[*7th May* 1835.]

DR. DONALD M'AULAY, Appellant.—*Tinney—Lushington.*

JAMES ADAM and DAVID BROWN, Jun., W. S., Respondents.—*Pemberton—A. M'Niel.*

Agent and Client.—Circumstances under which, although the accounts of a law agent, which had been rendered with a view to an extra-judicial settlement, were remodelled when the client required a taxation, and the remodelled accounts contained fictitious charges, (but which had been inserted by a third party employed to remodel them, and were afterwards withdrawn,) and 219*l.* was taxed off 819*l.*, the House of Lords affirmed with variations the judgment of the Court of Session, decerning for the balance with expenses.

Appeal.—Question, whether, where no objections are lodged to an auditor's report as to taxation of accounts, and an appeal is entered against the judgment of the Court approving of that report, it be competent to enter on the merits in the House of Lords; and if not so, whether, the only other question being one of costs, an appeal be competent?

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THE Respondent, Mr. Adam, acted for several years as agent for the deceased Mr. Donald M'Aulay, and his son, Dr. M'Aulay, the appellant, in various lawsuits in which they were concerned. In the year 1828 Mr. Adam entered into partnership with the other respondent, Mr. Brown, which partnership was dissolved in July 1831; and during the three years that it subsisted the business of Messrs. M'Aulay was conducted by Messrs. Adam and Brown.

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A state of accounts between them and Dr. M'Aulay, as at 25th March 1830, was rendered to that gentleman, by which it appeared that, after giving credit for the sums paid to account, there was a balance due to Messrs. Adam and Brown at that date of 464*l.* 17*s.* 5*d.*, exclusive of certain accounts previously incurred to Mr. Adam, and due to him as an individual.

Dr. M'Aulay, having been afterwards pressed for a settlement, expressed a desire that the accounts should be submitted to the auditor of Court for taxation, which was acquiesced in by Messrs. Adam and Brown; but as they alleged that the accounts, instead of being over-charged, were stated at a lower rate than they were entitled to have charged, they reserved to themselves the power of stating the charges at the full amount which they were entitled to demand; and they intimated to Dr. M'Aulay that they were sent to a Mr. Robertson to remodel for the auditor, and to fill up the regular fees.

A copy of the accounts as thus remodelled was afterwards sent to Dr. M'Aulay, with a notice that the 16th May 1831 had been fixed for the taxation; but he declined attending on that occasion, on the ground that a much longer notice was requisite to enable him to examine the accounts, and instruct an agent to state objections to them.

The copartnership of Adam and Brown was dissolved on the 11th July 1831, and Mr. Brown (who was empowered to collect the outstanding debts) wrote several letters to Dr. M'Aulay for a settlement, which were not attended to, and he having come to Edinburgh in November following, a summons was executed against

him for the balance claimed as due to Adam and Brown on the accounts as remodelled, as well as for the amount of certain additional accounts which had been incurred subsequent to 25th March 1830. Letters of arrestment, on the dependence of this process, were executed, by which some cattle belonging to Dr. M'Aulay were attached, which led to an arrangement under which he granted two bills, for 200*l.* each, to Adam and Brown, in consideration of which the summons was departed from and the arrestments were loosed; and Dr. M'Aulay gave them a letter, consenting "that the "accounts betwixt Adam and Brown, W. S., and me, "shall be audited under the authority of the Court of "Session." In consequence of this a petition, founding on the act of sederunt, 6th February 1806, was presented to the Second Division of the Court of Session, praying for a remit to the auditor of Court to tax the accounts. These accounts were those which had been remodelled by Robertson. Dr. M'Aulay lodged answers in which, while he admitted his liability generally, he stated "that Robertson, in place of remodelling the ac-"counts, had proceeded to concoct and fabricate a new "account, as large as he could make it, by inventing "and inserting additional fictitious charges, and alter-"ing, remodelling, and constructing documents to cor-"respond to these. The result of the whole was the "accounts now founded on in the petition, which con-"tain charges innumerable, not in the original accounts,— "not actually incurred,—and the mere fruit of invention. "Fees are stated as paid to counsel which never were "paid. Consultations are charged for which never "took place. There are borrowings, and revisings, "and meetings set down, not one of which ever hap-

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" pened. There are memorials to counsel and copies " of papers charged, none of which ever were drawn " at the time, and which, if they exist at all, were " drawn ex post facto, by this Mr. Robertson, to bear " out the false charges before the auditor. To the " extent of about 300*l.* the accounts now charged to " the respondent (including both those of the firm and " Mr. Adam individually) are a mere fiction." He further maintained that he was not liable for certain claims, arising, as he alleged, out of the professional errors and negligence of Brown and Adam.

