Wednesday, November 18.

FIRST DIVISION.

[Lord Trayner, Ordinary.

M'KINLAY *v.* WILSON.

Prescription, Triennial—Account-Current—Sales and Purchases—Commission Transactions.

Held, in an action for payment of the balance upon an account, that a series of mixed transactions between two horse-dealers embracing sales and purchases of horses and other goods by both parties, purchases of horses on commission by the pursuer for the defender, and cash transactions, were properly stated in the form of an account-current, and that therefore the triennial prescription did not apply.

This action was raised in the Sheriff Court of Renfrewshire at Paisley at the instance of Alexander M'Kinlay, horse-dealer, Glasgow, against Archibald Wilson, horse-dealer, Strathbungo, for payment of the sum of £912, 7s. 9d., alleged by the pursuer to be due to him as a balance on certain transactions.

The pursuer averred—"The pursuer is a dealer in horses, and executes commissions for the sale and purchase of horses, and in that capacity he was employed by the defender, who is also a dealer in horses, to purchase and sell for him a large number of horses, and the defender also purchased from pursuer and got delivery of a number of horses, the particulars of which, as well as certain disbursements made, and of sums paid to the defender in connection therewith, are set forth in an account-current between the pursuer and defender, commencing 30th March 1876 and ending 5th October 1880."

The defender admitted "that the pursuer and defender had sundry transactions in horses between March 1876 and April 1880, in which the defender purchased horses from the pursuer, and the pursuer sold horses for the defender," but denied that any balance was owing.

The last item of charge in the account was dated 7th September 1880, and the action was raised on 29th September 1883.

The defender's first plea-in-law was that the account had undergone the triennial prescription.

The following are specimens of the account sued upon:—

1876.		*Dr.*			
Aug.	4	To Bay Horse	£54	0	0
	,,	,, ,, ,,	54	0	0
	,,	,, Waggonette	30	0	0
	8	,, Ches. Horse	58	0	0
Sept.	18	,, Bay ,,	57	0	0
	,,	,, ,, ,,	56	0	0
	25	,, ,, ,,	39	10	0
Oct.	11	,, ,, ,,	58	0	0
	14	,, Ches. ,,	46	0	0
Nov.	3	,, Bay ,,	48	0	0
	20	,, Brown ,,	22	0	0
	22	,, Grey ,,	66	0	0
Dec.	5	,, Ches. ,,	55	0	0
	11	,, Brown ,,	56	0	0
	19	,, ,, ,,	86	0	0
1877.					
Jan.	16	To Brown Horse	£70	0	0
	30	,, Bay ,,	40	0	0
	,,	,, Grey ,,	70	0	0
Feby.	2	,, Bay ,,	38	0	0
1877.		*Cr.*			
Feby.	28	By Ches. Horse	£36	0	0
Mar.	3	,, Bay ,,	35	10	0
	14	,, Brown ,,	45	0	0
	,,	,, ,, ,,	48	0	0
	29	,, Cash	3	15	0
	14	,, ,,	130	0	0
April	5	,, ,,	144	0	0
	14	,, Brown ,,	65	0	0
May	1	,, Cash	50	0	0
	16	,, ,,	50	0	0
	23	,, ,,	60	0	0
June	8	,, ,,	60	0	0
	22	,, Brown ,,	38	0	0
July	10	,, Cash	35	0	0
	14	,, ,,	60	0	0
	28	,, Ches. ,,	49	0	0
Aug.	4	,, Cash	50	0	0
	10	,, Bay ,,	54	0	0
Sept.	24	,, Cash	50	0	0
Oct.	10	,, 25 Horses	625	5	6
1877.		*Dr.*			
Oct.	5	To Harness	£ 4	0	0
	10	,, D. & D. M'Coll's account	64	8	6
	,,	,, Black Horse	36	15	0
	,,	,, Ches. ,,	32	0	6
	,,	,, Bay ,,	23	12	6
	17	,, Brown ,,	12	12	0
	,,	,, Black ,,	4	0	0
	,,	,, White ,,	4	0	0
	4	,, Bay ,,	46	0	0
	10	,, Brown ,,	38	6	6
1878.		*Cr.*			
Aug.	31	By Brown Horse	£ 57	0	0
Sept.	23	,, Cash	150	0	0
	28	,, ,,	70	0	0
Oct.	9	,, Brown Mare	65	0	0
	,,	,, 13 Horses	229	16	0
	30	,, Brown Horse	8	0	0
Nov.	1	,, ,, ,,	13	10	0
	15	,, ,, ,,	60	0	0
1879.					
Jan.	22	,, Bay ,,	45	0	0
	25	,, Cash	100	0	0

The Sheriff-Substitute (COWAN) on 30th October 1883 repelled the first plea-in-law for the defender.

