LORD LOW—I am of the same opinion. The fact that the respondent got harbour wages of 5s. a-day for two days has no bearing upon the question. When the accident happened the respondent was a first fisherman on board a trawler actually engaged in trawling. At that time his remuneration was determined by the award of the Aberdeen Conciliation Board. On the other hand, at the time when he was being paid harbour wages he was not engaged in trawling, and the award of the Conciliation Board did not apply. The trawler had just undergone her Board of Trade survey, and the survey having been completed the crew were engaged preparing the fishing gear for going to sea, and it was during that time that the respondent was paid harbour wages. But after that the trawler went to sea, and then the respondent's remuneration was regulated by the award of the Conciliation Board, and according to that award all that he could get was a certain share of the nett balance of the gross price of the fish caught during the trip, after making certain deductions. If that is not remuneration by a share "in the profits or the gross earnings of the working" of the vessel I do not know what is. I therefore think the Sheriff-Substitute's decision was wrong and that the question should be answered in the affirmative.

LORD ARDWALL—I am of opinion that the question ought to be answered in the affirmative. The respondent, except when in harbour, with which time we have nothing to do in this case, was not remunerated by wages in the proper sense of the word; he was paid neither by time nor by work. His remuneration was arrived at in this way:—from the gross earnings of the vessel on which he was employed certain deductions specified in the first paragraph of the schedule quoted in the stated case were made. The gross earnings were then divided into 14 shares, and the respondent was paid one and one-eighth of such shares, or about a twelfth share of the total gross earnings. In this state of the facts I think it clear that the respondent was remunerated by shares in the gross earnings of the working of the steam trawler "Strathmartin," on board which he was employed at the date of the accident. I cannot accept the argument that because a certain small deduction for current expenses was made from the gross earnings before dividing them into shares, these shares were not shares of the gross earnings within the meaning of the Act. It might possibly be maintained that the shares paid to the respondent were shares of the profits before deducting certain fixed charges such as interest on capital, depreciation, and wages of the crew. But I think it is more appropriate to regard the respondent's remuneration as shares of the gross earnings.

On the general construction of section 7 (2) of the Workmen's Compensation Act 1906 I may say that in my opinion it was intended to cover by the two categories of payments there set forth all cases where the person employed was to a greater or less extent a co-adventurer or partner in the business in which he was employed.

In the present case I have no doubt that the respondent must be treated as coming under the exception enacted by section 7 (2) of the said Act.

LORD STORMONTH DARLING was absent.

The Court answered the question of law in the affirmative.

Counsel for the Appellants—Scott Dickson, K.C.—Lippe. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Respondent—Kennedy, K.C.—Gillon. Agents—Henderson & Mackenzie, S.S.C.

Tuesday, December 17.

SECOND DIVISION.

[Sheriff Court at Perth.

HAY & COMPANY *v.* TORBET.

Payment—Appropriation of Payments—Account Current.

When a debtor pays money on account to his creditor, if the debtor has not appropriated particular payments to particular debts the appropriation is governed by the intention of the creditor, either express, implied, or presumed. In the absence of contrary indications such intention may be presumed from the form of the account he has rendered to the debtor. Where it is in the form of an account-current, of the nature of that between a banker and his customer, the presumption is that the payments extinguish the items of debit in their order in the account.

An account between a farmer and a firm of cattle auctioneers, rendered by the latter to the former, set forth in a column in order of date the cattle, hay, etc., sold and the cash advances made by the firm to the farmer, and below it, in another column, in order of date the payments, generally in cash, but sometimes in cattle, made by the farmer to the firm. Each of these columns was then added up, and the latter deducted from the former, and the balance struck.

