

Saturday, June 18.

SECOND DIVISION.

[Sheriff of Forfar.]

BATCHELOR AND OTHERS (BATCHELOR'S TRUSTEES) v. HONEYMAN.

Prescription—Triennial Prescription—Act 1879, c. 83—Account-Current.

Between the years 1877 and 1887 a cattle-dealer supplied a farmer with cows and potatoes to the value of £529, 10s., and received from him dung and cows and various cash payments which together amounted to £448. In an action for the balance of the account the Court *sustained* the defender's plea of prescription, *holding* that this was not a proper account-current between merchants, but only a trading account in which certain payments were credited, to which the principle of the case of *M'Kinlay v. Wilson*, November 13, 1885, 13 R. 210, did not apply.

Mrs Francis Batchelor and others, who as trustees of the late Francis Batchelor continued his business as cattle-dealer near Dundee, sued James Honeyman, farmer, Hillhouses, Dundee, for £81, 9s. 6d., "being the balance due by him on an account" produced.

The pursuers averred—"The defender is tenant of the farm of Hillhouses, near Dundee, and on the various dates specified in the statement or account-current, a copy of which is annexed hereto, the defender purchased from the pursuers, or from the said Francis Batchelor, the cows and potatoes at the prices mentioned in the said account. These prices amount, *in cumulo*, to the sum of £529, 10s., to account of which sum the defender has paid or accounted for to the said Francis Batchelor, or to the said trustees, various sums on the dates and of the amounts also set forth in the said account-current. These payments to account amount in all to £448, 0s. 6d., which being deducted from the said sum of £529, 10s., leaves a balance due to the pursuers of £81, 9s. 6d."

The defender averred—"Admitted that the defender is the tenant of the farm of Hillhouses, near Dundee, and that the defender had various transactions with the said deceased Francis Batchelor, but these have all been closed and settled. *Quoad ultra denied.*"

The account was as follows:—

1877.	
Sept. 1. 2 Cows,	£55 0 0
Dec. 1. 2 Cows,	55 0 0
Balance on Cow,	1 10 0
1 Cow,	21 5 0
Potatoes,	4 0 0
1878.	
Oct. 4. Off for Dung and Cash, £103 1 6	
Off for Cow,	1 6 6
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Carried forward, £104 8 0	£136 15 0

Brought forward, £104 8 0		£136 15 0
1879.		
Aug. 9. 1 Cow,	24 0 0	
" 26. 2 Cows,	38 10 0	
" " 1 Cow,	17 0 0	
Sept. 2. 1 Cow,	23 10 0	
Dec. 9. By Cash,	20 0 0	
1881.		
Jan. By Cash,	20 0 0	
May 3. 2 Cows,	34 0 0	
Aug. 27. 81 Loads Dung,	30 7 6	
1882.		
Jan. 20. 1 Cow,	24 0 0	
" " By Cash,	20 0 0	
Nov. 28. 1 Cow,	23 0 0	
Dec. 26. 1 Cow,	24 15 0	
1883.		
Mar. 28. 2 Cows,	35 10 0	
" " 70 loads Dung @ 7/6.	26 5 0	
June 11. By one Calf,	1 10 0	
Sept. 18. By Cash,	20 0 0	
1884.		
April 1. By Cash,	20 0 0	
May 8. 1 Cow,	16 10 0	
" By Cash,	6 0 0	
Sept. 9. 1 Cow,	23 0 0	
Dec. 9. By Cash,	23 0 0	
" " 1 Cow,	21 0 0	
1885.		
Feb. 10. 1 Cow,	19 0 0	
April 7. 1 Cow,	17 0 0	
" 11. 1 Cow,	20 10 0	
June 2. 1 Cow,	17 0 0	
" 9. By Cash,	17 0 0	
Oct. 20. By Bill,	21 0 0	
Nov. 21. 1 Cow,	18 0 0	
1886.		
Jan. 12. By Cash,	18 0 0	
April 6. By Bill,	20 0 0	
July 27. 1 Cow,	17 0 0	
Sept. 6. By Bill,	20 0 0	
1887.		
June 1. By Bill,	29 0 0	
Oct. 1. By Bill,	20 0 0	
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	£448 0 6	529 10 0
		448 0 6
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Balance due,	£81 9 6	

The defender pleaded—"(2) Prescription."

The Sheriff-Substitute (J. C. SMITH) pronounced as follows:—"Sustains the defender's plea of prescription: Finds that the pursuers are entitled to prove their averments only by the writ or oath of the defender: Allows them, *primo loco*, a proof by writ, and the defender a conjunct probation by writ, &c.

