SUMMER SESSION, 1895.

COURT OF SESSION.

Wednesday, May 22.

FIRST DIVISION.

LYSONS, &c. *v.* STEWART.

Company — Voluntary Liquidation — Removal of Liquidator.

The liquidator of the Miraflores Company, which was in voluntary liquidation, took proceedings against two of the shareholders to recover the value of certain shares in the Totumo Company, which had been formed for the purpose of acquiring certain lands and mines through the Miraflores Company, on the ground that they had received the said shares under a secret agreement with the vendors which had not been disclosed to the shareholders of the Miraflores Company.

A petition was thereupon presented by these and certain other shareholders for the liquidator's removal, and the application received the approval of a majority in value of the shareholders of the company at a general meeting. It appeared from correspondence which was produced that the liquidator, who had acted as secretary of the syndicate prior to liquidation, had also received shares in the Totumo Company for services in promoting the two companies.

The Court *granted* the prayer of the petition, but *observed* that the removal of the liquidator did not imply either suspicion of his professional character or disapproval of his having brought the action.

The Miraflores Gold Syndicate, Limited, Glasgow, registered under the Companies Acts, went into voluntary liquidation upon 14th December 1893, when J. L. Stewart, secretary of the company, was appointed liquidator. A committee of advice composed of shareholders was also appointed. At the date of the liquidation the liabilities of the company amounted to £20, and there was a sum in bank belonging to the company amounting to £130 or thereby. Thereafter the liquidator, at the request of a number of the shareholders of the company, took proceedings against two of the members of the said committee, who had been promoters and directors of the Syndicate, for recovery from them of the value of 35,000 £1 shares of the Totumo Alluvial Gold Company, Limited, which had been formed for the purpose of acquiring from or through the said Syndicate certain lands, mines, and mining rights in the district of Miraflores, in the United States of Colombia, and which 35,000 £1 shares it was alleged they had received under and in terms of a secret agreement with the vendors which had not been disclosed to the shareholders of the Syndicate.

In May 1894 a petition was presented by Colonel Lysons and other shareholders of said Syndicate, including James Dunnachie and William Stewart, under section 141 of the Companies Act 1862, praying for the removal of the liquidator and for the appointment of a fit person as voluntary liquidator. The petitioners alleged, *inter alia*, that it had been intended that the liquidator should immediately after his appointment pay off the liabilities of £20 and forthwith divide the balance among the shareholders, that he had raised the action above referred to without consultation with the committee of advice, and that it was believed that he contemplated calling up the remaining uncalled capital of the company to enable him to carry it on.

Answers were lodged by Stewart. He stated that he had been requested to take the proceedings complained of by a number of shareholders in the Syndicate; that portions of the shares illegally received by James Dunnachie and William Stewart had been gifted to several of the persons who were conjoined with them as petitioners, and that of the other petitioners a large proportion were relatives of, or con-

junct and confident, with James Dunnachie and William Stewart and the other holders of said shares; and that the petition was an improper attempt, instigated by James Dunnachie and William Stewart, to put an end to the proceedings against them.

The petition was continued to allow a general meeting of the shareholders of the company to be held.

At the general meeting, which was held on 1st May 1895, twelve members expressed approval of the petition and thirteen expressed disapproval. Upon a poll being demanded it appeared that, with proxies, twenty-two shareholders representing 492 votes had voted for approval of the petition, and twenty-two shareholders representing 349 votes for disapproval.

Upon the petition being again called the petitioners laid before the Court certain correspondence which had passed between the liquidator on the one hand and James Dunnachie and William Stewart on the other, with the view of showing that the liquidator had received 700 shares in the Totumo Alluvial Gold Company from James Dunnachie and William Stewart as recompense for services given by him in promoting the two companies, and that he had not been satisfied with this remuneration, but had claimed that his services were entitled to more substantial recognition.