In consequence of these allegations the Court made a special remit to the auditor " to report specially on the " different subjects and points in question to the Court " therein," and granted commission and diligence to the parties for citing witnesses and havers, in common form.

Thereafter some meetings took place between Mr. Brown and the agent for Dr. M'Aulay, with a view to an extra-judicial settlement of the accounts; and it was stated that upon these occasions the latter pointed out to Mr. Brown, not only that many new charges had been introduced into the remodelled accounts which were not in the first set of accounts, but that many of these charges were entirely fictitious; and that immediately Mr. Brown declared he had never seen the remodelled accounts, was entirely ignorant of such improper charges having been introduced, of which he expressed the strongest disapprobation, and at once agreed to strike them off, and to withdraw certain other charges, which, although not of the same description, were considered objectionable. But he declined to give up the charges as to which objections had been made

on the ground of non-liability, mismanagement, &c. He however offered to deduct for the whole account 180*l.*, so as to avoid further expense and litigation, but this was not acceded to.

A set of accounts, corrected by striking out the charges inserted by Robertson, were then produced to the auditor; but Dr. M'Aulay declined to allow any other than the remodelled accounts referred to in the petition to be received, except on payment of all the previous expenses; which Adam and Brown would not agree to. Various expensive proceedings then took place before the auditor. The total amount of the accounts were 889*l.* 7*s.* 6*d.*, from which he taxed off 219*l.* 2*s.* 3*d.*, leaving a balance due of 670*l.* 5*s.* 3*d.*; and he specially reported that, as the objectionable charges in the remodelled accounts had been withdrawn, it was not necessary for the Court to give any judgment on them; that Dr. M'Aulay had withdrawn some of his objections to articles which he resisted on the ground of non-liability, while Adam and Brown had, without admitting that they were not good claims, given up others, and he explained that some errors had arisen from claims which properly belonged to Mr. Adam as an individual having been inserted in the account of Adam and Brown. No note of objections was lodged to this report; and on advising it the following opinions were delivered:—

The *Lord Justice Clerk* said, "That the question de-
" served very serious consideration, inasmuch as it had
" reference to the characters of the parties who were
" the petitioners before their lordships. It was clear
" that, but for the statements in these answers, they
" never could have made this special remit; because
" the application just led to this, to examine and hear

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" parties, and to take all objections under consideration. " But, owing to special answers, they had here a special " remit, and they required a special report, directing " the attention of the auditor to all points in the case. " It was a most material circumstance, that in these " answers there were the gravest and most serious " charges against the petitioners. They were charges " which amounted to this, that false, fabricated, and fic- " titious accounts were prepared against this client of " theirs by those gentlemen jointly; and it was clear " there was no exception made, for not only were the " accounts of Mr. Adam, but the accounts of the whole " party, objected to, in passages in pages 2d, 3d, and 4th " of the answers; and the most material of them was " in the middle of page 4th, namely, 'There are memo- " 'rials to counsel and copies of papers charged, none " ' of which were ever drawn at the time, and which, if " ' they exist at all, were drawn ex post facto, by this " ' Mr. Robertson, to bear out the false charges before " ' the auditor.' Was it not, in reference to an answer " that contained such charges, material to attend to " the fact, that objections are competent to every fair " litigant, and which, whether they are sustained or not, do " not affect the character of the party? He may have " deviated from the rules of this Court in making his " charges, and the auditor strikes them out. It never " entered into the mind of any one, that, because there " were objections made and sustained, the character of " the individual whose accounts were so audited was to " be blasted. But it turned out that the objectionable " charges were previously withdrawn, and were declared " to be demands not made on this client. Then they " went to the auditor, who said, that, 'although these

" ' are not the accounts that I am called upon to audit
" ' by the one party, the other party insist that these
" ' are the accounts ;' — and all this voluminous cor-
" respondence takes place. It turned out, that, in
" order to get the accounts settled, they were brought
" forward in an imperfect shape ; but when it was stated
" that they must be audited, and have the sanction of
" the Court, they were sent to Mr. Robertson to be
" prepared ; but he chose to sit down, and, in order
" to make up for blanks, he proceeded to make other
" memoirs ; and this gentleman seemed to plume him-
" himself in this sort of business. He had clearly mis-
" taken his duty ; and Mr. Brown said, he never heard
" of them ; and Mr. Adam also consented that these
" charges should be thrown aside ; so that there was no
" dispute between them as to Robertson's charges.
" The objectionable articles were withdrawn before
" these answers were put in, and now the auditor's re-
" port was before their lordships. The auditor struck
" off a certain sum, but he did not strike off things
" that were of a fictitious nature, or of a false nature ;
" and not only were there no evidence of such charges,
" but no grounds whatever for such statements in the
" answer. He (the Lord Justice Clerk) was there-
" fore bound to say, that persons whose character was
" so affected, and who had vindicated their character,
" were entitled to that which they now asked for, the
" expenses of this discussion.

