Friday, March 9.

SECOND DIVISION.

[Sheriff of Caithness.

M'ADIE *v.* M'ADIE'S EXECUTRIX.

Writ—Res mercatoria—*Proof*—*Resting-Owing.*

In an action against the representatives of a person deceased, for the amount of an account extending over a number of years, and consisting partly of the price of goods, and partly of the amount of cash advances, the pursuer produced a writing signed by, but not holograph of the deceased or tested, bearing that he had examined the account against him in the pursuer's ledger and that it was correct. *Held* that the document was not privileged as a writ *in re mercatoria*, did not constitute the account a "fitted" account, and therefore did not prove the debt. Lord Rutherfurd Clark *dissented*, on the ground that the account being, with the exception of certain items, such an account as might have been proved by parole, the acknowledgment produced was sufficient to prove it, except so far as it consisted of loans above £8, 6s. 8d.

Process—Proof—Cash Advances against Cheques, Proceeds of which received by Endorsee—Parole Evidence, Competency of.

G. received from J., his brother, cheques which he cashed and of which he received the proceeds. In an accounting after the death of J., G. maintained that these cheques had in pursuance of a course of dealing been granted in payment of advances he had made to J., but for which he produced no vouchers. *Held* that in the circumstances of the case, the alleged advances were not established, and *Question*, Whether parole evidence was competent to establish them?

John M'Adie, fishcurer in Pulteneytown, Caithness, died on 29th July 1877, leaving a widow who was confirmed his executrix in October following. In 1880 George M'Adie, draper in Wick, brother of the deceased, raised this action in the Sheriff Court there against Mrs M'Adie, as her husband's executrix, in which he concluded for £955, 5s. 4d., with interest from 27th March 1877, and £8, 17s. 1d. with interest from 28th July 1877. He alleged that the first of these two sums was resting-owing to him by the deceased at the time of his death for goods furnished and cash supplied to him up to 27th March 1877, and the second for goods supplied subsequently to that date. Some of the entries bore to be for goods supplied to John M'Adie for fishermen in his employment. Indebtedness for a part of the second account was admitted by the defender. The account for the whole sum of £964, 2s. 5d. sued for commenced on 31st October 1865, and closed on 19th July 1877. It was taken from the pursuer's books. It was an account for (1) goods supplied; (2) disbursements made for John M'Adie; (3) loans under £8, 6s. 8d.; (4) loans over £8, 6s. 8d.; (5) money which the pursuer alleged that John M'Adie had collected for him, but which had not been accounted for.

The pursuer produced the following document (No. 6 of process), which he alleged to be an acknowledgment of indebtedness on the part of the deceased of the sums sued for up to its date—

"*Wick, 27th March* 1877.—I have this day examined account against me in my brother George's ledger, showing balance due by me of Nine hundred and fifty-five pounds five shillings and four pence sterling, for goods and cash supplied to me to this date, and I hereby declare the same correct JOHN M'ADIE."

This writing was not appended to the account in the books of the pursuer, but was written on a small slip of paper by itself. It was not holograph of John M'Adie, but it bore to be signed by him, and the genuineness of the signature was not disputed.

The defender pleaded — "(2) The alleged acknowledgment founded on not being holograph of the deceased John M'Adie nor in any way tested, is inept and insufficient to constitute a claim against the defender, his executrix. (3) The defender, as executrix of the late John M'Adie, not being indebted to the pursuer in the sums prayed for, except to the extent of £3, 9s. 2d., for goods supplied in May and July 1877, she is entitled to decree of absolvitor against the pursuer for any sum beyond the said amount admitted, with expenses."

The Sheriff-Substitute (SPITTAL) allowed a proof.

The pursuer having admitted in his examination that he had previous to the raising of the action made over his business, including book debts, to Charles Dunnet and George Swanson, two of his shopmen, the defender's procurator moved the Court to dismiss the action in respect of no title to sue on the part of the pursuer. On the motion of the pursuer's procurator the Sheriff-Substitute sisted them as pursuers.