"*Note.*—The Sheriff-Substitute is of opinion, on the authority of the case of *M'Kinlay*, December 11, 1851, 14 D. 162, that the transactions between the parties set forth in the account annexed to the petition do not fall within the class of cases to which the triennial prescription applies."

On appeal the Sheriff (MONCREIFF) on 29th November 1883 appointed the pursuer "to lodge a minute within six days, stating therein specifically which of the items in the account sued on represent the price of (1) horses or goods purchased or sold by him for the defender on commission; (2) horses or goods sold by him to the defender."

The pursuer in obedience to this order lodged a minute in which certain entries on the debit side of the account were specified to be sales by

the pursuer to the defender, and certain entries on the credit side of the account were specified to be purchases by the pursuer from the defender. The pursuer further stated that the other items, except two cross entries and the cash payments and disbursements, were all commission transactions, and that out of 214 transactions 69 were sales or purchases, and 145 were commission transactions.

The defender in his answers to this minute denied "that any of the horses or goods entered against him on the debit side of the account sued on were commission transactions between the pursuer and the defender; on the contrary, the whole items applicable to horses and goods entered on the debit side of the account against the defender were simple sales by the pursuer to the defender as seller and purchaser only; and the whole of the items entered on the credit side of said account, so far as applicable to horses or goods, were direct sales by the defender as seller to the pursuer as purchaser."

The Sheriff on 14th December 1883 recalled the interlocutor appealed against, and allowed both parties a proof of their averments on record, as explained by the minute and answers.

"*Note.*— . . . It appears to the Sheriff that before it can be decided whether the triennial prescription applies or not there must be evidence or admissions as to the course of dealing between the parties. If the sales by the pursuer to the defender were merely incidental or accessory to the commission business it may be that prescription does not apply—*Boyes' Trustees* v. *Hamilton*, June 30, 1829, F.C., and 7 S. 815. . . . . .

"Again, if the transactions are proved to have been all sales and not commission transactions, prescription probably will apply, and it may be necessary after all to discard the proof now allowed. The Sheriff is conscious of the inconvenience of allowing a proof *prout de jure* before answer on the defender's first plea, which goes to the competency of such proof. But he conceives that he has no alternative. There is authority for taking such a course—*Little* v. *Smith*, 8 D. 265; Dickson on Evidence, sec. 1938, 2 Mackay, 20; and the opinion of Lords Deas and Mure in *Simpson* v. *Stewart*, 2 R. 675–676."

The defender appealed to the Court of Session.

On 9th February 1884 the Court allowed the pursuer to amend his condescendence and to lodge new accounts.

The pursuer added to his condescendence the following statement — "With the said account-current, which embraces all the transactions between parties, the pursuer produces an account of his sales to and purchases from the defender, and also an account of the sales and purchases made by him for the defender on commission. The terms on which, as arranged, the pursuer purchased for the defender were that a commission of £2 should be allowed for each transaction in addition to the expenses of freight or carriage and keep. In the case of sales, a reasonable allowance was to be made to meet commission and charges. A few transactions were carried through under an express arrangement that the profits should be divided between the pursuer and defender."

On 12th July 1884 the Court pronounced this interlocutor—"Having resumed consideration of the appeal and record as amended, Adhere to the interlocutor of the Sheriff of 14th December 1883; the proof to apply to the record as amended, and under reservation of the question whether the defender's plea of triennial prescription applies in whole or in part to the pursuer's claim as amended, and remit to Lord Adam, Ordinary, to proceed as accords," &c.

