

JANE SMITH, Appellant.—*Lushington*—*James Campbell*. No. 9.

MARGARET MITCHELL, Respondent.—*Spankie*—*A. M'Neill*.

Proof—Partnership.—Held, (affirming the judgment of the Court of Session), That private books of accounts, kept by one partner, containing, among other entries, memoranda relative to company affairs—there being no evidence that the books had been seen by the other partner—could not be received as evidence against the representatives of the latter partner.

JOHN MAXWELL and Archibald Smith carried on business in company, as writers, in Glasgow. Maxwell died in 1793, and Smith in 1808. In mutual actions raised at the instance of the representatives against each other, for the balance respectively alleged to be due from the one partner to the other, a question of evidence arose. The firm had not kept regular books of account, and there was no company cash-book indicating what sums had been drawn out by Maxwell; but there were two small books, apparently the private books of Smith, containing memoranda of his personal affairs, and occasional entries relative to company concerns; among others, sundry items' of payments made by Smith to Maxwell. If these items were taken into account, the balance would be largely in favour of the representatives of Smith—if they were excluded, the balance would be largely in favour of the representatives of Maxwell.* There was no evidence that in point of fact these books had been seen or consulted by Maxwell. The Lord Ordinary, Alloway, found, 'that there was no reason to suspect that these books had not been fairly kept by Smith at his office, and subject to the inspection of Maxwell whenever he chose to look at them; and before answer remitted to an accountant to prepare a report of the state of accounts betwixt the parties, in which he will give such credit to the books in question as he shall consider them entitled to.' The accountant reported that both books were entitled to credit, and ought to be sustained as evidence; and that a balance of L. 489. 3s. was due, as at Martinmas 1808, to the representatives of Smith. Objections having been made to this report, the Lord

March 10. 1830.

1st DIVISION.
Lords Alloway
and Eldin.

* Before Smith's death, an accountant, founding upon the entries in these books, had reported a balance due to Smith, which, although not actually admitted by Maxwell's representatives, does not seem to have been, for a long while, actively disputed.

March 10. 1830. Ordinary, Eldin, found, that the 'said books ought not to be received as evidence in the accounting, and remitted to the accountant to amend his report accordingly;' and the Court adhered, with expenses.*

Jane Smith appealed.

Appellant.—No suspicion whatever attaches to the books in question; and there is every probability that their contents were quite well known to Maxwell. The company entries relative to payments made to him by Smith, are corroborated by various circumstances, and confirmed by the fact, that the representatives of Maxwell for years remained contented with the report of an accountant, framed on the principle that these books were legal and sufficient evidence. To strike out these payments, would lead to the untenable conclusion that Maxwell had not drawn money out of the copartnery at all, as there are no traces of any other payments to him.

The respondent's Counsel was stopped.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed.

Respondent's Authority.—Phillip's Law of Evidence, vol. i. p. 266.

RICHARDSON and CONNELL—D. CALDWELL,—Solicitors.

No. 10. JOHN KIRKPATRICK, Esq. Appellant.—*Spankie—Brown.*

ISOBEL INNES AND JOHN GAVIN, Respondents.—*Lushington.*

Trust—Title to Pursue.—A person having conveyed a right in a depending action to trustees and their assignees; and the trustees having died without assigning; and the next of kin (who was interested in the subject of the trust) having confirmed as executor to the truster; and a creditor of the next of kin having adjudged the right;—Held, (affirming the judgment of the Court of Session), that the creditor had a good title to pursue the action.

* 5. Shaw and Dunlop, No. 21. p. 32.