"*Note.*—I have had difficulty in sustaining the plea of prescription because of the case of *M'Kinlay v. Wilson*, November 18, 1885, 13 R. 210, and because of certain alleged broad *dicta* of the judges who decided it, to the effect that prescription cannot apply to accounts-current. But it seems to me that those unlimited *dicta* are much broader than the decision, and that if given full effect to they would exclude prescription wherever there are cross accounts, because cross accounts of sales say between a draper and a grocer can always be cast into the form of an account-current. But it seems to me the essential and decisive ground of that decision was that it was not an account solely of sales and purchases, but was also an account of sales on commission or as joint adventures. It was therefore not purely an account of buying and selling,

and its true character required a proof to disclose it. But here the account libelled and the pursuer's averments regarding it disclose an account of buying and selling and of nothing else. Unless therefore prescription be to be restricted to unilateral accounts of buying and selling, I see no sound or intelligible principle upon which I can hold that it does not apply to the present case as it is stated on the face of the account and of the record."

The Sheriff (COMRIE THOMSON) recalled this interlocutor "in so far as it limits the pursuer's proof to the writ or oath of the defender; *quoad ultra* adheres to the said interlocutor, allows the parties a proof and to the pursuer a conjunct probation."

The defender appealed, and argued—The Sheriff-Substitute was right; this was not a proper account-current between merchants. The pursuers and the late Francis Batchelor had sold articles to the defender, and the defender in settling had set off certain articles supplied by him, but these amounted only to cross entries, and did not warrant the application of *M'Kinlay v. Wilson*, 13 R. 210.

Argued for the respondents—1. They were entitled to inquiry. Prescription did not apply to proper accounts-current between merchants—*M'Kinlay v. Wilson*, *supra*. The question was whether this was an account-current. It was stated as such. The defender admitted that transactions had taken place. *Ex facie* it was not an account for goods sold and delivered by the pursuer; it showed a course of dealing between the parties. The sales by the defender amounted to £182, 13s.—a considerable proportion of the account. The Court might therefore regard it as an account-current. 2. If not, at least there should be proof before answer as to the course of dealing in order to ascertain whether it had been properly stated as an account-current. If it were shown that the transactions were treated not as separate but as one, that the items had been set against each other, that a balance had been struck, with periodical payments, the defender's plea of prescription could not be sustained.

At advising—

LORD JUSTICE-CLERK—It is, I think, plain that the transactions which appear in this account amount to no more than the sale of certain articles by the pursuer to the defender, and in settling for them each party set off what he had supplied, *i.e.*, the defender set off the dung he had sent, against the cows supplied by the pursuer, and then there was a money balance. That is all that the pursuer avers, and that is all he would be allowed to prove. Well he has put the words "account-current" at the head of his account, but it cannot make any difference to the actual character of the account what heading he puts on it. It is plainly just a trade account in which certain payments are credited. The Sheriff-Substitute has sustained the plea of prescription, holding that the only proof which can be taken is by reference to writ or oath of the defender. The Sheriff has

allowed a proof at large. It is plain that the account is one to which the triennial prescription applies, and as prescription has run, I think we should recall the Sheriff's interlocutor, and revert to that of the Sheriff-Substitute.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court sustained the appeal.

Counsel for the Appellant—N. J. D. Kennedy. Agents—Macpherson & Mackay, W.S.

Counsel for the Respondents—Boyd. Agents—Henderson & Clark, W.S.

Tuesday, June 21.

FIRST DIVISION.

FLANNIGAN v. MUIR.

Parent and Child—Custody—Right of Grandmother to Custody of Child of Thirteen Chargeable on Parish—Influence of Child's own Wishes on Subject—Right of Grandmother to Demand Address of Pauper Child from Parochial Board.

An Irishman, resident in Scotland, disappeared, and his child, a girl of thirteen, became chargeable on the parish. Thereafter the man's mother, who resided in Ireland, applied to the Court to ordain the parochial board to give the petitioner the address of her granddaughter, and also to deliver up the child herself to the petitioner. Answers were lodged on behalf of the parochial board, averring that the petitioner was not in a position to maintain the child, and that the child herself expressly desired to remain in Scotland. The curator *ad litem* appointed by the Court to the child adopted the views of the parochial board, and reported that in his opinion nothing short of force would induce the child to go to Ireland.

The Court refused to ordain the parochial board to deliver up the child to the grandmother, and were *equally divided* in opinion as to whether the parochial board were bound to give the grandmother the address of the child.

On 28th November 1891 Mrs Elizabeth Murphy or Flannigan, residing at Upper Drumquill, county Monaghan, Ireland, with consent and concurrence of James Flannigan, also residing there, presented a petition to the Court, in which she stated "that the petitioner's son Matthew Flannigan, labourer, King Street, Rutherglen, took ill of fever in the middle of November 1890, and when the fever was at its height, namely, on the 30th of November, he rose from his bed, went out of the house, and has never since been heard of. He is believed to have been drowned in the Clyde. He was a widower, and he left four children—Francis Flannigan and Catherine Flannigan (twins) aged sixteen years, both now