" *Lord Meadowbank* said he was of the same opinion.

" *Lord Glenlee* said, he concurred entirely with their
" Lordships. He had not paid so much attention to
" the question, perhaps, as their lordships, and he was
" struck with the fact that these petitioners were not

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" allowed to withdraw the accounts that were made by " Robertson, when they saw they were improperly pre- " pared; and it appeared to him that all the extravagant " productions before them were occasioned by the absur- " dity of not allowing the petitioners to correct their " accounts in the way that they desired."

The Court then pronounced the following interlocutor —" Edinburgh, 15th February 1834.—The Lords " approve of the auditor's report upon the accounts " libelled, and in terms thereof decern against the re- " spondent, in favour of the petitioners, for the sum of " 670*l.* 5*s.* 3*d.*, the sum reported upon as due, under " deduction of 304*l.* 13*s.* 8*d.* paid to account, as stated " in the petition, together with the legal interest on the " balance from the 17th day of November 1831 and " till paid; find expenses due to the petitioners, in- " cluding the expenses of this discussion, and of the " procedure before the auditor, &c."

Dr. M'Aulay appealed, and maintained, 1., that the report of the auditor was not made in compliance with the order of Court, as it omitted to take special notice of the circumstances relative to the remodelling of the accounts, which formed a prominent part of the appellant's answers to the petition; 2. that, although the answers had had the effect to cause the respondents to withdraw mere fictitious claims, and although the auditor had struck off 216*l.*, while the respondents had offered to deduct only 180*l.*, yet the Court had subjected the appellant in full costs; and 3., that credit had not been given to him for 200*l.* for which he had granted bills.

The respondent in answer contended, 1., that as no note of objections was lodged against the report it

was not competent for the appellant in any respect to challenge it; and if so, then, as the merits were excluded, this was an appeal as to costs, which was incompetent; and, 2., that as the charges objected to in the remodelled accounts were withdrawn before any litigation took place, and the appellant had been substantially the losing party, the Court had done correctly in finding him liable in expenses.

LORD BROUGHAM.—My Lords, although I of late have adopted the practice, in assisting your Lordships in hearing these appeal cases from Scotland as well as this part of the United Kingdom and Ireland, of reducing into writing the grounds of the judgments I recommend your Lordships to pronounce in each case of any importance, I think this is not one that calls upon me to undergo that labour, and put the parties to the necessity of waiting to another day, till judgment is pronounced. At the same time, if, upon further consideration, I should think (upon the construction of the act of sederunt — a matter of some importance in the regulation of professional conduct in the Court below) that it would be fitting that those reasons should be reduced to writing, I shall do so, though, as at present advised, I think it will not be necessary. I shall now shortly state the grounds upon which, although your Lordships might be disposed to reject one or two matters admitted in the Court below, you are precluded from going into the consideration of those matters; and I shall proceed to show the grounds upon which I think the judgment in the Court below, with a slight alteration as regards the sum of 200*l.*, both of principal and

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interest, ought to stand. The question arises in these circumstances: — Messrs. M'Aulay appear to have employed Messrs. Adam and Brown, writers to the signet, parliament house agents and common law agents in Edinburgh, for a series of years, in a great variety of business, conveyancing as well as litigation, — chiefly, however, litigation; and an account was rendered by these gentlemen to their clients, in which they held Messrs. M'Aulay liable to them in the amount of four or five hundred pounds. This account was one exceedingly obscure, as it is admitted on all hands; it was of a confused, and scarcely intelligible, if at all intelligible, nature; the consequence of which was, that not only persons not professional, but professional men themselves, could not easily find their way through it, or apportion the different items of charge to the different pieces of business stated to be done, in such a way as accurately or at all to be able to ascertain whether those charges were just upon those pieces of business. This objection being naturally taken by Messrs. M'Aulay, the consequence was that Messrs. Adam and Brown agreed to refer the account to some one privately on their part, employed by them, to what they called remodel and arrange it, and make it more easy to be understood, and consequently more fair towards the parties who were chargeable. That this was a very fit course to take no person can deny; but then it was fit, in my humble opinion, only thus far forth, that the person — the accountant — to whom it was sent to be what was called remodelled, or rather classified and arranged, should confine himself to such process of classifying and arranging, so as to make that easy of comprehension