Held that the account was not an account-current giving rise to the above presumption. *Devaynes* v. *Noble* (*Clayton's case*), 1 Merivale 530, 3 Ross L.C.(Commercial Law) 643; "*The Mecca*" [1897] A.C. 286, *discussed.*

On 7th May 1904 Robert D. Torbet granted to Hay & Co., auctioneers, Perth, an obligation under which he guaranteed "full and final payment of all purchases made, or that may be made, and of all sums advanced, or that may be advanced, by you to Alexander Cromb, dairyman, St. Martins, Balbeggie, with interest at the

rates as may from time to time be charged by you, declaring that the said sums shall not exceed the total of seventy-five pounds sterling (£75). And, further, providing and declaring that this guarantee shall be a continuing obligation until recalled in writing."

Thereafter various dealings took place between Alexander Cromb and Hay & Company, and on 1st August the whole business of Hay & Company was transferred to Hay & Company, Limited, who were incorporated under the Companies Acts, and who took over as at that date the whole assets and liabilities of Hay & Company. No notice was sent to Torbet. At that date Cromb owed Hay & Company £67, 4s. 6d. Thereafter he continued to deal with Hay & Company, Limited, to whom he became still further indebted, and who on 26th January 1905 sent him the following account bringing out a balance against him of £87, 10s. 10d. as at 2nd January 1905:—

"Account, Mr Cromb, Woodside Cottage, Balbeggie, and Messrs Hay & Company, Limited, Perth.

1904				
Feb. 19	To 1 cow,	£13	12	6
,, 26	,, 1 do.,	15	7	6
Mch. 4	,, 1 do.,	18	0	0
Apl. 29	,, 1 do.,	10	10	0
May 13	,, 1 do.,	8	15	0
,, ,,	,, Insurance,	0	1	6
July 15	,, 1 cow,	12	15	0
,, ,,	,, Insurance,	0	1	6
,, 29	,, 1 cow,	8	0	0
	,, Insurance,	0	1	6
Aug. 10	,, Southtown hay,	11	14	6
Sep. 3	,, Windeye sale,	2	11	4
Oct. 14	,, 2 cows,	28	12	6
,, ,,	,, Insurance,	0	1	6
,, 29	,, Southtown stocking sale,	11	5	0
Nov. 12	,, Southtown sale,	2	4	6
1904		£143	13	10
Mar. 14	By cash, £4 0 0			
Apl. 11	,, do., 4 0 0			
May 10	,, do., 4 0 0			
June 20	,, do., 3 0 0			
July 15	,, do., 5 0 0			
Aug. 16	,, do., 4 0 0			
Oct. 10	,, 1 cattle, 8 7 0			
24	,, 1 do., 7 2 6			
Jany. 2	,, 2 do., 21 5 0			
		60	14	6
		£82	19	4
	To interest,	4	10	0
		£87	9	4
	Insurance on cow, 14 Oct.,	0	1	6
		£87	10	10"

On 26th July 1905 Torbet wrote to Hay & Company, Limited, withdrawing his guarantee as from that date. On 29th July Hay & Company, Limited, replied that Cromb was already in their debt to more than the full amount of the guarantee, of which they accordingly demanded payment in full.

Torbet having refused to make any payment, Hay & Company and Hay & Company, Limited, raised the present action against him in the Sheriff Court at Glasgow for the sum of £64, 4s. 6d., the amount of Cromb's indebtedness to Hay & Company at 1st August 1904, the pursuers now admitting that Torbet's guarantee was terminated *ipso facto* by the change in the firm, of which he was not notified, and that accordingly he could not be made liable for debts incurred by Cromb after that date.

The defender's contention was that at 1st August 1904, when his guarantee ceased, Cromb was not indebted to the pursuers, inasmuch as the pursuers' account showed that they had appropriated the payments made by him after that date to the debts incurred before that date, with the effect of extinguishing them entirely.

The pursuers' contention was that at the date in question Cromb was indebted to them for the amount sued for, inasmuch as the facts showed that they had actually appropriated the payments made after 1st August to debts incurred after that date, and further that, in any case, the account did not warrant the inference the defender drew from it.