Proof was thereafter resumed, in the course of which the following facts were elicited—John M'Adie had had a course of dealings with the pursuer since the latter commenced business as a draper in 1846, till John's death in 1877. They had also had bill transactions. The pursuer had retired a good many bills for his brother, and these formed items in the account sued on. The pursuer deponed that he had also made cash advances to his brother, taking cheques for them. "My brother often came to my shop and took money as he required, and left a cheque for the sum, and I would cash the cheque some time after when his bank account admitted of it." On this point Dunnet and Swanson stated that John M'Adie used to come to the shop after bank hours with cheques, which they cashed for him. The other pursuers, Dunnet and Swanson, had been in the employment of George M'Adie during the whole time over which the account extended. The document above quoted was written out by Dunnett and signed by the deceased of the date it bore, in the shop, in presence of Dunnett and Swanson, after the deceased had occupied two hours in examining the ledger. Swanson explained in his evidence that the reason of the acknowledgment founded on being signed, was that a large bankrupt stock had been bought by G. M'Adie for his business, and the giving of the document was intended to help to raise money, John M'Adie intending to be cautioner for his brother.

The Sheriff-Substitute "decerned against the defender as executrix of the late John M'Adie, and in favour of the pursuers Charles Dunnet

and George Swanson, for payment of the principal sums with interest, as concluded for.

"*Note.*—The main point here is the document No. 6 of process. It appears to me to be a document *in re mercatoria*, binding on the late John M'Adie, though only signed not written by him, and binding also on the executrix. *Rule* v. *Aiton*, M. 16,961, and some other cases under 'writ' appear to come near the present case."

The defender appealed to the Sheriff, who "sustained the appeal and recalled the interlocutor of the Sheriff-Substitute, and allowed both parties further proof, by the production by the pursuers of the business books in which the accounts of John M'Adie with George M'Adie were contained, and by the defender of John M'Adie's books.

"*Note.*—The analysis of the account sued for, the evidence as to the document No. 6, and an examination of the authorities, have led the Sheriff to the conclusion that that document cannot be viewed as *in re mercatoria.*"

Thereafter he remitted the process to Mr James Gilchrist, banker, Wick, as an accountant, to examine the books, accounts, cheques, and other documents in process, and to report a statement of accounts between John and George M'Adie.

"*Note.*—The Sheriff finds, on examining the ledger, not only that there is no adjusted balance on 27th March 1877, the date of the document No. 6 of process, but that the account sued for seems inconsistent with the ledger. The entry of boats and nets handed over in 1870, and not entered until January 1877, has evidently, from the colour of the ink, not been made at the same time as the other entry under 15th January 1877. Further, there is deducted in the account sued for, under date 27th May 1877, a discount of £32, 11s. 3d., allowed in consideration of Alexander Miller's account and others, which is not in the ledger, is not satisfactorily explained by the evidence, and seems a random sum to bring out the balance stated in No. 6 of process. Another curious thing is, that this entry of the subsequent date of 27th May 1877 is necessary to get the summation at 27th March 1877 in the ledger to tally with the balance stated in the document (No. 6 of process) of that previous date, 27th March 1877. At best the Sheriff could not have given any further effect to the document than to consider it as a docquet to an account—separate, indeed, from the account—but that was held of no moment in *Mackenzie* v. *Mackenzie's Trustees*, 14th June 1831, 9 S. 730. There such a docquet was held not to exclude a remit to an accountant to examine the accounts so docqueted, and to report. The circumstances above alluded to seem, however, to bring the case nearer to *Laidlaw* v. *Wilson*, 27th January 1844, 6 D. 530, where similar suspicious circumstances led the Court to refuse to sustain such a docquet as a voucher of debt at all. The accountant will therefore, under the remit now made, frame an account between the brothers John and George M'Adie, embracing the cheques produced by the defender, which being holograph of John and endorsed by George M'Adie, seem to require at least equal effect given to them with the improbative document by John (No. 6 of process)."

Mr Gilchrist in his report, after tabulating the entries of the account under their appropriate headings, brought out a balance of £715, 8s. 0½d. against the deceased John M'Adie; but reported certain entries amounting to £553, 14s. 4d., as "all unsupported by any vouchers or a trace of corroborative evidence," and therefore falling to be deducted from the balance if disallowed by the Court. He credited to John M'Adie the amount of the cheques mentioned in the note of Sheriff.