The proof was taken by Lord Trayner, from which the following facts appeared—Between March 1876 and the autumn of 1880 the pursuer had a great many dealings with the defender involving large sums of money. Some of these transactions were sales of horses by the pursuer to the defender, and others sales by the defender to the pursuer. The pursuer also bought horses for and sold horses to the defender on commission. There was also an agreement between the parties that horses bought in Ireland by the pursuer might be selected while on board ship by the defender, who was to pay for them to the pursuer the price paid for them in Ireland, with expenses, and £2 for commission added. The account sued for was a general account, embracing the whole transactions within the said period.

The pursuer deponed—"There were cases where I had horses in my possession for some time, and sold them on commission to defender, but in most of the cases the defender got the horses that were sold on commission on the day I received them. (Q) If it was a purchase by you for defender, why did you not hand over the horse at once?—(A) I might not have bought it for him. I did not buy horses specially for him, but when he came into my yard he had his choice of my stock. It was not special orders that I acted upon in buying horses for him; he just told me the kind of horses he wanted, and he came to the yard and selected the horses he wished. . . . I do not say that I bought any special horses for the defender. He gave me a general indication of the kind of horses he wanted, and he came to my place and took any horses he liked." In regard to other cases there was an arrangement to divide the profits made upon horses bought and sold.

On 18th March 1885 the Lord Ordinary (Trayner) pronounced this interlocutor:—"Finds that the sum sued for is the balance of an account for goods sold and delivered by the pursuer to the defender; and that said account has undergone the triennial prescription: Sustains the first plea-in-law for the defender: Finds that the pursuer has not proved *habili modo* either the constitution or resting-owing of the debt sued for: Therefore assoilzies the defender from the conclusions of the summons.

"*Opinion.*—The pursuer sues in this action for payment of the balance of an account amounting to £912, 7s. 9d. The last item of charge in that account is dated 7th September 1880, and the action not having been raised until 29th September 1883, the defender pleads in defence the triennial prescription.

"Whether that defence can be sustained depends upon the nature of the account sued for. The pursuer represents his claim as the balance of an account incurred (1) in transactions of purchase and sale between him and the defender, and (2) transactions in which the pursuer acted as agent for the defender, and bought horses for

him on commission. In reference to the latter class of transactions, the pursuer in the account sued for charges the defender with the price of the horses bought *plus* the commission and expenses attending each transaction. The defender, on the other hand, avers that the pursuer did not in any case act as his agent—that the pursuer never made any purchases for him on commission—and that the whole transactions which took place between them were transactions of purchase and sale. If the defender's averments were correct, the triennial prescription is applicable, for in that case the sum sued for would be the balance of an account for goods sold and delivered; but if, on the contrary, the pursuer's averments are established, then, in regard at least to the agency or commission transaction, the triennial prescription probably is inapplicable. A proof was allowed to the pursuer by the interlocutor of the First Division, dated 12th July 1884, 'under reservation of the question whether the defender's plea of triennial prescription applies in whole or in part to the pursuer's claim.' That proof has been led before me, and the question thus reserved is now to be decided.