A proof was taken by the Sheriff-Substitute (SYM), the result of which, in so far as not stated above, may be gathered from the opinions of their Lordships *infra*.

On 2nd July 1907 the Sheriff-Substitute pronounced an interlocutor decerning against the defender for the sum sued for.

On 15th October 1907 the Sheriff (C. N. JOHNSTON) affirmed that interlocutor.

The defender appealed to the Court of Session, and argued — He was not liable to pay anything on his guarantee, because Hay & Company, Limited, had appropriated the payments made by Cromb after 1st August to the old debt and had extinguished it. Where the guarantee of a current account was revoked by a change in the firm to which the guarantee was given, and dealings under the account guaranteed continued to be carried on with the new firm, payments made into the account after the change in the firm were, in the absence of evidence to the contrary, presumed to be appropriated towards extinguishing the balance due at the date of the revocation of the guarantee—*Pemberton* v. *Oakes*, 1827, 4 Russell 154, at page 168; *Bodenham* v. *Purchas*, 1818. 2 Barn. and Ald., 39, 3 Ross's Leading Cases Commercial Law, page 661; *Hooper* v. *Keay*, 1 Q.B. D. 178, at 181; *Lang* v. *Brown*, Dec. 2, 1859, 22 D. 113; Gloag & Irvine, Rights in Security, page 933. The presumption in this case was further strongly supported by the form of the account rendered by Hay & Company, Limited, to Cromb. The account was to all intents and purposes an account current, governed by the rule established in *Devaynes* v. *Noble* (*Clayton's Case*), 1816, 1 Mer. 530, 3 Ross's Leading Cases Commercial Law, 654, viz., that in such an account the payments extinguish the items of debit in the order in which they stand in the account. There was no authority for the proposition that the rule applied only to bankers' accounts and pure cash accounts. All that was required was a composite or continuous account, such as the account here—*Scott's Trustees* v. *Alexander's Trustee*, January 10, 1884, 11 R. 407, 21 S.L.R.

281: *M'Kinlay* v. *Wilson*, November 18, 1885, 13 R. 210, 23 S.L.R. 134. There was no evidence in the case to contradict the inference to be drawn from the form of the account.

Argued for the respondents—The appellant was liable under his guarantee to the extent of the sum sued for, the payments made after 1st August having been applied to debts contracted after and not before that date. *"The Mecca,"* 1897, A.C., page 286, had modified the law upon this point, and settled that—failing appropriation by the debtor, which was not suggested here—the ultimate criterion was the intention of the creditor, and that the rule of *Clayton's* case only applied (1) in the absence of contrary evidence—*cf. in re Hallett's Estate*, 13 Ch. D. 696, at 728; (2) where there was an account-current between the parties of the nature of the account between a banker and his customer. Neither of these conditions were fulfilled here. There was, in the first place, ample evidence apart from the account to show that in fact the new company had appropriated the payments after 1st August to debts incurred after that date. In the second place, the account was not an account-current, as was clear from its form. There was no setting of the daily entries off one against another, but at the end of the account the credit items were all added up and deducted from the debit. The authorities all showed that the rule in *Clayton* had never been applied to such an account — compare, in addition to the cases already cited, *Batchelor's Trustees* v. *Honeyman*, June 18, 1892, 19 R. 903, 29 S.L.R. 780; *Lowson* v. *Ingham*, 1823, 2 B. and C. 65; *Dougall* v. *Lornie*, July 19, 1899, 1 F. 1187, 36 S.L.R. 927. *M'Kinlay* v. *Wilson* (*cit. supra*) was distinguishable, because there it was proved that the parties intended the account to be an account-current. The question was not affected by the fact that it arose between the creditor and the debtor's cautioner, and not the debtor himself—see *Eyre* v. *Everett*, 1826, 2 Russ. 381; *Creighton* v. *Rankin*, 7 Cl. and F. 325.