The Sheriff, on considering the report, allowed these deductions, and found the balance due to the pursuers Dunnett & Swanson to be £161, 13s. 8½d., and decerned therefor with interest.

The pursuers appealed to the Court of Session, and argued—The document signed by the deceased was meant as a docquet to the ledger account. It was therefore a privileged writ, being *in re mercatoria*, and was probative of the resting-owing of the account to which it was appended,—*Stephen* v. *Pirie*, Feb. 1, 1842, 10 S. 279; *Fell* v. *Rattray*, Jan. 28, 1869, 41 Jur. 236; *M'Laren* v. *Liddell's Trustees*, 24 D. 577; *Mackenzie* v. *Mackenzie's Trustees* (*supra cit.*); 1 Bell's Comm. 342. The last entry of the account being within the three years, no part of it was subject to prescription.—*Auld* v. *Aikman*, July 7, 1842, 4 D. 1487. Many of the items in the account were for goods supplied to fishermen in the deceased's employment. Parole was competent to prove intromissions with moveables, and these entries could be brought under that head.—Dickson on Evidence, sec. 587. Collection of sums and disbursements on behalf of a third party could also be proved *prout de jure.*—*Glasgow Royal Infirmary* v. *Campbell*, Nov. 2, 1857, 20 D. 1. As to the items below £8, 6s. 8d. parole proof was of course competent. With the exception of about £43, the pursuer had produced written vouchers for the whole sums claimed, and as to these only referred to the docquet by way of corroboration. (2) The cheques drawn by John and endorsed by George M'Adie, if not themselves sufficient vouchers of the loans, were at least enough to let in parole proof.—*Thoms* v. *Thoms*, Dec. 20, 1867, 6 Macph. 174.

The defender replied—Loans to a person deceased must be proved by writ, tested or holograph. This document was neither. It was not in any sense *in re mercatoria.* — *Hamilton's Executors* v. *Struthers*, Dec. 2, 1858, 21 D. 51; *Alexander* v. *Alexander*, Feb. 26, 1830, 8 S. 602; *Miller* v. *Farquharson*, May 29, 1835, 13 S. 838; *Armand's Trustees* v. *Armand*, Feb. 6, 1869, 7 Macph. 526. (2) A cheque proved the passing of money, nothing more, and it could not found a claim to parole proof where it was not otherwise admissible.—*Haldane* v. *Speirs*, March 7, 1872, 10 Macph. 537.

At advising—

Lord Justice-Clerk—I am of opinion that the document No. 6 cannot be accepted as a voucher of the debt sued for. It bears to be signed by John M'Adie, and the signature is proved to be genuine. The body of the document is in the handwriting of Charles Dunnet, then a shopman of George M'Adie, and now the real pursuer of this action. It is not attested in any way, and is written on a small slip of paper. It is in the following terms—[*reads.*]

I do not gather from the evidence whether the account which this writing professes to attest was a progressive account entered in the ledger, or whether it was an account prepared from the original vouchers, and made up in the ledger for

the purposes of the attestation in question. We learn from the evidence of Swanson that the document was not signed, if it was signed, with relation to any settlement of accounts between the brothers, but for the purpose of assisting George M'Adie to complete a certain purchase in which John M'Adie intended to be his cautioner. The transaction was otherwise carried out, and the document was not used in the way which seems to have been contemplated when it was signed.

It also appears that John M'Adie, when he signed this paper had not gone over any of the vouchers of the account sued on, which extended over at least eight years, embracing a great number of cash transactions in addition to shop furnishings.

In these circumstances I am not prepared to give to this informal writing the effect of a settled account. It is not probative, being neither holograph nor tested. It is not in its character *in re mercatoria*, or privileged in any way, as it relates in a large proportion to alleged advances of money. Neither in its substance can it be held to have been granted in the ordinary course of dealing, or as part of a regular settlement of accounts. It was only at the most intended to operate as an undertaking, for the purposes of a transaction with a third party very imperfectly described, that John M'Adie would be bound as debtor for that sum. It by no means followed that the writing constituted an obligation for any other purpose. I think therefore that the account sued on must be dealt with in the ordinary way, and that this writing does not enable the Court to dispense with the necessary vouchers to instruct it. I take for granted that no other vouchers were forthcoming in 1877 than have been produced here; and although John M'Adie's knowledge of the business might have enabled him in two hours to learn all he wished to know for the object of the transaction in hand, it could not have been sufficient for a complete mastery of its details within that time.

