary general meeting of the shareholders for the voluntary liquidation of the company, and Mr James Cowan Paterson, C.A., Glasgow, was appointed liquidator.

A petition was presented by Mr John Crawford, printer, Glasgow, an unsecured creditor of the company, craving that the liquidation should be continued subject to the supervision of the Court.

The petitioner averred—"There is no prospect of the creditors of the company being paid in full. Your petitioner is a creditor of the company conform to oath herewith produced. He holds no security. In the circumstances your petitioner is desirous that the liquidation should be put under the supervision of the Court, and he accordingly presents this petition to your Lordships. Complicated questions as to the respective rights of security-holders and ordinary and trade creditors are likely to arise, and in the interests of the creditors it is desirable that the prayer of this petition should be granted. Further, preferences may be running which it is desirable to cut down."

Answers were lodged by the company and the liquidator, in which it was averred that the liquidator was prepared to distribute the whole free assets almost immediately, and that "no question has arisen or will arise between secured and ordinary creditors, and it is the almost unanimous wish of the creditors that all unnecessary expense should be avoided, and that the company should be wound up by way of voluntary liquidation. The petitioner's debt only amounts to £24, 4s. 6d. The respondent James Cowan Paterson submits that the petitioner has no sufficient title to present the present application, and that no relevant or sufficient statement has been made in support thereof. The statement that complicated questions are likely to arise is unfounded in fact, and the prayer of the petition is contrary to the wish of the great majority of the creditors."

Argued for the petitioner—He was entitled as a matter of right to ask for a supervision order. It could not prejudice in any way the general body of creditors, and might be beneficial to them. There was no case where such an application had been refused. This was analogous to the case of creditors under a trust-deed, any one of whom might refuse to agree to the terms.

Argued for the respondents—A creditor was not entitled to an order as a matter of right, but must show some cause. Section 149 of the 1862 Act gave the Court full discretion to grant or refuse such an application.

LORD PRESIDENT — This case seems to raise the question quite sharply and simply, whether one of a number of creditors is entitled as matter of right to ask that a voluntary liquidation should be placed under the supervision of the Court. If the affirmative of that proposition can be established, the prayer of the petition will fall to be granted, but if it cannot, that prayer must be refused, as it is clear, and