LORD JUSTICE-CLERK—The defender Torbet having along with another become cautioner for Alexander Cromb, for all purchases made and all sums that might be advanced to him by a firm of Hay & Company, the question in the case is whether he is liable to pay to Hay & Company, Limited, as in right of all assets of Hay & Company, the balance which Cromb has failed to pay. The caution was for an amount not to exceed £75. The present claim is for a balance of £67, 4s. 6d.

The defence is that Cromb made payments to Hay & Company, Limited, which if appropriated to the first items in the account with Hay & Company would extinguish the obligation. The contention is that the rule as to appropriation of payments on accounts-current applies to the kind of account with which the Court has to deal, viz., that where there has been no special appropriation of payments these must be held to apply to and to go to extinguish the first items of debt. That there is in cases to which the rule is appropriate such a legal presumption is not doubtful, and indeed is not disputed. But the pursuers maintain that the case is not one in which the presumption applies, and further that if it did apply it is a presumption which can be redargued, and that it is redargued by the facts disclosed in the documentary and oral evidence.

If it were necessary to decide the question whether there was in this case an account-current between the parties, in the true sense of that expression, I should hold that there was not any such account-current. It is true that while an account between a bank and a customer to whom advances are being made is the most direct illustration of an account-current to which the presumptions as to appropriation of payments applies, yet it is quite certain that accounts of a similar character, although not occurring in business of a strictly banking type, may be held to be in the same position. The case of *M'Kinley* v. *Wilson* may be taken as an illustration of an account-current which was an account of transactions not purely of a banking character, including as it did purchases and sales. Nevertheless, on the facts which brought out the intention of parties, it was held that the account which was made out as an "account-current" was truly of that character, and the presumptions as to appropriation of payments applied. But in cases where the accounts truly disclose trade transactions the presumption does not apply. Where in course of a series of transactions of trade, payments are made to account, these go against the general indebtedness, the debtor not being entitled to claim that they presumably go to clear off the first items, and the creditor not being entitled to shut the debtor out from his defence against the liability for any particular item by maintaining that the debtor in making payment has cleared off that particular item and cannot go back upon it.

Now, in my opinion, the whole character of the accounts in this case is against the idea of the application of the doctrines which apply to accounts-current. It may be true that the pursuers did not absolutely confine their dealings with Croom to transactions of purchase and sale, and sometimes helped him over a temporary difficulty by financial aid. But that would not, as I think, necessarily convert what was in its general character a tradesman's account into an account-current. Therefore, as I said before, if it were necessary to decide the matter strictly, I should be inclined to hold that the defence set up on the theory of an account-current must fail.

But I am clearly of opinion that if there were any ground for holding that this was an account to which the doctrine of particular appropriation might apply, the presumption arising upon it has been completely redargued. The present pursuers, when they took over the business and assets of Hay & Company, made their

position quite clear, to the effect that in business with them Cromb was to make payments for that which they sold to him. This is made distinct by their insisting upon a payment to account on a purchase of hay before Cromb was allowed to take delivery, and by their repeated insistance that he should pay sums to account of purchases made from them. In no more marked way could Hay & Company, Limited, show their intention to appropriate to debts incurred to them payments to them for purchases made after they took over the business. I agree with the Sheriffs in holding that their right to do so has not been lost to them by anything that has been disclosed in the documentary or parole evidence.

I am therefore in favour of affirming the judgment in the Court below. The case will require to go back to the Sheriff that the question of interest may be settled, and in that view I would propose that the expenses in this Court should be awarded to the successful party, and that power should be given to the Sheriff to decern for them.

LORD STORMONTH DARLING—The stringency of the rule in *Devaynes'* case (1 Merivale, 585) has been a good deal modified by the course of recent decisions, particularly by the case of *Cory Brothers & Company*, (1897) App. Ca. 286 (see Lord Macnaghten at p. 293). In particular, it is now quite recognised that the rule (never a rigid rule of law, but always yielding to evidence of the intention of the parties) does not apply at all where there is no account-current between them of the nature of that between banker and customer, nor where it appears that the creditor intended not to make any appropriation but to reserve the right.