I am therefore of opinion that the Sheriff-Principal was right in the remit which he made to the accountant. The accountant made a very careful and exhaustive report, which is the more valuable as it appears that he was familiar with the relations of the parties. In that report he left to the judgment of the Sheriff a question as to whether certain unvouched sums should or should not be allowed as deductions from the balance which he brought out. This question truly depended on the effect to be given to the improbative writing. The Sheriff, in respect that no objections had been stated to these deductions being allowed, sustained them; and as I am of opinion that this document cannot operate as a voucher, I am of opinion that his judgment ought in this respect to be affirmed.

A question of some interest was raised as to the effect to be given to certain cheques drawn by John M'Adie and endorsed by George M'Adie, of which George is admitted to have received the proceeds. The accountant has carried the amount to the credit of John M'Adie. It has been maintained against this result that although it is true that George M'Adie cashed these cheques they were drawn in repayment of advances made from the till to John M'Adie. There is no writing whatever to establish these advances, but it is attempted to prove by the evidence of Dunnet and Swanson, the shopmen, who are now in right of the alleged debt, that John M'Adie was in use to obtain such advances when the bank was shut, and to leave a cheque for the amount in their place. I greatly doubt the competency of permitting parole testimony to establish such advances; but even if in a single instance such evidence might be admissible, I am of opinion that the proof as it stands is entirely insufficient to set up a course of dealing of this description unsupported by any entry in the books of the creditor, and so liable to error and abuse. In the present case the alleged creditor has allowed these accounts to run on for more than twelve years. The debtor died six years ago; and we have no means of knowing what account he would have given of the transaction. I am of opinion that on this head also the judgment of the Sheriff should be affirmed.

Lord Young and Lord Craighill concurred.

Lord Rutherfurd Clark—I am sorry that I cannot concur in the judgment which your Lordships are about to pronounce.

The account sued for has been regularly entered as it was incurred in the books of the pursuer, which, as I believe, have been regularly kept. Certainly no imputation was made on them by the defenders.

The amount consists of five branches—1st, goods supplied; 2d, disbursements made on account of John M'Adie; 3d, loans under £8, 6s. 8d.; 4th, loans in excess of that sum; 5th, cash collected by John M'Adie on behalf of the pursuer, and not accounted for by him. It has not suffered the triennial prescription, and with the exception of the 4th item can be proved by parole.

It was stated by the counsel for the pursuer, and not disputed by the counsel for the defender, that all the loans above £8, 6s. 8d. were vouched by writing with the exception of £43 or thereabouts. I lay aside this sum in the meantime.

This being so, there has been produced to us a document signed by John M'Adie in which he declares that he has examined the amount in the ledger showing a balance against him of £955, 5s. 4d., and that the same is correct. It is not holograph or tested; but it applied to the account sued for, which is the only account against John M'Adie in the pursuer's ledger.

The debt sued for being provable by parole, I hold that the acknowledgment of it under the hand of John M'Adie is sufficient to prove it. It is said that the acknowledgment was obtained for an ulterior purpose. So it was; but it is not the less an acknowledgment of the debt. Nor do I find that the defender has made any attempt to impugn the accuracy of the account. Nothing is said against it on the record, and therefore in my opinion the acknowledgment is conclusive.

A remit was made to an accountant. I think that remit should not have been made. But the accountant has only been able to diminish the debt due on the account by bringing into it transactions which form no part of it, and by which he attempts to contradict the admission of the debtor. This I hold to be inadmissible.

As I have no voice in the judgment which is to be pronounced, I do not say anything in regard

to the unvouched loans exceeding £8, 6s. 8d. They are in a different category, and I think it right to reserve my opinion with regard to them.

The Court pronounced the following interlocutor:—

"Find that the document No. 6 is not probative in law, nor such as to exclude inquiry as to the accuracy of the accounts libelled: Find that the balance arising due on the said accounts, so far as legally vouched, is £161, 13s. 8½d.: Therefore dismiss the appeal; affirm the judgment of the Sheriff appealed against: Find the defender entitled to expenses in this Court; remit," &c.

