

“ real assets, or as subject to the mortgage or judgments
 “ claimed by the Respondents, for such payments as have
 “ been made by him, prior to the filing of the Respondent’s
 “ bill, in discharge of interest of debts by mortgage or judg-
 “ ment affecting such real assets, whether prior or subsequent
 “ to the Respondent’s demands ; and that the Appellant is en-
 “ titled to have credit out of the sums of 12,000*l.* and 6000*l.*
 “ in the pleadings mentioned for all such sums of money as
 “ were payable out of such sums of 12,000*l.* and 6000*l.* re-
 “ spectively which have been discharged out of the said sum
 “ of 15,000*l.*, raised by such mortgage as aforesaid, or by
 “ the Appellant, in preference to any demand of the Re-
 “ spondent’s upon the said sums of 12,000*l.* and 6000*l.*, and
 “ that the Respondents can be entitled to no demand against
 “ the Appellant in respect of the said sums of 12,000*l.* and
 “ 6000*l.*, or either of them, except as creditors of the said Sir
 “ William Parsons, deceased, and which the said Sir William
 “ might have had if living : and subject to the said orders
 “ and declarations, it is further ordered, That the said cause
 “ be remitted back to the Court of Chancery in Ireland to do
 “ therein as shall be just.”

June 29, 1816.

AGREEMENT.
 —SPEC. PER.
 —WAIVER.—
 INTEREST.—
 MORTGAGE,
 &c.

Agent for Appellant, LANF.

Agent for Respondents, MUNDELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

Ivory and Co.—*Appellants.*

Gourlay—*Respondent.*

Feb. 21, 23,
 1816.

THOUGH a merchant’s books may, by the law of Scotland,
 afford a *semiplena probatio* in his own favour, yet in order

MERCHANT’S
 BOOKS.—
 EVIDENCE.

Feb. 21, 23,
1816.

MERCHANT'S
BOOKS.—
EVIDENCE.

to have this effect they must be regularly kept ; for otherwise no man could be safe in dealing with another : and even honest demands can be enforced only in a manner consistent with general policy, and the interests of the community.

Claim.

Action.

Defence.

IN 1803, Ivory and Co., flax manufacturers at Douglas town, in the county of Forfar, became insolvent, and a sequestration (in the nature of a commission of bankrupt) was issued. Gourlay, merchant in Dundee, entered his claim for 1437*l.* for flax furnished. The trustee in the sequestration rejected the claim, and in 1804 an action was brought before the Sheriff to recover the above sum, being the price of four several parcels of flax ; the first alleged to have been furnished in 1797, the second in 1799, the third in 1800, and the fourth in 1802. The defence was, that there was no evidence that any of the parcels had been furnished, and that the second article had been introduced solely for the purpose of saving the first from the triennial prescription which, as there was no evidence of the furnishing of the second article, had run upon the first supposing it to have been furnished. The Sheriff decided in favour of the claim, and the cause was removed into the Court of Session by advocacy.

Merchant's
books.

First article.

Under a remit from the Lord Ordinary an accountant examined the books, and he reported that first article was regularly entered in the day book of Frederick Gourlay, under whom the Respondent, Gersham Gourlay, claimed ; that the amount was transferred to the ledger, and that an account of it

had been produced entitled on the back, in Ivory's hand-writing, "Gourlay's flax, 1796;" the delivery appearing to have taken place in 1796, though the price was stated in Gourlay's books to have been due in 1797.

Feb. 21, 23,
1816.

MERCHANT'S
BOOKS.—
EVIDENCE.

The second article was also entered in Gourlay's books, but placed to the debit of one Sturrock, a flax manufacturer who had become insolvent before Ivory and Co., and with whom Ivory and Co. had some dealings. This, in a different hand-writing from that of the original entry, was *by a marking on the margin*, without date, transferred to the debit of Ivory and Co. This article was in the ledger carried to the debit of Ivory and Co. and appeared not to have been charged against the estate of Sturrock. The accountant however was of opinion that the irregularity of the entry was such as to deprive it of that degree of credit which would have been due to it if originally made to the debit of Ivory and Co.