"If the determination of that question turned to any material extent on the defender's own evidence, I would have great difficulty in deciding it in his favour. His appearance in the witness-box produced on my mind an impression very unfavourable to him. But I think there is enough disclosed in the evidence of the pursuer to enable me to decide the question before me without any difficulty. I hold it proved (notwithstanding the defender's denial) that the parties did enter into an agreement, under which the defender was to be entitled to take any horse which the pursuer bought, at the price which the pursuer himself had paid for it, with the addition (1) of any expense actually incurred by the pursuer in reference to it, in its transmission from one place to another, and its keep, and (2) of a fixed sum of £2. This, the pursuer explains, is what he means by buying horses for the defender on commission; and the £2 additional to which I have referred, the pursuer calls his 'commission' on the transaction. I think this agreement was acted on, and that in pursuance of it the defender often removed horses from the pursuer's yard, and also from the steamer in which the horses bought by the pursuer in Ireland were brought to Glasgow, without at the time agreeing to or fixing the price of any particular horse or horses so removed. But I am of opinion that this agreement was not in any proper sense an agreement of agency, or an agreement under which the pursuer was to purchase for the defender on commission. The pursuer states in his evidence—'I did not buy horses specially for him (the defender), but when he came into my yard he had his choice of my stock. It was not special orders that I acted upon in buying horses for him; he just told me the kind of horses he wanted, and he came to the yard and selected the horses he wished.' The pursuer no doubt further states that the defender sometimes gave him instructions to buy a particular horse, or to attend a particular horse fair on his account, but, he adds, 'of course he had the option of not taking the horse. If he could not sell them in two or three days after he took them, he could return them.' If the pursuer had purchased on commission, or as agent for the defender, this would not have been so. The horses bought on commission would have been the defender's horses, and he would have been bound to pay for them whether he could re-sell them or not. The contract between the parties rather seems to have been a contract of sale on approbation, or of sale and return. In short, the defender's position as spoken to by the pursuer himself was this: he was not bound to take any horse unless he liked; if he did take a horse, he was to pay for it. The price of a horse taken by the defender was, if not fixed at the time he took it, at least ascertainable from a fixed standard, namely, a *cumulo* sum made up of three items, these being (1) the price actually paid by the pursuer; (2) the amount actually expended on and paid for its transmission and keep; and (3) the fixed and invariable addition, £2. That £2 the pursuer calls commission—but in truth it was not a commission but price. There are several circumstances brought out in evidence which go to corroborate this view, but it is unnecessary to notice them in detail. On the whole, I am of opinion that the only claim which the pursuer has against the defender, if any, is one for the price of goods sold and delivered. To such a claim the triennial prescription applies, and I accordingly sustain the defender's plea to that effect. That limits the pursuer to a proof of the constitution and resting-owing of the sum sued for by the writ or oath of the defender, and as such proof has not been adduced I have assoilzied the defender from the conclusions of the summons."

The pursuer reclaimed, and argued—This account was properly stated as an account-current. There were purchases and sales, commission transactions, and cash transactions, and a contra-account in regard to all these heads. Such an account did not fall under the terms of the Act 1579, cap. 83, which applied only to "merchants' accounts, or other the like accounts." Nor could the Act apply to a series of deliveries arising out of a single contract as was the case here—*M'Kinlay* v. *M'Kinlay*, December 11, 1851, 14 D. 162; *Laing & Irving* v. *Anderson*, November 10, 1871, 10 Macph. 74; *Macdougall* v. *Campbell*, June 22, 1830, 8 S. 959—*aff.* 7 W. & S. 19; Dickson on Evidence, secs. 485-487. If prescription applied to some of the entries in the account, and not to others, then the pursuer was entitled to apply the indefinite payments which had been made in extinction of those entries which would prescribe—Ersk. Inst. iii. 4, 2. If the plea of prescription was not good, then decree could be given for the amount sued for, as the pursuer's books together with his oath proved *habili modo* that the amount was due.

The defender replied—The pursuer was not entitled to remodel the account sued on—*Jackson* v. *Nicol*, January 14, 1870, 8 Macph. 408; *Hooper* v. *Keay*, 13 D. 178; *Maclaren* v. *Bradley*, December 12, 1874, 2 R. 185; *Campbell* v. *Dent*, 2 Mor. P. C. 792; Guthrie's Sheriff Court Cases, 564. The account showed that the transactions were, with few exceptions, purchases and sales, and the account therefore was just a merchant's account within the meaning of the Act. Even if there had been an antecedent agreement out of which the transactions arose, that would not alter the matter—*Kerr* v. *Magistrates of Kirkwall*, June 15, 1827, 5 S. 742.

At advising—

Lord President—In this case the Sheriff-Substitute repelled the plea founded on the triennial prescription, and he did so on the authority of the case of *M'Kinlay*, 14 D. 162, under the impression that the account was one between principal and agent, and not one between buyer and seller. I think that the Sheriff-Substitute was not justified in taking that view, because it did not appear from the account that the pursuer stood in the position of a commission agent. If that was his position it could only be proved by evidence. The Sheriff therefore recalled that interlocutor, and before answer allowed a proof as explained in a minute and answers put in, and that proof was for the purpose of ascertaining the true relation of the pursuer to the defender before disposing of the plea of prescription. In taking that course I think that the Sheriff acted quite rightly.

An appeal was taken against that interlocutor, and in consequence the proof was taken here, and not in the Sheriff Court. We have now the proof which was led, and the Lord Ordinary's interlocutor, in which the Lord Ordinary "Finds that the sum sued for is the balance of an account for goods sold and delivered by the pursuer to the defender; and that said account has undergone the triennial prescription." His Lordship therefore sustains the first plea-in-law for the defender.