which before was hardly comprehensible at all. It is one security that a party has who runs up a bill with any man employed by him, whether as a tradesman or a professional agent, and who allows that account to run on from year to year, and to combine a great variety of items, that the books of the person charging him for those items — that the accounts kept regularly from day to day of the business done by the professional person, or of the goods supplied by the tradesman, should, in the first instance, speak for him, and for themselves, and tell a tale against the customer, or against the client, with the kind of authenticity, and therefore proportional degree of credit derived from contemporary entries in books of account; consequently, whoever makes out a bill against a client or against a customer, ought, as near as may be, to follow the entries in the order of time, and in the specification of the items in the account. If a confused statement is made in the first instance, and if the account books will not help those persons so charging and so making out the confused statement to clear it, then it becomes a very delicate matter indeed to do any thing but merely new arrange, with explanations, the entries in those books, or upon those separate sheets of paper, if they have been so kept; but it is by no means a proceeding to be countenanced in any court of justice, or by any man of business, with any kind of approbation, that any thing further should be done in the way of making the account clearer, than simply explaining, apportioning, classifying, and, as it were, altering the arrangement of the items. If you go beyond that, you take away the credit and the kind of authenticity derived from such books or sheets of paper, if kept in separate

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memoranda, and you take away, by so much, the kind of security that the client or the customer derives from that source. I therefore cannot say that I approve of any thing called remodelling, unless it is confined, as I have described the process ought to be confined, to arrangement and explanation. With that remark, I now resume the statement, and proceed to add, that after Messrs. M'Aulay had taken the objection, and Messrs. Adam and Brown had so far yielded to it as to say it should be referred to a person to remodel the account, they did so appoint James Robertson to that office, who took it upon him, and from whose proceedings in discharge of that duty has mainly arisen this litigation. I ought to add, that at the time the objection was taken to the account by Messrs. M'Aulay, Messrs. Adam and Brown said, we have charged you below, or they gave him to understand that they had charged him below the amount they were, strictly speaking, entitled to; and if it was made a matter of contentious discussion, they then might raise the charge to the usual level. Accordingly, when they appointed Mr. Robertson to perform the operation of remodelling, they desired him to take that into consideration, and see if any thing could be added. Now, as I have made one observation with reference to the remodelling entrusted to Mr. Robertson, so I will make another here. I by no means intend to assert that a person who has made one charge against his debtor, and limited himself to that amount, may not honestly and correctly enough, if that charge is refused to be paid, and the justice of it disputed, say, If you dispute it I will charge what I have a right to do; I have not gone to the extent of my right, but I will go

to the extent of it if you defend yourself upon your right. — Nevertheless it is not, generally speaking, the ordinary, or, generally speaking, a creditable mode of proceeding. Is it fair, because a party refuses payment of an account delivered, to say, All I have done hitherto means nothing; — all I have given you in as my demand shall go for nothing, I will ask you a great deal more, and more than double? It is not a very common mode of proceeding, and if the first bill came before a jury in the course of a contest, I do not think there is any reason which could suffice to convince the jury that the first was not the proper amount of charge, unless, from circumstances which I can hardly figure to myself, the person had been kept from going in the first instance to the full extent of his claim. But however, it is perfectly clear that the solicitors here did give notice to their clients; for they said, We shall charge you to the full extent if you dispute it. Accordingly, Mr. Robertson, so authorized, proceeded with the office; and, in looking out for charges, he obeys the instruction to the letter, and even more than to the letter; for the success that attended his exertions was such as, apparently from one expression in the correspondence, to have surprised his employers. He raised the demand against Messrs. M'Aulay about 160*l.*, for business done since the account was rendered, and he raises it 300*l.* upon the whole, for that not brought in before, making the account between 900*l.* and 1,000*l.*, which had been between 400*l.* and 500*l.*; part of that was for business newly done, and another part was offered to be departed from to the pursuer by the present respondent. This at first was disputed, not unnaturally, and still more vehemently disputed

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afterwards by Messrs. M'Aulay; and then began the first contentions between the parties, and the litigation which has ended in bringing the whole case before your Lordships. It is material to observe, that the first application made to the Court by the respondents here — the petitioners below — was, in the usual way, to have their bill taxed,—to have the account of the expenses against their client remitted to the auditor of the Court; and it is material, for the course that the case has taken, to attend to the first part of the proceeding, which is the point from which the whole litigation springs. It was presented and served by the order of the Court, in November 1831, upon the other party, in the usual form; that was then the ground of the order, being the first interlocutor appealed from. The order of the Court of Session is in the usual form, — to remit the petitioner's account, annexed to his petition, to the auditor of the Court, and the parties to attend the taxing upon that order. There had been an attendance upon the auditor, and a report by that officer, and that report had found Messrs. M'Aulay liable in a large sum. It appeared that Messrs. M'Aulay, upon the report coming for confirmation by the interlocutor of the Court, had not taken their objection to the report in writing, shortly stating the reasons of their objection, as it is clear they must; and without that it is not denied on the other side of the bar that no further proceeding could have been had; for, by the act of sederunt, that order and deliverance of the Court so made, without any written objection to the auditor's report, must be final: that is admitted. But then, after the first remit to the auditor, answers are put in by Messrs. M'Aulay to the petition, and upon