Argued for the petitioners—(1) The liquidator had no right to raise this action on his own responsibility, and it now appeared that the majority of shareholders—and this was purely a shareholders' liquidation—were against him. The minority might litigate at their own expense, but the liquidator was not entitled to use the company's funds for that purpose. (2) From letters produced it rather appeared that the proceedings for which the liquidator took credit had really been brought in a spirit of revenge. He himself had had 700 shares of the Totumo Company allotted to him, but he thought he should have had more. If he had got what he wanted there would have been no action. He was therefore not an impartial party, and should be removed. (3) Removal did not necessarily cast a slur upon the character of the liquidator removed. It was ordered wherever the Court thought in the interests of the company that another person would be more suitable having respect to the special circumstances that had emerged—Buckley's Notes on sec. 141, *in re Marseilles Extension Railway and Land Company*, 1867, L.R., 4 Eq. 692; *re Tavistock Iron Works Company*, 1871, 19 Weekly Reporter, 672; *Sir John Moore Gold Mining Company*, 1879, L.R. 12 C.D. 325; *in re Adam Eyton, Limited*, 1887, L.R. 36 C.D. 299.

Argued for the respondent—He was bound to raise this action in the interests of the shareholders, and could not take the advice of the committee in this matter because they were interested parties. He was acting as liquidator, and that he happened, in his private capacity, to hold shares in the Totumo Company was beside the question. He held these shares when he was unanimously appointed liquidator; there was no reference to them in the petition, and it was too late now to introduce this new and really irrelevant ground of complaint. He showed his impartiality in bringing this action, because it was against his interest to do so. He now saw what he did not see when he took the shares, that he would have to give them up, and this he was quite willing to do. If the votes given at the general meeting were scrutinised, and the votes of those personally interested set aside, there would be a majority in favour of the liquidator's action.

At advising—

LORD PRESIDENT—I am for removing this liquidator. There is nothing said against his character or integrity generally, but only this, that he is in a complicated and compromised position as regards the main question agitated in the liquidation. And there is more than that. This question has been deliberately submitted for the consideration of the company, and an ostensible majority, to say the least of it, has pronounced in favour of the removal of the liquidator. Mr Abel has made an attack on the composition of the majority, and to a certain extent I think he has succeeded—that is to say, the votes are to a considerable extent votes of persons directly interested in this question. But then giving effect to that disqualification—a disqualification not in law but perhaps to be taken into account in the present controversy on the one side and on the other—it appears that there is in any view a very wide division of opinion in the company on the matter, and probably the preponderance of disinterested votes is on the side of the removal of the liquidator. That is a circumstance which we cannot throw out of account, and taking that state of opinion in the company along with the very ambiguous—I may say impossible—position of the liquidator, I think it is right that the judgment of some impartial person should be placed at the disposal of the company in its general interests, and that can be done by our removing this liquidator and appointing some fit person in his place.

As I have said, the removal is not due to any suspicion of the general conduct of this gentleman, against whom indeed nothing of that nature is alleged, but the circumstances disclosed in the correspondence are such as to show substantial reasons for thinking that his judgment is not the best one to be applied to this somewhat complicated question.

I may add also, that by removing him we do not indicate any disapproval of his having brought the action—as to the merits of which the Court has yet to be informed, and to decide, if need be.

LORD ADAM—I am of the same opinion. I am clearly of opinion that, for the sake of this company, there ought to be an independent liquidator.

LORD M'LAREN—It appears that the sole, or at all events the chief, business of this liquidation is to prosecute to a conclusion,

or to compromise, an action for setting aside an arrangement by which certain shares in another company were placed at the disposal of members of the company now in liquidation. It has, since the liquidation was commenced, come out that the liquidator is himself one of those to whom shares were allocated, and although his holding may be inconsiderable, that consideration places him in an embarrassing position, and he is therefore not the most proper person to carry on the legal proceedings to a conclusion.