Second article.

As to the third article, it was entered in Gourlay's books, but the entry in the day-book was inserted at the bottom of a page, out of the regular order of dates; and the accountant was of opinion that it had been interpolated, and that the Pursuer was not entitled to found upon Gourlay's books in support of this article. But there was an entry in the receiving books of Ivory and Co., of flax received at different times from the 7th of March to the 29th of April, 1801; and Sturrock having deponed that he assisted in the purchase of a quantity of flax for Ivory and Co. from F. Gourlay and the Pursuer, but in what year he did not recollect, the accountant thought it might be presumed that the

Third article.

Feb. 21, 23,
1816.

MERCHANT'S
BOOKS.—
EVIDENCE.

Fourth article.

Judgment be-
low, all the
articles
proved.

Ersk. lib. 4.
tit. 2. s. 4.

Judgment.

parcel in question might be part of this flax, and therefore reported that sufficient evidence had been adduced to prove the delivery of the third article.

The fourth article was regularly entered in Gourlay's books, and in those of Ivory and Co., and, on the appeal, was not disputed.

The Lord Ordinary and Court of Session were of opinion that the evidence was sufficient to prove the delivery of all the articles, and decerned for payment of the whole demand. From this judgment Ivory and Co. appealed.

It was contended for the Appellant that the entries in the books of Gourlay were by themselves *semiplena probatio*, and, with the Pursuer's oath in supplement, and evidence of Sturrock, ought to be considered as full evidence of the delivery. On the other hand, it was contended that these books were too irregularly kept to be relied on as to the second and third articles, and that these being out of the question, the price of the first was extinguished by the triennial prescription.

Lord Eldon (C.) If a merchant's books may, by the law of Scotland, afford a *semiplena probatio* in his own favour, they ought at least to be more regularly kept than these are: for no man can be safe in dealing with another, if books so irregularly kept are to be admitted as evidence. The whole demand may be honest; but there are many honest demands which, on grounds of general policy, cannot be enforced, on account of the danger to the interests of the community; and if persons will keep their books in this way they must bear the loss.

Judgment:—“ That there was sufficient proof to
 “ sustain the demand in respect of the first article,
 “ unless barred by prescription ; that there was not
 “ sufficient evidence to sustain the demand as to
 “ the second and third articles ; but the finding to be
 “ without prejudice to the instituting of any other
 “ suit in relation to the third article, in case the Pur-
 “ suer should allege that any thing was due to him
 “ in respect thereof, otherwise than as represented
 “ in this account ; and that there was sufficient
 “ proof as to the fourth article : and with these
 “ findings the cause was remitted.

Feb. 21, 23,
1816.

MERCHANT'S
BOOKS.—
EVIDENCE.

Formal judg-
ment. Second
and third ar-
ticles not
proved.

Agents for Appellants, SPOTTISWOODE AND ROBERTSON.
 Agent for Respondent, RICHARDSON.

NOTE.—In the cases of “ Jones v. Hancock,” and
 “ Long v. Hancock,” p. 145, it ought to have been stated in
 p. 150, in addition to the statement as to the heir-at-law's
 case, that on the ejectment by the heir of Hugh Henry,
 the ultimate devisee, the judgment in K. B. was against the
 lessor of the Plaintiff, and that that judgment was affirmed
 by the Court of Exchequer Chamber. Vid. Index, or Table of
 Contents, tit. DEVISE.

In the case of Stacpoole v. Stacpoole, p. 221, by the words
 “ nothing was said upon this point” (viz. whether such of
 the next of kin as did not appeal against a decree were en-
 titled to the benefit of the appeal of one who did appeal)
 “ *in the ultimate judgment,*” it is meant that nothing was
 said about the point in the speech in judgment ; for it will
 be perceived, from the abstract of the formal judgment, that
 they were, though nothing was said about it in the speech in
 judgment, in fact held entitled to the benefit of the original
 appeal, having been first made parties to the original and
 cross appeals, as Respondent.—Vid. Index, tit. APPEAL.