The only difficulty I have had in this case is that it arises not between the parties to the account but between one of them (the creditor) and a cautioner for the debtor, and that there was a change in the *persona* of the creditor during the currency of the account by the conversion of the private firm into a limited company—a change which (everybody is now agreed) brought the liability of the cautioner to an end as from the date of the conversion on 1st August 1904, but which neither limited company nor cautioner understood at the time as having that effect. I say that, because if the cautioner had realised his position he would not have written the letter of 26th July 1905, in which he declared that in any event he would take no responsibility beyond that date, although in truth his responsibility had ceased a year before, and the company on the other hand, if they had recognised the truth, would have intimated the change to the complainer at once, and would certainly not have replied to his letter repudiating further responsibility by writing the letters of 29th July and 4th August, in which they claimed payment of the full limit of his liability (£75), which clearly implied that they believed his liability to have continued after the formation of the limited company. Neither party, I believe, thought at the time that the conversion of Hay & Company into Hay & Company, Limited, made the least difference in the matter. The cautioner simply remained quiescent, while Hay & Company, Limited, went on dealing with the debtor till he became bankrupt in August 1905. They now sue the cautioner for the amount of the purchases remaining unpaid by the debtor down to the formation of the limited company, less the payments made to account by him before that date, the amount sued for being £67, 4s. 6d., with interest. But the defender claims to have the benefit of all the payments to the credit of the account in their order, whether before or after that date, on the assumed principle of *Devaynes'* case.

But, notwithstanding the misconception, common to both parties, which I have pointed out, and which is not shown to have prejudiced the cautioner's position, I have come to agree in what I understand to be the view of all your Lordships, viz., that the account between the auctioneers and Cromb is not an account-current to which the rule in *Devaynes'* case can apply, and that, even if it were, the limited company did evince an intention so to appropriate the subsequent payments into the account as to make Cromb, as far as possible, pay his way.

LORD LOW concurred.

LORD ARDWALL—The principal facts in this case are not in dispute. On 7th May 1894 the defender granted to Hay & Company, a firm of auctioneers, the guarantee by which he guaranteed the debts that might be due to Hay & Company by a dairyman called Alexander Cromb to the amount of £75. After certain dealings had taken place between Hay & Company and Alexander Cromb the business of Hay & Company was transferred, with its rights and obligations, to Hay & Company, Limited, who were duly incorporated under the Companies Acts on 1st August 1904, and on that date took over the assets and liabilities of Hay & Company. At that date the sum of £67, 4s. 6d. was due to Hay & Company by Alexander Cromb, and this action is brought for recovery of that sum, with periodical and other interest.

The parties are agreed that the defender is not liable for any advances made or goods supplied by Hay & Company, Limited to Alexander Cromb after the incorporation of the limited company, but the defender further maintains that the guaranteed debt has been extinguished by payments made by Alexander Cromb to Hay & Company, Limited, after 1st August 1904, and the only question which was discussed on the appeal was whether the defender was entitled to have such payments imputed to the extinction of the debt of £67, 4s. 6d. I am of opinion that he was not so entitled, and that accordingly the judgment of the Sheriff ought to be affirmed.

This case is of some interest as being, so

far as the citation of authorities at the debate was concerned, the first case in which the question of appropriation of payments to account of particular debts has been raised in this Court since the authoritative judgment of the House of Lords in the English case of *Cory Brothers & Co.* v. *Owners of "The Mecca,"* 1897, A.C. 286.

Two points were raised at the debate—*first*, whether the account, which was the only account rendered by Hay & Company, Limited, to the principal debtor, was so stated as to infer a presumption against the pursuers that the payments to account claimed by the defender had been appropriated by the pursuers to the items due by Mr Cromb to them in order of date, or, in other words, whether the account was a proper account-current between the parties similar to that between a banker and his customer? and *second*, whether on and after 1st August 1904 the payments made by Mr Cromb to Hay & Company, Limited, were appropriated by them from time to time to particular transactions.