those answers the Court made an interlocutor, which gives rise to the only doubt that continues to encumber the question. They set forth several items, amounting to five, for which they say, there is no ground, and gave the reasons; and they set forth the conduct of Mr. Robertson, in respect of the bills now delivered in by Messrs. Adam and Brown to them, as amounting to a gross fraud, to the fabrication of imaginary and fictitious items, and to the still more elaborate machinery of fraud, which consists in actually fabricating papers as having been written by Adam and Brown for the instruction of counsel in causes long since at an end; and in which causes no such papers had ever been written by them, or either of them, or written by any person at all, for the instruction of any counsel at all. This is a direct charge of fabrication, the most elaborate, and of the most discreditable nature on the part of Robertson; and though the answer does not bring the participation in the fraud as a charge against Adam and Brown, yet, for the reason I threw out during the argument, no doubt they are charged with it by implication; for after having stated in the most comprehensive terms the corpus delicti of Robertson, Adam and Brown are stated to have employed Robertson, and to have used the accounts so fabricated by him; and lest any doubt should remain that this was to let in an insinuation, though not a charge in distinct terms, Adam and Brown are said in distinct terms to have made an offer to Messrs. M'Aulay, after using the accounts, and in order to stifle further inquiry. I look upon this answer as raising the charge of fabrication against Adam and Brown, and charging, by something more than impli-

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cation, a participation; and that groundless charge may prove not immaterial to the question which has arisen touching the expenses of these proceedings. Answers to this purport having been given in, another and a second interlocutor was pronounced by the Court on the 8th of March 1832, of a peculiar nature; not the ordinary and usual remit, (that remit had been given before, and that remit was now ripe to be acted upon,) but it was an additional order, upon circumstances emerging out of the first remit, and as adding something to the inquiry which the first order charged the auditor to make: I say, adding something to the inquiry, and I say so advisedly; because, from all I can see of these proceedings, either as far as is stated or upon the face of the interlocutor of March 1832 which I am about to read, or upon the face of the report of the auditor which I am about to read, I conceive that the auditor has omitted to mention the earlier order, which was an order of course, and has mentioned only the second order which has given him additional instructions. He ought to have stated both these orders, as he has proceeded upon them; and that is very material. The second order is not a direction to tax; and if the second order had stood alone, the auditor would have had no right to tax. It is this: "The Lords having "resumed consideration of this petition, with the an- "swers thereto, and heard counsel for the parties, "appoint them to be heard before the auditor;" that is, to hear — it gives him the power to hear; — "grant "commission to him for this purpose," that is, to hear; "and instruct him to report specially on the different "subjects on the points in question to the Court "therein, and grant commission and diligence to the

" parties for citing witnesses and havers in common " form." There is not a word here about taxing; he has no right, by force of this order, to tax; it only authorizes him and commissions him to hear the parties, and report specially upon the different subjects and points in question. Nevertheless the auditor has, by his report, gone through the whole taxation, taxed the bill from beginning to end, and taxed off 219*l.* therefrom. He proceeded to do that regularly, independently of this order of the 8th of March 1832, by the order of the preceding month of December 1831; for observe, as that order stood, it was not interfered with, much less annihilated by the order of the 8th of March following; that order therefore was in existence and in full force; it had not ceased to exist by any rescinding process of the Court, or by efflux of time, or by any alteration of circumstances or parties. Certainly, therefore, that order stood with the second; and then I ask your Lordships in what situation the auditor found himself? He found himself acting under the exigency of two orders, — a direction to tax, and to report special circumstances; he was bound to follow both those orders, and to execute them. He did proceed; and then one party says, he did not comply with the second because he did not follow the instruction to report specially upon the different subjects and points in question therein (and by " therein " I apprehend they mean, in order to support their argument at all, " in the petition and answers ") ; and this desires him to report specially, instead of making the taxation generally. Whether it be so or not, I shall not stop to inquire, but proceed to finish the narrative of the facts. I say he did not report specially, but re-

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ported by taxing off 219*l.* from the account that had been sent in; that, in the meantime, a great many items were abandoned is admitted; that they were never before the taxing officer seems not to be disputed; and at length the question came before the Court upon the auditor's report and taxation. Now, why did not the appellants, Messrs. M'Aulay, take that objection before the Court below, which is not mainly but solely relied upon before your Lordships; to wit, not that items were allowed which ought not to have been,—not that the sum of 219*l.* was too small, and ought to have been larger,—but that the auditor had not complied with the instruction given by the second order, inasmuch as he had not reported on the special circumstances of the case, which is construed by the appellant to mean the fraud and fabrication imputed to Robertson directly, and less directly to Adam and Brown? Why, I ask, did they not then and there take that objection? Why have they reserved it for this last stage, in this last resort? If they had then and there made the objection, and grounded upon it an application to send back the matter;—not to remit in their favour upon the matter of the taxation, but to remit to the auditor, in respect of his not having performed what the Court desired him to perform,—if they had done that, and been well grounded in their application, the Court could conveniently and would immediately have sent it back, if they thought a case was made out for doing it, to the auditor to make a more full and explicit report. No such thing was done by the appellants; they did not say a word upon the subject; they confined themselves to the question of expenses alone. However material the omission in the report, (and I do not deny that the