Now, I am not able to concur in the opinion of the Lord Ordinary. I am not able to affirm, as matter of fact, that the sum sued for is the balance of an account for goods sold and delivered by the pursuer to the defender. I think the account is of a different description.

In all cases where the triennial prescription is pleaded, the first question is whether *ex facie* of the account the plea applies. It is scarcely necessary to say that that is not the case here, because both in the Sheriff Court and in this Court it was held that before determining whether the triennial prescription applied it was necessary to ascertain what had been the course of dealings between the parties. In other words, the question is whether the account sued on is properly stated as an account-current, with debit and credit entries, and not merely an account of goods on the one side and cash on the other—whether these were not a variety of transactions, in which the parties stood in the relation of vendor and vendee—the one however, being vendor in the one case and vendee in the other case.

The result of the Lord Ordinary's interlocutor would be to hold that this was not a proper way of stating the account, and that there should have been an account for goods furnished, and that the *contra* account should have been separately stated and pleaded in compensation. According to the view of the Lord Ordinary the two could not be stated as an account-current, and it is there that the important point arises.

I think that here the transactions were of such a nature that they could properly be stated in the form of an account-current, and that therefore the account sued on was properly stated, and if the account was properly stated, then *ex facie* of the account the triennial prescription does not apply. That I think was assumed by all who have applied their minds to the case. All took for granted that the triennial prescription would not apply to an account so stated, and that if the plea was to apply then the account would require to be stated in another form.

I am justified in saying that this was properly stated as an account-current, for not only were the transactions of a varied complexion, though the subjects were generally the same, but the sale one day was by the defender to the pursuer, and another day by the pursuer to the defender. These two sets of transactions go to meet one another—the credits meet the debits—and that within a day or two.

There is no doubt a considerable variety in the terms on which the sales and purchases, if they are to be so called, were made. Sometimes the parties had an agreement that horses bought in Ireland by the pursuer were to be at the disposal of the defender if he chose to take them, at the price paid for them in Ireland, *plus* the charges incurred, and a sum of £2 as a reward or commission. Sometimes there was an arrangement to divide the profits made upon horses so bought and sold. In these circumstances it cannot be said that there ought to be two accounts, one in which the pursuer is creditor and the other in which he is debtor. The transactions form naturally an account-current, and the triennial inscription has never been held to apply to such an account, and I do not think it involves the mischief that the statute was intended to remedy. I therefore think that the plea should be repelled.

There may be a difficulty in disposing of the case on the footing that this plea is to be repelled. The Lord Ordinary has found that the pursuer has failed to prove *habili modo* that the amount sued for is resting-owing, but what we have now to consider is whether the pursuer has proved *prout de jure* that the sum concluded for is due. That depends upon the pursuer's books, in regard to which we have had many observations. Those observations were directed to details, which it is not easy for the Court to follow, and not safe for the Court to investigate. The credit attaching to the pursuer's books, however, is of very material importance, and upon that question I think we should have an examination of these books by a competent person, in order to ascertain whether these books were regularly and well kept, whether they tally with one another, and whether the balance sued for is fairly brought out. If the report should be favourable I should then be disposed to give decree for the balance concluded for, or for whatever balance might be brought out. There are no books on the other side, and for that the defender must suffer.

I think that we should then have the materials for a judgment, for we have the oath of the pursuer, which would be practically an oath *in litem*. On the whole, I am of opinion that the pursuer has made out his case if the report should be in his favour.

Lord Mure—I am of the same opinion. This account is *ex facie* an account-current; it is called so by the parties, and it bears upon its face that it is so. It comprehends large transactions during the years 1876-1880; there were horses sold, and payments in cash made, one day the sales being by the pursuer to the defender, and another day by the defender to the pursuer. The trans-

actions were large; on one day I observe that twenty-five horses were sold at the price of £625. There were also sales by the pursuer to the defender of other articles, as, for example, a waggonette, harness, and a lorry.

The defender does not seem to have kept accounts after a certain date, and seems to have destroyed the accounts he had kept prior to that date.