It was agreed, I understand, by counsel on both sides that this litigation must be brought to a conclusion one way or other, and it appears to me that in these circumstances a neutral person should be appointed to conduct it. I agree that the displacement of the present liquidator implies no reflection on the professional character or integrity of the liquidator, and indeed no such reflection is suggested in the petition.

LORD KINNEAR concurred.

The Court removed the liquidator and appointed Mr J. M. Macleod, C.A., Glasgow, in his place.

Counsel for the Petitioners — Lees — A. S. D. Thomson. Agent — Marcus J. Brown, S.S.C.

Counsel for the Respondent — Salvesen —Abel. Agents—Gill & Pringle, W.S.

Thursday, May 23.

SECOND DIVISION.

MILLER *v.* M'PHUN.

Expenses—Extra-Judicial Offer.

A workman was offered £50 as compensation for injuries sustained by him in the course of his employment. The offer was made without prejudice, and under reservation of the employer's whole rights and pleas, but if not accepted was to be founded on in any action the workman might bring. The workman refused the offer and brought an action of damages. The employer in his defences stated that an offer in the above terms had been made and declined, but the offer was not renewed on record. The pursuer was awarded a sum of £40 by a jury.

The Court (following *Critchley* v. *Campbell*, February 1, 1884, 11 R. 475) found neither party entitled to expenses.

Opinion by Lord Young that the rule of Court in the matter of tender was unsatisfactory and should be altered.

On 15th October 1894 William Miller, while in the employment of J. P. M'Phun, timber merchant, Glasgow, and engaged at building operations carried on by his employers, was injured by the fall of a crane.

On 20th December Mr M'Phun's agent wrote to Miller's agents offering £50 in full of all claims by Miller on account of the accident. The offer was made without prejudice and under reservation of Mr M'Phun's whole rights and pleas, but if not accepted was to be founded on in any action Miller might bring. The offer was refused by Miller's agent.

Thereafter Miller raised an action of damages against M'Phun in the Sheriff Court at Glasgow, concluding for £500 at common law, or alternatively for £70, 4s. under the Employers Liability Act.

In his defences M'Phun stated that an offer in the terms above stated had been made and declined, but the offer was not formally renewed.

The case was appealed to the Court of Session for jury trial. At the trial a jury found for the pursuer and assessed the damages at £40.

Both parties claimed expenses.

Argued for the pursuer—No offer had been made judicially or accompanied by an offer of expenses. There was therefore no tender. The case was distinguished from *Critchley* v. *Campbell*, February 1, 1884, 11 R. 475, where the claim was for a liquid amount, whereas in the present case the claim was in respect of personal injury the extent of which had not been ascertained at the date of the offer.

Argued for the defender—The narration of the offer on record coupled with the denial of the necessity of the action was tantamount to a judicial repetition of the offer—*Gunn* v. *Hunter*, February 17, 1886, 13 R. 593. The action had been raised and continued solely owing to the pursuer's refusal to accept a larger sum than was ultimately awarded to him, and was an unnecessary litigation—*Mavor and Coulson* v. *Grierson*, June 16, 1892, 19 R. 868. In any event the pursuer was not entitled to expenses—*Critchley* v. *Campbell*, *supra*.

At advising—

LORD JUSTICE-CLERK—In this case the defender after the accident happened offered the pursuer the sum of £50 in full of all his claims. That offer the pursuer thought proper to decline. Had the defender in his defences repeated his offer distinctly there would have been no ground for thinking that the ordinary rule should not apply that where a party gets less than what was offered to him before the action was raised he is liable in expenses from the date of the offer.

But in this case I am unable to see that the defender placed himself in that position, for on his record he did not take the course of repeating his offer in name of damages and tendering expenses of process up to that date. The case therefore cannot be held to fall under any decision except that of *Critchley* v. *Campbell*. In that case before the action was raised an offer was made of a sum down larger in amount than the pursuer afterwards got decree for, and because the offer was not repeated on record the Court held that it was not a case in which expenses should be given to the pursuer, and found neither party entitled