fabrication of the accounts was the evil at that time pressing sorely upon them in their application to the Court,) they never think of making any such objection. Can there be a doubt why? They were perfectly aware that they could not make such an objection; they were perfectly aware that the auditor had been very strictly called upon to perform a certain duty by the second remit; and they were aware that the items relating to the vouchers fabricated had been abandoned long ago; and I am bound to say, in justice to Messrs. Adam and Brown, that they never persisted in them at all after they discovered what Robertson had been about. I do not see any reason to suppose that they had ever persisted before the auditor in making any one demand in respect of those items. The omission to say any thing about fabrications was an omission that, it is true, pressed sorely upon the appellants here; but it was an omission that pressed rather more sorely against Messrs. Adam and Brown, whose conduct, as I have a right to say, was most injuriously impeached by the other party. It is rather they than the other party who, by what letters we have upon the subject, and what took place, appear to have complained of the omission, which would strengthen their case and fortify their claim to expenses, as your Lordships are aware that a professional man can give no better reason for obtaining his expenses than the failing of an injurious and groundless charge brought against his character. That was a reason, which I can well understand, why the very learned and experienced counsel below, who had the conduct of the cause, said it was a mere question of expenses, but took especial care to say nothing of the cause of complaint,—the omission of which is the only ground of appeal

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before your Lordships. Accordingly, the Court below, in those circumstances, and for the reasons stated more than once in the argument, adopted the report of the auditor, and ordered the parties in the cause to pay the balance, with interest from the 17th of November. It happened in the meantime (and this is the last fact which it will be necessary to mention) that certain cattle having been sent by the Messrs. M'Aulays to the great yearly Hallow Fair at Edinburgh, Messrs. Adam and Brown had lodged an arrestment against the purchaser of those beasts for the unpaid price, or the sum due in respect of them; that arrestment was loosed afterwards; for the Messrs. M'Aulays sent two bills of 200*l.* each, one of which was paid upon the 23d of February, when it apparently became due, and the other we have no account of. That 200*l.* ought to have been credited,—it is not credited; and that will reduce the sum for which the judgment is to stand. In like manner, it follows that the interest upon the sum of 200*l.* subsequent to the 23d of February must be deducted from the amount of the judgment, and the only interest due upon that 200*l.* is from the 17th of November 1831 to the 23d of February 1832; but, with that exception, I am clearly of opinion that the interlocutor below must stand. I will now proceed shortly to state what other reasons I may have for rejecting the argument of the appellant, and agreeing with the Court below; and although in stating the facts of the case, and in the comments I have made already, sufficient reasons are afforded to support the decision; yet on account of the importance of the question relating to the taxation of costs, and the conduct of professional men, I shall more distinctly state the

grounds on which I think this appeal cannot be maintained: First, Let us consider whether, in point of fact, the argument is well grounded on which is raised the objection to the auditor's report, namely, that the report did not comply with the instructions of the order of the 8th of March 1832, inasmuch as it did not contain a special report on the different subjects and points in question upon the petition. I must read these words, as all words in all instruments are to be read, whether they be deeds or wills or judgments, rationally, and with a view to what must be their sense, regard being had to the subject matter upon which they are used. Can I, giving the Court the benefit of that construction, in fairness say, that the exigency of this order was such as to make it imperative upon the auditor to report specially upon all subjects and points that were in question under the petition and answers, whether they continued to be in question or not, when the subject matter of that petition and those answers should come before him in his office of auditor? I cannot see that he was so bound; it must have reference to the scope of the proceeding. If it had been of a twofold nature, it would have been otherwise. If it had been, on the one hand, the demand of a solicitor's bill on a private party, and on the other hand also, an application to strike him off the roll, made by the party resisting that demand; — if, upon the solicitor having claimed his bill, the client not only objected to pay, but charged the attorney with mal-practices, and called upon the Court to punish him, then I can understand how it would be material for the auditor, in taxing the bill, to report upon matters no longer in dispute between the parties; because, although their