The general law regarding the appropriation of payments was laid down with great clearness by Lord Macnaghten in the case above quoted, page 293. He says—"When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment, the right of application devolves on the creditor. . . . The creditor has the right of election up to the very last moment, and he is not bound to declare his election in express terms. He may declare it by bringing an action, or any other way that makes his meaning and intention plain. Where the election is with the creditor it is always his intention, express or implied or presumed, and not any rigid rule of law, that governs the application of the money." The noble and learned Lord states this as the law of England, but in this matter the law of England and the law of Scotland are identical, and have been so since the leading case known as *Clayton's* case (better known in Scotland as *Devaynes'* case) was decided.

According to the above statement of the law, and it being admitted that no appropriation was made at the times of payment by the debtor, the question in the present case comes to be whether by rendering to the principal debtor the account, the pursuers, Hay & Company, Limited, appropriated the payments in question to the first items in their account against Mr Cromb. I am of opinion that they did not.

In considering this question it is obvious that a great deal must depend on the form of the account, because if the account is so stated as to entitle the debtor to assume that there has been appropriation by the creditor of certain payments to certain items of debt the result will be that the creditor will be barred from going back upon that appropriation. Now, the account No. 18 of process is not stated as a proper account-current at all. It first contains a record of all the goods sold or advances made to Mr Cromb by the pursuers, and next, below that, a record of all the payments made by Mr Cromb to the pursuers. Each of these columns is added up, the one deducted from the other, and a balance struck. Now it appears to me that this is very far from being an account current. It was argued for the defender that an account stated in this way was in no view essentially different from an account stated with the debit and credit entries running side by side with each other, and that the fact of its not being so stated in the present case might simply be due to there not being room on the same sheet of paper so to state it. I do not think that this argument can be accepted seriously. If the debit and credit entries had been placed side by side, that might have raised a presumption of more or less force to the effect that the entries were to be set against each other in order of date—in short, that the account was an account current. In the present case there are two summations, and the fact that the one is deducted from the other in order to show the balance due certainly cannot turn what is merely a summation of items of debit separately from the items of credit into an account-current. Assuming that the pursuers desired to render a statement to Alexander Cromb showing the amount of his indebtedness to them, but without inducing him to believe that they were stating their account as an account-current, it is difficult to see in what other form they could have stated their account. I therefore have no doubt whatever that the account contains in itself nothing that the debtor was entitled to rely on as an appropriation of particular payments to particular items of debt, and nothing to show that the creditor appropriated or intended to appropriate payments in that way.

The two leading cases regarding the appropriation of payments in order of date to extinction of debit entries in order of date, namely, *Devaynes'* case, 1 Mer. 530, and the case of *Bodenham* v. *Purchase*, 2 B. and Al., page 39, were both cases of bankers' accounts, and indeed bankers' accounts are the typical examples of accounts-current. In *Devaynes'* case Sir William Grant, who was the Master of the Rolls, says that where an account-current is kept between parties as a banking account "there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably it is the sum first paid in which is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first payment on the credit side. The appropriation is made by the very act of setting the two items against each other."

This rule has been adopted both in England and in Scotland, but, as pointed out by the noble and learned Lords who decided the case of *"The Mecca,"* the rule in *Devaynes'* case had come to be considered a rule probably of much more force and

stringency than had ever been intended by the Master of the Rolls when he laid it down, although several cases *prima facie* falling within the doctrine in *Devaynes'* case have since the decision in that case been decided otherwise owing to their peculiar circumstances. The case of "*The Mecca*" was a case in which the account was stated very much in the same way as the one in the present case, and there it was held that there was no account-current between the parties and no other circumstances making it appear that the creditor intended to make any appropriation.