Counsel for Pursuers (Appellants)—Mackintosh—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defender (Respondent)—Campbell Smith—Nevay. Agent—Wm. Gunn, S.S.C.

HOUSE OF LORDS.

Tuesday, March 6.

(Before the Lord Chancellor, Lord Watson, and Lord Fitzgerald.)

ALLAN *v.* CAMPBELL.

(*Ante*, July 19, 1881, vol. xviii., p. 707.)

Feu-Contract—Construction—Erection in Alveus *of Stream—Lower Heritor.*

Terms of a feu-contract which were *held* (*aff.* judgment of Second Division) to bar the feuar in an attempt to alter a weir with a view to convey an increased supply of water therefrom to his distillery.

In Court of Session 19th July 1881, *ante*, vol. xviii., p. 707.

The defender appealed to the House of Lords.

Counsel for the respondent were not called on.

At delivering judgment—

Lord Chancellor—My Lords, your Lordships having heard the arguments of the learned counsel for the appellant in this case, are, I believe, all of opinion that the judgment appealed from is right, and that it is not necessary to call for any argument from the learned counsel for the respondent.

The note asking for the interdict is no doubt expressed in large words—"from erecting or constructing any works on the bed, run, or sides of the river of Tobermory," and "to restore the said bed, run, or sides of the said river to the state in which they were before the operations complained of were begun." Read with the rest of the record it is quite manifest what it is that is complained of, and if there be more generality in the words than there is in the interlocutor there is no objection at all to the interlocutor, which is at all events within these words, if it be in itself right.

Now, the interlocutor appears to me, so far as the matter of fact is concerned (and there is no question of fact really raised by the appeal before your Lordships) to displace entirely the averment of the defender, made in his third answer to the pursuer's condescendence, in which he denies the general allegations of fact made by the pursuer, and explains "that the defender has recently commenced the repair and reconstruction of a channel or lead for conveying a supply of water from the river here referred to to distillery works belonging to him at Tobermory." I cannot but observe, my Lords, that that being the answer to the allegation of the pursuer, in which both the work executed in the river (the enlargement of the weir), and also the iron-piping, are complained of, it is quite plain to me from that answer that the defender himself has at all events construed the contract as including in the words "channel or lead" as they occur in the contract, not only the sluice between the works and the stream but also the channel artificially made in the stream itself by which the water is conducted to that sluice. At the same time, though I think it is satisfactory to find that his own view in that respect of the contract was such, I do not think that he would be held to be bound by it if he could show that that was an erroneous construction, and that in point of fact a different construction would make the interlocutor in substance wrong.

Now, what the interlocutor orders is this—it first of all declares "that the defender in erecting a continuation of the weir in the river on and beyond the flat rock marked A on the plan, including the stones marked C, D, and E on the plan, lying on the top of the flat rock marked A, has acted in excess of his rights under the feu-charter, and has made an illegal encroachment on the *alveus* or bed of the river which belongs to the pursuer," and it ordains him within a limited time to remove the whole of that illegal construction or encroachment. That is the matter complained of, and in my judgment it depends wholly and solely upon the proper construction of the feu-charter.

No complaint is made as to the defender's taking too much water, and therefore the question whether the water which he takes is or is not more than sufficient for his works does not at all arise in the action. In favour of the appellant it may be, I think, and ought to be, assumed that if he has done nothing else which he was not entitled to do, he has not taken more water than was wanted for the purpose of his works. But the question is, whether this grant of the use of the main stream or river authorises him to interfere with the channel of the stream or river. The words are "together with liberty to use as much of the water of the main stream or river that runs on the west side of the said piece of ground as shall be sufficient for carrying on such works as have been or may be erected thereon by the said John Sinclair or his foresaids, to be conveyed in a lead or drain under the road without raising its level to and from the said piece of ground in the direction and channel in which it is presently and has been hitherto used by the said John Sinclair, and not otherwise." On the face, therefore, of the feu-charter, two things appear to me to be referred to as existing facts—one is the existence of a certain main stream or river, which I think according to the natural meaning of the words means the stream or river in the condition in which it then existed; secondly, the actual and previous use, under whatever title,