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dispute about the bill no longer required that they should be entered into in his report, yet the other part, the punishment sought against the solicitor, might require that they should be inquired into. But there is no such second objection in this suit, or any reference to it. It never came before the Court at all in that way; it never was regarded by the Court in that light; it is simply with a view to the rights of the parties,—that is the only question; and we cannot say that it continued to be of the slightest importance what became of the charge of fraud and fabrication, after the items connected with it were abandoned on the part of the solicitor and no longer in dispute before the auditor. Therefore I am disposed to put upon this the reasonable and consistent construction which I have now stated to your Lordships, and to hold that the auditor, under these circumstances, was only bound to make a special report upon those matters raised by the petition and the answers, and which should continue to be in contest between the parties before him, in his office of auditor. Now, he has reported upon all those subjects; he has not reported upon the matters connected with the fraud, those matters being no longer before him. This is the first answer to that which is alone the ground of the appeal; but the second answer is material, because it is that upon which the principal stress is laid. Admitting, then, that in point of fact the auditor did not comply with the order,—admitting, for argument's sake, that my construction of the second order is wrong, and that he was bound to report upon all the questions raised by the petition and answers, whether those questions continued to be agitated before him by the

parties or not, — admitting all that, — then I am of opinion that the act of sederunt has not been complied with by the appellant in the Court below, in such a way as to enable him to take the objection to the auditor's report. It is said by the appellant, that although, if the first interlocutor had stood alone, and the proceedings had been under it only, no objection whatever would be taken, except according to the provisions of the act of sederunt, by reducing it to writing, nevertheless this proceeding before the auditor was not under the first remit, but the second remit; that the second remit is casus omissus in the act of sederunt; and that of course any thing done under it is not within the purview of that act. I am of a contrary opinion, upon two grounds: first, I hold this to be a proceeding before the auditor, for the reason I mentioned in the first part of the argument, not only upon the order of remit of the 8th March 1832, but also upon the original order of remit of the 15th of December 1831. I have shown that the one did not abrogate the other; that they might both stand together; the first is as much alive as the second, and consequently the auditor proceeded as much upon the first as the second. The first is the governing order, — it is the order that commissioned him to tax; he has taxed, and is not that taxation within the scope of the act of sederunt? It is perfectly plain that, to take it out of the act of sederunt, you must clearly show facts applicable to a case to which the act does not apply, or you must produce an exception in the act of sederunt that will apply to this special case. Is there any exception? It is as general as words can make it; all reports, orders, and all pro-

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ceedings upon taxation, must be held to be within it, because there is no qualification—no restriction whatever—to confine its operation. It is said that they shall be remitted—of course to the auditor; that applies to the amount; and the second, by reference to the first, incorporates the first within it; it refers to it by words; and according to these regulations it is necessary, in my opinion, that the objection shall be made in writing. It says distinctly.—" In case either party means to " object to the report of the auditor, he shall imme- " diately lodge with the clerk a note of his objec- " tions." " In case either party means to object to the " report of the auditor;"—there is no exception; every objection taken to every report of the auditor is to come within the scope of the act, and to be governed by its provisions. No objection can be made, unless in compliance with the wholesome and, I think, necessary condition of being reduced, with its short reasons, into writing, that the Court may know upon what it proceeds,—that the other party may know what he has to answer,—and that the officer of the Court may see to what the party objects, and by what he will bind himself, and that the endless contestation upon the items of the account as well as upon its principle may be cut short. A party seeking to take this out of the act of sederunt is bound to show that the act does not apply to it; and upon what ground do they say so? It is this; not that the order which originally sent the matter to the auditor is not provided for in the act of sederunt, but that after it had put the auditor in possession of the case, and bound him to proceed under it, a second order was made, calling upon him to report upon special circum-

stances. I can see no ground for this position, or for doubting that the party was bound by the exigency of the act of sederunt, and having failed to comply with it, it is too late now to take the objection in the Court below or here.

But independent of this it appears to me that the whole appeal is an appeal upon costs; and this is the last of the reasons I shall urge as a ground for recommending your Lordships to confirm the decree. I have granted, for the sake of the argument only, that the construction I put upon the second order was an erroneous one, and that you were to take the auditor as not having complied with the second order. I will now admit also, for argument's sake, that my second argument was wrong, and that the act of sederunt does not apply to this case. Then it would follow that the party was not concluded;— he would not be precluded from objecting to the report of the auditor. But how does that bear upon the present case? Of what avail is it to Messrs. M'Aulay, that there should have been an omission upon the subject of these fabrications? In one of two ways only can that omission bear at all against the respondents case, or in favour of the appellant; either by showing that the fabrications took away all right in Messrs. Adam and Brown to be paid the items by the M'Aulays, connected with the fabrications, or as affecting the question of costs. In no other conceivable way could the omission touch the point in question. But as to the first head, those items are out of the question,— they were abandoned, — the auditor has not allowed them,—they never were in question after the case went into the auditor's office. On the first ground, therefore, this omission is entirely and absolutely immaterial.