Among the Scotch cases which were cited at the debate the case of *Lang*, 22 D. 113, may be taken as typical of the ordinary current account. In that case it was an account between agent and client, but the agent had from time to time been accustomed to make advances to or on behalf of the client, and, on the other hand, the client from time to time made payments to the agent by cash or by bill or note, and the account-current was kept in practically the same way as a banker's account, although the relation of the parties was that of agent and client. It was accordingly there held that the account was an account-current to which the principle of *Devaynes'* case was applicable.

The case of *Dougal* v. *Lornie*, 1 F., 1187, was a typical case of a different kind of account. That was a case of a plumber's account divided into sections according to work done from time to time, and the account sued for was the fifth of a series of accounts rendered in a similar way. For the work charged in these accounts various payments to account had been made, and it was there held that indefinite payments to account of a tradesman's account were not to be ascribed to the items or sectional accounts in order of date so as to preclude the debtor from subsequently challenging any item in the account. Lord Adam there pointed out that "the rule in *Devaynes'* case applies to cash accounts current, and has no application whatever to a tradesman's accounts. Payments to account of a tradesman's account go not against individual items in order of date but against summation."

There may, however, be accounts-current consisting of entries other than proper cash entries. The case of *Mackinlay* v. *Wilson*, 13 R. 210, was a case of this kind. That was a case where two horse-dealers had frequent dealings with each other, and in the account sued for by Mackinlay, which was titled "account-current," horses and harness and cash were entered on the debtor side of the account, and horses, cash, and other things were entered on the other, the dates on both sides being consecutive. There prescription was pleaded, and it was against that plea that the pursuer pleaded that the account was an account-current and that prescription was excluded. Before deciding the question of prescription a proof was led, and on that proof the Court was satisfied that it was the intention of parties that the transactions should be set against each other from time to time as they occurred, and that the account therefore was rightly stated as an account-current, the one side of the account being set against the other, and that accordingly the plea of prescription should be repelled—see opinion of Lord Adam, page 217.

The case of *Batchelor*, 19 R. 903, forms a useful contrast to *Mackinlay's* case, for there it was held that a merchant's account with cross-entries was not a proper account-current. There was no proof in that case, and it was decided simply upon the account as it stood, Lord Trayner saying "This is simply a merchant's account."

From an examination of the various cases which were quoted at the debate it is evident that the important alteration in the statement of the law that was introduced by the decision in the case of "*The Mecca*" is this, that while in several of the former cases the law was stated to the effect that, failing appropriation by the debtor or the creditor, the law appropriated payments to items of debit in order of date, in the case of "*The Mecca*" the law was stated to the effect that failing appropriation of the money by the debtor the appropriation of the money is governed by the intention of the creditor, expressed, implied, or presumed, and that such intention may be presumed from the form and statement of the account rendered by the creditor to the debtor. Applying this law to the present case, my opinion is that it cannot be presumed from the account that the creditor intended to appropriate payments to account as such after 1st August 1904, to the items of debt in order of date, and that by making the claim and raising this action for £67, 4s. 6d. they have shown that they do not so appropriate them.

But the pursuers maintain, further, that if any presumption arises from the statement of the account that is displaced by the fact that at the times of the payments which the defender seeks to impute in order of date to the debt incurred by Cromb before 1st August 1904, they were appropriated by the parties to particular items, and, to begin with, that the very first payment after 1st August, namely, £4 on 16th August, was paid for hay bought at Southtown sale, and in response to a letter dated 11th August 1904. This is established by the proof. The course of dealing with the new firm accordingly commences with a payment appropriated to a specific item. Again, it is proved that certain cows were paid for by instalments of £1 per week, and then again it appears that Hay & Company, Limited, were frequently finding fault with Mr Cromb for not paying for particular purchases which he made from them, and for not sending in stock to be sold by them so as to pay for such purchases. In short, without going into further details, I am of opinion that it appears from the whole of the proof that when those who had the management of Hay & Company, Limited, who of course had a responsibility to the company, commenced dealing with Mr Cromb on and after the incorporation of

the company they dealt with each transaction between them and Cromb separately as it arose, and demanded and received payments to account of the particular transaction. This course of dealing is quite inconsistent with treating these transactions as parts and portions of an account-current. But further, it proves the appropriation of particular payments to particular transactions, and therefore excludes the idea that the payments on August 16th and onwards were payments which the defender is entitled to have imputed towards the debt which had been incurred previous to that date.