I have looked into the cases bearing on this subject, and I find in the more recent cases, and especially in the case of *M'Kinlay*, observations by the Judges to the effect that accounts of this description do not fall under the triennial prescription. That doctrine is laid down by Lord Justice-General Boyle in *M'Kinlay's* case, and the same doctrine is contained in the earlier case of *Boyes' Trustees*. I am not therefore prepared to hold that this claim is struck at by the triennial prescription.

On the proof I think that the nature of the account is more clearly brought out. It has been proved that in a number of cases where horses were sold by the pursuer to the defender, the pursuer, though not acting exactly as a commission agent, was yet paid at a fixed rate for the transaction. That is different from an ordinary sale. I think that the arrangement has been proved, by which the defender was to take the horses brought from Ireland by the pursuer at an increased cost of £2 per head. I think that these transactions were of the nature of commission transactions, and therefore on the proof I am of opinion that the claim is not struck at by the triennial prescription. I also agree that there should be a remit to an accountant for a report in regard to the account.

LORD SHAND—As this case was originally presented in the Sheriff Court, and even after it had been brought here, it was impossible to say whether the plea of prescription was applicable or not, and therefore a proof before answer was allowed. The result of that proof is, I think, to show that the plea of prescription cannot be sustained. The transactions embraced in this account are of a very mixed character, and the defender admits in his first answer "that the pursuer and defender had sundry transactions in horses between March 1876 and April 1880, in which the defender purchased horses from the pursuer, and the pursuer sold horses for the defender." That embraces two classes of cases, viz., the case of sales by the pursuer to the defender, and sales by the pursuer for the defender.

Further, an investigation shows that there were a number of articles besides horses included in the account, and among others that there was the hire, as well as a sale, of harness. If the case stood in this way, that the accounts were separate accounts, and that the parties understood the accounts were to be separate, then the triennial prescription probably would apply. But in the present case the application of that plea is excluded not only by the nature of the transactions, but also from the fact that it is plain that both parties treated these entries not as goods sold and delivered, but that both held the one set of entries should be set off against the other, and a balance struck and paid. If one looks at the deposition of the defender, he there says that he paid the balance upon the account whenever it was due, but I think it is clear upon his evidence that the transactions between him and the pursuer were properly stated in the form of an account-current. The defender depones that at one time he kept a book in which his transactions with the pursuer were entered, but that the book had been lost, and then he says—"I marked down in the book anything I bought from pursuer, and also anything he bought from me, and the balance was always brought down either for or against me. I met the pursuer from time to time, and the account was generally made up then. Probably a balance was not struck every time I met the pursuer, but very often it was. On some of these occasions I was in his office, and he checked the balances on a scrap of paper. He made up a memorandum, showing how the account stood. When that was done he said he would square the account, but I do not know whether he did so or not. On every occasion when a balance was against me I paid it up." That evidence substantially comes to this, that the parties kept an account-current for a series of mixed transactions, and upon the authorities it is clear that the triennial prescription does not apply to a case of that kind.

I further agree with your Lordships that there should be a remit in order to ascertain how far the entries in the books support the entries in the account.

LORD ADAM—The account sued on contains a variety of transactions, and there are entries of the same character upon both sides of the account. I am quite satisfied the parties intended that as the transactions occurred the one should be set off against the other, and it follows that the account was correctly set forth as an account-current. Therefore upon this short ground I am of opinion that the plea of prescription should be repelled.

The Court pronounced this interlocutor:—

"Recal the interlocutor: Repel the first plea-in-law for the defender, and remit to Mr J. A. Molleson, C.A., to examine the pursuer's books and report whether they are regularly kept, and whether and how far they support the amount sued for."

Counsel for Pursuer—Mackintosh—Gillespie. Agent—J. Stewart Gellatly, S.S.C.

Counsel for Defender—Asher, Q.C.—Guthrie. Agent—John Gill, S.S.C.

Friday, November 20.

FIRST DIVISION.

DALGLEISH *v.* LAND FEUING COMPANY (LIMITED).

Public Company—Trust—Resignation of Trustee—Transfer of Shares—Trusts Act 1867 (30 *and* 31 *Vict. cap.* 97), *sec.* 10.

Held (Lord President *diss.*) that a trustee who has resigned office under the powers contained in the Trust Acts is entitled, on intimating his resignation, to have his name deleted from the register of a public company in which the trustees hold shares, without the execution of any transfer.