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Then, on the second ground, can the appellant avail himself of it? No; because the second ground is, that this omission deprived the appellant of a good argument for being allowed his expenses, and against the other parties expenses being allowed from him: that is the only argument. Then, is not that costs? If the Court of Session had given A. his costs out of B.'s pocket, instead of giving B. his costs out of A.'s pocket, that would have been admitted to be a question of costs, and not the subject of appeal. Is it less a question of costs, that the Court of Session are said to have done this,—to have given A. his costs out of B.'s pocket, instead of B. out of A.'s pocket, by means of another order, upon which they do not make the auditor report upon a thing that they ought to have made him report upon? That is the whole argument,—that the Court of Session did not give the Messrs. M'Aulays their costs, but made them pay Messrs. Adam and Brown their costs, for want of a special report from the auditor;—that if the auditor had reported specially, the Court would have allowed the appellants their costs; but as they have not chosen to call for such a special report, the appellants have not got costs, but have had to pay them. Is that less a question of costs? It is particularly, and exclusively a question of costs; therefore it is not a subject of appeal. I think it is very likely, if we had been sitting in the Court below, we might have taken a distinction between the costs up to one point, and after that point, in the case. The staggering nature of Robertson's fabrications might have inclined one to have great tenderness to the Messrs. M'Aulays, in the resistance they made to a claim of any kind connected with

those fabrications by any person who had at any time availed himself of them, though he had no share at all in them,—though he was cleared from all participation in them,—though he had been unjustly impeached of the participation, and though he stood perfectly fair with the Court in respect of them,—yet it might have been thought, that having employed Robertson, another professional man, as their agent, they should not have received but rather paid costs up to a certain stage of the proceeding; but that would have been a very early stage—it would have been at the threshold of the Court—it would have made a difference of a few pounds, and therefore I do not know that we need feel much regret at this course not having been pursued. I have already said that there is no ground for any impeachment of the character of these gentlemen; and for the reasons I have stated upon the facts of the case and the correspondence, I shall recommend to your Lordships to affirm, with the alteration suggested, the decree of the Court below; and that alteration will go to the interlocutor last appealed from, confirming the report of the auditor of the 15th February 1834, and that it will consist in adding the sum of 200*l.* to the sum of 304*l.* 13*s.* 8*d.*, and a clause respecting the interest. It will stand thus—"under deduction," then leaving out the sum 304*l.* 13*s.* 8*d.*—"under deduction "504*l.* 13*s.* 8*d.*," leaving out the words, "as stated in "the petition," and then, "together with the legal in- "terest on the balance from the 17th December till the "23d February," and then add these words, "deduct- "ing from such amount the interest upon 200*l.*, from "and after the 23d February 1832." That is the only

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alteration I mean to suggest to your Lordships. I have not called upon the respondents' counsel to argue this case, though I meant to suggest an alteration, because I understood they took no objection to it; the consequence is, that these circumstances will raise the question as to the costs of this appeal. Now, undoubtedly, though an appeal upon mere costs does not lie, yet if there is an appeal upon a substantial question, not colourable, if brought, costs may be dealt with by your Lordships. I have stated why I do not recommend disturbing the costs below; and in case it should be said this is not an appeal upon costs, as there is to be an alteration of the interlocutor to the amount of 200*l.*, it must further be observed that we cannot suffer a party to lie by and allow an error to be committed, abstain from making any remark,—a single word being sufficient to correct the error,—and then avail himself of that error to the effect of letting in the question of costs. There is a blot in the decree. Why did he not hit it below? If he did not hit it, it was not the other party's duty, and he shall not avail himself of that blot he has left, in order to thrust his hand through the decree, and by means of that blot reach hold of the question of costs. If you were to allow any other course to be pursued as a general rule, you would see constant instances of little matters being left, and not corrected in the Court below, in order to let in the question of costs by way of appeal. I shall not, however, recommend your Lordships, under the peculiar circumstances of this case, and these parties having obtained more than their original demand,—not upon the ground of character or conduct, except that they have raised

their demand—I shall not recommend your Lordships to give any costs[1], after granting the principle as to costs by the observation I have made.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed, with this variation, that the appellant, in addition to the deduction of 304*l.* 13*s.* 8*d.*, mentioned in the interlocutor of the 15th (signed 18th) February 1834, is entitled to a further deduction of the sum of 200*l.* paid by him on the 23d of February 1832, under deduction of the interest due thereon from the 17th day of November 1831 until the same was paid.

RICHARDSON and CONNELL — THOMAS DEANS, — Solicitors.

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[1] The counsel for the respondents having intimated their desire to be heard on the question of the costs of the appeal, they were then heard; but Lord Brougham intimated it would hardly do, after so material an alteration as £200, to give the costs of the appeal to the respondents.