On both the grounds above dealt with I am of opinion that the judgment of the Sheriff should be affirmed, and the case remitted back in order that the question of interest may be dealt with.

The Court dismissed the appeal.

Counsel for the Appellant (Defender)—Hunter, K.C.—J. Macdonald. Agents—Menzies, Bruce Low, & Thomson, W.S.

Counsel for the Respondents (Pursuers)—The Dean of Faculty (Campbell, K.C.)—Jameson. Agents—Carmichael & Miller, W.S.

Thursday, December 19.

FIRST DIVISION.

THE TUDOR ACCUMULATOR COMPANY, LIMITED, PETITIONERS.

Company—Petition for Compulsory Winding-up—Petition Subsequently Departed from—Motion by Other Creditors to be Sisted as Petitioners in Place of Creditors Withdrawing—Competency.

Creditors who had presented a petition for the compulsory winding up of a company, having compromised their claim against the company, departed from their petition. Certain other creditors thereupon presented a note stating that they desired to insist in the petition, and craving the Court to sist them as petitioners in room and place of the others. The company lodged answers questioning the competency, but did not oppose the application.

The Court *sisted* the applicants as craved.

On 1st November 1907 Hudson & Kearns, Limited, Stamford Street, London, presented a petition for the compulsory winding up of Scott Stirling & Company, Limited, 13 Campbell Street, Hamilton (of which company they were creditors), and for the appointment of an official liquidator. On 20th November Scott Stirling & Company, who had meantime resolved upon a voluntary winding-up, applied to the Court under sec. 147 of the Companies Act 1862 (25 and 26 Vict. cap. 89) to have the liquidation placed under the supervision of the Court.

Thereafter, on 26th November, the Tudor Accumulator Company, Limited, 119 Victoria Street, Westminster, London, who were creditors of Scott Stirling & Company under a decree against them for £247, presented a note in which they, *inter alia*, stated that Hudson & Kearns, Limited, having discharged their claim against Scott Stirling & Company, did not intend to insist further in their petition; that the affairs of Scott Stirling & Company had been in an involved condition for a considerable time; that during the past year a large number of actions had been brought against them in the Court of Session; that in these circumstances inquiry into the company's affairs was necessary in the interests of the creditors; that such inquiry could not be satisfactorily entrusted to the voluntary liquidators, who were the nominees of the directors; and that accordingly the company should be wound up by the Court and an official liquidator appointed. They accordingly craved the Court to sist them "as petitioners along with or in room and place of the said Hudson & Kearns, Limited," and to order Scott Stirling & Company to be wound up under an official liquidator.

Scott Stirling & Company lodged answers in which they averred, *inter alia*, that the note was incompetent.

Counsel for the Tudor Accumulator Company, in moving that that company be sisted, stated that though the application was a novel one in Scotland it was part of the appropriate procedure in England, where such applications were frequently made and granted; and referred to the Rules, of Court (General Rules, March 1893), made pursuant to sec. 26 of the Companies (Winding up) Act 1890 (53 and 54 Vict. cap. 63), *vide* Buckley on the Companies Acts, 8th ed., p. 972.

Counsel for Scott Stirling & Company stated that he did not oppose the application.

The Court sisted the Tudor Accumulator Company, Limited, as petitioners in room and place of Hudson & Kearns, Limited, to the effect of enabling them to insist in the petition.

Counsel for the Tudor Accumulator Company, Limited—Scott Dickson, K.C.—Macmillan. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Scott Stirling & Company, Limited—Sandeman. Agents—Deas & Company, W.S.